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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 8, 2002

(AFTERNOON SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 8th day of November, 2002, between the hours of 1:28 p.m. and 5:23 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: We've got on the agenda the ex parte communications, and Buddy is going to take us through that, I believe. That's you, Buddy, right?

MR. LOW: Yeah, but -- okay. We're going to do that first, but there are about three or four things we voted on that I put, you know, in a little index I sent you.

CHAIRMAN BABCOCK: Uh-huh.

MR. LOW: I don't know if everybody has that or not.

CHAIRMAN BABCOCK: You're talking about Rule 409, 103, 904, and 509?

MR. LOW: Yeah, 409, 103, 904, and the other thing is that Mark's committee sent to us, the State Bar committee, our committee voted on it. It shouldn't be too controversial, and we don't have to do them today, but --

HONORABLE SCOTT BRISTER: Speak up, Buddy. We can't hear you.

MR. LOW: I said we don't have to do those today, but they shouldn't be controversial, and I think the main thing that will take time is the other, the --

CHAIRMAN BABCOCK: Buddy, if we've already voted on it --

MR. LOW: No, no. No.

CHAIRMAN BABCOCK: Oh, we haven't.

MR. LOW: The full committee has not, but the evidence committee has voted on it.

CHAIRMAN BABCOCK: Okay.

MR. LOW: So you want me to go straight to the big argument or you want to just kind of sail smoothly for a minute?

MR. SALES: I'm not sure there's any smooth sail in here.

CHAIRMAN BABCOCK: Well, not that I disbelieve people when they say there's nothing controversial about something....

HONORABLE SCOTT BRISTER: This won't be controversial.

CHAIRMAN BABCOCK: If we can get through the four rules that you say are not controversial, let's do those.

MR. LOW: Let's try. First is 409 that came to us, and that is -- if everybody has their package, that came to us, and it's about payment of medical and similar expenses, and this committee said, wait, we want to see what it does with regard to non-tort cases and so forth. Mark's committee went back, and they changed that to include medical and I think the rule is furnish or pay any damages or expenses incurred in a personal injury or

property damage case. That cured the problem that this committee had that it might affect some other type cases, because it was never intended really to affect anything other than personal injury cases, so, you know, you want to vote on that or --

CHAIRMAN BABCOCK: Yeah. Let's do that one. Any discussion on that rule? We're talking about 409 now.

MS. SWEENEY: I move we adopt the change proposed by the subcommittee, which has thoroughly researched it and carefully thought it out.

CHAIRMAN BABCOCK: If you say so yourself.

HONORABLE SCOTT BRISTER: Where is that, Buddy?

MR. LOW: 409. It's Tab 1 of your --

HONORABLE SCOTT BRISTER: I see 409 in your --

MR. LOW: At "proposed revision of Rule 409." Then the front of it has the present 409.

HONORABLE SCOTT BRISTER: And you want to just add "paying"?

MR. LOW: No.

MS. SWEENEY: It's (d).

MR. LOW: The present rule pertains only to medical, and this pertains to pay any damages or expenses in personal injury or property damage cases, so really,

this committee talked about it, and the only reason we were concerned whether it would be changing something in a non-tort case, not only personal injury. Mark's committee went back and they confined it to property damage, personal injury, and that was what the original rule was designed for anyway, but it includes more than just medical.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I can't think of an example, but it seems to me that there are situations where contract cases, for example, where one party or another may have paid something which could be evidence of liability.

MR. LOW: Well, we said here "furnish or pay any damage expenses by personal injury or property damage." So do you think that includes contracts?

MR. HAMILTON: So that's just for torts then, just strictly torts.

MR. LOW: That's right.

CHAIRMAN BABCOCK: Anne, you got any thoughts about this?

MS. McNAMARA: I think it's a good change, and I don't know that you need to go to contracts, but --

MR. ORSINGER: Well, I'm not sure it's for torts. The one case that's here is a contract case, and

someone apparently was arguing -- or maybe it's not contract, but it would be like an insurance company is saying a letter from an insurance company authorizing medical expenses for a comp claim and stating that future bills should be sent to the insurance company is actually an admission of coverage.

CHAIRMAN BABCOCK: It's different.

MR. ORSINGER: Yeah, so but that's a contractual obligation to pay or reimburse someone for something, so this isn't just limited to tort cases.

CHAIRMAN BABCOCK: Well, but the insurance company messed up.

MR. ORSINGER: Well, I know that, but all I want to do is I want to make sure that--

MR. LOW: What do you want to do?

MR. ORSINGER: Nothing.

MR. LOW: Leave the rule as it is?

MR. ORSINGER: I just want to say that it is not limited to tort cases.

MR. LOW: Do you want to vote on a rule?

MR. ORSINGER: I'm not answering any questions. I'm just saying it's not limited to tort cases.

MR. LOW: I'm acting like a Federal judge now.

CHAIRMAN BABCOCK: Richard, for the record we'll state this is not your rule either. All right. Any other discussion on the proposed revision to 409?

All right. All in favor of the revision to 409 raise your hand.

All opposed? So unanimous, 22 voting for, the Chair not voting. All right. What's next?

MR. LOW: All right. The next is 103. The Federal in their 103 -- and I have a copy of that and it's underlined what the sentence that they included. It says, "Once the court makes a definitive ruling on the record admitting or excluding evidence either at or before the trial, the party need not renew the objection," and so forth. Our committee agreed to leave our Texas rule the way it was because I think the Federal rule might include motion in limine, what if -- we just didn't think it was necessary to add anything to it.

CHAIRMAN BABCOCK: Any discussion on that? Richard.

MR. ORSINGER: At the risk of slowing this railroad train down, I just want to say that the Federal system is a little bit varied. Some circuits say you can and some say you can't preserve error on a motion in limine, but the Court of Criminal Appeals has addressed the distinction between a ruling outside the presence of

the jury that you're not required to re-present or re-object, and they distinguish it on the grounds that a motion in limine prohibits the subject from being brought up in the presence of the jury but does not yet rule on admissibility. It just requires the permission of the court to bring it up.

This is really talking about you submit it for ruling on admissibility and you get a ruling either it's admissible or it's not. To me this helps to clarify something that is unclear in Texas law unless you're aware of the case that I'm talking about. But I don't care that much about it. I just want to say --

MR. LOW: Let me say this. The notes under that say that this applies to the motion in limine, and we've got a definite practice and rule in *McCardle* and *Hartford*. Bill.

PROFESSOR DORSANEO: I think actually a number of Texas cases embrace that Federal position when it's a definitive ruling --

MR. LOW: Right.

PROFESSOR DORSANEO: -- and not merely a preliminary ruling, and it's a good sentence, and we ought to adopt it.

MR. ORSINGER: I'll second that.

MR. LOW: All right. That was Mark's

committee's --

MR. SALES: That was the position of the rules evidence committee that we should adopt that.

MR. LOW: We didn't just turn over in our grave when we voted not to accept it. I just tend to go against Federal court, but you'll see later in my --

CHAIRMAN BABCOCK: Yeah, Judge Brister.

HONORABLE SCOTT BRISTER: My feeling was you could do that if you wanted to under current Rule 166. The trial court can always inter a pretrial order. So if you've had a *Daubert* ruling or something that you don't want to go into again, I think you can sign a 166 pretrial order. You wouldn't have to raise it again because of that order, because 166 specifically says that that will -- that will be the way the case is governed from here on out, and so I like the idea of at least getting a second chance to -- after the motion in limine, but if I really want this not to come up again and don't bother me about it again then I have to write it in a pretrial order, and everybody understands that that's different. So I like the committee proposal to leave it out.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I mean, isn't there something like that in the current 103(a)(1), the second sentence?

MR. LOW: There's also something in the

appellate rules, isn't there, about preserving error?

MR. GILSTRAP: Yeah, 33.1(a), but the second sentence says, "When the court hears objections to offered evidence out of the presence of jury and rules that such evidence shall be admitted, such objection shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections."

MR. LOW: Maybe that's why we didn't think it was necessary.

MR. ORSINGER: Well, but that doesn't work if the decision is to --

PROFESSOR DORSANEO: Pretrial decision.

MR. ORSINGER: No. I'm talking about like you run the jury out for a voir dire on a witness or something like that. If you make an objection and it's overruled and they bring the jury back in, you don't have to object again; but what if you make the offer, the objection is sustained and then they run the jury in? Do you have to make your offer again?

The Federal rule basically says, "We don't care whether the judge kept it out or let it in. If it's a formal ruling on admissibility, it works. You don't have to repeat the drill in front of the jury," and I don't see this as being a *Daubert* pretrial thing. I see it as being a little proceeding with the jury out of the

courtroom.

CHAIRMAN BABCOCK: All right. Any other comments? Yes, Nina.

MS. CORTELL: I think the Federal rule is a good idea. I do agree it will create some confusion with regard to current Texas case law on motion in limine rulings, although Bill is right that there are cases out there that are clear when it's not just a limine ruling but a firm ruling on evidence that may carry forward anyway, but I think this will add clarity and avoid unnecessary preservation issues during trial.

MR. LOW: We were not impressed with the fact that said it included that and somebody goes and we've adopted that, and the Federal note says it does. You get a motion in limine and then the judge says, "Or bring it up." Somebody says, "Well, I've already done that once." It's not really a definite rule I realize, but it might cause some confusion.

MS. CORTELL: Well, I do think there's a problem on that, but maybe that could be cleared up through a comment.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: We don't have a rule saying what a motion in limine is. I think that's what creates confusion. We don't necessarily need a rule, but

a motion in limine is a request for a preliminary determination and a proper limine order makes it plain before you get into this you need to come up and raise it before the judge, etc., and deal with it in the trial. This is a different kind of motion that asks for a definitive ruling, and the order is a definitive order. I don't see where the confusion would be other than just in general conversation.

MR. LOW: What about *McCardle* where they ruled? The judge says, you know, "It's admissible." Then it comes in. They don't object. *McCardle* is still the law. They said, "You've waived it."

I mean, that's a motion in limine, and I don't think a motion in limine is really a definitive ruling the way they're generally drawn, say, "Don't bring it up without coming to the bench" or something like that, but just current practice. But I can live with either one, and that was just what we thought better. Whatever the committee thinks, let's vote on it, and we will go down the road, because I'm not here to advocate anything.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: One problem I have with this, and lawyers just don't ever understand this. You know, we've got a case, and you-all have been living with this case for years. It's fresh with us, and I'll

just tell you that there are a lot of times where I make a ruling at the motion in limine stage and then the evidence comes -- is offered two or three days later or the objection is made, and it just looks totally different. Now I understand a lot better than I did before we even brought the jury panel in.

This underlined language means I've got to remember all that and make a clear -- you know, clearly address it. I mean, it takes the burden off the lawyer to re-offer it or to make the objection, and if things have really changed for me, it's hard to do. I mean, it is very hard sometimes to really grasp a rule -- how the ruling ought to go before you've heard the case, and sometimes it just everything clicks and you see it differently in the middle of trial than you thought you saw it before, and this I think does not respect that.

CHAIRMAN BABCOCK: Tommy, then Harvey, then Stephen.

MR. JACKS: Well, the very phrase "definitive ruling" is problematic. When we've all heard rulings from judges, whether it be at the limine stage or even during the trial, when you have a hard time saying whether it was definitive or not, and so cautious lawyers I guess are going to tend to want to keep objecting anyhow.

I think it's a bad idea, and I think our current practice works very well, and I think we know when we've got a ruling that -- you know, that permits us no longer to object to preserve our error and when we don't, and I think this adds a new layer of headaches.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: I was just going to say I think that the rule works a little more practically than what maybe Judge Peeples was talking about in that Federal judges will make it clear whether it's a definitive ruling or not by stating whether it's a definitive ruling or not and use those words. "This is not a definitive ruling. I might reconsider this in trial, so approach the bench and we'll talk about it later."

I know in my practice now I'm just using motions where I say in my order, "This is a definitive ruling admitting or excluding," and that's language I'm using to help myself preserve error. So I think it could be used, but I think it will take awhile to educate the Bar of this problem.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: I don't think -- I haven't researched Federal Rule of Evidence 103, but I don't think that this is really intended to address the motion in

limine situation. I think this is intended to address the situation when the judge makes a ruling during trial either excluding or admitting the evidence. Having said that --

MS. CORTELL: The comment says it does apply to limine.

MR. LOW: The comment says it is.

MR. TIPPS: Does it? Okay.

MR. LOW: The comment says it.

MR. TIPPS: Okay.

MR. LOW: That's where I got it.

MR. TIPPS: I withdraw what I said because obviously I hadn't read the comment.

CHAIRMAN BABCOCK: Nina's got a comment.

MS. CORTELL: The comment also speaks to what Judge Peeples was saying. I understand we may not want to get into it, but just so you understand how this is supposed to work, it says, "The amendment imposes the obligation of" -- I can't read this thing -- "even when the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered."

So even though it's definitive, and I know it probably makes it more confusing, it doesn't mean it can't be revisited at trial when the more complete picture

is with the court.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: In what other circumstance do we require two definitive rulings anymore, and the first one doesn't count? Huh? And what people will be taught in evidence courses in law schools in Texas and elsewhere is that if you get a definitive ruling it's a definitive ruling, and they will be surprised to find out otherwise.

MR. LOW: Are you overruling *McCardle*?

PROFESSOR DORSANEO: Well, if I am, I am.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I don't believe that this rule eliminates the role of -- or means that limines, ruling on motion in limine, in Federal court preserves error. If the judge grants a, quote, limine on the grounds that the evidence is inadmissible and will never come in and that's on the record, that's a definitive record; but if all the judge does is said, "You have to approach the bench before you tell the -- try to elicit this testimony from a jury" -- "in front of the jury," you don't have a definitive ruling on admissibility. You just have an order in limine.

So in my view the real distinction here is, is the judge ruling on admissibility or is the judge

saying there's a predicate before you can raise admissibility in front of the jury. The problem with the Texas rule right now is that if you run the jury out and you have an offer of proof and the judge sustains the objection, then under the Texas rule when you bring the jury back in, they put the evidence on, you don't have to stand up and have the jury see you get overruled. But if you run the jury out, you make an offer of proof and the offer of proof is rejected and then you run the jury back in, then under the Texas rule are you supposed to make your offer of proof again in front of the jury and then have it rejected?

MR. SOULES: No.

MR. ORSINGER: The Federal rule says you don't have to make a second offer of proof if your admissibility has been rejected. The Texas rule only applies to objections out of the hearing of the jury, not offers of proof out of the hearing of jury; and to me there's a distinction and there's a validity to saying that both kinds of out of the jury offers and an offer that's objected to and sustained or an offer that's objected to and admitted, you don't have to redo the drill in front of the jury.

CHAIRMAN BABCOCK: Okay.

MR. EDWARDS: I don't know of any rule that

says you have to redo the offer in front of the jury.

MR. ORSINGER: Well, it says if you make your offer outside the front of the jury, not in the presence of the jury, and the judge rejects it --

MR. SOULES: We already have this practice. This is the *Daubert/Robinson* practice right now. You have a hearing before the trial starts. If the judge says he's going to testify, he can testify, and he gives those opinions.

PROFESSOR DORSANEO: And that's why those motions in limine are usually not called motions in limine.

MR. SOULES: And that error is preserved by that pretrial objection. It doesn't have to be made again in trial. Of course, the Supreme Court said it has to be made at or before the time the evidence is offered, and I think that means it can be made ahead of trial and preserved.

CHAIRMAN BABCOCK: Actually, they are called motions to exclude and motion in limine because the judges will give you a hearing on motions in limine but not motions to exclude.

MR. SOULES: And a motion to exclude, for example, there's attorney-client privileged testimony, somebody says it's a crime fraud exception, hash all that

out in front of the judge, and the judge says, "I'm going to let it in." And so when it comes in you've had your hearing on whether it's a crime fraud and you ought to be able to -- why do you have to get up and make an objection in front of the jury that it's crime fraud?

Everybody in this room who has defended a complex case has pissed off a jury -- excuse me -- irritated a jury by having to make objections over and over again because Texas preservation of evidence error is so complicated; and where it's something that just pretty clearly shouldn't come in or there's a legal ruling that will decide for all time whether or not for the purposes of that trial of that case whether that evidence comes in, if you can get a ruling on that, that ought to preserve error without having to get in front of the jury and irritate them constantly and hurt your case and hurt your client just because we've got some weird evidence error protection system.

HONORABLE SCOTT BRISTER: Chip, this isn't even on the agenda. If it's going to be controversial, should we think about it?

MR. LOW: I don't care. It doesn't make me any difference. I can write the rule and put the Federal sentence and say --

HONORABLE SCOTT BRISTER: I mean, this would

be a major change in Texas practice.

MR. LOW: It would be a change.

HONORABLE SCOTT BRISTER: It seems like we ought to put it on the agenda before we vote on it.

CHAIRMAN BABCOCK: Yeah, that's a good point. There were materials sent out on this, but technically it didn't get on the agenda, and since there does appear to be a controversy --

PROFESSOR DORSANEO: An updated case report would be good because there are Texas cases that draw this distinction between a definitive ruling and a preliminary ruling that's intended not to be definitive. I mean, I think there are at least three or four in my evidence civil trial guidebook that I know of that that's a changing practice in Texas; and, you know, we have this old idea from a true/false test that a motion in limine, ruling on a motion in limine, is not a definitive ruling; but I think we've oversimplified the thought process on that as if there never can be a definitive ruling at the preliminary stage, which makes little sense.

CHAIRMAN BABCOCK: I think Judge Brister makes a good point that since there does appear to be some controversy and that technically it was not on the agenda we should defer it. So with Buddy's --

MR. LOW: My assertion that there will be no

controversial --

CHAIRMAN BABCOCK: I know. You guys are all the same.

MR. LOW: Everybody's had one today.

CHAIRMAN BABCOCK: So we'll defer this.

MR. GILSTRAP: Chip? Chip?

CHAIRMAN BABCOCK: Yes.

MR. GILSTRAP: You know, when we come back to this, I mean, I think we need to see how this meshes with 33.1(a) of the Rules of Appellate Procedure. It just says you've got to get a ruling and that's sufficient. Or maybe it says -- maybe it doesn't say that. That's the way I read it, and it seems to me that the two rules need to be consistent.

MR. SALES: There was, I think, a previous proposal by the committee that at least there ought to be a reference over to the appellate rule under this section. I don't know what happened to that, but --

MR. LOW: I don't know, but that was the appellate rule I remembered. I don't have it in this packet as an appellate rule, and I didn't remember which one. What was the --

MR. GILSTRAP: That's something we can talk about next time. 33.1(a).

CHAIRMAN BABCOCK: Okay. Buddy, is 904

really not controversial?

MR. LOW: It's really, really not. Mark -- that's one in Mark's committee. You might tell them what you proposed on that and we adopted it on affidavits.

MR. SALES: That was a rule, I think, awhile back when we were consolidating the Rules of Civil and Criminal Evidence, there was a request that we look at other areas that really were more appropriately should have been incorporated into the Rules of Evidence that were in the Civil Practice and Remedies Code, and that one was specifically mentioned and sent to our committee to look at. And so after a lot of looking, we voted, I think pretty much unanimously, that it should be moved into the Rules of Evidence, and I think there were a few changes to it as well.

MR. LOW: Basically what you-all were doing, as I understand it, is saying you couldn't just say, "I object," You had to file an affidavit or otherwise it would be admitted.

MR. SALES: That was the other thing, was that there was too much -- the two changes was, one, to move it into the rules and, secondly, to take care of just blanket objections to these affidavits that somebody went through a lot of time and effort to get without anything really backing up the objection, so that that forced,

particularly in smaller cases for, for instance, the plaintiff to bring a 3,000-dollar slip-and-fall case, the doctor to the courthouse; and so the feeling was that in that situation there ought to be at least something, a counteraffidavit or something, to specify and put out what's really defective about the affidavit; and an objection by itself wasn't going to cut it. So that was the two changes that our committee recommended.

CHAIRMAN BABCOCK: That sounds noncontroversial.

MR. LOW: No. The only thing we -- my committee accepted that. The only thing that we questioned is the -- what was the code? Not the Government Code.

MR. SALES: The ability to revoke that rule.

HONORABLE HARVEY BROWN: Texas Civil Practice and --

MR. LOW: Because that is the same rule as is in the Texas Remedies Code and we questioned whether the Court would or should change that. That's exactly the language used there, but then under the -- under 22.004, which is in there, the judicial branch of Government Code, the Supreme Court has rule-making power, and anything it adopts repeals any conflicts in law or parts. And they have a right to do that, but they mail it to the

Legislature, and if they don't do something it becomes a law, and we didn't feel that would be that controversial, and the Supreme Court in the *Johnstone* case said the same thing. If they pass a rule which amends a present legislative law then that rule is effective if the Legislature doesn't, you know, do something. Bill.

PROFESSOR DORSANEO: This proposed draft makes that affidavit evidence --

MR. LOW: Right.

PROFESSOR DORSANEO: -- all the time, right?

MR. LOW: Unless there's a counter --

PROFESSOR DORSANEO: No. No.

MR. SOULES: No.

PROFESSOR DORSANEO: Makes it evidence all the time.

MR. SALES: That's right.

PROFESSOR DORSANEO: It does --

MR. LOW: Well, okay. It's evidence, but it's not --

PROFESSOR DORSANEO: Inclusive.

MR. LOW: -- inclusive.

MR. ORSINGER: But you can't contradict it unless you file an affidavit.

PROFESSOR DORSANEO: So it just changes the whole rule around. The dynamics of the rule are reversed.

MR. SALES: The idea was that -- the whole point of this rule was to save money and costs and time; and what was happening was you go through, you get an objection, and now you've got to bring somebody live down there; and in these smaller cases in particular, you know, it would be at the person's option. If you want to submit it on the affidavit and the jury wants to believe it, they can or not, but the whole idea was to try to streamline it on a cost standpoint.

MR. ORSINGER: Well, but you see, part (e) does more than that. Part (b) says your affidavit is a substitute for a witness, but part (e) says you can't contradict an affidavit unless you file an affidavit. Now, that's saying that if I don't file an affidavit within 30 days of when you file an affidavit I can't even call eight witnesses to testify against your affidavit. So you're doing more than making the affidavit evidence. You're precluding the other party from calling a witness unless they also engage in the affidavit process.

CHAIRMAN BABCOCK: Paula Sweeney.

MS. SWEENEY: And that was the purpose and intent of the statute --

MR. LOW: That's right.

MS. SWEENEY: -- and what this rule would do would be to effectuate the intent of the statute, which

would be to reduce cost, reduce clogging of the courts in cases where it's not necessary, and take out an abuse of the system; and it, I think, clearly falls within the rule-making authority that the Court has in part (d) that allows them -- or part (c) in procedural matters that are not in conflict with substantive law to enact procedural steps as needed. There is no -- there is no reason for this committee not to do this, both in terms of the current practice that's going on, in terms of the good of the system and of the litigants.

HONORABLE SCOTT BRISTER: Well, except, again, it's not on the agenda.

MR. LOW: Let's go.

HONORABLE SCOTT BRISTER: This affects every personal injury case. These are used in every case. If we're going to change the practice that affects thousands of cases we need to put it on the agenda so people know we're going to discuss it.

CHAIRMAN BABCOCK: Yeah, the not on the agenda is a good objection if it's controversial, and it sounds to me like there is some controversy about it, so we'll defer this till next time. I would say the same about 705, so that gives us an hour to talk about 509.

MR. LOW: Well, it's not going to be very controversial.

MR. TIPPS: 10 minutes will be enough.

CHAIRMAN BABCOCK: Okay, good. We will save some time then.

MR. LOW: All right. Bill brought up the problem --

MR. SOULES: Chip, on this -- if we're going to do this 904 change then we need to move the deadlines to an earlier point in the process. In here, you get an affidavit 30 days before the evidence is supposed to be offered, all you've got to do if you don't have time to deal with that when the evidence in the affidavit is counteraffidavit and it's over before you've got oral testimony to go with it. If it's coming in anyway then the process probably needs to be backed up sometime before trial so that there's time to get a deposition or whatever you need to do. I don't know whether you have a policy that's going to be usable even if there's a controverting affidavit, but if you do, it needs to be earlier in the process.

MR. LOW: What are you suggesting, Luke?

CHAIRMAN BABCOCK: He's suggesting that that's a comment to consider when we take it up next time.

MR. SOULES: When you rewrite think about that, please. Okay?

CHAIRMAN BABCOCK: Okay.

MR. SOULES: Because it's going to come up whenever we get back to it.

CHAIRMAN BABCOCK: Okay. 509, Buddy, you want to --

MR. LOW: 509, Bill Edwards brought us 509 and rightly so. 509, as you all know by now, provides that if you file a lawsuit, you know, the privilege, the doctor/patient privilege, is waived -- or, no, it provides an exception, I'm sorry. 510 talks about waiver in the medical, that that's an exception.

Well, what is it an exception to? Does it mean that it's discoverable or does it mean that you can go out and just ex parte the doctor? Mark's committee agreed that these ex parte conferences should not be allowed without notice and some protection. Our committee agreed that as well.

Now, there's a -- there's a lot to be said about both 59 -- 509, 510. The 509 pertains only to physician and patient. 510 pertains to, well, mental health, drug abuse, and so forth, but it pertains to patient and profession, could be any licensed nurse or what. There are a lot of Federal statutes, one known as HIPAA that's going into effect which applies to any medical care, not just doctor, medical care that uses electronic transmission and makes it a fine to give out

information.

So our committees thought that there should be some rule so that you can obtain this information. You might even be able to talk to the doctor, but you have to give notice and then somebody would have a chance of going to court and objecting. If I go out and I talk to the doctor and I say, "Well, I can talk to him only about what's relevant," you know, am I going to stop the doctor if he starts talking about a drug problem that's not related? It doesn't operate that way. So if a person is given notice and then you can ask for protection, go to the court, and the court can outline certain things.

Now, Harvey drew a rule from our committee. That rule went back to Mark's committee, and Mark's committee drew a rule, and I could recommend adoption of either one of those rules. I'll let Harvey talk about the rule you and Tommy first drew. Is Tommy here? Okay. Tommy, you or you want to join in with Mark or --

MR. JACKS: Well, Harvey really --

MR. LOW: Harvey, I'm sorry.

MR. JACKS: Harvey is really the --

MR. LOW: Okay.

MR. JACKS: -- genius behind it, so I'll let him talk about it.

HONORABLE HARVEY BROWN: Well, I'm not the

genius behind the idea. The idea comes basically from the Fen-Phen cases in Houston and in Harris County where this issue was brought before the judges for thousands of plaintiffs and potentially thousands of doctors that the defendants wanted to interview and the plaintiffs didn't want them talking to. And basically what we did is we came up with a form that said you have the right to go talk to them, but, doctors, you have the right not to talk to them. If you're going to talk to them, you should only do so under certain parameters.

We didn't want to get involved in every single plaintiff and every single doctor. We wanted to have something that was basically self-executing that they could go forward and handle from there on. So what we came up with was this formal notice that the doctor would receive that says, "Here's what you can talk about. Here's what you can't talk about."

Well, then one of the disputes was how do you define what they can talk about and what they can't. You can't say what's relevant because they will fight over what's relevant, and so what we came up with for the Fen-Phen cases was you could talk about anything that's in medical records that have already been provided to the parties, because if those weren't relevant presumably the attorney had the ability to stop you from getting those,

they could have filed a motion to quash or limit the subpoena to the records custodian. They didn't do so; therefore, you can talk about only what records you have at hand. That meant they couldn't go look at the doctor's file itself because the doctor's file might be different than the file the lawyers had received, so we limited it to only talking about things that are in the file that you receive. In case something slipped through that had HIV status in it we said you couldn't talk about that no matter what because there was a regulation on it.

So that was basically the provision that I had to work off of, and Tommy and I tried to work on trying to figure out a way that we wouldn't have to involve the courts. I thought that was a big advantage as a trial judge. I didn't want to be hearing these every time the plaintiff and defendant disagreed, so what we did, if you just kind of quickly glance through it, basically we said that the defendant could do it unless they're otherwise prohibited by law. That would pick up things such as mental health records, HIV, etc. You could only do it by using certain things, like these records that we talked about.

If you do it, you have to tell the plaintiff's lawyers that you're going to do it so that they can go to the judge. So there is still a provision

to get to the judge, but it's not that you go to the judge automatically. It's only you go to the judge if there's a real dispute between the parties.

Then maybe they don't fight about it before you go talk to them, but after you go talk to them they might want to go talk to the treating physicians. We said tell them after the fact that you've talked to a treating physician; and then we said, of course, the plaintiffs can talk to the treating physician unless the treating physician has been sued, in which case you can't; or we also added "was an employee to a party that's been sued," since sometimes, it's rare, but it does happen on occasion, that a hospital or care provider might be sued without the doctor being individually named.

Then the issue was should we have a form of notice. The Rules of Evidence in other places have a form in it, and I believe it's 902, but I might be off on the rule number. It actually states the form of the affidavit for what it has to say for business records. So using that idea, we drafted the notice that is given to the healthcare provider. They have to sign it. This is probably the thing that Tommy and I spent the most time drafting, and it is intended to kind of explain to the doctor the law somewhat in simple terms so that they can make an informed decision as to whether they want to do

that.

So that's an overview of what we did and why we did it, which is mainly to try to make it self-executing. The one thing that I don't like in the rule and we didn't like in the rule, but we couldn't figure out a better way to fix it was the use of the words "defendant" and "plaintiff." You don't see those in rules usually. You see "parties," but since it's very different for the way the plaintiff can talk to the doctor and the defendant could talk to the doctor, we couldn't figure out a way to get around that problem. So that's a summary.

MR. LOW: Mark, you want to tell us what you did?

MR. SALES: All right. We had a subcommittee study this and then we had our formal meeting back in October, and ours is I guess in the separate packet that Buddy sent around as a new Rule 514. The rule that the State Bar committee came up with is something that was suggested by Judge Dave Godbey and then we tinkered with it, but it starts on the premise that ex parte, once these Federal regs go into effect on HIPAA and these others that there can be no ex parte without a violation. The only place you could think of it is some given doctor who's not engaging in some kind of electronic transmissions of materials. In other words, these HIPAA

regs are incredibly broad. They cover virtually everybody and that there are substantial fines to the doctor if he discloses or she discloses information.

So we started with the premise that unless you have something here it's improper to start off with, and the way the HIPAA regs -- it's sort of unclear about whether they really say notice is enough or not. Clearly an order is okay and clearly formal discovery is okay and clearly written consent from the patient is okay. Those are three ways you can get it, and after we started studying this, besides the HIPAA regs you have to deal with the HIV regs, the regs relating to alcohol and substance abuse, and mental health, all of which don't even allow notice clearly. You have to have an order or a form of discovery to get it, but we couldn't come up with an idea that would cover all of these areas.

And so the bottom line is we came up with a rule that says that outside of formal discovery the two ways that you can obtain this is either through written consent and then you could ex parte, if you want, or through some kind of a court order; and the court order needs to tell the doctor that you may or may not talk to the lawyer if you don't want to and, two, define the scope of what it is that the doctor or the healthcare would be allowed to talk about, and that that order needs to be

provided to the doctor in advance of the communication.

And so our rule came up with that as sort of the premise. It went beyond a little bit this -- the rule here on 509 that Harvey came up with, because we actually put it as the evidentiary effect of if you violate the order that the evidence would be inadmissible unless you could show good cause for what happened on that; and also we provided because a lot of times you may have the doctor, the hospital, the nurse, I don't know how many different parties, that you would still be able to share information or for a joint defense privilege.

A couple of other things our rule is a little bit different is it doesn't really talk about in terms of plaintiff and defendant because you don't have to worry about whether they're a third party defendant or if it's actually the defendant's healthcare information that may be at issue. If it's a truck driver and you're suing as the plaintiff and you're trying to get into their records about whether they were on something or not, you've got to go through the same process.

And the other issue that we looked at was because 509 really talks about physician/patient -- I mean, there's a separate 510 that deals with mental health that you really had to have a rule that dealt with it across both, so if you had this kind of Rule 509, you

would almost have to put the same language again in 510.

MR. LOW: 510 uses professional, any license.

MR. SALES: Yeah. And so you almost have the two different rules that are currently there, one dealing with mental health and professionals and one dealing with patient/physician. So really those two rules probably also need to be looked at a little closer. So that was really where we came up with that we felt like that that was -- this was the best and safest approach; and, you know, we were very concerned or a lot of concerned in the committee about from the doctor's perspective about what to do. So that was one of the driving reasons for the philosophy of our rule, so....

MR. LOW: And also I think one of the things you were interested in is because HIPAA is healthcare and not just doctor, physician. That's why you wanted a new rule instead of a 509 amendment, because 509 is basically that. 510 is any professional. 511 pertains to waiver of all privileges, and filing a lawsuit is not a waiver. A number of the things in 509 are also in the Occupation Code, and that is physician/patient. A number of things in 510 are in the Health and Safety Code, and there is no lawsuit exception to that.

There was a rule when it was originally

passed in '79 that you can give the information as authorized by law or rule, and that would be interpreted to mean under physician/patient favor. That was taken out in '95, and that's no longer it. So under that it's not a waiver, so I think we needed something that would come up and would handle healthcare, because that's what we're talking about. It's your healthcare records that should be protected, and you should have a way to know that they're being obtained and a way to protect them, and I think both of these rules do that, and that's all I have to say.

CHAIRMAN BABCOCK: Buddy, we've gotten an enormous volume of correspondence opposing this proposal. What do you think is behind that?

MR. LOW: Well, I tell you what is behind it. I got a letter from TADC that said, "Dear Member, please write Justice Hecht, Chip Babcock, and Buddy Low and tell them you oppose this rule."

HONORABLE SCOTT BRISTER: I enjoyed them. I didn't know Chip's middle name was Linde until I got 30 letters addressed to Charles Linde Babcock.

CHAIRMAN BABCOCK: Pronounced Linde, by the way.

HONORABLE SCOTT BRISTER: Oh, sorry.

MR. LOW: Well, that's the only thing that

worked for those letters. They didn't have much substance. They were told to object because they want to go out and talk to the doctor. I have defended cases for many years, and I have always refused to do that because I don't think it's right. *Mudder* held that just a broad exclusion, Supreme Court said, is not -- I mean, a broad right to go talk is just not valid. I didn't feel like it should be done. In 33 states it is unethical for the doctor to talk to you about that. In Texas they haven't ruled because the doctors want it in the malpractice situation. They want to be able to talk to their fellow doctors.

I felt that all the objections we got, and I got a stack of them. I read them, and it was almost like the same man wrote them and just asked somebody else to sign them. They really added nothing to it.

CHAIRMAN BABCOCK: Oh, there were three or four different versions.

MR. LOW: Oh, well, they edit. But I think it's just somebody that just -- I think there's no merit to it. I really don't.

CHAIRMAN BABCOCK: You think it's just because the defense lawyers want to have this procedural advantage of being able to talk to the lawyers?

MR. LOW: See, they argue that plaintiffs

lawyers have an advantage because a plaintiff's lawyer can go and talk to that doctor and they can't. Well, I send my client. I'm a plaintiff's lawyer, say, or I'm a defense lawyer, I'm saying. That's hard for me to realize anymore, and I send the plaintiff for -- up to that medical, independent medical exam. I don't want the plaintiff's lawyer running out and talking to him without me.

CHAIRMAN BABCOCK: You mean the defense lawyer?

MR. LOW: No. No. I mean, the defense lawyer wants -- I'm sorry. I got it reversed.

MR. EDWARDS: You got it right.

MR. LOW: But if there's an independent medical of my client --

CHAIRMAN BABCOCK: Right.

MR. LOW: -- then I shouldn't be able to go out and talk to that doctor, the other person's. What if you designate somebody as an expert? You don't talk to them.

CHAIRMAN BABCOCK: Not supposed to talk to them.

MR. LOW: I just think that if you need to talk to them in these situations, and somebody named -- you know, if the plaintiff's been treated by 50 doctors,

you don't want to take 50 depositions or something. You can go to the judge, get some kind of pretrial order, who he's going to call or what, get the records and do something, but I just don't think it's right to sneak out and talk to somebody's doctor under a rule that says I can only talk to them about what's relevant, and I've heard that lawyers sometimes get into disagreements in court about what's relevant. You know, so, but I don't know how you can get into a disagreement there because there's only one person to hear it, so it wouldn't be a disagreement. Everything is relevant.

CHAIRMAN BABCOCK: What if the lawyer doesn't sneak out?

MR. LOW: Well, he doesn't have to sneak out. He can drive his great big old long car out there, but still the patient has nobody there to protect him.

CHAIRMAN BABCOCK: Gotcha. John, what's the counterpoint to this?

MR. MARTIN: I'm going to give my counterpoint, and I don't purport to speak on behalf of any organization when I do this.

CHAIRMAN BABCOCK: Oh, you wrote all those letters.

MR. MARTIN: I did not write a single one of those letters, didn't ghost write them, didn't do

anything. But where I come out on this, I just don't think that this is something that should be the subject of an evidence rule or a procedural rule.

Let me try to explain what I think the practice has been for a number of years, and I base this on my own experience and in talking to some other lawyers. In regular nonmedical malpractice personal injury cases I do not believe it ever has been common, at least in my experience or people I've talked to, for defense lawyers to go talk to plaintiffs' treating physicians. I'm not saying it's never happened, and I will tell you in 28 years I've never done it, to the best of my recollection, nor have other experienced lawyers, including some of the leaders of the defense organization that you mentioned a moment ago, because I have discussed this issue with some of them.

Where it does happen on a regular basis is in medical malpractice cases, and it happens in this context: The defense lawyer is hired to represent a physician, take a surgeon, for example, where something has gone awry during a surgery procedure, and another doctor comes along afterwards to treat the patient and perhaps remedy the situation. It's very common under those circumstances for the defense lawyer to call the second doctor and say, "Do you have any criticism of the

treatment that my guy gave to this person?" And if the answer is "yes," they write a check; and if the answer is "no," then there's a witness for somebody to use; and that goes on. That's common, and back when I did a fair amount of medical malpractice work I certainly interviewed some doctors under those types of circumstances.

Buddy and some of the others and some of the materials that have been passed out today referred to HIPAA, and I've learned probably more than I ever wanted to know about HIPAA the last few weeks for a lot of reasons, both business-related and for this purpose. I have talked with a lawyer in my firm who knows a great deal about it. I've talked to a lawyer in another firm, another major Texas law firm, that knows a great deal about HIPAA, and I even took the step of reading most of this stuff myself. It's enormously complicated.

HIPAA itself is 181 pages long. It was an amendment to the Internal Revenue Code passed in 1986. It's the Health Insurance Portability and Accountability Act. Buried in all this stuff are about three paragraphs dealing with privacy and confidentiality. Congress was given three years to enact legislation to ensure privacy and confidentiality, after which if Congress failed to act, the Department of Health and Human Services was supposed to pass regulations. Guess what. Congress

didn't act.

The three years came and went, so the Department of Health and Human Services passed implementing regulations that are incredibly detailed, three columns, 30 or so pages long; and in my opinion and in the opinion of the lawyers I have talked to, the practice of interviewing subsequent treating physicians under any of these circumstances, med-mal or not, is probably prohibited by HIPAA. At least that's my reading of it and that's the reading of two other lawyers that I've consulted with. Somebody out there may be smarter than we are and think of a good argument why it's permissible, but I believe that under HIPAA the practice is going to have to stop, and that's what I would advise lawyers at my firm or elsewhere.

CHAIRMAN BABCOCK: Even in the malpractice situation?

MR. MARTIN: Yeah. Yeah. I happen to believe that's unfortunate, but I believe that's what the effect of HIPAA is. Now, I've read both of these proposed rules, and these proposed rules do not jive with HIPAA. They use some of the same terms like "healthcare provider" and "healthcare information," but those terms are defined differently in HIPAA in the regulations. I'm really talking about the regulations now when I say "HIPAA."

Those terms are defined differently than they are at various places in the Texas statutes.

We've had a lot of litigation in Texas about what a healthcare provider is under the medical malpractice statute, and the terms are defined -- it's much more broad under HIPAA than it is in Texas. I believe an employer who -- I used this example in talking to Mark this morning. My law firm provides free flu shots for the lawyers, but if our spouse wants a flu shot, she has to pay 15 bucks for it. That might make us a healthcare provider under HIPAA the way it's worded.

MS. SWEENEY: Will I have to send you a 4590 letter?

MR. MARTIN: If you charge anybody for medical services, like carrying oxygen on an airplane, you may be a healthcare provider under HIPAA and all this stuff applies. And I know most big employers are putting HIPAA plans into effect, but I will tell you, I don't think these two rules that have been drafted really, really do what HIPAA does, because there's a lot of exceptions here to allow -- in HIPAA to allow the healthcare system to continue to provide quality healthcare.

I am very familiar with the operation of a hospital in Dallas that my firm does some work for that is

literally -- and Tommy is familiar with them, too. He sued them a couple of years ago. But it's literally the only place that certain procedures are done in our part of the country, and it is fairly common for a patient whose family is suing the hospital to bring the child back to be treated there while the litigation is ongoing; and if you read these rules literally, our nurses would be unable to talk to the doctors about this child's healthcare without getting some kind of written consent filled out or a court order or something like that; and in emergency situations that could really lead to problems. Another area -- but that's addressed in HIPAA.

Another area where there would be problems is various Federal and hospital accreditation requirements possibly you have to go through such as the sentinel events where if certain types of events occur in the hospital, the hospital is obligated to conduct an investigation. Well, if there's a lawsuit pending against the hospital, they need to go talk to the doctors who were involved in the treatment; and under this rule, unless they're both defendants in the case, they would be unable to do that. Only if the hospital was a defendant and not the physician, they would be unable to do that.

Another situation that comes up, if the hospital is charged under various types of vicarious

liability theories, joint enterprise that the Court wrote on last week, or various agency theories; and if you read this literally, if you read the rules literally, a hospital sued under a vicarious liability theory might not be able to talk with the alleged agent of the hospital if the hospital were not also a defendant in the case.

So with HIPAA having been passed and with all of these pages and pages and pages of regulations that lawyers who represent healthcare providers are going to have to know a lot about and certainly healthcare providers are going to have to know a lot about, I don't think it's advisable to have a procedural rule to try to capture in two paragraphs what we have got pages and pages and pages of regulations about, and I just think that would be a big mistake for the Court to adopt this rule.

CHAIRMAN BABCOCK: Let me ask a couple of questions. Does HIPAA preempt state law?

MR. MARTIN: HIPAA preempts state law unless the state law is more restrictive.

CHAIRMAN BABCOCK: And that leads to the second question. Are the proposed rules more protective of patients' rights than HIPAA so that they would not be preempted?

MR. MARTIN: I think in some ways they may be, such as some of the examples that I gave, if they were

read literally and prevented a doctor from talking to a nurse because one of them was a defendant and one of them was not. That would be more restrictive than HIPAA. The investigation of events, the sentinel events investigation, the peer review investigation, things like that, would all be permitted under HIPAA, but I think if you read this rule where you had to go get a court order to do a peer review investigation, that would certainly be a drastic change; and I don't think that's -- I don't think that's what anybody intended by this rule, but I'm just telling you I think there are some serious unintended consequences if we were to pass this rule.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: No. The rule is what created the problem, and the court cases say that. I wouldn't go talk to the doctor and you wouldn't, but it's happening. It is happening.

MR. EDWARDS: It's being taught. The defense lawyers are teaching that in seminars.

MR. LOW: They are telling that they have that right. That's the letter they're saying, they have that right. They say they have the right under HIPAA. That's wrong. What created that wrong? Rule 509. That's what they're saying their authority is, 509.

If 509 is not in keeping with the law then

we need to have some rule that is in keeping with the law, not leave it just like it is so they go on and they can practice that while we mess around with a little language here and study HIPAA for 13 years and might not understand HIPAA.

MR. SOULES: What do the defense lawyers say about 509 that authorizes them to have that contact with the --

MR. LOW: They say that the exception is when you file a lawsuit you waive the doctor-client privilege.

MR. MARTIN: That's on the general personal injury case.

MR. LOW: Yeah.

MR. MARTIN: In medical malpractice there's a specific exception, (e)(1) for medical malpractice cases.

MR. LOW: And I would also point out that the same exception exists in the Occupation Code, section 159.002. Some subdivision of that has an express exception for the situation where a malpractice case is pending.

MR. MARTIN: That's another thing. I think this rule would be an attempt to amend the statute, and I don't think it --

MR. SOULES: Where does 509 allow that?

MR. HAMILTON: (e)(4).

MR. ORSINGER: (e)(1) and (e)(4).

MR. LOW: Both the Occupation Code and the Health Code provide for consent, and they say that the same three elements that you have to put, who is authorized, what you give, and so forth. They are not totally consistent, but, for instance, Healthcare 611.001, that's merely a patient and professional, but HIPAA goes beyond professional, you know. Occupation Code, physician and patient, and it has an exception where a civil suit is hired. Healthcare doesn't have the exception.

CHAIRMAN BABCOCK: Buddy, let me ask you --

MR. LOW: But what we're trying to do is make a rule where these things can be obtained and justice can be done without an injustice being done of somebody going out and just talking ex parte.

CHAIRMAN BABCOCK: Okay. Richard and then Paula, but let me ask you a question first. If 509 is being used as justification for defense lawyers to go out and talk to doctors and it's being taught in seminars and everything and HIPAA prohibits that practice, HIPAA is going to override 509, right?

MR. SALES: The issue there is who is HIPAA really governing? It's governing the doctors, not

governing the lawyers. That's the problem here. You've got -- HIPAA puts a big fine on them, but it doesn't say anything about the lawyer who obtained the information. That was the problem in the rule.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: Okay. It seems to me that the more fundamental problem is that (e)(1) and (4) are exceptions that involve the concept of relevance and that we have lawyers and perhaps doctors deciding what's relevant without it being an issue in court, and then perhaps what we should do instead of walking off into this mine field is to rewrite (e)(1) and (e)(4) so that the privilege does not apply to the extent that the Court determines that the information is relevant to an (e)(1) or (e)(4) exception, and that way no court -- I mean no lawyer on their own can just conclude that it's relevant.

CHAIRMAN BABCOCK: But John's point, Richard, is that -- and I see what Mark's saying about HIPAA doesn't apply to lawyers, but when that gets to the court, you know, the judge is going to presumably be told about HIPAA. It doesn't matter what you do. The doctor is prohibited from giving you this information, whether it's relevant or not.

MR. ORSINGER: But what I understand the complaint that the plaintiffs lawyers have is that the

defense lawyers are taking it upon themselves to determine what's relevant and then they just go and talk to doctors about what they think is relevant.

MR. LOW: That's not really what happened. They are just going to talk about -- just talk to them ex parte and like one doctor friend they will go to and say, "Well, if you help him, it's going to up your insurance rates," and they go and kind of woodshed them. I'm not -- I'm not saying that all defense -- most defense lawyers are just like we are. We don't believe it's right, and we don't do it, but it's going on, and 509 is what their excuse is, and they shouldn't be able to use that.

MR. ORSINGER: Okay. But, Buddy, if what you're trying to do is prohibit communication, don't tell us that what you're trying to do is preserve confidential medical information. If what you're trying to do is preserve confidential medical information, let's talk about our rules that preserve it.

MR. LOW: But, Richard, it's not a question -- there are certain things that may be relevant, may not. I think that ought to be obtained through discovery or some court order and not through an ex parte talk. If somebody has found --

MR. ORSINGER: But this is an elaborate procedure to obtain information on an ex parte basis when

there could be enormous disputes about whether the subject matter of discussion fits within the exception or not.

MR. SOULES: We already have a mechanism to do this in Rule 205.

MR. LOW: In what rule?

MR. SOULES: Rule 205, back in the discovery rules. I think what we need to do is say that the information -- and it's an exception under (e)(1) and (4) -- may only be obtained by a person other than the patient with the patient's consent or through discovery.

MR. LOW: That would be --

MR. SALES: That's kind of what this one says.

MR. SOULES: Another thing we've got to look at, too, that nobody has talked about yet is that the lawyer -- this lawyer is having a communication with an unrepresented nonparty, an unrepresented person, right?

MR. LOW: Right.

MR. SOULES: Well, the comment to Rule 4.03 says, "During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel." Now, what's the first thing that the lawyer -- that the doctor says whenever the lawyer calls up to talk to him? "Can I talk to you?"

CHAIRMAN BABCOCK: "No problem."

MR. SOULES: Lawyer says "sure." He has now violated Rule 4.04 of the disciplinary rules.

MR. LOW: It's been there a long time, but the practice is going on, and from the letters that --

MR. SOULES: But we've got the mechanisms there doing it.

MR. LOW: They're admitting doing it and telling you they've got the right.

CHAIRMAN BABCOCK: Judge Brown had his hand up for a long time.

HONORABLE HARVEY BROWN: Well, there's two separate problems, and we need to keep them separate when we debate it. One is the public policy issue as to protecting patients, patient rights, attorneys acting inappropriately. That's a good question. HIPAA is another good question, but they are two different questions. There is some overlap, but they are different questions.

I wasn't sure where John was going a hundred percent, but if part of your point is that these rules are new, then I personally probably was in favor of not actually adopting a rule right now because the HIPAA implications are so new. The HIPAA regs weren't adopted until March, and those were proposed. They didn't become

final until August, and they don't actually go into -- they aren't actually required for compliance until next year, so we're still trying to figure out I think what they mean. There is a debate about their meaning.

I think notice might be sufficient. Certainly a court order is sufficient, although you could argue that a little bit, but I don't think so. So is notice enough? I don't know for sure. That's one reason I would suggest that it might be good to put this off for a little while until we have some interpretations, but if we're going to debate it, I do think we should keep separate the two subjects.

MR. SOULES: But this notice, if given by a lawyer to a doctor, is giving that doctor a whole lot of legal advice. It talks about what the Texas law says about this and that and the other.

HONORABLE HARVEY BROWN: But we did that on purpose, so the lawyer doesn't do it.

MR. SOULES: That's okay for you to do it as a judge in the Fen-Phen cases and say "I approve this."

HONORABLE HARVEY BROWN: Well, the Court would be approving it. It would be the same thing. The Supreme Court would be approving the notice. That's why it's in the rule, so the lawyer doesn't give advice. That was the intent.

MR. SOULES: Well, maybe that's true. If it is true for the Supreme Court to do, it's too broad-sweeping. You've got a trial judge in a case or a mass tort situation who's deciding how to make rules related to evidence in order to manage his docket, which a judge is expressly allowed to do under our Rules of Evidence and should do, and how to make discovery orders; and in that context and that case, understanding everything, you come up and say, "This notice is good enough," but just to make that a universal tool for a lawyer to use in any case is too much, I think.

HONORABLE HARVEY BROWN: Of course, if you don't think it's good enough, the rule, this one, not necessarily Mark's, but this one says, "Plaintiff, I am going to be doing this. If you think this notice doesn't work here or you think there's some reason it shouldn't work here, you're now on notice to ask the judge to stop us." 14 days notice.

MR. SOULES: All you've got to do is file a 205 request to the doctor and you can get the records. You have to give notice of 205.

HONORABLE SCOTT BRISTER: Buddy, did you want to respond to him?

MR. LOW: No, no. Go ahead, Judge. I asked him to let you speak first. Go ahead.

HONORABLE SCOTT BRISTER: Well, I'm real concerned about this rule, not so much about, you know, ex parte in general. If everybody agrees -- I mean, my general feeling is -- I did ex parte when I was doing med-mal, talking with subsequent treaters to find exactly if it was going to be critical or not. I didn't sneak out, but I didn't drive a long car either.

MR. LOW: But you're the exception to the rule.

HONORABLE SCOTT BRISTER: But I -- the thing that I -- I did read through all those letters from both sides that obviously the plaintiffs need to get more organized --

MR. LOW: They do.

HONORABLE SCOTT BRISTER: -- on their letter writing than the defense side is; but, of course, the fact of the matter is the reason the defense lawyers are crying is because only their pig is being stuck. This is a one-sided rule. To me it's kind of like if you-all wanted to pass a rule saying to take a deposition you've got to stand on one leg while you do it. Well, I'm not really in favor of it, but as long as everybody has got to do it, okay, but I'm against a rule that says defense attorneys have got to stand on one leg to take a deposition but plaintiffs attorneys don't.

Now, everybody says, yeah, but you don't understand, plaintiff's attorney is in a different position. Plaintiff's attorney is representing the plaintiff, but when you push on every reason for this rule, I don't think that applies. Now, let me explain that. No. 1 concern is privacy. I'll come back to that one. That's the main one and the most important one, but let me do with some of the other reasons that are thrown out because I think they're easy to deal with.

No. 2, ethics. Disciplinary Rule 4.02 bars contact with the other side's retained experts. Of course, Texas law is clear as a bell. You can't turn a fact witness into an expert witness. There's a difference between an IME doctor and between the treater. Subsequent treater is a fact witness. You can't silence a fact witness by designating them as your consulting expert, and if that's the case, it is the work of a moment for a defense attorney to also designate the subsequent treater, and then if it's unethical for the defense attorney to talk to that designated expert, I don't see why it's not unethical for the plaintiff's attorney to talk to the expert.

No. 2, well, it allows woodshedding and molding the doctor's testimony. Obviously that goes both ways, too. Now, for every time a doctor talked to me when

I was defending med-mal cases there was three times where the following occurred: The plaintiff's treater's deposition was noticed for 1:00 o'clock. I showed up at 12:45, was told the doctor was in surgery. 1:00 o'clock came, 1:15, 1:45, I'm still in the waiting room and still being told the doctor is in surgery; and low and behold five minutes of 2:00 I go back to the doctor's conference room and there's the plaintiff's attorney with the doctor and six empty coke or coffee cup, cans around.

MR. SOULES: Mental surgery.

HONORABLE SCOTT BRISTER: Now, I didn't feel that great about it, but I didn't think anybody had done anything unethical either, and I won't ask for a show of hands, but I'll bet you every plaintiffs attorney in this room does that, and how do you think that looks to the defense attorneys? So, you know, yeah, it looks bad, and I don't doubt that there is a hint, perhaps given by some insurers or fellow doctors or whatever to somebody they ought to show up -- shut up, but I don't doubt also that there is some plaintiffs attorneys that suggest to a doctor, "If you want to get paid, it sure would be helpful, since my client has no insurance, and our right protection letter says we'll pay your bill if we win, sure would be helpful how you testify, but only if you want to be paid." If we're going to ban stuff that looks bad,

again, that goes both ways.

No. 3, the doctors don't know the privilege and they may feel uncomfortable, it puts them in a difficult situation having to decide these privilege matters. Well, I mean, I think it's wonderful the plaintiffs Bar is concerned about making sure the doctors are informed and don't get themselves into liability or other problems like that, but, I mean, really we're talking about doctors that work at hospitals or HMOs that take legal courses in medical school; and if they're counting on, you know, a third party, you know, they're -- No. 1, I think they don't count on a strange lawyer to tell them what the law is. No. 2, I think they know very well you don't tell somebody their HIV -- anybody's HIV status to a total stranger; and, again, I think it's strange that if a defense attorney goes to talk with a doctor, well, we have to have -- have to make sure you have the right notice form telling the doctor rights because, of course, defense attorneys may misrepresent how much you've got to tell them, but when a plaintiff's attorney does it you don't.

Do plaintiffs attorneys not ask things about a patient's health that they don't need to know? I don't see why not. Or why we have any assurance in the private meeting taking place while I was out in the waiting room

that some of that wasn't going on, and I just don't see why -- I can see why one side feels put upon when the rules only apply to me but not the other guys.

Five, that ex parte is unnecessary. You can get it all in formal discovery. That clearly applies both ways. Plaintiff's attorney doesn't need to ex parte the doctor. Just take the deposition. You're going to have to do it anyway in a personal injury case, so let's just all do it if we're going to do it at all.

Six, HIPAA -- and I have definitely not read -- I do point out for your amusement, it's interesting that the 180 pages is part of the administrative simplification rules issued by the Federal government. The purpose of these, only the Federal government, you know, could simplify something for 180 pages. The explanation of the history of comments is 92 pages, triple column, small print, and I don't -- there are certainly questions about it.

Yes, they go in effect next year, but the good news is they can be amended whenever the secretary wants to, but only once every 12 months, so they will only change once a year. At least we have that assurance for the future, and they are very controversial. I've spent 10 minutes on the website, the HIPAA website, and found out these were one of the last hours of the Clinton

administration was when they were issued. Now, that's not -- doesn't mean they're wrong, but I just feel a little queasy about a lot of things that went on the last hour of the Clinton administration, and the Bush administration did and changed them, at which point Ted Kennedy said back in August, "They are changing back. These changes are not going to be any good," which suggests to me it's all still up in the air; and if this election goes this way, the next election is going to go the other way; and I don't think we ought to be running after these people trying to keep up our rules when they're going to blow this way and that and may preempt it all anyway.

You know, this whole -- all this stuff, as I understand it, was so your insurance followed you from one place to the next. So we'll make it easier. We'll do it all electronically and then in that three paragraphs, "We want to make sure that those electronic transfers don't let information out." Somebody might say, you know, from there an agency regulation that just regulated all of healthcare information might not have been within exactly what Congress told them to write. I mean, we do take into context what the agency's authority was when they started writing these rules, and was that what -- did Congress give this agency authority to write a rule about all healthcare privacy? I don't have any idea, and I hope to

God I never have such a case I have to decide, but those are things that are going to have to be worked out and might change.

Last of all, so let me go back to the privacy case. Now, we can't forget that every privilege covers up facts. Some cases it covers up the truth. On numerous occasions, and by that I mean half a dozen to a dozen times over the last 10 years, I've got calls from new trial judges in Harris County who say they're looking at something in camera, which you don't get to do till you're a judge, and they say, "I am outraged. The defendant or plaintiff or whoever says they had the green light, and I'm looking at the paper where they told their attorney they had the red one. They ran the red light and now they're saying green. What can I do about it?" Of course, the answer is not a thing. The attorney-client privilege is supposed to protect lies. Indeed, that's all it protects, lies.

MR. LOW: Judge.

HONORABLE SCOTT BRISTER: If it improved your case, what would you do? You would waive it, of course. Of course, it protects the bad stuff.

Now, we do that with numerous rules and privileges, either, No. 1, because we want to encourage a particular type of communication, or, No. 2, because we

think the jury will be so confused and prejudiced by it that we don't want to get into that. Well, one thing I haven't heard in any of the discussion or any of the papers is anybody alleging that this private information is getting admitted at trial. I would be shocked if that was the case. That's what you have the judge there to say, "Don't do that." I have never heard anybody say or read a case suggesting that that was the case.

There was a period of time there when that was happening with mental health records, as you'll recall, till the Supreme Court said, "Not only do you not admit psychiatric records on a mental -- on a garden variety mental anguish claim, you can't even get them." It's got to be some special kind of psychological/psychiatric evidence by the plaintiff before the defendant can even get them, but so I don't think it's a matter of prejudice in the jury's concern.

Is it -- do we need to protect plaintiffs attorneys conversations, ex parte, with the doctor? Obviously everybody agrees we don't need to particularly protect defendants attorneys conversations with the doctor, but why are we protecting plaintiffs attorneys? Why doesn't it go both ways? There is nothing confidential when a plaintiff's attorney talks to the doctor because -- interesting question. Plaintiff's

attorney gets general power of attorney either in or with your contingency fee contract. Do you really think that makes the plaintiff's attorney the agent for getting healthcare -- making healthcare decisions for the patient?

What's going to happen in the case where the plaintiff's attorney says "pull the plug" or "don't pull the plug" on a terminally ill patient and the family says the opposite? Do we really think that the plaintiff's attorney's power of attorney means, "I have the authority to make healthcare decisions"? I imagine not. I will have to see when it comes out.

But then if that authority, that agency is not for healthcare decisions, what's going on in the conversation, we all know what's going on in the conversation. It's not for healthcare. It's for litigation. Is that something that needs to be protected against getting to all the facts?

Well, irrelevant information will be inadvertently disclosed. We've got a perfectly good rule on what happens with inadvertent disclosures. If an inadvertent disclosure of attorney-client information goes out, you get it back. We don't try to stop inadvertent disclosures of attorney-client information by prohibiting requests for production. We don't just bar the discovery, say, "This will make sure that nothing accidentally gets

out. We won't allow any discovery at all," and that's what this looks like to me. If the problem is inadvertent disclosure, we can cover that with a rule that takes care of inadvertent disclosure.

And -- and so what should we do? Everybody agrees, I think, from the stuff I read, and it was a lot, that a plaintiff has no right to privacy and no leg to stand on to claim a right of privacy as to relevant information. You want to sue somebody for a hundred thousand or a million or however many you want to sue them for, you've got no right to then claim, "Oops, sorry, you can't find out any of the facts about what I'm suing you about." There's just no good argument for that.

So everybody agrees there is no right of privacy whatsoever on relevant information. The only question is what's relevant and what's not, and everybody involved in the situations, not in a good position to make that call. Certainly the defendant's attorney is not, the insurance company certainly is not, but the plaintiff and the plaintiff's attorney aren't either. I had a number of conversations, hearings, as a trial judge where I was told by the plaintiff's attorney looking at the records about a neck injury from six months before the car accident, "Oh, that's irrelevant because we're suing for a back injury and so neck injuries are not relevant," or "The back

injury from two years ago is not relevant because she healed from that and so that's not relevant anymore because that one was over, so it's all from this new one."

Nobody is in a position to make that call except the judge. Who ought to have the burden to go to the judge? Both of these rules put that burden on the defendant. In every other area of Texas law we put the burden on the person who has the information and knows whether they ought to fool with a court hearing or not. We can't have these hearings on every case. You can't do a Fen-Phen hearing on every case in Harris County. The judges will kill us. You can do it on the big ones because, of course, you can decide pretty much on a Fen-Phen case for all of them what's relevant and what's not, but you can't do that on every case.

So who ought to have the burden to say is this worth troubling the trial judge about or not? That question answers itself. It ought to be what it is right now today. The plaintiff's attorney who can look at the medical records and see if there's anything worth keeping away has the burden to go to court, as you can do right now under Texas law. Nothing prevents a plaintiff attorney from going to the court and asking to bar ex parte communications between the defendants and the doctor or bar it in part on certain irrelevant information.

Nothing prevents you from doing it now, other than you might become a pest if you do it on all your cases, and this rule would make that the rule on all cases.

So my position is it doesn't matter to me whether we want to get rid of ex parte or not, but I can sure see why defendants attorneys feel like this is a one-sided deal, because it is, and it seems to me it ought to be good for one side is good for the other.

CHAIRMAN BABCOCK: So you're against the rule?

HONORABLE SCOTT BRISTER: I don't mind -- as far as I'm concerned, you can say no ex parte at all, but I am against a rule that says -- I would be against a rule that says plaintiffs can't do something and defendants can.

MR. LOW: Judge, let me ask you this: You said it ought to be what's good for the goose is good for the gander. All right. Bill sues my client, a corporation. He doesn't sue --

CHAIRMAN BABCOCK: Are you the defense lawyer?

MR. LOW: I'm the defendant. He doesn't sue the foreman, but he can't go out and talk to that foreman. That's a man that has operative facts, but so I as the defendant have that protection, and he can't even talk to

my foreman, but it would be all right for me to go talk to his doctor, and that's fairness?

HONORABLE SCOTT BRISTER: The difference is the doctor doesn't have to pay, whereas you do. If you get sued --

MR. LOW: No, Judge, I'm talking about your idea of not concealing, about facts being hidden and all that, and let's get to this hiding facts and truth. Is it hiding it when --

HONORABLE SCOTT BRISTER: Absolutely every restriction on --

MR. LOW: -- the plaintiff can't do it, but the defendant can? That's hiding it.

HONORABLE SCOTT BRISTER: Every restriction on discovery or admissibility, obviously, hides some facts. That's what they all do.

MR. LOW: But it's a question of how do -- you can get them, but it's the question how you can get them. I guess you can get them by poking a gun at a man's head or you can get them through discovery or you can get them ex parte, and you shouldn't be able to get them ex parte.

CHAIRMAN BABCOCK: Bill had his hand up before you did, Richard, by a whisker.

MR. EDWARDS: I'm not going to get into the

fray. I just wanted -- since this is on a public record, I wanted to register my shock at Judge Brister's comment concerning the purpose of the attorney-client privilege and say that if that's the case, I'm going to quit the profession.

MS. SWEENEY: Amen.

MR. HALL: Amen.

MR. LOW: Yeah.

MS. JENKINS: I agree.

CHAIRMAN BABCOCK: Well, perhaps he didn't mean it quite the way you took it. He might have been misunderstood.

MR. EDWARDS: I understood what he said, but I hope he overspoke.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I don't do plaintiff's or defense work, and so maybe I don't see the ramifications of all this, but the way this strikes me is that we take something that should be confidential, which is confidential medical information, and there is a lawsuit that's been filed, and because the lawsuit is filed lawyers for litigants are either -- under the present scenario, under their own authority or under this rule under some procedure, they're getting confidential information and not going through the court to get it and

there's no record of what's said and there's nobody being sure that the scope of the communication is within the purported authority to have the conversation.

And I consider medical information to be as secret, if not more secret, than attorney-client information, and it really troubles me and I don't know what -- where the plaintiffs get skewed on this and where the defendants get skewed on this, but it really troubles me that through a rule we're going to authorize off the record conversations between one litigant talking to someone that's supposed to be under a privilege on the basis of some kind of vague statement that something is partially privileged, and we don't know for sure what the scope of that privilege is, and we don't have anybody that's an umpire telling us what the scope of that privilege is.

It scares the hell out of me, and it seems to me like before anybody other than the patient or the patient's representative can get confidential information it ought to go through the court system, and it ought to be clearly delimited so that we only encroach on the confidential information to the extent that it's relevant to the court proceeding.

MR. LOW: Let me clarify one -- go ahead. I'm sorry.

CHAIRMAN BABCOCK: No, no, no. Paula had her hand up.

MR. LOW: I was going to clarify one thing.

MS. SWEENEY: Yield to Buddy Low.

CHAIRMAN BABCOCK: She will yield to you if it won't take as long as your yield to Judge Brister.

MR. LOW: I won't take -- I don't know how to filibuster. But HIPAA is complicated, and we can't really follow HIPAA, but our idea was that make somebody go to court, and if they understand HIPAA and can convince the judge that this is prohibited under HIPAA then the judge can enter orders accordingly. Or if you have to go to court and say, "Well, you can't get this information through the Health and Safety Code then you can argue the Health and Safety Code," but at least, as Richard's saying, go through some clearinghouse; and you may be authorized to do it, but then there you're authorized if you can follow the law and you don't necessarily have to know if you have some procedure where you can argue what the law is or the law might change, and as it changes, you can argue it's not authorized.

CHAIRMAN BABCOCK: Okay. Paula. Then Judge Peeples.

MS. SWEENEY: I'm mindful of the Chair's schedule at starting the other discussion at 3:00 and

between now and 3:00 I will not have time to state my thoughts in response to what Judge Brister had to say, but I'd like to note for the record that I object to almost everything he said. I'm also aware this is the last meeting of this constituted committee and that we may not finish this or that due to personal circumstances I may not be able to be here tomorrow, if that's when we come back to it. Excuse me. And I would like to get some guidance from the Chair about that, because I do want a response in the record to what was stated both about litigants, about members of the Bar, about the system, about the way it works, about the way the Court rules about what the law is, almost all of what was said. What's the Chair's pleasure?

CHAIRMAN BABCOCK: Well, as you know, Paula, everybody is free to respond either orally or in writing; and if it's in writing, unless you tell me otherwise, the writing will be posted on the website so that everybody can see it, so it will be part of the record; and you certainly have the opportunity to do that in this case; and let's keep going and see where we get and see whether we need to reconvene tomorrow; and if your circumstances are such that you can't be here, we'll accommodate that somehow.

MS. SWEENEY: You want to stay on this

subject now then?

CHAIRMAN BABCOCK: I'm going to stay on this for a minute or two. We have some people that we told to be here at 3:00, and it's not quite 3:00 yet.

MS. SWEENEY: All right. Then to address the substance of the issue, one problem that has not been focused on is that, as we saw a few years ago with a temporary sort of silly interpretation of a statute that was read to say that any expert had to be from Texas, it was a wrong interpretation. It was cleared up shortly, but during a window when that was the interpretation there were a number of otherwise intelligent lawyers who felt like it was their duty as zealous advocates to take that position, because it was a gotcha and because they thought they could; and, therefore, because they could, they felt like they had to.

And that -- in this circumstance and in the circumstance that we have with ex parte now, in the absence of a rule there are lawyers, some of whom wrote letters, who feel like because arguably they can, then they must; and they feel like they've got to go do it or they're not zealously representing their clients; and so among many reasons why we need a rule, a rule that provides a clear procedure, a clear mechanism, and doesn't put lawyers in the position of saying to people they don't

know, don't represent, have no relationship with and are, in fact, in many ways adverse to these treating docs doesn't put lawyers in the position of saying, "Well, we can talk about this part. It's relevant, but now be sure you don't tell me anything that's hurtful to my opponent that might not be relevant, and I'll let you know when you get there."

That's an untenable position for an ethical lawyer to be in. It's very difficult to go into a situation like that, talk to the opponent's treating doc with nobody there representing your opponent and stay within the bounds of appropriateness and relevance, which is why court orders are a good idea, but you can't always get them, and we don't want to go to court in every case. In the case you talked about, Judge Brown, where you've got a big group case, that's one thing, but in individual smaller cases you can't, and you can't go to every treating doc -- to the court about every treating doc and get a ruling.

The thought that simply going with no notice, with no warning, is somehow necessary makes no sense to me. Where is the harm in requiring notice to the other side, anymore than I can't go ex parte the defendant's physician? Then there are cases where the defendant's physical condition or mental condition, Arcay

versus something, the Ramirez case involving an impaired physician. That physician's health and mental health were in issue in the case, but if I were suing that impaired physician for -- in a malpractice case, I would not say that, therefore, I have a right as his opponent to go walking into his doctor's office and talk to him about his condition. I would -- I believe I would need a court order or an authorization, and I think that that ought to be the law and that we need to provide that as the law. Otherwise, we have no protection.

The argument that was made that a lawyer would say, "You better testify how I want or you won't get paid" is already well-handled by the Rules of Evidence, and I have not seen it happen, and I don't believe it happens.

HONORABLE SCOTT BRISTER: Have you seen defendants threaten doctors "I'm going to pull your insurance"? I just think the likelihood -- I don't care if we ban ex parte. The issue is do we ban it for defendants but not plaintiffs lawyers.

MS. SWEENEY: The plaintiff's lawyer stands in the shoes of the plaintiff. The plaintiff can talk to the plaintiff's own doctor. It is absurd to compare the two as though they were apples-to-apples.

HONORABLE SCOTT BRISTER: Do you tell the

plaintiff, "You don't have to give me an authority"? Do the plaintiffs attorneys tell their clients, "You don't have to give me authority to find out about your HIV status" or the other things we're requiring the defendants to do? I bet they don't. If they don't, why do we presume a patient wants the stranger who is his attorney to know about my sexually transmitted diseases but not the other stranger on the other side?

MS. SWEENEY: The answer to your question is the responsible plaintiffs lawyers tell their clients, "I need to know what's in your records and I need to go talk to your doctor so that I know whether I need to file a motion for protective order so that I can make a legal judgment and advise you and so I can make the appropriate motions on your behalf, and I am standing in your shoes and speaking to your physician in determining this information." The defense lawyer, however, is not standing in the plaintiff's lawyer's shoes. He's stomping on his feet.

HONORABLE SCOTT BRISTER: Nobody is saying you can't talk to your client and you can't get the medical records. The question is why do you need to go talk to the doctor but not the other side go talk to the doctor?

MS. SWEENEY: Because I have a right, as the

plaintiff does, to talk to my own doctor, to my client's own doctor. It is not apples-to-apples. The defense lawyer is my client's opponent.

HONORABLE SCOTT BRISTER: You are not going there for healthcare. You're going there for litigation.

MS. SWEENEY: I'm going there because I represent my client, who has a right to go talk to his doctor about his health and about how it impacts his life, which includes litigation or anything else he's doing including his job, if I'm representing him in an EEOC case, or anything else.

MR. SOULES: And a right to consent.

MS. SWEENEY: And a right to consent. Thank you. And it is not analogous in any way, shape, or form to say that the stated opponent stands in the same position to go talk to the physician. It is also inappropriate to put an insurance company, a malpractice carrier, in the position of coming in and advising the subsequent treater about what they should or shouldn't say, and it's equally inappropriate for the defense lawyer to do it, and I think putting the defense lawyer in a position where they don't have the protection of this rule is unfair, because they do end up in the position where they feel like they've got to go do it or else they haven't done every single thing they can do.

The rule makes it clear if it is necessary for them to go learn things informally they have a mechanism under the rule for doing it. Let me ask you this. Why do you care about notice? Why should they be able to sneak? Why can they not send the notice?

HONORABLE SCOTT BRISTER: I'm not here protecting the right of anybody to go. I don't care if you want to ban ex parte. As I read the letters, the screaming is why is it that my opponent in litigation gets to talk to a fact witness, who is also the treating doctor, but I don't get to talk to a fact witness under the same circumstances?

MS. SWEENEY: Because it's not apples-to-apples. I can't go talk to Buddy's foreman because he's on the other side of the case from me. He's Buddy's -- in privity with Buddy, not in privity with me. So the rule says that. It is the rule, it's been the rule. I understand the rule, other lawyers understand the rule.

HONORABLE SCOTT BRISTER: That's only because Buddy has to pay for whatever the guy says with regard to --

MR. LOW: No. I'm talking about --

MS. SWEENEY: No.

HONORABLE SCOTT BRISTER: With regard to the

police officer, with regard to the treating physician, nobody has to pay for them to show up at trial. Nobody has to pay for them if they ruin our healthcare case. They are a third party, independent, nonemployee fact witness.

MS. SWEENEY: Why are my clients -- why is a conversation with my female client's gynecologist relevant in a knee surgery malpractice case?

HONORABLE SCOTT BRISTER: I doubt that it is at all.

MS. SWEENEY: So the defense lawyer just goes over there and has an ex parte chat about her gynecologic history, but since it's not relevant I don't have to worry about it because it won't come into trial? He should not be allowed to go into that office and have that conversation without consent or a court order. It's not appropriate. It's not relevant. There is no logical or conceivable legal argument by which it's waived, and yet it happens.

HONORABLE SCOTT BRISTER: Why do you need to go talk to your client's gynecologist on your knee case?

MS. SWEENEY: It doesn't make any difference why. I'm entitled.

HONORABLE SCOTT BRISTER: Shouldn't she be just as embarrassed?

MS. SWEENEY: If she wants me to and I want to, and I'm in her shoes, I can go talk to her, and it's not anyone else's business. I'm on her side. If she says, "Go do it," I can go do it. I may be doing other stuff, too. I may be also getting her a divorce and doing other things for her that have nothing to do with the case.

CHAIRMAN BABCOCK: Okay. We're going to interrupt crossfire here for just a second to see where we're headed with this. It seems to me that -- where did Buddy go?

MR. TIPPS: He went to talk to his foreman.

CHAIRMAN BABCOCK: Say, "Watch out. Sweeney wants to talk to you."

HONORABLE HARVEY BROWN: Can I make a procedural point?

CHAIRMAN BABCOCK: Okay, if it's quick.

HONORABLE HARVEY BROWN: Our committee met after Mark's committee had a recommendation.

CHAIRMAN BABCOCK: Yeah.

HONORABLE HARVEY BROWN: We changed that, came up with an alternative. Mark's committee then met. We, frankly, have not had a chance for our committee to meet to look at Mark's. Obviously this is a complicated issue. I would suggest it come back to our committee to

look at now that we have Mark's committee's second recommendation.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: That's fine, but I find discussions like this helpful, and I don't think it would be good for the committees to just hash and hash it out and then bring it back and hit us cold turkey with a proposal. I mean, discussions like the one we have been having are helpful to the rest of us who are not on the subcommittees.

CHAIRMAN BABCOCK: Yeah, I agree with that.

HONORABLE DAVID PEEPLES: So we need to have some discussion probably.

CHAIRMAN BABCOCK: Yeah, I agree with that, so --

MS. SWEENEY: Do we still exist?

CHAIRMAN BABCOCK: That's where I was headed. We're going to have to recess this, and, frankly, it's a very interesting, helpful discussion and people feel strongly about it obviously, but we're going to have to break that because we have made a promise to a bunch of people that are taking their time off to talk to us about the electronic filing, to get to that. So Judge Brown anticipated what I was going to talk about, and that is we've got tomorrow morning to continue this dialogue if we

want or we can take a vote, and if it wins, we say we don't need a rule. I don't sense that that's the way the room's going, or we can refer it back to the subcommittee and let the new Supreme Court Advisory Committee take it up when it's reconstituted, and so those are sort of the options, and I'm happy to do it. Anybody see -- see, that will teach you to go to the bathroom.

MR. LOW: Well, no, I need 35 minutes to respond to Judge Brister. Really, why don't we take a vote on whether that something should be done to stop ex parte conferences.

MR. SOULES: Without consent.

MR. LOW: Without consent. And then -- and we can see if most people believe and if they believe there should be, we can work that in, but if they believe there shouldn't then just let the hide go with the hare and let it go.

HONORABLE SCOTT BRISTER: And I'm willing to vote to ban ex parte, if that's what everybody wants to do. That's not the question. The question is are we going to ban ex parte by one side but not the other.

MR. SOULES: This is ex parte without consent, Judge.

HONORABLE SCOTT BRISTER: Which is -- which is to ban it for one side but not the other.

MR. SOULES: If you don't like the consent waiver, I mean, it's there already.

MR. ORSINGER: It's to ban it for the nonpatient and not ban it for the patient, is the way I see it.

CHAIRMAN BABCOCK: Okay, kids, here's what we're going to vote on. Let's vote on whether or not we want to spend three hours tomorrow morning continuing to talk about this.

HONORABLE SCOTT BRISTER: I can't be here tomorrow, so that may help your discussion.

CHAIRMAN BABCOCK: Well, but Paula can't either, so as far as I'm concerned that's a push.

HONORABLE SCOTT BRISTER: Takes all the fun out of it.

PROFESSOR DORSANEO: I'm ready to vote.

HONORABLE DAVID PEEPLES: Chip, this is too important. Is this not the first discussion we've had of this?

CHAIRMAN BABCOCK: Yes, that's correct.

HONORABLE DAVID PEEPLES: This is too important to just zip on through like this.

CHAIRMAN BABCOCK: Well, we're not going to reach --

HONORABLE DAVID PEEPLES: Well, to vote on

the core question about whether to go one way or the other, I mean, gosh, this is supposed to be a deliberative committee, and to have a vote on the core issue before -- I don't know, we had four or five people who've talked.

CHAIRMAN BABCOCK: I didn't say we were going to do that.

HONORABLE DAVID PEEPLES: I thought that was the proposal you were getting ready to make.

MR. LOW: I didn't mean a binding vote. I just meant --

MR. SOULES: He meant a definitive vote.

CHAIRMAN BABCOCK: A definitive vote. I think the issue is --

MS. SWEENEY: It's a motion in limine.

CHAIRMAN BABCOCK: Yeah. I think the issue is whether or not we spend three hours tomorrow with people who may be talking about it or we defer it to -- what Judge Brown wants to do is go back and meet with Mark and his group and have further discussion about it at subcommittee and then come back, whatever the reconstituted committee is, and talk about it. I don't think that anybody, and certainly not me, is trying to ramrod this one through. Maybe some of the other ones, but not this one.

MR. ORSINGER: Chip, can I offer a

suggestion? What I'd like, if it's going to go back to the subcommittee, is I'd like for them to not just assume that ex parte will happen and we have to put procedures in place for it, but also consider whether we ought to ban it through the discovery rules or through the evidence rules or somehow structure it that it doesn't occur, because that's where my vote is; and if they would consider that, I will vote in sending it back to subcommittee; but if we're just going to assume that ex parte goes on and we have to figure out how to write a rule that's consistent with the Federal regulations that change every year, I'm going to vote against that.

CHAIRMAN BABCOCK: You want to say the first part of what you just said again?

MR. ORSINGER: I can't remember it.

CHAIRMAN BABCOCK: I didn't understand it.

MR. ORSINGER: I don't remember, either. My proposal is that if it goes back to the subcommittee that they also consider alternatives to just banning ex parte conversations that are done outside the discovery context.

HONORABLE HARVEY BROWN: I think he's saying it should be a discovery rule as much as an evidentiary rule.

MR. ORSINGER: Right.

HONORABLE SARAH DUNCAN: I think what he's

saying is there needs to be more of a report, not just a rule, but a report on the pros and cons of partial and total bans. Is that what you're saying?

MR. ORSINGER: Yeah, and I would expect that there might be some other changes that are being proposed here.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: And maybe I don't need to understand HIPAA, but it seems to me that some people said that HIPAA takes care of this. Some people said we need to have a hearing to argue about HIPAA, and I'm frankly confused about --

MR. SOULES: Well, there's another problem, too, and that is a lawyer is going into the doctor's office and getting the doctor to violate HIPAA, inducing the doctor to violate HIPAA. Is that okay?

PROFESSOR DORSANEO: Right. Or that, and I don't know whether I need to understand HIPAA to state my own viewpoint about whether somebody should be able to go talk to somebody else's doctor, but -- and I don't think I do; but if we're going to go into this in some depth, I don't like it when people say there's something that's really pertinent but we're going to do something short of comprehending that.

CHAIRMAN BABCOCK: Yeah.

HONORABLE JAN PATTERSON: Maybe HIPAA has a preamble and a policy statement.

MR. EDWARDS: About 180 pages of it.

CHAIRMAN BABCOCK: By the way, I think now is the perfect time to note this, the perfect time, because these peer review rules that Justice Duncan did started out with definitions, so structurally I just wonder about.

HONORABLE HARVEY BROWN: I noticed that, too.

CHAIRMAN BABCOCK: Judge Peeples, do you think that if we spend three hours tomorrow talking about this generally the way we have been talking about it that that would be helpful to you or to Judge Brown or whoever, or Mark or whoever, because obviously we've got the room and we've got a court reporter lined up.

HONORABLE DAVID PEEPLES: What we have just had this afternoon has been very helpful to me. I have not had this come up, frankly. I don't remember it, and I'm just not accustomed to this committee having an afternoon of discussion about something and then signing off on it and it go to the Supreme Court.

CHAIRMAN BABCOCK: Well, we weren't going to do that. I mean, we're going to have to -- if we say that we need a rule, we're going to have to work through the

mechanics of what they propose, and that's a lengthy project. So, well, I'm willing to do what everybody wants to do.

MR. LOW: Well, Mark can't be here tomorrow and Paula perhaps not, and I feel like --

CHAIRMAN BABCOCK: Don't forget your chief over there.

HONORABLE SCOTT BRISTER: That's why I said everything I wanted to say today.

MR. LOW: Well, that's all right. I'm not worried about him not being here.

CHAIRMAN BABCOCK: All right. Well, we have some key people who can't make it, so here's what we're going to do, with Justice Hecht's blessing, if you'll bless this. You-all keep working on this, Mark and Judge Brown and whoever else wants to be involved, and I'm sure the Court wants to hear what the Supreme Court Advisory Committee has to say about this, and so whatever the reconstituted committee is, I would guess the Court would ask it to consider the dialogue.

JUSTICE HECHT: Absolutely. Yeah.

CHAIRMAN BABCOCK: So that's what we're going to do. It doesn't require a vote, and all of you in the back of the room, sorry that we're behind schedule, but we're only 15 minutes and then when you add a

five-minute break we'll be 20 minutes behind. Is that okay with you-all? Is that all right? Okay. We're going to take a five-minute break. Okay.

(Recess from 3:15 p.m. to 3:29 p.m.)

CHAIRMAN BABCOCK: Okay. We're onto agenda Item 2.8, rules for the pilot project in Fort Bend and Bexar Counties regarding electronic filing, and Judge Peeples is going to take us through this.

HONORABLE DAVID PEEPLES: Are we ready?

CHAIRMAN BABCOCK: We are ready.

HONORABLE DAVID PEEPLES: You will need a handout called "Final report, subcommittee on e-filing local rules."

CHAIRMAN BABCOCK: I've got mine.

HONORABLE DAVID PEEPLES: A little bit of background on this, the Supreme Court has been experimenting or coming up with a pilot project for Fort Bend County, the county courts of Fort Bend County, and for the district courts in Bexar County; and the Office of Court Administration and the Joint Committee on Information Technology drafted some local rules to implement the electronic filing in those two pilot jurisdictions, the civil district courts in Bexar County and the county courts in Fort Bend County.

And so this is a baby step in the direction

of e-filing, and it's a baby step, not a big step, in two regards. Two pilot counties and it's limited in a modest step in a second way. Nobody has to do it. This does not displace and take away from anybody the way you handle a lawsuit, the way you do right now with paper filing, but people who want to do e-filing and receive e-filing can opt in to these experimental rules.

Now, OCA and JCIT came up with some proposed rules, and it was hashed out very, very well, and they were signed off on by the judges in Bexar County and the judges in Fort Bend County and were sent to the Supreme Court for hopeful approval, and the Supreme Court had a few questions, and they sent those questions to a group that consisted of several people -- and I'm going to let them introduce themselves in just a minute -- from OCA and JCIT and from TexasOnline. I'll tell you about that in just a minute, too; and about four or five people from this committee, me, Bonnie Wolbrueck, Andy Harwell, Richard Orsinger, and Bobby Meadows, we all had a big conference call, and I think we resolved the issues that the Supreme Court raised. And so what is before us now is a final -- you know, tentatively final version of the proposed rules for these two expertmental projects in these two counties.

Now, OCA -- and I've got three people here.

I want you-all to -- in just a minute -- I'm going to tell you one or two more things and then instead of going through this line-by-line or section-by-section I think the way to do it, because it's such a late day and the Supreme Court wants to move on this, is let those of you who have read it make comments or ask questions of the people who have been involved in this from the start; and, Margaret, if you'll go ahead and you-all introduce yourselves. These are from OCA, Office of Court Administration.

MS. BENNETT: I'm Margaret Bennett. I'm the general counsel for the Office of Court Administration. This is Ted Wood. He's our special counsel for trial courts, and he was the primary draftsman of the rules, and this is Mike Griffith. He's the director of the Judicial Committee on Information Technology.

HONORABLE DAVID PEEPLES: Okay. Thank you. And they're available for questions in just a moment. Now, as I understand it, the e-filing, it's not sent straight to the district clerk, for example. It goes to something called TexasOnline, which is a private provider, and then from them it's forwarded to the appropriate clerk, and TexasOnline I think has four people here. Would you-all tell us who you are, please?

MS. DWIGHT: Thank you. My name is Marianne

Dwight. I'm an attorney. I'm working with Bearing Point working on the TexasOnline project.

MR. CHISOLM: My name is Andrew Chisolm. I'm the technical project manager for the TexasOnline e-filing project.

MS. BRUNNICK: I'm Mary Lou Brunnick, and I'm the overall project manager for the e-filing project, and I'm with Bearing Point and TexasOnline.

HONORABLE DAVID PEEPLES: Thank you. And is anybody else here an expert, or are you-all involved in this?

MR. ANDERSON: Yes, sir, we are.

HONORABLE DAVID PEEPLES: Would you-all tell us who you are, please?

MR. ANDERSON: My name is Jerry Anderson, and I own a company called E-document Technologies here in Austin, Texas, and we are -- have been for the last year -- have been working on an e-filing solution that we presently have running and have been trying to beta test since June.

HONORABLE DAVID PEEPLES: Thank you.

MS. PASS: And I'm Michele Pass. I'm with E-doc also. I'm Jerry's partner.

HONORABLE DAVID PEEPLES: Now, if you will, this document that's before you, skip over the first three

pages. Those are sort of explanatory. The actual local rules are on about the fourth page. At the top of that page it says, "Exhibit A, subcommittee model local rule proposal" and there are eight pages, four front and back, and then just a little bit on page nine, and those are the rules. That's what I think we need to discuss.

Let me point out, however, that not all documents are covered by this. In other words, somebody who wants to e-file a document or pleading or so forth, not everything can be e-filed; and at the bottom of page two and the top of page three are the documents that cannot be e-filed, but others can; and I understand that we want to take abortion bypass documents and say they cannot be filed, e-filed.

MS. BENNETT: That's correct. The Jane Doe cases have been added, the parental consent cases have been added to the bottom of 3.3(vii).

HONORABLE DAVID PEEPLES: Okay.

CHAIRMAN BABCOCK: Can I ask a question? 3.3(vii) is 76a. 3.3(viii) is documents which access is otherwise restricted by law. You said --

HONORABLE DAVID PEEPLES: Would it be (viii), Margaret?

MS. BENNETT: Yes. I'm sorry. (viii).

HONORABLE DAVID PEEPLES: Proceedings under

Chapter 33 Family Code, and that's the judicial bypass cases that we've dealt with. Those would be exceptions. In other words, if you want to file one of those under these rules you have to do it the old-fashioned way by paper because you cannot e-file those.

CHAIRMAN BABCOCK: Great.

HONORABLE DAVID PEEPLES: And I want to stress again these proposals would apply in the civil district courts of Bexar County and the county courts of Fort Bend County, I assume civil cases only, not criminal.

CHAIRMAN BABCOCK: Only county court of Fort Bend?

HONORABLE DAVID PEEPLES: Yes. Yes.

CHAIRMAN BABCOCK: Why is that?

HONORABLE DAVID PEEPLES: Just wanted to have a different part of the state and a different court system. You've already got district courts in Bexar County, I assume is the reason for that. And, again, nobody can make anyone do this. In other words, if I'm a lawyer and somebody wants to e-file and e-serve me it cannot be done, right?

MS. BENNETT: (Nods head.)

HONORABLE DAVID PEEPLES: I have to agree before I can be made to accept an e-service, and nobody can be made to file a lawsuit electronically. You can do

it if you want to, but you have to opt into the system for it to apply to you. And obviously what is happening here is this is different; and I think very wisely the Supreme Court said, "Let's take cautious step and see how it happens," sort of road test this new vehicle and then we'll see how it works and make changes and maybe proceed and maybe not.

Anything else by way of preface that you-all think ought to be said? And the members of the advisory committee, Richard and -- did somebody raise their hand? Yes.

MS. DWIGHT: I kind of wanted to explain a little bit about TexasOnline, if I may. TexasOnline is actually a infrastructure, a portal that Bearing Point in conjunction with Clerk Information Resources put on, so it's actually -- TexasOnline itself is actually a state infrastructure that in order to facilitate various governmental entities within the state to provide services online. So, for example, if you want to renew your driver's license, you can do it online. So TexasOnline itself is kind of a strange entity, if you will. It's not technically an entity in that sense, but it's a project that's been done in conjunction with a state agency in order to provide governmental services online.

HONORABLE DAVID PEEPLES: Thanks.

MS. SWEENEY: You can renew your driver's license online?

MS. BENNETT: You can pay your taxes online.

HONORABLE DAVID PEEPLES: Let me just point out, look at Rule 1.3. Instead of quotation marks it came out "A" and the at sign, and that's throughout this document. That's just a little glitch. It's not substantive, but don't be misled by that, and I think we're at the point now where anybody who has a comment or a question or a suggestion, you ought to go ahead and make it, because we're not going through this section-by-section. This has gone through a lot of process so far, and we're at the point the Supreme Court just wanted this committee to take a look at it, and it is your opportunity to shoot at it.

MS. SWEENEY: Question. What's the reason for -- what was the thinking on excepting out these specific classes of documents?

MR. WOOD: I can answer that. There were some documents that we felt did not lend themselves to electronic filing, either because of the nature of the document, like the Chapter 33 document that we're talking about, a Jane Doe case, or documents that had seals on them, that kind of thing, and just did not lend themselves very well to the process. We might add that we did try

and look at the model rules from California, Colorado, some of the other jurisdictions that are doing e-filing, and they made similar exceptions. We did try to include as much as we possibly could without running into problems.

HONORABLE DAVID PEEPLES: Of course, it's conceivable that after there's some experience with this these other exceptions might be changed, but this cautious first step I think the thinking was let's not go all the way on every kind of paper that gets filed with the court.

MR. ORSINGER: Something else that might be said in terms of matters that are not public like, you know, adoption proceedings and things like that, technically there are some people in this filing process that are not the Texas government; is that not right? I mean, and so you can't very well make everything fit if it has to be handled by the government agency in a way that keeps it confidential to have it filed with someone that's not part of the Texas government, so those kind of things are not part of this filing system. Is that not right?

HONORABLE DAVID PEEPLES: Did anybody understand what Richard Orsinger said?

CHAIRMAN BABCOCK: That's not an infrequent thing.

MS. BENNETT: If you're for the rule, then

yes.

CHAIRMAN BABCOCK: Chris said that that's right.

MR. GRIESEL: And these are also the major exceptions in fax filing rules, too. Where we've allowed fax filing under local rules, we don't allow fax filing of the documents that we set out there for the same reason.

CHAIRMAN BABCOCK: David, could I ask a question?

HONORABLE DAVID PEEPLES: And I may not be the person to ask all of these. I have not been present from the creation of this.

CHAIRMAN BABCOCK: Well, you'll be the gatekeeper. I assume that these rules will be modified -- these rules will be modified as between the district court and the county court, because you've got "district court."

HONORABLE DAVID PEEPLES: Oh, yes. Yes.

CHAIRMAN BABCOCK: All right. And then on Rule 7.1, which is the last rule, a district court assigned in accordance with local assignment shall decide any dispute. That is -- is it intended that a district judge is going to decide the county court disputes in Fort Bend, or is there going to be a county judge?

HONORABLE DAVID PEEPLES: I think these are modified in Fort Bend County so that --

MS. BENNETT: That's correct. For the county rules we used the county-appropriate language.

CHAIRMAN BABCOCK: Okay. Margaret, what sort of disputes do you-all envision coming under this Rule 7.1, and the corollary to that question is what kind of problems have you encountered or have you seen encountered in other jurisdictions that had this that required dispute resolution by the judge?

HONORABLE DAVID PEEPLES: Suppose there's a default proceeding of some kind.

CHAIRMAN BABCOCK: That's what everybody worries about.

HONORABLE DAVID PEEPLES: Well, that would be handled the same way you would handle any other default proceeding, a motion to set aside some judgment and so forth. It's just making clear what really is pretty obvious, that you use your regular procedures to --

CHAIRMAN BABCOCK: Well, this is not what you would do in a regular procedure in a lot of counties. Maybe Bexar County it would be. Because in, say, Harris County or Dallas County if you had a default in the, you know, 195th, you would go to that judge and -- but here it looks like you go to a specially assigned judge.

MS. SWEENEY: This may be a paper thinking question, but where is the home of the data? I file

something. What computer does it go into where? Is it here in Austin? Is it statewide centralized? Is there one at each courthouse?

MR. GRIFFITH: Actually, it goes through a file to an electronic filing service provider of your choice of service provider. There's probably five or six companies in that business right now. LexisNexis CourtLink, E-filing.com. So you select your service provider. It goes from you to them and then goes from them to TexasOnline as a pass-through and from there to the clerk of the particular county that we're talking about, whether the district clerk or county clerk. So it resides on your computer. It may or may not reside on your electronic filing service provider, depending on your contract, but it will simply pass through TexasOnline. They don't archive and then it goes to the clerk of the court.

MS. SWEENEY: I mean, as the victim of many computer crashes, obviously the question is if the clerk's computer crashes what's the -- and it may be in here and I didn't see it or maybe I'm just too worried, but what's the back up? How does that work?

MS. DWIGHT: It depends on where in the process. So if you're going to file something, so you're at your computer, and I had to do things --

CHAIRMAN BABCOCK: Could you speak up a little bit, please?

MS. DWIGHT: I'm sorry?

CHAIRMAN BABCOCK: Could you speak up a little bit?

MS. DWIGHT: Sorry.

CHAIRMAN BABCOCK: The court reporter is having a hard time hearing you.

MS. DWIGHT: So you have it on your computer. You hit the send button. It goes to the e-filing service provider that puts it in the right format, and as I say, it's packaged right. So what they do is they change it from your regular Word format to this other XML format like a PDF file so they can talk, have the same language; and then if at the EFSP, if that crashes there, for example, you hit the send button and it crashes there then you will get a warning saying, "Oops, sorry, there's something wrong, your courier had an accident on the way to the courthouse, and they couldn't make it." That's the analogy, right?

And then you get the little cell phone calling you back saying, "Sorry, we're over here on 3rd and 4th Street, and we have to be over here at the courthouse on 10th." And so you get the warning sign from the EFSP saying, "Sorry, your document didn't get through

our space here. Something is not happening right." So that's the first level.

Then after the EFSP has formatted your document for you technically, not in the way it looks when you print it out, but in the technical manner, that's as far as I can go in explaining it. Then they send it on off to the post office. We're the electronic post office, the EFM. So it goes through a very secure environment that TexasOnline has done for any kind of service we've provided to governmental entities. So it's a secure environment, but it's done in a PDF format.

Now, if it crashes there, if, you know, your courier is almost to the courthouse, they're right there smack in front of the courthouse getting ready to walk in and file it and it crashes there, we have a warning, "hey." There's a warning goes from us to the EFSP back to you warning, "Sorry, it didn't make it." Mind you, this courier is lightning speed. This is going quickly. So then at that point you'll get a warning saying "crash."

Let's say that the courier gets all the way into the courthouse, they've gone up to the third floor district clerk like here in Travis County, and they're going to file it, and what happens is that what we do is we put it on what's called an FTP server -- is that what you call it? We put it in your box. It's like going to

the post office and having your own little box, you have your own little key for it. We put your document into a box.

MS. BRUNNICK: Make it available.

MS. DWIGHT: Yeah, make it available. At that point it's sitting waiting for the clerk to come pick it up. It's just sitting there. So the courier has gone all the way up into the clerk's office, and it's sitting on the desk, but it hasn't been stamped yet because the clerk hasn't picked it up yet. At that point then it's sitting there and you don't have any -- what you don't get then is any kind of approval that it's been accepted or rejected by the clerk.

MS. BRUNNICK: You get approval that we got it.

MS. DWIGHT: You get approval we got it.

MS. BRUNNICK: We got it and now we're waiting for the clerk to act on it.

MS. DWIGHT: So then it sits there at that point until the clerk comes up and says, "Okay, yeah, this is good. We can tell it has all the elements in it, and we accept it," and then, boom, you'll get back your -- a little acknowledgement -- confirmation, excuse me, using the wrong terminology here. The confirmation saying, "Hey, the courier not only got down the street, they got

to the courthouse, and they got that thing filed, and the clerk accepted it."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: At what point is the document officially filed? In whose custody when it reaches that place is it officially filed?

MS. BENNETT: When it is accepted by the clerk then you get the confirmation that goes back. The filer's credit card is charged, and it is considered accepted by the clerk. That's when it's filed. The filing date, however, goes back to when the filer first got his acknowledgement that it went from his computer to his electronic filing service provider.

MR. ORSINGER: So if I'm trying to file an answer by 10:00 a.m. on Monday morning and if I e-mail my answer to my EFSP at 9:59 a.m., I'm okay, even if the clerk doesn't get that for another 3 minutes or 8 minutes or 30 minutes? It's officially filed when it hits my EFSP?

MR. GRIFFITH: The way the rules are written, when it reaches TexasOnline and they confirm that it's properly formatted and it is financially backed, that is, you've given them a good credit card number, they give you preauthorization and they send you back acknowledgement that it is accepted into your post office

at that time. When the clerk accepts it you will get a return file stamp with that time on it.

MR. ORSINGER: I still haven't figured out when my answer is officially filed. Is it when it hits the EFSP or when it hits the EFM or when the district clerk downloads it?

MR. GRIFFITH: When it hits the EFM as properly formatted with either a good routing number or a good credit card number.

MS. BENNETT: But it's not officially filed till the clerk accepts it. However, the filing date and time goes back to when the EFM first got it.

CHAIRMAN BABCOCK: Andy.

MR. HARWELL: I think there's going to be some issues with that on the timing because we are -- my office is open from 8:00 to 5:00, and we can accept filings during that time. If I'm open -- if I'm open to TexasOnline and receive it as of that time when they receive the document then that -- then wouldn't I be open 24 hours a day, and if I am open 24 hours a day then I would think that I would have to go down and get a key and open up my office and have it open all day.

The other issue --

CHAIRMAN BABCOCK: Stop there, Andy. Why do you think that?

MR. HARWELL: Well, because if TexasOnline receives a document at midnight on -- or 11:00 o'clock, 11:00 p.m. Friday night and then I come in Monday morning and am able to receive that document as of 11:00 p.m., that's not standard operating hours for the office, so why wouldn't I be there for someone that just walks in at 11:00 p.m. at night to bring that document in?

CHAIRMAN BABCOCK: Well, Harris County has got late filing. I mean, there's a box that you can go down and --

MR. HARWELL: But their office hours are --

CHAIRMAN BABCOCK: Their office hours are like yours, but in Harris County you can go down and just file stamp something in the machine and drop it in a box. The clerk's office is not open.

MR. HARWELL: I just know that when people come in to look at documents we have our office hours posted, and we're available that time. Maybe Harris County has those hours posted, and that's standard operating hours.

CHAIRMAN BABCOCK: I don't know the answer. I just know -- Jerry.

MR. ANDERSON: Yes, sir. I think from our experience in marketing our e-filing solution to different states around the United States, the individual clerks

want to have control over when that document is actually accepted in their office, and I think the -- you know, from our standpoint we let that individual clerk tell us that, "Okay, any document filed before 5:00 o'clock today is today's business. Anything after 5:00 o'clock today is the next business day's business," and I think those things ought to be left up to the individual clerk to do.

You know, this -- you know, my concern about this whole pilot project is that, you know, with the electronic service providers, which I assume that we're going to be one, if we can't do it individually like we had anticipated on doing, is that these rules that are out there as they're proposed are very difficult for, you know, our programmers. We have 12 programmers sitting over right off of Capital of Texas Highway working on this very project that we have complete at this point. In fact, we're installing it in Randall County to do electronic filing of land records, and we've gotten that installed at the present.

But, you know, the solution with the EFSP is another layer of bureaucracy out there and then the use of DotNet, Microsoft's DotNet to program, is going to run the cost up to the filing attorneys so that I think it's going to drive the cost of doing e-filing to where a lot of attorneys won't pay the initial set-up charge and, you

know, regardless of what the fee is, you know, our experience in other states is, you know, some of them are $14 a document.

CHAIRMAN BABCOCK: Andy.

MR. HARWELL: From looking at the material, I understand that the filer when they initially send the document to the EFSP, that that EFSP will be allowed to charge a convenience fee. Have those fees been addressed yet?

MR. GRIFFITH: The EFSP can charge whatever contractually the filer is willing to pay. There are -- in the market right now, just to give you one example, since I'm familiar with it, LexisNexis Courtlink charges I think it's 10 cents a page with a two-dollar minimum. So whatever you file with them it's based upon your pay account.

(Ms. Bennett confers with Mr. Griffith.)

MR. GRIFFITH: Well, that's right. Other vendors may decide to sell their services generally, but we set this up specifically so it's an open market competition architecture. We haven't said that any EFSP can or cannot play. Any EFSP that wants to play in Texas can do that and work with the individual attorneys or the law firms. The law firms themselves may decide to be their own EFSPs and charge themselves nothing. If they

have the infrastructure there's no reason why they can't do that.

Now, you mentioned convenience fees. That's a term that's typically associated not with the EFSP but with TexasOnline. TexasOnline Authority that was created by the Legislature has the powers to assess convenience fees. We talked about doing your driver's license or paying your property taxes. There's a fee assessed against that by TexasOnline, the state -- the government authority. The fee that's been approved by the pilot program for TexasOnline for e-filing right now is a total of $6 per filing. Four of that goes to TexasOnline and the state. $2 we have included for Bexar County or Fort Bend County. So that money then goes to them, to those two counties to help defray their expenses.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah. I have a question about -- not probably from you, but whoever drew the rule. I don't understand. Is the rule that if one party wants to receive e-mailing, that party can consent to do that? Do you have to -- is there a procedure where you might withdraw consent? How do you file the consent or how do you go about that?

And the second question is, in other words, somebody might file and I've got to go to the courthouse

to get a copy, but I can't get everything because I've got to go through e-filing to get some things, so they are not all in one file. All parties are not required to -- I mean, to e-file in one case; is that correct? So you can have two; and, third, is there some procedure here that makes -- if they mess up, that makes them a deputy clerk so that's tantamount to filing with the clerk once you file with these people?

MR. WOOD: Let me answer that, if I could answer your questions.

MR. LOW: Okay.

MR. WOOD: First of all, on your first question about signing up to be the recipient of electronic service, under the rules as you have them in front of you, you do have to affirmatively sign up for that.

MR. LOW: I saw nothing in there that said I had to -- only where that party has agreed to receive, but I'm asking how do I do? You just call me up on the phone? Do I have to file a document saying I've done it? What makes -- I might say, "Well, no, I didn't agree to that."

MR. WOOD: You would file a document in the particular case. In fact, I think you should have a one-page handout that came along today, and that's addressed in Rule 5.1(b).

MR. LOW: I'm looking right here at 5.1(b).

MR. WOOD: It says you've got "Such agreement" -- this is an agreement to receive electronic service -- "may be evidenced by filing and serving a notice that the party will accept electronic service in a particular case." So we do envision a document being filed with a clerk saying that you're willing to receive electronic service.

MR. LOW: Okay. So there will be a document that's filed on record that I've agreed to it?

MR. WOOD: Yes, sir.

MR. LOW: Okay. What about the next question? Is there anything in there that makes you kind of like a deputy clerk so that it's tantamount -- when I file with you that's just like I have filed?

MR. WOOD: I'm not sure what you mean by tantamount to a --

MR. LOW: Well, in other words, what if you drop the ball?

PROFESSOR CARLSON: Your server goes down.

MR. LOW: And I think I've filed with you, but it some way doesn't get down the line. You tell me there's a notice and you'll get warning and some of these things mess up. I know the thing doesn't mess up when I take it down there and I hand carry it and Bonnie stamps

it. I know, and then I don't have a question, but what I'm saying is when I file it with you and I think I've done my job, is there anything in the rule that makes it say once I've done that that's like filing with the clerk?

MR. WOOD: Essentially, yes. What the rule says is that when your filing electronically hits TexasOnline that that's when the time of the filing is established. The document is then forwarded to the clerk. It is possible for the clerk to reject the filing. If for some reason it's -- you could have an attachment that's not the filing you say it is. It could be an attachment of something completely irrelevant. The clerk might reject that, and you would get an information back, something called an alert that would tell you if that was the case. So we built this into the system where you do get warnings along the way if something is not right.

MR. LOW: Well, but all those things don't always operate. I just sued a computer company because they don't -- but any rate, I'm just saying that --

JUSTICE HECHT: You're just gloating now.

MR. LOW: That's the way that it should be, but there's nothing that tells me that once I've filed with you my worries are over.

MR. WOOD: We -- you want to answer that?

MS. BENNETT: We tried to make it analogous

to the post office. It's not going to be analogous to you taking it down to the courthouse yourself and getting Bonnie to stamp it, but it's more analogous --

MR. LOW: Like I mailed it.

MS. BENNETT: -- to taking it to the post office, putting it in -- or, you know, mailing it certified mail and then it's in the post office's hands. If you never get your green card back, you realize there's probably a problem; and in the same situation, if you never get an acknowledgement, if you never get a warning, if you never get nothing once you've sent it to your EFSP, you know there's probably a problem.

MR. LOW: But there's something in the rule that says that filing with you is tantamount to dropping it in the post office? I didn't see it. I haven't read everything, but --

MR. SOULES: It's on -- what is this? 4.4 --

MR. LOW: I'm looking at --

MR. SOULES: (e).

MR. LOW: 4(e)?

CHAIRMAN BABCOCK: 4.4(e).

MR. SOULES: That starts out with --

MR. LOW: Okay. I just didn't see it.

MR. SOULES: -- the condition, "if the

document is accepted for filing," "if it's accepted for filing," and the mail rule doesn't have any sort of language like that.

MR. LOW: No, I know.

MR. SOULES: If it gets there, the clerk files it.

MR. LOW: Right.

MR. SOULES: There's not any question about it being accepted for filing.

CHAIRMAN BABCOCK: Well, that's not true. I mean, sometimes clerks will bounce it back at you.

MR. SOULES: State clerks? I don't think so. They're not like those bankruptcy guys.

CHAIRMAN BABCOCK: Federal clerks will.

MR. SOULES: Federal clerks will, but state clerks won't.

MR. LOW: Luke, that only says you'll pay a filing fee with the clerk.

MR. SOULES: No, it says if it's accepted for filing then it dates back to when somebody else got it.

What if it's not accepted for filing? They ought to have to file whatever they get, even if it's a bunch of gibberish, so you can show that it got there.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I have three questions. It talks about documents that are required to be verified are only going to be filed as a scanned image. I'm not sure I know what that exactly means, but I don't see anywhere in the rule that says it's only filed as a scanned image. Does that mean that it's like you took it and filed it in document form? I don't know what that means because it says "where it's been filed as a scanned image the court can require the filer to file it in a traditional manner," but if the court doesn't require it and it's filed only as a scanned image is it effective as of a file verified document, and I'm not sure what it means by "scanned image" because it says in (e) that an affidavit or other paper attached may be scanned and electronically filed. Who scans it? The one who sends it or you-all scan it?

MR. ORSINGER: No, the sender. In other words, if you wanted to send some kind of sworn account petition, you actually have to scan the affidavit. You can't just have an electronic document with some kind of "/s/" that symbolizes that it was signed. You actually have to have a digital image reflecting the signature on some piece of paper.

MR. HAMILTON: Okay. Okay.

MR. ORSINGER: But then you attach that onto your electronic file and it comes on in and everything

else comes in as a word processing document, but that affidavit comes in as a picture.

MR. HAMILTON: So does that mean it's effectively filed as a verified document, and if I want to go look at that document, how do I get to look at it?

CHAIRMAN BABCOCK: You mean the paper document?

MR. ORSINGER: It's going to get printed out and stuck in the clerk's file.

MR. HARWELL: I think what he's referring to, Richard, is what we talked about about how the attorney would retain the signature page for two years and then that would effectively be the original, but the clerk would have the scanned document at their office. But I disagree with that.

MR. ORSINGER: If Carl wants to go to the courthouse and see what was filed electronically, what he's going to find is a piece of paper, because what happens is it's going to get printed and stuck in a folder.

CHAIRMAN BABCOCK: No. No.

MR. ORSINGER: At least for the time being.

MR. GILSTRAP: Only the scanned documents or all documents?

MR. ORSINGER: Is that not right?

CHAIRMAN BABCOCK: Andy said something -- Andy, you disagree with --

MR. HARWELL: I disagree with the attorney or the filer having the original signature page and retaining it at their office for two years, I believe is what it said.

MS. BENNETT: It used to, but, remember, we rewrote the rule at -- I'm sorry. It used to provide that the attorney was basically the custodian for a two-year period, but at the subcommittee's recommendation the rule was changed so that the clerk is now the custodian. That's why you have to send a scanned image showing the actual signature so that the clerk is the custodian, which is -- and no longer the attorney.

MR. ORSINGER: Margaret, am I right that when the electronic filing is received by the clerk that it will be put on paper and filed like a conventional document or will it just be retained on a computer?

MS. BENNETT: It will depend on what the clerk wants to do, I believe.

MR. WOOD: That's right. I mean, if you go to Fort Bend County now and Dianne Wilson, who is the county clerk there, she has everything on electronic -- on electronic version. You can access anything that's not privileged in some way, and so her intention is that when

something is electronically filed it will stay electronic, and that will be the official document. For other clerks that might not be how they want to do it. They may print out a paper copy and put it in a file as is traditionally done.

CHAIRMAN BABCOCK: Look at 4.7, Richard. That's where you've got that, and while we're on that, Ted, maybe I could ask you a question. Is the clerk going to maintain a docket available to the public or anybody that walks in there that is going to show both paper-filed and electronically-filed documents?

MR. WOOD: Well, there are going to be cases that have a mixture of both documents because it's certainly possible to file electronically and file traditionally in the same case.

CHAIRMAN BABCOCK: Here's the problem. Let's say I'm a public interest group and I have been watching, you know, the ABC Company versus the XYZ Company, and I'm looking at the docket sheet periodically. Now, this is in a county where under these rules the clerk does not have to make a paper copy of the electronically filed stuff nor does the clerk have to make the electronically filed stuff available to be viewed electronically. Now, the only way I'm going to know that something has been filed, like a motion for summary

judgment or something, is if there's a docket sheet that reflects both the electronically filed stuff and that is available to me in some form, probably paper.

MS. BENNETT: These rules, these electronic filing rules, do not address a clerk's duty to give public access to court documents. It addresses how documents are filed, but it doesn't say that a clerk has to under the Constitution, for example, make documents filed in a case available to the press, to anyone who goes into the courthouse and asks for those documents.

PROFESSOR DORSANEO: Or even to the judge.

MS. BENNETT: We didn't -- we didn't try to address that.

MS. WOLBRUECK: Chip?

MS. BENNETT: It doesn't change the clerk's duty.

MS. WOLBRUECK: It does not change the clerk's duties in maintaining a docket, and it will not change the clerk's duties in regards to public access.

MR. ORSINGER: Well, Bonnie, if something -- if you're in a county that says, "Hey, I'm not going to print this electronic stuff out. I'm just going to store it on a hard drive" and I'm a member of the public and I come in and I'm interested in this case and I want to see somebody's response to motion for summary judgment, but

it's just in electronic form, am I going to be able to go onto a computer there in the clerk's office and see it and if I want to keep it, I can print it out and then carry the paper away?

MS. WOLBRUECK: That's exactly the way it will be handled. The access will be there.

MR. HARWELL: That's what we do now, Richard. We are scanning our documents in.

MR. ORSINGER: What do you do with the judge?

PROFESSOR DORSANEO: How does a judge get to see it?

MS. WOLBRUECK: My judges have computers on their benches and they look at documents on the computers.

PROFESSOR DORSANEO: So they are going to have a paper file and then a computer file?

MS. WOLBRUECK: If they choose to do so. It's not -- it depends upon each individual court. You have to -- you know, the clerk is going to -- these two clerks will be dealing with the courts in their counties in this pilot project, and so they will make the determination on will they make all of this paper and it will continue as a paper product, or do you have a judge that wants everything electronically, and I have judges now that like the electronic media, and so they can sit at

their bench and scan through the entire file electronically.

CHAIRMAN BABCOCK: Bonnie, just to --

MS. BENNETT: And the Supreme Court has rules now for how much clerks can charge for making copies of court documents.

CHAIRMAN BABCOCK: Bonnie, just to get back to something you said which maybe I misunderstood you or maybe I misunderstand the rule, but 6.2 says in its last sentence, "Where you haven't made provision for somebody to look" -- "to view electronically filed documents, persons wishing to view documents or court orders that have been electronically filed or scanned may arrange to have a paper copy of the document or court order printed by the district clerk." So that would suggest to me that there is a provision in these rules and a requirement that the district clerk provide a paper copy of something that was electronically filed.

MS. WOLBRUECK: That would be exactly it, and that's no change of any duties that we have today.

CHAIRMAN BABCOCK: Right. I understand that, but now here's the question I had a second ago.

MS. WOLBRUECK: Okay.

CHAIRMAN BABCOCK: How do I know that such a document exists?

MS. WOLBRUECK: Because there will be a docket of it, just like you requested earlier. It's held on the computer. Mine are all computerized, and I have a computerized docket listing all of that, and if you want that I'll print it out for you.

CHAIRMAN BABCOCK: Okay. All right.

MR. ORSINGER: I mean, in a sense this is already the case. I mean, they carry their docket on the computer and you can get it printed out if you want it on paper, but they don't print it out on paper for themselves. They keep it on their computer for themselves, so in a sense we're already doing this. We just aren't freaked out about it.

CHAIRMAN BABCOCK: Well, speak for yourself, big boy. You're the only guy on this committee that has passion about this. I think Andy had his hand up first, Bill, and then you.

MR. HARWELL: Chip, I guess I have a practical problem with so many steps in the process. For instance, in '96 we went with optical scanning of documents in my -- in the recording department in our county, and we have the ability to accept a document and charge for the document and everything by that attorney or by a filer just calling into the office. We haven't flipped the switch on it yet because I'm still a little

bit antsy about all of this.

But I guess, you know, the filer sends it to the EFSP. The EFSP charges a convenience fee. If it's accepted, acknowledgement is sent back that it's not rejected. Then an alert is sent back. If it's accepted it goes to the EFM, which can also charge -- which is TexasOnline, and they can charge a convenience fee.

Then if it's an acceptable format then it goes onto the clerk's office, who then the clerk can assess a convenience fee, and I just -- just the practicality of all of that and how many problems could come up in each transfer because we are -- Bonnie and I, the clerks are records keepers, and if people lose confidence in us keeping those records accurately then what are we going to have?

Buddy, if you're not sure that that document was received and what time and all that then how much confidence are you going to have in the system? And that's the only -- and I realize this is a pilot project, and I know that this is going to come down the pipes before long anyway, but I just see so many problems with all the steps that there are.

CHAIRMAN BABCOCK: Well, is your point, too, that it's going to be -- you know, it's going to cost you $50,000 to file a motion for summary judgment

electronically?

MR. HARWELL: Well, I can see that the Legislature may have to address the fees or the commissioners court or someone is, or it's just going to run rampant. For instance, plat filings are not -- right now plat filings are all over the board. Down in South Texas, you file a plat in one county it may cost you $500. In our county I took the cost of the plat cabinet and what it takes to keep those records over a year and then I charge $25 per plat and $5 per page. I don't know about the fee breakdown that you discussed earlier about the $6 retained by and $4 and $2, but I see it as three different tiers of fees, and I don't know how much it would cost, but somebody is going to have to address that and put some sort of parameters on it, I believe.

CHAIRMAN BABCOCK: Nina, Bill had his hand up first and then you.

MS. CORTELL: Sure.

PROFESSOR DORSANEO: I'm still concerned about the subject we were talking about earlier about the process breaking down, and I think I've tracked down what Rule 4.3 says happened. At the end it is different from using the post office to file because it looks like in (f) the way it works out, the document is not accepted for filing. The appropriate clerk informs TexasOnline and

then you're supposed to find out about it the same day, and then it says that it wasn't accepted for filing, and Rule 4.5 says the electronic filing does not alter any filing deadlines, and on our mailing rule that's not the way we handle it at all.

CHAIRMAN BABCOCK: When it's mailed?

PROFESSOR DORSANEO: We assume that the process may not work out and we give, you know, adequate time for somebody to check on it. This would be a very bad day if I get this notice at near the close of business that time is up or time is short, assuming I'm even there to get it, and something more comparable to our mail filing procedures would be more prudent, I think.

MS. BENNETT: If a document is electronically served under Rule 5.3 you add three days.

MS. CORTELL: It's not service. It's the filing.

MR. ORSINGER: He's talking about something getting bounced --

MS. BENNETT: You're talking about the filing deadline.

MR. ORSINGER: He's talking about something that's bounced by the clerk, not served on another party. Is that the same rule? He's worried about what happens when he files something that is bounced by the clerk that

he doesn't find out about it until there's not enough time to do anything about it.

MS. SWEENEY: The summary judgment response, something like that that's time critical.

MR. ORSINGER: Or even an original petition when limitations are about to run. It could happen to the plaintiff.

MS. BENNETT: Original petition --

MS. SWEENEY: Now, that --

MR. WOOD: What we're trying to do with the rules is -- the idea is to make it easier to file it. If you have a deadline that is tomorrow and you're not going to be able to file that document because you're stuck in this meeting right now, but you're going to do it later tonight, we want you to be able to push buttons that will allow the filing -- or say the filing deadline is today. I'm sorry. We want it to be able to be filed today. We want you to be able to push buttons at 8:00 o'clock, 9:00 o'clock tonight and have that filing count as coming in today.

When we originally wrote the rules we talked about that being the date the filing was accepted. The clerks said, "No, this is something that we do. We accept or don't accept filings, so while we don't have a problem with that being the time of filing, we want to make the

judgment on whether it's accepted or not," and the rules try and allow for that.

PROFESSOR DORSANEO: What happens if it's not accepted? I get notice that it's not accepted and what do I do then? Shoot myself?

HONORABLE SARAH DUNCAN: Call your carrier.

MR. WOOD: If you push the buttons on your computer to send it tonight, you would get an acknowledgement that the document has been received, and we had some language in the rules previously that stated something like the filer is not responsible after it hits the EFM. Now, we took that out. We can put something like that back in if necessary to make it clear, but once you have your document acknowledged you know that it's made it to TexasOnline.

Now, true, it's going to go to a clerk the next business day probably for the clerk to either accept it or reject it. If the clerk would -- and, frankly, we're talking about something that's not going to happen very often where the clerk is going to reject the document, but we want to leave that in the hands of the clerk.

CHAIRMAN BABCOCK: Nina has been trying to say something for a minute and then, Luke, you can blast that comment.

MS. CORTELL: I had two quick points. One was the mailbox rule point that Bill made, and I think we're comparing a little bit apples and oranges. You're talking about the dynamics, and we're talking about waiver of, you know, all kinds of deadlines that we have got, and we don't want to learn on Monday that something that was due today didn't happen because there was a glitch in the system. We need some grace period a la the mailbox rule that says once we press our button if it's, you know, not received within 10 days or whatever. We need a time period for it to actually happen and for it to date that. That's No. 1.

No. 2, and I wish I remembered this better, but I don't, but I feel like I heard a presentation -- and maybe, Chip, you were there at the Fifth Circuit conference on the pilot programs in the Federal system for e-filing; and my memory, which may well be wrong, was that it was far simpler than this and that it entailed PDFing the document at your law firm or your place and then just e-mailing that document directly to the clerk. And I may be remembering that wrong, but I do not remember it being this very complicated protocol through two providers. Am I remembering it wrong?

JUSTICE HECHT: Well, they've got -- I don't know the details, but they have an interface. I don't

think you send it directly to the clerk.

MS. CORTELL: So there was at least one?

JUSTICE HECHT: Yeah. There's a -- whatever they -- I don't remember what they call it.

MS. CORTELL: I may not remember it very well, but I don't remember it being this complicated, though.

CHAIRMAN BABCOCK: Margaret, let Luke --

MR. SOULES: Well, I don't know any easy -- but I'm pretty sensitive about burdens on parties that have consequences in litigation. We all are. I think the pilot project in terms of the mechanisms of serving and filing here is very overly complicated. It puts risk on a party and probably because of that precludes lawyers from using this at all. I think the pilot project ought to try to be as user-friendly as possible. Now, how do we get about that?

I think the pilot project ought to just eliminate all this complexity and say that when whoever that is gets it, the first send, and I get confirmation, the document is deemed filed, whether the clerk ever files it. It's deemed filed for all purposes in the litigation. That way I have confidence that I can use the system without having consequences to my party as long as I get a confirmation back from whoever gets it the first

go-around, and I can keep a hard copy or I can keep it on my electronic mechanism if I've got to go show a court what it was I sent and it's all scrambled and garbled and you can't even read it and the clerk doesn't want to take it and they can't recreate what it was, I can. This is what I sent, and it was deemed filed when I sent it, period, for all consequences in the litigation. That probably would work. I think we might use that system in our office.

Now, what happens if it's all screwed up? Well, it's probably a mutual benefit to the lawyers and parties and the government to go to this e-system, but we're testing it at this point, and there should be no consequences to anybody other than possible delay and possibly a little having to reconstruct, a little inconvenience after that, but the only entity involved in here that can suffer no adverse consequences is the government. Everybody else can have devastating consequences.

So if the government -- if it doesn't work right for the government, we don't have any risk in a pilot project. It just didn't work, and it was a problem for them, but it didn't hurt anybody, other than the inconvenience that was involved. I think there are a lot of reasons why we need to make this real simple. If the

first guy gets it and I get a confirmation, it's done. It's deemed done whether it ever gets done or not.

HONORABLE SARAH DUNCAN: And that --

CHAIRMAN BABCOCK: Sarah's been trying to say something for a minute.

HONORABLE SARAH DUNCAN: That's exactly -- when we file, we are mandated to file contribution reports with the Ethics Commission electronically unless you come within a very few exceptions, and that's precisely the way it works. I push the button on my computer, and within 10 seconds I get back an e-mail from somebody. I have no idea what this entity is, and it says "You filed." It doesn't have a picture of my contribution report. There's nothing. I just have an e-mail that says, "You filed on time."

I then -- if there's any question later, I can take that e-mail along with my hard copy of my contribution report, and that's it. It proves that I filed it on time, and I prove what it is I filed.

And I agree with you. If there's any risk involved, I as a lawyer, there is no way I'm going to use this; and to say that the clerk has -- can refuse something for filing is entirely contrary to what I have been told about clerks' responsibilities are; and this came up with a supersedeas bond that a clerk in East

Texas, Houston, refused to file because, who knows why, but refused to file it and incredible consequences like three mandamus actions, all of which were unsuccessful; and if there is risk to the lawyer and the client, they cannot use this system, if there's any risk at all.

CHAIRMAN BABCOCK: Andy.

MR. HARWELL: Sarah, I think that the consequences for not filing are embodied in this, in these rules. For instance, if we don't accept it, the reasons are that -- from what I've read in the material, are if it's not misdirected because of all of the different steps, if it complies with filing requirements set up by the Judicial Committee on Information Technology, and if the fees are paid.

HONORABLE SARAH DUNCAN: But I don't have control over those things.

MR. HARWELL: Right. That's my point.

HONORABLE SARAH DUNCAN: Even if I say to send it to the district clerk in Bexar County and then it ends up in McClennan County, I can't control that, and yet you're putting the risk on me, and I cannot accept that risk.

MR. SOULES: I'm not trying to get into your business. I don't care what you do. You can file it. You can throw it in the trash. You can do anything you

want to because it's of no consequence to me as long as I've got this file back. So you can go ahead and run your office exactly as you feel like it should be and I'm sure it will be at the very peak of ultimate responsibility because that's the way you operate, but I don't want it to have consequence to me if something gets messed up, and I can't afford -- and I won't allow it to risk consequences to my client, and it doesn't even really matter whether you ever get it.

Now, that's different from the mail, but that's implicit in what I'm saying. It doesn't make any difference whether you ever get it. Mail we've only got 10 days to get it, and it has to have a valid postmark, but I'm just talking about --

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: Bonnie and Andy, what do you guys do if somebody sends in something that there's a fee on and there's a check and it bounces? You've already filed it, I take it, subject to the check clearing; and if it doesn't clear, you don't unfile it.

MS. WOLBRUECK: No, sir, we do not.

JUSTICE HECHT: You just dun the lawyer for the money.

MR. HARWELL: Send it to the D.A.'s office.

MR. ORSINGER: Well, now what do you do when

somebody files a -- sends a motion for new trial by mail and it doesn't include a check? Do you go ahead and file that?

MS. WOLBRUECK: I have to file the motion for new trial.

MR. ORSINGER: But only the motion. So if somebody sent you an original petition with no filing fee, you would mail it back.

MS. WOLBRUECK: I would file the motion for the -- the original petition. The rules only state that I do not have to issue anything if the fees are not there.

MR. ORSINGER: Well, then it seems to me like under the mail that if you get it in an envelope, you file it even if you don't have a check with it or whatever.

MS. WOLBRUECK: That's correct.

MR. ORSINGER: Then this shouldn't be any more onerous than that.

MS. WOLBRUECK: And I file a motion to rule for costs if you don't give it to me.

MR. ORSINGER: Okay. So if the credit card doesn't work, you still ought to accept it for filing; isn't that right? No?

MS. WOLBRUECK: Well, it's a pilot project. It's sort of like, really, the fax filing rules. It sort

of mirrors the fax filing rules. The fax filing rules allow the clerk to accept the payment of that fee for that filing of that petition, and there's procedures in our fax filing rules.

MS. SWEENEY: But, you know, credit card company computers go down. You try to buy something at Saks and they can't process your credit card because Visa is down, but you can use -- so your petition doesn't get filed because Visa was out that day?

CHAIRMAN BABCOCK: Or Target for some of us. Skip.

MS. BENNETT: You'll know within a few seconds of when you file it.

CHAIRMAN BABCOCK: Hold it. Whoa, whoa, whoa. Hold it. Hold it. Everybody can't talk. Hold it. Hold it. Skip.

MR. WATSON: Well, I think that since the clerks are bound to file something regardless of the form that we can eliminate this language about if it's in the proper form. That can come out. Because that's going to chill a lot of people, and, I mean, it may be that I put it in in the proper form and it gets printed out or received on the other end in the shape that my version of this rule is in, equal signs for apostrophes and a's for quotation marks, and I'm not going to bear that burden,

thank you. You know, if anybody ever wants me to use this, the words "if in proper form" is coming out.

No. 2, if --

CHAIRMAN BABCOCK: Skip, hang on. What provision are you talking about?

MR. WATSON: They keep saying that, you know --

CHAIRMAN BABCOCK: What rule number?

MR. ORSINGER: It's probably not a specific sentence he's talking about.

PROFESSOR DORSANEO: 4.3(d) has got --

MR. WATSON: Yeah. I think it's in 4.3.

PROFESSOR DORSANEO: -- the filing requirements.

MR. EDWARDS: 4.3(d).

MR. WATSON: The filing requirements that are in there, those need to come out. Then the business -- you know, what we're down to really is does the credit card shell out the money to the three tiers of providers here. That's our problem, and if that's the problem, again, this sucker ain't going to get off the ground, Orville. You know, we've got to have a situation in which if I punch the button it's filed; and if somebody wants --

MR. SOULES: Deemed filed.

MR. WATSON: -- to come back and sue me for

$35, they can; or if they want to decline to issue anything on it, they can; but if I push the button, it's filed.

MR. SOULES: Or deemed filed.

MR. WATSON: It's considered filed.

CHAIRMAN BABCOCK: Hold on. Sarah.

HONORABLE SARAH DUNCAN: I was trying to buy some reading glasses on Ebay the other day, and the person, the seller, was using a new service to me, C2IT or something like that.

MR. WATSON: You didn't fall for that, did you?

HONORABLE SARAH DUNCAN: So I clicked, I went to C2IT. I registered my Southwest Airlines credit card. It was all fine, and I went through all the little process, and big red letters came up and said, "We are not able to complete this transaction," blah-blah-blah, just big red letters and lots of exclamation points and then I get a call from First USA, who issued my credit card, and they said, "We have suspected some fraudulent activity on your credit card," and I said, "Oh, no. What happened?"

And they said, "Did you just try to use C2IT?" And I said, "I did," and she went, "Oh, shoot. You know, we have the same problem with Western Union. They have got something in their program that does

something to our program so that it looks like fraudulent activity, and we won't approve it."

You can't take that risk as a lawyer. You just -- and you can say that it's five seconds, but if I've hit the send button right before I go into deposition, I think it's filed, and you tell me five seconds after I've gone into deposition that it's not filed, that doesn't help me a lot.

CHAIRMAN BABCOCK: It sure wasn't that they got a look at those glasses. Andy.

MR. HARWELL: You said that you studied other states and how they work. Do they have the same type of setup where there are as many providers at each level?

MS. BENNETT: Well, that's -- I want to explain that if I could for just a minute. The Texas Legislature established TexasOnline to be the portal for the government.

MS. DWIGHT: For the state.

MS. BENNETT: For the State of Texas to interact with the citizens electronically, but -- and there -- you-all have or the Supreme Court has approved a couple -- in a couple of jurisdictions in Texas electronic filing local rules where it's -- you have the same provider who's working with the government and everybody

has to go through the same private vendor to file anything in a court in that county, and that's who the county clerk or the district clerk contracts with also.

So it's basically a monopoly. I mean, I'm not trying to use a pejorative term there, but it's all one private provider, and that made a lot of people angry because they wanted a choice on who they could contract with, and so we decided to go with a pilot project that used TexasOnline, established by the government to be the main post office for electronic filings. However, attorneys could use their own law firm as the EFSP or they could use LexisNexis Courtlink or they could use E-Doc or they could use whatever provider they wanted to contract with to be their provider; and, you know, competition would rule and capitalism and all that good stuff.

And so we were trying to provide choice to the Bar, and that's why you've got a little more -- you've got -- you don't have a monopoly. You have different vendors out there going through the post office, and that's why you've got the different levels.

CHAIRMAN BABCOCK: And Jerry had his hand up.

MR. ANDERSON: Okay. I would like to take exception to what was just said in the fact that TexasOnline is a monopoly, which the original concept with

TexasOnline was a great idea, renew your driver's license, make a reservation at the State Bar, you know, buy your auto tags, all those things that are central government functions. Filing a document at a county court is that county's function, and that county has -- the state has not mandated software to the counties. Now, some states where the Supreme Court actually funds the court clerks in those states, they provide the same software for each court in that state, and I think that's the very exception to the rule here.

We have 254 ways of doing business in this state, and I think this is kind of a -- you know, to me, the state has never mandated a clerk use anybody's software, but at the same time our solution is more clearcut in that there's one portal to go through for the attorney, to the post office and to the clerk's office. That document just hits one server one time and then on to the county, and at the county it can be brought in electronically into their imaging and indexing scheme instead of going through this EFSP, which I think creates another little layer out there that's going to create more charges out there.

CHAIRMAN BABCOCK: Marianne, did you have something?

MS. DWIGHT: Oh, I -- thank you. Obviously

we've got -- I know when I was practicing law and filing lawsuits I practiced in more than one county, and I'm sure that many of you practice -- some practice in just one county, I know, but there are a lot of us that practice in more than one county. And so what this is trying to help facilitate, not only in working with other groups, it was also helping facilitate the filers, the lawyers, all of you, to be able to file in one manner with -- for other counties.

So if you're going to file something in Fort Bend County or Bexar County or Harris County, Travis County, it's going to be the same method that you'll use, but you will just have your own courier service, if you will. Either you'll have your own runners or your own system inside your law firm, or you'll have your other courier that you may contract with, your EFSP, but it will be the same post office with the same kind of specs.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I would like the world to be like Luke wants it. I mean, I think it would be great just to hit my button and it's filed and I can go home and I've met my filing deadline. It's probably not going to be that way. Like, for example, in this rule we were talking about, it doesn't talk about the wrong form. It says "improperly formatted," and it strikes me if you're

going to use e-filing there's probably got to be some way to ensure that the document is properly formatted or it gets sent back to you.

You know, I mean, this is a pilot project. Maybe we should let them try it, if that's our decision, and see how it works. Maybe -- maybe the report will come back everybody -- there's no problem. Any time there's a problem people know about it within five seconds. There is not a problem. Maybe there will be a horror story and have some poor litigant who has a problem, but, you know, maybe we ought to give it a try because something like this is going to be done, and it strikes me that formatting is probably something that's going to have to be done right.

CHAIRMAN BABCOCK: Frank, it seems to me that it's our charge to look at this rule and see if there are provisions -- or these rules and see if there are provisions in it that are obvious horror stories waiting to happen and advise the Court that they shouldn't allow that particular horror story to happen. So --

MR. GILSTRAP: Well, let's talk about this one. I mean, it says "in properly formatted."

CHAIRMAN BABCOCK: It says more than that.

MR. GILSTRAP: What's that?

CHAIRMAN BABCOCK: It says more than that.

MR. ORSINGER: Where are you reading?

CHAIRMAN BABCOCK: There's this 4.3(b), "Properly-formatted, electronically-transmitted from a filer's EFSP and verification that the filer has a sufficient credit card balance or valid ACH routing number to complete the transaction." That's a whole bunch of stuff.

MR. GILSTRAP: I understand. I question if they can really set it up without doing that. Somebody's got to get paid.

CHAIRMAN BABCOCK: Well, but, see, but Bonnie says, "Huh-uh. I mean, you send a check to me and it bounces sky high, that's okay. I'm still going to file it."

MR. EDWARDS: What's an ACH routing number?

MS. WOLBRUECK: Because it's -- Chip?

CHAIRMAN BABCOCK: Yes.

MS. WOLBRUECK: You have to understand that the clerks that are willing to do this pilot are doing it for the convenience of you that, you know, you're up at 2:00 o'clock in the morning and you can't sleep and you decide you want to file this petition, so you --

CHAIRMAN BABCOCK: That would not describe me, but --

MS. WOLBRUECK: You know, and so there's a

convenience thing here. So the clerks also -- you're concerned about your litigants, and I'm concerned about the clerk's liability in that we've got, you know, a document that's been filed and it hasn't been. We haven't received it. It reached one level and it never reached us; and, you know, where is my liability if it's been deemed filed or if it bears a file mark that, you know, I didn't put on there; and so I'm concerned about my liability just like you're concerned about your litigants' liability, too.

CHAIRMAN BABCOCK: Well, but, see, that's the problem that Sarah points out. You know, here you've got a whole bunch of picket fences you've got to jump over --

MS. WOLBRUECK: That's right.

CHAIRMAN BABCOCK: -- and the first fence has got about six different things that you've got to comply with that wouldn't happen if you're filing --

MS. WOLBRUECK: I wanted to make a comment about refused filing, and I would doubt that it would happen very often. The only thing that I can think of, and if you want to consider it a refusal, sometimes a runner comes to my office, and let's just say that runner is electronically, but oftentimes it's a runner that actually walks in the office and they put down a document

to be filed and it should have been filed in Travis County, you know, and I'm kind enough to say, "Hey, did you see that this says Travis County instead of Williamson County?"

"Oh, no," You know, "We could have cost the attorney a whole lot of money there if it's filed in Williamson County and then have to refile it or something." That's what I think refuse something, a document, is. You know, it could very blatantly have been filed in the wrong county, and the clerk says, "Hey, attorney, you need to take a look at this again. I don't think you want it filed here."

CHAIRMAN BABCOCK: Good point. Stephen.

MR. TIPPS: I think that what needs to be done is to make sure that Rule 4.3(b), which is the one that we have been looking at --

CHAIRMAN BABCOCK: Right.

MR. TIPPS: -- is electronically analogous to the second paragraph of current Rule 5.

MR. SOULES: Right.

MR. TIPPS: Which specifies what the threshold is in order to take advantage of the mailbox rule, and under Rule 5 you have to send it to the proper clerk by First Class United States mail in an envelope or a wrapper properly addressed and stamped and then deposit

that in the mail, and I don't know whether that is analogous to requiring that it be properly formatted or not. I mean, if it -- if that's the electronic analog, that would seem to me to be appropriate. What seems to me to be inappropriate is to include, as this draft does, the requirement that you pay for it and introduce that whole notion, which is not part of the current rule.

CHAIRMAN BABCOCK: Why isn't that like a stamp?

MR. TIPPS: Maybe it is like a stamp.

MR. EDWARDS: Because you can have your whole scheme of paying for it screwed up by some electronic mess-up with the credit card company or the bank.

MR. TIPPS: But it's really not like a stamp because, I mean, isn't this -- I thought this had to do with a filing fee. Does it not?

HONORABLE SARAH DUNCAN: Yeah.

CHAIRMAN BABCOCK: Yeah.

MR. TIPPS: I mean, you don't have to -- to comply with the mailbox rule you don't have to include the check, but you do have to put it in the right kind of envelope and put a stamp on it.

CHAIRMAN BABCOCK: Andy, then Paula, then Richard, then Bill, then Frank.

MR. HARWELL: I've just got a couple of things. Bonnie, a minute ago, you don't file the document, though. You just accept the document, but then you file it when the fees are paid. Is that my understanding?

MS. WOLBRUECK: No, that's not correct. I file the document. Any document that's tendered to me I file.

MR. HARWELL: Regardless of whether the fee is paid?

MS. WOLBRUECK: That's correct. I don't have a -- you know, I believe that, like Sarah said, that if a document is tendered to the clerk, the clerk shall file it, no matter what format it's in.

MR. HARWELL: But I believe the statute says that the fees must be paid before we can file, and I believe they do. Another thing, Frank --

MS. WOLBRUECK: I would wish it would be that easy.

CHAIRMAN BABCOCK: I'm going to your county.

MR. HARWELL: Frank -- and they are done different ways all across. But, you know, this format is not anything different than the statutes for filing documents by paper really. You can go out there and see that you've got to have a document that's properly

identified on the top, boldfaced. You know, it used to be that way. So why couldn't you set up -- why couldn't the Legislature set up a format and then do away with all these steps that you've got to do and set up the format that's universal and then have it filed. That way when you hit that button you get an automatic acceptance or --

MR. GILSTRAP: You're still going to have an improperly formatted document sent sometime, and it's going to come through as all dollar signs and deltas. I mean, that's the problem.

CHAIRMAN BABCOCK: Paula, did you want to say something?

MS. SWEENEY: Well, I still haven't heard a reason why we're doing all of this instead of just e-mailing the document to the clerk. Why all of this extra stuff? I mean, I do e-mail. I attach documents. I can make a PDF. I can make a PDF you can't edit. So can everybody in this room, or someone in their office for you dinosaurs. So why can't we -- why do we have all of this extra, cumbersome, scary, out of control, we don't know what's happening to it stuff? Why can't we just e-mail it to the clerk?

MS. BENNETT: How do you pay the clerk?

MS. SWEENEY: Send them a credit card, whatever billing --

MS. BENNETT: With your e-mail? I mean, that's --

MS. DWIGHT: How do you accept that? How do you send a credit card number?

MS. SWEENEY: I don't know, but I'm sure there are ways it can be done without having all of these additional steps. I mean, we shop online all the time.

MS. DWIGHT: And there's a payment gateway that --

THE REPORTER: I'm sorry. I can't hear what you're saying.

MS. DWIGHT: I'm sorry. I'm sorry. There's a payment gateway that's set up in the entity that you're buying something from. There's no payment gateway set up for any of these clerks, and what we have become is a payment -- is a payment mechanism. It's no different than when you pay your courier.

MS. SWEENEY: Okay. Let me change the hypothetical. Let's talk about something I'm filing that does not require any payment, a deposition notice. I want to e-mail my deposition notice to the clerk. It's free. I don't have to pay to file that.

MS. DWIGHT: That's true, but how do you get it to the courthouse?

MS. SWEENEY: I e-mail it.

MS. DWIGHT: Oh, no, how do you today?

MR. CHISOLM: How do you know that -- in internet e-mail you have no verification that the e-mail has actually been received unless the receiver's e-mail was set up to automatically send you a notice back.

MS. SWEENEY: Right.

MS. BENNETT: But I think another important answer is the clerk's office isn't set up to receive your e-mail and put it in their filing system and --

MS. SWEENEY: That's what I want to know.

MS. BENNETT: -- that's going to cost them a lot of money, and one way they can recoup their cost of setting up that system to receive electronic filings is through the TexasOnline portal, and they get a two-dollar fee every time you file something, and that helps them recoup their costs.

MS. DWIGHT: It also is a secure environment. Your e-mail is not a secure environment. The TexasOnline infrastructure creates a secure environment. We have become -- we think right now like our mail service, when we mail it in the post office we think that's secure. We know that sometimes things get lost and sometimes people steal mail, but we've become -- because it's been our way of the world for many years now when we mail something we think, all right, it's going to

get there and no one else is going to be opening it up.

In dealing through an electronic transmission we have -- because of the infrastructure that we have set up, we have made a very secure environment for any documents and any other information that's coming through that environment, and so -- and we also it's -- we packaged it, and, again, I'm not a technical person, and I'm trying to -- we packaged it in such a way that it can get to the clerk and they can then use it because it's in the right package. It's got the right technical specs to that document, but when these things happen, when you file electronically, if you're using this system, and you hit that send button on your computer, all these other steps are going to be seamless to you, and they're going to take a couple of minutes.

MS. BRUNNICK: Seconds.

MS. DWIGHT: Or seconds. I'm sorry, seconds. They're going to take a couple of seconds, and they're seamless to you, because it goes -- because of the cyberspace that it's going through, these formats are not going into someplace and it's staying there for awhile and there are some people coming into a room and formatting it there. This is all set up electronically ahead of time, and so you, the filer, will not see this or be waiting for this or be hanging around. It's going to be -- if

something crashes in the interim, if it -- it doesn't happen very often, but if it does happen, you will know almost immediately it happened.

So it will happen very -- this is when we are describing the steps it sounds like a lot of steps, but these steps, we've got the programmers and the project person here who are writing all these steps. These steps are being written and they're all the technology part of it. Once that's done, those steps are done.

MS. SWEENEY: And are all those entities closed to tort claims immunity? They are not government entities? They are not immune under the Tort Claims Act?

MS. DWIGHT: No.

CHAIRMAN BABCOCK: A reluctant "no." Richard and Justice Hecht.

HONORABLE SARAH DUNCAN: You just changed your defendant, Paula.

MS. SWEENEY: Yeah, I know. Let me reformat that.

CHAIRMAN BABCOCK: Justice Hecht has got a comment.

JUSTICE HECHT: I want to make sure we talk about as many things as we need to, and as I understand it, the transmission towards the clerk will be acknowledged as it gets there. What about the

transmission to the other party? I guess if the other party -- the other party could agree to acknowledge the receipt of the transmission, but they wouldn't have to do that, so what happens if the sender says, "I sent it, and here's the confirmation that I got from the clerk or the -- or TexasOnline that it got filed," but the other side says, "Well, I didn't get it. You didn't send it to me."

And so then do we just have a swearing match like we usually do where the secretary says, "Well, I always mail it at the same time," and because nobody ever remembers exactly, but "I always mail them at the same time." Is that any different under this system than under our current system?

MR. WOOD: I would like to say, first of all, that just because you electronically file a document does not mean that you have to electronically serve it. You can serve it traditionally, and, in fact, the electronic filer can't impose electronic service on the other party. That has to be agreed to, but let's jump to your situation where you're talking about somebody who has agreed to receive electronic service.

JUSTICE HECHT: Let me be sure I understand. You could electronically file even though the other side wouldn't agree to accept it, and you have to send it by

mail or whatever to that party.

MR. WOOD: Yes, sir. Exactly. Okay. But jumping to your example, let's suppose that the other side has agreed to accept service electronically. What the rules currently say is that service is complete upon transmitting that to the other party's e-mail address, and we recognize that, given that language, there is not the equivalent of a green card, for example, when you send something by certified mail. It is possible to write the rules in such a way that you get the electronic version of a green card. In other words, the recipient's e-mail system has to acknowledge that the document has hit the mailbox so to speak, and, in fact, we have drafted an alternative version of the rules that does allow for that.

CHAIRMAN BABCOCK: I think Richard and Bill have been waiting in the wings.

MR. ORSINGER: You know, I have partial knowledge of this, but I'm trying to simplify it. Part of the problem is, is that the individual clerks are in control of their own software systems, and they're not standardized, and there's no authority yet that has standardized them.

So it's my view that the EFM, TexasOnline, is an effort to create a government agency that the outsiders can conform to those standards and then the

government agency can go to the individual clerks and say, "You are required to accept electronic filings from us. They're always going to look like this, they're always going to be in this format, and you've got, you know, a year and a half to take it from us."

Okay. Now then you've got this EFS or TexasOnline. They can only read stuff if it's in certain coding. They can't read stuff that's in Chinese. They can't read stuff that's on some defunct computer, so if you wish to send things to TexasOnline in the condition they can read it, by definition you're an EFS -- you're an electronic filing service; and if a big law firm had enough of that, they would say, "We're going to get our computer guys on it, and all of our e-mails that go to filing are going to be in the condition for TexasOnline to receive, and so we're our own EFSP, and it goes directly from our law firm to TexasOnline."

But for someone like me as a sole practitioner, I'm not going to want to go and learn or pay for all of that, so what I do is I hire some representative, some intermediary EFSP and I'll say, "I'm going to pay you 10 bucks plus $2 a page or whatever, and I'm going to send you a Word Perfect document, and you're going to translate that into something that TexasOnline will accept," and that's why we're here.

If somebody had already said, "There's going to be one standard. Every clerk will comply with it, and every clerk will accept e-mails that have Word Perfect and Microsoft Word documents attached," then maybe we don't need all this, but we're not there. And so in the practicality we've got to have some government intermediary who's responsible for taking all this electronic communications into the government; and we've got to impose on the world a standard that they speak a language that that government intermediary requires; and so it may look like we have all these extra intermediaries that we don't need; and, you know, if we were dictators we could probably eliminate all that; but we would force on all these individual clerks uniformity in the software that they use and the filing systems; and we don't have that uniformity and probably only the Legislature can impose that uniformity; and I, frankly, don't think it's going to be coming.

And so if we're going to do a pilot project, we shouldn't do a pilot project where just the Bexar County Distric Clerk's office has its own e-mail server and then says, "Okay, you can send us stuff as attachments in Word Perfect and Word, but if you use any other kind of word processing software, you're out." We might be able to make that work on a county basis, but we can't make

that work on a statewide basis, so our pilot project has to have some kind of generic components to it so that when we do the test drive and figure out what to alter and everything, by the time we all get finished with this and we have some practical experience, we've got an electronic governmental intermediary and then we've got these private people out there, whether they're under a monopoly or not as a policy decision, and then we can -- this whole thing can start working.

And it looks complicated, and it is complicated, and that's because the pre-existing politics and the finances and the commitments that the clerks have made to the computer systems they have. They have hundreds of thousands of dollars invested in their computer software, and somebody is not going to snap their finger and have them conform to some norm overnight, so I think we have to kind of accept that, and we have to accept some complication here in order to create what to the user will look like a seamless uniformity but what in reality is a lot of individual, different kinds of offices with different kinds of software and different kinds of money from their county commissioners to get all this done.

CHAIRMAN BABCOCK: Richard, are you in favor of this or not?

MR. ORSINGER: We've got to do it someday. I mean, we've got to do it someday. If we don't do it today, we're going to have to do it tomorrow.

CHAIRMAN BABCOCK: Do you think these rules are flawed?

MR. ORSINGER: Yeah. I think we've got -- I mean, and one of the things that I think is important for the people who are working on this project is if the lawyers are afraid to use it, it isn't going to operate as a test drive. In other words, if Luke Soules and everybody else who's afraid to use this system because there's too many pitfalls, if we put the rules out with all these pitfalls and nobody uses it then we don't get our pilot project. We've got to design a pilot project that lawyers use so we have guinea pigs that we can, you know, react to, and we need to be sensitive to that, because if the lawyers are afraid to use it we will never know problems.

CHAIRMAN BABCOCK: Bill's been waiting in line for a long time.

PROFESSOR DORSANEO: A general comment. It seems that the drafter of the proposed rule makes the assumption that requirements contained in the Rules of Civil Procedure for preparation or signing of a document as to its size, contents, and the like are filing

requirements and not simply requirements that need to be satisfied assuming there's no waiver at some other point in the litigation process for consequences imposed short of not filing it at some other stage in the process. I just think that -- I think that that's a misconception.

I think the misconception is involved in the initial step of transmitting the document through an EFSP to TexasOnline and then it's really made worse in the provision dealing with the clerk. 4.3(d), "complies with all filing requirements." I'm wondering what filing requirements are we talking about here. Eight and a half by eleven, or as you have it in your document here, 82 inch by 11 paper, or what; and I think that you misperceive -- at least don't think about Texas procedure the way I do on this subject, and I think I'm not wrong.

MR. HATCHELL: As usual.

PROFESSOR DORSANEO: Well, a lot of times I am wrong when I think I'm not wrong.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: I have a motion that's intended to address at least in part what I keep hearing to be one of the primary concerns, and that is with regard to 4.3(b), we amend the language of that rule by adding at the end of the first sentence after the words "that the document has been received by TexasOnline" this: Comma,

"at which point the document is deemed filed." So that -- so that we could still debate whether or not the threshold requirements, including the credit card balance, are excessive, but the idea would be that once Luke pushes the button he has to wait at his computer for some number of seconds to see if he gets an acknowledgement back, but if he gets an acknowledgement back that he can then print out and send to his file he can go home because he has filed it.

CHAIRMAN BABCOCK: Bonnie and Andy don't like that, though, right? Why not, Bonnie?

MS. WOLBRUECK: Well, you're making TexasOnline the clerk, and I'm the clerk, and I have the right to at least -- I mean, the way I look at it is -- and these folks know that I visited with them a lot about it and I had some objections along the way we've talked about, but I have finally decided that what I'm going to contract with TexasOnline is they're going to be my electronic file stamp. I have a file stamp now that I can hit, so they will be my electronic file stamp. That document is going to have to reach me before I say "apply that electronic file stamp."

MR. TIPPS: Okay. All I was trying to make them be is the post office.

MS. WOLBRUECK: Yes.

MR. TIPPS: Analogous to Rule 5. Would it work for you if we had something in here that was comparable to the "if it then gets to the clerk's office within 10 days"? Because that's the current concept. Once you put it in the mailbox --

MS. WOLBRUECK: Yes. That's right.

MR. TIPPS: -- if you put a stamp on it, so long as it gets there in 10 days then you're okay.

MS. WOLBRUECK: And you have to prove that. I don't have to. Right?

MS. SWEENEY: Right.

MR. TIPPS: I have to prove that it gets there in 10 days.

CHAIRMAN BABCOCK: Joan.

MS. JENKINS: I have been browsing O'Connor's while this has been going on. We do have a Supreme Court case that says that -- in *J. Harvey Patterson* -- that an instrument is deemed filed when it's placed in Bonnie's custody and control, and it doesn't matter if she file stamps it. It doesn't matter if she wants to reject it. My job is to just get it to her, and if that case is correct and O'Connor's has got her cite correct then it seems to me what Stephen is saying is exactly what we ought to try to do.

If case law says that if the clerk refuses

to file a document or file marks it late, it doesn't matter because the document is considered filed on the date that I presented it to her. So it seems to me that we just need to construct a rule that says as soon as it is electronically presented, that's it. It doesn't matter if the credit card fails, it doesn't matter if it comes in a garbled format, but that needs to be the objective of the rule, and it seems to me that that's where we should try to place our focus.

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

MS. McNAMARA: No.

CHAIRMAN BABCOCK: No? Bill.

MR. EDWARDS: The only signatures that have to be scanned are where there's verification and things of that nature or the signature the other party is required, if I read this correctly. What happens to Rule 13 and Chapter 9 and Chapter 10 that has provisions for what it means when an attorney signs a pleading? That you're verifying that it's not frivolous, it's backed by law and all that good stuff.

CHAIRMAN BABCOCK: So your defense to the Rule 13 motion is going to be "I sent it electronically.

MR. ORSINGER: That's frivolous itself.

MR. EDWARDS: It says, "a digital filing" --

"a digital signing," but you know, anybody can push the button and put a digital signing on the thing. You know, I think, you know, how are you going to handle that? Doesn't there -- you know, if we're using fax, we've got to have the original signed document in our file in case somebody wants to see it.

MR. MEADOWS: But people sign your name to documents in your office, don't they, and file them?

MR. EDWARDS: Yeah, only over my dead body.

CHAIRMAN BABCOCK: You certainly seem alive and kicking to me.

MR. MEADOWS: My signature is applied to documents and they're filed and I know it and I approve of that.

MR. EDWARDS: I'm asking what do you do with Rule 13, Chapter 9 and Chapter 10 of the Civil Practice and Remedies Code?

MR. MEADOWS: Well, I mean, I'm responsible. I mean, it's as though I -- as far as I'm concerned it's as though I've signed it and filed it. I mean, I am responsible that I complied with these rules.

MR. EDWARDS: Yeah, but you know that somebody has signed and you've got the original either in the file in the clerk's office or it's in your file. If it's been faxed somewhere, it's in your file at home.

CHAIRMAN BABCOCK: Ted, you got an answer to this?

MR. WOOD: Well, I think so. If I direct your attention to Rule 4.2(b), and you are correct in saying that regular documents that don't have to be verified, those kind of things, you're not going to actually have a signature on the document when it's electronically transmitted. We say rather that "the attachment of a digital signature is deemed to constitute a signature for all the Rules of Civil Procedure purposes" and so on, and then there's some language that we've recently worked up that says, "The person whose name appears first in the signature block of the initial pleading is deemed to be the attorney in charge for the purposes of Texas Rule of Civil Procedure 8 unless otherwise designated, and that the digital signature on any document filed is deemed to be the signature of the attorney whose name first appears in the signature block of the document for the purpose of Texas Rule of Civil Procedure 13" and so on.

MR. EDWARDS: Well, if do you that then you can forget having any electronic filing out of my office. Period.

MS. SWEENEY: Why, Bill?

MR. EDWARDS: Because I don't want -- I am

not going to have somebody punching buttons and subject me to problems with Rule 13 or Chapter 9 or Chapter 10. I'm sorry, it's not going to happen, and just because my name is first on there and some other jerk in my office -- I am not going to take the gas for it.

MR. ORSINGER: But, Bill, what you do is you make sure the other lawyers in your office have their own identification number, and if they transmit it, it's their signature that they're responsible for.

MR. EDWARDS: Well, that's not what he says in these rules. He says that a digital signature will be deemed to be the signature of the attorney in charge, which is the first one who signed or name appears on this thing.

CHAIRMAN BABCOCK: In fact, we're all thinking about using your digital signature.

MR. ORSINGER: No, "the digital signature on any document filed is deemed to be the signature of the attorney whose name appears first in the signature block of the document."

MR. EDWARDS: That's right. That's what it says.

MR. ORSINGER: So if you have -- if it's sent under your digital signature as the principal one then you'll be given the credit for having signed it

first, but if it's under your associate lawyer's digital signature number --

MR. EDWARDS: You know, you set up a signature block, and what are you going to do, change it depending on who's signing it or something?

CHAIRMAN BABCOCK: Marianne.

MS. DWIGHT: I may be able to answer your question. When you want to use this e-filing service you have to register, and you put your -- it's just a little form, you know, that pops up. You just have to do it once, put your name, and you're going to get a password, and you can choose your password, and that password is what's going to identify you, the filer, and so unless you give your password to someone else, there's no one else in your office that will be able to file with your name and password.

CHAIRMAN BABCOCK: Michael.

MR. HATCHELL: As I listen to the debate I think we're passing a little bit like ships in the night. The technical people are giving us a lot of good reasons why the system has to be set up the way it is, but they're not, I think, giving us good reasons why these rules must read the way they do, and the lawyers are saying, "We're not going to use this system," which I think is a perfectly wonderful idea, "unless we have the same

security that we do when we go down and do something at the post office."

Stephen is getting real close to getting a solution. All we need is a grace period. I don't care if it goes around the world and you convert it into Sanskrit and 13 other languages before it gets to the clerk or if Bonnie doesn't want to file it because it's got one and a half inch margins and sans serif type in it. I don't care as long as I have a grace period that saves me and protects me in what I'm doing; and if we give Stephen just a little bit of time, I think he's going to get there.

CHAIRMAN BABCOCK: Stephen, and then Sarah can knock him down.

MR. TIPPS: I want to amend my motion.

MR. SOULES: Second.

MR. TIPPS: 4.3(b) after the first sentence. Leave the first sentence like it is, "that the document has been received by TexasOnline," period. Add this sentence: "If the document is accepted for filing by the clerk within blank days of its transmission to TexasOnline," comma, "it shall be deemed to have been filed at the time the," quote, "acknowledgement," end quote, "was received from TexasOnline."

PROFESSOR CARLSON: But what if it's not?

MS. BENNETT: I believe that's what we say

in 4.3(d), as in David.

MR. MEADOWS: See, I don't think that's enough protection, Steve, because that means that an after event could mean that it wasn't filed.

MR. TIPPS: That's what the current rule says.

MR. ORSINGER: But, you know, the problem with the mailbox rule is that if the mailbox -- if the post office loses your document then you still have to fall back on your proof of mailing. I mean, you don't get an automatic grace period if the post office loses your mail. You only get a grace period for if the pleading is received after the deadline but within 10 days, but if the letter is lost and it's never received by the clerk then you're in the suit. You have to get down there in front of the judge with your sworn testimony from your secretary and everything to try to save your case.

MR. EDWARDS: We kind of know what the risk is with the post office, and there's so many -- we've got three different connections here we're using electronically; and everybody knows that you have more crashes of your computer than you have lost mail; and I think what we need, if we're going to go have anybody use this, is some mechanism whereby if there's a screw-up in the electronics or the thing doesn't get done right you

get a period of, say, three working days after you're notified that there is -- that the thing didn't work to correct the deficiency; and if we do that then people will not, I think, be so reticent to use the system.

MR. MEADOWS: I agree. I mean, I think that's the point. It's the management of the problem. I think Luke is right. I think there should be more security in this than there is in dealing with the post office.

CHAIRMAN BABCOCK: The Court's going to need some sort of 45,000 feet direction from us. Is there anybody here that thinks that a pilot program of this type is just per se a bad idea? It doesn't matter what rules you write, just we're not there yet? Anybody feel that way? Anybody feels that way, raise your hand.

MR. TIPPS: I didn't hear. Sorry.

CHAIRMAN BABCOCK: Well, I know you don't.

MR. TIPPS: Hatchell's whispering in my ear.

CHAIRMAN BABCOCK: Huh?

MR. ORSINGER: Are you against any kind of pilot project?

MR. TIPPS: No. No. No.

CHAIRMAN BABCOCK: Okay. So everybody thinks there should be a pilot project.

All right. Now, how many people think that

the rules as drafted are flawed such that Justice Duncan and Luke and Richard, to pick three Bexar County lawyers just out of the hat, would -- just wouldn't use these rules as drafted. I mean, I assume -- how many people feel that way? Raise your hand.

MR. ORSINGER: I would go ahead and mail it at the same time that I --

CHAIRMAN BABCOCK: And how many people think that the rules as drafted are okay?

Two judges.

MR. ORSINGER: The sponsor is sticking with it.

CHAIRMAN BABCOCK: Bonnie, did you have your hand up on that?

HONORABLE DAVID PEEPLES: Here's what I think would happen.

CHAIRMAN BABCOCK: All right. So let me just announce this. By a vote of 19 to 2 these rules, this committee thinks, are flawed in a significant way that needs --

PROFESSOR DORSANEO: But correctable.

MR. SOULES: Just one way.

MR. ORSINGER: All we need is to cure it. If it screws up, we need three days to cure it.

PROFESSOR DORSANEO: No, we need more than

that. We need it if it's -- like in 5. 5 says if it's "received by the clerk not more than 10 days, shall be filed by the clerk and deemed filed in time." It doesn't say --

MR. WATSON: You could just add that exact language.

PROFESSOR DORSANEO: -- "accepted for filing by the clerk within 10 days."

MR. WATSON: Add that language. "If it is received by the clerk within 10 days it shall be filed." Whether it's electronically received or paper received, just move that -- give Stephen that language, and we vote and get out of here.

MS. SWEENEY: How does the public have access to this stuff?

PROFESSOR DORSANEO: There is the assumption that there are all kinds of technical requirements for filing, and that's not so.

CHAIRMAN BABCOCK: Paula, we did talk about that.

MS. SWEENEY: Okay. I was on the phone. Sorry. I have been "edumacated" by my neighbors.

CHAIRMAN BABCOCK: Andy.

MR. HARWELL: This will be a parallel deal, though. I mean, the clerk in Bexar County will do their

filing just as normal, and this will be in addition to, only for the test period. So there's not going to be any risk that something, I guess, could go wrong if they're going to have the parallel run, so....

HONORABLE SARAH DUNCAN: Well, but as Richard said earlier, if you're going to have a pilot project, it can only have a hope of being successful if someone uses it.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: As I understand what we're dealing with now, is that we're going to have a situation -- we're looking for a situation where when you press the button it's deemed filed and it is filed unless you get some notification that there is a problem with which you have a period of time, say 10 days, to correct the problem, and if you do, that's fine.

CHAIRMAN BABCOCK: Okay. The Court has asked for a vote on this issue, so let's see if we can give the Court some direction. If a fix is made in these rules along the lines that we have been discussing, i.e., that there be some sort of mailbox rule with a 10-day grace period and a deemed filing -- I know the clerks have objections to that, but if we can work all that out, how many people think that this pilot project, these rules, would be acceptable?

MR. SOULES: Would you take that to 10 days?

CHAIRMAN BABCOCK: Yeah. 10 days is included, Luke.

MR. EDWARDS: Can I raise something first? Does this include the possibility -- are you talking about if you push the button and if it's received within 10 days it works, but if something is screwed up in there, somebody pushed the wrong button, that sort of wrong or there's something wrong, flawed, with the hookups where there's no -- you can't trace it or anything, you can't redo it.

If we're dealing with something where you get time to fix it after notice that it's not right then I'd vote "yes." If you don't get time to fix it if it's not right or it didn't get there or something like that then my vote would be "no."

CHAIRMAN BABCOCK: Okay. Justice Hecht, we're voting on time to fix it, right?

JUSTICE HECHT: Yeah.

MR. SOULES: One way to fix it would be just to take a hard copy down to the clerk and hand it to them.

CHAIRMAN BABCOCK: Yeah.

MR. SOULES: Okay. That's okay.

CHAIRMAN BABCOCK: All right. So everybody thinks if we fix it --

HONORABLE SARAH DUNCAN: Well, but --

CHAIRMAN BABCOCK: -- to have time --

HONORABLE SARAH DUNCAN: There's a lot in here that we haven't talked about.

CHAIRMAN BABCOCK: That's true.

HONORABLE SARAH DUNCAN: The clerk, as I read the rule, the clerk has the option to let you view it electronically; and if they don't, if they say "no," then they have the option of printing you out a copy.

MS. SWEENEY: But they don't have to.

HONORABLE SARAH DUNCAN: But there's nothing in here about whether you're going to have to pay a dollar a page for a copy of a hundred-page motion for summary judgment, and I just use that as an example. I think it is premature to say whether if we fix the mailbox problem is the rest of the rule good enough. I think it's really premature.

MS. SWEENEY: Yeah. The rule has to, I think, be modified to mandate that the clerk print it for somebody who wants to read it, because right now you can go to the courthouse and read the file even if you're poor. This says you can only read the file if you're rich. If the clerk doesn't want to, because she may print it, but she doesn't have to print it.

HONORABLE SARAH DUNCAN: And it doesn't say

anything about cost, who's going to bear that cost.

MS. SWEENEY: Right.

CHAIRMAN BABCOCK: Buddy. Yeah.

MR. LOW: I put it in the general category of protection to the user, you know, in the sense of cost, security, and there might be other things, but I think the user needs more protection, and I would put it in that form rather than just time to cure a problem and might be other things besides cost, but we need to go through the whole thing with the question of giving protection so that it's affordable and will be used.

CHAIRMAN BABCOCK: Okay. Let me just ask Justice Hecht, what can we do to assist the Court? I don't know exactly what your timetable is. We can come back here in the morning and slug out all these other details. Are you guys at 45,000 feet or are you at --

MR. HATCHELL: Or on approach.

JUSTICE HECHT: Well, we're fairly well along given that it's a pilot project. I'm sensitive to Sarah's concerns that we need to take a hard look at some of the rest of it, although David and his group have done that with a view toward people that are actually going to be using it. And, you know, this has kind of come up at the last, and people have been working on it for sometime, and we asked you to look at it this afternoon.

I don't know -- you know, we're not shooting for perfection here, but we are shooting for a project that somebody will actually use, and I hope won't lose their case as a result of it, because then that will really be a bad thing, so I don't -- I guess the answer is we're pretty far along and the Court might go ahead and do this anyway, given making some of the modifications that we've talked about this afternoon, because it can continue to be modified as we go along, but I don't know whether they will or not. I mean, I don't know what they will do.

MS. SWEENEY: I would move that the committee vote not to approve any proposal unless it is the documents are available to the public to view for free where if they would be so viewable under the current law. Otherwise, we are radically changing the nature of whether or not this is a public judicial system, and I don't think we need to do that.

MS. WOLBRUECK: And again, I will state it again that this does not change the duty of the clerk to provide public access to the records.

MS. SWEENEY: Yes, it does. It says "may." It doesn't say "must."

MS. WOLBRUECK: No. This doesn't supersede all of the other duties of the clerk for public access. It may be reproduced and put into the file, you know, if

the clerk chooses to keep a paper file; and if somebody wants a copy or something that they may make a copy of it, but public access, I know that Dianne Wilson, the county clerk in Fort Bend County who plans to do this, scans all of her documents. She has a lot electronically. She has many, many public access terminals.

Anybody can come in and view all of the documents; and everything is, you know, there and viewable; and these documents will also be. She may also print them out for a hard copy because her courts need to have access to it, all of the courts. So that will happen in this pilot project. I think that Bexar County will operate very similar.

CHAIRMAN BABCOCK: Paula's right, though. The rule as written does give discretion to the clerk to maybe not do it and charge you if they do do it, so there's an issue there.

MR. TIPPS: But, I mean, somebody could -- even under this rule as written, someone could read the document on the computer.

MS. WOLBRUECK: Yes. Yes.

MS. SWEENEY: It says "The clerk may allow." It doesn't say "must."

MR. TIPPS: Oh, it says -- okay. That's wrong then.

MS. SWEENEY: Yeah, that's the problem. It's all "may."

MS. WOLBRUECK: I think, and I'm not sure about that, but I assume that that means either you have a paper copy or you may have it electronically.

MS. SWEENEY: She has "may" on both. She may let you see it electronically or she may print it out.

CHAIRMAN BABCOCK: Speak up a little bit, Paula.

MS. SWEENEY: Me? There is no mandatory laws, and there has to be some -- I mean, she doesn't have to print it for free any more than she has to make a copy free now, but there has to be some free --

MS. WOLBRUECK: Sure.

MS. SWEENEY: -- readable access, electronic, paper, whatever.

MR. SOULES: But there are other statutes that require the clerk to allow the public to see what's in the files.

MS. WOLBRUECK: That's right.

MR. HARWELL: That's right.

MR. SOULES: So that's already taken care of by the statutes.

MR. HALL: Would it be entirely too radical to include some sort of catchall provision at the end of

this that if there is some error in the transmission or something along those lines, it will not be a case-ending -- there will the not be a case-ending effect or death penalty effect on your case so that people know if they use this system it's not going to cause them to lose their case if an error occurs, for some defined period of time and then see how it works?

JUSTICE HECHT: Well, we did that in the TRAP rules when we changed those and said just in case something happens that we hadn't thought about, we don't want people to lose their rights because we changed the rules.

MR. HALL: Right.

JUSTICE HECHT: We didn't have any -- I don't know if a case came up, but we didn't have any problems. That's a good idea.

MR. LOW: But in keeping with the statute, if the Supreme Court passes a rule that's contrary to a law that's in existence now about duties of the clerk and they pass something and the Legislature doesn't amend it, that becomes the law and not the thing you're talking about, Luke. That was the statute that I referred to.

MR. ORSINGER: I think we have to -- I think the Supreme Court would have to specify that it's overruling a statute, and if it doesn't, it doesn't

automatically happen.

MR. LOW: You want me to read --

MR. ORSINGER: No, we've got experts right here in the room.

CHAIRMAN BABCOCK: No, we don't need to do that. What else? Anything?

I think, just talking to Justice Hecht, the Court has what it needs for now. It may need some additional feedback or input from us or the reconstituted committee down the road, but I think this has been helpful to the Court in trying to decide what to do with this pilot project, so what we're going to do now is adjourn for the final time for this committee. We don't need to come back in the morning because we've gotten through our docket.

There is one person that I need to thank right now in front of everybody, and that's our very own Debra Lee, who has been a terrific assistant to me and very dedicated to this committee and to the Court in the way she's organized everything; and if you have criticism of her, keep it to yourself because we won't accept or brook any criticism. We do have this reception --

(Applause.)

CHAIRMAN BABCOCK: We do have this reception at 6:00 o'clock at Jackson Walker, and I hope everybody

can attend, and there is another event in the building that night. I believe you can park in the parking garage, even though it says "contract parking only." Correct?

MS. LEE: That's true.

CHAIRMAN BABCOCK: Okay. So the parking garage is available for people to park in. Okay. So hopefully I will see everybody at 6:00, but if I don't, we will see you down the road.

(Meeting adjourned at 5:23 p.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 8th day of November, 2002, Afternoon Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1308.50 .

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

Given under my hand and seal of office on this the 25th day of November, 2002.

ANNA RENKEN & ASSOCIATES
1702 West 30th Street
Austin, Texas 78703
(512)323-0626

D'Lois L. Jones

D'LOIS L. JONES, CSR
Certification No. 4546
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