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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

March 4, 2005

(FRIDAY SESSION)

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COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 4th
day of March, 2005, between the hours of 8:55 a.m. and
5:17 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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Rule 14	12757
Rule 14, Family law exclusions	12809
Rule 14.3(f)	12861
Court of appeals transfers	12908
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Documents referred to in this session

05-1	Public Access to Case Records subcommittee draft
05-2	Mike Coffey Letter 3-2-05
05-3	Proposed Amendments to Appellate Rule 28
05-4	Coordinating a Conundrum, etc.

1 *-*-*--*-*

2 CHAIRMAN BABCOCK: All right. We're on the
3 record. Welcome, everybody. We've got a full plate today
4 and then some, and we've got a full plate tomorrow.
5 Definitely meeting tomorrow in case anybody is interested
6 in that. And we'll start as always with Justice Hecht's
7 report on the state of the union.

8 HONORABLE NATHAN HECHT: Just briefly, the
9 Chief Justice's State of the Judiciary message is
10 available to you on the table someplace, in case you
11 haven't seen it. We adopted the Bar's recommendation on
12 changing the fee-splitting provisions of the ethics rules,
13 and we adopted the Bar's recommendation on changing the
14 advertising provisions, so those have -- I'm sure you know
15 about those. Those are posted on various websites for
16 you.

17 We decided to defer the effective date of
18 the private service process rule until after this
19 legislative session because there are a number of bills
20 introduced or to be introduced in the Legislature that
21 would govern private process serving, so because the
22 Legislature has taken some interest in this in the past,
23 we decided it was better to let them take a shot at it
24 this session rather than weigh in with our own rule.

25 There is a lot of -- there are a lot of

1 bills that have been introduced that affect our work.
2 There are a dozen or more bills that call on the Supreme
3 Court to make rules on various subjects as soon as
4 possible, so we have a model that we used during the
5 last -- the previous session wherein the Legislature would
6 sort of set policy guidelines and then look for the
7 details to be worked out in rules, and that's successful
8 enough that we may have our hands full here this summer, I
9 don't know.

10 But there are a lot of those issues pending.
11 Apropos of what we will be talking about today, there are
12 a large number of bills filed already in the Legislature
13 concerned with various aspects of access to court records,
14 privacy, and all the issues that are involved in proposed
15 Rule 14 to the Rules of Judicial Administration.

16 We asked the -- we asked Chairman Nixon to
17 clarify the certified appeal statute, interlocutory
18 appeal, and to give us direction on the issues they merged
19 and Professor Dorsaneo's work on writing a rule to govern
20 the procedures for appeals, and there is a bill pending
21 which is not controversial that would fix the problems
22 that have been identified. There is also another bill
23 that would change that statute substantively, and it has
24 sparked a little more controversy, but one or the other of
25 them I hope will pass and give us some guidance there.

1 I think that's all I have to tell you. We
2 have only one additional referral to the committee that
3 I'm aware of. Judge Benton has asked the committee to
4 look at the jury shuffle rule, and that letter has gone to
5 Chip and I assume will go to the subcommittee.

6 MS. SWEENEY: What was the last thing you
7 said after "look at the jury shuffle rule"?

8 HONORABLE NATHAN HECHT: Judge Benton has
9 written a letter to the committee asking us to look at
10 that and --

11 CHAIRMAN BABCOCK: Yeah, Paula, you're on
12 the agenda for this meeting, Item 10, but I candidly am
13 not sure we're going to get to you; but Judge Benton a
14 couple of days ago wrote a very long and I thought
15 eloquent letter which is on the website, or not?

16 MS. SENNEFF: Not yet.

17 CHAIRMAN BABCOCK: Not yet.

18 MS. SWEENEY: Just up or --

19 CHAIRMAN BABCOCK: We just got it, but we'll
20 get you a copy, but I don't think we'll probably reach
21 that this meeting.

22 I thought I would talk about where we're
23 going to go in terms of order so that everybody can plan a
24 little bit. Justice O'Neill two weeks ago asked us to
25 consider on a very expedited basis the materials that have

1 been produced by a task force that has been working for
2 two years on protective orders, the proposed forms, and
3 because Justice O'Neill and the Court believe that this is
4 a time-sensitive matter I think we're going to have to
5 treat it as we did the parental notification rules about
6 five years ago where the chair of the task force appears
7 before us and we go through the rules making comments, and
8 if the task force chair thinks we have appropriate
9 comments then those changes will be made. If the task
10 force chair thinks they're not then we'll have a record
11 for the Court voicing our concern, but we won't make those
12 changes to rules that are submitted to the Court. That's
13 going to happen tomorrow morning, even though it's the
14 first item on our agenda. Stewart Gagnon could not be
15 here today, so we will postpone that till first thing
16 tomorrow.

17 On the proposed Rule of Judicial
18 Administration 14, that will be the first item we'll take
19 up today. That's Mike Hatchell's subcommittee. I can
20 tell you that there is enormous interest in this topic in
21 the Legislature; and, in fact, there are some members of
22 the Legislature that are holding off submitting
23 legislation pending what they see done by this committee
24 at this meeting, not to put any pressure on us, so that --
25 so that's the event across the street.

1 We do have today three members of the public
2 who wish to address us on this issue, and in deference to
3 their schedules we're going to take them up first. We'll
4 talk about this as long as we need to, or as long as we
5 have time, whichever exhausts us first.

6 At 3:00 o'clock today we'll have to take up
7 Item 6, which is Bill Dorsaneo's court of appeals
8 transfers, and Item 7, the appellate rule changes, again,
9 for Professor Dorsaneo's scheduling and the issues that
10 the Court wants us to advise them on quickly. And we'll
11 fit the rest of it in as we can.

12 I would add that the fact that the
13 Legislature has a number of bills that if passed would
14 refer to the Court rule-making procedures is a good thing,
15 I think, because it reflects the Legislature's confidence
16 in the Court, but by extension, confidence in our
17 committee, which six years ago I don't think that same
18 confidence was there; but it is today and that's because
19 of all your very hard and outstanding work, so I thank you
20 for that.

21 Without further adieu, we have three
22 speakers, Michael Schneider with the Texas Association of
23 Broadcasters; Wanda -- who goes by Fluffy -- Cash of the
24 *Baytown Sun* and the immediate past president of the
25 Freedom of Information Foundation of Texas; and Mike

1 Coffey, who is president of Imperative Information Group;
2 and I don't know if Mike Schneider is here, but --

3 MS. CASH: He's not here.

4 CHAIRMAN BABCOCK: Not here yet. Okay,
5 well, I think he's on his way, so Wanda, Fluffy, if you
6 could address us first on the issue of proposed Rule of
7 Judicial Administration 14 and if you could get near the
8 court reporter so she could hear you that would be great.
9 Try to speak up so everybody else can hear you.

10 MS. CASH: Great. Thank you. Good morning,
11 and I'm sorry that Chip outed me on my nickname. If he
12 can be Chip, I can be Fluffy. I'm the editor and
13 publisher of the *Baytown Sun*, which is a daily newspaper
14 about 20 miles east of Houston on Interstate 10. I've
15 been in the newspaper business for almost 30 years now.
16 I'm also the past president of the Freedom of Information
17 Foundation of Texas, and in that capacity was invited to
18 serve on the task force that was considering the
19 electronic access rule changes.

20 It was an interesting experience for me
21 since I was the only media type among all those jurists.
22 It was also interesting to me to realize how very little
23 most of the others on the task force knew about the
24 internet or the new world that we live in, the real global
25 village that we all live in today. There were some

1 shocking revelations of ignorance, just because I think
2 they haven't been around it, haven't used it, and didn't
3 know what's out there and how most of us use the
4 electronic world to do our business daily.

5 The core issue for me and for not just
6 newspaper editors, but the public who have an interest in
7 public records, is that we've got to provide fair,
8 consistent access, equal access, regardless of who makes
9 the request, the method of access, or the intended use of
10 the documents, the motivations of the requestor. Building
11 in practical obscurity by making somebody prove their
12 worthiness to have access by making them go to the
13 courthouse, find a parking place, slog through the
14 bureaucracy and demonstrate that they are a valued,
15 credentialed person eliminates so many people from even
16 trying to get that access.

17 It's so much easier to log on and get the
18 access, and because so many documents are increasingly
19 being created and stored in electronic format, I believe
20 that it's incumbent for our courts to keep up with that
21 evolving technology. I hope you will agree in -- that
22 providing consistent and fair access is part of keeping up
23 with who we are today and how our society functions.

24 CHAIRMAN BABCOCK: Okay. Thanks. Any
25 questions? Fluffy -- yeah, Richard. Richard Orsinger

1 wants to ask something.

2 MR. ORSINGER: I would like to ask if there
3 is any part of the information that you agree, you
4 personally agree, should not be public, like Social
5 Security numbers or addresses of children or birth dates,
6 or do you think everything ought to be available to
7 everybody no matter what it is?

8 MS. CASH: You know, it's already out there.
9 If it's available in the courthouse and somebody can go to
10 the courthouse and request a case file and get that
11 information, then why would we close it off
12 electronically?

13 MR. ORSINGER: Well, it's -- one possible
14 argument is it's harder to deal with en masse. In other
15 words, if you're going to go try to pick out 20,000 Social
16 Security numbers that you're going to pull individual
17 files, that's not practical. If you can do it
18 electronically, it is practical.

19 MS. CASH: It's not as easily practical as
20 it is at the courthouse. I mean, there are still hurdles
21 to get that information. The Federal system has a pretty
22 good model for redacting personal identifiers, such as
23 Social Security numbers and driver's license numbers or
24 financial information such as account numbers on a
25 checking account or credit card, and the Court I know

1 probably has copies of that Federal model now and can
2 consider that. But as far as we're concerned, if it's
3 open in the courthouse and it's available in a public
4 venue in a trial then it should also be available in an
5 electronic format as well.

6 CHAIRMAN BABCOCK: Fluffy, what about the
7 issue that, you know, if I'm in Australia just surfing the
8 net, you know, I'm certainly not going to go down to the
9 Harris County courthouse, you know, fly from Australia to
10 the Harris County courthouse and go look at records, but
11 if I'm surfing the net in Australia I can log on to old
12 Orsinger's lawsuit and find out his Social Security number
13 and his date of birth or whatever it is. How do you
14 answer the argument that this is just more access than we
15 currently have because the people on the net just aren't
16 going to get the time to go down to the courthouse?

17 MS. CASH: Well, it's a matter of geographic
18 equality as well, and the Federal Trade Commission did a
19 pretty broad and deep survey on identity theft, and what
20 they have done is to debunk the notion or the belief that
21 identity theft is happening over the internet. Most
22 identity theft cases that they proved were inside jobs
23 where people had access to paper copies and got it that
24 way.

25 And I'm not saying that it doesn't happen

1 online and certainly it can, but I still believe that --
2 and I think if you believe in the presumption of openness,
3 I believe that it is more important to punish a criminal
4 after the use than to punish all of us noncriminals and
5 restrict that access from us ahead of time before we have
6 committed any criminal act.

7 CHAIRMAN BABCOCK: Richard Orsinger again.

8 MR. ORSINGER: You know, you're making the
9 assumption you can punish, and for example, the very first
10 time anyone stole from me on the internet, someone had
11 captured a credit card number and got charges from
12 Romania, and they bought software, and it was delivered to
13 Romania, and there's nothing you can do about that. Okay.

14 MS. CASH: Right.

15 MR. ORSINGER: So you're making the
16 assumption that you can monitor or govern the use of the
17 information through -- or misuse of the information
18 through criminal prosecution, but if someone can come in
19 from Russia or Eastern Europe and steal then there's
20 nothing you can do, and so then the geographical practical
21 obscurity in a sense supports the idea that someone has to
22 physically subject themselves to at least the risk of
23 arrest or coming to the United States if they're going to
24 misuse the information. On the internet they can do it
25 through connections and you'll never even know who they

1 are.

2 MS. CASH: Correct. I understand that, and
3 there are very few restrictions that we can impose on
4 internet use in the United States that would have any
5 effect outside of our boundaries. I understand, but as
6 an -- as a public access purist I cannot sway from my
7 belief and my assertion that if it is available at the
8 courthouse it ought to be available in electronic format
9 as well.

10 CHAIRMAN BABCOCK: Frank Gilstrap.

11 MR. GILSTRAP: Who do you think ought to pay
12 for it?

13 MS. CASH: Access or making it accessible?

14 MR. GILSTRAP: Yes, making it available.
15 Taxpayers?

16 MS. CASH: Yes.

17 MR. GILSTRAP: Okay. The local taxpayers or
18 should the Legislature pass a bill?

19 MS. CASH: Well, the Legislature passes
20 bills everyday that are unfunded mandates.

21 MR. GILSTRAP: It is -- you're agreeing this
22 is an unfunded mandate?

23 MS. CASH: Of course.

24 MR. GILSTRAP: Okay.

25 MS. CASH: But many county and district

1 clerks are already doing this as a way to reduce their
2 actual costs of a paper system in the courthouse, and I
3 think our task force heard from several county and
4 district clerks who made that assertion, that it is a less
5 expensive way for doing business for them.

6 MR. GILSTRAP: That would be an important
7 thing to determine, whether or not it did in fact lead to
8 cost reductions, and we shouldn't decide that based on
9 kind of purity of belief, should we?

10 MS. CASH: Yes, I think so.

11 MR. GILSTRAP: Okay.

12 CHAIRMAN BABCOCK: Anybody else?

13 MR. LOW: Let me ask this. You say
14 punishing someone, but isn't it more important to protect
15 the innocent than it is to punish?

16 MS. CASH: Absolutely it's important to
17 protect the innocent, and I'm innocent when I request
18 access to public records, so you shouldn't punish me by
19 making me jump over barriers to get there.

20 I know what you mean.

21 MR. LOW: No, but the person whose identity
22 is stolen, is that the innocent? Don't you think we have
23 to consider some protection there?

24 MS. CASH: Yes, sir, absolutely.

25 MR. LOW: Because punishing somebody that

1 killed me doesn't help me a heck of a lot.

2 MS. CASH: I understand that.

3 CHAIRMAN BABCOCK: Although's Orsinger's one
4 thousand-dollar credit card limit would probably protect
5 you.

6 MS. CASH: You know, the truth of it is --
7 and all of you are savvy enough to know that -- that if
8 somebody wants to hack and get your private informaion,
9 they are going to be able to do that regardless of
10 whatever barriers we establish. That information is out
11 there, and it's available.

12 CHAIRMAN BABCOCK: Great. Fluffy, thanks so
13 much for coming by.

14 MS. CASH: Thank you, and I have a statement
15 to put on the record.

16 CHAIRMAN BABCOCK: Okay. We'll make that a
17 part of the record.

18 Is Mr. Schneider here?

19 MS. CASH: I think Michael is in Washington.

20 CHAIRMAN BABCOCK: No, I got a call from him
21 a minute ago saying he was coming over, so if he gets here
22 in the next few minutes, we'll hear from him.

23 Mike Coffey, I know you're here. So, Mike,
24 if you can step around and talk so that the court reporter
25 can hear you, that would be great.

1 MR. COFFEY: I'm Mike Coffey. I'm president
2 of Imperative Information Group. We're a licensed private
3 investigations firm in Fort Worth. Almost all of our
4 clients are corporate clients for whom we do due diligence
5 and background investigations on potential employees, on
6 potential customers, on vendors, those sorts of things.
7 All the business decisions that my clients make, anything
8 significant, some part of that comes through our office to
9 verify that the assertions made by the people they are
10 looking at dealing with can be verified.

11 We've probably saved our clients millions in
12 bad decisions over the last six years. I'm a former human
13 resources director and came into this from being a
14 consumer of background investigations to a provider of
15 them. I'm also the father of three, the oldest of whom
16 has just started Little League, and I'm very concerned
17 about the ability to do background investigation. As a
18 matter of fact, I just donated a ton of background
19 investigations to the Little League because they were
20 using DPS's system for background investigations, which is
21 horrible. So we donated over \$20,000 in background checks
22 last year to community service organizations in Fort Worth
23 just so that they had a good baseline for the people they
24 were letting have access to the people they were
25 delivering services to.

1 When I read the rule, 90 percent of the rule
2 was wonderful. I have been a user of Tarrant County's
3 computer system for a long time, the district clerk system
4 that allows controlled access in an orderly fashion to
5 court's records. I think it's ideal. I'm always alarmed
6 by the counties where the records are online just for
7 anybody to peruse. I just think that's -- because of the
8 sensitivity that we all have to identity theft and just
9 the perception by the citizens that their privacy is being
10 invaded daily, I think regardless of, you know, if you
11 want to be an intellectual purist or not, just to try and
12 be politically savvy, we've got to have a real sensitivity
13 to what people's concerns are about their privacy and
14 information being out there.

15 There is a couple of things. First of all,
16 let me say, again, that a subscriber access system where
17 the district clerk or the county clerk knows who I am and
18 they've gone through some due diligence to verify that I
19 am, you know, a licensed private investigator or that I'm
20 a legitimate business in Texas, or if I'm an individual,
21 even that I'm the individual I claim to be so that if
22 something goes wrong later they know who to go back and
23 find, that kind of system is what I think this committee
24 should focus on across the board, and I'm not clear from
25 the rule whether the court systems that provide over the

1 internet free access to everyone the court indexes where I
2 can look up and see a register of actions, if that would
3 be allowed or not under this system.

4 But one thing that -- and all my comments
5 are talking about either in courthouse access to court
6 files or access through a remote subscriber arrangement.
7 I'm not talking about anything being available just to the
8 general public, anybody in Australia or wherever else
9 accessing records, but date of birth is a key identifier,
10 and I got the feeling from talking to a couple of
11 committee members that you don't have a real good
12 understanding of how a background investigation is really
13 conducted, so let me give you -- I taught eight hours on
14 it last Friday to investigators and corporate security
15 guys and I'll try to condense that to two minutes, but you
16 need to understand there is not a central repository in
17 Texas or in the United States that you can go to and get
18 reliable criminal background information.

19 Texas DPS has a database that you can access
20 over the internet for \$3.50. The problem with that is
21 Darla Routier was put on death row in 1997. She didn't
22 show up in DPS's database until November of last year.
23 Now, she wasn't out applying for a job, I'm sure, but
24 there are people with much lesser offenses who are not
25 showing up in DPS's database. Our experience is only

1 about 40 percent of the records that we find doing
2 courthouse research across the state are found in DPS's
3 records.

4 There are certain things -- I don't believe
5 pretrial diversions and interventions and cases where the
6 person has actually entered a plea of guilt always show up
7 in DPS's system. And I also believe every county has
8 different methods of reporting and timeliness issues about
9 when they report things to DPS. Also, so what we do is we
10 research every county where we have associated that person
11 as having lived, worked, or gone to school, and then we
12 use the DPS as a safety net in case there happens to be a
13 record out there in some other county that we didn't know
14 about. But even in those cases, if DPS produces a record
15 we go back to that original county and verify the record,
16 and we have found many cases in DPS's records where
17 somebody had a deferred adjudication in DPS's records, and
18 we go pull the file in that county, and it was revoked.
19 The probation was revoked and a conviction was entered.
20 It didn't get updated in DPS's records.

21 If my clients made hiring decisions based on
22 those kinds of records, they're going to let people into
23 their facilities that pose a threat to their customers or
24 their coworkers or just the general public. So you need
25 to understand why we need the date of birth because if I

1 go to Tarrant County and do a criminal records search on
2 John Smith I'm going to have 200 cases for John Smith.
3 Without a date of birth I won't know if the John Smith I'm
4 researching is any of these people, if there's not a way
5 to verify that date of birth in there; and so I'm either
6 going to have to go to my clients and say, "Well, there's
7 a potential that you've got 200 possible John Smiths out
8 here, you may have 200 possible cases or you may have
9 nine. I can't tell you."

10 That's the issue that we face without those
11 identifiers, and I believe inside of a controlled access
12 system where either in the courthouse or if it's remote
13 where the clerk knows who we are, you know, there's a less
14 of a likelihood that something is going to happen like,
15 you know -- well, like we saw happen with ChoicePoint
16 recently.

17 And, by the way, I know ChoicePoint. I know
18 the company pretty well, and their due diligence is
19 abysmal. I think that when we get to talking about
20 selling data to the big database companies, it's a bad
21 idea. Their due diligence is bad, and their records are
22 bad, and it's going to end up costing citizens -- costing
23 them jobs, costing them credit and things like that when
24 businesses rely on those databases.

25 So one thing, in your -- on page two of my

1 comments I talk about this bulk distribution. I can't
2 tell from the rule as it's drafted right now if you're
3 going to allow a bulk sale of the index information, party
4 names, addresses, register of actions, you know, and
5 without copies of case documents just the list of filings.
6 If you're going to allow that, which is basically what the
7 status quo is now, these big companies buy this
8 information from certain counties. Tarrant County, of
9 course, doesn't normally sell it to them, but a lot of
10 counties do and it's a revenue source for them, but they
11 dump all this information in this big national database,
12 and employers access it, and, you know, they will put a
13 name in there and a date of birth and it will come back
14 with some records.

15 Just because a name and date of birth match
16 somebody who lives in Arizona, it's possible there's
17 another Mike Coffey, bless his heart, in Hawaii or
18 someplace with the same date of birth as me. So there's
19 got to be another level of due diligence employers don't
20 have the ability to do.

21 The Fair Credit Reporting Act governs
22 anything -- and the focus is on credit, but anything that
23 has to do with a third party getting a report on another
24 individual for a fee, whether if it's used in employment,
25 in credit, or in insurance it's governed by the Fair

1 Credit Reporting Act, and an employment background
2 investigation is treated just like a credit report under
3 Federal law. And these database companies are violating
4 that law daily because they're not complying with any of
5 the FCRA requirements, and so I would suggest that you
6 would be real wise to tighten that up your -- under bulk
7 distribution rules, tighten up your regulations as to what
8 information you're going to sell if at all to those
9 database companies.

10 CHAIRMAN BABCOCK: Mike.

11 MR. COFFEY: Yes, sir.

12 CHAIRMAN BABCOCK: When you're saying "I'm
13 commenting on the rule" you're talking about the Supreme
14 Court Advisory Committee proposal of February 25th?

15 MR. COFFEY: Yes, sir.

16 CHAIRMAN BABCOCK: Okay. Great. I thought
17 so, but I wanted to make it clear.

18 MR. COFFEY: When I look at that paragraph,
19 14.3(a) appears to allow the bulk distribution of index,
20 calendars, docket, or register of action information,
21 because what it says, except for those items you can't
22 bulk distribute this information, but for -- basically for
23 commercial purposes, and I would suggest to you I can't
24 see -- the only reason that a big company would want that
25 is to sell it to consumers or sell it to businesses and

1 consumers, and I just -- it's inaccurate the minute that
2 data is sold. It's out of date because dispositions
3 change, people have records expunged, and once you have a
4 record expunged how are you ever going to get it out of
5 this database? This data set has been sold to this
6 company, and you'll never get that expunged record out of
7 the public domain after you've sold it.

8 I would ask for clarification as to whether
9 this rule applies to civil and criminal. I anticipate
10 that you intended for it to apply to both criminal and
11 civil, but looking at the definitions of case records it
12 looks like you're only talking about civil records, and so
13 I wanted to ask you to look at that.

14 And finally, I understand the reason for the
15 sensitive data sheet, and it seems like a very practical
16 compromise between the needs of the court and parties to a
17 suit to have certain kinds of information to identify who
18 they're dealing with without it being just rampant and
19 available for anybody to go down either to the courthouse
20 or online and just harvest Social Security numbers. That
21 SDS seems like a really good idea.

22 The one exception I'd ask for that is if I'm
23 searching John Smith with a certain date of birth and I
24 have his driver's license also because on employment
25 application documents we always get driver's licenses, and

1 I find a civil case, and say we're hiring a -- you know,
2 somebody in a financial control position for one of my
3 clients, we routinely do searches of civil cases, and
4 there may be on that SDS a driver's license number, and I
5 can go to the clerk and say, "Here's the driver's license
6 number of the person I'm researching. Will you verify for
7 me that that number matches the information on the SDS?"

8 That way I'm not obtaining any new
9 information about somebody who I'm not -- who is not a
10 party to what I'm working on. That one little
11 modification would allow me to go back to my client and
12 say, "This case is associated with the subject that you've
13 asked me to look into" or go back to them and say, "You
14 know, there were no records found." Otherwise I'm going
15 to have to go back and give my client a list of potential
16 cases, and they will never really know.

17 These investigations that we do are used in
18 all kinds of business situations outside of just
19 employment. I mean, there are Federal -- for financial
20 services organizations now there are Federal
21 know-your-customer requirements, and they have to have an
22 idea of who they're dealing with financially.

23 Post 9-11 a lot of the Patriot Act
24 requirements and things like that have come down that
25 require that financial service institutions have an idea

1 of who they're dealing with, and a part of that is me
2 doing the background investigations on the company and its
3 officers, and if I go back and say, "This guy's been sued,
4 you know, 15 times for these reasons," that may give my
5 client pause before they decide to deal with them, but
6 they can't make those informed decisions without access to
7 that court information.

8 Can I answer any questions for you-all?

9 Yes, ma'am.

10 HONORABLE TRACY CHRISTOPHER: Well, everyone
11 who has come to speak to us has said that date of birth is
12 very important for criminal investigations or background
13 investigations. Can you identify what the dangers would
14 be in releasing date of birth information?

15 MR. COFFEY: On -- well, just the name and
16 date of birth is not really quite enough to do full out
17 identity theft, but you could -- you know, an identity
18 thief could do some damage with that. The biggest danger
19 would be that they print -- if they were to print checks,
20 something like that, adding a date of birth, something
21 like that, so it looks -- just to give more credibility to
22 a false document. That would be primarily where I would
23 see a small bit of information used in identity theft.

24 And my clients have to deal with identity
25 theft all the time because they have -- we have applicants

1 who come in to go to work for one of my clients and the
2 person that they claim to be when we do our research we
3 find out, well, this Social Security number belongs to a
4 60-year-old lady in Washington state, and this is a
5 34-year-old young guy here in Texas, but you know, we see
6 those kinds of things all the time.

7 HONORABLE TRACY CHRISTOPHER: So with a name
8 and a date of birth could you open up a credit card?

9 MR. COFFEY: No. The way the credit bureaus
10 are set up you would have to have a Social Security number
11 to key against their -- key against their database. So,
12 you know, you would have to create a Social Security
13 number. You could make one up, but hopefully -- and
14 they've gotten better, but they're not where they need to
15 be, the credit bureaus would recognize that that Social
16 Security number didn't line up with the name and
17 information already on file.

18 And I think there's also -- especially when
19 you're talking about criminals, you know, I hate to say
20 that a convicted criminal has -- because I do some
21 criminal defense work, too, but somebody convicted of a
22 crime probably loses some of their privacy rights when it
23 comes to the good of the public knowing who they are and
24 what offense they've committed against the public in the
25 past. There is a need for the public to be able to

1 protect themselves in the future, and the only way we can
2 do that is if we have a name and date of birth match.

3 Yes, sir.

4 HONORABLE STEPHEN YELENOSKY: Just a side
5 issue, but Social Security, as I understood it -- and I
6 don't -- I know the law is colloquial, but that they're
7 not to be used for identification purposes, I thought, I
8 thought, but apparently you're saying that they're
9 required.

10 MR. COFFEY: Oh, yeah.

11 HONORABLE STEPHEN YELENOSKY: I mean, they
12 obviously are, but I thought someone could say, "I'm not
13 giving you my Social Security number and you're not
14 entitled to have it and you still have to figure out who I
15 am."

16 MR. COFFEY: Well, for employment purposes,
17 no.

18 HONORABLE STEPHEN YELENOSKY: Right.

19 MR. COFFEY: Right, and in a business
20 relationship they can -- you know, credit, you can say --
21 you can refuse to give it to your credit card company, but
22 you're not going to get credit. I haven't seen anything
23 where they have to enter -- you know, there is no way that
24 they can verify who you are right now with their system.

25 Right or wrong, Social Security number has

1 been -- you know, the reason it's an identity theft issue
2 is because it's the one identifier we all share in common,
3 and a real truth is if they may -- if there was a Federal
4 law passed tomorrow that says nobody can use Social
5 Security number for anything other than wage reporting in
6 the employment context, all the credit bureaus would get
7 together and create a new identity number for everybody,
8 and two weeks later people would be stealing it.

9 That's the unfortunate truth, but there's
10 too much money to be made doing, you know, lending -- you
11 know, being able to know who you're lending to. Then
12 there's too much money on the criminal side to be able to
13 claim to be somebody you're not. Yes, sir.

14 CHAIRMAN BABCOCK: Ralph Duggins.

15 MR. DUGGINS: Excuse me. I want to make
16 sure I understand your comment about the Fair Credit
17 Reporting Act. Are you suggesting that the draft in the
18 provisions under "bulk distribution" violate that act, and
19 if so, how? Could you just clarify your statement on
20 that, please?

21 MR. COFFEY: I'm not saying that you would
22 be violating the Fair Credit Reporting Act or the courts
23 would. What I'm saying is that the database companies
24 themselves violate the Fair Credit Reporting Act. The
25 FCRA requires that any time public records are reported to

1 an employer that the consumer reporting agency, that would
2 be me, does one of two things: Either, A, verify it is
3 the status of the record when I report it to the employer.
4 And that's what we do routinely. That's our process. We
5 do court research. Our researcher in Atascosa or whatever
6 county verifies to us that this is the record, and we
7 always as a matter of policy obtain copies of the records,
8 just because, you know, we're really fanatic about having
9 everything be correct before we report it to our employer
10 clients.

11 So that's our one option, is verify it that
12 what I'm reporting matches the status of the record, or
13 send to the person the information is about, send to them
14 a copy of what I'm giving the employer immediately. The
15 problem with that is these database companies, that's the
16 only way -- you know, you put a search in and it comes
17 back in two seconds. In two seconds they're not calling
18 the court to verifying the record.

19 What they should be doing under the law and
20 what the credit bureaus do -- all three credit bureaus
21 have public records databases, and they turn around and
22 send a letter straight to that person saying, "This
23 company requested -- was provided this information about
24 you on this date," you know, public record whether it was
25 a bankruptcy or a lien or a judgment against them or

1 something like that.

2 But these wrapsheets.com, criminal
3 histories, you know, whatever dot com, they don't do that.
4 They don't even require that you provide that -- you know,
5 if I'm the employer and I'm accessing their online system,
6 they don't even require that I provide the address for the
7 person that I'm researching, so there is no way that they
8 can communicate if they wanted to that information back to
9 the consumer.

10 So that's how they violate the FCRA, and
11 what happens is these employers use this information and
12 the -- and employers very often aren't in compliance with
13 the Fair Credit Reporting Act at this point either because
14 their responsibilities haven't been communicated to them
15 by the consumer reporting agency or by, you know, the
16 database company. FCRA requires that I tell my clients
17 exactly what they have to do if I report anything negative
18 about this person.

19 Under the Federal law if I give anything in
20 a report that may, may -- that's the word, may --
21 adversely impact somebody's employment, the employer has
22 to give that person a copy of my report and a copy of
23 their rights under the law, and my clients do that.
24 Actually, I do that for my clients typically. They pay me
25 on each case to communicate directly, you know, because if

1 somebody is an ax murderer they don't -- you know, they
2 don't want to invite them back into their offices and say,
3 "Well, we found out you're an ax murderer. We don't want
4 to hire you." So, you know, what they do is they have me
5 do that, but these database companies don't do any of
6 that, and so then the employers are also in violation of
7 the Fair Credit Reporting Act.

8 The applicant never knows why he didn't get
9 the job, and he doesn't have the ability to dispute it.
10 Under the FCRA they could come back to me and say, "That's
11 not me" and they can dispute that information, and under
12 the law I have to reinvestigate it and either come back to
13 the employer and say, "Well, actually, we made a mistake
14 here" or go back and say, "Well, we verified the record.
15 It's as we reported it previously."

16 CHAIRMAN BABCOCK: Mike, let me ask you a
17 question. You mentioned that you do background checks for
18 a whole bunch of different organizations. Let's just say
19 one of the ones where you're working with the Y.M.C.A. or
20 some youth group and you find out that there is a Richard
21 Orsinger, to take an example, who is guilty of some bad
22 stuff and you report that to the -- and so he doesn't get
23 to coach the girls softball team because of what you
24 reported. Turns out, it's the wrong Richard Orsinger,
25 it's a different Richard Orsinger. Has that ever happened

1 to you? What safeguards do you have to protect against
2 that, and what impact will our proposed rule have on that
3 situation?

4 MR. COFFEY: Okay. Actually, I've never
5 misreported a criminal record. We've never had that
6 happen because we've always -- I asked you for name and
7 date of birth. You didn't mention addresses in here
8 thankfully, and we always look for an address as well as a
9 third identifier, so if I can match a name and date of
10 birth and then we can pull a case file and go through the
11 file and look for an address associated with the defendant
12 in a criminal case, if we can find one that we can tie
13 back to the person we're researching that gives us three
14 identifiers. Because our concern is always you're going
15 to have a Senior, you know, Bob Mills, Sr., Bob Mills,
16 Jr., and Bob Mills, the III, and may have all, you know,
17 lived in the same city in the same house, and so I can't
18 rely on just name and address, but I'm trying to find
19 three identifiers. So if I get a name, address, and date
20 of birth I can --

21 CHAIRMAN BABCOCK: So that's what's
22 happening now. What impact is our proposed rule going to
23 have on that, if any?

24 MR. COFFEY: Yeah, your proposed rule will
25 make it impossible for me to verify that Bob Mills is your

1 guy or isn't your guy because I won't know. I'll have to
2 go back to the Little League and say, "This coach may have
3 a sexual assault background. I can't tell you because all
4 I know is his name. There are five cases out there in
5 Tarrant County for people whose names match this record,"
6 and that's all the information I can give you because
7 there is no date of birth to eliminate these five cases
8 from being your subject or not.

9 What it's going to do, it's going to cause
10 employers in situations where they've got two candidates,
11 they're going to look at, well, this candidate came back
12 all clear. This one has name matches, if I have to go to
13 -- if something goes haywire with one of them and I end up
14 in court because something happens, you know, they hurt
15 somebody in my workplace, I could say this one had a clear
16 background check and this one, well, we did the due
17 diligence we're able to do, but we didn't know for sure
18 and we took a chance, and I don't think that -- having
19 testified in employment law cases, I wouldn't want to be
20 the guy on the stand explaining, well, we just took a
21 guess.

22 HONORABLE SARAH DUNCAN: And that's why you
23 want a procedure by which you can go to the court where
24 the record is located and ask them to verify the
25 information you already have on their sensitive data file.

1 MR. COFFEY: Yes. And I'm asking that
2 particularly in civil cases. I'm asking you in criminal
3 cases to leave the date of birth on there, and the only
4 reason for that is we get so many name matches on criminal
5 cases. If I go do John Smith or Jesus Garcia in Tarrant
6 County, I'm going to have 50 cases, and I'm going to have
7 to go pull 50 case files and go ask the clerks on all 50
8 cases, and that will be a giant burden on the clerks.

9 The other thing I'd ask you to do is if you
10 give us the ability to go to the clerk and ask them on
11 civil cases to verify identifiers, I'd sure appreciate it
12 if you would make that they shall, not that they may,
13 because we deal with a lot of small town county clerks and
14 district clerks who quite honestly are real proprietary of
15 their records and are protective, and that's good; but at
16 the same time, they may be overzealous; and you know,
17 we've had cases where we've had to really work to get the
18 identifier information or just to get copies of a criminal
19 conviction.

20 Just getting copies sometimes out of clerks
21 can be a challenge, and so if we made it real clear in
22 this rule -- and I'm glad to see this rule because I deal
23 with clerks -- you know, in our office we deal with clerks
24 everyday all over the country, and having an orderly rule
25 something similar to the Public Information Act, I mean, I

1 don't have -- I teach a class on Public Information Act
2 for investigators, and we don't have problems with PIA.
3 We can get the records we need for whatever we need in an
4 orderly fashion. Now, this rule is going to give us that
5 for court records. I think you're 90 percent of the way
6 there. There are just a few things, unintended
7 consequences, that might hurt it.

8 CHAIRMAN BABCOCK: Okay. Mike, thank you so
9 much for appearing before us. If on a break if you're
10 around maybe some people can talk to you.

11 HONORABLE SARAH DUNCAN: One more thing.

12 CHAIRMAN BABCOCK: Oh, I'm sorry. Justice
13 Duncan.

14 HONORABLE SARAH DUNCAN: You say 90 percent,
15 but I didn't hear all of the changes you think should be
16 made. Maybe you could take your copy of the rule, put
17 your name at the top, and make the changes you think ought
18 to be made.

19 MR. COFFEY: I'd be glad to.

20 HONORABLE SARAH DUNCAN: And we can look at
21 that.

22 CHAIRMAN BABCOCK: That would be great.
23 Thank you.

24 Michael Schneider has entered the building.
25 Michael is an officer of the Texas Association of

1 Broadcasters, actually on staff; and, Mike, I maybe owe
2 you an apology, or maybe Angie and I do. I don't know if
3 you got the proposed rule that came out the 25th.

4 MR. SCHNEIDER: Did not.

5 CHAIRMAN BABCOCK: So your comments would
6 not be directed to it, but please tell us what you have to
7 say.

8 MR. SCHNEIDER: Okay. I'm not quite as
9 eloquent as some of the previous speakers. I need a
10 little help after arriving on a plane from D.C. last
11 night, so if you'll indulge me just a little bit. I think
12 there are two basic reasons why the information should be
13 available online. The primary one, though, is public
14 trust and public confidence in our judicial system. I
15 don't think there should be any distinction made just
16 because you can have access to a courthouse record and you
17 can walk over there and look at it that you should have to
18 justify that when you look online. It's not good, sound
19 public policy to do so.

20 Pledges from our courts to expand access to
21 court files sends a confident message and allows us to
22 harness technology to improve democratic accountability,
23 and public interest is well-served by such a commitment.
24 Allowing participants in the court process to request
25 sealing orders when they show a need for secrecy is

1 probably the way to go in our opinion. It shouldn't be
2 just a blanket, wholesale redaction of certain types of
3 records.

4 I know there are concerns about name of
5 birth -- name of an individual and date of birth that
6 might be contained in court records, but there are already
7 websites for this type of information that are available
8 online. There's one called Public Data where you can
9 actually look up any person's driver's license information
10 in the databases, paying a 25-dollar fee to have up to 250
11 searches. So shutting it off one place doesn't
12 necessarily mean you can't find it in another location.
13 It is available in a wide variety of areas if you're
14 willing to look for it.

15 We already have statutes that exclude
16 certain information from public access, and if there is
17 any abuses there are tort causes of action within the laws
18 that could be used to curb improper conduct. We
19 understand that most people probably want to have it both
20 ways. In other words, they want to have a public
21 institution to resolve disputes, be it civil or criminal,
22 and keep that information from being disclosed; and that
23 is a natural tendency to feel that way, but it's not
24 necessarily sound public policy. The reason being is
25 parties are using the public process when they go to court

1 to resolve disputes, and public accountability must be
2 made -- must be available during the process.

3 Electronic access to court records will
4 enable the public to keep track of matters of public
5 concern. For example, the public has a strong interest in
6 knowing that drunk-driving laws are effectively enforced.
7 They have an interest in knowing who drives drunk, to
8 avoid or stop them, and how judges treat drunk drivers, to
9 determine whether we should take action for stronger DWI
10 laws or perhaps even new judges. Such a story is faster
11 and easier compiled with electronic access to records, and
12 in many cases comprehensive stories that were never
13 possible because of the burdens of compiling that from
14 paper records can be told, and you can do it by
15 jurisdiction, compare how your jurisdiction treats those
16 type of cases compared to other portions of the state.

17 Drunk drivers might claim that they have a
18 privacy interest in keeping their drunk driving history a
19 secret, or at least available only at the courthouse, but
20 there is clearly a much stronger public interest in
21 knowing how chronic drunk drivers are treated by the
22 courts.

23 For example, there was a story done by a
24 station down in San Antonio that reviewed the court
25 records from a certain time frame, about a three-year time

1 frame. It showed that second offenders were given
2 probation 68 percent of the time and third offenders it
3 was down to about 50 percent, and that's a story that's
4 sort of in the public interest.

5 Tort, divorce, custody, and contract
6 disputes are of public interest to the extent that they
7 show how the courts work and what standards are applied to
8 them. Access to such cases allows the public to
9 understand how faults are apportioned and what factors are
10 considered in determining outcomes. Such knowledge helps
11 the public better understand the court system and attempt
12 to resolve disputes without filing unnecessary lawsuits.

13 It would be adverse to the public's interest
14 to begin limiting access to court records in the name of
15 privacy. Limiting the public's ability to oversee the
16 court system and learn about dangers in its community
17 would be a greater harm and infringement on American
18 principles of self-government.

19 Privacy advocates seek to show how openness
20 leads to harm, and they rely almost exclusively on
21 examples of threats of physical harm and instances of
22 identity theft, but restrictions on electronic access
23 doesn't necessarily solve these problems. Those who wish
24 to use such records and do that harm will not necessarily
25 be stopped because they can't find the information on the

1 computer. Problems caused by those with criminal intent
2 are best addressed, as they are currently, by allowing
3 judges to consider the harms present in individual cases
4 and applying protective measures accordingly.

5 A categorical approach restricting access
6 based on the type of case or document will never work as
7 well as a case by case approach to sealing orders.
8 Protective orders can be used to keep the records off an
9 online system if that kind of access will cause particular
10 harm. Often information that is personal and of no public
11 value in one context can be crucial in public
12 understanding of the judicial process in another context.

13 A child custody battle, for example, may
14 seem like a purely private matter, but investigating how
15 factors like race, income, or gender affect custody
16 determinations requires a close look at all those records
17 in a searchable, sortable form.

18 Divorce cases provide another example.
19 There is private material in divorce cases, and the
20 parties are only before the court because they seek an
21 official state action to establish their rights and
22 responsibilities, such as allocation of alimony, child
23 support, or property. There is always a public interest
24 in knowing how courts decide these issues, what they
25 consider, and what they don't.

1 Serving the public interest in knowing how
2 the courts operate means that the records must be
3 presumptively open and allowing the privacy issue
4 addressed on a case by case basis, not by cutting off
5 meaningful access to a broad swath of important
6 information. Restrictions on access to certain types of
7 information would create an administrative nightmare and
8 could lead to a blanket closure of records and almost no
9 electronic access to them.

10 And then the cost of doing so, local
11 government is already cash-strapped. Requirements to
12 redact categories of information could lead to courts not
13 putting any documents online. Adopting a court access
14 policy that theoretically acknowledges the importance of
15 online access but effectively denies public electronic
16 access is counterproductive. Redaction must be an option
17 that the parties can seek from the judge and not a
18 requirement that clerks must fulfill before allowing
19 online access.

20 It's not a luxury, but it is a way to
21 utilize court information in a meaningful way. Important
22 public controversies can be tracked, statistical
23 comparisons can be made, and relevant information needles
24 can be pulled from a massive litigation haystack when
25 records are available electronically. There is great

1 public interest in knowing how our courts operate, and
2 allowing the online access to records instills that public
3 confidence.

4 CHAIRMAN BABCOCK: Mike, thanks. I know
5 that -- I know that you have a great deal of experience in
6 Public Information Act, and we have in our proposed rule a
7 suggestion that people who are incarcerated in a
8 correction facility not be entitled to gain remote access
9 to court records, and I know our Texas Public Records Act,
10 now called the Public Information Act, does not allow
11 discrimination against requesters of information. Do you
12 know of any other state --

13 MR. SCHNEIDER: Well, it also prohibits
14 individuals that are convicted and behind bars from
15 actually -- they cannot actually use the Public
16 Information Act.

17 CHAIRMAN BABCOCK: Okay. That's my
18 question. There is precedent for that in the Open Records
19 Act?

20 MR. SCHNEIDER: Yes. Yes.

21 CHAIRMAN BABCOCK: How about in other
22 states? Is that the practice?

23 MR. SCHNEIDER: By and large more states do
24 it than not do it. I couldn't give you the actual
25 numbers, though.

1 MR. GILSTRAP: More states restrict?

2 MR. SCHNEIDER: Yes.

3 CHAIRMAN BABCOCK: Richard Munzinger.

4 MR. MUNZINGER: I've heard a couple of
5 speakers now address the question of access to criminal
6 records, and I look at this rule and it says "civil
7 records." Are we writing a rule that will bind district
8 clerks in their custody of criminal court records, or are
9 we limited to civil court records in this rule? It seems
10 to me that that's a basic problem.

11 CHAIRMAN BABCOCK: It is.

12 MR. HATCHELL: This rule is limited to civil
13 records, and we are not -- we're not advocating that, but
14 it is as a result of our meetings presently limited to
15 civil records, and Tom Gray can explain why we did that.

16 HONORABLE TOM GRAY: Now? I mean, because
17 we're going to get into a lot of discussion, and I don't
18 know if that's where --

19 MR. MUNZINGER: Yeah, that isn't my purpose,
20 to cut anybody off. I just was confused because a couple
21 of speakers have addressed the need to have access to
22 criminal records, and as I read this, it's civil records,
23 and I'm certain it's going to affect many of us in our
24 deliberations on what we recommend to the Court as to
25 whether it does or doesn't apply to criminal rules.

1 CHAIRMAN BABCOCK: Yeah. I think it is
2 intended to speak to civil records, but Mike Coffey's
3 point was that in narrowing all the Tom Smiths that may
4 have been guilty of a particular offense that civil
5 records might give a lead to that; or if the wrong that
6 has been committed is civilly committed, child abuse or
7 whatever it may be, that the civil records would aid in
8 that function. Mike Hatchell.

9 MR. HATCHELL: I was unclear, Mike, in your
10 opening remarks as to whether you believe that clerks
11 should be forced to put records online as opposed to
12 establishing a regulatory framework for those that choose
13 to put them on there.

14 MR. SCHNEIDER: I would be in favor of -- if
15 you want to use the word "force," to put the records
16 online simply because it's -- it allows for greater public
17 accountability. It's part of the business of performing
18 our functions in democracy that every person has the
19 ability to participate in the process. Whether they're
20 physically there or not physically there, they can still
21 keep track of what's going on.

22 CHAIRMAN BABCOCK: Okay. Yeah, Ralph.

23 MR. DUGGINS: Are you advocating that in a
24 divorce action the property settlement, the parties'
25 assets, be made public?

1 MR. SCHNEIDER: I'm not aware of any county
2 currently right now that puts that information up online,
3 and if that was the case, there are means of sealing that
4 sort of information.

5 MR. DUGGINS: But is there ever a time where
6 you think that ought to be presumed to be public
7 information? I mean, I inferred that from your comments
8 that you thought that should.

9 MR. SCHNEIDER: I think the wholesale
10 shutting off of records related to divorce is problematic,
11 but I think there are probably instances where certain
12 types of information certainly is problematic by making it
13 public; and actual settlements involved, sometimes those
14 are quite newsworthy. We already have, for example, cases
15 around the country where the settlements in court cases
16 are available and discussed and are of public interest;
17 and, for example, I mean, shutting off that kind of
18 information doesn't allow you to necessarily gauge what
19 kind of factor is used in awarding those settlements as to
20 who gets what and the why; and that's a way of us being
21 able to track and see how justice is done.

22 CHAIRMAN BABCOCK: Frank Gilstrap.

23 MR. GILSTRAP: On a couple of occasions
24 you've said that you thought the remedy in certain cases
25 might be sealing the records. We already have rules

1 involving sealing paper records.

2 MR. SCHNEIDER: Right.

3 MR. GILSTRAP: Are you talking about some
4 broader authority of the court?

5 MR. SCHNEIDER: No, I'm not. I'm merely
6 saying if there is concern about potential issues of
7 privacy as the need dictates, there is a means of already
8 addressing that issue, but the wholesale cutting off of a
9 certain type of information, certain type of record is not
10 something we would want.

11 MR. GILSTRAP: So we would have to change
12 our current rule regarding sealing of court records, I
13 guess.

14 MR. SCHNEIDER: No, what I'm saying is
15 sealing allows for it now as a matter of course. I'm just
16 saying that we shouldn't cut off certain types of
17 information as a broad category.

18 MR. GILSTRAP: What I'm saying is, you know,
19 the authority of the court to seal records is very narrow,
20 in part because of some of the concerns by media.

21 MR. SCHNEIDER: Right.

22 MR. GILSTRAP: And are you saying that we
23 should be satisfied with the current sealing rule that we
24 have --

25 MR. SCHNEIDER: Yes.

1 MR. GILSTRAP: -- to deal with these
2 problems?

3 MR. SCHNEIDER: Yes.

4 CHAIRMAN BABCOCK: Any other questions?
5 Richard.

6 MR. ORSINGER: Michael, I wanted to focus on
7 your comment about the family law exclusion. Probably --
8 I don't have a real statistic on this, but my gut feeling
9 as a family lawyer for almost 30 years is that maybe 90 or
10 95 percent of family law matters are settled, particularly
11 divorces.

12 MR. SCHNEIDER: Mine wasn't.

13 MR. ORSINGER: And while I agree that --

14 CHAIRMAN BABCOCK: Thank you for that
15 candor.

16 MR. ORSINGER: Especially with an elected
17 judiciary, the public needs to know if a judge is
18 adjudicating in a way that's unfair to wealthy people or
19 women or men or whatever.

20 MR. SCNEIDER: Right. That's the whole
21 point.

22 MR. ORSINGER: But it's a very small sliver
23 of the cases that fall into the family law docket that are
24 tried to judges, and so in order to have public awareness
25 of a judge who may have a slant that the voters should

1 know about, we have to -- under your broad sense we have
2 to make all of the private records where no judge is
3 involved, the listing of assets, you know, the vehicles
4 and whatnot, all of that is in the public domain and that
5 you favor -- even if 95 percent of the information is
6 private and doesn't involve the judicial decision, you
7 think all of that should be available electronically to
8 everyone?

9 MR. SCHNEIDER: It's available at the
10 courthouse. I really don't see any distinction from
11 somebody being able to access it online or being able to
12 go down to the courthouse. It's not going to prevent a
13 real criminal from going there. It might make it a little
14 bit easier, but it's not going to prevent criminal
15 activity.

16 MR. ORSINGER: Well, what about just
17 prohibiting other people from snooping in other people's
18 financial affairs? Forget criminal.

19 MR. SCHNEIDER: Well, my stuff is on file
20 down at the courthouse right now.

21 MR. ORSINGER: So that's an acceptable cost
22 to you --

23 MR. SCHNEIDER: Yeah.

24 MR. ORSINGER: -- is letting people snoop
25 through other people's finances? Okay.

1 CHAIRMAN BABCOCK: Yeah, Jeff.

2 MR. BOYD: I just wonder if he has a copy,
3 any copies, of the written statement.

4 MR. SCHNEIDER: I can get one to you. I
5 don't have them with me.

6 CHAIRMAN BABCOCK: If you can get it to
7 Angie and Angie can get it to the committee, and she can
8 post it on our website, which is available over the
9 internet.

10 MR. BOYD: Not this morning, though,
11 apparently.

12 CHAIRMAN BABCOCK: Not this morning, though.
13 Mike, thanks very much for coming.

14 MR. SCHNEIDER: Thank you.

15 CHAIRMAN BABCOCK: We've had I think more
16 speakers on this topic than anything that I can remember
17 in maybe 16 years on this committee, and I think they're
18 all very helpful, and we thank everybody for doing that.

19 I don't know who gets credit, whether it's
20 Ralph or Hatchell or other people, but I see Hatchell has
21 left the room. No, there he is. He's taking a backseat,
22 but whichever of the two of you wants to lead us through
23 it, let's turn to the specific language.

24 MR. HATCHELL: I'm going to get where
25 everybody can see me and I can see you. Would somebody

1 hand me a chair?

2 CHAIRMAN BABCOCK: If we just could get a
3 fireplace, this could be a fireside chat.

4 MR. HATCHELL: I don't speak as loud as
5 Orsinger, so let me tell you first of all how I got to be
6 right here. This process began with a task force under
7 the Texas Judicial Council, which was concerned with the
8 topic of public access to records and sensitive
9 information. That task force held six public hearings
10 across the state and produced a very lengthy report and a
11 draft rule. That draft rule came to the Supreme Court,
12 which then referred the matter to this committee and then
13 ultimately to our subcommittee. The subcommittee consists
14 of Bonnie Wolbrueck, Andy Harwell, Justices Duncan and
15 Gray, Alex Albright, and Stephen, are you here, Stephen
16 Tipps. Did I miss anybody?

17 CHAIRMAN BABCOCK: Ralph.

18 MR. HATCHELL: And Ralph, of course. This
19 was an unusually smart and diligent group. We met twice
20 by phone at great length to produce a draft rule which was
21 then put within the committee process for a comment for
22 about three or four days.

23 We adopted early on the criterion of getting
24 you a draft rule within a week before this meeting, and we
25 missed that by seven hours. We got it at 4:00 o'clock

1 Friday a week ago because we felt like it was unfair in a
2 topic as important as this to dump something on you like
3 yesterday, so the -- but as a consequence of that, this is
4 not necessarily a perfect product. It has
5 typographical errors that we will get corrected of a
6 somewhat minor nature.

7 But I do want to tell you -- I started to
8 say that you got your moneys worth from the subcommittee,
9 but then I realized we weren't paid anything, so that
10 could have a double entendre, but this group was about as
11 no nonsense and diligent a group as I have ever worked
12 with; and Bonnie and Andy, particularly, I would say about
13 every 15 minutes opened our eyes to issues that we would
14 never have been aware of as to how this rule can operate
15 from a practical standpoint.

16 I need to say at the very beginning, while
17 you have heard a good philosophical debate as to what
18 should and should be available or how broad public access
19 should be to records and how broad it should be on the
20 internet, we did not enter that fray. We were tasked and
21 spent almost all of our time trying to craft a rule that
22 would work for the clerks and would work for the public.

23 The rule that we got from the Texas Judicial
24 Council, which was an excellent body of work, was
25 nevertheless very abstract and very philosophical in many

1 respects and somewhat confusing to us, and so we tried to
2 pare the rule down to make it much more straightforward
3 and sensible. But I emphasize again, it is not a perfect
4 product, and we are not here today laying down in front of
5 the tractor saying it's my way or the highway. Members of
6 the subcommittee in fact will probably speak to you today
7 and express their concern about some aspects of the rule
8 and would also probably suggest some changes.

9 But what I would like to do is to very
10 quickly tour you through the rule, if everybody will get
11 their draft of February the 25th and just let me go
12 through quickly so you can understand the structure of the
13 rule, and I will make just a very, very few comments about
14 our thinking before it's open to broad debate.

15 Rule -- paragraph 14.3 basically adopts as a
16 default premise that all case records in civil cases
17 should be as broadly open to the public as possible within
18 practical limits of both the law and the physical
19 facilities by which those records are contained. There
20 are some exemptions from public access, which include the
21 sensitive data form which is promulgated by this rule,
22 which you will see in subparagraph (b) and as well as
23 those items prohibited from public access by Federal law,
24 Texas law, this rule, or any court rule.

25 There are also limitations upon the duties

1 of the clerks. These limitations were in the task force
2 report, and we made no attempt to edit those. Ralph
3 Duggins has questioned (3), and he can certainly explain
4 that. Subparagraph (d) is probably the only thing that we
5 added of a substantive nature that was not in the task
6 force report because Justice Gray very wisely pointed out
7 that if read literally the draft rule could cover
8 discovery products in the offices of private counsel. So
9 the exemption in subparagraph (d) is for discovery
10 materials in private hands and also the nonadjudicated
11 records produced by courts, which would include land
12 titles, vital statistics, birth records, and the like.

13 Subparagraph (f) on page three is, and I
14 will tell you, a portion of the rule that gives me a bit
15 of indigestion, but it is in substance what came to us
16 from the task force. It says, "A court or court clerk may
17 make rules to provide for access to case records
18 consistent with the provisions of this rule, and then it
19 outlines a number of conditions that can be placed by the
20 clerk. Bear in mind that this is not remote access. This
21 is walk-in access and remote access both.

22 I have some concern as to whether or not we
23 wish to go down that road, although I will tell you that
24 the good faith of the clerks is probably the best
25 protection you have against abuse of this rule, but there

1 is in this subparagraph (f) the possibility that if you
2 walk in to look at a court record you will have to sign a
3 user agreement before you're given access to that, and so
4 I just call that to your attention.

5 Subparagraph -- well, actually, that
6 probably should be (g), "Inquiry to requestor." This is
7 to ensure that there is no discrimination among those who
8 come to request records, and that is carried forward in
9 the uniform treatment of requests. This, again, is trying
10 to be as open and provide as much open access and no bars
11 to entry to the court records.

12 Subparagraph (h) deals with bulk
13 distribution, which was a concept that was foreign to many
14 of the members on the subcommittee, and, Bonnie, I'm going
15 to call on you quickly to give me a 25-word or less
16 definition of bulk distribution so that the committee as a
17 whole can understand it.

18 MS. WOLBRUECK: Bulk distribution is when
19 vendors request from the clerk the last -- say in
20 particular in criminal records, the last 10 years of all
21 criminal dispositions, including their names, the dates of
22 birth, addresses, that information, and that's a very
23 frequent request from clerks' offices.

24 MR. HATCHELL: Okay. That is a frequent
25 request. What agencies or what kind of people would ask

1 for that?

2 MS. WOLBRUECK: Usually those that are doing
3 the criminal records searches, as Mr. Coffey was just
4 talking about.

5 MR. HATCHELL: 14.3 ends the general broad
6 provisions governing public access to all kinds of
7 records. There have been two topics that have fueled this
8 rule. The first is remote access, and the other is
9 sensitive information. What we found was, and I think
10 probably the task force did as well, that records are
11 being placed online in an indiscriminate fashion
12 throughout Texas in various clerks' offices. In Fort Bend
13 county, for example, everything is online, unrestricted,
14 no user agreement, no access fee or anything.

15 Tom Wilder, on the other hand, has
16 established a very sensible and apparently very
17 user-friendly access that requires password log-in, and do
18 you require a fee?

19 MR. WILDER: Yes, sir.

20 MR. HATCHELL: And a fee.

21 MR. WILDER: The commissioner's court sets
22 the fee.

23 MR. HATCHELL: So what you see is a very
24 wide divergence in the manner in which public court
25 records are being placed online if they're being placed

1 online at all, and that was the reason I asked the
2 questions of Mr. Schneider earlier as to whether or not we
3 wish to force clerks to put records online. The
4 philosophy that we adopted in our committee was to retain
5 as much autonomy as possible in the clerks to decide
6 whether to put records online, and if they put records
7 online, decide how they would permit that access. So you
8 will see those revisions then running through.

9 Subparagraph (c) of 14.4 deals with
10 exclusions from remote access. And these are largely the
11 ones that came to us from the task force report. There
12 are some members of our committee that would like to add
13 more things to this list. There are some that might think
14 that it's too broad.

15 PROFESSOR ALBRIGHT: Mike, can I ask a quick
16 question? What is No. (iii) under (c), "Exclusions,
17 statements of reasons or defendant stipulations"?

18 MS. HOBBS: That's a criminal case.

19 PROFESSOR ALBRIGHT: Does anybody know?

20 MS. HOBBS: I know briefly that it's
21 something in criminal cases. It's limited to the criminal
22 defendants, but the rule just didn't state that.

23 PROFESSOR ALBRIGHT: Just sounds like I'm a
24 defendant and I get to have stipulations and you can't put
25 it up.

1 MR. HATCHELL: Well, generally when you're
2 pleading guilty there are oftentimes written stipulations
3 entered into the record establishing the basic elements of
4 the crime.

5 HONORABLE TRACY CHRISTOPHER: I thought this
6 was just a civil rule.

7 MR. LOW: I thought this didn't apply to
8 criminal.

9 MR. HATCHELL: There are some -- this is not
10 a perfect product. Right?

11 CHAIRMAN BABCOCK: We may have some debate
12 about this provision is what you're saying.

13 MR. LOW: But I'm looking at the overall
14 thing whether this rule was designed to apply to just
15 civil or not to criminal, and then when I hear discussions
16 I hear that it doesn't apply to criminal, but then we keep
17 talking about it.

18 HONORABLE TOM GRAY: For purposes of where
19 we are right now in Mike walking through the rule, assume
20 (ii) and (iii) aren't there.

21 MR. LOW: I better not do that. I'm
22 confused enough already.

23 MR. HATCHELL: Subparagraph (d) under 14.4
24 is also a potential problem area. What we tried to do --
25 and I will tell you that I am largely responsible for the

1 drafting here. This was not something that was included
2 in the task force report. It's a mechanism that we came
3 up with to try to identify to make the clerk's job easier
4 to know when they get a pleading that has in it
5 information that should be excluded from public access,
6 but my concern is that this is not an appropriate place.

7 If the committee or the Court wishes to
8 adopt the procedure in 14.4(d), this is not an appropriate
9 place to do that. It should be done in the Rule of Civil
10 Procedure because it is actually a pleading requirement,
11 so I call that to your attention for future debate.

12 14.5 deals with sensitive data. I suppose
13 this is the topic that since the subcommittee has been
14 working on it has taken on a life of its own. Lisa has
15 done an excellent job of collecting for you a plethora of
16 bills that are now going through the Legislature dealing
17 with sensitive data. It is a very, very hot topic
18 obviously. I emphasize again that the subcommittee did
19 not engage in the philosophical debate as to what
20 sensitive information should be available and should not
21 be available. We simply followed the philosophy of the
22 task force report that there is some sensitive data that
23 should be kept private and should not be available for
24 public access, and those are listed for you in 14.5(a).

25 There is a very fine distinction that you

1 need to understand that our committee -- that just
2 suddenly dawned on us when you talk about requiring a
3 sensitive data form. It is a flaw that I actually see in
4 one of the bills that was handed to me today, and that is,
5 number one, who prepares the form, and number two, is it
6 required only when the sensitive data is required by the
7 pleading. Now, one of the bills I just read earlier, and
8 in fact the task force draft that we got, would seem to
9 require in every pleading that is filed that the party --
10 well, actually, it seemed to require that the clerk pull
11 the parties aside and say, "Fill out all of this sensitive
12 information," whether it needs to be in your pleading or
13 not.

14 And so that was a major thing that we
15 encountered early on, and so our draft rule makes it clear
16 that, number one, the requirement for tendering a
17 sensitive data form is on the party filing the pleading
18 and it should not be filed unless the sensitive data is
19 required by rule, statute, court order or what have you,
20 to be in a pleading. It was simply too much big
21 government for us to have a rule or a statute that
22 requires government to start collecting sensitive data
23 when it otherwise would not have done so, so that was a
24 major area for us.

25 14.5(c) is another pleading requirement,

1 pleading sensitive data information prohibited, which we
2 simply did not have the time to break out and suggest a
3 change to the Rules of Civil Procedure, but I believe
4 personally and perhaps the other members of the committee
5 do as well that this is more appropriate as a pleading
6 rule.

7 14 point -- and then there are -- as you
8 will see, there are specific guidelines as to how
9 sensitive data would be pleaded if it is required to be on
10 the face of a pleading, and this is pretty much exactly as
11 the task force sent it to us and I think matches other
12 analogs as well.

13 If you will turn then to 14.6, and there is
14 a major typographical error here. This was the absolute
15 last thing I did before I e-mailed it to Lisa, and 14.6
16 should end in the third line "that contains sensitive
17 data," period, and then strike everything else that
18 follows. Again, this is one that gives you a bit of
19 indigestion because it does place in the hands of the
20 court system the ability to restrict information. We did
21 not, again, engage in the philosophical debate as to
22 whether this is or is not a good rule. This is what came
23 to us.

24 Then there are provisions for sanctions,
25 provisions for immunity, which I'm sure Andy and Bonnie

1 are -- take some comfort in, and other technical matters
2 relating to contracts for providing technology services.

3 That's the basic structure of the bill -- I
4 mean of the rule. Again, I emphasize that we are not here
5 today to lay down in front of the tractors to sponsor what
6 we have done. We have simply tried as best we could in a
7 very short period of time to get a rule that is workable,
8 and we think that we have done a reasonably good job, but
9 we are very confident that you will also find both from a
10 philosophical standpoint and from a technical standpoint
11 improvements to this draft. But I do think that
12 regardless of the warts, you do owe these committee
13 members a debt of gratitude for a gargantuan job in an
14 extremely short period of time.

15 CHAIRMAN BABCOCK: You want to stay there to
16 field --

17 MR. HATCHELL: No, because they might ask me
18 questions that I can't answer. We will let all the smart
19 people on our committee do that.

20 CHAIRMAN BABCOCK: One of the things it
21 appears that you have done, to me anyway, is sidestepped
22 adroitly the dichotomy that was in the task force report
23 between internet access and general public access by
24 creating a sensitive data form and then prohibiting --
25 prohibiting the sensitive data from being in the pleading

1 that's open to the general public.

2 MR. HATCHELL: Right.

3 CHAIRMAN BABCOCK: Okay. So if we adopt
4 this, there will be a body of information that will be in
5 the future withdrawn from --

6 MR. HATCHELL: Yes.

7 CHAIRMAN BABCOCK: -- general public access.

8 MR. HATCHELL: Yes.

9 CHAIRMAN BABCOCK: As well as internet
10 access.

11 MR. HATCHELL: Yes.

12 CHAIRMAN BABCOCK: Okay.

13 MR. HATCHELL: The subcommittee is, if
14 anything, adroit.

15 CHAIRMAN BABCOCK: Yeah. And so if
16 that's -- if we pass the rule today --

17 MR. HATCHELL: Yes.

18 CHAIRMAN BABCOCK: -- that would be what
19 went forward from March 3rd or 4th or whatever forward,
20 but what about pleadings that have the sensitive data in
21 them prior to this date?

22 MR. HATCHELL: Good question.

23 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

24 HONORABLE STEPHEN YELENOSKY: I notice that
25 you had a question on page four of seven under remote

1 access, (c)(6), (vi), you exclude unpublished, unfiled
2 notes, memoranda, et cetera, and research of judge and
3 court personnel from remote access, but nowhere else in
4 the rule -- or maybe I'm missing it -- do I see that you
5 otherwise exclude those from being court records subject
6 to public access. In other words, the rule seems to make
7 those exempt from online access, but otherwise available.

8 CHAIRMAN BABCOCK: Ralph.

9 MR. DUGGINS: I think that's a great point,
10 and Mike and I discussed this, and, again, Mike is too
11 modest. He did an unbelievable job of trying to pull all
12 this together, but I think that that should be carved out
13 of the definition.

14 HONORABLE STEPHEN YELENOSKY: Yes.

15 MR. DUGGINS: And we just -- I think we just
16 didn't get it in the right spot.

17 MR. HATCHELL: Yes. I think that's right.

18 HONORABLE STEPHEN YELENOSKY: Yeah, I mean,
19 obviously if that's to be exempted it's not just from
20 public access. Rule 12 deals with nonadjudicated stuff,
21 and it specifically makes clear, to me anyway, that that
22 stuff is not public. Now, this rule seems to make it
23 public.

24 CHAIRMAN BABCOCK: Yeah, Judge, you're
25 speaking about Rule 14.4(c)(vi), correct?

1 HONORABLE STEPHEN YELENOSKY: Yes. I'm
2 speaking about the fact that that appropriate exemption
3 applies only to remote access when the exemption should
4 apply to the definition of what are court records.
5 Otherwise the notes that I'm making on the bench and all
6 my doodles are court records that are accessible to the
7 public.

8 CHAIRMAN BABCOCK: I think that's right, and
9 we can debate this exclusion paragraph and should, but I
10 mean, there are a ton of things that you would not
11 ordinarily expect to see in a court file. Income tax
12 returns. You can't even sometimes get them in discovery,
13 much less file them of record, so I'm not sure that
14 philosophically this is the right way to go.

15 MR. HATCHELL: Well, Stephen is exactly
16 right in his reading of the rule. This came up at the
17 very last, and Ralph and I talked about this actually
18 outside the subcommittee's presence. Ralph got off the
19 plane, and we had about an hour's conference about this,
20 and it suddenly dawned on us that the definition of case
21 record was so broad that it could --

22 HONORABLE STEPHEN YELENOSKY: Court-created.

23 MR. HATCHELL: It could include Justice
24 Hecht's draft opinions or even any internal memorandum in
25 Supreme Court chambers, and so we took a stab -- and bear

1 in mind this was like at 10:00 o'clock on Friday before we
2 were to send this rule out, so it just suddenly dawned on
3 us that there was a major hole in here for these kinds of
4 things, and that's what we were trying to fix up.

5 CHAIRMAN BABCOCK: Okay. Justice Pemberton.

6 HONORABLE BOB PEMBERTON: Would it be
7 productive to have a carve-out for every type of document
8 covered by Rule 12? Is there any overlap between the
9 rules, all things being equal? That might be one way to
10 limit that case definition.

11 CHAIRMAN BABCOCK: Okay. Carl.

12 MR. HAMILTON: Could you give us some
13 example of what statutes, rules, and regulations require
14 the sensitive data and then why the requirement even of
15 having this form?

16 MR. HATCHELL: Bonnie may know that better
17 than we do.

18 MS. WOLBRUECK: I'm sorry. I didn't quite
19 hear all of that.

20 MR. HAMILTON: What rules or statutes
21 require the sensitive data and then why have the sensitive
22 data form?

23 MS. WOLBRUECK: Mainly the sensitive data in
24 itself, I don't know of any rules or statutes just for
25 particular information, but there are many statutes

1 providing confidentiality of certain records.

2 HONORABLE SARAH DUNCAN: Well, like Family
3 Code proceedings.

4 MR. HAMILTON: Beg pardon?

5 HONORABLE SARAH DUNCAN: Family Code
6 proceedings. Richard, don't you have to put the date of
7 birth of the children --

8 MR. ORSINGER: Right.

9 HONORABLE SARAH DUNCAN: -- in a divorce
10 petition?

11 MR. HATCHELL: The task force report
12 emphasized family more than anything in this respect,
13 family cases.

14 MR. HAMILTON: I can't perceive of where you
15 would ever have to put bank account, credit card, Social
16 Security numbers, driver's licenses.

17 MR. ORSINGER: They show up in decrees of
18 divorce, although the form that the family law practice
19 manual that's published by the State Bar of Texas has now,
20 I think, shifted its paradigm and they're trying to
21 encourage you to use only the last four digits, but
22 historically if you go look at divorce files for the last
23 20 years you're going to find credit card numbers, bank
24 account numbers.

25 HONORABLE SARAH DUNCAN: Inventory in a

1 probate case is going to have bank account numbers.

2 CHAIRMAN BABCOCK: Lisa.

3 MS. HOBBS: The Judicial Council report
4 contains a list of current statutory protections and
5 requirements in Texas that lists those items that are
6 restricted from public access by statute and those
7 documents which require certain sensitive information. It
8 looks like it's Appendix B of the Judicial Council report.

9 CHAIRMAN BABCOCK: Judge Gray, did you have
10 something and then --

11 HONORABLE TOM GRAY: No.

12 CHAIRMAN BABCOCK: Judge Christopher. Judge
13 Christopher.

14 HONORABLE TRACY CHRISTOPHER: Oh, I'm sorry.
15 Well, are you just asking for general comments at this
16 point? Because I have a lot of specifics and I'm not
17 sure --

18 CHAIRMAN BABCOCK: Yeah, I think that's a
19 good point. I think we ought to try to confine our
20 comments right now to responding generally to what we
21 think about this.

22 HONORABLE TRACY CHRISTOPHER: All right.
23 Well, some -- we hope in Harris County that we will at
24 some point move to having all of our files electronic so
25 there will not be a paper file at the courthouse, and

1 remote access here needs to be -- the definition of remote
2 access needs to be tweaked with in my opinion because
3 certainly if you came down to the courthouse and logged
4 onto the computer there you should be able to review, you
5 know, the public case files. So that's an issue for
6 people that hopefully in the future we're going to move
7 all to electronic.

8 On prohibiting remote access, once we clear
9 up that definition, this doesn't seem to provide that
10 parties to a lawsuit could remotely access the information
11 that they have designated as confidential, so I think that
12 needs to be added. It also doesn't allow someone else to
13 like cross-reference somebody's pleading as not for remote
14 access. So, you know, maybe a defendant files something
15 and the plaintiff says, "Oh, you know, that's got
16 sensitive information in it," there needs to be some sort
17 of ability for the plaintiff to say, king's X, that
18 pleading should not be for remote access.

19 And then I think we talked about this last
20 time in terms of the medical/psychiatric expert. So many
21 times we have discovery motions where that is part of the
22 motion, and it seems to me, you know, 75 percent of our
23 pleadings are going to have 36 point type on a cover sheet
24 saying "not for remote access," if we have such a huge
25 exception.

1 CHAIRMAN BABCOCK: Okay. Ralph and then
2 Professor Dorsaneo.

3 MR. DUGGINS: I just want to answer one of
4 the concerns you had about access by a party. I think if
5 you look at 14.3(a)(i), that takes care of that. It
6 should and at least we thought it did.

7 HONORABLE TRACY CHRISTOPHER: Well, but
8 that's public access to the case records. I didn't think
9 that was the remote access.

10 MR. DUGGINS: Well, it says "neither the
11 provisions of this rule nor any procedures adopted by a
12 court or court clerk can limit access to case records in
13 any given action or proceeding by a party to that action."

14 HONORABLE TRACY CHRISTOPHER: I think I
15 would make it more clear in the remote access where it
16 says "remote access prohibited," which is more specific,
17 that a party can still remotely access their own
18 pleadings.

19 CHAIRMAN BABCOCK: Professor Dorsaneo, then
20 Jeff and then Richard.

21 PROFESSOR DORSANEO: First, it seems to me
22 that the -- you've already talked about this, but the
23 definition of case record is extraordinarily important and
24 needs considerably more work. It's -- I'm reminded of a
25 case out of the San Antonio court where a particular

1 exhibit which was ruled inadmissible was the subject
2 matter of a request, probably by a newspaper, for access,
3 court records; and the San Antonio court, in my
4 recollection, concluded in its analysis that it wasn't a
5 court record. And I can't really duplicate the analysis,
6 because it was a difficult accomplishment, but it does
7 seem to me that we're talking about all kinds of things,
8 and I'd like to know what they are one by one rather than
9 developing some kind of an omnibus definition that we
10 don't really understand.

11 And the second thing, I don't know about the
12 rest of you, but I have trouble understanding 14.3(f).
13 No, it's not. Pardon me, I'm wrong. 14.5. I turned the
14 page back and then didn't -- I lost my place. I have
15 trouble understanding what 14.5 means. "All court clerks
16 shall maintain as a case record." Does it mean as part of
17 the case record or a separate case record? What is this?
18 Do we mean in a family law case, a sensitive data where
19 you have sensitive information, a sensitive data form
20 where that information is located in addition to the
21 petition, which will no longer contain that information?
22 How does this work? I'm not -- I'm not sure I follow what
23 the engineering requires each person involved in this
24 process to do. If it does require that much work, I
25 wonder whether it's advisable.

1 CHAIRMAN BABCOCK: Okay. Jeff.

2 MR. BOYD: I just had some questions to be
3 sure I understood the transition from the earlier version
4 to the February 25 version. Two things. As I look -- so
5 have we now removed the provision that treats case records
6 and court-created records differently? Nobody knows?
7 Mike, do you know?

8 MR. HATCHELL: I don't know what you mean
9 by --

10 MR. BOYD: In the earlier version that I had
11 reviewed, 14.4(d), I guess -- no, 14.5(d) said "Remote
12 access by the general public to case records other than
13 court-created case records may be granted only through a
14 subscriber type system."

15 MR. HATCHELL: Right. We eliminated that.

16 MR. BOYD: So I don't think that this
17 version has that anymore; is that correct?

18 MR. HATCHELL: That's correct.

19 MR. BOYD: So I'm not sure we need
20 "court-created records" anymore, which is still in this
21 new version, if we're not treating court-created records
22 any differently.

23 MR. HATCHELL: Well, Bonnie, is it in bulk
24 distribution?

25 CHAIRMAN BABCOCK: Bonnie? Pay attention.

1 MS. WOLBRUECK: I apologize. We were just
2 talking. I had another question, I apologize. What was
3 the question?

4 MR. BOYD: Are we -- are we giving any
5 different treatment to court-created records than to other
6 case records in the current version of the draft?

7 MS. WOLBRUECK: I do not think so. The
8 original did give a different definition.

9 MR. BOYD: Right. Okay. And then the
10 second --

11 MR. HATCHELL: Let me explain that. There
12 is a philosophical debate. Many people would like to
13 restrict remote access to only court-created records, and
14 we opted not to go down that path. So that's the reason
15 there is a difference, but I thought that it remained in
16 bulk distribution, but I could be wrong.

17 MR. BOYD: Yeah. I don't see anything in
18 the current draft under bulk distribution that deals with
19 court-created.

20 MR. HATCHELL: That is largely what bulk
21 distribution is, but I don't think we use that term
22 anymore.

23 CHAIRMAN BABCOCK: There are a whole bunch
24 of people. Richard, and then Frank had his hand up and
25 then I think Carl and Alex.

1 MR. BOYD: Chip, I did have one other
2 question.

3 CHAIRMAN BABCOCK: Yeah. I'm sorry, Jeff.
4 I didn't mean to cut you off.

5 MR. HATCHELL: It is in Family Code
6 proceedings.

7 MR. BOYD: Family Code, okay. And then the
8 provision that was in the earlier draft on case by case
9 basis, you -- for a remote or electronic access you could
10 only get it by providing the specific style of a specific
11 case. Is that all gone now?

12 MR. HATCHELL: No. No. It's there. What
13 happened was the task force rule was somewhat unclear and
14 put portions of remote access in other things, and so we
15 lumped it all together, and it is there because I read it
16 this morning. 14.5(c).

17 HONORABLE SARAH DUNCAN: Right now 14.4.

18 MR. HATCHELL: Yeah, 14.4(c) right now.
19 That is -- that is another area that's one of
20 philosophical debate, and that is whether or not as a
21 policy matter we want to allow clerks to restrict remote
22 access when you say Smith vs. Jones. That was the way we
23 got it from the task force, and that's the way we have
24 kept it, but it's autonomous with the clerks.

25 MR. BOYD: But can you -- okay. I'm

1 confused. The earlier version had this provision that
2 said a court may only grant public access to a case record
3 in electronic form when the party requesting access to the
4 case record identifies the case record by the number of
5 the case, the caption of the case.

6 MR. HATCHELL: We made it optional with the
7 clerk.

8 MR. BOYD: But in the February 25th current
9 version I don't see that provision in here.

10 MR. HATCHELL: It's optional with the clerk.

11 MR. BOYD: The rule doesn't address it.

12 MR. HATCHELL: No, I think it does. It's
13 in, as I recall, that portion where the clerk "may."

14 HONORABLE TOM GRAY: Isn't it 14 point (a),
15 sub (ii)?

16 MR. BOYD: 14 point --

17 HONORABLE TOM GRAY: (a), sub (ii) on page
18 four of the draft.

19 MR. MUNZINGER: 14.4.

20 HONORABLE TOM GRAY: I'm sorry. 14.4. It's
21 on page four of the draft. "Except for an index,
22 calendar, docket, minute, or register of actions, permit
23 access only by case number, caption, or the first and last
24 name".

25 MR. BOYD: Oh, there it is. Thank you.

1 That's what I was looking for.

2 CHAIRMAN BABCOCK: Richard, Frank, Carl,
3 Alex.

4 MR. ORSINGER: Chip, I've got several. One
5 is, was it the committee's intention to broaden what's
6 available for visual inspection from beyond what it exists
7 today?

8 HONORABLE SARAH DUNCAN: Yes.

9 MR. ORSINGER: It was? So you are intending
10 to make more records public for walk-in visitors than
11 currently is the case, right?

12 HONORABLE SARAH DUNCAN: No, it restricts
13 it. For the sensitive data form you are restricting what
14 is publicly accessible.

15 MR. ORSINGER: My question was did the
16 committee intend to increase what is presently available
17 for visible inspection for a walk-in customer? Are we
18 narrowing that down or leaving it the same?

19 MR. HATCHELL: Narrowing it down.

20 MR. ORSINGER: I want to be sure that in our
21 definition of case record we don't inadvertently broaden
22 what's available or what's divulged upon the clerks to do.
23 For example, maybe the definition of court record could be
24 broad enough to include an exhibit that's offered in a
25 hearing or a trial that goes into the custody of the court

1 reporter and then ultimately in the custody of the
2 district clerk, which right now I don't think we
3 conventionally think is available for public inspection,
4 although maybe I'm wrong.

5 MS. WOLBRUECK: They are open to the public
6 because nothing prohibits it.

7 MR. HATCHELL: It's not a debate. It was an
8 expiration by us if you trace through the rules, the path
9 of exhibits that go from the court reporter to the clerk
10 and are filed and are there for case records, so -- and by
11 the way, Bonnie tells us that there is probably as much
12 sensitive data in exhibits as there is in anything
13 anywhere.

14 MR. ORSINGER: Yeah, I'm sure it's way more.

15 PROFESSOR DORSANEO: What if they are
16 sealed? What if they are sealed?

17 MR. HATCHELL: What if they are sealed?

18 MR. ORSINGER: This rule permits a court
19 order to remove information from public access. There is
20 a provision in here that says "or court order." It's
21 under 14.3(b).

22 MR. HATCHELL: But hospital records that
23 sometimes are this high are going to have Social Security
24 numbers, names and addresses of children.

25 MR. ORSINGER: Tax returns are going to have

1 everything you can dream of.

2 MR. HATCHELL: Right.

3 MR. ORSINGER: Okay.

4 MR. HATCHELL: But back to your question,
5 Richard, which is a very good one, it was our view that we
6 were trying to maintain as broad a public access to court
7 records as possible, bearing in mind the increasing
8 sensitivity with the Legislature and the public in general
9 about sensitive information. That was our approach.

10 MR. ORSINGER: Okay.

11 MR. HATCHELL: Whether or not these
12 definitions need to be tinkered with to preserve that is
13 for the committee.

14 MR. ORSINGER: Okay. My next comment
15 relates to probate records such as wills, which may
16 inadvertently contain information that we banned here, and
17 the inventory and appraisement, which probably for public
18 reasons we would want that information to be required, if
19 there's an administration with no will, no one has the way
20 to know who owns the bank accounts and the cars and the
21 title unless we put it in the inventory and appraisement
22 and it's in the order of administration.

23 It's probably less likely to occur, but if
24 there's an independent executor there is no public
25 information at all about any of it except what's in the

1 inventory and appraisal, and if somebody wants to come
2 back later on and figure it out, the independent executors
3 are informal. There is no recordkeeping, you could never
4 figure out 10 years later what happens to anything, so it
5 seems to me like maybe we ought to have a separate
6 consideration of what the sensitive data form -- or how it
7 would work in probate proceedings, or death proceedings I
8 mean.

9 Also, it seems to me that at least initially
10 and perhaps forever there will be a compliance problem and
11 that we should have a procedure for a motion to force the
12 clerk to return or withdraw a document filed in violation
13 of the rule. It doesn't do any good to have a motion to
14 strike granted and then an amended pleading filed if the
15 original one remains in the clerk's possession and is
16 subject to public view, so we have to I think have a
17 procedure to actually divest the clerk of an improperly
18 filed document, which I think is contrary to anything you
19 do right now.

20 MS. WOLBRUECK: That's right.

21 MR. ORSINGER: You would never give up a
22 document once it's in your custody.

23 MS. WOLBRUECK: No.

24 MR. ORSINGER: So we have to give you a rule
25 that forces you to give back a document filed in

1 violation.

2 MS. WOLBRUECK: You're asking me then to
3 review that document and see if it's in violation?

4 MR. ORSINGER: No, I think that it would be
5 -- I want a procedure where someone can file a motion and
6 request an order from the court striking a certain filing
7 that's in violation of the sensitive data rule and then
8 the court can order it and then you would be permitted
9 and, in fact, required to destroy your record or return it
10 or whatever. And then --

11 HONORABLE SARAH DUNCAN: What about 14.6?
12 Does that resolve your problem?

13 MR. ORSINGER: Let me read it separately,
14 and if it does then I withdraw the comment. Another thing
15 is that I haven't dealt with this in detail in a while,
16 but the Federal government promulgated regs to help with
17 the enforcement of child support, and they implemented a
18 lot of procedures like intercepting income tax refunds and
19 other things, all driven by Social Security number. I
20 believe at one time the Federal regs required that orders
21 involving child support contain the Social Security number
22 of the payor, the father who had to pay, and I'm not sure
23 whether -- I mean, I don't think we have a completely free
24 hand about how we handle that obligation.

25 Now, moving that obligation into a sensitive

1 data form may well meet Federal requirements and preserve
2 privacy, but I think we ought to run this by the head of
3 the child support division at the Attorney General's
4 office to see what tweaking may be required relative to
5 Federal regs.

6 And then just as a last point, I think the
7 sensitive data form is a very good compromise to allow
8 public access to most of the stuff but keep the most
9 damaging information where only those who have a lawful
10 reason to get it can get it, and I really like that
11 solution.

12 CHAIRMAN BABCOCK: Okay. Here's our order.
13 Frank and then Carl and then Alex and then Stephen
14 Yelenosky and then me and then we'll take a break.

15 MR. GILSTRAP: I have a couple of comments.
16 First of all, I'm a little puzzled by the definition in
17 14.2(g), which defines a case record as -- it says that a
18 case record is in electronic form if it's readable through
19 use of an electronic device. Arguably that would include
20 all paper records because they can all be scanned. That
21 is read through an electronic device.

22 In 14.2(g) -- excuse me, 14.3(a), we talked
23 about this earlier, and as I understood that initially,
24 this involved paper records. A suggestion was made that
25 somehow we should allow the people listed in (i), (ii),

1 and (iii) below that to be able to access this information
2 electronically; that is, a party could access all of this
3 file electronically. How would we do that? Would we give
4 them a password, and then does that make all the files
5 accessible by someone who simply hacked the password?

6 I think this gets into a real problem. I
7 think Richard mentioned last time is when we create a
8 sensitive data sheet or sensitive data information and
9 then we put it in electronic form, we're kind of inviting
10 it to be accessed by people who shouldn't be able to
11 access it. So I'm troubled by that.

12 Finally, maybe this isn't the time, but we
13 do need to talk about the civil/criminal problem. This
14 may be -- it would be helpful to know how many of the
15 requests for -- are, you know -- the queries involve civil
16 records and how many involve criminal records. I'm under
17 the impression that actually criminal records may be a lot
18 more of interest to the public, and is this a case of the
19 tail wagging the dog? Because if -- you know, whatever we
20 do is probably going to have a large effect on how the
21 clerks handle criminal records, and we can't be blind to
22 that because they're not going to like two systems.
23 That's all I have.

24 CHAIRMAN BABCOCK: Okay. Going to Carl.

25 MR. HAMILTON: Back to the sensitive data

1 form, as I read the report from the task force there's
2 only five statutes that require any sensitive data form,
3 and one of them, for example, is in a petition. Under
4 14.5 is the concept that it's only in those cases where
5 that data is required that this form has to be prepared,
6 and if so, are we saying then that you don't put it in the
7 pleading in contradiction of the statute if you put it in
8 the sensitive form, and if so, how do we avoid the effect
9 of the statute which requires that it be there and in the
10 various orders?

11 MR. HATCHELL: That's done through the
12 procedures in the rule that require you to plead it in a
13 certain way if it needs to be there, and then you can
14 reference the paragraphs in the sensitive data form, which
15 all parties to the case should have.

16 MR. HAMILTON: So you still put it in the
17 pleading?

18 MR. HATCHELL: But in the form as required
19 by the rule, the last four digits or this or that.

20 CHAIRMAN BABCOCK: Is that it, Carl, or do
21 you have anything else?

22 MR. HAMILTON: No. I think that's all.

23 CHAIRMAN BABCOCK: Alex.

24 PROFESSOR ALBRIGHT: I have some kind of big
25 issues, and I missed the last conference call, so you-all

1 may have discussed these and resolved this. First of all,
2 has anybody looked at this rule in the context of Rule
3 76a? Bob Pemberton brought up Rule 12, which I hadn't
4 really even focused on, but it appears that we have Rule
5 12, now this Rule 14, that talk about access for the
6 public and access to the court records, and we also have
7 Rule 76a that says, you know, they are presumably open to
8 the public, and this rule has some provisions where clerks
9 can restrict access, and I'm just wondering if we need to
10 get Rule 76 tied into this, 76a tied into this.

11 MR. HATCHELL: Well, Alex, Ralph and I
12 talked about this after we put the draft out for comment,
13 and we tried to fix it. You're right. At one time the
14 way it was drafted it was in conflict with 76a. The
15 redaction or the closure features now should be limited to
16 sensitive data, but I hope we accomplished that.

17 PROFESSOR ALBRIGHT: Do we need to put
18 sensitive data as -- do we need to amend 76a that says
19 that sensitive data is not --

20 MR. HATCHELL: Possibly. Yeah. Good point.

21 PROFESSOR ALBRIGHT: Because that's one
22 issue with 76a. A second issue is how have we addressed
23 sensitive data in old records? Like Fort Bend County has
24 all these old records. My divorce decree has got
25 everything, every bit of my information my whole family

1 has, so if that's put in remote access, you know, you've
2 got our Social Security numbers, you've got everything.
3 Is there any thought for dealing with old records?

4 MR. HATCHELL: Well, I think clearly there's
5 thought. The difficulty that we run into, Alex, is this
6 puts an enormous burden on Bonnie and her staff to do
7 this.

8 PROFESSOR ALBRIGHT: Right.

9 MR. HATCHELL: And so this is silent. As a
10 matter of fact, it almost goes in the opposite direction.
11 It relieves the clerks of any obligation to do that. So
12 it is -- it's a very good point, Alex, and --

13 PROFESSOR ALBRIGHT: Could the parties take
14 it upon themselves to make a sensitive data form and
15 substitute a new order or something? I don't know. I
16 don't know if you want to get into that, but I mean, it's
17 a closed record. I don't know if that's possible. I just
18 wanted to throw that out.

19 But also when we're talking about case
20 records, I think it sounds like everybody agrees that (c),
21 14.2(c) is too broad. One question I've got is are we
22 really talking about records that are in the custody of
23 the clerk when we're talking about this? Bonnie?

24 MS. WOLBRUECK: Yes. I think the case
25 record is the case file.

1 PROFESSOR ALBRIGHT: So what we're really
2 talking about is public access to records kept by the
3 clerk.

4 MS. WOLBRUECK: Yes.

5 PROFESSOR ALBRIGHT: Because what I'm -- we
6 don't want people running up to Judge Yelenosky's office
7 and saying --

8 HONORABLE STEPHEN YELENOSKY: Right, and
9 that was exactly my point. Why aren't we just -- aren't
10 we overcomplicating the definition of a case record?
11 Isn't it just what's filed and then we narrow it down from
12 there? Because a court-created record that's not filed
13 but maybe should be public is a different problem. If I
14 put it in my drawer, the clerk is not going to be able to
15 give public access to it. Somebody is going to have to
16 mandamus me or something to put it in the file, so why
17 isn't court record just what's filed by any person and a
18 court-created record is something filed by a person that
19 was created by the court?

20 CHAIRMAN BABCOCK: We'll talk about that
21 specific in a minute. I wanted -- Judge Lawrence, unless
22 it can't wait until after the break, let's wait until
23 after the break. I had a couple of thoughts that I just
24 wanted to throw out on the table. I think the
25 subcommittee was wise in overall philosophically generally

1 equating records that are available to the public if you
2 go down to the clerk's office and records available over
3 the internet and making that the same. Even though that
4 the price of doing that, and I think there is a cost, even
5 though the price is that it's going to narrow what is
6 currently available. I think that's okay so long as we
7 don't narrow it too much. I think that's good.

8 The second thing I would say is I think we
9 need to keep in mind something that one of our speakers
10 talked about this morning, and that is the public
11 confidence in our system, because I've heard several
12 comments talking about withdrawing from public access
13 things that are now typically available that go into the
14 judge's decision-making process, so that when Judge
15 Christopher is presented with a motion that she reviews
16 the papers on and makes a decision, except -- that stuff
17 is available to the public except within very narrow
18 limits, perhaps trade secrets or some other area, but very
19 narrow limits and that if anybody looks at her decisions
20 and they say, okay, she decided this because A, B, C, and
21 and I can look at that and see what she based her decision
22 on. If we withdraw a bunch of information from the public
23 so that now they say, "We know what Judge Christopher
24 decided, but she can't talk about a lot of what the basis
25 was and we can't see for ourselves," and I think that is

1 very dangerous if we allow that on any kind of wholesale
2 basis.

3 I've seen it in practice. I represent, as
4 you all know, a lot of media; and reporters, if they can
5 see it, they will say, "Okay, this is what happened." If
6 they can't see it -- and they're an extension of the
7 public. If they can't see it, they imagine all sorts of
8 horrors that don't exist in 99 percent of the cases, and
9 they are reflective of what the public thinks about what
10 we do in our job, so I ask us to keep that in mind when we
11 think about restricting from access things that judges
12 consider when they make their decisions.

13 Finally, one final point, housekeeping,
14 everybody go to Rule 14.3, and we have in the numbering on
15 page three of seven, we have two subparagraph (f)'s. In
16 going forward, I propose renumbering them, and in our
17 discussions so that we know we're on the right subsection,
18 let's turn the second subsection (f) into (g).

19 HONORABLE STEPHEN YELENOSKY: Aren't we
20 going to debate that first?

21 MR. ORSINGER: That would be "Inquiry to
22 requestor" becomes (g)?

23 CHAIRMAN BABCOCK: "Inquiry to requestor"
24 becomes (g). "Uniform treatment of request" becomes (h),
25 and "Bulk distribution" becomes (i), so that's what we're

1 going to talk about in the future. Let's restrict our
2 break to 10 minutes this time and then get back at it.
3 Thanks.

4 (Recess from 10:52 a.m. to 11:10 a.m.)

5 CHAIRMAN BABCOCK: All right. Back on the
6 record, and I think we got some good general comments. I
7 would propose that we start going through the rule and
8 continue after -- continue up to lunch, break for lunch,
9 and then continue on until 3:00 o'clock and see how far we
10 get. There is -- as you all know, there is a lot of
11 pressure on the Court to get this rule considered for a
12 lot of reasons. One of which is, you know, you've got
13 clerks out there just doing things, and so we need to --
14 if we're going to give them some guidance we need to get
15 it done before -- Bill.

16 PROFESSOR DORSANEO: Well, I'm back to that
17 14.5 that I was having trouble understanding.

18 CHAIRMAN BABCOCK: Yeah.

19 PROFESSOR DORSANEO: And as I read this
20 whole thing, the sensitive data form is only required in
21 the family law cases mentioned by Carl. So if that's so,
22 then this data, Social Security numbers, et cetera, is not
23 regarded as sensitive in other cases, and I don't think
24 that's what anybody had in mind or what the gentleman who
25 was speaking earlier was assuming.

1 CHAIRMAN BABCOCK: I don't think the
2 information is any less sensitive if it's in a general
3 civil cases versus a family law case, but the point is
4 that it is required in some cases, mostly family law.

5 MR. ORSINGER: What if somebody pleads it
6 voluntarily? You shouldn't permit that.

7 CHAIRMAN BABCOCK: That's the point. Yeah.
8 That's the point. Whether somebody just for whatever
9 reasons wants to throw in a bunch of, you know, Social
10 Security numbers, dates of birth, names and addresses of
11 minor children, should you -- or should you be silent on
12 that or should you try to prohibit it? That's the point.

13 PROFESSOR DORSANEO: So why is there this
14 limitation talking about required by statute, rule, or
15 regulation to be part of a pleading or other case record?
16 And I think if the concept is the sensitive data form
17 satisfies the requirements of the statutes, that ought to
18 be just said separately.

19 CHAIRMAN BABCOCK: Yeah. I think we can
20 talk about that, but I think that the subcommittee's
21 thought was that in order to satisfy the statute, rule, or
22 regulation, which requires this information, it would not
23 be put in a general pleading; or if it was, it would be
24 put in a muted form, but the information would still be
25 available in the clerk's office and still be available for

1 parties.

2 PROFESSOR DORSANEO: All I'm saying,
3 Mr. Chairman, is this does not say what we want it to
4 say --

5 CHAIRMAN BABCOCK: I know.

6 PROFESSOR DORSANEO: -- if these things are
7 meant to be kept sensitive in cases generally.

8 CHAIRMAN BABCOCK: I think that's exactly
9 right. We'll get to that. Mike and Ralph, do you want to
10 start at the beginning or do you want to start somewhere
11 else?

12 HONORABLE TOM GRAY: You assume he wants to
13 start.

14 CHAIRMAN BABCOCK: That was an assumption.

15 MR. HATCHELL: Based on the comments that
16 I've heard today I think that the civil/criminal thing is
17 something that needs to be gotten out of the way early on,
18 and I think I recollect -- Tom is ducking under the table
19 here, and I think that he had some very, very good
20 comments that were made, and he convinced the subcommittee
21 that it should be, and so we will let him speak.

22 HONORABLE TOM GRAY: I will try to recreate
23 the situation in which I made the comments. It was right
24 at the end of about an hour and a half or two-hour, maybe
25 two and a half-hour conference call, and I had been

1 keeping notes and decided that we had a lot of problems
2 that had been thrown into this Rule 14 hopper, and I was
3 trying to identify some discernible chunks that may or may
4 not be appropriate for this rule.

5 We had struggled with things like court
6 records and party records. We had struggled with the
7 issue that somebody had raised earlier, the old records
8 versus the new records, and I can get back to that. And
9 Bonnie had a great idea on the subscriber issue on that,
10 and then different courts -- because, remember, we're
11 dealing potentially with down to municipal level courts
12 here depending on how this is all structured; but then
13 we're dealing with different type cases and whether or not
14 that justified having different rules for criminal cases,
15 family cases, those in which minors were otherwise
16 involved, particularly personal injuries involving minor.

17 And I made the observation somewhere through
18 the two and a half-hour discussion that the -- and Mike
19 has alluded to it today, that we generally agreed that
20 some of these proposals that are going in this rule look a
21 whole lot more like pleading requirements and in effect,
22 for example, the concept of do not plead sensitive data in
23 a pleading is something that needs to be in a pleading
24 rule, not in Rule 14. Therefore, that goes in a rule
25 of -- Texas Rules of Civil Procedure, and all of the

1 procedures regarding criminal cases are in the Code of
2 Criminal Procedure, a statute over which we don't have
3 rule-making authority; and therefore, that led to the
4 dichotomy of whether or not we could by this rule, because
5 we need to impact some pleading rules, sufficiently deal
6 with criminal cases in concept in this rule.

7 And if you just lump everything in here and
8 try to make it one rule, you're almost talking like a
9 regulatory chapter, and it's a whole lot more involved
10 than just what we have here. So it was -- that was made
11 at the end of the conference call, and at the next version
12 I saw it applied to civil rules only, and I said, "Okay,
13 well, that makes it more narrow and less problematic."

14 CHAIRMAN BABCOCK: Lisa. I know you had
15 some thoughts about it and perhaps Justice Hecht does.

16 MS. HOBBS: I just wanted to -- I think
17 you're absolutely correct that we don't have authority
18 over the Code of Criminal Procedure. I may not even know
19 the correct name of it.

20 HONORABLE TOM GRAY: You got it.

21 MS. HOBBS: But under the rules, we do
22 have -- the Court does have authority over the
23 administrative procedural rules over criminal cases, too.

24 HONORABLE TOM GRAY: Yes.

25 MS. HOBBS: So under the Rules of Judicial

1 Administration the Court has constitutional and
2 statutory authority to promulgate rules that affect both
3 civil and criminal matters.

4 HONORABLE TOM GRAY: And that may be reason
5 enough of leaving these pleading requirements of not
6 pleading sensitive data over in this rule rather than over
7 there, but then you get into that's a pleading
8 requirement. But anyway, I do agree that on the
9 administration of the courts we have that authority. I'm
10 not questioning that.

11 CHAIRMAN BABCOCK: Richard. Or excuse me,
12 Justice Hecht.

13 HONORABLE NATHAN HECHT: Well, and I think
14 we're going to be asked to exercise it, and so -- and Tom
15 raises a good point, which is, you know, our whole frame
16 work in approaching these I think is necessarily going to
17 be from a civil case background, because that's who
18 everybody here is mostly; but I mean, the Court of
19 Criminal Appeals may have to get in on this at some point;
20 but I do think keeping in mind that pleading issues or
21 issues that more appropriately should be in the Rules of
22 Civil Procedure may need to be moved over there; but I
23 think the Judicial Council and the Legislature is looking
24 to us to make basic policy and practical decisions about
25 access to all this stuff, whether it's civil or criminal

1 or family or juvenile or whatever it is.

2 CHAIRMAN BABCOCK: Judge Lawrence had his
3 hand up before the break.

4 HONORABLE TOM LAWRENCE: I maintain both
5 civil and criminal records, so under Rule 12 all of these
6 records are now accessible under Rule 12, judicial
7 records, case records regarding civil, cases records
8 regarding criminal. If Rule 14 goes into effect then Rule
9 14 will govern civil case records, but Rule 12 will still
10 govern criminal case records and all other judicial
11 records; is that correct?

12 MS. HOBBS: Rule 12 is just records that
13 don't deal with your adjudicatory functions. So the court
14 case records that we are commonly talking about today
15 actually do not fall under Rule 12.

16 HONORABLE TOM LAWRENCE: Well --

17 MS. HOBBS: It's just your nonadjudicatory
18 papers that are subject to Rule 12.

19 HONORABLE TOM LAWRENCE: Well, then a
20 criminal court case record, the access to that would be
21 guaranteed under what?

22 MS. HOBBS: A common law right of access
23 probably.

24 CHAIRMAN BABCOCK: Judge Gray.

25 HONORABLE TOM GRAY: There was one comment

1 that was made also before the break about aren't we only
2 dealing with records that are filed in what we call a
3 shuck at our court, whatever you call it at the different
4 courts, and the answer to that question generally is no,
5 because we've got other data that are the indexes and
6 things that this rule is dealing with that we are trying
7 to -- if they put -- make it available for remote access
8 then this is going to control that and even some -- some
9 of us were concerned about it, but there is also some
10 compilation of data that the clerks have the ability to do
11 that its availability is regulated by this rule. So the
12 answer to the question in short answer is no, it's not
13 just what goes inside the file itself.

14 CHAIRMAN BABCOCK: Okay. Richard.

15 MR. ORSINGER: In my view we should debate
16 access to criminal records independently. I don't see how
17 they could be meshed into one rule the policies are so
18 different. In my view, for example, we've already decided
19 that, well, the further you go in the criminal process the
20 less of a right to privacy you have, so we restrict access
21 to arrest records. There's less restriction to charging
22 instruments like indictments, but there's still
23 circumstances in which sealed indictments are returned,
24 and then once the trial process starts they're always
25 public, and then once you're convicted I think you have no

1 privacy right as against the public knowing that you are
2 the person that was convicted, which all of the witnesses
3 here are telling us requires at least a date of birth.

4 So to get dates of birth of children out of
5 the family law record and to get dates of birth of people
6 who are convicted of felonies are so different that I
7 don't see we can debate the mix. But I think we need to
8 have a policy for civil litigation and then a different
9 policy for criminal, and by the time you get convicted
10 basically you've lost your privacy rights to the
11 identifying information.

12 CHAIRMAN BABCOCK: Richard Munzinger.

13 MR. MUNZINGER: I don't want to complicate
14 it unnecessarily, but I agree with your discussion, but
15 you assume that the only information in the criminal file
16 is the personal data of the accused. I don't know that to
17 be the case. I'm not a criminal practitioner. So there's
18 an indictment or an information. There are various
19 motions. There is a judgment of conviction. There may be
20 a notice of appeal, what have you. But I don't know that
21 something in the clerk's file wouldn't include the
22 identifying information of a minor witness or a minor
23 victim defined in those terms, and so the rule itself
24 making access to all records exposes what you want to
25 protect.

1 MR. ORSINGER: Right.

2 CHAIRMAN BABCOCK: Okay. Bonnie.

3 MS. WOLBRUECK: I've been listening to all
4 of this. I have a few comments, and if it's timely to
5 start with some of my comments I'd like to do so.

6 CHAIRMAN BABCOCK: Yeah.

7 MS. WOLBRUECK: Under 14.3(a), the public
8 access to case records, this exempts the sensitive data
9 form and those other items that are sensitive, and then I
10 know that it's supposed to say that except that the
11 parties, criminal justice agencies, and (i), (ii), (iii)
12 there, those people can see the sensitive data form and
13 those other documents; but I'm not sure that it's clear
14 enough; and maybe it just needs to be tweaked a little bit
15 to clarify that, yes, who can see the sensitive data forms
16 so the clerk is very clear about that. I think that's
17 what this says, but I want to be assured that it does and
18 that it's very clear of what it says. But, anyway, we can
19 work on that.

20 CHAIRMAN BABCOCK: Okay.

21 MS. WOLBRUECK: But I know that that's the
22 intent.

23 CHAIRMAN BABCOCK: Okay.

24 MS. WOLBRUECK: But I'm not sure that it's
25 completely clear.

1 MR. HATCHELL: Buddy Low has the same
2 comment.

3 MR. LOW: The question was is that "an
4 action by" or "access by"? The way it's modified it's "an
5 action by," proceeding by these people, instead of whether
6 that information was always going to be available to these
7 people regardless and no rule can do it, so it's a
8 question of what modifies "by." The "action by" or
9 "access by," and I think it's clearly intended "access
10 by," and that's what Bonnie is talking about, and that can
11 be made clear. You know, I don't --

12 CHAIRMAN BABCOCK: Okay.

13 MS. WOLBRUECK: Under 14.4(e), public access
14 to part of a case record, the word "redaction" gives
15 clerks a great deal of concern. Redaction would normally
16 -- to me that means either we're going to use a marker and
17 black it out and maybe make another copy of it because
18 even a blacked out copy of data sometimes you can still
19 read it and see it, or else it means I have to get out my
20 Exacto knife and cut it out.

21 The other issue, it now says part of the
22 requested case the court can order a portion of the case
23 record to be redacted. It doesn't state then if that
24 information then should be put into a sensitive data form.
25 So if we are redacting out information then should we not,

1 you know, put it in another format? Otherwise it's gone
2 forever.

3 I would rather instead of using the word
4 "redaction," I assume that this section means that a
5 pleading could possibly be redacted, a pleading can be
6 made confidential. Maybe an entire document is what we're
7 talking about here, and I would like for that to more
8 clearly reflect that.

9 MS. HOBBS: Is Clyde Lemon in the room? He
10 had a comment on that, a written comment about that same
11 provision?

12 MS. WOLBRUECK: Clyde is --

13 HONORABLE TRACY CHRISTOPHER: Yeah. He told
14 me that he -- one of their concerns was that they
15 wanted -- they didn't want the clerk to have to do the
16 redacting. You know, it would be better that the party
17 did the redacting and then presented the document back.

18 MS. HOBBS: He also reads a Government Code
19 or a local Government Code provision to allow him to
20 recoup his costs in having his staff do the redaction if a
21 judge does order a redaction, and if we keep the redaction
22 in and imply that the clerk is doing the redaction that it
23 should at least specifically allow him to -- it should
24 expressly state that he can recoup his costs for that. I
25 believe I'm characterizing his comment correctly.

1 CHAIRMAN BABCOCK: Okay.

2 MS. WOLBRUECK: Anyway, it's the "redaction"
3 word that is bothering me the most, and my concern is that
4 we can redact out Social Security numbers in a pleading
5 and leave the pleading but redact out the Social Security
6 number. Is it necessary for that to appear somewhere else
7 on a sensitive data sheet? Maybe it is, and maybe that
8 needs to be clarified.

9 MR. ORSINGER: Can I ask Bonnie a question?

10 CHAIRMAN BABCOCK: Yeah.

11 MR. ORSINGER: Bonnie, I'm just wondering
12 whether it's okay with the clerks to be striking out part
13 of information and then recopying so the redacted part is
14 in the public record, or would you prefer that this kind
15 of information not be filed, or if it is filed it be
16 forced to be withdrawn and filed in compliance, because if
17 the work is offloaded onto the lawyers to police this then
18 it's entirely different from if you have to police it, and
19 some papers have to be public, some not. Some papers that
20 are public have to be redacted and recopied and made
21 public.

22 MS. WOLBRUECK: Of course I would like the
23 latter and have the attorneys be responsible for this. I
24 think that it -- but it depends upon what the Court feels
25 is the proper action here. Do you just make the entire

1 pleading confidential? Do you remove the entire pleading
2 and replace it with something that has the proper
3 information in it or the lack of that information?

4 MR. ORSINGER: Well, a simple solution is
5 that if a party is aggrieved they can file a motion and
6 the court can order them "withdraw your pleading, redact
7 it in accordance with the rule" and then you only have to
8 keep the refiled one that's in compliance with the rules.

9 MS. WOLBRUECK: Which is exactly what the
10 clerk would prefer.

11 I had a question about the prohibitive
12 information in the sensitive data form. It talks about
13 the names of minor children, which I understand, but then
14 I think somewhere in the rule it talks about that they
15 could be referenced by initials in a pleading. I'm not
16 sure how this can be resolved, but many children of the
17 same family have the same initials.

18 CHAIRMAN BABCOCK: Yeah, George Foreman.

19 MS. WOLBRUECK: And if you have a court
20 order directing one child to be placed with one parent,
21 another child with a grandparent, this person pays child
22 support here and another one pays child support there for
23 the other child, I'm not sure how clear the order can
24 reflect which child they are talking about. I'm not sure
25 what the answer to that is, but I'm just bringing it up.

1 HONORABLE TOM GRAY: We've had it happen in
2 Waco, and we just numbered the initials.

3 MS. WOLBRUECK: Child No. 1, Child No. 2.

4 HONORABLE TOM GRAY: Child with initials 1,
5 child with same initials 2, and --

6 MS. WOLBRUECK: Child No. 1 is Child No. 1
7 in the sensitive data sheet, and Child No. 2 --

8 HONORABLE TOM GRAY: And if I remember
9 correctly, we did it by age of the child, 1st, 2nd, 3rd.

10 MS. WOLBRUECK: I just hope that all of the
11 attorneys understand that process when they're preparing
12 these orders.

13 MR. ORSINGER: There could be a problem if
14 you're going to issue a writ of habeus corpus to pick up
15 one kid, and it's going to be ACV No. 1 and you don't know
16 who that is, it's going to be a mess when they knock on
17 the front door.

18 HONORABLE TOM GRAY: Maybe they will stop by
19 and pick up their -- since they're entitled to a copy of
20 the sensitive data form.

21 MR. ORSINGER: Okay. I hope that works.

22 MR. GILSTRAP: Ask the kid his Social
23 Security number.

24 CHAIRMAN BABCOCK: Okay.

25 MS. WOLBRUECK: I think that 14.9 regarding

1 the costs is -- I know that the subcommittee wanted to
2 make that as broad as possible. I'm not sure if there's
3 even the necessity of putting that into this rule, and
4 that would be my question, should costs even be addressed
5 in the rule and can it just be addressed by statute as it
6 is today?

7 CHAIRMAN BABCOCK: Okay.

8 MS. WOLBRUECK: That's all that I have.

9 CHAIRMAN BABCOCK: All right. Thanks,
10 Bonnie. Let's see if we can get somewhere on the
11 civil/criminal thing. Justice Hecht, it sounds like for a
12 variety of reasons you think this rule needs to cover
13 both?

14 HONORABLE NATHAN HECHT: Yes. I do.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE NATHAN HECHT: I mean, the Court
17 is going to be asked to do both, so we've got it.

18 CHAIRMAN BABCOCK: Justice Duncan.

19 HONORABLE SARAH DUNCAN: Would it be
20 satisfactory if there was a 14a and a 14b or a 14 and a
21 15?

22 HONORABLE NATHAN HECHT: Yeah. I mean, I
23 don't --

24 HONORABLE SARAH DUNCAN: You don't care if
25 it's all in one rule?

1 HONORABLE NATHAN HECHT: No. And I think --
2 I mean, maybe it's a good idea to separate it. I don't
3 know. I want to hear what everybody says, but I think at
4 the end of the day they are going to want to know -- the
5 Legislature and the Judicial Council are going to want to
6 know what's our thought on the whole mole line.

7 CHAIRMAN BABCOCK: How -- before Justice
8 Gray made his eloquent speech in the subcommittee how far
9 down the road did you-all get on criminal? Anywhere?

10 MR. HATCHELL: Go ahead.

11 CHAIRMAN BABCOCK: Justice Duncan.

12 HONORABLE SARAH DUNCAN: My perception of
13 it, we got far enough to know you can't put it in one
14 rule.

15 MR. LOW: That what?

16 HONORABLE SARAH DUNCAN: You can't put it in
17 one rule. The criminal --

18 MR. LOW: But what is protected now by
19 criminal? I mean, they don't have a 76a. I mean, if
20 there is a case in Bonnie's court, and I want -- Bonnie, I
21 want everything about John Jones. He's been indicted for
22 murder or being tried or what. What protection is there,
23 Bonnie?

24 MS. WOLBRUECK: The expungement statute for
25 one. There's a new statute that went into effect last

1 session that makes -- someone can petition for their
2 deferred adjudication record to be nondisclosed. There is
3 a bill before the Legislature right now to petition that
4 any probated sentence be nondisclosed.

5 HONORABLE SARAH DUNCAN: Juvenile cases.

6 MR. LOW: Okay. We wouldn't be making a
7 rule to change that, would we?

8 CHAIRMAN BABCOCK: Justice Duncan.

9 HONORABLE SARAH DUNCAN: The problem is that
10 we want more available in civil. We want less available
11 in civil cases than in criminal cases. There are -- there
12 is more information that's protected that's filed in the
13 civil case than there is in a criminal case. At the same
14 time there are more governmental entities that have to
15 have access to what's in the criminal file than there are
16 individuals or entities that have to have access to what's
17 in a civil file.

18 So once you combine the two you end up
19 limiting information that DPS has to be able to get to in
20 a criminal file and opening up information that you don't
21 think should be disclosed in a civil file.

22 MR. LOW: But don't we have that exception
23 in this rule? That's what Bonnie said can't be denied to
24 certain people, governmental agencies and so forth; and if
25 right now that you can't get certain things in criminal

1 but other things are open, why wouldn't you just define
2 that to things that are allowed and not protected by law
3 now in criminal?

4 HONORABLE SARAH DUNCAN: Well, but that's
5 like birth dates. Mike Coffey this morning gave a very, I
6 thought, persuasive argument that he needs to be able to
7 get to birth dates in criminal cases.

8 MR. LOW: Yeah.

9 HONORABLE SARAH DUNCAN: At the same time I
10 think we would all agree that the birth dates of the
11 children that are the subject of a family law dispute,
12 nobody needs to know those other than the people involved
13 in that dispute. So the question is how do we make the
14 birth dates in criminal cases available but protect them
15 in civil cases? It's just a lot easier to do if you have
16 a separate rule for civil cases.

17 MR. LOW: I don't disagree, it's just a lack
18 of understanding, which is pretty common with me, but I
19 except.

20 CHAIRMAN BABCOCK: Justice Jennings had his
21 hand up.

22 HONORABLE TERRY JENNINGS: In regard to
23 criminal cases, all that information is going to be on the
24 indictment or information anyway. It's going to have all
25 the identifiers, you know, of the individual, date of

1 birth, everything. It's going to be on the information on
2 the indictment.

3 CHAIRMAN BABCOCK: Okay. Judge Gray and
4 then Judge Lawrence.

5 HONORABLE TOM GRAY: He's absolutely right
6 with regard to the defendant, but the more we talk about
7 this the more I remembered where the problem was coming
8 from; and it's coming from your witnesses and particularly
9 your victims in criminal cases; and it's not what's in the
10 shuck, if you will, so much it is what becomes exhibits;
11 and having been on the court of appeals and reviewed these
12 criminal cases, the district attorneys are not -- I mean,
13 they've got to get their conviction, they've got to get
14 the pictures into evidence, they've got to get the
15 statements into evidence. There is frequently videotapes,
16 because it's amazing what people will videotape themselves
17 doing; and all of this is something that there is no one
18 there to protect the victim from having that information
19 disclosed; and I think that was ultimately probably the
20 conversation --

21 MR. HATCHELL: Yes. That is right.

22 HONORABLE TOM GRAY: -- that we were having
23 when we said we've got to keep -- the criminal stuff is
24 different; and that's -- because I've seen things in
25 criminal case files that I never thought would happen, but

1 yet it's there.

2 And then, you know, you've just got the
3 really gruesome photographs of victims of whether it's
4 burned or mutilations or fights; and they've got to have
5 those pictures in evidence; and there's not anybody there
6 protecting those victims at the criminal trial; and, yes,
7 if you're at the trial frequently that's going to come in,
8 although there are some protections that the trial judges
9 can do in the event of a minor witness. But that was the
10 problem that really brought -- you know, weighed on me on
11 how to protect the victim in those cases.

12 HONORABLE SARAH DUNCAN: For private
13 interests. That was the argument that convinced me. I
14 had a case when I first got to the court of a man who
15 videotaped his molestation of very young girls. I don't
16 want that accessible to others with that interest, easily
17 accessible; and as Fluffy was saying this morning, the
18 great thing about internet access is it levels the playing
19 field and makes it easy. Well, I don't want to make that
20 easy.

21 HONORABLE TERRY JENNINGS: Well, some of
22 that stuff would be a crime. If a person were to acquire
23 it to possess it, you know, that would be a crime even to
24 possess that.

25 HONORABLE SARAH DUNCAN: It would be, but

1 it's a crime that's extremely difficult to detect and
2 prosecute.

3 CHAIRMAN BABCOCK: Well, you have to
4 remember that, you know, even in cases during the
5 testimony of juvenile rape victims the public has a
6 constitutional right to see that trial. That's a matter
7 of U.S. Supreme Court decision, *Globe Newspapers*. So
8 that's one thing, and then the next question is, okay, you
9 can go to the courthouse, you can fly from Australia to
10 the courthouse and see it if you want, but should you be
11 able to get it on the internet?

12 HONORABLE SARAH DUNCAN: And should you be
13 able to get it in digital form that you can then download
14 and reproduce.

15 CHAIRMAN BABCOCK: Yeah. Tough issue.
16 Munzinger and then Judge Lawrence and then Carl.

17 MR. MUNZINGER: It just seems to me as a
18 matter of efficiency that my guess would be the sense of
19 the committee is that you're either going to have to have
20 two rules or one rule with two separate parts, one for
21 civil and one for criminal, and it seems to me that if we
22 were to devote our attentions today to the civil we would
23 save ourselves time and avoid the discussion of -- the
24 philosophical discussions and the various problems that
25 are going to tie us down into minutia of the criminal

1 files, we're not going to get to the task of addressing
2 the civil rule, and I would suggest you might want to poll
3 the committee, Chip, to see if that's how we want to
4 proceed, because there's no doubt we don't have the
5 information, ability, or expertise, in my opinion at
6 least, to write a criminal rule today or to attempt to
7 tweak this one to apply to both kinds of records.

8 And lastly, you raised something that I
9 never thought of until you said it, and that's juvenile
10 records. There are district clerks and county -- I don't
11 think county clerks, but there are district clerks that
12 keep juvenile records, and I wonder if the committee gave
13 any thought to whether or not this rule would apply to
14 juvenile records and what do we do in that situation.

15 MS. WOLBRUECK: Chip, juvenile records are
16 confidential by statute. They also can be sealed and
17 restricted.

18 CHAIRMAN BABCOCK: Okay. Judge Lawrence.

19 HONORABLE TOM LAWRENCE: I have two points.
20 I would hope if we don't do it with this rule that we do
21 it in the future, that it be as consistent and simple as
22 possible. For the JP courts, for example, we've got a lot
23 of different types of records. So if we go to Rule 14 for
24 civil cases, Rule 12 applies to our other judicial records
25 including all the summaries and reports of criminal cases

1 that we provide, and common law for the criminal cases,
2 and I'm not sure that open records doesn't apply to some
3 records that we have in our courts. So we've got a lot of
4 different statutes and records that apply. The more
5 consistent and simple it is, the easier it's going to be
6 for us.

7 And on the criminal side, you're talking
8 about felonies, but let's talking about traffic tickets of
9 which there are several million a year. Are you aware
10 that on citation in traffic tickets it gives name,
11 address, phone number, business address, sometimes
12 business phone number.

13 MR. GILSTRAP: Driver's license number.

14 HONORABLE TOM LAWRENCE: Yeah, vehicle
15 license number, date of birth, witnesses -- some of the
16 information on witnesses. Sometimes accident reports are
17 in there. There is an awful lot of information just on a
18 simple traffic ticket of which there are millions filed in
19 Texas every year. So there is a lot of information
20 provided just in a traffic case.

21 CHAIRMAN BABCOCK: Carl.

22 MR. HAMILTON: Two questions. One is would
23 the sensitive information that you were talking about,
24 Sarah, be available if I walked into the court to see it?
25 Could I see that?

1 HONORABLE SARAH DUNCAN: Yes.

2 MR. HAMILTON: Okay. And then secondly --

3 HONORABLE SARAH DUNCAN: I don't know
4 that -- I don't know how to go get it. I mean, if you
5 know who the court reporter is or if they've given their
6 exhibits to the clerk, you know who the clerk is, and you
7 know what file to look for.

8 MR. HAMILTON: But these kind of exhibits
9 and things are not reduced to electronic means so they can
10 be accessed, are they?

11 CHAIRMAN BABCOCK: Typically today they're
12 not, Carl, but I mean, you know, a year from now, two
13 years from now, you know, who knows.

14 MR. ORSINGER: Videotape would probably meet
15 that definition.

16 CHAIRMAN BABCOCK: Yeah.

17 MR. HATCHELL: Bear in mind, Carl, that you
18 heard a speech today that said they want to require all
19 these people to make -- you know, all the clerks to do
20 this, so that's why it's an issue.

21 CHAIRMAN BABCOCK: Yeah. I think sometimes
22 you hear an idea that makes so much sense it doesn't
23 require a vote, and Munzinger is absolutely right. We
24 need to spend our efforts today on the draft that we have,
25 and Justice Hecht and I conferred over the break, and you

1 guys will be happy to hear this, but this is of such
2 urgency that the Court thinks we need to have an April
3 meeting, so between now and our April meeting we'll see
4 what we can do about the criminal side of things and maybe
5 draft some resources that practice criminal law that can
6 assist us, so why don't we -- yeah, Elaine.

7 PROFESSOR CARLSON: Chip, was there anyone
8 on the task force that had a background in criminal, and
9 did they -- does the task force report in their
10 recommended rule cover civil and criminal?

11 MS. HOBBS: There were members who had
12 criminal backgrounds, and their report does include
13 criminal and civil cases. They also I know consulted
14 individuals outside of the subcommittee, too, because
15 they -- I mean, they were as confused about some things in
16 criminal cases as we all are, and so some of them would
17 raise an issue and then they would go out and talk to
18 somebody who had some expertise and then come back and
19 report back to the committee on things that they thought
20 might be outside of their expertise.

21 CHAIRMAN BABCOCK: Yeah, Richard.

22 MR. ORSINGER: I don't know if this is the
23 right time to do it, but I would propose that this rule
24 have a prospective only effect.

25 CHAIRMAN BABCOCK: Yeah, I think somebody,

1 Tom maybe, raised that with me. I don't think there's any
2 way -- and I've talked to Charles Bacarisse about this. I
3 don't think there is any way we can go back in time and
4 create sensitive data forms for all the cases that have
5 been filed and handled in all the counties. I mean, it's
6 got to be prospective.

7 HONORABLE SARAH DUNCAN: Well, I thought
8 Alex made a very good suggestion that if a party has
9 sensitive data that is in a court file that they could
10 make a motion to redact and refile or whatever. There
11 ought to be some way for people to -- people who are
12 concerned enough to go back and protect sensitive data.

13 CHAIRMAN BABCOCK: Yeah. Maybe there is
14 some procedure where that can happen, but in a general --
15 as a general proposition I think mechanically,
16 practically, economically, the only way we can do this is
17 prospective. That's just my view. I don't know if
18 anybody --

19 PROFESSOR CARLSON: I agree.

20 HONORABLE SARAH DUNCAN: But you would allow
21 retrospective evidence.

22 CHAIRMAN BABCOCK: I think we ought to talk
23 about how that would happen. I mean, there's issues of
24 jurisdiction, there's issues of costs, there's issues of
25 -- you know, I mean, there are a whole lot of issues.

1 MR. ORSINGER: How do you validate -- if
2 it's a one-party motion to go back and redact a bunch of
3 stuff, how do you validate who redacted and was it refiled
4 redacted?

5 CHAIRMAN BABCOCK: You've got a lot of these
6 records that are out there in bulk. I mean, there is a
7 lot of issues on that, but as a general proposition I
8 think you're right, it's got to be prospective. Yeah,
9 Lisa.

10 MS. HOBBS: And I think that's one of the
11 reasons why the Texas Judicial Council issued that strong
12 letter saying we need to get sensitive data forms out
13 there because there are a lot of clerks who aren't online
14 now, and if we get attorneys in the state to start to
15 realize 20 years from now let's hope that there's 254
16 counties online and we need to kind of start thinking that
17 sensitive data might not sort of go in these records, and
18 that's kind of the real push from the Judicial Council to
19 put the sensitive data form out there.

20 CHAIRMAN BABCOCK: I reacted strongly
21 because I'm trying to save myself a million e-mails from
22 clerks. Yeah, Andy. See, we got our first one.

23 MR. HARWELL: Is there a way that we can put
24 an effective date that records could go out on the
25 internet for the clerks? I mean --

1 CHAIRMAN BABCOCK: I think the rule we come
2 up with, or my recommendation would be that we have --
3 tell the Court that, you know, there is a date, and this
4 rule applies from this date forward for all records on the
5 internet.

6 MR. HARWELL: Would that take care of the
7 few clerks that are out there now that have gone out and
8 put everything out on the internet now?

9 CHAIRMAN BABCOCK: I think they might have
10 to change. They might have to change their procedure.
11 Judge Christopher.

12 HONORABLE TRACY CHRISTOPHER: Is this too
13 wild a concept, since this obviously is an extremely
14 difficult concept, that we -- the Supreme Court passes a
15 rule that clerks stop doing this until we get a rule in
16 place?

17 CHAIRMAN BABCOCK: I think that's under
18 consideration.

19 HONORABLE NATHAN HECHT: Yeah. I mean, we
20 hadn't talked about it, but given the urgency that the
21 Judicial Council and some legislators think is involved
22 here, we may have to do that. I don't know.

23 CHAIRMAN BABCOCK: Yeah. Alex. Who is
24 that? Nina. My eyes are bad.

25 MS. CORTELL: I take that as a compliment; I

1 don't know where Alex is. By the same token I assume
2 there are no clerks out there doing this retroactively. I
3 mean, there is no one going back in a file.

4 HONORABLE NATHAN HECHT: Yes, they are.

5 MR. WILDER: We've been doing it for four
6 years.

7 MS. CORTELL: Oh, my goodness. Okay. I
8 stand corrected.

9 MR. WILDER: But not unrestricted.

10 CHAIRMAN BABCOCK: Okay. Let's -- yeah,
11 Elaine.

12 PROFESSOR CARLSON: I agree that the rules
13 should be prospective, but I also agree that there should
14 be some mechanism for parties to go in and even for court
15 access records that contain sensitive data to go in on
16 some type of motion and to be able to establish that it is
17 sensitive and protect it from walk-in access.

18 CHAIRMAN BABCOCK: Yeah. I'm -- I think I'm
19 okay as long as you don't go too far, because I can see,
20 you know, that somebody trying to clean up -- somebody is
21 running for office, but before I'm going to declare I'm
22 going to clean up my court file, and all these allegations
23 made against me were very, you know, embarrassing to me,
24 they were of a private nature and, boy, I don't want a
25 record of that, so I'm going to file a motion now because

1 it says I can and I'm going to clean up my records.

2 PROFESSOR CARLSON: Well, I was thinking
3 really more about Social Security numbers, financial
4 records.

5 CHAIRMAN BABCOCK: Yeah. If you limit it to
6 the stuff on the sensitive data sheet, fine, but as a
7 general broad proposition I think that could be a problem.
8 But it's something we could talk about it. Judge Gray.

9 HONORABLE TOM GRAY: The comment that I made
10 earlier that Bonnie made reference to during one of the
11 conference calls that -- and it sort of depends on what
12 your view is on whether or not you're going to only allow
13 subscribers to have access to the databases or not, but in
14 that discussion where the concept was that everybody would
15 be able to get access to the data after the rule was
16 adopted, in other words, there's not going to be any
17 sensitive data in the new records going forward, and so
18 everybody would have access to that data.

19 Bonnie raised the issue, and I thought it
20 was a masterful idea, of but what about all this data that
21 we're putting on for old records that has it in there
22 before the rule was adopted? And she raised the idea of
23 why not make that where the subscriber agreements apply so
24 that you could actually have the date that the rule is
25 adopted; and if the clerk is going forward with imaging

1 old files as a cost-saving tool or whatever, then they
2 can, in effect, charge people who want to access those
3 files. That gives you your practical obscurity, whatever
4 you want to call it, but then for the new files, then you
5 -- you know, everybody has the availability, but it
6 doesn't have the sensitive data in it.

7 And I know there's at least one person in
8 the room that disagrees with me, Tom Wilder, but it is
9 a -- there is a judgment call in there as to whether or
10 not you're going to charge everybody going forward.
11 That's really what it gets down to, and that's -- this
12 rule doesn't deal with that as far as the subscriber
13 agreements or not.

14 MR. GILSTRAP: I thought it had a charge
15 provision.

16 HONORABLE TOM GRAY: It's a "may." I mean,
17 that's up to the clerk.

18 CHAIRMAN BABCOCK: Yeah. And, you know,
19 we're -- even though under the current proposal we are
20 going to be restricting some information that is currently
21 available, we are allowing district clerks who will
22 probably follow this lead to make information infinitely
23 more available than it is now.

24 HONORABLE TOM GRAY: Yes.

25 CHAIRMAN BABCOCK: I mean, somebody in

1 California can find our court files now, so we're
2 expanding access in a huge way. It may be as a trade off
3 for that in order to help the clerks cover the cost of
4 this process that we may recommend appropriately that
5 there be a charge, there be a fee, whether it's subscriber
6 or otherwise. That might discourage the casual viewer who
7 is surfing for court files for whatever interest. It
8 might discourage that somewhat, and yet if they want to
9 pay a fee, whatever it may be, they could still do that.

10 I'm against -- I think it's inappropriate to
11 start inquiring about people's political views or why they
12 want to do it or whatever. If they want to pay the
13 subscriber fee then fine, but other restrictions I think
14 are problematic. I think that it may be wise to try to go
15 back to this rule, which is limited to civil, defer a
16 separate criminal rule until our April meeting, and go
17 through this more methodically and see if there are
18 particular provisions of this rule that we think needs
19 attention, understanding that this rule applies only to
20 civil.

21 Okay. So the scope, 14.1. Mike, would you
22 or, Ralph, would you make changes to that? Would you make
23 it clear it's only 14.1 -- or Rule 14 only applies to
24 public access to civil case records?

25 MR. LOW: (c) does that.

1 CHAIRMAN BABCOCK: Excuse me?

2 MR. LOW: (c) does that, "Case records in a
3 civil case."

4 CHAIRMAN BABCOCK: All right. Do you want
5 to have it in the caption or not?

6 MR. HATCHELL: Yeah, I think it would be
7 good.

8 CHAIRMAN BABCOCK: Rule 14, "Public access
9 to civil cases."

10 HONORABLE SARAH DUNCAN: "Case records in
11 civil cases."

12 CHAIRMAN BABCOCK: Excuse me?

13 HONORABLE SARAH DUNCAN: "Case records in
14 civil cases."

15 CHAIRMAN BABCOCK: "Case records in civil
16 cases."

17 MR. GILSTRAP: "Records in civil cases."

18 PROFESSOR CARLSON: There we go.

19 MR. ORSINGER: Can I make a comment? We
20 have a special definition for case records that naturally
21 this title is going to refer to the definition. Are we
22 happy with using 14.2(c) meaning for that section heading?
23 Because the section heading is actually broader than what
24 we define to be case records.

25 HONORABLE SARAH DUNCAN: We could just take

1 out "records."

2 MR. ORSINGER: You want to say "case
3 information"? We've got to do something besides case
4 records because --

5 MR. GILSTRAP: How about "records in civil
6 cases"?

7 MR. HAMILTON: Take out the word "case."
8 "Records in civil cases."

9 CHAIRMAN BABCOCK: Does that work?

10 MR. HATCHELL: Sure.

11 CHAIRMAN BABCOCK: Okay. "Public access to
12 records in civil cases."

13 HONORABLE BOB PEMBERTON: Should that be
14 qualified, like certain records, and then later on you
15 define what those records are, because again, you've got
16 the Rule 12 issue, you've got other kinds of court or
17 administrative records that you need to make clear aren't
18 covered by the rule.

19 CHAIRMAN BABCOCK: Well, it doesn't say "all
20 records in civil cases," and it's qualified below. What
21 does everybody think? Bill.

22 PROFESSOR DORSANEO: I think we should use
23 the term "court records" just like we use in 76a and make
24 these two conform, which they don't now. It's calling it
25 a case record and then saying it's a record, which adds a

1 new term that I'm not sure means the same thing or
2 something different.

3 CHAIRMAN BABCOCK: The problem with -- that
4 may be the right way to do it. The problem with calling
5 it a court record and making that a coextension of 76a is
6 that 76a provides that certain unfiled discovery are court
7 records within the meaning of that rule, which I heard was
8 a problem in this rule. And I think appropriately so.

9 MR. HATCHELL: Yes.

10 PROFESSOR DORSANEO: 76a needs work, and
11 it's needed work for a long time.

12 CHAIRMAN BABCOCK: One thing at a time,
13 Bill.

14 PROFESSOR DORSANEO: Well, you can't avoid
15 looking at it when it deals with exactly the same thing
16 we're talking about.

17 CHAIRMAN BABCOCK: That's true. I'm just
18 saying, Bill, if we were to say a court record means what
19 it means in 76a --

20 PROFESSOR DORSANEO: No, I don't want to say
21 that. I just want to use the term "court records" and
22 define it.

23 CHAIRMAN BABCOCK: Okay. Are we okay with
24 "Public access to records in civil cases"? Justice
25 Pemberton, are you okay with that?

1 HONORABLE TRACY CHRISTOPHER: I don't
2 understand why we were unhappy with using "court records."

3 CHAIRMAN BABCOCK: Excuse me?

4 HONORABLE TRACY CHRISTOPHER: I couldn't
5 hear why we were unhappy with using the term "court
6 records."

7 PROFESSOR DORSANEO: He said it was because
8 it was defined in another rule in a different way than
9 it's defined in this rule.

10 HONORABLE SARAH DUNCAN: I think that would
11 be fine, and then we just have -- I would actually say (c)
12 should be "court record" and then there should be a
13 subdivision for a "filed case record" as it's now done and
14 "court-created record."

15 CHAIRMAN BABCOCK: Okay. Well, the caption
16 is okay. "Public access to records in civil cases."
17 We're beyond that, right?

18 HONORABLE SARAH DUNCAN: I thought that's
19 what we were talking about is putting "court" in there.

20 CHAIRMAN BABCOCK: Okay. Inserting "court
21 records"? Okay.

22 MR. LOPEZ: Just call it "Public access,"
23 period.

24 CHAIRMAN BABCOCK: Okay. Is that okay?
25 Everybody wants to do that?

1 HONORABLE TOM GRAY: I'll second Carlos'
2 "public access," period. If you're just going to talk
3 about a title. "Public access to civil cases."
4 Something. I don't --

5 MR. LOW: And then just go.

6 MR. ORSINGER: Well, we're not talking about
7 the ability to walk in and out of the courtroom.

8 CHAIRMAN BABCOCK: Oh, yeah, we are.

9 MR. ORSINGER: We're talking about the clerk
10 -- we're not talking about broadcasting or accessing.

11 CHAIRMAN BABCOCK: Later on in the rule we
12 are.

13 MR. LOPEZ: Well, I certainly understand
14 Chip not wanting to get derailed, but 76a has a specific
15 -- one of the big arguments about 76a is how do you define
16 "record" for purpose of 76a. So somebody is going to say,
17 "Well, what do you mean by 'record'?"

18 CHAIRMAN BABCOCK: Yeah. And we're going to
19 have a definition here for sure.

20 Judge Christopher, my only point was if we
21 say "court records" means what it says in 76a, that was
22 going to implicate unfiled discovery, which my
23 understanding was this rule was trying to avoid or
24 exclude.

25 MR. LOW: Right.

1 CHAIRMAN BABCOCK: So what do we want to
2 call it? Mike?

3 MR. HATCHELL: I like Sarah's "Public access
4 to civil court records."

5 CHAIRMAN BABCOCK: "Public access to civil
6 court records"?

7 HONORABLE SARAH DUNCAN: Civil.

8 HONORABLE TERRY JENNINGS: "Court records in
9 civil cases."

10 MR. MUNZINGER: That's more accurate because
11 we don't have civil courts and criminal courts in all
12 places.

13 CHAIRMAN BABCOCK: "Public access to court
14 records in civil cases." Does that work?

15 MR. HATCHELL: Sure.

16 CHAIRMAN BABCOCK: Okay. 14.1, scope, "This
17 rule covers public access to" -- do we want to change that
18 to "court records"?

19 HONORABLE TRACY CHRISTOPHER: Yes.

20 MR. MUNZINGER: Uh-huh.

21 MR. ORSINGER: "In civil cases."

22 CHAIRMAN BABCOCK: "In civil cases."

23 PROFESSOR DORSANEO: So far so good.

24 CHAIRMAN BABCOCK: Listen, this group has
25 debated provisions like this for months. We are doing

1 something. 14.2, definitions, subparagraph (a), "Access."
2 Comments?

3 PROFESSOR DORSANEO: I think there are too
4 many definitions here. Like I don't think I need to have
5 "access" defined myself, but that's -- if you want to have
6 all these definitions we can do them one by one.

7 CHAIRMAN BABCOCK: Too many definitions
8 Dorsaneo says.

9 HONORABLE TOM GRAY: I said not enough, so
10 we'll compromise and stick with what we've got.

11 CHAIRMAN BABCOCK: Fair enough. Carl.

12 MR. HAMILTON: In (b) the phrase "without
13 modification," I'm not sure I know what that means, but if
14 it means that it can't be redacted --

15 MR. ORSINGER: He's jumped to (b).

16 CHAIRMAN BABCOCK: Okay. We're on (a).

17 MR. HAMILTON: Oh, I'm sorry.

18 CHAIRMAN BABCOCK: That's okay. Any
19 comments on (a)?

20 Hearing none, Carl, we're on (b). What's
21 your thought?

22 MR. HAMILTON: "Without modification," I
23 don't know what that means, and if it means without
24 redacting it seems contrary to some of the other
25 provisions.

1 MR. ORSINGER: We wouldn't want someone to
2 avoid the restrictions on bulk distribution by making a
3 tiny change and then claim it's modified and then
4 therefore it's not bulk distribution.

5 CHAIRMAN BABCOCK: Bonnie.

6 MS. WOLBRUECK: I don't know what we're --
7 "without modification" means either.

8 HONORABLE TRACY CHRISTOPHER: Right.

9 MR. ORSINGER: So if nobody sponsors it,
10 let's just strike it.

11 CHAIRMAN BABCOCK: Well, don't we later talk
12 about bulk distribution in 14.3(i)?

13 MR. ORSINGER: Well, what difference does it
14 matter if the information vendor massages the data? If
15 it's bulk, it's bulk, whether they format it differencely
16 on the screen or whether they -- I mean, this is a
17 loophole that you could drive a fleet of trucks through.

18 CHAIRMAN BABCOCK: Delivering their bulk
19 distribution.

20 MR. ORSINGER: Right.

21 HONORABLE TOM GRAY: Are you saying,
22 Richard, just to eliminate the words "without
23 modification"?

24 MR. ORSINGER: Right.

25 PROFESSOR DORSANEO: Mr. Chairman?

1 CHAIRMAN BABCOCK: Yes.

2 PROFESSOR DORSANEO: I realize you want to
3 go through this sequentially, but --

4 CHAIRMAN BABCOCK: Right.

5 PROFESSOR DORSANEO: -- going through the
6 definitions without knowing the context in which the words
7 are used --

8 HONORABLE TRACY CHRISTOPHER: Right.

9 PROFESSOR DORSANEO: -- is not the way to
10 go. I'm reminded of the American Law Institute some years
11 ago. "Physical injury" was being defined and some people
12 were thinking about physical injury in the context of
13 battery cases and other people were thinking about
14 physical injury in other contexts, and it caused a lot of
15 trouble later.

16 CHAIRMAN BABCOCK: Yeah.

17 PROFESSOR DORSANEO: Like bulk distribution,
18 I mean, it's a fine definition, take out "without
19 modification," but it doesn't tell me why it's being
20 defined.

21 HONORABLE SARAH DUNCAN: I agree, and if you
22 look at page three, the bulk distribution provision, it's
23 trying to limit the records that a clerk can give to the
24 general public. If you take out "modification" then
25 you're changing what the clerk can give to the public.

1 Because as it is right now all the clerk can give is the
2 information and multiple case records without
3 clarification. It's the clerks that can't do any
4 massaging of the information, not the recipient.

5 So if you take out "without modification,"
6 you're changing what the clerk is going to give access to
7 under the bulk distribution provision.

8 CHAIRMAN BABCOCK: Yeah. Richard.

9 MR. MUNZINGER: The way I understand bulk
10 distribution in section 14.3(i), a clerk could not allow
11 someone using a computer to simply copy every pleading in
12 every case in the clerk's files. The only thing that a
13 clerk would be permitted to allow someone to copy, quote,
14 "in bulk," close quote, would be the indicia that are
15 indicated here specifically, an index, a calendar, a
16 docket, et cetera.

17 CHAIRMAN BABCOCK: Right.

18 MR. MUNZINGER: And, I mean, I don't have
19 any problem with that, but that was the way I understand
20 and that's the reason for defining bulk distribution
21 because it's a limitation on the ability of clerks to
22 allow people to come in and just press a button and get
23 everything in the dad-gum clerk's files.

24 CHAIRMAN BABCOCK: Right. That's right.
25 And can you yield to Bonnie on this, Carlos?

1 MR. LOPEZ: Yeah.

2 CHAIRMAN BABCOCK: Bonnie.

3 MS. WOLBRUECK: I just wanted to explain
4 today probably additional uses of bulk distribution as
5 defined by 14.3(i). You can go to many county websites
6 today and find an index of civil cases with possibly the
7 list of actions or maybe the disposition that a judgment
8 was entered on a specific date, and so this would -- this
9 talks about the index, maybe the calendar, there is a
10 hearing date set, information regarding the docket or the
11 register of actions. That's what's happening today.
12 That's a very common usage of bulk distribution today in
13 civil litigation.

14 CHAIRMAN BABCOCK: Okay. Carlos, do you
15 want to yield to Judge Christopher?

16 MR. LOPEZ: Yeah, because I've got a
17 separate problem.

18 CHAIRMAN BABCOCK: Judge Christopher.

19 HONORABLE TRACY CHRISTOPHER: Well, I have a
20 question. If, for example, I was a plaintiff's lawyer and
21 I had a silicosis case and I wanted to go and ask Harris
22 County for every silicosis case that they had, is that
23 bulk distribution and it would not be allowed?

24 HONORABLE SARAH DUNCAN: What do you mean by
25 "case"?

1 HONORABLE TRACY CHRISTOPHER: I want
2 everything. I want a copy of all the silicosis files,
3 which I'm entitled to get if I went down and gave them,
4 you know, money for it.

5 HONORABLE SARAH DUNCAN: If you look at bulk
6 distribution, that provision, it limits what the clerk can
7 make available for bulk distribution.

8 HONORABLE TRACY CHRISTOPHER: Well, I think
9 it's a bad rule if we would limit a lawyer from doing
10 that.

11 MR. HAMILTON: Unless you file a request.
12 It says you can file a request for other information.

13 MR. MUNZINGER: Does the clerk identify now
14 a silicosis case?

15 HONORABLE TRACY CHRISTOPHER: Sure.

16 MR. MUNZINGER: How?

17 MR. LOPEZ: If you ask nicely and bring
18 donuts.

19 HONORABLE TRACY CHRISTOPHER: We have
20 identifiers for the types of cases we have.

21 MR. MUNZINGER: Well, but you may have it in
22 Houston. Do they have it in Sierra Blanca or in El Paso?
23 Are they required by law to identify cases by silicosis,
24 asbestosis, whatever?

25 HONORABLE TRACY CHRISTOPHER: There are some

1 requirements for types of cases.

2 MS. WOLBRUECK: There are requirements for
3 some types of cases, but not always to that degree.

4 HONORABLE TRACY CHRISTOPHER: Correct.
5 Right. The OCA requires that we keep records of the type
6 of cases that we have, so if you go in and say, "I want
7 all personal injury lawsuits" or "I want all asbestos
8 lawsuits," or you could pick out the name of one common
9 silicosis defendant and say, "I want all case files
10 involving this defendant."

11 MR. MUNZINGER: Why would that be prohibited
12 by this rule?

13 HONORABLE TRACY CHRISTOPHER: Because it
14 would be a bulk distribution.

15 MR. MUNZINGER: No, it wouldn't, because
16 here you can get the index, calendar, docket, or register
17 of actions.

18 HONORABLE TRACY CHRISTOPHER: But I want
19 everything. I want all the pleadings and et cetera.

20 HONORABLE SARAH DUNCAN: You can get that,
21 but you have to go through the little (i), (ii), and (iii)
22 to get it.

23 CHAIRMAN BABCOCK: Bill.

24 PROFESSOR DORSANELO: It seems to me that
25 trying to work on the definition part of it -- Bonnie,

1 please correct me if I'm wrong -- that the essence of it
2 is distribution of multiple case records.

3 MS. WOLBRUECK: Yes.

4 MR. LOPEZ: That's right.

5 PROFESSOR DORSANEO: And the rest of it
6 is -- the rest of it masks that a little bit, so I think
7 the definition ought to be "Bulk distribution means the
8 distribution of all or part of multiple case records."
9 Frankly, like in jury charges, if the word is only used in
10 one other place, the definition might be put in that
11 place.

12 MR. LOPEZ: And while you're at that, you're
13 going to have to define "multiple" because to me more than
14 one is multiple.

15 PROFESSOR DORSANEO: I think that's what it
16 means. I don't think we need to define everything.

17 MR. LOPEZ: If I ask for two files I've
18 asked for bulk distribution.

19 CHAIRMAN BABCOCK: Well, I wonder if we
20 could step back for a minute; and, Bonnie, maybe you or
21 Andy could explain why we don't like bulk distribution
22 anyway. I mean, one reason would be, well, the clerk's
23 office is earning some money on this thing because, you
24 know, we're charging a fee and if we allow these bulk
25 distribution guys to do it then they will go in

1 competition with us and we'll lose revenue. Is that it?

2 MR. HARWELL: Well, I think that what we
3 talked about last time was by not being able to access so
4 many records was the Google search. Wasn't that what we
5 talked about before, where you go out and just get
6 information? You could come into our office now and
7 request bulk information, and if our -- if our computer
8 program in McClennan County has a process to do that
9 already then we can provide that information at a dollar a
10 page or whatever the General Services Commission allows us
11 to charge for programming or what have you for providing
12 that report.

13 CHAIRMAN BABCOCK: Right.

14 MR. HARWELL: So, I mean, we can do that
15 now. And I had a request the other day. Bonnie, you
16 probably get requests like that all the time.

17 CHAIRMAN BABCOCK: Yeah.

18 MR. HARWELL: And if someone came in for
19 multiple records, is that bulk where they ask for several
20 records and get those? I think it's not defined clearly
21 at all.

22 CHAIRMAN BABCOCK: Bonnie.

23 MS. WOLBRUECK: Chip, the majority, again,
24 of our cases -- of our requests are for criminal records,
25 and I think when bulk distribution was put in here that

1 the consideration was much more the criminal records.
2 Clerks' offices are always requested for index, name, date
3 of birth, that information for bulk distribution. You
4 know, the last seven or ten years of all of your criminal
5 records. That's a very common request that clerks'
6 offices receive.

7 But referring this back to the civil
8 litigation now, we could get a request for, you know, "I
9 want a list of all divorces filed or all divorces granted
10 in the last 10 years." I mean, that could be what this
11 could be referring to in the civil matters. Now, Judge
12 Christopher's concern about wanting copies of all of this
13 information, one of the things I kept talking about in
14 our -- even in the subcommittee meeting is whenever we
15 look at all of this we all have to remember that it
16 pertains to the paper file in the clerk's office and the
17 electronic file whenever we start talking about everything
18 that's referenced in here unless it specifically talks
19 about electronic or remote access.

20 CHAIRMAN BABCOCK: Judge Lawrence.

21 MS. WOLBRUECK: And if we look at it as
22 talking about everything does that mean that if somebody
23 wants to come in and get copies of 10 files, just the
24 paper file, is that what that's talking about?

25 HONORABLE TRACY CHRISTOPHER: Yes.

1 CHAIRMAN BABCOCK: Judge Lawrence.

2 HONORABLE TOM LAWRENCE: The apartment
3 association comes in and looks at eviction records of the
4 JP courts because they want to promulgate this information
5 to all the member apartments in the apartment association
6 to make sure that they don't rent to somebody that just
7 got evicted for nonpayment of rent or damaged the
8 apartment. So is (ii) going to prevent them from
9 utilizing that information if they get it in bulk?

10 What they do now, they come in with their
11 laptop and they physically go through each file and type
12 in. So nothing in Rule 14 would prohibit that, but it
13 appears that the bulk distribution would prohibit them
14 from getting that if they're going to promulgate that
15 information. Is that correct?

16 HONORABLE TOM GRAY: Nothing in this rule is
17 designed to impact what a person per se does with the
18 information if it's obtained pursuant to the rule. We
19 really can't -- we're really not in the business or in the
20 position to control that. What we are trying to do, as I
21 understand it, is control the manner in which they can get
22 it.

23 And to follow up in context with Judge
24 Christopher's question, the person comes in and asks the
25 clerk to prepare the report that Andy described based on

1 the information that's in the database of a listing of all
2 the silicosis files. You then go back in individually
3 file by file and obtain the information that you want or
4 through an instruction to the clerk say, "I want the
5 petition in these cases" and you give them a list of
6 cases. That is not a bulk distribution.

7 HONORABLE TRACY CHRISTOPHER: Why not?

8 HONORABLE TOM GRAY: That is individual case
9 by case.

10 HONORABLE TRACY CHRISTOPHER: But it's a
11 portion of information in multiple court cases.

12 HONORABLE TOM GRAY: But it is a petition or
13 it is a -- it is a portion of a file. It is not a portion
14 of a record. And the concept here is, as I understood it,
15 and I mean, obviously Mike may have a different concept.
16 I mean that's obviously what we're talking about here are
17 the different concepts of what do these words on the page
18 mean, but the concept that I had in mind was that the
19 clerk was not going to be required to prepare a program to
20 pull information out of their files. They would only have
21 to provide information that was already in their files.

22 If it had been checked off silicosis case,
23 fine. You ask for a report that lists all silicosis
24 cases, it gets reported. The clerk is not required to go
25 through every petition and identify other cases that may

1 tangentially involve silicosis. That's what I thought we
2 were trying to avoid when we had the language "without
3 modification" in there, is the clerk having to prepare
4 something, and maybe I was confused.

5 CHAIRMAN BABCOCK: Munzinger.

6 HONORABLE TOM LAWRENCE: Well, I'm not sure
7 that -- so (ii), isn't that going to prevent the apartment
8 association from promulgating information about the
9 defendant; and would it not prevent a credit bureau, for
10 example, which also comes in to pick up judgments, would
11 it prohibit them also from getting that information in
12 bulk because they're obviously going to promulgate that
13 information to subscribers?

14 CHAIRMAN BABCOCK: Munzinger.

15 MR. MUNZINGER: I would only point out that
16 I don't see how we can define bulk distribution without
17 discussing all of the philosophical and legal issues that
18 are raised by subsection (i).

19 CHAIRMAN BABCOCK: Well, I think we do. I
20 think that's what we're doing.

21 HONORABLE TRACY CHRISTOPHER: That's what
22 we're talking about.

23 CHAIRMAN BABCOCK: And I get back to my
24 original question. What are we trying to achieve by this
25 other than some -- you know, the bulk distributors are

1 competitive with the clerk?

2 MR. HATCHELL: No. I think Tom Gray has it
3 exactly right. This is to protect the clerks from
4 somebody coming in and saying, "Bonnie, by 5:00 o'clock
5 today please give me all of your divorce records for the
6 last 15 years" and the clerk's office is brought to its
7 knees, and so we figured that, you know, there needed to
8 be protection against that.

9 Now, if Bonnie can figure out a program if
10 she goes to remote access, and by the way she has a remote
11 terminal in her office that people can walk up and use,
12 and they can figure out how to put in a search that brings
13 up all the divorce cases, more power to you. But this
14 rule, the limitations in this rule are to protect the
15 clerks' offices from being brought to their knees.
16 Bonnie, am I saying this right?

17 MS. WOLBRUECK: Yes, that's correct, and
18 that's the intent here. I know we discussed that in
19 subcommittee.

20 HONORABLE TOM LAWRENCE: Well, is there
21 going to be a form that you're going to give to people to
22 fill out that says they agree to keep this confidential,
23 and if they violate that, what's the penalty? You just
24 don't give them that information anymore?

25 CHAIRMAN BABCOCK: I mean, this rule -- I

1 mean, I can see now the policy, but I don't see that
2 subparagraph (i) particularly furthers that policy.
3 You've got to agree to maintain confidentiality, you've
4 got to agree that the court is the owner of the case
5 records.

6 HONORABLE TOM GRAY: No, no. You've got to
7 back up to how you're using (i), (ii), and (iii). That's
8 only for those people having the bona fide scholarly,
9 journalistic, political. That is a very small subset.
10 That is not your commercial vendor of bulk information.

11 MR. MUNZINGER: But that raises the question
12 of who is a bona fide scholarly, journalistic, political,
13 governmental, or other legitimate research purpose and who
14 makes that decision? Who tells me that I'm legitimate or
15 I'm not legitimate?

16 HONORABLE TOM GRAY: We had that discussion
17 in the subcommittee.

18 MR. MUNZINGER: Which is why I said we have
19 to address the philosophy of this subsection.

20 MR. ORSINGER: Do I get a hearing on whether
21 I'm legitimate, and can I appeal the results of the
22 hearing?

23 MR. MUNZINGER: Can the district clerk say,
24 "No, you're not legitimate, you're Muslim"? "You're a
25 Muslim guy looking for people to blow their homes up".

1 CHAIRMAN BABCOCK: And maybe I'm
2 misunderstanding, but are you saying that bulk
3 distribution is absolutely prohibited unless you're one of
4 this category of people?

5 HONORABLE TRACY CHRISTOPHER: No, it says --

6 HONORABLE SARAH DUNCAN: Index, calendar,
7 docket, or register of actions.

8 CHAIRMAN BABCOCK: Yeah, you get the limit,
9 but I can't come in there as a plaintiff's lawyer who
10 wants silicosis cases, I can't come in there as a landlord
11 who wants a specific class of cases, or I can't come in
12 there as a commercial entity that says, "Hey, I want to
13 download all this information, and you don't have to get
14 on your knees to do it. You can take a week or a month.
15 I want to download this and then I'm going to sell it"?
16 I'm perfectly up front about what I'm going to do. I'm
17 going to sell it.

18 HONORABLE TOM GRAY: The concept -- this is
19 one of the areas where we really got into the discussion
20 of the old versus the new records. If a bulk distributor
21 can walk into the clerk's office and say, "I want in bulk
22 every case file that has been imaged in your office and
23 get everything back to time in memorial, to the memory of
24 man runneth not to the contrary --

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE TOM GRAY: -- that you have on
2 images. I then take that data, and it's called data
3 mining, and it's just the images, but you take it to a
4 computer terminal where it's a room full of -- pick the
5 nationality, somebody working for 10 cents an hour in a
6 foreign country that is not regulated, and they're going
7 through and they're looking for Social Security numbers,
8 bank account numbers, everything that we've talked about
9 that we don't want them to get.

10 They can walk in and get this information on
11 the old files. This is more in the old files but also
12 applies to the criminal, which we're not talking about
13 yet, but they get that information, they mine the data,
14 and then they have that information. That is part of what
15 we were trying to prevent by the bulk distribution, and of
16 course, it doesn't go just backward. It goes forward.
17 It's just hopefully that sensitive data will not be in
18 those pleadings and stuff in the future, but we were still
19 trying to prevent not people like the apartment
20 association being able to come in, get those files that
21 they were interested in on an -- because really, they're
22 going to have the individual file numbers and names of the
23 people that they are interested in. They are not getting
24 it bulk. They may get the docket of the FEDs, but they're
25 not going to get the underlying records in all those FED

1 cases.

2 And so philosophically, to answer Richard,
3 the two Richards' question, we did not decide whether or
4 not the clerk was going to make the record, if you met
5 this qualification or the -- whether or not it would be a
6 judge that made that requirement, what the review would
7 be. We -- at least as far as my view on it, we
8 consciously left that out of the rule.

9 MR. ORSINGER: You punted.

10 HONORABLE TOM GRAY: Now, Mike might have
11 subconsciously left that out of the rule, but I thought
12 that was too much to go beyond this and that there would
13 be a -- literally a -- if you felt like you were denied or
14 that you were entitled to it that you would invoke a
15 separate proceeding in district court. I don't know. It
16 doesn't matter to me, but some process where due process
17 would be applied to get the information.

18 CHAIRMAN BABCOCK: Justice Duncan and then
19 Andy and Judge Christopher.

20 HONORABLE SARAH DUNCAN: If I could make a
21 suggestion, I don't think we're having a problem
22 necessarily with the definition of bulk distribution. I
23 think we may be having a problem with the bulk
24 distribution provision itself, and if it were rewritten to
25 say the clerk must provide bulk distribution to the

1 general public of index, calendar, docket, and register
2 and may provide bulk distribution of other case records,
3 with or without conditions that may include one or more of
4 the following, I think that --

5 CHAIRMAN BABCOCK: That would help.

6 MS. WOLBRUECK: No. No.

7 CHAIRMAN BABCOCK: No? Bonnie says "no."

8 MS. WOLBRUECK: You're requiring clerks that
9 don't have the ability or the technology in order to do so
10 to, you know, to provide it. You have to understand there
11 are clerks in this state that do not have computers.

12 MR. HARWELL: Many. Many.

13 MS. WOLBRUECK: Yeah. And so what that
14 sounded to me like, you know, in order to provide that --

15 HONORABLE SARAH DUNCAN: What if we say the
16 clerk may provide bulk distribution of calendars,
17 registers, blah, and may also provide bulk distribution of
18 other case records with or without --

19 MS. WOLBRUECK: The mays are fine. The
20 musts bother me.

21 MR. ORSINGER: If I can comment on the
22 remedy --

23 CHAIRMAN BABCOCK: No, because Judge
24 Christopher had her hand up.

25 MR. ORSINGER: Oh, I'm sorry.

1 CHAIRMAN BABCOCK: You're being rude. Just
2 kidding.

3 MR. ORSINGER: I was trying to slip in.

4 HONORABLE TRACY CHRISTOPHER: Well, I think
5 it's really hard for the clerks to decide, you know, who
6 is making a legitimate request or not, and perhaps -- I
7 mean, I don't know how to write the rule, truthfully. I
8 mean, we want to prevent somebody from using that
9 information for nefarious reasons, but how do we say that
10 and how do we write a rule to that effect? I mean that's
11 what we're trying to prevent, somebody who is mining data
12 and selling it for identity theft, or we're trying to
13 prevent someone maybe, maybe we're trying to prevent this,
14 from undercutting the clerk by charging 10 cents a page
15 instead of a dollar a page. But it seems to me that those
16 two things are what we're trying to prevent.

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE TRACY CHRISTOPHER: And we're
19 trying to prevent the clerks from having to create records
20 when they don't have the ability to do so.

21 CHAIRMAN BABCOCK: Andy.

22 MR. HARWELL: Bonnie, doesn't the Open
23 Records Act cover a lot of this?

24 CHAIRMAN BABCOCK: Could you speak up?

25 MR. HARWELL: The Open Records Act I believe

1 covers a lot of this with requests for information from
2 our office. I mean, this bulk distribution issue is -- I
3 mean, we're providing it now, so is this going to apply
4 then once this is passed on the time forward basis and
5 it's going to be a fundamental change from what we're
6 doing now? Or does it only apply to the records that are
7 digitized or on the computer? I mean, does it mean all
8 records?

9 MS. WOLBRUECK: The Open Records Act or the
10 Public Information Act exempts judicial records, so we
11 always rely upon that exemption in order to provide that
12 in the format in the manner by common law.

13 CHAIRMAN BABCOCK: But as a matter of
14 structure --

15 MS. WOLBRUECK: Yes.

16 CHAIRMAN BABCOCK: -- what does the Public
17 Information Act do on -- I don't recall that it speaks to
18 it, but maybe it does. I mean, just a matter of
19 precedent, well, here's what they do in the other branches
20 of government, what do they do about it? Do they do
21 anything?

22 MR. COFFEY: I can address that.

23 CHAIRMAN BABCOCK: Yeah.

24 MR. COFFEY: The Public Information Act says
25 that the entity doesn't have to create any document, but

1 they do have to do programming. The user has to request
2 -- has to pay for the programming, but if I went to the
3 Texas Department of Public Safety and said I wanted a list
4 of every private investigator and a list of ZIP codes,
5 they would have to do the programming in their system.
6 They would charge me for that, but they would have to do
7 the programming at that request.

8 CHAIRMAN BABCOCK: Okay. Yeah, Bill and
9 then Richard.

10 PROFESSOR DORSANEO: Well, I'm back to
11 working on the definitions, which is what you directed
12 people to do. "Bulk distribution means the distribution
13 of information contained in either multiple court records
14 or court records in multiple cases." And then as soon as
15 you get to case record, that is to say court record, I'll
16 give you a definition for that.

17 CHAIRMAN BABCOCK: Right. And the point is,
18 Bill, I think that you can't -- as you so appropriately
19 pointed out, you can't just look at this definition in a
20 vacuum. You've got to see what it's going to do when we
21 get to bulk distribution over in 14.3(i).

22 PROFESSOR DORSANEO: I think that will work.

23 HONORABLE SARAH DUNCAN: Can you read that
24 again, Bill?

25 PROFESSOR DORSANEO: "Bulk distribution

1 means the distribution of information contained in court
2 records in multiple cases."

3 MR. ORSINGER: You said "multiple records"
4 the first time.

5 PROFESSOR DORSANEO: I said "multiple court
6 records," but I think it's actually better to say "court
7 records in multiple cases" and then we're going to define
8 "court record" next, rather than "case records."

9 CHAIRMAN BABCOCK: Right. Richard.

10 MR. ORSINGER: Let me respond to Bill. Are
11 you saying that -- are you rejecting the concept of a
12 portion of information?

13 PROFESSOR DORSANEO: No. I just don't think
14 it's necessary to say, you know, "all or part."

15 MR. ORSINGER: Well, what if someone only
16 wants certain information off of each form but they don't
17 want the entire record?

18 PROFESSOR DORSANEO: Is that information?

19 MR. ORSINGER: Yeah, I think it is
20 information.

21 PROFESSOR DORSANEO: Well, then just say
22 "information."

23 MR. ORSINGER: Okay. Then on what I was
24 going to say before when I was being impolite --

25 CHAIRMAN BABCOCK: We heard the

1 acknowledgement.

2 MR. ORSINGER: If we were to go with Sarah's
3 approach that the district clerk would make this decision,
4 I think that was Sarah's comment, then it seems to me the
5 remedy would be to file a mandamus proceeding in the
6 district court to review the decision of the court clerk,
7 but the standard is abuse of discretion, which is so broad
8 I'm not sure that's effective judicial review.

9 PROFESSOR DORSANEO: Well, it might not be
10 abuse of discretion.

11 MR. ORSINGER: It might not be?

12 PROFESSOR DORSANEO: It might not be.

13 MR. ORSINGER: Okay. Well, we'll have a
14 private discussion about that.

15 PROFESSOR DORSANEO: People don't do things
16 they're supposed to do all the time. You just can't write
17 a rule that says otherwise.

18 CHAIRMAN BABCOCK: Well, the first
19 justification I heard for the rule was that we don't want
20 the clerk's office to be brought to its knees, and these
21 bulk distributors could come in and bring the clerk's
22 office to their knees, and I think that what you do have
23 in the Open Records Act deals with that. I mean, it says
24 you don't have to make a program. You don't have to get
25 down -- and I think that goes without saying.

1 The second justification is the competitive
2 thing, and the third justification is bulk distributors as
3 a class of requestors might use these records for
4 nefarious purposes, and we don't like that.

5 HONORABLE SARAH DUNCAN: And there's a
6 fourth.

7 CHAIRMAN BABCOCK: And what's the fourth?

8 HONORABLE SARAH DUNCAN: When Tom was
9 talking about an internet search, a Google search.

10 CHAIRMAN BABCOCK: Yeah. I mean, that it
11 makes it more available, although the bulk -- the bulk
12 distributors are going to want to get this stuff and then
13 charge a fee for it.

14 MR. ORSINGER: But if you put it on the
15 internet, in a sense you're making a bulk distribution.

16 CHAIRMAN BABCOCK: Sure.

17 MR. ORSINGER: Although you do it file by
18 file. If you put it on internet, it's available for bulk
19 downloading.

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE SARAH DUNCAN: Right.

22 MR. ORSINGER: So this rule really has not
23 only to do when somebody comes into your office and
24 requests a bulk download. But these clerks who are
25 loading everything onto the internet, they're making a

1 bulk distribution.

2 CHAIRMAN BABCOCK: Right.

3 MR. ORSINGER: But this would stop loading
4 records on the internet, that's just it. Except for
5 index, calendar, docket or record, right?

6 CHAIRMAN BABCOCK: Well, I don't think that
7 was intended, was it?

8 HONORABLE SARAH DUNCAN: No.

9 MR. ORSINGER: Is that not right?

10 CHAIRMAN BABCOCK: Well, that wasn't
11 intended, I don't think.

12 MR. ORSINGER: If I'm a district clerk and
13 under my district judge everything is electronically
14 filed, which there is at least one of those, then it's on
15 the internet, although maybe with that one judge it's only
16 available through Lexis. Is it not making a bulk
17 distribution when you load the file onto the internet?

18 CHAIRMAN BABCOCK: Right. Right. And if
19 I'm one of the those district clerks that charges, you
20 know, I have a subscriber based system, so I say, okay, if
21 you want to get my stuff you've got to pay X number of
22 dollars. Well, I think this rule is intended to prevent
23 you, the private entrepreneur, from being a subscriber,
24 getting all this information, and then going out and
25 saying, "Okay, you can get it from Bacarisse for \$300 a

1 month. I'll sell it to you for \$200 a month." That's
2 what this is all about it seems to me. But I could be
3 wrong.

4 Yeah, Judge Lawrence.

5 HONORABLE TOM LAWRENCE: Well, if I go out
6 and set up an educational research firm that is designed
7 to determine how evictions are being handled in Harris
8 County and I compile all this information with a bulk
9 distribution, which I am entitled to do because I'm a
10 legitimate research firm, and then I take it and sell it
11 to the Houston Apartment Association, I may have violated
12 (ii), (ii), but what are you going to do about it?

13 CHAIRMAN BABCOCK: We'll cut you off in the
14 future maybe.

15 MR. ORSINGER: Well, it's the clerk who gets
16 punished at that point because this rule only governs
17 clerks' behavior.

18 HONORABLE TOM LAWRENCE: So really the
19 determining factor is if I'm going to make any money from
20 it, it's not good. If I'm going to do it just for some
21 other reason then it's okay.

22 CHAIRMAN BABCOCK: Judge Christopher.

23 HONORABLE TRACY CHRISTOPHER: I just don't
24 think this ought to be in our rule.

25 CHAIRMAN BABCOCK: That what?

1 HONORABLE TRACY CHRISTOPHER: I don't think
2 this ought to be in our rule at all. I mean, the only
3 thing that we're trying -- that we want to protect the
4 clerks from having to create a search engine when they
5 don't have the ability to do so, but other than that I
6 don't see the point of having this provision in our rule.

7 CHAIRMAN BABCOCK: Jeff.

8 MR. BOYD: I want to echo that. We had a
9 couple of speakers earlier this morning who both said they
10 don't think we ought to pass the rule at all because it
11 goes against the concept of these being records owned by
12 the public, not by the clerks or by the court, but rather
13 being public records, and we really haven't discussed that
14 issue. Instead we've assumed we're going to have the
15 rule, and we've gone forward discussing what the rule
16 ought to look like.

17 Before we go much further on that I would
18 like to weigh in in support of those speakers this morning
19 and make sure that's at least reflected on the record that
20 there are some on the committee, or at least one on the
21 committee, that thinks that -- particularly as we talk
22 about specifics of the rule I'm hearing more reasons why
23 our speakers this morning were correct. What we're doing
24 is we're sitting here and we're saying, well, we shouldn't
25 let them have it if they want it for nefarious reasons or

1 if it's going to allow them to sell it more cheaply than
2 the clerk can sell it, and all of these are reasons that
3 under the Open Records Act are just completely
4 unacceptable reasons when you stop and think about who
5 owns these records.

6 The court doesn't own them. The clerk
7 doesn't own them. The public owns them, and I'm afraid
8 we're going down a path here that goes contrary to
9 something that's much more fundamental than what we're
10 talking about here, and I think -- I think there ought to
11 be some recognition of not only the public's ownership in
12 these records, of these records, but also of the
13 legitimate public interest in these records, and I think
14 that we need to give more thought to that.

15 That's not to say some rule wouldn't be
16 appropriate. I think what we talked about protecting
17 sensitive data and then the question becomes is the best
18 way to do that by rule or by independent individual court
19 orders on a case by case basis, but at least I feel like I
20 want to weigh in and say that the discussion of specific
21 provisions is taking us further down the road than I think
22 this committee ought to be going.

23 CHAIRMAN BABCOCK: Thanks, Jeff. Ralph
24 Duggins, then Buddy, then Carl, and then we'll eat.

25 MR. DUGGINS: Jeff, I think there's a big

1 difference in a member of the public being able to access
2 the records at the courthouse, but the clerks will have
3 gone to great expense and the state taxpayers paid that to
4 put it in this electronic form that's easily and quickly
5 downloaded and then reused for commercial purposes. So I
6 think there is a distinction between saying the records
7 belong to the public. The original records do, but once
8 you put them in an electronic format and you've gone to
9 the expense to do it, I think there is a distinction, and
10 I was going to suggest secondly one possible solution to
11 this bulk distribution issue is a -- is to just allow the
12 subscriber agreement or user agreement to cover that, and
13 maybe the clerks could limit republication of it in some
14 fashion in the subscriber agreement rather than try to
15 write it into the rule.

16 CHAIRMAN BABCOCK: Well -- Buddy.

17 MR. LOW: No, I agree with Jeff, except to
18 this extent. The people who file those papers are part of
19 the public. The clerk and the courts are custodians for
20 the public, and as custodians for the public they owe a
21 duty to all the public, including the people that want to
22 see it, the people that file it. So it's not a question
23 of whether the courts own it, but it's what is the duty of
24 this custodian, is the way I look at it. I agree with
25 Jeff that the public owns it, but the public is a broad

1 thing including everybody, even those who file. So what
2 do we do as custodians to protect everybody?

3 CHAIRMAN BABCOCK: Yeah. Carlos, could I
4 just insert a comment here? You know, if we're going to
5 go the subscriber route, and that's still something we're
6 going to talk about, but if we're going to do that, it
7 seems to me you can allow the marketplace to work here a
8 little bit, and the clerk could certainly charge a
9 different rate for a bulk requestor than it would be if
10 Ralph goes down, and, you know, gets on the internet and
11 says, you know, "I want to get, you know, a couple of
12 files," but that lets the marketplace work. I mean, right
13 now we're trying to affect the marketplace by a rule.

14 Okay. Carlos.

15 MR. LOPEZ: Yeah, my comment to what Jeff
16 was saying is I do think -- I'm not sure if this is
17 constitutionally right or legally correct, but I see a
18 difference between -- certainly someone has got a right to
19 go access the records. That doesn't mean someone has got
20 a right to make money off of them. So that's where I see
21 the commercial aspect coming in a little bit into a
22 distinction.

23 Second thing is I have a question about what
24 the default is. If I vote and if Jeff is able to convince
25 a majority or whoever to not have this rule, what do we

1 default back to? What does this universe look like
2 without this rule? It seems strange to me that Jeff is
3 against -- we're in a position that Jeff has to be against
4 a rule that presumably is to provide public access because
5 he's for public access. So I'm wondering what the default
6 is that happens without this rule.

7 MR. ORSINGER: The default is the
8 Legislature writes it.

9 MR. LOPEZ: Well, I don't know, or without
10 some kind of regulatory scheme, I guess.

11 CHAIRMAN BABCOCK: I didn't hear Jeff say
12 he's against the rule. He was talking about this
13 provision, I think.

14 MR. BOYD: Well, not -- well, this provision
15 is -- I see other problematic provisions that our
16 discussion will take us to. I think if -- I think the
17 public's right to access includes access for any purpose;
18 and if there is a bad purpose or a misuse then it's some
19 other law that needs to address that, whether it's theft
20 or invasion of privacy or whatever; but it shouldn't be
21 the access laws that restrict that; and so I do think that
22 the right to access includes the right to make money off
23 that access, it doesn't matter why.

24 And I think under the Public Information Act
25 the fact that the information is held in electronic form

1 doesn't change the public's right to access that
2 information. It makes it more difficult. The Legislature
3 has struggled with how to regulate that, and it does
4 provide they have a duty to manipulate the data if
5 necessary to provide it to the requestor in an electronic
6 format but can charge increased fees for the time
7 necessary to do that.

8 And I have been in a state agency and know
9 how difficult it is to try and respond. There have to be
10 reasonable -- you can't come in at 8:00 o'clock and say I
11 want you to dump all this and have it to me by morning.
12 You just can't do that. So I do agree there have to be
13 some proper guidelines to it, but I think the guidelines
14 have to begin with the recognition that these records
15 belong to the public, and they ought to have proper access
16 to them.

17 CHAIRMAN BABCOCK: Okay. Judge Christopher.

18 HONORABLE TRACY CHRISTOPHER: Well, you
19 know, I totally agree with Jeff. We shouldn't have this
20 provision in here. Somebody could come in and request
21 paper copies of everything and then scan them in and do
22 whatever they want to with them, and you know, we're all
23 afraid because now suddenly, you know, everybody is
24 getting these records on a CD instead of in the old paper
25 format. I mean, the same use can be made of paper

1 documents now.

2 CHAIRMAN BABCOCK: Richard Munzinger and
3 then Judge Lawrence and then we're going to eat, I
4 promise.

5 MR. MUNZINGER: The only problem -- and I
6 agree with what you just said, Judge, except what prompted
7 all this a meeting or two ago was the reality that the
8 computer today allows somebody to go into documents
9 electronically and acquire sensitive, arguably private,
10 information, my Social Security number, my child's defect,
11 or whatever it might be; and so whereas heretofore in the
12 absence of technology people couldn't get this kind of
13 information in the volumes that caused public concern, now
14 there seems to be a public concern with identity theft
15 because this type of information is found in these court
16 records.

17 And so as he said, you can pay a fellow in
18 Bangladesh or wherever 10 cents an hour to search for
19 Social Security numbers, driver's license numbers, and
20 it's now available in such volume that it poses a problem
21 to the community and to the society or at least to those
22 people whose personal identifying information is contained
23 in a court record. None of the records and none of the
24 concepts that we had concerning access to court records
25 were ever promulgated, thought about, enunciated by courts

1 or Legislatures in a time when you had technology that
2 allowed mass use of this information to the harm of the
3 citizen, and that's why we -- that's why we're here, I
4 think, is to address a rule that protects the citizen
5 while at the same time protecting access.

6 HONORABLE TRACY CHRISTOPHER: Well, if this
7 rule is only going to be prospective and if we're taking
8 the sensitive data out of the documents, we should not
9 have to worry about bulk distribution.

10 MR. MUNZINGER: If the driver's license
11 numbers, the Social Security numbers, the other privacy
12 information is preserved, I agree with you.

13 I also am -- I am concerned that this rule
14 as now written gives to some government functionary,
15 clerk, judge, whoever it might be, the legal authority to
16 determine a legitimate purpose, and I take great offense
17 at that. I'm like Chip. I do a lot of work for the
18 media.

19 I'm -- you know, who is anybody to tell me
20 that my purpose for using a public document is legitimate
21 or not? It's none of your business, government, what I
22 want to do with my information, and you ought not to be
23 telling me that I'm legitimate or not legitimate, and I
24 don't want to give that power to some person who can make
25 the decision and not let me have my say. It's not right

1 in a free country.

2 CHAIRMAN BABCOCK: Can we vote on whether
3 Munzinger is legitimate? Judge Lawrence, and then we're
4 going to have -- can we have lunch or, Sarah, do you want
5 to get a comment in before lunch?

6 Judge Lawrence.

7 HONORABLE TOM LAWRENCE: If somebody comes
8 into my office and requests information I'm not supposed
9 to ask them why they want that as a general rule, I
10 believe, but yet if they want it in bulk I'm in a position
11 that I'm supposed to inquire as to who they are and why
12 they want it to make sure that they're entitled to it, and
13 that sets me up as custodian of record of being in
14 difficult position. Plus this is a fairly subjective
15 standard that we're establishing here that's going to vary
16 from county to county and elected official to elected
17 official.

18 So the more limited you make those that have
19 access to this, the better I as custodian of records is
20 going to like it. This is fairly broad in the term
21 "legitimate research purposes." That's so broad that
22 almost anybody is going to figure out a way to justify
23 that, so if you could make it more limited in who would
24 get it, that would make it I think a lot easier for me to
25 get enthused about it.

1 CHAIRMAN BABCOCK: We're going to eat, but
2 let's try to limit it to 45 minutes, so we'll be back at
3 1:30. Thanks, everybody.

4 (Recess from 12:42 p.m. to 1:31 p.m.)

5 CHAIRMAN BABCOCK: Hatchell, you ready to
6 go?

7 MR. HATCHELL: Yeah.

8 CHAIRMAN BABCOCK: The suggestion was made
9 over the lunch hour that we take the bulk definition
10 definition and the bulk definition -- the bulk
11 distribution subpart and vote on whether we need it or
12 not. Any support for that or any discussion on that?

13 PROFESSOR CARLSON: Not necessarily as
14 written but in some format?

15 CHAIRMAN BABCOCK: Judge Gray.

16 HONORABLE TOM GRAY: I would like to say
17 that the bulk definition, we're not limiting the public
18 viewing or access to anything. You've got to go through a
19 file or some other identifier, but the real thing that's
20 driving the problem with the bulk definition is the access
21 to the old records. If it's the stuff going forward, not
22 a problem so much. It's the stuff that we filed 10 and 15
23 years ago that are being scanned and put out there that
24 creates a problem, so a mid-ground to me would be no bulk
25 distribution on old data.

1 CHAIRMAN BABCOCK: Richard?

2 MR. MUNZINGER: I've got a technological
3 question that perhaps one of the clerks that's here can
4 answer it for me. When I want to access information today
5 can I just ask your computer to give me everything in your
6 computer files, and can I do that without your permission?

7 MR. WILDER: No.

8 MR. MUNZINGER: So at the moment I can with
9 my computer just simply access a single file?

10 MR. WILDER: Correct.

11 MR. MUNZINGER: But I couldn't access all
12 your files? Because that helps me understand bulk
13 distribution in the way this is written because the way
14 it's written it seems to apply to what is done after it's
15 obtained as distinct from the method in which it is
16 obtained and we may want to give some thought to that, and
17 I don't want to get off your subject about the vote.

18 CHAIRMAN BABCOCK: Judge Lawrence.

19 HONORABLE TOM LAWRENCE: Now, this bulk
20 distribution is not just electronic. It's also paper
21 records, correct?

22 HONORABLE TOM GRAY: Correct.

23 HONORABLE TOM LAWRENCE: All right. So if
24 I'm a single JP, which we have a lot of them in the state
25 that do not have clerks and somebody comes in and makes

1 this request, that means I've got to get all of this data
2 together and make copies of it and provide, correct?

3 CHAIRMAN BABCOCK: Well, I don't think this
4 changes what your obligation is today.

5 HONORABLE TOM LAWRENCE: Well, the
6 obligation today is that if someone comes in and wants to
7 see the file then we say, "Here are the files. Go through
8 them," and then we can make copies, but now this puts more
9 of a burden it seems to me on the custodian of records to
10 get all of this information together in a form to
11 distribute it.

12 CHAIRMAN BABCOCK: If you've got your entire
13 record, your database computerized.

14 HONORABLE TOM LAWRENCE: I do, and this is
15 not going to be a big deal for me.

16 CHAIRMAN BABCOCK: If somebody comes in and
17 says, "Hey, I want your database". --

18 HONORABLE TOM LAWRENCE: Well, subject to
19 what they're entitled to, it's not a big deal to generate
20 that file and download it to a disk, but there are a lot
21 of courts that are not computerized where you only have a
22 single judge. It's going to be a little bit of a burden.

23 And then I've got another question. In the
24 first sentence, "The only case records a court or court
25 clerk may provide," does the "may," does that indicate

1 discretion on the part of the custodian of records to do
2 it or not do it, or does that modify the fact that if the
3 records are available they have to do it? I'm not sure I
4 understand the use of the word "may" there.

5 CHAIRMAN BABCOCK: Yeah, I think that point
6 was made by somebody else a minute ago that maybe that
7 ought to be "must," or maybe not, but Bill.

8 PROFESSOR DORSANEO: This focus on multiple
9 cases, court records in multiple case, if somebody comes
10 in now and asks for information, do they need to identify
11 a specific case?

12 HONORABLE TOM LAWRENCE: Are you asking me
13 or --

14 PROFESSOR DORSANEO: Yeah, or anybody who
15 can answer.

16 HONORABLE TOM LAWRENCE: Yeah, they would
17 have to say, "I want the information" -- if they want a
18 specific case they would have to request that case.

19 PROFESSOR DORSANEO: Well, suppose they
20 don't want a specific case. Do they have to ask for a
21 specific case anyway?

22 HONORABLE TOM LAWRENCE: Well, no, the
23 apartment association will come in and want to see all
24 the evictions for the past month, for example, and we
25 would hand them all of those, but then they would have to

1 go through the files and pick out what they want. There's
2 no duty on the clerk to have to go through and sort
3 documents out and make copies. The burden is on them to
4 go through, find what they want to find.

5 Now, if they want a summary of cases filed,
6 then we can do that in Harris County electronically. It's
7 not a big problem, but there are many, many counties where
8 there is -- the case records are not electronically filed.
9 They're all paper filed.

10 PROFESSOR DORSANEO: Well, let me ask it
11 this way. So if somebody comes in and they want to look
12 at your records, you let them look at your records to see
13 what cases contain information that they want?

14 HONORABLE TOM LAWRENCE: That's correct. It
15 can happen like that, yes.

16 PROFESSOR DORSANEO: Would that be a bulk
17 distribution?

18 HONORABLE TOM LAWRENCE: Well, if they're
19 only looking at it, no. I mean, this seems to be that
20 we're generating documents. I mean, isn't that what bulk
21 distribution means, that we're going to actually generate
22 some document, either electronically to a disk or we're
23 going to make copies of the records?

24 PROFESSOR DORSANEO: I think that's not
25 clear what distribution requires.

1 HONORABLE TOM LAWRENCE: Well, that's the
2 way I'm understanding it.

3 MR. ORSINGER: In my mind loading something
4 on the internet is tantamount to bulk distribution.

5 PROFESSOR DORSANEO: What I'm trying to get
6 at is all this seems to be saying is they have to ask for
7 it file by file and they'd have to go through this drill
8 of going in, finding out the identity of the file, and
9 then they could ask for them one by one, but not ask for
10 them in bulk.

11 CHAIRMAN BABCOCK: Judge Gray.

12 HONORABLE TOM GRAY: I have to say at this
13 point I think the Court has got a pretty good idea of what
14 we're looking at, and we're hung up on one small part of a
15 rule that we've got about another hour and a half to give
16 them some direction. I'd just make the motion to take the
17 bulk definition out and go on.

18 CHAIRMAN BABCOCK: Okay. There's a motion
19 from the guy who wrote it.

20 HONORABLE TOM GRAY: No. No, I didn't write
21 it. I just participated in it. But just to give the
22 Court some sense of where we are on it.

23 CHAIRMAN BABCOCK: Yeah. I think that's
24 sort of where I was headed based on what you and others
25 said to me over the lunch hour. So everybody who is in

1 favor of eliminating subsection 14.3(i) and therefore
2 obviating the necessity of the definition in 14.2(b) raise
3 your hand.

4 HONORABLE TOM LAWRENCE: So if you take --
5 if you take it out that means that they can come in on an
6 individual basis, but you wouldn't provide the records
7 in --

8 CHAIRMAN BABCOCK: It just means we're going
9 to take it out, Judge. Everybody that's in favor of that.
10 Everybody that is in favor of leaving it in
11 in some form?

12 The vote is 21 to 4 in favor of taking it
13 out, leaving it out. The Chair not voting.

14 Okay. Let's go to "case record." Bill, you
15 want to call it court record?

16 PROFESSOR DORSANEO: Well, again, as you
17 said the last time I wanted to define something, that it's
18 probably more profitable to look at something after the
19 definitions and work backwards to the definitions, but,
20 but if you don't want to do that, I would say "court
21 record means," and I wouldn't say "a record" because it
22 bothers me to define a term by using the same word.

23 "Court record means any document, tangible
24 thing," which is what we use in other rules, "or
25 electronic data created by a court official or filed in a

1 civil case, regardless of the physical form of the record,
2 how it was created, or how it is stored." I just
3 customized the language and made it more understandable.

4 CHAIRMAN BABCOCK: Buddy.

5 MR. LOW: Chip, I assume that throughout
6 here when we use the term "case record" we would
7 substitute that "court record."

8 CHAIRMAN BABCOCK: Yeah, right. Correct.

9 MR. LOW: So that would be in --

10 CHAIRMAN BABCOCK: Right. Yeah. Richard.

11 MR. MUNZINGER: The concern that I have with
12 the definition as it exists and what I understood Bill's
13 amended definition to be is it doesn't restrict the
14 information to the information which has been filed with
15 the district or the county clerk, for example, but would
16 include notes of the judge at the bench arguably, possibly
17 even notes of a court reporter, the transcript of a court
18 reporter in a case which is not completed or has been
19 completed.

20 It certainly would include -- I'm not sure
21 of your change, Bill, but the one that exists, it would
22 include exhibits in the possession of a court reporter in
23 a case arguably where a judgment hasn't been entered, and
24 the whole thing it seems to me, again in going back to the
25 history of why we're doing this, I thought our attention

1 was principally focused on making it possible to obtain
2 data for use in computers that was in the possession of
3 district and/or county clerks in civil cases, and the
4 definition that we're dealing with goes far beyond that.

5 CHAIRMAN BABCOCK: Justice Duncan.

6 HONORABLE SARAH DUNCAN: I was just going to
7 suggest, I may have suggested it earlier, that we have (c)
8 be "court record" and then have subdivisions under (c) for
9 what is now a case record, a court-created record, and
10 then have things that aren't court records, like judge's
11 notes, court reporter notes that have not been
12 transcribed, that structural point.

13 PROFESSOR DORSANEO: We can do the heavy
14 lifting in the definitions or we can do it later. It's
15 probably easier to do it later, even though I said earlier
16 that the definition needs to be worked on a lot, because
17 it's --

18 CHAIRMAN BABCOCK: Buddy.

19 MR. LOW: But the judge wouldn't file his
20 notes. Aren't we really speaking of what's been filed of
21 record? Isn't that what we're talking about?

22 PROFESSOR DORSANEO: You've got "created by
23 a court official."

24 HONORABLE SARAH DUNCAN: Yeah. For
25 instance --

1 MR. LOW: But if it's created by a court
2 official it would be filed, wouldn't it?

3 HONORABLE SARAH DUNCAN: Not necessarily.
4 For instance, our deputy clerks may create reports,
5 productivity type reports. Those aren't filed in any case
6 file.

7 MR. LOW: They're not a court -- well, I
8 guess so.

9 HONORABLE SARAH DUNCAN: But they were
10 created by a court in connection with matters that have
11 been before the court in its adjudicative function.

12 MR. LOW: Okay. But they're contained in
13 the file?

14 HONORABLE SARAH DUNCAN: No.

15 MR. LOW: No file at all?

16 HONORABLE SARAH DUNCAN: Not necessarily.

17 HONORABLE DAVID GAULTNEY: No case file.

18 MR. MUNZINGER: Say Judge Christopher takes
19 notes during a jury trial.

20 HONORABLE TRACY CHRISTOPHER: Well, you know
21 what, if I leave them in the file I assume somebody can
22 read them.

23 MR. MUNZINGER: Well, I agree, but if
24 they're not in the file --

25 HONORABLE TRACY CHRISTOPHER: So I take them

1 out.

2 MR. MUNZINGER: But if they're not in the
3 file, the way this is written they're subject to this
4 rule.

5 CHAIRMAN BABCOCK: Justice Jennings.

6 HONORABLE TERRY JENNINGS: I know that we
7 wanted to stay away from the definition in 76a, parts of
8 it, but it occurs to me at least on (2)(a), the definition
9 of court records for purposes of this rule, "The court
10 records means, (a), all documents of any nature filed in
11 connection with any matter before any civil court" and
12 then it has certain exceptions under (a).

13 It just occurs to me that maybe we're
14 putting the burden in the wrong place, because when you go
15 later in the rule about the sensitive data form and the
16 clerk has to maintain a sensitive data form, maybe the
17 burden ought to be on the party that wants to protect
18 their own sensitive information, and maybe a way to
19 approach that would be -- is to make an exception within
20 the definition of what is a court record that you can get
21 access to by making an exception for certain sensitive
22 information that a party's, you know, moved to have, you
23 know, removed or whatever.

24 And that might simplify some other things as
25 well within the rule and alleviate a lot of other concerns

1 and some other arguments, but to put the burden on the
2 party that's seeking to protect their sensitive
3 information and then having a definition of a court record
4 somewhat in line with 76a(2)(a) with certain exceptions
5 and sensitive information being one of the exceptions.

6 And then, boom, you don't even get there.
7 You don't have to worry about it because if it's been
8 properly -- you know, almost by analogy sealed or
9 whatever. It's been taken out of the context and then you
10 just open everything else up. That's just an idea.

11 CHAIRMAN BABCOCK: Judge Christopher, then
12 Orsinger, Munzinger, and Carlos.

13 HONORABLE TRACY CHRISTOPHER: I think we
14 ought to use 76a's definition to be consistent so we all
15 know what we're talking about. If we want to pull in, you
16 know, the exemption (d) of 14.3(d) on page two and put
17 that up into our definition, I think that would be a
18 better place for it.

19 CHAIRMAN BABCOCK: Did you say on page two,
20 14.3?

21 HONORABLE TRACY CHRISTOPHER: 14.3(d), the
22 nonfiled discovery materials.

23 CHAIRMAN BABCOCK: Yeah. Yeah, I think I
24 agree with Justice Jennings about this. If we were to
25 take the 76a definition and exempt the sensitive data form

1 and then we already -- and then maybe move up that we're
2 not talking about nonfiled discovery, that makes a lot of
3 sense to me.

4 Orsinger, Munzinger, and then Carlos Lopez.

5 MR. ORSINGER: Okay. I'm a little bit
6 worried about this idea of created by a court. I'm not
7 sure who is included in the court, but if the court
8 reporter is included in the court, does that include the
9 court reporter's notes before the transcript is typed?
10 Are they subject to being demanded and copied
11 electronically?

12 CHAIRMAN BABCOCK: Okay. Richard, what
13 about if we change the definition, however, to say, "Court
14 records means all documents of any nature filed in
15 connection with any matter before any civil court, except
16 for sensitive data forms and unfiled discovery" or
17 something like that?

18 MR. ORSINGER: That protects the district
19 judge's notes and it protects the court reporter's notes,
20 but would the district clerk's records that they generate
21 like indexes and everything else, are they technically
22 filed if they are internally generated?

23 CHAIRMAN BABCOCK: Well, I don't know.
24 What's the answer under 76a? It's the same definition.

25 MR. HAMILTON: It wouldn't be part of a case

1 file, would they?

2 CHAIRMAN BABCOCK: I wouldn't think they
3 would be.

4 MR. ORSINGER: Well, part of what we're
5 trying to do here is to make available information.
6 Probably the primary thing we're trying to do here is to
7 make information in the district clerk and county clerk's
8 office available to the public, including the indexes and
9 stuff like that, right? It's not just the documents filed
10 by the parties.

11 HONORABLE TERRY JENNINGS: Well, then you're
12 getting into judicial.

13 MR. HATCHELL: We had problems with "filed."

14 MR. ORSINGER: I mean --

15 CHAIRMAN BABCOCK: The word "filed"?

16 MR. ORSINGER: Yeah. You couldn't get an
17 index. I mean, an index is the most harmless piece of
18 information that the district clerk has. It's just a
19 listing of lawsuits and names. I mean, if you're going to
20 give anybody anything you ought to give them the index so
21 at least they can go to the file and check it out and read
22 it with their eyes. But that's not filed, so you have to
23 say "court-created," but once you say "court-created" you
24 better start talking about excluding what the court
25 reporter's notes are and what the judge's unfiled notes

1 are.

2 And what about drafts of decrees? If the
3 judge is drafting a decree and goes through four or five
4 drafts, is it only the final draft that's created or is it
5 the first draft?

6 CHAIRMAN BABCOCK: Could you say, "Court
7 records means all documents of any nature filed in
8 connection with any matter before any civil court and
9 index, calendar, docket, or register of actions"?

10 MR. ORSINGER: And register of actions? Is
11 that a term of art there?

12 CHAIRMAN BABCOCK: Must be.

13 MR. HATCHELL: We asked that same question,
14 and Bonnie has the answer.

15 MS. WOLBRUECK: The definition of that is
16 in -- it's the -- there's a rule that requires the clerk
17 to list all of the pleadings on the docket sheet. In
18 reality that's the list of everything that was filed, and
19 it's usually in a computer database, the listing of all
20 actions.

21 MR. ORSINGER: Okay. And then another
22 comment I'd make is that this is broad enough to include
23 the appellate courts, and we definitely have to say
24 "filed" if we're going to talk about the appellate courts
25 because there is a lot of stuff in the appellate courts

1 that are created that are not public, and so we've either
2 got to so work the word "created" for the appellate court
3 or we've got to go with the concept of filed.

4 PROFESSOR DORSANEO: I don't think the
5 appellate courts are in here.

6 MR. ORSINGER: Well, if you look at the
7 definition of court it means "any court created by the
8 Constitution or laws of the State of Texas."

9 PROFESSOR DORSANEO: I know, but I don't
10 think they -- well...

11 MR. ORSINGER: Well, the appellate courts
12 create tons of stuff that we can't see.

13 CHAIRMAN BABCOCK: We'll get to that.

14 MR. ORSINGER: Okay.

15 CHAIRMAN BABCOCK: We'll get to that in
16 time. You had something to say that --

17 MR. MUNZINGER: It's all the same
18 discussion. The idea is to limit it to what has been
19 filed with the clerk as distinct from all the working
20 papers of the judge and what have you.

21 CHAIRMAN BABCOCK: Right.

22 MR. MUNZINGER: So I don't have anything to
23 add.

24 CHAIRMAN BABCOCK: Justice Duncan.

25 HONORABLE SARAH DUNCAN: I do think, for

1 instance, if a productivity report is generated by a
2 clerk, I think there ought to be public access to that,
3 and your definition wouldn't include that.

4 CHAIRMAN BABCOCK: I think not unless we add
5 it.

6 HONORABLE SARAH DUNCAN: It is included
7 under the current definition.

8 CHAIRMAN BABCOCK: Right.

9 HONORABLE SARAH DUNCAN: I'm talking about
10 Richard's proposed definition wouldn't include those types
11 of documents.

12 MR. ORSINGER: My preference would be to
13 except out from the word "created" rather than to list
14 what's filed.

15 MR. LOPEZ: There is a million things you
16 would have to put in there.

17 MR. ORSINGER: Well, that's the problem,
18 but --

19 CHAIRMAN BABCOCK: Justice Jennings and then
20 Bill Dorsaneo.

21 HONORABLE TERRY JENNINGS: My concern about
22 what Richard seems to be talking about is, you know, these
23 court-created things, aren't they judicial records under
24 Rule 12 and governed by Rule 12? Maybe Lisa could answer
25 that.

1 MS. HOBBS: Well, I think a report like that
2 would be a Rule 12. It's a nonadjudicatory function.

3 HONORABLE TERRY JENNINGS: And it wouldn't
4 have to be within this new Rule 14, would it? It's
5 already covered under Rule 12?

6 MS. HOBBS: I was thinking that when Richard
7 was talking, but I don't know for sure.

8 MR. ORSINGER: What about the court
9 reporter's notes, and where do they fit?

10 HONORABLE TERRY JENNINGS: Well, the
11 judicial record is defined under 12.2(d). "Judicial
12 record means a record made or maintained by or for a court
13 or judicial agency in the regular course of business but
14 not pertaining to its adjudicative function, regardless of
15 whether that function relates to a specific case. A
16 record of any nature created, produced, or filed in
17 connection with any matter that is or has been before a
18 court is not a judicial record."

19 CHAIRMAN BABCOCK: Bill, then Carlos.
20 Carlos, I skipped you. I'm sorry.

21 MR. LOPEZ: That's okay.

22 CHAIRMAN BABCOCK: Move on to another one.

23 CHAIRMAN BABCOCK: Carlos, down to you.

24 MR. LOPEZ: I don't know if she was right,
25 but my court reporter used to tell me that her drafts

1 didn't really exist.

2 MS. HOBBS: Well, that's because they're
3 exempted. It is a court case record under Rule 12. It's
4 just an exempted one.

5 MR. LOPEZ: Okay. There's -- that's the
6 answer.

7 MR. ORSINGER: It's not in connection with
8 litigation even though it's notes of a trial proceeding?

9 CHAIRMAN BABCOCK: Carl.

10 MR. HAMILTON: There's other problems with
11 Rule 12. For example, one of the exceptions under Rule 12
12 is any judicial record relating to civil or criminal
13 litigation or settlement negotiations in which a court or
14 judicial agency is a party. So that's clearly a lawsuit.

15 CHAIRMAN BABCOCK: Bill, Justice Jennings
16 says on the definition of court records we ought to try to
17 use as our template Rule 76a. Do you think we ought to
18 stick with the language that is here in the draft rule or
19 -- as a template for how we go forward?

20 PROFESSOR DORSANEO: I like your definition
21 that talked about what we're really talking about.

22 CHAIRMAN BABCOCK: Okay.

23 PROFESSOR DORSANEO: Which combines 76a and
24 some of the language that's in here about indices.

25 CHAIRMAN BABCOCK: Index, calendar, docket,

1 or register of actions. Okay. Justice Duncan, what do
2 you think?

3 HONORABLE SARAH DUNCAN: I guess I got you
4 and Richard confused there momentarily.

5 CHAIRMAN BABCOCK: Yeah, well, stop that.
6 Here's what I was thinking. We could define it as "Court
7 records means all documents of any nature filed in
8 connection with any matter before any civil court and
9 indexes, calendars, dockets, or registers of actions."

10 HONORABLE SARAH DUNCAN: Well, what about
11 all the other documents? You don't want access to those?

12 CHAIRMAN BABCOCK: Well, if I knew what they
13 were I might. What you said, the productivity reports,
14 sounds like that's covered by 12.

15 HONORABLE SARAH DUNCAN: Right. But what
16 about a list like Tracy was talking about, a list of all
17 silicosis cases or if that's generated or it's able to be
18 generated?

19 CHAIRMAN BABCOCK: Would that be an index?

20 HONORABLE SARAH DUNCAN: I don't know. I
21 don't think so. I just -- I'm concerned that once you try
22 to specify the types of information that would be
23 available --

24 CHAIRMAN BABCOCK: Yeah.

25 MR. HATCHELL: You'll leave something out.

1 HONORABLE SARAH DUNCAN: -- you're going to
2 be inadvertently leaving out a whole bunch of information.

3 MR. LOPEZ: Yes. Yes. Yes.

4 CHAIRMAN BABCOCK: So you would favor going
5 back to the approach that the subcommittee has because you
6 think that captures more stuff?

7 HONORABLE SARAH DUNCAN: Yeah, with some
8 exceptions.

9 MR. ORSINGER: But you've got to create some
10 exceptions to "court-created" if you do that.

11 HONORABLE SARAH DUNCAN: Right.

12 MR. ORSINGER: Obviously there is a lot of
13 stuff created by the court that should never be seen by
14 anyone.

15 CHAIRMAN BABCOCK: I'm with you. Judge
16 Lawrence.

17 HONORABLE TOM LAWRENCE: If we're only going
18 to do civil do we need municipal courts in (e)? Don't we
19 want to take municipal courts out at this time?

20 CHAIRMAN BABCOCK: You want to be in or out?

21 HONORABLE TOM LAWRENCE: Well, I don't think
22 municipal courts do any civil, so I wonder why we would
23 need them in the definition at this point.

24 CHAIRMAN BABCOCK: Okay. Yeah. Good point.
25 Judge Christopher.

1 HONORABLE TRACY CHRISTOPHER: Could I
2 suggest that we do "Court records means, (1)," the
3 definition from 76a, and include the exceptions of in
4 camera and otherwise restricted by law, which is part of
5 14.3(b) anyway, because we haven't mentioned in camera
6 documents here and we need to make sure that they're not
7 public access documents; and then (2), say "Records
8 generated by the clerk for the management of the case
9 files" or something like that, a real generic term rather
10 than specifying.

11 CHAIRMAN BABCOCK: What do you think about
12 that, Sarah?

13 HONORABLE SARAH DUNCAN: Getting there.

14 CHAIRMAN BABCOCK: Yeah, David Jackson.

15 MR. JACKSON: Could we get one step more
16 generic and say "created by court personnel," and that
17 would include the court reporter and the clerk?

18 CHAIRMAN BABCOCK: Okay. Yeah, Bill.

19 PROFESSOR DORSANEO: Well, using the word
20 "created" and some people were talking about things to be
21 created in the future, I was thinking more along the lines
22 of "kept" or "maintained." It doesn't really matter who
23 creates them. It's kept or maintained.

24 HONORABLE TRACY CHRISTOPHER: Well, except
25 that gets around the judicial records that are protected

1 by 12 if we make it clear that it's clerk-created rather
2 than judge-created.

3 HONORABLE TOM GRAY: Well, you-all will be
4 interested to know that at one point the definition we
5 were using for court included a clerk, and that really was
6 mind-bending at one point.

7 PROFESSOR DORSANEO: The court does include
8 everybody that works for the court.

9 HONORABLE STEPHEN YELENOSKY: It isn't clear
10 to us. The clerks don't work for us.

11 HONORABLE SARAH DUNCAN: I don't think we
12 can necessarily sit here and work out exactly what's in
13 and what's out. But a court record ought to include
14 everything that we don't exclude. And we need to
15 exclude -- I mean, there are documents that are made
16 confidential by statute, for instance. Those should be
17 excluded from a court record, and I think we would all
18 agree on that. But I don't think we can sit here and
19 write this definition like this.

20 CHAIRMAN BABCOCK: Yeah, it's hard.

21 HONORABLE SARAH DUNCAN: We'll be here all
22 day or all year.

23 CHAIRMAN BABCOCK: Yeah. Yeah. So what do
24 you suggest we do?

25 HONORABLE SARAH DUNCAN: I think this is

1 going to have to go back to the subcommittee, and, you
2 know, the full committee is going to have to direct the
3 subcommittee on what's in and what's out.

4 CHAIRMAN BABCOCK: Well, it sounds like we
5 have a fair consensus that we ought to -- we ought to try
6 to use a similar definition to 76a(2)(a), which is "All
7 documents of any nature filed in connection with any
8 matter before any civil court and" --

9 HONORABLE SARAH DUNCAN: Why are you
10 excluding (b) and (c)?

11 CHAIRMAN BABCOCK: Because they were
12 excluded later in this rule.

13 HONORABLE SARAH DUNCAN: We're defining a
14 court record.

15 CHAIRMAN BABCOCK: Right.

16 HONORABLE SARAH DUNCAN: Why wouldn't we use
17 all of 76a(2)?

18 CHAIRMAN BABCOCK: Well, because 76 --
19 76a(2) includes unfiled discovery.

20 MR. GILSTRAP: We don't want that.

21 HONORABLE SARAH DUNCAN: No. Look at (c).

22 CHAIRMAN BABCOCK: Yeah. Discovery not of
23 record, not filed of record. That's unfiled discovery.

24 HONORABLE SARAH DUNCAN: (c) is limited
25 to -- I see what you're saying.

1 CHAIRMAN BABCOCK: It's not all unfiled
2 discovery, but it's some unfiled discovery.

3 HONORABLE SARAH DUNCAN: Well, you just
4 broaden (c) to say "unfiled discovery." Then you can
5 incorporate all of 76a(2), but broaden (c) to include all
6 unfiled discovery.

7 CHAIRMAN BABCOCK: Okay.

8 MR. ORSINGER: If you pick up the exclusions
9 in 76a entirely you've excluded all Family Code
10 proceedings.

11 CHAIRMAN BABCOCK: Yeah. We can't do that.

12 MR. ORSINGER: Divorces.

13 CHAIRMAN BABCOCK: Bill.

14 PROFESSOR DORSANEO: The unfiled discovery
15 really shouldn't be in 76a here. Let's just keep it out
16 of here, but Judge Christopher is right. The top part of
17 76a works well, and we could add on the bottom these
18 clerk-created or maintained records, and that's probably
19 progress.

20 CHAIRMAN BABCOCK: That's progress, and we
21 can keep our exemptions where the subcommittee already has
22 them at 14.3(b), and we can load up whatever exemptions we
23 want to put in there. What about that as an approach?

24 PROFESSOR DORSANEO: I like it.

25 CHAIRMAN BABCOCK: Okay. Justice Duncan, is

1 that okay with you?

2 HONORABLE SARAH DUNCAN: I don't know why
3 you would -- it doesn't matter.

4 MR. ORSINGER: To me that's the shorter
5 list.

6 CHAIRMAN BABCOCK: Yeah.

7 MR. ORSINGER: If you're going to say
8 court-created and then eliminate appellate opinions that
9 haven't been released, you're going to eliminate court
10 reporter's notes, you're going to eliminate judge's notes
11 that are not part of the trial. That's the shorter list
12 than trying to list --

13 CHAIRMAN BABCOCK: Yeah.

14 MR. ORSINGER: -- everything that is
15 included.

16 CHAIRMAN BABCOCK: Okay. Just so we're
17 clear, we're going to take -- or we're going to borrow
18 from 76a(2)(a) and say that court records means "All
19 documents of any nature filed in connection with any
20 matter before any civil court, and records generated by
21 court personnel for the management of the case, regardless
22 of the physical form of the record, how it was created, or
23 how it is stored," period. Generally speaking. We can
24 tweak the words and then we'll hit the exceptions when we
25 get over here to 14.3(b). Is that fair enough?

1 Justice Gaultney.

2 HONORABLE DAVID GAULTNEY: Did you say
3 "clerk-generated" or "court-generated"?

4 CHAIRMAN BABCOCK: I said "court personnel"
5 because that's what I heard somebody say. We can say
6 "clerk" if you'd rather.

7 HONORABLE DAVID GAULTNEY: I would prefer
8 clerk. I would prefer it to be clerk as opposed to --

9 CHAIRMAN BABCOCK: People prefer "clerk" to
10 "court personnel"?

11 MR. ORSINGER: Is the court coordinator a
12 clerk or not?

13 MS. WOLBRUECK: No.

14 MR. LOPEZ: No.

15 MR. ORSINGER: Is the court reporter a clerk
16 or not?

17 HONORABLE STEPHEN YELENOSKY: No.

18 MR. ORSINGER: Okay. Well, do we want to
19 say that anything court reporter-generated or anything
20 that the court coordinator generated who is handling the
21 dockets and everything, that they are not included?

22 CHAIRMAN BABCOCK: Munzinger.

23 MR. MUNZINGER: Well, what he's just saying
24 is that the court coordinator's notes fall within your
25 definition unless you start adding words like "such as

1 indices, registry," et cetera, when you're modifying
2 "documents created for the purpose of managing the court,"
3 but a court coordinator creates documents pertaining to
4 the management of business before the court just as a
5 court reporter does.

6 MR. ORSINGER: But are they a clerk? Are
7 they a clerk? I mean, I don't know. Are they, Bonnie?

8 MS. WOLBRUECK: No.

9 MR. ORSINGER: They are not a clerk. So if
10 you limit it to court clerk we have excluded the court
11 coordinator, so that means all of the scheduling of the
12 trial and all that --

13 HONORABLE TRACY CHRISTOPHER: But those are
14 all filed.

15 MR. MUNZINGER: The clerk doesn't appear in
16 76a's definition.

17 MR. ORSINGER: The proposal was made that we
18 limit it to court clerk rather than court personnel. I
19 was reacting to that suggestion.

20 CHAIRMAN BABCOCK: And he wants -- you're a
21 court personnel person, right?

22 MR. ORSINGER: I think that, yeah, personnel
23 is better.

24 CHAIRMAN BABCOCK: Okay.

25 MR. ORSINGER: But we've got to protect the

1 court reporters and the exceptions.

2 CHAIRMAN BABCOCK: Munzinger is a court
3 clerk guy. Buddy, what are you?

4 MR. LOW: Would it include like if it's a
5 court of appeals they get memos and Supreme Court gets
6 memos and so forth? That's not ordinarily a court clerk
7 because it's not the clerk of the Supreme Court, but that
8 is a clerk.

9 CHAIRMAN BABCOCK: So you're a clerk guy?

10 MR. LOW: Well, no. I want it to include
11 all.

12 MR. GILSTRAP: He's concerned about briefing
13 clerks.

14 MR. ORSINGER: I think we ought to write
15 that into an exception instead of into the definition.
16 Why don't we just say what's created, except, except,
17 except?

18 CHAIRMAN BABCOCK: Yeah. Carlos.

19 MR. LOPEZ: Will this incorporate the
20 protection of "unless otherwise restricted by law"?

21 CHAIRMAN BABCOCK: No. That's going to be
22 in the exception, 14.3(b).

23 MR. LOW: And your exception may take care
24 of that where it says this "Federal law, Texas law, and
25 this court rule," we call this a court rule, it's an

1 administrative rule, so I guess it includes Administrative
2 Rule 12, and some of the others may protect that anyway.
3 I don't know.

4 CHAIRMAN BABCOCK: Okay. Bill.

5 PROFESSOR DORSANEO: The word "stored" is in
6 here now, and that kind of means to me kept or maintained,
7 which I would like to have in there, and that would -- and
8 the judge's side notes or whatever presumably are not
9 stored, kept, maintained, except by accident.

10 CHAIRMAN BABCOCK: Leave your notes in the
11 court file.

12 PROFESSOR DORSANEO: Couldn't we deal with
13 the problem of clerk/judge by talking about what's not
14 only created but by what's kept, what's maintained? And I
15 would use the word "made" rather than "created" anyway.

16 HONORABLE SARAH DUNCAN: That varies from
17 court to court I would imagine. I know at our court we
18 have a safe, and all of my notes are in my bathroom, but I
19 know that others --

20 HONORABLE TOM GRAY: That's more information
21 than we need.

22 HONORABLE SARAH DUNCAN: No. They're in the
23 bathroom that's in my office because I don't want them in
24 the safe available to anybody that has access to the safe.
25 You can only get to my notes by coming to my office, and

1 I'm sure that across the state there are a wide variety of
2 storage solutions that people have come to for notes.

3 CHAIRMAN BABCOCK: Yeah.

4 HONORABLE SARAH DUNCAN: And some may very
5 well be maintained.

6 CHAIRMAN BABCOCK: Remember, if we go the
7 76a route we're going to have stuff filed in the court and
8 the records generated for the management of the case, so
9 we're not back to the old definition of court records.

10 So Justice Gaultney and then Paula Sweeney.

11 HONORABLE DAVID GAULTNEY: The problem I'm
12 having is with the "court-generated" and then trying to
13 list every exception, "court-prepared" and then trying to
14 list every exception, because I could imagine all types of
15 documents or notes in our court that might fit within the
16 court-prepared, and how are we going to list every
17 exception?

18 I prefer the proposal that you made to
19 define new 76a what's in the file and then try to identify
20 the other documents that we want to list.

21 MR. LOW: I second that motion.

22 CHAIRMAN BABCOCK: Carlos.

23 MR. LOPEZ: Especially if -- is this
24 universe of documents that we're talking about right now
25 modified by the the adjudicatory function language or not?

1 And if not, would that possibly be a -- I mean, if it -- I
2 mean, if it's not related to the adjudicatory function
3 then who cares?

4 CHAIRMAN BABCOCK: Well, we could go back to
5 the clerk. You know, rather than saying "court
6 personnel," which broadens the number of people we touch,
7 we could go back to "clerk."

8 MR. LOPEZ: I have a real question about
9 these notes. I mean, if these notes are worth keeping in
10 a safe somewhere I'm wondering why people wouldn't have
11 access to them. I'm thinking doodling. I'm thinking
12 stuff like that. I'm just wondering what do we mean by
13 notes. We've talked about notes. Are these notes that
14 have something to do with the adjudicatory function of the
15 judge or not?

16 CHAIRMAN BABCOCK: I think Justice Duncan
17 was talking about when she's preparing an opinion she's
18 going to take some notes, maybe from oral argument, maybe
19 from reading cases.

20 HONORABLE STEPHEN YELENOSKY: We take notes
21 on the bench all the time.

22 MR. LOPEZ: But you don't put them in a safe
23 after the case is done.

24 HONORABLE STEPHEN YELENOSKY: I might say --
25 sometimes I will type up something for future reference

1 because --

2 MR. LOPEZ: I'm not -- that's not a
3 rhetorical question. Someone talked about whether they're
4 maintained or not.

5 HONORABLE STEPHEN YELENOSKY: They may be
6 maintained. I would hate to think that whether or not
7 somebody was going to get my thoughts depended on whether
8 or not somebody thought they were maintained, because if
9 they exist, in some sense they were maintained.

10 MR. LOPEZ: That's what I'm trying to say.

11 CHAIRMAN BABCOCK: Yeah, Mike.

12 MR. HATCHELL: Just let me make a comment or
13 two. The concept of court-created or clerk-created
14 documents is really more to the debate over whether or not
15 you should allow party-filed documents out on the
16 internet. That's where the whole concept comes from, and
17 we really seem to be beyond that concept, and we also
18 philosophically adopted the broadest concept of access
19 that we possibly could within reasonable limitation.

20 It may really now under that philosophy be
21 easier to throw bodies out of the boat rather than try to
22 build the boat bigger and figure who can't get in it. So
23 you would just really -- case record would be everything,
24 and it might just be easier to say what it's not, and I
25 think maybe we could do that a little simpler. What do

1 you-all think?

2 Because I think we have a pretty good idea
3 what it's not, but then when you start trying to define
4 court personnel, personnel-created, court-created
5 clerk-created, and then when you use a concept like manage
6 the case, well, what if it's to manage the court? I don't
7 know.

8 CHAIRMAN BABCOCK: Justice Duncan.

9 HONORABLE SARAH DUNCAN: You also -- the
10 clerk suggestion concerns me because I wouldn't -- I
11 certainly wouldn't want someone -- the clerk to want to
12 create a document, but if the clerk created the document
13 it would be accessible, but if I create it it's not, so
14 the clerk will just stand at my desk and instruct me how
15 to create this document so it be judge-created, which will
16 be exempt, but it ought to be accessible. When you start
17 classifying accessibility based on who created the
18 document you give people bad incentives.

19 CHAIRMAN BABCOCK: Yeah, Richard Munzinger.

20 MR. MUNZINGER: The whole problem seems to
21 me to be solved by saying if it's filed with the clerk
22 it's public and you get to it and you quit worrying about
23 whether it's her notes or judge's trial notes or anything
24 else.

25 CHAIRMAN BABCOCK: The way we got down this

1 road was we said, okay, we're going to define it like 76a
2 says if you file it in connection with a case then it's
3 included. Then somebody said, well, wait a minute, we
4 want to have indexes, calendars, dockets or register of
5 actions, so we want that stuff.

6 And then somebody said, well, that's too
7 specific because there may be some other stuff, and so
8 that's how we got to the broad language of records
9 generated by court personnel for the management of the
10 case. We can go anywhere we want. We can keep it real
11 broad like we have it now, or we can go back to specifying
12 these things that we've already identified as indexes,
13 calendars, dockets, or register of actions.

14 MR. MUNZINGER: My personal thought is that
15 the public's right to know is satisfied by having access
16 to the indicia material, the index, registers, and what
17 have you, and the materials that have been filed with the
18 court, the remainder of it is going to cause terrible
19 management problems to the courts, to their law clerks
20 that brief for them at the appellate level,
21 confidentiality matters. It's going to be a mess. Just
22 look at what's filed and go on about your business.

23 CHAIRMAN BABCOCK: Yeah. And I might add
24 that if there is some report that the clerk does that is
25 not an index, a calendar or a docket or a register of an

1 action, some other report, there is still a common law
2 right of access. It doesn't mean, unless we exempt it in
3 14.3(b), it doesn't mean that you couldn't also get that
4 report or document some other way, just not through this
5 rule.

6 MR. MUNZINGER: Well, this rule is only
7 applying to court records in cases involving civil
8 matters, and court record by definition is that in 76a
9 which is things -- documents of any nature filed in
10 connection with the matter, et cetera, so it wouldn't
11 apply to reports that the clerk were making to the
12 administrative offices of the courts or to the Supreme
13 Court or anything else. It wouldn't be something filed in
14 court.

15 CHAIRMAN BABCOCK: Carl and then Judge
16 Yelenosky.

17 MR. HAMILTON: Well, Rule 12 now gives us a
18 definition of what judicial records are that are
19 available, and I thought under the Rule 14 we're trying to
20 differentiate between general judicial records and what's
21 in a case file, and maybe that would be an easier way to
22 do it, leave the judicial records the generic stuff under
23 Rule 12 --

24 CHAIRMAN BABCOCK: Uh-huh.

25 MR. HAMILTON: -- and restrict 14 to case

1 file.

2 CHAIRMAN BABCOCK: Buddy.

3 MR. LOW: What if you just said like we do
4 now, and you said "plus administrative records that are
5 not protected by a statute or court order" or something
6 like that, and that would include all these administrative
7 things?

8 MR. MUNZINGER: Well, that's a judicial
9 record under 12.2(d).

10 CHAIRMAN BABCOCK: Judge Yelenosky.

11 HONORABLE STEPHEN YELENOSKY: Well, I
12 apologize if I'm going over something that's already been
13 asked because I've been back at the courthouse shredding
14 all my records. Just kidding.

15 (Laughter.)

16 CHAIRMAN BABCOCK: Would you show
17 "laughter"?

18 HONORABLE STEPHEN YELENOSKY: I guess I'm
19 not hearing at this point, maybe it was said while I was
20 gone, why you don't -- there is a bifurcation between
21 adjudicative and nonadjudicative, and nonadjudicative is
22 12. If it's adjudicative it's dealt with by 76a, it's
23 dealt with by what we're drafting here, and it's dealt
24 with by the Rules of Civil Procedure.

25 And so if you -- if what we're doing here

1 says it deals with everything that's filed, the stuff
2 that's not filed is probably stuff you want that's
3 nonadjudicative and should be dealt with under 12.

4 CHAIRMAN BABCOCK: I think we've got a
5 pretty good sense of this definition. Let's go on to the
6 next one, 14.2(d); and, Bill, I'll seed you the ground on
7 this one. Where do we find "compiled information"?

8 PROFESSOR DORSANEO: That was my question.
9 Where is it? Where is it in the rule?

10 CHAIRMAN BABCOCK: Where is "compiled
11 information" used in the rule? Lisa will search it.

12 MS. HOBBS: I have it in electronic form.
13 It is in -- well, it's in the definition of court-created
14 records. Let's see. It's -- well, "compiled information"
15 is in the "inquiry to requestor," which is now one of our
16 changed numbers.

17 MR. ORSINGER: (g).

18 MS. HOBBS: (g). And it's in the contract
19 provision under 14.10. And that's all I can find.

20 MR. ORSINGER: See, you just pointed out
21 that bulk distribution is now a restriction on what you do
22 with the information after you get it from the clerk,
23 because "prohibit the vendor from making bulk
24 distribution," now we're talking about after market
25 behavior.

1 CHAIRMAN BABCOCK: We'll get to that.

2 MR. MUNZINGER: Well, isn't the problem with
3 the definition of compiled information that we're
4 struggling with because of the words "and put in a
5 separate case record"?

6 HONORABLE TRACY CHRISTOPHER: You don't need
7 it.

8 MR. MUNZINGER: Given the original
9 definition of case record, I think what -- I wasn't a
10 member of that committee, but it seems to me what they
11 were thinking of here was that a clerk or someone else
12 removes a bunch of data from an existing single court --
13 bunch of single court records and puts them into some
14 other kind of a report, which is a collection of data
15 relating to material in other litigation, but at that time
16 it fell within the definition of case record. If you
17 struck and put in a separate case record, why would you
18 have a problem?

19 CHAIRMAN BABCOCK: It would -- compiled
20 information as it exists in 14.3(g) is not going to be a
21 problem because that's going to come out since we've
22 struck the bulk distribution rule, right?

23 MS. HOBBS: Uh-huh.

24 CHAIRMAN BABCOCK: So that's not an issue.

25 PROFESSOR DORSANEO: It looks like compiled

1 information is something compiled by the -- compiled by
2 the clerk rather than compiled in response to a request.
3 Like it's something already there.

4 HONORABLE TOM LAWRENCE: Sounds like that
5 ought to be something that's a Rule 12 matter, not a Rule
6 14.

7 MR. ORSINGER: Well, no, it could be that
8 they're trying to compile litigation records. Like I want
9 the petitions from all asbestos cases in Harris County.
10 That wouldn't be covered by Rule 12 because that -- the
11 pleadings are not covered by Rule 12, right?

12 PROFESSOR DORSANEO: Because of the
13 adjudicative information language, which is itself very
14 undefined.

15 HONORABLE NATHAN HECHT: Well,
16 correspondence about the cases or calendars.

17 PROFESSOR DORSANEO: We could define
18 "compiled information" easily enough, Mr. Chairman, just
19 by saying, "Compiled information means data that is
20 collected from more than one case." I don't know what
21 this language "and put in a separate case record" is all
22 about.

23 CHAIRMAN BABCOCK: Yeah. Let's defer
24 subparagraph (d).

25 PROFESSOR DORSANEO: And that does very much

1 copy bulk distribution's concept.

2 MR. GILSTRAP: Yeah. At that point bulk
3 distribution means distribution of compiled information.

4 CHAIRMAN BABCOCK: Yeah. Let's defer (d)
5 until we get farther down the road.

6 What about (e)? Somebody said that we
7 needed to limit "court" to exclude appellate courts.

8 PROFESSOR DORSANEO: We can either define it
9 by mentioning -- when I read it I thought it should say,
10 "Court means any tribunal created by the Constitution or
11 laws of the State of Texas," you know, period, if we're
12 meaning to include them all. If we're not meaning to
13 include them all and we're only talking about trial
14 courts, we could say, "including district courts, county
15 level courts, justice courts, and small claims courts," do
16 it like that. This way seems to be more ambiguous than it
17 needs to be because I don't know whether it's meant to
18 include appellate courts or not.

19 CHAIRMAN BABCOCK: Lisa, where are we at?
20 Are we looking for appellate courts here or not?

21 MS. HOBBS: Oh, I don't know.

22 CHAIRMAN BABCOCK: And you can't get your
23 computer to answer that one.

24 MR. LOPEZ: We would all be out of a job if
25 she could.

1 MS. HOBBS: I had not thought about it.

2 CHAIRMAN BABCOCK: Huh?

3 MS. HOBBS: I hadn't thought about it
4 before. I don't know, but the Judicial Council may have.

5 MR. LOW: Why would we do it? What if
6 somebody wanted to make a study on the Waco court?

7 HONORABLE TOM GRAY: Bring them on. They
8 have.

9 MR. LOW: Or how many opinions Justice Hecht
10 has written concerning this or that, or want to write an
11 article? Why can't they get access to that at the Supreme
12 Court?

13 CHAIRMAN BABCOCK: Well, I don't think there
14 was -- I don't think they would get access to it now.

15 HONORABLE NATHAN HECHT: Judicial Council is
16 including all the courts.

17 CHAIRMAN BABCOCK: So Judicial Council
18 wanted all the courts?

19 HONORABLE NATHAN HECHT: All the courts, top
20 to bottom.

21 MR. ORSINGER: But the truth is almost --

22 HONORABLE NATHAN HECHT: Expand all that.

23 MR. ORSINGER: You don't have the need for
24 bulk access to Texas Supreme Court decisions because they
25 usually will decide one or two cases in an area and then

1 they don't have thousands of them, and most of what they
2 do is either secret or it's totally available to
3 everybody.

4 CHAIRMAN BABCOCK: Let's talk about a
5 definition right now, Richard. Are we going to include
6 all the courts or just the trial courts?

7 MR. ORSINGER: Okay. Well, the appellate
8 courts are transparent except the stuff that's required by
9 law to be secret, so if it's trouble including them I
10 think we could not worry about -- the Supreme Court is
11 already putting their opinions on the internet and now
12 they're starting to put their briefs on the internet, so
13 what else is there?

14 MR. LOW: What does it look like if we pass
15 a rule and we say only that? I mean, that looks like
16 we've got something to hide with the court of appeals or
17 Supreme Court.

18 MR. DUGGINS: Don't forgot we're talking
19 about setting up some guidance for the clerks of various
20 courts on electronic access and how to charge, use
21 agreements, all that, and I think you should include them.

22 CHAIRMAN BABCOCK: Yeah. Okay. Tom makes
23 the point -- Judge Lawrence makes the point that municipal
24 court is kind of out of place here because they only have
25 criminal jurisdiction.

1 MR. ORSINGER: But you have to except them,
2 not scratch them, because they are created under the
3 Constitution or law, so you must say "except."

4 CHAIRMAN BABCOCK: Yeah. Why was the
5 inclusion of JP and small claims? Wouldn't JP and small
6 claims be included as it's been created?

7 HONORABLE TOM LAWRENCE: Well, I think you
8 could solve that problem. A justice of the peace by
9 definition presides over small claims court. I think if
10 you just said "including justices of the peace" you could
11 then delete "and small claims court."

12 PROFESSOR DORSANEO: Well, why do you need
13 to say that? You're under the Constitution.

14 CHAIRMAN BABCOCK: Yeah.

15 HONORABLE TOM LAWRENCE: Well, that's fine.

16 MR. ORSINGER: Can't you just say "except
17 municipal courts"?

18 HONORABLE SARAH DUNCAN: Why do you need to
19 say that? If they don't do civil cases, they're not going
20 to have any civil records.

21 CHAIRMAN BABCOCK: Yeah. Why don't we just
22 put a period after "Texas"?

23 HONORABLE TERRY JENNINGS: Do we need a
24 definition of "court"?

25 MR. ORSINGER: Yeah, because almost

1 everybody here thought it didn't include appellate courts.

2 CHAIRMAN BABCOCK: You might, just so that
3 there is no dispute about the fact that appellate courts
4 are covered here.

5 Okay. Let's go to (f), "Court-created
6 record." Now, do we use that phrase? Lisa, where do we
7 use that phrase?

8 MS. HOBBS: Now I can look at my computer?

9 CHAIRMAN BABCOCK: Yes. Now you can look at
10 your computer.

11 MR. ORSINGER: May I make a general comment
12 about that?

13 CHAIRMAN BABCOCK: Yes.

14 MR. ORSINGER: To me a court-created record
15 is a subdivision of a court record.

16 HONORABLE SARAH DUNCAN: Yes.

17 MR. ORSINGER: And it differentiates the
18 things that parties prepare and file or intervenors or
19 whatever and what the court generates on its own, and what
20 the court generates on its own probably is more
21 susceptible to dissemination under most philosophies than
22 information that's prepared by people and filed, maybe
23 against their will and under a court order.

24 It seems to me like this ought to be a
25 subdivision of court records, and it ought to be the

1 things that the court and the personnel create, and they
2 should have them separately on some issues.

3 CHAIRMAN BABCOCK: Okay. Where is it?

4 MS. HOBBS: The only place we use
5 "court-created case records" is in -- sorry, when we're
6 talking about exclusions from remote access, so in
7 14.4(c)(v). The Family Code proceedings.

8 CHAIRMAN BABCOCK: (c), 14.4(c).

9 MR. ORSINGER: (v) as in victor.

10 CHAIRMAN BABCOCK: (v) as in victor.

11 MR. ORSINGER: Little Roman numeral five is
12 what that means.

13 HONORABLE STEPHEN YELENOSKY: You don't use
14 court-created report in the one I was talking about this
15 morning, but it's the same concept. So you say "of judges
16 and court personnel" in 14.4(c)(vi), or yeah, (vi). There
17 are two sixes. It's the first (vi).

18 CHAIRMAN BABCOCK: If that's the only place
19 we use it, the only place we use court-created record is
20 in an exemption, why are we doing it?

21 MR. LOW: Right.

22 HONORABLE SARAH DUNCAN: Because we want
23 to -- we want the net to pull in all the court-created
24 records, but then there are some records we don't want you
25 to have remote access to. Some court-created records

1 we're going to exempt from any access.

2 MR. ORSINGER: That's a philosophical
3 question. Do you want all of the client-filed or
4 party-filed family law information to be available for
5 internet access or not? That's why that definition is
6 important.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE TRACY CHRISTOPHER: Let's put it
9 in the exception rather than a definition that's only used
10 once.

11 CHAIRMAN BABCOCK: Right. Justice
12 Christopher could you say that louder?

13 HONORABLE TRACY CHRISTOPHER: My suggestion
14 was that we put it where we discuss family cases rather
15 than putting it up here in the definition if that's the
16 only place that it's used.

17 HONORABLE SARAH DUNCAN: But then you don't
18 pull in all those records into the general definition of a
19 case record and make them accessible other than remotely.

20 HONORABLE TRACY CHRISTOPHER: It's in the --

21 PROFESSOR DORSANEO: Mr. Chairman?

22 CHAIRMAN BABCOCK: Yes.

23 PROFESSOR DORSANEO: Aren't we going to when
24 we get to this remote thing make it applicable to walk-in
25 customers, too? I mean, if we have -- I thought that's

1 where we were going to say that like the notes,
2 unpublished or unfiled notes, weren't going to be
3 accessible, period.

4 HONORABLE STEPHEN YELENOSKY: I thought that
5 was going in the definition or --

6 PROFESSOR DORSANEO: And --

7 HONORABLE STEPHEN YELENOSKY: Isn't that
8 taken care of if we go with "file," in the "court records"
9 definition?

10 CHAIRMAN BABCOCK: We -- yeah, as I
11 understand the concept, is that we were going to take a
12 narrow category of sensitive data and prospectively we
13 were going to prohibit that sensitive data from being
14 placed in pleadings, and as a trade-off for that we were
15 going to make public and internet access coextensive.
16 That's what I understood was happening there.

17 PROFESSOR DORSANEO: But won't it be the
18 case that you can't get these notes and probably some
19 other things regardless of whether you walk in or access
20 remotely?

21 CHAIRMAN BABCOCK: When you say the notes,
22 are you talking about the sensitive data form?

23 MR. ORSINGER: No. He's talking about the
24 judge's --

25 PROFESSOR DORSANEO: No. I'm talking about

1 the judge's notes, I'm talking about the reports done in
2 the courts of appeals that I don't get to see about how
3 the case is going.

4 HONORABLE STEPHEN YELENOSKY: That's why
5 it's important to define it as filed, because notes aren't
6 filed.

7 CHAIRMAN BABCOCK: They're not available
8 now, are they?

9 MR. ORSINGER: No.

10 HONORABLE STEPHEN YELENOSKY: No, but why do
11 you need that? Didn't we agree you have to define "case
12 records" so it doesn't include that by one means or
13 another? I thought that was what was conceded early on
14 today.

15 CHAIRMAN BABCOCK: Right. And I thought we
16 crossed that bridge by defining it as stuff that was
17 filed --

18 HONORABLE TRACY CHRISTOPHER: Right.

19 HONORABLE STEPHEN YELENOSKY: Right.

20 CHAIRMAN BABCOCK: -- and maybe some other
21 stuff that we're not worried about.

22 HONORABLE STEPHEN YELENOSKY: And we don't
23 need it later on where we started -- or I started this
24 morning because it will already have been defined away.

25 HONORABLE TRACY CHRISTOPHER: Right.

1 HONORABLE STEPHEN YELENOSKY: So you won't
2 need it in the remote access portion because it's been
3 dealt with in the definitions.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE SARAH DUNCAN: But you have to
6 remember that this rule covers two different types of
7 access. It covers access when you walk into the
8 courthouse and you ask to see a file, and it covers remote
9 access when you're sitting at your computer in Australia.

10 The reason for that exception to the family
11 law records is that if it's not, for instance, an opinion
12 of the Supreme Court in a family law matter, court-created
13 record, we don't want the family law case records
14 available to the person sitting at their computer in
15 Australia. Isn't that right, Lisa Hobbs?

16 MS. HOBBS: That's the intent.

17 HONORABLE SARAH DUNCAN: That's the idea of
18 that provision, but you just have to remember that this
19 rule is trying to cover both you walk into the courthouse
20 and you ask for a copy of something and you're sitting at
21 your computer in Australia and you're going to get it.

22 CHAIRMAN BABCOCK: Let me -- I hadn't
23 realized exactly what was happening until what you just
24 said. Tell me what under this rule is available on the
25 computer in Australia in a family law case, prospectively.

1 HONORABLE SARAH DUNCAN: Court-created case
2 records.

3 CHAIRMAN BABCOCK: And what is that? Could
4 I get the pleadings?

5 HONORABLE SARAH DUNCAN: No. Those are not
6 court-created.

7 CHAIRMAN BABCOCK: Okay. You can't get the
8 petition. You can't get the answer. Can you get the
9 orders of the court as they --

10 HONORABLE SARAH DUNCAN: Yes.

11 CHAIRMAN BABCOCK: -- march along? What
12 else? Anything else?

13 HONORABLE SARAH DUNCAN: Judgments and
14 opinions of the court.

15 PROFESSOR DORSANEO: Why do you make this
16 distinction? What difference does it make?

17 HONORABLE SARAH DUNCAN: I think we
18 inherited it.

19 PROFESSOR DORSANEO: So carve them out.
20 What difference does it make whether you carve them out
21 for people who walk in the door or people who are doing it
22 by long distance? One would think you would want to
23 encourage people to do it by long distance rather than
24 walking in the door.

25 HONORABLE SARAH DUNCAN: I think we actually

1 inherited the distinction, but my understanding is that
2 there are -- and I wanted to make this point this morning,
3 there are uses of family law case information that we
4 would all agree are illegitimate; and we want to protect,
5 particularly children, that are involuntarily involved in
6 Family Code cases. My Chair is nodding.

7 PROFESSOR DORSANEO: This is kind of a crude
8 mechanism to do this because we're protecting them from
9 Australians and maybe people in Midland.

10 MR. ORSINGER: It's what they call practical
11 obscurity. It's available to the public, but it's not too
12 easily available so that it's restricted, but it doesn't
13 deny total access.

14 CHAIRMAN BABCOCK: This here is at odds with
15 the general philosophy of making prospectively computer
16 access and public access, walk-in access, coextensive.

17 MR. ORSINGER: That's true. And there are
18 some people that feel like the exception is warranted when
19 you're dealing with intrafamily personal matters involving
20 parent-child relationships, allegations of sexual abuse,
21 spousal abuse, neglect.

22 CHAIRMAN BABCOCK: All those things.

23 MR. ORSINGER: All those things that certain
24 newspapers want to get their hands on.

25 PROFESSOR DORSANEO: This is like when you

1 want to get a learner's permit for your 15-year-old you've
2 got to fill in 18 forms and get them all notarized,
3 because they don't really want to give you a learner's
4 permit. Well, if that's practical obscurity, you can put
5 a label on it, but it's a stupid idea. If we don't want
6 people to have it, we ought to say they can't have it.

7 CHAIRMAN BABCOCK: How do you feel about
8 that, Bill?

9 PROFESSOR DORSANEO: Well, I was listening
10 to Richard, and I thought he was praised for that kind of
11 talk and so I just --

12 MR. ORSINGER: If I'm praised it's in mock
13 admiration.

14 CHAIRMAN BABCOCK: Judge Yelenosky.

15 HONORABLE STEPHEN YELENOSKY: Well, that
16 speaks to Roman numeral (v), case records exceptions, and
17 I was speaking to (vi), and (vi) is the draft, and (vi) is
18 philosophical. I was saying (vi) goes away because of how
19 we define case records. But I wanted to add, on the
20 definition of court-created records about the first two
21 lines are a definition and thereafter you have a list of
22 various forms in which a case record might exist, which
23 are not unique to court-created records, so I don't know
24 why it's there. If it needs to be there at all it should
25 be in the definition of case records.

1 CHAIRMAN BABCOCK: The only place that
2 court-created record still exists in our rule as we go
3 through it is with respect to the exclusion from remote
4 access, which is Family Code proceedings, right, Lisa?

5 MS. HOBBS: Uh-huh.

6 CHAIRMAN BABCOCK: Okay. So that's the only
7 place we're talking about it.

8 HONORABLE STEPHEN YELENOSKY: Right. And
9 I'm just saying if you're going to use it, which you may
10 not need to, it seems to me you only need the first line
11 or two. The rest of it is "regardless of the physical
12 form of the record," blah-blah-blah-blah-blah, I mean, if
13 we need that, we need that for the definition of case
14 record, don't we?

15 CHAIRMAN BABCOCK: Justice Gaultney and then
16 Bonnie.

17 HONORABLE DAVID GAULTNEY: I would argue we
18 don't need the definition because it is only used in the
19 exemption; that is, we start off by knowing that we're
20 looking at case records in a Family Code proceeding. We
21 define case records as being filed documents, basically,
22 so we know that within those documents that are filed
23 there is a court-created document, and I'm not sure we
24 need to define what -- beyond that what it is. An order.
25 But the definition that we do have under (f) on the first

1 page essentially defines a court-created record as one
2 created by a court.

3 CHAIRMAN BABCOCK: Okay.

4 HONORABLE DAVID GAULTNEY: So I would argue
5 we don't need the definition. It's self-evident from the
6 exemption what you're talking about.

7 HONORABLE TRACY CHRISTOPHER: Right.

8 HONORABLE DAVID GAULTNEY: Once you've got
9 the definition of case record.

10 CHAIRMAN BABCOCK: Bonnie.

11 MS. WOLBRUECK: I guess I'm a little bit
12 concerned talking about exclusions. The way the rule is
13 written right now it talks about case records, which was
14 all of these papers that were filed with the clerk are
15 excluded in a family case, except the indexes and the
16 judgment and the order and notices and the minutes of the
17 court, so that's all of the orders in the line are open
18 for the public on remote access. And so if you take the
19 court-created out and you take that exemption out then you
20 need to clarify then is anything in family law then -- 80
21 percent of our case load is not open for the public
22 anywhere except for walk-ins?

23 HONORABLE SARAH DUNCAN: Well, you can't --
24 in line with what Bonnie was saying, I don't think you can
25 say that opinions, judgments, and orders in family law

1 cases aren't available remotely.

2 CHAIRMAN BABCOCK: Right. There's a
3 constitutional decision on that.

4 MR. ORSINGER: Right.

5 CHAIRMAN BABCOCK: Article I, section 8.

6 MR. ORSINGER: Well, this rule doesn't
7 propose that, does it?

8 CHAIRMAN BABCOCK: No, it doesn't, but
9 here's where we are today. If I want to walk into a
10 family court I can walk in and say, "I want to see Jones
11 vs. Jones. And I want to see the pleadings, I want to see
12 the orders and judgments, I want to see the file."

13 Now, the judge might say, "Well, you can see
14 it except there are certain matters that have been placed
15 under seal, and you can't see that," and that's okay under
16 76a because 76a exempts family law matters, right? So
17 there are some safeguards for family law cases where you
18 have stuff under seal without the restrictions of 76a, but
19 I can walk in there and get it.

20 MR. DUGGINS: Except in Harris County.

21 CHAIRMAN BABCOCK: Except in Harris County?
22 Why can't you do it in Harris County?

23 MR. DUGGINS: You have to be a party.

24 MR. WILDER: They have some bracketed
25 legislation.

1 MR. ORSINGER: Don't tell Chip that. He's
2 going to try to take it away.

3 MR. LOPEZ: That's a whole other story.

4 CHAIRMAN BABCOCK: Okay. Except for Harris
5 County. So now you're going to --

6 HONORABLE TOM LAWRENCE: We've got somebody
7 from Harris County here from the clerk's office.

8 CHAIRMAN BABCOCK: What?

9 MR. LEMON: No, you can walk in and see
10 family law cases in Harris County.

11 MR. WILDER: I thought you guys were holding
12 them for 30 days.

13 MR. ORSINGER: Yeah. They're talking about
14 soliciting within the -- there was a lawyer who was
15 soliciting divorce clients by saying, "Your spouse has
16 filed a divorce, come hire me" and frequently there were
17 TROs and protective orders that were out trying to be
18 executed, and they would go underground, couldn't get
19 served, so the Legislature fixed that law practice by
20 bracketing Harris County.

21 CHAIRMAN BABCOCK: So by the time I get here
22 from Australia I can see the records even in Harris
23 County. So the question on the floor is should we further
24 exclude the family court files from public access over
25 the -- from public access by denying access on the

1 internet? Sarah.

2 HONORABLE SARAH DUNCAN: I would like to
3 speak contrary to what Bill said. I think it's just like
4 Fluffy was saying this morning -- it's kind of hard to say
5 "Fluffy."

6 HONORABLE STEPHEN YELENOSKY: We can't hear
7 you.

8 HONORABLE SARAH DUNCAN: It's like -- I
9 think that excepting everything other than court-created
10 case records in family law cases is a brilliant idea,
11 contrary to Bill, and it's like something Fluffy was
12 saying this morning, against what she was saying. The
13 whole problem with remote access is how easy it makes it,
14 and the practical obscurity has worked fairly well in most
15 cases most of the time, but once you start putting all of
16 the stuff on the internet and make it instantly available
17 to anyone anytime, I think what we're going to end up
18 seeing is even more than bracketed legislation for Harris
19 County.

20 You're going to see closed, sealed files in
21 every family law case, and if that's what you want then
22 just say, you know, don't except out family law cases.
23 And I think that would be a reasonable legislative
24 response if we don't except out family law cases. There
25 is some awful, awful stuff filed in family law cases that

1 there is no legitimate use for. None.

2 CHAIRMAN BABCOCK: Okay. I think that we
3 can move ourselves way far down the road if we take a vote
4 on whether or not we should accept the subcommittee's
5 recommendation that family law cases be excluded from
6 internet access with the exception of court-created case
7 records or not. So everybody who is in favor of excluding
8 family law proceedings other than court-created case
9 records, raise your hand.

10 HONORABLE SARAH DUNCAN: You said it was a
11 stupid idea.

12 PROFESSOR DORSANEO: To do it differently.
13 I would exclude them altogether.

14 HONORABLE SARAH DUNCAN: Even opinions?

15 PROFESSOR DORSANEO: No.

16 CHAIRMAN BABCOCK: All those opposed?

17 PROFESSOR DORSANEO: I wouldn't let the
18 Australian walk in.

19 (Laughter.)

20 CHAIRMAN BABCOCK: By a vote of 21 to 3 the
21 family law exclusion, internet access for family law
22 proceedings other than court-created case records passes,
23 so the way the subcommittee wanted it, Sarah's idea.

24 HONORABLE SARAH DUNCAN: It wasn't my idea.

25 CHAIRMAN BABCOCK: Dorsaneo's idea.

1 MR. DUGGINS: Should we then move the
2 definition of court-created record over to exclusions?

3 CHAIRMAN BABCOCK: I think so.

4 MR. DUGGINS: Yeah.

5 CHAIRMAN BABCOCK: I think so, and shorten
6 it maybe a little bit to make it clearer.

7 Okay. Next definition, "A case record is in
8 electronic form if the case record is readable through the
9 use of an electronic device, regardless of the manner in
10 which the record was originally created." Anybody have
11 any problem with that definition?

12 MR. GILSTRAP: Do we use it?

13 CHAIRMAN BABCOCK: Yeah, do we use the
14 definition anywhere?

15 MR. LOW: No, but it sounds good.

16 MR. ORSINGER: A PDF file would be
17 electronic form, even though technically it's not.

18 MR. GILSTRAP: It means a written piece of
19 paper is an electronic form.

20 HONORABLE STEPHEN YELENOSKY: Yeah.

21 HONORABLE TRACY CHRISTOPHER: What does it
22 add?

23 MR. DAWSON: Why do we need it?

24 MR. GILSTRAP: We're seeing if they use it.

25 MS. HOBBS: When we talk about pleading,

1 sensitive information, like using the SDS form, sorry,
2 sensitive data form, we say that "Pleadings, whether filed
3 in written or in electronic form shall not include
4 sensitive data."

5 PROFESSOR CARLSON: Anywhere else?

6 MS. HOBBS: No. That's the only place we
7 use it.

8 CHAIRMAN BABCOCK: Bill, does that rise to
9 the level of a definition?

10 PROFESSOR DORSANEO: Could you say that
11 again?

12 MS. HOBBS: When we talk about that a party
13 cannot put sensitive data in their pleadings, we say
14 "whether filed in written or in electronic format."

15 HONORABLE SARAH DUNCAN: 14.5.

16 MS. HOBBS: 14.5.

17 HONORABLE SARAH DUNCAN: Page five.

18 MR. ORSINGER: I don't see the distinction
19 is necessary. If it's barred from pleadings it doesn't
20 matter if it's faxed or mailed or hand-delivered or
21 e-mailed.

22 MR. DUGGINS: Say "regardless of how filed."

23 HONORABLE SARAH DUNCAN: Just take it out.
24 Take out that phrase on page five and delete the
25 definition.

1 CHAIRMAN BABCOCK: Yeah. Where is the
2 definition? Where is the phrase used on page five?

3 PROFESSOR CARLSON: 14.5(c).

4 HONORABLE SARAH DUNCAN: (c).

5 CHAIRMAN BABCOCK: Okay. (h), "Remote
6 access means the ability of a member of the general public
7 to search, inspect, or copy information in a court record
8 by internet or other electronic connection." Where do we
9 use that? Well, we use that in a bunch of places, don't
10 we?

11 MS. HOBBS: Do you know where it was?

12 CHAIRMAN BABCOCK: 14.4 we use it. That's
13 the whole section. So this is worthy of discussion,
14 right, Bill?

15 PROFESSOR DORSANEO: Yes. What about mail?
16 Can the Australian just say, "Send me all the records"?

17 MR. ORSINGER: Well, all we're purporting to
18 address here is electronic, remote electronic access.
19 We're not saying -- this definition does not include
20 putting it on a CD and mailing it. As I understand this,
21 this means I get on the computer and I hook up somehow and
22 I see what's in your computer.

23 PROFESSOR DORSANEO: So this is -- I think
24 there may be good reason to be hostile to computer geek
25 people, but --

1 CHAIRMAN BABCOCK: Now, now.

2 MR. ORSINGER: You mean young people?

3 PROFESSOR DORSANEO: Yes. Which in my case
4 includes lots of different people.

5 MR. GILSTRAP: People who aren't ignorant.
6 That was what was said this morning.

7 CHAIRMAN BABCOCK: Okay, Carl.

8 MR. HAMILTON: I don't think you need that
9 phrase, "the ability of a member of the general public to
10 search" in there. I think remote access means "inspection
11 or copying information and court records by internet or
12 other electronic connection."

13 MR. LOW: It's the ability to do that.

14 MR. HAMILTON: Access doesn't mean ability.
15 Access means access.

16 CHAIRMAN BABCOCK: Okay. Would you say
17 "remote access means searching, inspecting, or copying"?

18 MR. HAMILTON: Yeah, something like that.

19 HONORABLE SARAH DUNCAN: I'd add "printing."

20 CHAIRMAN BABCOCK: Huh?

21 HONORABLE SARAH DUNCAN: "Printing."

22 MR. MUNZINGER: Did you drop the language
23 "member of the general public"?

24 CHAIRMAN BABCOCK: Yeah. You want to add
25 "copying or printing"?

1 HONORABLE SARAH DUNCAN: Uh-huh.

2 CHAIRMAN BABCOCK: Okay. The section now
3 reads, "Remote access means searching, inspecting,
4 copying, or printing information in a court record by
5 internet or other electronic connection."

6 PROFESSOR DORSANEO: Mr. Chairman?

7 CHAIRMAN BABCOCK: Yes.

8 PROFESSOR DORSANEO: Does this mean that --
9 does it or does it not mean that you could from Australia
10 e-mail the clerk and say, "I want this information"?
11 Can't?

12 HONORABLE SARAH DUNCAN: That's not
13 searching, inspecting, copying, or printing.

14 PROFESSOR DORSANEO: That's not remote
15 access?

16 MR. ORSINGER: No. It's no different from
17 calling him on the phone, walking in the front door, or
18 sending him a letter.

19 PROFESSOR DORSANEO: All right. So calling
20 on the phone, e-mailing, walking in the front door,
21 anything goes, but use your computer, you can't do that?

22 MR. ORSINGER: Use your --

23 HONORABLE STEPHEN YELENOSKY: Chip?

24 MR. ORSINGER: Directly connecting from your
25 computer.

1 HONORABLE SARAH DUNCAN: You're actually
2 looking at the documents or the videotapes or whatever is
3 in the record.

4 HONORABLE STEPHEN YELENOSKY: Should you
5 take out "member of the general public" if you're going to
6 have this apply to the court's -- the judge's access
7 electronically, and you don't want it to apply to that
8 because right now we have access to confidential, or we
9 will soon. We already have access to the files online.

10 CHAIRMAN BABCOCK: You want to add the
11 phrase at the end of it then "by the general public"? And
12 Carl's point was grammatical to a certain degree.

13 MR. MUNZINGER: Well, but don't you --
14 couldn't you cover that in 14.4(a) where you're talking
15 about "Remote access permitted"?

16 CHAIRMAN BABCOCK: Yeah. Uh-huh.

17 HONORABLE TRACY CHRISTOPHER: Yes.

18 PROFESSOR DORSANE0: I'm still trying to get
19 the idea of what remote access is.

20 CHAIRMAN BABCOCK: Okay.

21 PROFESSOR DORSANE0: Is remote access
22 something that you do without asking the clerk?

23 CHAIRMAN BABCOCK: Sure.

24 PROFESSOR DORSANE0: So I think that ought
25 to be in the definition, that remote access means that

1 you're actually searching the files without making any
2 kind of a request for the information, so you're outside
3 this whole process.

4 MR. ORSINGER: It says "by internet or other
5 electronic connection," so that means you have to dial up
6 their website or you have to dial up their modem. It goes
7 I think without further explanation.

8 HONORABLE SARAH DUNCAN: You don't --

9 MR. ORSINGER: Doesn't it?

10 HONORABLE SARAH DUNCAN: You may or may not
11 have to ask permission to access any given website, and
12 what we're saying is if you do it by the internet or other
13 electronic connection, you are remotely accessing a case
14 record.

15 MR. DUGGINS: Whether you do it from your
16 home or a computer at the clerk's office.

17 HONORABLE TRACY CHRISTOPHER: No, no, no.
18 That is what I have been raising my hand about down here.
19 The computer at the clerk's office is public access. It's
20 not remote access.

21 MR. DUGGINS: I disagree. That's written
22 that that is remote access.

23 HONORABLE TRACY CHRISTOPHER: Well, it
24 shouldn't be, though, because our files are going to be
25 maybe in five years all electronic. There will be no

1 paper files to look at. The only way the public could
2 come and look at a file is through the computer journal.

3 MR. DUGGINS: It's still remote access.

4 HONORABLE SARAH DUNCAN: That's precisely
5 why it has to be remote access.

6 HONORABLE TRACY CHRISTOPHER: Oh, I don't
7 agree at all. I mean, the public couldn't look at the
8 file. Everything is going to be sealed. Why are we
9 having public access versus remote access?

10 MR. MUNZINGER: Well, his point is to change
11 the definition to accommodate your concern.

12 HONORABLE TRACY CHRISTOPHER: I want to
13 exempt that and you don't.

14 CHAIRMAN BABCOCK: Justice Duncan.

15 HONORABLE SARAH DUNCAN: No. If what you're
16 talking about is if I bother to drive down to the
17 courthouse --

18 HONORABLE TRACY CHRISTOPHER: Right.

19 HONORABLE SARAH DUNCAN: -- then I get to
20 see all the sensitive data forms.

21 HONORABLE TRACY CHRISTOPHER: No. Sensitive
22 data is totally blocked.

23 HONORABLE SARAH DUNCAN: And I can see all
24 of the non-court-created documents in the Family Code
25 case. No, they shouldn't be exempted.

1 HONORABLE TRACY CHRISTOPHER: There's a
2 difference between 14.3 and 14.4. One is public access,
3 one is remote access. A computer that's down at the
4 court's office should be public access because it will be
5 the only public access to records in a few years.

6 HONORABLE SARAH DUNCAN: But it shouldn't
7 have access to all records.

8 HONORABLE STEPHEN YELENOSKY: Well, if it
9 doesn't then you have to have public access in a few
10 years.

11 CHAIRMAN BABCOCK: No, I think that, Sarah,
12 you're right if there's no difference between what you can
13 see at the courthouse and what you can see on the
14 internet.

15 HONORABLE TRACY CHRISTOPHER: But we're
16 making a difference.

17 CHAIRMAN BABCOCK: But we are making a
18 difference. We just got finished making a difference by a
19 vote of 21 to 3, so Judge Christopher is right about it at
20 least to the extent of the family law records in Harris
21 County in the future when everything is computerized,
22 because what you would say is she -- yeah, she can go down
23 and look at the family law records at the courthouse so
24 long as she doesn't use the computer.

25 HONORABLE SARAH DUNCAN: Right.

1 CHAIRMAN BABCOCK: But that's the only way
2 you can look at them five years from now because they're
3 all computerized. There's no paper.

4 HONORABLE TRACY CHRISTOPHER: Right. And
5 that has to be public access.

6 MS. WOLBRUECK: Yes.

7 MR. LOPEZ: Buddy has his hand up over here.

8 MR. LOW: That's remote access. If you're
9 in another town and you want to look through a computer,
10 that's remote, but if you go down to Houston to get it on
11 the computer it's direct access? I mean, what's the
12 difference?

13 HONORABLE STEPHEN YELENOSKY: Well, the
14 distinction is you've got to fly from Australia.

15 CHAIRMAN BABCOCK: That was Judge
16 Christopher's point.

17 HONORABLE TRACY CHRISTOPHER: Well, I mean,
18 we haven't gone to the larger question of whether it
19 should be different between public access and remote
20 access, but if we're going to have two different things, a
21 computer at the courthouse or a -- you know, a court clerk
22 computer at another location, it should fall under public
23 access, not remote access.

24 CHAIRMAN BABCOCK: Yeah. I think that may
25 reveal itself more clearly when we get into 14.3 and 14.4.

1 Yeah, Judge Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: Well, Sarah,
3 isn't your concern that the practical obscurity of going
4 down to the clerk's office and requesting files one by one
5 is greater than the practical obscurity of going down to
6 the clerk's office and getting on the computer there and
7 maybe being able to search many, many cases at a time?

8 So it seems to me you've got three levels.
9 You have two different levels of practical obscurity and
10 then you've got remote access, and I don't know that we
11 want to start trifurcating things, but at the very least
12 if the only access point is a computer then the one at the
13 courthouse has to be as open as it is now.

14 CHAIRMAN BABCOCK: Okay. Well, let's keep
15 going, but put an asterisk by this definition because I
16 think we may need to tweak it some.

17 "Vendor," where is "vendor" used? I think
18 it's late in the rule, isn't it?

19 MR. HATCHELL: Right at the end.

20 CHAIRMAN BABCOCK: Right at the end.
21 "Contracts with vendors providing information technology
22 services."

23 HONORABLE TRACY CHRISTOPHER: What about a
24 private agency? Like --

25 CHAIRMAN BABCOCK: Why were private

1 companies excluded there?

2 MR. HATCHELL: Well, first of all, this says
3 "includes," so I don't know that they were necessarily
4 excluded. This is an inherited definition, and we didn't
5 feel that we had the authority to just make it disappear.

6 CHAIRMAN BABCOCK: Well, I bet this whole
7 committee can make it disappear.

8 HONORABLE TOM GRAY: Was that a motion?

9 CHAIRMAN BABCOCK: Yeah, that's a motion.

10 HONORABLE TOM GRAY: Second.

11 CHAIRMAN BABCOCK: I mean, we all know what
12 a vendor is, right?

13 PROFESSOR DORSANEO: Well, I would say take
14 out "vendor" and put in 14.10 who we're talking about. It
15 makes me work too hard. I think I know what vendor means
16 when I look at the word, but --

17 CHAIRMAN BABCOCK: Right.

18 PROFESSOR DORSANEO: -- it doesn't mean
19 that. It means how it's defined.

20 CHAIRMAN BABCOCK: Anybody opposed to taking
21 "vendor" out of the definition, and we'll work on it if we
22 need to, and I don't think we need to, when we get to
23 1410, 14.10?

24 14.3, "Public access to court records."

25 MR. GILSTRAP: Chip.

1 CHAIRMAN BABCOCK: Sir?

2 MR. GILSTRAP: We were going to do something
3 at 3:00.

4 CHAIRMAN BABCOCK: Excuse me?

5 MR. GILSTRAP: Are we going to switch topics
6 at 3:00 o'clock in five minutes?

7 CHAIRMAN BABCOCK: I don't know. Bill, do
8 you need the full two hours?

9 PROFESSOR DORSANEO: No. I think I need 30
10 minutes.

11 CHAIRMAN BABCOCK: Yeah. So, no, we're not.

12 PROFESSOR DORSANEO: But I'm probably
13 underestimating the amount of information the committee
14 wants to provide.

15 MR. GILSTRAP: Bill may need 30 minutes, but
16 the rest of the committee may need more.

17 CHAIRMAN BABCOCK: Bill's mind is so much
18 quicker than all of ours collectively. Well, let's keep
19 going on this for a little bit.

20 14.3, "Public access to court records."
21 Buddy.

22 MR. LOW: That was what Bonnie raised, and
23 it's not clear whether what it's saying is that no rule or
24 nothing can exempt in these three situations, but the way
25 it's written is the question of what modifies what. Is it

1 an action by or is it limited by? In other words, what --
2 you cannot limit to the following any record or so forth.
3 In other words, no rule or anything can limit access to a
4 party or -- to a party, criminal justice agency, or other
5 person entitled to access by court order, but the way it's
6 written you can't tell that that's what it's saying.

7 CHAIRMAN BABCOCK: Justice Duncan.

8 HONORABLE SARAH DUNCAN: The further related
9 problem, this is only under the public access part of the
10 rule. It's not under the remote access. I just think
11 neither (i), (ii), (iii) and (b) needs to be moved up
12 before 14.3 into 14.2, and 14.3 --

13 PROFESSOR DORSANEO: What's the main thought
14 here in this mess?

15 HONORABLE SARAH DUNCAN: And in "exemption
16 for discovery materials," "Exemption for discovery
17 materials and non-adjudicative records" and whatever else
18 we add to that also needs to be in a separate global
19 provision that will cover both public access and remote
20 access.

21 CHAIRMAN BABCOCK: Okay.

22 HONORABLE SARAH DUNCAN: And there may be
23 some more, but those are just structural things that could
24 be done.

25 CHAIRMAN BABCOCK: All right.

1 MR. GILSTRAP: Chip?

2 CHAIRMAN BABCOCK: Frank.

3 MR. GILSTRAP: Am I clear, juvenile
4 proceedings are out? What about parental termination
5 proceedings? Are they covered by this rule?

6 HONORABLE SARAH DUNCAN: Yes.

7 MR. GILSTRAP: Well, does a party to the
8 action have a right to see everything in a parental
9 termination proceeding? I don't know. I'm just thinking
10 that there may be --

11 HONORABLE SARAH DUNCAN: Yes.

12 CHAIRMAN BABCOCK: Justice Duncan says
13 "yes."

14 MR. GILSTRAP: Okay.

15 PROFESSOR DORSANEO: Mr. Chairman?

16 CHAIRMAN BABCOCK: Yes.

17 PROFESSOR DORSANEO: This needs to be
18 rewritten so that the main thought is at the beginning and
19 then proceeds along those lines. I really can't tell
20 exactly what this means, although I think I can get
21 reasonably close. Maybe the drafters don't need any
22 advice on how to do it.

23 CHAIRMAN BABCOCK: All advice is welcome.
24 Are you -- let me be sure I understand it. Are you-all
25 suggesting that 14.3(a) should say generally "except for

1 the sensitive data form and case records listed in
2 paragraph 14.3(b) of this rule all case records are open
3 to the general public for viewing and copying," period,
4 and then move the rest of it somewhere else? Okay.
5 That's what --

6 HONORABLE SARAH DUNCAN: The rest of that
7 (a).

8 CHAIRMAN BABCOCK: The rest of that (a).

9 HONORABLE SARAH DUNCAN: And (b) and (d).

10 CHAIRMAN BABCOCK: Okay. And where do you
11 propose moving that?

12 HONORABLE SARAH DUNCAN: I would just make
13 the "neither" clause in (a), 14.2; make the exemptions
14 from public access 14.3; and there's no reason to have a
15 separate (d), an exemption from public access for
16 discovery materials and nonadjudicative records. We need
17 to add judges' notes, court reporters' notes that haven't
18 been transcribed, documents that have been made
19 confidential by law, rule, or court order.

20 CHAIRMAN BABCOCK: Let's back up. The
21 phrase that starts "Neither the provisions of this rule"
22 and then there is a Roman (i), (ii), (iii) under that or
23 little (i), double (i), triple (i). Where do you want to
24 put that?

25 HONORABLE SARAH DUNCAN: Make that 14.2.

1 CHAIRMAN BABCOCK: Put that into 14.2?

2 HONORABLE SARAH DUNCAN: Make that itself
3 14.2.

4 MR. TIPPS: We can't hear down here, Sarah.

5 CHAIRMAN BABCOCK: Yeah, she says --

6 HONORABLE SARAH DUNCAN: I would make that
7 14.2.

8 CHAIRMAN BABCOCK: Don't you mean -- we
9 already have a 14.2.

10 HONORABLE SARAH DUNCAN: Well, maybe you
11 should make it 3.

12 CHAIRMAN BABCOCK: Okay. You confused me.
13 You said "14.2." I didn't want know if you wanted to put
14 it into 14.2 or not. So that's a new 14.3.

15 HONORABLE SARAH DUNCAN: 14.2.

16 CHAIRMAN BABCOCK: 14.2, I'm sorry.

17 HONORABLE SARAH DUNCAN: And then make (e),
18 the exemptions, 14.3.

19 CHAIRMAN BABCOCK: Okay. And then this
20 "public access to court records" would be 14.4; is that
21 right?

22 HONORABLE SARAH DUNCAN: Right. And I would
23 move (d) up with (b) in 14.3.

24 PROFESSOR DORSANEO: You still have 14.2
25 definitions.

1 CHAIRMAN BABCOCK: Right.

2 PROFESSOR DORSANEO: So all of those numbers
3 need to move down a notch.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE STEPHEN YELENOSKY: I'm sorry.
6 Are you saying to put this in the exceptions in the
7 definitions? I couldn't follow.

8 PROFESSOR DORSANEO: No.

9 HONORABLE STEPHEN YELENOSKY: Okay. You're
10 talking about exemptions?

11 CHAIRMAN BABCOCK: We're talking about
12 making separate subject, separate numbering. All right.
13 I think I've got it. Let me try it again. We would have
14 the definitions, which would be in 14.2. Then we would
15 have a new 14.3 which would contain the language that
16 starts with "Neither the provisions of this rule," and end
17 after the triple (i), little triple (i). Then we would
18 have a new section 14.4, which would include subparagraph
19 (b) and subparagraph (d), and then our --

20 HONORABLE SARAH DUNCAN: And a new 14.4.

21 CHAIRMAN BABCOCK: That would be 14.4, new
22 14.4, and then we would have the section that we're
23 working on, "Public access to court records," would be
24 14.5. Is that the proposal?

25 HONORABLE SARAH DUNCAN: That's my

1 suggestion.

2 CHAIRMAN BABCOCK: Okay. Mike, what do you
3 think about that?

4 MR. HATCHELL: We made a lot of very good
5 structural improvements in this rule.

6 HONORABLE SARAH DUNCAN: Huge.

7 MR. HATCHELL: Huge, as Sarah says. I
8 thought there was some utility in the beginning with the
9 notion expressed in (a) that we're expanding as far as we
10 can expand within practical limits and then subparagraphs
11 thereunder start carving back on that. But I do not have
12 any serious objections to Sarah's proposals. The only
13 problem is when you start taking it out of "public access"
14 and putting it somewhere else, that was kind of the
15 problem with the rule that we inherited, was there were
16 just things stuck all over and you couldn't tell what
17 related.

18 PROFESSOR DORSANEO: When you draft it that
19 way then you will be able to look at it and see what the
20 order needs to be.

21 HONORABLE SARAH DUNCAN: I was going to say,
22 it may need to be moved to where it comes after.

23 PROFESSOR DORSANEO: What you're really
24 trying to do is to write three paragraphs and then see
25 what order they need to go in, and I would suggest that

1 this strange idiom that says -- you know, they use
2 "neither"/"nor," needs to be replaced with something a
3 little more digestible.

4 MR. LOW: But we need to change the modifier
5 so we make it clear that we can't limit these three groups
6 as distinguished from can't limit in an action brought by
7 these three groups.

8 CHAIRMAN BABCOCK: Okay.

9 MR. HATCHELL: No, no, no, no. That's not
10 -- not in an action brought by these. Bonnie, can you
11 help explain (ii) and (iii), why there must be access to
12 (ii) and (iii) under 14.(a)? It's much more than parties
13 bringing an action.

14 CHAIRMAN BABCOCK: Double (i) and triple
15 (i).

16 MR. LOW: I understand, but it's not clear
17 that that's what it relates to.

18 MR. HATCHELL: Well, let her explain what it
19 is.

20 MS. WOLBRUECK: Criminal justice agencies
21 have to have access to data -- that's what you're talking
22 about, Mike, right?

23 MR. HATCHELL: Yes.

24 MS. WOLBRUECK: And then there's other
25 entities like the authorities needing information of child

1 support cases in order for them to do the enforcement of
2 family law cases.

3 MR. LOW: Yeah. I don't question that. I
4 question "can limit access to case records in any given
5 action or proceeding by." That sounds like a proceeding
6 by these people.

7 MR. HATCHELL: No, I understand.

8 MR. LOW: And so it should be that these
9 people can't be excluded access.

10 HONORABLE SARAH DUNCAN: Right. But we
11 could --

12 MR. LOW: Okay.

13 CHAIRMAN BABCOCK: You could maybe say it,
14 "No rule or procedure adopted by a court or court clerk
15 under this rule may limit access to case records to the
16 following."

17 MR. LOW: That's right. Or something
18 that's --

19 CHAIRMAN BABCOCK: (i), double (i), triple
20 (i).

21 MR. LOW: Right.

22 PROFESSOR DORSANEO: Or "nothing in this
23 rule."

24 MR. LOW: Yeah. The way you're saying it is
25 correct.

1 CHAIRMAN BABCOCK: Okay. And if we do
2 something along those lines are we okay with this part of
3 it?

4 Let's go about the exemptions from public
5 access. "Neither general public access nor remote public
6 access is permitted to any sensitive data form, any case
7 record containing information that is excluded from public
8 access by Federal law, Texas law, this or any court rule
9 or a court order." That's straightforward enough, isn't
10 it?

11 PROFESSOR DORSANEO: No.

12 CHAIRMAN BABCOCK: No?

13 PROFESSOR DORSANEO: I think the language
14 could be written so it's easier to understand.

15 MR. LOW: I understand it very well.

16 CHAIRMAN BABCOCK: Carl.

17 MR. HAMILTON: It seems to me that that
18 statement does make a distinction between general public
19 access and remote access apparently. We were talking
20 about that earlier.

21 CHAIRMAN BABCOCK: Yeah. And I think that
22 that's necessary if you are going to bring into harmony
23 public access and remote access with respect to the
24 sensitive data form.

25 HONORABLE SARAH DUNCAN: Some part of the

1 structure of what the subcommittee has given you is a
2 result of trying to work with the rule that we got from
3 the Judicial Council and rearranging that in a very short
4 period of time, and I think Mike and Lisa and Ralph have
5 done a hell of a job. As Mike said this morning, it's not
6 perfect, and we can all see that as soon as it's pointed
7 out, and we can do that.

8 MR. GILSTRAP: The word "general," what's
9 the point of the word "general"?

10 MR. HAMILTON: Well, we've tried to define
11 remote access. If we're going to do that, we probably
12 ought to try to define general public access, too.

13 MR. GILSTRAP: There's not a difference
14 between general public access and public access.

15 CHAIRMAN BABCOCK: Yeah. We did use the
16 phrase "general public" before.

17 HONORABLE SARAH DUNCAN: I think the
18 distinction that was sort of in the rule we inherited, if
19 I'm remembering that long ago correctly, is there could be
20 access by a nonparty, nonattorney upon the file, a member
21 of the public, but then there could be access by a
22 subscriber who was a member of the public but not a member
23 of the general public.

24 HONORABLE TOM GRAY: That's what it was.

25 CHAIRMAN BABCOCK: Okay.

1 PROFESSOR DORSANEO: Hmm.

2 CHAIRMAN BABCOCK: All right. What about
3 this subparagraph (d), "Exemption for discovery materials
4 in nonadjudicative records"? Is this necessary the way
5 we've redefined court records?

6 HONORABLE TRACY CHRISTOPHER: No.

7 HONORABLE SARAH DUNCAN: It is to eliminate
8 any doubt. The reason it's in here is because the
9 question was raised during one of our conference calls,
10 what about discovery that's in the file in my office and
11 not part of the file at the clerk's office? And there was
12 just some discomfort that someone, somewhere might try to
13 use this rule to access documents in the lawyer's office,
14 and we wanted to just stop that before anybody started and
15 anybody has to go to the expense of proving that this rule
16 was not meant to cover that.

17 CHAIRMAN BABCOCK: Right. But the way we're
18 now defining court records we're defining it as stuff
19 that's filed with the court clerk. The only time you get
20 into a problem if you were to adopt the last part of 76a
21 that does define court records as unfiled discovery in
22 certain instances, and we're not going to do that.

23 HONORABLE SARAH DUNCAN: I don't think
24 that's the only time you get into that problem. Anybody
25 can argue it, and the subcommittee's point was we don't

1 want anybody even thinking they're going to go there.

2 MR. LOW: But what if you had a case that
3 involved tons of discovery, like a case I've heard of, and
4 the judge orders that you put it in a building, a big
5 building and got boxes, and the parties can go through
6 there and look at it. It's ordered, this discovery is
7 ordered, and they're going through it looking to see
8 what's sensitive, what they're going to really get at, and
9 what the others are going to claim needs to be filed and
10 so forth like that.

11 Well, that is really discovery. We consider
12 we got that by discovery, but that's unfiled discovery,
13 and I don't know if it has to be protected, and they
14 are -- what if a competitor wanted to go through there?
15 They say this is that, and "I want to go through these
16 records," and then, whoa, wait, and then you've got to go
17 to a judge.

18 HONORABLE SARAH DUNCAN: And I'm not even
19 sure it's unfiled. We had a similar case, and it was just
20 a room in an office --

21 MR. LOW: That's right.

22 HONORABLE SARAH DUNCAN: -- was considered
23 the discovery that was produced by a party, and I think
24 anybody in this room could make a good argument that that
25 was on file with the court and that office building room

1 was simply an extension of the clerk's office because they
2 didn't have the capacity to store that kind of quantity.

3 CHAIRMAN BABCOCK: Yeah, but this rule is
4 not going to help because either it's filed, I mean,
5 either that is a functional equivalent of the clerk's
6 office or it isn't, and if it is then it is filed, and if
7 it isn't then it's not.

8 MR. LOW: The discovery order is filed.

9 CHAIRMAN BABCOCK: I've got a case right now
10 where the judge has ordered a warehouse for documents, and
11 they're all going to be put on the internet, and anybody
12 can go into that and look at it. I would take the -- I
13 would say that that's probably filed discovery.

14 MR. MUNZINGER: Why would you say it's
15 filed?

16 CHAIRMAN BABCOCK: The judge has ordered it
17 to be placed in a room and available on the internet.

18 MR. MUNZINGER: No. I've had the same thing
19 in cases, but I never would have considered it that it was
20 filed with the clerk, because it was accessible to the
21 parties to the litigation in discovery. And my case was
22 in Federal court, but in state court Rule 76a would not --
23 well, it wouldn't even apply, I guess, but --

24 CHAIRMAN BABCOCK: I may be wrong about
25 that. I don't know. But this rule doesn't help that. I

1 mean, there's going to be a fight about whether it's filed
2 or it's not filed.

3 MR. LOPEZ: The Government Code talks about
4 that, though. There is some -- I don't remember what the
5 -- there is some guides in the Government Code like if you
6 hand the judge something and he handwrites on there
7 "filed" as whatever. It doesn't have to be just stamped
8 with the clerk's stamp, but if we're going to argue that
9 anything that's in there is arguably filed we're opening
10 up a huge can of worms.

11 CHAIRMAN BABCOCK: What about -- what's this
12 other stuff about land title records, vital statistics,
13 birth records, naturalization records, voter records,
14 recorded instruments recorded for public notice?

15 MR. HAMILTON: I have a question about that.

16 CHAIRMAN BABCOCK: Yeah, Carl.

17 MR. HAMILTON: Well, it says "not related to
18 the court's adjudicative functions including land title
19 records." Well, you would have land title records in a
20 trespass to try title suit.

21 CHAIRMAN BABCOCK: Sure.

22 MR. HAMILTON: You would have other recorded
23 documents in other suits, so why would those be exempted
24 from --

25 HONORABLE SARAH DUNCAN: Draw a distinction

1 between something that's on file in a particular case and
2 something that's just filed with Andy because he's the
3 person -- he is the repository of those records. Andy is
4 the one that scared the fool out of me talking about birth
5 certificates.

6 CHAIRMAN BABCOCK: But if we are going to
7 define court records as being related to a court case,
8 filed in connection with any matter before any civil
9 court, wouldn't that take care of your problem, but
10 include the documents that Carl is talking about?

11 Richard.

12 MR. ORSINGER: I'll betray my ignorance of
13 the actual mechanics of the way you run the county, but in
14 some counties the county courts, constitutional county
15 courts, still have some adjudicative functions as well as
16 some legislative functions.

17 MR. HATCHELL: Andy Harwell is our authority
18 on counties.

19 MR. ORSINGER: If a county court, a
20 constitutional county court has some litigation functions
21 and then also some legislative functions, when they're
22 making decisions in terms of management of the county is
23 that considered to be an adjudicative function, or is that
24 easily distinguished from their adjudicative function?

25 In other words, is this a clear delineation

1 when you have a constitutional county court that does
2 the -- that votes on commissioners, on budgets and all
3 that, versus occasionally doing a probate case or
4 whatever? Is that a clear delineation for that court?

5 HONORABLE STEPHEN YELENOSKY: Why does it
6 matter?

7 MR. ORSINGER: Well, because if it's not a
8 clear delineation as to what their adjudicative function
9 is then we probably do need to exclude documents that
10 relate to what I'm loosely calling a legislative function.

11 HONORABLE STEPHEN YELENOSKY: It says "in a
12 civil case." Didn't we leave that in the definition?

13 CHAIRMAN BABCOCK: Yeah.

14 MR. ORSINGER: Well, I mean, I don't know if
15 somebody -- if I was going to request from the county
16 commissioners -- I don't know the way the counties
17 operate, but if somebody has a complaint about some
18 employment with the county or if they want -- is that a
19 civil matter? Is that adjudicative?

20 MR. GILSTRAP: Is it still the commissioners
21 court?

22 MR. ORSINGER: I don't know the answers to
23 those questions, but if it's not absolutely clear when a
24 commissioners court or a county court, constitutional
25 county court, is sitting in a civil case in an

1 adjudicatory capacity or not then we do need to, I think,
2 distinguish the types of records that are not included.

3 CHAIRMAN BABCOCK: Well, Richard, if we have
4 the same definition of court records as in 76a, but more
5 limited than 76a because we do not include unfiled
6 discovery, then why is this paragraph necessary?

7 HONORABLE STEPHEN YELENOSKY: It's only a
8 comfort provision, as Justice Duncan said, and it seems to
9 me nothing could be -- I know that you can debate
10 anything, and that's whether it's filed or not, and we
11 will have that debate, but if we're already going to have
12 a debate over whether it's filed or not I don't think we
13 need to add on that, well, if it's unfiled it's not
14 covered.

15 CHAIRMAN BABCOCK: Okay. I'm with you,
16 Judge Yelenosky, maybe on the first sentence. "This rule
17 does not apply to nonfiled discovery materials in the
18 possession of a party," and that may be necessary because
19 that is in conflict with 76a(2)(c). So maybe you need it
20 for that purpose, but then "or to court records," using
21 the term that we have now defined.

22 MR. MUNZINGER: What if you said "public
23 records"?

24 CHAIRMAN BABCOCK: "That are not related to
25 the court's adjudicative functions." You could state the

1 obvious I suppose.

2 HONORABLE STEPHEN YELENOSKY: But then you
3 get -- I mean, you already defined "in a civil case,"
4 right? Is that still in the definition?

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE STEPHEN YELENOSKY: And so if you
7 start throwing in language about adjudicative and not
8 later on I think it muddies the water.

9 CHAIRMAN BABCOCK: I just think it leads to
10 a lot of mischief.

11 HONORABLE STEPHEN YELENOSKY: It does. It
12 does. Because then --

13 CHAIRMAN BABCOCK: I'm okay with leaving the
14 stuff about nonfiled discovery in there because you could
15 have confusion about 76a.

16 Skip. That is Skip, isn't it? No, it's
17 Stephen. Sorry. You appellate guys all look alike.

18 MR. TIPPS: I suppose you could have
19 confusion of 76a. 76a specifically says "for purposes of
20 this rule."

21 CHAIRMAN BABCOCK: Yeah.

22 MR. TIPPS: And it goes on and specifies
23 that court records include documents that are filed and
24 discovery that's not filed.

25 CHAIRMAN BABCOCK: Yeah.

1 MR. TIPPS: So I don't think we need that
2 section at all.

3 CHAIRMAN BABCOCK: Yeah. I don't think so
4 either. Let's take a 10-minute break.

5 (Recess from 3:15 p.m. to 3:33 p.m.)

6 CHAIRMAN BABCOCK: Okay, everybody, let's
7 get back to business. Let's talk about --

8 MR. LOW: We voted to keep everything just
9 like it is.

10 CHAIRMAN BABCOCK: 14.3, subparagraph (c),
11 "Limitations on duties of court or clerk." How do we feel
12 about that?

13 HONORABLE SARAH DUNCAN: We don't feel about
14 that. We think about that. There is a difference between
15 thinking and feeling.

16 HONORABLE TRACY CHRISTOPHER: What did you
17 say, Judge?

18 CHAIRMAN BABCOCK: This subparagraph gives
19 me a warm fuzzy feeling, but here's what I think about it.

20 MS. HOBBS: A lot of this section is taken
21 from Rule 12.4 on duties of custodians. That's the source
22 of -- it's been modified a little bit, but that's the
23 source.

24 MR. GILSTRAP: Chip?

25 CHAIRMAN BABCOCK: Yeah.

1 MR. GILSTRAP: I'm puzzled by this. I
2 thought the whole approach of the rule was that the clerk
3 is not required to do anything, that this rule only comes
4 into play if the clerk decides to put records out
5 available through remote access. And if that's the case,
6 why do we need a further statement that the court clerk is
7 not required to do certain things?

8 HONORABLE TOM GRAY: Because this also
9 applies to paper records and not just --

10 MR. GILSTRAP: So this deals with paper
11 records?

12 HONORABLE TOM GRAY: As well as electronic.

13 MR. GILSTRAP: Okay.

14 CHAIRMAN BABCOCK: Any other comments about
15 this?

16 PROFESSOR CARLSON: So does this apply to
17 remote access as well?

18 CHAIRMAN BABCOCK: This is public access to
19 court records, so this is not limited to remote access.

20 HONORABLE TRACY CHRISTOPHER: Well, I think
21 we need to have the clerk duties in a whole separate
22 provision rather than kind of piecemeal the way they are
23 here, and it should apply to both remote access and public
24 access and make it easier for them to understand what
25 their duties are, because we've got (c), then we jump down

1 to (e) and then we have (f), we've got (h). It seems to
2 me we should combine those all into one rule for the court
3 clerks and have it govern both remote and public.

4 CHAIRMAN BABCOCK: Yeah. It looks like (c)
5 and (e) could be melded together, couldn't they?

6 PROFESSOR DORSANEO: Yes.

7 HONORABLE TOM GRAY: You think they're
8 scattered out now, you should have seen them before Mike
9 got a hold of them.

10 CHAIRMAN BABCOCK: Would we make this like a
11 section six 14-- strike that. Would we make this section
12 14.6, combining (c) and (e) together?

13 HONORABLE TRACY CHRISTOPHER: I think I
14 might put it after "remote access" so that --

15 MR. GILSTRAP: Well, except it doesn't apply
16 to remote access. That's the problem, you see. The clerk
17 doesn't have any duty with regard to remote access.

18 CHAIRMAN BABCOCK: Right.

19 HONORABLE TRACY CHRISTOPHER: What do you
20 mean the clerk doesn't have any duty?

21 MR. GILSTRAP: The clerk doesn't have to
22 give remote access. This rule only says what the clerk
23 should do if the clerk decides to give -- it limits what
24 the clerk can do if the clerk gives remote access, but it
25 doesn't compel the clerk to give remote access.

1 CHAIRMAN BABCOCK: Does this subsection (c)
2 say anything new?

3 PROFESSOR CARLSON: Yeah.

4 CHAIRMAN BABCOCK: In other words, are we
5 giving the the clerks rights that they don't already have?

6 PROFESSOR DORSANEO: In (iii) it does.

7 CHAIRMAN BABCOCK: The stuff about letting
8 the prisoners --

9 PROFESSOR DORSANEO: (Nods head.)

10 CHAIRMAN BABCOCK: Buddy.

11 MR. LOW: Chip, the problem is that if you
12 put limitations, I mean, there's nothing in here that
13 says, and somebody could argue, that the court needs to
14 give priority to this request and that the clerk doesn't
15 have to put this behind other pressing business and when
16 they have to do it. It says how long they need to retain
17 a record, but it doesn't say as to when they should do it,
18 how many days. So somebody could argue, well, you've got
19 limitation, no limitation on that; you've got to put this
20 first. There is so many things we just have to leave up
21 to the clerk. I don't see why we need this at all.

22 CHAIRMAN BABCOCK: Yeah, I agree. What
23 about this thing about not letting the prisoners get
24 stuff? You've got all these writs that they're writing.
25 It's going to cut way down on that.

1 PROFESSOR CARLSON: That is a problem on
2 walk-in access.

3 MS. HOBBS: That's a Rule 12.

4 CHAIRMAN BABCOCK: Any other comments?
5 Judge Christopher.

6 HONORABLE TRACY CHRISTOPHER: They would
7 certainly be entitled to information in their own
8 lawsuits.

9 CHAIRMAN BABCOCK: Certainly, and sometimes
10 there are materials in other lawsuits that, you know,
11 whether they truly need them or not, they do use. I got
12 appointed once to a 10-year habeas case that --

13 HONORABLE SARAH DUNCAN: Well, as I
14 understand it, the problem with this -- and they're not
15 entitled to a copy of everything in their own case file.
16 I think that's right.

17 HONORABLE TOM GRAY: You are correct,
18 because the --

19 HONORABLE SARAH DUNCAN: On a PTR they don't
20 get a copy of the record.

21 HONORABLE TOM GRAY: Well, and jury
22 information and stuff that's in their own case records
23 they don't get. We get those requests frequently, and
24 they are summarily denied.

25 HONORABLE SARAH DUNCAN: But the problem

1 from which this provision springs, the vexatious litigants
2 will decide that they want all of the inmate lawsuits,
3 every piece of paper in every inmate lawsuit filed in
4 Harris County, to see if they have been treated the same
5 as the other inmates or to compare -- for comparison
6 purpose, and the problem is they don't have to pay court
7 costs, they have all the time in the world. Well, I mean
8 you laugh, but they really do, and they don't have a whole
9 lot else to do, and it can become quite burdensome.

10 I know there was a case in Houston with a
11 guy named -- doesn't matter what his name was -- where he
12 wanted a copy of half of what is in the courthouse, and
13 they got it dismissed and it went up on appeal and I don't
14 know where it is now, but it's not to say that this is
15 written as well as it might need to be, but I do think a
16 provision like this is going to be needed.

17 HONORABLE STEPHEN YELENOSKY: Or just give
18 them remote access.

19 CHAIRMAN BABCOCK: Justice Jennings.

20 HONORABLE TERRY JENNINGS: Well, my question
21 is going to be along those lines. I mean, the whole point
22 of this rule as far as us looking at this issue is the
23 issue of remote access, and my understanding is that given
24 the distinction between normal clerk's records, which I
25 understand maybe mistakenly which are governed by the Open

1 Records Act, versus judicial records, which are governed
2 by Rule 12, right? Is that incorrect?

3 MS. HOBBS: I think that is. Generally
4 speaking the judiciary would not be subject to the Open
5 Records Act at all.

6 HONORABLE TERRY JENNINGS: Even just normal
7 filings?

8 MS. HOBBS: Yeah. It's limited to the
9 executive branch, not to the legislative or judicial
10 branch as a government.

11 HONORABLE SARAH DUNCAN: Well, we have to --
12 we have to fulfill certain Open Records requests.

13 MS. HOBBS: I think they're probably
14 misnamed. I think they're really Rule 12 requests.

15 HONORABLE TERRY JENNINGS: Even a normal
16 filing is a Rule 12?

17 MS. HOBBS: Well, that's actually -- a party
18 filing is technically not Rule 12 either. That's some
19 sort of common law right of access or perhaps
20 constitutional, depending on whether it's civil or
21 criminal.

22 HONORABLE TERRY JENNINGS: So in crafting a
23 rule we have to be sure not to limit in anyway the common
24 law right to access of these documents.

25 CHAIRMAN BABCOCK: Is there anybody else

1 that feels that this subparagraph (c) is unnecessary? I
2 heard one person say that. I feel that way. Judge
3 Christopher.

4 HONORABLE TRACY CHRISTOPHER: No, I just
5 agreed with you. It's not necessary.

6 CHAIRMAN BABCOCK: You think it's necessary?

7 HONORABLE TRACY CHRISTOPHER: Unnecessary.

8 CHAIRMAN BABCOCK: Unnecessary.

9 HONORABLE TRACY CHRISTOPHER: Right.

10 CHAIRMAN BABCOCK: No, I said "unnecessary."

11 HONORABLE TRACY CHRISTOPHER: Right. That's
12 why I agree with you.

13 CHAIRMAN BABCOCK: Okay. Sorry.

14 HONORABLE TRACY CHRISTOPHER: I thought you
15 asked for a show of hands on who agreed with you, so I
16 raised my hand.

17 CHAIRMAN BABCOCK: How many other people
18 agree with Tracy and me that this is unnecessary?

19 MR. GILSTRAP: Chip, where else does it tell
20 the clerk that the clerk doesn't have to create a case
21 record not otherwise in written or printed form other than
22 to print information stored in a computer? If that's
23 somewhere else it's unnecessary, but --

24 CHAIRMAN BABCOCK: Well, I can't cite a
25 case, I can't cite a clerk case, but there is a bunch of

1 stuff under the Open Records Act that says that. I mean,
2 I don't think that that's a proposition that's much in
3 dispute.

4 MR. GILSTRAP: Okay.

5 CHAIRMAN BABCOCK: Stephen.

6 MR. TIPPS: I agree with you and Tracy that
7 it's probably unnecessary as a technical matter in that a
8 fair reading of the rule would not suggest that the court
9 has that responsibility, but given the fact that we are
10 anticipating with this rule greater public access, I
11 think, I wonder if it would not be helpful to make this
12 clear, so I guess I would be interested in what Bonnie's
13 thoughts are with regard to that.

14 MS. WOLBRUECK: No. (i)?

15 MR. TIPPS: Well, whether or not it's --
16 whether or not clerks are likely to find it helpful to be
17 able to point to a specific rule and say, "I'm not
18 obligated to create anything."

19 MS. WOLBRUECK: I think it would be helpful,
20 and I think the reason that Mike had rewritten this,
21 because in the original rule there was some other language
22 that was much more difficult to define, and I think that's
23 the reason that this was rewritten in order for a better
24 definition for the clerk, but No. (ii) here is really not
25 necessary I don't think at all because there are statutes

1 pertaining to the retainings of all of our case files and
2 documents, so I doubt if that's even necessary.

3 CHAIRMAN BABCOCK: Okay. What about No.
4 (iii)? Is No. (iii) good? Is that a smart thing for us
5 to do? Judge Gray nods his head "yes," and I know Justice
6 Duncan thinks so.

7 MS. HOBBS: Chip, I would like to look
8 through the Rule 12 stuff and see why that was included in
9 Rule 12. My guess is that a prisoner's access to
10 information may be governed by some other rule and that's
11 why it was excluded from Rule 12 and may need to be -- I
12 just bet there's something in the historical debates of
13 Rule 12 that would suggest why this was even put into Rule
14 12.

15 HONORABLE SARAH DUNCAN: I think it may be
16 in the Civil Practice & Remedies Code. There may be a
17 general whole section on inmate litigation.

18 MS. HOBBS: That's what I assume, is that
19 we're not saying prisoners don't have access; we're saying
20 it's governed by something else.

21 MR. DUGGINS: Isn't that covered by 14.3(b)?

22 MS. HOBBS: It could be.

23 PROFESSOR CARLSON: Could be.

24 HONORABLE STEPHEN YELENOSKY: Well, if
25 that's what we mean, though, it needs to be reworded then.

1 CHAIRMAN BABCOCK: Yeah.

2 HONORABLE STEPHEN YELENOSKY: It needs to
3 say "under this rule."

4 CHAIRMAN BABCOCK: Okay. That's Lisa's
5 homework on this part of it.

6 HONORABLE SARAH DUNCAN: Chapter 14 of the
7 Civil Practice & Remedies Code doesn't say that they're
8 entitled to it under some other rule. It says they don't
9 get it.

10 HONORABLE STEPHEN YELENOSKY: Right. That's
11 why it needs to be redrafted.

12 CHAIRMAN BABCOCK: Okay. Judge Pemberton.

13 HONORABLE BOB PEMBERTON: Historical note on
14 12, I think there may have been a Public Information Act
15 section that did carve inmates out of it for reasons that
16 Justice Duncan has already described.

17 MS. HOBBS: Okay. I'll report back.

18 CHAIRMAN BABCOCK: Subparagraph (e) to me
19 doesn't look like it requires a lot of discussion, at
20 least in the limited time that we have, but (f) is
21 something that I think we need to talk about.

22 We're not talking about a court or court
23 clerk making rules for access to -- should be "court
24 records." We're not talking about internet records here.
25 We're talking about down at the courthouse, and this is

1 not anything that has occurred in our jurisprudence as far
2 as I know.

3 MR. HATCHELL: This is an inherited rule. I
4 did not see in the report exactly why these conditions of
5 use were imposed. You can certainly gather that there
6 could be abuse, but it bothers me that an individual who
7 wants to come in and look at one file might have to pull
8 aside and say, "Okay, you've got to sign this user
9 agreement before you can get this," and I don't like that
10 frankly.

11 We were -- you must understand that an
12 organization that held six public hearings statewide, we
13 were very reluctant to make anything that seemed important
14 to them just disappear, but it's here to debate.

15 CHAIRMAN BABCOCK: Well, and I wonder about
16 a clerk getting a newspaper reporter to agree that the
17 clerk can monitor the newspaper reporter's access --

18 MR. HATCHELL: Sure.

19 CHAIRMAN BABCOCK: -- to case records.
20 That's out there. Judge Yelenosky.

21 HONORABLE STEPHEN YELENOSKY: Yeah, that
22 obviously raises constitutional questions; and other
23 things that would give discretion to the clerk, even
24 though we will assume it's always used in good faith,
25 could run afoul of the First Amendment prohibitions on

1 investing discretion in an official. I know that that's
2 the law with respect to limitations on speech, and I don't
3 know if this exactly parallels, but I think we do have to
4 be concerned about investing discretion that could
5 theoretically be used in a way that is illegal.

6 CHAIRMAN BABCOCK: Yeah. Justice Pemberton.

7 HONORABLE BOB PEMBERTON: This type of
8 provision is termed a, quote, "local rule." Does that
9 envision that these rules would go through the Supreme
10 Court like local procedural rules are? That might be one
11 way to police abuses; and if a county wants to set up a
12 procedure, you-all look at it, sign off on it; and perhaps
13 that would sway some of these concerns.

14 CHAIRMAN BABCOCK: You could also see the
15 argument saying that this is the authorization. Justice
16 Gray.

17 HONORABLE TOM GRAY: To follow up on Justice
18 Pemberton's comment, I think there is at least the
19 suggestion by having this rule here, and at least some
20 process, that absent a local rule the clerk has no
21 discretion to not provide the document to the person that
22 walks in, and it may, in fact, be just the opposite of the
23 effect that we think it is. It may actually take away
24 some of the more egregious examples of a clerk just
25 saying, "No, you can't have it," because they don't have a

1 rule to impose it. You know, if you wanted -- one of your
2 media defendants wants to challenge it then that would be
3 to your financial benefit.

4 CHAIRMAN BABCOCK: Yeah. Bill.

5 PROFESSOR DORSANEO: Most I would say, if we
6 want to keep something in here because of all the six
7 meetings would be "A court or a court clerk may impose
8 reasonable conditions for access to case records" and then
9 leave out (i), (ii), (iii) and say, "Public notice of the
10 conditions must be provided in the clerk's office and
11 posted on any court website." The rest of this seems,
12 especially the last sentence, that you could be punished
13 for being rude. It seems excessive.

14 HONORABLE TOM GRAY: Well, Chip, one of the
15 contexts I think in which this was done was the Republic
16 of Texas folks that were coming in and getting records
17 from all over the state and creating problems and then
18 filing and refiling stuff inappropriately and creating
19 some problems.

20 CHAIRMAN BABCOCK: Yeah. You know, without
21 commenting on the Republic of Texas folks, I'm not sure --
22 I've always believed that it's a bad idea to make a rule
23 that applies to the general population when you're trying
24 to hit a very small fringe splinter group, and a group
25 that is entitled to their opinions whether we all disagree

1 with them or not.

2 HONORABLE TOM GRAY: True.

3 CHAIRMAN BABCOCK: And I can see a lot --
4 like Bill, this last sentence, I mean, somebody comes into
5 the clerk's office say, "I have a common law right of
6 access to these records which is presumptive and now it's
7 going to be denied to me because you forced me to agree to
8 conditions that were oppressive about my access." I don't
9 think that's a good idea. Justice Duncan.

10 HONORABLE SARAH DUNCAN: If it were 1950 I
11 would agree with you, but it's no longer 1950.

12 CHAIRMAN BABCOCK: Awe. That would mean I
13 would be one.

14 HONORABLE SARAH DUNCAN: And the cost to the
15 general public to afford the kind of access some of these
16 fringe and splinter groups want is the problem. I mean,
17 if you look at -- that's why we have -- as much as I think
18 the Legislature may have gone too far in the Vexatious
19 Litigants Act, or Chapter 11 in general, there is a
20 serious cost problem with people who are burdening the
21 judicial system and precluding appropriate access by
22 people who need the judicial system.

23 So, I mean, I would never be in favor, I
24 would have thought, of a rule that told a person, a
25 particular person, that permitted a court to tell Bill

1 Dorsaneo, "You may not file any more lawsuits in the
2 courts in this administrative judicial region," but it has
3 gotten to the point that we need such a rule, and it needs
4 to be carefully drafted so that it doesn't preclude access
5 by people who legitimately need access and are not going
6 to overburden the judicial system, but to act like these
7 fringe groups don't exist or aren't causing huge costs is
8 1950's talk.

9 CHAIRMAN BABCOCK: Yeah, Carl.

10 MR. HAMILTON: Well, you start out by saying
11 (f) was only for people who walk into the courthouse. I
12 don't think that's clear. Are you assuming that public
13 access under 14.3 means walk-in as opposed to 14.4 remote
14 access?

15 CHAIRMAN BABCOCK: It appears to me to cover
16 both.

17 MR. HAMILTON: Huh?

18 CHAIRMAN BABCOCK: It seems to me to cover
19 both.

20 MR. HAMILTON: I think it does, too, and (f)
21 would cover both electronic, too, and I wonder how they're
22 going to get all that done electronically.

23 CHAIRMAN BABCOCK: I don't know. Judge
24 Christopher.

25 HONORABLE TRACY CHRISTOPHER: I do not think

1 that we should make it the clerk's job to determine
2 whether people's request for documents, public documents,
3 are just frivolous or for the wrong reason or for whatever
4 reason. I don't think that's the clerk's job. If it's
5 anybody's job it's probably the Legislature's job, then
6 maybe a judge's job, but I sure don't think it's the
7 clerk's job to be making that decision and having to draw
8 those hard lines.

9 And then I think in terms of whether it
10 belonged, I was persuaded by previous comments when I made
11 my comments that clerk duties ought to all be separated.
12 Since public access is mandatory and remote access is not
13 we can put conditions in remote access.

14 CHAIRMAN BABCOCK: Yeah, Bill.

15 PROFESSOR DORSANEO: "Public access" needs
16 to be defined. You know, because --

17 CHAIRMAN BABCOCK: I thought you were
18 against definitions.

19 PROFESSOR DORSANEO: Normally I am, but if
20 it includes mail, e-mails, as well as walk-in business, it
21 may be easier to define "public access" than it is to
22 define "remote access."

23 CHAIRMAN BABCOCK: Fair enough. Andy.

24 MR. HARWELL: I'm confused now and I'm on
25 the subcommittee, but I think that this may need to go

1 under the remote access part because it seemed like when
2 we talked about this we were talking about the local rules
3 in Beaumont. Do you remember that discussion we had and
4 that they had local rules that governed how they allowed
5 their remote access? And it seems to me that that's where
6 we discussed these issues, because I agree with Justice
7 Gray that if it's a local rule -- if it's not by local
8 rule then it's Open Records when you walk into the office,
9 and I don't know of any local rules that prohibit the
10 public from coming in to look at records that are open, so
11 this --

12 MR. HATCHELL: Well, first of all, my
13 sentiment is that this doesn't need to be in there at all,
14 but I went back and read the task force draft three times,
15 and it did not discriminate between walk-in and remote
16 access, so we kept it in, thinking that there was some
17 reason for it, but I think it's extremely dangerous, all
18 of it. I wrote the last part to try to put some
19 protections on this, but I would vote to take the whole
20 thing out.

21 CHAIRMAN BABCOCK: Yeah. Ralph.

22 MR. DUGGINS: Well, you still have the issue
23 even if it's public access at the clerk's office because
24 if somebody tries to hack into the sensitive data form, so
25 even if -- I think we have to take that into account and

1 at least consider a very restricted user agreement where
2 the user commits not to try to hack the site or try to get
3 into that information, and if they do that you can then
4 cut them off, because you're going to see people I think
5 try to do it. They've tried to hack every other website.

6 CHAIRMAN BABCOCK: Ralph, if somebody hacks,
7 that implies a criminal action.

8 MR. DUGGINS: Right.

9 CHAIRMAN BABCOCK: And if somebody has
10 broken the law to get into the system, I would think with
11 or without this rule you could probably discipline them.

12 MR. DUGGINS: Well, all I'm saying is I
13 think that is not an unreasonable condition to place on --

14 HONORABLE STEPHEN YELENOSKY: But it's
15 unnecessary.

16 MR. DUGGINS: -- computer access.

17 CHAIRMAN BABCOCK: Judge Lawrence, and then
18 let's see if we can determine the sense of the committee
19 about whether this ought to stay or go.

20 HONORABLE TOM LAWRENCE: Do I understand
21 that this is going to be a local -- would be a local rule
22 that would be under Rule 3(a) approved by the Supreme
23 Court?

24 CHAIRMAN BABCOCK: Well, it's not clear, but
25 for the sake of argument say "yes."

1 HONORABLE TOM LAWRENCE: Well, then you're
2 going to have to add JPs to the Rule 3(a) because we're
3 not under 3(a), so you would then prohibit us from
4 implementing any rules for access to data.

5 CHAIRMAN BABCOCK: All right. Let's have a
6 vote.

7 MR. GILSTRAP: Chip, may I just -- I mean,
8 if we take this out for local access, walk-in access, I
9 mean, does the clerk -- what does the clerk do when
10 someone comes in and insists on taking papers out of the
11 file to read them or underline them, that type of thing?
12 I mean, it seems like that we ought to give the clerks
13 some power --

14 MR. WILDER: We have a statutory authority
15 on that that says we should maintain care, custody, and
16 control of the records, and that implies that you've got
17 to have some rules.

18 CHAIRMAN BABCOCK: Okay. Whether there's a
19 statute or not it seems to me to be redundant to say that
20 clerks can impose reasonable conditions for public access.
21 They do all the time. You can't go in there at 7:00
22 o'clock at night.

23 MR. WILDER: That's fine.

24 CHAIRMAN BABCOCK: You can't, you know,
25 check files out that the judge has. There are all sorts

1 of things that are restrictions on that.

2 Sorry to race through this, but how many
3 people think that we should take subparagraph (f),
4 "Conditions of use" out of the proposed rule? Raise your
5 hand.

6 MR. HARWELL: Can I ask a question first,
7 Chip?

8 CHAIRMAN BABCOCK: No.

9 MR. HARWELL: Okay.

10 CHAIRMAN BABCOCK: How many people think we
11 should leave it in?

12 MR. GILSTRAP: As written or just something?

13 CHAIRMAN BABCOCK: Something. The vote is
14 22 to 3 to take it out.

15 Okay. It's five after 4:00, and we need
16 to -- we need to get to Dorsaneo. Bill, you are going to
17 be here tomorrow now, though, right?

18 PROFESSOR DORSANEO: Unless I get a better
19 offer.

20 CHAIRMAN BABCOCK: There could be no better
21 offer than this. Here's what I'm thinking. Are we going
22 to take the whole morning on the forms?

23 MS. HOBBS: I think so. I think it's -- we
24 have some preliminary things to decide that may -- that if
25 we decide them in a certain way that perhaps we won't.

1 CHAIRMAN BABCOCK: Yeah, but we can't count
2 on that. Okay. So here' s -- yeah, Bonnie.

3 MS. WOLBRUECK: I just wanted you to know
4 that Andy and I neither one will be here tomorrow.

5 CHAIRMAN BABCOCK: Well, that decides that.
6 Let's ram it through. No, just kidding.

7 MS. WOLBRUECK: I apologize, but --

8 CHAIRMAN BABCOCK: No, that's all right.
9 Here's what I think we'll do then. We'll shift now to
10 Bill Dorsaneo's issues, one of which is a five-minute
11 issue and the other of which is a 55-minute issue, so says
12 Bill; and tomorrow we'll take up the forms; and we will
13 come back on, appropriately enough, April Fool's Day,
14 April 1, and the morning of April 2 to finish off this
15 rule. In the meantime, the subcommittee has volunteered
16 to try to implement the votes that we have taken so far,
17 come up with a rule covering criminal court records, and
18 then we'll have a whole full day and a half to take a
19 swing at it, and we can tell the Legislature that we're on
20 top of this.

21 HONORABLE TERRY JENNINGS: Will we still
22 need a May meeting, or are we moving the May meeting up to
23 April?

24 CHAIRMAN BABCOCK: No, no, no. We'll still
25 meet in May because we have a whole bunch of other things

1 that are going on, too, and by then the Legislature will
2 have passed a bunch of legislation giving us more rules to
3 write.

4 HONORABLE TRACY CHRISTOPHER: Would it be
5 useful for us to e-mail the subcommittee if we have other
6 comments?

7 CHAIRMAN BABCOCK: Mike, did you hear what
8 Judge Christopher asked?

9 MR. HATCHELL: What?

10 CHAIRMAN BABCOCK: She wants to know if she
11 can e-mail you guys comments? I think you can.

12 MR. HATCHELL: Oh, yeah, of course.

13 MR. LOPEZ: That's called remote access.

14 CHAIRMAN BABCOCK: Okay. So we're going to
15 close the book on Rule 14 for now and open the book up on
16 our appellate points, and Bill, you want to take the easy
17 one first?

18 PROFESSOR DORSANEO: Yes. I have a
19 memorandum dated March 2nd, 2005, that deals with proposed
20 amendments to appellate Rule 28, and this is the
21 accelerated appeal subject that we talked about at several
22 meetings, particularly in connection with the petition for
23 permission to appeal topic that I believe we at least
24 tentatively completed.

25 The remainder of what's necessary in order

1 to get an appellate Rule 28 in shipshape from the
2 standpoint of the appellate rule subcommittee is addressed
3 in two alternatives under 28.1, and I'm not going to go
4 through those alternatives except to say this: In the
5 first alternative the committee decided -- I'm not sure
6 whether it was a bare majority of the committee or more
7 persons than that; but the committee, I believe it's fair
8 to say, decided that statutes providing for a different
9 timetable for accelerated appeals than the timetable
10 provided for in the appellate rules should be made subject
11 to the appellate rules; and if you look at page five of
12 this memorandum, you can see language, single space
13 indented, that tries to express that approach.

14 "Unless a statute expressly prohibits
15 modification or extension of any statutory appellate
16 deadlines, an accelerated appeal is perfected by filing a
17 notice of appeal in compliance with the appellate rules,
18 regardless of any statutory deadlines." That's a fairly
19 aggressive approach to these statutes, but I think that's
20 one way to go certainly.

21 The alternative and opposite approach is at
22 the bottom of page five. "Unless otherwise provided by
23 statute, accelerated appeals are perfected by the filing
24 of a notice of appeal in compliance with the appellate
25 rules." And all that says is be careful out there because

1 there are statutes which will override the appellate rule
2 timetable. I think just introducing this topic that will
3 be the main issue for the committee to address and to give
4 advice on to the Court, presumably on April 1 or shortly
5 thereafter.

6 And let me turn now to the topic that we
7 haven't talked about very much in this committee or at the
8 subcommittee level, and that has to do with the problem of
9 transferring cases from one court of appeals district to
10 another and, more specifically, the problem that results
11 when the transferor district's law or interpretation of
12 Texas law is different from the interpretation given to
13 Texas law by the transferee court. The case transferred
14 from the First District Court of Appeals to the San
15 Antonio court of appeals would be such an example if the
16 First Court had one view of Texas law and the San Antonio
17 court had a different view.

18 This subject is a subject that -- and
19 Justice Hecht, correct me if I'm wrong -- but that this
20 committee has been directed to address and to deal with by
21 rule by the Legislature; is that right?

22 HONORABLE NATHAN HECHT: Not yet, but the
23 chiefs of the courts of appeals, who meet together
24 regularly in a conference, decided that they would like to
25 see some mechanism for resolving this issue, what law

1 should govern in a transferred case, and another issue,
2 which is where do -- where are cases filed in districts
3 that overlap, and they believe that these issues have
4 caused them -- their courts problems and that either the
5 Bar or legislators or both would like to see them
6 resolved.

7 And so they drafted legislation on the
8 overlapping districts problem, and they were thinking
9 about doing the same thing with this issue, which is the
10 law in a transferred case, and they became persuaded that
11 they should instead pursue solutions through this process,
12 but rather than have no legislation at all they are asking
13 for a concurrent resolution, probably out of the Senate,
14 that would direct the committee to make -- or direct the
15 Court to make rules on these issues, and I don't -- that's
16 Senate Concurrent Resolution 7 by Senator Duncan, which
17 has been introduced, and I doubt it will be opposed. So
18 that will be our marching orders, and I told the chiefs
19 that we would resolve this sooner rather than later and
20 essentially to their liking. So once we come up with a
21 proposal we need to see what the chiefs think about it.

22 PROFESSOR DORSANEO: So the Senate
23 Resolution No. 7 was on the table over there, and you can
24 look at it, and it basically will give directions to write
25 a rule on this subject.

1 HONORABLE NATHAN HECHT: Right.

2 PROFESSOR DORSANEO: The bill concerning
3 assignment of cases in overlapping courts of appeals
4 districts is there as well, and there's several readings.

5 HONORABLE NATHAN HECHT: Well, it -- there
6 was legislation that was drafted, and I think we gave them
7 that. I think that's over there, but the chiefs are
8 not -- they've pulled back from that. That was just one
9 approach that they drafted, but they recognize that there
10 may be problems with it and maybe there should be another
11 approach, and Mike and I have e-mailed about that the last
12 two days.

13 PROFESSOR DORSANEO: What I have done in
14 between meetings is to ask one of my students, Michael
15 Filer, to prepare a research memorandum, which is
16 available in the materials. You may have read it, you may
17 not have read it. It is entitled "Coordinating a
18 Conundrum," with more words after that, and what he
19 attempts to do and what he did do, and I think he did
20 certainly an adequate job, is to explain the historical
21 development, the overlapping district problem, a
22 discussion of case law that addresses this problem, and
23 really the memorandum is just to give you a context in
24 which the discussion can be conducted.

25 It seems to me that there are -- and this is

1 not in the memorandum, but it seems to me that there
2 are -- and I would be pleased to take any questions if I'm
3 getting to the main subject of what could be done about
4 this too soon, but it seems to me that there are four, or
5 at least four, different approaches to this problem of the
6 law being interpreted differently in different courts of
7 appeals districts and the case being transferred from one
8 to another.

9 The transferee court can, quote, "follow its
10 own precedent," or if there isn't any precedent, you know,
11 decide the issue as it sees fit, you know, giving due
12 regard to available information, including the decisions
13 and judgments of other courts of appeals on the subject.

14 The second option would be to follow the
15 sister court's precedent and to act as if the transferee
16 court is like a visiting court or a group of visiting
17 judges with respect to the transferor district.

18 A third option would be to send it back some
19 way or another, and the fourth option that seems to me to
20 be an option would be to certify the issue to the Texas
21 Supreme Court for action, reassignment, or whatever else
22 might make sense.

23 HONORABLE SARAH DUNCAN: Punt.

24 PROFESSOR DORSANEO: Which might be regarded
25 as a kind of a punt, both by the Supreme Court and by

1 others.

2 Now, I would add this as my own idea and my
3 own belief. You know, in a perfect world courts of
4 appeals should work hard to avoid conflicts when that's
5 possible, considering other courts of appeals' decisions
6 and not using tunnel vision or looking only to their own
7 prior decisions, which I believe would be the kind of
8 tunnel vision; and that sentiment is based on the
9 assumption that Texas law is meant to be uniform and that
10 all courts of appeals decisions are precedent across
11 Texas. That is to say the law is not meant to be
12 different in different places, and I express that
13 viewpoint because one of the things that we don't want to
14 accomplish by working on this is to encourage the courts
15 of appeals to come to different conclusions on basic -- on
16 basic questions on the theory that it's perfectly
17 acceptable for the law to be different in different
18 places.

19 The rule that I would propose to draft would
20 try to deal with the practical problems of coping with the
21 reality that there are different interpretations and to
22 try to get that resolved in a sensible way as quickly as
23 possible, and I need guidance on what approach, one of the
24 four I mentioned, some other approach, would be a good way
25 to proceed.

1 There's not a lot of guidance that can be
2 gleaned from what is done in other states. New York, as I
3 understand it, has a procedure where the law that's
4 applied is the law that would have been applied in the
5 transferor district or transferor department. I don't
6 know why that's so exactly or how New York appellate
7 practice works, but that seems to be the approach there.

8 The California approach that's discussed in
9 the memo is not explained to me clearly enough for me to
10 understand exactly what they're doing.

11 MS. HOBBS: I think Rule 62 in California is
12 more sort of an MDL rule where it's not looking for
13 uniformity in California law as much as it doesn't want a
14 defendant subject to 14 different orders that he doesn't
15 know how to regulate his behavior, and so if the defendant
16 sees that happening or the court sees that is happening,
17 that court of appeals can pick up those cases from the
18 lower courts and say, "Okay, we're going to bring all of
19 these cases up to our district, even if we didn't
20 technically have jurisdiction over them so we can decide
21 for this one defendant or plaintiff or whatever how he
22 needs to conduct his business." I think that's how I'm
23 reading Rule 62.

24 PROFESSOR DORSANEO: All right. That makes
25 better sense than what this memorandum does. Is there

1 anything else that your staffpeople developed that would
2 be appropriate to mention at this point?

3 MS. HOBBS: I believe -- and Justice Hecht's
4 intern Matt Nickson is here, getting coffee as his name is
5 coming up. He did some research, and he found out that
6 Ohio, I believe, does the certify the case to the Supreme
7 Court, not to transfer it back or anything, but for
8 decision, something that may not be doable in Texas given
9 the workloads of the Court, but I think that's how Ohio
10 does it. And you found a couple other that weren't really
11 -- what else did you find, Matt?

12 MR. NICKSON: Well, Pennsylvania was
13 interesting because they have a superior court and then a
14 commonwealth court, both at the intermediate appellate
15 level and both handling civil appeals. The commonwealth
16 court jurisdiction appears to involve appeals that touches
17 on -- the stuff having to do with governmental liability,
18 and there are some cases concerning transfers between
19 those two courts, cases in which the superior court
20 transferred appeals to the commonwealth court because it
21 found that the commonwealth court would be in a better
22 position to resolve the appeals and because it found that
23 the commonwealth court would have a -- that they didn't
24 want to have conflicting case law develop.

25 But I really felt that the most apposite

1 state to look to, which you've already mentioned, is New
2 York because the New York Constitution, I believe it's
3 Article 6, does envision, and there is commentary to this
4 effect, transfers out of -- I believe it's the second
5 appellate department when that -- for reasons of docket
6 congestion, and New York does have that rule that you see
7 in the Doyle case and then another case, Kane V. Her-Pet,
8 that describes the rule of the transferor court as binding
9 on transferred appeals.

10 CHAIRMAN BABCOCK: Skip, you got a comment?

11 MR. WATSON: Well, I've had a few of these,
12 and the problem that I've had in trying to quantify them
13 or get a handle on them can kind of be summed up this way.
14 First, every appellate judge that I've talked to at court
15 of appeals level sincerely believes, and correctly, that
16 their job is to determine the law of the state of Texas,
17 not the law of the Fourteenth District or the Seventh
18 District, whatever, or what the law of the state of Texas
19 should be. Not all of them give equal deference to other
20 opinions from other districts, which may or may not should
21 be, but that's reality.

22 When there is a strong feeling that the law
23 should be a certain way, the problem to the practitioner
24 and to the litigant is that there is a tendency for the
25 court that the case was transferred into to simply ignore

1 the conflict with the case from the other district. I
2 mean, literally write the opinion without mentioning it
3 and from whole cloth fashion new law for this issue, which
4 is great.

5 I mean, the law is from the law of Houston.
6 The summary judgment is granted in Houston on the
7 assumption that it's going to a Houston court of appeals
8 that -- in one of my cases that had an en banc decision on
9 the issue, transferred to Amarillo. Amarillo does not
10 cite the en banc Houston opinion, says the law is 180
11 degrees the other way and, guess what, busts the summary
12 judgment, sends it back for retrial in Houston under which
13 law? Never mentioning the conflicting case, and when the
14 motion for rehearing goes up or anything else, it's just
15 denied.

16 I mean, there is no mention, and that's
17 what's enormously frustrating. That's the reason there
18 needs to be a rule, because it's just not being worked
19 out, and it's impossible to quantify. The evidence of
20 what's happening is going to be anecdotal, because you
21 don't see the case the same. "We realize that Smith vs.
22 Jones held this. We disagree. We think the law is this.
23 We're sending it back to Houston to apply our law and not
24 the law of Smith vs. Jones." It's ridiculous, and at this
25 point our only option is to say, "Guess what, Supreme

1 Court, here we are, we've got a conflict. Don't let the
2 fact that the case does not show up in the opinion below
3 tell you there is not a conflict. There is. In fact, the
4 fact that it's not mentioned ought to tell you just how
5 big the conflict is."

6 PROFESSOR DORSANEO: There's a case out of
7 the Fourth Court, American National Insurance Company vs.
8 IBM, which is discussed in Michael Filer's memo, and of
9 course, in that opinion the San Antonio court identified
10 the fact that its own precedent differed from the Houston
11 court's; isn't that right?

12 HONORABLE SARAH DUNCAN: (Nods head.)

13 PROFESSOR DORSANEO: And, you know,
14 obviously if we have a problem of the transferee court not
15 even paying any attention to the law of another court of
16 appeals district or the interpretation given to that law,
17 that's inappropriate judicial behavior. I think that
18 would be inappropriate behavior regardless of whether it
19 was a transferor or transferee context, at least if the
20 matter was brought to the court's attention by the lawyers
21 in the case. We could put in a rule at a minimum that the
22 matter needs to be addressed, considered and addressed,
23 but whatever is done beyond that is the harder part, I
24 would think.

25 CHAIRMAN BABCOCK: Justice Gray, do you want

1 to mention your solution to this problem?

2 HONORABLE TOM GRAY: Well --

3 CHAIRMAN BABCOCK: Or not?

4 HONORABLE TOM GRAY: I will. I will throw
5 it out on the table, and I have never discussed this with
6 Nathan or any member of the Supreme Court, but there is
7 actually a fix for this on probably 999 out of a thousand
8 transfers because they're transferred for docket
9 equalization purposes as opposed to some other purpose,
10 but the fix is that Wallace can -- excuse me, Chief
11 Justice Jefferson can actually assign justices to the
12 transferor court or what would otherwise be the transferor
13 court as opposed to transferring the case to another
14 court, and that -- but for the discussion that we had last
15 time that a panel is not obligated to follow the precedent
16 of its own court, which I disagreed with, but if I get
17 transferred to Houston to sit on a case that sort of
18 resolves the problem for -- certainly for me. And then
19 the case itself is not -- it doesn't become Waco
20 precedent, and it doesn't become -- it just stays in
21 Houston.

22 CHAIRMAN BABCOCK: So you would become a
23 member of the Fourteenth Court for the purposes of that
24 case?

25 PROFESSOR DORSANEO: That promotes the lack

1 of uniformity, which is not the desirable outcome.

2 MR. ORSINGER: No. I think the justice is
3 saying that if he's assigned to the Houston court he's
4 bound by the Houston precedent; whereas if the case is
5 reassigned from Houston to Waco he's bound by the Waco
6 precedent.

7 PROFESSOR DORSANEO: Well, same comment.

8 CHAIRMAN BABCOCK: Alistair.

9 MR. DAWSON: What about crafting a rule --
10 and I will just describe it generally. What about
11 crafting a rule that says if the court that receives the
12 case -- I'm all confused on this transferor/transferee,
13 but whoever gets the case, if it goes to Waco and you
14 determine that there is a conflict that might have some
15 bearing on the case, you're obligated to send it back?
16 Just send it back to Houston.

17 HONORABLE TOM GRAY: Well, that was the
18 option three that Bill discussed, and the mechanics of
19 that become fairly complicated, and the whole reason we're
20 doing this is docket equalization purposes, and we're
21 trying to get that case moved. I, in fact, in two cases
22 had this situation come up where it was actually both on
23 indigency appeals in existing civil appeals, and we were
24 utilizing a different procedure in Waco. We were filing
25 it as a second appeal as opposed to within the same

1 appeal. The courts from whence they came were Beaumont
2 and Houston. They both filed those indigency appeals in
3 the same case.

4 To make a long story short, there was no way
5 for us to reach the issue of the indigency appeal because
6 we didn't have jurisdiction of that appeal. The case --
7 the court from whence it was coming didn't have -- they
8 wouldn't docket it as a separate appeal and so we were
9 just hung in procedural limbo, and I finally prevailed
10 upon the other two colleagues on my court to change our
11 rule so that we brought it under the umbrella and it's all
12 one appeal. So I guess in that vain it did help bring
13 uniformity to the system as opposed to further split it,
14 but it's a real problem because it really is real.

15 The one observation that I have on Senator
16 Duncan's draft House resolution is that it only addresses
17 the situation if it arises that there is a conflict. It's
18 not clear, and I would say that it is still a conflict, if
19 the court receiving the case views the result as being
20 different than it would have been in the transferor court.

21 And if you look in Bill's memo there is a
22 case in there called Jaubert, where if you look further
23 than the initial discussion, it's actually on page 91,
24 footnote 1 of the opinion, that issue had never been
25 decided by our court. It had been decided by the Fort

1 Worth court from where it came, and as a result we decided
2 -- the majority on our court decided that it was going to
3 go a different direction. So prior to the transfer there
4 was no conflict. Fort Worth had decided it, Waco had not,
5 and when it got to us we decided it a different way,
6 thereby creating the conflict; and I would certainly say
7 whatever we do in the context of a rule, that should be
8 defined as a conflict so that that doesn't allow to creep
9 in.

10 CHAIRMAN BABCOCK: Justice Hecht.

11 HONORABLE NATHAN HECHT: Let me add one
12 thing for background and that is that, at least
13 heretofore, transfers have been required by the
14 Legislature. There is a rider to the Appropriations Bill
15 that requires the Supreme Court to transfer cases among
16 the courts of appeals I think quarterly, I think it's
17 quarterly, in such a way as to equalize the workloads; and
18 we have taken that directive very seriously; and we have a
19 very complex spreadsheet that makes it possible to
20 transfer cases from courts to courts to courts and back to
21 equalize the workload.

22 There is some growing antipathy among the
23 courts of appeals to that procedure, and they -- there are
24 courts that do not like to have cases transferred out.
25 They don't mind helping somebody else out, but they don't

1 want to lose their own cases because they feel some
2 responsibility to discharging their own workload, so we
3 have worked with the courts of appeals some to delay the
4 transfers, but in the end we feel like as long as this
5 provision is in the Appropriations Bill we have no choice
6 but to equalize workload.

7 So the point of that is that the transfers
8 are not at this point something that the judiciary feels
9 that they have a whole lot of choice about. They might be
10 able to fend it off for maybe a quarter or something, say,
11 "Well, you know we got behind for some reason. Give us
12 another quarter, we'll catch up and we won't need to do
13 this." Okay, but for the most part they are managing.

14 Secondly, with respect to Alistair's
15 suggestion, I just point out to you that there are a lot
16 of lawyers who don't like to be transferred, and if they
17 could get out of it by arguing that there was a conflict,
18 you know, we would have a whole hell of a lot more
19 conflicts than we've got already, which is a lot; and then
20 the second part of that problem is you wouldn't want to
21 encourage lawyers to argue about whether there was a
22 conflict or not with a view toward that they might not get
23 transferred if they won that argument. So I think there
24 are a lot of problems with that, even though on its face
25 it looks like a good solution.

1 CHAIRMAN BABCOCK: Justice Duncan.

2 HONORABLE SARAH DUNCAN: Another problem
3 with Alistair's suggestion is you don't know when a case
4 is transferred when the conflict will be recognized. In
5 our court, for instance, I don't know what cases I'm going
6 to even sit on the panel on until the lawyer gets notice
7 that I'm on the panel. You and I find out the same time.
8 By that point an enormous amount of court resources have
9 already been put into that case.

10 Even when I get on the panel I don't
11 generally get copies of the briefs until the Friday before
12 the week of argument, so maybe during that weekend
13 sometime I'll realize there's a conflict. Chances are if
14 it's not my case I won't, until I really get in and start
15 researching it, and it could be that it's not until the
16 day of argument or until somebody is trying to prepare a
17 draft opinion that you even realize that there is a
18 conflict that's actually going to be outcome
19 determinative in that case.

20 So whatever method you-all choose it needs
21 to be something that recognizes that you don't necessarily
22 know when the conflict is going to be recognized.

23 MR. DAWSON: Can I ask a question? From the
24 appellate courts' point of view what is the problem with
25 writing based on the law of the transferring court? In

1 other words, if the case was transferred from Houston to
2 San Antonio, say.

3 HONORABLE SARAH DUNCAN: I'm probably not
4 the best person to answer that.

5 MR. DAWSON: Well, I would gather, and I
6 guess the intellectual argument is you don't think that
7 that's the proper law and therefore you don't want to
8 write what you think is improper law.

9 PROFESSOR DORSANEO: In violation of your
10 oath.

11 HONORABLE SARAH DUNCAN: But it's not. All
12 you have to do is write the opinion to say, "This is a
13 Houston case. The Houston courts of appeals are in
14 agreement that this is the law; therefore, that's what
15 we're going to do." That's why I say I'm not the right
16 person to answer that.

17 MR. DAWSON: It would seem to me that
18 allowing different law to be applied is both fundamentally
19 unfair to the litigants and to the trial court. The trial
20 court bases its decision based on the law in its district.
21 Whether it should or it shouldn't, that's what it does,
22 and it creates -- so not only is it fundamentally unfair,
23 but it creates all kinds of potential for quagmire. I
24 mean, it goes up, gets transferred, they rule it's one
25 law, it goes back down. Then what do you do as the trial

1 judge, apply the San Antonio law or Houston law?

2 HONORABLE SARAH DUNCAN: Law of the case at
3 that point.

4 MR. DAWSON: Law of the case, goes back up,
5 doesn't get transferred. Now it's in Houston.

6 HONORABLE SARAH DUNCAN: Who's going to say
7 it's clearly erroneous.

8 MR. DAWSON: It seems to me that either
9 you've got to -- and I haven't read all this stuff. You
10 either apply the law of the transferring court, that's a
11 simple solution; or you send it back, which apparently
12 creates other problems; or the Supreme Court has got to
13 resolve the conflict; and those are the three options that
14 I see; and of those three I would guess that applying the
15 law of the transferring court is the simplest and easiest
16 to live with.

17 CHAIRMAN BABCOCK: Frank.

18 MR. GILSTRAP: We got into this last time,
19 and I'm not going to dwell on it, but the problem with
20 that approach is the transferring court is not bound to
21 apply its own law. Texas courts are not courts of strict
22 stare decisis. Now, a judge will say, "Well, I'm bound by
23 precedent," but they seldom say they are. I mean, you can
24 look through all these cases and you can say that they
25 will cite a prior case of their own court. They will cite

1 a prior case of another court. They seldom say, "We are
2 bound by this precedent."

3 HONORABLE SARAH DUNCAN: Because they're
4 not.

5 MR. GILSTRAP: And they're not. Okay. And
6 what we're doing if we pass a rule that says that the
7 transferee court is bound by the precedent of the
8 transferor court, transferor court, we are backing into
9 the notion of strict stare decisis in Texas. Now, we may
10 want to do that. We may want strict stare decisis. We
11 shouldn't back into it. We shouldn't just assume that the
12 transferring court will decide the case in a certain way.
13 That's the problem with the approach.

14 CHAIRMAN BABCOCK: Richard Munzinger and
15 then Skip.

16 MR. MUNZINGER: Substantive rights can be
17 affected by the problem. Company A is bound by the El
18 Paso court of appeals rule on Subject X. Company B is not
19 because the case was transferred to Houston. Now, Company
20 A may have acquired a competitive advantage or
21 disadvantage because of the results of that disadvantage.

22 Litigants in a case some years ago before we
23 did the new rules, the El Paso court of appeals had a view
24 of interrogatory answers and signatures that was different
25 from other people's rules or other courts. There were two

1 or three different rules about it. So here Litigant A in
2 El Paso is subject to the El Paso court of appeals rule,
3 but Litigant B is subject to the San Antonio rule, and
4 they are two guys in two cases and they are in the same
5 town, and it may be the same client.

6 You have some substantive right problems
7 about this, and I'm sympathetic to Bill's idea that the
8 law is the law, but we don't know what the law is until
9 the Supreme Court tells us what the law is, and a rule
10 which says you will apply the law of the transferring
11 court addresses the problem of judges who have taken an
12 oath to support the law as they understand it because it
13 is now the law that they must obey to apply the
14 transferring court.

15 HONORABLE TERRY JENNINGS: Well, is it that
16 simple, though, because, for example, in my court we have
17 three different panels, and we may have precedent in my
18 court, and a certain number of judges may think that we
19 need to overturn that precedent, that we were wrong. We
20 could have a good faith belief following our conscience
21 that it was wrong, and we can, you know, address it that
22 way. You know, you can call for en banc and call for it
23 to be overturned and, you know, the en banc court may
24 disagree and say, "No, we need to affirm our prior
25 precedent, but you still have the right to dissent. You

1 can exercise your conscience and you can give an opinion
2 in accordance with your conscience."

3 If you're the transferee court and you think
4 you're right and the court is wrong, there is no mechanism
5 for how to deal with that. So --

6 MR. MUNZINGER: I understand, but again,
7 from the litigants' standpoint, my point is only, yeah,
8 there is a -- I agree there is a problem. From the
9 litigants' standpoint substantive rights can be affected
10 seriously by differing rules being applied in the same
11 jurisdiction to different parties or possibly even the
12 same party; and I think, in all due respect, the appellate
13 court judges can write in their opinion, "For God's sake,
14 Supreme Court, solve this problem."

15 They did it years ago on venue. Actually,
16 it was the Legislature that had to, but judges were
17 begging the Legislature to do something about Article
18 1995, and they finally got around to it, but the judges on
19 the courts of appeals can very eloquently point out to the
20 Supreme Court, "We've got a real problem here." Either in
21 a concurrence or a dissent, a footnote or whatever, but
22 "Help us, Court. This is a big mess here".

23 CHAIRMAN BABCOCK: Justice Patterson, did
24 you have something?

25 HONORABLE JAN PATTERSON: Well, I think

1 somebody was before me, but I'll jump in. I agree with
2 Skip and Alistair and Justice Duncan. To me this is a
3 very simple, clear problem, with all due respect to Waco
4 and California, to the extent --

5 HONORABLE TOM GRAY: I've never been grouped
6 with California before.

7 HONORABLE SARAH DUNCAN: Nor has Waco.

8 HONORABLE JAN PATTERSON: I suspect that
9 those two words have never been used in the same sentence,
10 but I -- we have to remember that this issue does not
11 arise in a vacuum. It comes out of an equalization
12 system, which is a practical system to essentially shift
13 judges, and so Judge Gray's solution really is in effect
14 what I think we're already doing with this system, and our
15 court has previously been applying to the extent people
16 adverted to it, the law of the transferor court to the
17 extent that it can be discerned and figured out.

18 It's not really relevant in most cases
19 because there is uniformity in probably 95 percent of the
20 cases. It is that rare case where it does come up in
21 those two courts. But because it is a practical response
22 to a problem, all we really need is to decide which way we
23 want to go and make the solution because there are lots of
24 reasons why we could go one way or the other.

25 I think that the easy solution is number

1 two, following the original court's precedent to the
2 extent it can be discerned, but what to me is the most
3 important thing here is that we as judges sometimes start
4 to think of things as our cases. These are not our cases.
5 These are the litigants' cases, and so someone in Houston
6 or Waco has developed that.

7 I mean, it could be a termination of
8 parental rights in a particularly specific case in a
9 particularly specific locale that could end up in another
10 court, and that family has had the expectation that
11 they're going to be in their local court and follow their
12 local law, and at least those lawyers in that locale have
13 been trying to determine what the law is by their own
14 court of appeals, and so it came as a -- really a rather
15 shock to me when I first heard in Corpus Christi the
16 notion that we should apply our own cases of our district
17 even when we didn't have a conflict in a case.

18 Out of respect for that transferor court and
19 out of respect for those litigants who if we reverse this
20 case will go back to that district, out of respect I would
21 cite those cases in that court. It just seemed very
22 natural to me to do that because it arose out of a problem
23 of equalization. It wasn't -- it didn't have to do with
24 are we trying to make law uniform, are we trying to reduce
25 conflicts. It came out of this practical problem of

1 numbers, so it seemed to me the natural thing to do to
2 respond to that to honor that transferor court.

3 I just think it's a question of fundamental
4 fairness to litigants to apply the law of the forum to the
5 extent it can be discerned. We all know the practical
6 difficulties of dealing with that. It seems to me that we
7 can deal with it to some extent with a language of if we
8 apply the law of the forum, maybe a softer way to refer to
9 what we're trying to do here. The equalization system is
10 not a perfect system, but it's a good response to a
11 perceived problem by the Legislature, and I just think
12 that really the answer as some of the courts have -- I
13 mean, we just really want to know the answer and will
14 apply it.

15 CHAIRMAN BABCOCK: Skip has had his hand up
16 for a long time. Judge Sullivan, did you have your hand
17 up? Then Judge Sullivan and Bill.

18 MR. WATSON: I think at the end of the day
19 where we will end up is with the realization that this
20 happens most often when there is not an existing direct
21 conflict at the time of the transfer. It happens when
22 judges doing their constitutional duty are trying to
23 define what the law is, view the issue, that is the
24 transferee court views the issue, and comes up and says,
25 "Okay, there is this case of the transferring district

1 deciding this part of the question a certain way. But our
2 view of Supreme Court precedent would lead us to believe
3 that the law of Texas is this in this particular
4 circumstance, and after all, the prior case of the
5 transferring district is never precisely on point."

6 I mean, you can distinguish anything, and
7 therefore, there is a rationale for developing whole cloth
8 new law dealing with that issue. I believe where -- I
9 mean, I tried to sort of scheme ahead of how this thing is
10 going to play out, and it looks to me like that the
11 easiest solution would be for the Supreme Court -- and
12 it's going to have to be the Supreme Court or it will be
13 the Legislature, to adopt some sort of rule that says in
14 transferred cases if in your analysis, in that rare case,
15 you believe that the case could be controlled if forum
16 state law or forum court law were applied, but if you find
17 you disagree with that forum court law, then it is your
18 duty to send it back, because if an exception is going to
19 be made, if forum state law is going to be distinguished
20 on the facts of this case, the litigants are owed the
21 right to have that law made by the court that made the law
22 that's being distinguished.

23 That's the court that ought to distinguish
24 itself, and it ought to be the law that controls the
25 retrial of the case once they get back. That's got to be

1 the operative point. In the end, I think that what's
2 going to nail this thing is going to be one of two
3 concepts that are not related to what we're talking about.

4 The first is cost and delay in civil
5 litigation, the old Civil Justice Reform Act out of 1990
6 that Congress passed saying if you want more judges and
7 you want pay raises, we'll give you the judges, we'll give
8 you the pay raises, but we're going to find out why it's
9 so expensive and takes so long to litigate through United
10 States District Courts, and it's that power of the purse
11 of Congress over the courts that inevitably brought this
12 point to bear in United States District Courts. We cannot
13 have the luxury of that kind of judicial inefficiency, and
14 I can't pay for it for my clients. We just don't have
15 that luxury.

16 The second thing is, unlike the Federal
17 situation, we have, for better or worse, elected appellate
18 judges; and I as a litigant am telling my clients, "You're
19 right. You should have won that case and we would have
20 won that case in Houston and, yes, you are a citizen of
21 Houston, and that's where you vote, and that's where you
22 elect your judges, and yes, the judges who busted you on
23 this case and created new law and sent it back and just
24 cost you not only my attorney's fees but all of the
25 attorney's fees that have come up before this, are people

1 you cannot vote for."

2 And I think that issue is going to raise its
3 head somehow in the context of needing, you know, some
4 sort of geographic diversification in the courts; and I
5 fear that the wrong litigant being busted in the wrong
6 case with a big enough pocketbook is going to bring that
7 issue to the Legislature; and the little bit of testimony
8 that I've heard, that issue resonates; and it resonates
9 almost as much as the utter absurdity of the money that is
10 wasted when one of these cases is decided by a court
11 that's not going to end up trying it and is not going to
12 hear of the subsequent appeal.

13 CHAIRMAN BABCOCK: Judge Sullivan.

14 HONORABLE KENT SULLIVAN: I wanted to just
15 voice a similar issue. I was just concerned about the
16 possibility that we were going to bypass too quickly the
17 potential option of send it back, and I really raise this
18 as a question more than as a statement, but I wonder if
19 there are very many cases on appeal where the litigants
20 would identify this as a serious issue where there is a
21 conflict in what I would identify as a controlling
22 question of law. It may be naive on my part to say that,
23 but I suspect that there aren't going to be a high
24 percentage of cases in which that's really heard.

25 I wonder, for example, in some of the cases

1 that have been identified for us in the memo, in the
2 American National case that I know Justice Duncan wrote
3 her dissent in, I wonder if it wasn't clear to the
4 litigants at the outset that there was a conflict and that
5 this is an issue that the entire case potentially turned
6 on. In other words, I would be very surprised if that was
7 something that came up as a surprise at the end.

8 I don't know anything about the case. I may
9 be completely wrong, but when there is a precedent, I
10 would suspect if it's a controlling issue, it's an issue
11 that the case is likely going to turn on, that the lawyers
12 would be able to identify it, number one, identify it
13 relatively early when the issue of the appeal is being
14 disposed of and could raise it in such a way so as to
15 allow the case to remain in what would otherwise be the
16 transferor court with the parallel thought that there are
17 many, many cases for which the litigants probably wouldn't
18 raise an objection to transfer because there are many more
19 routine appeals that take place. Now, again, I invite
20 comments because that may be a naive thought.

21 CHAIRMAN BABCOCK: Well, Judge, I think what
22 you -- you have a species of cases where there is a
23 precedent from the court where the trial judge heard the
24 matter which is on point and dispositive and it goes to
25 another court that has no jurisprudence on the point at

1 all. So the anticipation is when you go to that other
2 court that they would follow the law that the trial judge
3 followed, but that doesn't always happen.

4 It happened to me where I won in the trial
5 court in summary judgment. It was a case on point and the
6 transferee court decided not to follow it, and we went
7 back down, and there was another intervening appellate
8 court decision back home, and now what's the trial judge
9 going to do?

10 HONORABLE KENT SULLIVAN: Wouldn't that be a
11 case, though, that falls into the first category; that is,
12 if you have a case where the controlling issue is clearly
13 settled in what would otherwise be the transferor court,
14 perhaps you don't want to characterize that as a conflict,
15 but if you're headed into a vacuum, it seems to me that
16 would be appropriate to point out. I guess the central
17 theme that I'm making is I don't know that there are that
18 many cases out of the total number of cases that get
19 appealed where this is an issue, and couldn't we identify
20 them and send them back?

21 CHAIRMAN BABCOCK: Yeah. We have a lot of
22 people's hands up. I think, Richard, you were first.
23 Then Buddy, then Judge Christopher, and then somebody over
24 there. Stephen and then Nina.

25 MR. ORSINGER: Who is first?

1 CHAIRMAN BABCOCK: You are.

2 MR. ORSINGER: Okay. It seems to me like
3 the problem here is deeper than we're talking about,
4 because if there is a transfer out of the geographical
5 area where your case was tried and there is no holding
6 that's precedent, but you're arguing an extension of a
7 previous ruling of the court in your area, you might have
8 won the case if you hadn't been transferred. You get sent
9 somewhere else, there is no binding precedent for them,
10 they rule differently, and you lost.

11 If the case is remanded and sent back down
12 to trial in Houston, you know, maybe those people in that
13 case are bound by the law of the case, and the court of
14 appeals on the second appeal is going to be bound to the
15 decision made by the transferee court, if you consider
16 those kind of rulings to be binding. You know, the issue
17 to me is if you -- if you see that we actually are having
18 judges deciding decisions that are not originally supposed
19 to be deciding it, we may have altered outcomes without
20 realizing it more often than we think, because right now
21 we're just focusing on the altered outcome when you have a
22 holding already and then the other court disagrees with
23 it; and given that there is probably a lot of altered
24 decisions going on that we don't realize, it's more acute
25 for us when the second decision disagrees with an earlier

1 decision, but it's just as much an unexpected alteration
2 of the outcome.

3 And I guess what I'm saying is that I'm not
4 sure that we have all the pressure to fix this problem by
5 forcing the transferee court to apply the law of the
6 transferor court in cases where there's a specific holding
7 that's stare decisis, but you don't in any way bind them
8 to follow the natural extension of the stare decisis of
9 the original court. And so I think we think we're fixing
10 the problem, and really we're only fixing one little
11 manifestation of the problem, and maybe what we ought to
12 do is realize that as long as these transfers are going
13 on, there is a risk that your outcome is different from
14 what it would have been if you hadn't have been
15 transferred.

16 And if we accept that risk then we have to
17 ask ourselves really is the solution then to make
18 transferee judges vote in a way that is not right in their
19 minds and their hearts simply because there was a decision
20 made by another court that they disagree with.

21 So I'm real close to -- I don't really have
22 a strong side that I'm on, but I really do think the
23 problem is bigger than this, and the fix is not going to
24 fix the problem for the people that don't know it's
25 happening to them.

1 CHAIRMAN BABCOCK: Sounds cosmic. Buddy
2 Low.

3 MR. LOW: I thought I had the fix, and the
4 more I think about it, I would create more problems by
5 that.

6 CHAIRMAN BABCOCK: Then you're out of order.

7 MR. LOW: Because as a practical matter
8 lawyers quite often prefer if it's a personal injury case,
9 you're a plaintiff, defendant, you prefer being in Waco
10 court or to prefer to be in -- you know, it's just
11 natural. Lawyers like to pick and choose. So if you gave
12 them some option of like saying, okay, there's a conflict,
13 you certify and swear to the Supreme Court that there is a
14 conflict, and the Supreme Court can decide, first of all,
15 whether, yes, there is and we'll transfer it back or are
16 we just going to take this directly. Then the Supreme
17 Court would have too too much work, I mean, but we have to
18 consider that a lot of lawyers want to create a conflict
19 that's not there just to get out of court.

20 CHAIRMAN BABCOCK: Judge Christopher, and
21 then Stephen who has been patient.

22 HONORABLE TRACY CHRISTOPHER: I wanted to
23 echo Ken's concerns about how many cases this is really
24 happening in, and I would like to point out that it can
25 happen when you stay in your own court. I mean, I have

1 been reversed following precedent of a Houston court of
2 appeals, and they have reversed themselves and reversed
3 me, and I have had cases when the First says something and
4 the Fourteenth says something, and, you know, I have to
5 take a chance. It's not that clear-cut, and I would
6 really be interested to see the -- you know, how many
7 times this really is an issue.

8 CHAIRMAN BABCOCK: Stephen.

9 MR. TIPPS: I agree with Buddy, and I was
10 going to respond specifically to Judge Sullivan's
11 observation. I think lawyers very clearly would look for
12 conflicts whether they are there or not when they have a
13 case that's transferred. I was just saying to Pam I think
14 if we did that we would end up seeing a new niche of
15 appellate practice, conflict motions, and Pam would talk
16 at CLEs on conflicting motion.

17 I just don't think that's workable, and my
18 strong view is the view that Judge Patterson expressed
19 that the simple solution is to direct the transferee court
20 to sit and decide as though it were the transferor court.

21 CHAIRMAN BABCOCK: Carlos.

22 MR. LOPEZ: I think that's probably more
23 workable than anything else I've heard, but in terms of
24 the lawyers wanting to certify it more often than perhaps
25 they should, why don't we just let the trial court decide

1 if they agree or not? I mean, the issue when I was on the
2 trial court had already come up, and it was clear I was
3 getting sent out to Eastland so often that people started
4 arguing to me -- they almost started hedging their bets as
5 to what would happen if they went to Eastland on summary
6 judgment. I'm not joking.

7 So, you know, make them bring it up at the
8 trial court level. Of course, at that point you don't
9 know if you're getting transferred or not.

10 CHAIRMAN BABCOCK: Yeah, you've got to argue
11 to 14 different --

12 MR. LOPEZ: You don't have to argue. You
13 just have to tell whether there is a conflict or not.

14 CHAIRMAN BABCOCK: Bill.

15 PROFESSOR DORSANEO: Maybe there is
16 another -- is there any way to make the courts of appeals
17 work together?

18 CHAIRMAN BABCOCK: Can't we all get along?

19 PROFESSOR CARLSON: Next.

20 PROFESSOR DORSANEO: That's kind of an
21 accident of history that we have different courts of
22 appeals, and that's fairly unusual across the United
23 States. We could have one court of appeals sitting in
24 several places with lots of judges.

25 HONORABLE SARAH DUNCAN: Which is what other

1 states do.

2 PROFESSOR DORSANEO: And they must work it
3 out somehow; and anyway, I was hoping not to have to draft
4 this four different ways. If you could provide me some
5 guidance on that, that would be helpful.

6 CHAIRMAN BABCOCK: We're getting there.
7 Justice Jennings, Judge Sullivan, then Elaine, then Judge
8 Patterson.

9 HONORABLE TERRY JENNINGS: I don't think the
10 committee should underestimate this idea of a violation of
11 conscience. You know, if the First or Fourteenth Court
12 rules a certain way under a certain set of circumstances
13 and Judge Gray's court feels like it would violate their
14 conscience to follow that law, that's one thing. How
15 about this as an idea: If a case is transferred, let's
16 say from the First, which has a precedent, to Waco and
17 Waco comes down differently, what about the idea of asking
18 for a rehearing in the First to trump, to go back, because
19 from what you're saying is you can't even identify this
20 problem until after the opinion comes down.

21 MR. WATSON: That's it.

22 HONORABLE TERRY JENNINGS: And then one way
23 to fix that would be to say, "Okay, I think the First was
24 right all along. Waco was wrong. I'm going to get a
25 rehearing now in front of an en banc court of the First

1 and they can issue an opinion."

2 MR. WATSON: Give me that chance, I'm a
3 happy man.

4 HONORABLE TERRY JENNINGS: I'm sorry?

5 MR. WATSON: Give me that chance, I'm a
6 happy man.

7 HONORABLE TERRY JENNINGS: If it goes to
8 Waco and Waco doesn't follow the First, have a rule or a
9 short, sweet mechanism where you can go back to the First
10 to trump it out because it's going to be -- it is going to
11 be in rare cases that that happens.

12 CHAIRMAN BABCOCK: Nina had her hand up a
13 long time ago and I didn't call on her. I'm sorry.

14 MS. CORTELL: Just a couple things. I
15 basically completely agree with what Stephen said about
16 application of the law of the transferor court. The
17 problem I have with any of the other suggestions is we're
18 creating collateral litigation, and that could cause great
19 expense and waste of effort and time. I just -- I have a
20 grave concern there, and in terms of are we asking judges
21 to rely on their conscience by following a law not of
22 their court, I am concerned about that, but isn't the
23 answer to that that the court says, "We are following the
24 law of, we may not necessarily endorse that law, but we
25 are following it."

1 MR. DAWSON: We're bound. We're obligated.

2 MS. CORTELL: Right. And then the only --

3 CHAIRMAN BABCOCK: Judge Sullivan and then
4 Elaine and then Judge Patterson and then Judge Gaultney.

5 HONORABLE KENT SULLIVAN: I just wanted to
6 at least touch on what could be a fifth alternative, and I
7 think Justice Gray implied this before about the
8 assignments of judges, but it's one other, and maybe this
9 is the sixth alternative in light of what Justice Jennings
10 said, but one other possibility would be to look at this
11 in the context of assigning individual judges so that
12 individual judges could be assigned to what would
13 otherwise be the transferor courts not as, again, as
14 panels, but as individuals.

15 That keeps the character of the transferor
16 or what would otherwise be a transferor court and gives
17 some deference to the point raised by Skip, and that is
18 the notion that people have some reasonable expectations
19 under a system of elected judges of getting judges that
20 you had an opportunity to vote for, and it's not perfect,
21 but it would at least give some deference to that concept,
22 and then you would have one individual judge operating
23 essentially as -- like a visiting judge who could fulfill
24 the objective of workload equalization but not change the
25 character of a panel or potentially change the

1 jurisprudence that would be applied to the case.

2 CHAIRMAN BABCOCK: Elaine.

3 PROFESSOR CARLSON: Bill, did you give any
4 thought to the imposition of a Pool vs. Ford Motor type
5 requirement?

6 CHAIRMAN BABCOCK: You've got to speak up.

7 PROFESSOR CARLSON: I'm sorry. Was there
8 any thought given of a Pool vs. Ford Motor type
9 requirement on the transferee court to address a conflict
10 either raised in the main brief or on a motion for
11 rehearing? At least it would be addressed. It might
12 clarify or assist the Supreme Court in determining whether
13 the conflict is something that they felt --

14 PROFESSOR DORSANEO: That is kind of where
15 it started, and I was astonished to hear Skip say that at
16 least one court didn't think they even had to consider the
17 conflicting authority from another court of appeals, and
18 that's outrageous judicial behavior.

19 PROFESSOR CARLSON: But that could be a
20 transfer requirement, Pool vs. Ford Motor requires the
21 other case -- it's a precedent.

22 MR. WATSON: That's the behavior that
23 generated Pool.

24 CHAIRMAN BABCOCK: Okay. Judge Patterson
25 had her hand up, I think.

1 HONORABLE JAN PATTERSON: Yes.

2 CHAIRMAN BABCOCK: And then Justice Gaultney
3 did and then Justice Duncan and then Judge Peeples.

4 HONORABLE JAN PATTERSON: I agree with
5 Richard that there are lots of subtle things happen in
6 these kind of cases and that is a problem, but that's a
7 problem of the equalization system itself and not of which
8 law we're applying so much.

9 Judge Sullivan, we have actually talked
10 about transferring judges before, and the thought is that
11 that would be healthy to have a little percolation and
12 transfer of judges and that that might lead to greater
13 uniformity and lots of other healthy things in the system
14 of justice, but as I understand it we're not here to
15 address the system of equalization, that we are talking
16 about the finer point of what happens under that system.

17 It's clear to me that we ought to really opt
18 for a clean, clear system here. I agree with the others.
19 I think we ought to discourage collateral or satellite
20 litigation. An automatic motion for rehearing would only
21 compound the work of the transferor court, which
22 presumably has higher filings and that's why the case has
23 been transferred.

24 The other problem is that, as Judge Duncan
25 pointed out, the problem -- unless the litigants raise it

1 early on and all of the litigants are going to raise it
2 because they're not going to want to be transferred so
3 they're all going to have controlling questions of law and
4 conflicts and reasons why, and that will lead to more
5 litigation. But other than it being raised by the
6 litigants at that early point it's not going to be
7 discovered by the judges until it's at issue and sometimes
8 after that, and maybe when it's, you know, percolating
9 throughout the court. So it's not as though it is
10 discovered at that point.

11 And the final thing is that, you know, we
12 follow our consciences, we follow precedents, and I don't
13 know that this is any different than the type of work -- I
14 don't think it's any different than the type of work we do
15 on every day, that is, we follow precedent, but we
16 don't -- but we obey our consciences in that rare case, so
17 this is really what we do.

18 CHAIRMAN BABCOCK: Okay. Justice Gaultney.

19 HONORABLE DAVID GAULTNEY: Yes, I just
20 wanted to second some of what was said. I think the point
21 about -- I want to make two points. The point about
22 transferring it back once you identify the problem, I
23 think -- I don't think is a practical option. First of
24 all, there is a delay. We're a transferor court, and we
25 don't receive cases, but I'm told there is some delay in

1 the cases that are transferred already, and by the time I
2 think that the conflict would be identified and then
3 transferred back, you're way down the line.

4 But I wanted to support the idea of
5 applying -- we're all trying to apply the law of the state
6 of Texas. I want to agree with Professor Dorsaneo on
7 that, and I want to support the idea of applying the law
8 of the transferor court. Now, maybe that doesn't come as
9 a surprise as we're a transferor court, but --

10 HONORABLE JAN PATTERSON: Well, we're a
11 transferee court.

12 HONORABLE DAVID GAULTNEY: Right. But I do
13 want to support that. I think it leads to consistency and
14 predictability for the litigants, and that's part of the
15 purpose, but the -- as a court looking at a case, you
16 know, I'm sometimes confronted with cases out of our
17 court, if I were writing for the first time on it, I may
18 not have ruled exactly that way, but I'm going to be
19 somewhat constrained by precedent.

20 The law needs to have some consistency to
21 it, and I think in terms of approaching a decision from a
22 transferor court that you have not written on that the
23 approach ought to be very similar. Would this be a case
24 were it in my court that I would feel constrained to
25 follow or overrule, because the transferor court does have

1 that option, and if the case were -- as Judge Christopher
2 said, you know, sometimes she may try a case under one
3 opinion and then the appellate court reverses it. So
4 there's no assurance that that case out of the transferor
5 court would be followed by the transferor court. It might
6 be mistaken. It might be error, but as a starting point,
7 I would encourage a rule that would say you would look to
8 the law of the transferor court.

9 CHAIRMAN BABCOCK: Okay. Final comment from
10 Judge Peeples. And then we're going to have some votes.

11 HONORABLE DAVID PEEPLES: Do I understand
12 that we cannot consider the option of the judges from the
13 transferee court being sent to the transferor court?

14 CHAIRMAN BABCOCK: Everything is on the
15 table.

16 HONORABLE DAVID PEEPLES: Okay. That seems
17 to me it might solve a lot of these problems. The lawyers
18 don't get transferred out, a judge gets assigned in, an
19 active judge, justice, and if they want to disagree with
20 the precedent from that court they would have to deal with
21 that court en banc to do it.

22 HONORABLE NATHAN HECHT: I don't know
23 physically how it works, and perhaps some of the courts of
24 appeals judges would know, but I think it happens that if
25 10 cases are transferred to the Seventh Court that not

1 always do all the lawyers go up to Amarillo, but the three
2 judges go down to Houston and hear the cases for a week.
3 I think that's the way it works.

4 MR. WATSON: That was before the five
5 percent budget cuts. That was before the budget cuts of
6 last and now this time. Now we've got 10 percent coming.
7 96 percent of the salary, travel budget is gone. They
8 can't even send the law clerks to the appellate court.

9 MR. ORSINGER: Just last week I argued to
10 the Waco court of appeals in the Dallas court of appeals
11 courtroom. So it still goes on.

12 CHAIRMAN BABCOCK: Wacky. Yeah, one last
13 comment. Go ahead.

14 HONORABLE SARAH DUNCAN: Well, you can't do
15 that. No, you can. He can't.

16 CHAIRMAN BABCOCK: Yes, I can.

17 PROFESSOR DORSANEO: It can be written
18 without transferring the judges, without thinking of it
19 that way, it can be written to deal with the main issue
20 instead of making a kind of a little trick out of it. The
21 issue it seems to me is whether there's going to be
22 deference to the decisions of the transferor court or due
23 regard unless -- or deference unless clearly erroneous.
24 That seems to be the point, and then the rehearing point
25 is an important one, too.

1 CHAIRMAN BABCOCK: I think the first thing
2 I'd like to hear, and I think I know the answer, but how
3 many people think that this is not a serious enough
4 problem to justify a statute or rule changing the status
5 quo?

6 MR. LOPEZ: Serious frequency or seriousness
7 of the issue?

8 CHAIRMAN BABCOCK: Just to change what we're
9 doing. How many people feel that way? Because I heard it
10 expressed by several people. Does anybody feel that way?
11 If you do, raise your hand.

12 Nobody feels that way. All right. The
13 thing that I've heard the most support for is that the
14 transferee court applies the law of the transferor court.
15 Now, how many people think that -- and the devil is in the
16 details, but as a general proposition how many people feel
17 that's the way to go?

18 PROFESSOR DORSANEO: Where it applies.

19 MS. SWEENEY: Apply the law?

20 MR. HAMILTON: With conditions.

21 MR. GILSTRAP: Yeah.

22 MR. LOPEZ: Depends on the details.

23 CHAIRMAN BABCOCK: Okay. That garnered 21
24 votes.

25 There are other things we can transfer,

1 judges, budget problems. We can petition to the Supreme
2 Court regarding conflict, forum shopping, complication.

3 MR. GILSTRAP: We can make them address the
4 conflict. That was another issue.

5 MR. ORSINGER: Could we take a vote on the
6 idea of transferring judges, because the idea of going en
7 banc if there is a deviation from precedent I'm attracted
8 to?

9 CHAIRMAN BABCOCK: We can vote on anything
10 you want. You know, transfer the case back once you
11 identify a conflict.

12 MR. ORSINGER: No, no. Rather than sending
13 the case from Houston to Waco you say, "Waco judges,
14 you're assigned to this Houston case," and there is a
15 panel and then if the panel doesn't -- they can go en banc
16 with the Houston court.

17 CHAIRMAN BABCOCK: How many people think
18 that the most preferable solution to this problem that
19 we've identified is to send the judges, for instance, from
20 Amarillo to Houston?

21 HONORABLE TERRY JENNINGS: Well, they don't
22 have to physically go there. They can be assigned and sit
23 in Amarillo.

24 CHAIRMAN BABCOCK: Okay. Yeah.

25 MR. ORSINGER: But the point is the

1 rehearing en banc is to the originating court rather than
2 to the transferee court.

3 HONORABLE TERRY JENNINGS: And if you
4 treated it that way, the opinion would be out of our court
5 by these judges who have been transferred into it.
6 Instead of it reading "Waco" it would read "Houston, First
7 Court of Appeals."

8 CHAIRMAN BABCOCK: Justice Duncan.

9 HONORABLE SARAH DUNCAN: It is not just a
10 problem of judicial time. You're also talking about
11 clerical and attorney staff time, and if the Houston court
12 is going to keep this case to process from filing to
13 submission, you really haven't accomplished a whole lot.

14 CHAIRMAN BABCOCK: How many people think
15 that the most -- that the best solution to this problem is
16 to have the judges, say the Amarillo judges in our
17 example, assigned to the Fourteenth Court, as an example,
18 so that they sit as judges of the Fourteenth Court and so
19 any en banc petition would go to the Fourteenth Court?
20 How many people think that's the best solution to this
21 problem? Raise your hand.

22 Okay. That got four votes. Any other --
23 any other solutions to the problem that people want to
24 have a vote on?

25 Justice Duncan.

1 HONORABLE SARAH DUNCAN: My solution is
2 probably not politically feasible, but it's still what I
3 think is the best solution.

4 MS. SWEENEY: Speak up, please.

5 HONORABLE SARAH DUNCAN: My proposed
6 solution is probably not politically feasible, but I think
7 it's the best solution, and that is that we have one court
8 of appeals in Texas with different divisions.

9 MS. SWEENEY: Can we do that by rule?

10 HONORABLE SARAH DUNCAN: The Legislature is
11 looking for a fix to this problem. The problem isn't just
12 transferred cases. You have the same problem within a
13 court that is a court of multiple panels.

14 CHAIRMAN BABCOCK: Well, they're trying to
15 break up the Ninth Circuit because it's too big.

16 MR. LOW: They've been trying.

17 CHAIRMAN BABCOCK: Mike Hatchell.

18 MR. HATCHELL: My solution would be to have
19 the transferee court either on its own motion or a motion
20 of a party on rehearing to certify that the case would be
21 different in outcome if the law of the transferor court
22 were applied, and the party could then appeal to the
23 Supreme Court to either take the case on the basis of
24 conflict, or the Supreme Court could set aside the
25 judgment without reference to the merits and return it to

1 the transferor court.

2 (Applause.)

3 CHAIRMAN BABCOCK: Everybody heard that?

4 PROFESSOR DORSANEO: Option four. Option
5 four.

6 CHAIRMAN BABCOCK: How many people think
7 that's the best solution to the problem?

8 MR. HATCHELL: I don't think I could say it
9 again.

10 PROFESSOR DORSANEO: I heard it.

11 CHAIRMAN BABCOCK: You got 10 votes for
12 that.

13 MR. ORSINGER: In 10 years that's going to
14 happen twice.

15 CHAIRMAN BABCOCK: So, Bill, I think in
16 drafting a rule we have a clear consensus from 21 people
17 that the rule you should draft ought to be that the
18 transferee court applies the law of the transferor court
19 in some fashion.

20 PROFESSOR DORSANEO: I'm going to define
21 what means "applies," okay?

22 CHAIRMAN BABCOCK: Yeah, sure, but that's
23 the concept.

24 PROFESSOR DORSANEO: Applying by giving this
25 or that or that or that.

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CHAIRMAN BABCOCK: I know. 9:00 o'clock

tomorrow.

(Adjourned at 5:17 p.m.)

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2 CERTIFICATION OF THE MEETING OF
3 THE SUPREME COURT ADVISORY COMMITTEE

4 * * * * *

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6
7 I, D'LOIS L. JONES, Certified Shorthand
8 Reporter, State of Texas, hereby certify that I reported
9 the above meeting of the Supreme Court Advisory Committee
10 on the 4th day of March, 2005, Friday Session, and the
11 same was thereafter reduced to computer transcription by
12 me.

13 I further certify that the costs for my
14 services in the matter are \$ 2,393.00.

15 Charged to: Jackson Walker, L.L.P.

16 Given under my hand and seal of office on
17 this the 16th day of March, 2005.

18

19

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