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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 29, 2017

(SATURDAY 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 29th day of April,
2017, between the hours of 9:00 a.m. and 12:05 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 <u>Vote on</u>	<u>Page</u>
5 State Bar Rules, Article IV, Section 5(A)(3)	27491
6 State Bar Rules, Article IV, Section 5(A)(3)	27498
7 State Bar Rules, Article IV, Section 5(A)(3)	27499
8 State Bar Rules, Article IV, Section 5(A)(3)	27503

9
10
11
12 **Documents referenced in this session**

13 17-09	Report on Suggested Changes to TRCP 21a, 14 21c, and 57
15 17-10	Subcommittee Report - State Bar Rules, Article IV, 16 Section 5(A)(3)

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2 CHAIRMAN BABCOCK: All right. Welcome back,
3 everybody, and Mr. Orsinger has joined us, which promises
4 for a much more lively session today than we had yesterday
5 without --

6 MR. ORSINGER: I've got to carry the load
7 for the other two.

8 CHAIRMAN BABCOCK: Yeah, we had it without
9 either you or Munzinger.

10 MR. ORSINGER: Must have been very dull.

11 CHAIRMAN BABCOCK: It was ridiculous. We
12 all fell asleep.

13 MR. LOW: We went out and found him and
14 brought him in.

15 MR. HUGHES: Judge Bland livened it up.

16 MR. ORSINGER: She said she was channeling
17 me yesterday.

18 CHAIRMAN BABCOCK: Buddy dozed off several
19 times.

20 MR. LOW: I said we can't even start.

21 MR. ORSINGER: I'm sorry. I was doing a
22 public duty. It was not self-interest or anything.

23 CHAIRMAN BABCOCK: Okay. So let the record
24 reflect that yesterday Mr. Orsinger was doing a public
25 duty. All right. So are you going to take us through

1 these Rules 21, et al?

2 MR. ORSINGER: Yes. They are not
3 controversial, but -- well, they were controversial up
4 until this discussion, but they come from -- these
5 recommendations have to do with giving notice and serving
6 documents in connection with litigation, and they
7 originated from the State Bar of Texas Committee on Court
8 Rules, and that committee has forwarded a report to
9 Justice Hecht, and it's on the back part of this packet
10 that you have. And what that subcommittee did -- what
11 that committee did was they have the current Rules, 21a,
12 21c, and 57, and then they have proposed changes.

13 So what our subcommittee did was to discuss
14 all of their proposed changes and then to think through
15 what we felt about them and whether we saw any
16 consequences that need to be discussed, and so the front
17 of the packet that you have is our committee report. I'm
18 going to propose that we go through our subcommittee
19 report and just use the other committee as background
20 material

21 CHAIRMAN BABCOCK: Sure, absolutely.

22 MR. ORSINGER: So back on September 1 Chief
23 Justice Hecht referred to the entire SCAC 21a, 21c, 57.
24 244 is in the same sentence, but it's not in our
25 subcommittee, so we didn't address it. The first thing to

1 look at is the proposed change to Rule 21a, and there were
2 six proposed changes. And, Chip, I would suggest that we
3 discuss each separately, because I'm afraid if we don't we
4 may not get committee comment on some.

5 CHAIRMAN BABCOCK: Yeah. That's fine.

6 MR. ORSINGER: Okay. So we'll start with
7 Arabic (1), subdivision parenthesis (1). The proposed
8 change to 21a would permit unfiled discovery to be served
9 by e-mail, and although I said these issues were not
10 controversial, I wasn't saying that my subcommittee agreed
11 on whether it was advisable. On most of these we had
12 differing opinions. Some didn't care, some felt like no
13 change was necessary, some proposed the change, and some
14 opposed the change. So this permitting unfiled discovery
15 to be served by e-mail was kind of split. Some of us were
16 uncomfortable with that. Others were saying that's just
17 fine, that's the way of the future. Just yesterday I
18 think Martha Newton sent out an e-mail from someone in the
19 Dallas Bar that was pretty upset about the suggestion of
20 serving discovery by e-mail.

21 The advantage is that we now have e-mail
22 service for filings, and the custom at least in my
23 practice is the lawyers communicate with each other by
24 e-mail almost every time that they do a filing. So you
25 end up getting two notices. One is the e-file notice, and

1 one is the direct notice. However, some lawyers don't
2 send an e-mail confirming their filing; and they're just
3 relying on the e-filing system to give you notice that
4 they filed a motion and have a setting; and if you have an
5 active trial practice you might get 6 or 12 of these
6 notices a day; and you pretty much have to open each one
7 of them to figure out what case it is, what got filed, and
8 whether there's a setting. And if you're away from your
9 desk all day or have two days worth of e-mails to catch up
10 on, sometimes, you know, stuff can slip by; and that has
11 happened to me a couple of times where notice of a hearing
12 slipped by and I didn't get it.

13 Now, on the e-filing system you can elect to
14 put anyone on the notice string that you want to. So I
15 have two paralegals and myself and whatever lawyer is
16 assisting me are all listed as recipients on the e-filing
17 notice. So even if I'm out of the office or two of us are
18 out of the office, somebody will probably get the e-file
19 notice, but if you're doing -- serving discovery directly
20 from one e-mail sender to one e-mail recipient and that
21 e-mail recipient is a lawyer who is out for the week or a
22 paralegal who is out for the week, then no one knows that
23 they've just received that; and so discovery, of course,
24 is not as deadly if you miss that as if you don't show up
25 for a hearing; but still, I think there may be some

1 concern that just allowing the service of discovery by one
2 targeted e-mail to an individual may present some
3 mechanical problems.

4 Additionally, sometimes e-mail servers are
5 broken. My office -- I have two offices. My main office
6 has its own e-mail server, and if that e-mail server goes
7 down, we'll lose e-mails for three days. My other office
8 has a connection with Rackspace, and so they never go
9 down, but sometimes the internet goes down in my area, and
10 you can't access your e-mails. So, you know, e-mail
11 technology is wonderful, and by the way, in my own
12 personal practice I do serve discovery by e-mail, and I
13 serve discovery responses by e-mail because the lawyers
14 that I practice with, we all like e-mail, and we just do
15 it. I don't even have a written Rule 11 agreement. We're
16 just sending notices and communicating with each other, so
17 that idea of serving discovery by e-mail in my practice
18 works just fine, but I'm just worried about the people who
19 don't have as robust a connection to the internet. They
20 don't have any IT people to help them.

21 So, as I said, my subcommittee was divided
22 on the issue, and so I guess with that I'll lay it out
23 there that e-mail does seem to be the wave of the future.
24 I think it's convenient. I think it saves the clients a
25 lot of money. It's easy to forward things to your client

1 when you receive them by e-mail, but is the technology
2 reliable enough? Are we willing to commit to it? And I
3 also would say that I believe -- and correct me, Martha,
4 anyone who knows -- I think licensed lawyers are required
5 to have e-mail addresses, aren't they, or not?

6 MS. NEWTON: Yes. Now you have to give the
7 State Bar an e-mail address for electronic service, every
8 licensed lawyer does.

9 MR. ORSINGER: Okay. So this is almost like
10 a follow-up step to making everyone file electronically,
11 and all the moaning and groaning that we heard about that
12 and I think that's just a fantastic system. It's speeded
13 things up. It's cheap. So, you know, this moaning and
14 groaning of the same kind, but, you know, maybe this is
15 the time for us to just go forward. So --

16 MS. GREER: I think most trial lawyers think
17 we already have e-mail service of discovery, and I'm in
18 favor of it. It doesn't kill trees, the postage issue,
19 the fax. Who has a fax machine? I mean, we have to
20 maintain -- Pam was just saying we ought to get rid of the
21 fax machine, which I wholeheartedly support, which no one
22 uses them, and this is a much more efficient way of doing
23 it, and I think there are ways that we could safeguard. I
24 don't know whether you build them into the rule or local
25 practice; but in my practice if discovery is served it

1 goes to every party and all of the people who are on the
2 list, because you just hit "reply to all" from an old
3 e-mail; and you make sure everybody is there; and so it
4 will go to paralegals who are also on the stream. We
5 could build in the rule that you have to serve everybody
6 who is registered on the website, the court's official
7 website, for that case.

8 MR. ORSINGER: Great idea.

9 MS. GREER: But I have not seen an issue in
10 my practice, and I do a lot of trial work, too, where
11 someone has not gotten discovery because of an e-mail, and
12 generally if a crisis comes we hear about it from
13 somebody. So --

14 CHAIRMAN BABCOCK: Kennon.

15 MS. WOOTEN: Speaking for the court rules
16 committee that wrote the proposal, I'll tell you that the
17 thought process was that service by e-mail of discovery is
18 already permitted in the rule because the rule says,
19 "Documents not filed electronically can be served via
20 e-mail." The idea was to clarify a right that exists in
21 the rule.

22 CHAIRMAN BABCOCK: Okay. Any other
23 questions?

24 MR. ORSINGER: Well, in response to that,
25 Chip, one of my subcommittee persons said that it was

1 clear that you could serve discovery or how you could
2 serve discovery. It's just kind of, you know, discovery
3 is served without saying; and he proposed, without giving
4 away his identity, that "Discovery can be served in the
5 manner prescribed in Rule 21a." And that might be stuck
6 in the discovery rules or stuck in this rule to make
7 explicit something that we all just kind of assume, which
8 is that these rules about serving motions also apply to
9 discovery.

10 CHAIRMAN BABCOCK: Is there any harm that
11 can come from doing this?

12 MR. ORSINGER: Just the mechanics that I'm
13 talking about, about servers down and stuff like that. I
14 mean, that's all I can think of.

15 CHAIRMAN BABCOCK: Kennon.

16 MS. WOOTEN: One of the potential harms that
17 exists in the current rule is that the current does not
18 address when e-mail service is complete, and so one of the
19 harms that can come about is somebody saying, "You didn't
20 serve it on me. That never happened. I didn't get it."
21 And so the idea in the proposal, drilling down a little
22 bit more, was to specify as for other types of service
23 when service by e-mail is complete and to require service
24 on the e-mail address that's condoned in the State Bar
25 rule to minimize the chances of somebody saying you sent

1 it to the wrong place.

2 CHAIRMAN BABCOCK: Yeah, but that's a
3 different issue. I mean, just serving discovery by
4 e-mail --

5 MS. WOOTEN: It happens all the time now.

6 CHAIRMAN BABCOCK: I know, I can't see the
7 harm in it. But maybe there are unintended consequences
8 here that we don't know about.

9 MS. WOOTEN: The biggest concern I think is
10 it getting lost in the shuffle because so many people get
11 so many e-mails each day, and that is something that was
12 discussed extensively at the court rules committee level,
13 but again, the thought process was if the attorney knows
14 which e-mail address this discovery may go to, it reduces
15 the risk of the e-mail getting lost.

16 CHAIRMAN BABCOCK: Yeah, Justice
17 Christopher.

18 HONORABLE TRACY CHRISTOPHER: My only
19 suggestion while we're tinkering with how you serve
20 discovery is that we require people to number what they've
21 produced. It's not in the rules, and if people were
22 required to number what they've produced, it would be so
23 much easier in the trial court when we have disputes about
24 what was and wasn't produced. Because you do your
25 document dump and you say, "I'm giving you Bates stamps 1

1 through 2,000, you know, 35" and then everybody knows
2 what's been produced.

3 CHAIRMAN BABCOCK: Yeah. Yeah. Tom.

4 MR. RINEY: I really agree with that.

5 Because particularly opposing counsel that are problems
6 are the ones, "Well, I've already produced it."

7 "Well, where is it?"

8 "Well, it's in that stack of a thousand that
9 I served on such-and-such date." I've been actually
10 incorporating that into docket control orders, and I think
11 it's an excellent idea.

12 MR. ORSINGER: So by numbering you're
13 talking about Bates numbering each page?

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE TRACY CHRISTOPHER: Yes. And
16 that, you know, if you include it in your e-mail, "I'm
17 sending you, you know, the document requests, Bates 1
18 through, you know, 1,500" then people will know that
19 that's what they should, you know, find in the attachment
20 at some point. So, I mean, it's just a way of tracking
21 and understanding what has been produced. That is just my
22 suggestion. I mean, I think it's done in a lot of big
23 cases already, but it would be useful even in small cases.

24 CHAIRMAN BABCOCK: Holly. By the way, does
25 everybody know Holly? She's the rules attorney for the

1 Texas Court of Criminal Appeals.

2 MR. ORSINGER: Oh, yeah.

3 MS. TAYLOR: So we routinely when I was
4 working for the DA's office did do service of discovery
5 via e-mail, but we would -- we would always send a form
6 that we wanted the other party to sign to acknowledge
7 receipt of the discovery. We did number the submissions
8 as you suggest; and I think that's critical, and then the
9 form they would need to date, sign, scan, and send back
10 but a lot of people would not, so we started sending the
11 e-mails with return service requested, which is a function
12 I think of a lot of e-mail programs; and so, I mean, I'm
13 not saying that you shouldn't have transmission as the
14 receipt of it; but sometimes it goes into people's spam
15 folders and things like this, so the person really didn't
16 receive it. So that's one way to address that is to use
17 this automatic function of return service requested via
18 the e-mail.

19 But the other thing is my husband works in
20 the computer business. He's a computer programmer, and he
21 won't send a lot of things via e-mail because he's
22 concerned about security because, of course, it's
23 traveling through all of these servers to get to the
24 recipient, so that is an issue with serving confidential
25 materials via e-mail.

1 CHAIRMAN BABCOCK: Good point. Frank.

2 MR. GILSTRAP: Well, you know, I'm going to
3 go back to the blizzard of e-mail problems because you not
4 only are getting -- you're getting all of this stuff that
5 you never asked for, but you're getting all of these
6 notices on all of these cases. For example, in Tarrant
7 County we've got the Chesapeake litigation on royalties,
8 and there's an MDL court, and Thompson & Knight probably
9 sends out 20 filings a day that hit your e-mail box once
10 you're in the case. I've settled out two cases. I'm no
11 longer there, but it's like the roach motel. You check
12 in, you can't check out. You can never get off the
13 e-mail. You've got to have somebody -- maybe this is --
14 maybe we all should be doing this, sit down and open every
15 e-mail. If there was some way to identify the case in the
16 e-mail address somehow so you could look at it and see
17 that might help, but it's a huge problem.

18 CHAIRMAN BABCOCK: Okay. Justice
19 Christopher.

20 HONORABLE TRACY CHRISTOPHER: Well, one
21 other thing that I'm sure most of the people here in this
22 room are familiar with that in some cases people don't
23 actually attach the discovery. They just send you a
24 computer link and a password for you to go get it there.
25 So I think we just have to be careful how we word it, too,

1 in terms of attachment.

2 CHAIRMAN BABCOCK: Yeah. Good point. Any
3 other comments? With respect to this language, including
4 "discovery materials not to be filed," is there any -- I
5 mean, would people think that we should not do that?
6 Anybody think we should not do that? Okay. So, Richard,
7 there you go.

8 MR. ORSINGER: Okay. So let me clarify
9 then. The discovery materials were not just focusing on
10 the production. You're also focusing on interrogatories,
11 request for production, request for disclosures. So is
12 the word "materials to be filed" inclusive enough? Does
13 it include the person initiating the discovery as well as
14 the one responding, or does "materials" tend you toward
15 thinking this is just a production component of it?

16 CHAIRMAN BABCOCK: See, if you weren't on
17 this subcommittee you would have raised that comment, but
18 now you draft a rule and then you criticize your own rule.

19 MR. ORSINGER: Right. No, I didn't draft
20 this. I'm just reviewing it.

21 CHAIRMAN BABCOCK: You're the presenter of
22 the rule.

23 MR. ORSINGER: I know, so that means I take
24 all the bullets for it.

25 CHAIRMAN BABCOCK: That's right. So

1 answering your own --

2 MR. ORSINGER: Well, perhaps I made a
3 mistake, perhaps we should broaden the word up, "including
4 discovery items not to be filed," or I don't know.

5 CHAIRMAN BABCOCK: "Materials"?

6 MR. ORSINGER: That could be picking nits
7 here.

8 CHAIRMAN BABCOCK: Well, it doesn't say you
9 have to do it. It says "may be served," so how is that
10 going to play out? I serve answers to interrogatories to
11 you by e-mail, and you say, "That's not good service, I
12 didn't get them in time. Your objections are waived."
13 And so you go to court, and you have an argument over what
14 the word "materials" means?

15 MR. ORSINGER: No, I was more worried that
16 if I was initiating discovery like sending a request for
17 production, is that discovery materials, or is it only the
18 actual documents I'm producing that are materials? It's
19 the choice of the word "materials" is confusing me a
20 little bit because it lends me to think this is the
21 response, this is the stuff I'm delivering, and not the
22 request.

23 CHAIRMAN BABCOCK: Okay. Well, you
24 shouldn't have used the word then.

25 MR. ORSINGER: I apologize for my choice of

1 word.

2 CHAIRMAN BABCOCK: What -- do you think
3 there's a better word for that, Richard?

4 MR. ORSINGER: How about "discovery request
5 or response," Buddy says.

6 CHAIRMAN BABCOCK: "Including discovery
7 request or response."

8 MS. GREER: I think "materials" is better
9 because you want to make it clear that we can also produce
10 the documents, the document production, and that's not a
11 response. That could be interpreted as not a response.

12 MR. LOW: That's usually in response,
13 though, the discovery materials you file are in response
14 to a request for it, isn't it?

15 CHIEF JUSTICE HECHT: Just clarify it in a
16 comment.

17 MR. ORSINGER: Yeah, we've clarified it in
18 the record here, so --

19 CHAIRMAN BABCOCK: Yeah, everybody's reading
20 this record. The whole Bar reads this record religiously
21 every other month.

22 MR. ORSINGER: Well, it's on the internet.
23 Just do a Google search for Chip Babcock.

24 CHAIRMAN BABCOCK: We ought to put it on my
25 microsite then. All right, yeah, let's --

1 MR. ORSINGER: Okay. Item two is the
2 proposal would permit parties to agree to some other form
3 of delivery of discovery, and I think that means other
4 than -- other than through e-mail or through any of the
5 traditional manners of delivery. I'm not quite sure I
6 understand the purpose of that on account of the parties,
7 of course, under Rule 11, they can agree to anything they
8 want, and so I'm not sure that a specified rule about
9 entering into agreements on discovery is necessary since
10 we have a broad rule that lets you enter into any
11 agreement you want.

12 MR. LOW: But Rule 11 has to be signed and
13 in writing. A lot of times lawyers just get on the phone
14 and say, "I'll deliver it to your office."

15 MR. ORSINGER: Well, then if that's the
16 case, Buddy, that these discovery agreements could just be
17 oral agreements on the phone then I'm opposed to allowing
18 it, because the beneficial effects of Rule 11 is you don't
19 get into a he-said-she-said dispute with lawyers in the
20 courtroom because it's either in a writing or in streams
21 of e-mails or it doesn't exist.

22 MR. LOW: I'm not arguing with the merits of
23 what you're saying. I'm saying as a practical matter
24 that's what happens.

25 MR. ORSINGER: Yes. So I think that, you

1 know, the subcommittee was kind of neutral, but it's like
2 is it necessary to say this for this, that you can enter
3 into agreements for this specific issue when you can
4 already enter into agreements on anything.

5 CHAIRMAN BABCOCK: I think I could argue it
6 either way, but the argument in favor would be this is
7 just alerting the practitioner that, look, there are all
8 of these ways you can do it, but think about if you want
9 to agree with the other side to do it in a particular way
10 because you have a lawyer who is -- you know, whose inbox
11 is inundated with MDL cases or whatever reason it may be.
12 That would be the argument in favor, but the argument
13 against it would be what Judge Peeples is always saying,
14 is don't put stuff in there we don't need. Don't put
15 stuff in there that's -- you know, that's redundant or
16 extraneous.

17 MR. ORSINGER: In response to Buddy's
18 comment, the rules committee suggestion was "by any other
19 method to which the parties agree in writing," so they're
20 carrying forward that --

21 MR. LOW: Oh, okay.

22 MR. ORSINGER: -- statute of frauds
23 component.

24 CHAIRMAN BABCOCK: Yeah. I think that's
25 necessary, because you don't want the guy on the other

1 side saying, "Hey, don't you remember we talked on the
2 phone six months ago, and you said that it was okay to do
3 it," and, you know, six months ago is a long time for --

4 MR. LOW: That's true.

5 MR. ORSINGER: So, I don't know, I mean,
6 there's no harm if you do it, but it's not necessary.

7 CHAIRMAN BABCOCK: Okay. What is everybody
8 thinking? Anybody feel strongly about this, Justice
9 Christopher?

10 HONORABLE TRACY CHRISTOPHER: Well, kind of
11 like our discussion yesterday, rather than saying "in
12 writing," you should say "pursuant to Rule 11," just so
13 that everyone knows what that means.

14 CHAIRMAN BABCOCK: Yeah, that's a good idea.

15 MR. ORSINGER: If you're going to say
16 "pursuant to Rule 11" then why say it at all?

17 HONORABLE TRACY CHRISTOPHER: Well, that's
18 the point.

19 CHAIRMAN BABCOCK: Just for the purpose of
20 saying, "By the way, think about this in this context,
21 think about Rule 11 in this context, guys. If you're
22 going to be griping about the fact that your inbox has got
23 a bunch of MDL cases then think about agreeing in writing
24 to do it a different way."

25 MR. LOW: Rule 11 doesn't tell what the

1 lawyers can agree to. It just is a form of how to do it.

2 CHAIRMAN BABCOCK: Right.

3 MR. LOW: It doesn't tell what you can agree
4 to.

5 CHAIRMAN BABCOCK: Yeah.

6 MR. ORSINGER: To follow up on what Justice
7 Christopher said before, in our case -- in my cases where
8 we have large discovery people will typically upload the
9 documents to a website called Dropbox where you can give
10 them a password and then they'll access it and you can
11 download it very easily, either to your own Dropbox
12 account or down to your computer. That probably
13 technically is not service by e-mail because you didn't do
14 anything but send the link.

15 CHAIRMAN BABCOCK: Yeah.

16 MR. ORSINGER: So perhaps that would be a
17 place where parties would agree in writing that in lieu of
18 attaching 400 documents to 25 e-mails I'm just going to
19 send you one link to a Dropbox site.

20 CHAIRMAN BABCOCK: Yeah, that's a good
21 point.

22 MS. GREER: And they should agree because
23 otherwise you're going to have spam filters, and it's not
24 going to go through potentially, so I mean, I think --

25 MR. ORSINGER: Okay. So then item three,

1 the most troubling of the changes, that at least we had
2 trouble with is when is e-mail service complete, and we --
3 we had vigorous discussion about this, and
4 opinions evolved as we went on. I myself was against
5 service being complete upon transmission because there are
6 so many particular reasons why the message may not be
7 received. Part of it is that the internet is down in your
8 area. Part of it is that the internet is down in their
9 area. Part of it is that because of the internet
10 sometimes there are delays. Part of it is the spam
11 filter. Part of it is people being away from their
12 computer. Part of it is people changing their e-mail
13 address and not telling everyone. Part of it is that the
14 e-mail address might have been this type.

15 I mean, so I have a lot of personal concerns
16 that a presumption of service on sending is not as
17 reliable in e-mails as it is, say, with the United States
18 mail, but when you start considering the mechanics of how
19 you would go about proving receipt, that becomes, I think,
20 impossible. It's impossible to prove that someone
21 actually received. Now, if you send a receipt notice like
22 you were talking about, Holly, it's optional I believe on
23 the receiver's side whether to confirm receipt or not; and
24 if you had one of those, great; but if you don't have one
25 of those what do you do? Because how are you going to

1 prove when the e-mail is received by their internet
2 service provider? How are you going to prove that it made
3 it down to their e-mail folder? How are you going to
4 prove that they opened it up and looked at it? I don't
5 think you can -- I don't think you can require a party to
6 prove receipt with e-mails. It's just technically
7 impossible.

8 MR. LOW: If they decide they don't want to
9 open it, then it might never be received.

10 MR. ORSINGER: Well, that's another debate,
11 is what about someone that can read the first three lines
12 and see that it's discovery, and they just don't open it.
13 So it seems to me you're almost forced to use the date of
14 sending as the date of delivery and then have some kind of
15 fairly lenient opportunity to prove that it didn't get
16 through to you. And not Draconian, like you were away
17 from the office and didn't open your e-mails. It
18 shouldn't impair your client's ability to litigate. So
19 anyway, we ended up after lots of discussion, which, you
20 know, we could dig into if you care, that really
21 presumption of service on sending is probably the only
22 workable approach to a definition of when something
23 occurred in this context.

24 CHAIRMAN BABCOCK: Buddy.

25 MR. LOW: No, I agree with it, that

1 presumption.

2 CHAIRMAN BABCOCK: Okay. Anybody else got
3 any thoughts about it? Levi, what do you think?

4 HONORABLE LEVI BENTON: I'm okay with that
5 perspective. I don't know -- I mean, what else would
6 work? It's a rebuttable presumption.

7 MR. ORSINGER: Exactly.

8 CHAIRMAN BABCOCK: Okay. Any other
9 comments? All right. Good. Yeah, Roger.

10 MR. HUGHES: Well, again, I understood that
11 we were -- we had eliminated the extra three days for
12 certain forms of service because apart from mail pretty
13 much everything else you could count on it getting there.
14 I think from the discussion we just had we realize that
15 presumption is a little shaky for e-mail, and so I might
16 suggest reconsideration that if we're going to make
17 service by e-mail presumptive, if service is presumed and
18 it's effective on date of transmission, we add the three
19 days back in. You know, I live in one of those areas
20 where the e-mail service may not be entirely robust.

21 CHAIRMAN BABCOCK: Nice way of putting it.
22 What do people think about Roger's idea?

23 PROFESSOR CARLSON: Good idea.

24 MR. GILSTRAP: How is three days going to
25 help? In other words, if you didn't get it, you didn't

1 get it, so you're still not going to get it three days
2 later.

3 CHAIRMAN BABCOCK: Three days for mail is
4 because it takes the mail --

5 MR. GILSTRAP: I understand, but I don't
6 know that it works with e-mail.

7 CHAIRMAN BABCOCK: No, I'm agreeing with
8 you, Frank.

9 MR. GILSTRAP: Oh, okay.

10 MR. HUGHES: Well, sometimes e-mail may not
11 show up immediately. I've had e-mail may not show up in
12 my inbox for a day or so, and I'm going, "This was sent
13 yesterday. Why am I only getting it now?"

14 CHAIRMAN BABCOCK: Oh, I see what you're
15 saying.

16 MR. HUGHES: If you can't show when it
17 actually turned up in somebody's box and, you know, the
18 person -- it didn't show up for a day, you know, the power
19 was out at their office or construction cut the internet
20 -- the transmission cable to your office, and you couldn't
21 -- I mean, that doesn't happen with the mail, and, you
22 know, there's always -- we'll always get into arguments
23 about that "I never got it," but I think we at least have
24 to recognize that with e-mail you may not get it for a day
25 or two.

1 CHAIRMAN BABCOCK: Justice Bland, and then
2 Alistair.

3 HONORABLE JANE BLAND: A lot of the local
4 rules that provided for electronic filing before we had a
5 statewide filing rule and for e-mail service have
6 something, you know, added to the liberal construction
7 policy that you have in the -- you know, at the very
8 beginning of the rules to say that "The rules shall be
9 liberally construed to avoid undue prejudice to any person
10 using electronic filing system or sending or receiving
11 electronic service in good faith." So and, you know, they
12 expressly put in the concept that a party that fails to
13 receive through their own neglect or basically a Craddock
14 standard for people that mess up on the receiving end of
15 electronic transmissions. We could consider putting that
16 somewhere in our rules, and I think the Supreme Court's
17 order adopting statewide filing rules had something about,
18 you know, that as well.

19 CHAIRMAN BABCOCK: What does the Supreme
20 Court order adopting the e-filing rules say in that
21 regard? Anybody know?

22 CHIEF JUSTICE HECHT: I don't remember
23 exactly.

24 MS. NEWTON: I don't remember either.

25 HONORABLE JANE BLAND: I could look.

1 CHIEF JUSTICE HECHT: I think there was a
2 provision in there that said you shouldn't lose a
3 substantive right or something because of a technical
4 failure or something like that.

5 CHAIRMAN BABCOCK: Uh-huh. Alistair.

6 MR. DAWSON: So, I mean, like in 99 percent
7 of the cases the document will be received on the day in
8 which it's -- the same day it's sent. It's these, you
9 know, 1 percent we're talking about it. It seems to me it
10 doesn't make sense to add three days for all of those 99
11 percent of the cases that they don't really need it; and
12 with respect to the one percent that is not received or
13 the internet is down, if you've got a rebuttable
14 presumption that it was received or served on the day it
15 was sent, if that's rebuttable, then the person whose
16 internet is down can file a motion and say, "Hey, I didn't
17 get it on this day, and therefore, I'm entitled to
18 additional time." That's a better way to deal with it, I
19 think.

20 CHAIRMAN BABCOCK: Okay. Yeah, Nina.

21 MS. CORTELL: I agree with the current
22 approach, and we have to remember there's problems with
23 any kind of service. In my office a fax can get lost in
24 the fax room, and in the old days if it's hand-delivery it
25 could come after hours, left outside, and no one find it.

1 I mean, we just have to remember there is no perfect
2 system, and I think this strikes a proper balance.

3 CHAIRMAN BABCOCK: Yeah. If Alex were here,
4 Professor Albright, she would remind us that we've had
5 lengthy discussions about fax machines back in the day.
6 She made that comment yesterday.

7 MS. CORTELL: Okay, sorry.

8 PROFESSOR CARLSON: You mean electronic
9 transmission machines.

10 CHAIRMAN BABCOCK: Right. Okay, Richard.

11 MR. ORSINGER: Okay. So the next item is --
12 and maybe Kennon can help us with this. There was a
13 proposed change on the time for action after service that
14 would take the three-day notice, three days additional
15 response time, and extend it to commercial delivery
16 services; and some of the people on this -- our
17 subcommittee could not understand why we would add three
18 days when the day -- when the clock starts on the day that
19 the item is delivered, not on the day the item is sent.
20 So there's no delay in delivery. I mean, there's no
21 accounting for the time of delivery. The delivery starts
22 when the commercial package is delivered, or does -- or
23 does service through UPS or Federal Express run from the
24 day you give it to Federal Express?

25 MS. WOOTEN: Right.

1 MR. ORSINGER: It does?

2 MS. WOOTEN: That's my understanding, and so
3 what prompted this change is actually the fact that people
4 who are sending items through commercial delivery services
5 can control to an extent when they get delivered. For
6 example, I can send something priority overnight, or I can
7 say, "Nah, let it arrive in three days."

8 MR. ORSINGER: Well, where do we look to see
9 that the clock starts running with commercial delivery on
10 the day it's sent and not the day it's received?

11 MS. NEWTON: 21a(b)(1).

12 MR. ORSINGER: Okay. So we have that here
13 attached.

14 CHAIRMAN BABCOCK: You thought she wouldn't
15 know that, didn't you?

16 MR. ORSINGER: 21a(b)(1).

17 MR. LOW: He was just testing her knowledge.

18 CHAIRMAN BABCOCK: Right, he was just
19 testing her. She whipped off the answer right like that.

20 MR. ORSINGER: I knew she would know. Okay.
21 So I would make an alternate suggestion, and that is that
22 we wouldn't treat commercial delivery as if service is
23 effected when it's turned over to the agency but rather
24 when it's delivered. Every commercial delivery service
25 I'm familiar with, local or national or international,

1 always has a receipt for delivery of the package, and so
2 maybe a better cure is not to assume a three-day delay on
3 something that may happen the same afternoon. If it's
4 just going across town maybe we ought to start the clock
5 on commercial deliveries when the package is delivered
6 rather than when it's given to the delivery service.

7 Maybe that's a better fix.

8 CHAIRMAN BABCOCK: Any comments on that?

9 MR. GILSTRAP: The post office would still
10 be when it's sent?

11 MR. ORSINGER: Yes, has to be, because
12 that's the only thing you can prove.

13 MR. GILSTRAP: Can't you get a receipt?

14 MR. ORSINGER: Well, you can, but when they
15 won't sign for it, then three weeks later you find out you
16 don't have a green card.

17 MS. BARON: You can also just do tracking
18 through the U.S. Post Office, and you can look online and
19 print out a sheet that says when it was delivered.

20 CHAIRMAN BABCOCK: Okay. Yes, Justice
21 Christopher.

22 HONORABLE TRACY CHRISTOPHER: I just -- the
23 three-day rule only talks about mail. It doesn't talk
24 about the commercial delivery service.

25 MR. ORSINGER: Exactly, so the proposal is

1 to add --

2 HONORABLE TRACY CHRISTOPHER: I mean, that's
3 a problem.

4 MR. ORSINGER: Okay.

5 HONORABLE TRACY CHRISTOPHER: I mean, I
6 think you need the extra three days for that, too, if
7 you're going to keep the three days at all.

8 MR. ORSINGER: Well, I mean, an alternate
9 suggestion, which is just mine, so it doesn't have
10 anything behind it, is that maybe commercial delivery
11 service should be treated like hand-delivery. It's
12 effective when it occurs, not when you give it to the
13 runner or when you give it to UPS. It's when UPS takes it
14 to the recipient. That should be the start of the clock.
15 There isn't going to be any question mark about that. We
16 don't need one day, two days, or three days because we're
17 now operating off of the actual event.

18 MR. LOW: And they have methods to prove.

19 MR. ORSINGER: And they have methods to
20 prove. Because almost all of them get receipts. I
21 mean --

22 CHAIRMAN BABCOCK: Skip.

23 MR. WATSON: My memory is, is that for
24 FedEx, UPS, or whatever, that as Kennon was saying, you
25 have the option of saying not only next day, but before --

1 by 8:00 a.m. or by 3:00 p.m. or second day or third day.

2 Is there anything that says that if you're using a
3 commercial delivery service you need to pick one of those?

4 MR. ORSINGER: No. And I can tell you from
5 personal experience if you ask for earliest delivery in
6 the day with Federal Express, they'll get by before your
7 office opens.

8 MR. WATSON: Yeah.

9 MR. ORSINGER: And if no one answers the
10 door they put it in the back of the truck and drive around
11 all day long and then it goes back to UPS central --

12 MR. WATSON: That is exactly right.

13 MR. ORSINGER: -- at night and then you may
14 get it the next day, or you may have to go get it
15 yourself.

16 MR. WATSON: You may have to go get it.
17 That's exactly right.

18 MR. GILSTRAP: How do you distinguish a
19 commercial delivery service from a courier? It's a third
20 party service.

21 MR. ORSINGER: This is why it would have
22 been better if I had made this suggestion at the
23 subcommittee level and we fleshed this through. It didn't
24 occur to me.

25 MR. GILSTRAP: It may be that you just say

1 three days for everything. Three days from the time it's
2 sent for everything. Simple rule, it's a step forward.

3 MR. ORSINGER: So and --

4 MS. NEWTON: Then why not just extend the
5 deadline instead of --

6 MR. ORSINGER: 33 days for everything?

7 MS. NEWTON: Well, I mean, instead of having
8 a deadline and then three days for everything, if you're
9 going to do that, why not just have a longer --

10 CHAIRMAN BABCOCK: Just make it 33 days.

11 MR. ORSINGER: But what if you hand-deliver
12 it to the lawyer at the courthouse? Are you going to add
13 three days to that? I mean, it just doesn't make sense.
14 If we can operate off of delivery, we should, and if we
15 can't then we ought to have a three-day rule.

16 CHAIRMAN BABCOCK: Kent.

17 HONORABLE KENT SULLIVAN: I think the point
18 is that Richard is making is that the effect can be
19 variable, particularly with a commercial service. You can
20 send something by UPS ground, and literally you don't know
21 when it's going to get there. So I think the point is
22 well-taken that it ought to be upon receipt. Giving three
23 days may or may not be pure coincidence as to whether that
24 works and an accurate reflection of when the recipient got
25 it.

1 CHAIRMAN BABCOCK: Justice Christopher, do
2 you have your hand up?

3 HONORABLE TRACY CHRISTOPHER: Well, I mean,
4 you'll have people ducking service. I mean, if it's on --
5 you know, when received.

6 CHAIRMAN BABCOCK: Yeah.

7 HONORABLE TRACY CHRISTOPHER: You know, if
8 they're -- and then, you know, am I allowed to leave it at
9 their front door? Am I allowed to leave it -- you know.

10 HONORABLE KENT SULLIVAN: Well, that is the
11 way it works normally. That is, normally it's going to be
12 left at the address that's reflected. That's what's going
13 to happen generally speaking, unless you made unique
14 arrangements for a signature.

15 CHAIRMAN BABCOCK: Is there a perceived
16 problem that we're solving here, or are we just thinking
17 of stuff?

18 MR. ORSINGER: I'm not aware of --

19 CHAIRMAN BABCOCK: It was to the group, but
20 I realize you're the --

21 MR. ORSINGER: Since I'm sponsoring all of
22 this, I don't -- I don't recall what the perceived problem
23 was.

24 CHAIRMAN BABCOCK: Justice Bland.

25 HONORABLE JANE BLAND: Adding a three-day

1 window adds uncertainty, especially in places where
2 they're trying to calculate, like the response for summary
3 judgment due seven -- you know, due seven days before the
4 hearing. And some -- and when is -- and so if your brief
5 is due 30 days after the appellant's brief, is that 30
6 days plus the three days that it took them? But if they
7 e-file it with the court and it's received as of the day
8 the court is, so the problem is that the three days just
9 creates uncertainty about what the deadline is, and it
10 would seem like the better thing would be to look at the
11 rules with tight deadlines to see if those need to shift
12 rather than put the three-day rule -- I don't think the
13 three-day rule is a huge problem for something that's a
14 30-day deadline. It's a bigger problem when the hearing
15 is noticed for Monday morning by e-filing on Friday
16 afternoon. Or, you know, some kind of tight window.

17 CHAIRMAN BABCOCK: Okay. All right. I
18 think we've beaten this particular horse.

19 MR. ORSINGER: Okay. So the next one, item
20 five, is changing the practice on the required information
21 for a certificate of service. If you look back at the
22 rules committee attachment, you can see that the current
23 rule just says in sort of vague terms, "The party or
24 attorney of record shall certify to the court compliance
25 with this rule in writing, over signature, and on the

1 filed instrument." And so what that leads to is a
2 certificate of service saying that "I hereby certify that
3 I complied with Rule 21a," but it doesn't tell you how.
4 And as I can tell you from my own personal experience as a
5 lawyer when I receive it and it doesn't say how it was
6 served, I have to go find out whether somebody came to the
7 front door or whether somebody opened an envelope or
8 whatever because I need to know whether to add three days
9 or not add three days.

10 So as a personal practice, I now specify who
11 it was served on, who they represent, and how it was
12 served, whether it was by certified mail or by
13 hand-delivery or by e-mail or by e-filing, which most
14 everything you file at the courthouse now is going to be
15 served by e-file plus whatever you add, and so I think
16 this is beneficial. I think that the subcommittee was
17 fine with it because it allows the certificate of service
18 to tell you enough information for you to calculate your
19 deadline, and I think that's very helpful, and I think the
20 subcommittee generally favored this recommendation.

21 CHAIRMAN BABCOCK: Okay. Any comment on
22 this? Justice Christopher.

23 HONORABLE TRACY CHRISTOPHER: In a case
24 where there are 50 parties, you know, your service is
25 going to be, you know, 10 pages. I mean, I can understand

1 the advantage of doing it, and maybe that's just something
2 where everybody agrees to waive that requirement on their
3 pleadings, but, I mean, it's just a lot of extra.

4 CHAIRMAN BABCOCK: Okay. Skip.

5 MR. WATSON: Just what's the thinking on
6 identifying the party they represent? I mean, what does
7 that add?

8 MR. ORSINGER: I don't know. I mean, maybe
9 Kennon can tell us. I do it so that I can keep track of
10 who's getting served.

11 MR. WATSON: Yeah, it's good for us, but, I
12 mean, who else?

13 MR. ORSINGER: Right.

14 MS. HOBBS: I'm assuming this tracks the
15 appellate rule.

16 MS. WOOTEN: That's what I think, but I need
17 to go back and make sure.

18 MS. HOBBS: Yeah, I'm pretty sure that's
19 what the appellate rule says, and this is just a
20 duplication of the appellate rule.

21 MR. WATSON: Oops.

22 MS. HOBBS: Do you not do that on your
23 briefs?

24 MR. WATSON: I don't think so.

25 MS. HOBBS: Yes, you do. I bet you do.

1 MS. WOOTEN: It does. So appellate Rule
2 9.5(e)(3), "Certificate of service must be signed by the
3 person who made the service and must state that the person
4 served is a party's attorney, the name of the party
5 represented by that attorney."

6 MR. WATSON: Huh.

7 MR. ORSINGER: But it doesn't require the
8 manner of service either, does it?

9 MS. CORTELL: It does.

10 MS. WOOTEN: "The date and manner of service
11 is required."

12 MR. ORSINGER: Date and manner of service?
13 Okay.

14 MS. CORTELL: Yes. No, we've been doing it
15 a long time.

16 MR. ORSINGER: Okay. So we'll just bring
17 the trial rule into conformity with a successful appellate
18 rule.

19 MS. CORTELL: Yes.

20 MS. GREER: And the federal rules. I mean,
21 that's how it's done in federal court, too, in the trial
22 court. And I think it's a good rule because it forces a
23 conversation to make sure that whoever is actually doing
24 the service, which may be a paralegal or a secretary, is
25 clear on what you intend; and it reminds you, oh, yeah,

1 did you want to do it this way, do you need to do it
2 differently with this person, and it also confirms --
3 people change law firms, people move, and that this is
4 where I sent it, not the old firm or wherever. So you
5 have a document that shows how it actually went out. And
6 it saved me a lot of time in trying to figure things out.
7 So I actually think it's a good thing, and we're all using
8 word processors, so it's not that hard to copy. It's not
9 like you have to type in each of those things, and it
10 gives discipline that's very helpful.

11 CHAIRMAN BABCOCK: Yep. Okay.

12 MR. GILSTRAP: Are we requiring the physical
13 address and an e-mail address of the person you serve? Or
14 do we need to?

15 MS. BARON: You mean if you're serving them
16 electronically?

17 MR. GILSTRAP: Well, however you're serving
18 them.

19 MR. ORSINGER: This proposed -- Frank, this
20 proposed change says "the name and address of each person
21 served."

22 MR. GILSTRAP: What do you mean by
23 "address"?

24 MR. ORSINGER: Well, I don't know, see, if
25 it's served by e-mail does that mean e-mail address, and

1 if it's served by U.S. mail, does that mean postal
2 address?

3 MS. CORTELL: I'll say typically in
4 appellate filings we're putting the full address but
5 including the e-mail address, and we show manner of
6 service.

7 MR. GILSTRAP: I understand, but what do you
8 have to do?

9 MR. ORSINGER: Well, what's the advantage of
10 prescribing the address served? Just so someone can prove
11 you sent it to the wrong address. I mean, why do we care?
12 If some of them may be mail, some of them may be e-mail,
13 do we care the address?

14 MS. CORTELL: I think what you just said,
15 you're providing a track record of what you've done.

16 CHAIRMAN BABCOCK: Roger.

17 MR. HUGHES: Well, I'm of two minds about
18 this. First, I'm not sure what the value of a detailed
19 certificate of service on documents going to be filed in
20 court is worth because you're going to serve it by e-mail,
21 and if you -- pardon me. You're going to e-file it; and
22 when you e-file it, first you get an e-mail saying, "This
23 is everybody that's on the list. We're filing it with the
24 court, and this is everybody that's getting copied." And
25 then you get service notifications for everybody on that

1 list. So I'm thinking what's the value, because the mere
2 fact of e-filing you're going to get detailed notices of
3 who exactly is being served electronically and whether
4 they got it or whether they didn't get it, because that's
5 part of the e-filing routine. So this is only valuable
6 about discovery.

7 The flip side of that -- and I've seen this
8 recently in an appeal over, I guess you might say, a no
9 answer default situation, was that the plaintiff was pro
10 se and -- or had become pro se after their attorney
11 withdrew, and so the court notices of hearings, et cetera,
12 were sent to an e-mail address. Well, there was nothing
13 in the record to show where they got the e-mail address
14 that the court was sending it to. So and incredibly, even
15 though they had detailed certificates of service saying,
16 "Yeah, we're e-mailing it to the plaintiff," plaintiff, of
17 course, was saying, "Well, I never got any of this stuff.
18 That's why I didn't show up at the hearings." And you
19 don't even -- you know, and of course, on appeal you can't
20 go back and have a fact hearing about "Well, where did we
21 get this e-mail address," et cetera, et cetera. So, like
22 I said, I'm not sure it's going to do a great deal of --
23 it's going to be of great value to have this detail at
24 all, but it may be of some value.

25 CHAIRMAN BABCOCK: Yeah. Judge Yelenosky.

1 HONORABLE STEPHEN YELENOSKY: Well, I was
2 going to say the pro se is one. I don't know whether this
3 gets at the issue or not, but as a judge it's often a
4 problem when I get a certificate of service that says "All
5 parties of record have been served," even if it's just
6 lawyers because there are a number of cases where parties
7 -- where lawyers have come in and out, and then there's a
8 question, well, did you send it to this lawyer? I don't
9 know just by "all parties of record," and oftentimes they
10 can't answer that question on the spot sitting there when
11 that lawyer doesn't appear. Go out in the hallway and
12 call them. I just don't see it's much trouble to include
13 that information and lots of lawyers do.

14 CHAIRMAN BABCOCK: Jim.

15 MR. PERDUE: How does the certificate of
16 service answer that question? The certificate of service
17 doesn't answer that question. The extraneous evidence of
18 the service answers that question.

19 HONORABLE STEPHEN YELENOSKY: Well, maybe it
20 does, but, I mean, when you initially see the certificate
21 of service and ask, you know, "Did you serve this person"
22 I guess, yeah, if they have proof of it at that point I
23 guess that answers that question. But shouldn't the
24 certificate of service tell you who you've sent it to or
25 tell who it was sent to? Why have a certificate of

1 service?

2 MR. PERDUE: No, I don't disagree with that,
3 but, I mean, it does feel like there's some
4 over-engineering going on. I mean, for the moderate case
5 or the big one with 50 parties, I mean, this just --
6 appellate practice is different than run of the mill trial
7 practice and you start -- just my perspective is it seems
8 like you're over-engineering just a little bit.

9 CHAIRMAN BABCOCK: Okay. Any more comments
10 about this? Yeah, Kent.

11 HONORABLE KENT SULLIVAN: Just one quick
12 comment. It occurs to me that with respect to electronic
13 filing we've almost got universal electronic filing now
14 for documents that are going to be filed with the court,
15 and there's I think almost no problems associated with
16 service, because as a practical matter the electronic
17 service provider automatically serves everybody, right? I
18 wonder if we're not simply heading towards a system with
19 respect to all other matters; i.e., things not to be filed
20 with the court shouldn't be the subject of a parallel
21 system. Maybe through the same electronic service
22 provider and simply they're not filed with the court, but
23 they automatically then handle all of the service issues
24 because everybody is on file in terms of their e-mail
25 addresses. You have to be pretty much -- in fact, there

1 are multiple people generally identified for every party.
2 We all know that. There's no real issue with respect to
3 what would happen to the filing that would be a one in a
4 million situation in which there would be a problem with
5 that. The problem that we have now is that there's not a
6 parallel system, but it sounds like the one system is
7 working almost perfectly, and the fact that we haven't --
8 we don't have a vision for simply setting up a parallel
9 system in trying to adopt the characteristics to the
10 system that work apparently almost seamlessly.

11 CHAIRMAN BABCOCK: How would the parallel
12 system work?

13 HONORABLE KENT SULLIVAN: I think you would
14 simply file something, whatever it is, could be a
15 discovery request, could be a response, could be anything
16 that requires service, and you would simply file it in the
17 same way. It simply wouldn't go to the court.

18 CHAIRMAN BABCOCK: Except it what? It would
19 not --

20 HONORABLE KENT SULLIVAN: It wouldn't be --
21 what I'm trying to distinguish is matters that are being
22 filed with the court on the one hand and, as I said,
23 apparently that's a system that everybody is very
24 satisfied with --

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE KENT SULLIVAN: -- and works
2 seamlessly, because there's automatic distribution of
3 those materials.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE KENT SULLIVAN: So you would
6 simply have an ability to file with the same service
7 provider, but file something that's not going to file in
8 the sense of you're sending it to the service provider.
9 It would seamlessly handle the distribution of all of
10 those. It would record the distribution of all of those,
11 but it's simply not something that's intended to be filed
12 with the court.

13 CHAIRMAN BABCOCK: And would this alternate
14 system be set up by the courts, by the --

15 MR. ORSINGER: Chip, let me follow up on the
16 suggestion. You could use the existing framework and just
17 have a little box to check that said it's to be served but
18 not filed, and then it's the same computer system, same
19 network, same software, same servers. It's just you check
20 the box "don't file."

21 HONORABLE KENT SULLIVAN: We're talking
22 around what could be the solution, it seems to me.
23 Although I acknowledge it would take some effort, but the
24 question is what's the real vision of where we should go?

25 CHAIRMAN BABCOCK: Yeah.

1 HONORABLE KENT SULLIVAN: What we're talking
2 about is interim, you know, solutions to problems that
3 really shouldn't exist if we --

4 CHAIRMAN BABCOCK: Yeah. You missed
5 yesterday. We were told to be visionary.

6 HONORABLE KENT SULLIVAN: I'm trying to
7 catch up.

8 MR. ORSINGER: But we're trying to fix the
9 wagon, and he's talking about moving to the automobile.

10 CHAIRMAN BABCOCK: He's on spaceships, man.
11 Yeah, Levi.

12 HONORABLE LEVI BENTON: I can't tell from
13 Richard and Kent's comments whether they're aware that
14 that exists already with the electronic filing service
15 providers. You can just do service already through them.
16 That exists today.

17 MR. ORSINGER: Without filing?

18 HONORABLE LEVI BENTON: Yes. I think what
19 the deal is, you --

20 HONORABLE STEPHEN YELENOSKY: Wow, you work
21 quickly.

22 HONORABLE LEVI BENTON: You big firm
23 lawyers, you don't have to do your own work. You don't
24 know this stuff.

25 MR. ORSINGER: My firm is not so big.

1 CHAIRMAN BABCOCK: Yeah, you know, Richard
2 resents being called a big firm lawyer.

3 MR. ORSINGER: I've never been a big firm
4 lawyer.

5 HONORABLE LEVI BENTON: You're a big firm
6 lawyer, for the record.

7 CHAIRMAN BABCOCK: I think if you substitute
8 the word "time," a big time lawyer. Roger.

9 MR. HUGHES: Well, it seems to me that we're
10 looking at the certificate of service from two different
11 points of view. The one is what does a certificate of
12 service do for the counsel or the parties, and the second
13 one is what does it do for the court, and I think it seems
14 to me -- I mean, I wasn't present at the creation. The
15 purpose of the certificate of court -- I mean, the
16 certificate of service is to assure the court that the
17 document was served on the other side and to create a
18 presumption that it was done. And when the -- and so the
19 first thing is, well, is the certificate -- whether it's
20 this or amended -- is it going to be able to give the
21 court a level of confidence that I can rely on what's in
22 that certificate that the other side got it. And so,
23 therefore, it may be a value to say, "I sent it to lawyer
24 Jones. I sent it to lawyer Gomez, by e-mail at address
25 blank." Or "I served it by fax," at fax.

1 CHAIRMAN BABCOCK: You don't mean "address
2 blank." You mean fill in the address.

3 MR. HUGHES: Yes. Yeah, and whatever.

4 HONORABLE STEPHEN YELENOSKY: Exactly.

5 MR. HUGHES: And beyond that, to provide
6 more information than that you're really just helping the
7 lawyer so when they're caught flat-footed in court.
8 "Well, Counsel, how did this get served?" You can flip
9 through your file and go, "Well, it was served by return
10 receipt mail, and I've got a green card" or "It was sent
11 to e-mail address such-and-such and I've got a
12 transmission receipt." But I'm not sure beyond that
13 whether we aren't doing what they've said is
14 over-engineering.

15 CHAIRMAN BABCOCK: Kennon.

16 MS. WOOTEN: I'll point to subsection (e)(2)
17 of the rule, starting on page three of the packet, because
18 that addresses the fact that under the existing rules the
19 certificate of service is there as prima facie evidence of
20 the fact of service, and my thought process in this is if
21 that certificate of service says nothing more than "I
22 complied with the rule," it doesn't really give the judge
23 very much evidence of service, and so to let this part of
24 the rule do the legwork intended I think the certificate
25 of service needs a little bit more detail than "Trust me,

1 I did what I was supposed to do."

2 CHAIRMAN BABCOCK: Okay. Yeah. Kent.

3 MS. WOOTEN: Oh, second page three.

4 HONORABLE KENT SULLIVAN: Just quick
5 verification. I think what Judge Benton was referring to
6 before, you can hire an electronic vendor to facilitate
7 your service. What I'm talking about is the
8 single unified state vendor so that it could be the same
9 electronic service provider that is handling the official
10 court filings. That's what I'm talking about when I'm
11 talking about a parallel track. I'm not talking about
12 everybody hiring a patchwork quilt of electronic vendors
13 to facilitate their own electronic service.

14 CHAIRMAN BABCOCK: But you would -- to make
15 that work, wouldn't the Court have to require that?
16 Wouldn't the Court have to mandate that it be done through
17 that ESP?

18 HONORABLE KENT SULLIVAN: Probably would
19 make sense, in my view. We end with up a unified system
20 where you took all of this out of play so no one was
21 arguing about it. That would probably make sense.

22 MR. ORSINGER: If you were going to do the
23 roll out, you could do it like they did with computer
24 filing in the first place, which is make it optional for a
25 period of time so we have the shakedown crews to get the

1 bugs out of the system, and then once there is wide
2 acceptance then you require it.

3 CHAIRMAN BABCOCK: Yeah. Marcy, then Roger.

4 MS. GREER: I'm a little bit concerned about
5 the additional filing fees. I'm sure the vendors would
6 love to hear this, but it's going to be an additional
7 filing fee for every single time you serve discovery,
8 supplement discovery, et cetera. And if the system were
9 broken and we were having massive problems with this, I
10 think it would be worth considering, but right now it's
11 working fairly well. I do like the idea of requiring the
12 information about specifically how it was served. I don't
13 think it's that much to ask. I mean, I don't feel
14 strongly about whether the address, the street address,
15 needs to be included if you're serving it by e-mail; but I
16 do think it's important for all forms of communication,
17 both making sure it goes out the right way, having proof,
18 the prima facie, the issue that Kennon raised, et cetera,
19 to specifically say in the certificate of service the
20 information necessary to show how it went and where it
21 went and to whom it went.

22 CHAIRMAN BABCOCK: Yeah. Roger, and then
23 Buddy.

24 MR. HUGHES: Well, I just wanted to echo the
25 comment about the additional expense. A lot of -- I know

1 many attorneys from my area, but not all, have taken to
2 using the e-filing service to serve discovery and to serve
3 responses and then send it by private e-mail. I have a
4 lot of corporate clients, who as far as they're concerned
5 the expenses of e-filing documents, whether it's a
6 pleading, discovery, motion, whatever, that's office
7 overhead, and they don't pay for it. So -- and they take
8 the attitude towards that the same way they began to take
9 about the cost of sending things by Fed Ex and -- serving
10 things by Fed Ex and serving things by return receipt
11 mail. "That's your problem. You pay for it out of your
12 pocket, lawyer." And so in one essence, using the state's
13 service that's the e-filing service is probably a good and
14 reliable idea. In one sense it may become an unfunded
15 mandate on the individual lawyers.

16 CHAIRMAN BABCOCK: Which you're in favor of?

17 MR. HUGHES: I'm just pointing it out,
18 folks.

19 CHAIRMAN BABCOCK: Did somebody else have
20 their hand up? Yeah, Buddy did.

21 MR. LOW: Chip, I think it's a good rule
22 because a case I'm involved in now, the lead lawyer is
23 with Vinson & Elkins. I'm in charge of a certain phase of
24 it. Another lawyer in my firm is in charge of other
25 phases, and if they just serve me, I assume I'll get

1 everything from the lead lawyer. So if they show, you
2 know -- and so it's good to show who they served, whether
3 somebody just served me. I'm not the captain of the team,
4 but I am representing that party, so I think the rule is a
5 good thing.

6 MR. PERDUE: What rule? Which rule?

7 MR. LOW: The one we're talking about.

8 MR. ORSINGER: You identify the attorney
9 served --

10 MR. LOW: Identify the attorney served.

11 MR. ORSINGER: -- and the party whom they
12 represent, I think is what Buddy was focusing on.

13 CHAIRMAN BABCOCK: Okay. All right. Let's
14 go on to the next item.

15 MR. ORSINGER: Okay. The next item has to
16 do with proof of nonreceipt or delay; and under the
17 existing rule, a kind of peculiar wording, but it says,
18 "Nothing herein shall preclude any party from offering
19 proof that the document was not received." And, you know,
20 perhaps that could be written a little better, but the
21 rules committee suggested "or receipt was delayed." So
22 we're only now allowing, if you will, proof to overcome a
23 presumption of service to show no service, but we haven't
24 explicitly allowed delayed service. So that is not -- for
25 our people was not a controversial suggestion.

1 And then the rules committee suggested
2 striking "If service was by mail that the document was not
3 received within three days of the time it was deposited."
4 It just replaced that with a simple phrase that it was not
5 received or receipt was delayed. It seems to me like it
6 clarifies it a lot, but if you're going to have e-mail
7 service effective upon sending, you must be sure that it
8 is -- that people can come into court and prove that they
9 didn't get it or that they received it three or four days
10 late.

11 CHAIRMAN BABCOCK: Yeah, this made some
12 sense to me, but what does everybody think? Any more
13 comments about this?

14 HONORABLE LEVI BENTON: How do you prove an
15 e-mail receipt was delayed?

16 MR. ORSINGER: Well, I mean, you know,
17 sometimes because of something about the internet that's
18 technical, I don't know, a delivery may be delayed by --

19 HONORABLE LEVI BENTON: I know. We all know
20 it happens, but how do you prove that?

21 MR. ORSINGER: Well, you have an inbox
22 receipt on your e-mail that's going to show the day that
23 you receive it. Now, am I wrong?

24 MS. CORTELL: No, it will.

25 MR. ORSINGER: Yeah. So the day that it's

1 sent creates a presumption that -- the sender's e-mail
2 will have a date sent and a time sent that creates a
3 presumption, and if it didn't work out on the opposite end
4 you could come in and show your e-mail and show that
5 delivery was delayed.

6 CHAIRMAN BABCOCK: Okay. Next, Richard.

7 MR. ORSINGER: Okay. So then we move on to
8 Rule 21c, and again, these are summarized into six
9 proposed changes. The first one is that in connection
10 with filings -- let me skip back here. Oh, give me a
11 second here. I'm sorry. It has to do with privacy for
12 the protection of filed documents; and this 21c, the first
13 focus on it has to do with sensitive data defined; and it
14 has categories of driver's license number, passport,
15 Social Security. That's one category. Another is bank
16 accounts, credit card, financial accounts; and third is
17 birthday, home address, and the name of a minor. So the
18 rules committee's proposed that the sensitive data
19 consists of all but the last three digits of a
20 government-issued personal identification number such as
21 -- and then lead into the existing list of driver's
22 license, passport, Social Security number. And they
23 suggested an edit, "personal tax identification number."
24 I presume that means not an entity tax identification
25 number. I don't know.

1 MS. WOOTEN: Correct.

2 MR. ORSINGER: You were attempting to
3 differentiate individuals. So if it was an entity, its
4 tax identification number would no longer after this
5 change be sensitive data. Was that the intention? So
6 it's only people whose tax ID number is protected, but
7 LLCs or partnerships, trusts, or whatever, they're not.
8 That was part of the change. So they've generalized it.
9 The proposal is to generalize it to "government-issued
10 personal identification number" and to require, if you
11 will, the disclosure of the last three digits, but not the
12 earlier digits, which would allow you to identify that
13 specific individual.

14 Now, it should be remembered that there's
15 already a requirement in the Civil Practice and Remedies
16 Code. I'm looking for it real quickly. 30.014 -- this is
17 in the subcommittee memo -- already requires in pleadings
18 that the last three digits of the driver's license and
19 Social Security number be included. That's already
20 required, and I would point out as a family lawyer I
21 sometimes probably always don't comply with that, but
22 there is provision that if you don't comply with that the
23 clerk can send you a letter asking you to communicate
24 directly with the clerk with this information, and you
25 must do it within seven days or be held in contempt of

1 court. So --

2 CHAIRMAN BABCOCK: What do you do about
3 that?

4 MR. ORSINGER: I respond. When that
5 letter -- all right. That's one letter that gets
6 immediate response, and if I don't get delivery of that
7 I'm in trouble. So, anyway, I mean, this is -- there's
8 some interesting changes going on here, and while some of
9 it's a little different from what we do, some of it is
10 not.

11 CHAIRMAN BABCOCK: Judge Yelenosky.

12 HONORABLE STEPHEN YELENOSKY: This goes to
13 the whole thing. Reading it and the comments I infer that
14 at least some people thought this applied to orders.
15 Internally it can't, at least in some instances. Like you
16 just said, you're not going to hold the judge in contempt
17 if he puts or she puts a Social Security number in there,
18 but there are a lot of other reasons. And we need to deal
19 with 76a in both ways, because there are instances in
20 which you want to be able to redact that in an order that
21 you cannot now, because 76a says no order may be sealed,
22 and I take that to mean no word in an order may be sealed
23 unless by statute. So if you're going to seal this stuff
24 in an order I think it needs to explicitly say that, and a
25 lot of this has to be changed because of that.

1 One of the things in here is there's an
2 exception to keeping these things out of a document and it
3 talks about a local rule. Well, if a local rule can say
4 this is going to be in a document, what clerk is going to
5 say, "I can't file this judge's order because it has a
6 whole Social Security number in there." Implicitly the
7 judge has just ordered you, clerk, to file the Social
8 Security number. So that isn't addressed in here at all.

9 The flip side of that is that there are some
10 things that 76a doesn't allow -- I don't know if it's flip
11 side. 76a does not allow you, as I said, to hide anything
12 in an order, as I read it now. I do think that that does
13 need to be modified, at least in one instance and maybe
14 two raised in here. I have signed name changes for people
15 who are trying to hide from an abuser, and the name change
16 order always has the name that you were and the name
17 you're going to be, and the whole point of the order is
18 not to do that, but it's inconsistent with 76a in my
19 reading. So that needs to be addressed somewhere. It's
20 probably not an issue here. Maybe it is, but there needs
21 to be a look at all of this again with the idea of an
22 order in mind.

23 MR. ORSINGER: If I could follow up on that,
24 Chip.

25 CHAIRMAN BABCOCK: Yeah.

1 MR. ORSINGER: This rule applies to filed
2 documents, and I think that decrees or orders, at least by
3 many clerks are not considered filed.

4 HONORABLE STEPHEN YELENOSKY: Well, yeah,
5 but your comment is -- there's a comment talking about,
6 well, if the order doesn't include the child's name.
7 There was a concern that somebody said that would be a
8 problem. Well, that's talking about orders.

9 MR. ORSINGER: Yes, and I think that this
10 whole question then needs to have a rule that's oriented
11 toward orders. So that comment is probably not -- if we
12 all agree that orders and decrees are not filed and,
13 therefore, this rule doesn't apply to them then we need to
14 have a separate discussion about what you just said.

15 HONORABLE STEPHEN YELENOSKY: Right. And it
16 should be explicit because at least one person made a
17 comment on the assumption that this applied to orders.

18 MR. GILSTRAP: Why would we not protect the
19 tax ID number of a business, an LLC, or a corporation?

20 HONORABLE STEPHEN YELENOSKY: Because it's
21 out there all over the place. Everybody they pay.

22 MR. GILSTRAP: What do you mean? You can
23 get a copy of their checks or something?

24 HONORABLE STEPHEN YELENOSKY: Well, every
25 whatever it is, W-9 or whatever.

1 MR. ORSINGER: 1099.

2 HONORABLE STEPHEN YELENOSKY: 1099.

3 MR. ORSINGER: 1099. If you pay people that
4 perform services, you're supposed to send a 1099.

5 MR. GILSTRAP: You make it a public record?

6 MR. ORSINGER: You know, I think that's an
7 interesting policy question. I mean, should entities have
8 any less privacy about their tax ID number? I mean, the
9 idea with a tax ID number can be used to file fraudulent
10 returns.

11 HONORABLE STEPHEN YELENOSKY: Have there
12 been any businesses that have been defrauded in that way?

13 MR. ORSINGER: I don't know. I know -- the
14 fraud that I know about is people filing false returns and
15 getting refunds, and I assume a business could get a
16 refund on a corporate tax if someone filed a fraudulent
17 tax return. I don't know.

18 MR. GILSTRAP: I don't see any reason to
19 distinguish between businesses and individuals here. I
20 mean, insofar as the requirement to put the last three
21 digits of the Social Security number, I've never done it,
22 and I've never had anybody complain. I don't see a
23 reason.

24 CHAIRMAN BABCOCK: Kennon.

25 MS. WOOTEN: It might help to explain what

1 prompted the change, and it was an appellate attorney's
2 comment that this information of entities is not
3 confidential. So in her mind the rule as it exists is
4 inconsistent with the reality, and she was having to
5 maneuver around that in all of her appellate filings by
6 taking out information that in her understanding of the
7 law wasn't confidential.

8 CHAIRMAN BABCOCK: Okay. Roger.

9 MR. HUGHES: Well, confidential and
10 sensitive are two different things. I mean, even when it
11 terms -- even in the professional disciplinary rules there
12 is privileged information that you have to protect, but
13 also confidential information, which may not be privileged
14 but nonetheless the client doesn't want to disclose. You
15 know, it's different -- I can see some businesses going,
16 "Look, when I do business with you and I give you this
17 information I really have no expectation that you're going
18 to start giving -- you know, in order to get paid you're
19 not going to go sell my pin number or EIN number to
20 somebody else." But you put it on a court website that
21 everybody from here to the Ukraine can get, there's a real
22 risk that somebody is going to pick it up and try to use
23 it for nefarious reasons.

24 And we faced this one, and that is when we
25 had the big row over whether or not the State Bar website

1 ought to have the home address and phone number of
2 attorneys; and the argument was, well, that's not -- you
3 don't really have a privacy interest in your home house
4 number and your phone number. Those can be obtained.
5 Well, that's all fine and well until you represent
6 somebody who is unpopular, and everybody and his brother
7 goes to the State Bar website to find out where you live
8 so they can go picket your house. That got solved, by the
9 way, by some timely legislation; but I can see people
10 arguing, "I may not have a common law privacy interest in
11 this. I may not have a privilege, but you putting it out
12 there for everybody from here to China to get their hands
13 on makes me a little nervous about how it might get used."

14 CHAIRMAN BABCOCK: Okay.

15 MR. ORSINGER: Holly had something over
16 there.

17 CHAIRMAN BABCOCK: Yeah, Holly, sorry.

18 MS. TAYLOR: No problem. So I just have a
19 couple of comments. One is that this sensitive data
20 definition from 21c I guess is echoed in Rule of Appellate
21 Procedure 9.9 and Rule of Appellate Procedure 9.10. So I
22 guess if we made changes, I don't know, would it make
23 sense to make them all match up?

24 And then the other thing is we also had
25 loosely based the definition of "sensitive data" in our

1 e-filing rules for criminal cases on the same language,
2 although we did tweak it a little bit just because of the
3 different character of our cases. So but that's another
4 set of rules that also employs this sensitive data
5 definition. So I guess it would have sort of a domino
6 effect if we make changes. There may be all kind of sets
7 of rules that I'm not even thinking about that refer back
8 to this definition.

9 Just incidentally, the changes that we made,
10 this is in our Rule 4.1 of the criminal e-filing rules,
11 which were passed just recently by both courts. We
12 included "personal phone number" in that list. I guess
13 we -- our committee and Court were thinking a lot about
14 things like cell phone numbers of victims of crimes. And
15 then also we changed -- I guess it says the name of a
16 minor, "a person who is a minor when the underlying suit
17 was filed." We added "unless under Texas Family Code
18 section 54.02, a juvenile court has waived its exclusive
19 original jurisdiction and transferred the individual to a
20 district court," because in that instance they've been
21 certified essentially. They've been transferred to the
22 district court. The appellate court case will use the
23 person's name, even if they were a minor when the
24 underlying suit was filed.

25 CHAIRMAN BABCOCK: Okay. Good. Thanks,

1 Holly. Judge Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: Give me a
3 business, and I'll tell you their employer ID number right
4 now on the web.

5 MS. WOOTEN: In an e-filed document or --

6 HONORABLE LEVI BENTON: Let's check Jackson
7 Walker.

8 HONORABLE STEPHEN YELENOSKY: "Can you look
9 up business federal tax number?"

10 "Yes. You can use electronic data gathering
11 known as EDGAR maintained by the United States Security
12 and Exchange Commission."

13 CHAIRMAN BABCOCK: Look up Yelenosky and
14 Benton.

15 HONORABLE STEPHEN YELENOSKY: Well, mine is
16 private.

17 CHAIRMAN BABCOCK: LLC.

18 HONORABLE STEPHEN YELENOSKY: Mine's a
19 Social Security number.

20 MR. GILSTRAP: A small privately held LLC is
21 going to be on the SEC website?

22 MS. CORTELL: No, the public --

23 HONORABLE STEPHEN YELENOSKY: Well, maybe
24 not that. That's true, but I haven't gotten all the way.
25 That's just the first thing.

1 MR. GILSTRAP: There are people who have
2 privately held corporations and LLCs that run a lot of
3 their personal business. They don't send out 1099s and,
4 you know, there's no -- there's no reason to put their
5 number in the pleading.

6 HONORABLE LEVI BENTON: Mr. Chairman?

7 CHAIRMAN BABCOCK: Richard, then Levi.

8 MR. ORSINGER: Having fought this issue a
9 number of times, there is a Texas Supreme Court case. I
10 don't remember the volume and page, but the name is
11 *Mareska vs. Marks*. And the Texas Supreme Court ruled that
12 tax returns were conditionally privileged in litigation
13 and that if one party wanted to do discovery of the other
14 party's tax returns, it required an in camera inspection
15 by the court, which could then reveal only the portions of
16 the tax return that were relevant to the claims in the
17 suit, and if the court failed to exercise that discretion
18 they would be mandamused. There are actually two Supreme
19 Court mandamus cases on that subject.

20 So while there's no privilege for tax
21 returns in the Rules of Evidence per se, our Supreme Court
22 has recognized that they are conditionally privileged, and
23 so throwing a taxpayer ID number out for an entity, to me
24 we should make a decision or somebody should make a
25 decision whether the conditional privilege is warranted

1 and extends to entities. In those two cases they were
2 individuals, but the philosophy behind some of our
3 privileges, like things that you're required to file for
4 the banking industry and things -- even entities are given
5 privileges for information that they're required by the
6 government to file with the government. And they are
7 spread all over federal and state law, those kinds of
8 privileges.

9 I don't know that I agree with the appellate
10 lawyer who believed that there is no privilege for
11 returns. Maybe we should call it a confidentiality or an
12 exemption or a conditional privilege, but I think that
13 there's a lot at stake here and that we should be very
14 thoughtful before we just conclude that entities don't
15 have any privacy interest in their taxpayer ID number.

16 CHAIRMAN BABCOCK: By the way, Martha can
17 give you the cite for that case just like that if you want
18 it. Levi.

19 HONORABLE LEVI BENTON: Yeah, I don't
20 join --

21 MR. ORSINGER: Richard.

22 HONORABLE LEVI BENTON: -- Richard in his
23 use of language, but I agree with Roger, and I don't hear
24 anyone arguing that the information is not sensitive. I
25 mean, it may not -- no, no. You're saying it may not be

1 privileged, it may not be confidential, and I don't
2 disagree with that, but it's still sensitive.

3 HONORABLE STEPHEN YELENOSKY: I don't know
4 why.

5 HONORABLE LEVI BENTON: Because there's --
6 because when you are over in Kuwait or whatever, you might
7 use it or our cousins in Kuwait or wherever, the Ukraine,
8 might use it for purposes it ought not to be used for.

9 HONORABLE STEPHEN YELENOSKY: Well, again,
10 you're assuming you can't already get it, and I think you
11 can.

12 HONORABLE LEVI BENTON: I'll assume you can
13 get it, but there are folks who enjoy spending their day
14 combing court records, and we ought not put it in the
15 court records is all I think what Roger says, and I agree
16 with that.

17 CHAIRMAN BABCOCK: Buddy, then Justice
18 Bland.

19 MR. LOW: What is protected in court is not
20 based on if you can get it someplace else and we don't
21 protect it any longer.

22 HONORABLE LEVI BENTON: Right.

23 MR. LOW: We don't do that. We do say is
24 you can't get it from a court record and that was based
25 originally on certain statutes and things, and we've gone

1 further, but just the fact that you can get it on the
2 internet doesn't say, well, then, in court you can't
3 protect that. We say you're not going to get it from a
4 court record.

5 CHAIRMAN BABCOCK: Justice Bland.

6 HONORABLE JANE BLAND: Well, I mean, the
7 existing ruling says similar government-issued personal
8 identification number. So is it already limiting the
9 universe to personal tax ID numbers? And our introductory
10 language also says "a government-issued personal
11 identification number." So, I mean, we're adding
12 "personal" in there a third time. Is that just for super
13 clarity, or do we -- does personal need to come out of
14 similar government-issued personal identification number
15 and government-issued personal -- it's in there -- adding
16 this third paragraph puts the word "personal" in this
17 three times.

18 CHAIRMAN BABCOCK: Emphasizes that it's
19 supposed to be personal.

20 HONORABLE JANE BLAND: Right. The point is
21 that without adding this third "personal," it could
22 already be read to be limited to the universe of similar
23 government-issued personal numbers.

24 MS. WOOTEN: Good point.

25 MR. GILSTRAP: They got personal. No. No,

1 take it out. There's no reason to take it out there.

2 CHAIRMAN BABCOCK: Frank, speak up.

3 MR. GILSTRAP: I'm sorry.

4 MR. ORSINGER: Speaking through the power of
5 the internet I have located *Maresca vs. Marks*,
6 362 S.W.2d 299

7 CHAIRMAN BABCOCK: Martha knew that.

8 MR. ORSINGER: 1962 case by Justice Stakely,
9 relying on an earlier Supreme Court case called *Crane vs.*
10 *Tunks*, and I determined that in *Maresca vs. Marks* there
11 were both tax -- personal tax returns and corporate tax
12 returns. And the Texas Supreme Court said that they were
13 conditionally privileged, so the stare decisis is that
14 even corporate entities have conditional privileges on
15 their tax returns. So this is not a tax return. This is
16 a taxpayer ID number, but is that sufficiently revealing
17 that it may -- that we should maybe not throw the
18 privilege away in this rule without more severe
19 consideration?

20 CHAIRMAN BABCOCK: Justice Bland.

21 HONORABLE JANE BLAND: That's great. Then
22 let's take all of the "personals" out, all three of them.

23 CHAIRMAN BABCOCK: Justice Bland is on a war
24 against the word "personal" here.

25 MR. ORSINGER: I'd have to say that I'm

1 behind her, beside her.

2 HONORABLE STEPHEN YELENOSKY: It's very
3 visionary I would say.

4 CHAIRMAN BABCOCK: Justice Christopher.

5 HONORABLE TRACY CHRISTOPHER: You know, this
6 rule has only been in place since 2014, right? And I
7 don't really see that there's a big issue about it. So, I
8 mean, unless there's some horrible thing, I don't see why
9 we would change it.

10 CHAIRMAN BABCOCK: Yep. Kennon, what's the
11 evidence of some horrible thing?

12 MS. WOOTEN: The evidence includes but is
13 not limited to multiple comments sent to Martha Newton
14 about the operation of the rule in practice. In addition,
15 the reality --

16 HONORABLE TRACY CHRISTOPHER: Well, I don't
17 understand what that means. What are the comments?

18 MS. WOOTEN: Well, we can send them to this
19 group, and maybe that should be done before we talk about
20 it further. It was sufficient to make the court rules
21 committee think that this is causing some confusion and
22 perhaps unnecessary in practice.

23 MS. NEWTON: So I did, I bundled up all the
24 many e-mails that I received and forwarded them to the
25 court rules committee, so they did have the benefit of

1 that when they were working on this.

2 CHAIRMAN BABCOCK: When you say "many" do
3 you mean 50, 100, 2,000?

4 MS. NEWTON: Not 2,000. Maybe 50. But two
5 things. One on this is that many people pointed out the
6 inconsistency between the rule and the statute that does
7 -- in the CPRC that does require the last three digits of,
8 what, a driver's license I think.

9 MS. WOOTEN: Social Security, too.

10 MS. NEWTON: But then circling back to our
11 -- potentially our conversation yesterday about debt
12 cases, I also heard from those lawyers who said that you
13 can't prove those cases without at least some digits for
14 an account or for a Social Security number.

15 CHAIRMAN BABCOCK: Okay.

16 MS. WOOTEN: And I'll add just one thing,
17 for what it's worth. When you're e-filing a document and
18 having to go in and redact all of this information, it can
19 be pretty time consuming, for what it's worth, and so the
20 practical impact is it costs more, it takes more time. So
21 if the information isn't truly of the nature that it's
22 sufficiently sensitive to be struck from the records, I
23 would be a proponent of not requiring the striking.
24 Because the burden I'm talking about is for me with an
25 assistant, and I think about the solo practitioner who in

1 addition to the substance in going through and having to
2 redact every single occurrence of sensitive data. It can
3 be laborious. I'm not saying it shouldn't be done if the
4 information is, in fact, sensitive.

5 HONORABLE TRACY CHRISTOPHER: This rule
6 isn't changing that. In fact, it's making it harder
7 because now you have to just partially redact Social
8 Security number and a, you know, credit card number so
9 that you're leaving digits.

10 MS. WOOTEN: The difference I think would be
11 just if you made it more specific in terms of as to
12 whether it applies to, for example, the entity's
13 identification number.

14 CHAIRMAN BABCOCK: Yeah, I think the record
15 should reflect whether you are in a big firm, big time or
16 some other type of lawyer doing your own redactions here.

17 MS. WOOTEN: I am at a mid-sized firm. I do
18 not have to do my own redactions, but I do have to wait
19 for that redaction process to occur. It adds time.

20 CHAIRMAN BABCOCK: And you charge your
21 clients for the redaction?

22 MS. WOOTEN: I don't, because my secretary
23 handles it. So the charge that comes into place for my
24 client is when I have to go back at the record and review
25 it to make sure that everything should be redacted.

1 CHAIRMAN BABCOCK: Which you do?

2 MS. WOOTEN: Yes.

3 MS. TAYLOR: Speaking from the perspective
4 from someone who has spent hours and hours redacting
5 material, I think that this won't be -- I don't know about
6 the Social Security numbers, but the account numbers part
7 will not be more laborious because most statements now,
8 bank statements, things like this, only list the last four
9 numbers in them. So, in fact, you would instead of having
10 to go through and redact all of those, it would already be
11 in the redacted form.

12 CHAIRMAN BABCOCK: Okay.

13 MS. TAYLOR: I think it would save time, for
14 what it's worth.

15 CHAIRMAN BABCOCK: Okay. Yeah, Roger, last
16 comment about this.

17 MR. HUGHES: Well, maybe we're also at a
18 crisis of philosophy, because there is a burden, and I
19 know we are -- you know, there's only nine lawyers and
20 some staff in my firm, and the redaction process in these
21 records has become just a burden to us. But what keeps
22 guiding me, which is why I favor going the other way and
23 protecting more information, is this information may not
24 be personal and sensitive to me, and it's just a royal
25 pain to have to go through and black it out or ask my

1 secretary to do it or my paralegal to do it and have to go
2 back and check, but it is personal to somebody.

3 And this is not just financial records.
4 There's a lot of this stuff in medical records; and I
5 assure you that, you know, the HIPAA compliance stuff is
6 pretty strict; and it's getting worse because the
7 government can fine you now about releasing this stuff.
8 But still there's a lot of information that is in medical
9 records. They want to know your Social Security number
10 because that's how they categorize you. That's what they
11 look you up. They want your home address and your home
12 phone because they want to know who to go after for the
13 dang bill. And so there is -- and as a defense attorney I
14 will go through and mine all of that information, but
15 there is a lot of personal -- not just medical history.

16 There's that, but there's a lot of personal
17 identifying information. In there, you know, your family,
18 your family's home phone, your family's cell phone
19 numbers, maybe even their Social Security numbers. So I'm
20 saying, once again, it may not be personal to us; and it's
21 just a pain; but it is personal to somebody; and they may
22 really care; and they may get -- they're the ones who are
23 going to bear the brunt if we get a little stingy about
24 not protecting their information.

25 CHAIRMAN BABCOCK: Yep.

1 HONORABLE LEVI BENTON: So at Wheeler Avenue
2 Baptist Church in Houston we would say, "Let the church
3 say 'Amen.'"

4 CHAIRMAN BABCOCK: There we have it.
5 Richard, we got anymore to talk about on 21c?

6 MR. ORSINGER: Yes, sir. Yes, sir. The
7 next item is the rules committee proposed that we take the
8 existing definition of "sensitive data" to apply to a bank
9 account, credit card, or other financial account and
10 restrict it to only those that are open bank accounts,
11 open credit cards, or other open financial accounts. So
12 closed accounts would be fair game, not sensitive. And
13 then the committee also recommended that the last -- that
14 the last four digits of any of those accounts not be
15 sensitive data. As it reads now I think you would
16 interpret it that the entire account number is sensitive
17 data, and they want to limit it to only open accounts, and
18 they want to allow the last four digits to not be
19 sensitive.

20 CHAIRMAN BABCOCK: All right. Any comments
21 on that, Justice Christopher?

22 HONORABLE TRACY CHRISTOPHER: Well, if y'all
23 will remember before we did this rule we had, you know,
24 all of the stakeholders come and talk and say, you know,
25 "We need the last four digits, we need this, we need this,

1 we need that," and the Supreme Court didn't go with it.
2 So it seems to me that all we're having right now is the
3 exact same thing. "We need this. We need this."

4 CHAIRMAN BABCOCK: Kennon.

5 MS. WOOTEN: That was a memory I had as
6 well, and before the court rules committee did the work on
7 this rule we did have communication with the Court to make
8 sure it was worthwhile. So my understanding, which may be
9 wrong, is that perhaps there is openness to reconsidering
10 the definition.

11 MR. ORSINGER: Motion for rehearing, in
12 other words.

13 MS. WOOTEN: But I could be wrong, I mean,
14 but we did have that concern before we looked at this at
15 the lower level.

16 MS. NEWTON: Well, I think I might be able
17 to shed some light on that because I'm looking it up now,
18 but my recollection is that the initial order, e-filing
19 order, that the Court put out for public comments
20 required -- did permit the last four digits. So that was
21 kind of during the turnover. Marisa left right after that
22 order was published for public comment and then I came in.
23 So I wasn't really privy to everything that had happened
24 on e-filing up until that point, but I was the one who
25 started to collect and receive the public comments, and

1 there were many, many public comments saying, "Well, if
2 you -- you know, if you let them put it in any digits then
3 you can figure out the rest of the number," that
4 permitting any digits wasn't secure enough. So there were
5 many comments like that and then ultimately so that's why
6 I think ultimately the final order required redaction of
7 the whole number, if I'm remembering correctly.

8 CHAIRMAN BABCOCK: Okay. Any more comments
9 about this?

10 MR. GILSTRAP: Why the distinction on closed
11 and open accounts? What's behind that?

12 MS. NEWTON: I think that's another
13 suggestion of the debt collection lawyers.

14 HONORABLE TRACY CHRISTOPHER: And they came
15 and talked before at length on how they wanted all of this
16 stuff, and the Court said "no." I mean --

17 CHAIRMAN BABCOCK: Okay.

18 HONORABLE TRACY CHRISTOPHER: They're still
19 complaining.

20 CHAIRMAN BABCOCK: Well, they're consistent.
21 All right. Anything else? Okay.

22 MR. ORSINGER: The next item is, is that
23 right now the entire birthdate is sensitive data, and the
24 committee proposed that it be -- not the subcommittee,
25 now, but the rules committee proposed that it just be the

1 month and date, but not the year. So the year of the
2 individual is not sensitive.

3 HONORABLE STEPHEN YELENOSKY: To some people
4 that is.

5 MR. LOW: I was going to object.

6 HONORABLE STEPHEN YELENOSKY: I would rather
7 have the date but not the year.

8 MS. GREER: My grandmother actually changed
9 her age on her passport.

10 HONORABLE STEPHEN YELENOSKY: What did you
11 say, Marcy?

12 MS. GREER: My grandmother changed her age
13 on her passport, but she made herself nine years younger
14 with a blue ballpoint pen.

15 MR. ORSINGER: So really what we ought to do
16 is we ought to make the first -- the month and the day
17 should be nonsensitive and the year should be sensitive.

18 CHAIRMAN BABCOCK: Only the last digit of
19 the year I think would be.

20 MR. ORSINGER: I don't know what's behind
21 this. Kennon may have something on that.

22 MS. WOOTEN: My recollection is not --

23 CHAIRMAN BABCOCK: She doesn't know.
24 Justice Bland.

25 HONORABLE JANE BLAND: I'd like -- I liken

1 this to Jim Perdue's comment about over-engineering.
2 Honestly, we're going to have people try to figure out,
3 okay, the month and day go out and the year goes in, and
4 it's going to get confusing, and people are going to do
5 the opposite. It seems like we're making this rule overly
6 complicated.

7 CHAIRMAN BABCOCK: All right. Richard, what
8 else?

9 MR. ORSINGER: The next item is subdivision
10 21c, subdivision (a), subdivision(4), just a change in
11 placement. The current wording is "the home address and
12 name of any person who was a minor when the underlying
13 suit was filed," and they want to say "name and home
14 address." "Name and address" rather than "address and
15 name." And then they want to take the wonder "underlying"
16 out because this is, in fact, the present suit, not the
17 underlying suit I'm assuming.

18 CHAIRMAN BABCOCK: You're dogging on Kennon
19 here, aren't you, when you say "they" want to take this
20 out? "No sense to me, but they want to take it out."

21 MS. WOOTEN: "Those people have ideas."

22 MR. ORSINGER: I'm like Martha. I came on
23 the scene after the decision was made.

24 MS. WOOTEN: Oh, you're in the scene, my
25 friend.

1 CHAIRMAN BABCOCK: Okay. Real briefly, the
2 importance of putting the name in front of home address as
3 opposed to home address and the name is?

4 MS. WOOTEN: Is that now it would apply to
5 minors across the board. Right now you're taking out home
6 address for everybody and this, again, is derived from I
7 think the public comments that we reviewed as a committee,
8 and so it's making it less restrictive.

9 CHAIRMAN BABCOCK: Can Tracy just have her
10 do-over comment again in response to that?

11 HONORABLE TRACY CHRISTOPHER: Yes. Yes.

12 CHAIRMAN BABCOCK: Let the record reflect
13 that.

14 MR. ORSINGER: What she's saying is that
15 that comma, that is a meaningful comma. That is not just
16 a pause. That's actually -- yes, but we heard about this
17 at the Supreme Court practice course yesterday about the
18 importance of commas and semicolons. So what -- Kennon,
19 what you're saying is because it says "name and home
20 address," comma, "and the name of any person who was a
21 minor," then --

22 MS. WOOTEN: It's home address for
23 everybody, regardless of age.

24 MR. ORSINGER: Everybody, but only names for
25 minors because of that comma?

1 MS. WOOTEN: Yes.

2 MR. ORSINGER: So if you move "name" in
3 front of the comma it's going to apply to everybody, or is
4 the entire clause restricted to minors?

5 MS. WOOTEN: Under the proposed amendment
6 the clause would be restricted to minors, is my
7 interpretation.

8 MR. ORSINGER: So in the old days you could
9 put anybody's home address in there, and you could not put
10 a minor's name? Now you can't put anybody's name or
11 address?

12 MS. WOOTEN: In the old days or, in other
13 words, in modern day, today --

14 MR. ORSINGER: Okay.

15 MS. WOOTEN: -- how I construe the rule, we
16 have to strip out every single home address, regardless of
17 age.

18 HONORABLE TRACY CHRISTOPHER: Yes.

19 MS. HOBBS: Yes. That's how I read the
20 rule. I've had this exact conversation.

21 MR. PERDUE: It's an oxford comma.

22 HONORABLE TRACY CHRISTOPHER: It's a good
23 rule.

24 MR. ORSINGER: Okay. So now under this
25 proposal what would we do?

1 MS. WOOTEN: Under this proposal it would be
2 protective of minors' names and home addresses, but
3 wouldn't extend across the board to every single home
4 address, and people may not agree with that approach, but
5 that's the change.

6 MR. ORSINGER: So the substantive decision
7 that's being made here is that adults' home addresses will
8 no longer be sensitive data.

9 MS. WOOTEN: That would be the change, yes.

10 MR. ORSINGER: I get it. I didn't figure
11 that out.

12 CHAIRMAN BABCOCK: Me neither.

13 MR. ORSINGER: Pretty clever, pretty clever.

14 CHAIRMAN BABCOCK: Okay. So now that you've
15 dogged on her and explained to her --

16 MR. ORSINGER: Cross-examination. I pass
17 the witness, your Honor.

18 CHAIRMAN BABCOCK: She's writhing in pain on
19 the ground.

20 MR. ORSINGER: I'll have to say --

21 MS. WOOTEN: For the record, I'm not
22 writhing or in pain.

23 MR. ORSINGER: My subcommittee did not grasp
24 the significance of that change in placement, and,
25 therefore, we have no opinion on this.

1 CHAIRMAN BABCOCK: Okay. Good. What's
2 next?

3 MR. ORSINGER: Oh, what's next? Okay. So
4 that brings us down to a proposal about having a reference
5 list, which -- and, Kennon, I hate to put you on the spot
6 again, but I'm going to need some help here. The
7 subcommittee was very confused. Is the proposal is to
8 create terms that are confidential; and we're, therefore,
9 going to create a code, like A, B, C, and D; and A is
10 going to represent so-and so and B is so-and-so? So when
11 you're reading a pleading or a judgment or whatever it is
12 you're going to get the coded names and then only people
13 who have a secret code sheet can translate it?

14 MS. WOOTEN: Correct.

15 MR. ORSINGER: Now then, is that workable?
16 Are we going to be able to mechanically keep track of that
17 sheet, and who is going to get the sheet, and how would
18 you get it if you don't already have it? Do you file a
19 motion? Or we're very confused about the mechanics of how
20 that would work.

21 MS. WOOTEN: I'll try to keep track of all
22 of the questions --

23 MR. ORSINGER: Yeah, sorry.

24 MS. WOOTEN: -- and address them all.

25 MR. ORSINGER: Multifarious.

1 MS. WOOTEN: So in terms of whether it would
2 work that is probably a question better directed to the
3 people in the room who practice in federal court where
4 there is a sheet like this in operation already. I don't
5 do enough practice in federal court to have seen how that
6 works and whether there are problems with it, but it's
7 happening already. The difference in the federal system,
8 if I recall correctly, is that there's protection of that
9 code, if you will; whereas in the current system we have
10 76a to contend with. And so a struggle at the court rules
11 committee level was the reality that if you give this code
12 over to the court, anybody could go to the court --

13 MR. ORSINGER: Oh.

14 MS. WOOTEN: -- and get it because it would
15 be part of the public record; and at the court rules
16 committee level there was, at least among some, a desire
17 to have automatic sealing of that code so that nobody
18 could come to the court and just get it readily.

19 Now, I think the reality that should be
20 stated is that currently -- before we had this whole
21 system of sensitive data and people could just go to the
22 courthouse and get all of this stuff anyway, the
23 difference with the code in shorthand is that it just puts
24 everything that's sensitive right there at the fingertips,
25 and people would know it's out there to get from the

1 court. So some members of the committee, including me,
2 for what it's worth, felt like there might be some good
3 sense in making the code subject to automatic sealing. Of
4 course, that would require further revision than what's on
5 the page. The thought process was let's put this out
6 there one step at a time and get a feel for how this
7 committee and the Court react to it.

8 MR. GILSTRAP: Does this require a code
9 sheet in every case in which you redact something?

10 MS. WOOTEN: It doesn't require it. Right
11 now it's permissive.

12 CHAIRMAN BABCOCK: Justice Bland.

13 HONORABLE JANE BLAND: Kennon, are people
14 filing that? I mean, we are not getting that filed.

15 MS. WOOTEN: Right now, to my knowledge,
16 people are not filing things like this because it's not
17 required --

18 HONORABLE JANE BLAND: Right.

19 MS. WOOTEN: -- and it's not even addressed
20 in the rules.

21 HONORABLE JANE BLAND: So are you saying you
22 would require it to be filed?

23 MS. WOOTEN: Right now it's just permissive.
24 So somebody could do that if they wanted to. For example,
25 there may be some scenario where someone thought this

1 information is important for the court to know for a
2 judgment, by way of example, so I'm going to go ahead and
3 put that into the court record, but it does not require
4 the filing party to do that.

5 HONORABLE JANE BLAND: Right, and that's how
6 it is right now.

7 MS. WOOTEN: Yeah, right now I guess they
8 could do that. Yeah.

9 HONORABLE JANE BLAND: People right now
10 aren't filing these.

11 MS. WOOTEN: I don't think they really think
12 about the option of doing it perhaps because it's not even
13 addressed in the rules and that's their --

14 CHAIRMAN BABCOCK: But I don't understand
15 how this -- I'm sure it's just me, but how does this work?
16 You file something, and you're very diligent about
17 redacting all of your sensitive information, and then you
18 create a document that says, "Well, when I redacted this
19 stuff in paragraph two, the redacted stuff is" and then
20 you tell them what it is?

21 MS. WOOTEN: Uh-huh.

22 CHAIRMAN BABCOCK: Doesn't that completely
23 defeat the purpose of the redaction?

24 MS. WOOTEN: Not if the code is not subject
25 to public disclosure, right? Because what's in the court

1 record and what people can get just in Russia, by way of
2 example, is just what --

3 CHAIRMAN BABCOCK: Why did you look at
4 Elaine when you said that?

5 PROFESSOR CARLSON: I was waiting for
6 Russia.

7 MR. ORSINGER: There's got to be a Russian
8 connection to everything.

9 CHAIRMAN BABCOCK: So --

10 MS. WOOTEN: She's Russian. I don't know if
11 you knew that.

12 CHAIRMAN BABCOCK: So you're talking now
13 about this code, and we would have to -- we would have to
14 craft a rule that said, okay, you could do the code, but
15 if you do the code, and you file it then 76a is out. It's
16 just per se confidential and --

17 MS. WOOTEN: It would be a policy choice for
18 the Court. I mean, one option would be that it's just
19 there, and people could walk up to the courthouse proper
20 and get it. The other option is to make it automatically
21 sealed so that --

22 CHAIRMAN BABCOCK: And what's the purpose of
23 the code?

24 MS. WOOTEN: So the code -- and the judges
25 can probably address this better than me, but part of it

1 would be for judgment purposes.

2 HONORABLE STEPHEN YELENOSKY: Well, I mean,
3 a couple of things on that. If you're talking only about
4 sensitive data, right?

5 MS. WOOTEN: Uh-huh.

6 HONORABLE STEPHEN YELENOSKY: If the judge
7 doesn't need to know the sensitive data, then you just
8 redact it. You don't need a code. You tell the other
9 side, you know, "You know what it is," but if the judge
10 needs to know then you have a 76a issue. I'm not against
11 automatic sealing of sensitive data. The problem is -- I
12 think Frank sort of alluded to this -- people will start
13 using codes for things that are not sensitive data that
14 they just don't want the public to see, and that needs to
15 go through 76a. So that's -- those are the issues.

16 CHAIRMAN BABCOCK: And if the code is needed
17 for the judge, so the judge can put the information into
18 a --

19 HONORABLE STEPHEN YELENOSKY: Then it's 76a.

20 CHAIRMAN BABCOCK: -- public document, then
21 that defeats the purpose. It's a circular thing.

22 HONORABLE STEPHEN YELENOSKY: Yeah, the
23 judge may need it but not to put in the judgment. The
24 judge may need it for purposes -- I don't know what they
25 would be, but, for example, the judge needs to distinguish

1 one bank account from another, right, in order to figure
2 division of property, but the judge isn't going to put
3 that in the order. I don't know. I'm trying to think of
4 something. Judges need to know things that aren't
5 necessarily going to be in the judgment. For instance, a
6 trade secret. Right? Judge doesn't put that in the
7 order, but that would be self-defeating if it is a trade
8 secret, but the judge is going to know perhaps through a
9 sealed document what that is.

10 CHAIRMAN BABCOCK: Yeah. Okay.

11 MS. NEWTON: One example that was given to
12 me by some clerks and trial court judges was child support
13 cases, that there is some information that the judge needs
14 to turn over perhaps to the Bureau of Vital Statistics.
15 So -- or the court does, so they need information, you
16 know, the child's name and Social Security number, but if
17 it's all redacted and they don't have another way to get
18 it then that impedes that process.

19 MS. WOOTEN: And it might be worth noting
20 that this concept isn't entirely novel. If I recall
21 correctly, when I was at the Court as a rules attorney we
22 were looking at a proposal that had a sensitive data sheet
23 accompanying the sensitive data rule. So what the court
24 rules committee has put into this proposal is somewhat
25 similar to the federal system that's in place already and

1 was also with the memory of a sensitive data sheet being
2 envisioned in Texas as well.

3 CHAIRMAN BABCOCK: It's even less novel than
4 that.

5 MS. WOOTEN: Oh.

6 CHAIRMAN BABCOCK: You may be too young to
7 remember the Ovaltine secret decoder ring. But this goes
8 way back.

9 MS. WOOTEN: I know Ovaltine.

10 CHAIRMAN BABCOCK: This goes way back. All
11 right. Richard, let's go to the proposed --

12 MR. ORSINGER: Okay. So the next proposal
13 is on subdivision (f). It currently says, "This is a
14 restriction on remote access. Documents that contain
15 sensitive data in violation of this rule," that would be
16 mean not properly redacted, "must not be posted on the
17 internet." And the proposed rewrite is "Documents that
18 contain sensitive data must not be made available remotely
19 to any person other than the court, the parties, or the
20 parties' counsel." So that clearly is more modern
21 language, and, you know, I'm sorry I can't report any
22 opinion on our subcommittee about that.

23 MS. HOBBS: Chip? I think that's a problem,
24 if I'm reading this right, is that we just made the
25 decoder sheet not available remotely, but somebody could

1 still go down to the courthouse and get the decoder sheet
2 the way this is drafted. Am I reading that right, Kennon?
3 I think it's just a drafting problem, but --

4 MS. WOOTEN: It's -- you're reading it
5 correctly, and it's a product of the committee not really
6 knowing how to deal with these decoder sheets, because
7 right now under 76a you couldn't just get them sealed
8 automatically. And so the compromise, which may not be
9 sufficient, is to say, "You can put it into the record,
10 party, if you decide to do that, but know that if you do
11 that it's not going to be sealed automatically." So, yes,
12 that tension is there.

13 CHAIRMAN BABCOCK: Well, and just reading
14 this, I'm sure I read it before at one point, but if
15 you're saying that here's a document that can be filed in
16 the record, but you can't post it on the internet. I
17 mean, talking about the current rule, not you're proposed
18 amendment. I mean, that's a prior restraint.

19 MR. ORSINGER: The existing rule does not --
20 if someone violates this rule by putting sensitive data in
21 there and not redacting it, there's an existing rule that
22 says that can't be put on the internet. So the First
23 Amendment has already been assaulted and defeated.

24 CHAIRMAN BABCOCK: Well, you know, I'm
25 saying that slipped by me last time.

1 MR. ORSINGER: Oh, okay. Well, we'll have a
2 redo on that one then.

3 MS. HOBBS: So the intent of that was --
4 just because I got to be the rules attorney who studied
5 this the first time -- is when we were first starting
6 talking about redacting sensitive information in court
7 records, the clerks were like "Do not put this burden on
8 us." And we were like, fair enough, we're going to put
9 the burden on the parties to redact it in the first
10 instance, but what (f) does is says, "If you see it, don't
11 put it online," and that -- so it's a nominal burden on
12 the clerks, is what the intent was, is that if the parties
13 aren't complying with the rules then the clerks are going
14 to bear the burden to like make sure the sensitive
15 information doesn't get out on their public access
16 servers.

17 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

18 HONORABLE STEPHEN YELENOSKY: Well, I'm with
19 you, I think, Chip, in that in today's day and age, if
20 it's not available remotely, that cuts out tons of people.
21 And you want to cut them out sometimes, but there is no
22 real reason to say, well, you can put it in paper and
23 people who live across the street from the courthouse can
24 get it, but somebody who lives in another city can't.
25 That doesn't make sense to me. What makes sense to me is

1 it's either sealed or not.

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE STEPHEN YELENOSKY: And it's
4 either sealed by individual order or automatically, and if
5 automatically, it's real strict as to what it is.

6 CHAIRMAN BABCOCK: Yeah. Good point. All
7 right. Richard, you want to talk about the comment?

8 MR. ORSINGER: Okay. The comment is -- just
9 read it. "21c is amended to modify the definition of
10 sensitive data, incorporate a procedure for filing a
11 reference list, clarify the scope of permissible remote
12 access to documents that contain sensitive data filed in
13 compliance with the rule and documents that are in
14 violative of the rule should not be made available
15 remotely." And "Remote access means anything other than
16 in-person, physical access." All of that is explanatory
17 of those changes, and if any of those changes don't go
18 through obviously that part of the comment would go out.

19 CHAIRMAN BABCOCK: Yeah, and it seems to me
20 that, again, on the prior restraint issue it's overbroad,
21 because a document, you know, could have sensitive data,
22 but it could be one paragraph on page 62, and you're
23 saying the whole document can't be put on -- you know,
24 can't be made available remotely.

25 MR. ORSINGER: Yeah. Somebody could

1 actually gain that, couldn't they? They could
2 intentionally violate this rule and then make the whole
3 pleading unavailable remotely.

4 CHAIRMAN BABCOCK: Yeah. Yeah.

5 HONORABLE STEPHEN YELENOSKY: I don't think
6 it works that way.

7 MR. ORSINGER: No? It wouldn't work that
8 way?

9 HONORABLE STEPHEN YELENOSKY: Well, at least
10 in Travis County I think what they would do is they would
11 have the paper document, but however they scanned it and
12 put it up, it would be redacted out under the current
13 rule, because it would not be available remotely because
14 that would be a redacted document remotely, but the
15 unredacted would be on paper there. I think that's a bad
16 way to do it, but that's how it's done.

17 MR. ORSINGER: Then your clerk's office
18 actually goes through and would redact that?

19 HONORABLE STEPHEN YELENOSKY: I don't really
20 know anything that goes on down there, but they tell me
21 things like that.

22 CHAIRMAN BABCOCK: But he does have a strong
23 opinion about it.

24 HONORABLE STEPHEN YELENOSKY: They tell me
25 things like that. Don't go there.

1 MS. HOBBS: Well, I think what they do now
2 is they kick it back to you and say, "This isn't
3 redacted." I think the clerks are getting pretty good
4 about kicking it back to you, identifying the problem and
5 saying, "This is your problem. Fix it and refile it."

6 CHAIRMAN BABCOCK: Justice Bland.

7 HONORABLE JANE BLAND: Well, and that's how
8 it needs to be, because we do not want the clerk's office
9 that we don't know what they would be doing, we would have
10 no ability to track what they were redacting, why they
11 were redacting it, and they're not trained lawyers. So we
12 can't have -- we can't have a rule that requires the clerk
13 to detect and remedy redaction errors.

14 CHAIRMAN BABCOCK: Eduardo.

15 MS. RODRIGUEZ: It's not their
16 responsibility. It's not the responsibility of the
17 clerks. It's the responsibility of the attorney.

18 CHAIRMAN BABCOCK: Frank.

19 MR. GILSTRAP: If you don't want to get into
20 this, that's fine, but I'm not understanding your comment
21 about prior restraint. Are you talking about the prior --
22 that the litigant can't put in the pleading what he wants
23 in the pleadings?

24 CHAIRMAN BABCOCK: No. I was reacting to
25 the current rule, subpart (f), that said in effect that

1 you have a document that you can file in court, but you
2 can't put it on the internet, and the comment supports
3 that.

4 MR. GILSTRAP: Are you saying the government
5 is restrained? It doesn't have a First Amendment right
6 necessarily.

7 CHAIRMAN BABCOCK: No. Well, that's a
8 complicated issue, but, no, I'm talking about the
9 litigant.

10 HONORABLE STEPHEN YELENOSKY: There's a
11 right to know issue, whether you call it First Amendment
12 or public --

13 MR. GILSTRAP: Yeah, the right to know is
14 not the First Amendment. That's another thing.

15 CHAIRMAN BABCOCK: Well, there are elements
16 of the so-called right to know that spring from the First
17 Amendment, but we don't need to get into that right now.
18 Justice Christopher.

19 HONORABLE TRACY CHRISTOPHER: I could be
20 wrong, but I think in Harris County they have different
21 grading of documents. So they've got the public view
22 documents, they've got the party view documents, and then
23 the sealed documents. And so like party view documents
24 would be the juror information sheet. Sealed obviously
25 has gone through the sealing procedure.

1 CHAIRMAN BABCOCK: Yeah. Okay.

2 HONORABLE TRACY CHRISTOPHER: And so like
3 when I look at the file remotely I would see them as
4 green, I think brown and red, so I would know how they had
5 been coded.

6 CHAIRMAN BABCOCK: Because you have the
7 secret decoder ring, don't you?

8 HONORABLE TRACY CHRISTOPHER: I have the
9 secret decoder.

10 MS. WOOTEN: Do you read them all while
11 drinking Ovaltine?

12 CHAIRMAN BABCOCK: This is a public record,
13 by the way. We now know --

14 HONORABLE TRACY CHRISTOPHER: I could have
15 the colors wrong, but I think that, you know, you could
16 tell what you were looking at based on that.

17 CHAIRMAN BABCOCK: All right. Kennon and
18 Richard, let's talk about Rule 57.

19 MR. ORSINGER: Okay. So the Rule 57 change
20 is simple. There's two. This has to do with the
21 information that you must disclose to identify when you
22 file pleadings. And it has to do -- the first change has
23 to do with parties who are self-represented, no lawyers,
24 and right now they have to put when they sign the
25 pleadings, their address, telephone number, e-mail

1 address, and if available, fax number. The first
2 committee recommended change is to say, "if available,
3 e-mail address and fax number," because the way it reads
4 now it looks like a pro se litigant has got to go out and
5 get an e-mail address and put it on the pleading, and a
6 lot of them don't. From the conversations we've had,
7 there are just a lot of self-represented people that don't
8 have e-mail addresses. So this is another way of saying
9 should we require pro se litigants to get an e-mail
10 address if they don't have one.

11 MS. WOOTEN: And I'll add that it's not just
12 about requiring them to get an e-mail address if they
13 don't have one, but also opening up the possibility that
14 communications to them will be via e-mail, and there are
15 many people who don't have ready computer access.

16 MR. ORSINGER: So the second phase of the
17 change -- maybe we should discuss simultaneously -- says
18 that you can use these methods that are listed in the
19 pleading to communicate. So, i.e., that means you can
20 communicate with them by e-mail.

21 CHAIRMAN BABCOCK: Yeah.

22 MR. ORSINGER: So I guess the question is
23 should we mandate pro ses to have e-mail so we can
24 communicate with them by e-mail?

25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: You remember we had that problem
2 with a lot of pro ses were in jail, and they couldn't get
3 a notary, and we amended the rule, you know, so they could
4 -- and so this is the same thing. They don't have access
5 to e-mail, I don't see there's any difference. Why should
6 we require it?

7 CHAIRMAN BABCOCK: Roger.

8 MR. HUGHES: I'll echo that. Again, where
9 I'm at people are more likely to have a cell phone and be
10 available by text than they actually have an e-mail
11 account.

12 MR. LOW: Right.

13 MR. HUGHES: And I'm not sure I'm ready to
14 start serving court documents by text messages yet.

15 CHAIRMAN BABCOCK: Okay. Tom. And we're
16 very sorry you missed your plane.

17 MR. RINEY: Well, I'm going to catch a plane
18 to Dallas. I would rather get stuck there overnight than
19 here.

20 CHAIRMAN BABCOCK: Whoa.

21 MR. RINEY: I have three grandkids in
22 Dallas.

23 MR. ORSINGER: Austin is the best place in
24 the world.

25 MR. RINEY: How many people here have

1 received something by fax other than an advertisement in
2 calendar year 2017? Okay. I mean, I think it's time to
3 take that out.

4 MS. BARON: Absolutely.

5 MR. ORSINGER: I agree. Time marches on.

6 CHAIRMAN BABCOCK: Okay. Buddy.

7 MR. LOW: There are -- a bank with a trust
8 that I'm involved in, they don't send by e-mail but send
9 by fax because they -- it's more secure.

10 CHAIRMAN BABCOCK: Okay.

11 HONORABLE STEPHEN YELENOSKY: Typically
12 HIPAA stuff is usually sent by fax. So if you have HIPAA
13 stuff in there you might.

14 CHAIRMAN BABCOCK: I've had judges, Tom, ask
15 me to send them stuff by fax.

16 MR. RINEY: I just --

17 CHAIRMAN BABCOCK: All right. Anything else
18 on 57? The charge asked us to talk about Rule 244,
19 service by publication. Is there nothing to be said about
20 that?

21 MR. ORSINGER: Yes. We didn't do that
22 because that's not in our committee, and if we should
23 have, that's our oversight.

24 CHAIRMAN BABCOCK: What do you mean it's not
25 in your committee?

1 MR. ORSINGER: Because we cut off at Rule
2 166a, and so there may have been some confusion. And if
3 so, I apologize.

4 CHAIRMAN BABCOCK: Okay. Well, next time
5 come back with 244.

6 MR. ORSINGER: Okay. And I've got 145 ready
7 to go, too. So it's on the runway ready to take off.

8 CHAIRMAN BABCOCK: Okay. So we'll put an
9 agenda for 145 and 244 --

10 MR. ORSINGER: Yes, sir.

11 CHAIRMAN BABCOCK: -- for next time. Okay.
12 We're going to take a quick break so we can get to Nina's
13 issue, but let's limit it to like 10 minutes instead of
14 our usual 15. We're in recess.

15 (Recess from 11:02 a.m. to 11:18 a.m.)

16 CHAIRMAN BABCOCK: All right. Nina has made
17 a special trip down here from far away Dallas, which some
18 people think is a better venue than Austin.

19 MR. RINEY: And I've got three in Fort
20 Worth, too.

21 CHAIRMAN BABCOCK: And so she's going to
22 talk or lead us through the discussion about the
23 amendments to the State Bar rules. So, Nina, take it
24 away.

25 MS. CORTELL: I'll wait one more second

1 until everybody is seated.

2 CHAIRMAN BABCOCK: Come on, guys.

3 MS. CORTELL: We were asked to look at a
4 very specific State Bar rule, and it was -- the initial
5 request came from a very fine attorney in San Antonio, who
6 at one point had a -- I guess some sort of substance abuse
7 issue that caused him to forfeit his license, but for the
8 last over 25 years he's been sober and well-qualified and
9 readmitted to practice law, and last year was -- his
10 nomination was made to serve as a State Bar board
11 director, but then after some hundred nominations were
12 made it was brought to his attention that there is a State
13 Bar rule that forever precludes him from seeking a
14 position as an officer or director of the State Bar, so he
15 asked that we look at amending the rules to permit at
16 least under certain circumstances that persons who had
17 previously either their license had been suspended or they
18 had been disbarred, that they could, if rehabilitated, be
19 considered for a State Bar board position either as an
20 officer or a director.

21 We provided you with a memorandum that sets
22 out the rules. I will go through it with you. I will
23 tell you that the basic recommendation of the subcommittee
24 is that we thought it should first be formally taken
25 through the State Bar itself and get their recommendation,

1 specifically the nominations and elections committee, but
2 we know that you want to consider yourselves the rules and
3 think about how we might approach this. As always there's
4 always the option not to do anything or if we wanted to do
5 something, whether we wanted to create a bright line rule
6 or a rule that had some discretion built into it. Okay.
7 So I hope you have the memorandum in front of you.

8 The two current State Bar rules we want you
9 to be looking at is Article IV, section 5(A)(3), which
10 basically says that "A person who has ever been suspended
11 or disbarred from the practice of law cannot serve as a
12 State Bar officer or director." And then the other really
13 is just by way of reference that there's a very recent
14 rule, Article III, section 9 that authorizes the Supreme
15 Court clerk to expunge an administrative suspension for
16 nonpayment of membership fees from a member's record, but
17 by its express terms does not allow expunction of a
18 disciplinary suspension. So it cannot be -- it doesn't
19 provide any relief in our circumstance, but we looked at
20 that rule because does it provide an example of actions
21 this committee could consider.

22 So we gave you -- again, attachments to the
23 memorandum are the two rules I've just mentioned as well
24 as the letter from the San Antonio attorney who brought
25 this to our attention, and of course, Chief Justice Hecht

1 then asked our subcommittee to look at it. As I said in
2 the memorandum, it's our recommendation to please first
3 formally get the input from the nominations and elections
4 subcommittee of the State Bar, but subject to that we did
5 have some proposals for you to consider. If it's okay I
6 think I'll go over those real quickly. I invite other
7 members of the subcommittee -- Justice Boyce and Kennon
8 are here today, and we're all happy to also further
9 explain the issues and then we'll open up it up to
10 discussion.

11 So the threshold issue is do you make any
12 change? Do you stay with a bright line rule that once
13 suspended or disbarred you may never serve on the State
14 Bar board of directors as an officer or director? Second,
15 if you don't want that rule then if you do want to change,
16 what should the revised rule look like? And we are giving
17 you two bright line options. One is to change "is" for
18 "has ever been" so that the Bar would only -- the
19 prohibition would only apply if you were currently
20 suspended or disbarred. It wouldn't encompass everyone
21 who has ever been suspended or disbarred. So that's one
22 bright line approach. Another bright line approach would
23 be to say if you had been suspended or disbarred within a
24 certain number of years, so sort of a statute of
25 limitations kind of concept, if you've been a practicing,

1 licensed member of the Bar for let's say 10 years you
2 would be eligible. So those were the two bright line
3 options that we would offer up aside from the current
4 bright line, which is a complete prohibition.

5 And then we thought for other options, the
6 discretionary option would be unless -- the prohibition
7 applies unless otherwise determined; and you could decide,
8 fill in the blank, what group would look at that, whether
9 it be the board of directors or some committee, so unless
10 otherwise determined by somebody; or go back to the
11 expunction rule that I mentioned and enlarge that rule to
12 provide a mechanism here to sort of revive a candidacy of
13 an otherwise disbarred or suspended lawyer. So with that
14 I will leave that to the committee and open it up.

15 CHAIRMAN BABCOCK: Okay. Nina, let me ask
16 you a question. How long has the current language been in
17 effect?

18 MS. CORTELL: You know, I don't -- I don't
19 really know. I know the expunction rule is very new. Let
20 me see if there's some indication of --

21 CHAIRMAN BABCOCK: I'm talking about the
22 current language that we're asked to modify or consider
23 modifying.

24 MS. CORTELL: I don't think I know that.

25 CHAIRMAN BABCOCK: Marcy, do you know?

1 MS. GREER: I have a question. Once you're
2 disbarred, you can get back in? Is that --

3 MS. CORTELL: Yes.

4 MS. GREER: Oh, that can happen? Because to
5 me suspension and disbarment are two different things; and
6 suspension, especially if somebody is having a substance
7 abuse or depression or something like that, they ought to
8 be able to be reconsidered. So to treat the two as the
9 same would be not good.

10 MS. CORTELL: I think that's a good point,
11 Marcy. Perhaps we could draw a distinction there.

12 CHAIRMAN BABCOCK: Yeah, I was trying to get
13 at how long has this been the rule and what was the
14 thinking behind passing the rule to begin with?

15 MS. CORTELL: Well, I don't know the answer
16 to that. I will say there are those at the State Bar who
17 are pleased with the current rule, who believe that the
18 bright line rule is appropriate and that it may not always
19 be just, it may not always be right, but that if you look
20 at the entirety of our Bar and that this bright line rule
21 was deemed appropriate at least by some.

22 CHAIRMAN BABCOCK: And do you have any sense
23 of whether that is a minority or majority view?

24 MS. CORTELL: I can't say that. We've
25 certainly talked to a few people and have a sense of that.

1 CHAIRMAN BABCOCK: So there's some people
2 that don't believe in redemption.

3 MS. CORTELL: I wouldn't put it that
4 harshly, no.

5 CHAIRMAN BABCOCK: All right. Buddy.

6 MR. LOW: Chip, did you talk to Linda
7 Acevedo? Because I'll tell you what. I helped a friend
8 get his license back, and you have to go through a heck of
9 a lot and then once you do that, I mean, they litigate it,
10 and once you do that you have to take the Bar again and
11 everything, and it's quite a task, so you go -- it's not
12 an automatic thing that you get it back.

13 CHAIRMAN BABCOCK: Yeah. Okay. Judge
14 Yelenosky.

15 HONORABLE STEPHEN YELENOSKY: I hadn't
16 thought of this before, but really to me it's a question
17 of whether the people who are going to be voting -- they
18 vote, right -- for the State Bar candidates should be
19 relied upon to make a decision, assuming full disclosure.
20 I don't know that you need to require it or it would be
21 automatically known, but if we're saying that the
22 electorate cannot elect someone even if they want to, then
23 that's a pretty high bar. I think members of Congress
24 have been backing off, haven't they, after convictions? I
25 don't know. Mayors certainly have. Baltimore. And so

1 there was a sense that people could elect who they wanted,
2 and they knew about it, and so to me that's sort of a
3 philosophical question. I kind of think if there's
4 disclosure and we're self-policing, the policing ought to
5 be done on that local basis where they know the person the
6 best, and that bright line would knock this guy out who
7 clearly seems to me should be able to run.

8 CHAIRMAN BABCOCK: Yeah, Eduardo.

9 MR. RODRIGUEZ: The problem is that there's
10 not necessarily information that everybody gets that a
11 person has been disbarred. I know it's publicized, and
12 it's in the Bar Journal, but the fact that it's in the Bar
13 Journal doesn't mean that five years later or 10 years
14 later somebody knows and in the meantime we have had two
15 or three thousand new attorneys come in --

16 CHAIRMAN BABCOCK: Yeah.

17 MR. RODRIGUEZ: -- that are --

18 HONORABLE STEPHEN YELENOSKY: That's why I'm
19 saying you could have a disclosure rule.

20 CHAIRMAN BABCOCK: Eduardo, where do you
21 come out on the issue of should we change the rule at all?

22 MR. RODRIGUEZ: I'm in favor of looking at
23 it, especially -- I mean, to me I differentiate between a
24 suspension and a total disbarment, and I differentiate --
25 can differentiate between somebody that's had a substance

1 problem, and that's why they're no longer practicing
2 versus somebody that has actually committed a crime. So I
3 don't have a problem letting somebody that's been
4 suspended that comes back run at all. I think that's --

5 CHAIRMAN BABCOCK: So you would say you're
6 in favor of relaxing the rule in certain circumstances?

7 MR. RODRIGUEZ: I would.

8 CHAIRMAN BABCOCK: Okay. Great.

9 MR. RODRIGUEZ: Especially since we are -- I
10 mean, it's part of the Bar's function to try and help
11 rehabilitate attorneys that have substance abuses, and so
12 I just think that that's part of the whole process.

13 CHAIRMAN BABCOCK: Yeah. Okay. Thank you.
14 Richard.

15 MR. ORSINGER: You know, this case is a very
16 good case to have this discussion with because this
17 particular lawyer after he was reinstated served on the
18 local grievance committee and was eventually elected
19 president of the San Antonio Bar Association, so I think
20 that everyone knows that he has rehabilitated. They know
21 he's committed to rehabilitation. He's very public about
22 it.

23 CHAIRMAN BABCOCK: Was he suspended or
24 disbarred?

25 MR. ORSINGER: I think he was disbarred.

1 I'm not sure. Do you know?

2 HONORABLE TRACY CHRISTOPHER: It says he
3 surrendered his license.

4 MR. ORSINGER: Surrendered his license? Is
5 that tantamount to being disbarred?

6 HONORABLE TRACY CHRISTOPHER: But then it
7 says a one-year suspension, so --

8 MR. ORSINGER: Okay. Well, I don't know. I
9 can't -- I mean, I can find out if necessary, but --

10 CHAIRMAN BABCOCK: No, that's okay.

11 MR. ORSINGER: But the point is that as much
12 as you could possibly imagine probably he has
13 rehabilitated and living the lifestyle we would all expect
14 and with the values that we would all expect of a lawyer,
15 and so this really becomes a question if everyone -- if a
16 person has demonstrated that they're trustworthy and that
17 they're ethical, notwithstanding the fact that there was a
18 problem in the past that might or might not have involved
19 a criminal conviction or whatever suspension or disbarment
20 or whatever it is, the question I guess is should the
21 lawyers be free to vote how they feel about that? Because
22 to me it's a question -- if you have a transgression and
23 then you can never rehabilitate fully, and you can
24 rehabilitate in almost all respects as a lawyer. You can
25 have a trust account. You can testify in some courts

1 without taking an oath, but you can't be on the board of
2 directors. This doesn't make a lot of sense to me. I
3 think you ought to give the lawyers that choice.

4 CHAIRMAN BABCOCK: Well, as Eduardo points
5 out, in this circumstance you have the check of the
6 electorate. You know, if the electorate doesn't think
7 he's sufficiently rehabilitated then they won't vote him
8 onto the board. Kent.

9 HONORABLE KENT SULLIVAN: A couple of issues
10 that occur to me. One is I think there's an overriding
11 issue that we have a classification system that does not
12 distinguish between misconduct, affirmative misconduct on
13 the one hand, and an administrative suspension or an
14 incapacitation, because you can get suspended just for
15 nonpayment of dues; and apparently we would call all of
16 those people suspended or use similar nomenclature to
17 describe them; and those are very different categories of
18 people. So it seems to me that's a threshold concern that
19 I think needs to be addressed.

20 As to the notion of let the electorate
21 decide, I think there's one other thing we have to
22 acknowledge, and that is over the last decade or two the
23 number of State Bar directors that are elected unopposed
24 has gone up dramatically.

25 CHAIRMAN BABCOCK: Yeah, true.

1 HONORABLE KENT SULLIVAN: So I think the
2 notion of, well, we'll let the electorate sort it out,
3 that may be an oversimplification.

4 CHAIRMAN BABCOCK: Yeah. You're saying I'm
5 too simple?

6 HONORABLE KENT SULLIVAN: That's an entirely
7 different discussion, Mr. Chairman.

8 CHAIRMAN BABCOCK: Let's take it outside.
9 What other comments? Frank.

10 MR. GILSTRAP: Why not rather than an all or
11 nothing thing why not just say after 20 years you can do
12 it? Something like that, seems like a common sense rule.

13 CHAIRMAN BABCOCK: Nina.

14 MS. CORTELL: Well, two things I just want
15 for the record. Our subcommittee, the people we talked to
16 at the Bar, everybody recognizes that this particular
17 lawyer is a poster child for why you should change the
18 rule. I mean, this is -- so any feeling about the rule
19 staying in place or not, it was very much recognizing his
20 high credentials.

21 To Kent's point I want to make sure
22 everybody misunderstands, and I may have mis -- or
23 overstated one thing. Section 9 says -- this is the
24 expunction rule. "This section does not apply to a
25 disciplinary suspension for professional misconduct." So

1 the exclusion there, you know --

2 HONORABLE KENT SULLIVAN: Takes care of it.

3 MS. CORTELL: -- is professional misconduct.

4 CHAIRMAN BABCOCK: Okay. Yeah, Justice
5 Bland.

6 HONORABLE JANE BLAND: Do we have a
7 recommendation from the State Bar board of directors as to
8 their proposed course on this? And it looks like under
9 the section with qualifications they're the body vested
10 with the authority to judge the qualifications of officers
11 and directors, and I certainly think their view on this
12 and their recommendation would -- we're rule makers.
13 We're not deciding who is qualified to run for office.

14 MS. CORTELL: Right. Right.

15 HONORABLE JANE BLAND: They have a lot of
16 restrictions, including that, you know, somebody who has
17 missed half the meetings can't run; and so I just would
18 think that it would be part of an overarching look by the
19 people that are actually governing the State Bar to make a
20 recommendation to us.

21 Secondly, it looks like -- is there a
22 requirement that you can't run if you're over 70? Because
23 at the bottom of the letter Mr. Keyser says, "I'll be 70
24 on my next birthday," which would be, you know, sometime
25 before March 1st of 2016, so -- and he said, "This could

1 be my last rodeo," indicating he couldn't run in 2017.

2 MS. CORTELL: I had understood he couldn't
3 run because of the time --

4 (Multiple simultaneous speakers)

5 THE REPORTER: Just a minute.

6 HONORABLE JANE BLAND: He's just thinking
7 about retiring?

8 MS. CORTELL: I don't know that there's an
9 age limit.

10 HONORABLE JANE BLAND: I'm just curious, but
11 mostly I think we're uninformed about, you know, the
12 policy reasons, and we're not the ones that would be
13 vested with working with the person and deciding
14 ultimately whether someone meets qualifications that are
15 established in these rules, and so it would be good to
16 have their recommendation.

17 MS. CORTELL: So --

18 CHAIRMAN BABCOCK: Judge Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: Well, it
20 would, but I don't know that -- I mean, if we're -- one, I
21 don't want a bright line, because pick 20 years. This guy
22 should have been able to run for a position less than 20
23 years after he was rehabilitated. The other thing is,
24 yeah, there are different things you can do wrong, but the
25 reason you did them wrong may matter, too. You know, I

1 used to represent people with disabilities. Somebody
2 could have a manic episode and something happens. It's --
3 particularly back then when there was no TLAP, and then 20
4 years they have to wait or they can never do it, and I
5 don't think that the Bar -- if it's not the electorate, I
6 don't think the Bar should be in control of that.

7 The Supreme Court can be in control of that
8 by giving the license back or not. One of the things you
9 get back if you get your license back is the ability to
10 run for a Bar position, and if the Supreme Court thinks
11 it's important enough that this person should not be able
12 to run for a Bar position, they can decide not to give the
13 license back.

14 CHAIRMAN BABCOCK: Richard.

15 MR. ORSINGER: Rule 609 of the Texas Rules
16 of Evidence will not let you offer conviction as
17 impeachment for a crime if it's more than 10 years after
18 you were released from prison. So there's a 10-year bar
19 on use of a conviction to reflect on credibility. I throw
20 that out as an arbitrary period of time, but 10 years is
21 good enough to keep out a prior conviction in a trial, so
22 maybe 10 years would be certainly a date to consider if
23 you're going to have a date.

24 CHAIRMAN BABCOCK: Okay. So Frank's at 20,
25 and you're at 10.

1 MR. ORSINGER: Yeah, because you're probably
2 too old to run by 20.

3 MR. GILSTRAP: It means you messed up in
4 your fifties. I'm concerned.

5 CHAIRMAN BABCOCK: Okay. Anybody? Kent. I
6 thought you were about to raise your hand.

7 HONORABLE KENT SULLIVAN: Just to throw this
8 out there, I would think that -- and this would require an
9 entirely different standard, but I think it would be
10 entirely appropriate that if you have engaged in
11 intentional misconduct that you be barred. I just -- I
12 don't know that anyone has affirmatively suggested that,
13 and I want to.

14 CHAIRMAN BABCOCK: Kennon and then Levi.
15 But, Kent, you're for intentional misconduct that results
16 in disbarment. You would say keep the rule as it is, but
17 like Eduardo, for other things like maybe suspensions then
18 you might be open to --

19 HONORABLE KENT SULLIVAN: Absolutely.

20 CHAIRMAN BABCOCK: Okay. Kennon.

21 HONORABLE KENT SULLIVAN: And I note Nina's
22 comment, which is absolutely appropriate.

23 CHAIRMAN BABCOCK: Yeah. Kennon.

24 MS. WOOTEN: When the subcommittee was
25 considering this particular rule there was some discussion

1 with State Bar leadership; and where things stood at the
2 time, if I recall correctly, is that they were going to
3 take a vote at the State Bar leadership level about
4 whether a change should occur and did have a desire for
5 that vote to occur before this committee makes a final
6 recommendation. The reason that they had not taken a vote
7 as of the date we were examining the issue is that they
8 had other things that were very pressing, like who they
9 were going to have nominated and other matters that sort
10 of took priority over this issue. So I don't know whether
11 the vote has occurred. I know that we don't know the
12 results of it if it has occurred.

13 MS. CORTELL: I'm going to guess it hasn't,
14 but --

15 CHAIRMAN BABCOCK: Levi.

16 HONORABLE LEVI BENTON: I favor let them all
17 run no matter what the conduct was, but then having an
18 affirmative disclosure of what the conduct was and having
19 a rule that permits the candidate to write in all of the
20 State Bar election stuff that goes out, you know, their
21 explanation and a summary of their rehabilitation so
22 there's more disclosure, and then just let the people
23 vote.

24 CHAIRMAN BABCOCK: Judge Yelenosky.

25 HONORABLE STEPHEN YELENOSKY: One other

1 perspective is how this is received by people who aren't
2 lawyers, so you're saying basically if we're only talking
3 about people that are not currently disbarred, that got
4 their license back, right?

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE STEPHEN YELENOSKY: That's who
7 we're talking about, and you're saying, well, this person
8 is good enough to be a lawyer representing me, but not
9 good enough to be on your Bar committee. That seems kind
10 of like -- I would receive that badly if that person were
11 representing me and committed malpractice.

12 CHAIRMAN BABCOCK: Okay. Yeah, Justice
13 Boyce.

14 HONORABLE BILL BOYCE: Just echoing some of
15 the comments, I would have concerns about trying to
16 articulate acceptable reasons related to substance issues
17 that will allow you to serve later in a Bar position
18 versus unacceptable reasons for the thought that there may
19 well be interconnections with that. Misconduct gets
20 committed because somebody's judgment is impaired because
21 they have substance abuse type issues.

22 CHAIRMAN BABCOCK: Right.

23 HONORABLE LEVI BENTON: Right.

24 HONORABLE BILL BOYCE: My point being that I
25 suspect all of these situations are going to be highly

1 context cases, specific, which counsel is in favor of
2 multiple comments to make sure that what we're doing by
3 way of proposing rules has consultation with and buy in
4 from the State Bar, because bright lines are not just
5 going to be really easily drawn in some circumstances.

6 CHAIRMAN BABCOCK: Yeah. Great point.

7 Thanks. Skip.

8 MR. WATSON: Well, echoing Justice Boyce, I
9 am strongly in favor of discretion on this; and that comes
10 from six years of serving on a State Bar grievance
11 committee; and there are profound differences between some
12 people who are suspended, others who surrender a Bar card
13 because they are completely humiliated by a mistake versus
14 those who surrender a Bar card right before the disbarment
15 goes to the jury, thereby mooting it and avoiding the
16 inevitable, and those who are, in fact, disbarred.

17 That -- it is a very difficult thing to do
18 to sit in judgment of your peers. It's very humbling
19 because you realize that there are people before you who
20 could draw a suspension from another committee that you
21 give a public reprimand, and there is a profound
22 difference in the effect of those two, and there are some
23 that can go either way.

24 On the other hand, there are persons who
25 surrender their cards, or some who were suspended but are

1 what I call frequent fliers, who have multiple suspensions
2 and come back after the suspension. I mean, suspension
3 isn't permanent. It's for a period of time and come back,
4 who are the type of incredibly charismatic, gifted people
5 who if it were channeled in the right direction could
6 persuade anybody to vote for me, anybody. And some of
7 those when I was doing this had been carried so often,
8 graduating from private reprimands to public reprimands to
9 suspended suspensions. I mean, you're suspended. The
10 penalty is suspended to actual -- to longer suspensions to
11 finally I pushed through a few to disbarment actions.
12 There is just a huge difference, and there's got to be
13 room for discretion.

14 There are people where I literally thought
15 there but by the grace of God go I. I mean, the people
16 who had the long-time assistant steal the diamond ring
17 that was, you know, part of the will distribution out of
18 the lockbox, and it's gone. Well, who does that fall on?

19 Well, that falls on the lawyer who was in
20 charge with entrusting a client's property, to, you know,
21 the extreme other end of the spectrum of the lawyer who
22 during amnesty for immigration signed people up like it
23 was a land office business, did absolutely nothing, and
24 when they came in after the period for amnesty had passed
25 and said, you know, "What about my money," et cetera,

1 purportedly said, "I know who you are, and I know where
2 you live, and I know the number of the INS." He's no
3 longer practicing. So there's got to be room there for
4 judgment. That's all I would counsel.

5 CHAIRMAN BABCOCK: Okay. Well, let's take a
6 vote. How many are in favor of keeping the rule as it is,
7 which is just bright line, you know, just the way it is?
8 Everybody who is in favor of that raise your hand.

9 Everybody who is against that, raise your
10 hand. So a vote of 17 to 2, 2 people favor keeping the
11 rule and 17 vote to modify it in some respect, the Chair
12 not voting, and so let's talk about proposed
13 modifications. The subcommittee has come up with a couple
14 of -- and why don't we discuss as quickly as we can the
15 two -- the two options that you've come up with or maybe
16 three options. You want to lay out the first option?

17 MS. CORTELL: Well, the one thing I would
18 say is that the discussion today has really created
19 another possibility, right, which is to draw a stronger
20 distinction between -- for lack of a better way to
21 describe it, maybe something -- professional misconduct
22 versus not professional misconduct, understanding that
23 that probably requires further explanation.

24 CHAIRMAN BABCOCK: Right.

25 MS. CORTELL: That I don't think is really

1 clear from either of the bright line rules here.
2 Certainly the discretionary option embraces that because
3 it was intended to -- for a body to consider this in that
4 context, what was the nature of the violation.

5 CHAIRMAN BABCOCK: Yeah.

6 MS. CORTELL: Should that be an exception to
7 the rule, so I think it's embraced in what I would call
8 the discretionary option.

9 CHAIRMAN BABCOCK: So let's talk about the
10 discretionary option. Justice Christopher.

11 HONORABLE TRACY CHRISTOPHER: Well, I think
12 with the disbarred lawyer who regains their license, they
13 go through a huge vetting process, and I'm not really sure
14 that there needs to be a vetting process after that. For
15 that class of lawyers.

16 I think with the suspended ones I do worry
17 about the serial suspended ones that are on a path to, you
18 know, ultimate disbarment. I mean, one of the things in
19 here is, you know, if you're incapacitated to perform your
20 duties; and obviously if you got suspended while you were
21 a director, then I think under other things you would not
22 be able to perform your duties. So, you know, we want to
23 make sure we don't find someone in that spectrum, in my
24 opinion; and maybe -- I'm not sure that the board should
25 be the judge of that. I'm thinking it maybe should be

1 more in the grievance committee. I don't know if that
2 would work

3 CHAIRMAN BABCOCK: Yeah. So you like the
4 discretionary option. You're just not sure who ought to
5 be deciding, who ought to be exercising discretion.

6 HONORABLE TRACY CHRISTOPHER: I think if you
7 were disbarred and you have your license back that --

8 CHAIRMAN BABCOCK: That's enough.

9 HONORABLE TRACY CHRISTOPHER: -- that has
10 gone through a huge vetting process.

11 MR. LOW: Right.

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE TRACY CHRISTOPHER: And if the
14 State Bar doesn't want you back, you know, they contest
15 it, and there's a jury trial on it, I think. Maybe a
16 bench trial.

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE TRACY CHRISTOPHER: And then an
19 appellate process. You know, I mean, they don't let you
20 have your license back unless they're pretty sure that --

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE TRACY CHRISTOPHER: -- you're
23 ready to go.

24 CHAIRMAN BABCOCK: So as I understand it,
25 you would say, Judge, that a disbarred lawyer who has gone

1 through -- run the gauntlet and gotten reentry, they're
2 okay.

3 HONORABLE TRACY CHRISTOPHER: Correct.

4 CHAIRMAN BABCOCK: And everybody else, it
5 ought to be discretionary with some body that exercises
6 discretion?

7 HONORABLE TRACY CHRISTOPHER: Correct.

8 CHAIRMAN BABCOCK: Okay. How many people
9 like that idea? Buddy.

10 MR. LOW: I second that. She's absolutely
11 right. You go through a process, and it's not easy to get
12 it back. You have to prove that you deserve it back, take
13 the Bar again, and all of that. You've got to want it.

14 CHAIRMAN BABCOCK: Let's stay focused on
15 this idea. Roger.

16 MR. HUGHES: I -- I favor a time limit, and
17 I don't think we should delegate to some body to decide
18 who is -- whose reasons for being suspended or disbarred
19 as the case may be are onerous simply because it does
20 involve judgment calls, and I -- maybe it's because of
21 where I practice. There is a third player on the field,
22 and that's the public. The public has to have some
23 confidence in who we select for our leadership because it
24 reflects upon us as a profession, and so the decision to
25 let somebody who has been suspended a couple of times for

1 active misconduct or even been disbarred, it's more than
2 just honoring the -- what the membership can judge about
3 that person. It's what the public perceives.

4 CHAIRMAN BABCOCK: Yeah.

5 MR. HUGHES: Because having practiced where
6 I have, you know, there is -- there are members of the
7 public who can get pretty cynical about this stuff, and
8 they're more than willing to believe that somebody is --
9 you know, "Oh, they just pled guilty because they were
10 prejudiced, but we know they really weren't guilty." Or
11 "Yeah, they were convicted and their conviction was upheld
12 on appeal, but we know all the government's witnesses were
13 really lying." Alternatively, they're equally happy to
14 buy into what I call the soap opera explanations. "Oh,
15 well, yeah, that person was disbarred but then they spread
16 around some money and influence, and they got their
17 license back."

18 CHAIRMAN BABCOCK: Yeah.

19 MR. HUGHES: And so putting it in the hands
20 of a body within the Bar association, maybe the public
21 will trust that, but I can -- and this is why I say
22 perhaps it's better to discuss this among the Bar rather
23 than just make a decision in the committee.

24 CHAIRMAN BABCOCK: Right.

25 MR. HUGHES: But I can also see the public

1 saying, "Oh, yeah, that committee that said they were okay
2 and cleared to run for the Bar presidency or whatever.
3 That's just a lawyer protective society."

4 CHAIRMAN BABCOCK: Yep. Judge Yelenosky.

5 HONORABLE STEPHEN YELENOSKY: Well, I think,
6 as I said before, it's the opposite of a public reaction.
7 I don't think the public is even aware that we have
8 committees. The way it would come to light is somebody
9 suffers some kind of malpractice from their attorney and
10 then finds out, well, that person was on a Bar committee.
11 So who should get their license back, but yet not be able
12 to be on a Bar committee is my question. So I agree with
13 Justice Christopher. At least there's two parts to what
14 she said. The first is redemption by getting your license
15 back, and I just can't see how we can tell the public, "We
16 vetted him, license back, but not enough to get on a Bar
17 committee," and then the other part I'm less sure about,
18 but I would ask that we at least vote those things
19 differently.

20 CHAIRMAN BABCOCK: Yeah, I'm winding up for
21 a vote here. Eduardo, and then Kent.

22 MS. CORTELL: Can I just make one
23 clarification? We are not talking about any Bar
24 committee. This is an officer or director.

25 HONORABLE STEPHEN YELENOSKY: Oh, okay.

1 Yeah. Sure.

2 CHAIRMAN BABCOCK: Eduardo.

3 MR. RODRIGUEZ: I would want to have a
4 period of time that the person has to serve before he's
5 qualified to run again.

6 CHAIRMAN BABCOCK: Okay. Kent.

7 HONORABLE KENT SULLIVAN: I'm just curious
8 whether Nina or another member of the committee perhaps
9 knows how many people are disbarred on average in a year
10 as opposed to how many people who are suspended?

11 MS. CORTELL: No.

12 HONORABLE KENT SULLIVAN: And the reason I'm
13 asking the question is I think that there is an assumption
14 on our part that maybe people who engage in intentional
15 and egregious misconduct with no mitigating circumstances,
16 to Justice Boyce's point, or at least what I took to be
17 his point, that's a person that's going to be disbarred.
18 I don't think that's the case. I think that those people
19 are often suspended, and what we've got is we've got a
20 very large category of people that fall in suspensions,
21 and we have to deal with that.

22 The point that I was trying to make earlier
23 was just that I think that if you have someone who is
24 engaged in something like the intentional obstruction of
25 the administration of justice or intentionally breached

1 their fiduciary responsibility to a client, without
2 mitigating circumstances, we need to identify those
3 people; and I'm concerned that we don't by way of
4 suspensions because a suspension includes so many
5 different things, and those people really should be
6 barred. They should suffer, candidly, the category I just
7 described, they should be disbarred, but I'm afraid that's
8 not happening.

9 And I agree with Justice Christopher. I
10 think that if somebody actually makes it all the way back,
11 then that's probably fine, but my suspicion is we're
12 talking about almost no one in terms of numbers. I think
13 that there are fewer people being disbarred than we think,
14 and the numbers of people who make it back and are
15 rehabilitated, if you will, from disbarment are also very
16 few.

17 CHAIRMAN BABCOCK: Let's take a vote on
18 this. If you are in favor of changing the rule to allow
19 lawyers who have been disbarred but have been able to run
20 the gauntlet and come back into the practice of law and,
21 therefore, should be eligible to serve on the board of
22 directors, if you're in favor of that, raise your hand.

23 MR. RODRIGUEZ: Without any qualification, I
24 mean, any limitation in terms of time period or anything?

25 CHAIRMAN BABCOCK: Yeah.

1 MR. GILSTRAP: Right away.

2 HONORABLE TRACY CHRISTOPHER: You have to
3 wait a long time to get reinstated.

4 CHAIRMAN BABCOCK: People opposed to that?
5 That passes by a vote of 12 to 5, the Chair not voting.

6 Now, let's take a vote on a second part of
7 that. Assuming that we now have drawn a distinction for
8 disbarred lawyers who have come back, how many people
9 think that there should be discretion vested in some group
10 to be defined who would allow suspended lawyers to run for
11 the State Bar board? How many people?

12 PROFESSOR CARLSON: Not disbarred,
13 suspended.

14 CHAIRMAN BABCOCK: What? Not disbarred,
15 suspended.

16 MS. BARON: Previously suspended.

17 CHAIRMAN BABCOCK: What?

18 MS. BARON: Previously suspended.

19 CHAIRMAN BABCOCK: Yeah, previously
20 suspended. Yeah, and they're no longer suspended.

21 MR. LOW: Right.

22 CHAIRMAN BABCOCK: Yeah, that's assuming
23 that, that they're not currently suspended.

24 MS. BARON: Right. Good, okay.

25 CHAIRMAN BABCOCK: But they've been

1 unsuspending, and so there's discretion for that. How many
2 people are in favor of that? Raise your hand.

3 How many are opposed to that? There are
4 eight in favor, nine opposed, the Chair not voting. So
5 for those people that are opposed, the nine who are
6 opposed, why were you opposed? Levi.

7 HONORABLE LEVI BENTON: Again, I don't think
8 we need to have them vetted. If their suspension has been
9 removed, they're a fully practicing lawyer, remember I
10 said, "Let them run."

11 CHAIRMAN BABCOCK: Okay. So you were
12 opposed because you don't think there ought to be --

13 HONORABLE LEVI BENTON: A vetting.

14 CHAIRMAN BABCOCK: -- discretion. I'm with
15 you. Other reasons why? Jim.

16 MR. PERDUE: I don't like the optics of the
17 politics.

18 CHAIRMAN BABCOCK: Okay. A Bar -- some Bar
19 function and the public looks at it --

20 MR. PERDUE: Right.

21 CHAIRMAN BABCOCK: -- and says, "Man, you
22 guys are just taking of your own." Got it. Who else?

23 MS. CORTELL: Chip, let me just say there is
24 some concern on the State Bar's part as well that it will
25 appear or actually be very political.

1 MR. PERDUE: I'm winning today.

2 HONORABLE LEVI BENTON: When Nina says --
3 because this is the third time she said something, I just
4 want clarification. When you say "the State Bar" are you
5 talking about the staff or the board lawyers, because --

6 MS. CORTELL: We've talked to officers and
7 staff. And but let me say, nothing formal because our
8 recommendation was that it go back formally for
9 consideration and to come back here.

10 CHAIRMAN BABCOCK: The Bar leadership.

11 MS. CORTELL: So this was just us talking to
12 a few people.

13 CHAIRMAN BABCOCK: Richard, why did you vote
14 for the --

15 MR. ORSINGER: For the opposite reason from
16 Levi. I don't think that they should be running, and I
17 don't believe that there's going to be a lot of
18 credibility if you have some committee deciding that this
19 suspension was forgivable and this suspension is not. I
20 just am troubled by that.

21 CHAIRMAN BABCOCK: Okay. Who else voted
22 against it that hasn't spoken already?

23 MR. GILSTRAP: I agree with Richard.

24 CHAIRMAN BABCOCK: Frank agrees with
25 Richard.

1 CHAIRMAN BABCOCK: Kennon, didn't you vote
2 against it? No. Elaine. I knew there was a hand over
3 here.

4 PROFESSOR CARLSON: I'm a Perdue person.

5 CHAIRMAN BABCOCK: Why did you vote against
6 it?

7 PROFESSOR CARLSON: Perdue reason.

8 CHAIRMAN BABCOCK: The Perdue reason. Okay.

9 MR. MEADOWS: I voted against it in
10 agreement with Richard and Jim.

11 CHAIRMAN BABCOCK: Say that again.

12 MR. MEADOWS: I voted against it for the
13 same reasons Richard gave, and I think they marry with
14 Jim's.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE STEPHEN YELENOSKY: I have a
17 question on what we're --

18 CHAIRMAN BABCOCK: Judge Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: So if somebody
20 was suspended before and no longer suspended, we have an
21 absolute rule that they can't run, is that one of the
22 options? Okay. Somebody who was suspended before, gets
23 disbarred, gets their license back, they can run.

24 CHAIRMAN BABCOCK: Right.

25 HONORABLE STEPHEN YELENOSKY: Right? Okay.

1 So I'm the guy who is suspended who hasn't been disbarred,
2 and there's no way for me to redeem myself unless you
3 first disbar me. That doesn't seem to make sense.

4 HONORABLE LEVI BENTON: So come my way,
5 baby, come my way.

6 CHAIRMAN BABCOCK: So Levi is feeling some
7 love here for Judge Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: I'm just
9 drawing the logic out.

10 CHAIRMAN BABCOCK: Yeah. That's right.
11 Well, and if you take Levi's vote, which really was not an
12 anti-suspended lawyer vote, we are essentially tied on
13 this issue, and I think that's as much as we are going to
14 get done today.

15 MR. GILSTRAP: How about just the, you know,
16 you can't do it for 10 years or 15 years? That was one of
17 the options here.

18 CHAIRMAN BABCOCK: Okay. And Eduardo likes
19 that idea. So how many people would favor a system
20 that -- forget about the distinction between disbarred and
21 suspended.

22 MR. GILSTRAP: Your last disciplinary
23 offense.

24 CHAIRMAN BABCOCK: Yeah, the last
25 disciplinary offense, if you're a good person for 10

1 years. Let's just use 10 years because 20 seems a little
2 Draconian, Richard.

3 MR. ORSINGER: Agreed.

4 CHAIRMAN BABCOCK: If you're a good person
5 for 10 years, then can you run? How many people are in
6 favor of that proposal?

7 And how many people are opposed?

8 MR. LOW: Chip, could I raise a question?

9 CHAIRMAN BABCOCK: Not right now. How many
10 people are opposed? That passes 11 to 6. Now you can
11 raise a question.

12 MR. LOW: When you say number of years, you
13 included people that have been disbarred, and we've
14 already most of us voted that if you are disbarred you're
15 automatically ready, and now we're saying you can add
16 years to it.

17 CHAIRMAN BABCOCK: Yeah, it's a series of
18 inconsistent votes. Inconsistent and confusing votes.
19 Nobody will be able to figure it out.

20 MR. ORSINGER: It gives the Supreme Court
21 cover no matter what they decide.

22 CHAIRMAN BABCOCK: Yeah, that's right.
23 "Well, the advisory committee said this was okay."

24 MR. LOW: Okay. All right.

25 CHAIRMAN BABCOCK: Marcy.

1 MS. GREER: I realize I was making an
2 assumption, but I was assuming that a time limit was in
3 addition to discretionary factors that we voted on
4 earlier.

5 CHAIRMAN BABCOCK: Yeah, it was --

6 MS. GREER: It's not a standalone, just 10
7 years you get to go back?

8 MR. GILSTRAP: Well, in my view it would be.

9 MS. CORTELL: I think it was a bright line.

10 MR. GILSTRAP: Throw all of the other stuff
11 out. Just give a bright line --

12 CHAIRMAN BABCOCK: Bright line year.

13 MR. GILSTRAP: -- last time you kept your
14 nose clean, you know, from that point on, you know, you
15 have so many years, end of story. No problem, you don't
16 have to worry about it.

17 CHAIRMAN BABCOCK: I think what we've done I
18 think is give the Court some idea about various ways to do
19 it and -- Levi.

20 HONORABLE LEVI BENTON: You know, I just
21 want to remind everyone there is an impeached federal
22 judge now serving in Congress. There's a suspended
23 lawyer, at least one now, serving in the Texas State House
24 of Representatives, and the Alabama Supreme Court justice
25 that was removed I think is about to become a United

1 States Senator, you know, and let the voters decide.

2 MR. GILSTRAP: Well, but that's --

3 HONORABLE STEPHEN YELENOSKY: Boy, that's an
4 argument against democracy.

5 MR. GILSTRAP: That's elected public office.
6 How about Louisiana?

7 CHAIRMAN BABCOCK: Well, now, Louisiana.
8 Let's don't be throwing up Louisiana at us. My goodness.

9 All right. Well, I failed in leadership
10 here this time because I had thought the way I had mapped
11 it out that we would be able to get through the rest of
12 the discovery without spoliation -- without spoliation,
13 sorry, but we didn't. Sorry, Bobby. So I think I would
14 hold off on your effort of trying to completely
15 incorporate comments and put all of that in, and next time
16 we'll finish up for sure. We'll talk about the spoliation
17 issue next time for sure and then there was another matter
18 that came up, as you know, from a comment from somebody
19 that approached the Court that you-all have looked at, and
20 we'll talk about that, and we will meet again on June 9th
21 for just one day this time, and I'm certain we can get
22 through our agenda at that time.

23 So thanks for everybody who came and for
24 being engaged, and it was a great conversation as always,
25 and, Nina, thank you for making the effort to come down

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MS. CORTELL: Of course.

(Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand
Reporter, State of Texas, hereby certify that I reported
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I further certify that the costs for my
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Given under my hand and seal of office on
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D'Lois L. Jones, Texas CSR #4546
Certificate Expires 12/31/18
3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

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