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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

May 6, 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 6th
day of May, 2005, between the hours of 9:03 a.m. and
5:38 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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Documents referenced in this session

05-9	Transfer of appellate cases 5-2-05 draft
05-10	e-filing rules draft
05-11	Electronic jury shuffle draft rule

1 we have a report from Justice Hecht at this time?

2 VICE-CHAIRMAN LOW: Boy, I almost got fired
3 before I got started. My goodness alive.

4 HONORABLE NATHAN HECHT: Notice that the
5 demand for it just welled up.

6 VICE-CHAIRMAN LOW: Judge Hecht.

7 HONORABLE NATHAN HECHT: Well, just a minute
8 to say that we did put out the protective order papers
9 that the committee looked at a couple of meetings ago, and
10 I appreciate your turning to those. It was kind of a
11 rush-rush, but some of the work had been in the process
12 for a long time, and we may have to come back and look at
13 those again with changes in the law and particularly
14 changes in e-filing, but for now they are out there, and
15 so if you need -- if you run across people that need that
16 help, you might just keep in mind that those -- all of
17 those papers are available on the Bar's website,
18 texashelpaw.com. And so they're easy to get and people
19 may want to make use of them.

20 We now have a full Court. Judge Johnson, I
21 invited to come by and say hello to you today, but he's
22 closing on the sale of his house in Amarillo, so he's
23 across the Rubicon as it were, and we look forward to
24 having him on board.

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

1 bills pending that may require us to do some rule writing.
2 I don't think it's going to require us to do so on an
3 emergency basis during the summer as we had to do last
4 session; but just so you'll have them in mind notably,
5 there's a bill that has to do with the pretrial procedures
6 and going to trial in asbestos and silica cases; and there
7 is a provision in the bill that says we can write rules to
8 implement that, which we may need to do or not do, I'm not
9 sure, I haven't seen the bill. And there is a bill,
10 again, urging the Court to adopt rules regarding the
11 speedy resolution of class actions, which we thought we
12 were through with a couple of years ago, but we may have
13 to look back at that again.

14 Of course, there is the resolution urging
15 us, requiring us to adopt rules to deal with filing in
16 overlapping courts of appeals districts, and that's
17 something that we're already talking about and I guess we
18 will talk about today. So we're ahead of the ball on
19 that, and that's passed both chambers, so I think that's
20 all a resolution has to do, so it's probably the law.

21 And then we may have to write some rules
22 with respect to some massive changes in guardianship
23 services and how guardians are appointed, I think mostly
24 for children, or maybe adults, too. I'm not sure. But
25 that whole operation is going to be moved over from Health

1 and Human Services to OCA for reasons that we need
2 political branches to explain to you, but I don't think --
3 I think it's fair to say that OCA was not a -- did not
4 volunteer for this duty and is not too excited about
5 having it, but is willing to do its best to discharge it.

6 So, anyway, there are those bills and a
7 number of things that do not seem to be moving, so it
8 looks to me as if in about four weeks when the session
9 comes to an end we will have a little work to do, but not
10 enough to require meeting during the summer.

11 And lastly, we've set the school finance
12 case for argument July the 6th, which I think will be the
13 last day of the Court's term before reconvenience in late
14 August. That's all I've got. Any questions? Yes, sir.

15 HONORABLE DAVID PEEPLES: Over the past
16 several years we have voted out and sent to the Supreme
17 Court several proposals, and I don't remember how many,
18 and I think the vast majority of them we've never heard
19 any action, and I'm wondering if you-all have dismissed
20 them for want of prosecution or what's happening.

21 HONORABLE NATHAN HECHT: No. Notably, the
22 recusal proposals are still there, but the Legislature is
23 far more receptive to the use of rules to change or
24 implement policies that they're interested in than they
25 have been for a long time, and I think it was mostly just

1 respect for that branch and its concerns about the
2 rule-making operation that have led us to soft pedal some
3 of these things, but we intend to dig them back out now
4 that things are better, including all the stuff the
5 committee has looked at, including the justice of the
6 peace rules, especially those.

7 HONORABLE DAVID PEEPLES: Well, some of the
8 things that we have passed may not deserve to be
9 implemented.

10 HONORABLE NATHAN HECHT: Right.

11 HONORABLE DAVID PEEPLES: And I don't insist
12 that they get favorable treatment from you-all, but it is
13 a little bit frustrating from our end of it to just send
14 something to the Supreme Court and never hear again; and
15 the recusal rule, if the problem is that it, you know, had
16 those -- the statutory provisions on contributions and so
17 forth, if that's a problem with the Legislature, that can
18 be ex -- you know, taken out of rules and we could have
19 some clean-up that needs to be done.

20 HONORABLE NATHAN HECHT: Well, I think the
21 thing is that problems with the Legislature are fluid, and
22 so they seem worse at some points than others or at least
23 different, and so waiting sometimes means that a better
24 product will come out, but we have not -- the Court has
25 not rejected the proposals that are still pending. We've

1 just been waiting for a good time to move on them, which
2 we are -- we seem to be at now.

3 HONORABLE DAVID PEEPLES: Thanks.

4 MR. LOW: There have been a couple of things
5 that we did that a decision took care of. You remember
6 years back when you object and then Payne kind of took
7 care of that, so some of those things.

8 HONORABLE NATHAN HECHT: But there is a lot
9 of stuff we could do, and, of course, we have still got
10 the recodification project that's very much in line, too,
11 especially now that the Federal rules -- the Federal Rules
12 of Civil Procedure have been restyled and will be in
13 effect December of 2005 -- either this year or next year.
14 I can't remember. But they have been completely redone,
15 so I think that gives us more justification for rewriting
16 our rules.

17 And, you know, it's a big change to go
18 through there and change a bunch of numbers and a lot of
19 provisions, but I think there is more -- there will be
20 more taste for that after lawyers see the new Federal
21 Rules of Civil Procedure. I think people will be very
22 happy with those rules. They're clearer, the references
23 are easier to follow, and the notes are clearer. I just
24 think people will say, "That's a good idea," and that
25 would be a good reason to keep going on ours.

1 MR. LOW: Judge, bring the committee up to
2 date like what you're doing. I mean, I see what Judge
3 Rosenthal's group is doing is making -- they're really
4 going into some major changes, and there could be some
5 very major changes in the Federal rules which we would
6 want to look at.

7 HONORABLE NATHAN HECHT: Well, the restyling
8 project, the Chief Justice of the United States okayed the
9 project on the condition that no substantive changes would
10 be made in the rules as a result of the restyling, so
11 that -- the committee was very careful to try to adhere to
12 that mandate; and it's a little frustrating, because as
13 you well know, when you start going through rules to
14 rewrite them you just find a million things that are
15 unclear and need to be fixed and inconsistencies and
16 problems, and not being able to fix those while you're
17 going through them is a little frustrating, but that
18 project was not intended to, and I don't think it has,
19 changed any of the substance of the rules.

20 However, the committee has just finished in
21 the next few days changes in the rules regarding
22 electronic discovery, and there are a couple of major
23 changes in the rules in that regard, and if they are
24 adopted by the standing committee in August and the
25 judicial conference in September then I think they become

1 effective in December of 2006.

2 Our rule that we, as I recall, wrote in the
3 anteroom of Steve Susman's home in Galveston one Sunday
4 morning with Alex Albright thinking it was a good idea and
5 taking notes has been the basis for much of the work
6 that's been done in the -- with the Federal rules, but
7 their changes are going to be more extensive and more
8 refined than the simple rule that we have in our book.
9 And I would be happy to tell you about them, but they're a
10 ways off still, and maybe I can tell you at a break, but I
11 hate to take us away from business for that.

12 MR. LOW: No. But there is a lot of
13 objection, there is going to be a lot of controversy over
14 that, because out of the panel that spoke at the Fifth
15 Circuit Judicial Conference there was some strong
16 opposition. So if we get into that, it's going to be a
17 couple hours work. All right.

18 MR. ORSINGER: Per page.

19 VICE-CHAIRMAN LOW: Bill, if you would,
20 let's go ahead and start on your agenda No. 5, get that
21 out first. Okay. I'm sorry. It's from Chief Justice
22 Radack, and she wants to amend 9.5 she says (d), but
23 that's a typographical error. It's actually 9.5(e), that
24 in the appellate procedure you have to list exactly what
25 you've done when you served, and in our civil rules we say

1 we complied with the rules. She also wants to do away
2 with certificate of conference on motions for rehearing,
3 and basically the only certificate of conference we have
4 is in 191.2 on discovery in our civil rules. And
5 basically that's it.

6 PROFESSOR DORSANEO: All right. I think
7 we've been through this.

8 HONORABLE JANE BLAND: Bill, I was just
9 going to say, at one of our earlier meetings I think we
10 already handled the certificate of conference issue and
11 took a vote on that to abolish it, so I think the only
12 issue that is left in the letter is the certificate of
13 service rule.

14 VICE-CHAIRMAN LOW: Well, now, had we voted
15 on certificate of conference on motion for rehearing? Did
16 we vote on that?

17 HONORABLE JANE BLAND: Yes, sir. We did.

18 VICE-CHAIRMAN LOW: Okay. That's fine.

19 MS. SENNEFF: We were going to come back
20 with a new draft, though.

21 HONORABLE JANE BLAND: Oh, I'm sorry. On
22 the language you mean?

23 VICE-CHAIRMAN LOW: Okay. Bill, it's yours.

24 PROFESSOR DORSANEO: Well, I guess we
25 haven't prepared the new draft on the certificate of

1 conference on motion for rehearing. I don't think it
2 would be a complex matter to say that a certificate of
3 conference on a motion for rehearing is not required and
4 to put that in the motion for rehearing rule. I haven't
5 run that by the subcommittee. I can draft that up, and it
6 won't be more complicated than that.

7 MR. LOW: Let's just see how everybody feels
8 about that. Does anybody have any objection to handling
9 it that way?

10 MS. BARON: Bill, I would put it in the
11 certificate rule, not the motion for rehearing rule, or
12 both, but the requirement for certificate is only in Rule
13 9, right?

14 PROFESSOR DORSANEO: That's right. Both
15 might be better. I'll do it both ways.

16 MS. BARON: Okay.

17 VICE-CHAIRMAN LOW: Well, 10.1(a)(5) is
18 certificate of conference on motions.

19 MS. BARON: Okay, I'm sorry, 10.

20 VICE-CHAIRMAN LOW: And 9.5(e) is a
21 certificate that -- where you say you've done all these
22 steps. So which one are you wanting him to put it in?

23 MS. BARON: 10, where the certificate --

24 VICE-CHAIRMAN LOW: How does everybody feel
25 about that? No objection? Sounds good, let's go.

1 MR. ORSINGER: Sure is different when you're
2 in charge, isn't it?

3 VICE-CHAIRMAN LOW: Well, till I get run out
4 of that door. Okay.

5 PROFESSOR DORSANEO: So that leaves us to
6 talk about 9.5; is that right?

7 VICE-CHAIRMAN LOW: Right.

8 PROFESSOR DORSANEO: Well, let me start out
9 by saying that 9.5 of the appellate rules, and
10 particularly 9.5(e), which gives certificate requirements
11 requiring, as the letter says, the date and manner of
12 service, the name and address of each person served, and
13 if the person served is a party's attorney, the name of
14 the party represented by that attorney, differs from the
15 language of the civil procedure Rule 21a, which talks
16 about methods of service and also provides for a
17 certificate showing service in the manner provided by Rule
18 21a, primarily because the appellate rule was written
19 subsequent to Rule 21a, and it was believed by this
20 committee in 1997 that it would be better for the
21 certificate to provide more meaningful information than
22 just a simple statement that everybody has been served.
23 I actually think that this specific language
24 was drafted by Chief Justice Guittard with that view in
25 mind. In 1997, if my recollection serves me correctly,

1 when we did the recodification draft we continued with
2 that same attitude, and the recodification draft's
3 replacement of civil procedure Rule 21a in all probability
4 looks like 9.5(e), yet there is this difference; and as I
5 understand the Chief Justice's letter that's a problem.
6 She says, "If the two rules had the same requirements, we
7 believe that fewer nonconforming documents would be
8 presented to the appellate courts." In some sense reading
9 between the lines here, I think the Chief Justice's letter
10 is suggesting that problems that the First Court is having
11 with things filed in that court are problems created by
12 the Rules of Civil and Appellate Procedure rather than by
13 the operating procedures of that court.

14 VICE-CHAIRMAN LOW: Let me stop you. Don't
15 you think what she's saying is that some people look at
16 the rule that said "I complied with the rule," and they
17 just think it applies on appeal and it doesn't? They get
18 confused, and she says that it ought to be the same rule.

19 PROFESSOR DORSANEO: Yes. Yes. I think
20 that's the point. And probably -- and it's certainly my
21 view that the rules ought to be the same.

22 VICE-CHAIRMAN LOW: Right.

23 PROFESSOR DORSANEO: But the question is
24 whether they ought to be the same like 21a or like 9.5(e),
25 is the real issue, and my view is it ought to be 9.5(e)

1 because that provides more information. I would echo what
2 Richard Orsinger said a couple of meetings ago about the
3 certificate of service and the need for it to provide
4 meaningful information.

5 VICE-CHAIRMAN LOW: She doesn't raise the
6 point, but there is another difference. 21b provides for
7 sanctions if you don't serve every party. The appellate
8 rules have no such rule. That's not on the plate now, but
9 that could come up. There is a difference there.

10 So what are you suggesting that we do, that
11 we go and on your pleadings in trial court and so forth
12 you list the five things? Because I think she's kicking
13 out -- they're not filing what -- will that create a
14 problem in the district clerk's office if they don't list
15 the five things and they just say, "I've done everything,"
16 and they've got to kick it back, because we are creatures
17 of habit?

18 PROFESSOR DORSANEO: Let's just see what
19 Richard has to say.

20 MR. ORSINGER: I don't think it will be a
21 problem in the trial court, Buddy, because there is nobody
22 monitoring compliance in the trial court like there is in
23 the appellate court.

24 VICE-CHAIRMAN LOW: Oh, it doesn't matter
25 what we say then.

1 MR. ORSINGER: Well, I guess what I'm saying
2 is I don't think it's a concern for the district and
3 county clerks because they don't actually check the
4 legitimacy of the certificate, whereas the clerks of the
5 appellate courts do, and I would support what Bill said.
6 I think that the appellate approach is better because it's
7 more meaningful and you can look directly to it and find
8 out how you were served and how much time you have and how
9 everyone else was served and how much time they have, and
10 that's not possible to know what service was on another
11 party unless you call them on the phone unless the
12 certificate says that.

13 VICE-CHAIRMAN LOW: Okay. All right. I'm
14 sorry. Is that Sarah? I can't see. You're in the wrong
15 seat.

16 HONORABLE SARAH DUNCAN: Well, I was told to
17 move.

18 VICE-CHAIRMAN LOW: Okay.

19 HONORABLE SARAH DUNCAN: And to speak more
20 loudly. The one difference I see is, you know, in
21 appellate court you're going to file maybe two briefs,
22 maybe a motion; whereas in the trial court you may be
23 filing something everyday; and if you've got a case with
24 30 parties in it, your certificate of service if it is --
25 has to mirror the TRAP certificate of service, could be 15

1 or 20 pages. And that's what I did anyway because, as
2 Richard said, I wanted the information in my file, but I
3 can see some clerks objecting, because until we get
4 e-filing everywhere this is going to add a lot of paper in
5 a big case.

6 VICE-CHAIRMAN LOW: David.

7 MR. JACKSON: From a court reporter's
8 standpoint this is a problem on the certificate of service
9 because we have disclosure requirements, some reporters
10 have contracts with lawyers and law firms and parties to
11 litigation, and without the information being on the
12 certificate of service they won't know whether they have a
13 disclosure issue that they have to address until they show
14 up at the deposition, which is too late, and that's what
15 we've used the certificate of service for as court
16 reporters, is to make sure that those people listed on
17 that notice we don't have an issue with and we don't have
18 to do any disclosure.

19 VICE-CHAIRMAN LOW: It boils down to useful
20 information versus too much paper. All right. Someone
21 else? Yes, Steve.

22 MR. TIPPS: I think that Rule 21 could be
23 improved by incorporating the provisions of 9.5(d), and
24 one way to deal with Sarah's problem it seems to me would
25 be to simply provide that these are the requirements

1 unless otherwise ordered by the court, because, I mean, in
2 asbestos litigation or something in which you have
3 jillions of parties it would be a pretty simple matter to
4 get the judge to enter an order that in this particular
5 case you don't have to provide as detailed a certificate
6 of service, but in the normal case I think this is not too
7 burdensome, and it would improve the overall quality of
8 information shared by lawyers concerning how they're
9 serving each other.

10 VICE-CHAIRMAN LOW: So would you just say
11 "unless ordered by the court"?

12 MR. TIPPS: "Unless otherwise ordered by the
13 court, the certificate of service shall provide
14 such-and-such."

15 VICE-CHAIRMAN LOW: But then would you give
16 the court discretion on going back to the old rule or just
17 discretion in whatever order they want it?

18 MR. TIPPS: I would give the court
19 discretion to enter an order consistent with the needs of
20 the parties in that particular case.

21 VICE-CHAIRMAN LOW: Okay.

22 HONORABLE TRACY CHRISTOPHER: Well, I agree
23 with Sarah that it would be a huge paper increase in trial
24 courts to have to put this information on all of the
25 certificate of services, and the number of times that I

1 have had a dispute about a Rule 21a certificate of service
2 has been maybe once in 10 years, so it is not a problem.
3 You know, we don't see problems with the current
4 certificate of service.

5 I don't like Stephen's suggestion because,
6 A, once you start making orders then it destroys the idea
7 that, you know, lawyers are -- cannot possibly read the
8 rules and distinguish between a trial court rule versus
9 the appellate court rule on a certificate of service,
10 because you get lawyers or secretaries that -- you know,
11 what if Harris County decides we want to save paper? So
12 in every case in Harris County, you know, we want the old
13 21a certificate of service. You're going to have the same
14 problem that you have now that there's two different
15 certificate of services, so respectfully, I don't think
16 that would be a good solution.

17 PROFESSOR DORSANEO: Mr. Chairman?

18 VICE-CHAIRMAN LOW: Yeah.

19 PROFESSOR DORSANEO: And I mentioned Chief
20 Justice Guittard earlier, and I actually think that it's
21 not a difference between the 21a certificate of service
22 and the appellate certificate of service. It's a
23 difference between what people across the state regard is
24 the proper way to follow Rule 21a. I think that the
25 approach in Dallas -- whatever it may be now, I try not to

1 go to the trial courts and I don't sign certificates of
2 service, but I think the approach traditionally was to
3 provide more detailed information in North Texas than in
4 Houston. So what we're talking about really is a Rule 21a
5 that doesn't say what the certificate of service is meant
6 to contain and different practices followed in different
7 places as a result.

8 If what we're really concerned with here is
9 the appellate rule, I don't see any reason at all to
10 change the appellate rule. There might be some reason to
11 do something to clarify what 21a doesn't explain, but if
12 we're dealing with the appellate rules, now, I think it's
13 fair to say that our committee would recommend that we
14 don't make any changes in 9.5(d) and (e) because they're
15 fine, notwithstanding the fact that they might be
16 different.

17 VICE-CHAIRMAN LOW: Let's divide it down to
18 that. Let's just take the appellate certificate of
19 service requirement first. Any other views about that?
20 Anybody feels that we should change that from the way it
21 is now? All right. Let's take a vote.

22 HONORABLE TRACY CHRISTOPHER: Can I just
23 mention one thing? In your appellate briefs you have this
24 big long list of parties, attorneys, you know, all the
25 information is there. So to the extent that you're

1 worried about not knowing who all the parties and
2 attorneys and addresses are, that information is in their
3 brief. So, I mean, I'm not on the appellate bench, but it
4 just seems to me sort of unnecessary to have everything
5 that's in 21 -- or in 9.5(d).

6 VICE-CHAIRMAN LOW: In other words, in the
7 front of your brief you have to state who the parties of
8 interest and everything is. All right. Kent.

9 HONORABLE KENT SULLIVAN: I'm concerned
10 about the trend line here.

11 VICE-CHAIRMAN LOW: The what?

12 HONORABLE KENT SULLIVAN: The trend line and
13 the big picture. It seems to me the big picture question
14 is are we headed towards making it easier to comply with
15 the rules or harder to comply with the rules?

16 Judge Christopher raises a very significant
17 point. I think she's been on the bench 10 years or
18 thereabouts and has had, what, one issue that's come up.
19 Now, that's a trial court experience, but when we've got
20 other issues pending that I think have some relationship
21 here, there are access to justice issues that we in this
22 branch of government are trying to deal with. There are
23 just questions of user friendliness that we are, I think,
24 trying to grapple with. I think we've got to try to put
25 this in context.

1 I think I agree in the abstract with the
2 point that's being raised that I always think it's better
3 to have more information, but what may be good in practice
4 and may be desirable I think is probably a bad idea for an
5 absolute rule, and I raise a couple of yardsticks by way
6 of comparison.

7 One, what about the Federal rules? What
8 about what other jurisdictions do? And I don't know that
9 either the Federal courts or other jurisdictions require
10 any real magic to certify that you've complied with the
11 service requirements. Again, I think it's good in
12 practice. I don't disagree with a notion that a good
13 lawyer would want to do it, but I think it's a bad idea
14 for the rule.

15 And I will make one practical suggestion,
16 and it will be sort of the mirror image of what Steve
17 Tipps suggested because I think the models may be a good
18 idea, but I would suggest the flip of it, and it hopefully
19 dovetails with Judge Christopher's experience, and that is
20 in those rare cases where there is an issue and where
21 someone, a party, suggests that they haven't been getting
22 properly served then it seems to me perfectly appropriate
23 for the judge to order under the specifics of that case
24 that the service -- that the certificate of service
25 requirements be enhanced, but that otherwise for 99.9

1 percent of the cases that are out there where it is never
2 an issue, that compliance be simplified as much as
3 reasonably possible.

4 VICE-CHAIRMAN LOW: So you're taking the
5 opposite of what Stephen says. Stephen says you can order
6 it up front, and you say that you can order if you're
7 having a problem. In other words, and otherwise you don't
8 be that specific, but if there is a problem then you can.

9 HONORABLE KENT SULLIVAN: My whole point is
10 I think that the more we head towards a system in which to
11 comply with routine rules you need greater technical
12 expertise, you need greater and more specific familiarity
13 with the rules -- and our rules are complicated -- then I
14 think we're headed in the wrong direction.

15 VICE-CHAIRMAN LOW: Okay. Bill.

16 PROFESSOR DORSANEO: I don't think any
17 appellate lawyer alive would say that it's difficult to
18 comply with the certificate of service requirement. It
19 may be a little longer in some cases than in other cases,
20 but this is not hard work. I mean, this is simpleminded,
21 writing down somebody's name and identifying the manner of
22 service. Every form book that's worth owning provides
23 this information as copy work for power professional
24 personnel to perform if they're properly instructed on the
25 manner of performance. This is not a difficult thing to

1 do. If the problem is that things are being struck
2 because they're not quite right then maybe we need a rule
3 that says don't do that.

4 (Applause.)

5 HONORABLE SARAH DUNCAN: Can you record that
6 as applause?

7 VICE-CHAIRMAN LOW: We can write down every
8 alternative, and I can't write that much. Okay. Jane.

9 HONORABLE JANE BLAND: Well, it seems to me
10 that you don't have to be an appellate practitioner or own
11 a form book to be able to practice in the appellate
12 courts, and we have a lot of people who practice in the
13 trial courts and practice in the appellate courts and are
14 not appellate specialists, and they have a rule, Rule 21a,
15 that is after all the Rules of Civil Procedure that says
16 all they need to do is certify that they've complied, in
17 other words, that they have served the other side and does
18 not require the specific and extremely detailed
19 information that this other rule requires.

20 And I, you know, I heed your comments.
21 They're well-taken with respect to striking of documents,
22 but the problem before us right now is that we have a Rule
23 of Civil Procedure that diverges from a Rule of Appellate
24 Procedure, and we have lawyers that practice in both sets
25 of courts, and we're making it unduly complicated for

1 them.

2 VICE-CHAIRMAN LOW: What would be your
3 suggestion to answer that?

4 HONORABLE JANE BLAND: To mirror Rule 21a in
5 the appellate rules.

6 VICE-CHAIRMAN LOW: Appellate rules, okay.
7 Judge.

8 HONORABLE TOM GRAY: My experience on the
9 Tenth Court is that frequently the certificate of service,
10 because it does require some level of disclosure, reveals
11 the problem that would be masked by a -- just a blanket
12 assertion, because the appellant is trying to comply with
13 the rule and he certifies that he has served a copy upon
14 the clerk of the appellate court, that's the only person
15 indicated that has been served, and it reveals the very
16 problem that it is designed to reveal, and that is that
17 the other side is not receiving service.

18 To me the trend line needs to be that we
19 require greater disclosure when it is helpful either to
20 the court or the litigants. It is not uncommon that we
21 look to the certificate of service to try to actually
22 identify who the parties to the appeal are, have they
23 dropped somebody out of the process. We'll look at the
24 notice of appeal, the docketing statement, the certificate
25 of service, all in an effort to try to identify who is

1 still in this appeal.

2 VICE-CHAIRMAN LOW: In other words, from the
3 original at the front of the brief they put who the party
4 in interest and so forth.

5 HONORABLE TOM GRAY: Well, sometimes that's
6 there, but that's also you get that in a brief. You don't
7 get it in every motion and everything else that's filed.
8 That's usually only in the appellant's brief.

9 VICE-CHAIRMAN LOW: Right.

10 HONORABLE TOM GRAY: So I find, especially
11 in the days of word processing, the ability to change
12 fonts, dual columns, you can compress it where it's
13 necessary to have smaller -- fewer number of pages if that
14 becomes a problem. I think there is ways to manage the
15 paper end of it, but what you're really providing is
16 information, and information is very important to just
17 know what's going on in a case, and I strongly support the
18 concept of putting Rule 9 over into 21.

19 VICE-CHAIRMAN LOW: Judge.

20 HONORABLE NATHAN HECHT: Let me make one
21 comment. Interestingly, the Federal rules contain the
22 same difference. Rule 5 of the Federal Rules of Civil
23 Procedure just says "all papers after complaint required
24 to be served upon a party together with a certificate of
25 service must be filed," et cetera. It doesn't say what

1 the certificate of service has to have in it or what it
2 even looks like; whereas, in rule of appellate procedure
3 -- Federal Rule of Appellate Procedure 25 it lists the
4 details pretty much like they are in our appellate rule,
5 for what that's worth.

6 PROFESSOR DORSANEO: It proves that the
7 appellate rules were written after the civil procedure
8 rules and are better, like ours.

9 MR. LOPEZ: I don't do anything in the
10 appellate courts, so take my comments in that vein, coming
11 from somebody who is only a trial person, but I'm not
12 particularly offended or bothered or surprised anymore at
13 the divergence between an appellate rule and a trial rule.
14 It's just kind of the way it's always been for me. I'm
15 aware that they're different, and if I were ever stupid
16 enough to venture into that territory on my own I would
17 know that I needed to do something.

18 So -- and I realize not everybody -- I mean,
19 you're going to have pro ses, you're going to have all
20 kinds of stuff, but I think if -- I kind of go back to
21 common sense. I mean, if the certificate is worth doing,
22 it seems to be worth doing in a way that makes it
23 meaningful to whoever is looking at it. I can't cite very
24 many examples because they're pretty infrequent
25 admittedly, but when they do happen they're an issue, and

1 I remember one case that we -- there was a problem with
2 service, and the way we figured it out was by looking at
3 the certificate, and everybody went "Oh, it's been faxed
4 to the wrong number." Because the certificate said where
5 it had been faxed and we figured out that somebody had
6 made a typo, and we figured it out by looking at the
7 certificate of service.

8 I had a case yesterday where the trial
9 court, we were in there arguing a motion, and the judge is
10 looking at something that the rest of us didn't have, and
11 we go back to our offices to try to figure out what
12 happened, and we got a certificate of service that says,
13 "You've been served in compliance with Rule 21a." We
14 can't go back and do the homework to figure out where the
15 glitch is. So it's admittedly not very often, but it just
16 seems like if we're going to have it why not have it be
17 detailed enough to tell us something?

18 VICE-CHAIRMAN LOW: Judge Patterson.

19 HONORABLE JAN PATTERSON: I confess to a
20 thorough irritation at certificates of service that merely
21 say "served in accordance," but I've always looked upon
22 that rule as self-enforcing, that if there is a problem
23 the parties enforce it, clean it up, speak to it. I think
24 I come to Judge Sullivan's school. Although I don't think
25 it adds a complication I think we also ought to be a

1 little sensitive to changes in rules and that we ought to
2 have a darn good reason to change rules. Otherwise, it is
3 difficult for practitioners to keep up with amendments and
4 rules, and so unless there is a true rationale that we can
5 justify, I do despair at a change to address a problem
6 that I'm not sure we're convinced is there.

7 And, you know, there's the old saying about
8 what is the evil sought to be corrected and the means
9 sought to cure the problem, and I'm not sure we have an
10 evil here or effective means that we need to implement on
11 the lawyers, and maybe the lawyers would be -- should
12 speak up if there's been some problem in appellate courts.
13 I'm not aware of any problem we've ever had on them.

14 VICE-CHAIRMAN LOW: Ralph.

15 MR. DUGGINS: I do both, mostly trial, but I
16 do some appellate practice. I don't find the appellate
17 rules difficult to comply with, but I don't feel real
18 strongly about having quite as much detail as is in the
19 appellate rule, but what I do think is important is for
20 the certificate to at least say how it was served, whether
21 it was faxed, certified mail, hand-delivery, because when
22 you just say it's been done in compliance with the rules
23 there is really no way to go back a month or two later and
24 find out what your deadlines are, how it was served. I
25 mean, that to me is an issue, and I see it come up a lot

1 in trial practice, so I do think whatever we do we ought
2 to say how it was served.

3 VICE-CHAIRMAN LOW: All right. Bill.

4 PROFESSOR DORSANEO: One historical comment
5 here. It may be that we need to look back at the practice
6 before 21a was amended to be the primary vehicle showing
7 service or delivery of things that were filed on the other
8 party. My recollection is that former civil procedure
9 Rule 72 is the rule that provided for delivery by mail,
10 first class mail, not certified mail, of pleadings and
11 other papers filed on other parties in the case. My
12 recollection, although it's been a while since I've
13 thought about Rule 72, is that that rule did require in
14 the certificate of delivery more specific information
15 about who the persons were who received things.

16 During Chairman Soule's regime we decided to
17 eliminate civil procedure Rule 72 and 73 and have one type
18 of service under Rule 21a, and we may not have done as
19 good a job as we should have done in saying what the
20 certificate could show. If it only dealt, as it did
21 before, with notices of hearings and such it would tend to
22 be more specific by -- more or less by nature, I think,
23 and I may be stretching my recollection a little bit here,
24 but if we're making assumptions about how we got where we
25 are, that this was all kind of conscious planning, I think

1 that's really very unlikely.

2 VICE-CHAIRMAN LOW: Tracy.

3 HONORABLE TRACY CHRISTOPHER: I would just
4 like to make one statement on behalf of the First Court
5 that's actually enforcing this rule. It is apparently a
6 problem, because a large portion of the things that get
7 filed in the First Court do not comply with this rule.
8 I've forgotten what the statistics were, but it's a large
9 percentage, and for you to say, "Well, why are they being
10 so picky in enforcing it," I mean, why have a rule unless
11 it's enforced. And if a rule is causing problems, you
12 know, it's just -- it's not -- in my mind it's not a good
13 thing to say, "Well, the First Court shouldn't be so picky
14 about enforcing it." We either have a rule and it ought
15 to be enforced, or if it's too hard or too picky then we
16 ought to make it more friendly, as Judge Sullivan said.

17 VICE-CHAIRMAN LOW: You know, let me --
18 Lamont.

19 MR. LAMONT JEFFERSON: I've kind of gone
20 back and forth on this argument, but I come down on the
21 side that it's no big deal to comply with this rule, and
22 it does add something. I don't do a whole lot of
23 appellate work. I've done some.

24 VICE-CHAIRMAN LOW: You mean the appeal
25 route?

1 MR. LAMONT JEFFERSON: To use 9(d) as
2 opposed to 21a if we're going to try to make them
3 consistent, and I think there is some benefit to making
4 them consistent. Trial lawyers I think historically, at
5 least as I recall, when I began practicing law everybody
6 basically put all of this information in the proof of
7 service, and then at some point someone came up with the
8 idea 21a doesn't require us to put this information in the
9 proof of service and they stopped. So now there are some
10 practitioners who just say "I've complied" and there are
11 some practitioners who put all of this information in
12 their certificate of service. It's not that big of deal
13 to just put this information in the certificate and make
14 it consistent.

15 VICE-CHAIRMAN LOW: Skip and then Kent and
16 then I want to hear from the -- we're going to come down
17 to what the appellate judges on this committee feel about
18 the changing, if any, the appellate rule and then go from
19 there. All right. Skip.

20 MR. WATSON: Well, I see -- I mean, from
21 doing it both in the trial court and in the appellate
22 court, I see two big differences between the two, and I
23 think they relate to the rules. First is that the
24 consequences of blowing a deadline in the appellate courts
25 are generally much more severe than blowing a deadline in

1 the trial court. As long as the trial court has plenary
2 power you're okay. In the appellate court, depending on
3 the court you're in and how the rules judge may feel that
4 day, your motion for extension may or may not be timely or
5 may or may not be granted, and all of us who have done
6 appellate work have had that knot in the stomach where we
7 have either been close to or missed something.

8 One of the ways, second, we miss those
9 things is that there is a distinct difference in the type
10 of service. This may go away with electronic filing. I
11 haven't thought that through, but the Rules of Civil
12 Procedure require that service by mail be by certified
13 mail. The Rules of Appellate Procedure just provide that
14 service is complete upon mailing and does not require
15 certified mail of anything filed in an appellate court in
16 Texas.

17 You have a green card that supplies the
18 information that Rule 21 -- excuse me, Rule 9 of the Rules
19 of Appellate Procedure. You know whether or not that
20 person signed in the trial court for the pleading you've
21 sent. You do not necessarily know that in the courts of
22 appeals, and when that knot in the stomach comes that
23 somebody is saying, "I didn't get it," you know, I mean, I
24 had occasions where I didn't get opinions from the courts
25 of appeals, not just from a party, and that's a bad thing

1 when you have a deadline on motions for -- I've had
2 occasions where thank God a lawyer in Timbuktu would call
3 me and say, "I got an opinion that I think may have
4 been -- should have gone to you. Did you by chance get
5 one that was intended for me in envelope mix-ups?"

6 At that point being able to come in and to
7 go down a certificate of service, I know that the courts
8 of appeals don't use them, but when that kind of thing
9 happens it really is helpful if there is no green card. I
10 just -- I'm sorry, I think if there is a problem in the
11 First Court it's because the First Court is trying to be
12 picky on enforcing stuff that really doesn't matter until
13 the wheels come off. When the wheels come off and there's
14 a problem then you need this information. This is for
15 when the bad things happen. I think that Bill's or
16 Sarah's, or Bill or whoever it was, initial suggestion of
17 just put it in, don't sweat it until there's a problem,
18 solves the issue.

19 VICE-CHAIRMAN LOW: Okay. All right. Let's
20 see. Judge Gray, how do you feel first about changing the
21 appellate rule? You don't want to change the appellate
22 rule, right, if it was just down to that?

23 HONORABLE TOM GRAY: I would not change the
24 appellate rule.

25 VICE-CHAIRMAN LOW: All right. Let's see.

1 Sarah.

2 HONORABLE SARAH DUNCAN: No change.

3 VICE-CHAIRMAN LOW: No, I'm sorry, Judge
4 Patterson.

5 HONORABLE JAN PATTERSON: I'm really of two
6 minds.

7 VICE-CHAIRMAN LOW: Okay.

8 HONORABLE TOM GRAY: Which one do we have
9 here with us today?

10 HONORABLE JAN PATTERSON: I need a couple of
11 months. No, come back to me, please.

12 VICE-CHAIRMAN LOW: Okay. Sarah.

13 HONORABLE SARAH DUNCAN: No change.

14 VICE-CHAIRMAN LOW: What do you say about
15 changing the --

16 HONORABLE SARAH DUNCAN: No change to the
17 appellate rule.

18 VICE-CHAIRMAN LOW: All right. David,
19 you've been on the appellate bench. What do you think?

20 HONORABLE DAVID PEEPLES: I would leave both
21 of them the way they are.

22 VICE-CHAIRMAN LOW: Okay. Who else?

23 HONORABLE LEVI BENTON: Can I ask, obviously
24 I can't answer the question you just asked, but I want to
25 pose to Skip and to Sarah, what do you -- how do you

1 propose the appellate justices -- what do you propose they
2 should do when they've got a response or a reply brief and
3 it represents that the others have been served and then
4 they invest hours into the preparation of an opinion, only
5 to find later that maybe somebody wasn't served? And
6 that's -- and since I've never sat on the court of appeals
7 and I don't --

8 HONORABLE JANE BLAND: Yes, you have, Levi.

9 HONORABLE LEVI BENTON: Well, I have sat
10 temporarily, yes, but you know, on the trial court, I
11 mean, it's easy for me to say, you know, what's said here
12 really should have caused the other side to respond, and I
13 get my clerk to get the lawyers on the line, but I just
14 don't know that the court of appeals are set up to do that
15 and then you invest hours into the drafting of an opinion
16 and maybe the other side didn't even get it in the first
17 place.

18 VICE-CHAIRMAN LOW: What is your suggestion
19 as an answer?

20 HONORABLE LEVI BENTON: Well, I don't have a
21 suggestion, but Skip said, "Don't worry about if the
22 wheels are broken," but you know, that's after hours are
23 invested. The wheels are broken after hours are invested,
24 and it's frustrating.

25 MR. WATSON: You're saying, Judge, that a

1 party says that they didn't get the motion for rehearing
2 or they didn't get the court's opinion?

3 HONORABLE LEVI BENTON: They didn't get
4 something the other side filed.

5 VICE-CHAIRMAN LOW: All right. Wait just a
6 minute. We're fixing to go to the agenda that we started.
7 We're going to the appellate judges. I believe Judge
8 Jennings is next.

9 HONORABLE TERRY JENNINGS: As far as a
10 change goes, I would like to point out -- and I am a
11 dissenter on my court. I have been against the strike
12 policy, but I would like to point out that I don't think
13 Judge Radack's intent was to incorporate, you know, 9.5(e)
14 into -- because I think her point is we need to get rid of
15 9.5(e) because of the compliance problems in our court,
16 and Judge Bland I think can correct me on this. I don't
17 think she wants to incorporate that same problem into the
18 trial court level. I don't know, but I think her point in
19 her letter is that we need to get rid of 9.5(e).

20 Having said that, I am a dissenter on my
21 court. I have been against our strike policy, and I don't
22 see a need for a change.

23 VICE-CHAIRMAN LOW: All right. Jane, I
24 tried to call you, and you were always on the bench. You
25 work real hard. Now, what's your view?

1 HONORABLE JANE BLAND: Well, I would like
2 there to be -- I'm with Terry on my court, but I think
3 another way to solve the problem would be to have
4 conformity between the trial and the appellate rules. It
5 seems like because of the problems that people are talking
6 about with having Rule 9 put into the trial court that it
7 would make more sense to have Rule 21a put into the
8 appellate court, but I don't really have a strong
9 preference either way.

10 I would just like the rule to be the same
11 because I think people do understand when they come to the
12 appellate court that there is a different set of rules,
13 and I think they look at those rules for appellate type
14 things like briefing and extensions of time and those
15 kinds of things, but I don't think to the common
16 practitioner there is a triggering mechanism in their mind
17 that says, "Oh, and the certificate of service rules are
18 probably different." I don't think that happens, at least
19 from what, you know, we experience.

20 VICE-CHAIRMAN LOW: Bob, I overlooked you.
21 I didn't even notice when you came in. What's your view?

22 HONORABLE BOB PEMBERTON: I was going to
23 say, we'll strictly enforce the rules only against Buddy.

24 VICE-CHAIRMAN LOW: Wait a minute.

25 HONORABLE BOB PEMBERTON: My view is if it

1 ain't broke, don't fix it, and I don't think it's really
2 all that broke.

3 VICE-CHAIRMAN LOW: In other words, leave it
4 like it --

5 HONORABLE BOB PEMBERTON: Leave both the
6 trial and the appellate rules alone.

7 VICE-CHAIRMAN LOW: Judge Jennings.

8 HONORABLE TERRY JENNINGS: Are there any
9 appellate judges here who are aware of any other
10 intermediate court of appeals that strikes documents
11 because they don't cross every T and dot every I in
12 compliance with 9.5(e)?

13 VICE-CHAIRMAN LOW: Our court doesn't.

14 HONORABLE TOM GRAY: We will on occasion.
15 It depends on the level of the infraction and whether or
16 not I can get the second vote.

17 VICE-CHAIRMAN LOW: There's an honest man.

18 MR. HATCHELL: Is that seldom?

19 PROFESSOR DORSANEO: Yeah, seldom happens.

20 VICE-CHAIRMAN LOW: It appears that most of
21 the appellate judges would not change the appellate rules,
22 so let's have a vote. I mean, we've got to start
23 somewhere. Let's have a vote of all those --

24 HONORABLE JAN PATTERSON: I'm ready to vote
25 for no change.

1 VICE-CHAIRMAN LOW: All right. So let's
2 vote on how many people here vote to leave the appellate
3 rule the way it is, 9.5(e). 9.5(e). All right. Are you
4 counting them? I can't count that high.

5 24?

6 HONORABLE NATHAN HECHT: Yeah.

7 VICE-CHAIRMAN LOW: 24. All right. How
8 many against? To four. Okay. We've solved that issue.
9 Now, we're going to the trial rule. Bill,
10 what's your suggestion?

11 PROFESSOR DORSANEO: Well, I think what I
12 would like to do is to look at how we got exactly where we
13 are with just one sentence in 21a talking about the
14 requirement for a certificate of service, but without any
15 kind of indication what the certificate should say. I
16 know this committee voted when we did the recodification
17 draft to follow the same practice that's in 9.5 in the
18 trial court certificate of service rules. I know that's
19 how we voted in 1997.

20 I, as I tried to indicate earlier, believe
21 that before everything was moved from other civil
22 procedure rules into 21a there was more specific
23 information about what the certificate should say, and I
24 believe that was in civil procedure Rule 72. I'm not
25 certain enough about that, though, to not want to check to

1 see about how we got to the point, as Lamont Jefferson
2 says, that one day somebody decided we didn't have to
3 provide any meaningful information in certificates, and
4 now at least in Houston that's the way people do business,
5 because I think that is a problem. Okay.

6 So I'd like to wait a little bit and see
7 what we decide to do. We're not going to amend 21a anyway
8 if we recommend it to the Court. We recommended many
9 changes, and they're all awaiting the right time for
10 action.

11 VICE-CHAIRMAN LOW: All right. Are you
12 saying that maybe -- I mean, there's been some suggestion
13 that you didn't have to put all the parties but just put
14 method of service. There is different things you could
15 require other than exactly like the appellate rule, and
16 you want to look at it further?

17 PROFESSOR DORSANEO: I want to apologize for
18 not being prepared to be ready to talk about that in an
19 intelligent way at this point. I think we -- I believe we
20 got where we are by accident, and I don't think that where
21 we are needs to be treated as with any kind of view toward
22 there is a historic practice one way in the trial courts
23 and another way in the appellate courts. I just don't
24 believe that to be so.

25 VICE-CHAIRMAN LOW: All right, Judge.

1 HONORABLE TERRY JENNINGS: With this caveat,
2 I would say to Professor Dorsaneo, be careful what you ask
3 for, because, you know, people of good will can have good
4 faith differences over how to enforce these rules; and if
5 you start making 21a -- if you start putting more
6 technical requirements into Rule 21a, you may get to the
7 position where you have people of good faith who have a
8 difference of opinion on how to enforce them, you may get
9 to a point where you're creating a big problem at the
10 trial court level where certain judges will enforce them
11 very strictly and others will not care so much about them,
12 so that could be opening a can of worms. So with that
13 caveat I would --

14 VICE-CHAIRMAN LOW: So we have two choices.
15 Leave 21a as-is or send it back to the committee to study
16 and see if it needs to be changed in some way, and if most
17 people don't want to change it there's no reason to go
18 back to the committee. So why don't we vote and see who
19 would leave that rule as it is now? All those in favor
20 raise your hand.

21 HONORABLE TRACY CHRISTOPHER: Kent. Kent.

22 VICE-CHAIRMAN LOW: 13.

23 HONORABLE KENT SULLIVAN: Oh, I would leave
24 21. She's right. Add me.

25 HONORABLE NATHAN HECHT: 14.

1 VICE-CHAIRMAN LOW: 14. All right. All
2 those who want it to go back to the committee for further
3 study? 11.

4 It's pretty close. I would say that we
5 don't do it, but you can take a look at it and come up
6 with something good, suggest it.

7 PROFESSOR DORSANEO: All I'm going to do is
8 make a report on how we got where we are and you can
9 decide what to do.

10 VICE-CHAIRMAN LOW: All right. That's fine.
11 Let's go to the next thing. I'm sorry.

12 MR. TIPPS: This is probably out of order,
13 but I'll make it really short. I think something -- I
14 think Jane is right, or whoever said it, that most lawyers
15 who are not regular appellate practitioners know that
16 there are a set of special appellate rules and they
17 certainly know that there is a rule on how you write your
18 brief, and they are going to read that rule for sure, and
19 I think maybe Bill's committee should give some
20 consideration to including in Rule 38.1, which has the
21 requisites for the appellate brief, just a sentence that
22 says, "A certificate of service complying with 9.5(e),"
23 just as a way to refer people to that rule. And while
24 you're at it you might also include in 38.1 some reference
25 to the fact that the request for oral argument ought to be

1 on the cover of the brief, because people miss that one,
2 too.

3 VICE-CHAIRMAN LOW: We've had a pretty close
4 vote. Would you do your report and then let's take a look
5 at it on the change or how we got to where we are?

6 PROFESSOR DORSANEO: Uh-huh.

7 MR. ORSINGER: Can you include in that a
8 copy of the recodification draft that an earlier version
9 of this committee has approved?

10 PROFESSOR DORSANEO: I think I can. Yes.

11 MR. ORSINGER: That would be helpful.

12 HONORABLE DAVID PEEPLES: John Martin
13 mentioned something that I think makes sense. This Rule
14 21a takes up a whole half page, and it's one paragraph.
15 It could be more reader-friendly.

16 PROFESSOR DORSANEO: I will bring the
17 recodification draft, and you'll see it's a number of
18 paragraphs with titles, and I'm probably out of order
19 here, but anybody who teaches from this rule book written
20 first in 1879 and carried forward through the Revised
21 Civil Statutes of 1925 and then put into the Rules of
22 Civil Procedure primarily by Roy McDonald without much
23 change will tell you that this is a terrible rule book.
24 All right. It's terrible. That's why we redid the draft,
25 and you just point out one circumstance where the rule is

1 not written very well.

2 HONORABLE DAVID PEEPLES: But even making no
3 substantive procedural changes in it, it can be made more
4 reader-friendly. That ought to be done.

5 VICE-CHAIRMAN LOW: Okay. Would you take
6 those --

7 PROFESSOR DORSANEO: I will bring what we
8 did before.

9 VICE-CHAIRMAN LOW: Okay. All right. Next
10 item is there is apparently going to be quite a difference
11 in opinion on this. The precedent to be followed by a
12 transferor court, and before I turn it over to Bill, I
13 mean, the last time we met we discussed this, and it
14 looked like many people wanted to follow -- or a few, or a
15 number, wanted to follow the precedent of the court from
16 which the case was transferred. Some were against that.

17 There were some that said you shouldn't
18 divide from courts of appeals, there's only one body of
19 law. The court should be free to do what they want to.
20 There was some suggestion, or maybe it came out of my own
21 imagination, that we do like the court of appeals. Now
22 they can certify a question to the Supreme Court, and they
23 certify that question and the Supreme Court takes it,
24 answers the question, and then the court of appeals
25 answers then all the whole appeal and that if the court

1 that got the case found there was a direct conflict they
2 could certify the question to the Supreme Court. Not
3 circumvent the court of appeals, just send it up there for
4 that question, and then they answer all the others.

5 There was -- let's see, what was the other
6 idea, Bill? Let's see. Oh, Judge -- well, that's a
7 deviation of the first one that Judge Gaultney had given
8 me. Can you think of other? Seems like there were about
9 four things.

10 PROFESSOR DORSANEO: Well, I mean, the four
11 things -- I can think of three things and then there was
12 Judge Gaultney's justification for the --

13 VICE-CHAIRMAN LOW: Law of the case.

14 PROFESSOR DORSANEO: -- for using the law of
15 the case doctrine as the logic for deciding whether you
16 follow the transferee court or the transferor court in the
17 transferee court.

18 VICE-CHAIRMAN LOW: Oh, the other one was to
19 follow the law of the case of their own court, transferor
20 court, transferee court. Any rate, go ahead and I --

21 PROFESSOR DORSANEO: Well, let me tell you
22 what we have. Does everybody have this March 23, 2005?
23 It's not March. There is a later one.

24 HONORABLE TERRY JENNINGS: May 2nd?

25 MS. HOBBS: May 2nd.

1 PROFESSOR DORSANEO: May 2nd.

2 VICE-CHAIRMAN LOW: May 2nd, 2005. There
3 may be some confusion because that wasn't on the list of
4 things on the agenda, and I didn't have it until --

5 PROFESSOR DORSANEO: They're over there on
6 the table. Does everybody have one?

7 HONORABLE SARAH DUNCAN: What is it?

8 MR. SCHENKKAN: Looks like this?

9 VICE-CHAIRMAN LOW: Well, let's see, yes.
10 Memoranda -- well, no. Yeah.

11 MR. LOPEZ: Sharon McGill's cover letter?

12 VICE-CHAIRMAN LOW: If anybody has a
13 question whether they have it, go ahead and get one from
14 the table.

15 PROFESSOR DORSANEO: Let me tell you what
16 this is. I mean, it really is a -- and I don't think that
17 the prior draft was presented at the last meeting. I
18 wasn't here at the last meeting, but I think that's right,
19 isn't it, Lisa?

20 MR. ORSINGER: It was the meeting before
21 that I think we discussed it, wasn't it?

22 PROFESSOR DORSANEO: Yeah. But we didn't
23 have a draft at all, and this draft which I have, just for
24 the sake of getting something down on paper, identified as
25 an administrative rule; and the reason I did that is it's

1 very difficult to fit any new rule into the appellate
2 rules because of the way that they are constructed. This
3 would be somewhere in the vicinity of Appellate Rule 56
4 if -- I think, if we tried to put it into the appellate
5 rules, but I just made it an administrative rule because I
6 couldn't figure out how to put it into the Rules of
7 Appellate Procedure in any kind of a convenient way
8 without splitting it up and putting a piece here and a
9 piece there so it wouldn't look clear from top to bottom.

10 VICE-CHAIRMAN LOW: Bill, you've got it 15.
11 I think we had one other proposed rule on something else
12 that we called 15, so I don't know whether it --

13 PROFESSOR DORSANEO: 15. So this might need
14 to be 16. I don't expect it's going to be an
15 administrative rule anyway.

16 VICE-CHAIRMAN LOW: Right. I understand,
17 but last time we had a suggestion of Administrative Rule
18 14 and 15, and so we might need to change the rule. I
19 mean, go ahead.

20 PROFESSOR DORSANEO: Well, I don't know if
21 this is going to be -- if it's going to be a rule at all,
22 I don't know if it's going to be an administrative rule or
23 some other kind of rule. That's unimportant to me.

24 VICE-CHAIRMAN LOW: Right.

25 PROFESSOR DORSANEO: The beginning parts of

1 it, 15.1 through 15.4, are either verbatim or
2 substantially verbatim provisions taken -- I think it's
3 Government Code, Chapter 73, isn't it?

4 VICE-CHAIRMAN LOW: Right.

5 PROFESSOR DORSANEO: Which provides for the
6 authority to transfer, and all of the rest of this other
7 information that I've incorporated in 15.1 through 15.4,
8 with the idea being that the -- those statutes would
9 either be mimicked by the procedural rule or they would be
10 superseded by the procedural rule. I will say that the
11 authority to transfer process, I learned this week, is
12 somewhat more complicated. It says the Supreme Court may
13 order cases transferred from one court of appeals to
14 another, but as I understand it, the Legislature by
15 providing a rider to an appropriations bill actually
16 suggests to the Supreme Court --

17 HONORABLE NATHAN HECHT: Mandates.

18 MS. HOBBS: Mandates.

19 PROFESSOR DORSANEO: Mandates. Well, if you
20 read it, it kind of says mandates.

21 HONORABLE NATHAN HECHT: Well, you can
22 either do it or not have any money, so....

23 PROFESSOR DORSANEO: Yes. So without regard
24 to how the rider is worded, the Supreme Court takes it as
25 a directive, so it isn't just the Court doing this. It's

1 the Court doing what the Court is mandated to do by the
2 rider to the appropriations bill.

3 Now, when we get down to the part that we
4 need to talk about, 15.5, the pedigree on that is first --
5 the first alternative comes from a draft that Mike
6 Hatchell did after one of our meetings, with a slight
7 addition at the end as a way to deal with this transfer
8 problem; and if you just look at it, "In cases transferred
9 from one court of appeals to the other the court may when
10 it issues its opinion, and must on rehearing, state
11 whether the outcome would have been different had the
12 court of appeals applied precedent of the court from which
13 the case is transferred," so that the transferee court
14 does what it wants to do and states whether the outcome
15 would have been different if the precedent of the
16 transferor court would have been followed; and then there
17 is a second part where the Supreme Court would take action
18 on a petition for review because precedent of the transfer
19 court was not applied; and that's (a), (b) and (c), and I
20 think Mike's provision had (a) and (b) but not (c). It
21 seems to me that (c) is --

22 MR. HATCHELL: Well, I never wrote anything
23 down. I just said it.

24 PROFESSOR DORSANEO: Well, it came to me in
25 written form.

1 MR. HATCHELL: Probably Lisa.

2 PROFESSOR DORSANEO: Okay. Well, I thought
3 you had written it all out because it came to me in
4 written form.

5 MR. HATCHELL: I just said it.

6 PROFESSOR DORSANEO: Okay. So that's one
7 approach to this problem, and I guess that's the approach
8 where the transferor court follows the law as it sees it
9 and then probably on motion for rehearing, but perhaps
10 earlier, makes a special effort to say that we've
11 considered the transferor court's precedent and did not
12 follow it and the outcome would have been different if we
13 had done so, so here you go, Supreme Court, take whatever
14 action you can consider to be appropriate.

15 That differs from the practice of just
16 certifying it to the Supreme Court without the court of
17 appeals doing anything on its own to begin with. It
18 doesn't authorize the court of appeals to simply pass the
19 buck. It says decide the case as you see fit and then put
20 it in shape to have the possible conflict resolved.

21 The second alternative is one that I
22 drafted, which attempts to be the alternative -- the
23 primary alternative approach where similar procedures are
24 followed. "In cases transferred by the Supreme Court from
25 one court of appeals to another, the court of appeals to

1 which the case is transferred must" -- and I have an
2 internal choice here -- "consider and give due regard to
3 the view held by the transferor appellate court of Texas
4 law as reflected in the decisions of the transferor court"
5 or "decide the case in accordance with the view held by
6 the transferor appellate court as reflected in the
7 decisions of the transferor court and state whether the
8 outcome would have been different had the transferee court
9 applied its own or another court of appeals' precedent or
10 view of Texas law."

11 That may be a little bit overcomplicated,
12 but it's meant to be something close to the mirror image
13 of the first alternative with the statement being whether
14 the outcome would have been different had the transferee
15 court applied its own or another court of appeals'
16 precedent or view of Texas law. Maybe that language more
17 closely matches "decide the case in accordance with" than
18 "consider and give due regard to," and then the Supreme
19 Court takes the appropriate action after that. Decide the
20 issue for itself, grant the petition, resolve the actual
21 or apparent conflict, and if necessary remand the case to
22 the court of appeals or deny or refuse the petition.

23 Again, the purpose of getting something down
24 on paper is to get something down on paper for discussion
25 purposes. With respect to alternative two there are more

1 things I would say about it. If the transferee court is
2 going to decide the case in accordance with the transferor
3 court's precedent, there could be various ways to think
4 about that by using doctrines with which we're already
5 familiar.

6 David Gaultney recommended that we think
7 about and perhaps add some language analogizing this
8 subject area to a law of the case thinking under which you
9 would follow the law of the transferor court unless you
10 thought this was just wrong, clearly erroneous, or
11 whatever language you might choose to take from the law of
12 the case cases, like *Briscoe vs. Goodmark*, which says at
13 one point "The Court has long recognized an exception to
14 the case doctrine that if the appellate court's original
15 decision is clearly erroneous, the court is not required
16 to adhere to the original rulings." You know, something
17 like that could be built in as a standard for the
18 transferee court to use as an exception to any requirement
19 that the transferor court's precedent be followed.

20 Sarah Duncan's opinion in this area -- you
21 can probably speak better about it -- certainly could
22 speak better about it than I can -- makes, I believe, an
23 analogy to choice of law principles; isn't that right,
24 Sarah?

25 HONORABLE SARAH DUNCAN: Yes.

1 PROFESSOR DORSANEO: So there are ways that
2 more could be said or this could be, you know, engineered
3 to be user-friendly, but that hasn't happened yet in this
4 draft.

5 VICE-CHAIRMAN LOW: But let me ask one
6 question. Choice of the law is usually where law of
7 Louisiana, Texas, and some -- and would choice of the law
8 work where you have just one state or those factors? But
9 anyway. Go ahead. I'm sorry.

10 PROFESSOR DORSANEO: That's all I have to
11 say about it. I didn't get any feedback from our
12 appellate rules committee, and I think my certificate of
13 service says that they all got one, a copy of it, but I'm
14 not sure, because it's a fairly opaque certificate of
15 service, whether they actually did.

16 VICE-CHAIRMAN LOW: Well, I got mine
17 e-mailed and the certificate of service said you had
18 mailed it.

19 MR. HATCHELL: They struck it and sent it
20 back.

21 VICE-CHAIRMAN LOW: Okay. How does
22 everybody feel about, first, the approach that we follow
23 to some degree -- I'm not saying -- it might be with some
24 different changes or something, the law of the court where
25 the case -- from where it was transferred? All right.

1 HONORABLE TERRY JENNINGS: Could you state
2 that again?

3 VICE-CHAIRMAN LOW: I mean, I'm trying to
4 see how people feel about the different approaches. You
5 can use different language on all of these, but the basic
6 concept is whether we would to some degree, with exception
7 or with no exception, follow the law of the court that
8 transferred the case, where the case was tried.

9 The problem -- and let me raise this first,
10 a question that came up to me. What if a case were tried
11 in Waco and they tried the same kind of case in Dallas? I
12 mean, this could happen. It probably would not. The case
13 is transferred from Dallas to Waco. All right. There is
14 a conflict. Does Waco write an opinion that says, "Okay,
15 this was tried in Waco, this is the law. Well, no, this
16 is tried in Dallas, so that's the law." Same kind of
17 identical thing. Does the same court come up with a
18 different result? I guess if you had clearly erroneous
19 you could get around it, but anyway, Carlos.

20 MR. LOPEZ: No, I was ready to vote.

21 VICE-CHAIRMAN LOW: Oh, okay. All right.
22 Richard.

23 MR. MUNZINGER: I addressed this the last
24 time I spoke about this, and I would like to address it
25 again. Some years ago there was a case, the Caller-Times

1 case, that was appealed to the Texas Supreme Court. It
2 was an antitrust case, and it was the first time the Court
3 really addressed substantive antitrust law under the 1983
4 Texas statute, and the court of appeals had addressed the
5 question of what conduct was predatory and had ruled that
6 the conduct was predatory and had affirmed a judgment.

7 The argument was made in one of the
8 appellate briefs that you could have a rule in Corpus
9 Christi which would be different from the rule in El Paso.
10 Let's assume that we had a case in El Paso where the El
11 Paso court of appeals has held certain conduct to be
12 violative of the Texas Free Enterprise & Antitrust Act,
13 whether it's price fixing or whatever it be. That would
14 be too clear, but let's just assume for a moment that the
15 El Paso court of appeals has once held that conduct is
16 prescribed by that statute.

17 A case arises in El Paso. It is tried, and
18 it is tried in accordance with the El Paso court of
19 appeals' rule on that point. On appeal the case is
20 transferred to Houston. The Houston court is now
21 addressing a situation where the substantive rights of a
22 competitor in El Paso are going to be resolved by the
23 Houston court's view of what the antitrust law is. If the
24 Houston court's decision is contrary to the El Paso
25 court's decision you now have two competitors in El Paso,

1 one subject to rule A and one subject to rule B.

2 That's entirely possible if you don't
3 require the transferor court to apply the law of the --
4 I'm sorry, the transferee court to apply the law of the
5 transferor court. These opinions affect the substantive
6 rights of parties, so if I'm going to be in the district
7 governed by the El Paso court of appeals, until the
8 Supreme Court of Texas annunciates the law then I ought to
9 be under the same law as my neighbor or as my competitor.

10 I see the same problem arising in discovery
11 cases. Some years ago there was a dispute, not a dispute,
12 but a difference in the courts of appeal as to how you
13 handled supplementations of answers to interrogatories and
14 whether or not interrogatories had or had not been
15 properly supplemented and if they had not been properly
16 supplemented could a person call a witness; and if you
17 can't call a witness, you can't prove your point; and if
18 you can't prove your point, you lose your case. So in El
19 Paso we had rule A; elsewhere we had rule B.

20 Is a litigant to be confronted with a
21 different set of rules and is that fair? Can I honestly
22 advise my client as to what the law is within my district?
23 And I feel very strongly that it would be a mistake to
24 allow appellate courts to cause this problem to citizens
25 in their various districts unnecessarily. I think it is

1 unnecessary to allow this, and I recognize that appellate
2 court justices have their oaths that they take that they
3 are required to do their best, in their best lights to
4 obey the law, to honor the Constitution, et cetera.
5 However, if the Supreme Court of Texas were to annunciate
6 a rule that states you will apply the law of the
7 transferor court, that becomes the law which that justice
8 must honor in accordance with his or her oath, and it
9 removes the problem from that standpoint.

10 It doesn't remove the intellectual problem,
11 but the intellectual problem and the good faith and the
12 conscience problem can be resolved by a paragraph or two
13 or three pointing out "I sure as heck don't like this
14 rule. I think it stinks to the high heavens, but I am
15 duty bound to honor it and I do, but I sure hope the
16 Supreme Court will take a look at this case." I won't say
17 anything else.

18 VICE-CHAIRMAN LOW: Jan.

19 HONORABLE JAN PATTERSON: The two big
20 complications are -- the first one, as Richard says, is
21 the litigants file their case with certain expectations
22 under the law of what they consider the land. The second
23 problem comes in if the case is reversed and it's sent
24 back for retrial or remanded. It becomes an additional
25 complication, and under what law would you send it back?

1 VICE-CHAIRMAN LOW: It's the law once --
2 under the law of the case. I mean, that is the law of
3 that case.

4 HONORABLE JAN PATTERSON: Well, I
5 understand.

6 VICE-CHAIRMAN LOW: I don't care what court
7 takes it.

8 HONORABLE JAN PATTERSON: But you're sending
9 it back to El Paso in his example, and how can that as a
10 practical matter -- you know, that just adds an additional
11 complication there.

12 VICE-CHAIRMAN LOW: Well, if you follow the
13 Briscoe case, I mean, unless you want to say it's clearly
14 erroneous. Sarah.

15 HONORABLE JAN PATTERSON: Let me just
16 conclude my point here.

17 VICE-CHAIRMAN LOW: Okay.

18 HONORABLE JAN PATTERSON: It honors the
19 litigants' and the lawyers' expectations when they file
20 their suit to follow the law of the transferor court.
21 Now, all the appellate judges really want is a decision in
22 this area because there have been a lot of really good
23 discussions. And there was a split of authority,
24 primarily Eastland and Corpus Christi followed the
25 transferee court system, and so I sent this rule around to

1 them and to some others; and we have had a wonderful
2 dialogue about it; and the two main concerns of those who
3 follow the transferee, one, we just need to know what the
4 rule is because in fact it doesn't occur in very many
5 cases.

6 And second, a lot of the judges didn't
7 realize that it was a problem. So it's a healthy thing to
8 talk about it, but the other aspect of it is that the ones
9 who follow the transferee court are not necessarily wedded
10 to it, and Judge Gray can speak to this I think as well,
11 but there are two main reasons that they like that system.
12 One is that they have a sense that we're an independent
13 judiciary, we follow our law, and nobody can tell us what
14 to do. However, they have been advised and they
15 understand this complication of the expectation of the
16 litigants, and they generally are coming around on that
17 view. That's not something we've talked about very much
18 before.

19 The other thing, and the real worry, and I
20 was just talking with -- Justice Gaultney is going to be
21 here this afternoon, and Judge Hinojosa, his concern and
22 the concern of the Corpus court was if we decided under
23 their law, the transferor court, then it becomes precedent
24 in our court; and that's what they wanted to avoid, is
25 creating precedent where you're following somebody

1 else's -- we all know there's one law, but following
2 somebody else's law is a problem for them because it
3 creates bad precedent. So we can deal with that by the
4 rule and --

5 VICE-CHAIRMAN LOW: Sarah. I'm sorry, go
6 ahead.

7 HONORABLE JAN PATTERSON: We can deal with
8 that by the rule, but also we have been talking about very
9 often in these transfer cases we don't say, "This is a
10 case transferred from. We are deciding under our law or
11 their," and so we have had good discussions about being
12 express on that so that it doesn't create precedent in
13 your own district, that it is decided with due regard to
14 the transferor court, something along those lines. So
15 this has had a very healthy discussion, but the big ticket
16 item is which law to follow, and then the rule flows from
17 that, I think.

18 VICE-CHAIRMAN LOW: Big ticket item is what?

19 HONORABLE JAN PATTERSON: Is whether you're
20 going to follow the transferor or the transferee.

21 VICE-CHAIRMAN LOW: Right.

22 HONORABLE JAN PATTERSON: That's kind of the
23 big ticket item and then the form of the rule flows from
24 whichever one.

25 VICE-CHAIRMAN LOW: Right. Sarah.

1 HONORABLE SARAH DUNCAN: I think Jan and I
2 have the same point. I don't think it's a problem
3 creating precedent for the Fourth Court of Appeals
4 district if I say in the opinion "I'm applying the law
5 that's annunciated by the Fourteenth Court."

6 I would only point out that my opinion was a
7 dissent and certainly not the majority view, but it
8 remains my view; and when Michael first proposed this
9 procedure that's now alternative one of the 15.5, I
10 thought, you know, I could go with that; and I could still
11 live with it; but I was thinking about it this morning and
12 I thought, you know, I can't keep up with my case load
13 deciding a case once. Don't tell me I have to decide it
14 twice.

15 VICE-CHAIRMAN LOW: Lamont, I believe.

16 MR. LAMONT JEFFERSON: Yeah, I'm just kind
17 of surprised at the way this discussion is going. It
18 seems to me that there is only, as Jan said, one law, and
19 it's not pronounced by an appellate court. It's great
20 that we can sit in here and get on Westlaw because here is
21 this Willy vs. McCain case, which is a 1964 Texas Supreme
22 Court decision that says, "After a principle, rule, or
23 proposition of the law has been squarely decided by the
24 Supreme Court" -- and that's referring to the United
25 States Supreme Court -- "or the highest court of the state

1 having jurisdiction of a particular case, the decision is
2 accepted as binding precedent by the same court or other
3 courts of lower rank when the very point is again
4 presented in a subsequent suit between different parties."

5 That's what stare decisis is. It's not --
6 and what an appellate court has to do when a justice is
7 trying to decide what is the law of the state, if it's not
8 -- if it is pronounced by the Supreme Court, by the Texas
9 Supreme Court, easy call. If it's not pronounced by the
10 Texas Supreme Court then you have to make a decision based
11 on the precedent that's out there what the law of the
12 state is. You don't make the law. All you're doing is
13 saying what you believe the law to be, but it makes no
14 sense to me to say there is precedent that works in Austin
15 that doesn't work in San Antonio or any place else.

16 VICE-CHAIRMAN LOW: Well, are you saying
17 then that there's conflict between two courts of appeals
18 and case is transferred, and no matter who gets it, where
19 it came from or what, they should look at it and ignore
20 Austin on it, Houston, or what, and just try to analyze
21 what the law is? Supreme Court hasn't answered the
22 question.

23 MR. LAMONT JEFFERSON: I don't think you
24 ignore anything. I think you look at everything, but I
25 don't think you should give deference to the fact that the

1 case came from a particular locale.

2 VICE-CHAIRMAN LOW: Well, I expressed it
3 differently than you did, but what you're saying is just
4 look at what you think the law is, look at each decision,
5 weigh it and see and then make decision from there.

6 MR. LAMONT JEFFERSON: Exactly.

7 VICE-CHAIRMAN LOW: All right. Carlos.
8 Wait, is there anybody on this side of the room? I have
9 been looking over here. I have been waiting on Richard to
10 say something, so I'm going to call on him whether he says
11 anything. So I don't mean to ignore this side of the
12 room. Richard. Richard is next. He hasn't spoken, and
13 I'm fixing to take a break, and he can't go.

14 MR. ORSINGER: Let me comment on the general
15 philosophical proposition that Lamont put on the floor. I
16 have some detailed comments here, but it's been an issue
17 of philosophy of government for centuries about whether
18 there is one law out there, and we're all just like the
19 three blind men and the elephant. We're all feeling
20 different parts of it and think it's a rope or a wall.

21 I don't really feel like we're going to be
22 able to resolve that on this committee. If we are then
23 let's publish it. But in my view the simple case is when
24 the Supreme Court has decided something and then that is
25 binding precedent on the inferior appellate courts and on

1 the trial courts, but also in my view, courts of
2 coordinate jurisdiction are not -- their rulings are not
3 binding on the others. So if the First Court makes a
4 decision based on its best judgment, it's not binding on
5 the Fourteenth Court even though they're in the same
6 appellate district. It's not binding on any other courts
7 of appeals, and I think that's good. I don't think that
8 the first time three judges look at a problem in one case
9 is necessarily the best time to make the binding
10 precedent.

11 This is a big state. The state of Texas is
12 as big as some regions in the United States. We have
13 fourteen courts of appeals. Many states have one, and we
14 have a lot of different -- we have oil areas, we have
15 agricultural areas, we have sea coast areas, we have, you
16 know, forest areas. We have -- there is so much diversity
17 in Texas and different perspectives, and of course, along
18 the border we have immigration from other countries and
19 whatnot, and I think it's healthy to respect the rights of
20 the courts of appeals to have different perspectives based
21 on whether they're Democrats or Republicans or whether
22 they're rural or urban or whatever.

23 And then over a period of time trends will
24 emerge as the different court of appeals address the same
25 issue over and over again, and if they reach a conflict,

1 that's the time for the Texas Supreme Court to step in.
2 And up until about 15 years ago, those of us who practice
3 family law lived in that world because the Texas Supreme
4 Court didn't even have jurisdiction in family law appeals
5 unless there was a conflict between court of appeals or a
6 dissent in that particular case, so we frequently would
7 wait for years while a trend was developing at the court
8 of appeals level, and then lo and behold, someone would
9 come along and hand out a decision to the contrary of the
10 others and then the Supreme Court would grant review and
11 then they would resolve the issue.

12 And I can remember one of the most
13 significant decisions in family law in the second half of
14 the 20th Century was in the Aguilar decision when the
15 Texas Supreme Court decided that the Constitution
16 prohibited divesting separate property in a divorce, and
17 there were six court of appeals decisions that said that
18 was okay and then finally one said it was not okay, and
19 the Supreme Court granted writ and in a five-four decision
20 we discovered that the Constitution prohibited something
21 we had been doing for a long time.

22 I don't think that there is anything wrong
23 with different courts of appeals having different views.
24 I think that's healthy, and I think that it's only over a
25 period of time that the validity of the first impression

1 from the First Court of Appeals is either validated by
2 other court of appeals or the trend goes the other
3 direction, and if the trend does go the other direction
4 it's time for the Supreme Court to step in.

5 So I'm not offended by the idea that
6 different court of appeals have different decisions or
7 different views of the law. However, I do think that if
8 you're trying a case in a district court that's under the
9 direct control of a court of appeals whose rulings are
10 binding precedent on the trial court, in my view, it's a
11 geographical concept, that it's really not wise to have an
12 entire court proceeding and even the briefing sometimes
13 done -- or does the assignment always occur before
14 briefing, the re-assignment? Does that always occur
15 before briefing?

16 HONORABLE NATHAN HECHT: Yes.

17 HONORABLE SARAH DUNCAN: No.

18 MR. ORSINGER: It always does?

19 HONORABLE SARAH DUNCAN: No.

20 MR. ORSINGER: It doesn't? So sometimes you
21 might even be briefing to one court of appeals and then
22 get assigned to another one, and to me that's an
23 inefficient way to run your system because you're not
24 following the guidelines that you -- everyone expects are
25 binding.

1 PROFESSOR DORSANEO: Mr. Chairman?

2 VICE-CHAIRMAN LOW: Wait just a minute.

3 Would you go for then -- are you saying some system of
4 certifying a question to the Court to resolve it?

5 MR. ORSINGER: No, I don't think the Supreme
6 Court is going to grant much of that. I think --

7 MR. LOW: It took a constitutional amendment
8 for the court to even get, you know, from the Fifth
9 Circuit. That was -- Bill.

10 PROFESSOR DORSANEO: Except for the very
11 last part Richard said, which I think, as I'll say in a
12 minute, would be a very bad policy choice, I'm not
13 troubled by the fact the courts of appeals are going to
14 interpret the law differently. All of us interpret the
15 law differently, and it could be interpreted differently
16 in different trial courts, but this was drafted with an
17 attempt to make it plain that there is really only one
18 Texas law and maybe different views about what that law is
19 from place to place.

20 With respect to your comments about
21 geography in trial courts, and I would say that the better
22 policy analysis and the one that we've sometimes not
23 always followed in Dallas County is that the decisions of
24 the Beaumont court are with respect to trial courts in
25 Dallas County of equal precedential value with the

1 decisions of the Dallas court or the San Antonio court and
2 they are meant to be given due regard, and that means to
3 me also that the Dallas court is not empowered to ignore
4 the decision of another court of appeals on the same
5 subject about what sue or be sued means in a particular
6 statute, and that's how we get these things worked out.
7 That's how these things are worked out.

8 This is drafted in order to get the
9 appellate court that's going to decide the case to explain
10 that the other courts' decisions were looked to, they were
11 either followed or not followed, and the outcome would
12 have been different if we had taken a different course of
13 action, so it's your turn now, Supreme Court. We have
14 done the best we can do on this, and it's the Supreme
15 Court's job to resolve the conflict, and it's to set up
16 that. That's what we're dealing with.

17 That's different from what Lamont says where
18 he just says, well, we're not going to deal with this.
19 Okay. We're just going to say it's one law and it's only
20 the Supreme Court's precedent that is binding on the trial
21 court. The courts of appeals precedent being, you know,
22 binding, although potentially in conflict. This is a way
23 to try to deal with it, whichever alternative you pick,
24 and it does preserve the idea that there is one law,
25 although interpreted differently, and it sets up the plan

1 that this needs to be resolved as quickly as possible.

2 VICE-CHAIRMAN LOW: But, see, the problem is
3 that apparently some courts of appeal are saying you
4 follow the law of the one court. Some are saying the
5 other, so, I mean, that's going to happen if we do
6 nothing. So do we have a rule that says you're not bound,
7 you should have -- this is one body of law and you should
8 consider everything and not give more precedent
9 necessarily to your own than the other; or do we have
10 something that just says, okay, if there is a direct
11 conflict, I mean, can't distinguish, it's just black and
12 white and between this one and that one, do you follow the
13 law of the court from where it's transferred? And some of
14 those things are happening now, and the question is, how
15 do we answer that? Richard, I believe you had your hand
16 up.

17 MR. MUNZINGER: I just would want to point
18 out that I'm not sure we're solving or being asked to
19 solve any kind of basic philosophical questions about
20 courts having different views of the law. The rule is to
21 be applied in that situation where an appeal comes from
22 one district which has already annunciated a rule which is
23 different from the district to which it has been
24 transferred, and no matter what we say about the
25 philosophy of law or what have you, we still end up

1 impacting the rights of citizens and litigants, and it can
2 be -- they can be critical rights of citizens and
3 litigants, whether it's in a trial or whether it's in
4 business.

5 And for those of you -- and I've heard
6 several say trial judges aren't bound by what their court
7 of appeals says. Tell that to the trial judge when you're
8 in El Paso. "Well, wait a minute, your Honor, the court
9 of appeals of Dallas says so-and-so."

10 "Yes, sir, but the one that's going to
11 handle your appeal says X." There are not too many dadgum
12 trial judges in El Paso, Texas, who are going to ignore
13 precedent from the court of appeals of El Paso, and I
14 suspect that's true of most places around the state,
15 unless someone has made some kind of an egregious error,
16 and I don't know about that.

17 But, again, whatever rule is announced
18 here is going to have an impact on citizens and litigants.
19 It is more than a philosophical question that is addressed
20 to can we all have differing views of the law until the
21 Supreme Court rules. Yes, we can, but until the Supreme
22 Court rules you are announcing rights of citizens, and
23 you are affecting their rights, and it can be something
24 that is extremely important to them in business, their
25 lives, fortunes, and sacred honors. I don't mean to be

1 dramatic about it, but by god, that's what you deal with.

2 VICE-CHAIRMAN LOW: All right. Let me call
3 on the appellate judges here. Judge Gray, you're the
4 first one. What do you think we should do?

5 HONORABLE TOM GRAY: Probably not the best
6 place to start, but from the general discussions I would
7 add that you generally will not get a court to say that
8 this is like X case and we do not think they reached the
9 right result and so we're going to do Z, because the
10 ability to distinguish or intellectually ignore other
11 precedent in good faith is very real and it happens.

12 I mean, everybody has heard me talk about
13 the Jaubert case before. It's just a classic case, and
14 you can't say as one of the proposals proposed that if you
15 already decided the issue you go with your law or if the
16 other court has already decided it and you haven't you go
17 with their law. The Jaubert case was a classic example of
18 that in two regards. One was on the issue of ineffective
19 assistance of counsel, the other one was on disclosure of
20 the intent to use extraneous offenses in the case.

21 That was a case that was transferred to us
22 from the Second Court of Appeals. They had -- with regard
23 to the second issue, following along what Richard was
24 talking about, the Second Court had expressly decided the
25 issue that if the extraneous offenses were only going to

1 be used in rebuttal, not in the case in chief, that it did
2 not have to be disclosed by the state prior to trial. Our
3 court looked at it, decided that they did have to be
4 disclosed before they could be used, and reversed on that
5 grounds.

6 And then also on ineffective assistance of
7 counsel issue we had decided that it was an issue that had
8 to be preserved. The Second Court -- we were the only
9 court that had done that, and the Second Court continued
10 to apply the old rule that it was a -- that particular
11 issue did not have to be preserved and they would address
12 them when raised for the first time on appeal.

13 While that case was pending within our
14 plenary jurisdiction the first issue was resolved. We
15 pulled it back. It was resolved against us, and so we
16 pulled the case down and wrote on the second issue that I
17 talked about, this disclosure of the intent to use the
18 extraneous offenses; and it was crystal clear what the
19 Second Court had done; but we had never addressed the
20 issue, and we did not follow the Second Court, and there
21 was a dissent.

22 But that was a question that under your
23 clearly erroneous rule is going to fall out as they felt
24 like, the majority did, that the Second Court was clearly
25 erroneous; but that doesn't help the trial judge when this

1 goes back, because I have no doubt that if it had gone
2 back and been tried again at the trial court level and the
3 evidence excluded, which in that particular case it
4 wouldn't have been because it had already gotten a notice
5 by that point, but retried under the rule that we
6 announced and it went up to the Second Court again on a
7 state's appeal, they would have prevailed in the Second
8 Court on the argument that we were clearly erroneous
9 because we didn't apply the rule that they had so clearly
10 articulated.

11 This whole problem is a result of -- it's a
12 symptom of another problem in the transfer of cases. It
13 is not in and of itself a problem. I agree with Richard
14 in everything he said about I think it's a good and
15 healthy thing because different courts look at different
16 things different ways. Different judges look at different
17 things different ways. If we had a rule that said, yes,
18 you apply it, the law of the transferor court, you're
19 going to have some intellectual problems of I -- how do
20 you really know what that law is and whether or not it's
21 going to -- would impact this case.

22 So if you require a judge to try to say,
23 "I'm following the law of that court," you're going to run
24 into some situations where they think they are, but they
25 miss it. I mean, it's the Erie doctrine, you know, that

1 we have in state court -- or Federal courts trying to
2 apply state court doctrine. I mean, this problem has been
3 around a long time. The problem that's unique to Texas is
4 because we're transferring cases around the state.

5 VICE-CHAIRMAN LOW: We're going to keep
6 transferring, so we've got to --

7 HONORABLE TOM GRAY: Well, we may or we may
8 not. I mean, the answer to that is a question of
9 redistricting that will -- is a political nightmare or
10 changing, like the problem that Justice Hecht referred to
11 on the mandatory provision that affects the budgetary
12 rider that requires the transfers, which if that were
13 removed we could do something like I mentioned once
14 before, assignment of judges to different courts.

15 But, I mean, one other way to approach this
16 animal that may or -- I mean, it actually occurred to me
17 as Professor Dorsaneo was talking. One of the problems is
18 you're trying to coordinate the law of three judges that
19 are not sitting on another court, and while they should be
20 rare, and I will be the first to concede these are fairly
21 rare. In seven years, we are a heavy transferor court --
22 excuse me, transferee court. We get about a hundred cases
23 a year transferred primarily from the two Houston courts.
24 Beaumont has been a heavy transferor court to us. Houston
25 -- excuse me, Dallas, and lately all of our transfers have

1 come from Fort Worth.

2 So those are the four we normally get, and
3 we get about a hundred cases a year, and this does not
4 come up all that often, and I would like to see if there
5 would be a way that you could change Rule 41.2, which is
6 the decision by en banc court to throw us into -- on a
7 motion into a decision to sit with that court and let the
8 nine judges then of the Second Court and the Tenth Court
9 sit together and resolve the issue if a majority of the
10 judges of the two courts involved thought that the motion
11 for rehearing en banc needed to be considered. That may
12 be way overkill for a very small problem because it would
13 generate virtually a motion for rehearing en banc in every
14 transferred case, but --

15 VICE-CHAIRMAN LOW: Do you have a favorite
16 of the menu that we have before us right now, following
17 the law, no law, or following the law of the other court?
18 Do you have a -- or just no rule at all?

19 HONORABLE TOM GRAY: If you're asking for my
20 personal --

21 VICE-CHAIRMAN LOW: Yeah.

22 HONORABLE TOM GRAY: -- viewpoint, it is set
23 out in the Jaubert opinion that I would follow the law of
24 the transferor court.

25 VICE-CHAIRMAN LOW: Okay. And I realize

1 that you're not necessarily -- that doesn't make you
2 happy, but that's what you would do.

3 HONORABLE TOM GRAY: To me it's easy, it's
4 fair to the litigants. It's just the cleanest answer out
5 there.

6 VICE-CHAIRMAN LOW: Okay.

7 HONORABLE TOM GRAY: And you just disclose
8 in the -- I mean, if for some reason you don't want that
9 same precedent in your court, you just say, "We're
10 applying the law and this is not precedent for the Tenth
11 Court."

12 VICE-CHAIRMAN LOW: David, what about you?
13 You were an appellate judge.

14 HONORABLE DAVID PEEPLES: I think Richard
15 Orsinger made good points when he spoke. It's healthy for
16 the law when these coordinate courts disagree with each
17 other and hash out the law when it's unsettled. I agree
18 with those who have said that this doesn't happen very
19 often that the transferee court has to apply a law or
20 faces a case where the transferor court's law is
21 different. It doesn't happen often, but for the reasons
22 expressed by Richard Munzinger, when it does happen it can
23 be very important, and the interest of the litigants need
24 to be honored. You know, they tried the case under court
25 A and now court B wants to disregard that. That is a real

1 problem.

2 I think I like alternative one and think
3 maybe it's the best we can do right now because basically
4 what that says is it's not a problem very often, go ahead
5 and write your opinions, but when this does come up, say
6 so on a motion for rehearing; and the court has to say
7 what it did and would it have made a difference; and that
8 might help flag it for the Supreme Court, which really is
9 the ultimate answer here.

10 VICE-CHAIRMAN LOW: Right.

11 HONORABLE DAVID PEEPLES: To help the
12 Supreme Court take these cases when they happen and give
13 us one rule, and from the Supreme Court's point of view, I
14 think it is probably easy for them -- or it's hard for
15 them to spot these issues in the mass of petitions that
16 they get, but if the court of appeals has to deal with it
17 on rehearing I just think that might make it easier for
18 the Supreme Court to spot these and give us some guidance.
19 That may be the best we can do.

20 VICE-CHAIRMAN LOW: Jan, what do you say?

21 HONORABLE JAN PATTERSON: I favor
22 alternative two, and Judge Gaultney, who will be here
23 shortly, favors alternative two; and Justice Hinojosa from
24 Corpus Christi and Terry McCall from Eastland like
25 alternative two because it may foster less collateral

1 litigation, which as you all may recall was one of our
2 concerns, that we do this in as simple a way as we can and
3 reduce the amount of collateral complication that we can
4 produce.

5 Let me just throw out one sample of where
6 this has come up and could come up. There were
7 differences among -- and I think whatever we do we ought
8 to protect the notion of one law, and it doesn't matter
9 whether it's healthy or unhealthy whether the courts of
10 appeals disagree because they do from time to time. There
11 are some differences; and as many of you may recall, some
12 of these basic differences were in the area of summary
13 judgment; and there is a movement as we learn from one
14 another and to look to one another's precedents, whether
15 we're required to or not, but we do look to one another,
16 but there are differences in summary judgment procedure
17 over time.

18 Waco, for example, had a different standard
19 than we did and some other courts on what could be
20 attached to a no evidence summary judgment motion, for
21 example. And the litigants ought to be -- I mean, how
22 would that work to transfer a case like that to another
23 court where we had a different procedure? So we just need
24 to keep those in mind, and so I favor alternative two.

25 VICE-CHAIRMAN LOW: All right. We're going

1 to take a break. The court reporter needs a break, and
2 then Sarah. Back in 10 minutes.

3 (Recess from 10:56 a.m. to 11:09 a.m.)

4 VICE-CHAIRMAN LOW: I need to take Richard
5 with me always. Okay. Sarah. Where is Sarah? We were
6 going to her next.

7 HONORABLE NATHAN HECHT: She left.

8 VICE-CHAIRMAN LOW: Maybe that's why she
9 left. We'll come back to her. Let's see.

10 VICE-CHAIRMAN LOW: Judge Jennings is next.

11 HONORABLE TRACY CHRISTOPHER: No, Bob is.

12 HONORABLE BOB PEMBERTON: Ready to -- are we
13 over here?

14 VICE-CHAIRMAN LOW: Okay, Bob.

15 HONORABLE BOB PEMBERTON: On this issue
16 about the transferor or transferee rule, I agree with what
17 others have said that it's a rare situation. I'm not
18 troubled by the philosophical consideration about there
19 being one law and courts of appeals differing in some ways
20 in their interpretation. I think the idea of different
21 courts of appeals evolving different interpretations of
22 what the law is is implicit in the very notion of conflict
23 jurisdiction, and that's just how things operate as a
24 practical matter.

25 I'm for a -- really a bright line rule to

1 the effect. I think alternative two is the closest thing
2 to it and just says in essence that the transferee court
3 should stand in the shoes of the transferor court and
4 decide the case based on the transferor court's governing
5 interpretations. Now, I realize that's something that may
6 conflict with the judge's personal views of what the law
7 is, but we do that all the time in regard to higher state
8 precedent.

9 So the one question or observation I would
10 have just administratively, both alternatives refer to a
11 requirement that where there is perceived to be a
12 difference the court state what the outcome -- whether it
13 would have been different, and I'm just wondering whether
14 it's envisioned that we write in essence two parallel
15 opinions or can we just say, "Austin court, we think you
16 might have come out differently under our cases," string
17 cite something, and that's enough.

18 VICE-CHAIRMAN LOW: Well, there's some
19 question about when you're predicting what another court
20 would do, but as long as the word "following the precedent
21 of that court" -- in other words, just if the language
22 just predicting what the other court would do, that's a
23 difficult thing to do, but if you say "following the
24 precedent" --

25 HONORABLE BOB PEMBERTON: Yeah.

1 VICE-CHAIRMAN LOW: It kind of -- that was
2 pointed out to me a few days ago. All right. Let's see,
3 where is -- all right, Terry.

4 HONORABLE TERRY JENNINGS: Back on our
5 previous discussion, it appears to me in having just
6 glanced at it, alternative one seems to strike the balance
7 between the two competing interests of, one, you want to
8 have predictability; but, two, you also want to recognize
9 the fact that judges do have an oath and they have to
10 follow their conscience in saying what the law is or
11 interpreting the common law in accordance with the way
12 they understand it.

13 One thing that seems very problematic about
14 alternative two, or at least one version of alternative
15 two, is this idea that you have to blindly follow the
16 precedent of the other court. The other court, if the
17 case were before them, could always overrule their
18 previous holding of decisions. They're not even bound to
19 completely and totally follow their own precedent. They
20 can come back, see that the common law has developed, you
21 know, look at it from another perspective in other
22 decisions that have been rendered by other courts of
23 appeals, and may have a good faith change of mind and say,
24 "You know what, we were wrong. We're going to overrule
25 that part of it."

1 And to bind the transferee court to that
2 precedent which the other court itself could overrule in
3 an en banc opinion, that seems to be a pretty big
4 inconsistency there.

5 VICE-CHAIRMAN LOW: Jane.

6 HONORABLE JANE BLAND: I prefer alternative
7 two because I think it provides a rule of decision for the
8 appellate courts on a matter that is capable of repetition
9 yet evading review, because if the Texas Supreme Court
10 takes the case they can resolve the conflict on the
11 merits, and I think it would do so rather than necessarily
12 announcing the rule of decision that ought to apply, and
13 this way we have it, had a rule of decision that can be
14 applied on a perspective basis.

15 I think that Justice Gray's comment about
16 Gary Rail vs. Tompkins is a good one. The Federal courts
17 that sit in diversity jurisdiction in our geographical
18 region apply the law of Texas, and I think it's a similar
19 rule of decision case, and that one, you know, was
20 affected through the common law; but I'm not sure that
21 we'll ever get a common law decision on this because it
22 just seems to me that if the conflict exists, one court of
23 appeals' view will prevail in the Texas Supreme Court; and
24 why would they ever need to decide whether or not the
25 court that ultimately was wrong on the substantive merits

1 should or should not have applied the court from which the
2 case was -- the court's decisions from which the case was
3 transferred; and I like a clearcut rule of decision. It
4 seems like we've been pushing towards this for a long
5 time.

6 VICE-CHAIRMAN LOW: You're similar to Bob.
7 Sarah. What do you have to say?

8 HONORABLE SARAH DUNCAN: Most of what I have
9 to say I've already said in one form or another.

10 VICE-CHAIRMAN LOW: Well, a lot of us have
11 forgotten.

12 HONORABLE SARAH DUNCAN: The -- what we are
13 talking about is a system of justice. It is supposed to
14 be a system that is to serve the litigants, not judges,
15 but litigants; and I completely agree with Richard's
16 sentiment that litigants do have settled expectations and
17 reasonable expectations; and to the extent administrative
18 convenience, which is what the transfer system is, trumps
19 litigants' settled expectations and justice for those
20 litigants, in my view is wrong.

21 And in the IBM case in which I dissented I
22 obviously thought the San Antonio law, view of the law,
23 was correct. I was on the panel -- I don't know if I
24 wrote the opinion, but I was on the panel that said you
25 can have a fraud cause of action even if what you're

1 talking about is also a breach of contract because they
2 are different elements. I thought the Houston court's
3 view on that issue was incorrect. To apply the law of --
4 San Antonio law as the San Antonio court viewed it
5 completely destroyed those litigants' expectations and,
6 I'm sure, bamboozled the trial court who was trying to try
7 the case according to what he correctly perceived to be
8 the law annunciated by the Houston courts.

9 The bottom line is I don't think
10 administrative convenience for judges' egos should trump
11 trying to do justice for litigants. That is not what the
12 system is set up for, and I guess --

13 VICE-CHAIRMAN LOW: What would you vote that
14 we do? What do you think we should -- how we should
15 answer the question?

16 HONORABLE SARAH DUNCAN: I think the law of
17 the transferring court should be applied. What I don't
18 want to do is also determine -- is to have to write more
19 and say why that would be different under the law.

20 VICE-CHAIRMAN LOW: But we're going to --
21 all right. We'll get -- I understand.

22 HONORABLE SARAH DUNCAN: So I'm not voting
23 for alternative two.

24 MR. ORSINGER: Did she say transferee court?

25 MR. TIPPS: Transferor.

1 MR. ORSINGER: She said transferor court.

2 VICE-CHAIRMAN LOW: Yeah.

3 HONORABLE TRACY CHRISTOPHER: Can I just ask
4 a procedural question, perhaps to Justice Hecht? If court
5 one says the law is A and court two says the law is B and
6 court two is hearing the case and court two applies the
7 law of A and it goes up to the Supreme Court; and if the
8 Supreme Court says, yeah, court A is the law or, you know,
9 A is the law, do they then go and reverse court B's law or
10 do they in the body of the case, even though B case is not
11 really brought up in front of them?

12 HONORABLE NATHAN HECHT: Yes.

13 HONORABLE TRACY CHRISTOPHER: Okay. So you
14 would mention B and say B is wrong?

15 HONORABLE NATHAN HECHT: Yeah, I mean, if we
16 know about B.

17 HONORABLE TRACY CHRISTOPHER: If you know
18 about B. You need to know about B. You need to know that
19 B is different.

20 HONORABLE NATHAN HECHT: Yeah. The parties
21 usually raise it in a brief that there is a conflict and
22 then if -- but they don't always, but then to the extent
23 we're aware of any conflict we try to overrule or
24 disapprove all of the cases so that it would show up in
25 the Shepherd's and all of the cite books and people won't

1 be confused.

2 HONORABLE TRACY CHRISTOPHER: So then it
3 would be important for the court to identify the case
4 they're disagreeing with.

5 HONORABLE NATHAN HECHT: Yeah. One other
6 wrinkle here that I hadn't thought of until just listening
7 for a minute, but I mean, this doesn't happen very much.
8 What -- the problem we're talking about doesn't happen
9 very much to start with, but it could happen that if the
10 Dallas court decided an issue a particular way and then
11 cases involving that same issue got transferred to other
12 courts and those courts would decide it differently, but
13 now they're constrained to follow the law as stated by the
14 Dallas court to prevent a conflict from arising. So in
15 some respects you sort of lessen the chance that the
16 Supreme Court is going to take the case and resolve it
17 because it looks as if all the courts are in agreement
18 when really all they're doing is what they were told.

19 Now, I suppose the court would -- the court
20 would say, "Well, we're just doing this because we have to
21 and not because we want to, and if we had our choice we
22 would do this" and then that would flag the conflict.

23 VICE-CHAIRMAN LOW: But wouldn't the lawyer
24 in their brief in saying you have jurisdiction say there
25 is a conflict between this decision and these courts and

1 this court here that actually decided the case, that there
2 is a difference in their own opinion, prior opinion?

3 HONORABLE NATHAN HECHT: Well, I'm just
4 saying that it's possible that the transfer system and
5 this rule would reduce the conflicts because court of
6 appeals who might disagree can't disagree because they've
7 got to follow the law of the transferor court.

8 VICE-CHAIRMAN LOW: Bill.

9 PROFESSOR DORSANEO: To the extent that this
10 would extend -- arguably extend the conflict jurisdiction,
11 do you think we have a problem with the statutes?

12 HONORABLE NATHAN HECHT: No. I mean, of
13 course, we've not construed the 2003 amendments, but they
14 seem to relax --

15 PROFESSOR DORSANEO: I'm just thinking if
16 alternative two was followed it says, okay, we followed
17 the previous decision, but we think it's no good, but we
18 followed it anyway, and then it says it's conflict. Could
19 that be a conflict or --

20 HONORABLE NATHAN HECHT: I don't know. I
21 don't know. But, see, that would affect interlocutory
22 appeals, but it probably wouldn't affect anything else.

23 VICE-CHAIRMAN LOW: Jane, you were next.

24 HONORABLE JANE BLAND: Well, with respect to
25 cases that originate from Dallas, had they not been

1 transferred presumably they would have been presented to
2 the Dallas court of appeals, so I don't see that you're in
3 any different position in terms of enhancing the, I guess,
4 petition for review potential or the, you know, potential
5 for conflict jurisdiction than you would be if the case
6 had not been transferred. And if the goal is to treat
7 cases that are transferred similarly to cases that are not
8 transferred then I don't think that the fact that there
9 might be less chance for a conflict for two cases arising
10 out of the same jurisdiction should be a reason not to
11 have a rule of decision.

12 VICE-CHAIRMAN LOW: Carl, and then Carlos.

13 MR. HAMILTON: Well, I don't know if it
14 would make any sense or not to allow the transferee court
15 that had not yet decided that issue to decide it in spite
16 of the ruling of the transferor court and have it only
17 operate when there's already a conflict on the books
18 between the two.

19 VICE-CHAIRMAN LOW: Carl.

20 MR. LOPEZ: I'm assuming you could fix
21 administratively somehow the idea that it begs the larger
22 question of if Justice Bland is sitting in a case and
23 applying Fifth District Dallas law, if there is such a
24 thing, that you administratively fix it so that they
25 really are sitting for the Fifth District because then

1 I -- then you even have another question of are the
2 lawyers going to think that the Fifth District is going to
3 give as much deference to its case that was decided by its
4 justices as opposed to this hybrid case that was
5 technically still -- I guess it's stare decisis on the
6 Fifth District for their internal purposes, but it was
7 decided by judges that, you know, aren't really on the
8 Fifth District Court of Appeals. There's all kinds of,
9 you know, little details, but it seems like a lot of that
10 stuff could be ironed out by whatever the rule says.

11 VICE-CHAIRMAN LOW: As I read what everybody
12 is saying, it appears that of the different things we
13 could do, a majority here -- and we're going to vote --
14 would favor some rule that requires following or suggests
15 following or that applies the law of the court of appeals
16 from which the case was transferred. Is anybody -- who is
17 in favor of that, to some degree varying? I mean
18 alternative one, two, or some variance of either one of
19 them.

20 HONORABLE LEVI BENTON: A variance that
21 maybe hasn't been addressed, and this really tries to
22 blend, I think, Richard's concern and something that Terry
23 said, because the panel -- the transferor court wouldn't
24 even be obligated to follow its precedent, so maybe where
25 there is a -- there is some pet history, a pet denial,

1 then you ought to require the transferee court to follow
2 the transferor court, but where there is no pet history
3 the transferee court ought to be able to write on a clean
4 slate.

5 VICE-CHAIRMAN LOW: Even though there has
6 been no -- you're talking about pet, writ history or --

7 HONORABLE LEVI BENTON: Buddy, it changed a
8 decade ago.

9 VICE-CHAIRMAN LOW: Well, I'm still decades
10 old, too, but all right. That's -- but are you saying
11 then that's another alternative, that if there's been no
12 pet history you're not allowed -- I've not heard that
13 being a problem, that the problem is if the opinion came
14 out of that court they don't care what the Supreme
15 Court -- you know, unless it was overruled.

16 HONORABLE LEVI BENTON: Yeah. Well, I mean,
17 at my core I agree with Richard's view that -- and with
18 Sarah's view that the law exists to serve people and we
19 have to be concerned about their expectations, but if the
20 transferer court wouldn't be obligated to follow that
21 opinion anyway then we need to make some adjustment, and
22 the only adjustment I can think of is one where there is
23 no petition for review.

24 VICE-CHAIRMAN LOW: Well, law of the case
25 could apply. It's clearly erroneous. Judge.

1 HONORABLE NATHAN HECHT: Could I ask the
2 judges on the bigger courts, maybe Jane and Terry. Sarah
3 is not -- yeah, Sarah is back there. Do you have a
4 practice, either formal or informal, that like the circuit
5 does, that a panel cannot disagree with another panel?

6 HONORABLE TERRY JENNINGS: Yes.

7 HONORABLE NATHAN HECHT: Is that just
8 informal or part of the local rules?

9 HONORABLE TERRY JENNINGS: I'm not sure if
10 it's part of our internal operating procedures, but it's
11 so well in practice that I don't know if it's written down
12 anywhere, but if a panel wants to disagree with a prior
13 decision the case must go en banc to overrule a prior
14 panel decision.

15 HONORABLE NATHAN HECHT: Is that true in San
16 Antonio, Sarah?

17 HONORABLE SARAH DUNCAN: It's the view of
18 some judges.

19 HONORABLE JANE BLAND: I will modify and say
20 that if it's -- if the court catches it, we have a 72-hour
21 full court review and unless, you know, it's an explicit
22 and express disagreement then it definitely goes en banc.
23 If it's been abrogated, distinguished, or other courts of
24 appeals have held something, the Texas Supreme Court has
25 held, I mean, like you said, the express explicit

1 conflicts are rare.

2 VICE-CHAIRMAN LOW: Steve.

3 MR. TIPPS: I was just going to say, that's
4 also the rule of the Fourteenth Court, and I know that
5 because I remember a relatively recent opinion that
6 Justice Brister wrote when he was the chief of that court
7 in which that was a big issue.

8 VICE-CHAIRMAN LOW: Levi, back to you, I'm
9 not positive I understand. So the others here can vote on
10 whether -- I mean, I'm looking to see whether under some
11 form you would follow the law of the case from where the
12 case was transferred, and I haven't heard you disagree
13 with that, but you disagree to the extent that if it's one
14 of the other hadn't had a petition, a pet in it, well,
15 then it wouldn't matter. You just do -- follow the law
16 that you want to; is that correct? It goes to Amarillo.

17 HONORABLE LEVI BENTON: Yeah. Trust me,
18 I --

19 VICE-CHAIRMAN LOW: I mean, I'm trying to
20 understand what you're proposing so I can present it to
21 the people here, because I've only heard -- the body of
22 the talk has been to some degree they would have a bright
23 line or a dim line or some line that suggested following
24 the law of the case where the case was transferred from.

25 HONORABLE LEVI BENTON: Well, I hadn't

1 factored in the question raised by Justice Hecht, and now
2 I'm more troubled or conflicted because of the reality of
3 the circumstances that Sarah suggests that some judges
4 feel obliged to address a prior opinion of another panel
5 and some don't. That's just reality. So I don't know how
6 to -- I haven't blended all of this calculus, so I
7 don't -- right at this very moment, Buddy, I don't know
8 where I'm at.

9 HONORABLE TOM Gray: Are you of two minds?

10 VICE-CHAIRMAN LOW: That's what bothered me.
11 That's what I thought --

12 MR. WATSON: Buddy, lets's just vote on what
13 you originally proposed.

14 VICE-CHAIRMAN LOW: Yeah, that's what I
15 wanted to do, but I think he confused me.

16 MR. DAWSON: I think we voted on this
17 previously.

18 VICE-CHAIRMAN LOW: I didn't know what I was
19 talking about and he didn't either.

20 MR. DAWSON: Buddy, I think we voted on this
21 two or three meetings ago. I think that this discussion
22 came up, and I remember there was -- somebody proposed one
23 solution where you actually go down and sit in the other
24 courts.

25 VICE-CHAIRMAN LOW: We're going to do what

1 they do in South Texas, vote more than once. I shouldn't
2 have said that. I'm sorry. Hush me up, Judge.

3 PROFESSOR CARLSON: Alistair, I think we
4 took kind of a straw vote to give guidance to the
5 subcommittee.

6 MR. DAWSON: Oh, okay. I stand corrected.

7 PROFESSOR CARLSON: I would like to speak to
8 alternative one. I favor alternative one for a number of
9 reasons. First of all, because I think it allows the
10 judge to --

11 VICE-CHAIRMAN LOW: Elaine, wait. We're
12 going to be sure that we are heading down -- that is a
13 form of following the law, and that's one of the things
14 that --

15 PROFESSOR CARLSON: Well, they all follow
16 the law, but I don't read alternative one as applying the
17 law of the transferor court.

18 VICE-CHAIRMAN LOW: Oh, okay. Maybe I
19 misread it.

20 PROFESSOR DORSANEO: That's right. That's
21 just a crude characterization of it.

22 PROFESSOR CARLSON: Did you intend that to
23 be?

24 VICE-CHAIRMAN LOW: It's supposed to be, but
25 let's make --

1 PROFESSOR DORSANEO: It's following the law.

2 PROFESSOR CARLSON: Following the law, but
3 not the law of the transferor court necessarily.

4 PROFESSOR DORSANEO: Right.

5 MR. LAMONT JEFFERSON: Buddy, I think I'm in
6 the distinct minority that's going to show out, so let me
7 just throw out one last comment and --

8 VICE-CHAIRMAN LOW: Just don't confuse me.

9 MR. LAMONT JEFFERSON: Okay. I'm not going
10 to confuse you. I don't disagree at all with what Bill
11 Dorsaneo said earlier. I think we're saying the same
12 thing; and I also agree with Justice Gray who says, I
13 mean, the reason why this isn't going to come up so -- or
14 it's not going to be obvious is because when you're being
15 intellectually honest and you're trying to decide a case,
16 there are different ways to get to the outcome that you
17 think is the right outcome; and so you're not going to --
18 if you're looking at past cases from a transferor court
19 you can distinguish it. There are ways that you can just
20 ignore it.

21 So what we're doing here is if we go the
22 direction that I think we're heading, which is basically
23 saying that Dallas law is different than McAllen law and
24 you have to follow the law of Dallas if the case gets
25 transferred to McAllen or Beaumont or wherever, all we're

1 doing is putting in place a philosophy that stratifies the
2 state and that has no practical benefit. I think it's a
3 huge mistake to somehow codify the notion that the law in
4 various regions of the state is different.

5 VICE-CHAIRMAN LOW: Okay. So you would be
6 for just don't address -- don't do anything, right?

7 MR. LAMONT JEFFERSON: That's right.

8 VICE-CHAIRMAN LOW: Okay. That's something
9 I do well, but I don't think that's what they want us to
10 do.

11 MR. SCHENKKAN: Buddy, I have missed the
12 previous sessions, and I apologize if I'm taking a couple
13 of minutes here to make a pitch against what seems to be
14 the drift of the room by repeating stuff that's been
15 carefully considered and rejected before, but I don't
16 think either of these rules is a good idea. I think when
17 you're talking about three or four hundred transfer cases
18 a year and whatever frequency a problem like this arises,
19 what we're calling on the judges in the transferee courts
20 to do is do a good job of being the judge, which doesn't
21 fall in the category of saying this is a case with a clear
22 conflict between the rule in the transferor court and my
23 situation or nothing, no relevance at all of the
24 jurisprudence of the transferor court. Very few cases are
25 going to fall in that category.

1 Almost every case that matters is going to
2 be a gradation of the law of the transferor court and some
3 other court and Texas Supreme Court decisions and all the
4 other law that's relevant; and one, but only one, of the
5 relevant factors is what were the legitimate expectations
6 of the parties who tried the case in the trial court
7 that -- where the case is being transferred from. That's
8 one relevant factor, but it's only one. I trust our
9 judges to give that appropriate consideration in facts in
10 the appropriate case and reach a sensible decision.

11 I think we're making a problem worse by
12 layering another set of rules on the intermediate courts
13 here and not getting anything useful out of it. So I'm
14 against either rule based on what I've heard so far.

15 VICE-CHAIRMAN LOW: The problem is it might
16 be Richard's client that only has one case in his whole
17 lifetime.

18 MR. SCHENKKAN: It may be, but that's the
19 nature of the legal system, is we're trying to do two
20 things. We're trying to get the law right.

21 VICE-CHAIRMAN LOW: I know.

22 MR. SCHENKKAN: And we're trying to get to
23 justice in a particular case, and those are in inevitable
24 tension to each other, and all I'm saying is that I trust
25 the appellate judges to weigh those considerations

1 sensibly in an appropriate case and try to make it come
2 out right on both counts.

3 VICE-CHAIRMAN LOW: Bill was the next one
4 raised.

5 PROFESSOR DORSANEO: Yeah, I didn't do a
6 very good job of explaining these alternatives when we
7 started out, and they were more carefully crafted than
8 just trying to get something down on paper. And Elaine is
9 right. I mean, this alternative one is meant to say,
10 "Decide the case, Eastland court of appeals, the way you
11 think the case should be decided under Texas law," but
12 then it goes on to say, "but don't hide the ball from the
13 Supreme Court with respect to the existence of a precedent
14 that the transferor court probably would have used to
15 decide the case differently."

16 And that's the key to this, is -- to this
17 alternative one is to disclose, give due regard to, and
18 disclose in your opinion this difficulty about different
19 views of the law in different places. That's what this is
20 about; and then it encourages the Supreme Court to grant
21 review to straighten this out; but it doesn't allow the
22 court of appeals to say, "This is your problem, Supreme
23 Court, we're not -- you know, we're not going to do
24 anything until you straighten it out beforehand. We'd
25 like to certify it."

1 VICE-CHAIRMAN LOW: Alistair.

2 PROFESSOR DORSANEO: The second --

3 VICE-CHAIRMAN LOW: I'm sorry.

4 PROFESSOR DORSANEO: The second alternative
5 is -- probably I should not have had the first bracket,
6 "consider and give due regard to." The second alternative
7 is really if you're going to follow the transferor court's
8 decision then what you need to state is that if you've
9 done what somebody else did, what you did before, what you
10 think ought to be done now, then disclose that, and it's
11 just the mirror image. It's just setting up things for
12 the Supreme Court to understand what the problem is if
13 they want to resolve it, and that's what these things are
14 for.

15 They are certainly not designed to encourage
16 different views of the law. They are designed to
17 recognize that there are different views and that those
18 different views need to be reconciled, because that's
19 what's necessary in order to -- for there to be one
20 coherent body of law that we can all go by, which is the
21 system we have, not the Federal system which involves just
22 a lot of different views about what the law is from place
23 to place and, frankly, a lot of confusion.

24 VICE-CHAIRMAN LOW: Alistair, I believe you
25 had your hand up first.

1 MR. DAWSON: And I think the best solution
2 would be to end transfers, but for political reasons
3 that's probably not going to happen, and as long as you're
4 going to have transfer of cases it seems to me that the
5 appellate courts that are receiving cases, in particular,
6 need guidance on which law they're supposed to apply to
7 the extent that there is a conflict.

8 If the transferor court would reach a result
9 that's different from the result under the law of the
10 transferee court, to me I agree with Richard, it is
11 fundamentally unfair not only to the litigants but to the
12 trial judge to say, "Well, we understand that were this
13 being decided by the El Paso court of appeals they would
14 have gone one way, but because we are the X court of
15 appeals we're going to rule a different way and we're
16 going to reverse" when the trial judge made a decision
17 based upon the case going up to the El Paso court of
18 appeals.

19 That's unfair to everybody, and I don't see
20 that there's any justification for allowing that to
21 happen, and I agree it's probably a limited number of
22 cases that that happens, but you know what, if it only
23 happened in one case there ought to be guidance to the
24 parties and to the judges that are impacted by it.

25 And, you know, as to Lamont's point that

1 this further stratifies, I don't think it does. To the
2 extent there are differences in the law or interpretation
3 of the law in various court of appeals throughout the
4 state, that stratification exists, and all you're really
5 doing is telling the courts where there is differences in
6 law and there are --

7 MR. LAMONT JEFFERSON: I'm saying defer,
8 though, to a court of equal jurisdiction.

9 MR. DAWSON: Yeah, but where the Supreme
10 Court has not definitively ruled on a particular issue and
11 the courts of appeals are trying to determine what they
12 believe the law under that circumstance would be there can
13 be differences in how -- and there are differences in how
14 different courts look at different things; and until those
15 issues are resolved by the Supreme Court, the courts of
16 appeals have to deal with, you know, one court viewing it
17 one way versus another court viewing another way.

18 So I strongly advocate regardless of the
19 limited number of circumstances under which this may arise
20 that the courts of appeals be given guidance, those that
21 are a receiving court or receiving cases, that they should
22 apply the law of the transferor court to the extent
23 that -- just that they should apply that law.

24 VICE-CHAIRMAN LOW: I'm going to call on
25 Jane, then Tracy, and then we're fixing to vote. I won't

1 tell you-all what we're going to vote on, but we're going
2 to vote.

3 HONORABLE JANE BLAND: I think that this
4 rule is important for the more than 90 percent of the
5 cases that do not get pet granted. I think for the cases
6 where pet is granted -- and it seems like we're drafting a
7 rule to set up the conflict so that the Supreme Court will
8 take it, but the parties can't always afford to take their
9 appeal to the Texas Supreme Court or choose not to. The
10 Texas Supreme Court has to weigh, you know, a lot of
11 factors in deciding whether to take a case. If they take
12 the case, it will -- the conflict will be resolved, so
13 that is not an issue.

14 The issue is for all the other cases that
15 they don't take; and the City of Houston, a common
16 litigant, could possibly be bound from conflicting
17 decisions from the First Court of Appeals, the Fourteenth
18 Court of Appeals, and some other court of appeals to which
19 their case was transferred; and it may be some issue
20 unique to that litigant who is a common litigant and it
21 may be an issue that has arisen three times with respect
22 to the City of Houston as a litigant but would never arise
23 with respect to any other litigant across the state, you
24 know, thus maybe not making it that attractive for Supreme
25 Court review. And then you've got not only neighbors, as

1 Richard was pointing out, but the same party potentially
2 having to be -- having to follow inconsistent decisions.

3 And when we're talking about the
4 stratification of the state, right now we are -- we have
5 these various geographic regions, and I agree with -- and
6 I think everybody agrees with Richard Orsinger that that's
7 a good thing, and that they're -- you know, it's a good
8 thing that we have this percolating through the system,
9 but when we're talking about stratification within the
10 geographic region and, you know, potentially with respect
11 to one particular litigant or a couple of litigants if
12 they sue each other a lot, it makes less sense.

13 VICE-CHAIRMAN LOW: All right. Tracy.

14 HONORABLE TRACY CHRISTOPHER: Well, I agree
15 with Pete that we shouldn't have to do anything. Trial
16 judges face this issue all the time. You will have
17 conflicting opinions -- well, in Houston you will have
18 conflicting opinions, in my opinion, between the First and
19 Fourteenth Court of Appeals, and you have to make up your
20 mind. I followed a First Court of Appeals opinion when
21 there was a Dallas court of appeals opinion that I thought
22 was a better reasoned one, but I followed the First Court
23 of Appeals opinion, the litigants probably expected to be
24 affirmed by the First Court of Appeals, but they were not.
25 We were both reversed because the First Court of Appeals

1 decided to reverse their old opinion. That just happens.

2 VICE-CHAIRMAN LOW: Okay. We're going to
3 first vote whether we have any rule at all. There's been
4 some suggestion that we just not do anything. Does
5 anybody here want to have just no rule, just leave as it
6 is?

7 Nine for no rule at all. Who wants a rule
8 of some type? I'm sorry.

9 15. So I think it's -- all right. Now, as
10 far as a rule, it appears that we have a choice. I have
11 not heard anybody express that we follow the law of the
12 case to where it's transferred, and if you think so, don't
13 say so now.

14 PROFESSOR DORSANEO: I didn't understand it.
15 I didn't understand it.

16 MR. ORSINGER: Transferee court. No one is
17 advocating following the law of the transferee court.

18 I've heard that around the table.

19 HONORABLE DAVID PEEPLES: That's exactly
20 what alternative one says.

21 PROFESSOR DORSANEO: No, it's not.

22 HONORABLE DAVID PEEPLES: Well, almost. It
23 can if it wants to.

24 PROFESSOR DORSANEO: Yes.

25 VICE-CHAIRMAN LOW: Wait. Wait. But see,

1 you don't know how I'm dividing up the votes yet.

2 HONORABLE JAN PATTERSON: Buddy, we need to
3 vote on transferee/transferor to make that clear.

4 VICE-CHAIRMAN LOW: All right. Because,
5 see, when it comes to the court from which it came, I'm
6 going to say do you just suggest they follow that or do
7 you say they must follow it, other than just the law. You
8 know, if it's the exception under the law of the case,
9 like clearly erroneous or something, so we're going to
10 just go step by step until we get there and then we're
11 going to decide the different wording. Okay.

12 All right. Then let's have a vote. Who
13 wants to follow the law to some degree, suggestion or
14 mandatory, of the transferee court?

15 PROFESSOR DORSANEO: Transferee or -or?

16 VICE-CHAIRMAN LOW: Transferee. I think
17 that would be easier.

18 HONORABLE TERRY JENNINGS: They must follow
19 the transferee court?

20 MR. ORSINGER: No, he said "must or may."
21 He's not weighting it yet.

22 VICE-CHAIRMAN LOW: Suggesting they do.

23 PROFESSOR DORSANEO: Just basically decide
24 it the way they would like to decide it.

25 MR. LAMONT JEFFERSON: Throw me in there,

1 too.

2 MR. ORSINGER: You've got lots of wavers
3 over here.

4 VICE-CHAIRMAN LOW: All right. Raise your
5 hands again.

6 Eight. Who wants to follow the law of the
7 transferor court?

8 HONORABLE TERRY JENNINGS: Must or may?

9 HONORABLE JANE BLAND: We're going to get to
10 that.

11 MR. ORSINGER: We're not deciding that yet.

12 VICE-CHAIRMAN LOW: 17. All right. Now,
13 the next question is to what degree do we follow that?
14 Now, realizing that -- I mean, there is the exception in
15 the Briscoe case, and I realize also that Judge Gray says
16 you can distinguish. One of them was a man 50 years old
17 and this kid was only 30, he's a minor, so you apply
18 different law to him. You can distinguish to some degree,
19 as you've all seen, if a court wants to distinguish a
20 case. So we're not dealing with that. We're dealing with
21 a clear conflict between the transferee court and the
22 transferor court where it's just a conflict, got to be
23 recognized.

24 All right. Now, who wants to have a red --
25 or a bright line, I believe as Bob put it, where that is

1 the law you will follow; and the other is whether you want
2 to do a modified version of that, like alternative one,
3 where it says you should consider that; and I'm not going
4 -- it's a one versus two deal, but each one may be
5 modified, their language. We're not bound by their
6 language, but the concepts in one versus two. Okay.

7 HONORABLE TOM GRAY: Buddy, so that I can
8 get a grip on how much you're talking about one versus
9 two, where would you put the Eerie doctrine? One or two?

10 VICE-CHAIRMAN LOW: Well, I mean, I put --
11 you mean, bound by -- I choose Eerie, I thought Eerie was
12 where Federal court had to follow the law of some state.
13 I consider Briscoe being the law where you don't have to
14 follow anything if it's clearly erroneous, and that's just
15 point-blank. So I don't even know how to deal with Eerie.

16 MR. ORSINGER: I would answer his question
17 by saying option two is closer to Eerie than option one
18 is.

19 VICE-CHAIRMAN LOW: Okay. Then Richard is
20 right because -- okay.

21 PROFESSOR DORSANEO: But are you asking us,
22 is it an option two, follow it even if it's clearly
23 erroneous in your view?

24 VICE-CHAIRMAN LOW: No.

25 PROFESSOR DORSANEO: Or option two, follow

1 it unless you think it's clearly erroneous?

2 VICE-CHAIRMAN LOW: We can get down to that
3 when we get to option two. I just think that if something
4 is clearly erroneous, the Supreme Court says stupidity
5 doesn't apply to the courts and they shouldn't be stupid.
6 You just can't -- I mean, their own decisions, but you
7 have to follow the Supreme Court's decisions but not their
8 own.

9 PROFESSOR DORSANEO: But alternative two
10 could be, you know, the hard and fast deal that you just
11 follow it.

12 MR. ORSINGER: He doesn't want to get there
13 yet. He wants to find out how many people really prefer
14 the two approach, either very extreme or moderately. We
15 can debate that later.

16 VICE-CHAIRMAN LOW: Then when we get to two
17 I'm going to -- we're going to divide two things. We're
18 going to keep dividing things until we won't know where we
19 are, but any rate, we're going to go somewhere.

20 Now, on how many of them favor -- and again,
21 I don't mean to make light of it and certainly clarify I
22 don't want somebody voting and not knowing what we're
23 truly voting on. I'm trying to express, alternative one,
24 which the language changes, or alternative two, which may
25 be some exceptions to alternative two or it may be just

1 have to, you know, a deadline following it. Now, we're
2 not to two.

3 Which one would favor one or two, with two
4 different versions of two? Does anybody not understand?
5 Bill.

6 PROFESSOR DORSANEO: I understand. I'm
7 voting.

8 MR. ORSINGER: What are you voting?

9 PROFESSOR DORSANEO: I'm voting in favor of
10 number one again, regardless of whether two is hard or
11 modified.

12 VICE-CHAIRMAN LOW: All right. All in favor
13 of one as limited? Wait a minute. People are raising
14 their hand after I counted. Everybody got his hand up?
15 Eleven, I believe. Is that correct?

16 PROFESSOR DORSANEO: Picked up two.

17 VICE-CHAIRMAN LOW: All right. And two as
18 may be varied, you know, two not just exactly. It can be
19 a hard line or with the exceptions. Who is in favor of
20 two? All right. Twelve. Well, we've got a hard
21 decision.

22 MR. DUGGINS: Would the Chair have to vote?

23 PROFESSOR DORSANEO: Do the modified two and
24 see who would signal for that.

25 VICE-CHAIRMAN LOW: All right. If it's two,

1 if we come down on two, where -- who is in favor of two,
2 just you just plain follow it?

3 HONORABLE JANE BLAND: Wait, wait. Because
4 I -- you said there is two, you just plain follow it; two,
5 you follow it with exceptions; but I see those two things
6 as much more hard line than two, which is consider and
7 give due regard to.

8 PROFESSOR DORSANEO: Yeah, that's a third.

9 HONORABLE JANE BLAND: That's a third one,
10 and that's the one I prefer because to me that is the same
11 -- or at least tries to articulate the same amount of
12 deference that a panel of that own court would have to
13 give an earlier precedential --

14 PROFESSOR DORSANEO: That's supposed to be
15 one. I mean, that language needs to be in one. That's
16 supposed to be in one.

17 HONORABLE JANE BLAND: Oh, in that case --

18 PROFESSOR DORSANEO: You give due regard to,
19 but you don't necessarily follow it.

20 PROFESSOR CARLSON: You want to change your
21 vote? Come on, Jane.

22 HONORABLE JANE BLAND: Well, no, because one
23 says that you would decide it that way, but then say, "But
24 I would have -- if I had been in the court it was
25 transferred for, I understood it would have come out a

1 different way," and I see two as you decide it the way the
2 transferor court -- or you consider and give due regard to
3 the precedential value of the opinion from the transferor
4 court, which is, I think, enough, and then if you depart,
5 you know, you've given as much due regard for it as
6 someone or as -- presumably as a panel sitting in the
7 transferor court would have given.

8 PROFESSOR DORSANEO: I repeat, that's
9 supposed to be in one. That's supposed to be the mindset
10 of this one.

11 MR. TIPPS: That's not what one says.

12 PROFESSOR DORSANEO: Huh?

13 MR. TIPPS: That's not what one says.

14 VICE-CHAIRMAN LOW: Hold on a minute. Bill,
15 you state -- and it's probably my fault. You state what
16 concept you are hoping -- trying to portray with one and
17 the concept you're trying to portray with two.

18 PROFESSOR DORSANEO: Okay.

19 VICE-CHAIRMAN LOW: And if you think either
20 one of them can have -- be divided, and we'll go back,
21 because I certainly want everybody to understand what
22 we're voting on because when we get there then we're going
23 to try to draw a rule that complies with what we voted on.

24 All right. What do you say -- everybody
25 listen. What do you say one are you trying to -- the

1 concept you're trying to portray?

2 PROFESSOR DORSANEO: Eastland court of
3 appeals decides the case the way it thinks the case ought
4 to be decided under Texas law, notwithstanding the fact
5 that the Dallas transferor court might have a different
6 view under its precedent. But built into that by
7 definition is a consideration of the Dallas court's view,
8 and although the language "give due regard to" is not in
9 there, in my way of thinking it is in there, and it ought
10 to be put in there.

11 I mean, it's like you decide the case the
12 way you think, but you don't ignore what everybody else
13 thinks, and you particularly don't ignore the transferor
14 court's decision, although you decide not to follow it,
15 and if you decide not to follow it you say so; and that's
16 one. One is, as I see, the way things ought to be done
17 now.

18 Two, in my drafted form was a follow the
19 transferor court's precedent, even though you probably
20 wouldn't have because you would have followed your own
21 precedent, somebody else's precedent, or just decided it
22 differently to begin with; and really when I put "consider
23 and give due regard to" in this alternative two I wasn't
24 thinking straight because that really fits in with one.
25 It doesn't fit in with two.

1 Two is transferor, despite what I would have
2 done if I wasn't bound in some sense by the transferor
3 court's precedent, and -- but Buddy added in and Judge
4 Gaultney added in the idea that, well, for alternative two
5 we might have an exception. If it's clearly erroneous
6 then maybe -- and that's a standard. It's not just some
7 "I disagree with it." If it's clearly erroneous --

8 HONORABLE JANE BLAND: No.

9 PROFESSOR DORSANEO: -- on the basis of its
10 age, other cases, other precedent, then I don't follow it.

11 VICE-CHAIRMAN LOW: We might not even have
12 to do that. That's the law that exists by the Supreme
13 Court, so we might not even have to mention that. I just
14 mentioned it. So let me --

15 HONORABLE TERRY JENNINGS: May I ask a
16 question?

17 VICE-CHAIRMAN LOW: Okay.

18 HONORABLE TERRY JENNINGS: Professor
19 Dorsaneo, if we were to take out the language "consider
20 and give due regard to" --

21 VICE-CHAIRMAN LOW: Which one are you
22 talking to?

23 HONORABLE TERRY JENNINGS: Alternative two.
24 If you were to strike that language or move it to
25 alternative one and just look at alternative two with the

1 language, "decide the case in accordance with," does that
2 mean that you could not have a dissent in the transferee
3 court, that the transferee -- each member of that court
4 would be bound by the law of the transferor court, and no
5 one on the transferee court would be entitled or be able
6 to write a dissent?

7 VICE-CHAIRMAN LOW: Not on that point. I
8 take it it means the whole court, not just --

9 HONORABLE TERRY JENNINGS: You're stuck with
10 it. You can't even write a dissent. You're bound by it.

11 HONORABLE TOM GRAY: No. The dissent has
12 still got to be able in that situation -- I mean --

13 HONORABLE TERRY JENNINGS: Well, if I'm
14 bound --

15 HONORABLE TOM GRAY: You disagree that that
16 is what the holding is --

17 HONORABLE TRACY CHRISTOPHER: Right. Right.

18 HONORABLE TOM GRAY: -- of that court.
19 That's where you're going to start having a dissenter
20 distinguish the holding of the other court.

21 HONORABLE TERRY JENNINGS: Well, what if you
22 agree that that is the holding, but you disagree with the
23 law? You can't write a dissent.

24 MR. ORSINGER: You can write a concurring
25 opinion if it really bothers you.

1 HONORABLE TERRY JENNINGS: I'm sorry?

2 MR. ORSINGER: You can write a concurring
3 opinion if you want to explain why your vote appears --

4 HONORABLE TERRY JENNINGS: But does that --

5 VICE-CHAIRMAN LOW: Wait a minute. Let's
6 one talk at a time.

7 HONORABLE TERRY JENNINGS: -- give me a
8 right to write a dissent? Isn't there an inconsistency
9 there?

10 MR. ORSINGER: You've got the same problem
11 if you disagree with something that the Texas Supreme
12 Court wrote. You can write a concurring opinion and say
13 you don't agree with it, but it's going to control your
14 vote. I mean, if we're going to be honest to the whole
15 system.

16 VICE-CHAIRMAN LOW: Carl has been trying
17 to --

18 MR. HAMILTON: Yeah, I would just like to
19 ask, in Bill's definition now, going back to alternative
20 one, what's the difference in that and what we now have?
21 It seems to me like that's no rule at all because the
22 court now considers it with due consideration from other
23 opinions.

24 VICE-CHAIRMAN LOW: What we now have is some
25 courts that feel like they're just bound to follow the law

1 of -- to number two, just deadline have to follow the law
2 of the transferor court.

3 MR. SCHENKKAN: Buddy, that's not the only
4 difference. The other difference, as I understood Bill's
5 pitch for alternative one, is it's a disclosure rule.

6 MR. ORSINGER: Right.

7 MR. SCHENKKAN: It says that at least on
8 motion for rehearing you must say you would have decided
9 it the other way had you believed you were bound to follow
10 the precedent of the transferor court. Now you've got to
11 send up a flag. I mean, that's a difference. That's not
12 the rule right now. That may be proven practice. That
13 may be responsible in terms of doing justice to the
14 individual litigants who have been prejudiced by your
15 deciding it the way you think is right rather than on the
16 precedent, but nobody is under that obligation.

17 PROFESSOR DORSANEO: And justices don't
18 necessarily like to do that and they don't want to be
19 reviewed.

20 MR. SCHENKKAN: They darn sure don't like to
21 do it, I'm assuming, so that would make it a change even
22 in alternative one.

23 VICE-CHAIRMAN LOW: But, see, what I was
24 trying to get to is we voted that we do want a rule. So
25 to some degree we want to follow the law of the -- or

1 suggest or give priority or precedent or something to the
2 law of the transferor court; and without studying
3 alternative one and two and the details, what you put in a
4 motion for rehearing and all that, I interpreted number
5 one to read that you can follow whatever you think the law
6 is but should give some precedent or consideration to the
7 law of the transferor court. It doesn't say you have to
8 follow it.

9 And I interpreted number two without the
10 language saying some other things, as saying, no, you
11 follow the law, not just consider it. You follow the law
12 of the transferor court. Now, the other thing, the
13 confusion came in maybe by something Judge Gaultney and I
14 raised, and maybe we don't even need to talk about that,
15 because even under the law of the case if something is
16 clearly erroneous and courts of appeals know that, they
17 would say, well, their own opinion, we're not bound by it
18 if it's clearly erroneous. If it's the law of the case,
19 we're not bound by it, so maybe we don't even need to deal
20 with that. Maybe that could be addressed in a footnote or
21 something like that.

22 So I want to get down to a vote of those two
23 concepts because we can mix and mingle and come up with
24 Johnny Cash's Cadillac, too, parts from 25 years; but
25 unless we know which concept we're going to follow, it

1 will be difficult, if not impossible, to draw a rule that
2 we could tinker with. So, again, let's talk about just
3 the mandatory following the law of the transferor court;
4 and the other vote is going to be a form of number one,
5 alternative one, which you can follow or whatever you want
6 to, just the Texas law, but gives some due consideration
7 to the law of the transferor court.

8 Now, is that clear? Who wants to make that
9 just -- and, again, I don't include this clearly
10 erroneous. That's going to be taken care of. Who wants
11 to follow the law, just say you're bound to follow the law
12 of the transferor court?

13 PROFESSOR DORSANEO: Transferor court?

14 VICE-CHAIRMAN LOW: I mean, yeah, the
15 transferor, the court from which the court case came where
16 it was tried.

17 PROFESSOR CARLSON: Must follow the
18 transferor's court whether you think it's right or wrong.

19 PROFESSOR DORSANEO: Clean up their
20 opinions.

21 VICE-CHAIRMAN LOW: 13. All right. Who
22 wants the other version, that the court is kind of free to
23 do what they want to, but they have to give lip service or
24 consideration --

25 PROFESSOR CARLSON: I can't teach this. I

1 cannot teach this.

2 PROFESSOR DORSANEO: Strike "lip service."

3 VICE-CHAIRMAN LOW: Well, that's what I

4 call --

5 HONORABLE KENT SULLIVAN: Professor Carlson

6 just retired.

7 VICE-CHAIRMAN LOW: What?

8 HONORABLE TRACY CHRISTOPHER: Due regard to.

9 VICE-CHAIRMAN LOW: You have to give some
10 recognition of the consideration let's say. All right.
11 Who would go for that?

12 HONORABLE TERRY JENNINGS: Due regard?

13 HONORABLE TRACY CHRISTOPHER: Due regard.

14 MR. SCHENKKAN: Lip service.

15 VICE-CHAIRMAN LOW: The form of alternative
16 one that I have tried to describe inadequately.

17 Eight. It looks like we favor just --

18 HONORABLE TRACY CHRISTOPHER: I'm sorry,
19 what was the vote?

20 VICE-CHAIRMAN LOW: 8 to 14.

21 HONORABLE TRACY CHRISTOPHER: Thank you.

22 PROFESSOR CARLSON: 12? No, 14?

23 VICE-CHAIRMAN LOW: 14. All right. So,
24 now, Bill, does that give you some guidance so you can
25 come back with a form of the mandatory, whether you want

1 to put a footnote in there or something like that?

2 PROFESSOR DORSANEO: Uh-huh.

3 VICE-CHAIRMAN LOW: Jane.

4 HONORABLE JANE BLAND: I think it should be
5 more than a footnote, and I don't think we need to say
6 "clearly erroneous."

7 VICE-CHAIRMAN LOW: I don't mean --

8 HONORABLE JANE BLAND: I'm talking about a
9 tilt, you know, and I voted against the mandatory even
10 though I favor a tilt. In other words, that they ought to
11 look at it, they ought to consider it and give due regard;
12 and, you know, I think that that doesn't require -- I
13 would like the transferee's court, it seems to me, to not
14 have to be bound any more strongly than a panel of the
15 court to whom it came -- from where it came, and that
16 isn't an automatic rubber stamp. That's something less
17 than an automatic rubber stamp. So --

18 VICE-CHAIRMAN LOW: Just give me the
19 language.

20 HONORABLE JANE BLAND: Well, I like
21 "consider and give due regard to," but what the
22 alternative one did was say "consider and give due regard
23 to and explain, you know, that you're not going to follow
24 it," and I would say the tilt should be "consider and give
25 due regard and explain that you would have done it

1 differently," but I guess I'm talking about a higher form
2 of consider and give regard to than --

3 VICE-CHAIRMAN LOW: It's difficult to do
4 unless you build in a scale, and we can't do that.

5 HONORABLE JANE BLAND: Well, I like it
6 better than -- "consider and give due regard to" better
7 than "decide the case in accordance with" because I don't
8 think that leaves any room for doing what a later panel of
9 the same court might do.

10 PROFESSOR DORSANEO: You like kind of a
11 stare decisis or full faith in credit kind of thought
12 process rather than a law of the case concept.

13 HONORABLE JANE BLAND: Right.

14 PROFESSOR DORSANEO: Which you follow it
15 unless it's clearly erroneous. I can try to do that.

16 HONORABLE JANE BLAND: Precedential value
17 concept, and precedential value is different than having
18 to determine that some earlier decision was clearly
19 erroneous. Thank you, Professor Dorsaneo.

20 VICE-CHAIRMAN LOW: Give Bill whatever views
21 you need to help him --

22 PROFESSOR DORSANEO: That was very helpful.

23 VICE-CHAIRMAN LOW: A rule, the latter one
24 that was favored, and he will draw accordingly.

25 Steve.

1 MR. TIPPS: Well, I was just going to say I
2 voted the other way from Jane, but I think I feel the same
3 way. I don't have the magic words, but I think the rule
4 should be that the transferee court should follow the
5 precedent of the transferor court unless it genuinely
6 believes that the transferor court would not itself follow
7 that precedent.

8 VICE-CHAIRMAN LOW: I tell you what. We can
9 have some versions of this. Richard.

10 MR. ORSINGER: I want to say that I'm very
11 troubled by the loose language in alternative two about
12 the view held and things of that nature, because it tends
13 to walk you into overt dictum. I think the stare decisis
14 concept is what we ought to be following, and we ought to
15 be following and be bound by holdings because even my own
16 court is only bound by its own holdings, not by its own
17 dicta.

18 Furthermore, stare decisis can be changed
19 for changed circumstances. If the precedent from the
20 First Court that transferred is pre-World War II and we
21 are considering --

22 HONORABLE TERRY JENNINGS: What is this,
23 pick on First Court of Appeals day?

24 MR. ORSINGER: Okay. Let's say the Third
25 Court. The point I'm making is that stare decisis can be

1 changed by the same body that issued the stare decisis,
2 depending on changed circumstances, changed constitutional
3 provisions, changed statutes. I think we have a stare
4 decisis concept here, not a law of the case concept, and
5 all the exceptions or the policies for when stare decisis
6 can be changed should apply.

7 So if I'm on the court of appeals and I'm
8 looking at a 1943 decision out of the transferor court and
9 I'm bound by it, I shouldn't be bound by it if that court
10 itself wouldn't be bound by it. So I think we ought to
11 latch onto the stare decisis concept, restrict ourselves
12 to holdings and not dicta, and recognize that stare
13 decisis changes over time.

14 VICE-CHAIRMAN LOW: One of the problems is
15 that a majority felt like -- I mean, they wanted
16 something -- if there is a clear conflict, and we haven't
17 written the rule, but there is a clear conflict, they
18 wanted the parties and the trial judge and so forth to be
19 able to say, okay, this case is going to be decided just
20 like it would have been decided by that court. Now, I
21 realize there are exceptions where that court could change
22 and so forth, but we're going to go -- I mean, if you have
23 any aid to Bill to draw a rule like that we voted on --
24 and, of course, there can be exceptions, stare decisis,
25 there can be clearly erroneous. Judge Gray.

1 HONORABLE TOM GRAY: It's been a long time
2 since I have looked at the Eerie doctrine because it
3 doesn't come up at our court very often, but I thought the
4 Eerie doctrine was very much like what Richard Orsinger
5 just described and stare decisis concept that if the
6 Federal court can define what the state court would hold
7 under those circumstances, that is what they're supposed
8 to hold. That includes the concept, as Richard just
9 described, that if that precedent is now wrong for some
10 reason it can be corrected, but the court must in its
11 opinion explain why that previous decision is being
12 overruled or not followed.

13 That's the whole concept of stare decisis,
14 and I think it's exactly as Richard explained, that that's
15 what we need to latch onto here, and there is some very
16 clear Supreme Court precedent of when you can overrule it.
17 That would address the people's concerns that you document
18 in the opinion of what you're doing and where the
19 difference is. If there is a conflict -- at that point
20 you are setting up the conflict whether you want to or not
21 just by rendering your opinion, but you are following the
22 common law of the jurisdiction from which it came, which
23 includes the ability to overrule your prior decision, but
24 you've got to explain in your opinion why you're
25 overruling that prior decision.

1 MR. SCHENKKAN: Buddy, I think you've
2 correctly described what I gather the sense of the portion
3 of the rule that I'm not in favor of having a rule on this
4 is being based on, the need to have a transferee court
5 follow the clear precedence of the transferor court. That
6 is not what alternative two says; and I would be a lot
7 less unhappy with alternative two if it did say that, if
8 it was limited to "you're bound by the clear precedence of
9 the transferor court." Thus, when we are often, as I
10 believe we will far more often be, in a situation where
11 it's not really clear what the transferor court's
12 precedents are or how they apply to this case, that this
13 doctrine does not apply or at least doesn't apply in its
14 full force.

15 VICE-CHAIRMAN LOW: No. What I was getting
16 at is that you start out with one premise, that you're
17 going to follow the law, not just refer to it. You're
18 going to follow the law of the court from which the case
19 came. All right. We voted on that. We have not voted on
20 the details of the rule, and I gave an example. Certainly
21 we are not saying that if the decision is clearly
22 erroneous, I'm not getting -- I didn't get into and I
23 don't disagree about what's been said about the Eerie
24 doctrine, those kind of things.

25 That's something we have to write, but we

1 have to start out with our major premise before we can
2 ever get to there, and there are going to be many
3 different views of that, and anybody that has a view of
4 what should be an exception and that, certainly should
5 write to or e-mail Bill so he and his committee can when
6 we come back come up with something that they think meets
7 what we want, and then we can vote on and change, if we
8 want to put Eerie in it and so forth, but I don't see how
9 we can write the details of that rule beyond the fact that
10 we start out with that premise and instead of the premise
11 that we just look at it and say, well, it's just there and
12 we should, but here are reasons.

13 And as Judge Gray pointed out, you can often
14 distinguish -- I mean, you know, if you want to. You
15 can't get around that. So if anybody has any suggestions
16 about the exceptions or details of the rule, and I'm not
17 even saying, just start with Bill's suggestion of the
18 alternative two. I mean, it can be a starting point. I'm
19 not voting on the details of that rule. So let's go. It
20 gives him some guidance as to exactly where we're heading
21 and what.

22 I wanted to get to one other thing before
23 lunch, but I guess it's going --

24 HONORABLE TOM GRAY: Well, you got to it,
25 Buddy. We just didn't get to talk about it. We're to it.

1 MR. ORSINGER: He wanted to get through.

2 PROFESSOR DORSANEO: Well, to sum up, we
3 voted down alternative one and we've accepted alternative
4 two, except now we're backing away from alternative one,
5 more back toward one -- backing away from two, but moving
6 back toward one.

7 MR. MUNZINGER: No, I don't see that at all.

8 VICE-CHAIRMAN LOW: No. There are some --

9 PROFESSOR DORSANEO: I heard what you said.

10 MR. LAMONT JEFFERSON: Nice try, Bill.

11 VICE-CHAIRMAN LOW: Okay. All right. We're
12 going to give Bill a break for just a little bit before
13 lunch. We're going to go to something I think maybe Levi
14 had it or I think was interested in, and that was jury
15 shuffle or doing away with it.

16 MR. ORSINGER: Buddy, how long are you
17 setting aside to discuss this?

18 VICE-CHAIRMAN LOW: Not a long time, because
19 when we start -- I start repeating myself I'm going to
20 tell myself to be quiet. That's already started.

21 MR. ORSINGER: We're about to start on a
22 long discussion.

23 PROFESSOR CARLSON: It's going to be a
24 heated discussion.

25 VICE-CHAIRMAN LOW: Well, then you want to

1 take lunch and maybe everybody won't talk too much?

2 MR. ORSINGER: I think we ought to take it
3 up after lunch. We're changing many, many years of
4 procedure.

5 VICE-CHAIRMAN LOW: All right. Let's go.

6 (Recess from 12:16 p.m. to 1:16 p.m.)

7 VICE-CHAIRMAN LOW: Richard and Lamont.
8 Who's going to --

9 MR. ORSINGER: Oh, I can start.

10 VICE-CHAIRMAN LOW: All right.

11 MR. ORSINGER: Just to remind you-all, this
12 is the e-filing issue. It has nothing to do with privacy
13 or public records on the internet. It has to do with
14 filing stuff with the clerk electronically and then
15 serving it on other lawyers in the case electronically;
16 and we have here with us against the wall, not all of them
17 are in the room, but I'll tell you, Mike Griffith, who is
18 with Bearing Point now; or, no, who is he with now? He's
19 now with the entity that's performing the electronic
20 interface between the court system and the public; and
21 then we have Dianne Wilson, who is with the Fort Bend
22 County -- county clerk or --

23 MS. WILSON: I'm county clerk.

24 MR. ORSINGER: Yes, and she spoke with us
25 before, and they have had electronic filing now for how

1 many years?

2 MS. WILSON: January of '03.

3 MR. ORSINGER: Okay. And then we have
4 Yolanda Aleman, who is the chair of the JCIT, Judicial
5 Committee on Information Technology, which is a subpart of
6 Office of Court Administration; and they have been
7 appointed by the Legislature to oversee this process; and
8 then we have Ted Wood, who is with the Office of Court
9 Administration; and then Mike is not here right now. They
10 are here as resources. They have already spoken to us
11 generally about the topic, and I hope that you-all can
12 remember that, and what our job is today -- and we have
13 very clear instructions from our committee chair to get
14 this accomplished with celerity. We are to look at the
15 proposed rules that would adapt existing rules of
16 procedure to accommodate electronic filing.

17 You will remember, for example, that last
18 time we talked about Rule 4 on computation of time and
19 that if you serve notice on another party by e-mail you
20 add three days to whatever time they have to respond, just
21 like with fax; and then last time Judge Christopher and
22 about four or five other people, all speaking
23 simultaneously, wanted to know why are we adding three
24 days for fax; and that's a very valid question, but Buddy
25 says that's not a question we're going to resolve today.

1 We will revisit the question of whether we should add
2 three days for fax when we have the issue of fax service
3 on the agenda. What he wants to do in order for us to get
4 finished and get a product out is to just confine
5 ourselves to the way we're going to handle the e-mail part
6 of it and then revisit otherwise the wisdom of the rule on
7 another occasion of it.

8 Okay. In that context, the first change
9 that's proposed on Rule 4 is to treat e-mails just like
10 faxes and that if you serve notice of a motion or a
11 discovery request or whatever by e-mail, then just like
12 fax you add three days to the other side's time to react
13 or three days before they can set the hearing. Whatever
14 the timetable is, if it's e-mail add three days. Yeah.

15 MR. DAWSON: And I apologize. I wasn't here
16 last time so I don't know if this was covered, but it
17 seems nonsensical to me that if I hand-deliver something
18 to someone, give it to a delivery agent or somebody is
19 going to walk it across town, they don't get the extra
20 three days, but if I e-mail it to them and they get it
21 long before the hand-delivery will show up then they do
22 get three days. That's nonsensical to me, and I don't
23 know why you would do that. I mean, frankly, I think you
24 ought to eliminate the three-day extra for faxes as well.

25 MR. ORSINGER: Okay. See, that's exactly

1 what we're not permitted to talk about today.

2 MR. DAWSON: Take it one step at a time and
3 say that e-mail is deemed on the day of delivery the same
4 as it would be hand-delivered.

5 VICE-CHAIRMAN LOW: That is something that
6 can be addressed, and this will be taken back if that's
7 the way it is, but right now we're trying to make it where
8 the rules that apply you just can e-mail, electronic
9 notice and so forth, and then Richard or his committee can
10 look and see and people can make notes of the things we
11 need to change, the deadlines. The main thing what we
12 wanted to do is we want e-filing. It's not listed in
13 there right now.

14 For instance, even right now the Appellate
15 Rule 9.5 calls for electronic service by fax but not
16 e-mail. Lisa tells me none of them are set up to receive
17 it anyway, but we're trying to make this where -- now, as
18 to rewriting these rules, how many days and those kind of
19 things, that may need to be readdressed, but we addressed
20 them at one time with regard to fax, and we've gone
21 through all that, and we're trying to make this a part of
22 the rule, and what needs to be changed we'll just have to
23 change. You have a valid point. I don't disagree. All
24 right, Richard.

25 MR. ORSINGER: Okay. So then the question

1 becomes what this subcommittee, which is external to
2 our -- actually, it's an external committee has proposed,
3 is that for the time being let's just treat e-mails like
4 faxes. That's kind of consistent throughout this. Since
5 we're adding three days for faxes, without regard to how
6 legitimate that is, let's go ahead and add the same three
7 days to faxes because e-mails are probably analogous to
8 faxes as opposed to hand-delivery.

9 MR. DUGGINS: I pointed this out earlier.
10 There is one difference, though. If you get an e-mail to
11 your computer and your computer is personal and you don't
12 let others have access to it and you're out, your
13 secretary is not going to see it; whereas, a fax comes
14 into your office, your office gets it; and I think that's
15 a real problem; and in my own situation, my computer is
16 not accessible by others, so I may get an e-mail notice of
17 a hearing, but if I'm not in there to open it nobody else
18 is going to see it, so I don't think it is analogous.

19 VICE-CHAIRMAN LOW: But, I mean, somebody on
20 this committee, I faxed them something and then I had to
21 e-mail them. They said the faxes get lost.

22 MR. ORSINGER: Ralph, are you saying that
23 you should have more than three days for e-mail or are you
24 just against e-mail service at all?

25 MR. DUGGINS: I'm not against it. I'm just

1 saying I don't think it's equivalent to a hand-delivery,
2 and it's not exactly the same as fax because a fax is a
3 physical document in the office that if you have anybody
4 besides yourself, a secretary, they're going to see it,
5 and an e-mail may come just to my computer.

6 MR. ORSINGER: Okay. What do you want to do
7 about Rule 4? Do you want to add more than three days for
8 service by e-mail? Do you want to have three days like
9 this recommendation is, or do you have some other
10 approach?

11 MR. DUGGINS: No, I'm okay with the three
12 days. I'm just giving a reaction to your statement that
13 they're equivalent.

14 MR. ORSINGER: Okay.

15 VICE-CHAIRMAN LOW: But for now we're kind
16 of treating them that way, and it may be wrong. We've got
17 to treat it like something.

18 MR. DUGGINS: I'm okay with that.

19 MR. ORSINGER: It's not e-mail? What do you
20 mean it's not e-mail?

21 MS. HOBBS: I think even e-service is -- I
22 mean, it comes through as an e-mail to you, but it's not
23 like somebody is just hitting "send" on an e-mail.
24 They're sending it to Texas Online. Texas Online is
25 sending it to the clerk and sending it your address, any

1 e-mail address you want to give them. You can give them
2 your secretary's e-mail address if you want to, but it's
3 not like -- someone is not just attaching a document like
4 we attach documents to send to this committee. Is that
5 correct?

6 MS. WILSON: Yes.

7 VICE-CHAIRMAN LOW: But it gets there the
8 same way, doesn't it?

9 MR. ORSINGER: But doesn't it come -- it
10 comes into your e-mail software as an e-mail.

11 MS. HOBBS: You could give them -- you could
12 make up an e-mail address for where you get it, so it's
13 service-at-whatever-your-law-firm-is dot com.

14 MR. ORSINGER: Okay. That's another rule.
15 Can we just defer the where we're going to serve to later
16 and just confine ourselves right now to whether we want to
17 have an additional three days added onto your response
18 time if service is by electronic transmission instead of
19 by fax, mail, or hand-delivery?

20 MR. LAMONT JEFFERSON: I thought we -- did
21 we not vote about that, vote on that before? I mean, I --

22 MR. ORSINGER: I think what happened is we
23 ended up in a big debate about whether we ought to have
24 three days added for fax and we didn't get a vote on it.

25 MR. LAMONT JEFFERSON: I remember that we

1 had a big discussion about it, and then as I recall the
2 record -- and I am, frankly, in favor of treating it like
3 a hand-delivery. I have the same issues of did you get
4 the delivery whether it's a hand-delivery or whether it's
5 sent electronically, and there are ways that you can
6 handle both of those situations, but I thought that the
7 last time we talked about it Nina Cortell made an argument
8 about a quality of life issue or something that seemed to
9 carry the day.

10 MR. ORSINGER: Okay. Lamont, I am informed
11 that we did vote on it and approve it. So --

12 VICE-CHAIRMAN LOW: I think you're right.
13 Elaine.

14 PROFESSOR CARLSON: Is this optional with
15 counsel or is now counsel under an obligation?

16 MR. ORSINGER: If you look to Rule 21a, and
17 we're not ready to get there, but just to answer Elaine's
18 question, "Service by electronic transmission to the
19 recipient's e-mail address may only be effected where the
20 recipient has agreed to receive electronic service or
21 where the court has ordered the parties to electronically
22 serve documents." So it's consensual.

23 PROFESSOR CARLSON: Are we supposed to have
24 this?

25 MR. ORSINGER: Yes.

1 VICE-CHAIRMAN LOW: All right. Carlos.

2 MR. LOPEZ: Well, that answers my question
3 to some extent.

4 PROFESSOR CARLSON: Yeah, me, too.

5 MR. ORSINGER: Okay. Then, all right, let's
6 move on to Rule 11. Now, does anyone have a record that
7 we voted on Rule 11 already and approved it?

8 HONORABLE TRACY CHRISTOPHER: We did not.
9 We did not.

10 MR. ORSINGER: Okay. Now, Rule 11, this
11 started another huge debate that ate up an hour of time,
12 which is the proposal is to take the current Rule 11 about
13 written agreements incident to litigation have to be in
14 writing and signed and filed, and then this committee, not
15 mine, but this other one, has said -- added on the
16 following sentence: "A written agreement between
17 attorneys or parties may be electronically filed only as a
18 scanned image." And, remember, we had a large discussion
19 about whether an exchange of e-mails can constitute a Rule
20 11, can you electronically sign something, or does it have
21 to be, as Pete Schenkkan called it, a wet signature with
22 ink on paper, and we did vote on that. Okay. And what
23 was the vote?

24 HONORABLE TRACY CHRISTOPHER: No.

25 MS. SENNEFF: Well, I'm looking at the

1 transcript from January 7th, page 12,368, and Chip says,
2 "For those of you who just returned, we're going to take a
3 vote on adding a sentence to Rule 11 that says, 'A written
4 agreement between attorneys or parties may be
5 electronically filed only as a scanned image of the
6 agreement.' So the words 'of the agreement' are being
7 added to the subcommittee's proposal. So everybody that
8 is in favor of adding that language to Rule 11 raise your
9 hand." And then "That fails by a vote of 9 to 13. 9 in
10 favor, 13 against."

11 MR. DUGGINS: Move to reconsider.

12 MR. ORSINGER: Did you say 1226?

13 MS. SENNEFF: 12,368.

14 MR. ORSINGER: Okay. So was the rule voted
15 down or was the amendment voted down?

16 MR. WOOD: Richard, the amendment was voted
17 down. Okay. And it was sort of left for -- Rule 11 was
18 still sort of open for discussion, but you never got back
19 to it, and that's where the discussion ended.

20 MR. ORSINGER: Okay. Okay. Let's assume
21 that that was a nonbinding -- or I guess none of them are
22 binding, but an inconclusive vote. So now the proposition
23 before us today is --

24 MS. SWEENEY: Wait. I don't want to assume
25 that. I'm sorry. I mean, point of order. Are we just

1 going to revote because we're here again?

2 MR. LAMONT JEFFERSON: I think, Richard, we
3 didn't vote on that sentence. There was a suggested
4 amendment to that sentence that added the language "of the
5 agreement" to the end of the sentence.

6 MS. SWEENEY: Okay. If that's what you
7 meant, Richard, then I withdraw my whine.

8 MR. ORSINGER: Okay. What I'm saying now is
9 the proposal today, unless somebody else has another
10 objection to it, is whether we're going to add to Rule 11,
11 "A written agreement between attorneys or parties may be
12 electronically filed only as a scanned image." Lamont.

13 MR. LAMONT JEFFERSON: I think that the term
14 "a scanned image" is ambiguous, and in the Western
15 District the courts have just approved an electronic
16 filing rule which calls for filings to be done in PDF
17 format, which is a lot more precise than just "as a
18 scanned image," and so I would suggest that we consider
19 "PDF format" as opposed to "a scanned image."

20 MR. ORSINGER: But you can scan in different
21 formats.

22 MR. LAMONT JEFFERSON: That's right, but it
23 has to be filed in PDF, would be my suggestion as opposed
24 to as a JPEG or --

25 MR. ORSINGER: Well, let me ask a technical

1 question. If you're trying to file something through our
2 interface and it's an attachment of a document that's been
3 scanned, does it get converted to some standardized scan,
4 and what is that? What kind of file is that?

5 MR. GRIFFITH: It does. It gets converted
6 to PDF. All documents that are attached get converted to
7 PDF.

8 MR. ORSINGER: It doesn't matter whether
9 they're a PDF or a TIF or a JPEG or a JIF or a word
10 processing document, they all -- all the attachments get
11 converted to PDF.

12 MR. GRIFFITH: That's right.

13 MR. ORSINGER: Okay. So we don't need to
14 standardize at our level. They can standardize at their
15 level.

16 MR. LAMONT JEFFERSON: Well, but the issue
17 here was the signature issue, and I think the idea was can
18 you count on a signature being filed if something is
19 merely scanned, but I think it's ambiguous the way it's
20 written in the proposal, that the agreement be
21 electronically filed as a scanned image.

22 MR. ORSINGER: Well, I guess what you're
23 saying is, does signed mean signed with a pen on paper
24 that you then scan or can you, quote, electronically sign
25 something in some way that last time we decided we

1 couldn't agree on what electronic signature was in the
2 context of exchanged e-mails.

3 MR. LOPEZ: That's where we ended it.

4 MR. ORSINGER: Right. And so are you
5 raising the question of whether we would continue the
6 requirement of signed, and if so, can you electronically
7 sign something? Is that what you're saying?

8 MR. LAMONT JEFFERSON: Well, and I think
9 that's the issue. I'm not really saying anything, but I
10 think that this sentence doesn't answer the question that
11 it's trying to solve, which is what is a signed agreement
12 or what is the manifestation of a signed agreement.

13 MR. ORSINGER: Let's go to our technical
14 resources here. What does signed mean in this context?
15 Let's assume we vote in favor of this. How do you sign it
16 or can you sign it electronically, and what does that
17 mean?

18 MS. WILSON: You could have your signature
19 electronically in your computer where it can just attach
20 to a document without a pen and ink. That is correct.
21 The majority of people don't do that. What they do is
22 actually sign with pen and then they scan it through a
23 scanner and then it's passed to Texas Online. What we
24 don't want is to identify like PDF, because at some point
25 technology is going to change and it could be XYZ and then

1 we would have to come back and say, well, PDF is no
2 longer -- that's old technology, now it's something else,
3 and so Texas Online would be responsible for maintaining
4 the most accurate language, whatever that is at the time,
5 and could change it internally to be of the Texas Online
6 rules rather than the rules committee.

7 MR. ORSINGER: Can I ask this? Are you
8 envisioning that in any event there will be something that
9 looks like a piece of paper with at least two signatures
10 on it?

11 MS. WILSON: The way the JCIT committee is
12 recommending to you is we went the least change of current
13 procedure in hopes that as technology evolves you could
14 then go in and as the discussion in January was more
15 electronic, digital signaturing and everything. Right now
16 a majority of people are signing with a pen and scanning
17 it and sending it to us. That's what 99.99 percent are.
18 At some point that evolution will change, and that's where
19 this committee or a committee will then start looking at
20 changing that scanned image to digital signaturing and
21 whatever other technology comes along.

22 MR. ORSINGER: Well, in your view does this
23 amendment to Rule 11 permit digital signatures, or will
24 that require additional rule change to permit digital
25 signatures?

1 MR. WOOD: Let me address that, if I could.
2 The word "sign" is already in Rule 11; and so I think that
3 whatever is going to constitute a signature between
4 parties is going to be valid; and as Dianne said, that's
5 generally going to be a wet signature, but it doesn't have
6 to be. It could just be someone's signification of
7 assenting to the agreement. And, again, we're talking
8 about a word that's already in the rule, what does sign
9 mean. We didn't attempt to redefine that.

10 VICE-CHAIRMAN LOW: But the rule as it
11 stands now says nothing about electronic. It just says it
12 must be in writing and signed.

13 MR. WOOD: Right.

14 VICE-CHAIRMAN LOW: If we want to make this
15 rule apply so that it meets the requirements of this rule
16 and we can do it electronically, what have we got to say?

17 MR. LOPEZ: Digitally or otherwise.

18 VICE-CHAIRMAN LOW: No. I mean, don't sit
19 down. Answer. What do we have to say, because I'm
20 wanting to hear the answer?

21 MR. WOOD: Well, if you go to UETA, which
22 has been -- it's a uniform rule that's been adopted by the
23 Texas Legislature, it's in the Business & Commerce Code,
24 it defines electronic signature; and it defines it very
25 broadly to include any kind of a symbol or even any kind

1 of a process that shows assent to an agreement.

2 VICE-CHAIRMAN LOW: So you're saying that if
3 we want to make this apply electronic, all we've got to do
4 is say "may be transferred electronically" or something
5 because there's nothing in here that says "electronically"
6 unless you get down "agreement or writing between" or "may
7 be electronically filed."

8 MR. ORSINGER: But, Buddy, they don't want
9 to because the concept of what constitutes a signature --
10 the concept of what constitutes a signature will evolve
11 over time. They don't want to define signature to mean X.
12 They want it to be kind of open. For most of us it's
13 going to be pen on paper, but maybe for two people it
14 might be electronic signatures.

15 VICE-CHAIRMAN LOW: But I thought he said
16 the Legislature had defined it.

17 MR. ORSINGER: Well, they defined it for
18 some purposes, but that definition of the Legislature
19 isn't binding on Rule 11, is it?

20 MS. WILSON: No. UETA, actually when the
21 state adopted that it said each agency then can set up
22 what they're willing to accept; and so we didn't want to
23 go so far as to assume that you were going to open that up
24 to everything at the beginning; and so in our request to
25 get e-filing going in the state of Texas, we left that --

1 what we think is clear, but we didn't want to open it all
2 the way up yet because that could be something you-all
3 could decide at a later date as to what does sign mean.
4 Right now it can be anything the parties agree to.

5 VICE-CHAIRMAN LOW: All right. Ralph.

6 MR. DUGGINS: I was just going to bring that
7 issue up about UETA because at the January meeting we
8 talked about this and what a can of worms this was going
9 to open if we didn't define sign, and I think we can live
10 with that language, or I can live with that language, but
11 I do think at some point we're going to have to define
12 what sign or signature means because of the confusion that
13 that creates and what is and isn't a signature.

14 VICE-CHAIRMAN LOW: Tracy.

15 HONORABLE TRACY CHRISTOPHER: Well, in the
16 draft that we have in Rule 21 they define a signature in
17 the case of a pleading, plea, motion, or application that
18 is electronically filed; and they define it as the use of
19 a confidential and unique identifier; and in my opinion, a
20 Rule 11 agreement ought to be able to be signed in the
21 same manner as a pleading, plea, motion, or application.

22 VICE-CHAIRMAN LOW: So in other words --

23 HONORABLE TRACY CHRISTOPHER: And to the
24 extent we need to put that language into Rule 11, I don't
25 know.

1 VICE-CHAIRMAN LOW: Well, wouldn't it be
2 there if we just stopped and said "may be electronically
3 filed"?

4 MR. LOPEZ: No, because the filing doesn't
5 necessarily --

6 VICE-CHAIRMAN LOW: Well, I know, but -- all
7 I'm looking for is language to cure it so we can get to
8 the next thing.

9 MR. LAMONT JEFFERSON: I'm not sure you need
10 this sentence at all.

11 HONORABLE TOM GRAY: Thank you. Can
12 somebody tell me what the sentence adds to Rule 11?

13 VICE-CHAIRMAN LOW: Well, the way it reads,
14 it might lead some people to believe that agreements have
15 to be the old way and you can't have an electronic
16 agreement. It doesn't tell me in there you can, and so
17 that's what I'm looking at.

18 HONORABLE TOM GRAY: If you start trying to
19 go to every rule, though, and add where you can do
20 something electronically, if you miss one, by implication
21 you've got a problem and --

22 VICE-CHAIRMAN LOW: But that's generally
23 handled by a broad rule that says that, but when it comes
24 down to something specific, we want agreements between
25 attorneys to be sure it's not something that is casual. I

1 mean, it's signed in writing and agreed to.

2 HONORABLE TOM GRAY: That's not what that
3 added sentence says.

4 VICE-CHAIRMAN LOW: No. The added sentence
5 says "a scanned image." I don't disagree. All right,
6 Tracy.

7 HONORABLE TRACY CHRISTOPHER: Well, again,
8 if you look at the draft, looking ahead you will see the
9 exact same language that I just read to you from 21 put
10 into 21a, put into 57; and, you know, frankly, I think we
11 ought to instead of trying to change every single one of
12 these rules, is to have just a separate rule on electronic
13 filing and signature.

14 PROFESSOR DORSANEO: I agree with that.

15 MR. DUGGINS: That's my point, too.

16 HONORABLE TRACY CHRISTOPHER: And then
17 whenever it says in this rule, you know, "signed and
18 filed" it means this.

19 MR. LOPEZ: Yes. Second.

20 VICE-CHAIRMAN LOW: All right. Paula.

21 MS. SWEENEY: We're talking about two
22 things. One is what's a signature, but the other is why
23 are we carving out this special distinction for Rule 11
24 that these have to be -- these can only be scanned, and I
25 would like to focus on that for a minute. What is the

1 worry with Rule 11 that makes it so much more important
2 than any other pleading? Because, I mean, there are many
3 other outcome dispositive pleadings that could be tampered
4 with, if that's what we're worried about.

5 MR. WOOD: Let me tell you, what we were
6 thinking of here was a situation where you have a pleading
7 and attached to that might be a Rule 11 agreement, and we
8 didn't want to have a Rule 11 agreement with just blanks
9 for the signatures because there is two required, okay,
10 two parties and one person filing the document. So when
11 we have this language that has been referenced here that
12 you see repeatedly about "a unique and confidential
13 identifier," that's when a document is filed with the
14 e-filing system; and a Rule 11 agreement or something like
15 that that calls for signatures besides the filer's
16 signature, we anticipated, like Dianne said, 99 percent of
17 the time be wet signatures on paper; and we anticipated
18 taking a picture of that or scanning an image, if you
19 will, and attaching it to the filing; and that's why we
20 carved out a different rule for Rule 11 agreements and
21 also for pleadings that have to be verified; and that's
22 the existing rule. And so we said, well, you need
23 something extra than just putting your confidential
24 identifier on it. That's the thinking behind it, be it
25 right or wrong.

1 VICE-CHAIRMAN LOW: Paula.

2 MS. SWEENEY: The same would apply to an
3 agreed order where you've got six parties that have to
4 sign the agreed order, and a lot of times what happens is
5 you end up with six signature pages, all six of which have
6 five blanks and one signature in the designated blank, and
7 they all get stapled on there, and you have an agreement;
8 but it seems to me that we're -- I think we're assuming
9 fraud here or the risk of fraud where there is no such
10 risk; and, I mean, if somebody pretends to sign my name to
11 a Rule 11, I'm not worried about that. I'm not worried
12 about someone pretending to forge other lawyers' names.
13 Why this extra sort of complicated hurdle? And I still am
14 not hearing why.

15 MS. WILSON: We didn't anticipate fraud.
16 What we were trying to think of was if you had two parties
17 and they are in different locations and they could sign
18 it, fax it to the other, sign it, and then scan that image
19 into and then transmit it to the clerk. We were just
20 trying to figure out and we didn't want to assume that you
21 would then get into electronic signaturing or no signature
22 on Rule 11 because it was done electronically.

23 We were still in one hand not jumping that
24 leap yet and thinking more in a paper world, getting that
25 paper; but you're right, there are agreements to where you

1 have five blanks and one signature and then all the way
2 through. That could be done, and I like the idea
3 personally of just identifying a signature as something
4 and not put it in every rule. That would work, too. That
5 may be the easier way to go. We were just trying to keep
6 it in a paper world right now because the majority of
7 people still understand that, and a lot of people are
8 still a little not quite sure about the electronic filing.

9 VICE-CHAIRMAN LOW: Let me stop you just a
10 minute. Lisa has something to say she's been trying to
11 say and I haven't recognized her.

12 MS. HOBBS: Paula, if you and I entered into
13 a Rule 11 agreement and I was going to send it to the
14 court, my signature would be a digital signature with my
15 password when I e-filed it to the court, and so the court
16 would see that my signature was on that, but it would
17 never show up with your signature because unless you put
18 it on a piece of paper and sign it and then scan it then
19 when it gets to the clerk's office it really just has Lisa
20 Hobbs' signature on it and never gets Paula Sweeney's
21 signature on it.

22 MS. SWEENEY: Well, there should be a way
23 electronically to accomplish that so that if I'm sitting
24 in my office and you're sitting in yours and Bobby is
25 sitting in his, if we're doing this electronically why do

1 we have to revert to paper because we want to file it, and
2 it seems that we ought to be able to he stamps his
3 electronic signature in his office and I do mine and you
4 do yours and we're not going through the arcane step of
5 scanning.

6 VICE-CHAIRMAN LOW: Lamont.

7 MR. LAMONT JEFFERSON: The notion of an
8 electronic signature isn't what we think about. I mean,
9 it's not like you send an e-mail and you punch a button
10 and now it's got your signature on it. We talked about
11 this last time that just an exchange of e-mails has the
12 digital signature of each party, whether there is actually
13 something handwritten on it or not, according to the EU --

14 MS. WILSON: UETA.

15 MR. LAMONT JEFFERSON: I mean, so there
16 really is no reason to insist upon -- and that's something
17 we have no control over. I mean, it's a recognized
18 signature. The law recognizes it as a signature, so why
19 shouldn't it bind the lawyer whether it's an e-mail
20 exchange or --

21 MS. SWEENEY: I would like to see --

22 VICE-CHAIRMAN LOW: Just a minute. Sarah is
23 trying to speak. Sarah.

24 HONORABLE SARAH DUNCAN: I agree with you.
25 I think that should at least be an option. I just got an

1 e-mail at alfred@courts.state.tx.us, which anybody that's
2 in the court system and has an e-mail address knows that
3 was not a legitimate Texas judicial system employee's
4 e-mail address. What are you going to do, Lamont, when
5 somebody goes into your e-mail address and enters you into
6 an agreement that you didn't intend to enter?

7 MR. LAMONT JEFFERSON: But the same thing I
8 would do if someone signed my name to a piece of paper. I
9 mean, if they're going -- if someone is going to try and
10 defraud me by forging my signature then I've got other
11 remedies, but the law -- UETA says that if I enter my
12 computer with my password, password protected, I get on my
13 system. I send you an e-mail and you get it through your
14 system. You respond to it after you've entered your
15 password to get on. We have a signed document just as if
16 both signed a piece of paper. It's the same legal effect.
17 That doesn't stop someone from breaking into your computer
18 and sending an e-mail, but --

19 HONORABLE SARAH DUNCAN: But that's what I'm
20 saying. This guy didn't break into the Texas judicial
21 system's server, I feel quite sure, but I remember Bill
22 Pataka at Fulbright, he -- and I was just asking David how
23 you do this because I don't know, but Pataka used to send
24 e-mails with not his e-mail address but somebody else's
25 e-mail address, like Gibson Gates, and I'm just -- so it's

1 not that they would have to break into your computer.
2 Somebody can ghost your e-mail address, and I don't know
3 how technically it happens. These guys do, but --

4 VICE-CHAIRMAN LOW: Carl.

5 HONORABLE SARAH DUNCAN: I'm just asking
6 what you're going to do.

7 MR. HAMILTON: May I ask a question about if
8 someone files a document using this confidential unique
9 identifier for a signature, I guess, and I go to the
10 courthouse and I want to look at that document and see who
11 signed it, what do I see?

12 MS. WILSON: Right now, since we have been
13 e-filing since January of '03, all the documents we have
14 received, if it has a signature it's a wet signature where
15 they scanned it in. The documents that do not require the
16 signature or the judges have agreed the person can just
17 put their Bar number and just put an S where their
18 signature might have been, and they are accepting that.

19 The others, we've not received an electronic
20 coded signaturing yet. That technology is coming and is
21 here now, but we've not received that document, so I can't
22 answer that for you. I don't know of a county yet that
23 has received the electronic type signaturing that
24 technology allows.

25 MR. WOOD: Let me just ask for clarification

1 on your question. Were you talking about just a regularly
2 filed document electronically by this unique and
3 confidential identifier?

4 MR. HAMILTON: Right.

5 MR. WOOD: Okay. Dianne, did you understand
6 the question there? Could you answer it that way? I
7 mean, Dianne has received many e-filed documents that have
8 no wet signatures on them at all, and so I think what the
9 question is, is if he came down to the courthouse to see
10 that document, what would he see in the signature blank?
11 Anything?

12 MS. WILSON: Nothing. You would not -- but
13 it would be coming through Texas Online, which has
14 validated that that is an authorized filer through the
15 system, and so that information the courts can look at to
16 know that that is the person who sent it or they've given
17 the authority of someone to send it; but the majority of
18 our documents they have signed it and they have
19 electronically scanned it into a scanner, which then turns
20 it into whatever format, and then Texas Online is changing
21 that into a PDF file.

22 VICE-CHAIRMAN LOW: As a practical matter,
23 though, say Richard and I enter into an agreement, Rule
24 11, and we don't sign. I've got -- I've got to serve him.
25 He ultimately is going to get a copy and he's going to

1 look at that and say, "Well, he is crazy. I didn't agree
2 to that." And he's going to call the court and call me
3 and say, "We don't have an agreement," and it's going to
4 be stricken, I mean, you know, because we don't have an
5 agreement. I mean, that's the only protection that I see.
6 I mean, is that -- yes.

7 HONORABLE JANE BLAND: Well, it seems to me
8 like the security issues and the protection issues are
9 issues that are better dealt with by the technology people
10 than by our rules, because we're not familiar enough with
11 the technology and how it works; and to require a wet
12 signature, given the rapid advancement of this technology,
13 seems to me that, you know, our rule will become
14 anachronistic; and if the parties -- if Paula and I enter
15 into a Rule 11 agreement and in that agreement we say, you
16 know, "It will be valid when both of us electronically
17 file a copy of it," you know, why can't that work? I'm
18 not saying that that's the way it has to be done, but I
19 don't think our rules should foreclose it either.

20 VICE-CHAIRMAN LOW: Well, Richard, first
21 thing I wrote Richard was that, you know, e-filing is
22 here, and the first question I have is whether it will
23 mechanically and electronically and otherwise work the way
24 we have it written, and I can't answer that question. And
25 so what we've got to do is get our language consistent

1 with what the technology is, and not knowing what the
2 technology is, I have extreme difficulty.

3 HONORABLE TRACY CHRISTOPHER: Well, it seems
4 to me if we define "signed" somewhere as an electronic
5 signature, that cures our problem with respect to Rule 11,
6 and we'll work out the mechanics as we go along on it.

7 VICE-CHAIRMAN LOW: All right. You
8 suggested something earlier that maybe we ought to have
9 one general rule about electronic signing or something
10 like that so that we don't just deal with it on each rule
11 and then overlook one. Was that your suggestion?

12 HONORABLE TRACY CHRISTOPHER: Right.

13 MR. LAMONT JEFFERSON: Well, I thought you
14 pointed out, and I think our guests have pointed out, that
15 there are rules that say what constitutes a signature when
16 you're filing something through Texas Online. What this
17 rule is designed to govern is what constitutes a signature
18 -- or what it's designed to do is require that there be a
19 signature not when something is filed with Texas Online
20 but when something is exchanged between lawyers.

21 I don't think that we have to -- for
22 purposes of passing this rule I don't think we have to do
23 anything to Rule 11. I mean, Rule 11 already says it has
24 to be signed, and then the question about what is a
25 signature is answered either in the UETA or you actually

1 see a signed instrument, and if it comes up, you resolve
2 it then. If someone says, "It's not my signature," but
3 Rule 11 agreement already says that an agreement between
4 lawyers has to be signed.

5 VICE-CHAIRMAN LOW: You would leave it like
6 it is?

7 MR. LAMONT JEFFERSON: Leave it like it is.

8 VICE-CHAIRMAN LOW: All right. And are
9 people going to think, well, I can't have a Rule 11
10 agreement electronically? How are they going to know they
11 can do that?

12 MR. LAMONT JEFFERSON: I don't know if
13 they're going to think that or not, but all of this
14 electronic signature stuff is new. I mean, I wouldn't
15 necessarily think that, but someone who has never used
16 e-mail before might think that they can't have a, you
17 know, signature without a wet signature, but I don't think
18 we have to address that here.

19 VICE-CHAIRMAN LOW: All right. So you move
20 that we leave Rule 11 as-is without the underlying
21 language?

22 MR. LAMONT JEFFERSON: And, yeah, just one
23 other point there. I think Paula has made this point
24 before, and it may be a little off base, but I don't know.
25 I mean, lawyers don't need all this protection. I mean,

1 lawyers can protect themselves. It's kind of silly that
2 we have to have a rule that says what's an agreement
3 between lawyers and how do you evidence that agreement
4 when we don't have that between private parties, so the
5 interests that we're trying to protect with Rule 11, I
6 think we're spending, you know, too much time talking
7 about what is an electronic signature and what is not.
8 All it is is a manifestation of agreements between
9 lawyers.

10 VICE-CHAIRMAN LOW: I guess it doesn't --
11 all right. Who all is in favor of taking out the
12 underlying, the written agreement -- the language
13 underlined and added to Rule 11 and leaving Rule 11 just
14 like it is?

15 Man, we've made it through Rule 11.

16 MR. ORSINGER: The record needs to reflect
17 it was basically unanimous. Was there anyone opposed to
18 that?

19 (No response.)

20 PROFESSOR DORSANEO: Mr. Chairman?

21 VICE-CHAIRMAN LOW: Yeah.

22 PROFESSOR DORSANEO: I really like the idea
23 of having one rule, if we could have one, that explains
24 this information in a way that we can understand it. When
25 we had that sentence we had a scanned image of something

1 that I don't know what it was a scanned image of.

2 We voted down "of the agreement," and that
3 really is a puzzling bit of information with respect to
4 this record, and then we ask the question of -- or Carl
5 asked the question of, well, what is this thing going to
6 look like, unique identifier when electronically filed;
7 and I thought I heard the answer be something like "We
8 don't know what that is," and that's -- and if I'm wrong,
9 I apologize, but that's -- I need and the lawyers who are
10 reading these rules need to be able to understand what
11 they mean; and it's not sufficient that it will work for
12 you people. We need to know what they mean and how we can
13 comply with them, not that this makes electronic filing as
14 it is now or as it may become something that can be
15 accomplished.

16 VICE-CHAIRMAN LOW: All right. Are you
17 saying that we should have a rule that says "Requirements
18 for electronic filing. Unless otherwise specifically
19 addressed and so stated are prohibited herein, this shall
20 apply. Signature is this, that," and so we just have an
21 electronic filing rule that -- not make it inconsistent
22 with what's there. Don't make it conflict with something
23 else we've done that is specific but is not covered
24 through that. All right. What committee wants to take
25 that on?

1 MR. ORSINGER: Well, the problem is the
2 subdivisions to that rule is going to be as lengthy as the
3 rules we're amending, because we're changing -- we're
4 governing judicial signatures, we're governing lawyer
5 signatures on agreements, lawyer signatures on pleadings,
6 what kind of oath, and what kind of things have to be done
7 in the conventional wet signature way if they have to be
8 under oath and stuff.

9 By the time we finish with that rule, Bill,
10 it's not going to be any shorter than this probably, and
11 why does that make it easier to understand? What that
12 means is you have got to now go to the electronic filing
13 rule and find the subdivision of that that relates to some
14 other rule and figure out what effect that subdivision has
15 on the general statement of the rule. Why isn't it easier
16 to put the electronic application in the rule that deals
17 with the underlying requirement? You see what I'm saying?

18 PROFESSOR DORSANEO: I understand what
19 you're saying. I don't know whether that's the way it
20 will turn out or not.

21 MR. ORSINGER: We can look -- as we go
22 through here you'll see it will be very difficult to write
23 one rule for all of this.

24 PROFESSOR DORSANEO: There seems to be
25 considerable repetition in it.

1 VICE-CHAIRMAN LOW: We're fixing to go
2 through them. Alistair.

3 MR. DAWSON: I think that we ought to
4 address the situation of what constitutes a signature in
5 the electronic world, because I think just taking the Rule
6 11 as an example, if we all know and we're all familiar
7 with Rule 11 agreements, if somebody sends me an e-mail
8 that says "This constitutes our agreement" and I write
9 back "agreed," is that an enforceable Rule 11 agreement?
10 I would think it would be, but there may be some people
11 that would interpret the rules to say, no, it has to be
12 signed and since it's not signed it's not enforceable; and
13 to clarify that ambiguity I would recommend that whatever
14 committee -- and maybe it can all be done in one rule.

15 I do agree with Judge Christopher we ought
16 to have one rule on electronic service, what constitutes
17 electronic service, as opposed to putting it in all the
18 various rules that it applies to, but we ought to include
19 it somewhere in the rules the circumstances under which an
20 electronic signature constitutes a signature under the
21 rules.

22 VICE-CHAIRMAN LOW: Or maybe in Rule 11 just
23 as long as electronically, you know, it shows that, you
24 know, one after the other you agreed and it comes from
25 you. I mean, why should it be in writing if you agree to

1 it? The thing that gave rise to --

2 MR. DAWSON: Well -- go ahead. I'm sorry,
3 Buddy.

4 VICE-CHAIRMAN LOW: -- Rule 11 was lawyers
5 would agree to things in the courtroom or something,
6 "Judge, he agreed" -- "I didn't agree to that." Lawyers
7 in the heat of battle, so they say it's either on the
8 record or sign it, so the courts didn't want to referee
9 fights when one lawyer calls another one a liar and the
10 other one says, "No, you're the liar," but maybe it could
11 be handled that way.

12 MR. LOPEZ: One suggestion that is a little
13 bit off the course we're on is that, I mean, we're
14 marrying ourselves to the word "signed" and we're marrying
15 ourselves to all the problems that we have and may have in
16 defining it or in dealing with the fact that the
17 definition may change, and we may just have to put it --
18 start with a type that says "it's enforceable if." And we
19 don't have to marry -- we don't have to use the word
20 "signed" if there's some better, more modern way that's
21 going to be more flexible eventually to define the assent,
22 which is really what it's about. Signed is just a vehicle
23 for the expression of the assent.

24 VICE-CHAIRMAN LOW: That was before we had
25 (e). Sarah.

1 HONORABLE SARAH DUNCAN: I'm sitting here
2 reading about digital signatures because I've been curious
3 what exactly is a digital signature, and I'm reading about
4 asymmetric with the system and hash functions and hash
5 values, and they're getting through to me that a digital
6 signature is not a signature as any of us think of a
7 signature. It is far more secure than Lamont sending me
8 an e-mail saying "agreed"; and frankly, if that's going to
9 be the law, I'm going to state on the record right now
10 that just because you get an e-mail with my e-mail address
11 on it saying "agreed" doesn't mean I've agreed to it; and
12 we need to know what we're talking about before we go down
13 this road, I think, and --

14 VICE-CHAIRMAN LOW: What should we do? I
15 mean, I don't mean --

16 HONORABLE SARAH DUNCAN: What these guys
17 tell us to do. No, I'm not willing to say that a Rule 11
18 agreement is forum when somebody sends an e-mail saying
19 "Here is our agreement" and they get back an e-mail from
20 their intended recipient apparently saying "agreed." I am
21 not willing to say that.

22 I am willing to say that if it's digitally
23 signed, has hash functions in the right place, then that's
24 a Rule 11 agreement; and I completely agree with Paula,
25 and maybe we speak from our own individual situations, but

1 I think the fact that there are two people in this room
2 that have very similar individual situations is indicative
3 of where the world is going. We should not tie people to
4 conventional work situations by our rules; and if they are
5 able to put a digital signature on a document in the Yukon
6 and the Caribbean at the same time and they both intend to
7 be bound, our rules shouldn't prevent that. It should at
8 least be an option.

9 But these amendments are using signature and
10 signed as though we were back in Shakespeare's time when I
11 don't think -- we're just not living in that world
12 anymore. So don't ask me what we should do, other than
13 generally speaking.

14 VICE-CHAIRMAN LOW: Well, would you say that
15 the parties have to file with the clerk, each party, some
16 unique identifying thing that couldn't be copied so that
17 when you see that that's the same as your signature, or in
18 each case?

19 HONORABLE SARAH DUNCAN: I'm finding places
20 where I could download digital signature software for
21 free, and, you know, I don't see why we don't just say
22 "digital signature as defined by the American Bar
23 Association in Introduction to Digital Signature
24 Guidelines tutorial." I mean, these things have definite
25 meanings, and apparently digital signature technology has

1 been around for a decade, and it's basically completely
2 secure, so let's not screw around with "signed" as
3 Shakespeare used the term. Let's use 2005 terminology and
4 say "a digital signature."

5 VICE-CHAIRMAN LOW: Well, in other words,
6 what you would say, we just voted on it so we're not going
7 back to it, so just for purposes of illustration, that "An
8 agreement between attorneys may be electronically filed by
9 digital" -- or, you know, "and parties signed by digital
10 signature"?

11 HONORABLE SARAH DUNCAN: Uh-huh. I wouldn't
12 require an attorney to have a scanner in order to file a
13 Rule 11 agreement, if they've got digital signature
14 software.

15 MR. ORSINGER: We just voted unanimously not
16 to require that.

17 VICE-CHAIRMAN LOW: No. And we're not going
18 back to it, but, I mean, there was the suggestion that we
19 have some general rules or something; and as I read what
20 Sarah is saying, where anything required signature it may
21 be done electronically by digital signature. Is that kind
22 of what -- under as a general rule? All right, Richard.

23 MR. MUNZINGER: I think the basic question
24 is Buddy sends me an e-mail, "Dear Richard, do you agree
25 to allow my witness Smith to testify by affidavit?"

1 That's an e-mail. And I send an e-mail back to Buddy,
2 "Dear Buddy, yes, of course." Is that a Rule 11
3 agreement? The e-mail that Buddy sends me has Buddy Low's
4 name, address, telephone number and that, but just the
5 standard thing. No sexy, fancy secret code or anything
6 else, just Buddy Low. It's an e-mail, and mine back to
7 Buddy is identical.

8 Question, is that a written agreement under
9 Rule 11? Question, has the agreement been signed? That's
10 the basic question here, what constitutes an electronic
11 signature. And I think that's what Sarah is saying as
12 well. I don't know enough about computers to have one
13 with me, but this digital signature that these people are
14 talking about it seems to me is one that is some kind of
15 secret code registered with Texas Online, verified by
16 Texas Online, and therefore considered valid by a
17 recipient clerk. I may be wrong in that.

18 The discussion of UETA is, is my sending an
19 e-mail a signature? And I think the answer may be "yes,"
20 but I don't know that for sure, and I'm not sure anybody
21 in the room knows that for sure. So when we talk about
22 signature, Sarah's point is what is it -- I think this is
23 her point. What is a signature?

24 HONORABLE NATHAN HECHT: Would it be helpful
25 to -- of course, I am sort of drifting this way, but is it

1 helpful to know from the committee whether we should just
2 try to bring the rules in line or make them consistent
3 with what the Legislature has already defined as an
4 electronic signature for everybody else if they want to,
5 or do we feel like there may be some instances where we
6 need to do something different?

7 VICE-CHAIRMAN LOW: All right. Well, I
8 would favor the electronic -- the legislative -- all
9 right. Alistair.

10 MR. DAWSON: I'm reading the same thing,
11 Justice Hecht. I mean, this doesn't tell me anything. It
12 says that an electronic signature is an electronic sound,
13 symbol, or process attached to or logically associated
14 with a record and executed or adopted by a person with the
15 intent to sign the record. And I'm sorry, but that --
16 maybe I'm just not an electronic whiz kid or anything, but
17 that doesn't tell me anything.

18 HONORABLE NATHAN HECHT: And that's out of
19 the statute?

20 MR. DAWSON: This is -- according to what
21 I'm reading, which is actually Judge Benton's, but it's
22 section 43.029 of the Business & Commerce Code where they
23 attempt to define electronic signature. They then go on
24 in a different section to state as a matter of law that
25 any law that requires a signature that an electronic

1 signature suffices, but that definition in response to
2 your question of should we just adopt what the Legislature
3 has done, I would respectfully submit we can do better.

4 HONORABLE NATHAN HECHT: Well, and I guess,
5 you know, the rest of the world doesn't have any choice
6 basically, although the statute says that you can decide
7 whether to go with it or not. But if we don't then the
8 recommendation is a very conservative one that we should
9 just use scanned documents, and there was some call for
10 liberalization of that, so I'm not sure how to overcome
11 any of that.

12 MR. ORSINGER: On that very topic, further,
13 if, in fact, the rest of Texas society is following the
14 definition that he just read except for court practices,
15 that's not a good place for us to put the court system.
16 We have a lot of people who are pro se, and if it becomes
17 conventional for people to take out car mortgages and sign
18 contracts in this electronic fashion and it becomes
19 routine, why should we be the only people that have some
20 type of arcane concept that's contra to the commerce
21 that's going on in our state?

22 VICE-CHAIRMAN LOW: Can we do this? Go
23 through these rules as they are, and where it has
24 "signature" we leave that open for answer later as to what
25 constitutes a signature? I mean, not all of them are that

1 way, but we do need to get to the rules and put in the
2 rules where they have specific things that it can be done
3 by e-filing. So the dispute I've heard about is signature
4 and what constitutes a signature. So any of the rules
5 that have that, let's leave that part of the rule open for
6 answer by, as Tracy said, some general definition, and
7 ignore that and go to the other rules as they apply to
8 electronic filing? Can we do that?

9 MR. ORSINGER: Yeah. The next rule is 19a,
10 and it's contra to what you just said, Buddy, but we're
11 going to have to deal with it. It's a new rule, and it
12 has to do with defining electronic signatures by judges,
13 and it says, "A judge signs an order by applying his or
14 her handwritten signature to a paper order or by applying
15 his or her digitized signature to an electronic order. A
16 digitized signature is a graphic image of the judge's
17 handwritten signature." So now for the court orders we're
18 going to have to have a graphical reproduction of the
19 judge's signature electronically attached to the
20 electronic order.

21 VICE-CHAIRMAN LOW: All right. I'll hear
22 what people have to say, but to me that's going to have to
23 be addressed signature of judge or lawyers. All right.
24 Tracy.

25 HONORABLE TRACY CHRISTOPHER: Well, that's

1 my point. We should not have 19a. We should define
2 "signature" somewhere.

3 VICE-CHAIRMAN LOW: Yeah. So that's one we
4 probably better skip, because that's -- and we'll come
5 back to that and treat judge's signature and signature to
6 have some general definition of what constitutes and make
7 certain from the people that know what we're doing that
8 the language meets the technology. That was my other
9 question, Richard, is any -- well, okay.

10 MR. ORSINGER: Well, let me just say in
11 response that I do not necessarily agree that the standard
12 for court orders is the same as Rule 11 agreements or
13 motions.

14 VICE-CHAIRMAN LOW: No, no. I don't either,
15 but --

16 MR. ORSINGER: And I would like to see some
17 kind of self-evident manifestation of the judge's intent
18 to sign something.

19 VICE-CHAIRMAN LOW: Okay. What bothers me
20 is the meat of this thing ends with the word "handwritten
21 signature." That's what bothers me, and we -- and so if
22 the rule is redrawn to take that out then we can deal with
23 the rule, because -- and I don't -- I mean, if we don't
24 want that requirement that it have the judge's signature
25 or something, but when we start defining signatures it's

1 going to have to be that applies to all electronic.

2 MR. ORSINGER: See, I don't agree with that.
3 I think that you can justify a distinction between
4 ordinary people and ordinary commerce indicating their
5 assent by signing in response to a signing e-mail, but if
6 you're going to have a judge sign an order or a judgment,
7 I would like to see something that even an ignorant person
8 can see that it's a judicial act.

9 VICE-CHAIRMAN LOW: In other words, I would
10 know it's a judicial act.

11 MR. ORSINGER: Well, in other words, all I'm
12 saying is if I get a court order that forecloses on my
13 homestead, I would like to have something that's signed by
14 a person and -- okay, so anyway, I don't want to stop the
15 process. All I'm telling you is that --

16 VICE-CHAIRMAN LOW: No, no. All I'm saying
17 is you said handwritten signature. I mean, how do I have
18 a handwritten signature by an e-mail order?

19 MR. ORSINGER: What this rule would require
20 is that the judge have signed something at some point and
21 that it be scanned and is now residing electronically and
22 it just gets affixed to the order. It's like the
23 electronic equivalent of stamping it with a stamp.

24 HONORABLE TERRY JENNINGS: Like a rubber
25 stamp.

1 MR. ORSINGER: Like a rubber stamp, only
2 it's an electronic stamp and it's a facsimile of the
3 signature.

4 HONORABLE TRACY CHRISTOPHER: Well, why does
5 a rubber stamp make you feel better?

6 MR. ORSINGER: Better than what?

7 HONORABLE TRACY CHRISTOPHER: I mean,
8 seriously. I could understand your wish to have a real
9 signature, but if I'm allowed to, you know, sign
10 something, scan it, and have it rubber-stamped on all of
11 my electronic orders, you know, why does that make you
12 feel better? I mean, if you really want a signature, you
13 should have us print out a piece of paper and sign it and
14 scan it.

15 MR. ORSINGER: I don't have a problem --

16 HONORABLE TRACY CHRISTOPHER: You really
17 want a signature?

18 MR. ORSINGER: I don't have a problem with
19 somebody signing the judge -- stamping the judge with a
20 rubber stamp or graphically. What I have a problem with
21 is a court order that does things that are really
22 significant like taking people's children away permanently
23 and stuff like that based on some kind of digital
24 assumption that it was done by someone with authority.

25 HONORABLE TRACY CHRISTOPHER: But if I'm

1 pressing a button that says "rubber-stamp it," how is that
2 any different from any button that I press that says
3 "digital signature"?

4 MR. ORSINGER: Because I can see it with my
5 eyes. I can see something that looks like a human being
6 signature on it.

7 But anyway, I don't want to stop the
8 process. I'm just saying that I'm not buying into the
9 idea that signature for all purposes is the same as
10 signature for signing judgments and orders.

11 VICE-CHAIRMAN LOW: I'm not saying it
12 wouldn't be. I'm just saying to speed things up so we can
13 at least get to first base that we -- where the word
14 "signature" appears that we kind of skip over that and go
15 to the other, and then where those places where the
16 signature appears that are different, you think different
17 and would apply differently, let's -- we'll deal with that
18 either with that rule or if we've suggested a general
19 definition. All right.

20 PROFESSOR DORSANEO: Let's go to 21a because
21 the next rule, 21, is one of those ones you don't --

22 MR. ORSINGER: Well, no, 21 is a different
23 concept. The idea on 21 is if you do electronic filing,
24 that by virtue of electronic filing that you are
25 certifying that you have made service in accordance with

1 the rules. It's like a deemed certificate. On a piece of
2 paper the rules require you to sign a certificate of
3 service. Rule 21 says that if you file electronically
4 it's deemed that you're also signing a certificate of
5 service.

6 VICE-CHAIRMAN LOW: Does anybody have a
7 problem with that? I don't -- that's -- all right.

8 MR. ORSINGER: I mean, so that's unanimous.

9 HONORABLE TRACY CHRISTOPHER: No, no, no. I
10 have a problem.

11 PROFESSOR DORSANEO: I don't see that as
12 different from the signature.

13 VICE-CHAIRMAN LOW: No, no. I'm asking who
14 has a problem. I want to hear what the problem is and
15 then let's vote on it.

16 PROFESSOR DORSANEO: I don't see that as any
17 different from deciding what's going to count as a
18 signature.

19 HONORABLE TRACY CHRISTOPHER: Right.

20 PROFESSOR DORSANEO: And the first time I
21 see that we're not talking about that is in 21a, except
22 for the part toward the end that says "the case of service
23 a certification is deemed." That's signature again.

24 MR. ORSINGER: But, Bill, this says you
25 don't have to have a digital signature on your certificate

1 of service, that if you file something electronically and
2 it's served electronically through this system we've set
3 up, it's deemed that you've signed a certificate of
4 service.

5 VICE-CHAIRMAN LOW: When I file a pleading
6 and I assume that everything I'm saying, these things are
7 true, not false, it's kind of deemed.

8 PROFESSOR DORSANEO: That depends on how we
9 define signature. If you define it as by using a unique
10 identifier, which I still thought I heard that they know
11 about that but they don't have any yet, then that's the
12 definition of a signature really.

13 MR. ORSINGER: But this rule is eliminating
14 the requirement of a signature on the certificate of
15 service if you file electronically.

16 HONORABLE TRACY CHRISTOPHER: No.

17 MR. ORSINGER: It's saying that if you
18 choose to file electronically you are held to have
19 acknowledged that it was served electronically or served
20 properly.

21 VICE-CHAIRMAN LOW: It's the same as if you
22 signed it is what he's saying, even though it's not
23 required. Terry.

24 HONORABLE TERRY JENNINGS: Well, I want to
25 say this as a confirmed Luddite. There are more reasons

1 other than just, you know, for the sake of a feeling of
2 goodness of having a wet signature, and one of those
3 reasons is, is whenever I sign something I go through a
4 ritual. I read what I'm signing, I make sure it says what
5 I want it to say; and by the act of requiring a wet
6 signature you're forcing someone to go through that
7 analysis, to make sure what they're signing they're bound
8 by. You know, there is a certain ritual and a certain
9 significance to making your mark on something, and as a
10 Luddite I just want to say that and have my peace.

11 VICE-CHAIRMAN LOW: All right. Tracy.

12 MR. LOPEZ: I think he's suggesting we go
13 back to wax.

14 HONORABLE TRACY CHRISTOPHER: I disagree
15 with Richard on Rule 21, because the language used there
16 is the exact same language that they use on Rule 57 when
17 it's defining what a signature of an attorney is; and if
18 you deleted that, what is left is "The party or attorney
19 of record shall certify to the court compliance with this
20 rule in writing over signature on the file, pleadings,
21 plea, motion, or application"; and so, you know, again,
22 "over signature" is the issue because you define signature
23 as "the confidential and unique identifier."

24 PROFESSOR DORSANEO: This sentence doesn't
25 dispense with the certification. It says the

1 certification is deemed to be signed, not that a
2 certification is deemed to be included. It still says
3 "the certification," but it's deemed to be signed by the
4 use of this confidential and unique identifier.

5 HONORABLE TRACY CHRISTOPHER: Right.

6 VICE-CHAIRMAN LOW: But it's like if I say,
7 okay, you make this check you mean it's deemed you've
8 signed it. I mean, it's in lieu of, and if you understand
9 that, why can't that be? I mean, if you agree and the
10 rule says that if you take this method, I mean, and use
11 that method, then you've agreed to these rules; and the
12 rule says you're agreeing that you treat that just as if
13 you've signed it even though you haven't signed. That's
14 what Richard's telling me; isn't that right?

15 MR. ORSINGER: Yeah. I mean, in a sense
16 we're arguing about whether we're going to deem that the
17 certificate of service is signed because the pleading is
18 electronically signed or whether we're going to come back
19 here to the signing of pleadings in Rule 57 and say that
20 when you file with your unique identifier you're signing
21 not only the pleading, but also the certificate of
22 service. I mean, you could get to the same place by
23 saying that if you file using Texas Online with your
24 unique identifier, that is deemed signature by the
25 attorney whose name first appears in the pleading

1 signature block and also deemed a signature of the
2 certificate of service.

3 Well, do you put that under Rule 57, which
4 only has to do with signing the pleading, or do you put
5 that under Rule 21, which has to do with signing the
6 certificate of service? Where do you put that digital
7 signature of the certificate of service?

8 PROFESSOR DORSANEO: You put that in the
9 separate digital signature rule.

10 MR. ORSINGER: Okay. And since you
11 volunteered to write it, we just won't worry.

12 VICE-CHAIRMAN LOW: Tracy has been trying to
13 speak.

14 HONORABLE TRACY CHRISTOPHER: No, no. I
15 think you put it in a separate rule.

16 PROFESSOR CARLSON: Is it true that there's
17 a difference in the signature of someone who uses this
18 system as a filer and the concerns that we would have
19 about the signature of another attorney or a judge who is
20 not initiating a filing, who doesn't have the confidential
21 and unique identifier with the highly --

22 MR. ORSINGER: Right. Those other people
23 that you just mentioned, they don't fit in this system at
24 all. They're not going through the system. They don't
25 have a unique identifier. If you and I have a Rule 11

1 agreement, I don't have a unique identifier. The only
2 person who has a unique identifier is somebody who files
3 something with Texas Online.

4 PROFESSOR CARLSON: Right.

5 MR. ORSINGER: And it's for purposes of what
6 they just filed, and since it's coming off of my machine
7 with my unique identifier it doesn't have your unique
8 identifier.

9 VICE-CHAIRMAN LOW: Be quiet and let Judge
10 Hecht speak.

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

12 HONORABLE NATHAN HECHT: Is it important to
13 lawyers that someone sign the certificate of service other
14 than the person who signed the pleading?

15 You said you didn't do it earlier. You
16 said, "I don't sign certificates of service," and I just
17 wondered is it ever important that you would feel that you
18 authored a pleading and you were going to sign that
19 certificate, but you were going to leave it to somebody
20 else -- sign the pleading, but you were going to leave it
21 to somebody else to make sure it got served and you wanted
22 whoever that person was to sign it?

23 MR. LAMONT JEFFERSON: I think that is often
24 important. You compose the document but your local
25 counsel -- or you're serving in some other limited role

1 and you're not the one who wants to be responsible for
2 making sure everybody gets it who is supposed to get it.

3 HONORABLE NATHAN HECHT: And I suspect that
4 you can't put two identifiers on these documents. There
5 will just be one.

6 MR. ORSINGER: That's right.

7 HONORABLE NATHAN HECHT: So you couldn't
8 have a -- and if you made electronic signature the
9 particular code of the person who is filing it wouldn't
10 necessarily be -- it would have to be the same for all
11 parts, and maybe that person would not want to endorse all
12 parts.

13 VICE-CHAIRMAN LOW: But, Judge, one of the
14 things is that like I will be local counsel helping
15 somebody in a case and they send me, physically, a
16 pleading they've signed and want me to serve everybody,
17 well, then, I will; but if he could just do it by e-mail
18 there would be no reason for him to come through me. He
19 would just -- yeah.

20 MS. HOBBS: What about a partner and an
21 associate? Like a partner will sign the pleading, and the
22 associate will actually make sure it gets served, and the
23 associate will have the signature on the certificate of
24 service.

25 MR. ORSINGER: What about a proposal that

1 you'll deem the person who has the unique identifier will
2 have signed it unless someone else's signature is scanned
3 and attached to the certificate of service so that you've
4 preserved the right of the primary lawyer to be seen as
5 the primary lawyer, but you preserve the right of the
6 office to delegate to someone else the right to sign the
7 certificate of service, and it will be conventional. It
8 will be pen on paper, scanned, and attached to the back of
9 the pleading.

10 HONORABLE NATHAN HECHT: And it seems to me
11 that this problem will come up in different contexts,
12 because I suppose you might want to file a motion for
13 summary judgment with affidavits attached, and it would be
14 important to you to put them in the same document, but the
15 people who are signing the affidavits may not be the
16 people who were signing the motion or the certificate of
17 service. So there might be four or five signatures in a
18 single document, and there would have to be some way to
19 accommodate that.

20 MR. ORSINGER: Well, the concept is where an
21 affidavit is required that it has to be a scanned image.

22 HONORABLE NATHAN HECHT: Yeah.

23 MR. ORSINGER: Of a wet signature. Is that
24 not right, guys? An affidavit?

25 MS. WILSON: Yes.

1 HONORABLE NATHAN HECHT: And I was
2 anticipating that there might be a move away from that.

3 MS. SWEENEY: Why are we back to that again?
4 I mean, who files fraudulent affidavits?

5 HONORABLE TRACY CHRISTOPHER: A lot of
6 people.

7 VICE-CHAIRMAN LOW: All right, Skip.

8 MR. WATSON: Judge, I think -- I may have
9 missed this, but I think in the proposed change to Rule 57
10 they're addressing the idea of different attorneys signing
11 a pleading; and as I read it it's saying, regardless, I
12 mean, presumably, you know, comes out from let's say an
13 associate's computer who has their unique identifier
14 attached, but it's deemed that the first named attorney is
15 the person signing regardless of whose identifier the
16 computer is attaching as it's sent, if I read that
17 correctly.

18 VICE-CHAIRMAN LOW: Sarah.

19 HONORABLE SARAH DUNCAN: I read it the same
20 way, and it concerns me, because that may not be true; but
21 why couldn't -- why does it have to be in the same
22 document? If I'm filing a motion for summary judgment
23 with affidavits, why can't I file the motion with my
24 digital signature and the affidavit with the affiant's
25 digital signature or file a certificate of service as a

1 separate document referenced in the certificate of
2 service, "This is the certificate of service for that
3 document that was electronically filed a few minutes ago,"
4 but because the associate is the one charged with ensuring
5 that service occurs, it will be digitally signed by the
6 associate.

7 MS. WILSON: You can file it.

8 HONORABLE SARAH DUNCAN: Won't that work?
9 So I think we should get -- this is part of what I was
10 saying earlier. We shouldn't get stuck into this scanned
11 image thing when technology is already so far beyond that,
12 and what I'm reading here is so much more secure than
13 that; but when I read a graphic image of my signature is
14 going to be good enough for an order, you can get a
15 graphic image of my signature at Central Carolina Bank
16 because all of our checks are online; and if you just sit
17 there long enough you can figure out how to get into our
18 account and you've got a perfect graphical image of my
19 signature.

20 Now, Richard, is that really going to make
21 you feel better when they come and take your client's kids
22 away because there's a graphical image of my signature on
23 that order when I have no -- I know nothing about this?
24 And that's what I'm saying, is the digital signature is
25 not a graphical image of a signature, and it is a billion

1 times more secure.

2 VICE-CHAIRMAN LOW: All right. We're on 21.
3 How many people believe that 21 means what Richard says
4 and it's okay and we don't have to put that in the general
5 category of the signature stuff we're going to draft? Who
6 agrees with Richard and who thinks that should be accepted
7 as it is, as distinguished from putting that in the other
8 category of to be done with the signature? Richard, you
9 agree, don't you?

10 MR. ORSINGER: I don't really care where you
11 put it, but if you want to put it in the signature rule
12 I'm okay with that.

13 VICE-CHAIRMAN LOW: Well, I'm just asking
14 how they feel about it. Judge Hecht.

15 HONORABLE NATHAN HECHT: Well, again, I
16 mean, it seems like we're drifting that way, but it might
17 be helpful to know if there is any sentiment remaining to
18 mean by signature in the Rules of Civil Procedure anything
19 other than what's meant by a signature under state law,
20 whether for orders, pleadings, affidavits, or whatever;
21 and if there is then we need to work on that.

22 VICE-CHAIRMAN LOW: Right.

23 HONORABLE NATHAN HECHT: But if there isn't,
24 which it sounds to me like we're all resisting that but
25 sort of drifting closer and closer, then that might

1 resolve about two-thirds of these issues.

2 MS. SWEENEY: I move we adopt state law.

3 PROFESSOR CARLSON: In which court of
4 appeals?

5 MS. SWEENEY: All of them.

6 VICE-CHAIRMAN LOW: Who agrees we should
7 follow state law?

8 HONORABLE SARAH DUNCAN: Whose law do you
9 want to adopt? Would that be First Court,
10 FourteenFourteenth Court?

11 VICE-CHAIRMAN LOW: Just a minute. Lamont.

12 MR. LAMONT JEFFERSON: I think the real
13 hesitation here is the newness of this electronic
14 signature thing, and no one knows exactly how it works.
15 No one has read UETA and no one really understands how
16 this is going to develop in commerce. What we could all
17 agree, I think, is that a signature, a handwritten
18 signature, whether it's scanned, in whatever format, is a
19 signature.

20 I mean, I think, no one would disagree about
21 that, so we could solve a lot of these questions and get a
22 rule in place that would allow electronic filing if we
23 just said that, that you had to have a handwritten
24 signature in some form on whatever gets filed and not an
25 electronic signature, that an electronic signature isn't

1 good enough. So and then whatever gets transmitted to
2 Texas Online it gets transmitted as a PDF or something
3 that has someone's handwritten concerns, which addresses
4 Justice Jennings' concern, which I agree with. There is
5 -- you don't feel like you signed a document just because
6 you logged onto your computer, but you have.

7 VICE-CHAIRMAN LOW: And that's the whole
8 thing about all of these rules. The rules are designed,
9 as Richard drew them, to make electronic filing
10 permissible and put it in the rules, and the thing that's
11 bogging us down is every place there is a signature and
12 the problem is what does that constitute and what do you
13 want and how do you know that it's your signature, and if
14 it's just a sign I haven't read it, and I only read when I
15 sign in pen and ink.

16 So I think we're not going to be able to get
17 much -- I mean, the mechanics I think are no problem. I
18 mean, there might be some, but the main thing is the
19 signature. Don't you see that, Richard? The main -- so
20 what do you think we can accomplish?

21 MR. ORSINGER: Well, let's decide whether or
22 not we're going to fix this issue of a deemed signature in
23 the signature rule. If we are then we will and then let's
24 move on to methods of service.

25 VICE-CHAIRMAN LOW: All right. Are we going

1 to fix -- who wants to fix this deemed signature,
2 incorporate that in the general signature rule? All
3 right. Instead of -- or who wants the rule as written?

4 MR. ORSINGER: We have got to have the
5 number on that. It was like four.

6 MR. LOW: No, I'm telling them what the vote
7 is, what they're voting on. All right. Who favors --

8 MR. DUGGINS: The question is whether or not
9 we're in favor of a general rule defining what a signature
10 is?

11 VICE-CHAIRMAN LOW: Whether this rule would
12 come within the general rule of signature, whether we fix
13 this rule in that general rule; or do we accept this rule
14 as stated, where you don't need that, it's a deemed
15 signature when you file it. Who wants -- who is in favor
16 of Rule 21 as written?

17 HONORABLE TRACY CHRISTOPHER: As written?

18 MR. LAMONT JEFFERSON: Without the signature
19 rule or with the signature rule?

20 VICE-CHAIRMAN LOW: As written. As written.

21 HONORABLE TOM GRAY: As it's in the books?

22 PROFESSOR CARLSON: As Richard has presented
23 it.

24 VICE-CHAIRMAN LOW: No, as written by
25 Richard.

1 HONORABLE TOM GRAY: Okay. That's
2 different.

3 VICE-CHAIRMAN LOW: All right. Who wants it
4 only -- who wants that to be taken care of in the general
5 signature rule?

6 All right. There is no need to count, just
7 the majority want to take care of it there. All right.

8 MR. ORSINGER: Okay. The next one is Rule
9 21a, and Rule 21a permits service of pleadings, motions,
10 and whatnot on other parties either in person or by
11 courier, receipted-delivery or by certified and registered
12 mail or by fax, and then they add "or by electronic
13 transmission to the recipient's e-mail address." This
14 authorizes e-mail service.

15 Now, later on in the rule, the next
16 underlined sentence, says that electronic transmission
17 service may be effected only where the recipient has
18 agreed to accept it or the court has ordered it. Okay.
19 So in the context, this is either based on your consent or
20 by court order that you can't do anything about, then
21 e-mail is one available method of service of pleadings and
22 motions.

23 VICE-CHAIRMAN LOW: In other words, you
24 can't do it unless the court orders or you consent.
25 That's written into the rule that you've written, right?

1 MR. ORSINGER: That's right.

2 VICE-CHAIRMAN LOW: So the alternative would
3 be that it's just automatic, I guess, that you don't
4 have to -- that the court doesn't have to order it or you
5 don't have to agree to it that it would be done
6 electronically, right?

7 MR. ORSINGER: Well, if we don't make any
8 change at all there is no authorization for e-mail
9 service, so we've got to authorize it.

10 VICE-CHAIRMAN LOW: I understand.

11 MR. ORSINGER: The proposal is to authorize
12 it only as against people who have consented to receive
13 service that way or where the court has ordered it, and I
14 can tell you from personal experience the judges that have
15 electronic filing also order electronic service because
16 they're trying to get away from paper. So this can't hurt
17 anybody that doesn't want to play along unless you're in a
18 court that forces you to do it, and there's nothing you
19 can do about that anyway, but without an amendment like
20 this there is no authority for e-mail service except under
21 local rules of judges who have adopted e-filing.

22 PROFESSOR DORSANEO: Let's keep going.

23 VICE-CHAIRMAN LOW: All or none. Anybody
24 opposed to 21a? So far.

25 HONORABLE TRACY CHRISTOPHER: Wait, wait,

1 wait.

2 PROFESSOR DORSANEO: No, there's more.

3 MR. ORSINGER: But, no, you know, the more
4 is going to get us into the deemed signature part, so why
5 don't we just see if people pass on this?

6 PROFESSOR DORSANEO: No, there's a little
7 bit more than that.

8 MR. ORSINGER: Okay. Bill, go ahead.

9 PROFESSOR DORSANEO: In this sentence that
10 we had trouble with earlier, "the party or attorney of
11 record shall certify to the court compliance with this
12 rule in writing or over signature," now that general
13 statement, if that will work, covers more territory,
14 including "the recipient has agreed to receive electronic
15 service or the court has ordered it." Now the certificate
16 of service that's not informative about what it means
17 covers more stuff, and I'm just pointing that out. Okay?

18 It seems to me, though, that in the case of
19 "service by electronic transmission is deemed" that that's
20 in the same category as the other stuff that would go in
21 the signature rule. So I'm happy with this if that "in
22 the case of service" sentence, "a certification is deemed"
23 moves to the general rule and if everybody understands
24 that this -- the certificate of service sentence that we
25 dealt with before has more to it now.

1 VICE-CHAIRMAN LOW: Well, all right. Tracy.

2 HONORABLE TRACY CHRISTOPHER: My only
3 suggestion with respect to the first underlined change,
4 "or by electronic transmission to the recipient's e-mail
5 address," I anticipate that in some law firms people will
6 set up an e-mail address for everybody versus a personal
7 e-mail address, and so the only thing I might add to this
8 is to say "to the recipient's designated e-mail address"
9 or some language to that effect to show that it's the one
10 that they agree to accept pleadings at.

11 VICE-CHAIRMAN LOW: All right. Do you have
12 any objection to that?

13 MR. ORSINGER: Not at all. But let me
14 clarify something in the record. I am not on the
15 committee that wrote this, I didn't write this, and I
16 can't agree for the committee to change this. There are
17 people over there that did participate in that and maybe
18 we ought to ask them if they have any problem with it.

19 MS. WILSON: No, that's good. We're fine
20 with that.

21 MR. ORSINGER: You're okay with that?

22 MS. WILSON: Yes.

23 MR. ORSINGER: Okay. They say that the
24 committee has no problem with adding "designated." "To
25 recipient's designated e-mail address."

1 VICE-CHAIRMAN LOW: All right. Just go
2 ahead and consider that as in there. Richard, you had
3 your hand up.

4 MR. MUNZINGER: It seems to me that it would
5 be a convenient way of indicating one's consent to be
6 served by an e-mail address to have this rule provide that
7 an attorney may indicate his consent to be served by an
8 e-mail address by adding the same to his signature line as
9 required by rule whatever it is that says every pleading
10 has to be signed with your name, address, and telephone
11 number, so that if I add my e-mail address under my
12 signature it is automatically assumed that I have
13 consented to be served at that e-mail address. Then you
14 don't have to have agreements and wait around for it.

15 HONORABLE TRACY CHRISTOPHER: That's a good
16 idea.

17 VICE-CHAIRMAN LOW: That sounds like a good
18 suggestion. Carl.

19 MR. LOPEZ: Yeah, is electronic transmission
20 defined anywhere? I mean, I've had people send me a Word
21 Perfect document that they thought was in good shape and
22 it was a disaster.

23 VICE-CHAIRMAN LOW: I don't know.

24 MS. HOBBS: I have a question about that.
25 My understanding -- and the e-filing folks can correct me

1 if I'm wrong. My understanding was that I sent my
2 document to Texas Online and Texas Online filed my
3 document with the court and sent my document to the party.

4 That's a very different thing than if I'm at
5 my desk and I e-mail the other party, and I'm just
6 wondering what the JCIT's position is on which of those --
7 those are two different things, and what is your intent?
8 Because if it's the former, I think you need to add "or by
9 electronic transmission through Texas Online to the
10 recipient's designated e-mail address," if that's what you
11 intend.

12 HONORABLE TRACY CHRISTOPHER: You do need
13 that.

14 HONORABLE KENT SULLIVAN: That's a very good
15 point.

16 MR. ORSINGER: Well, let me just ask, I
17 mean, are we saying that if I file a motion conventionally
18 that I cannot serve it by e-mail even if somebody has
19 agreed to accept service by e-mail?

20 MS. HOBBS: That's a good question.

21 MR. ORSINGER: I mean, because I do that
22 right now all the time, and we don't have this, but they
23 agree to do it and nobody fusses over it, so we're just
24 off in our own little universe. But you're now making it
25 impossible to conventionally file and serve by e-mail, and

1 I don't know if we want to do that.

2 MR. LOPEZ: That's kind of what I was
3 talking about.

4 HONORABLE NATHAN HECHT: No, we're just
5 asking.

6 MS. WILSON: We anticipate that it could be
7 either way. It's up to the parties. If they want to do
8 it strictly through Texas Online, they can; or if they
9 want to do it on their own between two e-mails, they can.
10 It could go either way. Anything that comes into the
11 court through the clerk has to come through Texas Online,
12 though. Now, the service itself can be done through Texas
13 Online or can be done among the parties through an e-mail
14 and does not have to go through Texas Online. We
15 anticipated both.

16 VICE-CHAIRMAN LOW: Richard.

17 MR. MUNZINGER: I have a question as to
18 whether Texas Online automatically serves the people who
19 are identified in the certificate of service. My
20 understanding of Texas Online is I send my petition to
21 Texas Online. It's registered with Texas Online and sent
22 to the district clerk of Dallas County, Texas. Does Texas
23 Online -- let's make it not a petition. Let's make it a
24 motion for continuance. Does Texas Online send it to all
25 persons who I have certified in my certificate of service?

1 MS. WILSON: Only if you have checked that
2 you want that service and you have paid the fee for that
3 service as part of that filing.

4 MR. MUNZINGER: Me, the sender?

5 MS. WILSON: Yes, sir.

6 MR. MUNZINGER: But there is no indication
7 in that that the recipient has consented to service by
8 e-mail with you or anyone else as yet?

9 MS. WILSON: Yeah, you may want to do that
10 one.

11 MR. GRIFFITH: The way the system works is
12 it is elective on the recipient's part. If they register
13 with Texas Online as willing to accept electronic service
14 then we can serve them. Otherwise it has to go through a
15 traditional method.

16 MR. MUNZINGER: So I'm attempting to serve a
17 Luddite and he doesn't register with you. How do I find
18 out that I didn't get service to him? Will you send it
19 back to me and say --

20 MR. GRIFFITH: What you'll actually see when
21 you select electronic service is those parties who have
22 agreed to accept electronic service. If his or her name
23 does not appear on there then you have to serve them some
24 other way.

25 VICE-CHAIRMAN LOW: Let me interrupt, and

1 it's my fault, but there are some people that have
2 scheduling problems, and I know you do, and we don't want
3 to lose you, but we're going to lose some of the people
4 that want to participate in this jury shuffle or doing
5 away with the jury shuffle; and if I spend about at least
6 30 minutes talking about that, whether we resolve it then
7 and come back to it, I need to do that so everybody is
8 heard. When do you have to leave?

9 Yeah. I'm talking about the four over on
10 the back.

11 MS. WILSON: We're here.

12 VICE-CHAIRMAN LOW: Okay. Forgive me, and I
13 apologize.

14 MR. ORSINGER: Some of them live in Austin,
15 but Dianne lives in Fort Bend County.

16 VICE-CHAIRMAN LOW: Okay. But I apologize,
17 but I really do because we're fixing to lose some people,
18 and it's my fault for letting this happen, but would
19 everybody -- Richard, you hold your place there, and let's
20 switch gears and go because this is a topic a number of
21 people are interested in, and I want to be sure those with
22 scheduling problems have a chance -- whether they're here
23 when we vote or not, have a chance to be heard, because
24 there are probably several people want to address the
25 issue.

1 We were first assigned the task of
2 determining whether or not and if so how we would shuffle
3 the jury electronically, and there are a number of
4 statutes and so forth talking about electronic selection
5 of jurors, if the county signs onto it, and electronically
6 doing all this. We've gotten letters from several who
7 want to do away with the shuffle.

8 Now, before we start I'll tell you that the
9 shuffle came about before the new rules in 1941. It was
10 amended in '90 or '92 so you could only get one shuffle,
11 no matter who requested it. There was a law review
12 article written about it in '94, a *Texas Bar Journal*
13 article, questioning how that would affect your -- oh,
14 what's the --

15 HONORABLE DAVID PEEPLES: Batson.

16 VICE-CHAIRMAN LOW: Batson strikes, yeah.
17 There is a case, the Supreme Court of Texas, in an opinion
18 by Judge Denton in 1972 -- let me get that. At any rate,
19 1972, that where the bailiff just took the people as they
20 came and he put their cards there, you know, nothing; and
21 they said that was okay and it wasn't error not to give a
22 shuffle.

23 There is a case in 2002 by the Court of
24 Criminal Appeals which held that it's not error. So
25 basically there are already two cases from a high court in

1 Texas that holds that it's not error. To do away with it
2 would mean then you couldn't do it. As I see the law now,
3 the judge has a right and probably would not be reversed
4 if he didn't give it. Now, that's giving you my own
5 opinion, and I'll give you the cases for the record if
6 you -- let's see. What number was that? Eight. All
7 right.

8 The Ford vs. State in 73 3d 923, three
9 judges dissented. That's the criminal appeals case.
10 Rivas vs. Liberty Mutual is in 480 S.W. 2d 610, written by
11 Judge Denton. So with that, who wants to take -- Bill.

12 PROFESSOR DORSANEO: I have two things to
13 say. I think the understanding in civil cases is that the
14 shuffle is required and that Rivas is no longer the law
15 for civil cases. I don't know what the Court of Criminal
16 Appeals has held.

17 VICE-CHAIRMAN LOW: I can't -- I saw no case
18 that overruled that.

19 PROFESSOR DORSANEO: Well, our case book has
20 such a case in it. I just don't remember its name right
21 now; but the other point is that this Rule 223, as I've
22 always understood it, doesn't apply in counties that
23 aren't governed by the laws providing for interchangeable
24 juries.

25 So when we're talking about really small --

1 we're talking about one-court counties. We're not
2 talking -- really, you know, smaller counties we're not
3 talking about a shuffle being provided for under the rules
4 anyway. That kind of seemed backwards to me, that you
5 would want to have a shuffle, if you wanted to have one at
6 all, in the smaller counties rather than in Dallas County
7 or any county that has I think as many as two district
8 courts or two courts that use something amounting to a
9 central jury room. So it's just to those points, but
10 otherwise I don't have anything to say at this point.

11 MS. SWEENEY: Mr. Chairman?

12 VICE-CHAIRMAN LOW: Okay. I did not do
13 extensive research on this. I found -- and you tell me
14 Rivas has been overruled by Texas Supreme Court you think?
15 Or maybe by legislative action?

16 PROFESSOR DORSANEO: No, I think it's been
17 -- I mean, I know there is case law and I think it's
18 Supreme Court case law that says you're entitled to a
19 shuffle when the list gets to a particular court, in civil
20 cases anyway.

21 VICE-CHAIRMAN LOW: All right. Then
22 disregard that. The Court of Criminal Appeals case still
23 stands, doesn't it?

24 PROFESSOR DORSANEO: I'm embarrassed to say
25 I don't read the Court of Criminal Appeals opinions.

1 MR. ORSINGER: He teaches civil procedure,
2 not criminal.

3 VICE-CHAIRMAN LOW: Well, I don't teach
4 either one of them. All right, Paula.

5 MS. SWEENEY: Buddy, I think there is two
6 issues on the table, and it might help us to move forward
7 to decide which one we're going to talk about first, and
8 what started all this was the letter from Judge
9 Christopher about modifying the shuffle procedure to
10 ensure that it could be done electronically and just
11 changing the rule to make clear that we don't have to put
12 the pieces of paper in a hat, that we can do it on a
13 computer. So that's what got us on this road, and the
14 subcommittee has a pretty good working draft of a proposal
15 to that effect.

16 VICE-CHAIRMAN LOW: Okay. Let's do that.
17 That's the way it's actually listed on the -- but I wanted
18 to state the whole thing, even though apparently part of
19 what I stated was inaccurate. Go ahead.

20 PROFESSOR DORSANEO: I think so. I'm not
21 saying you're inaccurate.

22 MS. SWEENEY: You-all have an e-mail that's
23 on the table over there of the most recent draft of the
24 proposal to work on the existing rule. The separate
25 question that will require, I think, more considerable

1 discussion is whether to retain the rule.

2 As to the content of the existing rule,
3 Judge Christopher's suggestion was that we allow some
4 other process of random selection, be it computer or
5 otherwise, and that has been written into the rule. So it
6 says the jury panel is to be shuffled by computer,
7 manually, or by other process of random selection. Jeff
8 Boyd suggested the addition of the phrase -- instead of
9 "or by process of other random selection," that it say "or
10 by other process that ensures a completely random
11 selection," either of which I think is fine, and I think
12 his language is probably a little better.

13 We spent a lot of time on the subcommittee
14 debating exactly how to phrase when voir dire begins for
15 purposes of establishing that the shuffle has to be before
16 voir dire begins, which is the rule. So we tried a
17 variety of different ways to phrase that and ran into the
18 issue that you have when you've got a questionnaire, the
19 issue that you have of when the panel is brought in, and
20 essentially at this point have said we can't get all that
21 into this rule; but it does say "prior to the beginning of
22 voir dire"; and the parties in each individual case will
23 have to ascertain when voir dire begins, at least as it is
24 currently left.

25 So right now the rule has remained silent on

1 when voir dire begins, and particularly we came to that
2 because of the jury shuffle issue because -- I mean the
3 jury questionnaire issue, because sometimes you get the
4 questionnaires a week before you ever come to the
5 courthouse to where the jurors are, and the issue is then
6 at what point can you command a shuffle in that instance.

7 Some of the courts before granting leave to
8 use a questionnaire will tell the parties, "I'll give
9 you-all a questionnaire, but you can't shuffle," and
10 that's the quid pro quo for being able to use a
11 questionnaire, so that's already being addressed on a
12 case-by-case basis. But in any event, the subcommittee
13 thus far has not come up with a proposal to redefine what
14 is the beginning of voir dire. The rule just says "prior
15 to beginning," so that the gist of what's before you in
16 terms of fixing the initial proposal or suggestion by
17 Judge Christopher is can we now say "shuffle the names of
18 all members of the assigned jury panel in the cause by
19 computer, manually, or by other process that ensures a
20 completely random selection" or "by other process of
21 random selection."

22 VICE-CHAIRMAN LOW: So, basically, in other
23 words, I know some of you might want to do away with the
24 rule, but assume the majority doesn't. Let's treat this
25 as to how we're going to handle the shuffle and then we

1 can get to the question of if we do away with it then what
2 we've done there is moot. Levi.

3 HONORABLE LEVI BENTON: I don't know that
4 I'm prepared to accept that a majority of the committee
5 would like to retain the shuffle, and I think perhaps it
6 might be worth the effort to take at least some straw vote
7 initially before we invest time debating the nuances of a
8 rule, if we have a rule, to first determine whether a
9 majority would like to retain the rule. I confess I
10 missed part of Paula's initial comments having a
11 conversation with Justice Bland.

12 MS. SWEENEY: You should have been listening
13 to me.

14 HONORABLE LEVI BENTON: And but I think she
15 said something along the lines of how this was teed up. I
16 can see this was teed up initially by Judge Christopher's
17 letter, but -- and I don't think I misspeak here -- even
18 Judge Christopher joins me in my effort to get the rule
19 abolished.

20 VICE-CHAIRMAN LOW: See, the thing is that
21 we have on the schedule that came to me and it came out,
22 your letter was in there, but it says about the jury
23 shuffle. We're going to get to whether we do away with
24 it, but first we're going to determine what this
25 committee's work -- and if it's wasted effort, it's wasted

1 effort, because they have spent a lot of time doing that.

2 HONORABLE LEVI BENTON: Fair enough. I
3 can't control the Chair here in this proceeding.

4 (Laughter.)

5 VICE-CHAIRMAN LOW: I haven't had any cases
6 in his court.

7 HONORABLE LEVI BENTON: And if it's the
8 Chair's desire to waste the jury's time, so be it.

9 VICE-CHAIRMAN LOW: You tell your juries
10 that?

11 MR. DAWSON: Buddy, I'll be your local
12 counsel.

13 VICE-CHAIRMAN LOW: All right.

14 MS. SWEENEY: Mr. Chairman, I appreciate
15 what Judge Benton is saying; however, we don't have the
16 power to abolish the rule or keep the rule. We only have
17 the power to make a recommendation to the Court, and the
18 Court has asked that we address the content of Judge
19 Christopher's proposal. I think we also have to address
20 the other proposal, which is whether or not to abolish the
21 rule, but I don't think we can just say, "Well, we blew
22 off the rule so we don't have to do the homework on the
23 content of the draft." So I do think that this committee
24 should vote on or discuss whether or not we're going to
25 allow computer shuffling, and frankly, I recommend it, and

1 I think the rule works as it's written.

2 VICE-CHAIRMAN LOW: And also, if we vote to
3 do away and the Supreme Court doesn't want to, they're
4 going to want this. So we've got to address it. Tracy.

5 HONORABLE TRACY CHRISTOPHER: I respectfully
6 like it the way we have here, which on the e-mail is just
7 "or by other process of random selection." That language
8 came straight out of 35.11 of the Code of Criminal
9 Procedure, and I just think we should have a mirror image
10 between those two rather than adding in extra words, so
11 that's where I came up with it to begin with, "or by other
12 process of random selection."

13 MS. SWEENEY: And that's fine by me.

14 VICE-CHAIRMAN LOW: Anybody else have
15 anything to say about the language used in -- as drawn
16 here?

17 PROFESSOR DORSANEO: Mr. Chairman?

18 VICE-CHAIRMAN LOW: Yes.

19 PROFESSOR DORSANEO: I'm looking at what
20 Carl has, the most recent shuffle rule proposal, and it
21 consists of these three separated sentences, right?

22 MS. SWEENEY: "After assignment to a
23 particular court" and "prior to beginning"?

24 PROFESSOR DORSANEO: Yes.

25 MS. SWEENEY: Yeah. That's it.

1 PROFESSOR DORSANEO: All right. I follow
2 that. Does it -- in the current rule that "after such
3 assignment to a particular court" is in a proviso.

4 HONORABLE TRACY CHRISTOPHER: Eliminated the
5 "provided, however."

6 PROFESSOR DORSANEO: So is this meant to
7 apply to all courts or only to counties governed as to
8 juries by the --

9 HONORABLE TRACY CHRISTOPHER: It's going to
10 be in that rule. It's just like a separate paragraph in
11 that rule.

12 VICE-CHAIRMAN LOW: 223, the first sentence
13 says it's only interchangeable. That's what the rule
14 says, isn't it?

15 PROFESSOR DORSANEO: Well, but if you take
16 the proviso out I think you create a potential ambiguity
17 because the rule is kind of an odd rule anyway. I mean,
18 the proviso is normally what we think of as the main part
19 of this rule and has this other stuff up at the beginning,
20 and my question is do you mean for this to be applicable
21 to all courts or only in counties governed as to juries by
22 the law providing for interchangeable juries?

23 HONORABLE TRACY CHRISTOPHER: Well, since
24 it's only in 223 I thought that's where it -- I mean
25 that's the title of 223.

1 PROFESSOR DORSANEO: Maybe I'm wrong, but I
2 think if you take it out of the proviso it looks like it
3 might have broader application than what is in the
4 proviso.

5 MS. SWEENEY: There was no intent to do
6 anything other than change the procedure in wherever it's
7 allowed now, that it's still allowed. The only difference
8 is you can do it by computer instead of putting them in a
9 hat. That's the only intent of the change intended by the
10 subcommittee.

11 PROFESSOR DORSANEO: Actually, I think if it
12 applied across the board it would be a good idea.

13 VICE-CHAIRMAN LOW: Well, we haven't
14 considered that.

15 MS. SWEENEY: You would like it to apply in
16 every county?

17 PROFESSOR DORSANEO: I've never seen why it
18 doesn't apply in every county.

19 VICE-CHAIRMAN LOW: Well, the Government
20 Code addresses the interchangeable juries. Let's see,
21 62.016 and 017, but I can't say that I remember.

22 HONORABLE LEVI BENTON: They're right here.
23 That's why I left.

24 VICE-CHAIRMAN LOW: What?

25 HONORABLE LEVI BENTON: The reason I left

1 was to go get 62.016 and 017.

2 VICE-CHAIRMAN LOW: I know it applies. I
3 don't know what it is.

4 HONORABLE LEVI BENTON: It's counties with
5 three or more district courts.

6 PROFESSOR DORSANEO: That's one of them, but
7 there's another one.

8 HONORABLE LEVI BENTON: That's 016, and 017
9 is two or more district courts.

10 VICE-CHAIRMAN LOW: Right. Yeah.

11 HONORABLE LEVI BENTON: So perhaps what we
12 ought to do is just make it applicable to counties that
13 have two or three district courts.

14 VICE-CHAIRMAN LOW: What about more? What
15 if you got -- what if it's four?

16 MR. ORSINGER: He doesn't want it to -- he
17 doesn't want it at all.

18 VICE-CHAIRMAN LOW: I know where he's going.

19 MR. ORSINGER: He's trying to limit it.

20 MR. DAWSON: He's secretly trying to limit
21 it.

22 MR. LOPEZ: It's not so secret.

23 HONORABLE TRACY CHRISTOPHER: If you think
24 the proviso is important, leave it in there. I just
25 thought it sounded sort of old-fashioned and backwards, so

1 I took it out, but --

2 PROFESSOR DORSANEO: Well, I agree it is
3 old-fashioned and backwards, and this rule needs to be
4 recrafted, and it needs maybe to be entitled instead of
5 "Jury lists in certain counties," "Jury shuffle" and have
6 it be a rule that somebody could find and understand where
7 it applies without having to read a sentence that's about
8 65 words long.

9 VICE-CHAIRMAN LOW: Does anybody know why it
10 only applies to those counties, I mean, you know, with
11 interchangeable juries?

12 PROFESSOR DORSANEO: Probably because it
13 said that since 1879.

14 VICE-CHAIRMAN LOW: I mean, I've always kind
15 of just overlooked that and said it applied in every
16 county. I know no history. Nobody here knows the history
17 of it or why it's only those counties that -- with
18 interchangeable juries?

19 MS. SWEENEY: Well, if we retain -- if we
20 use the rule as drafted here and change the title to "Jury
21 shuffle," does that solve your problem, Bill? That
22 particular problem?

23 PROFESSOR DORSANEO: It improves it. All I
24 was trying to do was to ask what your intent was.

25 MS. SWEENEY: That was it.

1 VICE-CHAIRMAN LOW: Paula, I think we have
2 to -- your committee decided not to change anything other
3 than to make this rule as exists work with electronic
4 shuffling.

5 MS. SWEENEY: That's right.

6 VICE-CHAIRMAN LOW: If we need to take a
7 look and see if this rule needs to be changed and not
8 limited to interchangeable juries and so forth, your
9 committee can take a look at that if we vote. So would
10 you take a look at that? Well, let's don't expand it here
11 because your committee hasn't even considered that.

12 MS. SWEENEY: We'll look at that and we'll
13 see if we can figure out how that started and what
14 relevance it still has in this century.

15 VICE-CHAIRMAN LOW: Yeah, because I just
16 don't understand. I underlined "interchangeable juries"
17 and then until I looked at the Government Code I didn't
18 know what they meant and then when I read what they meant
19 I didn't know why. Levi.

20 HONORABLE LEVI BENTON: If we have the rule,
21 then I would like the rule to expressly make a reference
22 to questionnaires and provide that voir dire, the voir
23 dire examination, effectively begins with counsel's
24 receipt of answers to questionnaires if -- even if they
25 haven't visibly seen the panel, and I think that -- I

1 don't have language to suggest, but that seems to me would
2 be consistent with Rule 327, which serves as the basis for
3 new trial upon jury misconduct, giving an incorrect answer
4 on voir dire examination. So if they've incorrectly
5 answered in response to a questionnaire, that would be a
6 grounds for a new trial because of misconduct. It seems
7 to me then consistent with that, voir dire effectively
8 begins once you get the answers back, and so your right to
9 shuffle is lost after you get the answers back.

10 VICE-CHAIRMAN LOW: I understand what you're
11 saying about the questionnaire. I don't relate that to
12 327, but Alistair.

13 MR. DAWSON: The subcommittee looked at
14 that, and the problem is, is that the procedures vary
15 across the state on the circumstances under which
16 questionnaires are used, when they're delivered; and as
17 Paula said, it's my recollection that in Travis County,
18 for example, you get the written questionnaires back a
19 week or two weeks before you even go down there to conduct
20 voir dire. And so because there was such diversity in how
21 the procedures were handled, we felt it better to let
22 individual courts deal with that issue, is my
23 recollection --

24 MS. SWEENEY: Right.

25 MR. DAWSON: -- rather than trying to write

1 one rule that would in effect deprive litigants in some
2 parts of the state from having a shuffle, which might be
3 my esteemed friend's ulterior motive here, but so we just
4 didn't think that was workable.

5 VICE-CHAIRMAN LOW: A lot of times
6 questionnaires the lawyers request, ask questionnaires,
7 and the judge gives them to them and that's not even the
8 order they're in. I don't know whether they're all the --
9 who is where. I mean, you know, but all right. Go ahead.

10 MR. LOPEZ: But you'll have the answer when
11 you get the order. So you know that these six are the
12 ones you most dislike based on substantive answers. You
13 get the list and you see that they're in the front row,
14 you ask for a shuffle.

15 VICE-CHAIRMAN LOW: I know, but see, when I
16 get the questionnaire -- I had this case with John
17 O'Quinn, and we had 95 questionnaires, and I got those and
18 looked -- I don't know what order they're going to be in.
19 I don't know. And so how can I say that all the bankers
20 happened to end up -- well, it wasn't all the people who
21 were interested in giving a thousand million dollars ended
22 up in the first three rows.

23 HONORABLE LEVI BENTON: I don't understand
24 how you would not know, because there has to be some order
25 to the distribution and the collection of the

1 questionnaires.

2 VICE-CHAIRMAN LOW: It is. They collect
3 them as they come in, but they're not numbered then how
4 they are going to be seated on the jury, so I don't know.

5 MR. ORSINGER: I recently had a 350-panel
6 questionnaires, and we would just go by the district
7 clerk's office every two or three days and see which new
8 questionnaires had come in, and we would take them back to
9 the office and look at them. They were not sequenced in
10 advance of showing up in the courtroom.

11 VICE-CHAIRMAN LOW: Me neither.

12 MR. LOPEZ: What's your definition of
13 questionnaire? Are you talking about a jury information
14 sheet?

15 MR. ORSINGER: No, I'm talking about a
16 questionnaire that the lawyers are putting --

17 VICE-CHAIRMAN LOW: That's the term that was
18 used.

19 HONORABLE LEVI BENTON: All right.

20 MR. ORSINGER: They come in at random, and
21 many of them won't answer them at all, and they come in
22 some on some days, some on another. There is no order to
23 it.

24 MR. LOPEZ: That doesn't answer my question,
25 though. I mean, you take the information, you digest it,

1 you figure out who you like and who you don't like, or at
2 least begin to form an idea of who you like and who you
3 don't like. Then when you find out the order they're
4 in --

5 VICE-CHAIRMAN LOW: But we find out when
6 they let us know or we see them we find out what order,
7 but I don't know that --

8 MR. LOPEZ: But then you can ask for a
9 shuffle at that point.

10 MR. DAWSON: I think the point, Buddy, is
11 that once you've had a questionnaire and had time to study
12 it, you have a lot more information upon which to base
13 your questionnaire as opposed to just seeing the panel and
14 getting the court information sheet so you could base your
15 request for shuffle on a variety of other factors other
16 than you just don't like the way it looks, you don't think
17 it's a random selection, there's -- you know, it's a med
18 mal case and there's 15 doctors in the first 20 seats, you
19 know, those kind of issues. It gives you more information
20 from which to make your decision, and some people think
21 you shouldn't have that information before you request a
22 shuffle, right?

23 And if that were workable uniformly across
24 the state I don't know that there would be a lot of
25 disagreement about that, but the problem is, is that the

1 procedures vary so much from county to county that it's
2 not -- it's not -- we weren't able to write one rule that
3 would apply across the state.

4 VICE-CHAIRMAN LOW: Tracy.

5 HONORABLE TRACY CHRISTOPHER: Well, we
6 e-mailed a lot about this. I wasn't really familiar with
7 how all the other counties did it, and I agree with Levi
8 that we should try to define when voir dire begins, but
9 ultimately decided to punt it because really all I want is
10 the ability to have the computer shuffle in the rule and
11 have that passed so that I don't have to keep asking
12 permission of the lawyers and putting it on the record to
13 not put the names in a hat.

14 MS. SWEENEY: And, Mr. Chairman, I would
15 like to, if we could, focus on that and let's just decide
16 this computer shuffle issue. Then if the group wants us
17 to go back and decide what to do about questionnaires and
18 any other issues, we would be happy to -- part of the
19 reason we punted it is because it wasn't our job, so we
20 just slid it off the side of the table. If you-all want
21 to make it our job we'll go do that.

22 VICE-CHAIRMAN LOW: I'm ready.

23 MR. ORSINGER: Okay. I have a question. Is
24 there going to be any regulation or oversight on the
25 software that is supposedly random? Is it going to be

1 issued by the Office of Court Administration? Is every
2 district and county clerk going to have their own
3 software, and how are we going to know if it's truly
4 random?

5 HONORABLE LEVI BENTON: I'm sorry. Say that
6 again, please.

7 MR. ORSINGER: Is every district or county
8 clerk going to design their own software, and if so, how
9 do we know it's truly random? Or is the Office of Court
10 Administration going to design a truly random program that
11 everyone is required to use? Bonnie has an answer.

12 VICE-CHAIRMAN LOW: Bonnie.

13 MS. WOLBRUECK: The Government Code already
14 dictates to the randomness of the jury list, and the
15 computer programs then would have to be designed
16 accordingly with the Government Code, and they're already
17 there because of the criminal shuffle.

18 MR. ORSINGER: So you would use the same
19 randomness that's now mandated by statute --

20 MS. WOLBRUECK: Exactly.

21 MR. ORSINGER: -- to do this shuffle?

22 MS. WOLBRUECK: That's right.

23 MR. ORSINGER: And who verifies the
24 randomness, by the way, under the current practice?

25 MS. WOLBRUECK: Under current practice

1 usually you can get verification through your computer
2 software provider. There are methods for doing that.

3 MR. ORSINGER: But if I show up in a small
4 county in South Texas and I want to find out whether it's
5 truly random, would I just get a copy of their software in
6 advance and give it to a computer analyst?

7 MS. WOLBRUECK: I don't know, Richard.

8 MR. ORSINGER: Okay.

9 VICE-CHAIRMAN LOW: We're going to go back
10 to a similar vote. All right. Kent, did you have your
11 hand up?

12 HONORABLE KENT SULLIVAN: I was just
13 following up on Judge Christopher's point. I was going to
14 ask for a show of hands for those who wanted to continue
15 to use hats.

16 HONORABLE TRACY CHRISTOPHER: Because we all
17 know how random that is.

18 PROFESSOR CARLSON: It says "acceptable."

19 VICE-CHAIRMAN LOW: Let's vote on adding --
20 get the other language, the electronic language that has
21 been suggested by Paula and Tracy. All in favor of that
22 raise your hand.

23 MR. JACKS: What are we voting on, Buddy?

24 VICE-CHAIRMAN LOW: Just raise your hand.

25 It's okay.

1 MS. SWEENEY: Can use computers.

2 MR. JACKS: Thank you.

3 VICE-CHAIRMAN LOW: Is there anybody against
4 that? One person. Everybody. It's unanimous.

5 Now, is the feeling of the committee they
6 want the committee to go back and address those issues
7 we've talked about, when voir dire starts, whether or not
8 it should apply just to interchange of counties or -- and
9 they need to research that because there's got to be some
10 reason that was there to start with. I don't know,

11 HONORABLE LEVI BENTON: Well, I'll say for
12 the record that at least one of us -- no, I'm sorry, two
13 of us did make some effort to find some historical
14 information about the rule, but we --

15 VICE-CHAIRMAN LOW: All right. Give it to
16 us.

17 HONORABLE LEVI BENTON: We didn't find it.

18 MS. SWEENEY: There is, I'll tell you, one
19 law review article written by, shockingly, Michael
20 Gallagher, but it's not the Michael Gallagher that
21 immediately comes to mind. I hadn't seen him write that
22 many law review articles. But it's a 33 *St. Mary's Law*
23 *Journal* 303 in 2004. It's by a Federal judicial clerk,
24 which I thought was intriguing, and it has about as much
25 footnoting and historical information. So if anybody

1 wants to dig in and get that or I will e-mail it to you,
2 and you can spring from those sites. He wants to do away
3 with it. It's kind of a polemic, but at least there is
4 Federal law clerk footnotes in it that you can start with.

5 VICE-CHAIRMAN LOW: Just a minute, Bill.
6 Are there any other things we want that committee to look
7 at and address other than the items I named?

8 MS. SWEENEY: I've got three things.

9 HONORABLE JAN PATTERSON: I want to suggest
10 to the committee that you use the term "prior to the
11 commencement of voir dire" and allow it to be developed by
12 case law.

13 MS. SWEENEY: Okay.

14 VICE-CHAIRMAN LOW: Just a minute. Bill, I
15 believe you had your hand up.

16 PROFESSOR DORSANEO: Did we already vote on
17 this language, Buddy?

18 VICE-CHAIRMAN LOW: No. No. What we're --
19 we have voted to make this the language that makes it
20 electronically possible and so forth, but some of the
21 other language we've not. They're going back, and we're
22 now deciding what else we want them to look at, like when
23 voir dire starts and that kind of thing.

24 HONORABLE LEVI BENTON: Buddy, there is
25 something else I'd like to --

1 VICE-CHAIRMAN LOW: Okay. Wait. Let me
2 answer Bill.

3 PROFESSOR DORSANEO: Because I just was
4 comparing 223 with the language, and the word "random"
5 doesn't appear in 223, and I wonder if it's supposed to
6 end up being random.

7 HONORABLE TRACY CHRISTOPHER: It doesn't,
8 and I wanted it to correspond with the Code of Criminal
9 Procedure shuffle rule.

10 PROFESSOR DORSANEO: Does the Code of
11 Criminal Procedure as interpreted mean that the result
12 needs to be random or only that you need to kind of take a
13 shot at becoming random? Not everybody in the first row
14 wearing ties?

15 HONORABLE TRACY CHRISTOPHER: That I don't
16 know.

17 VICE-CHAIRMAN LOW: They don't address the
18 result. They just address the process. Okay. I'm sorry,
19 Levi.

20 HONORABLE LEVI BENTON: I'd like to propose
21 that the committee also go back and do two things: One,
22 go back and bring up to date and memorialize for us the
23 historical basis for the rule in the first place.

24 VICE-CHAIRMAN LOW: I tried to do that, and
25 they referred me to a statute that's been gone 50 years.

1 HONORABLE JAN PATTERSON: I did, too. There
2 are about three law review articles and a handful of
3 cases. It's easy enough to do. I did it in about a half
4 an hour, and it's not all that useful. We've got the
5 system here, but it's very easy to follow up on, and I
6 want to propose that Paula has an agenda. She has three
7 items, and the committee -- we haven't heard the committee
8 report, have we?

9 MS. SWEENEY: Yeah.

10 HONORABLE LEVI BENTON: You missed it.

11 HONORABLE TRACY CHRISTOPHER: No, the
12 committee report is this language.

13 HONORABLE JAN PATTERSON: I mean, don't you
14 have a list of things that you --

15 MS. SWEENEY: That is our report on what we
16 were asked to do, but all these other issues have sprung
17 like mushrooms around our issue, and so I'm making a list
18 which includes why does the rule say only counties with
19 interchangeable juries, what do we do with the
20 questionnaire issue, what do we do about when voir dire
21 starts, noting your suggestion, and Levi wants me to write
22 a brief on historical significance, which I will of course
23 tender by electronic service to everybody.

24 HONORABLE JAN PATTERSON: Within 30 days.

25 MS. SWEENEY: So that's four things, and if

1 there's something else I will write it down.

2 VICE-CHAIRMAN LOW: Let us know.

3 MS. SWEENEY: Oh, he said two things.

4 What's the other?

5 HONORABLE LEVI BENTON: The other is perhaps
6 the committee ought to just revisit the issue of whether
7 or not we should even maintain the shuffle, unless we're
8 going to do that here today.

9 VICE-CHAIRMAN LOW: Well, I'm prepared to do
10 whatever you-all want to do. We can put it in. I can put
11 it to a vote today or have that committee -- I guess the
12 committee has not really addressed that.

13 MS. SWEENEY: We talked about it, but we
14 have not made a decision or a vote or made a
15 recommendation.

16 VICE-CHAIRMAN LOW: Procedurally I guess it
17 would be more appropriate to at least have the committee
18 consider that before we just put it up to a vote, but if
19 the group wants to vote I'm here.

20 HONORABLE TRACY CHRISTOPHER: Buddy, you
21 know, I'm pretty sure the committee is going to be about
22 three to five against abolishing, so I mean, so sending it
23 back to the committee -- and they just included me. I'm
24 not even on the committee. They just included me because
25 I was the one that brought this up to begin with. I mean,

1 there are a few people that are actually on the committee
2 that want to get rid of it and the rest of them are firmly
3 in favor, so...

4 VICE-CHAIRMAN LOW: All right. Does anybody
5 here object to bringing it up and voting on it to today?
6 Anybody that feels we shouldn't? Well, then let's get
7 with it. All right. Let's talk about it.

8 HONORABLE DAVID PEEPLES: Did anybody not
9 get my e-mail letter on this, because I've got some copies
10 if you didn't? Okay.

11 MS. SWEENEY: And Judge -- for everybody to
12 know, Judge Peeples has made it clear that he does -- he
13 does want to propose that the rule be abolished.

14 HONORABLE DAVID PEEPLES: That the shuffle
15 be abolished.

16 MS. SWEENEY: That the shuffle be abolished,
17 sorry. I didn't spam your e-mail out without your
18 consent, but it does contain his briefing points, and
19 everybody should have it on his briefing, so I guess maybe
20 it --

21 VICE-CHAIRMAN LOW: David, why don't you
22 tell us why you think --

23 HONORABLE DAVID PEEPLES: I was on this
24 subcommittee, and we frankly had trouble meshing the
25 rights of the shuffle with the questionnaire problem and

1 finally just decided let's don't do that, and it occurred
2 to me to see what other states do, how did they do it; and
3 I called the National Center for State Courts and I said,
4 "Can you tell me some other states that have this shuffle.
5 I want to see if I can find out how they work it with a
6 questionnaire," and they said, "I think you're the only
7 state that has it, but I'll get back to you" and then they
8 sent me some things.

9 And then I called a Federal courts
10 magistrate that's a friend, and she said, "We don't have
11 it over here," and the bottom line is the other 49 states
12 and the Federal courts do not have the shuffle in the
13 courtroom; and what they have and what I think we ought to
14 have and what I will -- am militant about is there needs
15 to be randomness on the front end; and if there are small
16 counties that don't have it, we need to be sure that they
17 do.

18 Randomness on the front end I think is one
19 of the fundamental fairness, due process elements that we
20 need to be sure we've got; but once there is randomness at
21 the initial stage it seems to me what goes to the
22 courtroom is random and people shouldn't be able to look
23 at it and decide, "You know what, I like the spares better
24 than I like the first 24 from my own personal view for the
25 case I've got" and have it shuffled in the courtroom. And

1 again, nobody else does that in this whole country and I
2 think the world; and the question for me is should we
3 continue it; and I think that if you grant my premise,
4 which I want to make a premise, which is randomness in the
5 central jury room, the assembly room, or the one courtroom
6 where it happens in a one-county court, once that happens
7 you ought to take what you get.

8 VICE-CHAIRMAN LOW: All right.

9 HONORABLE DAVID PEEPLES: Instead of looking
10 at it from your own partisan standpoint, thinking, "I can
11 improve this if I could mix the spares again."

12 VICE-CHAIRMAN LOW: Alistair.

13 MR. DAWSON: Yeah, and I guess, with all due
14 respect, Judge Peoples, I don't think it's all about
15 randomness. I think that we have lots of procedures and
16 lots of rules and lots of laws that are designed such that
17 every litigant is given as much opportunity as possible to
18 see a fair and impartial jury. It's not about the
19 randomness only. That's part of it, but it's a fair and
20 impartial jury, and that's why we have voir dire, so that
21 people that are not appropriate for the case are excused
22 either by the court or by the parties.

23 That's why we have recusal and
24 disqualification of judges, because there are some judges
25 that you know are not well-suited for a particular case,

1 and I think that we as litigants and we as officers of the
2 court and we as judges and rule-makers, we have an
3 obligation to do everything we can to assist in seating
4 the most fair and impartial jury that one can sit or seat
5 in a particular case, and I recognize that under modern
6 technology in most of the places where all of us operate
7 there are pretty good procedures in there for getting a
8 randomly selective group of 40 or 60 or whatever the
9 number is, but I think we ought to keep the shuffle for
10 two reasons. For many reasons, but here are a couple.

11 One is sometimes the system doesn't work.
12 Sometimes you get statistical anomalies. Sometimes -- and
13 this is particularly true today, because there was an
14 article in the *Houston Chronicle* about the fact that
15 because we only pay \$6 a day for jurors, the percentage of
16 higher income people that are showing up for jury service
17 is much, much higher than lower income people. Lower
18 income people can't afford to get paid \$6 a day, and so if
19 you're a plaintiff and you come down and the first 20
20 people on the -- let's use an absurd example. The first
21 20 people are doctors and this is a med mal case. That's
22 a statistical anomaly. The first 20 people, that's not a
23 random selection of the population at large. So sometimes
24 the system doesn't work, and that's particularly true
25 because of the problems we have in the jury system today.

1 The second thing is -- and I don't have any
2 firsthand knowledge of this, but I understand that in some
3 parts of Texas the jury pool that's allocated to a court
4 is not entirely random. Let me put it that way, that it's
5 subject to abuse; and if that's true then you need -- as a
6 litigant you need something to try and protect against
7 that; and so I say, well, okay, what's wrong with the
8 shuffle?

9 Well, it seems to me there's two issues that
10 I've heard. One is it's inconvenient. Well, you know,
11 that's not a good enough reason in my book to get rid of
12 something that may improve the chances of getting a fair
13 and impartial jury. Then the second reason I've heard is
14 I've heard some people say, well, it can be abused and a
15 shuffle can be racially motivated, and if that happens I
16 would say that's wrong. You shouldn't be able to shuffle
17 for racial means, but I submit that there is a better
18 solution than eliminating the shuffle.

19 If a particular trial judge thinks that it
20 was racially motivated, I suspect, although I have not
21 studied, that the trial judge can say, no, I don't
22 think -- you know, "I don't think that you're allowed to
23 shuffle because I believe, you know, that you're doing it
24 for racial reasons" or whatever or you sort of have a
25 Batson-like challenge, if you will, to the shuffle. I

1 recognize that that creates some issues. It may prolong
2 voir dire; but that's not going to come up very often; and
3 I suspect, and I would be curious to hear from the trial
4 judges in the room, that the number of times when they
5 believed that the jury shuffle was being used
6 inappropriately for racially motivated reasons is
7 exceptionally small, if at all.

8 And if that's the case then I don't see a --
9 and the fact that there are 49 other states and the
10 Federal courts don't have it, again, respectfully is not a
11 good enough reason to get rid of something that can and
12 does help us seek the most fair and impartial jury in a
13 particular case.

14 VICE-CHAIRMAN LOW: Levi.

15 MR. DAWSON: Levi wishes to announce that he
16 agrees with everything I just said.

17 HONORABLE LEVI BENTON: I really think
18 Alistair's argument makes my case. Nothing about having
19 an opportunity to see what the venire panel looks like or
20 to read about them is consistent with impartiality. It is
21 intellectually dishonest to suggest that justice is blind,
22 but it's only blind after I get to see what they look like
23 or where they come from. Now, nothing that I have ever
24 said to Alistair privately or informally or that I have
25 said formally on this issue would ever suggest that I

1 wanted to see this abolished because of inconvenience.

2 That is not a reason, it's not an issue.

3 The truth of the matter, my motivation is
4 about promoting blind justice. Alistair's arguments about
5 the statistical anomaly really just translated is one side
6 or the other wishes to use one socioeconomic group or
7 another as their pawn. I love Alistair, but that's one
8 translation of your words.

9 MR. DAWSON: Well, that's your translation.

10 HONORABLE LEVI BENTON: Now, he says the
11 shuffle protects against abuse. I respectfully suggest
12 that's bullshit. How does it protect against abuse? If a
13 district clerk is going to be corrupt, the district clerk
14 is going to be corrupt, and nothing about the shuffle is
15 going to change that.

16 So I wish I had the ability to be statesman
17 like David Peeples, others on this committee. I don't
18 know how our predecessors got to this rule. It is not
19 consistent with blind justice. It doesn't make the panel
20 any more or less random, and I really -- I wish the Court
21 would, even without permitting us to conclude debate on
22 this, abolish it.

23 HONORABLE TERRY JENNINGS: I just would like
24 to make a point between -- there is some discussion here
25 about why is 223 different than 224, and just one thing

1 that occurs to me is when you look at Rule 223, of course,
2 it's talking about counties governed as to juries by the
3 laws provided for interchangeable juries, and then it goes
4 on and further talks about juries that are selected for
5 service in one court can be basically put back into the
6 general panel after service.

7 Of course, the other rule, Rule 224, you
8 don't have that mechanism. You just have the assignment
9 to the court. So maybe what the drafters intended in Rule
10 223 is that, well, after you've had jurors assigned from
11 the general panel to a specific court and then either
12 rejected or whatever, sent back to the general panel, that
13 maybe some of that initial randomness that Judge Peeples
14 is talking about has been taken out of the mix, and maybe
15 there is a reason for allowing a shuffle after someone has
16 been to that court and then rejected and put back into the
17 system again, that maybe that's why they were having a
18 shuffle. And if that's the case then it occurs to me that
19 there's really today no need for a shuffle, and maybe
20 that's why we're such an anomaly and the only state that
21 allows that to happen.

22 VICE-CHAIRMAN LOW: Jan.

23 HONORABLE JAN PATTERSON: I'm curious
24 whether anyone recalls whether this was an issue of the
25 jury task force about ten years ago.

1 MR. ORSINGER: No, it was not. I was on
2 that task force, and we were confined to jury definitions,
3 instructions and questions, and how to preserve error. We
4 didn't discuss this issue.

5 MR. BOYD: I'm actually reading it, and that
6 report does suggest the issue.

7 MR. ORSINGER: Well, then my memory is
8 failing.

9 MS. SWEENEY: Yeah, because I agree with
10 Richard we didn't discuss it.

11 MR. BOYD: Is this the one that Frank Newton
12 led?

13 MR. ORSINGER: No.

14 MS. SWEENEY: No.

15 MR. ORSINGER: No, it was not.

16 MR. BOYD: Here is a report from five years
17 ago or seven years ago.

18 HONORABLE JAN PATTERSON: Justice Cornyn, I
19 think.

20 MR. BOYD: Right.

21 MR. ORSINGER: Well, there was a Supreme
22 Court task force --

23 HONORABLE DAVID PEEPLES: That's what she's
24 asking.

25 (Multiple speakers.)

1 THE REPORTER: Whoa, whoa, whoa. I can't
2 get this.

3 VICE-CHAIRMAN LOW: Let him finish and then
4 speak. All right. Jeff, what else do you have to say?

5 MR. BOYD: It's the Supreme Court of Texas
6 jury task force final report --

7 HONORABLE JAN PATTERSON: That's it.

8 MR. BOYD: -- dated September 8th, 1997. It
9 looks like Frank Newton headed it up; and in short, their
10 response or their recommendation on that issue is that you
11 ought to abolish it except in cases in which a jury has
12 been re-assigned to a different court following voir dire
13 having already occurred in the first court.

14 MS. SWEENEY: That's a different task force
15 than the Supreme Court task force that Richard and I were
16 on. I mean, this ground has been plowed before in terms
17 of handling juries, but the task force that the Court
18 appointed did not cover this issue.

19 MR. LOPEZ: I have a couple of, I guess,
20 comments. One is with regard to what Alistair said. It's
21 not -- I don't think it's statistically correct to say
22 that just because you have ten doctors that one in a
23 thousand cases are going to have ten doctors in the first
24 row. Statistically one in a thousand cases are going to
25 have ten doctors in the front row, and if you have the bad

1 luck to be that one in a thousand, it means you have bad
2 luck. It doesn't mean the process wasn't random,
3 statistically random.

4 So, I mean, either -- I don't know whether
5 it's random. I don't know. I don't have the information
6 to be able to know, just like Judge Peeples said, whether
7 it's random on the front end or not. What I do know is
8 that if it's random, it's random, and it doesn't get any
9 more random the second time, just philosophically. I've
10 always had an uneasy feeling about a rule that lets you
11 look at the panel and then for apparently no reason at all
12 be able to change it, a presumably random panel, again
13 begging that question.

14 HONORABLE TERRY JENNINGS: It's no longer
15 random after you changed it.

16 MR. LOPEZ: So, you know, it all depends on
17 where you look at it. I mean, the defense attorney in
18 that med mal case with those ten doctors on the front row
19 probably doesn't think it's very fair to have it shuffled.
20 I mean, so it kind of depends on how you look at it, but I
21 just have a real issue with it if -- you know, if we have
22 substantive information about them then the argument is
23 voir dire has begun and we really shouldn't be able to
24 shuffle it because we don't like their answers. If we're
25 shuffling it before we know anything about them other than

1 what they look like, that's probably even worse.

2 So I'm kind of -- as a practical matter, I
3 don't really care because it doesn't happen very often,
4 but I think philosophically speaking, unless somebody can
5 give me a better reason than I've heard so far, I think we
6 should do away with it.

7 VICE-CHAIRMAN LOW: All right, Carl.

8 MR. HAMILTON: If we really wanted to do
9 justice we would do it like they do in the criminal system
10 and just question each juror until everybody agrees, but
11 we don't do that, so we're stuck with 24 people. Now, in
12 a lot of counties, Webb County, Starr County, some of
13 these South Texas counties, the lawyers and the parties
14 know 50 percent of the people sitting on the jury. They
15 know their occupations, they know their prejudices; and if
16 there are people on the first 24 that we know are going to
17 be prejudiced, we don't want them on there; and that's a
18 reason for the shuffle, because we're not going to have a
19 fair trial with those people.

20 The second thing is that, as Judge Peeples
21 said, we want a truly random system. Well, the only way
22 we have to safeguard that we get one is with the shuffle
23 because in some counties you think you may get a random
24 selection, but it really didn't turn out that way when
25 they're all seated, and so it probably would cost more to

1 build a system to try to undo that problem than it would
2 be just to allow the lawyers to shuffle.

3 VICE-CHAIRMAN LOW: I asked several of the
4 trial lawyers in my area, and one of them put it to me
5 this way, that said, you know, they have all kind of
6 procedures when you pack a parachute. It's packed right
7 and it's certified to that, but wouldn't you want a
8 reserve chute in the event it didn't work? And that's the
9 way they -- you know, kind of if the system failed and
10 everything is stacked that this is something that they put
11 that didn't harm anybody. It took a little time, but at
12 any rate, that was what one of the lawyers told me, and I
13 asked a couple of the judges there in Beaumont, and they
14 didn't really feel strongly, but didn't feel it should be
15 done away with.

16 JUSTICE HECHT: You might give the reporter
17 a break.

18 VICE-CHAIRMAN LOW: Oh, I'm sorry, excuse
19 me. We need a break for the reporter. I forget.

20 (Recess from 3:31 p.m. to 3:42 p.m.)

21 VICE-CHAIRMAN LOW: Those of you-all that
22 are interested in this be seated, and the ones that aren't
23 go on with your conversation because we're going to hear
24 from about three more people, unless somebody can give me
25 some reasons we haven't heard. Everybody has his own

1 view, and why it's bad, why it's good, and so forth; and
2 before we start losing people we may as well vote unless
3 somebody has some reason we haven't heard. I have heard a
4 number of reasons why we should, why we shouldn't. Paula
5 has not had a chance to voice her view, and I will ask her
6 to do so now.

7 MS. SWEENEY: One, there has been zero
8 evidence of any kind of abuse of this rule. None, nada.
9 Two, it is an important safety valve for those cases where
10 the panel, however it gets there, whether randomly or
11 intentionally, is inappropriate.

12 VICE-CHAIRMAN LOW: Paula, let me stop you
13 just a minute. We're going to be voting pretty soon.
14 Anybody that has to leave, if you want to leave a vote I'm
15 going to allow you to do it. You've heard this argument,
16 you know what you're going to do.

17 HONORABLE LEVI BENTON: Now, that would be a
18 very interesting departure from prior procedure, but I
19 don't control this proceeding.

20 VICE-CHAIRMAN LOW: This is an interesting
21 discussion, but I think it's not fair for somebody who has
22 heard just about every argument you're going to hear, and
23 then because of a scheduling problem -- and if you object
24 to that, well, then that's fine. I just think it's fair.
25 If anybody doesn't want me to do that I will tear it up.

1 All right. Go ahead.

2 MS. SWEENEY: Two, it's an important safety
3 valve in cases where a panel is for whatever that case
4 inappropriately constituted; and three, and most
5 importantly, for some reason we are using the term
6 "random" as a synonym for the term "fair"; and those are
7 not synonymous terms. Random means unaffected by the hand
8 of man, but random does not mean fair. Tsunamis are
9 random; they are not fair. Lightning strikes are random;
10 they are not fair.

11 You can get a random panel that is utterly
12 unfair in a given case because of the nature of the case
13 and the composition of the panel. This rule allows the
14 intelligence in the hands of the lawyers to say, "This is
15 unfair in this case," and although the parties may
16 disagree on whether it is good or bad, or they will agree
17 on whether it's good or bad for a given side, they're just
18 going to want to have it as litigants pull it in the
19 direction they can. That's an entirely different thing.
20 On the one hand you're doing the best you can for your
21 client. On the other hand you're looking at the panel
22 saying, "This is not random in this case," and the shuffle
23 allows the intelligent application of the discretion to
24 fix it, and I would urge you-all to keep it for those
25 instances where a panel is not fair under the

1 circumstances of the case.

2 VICE-CHAIRMAN LOW: Okay. Tracy.

3 HONORABLE TRACY CHRISTOPHER: Well, first of
4 all, I don't think we know that there is no evidence of
5 abuse in connection with the jury shuffle because the jury
6 shuffle can be requested for any reason. So, you know, if
7 you wanted to keep the jury shuffle, you should at the
8 very minimum put restrictions on it. For example, you
9 should not be able to shuffle a jury panel to change the
10 racial mix. You should not be able to shuffle the jury
11 panel to change the male/female mix. Those things are not
12 allowed in terms of peremptory challenges, and they should
13 not be allowed in terms of the shuffle.

14 Paula says random does not equal fair and
15 that I am entitled to a fair jury. If you have unfair
16 jurors, they will be challenged for cause. You are
17 entitled to a random jury, and the unfairness is dealt
18 with through the challenges for cause. This shuffle does
19 not make a fair jury. You do it to make a jury that
20 favors you, and that's why people do it. They do it to --
21 they do it for racial grounds. I've seen it. They do it
22 to get jurors that favor them, they think, because of
23 economic reasons or -- well, usually economic or
24 occupational reasons, and a third reason they do it is to
25 waste time so that they can spend the time doing research

1 on the jury, because in a case that's big enough and I
2 have a big enough panel and there are investigators
3 sitting there, they will take that jury list, they will
4 run out and do a thorough investigation of every juror
5 that's there, and putting in 30, 45, an hour, it will be a
6 lot shorter now if I ever get the computer provision
7 passed, during that time period they do research on the
8 background of the jurors.

9 VICE-CHAIRMAN LOW: Richard, you tried to
10 raise your hand several times, and I apologize.

11 MR. MUNZINGER: Well, all I would say is
12 it's been part of our jurisprudence for a long time. I
13 have practiced law 39 years, and we did it when I started
14 practicing. I don't know that it's always done for racial
15 reasons or bad reasons, but one of the things that
16 advocates do is attempt to obtain juries that are open to
17 their arguments, and I think Paula's point that sometimes
18 you have a jury that may have -- may or may not have been
19 randomly selected and is not necessarily one that is fair
20 from your client's perspective, that's what we as trial
21 lawyers do, and it's our task to do that.

22 That we are the only state that does it, I
23 think it's proof of sanity and intelligence that we're
24 different than Massachusetts, for example, but that's no
25 reason to change a rule that has served Texas trial

1 lawyers.

2 Judge Peeples says' that the operative
3 assumption is randomness. Huge assumption, Judge, in all
4 due respect, a huge presumption. I've picked juries in
5 South Texas where my clients have come to me and said,
6 "That panel is not random. That panel has been jury
7 rigged." And these are people who lived in that
8 community, who work in that community. They were of the
9 same race and the same background of that community, and
10 they insisted upon a shuffle, and the panel was several
11 hundred people. I'm a stranger to South Texas. I don't
12 live there and I don't practice there, but I'll guarantee
13 you that if everybody in this room thinks that everything
14 is on the up-and-up in every jurisdiction in Texas, you're
15 dreaming, because it isn't that way.

16 And the -- I try some cases. I don't know
17 how often I have had a shuffle. I have probably had a
18 shuffle asked against me as often as I have asked for one.
19 I am very reluctant to change our jurisprudence because --
20 I don't mean to be disrespectful, because it
21 inconveniences judges, or juries, for that matter. We pay
22 too much attention to time constraints on our dockets.
23 Trials are searches for the truth. That's the truth of
24 it. Trials are searches for the truth in two or three or
25 four contesting views of different fact circumstances. It

1 takes time to learn the truth. It takes time to ask
2 deliberate questions.

3 That someone researches the background of a
4 jury to make their jury selection more intelligent is not
5 unlawful, shouldn't be unlawful, ought to be encouraged.
6 Now, whether it's done with a shuffle, I'm not sure of
7 that. Maybe we ought to give people more information
8 earlier about the juries. But before you go and change
9 your jurisprudence in a hurry, I think you need to be
10 careful.

11 Paula's point there is no evidence that this
12 is done for racial reasons, I join it. It is one thing to
13 say it's done for race. It may be, or it may not be. I
14 haven't done it for race. My daddy was a German
15 immigrant. He couldn't get a job because he couldn't
16 speak English. He supported himself pretending he was a
17 deaf-mute piano player in 1912, 1914, during World War I.
18 I wasn't raised where race or national origin meant
19 something. My dad would have kicked me around the room if
20 I felt differently, and I haven't acted that way in my
21 life, and I haven't tried cases or picked juries that way
22 in my life, but I don't think you ought to take away a
23 weapon from a trial lawyer.

24 HONORABLE LEVI BENTON: Richard Munzinger
25 and Paula talk about no evidence of abuse. One reason

1 there is no evidence of abuse on shuffles is the
2 intermediate courts, and I believe the Court of Criminal
3 Appeals, have expressly said that Batson doesn't apply to
4 shuffle, so we don't have any body of law about abuses.

5 On your argument that this ought to be about
6 some jury panels being rigged. Richard, here is why you
7 ought to join me on this issue. Where there is a rigged
8 jury panel we ought to motivate and inspire people to put
9 their allegation on the record, to put it to the proof,
10 because if you believe you've had a panel that's been
11 rigged, you'll ask for a shuffle and you'll go on.
12 Instead, make your record, force yourself to go to the
13 district attorney and the U.S. attorney. We've got
14 statutes dealing with getting people through the
15 courthouse.

16 Now, once you're in Starr County or Hidalgo
17 County or Harris County, once the panel is assigned to you
18 you don't have a right to say, "I don't like this panel.
19 Let's shuffle panels, send it back to the central room,
20 give me another panel." Once a case is assigned to the
21 215th in Harris County you don't have the right to say,
22 you know, "Something about Benton I don't like. Refile my
23 case, please. Give me a chance to go to Christopher or
24 Sullivan." It's wholly inconsistent with blind justice.

25 Now, this issue of fairness, well, I don't

1 understand how you conclude that changing the distribution
2 to put those with socioeconomic factors out of the seats
3 you want others in is fair when the other side wouldn't
4 agree it's fair. If we're going to have a shuffle then it
5 ought to say if one side requested it, the other side
6 ought to have the right to reshuffle after they see what
7 they look like. That would be fairer. Giving one side or
8 the other but only one shuffle per case isn't fair because
9 one side or the other is going to go away feeling
10 aggrieved.

11 I'll save the rest for cocktails.

12 VICE-CHAIRMAN LOW: All right. Richard, and
13 then I would be really interested in somebody that has a
14 real argument that hadn't been given two or three times
15 for or against, something new but not repetitive, if there
16 is such a thing. Yeah.

17 HONORABLE KENT SULLIVAN: This is new, but
18 it may be off topic, but I did want to note it in passing,
19 and that is one of the main concerns that resonates with
20 me in favor of maintaining a shuffle is some prospect of
21 corruption.

22 VICE-CHAIRMAN LOW: All right.

23 HONORABLE KENT SULLIVAN: It is, however, a
24 very limited weapon against corruption, and I at least
25 wanted to note, as a practical matter if that is one of

1 the main concerns, don't we have to think about some more
2 comprehensive solution down the road, one of which that's
3 readily available, I think, although it would certainly
4 take effort and resources, is to try and ensure that you
5 draw jurors from a sufficiently large geographic area.

6 One of the reasons in large counties why I
7 think it's impossible to stack the jury pool is not
8 because the clerks or the court personnel are all angels.
9 It's the fact that no one knows anybody else. Everybody
10 is, for all practical purposes, a number.

11 The prospect of a problem arises probably
12 most often where you're in parochial circumstances. The
13 smaller the area from which the jurors are drawn, the more
14 probable it is that everyone knows everyone else, the more
15 possible it is, I think, for some manipulation to occur,
16 and we've all heard at least anecdotal evidence of such
17 things, and I just think it's something worth noting.
18 It's not something we can vote on, of course, but that
19 seems to be at least something that underpins part of this
20 discussion.

21 MS. SWEENEY: Call the question.

22 VICE-CHAIRMAN LOW: Richard. I want to hear
23 Richard.

24 MR. ORSINGER: I also personally, like
25 Richard Munzinger, have experienced picking a jury in

1 South Texas where I felt like the jury was not randomly
2 positioned, and I requested a shuffle, and the shuffle was
3 on paper in front of me. I have now lost that today. Now
4 it's going to be shuffled in some computer, but if that
5 jury panel comes out and it looks just as bad as it did
6 the first time then I might make an objection and then
7 make the effort to spend the money to find out how the
8 computer program determines randomness.

9 But for me as a litigant, as a lawyer,
10 randomness is not as much in the method by which the
11 people get there as it is whether the jury is really
12 randomly mixed; and the way this system works, either side
13 can request a shuffle, but no one will request a shuffle
14 if it looks randomly mixed, because you don't gain
15 anything by if it's randomly mixed, you mix it again,
16 you're back where you started.

17 The only time anybody wants a shuffle is
18 where it doesn't appear to be random in result, not
19 because of any deception, but because in a bell curve most
20 of the juries are going to be in the middle where there's
21 a big arch, but there are going to be some of them that
22 are down there at the lower end of the bell curve where
23 they're going to be lopsided in terms of the way it ends
24 up, even though the method of selection may have been
25 random. And if you're on the plaintiff's side of the low

1 edge or the defendant's side, or if it's family law, the
2 mother's or the father's, or the state or the parent who
3 is being terminated or whatever, if anybody feels like the
4 panel is not really well mixed they can require it to be
5 mixed again, and it's most likely going to trend to the
6 middle. That's why I think you don't see a lot of these
7 shuffles, because most of the juries come out and they are
8 pretty well mixed and you couldn't improve on it by
9 shuffling.

10 So I think that we should not have our eyes
11 closed to the possibility that in smaller counties,
12 particularly where there are factions in the lawsuit and
13 the factions include people in the courthouse, and that
14 happens in the small counties and I've been involved in
15 litigation like that, then we do have to be concerned
16 about the honesty of the system.

17 And then secondly, even a randomly selected
18 jury panel can sometimes be at an extreme, and mixing it
19 one more time moves it back to the middle; and giving
20 either side the opportunity to say, "Man, this is too
21 extreme against me, I want to mix it again" I think is
22 good for the system and the parties.

23 MR. LOW: The reason I didn't go to the
24 district attorney is because he was on the other side. So
25 the district attorney in a lot of these little counties

1 can practice law, and so I felt like I wouldn't be able to
2 get very far. That question was asked, why not going to
3 the district attorney, but it's not always answered.

4 Okay. Judge, I believe you had --

5 HONORABLE TOM GRAY: I was just going to say
6 the second one is not any more -- the second seating is
7 not any more random than the first seating and that I
8 think the tools for fairness or whatever are good. That's
9 why I kicked around the idea with some folks at lunch that
10 thought it was a good idea, some others thought it wasn't,
11 that we take this rule away and give everybody -- or give
12 each side two more jury strikes, peremptory strikes to, in
13 effect, allow them greater opportunity to identify and
14 eliminate the problem jurors.

15 MR. MEADOWS: I'll take that.

16 HONORABLE TOM GRAY: And -- see, there is
17 some balancing there.

18 VICE-CHAIRMAN LOW: Right. There is, but
19 our problem here, we've got to take one step at a time.
20 It's been before us what we do with this. It doesn't
21 prevent us from coming back and say let's change. I don't
22 disagree with you. All I'm saying is it's like money in
23 the bank. It sure looks good, but I can't get to it.
24 And, I mean, you know, we can't get there right now.
25 Somebody just walked out, and I don't want to call for a

1 vote.

2 Well, no, Alistair, and I'm not going to
3 count his vote with the other, but he voted by paper, and
4 I was going to state to the Court how he voted.

5 MR. ORSINGER: Just put it in the record
6 when the vote comes.

7 VICE-CHAIRMAN LOW: Huh?

8 MR. ORSINGER: Just put his vote in the
9 record when the vote comes.

10 MS. SWEENEY: Let's vote.

11 VICE-CHAIRMAN LOW: Okay. Well, we
12 generally haven't done that, and some may object. I just
13 felt it wasn't fair for somebody to be here all day and
14 hear all the discussion and then --

15 MR. LOPEZ: Sounds like he made his view
16 pretty clear when he spoke.

17 VICE-CHAIRMAN LOW: So I won't count it when
18 I do that, but I'll say, "plus Alistair left his
19 handwritten vote" and the Court can consider that however
20 they want to. Bonnie.

21 MS. WOLBRUECK: I was just going to make one
22 comment. All of you have talked about jury shuffles and
23 reasoning for and against it. Just as an anecdote, we had
24 one attorney that practiced with us that asked for a jury
25 shuffle every single time because he was superstitious.

1 He had won a case because he had shuffled the jury, and he
2 believed that he had to have the jury shuffle.

3 VICE-CHAIRMAN LOW: I believe I would do
4 that if I had won a case.

5 MS. WOLBRUECK: So there is a lot of reasons
6 why attorneys ask for jury shuffles.

7 VICE-CHAIRMAN LOW: That's the best reason
8 I've heard. All right. Skip, go ahead.

9 MR. WATSON: Just a quick question to
10 Justice Hecht. I think I remember that Rule 223 was
11 amended in 1990, and what was that amendment? Was that
12 when they knocked it back to one shuffle?

13 VICE-CHAIRMAN LOW: One shuffle, right.

14 MR. WATSON: The last sentence was added?
15 So 15 years ago the Court or someone looked at it and at
16 least had the opportunity to go through all of the
17 balances we're trying to do today, is that correct, and
18 came up with limiting to one shuffle?

19 VICE-CHAIRMAN LOW: I was on the committee.
20 Do you know what --

21 HONORABLE NATHAN HECHT: Go ahead.

22 VICE-CHAIRMAN LOW: All right. People were
23 thinking that if you got a shuffle then the next person
24 got a shuffle.

25 MR. WATSON: No, I remember it. I practiced

1 during that time, too, and remember it.

2 VICE-CHAIRMAN LOW: And so the question came
3 and they said, well -- the discussion was that, you know,
4 the shuffle ensures the randomness, and although our
5 system is designed to be so fair and blind and everything,
6 that this -- in some counties it's blinder than it ought
7 to be; and so we decided, the committee decided, that you
8 should just have one shuffle. The court -- either party
9 could have and that was it.

10 MR. WATSON: Thanks. That answers my
11 question.

12 VICE-CHAIRMAN LOW: All right.

13 HONORABLE LEVI BENTON: Last observation. A
14 number of the proponents of the shuffle have made comments
15 about things that happen in smaller communities. If the
16 Court wants to leave it in those counties where -- you
17 know, say populations of less than 150,000 people, I'm
18 okay with that; but it does seem to me to be a real
19 redundancy in counties like Dallas, Harris, Travis, Bexar,
20 where you're not going to have the service -- first, there
21 is no allegation of jury rigging that's been made, and you
22 don't have the problems that others have expressed.

23 Final observation, Richard Orsinger and
24 others have talked about there is no evidence of abuse.
25 The rule doesn't require the district clerk or any person

1 to keep -- it doesn't require written order, so we don't
2 really know how frequently shuffles are occurring out
3 there.

4 VICE-CHAIRMAN LOW: All right. I'm fixing
5 to have to stop, because we're going to -- we're beginning
6 to repeat ourselves, and I think it's important that we
7 have the people here, we've got everybody here that's
8 heard all of this. If you have something that hadn't been
9 said, I mean, like my preacher, he just keeps talking to
10 me and talking to me and really hadn't done much good so
11 far, but we just need to know which direction we're going,
12 and that's what he tells me.

13 So let's bring it to a vote. Now, what Levi
14 suggests sounds very good, but we don't have that before
15 us whether we eliminate -- that hadn't been studied,
16 eliminate it in certain counties. We have the vote here.
17 Do we just point-blank do away with it, or do we retain
18 it, and that's the vote?

19 HONORABLE KENT SULLIVAN: Mr. Chairman?

20 VICE-CHAIRMAN LOW: Yes.

21 HONORABLE KENT SULLIVAN: Is it possible
22 that we could get some indication from the vote as to
23 whether that's a point of interest for some further
24 research, that is whether it would be --

25 VICE-CHAIRMAN LOW: Well, if it is retained

1 and somebody wants the committee to consider certain
2 things, just like we did earlier, it certainly can be
3 considered, but all we have before us today is whether it
4 goes or whether it stays, and so that's the vote. All in
5 favor of --

6 HONORABLE JAN PATTERSON: I have one last
7 question. Does this issue split out differently between
8 lawyers as opposed to judges?

9 VICE-CHAIRMAN LOW: I really haven't polled,
10 but from what I have heard it generally has, but not in --

11 HONORABLE JAN PATTERSON: Because the
12 only --

13 VICE-CHAIRMAN LOW: I haven't run my own
14 poll, so I don't know.

15 HONORABLE JAN PATTERSON: I would like for
16 us to at least be aware of the notion that some issues are
17 more important to one segment than to another, and I just
18 wonder whether this is more of a lawyer's issue and maybe
19 a clerk's issue than a judge's issue.

20 VICE-CHAIRMAN LOW: I'm going to tell you
21 hearsay because I try to get that in in trial all the time
22 and can't, but I heard somebody else that told me somebody
23 else heard that the lawyers were for keeping it and the
24 judges were against it. Now, that's triple hearsay, so
25 that makes it admissible.

1 Okay. All in favor of doing away with the
2 shuffle rule please raise your hand. Twelve.

3 All in favor of retaining the shuffle rule
4 raise your hand. Twelve.

5 Twelve to twelve.

6 HONORABLE TOM GRAY: And Alistair's vote is
7 off the record.

8 HONORABLE JAN PATTERSON: I didn't vote.

9 VICE-CHAIRMAN LOW: I'm sorry. 13.

10 HONORABLE LEVI BENTON: Can we have a voice
11 vote to be clear?

12 VICE-CHAIRMAN LOW: I might just state for
13 the record, whether the Court wants to receive it or not,
14 Alistair, who heard the argument, he is for keeping the
15 shuffle rule, whether that counts or not.

16 MR. ORSINGER: Buddy, can I also put in the
17 record that I looked around the table, and I didn't see
18 any judges vote in favor of keeping the shuffle rule.

19 HONORABLE BOB PEMBERTON: I did.

20 MR. ORSINGER: You did? Okay. Then one.

21 HONORABLE LEVI BENTON: One appellate court
22 justice.

23 MR. MUNZINGER: Did the Chair vote?

24 MS. SWEENEY: And you also had two
25 abstentions among the judges.

1 VICE-CHAIRMAN LOW: Well, when I voted I
2 thought it was tied, but the vote would have been tied.
3 It would be 14 with me voting. Yeah. No, I didn't vote.
4 13 to 12, but if the Chair had voted I would have voted
5 for keeping it, would have made it 14. And Alistair's
6 would have been 15.

7 HONORABLE LEVI BENTON: Though it might not
8 be the issue before us, so we don't have to return to this
9 unless the Court expressly asks us, might we take a vote
10 on modifying the right to a shuffle so that it applies
11 only in counties with populations of less than some
12 number?

13 VICE-CHAIRMAN LOW: No, I can't take a vote
14 on that. I can say that if someone has a suggestion for
15 the committee to consider on modifying that, in other
16 words, not doing away with the rule but modifying it to
17 certain extent, well, then let's have it. Let's give it
18 to Paula and have the committee consider it, but what
19 would -- all right. I'm sorry, go ahead.

20 HONORABLE LEVI BENTON: That would be my
21 request then to have the committee --

22 MS. SWEENEY: Counties of how much do you
23 want it?

24 HONORABLE LEVI BENTON: What is -- let's
25 see --

1 HONORABLE DAVID PEEPLES: We've talked about
2 this for an hour. How about just change the proposal just
3 a little bit and see if that changes the mix? The
4 strongest argument made here was South Texas and some
5 corrupt counties.

6 MS. SWEENEY: Well, I didn't make the
7 Panhandle argument, but it applies in the Panhandle, too,
8 the other way.

9 VICE-CHAIRMAN LOW: The problem is the
10 committee hasn't even studied that. It hasn't come before
11 the subcommittee, and so we already did the same thing.
12 So let's go through the process we ordinarily go through
13 before we change things. We went through the process to
14 determine whether we keep the rule. We went through the
15 process on the language, and that's the beginning, so
16 we'll begin there. If somebody has something to suggest
17 to Paula then I asked that that committee consider those
18 modifications, whether they would recommend them or not,
19 and we can vote on it.

20 MS. SWEENEY: I've got a list of six things,
21 and I'll ask you if you want me to add a seventh, but I
22 think it is fairly generated by the discussion. One is
23 look at the issue of why it's only counties with
24 interchangeable juries; two is the questionnaire issue;
25 three is when does voir dire start; four is the brief for

1 Judge Benton about the historical basis for the rule; five
2 is -- well, no, five is the one I'm going to suggest so
3 I'll do that next. The five, other is counties less than
4 some number, and I'm going to suggest that we debate
5 whether it can be drafted subject to Batson, that shuffles
6 may be made subject to a Batson challenge because I think
7 there is a legitimate concern there, and if Batson
8 objections were appropriate that might cure some problems,
9 so I would like the subcommittee to talk about that.

10 VICE-CHAIRMAN LOW: Tracy, did --

11 HONORABLE TRACY CHRISTOPHER: That was going
12 to be my request.

13 VICE-CHAIRMAN LOW: That's what I was going
14 to say. You had not just that but you had others. Were
15 there others you suggested?

16 HONORABLE TRACY CHRISTOPHER: I think if we
17 have a Batson protection on the shuffle that would go a
18 long way, so that was going to be my suggestion.

19 VICE-CHAIRMAN LOW: Good cause, I mean, show
20 or something. I don't know. All right. Go ahead.

21 HONORABLE JANE BLAND: There is a case
22 called Miller, et al, the U.S. Supreme Court.

23 MS. SWEENEY: Yeah.

24 HONORABLE JANE BLAND: And in that case they
25 were critical of the Texas jury shuffle in connection with

1 a Batson challenge. In that case they reversed the Fifth
2 Circuit's denial of a certificate of appealability in a
3 habeas corpus case, and in part they reversed the case
4 because they thought that the Texas prosecutor's use of
5 the jury shuffle could be included in an analysis as to
6 whether the Batson challenge was valid.

7 I say that for two reasons. One is I think
8 this vote was very close, and I don't know exactly what
9 the tally was and who was voting and who was not voting,
10 but -- and I also say that in response to that, you know,
11 there is simply no evidence of abuse, because I think the
12 United States Supreme Court concluded at least in one case
13 that it was something that merited looking at.

14 VICE-CHAIRMAN LOW: What was the date of
15 that?

16 HONORABLE DAVID PEEPLES: About a year or
17 two ago.

18 VICE-CHAIRMAN LOW: There is a law review --
19 not a law review. A *State Bar Journal* 1994 article that
20 questioned the jury shuffle and Batson. I think it was a
21 '94 article, and I can't remember who wrote it.

22 MS. SWEENEY: In the *Bar Journal*?

23 VICE-CHAIRMAN LOW: Pardon?

24 MS. SWEENEY: In the *Bar Journal*?

25 VICE-CHAIRMAN LOW: Uh-huh. 1994, and they

1 talked about Batson, and they also mentioned David's point
2 about we were the only state that was right. Or, no, that
3 we were the only state that did that. Okay.

4 MS. SWEENEY: We will meet and report back.

5 VICE-CHAIRMAN LOW: Okay.

6 MR. ORSINGER: Out of curiosity, is the
7 criminal shuffle process similar to the civil shuffle
8 process?

9 HONORABLE NATHAN HECHT: Yes.

10 VICE-CHAIRMAN LOW: Okay. All right. Let's
11 get back to where we were.

12 MR. ORSINGER: About e-filing?

13 VICE-CHAIRMAN LOW: Back on the front
14 burner.

15 MR. ORSINGER: We're back on Rule 21a, and I
16 think we had without vote but by kind of consensus decided
17 that we will not have a deemed signature on -- of service
18 and instead we will have a signature requirement that's
19 already in the rule and will define signature elsewhere.
20 That's the first underlined change on the second page.
21 These are not numbered, mine aren't, but 21a.

22 Now, after that is a sentence that says
23 "Every certification of service by electronic transmission
24 must include the filer's e-mail address, the recipient's
25 e-mail address, and the date and the time of service."

1 So, I mean --

2 VICE-CHAIRMAN LOW: What page are you on?

3 MR. ORSINGER: Well, mine is not numbered,
4 but it's Rule 21a, and it's the last underlined change.

5 VICE-CHAIRMAN LOW: Oh, I see.

6 MR. ORSINGER: The second to last underlined
7 change I think we have developed a principle that we're
8 going to leave the signature requirement in the rule as
9 originally designed, and we're just going to deal with
10 electronic signature separately, and that would have
11 uniform application.

12 VICE-CHAIRMAN LOW: Right. You're talking
13 about line four from the top, which says "signed."

14 MR. ORSINGER: You know, Buddy, I don't
15 know. My version and your version are looking different.
16 If you would look at the last underlined sentence --

17 VICE-CHAIRMAN LOW: "In case of service by
18 electronic transmission certification is deemed to be
19 signed."

20 MR. ORSINGER: No. That's not the last
21 underlined sentence in my draft.

22 HONORABLE TOM GRAY: What rule are you
23 looking at?

24 MR. ORSINGER: 21a.

25 VICE-CHAIRMAN LOW: 21a. I'm with you.

1 MR. ORSINGER: Okay. The last underlined
2 sentence merely requires that the sender include in the
3 certificate of service the sender's e-mail address and the
4 recipient's e-mail address and the date and time of
5 service. Is there any controversy about that?

6 VICE-CHAIRMAN LOW: Sarah.

7 HONORABLE SARAH DUNCAN: Did we change the
8 previous -- on the previous page, the sentence where it
9 was the recipient's designated e-mail address?

10 MR. ORSINGER: Yes, we -- I think kind of by
11 acclamation we put "recipient's designated e-mail
12 address."

13 HONORABLE SARAH DUNCAN: I didn't realize we
14 finished with that sentence. I think it needs to say
15 something more like "the e-mail address designated by the
16 recipient for service under Rule 21a."

17 VICE-CHAIRMAN LOW: All right. Richard, did
18 you hear what she said?

19 MR. ORSINGER: I'm sorry. I missed it.

20 VICE-CHAIRMAN LOW: Repeat it so he can --
21 I'm sorry, Sarah.

22 HONORABLE SARAH DUNCAN: What people had
23 said on the second underlined sentence in 21a was
24 "recipient's designated e-mail address."

25 VICE-CHAIRMAN LOW: Right. He did agree to

1 that earlier.

2 HONORABLE SARAH DUNCAN: I think it needs to
3 be "the e-mail address designated by the recipient for
4 service" because, as Tracy pointed out earlier, I thought
5 it was a good point, I imagine law firms are going to have
6 one e-mail address that is their designated e-mail address
7 for service, a lot of law firms are. So I think the same
8 change should be made to this in the certification.

9 MR. LAMONT JEFFERSON: Might want to fix
10 that just in the next underlined sentence where it says,
11 "Service by electronic transmission to the recipient's
12 e-mail address may only be affected where the recipient
13 has agreed to receive electronic service." Maybe insert
14 there "has designated an e-mail address for purposes of
15 service" and then go onto the rest of the sentence.

16 HONORABLE TRACY CHRISTOPHER: In his
17 pleadings? I mean, we have to show where it's going to be
18 designated.

19 VICE-CHAIRMAN LOW: Let's be sure Richard
20 follows.

21 MR. ORSINGER: The problem with Lamont's fix
22 there is that wouldn't apply when the court orders it.

23 VICE-CHAIRMAN LOW: Then you need to put
24 it --

25 MR. ORSINGER: Why don't we have a separate

1 sentence that we add on saying that "e-mail service may be
2 effective only to the e-mail address specified by the
3 receiver."

4 HONORABLE DAVID GAULTNEY: "For service."

5 MR. ORSINGER: "Specified for service."

6 Otherwise --

7 VICE-CHAIRMAN LOW: Carl has the answer,
8 Richard.

9 MR. HAMILTON: I have just got a question.
10 My question is if you have a law firm that has one common
11 e-mail how do you designate a particular lawyer's e-mail
12 address other than the firm's address?

13 MR. ORSINGER: It's up to the receiver, but
14 if you're the receiver and you choose to have all your
15 e-mails come to your receptionist, you know, for the whole
16 law firm, that's your choice. If you want the lawyer's
17 incoming e-mail to go to the legal assistant, then you
18 specify the legal assistant's e-mail. If you want them to
19 come to you personally, you specify your e-mail. It's
20 your choice.

21 MR. HAMILTON: Okay.

22 VICE-CHAIRMAN LOW: All right. You have the
23 language to give us and where you put it. You would put
24 it in a separate sentence?

25 MR. ORSINGER: Yeah. I would suggest that

1 rather than try to put it in -- or debate about whether to
2 put it in two or three places that we just add a sentence
3 that says e-mail it -- "service by electronic transmission
4 shall be to the e-mail address designated by the
5 recipient" -- what did you say?

6 HONORABLE DAVID GAULTNEY: "Designated for
7 service."

8 MR. ORSINGER: Okay. "To the e-mail address
9 designated by the recipient for service." Okay. So the
10 thought is, subject to the JCIT wanting to put it in a
11 different place in this rule maybe, is just to say
12 "service by electronic transmission may be only to" or do
13 we say "shall be"?

14 VICE-CHAIRMAN LOW: Well, "may be only" and
15 "shall" are both mandatory, aren't they?

16 MR. ORSINGER: "Shall be to"?

17 VICE-CHAIRMAN LOW: That's a shorter way to
18 say it.

19 MR. ORSINGER: Okay. Are we going to decide
20 right now where we're going to put it? Is that what you
21 want to do, Lisa?

22 HONORABLE NATHAN HECHT: Let's keep going.

23 MR. ORSINGER: Okay. Then let's move on to
24 Rule 45.

25 HONORABLE TRACY CHRISTOPHER: Wait, wait.

1 I'm sorry. I had a question on the -- on the "every
2 certificate of service by electronic transmission must
3 include the filer's e-mail address, the recipient e-mail
4 address, and the date and time of service." If I am
5 serving -- choosing to serve through Texas Online, will
6 Texas Online give date and time of service? I mean, how
7 am I going to know -- I know date, but how am I going to
8 know time of service from Texas Online?

9 MS. HOBBS: That's always been my problem
10 with that sentence, too.

11 HONORABLE TRACY CHRISTOPHER: I mean, if I'm
12 just personally sending it I know what time I sent it,
13 but --

14 MR. ORSINGER: Don't you get an e-mail?

15 HONORABLE TRACY CHRISTOPHER: -- if I'm
16 going through a provider for service --

17 MR. ORSINGER: Don't we get an e-mail
18 indicating the time of the service?

19 HONORABLE TRACY CHRISTOPHER: Yeah, they're
20 supposed to give you an e-mail, but I couldn't certify as
21 to what time that was. I mean, Texas Online sends me an
22 e-mail after the fact saying that they did it, but I
23 couldn't include it in my certificate of service.

24 MS. HOBBS: It also seems like this is a
25 move towards more specificity as opposed -- I mean, it

1 kind of goes back to our conversation earlier of how much
2 specificity do we think we need in the certificate of
3 service.

4 MR. ORSINGER: Well, do we need -- do we
5 have date in an ordinary certificate of service?

6 MS. HOBBS: Date, but not time.

7 HONORABLE TRACY CHRISTOPHER: Yes.

8 MR. ORSINGER: We do have the date, but not
9 time. So we don't need the time. Does everybody agree we
10 take out time?

11 VICE-CHAIRMAN LOW: Well, if you can't give
12 it then how are you going to do it?

13 MR. ORSINGER: Okay. Then that's a simple
14 one. Ready to go on to Rule 45?

15 VICE-CHAIRMAN LOW: All right.

16 MR. LAMONT JEFFERSON: Well --

17 VICE-CHAIRMAN LOW: You're going to back us
18 up?

19 MR. LOPEZ: I ran it by him first because he
20 can say it better than I can.

21 MR. LAMONT JEFFERSON: Carlos had a good
22 point, and that is we've all been in a situation where,
23 you know, either pro se litigant or whatever the situation
24 is where the original information you got for service is
25 no longer good, and it might be the same situation here

1 where if there is a -- you're trying to serve through
2 making electronic service to the designated recipient's
3 address, but for whatever reason it doesn't work, and you
4 know it doesn't work as the server, either their computer
5 is down or you get a rejection notification back or
6 whatever.

7 I mean, could we account for that -- or the
8 e-mail address changes or the server goes down or their
9 ISP provider isn't -- you know, it's not their fault, but
10 you can't effect service, and you as the sender know that
11 you're not getting service.

12 MS. HOBBS: What do you do when the fax
13 machine won't pick up?

14 MR. LAMONT JEFFERSON: Well, what do you do?
15 You sent it to the address specified that they've
16 designated or you served it in the manner that they've --
17 but you know it's not effective. You don't know it
18 doesn't work.

19 MR. LOPEZ: The difference is if the fax
20 doesn't go through, you don't really have proof of that.
21 If the e-mail rebounds from their server because the
22 mailbox is full, you know it's their fault. And I know
23 that sounds harsh, but if we're going to talk about
24 constructive receipt at some point, I mean --

25 MR. LAMONT JEFFERSON: I don't know what the

1 answer is, but I think it's a legitimate issue to try to
2 solve; that is, if you send the e-mail and it doesn't go
3 through for whatever reason. It's not always the
4 recipient's fault. It may be that the ISP was down.

5 VICE-CHAIRMAN LOW: Where we don't have
6 answers we're just going to let Richard take a look at it,
7 and we're going to go on. If we have got a problem and we
8 have answers we're going to change it with language, but
9 that will be one thing he will have to look at.

10 MR. LOPEZ: One other technical issue that I
11 think is valid, but maybe someone who knows more about
12 technical will tell me I'm wrong, is that depending on how
13 good their server is, your records may show it was sent at
14 3:00 p.m., but their record is going to show it was
15 received at 9:00 p.m., and that may make a -- you know,
16 that date may make a difference. I don't know how you
17 deal with that.

18 VICE-CHAIRMAN LOW: We're going to deal with
19 it when it happens.

20 MR. HAMILTON: Because we've got that one
21 rule that says if it's received after 5:00 it's considered
22 the following day.

23 MR. ORSINGER: We have a similar problem
24 when you start the fax at 4:59 and end it at 5:20. Was
25 that before or after 5:00? We'll have to consider that,

1 and just for clarification, it's not always because you
2 haven't emptied your e-mail. Sometimes if the attachment
3 is too large it will bounce because it's too large and you
4 don't even know it's bounced.

5 MR. LOPEZ: Or if it has a virus.

6 MR. ORSINGER: Okay. So I guess we'll have
7 to consider putting that in somewhere.

8 VICE-CHAIRMAN LOW: Yeah, problem No. 2.

9 MR. ORSINGER: Okay. Rule 45. Under the
10 current rules of procedure there are certain prescriptions
11 for a pleading, but right now it includes a requirement
12 that they be in writing on 8 1/2 by 11-inch paper. That
13 has to be changed if we're going to have electronic
14 filing, so what the JCIT did was to say that it would --
15 on (d), 45(d), it would be "on paper or electronically
16 filed with the clerk by transmitting them through Texas
17 Online." So that adds electronic filing as an additional
18 method of filing. Jane.

19 HONORABLE JANE BLAND: Can we just say "on
20 paper or be electronically filed with the clerk"? Do we
21 have to say "by transmitting them through Texas Online,"
22 because --

23 MS. WILSON: Yes.

24 HONORABLE JANE BLAND: Well, okay. Then do
25 we define Texas Online somewhere, because Texas Online is

1 a vendor.

2 MR. ORSINGER: No, it's not. It's a
3 government agency.

4 HONORABLE JANE BLAND: State of Texas.
5 Okay. It's a government agency that's not anywhere
6 defined in these rules.

7 MS. HOBBS: It's defined in the statute.
8 It's defined in statute.

9 HONORABLE JANE BLAND: Its short name is
10 Texas Online to be used -- okay.

11 MS. HOBBS: I think so.

12 HONORABLE JANE BLAND: Do we need to tell
13 somebody where to go to get to Texas Online?

14 MR. ORSINGER: You know, if anybody is going
15 to do this they're going to call an electronic service
16 provider who is going to handle all that. You don't
17 actually file it with Texas Online. You subscribe to some
18 of the vendors and then they kind of handle it.

19 That's true.

20 HONORABLE TRACY CHRISTOPHER: You do. You
21 don't send it to Texas Online.

22 HONORABLE JANE BLAND: I know. So then why
23 do we need to say through Texas Online, or do we --

24 HONORABLE TRACY CHRISTOPHER: Because that's
25 the only one the court is going to accept.

1 VICE-CHAIRMAN LOW: Like if you tried to
2 e-mail the district clerk directly, that does not count as
3 electronic filing.

4 HONORABLE JANE BLAND: I understand. And
5 what I'm trying to say is for all of the people in the
6 state of Texas that are not as savvy with all of this
7 stuff and as informed, is there a way to inform them? I
8 mean, if you say through Texas Online, that is not
9 necessarily going to clue somebody in that they need to
10 get a subscription service and get it filed through Texas
11 Online. That's not going to give them any helpful
12 information.

13 VICE-CHAIRMAN LOW: Stephen has got the
14 answer.

15 MR. TIPPS: Well, I don't know that it's the
16 whole answer, but should we have a comment to Rule 45 that
17 provides some basic explanation concerning what Texas
18 Online is and where you go to find out more information
19 about it?

20 MR. ORSINGER: I don't think we owe it to
21 the lawyers of Texas to tell them that. If they want to
22 electronically file they need to go to a CLE conference or
23 call up the guys that are bombarding them with
24 advertisements. I mean, how much technology do we need to
25 explain in the Rules of Procedure?

1 MS. HOBBS: I mean, was there at one point
2 confusion about what a telecopier machine was? I'm
3 assuming so, but we didn't write our rules as "Here is how
4 you fax something." I mean, at some point you have to
5 assume a level of knowledge.

6 VICE-CHAIRMAN LOW: What's your next rule,
7 Richard?

8 MR. ORSINGER: Okay. I just want to point
9 out that the preservation of the paper requirement is the
10 same as it used to be, but it's now in a separate
11 paragraph, and then you've come over here to try to
12 address the same formatting issues about the 8 1/2 by 11
13 page, and the effort here is to say that if you do file
14 electronically it has to be formatted so that if printed
15 it comes out on 8 1/2 by 11-inch.

16 PROFESSOR DORSANEO: Why don't you say "must
17 be approximately 8 1/2" instead of "shall measure" and
18 make "shall be" "must be" in the first paragraph you
19 mentioned?

20 MR. ORSINGER: Well, the paper pleading is
21 "shall measure."

22 PROFESSOR DORSANEO: Well, that just sounds
23 like a stupid way to talk.

24 MR. ORSINGER: Well, okay. You want to
25 change both of the rules, or do you want them to state it

1 stupidly one time and --

2 VICE-CHAIRMAN LOW: You say "must" or
3 "shall." Somebody tells me either one I figure I've got
4 to do it.

5 PROFESSOR DORSANEO: "Must be" will be fine
6 in all places.

7 MR. ORSINGER: Bill, you're probably the one
8 that wrote the old language. It's just it's in a new
9 paragraph and you don't like it.

10 PROFESSOR DORSANEO: No, this language was
11 written by somebody who wrote a statute many, many years
12 ago.

13 VICE-CHAIRMAN LOW: All right. We'll accept
14 your language. Write it down. What's the next rule?

15 MR. ORSINGER: Oops, I better write it down,
16 Buddy, unless somebody else is making a record of what's
17 going on. What are you saying?

18 PROFESSOR DORSANEO: I'm saying in the first
19 paragraph after the (a), (b), (c), (d), say "Paper
20 pleadings must be approximately 8 1/2" and "must be
21 signed."

22 MR. ORSINGER: Why does it --

23 PROFESSOR DORSANEO: And electronic at the
24 top of -- well, we may not be formatting the same way.

25 MR. ORSINGER: Formatted for printing, must

1 be formatted for printing on a --

2 PROFESSOR DORSANEO: Yeah.

3 MR. ORSINGER: Well, paper is either 8 1/2
4 by 11 or it's 8 1/2 by 14, right? I mean, we're not
5 approximating the paper size, are we?

6 MR. LAMONT JEFFERSON: But the formatting
7 thing doesn't make any sense. I mean, you can print
8 anything on 8 1/2 by 11 paper.

9 PROFESSOR DORSANEO: Yeah. It could be just
10 real small.

11 MR. LAMONT JEFFERSON: Yeah.

12 MR. ORSINGER: I guess the point is that if
13 the clerk is one of those clerks that prints it on paper
14 it needs to print out on 8 1/2 by 11 paper, not 8 1/2 by
15 14 paper.

16 MR. LAMONT JEFFERSON: But that just depends
17 upon how they set their printer set up.

18 MR. ORSINGER: No, we don't want the clerks
19 to have to reformat the document. When you do a word
20 processing document or when it comes in from whoever it
21 is, it should come in on something that prints on 8 1/2 by
22 11 page, right?

23 MR. LAMONT JEFFERSON: Everything prints on
24 8 1/2 by 11 page. It just may be more pages, but it will
25 print.

1 MR. LOPEZ: It may be legible or not.

2 VICE-CHAIRMAN LOW: If the clerk is doing it
3 incorrectly I think it will be corrected. I don't think
4 we ought to talk about how far is the margin and how far
5 to the top you're going to go and how far to the bottom
6 and have a --

7 MR. ORSINGER: Dianne, give us some help
8 here. I mean, is this -- what is life going to be like
9 without this?

10 MS. WILSON: Because there is still a lot of
11 judges in Texas that require the paper to be printed out
12 and we don't want someone to set their margins up that
13 could take an 8 1/2 by 14 and then everybody prints it on
14 8 1/2 by 11 and then your print is so small that you can't
15 read it. So it needs to be legible.

16 MR. LAMONT JEFFERSON: If it has to print so
17 that it's a certain font, that's a different question than
18 what size does the paper have to be that it's printing on.

19 PROFESSOR DORSANEO: The paper change was
20 just to reflect the change that we made some years back
21 for file cabinets, and it doesn't really explain what we
22 mean by 8 1/2 by 11.

23 MS. WILSON: Well, following the Federal
24 guidelines of 8 1/2 by 11.

25 VICE-CHAIRMAN LOW: What language should we

1 use there so that it will conform to what is happening?

2 MR. LOPEZ: "Formatted such that it is
3 legible when printed in the 8 1/2 by 11 format."

4 MR. ORSINGER: Aren't we being overly picky
5 here? I mean who doesn't understand this?

6 PROFESSOR DORSANEO: Everybody understands.
7 Just change the "shall" to "must" and we'll be fine.

8 MR. ORSINGER: Okay. Thank you.

9 VICE-CHAIRMAN LOW: Okay. That's good.

10 MR. LOPEZ: Let the record reflect it's
11 Friday afternoon.

12 VICE-CHAIRMAN LOW: That's the best
13 suggestion I've heard all afternoon.

14 MR. ORSINGER: Okay. On Rule 57, this has
15 to do with -- the first underline has to do with
16 including, if available, your telecopier number and e-mail
17 address. We are probably going to have to rethink this.
18 If the listing of an e-mail address constitutes your
19 consent to being served by e-mail then you should not
20 mandate an e-mail.

21 VICE-CHAIRMAN LOW: So this whole thing,
22 signing of pleading --

23 MR. ORSINGER: No. You're skipping to the
24 second point. The first point is that we have now decided
25 that putting the e-mail on the pleading is going to be

1 your way of indicating consent to receiving service by
2 e-mail. We, therefore, cannot mandate that everyone put
3 an e-mail address on their pleading, so we basically have
4 to take that off and have another rule somewhere else that
5 says if you voluntarily put your e-mail address there by
6 your signature block you're consenting to service at that
7 address.

8 HONORABLE TOM GRAY: Actually, you wouldn't
9 have to do that, Richard, because you just said the
10 operative phrase, "if you consent to service by e-mail."
11 If that was inserted immediately after the word "and" it
12 would be much like "and, if available, telecopier number."
13 "And if you consent to service by e-mail, your e-mail
14 address."

15 HONORABLE TRACY CHRISTOPHER: That's good.

16 HONORABLE JANE BLAND: That is good.

17 MR. ORSINGER: Okay. Great suggestion.

18 Okay. Now, the next sentence is another signature deal,
19 and we've decided to move that off in the signature rule.

20 VICE-CHAIRMAN LOW: Skip it. Skip it.

21 MR. ORSINGER: Okay. Rule 74, we move away
22 from the use of the term "papers" to the use of the word
23 "documents" because obviously electronic documents are
24 documents but they're not paper. Richard.

25 MR. MUNZINGER: What do you mean by "on

1 electronic media" in the last sentence as distinct from
2 just saying "submitted electronically"? That's the only
3 time I've seen it so far in the rule, and I didn't
4 understand what you meant by it, "on electronic media."

5 MR. ORSINGER: Let's ask the JCIT what that
6 significance is.

7 MS. WILSON: Where?

8 HONORABLE TOM GRAY: Rule 74, the last
9 sentence.

10 MR. ORSINGER: I can tell you that one
11 possible electronic media would be a disk, and so if the
12 judge says, "I want all your pleadings on disk" --

13 MS. WILSON: Correct. Or FTP or USB or any
14 of the above means of electronically giving you the
15 document. They could bring it in on a hard drive and the
16 judge or the clerk could put it into their computer and
17 download it into the system.

18 MR. ORSINGER: Okay. Now, what is the
19 rationale for not letting judges to accept e-filing
20 directly with judges?

21 MS. WILSON: We didn't want to bypass the
22 clerk of court, and currently the -- all electronic
23 filings come through the clerk and then it's submitted to
24 the judge either electronically or by paper, and by doing
25 that that would bypass and you may not have a public

1 record then of that record, of that document.

2 VICE-CHAIRMAN LOW: All right. Judge Hecht.

3 HONORABLE NATHAN HECHT: How often does it
4 happen, let me ask the clerks, two clerks, that someone
5 files directly with a judge?

6 MS. WILSON: Electronically they don't. By
7 paper they have. At the time they're in the courtroom,
8 they'll hand the document to the judge.

9 HONORABLE NATHAN HECHT: But outside the
10 courtroom?

11 MS. WOLBRUECK: Not outside the courtroom
12 normally.

13 MS. WILSON: Not that I know of.

14 HONORABLE NATHAN HECHT: You could do it
15 outside the courtroom, can't you?

16 MS. WOLBRUECK: You can file it outside of
17 the courtroom, but normally it's done inside the
18 courtroom.

19 HONORABLE NATHAN HECHT: I know, but you can
20 go find a judge --

21 MS. WOLBRUECK: Yes.

22 HONORABLE NATHAN HECHT: -- and if he'll
23 take it --

24 MS. WOLBRUECK: Yes, the rule allows it.

25 HONORABLE NATHAN HECHT: But how often does

1 that happen?

2 MS. WOLBRUECK: I've never known it to
3 happen.

4 PROFESSOR DORSANEO: I've done it myself.

5 MR. LOPEZ: Judge Evans does it. He will
6 accept it.

7 MR. MUNZINGER: The use of the word
8 "pleadings" on the next to the last line, above you've
9 said "the filing of pleadings, other documents," and now
10 you've limited the submission of pleadings only to the
11 judge, and I would suggest that you ought to be uniform.
12 What we're talking about may be requested court charges,
13 motions for directed verdict, or something like that that
14 he wants electronically, but the use of the word
15 "pleadings" seems to me to limit the scope of the rule
16 unnecessarily.

17 MR. ORSINGER: Can we substitute "documents"
18 for "pleadings"?

19 MR. MUNZINGER: Yeah, I mean, but then
20 again, you've got pleadings and documents to distinguish.
21 You've distinguished three types of filings, pleadings,
22 documents, exhibits.

23 MR. TIPPS: Say "other documents."

24 MR. ORSINGER: Why don't we just take
25 "pleadings" and "exhibits" out? "The filings of documents

1 as required by these rules"? "The filing of documents as
2 required by these rules"?

3 MR. MUNZINGER: There's almost -- I'm not in
4 favor of distinguishing -- I mean, of doing away with the
5 significance of pleadings. I think pleadings is a word of
6 art and has significance to the practitioner. All I was
7 pointing out was, is that the way this rule is written,
8 it's -- I don't want to say it's inconsistent, but it can
9 create a problem. If you just have the same phrase, "from
10 accepting and considering pleadings, other documents, and
11 exhibits submitted on electronic media during trial" you
12 don't have a problem with it.

13 VICE-CHAIRMAN LOW: Just add that instead of
14 taking it out of the others.

15 MR. MUNZINGER: Yeah. I wouldn't change the
16 word "pleadings." I think that is significant.

17 VICE-CHAIRMAN LOW: Just add it and leave
18 pleadings in there.

19 HONORABLE TRACY CHRISTOPHER: Is there a
20 reason "during trial" is put on there at the end of the
21 sentence, "during trial"? I mean, what if they sent me
22 things before trial?

23 VICE-CHAIRMAN LOW: I don't know. Richard,
24 do you know?

25 MR. BOYD: Like courtesy copies.

1 HONORABLE TRACY CHRISTOPHER: Yeah, courtesy
2 copy.

3 VICE-CHAIRMAN LOW: What, Jeff?

4 MR. BOYD: I think what we're really talking
5 about is the difference between filing the document and
6 giving the judge a courtesy copy of the document; and I
7 know, for example, in Travis County there is this standing
8 order on discovery docket; and that standing order
9 requires that you send a copy of your document to the
10 judge who is assigned the discovery docket for that day,
11 that week, that upcoming docket. So we don't want to do
12 anything, I don't think, that makes it sound like you can
13 never submit something directly to the judge. We just
14 want to be clear that what we're talking about is that by
15 doing it you're not, quote-unquote, filing the document.

16 HONORABLE TRACY CHRISTOPHER: Right.

17 VICE-CHAIRMAN LOW: It doesn't relieve you
18 of the filing of it and service. All right.

19 HONORABLE JANE BLAND: I think we should
20 eliminate the last sentence, because to me it confused
21 the -- what does a judge -- what is "a judge accepting and
22 considering"? What does that mean? I think we should
23 only have judges, you know, consider things that are
24 filed; and we allow filing with the court clerk, we allow
25 filing with the judge, and I guess the only time outside

1 the courtroom I could think of is when there are temporary
2 or emergency hearings and the judge might have accepted
3 for filing documents.

4 But I don't -- this last rule to me seems to
5 indicate that we're going to have this other category of
6 documents that judges can consider that aren't courtesy
7 copies, because courtesy copies are copies of things that
8 are filed, and that judges can consider them; and I think
9 that's -- then that raises a whole host of problems about
10 whether these things that were accepted and considered are
11 part of the appellate record. You know, if they're not
12 filed, they're probably not.

13 MR. ORSINGER: What if we -- the first
14 underlined sentence, what if we said that "a document
15 electronically transmitted to the judge is not filed," or
16 words to that effect, or you can only electronically file
17 with the clerk and then say nothing about how you give
18 copies to the judge?

19 HONORABLE TOM GRAY: Actually, you've
20 already said you can only electronically file with the
21 clerk in 45(d). That was part of the JCIT's statement
22 over here as to why they added that language on 45(d).

23 VICE-CHAIRMAN LOW: Yeah.

24 HONORABLE JANE BLAND: I don't have a
25 problem with "A judge may not accept electronically

1 transmitted documents for filing."

2 MR. ORSINGER: Okay.

3 HONORABLE JANE BLAND: Because I don't think
4 we ought to have to rely on judges to receive an
5 electronic copy of something and then put that burden on
6 them to forward it to the clerk for filing.

7 MR. ORSINGER: Right. I agree.

8 HONORABLE JANE BLAND: But I don't think we
9 need the second sentence, because that seems to indicate
10 that there's going to be this other category of documents
11 that are not filings that judges can accept and consider.

12 MR. ORSINGER: You know, I don't interpret
13 the language to prohibit it anyway, and by saying it
14 doesn't prohibit it it creates more problems probably than
15 it cures.

16 MR. LOPEZ: If they're considering it then
17 it ought to be filed.

18 MR. ORSINGER: I agree we ought to take it
19 out.

20 PROFESSOR DORSANEO: Take it out. There's a
21 bigger problem, though.

22 MR. ORSINGER: What's that?

23 PROFESSOR DORSANEO: When you go back and
24 look at 21, the first paragraph in 21, it says, "Every
25 pleading, unless presented during a hearing or trial,

1 shall be filed with the clerk of the court in writing" and
2 that is, you know, a little bit redundant with the first
3 sentence of 74, but I think it may point out that it
4 doesn't say in 21 "may be filed electronically." It just
5 contemplates in the thing we're going to worry about later
6 that the filing will be electronic, and this just points
7 up a problem that we have with these rules not meshing
8 very well, and they just don't. Maybe we ought to try to
9 clean that up some at least.

10 MR. ORSINGER: Well, if I can respond, Bill,
11 Rule 21 is the general rule about how you file with the
12 clerk, and Rule 74 is an existing rule about when you can
13 file with the court. Nobody wants to change the fact that
14 you can file paper documents with the judge directly.
15 That's already there. We're not changing that. All we
16 want to say is, "Although we're permitting electronic
17 filing with the clerk, it is only permitted with the
18 clerk. We are not permitting you to electronically file
19 with the judge," and so we probably should say that so
20 that people won't think, "Oh, hey, electronic filing
21 substitutes for paper filing throughout the rules, so I
22 can just e-mail this to the judge under the authority of
23 Rule 74."

24 PROFESSOR DORSANEO: Okay. Let me respond
25 this way. Am I wrong about the first paragraph of 21 not

1 saying anything about electronic filing?

2 MR. ORSINGER: It doesn't.

3 PROFESSOR DORSANEO: So it's wrong, if we're
4 going to allow pleadings to be filed electronically?

5 HONORABLE TRACY CHRISTOPHER: No, it just
6 says "shall be filed."

7 MR. ORSINGER: Why is it wrong?

8 PROFESSOR DORSANEO: It says "shall be filed
9 with the clerk of the court in writing."

10 MR. ORSINGER: What's wrong about that?

11 Because we're considering an electronic document to be
12 written. It's not signed, or maybe it is, depending on
13 what the rule says, but it's certainly in writing.

14 HONORABLE TOM GRAY: Then why did we take
15 "in writing" out of 45(d)? I think we should take "in
16 writing" out of the paragraph that Bill is talking about.

17 PROFESSOR DORSANEO: Or just say in -- I
18 think "writing" and I don't think electronically is
19 writing in the same sense that the term has been used in
20 all of these rules.

21 MR. ORSINGER: Then we better say "filed
22 with the clerk of the court on paper or electronically."

23 HONORABLE TRACY CHRISTOPHER: Just eliminate
24 "in writing."

25 MR. ORSINGER: Okay.

1 MS. HOBBS: How do you file something
2 orally?

3 HONORABLE TRACY CHRISTOPHER: Yeah, I mean,
4 file -- you can't file something orally.

5 PROFESSOR DORSANEO: And beyond that, 74 and
6 21, which was, you know, rewritten pretty substantially
7 along the way, do overlap. 74's first sentence is not
8 just about you can file things with the judge. It says
9 "the filing of pleadings, other documents" and other
10 documents aren't dealt with in -- "all other documents"
11 aren't dealt with in 21. "Shall be made by filing them
12 with the clerk of the court," which is a --

13 MR. ORSINGER: Can we get clarity on Tracy's
14 suggestion that we say "shall be filed with the clerk of
15 the court" and delete "in writing" so that we don't get
16 balled up in argument?

17 PROFESSOR DORSANEO: Somebody needs to just
18 look at this and see where --

19 MR. ORSINGER: But, Bill, we're moving --

20 PROFESSOR DORSANEO: -- the contradictory
21 language --

22 MR. ORSINGER: -- through this part today.

23 VICE-CHAIRMAN LOW: We're doing it now.

24 MR. ORSINGER: So simple fix is to take "in
25 writing" out of the first paragraph of Rule 21 because you

1 can't very well file an oral statement, and then we don't
2 have to worry about whether an electronic document is
3 written or not. So couldn't we just take "in writing" out
4 and eliminate the technical problem and not lose anything?

5 PROFESSOR DORSANEO: Where is the general
6 rule that says you can file any document electronically?

7 MR. ORSINGER: On the very end of Rule 21 is
8 your general authority to file electronically. Oops.
9 That's not right. Excuse me. I withdraw that.

10 PROFESSOR DORSANEO: It ought to be in
11 this -- if we can, it ought to be early. Say it, and it
12 ought to be said early on and not left to Rule 74.

13 VICE-CHAIRMAN LOW: In other words, maybe we
14 put it with the rule talking about signature, maybe just a
15 general rule, "document submitted otherwise."

16 MR. ORSINGER: No, it needs to be in Rule
17 21.

18 MR. MUNZINGER: Doesn't 45(d) say that you
19 file electronically, "pleadings shall be" so-and-so?

20 MR. ORSINGER: Well, that's only pleadings,
21 though.

22 VICE-CHAIRMAN LOW: That's only pleadings.

23 MR. ORSINGER: Why don't we -- you know,
24 it's inferential in the last -- in the underlined part of
25 the second to last paragraph of Rule 21 where it says, "in

1 the case of a pleading, plea, motion, or application that
2 is electronically filed," so that implies you can do it,
3 but it doesn't exclusively say you can do it.

4 PROFESSOR DORSANEO: I think that's one we
5 were going to move to the general rule anyway.

6 MR. ORSINGER: Well, no, but we're moving it
7 to the general rule because of the signature requirement,
8 but we still probably need an unqualified straightforward
9 statement that you can electronically file it.

10 VICE-CHAIRMAN LOW: Right. Tracy has
11 been --

12 HONORABLE TRACY CHRISTOPHER: Well, I think
13 that I've -- I'm taking back the idea that we should just
14 delete "in writing," and I think we should put in the
15 first paragraph of 21 "shall be filed with the clerk of
16 the court on paper or by" -- "or be electronically filed
17 with the clerk by transmitting through Texas Online," just
18 like we did in 45.

19 PROFESSOR DORSANEO: That certainly improves
20 it.

21 VICE-CHAIRMAN LOW: It improves it enough
22 that you would approve of it?

23 PROFESSOR DORSANEO: I've already said that
24 I don't approve of this whole rule book, that it's in bad
25 shape, and tinkering in this other stuff doesn't improve

1 the bad parts.

2 HONORABLE TRACY CHRISTOPHER: Buddy, I did
3 have one other comment. If we're making changes, can the
4 Court eliminate "him" and "he" for judge to the extent
5 possible?

6 VICE-CHAIRMAN LOW: That's a good thing.
7 Carlos.

8 MR. MUNZINGER: Why?

9 MR. LOPEZ: At some point I think -- I may
10 be wrong about this, but I think we may have to harmonize
11 wherever it is in the Government Code that says that Judge
12 Evans can accept it on the courthouse square by putting it
13 in his hands. I mean --

14 PROFESSOR CARLSON: That's in Rule 74.

15 MR. LOPEZ: Well, no, there's a Government
16 Code provision that says judges can accept filing. I
17 don't remember how it works, and it just says "filing"
18 probably. It doesn't say electronic, it doesn't say
19 paper. We may need to just make sure to look and see how
20 that reads to make sure it's still consistent with
21 whatever we end up doing to this.

22 VICE-CHAIRMAN LOW: All right. Richard,
23 would you write that on the general thing when we're -- to
24 look at the Government Code on that specific part?

25 MR. LOPEZ: I wish I could remember the

1 section. I think it's 72 or 74.

2 VICE-CHAIRMAN LOW: We don't have it before
3 us now anyway, so --

4 MR. ORSINGER: Okay. We've got a special
5 request here to consider the proposition of proposed
6 orders being submitted directly to the judge as opposed to
7 being filed with the clerk. What do we want to do about
8 that? Do proposed orders have to be filed with the clerk
9 with a copy to the judge?

10 VICE-CHAIRMAN LOW: Wait a minute. A
11 proposal to do what now?

12 MR. ORSINGER: A proposed order. Right now
13 ordinarily proposed orders are sent to the judge because
14 you never know whether they're going to be signed or not;
15 and then if they're signed they show up with the clerk;
16 and if they're not signed, they don't. That's my
17 practice. I don't know how anyone else practices, so the
18 question becomes can you send a proposed order
19 electronically directly to the judge, or if you're going
20 to send it electronically do you have to send it to the
21 clerk and let the clerk submit it to the judge? Jane.

22 HONORABLE JANE BLAND: I think it should be
23 handled like every other filing, and the judge should
24 consider filings, and proposed orders sent to the judge
25 may never make it into the file. I mean, if they were

1 sent to me they would probably never -- but parties like
2 to have what they proposed to the judge in the file so
3 that --

4 MR. ORSINGER: Well, then they can choose to
5 file them with the clerk if that's what they want, but if
6 they don't -- and I don't. I just would rather have the
7 real order in there and then I will file an objection to
8 it if I don't like it. So if I want it to be in the
9 clerk's office, I file it with the clerk, but if I don't,
10 I just mail it to the judge or drop it by.

11 HONORABLE JANE BLAND: But since when do we
12 say filings of the court, whether or not they become part
13 of the record turn on whether the litigants want them to
14 be part of the record? Anything that the judge sees ought
15 to be available to both parties. If you send -- both
16 parties and anybody else who comes to inspect the file.

17 MR. ORSINGER: Well, you're wanting to
18 rewrite the rules on paper then, because the paper rules
19 don't require that right now.

20 HONORABLE JANE BLAND: Well --

21 MR. ORSINGER: Do they?

22 HONORABLE JANE BLAND: You know, if you're
23 saying you're submitting things to the judge that don't go
24 through the clerk's office --

25 MR. ORSINGER: Happens all the time. It

1 happens all the time. They mail them to the judge, they
2 mail a copy to me, and if I don't like it, I've got three
3 days to respond. Maybe I'm the only guy in Texas doing
4 that, but I have lawyers on the other side doing it.

5 VICE-CHAIRMAN LOW: Sarah has had her hand
6 up. Go ahead, Sarah.

7 HONORABLE SARAH DUNCAN: If you're going to
8 add the sentence, the general permission to file
9 electronically in 21, then you need to have some reference
10 to 74(b).

11 MR. ORSINGER: To what?

12 HONORABLE SARAH DUNCAN: 74(b).

13 VICE-CHAIRMAN LOW: 74(b).

14 MR. ORSINGER: Some reference in 21 to
15 74(b)?

16 HONORABLE SARAH DUNCAN: If you're going to
17 add a general statement "may be filed on paper or
18 electronically" it needs to be "electronically if
19 permitted by 74(b)," because otherwise you've created a
20 conflict between the two rules.

21 VICE-CHAIRMAN LOW: 74(b) says "Documents
22 that may not be electronically filed."

23 MR. ORSINGER: Okay. So is the rule is
24 every time there is an exception to the general rule, the
25 general rule needs to state and cross-refer to the

1 exception?

2 HONORABLE SARAH DUNCAN: When they are 50
3 rules apart, yes.

4 MR. ORSINGER: Okay. Well, I don't think
5 that's the policy we use normally. Normally we state a
6 general rule and if we have an exception we create the
7 exception.

8 HONORABLE SARAH DUNCAN: Well, generally
9 when you have a general rule and you have an exception in
10 this committee the exception has been in the same rule and
11 immediately followed the general rule. We don't generally
12 create a general rule in one rule and an exception in
13 another rule 50 rules away. You think?

14 HONORABLE TRACY CHRISTOPHER: That's a
15 problem.

16 HONORABLE SARAH DUNCAN: We had a long
17 discussion about Brian Garner not creating an exception in
18 a separate sentence, and that bothered a lot of people,
19 including me, but here we're creating an exception 50
20 rules away.

21 VICE-CHAIRMAN LOW: I'm sorry. Carl.

22 MR. HAMILTON: I have two problems with Rule
23 74. The first one, it says, "a judge may not accept
24 documents," and I'm not sure what the judge has to do to
25 not accept if they're sent. Does he have to send them

1 back? But shouldn't we just say "the parties shall not
2 attempt to file stuff with the court"?

3 HONORABLE TRACY CHRISTOPHER: Right. That's
4 better.

5 HONORABLE SARAH DUNCAN: It's not filed.

6 MR. HAMILTON: Not what?

7 HONORABLE SARAH DUNCAN: It's not filed.

8 MR. HAMILTON: Well, then the other problem
9 is the last sentence. It says, "The rule doesn't prohibit
10 judges from accepting and considering pleadings submitted
11 on electronic media during trial." Does that mean they
12 can bypass the clerk's office with the filing of that
13 pleading?

14 VICE-CHAIRMAN LOW: No. We talked about
15 that earlier and about that, that sentence, and when it
16 was really started is it says it's basically a judge can't
17 accept something for filing. In other words, you just
18 say, "I'm going to give it to you and you file it." Then
19 the other was, the other sentence originally was put in
20 there "but a judge may consider certain things," but the
21 first it's prohibiting him from being the one you file it
22 with.

23 MR. ORSINGER: But, see, now Jane has said
24 why don't we forget this argument by taking the sentence
25 out --

1 HONORABLE JANE BLAND: I thought we did.

2 MR. ORSINGER: -- and we don't really need
3 this sentence to make this work, and we can't eliminate
4 this debate by taking it out.

5 VICE-CHAIRMAN LOW: Right. And that was
6 what we decided to do.

7 MR. ORSINGER: So let's take it out.

8 MR. LOPEZ: If you take it out will there
9 still be something explicitly that explains to them that
10 just because you hand it to the judge not only doesn't
11 mean that it's filed, it's never considered filed?

12 MR. ORSINGER: It says right here. Is this
13 explicit? "A judge may not accept electronically
14 transmitted documents for filing." Isn't that enough?

15 MR. LOPEZ: I would say change it to say
16 it's not considered filed. I mean, the judge is going to
17 hold his hand out if he wants to hold his hand out, but
18 that doesn't mean it's considered file so that it doesn't
19 turn on whether the judge decides physically to accept it
20 or not.

21 VICE-CHAIRMAN LOW: Sarah.

22 HONORABLE SARAH DUNCAN: To me the problem
23 is that this sentence is concentrating on what a judge may
24 or may not do --

25 VICE-CHAIRMAN LOW: Right.

1 HONORABLE SARAH DUNCAN: -- instead of on
2 what a party may and may not file. The sentence is fine
3 with me if you just changed it to say, "A party may not
4 electronically file documents with a judge."

5 MR. LOPEZ: Right.

6 MR. ORSINGER: But the previous sentence,
7 Sarah, says a judge may permit paper documents to be filed
8 with him. So it's elective with the judge on paper, but
9 it's not elective with the judge electronically. Is that
10 a problem? I mean, we're giving -- we're talking about
11 what the judge can and can't do on paper, but you don't
12 want to talk about what the judge can and can't do
13 electronically?

14 HONORABLE SARAH DUNCAN: But, Richard, I
15 have no way of not accepting an e-mail with an attachment
16 from a party in an appeal pending before the court. I
17 can't not accept it. It just comes in and it sits there.
18 So don't tell me I can't accept it because I have no
19 choice whether to accept it. Tell the party that the
20 party can send me e-mails with attachments all day long,
21 but that's not filing.

22 MR. LOPEZ: Right.

23 MR. MUNZINGER: Good point.

24 MR. WOOD: If you'll go back to Rule

25 45(d) --

1 VICE-CHAIRMAN LOW: 45(d)?

2 MR. WOOD: 45(d), as in dog, we talked about
3 "Pleadings in the district and county courts shall be on
4 paper or be electronically filed with the clerk by
5 transmission through Texas Online." That is the only way
6 to file through Texas Online that will get the document to
7 the clerk. That's the only place it goes. You cannot
8 electronically file through Texas Online and have the
9 document end up with a judge, and so to the extent that
10 you have an attachment to an e-mail that goes to a judge,
11 that's really not electronic filing as the rules perceive
12 it.

13 That wouldn't even be electronic filing to a
14 clerk, and all we're trying to do in Rule 74, "Filing with
15 the court," is that we realize in the paper world that
16 generally documents come into the clerk, but there is a
17 rare occasion -- Professor Dorsaneo mentioned it -- where
18 he filed himself. He found a judge outside of regular
19 hours and filed, and we're trying to say here that since
20 that rule is out there let's make it clear that electronic
21 filing only works with clerks. It doesn't work with
22 judges because Texas Online just isn't set up with judges.

23 VICE-CHAIRMAN LOW: 45 pertains to
24 pleadings. What about motions or briefs and so forth?

25 MR. WOOD: Yeah. We should -- the problem

1 here is that Rule 45 from the get-go says "pleadings," and
2 Rule 74 talks about "pleadings and other papers," and
3 we've tried -- we had that problem before we started, but
4 I agree that a fix to it is to try and include pleadings
5 and everything else you can think of as traditionally on
6 paper and put that into the rule.

7 VICE-CHAIRMAN LOW: And put that in 45?

8 MR. WOOD: I think that would be an
9 improvement, yeah.

10 PROFESSOR DORSANEO: Let me just say that
11 where 74 and 75 and related rules about papers are
12 located, they're in the general rules on pleadings, and
13 they're really -- I don't know how they started out to
14 read, but they're about other papers beyond pleadings.

15 VICE-CHAIRMAN LOW: Right.

16 PROFESSOR DORSANEO: It would be better from
17 an overall organization for them to be in -- for rules,
18 including all filing rules, to be in the general rules,
19 and we could do some minor work just by moving some things
20 around that you wouldn't miss in the pleadings that would
21 go better in the general rules. Obviously not their fault
22 because this is the way it was organized when they got it
23 to work from.

24 HONORABLE SARAH DUNCAN: That's the problem.

25 PROFESSOR DORSANEO: But it's terrible and

1 should be improved to the extent we can do it without
2 redoing the whole thing.

3 VICE-CHAIRMAN LOW: Right, because I can
4 think, if I file a brief I don't really think of that as a
5 pleading. I mean, maybe it is, but I don't think of it
6 that way, so maybe there should be some, in one of these
7 rules, general thing that includes all these things, and
8 then you don't have to --

9 PROFESSOR DORSANEO: The place to put them
10 would be in the general rules of practice in district and
11 county courts, which is where the motion rules are and
12 where the service rules are. We don't have a filing rule
13 exactly. We've got it talked about here and there, and
14 that makes it difficult to put electronic filing in here.

15 VICE-CHAIRMAN LOW: And then we don't have
16 to put what a judge -- maybe we talk about what a party
17 may file, but do we need something in there that the judge
18 can't consider? We've got something in there now that he
19 can consider electronic media. I don't know what that
20 means, but would we strike that sentence out or what would
21 we do with that?

22 MR. ORSINGER: You're talking about the last
23 sentence in 74?

24 VICE-CHAIRMAN LOW: Yeah. We talked about
25 striking out.

1 MR. ORSINGER: We've struck that. The
2 question that Sarah has on the floor is whether we ought
3 to prohibit a party rather than a judge and then Bill is
4 saying that this is all really in the wrong place in the
5 rules. So what we're talking about now is not how to
6 introduce electronic filing to the rules, but how to
7 rewrite the rules involving paper and electronics so that
8 they make more sense. Is that what we want to do?

9 VICE-CHAIRMAN LOW: That's what it sounds
10 like to me.

11 MR. ORSINGER: Okay.

12 VICE-CHAIRMAN LOW: I'm thinking about what
13 if you're in trial and somebody -- you use the judge's
14 e-mail and they send something to you and the judge's
15 clerk gives it to you, and you're in trial, copies to him
16 and the other lawyer, a brief on a point of evidence or
17 something. The judge, he can consider that. I mean, you
18 would give it in your argument. Couldn't he consider
19 that?

20 MR. ORSINGER: Well, we don't have to say he
21 can consider that any more than we have to say that if I
22 give the judge a trial brief or a copy of a case he can
23 consider it. I mean, we know he can consider it, or she,
24 I guess, can consider it.

25 VICE-CHAIRMAN LOW: All right. But -- okay.

1 MR. HAMILTON: Buddy, you did raise one
2 other point, though, and that is if we say that the party
3 cannot file anything with the judge electronically that
4 may be construed to prohibit you from sending a brief to
5 the judge that he asks for electronically.

6 MR. ORSINGER: Could we say the sentence
7 that "a document electronically transmitted to a judge is
8 not considered filed"?

9 VICE-CHAIRMAN LOW: Yes.

10 PROFESSOR CARLSON: Must be filed with the
11 clerk.

12 MR. ORSINGER: We don't need to say that
13 because everything else on their requirement must be filed
14 with the clerk. This is just in the gate filing with the
15 judge. So couldn't we put a sentence -- instead of this
16 sentence couldn't we say, "A document electronically
17 transmitted to a judge is not filed"?

18 VICE-CHAIRMAN LOW: But we don't want to get
19 into, I mean, you can file something or send it to the
20 judge and not send a copy to the other party or something.
21 I mean, maybe just ignore that and say the right thing and
22 then have Bill's suggestion that we put --

23 MR. ORSINGER: Well, we have an ethical
24 constraint about ex parte communications that normally
25 saves you from writing letters to the judge and calling

1 him on the phone.

2 VICE-CHAIRMAN LOW: I know.

3 MR. ORSINGER: And neither one of those are
4 protected in here, but if somebody abuses it, let's just
5 take their law license.

6 VICE-CHAIRMAN LOW: I understand. I just
7 don't want to give rise to something in here that --

8 MR. ORSINGER: I tell you what, we're
9 violating -- I had an instruction from you not to rewrite
10 the entire Rules of Procedure, but just to try to fold in
11 electronic filing. We're now rewriting the Rules of
12 Procedure.

13 PROFESSOR DORSANEO: Just a little bit.

14 MR. ORSINGER: Just a little bit.

15 VICE-CHAIRMAN LOW: Disregard what I said
16 and remember what I said this morning. Let's go.

17 MR. ORSINGER: How about -- Sarah, are you
18 still with us?

19 HONORABLE SARAH DUNCAN: I am.

20 MR. ORSINGER: Okay. What if we were to
21 take that sentence and say, "A document electronically
22 transmitted to a judge is not filed" or "is not considered
23 filed"?

24 HONORABLE SARAH DUNCAN: "Is not filed with
25 the clerk."

1 HONORABLE JAN PATTERSON: "Is not considered
2 filed."

3 MR. ORSINGER: Are you okay with that?

4 HONORABLE SARAH DUNCAN: Uh-huh. I am.

5 MR. LOPEZ: "Submitted only in electronic
6 form is not considered filed."

7 MR. ORSINGER: No, we don't have to worry
8 about that. The paper handles itself.

9 VICE-CHAIRMAN LOW: Wait just a minute.

10 MS. WILSON: You had asked the question
11 about what we meant by electronic media. Some of the
12 courts, because of their setup electronically with all the
13 media in their courtrooms, that could be a DVD, a CD, a
14 video, anything like that. We didn't want to prohibit
15 that from being presented in the courtroom.

16 VICE-CHAIRMAN LOW: Okay. All right.
17 Proceed. Remember what I said this morning. Let's go
18 back.

19 MR. ORSINGER: Okay. Let's move on to
20 74(a). Important concept here that the time of filing
21 with the court system is considered to be the time that
22 you transmit the document to the EFSP. We had a lot of
23 talking about that, but they decided that the filing time
24 would not be when the electronic transmission reaches the
25 clerk of the court, but it's when your pleading reaches

1 the EFSP; and if there is some technical breakdown or
2 whatever, it doesn't hurt you because your filing time is
3 fixed when you get it to the party who interfaces with
4 Texas Online.

5 VICE-CHAIRMAN LOW: And then if there is
6 some date or other thing, we consider that later.

7 MR. ORSINGER: Okay. Is everybody okay with
8 that?

9 PROFESSOR DORSANEO: Yeah, but I want to
10 talk about the next one.

11 MR. ORSINGER: Okay. What's the next one?

12 MR. DUGGINS: Whoa, whoa.

13 MR. ORSINGER: Not okay.

14 MR. DUGGINS: Well, you say "to an
15 electronic" -- I mean, "to an electronic filing service
16 provider," but it doesn't say for whom. Shouldn't that be
17 "for Texas Online"? Suppose you send it to your private
18 EFSP.

19 MR. ORSINGER: We could sure say that. I
20 don't know where EFSP is defined. Is it defined in state
21 law anywhere?

22 MS. WILSON: Yeah. It's under the Texas
23 Online, isn't it, Mike?

24 No, it is not. Sorry. We're just using
25 that term.

1 MR. ORSINGER: Do you want to say "an EFSP
2 for Texas Online"?

3 MS. WILSON: Well, the EFSP is an
4 independent vendor hired by the filer. It could be
5 anyone, and then they have --

6 MR. ORSINGER: Do they have to be approved
7 by the state in order to do business?

8 MS. WILSON: They have to be approved by the
9 Texas Online.

10 MR. ORSINGER: Why don't we just say
11 "approved by the state," or who is it approved by?

12 MS. WILSON: Texas Online.

13 MR. DUGGINS: No. "To an approved
14 electronic filing service provider."

15 MR. ORSINGER: Who does the approving?

16 MS. WILSON: Texas Online.

17 MR. ORSINGER: Is "approved" okay or do we
18 want to say "approved by Texas Online?" Just say
19 "approved"?

20 MS. WILSON: "By Texas Online."

21 MR. ORSINGER: At the end of it, "service
22 provider approved by Texas Online"?

23 MS. WILSON: Correct.

24 HONORABLE TOM GRAY: So is that why we knew
25 the date and time of service back in Rule 21a, is because

1 that is defined over there as the time that it is provided
2 to the EFSP?

3 MS. WILSON: Correct.

4 MR. ORSINGER: Okay. Bill, what's wrong
5 with the next one?

6 PROFESSOR DORSANEO: Well, (b), "when a
7 clerk accepts," I don't like the idea of acceptance
8 consistent with your idea that it's considered to have
9 been filed with the clerk.

10 MR. ORSINGER: Why don't we say "receives,"
11 "when a clerk receives"?

12 PROFESSOR DORSANEO: Yeah. Something like
13 that. Just to take the notion out of here that we could
14 be prevented.

15 MR. ORSINGER: That it's discretionary.
16 "When a clerk receives."

17 MS. WILSON: We have rejected one in our two
18 years, two and a half years, because it was sent to the
19 wrong county.

20 VICE-CHAIRMAN LOW: How is that going to
21 change it?

22 MS. WILSON: We just rejected it, and it
23 went back to the Texas Online that it was sent to the
24 wrong county.

25 VICE-CHAIRMAN LOW: Well, then do we want to

1 change that?

2 MR. ORSINGER: What if it happened in the
3 mail? What if the district clerk opens an envelope and
4 it's sent to the wrong county? What do they do?

5 MS. WILSON: We reject it and mail it back
6 to them. If the filer sent it, they -- it's a drop down
7 box on Texas Online, and instead of selecting Travis
8 County they selected Fort Bend County or whatever it was,
9 and so we rejected that document. It would be the same if
10 they mailed it to us and it should have gone to Harris
11 County. We would give the reason rejecting and mail it
12 back or fax it back saying "You have in here that you
13 wanted this to go to Harris County instead of Fort Bend."

14 VICE-CHAIRMAN LOW: So you're saying we
15 should keep the language as it is?

16 MS. WILSON: Well, we just used the word
17 "accept" because that's been the normal process in the
18 clerk's office.

19 VICE-CHAIRMAN LOW: It's not if you reject
20 it, and it's been received, but not accepted.

21 MS. WILSON: Correct.

22 PROFESSOR DORSANEO: I think it's nice that
23 you tell them that they've sent it to the wrong place, but
24 I don't think you need to reject it. I don't think that
25 that's your job.

1 MR. ORSINGER: But, Bill, if they receive
2 it, they're required to stamp it, and that establishes the
3 date of filing. Read the rest of the sentence. So if
4 it's in the wrong county we don't want them to treat it
5 like it's been filed and stamp it and have a bunch of
6 deadlines operating based on it. So we have to preserve
7 the idea that you haven't completed your filing job if you
8 haven't sent it to the right clerk.

9 VICE-CHAIRMAN LOW: He'll withdraw his
10 objection to that.

11 MR. ORSINGER: Okay. Then the last one, you
12 cannot initiate or commence a civil suit on a Sunday
13 electronically except for injunctions, attachments,
14 garnishment, sequestrations, or distress warrants. Is
15 that consistent with the rule otherwise? I'm not aware.

16 PROFESSOR DORSANEO: That's Rule 6.

17 MR. ORSINGER: That's rule what?

18 HONORABLE NATHAN HECHT: Rule 6.

19 VICE-CHAIRMAN LOW: Then let's go on.

20 MR. ORSINGER: Okay. So we're okay with
21 that?

22 VICE-CHAIRMAN LOW: Yeah.

23 MR. ORSINGER: Okay. So if you do try to
24 file it electronically on Sunday it will be deemed as if
25 filed Monday. It won't be rejected, but it will just I

1 guess be filed Monday morning.

2 Okay. The following documents are
3 categorically ruled out as electronic filing material:
4 juvenile cases, anything relating to a juvenile case,
5 anything relating to a mental health case. Chapter 33, is
6 that a termination under the Family Code?

7 MS. WOLBRUECK: Parental notification.

8 MR. ORSINGER: Okay. That's the parental
9 bypass on abortion.

10 VICE-CHAIRMAN LOW: Hold on just one second.
11 Richard.

12 MR. MUNZINGER: Are the words "juvenile
13 cases" and "mental health cases" words of art that
14 everyone knows what they mean, or are there statutory
15 descriptions such as "Chapter 33 of the Family Code" in
16 subsection (c) that should be used for the sake of
17 precision? I'm not sure that I know what a -- I mean, I
18 have a general idea talking informally about what a
19 juvenile case is and what a mental health case is. Buddy
20 is a mental health case.

21 VICE-CHAIRMAN LOW: Yeah, but it's not up
22 yet. It's not on the docket.

23 MR. MUNZINGER: But I just wonder if there
24 isn't a more precise definition that can be given to those
25 categories.

1 MR. ORSINGER: Well, I believe all juvenile
2 cases will fall under a certain either title or subtitle
3 or chapter of the Family Code. I don't know about mental
4 health. That would be under a statute.

5 MR. MUNZINGER: There is a Mental Health
6 Code, I think, as well, but obviously, my point is, is
7 don't we want to have a better definition than what we've
8 got?

9 PROFESSOR DORSANEO: That's an excellent
10 point.

11 MR. ORSINGER: It seems reasonable to me.
12 So we'll make this more precise. We'll define the statute
13 that covers juvenile and we'll define the statute that
14 covers mental health.

15 HONORABLE NATHAN HECHT: Just so we'll have
16 it for the record, why do we have this list? Why, for
17 example, affidavits of inability to pay, why can't they be
18 filed electronically or subpoenas?

19 MS. WILSON: At this point in time Texas
20 Online has not set up for a pro se or an indigent person
21 because there are fees associated with the filing, and
22 until we're able to change that whole structure, inability
23 to pay would force them to pay up-front, then have the
24 judge sign the inability to pay, and then a refund would
25 have to be issued. So that's why we put that in there.

1 HONORABLE NATHAN HECHT: It seems like it
2 would be easier if you could let them file through Texas
3 Online and if they can afford the fee you could deny the
4 indigency.

5 MR. ORSINGER: That's like a Catch 22.

6 HONORABLE NATHAN HECHT: But what about --
7 just out of curiosity, what about subpoenas? Yeah.

8 MR. WOOD: Judge, this list is arbitrary.
9 It's really your decision on what to recommend should be
10 something that can be electronically filed or not. I
11 mean, mental health cases, there's no reason inherently
12 why that wouldn't work in the system. They simply have a
13 confidential nature to them, but just because they have a
14 confidential nature doesn't mean they can't be
15 electronically filed. So it's really for historical
16 reasons. That's the way we did the pilot project in the
17 local rules, but again, it's very arbitrary.

18 MR. ORSINGER: If we have like in adoption
19 cases required by law to be kept out of the public eye and
20 whatnot, is that privacy requirement guaranteed under the
21 current structure?

22 MR. WOOD: It's really two different issues.
23 What is confidential can be e-filed and it can be
24 confidentially e-filed.

25 MR. ORSINGER: So there is nothing about

1 e-filing that would make it difficult for the clerk to
2 follow the statutory requirement of nonpublic information?

3 MR. WOOD: Exactly. There is nothing about
4 e-filing that somehow makes a confidential document not
5 confidential.

6 MR. ORSINGER: Then there's really no reason
7 to treat these as exceptions because filing electronically
8 is the functional equivalent of filing in paper, right?

9 MR. WOOD: Exactly. And so that's why I say
10 it's an arbitrary list, with the exception of perhaps
11 something like a will just because the whole idea of a
12 probate proceeding is proving up the signature on that
13 will, and you might consider that differently; but yes,
14 juvenile proceedings and mental health cases, it's just an
15 arbitrary item on this list.

16 MR. ORSINGER: I would suggest we take the
17 whole list off of here.

18 MS. WOLBRUECK: I have a point.

19 MR. ORSINGER: Bonnie, what did you say?

20 MS. WOLBRUECK: The Chapter 33 of the Family
21 Code, the reason that's on there is because of the time
22 element, and understand that there is this 24/7 filing and
23 because of that two-day limit on these parental bypasses,
24 so that if it's electronically filed over the weekend,
25 then getting it to the judge in a timely manner may limit

1 that opportunity.

2 MR. ORSINGER: Are those rule deadlines or
3 statutory deadlines?

4 MS. WOLBRUECK: Statutory.

5 MR. ORSINGER: So we're going to basically
6 say that they can't e-file, but could they fax file over
7 the weekend and start the timetable running, or is the fax
8 machine on?

9 MS. WOLBRUECK: It depends upon -- fax
10 filing is different from county to county, and there are
11 some counties that have 24/7 fax filing and some that do
12 not.

13 MR. ORSINGER: And what about the counties
14 that -- like Dallas County I think you can file
15 mechanically. They have a little window there where you
16 can get your file stamp.

17 MS. WOLBRUECK: I don't know what they do
18 with these in Dallas County, because these are so
19 time-sensitive, along with confidentiality sensitive, to
20 where -- it's the time-sensitive document.

21 VICE-CHAIRMAN LOW: Richard.

22 MR. MUNZINGER: Did I understand you to say
23 that there are some filings under the Family Code that the
24 law requires that there be 7-day, 24-hour --

25 MS. WOLBRUECK: No.

1 MR. MUNZINGER: -- availability for filing?

2 MS. WOLBRUECK: No. Richard was talking
3 about fax filing, and some counties have 24/7 fax filing.

4 MR. ORSINGER: And what she's saying,
5 Richard, is that on the parental bypasses they have to
6 react so quickly that if it gets filed after everyone
7 leaves on Friday afternoon somebody needs to act Sunday
8 afternoon, but there is nobody even knows it's there. So
9 by saying you can't do it, that means you can't have it
10 happen on a weekend so that a judge can see it before the
11 time runs, which might be a reason to leave that one in
12 there, but what's the reason for the rest of them?

13 VICE-CHAIRMAN LOW: Why couldn't we review
14 that and see what really just can't be done, either by
15 statute or in practical under the category of things that
16 I covered? And we're apparently going to have to have
17 some kind of list, but the problem is then if you leave
18 something out, you know, and --

19 MR. ORSINGER: Well, is this nothing we can
20 resolve today? I mean, like, for example, the danger of
21 fax filing a will is that you don't have the original in
22 the courtroom and somebody objects to authentication and
23 it gets sustained, you're dead. You bring the original to
24 court, right?

25 VICE-CHAIRMAN LOW: I mean, I would say

1 everything that's practical at this time within technology
2 and requirements of the law, and the law in a will, you
3 know, you can't do that in a will, and let the lawyers
4 figure it out, because we just list each thing, we'll
5 overlook several things. I mean --

6 MR. ORSINGER: What do we do with the list?
7 What do we do with this list? Do we drop it? Do we
8 debate it? Do we --

9 VICE-CHAIRMAN LOW: I would suggest that we
10 review that and try to substitute some general language of
11 what -- you know, so that something that can't be done or
12 that the law prohibits or something, I don't know, maybe
13 there are some things that because of the requirements of
14 the law you couldn't do it. I don't know. What do you
15 think about that?

16 MS. WILSON: We really when we wrote this it
17 was during the pilot project, and there were a lot of
18 judges that were concerned during the pilot, and that was
19 why this list was put there, and then under the Chapter
20 33, because of the time line we didn't want someone to
21 think that their request was going to be responded to on a
22 weekend, which is why we put that in there.

23 As Mr. Wood said, we have no problem with
24 eliminating those. Anything can be filed electronically.

25 VICE-CHAIRMAN LOW: Well, I would -- the

1 committee needs to kind of study that because once you
2 give a list, I mean, then you're going to overlook
3 something that maybe should be in the list. That's -- I
4 don't know the answer. What do you think, Richard?

5 MR. ORSINGER: Is it acceptable, Judge
6 Hecht, if we just send this back to the drawing board?

7 HONORABLE NATHAN HECHT: Yes.

8 MR. ORSINGER: And leave the record as-is?
9 Okay. Then let's move on to Rule 93.

10 MR. MUNZINGER: Richard, before you go there
11 can I ask a quick question? We spent a lot of time at the
12 last meeting talking about various things that were not
13 going to be available for online access, people's Social
14 Security numbers, this, that, and so forth. How does that
15 dovetail with electronic filing, and is there anything in
16 here that addresses that?

17 MR. ORSINGER: Well, if we implement this
18 before we implement that then the Brazoria County clerk is
19 going to have all of this on the internet. So we better
20 implement our noninternet publishing restriction before we
21 give them all of this electronically.

22 MS. HOBBS: They may be e-filing already.

23 HONORABLE TRACY CHRISTOPHER: They're
24 already doing it.

25 MS. WILSON: I'm already e-filing, and all

1 public records on my website are out for the public.

2 MR. ORSINGER: There you go.

3 MS. WILSON: But if it's a closed record
4 like juvenile or mental or a sealed case, we have the
5 ability to just click that that's a closed record, and
6 it's not available to anybody.

7 VICE-CHAIRMAN LOW: What about, I want to
8 file some discovery or something that I want sealed and I
9 want a temporary sealing and so forth, but I would have to
10 describe it in my papers more than I want, so I don't want
11 that to be -- I want that to be sealed temporarily. How
12 do you handle --

13 MS. WILSON: We actually had one of those
14 come through electronically. It was a document that the
15 attorney wanted sealed until reviewed by the judge, and so
16 we immediately took that to the judge. He ordered it
17 sealed, and it was never put out on the internet. They
18 put that -- there is a comment field in an electronic
19 filing.

20 VICE-CHAIRMAN LOW: Okay.

21 MR. ORSINGER: And what does that comment
22 field determine?

23 MS. WILSON: Well, it could be a message
24 back to the clerk on something.

25 MR. ORSINGER: So if I file something that I

1 don't want on the internet I could just put an X in that
2 box and --

3 MS. WILSON: No. That's a public record.
4 What you could say is "Before you scan this" or, you know,
5 "Would you please let the judge review it? I'm asking the
6 judge to seal it." We actually had one document in the
7 two years.

8 VICE-CHAIRMAN LOW: Richard.

9 MR. MUNZINGER: Her comments prompt this
10 question in my mind. If I have a -- pretend I have a case
11 under Rule 76a where I have to have some documents that
12 are reviewed by the trial court in camera to determine
13 whether they are or aren't public. Now, if I file all of
14 those documents electronically, how is it brought to the
15 attention of the clerk, if at all, requiring a response
16 from the clerk who receives them, that they are, in fact,
17 to be considered confidential, et cetera, not available to
18 anybody electronically or otherwise other than the court
19 in camera, and how do they get there? I don't understand
20 how that's going to work, and I don't understand if it can
21 work.

22 VICE-CHAIRMAN LOW: Well, you've asked the
23 wrong person. Maybe you ought to ask --

24 HONORABLE NATHAN HECHT: No, it can work.
25 But tell us how the lawyer designates.

1 MS. WILSON: Well, currently the local rules
2 do not allow anyone to electronically file an in camera
3 document.

4 MR. MUNZINGER: Local rules?

5 MS. WILSON: The local e-file rules. Yeah.
6 74b(d), does not allow in camera documents to be filed
7 electronically. If you eliminate that from the rules as
8 proposed then people would be allowed to file the in
9 camera, and in that comment field you would have to state
10 that this is an in camera or we would have to have a box
11 that you check that this is in camera and then the clerk
12 would then know that that was not to be made public.

13 MR. MUNZINGER: The way I have it in my
14 mind, if I file an ordinary pleading that doesn't have any
15 of these problems with it, clerks are really not doing
16 anything. These things are all being shoveled
17 electronically, put into the files electronically, clerks
18 don't do squat, but if I come along and I say, "Here I've
19 got this volume of papers here that you better determine
20 whether these are public or not public." This is a public
21 hospital and we're going to get into medical staff
22 affairs, we're going to do this, that, and so forth; and
23 I've got 50 pounds of documents; and I do that
24 electronically.

25 Now, how do I get the clerk's attention to

1 address that I've got 50 pounds of documents, or so many
2 million gigabytes or whatever it is, of documents that no
3 one should be looking at other than the judge; and how do
4 I get them to the judge; and how does the court assure the
5 practitioners, the public, and the parties that all of
6 this is done, because sometimes this stuff is very
7 sensitive?

8 MS. WILSON: We would have to go back --
9 since that currently under the local rules that's not even
10 considered, we would have to go back to Texas Online, and
11 they would have to reformat as part of one of the issues
12 that you would address, and you would have to check that
13 those documents were in camera, which would then
14 automatically seal that from everyone.

15 MR. MUNZINGER: Well, the reason I raise the
16 question is that the tendency here was we were going to
17 throw out (a) and (b), and now we come down and we find
18 that we can't throw these things out quite so easily.

19 VICE-CHAIRMAN LOW: Well, maybe you've
20 raised a pretty good point, and we -- you know, when we
21 tell everybody we can file, that e-mail is good for the
22 world, or e-filing is good for the world, but then not
23 really, we may have to look at a list like this; and if we
24 overlook something, well, I guess we'll learn about it.

25 MR. ORSINGER: But, see, I mean, the fix

1 here is to make Texas Online obey our procedures.

2 VICE-CHAIRMAN LOW: Right.

3 MR. ORSINGER: Not to formulate our
4 procedures so that Texas Online doesn't have to change its
5 software.

6 VICE-CHAIRMAN LOW: Right.

7 MR. ORSINGER: And so if we're asking for
8 something that's humanly impossible, okay, well, then
9 that's fine. Let's not request it, but if we want
10 juvenile cases and mental health cases and parental
11 bypasses not to be public, then we have a rule somewhere
12 or a contract change or a directive from the Supreme Court
13 or something saying "Don't make this public." Wouldn't
14 that work, and then they just go change their software,
15 right?

16 MS. WILSON: Well, it wouldn't be public
17 under current law, juvenile or mental. It wouldn't be,
18 but the in cameras, those normally go right to the judge
19 in the courtroom. If you were to electronically file it
20 then Texas Online would have to change the screens to
21 allow for an in camera document not to be open to the
22 public.

23 MR. ORSINGER: Okay. Is that technically
24 feasible then?

25 MS. WILSON: Yes.

1 MR. ORSINGER: Okay. And whose permission
2 do we need to require them to do that? If the Supreme
3 Court wants to write a rule, do they have the authority?

4 MS. WILSON: They're a state agency, so they
5 have to follow that rule.

6 MR. ORSINGER: So they could issue an
7 administrative order saying "Formulate Texas Online so
8 that it permits in camera filing"?

9 MS. WILSON: Correct.

10 MR. ORSINGER: And then Online would have to
11 do it?

12 MS. WILSON: Correct.

13 MR. ORSINGER: To me that's the better fix.

14 VICE-CHAIRMAN LOW: Do it.

15 MR. MUNZINGER: It's commonplace. I mean,
16 you do it frequently in discovery fights and what have
17 you. It's not limited to Rule 76a cases. You've got
18 trademark cases and --

19 VICE-CHAIRMAN LOW: That's the best way.
20 All right. I think the last thing, Richard, is --

21 MR. ORSINGER: Rule 93. Rule 93 has to do
22 with the verification of certain pleas, and if you look at
23 the next to last one on subdivision (b), it's only
24 verified if it's scanned.

25 VICE-CHAIRMAN LOW: Well, that goes in the

1 general rule, doesn't it?

2 MR. ORSINGER: Does it? It does?

3 VICE-CHAIRMAN LOW: Yeah.

4 MR. ORSINGER: Okay. Put that in the
5 signature rule.

6 VICE-CHAIRMAN LOW: All right.

7 PROFESSOR DORSANEO: Maybe you ought to have
8 a separate filing -- a signature rule and a filing rule
9 and put those up in the front in the general.

10 MR. ORSINGER: What would be the filing
11 rule?

12 PROFESSOR DORSANEO: It would be a
13 combination of some parts of 21, 74, 74a, 74b.

14 HONORABLE NATHAN HECHT: 21a.

15 MR. ORSINGER: Okay. Now, subdivision (c),
16 assuming we dump this in the signature rule, subdivision
17 (c) says that a court can require someone to file an
18 original document if a scanned image was filed raising one
19 of these affirmative defenses that have to be verified.
20 Tracy.

21 HONORABLE TRACY CHRISTOPHER: Well, the only
22 thing that worries me about that is if someone brings the
23 hard copy to a clerk without some directive, they're just
24 going to scan it and throw it away, which is, you know,
25 the current plan. So there has to be something more to

1 that rule if the idea is to present it to the judge in
2 hard format for the judge to look at, for people to look
3 at, because the intent of the clerk's office is to get rid
4 of the paper file; and so just the way it's written here,
5 "promptly file the document in a traditional manner"
6 doesn't tell you anything, because the current plan of the
7 clerks is anything that's filed in a traditional manner
8 will be scanned and thrown away.

9 MR. ORSINGER: Well, then that's a problem
10 we have with paper filing, too, isn't it? Right now.

11 HONORABLE TRACY CHRISTOPHER: Yeah. But the
12 -- which is fine, but I think the idea behind this rule is
13 that someone wants to actually look to see that it was
14 verified. They want to see the hard copy.

15 MR. ORSINGER: Then we have to change not
16 only the electronic filing rule but the paper rule to say
17 that either automatically or on court order they won't
18 throw away verified pleadings or something?

19 HONORABLE TRACY CHRISTOPHER: We would have
20 to do something, because otherwise that's the current
21 plan.

22 MR. ORSINGER: Well, that problem exists for
23 paper as well as electronically filed documents.

24 HONORABLE TRACY CHRISTOPHER: Right. It
25 does.

1 MR. ORSINGER: It doesn't seem realistic to
2 have the clerk search through the file and see what's
3 verified and what's not before they scan and destroy,
4 right?

5 HONORABLE TRACY CHRISTOPHER: I'm just
6 saying I think that the rule should be written, you know,
7 if the judge wants to see the actual -- well, I don't know
8 what we're going to do with the paper ones that are
9 verified that people file as paper unless there is some
10 rule that says you've got to keep the hard copy until the
11 judge says you can get rid of it. You know, I don't know
12 what to do with that.

13 MR. ORSINGER: Well, we already have a rule
14 in here somewhere -- Bill, maybe you remember where it is
15 -- that if you're filing a copy, if you're filing a fax
16 copy of something or some other kind of copy, you've got
17 to retain the original and produce it upon request.

18 HONORABLE TRACY CHRISTOPHER: That's right.
19 I think that would be better, you retain the original and
20 then you produce it at some point if somebody needs to see
21 it.

22 HONORABLE SARAH DUNCAN: Yeah.

23 VICE-CHAIRMAN LOW: Why don't you find that
24 rule and put that?

25 MR. ORSINGER: That's already in these rules

1 of procedure about something. I don't know which one it
2 is.

3 MR. WOOD: It's 45, Richard.

4 HONORABLE TRACY CHRISTOPHER: We might need
5 to say that with respect to paper documents, that you
6 shouldn't be filing the original with the clerk anymore if
7 the plan is that they're going to scan everything and
8 destroy the hard copy. You know, if you want to preserve
9 the notarized original, you don't want to send the
10 original will down there and have it get destroyed if you
11 need the original will for some reason.

12 MR. ORSINGER: Okay. Right now under Rule
13 45 the lawyer has the election of whether to file the
14 original of a pleading or a copy. "When a copy of the
15 signed original is tendered for filing the party or his
16 attorney filing such copy is required to maintain the
17 signed original for inspection by the court or any party
18 incident to the suit should a question be a raised as to
19 its authenticity." So you're not required to file
20 originals, right? We can file copies, and if we do, we
21 have to retain originals.

22 That's what we do right now before we even
23 have electronic filing. Why couldn't electronic filing be
24 the same way, that you retain the original subject to
25 somebody saying "I challenge the authenticity of this" and

1 then the lawyer must produce the original of what was
2 electronically filed.

3 HONORABLE TRACY CHRISTOPHER: That's fine.
4 But it doesn't cure the paper problem if you filed the
5 original.

6 MR. ORSINGER: Well, the paper problem has
7 to do with the paper destruction policy, and if you're
8 worried about that then start filing copies of everything
9 and keep the originals.

10 HONORABLE JAN PATTERSON: Why not just
11 require filing of the copy and retention of the original?

12 HONORABLE TOM GRAY: Because we're talking
13 about electronic filing, not paper filing today.

14 MR. ORSINGER: Man, I tell you, I would
15 rather file the original and then not worry about it. I
16 get all the originals out of my office as quickly as I
17 can.

18 PROFESSOR DORSANEO: The whole idea of an
19 original and a copy and this whole thing just doesn't make
20 any sense.

21 MR. ORSINGER: Especially if signature no
22 longer means that we sign a piece of paper. What's the
23 difference between the original and the copy? So are we
24 going to try to create a similar fix for that?

25 HONORABLE NATHAN HECHT: Yeah, right.

1 (Laughter.)

2 MR. ORSINGER: Move on to Rule 167. Okay.
3 Rule 167 says that a party can move, and for good cause a
4 court can order, electronic filing and service other than
5 ones that are prohibited under Rule 74b. So this allows a
6 judge in a case to mandate that all filing in the case
7 will be electronic unless it's on the list of
8 prohibitions. Richard.

9 MR. MUNZINGER: Why do you have a good cause
10 requirement in there and what does it mean? I mean, just
11 because you're smart and you want to be efficient and
12 you're modern, that ought to be enough.

13 MR. ORSINGER: Why does it have to be on
14 motion of a party?

15 HONORABLE TRACY CHRISTOPHER: Right.
16 Shouldn't be.

17 MR. WOOD: We wanted to suggest that that
18 first clause be stricken.

19 MR. ORSINGER: Okay. Everybody dislikes it
20 anyway.

21 HONORABLE JANE BLAND: Hold on, hold on.
22 There's a fee associated with filing online. Why are we
23 going to allow the mandatory ordering of filing online?

24 MR. ORSINGER: Because we're trying to get
25 this whole program off the ground. The people who are

1 doing it right now it's being mandated, and if you don't
2 like it then you can --

3 PROFESSOR CARLSON: No, she's saying the
4 opposite.

5 HONORABLE JANE BLAND: I'm saying I want to
6 go for, you know, no fee, file my motion with Judge
7 Christopher in the 295th, and I don't want to have to pay
8 \$10 to file it and however many extra dollars to serve it,
9 and I understand that that may not be a good economic
10 decision because it might have been cheaper in the long
11 run for me to just file it electronically, but I think
12 there should be some access to the courthouse that doesn't
13 require you to pay money, extra money.

14 MR. ORSINGER: Okay. But here is the
15 problem, Jane. If you create that exception then
16 everybody who wants to continue to paper file will invoke
17 the exception, and you'll never get electronic filing off
18 the ground. In the courts where electronic filing has
19 happened it's because the judge says, "I won't let you
20 file anything unless you file it electronically."

21 "Well, then I've got to pay Lexis \$25 a
22 year."

23 "Well, that's tough. If you're in my court
24 you file electronically." That's what's going on right
25 now, and that's what this is all about statewide. No

1 exceptions if a judge is ruling.

2 VICE-CHAIRMAN LOW: What are we going to do
3 on --

4 MR. ORSINGER: Is that right or wrong? Did
5 I misstate that?

6 MR. MUNZINGER: Well, what is the cost right
7 now? I have people in my office that do all this. What
8 does it cost somebody to file electronically today? I'm
9 Joe Schmoe, the sole practitioner with a limited budget.
10 What does it cost me to file?

11 MS. WILSON: There are five or six EFSPs?
12 There are six EFSPs, electronic filing service providers.
13 You could contract with any of them. Depending on what
14 you work out on a contract, the fee could be from \$1 to
15 10, \$15.

16 MR. MUNZINGER: Per filing?

17 MS. WILSON: Per document. That could be a
18 one-page document or a thousand page document. It's \$4 to
19 file through Texas Online and \$2 to file with the county,
20 so your minimum might be \$7.

21 MR. MUNZINGER: Per document.

22 MS. WILSON: Per document.

23 VICE-CHAIRMAN LOW: All right. Costs off
24 the table now, what are we going to do with 167?

25 MR. ORSINGER: I think that's the whole

1 philosophical issue here. Are we going to authorize a
2 court to require everyone to use electronic filing, or are
3 we going to make it subject to a good cause exception,
4 which is not defined and we don't even know how you get
5 appellate review of that?

6 VICE-CHAIRMAN LOW: You can't. You can't
7 have -- I mean, you're just not going to be able to do
8 that.

9 MR. ORSINGER: You want submit the exception
10 for pro ses who are indigent, or anybody who is indigent?

11 MS. HOBBS: Or just a pro se who doesn't
12 want to contract with -- I mean, because for a law firm it
13 makes sense to contract, but a pro se may not want to
14 contract.

15 MR. ORSINGER: So you want to except pro ses
16 here and just say except -- write in an exception for pro
17 ses?

18 VICE-CHAIRMAN LOW: Maybe it's so that they
19 have to do it unless authorized otherwise by the court,
20 and the court decides. Because you're going to have a
21 mixed system. How are you going to get everything and --
22 it's just not going to work good.

23 MR. MUNZINGER: Judge Bland has a good point
24 about access to justice. I mean, everybody in this room
25 -- all of these people have got computers. I've got one

1 that someone knows how to work, but there may be people
2 that don't, and there may be people that don't have the
3 money or don't want to spend the money that are not just
4 curmudgeons. I mean, they have a problem. It's an access
5 to justice point. I know we're in a hurry, but at the
6 same time I think we need to be careful. It's our justice
7 system, citizens' justice system.

8 HONORABLE JANE BLAND: People handwrite
9 motions all the time and file handwritten motions all the
10 time.

11 HONORABLE TOM GRAY: You get down to the
12 courthouse, you know, and you need a motion for
13 continuance. Bam, there it is.

14 HONORABLE JANE BLAND: There it is.

15 HONORABLE TOM GRAY: Oh, wait. I can't do
16 that. I've got to go over to my ESPN and get it filed.

17 HONORABLE TRACY CHRISTOPHER: You don't need
18 to worry about it because we're going to have wireless
19 internet in the courtroom, so you will just bring your
20 computer with you and do it.

21 VICE-CHAIRMAN LOW: I have to walk back
22 around the corner to my office.

23 MR. ORSINGER: No, that doesn't apply
24 anymore. They have an automatic gate now.

25 VICE-CHAIRMAN LOW: Why did you tell that?

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

2 VICE-CHAIRMAN LOW: All right. Go ahead.

3 HONORABLE TRACY CHRISTOPHER: Well, maybe we
4 should say, "A court may order electronic filing and
5 service of documents" and then do a, you know, "parties
6 for good cause shown can request to be exempted from that
7 rule."

8 HONORABLE JANE BLAND: Yes.

9 HONORABLE TRACY CHRISTOPHER: And then that
10 could be the pro se. I mean, I'm not going to order it in
11 a pro se case. I'm going to look at my files before I
12 would start making a blanket order to that effect.

13 VICE-CHAIRMAN LOW: All right. Anybody have
14 a better suggestion than that?

15 HONORABLE TOM GRAY: You're going to make it
16 mandatory electronic filing?

17 HONORABLE TRACY CHRISTOPHER: No. A court
18 may order it, may order electronic filing.

19 MR. ORSINGER: And what's your exception,
20 Tracy, or what's your statement?

21 HONORABLE TRACY CHRISTOPHER: Well,
22 basically, "A party may request to be exempt from this
23 order upon good cause shown."

24 VICE-CHAIRMAN LOW: That's the second
25 sentence. All right. Carl.

1 MR. HAMILTON: I think that rule ought to be
2 deleted, and for another reason, we've already got all
3 these rules that say you can do all kinds of paper filing.
4 Then we're going to come along and say, but if the judge
5 wants to change all that he can say it's all got to be
6 electronic, and I think it ought to be optional with
7 whoever is doing the filing.

8 MR. ORSINGER: You're in front of the train,
9 Carl. Get out of the way.

10 VICE-CHAIRMAN LOW: There are 15 cars
11 already run over you. Levi said, "I hope the train hasn't
12 run."

13 PROFESSOR DORSANEO: That kind of reminds me
14 of when I'm eating ice cream and say, "I'll eat a little
15 bit" and then say, "I'm just going to eat the whole damn
16 thing."

17 VICE-CHAIRMAN LOW: All right. I tell you
18 what, everybody sleep on that. All right, go ahead.

19 MR. WOOD: I just wanted to say that if you
20 strike the first clause it still says "a court may order"
21 and it's completely up to the court in every individual
22 case. So, Judge Bland, if you never want to order
23 electronic filing, this rule will allow you never to order
24 it. Judge Sullivan, if you want to order it in every
25 case, you can, and anywhere in between.

1 HONORABLE JANE BLAND: I'm not concerned
2 about that, that the judge can or cannot. I'm concerned
3 about a judge saying "For every case filed in the 281st
4 I'm going to require electronic filing," and what is a
5 litigant when faced with that option to do other than
6 electronically file? They ought to be able to have some
7 out.

8 VICE-CHAIRMAN LOW: So then our thing is to
9 make it mandatory with an exception that the judge some
10 way -- or some language, because otherwise it's not going
11 to be electronic.

12 HONORABLE LEVI BENTON: Well, Fred Edwards
13 and a few other judges across the state have been --
14 what's-his-name in Beaumont?

15 MS. HOBBS: Mehaffy.

16 VICE-CHAIRMAN LOW: Tell me about it.

17 HONORABLE LEVI BENTON: How are the pro ses
18 or others getting around the Edwards, Mehaffy, so-called
19 mandatory rule?

20 MR. ORSINGER: I think they ignore it, and
21 they just go paper file and then nothing bad happens to
22 them.

23 MS. HOBBS: I don't think Mehaffy has too
24 many pro se litigants.

25 HONORABLE JANE BLAND: How can you not have

1 pro se litigants? I can't imagine that Beaumont is pro se
2 free.

3 VICE-CHAIRMAN LOW: All right. Tomorrow
4 we're going to take up anybody that has any suggestions on
5 that last, we'll get to that in a couple of minutes. Then
6 the court reporter records, exhibits, appellate rules,
7 Bill, and then --

8 PROFESSOR DORSANEO: Appellate rules ought
9 to go first because it's alphabetical.

10 VICE-CHAIRMAN LOW: All right. We'll take
11 them up tomorrow.

12 (Adjourned at 5:38 p.m.)

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2 CERTIFICATION OF THE MEETING OF
3 THE SUPREME COURT ADVISORY COMMITTEE

4 * * * * *

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7 I, D'LOIS L. JONES, Certified Shorthand
8 Reporter, State of Texas, hereby certify that I reported
9 the above meeting of the Supreme Court Advisory Committee
10 on the 6th day of May, 2005, and the same was thereafter
11 reduced to computer transcription by me.

12 I further certify that the costs for my
13 services in the matter are \$ 2484.00.

14 Charged to: Jackson Walker, L.L.P.

15 Given under my hand and seal of office on
16 this the 18th day of May, 2005.

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