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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 26, 2013

(FRIDAY SESSION)

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 Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 26th day of April,
2013, between the hours of 9:08 a.m. and 5:00 p.m., at the
Texas Association of Broadcasters, 502 East 11th Street,
Suite 200, Austin, Texas 78701.

1 **INDEX OF VOTES**

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

4 Vote on Page
5 Proposed appellate e-filing Rule 4(b) 25904
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12 **Documents referenced in this session**

13 13-01 Proposed Statewide e-filing Appellate Rules
14 13-02 Proposed Statewide e-filing Trial Court Rules
15 13-03 E-mail from Fort Bend County Clerk, 4-24-13
16 13-04 E-mail from Dallas County Clerk, 4-25-13
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2 CHAIRMAN BABCOCK: Blake, since you're going
3 to be on deck, why don't you come up here, and Chris.
4 We're on the record, and welcome, everybody. Thanks for
5 coming. As usual, we will start with a report from
6 Justice Hecht.

7 HONORABLE NATHAN HECHT: Good morning. The
8 Court in February approved the final dismissal and
9 expedited actions rules that we wrote in accordance with
10 House Bill 274 from the last Legislature. I have visited
11 with some of the principals in the Legislature about the
12 rules, and they seemed to think that they were what the
13 Legislature had in mind and were glad that we wrote them
14 the way we did. So they're out there, and we will, of
15 course, continue to monitor both of them, but the
16 expedited rules, expedited actions rules particularly,
17 because there really is no other jurisdiction we know of
18 in the country that has a similar procedure that takes
19 cases of a certain size and automatically moves them over
20 into an expedited process.

21 So we'll be continuing to look at that, and
22 also in response to the 82nd Legislature we rewrote the
23 rules, as you know, for JP courts, abolishing the small
24 claims court and revising rules having to do with the
25 foreclosure and eviction as well as new debt claim rules;

1 and the committee's vetting of all of those issues were
2 very helpful in coming up with a final product. The
3 justices of the peace have had a good look at them in the
4 last stages of their finalization; and they asked the
5 Legislature for a few more months to prepare to implement
6 them, so the Legislature agreed with that; and now instead
7 of being effective May 1st, they'll be effective September
8 1st as the small claims court is abolished, effective
9 August 31st.

10 So I spoke at a gathering of justices of the
11 peace in Tyler a couple of months ago, and the general
12 reaction was positive of the justices, and several members
13 of the bar who do a lot of that kind of work in justice
14 courts thought they would be a big help. So my only
15 regret in that process was that we did not have time to
16 write them in our plain English format that we try to use
17 for the standard jury instructions. It just takes a lot
18 of work. It turns out that no one in the bar can speak
19 plain English, so we have to go outside the bar; and we
20 just were not able to get that done; but we can continue,
21 I hope, to work on that, because those courts, the justice
22 courts, handle the same number of civil cases that the
23 courts of -- the trial courts of record do, which is close
24 to 500,000 cases, so they have quite a bit of traffic, and
25 those rules need to work smoothly. In addition to the

1 civil docket, the justices of the peace handle about one
2 and a half million criminal cases, so altogether they
3 handle about 2 million cases a year, which of 815 of them
4 all but 60 are nonlawyers, so a lot of work gets done in
5 the justice of the peace courts.

6 Then in March we made some minor corrections
7 to the word limit amendments to the Rules of Appellate
8 Procedure. We also made minor changes in the medical
9 records form that was Rule of Evidence 902 attached to
10 the -- as part of the dismissal rules?

11 MS. SECCO: Expedited actions.

12 HONORABLE NATHAN HECHT: Expedited actions
13 rules. The Legislature, as you know, is in session; and
14 every report I have gotten from legislators of all stripes
15 has been that they have a lot of confidence in this
16 process and are pleased at the way it works, so that's not
17 always been true, has it, Richard?

18 MR. ORSINGER: Right. True.

19 HONORABLE NATHAN HECHT: And we're glad that
20 it is true at this point. The downside to that is that
21 they seem to want to use it more, so we expect that there
22 will be several rules directives in this legislative
23 session, some of them kind of rifle shots like we got last
24 time, but some of them may be very significant. So we
25 won't know for a few more weeks exactly what that will

1 look like. The one aspect of this that we have not been
2 successful in persuading the Legislature to relax is the
3 deadlines for completion. They still just sort of
4 instinctively pick September the 1st or January the 1st as
5 the completion dates, so we may have to have another
6 session this summer if that -- if we get deadlines like
7 that, but we have met them in the past, and we will make
8 every effort to do that in the future.

9 On April 18th Andrew Jackson Pope was a
10 hundred years old, and we had a wonderful celebration for
11 him over in the House of Representatives. We got
12 congratulatory letters from all five presidents who have
13 agreed on it being a great thing that Jack Pope is a
14 hundred and it's a nice thing that the Bush library is
15 standing in Dallas, and I don't know what else they've
16 agreed on in the last few years. So that was great, and
17 the U.S. Supreme Court wrote a nice congratulatory letter
18 to the Chief that is a little paragraph on the Court's
19 letterhead, and then it's just all nine justices just
20 scribbled their names on it. There's no signature lines
21 or anything, so it kind of looks like a birthday card
22 except for the letterhead says, "Supreme Court of the
23 United States"; and we don't know that they've ever done
24 that before, so it was nice of them to do; and we're
25 indebted to Justice Scalia for talking them into that; and

1 as well all of the appellate judges in Texas, all 98 of
2 us, signed a letter to Chief Justice Pope; and that was a
3 feat that Blake helped us accomplish; and it was very
4 touching and Jack was very moved.

5 I had lunch with him about six or eight
6 weeks ago; and he said that -- as soon as I sat down, I
7 couldn't even get my napkin in my lap, and he said, "Well,
8 I'm sorry," he said, "My mind's just gone, and I know it's
9 embarrassing and it's very awkward and I know it is for
10 you and it certainly is for me, but that's the truth" in
11 his own inimical style, and then for the next hour and a
12 half he proceeded to remember how he went out to Coke
13 Stevenson's farm to get -- to talk to a hired man there,
14 whose name he believed was such-and-such and then he went
15 to the LBJ side, and that's how he got appointed; and also
16 he remembered Allene and he went to the nickel movies back
17 in the Thirties, which was a splurge but turned out all
18 right in the end and basically remembered everything there
19 was for the last 90 years; and every once in a while he
20 would stumble on some immaterial particular and look over
21 at me and say, "See, my mind's just gone." So I assured
22 him by that test mine was, too, and we could commiserate,
23 but it was a beautiful day for the Chief and several --
24 most of the Court was there, the Court of Criminal
25 Appeals, Federal judges, and I know some of the courts of

1 appeals judges attended, and so it was a great thing.

2 And finally, we welcomed Jeff Boyd, of
3 course, to the Court, and he's been a great hand already,
4 and the Chief has asked him to take Justice Medina's place
5 as deputy liaison to this august group, so we're happy to
6 have him in that capacity, and we look forward to the
7 e-filing today. The Legislature has -- well, the House of
8 Representatives has remarkably looked favorably on a
9 e-filing -- on e-filing legislation that will we hope in
10 broad terms make it possible for us to have like a PACER
11 system for the state courts if we provide the money to
12 provide the infrastructure for the e-filing system so that
13 we don't have to charge for every document that's filed,
14 and that's a great thing, and I think it -- the benefits
15 are just overwhelming, but the -- there is a lot of
16 antipathy in the Legislature to any kinds of taxes or
17 fees, and they typically view fees as taxes, so to have a
18 fee bill for this initiative is really quite extraordinary
19 and a tribute to Casey and David Slayton and others at OCA
20 who have worked on it, and so we -- and the Chief, of
21 course, to whom we owe a lot on this. So I think that's
22 all of it.

23 CHAIRMAN BABCOCK: All right. Thank you,
24 Justice Hecht, and I note that Justice Boyd in a break
25 from protocol is not sitting up here at the head table,

1 but rather in his old 'hood where he always used to hang
2 out, and I notice that Justice Peeples has left his old
3 'hood to go over to the right side of the room, and I
4 don't know if they're related in any way, the change of
5 places, but we'll have to explore that at the break. We
6 have Justice Simmons down at the end of the table; and we
7 have Casey and Blake Hawthorne, the clerk of the Supreme
8 Court, which all of you know, here to help us with these
9 electronic rules; and, Blake, I think you're going to take
10 the court of appeals and the Supreme Court?

11 MR. HAWTHORNE: Yes, sir.

12 CHAIRMAN BABCOCK: And Justice Simmons is
13 going to take us through the trial court rules.

14 Okay. So why don't you -- you said you
15 have four points to make, but I suspect that this group
16 will have more points than that. Justice Peeples.

17 HONORABLE DAVID PEEPLES: If there's going
18 to be a summer meeting, I for one would rather get it on
19 my calendar now and then have to scratch it later if it's
20 not necessary than to wait until the last minute and try
21 to --

22 CHAIRMAN BABCOCK: There is one summer
23 meeting that is currently on the calendar.

24 HONORABLE DAVID PEEPLES: But I thought he
25 mentioned a possible additional one.

1 CHAIRMAN BABCOCK: That's right, and what
2 you're saying is if we need one, we should put it on the
3 calendar now and then cancel if we don't need it?

4 HONORABLE DAVID PEEPLES: Not knowing right
5 now whether we need it or not, I'd rather get it on my
6 calendar. That's just me.

7 CHAIRMAN BABCOCK: Yeah. Okay. We'll --
8 we'll do that, that's a good idea. Okay.

9 PROFESSOR HOFFMAN: Chip?

10 CHAIRMAN BABCOCK: Yeah, Lonny.

11 PROFESSOR HOFFMAN: If I could before we
12 start, I have a question, if I could, going back
13 to Justice Hecht's comments in the very beginning. You
14 were talking about we're going to kind of monitor what the
15 effect of the expedited rule may be. I'm wondering has
16 there been any conversations with the Legislature, since
17 it's their creation, whether there's any money that they
18 might allocate to OCA to actually track and see whether or
19 not the law they passed is having the effect they hope it
20 will have.

21 HONORABLE NATHAN HECHT: I don't think so,
22 but I don't know for sure. But we'll talk -- we should
23 talk with David and see if -- even if it's too late is
24 there a possibility that we could move some money around
25 in his budget. That's a good point.

1 CHAIRMAN BABCOCK: Yeah, and talking about
2 those expedited rules, I had a lawyer come up to me and
3 with a conspiracy theory, which may be true for all I
4 know, and he was taking the new civil cover sheet that has
5 -- you know, it says, "Is your case 100,000 or 200,000 or
6 300,000," and said that this was a stealth effort on the
7 part of the Supreme Court to expand the expedited rules
8 from cases of 100,000 and less to 200,000 and all the
9 information would be there for them to do that, and I said
10 that maybe so, but I'd never heard anything like that. I
11 didn't think they were connected. So, anyway, people are
12 watching what we're doing. I think that's good.

13 So, Blake, do you want to -- do you want to
14 take us through the court of appeals and Supreme Court
15 electronic filing rules?

16 MR. HAWTHORNE: Yes, I would be happy to. I
17 suppose I should begin with why we're considering this.
18 After all, as probably most of you know, the Supreme Court
19 and the courts of appeals already -- most of the courts of
20 appeals already have electronic filing in place, and they
21 have local rules for electronic filing, but what's
22 happened is, is we will have a new e-filing vendor that
23 will be called TexFile as opposed to Texas.gov. It will
24 be under the auspices of the Office of Court
25 Administration instead of being run through the Department

1 of Information Resources. So rather than going through
2 and changing all of our local rules it was thought that we
3 should have one set of uniform rules for all of the
4 appellate courts, so I was tasked with this; and what I've
5 done is I have -- my starting place was the local rules
6 for the Fourteenth Court of Appeals, which Chris Prine,
7 who is here next to my right, is the clerk of. I chose
8 the Fourteenth because Chris has been with us since the
9 beginning with electronic filing in our effort to
10 establish the TAMES system, and although the Supreme Court
11 has kept the changes to the local rules to a minimum,
12 there has been -- there have been some changes put in
13 place, and I felt that Chris' were the most, shall we say,
14 advanced of the local rules out there, so that was the
15 starting place.

16 I would start -- I said I had four points to
17 make. The first point is that you'll notice Rule 1
18 requires an electronic clerk's record. It does permit a
19 clerk to file a paper record upon leave of court, but it
20 would require clerks to file paper records with the
21 appellate court. The next thing you will notice about the
22 rules is that in Rule 2 it requires reporters to provide
23 electronic records. Chris can tell you more about --
24 Chris had a lot to do really I think with moving the ball
25 on having electronic reporter's records. I know that

1 initially we thought we would get quite a bit of pushback
2 on those, but I think Chris' experience has been positive
3 in that regard, and his court does require electronic
4 reporter's records as do some of the other courts of
5 appeals.

6 Next you'll notice in Rule 3 that electronic
7 filing is required. Of course, the Supreme Court has
8 issued an order requiring electronic filing in all civil
9 cases. This kicks in at the courts of appeals on January
10 1st, 2014, so all courts of appeals will have to begin
11 electronic filing on that date, as will the largest of our
12 counties, so any county with a population of over 500,000,
13 by order on January 1st requires electronic filing in
14 those counties and then as the population gets smaller
15 there is a progressive schedule roll out for that. So we
16 would require all attorneys to file electronically in
17 compliance with that order.

18 One key change here, this was Chris'
19 addition which I think is a good one, is we have changed
20 it to require electronic filing in criminal cases as well.
21 We will, of course, have to work with the Court of
22 Criminal Appeals on that, but Chris and I both agree that
23 that's -- that's a good thing to do. I should point out
24 here on that note that one of the reasons that hasn't been
25 mandated before is that there has been a fee associated

1 with each document filed, even in criminal cases, but with
2 the new e-filing system indigent parties will not have to
3 pay, so we felt that it would be appropriate to go ahead
4 and require electronic filing of criminal cases in the
5 courts of appeals.

6 Last, this is somewhat of a minor change,
7 but we have already amended -- as you know, clerks, when
8 we issue final orders in cases at the appellate courts, we
9 have to send notices to the clerks of the trial courts
10 and, of course, at the Supreme Court to the court of
11 appeals and also to the judges that were involved in the
12 case and to the presiding judge as well, and one change
13 that we have made is that those notices will be sent by
14 e-mail rather than having to send paper notices. We are
15 getting ready to transition off of paper notices to
16 attorneys. The changes have already been made to the
17 TRAPs that permitted that. The language was changed from
18 "mail" to "send," and so we've already begun transitioning
19 off of that, but we would go ahead and make it clear here
20 that we don't have to send paper to the clerks and to the
21 judges. This will require some effort working with Casey
22 and the Office of Court Administration, of course, to get
23 e-mail addresses for all of our clerks, and I understand
24 that not necessarily all of our clerks have e-mail, which
25 is somewhat surprising in this day and age, but I think we

1 can get that done. So those are my major talking points.

2 CHAIRMAN BABCOCK: Okay. Great. Frank.

3 MR. GILSTRAP: Up until now we've been
4 operating under a series of miscellaneous orders issued by
5 the Supreme Court, which have been a kind of a supplement
6 to the rule book which deal only with electronic filing,
7 and I think everybody's been comfortable with that. These
8 rules, when you first look at the title, appear to be the
9 same thing. Electronic filing rules. Well, they're not.
10 They're filing rules for all cases. All cases are
11 supposed to be electronically filed, but to the extent you
12 have paper filing, they're included in this rule, and what
13 this is, it looks like it's going to be a supplement to
14 Rule 34 dealing with clerk's record, Rule 35 dealing with
15 the reporter's record, and Rule 9 dealing with filing.
16 Now, are we going to go on and just have a permanent
17 supplement to the rule book, or is the goal to integrate
18 these rules into Rule 34, 35, and 9?

19 MR. HAWTHORNE: Shall I respond?

20 CHAIRMAN BABCOCK: Yeah. Yeah, you're going
21 to respond to all of these things. Because I have no
22 idea.

23 HONORABLE TOM GRAY: It's nothing personal,
24 Blake, it really isn't, but you're going to be grilled.

25 MR. HAWTHORNE: I've observed before, so I

1 would expect it. I have nothing against integrating these
2 rules into the Rules of Appellate Procedure. I think the
3 first time I was here talking about electronic filing
4 rules was with the trial court rules back when Kennon
5 Peterson was our rules attorney, and we had attempted at
6 that point to integrate the rules into the Rules of Civil
7 Procedure, and the comments that we got back from the
8 advisory committee at that time were that the rules were
9 more technical in nature and that they didn't -- they
10 weren't basically very rule-like, and so based on that
11 feedback we went back and went with these local rules,
12 these templates for electronic filing, so I -- I would
13 certainly support that effort. I have always felt like
14 it's confusing for attorneys to have to go look somewhere
15 else to find the rules, and I'll tell you, frankly, they
16 don't read them anyway, but so I don't have any problem
17 with that approach. I would say it would take quite a bit
18 of effort, I think, and we do have a January 1st deadline
19 that we're trying to meet to get all of this integrated
20 back into the rules themselves.

21 We have -- I would say that the
22 technology -- that one advantage to this, technology
23 changes rapidly sometimes, and we have made quite a few
24 revisions to these templates, especially at the Supreme
25 Court. I mean, a lot of this we have learned as we've

1 gone along, and the fact that they have been separate and
2 freestanding has made it I think much easier to make
3 changes.

4 MR. GILSTRAP: Well, I understand, and these
5 are certainly more detailed, and obviously there's some
6 things that could change very quickly when the underlying
7 system changes, but at some point we're going to have to
8 confront the idea are we going to have a permanent
9 supplement to the rule book or are we going to integrate,
10 and I think we need to bear that in mind as we proceed. I
11 understand the deadline, and maybe this is the way we have
12 to go for now.

13 CHAIRMAN BABCOCK: Justice Hecht, do you
14 have any thought about that?

15 HONORABLE NATHAN HECHT: No, we've thought
16 about the problem for a long time, and I think the issues
17 are clear, do we want to put this kind of detail in the
18 rules, do we -- should we make it like the -- I don't
19 remember the rule on exhibits, how they're kept, but I
20 think the rule says they'll be kept in accordance with a
21 Supreme Court order, and then that's published separately.
22 The Court of Criminal Appeals I think has their own order.
23 The standard jury instructions say that the jury will be
24 instructed as directed by order of the Supreme Court, and
25 the idea has been that could change more quickly, it was a

1 more flexible approach; but I think, you know, if
2 everything is moving to e-filing, at some point the rules
3 need to be written with that contemplation.

4 On the other hand, the changes in the
5 Federal rules have been small, and the Federal rules still
6 contemplate sort of -- I mean, their mindset is paper
7 filing even though it accommodates electronic filing, so
8 it's just something we have to keep in mind.

9 CHAIRMAN BABCOCK: Okay. Any other general
10 comments? Yeah. Nina.

11 MS. CORTELL: I'm sorry, is the intent that
12 this will supplant local rules?

13 MR. HAWTHORNE: Yes, that's the intent.

14 CHAIRMAN BABCOCK: Okay. Any other general
15 comments or questions?

16 HONORABLE NATHAN HECHT: Another reason for
17 the local rule approach was to let the appellate courts
18 experiment within the parameters with certain aspects of
19 e-filing so that if one or more courts found a better way
20 to do it, they could try that and then we could work that
21 into the general template, but now that they've been out
22 there for a while, we feel like pretty much what's going
23 to be discovered had been discovered.

24 MR. GILSTRAP: One more.

25 CHAIRMAN BABCOCK: Frank.

1 MR. GILSTRAP: This doesn't deal with
2 mandamus or original proceedings. Is the plan to keep
3 paper filing for now?

4 MR. HAWTHORNE: Well, I think that it would
5 cover mandamus and original proceedings because it
6 requires attorneys to file electronically everything; and,
7 as you know, in original proceedings attorneys are
8 responsible for filing the record, so currently attorneys
9 do have to file the record electronically and then they
10 file their mandamus petitions electronically.

11 MR. GILSTRAP: Well, we're talking about
12 clerk's record, and that's not the mandamus record. When
13 I read it, it didn't jump out at me that this is also
14 going to apply to mandamus, so maybe you might need to
15 make that clear.

16 CHAIRMAN BABCOCK: Well, the first two rules
17 talk about the clerk's record and the reporter's record,
18 but --

19 MR. PRINE: If you look at Rule 3 --

20 CHAIRMAN BABCOCK: I was going to say when
21 you get to Rule 3 --

22 MR. PRINE: And we've had it in both the
23 First and the Fourteenth, the mandamus in the rule, and no
24 one has ever questioned that, and then 3(d) talks about --
25 3(d)(3), records filed in original proceedings and

1 appendix of materials.

2 MR. GILSTRAP: There you go. Okay.

3 HONORABLE NATHAN HECHT: And on that note,
4 too, in the long run these would obviate the need for
5 clerk's record and reporter's record because the record
6 would consist of everything that was filed in the trial
7 court, which would be as readily available to the court of
8 appeals and the Supreme Court and the Court of Criminal
9 Appeals as it would be to the trial court, which is the
10 way it is already in the Federal system. The Federal
11 court -- the Federal appellate courts can access the
12 filings in the trial court as readily as the trial court
13 can, and so the record is really -- I'm speaking broadly
14 here. The record is really whatever is filed in the -- at
15 any point in the proceeding, although there are appellate
16 rules requiring that an appendix be filed and that certain
17 documents be specifically presented to the appellate
18 court, but if a circuit judge wants to see what was --
19 some motion that was filed in the district court, she just
20 pushes a button.

21 MR. GILSTRAP: Okay.

22 CHAIRMAN BABCOCK: Okay. Any more general
23 comments? Yeah, Roger.

24 MR. HUGHES: I notice that there's very
25 specific requirements about what's -- what software format

1 you're going to use for the clerk's record and the
2 documents, but no specific format ordered for the
3 reporter's record. There is a reason for that, or is that
4 already specified somewhere else?

5 MR. HAWTHORNE: Good question, Chris.

6 MR. PRINE: They have in their uniform
7 manual, Rule 8 deals with electronic reporter's records,
8 and so they have their requirements set forth there.

9 CHAIRMAN BABCOCK: They being the reporters?

10 MR. PRINE: Pardon? The reporters, court
11 reporters.

12 MR. HUGHES: Well, I mean, is it text
13 format, or is it Word or PDF?

14 MR. HAWTHORNE: PDF.

15 MR. PRINE: PDF.

16 MR. JACKSON: Searchable PDF.

17 CHAIRMAN BABCOCK: What, David?

18 MR. JACKSON: Searchable PDF.

19 CHAIRMAN BABCOCK: Searchable PDF. All
20 right. Any other general comments? Okay. Let's just go
21 through these rules. Yes.

22 HONORABLE NATHAN HECHT: Let me ask David,
23 has that replaced the proprietary systems that reporters
24 have used in the past?

25 MR. JACKSON: No, all of our proprietary

1 systems have already gotten on board and allow us to
2 create PDF files.

3 CHAIRMAN BABCOCK: Okay. Let's go through
4 these rules specifically to make sure that nobody has any
5 comments or catches any glitches. Anything on Rule 1.1,
6 which is preparation of electronic or paper clerk's
7 record? Anybody see anything on that? Yeah, Nina.

8 MS. CORTELL: I had a question. The
9 reference in the preamble paragraph that says "prepare
10 only one record in a case." I was a little concerned that
11 could be construed not to allow later supplementation. I
12 know there's a reference later to supplemental, but I was
13 a little concerned that someone could take that phrase to
14 mean this preempts the right to supplement.

15 CHAIRMAN BABCOCK: Nina, could you say that
16 again and speak up a little bit?

17 MS. CORTELL: Sorry. I'm referring to the
18 preamble under 1.1, line three, where there's a reference
19 to "only one record in a case," and my concern just on
20 first blush of reading it was that it seems to preempt or
21 negate the right to supplement the record later, which, of
22 course, is usually routinely done. I think later in the
23 rules there is a reference to supplementation, but I was
24 concerned that that phrase right here could be misread.

25 CHAIRMAN BABCOCK: Great. Justice Gaultney.

1 HONORABLE DAVID GAULTNEY: Would it help if
2 it said instead of "only one" if it said "one consolidated
3 record"? I mean, I think what you're trying to say is you
4 don't want -- if you've got two notices or two requests
5 you don't want two different sets of records initially.

6 MR. HAWTHORNE: Chris makes a good point
7 here.

8 MR. PRINE: This was really just lifted from
9 Appendix C of the Rules of Procedure. That same language
10 has been there forever, and I guess the clerks have all
11 understood that you just -- you know, you don't -- because
12 there's an appeal and a cross-appeal you don't have to
13 send up the same record to us twice, and but that language
14 is -- when we did this rule we just lifted it straight out
15 of the Appendix C on how to prepare the clerk's record.

16 MS. CORTELL: So I'm estopped to make my
17 comment.

18 MR. PRINE: No, no, but we haven't had --
19 you know, no one's --

20 MS. CORTELL: I understand. I understand.

21 MR. PRINE: No one's made that argument.

22 CHAIRMAN BABCOCK: Justice Gray.

23 HONORABLE TOM GRAY: We do have a problem
24 from time to time with appellants wanting to avoid the
25 cost of the clerk's record to move it from one proceeding

1 to another, and I don't know how that would impact either
2 a first appeal is -- we don't have jurisdiction of and
3 they get us jurisdiction, so they want to move it, or
4 there's an interlocutory appeal. So I think Nina's point
5 is a fair comment on a need to clarify what is a case. I
6 mean, we have a recurring problem with a case, a
7 proceeding, an appeal, suit, claim. You know, those are
8 words that permeate our rules, and there's no real
9 definition that we can go to each time they're used, so --

10 CHAIRMAN BABCOCK: Okay. Great. Yeah,
11 Scott.

12 MR. STOLLEY: This is sort of pertinent to
13 Nina's point. Under 1.1(a) it says "gather the documents
14 required by rule 34.5 and those requested by the party
15 under 35.4" -- "34.5(b)." You might think about adding
16 35.5(c), which is the supplementation paragraph.

17 CHAIRMAN BABCOCK: 34.5(c)?

18 MR. STOLLEY: Yeah, 34.5(c).

19 CHAIRMAN BABCOCK: Okay. Any other
20 comments? Yeah.

21 MR. ORSINGER: On 1.1(g), "as far as
22 practicable include the date of signing by the judge on
23 each order and judgment," I assume that means in the table
24 of contents, that the table of contents is supposed to
25 list each document separately; and where it's a court

1 order, would the table of contents state the date or are
2 you saying that somehow in addition to whatever the order
3 itself shows there must be another page that has the date
4 of signing?

5 MR. PRINE: That -- you know, this whole
6 first section was listed straight from Appendix C that's
7 been there forever, so when y'all approved Appendix C I
8 don't know what y'all meant when y'all did that.

9 MR. ORSINGER: Let me make a suggestion
10 because I have not found a lot of regularity in the way --
11 in the way that these things are handled. It would seem
12 to me to be most convenient if in the table of contents
13 where there's a court order that the date of signing be
14 listed in the table of contents, because an extra page
15 associated with the order itself that has the date of
16 signing is -- is pretty much useless because usually you
17 can see that yourself or it's automatically stamped
18 originally when it was first done; whereas it would be
19 very helpful in the table of contents, so I'm wondering if
20 maybe we should move that requirement over to the table of
21 contents rule or the portion of the rule dealing with the
22 table of contents.

23 MR. HAWTHORNE: Or should we add clarifying
24 language there to that part of it perhaps, saying
25 include --

1 MR. ORSINGER: Maybe some other
2 practitioners here find it useful to have a separate page
3 showing the date of signing or judges.

4 CHAIRMAN BABCOCK: Yeah, Justice Jennings.

5 HONORABLE TERRY JENNINGS: I think Richard's
6 question brings up a practical problem that may arise in
7 that clerks may start -- stop looking at the Rules of
8 Civil Procedure and start looking at this as their
9 guideline, and when you're lifting language from the Rules
10 of Civil Procedure and putting them in here, for example,
11 you know, a clerk may look at this and say, "Well, I don't
12 have to draft a table of contents anymore because it's not
13 provided for in the electronic filing rules," when, of
14 course, we do need to have that table of contents because
15 we find valuable information in there. So I think that
16 raises a practical concern that maybe somewhere up front
17 -- and I think I've seen it in some filings in our court
18 where people aren't doing things that they should be doing
19 under the Rules of Civil Procedure. They're just not
20 including certain information, and maybe it might be
21 helpful to spell out up front that the Rules of Civil
22 Procedure control and still should be followed somewhere,
23 because I do think people are going to look at this and
24 stop -- and they're going to start ignoring the rules.
25 That's my concern. If that makes any sense.

1 MR. HAWTHORNE: That make sense. I wonder
2 to what extent -- you know, we've had this sort of
3 two-prong approach where we do have this separate Appendix
4 C because there were courts still permitting paper
5 records, and I wonder to what extent now if it's all
6 electronic we need to then bring it all --

7 HONORABLE TERRY JENNINGS: Right.

8 MR. HAWTHORNE: -- into this one rule.

9 HONORABLE TERRY JENNINGS: Or at least have
10 that reference there so that they understand, hey, those
11 rules still exist and they're still controlling.

12 CHAIRMAN BABCOCK: Frank.

13 MR. GILSTRAP: Parts (e) and (h) and also
14 the cover sheet on the next page talk about volumes. I
15 mean, are we going to have volumes on electronic records,
16 or is that just only for paper records?

17 MR. PRINE: Yeah, because of the size
18 limitation. You know, we've had clerks try to put four
19 volumes in one upload, and it's so big you could wait all
20 day to open it, or it won't make it through the size
21 limitations that OCA has set, so there is a limitation of
22 a hundred megabytes per volume, so it does require usually
23 more than one on a lot of civil cases especially.

24 CHAIRMAN BABCOCK: Good point. Sarah.

25 HONORABLE SARAH DUNCAN: In 1.1(e) it's

1 talking about page numbers, but it doesn't give a position
2 for the page numbers. I think it would be helpful if we
3 said where that page number needs to be. It's a lot
4 easier to find the page you're looking for if it's always
5 in the same place.

6 MR. HAWTHORNE: So "centered at the bottom"
7 or some language like that?

8 HONORABLE SARAH DUNCAN: I prefer the bottom
9 righthand corner, but I'm not saying that's where it has
10 to be. It just need to be a consistent place where
11 someone needs to --

12 CHAIRMAN BABCOCK: I think we should have a
13 vote on that.

14 HONORABLE SARAH DUNCAN: I do, too. I think
15 we should have several, and then we can revisit it June
16 the 7th.

17 CHAIRMAN BABCOCK: Yeah, right. Let's have
18 a Saturday session so we can revote.

19 MR. HAWTHORNE: Chris points out that the
20 last part of it says, "and place each page number at the
21 bottom of each page."

22 HONORABLE SARAH DUNCAN: I'm talking about
23 position not -- position on the line.

24 MR. PRINE: I think most of them try to
25 avoid the center because so many pleadings are numbered.

1 I think they're almost always at the bottom right, for the
2 most part.

3 MS. BARON: They are, and that's how Bates
4 stamps usually works.

5 MR. PRINE: Now, a lot of them they're doing
6 electronically. Adobe has its own Bates stamping process,
7 so you can kind of put it wherever you want.

8 MS. BARON: Yeah, you can.

9 CHAIRMAN BABCOCK: So should we specify
10 bottom right or not?

11 HONORABLE SARAH DUNCAN: I've just had a lot
12 of records where I couldn't see the clerk's page number.
13 I could see the party's number on the document, but not
14 the page of the records.

15 CHAIRMAN BABCOCK: Yeah, David.

16 MR. JACKSON: I mean, we're not talking
17 about the court reporter's record I hope, because ours has
18 always been top right, always.

19 MR. PRINE: This is on the clerk's.

20 CHAIRMAN BABCOCK: We're still on Rule 1.

21 MR. JACKSON: Yeah.

22 CHAIRMAN BABCOCK: We'll get to you.

23 MR. JACKSON: You just make me nervous.

24 CHAIRMAN BABCOCK: Okay. Good point.

25 Anything else on 1.1? Yeah.

1 MR. ORSINGER: As a follow-up to my previous
2 comment about the date of the order signed, if you look at
3 1.1(j) it requires in the table of contents the date each
4 document was filed, and it's been my experience that the
5 clerks don't have a filing date for an order. They have a
6 signing date. So I think that the filing date probably
7 refers to documents that the parties file, and the orders
8 are dated on the date they're signed, and what we really
9 want, I think, is to consolidate that concept so that the
10 table of contents shows either the date filed by a party
11 or the date signed by a judge, and all of that ought to be
12 consolidated into the table of contents where it's real
13 easy to find the document based on a time sequence. So my
14 specific suggestion is to take (g) out of where it is and
15 fold it into (j) so it's clear that filed documents will
16 have -- will be in -- according to the date filed and
17 intermingled between the court orders on the date signed.

18 CHAIRMAN BABCOCK: Sarah.

19 HONORABLE SARAH DUNCAN: But a document
20 could not -- it is possible that a document would not be
21 filed, an order, for instance, for months and months and
22 months because it got lost in a little cubbyhole
23 somewhere, and it seems to me we would want it by the
24 date -- orders by the date signed.

25 CHAIRMAN BABCOCK: Carl.

1 MR. HAMILTON: (j) talks about if the
2 clerk's record is filed in electronic form the clerk has
3 to use bookmarks to link each document, except
4 descriptions of sealed documents, so it almost sounds like
5 you e-file sealed documents, but over in Rule 3 it says
6 you don't e-file sealed documents.

7 MR. PRINE: 3 is the attorney rule where we
8 didn't want them -- however we got started -- and I don't
9 remember the genesis of why, but we didn't want the
10 attorneys to e-file sealed documents.

11 MR. HAWTHORNE: That was my fault.

12 MR. PRINE: And this is dealing -- but the
13 clerks do file sealed documents, and so, you know, they --
14 a lot of times in the middle of a record it will say
15 whatever was given to the judge for in camera review,
16 "sealed," and if that's the only thing there, if there's
17 no other -- if there's not a big description, if it just
18 says "sealed," where we would actually prefer them not to
19 do that and just file a completely separate sealed record
20 volume. So those are two different things. The clerks do
21 file sealed records, and so far the attorneys have not
22 filed electronically sealed records.

23 CHAIRMAN BABCOCK: Okay. Justice Gaultney.

24 HONORABLE DAVID GAULTNEY: Is there any
25 concern with the requirement that they identify each

1 document in the sealed record?

2 MR. PRINE: Which one are you looking at?

3 HONORABLE DAVID GAULTNEY: This is under
4 (j).

5 MR. PRINE: Like I said, you know, they
6 usually put pretty generic -- it usually just says,
7 "sealed documents," doesn't even tell us what it is.

8 HONORABLE DAVID GAULTNEY: Would there be
9 any problem with having a sealed table of contents for
10 sealed documents?

11 MR. PRINE: No, that's what we prefer at the
12 First and Fourteenth. If they're going to -- we don't
13 want them intermixed, an index with sealed, is to file the
14 whole separate sealed record. That's what we would prefer
15 if they're going to do it that way, and I think there's a
16 flexibility in the rule, and they've done it that way when
17 we've asked them. We haven't had much pushback from the
18 clerks.

19 CHAIRMAN BABCOCK: Okay. Yeah, Sarah.

20 HONORABLE SARAH DUNCAN: If we're writing a
21 rule, if that's the way you prefer it, let's just say
22 that. I agree with David. I think sometimes to reveal
23 the title of a document is to reveal the contents of the
24 document; and if we prefer it in a separate file, all the
25 sealed documents with a separate table of contents for the

1 document, for the sealed documents, why don't we just say
2 that?

3 MR. PRINE: That's fine.

4 CHAIRMAN BABCOCK: Okay. Yeah, Richard.

5 MR. ORSINGER: Can I ask a procedural
6 question? When a sealed document or set of documents is
7 filed, the sealing order of the trial court, is that
8 always implemented automatically by the appellate court
9 clerk?

10 MR. PRINE: It would be nice if we had the
11 sealing order, and so if we get a sealed document without
12 a sealing order then it's our policy not to let anybody
13 look at it until we either get an order from the trial
14 court and supplemental order or if they move and ask our
15 court to make an order on it. So it would be nice if they
16 included it all the time, but they don't.

17 MR. ORSINGER: And when you receive a sealed
18 document, who do you allow to look at it?

19 MR. PRINE: No one until we get some
20 clarifying order either from the trial court or if a party
21 files a motion in our court to get our court to let them
22 look at it.

23 MR. ORSINGER: So a party to an appeal is
24 not automatically entitled to see the sealant? Somehow
25 you sort through who's allowed to know what's inside that

1 filing?

2 MR. PRINE: Correct.

3 MR. ORSINGER: Okay.

4 CHAIRMAN BABCOCK: Sarah.

5 HONORABLE SARAH DUNCAN: Now that Richard
6 and I are talking about sealed records again, we might say
7 that there are at least two views at this table of whether
8 a trial court's sealing order binds the appellate court
9 and whether the documents are still sealed on appeal. I
10 am firmly of the view -- and may be in a minority, but I
11 am firmly of the view that the trial court's order stands
12 on appeal.

13 CHAIRMAN BABCOCK: I'm sorry, Sarah, you
14 said it stands?

15 HONORABLE SARAH DUNCAN: Yes, that the trial
16 court's order continues to be effective on appeal.

17 CHAIRMAN BABCOCK: Okay.

18 HONORABLE SARAH DUNCAN: But I know there's
19 at least one person here who disagrees with that, but why
20 don't we use this opportunity to say what it is one way or
21 the other?

22 CHAIRMAN BABCOCK: And when you say it
23 stands on appeal, what you mean is that --

24 HONORABLE SARAH DUNCAN: I think it's like
25 any other trial court order. It continues until it's

1 nullified, reversed --

2 HONORABLE JAMES MOSELEY: Vacated by us.

3 HONORABLE SARAH DUNCAN: -- vacated, vacated
4 by Justice Moseley, whatever. But I know that there is a
5 different view that the trial court sealing order is
6 effective only in the trial court.

7 CHAIRMAN BABCOCK: Huh. Okay.

8 MR. PRINE: And I'm just speaking for the
9 First and Fourteenth.

10 HONORABLE SARAH DUNCAN: I got bit by this
11 once, badly.

12 CHAIRMAN BABCOCK: Does anybody in this room
13 have a different view of that?

14 MR. ORSINGER: Oh, I have that view, and
15 I've had that experience in different courts as well, that
16 some clerks of appellate courts take the position that
17 only the sealing order of their court is binding on them,
18 or at least that's the way it used to be unless it's
19 changed recently.

20 CHAIRMAN BABCOCK: So tell me how that would
21 work. You got a sealing order in the trial court, and
22 that order goes up with the clerk's record to the
23 appellate court, so the appellate court is aware --

24 HONORABLE SARAH DUNCAN: Not necessarily.

25 CHAIRMAN BABCOCK: Huh?

1 HONORABLE SARAH DUNCAN: Not necessarily.
2 That's how I was bitten, is neither of the parties deemed
3 the sealing order sufficiently relevant to the appeal to
4 include it in the record, so I wrote an opinion and
5 released it, not knowing there had ever been a sealing
6 order.

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE SARAH DUNCAN: And then I got a
9 motion for rehearing.

10 MR. ORSINGER: I was the appellee in that
11 case, so I'm not going to accept any blame. I was not the
12 appellant.

13 CHAIRMAN BABCOCK: This is not a place for
14 settling old scores.

15 HONORABLE SARAH DUNCAN: I'm just saying as
16 long as we're talking about it here, let's say if the
17 sealing order has to go up in the record, if it's
18 mandatory, and if it continues in effect.

19 MR. HAWTHORNE: I guess my comment about
20 that would be that I think this is dealing with the
21 electronic filing of the document as opposed to the issues
22 about when to seal and what the effect of sealing orders
23 are.

24 CHAIRMAN BABCOCK: So we're off track? That
25 won't be the last time today that we get off track, but,

1 no, that's a great point.

2 MR. HAWTHORNE: But, I mean, I know
3 personally I would welcome, you know, direction in the
4 Rules of Appellate Procedure about sealed records because
5 we have no reference that I know of to sealed records, but
6 I do think that's, you know, more contentious and
7 difficult conversation.

8 MR. MUNZINGER: When you're down at that end
9 of the table talking to someone at that table, none of us
10 can hear up here.

11 MR. HAWTHORNE: I'm sorry, sir.

12 MR. MUNZINGER: You're speaking to all of
13 us. Thank you.

14 MR. HAWTHORNE: Yes, sir. I will just say,
15 like I said, I think this has to do with filing of the
16 record and not the effect of the sealing order, and while
17 I would welcome direction as a clerk on -- in the Rules of
18 Appellate Procedure about how to treat sealed records, I
19 think that really we should in this order just deal with
20 electronic filing.

21 MR. PRINE: And then making sealed orders
22 come up -- put that under one of the mandatory items under
23 34.5 that should be included in the clerk's record, sealed
24 orders if any, sealing orders if any.

25 CHAIRMAN BABCOCK: Yeah, good point.

1 Justice Gaultney, and then Roger.

2 HONORABLE DAVID GAULTNEY: So what I hear
3 you saying is the appellate rules could direct the
4 appellate clerk to treat it as a sealed record until
5 otherwise directed by the appellate court. We could have
6 a rule, a separate rule, that did that to clarify what I
7 think --

8 MR. HAWTHORNE: Yes.

9 HONORABLE DAVID GAULTNEY: -- is the law,
10 but you could clarify it in the rules.

11 CHAIRMAN BABCOCK: Yeah. Okay. Roger.

12 MR. HUGHES: Well, perhaps at this point a
13 compromise might be -- rather than cross the rubicon on
14 whether it's to remained sealed or not, just in 1.2,
15 modify it to say that documents sealed in the trial court
16 have to be filed as sealed, marked as sealed, because you
17 have a labeling format for the parts of the clerk's
18 records that were treated as under seal in the trial
19 court, and they're to be labeled that way, but it doesn't
20 say "must," and so perhaps one way to solve the problem
21 for now is to label the documents clearly -- or the file
22 clearly as sealed so that you know when you're going into
23 it that at least it was sealed in the trial court and you
24 can argue about it in the court of appeals, but you
25 wouldn't have the problem where nobody knows that, you

1 know, pages 200 through 250 were actually a sealed
2 document in the trial court.

3 MR. HAWTHORNE: I think if you look at
4 1.2(g) you'll see it says, "If filing a sealed document,
5 include a hyphen, number of the sealed document, and the
6 term 'sealed' after the term 'CLR' in the computer file
7 name."

8 CHAIRMAN BABCOCK: Well, that's a good
9 segue. Let's talk about 1.2. Any other comments about
10 1.2?

11 MS. CORTELL: Going back to the mandamus
12 issue, so it won't always come up just in the context of
13 the clerk's record, so do we want to make sure that that
14 is clear in other contexts?

15 MR. HAWTHORNE: Well, so, and as Chris
16 alluded to in Rule 3, we don't permit attorneys to
17 electronically file sealed documents, so they would have
18 to file it on paper.

19 MS. CORTELL: Well, why is that? We
20 recently did that in Dallas, and we coordinated with the
21 clerk. We wrote it in the comment box, and it was not
22 posted with the case.

23 MR. HAWTHORNE: That's entirely my fault.
24 It's entirely my fault that the rule was written that way.
25 My concern was that we default to post documents to the

1 web, and I was very concerned that a busy deputy clerk
2 that's on the phone, doing data entry, would forget to
3 uncheck that box to post the document to the web; and, of
4 course, we put this rule in place two years ago. Maybe --
5 maybe it's time to revisit that. I will tell you I was
6 definitely in the minority viewpoint on that. I think the
7 other appellate clerks felt like we ought to be able to
8 electronically file sealed records, but to me I didn't
9 want to be responsible for accidentally putting someone's
10 trade secrets out on the web because once it's out there
11 you cannot get it back.

12 MS. CORTELL: I appreciate that, and I would
13 just say that's something we maybe want to continue to
14 evaluate. Point well-taken. I will confess in that case
15 the other side cared more about the sealing order than we
16 did, but they were the first to file, and that's how they
17 did it, and we felt we could follow the same example they
18 did, and it worked in that case. It was not posted. I
19 just think if we're going to go electronic, you know, I
20 think we have to think seriously about trying to consider
21 allowing electronic in this situation as well.

22 MR. HAWTHORNE: Can I get a release?

23 CHAIRMAN BABCOCK: No, but you can get
24 immunity. Justice Jennings, did you have your --

25 HONORABLE TERRY JENNINGS: Well, I certainly

1 see Blake's point because you would think that in a sealed
2 document situation it's going to be a limited -- something
3 like a mandamus or something like that where the other
4 side's arguing about the trial court's ruling, the
5 documents have been sealed for the appellate court to
6 consider the trial court's ruling. Maybe that might be
7 one exception where it should be paper, and I do have a
8 question about ultimately if it's -- what's going to
9 happen with the electronic records? Are they going to be
10 there forever? Are they going to be purged from the
11 system after a period of time? Because that would bring
12 up a concern about, well, is this sealed record going to
13 be available somewhere electronically forever, or how's
14 that going to work?

15 MR. HAWTHORNE: We handled those issues by
16 our retention schedules and the retention schedules vary
17 depending on whether it's a civil or criminal case that,
18 you know, if there's a specific need to have a different
19 retention period for sealed records I think we would
20 probably handle it through the retention schedule, and
21 right now I think that my answer to that would be if
22 someone came to me and said, "We have these sealed
23 electronic records in this case," I would say, "What's the
24 retention period for the case?" There is no separate
25 retention period for sealed records.

1 HONORABLE TERRY JENNINGS: And that's not
2 going to be governed by these rules that we're
3 considering?

4 MR. HAWTHORNE: No.

5 HONORABLE TERRY JENNINGS: That's a separate
6 --

7 MR. HAWTHORNE: Yes. We're required by
8 statute to have retention schedules.

9 MR. PRINE: And for the civil cases it's six
10 years.

11 HONORABLE TERRY JENNINGS: So it applies to
12 electronic and paper all across the board.

13 MR. PRINE: We haven't got to the point of
14 how -- what we're going to do to purge all of our -- or if
15 the court decides -- you know, because we get requests for
16 cases that are real old on paper, we've destroyed them,
17 they're gone, they're not there anymore. Whether the
18 courts are going to want to due to capacity per -- under
19 the retention rules by the state archives we should
20 destroy those electronic records just as we would a paper
21 record, but no one's gotten to that point where now that
22 we have two or three years of electronic, is there -- are
23 they going to want to archive that electronic somewhere to
24 make it available?

25 MR. GILSTRAP: You covered my point.

1 CHAIRMAN BABCOCK: You're okay. Okay.
2 Skip.

3 MR. WATSON: Blake, is there a procedure in
4 place where --

5 CHAIRMAN BABCOCK: Be sure that Munzinger
6 can hear you.

7 MR. WATSON: Well, I'm speaking into the
8 good ear here. Is there a procedure in place for Supreme
9 Court cases to preserve the record by archiving it? I
10 mean, for example, now I can go over to the state archives
11 and pull -- you know, blow the dust off, but pull a
12 50-year-old case and read the amicus briefs that were
13 filed that resulted in an opinion on motion for rehearing,
14 and I just want to be sure I can still do that and indeed
15 look back at the records cites that those amicus briefs
16 cite to see what that document looked like or see what the
17 language was.

18 MR. HAWTHORNE: That's a great question. We
19 are very fortunate that we have an archivist on staff that
20 advises us about these issues. There are some serious
21 issues in preserving for the long term electronic records,
22 and they're easily solved I think with money, so -- but in
23 terms of -- let me -- as you know, we still get paper
24 courtesy copies, and one of those copies is going into a
25 control folder at the Supreme Court, and I would say that

1 at the Supreme Court it's a little bit different issue
2 than at the courts of appeals because all of our cases are
3 permanent records, and that's our retention schedule, is
4 we have to keep everything forever. So we do hand them
5 over to the state archives. One of those paper courtesy
6 copies that we're getting is now going into the file, and
7 those will be handed over to the state archives, but with
8 regard to the record, you're right, there's an issue there
9 in terms of it being electronic.

10 The state archives has not -- has asked for
11 many years for money to put into place a -- an electronic
12 records preservation program, and they've never gotten it,
13 so they don't currently have the ability to accept
14 electronic records from us, which means that by statute
15 then the clerk is responsible for retaining those records.
16 We've had a lot of discussions with Office of Court
17 Administration about who's going to be responsible in
18 case PDF goes away and we would have to do some sort of
19 mass conversion of those documents over. As you know --
20 anyway, I could go on a very long time with that, Skip,
21 but it's --

22 MR. WATSON: I'm just concerned if Justice
23 Hecht ever leaves the Court its institutional memory will
24 be gone.

25 CHAIRMAN BABCOCK: Not likely, though.

1 MR. WATSON: We'll have to go back and look
2 at those records.

3 MR. HAWTHORNE: Yes, and, Casey, do you want
4 to jump in here?

5 MR. KENNEDY: I was going to say, at the
6 Office of Court Administration we've got a program in
7 place to where, you know, the way their documents are
8 backed up, everyday there's a realtime backup between here
9 in Austin and our data recovery site, which is up 35 a
10 little bit, and so whenever those records come in, we've
11 got them, so that if a disaster were to strike that
12 nothing would happen to those records. As far as long
13 time preservation goes, the reason they're in PDF is
14 because PDF is now an open standard that's an ISO standard
15 that keeps getting updated, and then as that changes we
16 can acquire software that can bulk take those files and
17 keep them rolling through, much like a text file goes
18 through.

19 MR. HAWTHORNE: But I do have a statutory
20 obligation to migrate all of those documents. If PDF were
21 to become obsolete then there is a statutory obligation on
22 the clerk to make sure that those records are migrated
23 over to another standard.

24 MR. WATSON: Thank you, Blake.

25 CHAIRMAN BABCOCK: Yeah, Justice Gray.

1 HONORABLE TOM GRAY: The short answer is
2 that as long as their document retention schedule is
3 permanent you will be able to see those. Not at the court
4 of appeals.

5 MR. WATSON: I know that.

6 HONORABLE TOM GRAY: They're six years at
7 the courts of appeals, and they're gone.

8 MR. WATSON: Yeah, I know. We get those
9 letters, do you want it back or can we toss it?

10 CHAIRMAN BABCOCK: Okay. Anything more on
11 1.2? How about 1.3? Filing of paper clerk's record.

12 HONORABLE TOM GRAY: Chip, there was one
13 other, I'm sorry, on 1.2(a).

14 CHAIRMAN BABCOCK: Yeah.

15 HONORABLE TOM GRAY: Why are we specifying
16 black and white?

17 MR. PRINE: Because of the file size.

18 HONORABLE TOM GRAY: File size is file size,
19 Casey just needs more --

20 MR. KENNEDY: We get more volume, but I
21 think the other issue there is that you get a lot of
22 clerks that will turn the scanner on and put full color
23 and then they'll scan a bunch of pages that are black and
24 white, and so I think if color was needed and it was
25 relevant to what they're doing, then yes, I would be okay

1 with color, but what happens is, is we get files that come
2 in that are huge, and even though it's a black and white
3 file it's because they had it set to color rather than to
4 black and white.

5 HONORABLE TOM GRAY: But you're mandating it
6 be in black and white, and I'm just saying we're seeing
7 more color, especially with the embedded links and on the
8 orders and sometimes in the documents themselves. They're
9 difficult to read if they are not in their sort of
10 original where they've been scribbled on or highlighted,
11 which sometimes can be important. If there's a way that
12 you could say in their --

13 MR. HAWTHORNE: How about "unless the
14 original is in color"?

15 HONORABLE TOM GRAY: Something like that.

16 MR. WATSON: Or "has color on it."

17 HONORABLE TOM GRAY: It gets much more
18 important when we get over to the reporter's record that
19 has the exhibits in it because we are constantly having to
20 send back to the reporters to get us color copies, as they
21 were in the record, particularly in criminal cases where
22 the kind of the subject matter is different, so --

23 MR. WATSON: Chip.

24 CHAIRMAN BABCOCK: Yeah, Skip.

25 MR. WATSON: I mean, part of that problem

1 is, is that if you think of it, when you have a PDF of a
2 highlighted deed where the key language in the deed is
3 highlighted, unfortunately in the record the key language
4 is obliterated. It's got to be a copy with the colored
5 parts copied. I just can't tell you how frustrating that
6 is that the trial lawyers have gone to the trouble of
7 isolating the two sentences in a 40-page document that are
8 -- that the case turns on and in the record they're black.

9 MR. PRINE: We had that same problem with
10 our paper record because they're always coming --

11 CHAIRMAN BABCOCK: Sure, yeah.

12 MR. PRINE: -- in black and white.

13 MR. WATSON: True.

14 MR. PRINE: So it really just kind of
15 carried over what they were doing and a lot of these
16 clerks -- the big problem is if they do one like that,
17 they'll set it to color, and you can get four pages in the
18 clerk's record and it will be a hundred megabytes because
19 they scan it in color. It makes that big of a difference.
20 You scan even a black and white page in that color setting
21 it makes the size triple, and so -- and a lot of them now
22 are fine with us, but it's the clerks that are going to
23 have the bigger issue with it. I know we do order at
24 times -- we'll order the original up from the clerk's
25 office or a color, you know, color copy, both from the

1 reporters and the clerks if there's something in the
2 record that we find that we need in the original format.

3 CHAIRMAN BABCOCK: Of course, if we wait 15
4 minutes technology will fix all of that, right?

5 MR. PRINE: Right.

6 CHAIRMAN BABCOCK: Okay. Anything else?

7 Yeah, Roger.

8 MR. HUGHES: Two things. Going along with
9 what you just said, one of the things we're talking about
10 is electronic filing in the trial court, in which case
11 you'll be able to file a document in PDF with it already
12 highlighted using the PDF format. Is the ultimate intent
13 is simply that the clerk's not going to be running
14 anything through the scanner, they're just going to be
15 transferring documents into a larger document? So, in
16 other words, it will be just taking one electronic file
17 and attaching it to another electronic file, and that
18 becomes the record, in which case I think your
19 highlighting problem is over.

20 MR. HAWTHORNE: Chris and I were just
21 discussing the fact that I think we do need to do some
22 clarification here because it does direct that they scan
23 the record, and of course, this was written when we
24 weren't getting any electronic records, and now that it's
25 going to be mandatory I think we probably do need to

1 clarify if you have it electronically we want it in the
2 original electronic format, not for you to print it out
3 and scan it, and then the point about color is well-taken,
4 so I think that we can probably clarify some of that
5 language as well.

6 MR. HUGHES: Okay. My second one was maybe
7 it's a matter of information, because there certainly is
8 some experience here. How do you check out an electronic
9 record? I mean, now I just get the court to send me the
10 paper file and trust me. But now with an electric file,
11 what do they do, do they just copy it? In which case,
12 aren't you buying court records?

13 MR. PRINE: We put it on a disk and send it
14 to you.

15 MR. ORSINGER: CD.

16 MR. PRINE: On CD and then you can download
17 it, do whatever you want with it.

18 MR. ORSINGER: Print it out.

19 MR. PRINE: Print it out if you want paper.

20 MR. HUGHES: Okay. The reason I ask is that
21 -- and frequently the reason that practice is done of
22 checking it out is that the district clerks and the court
23 reporters want to charge you to make a duplicate, a paper
24 duplicate, and I imagine if you ask them for a -- you
25 know, send me a copy of what you're sending to the court

1 of appeals, I'm going to get the same response, "Fine,
2 that will be a dollar a page, please, sir."

3 MR. PRINE: I think you're right.

4 MR. ORSINGER: It's been my experience that
5 you can get a CD with the record for like 15 bucks or some
6 fairly nominal charge from the clerk of the appellate
7 court. Do y'all have a --

8 MR. PRINE: If you -- at our two courts, if
9 you take the CD and send it back to us, no charge. If you
10 want to keep it, we charge a dollar, just for the time and
11 the CD cost, and you keep it and do what you want.

12 MR. ORSINGER: If it's an electronically
13 filed reporter's record so that you have it in electronic
14 form, I have been able to order it from the Houston courts
15 of appeals, and they'll send me a CD. Is that --

16 MR. PRINE: All the whole record, even if
17 it's not electronic, we scan it and make it electronic.

18 MR. ORSINGER: Yeah.

19 MR. PRINE: We have no paper files in our
20 shucks anymore, and then so what we would send you is the
21 electronic.

22 MR. ORSINGER: And that's -- is there either
23 no charge or a nominal charge for that CD?

24 MR. PRINE: If you want it and send it back,
25 there's no charge. If you want to keep it, we charge you

1 a dollar.

2 MR. ORSINGER: There you go. That's the
3 answer to your problem.

4 MR. HUGHES: Well, but that's a practice in
5 your court. I assume there's not going to be a rule --

6 MR. PRINE: Well, some folks don't charge a
7 dollar.

8 MR. HAWTHORNE: We're talking about the
9 appellate courts here, and I think you're right, the trial
10 courts take a very different view of that.

11 MR. HUGHES: And I know the court -- part of
12 the reason I ask is, is I see here that you've changed the
13 rules about binding and I can tell you that at least in my
14 area the reason for seals on the clerk's record and
15 reporters doing all sorts of very interesting things about
16 binding is that they want to discourage people from
17 checking the record out and making a copy and thereby
18 depriving them of a fee for making the attorney a copy.

19 MR. HAWTHORNE: And to keep us from scanning
20 it.

21 MR. ORSINGER: Yeah.

22 MR. HAWTHORNE: Yeah.

23 MR. PRINE: I cut the ribbon, and I scan.

24 CHAIRMAN BABCOCK: Justice Jennings.

25 HONORABLE TOM GRAY: And you throw away the

1 ribbon, hand everything else --

2 MR. PRINE: I have a collection of ribbons
3 in my office.

4 HONORABLE TERRY JENNINGS: Just a quick
5 question on 1.2(a) again, the black and white. So if
6 somebody files a motion for summary judgment and they
7 attach an affidavit and attached to that affidavit are
8 color photographs and so forth, this rule requires that
9 those color photographs or those charts and graphs be
10 scanned in black and white.

11 MR. HAWTHORNE: Yeah. That's correct.

12 MR. PRINE: But they have been.

13 MR. HAWTHORNE: And I agree with the
14 comments earlier that I think we need to clarify that.

15 HONORABLE TERRY JENNINGS: And one other
16 question, so and you're concerned about this -- going back
17 to the sealed records for a second, you're concerned about
18 those getting out. If a clerk accidentally puts a sealed
19 record onto one of these CDs and it gets out there and the
20 information is leaked, it can't be traced back to where
21 the leak was. Is that a legitimate concern?

22 MR. PRINE: Well, we have it set up -- we
23 have in our folders, we have the clerk's record folder and
24 we have a sealed folder that they all know not to put on
25 the disk.

1 HONORABLE TERRY JENNINGS: But human beings
2 being human beings, that's a possibility that that might
3 accidentally get out there.

4 MR. HAWTHORNE: You asked is it an area of
5 concern, absolutely, and I would say with our paper sealed
6 records they're behind three locked doors and behind, you
7 know, another cabinet that's locked. So, yes, it's a
8 concern. And I -- I think, you know, the idea, again,
9 with lawyers not being able to file sealed records, others
10 may not agree with it, but the idea was to make it as
11 difficult as possible to end up putting it on the web.

12 HONORABLE TERRY JENNINGS: Right.

13 CHAIRMAN BABCOCK: Did you get that, David?

14 MR. JACKSON: I'm having a hard time
15 hearing.

16 HONORABLE TERRY JENNINGS: Sorry.

17 CHAIRMAN BABCOCK: No, it wasn't you. It
18 was Blake. If you could just speak up a little bit and
19 actually route it around Munzinger so it bounces back off
20 of --

21 MR. HAWTHORNE: I will speak up. I
22 apologize. The idea behind Rule 3 requiring -- saying
23 that lawyers can't file electronically sealed records was
24 to make it as difficult as possible for someone to
25 accidentally put that record out on the internet through

1 our case management system.

2 CHAIRMAN BABCOCK: Richard.

3 MR. ORSINGER: In any area besides the law
4 this probably would have been solved by requiring that the
5 files be encrypted; and if the files are encrypted you can
6 put them anywhere and they're probably still encrypted,
7 depending on the degree of sophistication. Maybe you
8 should consider a requirement that documents under seal be
9 filed with encrypted and the key be personally delivered
10 to the court or separately delivered to the court, and
11 then if you find an inadvertent posting, except for
12 sophisticated hacker types you may be able to pull it back
13 down and you won't have released it to the world, and they
14 do this all the time in other industries, but law is 50
15 years behind, right?

16 CHAIRMAN BABCOCK: Now we're catching up
17 quickly. Justice Gray.

18 HONORABLE TOM GRAY: Sub (i), if you've got
19 four -- excuse me, 16 websites that you're going to be
20 posting instructions to, it would be kind of nice since
21 we're doing uniform rules to maybe have a uniform
22 instruction posted in one location.

23 CHAIRMAN BABCOCK: And you're saying this
24 subsection doesn't accomplish that?

25 HONORABLE TOM GRAY: No, it actually

1 requires that there be 16 different websites, and we may
2 or may not all be using the same set of instructions, and
3 maybe there's a way to compel a certain instruction, but I
4 would rather it specify -- Blake, you understand what I'm
5 saying?

6 MR. HAWTHORNE: Yes, sir.

7 MR. PRINE: And OCA does have the ability to
8 -- when you pull up each court's website there's links on
9 the right side that they can make standard on every
10 court's website.

11 MR. KENNEDY: I think to kind of reword what
12 Chief Gray is saying is that we may be able to change that
13 phrasing to say, "Instructions provided on the web
14 portal," because those instructions exist on that one
15 portal and all the appellate courts use that same portal.

16 CHAIRMAN BABCOCK: Any more comments on 1.2?
17 1.3. We've already talked about it a little bit.
18 Anything else on 1.3? Yeah, Justice Gaultney.

19 HONORABLE DAVID GAULTNEY: Is this the
20 existing language, or have there been any changes to this?

21 MR. HAWTHORNE: No.

22 MR. PRINE: No, I think it's the --

23 CHAIRMAN BABCOCK: 1.3 does not change
24 existing language. That's right?

25 MR. HAWTHORNE: That's correct. We did not

1 change the existing language that's in the Fourteenth
2 Court's local rules.

3 CHAIRMAN BABCOCK: Okay. Justice Gray.

4 HONORABLE TOM GRAY: I put the proposed
5 rules out to the chiefs yesterday, and I got a comment
6 back from one of the chiefs, and right now -- I was about
7 to quickly try to look it up, but there's a prior
8 instruction out from the Supreme Court about the standard
9 to require or allow a paper copy to be filed, and I
10 understand that it is more stringent than what is required
11 here, just the court's prior approval. I didn't quite get
12 the link in time to work it into this comment, but I want
13 to make sure that -- this just says "Court's prior
14 approval." It may actually be in connection with Rule 6,
15 but the -- the standard for allowing paper copies, I
16 understand the Court previously specified that standard,
17 and the standard that is in Rule 6 and may inadvertently
18 be in 1.3 is very lax, and I think it needs to be -- if
19 we're going to require it, it needs to be strong, and it
20 needs to be standard across the board that it has to be
21 for exceptional circumstances or something of that nature,
22 consistent with the prior order of the Supreme Court.

23 CHAIRMAN BABCOCK: Thank you. Yeah, Marisa.

24 MS. SECCO: I would just mention that in
25 Rule 1.2 --

1 CHAIRMAN BABCOCK: Speak up.

2 MS. SECCO: I'm sorry, in Rule 1.2 it
3 specifies that unless otherwise approved by the Court for
4 exceptional circumstances the clerk's record must be filed
5 in electronic form, and so maybe we should just repeat
6 that language in Rule 1.3.

7 CHAIRMAN BABCOCK: Okay. Yeah, Justice
8 Boyd.

9 HONORABLE JEFF BOYD: Does 1.3(g) -- is that
10 intended to govern only paper filings under 1.3, or is
11 that intended to govern all of Rule 1?

12 MR. PRINE: It probably should be like a
13 1.4.

14 MR. HAWTHORNE: I think that's a good point.

15 CHAIRMAN BABCOCK: Okay. Any other comments
16 about 1.3?

17 HONORABLE SARAH DUNCAN: Wait.

18 CHAIRMAN BABCOCK: Yeah, Sarah.

19 HONORABLE SARAH DUNCAN: Well, now I'm
20 confused about 1.3(g). Does that not apply to an
21 electronic record?

22 MR. PRINE: It does. That's why we say it
23 should probably be separated out into its own separate
24 1.4.

25 HONORABLE SARAH DUNCAN: Oh, 1.4. Sorry, I

1 missed that because I can't hear you.

2 CHAIRMAN BABCOCK: Rule 2, the electronic
3 reporter's record. David, you can go first if you want.

4 MR. JACKSON: Well, I'm just going to hold
5 you guys to that being -- 2 being only us. The only
6 problem that I have in all of this is that limitation of
7 100 megabytes, and it's not in 2, so that's fine. The
8 complaints I've heard are that sometimes exhibits exceed
9 that 100 megabyte and court reporters having to go to the
10 expense of converting mp3 files or whatever files they
11 wind up getting as exhibits to something that comports
12 with this rule, and I don't think they should have to do
13 that.

14 CHAIRMAN BABCOCK: Okay.

15 MR. HAWTHORNE: Casey, why don't you tell
16 them about some of the problems we have with files that
17 are that large?

18 MR. KENNEDY: Yeah, so with the Judicial
19 Committee on Information Technology we had an interesting
20 presentation that was talking about some of the rules
21 specifically of requiring all the court reporters to
22 convert everything to mp4, and the example we were shown
23 was a video of I believe it was a -- like a robbery, a
24 convenience store robbery, and we were shown the original
25 in its native format, what it came from the convenience

1 store, and then we were shown what gets filed after it
2 gets converted to mp4, and you can -- one you can see
3 there's a convenience store being robbed. The next one
4 you see a bunch of black boxes moving around the screen
5 because it's been converted.

6 What the Judicial Committee on Information
7 Technology has done is adopted a set of technology
8 standards that talk about not only documents but they talk
9 about audio and video files as well, and that's where, you
10 know, OCA is working with the Court Reporters
11 Certification Board to look at the Uniform Format Manual
12 to see if we can change that to make it to where you don't
13 have to convert everything to mp4, that if it can be
14 played on either the Windows Media Player, VLC, or Apple
15 QuickTime then you can submit it in its native format,
16 which I think would alleviate some of that concern.

17 MR. HAWTHORNE: I would say that the other
18 issue that I see, though, with files as large as 100
19 megabytes is that we get frequent complaints from our
20 staff that it basically grinds their computer to a halt,
21 so they're not able to do anything else other than just
22 look at that record; and of course, one of the advantages
23 of trying to promote the electronic filing is this ability
24 to multitask, right, so they have a record up and to be
25 able to write your opinion at the same time; and with

1 files of 100 megabytes we do get complaints from our staff
2 that that's all they're able to do, is just look at that
3 record.

4 HONORABLE TOM GRAY: Seems like as close as
5 you are to OCA you ought to get better technology.

6 MR. HAWTHORNE: I'm told that the wires in
7 between us are quite old, so it's not our computers or our
8 servers that's the problem. It's the wires, so --

9 CHAIRMAN BABCOCK: All right. Anything more
10 on Rule 2?

11 HONORABLE TOM GRAY: 2(a), at the end of the
12 first sentence I'd like to make a pitch for the inclusion
13 of the uniform lawyer language, "if any," because the
14 Tenth Court of Appeals really hates local rules, and we
15 want them all coming from the Supreme Court, and so we may
16 not -- we will actively try to avoid having a local rule
17 on this. So --

18 CHAIRMAN BABCOCK: Okay. Any other comments
19 on Rule 2? Okay, Rule 3, electronic -- electronic filing
20 of documents. Comments on Rule 3? Roger.

21 MR. HUGHES: If -- the predicate of this
22 entire system is that you have internet access, and quite
23 frankly, if one has internet access one probably has an
24 e-mail address, so at this stage of the game I'm wondering
25 why we make it optional that a person can refuse to accept

1 e-service. I mean, the Federal courts, they don't permit
2 it. You will accept it. That's part of you getting to
3 practice in front of that court, is that then you will
4 accept service through the -- by e-mail, and even I've
5 begun to trust it. So -- and if the Court is going
6 over -- we're just going to send you an e-mail notice that
7 an opinion's been issued and you can go to the website and
8 download it, et cetera, because the way I read 3(c) about
9 service, if the -- if the respondent to the motion or
10 whatever has decided I don't want to accept e-service,
11 then you're going to have to mail it to them. But
12 nonetheless, the rule says that if in that case you have
13 to e-mail it to them if you know their e-mail address and
14 mail it to them, sort of this belt and suspenders
15 approach.

16 Now, that seems to be in every rule that I
17 see and seems to be part of the system, and I'm wondering
18 is there a practical reason why we just haven't said, I'm
19 sorry, you don't get to refuse electronic service if
20 you're going to be out -- if you're going to be
21 electronically filing?

22 MR. HAWTHORNE: I'm not as persuasive as
23 you, I think. I think that's why the rule is written the
24 way it is. You're preaching to the choir.

25 MR. HUGHES: Okay.

1 MR. HAWTHORNE: So I would love it if we
2 could mandate that all attorneys sign up and agree to
3 receive electronic service or make electronic service
4 mandatory.

5 CHAIRMAN BABCOCK: David.

6 MR. HAWTHORNE: I'm with you.

7 MR. JACKSON: It reminds me of the old fax
8 debate we had about 15 years ago, that you figure out some
9 guy's isolated fax machine somewhere in their back office,
10 and that's how you send notice to them, is by this
11 isolated fax; and now if you can find out an isolated
12 e-mail that they never use, you serve them with an
13 isolated e-mail.

14 CHAIRMAN BABCOCK: Frank, then Pam.

15 MR. GILSTRAP: Well, I'm one that doesn't
16 find that example so funny. I'm particularly concerned
17 that these are going to apply to original proceedings, so
18 are we saying that I file my mandamus petition with the
19 court of appeals and I e-mail Joe Blow over here, who may
20 not even know the case is coming, and that's his service?
21 It even gets even worse where we're talking about
22 (c)(2)(b) where we're talking about a party not
23 represented by counsel and you can mail it if the filer
24 has the e-mail -- the party's e-mail address. Well, I may
25 have a 10-year-old e-mail on Gmail for this person, and I

1 serve him. Is that all the service you get? We don't
2 have this in the rules for district courts. You've still
3 got to cite them, but we're talking about beginning an
4 original proceeding that, you know, may not have had any
5 prior court action and serve the people with e-mail. I'm
6 not comfortable with that.

7 CHAIRMAN BABCOCK: Yeah, Blake.

8 MR. HAWTHORNE: One thing that I would say
9 about that is that the Office of Court Administration
10 provides us the State Bar information about all attorneys
11 and the address that they are by rule required to give to
12 the State Bar and including their e-mail address, so I
13 would also say that I think that at the appellate courts
14 we're pretty good about hunting down attorneys and making
15 sure that when we need to send them a request for a
16 response in original proceeding that we find them, so
17 maybe Chris can speak to that. I don't know if you've had
18 issues with people not -- not being aware of original
19 proceedings or --

20 MR. PRINE: No. We also send out a notice
21 when it's filed. The rule requires us to send out a
22 notice when an original proceeding is filed to the parties
23 identified, of course, by the relator and --

24 MR. GILSTRAP: You send it electronically?

25 MR. PRINE: We do.

1 MR. GILSTRAP: Well, the problem is, it's
2 one thing to have -- be looking at your e-mail and know
3 that I've got a case in bankruptcy court where I'm getting
4 20 filings or something like that, but we're talking about
5 a case that's coming at you completely out of the blue. I
6 didn't know they were even going to file it, and it's
7 there on my e-mail, and that's my notice.

8 CHAIRMAN BABCOCK: Well, and it doesn't
9 address the second problem where it's an original
10 proceeding and the party is not represented by a lawyer,
11 or at least you don't know that he is, so you're basically
12 serving an original proceeding by e-mail.

13 MR. GILSTRAP: You send it to his Facebook.

14 CHAIRMAN BABCOCK: Yeah.

15 MR. GILSTRAP: I mean, you know, that's what
16 we're talking about.

17 MR. PRINE: For pro se parties we send paper
18 copies of all notices even if they send us an e-mail
19 because the rules haven't been clear that we can send the
20 pro se. So -- and he's really talking about the filing
21 that the attorneys are doing on each other under the rule.

22 MR. GILSTRAP: I'm talking about both. I'm
23 talking about both. I'm talking about the person,
24 attorney or pro se, who doesn't know that the litigation
25 is commencing and he needs to get some notice and the

1 notice is something that pops up on his e-mail.

2 MR. PRINE: Like I said, the courts have
3 still sent paper to the pro ses when we get -- with the
4 address provided to us by the attorney, of course, that
5 has filed the original proceeding.

6 CHAIRMAN BABCOCK: Okay. Pam.

7 MS. BARON: When you accept e-service do you
8 accept it on a case-by-case basis, or do you accept it for
9 all cases?

10 MR. HAWTHORNE: I believe you accept it for
11 all cases.

12 MS. BARON: So if you mandate e-service you
13 would require attorneys to go on and indicate a proper
14 e-mail address through Tex.gov or whatever our portal is
15 going to be, correct, so that you know that if you serve
16 it they should get proper notice through the system?

17 The other thing, I have a number of cases
18 where I invite people to participate in e-service, and
19 they ignore it, and so I have to go make copies and send
20 it to them, and these are people at firms with e-mail
21 addresses who really have no reason to do that in an
22 ongoing case, so I would join your view that we should
23 mandate e-service.

24 CHAIRMAN BABCOCK: Yeah, Casey.

25 MR. KENNEDY: Blake can see the look on my

1 face. Just so that everybody knows, with TexFile, the new
2 e-filing system, attorneys can specify e-mail addresses,
3 plural, so if you're in a large law firm and you want your
4 legal secretary, the attorney, maybe there's a service
5 clearinghouse to where there's nothing but interns that
6 deal with service that comes in, you can specify as many
7 e-mail addresses that you want to be served.

8 MR. PRINE: And at our level I know we can
9 do at least three per attorney, you can give us three
10 e-mails, and you'll -- you know, if you want it to go to
11 an administrative assistant or your firm wants to put up
12 an appellate e-mail where all appellate notices go to, so
13 we can do your personal one, your assistant, and a firm
14 generic one, too. You just have to let us know.

15 CHAIRMAN BABCOCK: Okay. Justice Gray, and
16 then Buddy.

17 HONORABLE TOM GRAY: Kind of getting off the
18 e-mail, so if Buddy's is on e-mail service --

19 MR. LOW: No, it's a question, and if I knew
20 more about what we were doing I probably wouldn't ask, but
21 on 3(a), the fourth line, we've heretofore been dealing
22 with documents that were under seal and now we're talking
23 about documents that are subject to a motion to seal.
24 Now, I know the other was a clerk's record and this is
25 what the lawyer files, but what is the -- why is "subject

1 to a motion" included here?

2 MR. HAWTHORNE: The idea was, I believe,
3 that if someone may be confused and think, well, you
4 haven't ordered this to be sealed yet, but I'm going to
5 file some documents, say in a mandamus proceeding, and
6 I've got some discovery materials that I think should -- I
7 shouldn't have to turn over and they want that sealed, so
8 they file both the motion to seal and the documents at the
9 same time, and they might think, "I'm going to do this
10 electronically because the Court hasn't ordered it sealed
11 yet," so the thinking was that if you want something
12 sealed that hasn't been sealed yet, you don't file that
13 electronically either, because we have the same issue
14 again that we might accidentally put it out on the
15 internet before the order comes from the court sealing
16 those records.

17 CHAIRMAN BABCOCK: What about the situation
18 where there has been a proceeding in the lower court and
19 the request has been to seal the document, but the court
20 has denied the request?

21 MR. PRINE: I think that is contemplated,
22 too. I mean, if you're filing your mandamus saying, "Hey,
23 he didn't seal it, and I think he should have," you don't
24 want to have those records everywhere until that's
25 decided.

1 CHAIRMAN BABCOCK: Wouldn't you have to stay
2 his order?

3 MR. HAWTHORNE: Well, I think in that
4 instance wouldn't you -- you're saying they should have
5 been sealed but they weren't?

6 CHAIRMAN BABCOCK: Right.

7 MR. HAWTHORNE: So wouldn't you then want to
8 ask the court of appeals to seal them as well?

9 MR. PRINE: And say -- say if he said, "No,
10 there's no sealing you've got to turn them over by May
11 4th," then you would file your mandamus asking to stay the
12 May 4th turnover until the court had --

13 CHAIRMAN BABCOCK: Right. Roger.

14 MR. HUGHES: I think the reason the language
15 is about subject to seal is -- my practice has led me to
16 conclude that I don't give sealed documents to courts of
17 appeal until I get an order allowing me to file them under
18 seal because you then run into the conundrum, is that you
19 file the motion to seal and you give them the documents at
20 the same time and they deny the motion. Now what do you
21 do? The best you can do is file a motion to return the
22 documents that didn't get sealed and hope nobody goes and
23 reads them in the interim, which is perhaps why someday we
24 ought to consider a uniform rule -- amendment to TRAP to
25 make this uniform rather than have to adopt these belt and

1 suspenders approaches. That's another way.

2 CHAIRMAN BABCOCK: Justice Gray.

3 HONORABLE TOM GRAY: Okay. Changing the
4 kind of focus, first sentence, I just want to be sure that
5 I understand that mandatory e-filing is not required in
6 the Court of Criminal Appeals. That's the way that first
7 sentence is written.

8 MR. HAWTHORNE: That's correct.

9 HONORABLE TOM GRAY: Okay. I just want to
10 make sure that I understood that. Under (b) my reference
11 earlier to the uniform instructions on filing and the
12 reference to the website is sort of -- will be taken care
13 of in that part as well. Then at the end of (b) and part
14 of (c)(1) -- and this may be an issue that we need to take
15 off line out of this group, but fees and the collection of
16 fees are a huge problem requiring lots of man hours for us
17 nowhere in relation to the dollars involved. I mean, it's
18 not balanced at all, and I want to make sure that either
19 from the rules or from some other source we can really do
20 what the rule says in if the filing fee for the EFM is
21 part of the court costs, how are we at the courts of
22 appeal going to know what that is and where does it go in
23 our certified bill of costs and how is that distinguished
24 from the e-service fees that are not court costs?

25 Because trying to sort this out, you -- I'm

1 talking to the choir, I know, but we spend an inordinate
2 amount of time of our clerk's time and deputy clerks
3 trying to sort that out, code it to the proper account,
4 because contrary to the litigants' perspective, we don't
5 get to keep those fees, we have to -- those fees all go
6 somewhere else. They don't come into the court, and we
7 need to know where they go and -- I mean, the fees may --
8 some of the fees we collect and then disburse. This is
9 not even that. We're just trying to account for what fees
10 are going to be part of the costs, and it needs to be very
11 clear.

12 MR. HAWTHORNE: I agree. I wasn't a fan of
13 this being put in. It is I believe in the court of
14 appeals template.

15 MR. PRINE: Under the contract we have with
16 the current -- you know, each court as they went online
17 had to sign a contract with Texas.gov, and it sets forth
18 that they -- it was a four-dollar fee and then it changed
19 in September of last year to a five-dollar fee for every
20 filing. So every filing we take in we put in a cost, and
21 it's called the Texas.gov fee or the e-filing fee of \$5,
22 the party who did the filing, and then when you run your
23 cost bill that comes up and you include that in your
24 costs. It's a set cost that we know. The other fees for
25 their service, we have -- we don't know what those are, we

1 don't deal with those currently at the court, but we just
2 know every time we get a filing it's \$5, you just add it
3 to the fee, and which party -- which party.

4 HONORABLE TOM GRAY: Just one of the many
5 reasons we chose not to do that early on.

6 CHAIRMAN BABCOCK: Yeah, Judge Wallace.

7 HONORABLE R. H. WALLACE: I think I also
8 have a problem with allowing people to register for
9 electronic filing to opt out of being served
10 electronically, but assuming it's allowed, as I understand
11 this, if someone does not consent to e-service then the
12 party filing the document must serve it by the regular
13 means and also must serve it by e-mail. Well, if they
14 haven't consented to receive service by e-mail, what is
15 the -- why require that you e-mail it to them? And is
16 that going to be service then if you e-mail it to them?
17 It seems to me that's --

18 MR. HAWTHORNE: Well, this came about --
19 actually, mind if I give you credit for this or blame for
20 this? I won't say. Anyway, an attorney contacted me and
21 said, "Hey, you know, I had an oral argument at the
22 Supreme Court and there were these amicus briefs that were
23 filed the day before the day of the argument, and I get in
24 there and the Court's already received all of this,"
25 because, of course, we're incredibly efficient here,

1 right, and we get those electronic documents to the Court
2 quickly, and -- but the parties had decided to put it in
3 snail mail, so here she is --

4 MS. BARON: Certified mail.

5 MR. HAWTHORNE: -- arguing to the Court, and
6 they're asking questions about these briefs that have been
7 filed and she hasn't seen them, so the thought was, well,
8 we need to find a way to keep people from being able to do
9 that.

10 CHAIRMAN BABCOCK: Knowing her she had
11 answers anyway. Okay. Anything more on Rule 3? Yeah,
12 who is that, Gene?

13 MR. STORIE: Gene.

14 CHAIRMAN BABCOCK: Yeah.

15 MR. STORIE: Would there just be one
16 communication for the receipt, in other words, to
17 acknowledge receipt of an e-filed document and a
18 confirmation that it's been accepted, because it seems to
19 me the clerk is going to look at the document to see if
20 it's acceptable, correct? So would you send an
21 acknowledgement that I've got something from you
22 immediately but then it might take a little while for the
23 clerk to look at it and see if it's really okay?

24 MR. HAWTHORNE: That's correct. So you get
25 basically two different notices. You'll get a notice

1 basically that you have successfully delivered it to the
2 e-filing system and then you get another notice when your
3 document is accepted by the clerk. If you didn't do it
4 properly, you'll get a notice from the clerk that says you
5 did all of these things were wrong, you need to fix these
6 things before we will accept it.

7 MR. PRINE: And people do get confused and
8 think that first acknowledgement means it's been filed.
9 We reject it and then, you know, we send out a past due
10 brief notice, and they say, "I filed it," you know, you'll
11 have to go back and research it. So it is a two step
12 process. One just says, yes, it went through -- it's in
13 the court's portal and then the court either accepts it or
14 rejects it and says why it rejected it.

15 CHAIRMAN BABCOCK: Nina.

16 MS. CORTELL: And what is the intent of
17 (g)(1) where it says that "A document is e-filed when the
18 document is transmitted to the EFSP," because it can still
19 then be rejected by the court, so are we saying it's -- am
20 I comfortable when I get that first acknowledgement or not
21 until I get the second?

22 MR. HAWTHORNE: Well, so here's the thing.
23 I think, first, this language is taken from trial court
24 rules. That was where we began with this, and so we
25 wanted to be consistent with that when we drafted these,

1 but I do think there's an important reason to keep it this
2 way, which is that if you have a document that has a time
3 line, and I think you should be protected as an attorney
4 if you transmit that, basically put it in the mail so to
5 speak, and it's considered filed then when you do that,
6 even though the clerk may then look at it and say, "Hey,
7 you didn't follow any of the e-filing rules, you need to
8 fix this." So what we do in those instances is that we
9 manually then backdate it to the date that you first
10 delivered it to the EFSP, even though we may have had to
11 work with you to get your document in the shape that it's
12 supposed to be in.

13 MS. CORTELL: That's fine with me. I just
14 want to make sure I understood. So once I get that
15 initial confirmation of receipt by the provider then I'm
16 covered in terms of timeliness.

17 MR. HAWTHORNE: That's right.

18 MS. CORTELL: One other question I think I
19 already know the answer to, but is it possible that when
20 you can't file because the provider is down that you get
21 an automatic extra day? I mean, I've had to file a motion
22 for one-day extension, and I know that -- not to worry
23 about it, but is there any way to consider something like
24 that?

25 CHAIRMAN BABCOCK: He's looking over at you,

1 Justice Hecht.

2 MR. PRINE: We don't get notice when a
3 provider is down, so it would -- that's probably why they
4 ask for a motion so you could just set out the facts.

5 MR. HAWTHORNE: Yeah, and I know the
6 electronic service providers will provide a certificate,
7 and perhaps you could say, you know, if you could provide
8 a certificate or something like that that it will be
9 extended. I think we would just need some proof, right,
10 that it was, in fact, down because they don't notify us
11 necessarily when they're down.

12 MS. CORTELL: Right. Maybe then, just for
13 consideration, and I can understand why we would stay with
14 the current wording, it works fine, but maybe an automatic
15 one day if you can provide the court with that
16 certificate, something like that, so that -- and that
17 would make it easier for the courts, too. They wouldn't
18 have to worry as much about it.

19 CHAIRMAN BABCOCK: Judge Wallace, and then
20 Frank.

21 HONORABLE R. H. WALLACE: It was pointed out
22 to me yesterday that "legal holiday" can mean different
23 things depending upon which county you're in. Some --
24 Tarrant County recognizes Cesar Chavez Day, and I'm told
25 it's the only county in Texas that does. I think some

1 counties --

2 MR. RODRIGUEZ: Hidalgo County does.

3 HONORABLE R. H. WALLACE: Okay. Some
4 counties have Good Friday as a holiday, others have
5 Columbus Day as a holiday. That's what I'm told. So when
6 we say "legal holiday" we might ought to say "legal
7 holiday in the county of filing" or something like that.
8 I didn't know that. I assumed that those were all state
9 holidays and they were all observed, but apparently that's
10 not the case.

11 MR. PRINE: And I'm not sure we could do
12 county because Harris County is closed on Good Friday, but
13 because we're the only occupants of the building we were
14 open, so we're there on that day.

15 HONORABLE R. H. WALLACE: Well, I don't
16 think they are in Tarrant County.

17 CHAIRMAN BABCOCK: But, wait a minute,
18 Harris County is closed but you're open?

19 MR. PRINE: Because we're a state agency,
20 not a --

21 CHAIRMAN BABCOCK: Not a county agency.

22 MR. PRINE: Not a county agency.

23 CHAIRMAN BABCOCK: Well, what about in
24 Tarrant County? Is the Fort Worth Court of Appeals closed
25 on Cesar Chavez Day?

1 MR. PRINE: Some courts of appeal are in
2 county buildings. Like in Eastland I know -- I mean, the
3 building is shut down.

4 MR. GILSTRAP: Fourth Court of Appeals.

5 CHAIRMAN BABCOCK: Fourth Court of Appeals
6 is in a county building, right?

7 MR. GILSTRAP: I think it's still open.

8 MR. KENNEDY: They were open on Cesar Chavez
9 Day.

10 MR. GILSTRAP: Yeah, I think so.

11 CHAIRMAN BABCOCK: Justice Gray.

12 HONORABLE TOM GRAY: Chip, I've struggled
13 with this for 14 years. It's all over the map.

14 CHAIRMAN BABCOCK: It's what?

15 HONORABLE TOM GRAY: It's all over the map.
16 I mean, counties will be closed, the court will be open.
17 There are security concerns, so some courts choose to use
18 an emergency exception to be closed. There is no uniform
19 which courts are open and which courts are closed on days
20 when the courthouses in which they are located are open or
21 closed. I can tell you it is not uniform across the
22 state.

23 CHAIRMAN BABCOCK: Wow. Frank.

24 MR. GILSTRAP: Well, the purpose of
25 making -- when your filing day falls on a Saturday, the

1 reason that you don't have to -- it's extended until
2 Monday is because the courthouse is closed, but we're not
3 talking about that. We're talking about e-filing, which
4 is automatic. I mean, there doesn't have to be a person
5 there to take your paper. Why shouldn't it be filed -- if
6 you file it on a Sunday, why shouldn't it be filed that
7 day?

8 MR. PRINE: I know part of the discussion we
9 had is because so many things get counted from the date of
10 filing. So you file yours on a Saturday. Well, that cuts
11 out two days for your -- for someone on the other side to
12 file their response brief because two days -- they didn't
13 know for two days, so we moved it to the Monday of the
14 next business day so they get their full 30 days.

15 MR. GILSTRAP: They didn't know because they
16 didn't check their e-mail that day.

17 CHAIRMAN BABCOCK: On Saturday. They took
18 the day off. Professor Albright.

19 PROFESSOR ALBRIGHT: I was just going to
20 say, and I was looking it up right now, I believe that
21 there is a Supreme Court opinion that defines "legal
22 holiday," so we may just not even want to go there. I
23 think it says it's when the courthouse is closed.

24 HONORABLE TOM GRAY: "Court is closed."

25 PROFESSOR ALBRIGHT: "Court is closed."

1 HONORABLE TOM GRAY: Because it's different.
2 Courthouse is a structure. We are a court located in the
3 courthouse, and we are open on days that the courthouse is
4 closed.

5 PROFESSOR ALBRIGHT: But there is an
6 opinion.

7 CHAIRMAN BABCOCK: Skip.

8 MR. WATSON: It depends on what you're
9 talking about by closed or open. Okay.

10 MS. ADROGUE: Oh, no.

11 CHAIRMAN BABCOCK: Only a lawyer could add
12 that extension. Richard.

13 MR. ORSINGER: As a rejoinder to Frank's
14 comment that the e-filing works on Saturday and Sunday, my
15 paralegal doesn't, and so I wouldn't want to have to file
16 something on a Sunday myself, who is not really trained in
17 electronic filing.

18 MR. GILSTRAP: No, no, I'm not saying that.
19 The filing date is put off until Monday, but you can file
20 on a Sunday.

21 MR. ORSINGER: Oh, yeah, permissive but not
22 mandatory. Okay, sure, no problem.

23 CHAIRMAN BABCOCK: Yeah. Yeah. Yeah,
24 Sarah.

25 HONORABLE SARAH DUNCAN: I feel better. Now

1 we're getting back to where we were 15 years ago with the
2 fax discussion with somebody slipping something --

3 MR. JACKSON: Friday night fax.

4 HONORABLE SARAH DUNCAN: A Friday night fax,
5 but there does have to be something in here that does need
6 to be said or what Richard just said, that you can e-file
7 any time -- you can "e-file," quotes, but it's not filed
8 with the court until the court is open.

9 MR. PRINE: That's what (g)(2) does, right.

10 HONORABLE SARAH DUNCAN: You think?

11 CHAIRMAN BABCOCK: Okay. Any more comments
12 on Rule 3? And if not, we'll take our break. Roger.

13 MR. HUGHES: I'm just -- was kind of
14 curious, (e)(5) says -- has to do with the certificate of
15 service where the person who signs the certificate is
16 different from the person who's filing. Why is that even
17 a problem? Because usually e-service is done by the --
18 some person who works for the attorney using the
19 attorney's PIN number, which is what the rules provide
20 for, so why -- where did this rule come from where -- is
21 there some practical problem here I'm missing or some
22 situation that comes up?

23 CHAIRMAN BABCOCK: Well, I know that a lot
24 of times you'll have more than one lawyer on a brief, and
25 so the lead lawyer signs the brief, but you tell your more

1 junior lawyer, "Hey, make sure this is served" and "You do
2 the certificate of conference" if it was a motion and
3 blah, blah, blah.

4 MR. PRINE: I don't think it contemplates
5 that your legal assistant is using your PIN number to
6 e-file it. That's a different purpose, just the situation
7 that he was talking about where a senior partner signs up
8 here and the other person signs at the bottom.

9 CHAIRMAN BABCOCK: Which is fairly typical.
10 Okay. Let's take our morning break, 15 minutes, and we
11 will be back at 11:09.

12 (Recess from 10:54 a.m. to 11:16 a.m.)

13 CHAIRMAN BABCOCK: Rule 4, redaction of
14 information. We got a couple of e-mails on this
15 yesterday, and, in fact, last night the Dallas County
16 district clerk I think sent me one, which, Marisa, I sent
17 to you, an e-mail last night.

18 MS. SECCO: Yes. We sent out both of those
19 e-mails to the group, I believe.

20 CHAIRMAN BABCOCK: Okay. Good, and so we've
21 got that, and they are available I believe at the back
22 desk, but any comments on Rule 4, redaction of
23 information? Yeah, Richard.

24 MR. ORSINGER: I have a question. It
25 applies to a document other than a clerk's record or

1 reporter's record, and so what does it apply to?

2 MR. HAWTHORNE: Anything the attorney is
3 filing.

4 MR. ORSINGER: In the appellate court?

5 MR. HAWTHORNE: Yes, sir.

6 MR. ORSINGER: And clerk's record includes
7 exhibits, right, so you wouldn't have to redact exhibits?
8 Or are exhibits not considered part of the clerk's record?

9 MR. HAWTHORNE: Well, I -- I think --

10 MR. PRINE: If you were filing the exhibits
11 as part of your appendix and it needed redacting then you
12 would have to redact it. The reason is because we were
13 posting things that the attorneys file under the new TAMES
14 file, we're posting your stuff on the web. We don't post
15 the clerk's record. We don't post the reporter's record.

16 MR. ORSINGER: Oh, I see.

17 MR. PRINE: So that data wasn't out there,
18 but things the attorneys are filing we do post, so you
19 have a duty to redact the sensitive information.

20 CHAIRMAN BABCOCK: What would be an example
21 of a document that a lawyer would be filing in the court
22 of appeals that would contain some of this information?

23 HONORABLE SARAH DUNCAN: I'm sorry, Chip,
24 can't hear you.

25 CHAIRMAN BABCOCK: I said what would be an

1 example of a document that a lawyer would be filing in the
2 court of appeals or the Supreme Court that would contain
3 some of this information?

4 MR. HAWTHORNE: Family law cases are
5 particularly problematic.

6 MR. PRINE: Medical records.

7 HONORABLE KEM FROST: Anything with a Social
8 Security number.

9 CHAIRMAN BABCOCK: So they would be -- it
10 wouldn't be pleadings so much. It would be something that
11 was attached.

12 MR. ORSINGER: No, it is pleading because
13 you've got children's names, and the Family Code for some
14 reason requires you to put Social Security numbers in your
15 petition. I disregard that because I don't consider it to
16 be good law.

17 CHAIRMAN BABCOCK: So you break the law
18 regularly?

19 MR. ORSINGER: Constantly.

20 CHAIRMAN BABCOCK: Dee Dee, did you get
21 that?

22 MR. HUGHES: To protect the innocent. To
23 protect the innocent.

24 MR. ORSINGER: Right. We have to redact a
25 lot of stuff, but what's odd is that it's not redacted in

1 the underlying records, so I guess you're saying that
2 anyone that wants to physically go to the court can see
3 the unredacted information in the clerk's record or in the
4 exhibits. There will be tax returns that are marked.
5 It's got all kinds of data in it. You know, all the
6 awful stuff. The worst thing you could possibly file is a
7 tax return, and yet, that's not protected, unless the
8 lawyer makes it an exhibit to a brief, in which event then
9 that would have to be redacted, that exhibit.

10 CHAIRMAN BABCOCK: Well, but wouldn't -- you
11 know, to take your example of a tax return, wouldn't that
12 be -- wouldn't there be a protective order on that in the
13 trial court? No?

14 MR. ORSINGER: No. There are very few
15 cases, family law cases, that have protective orders. The
16 ones that have a lot of money and the ones that involve
17 real sensitive business transactions might be under
18 protective orders, but routinely they're not. Would
19 you-all agree with that?

20 MR. HAWTHORNE: Yes.

21 MR. PRINE: That's true.

22 MR. HAWTHORNE: One that stands out in my
23 mind was one involving a Mr. CB, who was a basketball
24 player for a certain basketball team in Dallas, and -- of
25 course, you can figure out who that is, right?

1 CHAIRMAN BABCOCK: Well, those are my
2 initials, so I immediately leaned to --

3 MR. HAWTHORNE: All kinds of his paychecks
4 were included in this, and his Social Security number was
5 in there and just all sorts of information was included
6 initially in that filing. Of course, we made them redact
7 that because there were exhibits attached, and actually it
8 may have been a mandamus, so maybe that's why we got all
9 that, but that one stands out in my mind. There was a lot
10 of information that had to be redacted.

11 HONORABLE TOM GRAY: That's actually what I
12 was just fixing to mention, Chip. You have to remember
13 that these can include original proceedings where they
14 prepare the record and file it, and it can frequently be
15 something that if it was over in the clerk's record, it
16 would come up separately and could be protected or
17 whatever, but because it's part of the mandamus, it's not
18 and, therefore, has all of that information in it.

19 CHAIRMAN BABCOCK: Okay.

20 HONORABLE TOM GRAY: But as Richard said,
21 we're still getting briefs in termination cases that the
22 parties just feel obligated to use the child's entire
23 name. I don't know why. The rules clearly specify
24 otherwise, so we've just had to make the decision the
25 inverse of what the Supreme Court's done, is we're going

1 to post nothing online until we check the box that says
2 "post it to the web," which was very contrary to my
3 initial reaction of I only want to not post as a matter of
4 course those items that are specifically prohibited from
5 being posted and -- but we just thought of too many
6 nightmare scenarios of what gets out there if everything
7 is posted. So --

8 CHAIRMAN BABCOCK: Okay. The example that
9 you gave of the basketball player, CB, this Rule 4
10 wouldn't necessarily get -- reach the entirety of the
11 records you've described.

12 MR. ORSINGER: No. The clerk's record and
13 the reporter's record are not covered by this, only the
14 stuff that the lawyers file, like if they attach a copy to
15 their brief, but anyone can go to the courthouse and get
16 all of that information out of the clerk's record or the
17 reporter's record.

18 CHAIRMAN BABCOCK: But he said as an
19 original proceeding.

20 MR. HAWTHORNE: It was an original
21 proceeding in that case, and the lawyer is responsible for
22 filing the record in that case in an original proceeding,
23 so it's a lawyer filing, so they're covered by the
24 redaction rules.

25 MR. ORSINGER: Maybe I could clarify that

1 the clerk's record only occurs in an appeal, and the clerk
2 sends it up. The reporter's record occurs in an appeal,
3 and the reporter sends it up. A mandamus is entirely
4 driven by the petitioner's lawyer, and so it's all
5 governed by what a lawyer files, but in the ordinary
6 appeals you'll have no protection.

7 MR. HAWTHORNE: And the solution I think is
8 in the next set of rules where we have added these
9 redaction requirements to trial court filings.

10 CHAIRMAN BABCOCK: Okay. But that's still
11 in the process.

12 MR. HAWTHORNE: That's still in the process.
13 So, and as Chris mentioned earlier, that's why we don't
14 post records in ordinary appeals, because it can contain
15 those kind of information.

16 CHAIRMAN BABCOCK: What I'm struggling with
17 is if these records were in the lower court, let's take
18 your basketball example, that CB's records, his paycheck
19 and whatever else it is, they weren't protected in the
20 lower court? They were part of the public record in the
21 lower court?

22 MR. HAWTHORNE: Yes.

23 MR. ORSINGER: They were probably exhibits,
24 Chip.

25 CHAIRMAN BABCOCK: Well, yeah, sure.

1 MR. ORSINGER: And so when you get into a
2 hearing or a trial, if you don't have a pretty
3 sophisticated confidentiality order, people just mark
4 exhibits, they're offered to the trial judge, and unless
5 you withdraw them at the end of the hearing or trial,
6 they're in the custody of the court reporter, and they're
7 not redacted. It would be -- it would be incredibly
8 burdensome to try to redact all personal information from
9 all of the exhibits that you're going to use in a trial.
10 Does your proposed rule require that, or is it just the
11 pleadings and motions that have to be redacted?

12 MR. HAWTHORNE: The -- well, the trial court
13 rule, which we'll get to in a minute, I think, Justice
14 Simmons, doesn't it essentially have the same
15 requirements?

16 HONORABLE REBECCA SIMMONS: Yes, it does.
17 It's anticipated that the same requirements regarding
18 sensitive data would be for pleadings filed by lawyers as
19 well as the attachments, so if you're going to do medical
20 records and other things those would also be perhaps
21 redacted under the rules that we'll get to.

22 MR. ORSINGER: That's not so burdensome, but
23 also that doesn't plug one of the biggest holes, which is
24 the exhibits that are marked and offered and then are in
25 the custody of the court reporter and arguably are subject

1 to public examination unless they're under a
2 confidentiality.

3 CHAIRMAN BABCOCK: Well, here's what I'm
4 struggling with. You have a proceeding in the lower
5 court, which at least in one party's estimation justifies
6 mandamus release, but at the trial court you have not
7 moved under 76a for whatever reason.

8 MR. ORSINGER: Don't have to. Under the
9 Family Code 76a doesn't apply to any Family Code
10 proceeding.

11 CHAIRMAN BABCOCK: Okay, but forget about
12 the Family Code. I know you've exempted everything from
13 the Family Code, so we're not talking about that anymore.

14 MR. ORSINGER: Okay, good. Good.

15 CHAIRMAN BABCOCK: We're talking about his
16 basketball player, and so the basketball player's lawyer
17 has not requested relief under 76a, and so the records are
18 now public, and the *Dallas Morning News* can go down there
19 and find out what CB was making last year, which may be a
20 good thing, may be a bad thing.

21 MR. RODRIGUEZ: Depends on how good he was.

22 CHAIRMAN BABCOCK: Now, you've 76a'ed, you
23 know, these documents even though nobody moved for that
24 protection in the trial court. That's the issue I'm
25 raising. Roger.

1 MR. HUGHES: Well, two things, sort of
2 related. I realize that this is a contested issue and
3 maybe the law isn't there yet. I think it's one thing to
4 say that a document is in a government warehouse someplace
5 and if you want to go dig for a day you might find it.

6 CHAIRMAN BABCOCK: Practical obscurity is
7 what you're talking about.

8 MR. HUGHES: Yes. And a document which is
9 available on the web with a particular party's name at the
10 top and all you've got to do is click, point, download. I
11 think there is a difference, and a lot of people -- as
12 they say, once it's on the web, it's forever, so I can see
13 a difference. But the other thing I was going to say is
14 right now it -- under 4(b) -- well, you're kind of on an
15 honor system. Simply by signing the document they e-filed
16 you've certified that it's been redacted in accordance
17 with the rules.

18 I kind of like the Federal system where you
19 actually have to click a box to get into the system that
20 the -- that before you can even get to the page that
21 starts the filing, e-filing of the document, you have to
22 click a box that says, "I've read and redacted everything
23 required by the rules." I've actually stopped a couple of
24 times, go, "Did I?" I think that clicking the box to say
25 you've done it is -- is a good reminder, because lawyers

1 file a lot of stuff, it's easy to forget. Maybe it's just
2 a good check in the system rather than just simply say
3 you're on your honor, if you've signed it you've agreed
4 that it's redacted. That's a suggestion.

5 CHAIRMAN BABCOCK: Okay.

6 HONORABLE REBECCA SIMMONS: If I could
7 comment.

8 CHAIRMAN BABCOCK: Justice Simmons.

9 HONORABLE REBECCA SIMMONS: Your suggestion
10 was heard, and it's already in place. There actually will
11 be a box for e-filing at the trial court level. When you
12 file you will check a box, "I have looked for sensitive
13 information," and you check a box whether your pleading
14 will include it or not include it, so there will be an
15 electronic check box.

16 MR. HUGHES: Okay, good.

17 CHAIRMAN BABCOCK: Carl.

18 MR. HAMILTON: What are the consequences of
19 not redacting, and who complains about it?

20 CHAIRMAN BABCOCK: Yeah.

21 MR. HAWTHORNE: Well, we're -- even though I
22 think the rules don't really necessarily require the clerk
23 to be vigilant about those, I would say that we are.
24 We're very vigilant about looking for sensitive
25 information, and we will reject documents that contain it.

1 I don't -- not every clerk's office necessarily is going
2 to do that. That's our practice.

3 MR. PRINE: We do try to catch it, and
4 especially in the termination cases where they put the
5 name, we'll reject it and make them, you know, comply with
6 the rule. Other information we try to catch, but we do
7 rely on the certification because of the voluminous nature
8 of what we get filed at the lower court; and, you know, if
9 we catch something we'll not post it to the web; and then
10 if it's something that we don't catch, another party may
11 complain or a judge might find it and then we can take it
12 down; and, you know, as they say, it's hard to get
13 anything permanently erased, but OCA will take it off the
14 web -- we call them, they have it off within 10 minutes.

15 MR. HAMILTON: Should we have a procedure
16 for waiving that? Because you may have a case that
17 involves 2,000 checks, let's say, that a party has put
18 into evidence and the party putting it into evidence
19 doesn't care that the bank number is on there. Otherwise
20 if they cared they would have redacted before they put
21 them into evidence. Why do we need to go through and
22 redact all of those?

23 MR. PRINE: What we reject most of the time
24 is lawyers' letters to us proving they paid for the
25 clerk's record, we've sent out a no pay or reporter's

1 record, and they attach a copy of their firm check with
2 the routing number and the bank account, and so we reject
3 it and ask them not to put that information.

4 CHAIRMAN BABCOCK: Sarah.

5 HONORABLE SARAH DUNCAN: I didn't just turn
6 a hundred, so I can't claim Chief Justice Pope's excuse,
7 but this is all reminding me, we actually proposed to the
8 Supreme Court some years ago -- and somebody might
9 remember a number of years -- on a more complete sealing
10 rule that would -- that included a procedure for getting
11 something sealed. Tom's remembering.

12 HONORABLE TOM GRAY: Oh, yeah. I was the
13 one that presented it to the committee, and they didn't
14 like our hot pink recommendation at the trial court level
15 for the sensitive data form, but, yeah.

16 HONORABLE SARAH DUNCAN: Because we're
17 raising the same issues that we have discussed previously
18 and we thought we resolved, and it got sent to the Supreme
19 Court, but it was not adopted with the amendments to the
20 TRAP rules, but I think we are -- and we raised these same
21 issues, too, with the sensitive data discussion that went
22 on for months and years.

23 CHAIRMAN BABCOCK: Yeah, Sarah, I believe
24 there was a task force --

25 HONORABLE SARAH DUNCAN: Yes, Hatchell and

1 me --

2 CHAIRMAN BABCOCK: -- that was appointed.

3 HONORABLE SARAH DUNCAN: -- and Tom.

4 CHAIRMAN BABCOCK: And the task force had a,
5 report, and we got a lot of input from different people,
6 and then we spent a couple of meetings on it, and then it
7 went to the Court, and the Court has not acted on it, and
8 I suggest it probably won't since so much time has passed
9 but --

10 HONORABLE REBECCA SIMMONS: And I hate to
11 interrupt because I just want to update you a little bit
12 in terms of JCIT has actually taken your advisory
13 recommendations. Lubbock actually implemented those
14 recommendations to see how it would work during the --
15 with a true court and that sort of thing, and so they did
16 that. Based on that we now have taken that, are looking
17 at that again; and actually, Jody Hughes and Kennon Wooton
18 are also looking at that and coming up with kind of some
19 suggestions on those that we would like to present and
20 provide to you again and to look at those again in the
21 context of this access piece. These rules don't really
22 cover that, nor do they cover what we'll be looking at
23 later on, what the district clerk is going to do regarding
24 public access. It really just deals with the pipeline of
25 not putting sensitive data into the court -- into the

1 clerk's office to begin with, but I did want to advise you
2 that they're very well-taken, that we are taking what the
3 advisory committee had done before and have been tweaking
4 and working with that.

5 CHAIRMAN BABCOCK: Justice Hecht.

6 HONORABLE NATHAN HECHT: The Court got about
7 two-thirds of the way through that recommendation and
8 then, based on its own internal research, concluded that
9 there was too much controversy around the country about
10 what should be in, what should be out. The Feds had just
11 adopted redaction rule for the -- for papers filed in
12 their courts, but as you'll recall the discussion, there
13 was concern expressed by the Catholic church and the Boy
14 Scouts, for example, about being able to mine court
15 documents and determine -- do background checks for people
16 who wanted to work in their areas. The title companies
17 expressed concern about being able to use court records to
18 ascertain titles, and they have since gotten a statute
19 passed that requires certain information in civil -- civil
20 papers, and so because of all of the -- there didn't seem
21 to be a clear path, and it involved a whole lot more than
22 court procedure, because there were outsiders who were
23 interested in this.

24 Then there's the advocates of freer
25 information and that everything that happens in court

1 should be public; and the argument is made, well, you
2 could -- even though information and documents was
3 practically obscure, you could go down to the courthouse
4 and find out all this information since the beginning; and
5 for many, many years Social Security numbers, bank
6 numbers, are in pleadings, particularly with children
7 because child enforcement people want -- child support
8 enforcement people want Social Security numbers to be sure
9 they have the right child and to be sure they have the
10 right parent, how many Jane Smiths are there.

11 And so there are all of these considerations
12 that the Court on balance thought had to mature awhile
13 before we could really say this is what we wanted to do
14 going forward. Now, the other problem was that if we
15 said, "Redact this, don't redact that," if we came up with
16 a rule and then the clerks began to implement it,
17 particularly the trial court clerks, and went to a great
18 deal of trouble to do that and then we said a year or two
19 later "Oh, sorry, we changed our minds" or maybe the
20 Legislature pops up and says, "Well, we want to change the
21 policy for these reasons" then it would cost a lot of
22 expense. So on balance we just tabled the effort, but
23 it's still -- I mean, the problem hadn't gone away, and
24 the more e-filing there is, the bigger the problems.

25 CHAIRMAN BABCOCK: Yeah. Sarah.

1 HONORABLE SARAH DUNCAN: And all of those
2 considerations we certainly discussed in the sensitive
3 data discussions, but it's true, isn't it, that there is
4 an order of the Supreme Court -- now I remember having a
5 brief rejected because I didn't even know the order had
6 come out -- requiring redaction of this sensitive data,
7 but it's only in an order. It's not in the rules; isn't
8 that correct?

9 HONORABLE NATHAN HECHT: No, there's --

10 MR. HAWTHORNE: The electronic filing rules
11 for the Supreme Court contain these redaction
12 requirements, which is just an order of the Court.

13 HONORABLE SARAH DUNCAN: Right, but they're
14 not in the rule book as a rule of procedure.

15 MR. HAWTHORNE: They're not in the Rules of
16 Procedure.

17 HONORABLE SARAH DUNCAN: Going back to the
18 first question I think from Frank, the discussion between
19 Blake and Frank about where are these rules going to be,
20 we're getting to the point we have more and more rules
21 that are affecting lawyers and what they file in trial and
22 appellate courts that aren't in their rule books. They're
23 in -- or they're in the Rules of Judicial Administration
24 or they're in a court order, and I think to the -- I mean,
25 it's hard enough to get attorneys to follow the rules in

1 the rule book, and trying to get them to comply also with
2 all of these other areas of rules, I think we're really
3 complicating lawyers' lives and ensuring noncompliance.
4 That's with an "e."

5 CHAIRMAN BABCOCK: The thing about the box
6 that's being checked, about, "Yeah, I certify I've
7 redacted everything," maybe I'm showing my age, but if I
8 want something filed at the courthouse, you know, I'll
9 usually get, you know, a paralegal or a runner or somebody
10 to go down there and file it; and I've not changed that
11 practice now just because it's electronic. I tell my
12 secretary, "Okay, here we've got this brief that's got to
13 be filed, go file electronically." Do I -- do I have --
14 do I as a lawyer now have to start checking boxes and
15 doing online stuff, or is --

16 HONORABLE SARAH DUNCAN: Same problem with
17 the certificate of service.

18 CHAIRMAN BABCOCK: I'm sorry, what?

19 HONORABLE SARAH DUNCAN: With the
20 certificate of service. You weren't in the habit, I don't
21 think, in the last 30 years of actually performing the
22 ministerial duties of addressing envelopes and getting
23 postage on them --

24 CHAIRMAN BABCOCK: Right. Yeah.

25 HONORABLE SARAH DUNCAN: -- and getting them

1 to the post office.

2 CHAIRMAN BABCOCK: I do look to make sure
3 that everybody who should be served is served.

4 HONORABLE SARAH DUNCAN: Listed, but then do
5 you sign the certificate of service as the person who did
6 the service?

7 CHAIRMAN BABCOCK: Usually. Or somebody
8 younger in the firm whose got the same practice does.

9 MR. ORSINGER: But you signed it before it's
10 actually mailed.

11 CHAIRMAN BABCOCK: Well, how can you sign it
12 after it's mailed?

13 MR. ORSINGER: My point is that you're
14 certifying an event that hasn't occurred yet.

15 CHAIRMAN BABCOCK: Right, but you always do.

16 MR. ORSINGER: Right.

17 CHAIRMAN BABCOCK: Okay. Sorry, didn't mean
18 to digress. Sorry, Blake, got off on a tangent there.
19 Justice Gray.

20 HONORABLE TOM GRAY: Moving to (b), I think
21 it was Carl that asked remedy or what -- who has the
22 liability. It might get everyone that's a practicing
23 attorney's interest that all of the attorneys of record
24 are making this certification that the document complies,
25 not just the lead attorney or not just the attorney that

1 signs the document. So that might be something that is
2 intended. It certainly covers the waterfront, but is that
3 what you really want it to say?

4 CHAIRMAN BABCOCK: Richard Munzinger.

5 MR. MUNZINGER: I think that's an important
6 commentary that Sarah just made. Good lord, here is an
7 attorney who incurs an ethical obligation and subject
8 himself to sanctions, subjects himself to all kinds of
9 problems, making a certification in a document that he may
10 never read. Somehow or another this should be
11 incorporated in the Rules of Civil and Appellate Procedure
12 so that attorneys know that when you do this electronic
13 filing, stud, you've just made a promise.

14 CHAIRMAN BABCOCK: Yeah, this isn't just
15 some ministerial. This is how you get it --

16 MR. MUNZINGER: Yeah, this is serious
17 business.

18 CHAIRMAN BABCOCK: A how-to manual. This is
19 something else. Yeah. Eduardo.

20 MR. RODRIGUEZ: I agree with the judge that
21 (b), if it applies to all of the attorneys that are of
22 record, I mean, a lot of cases now the lawyer that tries
23 the case, that loses it, it gets sent over to an appellate
24 lawyer and they don't have anything to do with it anymore;
25 and if that appellate lawyer is certifying something that

1 the trial lawyer is responsible for when he doesn't have
2 any -- any idea of what's -- you know, sometimes they
3 don't even send you the briefs to read and stuff. So, I
4 mean, I think we need to make some kind of change there to
5 accommodate that, because that's -- that's happening more
6 and more in trial and appellate cases.

7 CHAIRMAN BABCOCK: Yeah. Justice Jennings,
8 and then Sarah, and then Richard.

9 HONORABLE TERRY JENNINGS: Well, my
10 understanding is this Rule 4 -- we're talking about Rule
11 4, right? This is talking about documents that can be
12 filed with the appellate -- we're still in court of
13 appeals, the appellate court. Usually this is going to be
14 in the context of a brief where somebody's attached an
15 appendix, and they're usually attaching some exhibits for
16 the court's benefit so that you can go to the appendix and
17 find it. So, yeah, if a lawyer is signing a brief or a
18 motion or a response to a motion or a reply, they should
19 have read what they've signed.

20 HONORABLE SARAH DUNCAN: What about
21 signing --

22 HONORABLE TERRY JENNINGS: So I don't have a
23 problem holding them to it that they signed it. Now,
24 this, of course, raises all kinds of other issues, which I
25 agree with Sarah on, on the effect of all of this on the

1 practice of law, but we are where we are.

2 CHAIRMAN BABCOCK: Sarah.

3 HONORABLE SARAH DUNCAN: And if I can point
4 out, we're not talking about signing. We're talking about
5 if you are an attorney of record and if there are any
6 teeth in this, it will sure cut down on the number of
7 attorneys of record in a case, because I can tell you that
8 I've written an awful lot of briefs that everybody on that
9 cover page shown as an attorney of record, they didn't
10 even open it, much less read it, much less look for the
11 type of information that should have been redacted or even
12 know what redacted information is -- what information is
13 required to be redacted.

14 On (a), just a housekeeping thing, "the
15 court," what court? I assume we mean the appellate court
16 in which somebody is trying to file a document, and "a
17 document," a document somebody wants to file I assume?
18 That's just a little less than clear.

19 CHAIRMAN BABCOCK: Richard Munzinger.

20 MR. MUNZINGER: Again, Sarah hits the nail
21 on the head. I'm local counsel frequently, and a lawyer
22 in Washington, D.C., files electronically. I'm now bound
23 by his conduct because I'm an attorney of record, if this
24 is read literally, so there are two problems that I see
25 with this. One, you have a rule that triggers

1 consequences to an attorney that he may not be aware of
2 because of where it's published, and two, the breadth of
3 the rule is amazing.

4 CHAIRMAN BABCOCK: Well, and if you want to
5 have three lawyers, just say, let's say the two people in
6 Washington who did the brief and you as local counsel, you
7 know, client's probably going to balk a little bit at
8 three lawyers, you know, reading everything for the
9 purposes of certifying this.

10 MR. MUNZINGER: Absolutely.

11 CHAIRMAN BABCOCK: Okay. Gene.

12 MR. STORIE: Yeah, to give another example,
13 my former boss, Greg Abbott, would have some trouble with
14 this potentially because his name is on a whole bunch of
15 stuff that, of course, he's not going to personally
16 review.

17 CHAIRMAN BABCOCK: Yeah, Roger.

18 MR. HUGHES: Well, I guess I'll join the
19 chorus on this one because I recently had to research this
20 in relation to a sanction motions under Rule 13, and
21 although there is a division of authority, the weight is
22 that under those rules you actually have to sign the
23 pleading, only the attorney, not his law firm, not every
24 other attorney on the pleading is liable either under the
25 statute or the rule, and this then plays back into

1 sanctions. It may be that a court would be unwilling to
2 sanction an attorney who didn't read it, who found out
3 about the motion after it got filed and his or her name
4 just happens to be on it, but the opposing party might not
5 be so lenient, and they might cite this rule in its
6 present form as creating a kind of vicarious liability
7 that if your co-counsel in another firm files something,
8 you're nonetheless responsible if that motion or brief
9 revealed confidential information.

10 CHAIRMAN BABCOCK: Yeah. Blake, what was
11 the thinking behind making everybody who is an attorney of
12 record --

13 MR. HAWTHORNE: You know, I honestly don't
14 know. I don't recall. We drafted that a couple of years
15 ago, and I honestly don't recall where the language came
16 from.

17 CHAIRMAN BABCOCK: Richard.

18 MR. ORSINGER: We don't operate by motions
19 around here, but I'm wondering if it would be helpful to
20 anyone if we took a show of hands as to who thinks we
21 ought to limit this to the signing lawyers rather than
22 everyone that's an attorney of record.

23 CHAIRMAN BABCOCK: I can probably predict
24 how that's going to come out.

25 MR. HAMILTON: You want to make a motion to

1 that effect, Richard?

2 MR. ORSINGER: Well, we don't make motions
3 on this committee.

4 CHAIRMAN BABCOCK: No, no, you do make
5 motions. You make motions all the time, and you just get
6 somebody to second and then we'll follow-up.

7 MR. ORSINGER: Well, I would move that we
8 limit this to the people who signed the document that's
9 filed.

10 CHAIRMAN BABCOCK: Okay, and anybody want to
11 second?

12 MR. HUGHES: Right here.

13 CHAIRMAN BABCOCK: Okay. So Roger seconds
14 it. So we'll have a vote on that.

15 HONORABLE DAVID GAULTNEY: Can I have a
16 question here?

17 CHAIRMAN BABCOCK: Yeah. Before we vote,
18 though, we'll have a question from Justice Gaultney.

19 HONORABLE DAVID GAULTNEY: Would that also
20 include the lead attorney? I mean the first attorney that
21 signed it. I mean, they're in charge of the litigation,
22 just because someone else signed the particular document,
23 but it doesn't let them off, does it?

24 CHAIRMAN BABCOCK: Sarah.

25 HONORABLE SARAH DUNCAN: This is probably

1 generally why we have a discussion before we vote.

2 HONORABLE DAVID GAULTNEY: I was trying.

3 HONORABLE SARAH DUNCAN: Because I would
4 actually be against Richard's proposal. To me if you're
5 going to be lead counsel on appeal or in the trial court,
6 if you're not going to sign the brief but you're going to
7 say, "Associate, I am willing to throw you to the wolves.
8 You go sign the brief," and you don't read the brief but
9 your name's on it because you're going to argue the case,
10 I would be in favor of, you know, if you're going to be an
11 attorney of record in this case, you're -- if anybody
12 checks that box, you're responsible, too.

13 CHAIRMAN BABCOCK: Okay. So you're going to
14 vote "no" against his motion.

15 HONORABLE SARAH DUNCAN: I am.

16 CHAIRMAN BABCOCK: Okay. Got it. Justice
17 Gray.

18 MR. RODRIGUEZ: Can I ask a question?

19 CHAIRMAN BABCOCK: Yeah, sure. Eduardo.

20 MR. RODRIGUEZ: What about the trial
21 attorneys that are no longer involved in the appellate
22 procedure?

23 HONORABLE SARAH DUNCAN: Then I would
24 suggest you file a motion to withdraw as attorney of
25 record. That's just me.

1 CHAIRMAN BABCOCK: Justice Gray, then Carl,
2 then Justice Gaultney.

3 HONORABLE TOM GRAY: And maybe this is a
4 proper time in the discussion and the motion to make this,
5 but as drafted and possibly corrected by the proposal, is
6 the distinction between -- which has always troubled me,
7 pro se litigants getting an advantage that represented
8 litigants do not, because as drafted this does not apply
9 to a pro se litigant that is filing electronically, and
10 therefore, they're not having to make this certification;
11 and it may be the recipient, the other side of the
12 litigation, that they're attempting to aggravate by filing
13 something that they shouldn't be filing.

14 CHAIRMAN BABCOCK: Yeah, so Gideon gets off
15 the hook on this rule. Carl.

16 MR. HAMILTON: I'm still struggling with
17 consequences. I can see that it would make a difference
18 if somebody is going to come put you in jail if you did
19 this, but if there are no consequences to it, what
20 difference does it make? If somebody is just going to
21 change it --

22 MR. HAWTHORNE: Just on that point, I have
23 never seen anyone move for sanctions because the rule is
24 violated. I would say that it's fairly routine.

25 MR. HAMILTON: Well, particularly --

1 MR. HAWTHORNE: We have to reject --

2 MR. HAMILTON: -- if it's your own party's
3 documents and they don't care, you know, who's going to
4 sanction you and what difference does it make?

5 MR. HAWTHORNE: I would say, too, though,
6 perhaps I was being too cynical, but in the case I was
7 discussing earlier I sort of felt like the lawyer that had
8 put in all the sensitive information maybe had an agenda
9 for doing that. I mean, it just struck me --

10 MR. ORSINGER: Sure. Absolutely.

11 MR. HAWTHORNE: -- that there was no need
12 for any of this to be put in there, so I can see a
13 situation where a party -- sort of as Chief Gray is
14 discussing, where they might throw in a bunch of documents
15 that really shouldn't be in there with the thought that
16 I'm going to put this stuff out on the internet now.

17 CHAIRMAN BABCOCK: Yeah, but -- I mean, not
18 to beat the basketball player to death, but, you know, we
19 are in an adversary system; and if the basketball player's
20 opponent put in sensitive data and his lawyer didn't do
21 anything about it, you know, and now, you're saying,
22 "Okay, son, you erred and we're going to take care of
23 you," without knowing what the dynamics were at the trial
24 court. That's where I have a problem with your basketball
25 case.

1 MR. HAWTHORNE: Well, let me give you
2 another example, though. We often see parental
3 termination cases --

4 CHAIRMAN BABCOCK: No, but family law
5 doesn't apply.

6 MR. HAWTHORNE: But this is -- that's
7 another area where we routinely see that information isn't
8 redacted and then, you know, on the subject of information
9 at trial court, we'll see the trial court order in the
10 style they have the initials but then the trial lawyer, of
11 course, drafted it, but the style has initials and in the
12 body it has the child's name.

13 CHAIRMAN BABCOCK: No, I can see that, sure.
14 Sarah. I'm sorry.

15 HONORABLE SARAH DUNCAN: I think Eduardo's
16 convinced me very gently to amend my -- to at least be
17 open to amending my position that it's only the attorney
18 in charge as defined by the Rules of Appellate Procedure
19 that's on the hook for the certification.

20 CHAIRMAN BABCOCK: Okay. Eduardo, and then
21 Justice Gaultney.

22 MR. RODRIGUEZ: No, I -- that's fine.

23 CHAIRMAN BABCOCK: That's your point.
24 Justice Gaultney.

25 HONORABLE DAVID GAULTNEY: I agree with

1 that, in addition to any other lawyer who desires to sign
2 it at that point, so lead attorney plus whoever signs it.

3 CHAIRMAN BABCOCK: Okay.

4 HONORABLE DAVID GAULTNEY: Because we get
5 briefs with three different law firms, and each one has
6 three different names underneath it, and they're not
7 signing anything.

8 CHAIRMAN BABCOCK: Gene.

9 MR. STORIE: Yeah, you can also possibly be
10 dealing with confidential information of third parties or
11 witnesses who are -- or people who are not actually
12 parties to the suit, and you want to protect them as well.

13 CHAIRMAN BABCOCK: Yeah, Peter.

14 MR. KELLY: Is it worth having a separate
15 certificate? I mean, as it is, we have to certify the
16 page count or the word count.

17 CHAIRMAN BABCOCK: Right.

18 MR. KELLY: We have to certify service.

19 CHAIRMAN BABCOCK: Right.

20 MR. KELLY: We have to certify conference.

21 CHAIRMAN BABCOCK: Right. Well, on some
22 things.

23 MR. KELLY: Why not just have a separate
24 redaction certification, and whoever signs that
25 certification is the one on the hook, whether they're

1 attorney in charge, local counsel, or Chicago counsel.

2 CHAIRMAN BABCOCK: Yeah. I'm going to sign
3 Eduardo's name to all of my things. Okay. That's a good
4 idea. Sarah.

5 MR. RODRIGUEZ: We moved behind the fence,
6 you know.

7 CHAIRMAN BABCOCK: Sarah.

8 HONORABLE SARAH DUNCAN: Chief Justice keeps
9 bringing up signature blocks, says to me we're going to
10 have define "signed."

11 CHAIRMAN BABCOCK: Okay. Yeah, Kem.
12 Justice Frost.

13 HONORABLE KEM FROST: And Peter Kelly's
14 comment would also take care of the party situation.

15 CHAIRMAN BABCOCK: Yeah. Yeah. Okay.
16 Richard, do you want to vote on your motion?

17 MR. ORSINGER: I would.

18 CHAIRMAN BABCOCK: Okay. You want to state
19 it again so we know what we're voting on? You've
20 forgotten it, haven't you?

21 MR. ORSINGER: Well, I haven't thought in
22 those terms. This is Rule 4. I would say that we ought
23 to amend (b) to restrict it to the attorneys who signed
24 the filing to make it similar to Rule 13 of the Rules of
25 Civil Procedure.

1 CHAIRMAN BABCOCK: Okay. So everybody who
2 thinks we ought to change Rule 4(b) to limit it to the
3 attorney signing the pleading, everybody thinks that's a
4 good idea raise your hand.

5 MR. HAMILTON: Pleading or the certificate?

6 CHAIRMAN BABCOCK: The pleading.

7 Okay. And who thinks that's a bad idea?
8 The bad idea guys don't have their hands up very high.
9 You only get one vote there in Waco.

10 The ayes have it 17 to 8. The people that
11 want to amend the rule are 17, people who don't want to do
12 that are 8, the Chair not voting, as customary. So what
13 else do we want to talk about? Richard.

14 MR. ORSINGER: I think we should make it
15 clear that no one should infer that the negative votes
16 support the current language. The debate I heard was that
17 they supported alternate language that was narrower than
18 "every attorney of record."

19 CHAIRMAN BABCOCK: Justice Gray is nodding
20 his head.

21 HONORABLE TOM GRAY: Because I wanted pro
22 ses in there. I want it to be the person signing it as
23 opposed to the attorney.

24 CHAIRMAN BABCOCK: And Justice Frost is
25 nodding her head vigorously, the record should reflect.

1 MR. ORSINGER: Gosh, then we should restate
2 that motion, and we would get more votes.

3 CHAIRMAN BABCOCK: I think the Court will be
4 aware that there's an issue about pro ses, and we've had a
5 fulsome discussion about 4(b), so we need to move on or
6 we'll never get done. What else about 4? Any other
7 comments on Rule 4? Justice Jennings, yeah.

8 HONORABLE TERRY JENNINGS: Just a quick
9 question on 4(a). There's the laundry list of information
10 that should be -- or must be redacted. Of course, there's
11 all kinds of other information that probably should be
12 redacted that we haven't thought of. Should there be a
13 catch-all phrase? Because it says "or other financial
14 account information." Well, what if it's a diagram of,
15 you know, a trade secret?

16 CHAIRMAN BABCOCK: Okay.

17 HONORABLE TERRY JENNINGS: Or something like
18 that.

19 HONORABLE SARAH DUNCAN: Long time ago, but
20 I seem to remember -- Richard, do you remember, weren't
21 the names of the parties in that case part of what was
22 under seal, so we couldn't even use the parties -- and
23 we're not talking about minors or children or Family Code
24 or anything of that, but we couldn't even use the names of
25 parties in an opinion, and they shouldn't have been used,

1 in my opinion, in a brief.

2 MR. ORSINGER: What happened in that
3 particular case was it was actually a third party that
4 wanted their information confidential, and the husband and
5 wife didn't care.

6 HONORABLE SARAH DUNCAN: Right. That's
7 right.

8 MR. ORSINGER: And then the husband took the
9 case up on appeal, and he didn't bother to inform anybody
10 that there was an order, and I was the appellee, so I
11 didn't care so I didn't inform anybody. The opinion came
12 out and then all of the sudden the third party said, "Holy
13 moly, all of this is now in the opinion," and I apologized
14 for that although it wasn't --

15 HONORABLE SARAH DUNCAN: Five or six years
16 later.

17 MR. ORSINGER: -- primarily my fault.

18 CHAIRMAN BABCOCK: Justice Jennings, my
19 reaction to your comment is the laundry list you have here
20 is pretty specific.

21 HONORABLE TERRY JENNINGS: Right.

22 CHAIRMAN BABCOCK: I know what a bank
23 account number is, I know what a Social Security number
24 is. If you get more -- if you say like a diagram, well,
25 maybe it has a trade secret, maybe it doesn't. That gets

1 back to my point about what's going on in the trial court.

2 HONORABLE TERRY JENNINGS: Right.

3 CHAIRMAN BABCOCK: Because if the parties
4 didn't think it was sufficiently important to protect it
5 in the trial court, and now you're going to impose an
6 obligation on me on some vague thing that I've got to
7 redact it in the court of appeals.

8 HONORABLE TERRY JENNINGS: It's certainly
9 problematic because if you try to come up with a catch-all
10 phrase, the catch-all phrase would be too -- would be
11 overbroad itself, but my concern would be that there are
12 things here we haven't thought of that probably should be
13 included, and I know the rule can't be perfect.

14 CHAIRMAN BABCOCK: Yeah, and again, I get
15 back to if there's really sensitive stuff, putting aside
16 the third party protection --

17 HONORABLE TERRY JENNINGS: You need to
18 protect it yourself, yeah.

19 CHAIRMAN BABCOCK: -- then the parties --
20 you know, we're in an adversary system. We need to
21 protect ourselves in the trial court and then there are
22 consequences that flow from the grant or denial of that
23 protection in the trial court, just as there are with all
24 things.

25 HONORABLE TERRY JENNINGS: Right.

1 CHAIRMAN BABCOCK: Sarah.

2 HONORABLE SARAH DUNCAN: What if they did
3 protect themselves in the trial court, and there is a
4 sealing order or protective order, and shouldn't that
5 information be covered by the redaction?

6 CHAIRMAN BABCOCK: Yeah. Yeah. I mean, you
7 can't go -- I wouldn't think that you could go filing
8 stuff in the public record if you're bound by a lower
9 court ruling, but I know Richard -- Richard didn't do
10 that, but --

11 MR. ORSINGER: I was the appellee. It
12 wasn't my fault.

13 CHAIRMAN BABCOCK: Carl.

14 MR. HAMILTON: Could we have something said
15 in here that if it's not redacted in the trial court it
16 doesn't have to be redacted on appeal?

17 CHAIRMAN BABCOCK: Well, that was sort of
18 what I've been raising --

19 MR. HAMILTON: Yeah.

20 CHAIRMAN BABCOCK: -- the issue of.
21 Richard.

22 MR. ORSINGER: It occurs to me it might be
23 useful to everyone if we had a check box on the docketing
24 sheet that you file in the appellate court indicating
25 whether there is a confidentiality or sealing record. I

1 don't think we're tipping off the appellate court yet that
2 there is such a thing, and if that was checked then the
3 clerk's office might have a heads-up that there may be
4 requirements that would be out of the ordinary. Another
5 thing, Chip, is that this rule would apply to family law
6 cases, and --

7 CHAIRMAN BABCOCK: Uh-oh.

8 MR. ORSINGER: -- children are not
9 represented directly. They're only represented
10 indirectly, so if their parents are neglectful, but
11 information about a minor that could be relevant when
12 they're adults, there's no one protecting their interest
13 unless the system protects their interest, so we need to
14 be sensitive to that part of it.

15 CHAIRMAN BABCOCK: Yeah, that's a good
16 point, because this rule, you know, would reach family law
17 cases, and as you pointed out, there are statutes
18 requiring some of this information to be a part of a
19 pleading or a record, a court record.

20 MR. ORSINGER: Right. Right.

21 CHAIRMAN BABCOCK: And so now the Court is
22 overruling by rule a statute.

23 MR. ORSINGER: Not really. The information
24 that's required by the Family Code is required to be in
25 the trial court pleading, and the appellate court is

1 coming in and saying if this information is in the
2 pleading, you have to black it out before you file it in
3 the -- before a lawyer files it in the appellate court.
4 The clerk is still going to file it in the appellate court
5 with that information in it.

6 CHAIRMAN BABCOCK: Yeah, okay.

7 MR. HAWTHORNE: I would say, too, on that
8 point, that there is a -- in the appellate rules there is
9 a provision that talks about children's initials being
10 used.

11 CHAIRMAN BABCOCK: Yeah.

12 MR. HAWTHORNE: So I think that when it
13 comes to children's names, this is consistent with what's
14 in the appellate rules.

15 CHAIRMAN BABCOCK: Yeah, and I would doubt
16 that there's much controversy about that.

17 HONORABLE SARAH DUNCAN: It's not followed.

18 CHAIRMAN BABCOCK: Sarah.

19 HONORABLE SARAH DUNCAN: It's not followed,
20 but I was also going to say this -- it's not.

21 CHAIRMAN BABCOCK: Okay.

22 HONORABLE SARAH DUNCAN: I mean, in any
23 event, this is also going to cover criminal cases, and
24 there's certain information in criminal cases that's not
25 supposed to be made public.

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE SARAH DUNCAN: That's not included
3 in this.

4 CHAIRMAN BABCOCK: Anything else about Rule
5 4? Who would have thought? Okay. Let's go to Rule 5,
6 communication and service of documents by the court. Not
7 nearly long enough a rule, right, Richard? Any comments
8 about Rule 5?

9 HONORABLE DAVID GAULTNEY: I'd like to
10 change "via" to "by e-mail," but other than that --

11 CHAIRMAN BABCOCK: You don't like the word
12 "via." All right. That would be Rule 5(b) about "a case
13 by e-mail" as opposed to "via e-mail."

14 HONORABLE SARAH DUNCAN: Are these going to
15 incorporate the definitions in the Rules of Appellate
16 Procedure?

17 CHAIRMAN BABCOCK: I think that was directed
18 at you, Blake.

19 HONORABLE SARAH DUNCAN: You're requiring
20 people to list the opposing party's e-mail address. What
21 about opposing counsel? I mean, that's -- part of what's
22 disconcerting to me about having these be or not be part
23 of rules we already have is we've kind of worked some of
24 these things out in the rules we already have that aren't
25 worked out here.

1 MR. HAWTHORNE: I'm sorry, so what are we
2 missing here?

3 HONORABLE SARAH DUNCAN: Well, it says -- go
4 ahead.

5 MS. BARON: We don't have the opposing
6 party's e-mail address. We have their counsel's e-mail
7 address.

8 MR. HAWTHORNE: Oh, okay.

9 HONORABLE SARAH DUNCAN: But I think under
10 the Rules of Appellate Procedure attorney includes the
11 party, right?

12 MS. BARON: Right.

13 HONORABLE SARAH DUNCAN: But party doesn't
14 include the attorney unless they're pro se, right?

15 MS. BARON: I think so.

16 CHAIRMAN BABCOCK: Okay. Justice Gray.

17 HONORABLE TOM GRAY: I'm sorry I just
18 noticed this. I didn't want to delay it, but between (b)
19 and (c) it's not clear that orders of the appellate courts
20 are covered by either of those, although possibly orders
21 is other communications. I just think the word "order"
22 ought to be there somewhere in one or the other of those,
23 and I personally wouldn't mind (b) saying, "The clerk must
24 send the notices or other" -- "notices, orders or other
25 communications about a case by e-mail unless ordered

1 otherwise."

2 CHAIRMAN BABCOCK: Pam.

3 MS. BARON: Would the same -- suppose that
4 the clerk decides to send all notices electronically and
5 you don't receive the notice. Is that just -- it would be
6 treated the same as not getting the paper notice under the
7 appellate rules?

8 MR. HAWTHORNE: Under 4.5, right, I think
9 so. You would, I think, follow the same procedure under
10 4.5 if you needed more time. In fact, I've seen one
11 instance of that where someone said they didn't get an
12 e-mail notice and asked for more time under 4.5 as a pro
13 se, for whatever difference that makes.

14 MS. BARON: Right, because at least in the
15 Supreme Court, for example, your time runs from the date
16 of the last timely filed motion for rehearing in the court
17 of appeals, and I would assume the court of appeals would
18 probably go to electronic notice on that, and if you don't
19 get it, of course, you're subscribed to case mail, so you
20 should have it one way or the other, right?

21 MR. HAWTHORNE: Right. Right.

22 MS. BARON: Okay.

23 CHAIRMAN BABCOCK: Sarah.

24 HONORABLE SARAH DUNCAN: Under 5(c), is the
25 notice going to go to the party? It's the same problem.

1 Or the attorney?

2 MR. PRINE: (b), (b) took care of all
3 notices to the -- to the parties, and then the rule --
4 there was concern that the rules, current rules, didn't
5 allow us to send our orders to -- or our opinions to the
6 trial court and the trial judge, so we added that so that
7 those under 48.1 and 2.

8 MR. HAWTHORNE: And I would add there maybe
9 arguably maybe (c) isn't needed because the Rules of
10 Appellate Procedure have changed from "mail" to "send."
11 Well, except for the heading.

12 MR. PRINE: And our judges were concerned
13 because it does say "mailing opinions," do you have to
14 mail the opinions to --

15 HONORABLE SARAH DUNCAN: How are you going
16 to find out the party's addresses to mail them these
17 notices?

18 MR. PRINE: E-mail? E-mail notices?

19 MS. BARON: She's distinguishing between
20 parties and the parties' attorneys, and this rule I guess
21 is using the word "parties" to mean counsel --

22 MR. PRINE: Right.

23 MS. BARON: -- if you're represented or the
24 party if you're not, but it could be better clarified or
25 it could incorporate however we've addressed that in the

1 appellate rules.

2 CHAIRMAN BABCOCK: Richard Orsinger.

3 MR. ORSINGER: I hope I didn't miss the
4 comment if it was made, but Justice Gray has made me think
5 through the pro ses, and on 5(a), if a pro se is e-filing,
6 should they be required to meet the same procedural steps
7 that the attorney filing would? If the pro se is
8 sophisticated enough to e-file, shouldn't they enclose the
9 same information that a lawyer would that was e-filing?

10 MR. PRINE: They should, and we had prior
11 versions of our rule that we submitted had some
12 requirements for the pro se the same as attorneys, and the
13 Supreme Court was reluctant at that time to put as much on
14 the pro ses as we had on the attorneys, so we had some
15 exceptions.

16 MR. ORSINGER: Well, in this instance,
17 though, it would be a fairly sophisticated pro se that was
18 able to navigate the e-filing system, and you would think
19 that they could include the e-mail addresses. It may not
20 be too big a burden. I could imagine that some procedures
21 would be -- require so much legal knowledge or whatever
22 that it would be a burden for a pro se, but maybe not
23 that.

24 MR. HAWTHORNE: We do have some that are
25 that sophisticated. In fact, sometimes I'm tempted to

1 take their briefs out as examples for lawyers to follow.

2 Really, it's not that difficult.

3 MR. PRINE: And we have some very
4 unsophisticated who have e-filed, so --

5 CHAIRMAN BABCOCK: Okay. Carl.

6 MR. HAMILTON: Does this also apply to
7 mandates?

8 MR. HAWTHORNE: Yes.

9 MR. PRINE: Yes.

10 MR. HAWTHORNE: It would.

11 CHAIRMAN BABCOCK: Okay. Anybody else?
12 Skip, you okay?

13 MR. WATSON: Yeah.

14 CHAIRMAN BABCOCK: All right. Justice
15 Peeples, any questions?

16 HONORABLE DAVID PEEPLES: No.

17 CHAIRMAN BABCOCK: A man of few words.
18 Okay. Let's go to Rule 6.

19 MR. KELLY: Over here.

20 CHAIRMAN BABCOCK: Yeah, Peter.

21 MR. KELLY: I've been mulling over liberal
22 construction of rules this past week, and, you know, TRCP
23 has Rule 1, which allows for liberal construction or
24 requires liberal construction. There is no cognate in the
25 TRAPs, although, it does allow for suspension by the

1 courts of appeals at any time, but we have here -- we also
2 have the background of Verburgt and Maxfield, which
3 require liberal construction or application of the Rules
4 of Appellate Procedure, but there's no specific rule
5 requiring liberal construction, but we have under Rule
6 3(j), it says "Construction of rules," but then says,
7 "This rule," presumably solely Rule 3, "must be liberally
8 construed."

9 I guess my question is why aren't all the
10 rules liberally construed, setting aside the TRAPs as a
11 whole but just these electronic filing rules? Could 3(j),
12 liberal construction, be made part of Rule 6 so that
13 liberal construction applies to all of the rules that are
14 being promulgated and not just Rule 3?

15 MR. PRINE: I guess we didn't want to be
16 very liberal with the clerks and the court reporters. You
17 know, we wanted their records to comply with what the
18 parties needed, and so we didn't want to give them too
19 much wiggle room to file a good record.

20 CHAIRMAN BABCOCK: And what does -- in this
21 context or in the context of your comments, Peter, what
22 does liberal construction mean?

23 MR. KELLY: I don't know exactly. I haven't
24 had to litigate any of these yet. I haven't had any
25 problems arise.

1 CHAIRMAN BABCOCK: Well, in the context of
2 Rule 1 what does liberal construction mean?

3 MR. KELLY: Well, if the purpose of the
4 rules is to ensure that justice be done, I think that
5 should apply to the filing rules overall and not just the
6 Rules of Civil Procedure.

7 PROFESSOR HOFFMAN: You know, this is a
8 problem that democrats have been struggling with for
9 years, the liberal side of the --

10 CHAIRMAN BABCOCK: Well, I mean, and, you
11 know, Justice Scalia would argue that the beginning and
12 ending of a rule is the text of the rule. You read the
13 rule, and you do what it says. Not to start that debate,
14 but just a curiosity. Yeah, Sarah.

15 HONORABLE SARAH DUNCAN: And some of us
16 don't agree with that, and some of us don't agree that
17 Rule 1 doesn't apply in the appellate courts or in
18 construing appellate rules. What concerns me is not
19 giving court reporters and clerks too much wiggle room.
20 It's giving courts of appeals and the Supreme Court too
21 much wiggle room under this. There are no exceptions.
22 They can suspend any rule, anywhere, for any reason,
23 whether it's a good, bad, indifferent, or horrible reason;
24 and the other suspension rule in the TRAPs, we have
25 exceptions. You can't suspend rules relating to

1 jurisdiction. You can't suspend rules relating to
2 deadlines. This has no exception in it.

3 MR. PRINE: Well, the exception has to be in
4 accordance with the Texas Rules of Appellate Procedure,
5 and it has to be for good cause shown.

6 HONORABLE SARAH DUNCAN: Well, it says
7 "order a different procedure." "In accordance" modifies
8 "a different procedure." It doesn't modify "a rule" at
9 the end of the second -- middle of the second line.

10 MR. PRINE: I think that's what it was meant
11 to be, is that you would still have to be within the rules
12 of the TRAPs.

13 HONORABLE SARAH DUNCAN: Well, then it's a
14 mis --

15 MR. PRINE: Because we were requiring
16 mandatory e-filing, you know, from all of these people for
17 the first time, and if an Austin county clerk who files
18 two records a year decided they couldn't do it even though
19 we had mandatory and it gave the court to say, "Okay, you
20 can file under the old procedure of paper copies."

21 HONORABLE SARAH DUNCAN: But it's a really
22 broad rule to achieve such a narrow purpose in my opinion,
23 and I don't agree with this.

24 MR. HAWTHORNE: I guess I would just say
25 that again it just deals with the electronic filing of

1 documents.

2 MR. GILSTRAP: But that's all the documents
3 now. All the documents are going to be electronically
4 filed. It's kind of a Trojan horse. We're talking about
5 electronic documents, but we really mean everything.

6 MR. HAWTHORNE: Well, but, I mean, I guess I
7 take it as to the manner in which a document is filed, not
8 so much --

9 CHAIRMAN BABCOCK: And Blake is offended at
10 being compared to a Trojan horse.

11 MR. GILSTRAP: I didn't compare him. I
12 compared the rule.

13 CHAIRMAN BABCOCK: Ah, okay. All right. As
14 long as that clarity is achieved. Yeah, Justice Gaultney.

15 HONORABLE DAVID GAULTNEY: I argue in favor
16 of Rule 6. We can't anticipate every problem that's going
17 to happen. That's how Rule 2 works. It allows you to
18 adjust in the event of a problem.

19 CHAIRMAN BABCOCK: Justice Bland.

20 HONORABLE JANE BLAND: Well, it's so that
21 when somebody needs to file something in an emergency and
22 they can't e-file it, a judge can lift that rule and take
23 their filing, and we do that now with filings that are
24 filed in an emergency. They may not comport in every
25 which way, but somebody at the hospital needs something

1 done, they need to get it filed right away on a weekend or
2 late, they don't have time to go through the whole
3 e-filing thing, they want to hand write out their --
4 whatever it is, their request for emergency relief, this
5 lets that happen, let's something get filed to get to a
6 judge because time is of the essence or something like
7 that, and it happens in the trial courts a lot.

8 MR. HAWTHORNE: Another potential example
9 that occurs to me is say someone has a particular
10 disability that would prevent them from being able to use
11 the electronic filing system. I don't think you want to
12 face a legal challenge to the electronic filing system
13 because it doesn't accommodate them somehow, and I think a
14 court ought to be able to say, "Okay, look, we recognize
15 that it's not working here in this particular instance, so
16 we're going to order another procedure and allow you to
17 file the document."

18 CHAIRMAN BABCOCK: Rule 9.2(a)(2) of the
19 TRAP rules says that "A document is filed in the appellate
20 court by delivering it to a justice or judge of that court
21 who is willing to accept delivery. A justice or judge who
22 accepts delivery must note on the document the date and
23 time of delivery, which will be considered the time of
24 filing, and must promptly send it to the clerk." So that
25 would be an example of nonelectronic filing. Frank.

1 MR. GILSTRAP: The problem is these cases
2 all make sense. It would be nice to address them in the
3 rule, but the way the rule is drawn I think they could
4 say, "Well, the motion for rehearing was filed on day 20.
5 We're going to suspend the rules, it's okay."

6 HONORABLE SARAH DUNCAN: I'm not --

7 CHAIRMAN BABCOCK: Justice Jennings, and
8 then Sarah.

9 HONORABLE TERRY JENNINGS: Well, this is a
10 rule -- I think this is a rule that you have to have a
11 great deal of flexibility for the court to consider, and
12 an example of this would be we had a -- under our local
13 rule we had a case -- I don't think you were our clerk
14 yet. This may have been under Corinne. We had a case
15 where a criminal defendant had been accused of aggregate
16 theft, and a part of the state's evidence in that case was
17 literally thousands of checks, and we suspended our local
18 rule to allow them to file the paper copies that were
19 introduced in front of the jury because to make them go
20 through and scan each check to get it in electronically
21 would have been extremely expensive. You know, you're
22 dealing with an indigent defendant, so courts need to have
23 that flexibility to recognize that in some circumstances
24 it's better just to go ahead and suspend the rule and take
25 the paper copy; or as you pointed out, there are

1 situations where you really need an expeditious ruling,
2 you know, a motion to stay, something, where they get hold
3 of a judge immediately because it is critical that the
4 stay be issued immediately, they get hold of the judge.
5 So you do have to have a great deal of flexibility here,
6 and again, this only applies to exceptions for electronic
7 filing.

8 CHAIRMAN BABCOCK: Yeah, Sarah.

9 HONORABLE SARAH DUNCAN: I'm feeling
10 misunderstood. I was never arguing against a suspension
11 rule. I was arguing in favor of a suspension rule with
12 limits like we have in the TRAP rules.

13 CHAIRMAN BABCOCK: Pam.

14 MS. BARON: I think the only addition in the
15 suspension rule in the TRAP rules is you can't modify the
16 Code of Criminal Procedure or alter the time for
17 perfecting appeal. Those are the only two exceptions in
18 Rule 2, so basically all the examples that we've said
19 would be permitted under Rule 2.

20 MR. GILSTRAP: Well, why doesn't this rule
21 override Rule 2?

22 HONORABLE TERRY JENNINGS: Because it deals
23 only with electronically filing.

24 MR. GILSTRAP: Which is all filings.

25 MR. HAWTHORNE: Well, not pro se, but true,

1 all attorney filings.

2 MR. GILSTRAP: Well, why don't we just carve
3 out, just take it and put the carve out language from Rule
4 2 into this suspension rule, which is Rule 6 we're talking
5 about?

6 MR. HAWTHORNE: Or we could say perhaps that
7 Rule 2 applies to these rules or something like that.

8 CHAIRMAN BABCOCK: Justice Bland.

9 HONORABLE JANE BLAND: Well, this rule does
10 not suspend the rules with respect to perfecting the
11 appeal, other than as they might pertain to the filing of
12 electronic documents.

13 HONORABLE SARAH DUNCAN: It says, "The court
14 can suspend a rule." It doesn't say --

15 HONORABLE JANE BLAND: It says, "A rule
16 pertaining to the filing of electronic documents."

17 HONORABLE SARAH DUNCAN: Uh-huh.

18 MR. GILSTRAP: Which like includes the
19 motion for rehearing, because you file it electronically.

20 HONORABLE JANE BLAND: But the motion for
21 rehearing is not a rule pertaining to electronic
22 documents. It's pertaining to a motion for rehearing, not
23 these electronic document rules.

24 MR. GILSTRAP: It is an electronic document.
25 That's the problem. We're thinking that this only applies

1 to certain filings. It's every filing.

2 HONORABLE JANE BLAND: To the filing of it,
3 not to the document.

4 MR. GILSTRAP: Like when you file it.

5 CHAIRMAN BABCOCK: Justice Gray.

6 HONORABLE TOM GRAY: I am --

7 MR. GILSTRAP: I get your point now.

8 HONORABLE TOM GRAY: -- very cautious in
9 making this comment. It came from one of the chiefs, and
10 it's about this border between the electronic documents
11 and the filing of them versus paper documents, and I know
12 that there are those in this room that have strong
13 preferences for where footnotes go, but in an
14 electronically filed document that we are trying to read
15 online, it is very problematic if they're in notes. Now,
16 as this person and I was having the conversation, I made
17 reference to Justice Hecht, who very much prefers citation
18 of authority not be included in the body of the brief, and
19 this would be something probably mostly connected with
20 Rule 3 here, but when Justice Hecht is writing an opinion,
21 it is -- he's writing the rule that we all go by.

22 At the court of appeals, when we're reading
23 a brief, we need to know what authority the appellant or
24 appellee, the brief writer, is relying upon and whether
25 it's one of the rules established by the Supreme Court or

1 if it was some reference to maybe some obscure dissent
2 from the Waco court of appeals, and so I think the point
3 is well made by this fellow chief that somewhere we need
4 to address that issue. I don't know if it's in the
5 electronic rules or in the Rules of Appellate Procedure,
6 but the positioning of some information within the briefs
7 of the parties makes it very difficult to read and work
8 with electronically, and so I would make the pitch -- join
9 this chief's preference for briefs with citations included
10 in the body of the brief to facilitate reading and review.

11 CHAIRMAN BABCOCK: Okay. Richard.

12 MR. ORSINGER: Can I just step back for a
13 second? This entire e-filing network is going to be
14 operated by the State of Texas, not by each appellate
15 court, right?

16 MR. HAWTHORNE: Well, there's a contract
17 between the Office of Court Administration and a private
18 company to operate the e-filing system.

19 MR. ORSINGER: So if we have -- let's say we
20 had a local problem like a hurricane in Houston that
21 knocked out electricity for two weeks, the filing would
22 still go on for 24 hours a day, because the filing is not
23 at a server that's located in Houston.

24 MR. HAWTHORNE: I think that's entirely
25 possible, yes.

1 MR. ORSINGER: Okay. Because I can foresee
2 that this rule, exception rule, would be used if it's
3 local and you don't have electricity, we can't require
4 people to file everything electronically, but if it's in
5 Austin, Texas, which hasn't been hit with a hurricane then
6 it will be up 24 hours a day. Okay.

7 CHAIRMAN BABCOCK: Okay. Good point.
8 Anything else on Rule 6? Okay. So we've now spent most
9 of the morning getting through the easy stuff, let's get
10 to the hard stuff. No? No, it's not a good time for a
11 break.

12 MR. PRINE: Can I say one more thing about
13 these rules? As I was looking at the redaction rules, and
14 we have them under electronic and e-filing. When we first
15 did our rules we had redaction under the attorney -- or
16 under the e-file documents, it was part of the rule before
17 that, so this Rule 3, and then we had a -- but, you know,
18 where we scan everything and put it on the web, and a pro
19 se had put her husband's Social Security number and her
20 children's Social Security number and birth date, and we
21 didn't post hers to the web, and she called and said, you
22 know, you're -- "I'm not getting due process. I can't
23 look at my own stuff on the web." I said, "Well, our
24 redaction rules require you not to put that in there," and
25 she was smart enough to know, no, those are redaction

1 rules for electronic filing, we have no redaction rules
2 for paper filing.

3 So right now -- so we separated it out and
4 put it in a rule, so ours were just local rules so it
5 didn't just apply to electronic filing. Now, as it reads,
6 again, it would be redaction just for electronic filing
7 because of where it is, and, I mean, there's no good way
8 to fix that, but that is an issue that may come up.

9 CHAIRMAN BABCOCK: Okay. Justice Simmons,
10 if maybe you could give us a quick maybe seven-minute
11 overview.

12 HONORABLE REBECCA SIMMONS: Yes.

13 CHAIRMAN BABCOCK: And then we'll take our
14 lunch break, okay, Angie? Angie has to leave at noon, so
15 that's why she's anxious.

16 HONORABLE REBECCA SIMMONS: That's okay. If
17 you don't mind I'll stand up just so I can see you and so
18 I can speak loud enough so that you all can hear, if
19 that's okay. I'm going to talk about three things real
20 quickly. First I'll give you a little bit about the
21 history and background. Secondly, what I'd like to talk
22 about are the concept and the source documents for the
23 rules that we developed; and finally, basically I'd like
24 to talk about a hot spot, at least for the clerks, and
25 maybe some new concepts that we'll be introducing in this.

1 So as background, as you know, in the major
2 metropolitan areas we've had e-filing for about seven or
3 more years. Lawyers in Houston and in Bexar County and
4 Tarrant -- not in Tarrant, but in Dallas County have been
5 e-filing for quite sometime. They've been e-filing
6 pursuant to local rules that the Supreme Court has
7 approved, and these local rules are contained in a
8 template. These templates are available to anyone on the
9 website of JCIT and -- which is the Judicial Committee on
10 Information Technology of which I am chair.

11 Let me give you an idea a little bit about
12 the concept of these rules. We weren't starting from
13 scratch. Basically there have been rules in place, as I
14 just mentioned, for lawyers to e-file in our state, and
15 let me tell you what those sources are. You have been
16 provided with copies of them. We have the JP rules, which
17 are statewide e-filing rules for the justices of the peace
18 courts. Okay. So we have those e-filing rules. We have
19 the local rules for county, local rules for district
20 courts that have been implemented. There are slight
21 differences, for instance, between the Harris County local
22 district rules that have been implemented and the Dallas
23 ones, but they're not substantial differences. So all of
24 the district and county courts that are e-filing now have
25 these local rules that are all fairly similar. You've

1 been provided a copy of those rules.

2 Our most recent rules that we looked to, of
3 course, were the appellate e-filing rules and templates
4 that were approved by the Supreme Court, so we also looked
5 to those rules. Keeping in mind our concept was lawyers
6 do not like change. I am sure you are probably -- that's
7 foremost in your minds, and you're quite aware of that, so
8 what we tried to do was to use language that lawyers would
9 already be familiar with and would already know, so for
10 the most part we looked through the rules, tried to find
11 something that was most workable, but also tied to rules
12 that were also originally outstanding. The committee that
13 worked on this was comprised of lawyers, court clerks,
14 judges, and attorneys, and so they all worked together to
15 develop these rules and put them together.

16 Finally, let me mention a hot spot for the
17 clerks. I think the Supreme Court has received some mail
18 on this. Currently there is a tension between attorneys
19 or, actually, more judges who don't like electronic filing
20 or perhaps they don't understand the benefits of
21 electronic documents and then the clerks who are desperate
22 to get documents in electronically because it works well
23 with their system, it saves them money. They don't have
24 to store paper, and it's much more efficient for them.
25 All right. The clerks are very worried that unless there

1 is a specific rule in place there are judges out there who
2 basically order the clerks to print out each and every
3 document that's e-filed and keep a parallel paper file for
4 every single case, right, and that actually is -- there
5 are a few counties where this has happened, so the clerks
6 want some protection on that. I don't know how much we
7 can do about that, but that is a hot spot that you need to
8 be aware of.

9 The second thing that would be quite a
10 change and you've addressed a little bit of it already,
11 that is on electronic service. The rules as we have
12 anticipated them will require e-filers to all provide a
13 designated e-mail address and that actually e-service will
14 be mandated for every e-filer, and that is because it's
15 free and it goes through the system, but that's quite a
16 change. It will also require some tweaking to Rule 21a,
17 and so -- but that is something that we feel would be very
18 prudent for our state. It's free. That way as soon as
19 you e-file, service would be accomplished to the
20 designated e-mail address of the opposing attorney.
21 Currently pro ses are not required to e-file, and so we
22 have to take that into account as well, but I think my
23 seven minutes are up, so -- and everybody looks hungry, so
24 I think I'll stop there.

25 CHAIRMAN BABCOCK: Okay. Thank you, Justice

1 Simmons. We'll take our lunch break and be back in an
2 hour at 1:30. Thanks, everybody.

3 (Recess from 12:27 p.m. to 1:31 p.m.)

4 CHAIRMAN BABCOCK: All right. Does anybody
5 have any general comments about the statewide rules
6 concerning electronic filing and service of documents in
7 district, county, and justice of the peace courts?

8 HONORABLE TOM GRAY: I will make a motion
9 that they be approved as drafted.

10 CHAIRMAN BABCOCK: That will be denied by
11 the Chair, the only person voting.

12 HONORABLE TOM GRAY: I got a second one,
13 right here.

14 CHAIRMAN BABCOCK: Any other general
15 comments not of a frivolous nature?

16 MR. GILSTRAP: Could someone clarify what
17 these -- when these rules are adopted, let's say they're
18 adopted tomorrow, what courts they're going to apply to?

19 CHAIRMAN BABCOCK: Well, just a hunch, but
20 it would be district, county, and justice of the peace
21 courts.

22 MR. GILSTRAP: Well, no, it also says
23 probate courts, but also I've heard that it's not going to
24 apply to all the district courts.

25 HONORABLE REBECCA SIMMONS: This is taken

1 directly from the Supreme Court order that requires
2 e-filing, and it's taken directly from the language in the
3 order, so that's what the order states, and so that's why
4 we incorporated that into the rule, because the order
5 basically provides that it does apply to the courts that
6 are stated there.

7 MR. HAWTHORNE: Well, but a point of
8 clarification, there is a roll out of the mandate, so it
9 begins with the largest counties, so on January 1st it
10 would affect the courts in counties with population of
11 500,000 or more.

12 HONORABLE REBECCA SIMMONS: Yes.

13 MR. HAWTHORNE: Correct?

14 HONORABLE REBECCA SIMMONS: Correct.

15 MR. GILSTRAP: What's the next stage?

16 MR. KENNEDY: July the 1st for 200,000 and
17 above.

18 HONORABLE REBECCA SIMMONS: If you look at
19 the Supreme Court order that's attached to your document,
20 order requiring electronic filing in certain courts, the
21 layout is on page four of five of that order, and it kind
22 of gives you the schedule.

23 MR. GILSTRAP: Okay. Thank you.

24 CHAIRMAN BABCOCK: Okay. Any other general,
25 general comments before we dig into the rules themselves?

1 Yeah, Gene.

2 MR. STORIE: Maybe unnecessary, but justice
3 courts, not all of them will use e-filing, right? They
4 sort of get to opt into that?

5 CHAIRMAN BABCOCK: I don't know about that.

6 MR. STORIE: Is that correct?

7 HONORABLE REBECCA SIMMONS: That's not
8 correct. No. The JPs ultimately will be involved, but
9 they'll probably be the last -- I mean, I think the JPs
10 under the Supreme Court order are part of the e-filing
11 mandate.

12 MR. STORIE: All of them?

13 HONORABLE REBECCA SIMMONS: Yeah.

14 MR. STORIE: Okay.

15 HONORABLE REBECCA SIMMONS: Yeah.

16 CHAIRMAN BABCOCK: Carl.

17 MR. HAMILTON: Does this mean that by the
18 time this goes into effect that all district courts will
19 have to have the e-filing? Because some of them don't
20 have it now.

21 CHAIRMAN BABCOCK: I think that's right,
22 but --

23 HONORABLE REBECCA SIMMONS: Yes, it will
24 apply to all courts. They will all provide for e-filing.
25 They're all working with the vendor now to start getting

1 involved, but because right now the largest counties all
2 have courts that are e-filing. There are also exceptions
3 that can be filed with the court for those counties that
4 are just now implementing the infrastructure in order to
5 e-file, but basically ultimately all courts will e-file.
6 They'll just come on board at different stages.

7 CHAIRMAN BABCOCK: Okay. Any other general
8 questions or comments about these? Professor Hoffman, you
9 look pensive.

10 PROFESSOR HOFFMAN: No.

11 CHAIRMAN BABCOCK: No? You look like you're
12 winding up in the bullpen, warming up in the bullpen.
13 Okay. Anything else? Yeah, Buddy.

14 MR. LOW: Will a different court be notified
15 that they can get exempted from this by the Supreme Court
16 or what notification will go out?

17 CHAIRMAN BABCOCK: Justice Simmons, did you
18 hear the question?

19 HONORABLE REBECCA SIMMONS: No.

20 CHAIRMAN BABCOCK: Buddy wants to know if a
21 county can get out of this.

22 HONORABLE REBECCA SIMMONS: No.

23 MR. LOW: I thought you said that the Court
24 under circumstances could allow --

25 HONORABLE REBECCA SIMMONS: Oh, they could

1 apply -- I'm sorry, I didn't understand your question.
2 Yes, they can apply for an exception. I think that the
3 rules allow -- or that they can apply for exception to the
4 e-filing so that they can be given more time to comply
5 with it --

6 MR. LOW: Okay, I understand.

7 HONORABLE REBECCA SIMMONS: -- but not to
8 completely opt out.

9 MR. LOW: Is that in the rules that we're
10 going to --

11 HONORABLE REBECCA SIMMONS: No. It's in the
12 order, I think.

13 MR. LOW: How are they going to know they
14 can do that?

15 HONORABLE REBECCA SIMMONS: Because it's in
16 the Court's order of December, and it says, "Courts or
17 clerks who believe they can't comply with the order by the
18 date specified may petition the Supreme Court for an
19 extension," and that's in the Supreme Court's order. Go
20 ahead, Marisa. On the JP courts, you want me to -- okay,
21 on the justice courts there's statewide rules, but they're
22 not included in the -- in the e-filing mandate. Somebody
23 asked that. I was incorrect on that. The justice courts,
24 they're in these rules because there are statewide JP
25 e-filing rules, and we wanted them to be consistent, so

1 that is what the -- why they're incorporated into these
2 rules.

3 CHAIRMAN BABCOCK: Okay. Marisa.

4 MS. SECCO: I wanted to -- just on this
5 issue generally about what courts these rules apply to,
6 the Court has mandated e-filing, as Justice Simmons said,
7 through an order. These rules will govern e-filing in the
8 courts where e-filing is mandated, so the rules aren't
9 meant to delineate which courts have mandatory e-filing
10 and which don't. That's determined by the Court's
11 mandatory e-filing order, and because it's on a rolling
12 basis it's fairly complicated. So our aim with the rule,
13 I think, and I gave this feedback to Justice Simmons and
14 Blake, is that the rules should just govern e-filing
15 wherever it's used, but the rules themselves do not tell
16 you where e-filing is mandatory and where it's not.

17 CHAIRMAN BABCOCK: Okay. Let's go through
18 these. Talk about Rule 1. 1.1, scope. Any comments or
19 questions about that? Richard.

20 MR. MUNZINGER: Not about that rule, but
21 about the title. Since in light of Maria's comments and
22 the fact that probate courts are excluded from the title,
23 why don't you stop the title after the word "documents"?
24 If I looked at this, I would say that this only applies to
25 district, county, and justice of the peace courts, but it

1 applies to certain probate courts as well.

2 CHAIRMAN BABCOCK: So you would say, "These
3 rules govern the electronic filing of documents," period?

4 MR. MUNZINGER: No, the title, "Statewide
5 rules concerning electronic filing and service of
6 documents," period.

7 CHAIRMAN BABCOCK: Okay. So just put a
8 period or stop it there.

9 MR. MUNZINGER: Stop it there, yeah.

10 PROFESSOR HOFFMAN: But what do we do about
11 our conversation this morning about Court of Appeals and
12 Supreme Court?

13 MR. ORSINGER: Maybe you should say "in
14 trial courts."

15 MR. HUGHES: Rule 1.1 answers that. "These
16 rules govern," and they list the courts in which it
17 applies. Unless you want to collapse the appellate rules
18 into these.

19 HONORABLE TERRY JENNINGS: Why not just say
20 "trial courts" instead of "appellate courts"?

21 CHAIRMAN BABCOCK: Yeah, Richard.

22 MR. MUNZINGER: We put a parenthetical
23 reference to e-filing in quotes and then the term is
24 defined in subparagraph (d) of the next rule. I don't
25 know if that would cause confusion, but I think the

1 parenthetic use of, quote, "e-filing," is unnecessary
2 given the definition of the term.

3 CHAIRMAN BABCOCK: Okay. And we have lower
4 case "e" in one and upper case in the other. Yeah, Buddy.

5 MR. LOW: Chip, I notice in the appellate
6 rules it includes both civil and criminal, and apparently
7 this includes only civil and not criminal; is that
8 correct?

9 HONORABLE REBECCA SIMMONS: That's --

10 MR. HAWTHORNE: That is correct.

11 HONORABLE REBECCA SIMMONS: That is correct,
12 and that's because the criminal rules, we're working with
13 a separate group on criminal rules. They will need a few
14 different things than we need in the civil filings.

15 MR. LOW: Okay.

16 CHAIRMAN BABCOCK: Okay. Anything else on
17 1.1? All right. Let's go to 2, the specific terms.
18 Questions or comments about 2.1? Yeah, Richard.

19 MR. MUNZINGER: You've got in 2.1(a) the
20 word "court," it's capitalized in the definition but not
21 in the text, and I wonder whether you want to have that
22 capital letter "C" for Court. You know, if I write a
23 document and I capitalize a term, if it isn't capitalized
24 later I raise a question in the document did I mean the
25 capital -- the definition used or just the generic use,

1 and I think that --

2 HONORABLE REBECCA SIMMONS: You're right.
3 That's my problem, I agree with that.

4 MR. MUNZINGER: It also applies to that
5 "e-filing," as you pointed out, Chip.

6 CHAIRMAN BABCOCK: Okay. You've beaten her
7 down on that one. All right. Any other comments? Judge
8 Wallace.

9 HONORABLE R. H. WALLACE: In part (e), the
10 electronic filing manager, I assume that would be the,
11 what, Tyler Company. Is that who that is?

12 HONORABLE REBECCA SIMMONS: Yes. It's
13 TexFile.

14 HONORABLE R. H. WALLACE: And what is an
15 electronic filing service provider? What would be an
16 example of that?

17 HONORABLE REBECCA SIMMONS: That would be
18 someone like Case File Express. That is the entity that
19 the lawyer will actually interact with. The EFM -- can I
20 -- one second and I'll kind of just structurally walk you
21 through; and we'll analogize it if we will to a post
22 office, okay. So the lawyer basically uses an EFSP. That
23 is who they have contact with. It's like in the old days
24 when lawyers would get couriers to carry documents, say,
25 to the court -- to the post office. The EFSP is the

1 courier. That's who will transmit the document to the
2 portal that is managed by the e-filing manager, so the EFM
3 is like the post office, all right, and then the EFM is
4 the one that then shoots that on through to the clerk, so
5 that is like the post office delivering the package on to
6 the clerk of the court or the court where it is going.

7 So it is a multiple process and that is how
8 the State of Texas decided to do e-filing in this state,
9 by using something similar to a courier, but it's
10 electronic, and that is your e-filing service provider,
11 and, Casey, do you want to add anything else to that?

12 MR. KENNEDY: I think you're absolutely
13 right, and so those EFSPs have other value adds that they
14 add on, like there are some that will tie back into the
15 attorney billing systems. Some of them give loans to the
16 attorneys to where they can file all they want and they --
17 they pay the fees, and at the end of the month they send
18 the attorney an invoice for everything that you've filed,
19 and if that's a public -- that's a choice that the filer
20 makes when they file. They can choose between today six
21 of them. When we go to TexFile, the new system, they'll
22 have 11 different choices to choose from.

23 CHAIRMAN BABCOCK: Okay. Yeah, Judge
24 Wallace.

25 HONORABLE R. H. WALLACE: So how would an

1 attorney or a law firm act as an EFSP?

2 MR. KENNEDY: What they would do is they
3 would contact OCA, and then we would provide them with the
4 necessary specifications that would allow them to tie
5 directly into the EFM, and we've got several groups that
6 are doing that. Like Linebarger, with all the tax stuff,
7 they're going to tie directly into the EFMs so they don't
8 go through a service provider.

9 CHAIRMAN BABCOCK: Okay. Any other
10 questions, comments? Okay. Rule 3.1, electronic filing
11 requirements.

12 MR. MUNZINGER: Chip? Chip?

13 CHAIRMAN BABCOCK: Yes, sir.

14 MR. MUNZINGER: I'm sorry, I thought you
15 were going to go through this seriatim. Look at paragraph
16 2.2(d), as in dog.

17 CHAIRMAN BABCOCK: Right.

18 MR. MUNZINGER: "E-filing is a process by
19 which a person or entity files a court document." What is
20 a court document? Isn't the word "court" superfluous in
21 that context? Wouldn't it be better if it read "files a
22 document with a court or court clerk"?

23 HONORABLE REBECCA SIMMONS: That's just
24 language taken from another set of rules, and so I'm
25 ambivalent to -- it could be just "document."

1 CHAIRMAN BABCOCK: Buddy.

2 MR. LOW: Were many of these definitions
3 incorporated from other definitions --

4 HONORABLE REBECCA SIMMONS: Yes.

5 MR. LOW: -- that have been used --

6 HONORABLE REBECCA SIMMONS: Correct.

7 MR. LOW: -- before? But not one of those
8 includes all of these or vice versa?

9 HONORABLE REBECCA SIMMONS: Correct.

10 MR. LOW: There are several ones that you've
11 used.

12 HONORABLE REBECCA SIMMONS: Right. And so,
13 for instance, I've tried to footnote through here kind of
14 different rules that more specifically apply. So I am --
15 so you will see kind of some arcane perhaps language in
16 some of these, but they're taken from rules that lawyers
17 have been using.

18 CHAIRMAN BABCOCK: Okay.

19 MR. LOW: With some improved language.

20 HONORABLE REBECCA SIMMONS: Yes.

21 CHAIRMAN BABCOCK: I can go through these
22 seriatim, but anybody got anything on (e), (f), (g), (h),
23 (i), (j), (k), (l), (m), (n), (o), (p)? Actually, there
24 is no (o) and no (p). I assume Judge Wallace got that.

25 HONORABLE R. H. WALLACE: All right,

1 subparagraph (h), electronic orders. How would a judge
2 apply their electronic signatures to -- or is that beyond
3 the scope of this?

4 HONORABLE REBECCA SIMMONS: There are judges
5 that are doing electronic orders. You actually can do a
6 signature pad like you use when you do a credit card.
7 Actually, there are ways that judges are already signing
8 electronic orders, and I think in Houston or in Harris
9 County some of them do, and I think they just submitted a
10 -- or got a bill passed or added -- there's something in
11 the Legislature -- did you know this, Blake?

12 MR. HAWTHORNE: No.

13 HONORABLE REBECCA SIMMONS: There's
14 something to make sure it's approved that judges can do
15 electronic orders, but there are signature pads that you
16 can use for -- so that it can be an electronic order.

17 CHAIRMAN BABCOCK: Okay.

18 HONORABLE JAMES MOSELEY: We do them on the
19 Dallas Court of Appeals. It's one of my amazing special
20 powers I don't understand.

21 CHAIRMAN BABCOCK: Okay. Carl.

22 MR. HAMILTON: This (g) where it says that
23 registration is consent to accept e-filing, is it just in
24 that case or in any other cases, too?

25 HONORABLE REBECCA SIMMONS: Any other case.

1 All cases is the intent. And the reason for that is you
2 want them to register as an e-filer. They then have to
3 provide that digital address that then everyone can use
4 for the electronic service, and so since everybody is
5 going to be ultimately required to e-file then we want
6 them to register and be in the system.

7 CHAIRMAN BABCOCK: Richard.

8 MR. MUNZINGER: In subparagraph (g) we say,
9 "E-filer means a person or entity or their authorized
10 agent who e-files in accordance with these rules.
11 Registration as an e-filer constitutes consent to accept
12 electronic service of pleadings filed by other registered
13 filers," and then I go over to Rule 4.1, and it talks
14 about "the electronic service of other documents," which
15 would not necessarily be pleadings, but would be, for
16 example, discovery or something else. I think that may
17 need to be articulated more carefully.

18 HONORABLE REBECCA SIMMONS: Okay. But the
19 intent is this, that there ultimately would be two
20 types -- there is service when you e-file something, and
21 that will shoot through the EFM and be served, but there
22 are lots of other things that lawyers file, such as
23 discovery, that isn't e-filed with the court, but that the
24 attorney can use this EFM portal to have e-served as well,
25 so you make a good point. There will be more than just

1 pleadings that will be served.

2 CHAIRMAN BABCOCK: Sarah.

3 HONORABLE SARAH DUNCAN: What if a person or
4 entity e-files but not in accordance with these rules?
5 Are they not an e-filer?

6 HONORABLE REBECCA SIMMONS: That's a good
7 question. They are -- they're an attempted e-filer.
8 They're a wannabe e-filer. Their filing will get
9 ultimately probably rejected if it's not in accordance
10 with the rule, but I mean, we can make it someone who just
11 e-files. That would be -- and presume it's going to be in
12 accordance.

13 CHAIRMAN BABCOCK: Richard.

14 MR. MUNZINGER: In this same section (g),
15 the e-filer by filing an e-file agrees to accept service
16 from other e-filers. Is it limited to that case in which
17 the person has filed, or does it go to all activities in
18 all cases? So Richard files as plaintiff in the case of
19 Richard versus Chip, and Chip has answered. Now, we're
20 both registered as e-filers, and now Buddy wants to sue
21 one or the other of us or I want to sue Buddy or Chip
22 does, and he's filed. Can I serve him automatically just
23 e-filing --

24 HONORABLE REBECCA SIMMONS: Yes.

25 MR. MUNZINGER: -- simply because he has

1 filed an appearance?

2 HONORABLE REBECCA SIMMONS: Yes.

3 MR. MUNZINGER: As an attorney?

4 HONORABLE REBECCA SIMMONS: Yes.

5 MR. MUNZINGER: But now if I'm a party to
6 the case, so I'm not the lawyer now, I'm Richard, Inc.
7 Richard, Inc., is an entity which has e-filed. It's a
8 plaintiff in a case, in case number one. In a wholly
9 unrelated case, the effect of (g) is to allow service by
10 e-mail on Richard, Inc.

11 HONORABLE REBECCA SIMMONS: Once you become
12 in the system you have -- once you're in the system as a
13 filer, you've given a registered address, a designated
14 address, and then you are considered part of the system,
15 and, yes, you can be served.

16 MR. MUNZINGER: See, I think that's -- not
17 meaning to be disrespectful towards any of you, but I
18 think it's not fully considered. How do I serve a
19 corporation? I serve a corporation by the issuance of
20 citation in the state courts, summons in the Federal
21 court. On whom? On an officer or registered agent for
22 process, et cetera. The inquiry I just made and the
23 answer I was given would mean that Richard, Inc., can be
24 served by e-mail by anybody at any time in any case.

25 MR. GILSTRAP: We're not talking about

1 service of process.

2 MR. MUNZINGER: But it doesn't say that.

3 That was my question to her.

4 HONORABLE REBECCA SIMMONS: I'm sorry, I
5 thought you were talking about -- I didn't think you were
6 talking about service of process.

7 MR. MUNZINGER: Yeah, I was.

8 HONORABLE REBECCA SIMMONS: No. Okay, I
9 apologize. No, you can't be served by e-mail on --

10 MR. MUNZINGER: So where is the exception on
11 process? I missed it.

12 MR. GILSTRAP: It's at page 12, like 4.1(a),
13 that exempts out -- I'm sorry, that's not it. That's not
14 it.

15 MR. MUNZINGER: Well, rather than take
16 everybody's time, I think we are all alert to the problem
17 that exists here, and whoever the drafters are need -- in
18 my opinion need to be careful that we don't overdo the
19 thing.

20 CHAIRMAN BABCOCK: The phrase, "accept
21 electronic service of pleadings," what if a lawsuit is
22 filed by an e-filer and seeks injunctive relief and they
23 go down and they get an ex parte TRO, and then they come
24 back and they serve me electronically, and they say, "We
25 know that you've represented this defendant from time to

1 time, even though we don't know if you represent him on
2 this case, but we know you've represented him, and so
3 here's a copy of the TRO, and they're bound," and by this
4 rule now I've maybe had to consent to accept service on
5 that case.

6 MR. GILSTRAP: Chip? The rule pointed to
7 earlier, it was the correct reference. It's on page 12,
8 4.1(a), "Except for the citation to be served upon filing
9 of the cause of action, every document is to be filed
10 electronically." Now, you know, that obviously handles
11 Richard's situation, but it doesn't handle yours because
12 you're not being served with a citation. You're being
13 served with notice of a temporary restraining order.

14 CHAIRMAN BABCOCK: Right.

15 MR. GILSTRAP: So the intent I think has got
16 to be that the initial filing can't be served
17 electronically. I mean, it's got to be that way. Once
18 you've been served or maybe once you answer then you can
19 be served, but it can't be the initial suit papers,
20 whatever you call them.

21 HONORABLE REBECCA SIMMONS: Right, because
22 you wouldn't know that that lawyer is representing that
23 party. I agree, you're not going to know who's
24 representing that party, right? I mean that's --

25 CHAIRMAN BABCOCK: Well, you know, it's a

1 Catch 22 for the plaintiff's lawyer, because in most
2 counties if you're getting an expert -- if you're getting
3 a TRO and you're doing it ex parte you've got to certify
4 that you don't know who the defendant is represented by.

5 HONORABLE REBECCA SIMMONS: Right.

6 CHAIRMAN BABCOCK: But then -- this actually
7 happened to me. You turn around and you say, "Well, I
8 don't know, but I'm guessing," you know, after the ex
9 parte TRO has been issued, "I'm guessing that you're going
10 to represent these guys, and you represent them all the
11 time, and so just be sure they know that they're
12 restrained." Professor Albright.

13 PROFESSOR ALBRIGHT: How is this any
14 different from the situation where I took a piece of paper
15 and dropped it off at your office? I think what we tend
16 to do is think that sending something electronically has
17 some magical difference than walking it to somebody's
18 office and dropping them off. It's just a different
19 method of service after you've appeared. It's not a
20 substitute for service of process. It's not an
21 authorized -- I mean, it is an authorized method of
22 notification when you've appeared in the lawsuit, but if
23 I've dropped -- if I get a TRO against your long-term
24 client and drop it off at your office, that's the -- has
25 the same force and effect as if I e-mail it to you.

1 CHAIRMAN BABCOCK: Yeah, I think that's
2 right except this definition says that I've consented to
3 accept electronic service.

4 PROFESSOR ALBRIGHT: Well, which part are
5 you looking at?

6 CHAIRMAN BABCOCK: It's the one that
7 Richard's focusing on, (g).

8 HONORABLE REBECCA SIMMONS: And then -- and
9 I would raise this, that section, registration, starting
10 with "registration" that seems to be causing the problem,
11 that probably would be better placed anyway in the section
12 dealing with service, because all you're trying to do
13 right here is define what an e-filer is.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE REBECCA SIMMONS: And that's kind
16 of an afterthought here that probably would go better
17 elsewhere anyway.

18 CHAIRMAN BABCOCK: I think that's probably a
19 good --

20 PROFESSOR ALBRIGHT: Because I guess what
21 you're just trying to say is if you are filing documents
22 electronically then since our Rule of Civil Procedure
23 still doesn't allow e-mail as effective service of notice,
24 that you're putting it in here instead.

25 HONORABLE REBECCA SIMMONS: Right, we're

1 putting it in here, but we're also -- as I mentioned to
2 you or I mentioned to Marisa, I've also tweaked Rule 21 to
3 allow for that as well, and we'll submit a copy of that as
4 well for your idea.

5 PROFESSOR ALBRIGHT: Because if you don't
6 have that --

7 HONORABLE REBECCA SIMMONS: Right, I agree.

8 PROFESSOR ALBRIGHT: Then you can have
9 faxes. We can just be faxing all of this stuff
10 everywhere.

11 HONORABLE REBECCA SIMMONS: Right. Right.

12 CHAIRMAN BABCOCK: Judge Wallace.

13 HONORABLE R. H. WALLACE: Well, an original
14 petition would not be e-served on anyone.

15 HONORABLE REBECCA SIMMONS: Correct.

16 HONORABLE R. H. WALLACE: Okay. All right.

17 CHAIRMAN BABCOCK: Richard, and then Justice
18 Jennings.

19 MR. MUNZINGER: Well, my only point I guess
20 would be that these rules ought to somehow or another
21 alert everybody to the fact that an original petition or
22 an original summons, citation, whatever it might be, may
23 not be served through these rules, but a comment that was
24 just made troubles me for a moment. I have represented
25 Exxon in one lawsuit in my lifetime, but I suspect there

1 are people in Houston who have represented Exxon 10 times,
2 and their next door neighbor in a different law firm has
3 represented Exxon 10 times and so on and so forth.

4 Now, as an attorney I have an obligation to
5 a client, and it is limited to my undertaking for that
6 client in that particular matter. Now, can my obligation
7 to Exxon, if I'm one of those Houston lawyers, be
8 triggered somehow because I've entered an appearance for
9 them electronically in another case? These rules need to
10 recognize that problem, in my opinion, and differentiate
11 or distinguish so that you can't serve me in something
12 where I'm not attorney of record. My client can't be
13 bound by me because I worked for them in case one. This
14 is case 16.

15 HONORABLE REBECCA SIMMONS: It would be no
16 different -- I absolutely agree with you because it's no
17 different than paper. I can't go and serve you with
18 something in paper just because you represented Exxon in
19 another case. These are meant to kind of track that same
20 situation, and it could be clearer, so I think point
21 well-taken.

22 CHAIRMAN BABCOCK: You're winning, Richard.

23 MR. MUNZINGER: No, I know. I'm finished.
24 I can't hear real well, you know, sometimes.

25 CHAIRMAN BABCOCK: You're winning.

1 HONORABLE TERRY JENNINGS: I realize this is
2 covered in Rule 4.1(a), but why not say upfront in regard
3 to the scope of the rules, "E-filing of documents except
4 service of citation or whatever," just so that it's clear
5 upfront, this is -- that would make it clear upfront that
6 this applies only to documents filed after the lawsuit's
7 been filed.

8 CHAIRMAN BABCOCK: Okay. Fair enough.

9 MR. KELLY: We need to expand that. With
10 regard to Chapter 74 reports in medical malpractice cases,
11 if you -- if the petition has been filed and you still
12 don't have service on the defendant within 120 days, which
13 happens sometimes, you still have to have your report
14 served on the defendant doctor within 120 days, even if
15 you haven't effectuated service; and the Supreme Court's
16 actually ruled on this a couple of years ago in *Stockton*
17 *vs. Offenbach*, so there has to be some mechanism to
18 account for physical delivery of the expert report; and it
19 also needs to be made to work with the e-filed service,
20 because expert reports don't have to be filed with the
21 court, merely served on the defendant. So once they've
22 appeared, you can -- can you do e-filed service on the
23 defendant, even though the document doesn't have to be
24 served with the court or filed with the court? I mean,
25 I'm looking --

1 HONORABLE REBECCA SIMMONS: Yes.

2 MR. KELLY: -- at subchapter (i) in relation
3 to that. "E-filed service is a method of electronically
4 serving any e-filed pleading, motion, or other form of
5 request." Well, you don't file discovery requests with
6 the court; you don't file expert reports with the court.

7 HONORABLE REBECCA SIMMONS: So that's under
8 (j) where it says "unfiled document e-service," so that's
9 trying to take care of those things like your discovery
10 and things so that you don't file with the court, but you
11 want to use this -- the EFSP and the EFM.

12 MR. KELLY: But then under (j), "required to
13 be served on all other parties." You only have to
14 serve -- you only have to serve your expert report --

15 HONORABLE REBECCA SIMMONS: Right.

16 MR. KELLY: -- on that particular defendant.

17 HONORABLE REBECCA SIMMONS: Right.

18 MR. KELLY: So I have to serve the doctor's
19 expert report on the doctor and the nurse's expert report
20 on the nurse.

21 CHAIRMAN BABCOCK: I'm not sure I understand
22 that. What do you mean?

23 MR. KELLY: Well, in many cases you have to
24 have multiple expert reports.

25 CHAIRMAN BABCOCK: Right.

1 MR. KELLY: And if I have -- and we're
2 waiting to see how the Potts case is going to affect that,
3 but if you have -- I have to serve my expert report
4 detailing doctor's negligence --

5 CHAIRMAN BABCOCK: Right.

6 MR. KELLY: -- standard of care on the
7 doctor. I don't necessarily have to serve it on the
8 nurse.

9 CHAIRMAN BABCOCK: Is the doctor a
10 defendant?

11 MR. KELLY: If the doctor is a defendant.

12 CHAIRMAN BABCOCK: How about is the nurse a
13 defendant?

14 MR. KELLY: And if the nurse is a defendant.

15 CHAIRMAN BABCOCK: Why wouldn't you have to
16 serve it on the nurse?

17 MR. KELLY: Because you have to serve it on
18 the party against whom the allegations are being made. It
19 ends up being everybody gets the same -- I mean, the
20 nurses gets the nurse's report if I have two different
21 expert reports.

22 CHAIRMAN BABCOCK: Okay.

23 HONORABLE REBECCA SIMMONS: If you took out
24 the "all," and you just put "required to be served on one
25 or more other parties" or "required to be served" --

1 MR. KELLY: That addresses that.

2 HONORABLE REBECCA SIMMONS: -- "on other
3 parties," would that take care of that?

4 MR. KELLY: Yes.

5 CHAIRMAN BABCOCK: Okay. Carl.

6 MR. HAMILTON: And you and Justice Simmons
7 answered a moment ago. Are we now saying that once you're
8 registered in the system and consenting to e-filing, it's
9 only in that case? We're still not changing that?

10 HONORABLE REBECCA SIMMONS: What I -- the
11 concept is this: Once you register in e-filing you've
12 registered as an attorney in e-filing. That means in
13 other cases where you become attorney of record that you
14 have consented to be served electronically in those cases.
15 It certainly doesn't do anything -- just like in paper,
16 just because you've represented somebody in one case
17 doesn't mean you represent them in the next, and it's not
18 meant to apply that way. It's meant to only apply if you
19 are attorney of record in a case that's being e-filed and
20 you become attorney of record in another case that --
21 where you're using e-filing that you consent to have
22 service on your designated address by e-mail.

23 MR. HAMILTON: Is there a place where we can
24 get a list of the attorneys that are registered?

25 HONORABLE REBECCA SIMMONS: I think that,

1 yes, they'll all be registered in the -- through the
2 portal, the EFM. TexFile will have that registration.

3 MR. HAWTHORNE: So what happens is you go in
4 and you want to serve somebody or send them a copy on your
5 filing. You put the attorney's name in there, and it
6 searches in the database to see if you can serve them. So
7 it's not like you're looking at a list and picking them
8 out.

9 HONORABLE REBECCA SIMMONS: They're in
10 there.

11 MR. HAMILTON: Because if I have a case
12 right now --

13 MR. HAWTHORNE: Yes, sir.

14 MR. HAMILTON: -- where nobody is doing any
15 -- nothing by e-mail, everything is by paper, and I find
16 that attorney A is in the system then I can serve him by
17 e-mail?

18 MR. HAWTHORNE: Right, if they've consented.

19 MR. HAMILTON: Even if he hasn't -- even if
20 he hadn't consented in my case now.

21 MR. HAWTHORNE: Right.

22 CHAIRMAN BABCOCK: Under these rules you
23 mean?

24 MR. HAMILTON: Under these rules, yeah.

25 CHAIRMAN BABCOCK: Marisa.

1 MS. SECCO: Well, these rules contemplate
2 that e-filing is mandatory, so all of the cases subject to
3 these rules would be e-filed cases. Does that make sense?

4 CHAIRMAN BABCOCK: Sure.

5 MR. ORSINGER: So all attorneys are
6 consenting by being attorneys of record.

7 MS. SECCO: Correct.

8 CHAIRMAN BABCOCK: Well, but it will occur
9 over time, though.

10 MR. HAWTHORNE: Right.

11 CHAIRMAN BABCOCK: Because like you probably
12 don't have any cases that you've filed yet --

13 MR. ORSINGER: No, I have plenty.

14 CHAIRMAN BABCOCK: Well, hypothetically, you
15 don't.

16 MR. ORSINGER: Oh, yeah, hypothetically I
17 don't have any.

18 CHAIRMAN BABCOCK: And so next month you're
19 going to file one, and you're going to do it by an
20 e-filing, and by doing that, now you're part of the game.

21 MR. ORSINGER: Right, and you can't opt out,
22 so, Carl, get ready.

23 CHAIRMAN BABCOCK: So Carl can serve it.
24 Eduardo.

25 MR. RODRIGUEZ: I mean, if we just think of

1 this e-filing mechanism as your -- the address of your
2 office. Once you say -- tell somebody your office is at
3 321 West Stubbs then that's your office address, and
4 that's where they're going to send you mail. The fact
5 that you -- that I sent you a letter in the case and I'm
6 representing Joe Blow doesn't mean that the next time you
7 sue Joe Blow that he's going to hire me, and you can't
8 send me that letter and expect me to respond on behalf of
9 Joe Blow just because you have my address.

10 CHAIRMAN BABCOCK: Right. Judge Wallace,
11 then Richard.

12 HONORABLE R. H. WALLACE: Well, and that
13 was, I think, my point. Until a lawyer enters an
14 appearance on behalf of a party in the case, how can you
15 serve them?

16 CHAIRMAN BABCOCK: Right.

17 HONORABLE R. H. WALLACE: Serve him with
18 anything.

19 HONORABLE REBECCA SIMMONS: That's
20 absolutely correct, and that's what this is supposed to --

21 CHAIRMAN BABCOCK: I think Justice Simmons
22 has already conceded that point --

23 HONORABLE R. H. WALLACE: All right. I'm
24 sorry.

25 CHAIRMAN BABCOCK: -- multiple times and

1 she's going to --

2 HONORABLE R. H. WALLACE: I'm slow. It
3 takes awhile.

4 CHAIRMAN BABCOCK: And she's going to work
5 on fixing that.

6 HONORABLE REBECCA SIMMONS: I'll clarify
7 that, but, yes, no, that was absolutely always assumed
8 that nobody is going to serve somebody that they don't --
9 that hasn't appeared, so I will clarify that.

10 CHAIRMAN BABCOCK: Richard.

11 MR. MUNZINGER: No.

12 CHAIRMAN BABCOCK: No? Oh, come one.

13 MR. MUNZINGER: It would be repetitive.

14 CHAIRMAN BABCOCK: Okay. Justice Moseley.

15 MR. ORSINGER: When has that ever mattered?

16 MR. MUNZINGER: Sometimes I'm not understood
17 the first time.

18 HONORABLE JAMES MOSELEY: Back under (g),
19 and (g), the e-filer definition is written to be broad,
20 "person, entity, or their authorized agent," but when we
21 talk about this so far as we talk about our lawyers and
22 maybe a pro se individual.

23 HONORABLE REBECCA SIMMONS: Right.

24 HONORABLE JAMES MOSELEY: Is that who we're
25 really covering here?

1 HONORABLE REBECCA SIMMONS: Who we're
2 covering here really is -- are really lawyers because the
3 pro ses aren't required to e-file. Now, they can e-file
4 if they want, but they're not required to, and I don't
5 anticipate that most pro ses will e-file, but -- so this
6 is meant to really deal more with -- with lawyers, by
7 being a person -- because pro ses are allowed to e-file,
8 so those are people --

9 HONORABLE JAMES MOSELEY: So if a person,
10 i.e., a pro se e-files then they're an e-filer.

11 HONORABLE REBECCA SIMMONS: Right.

12 HONORABLE JAMES MOSELEY: If a lawyer
13 e-files, they're an e-filer. Does anyone fit within this
14 entity?

15 HONORABLE REBECCA SIMMONS: The entity,
16 which is -- you know, I don't know how an entity
17 necessarily can be an e-filer because either they have to
18 have a lawyer if they're a corporation or whatever to
19 represent them, but the thought was, okay, there might be
20 some sort of entity that can be pro se. I don't know.
21 But, I mean, I'm happy to take that out, but that was a --
22 but I agree with you that if you're a corporation you
23 generally have to have a lawyer.

24 HONORABLE JAMES MOSELEY: Okay.

25 CHAIRMAN BABCOCK: Okay. Any other comments

1 about Rule 2 or any of the subparts thereof? All right.

2 Let's go to Rule 3.

3 HONORABLE SARAH DUNCAN: Chip?

4 CHAIRMAN BABCOCK: Electronic filing
5 required. Sarah.

6 HONORABLE SARAH DUNCAN: On subsection (n),
7 definition of clerk, it's talking about -- the county
8 clerk and the district clerk don't actually have
9 employees. They're employees of the county, so I don't
10 think this is technically correct.

11 HONORABLE REBECCA SIMMONS: That's a good
12 point.

13 MR. ORSINGER: Could we call them
14 assistants? Are they assistant clerks?

15 MR. GILSTRAP: Deputy clerks.

16 HONORABLE REBECCA SIMMONS: Could we call
17 them staff, or deputies or staff?

18 HONORABLE SARAH DUNCAN: And I have to say
19 throughout the failure to use the serial comma makes this
20 very confusing in places to me.

21 MR. KELLY: It does switch back and forth.
22 I was asking Richard about this, is the house style to use
23 the serial comma or to not?

24 MR. ORSINGER: We're inconsistent about
25 that.

1 CHAIRMAN BABCOCK: I'm not -- I don't have a
2 view -- the Chair does not have a view on the serial
3 comma.

4 MS. ADROGUE: On the house style of the
5 serial comma.

6 CHAIRMAN BABCOCK: But I agree consistency
7 is a great.

8 MR. KELLY: On the very front page the title
9 uses the serial comma. Perhaps that should set the tenor
10 for the rest of the document.

11 MR. ORSINGER: May I note for the record
12 that the house style changes between meetings and
13 sometimes even during meetings?

14 CHAIRMAN BABCOCK: Point well made. Yeah,
15 Richard.

16 MR. ORSINGER: I would like to ask Justice
17 Simmons what the logic or principle is between the
18 exceptions in 3.1 of the things that are not to be filed
19 electronically.

20 HONORABLE REBECCA SIMMONS: All right.
21 Okay. If you look at the other sets of rules, there were
22 more things that were not filed electronically, mostly
23 dealing with things that had verifications or oaths. All
24 right. So when the committee went and looked, we looked
25 at some of those to see which ones we would keep or would

1 be best suited to keep. Wills came up because of probate
2 Judge King in Tarrant County felt very strongly that wills
3 actually in their original form are often required to be
4 filed in probate court, because the document itself
5 becomes part of the file, and he felt very strongly that
6 wills should be allowed to be not electronically filed
7 because even where a staple is placed apparently means a
8 great deal in those kind of things --

9 MR. ORSINGER: Sure, yeah. Absolutely.

10 HONORABLE REBECCA SIMMONS: -- and so that's
11 why wills are there. The documents to be presented to a
12 court in camera is just to make clear, often you don't
13 file those anyway, but you may have a question or
14 something to go before the court. Those are also excluded
15 from Rule 76a, which is the rule on sealing. It likewise
16 kind of excludes and says that those documents can be
17 presented to a court without having to be filed, and so
18 that was left in there. It's in the other rules. It was
19 left in there.

20 The document sealed pursuant to 76a, for the
21 reasons we discussed this morning, as far as making sure
22 they were kept separate and segregated by the clerks, that
23 was kept in paper form; and then there are documents which
24 were otherwise restricted by law or court order that
25 require certain kinds of confidentiality in the Family

1 Code in certain kind of abuse cases. I'm trying to recall
2 them all, but that was kind of also the fall back, so that
3 was what -- what the thinking was on those. You can see
4 as an example in the rules that are attached to your -- to
5 your copy, for instance, in some of the templates there
6 are a number of other documents that they do have. For
7 instance, under 3.3 of the district court local rules they
8 used to have bonds, subpoenas, and we took those out
9 because we felt that those now actually could be e-filed
10 effectively.

11 MR. ORSINGER: So there's a feeling, I
12 guess, that documents that are filed in paper form are
13 likely going to be privileged or confidential and that by
14 being in paper it's less likely they'll be inadvertently
15 disclosed?

16 HONORABLE REBECCA SIMMONS: At this point,
17 yes.

18 CHAIRMAN BABCOCK: Sarah.

19 HONORABLE SARAH DUNCAN: On (c), it's not
20 just documents that have already -- that are already
21 subject to a sealing order. It's documents for which a
22 sealing order or protective order is sought, it seems to
23 me. Right? Right now I'm entitled to file a motion to
24 seal these documents, and I don't have to file the
25 documents that I want to get subject to a sealing order.

1 CHAIRMAN BABCOCK: What if something is
2 already in the record and you -- like, for example, in a
3 trade secret case, the defendant files a summary judgment
4 and in the summary judgment the plaintiff believes that
5 the trade secret is too explicitly described, and so the
6 plaintiff files a 76a motion to have a portion of the
7 summary judgment motion put under seal. How does this
8 rule handle that?

9 HONORABLE REBECCA SIMMONS: The idea then
10 would be that the judge would make a ruling on whether
11 that part would be under seal or not, and then it would be
12 either under seal -- you know, under seal and kept under
13 seal, is my thought. I mean, in the Federal rules, of the
14 Western District at least, you can file a motion to seal
15 electronically, and it specifically allows that, but I
16 think for us we would want it to be in paper, but that
17 doesn't mean that a court can't come back even if
18 something has been electronically filed and then designate
19 as sealed and the clerk will treat it as sealed.

20 CHAIRMAN BABCOCK: Yeah. Richard.

21 MR. MUNZINGER: Subparagraph (b), as in boy,
22 limits documents to be presented to the court only in
23 those instances where a ruling on discoverability is
24 required, and I think that's an unnecessarily restrictive
25 condition because there may be other occasions where a

1 document should be presented to the court in camera, not
2 limited to discovery, and so if you deleted that
3 restriction, I think it would cover the restriction in
4 other cases that we may not have thought about.

5 CHAIRMAN BABCOCK: Yeah, what do you think
6 about that, Justice Simmons?

7 HONORABLE REBECCA SIMMONS: Can I -- I
8 didn't hear you completely.

9 CHAIRMAN BABCOCK: He's not speaking loudly
10 enough.

11 MR. MUNZINGER: Right now subparagraph (b)
12 limits a document that is not required to be filed
13 electronically to a document only to a situation where I
14 am concerned with the discoverability of the document, but
15 there may be a document that I don't want to file that
16 isn't part of a discovery dispute. I -- my mind is not
17 fertile enough to come up with a valid example right now,
18 but I can imagine that there are other situations.
19 Perhaps I had a breach of privacy concern, and it's not
20 for discovery. It has to do that I'm going to say
21 something to a nonparty to the court. It's not a family
22 case, but it's something else. There's a reason to keep
23 this document out of the public arena, but it isn't
24 discovery.

25 HONORABLE REBECCA SIMMONS: But then if you

1 do that or you want to do that don't you have to file 76a
2 motion to seal and go through the process of sealing?
3 Because right now I don't think a court -- unless you use
4 those procedures and there could be -- there's temporary
5 procedures that are provided for, but for the most part I
6 think you have to go through 76a in order to seal or get
7 things removed from the public in a court file.

8 MR. MUNZINGER: I was under the impression
9 Rule 76a had a subject matter limitation to those matters
10 that affected public health and safety, but I have to go
11 look at the rule.

12 CHAIRMAN BABCOCK: That's unfiled discovery.

13 HONORABLE R. H. WALLACE: Yeah, this is --
14 if it's just not filed with the court --

15 HONORABLE REBECCA SIMMONS: Right.

16 HONORABLE R. H. WALLACE: -- it wouldn't be
17 subject to 76a.

18 HONORABLE REBECCA SIMMONS: Right. Right.

19 CHAIRMAN BABCOCK: Nina.

20 MS. CORTELL: To quote another article, 76a
21 is one of those rules that gets far honored in the breach
22 than any rule we have, and there's a lot of sealing that
23 occurs outside the bounds of 76a.

24 PROFESSOR HOFFMAN: That's true.

25 CHAIRMAN BABCOCK: Judge Wallace.

1 HONORABLE R. H. WALLACE: Does 3.1
2 anticipate that wills will not -- shall not be filed or
3 just they don't have to be filed? And the reason I ask
4 that is in commercial disputes sometimes the terms of the
5 will may be at issue and people want to attach it as part
6 of their petition or motion or whatever when there's no
7 reason really not to.

8 HONORABLE REBECCA SIMMONS: Right. I think
9 it's anticipated that they may be filed in paper but they
10 can be e-filed. These don't preclude you from e-filing.

11 HONORABLE R. H. WALLACE: Might do well to
12 clarify that.

13 CHAIRMAN BABCOCK: Professor Hoffman.

14 PROFESSOR HOFFMAN: So three thoughts. The
15 first is I share that same question. I don't know how you
16 could write it differently, but it's a little unclear
17 whether these others are there, so I don't know -- I don't
18 know the answer, but I think that's also potentially a
19 question.

20 The second one is, also, you may have
21 thought about this already, but in the language of the
22 Supreme Court order it gives an exception for cases of an
23 emergency. Did you-all try to draft something and just
24 couldn't come up with it, or did you decide that it wasn't
25 appropriate for the rule to have that? And then my third

1 comment is very modest, but it relates to a, I think,
2 misplaced semicolon. In the very last dangling paragraph
3 there under 3.1, don't you mean "counsel may file a motion
4 in connection with a particular case requesting permission
5 to file documents in paper form" and then maybe semicolon
6 there or maybe just period and then say, "After notice and
7 hearing," comma, "a court may grant such motion." Is that
8 what you meant or am I missing --

9 HONORABLE REBECCA SIMMONS: You know, I
10 think I meant that. Well-taken. Yes.

11 CHAIRMAN BABCOCK: Roger.

12 MR. HUGHES: Notice and a hearing? I could
13 see most courts going, "Do I really want to drag counsel
14 40 miles to the courthouse to have an oral hearing to
15 decide whether to grant leave to file paper?"

16 HONORABLE REBECCA SIMMONS: This is one of
17 the rules that the -- if you'll recall one of the hot
18 spots for the clerks is that judges will order everything
19 to be filed in paper form. This is -- this was a -- kind
20 of stemmed from that concern, that -- that basically you
21 couldn't just by a standing order order everything to be
22 paper filed, that you had to take it up on a case-by-case
23 basis, and that's what -- just to tell you where this came
24 from and kind of the thought that kind of went into this.

25 MR. HUGHES: Well, the other thing is, is

1 that I know from reading summary judgment cases and
2 others, "hearing" sometimes broadly is interpreted to be
3 submit your response by Wednesday and I'll rule Thursday,
4 but don't bother coming, and I guess if you just leave it
5 as "hearing," I'm just -- I mean, I can -- I can see that
6 the rule as drafted prohibits a standing order. Counsel
7 would have to file. I'm just not sure if it's a good idea
8 to be promoting an oral hearing over this, but, I mean, I
9 can see, yes, case-by-case basis. That's probably a good
10 idea, but whether it would require an oral hearing, I
11 don't know. But since it says "hearing," doesn't say
12 "oral," maybe the judge can just say, "We're going to have
13 a written submission." Go ahead.

14 CHAIRMAN BABCOCK: Yeah, Professor Hoffman.

15 PROFESSOR HOFFMAN: So a couple of
16 follow-ups. One, if you could go back to my question
17 about the no exception for an emergency at some point --

18 HONORABLE REBECCA SIMMONS: Okay.

19 PROFESSOR HOFFMAN: -- so that was a
20 question I asked we didn't answer, and then another one is
21 to speak specifically to what Roger is just raising, and
22 maybe Justice Boyd could talk to us a little bit about
23 this. I'm reading the Court's order. I don't see an
24 exception that an individual judge gets to make, so in
25 other words, where does this last paragraph come from at

1 all? Doesn't the order -- so I'm reading out of paragraph
2 5 of the Court's order. It says, "Once a court is subject
3 to mandatory e-filing, courts and clerks must not offer to
4 attorneys in civil cases any alternative," et cetera,
5 "except in a case of emergency."

6 MR. HAWTHORNE: Well, I think that language
7 in that order is addressing a situation where a clerk
8 offers an alternative to electronic filing system, and
9 it's really aimed at not allowing an alternative e-filing
10 system.

11 HONORABLE REBECCA SIMMONS: Right. Right, I
12 don't think there was a -- I mean, I think there has to
13 be, as we discussed earlier, ways for if there's
14 emergencies and things like that to deal with the needs to
15 have something filed in paper. There could be extremely
16 large documents and things like that that might need to be
17 filed in paper, and there are lots of other things. This
18 was meant to give some -- basically to try and preclude a
19 standing order but also to let there be some flexibility.

20 MR. HAWTHORNE: And I would say that this
21 was hotly debated, and perhaps I should offer up a little
22 bit of mea culpa because I did feel like we needed to have
23 some safety valve in these rules, and there were a lot of
24 people that did not want this in here at all because they
25 are concerned that trial judges are just going to say,

1 "Well, great we don't have to do it even though the
2 Supreme Court said we did, and just as an order I can just
3 across the board order everybody is going to file on
4 paper," and so I think what you're seeing is a compromise,
5 language that's trying to make it so that it's -- it's
6 possible but not easy. Offer an alternative.

7 CHAIRMAN BABCOCK: Okay. Richard.

8 MR. ORSINGER: This gets back to my original
9 question, which is what is the point of listing these
10 items, but in a typical family law matter that is not by
11 law sealed like an adoption would be or something of that
12 nature, there are lots of documents that get filed that
13 are extremely confidential, like psychological
14 evaluations, which are privileged under statute and law
15 and everything else; tax returns, which are conditionally
16 privileged. Generally in most counties the family lawyers
17 solve that by getting an agreed order sealing the file.
18 For example, in Dallas County you can get that pretty much
19 any time that you agree on it.

20 There are other counties, like Bexar County,
21 where it's extremely difficult to seal the file, and so
22 what the lawyers frequently would do there is that they'll
23 agree not to file certain things but they can still be
24 used. Like a business record affidavit in a divorce case
25 may be two years of credit card charges or it could be

1 five years of bank records or something. You don't want
2 all of that information that's required to be filed in
3 order to use it in court, you don't want that in the
4 public domain. So I'm seeing the -- or the concept of a
5 sealing of file is the ultimate way that you preserve
6 confidential information. I'm seeing this distinction
7 between electronic filing and paper filing as being
8 different from sealing the file, and whether you file it
9 by paper in an unsealed file or file it electronically in
10 an unsealed file you're not preserving confidentiality
11 unless you seal the file. So I'm not entirely -- I don't
12 entirely understand the logic of having a difference
13 between documents that are filed in paper or
14 electronically in a sealed file or documents that are
15 filed in paper or electronically in a nonsealed file. I'm
16 not sure that the filing of the electronics is really
17 protecting anything or weakening of protection.

18 HONORABLE REBECCA SIMMONS: And that's a
19 point well-taken. I think what was -- what this rule
20 attempts to say is that you're supposed to e-file
21 pleading, okay, so this just deals with things that you're
22 filing with the district clerk, not your exhibits at a
23 hearing or something like that, and that if you want to
24 file a will in paper form that you could do that. You
25 don't have to, but you could. If you want to do documents

1 in camera in paper form, you're permitted to do that, and
2 you're permitted to do your documents sealed in paper form
3 and in a seal if you want to. That was just a concept
4 that after much discussion, those were the items that
5 people felt should be permitted to be filed in paper form,
6 if that is what they wanted to do, not required. So that
7 was just -- so but your point is extremely well-taken.

8 The district clerks are very cognizant of
9 sensitive data in the bigger counties and things that are
10 sealed, and they do accommodate it electronically very
11 well, but your point is well-taken, if we're moving into
12 an age where if it's electronically filed and sealed, the
13 paper is not going to help you. It's going to be
14 electronic.

15 MR. ORSINGER: Well, and if I could add on
16 to that, 76a doesn't apply to suits under the Family Code,
17 so the only way to protect a family law case is going to
18 be under this last paragraph, "after notice of hearing";
19 and I think that's probably going to be ignored and judges
20 are going to routinely sign agreed orders; but I would
21 echo what Roger said that we don't really want to make a
22 husband and a wife who want to keep their financial
23 records or their psychological profiles confidential have
24 to file a motion to have a hearing in every one of those
25 cases; or if we do, we ought to say that that's what we

1 intend; and right now it's handled usually by agreement.
2 Sometimes it's not even a court order. If this becomes
3 the rule, obviously the family lawyers are going to need
4 to file a motion and get an order in every case, if
5 they're going to have this confidentiality.

6 HONORABLE REBECCA SIMMONS: So do they file
7 it -- and just to make sure, I'm trying to make sure I
8 understand it from Bexar County, they actually file the
9 psychological exam with the court, with the court clerk,
10 the district clerk?

11 MR. ORSINGER: Well, the problem is any
12 court-ordered official that's appointed is supposed to
13 file their report with the court, and those are deeply
14 secret --

15 HONORABLE REBECCA SIMMONS: Right.

16 MR. ORSINGER: -- confidential data. We're
17 talking about events that happened to people when they
18 were children and things like that.

19 HONORABLE REBECCA SIMMONS: Right.

20 MR. ORSINGER: Okay. And that's a problem
21 because the Bexar County judges really are very reluctant
22 to seal a file, and so sometimes we patch around it by
23 just agreeing that we're going to waive the requirement in
24 the Rules of Evidence that a business record has to be
25 filed, and instead we get a court order where the court

1 permits you to exchange business records instead of filing
2 them. Because if your business record is all your
3 financial stuff or your mental health records or
4 something, you don't want to have to file them, and you
5 don't really need to have to file them. In fact, that's
6 an anachronism that business records have to be filed with
7 the clerk that we probably ought to fix.

8 CHAIRMAN BABCOCK: Yeah, Marisa.

9 MS. SECCO: Oh, well, the Legislature is
10 passing a bill probably that will affect Rule 902 and has
11 asked the Court to make rules that will at least make
12 confidential things like medical records, and the Court
13 will probably bring that rule change before the committee,
14 at which point the committee could advise the Court to
15 expand that exemption.

16 MR. ORSINGER: Okay. Well, that's
17 excellent. In the counties that seal files, if you're
18 going to have a file that has a lot of that kind of
19 information, generally you can go to the judge and it's
20 sealed and nobody can get it unless you're an attorney of
21 record, but in counties that won't seal files, the only
22 way to keep it out of the public eye is to agree not to
23 file it, even though rules and statutes may require that
24 it be filed.

25 HONORABLE REBECCA SIMMONS: Okay. And so

1 what is the difference then or how do we address it
2 between electronic and paper? Because what you're telling
3 me now is that the attorneys kind of do a work around or
4 go before the court and get something sealed or whatever.
5 What in this rule would be different in terms of them
6 still having -- I mean, is there some way to build
7 something in where they wouldn't have to do that? I mean,
8 I'm --

9 MR. ORSINGER: No, I don't think you can fix
10 that problem with this rule. I just -- I'm not getting
11 why filing something in paper makes it more confidential
12 than filing it electronically.

13 HONORABLE REBECCA SIMMONS: I agree with
14 you. Blake and I have had this disagreement, but --

15 MR. HAWTHORNE: So there's a great deal of
16 automation that's built in to electronic filing; and at
17 our Court, for example, I think with this new system it's
18 going to be easy to sort of automatically bring documents
19 in and put it into our case management system and then
20 voila` it's on internet, and you have to manually go in
21 and change the default setting for that document so that
22 it doesn't appear on the internet. And, you know, you
23 can -- it's I think somewhat of a policy choice. People
24 are going to make mistakes and someone is going to forget
25 to check that box. It's a lot harder for someone to mess

1 this situation up if it comes in paper because now I have
2 to take that paper document, I'd have to make a conscious
3 decision to scan it and then to save it on my computer and
4 then to attach it into the case management system and take
5 further action to get it out on the web; whereas, if I'm
6 just doing the inbox, I hit click, accept, boom, voila`,
7 there it is. It's in the system and out on the web.

8 MR. ORSINGER: Now, aren't your records,
9 appellate records, coming to you in electronic form
10 already?

11 MR. HAWTHORNE: Yes, they are, but, you
12 know, we discussed earlier that we have the similar
13 provision that says if it's sealed you can't e-file it.

14 CHAIRMAN BABCOCK: Right.

15 MR. ORSINGER: Okay.

16 MR. HAWTHORNE: So I think that's -- right,
17 am I correct? That's what we're aiming at here, is to try
18 to make it more difficult to accidentally put sealed stuff
19 out on the internet.

20 HONORABLE REBECCA SIMMONS: Right, that is
21 the policy. That's more a policy issue that --

22 MR. HAWTHORNE: Does that make sense? No?
23 Yes?

24 HONORABLE JANE BLAND: Yes.

25 MR. ORSINGER: I mean, I can see at the

1 trial court level you're worried about inadvertently
2 making something easily available over the internet rather
3 than most difficultly available by going to the courthouse
4 and what Chip called practical obscurity. It may be
5 public, but it's hard to do it on a mass basis, and it's
6 hard to -- it takes a lot of time to go down, check the
7 file out, photocopy it, and that's what you're trying to
8 do.

9 MR. HAWTHORNE: That's what I'm trying to
10 do.

11 CHAIRMAN BABCOCK: There is a paper that was
12 prepared by some professors on the East Coast somewhere,
13 George Washington or something, that argue that practical
14 obscurity has now been overtaken by the internet and
15 really where it's really obscure is on the internet
16 because there's so much stuff. It's an interesting paper.
17 Justice Gaultney.

18 HONORABLE DAVID GAULTNEY: But what I hear
19 you saying is not so much practical obscurity, it's a
20 mistake. In other words, the electronic record is
21 supposed to be sealed --

22 MR. HAWTHORNE: Yes.

23 HONORABLE DAVID GAULTNEY: -- that portion
24 of it, but it's easier to make a mistake with an
25 electronic record that's sealed than it is with the paper

1 record that's sealed in terms of getting it on the
2 internet.

3 MR. HAWTHORNE: Yes, and I think it's really
4 both. Essentially if I get something in paper then
5 presumably I'm keeping it as paper files somewhere else,
6 hopefully somewhere secure, and we have the practical
7 obscurity. If I want to make it electronic, I'm going to
8 have to go through some effort to do that to try to get it
9 out on the internet. So it's also this point, too, about
10 making a mistake because I think it's much easier to make
11 a mistake with the automation that we have in some of our
12 case management systems and with electronic filing, but
13 again, I will say that there are others, clerks in
14 particular, that disagree with that approach, and they
15 would just say, "I think it's fine to file those
16 electronically, and we can handle it."

17 CHAIRMAN BABCOCK: Okay. Sarah.

18 HONORABLE SARAH DUNCAN: I'm concerned with
19 the whole -- the structure of 3.1(a) through (d). It's
20 hard for me to -- and the use of the word "may." It's --
21 I want to say always, but for a long, long time it has
22 been my understanding that anybody can file anything they
23 want to file in any case in the state, and the clerks
24 don't have the discretion to refuse a filing. They can --
25 a judge can refuse to consider it. A judge can

1 subsequently strike it, but this talks about documents
2 that may be filed. Well, if I could file anything, who
3 gets to decide what I may file?

4 CHAIRMAN BABCOCK: David.

5 MR. JACKSON: I don't think you can file
6 anything, because they changed that a long time ago where
7 we couldn't file depositions. The clerks won't take them.
8 They won't accept depositions. They have to be brought in
9 through the trial court. Somebody has to actually admit
10 it into evidence. We can't go down there with a pocketful
11 of depositions and file them with the clerk, I don't
12 think.

13 HONORABLE SARAH DUNCAN: Doesn't the rule
14 just say that they're not to be filed? It doesn't say you
15 can't file them.

16 MR. JACKSON: Well, it's not to be filed and
17 I can't means the same thing to me.

18 HONORABLE REBECCA SIMMONS: I mean, all this
19 was meant to say is that if you can -- anything that's in
20 paper form can be filed e-form. I mean, that's all that's
21 meant to say, so that's just trying to tag on that. If
22 there's a better way to say it, we can do it.

23 CHAIRMAN BABCOCK: Justice Jennings.

24 HONORABLE SARAH DUNCAN: Well, that's what
25 I'm saying. It's just the structure; and as far as the

1 (a) through (d) exceptions, is what is being said is you
2 don't have to e-file if it's in an (a) through (d)
3 exception and you can file it in paper, or do you have to
4 file -- e-file what's in (a) through (d) and you may also
5 file in paper?

6 HONORABLE REBECCA SIMMONS: It means that if
7 you want to file in paper (a) through (d) you can file
8 those in paper.

9 HONORABLE SARAH DUNCAN: But you don't have
10 to e-file them.

11 HONORABLE REBECCA SIMMONS: And you don't
12 have to e-file them.

13 HONORABLE SARAH DUNCAN: So in a probate
14 case, I'm not going to have access to the will necessarily
15 if it's not e-filed? Or electronic access.

16 HONORABLE REBECCA SIMMONS: You might not
17 have -- you might not have electronic access, but what I
18 would tell you is that most of the clerks will scan
19 -- probably scan it, and it will probably be available,
20 but the will is what Judge King felt strongly should be
21 filed in paper form.

22 CHAIRMAN BABCOCK: Justice Jennings.

23 HONORABLE TERRY JENNINGS: It seems to me
24 there are two purposes to this rule. One is we want an
25 electronic record now, and so you want everything filed

1 with the court. You want it filed electronically so you
2 have the electronic record. But we also recognize that
3 there may be certain information and certain documents
4 that's too sensitive to be an electronic record that's
5 easily accessible on the internet and so forth. Is that
6 correct?

7 HONORABLE REBECCA SIMMONS: That's correct.

8 HONORABLE TERRY JENNINGS: Why not just say,
9 "A party represented by counsel must e-file all documents
10 with the court," period. And then you have -- then you
11 have your list of exceptions, what you have here, and then
12 in regard to this idea of a hearing and a -- you know, a
13 court hearing and so forth, why not allow the parties'
14 counsel and opposing counsel to agree that there may be
15 certain documents upon which they both agree that
16 shouldn't be in electronic form and give them that out
17 here, too? Or is that --

18 HONORABLE REBECCA SIMMONS: That the parties
19 can agree to file paper instead of electronic?

20 HONORABLE TERRY JENNINGS: In certain
21 circumstances that they can agree. Why involve the court
22 if the parties themselves can agree, "Hey, we're going to
23 file this motion. We want the court to have a paper copy
24 of it, and we'll attach these documents as exhibits, but
25 when we put it on electronically we can leave those

1 exhibits off."

2 HONORABLE REBECCA SIMMONS: The concern was
3 that there are many lawyers that don't want to switch to
4 new things and don't like new things, so they will end up
5 entering into agreement to file paper. The clerks
6 desperately do not want a court case that has e-filing and
7 paper and they have to keep track of all of it. They
8 would like to move to as much as possible a total
9 electronic file, so that's I think probably why that was
10 part of the concern.

11 MR. GILSTRAP: It's not about electronic
12 filing, it's about electronic storage.

13 HONORABLE REBECCA SIMMONS: A lot of it is,
14 yeah.

15 CHAIRMAN BABCOCK: Justice Gray.

16 HONORABLE TOM GRAY: This is the last time
17 I'll make this comment. Persons not represented by
18 counsel are getting a pass, and I don't think that's
19 appropriate if they are capable of using the e-filing
20 system. The Texas Ethics Commission used to have a
21 specific affidavit that a person who wanted to be exempt
22 from e-filing campaign records would have to execute, and
23 I think that it furthers the overall objective of the
24 e-filing if a similar process were utilized for
25 self-represented individuals in the court system.

1 MR. HAWTHORNE: What would you do about
2 prisoners? What would you do about prisoners?

3 HONORABLE TOM GRAY: They would have to sign
4 the affidavit that they don't have reasonable access to
5 electronic -- the affidavit requirement like the Texas
6 Ethics Commission used to have.

7 CHAIRMAN BABCOCK: Okay. Roger.

8 MR. HUGHES: Well, after kind of looking at
9 it, you're going to massage 3.1, it might be an idea to
10 divide it into three sections, the first section saying
11 you have to e-file, like it or not, unless there's an
12 exception. The next section is "These are the following
13 exceptions for which you do not need court approval," and
14 then a third section saying, "Otherwise, you're going to
15 have to go to court for approval, motion and a
16 hearing." I can understand why we want to forbid just an
17 agreed order sent in to the judge to sign it. I don't
18 have an opinion myself personally about pro se because I
19 come from an area where people are, shall we say, creative
20 in two different languages at the same time; and I'm a
21 little concerned about forcing people to -- to e-file in
22 which it's not just I can e-file you a document, but it's
23 got to be e-filed in PDF format, and not just any PDF, it
24 has to be text searchable, et cetera, et cetera, et
25 cetera. That may be just a bit much, but I can understand

1 the opposing.

2 MR. HAWTHORNE: I have to say we have enough
3 trouble with the lawyers, and I'd really rather not have
4 the --

5 MR. GILSTRAP: Chip?

6 CHAIRMAN BABCOCK: Yeah, Frank.

7 MR. GILSTRAP: When someone mentioned the
8 prisoner cases and, when you think about it, we might want
9 to think about it a bit more. I mean, my impression is
10 that a lot of the prisoners do have access to computers;
11 and if they don't, maybe they now have a constitutional
12 right to it; and if we do empower them to file
13 electronically, I mean, aren't there some writ writers who
14 are going to really be empowered? I mean, they file a lot
15 of paper, and now they can file a whole lot more. Has
16 anybody thought about that problem?

17 HONORABLE TERRY JENNINGS: Let the record
18 reflect that Blake just put his head in his hands.

19 CHAIRMAN BABCOCK: All right. Yeah, Justice
20 Peeples.

21 HONORABLE DAVID PEEPLES: Especially in
22 family law there's just an increasing incidence of pro se
23 litigants, and I share the concerns about, you know,
24 letting them opt out of this system en masse, but I'd like
25 to hear some discussion about how we're going to handle

1 pro se people by the critics because you -- I've dealt
2 with a lot of them, and their skills are -- most of them
3 are at a very low level, very. I mean, some of them have
4 trouble handwriting an answer.

5 MR. HAWTHORNE: Can I jump in on that?

6 CHAIRMAN BABCOCK: Yeah, sure.

7 MR. HAWTHORNE: I've heard a lot from the
8 new e-filing vendor about these wonderful kiosks that they
9 will set up, and some of the trial court clerks think that
10 this sounds great, but I have a feeling that they're going
11 to end up dedicating staff to stand there with them at the
12 kiosk to basically do it for them, and it seems to me --
13 and again, some -- many of the trial court clerks disagree
14 with me about this, but I think they're going to end up
15 spending more time doing that than they would just simply
16 scanning the paper, so I don't think it will end up being
17 more efficient to make them do it.

18 CHAIRMAN BABCOCK: Justice Jennings.

19 HONORABLE TERRY JENNINGS: Just a general
20 comment. I mean, these rules, frankly, there are certain
21 law firms that are going to have an advantage because of
22 these rules because there are law firms that can have an
23 IT person. There are law firms that have the money to
24 designate and manage service and all of that kind of
25 stuff. Just generally speaking, a solo practitioner who

1 is in trial a lot is going to be at a disadvantage under
2 these rules because they're going to be concerned about
3 their trial and their witnesses and so forth, and then
4 they may have more e-mail problems than a law firm that
5 can afford to hire somebody to watch this service and so
6 forth is not going to have.

7 Now, the pro se person doesn't have any of
8 that, and not -- we've talked about a number of problems
9 here, but the service problem with pro se people is going
10 to be huge with, you know, switching of e-mails and
11 internet service being down. I mean, there's all kinds of
12 practical problems why pro se people should be treated
13 differently.

14 CHAIRMAN BABCOCK: Okay. Justice Gray,
15 would you like to rejoin to that?

16 HONORABLE TOM GRAY: We see a lot of pro se
17 appeals. They run the gamut. In direct response to Judge
18 Peeples, the -- I think if you create the system that
19 accommodates the lower level, that's all we'll ever have
20 is the lower level. If we create the system that
21 encourages them to step up, I think they will, and, you
22 know, if we're going to -- I don't want this to be taken
23 the wrong way, but if we're going to start doing forms for
24 them then maybe we need to be providing a clerk to help
25 them get the form filed.

1 HONORABLE NATHAN HECHT: There's no right
2 way to take that.

3 HONORABLE TOM GRAY: I'm sorry?

4 HONORABLE NATHAN HECHT: There's no right
5 way to take that.

6 MR. ORSINGER: You're either a cowboy or an
7 Indian.

8 HONORABLE TOM GRAY: Well, I don't know
9 which side the anti-form group is on, but whichever, if
10 that's the cowboy or the Indian, that's what I am; but,
11 you know, there are all different kind of levels of
12 expertise out there. I recognize that. I've seen some --
13 I mean, one of our most successful repeat parties in our
14 court in the period of time that I've been there was a pro
15 se litigant and was very successful, very capable, but
16 she's not the only one. I mean, there's been many; and,
17 you know, you'll get cases where you can't even hardly
18 read the writing; but, you know, we have to deal with it;
19 and, you know, I think there's a lot better ways to
20 address the issues with the increasing frequency of pro se
21 litigation than some that have been chosen; but that's
22 beyond the scope of this group, and so I just -- I'd set
23 the rule, here's the rules, yes, all -- and this exception
24 that I was talking about from the Texas Ethics Commission,
25 I mean, if they come into the clerk's office and they

1 don't know how to find the kiosk, there's the form
2 affidavit that all they've got to do is sign that "I don't
3 have a computer, I don't know how to do this." They sign
4 the affidavit, and they get to file it manually, and
5 they're going to be standing there anyway. It's not going
6 to be like they're mailing it in.

7 CHAIRMAN BABCOCK: Sarah.

8 HONORABLE SARAH DUNCAN: Just a couple of
9 comments about the structure. I think some part of our
10 discussion has -- could have been obviated, the need for
11 it could have been obviated, if there had just been a
12 section at the beginning saying, "If a document must
13 be e-filed under the Supreme Court's December 11th, 2012,
14 order," this is actually courts that are subject -- it's
15 kind of written funny. "Once a court is subject to
16 mandatory e-filing under this order," but if the rule were
17 couched more in the language of the order; and regarding
18 the kiosks, I think there's going to be a huge
19 unauthorized practice of law from those kiosks. I mean, I
20 couldn't even get the clerks in San Antonio to tell people
21 when their briefs were due they were so, so afraid of
22 practicing law without a law license. I don't know if
23 that's still true or not, but if they're going to be
24 telling people how to get divorced and file lawsuits and
25 personal injury cases and divorces, you better be careful

1 who's standing at that kiosk.

2 CHAIRMAN BABCOCK: Justice Brown.

3 HONORABLE HARVEY BROWN: I just had a
4 question. How would this work with documents that are
5 created spontaneously at trial? You're in a charge
6 conference and you decide that you need an instruction you
7 didn't realize, you hand write it, you ask for in limine
8 instruction, you want it in writing, that you tender to
9 the court. Things like that, the pleadings that are
10 unusual but happen sometimes by hand in trial.

11 HONORABLE REBECCA SIMMONS: I think it's
12 anticipated and what the clerks tell us now is that
13 actually those would be scanned and put into the file
14 electronically that way. I think they can -- and, Casey,
15 correct me if they're wrong -- with the new vendor that's
16 coming in to -- into service in January, they will have
17 the ability to take court orders and things and also
18 things that are filed within your courtroom and get them
19 into the case management system for the clerk, but it's
20 anticipated right now that they would be scanned and
21 placed digitally into the court case.

22 HONORABLE HARVEY BROWN: Right now the party
23 has to do that, though.

24 HONORABLE REBECCA SIMMONS: Well, the
25 party e-file -- if you're filing something with the clerk

1 then you're e-filing that, but I think it's anticipated
2 -- and correct me if I'm wrong.

3 MR. KENNEDY: No, you're right. At some
4 point the vendor's indicated that they will have a
5 proposed order functionality where attorneys can send
6 proposed orders in and then they would route off to like a
7 judicial queue that the judge could go in and either make
8 edits or print it off or whatever, and once they've been
9 signed then the judge can then route it back through to
10 the clerk to file.

11 HONORABLE REBECCA SIMMONS: But you're
12 right, these rules address starting with the simple sort
13 of, okay, I'm going to e-file.

14 HONORABLE HARVEY BROWN: Right.

15 HONORABLE REBECCA SIMMONS: They do not
16 address you're at trial, I'm going to now change the
17 charge up, and now I need to get that filed, and I'm
18 assuming what happens now, when I talk to the district or
19 county clerks, is that they actually -- in like Travis
20 County they take that, they scan that, and it goes into
21 the record that way; but, you're right, these don't really
22 address that situation.

23 CHAIRMAN BABCOCK: Richard.

24 MR. MUNZINGER: But, Justice, you just spoke
25 to what the judges do. I'm trying a case and I say to the

1 judge, "I want to offer evidence of X not in these
2 pleadings, your Honor. I want to file a supplemental
3 pleading, Judge, let me scribble it in hand," and I hand
4 write my scribbled pleading. How do I get that of record?

5 Next example, we're in the court's charge.
6 "There's no pleading to support that issue, your Honor."

7 "Yes, there is, Judge, I'm writing out a" --
8 there has to be a way for the party to supplement the
9 record --

10 HONORABLE REBECCA SIMMONS: Absolutely.

11 MR. MUNZINGER: -- in these emergency
12 situations that Justice Brown contemplated, and you're
13 talking about allowing the judge to supplement the record
14 as distinct from the party.

15 HONORABLE REBECCA SIMMONS: I thought for a
16 minute we were talking about judges when they're signing
17 off on charges, and that was my mistake, and I
18 misunderstood, but I understand now what you're talking
19 about. Right now I presume that you're giving paper, and
20 if you were in Travis County the clerk would take your
21 paper, would scan it, and that would become the official
22 record, would be that digitized image and would get into
23 the file that way. These rules do not address that at
24 this point. They presume that you're in trial, that you
25 are doing your trial exhibits, you're doing whatever else,

1 and that you would continue to do that with paper. I
2 presume that some rule at some point will address that,
3 but these do not.

4 CHAIRMAN BABCOCK: Okay. Yeah, Justice
5 Gaultney.

6 HONORABLE DAVID GAULTNEY: This is just a
7 last point on that, and that is that the rule does say
8 that the e-documents must be filed. So I think we had a
9 case once where the notice of appeal was filed on the last
10 day, it was something handwritten on the back of -- got it
11 filed, whatever, but this would indicate that a clerk
12 might say, "We can't take that. You're an attorney, you
13 must e-file. I'm not going to take your handwritten
14 notice." Right? So maybe there should be some type of
15 emergency exception or something that would --

16 HONORABLE REBECCA SIMMONS: Uh-huh.

17 MR. GILSTRAP: Let me ask a question.

18 CHAIRMAN BABCOCK: Yeah, Frank.

19 MR. GILSTRAP: Is the clerk still going to
20 have a stamp?

21 HONORABLE REBECCA SIMMONS: Yes.

22 MR. GILSTRAP: So if I write out my notice
23 of appeal on the last day, I can get it stamped, and it
24 doesn't have to be digitized for it to be timely filed?

25 HONORABLE REBECCA SIMMONS: Right now the

1 clerks have -- well, the clerk will have the electronic
2 stamp. If you're required to e-file, all right, and you
3 go to the clerk and say, "Here's a piece of paper," and
4 they say, "No, there's the kiosk, get back out there and
5 get to your kiosk and put it through that way," is what
6 may happen. That's what the kiosk is in part there for.
7 So you can go to the courthouse just as if you would go to
8 file a paper something and you would just do it
9 electronically.

10 CHAIRMAN BABCOCK: Okay. Anything else on
11 this rule? We beat it to death? What about 3.2,
12 electronic filing manager? Any comments about 3.2?

13 HONORABLE R. H. WALLACE: I've got a
14 question.

15 CHAIRMAN BABCOCK: Yeah, Judge Wallace.

16 HONORABLE R. H. WALLACE: There seemed to be
17 a couple of comments about clerks who had concerns about
18 ending up in jail if they didn't provide paper copies.
19 Would this be -- if we're going to submit any language on
20 that, would this -- maybe paragraph 3.2(a) -- be a place
21 to do it, or are we not going to worry about that or what?

22 HONORABLE REBECCA SIMMONS: That might be a
23 good place to do it. I think where that was addressed
24 before, there is something in here that basically dealt
25 with it. Let me see if I can find it, that they wanted

1 it -- okay, actually, it's in 3.7, and it's 3.7(f), and
2 that is really kind of the language that the clerks
3 wanted. If we want to put that somewhere else, that's
4 fine, but that is what --

5 MR. GILSTRAP: Well, I think 3.7(f) is where
6 the debate has to occur.

7 CHAIRMAN BABCOCK: Yeah. Let's get through
8 3.2 and then have the debate when we get to 3.7. Any
9 other comments on 3.2? Let's go to 3.3, multiple
10 documents. "An e-filer may e-file more than one document
11 in the same case in a single transmission through the EFM.
12 However, each e-filed document will be individually
13 accepted or rejected by the clerk." Any comments or
14 questions about that? Justice Gray.

15 HONORABLE TOM GRAY: Question, I think
16 primarily for Blake. Where is the bill on the status of
17 whether or not there's going to be one turnkey fee for
18 filing in a case or if each document is going to be
19 charged? Does it look like that's going to pass, or do we
20 know?

21 MR. KENNEDY: It passed the House,
22 unanimously as well.

23 MR. HAWTHORNE: So it's in good shape, looks
24 like.

25 HONORABLE TOM GRAY: Because obviously that

1 impacts sort of this aspect of the rule of whether or not
2 the filing is one filing or multiple. Under the old
3 system they have to pay a fee each time they file, and if
4 they're trying to group several motions together, we've
5 always had the question in our court, three motions filed
6 together, is that three fees or a single fee?

7 MR. HAWTHORNE: Well, I think this language
8 was put in, right, to accommodate the way the new system
9 works, right, because something they advertised was, hey,
10 we can give you this ability to e-file multiple documents
11 at one time, correct?

12 HONORABLE REBECCA SIMMONS: Right, but that
13 the clerk can then look at them individually.

14 HONORABLE TOM GRAY: Okay.

15 CHAIRMAN BABCOCK: Sarah.

16 HONORABLE SARAH DUNCAN: And is it
17 understood in 3.3 that an e-filed document may be rejected
18 by a clerk only if it's not in conformity with these
19 rules, requirements of these rules?

20 HONORABLE REBECCA SIMMONS: And that is
21 somewhere else, and so we can put it in there, but it is
22 addressed, I think, in --

23 HONORABLE R. H. WALLACE: 3.7(c).

24 HONORABLE REBECCA SIMMONS: 3.7(c), (d), and
25 (e), deal with the clerk's acceptance of filing.

1 CHAIRMAN BABCOCK: Okay. Anything else on
2 3.3? Let's talk about 3.4, signatures, plural. Richard,
3 and then Frank.

4 MR. MUNZINGER: 23.4(a) talks about
5 notarized documents and oaths, but does not recognize the
6 new procedure under the Civil Practice and Remedies Code
7 that allows a person to make a statement under penalty of
8 perjury and should.

9 CHAIRMAN BABCOCK: A declaration.

10 MR. MUNZINGER: That declaration, yeah, it
11 has a specific name to it, and it ought to be added there,
12 in my opinion.

13 HONORABLE REBECCA SIMMONS: Okay. I think
14 it was done. If it is a declaration, wouldn't it just be
15 able then to be e-filed? This takes into account that
16 somebody else when it's notarized is filing a stamp and
17 signing off on it, the notary is, and so it doesn't go in
18 as it would if it was just a signed document by the
19 attorney or by someone. That's why that's not in there.
20 If you think that would be -- and, Blake, you can help me
21 out a little bit, because these are the same things that
22 also are involved in the appellate rules; but my thought
23 is that a declaration could be on a readable PDF and just
24 submitted, whereas the notarized one you have to take that
25 document to a notary generally and have her sign or

1 whatever, and so it can't be submitted in the same way.

2 That's why notarizations or oaths were separate.

3 MR. MUNZINGER: Well, if my client is going
4 to sign a document under oath under the current rules, the
5 amendments to the Civil Practice and Remedies Code have
6 made it possible for that client, rather than to file it
7 under oath to make it a statement under penalty of
8 perjury, a declaration, but the signature of the person is
9 still required --

10 HONORABLE REBECCA SIMMONS: Right.

11 MR. MUNZINGER: -- to the declaration.

12 HONORABLE REBECCA SIMMONS: Right.

13 MR. MUNZINGER: And I don't know that this
14 recognizes that.

15 MR. HAWTHORNE: Well, it's a good --

16 HONORABLE REBECCA SIMMONS: Declaration to
17 me was not under oath, it was something different, but if
18 you think it should be included then that's fine, too.

19 MR. HAWTHORNE: Well, and I think what we're
20 trying to get at here is that if you have to have a wet
21 signature on something, you're going to have to have
22 somebody actually apply a pen to paper, then we want you
23 to have to scan that.

24 MR. MUNZINGER: Well, practitioners and pro
25 se people are going to be reading this, and if I

1 understood the amendment to the Civil Practice and
2 Remedies Code, it was kind of like the Uniform Electronic
3 Transactions Act. It said anything under oath can now be
4 done with a declaration --

5 HONORABLE REBECCA SIMMONS: Right.

6 MR. MUNZINGER: -- under penalty of perjury.
7 It has to be signed and the person's address and all that
8 stuff has to be good, and there's a form under the
9 statute. That ought to be recognized in this rule so that
10 people realize that they can do that. It isn't an oath.
11 It's a declaration under perjury, but it still must be
12 signed by the person.

13 CHAIRMAN BABCOCK: If the trigger is that
14 you've got to sign it, a declaration, the witness or the
15 party has to sign it, because they have to sign it and
16 then say, "I declare under penalty of perjury of the State
17 of Texas that the foregoing is true and correct." So
18 that's a signature just no different than a notarized
19 signature. It's just that after the notarized signature
20 then you have somebody else sign it.

21 MR. HAWTHORNE: So you have to have a wet
22 signature, or can you sign by electronic means?

23 CHAIRMAN BABCOCK: I don't believe the
24 statute --

25 MR. MUNZINGER: The statute doesn't --

1 CHAIRMAN BABCOCK: -- permits --

2 MR. MUNZINGER: I don't remember that the
3 statute says it one way or another.

4 MR. HUGHES: The statute says -- it says it
5 has to be subscribed.

6 CHAIRMAN BABCOCK: Sounds pretty wet.

7 MR. HUGHES: "Subscribed by the person
8 making the declaration is true under penalty of perjury."
9 That was going to be my question. Is this -- would notary
10 or unsworn declaration, are we going to -- is this going
11 to require a -- as you say, a wet signature? I mean, if
12 you were the DA would you want to prosecute somebody
13 because they typed "s/Roger Hughes"?

14 CHAIRMAN BABCOCK: Skip.

15 MR. WATSON: Well, the option that this says
16 "e-file or may electronically notarize or," is the
17 electronically notarized in the notary thing, the S slash
18 backslash or how do you -- I missed it. How do you do
19 that?

20 HONORABLE REBECCA SIMMONS: There's actually
21 technology where you can have electronic notarization, and
22 it's done with a certain keypad and whatnot, and it's --
23 the technology is out there, and actually some magistrates
24 do their magistration for criminals or whatever by these
25 keypads that are electronic notarizations, so it's there.

1 It's out there.

2 MR. WATSON: So there will still be a
3 notary. I mean, you still go to the sign that says, you
4 know, "ordained minister, notary," et cetera, and get that
5 done. They just have to have an electronic key pad.

6 HONORABLE REBECCA SIMMONS: No, actually for
7 the magistration it's like they have their iPad and they
8 -- I forget how they send it through to -- or they have a
9 special pad that the notary provides, but there's not a
10 person there that sees them doing it because it's in their
11 own --

12 MR. WATSON: So you don't have to show your
13 driver's license.

14 HONORABLE REBECCA SIMMONS: No, I'm just
15 thinking about the one they use for the magistrates that
16 do the late night magistration and their --

17 MR. HAWTHORNE: Casey, can you --

18 THE REPORTER: Wait, wait, wait.

19 CHAIRMAN BABCOCK: Whoa, whoa, whoa. Hold
20 it. We've got too many people talking at one time. So
21 now Casey is going to explain something.

22 MR. KENNEDY: So my understanding of how it
23 works is it was either on the iPad or they have, you know,
24 like at the bank, the little signature devices that
25 capture the pressure points, and that that's how they used

1 it. I'm not exactly familiar with that exact piece of
2 software, but I imagine it's much in the same vain.

3 MR. WATSON: Silly me, I should have known
4 there was an app for that.

5 CHAIRMAN BABCOCK: Somebody before we get
6 too deeply into this probably should look at the notary
7 statute, because I -- my fuzzy recollection is the notary
8 statute requires the notary to get some sort of proof of
9 who it is that they're notarizing, and you're supposed to
10 sign a book. David.

11 HONORABLE REBECCA SIMMONS: Yes, and I'm
12 sorry. They made a presentation. There is an electronic
13 notarization person came before JCIT, and I don't know if
14 you were there, Blake, that day.

15 MR. HAWTHORNE: Yeah, I saw that.

16 HONORABLE REBECCA SIMMONS: They did
17 present, and they already have that information, for
18 instance, from the magistrate, and they already have a
19 recorded signature, so they know that signature by
20 biometrics. Biometrically they know what that signature
21 is, and that's how they're able to do it, but I can't
22 remember the exact technical features.

23 MR. WATSON: Whose signature?

24 CHAIRMAN BABCOCK: Whose signature do they
25 know biometrically?

1 HONORABLE REBECCA SIMMONS: The magistrate.

2 MR. WATSON: Well, what about my signature?

3 HONORABLE REBECCA SIMMONS: They may not
4 know you, I don't know.

5 MR. WATSON: That's what I'm trying to get
6 at is --

7 HONORABLE REBECCA SIMMONS: Okay, so you
8 could go --

9 MR. WATSON: -- what does electronically
10 notarization encompass?

11 HONORABLE REBECCA SIMMONS: Okay. It
12 encompasses going and -- very good point. Maybe we need
13 to be more specific, but there is an electronic
14 notarization process. You can have an electronic notary
15 that actually notarizes things, and I don't know what
16 statute allows that, and I will go and look at that.

17 MR. WATSON: Well, I'm sorry, I didn't mean
18 to cause you a problem --

19 HONORABLE REBECCA SIMMONS: No, no, no, it's
20 a good point.

21 MR. WATSON: I just haven't heard that term.

22 HONORABLE REBECCA SIMMONS: It's a good
23 point. Now I understand what you're asking.

24 CHAIRMAN BABCOCK: Hang on. David was going
25 to answer the whole thing for us.

1 MR. JACKSON: Yeah, I mean, I can sign
2 documents, but I have to be -- if I notarize someone's
3 signature, I have to be in the presence of that person
4 signing it.

5 MR. WATSON: Yeah.

6 MR. JACKSON: And I don't know how you can
7 electronically be in somebody's presence.

8 MR. WATSON: That's what threw me.

9 CHAIRMAN BABCOCK: Well, well, what could
10 happen would be that I come to see you David, and I say,
11 "Hey, I want you to notarize my signature," and you say
12 "Fine," and I sign. You know, you swear me in, and I
13 sign, and then I show you my driver's license, and I sign
14 your book, and then I suppose you could electronically
15 notarize after having gone through those steps and the
16 magistrate somehow magically knows your digital signature.

17 HONORABLE REBECCA SIMMONS: You have a token
18 that you put in as well and some other weird passwords,
19 too.

20 CHAIRMAN BABCOCK: This sounds medieval,
21 but --

22 MR. JACKSON: Then you create another
23 problem. You've created a document that is electronically
24 signed, under the technical terms electronically signed,
25 and can't be altered --

1 CHAIRMAN BABCOCK: Yeah.

2 MR. JACKSON: -- and the clerks have already
3 said they can't accept that because they have to be able
4 to put their file stamp electronically on it. That
5 changes the document and kills the signature.

6 CHAIRMAN BABCOCK: So it sounds to me like
7 maybe we need to look at this a little bit. Frank.

8 MR. GILSTRAP: I think it needs to be looked
9 at further. I'm not sure that the people who are doing
10 the electronic notarization aren't the people who are also
11 doing the red light cameras, but --

12 CHAIRMAN BABCOCK: Whoa, man. Is this a
13 privileged --

14 MR. GILSTRAP: It's a -- we can make money,
15 and we can kind of get rid of the old legal procedure, but
16 if we're going to do it here we need to do it in the
17 appellate rules we talked about this morning on page nine,
18 Rule 3(e)(2). I mean, we do it one place, we've got to do
19 it both.

20 CHAIRMAN BABCOCK: Yeah. Richard.

21 MR. MUNZINGER: The Uniform Electronic
22 Transactions Act may apply to transactions between a
23 notary and a person getting the notary's signature. I
24 have not briefed the issue, but I'm looking at the
25 definition of "transaction" under that statute, and it

1 involves two or more people, et cetera, et cetera, and the
2 rule is anything that can be done in writing can be done
3 electronically, so whoever answers this question needs to
4 take a look at the Uniform Electronic Transactions Act,
5 which is section 322 of the Business & Commerce Code.

6 CHAIRMAN BABCOCK: Okay. Marisa, and then
7 Roger.

8 MS. SECCO: I was just looking at the
9 Secretary of State's website --

10 MR. MUNZINGER: Can't hear you.

11 CHAIRMAN BABCOCK: Say it louder.

12 MS. SECCO: I was looking at the Secretary
13 of State's website, and it provides some information on
14 electronic notarization, and it does state that the Texas
15 Uniform Electronic Transaction Act applies to
16 transactions, including notarization and acknowledgement,
17 and that's section 322.011, and defines an electronic
18 notarization there. It doesn't actually define it, but it
19 kind of lays out some requirements, and the Secretary of
20 State's website also says that electronic notarization
21 must meet all of the requirements of any other
22 notarization. So somehow it meets those requirements, and
23 perhaps we should include a cross-reference to the
24 definition in the code.

25 CHAIRMAN BABCOCK: Yeah, Roger.

1 MR. HUGHES: Well, I think part of it is a
2 very practical problem that I didn't realize that occurred
3 in magistration is that frequently the magistrate does not
4 want to be in the same room as the accused. They
5 sometimes can get abusive, and the judges deserve some
6 protection, and so this might -- I wouldn't be surprised
7 if this is a way of solving the problem that maybe the
8 notary doesn't want to be in exactly the same location as
9 the person or that maybe the notary and the person are in
10 the same room but the judge is in another. I could,
11 again, see why this process was necessary.

12 MR. GILSTRAP: Well, excuse me.

13 CHAIRMAN BABCOCK: Frank.

14 MR. GILSTRAP: I'm troubled by that. I
15 mean, I'm troubled by this whole process of I talk to a
16 judge who was doing the hearings for magistration. He was
17 doing them from a convention in San Diego by his laptop.
18 I mean, you're entitled -- I mean, at some point there's
19 supposed to be a face-to-face confrontation. I mean, it
20 seems to me when someone signs a document someone's
21 supposed to see them or at least hear them say they've
22 done it, and I'm just real concerned that we're going to
23 have this process where, you know, nobody sees anything.

24 CHAIRMAN BABCOCK: Yeah. Okay. Let's keep
25 moving on 3.4, signatures. Any other comments about --

1 yeah, Justice Moseley.

2 HONORABLE JAMES MOSELEY: This is -- also
3 may apply to some other sections, but we talked earlier
4 about what the definition of an e-filer was, maybe it's
5 the lawyer or maybe a pro se party. In this particular
6 section it talks about a party, a party's agent, the
7 counsel of record, an e-filer, counsel, attorney, and it
8 may be that someone needs to walk through this and just go
9 through the definition.

10 HONORABLE REBECCA SIMMONS: Where are you --

11 HONORABLE JAMES MOSELEY: I'm looking at
12 3.4, and decide which of these, if any, could be changed
13 to "e-filer," which is going to cover whoever is filing.

14 HONORABLE REBECCA SIMMONS: So --

15 CHAIRMAN BABCOCK: You're talking about
16 3.4(d)?

17 HONORABLE JAMES MOSELEY: Let's see, (d)
18 covers party, agent, counsel of record. The intro to 3.4
19 talks about counsel, talks about attorney. I'm just
20 saying we ought to try to synthesize those and make it
21 -- I'm looking at 3.4.

22 HONORABLE REBECCA SIMMONS: Under
23 "signatures"?

24 HONORABLE JAMES MOSELEY: Yeah.

25 HONORABLE REBECCA SIMMONS: Okay.

1 HONORABLE JAMES MOSELEY: There's about four
2 or five different nouns used for this person we're talking
3 about.

4 HONORABLE REBECCA SIMMONS: Okay.

5 CHAIRMAN BABCOCK: Okay. Got it. Anything
6 else about 3.4? Yeah, Richard.

7 MR. MUNZINGER: (e), attorney in charge, "On
8 the occasion of the party's first appearance through
9 counsel the attorney whose signature first appears on the
10 initial pleading," you've got a couple of words in there
11 that are unnecessary, but Chip is out of town, and he
12 tells Jane Brown, the newest associate in the law firm who
13 is licensed in the court, to sign the petition or the
14 answer or whatever it might be for his firm. Because she
15 signs it she is now the lead counsel.

16 CHAIRMAN BABCOCK: What if she signs my
17 name? Is that okay?

18 MR. MUNZINGER: I don't know.

19 MR. WATSON: That's the way you do it.

20 MR. MUNZINGER: I assume so, but I just want
21 to point out that problem. Maybe it's cured by
22 designating lead counsel somewhere as distinct from having
23 it automatic.

24 HONORABLE REBECCA SIMMONS: I think it just
25 tracked the Rule of Civil Procedure 8, and I agree with

1 you, with what you're saying, but the Rule of Civil
2 Procedure 8 basically says that, that the person -- it
3 basically says, "The attorney whose signature first
4 appears on the initial pleading shall be the attorney in
5 charge" --

6 HONORABLE JAMES MOSELEY: Until changed.

7 HONORABLE REBECCA SIMMONS: -- "until such
8 designation is changed." So we can change that around,
9 but --

10 CHAIRMAN BABCOCK: Sarah.

11 HONORABLE SARAH DUNCAN: But why is that
12 there? I mean, either these rules are going to be read in
13 conjunction with the Rules of Civil Procedure and
14 Appellate Procedure or they're not, and if we're going to
15 incorporate the substance of Rule 8, why are we doing that
16 if we're not already incorporating the subject of Rule 8?
17 It's not selective prosecution, but it's selective
18 inclusion.

19 HONORABLE REBECCA SIMMONS: I think that was
20 because the clerks were having -- this was from some of
21 the clerks' concern that they didn't know exactly who to
22 send notices to or what they were supposed to, so they
23 wanted to make sure for e-filing that it was the person
24 who signed it as opposed to is there going to be a
25 signature block or who -- so I think that's why they

1 wanted -- the clerks in particular wanted to have it
2 confirmed for e-filing who was in charge, so that's I
3 think the basis, but I don't disagree with you that it's
4 repetitive over what's in Rule 8.

5 CHAIRMAN BABCOCK: Okay. Anything else?
6 Okay. 3.5, electronic court orders. Any comments on
7 this? Frank.

8 MR. GILSTRAP: 3.5(b) has two sentences.
9 The second sentence has to do with 3.7(f) on page 11, and
10 I won't comment on it here. The first sentence contains a
11 classic dangling participle and needs to be -- the first
12 line of 3.5(b) needs to be rewritten to say, "When an
13 order is electronically signed," comma, "it shall."

14 CHAIRMAN BABCOCK: Okay. Richard, and then
15 Carl, and then Buddy. And then Gene.

16 MR. MUNZINGER: Does the rule automatically
17 say when the judge signs it it's served on the lawyers?
18 How do the lawyers know that an order has been signed? Is
19 there any provision in the rule that the lawyer is served
20 with a copy of the judge's order electronically, and if
21 not, should there be?

22 HONORABLE REBECCA SIMMONS: No, there is
23 nothing in there addressing how the lawyers learn of the
24 electronic order signature, so --

25 MR. MUNZINGER: Well, that seems to me to be

1 a problem because the judge's clerk or secretary is told
2 to do something with the order, take it down, have it
3 scanned, or whatever it is that they do, but the parties
4 don't get the order necessarily.

5 CHAIRMAN BABCOCK: Carl, Buddy, Gene, and
6 Judge Wallace.

7 MR. HAMILTON: Does this contemplate that
8 the order starts out as a piece of paper? Or otherwise,
9 what does it mean when it says judges are not required to
10 sign electronic orders? Or does the order start out in
11 the computer as an electronic order?

12 CHAIRMAN BABCOCK: It says, "Judges are not
13 required to electronically sign orders."

14 MR. HAMILTON: Yeah. Does that mean they
15 can sign them pen and ink, and how do they do that if it's
16 an electronic order?

17 MR. GILSTRAP: Okay. We --

18 HONORABLE REBECCA SIMMONS: Those are from
19 the county court rules and from the other district court
20 rules that basically what they did is allow judges, if the
21 judges wanted to continue to sign in paper they could, and
22 if they wanted to do an electronic order they could do it,
23 and that's just taken from those rules.

24 CHAIRMAN BABCOCK: Buddy.

25 MR. LOW: Yeah, we talk about may treat this

1 electronic order as an official copy of the order. I
2 always thought what's filed is the -- is the official
3 order. Why do you call it an official copy? And then
4 down here the same thing, "scan a paper, court order,
5 which may serve as the official copy." I would think that
6 would serve as the official court order instead of a copy.

7 CHAIRMAN BABCOCK: Yeah. Gene.

8 MR. STORIE: I have an easy one. Subsection
9 (a), "applying his or her electronic signature."

10 CHAIRMAN BABCOCK: Say that again, Gene.
11 Sorry.

12 MR. STORIE: Applying his or her signature
13 in the first line of (a), since we have many fine female
14 judges.

15 MR. KELLY: What about "the judge's"?

16 CHAIRMAN BABCOCK: Okay. Judge Wallace.

17 HONORABLE R. H. WALLACE: Wave off.

18 CHAIRMAN BABCOCK: Huh?

19 HONORABLE R. H. WALLACE: I've waved off.

20 CHAIRMAN BABCOCK: You're waving me off.

21 Okay. Scott.

22 MR. STOLLEY: The last sentence of (b), "The
23 clerk may electronically scan," "which may serve," that
24 makes it optional. Shouldn't it be mandatory?

25 HONORABLE REBECCA SIMMONS: I think that

1 that is actually -- as pointed out, I think that is
2 covered again in 3.7, but it is just taking -- what we did
3 is just take the rules directly from the county court
4 rules where if you have an order that's in paper, the
5 clerk can scan that court order and make that the official
6 copy.

7 MR. STOLLEY: But you would think if you
8 want court records to be all electronic, it's got to be
9 mandatory that a paper order be reduced to electronic copy
10 and it becomes the official court record.

11 HONORABLE REBECCA SIMMONS: Sounds good.
12 They would like that.

13 CHAIRMAN BABCOCK: Frank.

14 MR. GILSTRAP: The classic -- I mean, the
15 typical practice is you send a proposed order to the
16 judge, maybe both sides send a proposed order, they're in
17 paper, the judge signs one, or maybe makes his own order
18 and then that's the order. Now we're going to do all of
19 this electronically. Are we going to be e-mailing
20 proposed orders to the clerk? How are we going to do it?

21 HONORABLE REBECCA SIMMONS: You will be
22 e-filing those proposed orders.

23 MR. GILSTRAP: But, see, you don't file --
24 when you have a proposed order that's going to Judge
25 Wallace, I don't file it. It never gets filed unless he

1 signs it, you see. That's my point.

2 HONORABLE REBECCA SIMMONS: I thought they
3 get filed. I think you file a motion -- don't you file a
4 proposed order or something that gets filed? No?

5 MR. GILSTRAP: In many cases you don't, in
6 many cases you give it to the judge and you sign it.

7 CHAIRMAN BABCOCK: Sometimes you do,
8 sometimes you don't. Judge Wallace.

9 HONORABLE R. H. WALLACE: Well, I don't know
10 how it will work here, but I think the way the Federal
11 system works is you can upload your order along with your
12 e-filing, but it doesn't get, quote, filed.

13 MR. GILSTRAP: Okay.

14 HONORABLE R. H. WALLACE: And maybe -- maybe
15 this will work the same way.

16 MR. KENNEDY: My understanding of the
17 TexFile system, the piece that they're developing with
18 that proposed order functionality would allow you to
19 submit your proposed order electronically, but you're
20 right that it wouldn't get filed with the clerk's office.
21 It would route off to the side to what they call a
22 judicial queue to where the judge could pull that off, it
23 may be in a Word format, and do whatever editing and sign
24 it and file it back through electronically.

25 MR. GILSTRAP: Sounds great.

1 CHAIRMAN BABCOCK: Let's talk about 3.6,
2 format of e-filed pleading or document. Any comments
3 about this? Yeah, Judge Wallace.

4 HONORABLE R. H. WALLACE: I don't understand
5 something in subparagraph (c), last sentence, "Whenever
6 possible scanning of exhibits should be avoided." How
7 else do you get them in electronic form? I obviously
8 don't understand.

9 HONORABLE REBECCA SIMMONS: It depends on
10 what your exhibits are. There will be times I would
11 suspect that you could have an exhibit that is one that
12 you've created or whatever that you could have as an
13 exhibit to a motion or whatever, but there are many times
14 that you will have exhibits. These actually -- this was
15 actually taken from the appellate rule.

16 HONORABLE R. H. WALLACE: Well, but --

17 CHAIRMAN BABCOCK: Go ahead.

18 HONORABLE R. H. WALLACE: But, okay, this
19 piece of paper is an exhibit. How do I get that --

20 HONORABLE REBECCA SIMMONS: You will scan
21 that.

22 HONORABLE R. H. WALLACE: It just says
23 "scanning exhibits should be avoided."

24 HONORABLE REBECCA SIMMONS: Right, and like
25 I said, it's from the -- when you -- if you have the

1 original document then what it's anticipating is don't
2 take this document that I just generated and go scan it
3 and attach it when you could actually attach just the
4 original native document. That's all it's addressing. If
5 you think it's too confusing and that people will think,
6 "Uh-oh, I can't scan something" then we definitely should
7 take it off. It was just meant to keep you from
8 generating a Word document, then scanning your Word
9 document to --

10 HONORABLE R. H. WALLACE: I understand what
11 you're saying, but --

12 CHAIRMAN BABCOCK: Okay. Anything more on
13 3.6? Anything else? Going once. All right. 3.7, time
14 of e-filing. There's plenty of meat on this one. Judge
15 Wallace.

16 HONORABLE R. H. WALLACE: Yeah. All right.
17 I met with our clerk and a couple of his staff, and they
18 had a concern particularly that the clerk "must accept it
19 if it's not misdirected and complies with all e-filing
20 requirements."

21 CHAIRMAN BABCOCK: Which subpart are you
22 talking about?

23 HONORABLE R. H. WALLACE: Subparagraph (c),
24 3.7(c).

25 CHAIRMAN BABCOCK: Thank you.

1 HONORABLE R. H. WALLACE: Now, and their
2 concern was how do we determine if it complies with all
3 e-filing requirements? There's e-filing requirements that
4 -- well, they're all throughout here, but like there's one
5 of them pertaining to it's got to have certain signatures
6 of opposing parties. What if it doesn't have that? What
7 if it doesn't have the e-filer's designated e-mail
8 address? What if it doesn't -- it's not in text
9 searchable PDF format? I don't know how they would know
10 that.

11 HONORABLE SARAH DUNCAN: We need Bonnie or
12 Harwell.

13 HONORABLE R. H. WALLACE: Seriously, the
14 issue is how does -- how does that deputy clerk know when
15 they see something we're not going to file this as opposed
16 to just saying if it's in this court and it's got a
17 signature, it's filed?

18 HONORABLE REBECCA SIMMONS: And well-taken,
19 but those are the rules directly from the district court
20 rules and the county court rules that are now in place,
21 and that's where they come from, and so certainly we can
22 modify them, but just so you know, that's actually been in
23 place where people have e-filing. That's what --

24 CHAIRMAN BABCOCK: And, Judge, in the
25 Federal system you get notices all the time from the

1 clerks saying this hadn't complied and, you know, in this
2 respect or, I mean, somehow they're figuring out, you
3 know, whether the filing complies with the rules. I don't
4 know how they do it.

5 HONORABLE R. H. WALLACE: I think that
6 varies.

7 MR. HAWTHORNE: Is the question how do you
8 know if it's searchable?

9 HONORABLE R. H. WALLACE: Pardon me?

10 MR. HAWTHORNE: Is the question how do know
11 if it's searchable?

12 HONORABLE R. H. WALLACE: No, it's just how
13 is the -- when it says "has met all e-filing
14 requirements," what if they didn't -- what if they don't
15 have -- they've got a space for a signature of opposing
16 counsel and it's not there? What if it's not -- they can
17 tell it's not in PDF format? I guess the main issue I
18 think is does the clerk file anything that's got the court
19 cause number and I guess an electronic signature and then
20 let the judge or the court later decide?

21 MR. HAWTHORNE: So do you take it in and
22 then strike it? Is that the question?

23 HONORABLE R. H. WALLACE: Yeah, uh-huh.

24 MR. HAWTHORNE: Well, let me talk about
25 that. I personally think that it's much more efficient to

1 do it the way it's being done now, which is when documents
2 -- and the way it's done in the Federal system that
3 when it does -- you see that a document doesn't comply
4 with the rules, you reject it; and you get a nice message
5 back from the clerk, hopefully nice anyway, explaining
6 what it is that is wrong with the document and then you
7 fix it there. We find that things that are wrong with
8 documents are oftentimes fixed right away, they get sent
9 back immediately, and then I think the other benefit of
10 this is remember if you're taking these things in, you're
11 attaching them to a case management system, and if I have
12 to go in and attach everything -- every document that I
13 get that is done incorrectly then imagine the judge trying
14 to come through and go, "Okay, which one of these am I
15 supposed to read" because this person messed up six
16 different times and then they finally got it right.

17 So I think that the system works well, and
18 it's -- it's, I think, really, frankly, more user friendly
19 to help the lawyer get it right upfront rather than having
20 to go in, take it in, strike it. Go ahead. Chip, back to
21 you.

22 CHAIRMAN BABCOCK: Okay. Carl.

23 MR. HAMILTON: If a lawyer or a law firm is
24 its own EFSP, does it file the document with itself?

25 CHAIRMAN BABCOCK: Is that an existential

1 question?

2 MR. HAMILTON: Yeah.

3 HONORABLE REBECCA SIMMONS: I'm sorry, what
4 was the question? I apologize.

5 CHAIRMAN BABCOCK: Justice Simmons didn't
6 hear that, although it's worth repeating.

7 MR. HAMILTON: If a law firm or a lawyer is
8 its own EFSP, that's where your filing date takes place.
9 Does it file it with itself or how does it --

10 MR. KENNEDY: No. Because they're connected
11 directly with the EFM, they would file it with the EFM and
12 then they would get -- based on them transmitting, it
13 would get a response back from EFM saying, "I got the
14 document. Everything's okay, and here's the date and time
15 that I received the document," and so that's the time that
16 it's filed.

17 CHAIRMAN BABCOCK: Okay. Pam, then Sarah.
18 Sorry.

19 MS. BARON: I'm concerned about rejection.

20 CHAIRMAN BABCOCK: Yeah. We've always said
21 that about you.

22 MS. BARON: Generally, but also more
23 specifically in this context. In the trial court there's
24 certain deadlines that cannot be extended, like the motion
25 for new trial deadline. In the appellate court if they

1 reject my filing I'm not concerned because I can almost --
2 I can always get an extension to cover anything, but what
3 happens if I file my motion for new trial and then a day
4 later -- I file it on the last day, and the next day the
5 clerk rejects it. Am I out of time at that point?

6 MR. HAWTHORNE: May I respond?

7 CHAIRMAN BABCOCK: Yeah. Yeah, absolutely.

8 MR. HAWTHORNE: This is my interpretation of
9 these rules, is that you have filed it when you delivered
10 it to the electronic filing server provider. Now, as to
11 the question of -- I don't know the answer to this, if you
12 deliver it to yourself if you filed it, but so you have
13 filed it at that point.

14 MS. BARON: Okay.

15 MR. HAWTHORNE: Even though the clerk may
16 reject it later on, it was filed when you delivered it to
17 the electronic filing service provider. That's why at our
18 court when we have to reject a petition for review and it
19 takes more than a day to get it back, we change the file
20 stamp and backdate that document. We do the same thing
21 with motions for rehearing because they have a time limit
22 on them.

23 MR. WATSON: But is everybody going to do
24 that?

25 HONORABLE R. H. WALLACE: No.

1 MR. HAWTHORNE: Well, and yes. I mean, no,
2 I don't know that everyone necessarily understands the
3 rules that way, so --

4 MS. BARON: We need to fix that.

5 MR. WATSON: She's exactly right.

6 CHAIRMAN BABCOCK: Sarah.

7 HONORABLE SARAH DUNCAN: They're just -- I'm
8 not disagreeing that it would be more efficient for the
9 clerk to be the one accepting or rejecting or looking at
10 to see if it meets the e-filing requirements, but, you
11 know, I had a clerk refuse to file a supersedeas bond once
12 that complied with the rules, and there are tremendous
13 consequences to that. I think the confusion, at least on
14 my part, is that (a) says it's timely filed once it gets
15 delivered to the EFSP, but then (c) says the clerk gets to
16 decide whether to accept it for filing. Well, if it's
17 filed, the clerk doesn't have that decision to make. The
18 reason I asked for Bonnie to be here is if she were here
19 she would be saying, "We don't want discretion to decide
20 what's fileable and what's not because we don't want --
21 we're going to be liable on our bonds if we screw this up,
22 so y'all just decide what gets filed and we'll file it,
23 but we don't want the discretion. We're happy for judges
24 to have discretion, but we don't want it." And so (c)
25 doesn't make any sense to me in light of (a).

1 HONORABLE REBECCA SIMMONS: Well, the clerks
2 are rejecting --

3 MR. HAWTHORNE: Well, why wouldn't she just
4 take the document, though? I mean, if she doesn't -- if
5 she doesn't want to make that decision, why not just take
6 it?

7 HONORABLE SARAH DUNCAN: I'm sorry?

8 MR. HAWTHORNE: Why not just take the
9 document then?

10 HONORABLE SARAH DUNCAN: She does.

11 MR. HAWTHORNE: I mean, is she required to
12 reject it?

13 HONORABLE SARAH DUNCAN: But this says that
14 they're going to have the discretion to accept the
15 document for filing --

16 MR. HAWTHORNE: Yes, this is to your
17 point --

18 HONORABLE SARAH DUNCAN: -- after it's
19 already been filed.

20 MR. HAWTHORNE: This is to your point that
21 she doesn't want to have the discretion. I guess what I'm
22 asking is does she -- is she mandated by this rule to
23 reject a document that doesn't comply?

24 HONORABLE REBECCA SIMMONS: No.

25 MS. BARON: But she can.

1 MR. WATSON: But she's allowed to.

2 HONORABLE SARAH DUNCAN: She's allowed to
3 accept noncomplying --

4 MR. WATSON: That's our concern. One side
5 or the other is going after her saying, "You did it wrong,
6 pay up on your bond."

7 HONORABLE REBECCA SIMMONS: Okay. They're
8 doing -- this is the rule that's in place and has been in
9 place for quite sometime, and as I understand it, there
10 are clerks that reject based on money, and I think that's
11 -- what is the biggest rejection? Oh, no, it's
12 jurisdiction.

13 MR. KENNEDY: Jurisdiction, and then it's
14 signature after that, right, Blake?

15 MR. HAWTHORNE: Jurisdiction. I think the
16 wrong fee.

17 HONORABLE REBECCA SIMMONS: Right, and the
18 wrong place.

19 MR. HAWTHORNE: Some people will claim to be
20 exempt when they're not exempt. I think those are
21 probably the top two, and then other minor things after
22 that. It's very different in the appellate courts where
23 we have some more sophisticated requirements for our
24 briefs, so but in the trial court that's my understanding,
25 those are the reasons that they reject.

1 CHAIRMAN BABCOCK: Roger.

2 MR. HUGHES: Well, I can understand in the
3 courts of appeals where a clerk actually has some
4 responsibility to check to make sure there are certain
5 procedural prerequisites before a document is eligible for
6 filing, but there are -- those are pretty rare in the
7 district and county courts and perhaps it might be
8 advisable to build in some safety valve for clerks that
9 reject things that shouldn't be rejected. We've already
10 heard one, the supersedeas bond that was absolutely -- was
11 absolutely correct and they wouldn't file it, which, of
12 course, means there is a writ of execution out there which
13 is not being recalled, but I had one case recently where I
14 removed a case to Federal court from county court, and I
15 filed the removal notice in the state court with the
16 county clerk by electronically, and that's an important
17 document because under Federal procedure until the state
18 court is notified that the case has been removed it's free
19 to take action, sign orders, do stuff on the case.

20 Well, the next day I get back a rejection
21 from the clerk of the court. I'm going, "What? This is
22 from your court. How can you reject it?" And in that
23 particular county they had just decided that all county
24 court cases of a certain amount, which involved a certain
25 amount of money or more, would simply be kept with the

1 district clerk and the district clerk would take care of
2 the files and I needed to e-file with the district clerk a
3 county case that had been filed in county court that had
4 not been officially transferred, which strangely enough,
5 the district clerk accepted the filing. I'm not -- I
6 mean, maybe there's a local rule that authorizes this sort
7 of thing, but it just seems to me there must be some
8 safety valve involved when you're -- when you -- when a
9 document is kicked back and it shouldn't have been kicked
10 back, or it's, you know, as they -- it may be for purely
11 procedural reasons it can get fixed, could have been fixed
12 that day.

13 MR. HAWTHORNE: Well, it strikes me that
14 there's got to be a balance between trying to do this
15 efficiently and protecting people's interests and rights,
16 so I'm wondering if there isn't a way to clarify that, you
17 know, just because a document is rejected doesn't mean
18 that it wasn't filed.

19 HONORABLE REBECCA SIMMONS: And that would
20 be my suggestion. I think you could put something in
21 there that if a document is improperly rejected that it
22 will be deemed to have been filed -- you know, accepted
23 the day it was filed or something like that, but a safety
24 valve we can include.

25 MR. HAWTHORNE: And I don't know necessarily

1 that it would be improperly. I think it has to be that
2 when you delivered it to the electronic filing service
3 provider it was filed, and the clerks's decision later on
4 to reject it and require you to resubmit it, and maybe
5 that's what we need to get at --

6 HONORABLE REBECCA SIMMONS: Right.

7 MR. HAWTHORNE: -- is that what we're
8 trying -- although, I suppose if I reject something -- if
9 I tell you, "Hey, you're in the wrong court," I mean,
10 hopefully then you go and file in the right court. I
11 mean, really, I know that clerks do things they shouldn't
12 do, but most often we're trying to help when we do those
13 things. Yeah, sorry. Chair, there are other people
14 raising their hand.

15 CHAIRMAN BABCOCK: No, finish your thought,
16 but then Pam.

17 MR. HAWTHORNE: That's enough.

18 CHAIRMAN BABCOCK: Well, Pam can speak or
19 she would feel rejected otherwise.

20 MS. BARON: How about we take out the word
21 "rejected," which would make me feel better, and say, "The
22 clerk may require the document be resubmitted to conform
23 to the rules." Something more like that.

24 HONORABLE SARAH DUNCAN: So it will be filed
25 one way or the other.

1 MS. BARON: Yes. It just has to be
2 resubmitted.

3 HONORABLE SARAH DUNCAN: It might be subject
4 to resubmission.

5 HONORABLE REBECCA SIMMONS: Okay. Where
6 would you want to put that?

7 CHAIRMAN BABCOCK: That's an idea.

8 MS. BARON: Well, instead of "rejections of
9 filing" we would rewrite (e) somehow.

10 HONORABLE REBECCA SIMMONS: Okay.

11 MS. BARON: Or "correction of filing."

12 CHAIRMAN BABCOCK: Did Sofia -- oh, Justice
13 Peeples. Sorry.

14 HONORABLE DAVID PEEPLES: I'm just
15 wondering, it says, "if it doesn't comply with all
16 e-filing requirements." Why not list the things that are
17 important enough to justify rejection?

18 HONORABLE REBECCA SIMMONS: Okay.

19 HONORABLE DAVID PEEPLES: Don't have your
20 own e-mail address or something. I mean, if we're going
21 to do that, and it bothers me that right now if they get a
22 paper answer that doesn't have the State Bar number or an
23 address or phone number, they go ahead and file that.
24 They don't reject it, and your answer is not filed, and,
25 you know, we're trying to say basically --

1 HONORABLE REBECCA SIMMONS: Right.

2 HONORABLE DAVID PEEPLES: -- you do it
3 electronically instead of paper, but the rules still
4 apply.

5 HONORABLE REBECCA SIMMONS: And what happens
6 -- and let me clarify, when we talk about they file in the
7 wrong court. It's not jurisdictionally the wrong court.
8 It's they check the wrong box, and instead of filing in,
9 you know, Harris County, they filed in Houston County,
10 because they weren't thinking about it, so it's actually
11 geographically off in some other place, and so it gets
12 rejected at that point by the clerk because it's in the
13 wrong geographic place, so that's more the rejections
14 we're talking about, so we could have what you're saying a
15 list of --

16 HONORABLE DAVID PEEPLES: Well, if the rule
17 doesn't say you can -- the clerk can reject it for reasons
18 A, B, and C, they're going to have to go to seminars and
19 figure out what's important enough and when they can
20 reject if we're going to allow that. I think it would be
21 helpful and improve it.

22 MS. BARON: I'm not even sure we want to use
23 the word "accept" either.

24 MR. HAWTHORNE: Here's the thing. I don't
25 want to take anybody's money and have to keep it because I

1 couldn't reject something that I shouldn't have gotten.
2 And, you know, you're in the wrong place. Now I have to
3 take your money, and I have to open up a case and tell
4 you, "Sorry, yeah, I could have told you that upfront and
5 saved you a lot of time and aggravation, but these rules
6 don't let me do that."

7 MS. BARON: Well, I mean, for example, it
8 says, "if the clerk" -- in (c), "If the clerk fails to
9 take action to accept or reject within the time period,
10 the document is deemed to have been accepted and filed."
11 Well, we've already said it's already filed, so that
12 suggests that it's not filed unless there's an acceptance,
13 and "rejection" implies it's not filed. So those two
14 terms there, particularly when you couple with them with
15 the word "and filed" can have pretty significant
16 ramifications for time sensitive filings.

17 CHAIRMAN BABCOCK: Sarah.

18 HONORABLE SARAH DUNCAN: We had this exact
19 same discussion on the supersedeas amendments.

20 CHAIRMAN BABCOCK: On the what?

21 HONORABLE SARAH DUNCAN: Amendments to the
22 supersedeas rules about equating filing with filing --

23 CHAIRMAN BABCOCK: Right.

24 HONORABLE SARAH DUNCAN: -- as opposed to
25 rejection.

1 CHAIRMAN BABCOCK: And how did we resolve
2 it?

3 HONORABLE SARAH DUNCAN: I don't want to
4 represent that I remember, but my thought is that once it
5 is file stamped, it is deemed filed, and it would have to
6 go to a judge to say that it was going to be stricken or
7 ineffective.

8 MR. HAWTHORNE: It's not file stamped until
9 we hit "accept." You don't get a file stamp until we hit
10 "accept."

11 HONORABLE SARAH DUNCAN: But that's kind of
12 what we're talking about is the problem.

13 CHAIRMAN BABCOCK: Okay. So I file --

14 MS. BARON: But that's not correct.

15 CHAIRMAN BABCOCK: I've got a motion for new
16 trial, and I file it on the last day that I can file it,
17 and but somebody doesn't do it right, and so that night or
18 the next day I get a notice saying, "Hey, didn't do it
19 right, resubmit it." Okay. So I resubmit it, and I do it
20 right this time. You hit "accept," and it has a file
21 stamp, but now I'm too late.

22 HONORABLE SARAH DUNCAN: Right.

23 MR. GILSTRAP: That can't be.

24 MR. HAWTHORNE: No. No. I don't think
25 that's how it should work.

1 CHAIRMAN BABCOCK: Isn't that how you
2 described it?

3 MR. GILSTRAP: No, I'm saying whatever the
4 rule says --

5 THE REPORTER: Wait.

6 MR. HAWTHORNE: You're right, in that the
7 system will apply a file stamp, with that subsequent
8 date --

9 CHAIRMAN BABCOCK: Right.

10 MR. HAWTHORNE: -- when I accepted it, but
11 as I was explaining earlier when this happens at our
12 court, we change the file stamp date to the date when you
13 originally submitted it.

14 CHAIRMAN BABCOCK: You backdate it?

15 MR. HAWTHORNE: Yes, sir.

16 MR. WATSON: Yeah, but that's --

17 CHAIRMAN BABCOCK: Skip.

18 MR. WATSON: But the problem is -- and Blake
19 is the model of how it should be done.

20 MS. ADROGUE: Right.

21 MR. WATSON: But that's not the way it has
22 to be done, and what we need to write this is so that it
23 has to be done Blake's way, and to me the way to do that
24 is to say that it's filed and, you know, when it's filed,
25 but that the clerk can require it to be redrawn, but when

1 it's redrawn to comply with the rules it is deemed filed
2 on the date of the original filing, period.

3 CHAIRMAN BABCOCK: Sophia.

4 MS. ADROGUE: In the same vein, dealing with
5 that a document will be considered filed -- timely filed
6 if it's e-mailed, e-filed at any time before midnight,
7 that's under 3.7, but then if you go to 4.1 and the others
8 it references when the e-service is made after 5:00 the
9 date of service is the next day. I just think it would
10 just be good at some point that it clarifies you have up
11 to midnight, but be aware if you do that, the next place
12 says if it's after 5:00, it's deemed the next day.

13 HONORABLE REBECCA SIMMONS: That's for
14 service.

15 MS. ADROGUE: It is for service, sorry, but
16 it --

17 HONORABLE REBECCA SIMMONS: Yeah, it should
18 be put into service.

19 MS. ADROGUE: But it just may be worthwhile
20 to get in there.

21 CHAIRMAN BABCOCK: Yeah, Carl, then Buddy.

22 MR. HAMILTON: If there's something
23 electronically wrong or something with the filing, if
24 it's -- if they accept it anyway, does that cause some
25 problem with the system or --

1 MR. HAWTHORNE: Well, right now it's the
2 problem that I -- that if you go ahead and accept it, I
3 see two problems. One is you've paid your money and you
4 can't get it back because you have to pay to e-file; and
5 when I reject a document, you're not charged by the
6 electronic filing manager, okay, so I can save you some
7 money. I also don't -- and if there was a filing fee
8 associated with it, you know, there could be an issue
9 there as well; but then the other issue is just what I was
10 talking about earlier in that this document -- I now have
11 to keep this document and it's going to basically make a
12 mess of my case management system, because I'm going to --
13 my experience is we often have to reject, reject, reject,
14 until we get it right; and so I'm going to have to keep
15 each one of these documents, right, it was filed with my
16 court.

17 MR. HAMILTON: Yeah, but in the trial court,
18 I mean, my experience has been like they said before.
19 Clerks never refuse to file anything. They file whatever
20 you give them, and if there's something wrong with it,
21 somebody brings it to the attention of the judge or
22 something, and he may strike it or whatever. So in the
23 trial court I don't see anything wrong with requiring the
24 clerk to accept all e-mail filings, unless it technically
25 fouls up the system some way or another.

1 MR. HAWTHORNE: I would add, too, I think it
2 really speeds up the process of getting things done
3 correctly. I mean, you get much quicker turnaround when I
4 can electronically, you know, transmit a message back
5 saying, "Thank you, but this is what's wrong, and we need
6 to fix this." We find that they get fixed right away, as
7 opposed to if I take a document in typically, at our court
8 at least, and we strike it then there's -- you know, we
9 have to issue an order striking it. So and if it's a
10 judge, I would imagine if a judge is making the decision,
11 I don't know, is it the judge who is going to verbally
12 tell the clerk, or are we going to have to have an order
13 striking that? I mean, it's just this is really an
14 efficient way to do it, and I think that if we can address
15 the concern about it having been filed but still require
16 it to be resubmitted without having to go through a formal
17 process of striking the document I think it will work much
18 better.

19 CHAIRMAN BABCOCK: Buddy.

20 MR. LOW: Chip, they address that issue
21 right in the end on the sensitive documents, where they
22 say --

23 HONORABLE REBECCA SIMMONS: Right.

24 MR. LOW: -- that if it's filed in violation
25 of these rules and so forth, the substitute document will

1 be deemed filed as the same day the document was struck.
2 In other words, why couldn't you do the same thing here?
3 Like your situation, you file motion for new trial and
4 it's not good and it's stricken, then under this language
5 you refile properly, and it would be considered filed the
6 day that it was struck is what it says on 5.4(a) on --

7 CHAIRMAN BABCOCK: What if I wait six months
8 to refile?

9 MR. LOW: Well, I would think you would
10 never do that. I don't know.

11 MR. MUNZINGER: Chip?

12 CHAIRMAN BABCOCK: Yes, sir.

13 MR. MUNZINGER: The clerk's refusal to
14 accept a document for filing is based upon a failure to
15 comply with the electronic details of the filing
16 requirements --

17 CHAIRMAN BABCOCK: Right.

18 MR. MUNZINGER: -- as distinct from the
19 substance of the document or whether it meets the
20 other substantive requirements of the Rules of Civil
21 Procedure. Am I correct in that?

22 HONORABLE REBECCA SIMMONS: Yes. Yes.

23 MR. MUNZINGER: The rule ought to say
24 something along those lines because -- at least it seems
25 to me they should, because you're always worried about

1 late filing a motion for new trial or a motion for
2 whatever it might be that triggers these appellate
3 timetables, and the lawyers need to know that their
4 document may be rejected by a clerk, but it has not
5 affected the substantive validity of the filing, which can
6 only be affected by a court and not a clerk. I think
7 that's where a lot of the concern comes from. At least I
8 have that concern here, and perhaps there's a way of
9 saying that in the rule and alerting the practitioners to
10 the fact that if you file a motion for new trial which
11 meets the requirements of rule whatever it is, 327 or
12 whatever, but you didn't do whatever you're supposed to do
13 electronically, you've still filed your motion for new
14 trial on time. Somehow or another I think that if that
15 could be addressed it would give comfort and guidance to
16 the bar.

17 CHAIRMAN BABCOCK: Yeah. Justice Peeples.

18 HONORABLE DAVID PEEPLES: I'm going to state
19 two or three principles that I would like to suggest to
20 your committee. Number one, I think things ought to be
21 filed even if they're incorrect and substantive rights
22 shouldn't be lost because it wasn't done right. Okay.
23 Now, I think that Blake and the other clerks ought to be
24 able to go back to someone and say, "You know, you didn't
25 give us such and such an address," and "You need to do A,

1 B, and C," and a lot of people will do that. Some of them
2 won't, and just being realistic, and the ones who won't,
3 let the court deal with it. They deal with it now when
4 someone doesn't put an address or a phone number, but I
5 think, you know, I would state it as a principle that I
6 just think we would all agree substantive rights shouldn't
7 be lost because you didn't do it right.

8 HONORABLE REBECCA SIMMONS: Right.

9 HONORABLE DAVID PEEPLES: If it got there.
10 Just like if you mail it in or take it in, it got filed,
11 it got there; and but the clerks, all of them ought to
12 have the discretion and maybe be encouraged to push back
13 and say, "We need more from you"; and a lot of people will
14 give it to you because they're dealing with the
15 government, but some won't; and the ones that don't, I
16 don't think clerks ought to be asked to do that. Judges
17 ought to have to take it up.

18 CHAIRMAN BABCOCK: Yeah, Blake.

19 MR. HAWTHORNE: Chris had I think a good
20 suggestion, which is the appellate rules, 9.4(j), talk
21 about nonconforming documents; and it says, "Unless every
22 copy of a document conforms to these rules, the court may
23 strike a document and return all nonconforming copies to
24 the filing party. The court must identify the error to be
25 corrected and set a deadline for the party to resubmit the

1 document in a conforming format. If another nonconforming
2 document is filed, the court may strike a document,
3 prohibit the party from filing further documents of the
4 same kind." I would modify that, though -- although
5 strike isn't defined, my concern is that it's adding some
6 unnecessary formality to this, so I would say, "The clerk
7 may require the party to resubmit the document." Does
8 that make sense?

9 CHAIRMAN BABCOCK: It does, but, Blake,
10 isn't -- that's a TRAP rule, and other than failure to
11 file a timely notice of appeal, there's hardly anything in
12 the appellate rules that can't be fixed. I mean, there's
13 nothing jurisdictional like a motion for new trial or
14 failing to file a notice of appeal, that type of thing.

15 MR. HAWTHORNE: Okay. So we have a section
16 that's called "Nonconforming documents," and we say that
17 the clerk may require it to be resubmitted if it doesn't
18 comply with the rules, and then we say that requiring it
19 to be -- the document will still be deemed to be filed on
20 the date that it was transmitted to the EFSP, but it gives
21 the clerk the ability to require it to be resubmitted.

22 CHAIRMAN BABCOCK: Yeah, I don't know if
23 that's a problem.

24 MS. BARON: But I would object to a two
25 strike rule.

1 MR. HAWTHORNE: And I wasn't -- I'm sorry, I
2 was just reading the entire rule to be fair to what it
3 said, and I'm not suggesting that we need a two strike
4 rule.

5 MS. BARON: Okay.

6 MR. HAWTHORNE: But I'm just suggesting that
7 maybe we could look to this rule for some language that we
8 could use here to allow the clerk to require documents
9 that don't conform with the rules to be resubmitted.

10 MS. BARON: Right.

11 MR. HAWTHORNE: And at the same time make it
12 clear that the filing date is the date that it was
13 submitted to the electronic filing service provider.

14 MS. BARON: Good.

15 CHAIRMAN BABCOCK: Okay. Justice Moseley.

16 HONORABLE JAMES MOSELEY: Blake, from
17 your perspective, is there something that's a problem
18 about the word "strike"?

19 MR. HAWTHORNE: Well, because in our court,
20 at least to me, what it connotes is that I need an order
21 from the Court, and I have to do a formal order of the
22 Court. That's how we strike documents. I guess we -- you
23 know, I mentioned that the word "strike" isn't defined
24 here, but that's certainly what it means at our Court. So
25 we could use "strike," but I'm not sure what our --

1 MR. MUNZINGER: Yeah, but the distinction is
2 it's the court that's striking, not the clerk, and I think
3 that may be what's some of the concern about striking.
4 Clerks can't strike, courts can.

5 MR. HAWTHORNE: And I think that what's --
6 also in this rule it says that the document's being
7 returned, and so I think there is sort of an unfiled of
8 this document when we strike it. It's like this is not
9 officially a part of our record. So we -- it's like we
10 took it in and now we're taking it out.

11 HONORABLE SARAH DUNCAN: And I certainly
12 wouldn't argue with you about the way it is in the Supreme
13 Court, but as far as I know, it's not like that in any
14 other court I've ever been in. A document can be ordered
15 stricken, and it's still a part of the official record.

16 CHAIRMAN BABCOCK: Right. Anything else
17 from anybody? Pam.

18 MS. BARON: I don't know if this is jumping
19 ahead or not, but, you know, (a) does allow you to submit
20 any time before midnight. I guess my question is if I'm
21 submitting before midnight but after 5:00 o'clock, what
22 does my certificate of service say? Because it will not
23 be served that day.

24 CHAIRMAN BABCOCK: Right.

25 MR. KENNEDY: From a technical standpoint it

1 will be served instantaneously.

2 MS. BARON: It will be?

3 HONORABLE REBECCA SIMMONS: Yes.

4 MS. BARON: It just doesn't count as
5 service.

6 MR. KENNEDY: Well, it was my understanding
7 is the e-mail would go out immediately when you hit the
8 submit button, but then when it shows the time of service
9 it would be 8:00 a.m. the next day.

10 MS. BARON: So can I certify that it's filed
11 on the day that I submitted -- served on the day that I
12 submit it to the provider? Or I have to say it's actually
13 served tomorrow?

14 HONORABLE REBECCA SIMMONS: I think it's
15 like fax filing. It's really kind of what it is. It's
16 more of the thought of fax filing after 5:00 o'clock, you
17 know, if you submit it then it's considered for purposes
18 -- you know, for counting after days. I think that's the
19 thought.

20 CHAIRMAN BABCOCK: She files her motion for
21 new trial Friday at 8:00 p.m. and the motion for -- and
22 that's the last day, that Friday, and the motion for new
23 trial has obviously got a certificate of service, and Pam
24 wants to know, she says, "I hereby certify" -- "I certify
25 that I have served the other parties on this," whatever

1 the Friday date is --

2 MS. BARON: Right.

3 CHAIRMAN BABCOCK: -- when, in fact, the
4 rules say that it doesn't count as service on Friday. It
5 counts it as Saturday, or Monday.

6 MR. KENNEDY: Counts it as Monday at 8:00
7 a.m.

8 CHAIRMAN BABCOCK: Monday at 8:00 a.m., and
9 so now is her motion for new trial timely?

10 HONORABLE REBECCA SIMMONS: Yes. I mean,
11 the fact that you file a certificate of service to
12 somebody else on when you serve it, does that -- how does
13 that it affect --

14 CHAIRMAN BABCOCK: Well, but I'm on the
15 other side now, and I come into court and I say, "Judge,
16 the certificate of service clearly says that it wasn't
17 served until Monday."

18 HONORABLE REBECCA SIMMONS: But does that
19 not mean that it wasn't, I mean, filed? I'm just saying I
20 think that's correct. I think that --

21 CHAIRMAN BABCOCK: Yeah, Skip.

22 MR. WATSON: Pam does something that I've
23 started doing that solves that in the appellate courts, is
24 that -- is just to send a courtesy PDF to opposing
25 counsel.

1 CHAIRMAN BABCOCK: Yeah.

2 MR. WATSON: Just you know, "Dear counsel,
3 here's what I just filed. Love and kisses, Pam."
4 That's --

5 CHAIRMAN BABCOCK: I've never gotten that.

6 MS. BARON: No. I reserve that for a few
7 people.

8 CHAIRMAN BABCOCK: Apparently you and Skip.

9 MS. BARON: I think I would probably change
10 my certificate of service to say "I provided" -- "I
11 effected service by providing this to the EFSP on this
12 date."

13 CHAIRMAN BABCOCK: Yeah.

14 MR. WATSON: That works.

15 MS. BARON: But I wouldn't say I served it
16 on opposing counsel because I don't know if I have or not.

17 MS. CORTELL: And you can't serve by
18 e-mail --

19 CHAIRMAN BABCOCK: Nina, let's take a few
20 more comments. We've got to give Dee Dee a break here,
21 and Justice Hecht has got to go impart wisdom to another
22 group other than ourselves. Nina.

23 MS. CORTELL: Okay. Two quick things. I
24 was just going to flag that later on it says you can't
25 serve by e-mail unless it's by agreement of the parties,

1 so that's --

2 HONORABLE REBECCA SIMMONS: That's a
3 different --

4 MS. CORTELL: That's a different thing?

5 HONORABLE REBECCA SIMMONS: Yeah. We'll
6 talk about it. It's different.

7 MS. CORTELL: Okay. Then the one other
8 request I would make is the same I made on the appellate
9 rules, and that's under (b). If we could have some sort
10 of automatic extension of one day if there's been a
11 technical failure as shown by a certificate from the
12 provider.

13 CHAIRMAN BABCOCK: Okay. Any other
14 comments? Yeah, Chris.

15 MR. PRINE: I think Justice Simmons had it
16 right. This really just conforms to the fax rule. Fax
17 rule says the same thing. If you served it -- if you fax
18 it after 5:00 it's deemed served the next day, but I bet
19 everybody who faxes still puts the day they faxed it on
20 there. That's really for purposes of counting --

21 HONORABLE REBECCA SIMMONS: The response.

22 MR. PRINE: -- of when your response is due,
23 so maybe it needs to be worded a little different, but
24 that's exactly what the fax rules say under 21a.

25 HONORABLE REBECCA SIMMONS: Right.

1 MR. PRINE: -- is deemed filed the day
2 after, and I know when I was in practice we always dated
3 it the day we were putting it to the court and faxing it,
4 so it's really not much different than that.

5 CHAIRMAN BABCOCK: Yeah. Let's take our
6 afternoon break. A little late, sorry, and maybe just
7 keep it to 10 minutes, so we'll be back about 4:05 to try
8 to get through the rest of this real quick.

9 (Recess from 3:53 p.m. to 4:10 p.m.)

10 CHAIRMAN BABCOCK: Do we have anything more
11 to say about Rule 3.7? Anything left unsaid about 3.7?

12 MR. GILSTRAP: Yes.

13 CHAIRMAN BABCOCK: All right, let's hear it.

14 MR. GILSTRAP: Have we talked about (f)?

15 CHAIRMAN BABCOCK: Have we talked about (f)?

16 MR. GILSTRAP: Yes.

17 CHAIRMAN BABCOCK: No.

18 MR. GILSTRAP: Well, that's kind of the
19 whole crux of the thing. I mean, we are now saying that
20 the clerk has an electronic record, the clerk can declare
21 that as the official record.

22 CHAIRMAN BABCOCK: Right.

23 MR. GILSTRAP: And can't -- apparently can't
24 declare the paper record as the official record, and the
25 judge can't get a paper copy if the clerk doesn't want to

1 give it to him; and, you know, I know there's a lot of
2 good reasons for that and the clerks want it; but it's an
3 important change; and that's what we're doing here; and is
4 the Supreme Court of Texas going to do this by judicial
5 action?

6 CHAIRMAN BABCOCK: Blake wants to respond to
7 that.

8 MR. HAWTHORNE: I think what we discussed in
9 the -- the clerks are fine with giving you the paper that
10 you want to provide, that the lawyers want to provide to
11 the judge, like we do at the Supreme Court. We have what
12 we call paper courtesy copies. In other electronic filing
13 rules they call them the judge's copy, and they're okay
14 with that. What they don't want to have to do is to
15 actually maintain an entire separate file and be under an
16 order from a judge saying, "You must print every document
17 that comes in."

18 MR. GILSTRAP: I understand, and I
19 understand that's the purpose of the rule. What do the
20 judges want?

21 HONORABLE DAVID PEEPLES: Wouldn't I as
22 judge -- I've got it on my computer and I want a copy,
23 can't I hit print and print my own copy?

24 HONORABLE REBECCA SIMMONS: Absolutely, and
25 the clerk would love you if you did that. This is

1 because, for instance, the clerk in Fort Bend has been
2 ordered that every single thing e-filed must be printed
3 and put in a paper file.

4 HONORABLE DAVID PEEPLES: I read the
5 e-mails, but there's an easy cure for these judges. It's
6 learn how to print.

7 HONORABLE SARAH DUNCAN: I would say,
8 though --

9 CHAIRMAN BABCOCK: Sarah.

10 HONORABLE SARAH DUNCAN: It's just like this
11 paper that I printed on my computer. It's a quarter of a
12 ream of paper and probably a cartridge. You shift costs
13 when you do that, and you're shifting the cost from the
14 clerk, whose job it is, to the court, whose job you're
15 making it; and I'm not taking a position one way or the
16 other, but it can add up to a very substantial cost.

17 MR. GILSTRAP: Including the cost of filing
18 cabinets. I mean, if I want to keep courtesy copies on a
19 number of cases I've got to put up a filing cabinet, I've
20 got to get somebody to put it in there, and it can't be
21 the clerk if the clerk doesn't want to do it, and if I'm
22 out here in podunk and I don't have an assistant then
23 basically I'm my own filing clerk. If that's what we want
24 to do, that's what we want to do, but that's what we're
25 doing, and I think we need to make no mistake that that's

1 what we're doing.

2 MR. HAMILTON: How does the clerk designate
3 the electronic version as the official document?

4 HONORABLE REBECCA SIMMONS: They feel they
5 have the power to do that under the Government Code,
6 actually. There is a provision in the Government Code
7 that allows the public official to basically decide -- and
8 most of the courts, like Travis County, those electronic
9 versions, when they go back and scan and then destroy the
10 paper so they don't have to store it, those are the
11 electronic versions. So the clerks already think they
12 have that ability.

13 MR. HAMILTON: I know, but how do they
14 mechanically designate something as the official record?

15 HONORABLE REBECCA SIMMONS: That I don't
16 know.

17 MR. HAWTHORNE: I don't think there is any
18 abracadabra or anything like that. They're just attaching
19 it into their case management system, and that's where
20 they keep their documents.

21 CHAIRMAN BABCOCK: Justice Bland.

22 HONORABLE JANE BLAND: I have two concerns.
23 One is this implies that 24 hours is soon enough to get
24 access of a record to a judge. 24 hours in some cases is
25 not soon enough. Sometimes it needs to get to a judge

1 immediately. The second is -- and Judge Jennings, who I
2 wish had not departed at the break, could speak more
3 eloquently to this because I think it's of concern to him,
4 but I will articulate the best I can, not just to him but
5 he speaks on this issue better, and it has to do with
6 Frank's comment about shifting administrative tasks onto
7 others and whether that's the best allocation of
8 resources. So a rule that says, "A judge or the judge's
9 staff may print as necessary" puts the task of printing on
10 the judge or the judge's staff, but in most trial courts
11 the judge has no staff other than clerk's office staff.

12 So I understand the problem that a
13 particular clerk is facing with a particular judge, but I
14 worry about passing a rule that is designed solely to
15 handle that one off, because I think in most instances the
16 clerks will keep the electronic record electronically, the
17 judge will hopefully only ask for a printed document if
18 the judge absolutely needs it, and probably as time passes
19 there will be fewer requests for printed materials, but
20 that to try to put this in as a rule basically shoves all
21 of that onto the judge, who then spends -- I spend a fair
22 amount of time organizing documents, printing documents,
23 downloading documents so that I can access them, all time
24 that I never had to spend prior to e-filing. I don't mind
25 doing it, but the fact is I don't get as much in terms of

1 paper as trial courts do, and I have probably a better
2 ability to manage that with the clerk staff that we have,
3 because they mostly accept stuff that goes back to the
4 judge.

5 So those are the two concerns I have, is,
6 one, this idea that the judge may not get something for 24
7 hours that he or she needs to see immediately, and
8 secondly, this idea that the judge's staff is going to
9 somehow put this in readable form for the judge when I
10 know that in the trial courts there are very few judges
11 that have staff.

12 HONORABLE REBECCA SIMMONS: Okay, and
13 excellent, excellent points and this rule is generated --
14 and really generated by the clerks in large part,
15 because -- and if you saw -- I don't know, Blake, did you
16 print out the letters that they wrote to the Supreme
17 Court, some of the clerks? I've had more comments, more
18 e-mail, and everything else from court clerks who are so
19 concerned that they're going to have to keep parallel
20 paper and electronic files, and so they said -- I mean,
21 the original request was put it in an order that a judge
22 can't order a clerk to make a copy, a paper copy, and I
23 went "What?" And so I said that's -- let's talk more
24 about what are we really talking about here.

25 So let me address, number one, the 24 hours.

1 Most -- most all of the clerks will tell you they get it
2 to the -- because of their case management systems, and I
3 think in Harris County this is true, the trial judges get
4 it like that. They get it super, super fast into their
5 system. This was kind of to be the outside, you know, you
6 have to have it done by X amount of time so it's not five
7 days later or four days later or you let it sit in some
8 queue somewhere. So that's kind of where that came from,
9 and then the other part is that these documents say they
10 come in electronically, and so the clerk is concerned
11 about just its wholesale printing of reams and reams of
12 paper and filing and whatever, but again, not -- they
13 absolutely agree that if a judge asks, "I want this oil
14 and gas case copied out," "I want things done," that they
15 should be done, so if there's a better way to write this
16 to deal with that, I think we should definitely. But that
17 was the big concern, and lots of clerks weighed in on
18 that.

19 CHAIRMAN BABCOCK: Okay. Any other comments
20 about (f)? Yeah, Justice Moseley.

21 HONORABLE JAMES MOSELEY: Part of this may
22 fit here, and part of this may fit with what we talked
23 about this morning in terms of the level of detail that
24 we're doing through these scans, but there are some
25 documents, maps, or -- and someone mentioned on the

1 criminal side photographs, where you really need fairly
2 high resolution color copies in order for the court to
3 understand on appeal what happened down at the trial
4 court, and I'm not saying that we need to do that in every
5 instance, but I do think that somewhere in this process
6 there needs to be a motion, safety valve, or something, so
7 that if you need a color copy of the map or of the
8 exhibits from trial or a high detail resolution of a
9 photograph of a murder scene, whatever it may be, that
10 that can be obtained before people start throwing away
11 original documents.

12 CHAIRMAN BABCOCK: Yeah, Justice Gaultney.

13 HONORABLE DAVID GAULTNEY: I don't know if
14 we've abandoned the acceptance for filing concept or not,
15 but I guess my question is if that's still in play, when
16 is the duty to respond to a filing? Is it triggered from
17 the deemed filing date, or there is a -- so if there's an
18 amended pleading filed, when do you answer? Is it not
19 until the clerk accepts it or how does it -- how is that
20 going to work? In other words, could I -- if I file
21 something that the clerk never ends up accepting, it's a
22 defective filing, and I've got it, the other side's been
23 served with it, we're rocking along getting ready for
24 trial and it's never been accepted, what's the effect of
25 that at trial?

1 HONORABLE REBECCA SIMMONS: So it's been
2 rejected? In 24 hours it's either accepted or rejected.
3 The default position is it's accepted unless it's
4 otherwise rejected, and I think when it's rejected does
5 rejection notice go to all -- it goes to all counsel,
6 right?

7 MR. KENNEDY: I think so, yeah.

8 HONORABLE DAVID GAULTNEY: So it's rejected
9 for a technical default?

10 MS. CORTELL: But it's deemed filed.

11 HONORABLE REBECCA SIMMONS: But we're going
12 to -- right.

13 MS. CORTELL: So then I think it's still
14 deemed filed, so your answer or response or anything --

15 HONORABLE DAVID GAULTNEY: Even though it
16 hasn't been accepted.

17 MS. CORTELL: I think.

18 HONORABLE REBECCA SIMMONS: That's where
19 he --

20 MS. CORTELL: I think that's where we were.

21 HONORABLE REBECCA SIMMONS: I think that's
22 where we discuss it more.

23 MR. HAWTHORNE: I would think so, and again,
24 if it's for noncompliance with the electronic filing rules
25 then it's probably not something substantive that should

1 affect your ability to respond to it, I think, and if it's
2 deemed filed when you deliver it to the EFSP then I would
3 think that would trigger -- I'm sorry, that would trigger
4 then I think the time running.

5 HONORABLE DAVID GAULTNEY: I mean, I
6 understand there might be a problem with defects that
7 prevent the clerk from doing their job. Okay. But if
8 it's a substantive problem, maybe it ought -- or if it's
9 something that might affect the rights of the parties,
10 maybe it's up to the opposing party to object, and anyway
11 that's just a thought.

12 CHAIRMAN BABCOCK: Okay. Marisa.

13 MS. SECCO: If it was rejected, however we
14 end up structuring that, it would have to be refiled, at
15 which point you would be responding probably to the
16 refiled document as the opposing party, and your time
17 would run from the date it was filed again, I would think.
18 I don't know exactly how this will work out in the end,
19 but I think that could address your concern possibly.

20 HONORABLE DAVID GAULTNEY: But, see, my
21 concern is you've got a trial date. The judge is not
22 going to move that trial date, and you want to get your
23 pleadings timely filed, but you can't seem to get it past
24 whatever technical defects there are. Substantively
25 you're good. You've got your cause of action pled,

1 whatever, and the other side knows you're going, but you
2 can't quite get it filed until time runs. I guess I'm
3 just wondering what the effect of that is and what the
4 other side's -- if you're telling me I guess is that it's
5 not filed until accepted and, therefore, there is no
6 obligation to respond even though substantively it states
7 cause of action or whatever.

8 MS. SECCO: Well, it wouldn't be an original
9 pleading because that wouldn't be served through
10 the e-file. You would serve that through a regular
11 mechanism.

12 HONORABLE DAVID GAULTNEY: I'm thinking
13 about an amended, amended pleading.

14 MS. SECCO: So if there's an amended
15 pleading I would think, again, you would have to refile it
16 and then it would be reserved through the EFSP, and so the
17 date of service, your date of service on the official
18 amended pleading, would be when you got -- when it
19 technically complied with the -- when it both was
20 substantively correct and complied with the technical
21 requirements of the e-filing rules.

22 HONORABLE REBECCA SIMMONS: Okay, so this is
23 practically, procedurally how it works, and then you can
24 decide what the best way to handle it. Technically what
25 would happen in that case is you filed your amended

1 pleading. Now, bear in mind that your courier, your EFSP,
2 has checked for PDF, checked it for sensitive information,
3 all kinds of things have done; but just in case the clerk
4 rejects that, doesn't accept it, rejects it, notice goes
5 back to you immediately that it's been rejected and also
6 goes to the other parties in the lawsuit. So they now
7 know it's been rejected as well. Then presumably you
8 attempt to refile it again and get it done correctly.

9 You would have done an e-service on that
10 document stating that that's the day, and it would have
11 been immediately e-served when you filed your first
12 amended and then when you filed your second amended. Now,
13 how you want to treat that rejection is something for this
14 committee to decide.

15 CHAIRMAN BABCOCK: Okay. Sarah.

16 HONORABLE SARAH DUNCAN: This again, brings
17 up my concern about having these rules divorced from the
18 regular rules. I mean, just looking at 21a as an example,
19 "Service by mail shall be complete upon deposit of
20 paper" -- you know, the litany, so I can sign a
21 certificate of service, even though it is an event to
22 occur in the future, if I know I'm going to put that
23 document in the mail that afternoon, but we're changing
24 everything with this.

25 We're giving -- we're making technical

1 compliance with the e-filing rules trump the rest of these
2 rules that people have been living with for centuries that
3 take a document to the courthouse, you get it filed, you
4 mail it to opposing counsel, and you're done unless
5 somebody takes some action to do something, like opposing
6 counsel or a judge; and we're turning that around and
7 we're making these technical requirements trump a century
8 of the way we've been doing it, and I --

9 HONORABLE REBECCA SIMMONS: I think, though,
10 this is no different than if I had a pleading and I'm
11 going to go file it at the courthouse, and say there's
12 some money associated with it, but I go ahead and sign the
13 certificate of service, and I go ahead and put it in the
14 mail to you. Okay. It's already gone. It's going in the
15 mail, but then I get to the courthouse and the clerk goes,
16 "You've got to be kidding, I need a check for 200 bucks.
17 I'm not taking that with your one dollar or whatever you
18 think it might be. Go get me some more money and then you
19 can file it."

20 Well, technically then I go back and maybe
21 then I have to go get and refile the document again, but
22 you've already -- you've already got that certificate of
23 service from the mail. This is like that in the sense
24 that when you transmit it to the EFSP you're putting it
25 over into the courier, into the mailbox, and it's going to

1 go to you; and granted, 21a needs to be amended to allow
2 for electronic service. It doesn't have it now, but I
3 don't think it's so far off of those rules, and, in fact,
4 it was based kind of on those, I think, when you look at
5 the -- the district court and county court kind of
6 templates.

7 HONORABLE SARAH DUNCAN: It's just like Pam
8 was saying earlier. Right now she can sign a certificate
9 of service because she knows she's going to put a brief in
10 the mail that evening, but now she doesn't even know when
11 it's going to be served, and we're not just talking about
12 service. We're talking about messing with the time that
13 something is filed; and sometimes the time, within minutes
14 that something is filed, is critical; and y'all are
15 talking about having to refile it; and so the time that I
16 thought that I filed it to preserve my client's rights is
17 no longer the time that it's filed.

18 MR. HAWTHORNE: Well, I think we're trying
19 to find a way to make all of this work, so let me give you
20 an example from the paper world. Somebody walks into my
21 office with a brief that has a black cover on it. Can't
22 do that. I can't put my red file stamp on it. Do you
23 want me to take this and go to the court and have an order
24 striking it, or would you like for me to tell you now,
25 "Hey, you know what, let me hold onto one of these. You

1 know, we'll put a file stamp on the inside of it. You go
2 back to the office, fix this, and we'll get this taken
3 care of today"; and to me that's the electronic equivalent
4 of me helping you get this fixed, is the electronic
5 equivalent of saying, "Let's resubmit the document." As
6 long as we're saying that when you submitted it to the
7 EFSP it was filed then you're okay. And that's what we're
8 trying to do.

9 CHAIRMAN BABCOCK: Yeah.

10 MS. BARON: I think it would help not to use
11 the words "accepted," "rejected."

12 MR. HAWTHORNE: And I don't disagree with
13 that.

14 HONORABLE REBECCA SIMMONS: And I agree.

15 MR. HAWTHORNE: And I think if -- like we
16 talked about before, if we had -- maybe take some of that
17 language from the nonconforming rule and the sensitive
18 data or from Rule 9.4 and make it clear that if it doesn't
19 conform you can require it to be resubmitted, make it
20 clear that it was filed when it was delivered to the EFSP,
21 and perhaps then we need to address Justice Gaultney's
22 issue of when do you have to respond in that situation,
23 but I think it could be worked out.

24 HONORABLE DAVID GAULTNEY: See, I just think
25 that the trial courts, JP courts, county courts at law,

1 are going to have -- as an appellate court, you know, the
2 court's going to make a decision sometimes so we kind of
3 allow things to happen, but there's a different time
4 constraint there, and they've got a trial date they're
5 working up against, and I think that there just -- it
6 might be that the system needs to tolerate a little bit
7 more imperfection in the electronic matter that's
8 eventually submitted and maybe allow if there's a
9 substantive problem with that, the opposing party to
10 object to the noncompliance, and otherwise, let the system
11 move forward.

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE DAVID GAULTNEY: Unless it
14 interferes too much with the clerk's responsibilities.

15 CHAIRMAN BABCOCK: A lot of the issues in
16 Rule 4 we've been talking about, but is there anything in
17 Rule 4 that we have not discussed that we need to point
18 out? Carl.

19 MR. HAMILTON: On Rule 4.2, unfiled
20 documents.

21 CHAIRMAN BABCOCK: Right.

22 MR. HAMILTON: Do I understand that for
23 filed documents all we do is file them with the EFSP or
24 whatever it is and then they send them on to opposing
25 counsel? We don't have to send anything to opposing

1 counsel?

2 HONORABLE REBECCA SIMMONS: Right, under
3 the -- when you e-file a document, the concept is when you
4 e-file a document it goes to the EFSP, to the EFM, and
5 that automatically service will be accomplished at the
6 same time to the designated e-mail addresses of the people
7 you want to serve. So that's for the e-filing documents,
8 yes.

9 MR. HAMILTON: Okay. So if it's an unfiled
10 document, I do it the same way, but I just tell them to
11 serve the opposing counsel or what?

12 HONORABLE REBECCA SIMMONS: Yes. You can
13 also do it if it's an unfiled and you want to do your
14 discovery the same way through the EFM. You can tell them
15 who to serve, and they will serve them.

16 CHAIRMAN BABCOCK: Marisa, were you -- no.
17 Just doing your hair? Roger.

18 MR. HUGHES: Both in 4.1 and 4.2 it says
19 the EFM will send you back proof of service. What does
20 that proof of service say? Does it actually show who or,
21 you know, that the opposing counsel actually received and
22 opened the document and who signed -- it just says, "We
23 sent it to them"?

24 MS. BARON: Yep.

25 MR. HUGHES: So it's sort of like ordinary

1 mail where you just trust the post office to get it there,
2 but you don't get a green card saying somebody signed for
3 it.

4 MR. KENNEDY: So there's a technical piece
5 to that as well with the TexFile system. The time that
6 shows of when that service was complete is when they
7 contact that e-mail server and get a successful send, so
8 if they don't get a bounce back or this e-mail address is
9 bad, if it comes back saying, yep, I received your
10 message, then it records that date and time.
11 Additionally, in that message there's a link that says,
12 you know, here's a document that -- and here's -- you've
13 been served, here's your document. When you click on that
14 link, the system then records the date and time that that
15 person clicks on that link, and so then you can tell that
16 they've actually opened a document. So you'll be able to
17 tell, yes, I delivered this to you, and you'll also be
18 able to tell and I can see when you opened it.

19 CHAIRMAN BABCOCK: Justice Gray.

20 HONORABLE TOM GRAY: Casey, what happens if
21 the mailbox is full?

22 MR. KENNEDY: It would not be delivered
23 because it would come back like a bounce back saying that
24 I can't deliver this message, the mailbox is full.

25 CHAIRMAN BABCOCK: Gene.

1 MR. STORIE: Yeah, I'm assuming that if the
2 party is represented by counsel then the service has to go
3 to counsel. Yes?

4 HONORABLE REBECCA SIMMONS: Yes.

5 MR. STORIE: But I don't think the rule
6 strictly reads that way. It just says "or."

7 HONORABLE REBECCA SIMMONS: Okay.

8 CHAIRMAN BABCOCK: Frank.

9 MR. GILSTRAP: Rule 4.2 is about unfiled
10 documents, and, you know, we have certain discovery that's
11 filed with the court and certain discovery that's not
12 filed with the court, and as I understand the reason for
13 that is to save space. Now, since we're going to all
14 electronic filing, why do we need that? Why don't we file
15 everything? I mean, it's similar with regard to the
16 clerk's record. As I understand the goal is you're not
17 going to -- at some point you're not going to designate
18 the clerk's record. You're just going to file everything.
19 It's already there. Why do we have to worry about
20 discovery if it's all going to be electronic? Who cares
21 about space?

22 CHAIRMAN BABCOCK: Well, as I recall, the
23 long ago debate about not filing interrogatories and
24 depositions and everything, it was more -- space was
25 certainly an issue, but it was more than space. There

1 were some people that didn't think all that testimony
2 ought to be in the public record --

3 MR. GILSTRAP: Okay.

4 CHAIRMAN BABCOCK: -- and there was a big
5 fight about that, so -- Justice Simmons.

6 HONORABLE REBECCA SIMMONS: And I think also
7 it's the thought of if your -- the document response, if
8 it attaches tons of documents, A, you run into your
9 sensitive data issue, but, B, also it takes up server
10 space. I mean, it will take up, you know, electronic
11 space in that regard, so I think the thought was don't
12 change too many things on the lawyers, if they're not used
13 to -- they've now gotten used to not filing that with the
14 court then maybe we don't change it, and I think that was
15 one of the thoughts.

16 CHAIRMAN BABCOCK: Carl.

17 MR. HAMILTON: What happens, as Tom said, if
18 the mailbox is full, and it doesn't get delivered? Then
19 what do we do? Do we serve them under Rule 21a, or we
20 notify them, or what do we do?

21 HONORABLE REBECCA SIMMONS: I think then
22 that probably you would serve them under 21a, and I'm
23 trying to look. We had a rule at one point.

24 MR. HAMILTON: Then this rule ought to say
25 that, if --

1 HONORABLE REBECCA SIMMONS: Yeah, no, I
2 agree.

3 MR. HAMILTON: -- they can't get served what
4 the lawyer has to do to get it served.

5 HONORABLE TOM GRAY: I mean, that seems to
6 me to be a real problem. If you think you've served them,
7 you know, on a certain date with regard to notice for a
8 hearing that, you know, it's coming up, that's already
9 scheduled and you're trying to get it done, and all of the
10 sudden their mailbox is full and they didn't get notice,
11 you can't show that you served them.

12 HONORABLE REBECCA SIMMONS: I think we can
13 modify the 4.1(d) because that basically deals with if you
14 have someone who does not have a designated e-mail address
15 and therefore can't be served by e-mail then you can go
16 and use 21a, so probably we should actually use that
17 perhaps if you get a bounce back and their mailbox is full
18 that you then -- this is the default. That's one way of
19 handling that.

20 CHAIRMAN BABCOCK: Okay. Go ahead, Peter.

21 MR. KELLY: Don't you have a burden to give
22 them a valid e-mail address?

23 HONORABLE REBECCA SIMMONS: Yes.

24 MR. KELLY: I mean, then you're shifting the
25 burden on the person who's doing the serving, and you've

1 given them an e-mail address that doesn't work, and, you
2 know, why should it be the burden on the person doing the
3 filing to then do 21a, you know, fax or mailing when if
4 the person -- when the e-mail address that's been provided
5 for service is not accepting messages?

6 HONORABLE REBECCA SIMMONS: Good point.

7 CHAIRMAN BABCOCK: Richard.

8 MR. MUNZINGER: I couldn't agree more. I
9 mean, once I've gone through what the rule says and filed
10 and sent it to the EFSM and the ESM and some bird doesn't
11 read his e-mail, that's his problem. That's not mine.
12 Why would you put the burden on the person serving? If
13 you're going to practice law, practice law. Open your
14 dadgum mail.

15 HONORABLE REBECCA SIMMONS: Good point.

16 HONORABLE SARAH DUNCAN: You don't have to
17 open it. It just has to be put in my mailbox, properly
18 addressed.

19 MR. STORIE: Right. It doesn't have to be
20 received.

21 CHAIRMAN BABCOCK: Good point. Roger.

22 MR. HUGHES: A minor point on discovery
23 issues. I've had experience is that I have to request the
24 other side sign authorizations, and I have to insist that
25 I get, as they say, something with a wet signature on it

1 back because I'm dealing with a provider such as a
2 hospital or the IRS that if they get a photocopy of a
3 signature they won't honor it. So we have -- I suggest
4 perhaps some means by which the person can say, "No, your
5 discovery response and your request for production, I need
6 a wet signature on that authorization."

7 CHAIRMAN BABCOCK: Are we going to define
8 "wet signature"? It sounds sort of dirty to me.

9 MR. HUGHES: Well, you know, what I usually
10 get is "That's not an original signature, that's a
11 photocopy."

12 CHAIRMAN BABCOCK: Yeah.

13 MR. HUGHES: And all they want to do is see
14 something that looks like that person signed that piece of
15 paper, and I know -- my experience is that there are
16 enough hospitals that they don't like processing these
17 requests for records to begin with --

18 CHAIRMAN BABCOCK: Right.

19 MR. HUGHES: -- and they will look for
20 any -- you know, they want their form and then they want
21 an original signature on their form, no photocopies, you
22 know. It's like I've got to jump through all of these
23 hoops, and I unfortunately have to insist on this, and the
24 same thing goes for some banks when you sign the
25 authorization to get records. They want to see an

1 original signature.

2 CHAIRMAN BABCOCK: Yep. Yep. Good point.
3 On Rule 5 we've also talked about a lot of these issues in
4 the context of the appellate rules, but is there anything
5 about the way it's been written here that needs comment or
6 questioning or illumination? One question I had that I
7 didn't ask this morning, and that is, Justice Simmons, was
8 the list taken from the task force report or the Supreme
9 Court Advisory or consultation with the Court or what?

10 HONORABLE REBECCA SIMMONS: Oh, the list of
11 what the sensitive data is?

12 CHAIRMAN BABCOCK: Yes, 5.2.

13 HONORABLE REBECCA SIMMONS: Okay. So that
14 was taken not only from the -- it was taken from the
15 appellate rules, and it was also taken in consultation
16 with the committee that also included Jody Hughes and
17 Kennon Peterson, or Kennon Wooten now, that is a little
18 side committee that's also working on sensitive data and
19 access to the court. So that's kind of where that came
20 from, but it's basically more or less the same things that
21 are also in the appellate rules. It just may be formatted
22 a little differently.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE REBECCA SIMMONS: And it just
25 makes a note, the footnote's a note to that Government

1 Code that does require in pleadings certain digits of the
2 driver's license number and the Social Security number, so
3 that's what that footnote is, just letting people know
4 that's why.

5 CHAIRMAN BABCOCK: Justice Hecht alluded to
6 a statute this morning that the -- I think it was the
7 Catholic church and some investigators, and there was
8 another interest group.

9 MS. CORTELL: The Boy Scouts.

10 CHAIRMAN BABCOCK: Huh?

11 MS. SECCO: Title lawyers.

12 CHAIRMAN BABCOCK: Title lawyers, and was
13 that statute taken into consideration?

14 HONORABLE REBECCA SIMMONS: Yes. Part of
15 that statute I think is that 30.014. That was by the
16 title or the real estate people. They wanted to have the
17 ability to track down people and track down things by
18 using the last three digits of the driver's license number
19 and the Social Security number, so instead of not ever
20 putting any of it in, you have to let there be three
21 digits.

22 CHAIRMAN BABCOCK: Okay. Do you know,
23 Marisa, if that was satisfactory to everybody who was a
24 stakeholder in that?

25 MS. SECCO: I don't know. I do know

1 originally as that bill was filed it required the entire
2 number and then there was some negotiation that knocked it
3 down to this last few digits, and I do know the title
4 attorneys were involved, but I don't know about the other
5 interest groups, so --

6 CHAIRMAN BABCOCK: Yeah, we had -- I
7 remember we had one guy -- we had this, you know, one of
8 these, you know, real life stories about how they tried to
9 find a guy and he turned out to be a Boy Scout leader and
10 then he molested all the little boys, and if they had some
11 more data they would have found him and all that stuff.
12 But that was then, this is now. Any other -- any other
13 thoughts about this rule? Okay.

14 MR. HAMILTON: Yeah, I have another problem.

15 CHAIRMAN BABCOCK: Yeah, Carl.

16 MR. HAMILTON: I'm still bothered by the
17 fact that -- let's just take a bank account number. You
18 may be dealing with a bank account number and hundreds or
19 thousands of checks that the bank account number no longer
20 means anything, it may not even be open, so if the client
21 that provides the documents doesn't care if that number is
22 there, why should we have to redact it? Because there
23 ought to be some kind of waiver or something.

24 CHAIRMAN BABCOCK: Yeah. So your point is
25 if it's your client's documents --

1 MR. HAMILTON: Right.

2 CHAIRMAN BABCOCK: -- and your client says
3 to you, "Look, we're going to have to put in 5,000 pages
4 of checks that have a stale bank account number, and I
5 don't want you having some young lawyer at, you know,
6 whatever, \$200 an hour sitting there redacting things, so
7 just go ahead and file it."

8 MR. HAMILTON: Yeah.

9 CHAIRMAN BABCOCK: And no big deal. And so
10 what if you follow your client's wishes and do that? Some
11 clerk is going to bounce that back at you, I guess.

12 MR. HAMILTON: That's what it says here.

13 MR. GILSTRAP: Okay, draw a rule.

14 CHAIRMAN BABCOCK: Huh?

15 MR. GILSTRAP: Okay, draw a rule. How do
16 you draw a rule to let people do it?

17 CHAIRMAN BABCOCK: I don't know. I'm just
18 trying to flesh out his hypothetical.

19 MR. HAMILTON: You just file a paper with it
20 saying that the client doesn't need these redacted anymore
21 or something.

22 CHAIRMAN BABCOCK: Maybe if you had a wet
23 signature of the client.

24 MR. HAMILTON: Yeah, in blue.

25 HONORABLE REBECCA SIMMONS: Well, except it

1 looks like if you want to get rid of the sensitive data,
2 you file a motion with the clerk to strike it or if it's
3 your own data you're not going to file -- I mean, who's
4 going to file a motion to strike it, I guess is kind of
5 what the thought is. If you decide your client doesn't
6 want to pay the money to redact it all and you file it, is
7 the other side going to move to strike that? I don't
8 know.

9 CHAIRMAN BABCOCK: Probably not. Roger. I
10 wouldn't think.

11 MR. HUGHES: I mean, there is a tension
12 here, because 5.3 says, "You may not file," which is
13 mandatory the way I read the Government Code.

14 CHAIRMAN BABCOCK: Yeah.

15 MR. HUGHES: But then 5.4 says, "The court
16 may strike," and I guess this may have reflect a
17 philosophical issue as to who is responsible for keeping
18 this data out of the public domain; and if you're going to
19 put the burden on the filer to eliminate it, then I don't
20 see that the court has a duty to police the document to
21 strike it. That is -- the burden should be on the other
22 side or somebody other than the clerk. On the other hand,
23 it is the court's rule, and you would like clerks to
24 enforce rules that judges create in judge's life.

25 All I know is that in -- I've been in the

1 Federal system, and I have gotten orders to strike, but
2 I've never had a case where they just flat refused because
3 somebody messed up, didn't redact everything. Instead
4 what happens, because the judges there read everything --
5 I'm just saying I think you have to make a philosophical
6 decision, is do you want the clerks to enforce this rule
7 and possibly kick stuff back, or do you want to put the
8 risk on the party saying it's your job to police this
9 rule.

10 CHAIRMAN BABCOCK: Yeah. Carl.

11 MR. HAMILTON: Well, I was just going to say
12 that the only one to complain would be the one filing it;
13 and if they file it without redacting it that may be some
14 kind of implied waiver anyway; but if the clerk has to
15 have something, maybe whatever pleading goes along with
16 the filing they could just put a statement in there that
17 the party doesn't care to have to redact everything or
18 something.

19 CHAIRMAN BABCOCK: Yeah. Justice Simmons.

20 HONORABLE REBECCA SIMMONS: I want to make
21 it clear there was almost a provision put in here. The
22 clerks do not want to be responsible for policing this,
23 for redacting anything, or anything else; and they made it
24 very clear; and we also almost put a provision in there
25 saying nothing in here puts the burden on the clerk to do

1 any of that because they don't want -- they don't want
2 that responsibility. There's no way for them to really
3 know does a party want it, not want it, is it necessary
4 for the case or not. So the clerks don't want anything to
5 do with it, which is why it kind of went to, okay, so if
6 somebody really doesn't want it, we'll let our adversarial
7 system go to play and move the court to strike it, but the
8 clerk's not going to be -- doesn't want this
9 responsibility. I'll just let the committee know.

10 MR. HUGHES: Well, perhaps then the tweak is
11 to make it clear that 5.3 is that the party filing the
12 document may not file it.

13 HONORABLE REBECCA SIMMONS: Okay.

14 MR. HUGHES: And that way that doesn't imply
15 the clerk is supposed to be the cop.

16 HONORABLE REBECCA SIMMONS: Okay.

17 CHAIRMAN BABCOCK: Sarah, then Peter.

18 HONORABLE SARAH DUNCAN: See, in our
19 adversary system of justice, I'm not saying I would ever
20 do this, I want your client to have to pay \$200 an hour
21 for the associate to redact all of this stuff. So if --
22 I'm serious. I mean, we all know people who --

23 CHAIRMAN BABCOCK: And why do you want that?

24 HONORABLE SARAH DUNCAN: -- realize that
25 time is money, and money wins lawsuits.

1 MR. GILSTRAP: How about this, maybe I'm
2 your client's former business partner and I don't think
3 that data ought to go out. It's not clear who owns the
4 account.

5 HONORABLE SARAH DUNCAN: Or a successor
6 corporation who does own that account.

7 MR. GILSTRAP: I mean, I could see them do
8 it by agreement, but, you know --

9 CHAIRMAN BABCOCK: But you're the former
10 partner and you're not a party to the case?

11 MR. GILSTRAP: No, I'm a former partner, and
12 I am a party to the case.

13 CHAIRMAN BABCOCK: Oh, you are a party.

14 MR. GILSTRAP: And I don't think Carl ought
15 to put this in the public record. It doesn't bother him,
16 it bothers me.

17 CHAIRMAN BABCOCK: Well, but Carl's the
18 lawyer, he doesn't care. He's not your partner.

19 MR. GILSTRAP: I understand. His client --

20 CHAIRMAN BABCOCK: Your partner is Skip, so
21 the complaint is between you and Skip.

22 MR. GILSTRAP: Yeah, I understand that.

23 MR. WATSON: Oh, heaven help us.

24 CHAIRMAN BABCOCK: And Skip doesn't want to
25 pay \$200 an hour to Carl's, you know, measly associate.

1 MR. GILSTRAP: I understand, but it's my
2 bank account, too, and I don't want the records out in the
3 public, in public.

4 CHAIRMAN BABCOCK: You and Skip take this
5 outside. David.

6 MR. JACKSON: I think we're missing a little
7 bit of a point here, that what's going to happen is
8 somebody in Afghanistan is going to mine all of this
9 information and steal your identity, and it's not going to
10 be important to anyone until their identity gets stolen,
11 and then they're going to go back on their lawyer that let
12 all of this stuff out, and I think that's going to be the
13 issue, when you start having people being able to mine
14 court documents and steal identities and steal money, and
15 it's the lawyer's fault for not having redacted it.

16 CHAIRMAN BABCOCK: And Carl being the
17 careful lawyer that he is has got an e-mail from Skip
18 saying, you know, "I don't want this stuff redacted. It's
19 too expensive."

20 HONORABLE TOM GRAY: No, it wasn't an
21 e-mail. It was a wet signature.

22 CHAIRMAN BABCOCK: Oh, sorry, a wet
23 signature, even better.

24 MR. HAMILTON: In blue. In blue.

25 CHAIRMAN BABCOCK: In blue.

1 HONORABLE REBECCA SIMMONS: As a note of
2 hesitation, I think there is some people from Tarrant
3 County that, of course, they ran into this problem of data
4 mining and basically creating all kinds of false
5 identities based on the documents that were on the
6 internet that had this kind of information, so it may be
7 that you just really don't want this information in the
8 system.

9 CHAIRMAN BABCOCK: Yeah. Well, that is for
10 sure the concern. I mean, we heard that -- and I want to
11 think it was like four or five years ago, Sarah, wasn't
12 it, that we had that whole --

13 HONORABLE SARAH DUNCAN: It could be now.

14 CHAIRMAN BABCOCK: Huh?

15 HONORABLE SARAH DUNCAN: I still get tired
16 thinking about those conference calls, but, yes, it could
17 be that long ago.

18 CHAIRMAN BABCOCK: Yeah. And that was the
19 big thing about, you know, identity theft and everything.

20 HONORABLE SARAH DUNCAN: And there are
21 articles on data miners like everyday; and I keep thinking
22 I'll send them to all of y'all; and I think, no, let's
23 just put that to bed.

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE SARAH DUNCAN: But I have to say

1 that a third party, not a party to the litigation, is who
2 was so upset about my opinion in Richard's case where I
3 didn't know that there was the confidentiality agreement
4 on these business records and sensitive data. It could
5 easily be someone who is not a party to the case, who is
6 the successor corporation who has inherited this bank
7 account; and Carl's client doesn't care because he doesn't
8 have any shares in that corporation; but Skip, who is now
9 the sole shareholder, cares a lot if that's released.

10 CHAIRMAN BABCOCK: Right.

11 HONORABLE SARAH DUNCAN: So I think these
12 might need a little bit of tweaking.

13 CHAIRMAN BABCOCK: Yeah. Yeah. Okay.
14 Anybody else?

15 MR. KELLY: I wanted to touch back on --

16 CHAIRMAN BABCOCK: Oh, yeah. Peter, I'm
17 sorry.

18 MR. KELLY: No problem. I wanted to go back
19 out of order to 4.1(a). I was looking at the designated
20 e-mail address, about the full mailbox issue. It seems to
21 suggest that e-mailing it to the designated e-mail address
22 would be sufficient, but it might help to have that
23 actually clarified.

24 HONORABLE REBECCA SIMMONS: Which one, I'm
25 sorry?

1 MR. KELLY: 4.1, electronic service of
2 documents.

3 HONORABLE REBECCA SIMMONS: Yes.

4 MR. KELLY: It might help if there was a
5 more clear and direct statement that e-mail to the
6 designated e-mail address shall constitute service or
7 something like that.

8 HONORABLE REBECCA SIMMONS: Okay.

9 MR. KELLY: And then I was reading (b), and
10 the second sentence of (b) is "When e-service is completed
11 after 5:00 p.m. recipient's time." Who is the recipient,
12 and if it's the opposing counsel, why is the recipient's
13 clock governing rather than the person who is actually
14 doing the serving? I guess I'm asking on behalf of the
15 people in El Paso.

16 HONORABLE REBECCA SIMMONS: Right. No, you
17 know, I'm trying right now -- I actually looked at that
18 again, and I'm trying to remember where -- where it came
19 from.

20 MR. KELLY: I guess part of --

21 HONORABLE REBECCA SIMMONS: It came from
22 Rule 21, actually. If you go look at the fax filing rule,
23 it says it's "documents after 5:00 o'clock p.m. local time
24 of the recipient shall be deemed served the following
25 day." That's just --

1 MR. KELLY: But here we have the middle man.
2 We have the service who is to be constituted -- to be
3 considered a recipient --

4 HONORABLE REBECCA SIMMONS: Good point.

5 MR. KELLY: -- and then the party receiving
6 could be the recipient, the served party, but in faxes
7 it's just --

8 MS. BARON: But the question is, is it
9 before or after 5:00 o'clock if you are in Austin serving
10 it at -- submitting it at 5:00 o'clock. I don't know, if
11 you're in El Paso submitting it at 4:55, that's past 5:00
12 o'clock to me in Austin as the recipient.

13 MR. KELLY: Right.

14 MS. BARON: So when does my three days
15 start? So you base it on the recipient's time, I think is
16 why the rule was written that way.

17 MR. KELLY: What if you have, say, a pro hac
18 vice in New York, which I actually have in a case right
19 now? So I have to serve things according -- by 5:00
20 o'clock New York time?

21 MS. BARON: Right.

22 MR. KELLY: Just because he's in New York?
23 Or what if he has local and -- you know, lead counsel is
24 in New York, local is in Houston. When does the clock
25 start running?

1 MS. BARON: Well, you have that problem
2 right now, but --

3 MR. KELLY: With faxes, but --

4 HONORABLE REBECCA SIMMONS: Right.

5 CHAIRMAN BABCOCK: Yeah, Judge Peeples.

6 MS. BARON: I think the idea is you can't
7 send it after office hours to sandbag people, was the
8 point of the rule.

9 CHAIRMAN BABCOCK: Judge Peeples.

10 HONORABLE DAVID PEEPLES: I want to go back
11 to the data mining issue. I think we need to think very
12 carefully about unintended consequences here; and, you
13 know, tradeoffs will need to be made; but to the extent
14 that we're encouraging a bunch of sensitive information
15 that might not get redacted, especially third parties,
16 witnesses, and so forth, we ought to be sure we've thought
17 about what do we gain by putting that on the internet and
18 what are the risks, unintended risks if we do it. Does it
19 matter, Rebecca, for example, if exhibits are not
20 searchable? In other words, these data miners, do they
21 search for things or they just get on and go page after
22 page?

23 HONORABLE REBECCA SIMMONS: Oh, no. They
24 search. It's electronic. It's automated.

25 HONORABLE DAVID PEEPLES: Well, I would ask

1 then that we ought to weigh what do we gain by making all
2 of this be searchable, which is -- I can't remember if
3 that was this morning or this afternoon that that's a
4 requirement.

5 HONORABLE REBECCA SIMMONS: Yeah. It's for
6 -- that probably is much more important for the appellate
7 rules, because they desperately want it searchable. For
8 the trial court it's just for the ease ultimately of the
9 lawyers who will have access to the court filings and that
10 sort of thing. They'll be able to search them as well,
11 and that's all it's -- it's a matter of convenience for
12 the lawyers that want to look at the documents, so --

13 MR. KENNEDY: And to add to that, though, if
14 you have a case at the trial court level, and it goes up
15 onto --

16 HONORABLE REBECCA SIMMONS: Right. That's
17 right.

18 MR. KENNEDY: -- appeal, you're going to
19 want the record to be essentially searchable.

20 HONORABLE REBECCA SIMMONS: So it has to be
21 what was filed, yeah.

22 HONORABLE DAVID PEEPLES: But can't we trust
23 the lawyers to do the searching? Do we need to let the
24 public be able to search it? I think that's a question
25 that should be asked and pursued.

1 HONORABLE REBECCA SIMMONS: Okay. In terms
2 of the access, the ultimate public access and stuff that
3 goes on the internet?

4 HONORABLE DAVID PEEPLES: Yeah.

5 HONORABLE REBECCA SIMMONS: That's what
6 you're talking about. Yeah. Okay.

7 HONORABLE DAVID PEEPLES: And it seems to me
8 to -- we're putting a lot of weight on the idea of
9 redaction to protect people. Another thing to do is to
10 minimize the searchability, minimize the occasions the --
11 the documents that are opened up. I mean --

12 HONORABLE REBECCA SIMMONS: And I will tell
13 you --

14 HONORABLE DAVID PEEPLES: -- this is a
15 serious, serious thing --

16 HONORABLE REBECCA SIMMONS: It is.

17 HONORABLE DAVID PEEPLES: -- and I think we
18 need to weigh the benefits that we get from -- I'm not
19 talking about the briefs and pleadings search --

20 HONORABLE REBECCA SIMMONS: Right.

21 HONORABLE DAVID PEEPLES: -- and accessible,
22 but weigh the benefits against the potential costs and
23 risks, and I'm not sure we've done that.

24 HONORABLE REBECCA SIMMONS: But I will tell
25 you this, and this is one of the things that's entering

1 into the sensitive data, is that some of the clerks in the
2 larger counties have a very, very impressive redaction
3 software that actually runs through documents that were
4 previously filed, hard copy, they then scan them and they
5 want to put them on the internet. They run them through
6 a basically a type of software that was evolved from
7 facial recognition software, and it looks for Social
8 Security numbers and all of this sensitive data, and it
9 has a very high percentage of successful redaction on
10 these things, and the clerks are already doing that.

11 Also, if you ever have used or gotten a
12 document through something -- a company called iDocket,
13 which is a private company which actually is contracting
14 with the district clerks. They upload all of the district
15 clerk's documents every night and then they put them on
16 the internet. Well, they're using redaction software to
17 get rid of all the -- you know, anything that might be
18 filed. So they're trying to kind of start by definitely
19 putting in redaction software to try and avoid what you're
20 talking about, but I agree, it's a serious problem.

21 HONORABLE DAVID PEEPLES: But we're making
22 it possible for perverts in their office, leaning back,
23 you know, at their computer with nothing but time to just
24 dig and probe.

25 HONORABLE REBECCA SIMMONS: Yeah.

1 HONORABLE DAVID PEEPLES: That's a serious
2 matter.

3 CHAIRMAN BABCOCK: Sarah.

4 HONORABLE SARAH DUNCAN: Well, and it's
5 compounded by giving the clerk the authority or discretion
6 to decide whether the digital record will be the only
7 record, because with practical obscurity there was some
8 protection for some of this information by virtue of
9 proximity, ease of accessibility, but if the digital
10 record is the only record and we are not giving the public
11 access to that record, there's substantial problems with
12 that.

13 CHAIRMAN BABCOCK: David, is the perversion
14 you're talking about, sitting back in your office looking
15 at legal documents? Is that -- just to clarify.

16 All right. Well, Blake left before I could
17 thank him for everything he's done and for hanging with us
18 until almost the end, but, Justice Simmons, thank you.
19 It's a terrific work product, and you may think we've been
20 hard on you, but this is nothing --

21 HONORABLE REBECCA SIMMONS: Oh, no.

22 CHAIRMAN BABCOCK: -- compared to what we
23 usually do, and, Casey, thank you for your help, and we
24 can report to the Court that we've gotten through these
25 rules, and we'll have a record created that they can

1 consider, and they may ask for further work from us or
2 maybe they may not. But no meeting tomorrow obviously,
3 and if everybody could be sure to pick up their cans and
4 glasses and stuff and put them in the trash, that would be
5 great, and thanks until our next meeting.

6 And, Judge Peeples, we will get a date out,
7 a tentative date for the summer. We've got to check with
8 the hotel, and we've got to check with, you know, other
9 people before we can get a date.

10 HONORABLE SARAH DUNCAN: We have two dates
11 scheduled, I think.

12 CHAIRMAN BABCOCK: Do we? In June and
13 August?

14 HONORABLE SARAH DUNCAN: 7th of June and the
15 23rd of August.

16 CHAIRMAN BABCOCK: Okay. So it would be a
17 July meeting if we have one.

18 (Adjourned at 5:00 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

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