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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE
MARCH 4, 2004

Taken before Anna L. Renken, a Certified Shorthand
Reporter in Travis County for the State of Texas, on the 4th
day of March, 2004, between the hours of 9:06 a.m. and 12:49
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502 E. 11th Street, Suite 200, Austin, Texas 78701.

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1 CHAIRMAN BABCOCK: All right. Should we get
2 going, everybody? All right. Are we all ready to go?
3 We're on the record. And welcome everybody. As many of you
4 may have heard, our -- the person who, other than Deb Lee,
5 who really runs this organization is leaving us, sadly; and
6 to celebrate that we're going to try to get together tonight
7 at Sullivan's at 8:00. And Mr. Griesel has consented to
8 stay up past his bedtime and have a cocktail and some dinner
9 with us. So everybody who wants to come to this let Deb
10 know so we can get a head count so we can let the restaurant
11 know we're all going to be there. But we're very sad,
12 Chris, that you're leaving us.

13 MR. GRIESEL: Thank you.

14 CHAIRMAN BABCOCK: And I don't know if your
15 successor will be as talented as you, but I doubt it.

16 MR. GRIESEL: Well, I won't be as successful
17 as the previous staff attorney for rules, as Justice
18 Pemberton told me this morning.

19 (Laughter.)

20 MR. BABCOCK: Perhaps.

21 MR. GRIESEL: I'm certain that the successor
22 will be a fine person. And the Court has been very
23 fortunate with all their staff attorneys.

24 CHAIRMAN BABCOCK: That is true. That is
25 true. We will miss you for sure.

1 Justice Hecht, do you want to give your report?

2 HONORABLE NATHAN HECHT: Well, the Court is
3 very grateful to Chris for his service and is in despair
4 over his leaving. The legislature has done it to us again.
5 They let us train all the talent and then they steal it,
6 because they set the budget. So but we're happy for Chris
7 and we wish him well. The job had been posted. And so any
8 of you who know people who are interested in it, why be sure
9 and ask them to send in a resume.

10 The Court amended Rule 194.2, the disclosure rule,
11 to provide for the disclosure of the name on request of the
12 name, address, and telephone number of any person who may be
13 designated as a responsible third party. And that's in
14 reaction to, in response to House Bill 4 that requires that
15 change specifically, quote, "as soon as practicable."

16 There's been a little delay in making the change,
17 not for any reason other than we had a lot of other things
18 to do; but certainly people could obtain discovery of this
19 information, just not disclosure; but now it's been added to
20 that. And we'll have a copy of the substantive portions of
21 the Order for you to pick up if you wish during the day. It
22 will be effective May 1st in any case filed on or after July
23 1st, 2003. And that's again pursuant to the House Bill 4.

24 Steve Susman and I were at a federal rules
25 conference on electronic discovery several weeks ago in

1 New York City. The Federal Advisory Committee on the Rules
2 of Civil Procedure is looking at changes in the discovery
3 rules specifically to accommodate electronic discovery. And
4 there are a number of issues about preservation of
5 information after when, you know, litigation is going to be
6 filed or after it's filed at some point in time, the form
7 and the manner in which it is produced and privilege/privacy
8 issues that arise particularly with respect to electronic
9 discovery.

10 I'm pleased to tell you that among the paradigms,
11 among the two or three paradigms that the federal rules
12 group is looking at for a rule, is the Texas rule on
13 electronic discovery which we wrote from scratch some years
14 ago when we changed the discovery rules. And Steve, of
15 course, was the head of that subcommittee and several of
16 you-all worked on it. So I thought you should know that
17 while there remains a considerable some would say bias, some
18 would say jealousy about Texas in the rest of the nation,
19 they do seem to be impressed with our rule on electronic
20 discovery.

21 So Steve and I polled the lawyers and Courts in
22 Texas a couple of times recently and then a year or two ago
23 on electronic discovery issues that lawyers and judges have
24 encountered in practice in Texas, and there don't seem to be
25 very many. I suppose at least the rule is not unworkable.

1 And whether it's working fine or whether there just haven't
2 been any occasions to test it, I'm not sure. But anyway,
3 those issues are out there, and you can expect a report from
4 the federal committee in the fall; and when that happens we
5 may want to take another look at our issues and see how
6 they're doing. By anyway, I thought I should tell you about
7 that.

8 And then I think the Bar is working on lawyer
9 ethics rules and are quite a long ways along that project
10 and are down to the hot potato issues; and so perhaps
11 they'll have something to report to us before long. And
12 that's what I have. Wallace, do you want to tell about
13 Judicial Conduct?

14 JUSTICE WALLACE JEFFERSON: Well, we have a
15 committee studying the Code of Judicial Conduct. And Chip
16 has been very gracious to help chair that committee. It's
17 not as well funded at this; but we meet about every other
18 month; and we're fortunate to have Dean Alfini who is on the
19 ABA Commission studying the Model Rules of Judicial Conduct
20 for the American Bar Association and professors and renowned
21 lawyers all around the state.

22 This was prompted in part by the Supreme Court's
23 decision and Republican Party of Minnesota last term which
24 opened up the freedom of speech for judicial candidates and
25 judges who are running for office. It was prompted by that;

1 but when we took a look at that opinion and compared it with
2 our rules the Court decided that the entire Code needs to be
3 scrutinized; and so we have begun a process for that. We
4 met about a month ago or three weeks ago; and we'll meet
5 four or five more times.

6 There are several members of the committee from
7 this committee who are serving also on that committee and we
8 thank you for your service. If you have any interest in the
9 subject, the materials and the transcripts of those meetings
10 are on the website, Chip's website. And Deb has been
11 gracious to coordinate the activity that she does for this
12 committee, so you'll know that the materials are all there.
13 And I would encourage you to review those transcripts,
14 because if you have good comments, the committee of course
15 will take them into account. So that's my report.

16 CHAIRMAN BABCOCK: Great. Thank you.
17 Justice Hecht.

18 HONORABLE NATHAN HECHT: I neglected one
19 other thing. I'm sure you've heard Justice Schneider has
20 been recommended by Senator Hutchinson and Senator Cornyn
21 for nomination to the United States District Court for the
22 Eastern District of Texas. And so he has begun the process
23 of interviewing with the White House and the ABA and the
24 FBI; and we hope that for him that he will be confirmed for
25 later this year, although it's an election year, and so

1 that's always problematic.

2 We'll miss Mike. He grew up in East Texas. His
3 father was a Methodist preacher. He moved around all over
4 East Texas. It's like going home for him. And while he
5 claims to love us, he doesn't love us enough not to leave us
6 for this opportunity. And so we wish him well too.

7 CHAIRMAN BABCOCK: There's a disturbing
8 pattern developing here.

9 (Laughter.)

10 HONORABLE NATHAN HECHT: Yes. I know it.

11 CHAIRMAN BABCOCK: One other thing just of
12 note, the interplay between our system of rules and the
13 federal: The Federal Rules of Appellate Procedure are up
14 for amendment; and one of the controversial amendments is
15 proposed Federal Rule of Appellate Procedure 32.1 which
16 follows in part what we did with our Rule 47 regarding
17 citing unpublished opinions. And the proposal of the
18 advisory committee to the federal rules is to abolish those
19 few remaining federal circuits, there are four of them, that
20 prohibit the citation of unpublished opinions and make it a
21 uniform rule such that even unpublished opinions can be
22 cited for whatever persuasive value they may have.

23 The comment period for that rule closed on
24 February 16th, and they received over 400 comments on the
25 rule; and about 90 percent of the comments were negative, if

1 you can believe that. And geographically most of the
2 comments came from the 9th Circuit, which is rabid about not
3 wanting to be able to cite to unpublished opinions.

4 And it's a remarkable intellectual debate; but
5 again, for better or for worse our example has been among
6 those cited as the leading rule in terms of how we dealt
7 with it and what we did; and the people that are in favor of
8 the amended Rule 30.2 are citing to what we did as good,
9 healthy precedent for what should happen in the federal
10 system.

11 HONORABLE NATHAN HECHT: If I can just
12 comment on that, the federal rules committees are structured
13 a little differently from ours. There are five rules
14 committees, advisory committees: One for the civil rules,
15 the criminal rules, the bankruptcy rules, the appellate
16 rules and the evidence rules. And they all report, they
17 each report to a standing committee which has about 12 or 15
18 members on it. Then that committee reports to the Judicial
19 Conference of the United States which is composed of all of
20 the chief judges of the circuits and the chief judges of a
21 similar number of district courts and the Chief Justice of
22 the United States.

23 And so when the -- this is at the stage where the
24 appellate rules committee, advisory committee has
25 recommended this change, put it out for comment. The

1 comments will then be reconsidered by the standing committee
2 who since they put out the rule in the first place, will
3 probably stick by their decision, although they might not.
4 But then the more, if you will, political or policy issues
5 are decided by the judicial conference.

6 So the fact that there are so many judges, well,
7 so many comments against the proposal is not good; but it's
8 not the end of things either. But there is a huge debate
9 going on in the federal courts about what to publish and
10 what to cite. And Judge Kazinski, Judge Pozner, --

11 CHAIRMAN BABCOCK: Rinehardt.

12 JUSTICE NATHAN HECHT: -- Rinehardt, Judge
13 Jerry Smith and a lot of people have been involved in it.
14 That's the status.

15 CHAIRMAN BABCOCK: Okay. A very interesting
16 debate.

17 Well, our first agenda item today is we're
18 fortunate to have representatives of the Judicial Committee
19 on Information Technology with us; and they're going to give
20 us a report in the nature of a status report on where we are
21 in the electronic filing and the impact that that is going
22 to have on our local rules. And we have Peter Vogel,
23 Mike Griffin and Mark Unger with us today to talk to us
24 about it, and we welcome them. And thank you, Peter, for
25 coming and sharing your thoughts with us.

1 MR. VOGEL: I wasn't planning on having a
2 roster when I started this. But I'm not going to do
3 PowerPoint. I wanted to give the committee sort of an
4 update on JCIT and where we are. And I certainly appreciate
5 you-all allowing us some time today to sort of give you an
6 update on where we are and where we hope to be with
7 electronic filing in the State of Texas.

8 Let me take a minute and give the committee a
9 little bit of background about the Judicial Committee on
10 Information Technology so you'll have a frame of reference
11 on how we fit in with the Supreme Court committees. In 1995
12 the legislature gave the Court about \$100,000 to study a
13 number of different things including judicial salaries,
14 appointment versus election, hiring minority clerks and also
15 information technology. And as a result of the efforts of
16 the task force on information technology we recommended to
17 the legislature in 1997 that this committee be created.

18 There are 15 members of the committee. We thought
19 having a small committee would be very helpful. I'm the
20 only lawyer member of the committee. Everybody else on the
21 committee is either an appointed or elected official in the
22 state. And I've been chair of the committee since it was
23 created in 1997 with the legislature. One of the things
24 that we have done is we have tried to engage the local
25 government. We have as a matter of fact, one of the

1 executive directors of the the North Central Texas Council
2 on Governments is a member of the committee. We have
3 commissioners, clerks and judges of all different courts.

4 What we found over time is, and I think you-all
5 will appreciate this, and certainly I know many of you-all
6 in the room today from years in Bar work, we all know that
7 at the end of the day in the future we will all have
8 electronic filing. It's an inevitability. And what I've
9 been telling the legislature over the years is what we'd
10 like to do from the Supreme Court is we'd like to have some
11 unity to that so that we don't have 254 different options.
12 Each one of us when we file whatever county we end up in it
13 is going to be different.

14 Let me tell you by way of background, we have on
15 our website among other things a status report, which I have
16 a copy of here; but we only produce it electronically
17 anymore, and we've gotten out of the paper business. The
18 legislature likes that as well. If you'd like to know more
19 about the particular issues that are confronting our
20 committee and what we are doing, I would encourage you to go
21 take a look at our website. And if you go to the Supreme
22 Court Committee, or I'm sorry, the Supreme Court's website
23 the court system, I think Mike will direct us there later,
24 because I'm blanking out on the URL; but we could certainly
25 provide it to the committee, that this is available as are

1 all of the standards that we've come up.

2 We also want to thank you all for your assistance
3 in helping us get the e-filing project underway. We came to
4 you-all last year -- no. I guess a year half ago -- with a
5 proposed set of local rules. And as you will recall, you
6 approved two different sets that went to the Supreme Court
7 for their approval, one for the counties and then another
8 one for the district clerks. And so when Mike Griffith here
9 in a minute gives an update with PowerPoint about where we
10 are you'll note that all of the counties that -- all of the
11 county districts, I'm sorry, all of the county clerks that
12 have signed up are using one set of rules and all the
13 district clerks are using a different set. Of course Bexar
14 county has a different set because they operate their docket
15 somewhat differently; but other than Bexar County we expect
16 all the other districts' rules to be exactly the same.

17 What we have found is that between the experiences
18 we've had in Jefferson and Montgomery Counties who had local
19 rules approved in 1997 and have been operating with one
20 vendor we've learned a lot from their own experience. We've
21 also learned a lot in the past 13 months since we've been
22 operating in this project.

23 We anticipate, as Mike will give your more
24 details, we anticipate by the fall we should have about 40
25 counties using electronic filing. So we're very optimistic

1 and enthused about this. And I certainly welcome any
2 questions.

3 I'm going to ask Mike Griffith who is the director
4 of the Judicial Committee on Information Technology to sort
5 of give you an update with PowerPoint. But certainly if you
6 have questions, please, I welcome them now, or if you guys
7 can wait until we finish this or any time during the
8 presentation. Does anybody have any questions? It's
9 probably a mistake to ask; but I decided to do that anyway.
10 Chip told me not to.

11 MR. BABCOCK: That's not true.

12 MR. GRIFFITH: Good morning and thank you for
13 the invitation to be here today. As Peter mentioned, we
14 were here about a year and a half ago. We got some good
15 guidance from you on the local rules and we've incorporated
16 that; and we're here basically to give you an update on
17 where we've been for the last 18 months.

18 On the website question, it's pretty simple. It's
19 courts.state.tx.us. This is the agenda we'll follow
20 (indicating): Real quickly on the history, Peter mentioned
21 Jefferson and Montgomery Counties. They started back in the
22 1995-1997 time frame; and they were really the pioneers of
23 electronic filing in Texas, so we've got a good eight or
24 nine years of information from them. Their rules allowed
25 them, for their local judges to designate electronic filing

1 as required in certain cases, mostly in multi-party cases.
2 And they contracted with one vendor. At that time it was
3 called Law Plus. It has since become Justice Link, Court
4 Link; and it's now Lexis/Nexus. So it's been bought up
5 several times since that time.

6 It was pretty simple. You had the two clerks, two
7 district clerks on one side and you had various attorneys on
8 the other side representing the parties. Law Plus was in
9 the center. The counties contracted with them to provide
10 the services; and then the attorneys had to go through
11 Law Plus to get to Jefferson and Montgomery County.
12 Potentially other counties could have come on, signed up
13 with other vendors who were out there. At that time there
14 was actually one; but others have since entered the market.
15 The attorneys then to get to a particular jurisdiction might
16 have to have multiple accounts, one with Law Plus, one with
17 Lexis or another with Pro Doc or someone else.

18 It was pretty simple and good for the counties.
19 They only had to point in one direction with their
20 contracted vendor. It got very complex with the attorneys.
21 And the Office of Court Administration, the Office of the
22 Attorney General received numerous complaints from attorneys
23 who were not pleased with having to contract with a
24 designated vendor and file in designated cases.

25 So we took those lessons. First, e-filing works.

1 The technology is not trivial; but it's not that complex.
2 We can move documents that are created electronically, move
3 them electronically through the system securely and deliver
4 them to where they're supposed to go. The single service
5 provider model is good for the counties because they only
6 have to deliver one direction. It is not good for the
7 attorneys.

8 As we started expanding electronic filing
9 throughout the state we needed one set of standards and
10 processes that the attorneys could use without having them
11 have to guess what set of standards were in effect in
12 another county.

13 I mentioned the JCIT and its mandates. One of
14 them that the legislature gave us was to look at electronic
15 filing and to recommend the rules for the movement of
16 electronic documents throughout the system. JCIT's intent
17 was to first of all do what the legislature told us and to
18 handle e-filings, try to make it cost mutual for the
19 counties. The state government takes a lot of bad press,
20 and the county governments, the local governments for
21 unfunded mandates, so we tried to be very sensitive to that.
22 We tried to make it a revenue generator where possible; and
23 we wanted it to be open competition on the service
24 providers. We didn't want one service provider to be the
25 designated one to provide all the services. We felt that

1 competition would be healthy, and we wanted to move in that
2 direction.

3 Finally, we wanted one single place for everyone
4 to point to as kind of the electronic post office, and we
5 settled upon Texas Online to do that. The reason is that's
6 the official website of the State of Texas. It's designated
7 by the legislature as the electronic government portal for
8 doing business with the State. It's self funding. There is
9 no taxpayer dollars that are put into that. It's all based
10 on cost recovery. And it also has a mechanism, going back
11 to the unfunded mandates, for counties to collect fees to
12 recover their costs. It's overseen by a government
13 appointed authority. It's mandated for use by State
14 agencies. Again, that made our decision fairly easy. And
15 right now, as many of you are probably aware, through Texas
16 Online you can renew your driver's and fishing license, you
17 can pay your traffic fines, get permits and so forth.

18 Now the solution looks pretty much the same.
19 We've got the same set of players. We've got the county,
20 the clerks, we have the attorneys and we've got the service
21 providers. What we've done is add Texas Online as the post
22 office in between. The counties and local governments now
23 point toward Texas Online, one connection. The service
24 providers once they're certified to do business in Texas
25 point to Texas Online, and then the attorneys are free to

1 select any service provider they want; and then their
2 electronic filing processes through their service provider
3 kind of like your AOL or your some other ISP type service
4 provider. The document is then filed through Texas Online
5 to get you to the designated jurisdiction. It provides for
6 standard processes to include, and this is important from
7 the clerk's side, is the electronic interface in the case
8 management systems.

9 What we don't want is the clerks to have to
10 reenter the data once it gets to them. We want that to flow
11 electronically into their database, and Texas Online
12 provides that. We are now working with case management
13 vendors so that they can import the data electronically.

14 Some of the features, Texas Online we find is
15 secure. All the filing fee information is presented to the
16 filer, so that when they select a particular document or a
17 filing type the fee is presented to them at that time. They
18 can pay by credit card, debit card. Some of the service
19 providers allow for escrow accounts or monthly billing.

20 The clerk reviews the filing before it's accepted.
21 They do that online in a mailbox. And once they have
22 accepted the filing it's returned with a file stamp from the
23 clerk back to the filer so that they have an electronic
24 record of having filed it just as though they showed up at
25 the window.

1 The data is kept private. We required that of
2 Texas Online that they not keep the data or sell it as it's
3 done in some other states. It's strictly a passthrough.
4 The service providers, depending on their contract with the
5 filer or the attorney, may put out archiving services; but
6 the government does not do that nor does it sell
7 information.

8 The filer sees something like this when they log
9 onto the internet (indicating): They can elect to submit a
10 filing, review status of the filing and so forth. They fill
11 in the information on the screen in terms of where they want
12 to file, what document they want to file, if it's an
13 original petition or a subsequent filing. All the
14 information is calculated for them in terms of fees, and
15 then they just send it. And when it arrives at the clerk's
16 office this is what it looks like, sort of like an outlook
17 e-mail in box (indicating). They can call up each filing,
18 act on it, send comments back to the filer saying "Yes, it's
19 accepted," or "No. You filed it in the wrong jurisdiction.
20 Please file it in the county court. This is the district
21 clerk's office."

22 The pilot rules that are in effect right now, the
23 local rules, they are consistent for each of the
24 participating counties in the courts. Some of the things we
25 want to highlight for you here are, first of all, what

1 documents may be filed? The rules right now allow for
2 filing of all civil non juvenile documents except for those
3 that require an original seal or are sealed by the Court.

4 Some of the noteworthy provisions, when we came to
5 you last time there was some concern about what time stamp
6 would appear on the document. Our original rule said that
7 it would be when it reaches the clerk or the government
8 side. The guidance from your committee was that it should
9 be when the filer sends the document. We incorporated that
10 into the rules, and you'll see an example of that shortly.

11 Payment guaranteed? Our original rules envisioned
12 that if your credit card was no good, your filing was not
13 processed. The guidance from your committee was, no, you
14 want the filing processed regardless. We included that; and
15 we've had pretty good success. There have been a couple of
16 bad credit cards processed, and I'll talk about that in a
17 minute.

18 Automatic acceptance by the clerk: That's in
19 keeping with traditional paper filings unless it's in the
20 wrong jurisdiction.

21 Opt in for electronic service: The rules provide
22 that a party to a case may elect to receive electronic
23 service by filling out a form for each particular case.
24 It's not a global or universal opt in. It's done on a
25 case-by-case basis.

1 And finally, again guidance from the committee was
2 we incorporated Rule 7.2 which basically there is no death
3 penalty. If the e-filing system had a problem, it should
4 not bias the case in the judge's view.

5 Project status: We've got local rules. Fort Bend
6 County came up early last year. We added Upton County which
7 is out in West Texas about halfway between Midland and
8 San Angelo -- excuse me -- between Fort Stockton and
9 San Angelo. There are no living attorneys in Upton County
10 right now. The population is not real big. So folks say
11 "Why go to Upton County?" Well, for that very reason. A
12 lot of the filings that come in here for oil and gas leases,
13 for example, come out of Harris County, Dallas County and so
14 forth. In fact, we have actually had electronic filing from
15 Harris County into the Upton district courts.

16 Bexar County district courts came up in June,
17 El Paso in September; and we anticipate that Tarrant will be
18 up either late this month or early next month, and Dallas
19 will follow very soon.

20 We have got three service providers who have been
21 certified to do business in Texas right now and others in
22 the process of coming on board. So the competitive market
23 is being well served right now. And we're spending a lot of
24 time out on the road doing CLEs for local Bar associations,
25 talking to legal assistants, anyone we can to get the word

1 out about electronic filing.

2 We established an exit criteria for the pilot
3 phase. We wanted to make sure the software functioned
4 properly; and we think we've satisfied that. Filers and
5 courts were satisfied. I'll give you some details on that
6 in a second. We wanted at least two service providers. We
7 now have three and more coming in.

8 No unresolved critical problems. We haven't
9 checked that yet because we don't know. There may be some
10 more popping up down the line; but as of now everything is
11 working smoothly. And we wanted sufficient filings. We set
12 a number that was probably too high based upon the time line
13 that we were looking at. We are relooking at that. We
14 think the proof of concept right now has been successful;
15 and from the Judicial Committee on Information Technology
16 side we were recommending that the pilot phase be ended with
17 implementation being the middle of this year.

18 We started with six counties: Fort Bend, Bexar,
19 Upton, El Paso, Dallas and Tarrant. There's about 35 or 40
20 other counties that are out there that have expressed an
21 interest. Williamson County, we've been talking to
22 Ms. Wolbrueck. McClendon County, we've been talking to
23 Mr. Harwell. There is a lot of interest. We have, the last
24 count that I did with Chris Griesel, we have approximately
25 seven sets of local rules that have been adopted and are now

1 before the Supreme Court for approval. So a lot of
2 interest. Travis County wants to be an early implementer
3 once we come out of the pilot phase. Their district court
4 rules have already been adopted and approved by the Supreme
5 Court. There are a lot of folks queuing up.

6 We are coming back to you for our charge and the
7 Supreme Court with some recommended rules, recommended
8 changes to the Rules of Civil Procedure. We expect to have
9 those back to you as a recommendation sometime later this
10 spring.

11 Some quick results: I mentioned we have had a
12 little over 200 filings. Fifteen of those have been
13 rejected. The first two, "clerk error" and the "no copy
14 fee," those were really training issue with the clerks.
15 Those should not have been rejected. They should have been
16 accepted. That's a training problem that we're working on.

17 "Wrong court," it went to the wrong jurisdiction.
18 It should have been district court and it went to the county
19 clerk. And the last one, "filer requests a duplicate,"
20 those were at the request of the filer that they be deleted.
21 So it's a fairly high rejection rate; but the first seven we
22 could probably take out. They shouldn't have happened. It
23 was training issues; and the others will probably occur
24 somewhere down the line.

25 HONORABLE JAN P. PATTERSON: In your total

1 filings are those cases, or are those --

2 MR. GRIFFITH: Those are filings, not cases.
3 It's individual motions and pleadings.

4 HONORABLE JAN P. PATTERSON: Individual
5 documents?

6 MR. GRIFFITH: Yes, ma'am. We did a recent
7 survey of clerks and filers who have actually participated
8 in the system. On a scale of one to five we asked them what
9 their satisfaction was with the system. The clerks we
10 surveyed all gave fives, except one who gave a three, so we
11 got an average of 4.5 out of them. They liked the
12 efficiency. They liked the convenience.

13 The attorneys have offered there is a lot of promise
14 to save them a lot of paper and make their staff more
15 efficient. They are concerned that they want to see what
16 the system does when it gets loaded down; and that's another
17 reason we think it's probably time for us to move into wider
18 implementation. The attorneys also gave fairly good
19 feedback, 4.4. They said consistently we should continue
20 the program and expand it statewide as soon as possible.
21 They like the ease of extended time. It basically keeps the
22 courthouse open until midnight instead of 5:00 o'clock, so
23 they can file up until midnight and still make their filing
24 deadline.

25 There was some indication of fear of failure; and

1 what that came back to from the attorney side was many of
2 them have said they like electronic filing and they continue
3 to use it, but they'll also continue to do paper filings
4 where required because they want to make absolutely sure to
5 get it in. We think that one over time will probably
6 diminish a little bit once the confidence in the system
7 increases.

8 Some of the problems noted: On the technical side
9 we had one instance in Fort Bend County where the screen
10 disappeared momentarily. It turned out to be a server
11 software problem at Texas Online. That's been fixed.
12 Guaranteed payment process: Going back to the bad credit
13 cards, the rules right now allow for processing of the
14 filing even if the credit card bounces. We had two
15 instances in one jurisdiction where for whatever reason an
16 attorney probably typed in the credit card number wrong.
17 I'm sure it wasn't a bad credit card. But to get the money
18 then to the clerk on guaranteed payment the process we
19 thought we had working in place turned out that it wasn't
20 quite as smooth as we thought it was. So that part has been
21 fixed now, and the payment still gets to the clerk even if
22 the credit card is no good. It's then incumbent upon Texas
23 Online, the service provider to go back to the filer so that
24 the clerk doesn't have to worry about that. And finally, I
25 mentioned clerk training, some of the rejects that shouldn't

1 have happened. That's ongoing.

2 Just this is more anecdotal: We usually allow
3 attorneys to file from anywhere. We've actually had an
4 attorney, in fact who is here with us today, Mark Unger, who
5 filed from Dallas County into Bexar County when he was on
6 the road one time. We've mentioned a Houston, Harris County
7 filer filing in Upton County. There is no requirement for
8 them to be actually there.

9 Meeting deadlines: We had an attorney down in
10 Hidalgo County who physically could not make it to the
11 Bexar County courthouse to meet a filing deadline. They
12 called up one of the service providers, they signed up for
13 service on the spot, and made a filing deadline that they
14 otherwise because of time and space limitations could not
15 have made. The same thing happened from Tempe, Arizona
16 filer. A filer had a filing deadline to meet in El Paso
17 district court and was able to do it electrically.

18 I received an e-mail, and this is just, you know,
19 kind of a downside. I received an e-mail from an attorney
20 in East Texas who said that they thought the model was
21 broken and that third parties should not profit from
22 e-filing. I just offer that as one perspective. And we had
23 another attorney in Bexar County who thought that the
24 district courts down there should use Pacer and not Texas
25 Online.

1 I won't go into a lot of details; but basically
2 Texas Online gets the filing from the filer to the clerk.
3 Pacer allows you to view that filing once it's been accepted
4 by the clerk. So Texas Online and Pacer are not
5 competitors. They do different functions. And I think this
6 was just a misunderstanding.

7 And finally, we've been asked when will Texas
8 Online include criminal filings. The answer is once we get
9 civil filings up and running, then we intend to expand into
10 to criminal filings.

11 Frequently asked questions, time stamp, if an
12 attorney on Friday night after the courthouse is closed
13 decides to submit a filing, that time is captured. The
14 clerk may not see the filing until Monday afternoon, Mondays
15 being like they are. And when the clerk actually hits the
16 accept button at 3:30 or 3:37 on a Monday afternoon the
17 time stamp that is placed on the document is 7:15 Friday
18 night, so the filer gets credit for having met that
19 deadline.

20 Fees that are associated, Texas Online as a
21 government entity charges \$4 per filing. Right now counties
22 are getting \$2 per filing, and that's to recover the cost of
23 their investment to implement electronic filing. The
24 service providers really have a range. And again, this is a
25 competitive market. Some are offering free filing for a

1 while. Some charge up to \$6 per filing. It's somewhere in
2 the range of \$6 to \$12 to get a filing from the filer into
3 the county or district clerk. If it's a one-time filing,
4 that price could go up, not from the government side, but
5 from the service provider side. Based upon limited use and
6 one-time filing some may charge a premium; but even then
7 it's expected to be somewhere under \$20.

8 We talked about payment methods earlier. Pretty
9 much anything goes. How does a filer know that the filing
10 was submitted? The answer is they receive back a
11 filed-stamped copy of whatever it was they filed. It comes
12 back to them electronically. They can print it out, put it
13 in an electronic folder, however they choose to do their
14 filing system.

15 At this time I'd like to introduce Mark Unger who
16 is one of our e-filers from Bexar County. Mark gets around.
17 He's kind of the leading edge of electronics and has done --
18 he's actually a member of the State Bar Computer Technology
19 Council and chair of the San Antonio Bar Technology
20 Committee. We invited him to be here today because he gives
21 an attorney's perspective on this rather than the government
22 standing up here telling you it's good.

23 MR. UNGER: We'll check back with you on the
24 credibility after I finish my presentation. I do want to
25 thank Mike and Peter for allowing me to be a part of this

1 and the committee for allowing me to continue to be involved
2 in a program that I feel very strongly about and that I am a
3 big support of.

4 I should tell you that I am probably not a typical
5 lawyer. I'm kind of a small-time lawyer from San Antonio;
6 but I do like technology and I've been working on this
7 project for about three and a half years. Also another I
8 guess important part of my approach is that I like different
9 types of things, one of which is very strongly Starbucks
10 coffee. So the picture that you're looking at is from a
11 launch last summer at Starbucks. And I also write poetry.
12 So it's during the manic phase of this beta testing that
13 really my world seemed to be colliding. And I don't know
14 how I reached this conclusion; but somehow I figured out
15 that I thought Robert Frost would probably like e-filing
16 quite a bit. And so in a worldwind of caffeinated poet rage
17 we wrote together Stopping by Starbucks on a Weekday
18 Morning:

19 Whose courts these are I think I know.

20 His office not in earshot though.

21 My boss will miss me as I drink a cup of Starbucks
22 java joe.

23

24 My little Dell must think it queer

25 To stop without a courthouse near

1 When filing deadlines loom and scream
2 And statutes cry limitations tears.
3
4 He gives his motherboard a thunder
5 To ask if I had made a blunder.
6 The only other sounds the "SHHHHHWWW"
7 Of foaming milk with late under.

8
9 But I have signed on Texas Online.
10 EFSP is my call sign.
11 For I am filing brand new lawsuits.
12 Why file legal pleadings on time?
13 Starbucks coffee dark and deep
14 But I have client promises to keep.
15 And suits to e-mail before I sleep.
16 And suits to e-file before I sleep.

17 (Applause.)

18 MR. UNGER: I made my coffee this morning; so
19 it's not working quite as well. The attorney perspective
20 for me, I believe that e-filing is probably or could be one
21 of the most important additions or tools that we use in
22 practicing law for three reasons. One, I think that we are
23 becoming more global as lawyers. We travel a lot more; and
24 the demands to adapt to that mobility have been placed on
25 us. This is just one tool that I think can help us be

1 better lawyers.

2 The second reason, I think in general, more
3 general reason: Computer technology and its progeny, you
4 know, your Black Berries, your PDAs, two-way pagers and
5 notebook computers have become fairly pervasive in the
6 practice of law; and I think that will continue in the
7 future.

8 And I think the third reason, and again this is
9 from my perspective as sort of a small-time lawyer: I think
10 that this is one tool that can be used to sort of level the
11 playing field; and I think if we encourage that among all
12 the lawyers in the state, that that can only be a good thing
13 for all of the clients in the state.

14 Some of the concerns -- I didn't follow the
15 program. But some of the concerns that I had, and at this
16 point they're not much, a lot of these we dealt with over
17 the past three or four years in developing the program and
18 feedback and design. But there currently, as mentioned by
19 Mike, there is three EFSPs or Electronic Filing Service
20 Providers and service is only capable using one of them; and
21 for service to be accomplished of course the opposing
22 counsel needs to opt in. I don't think it should be
23 required as mandatory; but I think that we ought to
24 encourage and make it as easy as possible for other
25 attorneys to use it.

1 Another concern would deal with settings.
2 Currently settings are not available, although I believe
3 that that is a rule that has been talked about and it's
4 possibly in the works. That's probably I think either the
5 first or second greatest barrier to widespread use of this
6 tool. The other being just the general ease and comfort
7 with computer usage from remote locations by attorneys.

8 The other one that of course everybody that comes
9 to mind is of course privacy. And I think of course in the
10 remote usage when you're using a wireless system you have
11 got a system on top of a system, so there is a concern with
12 transmitting data wirelessly. That is certainly something,
13 although what we're transmitting is about to become public
14 record and something we should look at; but I'm much more
15 concerned with the widespread use of e-mail than anything
16 regarding the transmission of an electronically filed
17 document. I'm very comfortable at this point with that
18 given the protections that have been put in place.

19 Some examples of this mobility and adaptation: I
20 was in court one time, and of course in Bexar County we have
21 a presiding system. So I'm in presiding on what I would
22 consider a slightly dubious application for protective
23 order; and it was very difficult to try and work something
24 out. We were of course dealing with the district attorney's
25 office. So while we were in presiding, with the permission

1 of the judge I went into one of the rooms, connected to the
2 computer line and I drafted and filed a Counter-application
3 for Protective Order, went downstairs, got a copy of the
4 file-stamped pleading and went upstairs, made copies,
5 distributed all the copies to everybody, and we had an
6 agreement within an hour. And so I think as far as saving
7 time I'm sure we would have been in court all day if we
8 would have had to fight that. We also got some language in
9 there that down the road basically saved our client. We
10 were able to get some language in there because of that.

11 And as Mike mentioned, I had a trial setting
12 coming up and a deadline the upcoming Monday. I was in
13 Dallas. I was able to on a Friday from Starbucks on the
14 Northwest Highway draft the amended pleading and file it
15 that Friday night so it would be waiting on the Monday
16 deadline for the clerk in San Antonio. So of course I was
17 able to download that pleading and print it out in Dallas
18 and fax it to the opposing attorney once it was filed.

19 So with that I will let you go. Thank you.

20 MR. VOGEL: I don't know if you-all have any
21 questions. But let me sort of anecdotally also tell you
22 that as a trial lawyer I have found, as I'm sure many of
23 you-all have, in dealing with federal court filing systems
24 around the country that this is a much easier way to
25 practice law than it is dealing with paper. So those of us

1 who have dealt in those jurisdictions where we have
2 mandatory electronic filing I know we all benefit and it
3 makes it a lot easier to operate. We welcome any kind of
4 questions you-all may have.

5 MR. SUSMAN: Which format do you file in?

6 MR. VOGEL: Our committee standard was
7 essentially anything. And what happens is by the time it
8 gets to the courthouse it's in PDF. It gets converted to
9 PDF. From a technical standpoint I'll tell you what
10 happens. We put something around it, the XML wrapper, that
11 describes what it is so that when the clerk gets it it knows
12 what the document contains; but it is a PDF file that gets
13 to the clerk's office. It's a uniform. It becomes uniform
14 that way. Yes.

15 HONORABLE KENT SULLIVAN: I was curious about
16 the statistics that were cited. With the very limited
17 historical experience, 200 filings when some of the courts
18 that have been doing this apparently for seven or eight
19 years, I was curious whether anyone had tried to pull
20 together that historical experience to see what sort of
21 problems. Because 200 filing is, you know, five minutes in
22 Harris County.

23 MR. VOGEL: I think I can respond to that
24 this way: As a matter of fact, I spoke with Jim Mahaffey a
25 couple of weeks ago, who is again the leader in Jefferson

1 County, as you-all are probably aware. And as far as I can
2 tell they don't have any, they do not have a history of any
3 problems. And he in January under his local rule he ordered
4 that every case filed in his court be electronically filed.
5 I'm unaware that my friends who have cases pending there --
6 I'm sure that some of you-all have -- I'm unaware of any
7 problems. They're using Lexis as a matter of fact. Mike
8 didn't mention this; but of the three vendors one reason I
9 think we have had so few filings is that until Lexis joined
10 the market this spring we really didn't have that sort of
11 big gorilla to go into the big law firms and sort of push
12 this.

13 They also are offering a feature which I think is
14 really going to change the lawyer time. They have some
15 software that will allow a currently paper-filed case in
16 court and they can blow it back into their system and make
17 it electronic tomorrow. So I think instead of having to
18 wait for the next case to come up in Bexar County or El Paso
19 County, those of us that have pending cases in an existing
20 county whether it's Fort Bend or Upton can make it an
21 electronic case tomorrow. So I think once Lexis is out in
22 the market really pushing that I think we're going to see a
23 big change.

24 Their expectation, I'll tell you what they told
25 me. They anticipate that they'll make, Lexis will make more

1 money on electronic filing than they will on legal research.
2 That's where they see this market. So they are deeply
3 committed to making this a success. And I will also
4 mention -- Mike didn't say this -- this has not been a
5 successful enterprise in other states. Now there are some
6 states like Colorado and Mississippi and New Mexico where
7 the legislature, the government, the legislature pays the
8 whole cost of the judiciary; but that's a simple process.

9 Now with our government of 254 counties and over
10 1100 cities trying to make this work is much more
11 complicated because it's a local government issue, as we all
12 know.

13 We have great optimism that this is going to be a
14 successful model. And I will tell you we are constantly
15 asked by other state governments about the success of this
16 project. Mike and I have been invited to write papers for a
17 number of monthly publications about our project; and I'm
18 optimistic that this is going to be a model not unlike what
19 Nathan was talking about before about how we approached
20 electronic discovery. I think we are cutting edge on how
21 this is approached. The reason for the few local filings
22 though I think is, as we understand it, we have over 500
23 people that are registered; but the fact that it has been
24 called a pilot has gotten in the way. That's what Lexis has
25 told us. They have said people are waiting for it not to be

1 pilot anymore. So my committee has recommended to Texas
2 Online that it be taken out of the pilot phase. I think
3 that will change things too.

4 HONORABLE TRACY E. CHRISTOPHER: What is the
5 initial cost to the county?

6 MR. VOGEL: Actually not much. Like in
7 Dallas what the county clerk is doing there is she is
8 accepting everything through the system, and then she can
9 print it, because they don't -- we don't have an electronic
10 case filing. So that the judges, the county judges in
11 Dallas, which I might add, have concurrent jurisdiction with
12 the district court, so I think that that is going to have a
13 big impact in Dallas filings. What she's doing is she's
14 buying some new printers. So that's her cost. And the \$2
15 fee that she is going to get on every filing is going to
16 help pay for that. So from the commissioners' standpoint it
17 has no cost to the county.

18 HONORABLE TRACY E. CHRISTOPHER: So the cost
19 to the county would come in making the document accessible
20 through the computer?

21 MR. VOGEL: Yes. Like, for instance, in
22 Harris County, as we were talking about, when Charles
23 Bachrees, which we anticipate to be this summer, whenever it
24 is that he has an electronic case management system, and
25 El Paso is about to do that right now. But now we're using

1 software groups' products that is, will accept these cases
2 electronically. Until that happens for the most part the
3 money that is going to be invested is going to be in
4 printing these. And I believe in Tarrant County ultimately
5 when the district court adopts this everything in the
6 district court's office in Tarrant is imaged in a fax model.
7 And I believe what the plan there is that whenever we get to
8 that point they'll just convert it all into their image
9 system that they already have. So that, the front end of it
10 is going to change. The cost is not that significant. I
11 don't know. Bonnie is in line to do this. Bonnie, do
12 you -- what cost does Williamson County anticipate?

13 MS. WOLBRUECK: We were concerned about the
14 data transfer into our case management system; and there
15 would be a cost to the county in order to accept that data
16 and put it into our case management system.

17 The other issue of course is accepting the image
18 so that my staff didn't have to print it out and then
19 reimage it and put it into our image system. So and that's
20 all a software issue on our end with our software vendor.
21 And there are issues regarding funding for that. And
22 El Paso County, I'm on the same software vendor as El Paso
23 county and decided that they could be the pilot to see if
24 that worked before I picked it up. But anyway, hopefully
25 we, you know, we're talking to them. I want it done. I

1 want the -- right now the electronic transfer of the data is
2 not part of the package. It's just basically the document
3 is coming in like an e-mail attachment.

4 MR. VOGEL: Right.

5 MS. WOLBRUECK: And then the clerk prints it
6 out. In order to make it efficient for my staff I want the
7 electronic transfer of data into my case management system.

8 PROFESSOR ALBRIGHT: Bonnie, do you image all
9 the documents and keep them electronically instead of paper
10 files?

11 MS. WOLBRUECK: We have paper files, because
12 my Courts still -- I have one Court that likes the
13 electronic images, but most of the other Courts still want
14 the paper file. So because of that everything -- we image
15 everything because of the convenience of being able for the
16 staff to do research and for the judges to do research if
17 they choose to do so; but we still keep paper files.

18 PROFESSOR ALBRIGHT: What is your official
19 record? The electronic?

20 MS. WOLBRUECK: No. The official record
21 right now is the paper file until we get to a point that we
22 dispose of the paper files. The official record actually is
23 a microfilm backup. We image and back it up with microfilm
24 through archival purposes.

25 MR. VOGEL: Let me -- that's an important

1 issue as well about the archives. I was, on behalf of
2 representing the Courts the Department of Information
3 Resources appointed me to be a part of the Uniform
4 Electronic Transactions Act Task Force to evaluate what
5 impact it had on the courts and the state archives. And so
6 the rules have been established with regards to the
7 retention of the electronic documents; and I believe that's
8 all posted on the DIR website. So that is all taken --
9 theoretically it's all taken into account at the point at
10 which everything becomes totally electronic.

11 MR. HARDBERGER: Does Texas Online submit to
12 the clerk the document only, or do you have index
13 information that could come across as well?

14 MR. VOGEL: Texas Online is like a funnel.
15 They don't really retain anything. The electronic filing
16 service provider may or may not have a copy. It goes
17 through the Texas Online portal. And I think it's held
18 there just only in case there is a handoff problem for,
19 Nicole, a day?

20 MS. CREED: Fifteen days.

21 MR. VOGEL: Fifteen days. But it's not
22 retained there. It's only really retained at the clerk's
23 office. Now one of the issues with this and one of the
24 reasons we engaged so many clerks, as you-all are well
25 aware, the clerks have constitutional responsibilities to

1 maintain these documents. They're the official. It's not
2 the Courts. It's the clerks. And so as a result of that we
3 were very mindful of engaging the clerks to help us figure
4 out how that handoff was going to take place, as Bonnie
5 pointed out.

6 MR. HARDBERGER: So this is a document only
7 that comes across right now?

8 MR. VOGEL: Right. Just the document.
9 That's what I was saying is electronically there is
10 something around it, an XML wrapper that describes what it
11 is; but what hits the clerk's office and Bonnie's office and
12 the other clerks is they have a browser that comes up and
13 might show you the copy of it. And it's sort of like an
14 e-mail box when they get documents. And I think Bonnie
15 pointed out, as many others clerks did, if they are going to
16 be imaging it, why should they bother printing it out? And
17 so I think that's part of this hand-off; but that's
18 ultimately down the road when we have case management
19 systems that will accept these. Like for Dallas County,
20 Harris County and the other large counties we have written
21 our own systems. And so until we migrate to a new case
22 management system it's going to take some time.

23 I might add that the CDCs of the 13 largest
24 counties are working on trying to come up with standards so
25 that there are some data standards for all of the major

1 counties in the state right now.

2 MR. HARDBERGER: Has your committee talked to
3 any of the title companies? Because this discussion is
4 happening on the land records side as well.

5 MR. VOGEL: There are other -- well, as a
6 matter of fact, the title companies participated in the
7 project. I mean, they were part of that, so they were
8 involved. They have been involved.

9 MR. GRIFFITH: I guess as a follow-up, from
10 the JCIT side they have not, because the function or the
11 focus there is in the courts. The county clerks though are
12 working with Texas Online to work with the title companies
13 for the property records.

14 MR. VOGEL: The point I was making though is
15 that when the DIR and the archives came up with its rules
16 the title companies participated in that. So they were not
17 left out of that equation, because they're such big filers
18 obviously and users of the title. Any other questions?

19 HONORABLE JAN P. PATTERSON: I assume there
20 is some form of simultaneous service. And I wonder if there
21 has been any feedback from lawyers about any problems on
22 that.

23 MR. VOGEL: I'm unaware of hearing any
24 problems on that. I mean, so far we haven't had any.

25 MR. GRIFFITH: Electronic service, the Rules

1 do address electronic service. That feature has just now
2 being implemented. As Mark indicated, only Lexis right now
3 offers electronic service and they've only just now entered
4 the market. So we don't have a whole lot of information
5 back on it yet. Texas Online will implement electronic
6 service throughout the network probably in the next several
7 months. That's the intent right now.

8 MR. VOGEL: As I pointed out, from my
9 experience in other jurisdictions, I mean, those of us who
10 have done it, I mean, it does work itself out. I mean,
11 that's what we found. And we also took into account with
12 the rules that if somebody did not have a computer or if
13 they were indigent, it was all taken into account that those
14 documents can still be filed at the courthouse. I mean, we
15 are not excluding the fact that if somebody for whatever
16 reason is not in a position to use a computer, that they're
17 not excluded from filing in any of these cases.

18 MR. HARDBERGER: Do the attorneys -- I'm
19 sorry.

20 CHAIRMAN BABCOCK: Go ahead.

21 MR. HARDBERGER: Do the attorneys have to
22 file with Texas Online their unique identifier to use the
23 system?

24 MR. VOGEL: They don't deal with Texas --
25 lawyers do not deal with Texas Online. If you have a

1 contract with Lexis, you can sign up for this system today.
2 You can go back to your office and it's available. As a
3 matter of fact, if you go to TexasOnline.com, in the middle
4 of the screen it describes the electronic filing system. I
5 mean, it's one of their premier services that they're
6 offering on the front page.

7 MR. HARDBERGER: I'm just curious. Is there
8 a unique identifier for the attorney to be able to file the
9 document?

10 MR. VOGEL: Yes. Okay. But you do it with
11 the electronic filing service provider. You do it with
12 Lexis or Pro Docs or somebody like that. You wouldn't do it
13 with Texas Online.

14 MR. HARDBERGER: Do you have any idea how
15 many attorneys have signed up for this?

16 MR. VOGEL: We have over 500.

17 MR. GRIFFITH: Six hundred.

18 MR. VOGEL: Six hundred.

19 MS. CREED: Eight hundred.

20 MR. VOGEL: Eight hundred. I'm sorry. Yes.
21 Lexis has really gone to -- as a matter of fact, I
22 understand they trained 600 people at Vinson & Elkins a week
23 before last. So I mean, they are really working on trying
24 to get this moving. Richard.

25 MR. ORSINGER: Two questions really: Is

1 there a continued interest in other lawyers subscribing to
2 get automatic copies of everything electronically filed, say
3 if I want to follow another lawsuit in another county and I
4 was to sign up and get electronic copies?

5 And secondly, is this technology being positioned
6 so that later on we can build on it so that outsiders can
7 get remote access to the case management system or maybe
8 ultimately even receive the digital copy of a document
9 filed?

10 MR. VOGEL: Let me deal with the second
11 question first.

12 MR. ORSINGER: Okay.

13 MR. VOGEL: The Judicial Council is currently
14 reviewing what things ought to be online for public access;
15 and so that's really sort of out of the scope of what our
16 committee is doing.

17 MR. ORSINGER: Okay.

18 MR. VOGEL: That's not unlike looking at
19 Pacer or OCM's files. That's a difference issue, because
20 that's a part of the federal system. And until the Judicial
21 Council sort of makes its determination about what they're
22 going to do, I guess we're sort of going to stay tuned as
23 well. So I think that sort of answers the other question
24 with regard to the availability of information. I don't
25 think we're quite there yet. I think that the comment

1 you're making though really has to do with how you evaluate
2 current appellate cases to be kept up with and whether we
3 have something, an analog in the trial courts.

4 MR. ORSINGER: I'm wondering about the next
5 generation of remote access following the case management
6 system with the documents filed in the trial court. And I
7 understand now that the decision has to be made as to what
8 is public.

9 My other question is there was originally a
10 concept that an outsider to the lawsuit who subscribes to
11 the service provider can automatically be kept up-to-date
12 with some lawsuit that's going on.

13 MR. VOGEL: I'm not aware that that's on the
14 current design.

15 MR. GRIFFITH: Certainly not from our model.
16 The service provider may provide that as one of their
17 services.

18 MR. ORSINGER: But we don't know whether they
19 are or are not?

20 MR. GRIFFITH: No.

21 MR. VOGEL: Well, if there is a -- let me put
22 it this way: My suspicion -- and by the way, West is
23 imminent sometime this summer I think to be a service
24 provider too. I think there is a demand for West and Lexis
25 and providers. I think it will be available. And I might

1 add to the committee as well, Richard Orsinger was part of
2 our original design team to come up with this concept. So
3 if you want to blame anybody for this, blame Richard
4 Orsinger. Not unlike other things, I suspect.

5 (Laughter.)

6 CHAIRMAN BABCOCK: Peter, how does the public
7 obtain access to a e-filed cases?

8 MR. VOGEL: Well, that issue is coming back
9 to the Judicial Council.

10 CHAIRMAN BABCOCK: Well, but that's a
11 follow-up to what Richard is asking.

12 MR. VOGEL: Yes. The concern is there is a
13 public issue concern that the legislature is concerned
14 about. The Chief asked us to evaluate that; and my
15 committee made a recommendation to the Judicial Council
16 about what things ought to be publicly available and what
17 not. There is a committee of the Judicial Council that is
18 reviewing that right now; and I'm not sure what their time
19 line is. My expectation is though that they are going to
20 have a proposal before the next session, because I think
21 they want to have a recommendation in place rather than let
22 the legislature make a decision for us; but that's just my
23 surmise, I don't really know that for sure.

24 CHAIRMAN BABCOCK: Well, I may not have been
25 clear. But in the normal case if I file my petition, and

1 the --

2 MR. VOGEL: Right.

3 CHAIRMAN BABCOCK: -- answer and the
4 pleadings that are filed in the courthouse and I go down to
5 the clerk's office and I say "Show me Smith vs Jones file,"
6 I can see that. Does the fact that it's been electronically
7 filed changed that? In other words, can I still go down to
8 clerk's office --

9 MR. VOGEL: Yes.

10 CHAIRMAN BABCOCK: -- and see the file?

11 MR. VOGEL: It doesn't change anything on the
12 clerk's side. From the clerk's side over, you know, this
13 diagram we have here, there is not going to be anything
14 different on the other side for any lawyer or any member of
15 the public to access anything that has been filed unless
16 it's related to the limits that already exist with regard to
17 juveniles --

18 CHAIRMAN BABCOCK: Right.

19 MR. VOGEL: -- and, you know, mental
20 competence and those kinds of topics.

21 CHAIRMAN BABCOCK: The second question that
22 follows up on that: If I have obtained a, let's say, a
23 sealing order, I've got a trade secret case and I have
24 obtained a ceiling order from the judge with respect to
25 certain answers to interrogatories that are filed in support

1 of a motion for summary judgment or something of that
2 nature, but I electronically file. How does the electronic
3 system protect this information that has been sealed by the
4 judge?

5 MR. VOGEL: Well, I guess that works in two
6 ways. One is in terms of Rule 76(a) kinds of
7 filings anything that is going to be protected --

8 CHAIRMAN BABCOCK: Yes. We've gone through
9 76(a).

10 MR. VOGEL: -- for in camera, right, for any
11 kind of in camera review or anything --

12 CHAIRMAN BABCOCK: Right.

13 MR. VOGEL: -- I guess it's sort of handled
14 in two ways. One possibility is maybe you wouldn't want to
15 file it electronically. You might want to serve that in
16 paper. The other possibility is you file the pleading
17 without the attachment and you do that separately. That's
18 another possibility. And the other is to put the burden on
19 the clerks, which is I think part of the clerk's push back
20 on this is that they don't have a position to know which is
21 which.

22 CHAIRMAN BABCOCK: Bonnie.

23 MS. WOLBRUECK: In the event that that has
24 happened to where we receive it electronically, it is stored
25 electronically, then our case management system would have

1 to seal that electronically.

2 MR. ORSINGER: But the problem is the
3 electronic service provider doesn't have that information,
4 they are not an organ of the government, and they're going
5 to have to get an order requiring them not to share it with
6 their subscribers, because I predict that they'll offer
7 prescriptions to outsiders to automatically get a copy of
8 everything filed.

9 MR. VOGEL: I think right now that's not part
10 of the scheme. I mean, they'll have to change things in
11 order to do that.

12 MR. ORSINGER: But I mean, some of the --

13 MR. VOGEL: In other words, if you have a
14 contract with Lexis, your contract with them is not going to
15 permit them to do anything with anything you file. In other
16 words, they're not going to have access to the documents you
17 file. The access would be through the clerk's office.

18 MR. ORSINGER: That is not a necessary
19 component of the technology and the law doesn't require
20 that; and it may be to some of these electronic service
21 provider's interest to allow other subscribers to their
22 system to receive electronic filings that pass through their
23 service provider.

24 MS. BENNET: The Texas Online --

25 MR. VOGEL: This is Margaret Bennett, staff

1 counsel for the Office of Court Administration.

2 MS. BENNETT: The contract between Texas
3 Online and the service providers require that if any
4 document is sealed by the Court, that the service provider
5 has to keep it confidential. That's the contract between
6 Texas Online and the service provider.

7 MR. ORSINGER: That wouldn't apply unless
8 there is a sealing order?

9 MS. KREE: What we have now in place with our
10 service providers is if it was deemed to be sealed by the
11 Court, it is the responsibility of the service provider to
12 also seal it on their end as well.

13 MR. ORSINGER: Chip, if you don't mind, let
14 me follow up. There is a public policy argument that has
15 been made around the country that the fact that a physical
16 paper file is open to the public is not really a functional
17 equivalent to making that open electronically.

18 MR. YELENOSKY: I can't believe I'm saying
19 this: But Richard, could you speak up?

20 (Laughter.)

21 MR. ORSINGER: Yes. There is a public policy
22 argument which I suppose the judicial committee is
23 evaluating, that even though a file may be open for someone
24 who walks in for a visual examination, that that is much
25 more limited in terms of public access than if it becomes

1 electronically available to the worldwide web to anyone in
2 the world. And the argument I suppose is whether there is a
3 kind of a de facto limitation on the dissemination of this
4 information by requiring you to physically walk into the
5 clerk's office and check out the file versus electronically
6 seeing documents.

7 MR. VOGEL: That is precisely what the
8 Judicial Council is debating right now.

9 MR. ORSINGER: And even though we know the
10 government document is public, some people say "We don't
11 want it to be too public." And that's a very important
12 policy decision that people ought to be involved in if they
13 care about openness in government proceedings.

14 MR. VOGEL: Let me respond. I had forgotten
15 the specific rule. But our local Rule 3.3 identifies things
16 that may not be filed electronically; and included in that
17 are documents to be presented for in camera review, Rule
18 76(a), or documents otherwise restricted by law or Court
19 Order including a document filed in a proceeding under
20 Chapter 33 of the Family Code. So there are limits. (v.i.),
21 the last three there before B.

22 MR. HARDBERGER: Peter, those documents are
23 wiped off I understand after 15 days from Texas Online?

24 MR. VOGEL: Yes. And that's only for backup
25 purposes in case clerks have some technical problem on their

1 end.

2 MR. HARDBERGER: I know that like when we
3 went to imaging in McClendon County the land records back in
4 '96, we wrote in our contract that the clerk would have
5 proprietary control of the information; and then if we
6 decided to put that out on the internet, that would be our
7 decision. So we're talking about others having this
8 information electronically besides us even after the 15-day
9 period when you-all wipe it off?

10 MR. VOGEL: No. They're doing -- let me go
11 back three steps here. The Department of Information
12 Resources has a contract with Baron Point to operate Texas
13 Online. If tomorrow for whatever reason Baron Point could
14 move on and it could be some other vendor. It is really
15 being done on the part of the State to manage this portal.
16 We're assuming that it's going to continue to be Baron Point
17 because they have the data contract; but that is being done
18 really for the convenience of the clerks. And we did this
19 really to protect them in case they have a hardware/software
20 problem. That way that can get the documents.

21 So there is no intent that those documents be
22 retained anywhere except in the clerk's office. And if
23 they're going to be publicly available, as Richard is
24 pointing out, it's really more an important issue for the
25 Judicial Council to come up with some rules with regard to

1 what can be posted on the internet, because what is now
2 available in the clerk's office is based on the rules that
3 already exist on what the public can come see and get copies
4 of. Yes.

5 MR. YELENOSKY: Legally I heard that the
6 contract requires something of, and I'm not going to try to
7 figure out which private party we're talking about here, but
8 a private party to seal what has been sealed by the Court,
9 correct, in some electronic fashion? Which implies that
10 they're not required to seal other things. And does that
11 mean that the contract doesn't prohibit them from making
12 that available?

13 MR. ORSINGER: That's correct. They're free
14 to sell that information. It's my understanding that was
15 part of the model.

16 MR. YELENOSKY: In other words, if you had --

17 MR. ORSINGER: If it's a non-sealed document
18 and it's filed through an electronic service provider,
19 they're free to sell it.

20 MR. VOGEL: Well, Richard, anybody is free to
21 go to any clerk in the state and get any document that is
22 publicly available regardless of where it came from.

23 MR. YELENOSKY: That's not what we're asking
24 about. We're asking about whether the private entity which
25 has an unsealed document can publicize it electronically

1 should it choose to do so without violating the contract?

2 MR. VOGEL: They would be violating the
3 contract. They do not have that authority to do that.

4 MR. ORSINGER: He's talking about an unsealed
5 Order though.

6 MR. VOGEL: No, no. I'm saying that EFSP has
7 a contract with Texas Online which is part of DIR in the
8 contract. And they don't, as I understand it, they don't
9 have the contractual authority to do that. Isn't that
10 right, Nicole?

11 MS. CREED: If it is sealed, they are not to
12 sell it. But if they have a contract with the service
13 provider who has a contract with the attorney and if it is a
14 non-sealed, they have a legal contract with the attorney as
15 well as to what to do. If I'm a practicing attorney and I
16 do not want any of my filed cases to be sold, I can deem
17 that as appropriate for the service provider. But at the
18 time that an attorney enters into an agreement with the
19 service provider it's up to them to make that judgment.

20 MR. VOGEL: So you make that decision
21 yourself when you sign up with the EFSP whether you want it
22 to be available.

23 MS. CREED: And please free to go to
24 TexasOnline.com. There is a legal disclaimer once you sign
25 on that does mention what your opportunities are; and your

1 service providers have to give a legal disclaimer as well to
2 say what this information is going to be used for. When I
3 pick a service provider that is my choice as a user.

4 MR. VOGEL: Okay. So what our plan is right
5 now, just sort of to recap this, our expectation is that
6 later this spring we will bring back a proposed Rule of
7 Civil Procedure based on our experience based through this
8 process and that, as I indicated, that's also the experience
9 in Jefferson and Montgomery Counties in the single EFSP
10 model and also what we've found in the past 15 months.

11 CHAIRMAN BABCOCK: Peter, the issue that
12 Richard is alluding to has actually found expression in some
13 lawsuits, the issue that the Judicial Council is going to be
14 considering. And the lawsuit in question occurred, it
15 started in federal court in Houston, and the plaintiff filed
16 I think a 60-page complaint that had, that read like a
17 novel, and it accused the defendant of racketeering and all
18 sorts of things. And the plaintiff then contacted somebody
19 who had a website that was interested in the defendant and
20 was very critical of the defendant and said "We just filed
21 this thing. We can't give it to you. But if you will go
22 down to the clerk's office and get the complaint, you'll be
23 very interested in this. And we'll pay you, reimburse you
24 for whatever it costs you to get it from the clerk."

25 They got it from the clerk and then posted it on

1 the website, the pleading on the website, and then there was
2 a lawsuit against the website owner for defamation. And it
3 went forward that way. But the same sort of thing could
4 have happened if the pleading had been available
5 electronically, which at that time it wasn't yet. Although
6 now on the Pacer system it probably is. And that raises the
7 policy issue that Richard talks about.

8 MR. VOGEL: It is an issue. And I know -- I
9 mean, we went through and analyzed the federal law dealing
10 with this, and that's what we recommended to the Judicial
11 Council. It's my understanding they are writing something
12 anew. We're monitoring it.

13 CHAIRMAN BABCOCK: Right.

14 MR. VOGEL: But that's really the Judicial
15 Council's call.

16 JUSTICE JEFFERSON: I would just point out
17 that Judge Polly Jackson-Spencer is chairing the committee
18 that is looking at these privacy matters. They have met a
19 couple of times, I think once a month for the last couple of
20 months, and there are future meetings scheduled. They're
21 looking at all these issues.

22 I attended one of the meetings where a concern was
23 raised that in a divorce proceeding, you know, all of the
24 salacious material might be posted on the website, and then
25 one of the children would go to class the next day and it

1 would be the topic of conversation and whether that is a,
2 from a policy appointment of view, a good thing or not. And
3 you pit that against the issues of open records across the
4 state. And that is something that is being debated not,
5 obviously not only here in Texas, but all over the country
6 in lawsuits and in committees like Judge Spencer's.

7 But I would, if you're very interested in this
8 area, I would contact her and find out when the next meeting
9 is. I'm sure she has got some of the materials on that that
10 discuss the area in pretty good depth.

11 CHAIRMAN BABCOCK: Peter, thank you so much.

12 MR. VOGEL: Thank you.

13 CHAIRMAN BABCOCK: And Mike and Mark as well.
14 Great presentation.

15 (Applause.)

16 CHAIRMAN BABCOCK: Okay. We've got a -- yes.
17 I'm sorry. Justice Hecht.

18 HONORABLE NATHAN HECHT: Let me say two
19 things: So the project will be back looking for statewide
20 rules at some point. We're operating under local rules now;
21 but we don't envision this expanding much further without
22 statewide rules. Maybe there will be local exceptions if
23 necessary; but we don't want, as Peter says, we don't want
24 to patchwork things. That would defeat the whole purpose of
25 this, number one.

1 And number two, the privacy issues are very
2 profound, because we had -- our court had a case several
3 years ago too where the customer of an ISP was suing because
4 he said the service was not what had been promised. And
5 part of the theory of the case was that the ISP did not have
6 the wherewithal, equipment and software and so on, to manage
7 the customers they had; and so he wanted to show that there
8 were all these customers and they did all this business and
9 therefore he wanted everything on the server. And there
10 were law firms and all sorts of people who used this ISP as
11 their server.

12 So a fellow in a lawsuit with the provider
13 unbeknownst to all of these other customers wants all of
14 their information to prove the substance of his case. And
15 so it may not be that contractual provisions are enough to
16 provide either the kind of privacy that people want or the
17 kind that they should have. And so all of these things will
18 have to be worked out; and to the extent that the Judicial
19 Council is working on this and their solutions involve the
20 procedure and administration of the Court system, I think
21 you'll see those, you'll have a chance to see their
22 recommendations and to comment on them. So but --

23 MR. VOGEL: Nathan, if I might add, one of
24 the concerns that we've got from our committee and that we
25 have seen from our interaction with the legislature, the

1 legislature is very interested in this as well.

2 HONORABLE NATHAN HECHT: Oh, yes.

3 MR. VOGEL: And there is a very strong
4 probability that they may consider enacting some new laws,
5 you know, that are either in conflict or just taking this
6 over entirely. So I think that's another reason for why the
7 Judicial Council is trying to have something in place by
8 next January.

9 HONORABLE NATHAN HECHT: Bullock called me up
10 before he died and -- which you have to add.

11 (Laughter.)

12 CHAIRMAN BABCOCK: Because he has been dead a
13 few months.

14 JUSTICE NATHAN HECHT: He might have called
15 me up since.

16 CHAIRMAN BABCOCK: Knowing him.

17 (Laughter.)

18 HONORABLE NATHAN HECHT: He called me up and
19 said "Get over here and bring Phillips." And so we went
20 over there. And this was some years ago. And he had a copy
21 of the cover or Time magazine which said "The End of
22 Privacy." And he was just outraged. He said, "You know
23 this is terrible. You're just going to be able to push a
24 button and you're going to be able to find out if anybody,
25 whether anybody has ever been arrested in Texas or divorced

1 in Texas or anything; and it's crazy. And you boys are
2 irresponsible in furthering all of this and not doing
3 something about it." Of course, we claimed a good bit of
4 ignorance; but that didn't help us.

5 So by the time I got back to my office he had a
6 courier pull a bunch of stuff off the internet and run over
7 there and get there about five minutes after I did what he
8 could find on the internet about me just by punching a few
9 buttons of which I had a girl living in one house and a boy
10 living in the other house I own. And it turns out the girl
11 was my mother and the boy was my nephew. So it didn't
12 result in any front-page headlines.

13 But he was very concerned at the time, and this
14 was five or six years ago, about the ease of access to
15 information, because electronic technology keeps you from
16 having to go to the courthouse in Upton County and rummage
17 through the files and find it. And is that a good thing or
18 bad thing? So Peter is right, the legislature has expressed
19 concern about this for some years.

20 MR. VOGEL: Maybe a bigger problem: I teach
21 a course on Law and the Internet at SMU; and one of the
22 problems we have, which is really not an issue for this
23 committee, is that with the advent of the aftermath of
24 September 11 there is a big reason for the federal
25 government to not want to have certain privacy laws in

1 place; and with the change, ubiquitous nature of the
2 internet we're just in a different time model, and it's kind
3 of hard to put that in the perspective of what is going to
4 happen in the future and it makes it much more perplexing.

5 MR. ORSINGER: We have a problem in the
6 family law arena that federal regulations in child support
7 collection have led states including Texas to require that
8 you put social security numbers in for ease of identifying
9 absent fathers and whatnot. And so the Family Code requires
10 the decrees to contain identifying information about the
11 parents and the children, which I intentionally disobey, but
12 which many lawyers --

13 CHAIRMAN BABCOCK: Now that we're on the
14 record.

15 (Laughter.)

16 MR. ORSINGER: Many lawyers don't
17 intentionally disobey that. And if and when our divorce and
18 custody suits become remotely accessible, unless we change
19 that law, then we are going to be offering up our citizens
20 to have their identity stolen and it will happen in an
21 automated manner.

22 MR. VOGEL: And that is specifically one of
23 the things that the Judicial Council is reviewing,
24 precisely.

25 MR. ORSINGER: Uh-huh (yes).

1 CHAIRMAN BABCOCK: Steve.

2 MR. SUSMAN: One of the things we learned in
3 New York when Nathan were there, which was scary, when you
4 transfer documents to another side and you send pleadings,
5 interrogatories, requests for admissions obviously it's
6 easier to do it in Word Perfect or Word because then the
7 other side can manipulate it and reformat or use it; but the
8 other side can also figure out all the changes and edits you
9 made. There is some way you can get the meta data or the
10 properties. That's a serious problem. And I mean, I just
11 never thought of that before. I thought it was safe to
12 send opposing council. And it may be at some point in time
13 an appropriate area. Lawyers again communicating by sending
14 drafts of manipulated things, maybe there need to be some
15 rule that says by doing so you are not waiving any work
16 product claim or privilege claim simply by doing that, which
17 may be something we need to think about.

18 CHAIRMAN BABCOCK: I just negotiated a
19 protective order, a discovery order that dealt with meta
20 data, whether included or not, a discovery request.

21 Okay. Well, Peter, thank you again. We have a
22 short, I think a short item that we can take care of before
23 the break. And Judge Sullivan, I know that you and I spoke
24 and then you spoke with Justice Hecht about the pattern jury
25 charge committee and the issue raised by House Bill 4; and I

1 think probably our committee is going to have to deal with
2 that. But could you just tell us what the issue is?

3 HONORABLE KENT SULLIVAN: I think the issue,
4 trying to put it as simply as possible, is that House Bill 4
5 has a unanimity requirement relative to the exemplary damage
6 issues; and so that creates certain issues about performing
7 and/or revising 226(a) which deals with the monitory
8 instructions to the jury panel and the jury and the whole
9 jury charge instructions, because some of that will not be
10 appropriate now in light of the requirement of unanimity.
11 And there's -- that's with respect to both the instruction
12 itself and the certificate, so there will need to be some
13 changes. And it is not as straightforward as one might
14 like. So the pattern jury charge committees have struggled
15 with it, and they struggled even more with knowing that
16 226(a) has not yet been changed and trying to deal with how
17 much discretion they might have in putting together a
18 pattern instruction and set of questions that would be
19 consistent with 226(a).

20 CHAIRMAN BABCOCK: Justice Hecht and
21 Jefferson, are you at the point where you want us to
22 recommend something on that, or is the Court working on it
23 itself?

24 HONORABLE NATHAN HECHT: No, we are not
25 working on it ourselves; but we may have to, because I

1 talked to Kent earlier this week. But we think this applies
2 in cases filed after September 1st. So it would be getting
3 to the point where since it's been about six months there
4 might be some cases going to trial that would be affected by
5 this. And 226(a) is mandatory, so we've got to do
6 something.

7 And where is the pattern jury charge committee at
8 present on it all, Kent? Are they --

9 HONORABLE KENT SULLIVAN: I think with the
10 exception of this issue, that we have people and in
11 particular staff with the State Bar who are chomping at the
12 bit so to speak to get something published so that they have
13 something out dealing with all the HB 4 changes. So this is
14 really the last issue before it is final and sent for
15 publication.

16 HONORABLE NATHAN HECHT: But are they close
17 to deciding?

18 HONORABLE KENT SULLIVAN: There is at least a
19 proposal on the table that is being discussed, with the
20 assumption there was not going to be a revised Rule 226(a);
21 but it has been discussed with a lot of discontent.

22 CHAIRMAN BABCOCK: Elaine Carlson.

23 PROFESSOR CARLSON: That's further
24 complicated, is it not, because HB 4 requires unanimous
25 finding on liability and damages? And then the legislation

1 sets forth a mandatory instruction to the jury that only
2 goes to unanimous decision on damages. So that's
3 problematic. I'm sure that committee is really struggling.

4 HONORABLE KENT SULLIVAN: Yes. And 226(a)
5 does contain some language implying some discretion. I've
6 got the rule in front of me and it does discuss, quote,
7 "with such modifications as the circumstances of the
8 particular case may require," closed quote. And that
9 language has been the subject of a great deal of discussion
10 as to how far the TJC in particular should go in
11 interpreting how much discretion a trial Court might have in
12 issuing instructions that would be consistent with the HB 4
13 changes without further guidance from the Supreme Court.

14 HONORABLE NATHAN HECHT: Well, we probably
15 should get their work product, Chip.

16 CHAIRMAN BABCOCK: Uh-huh (yes).

17 HONORABLE NATHAN HECHT: And who that should
18 be assigned to here I don't know. We should get that and
19 look at it for the next meeting, which I think is in May.

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE NATHAN HECHT: And but in the
22 meantime the Court might feel it is necessary to change
23 226(a) anyway. So we'll just have -- I don't know about
24 that. We'll just have to look and see.

25 CHAIRMAN BABCOCK: Kent, by coincidence

1 perhaps, you are on the subcommittee that deals with 226(a).
2 So if we could ask you to be the liaison with the pattern
3 jury charge committee and get their work and with Judge
4 Peeples and Paula Sweeney who are the chair and co-chairs of
5 your subcommittee between now and our May meeting, maybe you
6 can talk about it and we'll put it on the agenda for May, if
7 that's all right.

8 HONORABLE KENT SULLIVAN: Absolutely.

9 CHAIRMAN BABCOCK: That will teach you to
10 speak up.

11 (Laughter.)

12 CHAIRMAN BABCOCK: Let's take our morning
13 break.

14 (Recess.)

15 CHAIRMAN BABCOCK: Okay. Shall we get back
16 to it? Okay. We're back on the record, and the next agenda
17 item is class actions. And Richard Orsinger's subcommittee
18 with Frank Gilstrap has been looking into that and may have
19 a short report, maybe not.

20 MR. ORSINGER: Yes. No. We do have a short
21 report, because as you all remember, we debated what changes
22 should be implemented at the time that the House Bill 4
23 changes to class action were proposed; and we went ahead and
24 adopted the pending federal rules with some minor
25 modifications and we went ahead and verbalized some of the

1 recent Texas Supreme Court activity on the criteria to
2 consider in certification and things of that nature, folded
3 them all into a proposed rule, sent it to the Supreme Court,
4 and they adopted a rule consistent with the deadline set in
5 House Bill 4, and that rule has now been promulgated.

6 And it's too early to say what effect this is
7 having; but there were two unresolved issues that originated
8 with the Jamail committee involving inchoate claims and
9 whether there should be an absolute bar against including
10 persons with inchoate claims in a class. And then the other
11 Jamail proposal was to have -- to go entirely to opt in as
12 opposed to opt out class certification or as in --

13 CHAIRMAN BABCOCK: Class action.

14 MR. ORSINGER: Class action. Opt in class
15 versus opt out. We have mandated opt out right now in the
16 rules; and we don't even provide for a possible opt in.
17 It's our understanding as a committee, and we haven't heard
18 to the contrary, that there is no state that has opt-in
19 provisions written into their rules of procedure; and the
20 federal rules do not write opt in into their procedure.
21 There are some federal statutes that provide for opt-in
22 classes. Some of them are from the '30s legislation, tend
23 to be in the employment arena; and unfortunately they have
24 very global language about the Courts creating a lawsuit
25 where people can opt in to participate, but they don't

1 provide any procedural language that would be a model for
2 us.

3 And so even if we felt that the federal
4 legislation was a good paradigm to follow, unfortunately
5 there is nothing to follow there. So I think that our
6 committee's recommendation, subcommittee's recommendation is
7 that we give this a rest for a while. We have some very
8 radical changes that have just been implemented. The
9 substantive ones became effective for lawsuits filed on or
10 after September 1. The rule adopted by the Texas Supreme
11 Court did not specify the effective date for the procedural
12 changes thinking that that should be decided, you know,
13 through the common law process of case decision, appellate
14 review; and we know of no ground swelling to further define
15 the effective date parameters of the amendments to Rule 42.

16 And so our suggestion is that we take this off the
17 agenda for a while, allow some experience to mature under
18 the current rule changes. If it appears that there is very
19 large legislative impetus to either go with the inchoate bar
20 or to go with opt in, then we should become very active in
21 proposing language, sending it around the committee, getting
22 the input from the public, and give the Supreme Court the
23 option to propose a rule if it looks like the legislation
24 may be going to move in that direction. But at this point I
25 don't see that there is pressure to make further change, I

1 don't think there is need to make further change. And
2 unless somebody really has to, wants to say more on the
3 record today, admittedly we have discussed this many times,
4 then maybe what we ought to do is take the class actions off
5 the agenda for a while and see what percolates down through
6 the changes we have.

7 CHAIRMAN BABCOCK: And you've talked to
8 Justice Hecht on that?

9 MR. ORSINGER: Well, Justice Hecht, what is
10 your view on that?

11 HONORABLE NATHAN HECHT: No. That's fine. I
12 think it accurately states things.

13 CHAIRMAN BABCOCK: Does anybody have any
14 comments on that? Steve.

15 MR. YELENOSKY: Richard Orsinger, soft
16 spoken?

17 (Laughter.)

18 MR. YELENOSKY: It's the new Richard.

19 MR. ORSINGER: My wife is a psychologist.
20 We've been married now for a little over a year, and I think
21 it's helping.

22 (Laughter.)

23 CHAIRMAN BABCOCK: Heavy therapy.

24 (Laughter.)

25 CHAIRMAN BABCOCK: The next agenda item is

1 ad litem; and Paula Sweeney asked, if possible, that we save
2 this agenda item until she could get here right after lunch;
3 but I told her we would if we could and it didn't
4 inconvenience anybody else. Is there anybody present who
5 has a problem with skipping this for about an hour since
6 Paula feels strongly about this and wants to be present?
7 Does anybody have a problem with that? Well, if nobody has
8 a problem with that, then Richard, you're back on the hook.

9 MR. ORSINGER: My disadvantage is I need
10 Chris Griesel for this presentation. He probably didn't
11 expect it until this afternoon; and I don't know how far
12 he's gone. Does anyone know?

13 HONORABLE NATHAN HECHT: He went back home to
14 the capitol.

15 MR. ORSINGER: Okay. Well, let me set up the
16 general discussion. But Chris really is the one who has
17 done the personal examination of the filings of the Supreme
18 Court and I need him for that. But this item came back to
19 the attention of this rules committee to find out whether
20 our Rule 76(a) was working or whether it was overinclusive
21 or underinclusive.

22 There was a perception in the legislature which
23 was the subject of interim committee testimony that
24 Rule 76(a) may not be capturing all of what it should
25 capture because of the versatility of agreed confidentiality

1 orders and the lawyer's inclination to arrive at agreed
2 confidentiality orders without them being published like a
3 Rule 76(a) sealing order would be published. And therefore
4 the rest of the world is not on notice that certain
5 information is being kept from the public domain, which is
6 what Rule 76(a) was designed to do was to give public notice
7 so that anyone who had an interest could come forward when
8 they found out about it and be heard on whether the public
9 interest in knowing outweighed the party's interest in
10 keeping this information out of the public domain.

11 And I'm afraid that it's going to have to be kind
12 of on a case-by-case basis. We have no comprehensive
13 reporting method. There doesn't seem to be any capability
14 for us to gather statistics statewide; and the most useful
15 analysis that we could probably reach is by looking at the
16 filings in the Texas Supreme Court and just kind of getting
17 a feel for whether it looks like 76(a) is capturing all it
18 should be.

19 Unfortunately Chris, our rules attorney has done
20 that personal review and has been ready to talk about it for
21 several meetings and we never have gotten to it; and now
22 when we finally get to it out of order, Chris is not here.

23 CHAIRMAN BABCOCK: Well, it's all a sinister
24 plot. But --

25 (Laughter.)

1 CHAIRMAN BABCOCK: -- there are other things
2 we can do too; and that's, you know, one of the reasons we
3 have such a broad-based committee is so the Court can get
4 the input from people who may have experiences.

5 And where I think the legislature was focusing on
6 and where I think some issues arise is with the provision,
7 the part of Rule 76(a) that deals with unfiled discovery.

8 MR. ORSINGER: Okay.

9 CHAIRMAN BABCOCK: I don't think that there
10 are pleadings that are, there are a lot of pleadings and
11 certainly no court orders or judgments that are just being
12 routinely sealed without complying with 76(a). Where I
13 think the problem is, if there is a problem, is in the
14 routine case there will be business information that will be
15 exchanged between the parties; and typically rather than
16 going through the 76(a) procedures the parties will, even
17 though their unfiled discovery might arguably fall within
18 the definition of a court record under 76(a), the parties
19 will agree for a protective order, give it to the judge to
20 sign, and then wait to see if a member of the press or a
21 member of the public comes in and complains about it. And
22 then they do, then 76(a) gets implemented or implicated. Is
23 that your sense of it, Justice Hecht?

24 HONORABLE NATHAN HECHT: Yes. I haven't
25 looked at it in a long time. But I looked at filings in our

1 court some years ago; and I forget exactly what they're
2 supposed to file. But it's the Order or Notice of the Order
3 or something they're supposed to file with the clerk of our
4 court.

5 CHAIRMAN BABCOCK: Notice of Hearing.

6 HONORABLE NATHAN HECHT: Notice of Hearing.

7 And the purpose of that was for our court to be able to
8 monitor compliance with 76(a). But since 76(a)'s
9 application is pretty broad, when I last looked at the
10 filings we get about maybe 100 a year. So what you're
11 telling me is that we disposed of 250,000 cases and only 100
12 of them had a 76(a) Order. Surely confidentiality was
13 involved in more than 100 cases.

14 And I think Chip was exactly right. I just
15 assumed that lawyers were taking a risk and doing what they
16 felt would provide some protection at the time; and if it
17 gets to be a fuss, they'll worry about it later on. You
18 couldn't go, couldn't afford to undertake the 76(a)
19 procedures every time you wanted a Confidentiality Order.
20 Whether that's true or not, I don't know. But it can't
21 possibly be true that Rule 76(a) applies to only 100 cases a
22 year. I don't see how that's remotely possible.

23 CHAIRMAN BABCOCK: Allistair.

24 MR. DAWSON: Chip, I don't know if this helps
25 or not: We deal with this quite regularly. 76(a) hearings

1 only come up when -- the way it works is the parties execute
2 a confidentiality Protective Order which has to include
3 provisions on how you're going to deal with court records
4 when they're filed. Typically people will say they were
5 filed under temporary seal as permitted under 76(a)(5), I
6 think. And then the Court takes up the issue of a 76(a)
7 hearing on whether they'll be permanently sealed or not in
8 the court.

9 So parties then exchange all their documents. And
10 76(a) hearings or temporary filings under 76(a) only come up
11 when one party files with the court documents that have been
12 designated as confidential as exhibits in the motion; and
13 that will then trigger the application of 76(a), because
14 prior to that they're not court records. And this, if Chip
15 and I exchange documents, they're not court records.

16 CHAIRMAN BABCOCK: Well, that's true with the
17 exception of 76(a)(2)(c) which includes within court records
18 "discovery not filed of record concerning matters that have
19 a probable adverse affect upon the general public health or
20 safety or the administration of public office or the
21 operation of government except discovery in cases that are
22 intended to preserve bona fide trade secrets or other
23 intangible property rights." And it's that category where I
24 think the problem is. That was something that was added,
25 much debated and added I think by a five-point vote as I

1 recall of the Court at the last minute; and that's where I
2 think there is a problem. And maybe there are orders that
3 are protective orders being entered that are not strictly in
4 compliance with 76(a). I could be wrong with that.

5 MR. ORSINGER: Undoubtedly there are. I
6 mean, isn't it undoubtedly that there are some?

7 MR. DAWSON: That would mean, Chip, if you
8 and I exchanged documents, if some, a subset of the
9 documents I produced to you that are, adversely impact
10 public safety or otherwise meet this definition, that
11 grouping of documents would be considered a court record
12 under 76(a)?

13 CHAIRMAN BABCOCK: Right. You've got a
14 products case.

15 MR. DAWSON: How do you make that
16 determination? You're the plaintiff lawyer. You say they
17 impact public safety. I'm the defense lawyer. I say they
18 don't. So how do you deal with that?

19 HONORABLE NATHAN HECHT: Turn to the left or
20 the right.

21 (Laughter.)

22 MR. DAWSON: I gather that you as the
23 plaintiff lawyer if you've got some of my Firestone
24 documents and you wanted to say that impacted public safety,
25 then you could file some motions saying "These are deemed

1 court records" and then the judge would decide whether
2 they're court records and whether they should be sealed or
3 not sealed under 76(a).

4 HONORABLE TRACY E. CHRISTOPHER: Yes. I
5 think that's the way it should be working. And most of the
6 agreed protective orders that I sign do have a provision in
7 them now that if a party disagrees with the designation of
8 confidentiality, they come to me and ask me to make that
9 determination. So I have had cases where plaintiff's
10 lawyers will come and say "You know, judge these documents
11 affect the health and safety." I've had other plaintiff's
12 lawyers who want these documents and I want to give them to
13 them. And then I'll make a determination on them.

14 And then on the temporary sealing just sort of as
15 a practical matter and perhaps why, Justice Hecht, you don't
16 get very many filings, people will file something under a
17 temporary sealing order, will have the hearing, and if it's
18 okay with both sides, I give it back to them and, you know,
19 once we're done with whatever the issue was so it doesn't
20 have to stay in the court file and doesn't have to go
21 through the process of filing and notification. I mean,
22 that's the way I handle those.

23 CHAIRMAN BABCOCK: Yes. Just to be devil's
24 advocate, if you have a products case, let's just say, and
25 the defendant, Firestone or whoever the manufacturer might

1 be, has a set of documents that obviously deal with the
2 safety or not of this product and they come to you and want
3 a protective order and it's all agreed language, the
4 plaintiff's lawyer says "Fine with me, you know. I just
5 want the documents to present my case," do you under that
6 circumstance have to go through 76(a) procedures? Do you
7 have to give notice to the Supreme Court, do you have to do
8 a full blown 76(a) hearing open to the public with notice
9 posted at the clerk's office and at the Supreme Court? And
10 I think maybe that's what the legislature is driving at.

11 HONORABLE TRACY E. CHRISTOPHER: I would hope
12 that you would not want to be doing that in every case,
13 because that would be in every products case and it would
14 require a huge burden on the trial Court to look through
15 every single document that is produced to determine whether
16 or not it impacts the health, safety and welfare.

17 CHAIRMAN BABCOCK: Yes. I think that the
18 gloss that is being put on this rule is that it's working in
19 practice just exactly as you described; and in the instance
20 where a third party it may be another plaintiff's lawyer or
21 it maybe the press or it may be a public citizen's group or
22 something, if they want to challenge it, then come in,
23 because they're not bound by this agreed order. They come
24 in and they say "Judge, you know, this is a products case.
25 We know there is a protective order. We know there must be

1 documents. These documents fall under the category of court
2 records, so we want a 76(a) hearing." And in that instance
3 I think you'd give it to them.

4 HONORABLE TRACY E. CHRISTOPHER: Right.

5 CHAIRMAN BABCOCK: And so there is probably
6 no harm other than you're circumventing the notice
7 requirements of the rule.

8 HONORABLE NATHAN HECHT: When the rule was
9 adopted my position as I expressed it in writing was that
10 you can't possibly follow this rule every time it applies.
11 And the argument on the other side was "Who cares?"
12 Because, you know, what will happen is exactly what you
13 described. And so I think that's surely where we are,
14 because it can't possibly apply every time by on its face it
15 seems to apply. And I can I think even the person
16 requesting the documents could withdraw agreement from the
17 order and say "I agreed to this earlier; but I don't agree
18 to in anymore. And besides that, it's in violation of
19 76(a)."

20 CHAIRMAN BABCOCK: Yes.

21 HONORABLE NATHAN HECHT: But I'm not
22 sure -- I never knew whether the legislature thought sealing
23 ought to be easier or harder. I was never sure what their
24 concern was.

25 CHAIRMAN BABCOCK: Their language of

1 transmittal was a little opaque.

2 JUSTICE NATHAN HECHT: Yes.

3 CHAIRMAN BABCOCK: And one could read it
4 either way. Although I thought that the fairer reading was
5 that they were wondering how come the Court had such review
6 notices when you say some of the cases out there and surely
7 that's not all there is. Richard.

8 MR. ORSINGER: As a practical matter, and I
9 don't have a lot of involvement, but occasional involvement,
10 on the products liability lawsuits when the suits are
11 settled the plaintiff's lawyer typically gives back the
12 discovery they received, doesn't retain any copies of it,
13 because it has a lot of trade secrets in there and it's a
14 condition to the settlement; and then they also agree to the
15 confidentiality about repeating what they learned about
16 these materials. So if you come along later on after there
17 has been a pattern that developed of failure of tires or
18 vehicle design and you want to look back and see what notice
19 the manufacturer had through litigation and otherwise, you
20 can't get back in there with a 76(a) motion filed three
21 years later, because it's not there anymore. Does the trial
22 judge --

23 CHAIRMAN BABCOCK: I don't know that that's
24 right, by the way.

25 JUSTICE NATHAN HECHT: I don't know that's

1 right.

2 MR. ORSINGER: Does the trial judge have
3 power at that point to require the manufacturer to
4 redisclose that information although it's been returned and
5 the lawsuit is over? Maybe my question is the wrong
6 premise.

7 CHAIRMAN BABCOCK: You have a bad premise.

8 MR. ORSINGER: Okay. Correct it for me.

9 CHAIRMAN BABCOCK: Well, there is a lot of
10 discussion about who is the custodian of these, quote,
11 "court records." And one of the criticisms of the rule was
12 that it would put a burden on the lawyers what were deemed
13 to be the custodians of these court records, not a
14 government official, but rather a lawyer who had them. And
15 if the plaintiff's lawyer gave them back to the defense
16 lawyer, then the defense lawyer would be deemed, quote,
17 "custodian of these records" now. If a lot of time passes
18 and it's given back to the client, then I don't know where
19 you are. I don't know of a case where that has happened.
20 But if they're court records, they're court records; and
21 that's the problem with this provision.

22 MR. ORSINGER: Do you think they could be
23 followed even back to the manufacturer 10 years later?

24 CHAIRMAN BABCOCK: Possibly, now because
25 Hecht Jay when he was on the district bench had this

1 jurisdictional theory which the Supreme Court ultimately
2 bought into about how the Court was limited in its plenary
3 jurisdiction even over its own records, and the rule changed
4 that and gave the Court continuing jurisdiction over its
5 records. The question is, the problem is that unfiled
6 discovery really isn't in a physical possession sense a
7 court record; but it's deemed to be a court record by virtue
8 of this provision, so that's where the problem is.

9 MR. ORSINGER: Well, because of that is the
10 only reason why I think the notice issue may be important.
11 When the records are there, the lawsuit is still pending is
12 probably the best time for a third party to gain access to
13 them; and they don't even really know about it, because it
14 hasn't become a national issue showing up in the press.

15 HONORABLE NATHAN HECHT: Well, that may or
16 may not be true. One case I had as a trial judge before
17 there was a 76(a) was that there was a settlement of a
18 malpractice claim against a psychiatrist; and the whole
19 thing, everything was sealed. About a year or two or three
20 years later long after the case was dead, no appeal of
21 course, it was settled, he went through a divorce; and his
22 wife accused him of having liaisons with patients. So there
23 was speculation that maybe that was what the subject of this
24 medical malpractice case was. So the local newspaper came
25 in long after the case was dead and said "Reopen all this,

1 because we think there is stuff in there we want to write a
2 story about, because his wife says this is what he was doing
3 back at the same time." So it can come up a long time after
4 you think the case is over with.

5 CHAIRMAN BABCOCK: And there had been ongoing
6 complaints about this doctor; and the sealed case as it
7 turned out was by a patient who was making allegations
8 similar to what allegations were made, and the wife had also
9 made allegations, et cetera, et cetera. And the newspaper
10 tried to get the pleadings. And ultimately the pleadings
11 were all released because the record, of course, went up
12 through the appeal, and when it got to the Texas Supreme
13 Court the Austin American Statesman went down and said "I
14 want to look at the file," and they said "Sure" and looked
15 at the whole file.

16 MR. ORSINGER: Uh-huh (yes).

17 CHAIRMAN BABCOCK: So the petitioner paper
18 was the only news organization that couldn't print what was
19 released, in cruel irony.

20 (Laughter.)

21 CHAIRMAN BABCOCK: Allistair.

22 MR. DAWSON: I guess my thought is this is
23 more of a theoretical issue than a practical issue, because
24 what you are talking about are documents that are exchanged
25 that are -- do adversely affect the public safety and are

1 not filed with the court. And if the plaintiff lawyers in
2 my experience, they either want to share those with their
3 colleagues --

4 CHAIRMAN BABCOCK: Right.

5 MR. DAWSON: -- and/or they want to share
6 information about those documents to the press so they can
7 put some press coverage on the case and put some leverage on
8 the defendant. And all they need to do to do that, to
9 trigger 76(a) is file it with the court, append them to a
10 motion of any kind, and then there is no doubt that they're
11 court records and there is no doubt that the Court has to go
12 to the 76(a) process. So in my view and my experience the
13 system is working fine the way it is.

14 I don't think that you want to have every
15 protective order subject to the 76(a) hearing, because it's
16 been my experience the public interest groups they do watch
17 for 76(a) filings and they'll come and participate quite
18 often; and if you made the entry of every protective order
19 the subject of a 76(a) hearing, then they wouldn't know
20 which are the, you know, significant cases and which are not
21 the significant and you'd be inundated, you know, with
22 filings every day with 250,000, you know, protective orders
23 entered every year.

24 CHAIRMAN BABCOCK: Yes. I have a sense that
25 this is a solution in search of a problem. But Judge

1 Peeples, under your well recognized rule of "We don't do
2 rules unless there is a problem" what is your experience in
3 San Antonio?

4 HONORABLE DAVID PEEPLES: I have very little
5 experience with this.

6 MR. ORSINGER: You know, Chip, the interim
7 committee was to report back to the 2003 legislature; and
8 there was no significant activity I'm aware of in the 2003
9 legislature to do anything about this problem. And so it
10 doesn't seem to have been on the radar screen in the
11 legislature in the last session; and maybe we ought to quit
12 bothering the problem unless someone comes forward with some
13 kind of problem.

14 CHAIRMAN BABCOCK: I thought that the
15 legislature, the 2003 legislature did have a directive to
16 the Court.

17 MR. ORSINGER: I thought that there was a
18 proposed Bill in the 2001 session --

19 CHAIRMAN BABCOCK: Right.

20 MR. ORSINGER: -- that would have
21 criminalized the failure to reveal information.

22 CHAIRMAN BABCOCK: No. That's not what I'm
23 talking about.

24 MR. ORSINGER: Is there a mandate to the
25 Court that we rewrite the rule or that we just decide

1 whether it's broken or not?

2 CHAIRMAN BABCOCK: The latter.

3 MR. ORSINGER: Well, I mean, I think our
4 consensus here is that, although there are very few filings,
5 it seems to be functioning well; and the newspapers are not
6 angry and the TV stations are not angry. And so maybe what
7 we ought to do is just go on the record and say "It appears
8 that it seems to be working alright."

9 CHAIRMAN BABCOCK: Yes. And I think when it
10 gets to the stage where the unfiled discovery that is
11 subject to Section 76(a)(2)(c) gets to the point where it
12 has to be filed in support or opposition to a motion for
13 summary judgment or in some sense does get into the real
14 court filing, that's when I've seen the 76(a) hearings being
15 held. And in fact, I just had one where the press
16 intervened and they were heard and there was an agreement
17 worked out and everything was fine and the rule operated the
18 way I think it should have. So my sense is that if it ain't
19 broke, don't fix it. But if anybody disagrees, then we can
20 keep talking. Carl.

21 MR. HAMILTON: While we're on 76(a) of the
22 court rules, the Senate requested a change last year I think
23 it was because of the problem with trade secrets. With a
24 suit involving trade secrets and an injunction was sought
25 the Injunction Order has to be specific enough to specify in

1 terms the very trade secrets that are sought to be
2 protected, and yet 76(a) says that no orders can be sealed.

3 So we sent up a requested change on that to say
4 that orders could be sealed accept when necessary to
5 preserve bona fide trade secrets or other intangible
6 property rights. I know that's not before us today; but
7 that is still something that maybe needs to be looked at on
8 76(a).

9 CHAIRMAN BABCOCK: I'll tell you, Carl, I do
10 a fair amount of trade secret litigation; and the way I --
11 more for plaintiffs than defendants, and the way I handle it
12 is to have the order refer to a document that is in the
13 record but is itself sealed because it does contain trade
14 secrets. And I have never had a party question whether that
15 lacks specificity. And that's the way I do that.

16 I think it's dangerous business allowing the
17 orders and opinions of the Court to be sealed in any way,
18 because that's the only way that the public can judge what
19 our government officials are doing. That's my own view.

20 Does anybody else have any other comments on that?
21 Okay. Elaine.

22 PROFESSOR CARLSON: Your last comment made me
23 think of Rule 683. Is that what you're getting at,
24 injunction under 683? That specifically provides that the
25 order granting injunction or restraining order cannot

1 reference any outside document.

2 CHAIRMAN BABCOCK: Yes. My experience was
3 not in this jurisdiction. So...

4 (Laughter.)

5 PROFESSOR CARLSON: Because I think there is
6 case law that says if it won't support, it comes out if you
7 refer to a document by reference in the injunction.

8 CHAIRMAN BABCOCK: Is there a way that the
9 order can give notice to both the other side and to the
10 appellate court without revealing the trade secrets?
11 Because obviously you can't do that.

12 PROFESSOR CARLSON: I don't know.

13 CHAIRMAN BABCOCK: Does anybody have any
14 experience where that has been a problem? Nina, any
15 thoughts about that? Surely you have had something like
16 that.

17 MS. CORTELL: (Nods negatively.)

18 CHAIRMAN BABCOCK: Carl, what was your
19 group's resolution?

20 MR. HAMILTON: Well, we received a complaint
21 from a couple of lawyers that said that this needs to be
22 fixed, because we have to include it in the order and then
23 the order can't be sealed. So we suggested a change to
24 where that was the exception, the sealing of an order if it
25 needed to protect the trade secrets.

1 MR. ORSINGER: Maybe the change needs to be
2 in 683 and not 76(a).

3 HONORABLE TRACY E. CHRISTOPHER: Yes. We do
4 that. We just attach an exhibit and reference it in the
5 document that it's Exhibit A attached to the order and
6 Exhibit A is sealed. And I haven't had anybody appeal it
7 and reverse it on that ground. I know there is that
8 language in there; but we've always, I've always construed
9 that to mean you can't like say, you know, "I found all the
10 facts that were in the plaintiff's petition to be true."
11 You can't reference that kind of a document in your order.
12 You have to specifically set out your fact finding in; but
13 that's where I have seen it come up.

14 CHAIRMAN BABCOCK: You've got to describe in
15 intimate detail the act or acts sought to be restrained; and
16 I would think that the order would say you're restrained
17 from using or disclosing the trade secrets at issue in this
18 case. And it may be attached as Exhibit A, or it may be
19 just the trade secrets at issue in the case or the trade
20 secrets one, two, three and four or one, two, five and six
21 or whatever.

22 HONORABLE TRACY E. CHRISTOPHER: Well, if you
23 just say "trade secrets," then you get into all sorts of
24 problems, because that's what the whole fight is about,
25 whether it is or isn't a trade secret. That's the contempt

1 motion down the road.

2 CHAIRMAN BABCOCK: Down the road. Well,
3 Judge, have you seen this?

4 HONORABLE NATHAN HECHT: No. I was just
5 trying to think back. I don't recall seeing it. A lot of
6 times in non-compete situations and this sort of, these
7 sorts of trade disagreements, even if it's not really trade
8 secrets as such, the orders are sometimes pretty general;
9 but I don't recall any habeas petitions on the subject.

10 CHAIRMAN BABCOCK: Okay. Well, Carl, why
11 don't you see if the people on your subcommittee think it's
12 of sufficient importance that you can get it to Richard's
13 subcommittee and we can talk about it again.

14 MR. HAMILTON: It may be easier to fix 683,
15 as Richard suggested, than 76(a).

16 CHAIRMAN BABCOCK: Yes. Okay. Let's --

17 MR. ORSINGER: I think we were concluding
18 that we're going to take 76(a) off the agenda?

19 CHAIRMAN BABCOCK: That's right. Got that,
20 Deb?

21 PROFESSOR CARLSON: I see a pattern here.

22 (Laughter.)

23 CHAIRMAN BABCOCK: Richard, the work-shedding
24 machine here.

25 PROFESSOR CARLSON: I need to go under

1 Teresa's therapy.

2 (Laughter.)

3 CHAIRMAN BABCOCK: Bobby Meadows, you have
4 got Rule 202 and also ad litem. But in deference to Paula,
5 let's do 202.

6 MR. MEADOWS: Well, I don't think it's going
7 to take very long. The discovery subcommittee met this week
8 on the revision to the ad litem rule, which we understood
9 would be after lunch, and Rule 202. You will remember at
10 the end of our last meeting there was discussion generally
11 about the issues associated with Rule 202 and how the rule
12 came before this committee; and to that end the direction we
13 took from that was as a subcommittee to look at the rule and
14 consider it in light of the complaints that have been raised
15 about it, principally through letters to this committee and
16 the Governor's Office inquiries into the rule and concerns
17 about it and then an article that was written by Ralph
18 Hughes along with correspondence to the same effect.

19 After a full discussion in the subcommittee I
20 believe that the only recommendation for change is that the
21 rule be written in a way that there is more clarification,
22 more clarity on the scope of discovery that is permitted by
23 the rule, that is, that it be allowed, a procedure be
24 allowed only for factual discovery.

25 Now I'll bring to the full committee's attention

1 that that means that the subcommittee is not recommending a
2 change on whether or not an order allowing a Rule 202
3 Deposition can be appealed. It is not recommending that the
4 rule carry particular sanctions for abuse. I'm trying to
5 think of the other. There is a -- there was -- we did not
6 actually.

7 I was thinking about it after we broke up, Tracy.
8 We did not really talk much about whether or not the time
9 limits that are imposed under the discovery rules generally
10 would carry forward from a 202 proceeding if there was a
11 subsequent lawsuit. And we might want to at least --

12 HONORABLE TRACY E. CHRISTOPHER: I think the
13 problem with that is that the 202 deposition is not supposed
14 to be used in a subsequent lawsuit under the rule.

15 MR. MUNZINGER: Not true.

16 HONORABLE TRACY E. CHRISTOPHER: So I don't
17 know how can you set somebody's time the second time they
18 take a deposition?

19 MR. MEADOWS: Fair enough. We just
20 didn't -- I don't recall talking about it.

21 HONORABLE TRACY E. CHRISTOPHER: Right.

22 MR. MEADOWS: So I'd just remind everyone of
23 those points, because they were briefly discussed among us
24 when we were together last time. And one final thing that
25 was observed about the rule and a concern about it in some

1 quarters is that perhaps a threshold for obtaining a
2 deposition under 202 is a little low, that is it simply
3 requires a representation and a finding by the Court on a
4 verified motion that the benefit of the deposition will
5 outweigh any cost and expense and that justice requires --
6 or that justice requires it.

7 And so that's the subcommittee's report, Chip. We
8 don't have any language to suggest on that one change that
9 we would recommend. It will be pretty straightforward and
10 easy to do. I think that what we wanted to do is to bring
11 back that recommendation, report on our discussion and see
12 if that was the -- comports with the thinking of the full
13 committee.

14 CHAIRMAN BABCOCK: Okay. And you would be
15 proposing to change the language or strengthen the language
16 in 202.4(a)(2) which is what the judge is required to find?

17 MR. MEADOWS: I'll have to look at exactly
18 what you're referring to.

19 CHAIRMAN BABCOCK: Right.

20 MR. MEADOWS: Where the --

21 MR. YELENOSKY: The part you said that it
22 would outweigh?

23 MR. MEADOWS: No. I'm not talking about that
24 right now. That's not a recommendation that we're making.
25 The recommendation that we're making is that the procedure

1 be clearer about what type of discovery is allowed, scope of
2 discovery, and a Rule 202 deposition be allowed only for
3 factual discovery, not beyond that. For example, retain
4 opinions, standard-of-care type testimony, that sort of
5 thing, that it really be used as we understand it is, and
6 that is to assist in the investigation that would be
7 necessary to make a decision about participating in
8 litigation along with the right to conduct perpetuatory
9 testimony.

10 CHAIRMAN BABCOCK: Okay. You then try to
11 tinker with 202.1 when talking generally about when you can
12 petition a court for an order? The language, the "cost
13 benefit" language I think comes in in 204(a)(2).

14 MR. MEADOWS: Right. That's what the
15 Court must find in order to allow it.

16 CHAIRMAN BABCOCK: Right.

17 MR. MEADOWS: And that is that the requested
18 deposition is necessary to prevent a failure or a delay of
19 justice or that the likely benefit of allowing the
20 petitioner to take the deposition outweighs the burden and
21 expense.

22 CHAIRMAN BABCOCK: Right.

23 MR. MEADOWS: And we're not recommending a
24 change there.

25 CHAIRMAN BABCOCK: Okay.

1 MR. MEADOWS: There is a interest in a change
2 there; but the subcommittee is not recommending it.

3 HONORABLE TRACY E. CHRISTOPHER: I think it
4 would be 202.5 that we would want to change where it says
5 the scope of discovery is the same as if the suit or claim
6 had been filed.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE TRACY E. CHRISTOPHER: That's the
9 full scope. You can ask any questions you want to. And
10 our recommendation would be you can only ask factual
11 questions rather than everything that you could normally ask
12 in a deposition.

13 People in -- people who represent doctors and
14 nurses, they think it's unfair, they think doctors and
15 nurses have to get questioned about opinions before they
16 even know, you know, what the suit is about or before they
17 have the protection of the report that they're supposed to
18 get now in medical malpractice cases. So if you limit it to
19 just the facts, who did what, when, where and how, which
20 sometimes you cannot find in the medical records just
21 because they're hard to read or you can't figure out who did
22 what in connection with the treatment of a patient, that
23 that would cure a potential problem that we hear from the
24 medical malpractice Bar.

25 And I think and Bobby thinks that's going to be

1 easy to draft. I don't think it is, so we didn't come up
2 with the language right away, because we wanted to know if
3 that's where the whole committee wanted us to go. But it
4 seems to me whenever I have anybody contest the 202 it's
5 always on the scope of the deposition, what kind of
6 questions are going to be allowed and what aren't.

7 MR. MEADOWS: And let me just highlight
8 the -- and that's right. Judge Christopher is exactly right
9 about what we looked at and what we were able to obtain
10 agreement on. There was discussion about points that were
11 raised in our last meeting and a point that you made and a
12 point that others made about how this rule is gamed a little
13 bit and that you can meet the requirements of this as a
14 petitioner by what is required in Rule 202.4. And the
15 concern is that it's really not for, being conducted for the
16 investigation of a potential lawsuit. The decision has
17 already been made that there is going to be a lawsuit, and
18 this procedure is being taken to get a leg up.

19 That was -- it was not the feeling of the
20 committee as a -- subcommittee as a whole that that was a
21 change that we should make; and there was some concern about
22 how it would actually be accomplished anyway and how you
23 would deal with someone who is not being straightforward
24 with the Court about their intentions for a Petition for a
25 Rule 202 Deposition.

1 CHAIRMAN BABCOCK: Yes. I think the point
2 that I made before deals with a specific type of litigation;
3 but it could easily apply to others. But in a defamation
4 suit if the plaintiff doesn't allege what the defamatory
5 publication is and what the false statements within the
6 defamatory publication that are being claimed of, then his
7 petition is subject to special exception so that before your
8 defendant, your publisher, your speaker has to give a
9 deposition they know what they're being accused of saying
10 falsely and they can then focus their efforts in trying to
11 substantiate that. Alex.

12 PROFESSOR ALBRIGHT: When you talk about you
13 want scope limited to the facts do you mean any facts, or do
14 you mean facts relating to the incident? I can't remember.
15 Do they have to describe an incident or a situation? Which
16 might help.

17 HONORABLE TRACY E. CHRISTOPHER: That's why I
18 said to Bobby I don't think it's going to be that easy to
19 draft. And the way it's currently written it's just a
20 general discovery deposition. And unfortunately, like I
21 could sit down and write the rule to cover medical
22 malpractice, who went what, where, when how; but it wouldn't
23 necessarily cover another type of lawsuit. I'm not really
24 sure how to address Chip's complaint that the defamation,
25 that it's a little unfair in a defamation case, although I

1 could certainly see how if a plaintiff has said, you know,
2 somebody says to a plaintiff "Oh, yes. Channel 11 did a bad
3 story on you," and he wanted to know, he wanted to take
4 Channel 11's deposition to find out, to get a copy of the
5 story, to find out how many times they aired it, to find out
6 how many times it was in a promo, to get an idea as to
7 whether, you know, it was some random off-the-cuff remark or
8 something that you really need to worry about in terms of
9 defamation, you know, I could probably write a rule to sort
10 of restrict it in that situation.

11 CHAIRMAN BABCOCK: Right.

12 HONORABLE TRACY E. CHRISTOPHER: But perhaps
13 what we'll have to do is just essentially say that the Court
14 can craft a rule -- an order about the scope of the
15 deposition to meet the facts of the case.

16 CHAIRMAN BABCOCK: Uh-huh (yes). Judge
17 Peeples and then Judge Pemberton.

18 HONORABLE DAVID PEEPLES: I have had it
19 argued to me that this rule pretty much takes the discretion
20 away from the Court and tilts in favor of allowing these
21 rather than they're pretty extracoronary. And Bobby, I'd
22 like to know if you-all took a look at the language in
23 202(4)(a), "The Court must order" -- not "may" -- "must" if
24 it finds allowing the deposition "may prevent." That's
25 almost like "Anything is possible; but let us go fish

1 around."

2 And so I think if you would take a look at
3 the word "must" and the word "may" and tighten those up a
4 little bit, you could tilt this away from these are almost
5 mandatory, which I don't think was the Court's intention
6 when they wrote this.

7 CHAIRMAN BABCOCK: Judge Pemberton.

8 JUSTICE BOB PEMBERTON: A quick question.
9 Are you proposing scope limitations for all type of 202
10 Depositions or just the ones that investigate claims?

11 CHAIRMAN BABCOCK: Repeat your question.

12 JUSTICE BOB PEMBERTON: I'm asking whether
13 the proposed scope limitations are intended to apply both to
14 depositions to perpetuate testimony and depositions to
15 investigate a claim. The rule sort of combines the old
16 Rule 187 perpetuating testimony where you might want to have
17 some leeway to get opinion testimony and what was the
18 practice under Rule 737, the old Bill of Discovery.

19 HONORABLE TRACY E. CHRISTOPHER: I think you
20 would want to split those out.

21 HONORABLE DAVID PEEPLES: Yes.

22 HONORABLE NATHAN HECHT: On Judge Peeples'
23 point, there may be exceptions to it; but I think as a
24 general drafting matter at least in the last 15 years we
25 have said "the Court must do something if it finds these

1 things" so that there is latitude given to the trial judge
2 to find these things or not find them; but no latitude to
3 say "I found them, but I'm still not going to let you do
4 it."

5 And frankly, that's probably driven by judicial
6 selection concerns rather than anything else. And the idea
7 with sanctions was that a judge would say "Well, yep, that's
8 real bad. But, Jack, don't do it anymore," because he just
9 couldn't bring himself to sanction Jack is what he would
10 have done if realities weren't what they are.

11 So typically, and this has come up and this came
12 up at our Electronic Discovery Conference too; but I think
13 there are a lot of rules that say "must" but there is
14 built-in discretion on the other side, because you don't
15 have to find the predicate. At least if you don't find the
16 predicate, that's reviewable. Somebody at some point will
17 say "This is undisputed. You can't find that."

18 That's by way of explanation. You can argue it
19 one way or the other.

20 CHAIRMAN BABCOCK: Carl.

21 MR. HAMILTON: The Court Rules Committee is
22 looking at this same problem; and we get the same complaints
23 that Judge Christopher has already spoken about. But in
24 addition we get complaints that the Courts are not really
25 conducting any hearings or someone just goes in with a

1 motion, the judge signs the order, and they go take their
2 deposition.

3 And this is part of the problem. And one of the
4 things we've discussed is whether there shouldn't be more of
5 a showing before the trial Court as to why such deposition
6 can't wait. And if the party wanting it says "Well, I'm
7 having a problem identifying the parties that I need to
8 sue," for example, the Court might say "Okay. You can take
9 a deposition; but you are limited to discovering who the
10 parties are." Because, you know, we're getting these
11 complaints of problems with depositions being taken of
12 people without counsel and not knowing what the charges are
13 going to be or the complaints against them. And so maybe
14 that's another thing we need to look at is more of a
15 requirement that hearings and findings be held as to the
16 necessity for a particular deposition.

17 CHAIRMAN BABCOCK: Okay. It's supposed to be
18 that at least the person being deposed has got a right to a
19 hearing and the party wanting to take the 202 discovery
20 knows who the defendants are in the potential lawsuits.
21 They're supposed to be given notice through. And I've been
22 to some knock down, drag out hearings on this.

23 MR. HAMILTON: Oftentimes though the person
24 being deposed is not aware of the rule and doesn't have a
25 lawyer.

1 CHAIRMAN BABCOCK: Yes.

2 MR. HAMILTON: So they're at the mercy of the
3 plaintiff's attorney.

4 CHAIRMAN BABCOCK: Right. Okay. Yes, Judge
5 Sullivan.

6 HONORABLE KENT SULLIVAN: Another brief
7 comment that I've seen come up several times is when these
8 arise in the context of a potential arbitration clause, that
9 is, where no arbitration is pending, but someone wants to
10 take a deposition and the parties argue about whether or not
11 a deposition should be allowed with the implication that
12 whatever the ultimate dispute it might take the form of a
13 lawsuit would somehow be subsumed by an arbitration
14 agreement, I don't know if anyone else has seen that, i.e.,
15 the implication this is in some way to circumvent the
16 arbitration process. It's come up several times with me.

17 CHAIRMAN BABCOCK: Judge Gaultney.

18 MR. GAULTNEY: That sounds like a little bit
19 of a variation of the problem you described, that as the
20 rule is currently written there are no restrictions that
21 might apply in a subsequent lawsuit that don't apply to the
22 discovery that's going to occur in a 202 Deposition. And
23 the deposition as long as you notice and provide notice to
24 everybody you're going to sue in the lawsuit and you've got
25 everybody there, you're going to be able to use the

1 deposition in the subsequent lawsuit. So I'm not sure that
2 even the scope of discovery restrictions, the factual issues
3 is going to solve what, if there is an abuse problem.

4 You know, the rule has really two roles. One is
5 the perpetuation of testimony. But the investigation of a
6 potential claim or lawsuit as it's currently written is just
7 as though you have filed a lawsuit.

8 CHAIRMAN BABCOCK: Right.

9 MR. GAULTNEY: And I'm not sure that limiting
10 it in the rule of factual discovery is going to do anything
11 to restrict any abuse of the process.

12 CHAIRMAN BABCOCK: My sense is that there is
13 a potential here for -- I don't want to elevate it to a
14 Constitutional concern; but there is a certain due process
15 element to this where somebody can go and get discovery
16 before they give notice to the other side of what the
17 allegations are.

18 I know they have to describe what the testimony is
19 they're hoping to elicit. That gives you some protection.
20 But still it's not like you have notice of what their claims
21 are going to be.

22 So I don't know. I have trouble with the rule.
23 But again, it's maybe it's because I have had some
24 experience with it.

25 HONORABLE TRACY E. CHRISTOPHER: I get a

1 contested hearing once every two years. So, you know, I
2 don't...

3 CHAIRMAN BABCOCK: It doesn't pop up on your
4 radar screen?

5 HONORABLE TRACY E. CHRISTOPHER: You know,
6 everybody pretty much in the medical malpractice they'll get
7 their nurse to say, you know, read the records to them and
8 they make some sort of agreement with respect to that. But
9 I think if we cure it by giving the trial judge a little
10 more discretion to limit it and perhaps address what David
11 said in terms of what the threshold findings we need to make
12 to begin with.

13 CHAIRMAN BABCOCK: Yes. Okay. How does
14 everybody? Is that our consensus, or do we have a silent
15 majority sitting here seething and thinking that it's fine
16 as written.

17 HONORABLE TRACY E. CHRISTOPHER: Yes. Paula
18 is going to be unhappy she is not here for this, because
19 this is her issue.

20 CHAIRMAN BABCOCK: Well, you know, we can
21 only do so much for Paula.

22 (Laughter.)

23 MS. BARON: This is not a group that seethes
24 in silence.

25 MR. MEADOWS: This question though about time

1 limitations, I suppose it would be nice for the subcommittee
2 to hear from this committee about whether or not they should
3 carry forward into a subsequent suit, because it is true
4 under 202.5 it's clear that it can, again along with the
5 comments to the rule, that it can be used in a subsequent
6 proceeding. It may be limited as far as scope; but the just
7 of the Rules of Evidence control whether or not it can be
8 used. So obviously there are situations where it will be.
9 And then there is just the question that has been raised
10 along the way as to whether or not time limits should be
11 imposed on the subsequent proceedings.

12 CHAIRMAN BABCOCK: Judge Pemberton.

13 JUSTICE BOB PEMBERTON: I was going to offer,
14 and Justice Hecht can clarify. I think we considered this
15 in the drafting and just sort of left it as one of those
16 many issues that can be addressed in the discretion of the
17 trial Court in the subsequent suit, adjustment by the
18 circumstance of pre suit discovery.

19 MR. MEADOWS: I think that would probably
20 capture the feeling of the subcommittee.

21 HONORABLE NATHAN HECHT: Maybe in light of
22 David's comment, it should say that. I think Bob is right
23 in what he's saying, that the argument can be made "No, no.
24 You can't think of any of that. Just give the order." And
25 maybe we should be more explicit.

1 MR. MUNZINGER: If you're going to amend the
2 rule, I've heard several people say the Rule in subsection
3 (5) prohibits the use of this testimony automatically. And
4 that isn't the case, it doesn't appear to me. It's left to
5 the discretion of the trial Court; and the use is not
6 defined so that theoretically, one, if the Rules of Evidence
7 are applied, I am always free to use a prior inconsistent
8 statement to impeach. But now I am being victimized by a
9 prior inconsistent statement that I had no opportunity to
10 participate in the creation of, which raises due process
11 issues, I think.

12 A second problem if you're going to amend the
13 rule, also is that the parties to whom notice must be given
14 and the parties who must be identified in the current rule
15 are those parties who have an interest adverse to the
16 petitioner; and I'm not sure that leaves to the plaintiff,
17 the petitioner the decision as to who does or doesn't have
18 an adverse interest. It would be better it seems to me for
19 due process protection to just simply say "All persons who
20 have an interest" whether it's adverse to the petitioner or
21 not, and in that way you might sweep broader and protect or
22 at least reach or attempt to reach some of the due process
23 concerns that are apparent in the rule.

24 CHAIRMAN BABCOCK: So you would suggest
25 removing the word "adverse" in 202.3(a)?

1 MR. MUNZINGER: Yes. And in (5) I would
2 think that we may want to discuss limiting the discretion of
3 the trial court, because again, the problem is "Smith said A
4 in this deposition that he gave me; and now in court he's
5 saying B, so I'm going to impeach him with that." But he
6 says it under a circumstance where no one has had any
7 opportunity to cross examine him or have him explain it or
8 anything else. And that's a real problem, because the rule
9 now says the Court may restrict its use. Well, what do you
10 mean by that? It's small solace to someone to tell them
11 that "Well, I'm only allowing it for impeachment." That's
12 the bottom line of the lawsuit.

13 CHAIRMAN BABCOCK: That's why you took the
14 deposition.

15 MR. MUNZINGER: Sure. That's why you took
16 the deposition. The truth of that matter is people who are
17 taking the depositions are seeking an advantage. I've done
18 it myself; and you're seeking an advantage. There is no
19 doubt about it. None of us operate without our client's
20 interests at heart. We're not supposed to. We're sworn to
21 protect them and represent them.

22 So there is always when you file one of these
23 things you're not doing it for motherhood and country, apple
24 pie, truth and justice. You're doing it for a client.

25 (Laughter.)

1 MR. MUNZINGER: And our concern should be due
2 process. And given the people who have talked about the
3 abuse of the rule, restricting to some extent it seems to me
4 the trial Courts in how they can handle this, particularly
5 in the area of impeachment, making it clear for example in
6 the rule "any use including impeachment." That way at least
7 the judge is told "You don't have to honor that rule of
8 evidence that would allow that."

9 CHAIRMAN BABCOCK: What suggestion would you
10 have to the last sentence in 202.5?.

11 MR. MUNZINGER: Give me a few minutes to look
12 at it and try and scribble something.

13 CHAIRMAN BABCOCK: Okay. Carl.

14 MR. HAMILTON: Well, I was trying to think
15 back to when we did all this, Justice Hecht. And I know we
16 eliminated the Bill of Discovery and the Deposition to
17 Perpetuate Testimony; and I'm not sure why we were trying to
18 do all this, because we didn't have these problems under the
19 old system. We sort of created the problems by adding this
20 "investigate potential claims or suits."

21 JUSTICE NATHAN HECHT: Well, as I've said
22 before, we got to the end of the discovery rules and these
23 were the only two left. And so we thought "Well, you know,
24 you just hate to quite just short of the wire." So it
25 seemed an easy matter to put these things, talked to

1 Dorsaneo about it. He said "Oh, nobody cares about that
2 stuff anyway." So we tried to combine them together without
3 changing anything. And there was a federal rule on the
4 subject, and so we were sort of informed by that; and I
5 don't know that the language itself has -- I've not gone
6 back to look to see if the language itself changed much. I
7 was not under the impression it did at the time Bob and I
8 were working on it; but I think what it did do is put in
9 everybody's mind "Oh, here is what I could do. I never
10 thought about that." And we just got a lot of attention
11 from the change that is not attributable to the words; but
12 that's been my opinion. I don't know whether it's true or
13 not.

14 CHAIRMAN BABCOCK: Steve.

15 MR. YELENOSKY: Justice Hecht, earlier you
16 described the rationale for the "must" language, basically
17 allow judges to do what they should do. And I understand
18 that in the context of perhaps imposing sanctions of
19 hometown lawyers. Is there a reason for it here? I would
20 think at least putting perpetuation of testimony aside and
21 just looking at investigation I would think that the "must"
22 language would be appropriate either if there is a problem
23 like there is with imposing sanctions, the reality of the
24 situation, or if there is an underlying right that exists
25 upon certain findings of fact. And I don't know what the

1 underlying right is here. I don't know what the problem is,
2 like sanctions. And I don't know what, if there is an
3 underlying right, that would trigger "must" language.

4 HONORABLE NATHAN HECHT: I don't know that we
5 should not go back to "may" or some other word here; but I
6 do think at the time we wrote it we were just following the
7 ordinary pattern. For example, the summary judgment rule
8 says "If no fact issue, the trial Court must grant the
9 summary judgment." They're not talking about "must" in the
10 sense that it's mandamusable; but we're talking about "must"
11 in the sense the trial judge doesn't have any discretion to
12 say "Oh, well, yes, I don't think this is a fact issue; but
13 you know, this guys deserves a trial, I feel bad for him,
14 and so I'm not going to grant the motion." That's never
15 going to be said.

16 MR. YELENOSKY: Well, then I guess my
17 question should be we of course have to look at what the
18 underlying finding and as opposed to saying there is no
19 genuine issue of material fact and that that of course leads
20 to a conclusion. The likely benefit of allowing the
21 petitioner outweighs the burden or expense, it doesn't seem
22 to have the same pull to it.

23 CHAIRMAN BABCOCK: Judge Pemberton.

24 JUSTICE BOB PEMBERTON: A little bit about
25 the history, and you-all may have covered this previously:

1 The language regarding "investigation of potential claims"
2 was largely crafted on our own. It was an effort through
3 collaboration with I guess the Plaintiff's Bar and the CRC
4 to come up with a middle ground between -- I guess where it
5 started, as I recall, Carl, the Court Rules Committee raised
6 the concern that the Bill of Discovery was being abused,
7 that there were no constraints whatsoever. The initial
8 response was to put both Depositions to Perpetuate Testimony
9 and these pre suit or outside-the-suit depositions under the
10 old Rule 187 framework. That raised concerns that that was
11 too cumbersome and restrictive; and so we kind of played
12 ping pong through about three drafts of the rules. As I
13 recall the standards for the investigatory depositions were
14 sort of crafted to reach some kind of middle ground. It's
15 not something that was in the prior rule.

16 CHAIRMAN BABCOCK: Bobby.

17 MR. MEADOWS: I think there was language in
18 Rule 187 that could help us here if -- and I may be wrong
19 about this. But if I am right, it might help us with
20 raising the threshold a bit, because this procedure as it
21 now operates under 202 allows you to petition the Court to
22 perpetuate your own testimony or to perpetuate the testimony
23 of another in an anticipated suit. It also allows you to
24 conduct a 202 proceeding to investigate a claim for an
25 anticipated suit.

1 One of the things we could do, and I think this is
2 what was in Rule 187, is require the petitioner to state in
3 the verified petition why it is or give some reason that the
4 suit can't be filed, can't be initiated. In other words, if
5 you have -- it would require a statement or finding by the
6 Court I suppose that there was some reason that a lawsuit
7 could be filed and therefore this proceeding needs to be
8 allowed as an alternative; and that way you wouldn't just
9 have the proceeding taking place on a statement that it's
10 just a good thing to do and it's not going to be that
11 expensive anyway. It would put before the Court the whole
12 issue about why you don't just proceed with the lawsuit; and
13 you could put that language in 202.2(g) where the verified
14 petition requires them along with the names, addresses and
15 so forth some allegation or statement as to why the suit
16 cannot be filed.

17 CHAIRMAN BABCOCK: Okay. That's 202.1(g)?

18 MR. MEADOWS: Yes.

19 CHAIRMAN BABCOCK: Has anybody else got any
20 other thoughts? Judge Christopher.

21 HONORABLE TRACY E. CHRISTOPHER: Well, just
22 to give you a perspective on how many cases we're talking
23 about, at least in Harris County -- I'm kind of interested
24 to see in other counties -- from January of '02 through the
25 end of October '03 --

1 CHAIRMAN BABCOCK: Don't confuse us with the
2 facts.

3 HONORABLE TRACY E. CHRISTOPHER: -- we had 305
4 of these type cases filed.

5 CHAIRMAN BABCOCK: 202 proceedings?

6 HONORABLE TRACY E. CHRISTOPHER: In 22 months
7 we had 305 cases. And we were able to verify that 42 of
8 those became actual lawsuits.

9 HONORABLE NATHAN HECHT: How many?

10 HONORABLE TRACY E. CHRISTOPHER: Forty-two.
11 But the statute of limitations has not run. They still have
12 a lot of time to end up filing actual lawsuits. So those
13 numbers are a little off. They're not -- it wouldn't pass
14 Daubert.

15 (Laughter.)

16 HONORABLE TRACY E. CHRISTOPHER: But 305 is
17 the verifiable one in terms of how many become an actual
18 lawsuit. So I would be interested to see, you know, if
19 that's the scope that we're talking about throughout the
20 state, or is it used more often in other places. And
21 perhaps we need to get the perspective of people where it's
22 used or abused more, because like we don't seem to have that
23 big an issue; but perhaps in other parts of the state it's
24 more of a problem.

25 CHAIRMAN BABCOCK: And that's all the

1 district courts in Harris County?

2 HONORABLE TRACY E. CHRISTOPHER: That's all
3 the district courts in Harris County.

4 CHAIRMAN BABCOCK: 2003?

5 HONORABLE TRACY E. CHRISTOPHER: For 22
6 months --

7 CHAIRMAN BABCOCK: Twenty-two months.

8 HONORABLE TRACY E. CHRISTOPHER: -- 305
9 cases.

10 CHAIRMAN BABCOCK: Justice Gray.

11 JUSTICE TOM GRAY: I'd like to ask Scott if
12 during that time period while he was on the Houston court
13 did he see any mandamuses related to Rule 202 preliminary
14 injunctions that were alleged to be improper.

15 HONORABLE SCOTT BRISTER: Not that I recall.
16 Jerry or others may have.

17 JENNINGS: (Nods negatively.)

18 CHAIRMAN BABCOCK: Frank.

19 MR. GILSTRAP: On Bobby Meadows' comment, the
20 inference I got from that is that we shouldn't do this, use
21 this procedure unless suit can't be filed. And I'm not sure
22 that that is really the way, what we need. I mean, there
23 may be situations in which we don't want to file a suit.
24 The person is dying, I want to perpetuate his testimony, I
25 could file suit now; but I don't want to yet. I could file

1 suit; but I really would like to know more about the facts
2 before I make the decision.

3 I think there is a danger if you put that standard
4 in it, you're just going to make people file suit when
5 otherwise suit might not be filed.

6 CHAIRMAN BABCOCK: Okay. Judge Sullivan.

7 HONORABLE KENT SULLIVAN: In that regard just
8 trying to give some incentive so that the procedure is used
9 for proper purposes, I think it would be a good idea for the
10 subcommittee to look at the default rule regarding time
11 limits being six hours and you count a 202 towards that
12 with of course the alternative that if you make a showing,
13 that the judge can amend that; but what you don't want I
14 think is to give anybody the implication that if you file a
15 202, suddenly you get 12 hours with the witness or to use a
16 202 deposition in a manner that's inefficient where
17 you're -- I think with the implication the default rule
18 being that the time with that 202 witness will be counted
19 against you if there is a lawsuit filed, then the attorney
20 has some incentive to be efficient to get at what they need
21 and not, you know, waste everyone's time. And I think it
22 serves the public policy interest that I presume was one of
23 the interests in the new rule that you protect the witness.

24 CHAIRMAN BABCOCK: Okay. Allistair.

25 MR. DAWSON: I would add to that, if you're

1 going to do that, which I think makes sense, then the
2 deposition could be used in the subsequent proceeding, which
3 would also give the producing party incentive to make sure
4 that the witness is properly prepared for the deposition.

5 MR. GAULTNEY: Maybe I made a mistake. I
6 assume that if you notice the party you're going to sue,
7 you're going to get to use that deposition in that suit
8 against the party. Isn't that way 202 applies?

9 CHAIRMAN BABCOCK: Well, not necessarily.

10 HONORABLE TRACY E. CHRISTOPHER: Unfair
11 prejudice.

12 CHAIRMAN BABCOCK: Yes. 202.5 now, the last
13 sentence gives the judge some discretion to restrict or
14 prohibit the use of it.

15 MR. GAULTNEY: If the person is not served
16 with notice. So if you're served, --

17 HONORABLE KENT SULLIVAN: If you're there
18 testifying, you have notice.

19 MR. GAULTNEY: -- the Rule of Evidence would
20 permit the use of the deposition.

21 CHAIRMAN BABCOCK: Well, but yes. That's
22 right. But you could still -- you're Defendant A and you're
23 deposed; but Defendant B was not given notice.

24 HONORABLE KENT SULLIVAN: Right.

25 CHAIRMAN BABCOCK: So an order could be

1 entered saying that you can't use the deposition of
2 Defendant A because Party B wasn't there.

3 MR. GAULTNEY: Right. But if we're assuming
4 a situation where --

5 CHAIRMAN BABCOCK: A one-defendant lawsuit.

6 MR. GAULTNEY: I mean, if this rule were not
7 subject to possible abuse, I guess we wouldn't be having
8 this discussion. So I'm looking at it from the perspective
9 of, okay, if you wanted to circumvent discovery rules or
10 laws that prohibited discovery, say arbitration provisions
11 or defamation or whatever the situation is, would this rule
12 permit it? And the way you would approach it I assume if
13 you wanted to do that, would be you would join everybody
14 you're going to sue. Then no one has an objection to the
15 deposition. You're not limited by time.

16 CHAIRMAN BABCOCK: Right.

17 MR. GAULTNEY: You're not limited by any type
18 of appeal process. So I mean, I think if we're going to try
19 to restrict, and I'm not sure that this is an abuse problem.
20 If the number is what she says, maybe this isn't a problem;
21 but if we are going to try to restrict it, then I think we
22 ought to look at it in terms of where it could be used like
23 that.

24 CHAIRMAN BABCOCK: Judge Sullivan and then
25 Bobby Meadows.

1 HONORABLE KENT SULLIVAN: I don't think in
2 the final analysis it's a huge problem, because there are
3 many suits which when I was in private practice where you
4 were taking depositions in a case, and low and behold the
5 petition is amended and people are added later and they did
6 not attend a deposition. And there is a body of case law
7 out there and there are rules that deal with that, those
8 same rules, that that same body of law would apply.

9 CHAIRMAN BABCOCK: Bobby Meadows.

10 MR. MEADOWS: Well, I think on that same
11 point, I think Rule 202.5 reads that the Court's ability to
12 restrict or prohibit the use applies only to a party who was
13 not served. So if the petitioner serves one or more
14 potential or ultimate defendants, I don't believe the Court
15 has the right under Rule 202.5 to restrict the use other
16 than he would under just the Rules of Evidence.

17 CHAIRMAN BABCOCK: Right. Judge Peeples, do
18 you have any empirical or otherwise data on the extent of
19 this or scope of this problem in Bexar County?

20 HONORABLE DAVID PEEPLES: Not much. I have
21 not seen many of these.

22 CHAIRMAN BABCOCK: Ralph.

23 MR. DUGGINS: I don't question your facts;
24 but I do question the inference that just because there were
25 only 45 suits filed, they weren't abuses. And if you look

1 at the rule, you're supposed to give the subject matter the
2 anticipated action and that you anticipate the institution
3 of the suit. So I'd say you could read that the other way
4 too is that --

5 JUSTICE TOM GRAY: There were 200 abuses --

6 MR. DUGGINS: Yes.

7 JUSTICE TOM GRAY: -- because there were 200
8 that didn't.

9 MR. DUGGINS: That didn't follow through with
10 anticipated. I just don't think you know that.

11 HONORABLE TRACY E. CHRISTOPHER: No. I'm not
12 saying that --

13 MR. DUGGINS: And I'm not saying you did.

14 HONORABLE TRACY E. CHRISTOPHER: No. I'm
15 not. Absolutely not. I was just giving you the numbers I
16 had.

17 MR. DUGGINS: I think there is a lot of abuse
18 of that rule.

19 JUSTICE BOB PEMBERTON: Judge, I had a
20 question about the stats. Forty-two suits were filed, 305
21 202 Depositions, was that track based only on when the
22 witnesses in the 202 Deposition are showing up in a suit
23 later?

24 HONORABLE TRACY E. CHRISTOPHER: Yes.

25 JUSTICE BOB PEMBERTON: Or did that account

1 for the possibility that some of these 202 Depositions deal
2 with witnesses who may not be parties in subsequent
3 lawsuits?

4 HONORABLE TRACY E. CHRISTOPHER: That 45 is a
5 very squishy number, because if a nurse was deposed and then
6 ultimately the nurse wasn't named but the hospital was, I
7 wouldn't have found that lawsuit.

8 CHAIRMAN BABCOCK: Carl.

9 MR. HAMILTON: Except in the instance of
10 perpetuated testimony, I like the idea that that deposition
11 cannot be used in the trial of the case, because really all
12 the plaintiff wants it for is to investigate facts and find
13 out some discovery. And so if the defendant is unprotected
14 by having a lawyer there or something, then you're not going
15 to be prejudiced if it can't be used at the time of trial.

16 CHAIRMAN BABCOCK: What if the witness says
17 "The light was green when I ran through it in the 202
18 Deposition" and then at trial he says or in deposition once
19 the case is filed he says "Oh, that light was sure red for
20 sure"?

21 MR. HAMILTON: "Well, I didn't have my lawyer
22 there when I said it the first time."

23 (Laughter.)

24 CHAIRMAN BABCOCK: "He didn't explain to me
25 the difference."

1 (Laughter.)

2 CHAIRMAN BABCOCK: Richard.

3 HONORABLE TERRY JENNINGS: I was going to say
4 your comment was on the other hand, if suits are filed to
5 investigate a claim, perhaps they found out information
6 which led them to believe they didn't have a case and it
7 helped to prevent unnecessary litigation.

8 HONORABLE TRACY E. CHRISTOPHER: I think
9 Paula has stated that she has done it before and not filed
10 cases afterwards.

11 MR. MEADOWS: And if Bill Edwards were here,
12 he would say that is exactly the way he has used this rule
13 is to investigate a potential claim and learn that he didn't
14 have one, and therefore the suit was avoided, which goes to
15 Frank's comment.

16 HONORABLE NATHAN HECHT: And there were a
17 number of comments to the effect at the time we adopted the
18 rule, because that was one of the rules that convinced us
19 that the rule ought to be there.

20 HONORABLE TERRY JENNINGS: But to the extent
21 that there may be some abuse, there may be a policy reason
22 that says "Yes, there may be a little bit of abuse going on
23 here; but on the other hand we're avoiding how many lawsuits
24 that weren't filed."

25 CHAIRMAN BABCOCK: Yes. Richard and then

1 Pete.

2 MR. ORSINGER: I don't use this rule myself.
3 But if we're disposing, as Justice Hecht has said, of
4 250,000 cases a year, this is a miniscule number of cases
5 that are implicated. And as I understand the operation of
6 the rule, you can only take this deposition if the judge
7 authorizes it. Is that not true?

8 CHAIRMAN BABCOCK: True.

9 MR. ORSINGER: So if there are abuses, these
10 are abuses permitted by district judges. And it seems to me
11 that rather than change the rule, what we ought to do is
12 start granting mandamus. I mean, what is a better
13 gatekeeper to avoid abuse of this obviously valid procedure
14 in some instances other than to say that an impartial judge
15 is going to listen to both sides and then make a decision.

16 And I don't consider these numbers to suggest an
17 abuse. But if they are, my suggestion is there ought to be
18 more mandamus, not that the rule needs to be changed.

19 CHAIRMAN BABCOCK: What is your theory on
20 mandamus?

21 MR. ORSINGER: My theory on mandamus is --

22 CHAIRMAN BABCOCK: If the rule is complied
23 with, the judge makes the findings.

24 MR. ORSINGER: The theory is that if the
25 trial Court is abusing its discretion, then the court of

1 appeals is there to restrain that. I frankly don't think
2 that the trial judges as a whole in this state are abusing
3 their discretion. I think for the most part they're in the
4 mainstream and they do what's fair given all the
5 considerations.

6 MR. DUGGINS: But the trial Court doesn't
7 have any discretion if they make the findings that are in
8 the rule. That is the point.

9 MR. ORSINGER: Well, then are we saying then
10 that we should give them the discretion even when the
11 criteria are met to just arbitrarily not permit it? I mean,
12 is that what this debate is really about?

13 HONORABLE TERRY JENNINGS: Well, in regard to
14 mandamus you'd still have to clear the hurdle, which is
15 clear abuse of discretion. And under 202.4(a), you know, if
16 the trial Court makes a certain finding, it's going to be
17 awful hard to show that the trial Court abused its
18 discretion in making its findings.

19 MR. YELENOSKY: The only way to win a
20 mandamus is if they find it and then don't do what they're
21 supposed to do. But what is going to happen is they're
22 going to find otherwise.

23 HONORABLE TERRY JENNINGS: Right.

24 MR. ORSINGER: So the rule change, is the
25 rule change going to make this more reviewable on appeal or

1 less reviewable on appeal?

2 CHAIRMAN BABCOCK: It depends what we do.

3 MR. ORSINGER: Well, I go back to my original
4 point: You know, I think most of the trial judges in this
5 state are fair, maybe almost all of them, and that this is a
6 very, very small number of people out of our population in
7 cases out of our caseload that are implicated; and I really
8 wonder whether this requires surgery.

9 CHAIRMAN BABCOCK: Pete, do you have a
10 comment?

11 MR. SCHENKKAN: I haven't been involved in
12 this on either side myself. I'm wondering if any current
13 surge in activity in this area is for reasons similar to
14 what Justice Hecht just described as being the surge that
15 happened after we recast the old rules into this rule, and
16 that is simply some attention given to the existence of this
17 and the attention I'm considering is my recollection of this
18 is that this is the procedure that General Cornyn used to
19 try to investigate the outside lawyers hired by then General
20 Morales in the tobacco cases, and there were some
21 controversies about that that were on the front page of at
22 least one and maybe two or three issues of Texas Lawyer.
23 And I'm wondering if that didn't just kind of call this
24 procedure to the attention of a whole bunch people who never
25 new about it or had forgotten about it, and we may have had

1 a surge of activity from that that will itself die off again
2 as I gather when the Court originally adopted it rather than
3 a, you know, a widespread and lasting use of the procedure.

4 CHAIRMAN BABCOCK: Okay. What I've heard is
5 that we have a sense from the subcommittee that perhaps the
6 second sentence of 202.5 which says the scope of discovery
7 in depositions authorized by this rule is the same as if the
8 anticipated suit or potential claim had been filed, that
9 perhaps that could use some tightening up.

10 We've also had suggestions that the word "adverse"
11 ought to be removed from 202.3(a) in its current form
12 202.1(f), that we ought to add some language to 202.1(g)
13 requiring the petitioner to say why the suit can't be filed,
14 Judge Peeples' suggested that perhaps we should think about
15 "must" versus "may" in 202.4; and Judge Sullivan says that
16 perhaps the discovery limitations ought to be drafted onto
17 this rule. And that's everything that I have.

18 MR. MUNZINGER: We were going, at least I
19 discussed suggesting the insertion of the words "for any
20 purpose" after the word "use" in the last sentence of 202.5
21 to make it clear the trial Court could prevent use of the
22 deposition for impeachment purposes.

23 CHAIRMAN BABCOCK: Okay.

24 MR. YELENOSKY: Say that again.

25 HONORABLE TRACY E. CHRISTOPHER: Chip.

1 CHAIRMAN BABCOCK: Yes.

2 HONORABLE TRACY E. CHRISTOPHER: Before you
3 send us back to work on all of these things can I get a --

4 CHAIRMAN BABCOCK: No, no, no.

5 HONORABLE TRACY E. CHRISTOPHER: -- sense as
6 to whether people really want it to be worked on?

7 CHAIRMAN BABCOCK: Yes. No, I'm not -- the
8 remand motion hasn't even been filed.

9 HONORABLE TRACY E. CHRISTOPHER: Okay.

10 (Laughter.)

11 CHAIRMAN BABCOCK: In fact, I think that
12 there is one sense, and it may not be a consensus; but one
13 is "Hey there is nothing wrong here. Let's just leave it as
14 it is." And then we have your subcommittee's suggestion
15 that maybe the scope in 202.5, and then we have all these
16 other ideas.

17 So I think I'm trying to get a sense of whether I
18 guess the initial thing is whether everybody thinks we ought
19 to leave it alone without any change and any modification;
20 and that it seems to me would be a helpful vote for us to
21 take if anyone is ready to do that. Steve.

22 MR. YELENOSKY: I just wanted to say
23 something. I'm not sure I heard Richard right on the
24 impeachment issue; but earlier on there had been a
25 suggestion that the default rule ought to be that these

1 depositions aren't usable. And I guess I can see both
2 side's of allowing it or not allowing it; but I don't really
3 see why if we are going to allow a deposition under oath,
4 that we would from the start say that it's not going to be
5 usable later on or it can't be. I don't know if you said it
6 can't be used for impeachment. Because then how does it
7 serve the purpose of deterring suits? I mean, the
8 plaintiff's lawyer doesn't know whether he can rely on it or
9 not or she can rely on it or not. Why don't we just instead
10 of having it in a deposition have an order saying "You can
11 go talk to this person; but it's not under oath."

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE TERRY JENNINGS: You can do that
14 anyway. You can always have an investigator got out and
15 interview somebody.

16 MR. YELENOSKY: Right. But they don't have
17 to talk to you.

18 CHAIRMAN BABCOCK: Carl.

19 MR. HAMILTON: One other comment: If we're
20 going to be tweaking the rule under 202.4, the judge is
21 always going to find 202.4(a)(2). What he's going to say is
22 "Well, it's going to be of benefit." But on (1) there is
23 some question about what that really means, "to prevent a
24 fairly or delay of justice." There is no language that
25 helps us really identify what we're talking about there.

1 CHAIRMAN BABCOCK: Right.

2 MR. HAMILTON: It's pretty nebulous.

3 CHAIRMAN BABCOCK: Okay.

4 MR. GILSTRAP: Chip, insofar as these
5 restrictions on use, we are carving out the deposition to
6 perpetuate testimony. You have got to do that. I mean, the
7 whole purpose of a deposition to perpetuate testimony is to
8 use it.

9 (Laughter.)

10 MR. DAWSON: "You can perpetuate it; but you
11 can't use it."

12 CHAIRMAN BABCOCK: And if the person dies and
13 goes away.

14 MR. GILSTRAP: "Sorry. You can't use it."

15 CHAIRMAN BABCOCK: Let the record reflect
16 that Paula Sweeney is in the house.

17 HONORABLE TRACY E. CHRISTOPHER: I gave your
18 argument, Paula, while you were gone.

19 MS. SWEENEY: Did you?

20 HONORABLE TRACY E. CHRISTOPHER: Yes.

21 MS. SWEENEY: Why would you allow a
22 deposition and give it the implied assumption of
23 unreliability or of some kind of unfairness in the process
24 at the very beginning by saying it's not usable, that "We
25 are going to create a two-tier deposition system where you

1 can take it, but it's meaningless, useless and it can't be
2 used? Your oath means nothing in this case. So go ahead
3 and give it; and we'll depose you under oath, but you know,
4 if you get something wrong, don't worry about it, nobody is
5 going to read this again."

6 We have a provision in the rules right now, the
7 rules of discovery pertaining to the reports in malpractice
8 cases that says they are not usable for any purpose. They
9 are used for every purpose; and that rule is completely
10 ignored in virtually every circumstance including appellate
11 case law. So to try and create the fiction of nonusability
12 for any reason, and I was in favor of that rule when it was
13 written because I thought it served a purpose. It didn't
14 and it doesn't work, it didn't work in that context to help
15 plaintiffs; and this won't work in this context to help
16 defendants.

17 What are you going to tell the trial Court? When
18 you have a contradictory statement and you have evidence
19 that somebody has perjured themselves, you're just not going
20 to mention it to the judge, you're not going to refer to it,
21 you're going to ignore it? And then when it is presented to
22 the judge whether she is supposed to look at it or not, she
23 is going to say "Well, it look like perjury; but I can't do
24 anything about it." It is not a workable fix just to create
25 something under oath and then pretend it doesn't exist

1 anymore based on the experience with the 13.01 reports.

2 CHAIRMAN BABCOCK: If you can believe it,
3 Paula, somebody made that point about 15 minutes ago.

4 MS. SWEENEY: Yes. All right.

5 (Laughter.)

6 CHAIRMAN BABCOCK: Okay. What I think we
7 ought to get a sense of the full committee as to whether or
8 not there is a view that the rule ought to be tinkered with,
9 that we ought to do something to the rule. Is that a
10 worthwhile vote to take, Bobby?

11 MR. MEADOWS: I think so. I think it's worth
12 seeing how people feel about it.

13 CHAIRMAN BABCOCK: And I would propose the
14 vote as to how many people think we ought to leave the rule
15 as it is for whatever reason because there is no evidence of
16 abuse, it looks like it's going to work okay or whatever.

17 MR. MEADOWS: On that point, there is not,
18 apparently there is not a strong voice for this on this
19 committee in this room; but there is -- there are complaints
20 about abuse. I mean, Ralph Houston in particular has
21 written this committee and written an article about it and
22 his position is out there to be considered for whatever it's
23 worth.

24 CHAIRMAN BABCOCK: Right. We've seen that in
25 prior meetings. But everybody --

1 MR. SUSMAN: Who was that?

2 MR. MEADOWS: Ralph Hughes.

3 MR. GILSTRAP: Roger Hughes?

4 MR. MEADOWS: I'm sorry. Roger Hughes.

5 MR. GILSTRAP: Roger Hughes.

6 MR. MEADOWS: I apologize.

7 CHAIRMAN BABCOCK: So everybody who is in
8 favor of leaving the rule as it is raise your hand. All
9 those who think it should be modified in some respect raise
10 your hand. Interestingly enough, it's a tie.

11 (Laughter.)

12 MR. GILSTRAP: Does that mean you get to
13 vote?

14 CHAIRMAN BABCOCK: Actually I did vote. So
15 it would be 11 to 10 in favor of not tinkering with the
16 rule. If I voted, it would be a tie.

17 MR. GILSTRAP: Did you vote or not.

18 CHAIRMAN BABCOCK: If it's 11 to 11, I voted;
19 and I do feel the rule needs to be adjusted in some way. So
20 Justice Hecht, maybe you break this tie. What would the
21 Court like to see from us on this?

22 HONORABLE NATHAN HECHT: Well, we've
23 identified several issues.

24 MR. SUSMAN: Could I make a suggestion? I
25 haven't heard of all the great abuses, and I have not read

1 this article. Maybe we should have a report on what the
2 abuses are.

3 CHAIRMAN BABCOCK: Well, we've had three
4 meetings on this before and talked about it at some length;
5 but there is a letter and there has been some discussion
6 about different things. But...

7 JUSTICE NATHAN HECHT: Well, I mean, I think
8 all of the concerns that have been raised deserve looking
9 at. I guess the question is how much work should we put the
10 subcommittee to if it's not going to be supported here. But
11 I think on most of these you ought to at least look at
12 either a specific language or setting out an issue or
13 something so that the Court has got a little better idea
14 that these are the issues and this is what the committee
15 thinks.

16 I mean, specific language would be the most
17 helpful; but at least I think the members of the Court need
18 to be able to sit down and look through and say "Well,
19 you're right about that. I'm not sure about this. We need
20 more work on that."

21 CHAIRMAN BABCOCK: Bobby, I think on what the
22 issue that the subcommittee did identify, which was the
23 scope language in 202.5, that might be something. I think
24 you started out by saying "Let's get a sense of the full
25 committee about whether that is a place that calls for

1 language." And is that something that you would like to
2 hear a fuller discussion on?

3 MR. MEADOWS: I suppose it would be helpful.
4 I don't know. Tracy, what do you think? I don't know if it
5 would change the voting patterns to do this now that we've
6 had this vote up or down on change at all. But since we
7 know now the Court would like us to look at this a little
8 more closely issue by issue, one thing we could do is just
9 run through the checklist and see how people feel about the
10 various items. You had half a dozen things that were
11 discussed; and I take it that is what Justice Hecht has
12 indicated he would like us to look at when he mentions that
13 there have been a number of issues raised.

14 So I don't know whether that would be a useful
15 exercise or not. But if we don't do that, I think that's
16 the laundry list we would use to talk about it among
17 ourselves on the subcommittee and either come back with
18 proposed language for those items or just some kind of
19 better definition of the issue.

20 CHAIRMAN BABCOCK: Judge Christopher.

21 HONORABLE TRACY E. CHRISTOPHER: Well, you
22 know, I've read. I was one of the ones who voted that I
23 didn't think it needs change, because I don't really see a
24 problem with it in Harris County. I read Roger Hughes'
25 article, and his main thrust of his complaint is that there

1 is no real appealability issue about it. I've heard your
2 complaint about it. And maybe since Carl is on another
3 committee you said that has discussed this, perhaps if we
4 could get that information, or perhaps even ask the Supreme
5 Court to put on their website to the effect "If you have
6 problems with" 76(a)--

7 CHAIRMAN BABCOCK: 202.

8 CHAIRMAN TRACY E. CHRISTOPHER: -- or "202,
9 let us know so we can get a little bit more a sense of the
10 problems." I mean, we're evenly divided here in thinking
11 that there is not really a problem. So perhaps we need to
12 know more what the problems are before we start drafting
13 solutions. I mean, you know, we can tinker with a rule
14 forever. We're very capable of doing that. I've seen it.

15 MR. ORSINGER: We're not really evenly
16 divided. There's by my count 28 members of the committee
17 here, and only 11, the chair included think there ought to
18 be a change, any change, much less a concurrence on what
19 change. So although the vote was 11 to 11 as to whether to
20 do nothing or something, quite a number of people didn't
21 vote, so obviously they were not in favor of changing it.

22 (Laughter.)

23 MR. ORSINGER: If they wanted to change it,
24 they would have voted to change it. Right? I just don't
25 want the record to think the committee is evenly divided.

1 CHAIRMAN BABCOCK: Richard, we have members
2 of the committee who are here that don't vote that are
3 ex officio.

4 MR. ORSINGER: How many voting members are
5 there?

6 CHAIRMAN BABCOCK: I think 35.

7 HONORABLE NATHAN HECHT: But the problem is a
8 number of concerns have been raised. And my colleagues are
9 going to want to know "What did they say about it?" I'll
10 say "Well, they raised 12 concerns." And they'll say "Well,
11 what did they decide to do?" "They decided to do nothing."
12 "Well, what was the vote?" "11 to 10." "Why did they
13 decide to do that?" "Well, they decided not to tell you."

14 (Laughter.)

15 JUSTICE NATHAN HECHT: And they're going to
16 want to know more information than that. They're going to
17 want to know, even if it's just one or two people that think
18 it's this problem or that problem, that the wisdom of the
19 group is these are the problems that have been raised by
20 anybody, Ralph or anybody, and this was what the committee
21 thought should be done, and this is why. And then they can
22 say "Well, that's fine" or "That's not good enough."

23 CHAIRMAN BABCOCK: Steve.

24 MR. SUSMAN: Why couldn't we just, since
25 we're here kind of taking straw votes, go through each of

1 the items, the six or seven items that Bobby has identified
2 or that anyone has identified that may need changing and see
3 what the consensus on that is, because if the 11 that voted
4 to change the rule each of them had in mind a different
5 thing, then that really does make a difference.

6 CHAIRMAN BABCOCK: Yes. And I think that's a
7 good idea; and that will give some direction to the
8 subcommittee so you're not just, you know drafting, in the
9 dark. And to me on the hierarchy of things that we ought to
10 vote on, the most important was what the subcommittee
11 thought was something that could be benefited from, perhaps
12 some language if the full committee thought so. And so that
13 is the scope of discovery that is outlined in the second
14 sentence of 202.5. Right, Bobby?

15 MR. MEADOWS: Right.

16 CHAIRMAN BABCOCK: That's how you started.
17 So everybody who thinks that that should be adjusted in some
18 way --

19 HONORABLE TOM GRAY: Question beforehand.

20 CHAIRMAN BABCOCK: Okay.

21 JUSTICE TOM GRAY: Because that sentence if
22 you're thinking in the context of an investigatory-type
23 deposition, has one meaning. But if it is in a preservation
24 sense that you're thinking about, it's an entirely different
25 sentence.

1 HONORABLE TRACY E. CHRISTOPHER: Right.

2 CHAIRMAN BABCOCK: That's why Tracy thinks
3 it's not going to be as easy as Bobby thinks it is going to
4 be. Is that right?

5 HONORABLE TRACY E. CHRISTOPHER: I think we
6 ought to carve out preservation. Nobody really seems to
7 have identified any abuses in connection with that or
8 requested any changes.

9 HONORABLE TOM GRAY: Separate the rule?

10 HONORABLE TRACY E. CHRISTOPHER: Separate the
11 rule perhaps.

12 MR. GILSTRAP: So all the votes we are
13 talking about don't involve deposition to perpetuate
14 testimony?

15 CHAIRMAN BABCOCK: Right. So with that
16 friendly amendment from Justice Gray everybody in favor --

17 HONORABLE DAVID PEEPLES: Is this the issue
18 on fact inquiry as opposed to opinion also?

19 HONORABLE TRACY E. CHRISTOPHER: Uh-huh
20 (yes).

21 MS. SWEENEY: One caveat is that you can't
22 take a doctor's deposition and not talk about opinions.
23 "Why did you choose the big screw instead of the little
24 screw?" He is going to have to answer that "Because in my
25 opinion it was necessary." It isn't just "was the light red

1 or green?" You-all are creating a distinction that does not
2 exist in realty. There isn't a line there.

3 Now if you want to go "In your opinion what is the
4 standard of care," then that's a clearer example. But it's
5 just like we used to run into if you're asking about an
6 ultimate issue that is going to be presented to the jury or
7 you're asking a mixed question of law and fact. All of
8 those things we've done away with we're now going to drive
9 right back into trying to carve out a distinction between
10 what is a fact and what is an opinion.

11 CHAIRMAN BABCOCK: Yes. Before you got here
12 Judge Christopher raised that exact issue with respect to
13 medical malpractice and how some of the complaints that she
14 has seen have arisen in that context.

15 MS. SWEENEY: And that arise in the standard
16 of care as opposed to why.

17 HONORABLE TRACY E. CHRISTOPHER: I think when
18 you start asking "why" questions you go into standard of
19 care. I mean, most of the time that I see the issue brought
20 they can't read the medical records, they can't identify,
21 you know, who has done what. And I do think it's different
22 for a doctor to have to be prepared to say, you know, "why I
23 used this versus that" versus saying "I used this in
24 connection with the surgery. I used this X screw," because
25 that's what, you know, you need to know to give to your

1 expert for that expert to decide. Not his thought processes
2 and why he picked one thing over another.

3 HONORABLE TERRY JENNINGS: But there does
4 seem to be this logical inconsistency between having a rule
5 that allows you to take a deposition to investigate a
6 potential claim or suit and not be able to ask why something
7 happened.

8 MR. YELENOSKY: Well, you could actually have
9 a factual answer to a "why" question. "Because those are
10 the only size screws we had."

11 HONORABLE TRACY E. CHRISTOPHER: As I said, I
12 don't think it's an easy thing to draft.

13 CHAIRMAN BABCOCK: We're starting to debate
14 language that doesn't exist. This vote is whether or not to
15 create language. And so everybody that is in favor of
16 having the subcommittee draft language on the scope of
17 discovery found in the second sentence of 202.5 raise your
18 hand.

19 MR. GILSTRAP: To change it?

20 CHAIRMAN BABCOCK: Yes, modify it. All
21 opposed. By a vote of 13 to 9 the opposed are in the
22 majority on this. So I take it that --

23 MR. MEADOWS: We are relieved of that
24 assignment.

25 CHAIRMAN BABCOCK: Let's go to some others.

1 MR. SCHENKKAN: Did you get why I voted with
2 the 13? I don't know whether we've given you enough to work
3 with.

4 HONORABLE NATHAN HECHT: Well, the Court has
5 not talked about this, so I guess I need to talk with them.
6 But, no, that's not enough to work with. They may be not
7 interested either; but I should probably find out.

8 HONORABLE JAN P. PATTERSON: It may or not
9 not help as we go through the factors. Isn't that a
10 possibility? It may have been helpful, but may not give you
11 what you need.

12 CHAIRMAN BABCOCK: It seems like it would be
13 helpful, because the 11 to 10, 11 to 11 vote is somewhat
14 misleading, because the 11 people who were in favor of
15 changing the rule, you know, I may have voted because of
16 scope and somebody else may have voted because of adverse
17 interest, et cetera. So this might give us some sense of
18 how our committee. It will only take a second, I think.

19 MR. ORSINGER: Chip, I might add that we
20 probably shouldn't -- I mean, the majority should not
21 control. We ought to look at it to the end if there are a
22 couple that only one person wants, lets drop them off the
23 list. But if nine people on this committee want a
24 change, --

25 CHAIRMAN BABCOCK: The chair not voting.

1 MR. ORSINGER: -- probably we ought to let
2 them put some language down. But we can decide that after
3 the fact, because some of these maybe one person wants a
4 change.

5 CHAIRMAN BABCOCK: Want change.

6 MR. YELENOSKY: On this one particular point,
7 the third way is to write it so the judge has some
8 discretion. The way it's written now it's got to be the
9 same as the scope in a typical deposition. What was
10 proposed was to require the judge to exclude what is
11 nonfactual in some undefined way.

12 HONORABLE TRACY E. CHRISTOPHER: I didn't
13 mean to require it that way. I thought our vote was to
14 allow the trial judge to have some discretion.

15 MR. YELENOSKY: Was it? I thought it was
16 that it would be mandatory that they were limited to some
17 undefined.

18 CHAIRMAN BABCOCK: No. That's not what we
19 were voting on.

20 MR. YELENOSKY: Wrong assumption.

21 CHAIRMAN BABCOCK: Not what we're voting on.

22 MR. HAMILTON: Chip, the problem voting this
23 way is that these things are intermingled. If someone comes
24 in and says "I want to take a deposition because I have to
25 identify parties," and the judge ought to be able to say

1 "Okay. Then that's the scope of that deposition, to
2 identify parties." So all of these things are iterrelated;
3 and to vote on them one at a time is not very meaningful, I
4 don't think.

5 CHAIRMAN BABCOCK: I don't know how to vote
6 any other way.

7 MR. HAMILTON: The issues have all been
8 raised. I would say let the subcommittee deal with each of
9 the issues.

10 CHAIRMAN BABCOCK: Judge Sullivan, easy to
11 say if you're not on the subcommittee.

12 HONORABLE KENT SULLIVAN: I get the
13 impression that the interpretation of what we were voting on
14 is evolving, because I didn't understand that the vote was
15 one to allow trial Court discretion.

16 MR. YELENOSKY: Right.

17 PROFESSOR CARLSON: I didn't either.

18 HONORABLE KENT SULLIVAN: I thought it was
19 more a hard-and-fast rule. I didn't vote because I was a
20 bit ambivalent, quite frankly. I would be much more
21 interested in a vote that we would try to fashion language
22 that would clearly give the Court discretion in a protective
23 order.

24 CHAIRMAN BABCOCK: I obviously wasn't clear.
25 My intent on that vote was to get people who thought it was

1 worthy of the subcommittee's time --

2 HONORABLE KENT SULLIVAN: To continue.

3 CHAIRMAN BABCOCK: -- to further study and
4 propose language with the second sentence of 202.5 regarding
5 scope of discovery, but not to predetermine right now what
6 their recommendation would be.

7 HONORABLE KENT SULLIVAN: I think the
8 discussion that Tracy touched on and Paula touched on
9 earlier though sort of skewed everybody's thinking, and that
10 was the only issue. I think we might get a different result
11 if what we were talking about was someone tailoring specific
12 language that would allow a protective order and/or judicial
13 discretion relative to a 202 Deposition.

14 CHAIRMAN BABCOCK: Right. Again, we can't
15 right now vote on language, because we don't have any
16 language. The issue now is only whether or not on this
17 issue we think that this is worthy of their time.

18 And I don't want them having to spend, and that's
19 how Bobby started this discussion, where "Hey, what does the
20 full committee think about this issue?" And so we're trying
21 to say "Here is what the committee thinks. Yes, we should
22 look at it," or "No, we should not." And if the vote was
23 unclear, then --

24 HONORABLE KENT SULLIVAN: My comment would
25 have been shorter by saying ad another "yes" vote.

1 (Laughter.)

2 MR. SUSMAN: Doesn't the trial judge in
3 normal discovery have discretion as to what the scope of
4 discovery is going to be, I mean, have people objecting all
5 the time that this question is beyond the scope of discovery
6 in the request for documents. And you go before the judge,
7 and the judge exercises discretion all the time.

8 I mean, I find judges exercising discretion on
9 scope anyway. "It's beyond the scope of your lawsuit. It's
10 beyond the scope of your allegations." All this sentence is
11 suggesting is the same kind of discretion that should be
12 excised under Rule 202 that the judge exercises anyway.

13 So I mean, I guess the question is how should it
14 be different? How should the discretion be different than
15 the judge exercises normally in determining whether an
16 interrogatory is appropriate or a deposition question is
17 appropriate?

18 CHAIRMAN BABCOCK: So under your scenario
19 talking about Tracy's issue or Paula's issue, if the lawyer
20 for the doctor comes in and says to Tracy "Judge
21 Christopher, look. This is a pre suit deposition, and my
22 guy shouldn't have to be giving opinions," then she has the
23 discretion to limit discovery in that way if she wants to.

24 MR. SUSMAN: Sure.

25 MS. SWEENEY: Under existing procedure that's

1 true. That motion is made all the time.

2 CHAIRMAN BABCOCK: Okay. You had your hand
3 up.

4 MR. SCHENKKAN: And that's why I remained a
5 "no" vote on this. I haven't seen a case made or a concrete
6 need to change the rules on scope of discovery in this
7 context that isn't taken care of by the existing rules on
8 the scope of discovery and the processes dealing with them;
9 and it seems to me therefore that's the explanation, at
10 least for this vote, of why I wouldn't see a need to invest
11 more time and energy exploring that possibility.

12 CHAIRMAN BABCOCK: That's helpful. That's
13 why maybe we shouldn't require them to do this. Yes, Carl.

14 MR. HAMILTON: I may be reading this wrong:
15 But as I read what it says in 202.5 is we're not going to
16 have any restrictions on the scope of this. You can do it
17 the same as if you were doing it in a lawsuit. So that
18 seems to me that that's saying there can't be any
19 restriction.

20 HONORABLE TRACY E. CHRISTOPHER: Right. If I
21 wanted to restrict it in a doctor's deposition to facts
22 only, I couldn't do it under our existing rule.

23 HONORABLE DAVID PEEPLES: "Scope reasonably
24 calculated to lead," 192.3, that's going to be thrown right
25 to the Court.

1 HONORABLE TRACY E. CHRISTOPHER: Right.

2 HONORABLE DAVID PEEPLES: What the problem --

3 HONORABLE TRACY E. CHRISTOPHER: I mean, I
4 think you have to specifically give the judge more power to
5 limit depositions. Otherwise --

6 CHAIRMAN BABCOCK: What about Steve's
7 argument that says in a regular suit if I wanted to
8 bifurcate discovery, just have fact discovery first and
9 opinion discovery later? Your doctor may be subjected to
10 two depositions, if that's what you want. Wouldn't you have
11 authority to do that? You're saying "no," I take it?

12 HONORABLE TRACY E. CHRISTOPHER: I ultimately
13 voted "yes" because I think it ought to be clear the judge
14 has discretion, because their scope of discovery is so
15 broad.

16 MR. HAMILTON: This is a special proceeding
17 anyway. It's a special deposition for a special purpose;
18 and I think we need to define the rules for that and not
19 just say you can do it under other rules or leave it sort of
20 vague.

21 MR. SCHENKKAN: My concern about that is
22 there are too many special purposes for which it can be
23 used; and it's not possible in a single rule to improve upon
24 the existing protections on the scope of discovery we have
25 under the existing rules by saying these are ones in

1 anticipation of suit. If there is anticipation of suit, the
2 discovery that is sought presumably could at least go as far
3 as any discovery could be sought in the suit, maybe even
4 farther, but certainly as far as anything sought if the suit
5 if filed. And thus again, I'm back to, absent hearing a
6 relatively clear, concrete proposal for a specific
7 limitation to the scope of discovery, either in all Rule 202
8 Depositions or in a specific category of them, it seems to
9 me we're making problems rather than fixing problems by
10 making changes.

11 CHAIRMAN BABCOCK: Justice Jennings.

12 HONORABLE TERRY JENNINGS: In response to
13 what you said and also some concerns that Richard raised,
14 what about some language to the effect change the sentence
15 to "The trial Court shall have discretion to define and
16 limit the scope of discovery to effectuate the purposes of
17 this rule"? Or is that too nebulous?

18 JUSTICE DAVID PEEPLES: "Purpose for which
19 the deposition is sought."

20 HONORABLE TOM GRAY: Which would require
21 basically in addition to 202.2 of what the contents must be
22 that what the scope of the issue being investigated is. I
23 mean, so I mean, there's some -- that's why I voted for it.
24 I think there is some tinkering with it that can tighten it
25 up.

1 CHAIRMAN BABCOCK: Justice Patterson.

2 HONORABLE JAN P. PATTERSON: I'd like to
3 recommend that Bobby and his committee caucus over the lunch
4 break and recommend how we could best proceed, because I do
5 think that any vote might be impaired by someone's low sugar
6 level at this time.

7 (Laughter.)

8 CHAIRMAN BABCOCK: That's a fair comment.
9 "Make them work over lunch, and then we can go eat." Let's
10 take our recess.

11 (Lunch recess.)

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