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7 MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

8 January 7, 2005

9 (FRIDAY SESSION)

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19 Taken before D'Lois L. Jones, Certified

20 Shorthand Reporter in Travis County for the State of

21 Texas, reported by machine shorthand method, on the 7th

22 day of January, 2005, between the hours of 9:04 a.m. and

23 5:16 p.m., at the Texas Law Center, 1414 Colorado, Room

24 101, Austin, Texas 78701.

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1 INDEX OF VOTES

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

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2 CHAIRMAN BABCOCK: Welcome, everybody.
3 Thanks for coming. The plan today is to work right up
4 until about 1:30 when we'll break for those of us who want
5 to go to the investiture of Justice Green, but lunch is
6 going to be here at noon, at the usual time, but I thought
7 hopefully that people would just go out and get their
8 lunch and come back in and we'll keep going, if that
9 works, and the people that are not going to the
10 investiture could maybe take a late lunch if they wanted
11 to do that. So we'll get through with that and then we'll
12 come back at 3:30, try to work for about an hour and a
13 half, and then finish up tomorrow morning.

14 As you can see, there's a lot -- there are a
15 lot of items on the agenda for this session, and hopefully
16 we can at least touch on all of them. There has been some
17 confusion about some assignments, and we'll just have to
18 work through that, and there's at least one key person
19 missing right now, so we'll have to -- maybe two key
20 people -- to try to work through that. But having said
21 that, we'll go through the agenda in a minute, but Justice
22 Hecht typically leads us off with some comments.

23 HONORABLE NATHAN HECHT: Well, we have two
24 new justices on our court. David Medina was sworn in.
25 Well, he joined us in November and was formally sworn in

1 in December. He is a native of Galveston, those of you
2 who are not familiar with him, a graduate of Southwest
3 Texas State University and the South Texas College of Law.
4 He graduated the South Texas College of Law in 1989,
5 shortly after I started on the Court; and he was a
6 district judge in Harris County for several years,
7 associate general counsel at Cooper Industries, and most
8 recently general counsel for Governor Perry.

9 Then Chip mentioned Paul Green's swearing in
10 this afternoon. He started January 1st replacing Justice
11 Smith, and Paul is a native of San Antonio, a colleague of
12 Sarah's for a number of years on the Fourth Court, a
13 graduate of the St. Mary's University School of Law and UT
14 undergraduate and former president of the San Antonio Bar.
15 So we have two fine colleagues, and there's plenty for
16 them to do.

17 You will have noticed that the referendum on
18 referral fees and changes to the advertising rules passed
19 fairly handily. The fee division rule passed a little
20 over 54/46 percent, and the advertising passed a little
21 over 76 to 23, so pretty healthy margins. There was about
22 three percent turnout.

23 The Court will take up these two rules that
24 were adopted by the Bar in a week from today, and I
25 anticipate the Court will adopt the referral fee changes

1 and retract proposed Rule of Civil Procedure 8a in an
2 order to be signed later this month.

3 The Court is still considering
4 constitutional issues regarding the advertising rules and
5 will take those up a week from today, too, and I think
6 will act on those rules later this month.

7 Then we have a deadline of January 15th for
8 comments to a number of rules that are out there that have
9 been published, that change principally the changes in the
10 process serving rules, changing the ad litem rule, and
11 some changes to the standard jury instructions in Rule
12 226a as well as a few other less significant changes. We
13 have received a number of comments on the process server
14 rule, maybe two or three on the ad litem rule, just a
15 handful, and then essentially none on the others. One on
16 the jury charge rule. So not very many comments, and the
17 effective date of those rules is supposed to be February
18 1st, and I anticipate that's when it will be.

19 So I think that's the status of things in
20 our shop. Some of you -- perhaps some of you have not
21 heard. Justice Mack Kidd on the Third Court of Appeals
22 died this week, and we had his funeral yesterday. You
23 might keep his family in your prayers.

24 That's all I've got.

25 CHAIRMAN BABCOCK: Okay. I know, Justice

1 Hecht, that we've talked from time to time about the
2 recusal rule that we anguished about several years ago.
3 Is there any effort to remand that to us, or are we just
4 going to leave recusal alone for now?

5 HONORABLE NATHAN HECHT: I think we'll put
6 that on the list of things for the Court to talk about.
7 We might -- we got a proposal from the presiding judges
8 for a simpler approach to that, and the Court simply has
9 not tried to decide between the two of them or whether it
10 should just be rethought again.

11 CHAIRMAN BABCOCK: Yeah. Great. I think
12 Angie has passed out a re-revised agenda for today, and
13 there were some changes necessitated by some last minute
14 issues with speakers who were here today. We're going to
15 try to stick to this order, even though Hatchell is not
16 here, because we have some speakers with travel situations
17 that need to be -- need to be accommodated. The proposed
18 Rule of Judicial Administration 14 has got a fair amount
19 of documentation on it; and, Ralph, as I understand it,
20 your subcommittee has not met between the last meeting and
21 this one; is that right?

22 MR. DUGGINS: I regret to report that's the
23 case.

24 CHAIRMAN BABCOCK: Okay. Well, I don't
25 know. I've tried to get in contact with Mike Hatchell,

1 and we have been exchanging e-mails -- I mean phone calls,
2 phone messages, back and forth. Could you take it on
3 yourself as the cochair to spearhead --

4 MR. DUGGINS: Yes.

5 CHAIRMAN BABCOCK: -- this effort so that
6 we're ready to take it up at the next meeting?

7 MR. DUGGINS: Yes.

8 CHAIRMAN BABCOCK: But in the meantime we
9 have two speakers who want to address this issue. And for
10 those of you who weren't here at the last meeting, this
11 issue, the Judicial Administration Rule 14, has to do with
12 internet access to court records; and there are a whole
13 bunch of public policy issues as well as technical,
14 administrative type issues. We had a couple of speakers
15 at our last meeting about this, and we have two more
16 today. Sherry Woodfin from San Angelo is here, and why
17 don't you just tell us what you'd like us to hear about
18 this?

19 MS. WOODFIN: I appreciate the opportunity
20 to speak with you today. Just to explain a little bit of
21 background as to how Tom Green County serves the public
22 with the internet access, we have an index that we allow
23 people to go in without paying a fee to view just an
24 index. It provides a search base for name. On criminal
25 records it gives the date of birth, and it also offers the

1 opportunity to look at the events that have occurred in a
2 case, provides a capability for you to check the service
3 on a defendant in a civil case or family case.

4 It does not provide the actual images that
5 are contained in the file, and I know that there's -- when
6 reading this rule, it's kind of confusing as to whether or
7 not an index and the documents contained in a file are one
8 in the same, and I believe they are not. I would like to
9 see the rule maybe kind of differentiate between the two
10 and allow the index to still be made available and the
11 concern be with the actual documents that are contained in
12 the file.

13 As -- and I'm going to try and stick a
14 little bit to this because I don't want to linger too
15 long. I know that Mr. Wilder and several other clerks
16 have addressed many of the concerns, and I don't want to
17 bring those back up to you to look at, but one thing that
18 as I speak to you today our district judges would be
19 concerned about are some of the things that are contained
20 in the definition of the case record, and I wanted to
21 bring those up to you. A lot of the things that are in
22 that definition are also contained in the Rules of
23 Judicial Administration under 12, Rule 12, and the judges
24 felt like it might be a good idea to list the exceptions
25 to the documents that are available.

1 Another thing that I would like to see is
2 maybe the judicial work products. In 12.5 it shows
3 judicial work products and drafts, any records that relate
4 to judicial officer of adjudicated decision-making
5 process, and the second exception is the internal
6 deliberations on the court or judicial administration
7 matters. So basically the things that are contained in
8 12.5, maybe include those in this rule as exceptions of
9 things that you cannot -- that you're not required -- have
10 to provide. So that was one thing that one of the judges
11 asked that I relay. I probably didn't do it as well as he
12 could have, but --

13 CHAIRMAN BABCOCK: No, you're doing fine.

14 MS. WOODFIN: And then in 14.3 has the
15 authority and applicability, and this rule does not
16 require any court or court clerk to redact or restrict
17 information which is otherwise provided to the public.
18 And -- but then when you go on and continue to read the
19 rule under 14.7 it has a portion there that requires the
20 clerk to redact the information from documents because it
21 allows a person to come in and apply for information to
22 not be released to the public by redacting it. So I think
23 there's kind of an issue of whether or not -- I mean, me
24 as a clerk, I don't want to have to put that
25 responsibility on my employees to have to try and take out

1 information in a document that has been done 20 years ago
2 and have to keep that updated. I think it would be very
3 difficult as requests continue in the future to have to go
4 back and say, okay, was this one that we have to take out
5 the information in, so I think it would be a very
6 difficult rule to abide by.

7 Under 14.4 it has established by the court
8 as far as business hours, and I think that I can speak for
9 most clerks, I don't like the court to establish my
10 working hours.

11 Also, it says "to create a case record or
12 report." Let's see, "create a case record other than
13 current information stored in a computer," and I would
14 like this to reflect something like "create a case record
15 or report or otherwise provide data stored in a computer
16 if the capability does not exist." So in other words, if
17 someone came in and asked me for something that I don't
18 have available, that does not exist, that I would have to
19 kind of devise a plan and try to figure out how to do it.
20 I don't want to have to do that. I would rather it state
21 something that if it doesn't exist then I don't have to
22 provide it.

23 Let's see, and if there's any questions as
24 I'm going through this, please feel free to stop me,
25 except for Tom. I told him I'm sure I'll say many things

1 that he'll probably need to correct me on later, because I
2 know that the technologically advanced counties like
3 Tarrant County, Harris County, many of those, are much
4 more advanced than Tom Green County, so I understand that
5 they probably have addressed many of these issues that I'm
6 concerned with.

7 MR. TIPPS: Sherry?

8 MS. WOODFIN: Yes, sir.

9 MR. TIPPS: I think I understand exactly
10 what your concern with 14.4(a)(1) is, but I'm not sure why
11 the language that's here doesn't satisfy your concern.
12 Can you explain that a little?

13 MS. WOODFIN: 14 -- I'm sorry.

14 MR. TIPPS: The one you were just talking
15 about, that you don't want to have the burden of creating
16 some new document, but it seems to me that's what this
17 says.

18 MS. WOODFIN: Well, the way that it reads,
19 it currently says "to create a case record other than to
20 print information stored in a computer." Just because
21 it's stored in a computer doesn't mean that I have the
22 capability of going into that computer and creating a
23 report, so what I would like for it to say is something --
24 even though it's stored in the computer if the capability
25 exists for me to create that report.

1 MR. TIPPS: Okay.

2 HONORABLE BOB PEMBERTON: What you're
3 worried about is having to manipulate data --

4 MS. WOODFIN: Correct.

5 HONORABLE BOB PEMBERTON: -- or pulling it
6 out in a way that you wouldn't otherwise readily be able
7 to.

8 MS. WOODFIN: And you get those type of
9 requests often; and if you don't have the capability, now
10 we just say, "You know, this capability does not exist,"
11 but the way that this rule is written it doesn't provide
12 me to be able to do that.

13 MR. LOW: May I ask a question? Are the
14 questions or things you're raising now, are those the only
15 things in this draft that you have problems with? Is that
16 what you're saying or not?

17 MS. WOODFIN: Well, I cannot speak for the
18 judges. I know that they had several -- several concerns
19 other than what I'm going to mention to you.

20 MR. LOW: No, I'm saying you.

21 MS. WOODFIN: As far as my personal opinion,
22 I don't have a problem providing an index over the
23 internet. I don't have a problem with the subscriber
24 system if someone wants to subscribe to me to be able to
25 get copies of imaging, but I think that it would be very

1 difficult to deal with people if you provided the images
2 just blanket and that they were able to go online and get
3 those copies and not have to know who they were, that kind
4 of situation.

5 CHAIRMAN BABCOCK: Sherry, while you're --
6 while I'm thinking about it, on this issue of requiring
7 the clerk or not to manipulate data in a computer program,
8 there is at least one case that I know of that we might
9 want to look at, Ralph. It's called, I think it's
10 Wishlist versus the Dallas Central Appraisal District; and
11 the holding in that case was something to the effect of if
12 there was computerized information and the data -- and the
13 public person who was requesting it could obtain it -- the
14 clerk could easily or the custodian could easily create a
15 program to get that data, that they had to do it; and I'm
16 not sure I'm quite clear. It's about a 15-year-old case,
17 so we ought to look at that issue that Sherry is raising.

18 MS. WOODFIN: And the next thing that I'll
19 mention is the uniform treatment of requests, and this is,
20 again, something that one of our judges pointed out. In
21 the rule it provides treatment for people that subscribe
22 and then treatment for people that want bulk distribution,
23 and he felt that the way it was written it has stipulated
24 different requirements for individuals wanting access
25 versus individuals wanting bulk access, so maybe that

1 might need to be looked at as well.

2 CHAIRMAN BABCOCK: And on that issue, Ralph,
3 I think there is the Open Records Act specifically says
4 you can't ask somebody why they want the information, and
5 I think that there was some case law that some people felt
6 that that part of the Open Records Act was required.

7 MS. HOBBS: And Rule 12 of Judicial
8 Administration also has a similar statement in there.

9 MS. WOODFIN: Yes.

10 CHAIRMAN BABCOCK: So that's a big issue,
11 whether you can discriminate against somebody based on
12 what they're going to do with the information.

13 MS. WOODFIN: Exactly. I think as a clerk
14 if you provide images, there has been a lot of issue and
15 problem if you're giving copies of certain documents and
16 then someone takes those documents and then goes and sells
17 them to another company. That's also something that's
18 been going on that I know as far as county clerks have
19 been having a problem with for a few years now.

20 CHAIRMAN BABCOCK: Right.

21 MS. WOODFIN: And then under, let's see, the
22 Family Code proceedings it references the general public,
23 and there was a question whether or not someone that is a
24 subscriber could be a member of the general public. I
25 mean, that's just a question. It says that

1 "notwithstanding Rule 14.5(d)(1), the case records filed
2 as part of any Family Code proceeding other than
3 court-created case records is excluded from remote access
4 by the general public." And so the question is if someone
5 is subscribing from the general public, I mean, how would
6 you accommodate that?

7 CHAIRMAN BABCOCK: That's a good point.

8 MS. WOODFIN: And under (f), public access
9 to part of case records under the Family Code, it would be
10 impossible to maintain a record that are public with
11 portions of that information, again, redacted; and it
12 should either be confidential in its entirety by the court
13 order or rule or open in its entirety. I think the
14 problem exists that you have a case that it's a public
15 record, it's an open record, and it would be very
16 difficult to have some of those cases that are ordered not
17 to be public and keep those in two separate places to make
18 available. I don't think computers -- or ours wouldn't be
19 able to handle that. Now, Tom's may be, but as far as
20 what we have --

21 MR. WILDER: We have it all in one place.

22 MS. WOODFIN: Yeah. It's usually housed all
23 in one place, and I think probably the most difficult part
24 of reading through this and trying to understand it, it
25 not only affects what you put out on the internet, but it

1 will also affect the way that you keep your files in the
2 actual office, and that tends to be a little bit of a
3 hang-up with some clerks, I feel.

4 CHAIRMAN BABCOCK: Okay.

5 MS. WOODFIN: And then the very last thing
6 I'll mention is the sensitive data sheet. Let's see.
7 There are certain types of cases that require some of the
8 things that will be contained in the sensitive data sheet
9 to be used to do your job. For instance, if you get a
10 civil suit with a CD that you have to purchase for a
11 minor. We would have to as clerks divulge the Social
12 Security number, the date of birth, for the minor in order
13 to proceed with what we're required to do by law, so I'd
14 like to see something in there to cover the clerk to be
15 able to divulge that information when needed to perform
16 our duties, and that basically is it.

17 Records of search by clerks, and I'm sorry,
18 that wasn't it. I have one closing thing. I'm sorry. On
19 the criminal cases, we need an identifying factor to -- an
20 identifying date of birth, something, because whenever DPS
21 comes in, asks for criminal background check for a
22 concealed handgun, for instance, that is something that we
23 use everyday to be able to help not only just the general
24 public coming in your office, but also people that work
25 for the state; and you have DA's office, the DPS office,

1 sheriffs departments, police departments from all over the
2 state that call your office; and that's the one
3 identifying factor that we use at this point. I think
4 it's important to either exclude criminal cases completely
5 from this rule or give us some way to help us identify and
6 keep that as a way to still, again, be able to do our job.

7 So is there any questions that anyone has of
8 me? Yes, sir.

9 MR. ORSINGER: I have a question. The
10 statistical certificate that you're required to file when
11 you do a divorce decree has the maiden names sometimes and
12 other things that might be used by someone to steal an
13 identity. Is that file -- is that statistical certificate
14 considered one of your records, or do you forward it to
15 the state and do not keep a copy in your records?

16 MS. WOODFIN: Now, in our county we do not
17 keep a copy of it, but I know that has been kind of a
18 difference of opinion between clerks, and some clerks may
19 actually keep a copy of it in their file.

20 We in Tom Green County had a very similar
21 situation to what you're referring to. We had a probation
22 officer that was divorced and then one of his probationees
23 came up and looked at his file and got some information,
24 where he was born and different things like that, which
25 was concerning, so that led me to call the vital

1 statistics and say, you know, "Is this something that
2 should be kept in our files as public record? If someone
3 were to come to your office, would they be able to get a
4 copy of that?" And they informed me that they would not,
5 so I took it upon -- in our office that we don't keep
6 those in the file. We just --

7 MR. ORSINGER: But some clerks do?

8 MS. WOODFIN: Yes, I believe so.

9 MR. ORSINGER: How would we fix that? Is
10 there -- could it be fixed by a little sentence in this
11 rule, or do we need to fix it through continuing education
12 to clerks, or do we need an administrative rule from the
13 Supreme Court or an amendment to the Family Code?

14 MS. WOODFIN: I don't think that it would
15 fit very well within this rule, but there's probably where
16 it's required -- I think it's in the Health & Safety Code
17 where that vital statistics form -- I think it's Rule 193.
18 Do you know, Bonnie?

19 MS. WOLBRUECK: It's 191.

20 MS. WOODFIN: I know it's in the Health &
21 Safety Code, though, where that's required. So maybe
22 something in that --

23 MR. ORSINGER: Maybe a little sentence in
24 that. Okay.

25 MS. WOODFIN: -- would be good.

1 CHAIRMAN BABCOCK: Okay. Any other
2 questions? Sherry, thanks so much for coming. We
3 appreciate it.

4 MS. WOODFIN: Thank you very much.

5 CHAIRMAN BABCOCK: You bet. All right. Ed
6 Rains is here, and we thank him for coming to share his
7 thoughts. Ed, maybe you could tell us a little bit about
8 your background and whom you are speaking on behalf of, if
9 you're speaking on behalf of anybody other than yourself.

10 MR. RAINS: Well, of course, I would claim,
11 Chip, that I'm speaking on behalf of the public good
12 always, but I am now employed by ChoicePoint, which is one
13 of the largest database companies in the world. My
14 company, Rapsheets, was acquired by them in June of last
15 year, and we just consummated that deal, waiting on the
16 rest of our money.

17 MR. TIPPS: Ed, we can't hear you at this
18 end of the table.

19 MR. RAINS: Sorry. But I began in this
20 business as general manager of a small newspaper in
21 Memphis, Tennessee. It was what we call a legal
22 newspaper. I'm sure you have one here in Austin, a public
23 notice newspaper wherein you publish, oh, foreclosures,
24 court filings, et cetera, and we have one in Memphis
25 called The Daily News that's been in business since 1886.

1 So beginning in 1995 I became general manager of that
2 paper and began to collect civil records and put them up
3 on the web about 1997, which was a new thing then.

4 I hate to belabor you with this, but so
5 you'll know, and we decided then to begin to collect
6 criminal records and put those on the web, and we're
7 actually making them available to our subscribers for a
8 fee. And I kind of found myself in the position of that
9 old Texas farmer who doesn't want to own all the land; he
10 just wants to own every ranch that abuts his; and with the
11 result that last year we had amassed 180 million criminal
12 records, most of them conviction records, from all the
13 states. We have statewide records that are fairly
14 reliable from 42 states now.

15 We try to collect only conviction records,
16 because I think that we're still living in America and
17 until you've been adjudged guilty you're innocent, no
18 matter what things look like, and with the result that I
19 think our database now contains about three or four times
20 as many records as the FBI and is far more reliable and is
21 indeed used by law enforcement around the country. It's
22 also used by people like the Boy Scouts who use us to
23 check out their volunteers. They're one of our premier
24 customers. Little League of America, the Catholic
25 Diocese, and then a number of businesses. We have become

1 very important to businesses in Texas and elsewhere
2 throughout the country who use us to screen their
3 employees or to screen tenants, or to, you know, see who's
4 going to be looking after our children in many cases.

5 I have a couple of issues. I think that you
6 have in front of you a copy of a letter dated December 8th
7 and addressed to Judge Phillips, the Chief Justice of the
8 Supreme Court here in Texas. It's very thorough, because
9 we pay our lawyers by the word, but I really think it's
10 well done, partially because I helped draft it and
11 partially because it's very thorough in looking at the
12 issues, I think, and in clarifying some things.

13 I know you-all are busy. You've done great
14 work, by the way, in making this draft. I say that, I
15 think, with some authority. I am frequently called upon
16 now to testify before forums like this. I was recently
17 before the superior court in D.C. They are grappling with
18 these same kinds of issues now. My lawyer in D.C. and I
19 were -- and Maryland were instrumental in drafting a
20 public access policy for records for the state of
21 Maryland, and I think it's going to serve as a model.
22 Florida recently has come up with problems in doing the
23 same thing, and we're helping them, and so we're trying to
24 -- trying to be a power for good. I think what we're
25 faced with here is balancing the right of the public to

1 know what the courts are doing -- I don't think anybody
2 should challenge that -- with the rights of privacy of
3 individuals.

4 So specifically today I'd like to address
5 very briefly a couple of issues. One bugaboo that pops up
6 constantly and generally in these meetings, somebody will
7 get worried about identity theft. I'd just like to
8 clarify that, at least from my perspective. I think with
9 9/11 the idea of a risk to all of us has been elevated in
10 the American consciousness, even sometimes maybe in the
11 minds of the judiciary and certainly, certainly in the
12 minds of Legislators. I know that I was in Pennsylvania
13 recently to testify about proposed legislation up there
14 which would have been absolutely disastrous, would have
15 done far more harm than good, and so I think we have to be
16 kind of Hippocratic here versus do no harm when we're
17 talking about access to records.

18 With the matter of identity theft, I know of
19 -- and I think I've had a good deal of experience.
20 Millions of searches have been done on individuals through
21 our system. To my certain knowledge, I can't say a
22 hundred percent, I don't know, but as far as I know no
23 identity theft has ever occurred. Why would you go steal
24 the identity of a convicted felon? What do identity
25 thieves want? They want your money. So what they want,

1 they want credit card information, things like that.

2 Now, did we run into the problem of identity
3 theft in this business, absolutely, but here's how it
4 would happen. People would call us and say, "Somebody
5 charged this on my credit card. I didn't do this." Nine
6 times out of ten, guess who it was. A son or daughter, a
7 neighbor, or a good friend. It's kind of like homicide.
8 The chances of identity theft 99 percent of the time are
9 going to be someone who knows you and goes in and steals
10 your credit card or gets the information. Either that or
11 they dumpster dive. They don't go to the courts. As far
12 as I know, there has never been a documented case of
13 identity theft from a court record that was released.

14 Now, do I think that everything should be
15 released, whole cloth? No, absolutely not. If you read
16 our letter there is a list of things that -- of elements
17 that we need. All we need is a full date of birth, and
18 that brings us to the second issue. I notice that in Rule
19 14.4(c) or (e), I can't remember, you propose redacting
20 all or part of date of birth. Don't do this. Please
21 don't do this. This is a mistake.

22 Before I came over here I was in a bit of a
23 hurry, so I didn't get it in a cute little chart or
24 anything, but I said, "I'm going to run a check in a
25 smaller state than Texas." No, I actually ran it in

1 Texas. I ran a state -- a check in Texas on the name
2 Robert Stevenson, I think it was, without a date of birth.
3 I came up with 112 folks out of my file.

4 What does that mean? That means that all of
5 these people have been convicted. We know they are
6 offenders who have been convicted. They are criminals,
7 but without a full date of birth there is no way to
8 identify who is who. And so I recommend that you do this.
9 I notice that someone has proposed -- well, possibly let's
10 just put partial date of birth and Social Security number.
11 Social Security number is the most unreliable piece of
12 data that you can possibly tag to a person. Please don't
13 do that.

14 CHAIRMAN BABCOCK: Hang on for a second.
15 You're talking about Rule 14.6(a) that suggests redacting
16 a number of things, including Social Security numbers and
17 date of birth?

18 MR. RAINS: Social Security number I think
19 would be fine because it's so unreliable, but date of
20 birth is essential.

21 CHAIRMAN BABCOCK: So you wouldn't have a
22 problem if Social Security numbers were redacted?

23 MR. RAINS: Absolutely not. I think -- when
24 we get Social Security numbers, most of the time, Chip, we
25 take it out. I don't make it available. The other thing

1 is, I think people have a misconception about records on
2 the internet. They have some idea that we're going to get
3 everybody who had a traffic ticket in Texas and put it up
4 where anybody can read it. If you don't have the full
5 name and date of birth, you can't get information on
6 somebody out of our system.

7 I guarantee you that I know more about
8 anybody who comes under my system to do research than any
9 clerk does about a person who walks in and asks to please
10 see a file at the courthouse. I know the person's name,
11 at least what they tell me their name is. I know they
12 have a valid credit card number. I know that they have a
13 valid e-mail address, and I pretty well know where to find
14 them. And if I don't, I know where to find the state
15 attorney general that knows where they are.

16 The third thing with respect to this is that
17 if you include date of birth then this can be integrated
18 into what we call a global search. In other words, it can
19 be integrated and searchable. Something like 40 percent
20 of all crimes are committed outside of the jurisdiction in
21 which the offender lives. The traditional background
22 check was done where you send a runner to the Harris
23 County courthouse, and he goes down there and he looks,
24 and there's not a record. Well, guess what? The guy
25 committed a murder in Travis County or he committed grand

1 theft auto over in Arkansas, and you're going to find this
2 over and over again.

3 So I think you've done great work. I think
4 that possibly the section on bulk access to records
5 probably deserves a little more work. I would have some
6 specific recommendations to make with respect to that if
7 you would permit me to do that. I ask you again to read
8 the memo that we have submitted because we paid a lot for
9 every word in it, and I'll make myself available at any
10 time to come back to talk with you. I'd love to be a
11 resource for you in this thing, and I'm -- I would welcome
12 any questions anyone might have.

13 CHAIRMAN BABCOCK: I have a question. At
14 the -- this phrase, practical obscurity, was mentioned at
15 our last meeting, and I know that you address it in your
16 December 8th memo. Could you tell me, has that been
17 elevated to a doctrine, and what is practical obscurity?

18 MR. RAINS: Well, practical obscurity is
19 indeed kind of a nebulous phrase. Well, in the old days
20 when you had to go down to the Harris County courthouse to
21 find out if Chip Babcock had a record there, practical
22 obscurity. In other words, someone had to go to the
23 trouble to do that, and the internet has changed our whole
24 lives; but, guess what, the telephone did, too. Suddenly
25 we've got access to anybody worldwide. I've got it in my

1 pocket right now. I can call somebody in Zambia right
2 now. Our world has changed. It's different. We've got
3 to be careful.

4 The other thing about practical obscurity is
5 -- and, again, I think this relates to this bugaboo of
6 identity theft. Let me tell you something. I read an
7 article in the New York Times Sunday edition about three
8 weeks ago. Good ol' southern company over in your
9 neighboring state of Arkansas. It's called Wal-Mart.
10 Wal-Mart has more information on its customers -- the
11 amount of information it has on its customers is twice the
12 size of all the data on the internet. Man, they know how
13 many Tootsie Rolls you bought last month, or could find
14 out. They know your driver's license number. They know
15 more about us than anything else in the world.

16 If we want -- I'm kind of like Pogo, you
17 know, we have found the enemy and he is us. In this case,
18 he's people like Wal-Mart. He's people like Axion. I
19 mean, the horse is out of the barn. The whole herd is out
20 of the barn, so what we've got to do is, A, not restrict
21 public access, not violate the First Amendment, be careful
22 in balancing the rights of the public to know with the
23 privacy rights of individuals. Our position is that
24 anything that's a court disposition is public record.

25 Do we want medical records? I think not. I

1 think that's bad. Financial records? No. But when we're
2 talking about the safety of our children or the
3 reliability of an employee or dangers to our people that
4 work with us, I think we need to know at least enough
5 about them to be sure that we've got the right Chip
6 Babcock or the right Ed Rains, and so that's the reason I
7 would ask you to please reconsider this redaction of date
8 of birth. Other questions?

9 CHAIRMAN BABCOCK: Any other questions?

10 MS. HOBBS: I'm sorry. I've got a --

11 CHAIRMAN BABCOCK: Yes, Lisa.

12 MS. HOBBS: Mr. Rains, if you ran the
13 Stevenson search with just the month and the year --

14 MR. RAINS: Uh-huh.

15 MS. HOBBS: -- of the --

16 MR. RAINS: I did that.

17 MS. HOBBS: And how many came up?

18 MR. RAINS: Month and year, I hadn't done --
19 what I did, of course, was just against convicted people
20 and seems like -- I can't remember how many duplicates I
21 had. I had several, but wait a minute. That was just
22 people who have been convicted. Suppose we took the whole
23 population of Texas and we said -- took month and year and
24 we had John Smith. I mean, you're going to come up with
25 so many false positives, the potential for doing harm to

1 an innocent person there is so vastly, vastly multiplied
2 if you don't put full date of birth. Why not put full
3 date of birth? It's going to do more good than harm if
4 you do that, because there's less chance for false
5 positive. There's less chance of misidentifying somebody
6 who's totally innocent and happens to have a common name.
7 I mean, that's about the only way I can put that argument.

8 MR. ORSINGER: I see in your memo that you
9 don't oppose excluding documents from divorce cases other
10 than you want the final disposition to be in the database.

11 MR. RAINS: I think the final disposition
12 makes sense because it's important to people who are doing
13 business. It's essential, I think, and it's -- I mean,
14 it's used everywhere. Again, this is a court disposition,
15 and I think at least certain elements of that should be
16 public, and I'll give you the little example that -- if
17 you'll bear with me, Richard -- when I was running the
18 newspaper, we published divorces. In other words, if Ed
19 Rains got a divorce, it was published in our paper just
20 so-and-so versus so-and-so, granted, whatever. And I used
21 to get called about once every three months, some lady
22 would call me up and say, "I can't believe you published
23 this. My children are just going to be heartbroken."

24 I said, "Well, you went to court. You went
25 into a public forum, and you hired a lawyer, and you got

1 the divorce"; and then I would say, "I have been married
2 three times," which is true, "divorced twice, and guess
3 what, both my divorces appeared in that paper." My
4 publisher had been divorced once, and he could have taken
5 anything out of there he wanted to, but I feel very
6 strongly that that's public information. A court action,
7 unless it's sealed by the court or unless it has to do
8 with a juvenile is public information.

9 MR. ORSINGER: Let me clarify a little bit.
10 Are you saying the fact that two named individuals got
11 divorced is what you want public, or do you want a copy of
12 the decree that has a listing of their assets, their cars,
13 their bank accounts?

14 MR. RAINS: I don't think you need to
15 publish that myself. If somebody is interested in that
16 it's enough to put the notice that a divorce has occurred
17 here, and if they want to do the research, go down to the
18 courthouse, get a court order, and look at all that stuff
19 so they can go after some assets somewhere, then that
20 would be my position, but that's personal.

21 MR. ORSINGER: So what you're abdicating
22 basically is just, if you will, a line item entry that "A
23 got divorced from B" --

24 MR. RAINS: Right.

25 MR. ORSINGER: -- "in this case on this

1 date."

2 MR. RAINS: Right, exactly. And I think
3 that applies throughout civil and criminal records. If
4 you look in my memo, there is a set of 10 or 12 elements
5 that we say we need to make as positive an identification
6 as you can without fingerprints or DNA or retinal scanning
7 or whatever; and I do think that -- I think they have to
8 be a little careful. I, myself, again, this is a personal
9 opinion, think that extracts of court documents,
10 particularly -- again, I came only to address criminal
11 matters here, but I think extracts probably make sense.
12 In other words, we're going to publish these items. We're
13 going to make these items public, or widely public. If
14 they want anything else, they can come to the courthouse
15 and get it.

16 MR. ORSINGER: Let me ask you, you make an
17 exclusion for juvenile proceedings. How do you feel about
18 entries relating to custody of children? Frequently in
19 Texas our decrees will have identifying information like
20 the date of birth and Social Security number, the home
21 residence and age of the children. Is that --

22 MR. RAINS: I would be disinclined to put
23 that in. Now, as I said in preface to my remarks, I came
24 to talk about criminal conviction cases because I think
25 that's very important. But -- and so, again, I'm giving

1 you a personal, not a company opinion here. I think that
2 you have to be damn careful. I think I would be
3 disinclined to do that. I know in our paper we wouldn't
4 have done that, wouldn't have done that.

5 CHAIRMAN BABCOCK: Is that public now,
6 Richard, if you go down to the courthouse?

7 MR. ORSINGER: Yes, it is public, although
8 in some counties judges will upon request seal divorce
9 records or custody records --

10 MR. RAINS: Right.

11 MR. ORSINGER: -- but in some counties they
12 won't. Like in Bexar County the newspapers gave the
13 judges so much hell that they just won't seal anything.

14 In Dallas County they will, but the law does
15 require that you have the identifying information
16 sufficient to collect child support on the face of the
17 decree, so you end up having lots and lots of information
18 about the parents and the children --

19 MR. RAINS: Right.

20 MR. ORSINGER: -- to assist the government
21 in child support enforcement at a later time, but by
22 necessity you're putting in the age and address of
23 children, their gender, their Social Security number. I
24 mean, that information could be misused.

25 CHAIRMAN BABCOCK: Yeah. Ralph, I think

1 there is a big policy issue on two levels on this, and one
2 is whether we're going to follow the recommendation that
3 some information that is now public and available if I
4 take the time to go down to the courthouse is not going to
5 be available electronically over the internet, and that's
6 a big policy issue.

7 And the second question is, even if we are
8 going to have a section 14.6, is that practical to do?
9 Can the clerks do that, or are they going to have to add,
10 you know, 15 staff people to be redacting things that this
11 rule says? So I think the subcommittee is going to have
12 to look at those two questions very carefully; and I think
13 last session we had a discussion about the Nixon case out
14 of the United States Supreme Court which dealt with the
15 common law right of access. There is also jurisprudence
16 in Texas on that same question, and that's going to
17 delimit perhaps what this rule does and does not do. So
18 that's an issue to think about.

19 Any more questions for Ed? Yeah, Andy.

20 MR. HARWELL: Yes, sir. One, are you -- we
21 had talked about a subscription or a fee to be able to
22 access the records.

23 MR. RAINS: Yes.

24 MR. HARWELL: What's been your history on
25 that?

1 MR. RAINS: Well, what we did a couple of
2 years ago, Andy, we quit offering our service to
3 individuals online, so most of our customers now are
4 volunteer organizations and big companies who are doing
5 background, and so we charge them somewhere -- depending
6 on the volume they do.

7 With respect to the data sources, I mean, we
8 pay a wide range of fees. It depends. And many state
9 laws, by the way, are written to enable custodians of
10 record to charge people like us, and you should. I mean,
11 I don't think the citizens of Texas or any other state
12 ought to subsidize ChoicePoint or Rapsheets or anybody
13 else. I think whatever it costs, at least repeat that,
14 and I quite frankly think you ought to be entitled to a
15 little fee for doing that, something reasonable.

16 Many states stipulate -- I don't know
17 whether it is in Texas -- that you can only charge a
18 vendee the actual cost of the programming or whatever; but
19 to return to this matter we were discussing earlier, I get
20 information at the circuit court level -- what do you call
21 them here? District court level in Texas, from 15 of the
22 biggest counties right now. Harris, Travis, Dallas,
23 Denton, and about 10 other counties in addition to getting
24 information from the Department of Corrections and from
25 the Department of Public Safety, and we pay all of them,

1 and I pay them cheerfully because it takes your time to do
2 that.

3 MR. HARWELL: Is there a wide range that
4 they charge?

5 MR. RAINS: There is an incredible range.
6 Some states give me that. Alaska gives me the data. I
7 have got every traffic ticket, everything. I mean,
8 whatever you want. Some states put a 12-gauge to the base
9 of my skull and take more money. I will be happy, if you
10 want to call me or something, to give you that, and I'll
11 be very frank with you and tell what you the range is.
12 It's going to vary with the amount of troubles.

13 Some people like this lady from Tom Green
14 County, isn't it?

15 MS. WOODFIN: Uh-huh.

16 MR. RAINS: I think I've written you a
17 letter. Probably have. Some of them don't really have
18 the capacity right now, and it would be onerous, and they
19 can't do it. Others, you know, Bexar County, Travis
20 County. You've got a great clerk's office here. They
21 were able to produce stuff for us and absolutely perfectly
22 what we wanted, just an extract giving me only the data
23 elements that I wanted, and that way there isn't any way
24 I'm going to publish what you don't want me to publish.

25 And typically in a letter of request I will

1 say, look, "Here are the data elements we want on each
2 conviction"; and depending on the level of sophistication
3 of the computer system if they can produce it, they say,
4 "Ed, it's going to be a grand, two grand, five grand,
5 whatever it is, and then we're going to charge you so much
6 a month," and later on -- in this matter of bulk access,
7 if you decide, well, yes, we're going to release this data
8 from our county, I would put some stipulations. I'd have
9 a contract with whoever buys that and say, "Look, you
10 agree if you get this information you're going to update
11 it at least monthly. You're going to pay us a certain
12 fee. If you don't pay us then you don't get this stuff
13 anymore; and if we find out you're misusing it, not only
14 are we going to cut you off, we're going to do what we can
15 with the state attorney general to prosecute you." To be
16 sure, in other words, that people who buy this stuff in
17 bulk use it responsibly.

18 And I can say this in my company: After
19 millions of searches I have never been sued even by the
20 subject of a search, by a data source, or by a company who
21 used us, but that's because we are extremely circumspect
22 and use immense care in updating this stuff and trying to
23 keep it right.

24 Are there going to be mistakes in public
25 records? Absolutely. Everything in your system is not

1 going to be right, but in Texas -- I think your liability
2 in Texas is something like a thousand dollars will be the
3 maximum anybody could get from you for damages anyway. If
4 somebody calls up and says, "Look, this record was
5 expunged," first thing we do, I say, "Send me a copy of
6 that expungement order signed by the judge." Then I call
7 the judge and then I call the court and if they verify
8 it's been expunged, it goes out of my records that day,
9 and it doesn't exist anymore.

10 CHAIRMAN BABCOCK: Paula Sweeney, you had a
11 question?

12 MS. SWEENEY: Yeah, I've got two questions.
13 Did you just say that your service is not available to the
14 general public?

15 MR. RAINS: Rapsheets is not.

16 MS. SWEENEY: No, the other one.

17 MR. RAINS: Oh, ChoicePoint?

18 MS. SWEENEY: Yeah.

19 MR. RAINS: ChoicePoint has some other
20 products, and I-- I have been with them exactly seven
21 days now. I don't know what all they have. I'm just
22 talking about what I find they do with us.

23 MS. SWEENEY: All right, but the comment
24 that -- because we're talking about the internet making
25 these documents and so on accessible to everybody, and

1 what you just said gets me to believe it's accessible to
2 large corporate entities and law enforcement --

3 MR. RAINS: That's our product, not yours.
4 Yes.

5 MS. SWEENEY: I'm sorry.

6 MR. RAINS: Yeah.

7 MS. SWEENEY: But not to the general public?

8 MR. RAINS: Not to the general public via
9 Rapsheets right now. Now, my understanding is via -- I've
10 been with them eight days. ChoicePoint I think has some
11 products where you can get certainly limited information.
12 But to get anything you're going to have to know the full
13 name and full date of birth before you go inquire. Well,
14 I want to check on Ed Rains, Edgar McDonald Rains, born in
15 1946, February the 8th, you go in there and if I've got a
16 record, you'll find it. Otherwise there is no way to
17 access it.

18 PROFESSOR ALBRIGHT: Paula, I think the
19 distinction is I can pay him to do a search for whatever
20 he's looked in, every county record, or I can do it myself
21 if I go into each county and look. So the data is
22 accessible publicly, but I have to pay to get him to be --
23 to do this search easier.

24 MS. SWEENEY: But as a member of the general
25 public you can't pay him unless you're a big corporate

1 entity.

2 MR. RAINS: Well, you wouldn't have to be a
3 big corporate entity. I've got lots of small companies.

4 CHAIRMAN BABCOCK: If you guys have a little
5 private conversation down there, the court reporter can't
6 get it.

7 MR. RAINS: Forgive me.

8 CHAIRMAN BABCOCK: That's okay.

9 MS. SWEENEY: I'm trying to ascertain
10 whether or not there are services or are not services that
11 are going to be collecting this data and making them
12 available to the public versus to corporate entities,
13 because there's a huge disconnect there as to who we're
14 benefitting by this work that we're doing, and I'm very
15 curious about the answer.

16 MR. RAINS: Well, I know that I'm
17 benefitting people like Little League, Boy Scouts of
18 America, a mass number of employers and people who own
19 apartments and rent property because we're keeping them --
20 we're screening out sex offenders nationwide; we're
21 screening out people who might molest children; we're
22 screening out people who might do serious vandalism; we're
23 screening out people who have a felony conviction.

24 MS. SWEENEY: I'm grateful for that
25 information, but what I'm trying to find out is whether

1 there is anything like what your describing that's
2 available to people.

3 MR. RAINS: I don't know exactly, to repeat,
4 what ChoicePoint offers, but if you will give me your card
5 or something I will call you Monday and let you know what
6 we've got.

7 MS. SWEENEY: Do we know, Chip -- I mean, I
8 appreciate you being here as somebody who is in this
9 field, but do we know from the study that was done if this
10 is -- is this the only game in town? How many of these
11 are there? I mean, if I decide I want to rent out my
12 garage apartment, and I want to check out one potential
13 tenant one time every three years, is there something
14 available to me like that?

15 CHAIRMAN BABCOCK: I don't know that we've
16 studied that, Paula; but, of course, the issue that our
17 rule is addressing is whether and under what circumstances
18 we're going to have a statewide rule where the clerks are
19 going to be obligated to report or have the ability to
20 offer certain information online so that private companies
21 like this can or can't, depending on how the rule reads,
22 take this data and do with it what they want, whether they
23 want to give to it the Boy Scouts or they want to give it
24 to the Texas Trial Lawyers or to just public citizens.
25 That's a separate question, it seems to me, from what the

1 government is going to do with the information, and that's
2 the rule that we're looking at.

3 MR. RAINS: I do know that there are about
4 300 companies like mine now, and I can just about
5 guarantee you that probably many, many of them -- and I'm
6 sorry, I don't have a precise answer to your question. I
7 guarantee you you can go to them and check out your garage
8 tenant or your babysitter or your boyfriend or whoever.

9 MS. SWEENEY: My question is a policy one,
10 Chip. If we're going to be using government resources in
11 the way that we're talking about, then it seems to me
12 there should be some attention paid as to whether the use
13 of those government resources is only servicing for-profit
14 companies that in turn service large corporations and
15 entities such as this gentleman described or whether we're
16 really making the information accessible to the public.

17 CHAIRMAN BABCOCK: Yeah.

18 MS. SWEENEY: And we can't pretend that it's
19 the same thing. It's not.

20 MR. RAINS: I can -- I think I can answer
21 your question now. I think I understand it now, if I may.
22 We -- my company serves as a reseller of this information.
23 Anybody using us is subject to FCRA rules, Fair Credit
24 Reporting Act rules, two or three other Federal laws that
25 have to do with how you use information, under what

1 circumstances you can do a background check on this, that,
2 or the other; and it's really up to those companies who
3 buy from us to abide by those rules. They are the ones
4 that are supposed to do that.

5 So I -- I mean, my answer is that I'm sure,
6 I am sure, that this information is available through some
7 of the people who buy from us. We don't do it. I just
8 make it available to companies, but through these other
9 companies, I'm sure that -- and in addition to that, if
10 you just want to check like Harris County or Dallas
11 County, I know that there are a number of counties -- I
12 don't know how many in Texas and elsewhere -- who make
13 themselves available on the web. You can go directly to
14 that jurisdiction and find it. What we have done is put
15 all this stuff together into a huge searchable database,
16 so, of course, we can decide how we release it.

17 CHAIRMAN BABCOCK: Yeah, I think, Paula,
18 that probably your question implicates Rule 14.4(g) and
19 (h), which was whether -- and it's something I brought up
20 earlier, whether the clerk has discretion to inquire about
21 the use that's going to be made of the records and treat
22 different requesters differently depending on the answers
23 they get, and that's an issue that I think the
24 subcommittee has got to grapple with.

25 MS. SWEENEY: So which subcommittee is this?

1 Who's on it?

2 CHAIRMAN BABCOCK: This is the subcommittee
3 chaired by Hatchell and cochaired by Duggins on judicial
4 administration.

5 MS. SWEENEY: Okay. I'll bother them.

6 CHAIRMAN BABCOCK: Okay. No bother at all.
7 Thanks so much for coming.

8 MR. RAINS: Thanks so much. Sorry for
9 taking so much of your time. I appreciate it.

10 CHAIRMAN BABCOCK: Yeah, Tom.

11 MR. WILDER: Mr. Chairman, I realize I had
12 my say last time, but there were a few issues that were
13 raised -- I did not -- I didn't get the agenda that showed
14 these individuals were speaking. Do you have a few
15 minutes for me to make a couple of comments on issues?

16 CHAIRMAN BABCOCK: Tom, we're running
17 behind, and we have three other speakers that have travel
18 plans, so --

19 MR. WILDER: I'll send a letter to --

20 CHAIRMAN BABCOCK: Yeah. Work with Ralph
21 and Mike Hatchell on that. That will be great.

22 We'll be coming back with something next
23 time. So, Ralph, anything else that you want to talk
24 about on this? Or anybody else, but, Ralph, you first.

25 MR. DUGGINS: No. I told Tom that I would

1 get with him to get his thoughts; and anyone else that
2 wants to weigh in, of course, get with us; and I'll try to
3 coordinate the subcommittee as soon as possible and not
4 let this slip again.

5 CHAIRMAN BABCOCK: Yeah, that would be
6 great. I have gotten a number of phone calls about this.
7 It's an important -- and I know Lisa has, too. It's an
8 important issue, and it's a tricky one, too, and there is
9 an equilibrium right now, I think, across the state with
10 respect to public access to court records, and this rule
11 has the possibility of disturbing that equilibrium, so we
12 need to think about it carefully.

13 Buddy, then Tracy.

14 MR. LOW: Chip, I have one real concern when
15 we get specific about it doesn't include this and then you
16 don't mention somebody that's been treated for drugs and
17 the law changes and the Legislature changes, and who is
18 going to keep up with -- and then the Supreme Court says
19 "This is not available" or "This is available." We are
20 almost codifying all existing law on access to public
21 records and those things you can't give, so when you get
22 beyond just saying we're going to do everything that's not
23 sealed, you can have it, then we are in the process of
24 having a court administrative rule that codifies all the
25 laws pertaining to public access and what you can't get,

1 and I don't know who can keep up with that.

2 CHAIRMAN BABCOCK: Yeah. You've said much
3 better what I was worried about.

4 MR. LOW: Okay.

5 CHAIRMAN BABCOCK: Judge Christopher.

6 HONORABLE TRACY CHRISTOPHER: Just my
7 comment for the subcommittee when they go back to draft
8 it, I mean, the idea of excluding medical, psychological,
9 or psychiatric records seems kind of undisputed, but we
10 have discovery motions where those are referenced and
11 attached and are necessary all the time, med mal cases
12 where medical records are key, Daubert motions where
13 medical testimony is necessary. I mean, there are so many
14 exceptions that you would think that kind of information
15 would be necessary, and if it's -- or should be part of
16 the record; and if it's not, how are we going to be going
17 through a discovery motion and making sure that the
18 medical records aren't in there?

19 CHAIRMAN BABCOCK: Yeah. And it's going to
20 be referenced in open court, probably.

21 HONORABLE TRACY CHRISTOPHER: Right.

22 CHAIRMAN BABCOCK: Anybody else? Okay.
23 Well, we'll -- this will be, Angie, at the top of the
24 agenda for next time. Let's move on to the next agenda
25 item, which is the subcommittee on information technology.

1 We have three speakers here who want to address this
2 subject, but Richard and Lamont are the two shepherds of
3 this issue. Anything either one of you guys want to talk
4 about before we --

5 MR. ORSINGER: No, I think we ought to hear
6 from the speakers and then proceed from there.

7 CHAIRMAN BABCOCK: Lamont, that okay with
8 you?

9 MR. LAMONT JEFFERSON: Yeah. Agreed.

10 CHAIRMAN BABCOCK: Okay. Well, the first
11 speaker on the agenda is the great Peter Vogel from
12 Dallas.

13 MR. VOGEL: That's dangerous.

14 CHAIRMAN BABCOCK: Peter, have at it.

15 MR. VOGEL: Okay. Thanks, Chip. I
16 appreciate it. Thanks for letting us come today and talk
17 about electronic filing. As many of you-all will recall,
18 last March we came to the committee and gave you-all an
19 update about where we were with the electronic filing
20 project for the state, and I thought it might be helpful
21 today for those of you who have slept since then to sort
22 of go back and give a little historical perspective of
23 where we came from and how we got to the point we are
24 today.

25 And let me also comment that the committee

1 that I chair, just to give you-all a perspective as well,
2 was created eight years ago by the Legislature; and one of
3 our statutory obligations is to effectuate electronic
4 filing, so that's part of -- that's one of the things on
5 our to do list.

6 It took about -- three years ago was the
7 first time we were really in a position to do that. I
8 think when we initially started back in '95 before the
9 committee was even created we had an expectation that we
10 were going to have to have our own telecommunications
11 network for the judicial system, and what we found out
12 much to our chagrin was that the state already had 27
13 independent, separate telecommunications networks. So
14 luckily the internet came along and sort of wiped all that
15 out, so we have a different model today than what we
16 started with back in '97.

17 So what we did was about three years ago we
18 started in a discussion with what was then KPMG
19 Consulting, and this has now become Bearing Point. They
20 are the vendor that the Department of Information
21 Resources has selected to be the portal for e-government,
22 and I'm sure most of you-all are familiar with Texas
23 Online or Texas.gov or however you get there.

24 It has been a very effective tool for the
25 state. I think in June they went over \$1 billion worth of

1 commerce since they went into business, so they have been
2 successful. You can get your beautician license or your
3 fishing license or hunting license or renew your driver's
4 license on that portal, among other things. So it seemed
5 logical to our committee that we would use Texas Online.
6 Also, the Legislature mandated that every state agency use
7 Texas Online except for some special cause that they could
8 get an exception. We didn't see any reason to have an
9 exception. We didn't appeal for one, and so we decided we
10 would go along with Texas Online.

11 So what we did was we met with approximately
12 13 county and district clerks, starting about two and a
13 half years ago, and tried to figure out what it was
14 that -- how we would effectuate this in Texas; and as many
15 of you-all know, we have -- the Supreme Court approved two
16 sets of local rules, one for county clerks, county
17 filings, and one for district clerks. The first district
18 that signed up was Bexar County. David Peeples actually
19 was one of the leaders in that. What we ended up doing on
20 this was we have had now I think about -- how many
21 counties are signed up now, seven?

22 MR. GRIFFITH: Eight.

23 MR. VOGEL: Are online right now. And what
24 we have found is, we had a pilot for a little more than a
25 year, and in that pilot we found out there were certain

1 things that we needed to change, and some of the reasons
2 we had that change is -- now we go back to history one
3 more time. In 1995, Jim Mehaffy, who is a judge in
4 Jefferson County, came to the Supreme Court and said he
5 wanted to start doing electronic filing for high plaintiff
6 and high defendant cases, and the Supreme Court authorized
7 Jefferson County to do that, and they were using a single
8 vendor; and there was much hullabaloo about it at the time
9 because there were many lawyers who were unhappy about
10 having to deal with a private vendor. Now, ultimately
11 that vendor was acquired by Lexis, so now the people that
12 are filing in Jefferson County deal with Lexis/Nexis.

13 And then Montgomery County came along in
14 1997, so those two counties have in place the same rules
15 that allow judges to require all the filings in particular
16 cases to be electronically done. As a matter of fact,
17 Judge Mehaffy last January, a year ago, ordered that every
18 case in his court be electronically filed. He had that
19 authority under that order.

20 So when we had the first set of rules, Bexar
21 County, and Fort Bend County was the first county that
22 came along as well, and they both went online. I think
23 the first filing in the state was in Fort Bend County, and
24 what we found was in going through this during the first
25 year or so, that there were certain things we needed to

1 change. So last June we went back to the Supreme Court
2 and asked for some revisions to the local rules, and
3 included in that would allow a judge to on motion of one
4 party require the case be electronically filed and also
5 deal with options on service electronically.

6 So in any event we've had some counties that
7 have signed up under those new rules, and in the process
8 we hope in the next year that we're going to have between
9 30 and 40 counties in the state that will be online. So
10 what we did was last June we presented to the Chief
11 Justice Phillips and this committee the proposed rules
12 that we think would be -- should go into effect to alter
13 the Rules of Civil Procedure to effectuate this, and
14 that's essentially what we presented.

15 Now, I might also mention that the model
16 that we're using in Texas is different than most other
17 states. There are a handful of states in the country that
18 have tried electronic filing with not such great success;
19 but there are some states that are very successful; but
20 one of the reasons for that is like Colorado, for
21 instance, one of the reasons for that is that the funding
22 for the whole court system is done by the state; and
23 because we have local funding for everything that's done
24 for our court system, we have to deal with a
25 county-by-county and city-by-city basis; and with 254

1 counties and over 1,100 cities, when you get into
2 municipal filings, it's a much more complicated process to
3 bring this online.

4 And so in order to do that, what our
5 planning committee did -- and I'd say Richard was on that
6 planning committee -- we came up with a model where every
7 filing in the state would go through one central focal
8 point, and that was the Texas Online portal so that they
9 have -- the Texas Online Authority gave Bearing Point the
10 ability to make agreements with every county and district
11 court so that they could permit filings and then they
12 would have to give the data in a certain format.

13 And then we allowed for electronic filing
14 service providers, and there are about four or five of
15 those now, and what they do is they are private
16 enterprises and they go out and sell to lawyers like my
17 firm at Gardere. We use Case File Express so that we can
18 file electronically on the internet without having to have
19 any paper; and I know many of you-all had this experience
20 in the Eastern District, has already gone to mandatory
21 electronic filing; and we anticipate probably all the
22 Federal courts in the state will be electronically filing
23 by the end of the year. So we think it's time obviously
24 to look at how the Rules of Civil Procedure are going to
25 be modified to effectuate what is an inevitable part of

1 the way we're going to practice law in the future. That's
2 sort of where we're coming from.

3 I have with me today two other individuals
4 that I would like to get them to make presentations I
5 think will be helpful to you in the background before I
6 try to answer questions if that's okay. Richard, is that
7 all right?

8 MR. ORSINGER: Yeah, sure.

9 MR. VOGEL: Dianne Wilson is the county
10 clerk from Fort Bend County, and she is a member of the
11 Judicial Committee on Information Technology. She is
12 chair of our subcommittee on standards, which is
13 responsible for setting the standards for this electronic
14 filing. I might add, in the general scheme of things that
15 my committee's responsibility is kind of simply to
16 automate the court system in Texas and put internet on the
17 desks of all 3,100 judges; and in order to do that what we
18 have done is we have set a number of standards which are
19 posted on a website. We look at national standards and
20 then we try and figure out do we need to change them for
21 Texas. Some standards that are national we accepted just
22 the way they are. Others we changed because we do things
23 that are different.

24 So, Dianne, would you like to make some
25 comments about your experience in Fort Bend County?

1 MS. WILSON: Good morning. Thanks for
2 having us here this morning. You know, when you're the
3 test site, the pilot site, you always plan for the worst
4 and hope for the best, and our local rules were adopted in
5 December of 2002, and our first electronic filing was in
6 January of 2003. It went too smoothly. We kept thinking
7 "something's wrong," and to this date two years this month
8 we have had only one glitch, and that was early on when
9 someone's credit card wasn't any good. Other than that,
10 it's been an extremely pleasant experience.

11 Our attorneys that are using it absolutely
12 love it. In fact, one attorney out of Houston says that
13 he saves \$175 every time he electronically files because
14 he doesn't have to make copies; he doesn't have to have a
15 runner come from Houston to Fort Bend. And if any of you
16 have ever driven I-10 or Highway 59, that's not an easy
17 task to get from one side of one county to another, and so
18 we have had excellent experience.

19 The only downside is enough attorneys are
20 not using it, and I think once Harris County goes online
21 we'll see a tremendous boost in the number of filings.
22 We're 23 miles from downtown Houston, city of Richmond is
23 our county seat, and we have a lot of attorneys that do
24 practice in both counties, so we are hoping that when
25 Harris County goes online, hopefully this year, that our

1 numbers will drastically increase, but it's been a great
2 experience.

3 As Peter said, it is the -- the future is
4 here today. My office is pretty much paperless. We're
5 starting this month with electronic filing of property
6 records. We're currently doing electronic filing of birth
7 records, and then we have been doing the e-filing for two
8 years now. So after Gilbert Sanchez, the district clerk
9 in El Paso, will tell you a little bit of experience of El
10 Paso and then the three of us are here to answer any
11 questions. Thank you.

12 MR. VOGEL: Let me just add one comment,
13 because this has been discussed and she came in and she
14 missed it before. Every county record that has ever been
15 filed in Fort Bend County is available on the internet in
16 her office.

17 MS. WILSON: We have over 15 million records
18 out on the internet free to the public to access.

19 HONORABLE SARAH DUNCAN: Do you have any
20 idea, Dianne, how much e-filing saves your office?

21 MS. WILSON: Electronic filing, at this
22 point in time we haven't seen the benefit on my side yet,
23 only because we're still trying to work out the
24 connectivity so that it goes directly into my imaging
25 system. We're still having some -- a glitch there between

1 two separate systems with Texas Online and my office, and
2 so as soon as that's worked out it will go directly in.
3 Then we will see the benefit because we won't have to take
4 that document and image it into our system. It just will
5 go directly into it.

6 HONORABLE SARAH DUNCAN: Do you anticipate
7 that that will be worked out sooner rather than later?

8 MS. WILSON: Well, let me put it this way.
9 I was hoping it would have been a lot sooner than now, but
10 apparently Microsoft has been hired to figure out why that
11 connectivity is not happening and come up with a solution,
12 so we anticipate by April or May that will happen, and
13 then we -- my staff will then greatly benefit.

14 But I will say that it is a lot faster to
15 print a document that -- that's been imaged than it is to
16 take and go find a file, open a file, get the paper out,
17 go to a copier, print it. That takes a lot of staff time,
18 and so the imaging works great.

19 MR. VOGEL: Let me just make one comment --
20 I sort of skipped over this -- before I ask Gilbert to
21 make some remarks. We have through the Texas Online
22 Authority a convenience fee for the filers, and the
23 counties get \$2 per filing to help defray the costs. So
24 one of the things is, is it costing the local government
25 anything is one issue, but the other part of that is

1 that -- and they have the ability from under that
2 authority to recoup whatever the cost is so if they have
3 to buy more printers or more hardware or whatever, and so
4 we imagine that that's going to continue on, and that's
5 all part of the cost that's built into it.

6 I'm going to ask Gilbert Sanchez, who is the
7 district clerk of El Paso County, if I may, and then we
8 would be happy to all three of us answer questions, if you
9 don't mind.

10 CHAIRMAN BABCOCK: No, that's fine.

11 MR. VOGEL: We're the guests, so I don't
12 want to change your procedure.

13 CHAIRMAN BABCOCK: Okay.

14 MR. SANCHEZ: Good morning. My name is
15 Gilbert Sanchez. Thank you very much for having me here.
16 To answer your question, ma'am, unlike Ms. Wilson here, in
17 El Paso County we do have it fully integrated now. That
18 means it comes directly into my CMS system. I'll wait
19 until the --

20 (Sirens outside.)

21 MR. SANCHEZ: We do have it fully integrated
22 into our system. It's approximately saving me about three
23 to four individuals, so that saves me the front counter
24 clerk to do the data entry, clerk to do the filing, and
25 clerk to pull the file and everything of that nature.

1 Myself, I don't charge the two-dollar convenience fee. I
2 think that is kind of an incentive to get attorneys to
3 start using the e-filing. It has been extremely helpful,
4 and I think this is the wave of the future, and this is
5 what's going to happen. It's inevitable, as was mentioned
6 earlier.

7 What I have done is gone totally paperless
8 on the file; and it's just a way of educating the
9 attorneys as well as the judges on how to use the
10 computers. What I do is when, for example, we get a
11 600-page brief, summary judgment brief with exhibits,
12 which has occurred -- as a matter of fact, that occurred
13 on a Christmas Eve, when I got it. So it's been extremely
14 helpful in that because it comes in automatically imaged.
15 All the attorneys get notice of it immediately, but what I
16 do is rather than printing out all 600 pages, and which
17 some of the counties may want to consider, is I only print
18 out the front page and a pink sheet of paper and put
19 "e-filed" in front of it; therefore, the attorneys and
20 judges will have to either go online or onto the computer
21 system, which the judges have on their bench and can
22 actually view it from the bench. So that kind of saves me
23 the costs of printing and the paper.

24 And also, like Ms. Wilson has indicated and
25 stated, printing out directly when it comes clean, it's

1 not -- there's no problem with image of it being faxed or
2 any copy problems. It's a clean, crisp copy directly into
3 your system.

4 So with that, Texas Online has helped me
5 work with the software group which is the vendor for my
6 CMS system; and with us being able to integrate it, that's
7 going to allow 26 other counties to automatically get the
8 full integration, so that will assist other counties in
9 coming on board and having the same cost effectiveness.

10 One of the things that the judges, Judge --
11 I apologize. Mary Anne Bramblett from the 41st as well as
12 Judge Patricia Macias, what they liked the idea was being
13 able to sign an order and issue it electronically to all
14 the parties involved, and some of the attorneys thought
15 that was extremely helpful, because you know how it is.
16 You wait one, two, three weeks just to get an order back.
17 If the judge can sign it electronically and send it out to
18 all the parties, it saves everybody time, especially
19 sending runners up to the courthouse and everything else.

20 And also, as Ms. Wilson was indicating with
21 the attorneys saving money, by being able to have an open
22 system where you have multiple vendors, which allows open
23 competition, they are able to bring the costs down; and
24 most of the attorneys say they are willing to spend
25 anywhere between 6 to \$10 on a filing if that's what can

1 be achieved; and that's where we're heading.

2 So I think it's going to be extremely
3 helpful for everybody involved. I have got filings as far
4 away as New York, Phoenix, Houston, and everywhere else.
5 Being from El Paso, you know, that's a good distance.

6 CHAIRMAN BABCOCK: Different time zone.

7 MR. SANCHEZ: Different time zone, yes. The
8 young man in the back, it took us about 10 hours to drive
9 here last night. We got here at 3:00 this morning. So --

10 CHAIRMAN BABCOCK: Well, you look very
11 chipper for --

12 MR. SANCHEZ: Well, it was a good drive. It
13 was a good drive.

14 It's been extremely helpful, like I said. I
15 only have one clerk having to physically review the file;
16 and usually the common mistake, unlike Ms. Wilson with the
17 credit card, it's wrong cause number with the style. So
18 all we do is my clerk notifies the attorney, you know,
19 there is a little quick mistake. We go ahead and correct
20 the mistake, and that's usually about it. We have not had
21 to refuse any filings that have come into the system.

22 CHAIRMAN BABCOCK: Great.

23 MR. VOGEL: I think that generally that we
24 know that this is not going to be perfect, but in the big
25 scheme of things, you know, filing in paper is not perfect

1 either, so I think that the glitches that we've found and
2 the experiences that we've had since we started this two
3 years ago has been -- generally this has been pretty
4 smooth.

5 MR. SANCHEZ: I will say I had an open -- we
6 had a little round table discussion last month with
7 several of the attorneys from several law firms. One of
8 the things they did like also was the service that we've
9 been talking about to basically have the Bar send out
10 saying if you're going to accept service or not, to have
11 that option in progress. They like the idea that it's
12 more of a forced issue, that they have to physically say,
13 "Don't opt me in." They all like that because in this way
14 they can now send out all their pleadings and documents to
15 all the attorneys involved rather than trying to find who
16 is and who isn't registered. So they like that idea as
17 well.

18 MR. VOGEL: We're happy to try and answer
19 whatever questions.

20 CHAIRMAN BABCOCK: Justice Hecht.

21 HONORABLE NATHAN HECHT: One concern when
22 the pilot project was set up was that there would be
23 missed deadlines or --

24 MR. VOGEL: Right.

25 HONORABLE NATHAN HECHT: -- misfilings that

1 would impact the proceeding in the case. Has there
2 been -- and that there would be a complaint that that was
3 the system's fault and not the lawyer's. Has there been
4 any of that?

5 MR. VOGEL: Well, let me say this. This
6 committee reviewed our local rules before the Supreme
7 Court approved them, and I think, David, you were chair of
8 that subcommittee, right? Does that sound right?

9 HONORABLE DAVID PEEPLES: (Nods
10 affirmatively.)

11 MR. VOGEL: Any event, one of the issues
12 that you-all's subcommittee recommended was that the
13 filing be 24 hours, seven days a week, and I have not
14 heard of a single case where there has been a problem
15 anywhere in the state.

16 MS. WILSON: No. In fact, that committee
17 also recommended that the file date and time be when the
18 filer sent it, not when the clerk received it, and I
19 personally was a little concerned with that, but I said,
20 "Well, let's try it. It's a pilot anyway. You know, what
21 can we lose?" There has been no problems with that.
22 We've not had -- in fact, the attorneys, we had one
23 attorney who was getting ready to get on an airplane when
24 he realized he hadn't filed a document, and it was like
25 11:00 o'clock at night, and the deadline was that day, and

1 he said that was the easiest thing he ever did, and he
2 didn't miss his deadline. It was filed the next morning
3 when we came into the office. We have also one person
4 with backup who reviews everything that comes in, and it
5 was filed and timely.

6 CHAIRMAN BABCOCK: Great.

7 MR. ORSINGER: Peter, I'd like to ask you a
8 couple of questions in a row. First of all, on the
9 proposed amendments to the Rules of Civil Procedure I have
10 not found anyone that I have inquired with that objects to
11 any of them.

12 MR. VOGEL: Okay.

13 MR. ORSINGER: Can you briefly tell us --

14 MR. VOGEL: Does that mean you're going to
15 vote right now?

16 MR. ORSINGER: Briefly tell us who wrote
17 this and if there is any opposition out there that has
18 surfaced.

19 MR. VOGEL: Well, let me tell you, what
20 happened was this group of clerks, the 13 of us met with
21 Office of Court Administration, Margaret Bennett, who is
22 the general counsel there, and Ted Wood, who works in her
23 office who used to be the county judge -- constitutional
24 county judge and the county judge in what county?

25 MS. BENNETT: Randall.

1 MR. VOGEL: Randall County. He helped us --
2 he went around the country and looked at other electronic
3 rules and we came up with -- by the time we recommended it
4 and it ended up with this committee we were on version 14.
5 So we had sort of hammered through every possible issue
6 that we could come up with. I have not heard -- I haven't
7 heard a single complaint about the current revised rules
8 that were adopted last June. Jim Mehaffy didn't like some
9 of the things we had in the first set, and we have made
10 those changes, and that's what the Supreme Court adopted
11 in June, which is what's before you now.

12 MR. ORSINGER: Okay.

13 MR. VOGEL: So I haven't heard a complaint
14 from a single lawyer, and the other -- let me just make
15 one other comment that I forgot to say. The format in
16 which the clerks receive these things are all PDF, which
17 is the same format the Federal court system is doing it
18 in, but the advantage that we have in our system is you
19 don't have to have a PDF writer in order to do it. If you
20 submit it through the internet through our -- the EFSPs,
21 they convert it to PDF for the filer. So that would allow
22 somebody who is sitting in an airport, you know, with just
23 a computer that happens to be there to send it without
24 having to have the PDF writer on that machine. So, and
25 that's got an advantage, so --

1 MR. ORSINGER: Okay. My next question is
2 along the lines technologically. The Rules of Procedure
3 don't undertake to define what constitutes an electronic
4 filing, what kind of format it has to be, whether it's an
5 e-mail with an attachment that's a word processing file or
6 whatever. Where are those standards set out?

7 MR. VOGEL: That is -- in my view, because
8 of the standard by which the Texas Online Authority has
9 authorized through the Department of Information
10 Resources, we say in the rules that you have to use --
11 that's part of the rule. You have to use the Texas Online
12 rules, and those rules are propagated and approved by DIR.

13 MR. ORSINGER: So even though our Rules of
14 Procedure don't direct that, as a practicality you can't
15 e-file unless you comply with those requirements.

16 MR. VOGEL: With those, right.

17 MR. ORSINGER: And then as technology
18 changes and as those requirements change, the marketplace
19 will change, and we don't need to change our Rules of
20 Procedure.

21 MR. VOGEL: Right. That's what -- because
22 right now we're using XML. In five years there may be
23 something entirely different, but to the user's standpoint
24 they don't have to know that. Of course, nobody in this
25 room needs to know that either, but -- whatever that

1 means, XML.

2 MR. ORSINGER: Can you explain to those in
3 the room who don't understand when the rules talk about
4 the judge affixing an electronic signature, you're talking
5 about the clerk has received a PDF file, which is
6 basically a graphical file; and let's say it's an agreed
7 order that the lawyers have signed off on and now the
8 judge is going to electronically sign it. Is there some
9 computer process where a facsimile of the judge's
10 signature gets affixed to that PDF file and now a new PDF
11 file is generated?

12 MR. VOGEL: Well, a new file would have to
13 be, because that would be a signed order, so it wouldn't
14 be the same one anyway.

15 MR. ORSINGER: Right.

16 MR. VOGEL: Let me change -- let me try to
17 answer that by giving you a different issue. Four years
18 ago the Legislature enacted the Uniform Electronic
19 Transactions Act, and I represented the courts when DIR
20 was evaluating how do you implement the Uniform Electronic
21 Transactions Act and the e-sign law that went into effect
22 four years ago, five years ago now. Under the rules for
23 an electronic signature under the Uniform Electronic
24 Transactions Act, whatever the signature happens to be is
25 what's accepted. So if it's an S -- you know, /S/, which

1 is what most of the Federal courts are using, that is an
2 acceptable signature if it comes from the computer of the
3 judge. So the signature essentially becomes done because
4 it's coming off the computer, the judges's computer, and
5 it's coming back that way. So it's part of our -- it's
6 part of the electronic law that Texas has adopted.

7 MR. ORSINGER: Okay. But how does the judge
8 -- let's say that we're going to adopt these rules and the
9 judge is going to get a PDF file.

10 MR. VOGEL: They have to have a PDF writer
11 to put it -- you know, that signature on it.

12 MR. ORSINGER: Okay. So the judge can sign
13 a piece of paper and then they can scan it again.

14 MR. VOGEL: They can -- right, which is what
15 we do now, we did under the original rules; and that's
16 what Jim Mehaffy says, "That's just too cumbersome because
17 I can do it electronically." So we changed the rules to
18 go back to what he was doing. I'm not quite sure why he
19 came up with it that way, but that, I mean --

20 MR. ORSINGER: The rules permit electronic
21 signatures, but the technological level that's happening
22 is we're just having a real signature on a printed piece
23 of paper that's then rescanned, right?

24 MS. WILSON: In many cases, yes.

25 MR. VOGEL: Under the old -- under the rules

1 that were adopted before June, yes, that's what happened.

2 MR. SANCHEZ: What we're planning on doing
3 in El Paso is get some kiosks for the judges where the
4 document actually comes up onto the kiosk, and at that
5 point the judge can sign the kiosk.

6 MR. ORSINGER: They will use like a stylus?

7 MR. SANCHEZ: Exactly.

8 MR. ORSINGER: And then it will cause it to
9 appear on paper?

10 MR. SANCHEZ: Yes, sir.

11 CHAIRMAN BABCOCK: Judge Christopher had a
12 question and then Bill.

13 HONORABLE TRACY CHRISTOPHER: Well, I had a
14 couple of questions, but along the line of the judges
15 order, if a document is in PDF and the judge wants to
16 change the order, is that possible, or do I have to print
17 it and handwrite the changes?

18 MR. SANCHEZ: You would have to print it and
19 handwrite the changes, ma'am. Yes.

20 MR. VOGEL: Well, no, that isn't true.

21 MS. WILSON: You can copy.

22 MR. VOGEL: If you have -- if Harris County
23 decides that the judges ought to have a PDF writer on your
24 desk, you can convert that PDF file to a Word file and
25 edit it or you can even edit it in PDF if you have the

1 right technology to do that, but I'm not suggesting that
2 any county is going to do that. I'm just saying that is
3 an option; or you, if you want it, could buy that writer
4 and put it on your own computer to make it easier for you
5 when you wanted to change an order.

6 MR. ORSINGER: Is that software or hardware?

7 MR. VOGEL: That's software.

8 MR. SANCHEZ: Software.

9 MR. ORSINGER: What's the cost?

10 MR. VOGEL: PDF writer is about -- the cheap
11 version is about 400. The pro version is I think 600,
12 something like that.

13 MR. SANCHEZ: I think our judges in El Paso
14 are a little leary about being able to change it on the
15 computer with the writer, because they were thinking that
16 anybody can come in, make a change if they wanted to and
17 so forth, so they preferred to actually print it out, make
18 the handwritten, you know, initial, all that type of work
19 rather than having the ability of just the clerk coming in
20 and retyping an order.

21 HONORABLE TRACY CHRISTOPHER: Okay. And
22 then my other question was relating back to the Rule of
23 Judicial Administration 14. Ms. Wilson, you said you have
24 all your records available on the internet, open access?

25 MS. WILSON: All public records.

1 HONORABLE TRACY CHRISTOPHER: Okay. Does
2 that include divorce decrees we've been talking about?

3 MS. WILSON: I don't do that.

4 MR. VOGEL: She's county.

5 MS. WILSON: I'm county. We don't do --
6 well, we could do divorces. We have the current
7 jurisdiction, but we don't, but it's all public records,
8 property records; and in the courts it's probate, civil,
9 and criminal. No juvenile, no mental, and no document
10 that's been -- or case that's been sealed by the judge.

11 HONORABLE TRACY CHRISTOPHER: So like wills
12 that were filed?

13 MS. WILSON: If it's been probated, yes.

14 HONORABLE TRACY CHRISTOPHER: Unless it was
15 sealed.

16 MR. VOGEL: Let me also add that as part of
17 these rules is that on county -- we have exceptions
18 included in these proposed rules that things like wills
19 can't come in electronically, because the thing, the --
20 under the -- you know, the current rules, we're not trying
21 to change that, so we tried to take all those things into
22 account as well.

23 HONORABLE TRACY CHRISTOPHER: And have you
24 had any problems with identity theft or, you know,
25 improper use of your records that have been open and free

1 for everyone to use that you're aware of?

2 MS. WILSON: Not that we're aware of. Most
3 -- based on all the research I've done and articles I've
4 read, most identity theft comes from insiders, people who
5 tap into credit unions or steal credit cards and stuff
6 like that. We haven't seen any of that. There is a law
7 that went into effect last year that allows people to
8 redact out their Social Security number and driver's
9 license prior to filing, and I serve on the public access
10 committee, and the confidential document that we -- I
11 think was proposed to this committee should also handle
12 most of the issues regarding the privacy.

13 HONORABLE TRACY CHRISTOPHER: The sensitive
14 data exception?

15 MS. WILSON: Correct.

16 CHAIRMAN BABCOCK: Bill and then Paula and
17 then Judge Sullivan and then Andy.

18 PROFESSOR DORSANEO: I seem to remember that
19 the deadline problem that Justice Hecht asked about in at
20 least one of these sets of rules involved the idea that if
21 a filing was rejected by the clerk's office ultimately
22 that the person who filed it wouldn't be able to rectify
23 that because that person wouldn't find out about it until
24 24 hours later. Is that just an old problem or a
25 nonproblem, or was it solved by the date of filing being

1 the first thing that somebody tried to put into the
2 system, or how does that work?

3 MS. WILSON: The only document that we have
4 rejected in two years is the one where the credit card and
5 the Texas Online caught that, and it didn't --

6 PROFESSOR DORSANEO: That doesn't help me
7 with respect to the person whose document is rejected --

8 MS. WILSON: Exactly.

9 PROFESSOR DORSANEO: -- later in some other
10 county.

11 MS. WILSON: Exactly. We have not had any
12 issues with that.

13 MR. VOGEL: I'll tell you what we come back
14 to, which is I think sort of what you're asking, is that
15 the fundamental basis of what we're doing is we're trying
16 to -- we try and look at this as if we were using paper
17 what would we do; and if someone inadvertently files
18 something in the wrong county, they do it timely, but it's
19 in the wrong county, with paper, it shouldn't be any
20 different electronically than it is with paper. I mean,
21 and so we can't change human nature and people's ability
22 to make mistakes.

23 PROFESSOR DORSANEO: But I think that if
24 it's tendered for filing and then that tends to be the
25 date of filing under most paper circumstances.

1 MR. VOGEL: I think that's what we
2 contemplate, too, is that if it was delivered -- if it has
3 the time stamped when it was delivered to the EFSP and it
4 gets rejected, it could be rejected a day or two later
5 because if it comes in, let's say, Friday night before
6 midnight, the clerk has the first day to -- they might not
7 reject it until Tuesday; isn't that right?

8 MS. WILSON: Uh-huh.

9 MR. VOGEL: They have to reject within one
10 day or it's automatically accepted.

11 MR. SANCHEZ: They have three days.

12 MR. VOGEL: Three days, okay.

13 MS. WILSON: I think your EFSPs are -- tend
14 to be really on the ball, and they're catching those if
15 it's happening. I'm not aware of it happening, but if it
16 is then the EFSP --

17 PROFESSOR DORSANEO: Well, I think it will
18 happen.

19 MS. WILSON: It could, but I think the EFSP
20 is catching it.

21 MR. SANCHEZ: I think really, in all
22 honesty, sir, we accept it as-is. The only things what
23 we're looking for -- because we have to accept no matter
24 what comes across the counter if it's paper or electronic.

25 PROFESSOR DORSANEO: So that would be a good

1 rule, right, that you have to accept it?

2 MR. SANCHEZ: Yeah. We accept it. We're
3 required to.

4 MS. WILSON: Except if it's in the wrong
5 county.

6 MR. SANCHEZ: Well, we don't have that issue
7 in El Paso.

8 MR. VOGEL: But if somebody filed something
9 for her county in your court --

10 MR. SANCHEZ: We would accept it. Not just
11 we would see it, we would accept it, saying we have
12 received it, but we would notify the attorney, "By the
13 way, you create -- you did make a mistake" and leave it to
14 the courts to decide, you know, on the document. It's the
15 judge's to decide, not the clerk's to decide.

16 MR. VOGEL: But, see, that's what I'm saying
17 is with paper that's the same issue now that if that
18 happens in a court in his county and it was for the wrong
19 court then that judge is the one that has to make that
20 determination. It's not a clerk's decision.

21 CHAIRMAN BABCOCK: Yeah, Bill's point,
22 Bill's point, though, is that if I'm going down to the
23 clerk's window and I've got a piece of paper and I give it
24 to the clerk and the clerk says, "Wait a minute, you
25 knucklehead, this is supposed to be filed in Fort Bend

1 County and you're way west of there," then you're going to
2 know that right away; whereas here there's going to be a
3 lag time; and if it's a pleading that's got to be filed on
4 the day and it's jurisdictional or something, you might
5 lose some right.

6 MR. VOGEL: But what I'm saying is you have
7 that -- you still have that problem with paper, too,
8 because --

9 PROFESSOR DORSANEO: You really don't have
10 the same problem with paper.

11 MR. ORSINGER: We have a problem with mail.
12 You have a problem with delivery by mail.

13 HONORABLE JAN PATTERSON: The reporter is
14 trying to take this down.

15 CHAIRMAN BABCOCK: Hold on. Hold on. The
16 court reporter can only take one at a time, so whoever
17 wants to talk.

18 MR. SANCHEZ: I understand what you're
19 saying, sir. Just for example, it comes in on Friday. We
20 don't see it until Monday or Tuesday. By that time the
21 attorney doesn't have the ability to go back and remedy
22 the problem. Unfortunately, as you're saying, sir, we
23 can't tell the attorney, "You messed up." You know,
24 that's really the attorney's problem and the judge's to
25 decide how they're going to remedy that issue.

1 CHAIRMAN BABCOCK: Paula.

2 MS. SWEENEY: This question is against the
3 backdrop of yesterday's news that we're still contesting
4 the Ohio election because there is no paper backup for the
5 voting machines and so we don't have a paper trail to
6 determine who did or didn't vote or how they did or didn't
7 vote. What's the backup to some sort of electronic
8 failure or glitch or problem or attack? Or, you know, the
9 hospitals in Houston all flooded a couple of years ago and
10 lost patients and data and everything else. That
11 presumably is going to happen eventually to a courthouse.
12 What's our backup if we go to all electronic, no paper?

13 MS. WILSON: Are you referring to -- of the
14 transferring from the filer to the clerk, or are you
15 talking about once it gets to the clerk?

16 MS. SWEENEY: Both. All of the above; and
17 also, you know, if I've got something that is super time
18 critical, the statute of limitations pleadings that I'm
19 filing on the last day at the last hour, can I still bring
20 the paper and get a stamp and have it in my hand; or are
21 we going to be required to only do electronic at some
22 point?

23 MR. VOGEL: It's my understanding, I mean,
24 what we contemplate, that if somebody wants to file
25 something in paper because that's what they need to or

1 give them a pro se litigant or an indigent litigant who
2 doesn't have computer access can still go to the
3 courthouse and file something and then it puts a burden on
4 the clerk to enter in electronically into the system.

5 MS. SWEENEY: Okay.

6 MR. VOGEL: The other part of this is that
7 when a consumer like my law firm, when we dial into Case
8 File Express and we're on the internet and we send the
9 filing, it is stored electronically with Case File
10 Express. It's got the time stamp on it. Then it goes to
11 Texas Online. It has another time stamp. It's held there
12 for a week.

13 MR. SANCHEZ: And then turned down.

14 MR. VOGEL: No, well, I think they hold it
15 for a week or two weeks.

16 MS. WILSON: Two weeks.

17 MR. VOGEL: Two weeks. And then it goes to
18 the clerk's office, so if there is some problem during at
19 least that two-week period, you have the time stamp of
20 when it left the EFSP. You also have the time stamp of
21 when it got to Texas Online. Then you have the time stamp
22 of when it hit the clerk's office. So at any one of those
23 spots if there was a problem, there was some technology
24 issue, theoretically you have the other parts to connect
25 the dots later.

1 That's one issue. The other part of it is
2 that in this electronic service where you get a notice
3 back that it's been filed and you send notice to the other
4 parties, there will be ways to have documents to prove
5 them. Whether or not they're all in one place at one time
6 is I think something of a little bit different issue, but
7 they have their own experiences on that.

8 MR. SANCHEZ: We're also required, ma'am, to
9 have a disaster recovery plan in set. Each county, each
10 clerk is required to have that under records management.
11 In El Paso we have two separate in particular locations
12 servers that maintain copies of everything that we do. So
13 we are required to save it just as if it was a paper.

14 MS. WILSON: And we too have redundant
15 servers to hold the documents, because we have probably 20
16 million documents, and so I have to make sure that it
17 doesn't get lost in outer space.

18 CHAIRMAN BABCOCK: Judge Sullivan had a
19 question.

20 MS. SWEENEY: Thank you.

21 MR. VOGEL: Let me just, if I may, just
22 finish one more comment. Under the Uniform Electronic
23 Transactions Act as well the local governments have
24 obligations under the archives of library rules that the
25 clerks have to adopt -- are obligated to deal with just as

1 any other state agency, so these obligations for
2 electronic records are now uniform for the whole state of
3 Texas and are not peculiar to the courts.

4 CHAIRMAN BABCOCK: Judge Sullivan.

5 HONORABLE KENT SULLIVAN: Just a quick
6 question. I think everybody has painted a pretty rosy
7 picture, which is very optimistic, and I hope things go
8 that well, but I had two concerns that I thought of. One
9 is do we have any experience, whether it be in Fort Bend
10 County or any other pilot project, where the volume has
11 truly been high enough that we think we could project from
12 that and say this is a representative experience of what
13 is likely to happen when we go to some sort of mandatory
14 system. In that regard I'm curious whether there's any
15 truly major urban area in the country that has already
16 gone full bore with online filing and has something that
17 we can truly extrapolate from.

18 That's number one. Number two, my concern
19 about the pilot project experience is the guess that the
20 people that you have participating are probably the most
21 technologically sophisticated people, who are going to
22 pose the fewest user problems for you, as opposed to when
23 you suddenly convert and say this is now mandatory or
24 virtually mandatory -- I'm just curious. These are
25 guesses and just speculative concerns on my part, and I

1 was curious what your reaction was.

2 MR. VOGEL: Well, first of all, we're not a
3 pilot anymore. That pilot ended last spring, and we are
4 now at a stage where we have been looking at other states,
5 and, for instance, Colorado is totally e-file. I think
6 Delaware as well. For those of you who practice in
7 Federal courts you know that these things seem to be just
8 routine. As a matter of fact, in those jurisdictions that
9 I practice in where there's e-filing most lawyers don't
10 want to have anything to do with paper. I mean, they get
11 very hands -- you know, they get standoffish to that.

12 The model and the experience that -- and we
13 have been participating with other states and trying to
14 figure out what they're doing. I have not heard of a
15 single catastrophe of any sort, and I think a lot of it
16 has to do -- a lot of it is an internet/e-mail fundamental
17 change of the way we as humans are now communicating; and
18 what we've set up and the model that we're using is if
19 you're going to go to Yahoo and you want to get a map to
20 go across town, this is no more complicated than your
21 doing that. That's essentially what we're doing.

22 So that if you draft -- if I'm drafting a
23 pleading and I want to file it in your court, that is no
24 different than if I'm going to print it out and have a
25 courier take it down to your court. I mean in terms of

1 what I do as a user, and I'll admit I'm maybe more techie
2 because I've got a master's in computer science. The
3 average lawyer doesn't, but what we see is that there are
4 a lot of paralegals that are doing this, a lot of
5 secretaries, and it isn't the lawyer at all. You know, a
6 lot of lawyers don't draft things at computers, and then
7 there are many who do. So you have somebody like Richard,
8 who I suspect drafts a few things at his computer and
9 files things as well. I have not heard any problem
10 anywhere in terms of growth of involvement, so I'm unaware
11 of that.

12 MR. SANCHEZ: And, Judge, one of the things
13 that we have done in El Paso is we've actually started
14 classes. We have a training room that we've opened up.
15 We've allowed the vendors to come in and show their
16 systems as well as our people who show those attorneys,
17 those paralegals, that may not be computer literate just
18 to show them how easy it is.

19 HONORABLE KENT SULLIVAN: And before we --
20 one other question. What is the largest major urban area?
21 I'm not talking about Federal court now because I don't
22 think a Federal court generally experiences the volume
23 that we're talking about, state courts being sort of --

24 MR. VOGEL: You mean in Texas?

25 HONORABLE KENT SULLIVAN: -- a truly general

1 jurisdiction. In the United States I was curious, what's
2 the biggest one that's gone --

3 MR. SANCHEZ: Denver.

4 HONORABLE KENT SULLIVAN: And it's gone
5 mandatory?

6 MR. VOGEL: Yeah. The whole state. It's a
7 statewide program there.

8 HONORABLE KENT SULLIVAN: Okay.

9 MR. VOGEL: I think New Mexico is as well.
10 Mississippi. There are a number of states that are doing
11 this, but it's all statewide, so the big cities there,
12 that's what they're doing.

13 CHAIRMAN BABCOCK: Andy, then Lamont, then
14 Judge Bland and then Judge Lawrence.

15 MR. HARWELL: Hi, Dianne. My question is
16 kind of on the same lines. How many attorneys, Dianne, in
17 your county have -- they have to sign an agreement to do
18 this electronic filing. How many attorneys have done that
19 in your county?

20 MS. WILSON: I think there is right now
21 across the state and they are from all over the United
22 States, I think they have signed up in Texas close to
23 4,000 attorneys. In Fort Bend we probably have about 75
24 attorneys, and I don't know how many out of Harris County.
25 I know offhand probably about 20, 25 that practice in Fort

1 Bend that I know for a fact have signed up; but I don't
2 know, you know, based on address how many exactly other
3 than statewide; and once you're signed up, regardless of
4 where you are in the world, you can electronically file
5 anywhere in those counties that are online.

6 MR. VOGEL: Let me give you an example,
7 though, too, because at Gardere Wynne Sewell we've got
8 about 300 lawyers. We're making it mandatory that every
9 lawyer get signed up for it, and there are a number of
10 other firms that have done that already.

11 MR. HARWELL: Just another question. The
12 fee that's paid to Texas Online, is it \$2 per filing?

13 MS. WILSON: Six.

14 MR. VOGEL: It's \$2 for the county and 4 for
15 Texas Online. They get a convenience fee. The way -- and
16 let me mention that Mike Griffith is over here from -- he
17 represents Bearing Point, and actually he used to be the
18 director of my committee, and he's now in charge of the
19 e-file project over there, and what they did was they
20 invested -- Bearing Point invested millions of dollars.
21 The state hasn't paid a penny for this, for the
22 e-government operation; and they are recouping 90 cents on
23 the dollar for everything that comes through their system
24 until they recoup their investment; and then the state
25 will get -- and the state gets 10 percent; and then when

1 they recoup their investment, Bearing Point will share
2 with the state 50 cents of every dollar that's collected
3 through this system.

4 MR. HARWELL: That was what I was getting
5 to, was I understand that you have to have a portal where
6 everybody knows what they're supposed to do and there's
7 one house for the information and then it goes on, but
8 then then when you look at Rule 45, definition of system
9 it says, "(d), be filed on paper or electronically filed
10 with the clerk by transmitting them through Texas Online,"
11 and that was -- I was just wanting to know what Texas
12 Online is. Is that a government --

13 MR. VOGEL: Okay. Let me explain that. The
14 Governor appointed the Texas Online Authority. It is
15 maintained out of the Department of Information Resources.
16 That authority controls Texas Online, the e-government
17 portal; and everything they do, everything Texas Online
18 does, is based on the approval of the Texas Online
19 Authority; and they have to adhere to all the Department
20 of Information Resource standards and our committee
21 standards as well; and so the fact that Bearing Point is
22 the vendor today, it means that they have a contract with
23 the Texas Online Authority, but that it was a competitive
24 bid. They sent in an RFP, and they were selected.

25 It's possible that the next go-around that

1 another vendor will come in, and it shouldn't -- the way
2 we have this constructed it won't matter who it is. This
3 is the e-government portal for the state, and whatever the
4 rules that are propagated by the Texas Online Authority
5 are what dictates that side of it, which is I think really
6 the first question that Richard was starting with before,
7 was that. So that it doesn't come back to this committee
8 to consider every time there is a change in the internet
9 or something.

10 CHAIRMAN BABCOCK: Lamont, then --

11 PROFESSOR ALBRIGHT: Peter, can I just make
12 one quick comment about Texas Online?

13 CHAIRMAN BABCOCK: You want to butt in line?
14 Okay.

15 PROFESSOR ALBRIGHT: I have my computer on,
16 and it's wireless here now, and I just Googled Texas
17 Online just to see if you had no clue what Texas Online
18 is. If you Google Texas Online, you get Texas Online, and
19 one of the listed online services is e-filing for courts.

20 MR. VOGEL: It's on the front page, right.

21 PROFESSOR ALBRIGHT: Yeah. So it's very
22 easy to find.

23 CHAIRMAN BABCOCK: Lamont, then Justice
24 Bland, then Judge Lawrence.

25 MR. LAMONT JEFFERSON: Just a mechanical

1 question. You said that the filing is coming in PDFs?

2 MR. VOGEL: Yes.

3 MR. LAMONT JEFFERSON: Is it required to be
4 filed in PDF?

5 MR. VOGEL: No, it's not.

6 MR. LAMONT JEFFERSON: Okay. When you get a
7 file in PDF, do you create another file or do you simply
8 file the PDF image?

9 MR. VOGEL: A lawyer can file in any one of
10 about eight formats. We've said Word, Word Perfect, PDF,
11 TIF.

12 MR. LAMONT JEFFERSON: Let me ask you just
13 as a matter of practice, though. Are you receiving
14 filings in anything other than PDF?

15 MR. VOGEL: No. When it gets to the
16 courthouse it's all PDF.

17 MR. LAMONT JEFFERSON: Right. But, I mean,
18 you've said that lawyers can file in these different
19 formats.

20 MR. ORSINGER: But the EFPS is converting
21 it.

22 MR. VOGEL: Right, the EFSP.

23 MR. LAMONT JEFFERSON: Yeah, but what I'm
24 trying to get to is Kent and Andy's and kind of my
25 concern, too, is just how much can we learn about what's

1 happened so far; and as I understand what you've said, is
2 you convert everything to PDF. Are you getting things
3 from lawyers in PDF?

4 MR. VOGEL: We could, but we don't. It's
5 not necessarily -- it doesn't matter what format it is.

6 MS. WILSON: We don't know.

7 MR. VOGEL: Yeah. They wouldn't know what
8 the start -- the original format is.

9 MS. WILSON: We don't know what --

10 MR. VOGEL: Here's another issue, though.
11 If something is scanned for a signature --

12 MR. LAMONT JEFFERSON: Yes.

13 MR. VOGEL: -- then it may be by fax or it
14 may be scanned into a PDF reader, and what happens is that
15 gets attached and sent on just like an e-mail when you're
16 attaching something to that.

17 MR. LAMONT JEFFERSON: Right. You're
18 getting to my question, which is the signature. I mean,
19 are the signatures that you're getting handwritten
20 signatures, or are they electronic in the electronic form
21 from the lawyers?

22 MR. LOPEZ: Or are they both?

23 MS. WILSON: Both.

24 MR. VOGEL: Both. They're both. Because,
25 see, I could sign it --

1 MR. LAMONT JEFFERSON: I understand what the
2 options are. I'm just wondering in practice how it's
3 happening. I mean, it's easy to see -- you know, I can
4 recognize my signature. Most folks can recognize their
5 signature. If you're signing something electronically
6 then you have the ability through passwords and et cetera
7 to have somebody else submit your document for you, right?

8 MR. VOGEL: Right.

9 MR. LAMONT JEFFERSON: As long as it's
10 authorized, it's fine, but that's what I want to kind of
11 test and see in practice how that's working, and the only
12 way to know that is if -- I mean, if you're getting all of
13 your filings by PDF with a scanned signature on it then I
14 don't know what kind of problems might be created if
15 you're getting the bulk of your filings by an electronic
16 signature, something other than someone's handwritten
17 signature.

18 MR. VOGEL: Well, I will tell you what I
19 have heard and my experience in other Federal courts
20 because they just use the /S/ and not the signatures in
21 those courts, and I am unaware of any problems -- I mean,
22 the concern that I have and I know a lot of you might is
23 that somebody else would file something on my behalf and
24 it not be exactly in my client's best interest, and I am
25 unaware of anything like that happening. You-all may be.

1 MR. SANCHEZ: No.

2 MR. LAMONT JEFFERSON: But to know whether
3 it's even an issue you have to know how much stuff you're
4 getting that is not by someone's hand signature.

5 MR. SANCHEZ: Sir, I think what happens is
6 that when it's sent to the EFSP individually, you have to
7 set up an account giving your Bar number, giving your name
8 and everything else just to even send the document, so
9 that's how Texas Online knows who is sending the document.
10 We can track it back to that route. Computer -- I mean,
11 by looking at the EFSP, who sent the document, what the
12 Bar number is, and what the name is. How it comes to us,
13 we really don't know if it's coming in a PDF, TIF, or
14 whatever form.

15 MR. LAMONT JEFFERSON: Okay. Let me ask you
16 just one other question. When you get a filing of a
17 document --

18 MR. SANCHEZ: Yes, sir.

19 MR. LAMONT JEFFERSON: -- in whatever format
20 it is, it's got additional information on the file besides
21 the file itself, right, meta tags?

22 MR. SANCHEZ: Yes, sir.

23 MR. LAMONT JEFFERSON: Do you do anything --
24 is there anything done in the system -- are the meta tags
25 preserved? If I go online to Fort Bend County and I pull

1 up one of those documents and I look for the properties of
2 that document, can I tell when the document was created,
3 for instance, when it was edited.

4 MR. VOGEL: Not the original. Let me tell
5 you what happens. I've mentioned this before, so maybe I
6 will try to explain this so it will make more sense. When
7 you file, whatever the format happens to be, you send it
8 with an EFSP. It gets to -- it goes directly to our
9 filing manager, Texas Online. They put something around
10 it called XML. It's a standard data description that can
11 be read by any computer, and the information about that
12 filing is captured and is part of that electronic record,
13 and it's called an XML wrapper because it wraps around
14 that record, and that stays with it when it hits these
15 courts. So you wouldn't know who -- if you wanted to look
16 at the properties feature of that file, you could not find
17 out at that point.

18 MR. LAMONT JEFFERSON: Thank you. Okay.

19 CHAIRMAN BABCOCK: Hang on. Peter, can you
20 guys -- if we take our morning break can you guys stay?

21 MR. VOGEL: Sure.

22 CHAIRMAN BABCOCK: Okay. Because I know
23 there are five or six pending questions, and there may be
24 more. So let's take a 15-minute break. Be back at 11:15.
25 Thanks.

1 (Recess from 10:57 a.m. to 11:19 a.m.)

2 CHAIRMAN BABCOCK: I forget where we were.
3 I think it was Justice Bland was up with a question for
4 our group.

5 HONORABLE JANE BLAND: My question is have
6 you looked at the appellate courts, and where are you with
7 that in the appellate rules?

8 MR. VOGEL: We're looking at that. The
9 First, Fourteenth, and Third Courts have adopted rules
10 that permit a certain form of electronic filing.

11 HONORABLE JANE BLAND: The First has?

12 MR. VOGEL: Well, wait. It still requires
13 paper. That doesn't change, but we're in a process where
14 we're looking and working with district clerks that have
15 to handoff to the appellate courts. The district clerk
16 here and the Third Court are working on methodology so
17 that what we're hoping to do is to have -- we think that
18 the appellate rules will maybe be a little less
19 complicated in getting this done, but we are working on
20 that as well.

21 HONORABLE JANE BLAND: You've already
22 started drafting on the appellate rules?

23 MR. VOGEL: I didn't say we were drafting.
24 I said we're working on it.

25 HONORABLE JANE BLAND: Oh, okay. That's

1 what I was trying to figure out, what's our timing? Or
2 should we just wait until --

3 MR. VOGEL: I think we're interested in
4 getting the trial courts going first and not trying to
5 push the appellate courts, but what we're finding is the
6 appellate courts are very interested in moving this along,
7 and I'm not sure what the timing is, but we anticipate
8 that that's going to be -- I don't know. I think it's
9 going to be in the next couple of years.

10 HONORABLE JANE BLAND: Okay. And then I
11 understand the need for the communication between the
12 trial courts and the appellate courts to get what has been
13 filed in the trial court up to the appellate court, and
14 then there is also the issue of original filings like you
15 would have in the trial courts. The appellate lawyers
16 file briefs and motions and that kind of stuff that, you
17 know, we have similar type of arrangement, and I wondered
18 if the holdup is -- if we're going to wait for the trial
19 courts to be totally online and able to communicate and
20 send all of their stuff to the appellate courts before we
21 allow any kind of e-filing from the lawyers, that's going
22 to put us way down the road.

23 MR. VOGEL: Margaret, would you want to
24 address that? Margaret Bennett is the general counsel.

25 MS. BENNETT: Well, I was thinking Lisa

1 might want to answer the question.

2 MS. HOBBS: Well, we're facing different
3 problems in the appellate courts than we faced in the
4 trial courts where a small convenience fee on a lot of
5 filing can make it economically feasible to get e-filing
6 going on the trial court level, that the same economic
7 incentive at the CA is a little bit -- I'm feeling a lot
8 more -- I appreciate your enthusiasm, Judge Bland, but I'm
9 feeling a lot more resistance at the appellate court level
10 where then this document comes in electronically and you
11 get a one-time convenience fee that doesn't add up to a
12 lot of money, and then the clerk's office is going to have
13 to print, you know, three or four copies for your judges
14 because they're not ready to look at the screen or they
15 need to get into the record and look at it. We're just
16 facing a lot of different issues on the appellate side
17 than we were on the trial court side.

18 HONORABLE JANE BLAND: But what are we
19 doing? Or is there any effort underway to start --

20 MS. HOBBS: There is a separate committee
21 through JCIT, a subcommittee that is studying the
22 appellate rules and the appellate process.

23 HONORABLE JANE BLAND: Okay. And who is
24 doing that?

25 MR. VOGEL: And let me add in one other

1 issue that helps this as well. My committee with the
2 Office of Court Administration is responsible for all of
3 the case management systems for all 16 appellate courts,
4 so we are in a position where it will be a lot easier to
5 have the technology accepted electronically than the trial
6 courts, which we think we can do faster, because there is
7 no uniform case management system in the trial courts,
8 unfortunately, although we would like to get the
9 Governor's office to get on board with that. I don't
10 think they want to spend the money.

11 CHAIRMAN BABCOCK: Judge Lawrence had his
12 hand up, and then Richard Munzinger and then Buddy.

13 HONORABLE TOM LAWRENCE: If someone files an
14 e-filing petition, it comes into the clerk, the clerk
15 would have to make a copy of that to attach to the
16 citation; is that correct?

17 MS. WILSON: It depends on the county,
18 though, that it goes right into their imaging system.
19 They don't have to if the judge is willing to accept
20 looking at a screen. Otherwise, yes. But as I stated
21 earlier, it's a lot faster to print a paper copy from
22 electronic than it is to go pull a case file, make a copy,
23 stuff like that. It's a time-saver.

24 HONORABLE TOM LAWRENCE: Is there something
25 on the citation that tells the defendant that they can

1 file their answer electronically?

2 MR. ORSINGER: No.

3 MS. WILSON: No.

4 HONORABLE TOM LAWRENCE: Okay. Is there --
5 if someone wants to come in and access the case files,
6 they would come into my office now, and the clerk would
7 pull the file and let them look at it. What are the
8 mechanics for having someone inspect the file if it's
9 electronic?

10 MS. WILSON: From my county we have it out
11 on the internet if it's a public record. If it's a sealed
12 record, it's not there; and even if they came in they
13 wouldn't have the right to see it unless they get a
14 judge's order. For those counties that do not have web
15 access, they would still have to go into the clerk's
16 office and either go to a computer and look at it or go to
17 the counter and ask to see it, and the clerk would have to
18 either produce the paper or have a screen for them to look
19 at it.

20 HONORABLE TOM LAWRENCE: So if a litigant on
21 the case wanted to come in and inspect the file, how would
22 they do that exactly?

23 MS. WILSON: I'm sorry. I didn't hear that.

24 HONORABLE TOM LAWRENCE: If one of the
25 parties on the case wanted to come in and inspect the

1 file, how would they do that if it were an electronic
2 document?

3 MS. WILSON: It depends on the county. In
4 some counties we still have the paper because the judges
5 want to see the paper. I only have one judge that's
6 willing to look at the case on the computer, so we still
7 produce a paper copy. For those counties that do not,
8 they would -- the litigant would have to go to a computer
9 and access it in the courthouse, in the clerk's office.

10 HONORABLE TOM LAWRENCE: So they would have
11 to look at the computer. Then they would come back and
12 tell the clerk that they want a copy of this document or
13 that document and you would have to print it out?

14 MS. WILSON: Correct.

15 HONORABLE TOM LAWRENCE: Do you contemplate
16 that this system is going to apply to the justice courts
17 in Texas?

18 MS. WILSON: I think eventually it will.
19 They have a technology fee. Many of them right now were
20 so far behind technologywise that they are just now
21 getting up to speed, and I think once that happens more
22 and more of the justice courts will adopt imaging and
23 probably start allowing electronic filing. We didn't
24 even -- our electronic filing committee and JCIT at the
25 time only looked at the county and district clerk and not

1 the JP court because we have a JP on our committee, and he
2 just felt that based on discussions that they weren't
3 quite ready yet.

4 MR. VOGEL: And I might add that JCIT does
5 have a separate subcommittee dealing with municipal and
6 justice courts, and this is on their to do list. I think
7 our concern is that approximately 86 percent of all the
8 filings in the state are at the JP and municipal level,
9 and so the volume there is so disproportionate, dealing
10 with that is very different.

11 One way that we're dealing with it is that,
12 for instance, Houston, the city of Houston, has a fine
13 payment for tickets on the internet. Texas Online has
14 that available in some other cities, so it may be because
15 of the nature of the type of transactions that occur in
16 municipal and justice courts that we may have sort of a
17 different model to deal with those kinds of filings as
18 well.

19 HONORABLE TOM LAWRENCE: Last question, is
20 there -- what type of a volume of filing have you had at
21 this point? How many documents?

22 MR. VOGEL: Mike Griffith.

23 MR. GRIFFITH: We've had about a little over
24 2,000. It's not significant, but it's going to be after
25 its around for a little while.

1 HONORABLE TOM LAWRENCE: And if a pro se
2 wants to file something, how would they do that?

3 MR. GRIFFITH: A normal pro se -- I'm sorry.
4 Do you want me to --

5 MR. VOGEL: Go ahead. Sure.

6 MR. GRIFFITH: A normal pro se would have
7 to --

8 THE REPORTER: I can't quite hear you. I
9 can't hear you. I'm sorry.

10 MR. GRIFFITH: Okay. A pro se filer could
11 register with Texas Online, select a service provider, and
12 file in any participating court. If they are indigent
13 then we have procedures that we have defined, we have not
14 put in place yet, for an indigent filer to file an
15 affidavit of indigency with the clerk, get that approved,
16 and they could file at no fee or they could go through
17 Legal Aid and file for no fee.

18 MR. VOGEL: Or they can file in paper at the
19 courthouse. They are not precluded from doing that as
20 well.

21 CHAIRMAN BABCOCK: Richard Munzinger, then
22 Buddy.

23 MR. MUNZINGER: My question was addressed.
24 Thank you.

25 CHAIRMAN BABCOCK: All right. He passes.

1 Buddy.

2 MR. LOW: The only provision I see about
3 fees for filings in the Government Code -- I don't see
4 anything in the rules, and Government Code 51.317(b)
5 provides for that. Have you-all gone -- has anybody gone
6 to the Legislature, and has that been amended or taken
7 care of so that the filing fee is in that part of the
8 Government Code, or where is it?

9 MS. WILSON: The county clerk's -- the
10 county court fees are in local Government Code 118.

11 MR. VOGEL: That's one issue, but in terms
12 of what's happening here, though, the authority was given
13 to the Texas Online Authority from the Legislature to set
14 fees for our e-government structure, and in that they have
15 authorized the counties to have a recoupment fee of \$2 per
16 filing. So theoretically if Fort Bend County recoups
17 whatever hardware or software they invest, they are not
18 entitled to that fee anymore, and in El Paso's decision
19 they decided they didn't want to charge that fee, but they
20 have the authority through the Texas Online to do that.
21 So it's not through the other process.

22 MR. LOW: That's in the Government Code?

23 MR. SANCHEZ: Local Government Code, sir.

24 MR. LOW: Yeah.

25 MR. GRIFFITH: It's Government Code

1 2054.111(e).

2 MR. LOW: Okay. I'll remember that.

3 CHAIRMAN BABCOCK: Any more questions? No
4 more questions? Okay. Well, what we're going to do now
5 is go through the proposed rule; and Peter and Dianne and
6 Gilbert, thank you so much for coming; and your work on
7 this has been really terrific.

8 MR. SANCHEZ: Thank you all.

9 MR. VOGEL: Do you need us to stay?

10 CHAIRMAN BABCOCK: You're welcome to stay if
11 you want, but you can see the sausage while it's being
12 made or after it's been made. Whatever your pleasure is.

13 So, Richard, is it you or Lamont who is
14 going to take us through this?

15 MR. ORSINGER: I will be happy to. Rule No.
16 4 -- you'll find that these proposed changes in many
17 instances just extend the current treatment of fax service
18 and filing to electronic filing, and other times it's a
19 completely unique concept that's relevant to electronic
20 filing.

21 The change to Rule 4 is that the additional
22 three days that you get if you mail or fax a document to
23 your opposing lawyer, the extra three days are required if
24 you use electronic transmission to serve on the other
25 lawyer.

1 CHAIRMAN BABCOCK: Any discussion about the
2 proposed change to Rule 4? I would think that -- hang on,
3 I'm sorry. Judge Christopher.

4 HONORABLE TRACY CHRISTOPHER: Why are we
5 doing that? Why are we adding three days?

6 MR. LAMONT JEFFERSON: I agree.

7 MR. BOYD: I agree.

8 MR. ORSINGER: I mean, we really don't need
9 three days even for fax. It's just a tradition.

10 HONORABLE TRACY CHRISTOPHER: Well, I think
11 we ought to change it.

12 MR. LAMONT JEFFERSON: Well, we're not
13 changing it. We're --

14 MR. ORSINGER: No, she wants to eliminate
15 the three days for fax and electronic filing.

16 MR. LAMONT JEFFERSON: But if we're going to
17 create a rule for electronic filing, I agree that it's at
18 least the equivalent of hand delivery. It's even better
19 than hand delivery or faster. I mean, I don't understand
20 why you would have an additional three days when you have
21 something instantly on your desktop.

22 CHAIRMAN BABCOCK: Justice Duncan.

23 HONORABLE SARAH DUNCAN: If my memory serves
24 me, and it frequently doesn't now, but if memory serves,
25 the reason the three days was added when fax service was

1 put into the rules was so that the rules didn't
2 discriminate amongst the types of service that were
3 possible. I thought that was persuasive at the time, that
4 the rules shouldn't encourage or discourage a particular
5 type of filing or penalize someone who doesn't get to
6 choose the type of service that they're going to get,
7 penalize them because of the type of service that the
8 filing party adopts; and if that's true for fax, it's
9 certainly true for e-filing.

10 CHAIRMAN BABCOCK: Yeah, Richard.

11 MR. MUNZINGER: I agree with that. There is
12 no reason really to have the three days, but if you're
13 going to have three days for fax, why would we have all
14 these rules that a person has to parse out in their mind?
15 There's a lot to be said for uniformity, and if you're
16 going to have three days for fax, you ought to have three
17 days for electronic service so that dumb people like me
18 don't have to think of all these different rules.

19 CHAIRMAN BABCOCK: Ralph.

20 MR. DUGGINS: Well, there's another problem,
21 too, that if you're the sole -- if your computer is the
22 sole recipient of the e-mail and you're out, your
23 secretary might not see it unless you allow her access to
24 your computer, and I think that could be a real problem,
25 because otherwise it's coming to an office and there's

1 someone to receive it.

2 HONORABLE BOB PEMBERTON: Uh-huh. Then
3 you're discriminating against people who don't have
4 BlackBerries.

5 CHAIRMAN BABCOCK: A protected class, I
6 think. Harvey.

7 HONORABLE HARVEY BROWN: Well, I was going
8 to point out the BlackBerry issue, too, but in addition to
9 that, if your computer crashes, I mean, I just had three
10 days where I did not have access to any e-mail and it
11 about drove me crazy. So I could see that -- particularly
12 in a small firm that that might be more of an issue.

13 CHAIRMAN BABCOCK: Okay. Any other
14 comments?

15 MR. LAMONT JEFFERSON: Well, I think you can
16 always -- I mean, even in the hand delivery situation
17 there are scenarios where something hits the door and no
18 one is there to sign for it, but it's still there. I
19 mean, you still argue about when you got it. The fact
20 that you have issues with reception I think doesn't
21 justify the change when you're getting something right
22 now. It just defies logic that you ought to have another
23 three days when it is instant; and you can always say, "I
24 didn't get it for whatever reason"; and you can prove that
25 you didn't get it for whatever reason; but in the normal

1 course of events you're going to have it right now.

2 CHAIRMAN BABCOCK: Any other -- yeah, Bill.

3 PROFESSOR DORSANEO: Well, 4 is talking
4 about "Saturday, Sunday, and legal holiday shall be
5 counted for the purpose of three-day privileges" when
6 you're really talking about 21. I mean, this is a more
7 complicated and probably too complicated part of our rule
8 book, "Saturdays, Sundays, and legal holidays shall be
9 counted for purpose of the three-day period in Rules 21
10 and 21a, extending other periods by three days when
11 service is made by mail, fax, or electronic transmission."

12 Now, I think it makes sense to add "by
13 electronic transmission there," but it's pretty
14 complicated to try to figure out what in the world this is
15 really talking about. It's talking about Saturdays,
16 Sundays, and legal holidays counting for the three-day
17 period when service is by registered or certified mail,
18 telephone document, or electronic transmission; and I
19 think that all makes sense; but it's still more
20 complicated than what appears to be the nature of the
21 discussion.

22 CHAIRMAN BABCOCK: Yep. Alex and then Judge
23 Christopher.

24 PROFESSOR ALBRIGHT: If we wanted to get
25 into those three-day periods and stuff, I believe we

1 passed a rule about 10 years ago where we changed -- we
2 considered all those complications and changed it, but
3 that was -- remember Alex Acosta was head of that
4 committee. I was on the committee, and I remember we
5 brought it up. So that rule has been rewritten at some
6 point or another.

7 MR. ORSINGER: Well, it's in the recodified
8 draft, which is collecting dust somewhere.

9 CHAIRMAN BABCOCK: Which is in the ether.
10 Judge Christopher.

11 HONORABLE TRACY CHRISTOPHER: Well, I mean,
12 21a says if you deliver it in person it's delivered that
13 day, and it seems to me that if you fax it that day or you
14 e-mail it that day, it's that day. I mean, certified mail
15 there's a reason why we give three days because sometimes
16 certified mail takes a couple of days.

17 CHAIRMAN BABCOCK: Right.

18 HONORABLE TRACY CHRISTOPHER: But fax and
19 e-mails don't. I mean, you know, I wasn't here when you
20 put faxes for three days, and I think it's a mistake. I
21 think fax and e-mail ought to be the day of.

22 MR. GILSTRAP: Does that mean by midnight?

23 HONORABLE TRACY CHRISTOPHER: Do it by 5:00
24 p.m.

25 MR. ORSINGER: For service the next day it's

1 after 5:00 p.m.

2 HONORABLE TRACY CHRISTOPHER: Right. Right.

3 CHAIRMAN BABCOCK: Okay. Any other comments
4 about this?

5 MR. BOYD: Well --

6 CHAIRMAN BABCOCK: Yeah, Jeff.

7 MR. BOYD: If we were starting from scratch,
8 I agree. I wasn't here when the decision was made to add
9 fax to the three-day period, but if we were starting
10 from -- because we're already discriminating against types
11 of service. We don't give three days if you hire a runner
12 to go take it there personally, but we do give three days
13 if you drop it in the mail, but there's a good reason for
14 doing that. That reason doesn't seem to apply to e-mail
15 but nor does it seem to apply to fax.

16 If we were starting from scratch I wouldn't
17 do it that way, but are we prepared to all of the sudden
18 stop allowing the three-day period to apply to a fax, and
19 are practitioners ready to change that practice, and if
20 not, it makes sense to just keep it the way it is and add
21 e-mail just as if it were a fax.

22 CHAIRMAN BABCOCK: Are we aware of any evils
23 that the three-day rule for faxes has led to or caused?

24 MR. ORSINGER: It requires a lot of hand
25 delivery when you're tight on time, which is, of course,

1 an enormous waste of money and resources.

2 MR. LAMONT JEFFERSON: That's right. That's
3 the evil.

4 CHAIRMAN BABCOCK: Justice Bland.

5 HONORABLE JANE BLAND: I think the three-day
6 grace period cures a lot of glitches that lawyers would
7 fight about if they didn't have a three-day grace period.
8 By that I mean with fax and with e-mail your proof of
9 service is your confirmation, and that is generated
10 whether a person signs for it or not. With certified mail
11 and hand delivery, there is a signature that somebody
12 signed for it, a human being took it. Now, if they drop
13 it at the door, yes, that could be something they fight
14 about, but most often if you're going to prove service you
15 prove it by saying so-and-so signed for it at such and
16 such time. Same thing with certified mail.

17 With fax your proof doesn't necessarily
18 correspond to a live person looking at or receiving the
19 document. And while there is really no difference between
20 that and dropping it at somebody's door, the truth is that
21 if, you know, I didn't look at it and I wanted to fight
22 about it because I hadn't really received it because of
23 fax transmission problems or e-mail transmission problems,
24 you know, I might not be inclined to because I got this
25 extra three days, so it didn't really matter to me; but if

1 it cut into my response time significantly it would be
2 enough for me to like, you know, go fight about it or have
3 to arrange extensions and all; and this avoids having to
4 arrange extensions and go have issues about when I
5 actually received it.

6 MR. LAMONT JEFFERSON: We're talking about
7 two different issues, though. One is, I mean, if you get
8 it, there's no problem; and then the second issue is how
9 do you prove you got it, which right now the rules don't
10 really address except for in the certified mail situation.
11 Or how do you prove that it was actually transmitted in
12 the manner that you declared that it was.

13 HONORABLE JANE BLAND: But it's usually
14 going to be how do I prove that my response was timely,
15 not, you know, whether I got it or not. It's when I got
16 it, and why have to generate a whole bunch of fights about
17 it when the three-day rule seems to work fine and cures a
18 lot of these when-I-got-it type of disputes.

19 MR. LAMONT JEFFERSON: I'm not sure that it
20 does because if-- I mean, a lawyer is going to say, "I
21 never got it," whatever it is. It's not going to be "I
22 didn't get it on a particular day."

23 HONORABLE JANE BLAND: Oh, no. It's going
24 to be "I didn't get it -- my fax machine was turned off.
25 It didn't actually go through until midnight" and then,

1 you know, "No, I sent it to you. I have a confirmation
2 that says you got it at 4:00." And, you know, "Well, I
3 got it, but I was missing page 17 and you had to fax me
4 that the next day." I can go through the whole litany of
5 things that happen, you know, but there is just a lot of
6 them, and I don't think we see them if we leave the grace
7 period; and besides which, if we're going to have the
8 grace period then --

9 MR. LAMONT JEFFERSON: It's just kind of a
10 backdoor way of handling that issue. It seems to me if
11 it's an instantaneous delivery, to say we're going to cure
12 the problem of someone complaining about they didn't get
13 it by adding three days to the -- assuming three days to
14 get it.

15 CHAIRMAN BABCOCK: Judge Sullivan.

16 HONORABLE KENT SULLIVAN: At the risk of
17 running down a rabbit trail, I want to raise one related
18 issue that I think is directly on point in terms of why
19 does this really matter other than sort of an abstract
20 discussion of when you got it and the like. In other
21 words, why does it really count, so to speak; and I think
22 the reason is that under Rule 21 you can have a motion
23 heard, you can have a hearing on a nonemergency matter on
24 three days notice under the state rules, which I think is
25 an extraordinarily short time frame for a nonemergency

1 substantive matter to be taken up, because that's when
2 this really becomes a problem, is when you have that sort
3 of turnaround.

4 I mean, we wouldn't be having this
5 discussion with a real fear of repercussion, I think, if
6 you had some dramatically longer time period, not that I'm
7 advocating that, but I'm saying it's the time period for
8 actually having the hearing and facing the possibility of
9 judicial decision that drives this in terms of the real
10 impact of it, and I wonder if that isn't something that
11 might be appropriate for consideration at some point.

12 CHAIRMAN BABCOCK: Okay. Judge Christopher.

13 Or Nina. I'm sorry.

14 HONORABLE TRACY CHRISTOPHER: No, go ahead.

15 MS. CORTELL: Approaching a little different
16 way, when in doubt I would err on the side of quality of
17 life for lawyers; and if we're going to have to be tied
18 forever to the BlackBerry, which I do have here, or our
19 computer, I mean, that's what we'll be doing because
20 you'll have to be monitoring it all weekend.

21 And I was telling Peter Vogel, I had a case
22 where the judge -- we were held accountable to be online
23 basically 6:00 a.m. to midnight seven days a week; and
24 when the other side filed something on Saturday, I was
25 expected to have a reply there on Sunday; and it was just

1 a very grueling, difficult sacrifice. I know we all work
2 hard, but it just took it to a new level. So I would vote
3 for quality of life and when in doubt give lawyers a
4 little extra time.

5 HONORABLE TRACY CHRISTOPHER: But we have
6 that provision under the rules now. If it's after 5:00
7 p.m. or Saturday or Sunday it doesn't count until the
8 following Monday.

9 MS. CORTELL: I just had an adverse case
10 then.

11 HONORABLE TRACY CHRISTOPHER: You did. I
12 mean, it shouldn't be that way for you.

13 CHAIRMAN BABCOCK: Buddy.

14 MR. LOW: The rule says that if it's
15 electronically filed after 5:00 p.m. then it would be
16 received the next day, the next day, so if you don't have
17 some extension, what are you going to do in a situation
18 where you filed after 5:00? It specifically says that.
19 It shall be deemed filed the next day. That's a day late
20 if you filed after 5:00. So if you don't have some
21 extension, what do you do?

22 MR. LAMONT JEFFERSON: File it by mail.

23 MR. LOW: Well, no. So you've got to have
24 at least a day's extension; and I'm like Richard, why not
25 just leave it three because it's easy to give somebody

1 more than they need; but it's harder to give them less
2 than they need.

3 HONORABLE TRACY CHRISTOPHER: The three-day
4 extension is for receipt. It's not for filing. Is it?

5 MR. LOW: Well, the way I read here, the way
6 it's redrafted, that electronic service shall be
7 considered as -- after 5:00 p.m. shall be deemed to be
8 served on the following day, not that day, on the
9 following day.

10 PROFESSOR DORSANEO: That's not filing.
11 It's service on the other person.

12 MR. LOW: Service, okay.

13 HONORABLE TRACY CHRISTOPHER: So that's
14 receipt.

15 PROFESSOR DORSANEO: But it could be
16 Saturday.

17 MR. LOW: Okay.

18 CHAIRMAN BABCOCK: Okay. Any other
19 questions? Comments? Well, let's vote on whether we
20 should adopt the recommendation of the subcommittee on
21 this. So everybody in favor of --

22 PROFESSOR DORSANEO: On which one? On 4 and
23 21 together? Because you're really talking about 21.

24 MR. BOYD: Well, that portion of 21.

25 CHAIRMAN BABCOCK: Right now we're just

1 talking about Rule 4, but I agree that if we vote this up
2 then Rule 21 is going to follow.

3 PROFESSOR DORSANEO: Let me make my point
4 clear again. All 4 does is say that you count Saturdays
5 and Sundays for the 21-day -- for the Rule 21a three-day
6 period.

7 CHAIRMAN BABCOCK: Right. This is
8 foreshadowing the vote on 21, 21a, but if the vote comes
9 out differently on 21a then we're going to have to take
10 back the 4 to fix it. So everybody in favor of the
11 subcommittee's proposal --

12 MR. BOYD: I'm sorry. Can I make one more
13 comment?

14 CHAIRMAN BABCOCK: Okay.

15 MR. BOYD: Bill's comment made me realize
16 21a, the proposal from the subcommittee says that service
17 by e-mail -- service can be made by e-mail only if the
18 parties have agreed to that or the Court has said so. Do
19 I read that right, subcommittee

20 MR. ORSINGER: Yes.

21 MR. BOYD: And if that's the case then
22 anybody who is worried about they don't ever access their
23 e-mail or rarely use their e-mail isn't going to agree to
24 it; and those of us who use e-mail a lot and, in fact,
25 would rather get served by e-mail than any other way are

1 going to agree to it and are going to have less need for
2 three-day extensions because we do carry BlackBerries or
3 have access.

4 CHAIRMAN BABCOCK: Okay.

5 MR. BOYD: I've changed my mind.

6 CHAIRMAN BABCOCK: Never too late. All
7 right.

8 MR. BOYD: Well, it was almost too late.

9 CHAIRMAN BABCOCK: Everybody who is favor of
10 the subcommittee's proposed language on Rule 4, raise your
11 hand.

12 All those opposed? Passes by a vote of 23
13 to 3, the Chair not voting. Let's go to the next thing.

14 MR. ORSINGER: The next one provides that
15 agreements between counsel under Rule 11 touching on
16 matters of litigation, if they are going to be
17 electronically filed it has to be by scanned image. Now,
18 we know that all of the images going from the electronic
19 service -- the EFSP, electronic filing service provider,
20 are coming in as scanned images. So this would affect
21 what you send to the EFSP, and if it's a Rule 11
22 agreement, it's going to have to be a scanned image, and I
23 presume that that means that's going to reflect the
24 signatures in ink of the lawyers.

25 CHAIRMAN BABCOCK: Lamont.

1 MR. LAMONT JEFFERSON: And I just didn't
2 understand what this meant. I don't understand what it
3 means that it has to be electronically filed as a scanned
4 image.

5 CHAIRMAN BABCOCK: Well, here is the
6 problem, and I think that this is -- we're going to have a
7 discussion about this when we get to Rule 57, but as I
8 understand it, the proposal is that you can file things
9 without actually signing it as long as it has this magic
10 identifying characteristic, which Richard will explain to
11 me when we get to Rule 57.

12 But Angie and I are working on a case in
13 Rhode Island where everything is being done by electronic
14 filing, and there have been problems with things being
15 filed that are not signed, and there's some people have
16 said, "Well, you know, the recipients are changing the
17 documents so that, you know, what's filed isn't what is
18 received," and the judge has now entered an order saying
19 only scanned, signed pleadings can be filed
20 electronically. They have to be. Right, Angie?

21 MS. SENNEFF: Everything has to be served
22 electronically. It doesn't have to be filed
23 electronically.

24 CHAIRMAN BABCOCK: Okay. But whether they
25 serve it or file it, it has got to be with the original

1 signature on it, right?

2 MS. SENNEFF: Right.

3 MR. LAMONT JEFFERSON: That's different. I
4 mean, an original signature is -- so you're saying that
5 there has got to be an original signature on the document
6 as opposed to being a scanned image.

7 CHAIRMAN BABCOCK: Yeah. I think the point
8 of this language is that the signatures would be on the --

9 PROFESSOR DORSANEO: Well, it needs to say
10 that.

11 MR. ORSINGER: Well, no, the first sentence
12 in 11 does say that. The first sentence in 11 says you
13 can't enforce an agreement between the lawyers on a
14 pending case unless it's in writing, signed, and filed.
15 Now, what they're saying is if you have to file the
16 scanned image electronically, you're filing a scanned
17 image of something that's in writing and signed, so the
18 first sentence continues the signing requirement we're
19 familiar with. The second sentence just clarifies --

20 MR. LAMONT JEFFERSON: What a signature is.

21 MR. ORSINGER: -- you can't substitute it
22 with an electronically signed agreement. You have to have
23 a real piece of paper signed by real people with real pens
24 and then scan it and then file it.

25 CHAIRMAN BABCOCK: Right. Bill.

1 PROFESSOR DORSANEO: Assuming that's a good
2 idea, I would say "a signed agreement" rather than "a
3 written agreement."

4 MR. LAMONT JEFFERSON: Well, isn't the point
5 here is that we're not going to -- if we're trying to say
6 we're not going to accept an electronically imprinted, you
7 know, coded authorized signature, it's got to be someone's
8 handwritten --

9 CHAIRMAN BABCOCK: Right.

10 MR. LAMONT JEFFERSON: -- signature, it
11 should say that. I mean, I don't think saying that it's a
12 scanned image necessarily says that.

13 CHAIRMAN BABCOCK: Yeah.

14 MR. ORSINGER: Yeah.

15 MR. LAMONT JEFFERSON: And a scanned -- I
16 mean, there are a lot of different ways to do scanning.
17 You know, is this saying it's got to be a PDF formatted
18 scanned image or it's got to be put on a scanner or --

19 MR. ORSINGER: That's between you and your
20 EFSP. All this requires is that it be filed as a scanned
21 image, and we know technically that means that the clerk
22 is going to get a PDF file.

23 MR. LAMONT JEFFERSON: Not necessarily. It
24 could be, you know, a TIF or whatever.

25 MR. ORSINGER: No. No, that isn't right.

1 You have to understand that you don't file directly with
2 the clerk. You file with the electronic filing service
3 provider. They convert it to a standard format and then
4 it's universally filed with the clerk.

5 CHAIRMAN BABCOCK: But there's potential
6 confusion and ambiguity if you are making -- if we're
7 going to make a distinction between Rule 11 agreements,
8 which must be signed, and apparently according -- I mean,
9 the intent of this language is that they have to be signed
10 when they're sent to the service provider, and Rule 57
11 which suggests that pleadings can be sent when they're not
12 signed in the sense of "Here's my signature."

13 MR. ORSINGER: Okay, but there's a real
14 policy difference. First of all, we don't want to require
15 all electronic filing to have to be scanned; and so if you
16 have some way of the lawyer having a unique identifier for
17 their signature, that's really not a problem because
18 you're not holding someone else to a document that they
19 didn't sign.

20 CHAIRMAN BABCOCK: I'm just arguing -- I'm
21 agreeing with whoever said we need to clarify this.

22 MR. ORSINGER: Lisa said why don't you just
23 say, "The agreement may be electronically filed."

24 MS. HOBBS: That would encompass more of the
25 first sentence.

1 MR. LAMONT JEFFERSON: But then the question
2 is still what is a signature?

3 MR. ORSINGER: You have the same problem of
4 what is a signature if you don't add this sentence.

5 MR. LAMONT JEFFERSON: Well, that's right.

6 MR. ORSINGER: Then it's not a problem,
7 because we have been doing this for -- ever since 1940.

8 MR. LAMONT JEFFERSON: Well, okay. But I
9 think the idea -- the intent behind this sentence to me,
10 it seemed like what they were trying to do is say you have
11 got to have a manual signature on the document. I thought
12 that that was the intent behind this proposal.

13 CHAIRMAN BABCOCK: Yeah. The ambiguity is
14 created, Richard, by the proposed rule change to Rule 57
15 which suggests that a signature can be other than a
16 written signature. It can be an electronic identifier.
17 So all I'm saying is we ought to make clear if that's what
18 we want that Rule 11 is going to be treated differently.
19 Rule 11 is going to be treated like "We don't want the
20 identifier that you see in 57. We want the actual
21 signature."

22 MR. LAMONT JEFFERSON: And if that's the
23 case then I would be opposed to that change. I mean, a
24 signature is a signature. If we're going to say it's
25 authorized on a pleading, it's authorized on a Rule 11

1 agreement.

2 CHAIRMAN BABCOCK: That's another issue that
3 we're going to get to. Justice Gray.

4 HONORABLE TOM GRAY: If I understand the
5 impact of the rule, currently if you send an e-mail to
6 opposing counsel that says, "I agree to a 15-day extension
7 on responses to discovery" and you put your initials or
8 sign off on the e-mail, whatever the traditional form,
9 then there becomes a dispute over it. They would have to
10 print out that e-mail, and I get those at our court all
11 the time regarding extensions of different things,
12 particularly mandamus, and they are electronic
13 communications, no physical signature on anything.

14 Clearly the parties intended it as a
15 signature at the time they signed it, but if I understand
16 where this is going, someone would -- that would be
17 unenforceable, or the alternative would be they would
18 print out the e-mail and then physically scan that and
19 make that -- file it, and that doesn't seem to be -- I
20 don't see the need to add the sentence at all myself. I
21 mean --

22 CHAIRMAN BABCOCK: You don't need to add it
23 unless you're trying to treat Rule 11 agreements
24 differently than you are other things. Justice Duncan.

25 HONORABLE SARAH DUNCAN: That was going to

1 be my suggestion, that we first decide whether we want to
2 treat Rule 11 agreements differently; and if we do,
3 rewrite this to say something like "An electronically
4 filed agreement must contain a handwritten or manual
5 signature," if that's the point of the sentence.

6 CHAIRMAN BABCOCK: Bill.

7 PROFESSOR DORSANEO: Could you or Richard
8 explain what is meant in 57 and a lot of other places by
9 "confidential and unique identifier," when electronically
10 filing?

11 CHAIRMAN BABCOCK: I certainly can't. I
12 hope Richard can.

13 MR. ORSINGER: We would need help from the
14 people sitting over there.

15 PROFESSOR DORSANEO: That would help me to
16 understand whether this is good enough in this context or
17 not.

18 MR. ORSINGER: Why don't we invite someone
19 -- I guess whoever is technologically aware -- to explain
20 that to us? Mike Griffith.

21 MR. GRIFFITH: That's intended to -- when
22 you register you're assigned a PIN and password for
23 authentication. That's what that is intended to be. If
24 you log on the system and authenticate, we know
25 electronically, digitally who you are.

1 MR. LAMONT JEFFERSON: But -- okay, but
2 you're not doing something extra when you send a
3 communication to attach a signature? I mean, you're
4 assuming that because you have the authorization and it's
5 coming from your computer that it's signed?

6 MR. GRIFFITH: Exactly.

7 PROFESSOR DORSANEO: That didn't help me
8 very much.

9 CHAIRMAN BABCOCK: It's a thing. It's some
10 thing that you get.

11 MR. GILSTRAP: It's a PIN and password. I
12 mean, that's what I'm hearing. It's just a PIN and
13 password.

14 MR. ORSINGER: That's between the lawyer and
15 the EFSP, right?

16 MR. GRIFFITH: That's right. Well, and
17 Texas Online.

18 MR. ORSINGER: How does Texas Online become
19 aware of the password?

20 MR. GRIFFITH: We maintain the same PIN and
21 password as -- when you register we add that, so when you
22 log on you're not only logging into your service provider,
23 but you're logging into Texas Online as well.

24 CHAIRMAN BABCOCK: So if I understand it,
25 you could have a pleading -- let's say my password is Show

1 Dog, and I'm going to file my original petition, and I'm
2 going to sign it "Show Dog."

3 MS. SWEENEY: What is it?

4 MR. ORSINGER: Show Dog.

5 MR. TIPPS: That's now on the public record.

6 CHAIRMAN BABCOCK: Well, and the danger
7 there, of course, is that if I sign it, you know, and
8 somebody -- and I later say, "Wait a minute, that's not my
9 signature," that's verifiable. It either is or it isn't;
10 but if you just put in "Show Dog," I mean, somebody could
11 have, you know, gotten my password somehow and done it;
12 and so people are challenging -- you know, if I say, "I
13 didn't file that thing. You know, don't have sanctions
14 against me. I didn't do that," there's no way of really
15 knowing really.

16 HONORABLE BOB PEMBERTON: So is the
17 electronic identifier something that the user adds to the
18 document?

19 PROFESSOR DORSANEO: No.

20 HONORABLE BOB PEMBERTON: Or is it something
21 that the document is just sort of tattooed with because
22 you're logged on and you're there?

23 MR. GRIFFITH: You're authenticated when you
24 log on.

25 HONORABLE BOB PEMBERTON: Okay. Everything

1 that comes out of me is going to be with that brand on
2 there.

3 MR. GILSTRAP: Whether it's a pleading or
4 anything else.

5 MR. MUNZINGER: But it doesn't appear on the
6 document itself. It appears on the accompanying
7 electronic identifying information.

8 CHAIRMAN BABCOCK: Right. Judge
9 Christopher. I'm sorry.

10 HONORABLE TRACY CHRISTOPHER: No, I'm still
11 a little confused, too, about the electronic identifier.
12 So would it even be possible for a lawyer to put their own
13 electronic identifier and somebody else's electronic
14 identifier onto a Rule 11 agreement?

15 MR. ORSINGER: No.

16 HONORABLE TRACY CHRISTOPHER: And if not,
17 what are we worried about?

18 HONORABLE BOB PEMBERTON: Well, only if, as
19 I understand this, someone logs into your computer and
20 uses your PIN, like stealing from your ATM. Then they
21 might be doing it; is that correct? Is that how it works?

22 MR. GRIFFITH: Yeah.

23 CHAIRMAN BABCOCK: Yeah, Richard.

24 MR. MUNZINGER: But I could use Lamont's
25 laptop right now to enter into a Rule -- I have got a

1 lawsuit right now litigating a Rule 11 agreement for four
2 and a half million dollars. It was a settlement of a
3 pending lawsuit. I could use his computer right now to
4 log a Rule 11 agreement and settle a 50 billion-dollar
5 lawsuit. It doesn't have to be my computer in my office.

6 CHAIRMAN BABCOCK: All you got to do is say
7 "Show Dog."

8 MR. MUNZINGER: All I got to do is say "Show
9 Dog."

10 HONORABLE SARAH DUNCAN: One signature won't
11 do it. An agreement necessarily contemplates more than
12 one signature. Just the fact that you've got Lamont's
13 signature doesn't get you anywhere.

14 HONORABLE JANE BLAND: Well, it would be one
15 electronic and one signed, because the filer would have
16 their electronic signature, and presumably they sent the
17 Rule 11, but they would have to get the real signature of
18 the other party.

19 HONORABLE TRACY CHRISTOPHER: And wouldn't
20 that be all right, if I got the signed settlement letter
21 from somebody via e-mail somehow and then I send it off
22 with my electronic signature on it? Wouldn't that be
23 okay? I mean, I'm just asking. I don't know.

24 CHAIRMAN BABCOCK: Justice Gray.

25 HONORABLE TOM GRAY: But if you're trying to

1 enforce it against the person that sent it to you, it was
2 my understanding it did not have to be signed by the
3 person who was trying to enforce it. It had to be signed
4 against the person it was being enforced against. Only
5 one signature required.

6 PROFESSOR DORSANEO: Right.

7 HONORABLE TRACY CHRISTOPHER: I didn't know
8 that.

9 HONORABLE SARAH DUNCAN: You still have to
10 prove an agreement.

11 MR. BOYD: But when you file it, depending
12 on how --

13 PROFESSOR ALBRIGHT: The committee that's
14 thought about this for a long, long time has decided that
15 electronic signatures were not sufficient for Rule 11
16 agreements. So the issue is really what this added
17 sentence on Rule 11 means; and I think the issue is what
18 is a signature after we amend Rule 57; and I think what
19 they intend is that a electronic signature under Rule 57,
20 which is the confidential and unique identifier, is not a
21 sufficient signature for Rule 11. So it seems like Rule
22 11 just needs to be thoughtfully rewritten with those
23 ideas, and I'm not sure that this place right here is
24 where to thoughtfully rewrite that.

25 CHAIRMAN BABCOCK: Well, if we buy into

1 distinction --

2 PROFESSOR ALBRIGHT: Right.

3 CHAIRMAN BABCOCK: -- between a Rule 11 and
4 pleadings, which is Rule 57, then I think it's a pretty
5 easy fix; but if we don't buy into that distinction then I
6 agree that's pretty hard. Richard.

7 MR. ORSINGER: Rule 11 as presently written
8 requires signatures. So joint e-mails don't make a Rule
9 11 agreement under the law right now.

10 MR. MUNZINGER: That's right.

11 MR. ORSINGER: And we don't change that by
12 adding this sentence. I think that this sentence doesn't
13 have anything to do with whether you really have a Rule 11
14 agreement or not. This sentence has to do with how do you
15 prove you have one if you do. If you do have one, that
16 means it's on paper, it's got -- you say one signature. I
17 thought two signatures. I don't know the answer to that
18 question, and then the question is, well, how do I get
19 that down to the courthouse so I can win a motion on it?

20 You can either walk it down there and file
21 it, mail it, fax it, or you can e-mail it; and if you're
22 going to e-mail it, this rule says just e-mail a copy of
23 it. E-mail a scanned copy of it.

24 Now, this doesn't say that you can or can't
25 reach a Rule 11 agreement through electronic signatures.

1 Rule 11 already says you can't. So really this is just a
2 question of how do we prove to the court that there is a
3 signed written agreement. We can either file it by hand,
4 we can fax it, we can mail it, or we can e-mail it. If we
5 e-mail it, we're going to have to e-mail the image. We
6 can't e-mail just some electronic document that doesn't
7 have any signatures on it; and to me this is like very
8 uncontroversial and doesn't require us to debate the
9 policy behind Rule 57 on pleadings, which has an entirely
10 different public policy, which is that if you're going to
11 have to scan everything anyway then why are we even
12 bothering.

13 CHAIRMAN BABCOCK: Justice Hecht had a
14 comment.

15 HONORABLE NATHAN HECHT: I was just
16 wondering, though, is there a way -- there would be a way
17 to have some manifestation from both parties on an e-mail.
18 If I send Tracy an e-mail and say, "I agree to do this, do
19 you" and she sends me an e-mail back and says "yes," I now
20 have a copy of something that has my proposal on it and
21 her response to it. It has the data that showed it came
22 from her e-mail, shows it came from my e-mail. Now, would
23 that be good enough for a rule -- then can I just send
24 that to the court?

25 MR. ORSINGER: It doesn't meet the current

1 requirements of Rule 11. One of two things is going to
2 have to happen if we want to permit that. We are either
3 going to have to eliminate the requirement of signing or
4 we're going to have to permit electronic signing in lieu
5 of what we traditionally think of as signing. We could
6 say that under Rule 11 signing means an exchange of
7 electronic e-mails that's somehow verified, but this
8 doesn't do that. All this says is whatever we're doing
9 under Rule 11 now, there's about four different ways to
10 get it to the courthouse, and if you're going to use
11 e-mail, we want you to send us a scanned image.

12 CHAIRMAN BABCOCK: Richard, what if we said
13 -- what if we said this: "A written agreement between
14 attorneys or parties may be electronically filed only as a
15 scanned image of the agreement," period.

16 PROFESSOR DORSANEO: Just say "the
17 agreement."

18 MR. LAMONT JEFFERSON: I mean, the question
19 is still what is a signature, and that's why we get to
20 Rule 57, which says you can have an electronic signature.

21 MR. ORSINGER: But Rule 57 only applies to
22 pleadings. It doesn't apply to Rule 11 agreements.

23 MR. LAMONT JEFFERSON: Okay. But if we're
24 going to allow -- if we're going to say that a signature
25 on a pleading, an electronic signature on a pleading is

1 good for all purposes then why wouldn't an electronic
2 signature on a Rule 11 agreement be good for all purposes?

3 MR. ORSINGER: Technologically there is no
4 such thing as an electronic signature on a Rule 11
5 agreement as we comprehend for Rule 57. Rule 57 is
6 nothing more than "I'm sending you a pleading using my
7 secret password."

8 Now, if two people have secret passwords,
9 they can't both be putting their secret password on the
10 same document because the document has to originate from
11 one computer. I mean, the other guy would have to give
12 you his secret password for you to put it in to make that
13 work.

14 MR. LAMONT JEFFERSON: Well, you're debating
15 the question of what is a signature. If, for instance,
16 you could say you can sign an e-mail with an electronic
17 stamp; you have to know the password; you have to have,
18 you know, the code; and you enter it; and, therefore, you
19 get a -- and you get, I don't know, a watermark or
20 something on the e-mail that is something different than
21 just typing the e-mail; you're actually affixing something
22 that you call your signature, even if it's not
23 handwritten. Should that count?

24 MR. ORSINGER: I'm sorry Peter left. I
25 think Federal law maybe requires that we permit that, but

1 I don't know. The Electronic Transactions Act. The
2 Electronic --

3 PROFESSOR DORSANEO: UETA.

4 MR. ORSINGER: I think it requires state
5 laws to permit electronic signatures to be used for all
6 legal purposes.

7 CHAIRMAN BABCOCK: Justice Hecht.

8 HONORABLE NATHAN HECHT: And just to take it
9 yet another step, wouldn't it be a binding agreement if --
10 between you and Ralph if you sent it in with your Rule 57
11 identifier and he sends in the same thing with his so that
12 the Court now has the agreement, it's just been signed in
13 counterparts?

14 MR. ORSINGER: Except for the fact we don't
15 permit electronic signing under Rule 11. We only permit
16 it for pleadings, so we're going to have to engraft that
17 onto either this rule or all the rules.

18 PROFESSOR DORSANEO: Well, Rule 11 doesn't
19 make it -- I mean, you're clear on what a signature is
20 under Rule 11, but I'm not so clear as to what would
21 constitute a signature under Rule 11 in addition to a
22 manual signature.

23 One of the problems that I have with 57 is
24 what you're saying is a signature is really not a
25 signature at all. It has virtually nothing to do with a

1 signature. It's just a thing that you have to do. Now,
2 you're calling it a signature, presumably because there
3 are consequences -- you want there to be consequences to
4 filing, but I don't know what extra consequences there
5 would be to filing if it wasn't signed anyway.

6 MR. ORSINGER: Rule 13 sanctions applies to
7 the lawyers who sign the pleadings.

8 PROFESSOR DORSANEO: I know that, Richard.
9 I'm familiar with these rules, but to say that --

10 CHAIRMAN BABCOCK: You sound like the
11 President in the first debate. "I know that."

12 PROFESSOR DORSANEO: To say that this thing,
13 this use of a confidential and unique identifier when
14 filing is a signature, I mean, it's no more a signature
15 than I'm a kangaroo, frankly. I mean, it's just something
16 that gets you into the system.

17 CHAIRMAN BABCOCK: Okay, Hopper. Alex.

18 PROFESSOR ALBRIGHT: Two comments. One, we
19 need to quit talking about e-mails when we're talking
20 about e-filing because when you're e-filing you're not
21 using an e-mail. You're entering into a system, and a
22 document is going through a couple of servers and then
23 landing on the county server, so that we don't have
24 e-mails going back and forth.

25 Also, I think the issue here on Rule 11 is

1 what are you going to use to prove up that you had an
2 agreement.

3 MR. LOW: Right.

4 PROFESSOR ALBRIGHT: And when you're proving
5 up that you had an agreement you have to have a document
6 with real signatures on it, so you have a settlement
7 agreement with a real signature. The issue is, okay, that
8 document to be proved up has to be filed, and so it's --
9 you know, what you're doing is you have to have that
10 signature in the file as a signature so that you can prove
11 it up.

12 You have the same issue on verified
13 pleadings. You -- if you look on Rule 93 it says that --
14 93(c) where a filer has electronically -- no, wait. It's
15 (b). "Documents that are required to be verified,
16 notarized, acknowledged, sworn, or made under oath may be
17 electronically filed only as a scanned image." I think
18 the signature for a pleading is treated differently
19 because it's the lawyer signing it; and the lawyer can be
20 identified as the person sending this, so that can
21 be equivalent to a signature, but it's a different kind of
22 signature from when we're talking about an affidavit or a
23 verification or an agreement that has to be proven up; and
24 so I think that's the distinction that we need to make, is
25 that the signature on page 57 is a different kind of

1 signature than we're talking about on other kinds of
2 signatures.

3 CHAIRMAN BABCOCK: Okay. Buddy.

4 MR. LOW: The purpose behind Rule 11 was to
5 be in writing so there is no misunderstanding as to the
6 terms. The signature was not just so they can look and
7 see how you sign your name, but was proof that you had an
8 agreement, so that was the whole thing.

9 Now, is there something else that can offer
10 that proof without a signature, because that's the main
11 thing, is to know what the agreement is and that you had
12 an agreement. Somebody could forge somebody's name even,
13 but there's got to be a substitute for that to prove that
14 there was an agreement. And like Justice Hecht said, if
15 it comes from your e- -- well, I'm not supposed to say
16 e-mail, your electronic -- okay.

17 CHAIRMAN BABCOCK: Your special PIN thing.

18 MR. LOW: Is that sufficient? I don't know.

19 CHAIRMAN BABCOCK: Justice Bland.

20 HONORABLE JANE BLAND: Well, I think we get
21 into trouble if we start making a distinction that
22 electronic signatures are valid signatures for some
23 documents and not for others. I mean, we're going to have
24 judges using electronic signatures on their orders. We
25 have an electronic signature feature for lawyers. It

1 ought to have the same weight, carry the same weight as a
2 signature that a lawyer signs out, because when you start
3 differentiating between the signatures you devalue the
4 electronic signature; and it should be given the same
5 weight both in evaluating whatever is signed under Rule 13
6 or any other rule and in the degree of conscious use of
7 that mechanism by the lawyer in preparing and signing the
8 document as that lawyer would use in using his or her
9 handwritten signature; and if we start drawing this
10 distinction, I mean, then we're not putting a lot of
11 weight to the fact that this is a private password, you
12 shouldn't distribute it. It's only for you. It's just
13 like if you're signing it. You give it to anybody else,
14 you better be sure that they're only doing with your
15 authorization.

16 CHAIRMAN BABCOCK: Yeah, Richard.

17 MR. MUNZINGER: There is a distinction
18 between a pleading and a Rule 11 agreement. A pleading
19 sets out, for example, my position before the court. A
20 Rule 11 agreement most often involves one or the other
21 party waiving a right that they have or agreeing to a
22 judgment. It affects substantive rights of the parties,
23 be they procedural or substantive on the premise. The
24 electronic signature only works when you go through Texas
25 Online because Texas Online already has, because I have

1 registered with them, the hallmarks of my secret
2 signature; but if I send an e-mail to Richard and I agree
3 to extend his time for discovery 10 days or to assert his
4 objections to my request for production, it's just an
5 e-mail; and there is no authenticity to that e-mail other
6 than my computer, of course. But there is a
7 distinction --

8 HONORABLE JANE BLAND: Unless you both file
9 it with your signature with the court, as Justice Hecht
10 mentioned. You exchange e-mails waiving a substantive
11 right, and you both decide that this is going to be a Rule
12 11 agreement, and you both, using your electronic
13 signature, file a counterpart with the court. Why
14 shouldn't that carry the same weight as counterpart
15 written signatures?

16 MR. MUNZINGER: I agree with you. It should
17 not under those circumstances.

18 HONORABLE JANE BLAND: No, I think it should
19 carry the same weight.

20 MR. MUNZINGER: I would have signed it.

21 CHAIRMAN BABCOCK: Skip.

22 MR. WATSON: I don't see the difference
23 functionally or legally between in a Rule 11 agreement
24 done by e-mail whether I with a pen and paper signed that
25 e-mail or if I keystroke those same letters to sign my

1 name by typing it or if I've used the signature block,
2 which I think is what it's called that on the bottom of
3 every e-mail that goes out of my office says me with all
4 of my aliases at this phone number, this fax number, and
5 this address. The fact that I am causing my name, which I
6 would otherwise be signing with a pen on paper, to be
7 placed on the screen and then printable on a piece of
8 paper, to me is a signature for purposes of Rule 11, and
9 if it's not then what we've got is lawyers thinking they
10 are entering into Rule 11 agreements and they are not, and
11 that we need to address.

12 CHAIRMAN BABCOCK: Judge Sullivan and then
13 Justice Duncan and then Judge Lawrence.

14 HONORABLE KENT SULLIVAN: I want to speak
15 briefly in support of what I think Richard's point was,
16 and that is I think there may be a policy reason and a
17 practical reason to devalue electronic signatures and to
18 differentiate. I think practically speaking if, once we
19 get to high volume electronic filing, we require
20 electronic signatures, which certainly makes sense to me
21 on things like pleadings, that those electronic signatures
22 as a practical matter will be available to more people
23 than the intended signatory.

24 Everyone knows who has practiced more than
25 about a week in an office of any size or any volume the

1 lawyer may be giving that to a secretary or the lawyer
2 will be giving that to her legal assistant; and there will
3 be some dissemination, I suspect, of those passwords; or
4 at least I would predict that something like that is going
5 to happen; and as long as you relegate to a very narrow
6 scope the number of documents that require real signatures
7 and real scanned images of those signatures, I think that
8 makes a certain amount of sense.

9 I presume that this same debate is going to
10 occur with respect to affidavits, for example, as it's now
11 occurring with respect to Rule 11 agreements; and I can
12 see where there is some sense to saying an electronic
13 signature which -- for which the capability we can predict
14 will not be limited to the person whose signature it is
15 may not be adequate for things, which as Richard properly
16 points out is not just a mere statement of position like
17 the pleading is, but for things that have a much -- or
18 normally carry a much higher degree of scrutiny, and that
19 is when someone is swearing under oath and is subject to
20 the penalty of perjury or when someone is waiving a right
21 or otherwise engaging in some substantive legal agreement
22 or decision. It just -- it makes practical sense to me.

23 CHAIRMAN BABCOCK: Justice Duncan.

24 HONORABLE SARAH DUNCAN: Well, since I would
25 agree with Judge Bland, I will defer to Judge Bland.

1 HONORABLE JANE BLAND: With respect to
2 affidavits, those have to be signed in front of a notary,
3 so I don't see that you could use an electronic signature
4 for that because the whole idea then is not just the
5 signature, but also that somebody has attested to the
6 signature, but with respect to --

7 HONORABLE KENT SULLIVAN: That would be
8 contemplated as well theoretically, I presume.

9 HONORABLE JANE BLAND: That the notary could
10 stand while I -- and then attest it. Yeah, I agree with
11 you about affidavits, but with Rule 11 agreements, I mean,
12 they carry the same sort of weight as pleadings and other
13 things. You can plead out causes of action; you can
14 nonsuit parties of causes of action.

15 Right now I bet every lawyer in this room
16 has said to their secretary on one occasion or maybe more
17 than one, "Please sign my name by permission"; and so I
18 don't see -- you know, "Please file this with my
19 permission," but you have to be, you know, careful about
20 how that's done; and if it got done without your
21 authorization, well, then you have to try to undo it, just
22 like you have to do with a regular old signature; and this
23 is the future of our filing system; and to carve out Rule
24 11 agreements, they are not the same as affidavits. They
25 are not testimony. They are agreements between lawyers,

1 and just to carve that out seems to be not -- you know,
2 not where the -- where we're going.

3 CHAIRMAN BABCOCK: A second ago somebody
4 said they wished Peter Vogel was here, and all of the
5 sudden miraculously he appeared.

6 MR. ORSINGER: Can I ask Peter a question?

7 CHAIRMAN BABCOCK: Yeah. He's going to
8 answer the question of a minute ago and then you can ask
9 him another one, but he's going to vanish here in a
10 minute, so...

11 MR. VOGEL: Yeah, I'm sorry. I have to
12 leave. I wasn't planning that, but I'm not sure what
13 question was --

14 MR. ORSINGER: Let me tell you what the
15 question was.

16 MR. VOGEL: Oh, okay.

17 MR. ORSINGER: The Rule 11 is really nothing
18 but a statute of frauds for egregious -- touching on
19 pending lawsuits, it's just a contract, but it's a statute
20 of frauds requirement of signing. The Federal Uniform
21 Electronic Transactions Act has mandated, has it not,
22 certain recognition of electronic signatures in situations
23 where there might have been state laws and statutes of
24 frauds that require written signatures?

25 MR. VOGEL: I mentioned this earlier, but

1 there is a juxtaposition between the Electronic Signature
2 Act, the e-sign, which is the ability to use an electronic
3 signature, the uniform electronic -- Uniform Electronic
4 Transactions Act, the point of that is really to allow
5 parties to electronically contract and acknowledge that
6 there is some method by which they can validate that that
7 is the contract that they entered into.

8 MR. ORSINGER: Right.

9 MR. VOGEL: Historically we have been doing
10 that for years with credit card transactions on the
11 internet and nobody has given it a thought, so it's really
12 sort of legitimizing what we've been doing historically to
13 say, "Yes, I'm buying this pair of running shoes from this
14 company on the internet"; and so it seems to me from the
15 standpoint of what's happened in the Federal court and
16 before the patent office is that if I adopt the signature
17 of /S -- /S/ as my signature and I tried then to use some
18 other signature like a facsimile signature, they won't
19 accept that because that's not what I adopted to be my
20 signature. So under the Uniform Transactions Act and
21 e-sign I believe that whatever it is that any lawyer
22 chooses to adopt as their signature is recognized under
23 the laws as that signature.

24 MR. ORSINGER: Well, does our Rule 11 need
25 to be amended then to permit electronic signing of Rule 11

1 agreements, because the language appears to require the
2 signing of a writing in traditional terms?

3 MR. VOGEL: I think under that the -- I
4 believe under the Electronic Transactions Act that was
5 adopted by the state of Texas that it doesn't have to
6 be -- if it is done electronically then the rules that the
7 DIR and the archives of the library adopted would apply
8 because it applies to all court filings.

9 MR. ORSINGER: So is our Rule 11 preempted
10 and we just don't realize it?

11 MR. VOGEL: I think that's what it sounds
12 like.

13 MR. GILSTRAP: I think you're talking about
14 what electronic signature is on the pleading or agreement
15 on the signature line, I would type in "XYZ49" or
16 something. Is that what you're saying?

17 MR. VOGEL: No, no, no. That's a
18 manifestation. Under the Uniform Electronic Transactions
19 Act the point of that is to allow parties to have commerce
20 between themselves and agree that whatever it is that I'm
21 agreeing to, I'm accepting responsibility; and so there
22 had to be some laws enacted to do that; and that's what
23 UETA did; and it was adopted by the Department of
24 Information Resources for state government and by the
25 archives of the library for all state documents, which I

1 believe would apply to -- Dianne, you maybe have an
2 opinion on that as well from the standpoint of the clerk's
3 office. I think those are the laws that apply, don't
4 they?

5 MS. WILSON: Uh-huh.

6 MR. GILSTRAP: We were just told that on
7 signing the pleadings that the unique identifier is merely
8 a name and a password or a name and a PIN, something like
9 that.

10 MR. VOGEL: But that's how you log into the
11 system.

12 MR. GILSTRAP: We're told that's what the
13 signature is. Are you telling us that's what --

14 MR. VOGEL: Essentially that's what makes it
15 unique, is that it's coming from my ID password on my
16 system that allowed me to log into the EFSP.

17 MR. GILSTRAP: Is that what you're talking
18 about on the electronic documents as well?

19 MR. VOGEL: Yes, right.

20 MR. ORSINGER: But how do two people sign a
21 Rule 11 agreement electronically through their computers,
22 not signing a piece of paper?

23 PROFESSOR DORSANEO: How do they physically
24 do it?

25 MR. VOGEL: How do they physically do it?

1 MR. ORSINGER: Yeah. How do I enter into a
2 Rule 11 agreement with an electronic signature with a
3 lawyer who is also signing electronically?

4 MR. VOGEL: I think essentially you would
5 have to have two -- which is not any different than having
6 a fax signature on a different page. I think you would
7 end up with two separate identical documents, one coming
8 from your computer and one coming from your computer, and
9 under UETA I think that would --

10 PROFESSOR DORSANEO: Would there be a thing
11 that you would call a signature on each of those
12 documents?

13 MR. VOGEL: Your electronic login process
14 with the EFSP would uniquely identify you and your
15 agreement to whatever it is you send through the EFSP to
16 the clerk's office; and if you send exactly the same thing
17 and they both showed up as an agreement, you're saying
18 that if both parties both filed this same identical
19 document, that it's a signature from each one of you-all,
20 that would be a contract under UETA. It would be a
21 contract under UETA it seems like to me.

22 PROFESSOR DORSANEO: So, in other words, you
23 don't need a signature anymore.

24 PROFESSOR ALBRIGHT: But, Peter, that's the
25 lawyer's signature, not the party's signature. So if it's

1 an agreement, "I agree to give you 30 more days to answer
2 the interrogatories," that works. If it's a settlement
3 agreement between the parties you would have to figure out
4 some way to get the electronic signatures of the parties.

5 CHAIRMAN BABCOCK: Justice Duncan had a
6 question.

7 HONORABLE SARAH DUNCAN: I only deferred to
8 Justice Bland. I didn't give up my time to speak. Why is
9 it that this last sentence has been added to Rule 11?

10 MR. VOGEL: I don't have that in front of
11 me.

12 HONORABLE SARAH DUNCAN: Because that's what
13 we're stuck on.

14 MR. VOGEL: Oh.

15 HONORABLE SARAH DUNCAN: And the answer to
16 that might determine my next question, which goes back to
17 Justice Hecht's question.

18 CHAIRMAN BABCOCK: And similar language is
19 on Rule 93.

20 MR. VOGEL: Well, let me go back
21 historically one more time. We went through I guess now
22 16 different versions of local rules before we got to what
23 we have now. We went back and forth on a lot of these. I
24 believe that the reason we included this was because we
25 thought in the context of people that did not have

1 computer access that you had to include other alternative
2 ways to do that, but under UETA you don't need this.

3 In other words, let's say one party doesn't
4 have electronic accesss, one of the lawyers doesn't, and
5 they needed to have some agreement to it. Well, you need
6 to have a means to facilitate that as well.

7 MR. GILSTRAP: But this says "only."

8 CHAIRMAN BABCOCK: This says "only," yeah.

9 HONORABLE SARAH DUNCAN: This says "only."
10 So my --

11 MR. VOGEL: Well, then we can fix it. You
12 know, you-all are -- I mean, I don't have a simple answer
13 to that because --

14 HONORABLE SARAH DUNCAN: My follow-up
15 question -- your example was the same as Justice Hecht's.
16 If I file an agreement from my computer with my digital
17 password, name, whatever, and you filed the same agreement
18 from your computer with your digital password, name,
19 whatever, why isn't that good enough? If it's good enough
20 for pleadings --

21 MR. VOGEL: Well, I would agree with you.

22 HONORABLE SARAH DUNCAN: Okay. So it
23 shouldn't necessarily have to be a scanned image.

24 (Ms. Wilson conferring with Mr. Vogel.)

25 MR. VOGEL: Okay. Well, you can say that,

1 too.

2 MS. WILSON: I guess I'm really surprised
3 and pleased that you-all are even going further than we
4 anticipated. We were trying to find an electronic method
5 for the current Rule 11 to be put into the court record
6 electronically. We never dreamed that you-all would go
7 even further than that. It's great. We have no problem
8 with it, and if you do then definitely you're going to
9 have to revise current Rule 11, but that was the only --
10 all we were trying to do was a delivery method.

11 HONORABLE SARAH DUNCAN: Because I think
12 Judge Bland has a very good point, that if we preserve
13 manual signatures only for Rule 11 agreements we have
14 devalued digital signatures for purposes of pleadings.

15 MR. VOGEL: No, I agree; and, I mean, part
16 of our problem with this was we didn't -- we could not
17 foresee how this committee would view what we were trying
18 to accomplish; and, you know, if we were doing this two
19 years ago it would have been totally different than now.
20 So I think for everybody's experience because everybody
21 here now has internet experience, two years ago that may
22 not have been the case.

23 MR. ORSINGER: If we take the word "only"
24 out of here so that this is just an option but not an
25 exclusion, does that really eliminate most our debate?

1 MR. BOYD: But then why do you need it in
2 there at all?

3 PROFESSOR DORSANEO: Yeah, why do you need
4 it?

5 CHAIRMAN BABCOCK: Kent. Judge Sullivan.

6 HONORABLE KENT SULLIVAN: I thought Justice
7 Bland's other point, though, was very salient, and that's
8 about affidavits, and that is what I presume -- and maybe
9 I should ask this as a question. Do we not contemplate
10 that if you're going to file an affidavit which would
11 include any plea that needs to be verified, I presume,
12 that that will have to be done with a scanned original
13 document? If --

14 MR. VOGEL: Let me get -- here's an
15 important point in that, and when we looked at it for UETA
16 purposes, why do we need notary republics (sic) anymore.
17 I mean, the whole notion of having a notary just goes by
18 the wayside and we can get to just a Federal declaration
19 and be done with it, and obviously that may be a whole lot
20 simpler anyway, because what's the point of the affidavit
21 if it's really no different than a declaration, except the
22 notary signed it.

23 HONORABLE KENT SULLIVAN: Well, my point
24 was --

25 MR. VOGEL: I'm not saying --

1 HONORABLE SARAH DUNCAN: Not a very strong
2 lobby for that.

3 HONORABLE KENT SULLIVAN: My point was
4 intended as a practical one, because if we say that, and I
5 think under our existing situation that is what we say,
6 then the message -- the practical message to practicing
7 lawyers and litigants is you must have this scanning
8 capability because you are going to have to file
9 affidavits and/or verified pleadings from time to time;
10 and if that's the case -- that is, if we cannot
11 contemplate a system wherein electronic signatures would
12 satisfy the universe of possibilities, then it -- again,
13 it's reasonable to me to carve out a narrow group of
14 documents, since, again, we have crossed this bright line
15 and said you've got to have this capability in any event
16 because there are certain documents where the original
17 signature must be scanned and filed.

18 Then it's not a practical problem, and there
19 is some enhanced reliability associated with it for the
20 reasons that I stated earlier. I mean, you have to have a
21 forged signature, you know, if somebody wants to corrupt
22 that process; and that is different from what we're
23 talking about with electronic signature.

24 MR. VOGEL: But if we look at what the -- if
25 I'm right, and I haven't looked at it recently, but I

1 think under the Federal rules you have an option of an
2 affidavit or a declaration, and maybe that would be
3 something to consider, and then you would -- then you
4 could have the affidavit if it's required then it wouldn't
5 be electronic like that. I mean, you couldn't use -- you
6 would have to have a signature, a handwritten signature.

7 CHAIRMAN BABCOCK: Frank.

8 MR. GILSTRAP: One point before you leave.
9 You were expressing some amazement that we were going down
10 this road, and one of the things that's driving us down
11 this road is the suggestion that the Federal law is
12 requiring it. Now, are you telling us that this UETA,
13 which as I understand was enacted to allow electronic
14 signature of credit card receipts, mandates use of
15 electronic signatures in state court pleadings? Are you
16 telling us that?

17 MR. VOGEL: No. What I'm saying is if an
18 electronic filing is made, UETA would come into play --

19 MR. GILSTRAP: Okay.

20 MR. VOGEL: -- and effect that document
21 electronically.

22 MR. GILSTRAP: So what you're saying is UETA
23 does apply to electronic filings in state court?

24 MR. VOGEL: Yes, it does.

25 MR. GILSTRAP: Okay.

1 PROFESSOR DORSANEO: It validates the
2 electronic signature. It doesn't require it.

3 MR. GILSTRAP: Okay.

4 MR. VOGEL: Well, it requires it because the
5 way UETA is written and the way the Federal e-sign law is
6 written is that it allows the means by which I have a
7 verified signature that it's me who's signing this, so
8 there is a relationship between the two.

9 CHAIRMAN BABCOCK: Buddy.

10 PROFESSOR DORSANEO: Well, we could say in
11 our rules "a manual signature" if we wanted to.

12 MR. VOGEL: Yes, of course.

13 PROFESSOR DORSANEO: Or a seal.

14 CHAIRMAN BABCOCK: A wax seal, transmitted
15 electronically.

16 MR. LOW: Have there been any changes in the
17 laws of perjury? I know for perjury now, I sign an
18 affidavit, it's false, I say I participated in some show
19 where a woman drowned her kids and I didn't do that, then
20 I'm guilty of perjury. Have the laws of perjury -- I
21 mean, what if I filed that with electronic seal? Would
22 that be perjury? Could I be -- in other words --

23 MR. VOGEL: I'm afraid I'm not a judge.

24 MR. LOW: Well, no, I'm not either and
25 that's --

1 HONORABLE SARAH DUNCAN: Buddy, if you
2 signed it, you signed it.

3 MR. LOW: -- part of the reason I'm asking
4 the question.

5 MR. ORSINGER: But electronic signature
6 doesn't require you to sign it. It just requires you to
7 know the password and have an account, so I don't think
8 you can get -- or you may never be able to get a
9 conviction on perjury because there would probably be
10 three or four people in the office or maybe a dozen people
11 in the office that know your password. How are you ever
12 going to put anybody in prison? I mean, to me an
13 affidavit better still be pen on paper in front of
14 somebody official or we ought to do like the Feds and say
15 if you invoke this clause then it's under oath by law.

16 MR. LOW: I agree.

17 MR. GILSTRAP: But can you invoke it
18 electronically? That's the problem.

19 HONORABLE SARAH DUNCAN: Richard, I signed
20 -- last night before I drove here I signed my required
21 campaign contribution form electronically. Now, if it's
22 an -- it used to be an affidavit on a piece of paper.

23 MR. ORSINGER: You didn't use your password,
24 your EFSP, your electronic --

25 HONORABLE SARAH DUNCAN: That's the only way

1 I can sign into the Ethics Commission is to use my digital
2 signature as we have been discussing it, so what's the
3 difference between that affidavit and this affidavit?

4 MR. ORSINGER: If you deny sending that and
5 there are six or eight people out there that might have
6 your password, it's going to be hell to prove that you
7 signed it.

8 HONORABLE SARAH DUNCAN: I don't know about
9 you, but when I have a password that will enable someone
10 to destroy me or my reputation or a member of my family I
11 don't --

12 MR. ORSINGER: No, Sarah, in the law offices
13 the lawyers are not going to be filing electronically.
14 The legal assistants are going to be filing
15 electronically.

16 HONORABLE SARAH DUNCAN: Not in this office.

17 MR. ORSINGER: I think that in most of the
18 uses around here it's expected that the lawyer's assistant
19 is going to be the one who's actually doing the filing.

20 HONORABLE SARAH DUNCAN: Other people do
21 that with their signatures. I'm not going to do that with
22 my signature either. That's a choice people make, and
23 there are consequences to choices.

24 CHAIRMAN BABCOCK: Richard is less
25 reputation conscious than you are, Sarah.

1 HONORABLE SARAH DUNCAN: He has less
2 reputation to be conscious of. That was a joke, Richard.

3 MR. ORSINGER: Many a truthful thing are
4 said in jest.

5 CHAIRMAN BABCOCK: Jeff.

6 MR. BOYD: I'm reading -- you call it UETA
7 -- for what I think to be the first time I've ever read
8 it, so I'll admit that first, but -- and I'm reading the
9 definition of electronic signature, and I'm wondering if
10 you-all are in agreement on what this definition means
11 because I think it does impact where we go. Electronic
12 signature means "an electrical" -- I mean, excuse me, "an
13 electronic sound, symbol, or process attached to or
14 logically associated with a record and executed or adopted
15 by a person with the intent to sign the record."

16 But then it goes on to talk about how that
17 intent can be determined by conduct, and so I'm sitting
18 here thinking if I send an e-mail to Buddy and say,
19 "Buddy, my objections and responses are due Monday. Will
20 you agree to give me a two-week extension" and he e-mails
21 me back and says, "You bet, I agree," does that qualify as
22 an agreement signed by Buddy?

23 MR. VOGEL: I would say under UETA it does.

24 MR. LAMONT JEFFERSON: It was a process
25 logically associated with the record.

1 MR. BOYD: I mean, I don't know. It's a
2 process associated with a record, and I would say under
3 his conduct, "adopted by a person with the intent to
4 sign." And if that's the case then maybe all we've got to
5 do is amend Rule 11 to say "the requirement of a signature
6 may be met as provided under UETA."

7 PROFESSOR DORSANEO: I think we're finished
8 once you read that for all the things.

9 CHAIRMAN BABCOCK: Justice Duncan.

10 HONORABLE SARAH DUNCAN: The problem is you
11 can ghost somebody's e-mail. I mean, Bill McCoppell
12 (spelled phonetically) was just horrible about it. And so
13 e-mail, me sending you an e-mail is not necessarily
14 evidence that I signed or adopted that.

15 MR. BOYD: Well, it is if you really did
16 send me the e-mail.

17 HONORABLE SARAH DUNCAN: If I really did.

18 MR. BOYD: And so that's no different than
19 whether you really signed the Rule 11 agreement by hand,
20 so when I say -- when he files the motion to compel me for
21 sanctions and argues that I waived all my objections, I
22 go, "Wait a minute. You entered a Rule 11 agreement. I
23 filed a Rule 11 agreement. Please enforce it." And then
24 you show up and say, "But, Judge, I didn't sign that
25 e-mail."

1 HONORABLE SARAH DUNCAN: Right.

2 MR. BOYD: And it becomes no different than
3 if we were doing it by hand.

4 HONORABLE SARAH DUNCAN: I agree.

5 MR. MUNZINGER: Yeah, but handwriting
6 experts can identify my signature with some accuracy. How
7 do you differentiate with an e-mail? Again, I'm in a Rule
8 11 case right now where it's a four and a half
9 million-dollar settlement if he issued. Now, with the
10 authenticity of one or the other of the parties'
11 signatures, you can bet your boots we would all have
12 document examiners who would look at that signature and
13 identify those features of each parties' signature that
14 would prove the point. You don't have that
15 electronically, and that's part of your risk in Rule 11
16 agreements. They're not all just extending time for
17 discovery. Some of them are settling big lawsuits.

18 CHAIRMAN BABCOCK: Pete.

19 MR. SCHENKKAN: I'm wondering whether, Jeff,
20 which point you want to make. What you established in
21 your example is that Buddy had the intent to agree, not
22 that he had the intent to sign.

23 MR. BOYD: Well, and that's what I was
24 asking our expert here is, is that the intent to sign in
25 light of the provisions that say intent can be

1 demonstrated by conduct.

2 MR. SCHENKKAN: And I don't think that is,
3 but that can be true that the intent to sign could be
4 demonstrated by conduct, but you haven't established that.
5 To go back to Richard's point, you have established that
6 Buddy had the intent to agree, but if Texas requires that
7 for that particular agreement to survive the Rule 11
8 equivalent of statute of frauds you have to have a
9 signature, you haven't established that you have an intent
10 to sign. That's a separate question, and you may have a
11 separate body of law that says for this particular kind of
12 agreement a signature means a web signature.

13 MR. ORSINGER: That's a new term for us, web
14 signature. We'll start using that.

15 CHAIRMAN BABCOCK: Frank.

16 MR. GILSTRAP: Well, I mean, what's really
17 going on here is that basically a lot of these
18 transactions, signatures are impractical. I mean, it's
19 impractical to require people to sign documents if you're
20 going to sell them sneakers over the internet. So
21 basically what this UETA has done is it's just done away
22 with it.

23 Now, you know, there are places where
24 signatures are needed, like a will, you know; and it seems
25 to me that the notion that somehow that maybe we do need

1 some kind of hierarchy of signatures. I mean, it may be a
2 signature on a Rule 11 agreement is more important than a
3 signature on a pleadings. I think one of the false things
4 we're thinking about is, well, we're going to devalue
5 signatures. Signatures have already been devalued in
6 certain areas, but do we want to devalue all of them? I'm
7 not sure we do. I think we might want to proceed slowly
8 on some of these things, like a Rule 11 agreement.

9 CHAIRMAN BABCOCK: Peter, there's a phrase
10 that's used in Rule 11, the proposed Rule 11, and it's
11 repeated in Rule 93 subparagraph (b), (b) as in boy, that
12 it can be filed only as a scanned image. What does that
13 phrase, a scanned image --

14 MR. VOGEL: What a scanned image could be,
15 either a fax where you have the signature and then you
16 file a TIF file instead of, you know, a Word file.

17 CHAIRMAN BABCOCK: Right.

18 MR. VOGEL: Or it can be PDF -- same as you
19 scan something in and it comes out PDF.

20 CHAIRMAN BABCOCK: Right.

21 MR. VOGEL: So that's what we had in mind
22 with that.

23 CHAIRMAN BABCOCK: Okay. So if --

24 MR. VOGEL: Or if somebody faxes you, let's
25 say they fax it to your office. Your client signs an

1 affidavit in their office and faxes it to you. You can
2 attach it to a pleading through your EFSP.

3 CHAIRMAN BABCOCK: All right. But on this
4 Rule 11 or on the Rule 93 it would be, you know, "Dear
5 Buddy Low, I agree to give you a 30-day extension to file
6 a response to the pleading, if that" -- "you have agreed
7 to give me 30 days. If that reflects our agreement,
8 please sign below" and then I have a place for him to
9 sign. He signs it, sends it back to me, then I would file
10 that -- I would take that letter and scan it into a PDF or
11 a TIF file and file it with the court, and that's what you
12 have in mind.

13 MR. VOGEL: Right.

14 CHAIRMAN BABCOCK: So our signatures would
15 appear on the court file.

16 MR. GILSTRAP: Written signatures.

17 CHAIRMAN BABCOCK: Written signatures. So
18 that's what the subcommittee had in mind --

19 MR. VOGEL: Right.

20 CHAIRMAN BABCOCK: -- when you were
21 differentiating Rule 11 and Rule 93 from Rule 57, which
22 applies pleadings.

23 MR. ORSINGER: Chip, they also differentiate
24 from Rule 19a because judges can sign orders only through
25 graphic images, so a judge can sign an order by having a

1 canned signature on the computer hard drive which is then
2 cut and pasted into the court order and, voila, it's now a
3 signed order.

4 CHAIRMAN BABCOCK: Yeah. That's a third
5 concept, graphic image.

6 MR. ORSINGER: And, by the way, what's more
7 important than judges signing judgments, and we're
8 allowing that to be done by cutting and pasting scanned
9 signatures.

10 MR. VOGEL: Facsimiles, yeah.

11 MR. ORSINGER: So we're not -- in a sense
12 it's easier to fake a judgment than it is to fake a Rule
13 11 agreement. Isn't that what that boils down to?

14 CHAIRMAN BABCOCK: We've got scanned images,
15 we've got graphic images, and then we've got the
16 electronic identifier.

17 PROFESSOR DORSANEO: There's one other point
18 that I think is important, Mr. Chairman, on 57 when
19 reading it over and over again, in a case with
20 electronically filed pleading, the use of the identifier
21 constitutes the signature, well, that would seem to say
22 that you don't actually need to put a manual signature on
23 documents that you file electronically. We might want to
24 have a manual signature on such a document for some other
25 purpose to indicate that somebody, you know, actually read

1 it and signed it rather than more informal behavior. From
2 our standpoint more informal behavior.

3 CHAIRMAN BABCOCK: Judge Christopher.

4 HONORABLE TRACY CHRISTOPHER: Well, I can
5 understand Richard's point about settling lawsuits, and,
6 frankly, I've often thought that Rule 11 needs work and
7 that it ought to be -- there ought to be a difference
8 between settling a lawsuit versus one lawyer giving an
9 extension to another lawyer on discovery; and I certainly
10 think that an e-mail, a set of e-mails back and forth,
11 should be enough to extend discovery; but, you know, if
12 you're settling a lawsuit, perhaps we actually ought to
13 require a signature of some sort.

14 I mean, I routinely as a matter of course
15 will give extensions when somebody attaches to a document
16 that they had an agreement between -- you know, an e-mail
17 agreement. The reason I think that we started Rule 11 a
18 long time ago is to avoid the situation where one lawyer
19 said, "I gave them an extension" and the other lawyer
20 says, "No, they didn't" or "I settled the case" and "No,
21 they didn't." But when you have a clear agreement and you
22 have some written evidence of what the agreement was
23 between the parties via an exchange of e-mail, that ought
24 to be enough between lawyers in the vast majority of the
25 situations.

1 CHAIRMAN BABCOCK: Buddy and then Carlos and
2 then Jeff.

3 MR. LOW: What if I e-mailed Jeff and I
4 said, "Jeff, this will acknowledge you and I have agreed
5 to X and so forth. Your returning this to me shall
6 constitute your signature and your Rule 11 agreement," and
7 he returned it to me but he doesn't sign. What would be
8 wrong with that? I mean, that doesn't have a signature,
9 but that certainly complies with everything Rule 11 would
10 want.

11 CHAIRMAN BABCOCK: Carlos.

12 MR. LOPEZ: We were just talking about that
13 exact same thing. The rule says "in writing, signed and
14 filed"; and if somebody decides that it doesn't have to be
15 signed anymore, just as long as it's in writing and
16 decipherable, it's different when they give it to you --
17 say, "If you agree, sign this." Obviously there the
18 signature is the evidence of the writing itself, but if
19 it's an e-mail exchange where you -- where it's clear what
20 it was then maybe that ought to be enough; and so in that
21 circumstance, what real difference does it make if it's
22 signed or not as long as it truly was sent; and that's
23 always an evidentiary issue that we've had. We've had it
24 long before electronic stuff came along.

25 CHAIRMAN BABCOCK: Jeff, then Judge

1 Patterson and then Richard Munzinger.

2 MR. BOYD: I've sat here and I've kept
3 reading this and I'm intrigued, but I think --

4 HONORABLE JAN PATTERSON: And you're
5 learning something.

6 MR. BOYD: I really am. I had no idea all
7 this law was out there. I think at least the
8 subcommittee, if not all of us, ought to go back and read
9 UETA carefully before we make this decision because I
10 think this answers all of it; and it says very clearly the
11 Legislature said the purpose was to encourage electronic
12 transactions to -- I scrolled off of it, but to encourage
13 electronic transactions, to reflect the practices that are
14 already happening in our society, and to make the laws
15 uniform.

16 So if we make a rule that's different from
17 what UETA says about what is and what is not a signature
18 then we've defeated the purpose of that, and frankly, I'm
19 not sure the Rule would survive in light of the statute
20 anyway. But it goes on and it even says that
21 notarizations are signed electronically, so that answers
22 that question, so long as the notary's electronic
23 signature is attached to or logically associated with the
24 electronic signature of the affiant. I don't know that
25 we're prepared to really answer these questions until

1 we've looked closer at this statute.

2 CHAIRMAN BABCOCK: Is the suggestion that
3 this a Federal statute?

4 MR. BOYD: No, this is Texas Business and
5 Commerce Code.

6 MR. ORSINGER: It's a uniform act that the
7 legislatures have adopted, but it's the same language
8 everywhere.

9 MR. VOGEL: Yes, it is, but let me also tell
10 you that the way it was enacted, it's controlled by -- the
11 court documents are controlled by the archives and --
12 state archives and library, so they have regulations over
13 what the clerks do on many of the filings to begin with,
14 and this is just an extension of what authority they
15 already have. So you maybe ought to consider how that
16 fits in with the clerks themselves because I think, you
17 know, if you will, part of this is the clerks have the
18 constitutional responsibility to be the keeper of the
19 documents, and so part of that all fits in with UETA.
20 When it's electronic it has got to be managed through the
21 state through the archives and library.

22 CHAIRMAN BABCOCK: Well, it seems to me that
23 Rule 11 is a genius of our practice. You know, a lot of
24 states don't have the Rule 11 agreements. It's simple,
25 it's easy, if you follow the procedures it eliminates a

1 whole bunch of disputes; and I think our debate is
2 starting to wander into changing of Rule 11 as opposed to
3 whether or not -- how a Rule 11 agreement gets filed, and
4 I for one think that that would be a mistake to try to
5 change Rule 11 that works so well under the guise of how
6 we file these things. So that's one issue.

7 The second issue is obviously the
8 subcommittee thought that there ought to be a hierarchy of
9 signatures, and for Rule 11 and for Rule 93 they came up
10 with the scanned image idea, which was to --

11 HONORABLE SARAH DUNCAN: That's not what
12 Dianne said. They were concerned about this committee's
13 response to digitized signature on a Rule 11 agreement.
14 They're not concerned.

15 MR. VOGEL: No. Yeah. Absolutely.

16 CHAIRMAN BABCOCK: So you did it thinking
17 that that's the best you could get away with with this
18 committee?

19 MR. VOGEL: No. No. No, I think what we
20 were trying to do was there was no way for us to predict
21 in advance how this committee would view this technology
22 and the impact on the existing rules, so what we wanted to
23 do was to try and not change -- well, we wanted to change
24 the rules as little as possible to effectuate what we were
25 doing. That was sort of the bottom line on it, and we

1 looked at every rule that we thought was affected, and we
2 just gave it a shot.

3 There are different -- this is not the only
4 version we have. It took us a while to sort of work
5 through this and how we were going to approach it, and we
6 did it by committee as well, so we had different opinions
7 on these different topics just as you-all do.

8 CHAIRMAN BABCOCK: Okay. Well, I for one
9 think it would be a mistake to substantively change Rule
10 11, but beyond that, I guess we can keep talking about it.

11 MR. ORSINGER: Well, Chip, the idea of Rule
12 11 is salutary --

13 CHAIRMAN BABCOCK: Richard, you just talked
14 out of turn.

15 MR. ORSINGER: Oh, I'm sorry. Excuse me,
16 Jan.

17 HONORABLE JAN PATTERSON: Well, this
18 discussion is sending me in deep mourning of the English
19 language, and my only plea to you, Peter, is as we go
20 through this that we avoid the confusion of words and
21 language and avoid things like "manual signature,"
22 "signature of some sort," "shall constitute your
23 signature," and that kind of thing because signature is
24 one's name as written by oneself, the affixing of the name
25 with one's own hand. The word "signature" does have --

1 did have until today a peculiar meaning, and if we can
2 preserve that, I think it might help to clarify to come up
3 with different language and different words for whatever
4 this process is.

5 MR. VOGEL: I think you're wrong. I think
6 signature has changed. Just as the internet has changed
7 the way we live and the way we communicate, I think that
8 signature doesn't mean what it did before UETA and e-sign
9 was created.

10 HONORABLE JAN PATTERSON: Well, it may have
11 changed in the last couple of years, and maybe that's
12 good, and maybe that's bad, and maybe that's a
13 deterioration that we can correct, and I just raise that
14 issue because it may have happened without anybody
15 advertizing it.

16 MR. VOGEL: Well, part of me says -- to
17 change the subject just a little bit and sort of come back
18 to this, and I know some of you-all have heard me say this
19 before, but I think -- I teach the law of e-commerce at
20 SMU and have for a number of years, but my sense is that
21 the internet is the greatest social change that's ever
22 happened in the history of humans, and we are in a
23 profession that is always behind the curve anyway, and I
24 think we're a little bit further behind as a result, and
25 I'm not thrilled about what's happening to the English

1 language. I know Richard and I have had conversations
2 about this over the years, too, but we also have to deal
3 with the reality that 5 years ago or 10 years ago
4 everybody wouldn't know what Google was and how it impacts
5 us everyday.

6 HONORABLE JAN PATTERSON: All of that is
7 true, but by virtue of the conversation we've had here and
8 the confusion, there's a reason why we have words, and
9 there is a reason why words have meanings, and sometimes
10 they acquire new meanings. Sometimes that's right and
11 sometimes that's wrong. I'm just asking for a certain
12 sensitivity that there may be a reason why we use the word
13 "signature," and I'm not asking that it be with quill and
14 ink, but it may have acquired a distinctive meaning that
15 might allow us to have a certain precision in our
16 communication. I raise that question.

17 HONORABLE SARAH DUNCAN: I would suggest
18 just the opposite. I imagine the people who developed
19 digital signatures intentionally chose "signature" to give
20 it that validity and that formality that had traditionally
21 been associated with a handwritten manual signature, but
22 we can't change the definition of "signature." That's now
23 been -- as Jeff has read to us, that's now a function of
24 state law.

25 HONORABLE JAN PATTERSON: No. No. It's --

1 MR. BOYD: Well, it's an electronic
2 signature.

3 HONORABLE JAN PATTERSON: Right. Right. By
4 whole statute that's a single meaning as electronic
5 signature, and it means something distinct and with
6 intent. I mean, it does not -- that definition alone is
7 not dispositive of this question.

8 HONORABLE SARAH DUNCAN: So are you
9 advocating that we only ever use --

10 HONORABLE JAN PATTERSON: I'm not sure
11 what --

12 HONORABLE SARAH DUNCAN: -- "electronic
13 signature"? In quotes.

14 HONORABLE JAN PATTERSON: Yes. At least
15 that. At least.

16 MR. GILSTRAP: It would be a good place to
17 start.

18 CHAIRMAN BABCOCK: Richard Munzinger.

19 MR. MUNZINGER: Well, I have a question
20 which will betray my ignorance, but "writing" is used and
21 "written" is used repeatedly in the rules. Are electronic
22 communications writings, and are they written, and is
23 there case law that says that or is there a statute that
24 says that? And the reason that I ask the question is
25 precisely what Justice Patterson was talking about. Law

1 demands precision of definition and precision of
2 understanding. Otherwise there is no certainty in
3 dealings between humans and between parties who are often
4 at odds against each other. So if we're going to use
5 words, "writing," "written," "signature," "signed," it
6 seems to me it behooves the Supreme Court of Texas to
7 define those terms with a level of precision that tells
8 the dumbest of us practitioners what the hell it is.

9 CHAIRMAN BABCOCK: Jeff.

10 MR. BOYD: Let me say, I think the
11 Legislature has defined the term at least for purposes of
12 "electronic signature" already, but I'm still reading, and
13 now I've gotten to what I think is the key answer here,
14 which is "except as otherwise provided in an irrelevant
15 subsection, this chapter does not require a governmental
16 agency" -- which is expressly defined above to include the
17 judicial branch -- "does not require a governmental agency
18 of this state to use or permit the use of electronic
19 records or electronic signatures," which says to me the
20 Court has to decide are we going to allow signature under
21 Rule 11 to be -- that requirement to be met by the use of
22 an electronic signature. We're not required to by this
23 law, but we can do so.

24 CHAIRMAN BABCOCK: Richard.

25 MR. ORSINGER: The proposal as originally

1 written I think assumes that the word "sign" means, as
2 Pete Schenkkan said, a wet signature and then the question
3 is how do you file a wet signature electronically? What
4 the debate has segued into is what is the true definition
5 of the word "signed" and should signed either be expanded
6 to include electronically signed or maybe should we add
7 the term "signed or electronically signed" to now permit
8 electronically signed Rule 11 agreements. I think that's
9 really what we're now debating.

10 MR. BOYD: That's right.

11 MR. ORSINGER: We're now debating whether we
12 ought to permit electronically signed Rule 11 agreements.

13 CHAIRMAN BABCOCK: Lisa has got a comment.

14 MS. HOBBS: Well, it sounds like from some
15 of the judges talking in here that signed -- regardless of
16 what we think this word means, that signed in practice is
17 meaning something more than a wet signature.

18 HONORABLE SARAH DUNCAN: Uh-huh. If they're
19 accepting e-mail agreements as Rule 11 agreements for
20 purposes of discovery extensions.

21 CHAIRMAN BABCOCK: Judge Benton.

22 HONORABLE LEVI BENTON: I think by what Jeff
23 brought to our attention the word "signed" under Texas law
24 has perhaps been modified or at least an argument can be
25 made, and what we just need to do is bring that to this

1 reader's -- the reader's attention by way of a footnote or
2 a comment or parenthetically because the word "signed" has
3 been changed in Texas law arguably.

4 CHAIRMAN BABCOCK: Nina.

5 MS. CORTELL: If we're going to move toward
6 exchange of e-mails being an agreement and so forth, and I
7 don't have a problem with that, but I agree with Judge
8 Christopher that ought to be a certain type of agreement
9 then. Because if we go into settlement agreements and you
10 have a stream of e-mails, I think we're going to be
11 inviting just a lot of litigation over when did you have
12 the settlement agreement, did it encompass these terms or
13 not; and we ought to stay with what has historically
14 worked, which is a letter or something sent by e-mail but
15 has a handwritten signature on it to show agreement on a
16 settlement.

17 CHAIRMAN BABCOCK: Judge Lawrence.

18 HONORABLE TOM LAWRENCE: With regard to
19 scanning in a document that has been signed, sometimes
20 when I scan documents the document that ends up in my
21 computer is not what I scanned. There's some little
22 problems. Not all the words come through, sometimes
23 letters are juxtaposed. Have you-all had that experience
24 with any scanned documents into the system?

25 MS. WILSON: Huh-uh.

1 HONORABLE TOM LAWRENCE: So a hundred
2 percent of the document comes through frequently?

3 MR. SANCHEZ: Yes, sir.

4 MR. ORSINGER: Well, there's a difference,
5 Tom, between scanning into a word processor, which they
6 call character recognition which does jumble and misspell
7 the words versus a scan that's just a picture. If you
8 have a PDF file or TIF file, it's a photograph of the
9 document, and it's not possible to jumble the letters. If
10 you pull it into an optical scanner to go into Word
11 Perfect or Word then it has a software routine that's
12 trying to read letters and convert it into electronic, and
13 that's where your jumbling goes.

14 This is talking about what's essentially a
15 digital photograph, and so it's possible you might leave
16 the edges off or the top or the bottom off if you didn't
17 put it on the scanner correctly, but you'll never jumble
18 the words that are actually being photographed.

19 HONORABLE TOM LAWRENCE: But the PDF is one
20 of the Word documents -- if I scan a document into Word
21 and then send that to the service provider, that's where
22 it's going to be converted to PDF, the image, but when I
23 scan it in it's going into Microsoft Word.

24 MR. ORSINGER: No. I don't agree with that.

25 MR. VOGEL: You could scan it into PDF. You

1 could fax it and just have a TIF file and file that with
2 an EFSP as well.

3 HONORABLE TOM LAWRENCE: Okay.

4 MR. VOGEL: You could file it in PDF with
5 EFSP.

6 CHAIRMAN BABCOCK: Carlos.

7 MR. LOPEZ: I was surprised to learn only
8 three weeks ago that you can turn a Word Perfect file into
9 a PDF very simply. Instead of "save as" you go to
10 "publish," you hit "PDF," and it turns it into a PDF.

11 CHAIRMAN BABCOCK: Jeff is in the seventh
12 inning of reading the statute and has a report.

13 MR. BOYD: I am. I think it's important,
14 and I still think we all ought to read this before we
15 decide.

16 CHAIRMAN BABCOCK: Well, we're relying on
17 you, Jeff.

18 MR. BOYD: "A record or signature may not be
19 denied legal effect or enforceability solely because it's
20 in electronic form. If a law requires a signature, an
21 electronic signature satisfies the law."

22 MR. GILSTRAP: Yeah, but that's --

23 MR. ORSINGER: But isn't that excepted for
24 government agencies?

25 MR. BOYD: Then it says the part I just

1 read, which is "This whole chapter does not require a
2 government agency to accept the use." In other words, the
3 Court gets to decide just like TDI gets to decide or
4 whoever gets to decide. But if we decide -- I mean, it
5 shows certainly that for purposes of commercial
6 transactions the Legislature has decided to blur the
7 meaning of signature and in recognition of the high-tech
8 world we now live in.

9 CHAIRMAN BABCOCK: For the purposes of
10 giving the Court some direction on this, I might suggest
11 that we vote -- give myself some direction on this -- on
12 the proposal with one modification. The proposal is "a
13 written agreement between attorneys or parties may be
14 electronically filed only as a scanned image," and I would
15 add the words "of the agreement," and I'd like to get a
16 sense of what our committee feels about that sentence
17 being added to Rule 11.

18 MR. ORSINGER: If you leave the word "only"
19 in there, you're prohibiting electronic signatures of Rule
20 11 agreements.

21 CHAIRMAN BABCOCK: Right.

22 MR. GILSTRAP: Yes. Yes.

23 CHAIRMAN BABCOCK: That's what I sensed was
24 the intent of the subcommittee, but that's certainly my
25 intent in proposing it. All right. So everybody -- Bill.

1 MR. JACKSON: Chip, there are a lot of
2 people out of the room.

3 PROFESSOR DORSANEO: I think you end up with
4 something that's just highly confusing if you haven't
5 listened to this debate, just the last part.

6 CHAIRMAN BABCOCK: So you would vote against
7 it.

8 PROFESSOR DORSANEO: If you want to say -- I
9 think what the committee needs to advise the Court is
10 whether we ought to opt into this statute or opt out of
11 it, and I think the language about whether you opt in or
12 opt out is not altogether clear from what Jeff read
13 because you don't have to go along with it, but you might
14 go along with it. So we would either be on that game plan
15 or not on that game plan, but if we're going to
16 differentiate between manual signatures and electronic
17 signatures, if we're on the game plan, then we talk about
18 manual signatures if we wanted one.

19 In other words, into the game plan but not
20 for every play, and to go through it and try to get
21 something done here today -- even though I know that's
22 what you want to do -- I think is probably going to get us
23 back to the drawing board again pretty quickly.

24 CHAIRMAN BABCOCK: Well, And why do you say
25 it's going to get us back to the drawing board? Suppose

1 people vote against this, vote against the language.

2 PROFESSOR DORSANEO: Well, we'll pretty soon
3 be down to the next issue, which will involve the same
4 larger issue.

5 CHAIRMAN BABCOCK: Yeah, that's probably
6 right. So if people are persuaded by your view then they
7 will vote against it.

8 PROFESSOR DORSANEO: Okay.

9 CHAIRMAN BABCOCK: For those of you who just
10 returned we're going to take a vote on adding a sentence
11 to Rule 11 that says, "A written agreement between
12 attorneys or parties may be electronically filed only as a
13 scanned image of the agreement," so the words "of the
14 agreement" are being added to the subcommittee's proposal.

15 So everybody that is in favor of adding that
16 language to Rule 11 raise your hand.

17 All those opposed?

18 MR. DUGGINS: Sorry.

19 CHAIRMAN BABCOCK: That's okay. Carlos, you
20 got your hand up?

21 MR. MUNZINGER: Chip?

22 CHAIRMAN BABCOCK: All right. So that fails
23 by a vote of 9 to 13, 9 in favor, 13 against.

24 MR. MUNZINGER: Chip?

25 CHAIRMAN BABCOCK: Yeah, Richard.

1 MR. MUNZINGER: Could we take a vote if we
2 added the words "effecting a settlement of all or part of
3 the litigation" to that same rule and see if you got a
4 different result so that the scanned image would only be
5 required in the event of the settlement of all or part of
6 the litigation but would not, for example, be an agreement
7 extending the time for discovery or canceling a deposition
8 or doing something of that nature? I think that may be
9 one of the reasons why a number of people voted against
10 the rule.

11 CHAIRMAN BABCOCK: Judge Bland.

12 HONORABLE JANE BLAND: Well, I think we
13 might be treading into the substantive law area because
14 there is a lot of law out there about Rule 11 agreements
15 and when they are enforceable in settlement of litigation.
16 I mean, you've got Padilla vs. the Trans case and all
17 these other cases that talk about, you know, when the
18 parties can be bound to an agreement between lawyers, Rule
19 11 agreement between lawyers settling the litigation, and
20 I just don't think -- I think we should stick with -- are
21 we going to be able to use electronic signatures in the
22 same -- for the same kinds of things that we can use
23 written signatures and not try to change the substantive
24 law of Rule 11 as it stands. And that may need to be
25 done, but I think that's a whole different topic.

1 CHAIRMAN BABCOCK: Okay. Ralph.

2 MR. DUGGINS: Well, I think we ought to
3 decide whether we're in favor of use of -- of allowing
4 Rule 11 agreements by any means other than an actual
5 physical signature. That was my problem with the
6 proposal, and I do think the rule is now ambiguous because
7 in Rule 19a, as Richard points out, we use the word
8 "handwritten signature" and "digitized signature" and
9 throughout the rules there is the word "sign" and
10 "signature." I mean, I think this process is great, but
11 it's created confusion about what is and is not a
12 signature.

13 CHAIRMAN BABCOCK: Yeah. So you voted
14 against it because you want to leave Rule 11 the way it
15 is?

16 MR. DUGGINS: I think it ought to be
17 clarified and be limited to writings actually signed in
18 the traditional Jan Patterson sense.

19 CHAIRMAN BABCOCK: Wet --

20 MR. DUGGINS: Wet signatures, yes.

21 HONORABLE JAN PATTERSON: Or with carbon
22 paper. I'm just kidding.

23 CHAIRMAN BABCOCK: Okay. I'm told, by the
24 way, anybody who hasn't gotten their food is in danger of
25 not getting it because they're --

1 MR. ORSINGER: We better have a recess then.

2 CHAIRMAN BABCOCK: So I think maybe now is a
3 good time to let everybody who has got food finish eating
4 and those of us who haven't to go get it and eat.

5 MR. DUGGINS: Fight over it.

6 CHAIRMAN BABCOCK: So given our schedule,
7 what that means is we'll be back at back at 3:30 to start
8 up again; and the question I have for Pam is, Pam, if we
9 switch over to your topic, which really is time sensitive,
10 we need to get that done this meeting, could we finish
11 that by 5:00 o'clock? Or it looks to me like it's not
12 very controversial. Your subcommittee did great work on
13 it.

14 MS. BARON: I think we can, but I haven't
15 heard input from other people outside the subcommittee
16 other than from district clerks.

17 CHAIRMAN BABCOCK: Well, this way, that is
18 the most time sensitive thing we're doing. We're going to
19 spend a lot of time talking about our current topic, so I
20 think at 3:30, Pam, why don't we take up your
21 subcommittee's, which is the agenda Item No. 5 on the
22 agenda, retention and disposition of exhibits and
23 deposition transcripts.

24 MS. BARON: And if we do have other clerks
25 still here then they may want to come back.

1 CHAIRMAN BABCOCK: Right. So let's do that,
2 and then as soon as we're finished with that we'll hop
3 back to the information technology issue. Okay.

4 HONORABLE JAN PATTERSON: We're adjourning
5 now until after the ceremony?

6 CHAIRMAN BABCOCK: Yeah. We'll be in recess
7 until 3:30.

8 (Recess from 1:06 p.m. to 3:43 p.m.)

9 CHAIRMAN BABCOCK: Okay. We're back on the
10 record. Everybody outside has been notified that we're
11 back at work.

12 MR. LOW: Let's do something fast.

13 HONORABLE TOM GRAY: Pete wanted me to make
14 a motion that Rule 11 be left alone, and I was going to
15 second it.

16 CHAIRMAN BABCOCK: That's probably passed.

17 HONORABLE TOM GRAY: Oh, okay.

18 CHAIRMAN BABCOCK: We're going to move on to
19 Pam Baron's topic right now, retention and disposition of
20 exhibits and deposition transcripts. And, Pam, why don't
21 you -- hopefully this is not controversial, but Pam's
22 subcommittee has done some great work on it, so let us
23 know.

24 MS. BARON: Okay. You should have in front
25 of you a report from the subcommittee dated December 21st

1 together with an appendix to the report as well as a
2 letter dated August 11th, 2004, from Lisa Hobbs, rules
3 attorney, to Charles Babcock. All of these address issues
4 relating to retention and disposition of exhibits and
5 depositions in civil cases, and I want to start by
6 emphasizing that we're only talking about civil cases and
7 we're only talking about exhibits and depositions. We're
8 not talking about criminal cases, and we're not talking
9 about materials in the main court file like pleadings.

10 We were referred a letter from Charles
11 Bacarisse, who is the district clerk of Harris County, who
12 has raised his concerns and problems that they are
13 currently having with retention and disposition of
14 exhibits, and basically they are twofold. The first is
15 the cumbersome, expensive cost of notification by the
16 clerk 30 days prior to any disposition of exhibits and
17 depositions; and the second is the ongoing problem of
18 storage of oversized exhibits and depositions.

19 Our subcommittee met and considered the
20 letter. We had an excellent meeting. We had Stephen
21 Yelenosky, new trial judge. Bonnie Wolbrueck was there.
22 She's sorry she could not be here this afternoon. She had
23 a family medical issue come up, who is clerk of the
24 district court of Williamson County, which is one of the
25 fastest growing counties in the state. Lisa Hobbs, our

1 rules attorney, was there and did some excellent
2 background research for us. Robert Valadez, a trial
3 attorney out of San Antonio, and then I was there as an
4 appellate lawyer.

5 We identified the issues: notice, storage,
6 and then also retention; and I'd just like to go through
7 those in order. We were asked to report back with a
8 proposal on just the notice question at this time, but we
9 did have preliminary discussions on the other two issues.
10 The current rules are Rules 14b and Rule 191.4(e), which
11 basically direct the clerk to retain and expose of the
12 exhibits in accordance with whatever the Supreme Court
13 orders. If you go to the second page of the memo we've
14 set out what the current miscellaneous order from the
15 Texas Supreme Court is as relating to these, and basically
16 the two orders are identical except one says "exhibits"
17 and one says "depositions."

18 The first paragraph is sort of an
19 introductory paragraph. The second paragraph sets out a
20 time frame, and the time frame is basically one year after
21 final judgment in a case with no appeal, two years in a
22 case after final judgment with no appeal if service is by
23 publication, and, finally, after the mandate issues in a
24 case in which there is an appeal and all issues and
25 parties are finally disposed at that time.

1 The rule then provides that the clerk has to
2 get individual notice prior to disposition of exhibits and
3 depositions. In fact, that permits the parties 30 days to
4 withdraw and has a fairly complicated scheme for deciding
5 if there is a fight over the depositions and exhibits who
6 gets them and puts the burden on the clerk to make extra
7 copies and charge people and so on and so forth.

8 The experience of the district clerks has
9 been one of probably individual notice. The notice is
10 given obviously long after the case has gone to final
11 judgment, and many of the notices come back undeliverable
12 because attorneys have moved in the interim, or attorneys
13 will call having no recollection of what the case was
14 about, and there are a few situations in which they
15 actually get picked up.

16 Storage of exhibits, what Charles Bacarisse
17 said, they have an estimated 3.5 million case files, which
18 we're not dealing with, over a hundred thousand civil
19 exhibits, and 19,000 depositions that they are currently
20 storing; and they range from the blow-up boards to
21 photographs, to drums, automobile parts, and so on.

22 Bonnie Wolbrueck also confirmed the
23 experience of the Harris County District Court is the same
24 in Williamson County where these notices do come back or
25 attorneys have no recollection or rarely claim exhibits

1 and depositions one to two years after a case has gone to
2 final judgment. What the Harris County district clerk has
3 requested on occasion is dispensation from the Supreme
4 Court to do notice by publication in the the Bar Journal
5 that they are fixing to destroy exhibits and depositions,
6 and the Supreme Court has twice granted a special order to
7 permit that to happen, and we did review the actual notice
8 that was published in the State Bar Journal, and it's a
9 generic notice that does not identify particular cause
10 numbers, and we kind of discussed what the merits of that
11 kind of notice would be as opposed to -- which really puts
12 notice whenever the clerk happens to get around to
13 publishing it in the Bar Journal as opposed to having a
14 set rule in all cases where everybody knows what the date
15 is that the clerk can begin to dispose of exhibits and
16 depositions.

17 We also discussed a little bit about who
18 should have the burden of claiming them, whether it should
19 be the burden on the clerk to tell everybody "come and get
20 it" or whether the attorney should be marking this on
21 their own tickler system and come forward and claim them
22 within the time as long as they know what the time is well
23 in advance. We talked about the possibility of notice in,
24 for example, the postcard or the notice of the judgment
25 which would say, "Oh, by the way, 30 days after one of

1 these three events we can begin to get rid of exhibits and
2 depositions." We didn't think that that notice would add
3 anything more than if we had a very clear Supreme Court
4 order and rule that said a set time that could be measured
5 in all cases uniformly instead of being dependent on
6 whenever the clerk happened to give notice.

7 We looked at the experience of the Federal
8 courts. The way it works in the district courts in Texas
9 is that each court by local rule determines how exhibits
10 and depositions will be retained and disposed of. We
11 found several of these rules to be useful in that they did
12 put the burden on the parties to come forward in a set
13 time to claim exhibits and depositions, after which time a
14 clerk would be able to dispose as the clerk saw fit.

15 And basically after this discussion the
16 committee recommends that either the standing order or the
17 two rules be amended to adopt an approach similar to that
18 of the Federal district courts which sets a time certain
19 following the date a case becomes final by which parties
20 must withdraw exhibits and depositions or the clerk may
21 dispose of them.

22 We then discussed how do we make this change
23 if we want to do it, and basically -- I may need you to
24 help me -- but the archives, State Library and Archives
25 sets a retention schedule, and the retention schedule

1 currently embraces what the Supreme Court standing orders
2 now say, and they've indicated that they would revise that
3 potential order to reflect whatever this committee did.

4 Then we discussed about whether it be would
5 be better to have it in the rule or in the standing order,
6 and we were given to -- given the impression that the
7 Court was under some time constraints and wanted to move
8 forward quickly, which would suggest that an amendment to
9 a standing order might be a good idea, if we could publish
10 that, test to see whether or not it was working, and at
11 that point it would be nice to see it in a rule because we
12 think the rule is more accessible and easier to find for
13 the parties so that they can mark their calendars to know
14 when exhibits and depositions must be withdrawn by.

15 We also in connection with publication would
16 want to see the district clerks post notice on their
17 website that this is the way the standing order would work
18 in all cases and also maybe post them up in their offices,
19 but we did not want to include that in the standing order
20 because we didn't want somebody to say, "Well, you didn't
21 comply with the order, therefore, you couldn't, you know,
22 proceed with my exhibits."

23 So in a minute, we did actually take the
24 existing standing orders and mark them up with suggested
25 changes, and I guess in a minute we'll go through that

1 language. We did make one other kind of set of changes,
2 which was that we really thought that the clerk should not
3 be the the arbiter of disputes over ownership of exhibits
4 and depositions. If the two parties come in, the clerk
5 shouldn't have to settle that. What we did say is that
6 the party that offered would be the one that withdrew it
7 and did not place a burden on the clerk to make copies or
8 photographs or videorecording tapes of whatever had been
9 submitted, but to put that burden on the parties; and with
10 all of this the rule provides that, of course, you can
11 apply to the court and get something else different to
12 happen if you think exhibits or depositions need to be
13 retained longer. If you think a nonoffering party would
14 like to to have withdrawal of the exhibits then you can
15 also move for that, whatever, but there is flexibility in
16 the rule.

17 CHAIRMAN BABCOCK: Pam, where is it that --
18 because that's one of the things that I wondered about, is
19 if you have a case where somebody, one of the parties,
20 doesn't want the exhibits removed and it may be even that
21 the court itself thinks that this case is of historical
22 importance, a Brown vs. Board of Education type of case,
23 and the exhibits and everything relating to the case ought
24 to be permanently retained, what mechanism is there to do
25 that?

1 MS. BARON: Well, there are actually a
2 couple because, one, in the rule I think we say that you
3 can apply to the court and get this changed a little bit;
4 but second is the court has an independent duty -- the
5 clerk has an independent duty to evaluate items for
6 historical importance before they get rid of them under
7 the -- there is a statute on that, right, Lisa?

8 MS. HOBBS: Government Code provision.

9 MS. BARON: Government Code provision that
10 requires a review for historical importance prior to
11 destruction.

12 CHAIRMAN BABCOCK: And where -- so that
13 covers the judge, and where does the party have authority
14 to say, "Keep this stuff"?

15 HONORABLE STEPHEN YELENOSKY: I think it
16 says "unless otherwise directed by the court."

17 CHAIRMAN BABCOCK: So that implies that
18 somebody can move.

19 MS. BARON: Yes. Yes.

20 CHAIRMAN BABCOCK: Okay. Great. Thank you.

21 HONORABLE JAN PATTERSON: Pam, I have a
22 question along those lines. If a party can withdraw the
23 exhibits it tendered, what happens if the other party
24 doesn't come forward and the 30 days expires but one party
25 wants all the exhibits whether they tendered them or not?

1 Aren't they entitled to --

2 MS. BARON: I think they would have to get
3 an order from the court.

4 HONORABLE JAN PATTERSON: So you can only
5 get the exhibits that you offered.

6 MS. BARON: Yes. So that the clerk doesn't
7 have to resolve disputes among parties about who gets
8 exhibits. If it's Plaintiff's Exhibit 1 and the
9 plaintiff's attorney show up, they get it. If it's
10 Defendant's Exhibit 1 or whatever, it would work like
11 that; and if that's a problem, the parties need to go to
12 the trial judge to work it out instead of making the clerk
13 trying to work out those problems.

14 HONORABLE STEPHEN YELENOSKY: We even talked
15 about, you know, if the plaintiff had introduced the
16 defendant's diamond ring then the plaintiff could withdraw
17 it; but, of course, the ownership issue between the
18 plaintiff and defendant could live on for another battle,
19 I guess.

20 MS. BARON: Right. I guess that's the next
21 lawsuit. Then we talked about storage of bulky exhibits,
22 and we don't have a proposal to bring forth to you at this
23 time, but we did have some interesting ideas on this, and
24 it kind of ties in with some of the stuff that we have
25 been talking about earlier in that courts are increasingly

1 imaging the materials that they have in front of them, and
2 obviously it's very hard to image an oversized board or a
3 piece of equipment.

4 The way several of the Federal district
5 courts in Texas work on the oversized exhibit issue is
6 that they require the parties before the trial is over to
7 submit file-sized reproductions, copies or photographs,
8 submit those; and when they go home they take their
9 exhibits home unless the Court issues a special order
10 where the exhibits need to be preserved at the courthouse
11 for some reason; but we're trying to get in a situation
12 where most things at the courthouse can be imaged and the
13 clerks stop being warehouses for 55,000 drums of oil.

14 There are some issues that kind of come up
15 from that. In some appeals you do want to take the
16 original exhibits up with you. We started exploring those
17 and we realized we were way beyond our island of 1 through
18 14c at this point and wanted to come back to the committee
19 because we think it would require changes at a minimum to
20 Texas Rule of Civil Procedure 75b and the appellate rule
21 dealing with exhibits, transmission of original exhibits.
22 We have to work out whether one party would be kind of
23 bailiff for the exhibit and be responsible for getting it
24 up to the appellate court or whether it would be left in
25 the trial court to bring up. There are a bunch of issues

1 that would need to be worked out, but if that's something
2 people generally think is a good idea, which is to replace
3 bulky items at the trial instead of two and a half years
4 later after the case is over and gone to final judgment,
5 it would be a great relief for the clerks.

6 We have run this proposal by the Harris
7 County district clerk, who was very pleased with it in
8 response to their concerns. Bonnie Wolbrueck thought it
9 was a useful proposal. Do you want to discuss now or do
10 you want us to present the standing order changes?

11 CHAIRMAN BABCOCK: I think we ought to go to
12 the standing order changes, and we can have our discussion
13 surround that language that you proposed.

14 MS. BARON: Okay. Basically they are the
15 last two pages of the memo before you get to the appendix.
16 There is a standing order currently for each of the two
17 rules, one dealing with exhibits and one dealing with
18 depositions, and we've made changes that are essentially
19 identical to each, and I'll just go through the first one,
20 and the second one I think should pretty much follow.

21 We discussed the time frame, which is the
22 one year, two year, or after appeal; and none of the
23 clerks' comments complained about the retention period;
24 and there didn't seem to be any great problem with using
25 this as a retention period, so we decided everybody

1 understands it so we're not going to mess with it. In the
2 following paragraph what we did is we took out the 30-day
3 written notice, and there is a typo in the struck through
4 part. I'm sorry about that. It should be "30 days," not
5 "30 dates."

6 HONORABLE STEPHEN YELENOSKY: That was
7 another discussion.

8 MS. BARON: Right. And instead of requiring
9 individual notice in cases, we say that you have to
10 withdraw within 30 days of the later of the case becoming
11 subject to the rule, which is the one year, two year, or
12 mandate issue rule which is in the paragraph before that,
13 or the date this order is published in the Texas Bar
14 Journal, because we thought we needed to give people a
15 starting point for all older cases so that the order would
16 be in the Bar Journal and people would have a run on the
17 clerks to get their exhibits and depositions for the next
18 30 days, and then we kind of get back to business as
19 usual. Eventually obviously the second part of the order
20 would become useless because 30 days later you wouldn't
21 need it.

22 But then we provide that the clerk, unless
23 otherwise directed by the court, may then go and do
24 whatever it wants with the exhibits, subject, of course,
25 to all these other laws that relate to that. And then we

1 have eliminated provisions that relate to the clerk being
2 the arbiter and the copier of exhibits and depositions,
3 and what you'll see is in the underlined part the party
4 who offered the exhibit must remove it within 30 days or
5 the clerk may do whatever it wants, and then the part on
6 depositions and deposition excerpts is basically the same
7 provision except it says "depositions" instead of
8 "exhibits."

9 MR. LOW: Luke? (sic)

10 CHAIRMAN BABCOCK: Yeah, Buddy.

11 MR. LOW: I hate to raise a question we had
12 before, but when you say "within two years after
13 judgment," and you know we've got in the law or Richard
14 has convinced me there can be more than one judgment and
15 is that final judgment, and I remember we had two sessions
16 we couldn't define final judgment. The Federal court --

17 CHAIRMAN BABCOCK: Sarah is still working on
18 it.

19 MR. LOW: The Federal court in the Western
20 District put "after final disposition," so there may be a
21 judgment and the court understands it is not a final
22 judgment, and there are other parties out there, and the
23 thing might linger on the docket for, you know, two years
24 or something. How -- did you discuss using the term
25 "judgment" or "final disposition" on that because --

1 HONORABLE STEPHEN YELENOSKY: We were
2 looking around for Bonnie because, of course, the question
3 would be how are the clerks going to know when they reach
4 that point, so we need something that's pretty functional.

5 MR. LOW: Right. I understand, and maybe
6 that ties into something either. I don't remember whether
7 we did or just finally gave up defining final judgment.

8 MS. BARON: I think we never resolved that
9 issue.

10 MR. LOW: And so that makes it hard to tie
11 in when we haven't really defined what the finish line is.
12 We don't know when the race is over.

13 HONORABLE STEPHEN YELENOSKY: Well, if we
14 don't then there are a lot bigger repercussions than the
15 exhibits thrown away.

16 MR. LOW: No, there sure are, but I can't
17 take them all on at once. Right now I'm just taking them
18 one at a time.

19 MS. BARON: Do you have a recommendation?

20 MR. LOW: No, I haven't. As usual I don't
21 have an answer. I've got a problem.

22 CHAIRMAN BABCOCK: Justice Gray.

23 HONORABLE TOM GRAY: I'll offer a
24 recommendation, and it's a similar issue to what we have
25 in the court of appeals of how do we dispose of the case

1 files, and I realize you-all are dealing only with
2 exhibits, and I'll limit mine really to the exhibits as
3 opposed to the discovery document, but I think it would be
4 the same.

5 At the time we have a time period that is
6 triggered from the date of the issuance of the mandate
7 that we can start -- or that we are compelled, actually,
8 to notify; and who we notify is actually the district
9 clerk or the court clerk that sent us the documents in the
10 first instance that we're about to dispose of them and if
11 there's anything in our file that they want under the
12 county requirements for -- county and state requirements
13 for keeping exhibits, that they need to tell us or we're
14 going to throw them away.

15 And we send -- that's a separately required
16 notice, but we have actually incorporated that into the
17 transmittal letter of the mandate. Buddy is concerned
18 about what is the triggering event on this, i.e., the
19 final judgment; and under 306a(3), which I know you said
20 you considered, there is a requirement that the clerk send
21 a notice of judgment; and it seemed to me at that point
22 you've identified something that somebody thinks is a
23 final event that are going to have consequences flowing
24 from it; and I guess my preference would be to see the --
25 basically the exact same language of when this stuff is

1 going to get thrown away incorporated as part of the
2 notice requirement that goes out with the judgment under
3 306.

4 MR. LOW: See, if you give a notice at least
5 they can't complain. If somebody says, no, it's not a
6 final judgment, you know, they're still there, well then,
7 you know, forever hold your peace, but -- if you give a
8 notice, but see, yours ties it into notice and the clerk
9 gives notice to everybody that it's a final judgment or
10 something, but I just worry about it without that when
11 we're not sure what's final judgment.

12 CHAIRMAN BABCOCK: Frank, then Bill, then
13 Justice Duncan.

14 MR. GILSTRAP: I have a little problem with
15 the time period. One year certainly seems like enough
16 after the case has been tried on the merits, but what if
17 it's a default judgment? I mean, they can come back in
18 after three years I think with a bill of review.

19 MR. ORSINGER: Four years. Four years under
20 the review.

21 MR. GILSTRAP: Four years. Okay. Four
22 years. There's not a lot of exhibits in default
23 judgments, but there may be some, and I'm just wondering
24 what happens if the person files a bill of review and the
25 exhibits have been destroyed.

1 MR. ORSINGER: But the bill of review really
2 doesn't depend on the record that was made during the
3 first trial, so if you're going to file a bill of review
4 you have to show fraud and inducement. Well, maybe fraud
5 does have something to do with some of the papers that
6 were filed.

7 PROFESSOR DORSANEO: I don't think I would
8 worry about building in bill of review and just put the
9 finality --

10 MR. GILSTRAP: Until you have one.

11 PROFESSOR DORSANEO: The finality language
12 in this order is really in this second paragraph. I mean,
13 to say final disposition the way the Federal rules do, I
14 mean, that's a terrible way to do it, because this
15 explains what we're talking about. It talks about, you
16 know, cases -- and I don't even know why it's so limited,
17 those cases where judgment is rendered on service by
18 publication, all other cases judgment has been signed for
19 one year.

20 MR. GILSTRAP: Well, the two years is how
21 long you have to file a motion for new trial.

22 PROFESSOR DORSANEO: Yeah, motion for new
23 trial, citation by publication. I probably would have
24 put --

25 MR. GILSTRAP: That cuts it kind of close in

1 my opinion. I mean, you know, the day your motion for new
2 trial is due is the day they destroy the exhibits.

3 PROFESSOR DORSANEO: That does cut it a
4 little bit close, but what this is key to is for when the
5 last step would -- when you would be finished and there
6 would be no more steps available to be taken, and I think
7 that one may be a little bit on the short side, 30 days
8 too short.

9 HONORABLE STEPHEN YELENOSKY: Why is that
10 short?

11 PROFESSOR DORSANEO: Well, because --

12 MS. BARON: Well, you have 30 days after
13 that date. You have 30 days after.

14 PROFESSOR DORSANEO: "Which no motion for
15 new trial was filed within two years after the judgment
16 was signed." It's two years and 30 days after the
17 judgment is signed really.

18 MS. BARON: Yes.

19 HONORABLE STEPHEN YELENOSKY: Yes.

20 CHAIRMAN BABCOCK: Justice Duncan.

21 HONORABLE SARAH DUNCAN: Not all clerks --

22 PROFESSOR DORSANEO: No, it isn't.

23 HONORABLE SARAH DUNCAN: -- send out notices
24 of judgment.

25 HONORABLE STEPHEN YELENOSKY: Yeah, the

1 second paragraph.

2 CHAIRMAN BABCOCK: Hang on.

3 MR. LOW: What's that?

4 CHAIRMAN BABCOCK: What did you say?

5 HONORABLE SARAH DUNCAN: Not all clerks send
6 out --

7 PROFESSOR DORSANEO: Okay, I see.

8 HONORABLE SARAH DUNCAN: -- notices of
9 judgment.

10 CHAIRMAN BABCOCK: What did you say?

11 HONORABLE SARAH DUNCAN: Not all clerks send
12 out notices of judgment.

13 CHAIRMAN BABCOCK: Everybody get that?

14 MS. BARON: No, I can't hear.

15 HONORABLE SARAH DUNCAN: Not all clerks have
16 been sending out notices of judgment; and, two, I know I
17 sound like a broken record, but I really do think this
18 brings up the need for a closing memorandum again on a
19 case. We've had all sorts of problems with clerks sending
20 out notices of things that are final judgment that aren't
21 and not sending out notices on things that are final
22 judgments, so it's just all part of the same problem, and
23 I think Buddy is right. I think we're right back up to
24 it.

25 MR. LOW: We can't go much further 'til you

1 know where the race ends.

2 CHAIRMAN BABCOCK: Judge Bland.

3 HONORABLE JANE BLAND: Could you say
4 something like "the judgment or order that disposes of all
5 claims and all parties," like they did in Harcon.

6 CHAIRMAN BABCOCK: How does that strike
7 everybody?

8 HONORABLE JANE BLAND: So it wouldn't be the
9 final judgment, but it would be the judgment or order that
10 finally disposes of all claims and all parties.

11 CHAIRMAN BABCOCK: What do you think of
12 that, Pam?

13 MS. BARON: Well, I just don't know how the
14 clerk would know.

15 HONORABLE STEPHEN YELENOSKY: Yeah, we need
16 a clerk.

17 HONORABLE JANE BLAND: When they see you
18 dispose of a party, that makes it the end. That's a final
19 disposition. Well, we should get a clerk. I shouldn't --

20 HONORABLE SARAH DUNCAN: But those are
21 judicial determinations which we're asking the clerks to
22 make, which I think is terribly unfair.

23 MR. LOW: Didn't we, Chip, at one time come
24 to saying that -- and I don't know whether we voted on it
25 or not -- that entitle a document "final judgment" and

1 then, you know, if it's not, somebody better let everybody
2 know, you know?

3 CHAIRMAN BABCOCK: Yeah. We had many
4 discussions about it. I don't think the Court other than
5 through case law has acted on it. I may be wrong about
6 that.

7 MR. LOW: I mean, it's something the clerk
8 has to be able to see so the clerk doesn't -- not that the
9 clerk doesn't know as much law as anybody else, but so
10 that that definite thing triggers it.

11 CHAIRMAN BABCOCK: Frank, and then we have a
12 clerk.

13 MR. GILSTRAP: We fought a long battle on
14 that, and we did nothing, and the Court handed down a
15 ruling against Harcon and basically as far as I'm
16 concerned solved the problem of finality. That's not an
17 issue anymore, and we should not go back and revisit that.
18 The issue here is not whether the judgment is final.

19 HONORABLE SARAH DUNCAN: Tell my 20-year
20 staff attorney that. She would love to hear it.

21 MR. GILSTRAP: The issue here is whether or
22 not -- is whether the clerk knows it's final and that's a
23 different question of whether -- we shouldn't go back and
24 tamper with finality of judgments. We might want to have
25 some way to notify the clerk. That's a different

1 question.

2 MR. LOW: The clerk is the one going to have
3 to make that decision, and so if the person that's going
4 to destroy the records doesn't know whether it's final, it
5 doesn't make any difference whether the rest of the world
6 knows it or not. They're not going to destroy the
7 documents.

8 MR. GILSTRAP: Or they may destroy it
9 quickly. That's the problem.

10 CHAIRMAN BABCOCK: Andy and then Richard.

11 MR. HARWELL: I don't really have the
12 problem that I guess the district clerks have with the
13 exhibits and that type of thing, but I can tell you that
14 my predecessor just retained documents forever; and when I
15 came in I activated our retention schedule, which in
16 criminal is five years from last disposition, is the way
17 it's -- that we handle it in McClennan County, so I don't
18 know if that helps out or not.

19 CHAIRMAN BABCOCK: Richard.

20 MR. ORSINGER: Revisiting the discussion we
21 had when we were dealing with finality, one of the reasons
22 why it's probably impossible for the clerk to do this is
23 because sometimes parties are dismissed because the
24 pleadings are amended and they're just dropped and there's
25 no order signed by anybody that takes them out of the

1 lawsuit and, in fact, typically on the computer records
2 they don't change the names of the parties. That's based
3 on some earlier stage in the lawsuit like the original
4 petition or something. So it would be very difficult in a
5 multi-party case where some people are out on special
6 exceptions, some are out on summary judgment, some are out
7 on amended pleadings and then you can go and have a trial.

8 I think it would be impossible for a clerk
9 to figure that out, and we -- I think since we're probably
10 dealing with cases that are real old and nobody will care,
11 let's put the time out there long enough that it's
12 probably not going to harm anybody and then just say use
13 the judgment, final or not, and then once you throw the
14 papers away then no one will know, right? But let's make
15 that date out long enough that no one reasonably will be
16 harmed and then forget it.

17 MS. BARON: How long do you think that would
18 be?

19 MR. ORSINGER: Well, I mean, I would say a
20 year after the appeal comes back down, after the appeal is
21 affirmed, or two to three years after the judgment is
22 signed. Surely stuff will surface by then.

23 MR. LOW: What about family law cases? You
24 were talking about how long they may be pending. Do you
25 think we should make an exception?

1 MR. ORSINGER: You know, I don't know what
2 we're planning to throw away under this rule, but as long
3 as kids are minors, you'll be modifying the same -- you'll
4 be modifying a succession of court orders in the same
5 court, and we're not ever going to throw the judgments
6 away, right?

7 MS. BARON: No. We're not talking about any
8 part of the file. We're only talking about exhibits and
9 depositions.

10 MR. LOW: Exhibits and depositions and so
11 forth.

12 MR. ORSINGER: Yeah. I think I'm about to
13 go to trial on Monday and there's a huge question there;
14 but, you know, there's a res judicata bar on modification
15 cases; and you're not supposed to go back into the
16 evidence that existed before the decree. But there is a
17 recognized exception that the Supreme Court recognized
18 many years ago that if you can show similar behavior since
19 the decree, that opens the door to show similar behavior
20 from before the decree, and so if that exception exists
21 and applies in your case you are permitted to put on
22 evidence from before.

23 MR. GILSTRAP: Like the videotape they're
24 going to throw away.

25 MR. ORSINGER: Well, I mean, likelihood it's

1 going to be testimony of somebody about bad acts. You
2 know, maybe it's a deposition. But I'm not suggesting
3 that we ought to keep cases alive for 18 years plus two
4 just because they're a modification case. I think that
5 reasonably that stuff should be thrown away at some point,
6 but that is a special instance. When you're modifying an
7 order relating to a child, there may be a lawful reason
8 for you to go back and find out what the circumstances
9 were in the past.

10 MS. BARON: But you can also keep copies.

11 MR. ORSINGER: Sure, and I do.

12 MS. BARON: There's nothing that says you
13 can't keep copies of documents that have been admitted.

14 MR. ORSINGER: I do, by the way.

15 HONORABLE JANE BLAND: And you can get these
16 copies.

17 MS. BARON: Right.

18 HONORABLE JANE BLAND: Right? I mean,
19 aren't we contemplating that the offering party can just
20 take these exhibits back?

21 MR. ORSINGER: Sure. But we're going to
22 have a big flush here 30 days after this hits the Bar
23 Journal and about one percent of the people are going to
24 come get their stuff and then we're just going to have a
25 big bonfire and burn everything.

1 MS. BARON: Well, you're assuming that
2 clerks are -- just have lots of time to do nothing but
3 purge, which they don't.

4 MR. ORSINGER: All I ever hear about is how
5 bad they want to get rid of their records. I mean, gosh,
6 if we give them a chance to do it --

7 MS. BARON: They do, and it's also a very
8 time-consuming process for them.

9 MR. ORSINGER: Oh, okay. Well, let's tell
10 them to start with the oldest ones first then.

11 MS. BARON: All right.

12 CHAIRMAN BABCOCK: Okay. So where are we?
13 Are we going to leave the language as -- I mean, this is
14 in the current order, isn't it?

15 MS. BARON: Yes, it is.

16 HONORABLE STEPHEN YELENOSKY: The only
17 difference is once -- the clerk still has to figure out
18 what we're saying the clerk can't figure out. The only
19 difference is once the clerk does that, he or she sends a
20 notice, and that's what Buddy is saying.

21 CHAIRMAN BABCOCK: Yeah, Buddy's point is,
22 you know, it's fine as long as there's notice because if
23 the clerk makes a mistake then if you get notice you'll be
24 able to cure it; but if there's only notice by publication
25 in the Bar Journal, you're likely going to miss it; and if

1 the clerk makes a mistakes, that's bad news. So Buddy's
2 argument is to put an actual notice provision back into
3 the --

4 MR. LOW: Or have a definition where the
5 clerk -- I mean, it's just definite, and it might be
6 easier to put in the notice.

7 CHAIRMAN BABCOCK: And the notice is what
8 is -- Pam, is what is irritating or troubling the clerks,
9 right?

10 MS. BARON: It's a problem for them, yes.

11 CHAIRMAN BABCOCK: Yeah. That's the problem
12 we're supposed to be fixing. Justice Gray.

13 HONORABLE TOM GRAY: Which comes back to my
14 argument to put it in the notice that they're supposed to
15 send under 306a; and as Justice Duncan pointed out, yes,
16 maybe some don't send that notice, but they can't throw
17 away the documents until they do send it. So maybe it
18 will actually give them an incentive to send the notice
19 that they're supposed to do.

20 HONORABLE SARAH DUNCAN: That's true.

21 HONORABLE TOM GRAY: So at least we would
22 have -- arguably have a piece of paper sent to the party
23 on their case, and you-all may or may not find this hard
24 to believe, but people don't always read the Bar Journals,
25 and even though it's in one of the rules they don't know

1 that it's in a rule until it comes to them bright line in
2 their face on a particular postcard or, you know,
3 envelope. It's just they will get away from you.

4 CHAIRMAN BABCOCK: Yep. Pam, how do you
5 think that that would be received by the clerks, if there
6 was a 306a(3) notice?

7 HONORABLE STEPHEN YELENOSKY: But that's
8 going to come out at the time of the issuance of the
9 judgment.

10 CHAIRMAN BABCOCK: Yeah.

11 HONORABLE STEPHEN YELENOSKY: And is it
12 going to tell them, "Okay, we think this is the final
13 final judgment that disposes of everything," or is it just
14 going to say "This is a judgment"?

15 HONORABLE TOM GRAY: Any time they think
16 they have to send the 306 notice, they ought to send a
17 notice under this concept of throwing away those exhibits.

18 HONORABLE STEPHEN YELENOSKY: Okay.

19 CHAIRMAN BABCOCK: So there's an added
20 sentence in the postcard that says, "By the way, we're
21 going to ditch your exhibits. See standing order" --

22 HONORABLE STEPHEN YELENOSKY: In two years.

23 MS. BARON: Well, I think it would say,
24 "Exhibits and depositions on file with the court are
25 subject to disposition under X rule or X order." I'm not

1 sure how useful that's going to be. Bonnie, who
2 unfortunately is not here, when we suggested this as an
3 idea really didn't like it, and I can't tell you why.

4 CHAIRMAN BABCOCK: Well, it cures Buddy's
5 problem, doesn't it, Buddy?

6 MR. LOW: Yeah.

7 CHAIRMAN BABCOCK: Yeah. That cures Buddy's
8 problem, but Bonnie may -- Bonnie is going to be back
9 tomorrow.

10 MR. LOW: Don't tell her I was the one.

11 CHAIRMAN BABCOCK: Bill.

12 PROFESSOR DORSANEO: Does Bonnie think
13 clerks can figure how this rule works? I'm looking at it
14 saying now when is this publication?

15 MS. BARON: They're doing it now as we
16 speak.

17 CHAIRMAN BABCOCK: This is an existing rule.

18 MS. BARON: They have been using it since
19 1988, I think was when this order was adopted.

20 CHAIRMAN BABCOCK: The only thing we're
21 changing, Bill, is the notice.

22 MR. LOW: Right.

23 CHAIRMAN BABCOCK: And this is the existing
24 rule.

25 MR. GILSTRAP: Well, let me say, we could do

1 better with paragraph Roman II in the second paragraph. I
2 mean, we could certainly leave out the reference to
3 whether an appeal has been perfected. Technically that
4 paragraph doesn't even apply in a case in which the notice
5 of appeal was filed late, because the appeal wasn't
6 perfected, ever. And yet, you know, you obviously want to
7 retain it. I mean, maybe we don't want to mess with that,
8 but I think we could certainly make it easier for the
9 clerk to read the second -- that clause two.

10 CHAIRMAN BABCOCK: Bonnie did not raise an
11 issue with this second paragraph; is that right?

12 MS. BARON: No. Nor did the Harris County
13 district clerk.

14 CHAIRMAN BABCOCK: Nor what?

15 MS. BARON: Nor did -- yeah, she did not,
16 and the Harris County district clerk also did not raise a
17 problem on this paragraph.

18 CHAIRMAN BABCOCK: If the clerk is required,
19 even though they don't all do it, to send a notice under
20 306, and that's mandatory, right?

21 PROFESSOR DORSANEO: Yes. 306a.

22 CHAIRMAN BABCOCK: 306a, that's mandatory,
23 so they're supposed to be doing it. They could hardly
24 gripe about doing what they're supposed to be doing. Why
25 not just add a sentence in there that says, "Your exhibits

1 and depositions are subject to destruction pursuant to
2 Supreme Court Order No. 306" or whatever it may be.

3 MS. BARON: Because we have all those cases
4 sitting there right now that are way overripe for which
5 that was not done and which the Harris County district
6 clerk has done exactly just this by notice of publication
7 in the Bar Journal and then gone off and destroyed them
8 apparently without incident that we've heard about, but I
9 think part of it is to kind of shed some of these older
10 cases so that they don't have the burden of sending out
11 notices that come back.

12 CHAIRMAN BABCOCK: Buddy, then Richard.

13 MR. LOW: There -- and I guess still is a
14 rule that, you know, where out of town lawyers used to
15 send a postcard, and they would have to notify you or
16 something. I guess we could even put something in there
17 that when you -- no, because that would just be the person
18 filing the suit that you had to put a postcard and so that
19 they would -- that the clerk would hold and mail, but they
20 wouldn't want to do that, you know, saying that they're
21 going to dispose of it. That's a bad idea.

22 CHAIRMAN BABCOCK: Justice Hecht.

23 HONORABLE NATHAN HECHT: Do you get notice
24 in the Federal courts in Texas?

25 MS. BARON: No.

1 MR. DUGGINS: We do.

2 MR. LOW: Oh, yes, sir.

3 MS. BARON: I think you do in a few of them
4 when there's an appeal. They'll give you a 30-day notice.
5 Is that not right?

6 MR. LOW: Not in the Eastern District.

7 MR. DUGGINS: Well, in the Northern District
8 you do get a notice, and it says --

9 MS. BARON: Well, I have all those rules.
10 Let me look.

11 MR. DUGGINS: You get a postcard, or now you
12 get an e-mail that says unless you come to get them it
13 will be destroyed.

14 MS. BARON: Except that -- okay, is that the
15 Northern District?

16 MR. DUGGINS: Yes.

17 MS. BARON: "What it provides is all
18 exhibits in the custody of the court must be removed from
19 the clerk's office within 60 days after final
20 disposition." Okay. Period. So we're dealing with a
21 much shorter time frame at that point. We're not talking
22 a year or two years out.

23 PROFESSOR DORSANEO: Depends on what final
24 disposition means.

25 MS. BARON: Right. Any exhibit not removed

1 within the 60-day period may be destroyed.

2 PROFESSOR DORSANEO: So they send out an
3 e-mail because they want to be nice about it.

4 MR. LOW: I guess they do in Beaumont, too,
5 because every case I've ever had there I get an e-mail
6 saying the same thing, "Exhibits will be destroyed. You
7 can come get them."

8 CHAIRMAN BABCOCK: It's the Buddy Low rule.

9 MR. LOW: I don't know what it is.

10 MS. BARON: Well, the Southern District does
11 have a 10-day notice provision. The Eastern District does
12 not. "It says 30 days after final disposition the clerk
13 is authorized to destroy exhibits."

14 CHAIRMAN BABCOCK: Justice Hecht has got
15 another question.

16 HONORABLE NATHAN HECHT: That was really
17 prepatory to the next question, which is in this group at
18 least is there or not some expectation in the Bar that if
19 you don't go check on this at some point it may not be
20 there, or is the expectation that it's always going to be
21 there and I don't have to worry about it? 50 years goes
22 by and I'll just go back and get it.

23 MR. ORSINGER: My personal opinion is, is
24 that the lawyers don't think they will need it or they
25 would have checked it out themselves, and I get these all

1 the time, and I always send a letter to my client. Many
2 of the times I don't know what address they're at or even
3 what name their new married names are, and I've never had
4 a client say that they wanted me to go get the records.
5 So I just kind of make a judgment call is it the kind of
6 case that's likely to end up in litigation again; and if
7 it is, I'll go over and check out; and they will only let
8 me check out my exhibits. I can't check out the other
9 guy's exhibits.

10 CHAIRMAN BABCOCK: Stephen Tipps had a
11 question.

12 MR. TIPPS: I was just going to say, to echo
13 what Richard said, I have been getting those notices for
14 30 years, and I don't recall a single time when I or my
15 client thought it was necessary to go retrieve the
16 records. So it seems to me here that in terms of
17 balancing the respective interests that the interests of
18 the district clerks in being relieved of the burden of
19 caring for all these records that in all likelihood nobody
20 wants are paramount in the interest of the lawyers and the
21 clients who have let their exhibits sit over there for a
22 long time.

23 MS. BARON: I also think you have to keep in
24 mind if we get to our next idea, which is that there
25 aren't going to be so many of them because they will all

1 be on paper and they can all be imaged by the clerk so
2 that there won't be this great mass of exhibits that
3 people will be in great need to go back and get.

4 CHAIRMAN BABCOCK: Bill.

5 PROFESSOR DORSANEO: I think many clients
6 have the expectation that the documents will be available
7 either at the lawyer's office or somewhere else.

8 CHAIRMAN BABCOCK: The lawyer almost always
9 would keep copies, I would think.

10 PROFESSOR DORSANEO: Yeah.

11 HONORABLE STEPHEN YELENOSKY: If you go to
12 the next item and we adopt that, all the clerk is going to
13 have is paper, which there is not going to be anything
14 unique like a fender or a barrel of oil. It's going to be
15 a picture of a barrel of oil.

16 CHAIRMAN BABCOCK: Ralph.

17 MR. DUGGINS: Well, I think what I was
18 trying to do was give my expectation, and I think -- I
19 don't think anybody believes that the exhibits from a
20 trial, for example, in 1987 against U.S. Steel in Fort
21 Worth are still in existence, only the judgment itself.

22 MS. BARON: They might be.

23 HONORABLE STEPHEN YELENOSKY: They probably
24 are.

25 MR. DUGGINS: Pardon?

1 MS. BARON: They might be.

2 MR. DUGGINS: No, but I was just trying to
3 answer the question, do we think they're there. I don't
4 think most people reasonably think the exhibits are still
5 there.

6 MR. ORSINGER: And if they were, they
7 couldn't be found anyway.

8 HONORABLE STEPHEN YELENOSKY: Exactly.

9 CHAIRMAN BABCOCK: Buddy.

10 MR. LOW: Sometimes, like one case we had, a
11 long case, I bet there were a ton of exhibits, four
12 months. Well, the judgment became final, everything, but
13 after that then the defendant wanted to sue the insurance
14 company for coverage, and they've got, I don't know,
15 several years after that, and all these documents were
16 going to become relevant, and the insurance company is not
17 even a party to that. Now, the railroad was, so I guess
18 they could do something when they're going to, but it
19 is -- there is a situation where you may need them after
20 two years, somebody could need those exhibits, could very
21 well be important because that was a real key issue, the
22 evidence and what happened, and so it's possible. That's
23 the only case I've had where I knew that the records
24 shouldn't be destroyed.

25 CHAIRMAN BABCOCK: David Jackson, do you

1 have a comment?

2 MR. JACKSON: Yeah. I think that's the
3 disconnect, is that a lot of cases no one wants the
4 exhibits, but no one notices, and I think if the clerk
5 could send out a notice that they're going to destroy the
6 exhibits in a certain amount of time if they don't hear
7 from the lawyers, then I don't think you would have an
8 issue if the lawyers would just let them know that it's
9 okay to destroy them. I'm holding a ton of exhibits that,
10 you know, I'd like to get rid of, too, but we don't know,
11 and there's no way to really find out what the status of
12 the case is.

13 CHAIRMAN BABCOCK: Richard.

14 MR. ORSINGER: I want to comment something
15 and then propose what might be a compromise. I want to
16 comment that if you send a notice out at the time the
17 judgment is signed and the case is going up on appeal
18 that's really not a fair notice because you probably won't
19 have it in mind when that petition for rehearing on the
20 denial of the petition for review is denied three years
21 later, so I'm a little troubled that the only notice you
22 get is a notice of the signing of the judgment in the
23 trial court in those cases where there's further activity.

24 Now, if we have 10 or 50 years of
25 accumulated documents, what if we just say everything

1 that's over 10 years old, we will give one notice one time
2 in the Texas Bar Journal and then destroy it all and then
3 maybe for -- or maybe anything that's over five years old.
4 Just one notice, destroy it all, and then make you -- make
5 the clerks mail out the destruction of the more recent
6 records where it's more likely that someone might be alive
7 today that would care. I mean, if we narrowed down the
8 scope of the notices they were required to issue to say
9 things that are three years old or four years old rather
10 than everything that's in their basement and in the
11 warehouse and in the old county jail, maybe they could be
12 willing to do that and maybe we would be happy with that.

13 CHAIRMAN BABCOCK: Bill.

14 PROFESSOR DORSANEO: In one of these local
15 rules I know it talks about scanning sealed documents into
16 electronic form, and that may not be -- given 3.5 million
17 documents may not be adequate, but then again, on the
18 other hand, one wonders if this is really going to be a
19 continuing problem if things ultimately are in the not too
20 far distant future electronically filed, but I wouldn't
21 think it would make any sense at all to erase those
22 electronic files at any point. I'm assuming kind of
23 unlimited storage capacity there, but maybe --

24 MS. BARON: Yeah. In fact, Bill, my
25 understanding is in terms of retention, like there are

1 different retention schedules for different documents in
2 the file; and as a practical matter, with imaging, the
3 manpower necessary to go back and say "Oh, well, we can
4 get rid of this document and we can get rid of this
5 document" is not -- it doesn't make a lot of sense. So
6 they just end up retaining everything that's imaged
7 instead of going through, sorting through what should be
8 saved and what shouldn't, and they save everything for the
9 longest period of time that the retention schedule
10 provides. So nobody is going to go through and say, "Oh,
11 I've got this whole case imaged. Now I'm going to go dump
12 the exhibits," because that's way too costly to go back in
13 and do that. It will just stay there.

14 CHAIRMAN BABCOCK: Buddy.

15 MR. LOW: Yeah, they talk about notice in
16 the Bar Journal, but what is that notice going to say?
17 It's going to list all cases, or what is the notice in the
18 Bar Journal?

19 CHAIRMAN BABCOCK: Justice Hecht.

20 MS. BARON: It will look just like this
21 order, is what it will look like.

22 HONORABLE NATHAN HECHT: I'm still
23 interested in exploring -- it seems to me very hard to
24 argue that the government ought to pay for storing all
25 this stuff. If the parties want it, they can come and get

1 it. If one side is afraid the other side is going to lose
2 stuff then they can either have a motion in court to
3 preserve it some way, they can each get copies of it. I
4 mean, surely that can be accommodated, but it seems to me
5 that by far the stronger argument is that if anybody wants
6 this kept they need to be -- they need to go get it and
7 keep it at their own expense and not at the government's
8 expense.

9 And then if we have a cultural problem in
10 the Bar that that's not the expectation then we better
11 spend several months repeatedly trying to educate the Bar
12 that we're about to change this now. Maybe you've never
13 thought about this, but starting on X date everything
14 that's a year old or two years old or it doesn't even seem
15 to me that it matters very much if the case is on appeal
16 because you can always go down there and either check it
17 out, put it in the appellate record, move to have it
18 stored somewhere or something, but just to make it as
19 simple as possible for the clerks that after some period
20 of time it's gone unless you want it; and if you want it,
21 come get it.

22 CHAIRMAN BABCOCK: Judge Yelenosky, then
23 Judge Sullivan.

24 HONORABLE STEPHEN YELENOSKY: Well, speaking
25 of what the notice is and to the question of changing our

1 culture, one thing I suggested in our subcommittee
2 discussion was if we are going to get rid of a backlog
3 that it not just be this notice that no one is going to
4 pay attention to in the Bar Journal, that we get one of
5 these clerks -- I guess it's Bacarisse, is it -- to write
6 an article in the Bar Journal and get -- you know, give it
7 a high profile. And then going forward it could also
8 address whatever it is we're going to do going forward.

9 CHAIRMAN BABCOCK: I sense a cover story
10 with Bacarisse.

11 HONORABLE STEPHEN YELENOSKY: Bacarisse,
12 that's right.

13 HONORABLE NATHAN HECHT: The bonfire.

14 CHAIRMAN BABCOCK: Bonfire of the Harris
15 County clerk. Judge Sullivan.

16 HONORABLE KENT SULLIVAN: As something of a
17 follow-up to those comments, is there some reason,
18 philosophical or otherwise, why we don't want this to
19 appear on the face of the rule and it needs to be, shall
20 we say, buried in a miscellaneous order? And the reason I
21 raise the question is that I just opened my rule book and
22 I was curious whether or not the current rules, which are
23 in miscellaneous orders, would be reflected somewhere in
24 this publication that is a rule book that most lawyers
25 have, and they are not.

1 And just as a practical matter, I think
2 consistent with the suggestion that maybe there needs to
3 be a cover story on the Bar Journal to deal with some of
4 the cultural issues, I think just the fact that it would
5 not appear in the rule book is a practical impediment of
6 getting the word out to lawyers. I think it ought to be
7 easy to access, and it would be infinitely easier to the
8 average civil litigator if it was embedded in the rule
9 itself.

10 MR. ORSINGER: I don't know what book Judge
11 Sullivan is using. The West desk copy has the current
12 rule in little, small print after Rule 14b. Maybe that's
13 the problem, the print is too small.

14 HONORABLE KENT SULLIVAN: Well, I guess I
15 was looking at the wrong one, 191.4.

16 MR. ORSINGER: Look at Rule 14b, and you'll
17 see in real small print they've set out the miscellaneous
18 order issued pursuant to the authority of Rule 14b.

19 MS. BARON: But that is a valid point. It
20 is harder to find in some ways, and the subcommittee did
21 think that at some point it would be preferable to have it
22 in a rule so that everybody knows about it. We were
23 trying to meet what we thought was some kind of urgent
24 response.

25 HONORABLE KENT SULLIVAN: It's half and half

1 then because where I looked, I just looked at the first
2 one, which is 191.4 which would pertain I presume to the
3 deposition portion --

4 MS. BARON: Right.

5 HONORABLE KENT SULLIVAN: -- and deposition
6 on written questions, and unless I'm totally misreading
7 this I see nothing there. And, you're right, I flipped to
8 14b, and it's there.

9 MS. HOBBS: When the Supreme Court amended
10 or moved Rule 209 to Rule 191.4 West did not follow along
11 with our order, so when it was 209 it was always published
12 right there just like it's published after 14b and then
13 they're -- when we redid the discovery rules it didn't
14 kind of bring it over, and that's something that I have
15 pointed out to West and so hopefully in 2005 under 191.4
16 there will be a miscellaneous docket entry there.

17 HONORABLE KENT SULLIVAN: Touche'.

18 CHAIRMAN BABCOCK: And just when they get
19 that right we're going to change it.

20 MS. HOBBS: I know.

21 MR. ORSINGER: Well, the argument against
22 putting it in the rule formally, Ken, is it takes 10 or 15
23 years to change some rules. Some rules get changed in
24 three months after the Legislature goes out of session,
25 but others -- I mean, so it's always been thought that on

1 these things where it's still a work in progress that we
2 prefer to do a miscellaneous order, which seems to be more
3 responsive than a rule.

4 HONORABLE KENT SULLIVAN: My point may be
5 moot based on Lisa's comment.

6 MS. BARON: And I guess what we may find
7 from experience is that this was a bad idea and we can fix
8 it a lot more easily. If it's working, I think it should
9 be put into a rule because it provides better notice to
10 the litigants as to what their deadlines are so that they
11 can set their time clock on their computer tickler for
12 "Oh, gosh, my exhibits are about to go up in smoke."

13 MR. ORSINGER: You really think somebody is
14 going to do that?

15 MS. BARON: No, but, you know --

16 CHAIRMAN BABCOCK: Bill.

17 MS. BARON: It will be their obligation.

18 PROFESSOR DORSANEO: The last time we worked
19 on this we didn't put it in a rule because we felt it was
20 going to be changed shortly thereafter, et cetera.

21 MS. BARON: It wasn't.

22 PROFESSOR DORSANEO: And it wasn't, and it
23 ought to be in a rule, and rules are not permanent.

24 MS. BARON: Right.

25 PROFESSOR DORSANEO: They're very

1 transitory.

2 MR. ORSINGER: Well, you're looking in the
3 long view when you call the rules very transitory.

4 PROFESSOR DORSANEO: Every ten years we
5 change them.

6 MR. ORSINGER: No, but some of these rules
7 have been the same since 1940.

8 PROFESSOR DORSANEO: True.

9 MS. BARON: But this standing order has been
10 the same for more than 20 years is kind of where we are on
11 this. So maybe it should be in the rule.

12 CHAIRMAN BABCOCK: Okay. Any more comments?
13 Yeah, Justice Gray.

14 HONORABLE TOM GRAY: I've got three
15 actually, if I can get these out. With regard to
16 Richard's concern about the clerk not knowing when the
17 appeal is over, I think the clerk, if my memory serves me
18 correct, gets a copy of our mandate, the trial court
19 clerk; and as to the fix as to about the parties, we could
20 notify everybody certainly that was a party to the appeal
21 by an amendment to the TRAP rules requiring that notice.
22 "As a reminder, your exhibits are going to be disposed of"
23 in accordance with whatever we decide to do here, and so
24 we could -- I think that's an easy fix on those cases that
25 go up on appeal.

1 As far as the old cases versus the new
2 cases, if we did it in a 306a type notice requirement on
3 all future cases, you know, after the effective date of
4 the rule, then we do this type order in the Bar Journal
5 with regard to all the older cases; and, in fact, I'd go
6 one step further. The Bar currently sends out at least
7 one letter, if not three, to all of us every year: One
8 regarding our CLE requirements, one regarding the fees,
9 and seemed like there was one regarding something else
10 that are always -- just include "We are doing a
11 fundamental change at all the clerks. You need to be
12 aware that, you know, after 2005 this is going into
13 effect. All of these old records are going to get
14 destroyed." "Go get them if you want them" kind of
15 notice. That puts it on the lawyer's desk usually.

16 And then as far as the -- some people
17 expressed a concern that if this goes out as part of the
18 306a notice it's two years before the records are going to
19 get disposed of, but on their tickler system or whatever;
20 and then Justice Hecht commented that, you know, you may
21 not even need to wait two years, just put the onus on the
22 parties that are withdrawing the exhibits to get them. I
23 don't see why there should be an impediment that the party
24 cannot immediately move or immediately withdraw them any
25 time during that two-year period. They get the 306a

1 notice. They want to get their documents. Let them have
2 them then and put the onus on them to keep them for the
3 two-year period that you think they need to be kept.

4 CHAIRMAN BABCOCK: Judge.

5 HONORABLE STEPHEN YELENOSKY: Judge Gray, I
6 don't understand how the 306a notice adds anything, and
7 maybe I'm misunderstanding. If that goes out with every
8 judgment, is that what you're contemplating?

9 HONORABLE TOM GRAY: Any time that the clerk
10 thinks that something is over --

11 HONORABLE STEPHEN YELENOSKY: Okay.

12 HONORABLE TOM GRAY: -- and they send the
13 306a notice to a party, "A final judgment has been
14 entered in your case," it's just part of that notice.

15 HONORABLE SARAH DUNCAN: "Or other
16 appealable order."

17 HONORABLE TOM GRAY: "Or other appealable
18 order."

19 HONORABLE STEPHEN YELENOSKY: Okay. And I
20 guess I'm wondering, and it's mechanics again, if that
21 creates some additional burden on the clerk, and maybe it
22 doesn't. I just don't know.

23 MS. BARON: It's not clear to me that that
24 gives a substantial amount of additional notice if we have
25 this provision in a rule that if you think there's

1 something in your case that looks like a judgment then
2 you're on notice that you need to get moving on your
3 exhibits.

4 HONORABLE TOM GRAY: Most people don't even
5 know they're supposed to get notice of -- 306a notice
6 because they get their judgment and they go on and they
7 react to it without getting the notice. The 306a notice
8 is there to kind of provide a notice to those people who
9 don't otherwise realize that it may be over. And a lot of
10 times that's going to be people like Richard referred to
11 earlier that they've been kind of drug along in a case
12 they got served in, but they were dismissed because they
13 were dropped from the petition or maybe there was a formal
14 order of dismissal. They're still a party to the case.
15 Until they are severed out they're still there. They may
16 have some exhibits that they want back, and they wouldn't
17 necessarily be even a party to a judgment at that point.

18 HONORABLE STEPHEN YELENOSKY: And you're
19 confident that the 306a notice solves Buddy's problems?

20 HONORABLE TOM GRAY: I'm confident that the
21 306a notice is going to bring it home to more lawyers that
22 their exhibits are about to be destroyed than something
23 entered in the Bar Journal or in a rule because it lands
24 on their desk or their secretary's desk or their
25 paralegal's desk. Somebody is going to read it, think

1 about it in the context of this is a notice in this case,
2 and that's why I have so much more confidence in it than
3 simply in a rule.

4 CHAIRMAN BABCOCK: Justice Duncan, did you
5 have reaction to that? No.

6 Oh, yes, you did. Pam.

7 MS. BARON: Well, I just -- you know, I'm
8 aligned with the clerks here in terms of not taking on
9 additional burdens, and we're going to give the people
10 better notice about their exhibits in depositions than we
11 are about the timetable on their appeal, which is a
12 substantially more important right, you know. So I think
13 that this in the great scheme of things based on
14 experience of people in this room about when people
15 actually do show up and pick these things up later is this
16 is not a "ginormous" issue, and if you really care about
17 them, you're going to have plenty of time to figure that
18 out.

19 CHAIRMAN BABCOCK: Pam, can I ask you a
20 question? Why did you recommend that we strike the final
21 paragraph of the current order?

22 MS. BARON: I think the idea was that once
23 we decided the party offering the exhibit got it, right?

24 CHAIRMAN BABCOCK: Right.

25 MS. BARON: That the clerk didn't have to be

1 going out and making copies for everybody. And according
2 to Bonnie, that can be very complicated, like if you have
3 a family photo album or videotapes or CD-ROMs that the
4 clerk has to go out and find a service to make the copies.
5 Then they have to dun the parties, collect for it, and
6 dispose of it, and that would be better for the parties to
7 either deal with on their own or if they need a special
8 order to come in and do it, but that should not be, again,
9 the clerk's burden as some kind of bailiff for all things
10 that people decide to leave behind when they go home after
11 the trial.

12 CHAIRMAN BABCOCK: Judge Bland.

13 HONORABLE JANE BLAND: It looked like that
14 paragraph was more directed to letting the opposing party
15 make a copy of the document provided that they're willing
16 to pay a fee for it.

17 HONORABLE STEPHEN YELENOSKY: Well, I think
18 there is another -- another response is have we gotten to
19 the thing about got to take your three-dimensional object
20 away in the file, but when we get to that this is going to
21 be superfluous because, beginning of paragraph, "if the
22 exhibit is not a document or otherwise capable of
23 reproduction," well, what we're proposing is that there
24 won't be anything like that; isn't that right?

25 MS. BARON: Oh, I see what you're saying.

1 HONORABLE JANE BLAND: You see what I'm
2 saying, though?

3 MS. BARON: Yeah. I thought that Chip was
4 asking about the last sentence of the third paragraph.

5 CHAIRMAN BABCOCK: No, I'm talking about the
6 fourth paragraph about getting a photograph.

7 HONORABLE STEPHEN YELENOSKY: Except there
8 won't be any --

9 HONORABLE JANE BLAND: Except the other
10 party ought to be able to get a copy of whatever you
11 withdraw.

12 MS. BARON: I don't have a problem with
13 putting that back in, actually.

14 HONORABLE STEPHEN YELENOSKY: But you have
15 to take out the "if" to the first comma, right?

16 CHAIRMAN BABCOCK: Not necessarily.

17 HONORABLE STEPHEN YELENOSKY: Well, it's
18 just that what we're proposing is there wouldn't be
19 anything but paper and photographs, right?

20 MS. BARON: Well, there may be situations
21 where there still are three-dimensional exhibits.

22 HONORABLE STEPHEN YELENOSKY: Okay.

23 MS. BARON: They won't be as common if we
24 move forward, but we still have to go through a whole
25 other set of rules to get there, and that's not going to

1 happen today.

2 CHAIRMAN BABCOCK: Yeah, this last paragraph
3 doesn't really implicate the clerk the way it's written,
4 it doesn't seem to me.

5 MS. BARON: Right. I think that was -- it's
6 in the second order. I'm sorry. In the second order it
7 says the clerk has to make all the copies and prorate and
8 so on and so forth.

9 CHAIRMAN BABCOCK: Right. Yeah. That's a
10 different issue.

11 MS. BARON: I think this paragraph should
12 actually go back in, and my subcommittee does not object
13 to that.

14 CHAIRMAN BABCOCK: I don't know who had
15 their hand up. Richard, Bill, and then Buddy.

16 MR. ORSINGER: This last paragraph
17 interfaces with the requirement in Rule 75b which applies
18 to the withdrawal of exhibits before the time allowed in
19 14b; and if you're going to withdraw the exhibits from the
20 clerk before the time allowed in 14b then you have to
21 leave on file a certified photo or other reproduced copy
22 of the exhibit.

23 Now, once you reach the time limit for
24 removal of the exhibits from the custody of the government
25 I don't think there should be any continuing obligation

1 for you to provide copies to other people after that
2 point. This -- if we leave this paragraph in, it suggests
3 to me that if you go ahead and claim your documents at the
4 time of destruction, before the time of destruction, that
5 you may have a continuing obligation to maintain those
6 exhibits for other parties who come in two or three years
7 later. We certainly don't want that. I mean, if they
8 want a copy of someone else's exhibit before it's
9 destroyed, they need to go get a copy from the clerk.

10 CHAIRMAN BABCOCK: Well, wait a minute.
11 Hang on. Which paragraph are you talking about? The last
12 one, the one that we're going to put back in?

13 MR. ORSINGER: Yeah.

14 CHAIRMAN BABCOCK: Doesn't that only --
15 that's when the exhibit is not a document. These are
16 these three-dimensional exhibits.

17 MR. ORSINGER: Well, I don't know, a
18 document does not include a photograph?

19 CHAIRMAN BABCOCK: "Or otherwise capable."

20 MS. BARON: I think Richard makes a good
21 point here because there is no time limitation on this
22 last paragraph for when the other party has to give you a
23 copy.

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

1 MS. BARON: And you should not have an
2 obligation to retain.

3 MR. ORSINGER: Once the destruction period
4 is gone --

5 MS. BARON: Right.

6 MR. ORSINGER: -- you should have no
7 obligation to the other side.

8 MS. BARON: Right.

9 MR. ORSINGER: And if you withdraw your
10 exhibit before the destruction time, your obligation
11 should be to the court, not to the other parties. It
12 seems to me that if the government is going to let you
13 have your exhibits in the original form then they can
14 require you to substitute them with a reasonable facsimile
15 that others can access, but certainly you wouldn't want
16 the withdrawing party to have the duty to answer letters
17 or phone calls or e-mails requesting copies of exhibits.

18 MS. BARON: After this period has gone.

19 MR. ORSINGER: Well, even before, but
20 certainly after.

21 HONORABLE STEPHEN YELENOSKY: But doesn't
22 this order as it says by its own terms only apply to
23 exhibits that meet the definition of (1) or (2) and,
24 therefore, are beyond the time limit and only those
25 exhibits that are beyond the time limit, so that last

1 paragraph, I mean, is pertaining to stuff that can be
2 destroyed.

3 MR. ORSINGER: Yeah. We don't want the --

4 HONORABLE STEPHEN YELENOSKY: And if it's
5 not beyond the time period then this rule doesn't apply to
6 it, and you're talking about something entirely different,
7 which is removing an exhibit before this rule applies.

8 MR. ORSINGER: Which is covered by Rule 75b.

9 HONORABLE STEPHEN YELENOSKY: Right.

10 MS. BARON: So obviously we brilliantly
11 removed this paragraph as unnecessary, but then we forgot
12 why.

13 HONORABLE STEPHEN YELENOSKY: We just wanted
14 to see if you-all could figure it out.

15 CHAIRMAN BABCOCK: Bill.

16 PROFESSOR DORSANEO: When you look at 14b
17 and 75a and 75b in the civil procedure rules they don't
18 tell you when, if ever, you can withdraw an exhibit, and
19 what we're ultimately told in 75b is to read 14b and then
20 that will take us to this order.

21 CHAIRMAN BABCOCK: Right.

22 PROFESSOR DORSANEO: And I guess if anybody
23 got one of these -- if anybody read this now, they would
24 be authorized and required to remove from the clerk's
25 office within this 30-day period any exhibits. Now, I

1 think we're -- I think the rules as drafted assume that
2 these documents would be on file forever and that you
3 would not be able to get them back unless you got
4 permission to get them back and even substituted something
5 else for them, a picture or whatever.

6 What we're doing is changing the whole
7 approach, suggesting that people should go and get them
8 back on their own whenever it makes sense for them to do
9 so, and if they don't do that they will be destroyed
10 later, but we don't have the first part of this in the
11 structure saying when they can go get them. I mean, you
12 can't go get one just when the judgment is final. You
13 can't just go get all your exhibits.

14 MR. LOW: Right. That was the point I was
15 going to make following on what Justice Hecht said. You
16 know, what if we just took the approach, like used to we
17 kept depositions. You know, the lawyers had to keep the
18 custody of them and certain things. What if we said two
19 years after a judgment, any kind of judgment is entered,
20 the parties have a right to withdraw, and if they don't,
21 the clerk may destroy them, and a party shall not destroy
22 a document in a case, that he should know that the case is
23 not ongoing or on appeal or something like that and the
24 clerk -- and it's up to the lawyers then to protect
25 because otherwise the clerk may just destroy records, and

1 if it's on appeal, that's the lawyers' fault.

2 PROFESSOR DORSANEO: It ought to be good
3 enough to do one year if there is no appeal perfected.

4 MR. LOW: Right.

5 MS. BARON: Well, I think where our
6 subcommittee really wanted to head with all this is that
7 really all the exhibits would be withdrawn at the end of
8 the trial. Unless there was an order from the court
9 retaining them, the parties would have an obligation to
10 retain them for a certain period of time in case they are
11 needed on appeal.

12 PROFESSOR DORSANEO: That's terrible.

13 MR. LOW: If you had a certain date.

14 MR. ORSINGER: You're making all the lawyers
15 district clerks now for two years after the judgment is
16 signed, and that's not going to work.

17 MR. LOW: All the what now?

18 MR. ORSINGER: You're making all the lawyers
19 district clerks for two years after the judgment is
20 signed.

21 MR. LOW: No, we're making lawyers lawyers.
22 They need to protect their record and exhibits.

23 MR. ORSINGER: I totally disagree that when
24 the final judgment is signed that all the lawyers have to
25 go get their own exhibits and then keep them safe while

1 some appeal is pending so if there is a remand they've got
2 to come up with the right --

3 HONORABLE STEPHEN YELENOSKY: No. I think
4 there is a misunderstanding. Maybe --

5 MS. BARON: Yeah. I misspoke I think.

6 HONORABLE STEPHEN YELENOSKY: She misspoke.
7 At the end of the trial you have to take anything that
8 can't be reduced to an eight and a half by eleven piece of
9 paper or photograph and you have to substitute an eight
10 and a half by eleven copy or photograph of that item. The
11 clerk retains all that paper.

12 MS. BARON: Right.

13 PROFESSOR DORSANEO: No oil drums.

14 MR. ORSINGER: Yeah, no automobile or seat
15 belt or defective car engine part.

16 HONORABLE STEPHEN YELENOSKY: And that's the
17 thing we keep talking about have we gotten to that yet.
18 That's the Federal courts' practice. In large part you
19 don't leave three-dimensional objects in the courtroom.

20 MR. ORSINGER: And you're required to keep
21 them while the appeal is pending and then when the appeal
22 is over you can destroy them? Is that what you're saying?

23 HONORABLE STEPHEN YELENOSKY: Well, I don't
24 know if they're reduced to a piece of paper whether that
25 is true or not, but that's a different question.

1 MR. ORSINGER: What if it's a product defect
2 case and it gets reversed and remanded?

3 MS. BARON: Right. Well, there are things
4 -- you know, there are going to be situations where you
5 may want the clerk to retain it. You may want an order to
6 retain.

7 HONORABLE STEPHEN YELENOSKY: Right.

8 MS. BARON: You can have provisions that
9 will cover that. We have not explored all these that
10 discuss how original exhibits are to be preserved,
11 particularly if they're needed on appeal or remand. So
12 those are issues that we haven't addressed because they
13 were getting into Rule 75 in the appellate rules, and we
14 wanted to get a sense from the committee whether we wanted
15 to move towards trying to reduce oversized exhibits that
16 the clerks have to store in warehouses right now.

17 HONORABLE STEPHEN YELENOSKY: And the idea
18 was you could get an order from the court if it's in your
19 interest to make sure the item is preserved and the other
20 party had offered it and took it, you get an order from
21 the court that they have to preserve it.

22 MS. BARON: Or to have the clerk hold onto
23 it, but I guess the concept is a great majority of
24 exhibits can actually be reduced to an eight and a half by
25 eleven piece of paper that's quite adequate to make a

1 record. All these oversized poster boards that are
2 basically just words or pictures can be reduced and put
3 into an imager and then they are preserved forever.

4 CHAIRMAN BABCOCK: Nina.

5 MS. CORTELL: I just had a question. One
6 time I came into contact with some provision in local
7 Government Code that said that the clerk must keep
8 possession of the exhibits until -- and I can't remember
9 what that end point was, because I won't go through the
10 whole horror story that occurred, but is it only through
11 time of judgment or does it go beyond?

12 MS. BARON: Lisa, do you know what that rule
13 is?

14 MS. HOBBS: No. I thought that the
15 Government Code deferred to us on exhibits.

16 MS. CORTELL: I would have to look, but
17 there is a code --

18 MS. HOBBS: I think it says by direction of
19 the Supreme Court, though.

20 CHAIRMAN BABCOCK: Well, the rule says that.

21 MS. HOBBS: I know, but I think we -- I
22 should have brought that whole packet that I had at our
23 subcommittee meeting, but I thought the Government Code
24 said, "We'll let the Supreme Court set the rules for
25 exhibits and depositions" and then we set our rules and

1 then the State Law Library adopted our rules, so that it
2 was -- I mean, the Government Code has deferred to the
3 Supreme Court, I thought.

4 MS. CORTELL: It may only be up until time
5 of judgment. I just don't recall. In that case the
6 parties also didn't want to agree to a substitute
7 procedure and there was a holdout, and he moved for
8 mistrial, and I'm having a hard time figuring out how to
9 avoid that mistrial because there was a code provision
10 that did require once you admit something into evidence
11 the clerk had to take it into possession and ensure the --
12 you know.

13 MS. BARON: Well, I think there are
14 obligations on the court reporters and the clerks to
15 retain things for a certain period --

16 MS. CORTELL: Maybe it was the court
17 reporter.

18 MS. BARON: -- in case an appeal is taken.

19 MR. LOPEZ: It's right here. It's
20 Government Code 51.204.

21 MS. CORTELL: What does it say?

22 MR. LOPEZ: Well, it's kind of long, but
23 that's with --

24 CHAIRMAN BABCOCK: Carlos, speak up a little
25 bit.

1 MR. LOPEZ: Well, I found it for the court
2 of appeals. I didn't find it for the trial court yet.

3 CHAIRMAN BABCOCK: Judge Christopher.

4 MS. CORTELL: What does it say, though? I'm
5 sorry.

6 HONORABLE TRACY CHRISTOPHER: I was just
7 going to say, I don't have any problem with any of this
8 language or this concept other than just sort of a
9 technical question where we say, "The party who offered an
10 exhibit must remove it from the clerk's office within 30
11 days." That strikes me as kind of an odd thing. I mean,
12 you know, ask for it, do a motion to withdraw, but just
13 the language of it, "must remove it from the clerk's
14 office" strikes me as kind of a weird way to put it.

15 HONORABLE STEPHEN YELENOSKY: Take
16 possession of it.

17 PROFESSOR DORSANEO: Mr. Chairman, I repeat
18 that there is no authorization to remove it if you're a
19 party other than this "you must remove it" sentence within
20 these 30 days. There is nothing that says you can do it
21 before then, and I think there ought to be.

22 HONORABLE TRACY CHRISTOPHER: I do, too. I
23 think it ought to be cleared up you can take it before
24 this time and you have to keep it and then after this time
25 you get to take it.

1 HONORABLE STEPHEN YELENOSKY: You think you
2 should be able to take it beforehand without a court
3 order? Because under 75b you can take it by court order.

4 PROFESSOR DORSANEO: Well, I think if the
5 case is over you ought to be able to take it. There's
6 nothing that says that.

7 MR. ORSINGER: But would you substitute
8 copies, or are you talking about taking all the exhibits,
9 paper and otherwise?

10 PROFESSOR DORSANEO: If the case is over,
11 all the appeals are over, and including the judgment with
12 citation by publication two years elapsed, if the case is
13 over then I think you ought to be able to -- you ought to
14 be required to get the documents within a short period of
15 time or they should be disposed of, but if the case is
16 over I think you ought to be able to get the documents.

17 CHAIRMAN BABCOCK: Has anybody, Pam or
18 Steve, talked about -- what Bill is focused on is the
19 party's interest. Has anybody focused on the public
20 interest? Maybe there is a public interest in keeping
21 this around for a period of time. I don't know. I'm just
22 wondering if that's ever come up. On historical cases I
23 can see you keeping it for a long time, but just on the
24 run of the mill auto accident case is there any reason to
25 keep it around for a while?

1 PROFESSOR DORSANEO: Presumably there's
2 somebody at least who's looking to see if there are
3 historical cases, not just burning everything in a
4 bonfire.

5 HONORABLE STEPHEN YELENOSKY: Well, and we
6 sort of -- Lisa can speak to that. We sort of said there
7 are other mechanisms for that.

8 CHAIRMAN BABCOCK: Yeah, right.

9 HONORABLE TRACY CHRISTOPHER: The auto
10 accident of the President of the United States 20 years
11 from now could be a historical auto accident, so you've
12 got to remember that.

13 MS. BARON: Well, the clerks are actually
14 analyzing that.

15 HONORABLE STEPHEN YELENOSKY: Predicting who
16 the president would be. It's a tough job.

17 HONORABLE TRACY CHRISTOPHER: Yeah, I mean,
18 how would you know?

19 CHAIRMAN BABCOCK: There is a particularly
20 bright county commissioner who is rising. Yeah, Richard.

21 MR. ORSINGER: Is there any time associated
22 with an obligation to maintain records under 76a?

23 CHAIRMAN BABCOCK: I don't think so. Is
24 there?

25 HONORABLE NATHAN HECHT: Huh-uh.

1 MR. ORSINGER: So when the court says that
2 certain documents have to be made available to the public
3 or what have you, is there no time -- I mean, how long
4 does that last?

5 CHAIRMAN BABCOCK: I don't think it says in
6 the rule itself. I know there was a concern about this
7 unfiled discovery, that attorneys are the custodians of
8 the discovery.

9 MR. ORSINGER: Yeah. And is there no rule
10 that says that that expires at the end of 1 year, 5 years,
11 or 20 years?

12 PROFESSOR DORSANEO: No. They are court
13 records until they are gone.

14 MR. ORSINGER: So this 14b also liberates
15 the lawyers from the duty to keep unfiled discovery then.

16 PROFESSOR DORSANEO: No.

17 CHAIRMAN BABCOCK: It would as to
18 depositions.

19 MS. BARON: This is only exhibits and
20 depositions.

21 CHAIRMAN BABCOCK: Okay. Let's see where we
22 are. Pam, would it be fair to say that you, even after
23 all this weighty discussion, feel that your proposal is
24 meritorious and should be adopted by the Court?

25 MS. BARON: Yeah. I do think that Judge

1 Christopher's point may -- instead of saying "must
2 remove," say "withdraw." Would that take care of your
3 concern? So I would change the word "remove" to
4 "withdraw".

5 HONORABLE STEPHEN YELENOSKY: And we need to
6 address Bill Dorsaneo's point about this doesn't authorize
7 anything until two years after or one year after, right?

8 PROFESSOR DORSANEO: Well, my point mainly
9 is to have this thing -- to re-engineer it to say when
10 somebody can get the documents and then say if they don't
11 pick them up -- it may be the same time period or
12 essentially the same time period, and if they don't get
13 them within that time period, they can be destroyed, you
14 know, in effect without further notice.

15 HONORABLE STEPHEN YELENOSKY: And we
16 purposely attempted not to re-engineer the first part of
17 the rule and left it as it was and that --

18 PROFESSOR DORSANEO: And I think that was a
19 mistake because the rule is operating on a different
20 assumption --

21 HONORABLE STEPHEN YELENOSKY: Okay.

22 PROFESSOR DORSANEO: -- with the rest of the
23 material about how things really work. I mean, the game
24 plan we have now is that, okay, these things will be
25 destroyed after notice. When you get the notice then

1 you'll know you can come get it or it will be destroyed.

2 That in effect takes care of both problems.

3 CHAIRMAN BABCOCK: Well, we've been
4 operating with this -- essentially this rule for 16 years.
5 Has anybody run into difficulty where they thought they
6 should be able to get their exhibits and they haven't been
7 able to?

8 PROFESSOR DORSANEO: Has anybody gone to get
9 the exhibits?

10 MR. ORSINGER: Sure.

11 MR. LOW: I mean, generally like you've got
12 an oversized --

13 MR. ORSINGER: I have, but I get notices
14 when they're going to destroy.

15 MS. SWEENEY: We did.

16 MR. LOW: We had a Ford wagon in and the
17 clerk says, "Look, you-all better take this thing. We
18 don't have any place. Where did you put it before you
19 brought it in court?"

20 "Well, my office."

21 "Well, take it back." I mean, in other
22 words, there's some things like that that you should be
23 able or have to take right away. I mean, the clerks have
24 no place for a car body that takes up the courtroom.

25 CHAIRMAN BABCOCK: Paula, did you have --

1 MR. LOW: So you need something like the
2 judge could order large objects and then the two points
3 you're talking about, that you can get them at a date and
4 if you don't get them then they may be destroyed, and
5 that's a definite time for everybody.

6 CHAIRMAN BABCOCK: Paula, did you have
7 something?

8 MS. SWEENEY: We had an issue where we had a
9 lawsuit and then had a related lawsuit and the exhibits
10 were relevant to both parties, and there was a real issue
11 with -- and this is a long time ago, probably 12, 13 years
12 ago, but there was a real issue with multiple parties,
13 people each going and getting some stuff and you didn't
14 know who had what. There was no real way to tell who had
15 been in the file, who had withdrawn what, and it was in
16 Dallas, and there's so much -- they have so much stuff
17 stored that we never did reconstruct the exhibits, and we
18 needed -- it would have been very helpful to everybody to
19 be dealing -- you know, playing from the same set of
20 cards.

21 So I don't know if -- I mean, in that
22 instance it would have helped if there was some record of
23 who withdrew what in the prior case, but I hate to write
24 an entire rule creating a requirement for that kind of a
25 record because one time in 25 years of law practice that

1 happened.

2 CHAIRMAN BABCOCK: Yeah, but if we do it, it
3 will teach Bacarisse a good lesson. You want some burden,
4 we'll show you some burden.

5 (Laughter.)

6 HONORABLE NATHAN HECHT: Let the record
7 reflect there was laughter.

8 CHAIRMAN BABCOCK: Charles, we're just
9 kidding about this. All right. Carlos.

10 MR. LOPEZ: The Government Code 51.304 does
11 talk about the stuff that I think Paula is referring to,
12 which is systematic and orderly retrieval.

13 CHAIRMAN BABCOCK: Right.

14 MR. LOPEZ: What it doesn't seem to do as
15 far as I can tell, kind of looking at it here, it doesn't
16 really talk about the time frame. It just says "shall
17 come up with a process for these things."

18 CHAIRMAN BABCOCK: Okay. Let's try this.
19 Why don't we vote on the proposal, substituting the word
20 "withdraw" for "remove," in both proposed orders and see
21 how many people on our committee like it the way it is.
22 If that fails then we can continue to slug away at it
23 tomorrow morning.

24 MR. LOW: We can do this Dorsaneo version or
25 no?

1 PROFESSOR DORSANEO: Well, my thoughts are
2 still not crystalized.

3 MR. LOW: Oh, I know what you're doing.

4 CHAIRMAN BABCOCK: Yeah, Pam.

5 MS. BARON: I think we -- I don't know. It
6 seems to me under Rule 75b the court will let a party
7 substitute for an exhibit and take the exhibit home pretty
8 much any time up to this period. Your problem is you just
9 don't want any exhibits to exist at all if the case is
10 over and the one-year or two-year period hasn't gone by?

11 HONORABLE STEPHEN YELENOSKY: You want to be
12 able to get them without court intervention? Because you
13 can get them under 75b with court intervention.

14 MR. ORSINGER: You're always going to have
15 to have court intervention because you've got to get them
16 from the court reporter. I mean, the court reporter is
17 probably going to require some authority, aren't they?

18 MS. BARON: So you can get them. You can
19 get them under 75b now, 75b(a) now. I think our theory,
20 if the committee wants us to in the next phase, would be
21 basically to not really have a lot of exhibits lying
22 around that people would want to get anyway.

23 CHAIRMAN BABCOCK: Yeah. Well, and as I
24 think about it, there may be some rationale for having
25 this in the court file if -- in most cases if there are

1 exhibits that means there's been some adversarial
2 proceeding that the court has had to rule upon and there
3 may be some public interest for a period of time in being
4 able to go into the file and see exactly what happened and
5 evaluate the performance of the judicial officer, so I
6 could see some reason for having it that way. Nobody is
7 hurt, Buddy, because you can go in, you know, under 75a
8 and get the stuff if you want it --

9 MR. LOW: Right.

10 CHAIRMAN BABCOCK: -- and substitute, so
11 nobody is hurt that way. Bill.

12 PROFESSOR DORSANEO: Here's what I would
13 want and what I would think should be the real solution to
14 this entire problem if it could be drafted properly. It
15 would be accommodation of Rule 14b, 75a and 75b and
16 whatever this miscellaneous order adds as part of a rule,
17 and what I would like would be for what's added in your
18 draft in the third paragraph to say that a party may
19 remove a document without court order.

20 MR. LOW: Giving notice to the other party
21 so you don't --

22 PROFESSOR DORSANEO: Well, again, I don't
23 have any problem with parties giving notice to other
24 parties.

25 MR. LOW: Or other parties, yeah.

1 PROFESSOR DORSANEO: And then you could do
2 your (1) and (2) in this third paragraph or something like
3 it and then have it say if they don't the clerk, unless
4 otherwise directed by the court, may dispose of any
5 exhibits.

6 HONORABLE STEPHEN YELENOSKY: So they may
7 remove after it's final before the one- or two-year
8 period.

9 PROFESSOR DORSANEO: And then if they don't
10 then it gets destroyed.

11 HONORABLE STEPHEN YELENOSKY: You're not
12 concerned about Chip's point that somebody needs some time
13 to figure out if these documents are of historical value?

14 MR. ORSINGER: No, Bill is saying if you
15 pull it out before your one- or two-year period you're
16 going to have to substitute --

17 HONORABLE STEPHEN YELENOSKY: Like 75b.

18 MR. ORSINGER: -- and leave something
19 behind. It's only when you reach this deadline that you
20 can remove without any kind of evidence, right?

21 PROFESSOR DORSANEO: But it's not a good
22 idea to have a Rule 14b, a Rule 75a and 75b and then this
23 over here. It's just it's a mess, and every time we go
24 back to look at it we have to try to figure out what all
25 this is about.

1 MR. ORSINGER: And something else that he
2 said that is important is he did not say you are required
3 to remove it. He says if you don't then you lose it. I
4 think it's a little bit of an anomaly to tell everyone
5 that they must come do something that we know they're
6 never going to do. I'd rather say that if you don't come
7 get them by this time then you lose it.

8 MR. LOW: They're on notice by the rule.

9 MR. ORSINGER: Yeah. Because this puts a
10 duty on the lawyers arguably and the parties, and they're
11 in violation of this rule two years after their judgment
12 is signed and they don't even realize it.

13 CHAIRMAN BABCOCK: Just change "must" to
14 "may."

15 PROFESSOR DORSANEO: If you just want to
16 just engineer this you change "must" to "may." Really I
17 don't like the way (1) and (2) work, but I could live with
18 it and then change back the clerk sentence to say --

19 HONORABLE STEPHEN YELENOSKY: Pam and I feel
20 we can go back and --

21 PROFESSOR DORSANEO: -- if there is no
22 request or if the documents are not removed.

23 CHAIRMAN BABCOCK: What were you going to
24 say, Steve?

25 HONORABLE STEPHEN YELENOSKY: I was just

1 going to say, I mean, I think we can go back and do some
2 work on this and bring it back if you want.

3 CHAIRMAN BABCOCK: Well, but there was a
4 concern by the Court that we --

5 PROFESSOR DORSANEO: Even tonight, right?

6 HONORABLE STEPHEN YELENOSKY: Oh,
7 absolutely.

8 MS. BARON: Well, I think we can just change
9 it to "may withdraw," and I think the effect is exactly
10 what Bill is saying. He just doesn't like the side we're
11 building from. He wants to build it from the other side.
12 But I also think that we would like to go and work with
13 75b and make some changes there that may make this all
14 clearer.

15 PROFESSOR DORSANEO: And if anybody could
16 find the recodification draft, all of that was reworked --

17 MS. BARON: Right.

18 PROFESSOR DORSANEO: -- and submitted to the
19 Court in 1997, I believe.

20 CHAIRMAN BABCOCK: Hecht is the only one
21 around that still remembers that.

22 PROFESSOR DORSANEO: And it will be in the
23 section entitled "clerks."

24 HONORABLE TOM GRAY: That would be unless it
25 has already matured under the retention policy and been

1 disposed of.

2 HONORABLE STEPHEN YELENOSKY: If we can't
3 find the recodification, how are we ever going to find the
4 rule?

5 HONORABLE NATHAN HECHT: We gave that to
6 Judge Gammage.

7 MR. ORSINGER: Oh, Bill has a copy. He's
8 just teasing.

9 CHAIRMAN BABCOCK: Yeah, that's right. All
10 right.

11 MR. ORSINGER: Bill goes to bed with it at
12 night.

13 MS. BARON: I mean, personally I think we
14 might not even need to talk about this tomorrow. I think
15 that our subcommittee would propose as we have submitted
16 it except instead of saying "must remove" we would say
17 "may withdraw."

18 CHAIRMAN BABCOCK: Okay. Let's vote on
19 that, okay? Just to satisfy my sense of voting. Lisa
20 doesn't want to vote, though.

21 MS. HOBBS: Well, I want to vote, but, Pam,
22 you were suggesting this as the fix to make Harris County
23 happy.

24 MS. BARON: Yeah.

25 MS. HOBBS: And you agree with Professor

1 Dorsaneo that we would then look at making it all cleaner
2 when we deal with 75 and 75b, right?

3 MS. BARON: Right.

4 MS. HOBBS: So everybody knows that we
5 understand that there are issues that we might want to go
6 back to.

7 MS. BARON: I just want to take care of
8 their -- their real concern was notice. That was their
9 most significant concern in the letter. Second was
10 storage. This takes care of the notice issue, which is
11 the one they have been pressing with the Court for
12 probably the last four years plus as a concern that
13 they've been having, so it would immediately relieve this.

14 They were quite pleased with it, and I think
15 they would like to see, you know, more work done on stage
16 two to handle some of their bulk storage problems, but
17 this was their main concern.

18 MR. ORSINGER: You see the problem is this
19 is the only opportunity in our lifetimes to change 14a,
20 75a and b and --

21 CHAIRMAN BABCOCK: No, that's not true.

22 MR. ORSINGER: -- we're going to let it slip
23 through and then it's going to sit on a shelf.

24 CHAIRMAN BABCOCK: Pam is going to come back
25 at the next meeting. This is just the first step in a

1 process, Richard.

2 MR. ORSINGER: All right. I believe that.

3 I've been around too long to believe that.

4 CHAIRMAN BABCOCK: Yeah.

5 MS. BARON: Can we make the next meeting not
6 a week after a major holiday?

7 CHAIRMAN BABCOCK: We'll make it the weekend
8 of a major holiday. How about that?

9 HONORABLE STEPHEN YELENOSKY: Can we do it
10 on submission?

11 CHAIRMAN BABCOCK: So let's vote on that
12 with this change, recognizing, as Lisa says, that we've
13 said all along that we're going to go back and try to look
14 at the big picture and have a rule as opposed to a
15 miscellaneous order.

16 So everybody who is in favor of the
17 subcommittee proposal for the orders, the rewrite of the
18 orders with the exception we're going to change "must
19 remove" to "may withdraw," raise your hand.

20 Opposed? Two lonely voices in the
21 wilderness. 21 in favor, two opposed, so we'll recommend
22 that to the Court; and at the next meeting, Pam, you and
23 Steve will continue your work and come back with a --
24 something we can discuss about some rules with respect to
25 this. Does that make sense to everybody?

1 Okay. So now tomorrow we're going to --
2 we're going to go back to the information technology rule,
3 right?

4 MR. ORSINGER: No. That's pretty scary if
5 we have a small group here that happens to be
6 anti-technology.

7 CHAIRMAN BABCOCK: You don't want to do that
8 tomorrow? Justice Hecht, what's your pleasure?

9 MR. ORSINGER: We did this one Saturday
10 morning and almost lost the fax rule. I don't know if you
11 remember that, but we had a small group on Saturday and
12 there was a ringleader lead by a former president of the
13 State Bar to eliminate fax filing.

14 CHAIRMAN BABCOCK: I think it was Harriet
15 Myers, wasn't it?

16 MR. ORSINGER: Well, I won't use any names,
17 but I'm telling you these small groups on Saturday
18 mornings on technology issues can be frightening.

19 HONORABLE TRACY CHRISTOPHER: I don't know.
20 I think you're okay if we all come back.

21 HONORABLE JAN PATTERSON: Don't worry,
22 Richard. I'll bring the crying paper.

23 CHAIRMAN BABCOCK: All right. I'm open to
24 suggestions. Dorsaneo has got three items that he's eager
25 to talk about. Richard, you've got -- you and David have

1 an issue that we could talk about. Paula has got one.

2 PROFESSOR DORSANEO: I'm ready. This time I
3 have a draft that is bulletproof.

4 MR. ORSINGER: Saturday is traditional for
5 appellate rules. See, that's because the appellate
6 lawyers are the only ones here anyway.

7 CHAIRMAN BABCOCK: Is that the sense of --
8 Justice Hecht, what do you want to do?

9 HONORABLE NATHAN HECHT: Well, I was trying
10 to see what we could do. We can probably do that.

11 CHAIRMAN BABCOCK: Okay. All right. Here's
12 what we'll do tomorrow then. We will do the items that
13 have "Dorsaneo" next to the name at 9, 10, and 11, and
14 then we'll go to Orsinger/Jackson and Sweeney and then the
15 Meadows/Duncan/Hatchell/Lawrence/Carlson/Orsinger/Low on
16 the HB4, the cleanup on HB4.

17 All right. Does that make sense to
18 everybody?

19 HONORABLE JAN PATTERSON: Give us that
20 again, please.

21 CHAIRMAN BABCOCK: Here's the lineup: Items
22 9, 10, and 11 will be first. That will be No. 1 tomorrow.
23 Item 8, that's the court reporter's record and admitted
24 exhibits will be No. 2. Amendment to Rule 223 will be No.
25 3. That's Paula's issue on jury shuffles, and then the

1 final issue if we get to it will be the final review of
2 Justice Hecht's June 16th, 2003, letter. Remember that?
3 We went through that before and there were just a few tail
4 items on HB4 that we hadn't --

5 HONORABLE JAN PATTERSON: So what time are
6 we starting?

7 CHAIRMAN BABCOCK: 9:00 a.m.

8 HONORABLE JAN PATTERSON: And we need
9 everybody, right?

10 CHAIRMAN BABCOCK: We need everybody.

11 Okay. Pam, thanks very much. Great job on
12 all this.

13 MS. BARON: And Steve and Bonnie and Robert,
14 and Lisa has been very helpful.

15 (Recessed at 5:16 p.m. until the following

16 day, as reflected in the next volume.)

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

4 * * * * *

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

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

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

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

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24 #DJ-105

25

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