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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

November 12, 2004

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 12th day of November, 2004, between the hours of 9:15 a.m. and 3:36 p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: Welcome, everybody, to our first post-election of 2004 meeting. Congratulations are in order, I think, for several of our members. I think we went undefeated in this election. Jan Patterson won a contested election to the Austin court of appeals. Bob Pemberton in the opposite party did as well, and I understand the vote was -- the margin was about the same, even though they were in opposite parties, so they speak well for our committee. And Stephen Yelenosky, the favored winner in the district court in Travis County, and Scott Brister, who I guess is still a member of our committee was elected, and then Tom Gray, Jane Bland, and Levi Benton won, although they didn't have much opposition, like zero opposition. So congratulations to everybody. The voters were wise in their choices based on our experiences.

We have a number of things to do today, but I'm certain that we're going to get done today. Justice Hecht and Chief Justice Jefferson have a commitment tomorrow, so we will get through this agenda today, and I suppose we ought to just start with you, Justice Hecht, on the status of things.

HONORABLE NATHAN HECHT: Well, since our last meeting we have a new Chief Justice, Wallace

Jefferson, who has served as the liaison, another liaison from the Court to this committee. He was sworn in yesterday formally by Justice Scalia, who was good enough to come down to do the honors; but Wallace has been on the job since shortly after his appointment; and so we have been operating with seven until day before yesterday, Wednesday, when Governor Perry swore in David Medina as our eighth judge; and David is formerly a district judge in Harris County and was in the general counsel's office at Cooper Industries for a while and then most recently he has been the Governor's counsel; and so he has taken the oath and is moving in as we speak; and we've got lots of work for him to do; and we are expecting an appointment for the last vacancy on our Court almost anytime now.

We had a near miss. Justice O'Neill and her husband, Kerry, were hit by a drunk driver in Washington, D.C., and Kerry was knocked unconscious and was in the hospital for a couple of days up in Washington, and Harriet was bunged up pretty good, but thankfully they're doing better, and Harriet's been at work all week and both were at the ceremony yesterday. So if you see them or have a chance to drop them a note you might think about it, because they seem to be doing much better.

Of course, you have heard that Al Gonzalez, formerly of our court, has been nominated by the President

to be Attorney General of the United States and so we're very proud -- we continue to be very proud of Al.

I went to David Peeples' retirement party several weeks ago, which was a great affair. Most of San Antonio was there, and all of them speaking lauditorially of David.

HONORABLE DAVID PEEPLES: Those are the only ones invited.

HONORABLE NATHAN HECHT: And deservedly so. And it was good to see that tribute being paid to people who have served the judiciary for many years. Judge Pemberton won election, but that's not the only thing or not even the most important thing that's happened to Bob. Where's Bob?

CHAIRMAN BABCOCK: He's stuck right over here.

HONORABLE NATHAN HECHT: He's got a new little girl. Eloise?

HONORABLE BOB PEMBERTON: Ella Louise.

HONORABLE NATHAN HECHT: Ella Louise. So he's a judge and a dad at the same time and that's good, and I understand Pete Schenkkan's son gets the key to Newport Beach in December, so that's good. Maybe that's better than all of the rest of them.

The Court put out some rules orders several

weeks ago, and I hope they're available to you, but if they're not, they can be made available to you. One regarding rules -- the service process rules, the jury instructions, and then some technical amendments to the -- not really technical, but small amendments to the Rules of Judicial Administration for multidistrict -- for the multidistrict panel that Judge Davidson requested to help expedite things over in that area, which he reports is working pretty well, and so that's a tribute to the committee, too. We wrote those rules pretty fast, and even though we had experience with Rule 11, there was still a lot of intricacies to work out, and the pretrial judges that I know about are all saying they're working pretty well, so that's good.

And then the Bar sent in a report on referral fees and advertising and recommended that the Court submit it to the Bar for referendum, and we did that, and I think that referendum is either under way or imminent. I just got an e-mail from the litigation section yesterday encouraging members of that group to vote for both -- both parts of the referendum. It's divided between the referral fee provisions and the advertising provisions.

We've still -- the Court is still looking at the substance of the advertising provisions, like we did

the last time. There has been some confusion about this, so let me just say that when we last promulgated advertising rules we were aided by a good deal of briefing on both sides of the constitutional issues whether these -- in essence whether these rules were an infringement on freedom of speech, protected by the Constitution. And this time, because of the timing of the process, because the Bar had set for itself a very short time period to finish this project, we got one brief on the legality of the rules but not the kind of in-depth analysis that the Court had before, so we're still looking at that.

And the press asked, "Well, isn't this a little peculiar that you would put rules out for comment and then study the legality of them later," and it is a little bit, but just the timing issue. I mean, we could have asked the Bar to stand down, but then we didn't want to interfere with this project that they've undertaken and have carried through remarkably well, and so that's the reason for it, but we're still looking at the constitutional issues that are involved in the advertising rules.

And other than that I don't think I have anything else to report to you. I'd be happy to answer any questions.

CHAIRMAN BABCOCK: Yeah. I've got one question, and I think I know the correct answer, which is the one I've been giving, and that is we did several years ago an enormous amount of work on the recusal rule, and we worked it pretty heavily, and that's been pending before the Court for sometime, but in the interim, the United States Supreme Court decided the *Republican Party of Minnesota vs. White* case, which impacts recusal area, and it's been my sense that the Court might after it's finished with its work rewriting the Code of Judicial Conduct, might send that recusal rule back to us for further analysis.

HONORABLE NATHAN HECHT: Yeah. This Court -- this committee did a great job on a very careful and detailed recusal rule. Then the presiding judges submitted a competing proposal that they felt like got the job done as well in something -- in a somewhat less complex fashion. Meanwhile, the *Minnesota vs. White* issue jumps up and we start looking at the Code of Judicial Conduct, and so it has just seemed wise to the Court to defer the recusal decision until we know more about the whole lie of the land.

So the committee that's been working on the judicial conduct revisions, which Chip also chairs, is finished with its work and now we can go back and take a

look at it again, but it probably will mean this committee looking at it again, because *Minnesota vs. White* changes a lot of stuff, and so we just need to view recusal through that prism, which we have not done in the past.

CHAIRMAN BABCOCK: Great.

MS. BARON: Can you just tell us what it held for those of us who aren't familiar with the case?

HONORABLE NATHAN HECHT: *Minnesota Republican Party vs. White* said that elected judges do not give up their constitutional rights of free speech when they're running for office and they are free to comment on any issue they choose. So if you want -- a candidate wants to talk about what he thinks about the death penalty or abortion or whether President Bush should be re-elected, he or she is free to do that, and so that -- of course, we have provisions, like most states, in our Judicial Conduct Code that prohibit that, all those things, and the --

MS. BARON: Did it address recusal, though?

HONORABLE NATHAN HECHT: No.

CHAIRMAN BABCOCK: No.

MS. BARON: Okay. That's what I was confused about.

HONORABLE NATHAN HECHT: But then recusal gets to be a much bigger issue because ordinarily somebody

who talks about issues that they shouldn't has got bigger problems than recusal, but now those problems have melted away and recusal becomes a bigger issue.

MS. BARON: Okay. Thank you.

HONORABLE NATHAN HECHT: So far, as far as I know, I haven't looked just real carefully, but I don't think we've had any great deviations from the past code in Texas. I think judicial candidates have voluntarily chosen to limit their campaigning to the kinds of things they could say before, but I think it's only a matter of time --

CHAIRMAN BABCOCK: Right.

HONORABLE NATHAN HECHT: -- before someone will say, "I'm going to talk bad if I want to."

CHAIRMAN BABCOCK: Right. Any other questions? It's a rare opportunity to be able to ask the Supreme Court justice questions.

MR. ORSINGER: Can we ask about specific cases?

HONORABLE NATHAN HECHT: I may not answer.

CHAIRMAN BABCOCK: That would be out of order. Speaking of the order, we have a lot of loose ends that we have -- that I have allowed to dangle for too long, and the primary one is Justice Hecht's letter to me dated June 16th of 2003 and the accompanying list of rules

that are potentially implicated by House Bill 4. We've had on the agenda for several sessions now reports by the subcommittee chairs building off this list of what rules need further study and revision, and I say "building off the list" because the list was said not to be exhaustive, although there is certainly many things -- many things on it, the majority of which we've already dealt with, but there are a lot of little things that we haven't, and we need to get through that.

So the various subcommittee chairs have to varying degrees talked about that since our last meeting and I hope are ready to report and give us a sense of what is thought we should do or recommend to the Court in terms of studying and making recommendations of rules that are impacted by House Bill 4, and Bobby Meadows got called to trial. He told me he might and indeed he did, so Bobby is not able to report, but I think John Martin was delegated something at 11:00 o'clock at night or something.

MR. MARTIN: Yes. I had a lengthy e-mail from Bobby at 11:00 o'clock the other night, and that committee studies Rules 171 through 205. Judge Christopher thinks we should at least attempt to try to see if we can write a rule to address the issues that arise when responsible third parties that don't have to be designated until 60 days before trial are designated late,

what does that do to the discovery deadlines. This was all done by e-mail, and I think several people suggested that it may not be possible to deal with that with a rule. It may just have to be dealt with on a case-by-case basis, but that was one issue that was suggested for discussion by that subcommittee.

Another one that came up is apparently under the new medical malpractice amendments that were in House Bill 4 you can't take depositions until after the reports are produced, and so there's a question about how does that impact Rule 202, and there's a case out of Beaumont addressing this issue, and I could be wrong about this, but I think the Beaumont case held that a plaintiff cannot use Rule 202 to take a presuit deposition of a potential defendant doctor.

MS. SWEENEY: No, that was after suit is filed.

MR. MARTIN: After medical suit is filed.

MS. SWEENEY: Because of the moratorium that's been imposed you can do very limited depositions, but you can't do the defendant's deposition until after the report has been filed, but it's not a 202 case at all. It's not 202.

MR. MARTIN: Well, somebody mentioned a Rule 202 case.

HONORABLE KENT SULLIVAN: Judge Gaultney wrote it, so maybe we ought to ask him. Just a thought.

MR. MARTIN: I have not read the case.

MR. LOW: Have you read it, Judge?

HONORABLE DAVID GAULTNEY: I think the type of motions we're hearing is passed, but she's correct, it was not a 202 case. It was a suit had been filed, and it was a question of whether the treating physician defendant could be deposed before the report was provided.

MR. MARTIN: Okay. I'm not sure there's anything for the committee to do there or not, but that was another one that was in an e-mail. Bobby tells me that Judge Christopher thinks the committee should really just do an overall canvas of that group of rules to see if there are any other issues that ought to be addressed. That has not been done yet, and then the other issue is that Carl has reminded me that the Court Rules Committee has sent up several proposed revisions to that set of rules that are just sitting there, and I guess the question is should the subcommittee of this committee go ahead and take a look at those?

CHAIRMAN BABCOCK: Maybe we should, but right now let's try to focus on things that House Bill 4 either mandated or because of House Bill 4 the rules are not in sync anymore.

MR. MARTIN: The only House Bill 4 issues that anybody raised were the ones that I mentioned.

CHAIRMAN BABCOCK: Okay. Responsible third parties I think probably run across several different subcommittees. Richard, I thought that maybe it hit -- it hit some of your rules, 15 through 165a; and I thought, Paula Sweeney, that maybe some rules in the 216-299a range were hit by the responsible third parties. Do you-all agree or disagree?

MR. ORSINGER: Well, I think it's certainly possible. We have not received a suggestion from any orders that any part of the rules that fall within the scope of my subcommittee would need to make changes. The statutes, the statute itself is self-enacting, and so really the only urgency is if there's a conflicting rule of procedure, but if we were to undertake to be sure that specifications in the statute that are not currently part of the rule are in the rule so that people who are reading the rule pick up the statute statutory language then we have not done that yet.

CHAIRMAN BABCOCK: What John was talking about, I think, comes from section 4.12 of House Bill 4, which talks -- which requires Rule 194.2 to disclose responsible third parties as soon as practicable. Am I right on that, John?

MR. MARTIN: Yeah. I'm looking at Tracy's e-mail, and I think that's right.

MR. ORSINGER: To me, Chip, that would be a discovery issue and not a pleading issue.

CHAIRMAN BABCOCK: I know, but if you look at section 4.01 there are some potential issues that Chris Griesel flagged that deal with pleading issues.

MR. ORSINGER: Then we're going to need to undertake that. I apologize to say that we haven't analyzed that, so I'm going to need to get the subcommittee together to consider that.

CHAIRMAN BABCOCK: And the reason why I thought that Paula's committee might be involved is because 4.01 might also deal with issues relating to the charge on responsible third parties. Have you-all looked at that, Paula, or thought about that? Agree, disagree?

MS. SWEENEY: I've done a lot of heavy thinking, but, no, we haven't. We'll get together by e-mail first, and no one has brought anything to our attention at all. There's been no correspondence, I think probably because most of those cases haven't gotten to the jury charge stage yet.

CHAIRMAN BABCOCK: Right.

MS. SWEENEY: But we'll look at it and report back.

CHAIRMAN BABCOCK: Okay. Great. And so next time, just so the record is clear, on the overall broad issue of responsible third parties we'll have Bobby's -- Bobby Meadow's subcommittee, which deals with Rules 171 through 205, to look at the discovery issue; and I think the cross-reference there to the statute is section 4.12; and then we'll have Richard's subcommittee, which is Rules 15 through 165a, to look at pleading changes, if any; and the cross-reference on the statute is 4.01, although there may be other provisions; and then Paula's subcommittee, which deals with Rules 216 through 299a, will look at any issues relating to the charge; and I think you'll find that, the cross-reference being section 4.01 in the House Bill 4; and there may be subsequent sections as well that deal with that. So we'll have that as an agenda item at our next meeting.

MS. SWEENEY: Which is January?

CHAIRMAN BABCOCK: Yes. We haven't set the 2005 schedule yet, but we'll -- I'll get with Justice Hecht and Lisa, and we'll set that soon, and, by the way, while I'm on that, if anybody knows of conflicts, significant conflicts like Bench-Bar or some, you know, big deal conference that your university is going to put on on two weeks notice, let us know by e-mail about that. We'll try to avoid those weekends. I think we've got

Bench-Bar, don't we, Angie?

MS. SENNEFF: October 13 and 14th.

CHAIRMAN BABCOCK: We'll try to avoid -- well, there's more than one. There's several. We'll try to avoid those to the extent we can. We've got football games we've got to worry about, and we've got all sorts of things.

Okay. So we'll put that behind us. And, Elaine, you looked at some issues relating to House Bill 4 -- well, why don't you just tell me what you looked at?

PROFESSOR CARLSON: For the 735 to 822 rule subcommittee, the issue was raised as to whether House Bill 4 mandating a cap on appellate security or appeal bond might be applicable in other contexts, such as appeal bonds when a party appeals from the JP court to county court.

MS. SWEENEY: We can't hear you.

PROFESSOR CARLSON: Oh, I'm sorry. The issue was raised as to whether the change in House Bill 4 that put a cap on appellate security, AKA supersedeas required to suspend a money judgment based on a judgment debtor's net worth or substantial economic harm, also would apply to other appeal bonds outside that process, such as an appeal from the justice court to the county court, because House Bill 4 provision says "not

withstanding any other law or rule of the court, the cap is X."

When I went back and looked at the entire statutory scheme under Chapter 52 of the Civil Practice and Remedies Code, there is no problem because security is defined by that as "a bond or deposit as provided by the Texas Rules of Appellate Procedure," so that's a nonissue.

The other thing I tried to hoist upon Chip and I got it back on the plane this morning --

CHAIRMAN BABCOCK: Yeah, nice try.

PROFESSOR CARLSON: Which is just me being a buttinski, when I was working on my treatise this summer I noticed that House Bill 4 had about five different provisions of mandatory jury instructions or presumptions; and, of course, the committee and the Court have addressed the exemplary damage mandatory requirements, but particularly in the the health care provider area there is a number of mandatory instructions or presumptions, including emergency medical care, that the jury is to be charged with; and there is also a provision dealing with certain economic losses that if a claimant seeks recovery in any case or loss of earnings, loss of earning capacity, et cetera, the court must instruct the jury as to whether the recovery for compensatory damages is subject to Federal or state income taxes.

So I just kind of threw this at Chip in an FYI, "Here's some provisions," on the plane. He said, "Will you address that in the meeting?" Looking at Rule 277, it says that "The court shall submit such instructions or definitions as shall be proper to enable the jury to properly pass upon or render a verdict." I think it would probably not be profitable, might even be a little bit reckless, for us to start putting in particularized instructions that apply to only certain kinds of cases; and to be very honest, I don't know what other statutes might be out there that provide for mandatory jury instructions in particular kinds of cases. So in keeping with my job as an academic, I have raised a nonissue and presented it and hopefully not be defeated.

MR. SCHENKKAN: Law Review article to follow.

CHAIRMAN BABCOCK: Does everybody agree that that's the proper approach, rather than try to write into the rule what the statute already says and presumably the parties will bring up to the court at the appropriate time, just to let it sit there as it is? Anybody disagree with that approach? Okay. Anything else?

PROFESSOR CARLSON: That concludes my report, Mr. Chairman.

CHAIRMAN BABCOCK: All right. Terrific.

Judge Lawrence has a written report that is available somewhere.

HONORABLE TOM LAWRENCE: It's on the table back here.

CHAIRMAN BABCOCK: It's on the table in the back, and this relates to Rules 523 through 734 as impacted by House Bill 4, and could you just run us through that, Judge Lawrence?

HONORABLE TOM LAWRENCE: Well, the problem is the requirement in House Bill 4 that there be a jury charge with regards to the exemplary damages question, and to give you a little background, there are about a thousand JPs in Texas, of which approximately at any one time four or five percent are attorneys. Many JPs or some JPs do not have any staff whatsoever. It's just the judge himself and no one else that works for him.

There are a considerable number of jury trials where there are pro se's on both sides, an even larger number where there is an attorney on one side and a pro se on the other, a relatively small percentage where there are attorneys on both sides. There has been a provision in the Civil Practice and Remedies Code in 41.012 that there be a jury instruction on -- I don't have my code in front of me, but that there be a jury instruction that has been in effect since 1995, which has

been for the most part routinely ignored by the justice courts because of a specific provision, Rule 554, which says, and I'll quote, "The justice of the peace shall not charge the jury in any cause tried in his court before a jury." So there is not a jury charge.

Now, there are two different types of cases the JPs handle. One is what we refer to as a justice court suit which is filed under the Rules of Procedure, in which case the Rules of Evidence would be in effect. The other is a small claims court case, which is filed under Chapter 28 of the Government Code. The Legislature created those rules, and the Rules of Evidence are not in effect.

Now, when the Legislature passed House Bill 4 this past year and when they passed in 1995 the provision that required instructions, they did not amend the small claims court provisions to require a jury charge, and so it's my belief -- and I don't think the JP legislative team really even noticed this, and I think they'll probably seek to correct this problem in the next session, but there's really not been what you call an outcry or alarm at the lack of any jury charge since 1995.

My recommendation would be that, because of all the problems that I've relayed in the outline, my recommendation would be that we not try to repeal 554 to

require a jury charge, that if you turn to the last page in my handout there is what I would call a verdict form and that you allow me to go to the Texas Justice Court Training Center and provide them with this jury verdict form and then have them send out to the JPs the jury verdict form; and what that will do is that will comply with the express provisions that the Legislature wanted, which is that if you award exemplary damages you have to have a unanimous vote, all six must agree; and this would allow us to comply with that, but it would not require a jury charge or instruction, which I think would be a tremendous problem in the justice courts right now. So that would be my recommendation.

CHAIRMAN BABCOCK: Okay. Go ahead, Justice Hecht.

HONORABLE NATHAN HECHT: Tom, do you have any sense how often punitive damages are awarded in justice cases or small claims court cases?

HONORABLE TOM LAWRENCE: Well, I would say very seldom; and another part of the problem is that the justice court rules actually allow oral pleadings; and the small claims court provisions, which is a bill that I got through a number of years ago, does require written pleadings, but there are no formal pleading rules at all. So what that means is that often you're in the middle of a

trial before you even know that the plaintiff is asking for any kind of punitive or exemplary damages, and it would probably very rarely be pleadings, and it's requested really fairly seldom, and usually it's requested when it's not even appropriate.

HONORABLE NATHAN HECHT: And do you know if those damages are subject to the jurisdictional limits of the court?

HONORABLE TOM LAWRENCE: Yes. Attorneys fees, the compensatory damages, everything except court costs and post-judgment interest would be part of the amount in controversy, which is $5,000. I would also point out that it's been the law in Texas at least since 1919 in one case I found out of the Amarillo court and it is the practice that the county courts where there has been an appeal from the justice courts to the county courts, they do in fact provide jury charges. So if the case was appealed from the justice court to the county court then there would be a jury charge, and they would fully comply with House Bill 4.

CHAIRMAN BABCOCK: So what you're suggesting is that we recommend that the Court do nothing about this, but in some fashion approve this verdict form?

HONORABLE TOM LAWRENCE: Well, I don't know that it requires an approval. Certainly if you want to,

but if it's the sense of the committee and the Court doesn't oppose it, I would say let the Justice Court Training Center send this out in the infrequent times it's going to be needed, and I would suspect that maybe there would be an amendment to this bill in the next session by the JPs. There is a motion, a move afoot to raise the jurisdictional limits of the justice courts to at least $10,000. Now, if that passes, we may want to come back and revisit the idea of a charge or some kind of a limited modified charge in the future, but I would say for the time being let us do this.

Yes, it's the last page of the handout. Yeah, now, before that, two pages before that would be kind of a sample jury charge in JP court on exemplary damages, which begs the question, if the law requires that we have a jury charge on exemplary damages and the rules prohibit the jury charge presumably on everything else then are we going to charge the jury on exemplary damages but no charge on anything else in the case? There are just so many problems involved in trying to have a charge, and it's just not a big problem.

CHAIRMAN BABCOCK: If the committee recommended this, what would be the mechanism for the Court to communicate to the state that, yeah, we -- that they think this verdict form is okay?

HONORABLE TOM LAWRENCE: To the state?

CHAIRMAN BABCOCK: I mean, how are we going -- we don't propose a rule change, how are we going to do this?

HONORABLE TOM LAWRENCE: Well, I mean, I would communicate or the Court can designate someone or the committee could to talk to the Justice Court Training Center to get this out with appropriate instructions and explanation and then that would be sent out to all the JPs in the state.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM LAWRENCE: Now, as far as communicating with the Legislature, whatever your pleasure is. I would certainly be willing to go and talk to somebody, or you would or maybe the Court. I don't know. It's been a requirement since 1995 that there be a charge under 41.012, and it's not been done, and there's not been any mention of it. In fact, it's for the most part totally escaped the justice courts that that's been required. So it doesn't seem to be a hot issue.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: Yeah, I would like to maybe ask a couple of questions, but in most instances if somebody loses a significant judgment do they appeal for a trial de novo in the county court?

HONORABLE TOM LAWRENCE: It is. An appeal from the JP court is a trial de novo at the county court.

MR. ORSINGER: So that's why we're not seeing these issues in the courts of appeals because usually they get tried with more robust procedural framework in a county court?

HONORABLE TOM LAWRENCE: Right.

MR. ORSINGER: And on the verdict form is there -- I mean, theoretically, punitive damages are supposed to be on clear and convincing evidence rather than a preponderance, but I don't even know if you're charging the jury -- I mean, I don't know, the jury doesn't even know what constitutes an assault and battery, they don't know what constitutes preponderence of the evidence, so maybe they don't need to know what constitutes clear and convincing evidence.

HONORABLE TOM LAWRENCE: Well, it may come out because one these juries may provide cases or may talk about the law, but it doesn't come from the Court.

MR. ORSINGER: Should the verdict form say anything about the burden of proof, or are we just not worried about that part of it?

HONORABLE TOM LAWRENCE: Well, where do you stop?

MR. ORSINGER: Yeah.

HONORABLE TOM LAWRENCE: When you start doing that where do you stop? And this is sort of a minimum that complies with House Bill 4 requirement that exemplary damages be unanimous. So that's what I was trying to do, is make sure that we did what the Legislature wanted acted on.

MR. ORSINGER: And just as a matter of interest, is it typically tort cases or property boundary cases or what gets tried to juries in those courts?

HONORABLE TOM LAWRENCE: Oh, everything.

MR. ORSINGER: It could be contract cases?

HONORABLE TOM LAWRENCE: Oh, yeah. Yeah, everything. The only thing we don't have jurisdiction over is slander and libel and I think one or two other things, and honestly, we don't get a lot of medical malpractice, but we get a lot of doctors suing patients and patients suing doctors, but the jurisdictional limit is, except in deed restriction cases, $5,000. Deed restrictions we have an unlimited jurisdiction.

CHAIRMAN BABCOCK: Judge Yelenosky. That sounds funny.

HONORABLE STEPHEN YELENOSKY: My understanding of what Judge Lawrence is suggesting is not that the committee or that the Supreme Court do anything, but that he propose something to the JPs that will get

them by, because it seems to me for us to do or for the Court to do anything to say this is blessed in some way is problematic because a lawyer could come in the JP court and say, "Here's HB4. Give me my charge." I don't think it's appropriate for the Supreme Court to preempt that argument or a decision on what's required in JP court unless and until there is a change in the law.

CHAIRMAN BABCOCK: Yeah. That's a good point. Sort of what I was trying to say but said much better. Any comments about this verdict form itself? I wondered if when you have a form that says "Verdict for the Plaintiff" whether that's not subliminally telling the JP jury that --

HONORABLE TOM LAWRENCE: Well, there is a separate jury form for the verdict the other way, but I didn't provide that.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Well, we had a huge fight over whether the verdict for the defendant has to be unanimous or on a -- I mean, on a five to six vote or not, didn't we? Did we ever resolve that issue? Remember, there was an argument that you couldn't return a verdict of any kind on punitive damages unless it was unanimous?

HONORABLE STEPHEN YELENOSKY: On the liability issue? We resolved that.

PROFESSOR CARLSON: I think the Court resolved that.

CHAIRMAN BABCOCK: The Court resolved that. He said "yes" to that.

MR. ORSINGER: You can get a verdict for the defendant on 10 out of 12 or you have to have 12 out of 12?

CHAIRMAN BABCOCK: 12 out of 12. Okay. Any other comments about the verdict form? Professor Carlson.

PROFESSOR CARLSON: Judge Lawrence, maybe in the side where you say, "All six jurors must agree to award exemplary damages" you might want to track the HB4 language at a minimum because I think it says "finding of liability for and damages" and your form just suggests a unanimous as to the damage number.

HONORABLE TOM LAWRENCE: Okay. Well, I mean, I have no pride of authorship in this, and I would be happy to have -- any comments for rewording something would be appreciated.

CHAIRMAN BABCOCK: Yeah, that probably makes some sense. Okay. Any other comments about this? Okay. Anybody think that we should do more than what Judge Lawrence is proposing on this topic? Okay.

MR. BOYD: I think we should do less. I mean, only in the sense that I think the record should be

clear that this committee is not officially approving the distribution of this form because this form in and of itself I think violates Rule 554, because the court is not supposed to charge the jury at all in justice court under Rule 554.

CHAIRMAN BABCOCK: I think that was the point that Judge Yelenosky made a minute ago.

HONORABLE TOM LAWRENCE: Well, the difficulty becomes -- and a lot of JP Courts do provide some type of a verdict form because when the parties finish their closing arguments someone has to tell the jury what to go do and there has to be some brief way to do that. We have a justice court desk book, and that's provided in the handout, and there are some brief instructions that are provided for in there just to tell the jury what to do and how to render a verdict, and that's about it, but if you don't do that the jury is just going to sit there and look at themselves because there are no other instructions, so you have to tell them something.

CHAIRMAN BABCOCK: Okay. All right. There are a couple other loose ends, again, with House Bill 4. There is a lot of stuff in House Bill 4 about health care liability claims and specifically section 10.01, and there's almost a system of notice, pleadings, and

submission of expert reports. Does anybody on any of the subcommittees think that there are rule revisions required as a result of that, or has anybody looked at that? Those of you who do med mal, I guess.

MR. ORSINGER: Chip, I'll tell you that I don't think that the requirements of House Bill 4 conflict with the existing pleading rules, although if someone disagrees with me say so, and we almost have to make a philosophical decision in specific areas that are heavily regulated by statute whether we're just going to expect the practitioner to know the statute to go to or whether we're going to undertake to write a rule to call to the practicing lawyer's attention that's looking at the Rules of Procedure that you've got special procedures in certain areas. In the revamping of the rules that we did several years ago, I think what Dorsaneo calls the -- I forgot what he calls it.

PROFESSOR CARLSON: Recodification.

MR. ORSINGER: Recodification. We did have a philosophy where we stated a procedure and then there were well-recognized exceptions. We tried to amend the rule to call that to attention, and maybe that's a result of the fact that so many members of my subcommittee are law professors and they're teaching procedure to people who don't know it, and so if they say, "Oh, okay, this is

the way you handle this thing," but then there are whole segments of that that are not covered by that rule, it's natural for the professor to have to say, "But you've got to rook at this statute, this statute, and this statute." And so in fairness we tried to bring in everything, but we can't do it all the time.

There are a lot of special statutes out there that are just not worth burdening the Rules of Procedure with, and so I feel like we need to make a philosophical decision do we want to have either a new subsection of our pleading rules or our stand-alone pleading rule that covers the med mal area or do we just put something in a comment to look at the med mal statute or we just assume med mal lawyers are smart enough to know where to look.

CHAIRMAN BABCOCK: I'd like to assume the latter, but Buddy.

MR. LOW: It seems like to me the committee has three things: Some things the Legislature asks the Court to implement by rules.

CHAIRMAN BABCOCK: Yeah. I think we've already done that.

MR. LOW: Certainly we need to do that. There are some things that the rules are inconsistent, and we certainly need to do that, but I don't think we need to

just draw a rule just because the law has expanded, and the law -- lawyers in that field should know the law; and at a minimum if you think something might be inconsistent in the med mal thing, then you could put a note or a footnote on that; but if it is inconsistent with that then we have to draw a rule.

CHAIRMAN BABCOCK: Right. I think that's exactly where we need to be, and I think, subject to being contradicted by Justice Hecht or Lisa, we have recommended rules in all the areas where the bill mandated it. So what we're really doing now is trying to make sure there is no inconsistency in the rules, and that's behind the issue of responsible third parties where there may be inconsistencies in the rules.

MR. LOW: And if the rule says so many days for this but the Medical Mal Act says differently then that's inconsistent. So, you know, we just -- but not everything is inconsistent.

CHAIRMAN BABCOCK: Yeah. It would be a rule that was just inconsistent because of a legislative directive that applied to all instances with the rule.

MR. LOW: Right.

MS. SWEENEY: I think with regard to Chapter 74 there have been so very, very few of those cases filed and even fewer than that have made it to the appellate

courts. All of the ones that have made it to the appellate courts have been on interlocutory issues. I don't -- if there have been any new law cases actually tried, it's less than a handful, because I don't know about them; and, John, I don't know if you've heard of any or, Buddy, if you have, but --

MR. LOW: No.

MS. SWEENEY: -- I don't think there have been any tried, so there have not yet been appellate court opinions that reflect inconsistencies that are causing problems. I mean, there are a lot of other issues, but I don't know of anything where the issue is, well, the rules say one thing and Chapter 74 says another and what do we do. So I think we may be looking for problems that have not yet manifested and probably we just need to keep an eye on it and wait for reports from the field, none of which I'm hearing yet.

CHAIRMAN BABCOCK: Okay. Anybody disagree with that? John, any conflicting information?

MR. MARTIN: No, I don't know of any problem.

CHAIRMAN BABCOCK: Okay. Good. Speaking of interlocutory appeals, there are, as I understand it, no rules with respect to interlocutory appeals; and there's now a decision, perhaps authored by our own Justice Duncan

out of San Antonio, and another opinion out of El Paso that may have suggested slightly different procedures. Anybody know anything about that?

PROFESSOR CARLSON: That's for agreed interlocutory appeals.

CHAIRMAN BABCOCK: Right. For agreed. Yeah, I'm sorry. Now you can agree to go up, and the question is whether there ought to be procedural rules to determine how one does that. Am I right about that, Elaine?

PROFESSOR CARLSON: Yes, and I would think that we would want to have clarifying rules on that.

MR. ORSINGER: We've had a debate that I remember about who is the appellant, who is the appellee, whether we ought to treat it as a petition for review with a hundred pages or a 50-page brief, and we did a little exploration of that. I don't know think we ever got where it --

MR. LOW: I guess we didn't know what we were doing because we agreed to do that in a case.

CHAIRMAN BABCOCK: When you say "we," Buddy, you are not talking about this committee.

MR. LOW: Both sides, both the plaintiff and defendant. I happened to be representing the plaintiff, and the judge ruled a certain thing on following certain

law, and it was agreed that it would be better to appeal it than just try the whole case and find out, and we didn't have any problem at all. We just -- one was appellant and one was appellee, and maybe I didn't learn much about it, but it worked.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think you might want to run this past Bill Dorsaneo. I believe the appellate rules subcommittee did have -- maybe I dreamed this, but a telephone conference about this. The problem is, is that there are five reported opinions under this permissive appeal subsection of 51.014, I think it's (c) and -- or (b), I believe, and there's five reported opinions, and nobody's gotten it right.

CHAIRMAN BABCOCK: In your humble opinion.

MR. GILSTRAP: No, no, no. No, no, no. That's not my humble opinion. That's the humble opinions of the court of appeals. Nobody has got it right. Every court of appeals said this has been done wrong. Some courts of appeals said this wasn't reversible error, but it is something that needs to be addressed, and I think probably you might want to talk to Bill about this.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I think we did also have a discussion in this committee, I don't know

how many meetings ago, in which we talked about whether or not there would be a filing of a notice and what exactly would invoke the jurisdiction of the appellate court, and so we -- we did have a telephone conference, and there was -- I think Professor Dorsaneo made a preliminary report, so there is an issue there that needs to be addressed.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: So I didn't imagine the dream?

HONORABLE DAVID GAULTNEY: There were several issues that need to be --

CHAIRMAN BABCOCK: Frank, as the oldest member of this subcommittee currently present at this meeting, can you get with Bill and bring this issue back to the full committee at the next meeting?

MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: And you might -- you might take a look at sections 102 and 103 and 10 -- I'm sorry, just those two, of House Bill 4 that deal with the interlocutory appeals.

MR. GILSTRAP: Conflict --

CHAIRMAN BABCOCK: Those sections may be broader than what we're talking about, but you ought to look at those as well; and let's just see what rules, if any, we need on interlocutory appeals. So we'll take that

up at the next meeting, if that works for everybody.

Richard Orsinger, there was a rule -- excuse me, there was a bill that dealt with class actions, Senate Bill 1601, dealing with approving settlement or judgment. I think we've already dealt with that, though, in our class action recommendations, right?

MR. ORSINGER: I believe that that was folded into our comprehensive recommendation to the Court, but --

CHAIRMAN BABCOCK: I'm pretty sure that's right.

MR. ORSINGER: Maybe I better double-check that if nobody remembers.

CHAIRMAN BABCOCK: It's the last item on Justice Hecht's June 16th, 2003, letter to me.

PROFESSOR CARLSON: Chip?

CHAIRMAN BABCOCK: Yes, Elaine.

PROFESSOR CARLSON: My very muddled memory is that we did talk about the cy pres, but I don't know if it was before House Bill 4 or after.

MR. ORSINGER: It was before, I think.

PROFESSOR CARLSON: And then we had a vote, and I think the vote was not --

MR. ORSINGER: Well, we voted not to do anything in the Rules of Procedure about it.

PROFESSOR CARLSON: Right.

MR. ORSINGER: And I'm not sure that we want to, frankly; but, again, this is the question. We have a specific procedure for a very kind of infrequent situation, and are we going to write a rule about that or are we going to let the class action lawyers look at the statute?

CHAIRMAN BABCOCK: Richard, would it be too much trouble to just take a look at --

MR. ORSINGER: Not at all.

CHAIRMAN BABCOCK: -- the statute, Senate Bill 1601?

MR. ORSINGER: Not at all.

CHAIRMAN BABCOCK: And I think perhaps Justice Hecht is not sure that we have looked at this.

HONORABLE NATHAN HECHT: At least the first one. I don't remember a report to the Court about how much was done.

MR. ORSINGER: No, we didn't. We didn't ever adopt anything.

CHAIRMAN BABCOCK: Well, but even report to the Court that we don't think something should be adopted.

PROFESSOR CARLSON: We looked at this before House Bill 4, I think.

MR. ORSINGER: I know that we talked about

it and decided to do nothing, but I could be wrong, but regardless of that we would be happy to look at it fresh and then make a recommendation.

CHAIRMAN BABCOCK: Let's have that issue on the agenda for next time, and it's looking at Rule 42 of the Rules of Civil Procedure in light of Senate Bill 1601. So we'll get that on the agenda.

Pam, are there any -- Pam Baron, are there any rules that your committee is aware of that House Bill 4 impacts?

MS. BARON: No, and I think Steve and I both looked at it, so no.

CHAIRMAN BABCOCK: Okay. Judge Peeples, I wouldn't think that your two rules would have been impacted by House Bill 4.

HONORABLE DAVID PEEPLES: Don't think so.

CHAIRMAN BABCOCK: Okay. We talked to Bobby. Ralph Duggins, on 215 anything?

MR. DUGGINS: No. Last time we reported we had nothing to do pending the draft of the model discovery.

CHAIRMAN BABCOCK: Paula, we've heard from you. Justice Duncan is not here on Rules 300 through 330. Elaine, do you know anything that affects those rules?

PROFESSOR CARLSON: I don't.

CHAIRMAN BABCOCK: I've heard from Judge Lawrence. Elaine, we've heard from you on Rule 735 through 822. Bill Dorsaneo is not here. Frank, are you aware of any other rules other than the ones we've just talked about that impact the TRAP rules?

MR. GILSTRAP: No.

PROFESSOR CARLSON: Chip?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR CARLSON: I thought at the last meeting or the meeting before there was an agenda item, again, the years have not been kind, I think it was Justice Radack made a suggestion to delete the conference requirements on motion for rehearing.

CHAIRMAN BABCOCK: Right.

PROFESSOR CARLSON: And that issue was raised at the UT conference, and there seems to be a robust support for that notion since it's silly.

MR. ORSINGER: It's my understanding that at the Supreme Court level there is kind of a de facto relaxation of that ruling, and I check with the clerk's office every now and then.

MS. BARON: Yeah. I actually had a conversation with the clerk's office. It's not required at the Supreme Court.

MR. ORSINGER: I think the Supreme Court is

kind of relaxing that requirement even though it's in black and white.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: It is on the agenda under Dorsaneo's report, and I apologize, Lisa, but the problem that we have is there are members of our court that believe that de facto relaxation of the rules is not really a good idea, that we should either have a rule and enforce it or not have the rule, and it's a problem with certificates of conference on motions for rehearing, and it's a problem with certificates of service.

And the problem that we see with respect to certificates of service is that the Rule of Civil Procedure certificate of service rule is dramatically different and less comprehensive than the certificate of service rule that is required by the TRAPs, and I think it's the position of our court and I think the reason that Chief Justice Radack sent the letter to this committee or Justice Hecht asking him to refer it to this committee that give us a rule that is the same for the Rules of Civil Procedure and the Rules of Appellate Procedure because it's causing confusion among the Bar, and we're getting a number of nonconforming certificates of service, and it puts us in the position of either having to accept nonconforming certificates of service or strike them, and

neither alternative is very palatable to our court.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Is this issue something that relates to the legislative changes? If it's not --

CHAIRMAN BABCOCK: No.

MR. GILSTRAP: -- then I think we're just straying out of our subject matter, and there is a whole range of issues of rules that have been discussed in the past, and this is one of them. If we want to go there, that's fine. I just don't want to go there inadvertently.

HONORABLE JANE BLAND: That's true. I stand down. You're right. It doesn't have anything to do with House Bill 4, but I thought since Elaine brought it up and Chief Justice Radack asks me about it after every meeting --

PROFESSOR CARLSON: Chip said anything else dealing with the appellate rules we need to discuss.

HONORABLE NATHAN HECHT: This is on Bill's list when he reported the last time.

CHAIRMAN BABCOCK: I can't remember if he reported on this or not.

HONORABLE JANE BLAND: We didn't get to it. It was at the bottom of the agenda last time, and we didn't get to it.

CHAIRMAN BABCOCK: Okay. Well, Angie, will

you make a note that this is something that Chief Justice Radack is interested in? We didn't get to it last time, and we need to get to it, so let's dig out those documents and put them on the agenda for next time. All right. That will work.

Buddy, on the evidence subcommittee, section 801 of the House Bill 4 repeals the evidentiary bar on seatbelt nonuse. Is that something that necessitates a change in either the Rules of Civil Procedure or Rules of Evidence since that bar is mentioned in both?

MR. LOW: I have not addressed that. I've overlooked it. I saw 407, and we were working because of our amendment now looking at a possible amendment to 407b in the State Bar, but I have not looked at that and I apologize, so I'll have to get my committee to focus on that.

CHAIRMAN BABCOCK: Let's put that on the agenda, too, because this is something, as I understand it that --

MR. LOW: Right.

CHAIRMAN BABCOCK: -- in both the Rules of Civil Procedure and in the Rules of Evidence the seatbelt bar is mentioned.

HONORABLE DAVID PEEPLES: I'm not aware of that.

PROFESSOR CARLSON: I don't think so.

HONORABLE DAVID PEEPLES: Supreme Court did that way back and then the Legislature ratified it and then they changed it last year. I don't think it's in the rules.

MR. TIPPS: Where would it be in the rules?

MR. LOW: It's never been in the rules. Like David says, it's just been accepted. I mean, the Court wrote an opinion, and it never was questioned.

CHAIRMAN BABCOCK: So you don't think it's in the Rules of Evidence or the Rules of Procedure?

HONORABLE BOB PEMBERTON: Chip, I think it may have been buried in the Transportation Code somewhere in the seatbelt law and then it got repealed -- got changed last session.

CHAIRMAN BABCOCK: Okay. Well, then maybe we don't need to do anything. Is everybody pretty confident that it's not in the rules?

MR. LOW: Yeah, I know it's not in the rules.

CHAIRMAN BABCOCK: Okay.

MR. LOW: But I thought maybe you were asking that we draw a rule --

CHAIRMAN BABCOCK: No, no, no.

MR. LOW: -- to adopt that because it's

never been in the rules. It started with a Supreme Court opinion some years back.

CHAIRMAN BABCOCK: That's okay. We don't need to take on things -- problems that aren't there.

Okay. Anybody -- the Jamail report is already done. Any other HB4 issues that anybody is aware of? Okay. So we -- yeah. I'm sorry. Harvey.

HONORABLE HARVEY BROWN: I think that we should look at and have a real healthy debate about the supersedeas bonds. Right now there's a rule that says -- and some people remember the rule number, I don't, but it says once a supersedeas bond is filed there is no discovery. Well, now that there is a 25 million-dollar cap on the amount of bond or 50 percent of your net worth some parties are saying, "Well, we're really not secured; therefore, we should be allowed to do discovery and try to have some type of equitable relief to prevent us from being more insecure in the future because the company or the defendant does something," so I think some courts are struggling with that issue.

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: 621a. Rule 621a.

CHAIRMAN BABCOCK: That's not a -- that's not a House Bill 4 inconsistency issue, I don't think, is it?

HONORABLE HARVEY BROWN: Not necessarily, but it's a question of what are the ramifications of House Bill 4 on that rule which says there's no discovery.

CHAIRMAN BABCOCK: Okay. Justice Hecht, what about that? Is that something the Court would like us to look into or can you tell?

HONORABLE NATHAN HECHT: I can't tell.

CHAIRMAN BABCOCK: Okay. The way we've been doing it is if the Court wants us to look at something they'll tell us, but now that you've raised it we'll see about assigning it to a subcommittee. It would probably be Judge Lawrence's committee that has Paula Sweeney, Jeff Boyd, and Carl Hamilton on it, if it was assigned, so we will get on that. Thanks.

MR. ORSINGER: Can I ask a follow-up question?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Is discovery permitted on the issue of net worth when the bond is being cut down? Is it clear that discovery is permitted?

PROFESSOR CARLSON: Yeah.

MR. ORSINGER: So the question here is after you've had discovery in a trial on net worth can you do later discovery on like the financial condition of the defendant?

PROFESSOR CARLSON: I think what Harvey is saying is now that you can partially supersede a judgment, you don't have to supersede punitives, for example, can you do discovery on the parties -- their asset situation?

MR. ORSINGER: You're talking about discovery in aid of collecting the judgment?

PROFESSOR CARLSON: Yes.

MR. ORSINGER: For the unbonded part.

PROFESSOR CARLSON: Uh-huh. I think that's what you were saying, wasn't it?

MR. ORSINGER: I think that's a pretty important question, I agree.

PROFESSOR CARLSON: Harvey, did I --

HONORABLE HARVEY BROWN: Yeah. That's right, and sometimes the party has posted 25 million, so you don't have any discovery on the net worth issue.

MR. ORSINGER: Uh-huh. Okay.

HONORABLE HARVEY BROWN: And then there is a question do they get any discovery.

MR. ORSINGER: Interesting.

CHAIRMAN BABCOCK: Okay. Yeah. Judge Peeples.

HONORABLE DAVID PEEPLES: Just on the general question of what issues we study, I would like to suggest that we wait until the Supreme Court asks us to

study something before we study it because if you look back over the years we spent untold man hours, person hours, studying things and then we never hear back from the Supreme Court, and we don't have the right to expect them to implement what we recommend, but I think that -- I mean, I would prefer that before we spend very much time on anything, we get some indication from the Court that they're interested in hearing from us on it.

CHAIRMAN BABCOCK: I completely agree with that, Judge, and to the extent it's been within my power that's how we have been doing it for the last five years.

HONORABLE DAVID PEEPLES: Lately, it's true.

HONORABLE STEPHEN YELENOSKY: You're not thinking like the academic that you now are.

CHAIRMAN BABCOCK: Okay. Here is something that the Supreme Court has asked us to look at. Justice Wainwright forwarded me a request to study an issue relating to exhibits that are admitted, tendered in offer of proof or offered in evidence being part of the court reporter's record, and I just got this a couple of days ago, and I told him we would be -- we would bring it up and refer it to the appropriate subcommittee for discussion at our next meeting, and the question is what is the appropriate subcommittee.

David Jackson, our court reporter, should

surely be involved in this, but what subcommittee did we think was the appropriate one? It spans Rules 75, 14 and -- 75 and 14 and Rule 13 of the TRAP rules.

MR. ORSINGER: You know, I can make a comment here. I know you don't want to get into the merits of it, but I think this is almost stealth eminently a beneficial recommendation, and in my personal experience there's quite a variety among court reporters as to whether they consider marked and offered but rejected exhibits to be their responsibility or not, and sometime ago this committee decided the best repository for exhibits was the district clerk, I think, until the record was being filed by -- if I understand that process, and I have had a problem with court reporters not recognizing rejected exhibits as part of the record, and you don't realize that until you're writing your brief and you've got to chase them down and so --

CHAIRMAN BABCOCK: Richard, we just determined who's subcommittee this goes with.

MR. ORSINGER: I can write the recommendation over lunch.

CHAIRMAN BABCOCK: I knew it would reveal itself if given enough time, but would you make sure that David Jackson who is not --

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: -- on your subcommittee gets involved in it? And, Angie, make sure that Justice Wainwright's request gets to Richard, and let's follow-up with Justice Wainwright so that he knows that we've done this. So there's one, Judge Peeples, that fits the rule of when the Court asks we respond.

Speaking of the Court asking, there is something that I want to take out of order because we have some guests that have traveled to be with us; and it relates to Item 8, which is proposed Rule of Judicial Administration 14; and Tom Wilder, the District Court Clerk for Tarrant County is here and would like to speak briefly on this; and Clyde Lemon from the Harris County district clerk's office is here.

This material was provided to you only recently, and there has been -- since we got it and put it on the agenda there has been a flood of e-mail traffic that has come in that I don't even know if it's on the website, and in addition one page of the proposed rule was not included in the PDF file, so we've got all sorts of problems here, but this generally -- and Justice Hecht may want to give us more background on this, but the Texas Judicial Council did a substantial study, held public hearings, and made recommendations regarding access on the internet to court records, and it's a big issue

nationally, a lot of states have studied it.

In the materials we have some report on what other states have done, but there is a proposed rule, and the Court has asked us to look at it and give the Court our comments. And, Justice Hecht, do you want to give people more background, because I know you know more about it than I do?

HONORABLE NATHAN HECHT: The Congress passed a statute that requires the U.S. courts to make available electronically all documents that they have electronically; and since the U.S. courts are going to electronic filing, that will soon be a lot of documents; and things basically fall into three categories, things that the parties send in, things that the court itself generates, and then other.

And the Federal statute says that the Supreme Court of the United States shall make rules to protect privacy interests. So after that statute passed, the U.S. Judicial Conference designated a couple of groups to work on these, implementing the statute, and there are two basic implementation problems. One is all of the policy issues that surround how much of this goes to the internet, under what circumstances, what is redacted, how does it get redacted, the policy issues about what should be known through this electronic access process. That's

the policy issue.

Then there's just a mechanical issue about, okay, then how do you do all that, physically, how do the parties and counsel and the clerks and the court make sure that this happens. The policy issues on the -- in the Federal system have more or less been decided by the committee that the U.S. Judicial Conference charged with doing that, and without going into detail, they have been decided very much toward making what's filed available electronically. Then -- and there are some exceptions. Then the Federal advisory committees are in the process of going through trying to figure out a mechanical way to carry out policies that have been cited.

As Chip says, a whole bunch of states are doing this at the same time, not because Congress requires it but because they either have a state statute telling them to do it or because they just think it's a good idea; and the Judicial Council here in Texas took this issue up about a year ago; and they have had numerous meetings on this, mostly aimed at the policy issues but to some extent at implementation; and they have gotten a lot of good information from the clerks' offices about what people are doing or wanting to do or in the process of hoping to do at various different places in the state; and they have made a recommendation to the Court, which is in this

stuff, I think, right?

CHAIRMAN BABCOCK: Right.

HONORABLE NATHAN HECHT: And so then the Court just got this a little while ago and has not had a chance to discuss the policy issues, and our liaison -- well, not our liaison, but, yes, I guess our liaison to this group that has worked on this for the last year was Chief Justice Phillips, and he's gone, so that leaves a bit of a vacuum there, and we've got some -- the Court is just going to have to take this up and go through the discussions and try to get up to speed on the policy issues.

But no matter how the policy issues come out, the Court will want this committee's views on how to implement those policies, how to make them work, what instructions to give the clerks and so on. So rather than wait until next meeting, which may be in January, but even so, rather than wait that long, we decided to go ahead and send this over to you so that you have it, you can start looking at it.

There's a lot of stuff here, and it's very interesting to look not only through the Judicial Council's proposal but through the analysis of the other states so you can begin to see what the privacy issues are. And then while the Judicial Council I think has done

a very good job of venting those issues, still there may be some input from this committee on that because the privacy issues are heavily affected by types of cases. There are wholly different privacy concerns in family cases than there are in med malpractice cases than there are in contract cases.

The same thing is true in the Federal system. There are immigration cases, and Social Security cases have whole different problems than ordinary civil cases and criminal cases. And so it will -- it really will require a great deal of input from different areas of practice to be able to see how this disclosure is going to work throughout the state, and because both -- there's basically two sides of the debate, and both sides have a gigantic interest in how this comes out, because the interest in public access to information in the court system is a historic and deep-seated interest. The interest of privacy is equally important and deep-seated, and there has to be some balancing here.

And the changes in what electronic access means, that is to say as the internet keeps changing, but what we thought was a big problem five years ago may have disappeared and now something else is a big problem, it really requires us to do a good bit of thinking about this.

But on implementation and on just how to roll it out, several clerks offices are way ahead of all of this, and they have done a lot of work on this, and so I guess we'll hear from them.

CHAIRMAN BABCOCK: Yeah. And Tom Wilder from Tarrant County is here, and there is a letter on our website from Lisa to myself that has been perhaps misconstrued. I don't think Lisa intended to say nor does this committee mean that there are no efforts being made in this regard, Tarrant County being a good example. Harris County is another that I'm aware of. Just that we don't have any statewide statute or statewide rule that governs this, and that's what this effort is all about.

But, Tom, if you could in five or so minutes just give us a report on what your county is doing, and if there are some issues that you would like us to be sensitive to as we're going through the rule and making our recommendations to the Supreme Court, that would be -- that would be terrific.

MR. WILDER: All right. Shall I present from the podium, or do you have somewhere else you prefer?

CHAIRMAN BABCOCK: Well, you can squat in the middle or you can go to the podium or whatever your pleasure is.

MR. WILDER: All right. Thank you, Mr.

Chairman. Justice Hecht and Mr. Chairman, members of the committee, I don't think this is on, but I rarely need amplification of my voice anyway. Our county got into this some 10 years ago when I was elected. I'm going to give you a little history because our county is like a microcosm of the rest of the state. Various clerks offices are in the Stone Age on this; others of us are out in front of the pack. Because we got started on it early, we have sort of addressed some of the issues that you will hear both pro and con about this and which Justice Hecht so ably laid out.

There are concerns at the Federal level. I work with a House committee and have filled out two massive surveys from the GSA over the last year regarding the use of Social Security numbers, and in your draft rule that you have that I believe -- Lisa, do they have the draft rule?

MS. HOBBS: Uh-huh.

MR. WILDER: You are addressing that, and it needs to be addressed because if we don't address it they're going to address it at the Federal level, at least the staff tells me, and that's going to have a huge impact on our operations.

Ten years ago when I first took office in '95 our county judge, Tom Vandergriff, asked me to put

together one of these systems. I have a lot of, you know, sort of large-scale computer knowledge, and I proceeded to do so. Little did I know that it would take the approval of 26 district judges, 14 county judges, the sheriff, the district attorney, the county clerk, and an assorted commissioner's court; and the judge, I kid him to this day that he sort of suckered me into doing this because I was the rookie.

Well, after about nine months of various debate and hearings or whatnot, we came up with a plan that is much like the draft rule that you have, only it was in the form of court orders, and our judges signed those. Other county elected officials had to be coerced into signing them, and we've had sort of a running gun battle for 10 years over that. What you are doing here today will in large measure stop a lot of that wrangling and hopefully hold down the number of lawsuits and other contests that we get from outsiders who want bulk distribution of records, which my judges have never allowed and which I have been ordered not to allow, and we've won two lawsuits on that from major entities where the courts held that -- basically they were thrown out on summary judgment. We have issues up to and including today in our county where the sheriff is attempting to grab judicial information off the mainframe and put it on

a free and open website. The county clerk had previously attempted that, and the judges ordered her not to do it. She has the same court orders and the same duties that I do.

So this is a -- much needed access to these records, though, exists from landlords, employers, I mean, Lockheed, Bell, all your major employers in town, many information vendors who do work for other employers, landlords who get sued if they don't do background checks on tenants, and I could quote you chapter and verse on that, but I'm going to try to cut this short. So you have many, many entities. Nonprofits even check backgrounds on volunteers anymore.

So I have hundreds of subscribers, and this is the key portion. Rather than throw this open on an open website, if you will, my judges prefer that we hold it under a subscriber agreement, and we would have a little fee. Of course, district clerks don't have the money -- when I go to commissioners court to get something I have to bring revenue. County courts have money. That's another issue, but it's a practical reality. JPs would be in the same boat. They don't get money, neither do I. So I've got to bring revenue to do it, and just as a matter of philosophy, you would want those who use the system to pay for it.

Now, the way this newest technology was implemented was the web access. My old technology was a dial-up system that for all practical purposes it was a remote access from people's offices or whatever. The web access that we put on where you can actually in addition to our case management data, which there is an exhibit on the original court order that says what that data is, what is judicial records, the web access was like an addendum that simply let subscribers come in another door. I was glad to see Ralph Duggins being a member of this committee because his firm is a subscriber to this.

The way the judges handled that was to have a debate at the Bar association, and it was debated pro and con, and over two-thirds of the Bar wanted this access. In fact, the one that the judge asked to be -- to do the con, he said, "Now, Tom, I'm going to be against you today, but as soon as you get that system in place I want to be one of your first subscribers," because I get nothing from compliments from the Bar, the news media, the people that use this; and yet it allows the judiciary to control their records as is recited in *Nixon vs. Warner* and other important cases that are part of the body of law. There's also over 20 years of attorney general's opinions and other cases where it has been held that judges may control the records and direct their custodian,

the clerk of the court, to operate in a certain fashion.

So you have a rule before you that will take away a lot of the problems that have approached this, including those who want to put this on a wide open access, no restrictions, which I do not believe is in the public's best interest, and I will be happy to take your questions after about that, but again, I'm going to try to shortcut this a little bit.

On your existing rule, there were some things that although the rule passed 16 to 3 it was posited by Justice Phillips that those of you who would want a free and open access vote one way and those who would want it a more restrictive subscriber access a` la Tarrant County would vote the other way. Well, the vote was 16 to 3 to do it with the more limited area.

However, somehow or another in the rule there was several things put in here that would make it impractical for us to implement it, especially if we already had a system going or if you had, you know, old disposed records and you wanted to include them in something new or you started this from a certain date and went forward, to go forward, but really you need to include all your records in this if you possibly can in the interest of a subscriber having the most access.

And I would respectfully refer you to these

several places in rule -- the proposed Rule 14. First Rule 14.5(d)(1), and, Lisa, was this sent to the committee, this document that I have?

MS. HOBBS: (Nods affirmatively.)

MR. WILDER: They have this, okay. As I read Rule 14, there are two classes of records. There are court created records and then other filings in the case. Our judges took the position that if it was open at the courthouse, in other words, Mr. Clerk, if you had a paper filed and it was open in the public, that that should also be open on this more restricted website. What that does is keep the doctrine of practical obscurity in place. If you're coming down to look at a paper file, you've got to have a name and, you know, and/or a case number. You've got to come downtown. You've got to park. You've got to come in and find the record, and basically there are barriers there to the casual snoop who may just be looking for records for something that's inappropriate.

By using a controlled website like this with subscriber agreement application, we know who we're dealing with; and with a little fee in there -- and Judge Sudderth, who chaired the committee for the judges, he actually negotiated that fee as to what it would be to be enough to eventually -- we're not covering our costs now, but be enough that just your casual teenage surfer

wouldn't be interested in hooking onto this system.

It also gives me the ability to if they violate the security rules or use the information in some inappropriate way, that I can cut them off; and you have that in your rule, that I must, you know, have the proper security things and, you know, sort of monitor this, and that's good.

You also outlaw or prohibit bulk distribution of records, which has been -- which is an awful thing, and again, I'm not going to get into that unless you have individual questions. You do make the same allowance that our judges do --

MS. SWEENEY: Can you just tell us what that means? That bulk distribution, can you just tell us what that is?

MR. WILDER: In my first big fight and one of the first lawsuits that -- the first times I was sued was somebody wanted all of our court records downloaded to an individual, to a disk, basically a bulk download of records. So everything that was in our mainframe database would be given to them in bulk.

Now, there are problems with that. First of all, how is a criminal judge ever going to expunge a record if you sold tapes and disks all over the country? Now, other counties do this, but my judges have never

wanted to do that; and, frankly, the county fathers never wanted to do it. When I had a fight with another entity in the county, my commissioners court gave me $5,000 and I hired Senator Harris to brief the Attorney General, and we got a so-called prior determination that we do not have to even bring it before the Attorney General again about this bulk download of records.

But you're actually putting that in a rule, because I had a conversation with one of my colleagues in another county this morning, and she's deluged with all of these requests. They're very expensive to comply with, and yet they don't do the job for their requestor because the day you hand out that disk it's outdated. With 52,000 cases a year, you know, if you hand out a disk and they don't get another one till the month later or six months later when their people that are buying that information, they're not getting the rest of the case; whereas when they come in under a subscriber agreement they're getting what happened that day. It's updated right to that day.

So if the person was acquitted or the DA dropped the charges, it may still show that pending on that disk, but it's going to be up to date. If I had an expunction order, boom, it's gone that day within five minutes.

But then if you sold tapes and disks -- one

of the ones that sued me was in Florida. Now, how would I go to Florida and try to get that expunged if -- and we have hundreds of expungements now, because people understand when you're charged with a crime that's on your record forever; and as you know, I'm sure, you're only entitled to an expungement generally speaking if you're found not guilty or the DA dropped the charges or your no-billed by the grand jury or whatever; but it is definitely in your -- or the person's best interest to come in and get an expungement because employers will deny you, you know, employment. Landlords may deny you an apartment. Lenders may deny you on credit if you've got any kind of criminal background. I've seen that happen. So that's what the bulk download talks to. Yes, Andy.

MR. HARWELL: Just a question. How do you differentiate the downloaded record from a paper record if someone comes into the office during this interim period before it's expunged and buys a paper record, which they can do because it's an open record? You wouldn't then go back out to capture that document that had been copied and sold to this individual, would you? How do you see the difference there?

MR. WILDER: That's true. Frankly, you don't. When the paper record -- again, to paraphrase *Nixon vs. Warner*, there is a common law right of access

because the records of the judiciary have an exemption under Public Information Act. They are considered to be open for inspection, but that right is not unlimited, as that case says. Who limits it? The judges, with the clerks' participation. So, yes, a paper record, if I sold, say, a copy of the indictment, there's no way that I could physically get that back. We don't know where that's going, but that doesn't happen that often.

What you have there is an ability of, say, one of these information vendors that's doing background checks for employers, and if they have a disk, they've got that in their possession, it's difficult to get it back, but if I have control of that record -- in other words, it's much more -- the capability for a more widespread distribution exists with the disk and even out of state that probably isn't there on the paper record.

Now, my judges have always taken the attitude that if it was open in the paper file, we could put it on the web access, again, as long as we kept it in a controlled way, but I have given each of my judges the technical ability -- all they've got to do is put an X in a box if they just can't stand for a particular document to be on my website, even though it's controlled by, you know, the subscriber agreement and a little fee and whatnot, they can just X a box and say, "Don't put this on

there," and we can hide that. That's very easy to do.

What we can't do is go back through the hundreds of thousands of cases that we've got and do that on a go-back basis, so I would urge anything that this committee does, do it on a prospective basis; and, of course, those counties that have microfilm, as Bonnie Wolbrueck and I were discussing, how do you go back and dig it out of microfilm? Now, we're converting all of our microfilm to image products where it's essentially a seamless system, and we're getting off the microfilm because of the limitations. If the feds came in and said, "Okay, you can't show Social Security numbers in any court document anymore," as I have told them, I don't know how you comply with that if you're using microfilm as your primary backup document, and if you've destroyed the paper record, that's all you've got. I'm sure you-all do that much more in the county courts possibly, Andy, than we do in the district courts.

But essentially the system that we have in place and which this rule pretty much tracks, with these few exceptions, is something that will take care of your problems; and in 10 years, other than the ones who want to try to break the rule and either put the stuff on a free and open website like the sheriff that we're -- my local administrative judge was quoted in the paper this morning

that we have a court order in place, the clerk is ordered not to allow access to this information, and the status quo will be maintained. He alluded to the work of this committee, that he wanted to wait and see what this committee decides because that may alter what we do. Now, I hope that -- did that answer your question, someone? Andy, do you have something else?

MR. HARWELL: I had one other question. So you approve the subscriber then that wants to pay the 35-dollar fee?

MR. WILDER: Right.

MR. HARWELL: What are the criteria for this subscriber to be either approved or denied access to your system?

MR. WILDER: Just what you have in your rule, that basically I have to treat everyone the same. Now, I have denied one person or one entity access to the records, and that was the Republic of Texas, and Mr. McClaren that was out here and took hostages out in West Texas, before he got into that -- they're letting him out of jail. I'm not sure why. He threatened me as well as other clerks, but he is -- he was sitting in my office and wanted to make copies of all the records that I had, and I said, "No, that would be physically impossible." He wanted to set up a copy machine in my office, and I said,

"Well, we'll be here till you and I are both old and gray if you expect to make copies of all the records. So, no, that's unreasonable. I'm not going to allow it." Then he wanted a bulk download of everything, and I disallowed that because I'm ordered not to allow it in my county.

Thirdly, then he said, "Well, I want to hook onto your online system," and I declined that because they have a history of misuse of court records, which was discussed in various court cases, including *Nixon vs. Warner*. So on that basis I declined to allow him to have them; and about that time he decided he would get violent; and he's, like I said, either out of jail or getting ready to get out of jail.

So we don't really say, no, you can't have them, but after the fact if I found that they were somehow misusing them, and we've not -- the only problems I've had, there's been a few over 10 years that wouldn't follow the security rules, and we cut them off until they decided to follow our rules.

Yes, ma'am.

HONORABLE JANE BLAND: Bottom line, are you in agreement with the proposed rule, and if you're not, can you tell us what areas of disagreement you have with the rule?

MR. WILDER: Yes, I will. As I mentioned

before, 14.5(d)(1), case records other than court created records. There appears to be a split arrangement in the rule. Now, Lisa and I had some back and forth yesterday on that. She felt like we could overcome this if my judges wanted to have all the documents under the subscriber agreement, not just the ones that are not court created documents. And to this date that's -- I mean, I talked to them before I came down here. That's what they would like to do.

There is a sentence in the last paragraph. In fact, it's the last sentence of 14(e), as in elephant, that says that if the judges create a local rule and you-all -- and the Supreme Court approves it, they cannot -- at least as I read it, essentially in court include the court created documents, so I'd ask you to take out that last sentence so we could incorporate -- in other words, we could put the whole file under the protection of the subscriber agreement and, therefore, under the protection of the judiciary.

CHAIRMAN BABCOCK: Tom, are you talking about 14.5(e)?

MR. WILDER: It's the very last sentence, let me get the actual --

MS. HOBBS: It's 14.4(e).

MR. WILDER: Maybe I misquoted it.

MS. HOBBS: On the bottom of page three.

MR. WILDER: Lisa, do you have it there?

MS. HOBBS: 14.4(e) on page three.

CHAIRMAN BABCOCK: Okay. Thank you. That's all I needed. Tom, one other question, could you get us a copy, just a form copy, sample copy, of your subscriber agreement?

MR. WILDER: I have provided that to various levels of staff, but I'll be happy to -- in fact, it's on my website, but however the committee would like to have it, I will be happy to.

CHAIRMAN BABCOCK: Well, we could probably get it from your website.

MR. WILDER: www.tarrantcounty.com, and go to "web access," and that has got a copy of the subscriber agreement there.

CHAIRMAN BABCOCK: Great.

MR. WILDER: And that agreement was written by one of our judges. She was the chief of civil litigation, Dana Womack, at the time she represented me. She's now one of my district judges, and that subscriber agreement has worked well. It is adapted by another agreement that's on there about if you want web access.

CHAIRMAN BABCOCK: Judge Yelenosky has got a question, and then after that we're going to take a break.

And, Tom, can you hang around during the break and answer some questions?

MR. WILDER: Yes, sir. I'm here at your pleasure.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I just wanted to ask, a couple of words you used, if you could explain what you meant by them, one was "improper purpose" that some people may have and "misuse."

MR. WILDER: Yes, sir. That's somewhat nebulous. I'll recite something that apparently happens in the family section. Some of my family law judges until they fully understood the protections of the court order weren't real happy with the idea of putting these up on the web because Ms. Jones -- there are actually people in churches who apparently want to search the divorce records for members of the church and then make copies of them and pass them out, especially under the old rules where you can allege adultery or whatever, and there are -- I guess we used to call them busy bodies, who will go and try to find records and go hand them out in the church to embarrass people.

There are also political opponents. Probably the most misuse of court records comes in the political field. We had an issue in our county on court

statistics that I've always closely held, and I understand other clerks don't put them out at all, where a challenger to a judge, well, he selectively quoted some court statistics off of an internal report that put the judge that he was running against in a bad light; and I contested him on it and said, "You didn't do this correctly. You pulled it off the wrong line, and basically it shouldn't have been used in the first place." That's sort of another debate, but --

HONORABLE STEPHEN YELENOSKY: Well, if we use that standard, we wouldn't have political campaigns at all.

MR. WILDER: I understand. But if I had had that stuff under the subscriber agreement that we have, I could control that to some degree. Not entirely. None of this is foolproof.

HONORABLE STEPHEN YELENOSKY: Well, and that's my concern, is you're controlling it, because there's clearly discretion there. Anyway, we will get --

MR. WILDER: It's discretion with the overview of my judges who can always overrule it.

HONORABLE STEPHEN YELENOSKY: And as a judge to be, I'm still concerned about it.

CHAIRMAN BABCOCK: Okay. Tom, thanks so much. We're going to take break, and if anybody has got

questions during the break, this discussion about this rule is not going to end today, although I know that the Court is anxious to get our views. We're going to study it more closely; and we have a subcommittee that has met, albeit briefly, about it; and we'll get into that after the break. But we're in recess. Thanks.

(Recess from 10:56 a.m. to 11:20 a.m.)

CHAIRMAN BABCOCK: Okay. Tom is going to take five minutes. He's going to be on the clock, so listen attentively, and we'll get the cow bell and the foghorn when we get to five minutes. Tom, how about it?

MR. WILDER: Thank you, Mr. Chairman. Again, the split case record thing would be a real problem for us to implement. I just ask you to look at the verbiage that's in my document here as to why my judges after talking to them again this week would prefer that you just simply let us image the case file and not put it into two categories of court created documents and other filings. If you put the court created documents, if you allow people to put them wide open on the web, you are really not offering them protection there.

The date of birth, this would be a real chiller. If you restrict the date of birth to the sensitive data sleet, I mean, other things ought to be on that sensitive data sheet, since I'm the one that proposed

it, but the date of birth is not one of those. You can find dates of birth a lot of places, but what we use date of birth for and what, like Lockheed, if they're looking in to see if somebody has got a criminal background, they're going to use that date of birth as a unique identifier and something to -- you know, we're going to have 16 whatever person's name that they log on for; and if they have got the date of birth, which they would have on their application, they're going to be able to use that. But if we can't display that, that kills the use of it because they're not going to take the chance that they might pick the wrong one and deny them hiring, and I'll go into that in more detail if you want.

The cost of copies, for whatever reason this popped up in the draft rule. We've always taken the position that since we have an exemption under 552 of the Government Code, which is the Public Information Act, the records maintained by and for the judiciary, that we then should not be subject to the cost schedule that's mandated in that particular statute. That has always held up. If -- right now I get 35 cents a copy, which is based upon a workflow study and it's based upon other statutes that allow me to charge that. Other counties get different amounts based upon what their costs are. I cannot get more than what my actual costs are.

This would be a hit of $150,000 a year to my county. My commissioners would go crazy, and I can tell you what we spend for that, if you -- you know, what we use that money for. So if you'd please consider deleting that as far as mandating what a -- it essentially would be only 12 cents if we use the GSA cost schedule.

That copy fee, we do not charge a copy fee on our web access, just when they come to the courthouse to make paper copies, but the way I read it you would even be restricting what we do at the courthouse on that. So those few of -- oh, and one last thing, the Family Code proceedings, currently your rule would prohibit the display of any family court case on a website, even one with a subscriber agreement as we have.

Now, I don't personally think that's fair to the family Bar. Harris County has problems with that; and I know my colleague, visiting with the chair yesterday, and I would simply ask you to reconsider that because, after all, they can come to the courthouse and look at that paper file; and if you keep it under -- if you make the whole file subject to a subscriber agreement, which right now you've got this split situation, then you afford yourself to be covered under the doctrine of practical obscurity where they have some costs and some barriers to jump over just like they would if they had to come to the

courthouse.

So with that, I appreciate you listening. If the chair wants to entertain any other questions, I will be happy to answer it.

CHAIRMAN BABCOCK: Thanks very much. As I said before, we're not done with this by a long shot, so we'll have plenty of additional opportunity to talk about it. The phrase "practical obscurity" I'm glad to see has now been turned into a doctrine as of --

MR. WILDER: Theory, theory. Thanks, Mr. Chair.

CHAIRMAN BABCOCK: You're welcome. Thanks very much for coming and talking to us. Our subcommittee on this is the subcommittee on judicial administration, which Mike Hatchell chairs, and consists before today of Ralph Duggins, Sarah Duncan, Tom Gray, and Stephen Tipps. We've had a couple of people who have asked to be included for the purposes of this rule, and they all bring great expertise to us, so I think it would be appropriate to add Alex Albright, Bonnie Wolbrueck, and Andy Harwell, all whom have got practical experience on this.

In Hatchell's absence, Ralph and Stephen and I have had two minisubcommittee discussions about this rule, and I think it might be helpful if we just throw out a few things that we see as a practical matter, if it's

all right if I can go first.

The one issue I see right off the bat is that there is no cross-reference or no attempt to blend this rule with 76a. There are different definitions for what a court record is, and it seems to me -- and, of course, as we all know, 76a was a highly negotiated, if that's the right word, rule that a special committee spent a lot of time working on. It may or may not need revisions, but in any event it needs to be harmonized with this rule, and right now there are certainly conflicts that I can see.

I also see that, as often happens, you get people working on rules and they try to solve all problems. I'm not sure granting immunity in a rule is something that is necessarily within the rule-making authority, but Rule 14.9 of this proposed rule purports to grant immunity to Bonnie and Andy, and, nice try, but I'm not so sure that --

MS. WOLBRUECK: And the problem with that is?

CHAIRMAN BABCOCK: Well, you can fight hard for it in the subcommittee, but I would have concerns about that. There -- you know, having specific sanctions in a rule, we've talked about that a lot in the context of other rules. We seem to have a lot of sanctions

availability to judges if they want to use sanctions, and I don't know about adding that.

And there are, as people have said to me on the break, a number of First Amendment issues that are all over this rule, and I think we're going to have to study it very carefully to make sure that we do it in a way that is constitutional and, more importantly, that the record that we create, because it will probably be on some of this a compelling needs standard, specifically if we try to restrict the use of public documents. We're going to have to come up with a compelling need to justify that, and we need to keep that in mind as we go through. But those were just some of the basic general ideas that struck me as I was reading it; and, Stephen, as the person that has the least amount of hair on our subcommittee, will go next.

MR. TIPPS: Don't know what I did to earn that. I just have -- I mean, I will just add one thing to your list. The one thing that is not clear to me about this rule was the reference in I think it's 14.5(d)(2)(c), which is the listing of specific types of records that are to be excluded from remote access by the general public. The third one is "statements of reasons for defendant stipulations, including any attachments thereto." I have no idea what that is. And I doubt that anybody --

CHAIRMAN BABCOCK: Lisa says that's criminal language.

MR. TIPPS: Oh, okay. Well --

MS. HOBBS: In the recommendation from the subcommittee to the Texas Judicial Council that was clear and then somehow it was just kind of a typo that didn't get clarified in the actual recommendation from the Texas Judicial Council to the Court.

MR. TIPPS: That clarifies that, and then one of the issues that we had discussed in our many telephone meetings concerns this notion of creating a sensitive data form for each case that would contain the data that we're most interested in protecting, and Ralph and I both had expressed some concerns about whether that was a good idea in that we would be putting sensitive data in a place, in a form that if it did get out that could create real problems, but I visited with Mr. Lemon about that from the Harris County district clerk's office at the break, and he indicated to me that he felt that as far as the Harris County district clerk's office goes that a form like that could be adequately protected, but I think that that's obviously something that we would want to give close attention to.

CHAIRMAN BABCOCK: Okay. Ralph.

MR. DUGGINS: I would pick up right where

Stephen left off and say that I know that Tom says -- Tom, you think that this can be adequately protected by a firewall or some sort of security measure, but I just think it's really a knee-jerk reaction to this is that that's placing on a modem or a way to get this out so easily by computer all the sensitive personal information that if somebody can hack into the -- into it or a member of the staff makes an error, somehow it gets it in the wrong form, that we're just inviting problems. And that's just, as I said, was one of our initial reactions.

MR. WILDER: It would never even be in the same database.

MR. DUGGINS: But it would be in an electronic database.

MR. WILDER: We would have to scan it in order to keep it for -- you know, in case the paper burned up or whatever, but that would be -- you can have different areas that there wouldn't even be a pathway into that.

MR. DUGGINS: But somebody could easily put it in the wrong database or if they did retrieve it from the database then it can just be transferred on and on and on. I'm just saying it's a concern that I have.

MR. WILDER: And I understand you want to play devil's advocate with that because that's a good way

to do it, to get it out on the table. We're used to handling things like adoptions, for instance. In all the years I've been there and all the years before no adoption record -- even though we archive those, no adoption record has ever been released accidentally or otherwise, or we've never been hacked into, and it absolutely can be technically done to sequester that information that is not to be disseminated to the public.

MR. DUGGINS: Okay. Well, that was one of the issues we shared. Also, it seems to me the way that in the definitions are done in 14.2 that it includes notes of a judge, and I don't think that that's -- if I'm interpreting it correctly, in my view it should not include a judge's notes taken at a bench trial or any hearing or oral argument, whatever. Because it's so broadly written.

And then I think the 14.4(b) where we -- you speak of what you call a user agreement, in my view that ought to be standardized because if you're going to have a different user agreement for each county, we're going to have problems, and there ought to be something in there about what's called scraping -- I know Anne will understand that -- where commercial users can use a spider, what's sometimes called a spider or robotic search tool, to ping databases constantly to look for some

celebrity's name or some high profile person and just pick up on some piece of information that may have been filed or put in a court file that day; and I think these use agreements ought to preclude that type of use; and in my own view, we ought to try to standardize it and limit commercial use of this. Those were some of my observe -- well, they were our observations, I think.

CHAIRMAN BABCOCK: Okay. Great. Yeah, Bonnie. Sorry.

MS. WOLBRUECK: That's okay. I'll just make a general statement regarding this. First of all, I know that the committee realizes this, but I need to voice it anyway. The clerks take their responsibility as custodians of the record very seriously and -- but because of that, I really think a rule is necessary. You must understand that these decisions right now are being made on a county by county basis, and I think that it's very important that when we're addressing privacy issues along with public issues that the Court really take a hard look at this and make a determination so that clerks know exactly how we need to take care of those court records that we have.

I know that over 15 years ago when I had a gentleman walk in my office one day that wanted copies of all of my divorces because he was going to set up a dating

service, I knew then that we would probably have some concerns over privacy issues, but -- and, you know, we're still dealing with trying to determine, you know, what to give to people and possibly what not to release.

So just so that everybody here realizes that clerks have some issues with this, differing opinions throughout that state on how to handle it. Many of that has to do with personal reasons, other reasons, but the point being that a rule needs to be determined so that clerks in the state know exactly how we handle these court records.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: One of the things, a lot of the lawyers don't even think of administrative rules. You know, we've had administrative rules, and I see lawyers that don't even know about them. Okay. Now, we quite often enter into confidentiality agreements where, you know, you can't file -- you mark something confidential and then, you know, you do that. So we would have to tie it in, as you say, to 76a because if the lawyers don't know about it then they're certainly not going to incorporate this in their confidentiality agreement for some procedure. So some way we need to tie it in or make reference to it in 76a. I don't know how, but we need to not overlook the fact that a lot of lawyers won't even

know about it because it's not in the rules.

CHAIRMAN BABCOCK: Yeah. There are some huge policy decisions. Are you going to have one system for paper records and another system completely different system for electronic records, and if so, what are your standards? It's a pretty meaty issue. David Peeples.

HONORABLE DAVID PEEPLES: Could I ask Mr. Wilder how this works. If I'm at my computer in my home miles away from Tarrant County, and let's say the name Thomas Wilder is in a lawsuit somewhere that if I walked into Tarrant County, I could look that up.

MR. WILDER: Yes.

HONORABLE DAVID PEEPLES: And if I walked in I could get it in paper, and my question is can I get it from San Antonio without coming to Tarrant County? As I understand it, I've got to pay you-all some money and become a subscriber and then I could search the Tarrant County records; is that right?

MR. WILDER: If you were, say, in Houston, yes, sir, that's how you would have to do it. If you came to Tarrant County, you could look it up on the free computer.

HONORABLE DAVID PEEPLES: So the subscriber is just a way that I from a remote position could do what I could do if I was in Fort Worth.

MR. WILDER: Yes.

HONORABLE DAVID PEEPLES: If I was doing a search on Google or something and I put your name in, "Thomas Wilder," will it show that there is something in Tarrant County?

MR. WILDER: No.

HONORABLE DAVID PEEPLES: Okay. So a subscriber agreement makes it off the web, so to speak.

MR. WILDER: Yes, exactly. It's sequestered. You come in through a door, and you couldn't go to any of the search engines and utilize them to find so-and-so has got court cases in Tarrant County.

MR. GILSTRAP: But, Tom, I think you also mentioned you can't text search your documents.

HONORABLE DAVID PEEPLES: Same thing.

MR. WILDER: Exactly. This was similar to what Ralph was talking about about this ping issue. You can't ping our system, and any competent security operation can set that up that way. You may not do a text search where you enter in "Give me every case that has the phrase 'Social Security' in it." You can't search it that way.

MR. ORSINGER: If I could follow-up on what David Peeples just said, it's not just the licensing or subscriber agreement that stops it from being on Google.

If I understood our discussion, Tom, that just technically the data is in visual files --

MR. WILDER: Yes, sir.

MR. ORSINGER: -- and it is not susceptible to electronic search by a remote computer. So it's just technically impossible --

MR. WILDER: It's technically impossible.

MR. ORSINGER: -- for it to be, quote, on the internet. You have to sign onto the system and then use an indexing system looking for a name that you know, and then that's only going to be one of the litigants. It's not a name that appears in a judgment or a pleading.

MR. WILDER: That's correct. It's only the party -- you must search by party name or the case number, or on criminal cases you can enter our local CID number if you happen to know it.

CHAIRMAN BABCOCK: Paula, did you have a question? Paula.

MS. SWEENEY: I have a real concern about the philosophical direction that we're going to take on this. Are we at some point going to discuss the underlying idea of do we have freedom to access these records or not? Because I'm very concerned here that we have gatekeepers protecting records from the public as a threshold when they're records of our court proceedings.

So what's the chair's direction on that?

CHAIRMAN BABCOCK: Well, it's -- I have no direction, but I do have the Court's transmittal letter, and Justice Hecht and I were talking about it this morning, and the transmittal letter suggests that we ought to look at it structurally given the fact that this other committee has spent an enormous amount of time, had six public hearings, et cetera, et cetera. My comment, perhaps foreshadowing yours, was it will be a cold day in hell when this committee doesn't weigh in on policy considerations, but anyway, I think we'll have a fair and open discussion of it. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Just an observation, given the time frame in which we usually work, I don't think we should assume that the technology as it is now is how technology will always be, and if we're going to do this over a period of time it might be good to assume that just about anything is technologically possible or may be.

CHAIRMAN BABCOCK: Yeah. Andy.

MR. HARWELL: Do we all agree at least, or maybe not, that if a record is open to the public in the clerk's office then that record should also be open to the public through the internet or if someone walks in and pulls it up in the office? I mean, are we going to

differentiate between what is a public record over the internet versus what comes into the office? And that goes back to what you're saying. I mean, I --

CHAIRMAN BABCOCK: I think there's been a huge debate about that. If you look through these papers, the report of the committee, that there was a lot of discussion; and this doctrine of practical obscurity, this phrase maybe, is that if it's in the clerk's office, yeah, it's there, it's public; but nobody can get to it or very few people can get to it. But if you put it on the internet, I mean, it truly is accessible; and you've got to think about what you're making truly accessible. There's a big argument that one can have on either side of that, but I don't think you would get a consensus if you went around the room today on whether if it's public in paper it ought to be public electronically.

MR. HARWELL: Can I also add --

CHAIRMAN BABCOCK: Sure.

MR. HARWELL: There are also in the county clerks, not the district clerks, but the county clerks, we're having to deal with these same issues on the land records side with the title companies, and so it might be good if maybe we looked at how that's progressing, too, because I know in title companies there's a lot of work being done in other states with these issues as well.

CHAIRMAN BABCOCK: Yeah. Yeah. And this report talks about a lot of issues, maybe not as comprehensive as you know it. Buddy and then Richard.

MR. LOW: Chip, would they have some system, like right now you can go down and you tell them, "I want to see the records in Jones vs. Smith," and the clerks will get them. Somebody that goes to the courthouse, they're not records like that anymore. Can they go down and say, "I want to see the records," and can they sit down at something and draw them up right there?

MR. GILSTRAP: They've got a terminal. There's a terminal that's open then.

MR. LOW: So if they can do that, we're not depriving them of anything they have now. It's just to add something to it, as I understand it. Is that the way --

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: On the mechanical side of it, I don't want to stop any kind of philosophical debate here, but, you know, we already have -- I mean, there is no incremental cost to people coming into the district clerk's office and asking for a file because the office has got to be open during business hours and it's got a lot of employees and it's got tables and chairs and everything, but if we're going to implement a remote

electronic system that requires software to be designed and maintained, there is a cost that's an additional cost.

And so it seems to me like we have to ask ourselves on a county by county basis or on a statewide basis how much are we willing to pay to make this information more accessible remotely and automatically, and should we make the user of that easy access pay its own way, and that's what's -- I think that's what effort has been made in Tarrant County to try to make it pay its own way, and I think we'll get around to that at some point because some proposals are, well, since we have an obligation to make these records available to the public, let's just make them available to the public on the internet without recognizing that we're talking about hundreds or maybe even millions of dollars to make that happen.

CHAIRMAN BABCOCK: Yeah. Justice Hecht.

HONORABLE NATHAN HECHT: To be -- to clarify a little bit, the -- please keep in mind in talking about the policy decisions, because they are very difficult and they involve a lot of different competing interests, that this is not the first group to have talked about those; and so if we don't look at the work that's already been done and consider all the arguments, because I assure you that in various forms all over the country people have

argued that -- these issues very vehemently. I think it's most helpful at this point in that process for this committee to go through those articles and add to them or comment on them or put your two cents in because there's ongoing debate; and even the rule that's adopted in the short term is not going to be the end of the matter because technology is changing and the interests are perceived differently as time passes.

But the other thing that this committee could add to the discussion that has not been looked at as carefully as this committee is capable of is the mechanics of how any rule is going to get done and specifically whether Tarrant County is -- and Harris County are indicative of Morris County and Trinity County and Cameron County. We have 254 of them, and whether -- how this is going to roll out on a statewide basis with lawyers practicing different places different ways and that kind of complexity that has to be the implementation of the policy.

So I'm not trying to -- the Court talked about this, and we knew we couldn't discourage you from looking at the policy issue, and there wasn't any point in trying, but at the same time don't lose sight of the fact that you're one group out of scores that are talking about this, and -- but you're only one group out of one that's

talking about, or maybe two, that's talking about implementation.

CHAIRMAN BABCOCK: Yeah, Paula.

MS. SWEENEY: Well, all right. Looking at the mechanics of it, on the letter from Polly Jackson Spencer to members of the Texas Judicial Council, under alternative two, which is "Modified remote access," "Place the following limitations on remote public access."

No. 3, "Regardless of whether a subscriber type system is in place the following case records should be excluded from remote access: A, medical, psychologic, or psychiatric records including any expert reports based on medical, psychologic, or psychiatric records."

You just closed the file on all malpractice cases as to the nuts of the case, because all reports from all the experts are going to be based on medical, psychological, or psychiatric records. Ditto most product liability cases where causation is in question and the issue is whether Drug A caused Disease B and all of the experts opine based on the records. So, and looking at the list of the folks on this committee, I don't see any trial lawyers, so maybe they just didn't think about that or maybe it didn't matter to them, but that's the very heart of a lot of these cases that go to public safety. If a drug is killing people and the testimony establishes

it or doesn't, I don't see why you would exclude all of those expert reports just because they're based on medical -- underlying medical records.

CHAIRMAN BABCOCK: By the way, we invited Judge Spencer, who was the chair of the committee that studied this, to attend today's meeting. She wasn't able to just only because we gave her such late notice, but I expect that she will be at future meetings and can give us the benefit of what their committee did, and somebody said to me during the break that they felt disadvantaged when talking about what the Jamail committee did because they didn't really have a good sense of what the Jamail committee would -- what they considered, where they were coming from. We had some trial lawyers on the Jamail committee, but probably not enough appellate lawyers. So she I'm sure will be here, as will I think Elizabeth Kilgo was the staff person that worked on this, so we'll get the benefit of that.

But this is obviously a very important issue, and we'll -- you know, we'll have a full discussion about it, all aspects of it, but Justice Hecht's point is, you know, in terms of how this thing is going to work, we're certainly the last line of defense on that other than the Court, so we need to pay careful attention to it. Harvey.

HONORABLE HARVEY BROWN: Since this has been studied a lot, it seems to me there is some overlap between the mechanisms and maybe constitutional questions. If there's some article that some of us could look at to get a better sense of that overlap I think that would be helpful, because I think some of us have the initial reaction of "Boy, there is some real First Amendment problems," and to draw those lines I think it would be helpful to know what those problems are.

CHAIRMAN BABCOCK: Yeah. The report itself has citations to it.

HONORABLE HARVEY BROWN: Okay.

CHAIRMAN BABCOCK: But I know the Federal system issued a fairly lengthy report that has a bibliography, so that would be a good place to start. Alex.

PROFESSOR ALBRIGHT: Ernie Young and Toni Reese from the University of Texas faculty were on these committees, and they're not in Austin this year, but I just drafted an e-mail. I'm going to talk to them and see if they have anything like that that might be helpful to us.

CHAIRMAN BABCOCK: If you get some resource material, just let Angie know so we that can let everybody know if they want to study on it.

PROFESSOR ALBRIGHT: Right, uh-huh.

CHAIRMAN BABCOCK: That would be great. Lisa.

MS. HOBBS: I wanted to add too is that -- and I know it's been said, but just to reiterate one more time, is most of the recommendations are not changing the access that you have at the courthouse. Most of the recommendations just come into play -- or the more controversial recommendations just come into play when you then make records that are available at the courthouse available on the internet, or online actually. Not really on the internet but online, and so I think that's kind of important to keep in the back of your mind as you look through all the material, is that when are we distinguishing between something that's available at the courthouse and then something electronically available, and the rule is meant to give more access to records, but then to just make that access protect people's privacy interests as well.

CHAIRMAN BABCOCK: Okay. Anymore preliminary thoughts about this? Yeah. Justice Gaultney.

HONORABLE DAVID GAULTNEY: Just so I can understand what our charge is, there is a draft rule attached to this material. Are we supposed to begin with this, because the letter itself that Paula was referring

to of July 16th is a much broader referral than just a draft rule, as I read it?

CHAIRMAN BABCOCK: Well --

HONORABLE DAVID GAULTNEY: I can go through the draft rule, and I have concerns. Some of them are the broadness of the definition of case record, for example. I'm just trying to get a feel for where this committee is going on that.

CHAIRMAN BABCOCK: If you'll look at Lisa's letter of November 2nd, and obviously it could be subject to amendment at any time, "The Court requests that the subcommittee on the rules of judicial administration consider the mechanics of the proposed rule, assuming the Court adopts the policy recommendations of the Judicial Council and presents the rule with any recommendations to the full committee." That is what I take our charge to be.

That, as Paula pointed out, you can hardly talk about mechanics without getting into policy, even if you were inclined to draw a hard line. It's almost impossible to do, but, you know, this committee has strong views, as some of you have already been expressed about these issues, and we do want to obviously recommend a rule that's constitutional. We don't want to recommend to the Court that they implement something that works great but

is going to get struck down by a Federal court in Austin.

MR. ORSINGER: Chip?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: I'm a little concerned about what resources we have available to estimate the costs associated with different proposals. Has any standing committee or court administration body evaluated what kinds of proposals would have -- what kinds of costs associated with it or are we just going to be guessing at that ourselves?

CHAIRMAN BABCOCK: Lisa, are we going to be guessing?

MS. HOBBS: Well, the rule only comes into play if a county or district court clerk decides to have their records available online. So it's not a rule that requires a county or a district court to put their records online. It just says if you do, here are the guidelines that you should follow. So that's kind of the initial standpoint, is we're not forcing any county -- the rule would not force any counties to put money into a system that would allow their records to be available online.

MR. ORSINGER: Would the rule purport to say you either can or cannot charge a fee for this service that you offer?

MS. HOBBS: My understanding, and I did sit

through some but not all of the subcommittee public hearing, my understanding is we wanted to leave that as much to the local entity as we could and so that they could make that call and they have -- some have systems in place, some don't, and that we would only reference the Government Code as a way of stating that you can fund this however the Legislature allows you to fund it, and I guess we were not -- in trying to make our rule as broad as the Legislature allows you to do something, we may have gotten too specific, and maybe that rule should be more broad to make that clear. But the Legislature does step in, I believe, in some situations and tell counties -- or I'm not exactly sure how it works, but I'm sure that Mr. Wilder would, and put some limitations on fees that you can charge and for various things that you implement.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, they've always been able to charge for copies or costs. Could this be considered like a copy? In other words, even though it's not a paper, it's a copy electronically, and I've never heard of a case that was struck down to be unconstitutional because of the cost of the making a, you know, copy or producing it or something. Maybe there is such a case, but that's certainly not my field, though.

HONORABLE NATHAN HECHT: But on this -- I

mean, this is a good illustration. On this issue, this committee might make -- might want to make its views known on whether it's a good idea generally speaking for lawyers to have to pay to get to this or not. But that's not going to -- you know, neither this group nor the Court can force the counties to spend money on this to fund it. We don't know if there will be state funding, so that -- in answer to Richard's question, that's just a whole set of issues over here that, again, are sort of off our table, but if you were interested in exploring it like Tarrant County has been or Harris County, then this is the way you have to go about it.

MR. ORSINGER: Well, if we were to get through the philosophical part and want to get about the business the Court wants us to attend to and if we put the financial part of it off the table, too, then what is it we're really considering?

HONORABLE NATHAN HECHT: Well, we're considering how this is going -- how this is going to work, just the mechanics of the service that Tom has begun to describe and then is described in the rules, the several questions that people have raised already about immunity or about this and that procedural in the rule. This committee needs to look at that as well as, as I say, comment on do we think access should be broader, narrower;

but keep in mind that we have no mandate to do this, so that if we decide we think certain kinds of records should be available, there is still no requirement that Kennedy County make them available if they don't have any money and they don't want to do it.

MR. ORSINGER: Well, if I can just finish, the Judicial Committee on Information Technology, which I sat in on some when we were -- when the committee was considering what to recommend, we had a lot of industry information about what different information access alternatives were available and the cost associated with them and whether they would be provided by the government or whether they would be provided by someone who had a license from the government or whatever, and I'm having a hard time seeing how we're going to be able to grapple with what -- you know, is it -- his county, for example, has decided you can only get an image. You cannot get digital information; you can only get an image.

If we were to say we want the rule to provide that you can get digital information about the content of the document, we won't have any idea what that would cost, and I'm wondering if the counties will even care what we say. I mean --

HONORABLE NATHAN HECHT: Well, the -- they care, as Bonnie says, to this point, which is now they're

off doing their own thing. Each county clerk and district clerk, they have been working on this independently, sometimes together, and they have decided to do different things. The local judges are telling the clerks, "Do this, don't do this. This is a good idea. Don't do that," and it's far enough along, plus we have the Federal -- we have everything that's going on in the Federal system right beside us that it's time to say, okay, you can't put -- take the family context, you can't put family pleadings on the internet that have people's Social Security numbers and home addresses.

CHAIRMAN BABCOCK: Found a way right to his heart, didn't you?

HONORABLE NATHAN HECHT: Digitally or any other way. If that information has to be disclosed in pleadings because of statutes then we have to either find a way around that or else you can't disclose that. So the concerns are now that this is going forward without any attempt to organize it or to control it, it's time to begin to come in and say, "Okay, you can do this, you can do this, you can do this, but you can't do that." On the other hand, to say that you must do something that costs money, obviously we have no authority to do that.

CHAIRMAN BABCOCK: We're not going to stop the debate, but we do have an honored guest who wants to

address us briefly on a totally different topic. Most of you know Edwardo Rodriguez, who is the President-Elect of the Bar. And, Edwardo, I know you want to talk a little bit about the referendum, so now's your time.

MR. RODRIGUEZ: Thank you. First of all, I want to thank all of you for -- on behalf of the lawyers in Texas for the time that you-all take to participate and help the Supreme Court and help all of us through your work. It's -- I know that everyone does it because of your sense of professionalism, but I just want you to know that I and the State Bar of Texas and the lawyers of Texas appreciate the time that you've done that.

Secondly, probably the most important thing, lunch is out there; but the third thing I want to remind you-all is Sunday night is the end of electronic voting on the referendum. I got a report this morning that we've got about 9,500 people have voted electronically so far. Those of you that have not voted yet, please do so before Sunday. Those of you that have firms, during the lunch hour contact somebody back at your firm to send out an e-mail to everybody that's there. We really would appreciate as many people voting electronically as possible. It would be a cost savings to the Bar, and it's the first time that we've been able to use this process, and we want to see how it proceeds.

We're planning on asking the Supreme Court to allow us to vote electronically for the presidential elections next year, so I would just remind you that the referendum is out there and we need to see if as many people can vote electronically. And the cutoff is Sunday night, so after that we wait a period of time, and those people that have not voted electronically will get paper ballots and will have 30 days to return them, and we will know the results sometime around Christmas time, around the 20th of December and so forth. That's what I wanted to ask you-all, and I appreciate your time.

CHAIRMAN BABCOCK: Thanks, Edwardo. You meant president of the State Bar, right, that presidential election?

MR. RODRIGUEZ: Yes, sir. We don't have the other one next year. Thank you-all.

CHAIRMAN BABCOCK: You bet. All right. Back to the fight. Bonnie, you wanted to say something?

MS. WOLBRUECK: I just wanted to comment. I'm sure that everybody here knows it, but every time the Legislature has met over the last couple of sessions they have proposed a uniform legislation regarding our entire records, and a bill passed during the last session regarding criminal records, so this is an ongoing issue with the Legislature, and with that session coming up

again in the very near future I'm sure that additional bills will be filed again. I only state that as, you know, I would hope that the Court could make some decisions as timely as possible and not have it piecemealed by the Legislature, which is going to happen.

CHAIRMAN BABCOCK: Andy had his hand up first, and then Buddy and Carl, and then you, Frank.

MR. HARWELL: This is kind of addressing what Buddy and Richard were talking about. The fee for digital record or an image, in other words, you want to download it to your computer. I'm on the legislative committee for the Association of County and District Clerks, and we're meeting next week to talk about a fee that could be charged, and right now it's been thrown around -- nothing has been voted on or anything -- it's up to 2 cents per image. I don't know if you-all have heard about that or not, that it could be up to 2 cents per image on that fee.

The other thing is about talking about paying for this. You know, this is not too much unlike the Texas Online where if an attorney wants to file they pay an additional fee to go through Texas Online that's totally separate from the clerk.

And then the last point I wanted to make is that the county clerks do have a dedicated fee that is

charged that's a $5 records management fee; and I know Bonnie, you and Tom and the district clerks probably tried to work on a fee that's get paid. Right now we charge a records management fee on the court which is comingled with the district clerk, and that's used at the expense of the commissioner's court.

MR. WILDER: But they don't give us the money.

MR. HARWELL: Maybe there's a way that can be dealt with and pay for these kind of activities.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, back to Richard's point and Justice Hecht, we can't tell somebody what to charge, but the problem if we don't do something, they say, "You're allowed to do this, do this, do this," but we don't tell them they're allowed to make a reasonable charge. Some of the clerks may think they can't. So we have to at least allow them or put something in there. Not how much, but a reasonable charge, and it might be different for each clerk, but I think we do have to address that because you tell somebody what they can do, what they can do, what they can do, and you don't say that, I think it's misleading.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: In Polly Spencer's letter

there are two alternative approaches, and we have only a rule apparently for alternative two. Does that mean that we are not to consider alternative one at all?

MS. HOBBS: Polly was on the -- or Judge Spencer was on the subcommittee that held the public hearings, and the subcommittee was divided on option one and option two, so they -- instead of deciding, because they couldn't, they just recommended to the Texas Judicial Council that a separate -- that's the main body that recommends policy things to the Court. They looked at both of the two recommendations and they voted 16 to 3 to go with the option two, I believe, which is why the rule is only written under one option.

So the subcommittee was split. It went to the Judicial Council. The Judicial Council voted, and they voted 16 to 3 in the way the rule was written.

MR. HAMILTON: So we don't need to worry about alternative one then.

HONORABLE NATHAN HECHT: Well, for example, this committee could say 20 to 4, you could take a vote and say that "We think alternative one should be pursued; however, we recognize the Judicial Council is recommending alternative two; and now with respect to how that operates, if you're going to go that way, you should do this, this, this, this."

CHAIRMAN BABCOCK: Richard, do you have anything else?

MR. ORSINGER: Well, I just wanted to say this may not be a factor, but we struggled through something like this when we were trying to get the courts of appeals to put their opinions online free of charge, and I remember in particular talking to the chief justice of the El Paso court of appeals, and they made over a hundred thousand dollars a year selling copies of their opinions and were going to have to let two staff attorneys go, and blah-blah-blah. They finally went down and fixed that in the Legislature, and I think they got an appropriation to make up for that lost revenue, but I don't know whether copies is a revenue item at the trial court level or not. Is it, Bonnie?

MS. WOLBRUECK: Yes, it is.

MR. ORSINGER: Okay. So as long as it is optional with the county they can decide if they want to give that revenue up or whatever, but that was a stumbling block for probably at least three years to try to get the courts of appeals to voluntarily make their opinions available for free on the internet.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: With regard to the cost issue, I don't know if it was Carl or Richard,

somebody said earlier they didn't see where there would be any objection to that, and in general I would agree, but it could be costs wouldn't raise any constitutional problem, but to the extent there is a required subscriber system and to the extent online access raises constitutional questions, I do think that method of charging does raise a constitutional issue because the stated purpose in effect is to create a barrier, not exclusively to raise revenue, and we heard that here today, that the purpose of the subscriber system is to keep certain people or people with certain purposes from using it.

So I do think that takes it out of the realm of simply being a recouping of costs and would be similar to saying perhaps, without prejudging the question, that with regard to an open records request, "Well, you only want one page, but to get that one page you have to be a subscriber, and that costs X per month."

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: In regard to some of these comments about cost and so forth, my understanding of the rule that we're talking about, what we're really talking about is remote access; and to me remote access is a service that a county can on its own make available to the public. This rule is not talking

about limiting access to public records or to court records that are already available, and if a county wants to go through the additional expense -- and I think this is what Lisa may have been getting at earlier.

If the county itself wants to take that additional expense of providing this additional service, a lot of the philosophical issues I have are resolved because if you look at it from the perspective of this is just a service that the county may undertake on its own, I think that resolves a lot of those philosophical problems because the access is there. If somebody wants to pay additionally for this service above and beyond what we normally have done in the past, I think that resolves some of the philosophical questions, at least in my mind.

CHAIRMAN BABCOCK: Okay. Yeah, Alex.

PROFESSOR ALBRIGHT: I just want to make sure that everybody understands that data isn't free to collect. If these counties are going to be doing this, in order to have data you have to store the data, and you have to have the servers available to serve it out, and that costs huge amounts of money, and so I think I just -- I don't agree that the sole purpose of the fee is to create barriers.

HONORABLE STEPHEN YELENOSKY: No, I was saying when you create a subscriber system it raises that

question because the stated purpose of the subscriber system was to limit it to individuals who have a purpose that's considered legitimate.

PROFESSOR ALBRIGHT: I think that's what one speaker said. I'm not sure that's what everybody would say.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Frank.

MR. GILSTRAP: I just want to add one more thing about the cost. I mean, it is true, as Lisa says, that if we create some requirements for a system and the good people in Loving County decide, well, we're going to implement this, this is what they're going to have to do, and they don't have to do it. So it's, you know, not costing the people in Loving County anything because they don't have to implement the system.

It's quite different, though, to say that we're going to mandate these requirements and say that to Tarrant County because they already have a system, and they're almost certainly not going to get rid of it. So whatever decisions we make here could have huge cost consequences for these entities that already have these systems, and, you know, I don't think we can do that in a vacuum. We've got to recognize that it is going to cost money.

CHAIRMAN BABCOCK: Yeah, I think that's why Tom is here in part. Paula.

MS. SWEENEY: I'm real concerned about the substance of this, that it's a rollback of Rule 76a on the issue in almost any injury case that I alluded to before, and now I'm reading deeper into this, and it's pretty clear that the intent is to exclude the medical evidence that relates to things that are publicly dangerous that Rule 76a was designed to make available and accessible.

HONORABLE NATHAN HECHT: Well, Paula, it's just not.

MS. SWEENEY: Pardon?

HONORABLE NATHAN HECHT: It's not. 76a is untouched. You can get everything under 76a with this rule or without the rule. This is a question of "And now what are we going to put on the internet?" You can go down to the courthouse. 76a is untouched. Nobody is quarreling with that. I agree with Chip there needs to be some -- I mean, there is no interface here between this proposed rule and 76a, but even if this rule passed as it was, you could still go down to the courthouse and get any of the information under Rule 76a that you would otherwise be entitled to.

So the only thing this affects is now what are you going to be able to remotely access. That's

not -- this doesn't -- what you can get walking in the courthouse door, you can still get and forever get. This doesn't touch that, but the question is what can you dial up either from your law office, Ralph's law office, or from Czechoslovakia and mine using these spiders; and this is all the concern, is how far should we go in putting the very private information, not the basics of the case, but identifying information, bank numbers, Social Security numbers, credit card numbers, dates of birth, that kind of stuff.

MS. SWEENEY: And I have had no concern or quarrel of any kind with those, you know, Social Security and so on. But, I mean, that's a reality in the world we live in, but another reality is that the internet is here, and just about everything is on it, and what's not on it is about to be on it, and to -- I think it's a little bit of a head in the sand approach to say, "We're going to put a lot of stuff on there, but we're going to not put some stuff on there because it's important."

And so on the one hand I completely agree with the personal sensitive information being -- never entering the computers. In fact, I don't let my clients reveal that stuff on the record at all because somebody could get their deposition and then, there you go, there is all their addresses and so forth, and a lot of people

on the other side have the same protections for their clients. So there's nothing wrong with that, but to take things here that are actually the heart of the liability of a lawsuit and exclude those from the internet, I think is artificial, and I think it is putting a cache on the internet that ought not to be there. I mean, people can search these files for every other possible form of information or data or read them or whatever, but to exclude the core liability issues in one category of cases seems to me to be trying to get through the back door what couldn't be done during the 76a debates through the front door.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I just have a basic problem with the idea that something may be public if used by one person but not public if used by another person who intends mass distribution. And I'm frightened to some extent that I may agree with Paula.

MS. SWEENEY: That's a first.

MR. MUNZINGER: I think there was one other time, Paula. But it does bother me that -- and I'm very sensitive to what Richard is saying. If you start imposing obligations on district clerks to pay for these things, that's one thing. The rule probably ought to be written with "if a district clerk or county clerk decides

that they want to make this available then this is the way it will work" as distinct from the Supreme Court imposing an obligation to make it available.

But who is to determine whether one public use or another public use is legitimate, that smacks of censorship. It smacks of prior restraint. It smacks of weighing whether users have the same validity; and simply because something is available technologically speaking and available to the masses for commercial or noncommercial purposes, I'm no friend of plaintiffs lawyers, but, by golly, if the Texas Supreme Court and Texas law says that information in a file is public, how can you say it's not public if the intended user wants to use it for mass distribution?

It's a logical inconsistency, and it is not something that I -- and I don't see how you can say it. I don't see how you can say it's public for Richard to go down and find out that Dr. Smith diagnosed so-and-so arising from Drug X if Richard walks in and does it in person, but the identical information contained in a file not designated private, not designated confidential because it can't be under Rule 76a, is unavailable for you because it can be mined or dinged by a computer or by a plaintiff's firm in Dallas looking to have a class action against all Vioxx manufacturers or whoever it might be.

If it's public, it's public. If it's not public, it's not public. And let's honor the law, whatever the law are.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: We are talking about civil and criminal?

CHAIRMAN BABCOCK: Yes.

HONORABLE TOM LAWRENCE: Are we talking about the JP courts also?

HONORABLE NATHAN HECHT: Yes.

MS. HOBBS: Yes.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'm going to sound like a broken record, but even those of you who are very much public advocates want to exempt something like Social Security numbers. Paula, as family lawyers we don't have the same latitude to direct our -- to control our privacy because the Family Code and I think even Federal law requires that people who are paying child support have their Social Security numbers in the child support decree, and I need to pull the Family Code and look at it, but I think we're required to even put the Social Security number of children either in the petition or the decree. I can't remember for sure. I routinely strip that information out, even though it's required by law, and I

suppose the State Bar can file a lawsuit against me if they want to, but that is how strongly --

CHAIRMAN BABCOCK: Richard, I would advise you against saying that on the record.

HONORABLE NATHAN HECHT: In their building.

CHAIRMAN BABCOCK: In their building. They'll just serve you right here.

MR. TIPPS: Good thing Edwardo's left.

MR. ORSINGER: You know, the thing is if we're going to be selectively protective, which I think a strong argument can be made that dates of birth and Social Security numbers for children should be private or should not be worldwide even though they might be available to those that walk in, the practical costs of trying to determine which pieces of information contain an entry that requires privacy is going to be I think an impossible problem, which I think it's mentioned in passing in one of Tom Wilder's paragraphs here.

And so the only way you're going to protect child support decrees probably is just to say that none of this applies to Family Code cases; and if you do that, well, that's 60 percent of the cases that are filed on the civil side are Family Code cases. So I don't know. It's an issue for me, and yet I don't like Social Security numbers being in jackets, but I like less somebody in

eastern Europe culling all of our files for Social Security numbers and then sticking them into programs and seeing if they can't unlock the key to some, you know, Wells Fargo bank account or something, so anyway, I think it's complicated.

CHAIRMAN BABCOCK: Judge Sullivan and then Buddy. Sorry.

HONORABLE KENT SULLIVAN: Eventually it seems to me that you're headed down a road towards revisiting the fundamental policy decisions that have previously been made about what should be public and what should not be public. My suspicion is that many of the decisions that were made historically were based probably in part, practically speaking, at a paper driven set of court records and that records, even if public under 76a and otherwise, were not subject to massive and widespread abuses; and I think the reality is that -- in other words, that there was probably some acknowledgement that there might be some problems, but the problems would be contained and would probably be relatively marginal.

I don't know that everyone would make the same choices today looking at the prospect of exactly the reverse, that once everything that is currently public is available on the internet, we can no longer say at all that there isn't a likelihood of widespread and truly

massive abuse of that information. So I do wonder if you're not looking at a wholesale review of the substance of the issue.

MR. GILSTRAP: Let's stop there.

CHAIRMAN BABCOCK: Could I just insert a comment on that? Because I think that the paranoia of some of the public access groups and the media groups is that option two or alternative two will be adopted here and then the next step will be to rollback 76a into the more limited access that we have for the internet thing, not the other way around, and I don't know if that paranoia is justified or not. I only recall the statement that just because you're paranoid doesn't mean they're not out to get you. Buddy.

MR. LOW: In response to Richard, I think we're overlooking the fact that we are not protecting anything. I mean, if you want to go to the courthouse you can get it. It's not hidden from them. Somebody might not have the money to ride the bus down to the courthouse, so maybe it's not accessible to them. So the same thing. Maybe certain things we can choose. We are not protecting anything that's open. You can go to the courthouse and get it. You can go down and sit in the courtroom, but you can't send your camera down there. I mean, I don't see the issue.

CHAIRMAN BABCOCK: Richard Munzinger and then Judge Lawrence.

MR. MUNZINGER: I agree with everything Kent said. Yes, it is open to abuse and frightening abuse, frankly, in the current context. The GHOD committee for killing fat, old, Catholic, balding lawyers in El Paso, Texas, might get after me pretty quick, but who is the person that's going to tell me that I can't have access to that? I go down to the Tarrant County District Clerk today, and I say, "I am the American Association of Curious Searchers. I want to sign up." Is the district clerk going to say, "I've never heard of you. You can't do this"?

What kind of protection is that, and who gives the district clerk the authority to make that kind of protection or a judge to make that kind of protection? These are judgment calls that have to be made in accordance with law and known standards to ensure that freedom of information in our society is honored. That's my point. I don't doubt that there is abuse, but if you're going to allow access, I dang sure don't think you ought to be saying -- in all due respect to district and county clerks -- that somebody can judge that the GHOD committee can't have the information, but the Catholic committee can.

HONORABLE KENT SULLIVAN: And I think it's very important that we not pretend ultimately that we're not making that decision.

MR. MUNZINGER: Exactly so, because we are, in fact, doing so.

HONORABLE KENT SULLIVAN: That's right.

MR. HARWELL: I don't want to have to make that decision as a clerk.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: Well, I am a custodian of records, and I deal with these requests all the time, and once it has been determined that a document is a public record the most troublesome thing is if it is sitting in a file and somebody comes in and has to have a clerk take time out to go find the file and sit there and watch them look through it. That takes a lot of time, and it's expensive and disruptive.

The next best thing is if it's something that we can generate a report from the computer because we have that information internally on a computer system, and there is actually a schedule. The local Government Code through the Legislature determines most of the cost and expenses for these. We have a schedule for generating electronic documents, and we charge according to the fee schedule in Harris County. And sometimes we give

permission that on the first of every month there is a document dump, and it's sent out electronically to various individuals that have requested what has been determined to be public records. So and that still requires a little bit of clerk time, somebody has got to do that, but if it is a public record, if it's on the internet then we don't have to do anything, and that is above all things the least disruptive. And I'm hard-pressed as a custodian of records, once something has been determined to be a public record, I'm hard-pressed to justify not allowing access to that. I can do it, but I would likely wind up as a defendant.

CHAIRMAN BABCOCK: Okay. Andy, last comment. Then we will break for lunch.

MR. HARWELL: Chip, in the land records side, about two years ago the DD214 military discharge documents were being put on the internet by a county clerk's office. That went out in the vapor trail, have any of you-all heard of the vapor trail if you deal with the military? They put in there that your Social Security numbers that are on the DD214 are now being broadcast on the internet.

There was a large uprising with administrative people. Vada Sutton in Bell County had just an enormous amount of military people coming in.

What was done through the Legislature, and, forgive me, I don't have the statute, but it said that if those records are available to the public then the Social Security number has to be removed.

We have -- in McClennan County we have DD214s back 60, 70 years back. So that would be an enormous amount of work to go back, so what I chose to do is just take those records out of the public view, and the Legislature also put in there you have to be a qualified applicant to view those records, either the actual veteran, a family member, or attorney, so that right there is exactly something that's happened that we can look at and see. It would be an awful lot of trouble for the clerks to go back and take out any information, but the Legislature answered that by saying if it is made public then you have to, so there might be some ways that you can get around some of those issues like that.

CHAIRMAN BABCOCK: Okay. Let's break for lunch and be back at about 1:30.

(Recess from 12:30 p.m. to 1:44 p.m.)

CHAIRMAN BABCOCK: Okay. Richard, you ready?

MR. ORSINGER: Ready for me?

CHAIRMAN BABCOCK: Ready for you. Well, sort of. Ready as we can be for Richard. Is Judge Bland

here? Yes, she is.

As most of you know, the Federal side is dealing with the issue of electronic discovery, both exploliation issues and what your obligations are to retain electronic discovery at various points in threatened or pending litigation, and several people have approached me and the Court about whether Texas should have a rule of comparable complexity to what is being considered on the Federal side. We have a rule, which was done or was recommended by this committee and approved by the Court at the time that we redid the discovery rules, but we don't have anything that takes into account a lot of the recent decisions in the Federal side, particularly in the Southern District of New York.

So I think, Justice Hecht, if I'm correctly expressing his views, sort of wanted to hear from us today as to whether or not this is a project that needs to be taken on. Is that more or less where we are?

HONORABLE NATHAN HECHT: Yeah. Just a brief history, when Texas revised the discovery rules some years ago we put in a paragraph on electronic discovery, and I wish Steve were here, but maybe Alex remembers. I think we just sort of made that up in the end.

PROFESSOR ALBRIGHT: Yeah, we kind of made up it up, but there was a group of people in Washington or

Oregon or someplace that got a copy of the draft rule, and they were collecting information all over the country and they said, "Wow, we think you got it right." They were very impressed with our attempt at the time.

JUSTICE HECHT: But we just sort of made this up out of whole cloth. But it then began -- became the basis for the debate in the Federal system over whether they should amend their rules to take up some of the provisions that Texas has in its rules and other issues, and that blossomed into a national conference and then there have been several other practitioners conferences, mostly in Arizona, and in September amendments to the Federal rules were published for comment, and there will be a comment period until next spring next time and public hearings in the spring, and I wonder if we shouldn't begin to look at those developments to see whether there should be some refinement in our electronic discovery rule.

Interestingly, as late as February of last year -- of this year, when Steve Susman called all around the state asking trial lawyers and trial judges whether they had much experience with electronic discovery, the report was essentially "no." And as far as I know we've had no cases dealing with any significant issues under our rule, but the Federal courts have had a number of cases,

dozens at least, on these issues and whether we should begin to look at those.

CHAIRMAN BABCOCK: Okay. Comments, Justice Bland.

HONORABLE JANE BLAND: Well, I think it may make some sense to -- I guess our current rule is 196.4, and it might make some sense to compare that with the proposed Federal rules and make some recommendations about whether or not we ought to bring our rules in line with the Federal rules or not and something akin to what Robert's subcommittee did with Rule 42 and class actions, because I think it just makes sense to try to at least be informed when we depart from the Federal standards, and that way we don't create different rules under the state standard and the Federal standards.

And I don't think that Rule 196.4 is -- there are a couple of differences with it and the proposed rule, the proposed Federal rule. One is that the proposed Federal rule deals with preservation of electronic information; and our rule does not; and I think that's a big issue in these cases that rely on electronic information, when does your duty to preserve electronic information arise; and we do have some common law case law out of the Texas Supreme Court, not involving electronic discovery, but involving a lighted reindeer; and the Court

took that opportunity to talk about when your duty to preserve evidence arises.

But it might be fair to say that the differences are great between preserving electronic information that can be inadvertently discarded without you even knowing about it. It can roll off your server or roll off your e-mail without you doing anything intentional to destroy it, backup tapes get replaced and that sort of thing. That's one thing that I think the Federal rules attempt to address, is the preservation of electronic information, and then there's -- the Federal rules also talk about how that information ought to be produced; and that is also an issue and might be worth us looking into to see if we want to put some guidelines about how it ought to be produced, whether it needs to be in searchable format, whether it needs to be the document itself, I guess JPEG, correct me if I'm wrong, or its native format, which you would be able to look to see if a document had been modified and that kind of thing.

And then the final thing that the Federal rules address that differs from our rule is I think the Federal rules have a provision about how the inaccessible information, how retrieving that information -- how the costs of retrieving that information are assessed; and our rule definitively says if the information is not

ordinarily accessible the requesting party pays the cost for any special retrieval; and that's a big issue because there are technology issues. You might have information on technology that's now outdated and difficult to retrieve. You might have technology or data in inaccessible forms, like, for example, magnetic backup tapes that are only intended to be used given some catastrophic event and as a result are pretty expensive to pull up and retrieve responsive documents out of.

And the Federal courts have -- you know, in their common law decisions have spent a lot of time analyzing who should pay; and in particular a judge out of New York, Judge Sheindlin, has written a series of cases called the Zubulake cases, some of you may be familiar with; and in that she assesses how -- or she doesn't assess, but she comes up with a framework for analyzing how costs ought to be assessed; and the Federals also I think come up with a framework. We may not even need to go there since we have a rule that already addresses that issue, but it is different than the Federal rule, so it might make sense to compare.

CHAIRMAN BABCOCK: Okay. Does anybody on the committee have experience with electronic discovery where there's been claims of exfoliation or there have been issues? Judge Sullivan.

HONORABLE KENT SULLIVAN: Yes.

CHAIRMAN BABCOCK: Any problems? You had to make rulings interpreting our rule or --

HONORABLE KENT SULLIVAN: No. As I sit here and think about it, ultimately, there are two cases that I can think of in which ultimately the matter was resolved and didn't really require any significant interpretation of the rule by me. The bigger issue that seems to come up is the question of what extraordinary measures will be taken, who will supervise those extraordinary measures, and like that I've dealt with several times.

CHAIRMAN BABCOCK: Yeah, Alistair.

MR. DAWSON: I haven't dealt with the issue in court in Texas, but I've studied this issue quite a bit and I've taught it to students in CLE classes and what have you and studied the cases. I think you're right that largely the case law is outside the state of Texas. I would point out parenthetically that there is one case that I forget the name of that held that the Zubulake factors don't apply in Texas, and I presume -- I haven't looked at it in a while, but I presume it's because the rule specifically addresses who pays what costs, and so the court said that those factors don't apply.

So to the extent that the Court or this committee wants to consider some form of cost shifting, I

think I agree with Jane there needs to be some change in rule. I think the issue that I see when I look at all these cases is, No. 1, the duty to preserve, because unlike paper documents these documents just disappear automatically unless you take affirmative steps to stop that process. That is largely a matter of common law in most other states. I'm not aware of other states that have written that into their Rules of Procedure. That's not to say you couldn't, but I think it would be a bit unusual.

The other big issue, and it's the one that Judge Sullivan referred to, is access to information. Once you have preserved it are you going to give one party or the other sort of unfettered access, and this becomes a huge issue in databases where there's privacy issues and things like that. And, you know, A lot of courts solve that on a case-by-case basis, and I'm not sure it's suitable for rule-making, but essentially electronic discovery I think raises a whole panoply of issues, some of which -- a lot of which are probably covered by our rule, but not to say we couldn't make other changes that make them more --

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: My only problem with common law rule-making -- I mean, common law

interpretation on preservation issues is it's usually in the context then of somebody having failed to preserve and what are we going to do about it, and there's no way to put companies who do business in Texas on notice of what they need to do to comply with our rules of discovery and our rules for preservation until somebody gets dinged with death penalty sanctions because they failed to secure information on a particular server. And it would be helpful, I think, if we at least looked to see if we -- I'm not suggesting that we have to have a rule, but I think it would be worth a subcommittee studying the issue of whether we ought to give some guidance about what your preservation obligations are so that we're addressing it before the problem arises rather than after and then try to decide if what they came up with was reasonable.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: What rule now says a document that I have to preserve, and I know I do because it's required, but what rule do we have in the Rules of Procedure? There's a rule that says I can't test something and destroy in testing it and so forth must preserve, but is there a rule on just a plain piece of paper I've got that says I have to preserve it after I've been sued? I don't know of a rule of procedure that does that. So if we don't have one on that, why have one on electronics? I

mean --

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: The difference between something that's destroyed by testing and electronically destroyed information is that somebody makes an affirmative decision to test and destroy the evidence. With electronic information every time you turn off your computer there is information that was on the computer that if you turn it back on the next morning will no longer be there. It's called -- I'm not any expert on this, but defragging, and you may not know this; but your IT people at your firm may have a policy about how long they keep deleted information, about how often they back up information for disaster recovery purposes; but you as the person with knowledge of relevant facts may have no idea that that information is still accessible, but only until next month when they destroy the backup tapes as part of their regular -- and so basically information is being deleted or not preserved without anybody affirmatively issuing the order to destroy the documents. It just happens in the ordinary course of business.

MR. LOW: I know, but, see, you have a duty to preserve, I mean, certain things once you get sued. In other words, just a piece of paper. I read this Rule 196.5 is like you've got to fuse, in order to test it you

have to test it to destruction, so therefore, you could get a court to allow everybody to do that and so forth, but that's all handled, as Alistair said, on a case-by-case, and then, you know, you've got that and you could have preserved it. Well, you had it when you got sued, so did you -- you know, that goes to the question did you intentionally allow that? How's a rule going to educate anymore on my lack of knowledge in computers than what I know I have to do now?

CHAIRMAN BABCOCK: Pete had his hand up and then Alex.

MR. SCHENKKAN: I think there's hardly anything we can do that's more important than this task in the future. This is a huge tidal wave --

MR. TIPPS: Pete, we can't hear you down here.

MR. SCHENKKAN: I think there is hardly any task we could assign ourselves or help take on than this one. This is an enormous tidal wave that's about to break over the American legal system. My large institutional client that operates in other states and courts are experiencing this already in these other forums. The answers that are going to be arrived at have to work nationally. We really can't effectively have 50 different rules in different states plus a national rule that's a

51st version because we're going to have to have one set of rules for the computers and the people who operate the computers and the people who know what's in the computers and the people who know how hard it is and how expensive it is to retrieve it from the computers at different stages of the process.

It fits back to a comment that Justice Hecht made at an earlier meeting about we're pricing ourselves out of the dispute resolution business. If you think that's been true from what we've been seeing in discovery so far, you ain't seen nothing yet if we don't find a good cost effective way to say what the rules are on what has to be kept and what has to be retrieved.

It may well be that our rule is still the best rule out there or the best starting -- that's an entirely possible answer, but we ought to restively look at that question; and if we think ours is and is better than the Federal rule, maybe our task this time is not to change our rule but to supply some strong comments with as much as support as we can generate to the feds to try to get them to move theirs closer to what we think is the best answer.

But I really do hope we will make this a high priority and we will try to attract the participation of some lawyers who are knowledgeable about it, and

especially I'm interested in some general counsels of some major corporations whose clients have enormous computer operation systems, information databases, and problems. They are the ones we really need to figure out how are we going to make this work on a systematic basis.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I'm in charge of technology at the law school, and so I'm in the middle right now of trying to write out policies for retention and disaster recovery for all of our data that we keep at the law school, so I have been very involved in it from that side, and I also worked on the rule that we have now. I think the beauty of the rule we have now is that it's general, and we did -- we came about it from the point of view of documents that if you have it, you have to produce it; and the issue is who is going to pay for producing it, because data is a thing, it's not a piece of paper; and we definitely wanted to distinguish data from documents. We didn't want people to say they got -- they deserve data when they requested documents.

But I think what Judge Bland was talking about, the people that create documents and create data and keep data have obligations to retain it that is dependent upon the document retention or information retention policies of where they work and their duties to

keep certain information for a certain period of time.

Then there are all these backup tapes that are not part of retention in that sense, your duty of retention. They are completely part of disaster recovery, but in many organizations those duties have gotten mixed up. So when you're conducting discovery there is lots of data that I may have created and may have thought I had deleted and I thought it was gone forever, but because my company keeps tapes for two years that data is still there on a tape somewhere, and it may be very expensive to get it, but it can be gotten.

So I think for us to get into what you have a duty to retain, that's much different than what the Supreme Court says would just be -- you know, it's very difficult to articulate even within your company what you have a duty to retain and what you don't. I think for discovery it's whatever you retain in the ordinary course of your business and then you have the duty to retain certain information after you anticipate litigation. I think that's about as far as you can go.

I agree with Pete. I think it makes sense for us to look at the Federal rule and see what we're doing and kind of follow what's going on. I think it would be very interesting. The fact that we haven't had much litigation perhaps indicates that there hasn't been

much problem with the way our rule is working right now. It could be that our rule is so bad nobody pays any attention to it. That's the other alternative, but I think it deserves looking at what the feds are doing and comparing it to what we've got.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: My experience with this is a little bit different perspective because in the family law we fight over individual computers. We don't fight over mainframes off in Cincinnati or something like that, and one of the problems that -- it's easy for a judge to make a decision that computer X, that a technician will come in and make a mirror copy of the hard drive without looking at the contents. You just have a duplicate, an electronic duplicate, and then that electronic duplicate goes into some kind of safekeeping place.

But then you get to the more difficult problem of how do you ferret out the confidential information from the nonconfidential information and who's going to supervise that process, and do you have this independent court-appointed technician print everything and then have the lawyers vet what's privileged and what's not, and that's usually a messy process.

Another thing, probably more frequent for family lawyers than anything else I'm going to say is not

something the Rules of Procedure can address, but probably my most frequent problem is when a client brings in e-mails from the other side that they have printed off of the home computer or off of AOL or whatever and it includes communications with the opposing party's lawyers. So you've got all these e-mails -- you've got a stack of e-mails on your desk, and it's got a lot of stuff in there about the other side's litigation strategy and everything, and I just take it all and put it in an envelope and seal it and file it with the court and ask for an in camera inspection. I don't know what you do there, and I'm not sure that this committee can decide that, but maybe some CLE people could talk about it. At the family law level that is a really frequent problem.

And the problem probably that maybe we could address that concerns me that doesn't happen frequently, but it does happen some, is TROs to seize personal computers. Somebody will go down and get a family law judge to sign a TRO to seize a dozen computers at a business or three computers or a laptop or whatever, and one case that my law firm was involved in the judge issued a TRO to pick up certain identified computers and then issued a show cause order for the husband to show up at 2:00 o'clock that afternoon and then as part of the TRO instructed the lawyers not to tell the client what the

hearing was about.

So we were prohibited -- we had to tell our clients to be there at 2:00, and we had somebody that was headed out to the office while he was going to be at the courthouse to go in and take the computers and then we were prohibited from telling him what the hearing was, and we actually tried to get a mandamus on that one, and the Dallas court of appeals turned it down, although in those days probably they were turning everything down.

But to me, if a government official is going to seize personal property, the Fourth Amendment is implicated, and I know that normally we think of the Fourth Amendment in terms of criminal investigation, but you know, if a government agent is going into someone's home or business and seizing property at the direction of the government, I think there ought to be probable cause. And so I don't know -- I'm sure that no one is ever going to get a TRO against IBM or anything like that, but, you know, 60 percent of the docket I hear is family law, and so when we're --

CHAIRMAN BABCOCK: You're pretty proud of that, aren't you?

MR. ORSINGER: But, you know, after all within three years or five years probably we'll all be practicing family law.

CHAIRMAN BABCOCK: So you got a leg up, huh?

MR. ORSINGER: There's another level at which -- and I'll be attending if I'm still on the committee, so I'll be sure to remind you, but it's not always two huge corporations or one really, really rich plaintiffs lawyer trying to make, you know, GM disgorge everything they've got. You know, and so we've got to write these rules in a way that they'll work with individual litigants who are fighting over specific computers, and then I can kind of ask around my family law friends and find out what's being litigated by them.

CHAIRMAN BABCOCK: Do you think we ought to look at this rule or not?

MR. ORSINGER: Oh, I think we should look at this rule. I mean, I think this rule is serviceable, although I've heard a lot of fights between people as to whether you ought to have a rigid rule that the party requesting has to pay to recover archived data. The New York case basically is a balancing and the judge has discretion. You have balancing factors.

You know, there are some areas where taking discretion away from trial judges is appropriate and there are other areas where we just have to trust our trial judges to have good judgment and give them a little freedom to do what's right in the specific circumstances,

and I think that part of it ought to be looked at pretty carefully.

But I do think that it's worth looking at. I agree with Pete. I think that we're going to see more and more of this both at the big case level and at the small case level.

CHAIRMAN BABCOCK: Yeah. Anne McNamara, when you were at American did this -- and, of course, you had a national, you know, docket, was this a problem that you had to deal with?

MS. McNAMARA: Yeah. It was a daily issue. You know, at what point do you need to start cloning data from computers and preserving things, when can you destroy it, when is it over. If you wait long enough there is another case that implicates some of it, so it is a big issue. I'm not sure that it lends itself to a lot of specific rule writing for the reasons some folks have mentioned. It's a little bit different everywhere, and the machines do a lot of different things, but it is a big issue.

CHAIRMAN BABCOCK: Yeah. Okay. Alistair.

MR. DAWSON: One of the things that I see is troubling is recycling of backup tapes, because they have these things on a cycle where they rotate them in and out the debate is, look, I'm supposed to preserve evidence.

It's theoretically possible that there might be something on there that I don't know about it. I'm in the middle of this litigation, so there's one side that says you shouldn't destroy anything, which means you've got to suspend your recycling of backup tapes, but that costs a lot of money.

And there's nothing in our rules nor in the case law in Texas that I'm aware of that really addresses that conflict, and I'm not sure whether it lends itself to rule-making or not, but I can tell you there would be a lot of happy clients if there were some rules about when you have to preserve, when you -- you know, what to do with backup tapes, when they can -- you know, are required to suspend their policies and when they're not, because it really is expensive. I mean, we're talking, depending on length of time, millions of dollars just to suspend the recycling of backup tapes.

PROFESSOR ALBRIGHT: That's disaster recovery. That's not retention. That's what I would say.

HONORABLE JANE BLAND: But not according to Judge Sheindlin.

MR. DAWSON: Then I'll hire you.

CHAIRMAN BABCOCK: One of the problems with these New York decisions is that there are duties imposed on outside counsel to ensure that documents are saved, and

I guess it's one thing if you're in Judge Sheindlin's court in the Southern District of New York and you can say to your client, "Look, we think this is how she's going to rule, and I've got to let you know about this so you've got to spend all this enormous amount of money and effort to do it." It's quite another thing if you're before another judge in that district or in the Southern District of Texas or the Northern District or in state court, you know, what obligations do you have, so I think it could be productively looked at from the lawyer's perspective as well.

I personally have had three cases where this has been a huge issue. One was in the Eastern District of Virginia where we had multiple hearings about electronic discovery that our side said had been deleted after the litigation started and days and days of testimony about it, and another case in the Eastern District of Texas where there were a multitude of issues about electronic discovery.

The one that was headed down for resolution before the case settled was critical documents that had been deleted after the litigation and then our litigation opponent had gone back and recreated them. So the original documents had been destroyed but they said, "Well, this is as good as gold because we went back and

recreated it," and that raised issues as well.

And the third case was in a state court in Maryland where the plaintiff had after the lawsuit ditched all their electronic data, and that one resulted in death penalty sanctions for the plaintiff, so I can't say that I have any experience in Texas state court, but like Pete, I think this is a little bit of a tidal wave that it may wash over us before long; and it wouldn't be a bad idea if we got ahead of the curve and at least looked at it; and I think that our discovery rules are very well respected around the country, such that we may be able to influence the Federal side if -- you know, depending on what we decide to do, and the Federal side is getting very involved, I think it would be fair to say; and that might not be right for us. We might not think that's the right way to go, and I know there's a lot of people in the Federal system that think the advisory committee is headed in the wrong direction on the Federal side. So it seems to me it might be a good thing to look at. Richard.

MR. ORSINGER: You know, when we're looking at the subject we might look into the Rules of Evidence also. We have a lot of really thorny authentication issues with the production of electronic evidence, and we did amend our rule to get rid of the best evidence rule problems. Now the computer printout is considered to be a

duplicate of the original information on the hard drive, which was an intellectual barrier for awhile, but the authentication of computerized information and the distinction between the application of the hearsay rule and the requirements for authentication are not -- how they apply in terms of computer-generated information is very unclear, and as long as we are putting our minds to it we probably ought to keep an eye on some of the Rules of Evidence that we might could, you know, tweak them a little bit, and they might work a little better, too.

CHAIRMAN BABCOCK: Okay. Any other comments on this? Yeah, John.

MR. MARTIN: I think I read recently that there's going to be a public hearing on the Federal rule in Texas early next year.

CHAIRMAN BABCOCK: Dallas, I think.

MR. MARTIN: So I was going to say if you're serious about wanting to influence that process, that might be something to target because that train is moving along.

CHAIRMAN BABCOCK: Yeah. Of course, we first have to know what to say, but, yeah, Frank.

MR. GILSTRAP: Don't forget Tommy Jacks I think has some expertise in this area. He's spoken widely on it, on electronic discovery.

CHAIRMAN BABCOCK: Tommy Jacks has?

MR. GILSTRAP: Yes, he has. As a matter of fact, you can go to his website and he will send you a Power Point presentation on electronic discovery.

CHAIRMAN BABCOCK: Okay.

MR. DAWSON: Did you say Tommy Jacks?

MR. GILSTRAP: Yeah, Tommy Jacks.

CHAIRMAN BABCOCK: Okay. Well, what do you think? We ought to look at it or --

HONORABLE NATHAN HECHT: Yes.

CHAIRMAN BABCOCK: Well, it makes sense that the discovery subcommittee do that, and, Justice Bland, since you're the most passionate voice on this, maybe you could organize that group into looking at it, and it might make sense if Tommy Jacks is -- has worked on this, and Anne McNamara, too, would have a lot of experience, if you consulted them and maybe even drafted them to help you, would be a good idea.

Yeah, Harvey.

HONORABLE HARVEY BROWN: I was going to suggest it might be helpful to have a couple of lawyers who really have a lot of computer expertise as ex officio members. You know, there are some lawyers who really know computers very, very well. It might be helpful.

CHAIRMAN BABCOCK: Yeah. There is -- of

course, Peter Vogel has asked to do this every time something comes up, and he's very astute. Justice Bland, there's also a lawyer at my firm by the name of Mary Lou Flynn-DuPart. A lot of names for one person, but she is a very -- has a deep understanding of this and has been through a lot of these battles on the Federal side.

MR. ORSINGER: You know, former plaintiff's lawyer Craig Ball in Houston pretty much confines his practice now to electronic discovery issues either as a hired advocate or as a court-appointed master or whatever.

CHAIRMAN BABCOCK: How do you spell his last name?

MR. ORSINGER: B-a-l-l. Craig Ball.

CHAIRMAN BABCOCK: I thought you added a syllable there.

MR. ORSINGER: I said he was a former plaintiff's lawyer because I don't know that he's actively litigating the docket, but I think he's -- last time I talked to him he was full-time just electronic discovery and had a role as a court-appointed neutral in many cases, so if anyone is interested, I've always had an easy time working with him. You might call him. I bet he would have a lot to contribute.

PROFESSOR CARLSON: He's actually in Montgomery.

MR. ORSINGER: Montgomery, okay.

CHAIRMAN BABCOCK: County or Alabama?

PROFESSOR CARLSON: City.

MR. ORSINGER: Is that somewhere near the county of Houston or the state of Houston?

CHAIRMAN BABCOCK: Okay. Anymore on that? All right. Just since I've been jumping around all day I'm going to jump around to Item 7, which we can get rid of easily. Item 7 is the retention of records, retention and disposition of exhibits and deposition transcripts.

The history of this is that Charles Bacarisse primarily has been concerned about this issue and had thought about maybe seeking a legislative solution to the problem, but he checked with Justice Hecht and what the Court's pleasure was, and I met with Charles two days ago to see where he was, and everybody is being very polite to everybody else, "No, you do it." "No, you do it," and the bottom line is Charles and Justice Hecht and I agree that this is probably an area where rule-making is more appropriate than legislation, so we are going to suggest that this issue be looked at by the subcommittee of our group that handles Rules 1 through 13c, which would be Pam Baron; and Jane Bland, who is in a volunteering mood today, volunteered to assist in that project as well.

MS. BARON: She didn't. She did not

actually.

CHAIRMAN BABCOCK: She didn't? Never mind. Strike that then.

MS. BARON: But I've got a great subcommittee, so...

CHAIRMAN BABCOCK: Okay. Who is that?

MS. BARON: I've got Steve and Bonnie -- excuse me, Judge Yelenosky, clerk Bonnie Wolbrueck. I'm the only nonelected official. There may be somebody else.

CHAIRMAN BABCOCK: Okay.

MS. BARON: But I think Bob has actually worked on this issue before, and Bonnie will have insight from the district clerk's perspective.

HONORABLE BOB PEMBERTON: I thought it was the rule of practical impossibility, but I have no memory of that.

MS. BARON: We're going to do some memory enhancement with him.

HONORABLE BOB PEMBERTON: I will go under hypnosis before the next meeting to try to bring this back.

MS. BARON: I do have a question, though.

CHAIRMAN BABCOCK: Sure.

MS. BARON: My understanding of Charles' concern, why he's been initiating this request with the

Court, is not so much the length or timing or what has to be retained but the cost of notifying parties and attorneys, and is that what we're supposed to be focusing on?

JUSTICE HECHT: Yes.

MS. BARON: All right.

JUSTICE HECHT: He wants to throw everything away that he doesn't have to keep, and so the issue is what do we do by way of giving attorneys or other people notice? Do we publish it in the Bar Journal? Can we put in there maybe twice a year that the clerks are going to throw stuff away if you don't come get it or something to facilitate the storage problems?

And historically, when Bob worked on this we had a task force that looked at it, too, but this was back when throwing it away meant it was gone forever; and now I think Charles is archiving everything electronically, so it's not getting rid of it forever. It's just getting rid of the paper copy; and the storage costs that the clerks face -- Bonnie is not here, but they're all complaining about how much money it costs to store all these records; and, of course, in the last two or three years with budget constraints people are trying to save money.

So the problem takes on a new face when you're just talking about getting rid of one copy of it,

and so how easily -- how easy would it be to accommodate this? But the rub is that there is a state statute on archival and then there are other administrative rules, I think.

MS. BARON: Is it your understanding, though, that they're archiving things like exhibits and depositions that are filed?

HONORABLE NATHAN HECHT: I don't know. And the fellow who was here --

MR. DUGGINS: Tom. You might ask him about Tarrant County.

MR. WILDER: Yes, the exhibit things, we are holding those, and we would love to have a more streamlined way to unload them, especially on the civil side. There are some issues on the criminal side regarding what might have DNA on it that we've had to deal with, and I don't want my clerks making a decision, you know, "This has DNA" or "This doesn't," so we basically agreed to keep the criminal stuff until the law firms quit arguing over DNA. You know, even after somebody may have been executed they're still arguing over that, but the civil records very definitely we would love to have some streamlined procedure.

I've got three giant rooms. The news media has done -- I've got more press off of that than anything

else. It looks like Raiders of the Lost Ark. At the end of it you're looking down these huge racks of stuff, of evidence and exhibits, and we would love to move to get rid of some of that.

CHAIRMAN BABCOCK: Any other questions about this?

MS. BARON: There will be.

CHAIRMAN BABCOCK: I'm sure. Just holler. Item 4, I think, Richard, proposed Rule 103 has already been posted by the Court, right.

MR. ORSINGER: Yes, it has, but there is a little something to discuss. Do you want to take a minute or two?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Lisa Hobbs has written these proposals, and I want to thank her for doing all that hard work and did a great job. If there's one constituency we've ever reached, it's the private process servers. They are so happy with what we've done. I will read you one e-mail because everything else is a variation of this. They either put a sentence in front of it, a key word in the middle of it, or a sentence after it, but it's "I would like to thank the Court for putting forth the changes to the TRCP Rules 103 and 536. These changes have been needed for a very long time. I support the changes

as published." We probably got 150 e-mails that have variations of that particular message there.

It seems like the only people that don't like it are a few constables; and I can't tell, but the people in here who are former constables say, "I was a former constable, and it was a nightmare for us. You know, we didn't have time to do it, and we couldn't do our service and everything." So I'm not really sure that anybody is unhappy. I think the lawyers haven't noticed. I think there's hardly anything here from a lawyer.

And there are some transitional issues like "Well, if I'm certified now do I get three years on my last exam," and this, that, and the other. And then the others are interested to know about the registration and application process, and there is a packet here which has not been aproved by the Supreme Court yet, but that was our best effort to consolidate the information that we received from people in the industry; and, you know, the essentials are if you're convicted of a felony or a misdemeanor of moral turpitude, you can't serve process; and if that happens to you after you've been certified then you're going to lose that certificate if the Supreme Court finds out about it.

There's an administrative agency -- pardon me, an administrative board called the Process Service

Review Board, which apparently is going to be appointed by the Supreme Court with no legislative authority or constitutional authority or anything; and we don't know who they will be, but they will definitely be serving without compensation. Don't know where they will meet or who will store their records, but we do know that the certifications will be somehow, I guess at the Supreme Court, on the internet so lawyers can check and see if the process was served by a certified person.

MS. HOBBS: Through the Office of Court Administration.

MR. ORSINGER: Through OCA? Okay. One point of controversy is that proposed Rule 103 as promulgated permits the private process servers to serve writs and orders. Writs and orders. Okay. Now, some of these writs allow you to take somebody's furniture and put it in the street. Another writ allows you to take a minor child away from the parent. Another writ allows you to take a person in your car down to the county jail. I mean, there's a lot of writs out there that, as one of these guys said, probably they're going to want to have people that are wearing guns serving those writs, and that may well be true; but I think the inclusion of writs and orders as something that could be served through private process may be something that you might want to raise your

eyebrow at.

Now, as a reverse, and maybe I shouldn't even say this, but it's possible that if this is controversial enough it may prompt the Legislature to react to the rule, saying, "Well, we don't really want 18-year-old kids serving, you know, writs of attachment on human beings, so we're going to go ahead and adopt a law and establish an agency and have licensing just like everybody else," in which event maybe it would be salutary to leave writs in there. On the other hand, you know, I can -- I mean, I have been around when there were some tense writs served for minor children in family law matters, and, you know, it could be a point of controversy.

So, anyway, I'm real happy with what's happened so far; and, Lisa, what is your perception? Have you been getting different signals from what I have talked about here?

MS. HOBBS: No. I think you covered all the rules -- all the major comments that we're getting, and the majority of them are in favor of the rule, and the ones that are against the rule concentrate on the writs part of the rule. So you provided a fair summary of the comments I've received.

MR. ORSINGER: Okay. There was one piece in

here that was critical. In our proposed -- we've authorized or we've recognized or acknowledged the legitimacy of I think two of these courses; isn't that right? Two of them. And, yeah, Houston Young Lawyers and Texas Process Servers Association. There was one e-mail in the packet that said that they went to one of these two, and it really was a two-hour course, not an eight-hour course, and it really was a bunch of war stories and not much law or procedure and that the test was really a joke.

MS. HOBBS: And, Richard, I got an e-mail in response to that yesterday that it has been clarified that he did not attend the TPSA course, and he has withdrawn his comment about that course.

MR. ORSINGER: Okay. Well, we might -- I mean, we might want to kind of keep an eye on the courses that have been identified to be sure that they're legitimate, but, you know, they do a good job of that in the driving classes. I have to go to those all the time, and they make you stay there and pay attention the whole time and take a test. If they can do that for that level of administration, we ought to be able to do it on this one. But --

MR. GILSTRAP: Will you have a comedy course?

MR. ORSINGER: Yeah, I've taken the comedy course, too, and it's not much better. I did it on the internet one time, and that was worse than going to class.

CHAIRMAN BABCOCK: Judge Lawrence has got a serious comment about your frivolity.

HONORABLE TOM LAWRENCE: Well, several questions. When we talked at the last meeting, did we talk about writs being in this or was that something that was added?

HONORABLE NATHAN HECHT: I don't recall. It was added. It was not in the recommendation that came before, but it was added.

HONORABLE TOM LAWRENCE: I've got a few calls on this issue of writs, and I was looking through the writ of attachment rule, distress warrant execution and garnishment, injunction and sequestration. It's kind of interesting. Some of them talk in terms of "the citation may be served in the same manner prescribed for citations," which I presume would be private process servers. Others use the term "sheriff or constable or officer" in determining what can be done under the writ. And are we saying or is the Court saying that a private process server can serve a writ of sequestration, garnishment?

HONORABLE NATHAN HECHT: Well, the proposed

rule would let you serve -- would let a private process server serve whatever process he could serve by court authorization as long as he followed these procedures, so if there were a statute limiting service to an officer with the idea that that were public officer then the answer would probably be "no."

HONORABLE TOM LAWRENCE: Well, for example, in the writ of attachment rule, the service of the citation, apparently Rule 598(a), says it can be served in the same manner prescribed for citation. Then you've got 597 that says "sheriff or constable" and then 604, 606, and 607 use the word "officer." "Officer will return" or whatnot. So it's a little -- but the question is going to be, if I've got a writ of sequestration or an execution or a distress warrant, does that mean that the private process server can serve that and handle everything involved in that; or are we going to have the private process server serve it and then where it says "sheriff, constable, or officer," somebody not involved in the service is going to somehow get put into this process?

HONORABLE NATHAN HECHT: No, I think that identified a problem, as Richard did, that we're going to have to clarify either by ironing out those inconsistencies or taking "writs" out.

MR. ORSINGER: Well, you know, you could

take "writs" out of here and not damage much civil litigation. The writs, writs are usually where you're using the force of law against someone against their will. I mean, that's not always the case; but most writs are issued out because the court has made either a preliminary or a final decision that somebody is going to have to do something they don't want to do; and private process serving for the most part is just getting lawsuits going and getting stuff served that allows the litigation to move along; and so taking "writs" out probably wouldn't damage the benefit that we're accomplishing; and frankly, I can't imagine an 18-year-old woman trying to, you know, move a bunch of furniture out of a house when an FE&D has been granted or trying to arrest somebody and take them to jail. I don't even know if they can. Maybe you would know better than I, but some of these writs I think that private process servers are going to refuse to do because they're just likely to get them shot or stabbed or hit.

HONORABLE TOM LAWRENCE: Well, if you talk to a constable or sheriff that does civil process they will tell you that the service of citation is relatively simple compared to service of writs, which is what they spend most of their time training on. I don't know that the private process servers spend any time training on writs of execution, distress warrants, writs of

sequestration or garnishment. I mean, this is not something that -- I don't think they receive any training on. I think if you took writs out that you would solve a big problem, and I'm presuming that when you say "writs," would that mean a writ of possession in a forcible? It would?

HONORABLE NATHAN HECHT: Yes, it would, but once again, I think we have to look at whether it wouldn't be simpler just to take "writs" out.

HONORABLE TOM LAWRENCE: Well, I think it -- I would recommend taking "writs" out, for the time being at least until this is studied a little more. I think it's going to be very problematic.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: First I want to say to Richard that I think you grossly underestimate what an 18-year-old woman can accomplish.

HONORABLE NATHAN HECHT: He deserved that.

HONORABLE JANE BLAND: But I do not think that the -- and Levi or Kent can correct me if I'm wrong, but I don't think that the district judges use private process servers to serve writs, and so I think we're better off taking it out and leaving it out. I had to make the second comment just so I could make the first.

CHAIRMAN BABCOCK: Anybody else have any

thoughts on that? Yeah, Jeff.

MR. BOYD: What is the source of what we're talking about now that allows these new individuals to serve writs? 103 as written doesn't do that. What am I missing?

MR. ORSINGER: The proposed rule does. You need to be looking at this. That piece of paper is really not the proposed Rule 103, and I don't know why.

MR. LOW: I thought I had everything.

MR. BOYD: So this --

MR. ORSINGER: I don't know what this is. This was a version of 103 that was sitting out there, and I don't think it's the proposed rule. I don't know where it came from. I had nothing to do with it.

MR. MUNZINGER: So could someone read it outloud? It's a relatively short sentence that we need to have read. It's not included in anybody's packet.

MR. ORSINGER: I can read it. "Process, including" -- this is it. It's in the first phrase. "Process, including citation and other notices, writs, orders and other papers issued by the court may be served."

MR. BOYD: Now, has that been published?

MR. ORSINGER: This is effective February 1 unless the Supreme Court pulls it back.

MR. BOYD: And that's the version that was published, not this?

MR. ORSINGER: True. So the writs and orders part is something that's new. It's not in our current 103.

HONORABLE TOM LAWRENCE: Doesn't the Property Code specify sheriff or constable for writ of possession?

MR. ORSINGER: Well, I think that what Justice Hecht is saying is that the statute would trump the rule, but you know, why would we have a rule that's contrary to the statute?

HONORABLE TOM LAWRENCE: Well, the statute in the Property Code I believe says writs of possessions after evictions have to be sent to a sheriff or constable.

MR. ORSINGER: The current Rule 103 says "citation and other notices may be served," so adding "writs and orders" is to change the Texas practice because under the current rule, if you had a court order that would permit you to serve, the order would be limited to citation.

HONORABLE TOM LAWRENCE: I understand. What I'm saying is this rule as amended with "writs" would be in conflict with the Legislature when they drafted the Property Code and said only sheriffs and constable can

serve a writ of possession. I think you've got a conflict there.

CHAIRMAN BABCOCK: Carl, then Frank.

MR. HAMILTON: I would take out "other papers" also if you're going to take out "writ."

MR. ORSINGER: Well, that raises another kind of -- "other papers issued by the court may be served by" and you've got three choices, sheriff or constable or someone authorized by law, someone pursuant to a court order, or a certified person. Some of these e-mails said, "Well, you could interpret that to mean that any notice of a setting."

We have one from a judge in Midland who reads the rule as exclusive and that, therefore, lawyers may be impaired from sending notice of hearing themselves because that's another order, order setting a hearing on a motion to, you know, compel or expand the number of interrogatories or whatever; and he expressed the concern that if we were satisfied with the language maybe we ought to clarify with a comment that we're not saying that notices of hearing have to be served by Category 1, 2, or 3 and that lawyers should still be able to serve notices through the Rules of Procedure. Now, the rules that permit service already may take care of that, but I think it's reasonable.

CHAIRMAN BABCOCK: Frank, then Jeff.

MR. GILSTRAP: Apparently allowing a private person to serve writs is problematic. I have this image of like the bounty hunter coming out and breaking in and taking somebody's computer, that type of thing. So is there any reason to allow private persons to serve writs? What are the advantages of it, if any?

MR. ORSINGER: I can't think of one. I mean, it seems to me like if you're going to use force, whether it's against property or a person, you just need to be a peace officer; you need to be trained; you need to be armed; you need to know what the limits of the Constitution are and --

MR. DUGGINS: Except if you had a common writ of injunction.

MR. GILSTRAP: Common writ of what?

MR. DUGGINS: An injunction. Just in a civil case. It doesn't involve seizing people or property, just the issuance of an injunction.

MR. GILSTRAP: More the nature of a service.

MR. DUGGINS: Yes. And if you're trying to find somebody, it's hard to get a constable or sheriff to sit outside for hours and hours waiting on them. It is convenient to use a process server in that circumstance. I agree with everybody on the other circumstances.

MR. GILSTRAP: Why don't we just allow them to serve writs of injunction and that's it, or temporary restraining orders and that's it. That might be one approach.

MR. DUGGINS: I think we should consider carving that out because it's merely service of a court order, but you can't do it presently by a process server.

HONORABLE TOM LAWRENCE: You know, if you look at the writ of attachment, you've got different language used which is a little confusing, because Rule 598a says, "The defendant shall be served in any maner prescribed for service of citation" and then Rule 597 says, "The sheriff or constable receiving the writ shall," and then 604, 606, and 607 talk in terms of the officer making such sale. "The officer executing the writ of attachment," and so I'm not -- it's a little confusing, and then you -- so which rule would trump which rule?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: You know, aren't we really talking about writs that require the server to take action against person or property? And the other writs, they don't do that, and anybody could serve, like a writ of injunction. He's not required to take action against a person or property, so wouldn't -- isn't it -- aren't those the writs we're talking about that require action, that server

take action against the person or property, like physically take property?

CHAIRMAN BABCOCK: We're talking about taking them out, you mean?

MR. LOW: Pardon?

CHAIRMAN BABCOCK: Talking about taking them out?

MR. LOW: Right, taking them out, but then that would leave in the other like a writ of injunction, you just serve or a notice and so forth, and it sounds like to me the only ones we're worrying about is where the server must take physical action against a person or property.

CHAIRMAN BABCOCK: Or the Property Code, if the Property Code requires --

MR. LOW: Yeah.

HONORABLE TOM LAWRENCE: I don't have my Property Code, but I believe it says "sheriff or constable" for writ of possession.

MR. ORSINGER: You could say "and other notices," comma, "and where by permitted by law, writs, orders, and other papers" so that we automatically make the rule subordinate to the statute.

MR. LOW: I know, but how does that take care of a writ of injunction?

MR. ORSINGER: Well, maybe we should say "where not prohibited by law." I mean, we've got some provisions there that really seem to require a peace officer, a certain writ, and others like a writ of injunction there's no requirement that that be served by a peace officer, so we might be able to just --

HONORABLE TOM LAWRENCE: No, in the writ of injunction you've got Rule 686 that says "serve like citation." 688 uses the term "sheriff or constable," and 689 uses the term "officer."

MR. ORSINGER: 688 is for temporary injunctions or permanent injunctions?

HONORABLE TOM LAWRENCE: Let me look.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: There's another problem. I mean, this term "writ" is extremely vague. I mean, what about writ of certiori? What about a writ of prohibition or a writ of mandamus? I mean, those are all writs, which is kind of a vague term meaning an order issuing from the court, kind of; and before we just stick in that vague term we might want to scrutinize exactly what we're allowing to be done; and maybe we need to limit it -- I mean, I like Buddy's idea, something along those lines, something that requires something more than just handing somebody a piece of paper.

CHAIRMAN BABCOCK: Elaine.

MR. LOW: You could put in there "except as provided" -- "where contrary by law" or something like that, and if the Property Code requires something, well, then it wouldn't be inconsistent.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: I disfavor including writs at all and the proposed Rule 103.

MS. SWEENEY: You just favor or you disfavor?

PROFESSOR CARLSON: Disfavor.

CHAIRMAN BABCOCK: Not in favor.

PROFESSOR CARLSON: Not in favor.

MR. ORSINGER: She's against.

PROFESSOR CARLSON: I'm against. And in response to Judge Lawrence I think that the reason that the rules sometimes refer to sheriff or constable, other times officer, other times "as prescribed by the rules of citation," these rules were principally promulgated before Rule 103 was amended to allow the court to authorize a private person to serve, and I just don't think we went back and looked at that in terms of who was serving those writs.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: The new proposed rule adds what I

think was intended to be a solution to the question that was raised at our last meeting, and that's that any person certified by order of the Supreme Court can serve. Is there a proposed order of the Supreme Court already? And is that in our materials?

MS. HOBBS: It's over there on the --

MR. BOYD: What I'm wondering is maybe the order of the Supreme Court should just say these persons can serve citation only but not writs and other papers.

MR. ORSINGER: Well, that doesn't fix the problem that people under subdivision (2), who are also 18-year-old women, will be doing it under subdivision (2) instead of subdivision (3).

MR. BOYD: But that problem has existed for a long time if that's a problem, because the rules on attachment and distress warrants and all those say that they can be served by anybody authorized to serve citation, and Rule 103 has for sometime allowed them any person authorized by law or written order of the court who is not less than 18 years of age to serve citation.

I mean, as I recall, we got into this just because of the idea that serving citation didn't always have to be a constable and if we could set it up in a way to allow other people to serve citation, and we decided to solve that -- address that issue by saying we'll allow

people authorized by a Supreme Court order to do so. So the Supreme Court order could just say, "We hereby order that the following people can serve citation but not writs or other papers."

MR. ORSINGER: Well, the existing practice before this effective rule for persons authorized by written order only applies to citation and other notices, so the insertion of "writs and orders" is a change on the previous practice.

MR. BOYD: No, because if you look at the rules on service of a writ of attachment or distress warrant or others, it says those can be served by anybody authorized to serve citation, which takes you back to this rule to say any person.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: Well, that's right. It does allow the service of a writ, but virtually everything else other than the actual service of the writ has to be done by a sheriff, constable, or officer. So as a practical matter a private process server could serve it, but they're not going to send that over to the sheriff or constable, who are not going to have anything to do with that if they didn't serve it. So while it's theoretically possible for a private process server to serve the writ of attachment, he can't do anything else.

Everything else involved in that writ has to be a sheriff or constable or officer.

CHAIRMAN BABCOCK: Okay. Yeah, Carl.

MR. HAMILTON: Well, I think that the concept of private process serving was always just intended, wasn't it, for citations to facilitate the service of citations and subpoenas, perhaps; but if we exexpand to it writs, as Tom points out, how is that person going to care for and take care of property that's sequestered or something like that? They don't have any ability to do that.

CHAIRMAN BABCOCK: Why was "writs" inserted later?

HONORABLE NATHAN HECHT: There was some suggestion that it should be because it was as -- as has been pointed out by a couple of people, sometimes it's hard to serve injunctions on people, it's hard to catch them, same problem that you have with serving citation.

MR. ORSINGER: TROs particularly.

HONORABLE NATHAN HECHT: TROs.

MR. ORSINGER: They can duck a TRO for days.

HONORABLE NATHAN HECHT: And that that's one of the reasons that private process servers are so welcome by the Bar, is because they have a profit incentive to get the job done as opposed to the sheriff or constable who

may or may not act, because, in all fairness, they've got lots of other things to do; and so -- and, frankly, to get comments like we've gotten and we're talking about now to see if this is really a good idea or a bad idea.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Wouldn't the problem be solved by simply allowing private process servers to serve citation or notice? I mean, you're never served with a writ of injunction. You're served with a notice of a temporary injunction, I believe. You're not served with a TRO. You're served with a notice of a TRO. Is that correct?

MR. DUGGINS: No, it's a writ.

MR. ORSINGER: There actually is a piece of process. Even though what the judge signs is called a temporary restraining order, it's really an order directed to the clerk of the court to issue a temporary restraining order, which is a piece of process.

MR. GILSTRAP: I thought you got a notice.

MR. ORSINGER: You have a notice of the hearing. If you get a TRO you typically get a hearing at the temporary injunction hearing, and that notice is with the TRO, and you have to serve not only a temporary restraining order signed by the clerk of the court, but you have a notice of the temporary hearing signed by the

clerk of the court, two separate pieces of process resulting from one combined order signed by the judge, and most people confuse the TRO, "I got a TRO signed by the judge." They got an order for the issuance signed by the judge.

HONORABLE NATHAN HECHT: And covered by Rule 687.

MR. GILSTRAP: I'm wrong.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: But even with TROs and injunction, I think before you subject a citizen to contempt or the potentiality for contempt that it should be served by an officer, not by a process server.

CHAIRMAN BABCOCK: Why?

PROFESSOR CARLSON: I think not only because of the training of those folks, I think the ramifications. Maybe someone won't take it real seriously if -- well, Richard is not, if an 18-year-old girl -- apparently he's not paying attention.

HONORABLE JANE BLAND: I'm listening, and I made my comment.

CHAIRMAN BABCOCK: Yeah, but we can run with this all day.

PROFESSOR CARLSON: We've only just begun.

CHAIRMAN BABCOCK: Yeah, in light of

Richard's recent experience with an 18-year-old girl.

PROFESSOR CARLSON: I just think there is something about --

MR. ORSINGER: Which is none, I might add.

CHAIRMAN BABCOCK: Yes, Carl.

MR. HAMILTON: Rule 103 specified citations and other notices, so it wouldn't be a big problem just to list under the new rule exactly what these people could serve. Not very many things, but just list them.

CHAIRMAN BABCOCK: Yeah. Buddy.

MR. LOW: But some of the private process servers are better trained than the constables. We had a constable in my little county that couldn't read and write. I mean, he wasn't going to school. That is the absolute truth and --

CHAIRMAN BABCOCK: But when he served an injunction people stood up and took notice.

MR. GILSTRAP: But he does have a badge. He does have a badge.

MR. LOW: That's right. And, I don't know, we've come a long way now because in my county a lot of people can read and write. I'm not certain about some of those other counties.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: You know, probably 99.9

percent of the TROs are family law TROs. I mean --

CHAIRMAN BABCOCK: 60 percent of the cases, 99 percent of the TROs.

MR. ORSINGER: I know there are TROs in family law constantly. I don't see it that often now that the foreclosure craze is over, but we definitely would need to perpetuate private process servers for TROs in family law matters, because, you know, you frequently have people that are avoiding service there; and you can't get a constable or sheriff's deputy to stake somebody out for eight hours, so we have to be sure we can keep that process alive.

CHAIRMAN BABCOCK: Okay.

MR. DUGGINS: It's a real problem, too, in trying to prevent somebody from taking businesses where the small business owners are fighting over the breakup of a business, and somebody is trying to grab or hide records. I mean, I think we do need to allow it in those limited circumstances because you cannot get a constable or sheriff to hide out and find this person and get them served.

MR. ORSINGER: And they won't do clever things like pretend like they're delivering flowers, you know, or be carrying a file that looks like a business file and you open it up and it's got the process inside.

Peace officers are not that --

MR. DUGGINS: Pizza delivery.

MR. ORSINGER: Yeah. There's a lot of tricks of the trade.

CHAIRMAN BABCOCK: Okay. Any other comments? Richard, anything else to say, last word?

MR. ORSINGER: (Nods negatively.)

CHAIRMAN BABCOCK: Okay. Does this give you a sense of --

HONORABLE NATHAN HECHT: Very helpful. Yes. Very helpful. Thank you.

CHAIRMAN BABCOCK: All right. Great. Paula is here on Item 5, the electronic jury shuffling.

MS. SWEENEY: You-all have a one-pager in your stack on this, which is a letter from Judge Christopher to Justice Hecht about Rule 223 of Rules of Civil Procedure, which is the jury shuffle rule; and her proposal is that when a lawyer wants a shuffle, that instead of shuffling manually the clerk be able to shuffle in the computer, rerandomize the jury cards and produce a now shuffled list without the time delay and so on of having the panel sitting around in the hall while the cards are manually shuffled. I've heard no other comment from any other group or comment on this. I personally think it's a great idea and would commend it to you and

would open the floor to comment for anybody that wants to say anything about it.

MR. ORSINGER: I don't know, Paula probably hasn't tried as many cases in South Texas as I have, but --

CHAIRMAN BABCOCK: Family cases.

MR. ORSINGER: Family law cases. If I'm in a hostile county where the opposing lawyer is very well positioned at the courthouse, I want to be able to watch the jury shuffle, and I've tried to watch it, and I think that it's been a good practice. If you make this entirely electronic, it's not verifiable, and we're struggling with that issue now with the presidential elections. There are some states that have no paper trail for ballots that were cast, and we're about to see litigation on that, I understand, and I'm just -- I know that probably it's a hell of a lot more convenient, but if a shuffle is turned over to somebody that goes back into their office and hits a button on the computer, you've just lost all accountability, and it bothers me. It really does.

MR. LOW: What rule says you get a chance to watch the shuffle?

MR. ORSINGER: Well, I go in there, and I watch them shuffle it up.

MR. LOW: No, my question is -- now that's

the 18-year-old. What rule says you have a chance to do that, to watch them? The clerk goes back there and they come back and they say they shuffled it. You say, "You violated the rule."

MR. ORSINGER: No, I follow the clerk. Well, I haven't had to do this lately, but I follow the clerk back --

MR. LOW: What if she goes in the ladies bathroom and does it?

MR. ORSINGER: Well, if it's a ladies room, I wouldn't go in.

MR. MUNZINGER: He would get that 18-year-old process server.

MR. ORSINGER: Maybe nobody else cares, but, you know, if you've ever tried a case in a hostile small county against a well-positioned adverse attorney, the courthouse is not your friend.

MR. LOW: Well, I've been there many times.

MS. SWEENEY: I've tried a lot of med mal cases in little bitty counties against one of six doctors where, you know, I kept my car doors locked and my windows up until I was out of town, but I've not had the circumstance where I felt like I was getting screwed in that particular way.

MR. LOW: There are other better ways.

MS. SWEENEY: There's other ways.

CHAIRMAN BABCOCK: Justice Bland and then Judge Benton.

HONORABLE JANE BLAND: The reason that Judge Christopher requested the rule change is that the way that the rule is written now adds about an hour to an hour and a half of time to voir dire selection; and not only is that time valuable to the lawyers who are trying to get their jury picked and the judge, but to the jurors who must sit out in the hallway doing nothing while we type all the jury information cards up, put all the slips of paper in the trash can to shuffle, pull them out, reconstitute the jury with new numbers, and go and recopy that information to give to the lawyer.

So it's not just a simple process. It's a several step process that involves making multiple copies, so the computer regeneration would allow the bulk of this time to be saved, and it's critical time. It's time when everybody has a lot to do, so I think that we should allow for this in light of a problem that we know exists; and then, Richard, you can follow the clerk into the clerk's office and watch the clerk punch the button on the screen to see the random generation and report back to us if you think there's a problem; but I don't think we have any evidence yet that this would be a problem; and right now

we do have an existing problem to address; and that problem is that we always add an hour and a half of time in doing a shuffle.

Not to mention the fact that I think that, having watched my clerk do a lot of shuffles, it's less random than you think, not because of any intention on her part, but just because you cut things up and throw it into a trash can and who knows how good and random it gets redistributed; and just by, you know, experience, the jury doesn't always end up looking all that different than it did -- the jury order number doesn't end up looking all that different. That's for another day. I think this is a problem that's out there that here is a creative way to cut down on the time the jury spends out in the hallway that makes us all look bad.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: It would be helpful to know how Harris County does that technically, whether there's a program, because the smaller counties are not going to know how to do this; and they may have computer-generated or computer kept jury lists, but they just wouldn't know how to do a random shuffle on the computer; and so it might be useful to find out from Charles or somebody just technically how they do it; and if that were a separable part of the system or if it were

a part of the system that everybody has and they're not using, then it would be very easy to move to that and assure that the new one you get done, you really have a newly randomized list as opposed to a computer -- I mean, someone might think that, well, if you just sort it on zip codes or something that would reshuffle it, but it's not the kind of reshuffling that you want because there's an intended order, or sort on last names or something. That's not random. So we would need to know how the computer people actually get that done.

MR. ORSINGER: Well, is this the kind of thing the Office of Court Administration could promulgate a piece of software --

HONORABLE NATHAN HECHT: Might be.

MR. ORSINGER: -- that would be validated as accurate and then we could require that they use it?

HONORABLE NATHAN HECHT: It might be because, I mean, there are plenty of computer programs that do this, that can randomize lists, but they just need to be available.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Why don't we allow it if the parties consent, and if somebody wants to be a stick in the mud and say, "I'm afraid of getting hometowned in this small town. I want to watch them shuffle it," they can.

CHAIRMAN BABCOCK: Elaine, then Paula.

PROFESSOR CARLSON: Texas is pretty unique having jury shuffle. I think we may be one of the few, perhaps the only, jurisdiction that has it; and, of course, it's only available in counties in which you have interchangeable jury panels, two or more district courts. Three for sure, two if the two agree. Our rule hasn't been criticized in the academic literature.

CHAIRMAN BABCOCK: Has or has not?

PROFESSOR CARLSON: Hasn't.

CHAIRMAN BABCOCK: Has not.

PROFESSOR CARLSON: Has as being misused in some instances as an Enron against Batson.

MR. ORSINGER: An Enron against what?

PROFESSOR CARLSON: Enron against Batson. You go in, you say, "I want to reshuffle, redistributing my odds here," so we're used to it in Texas, but it's certainly not something that is the norm across the United States. I had understood Judge Christopher's remarks -- and I must have misunderstood them -- that because the jury shuffle was used at a time when we used jury cards and now we electronically are randomly selecting prospective jurors that perhaps there is not a need for a shuffle in those instances.

CHAIRMAN BABCOCK: Okay. Paula.

MS. SWEENEY: Well --

CHAIRMAN BABCOCK: Then Judge Benton.

MS. SWEENEY: We've already been to that party in this group several times and have articulated that the shuffle rule in its existence isn't really an issue, and I don't think that this raises that issue, and I do think and we've had the debate a bunch of times that it's important to retain that, but as to letting the lawyers agree, I think you would end up obliterating the rule. I think there's -- there are enough times when there are just obstructionists in the process on one side or the other or both that are just not going to agree to anything, and I think if you leave it open to that, you probably -- you eviscerate doing this if we did it.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: Yeah, Professor Carlson really just raised the issues that I wanted to raise. I was unaware that the purpose of the rule and its origin had been discussed before. I don't know why we still have the rule in 2004; and I, frankly, would like to see the Court on its own motion without any debate here just do away with the rule; but if we're going to have the rule, Frank's concerns and Richard's concerns are of no moment, because if you're concerned about the shuffle then you might as well go back further in the process and

insist on being there when the summons go out, insist on being there when the will is reconstituted. If there are -- if the system lacks in integrity, it's going to lack in integrity at several points and not just when a shuffle is requested.

CHAIRMAN BABCOCK: Yeah. I once used my opponent's shuffle as a basis for a Batson challenge because without having any information about the jury other than he went in and looked at them he asked for a shuffle, and the effect was to move a disproportionate number of people of one race around in the panel.

MR. LOW: But that's the whole thing. I mean, if you see 15 or -- well, you know, you're in trouble if you see that many, but if you see several right in a row and so forth and you don't think you've got a good gathering of it, you should be able to shuffle.

PROFESSOR CARLSON: These 18-year-old women.

MR. LOW: Yeah. I mean, I'm not --

CHAIRMAN BABCOCK: Richard and then Justice Bland.

MR. ORSINGER: To me the shuffle has an independent purpose from the original jury summons. If you're looking at a panel and you detect what you think is a pattern, whether it's a conscious pattern or an accidental pattern that you don't have a fairly mixed

jury, this is a palpable way where you can assure yourself that you do have the random sequencing. Now, you can't eliminate discrimination that occurs. That's been litigated all the way to the Supreme Court, and we have a lot of safeguards, but if you've ever gone to a place where it looks like the panel is stacked on the front end or the back end and that just doesn't look normal to you and you could shuffle, then if you end up about the same or worse off at least it's random; and to me that's an entirely different question from whether you want to challenge the integrity of the process all the way back to the beginning.

CHAIRMAN BABCOCK: Justice Bland, then Paula.

HONORABLE JANE BLAND: The reason that Judge Christopher sent the letter in now is because Harris County is in the process of building a new jury assembly room and also is getting software together to facilitate the delivery of jurors to courtrooms; and as part of that they're going to scan every juror information card or every bit of information that a juror has -- well, now it gives you, will be on the computer. So the idea of electronic shuffle is not only will it randomly regenerate the panel, but it will also attach with it all the jurors' information so when you press the button, information will

come out in the right order.

So not only does it save time in terms of the reshuffling, it also eliminates the reordering and the recopying and all of that. That's the reason why it's here now, and I will talk to Tracy and to Charles about giving us some information about how they're planning to do that, but I know that's what they would like to do; and when you have as many district courts and county courts as there are in Houston, it really will save time in the whole voir dire process.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: With all due respect to the Batson issue, of which I am a champion, that's a red herring in this venue, in this rule, I think; and I think it's being used to eliminate the shuffle for -- with unintended consequences. I've used the shuffle when I've gone to pick a malpractice jury and in the first 12 people there were eight health care providers and none on the whole remaining 60 people. So for that case this panel, where it may have been randomly constituted, but the coincidences were that that was an inherently horrifically unfair panel for me -- John would have liked it for that case.

Is it possible that somebody might use it for a Batson related reason for an inappropriate racial or

religious or protected categories? Sure. I mean, there's a possibility for abuse of almost every rule we have, but we can't keep letting the dog of abuse -- the tail of abuse wag the whole dog of these rules; and the rule was here for cases where a panel supposedly randomly constituted and even properly randomly constituted turned out to be unfair for that particular case, where, you know, you walk in and you've got six insurance adjusters in the first 10 or whatever would be unfair in your particular facts of your case, and so you rerandomize them.

You get one shot, so we don't have the abuses that we used to have of everybody is wanting to shuffle back and forth. You get one shot at it. If it can be done expeditiously electronically, I think that's terrific because I hate that delay, and then you have at least one more shot, and if they all show back up there again then you're just not going to have a good day, but at least you had a crack at making what appears to be unfair for that particular case fairer, and I hate to see us even picking up the idea of getting rid of one of the safety valves that's in the system.

MR. LOW: I totally agree, because I've had the experience where I'm the defendant, and the bank president, the head of the corporation, everybody I want

on the jury is No. 40 to 44, and we're never going to get there, so I'm going to ask. It happens. It's not a matter of race, and I don't even know how they pick them. I get there and they're there, but I know how to shuffle them.

CHAIRMAN BABCOCK: Not if we make it computer-generated.

MR. LOW: I don't know anything about computers. If they tell me they did it, I figure they did.

PROFESSOR CARLSON: That's just it. You're not looking for fair and impartial jurors. You're looking for jurors partial to your case.

MR. LOW: No, I want one that's equal where it will be -- well, maybe favor my client a little.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I just want to note that for the second time today I agree with Paula. We all want to watch the sky and listen for the trumpets, but it isn't a question of not wanting a fair and impartial jury. Of course you want a fair and impartial jury. You want fair and impartial jurors that reflects the community, and when your bank president is No. 40 and the first 13 are labor union members, and you've got a case involving a labor union, you may not get a fair reflection of your

community. The shuffle is a valid, valuable tool to a trial lawyer who is looking for justice and truth, and don't take it away from him.

CHAIRMAN BABCOCK: Yeah, I don't think the proposal, in fairness, was to take it away but rather just to be able to touch a button to reshuffle it.

MR. GILSTRAP: The point was moving.

MR. ORSINGER: Yeah, the point was to make it nonverifiable.

HONORABLE LEVI BENTON: I join, although I think you're a champion of this -- the Batson issue because I think, as Richard put it, it's not an opportunity for truth or justice because truth or justice ought to be the same whoever is in the box.

MR. MUNZINGER: That's nice to think.

MR. ORSINGER: I agree with you, it ought to be.

MR. MUNZINGER: Everybody comes to trial with their preconceptions and their self-interest, and to pretend that you can pick up 12 people at random and you are going to find 12 that are going to be equally fair, I don't believe it's true. I don't believe it's good or bad for either side of the lawsuit. Why do we have 36 people come and sit in the jury box. Just take twelve off the street and say, "Go try the lawsuit." Well, that's not an

intelligent jury trial.

HONORABLE LEVI BENTON: I have had a case go to trial where one side picks six, the other side picks six. We need 12 people.

MR. MUNZINGER: When I heard someone say that it was criticized in the circles of academia it bothered me. It bothered me greatly. I generally suspect those things.

CHAIRMAN BABCOCK: Poor Elaine is wounded deeply by this. Judge Peeples, did you have a comment?

MR. ORSINGER: Is she as angry as Judge Bland?

HONORABLE JANE BLAND: I didn't hear it.

HONORABLE DAVID PEEPLES: Those of you who want the shuffle in court, do you contend that if there truly has been a random shuffle in the central jury room and the panel that arrives at the courtroom is a random shuffled panel that you ought to have a second chance if you just don't like the way it came out?

MR. MUNZINGER: Yes, I do.

MS. SWEENEY: You get one shuffle.

HONORABLE DAVID PEEPLES: I know this gives you that, but this was written back before we had computer shuffles.

MR. LOW: I know, but we still had people.

HONORABLE DAVID PEEPLES: It works both ways, as Buddy and Paula have said, but I would be willing to write the rule so that if we could be very sure that the panel that arrives at the courtroom was randomly shuffled, and in the big cities you've got a lot of courts and you take excuses and reschedule people and you take what you've got leftover, and if that can be shuffled again and go out randomly to the courts, what is the injustice in taking what randomly you got? It might be good for you; it might be bad for you; and if it's good for you, it's bad for the other side and vice versa; but if randomness does happen in the central jury room, what is the injustice of having a fair and equal chance and if it comes out a little bit at one end or the other, what's wrong with that?

MR. LOW: But if you get a fair mix, you get a better shot doing it twice to get an equal mix than you do just one.

MS. SWEENEY: Yeah. Statistically speaking if it comes out skewed as it relates to that case and you shuffle again, I mean, the statistics tell you it's not going to come out skewed for that same case again probabilitywise.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: Well, as somebody

who is a trial lawyer now but was a judge for a while, I just think it's different perspectives. I think the judges have seen this abused, and when it's abused it bothers you, and I think most trial judges at some time have seen somebody ask for a shuffle when they haven't seen had time to study the sheets about the people, so we've seen it.

On the other hand, I do recognize that it can be valuable, although I've also seen it work the other way. The defendant asks for the shuffle and then you get -- the health care providers were in the back and all of the sudden now are up front and you're unhappy. I've always wondered why a second random is much better than a third random. Does the party that turned out really bad with the first shuffle seems like maybe they want a shuffle now? I understand there are some dynamics here, but it seems to me the proposal on the table today is a no brainer.

MR. GILSTRAP: Yeah.

HONORABLE HARVEY BROWN: This is simple. Maybe some people might say that we should allow the parties to by agreement opt out. I think that's not necessary to change or articulate it, but I think this is pretty simple.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: You know, one reason we have peremptory challenges and we have the shuffle, it gives the parties the feeling that they have some control over who's on the jury, and I don't think anybody in this room wants to give up the feeling that they have some control over the jury, and that helps your client accept the jury's decision, and I think we have to go through a lot of this just for that reason.

CHAIRMAN BABCOCK: Okay. Let's take a vote. How many people believe that the language of Rule 223 should be changed to allow for a computer shuffle? Raise your hand.

Against? 27 in favor, one not voting, the chair not voting, so that would be two not voting.

MR. HAMILTON: That's assuming it's a random.

MR. ORSINGER: I would like to append on there that --

HONORABLE LEVI BENTON: That's assuming we have a shuffle.

MR. ORSINGER: I would like to append on there that we ought to consider having a standard protocol for all the courts across the state that's issued by the Office of Court Administration.

CHAIRMAN BABCOCK: We're going to get down

to the details because Paula's committee is going to write a rule implementing this.

MS. SWEENEY: Yes, sir, we sure are. And it's going to be titled "The Sanctity of the Shuffle."

HONORABLE LEVI BENTON: I think we ought to turn all of these things over to Justice Brister.

MR. ORSINGER: But we like juries.

CHAIRMAN BABCOCK: Well, we'll call it the Brister shuffle or maybe the Brister hop. Okay. Paula, we'll try to get to that next time if your subcommittee is able to put some language together.

MS. SWEENEY: Yes, sir, we're very diligent.

MR. HAMILTON: Can I ask a question about that? It's my understanding from our court personnel that our jury lists come from Austin from random driver's licenses.

HONORABLE DAVID PEEPLES: The jury pool list comes from Austin, and it's got driver's license and voter registration people on it.

MR. HAMILTON: The pool?

HONORABLE DAVID PEEPLES: The pool that will be summoned to the courthouse on a given day.

MR. HAMILTON: Yeah, that's what I'm talking about.

HONORABLE DAVID PEEPLES: The list comes

from Austin, and the county decides how many they do.

MR. HAMILTON: Does that come from Austin by paper or by a computer?

MR. WILDER: It comes by tape.

MR. HAMILTON: Paper?

MR. WILDER: No, sir, it's electronic.

MR. ORSINGER: And is it random when it comes or is it sequential?

MR. WILDER: It's just all in there, and basically we do the -- when we spin the -- we call it spin the wheel. It's an electronic wheel. We have an algorithm that does all the random kicking out of the 6,000 or so a week that I call.

MR. ORSINGER: So does every county have its own algorithm, or is there a standard algorithm?

MR. WILDER: Yes, every -- to my knowledge, we have our own. It's held up a court challenge. It was created by an academic professor, and to my knowledge every county does it differently.

HONORABLE LEVI BENTON: Tom, I'm just curious, do you-all use the pi squared method or the KS method?

MR. WILDER: I haven't looked at that. The last challenge, court challenge we had to our algorithm was about seven years ago, and I, frankly, haven't looked

at it since. I can't tell you.

HONORABLE LEVI BENTON: Okay. I'm just curious.

MR. ORSINGER: Well, if there's two methods that means that the academics probably disagree which one is accurate.

HONORABLE LEVI BENTON: Well, I'm only aware of two, but I'm not an academic.

PROFESSOR CARLSON: Well, I am, and I'm proud of it.

CHAIRMAN BABCOCK: No more giving the academics problems. So we're done with this.

Richard, on the subcommittee on information technology, there are some proposed rules, and are you ready to discuss them?

MR. ORSINGER: You know, Chip, I wish I had some help here.

CHAIRMAN BABCOCK: Item 6 on the agenda.

MR. ORSINGER: I know that, but I wasn't able to get ahold of the actual rules themselves.

CHAIRMAN BABCOCK: While you're looking, Justice Hecht, where are these rules in the Court's panoply of things? Is it -- I mean, these are pretty far along, but I don't think our group has discussed them.

HONORABLE NATHAN HECHT: Well, you recall

that, what is it, about a year and a half ago or so now or maybe not quite that long, we presented -- an electronic filing proposal was presented to the committee, and people from the Office of Court Administration were here. We were meeting over in the broadcasters building, and we asked them questions, and we talked about how this was going to work. We gave them some suggestions, and this was on a case -- this was on a county by county approval, but this was not a statewide rollout. This was just an individual kind of a test project.

So they had some preliminary rules that they were going to use to start this project. They implemented it in several counties. Several other counties wanted in. There were a couple of rules changes along the way that people -- that the people who were using the project suggested. We made those again on an ad hoc basis. This was just for the purposes of the project, and the representation at that meeting and since has been that when the project was far enough along that there was a recommendation that it be used statewide by clerks that want to use it, then we would begin to look at statewide rules because we didn't want a rule on electronic filing in Bexar County and another rule in Harris County.

We wanted -- once you got through experimenting with it to see what was the best way to go,

then we wanted to standardize state rules. So these are the proposed standardized state rules that would apply to electronic filing, and they are taken from the rules that have been in use by the counties that have been using this, of which there are now a number.

MS. HOBBS: I want to say it's 16 live and, I mean, the Court gets a new county almost every week to approve the rules, so --

HONORABLE NATHAN HECHT: Well, this is starting to grow, this electronic filing project, and I think, Richard, you were involved in its development in Bexar County?

MR. ORSINGER: Right. But as a subcommittee of this committee we have received absolutely no input from anyone; and the counties where I practice, I don't think that they've fully implemented, or at least I don't -- I don't think they have in Dallas.

MS. HOBBS: Dallas County is live now.

MR. ORSINGER: When did they go online?

MS. HOBBS: Recently this fall, September or something.

MR. ORSINGER: Okay.

MR. WILDER: It's just the county, county courts.

MR. ORSINGER: Are we being asked just to

look at these tweaks, which are really just kind of practical suggestions to make it work smoothly, or are we being asked to say that it is now ready to mandate statewide?

HONORABLE NATHAN HECHT: Well, not mandate.

MR. ORSINGER: For the counties that are going to accept electronic filing it would be mandated?

HONORABLE NATHAN HECHT: Yes.

MR. ORSINGER: Okay. Well, we have no information base to do that. Chip, we don't have a vote from the subcommittee. If you'd like me to, I will get a meeting together, but the truth is we have no input from anyone as to how it's working. Are you-all getting any letters or complaints from anybody or any suggestions that there's anything bad?

HONORABLE NATHAN HECHT: No. But you should check with OCA. I mean, they have been doing the implementation; but as far as I know, not only do we not hear anything bad, but county after county, as Lisa says, comes up and says, "We want to do it, too," so -- and this is -- the Federal courts are -- have been mandated to go to this. Some of them have been using it voluntarily for the last couple of years, but now Congress has required them all to go to electronic filing, and you don't have any option except in some instances you can walk down to

the courthouse and file it or something, but generally speaking it's going to be required, and so we're nowhere near that in Texas, but we're far enough along that we need to begin to have standard procedures so that there aren't any differences county by county.

MR. GILSTRAP: Is it correct that no Texas court has mandatory electronic filing?

HONORABLE NATHAN HECHT: Yes.

MR. GILSTRAP: Is that correct?

HONORABLE NATHAN HECHT: That's correct. The part of the project was to make it completely voluntary. Many of the judges in the counties who are using it wanted the authority to order it, and we stopped short of that. We did give them some more power to entice people to do it, but it's not mandatory. But it is, as I say, far enough along that we need to take what the prototype rules were, which are three pages of rules, and disperse them into the Rules of Civil Procedure.

MS. HOBBS: And my understanding is that Harris County judges have approved a rule, and it's about to be submitted, too.

HONORABLE LEVI BENTON: That's right.

MR. ORSINGER: You're talking about putting these in the Rules of Procedure and not just a miscellaneous order?

HONORABLE NATHAN HECHT: Yes.

CHAIRMAN BABCOCK: You got a proposal, Richard?

MR. ORSINGER: Let me spend some time with OCA. I'm sorry. And I guess we'll get the whole subcommittee to comment on it, although, are we actually getting -- we may be getting counties that are signing on, but are we getting lawyers that are actually doing it? Do we have a few hundred examples or do we have a few thousand examples?

MS. HOBBS: I would guess closer to the thousand than the hundred, but that's just based on, you know, anecdoteal evidence. I do not know specifically from OCA, but I'm guessing OCA can tell you exactly how many filings are coming through every day or every month or --

MR. ORSINGER: Okay.

MS. HOBBS: I mean, I bet you can get raw data on that.

MR. GILSTRAP: Once the Federal courts mandate it, I think people kind of -- they are going to be a lot less reluctant to do it in state court, and I think the Eastern District of Texas just mandated electronic filing now.

HONORABLE NATHAN HECHT: Well, and the

report from the Federal people is the Bar is running downhill to have this, and there was some concern that it favored the large law firms, but it's turned out that the opposite was true, and, actually, the Bar's response is that especially favors smaller practitioners because they don't have the expense of trying to get things to the courthouse.

MR. LOW: Judge, we escaped the problem, I'm assuming, that we had initially when they were filing with somebody who in turn would relate it to the clerk, and then the question was if they didn't relate it, they weren't a deputy clerk, so therefore, you didn't file it on time, and that thing now is being filed directly, as I understand it.

MR. ORSINGER: Nope. Nope. It is the same system that you always heard about.

HONORABLE NATHAN HECHT: But we changed that. We changed the problem about when it was filed when we talked to OCA at first about the prototype rules, and it may be useful when the subcommittee comes back to have OCA come over again and show you the --

MR. LOW: Yeah, they did. They came. Has anybody had any experience? I mean, certain things you have to swear to. Is that perjury? Usually perjury is if you swear false swears.

MR. ORSINGER: But these rules provide -- especially the amendments in these rules provide that an affidavit has to be a photographic image and not just a digital.

MR. LOW: I thought it said --

MS. SWEENEY: It did.

MR. ORSINGER: But I believe this provides that an affidavit has to be an actual --

MR. LOW: Let's see. I'm sorry. I read it earlier. It says "documents required to be verified or sworn to under oath may be electronically filed only as a scanned image."

MS. SWEENEY: It is.

MR. ORSINGER: Yeah, what that means is you actually have a picture of the affidavit that has ink on it. Now, you don't have the original, but that's what we have with fax filing right now. You have an original --

MR. LOW: I don't know. I'm just questioning if that really meets with other laws about swearing to and has to be perjury if you're not right. I just raise that. That's all.

CHAIRMAN BABCOCK: Well, Richard, I think for the next meeting then you ought to --

MR. ORSINGER: Okay. I'm sorry. I did not realize this was ready for final action.

CHAIRMAN BABCOCK: I think it is, and go over it with your subcommittee, talk to OCA, and do anything else you think you need to to swab it out, and this will probably take a little bit of time.

MR. ORSINGER: Okay. And, Judge Hecht, are we going to do like we do with the instructions to the jury, and this will be an order that's appended to a rule rather than going through and trying to stick them in the various rules where they fit?

HONORABLE NATHAN HECHT: No, this sticks them in.

MR. ORSINGER: Well, we're talking about maybe amending quite a few rules of the Rules of Civil Procedure.

HONORABLE NATHAN HECHT: Four, five, six, seven, eight, nine, twelve to be exact that the Court would be proposing.

CHAIRMAN BABCOCK: Yeah. We've got, you know, redlined --

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: -- rules here that we can do, that we can go through.

Okay. Justice Hecht, in terms of priority for our next meeting, I would think that the Judicial Administration Rule 14 would be a top -- may be the top

priority.

HONORABLE NATHAN HECHT: I hope, actually, if we could get some proposal on destruction of court records, just because the Legislature will be in session, and I know Charles wants to get some legislation if he can't get a rule.

CHAIRMAN BABCOCK: Listening to that, Pam?

HONORABLE NATHAN HECHT: And so I don't think it's too hard. It's kind of tricky, but I don't think it will be real controversial when we get a proposal, and if we could do that, that would take that issue off the table.

CHAIRMAN BABCOCK: Okay. So, Pam, we will give top priority to the retention and disposition of exhibits and depo transcripts for the next meeting, so that will be number one priority. Rule 14 is second?

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Okay. So we'll have to be sure that Hatchell -- I've e-mailed Hatchell already to tell him that this is something that needs some work, immediate work. We will have a couple of months to deal with it, but that will be the second priority. Is there anything else that's time sensitive? Jury shuffles, HB4? Probably the HB4 cleanup is probably.

HONORABLE NATHAN HECHT: Yeah. And the jury

shuffle should be easy.

CHAIRMAN BABCOCK: Right. Once Paula writes her rule that enshrines jury shuffling forever.

MR. GILSTRAP: Maybe we will have HB4 finished by the time that the House passes HB5.

CHAIRMAN BABCOCK: Right. So we probably ought to do that. And --

HONORABLE NATHAN HECHT: And then electronic filing.

CHAIRMAN BABCOCK: Yeah, electronic filing, and Justice Wainwright's court reporter's record, and the certificate of conference on motions for rehearing, and any appellate rules that -- TRAP rules that Dorsaneo hadn't gotten to. Does that sound like an appropriate order of business? Okay.

HONORABLE NATHAN HECHT: And we can move up any that the subcommittee chairman certifies will not take more than five minutes.

CHAIRMAN BABCOCK: Is that going to be under oath? Can we get him for perjury, Buddy?

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Okay. Any other -- we've gotten through the agenda in record time. Thank you, everybody. Is there any other business that we need to talk about today?

(Meeting adjourned at 3:36 p.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 12th day of November, 2004, and the same was thereafter reduced to computer transcription by me.

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