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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

June 12, 2009

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[COPY

Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in Travis County for the State of  
Texas, reported by machine shorthand method, on the 12th  
day of June, 2009, between the hours of 9:03 a.m. and  
4:30 p.m., at the Texas Law Center, 1414 Colorado, Room  
101, Austin, Texas 78701.

**INDEX OF VOTES**

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

<u>Vote on</u>	<u>Page</u>
Rules 191.3(e), 215.2(b)(2)	18516
Rules 191.3(e), 215.2(b)(2)	18526
Rules 191.3(e), 215.2(b)(2)	18528
Rule 145(a) and (b)	18595
Rule 226a	18656
Rule 265.1	18662

**Documents referenced in this session**

09-13	Foreclosure rules history
09-14	Foreclosure timeline
09-15	Proposed amendments to Rules 735 and 736
09-16	Poverty law section proposals & supporting information
09-17	Poverty law - subcommittee report
09-18	Poverty law section rule referral letter



1 coincidentally, the author of the Caperton decision,  
2 Justice Kennedy raised the issue of recusal when a judge  
3 announced a position that then came before his or her  
4 court so that our Court, the Supreme Court, thought that  
5 we should re-examine recusal in light of the White case,  
6 and that thought has been lingering now for several years  
7 without a formal request from the Court for us to do  
8 anything.

9           Now, in light of Caperton, the Court is  
10 asking us to go back and re-examine our Rule 18 dealing  
11 with recusals and disqualifications and take into account  
12 both Caperton and the White case and discuss it in full  
13 committee and then make a recommendation to the Court  
14 again. So the lucky draw on that weighty topic goes to  
15 Richard Orsinger's subcommittee that covers Rules 15  
16 through 165a, and the members of that committee are the  
17 vice-chair Frank Gilstrap, Alex Albright, Elaine Carlson,  
18 Nina Cortell, Professor Dorsaneo, Carl Hamilton, Tommy  
19 Jackson, Pete Schenkkan. If anybody else is interested in  
20 that issue, those are the people to contact. Having said  
21 that, it's time for the status report from Justice Hecht.

22           HONORABLE NATHAN HECHT: First let me  
23 welcome Justice Johnson, my colleague here this morning.  
24 He's here to help us with judicial foreclosure rules, and  
25 let me just go over a little legislation that passed and a

1 whole lot that didn't so we can be in a celebratory mood  
2 this morning. There is a bill that requires the Supreme  
3 Court to adopt rules taking into account privacy of  
4 parties in litigation. We have that recommendation from  
5 the committee under submission, so we're still thinking  
6 about that. That's one new bill that requires  
7 rule-making, and the only other one is a bill that amends  
8 the Property Code to require some particular hearings in  
9 justice courts and a requirement that we promulgate rules  
10 by January the 1st to accommodate that, and I don't think  
11 that will be too difficult for us to do.

12           In sessions past we have had a number of  
13 bills that required Supreme Court rule-making, but this  
14 session those were the only two that passed. Other bills  
15 that did not pass that would have required rules, Senator  
16 Wentworth's bill on jury charges regarding the question of  
17 taking notes and the jurors asking questions during the  
18 trial did not pass, and so we have the committee's  
19 recommendation on those issues, and I think we will take  
20 action on those recommendations by the fall.

21           Senate Bill 992, Senator Duncan's court  
22 reorganization bill, a very good idea. As usual any  
23 reorganization of the Texas courts would be a good thing,  
24 but it did not pass. Senator Wentworth had another very  
25 good idea, which was to look at the jury selection process

1 in 254 counties and come up with standard rules governing  
2 the selection of the venire in every county.  
3 Unfortunately, we think that would take quite -- quite a  
4 bit of time and resources, probably a full-time person for  
5 at least a year, and while it's a very commendable effort,  
6 it requires resources that the Legislature did not  
7 commend.

8                   Senator -- I mean, Representative Hartnett's  
9 bill to change the process server process did not pass.  
10 You may know that we have a Process Server Review Board  
11 instituted by the Court that looks over private process  
12 servers, looks at their qualifications and decides who can  
13 automatically serve privately civil process in the courts.  
14 That didn't pass. Some other interesting legislation,  
15 Representative Dunnam had a bill to require this  
16 committee's recommendations and the Court's actions on  
17 them to be approved by a resolution of the Legislature  
18 before they take effect. That was not voted out of  
19 committee. The bill has been introduced before and got to  
20 various stages in the process, but this time it stalled in  
21 committee.

22                   Senator Corona and others had a bill, again,  
23 encouraging protection of personal information of  
24 litigants in the civil justice process, so we need to take  
25 a look at that, even though it didn't pass. Senator

1 Watson would have required the Supreme Court to announce  
2 its votes on petitions. It was voted out of committee,  
3 but did not pass the Senate. There was a bill in the  
4 Senate to abolish the Court of Criminal Appeals. It did  
5 not pass. There was a bill to change the way judges are  
6 selected in Texas, and unfortunately it did not pass,  
7 which would impact our response to Caperton, but it didn't  
8 pass. There was -- there were three bills on substantive  
9 issues on which the Court did not have a position. One  
10 bill would have reviewed -- would have changed the way the  
11 burden of proof is allocated in mesothelioma cases, did  
12 not pass.

13           Another bill would have changed the Court's  
14 decision in the Entergy case, which has to do with who is  
15 a covered employee on a job site; and the third bill we  
16 refer to as the Fleming Foods bill, introduced by Senator  
17 Duncan, which would changed the Court's unanimous decision  
18 in 1999 that says that in interpreting a recodified  
19 statute you do it the same as you would any other statute,  
20 and you take first its meaning on its face. The  
21 recodification procedure bills all say that no substantive  
22 change is intended, but the Fleming Foods case says, well,  
23 maybe one is not intended, but the public has to go by  
24 what's in the books and not by what's in the archives.  
25 The Legislature has attempted to change the decision in

1 the Fleming Foods case a couple of times. This time the  
2 vote was only 147 to nothing in the House of  
3 Representatives and 29 to 1 in the Senate, and Governor  
4 Perry vetoed it.

5           Then there was my personal favorite, House  
6 Bill 4548, which would have amended the Government Code to  
7 require judges on the Supreme Court and the Court of  
8 Criminal Appeals to recuse in any case in which during the  
9 past four years the judge had accepted a political  
10 contribution of a thousand dollars or more from a lawyer  
11 in the case or anybody in the lawyer's law firm or any  
12 employee of the law firm or the party or any employee of  
13 the party or any PAC that had anything to do with the  
14 party. We were very much in favor of this bill because it  
15 was going to give us some downtime and help us -- help us  
16 employ the retired judges, but it didn't pass, despite our  
17 best efforts.

18           We made a minor change in Rule 6.06 of the  
19 Texas Rules of Disciplinary Procedure to ensure that the  
20 opinions of the Board of Disciplinary Appeals are  
21 published and available for lawyers in the grievance  
22 process, and, of course, that's very important to those  
23 lawyers. And we are currently engaged with an enormous  
24 number of other people in a review of the entirety of the  
25 Texas Disciplinary Rules of Professional Conduct. Justice



1 Johnson is the liaison for that. Kennon is working with  
2 him on that. The Court is plowing through those changes,  
3 which have been very thoroughly debated by a number of  
4 committees of the Bar and others, and we hope to finish  
5 that process end of the year or next year as soon as we  
6 can. I believe that's it.

7 CHAIRMAN BABCOCK: How about the appellate  
8 e-filing?

9 HONORABLE NATHAN HECHT: Yes, the appellate  
10 e-filing on which we worked assiduously the last session  
11 has hit a little technical snag in the development of the  
12 software programs necessary to implement it. The  
13 contractor working on those programs has changed, but we  
14 are still moving ahead as quickly as we can. At the same  
15 time we are looking very carefully at the rollouts of  
16 electronic filing in the circuits. The Tenth Circuit went  
17 to electronic filing about six months ago, the Fourth  
18 Circuit about four months ago. Now the Fifth Circuit is  
19 going to electronic filing. I think they have a comment  
20 period until August of this year, and then they will begin  
21 to require e-filing in those courts.

22 So we're still pushing ahead on that, but we  
23 have deferred further work on the rules that we presented  
24 at the last meeting until we get a good idea from the  
25 technical people what direction we're going to go and what

1 our timing is. A lot of the work on this general matter  
2 of electronic filing in the appellate courts has been --  
3 has already been done in the Federal system, but just to  
4 make this brief statement about it, they have a different  
5 situation in that they have -- they're working to good  
6 success for a long time on electronic filing in the trial  
7 courts, and so the electronic filing in the circuits is a  
8 smaller step.

9           We have been working on electronic filing in  
10 the trial courts for a long time, but we have a long way  
11 to go because of the diversity of our courts and the  
12 difference in the resources available to them and the  
13 difficulties in coordinating that effort, but the  
14 electronic filing in the trial courts is moving ahead.  
15 It's in 30 counties, 70 percent of the cases or something.

16           MS. PETERSON: 32 counties, uh-huh.

17           HONORABLE NATHAN HECHT: 32 counties, 70  
18 percent of the population or something like that is  
19 covered, so we've made a lot of progress, but we still  
20 have a little ways to go.

21           CHAIRMAN BABCOCK: Great. Thank you,  
22 Justice Hecht. Just one thing about scheduling, at 10:00  
23 o'clock this morning my phone is going to ring, and it's  
24 going to be a Federal judge from Arkansas who insists on  
25 talking to me at 10:00 o'clock, so Justice Hecht will take

1 over the presiding of this, and then we're going to take a  
2 little shorter lunch break than usual today, probably 45  
3 minutes, so that we can recess at 4:45 this afternoon.

4           Having said that, the first item on our  
5 agenda is the Judicial Foreclosure Task Force proposed  
6 amendments to Texas Rules of Civil Procedure 735 and 736,  
7 and Kennon Peterson is going to take us through that.  
8 This is Judge Yelenosky's subcommittee with Lamont  
9 Jefferson, Frank Gilstrap, Judge Lawrence, and Pete  
10 Schenckan serving on it, and we have -- I would like to  
11 say distinguished guests with us today, Mike Baggett and  
12 Tommy Bastian, who also will weigh in on this. So Kennon.

13           MS. PETERSON: My job is really easy today.  
14 I'm just really going to turn the floor over to Mike and  
15 Tommy, but before I do, I wanted to mention one other bill  
16 that would have required rules if it had become law. It's  
17 House Bill 1976, with a companion by West, Senate Bill  
18 237, and House Bill 1976 would have amended the Property  
19 Code to require the Court to adopt rules establishing  
20 expedited foreclosure proceeding for use by property  
21 owners association in foreclosing an assessment lien of  
22 the association. So there would have been more work for  
23 this task force to do that is already on its third meeting  
24 to work on these Rules 735 and 736, and with that I'll  
25 just turn it over to Mike Baggett and Tommy Bastian.

1 MR. BAGGETT: Okay. You should have before  
2 you several -- one is three pages with a border around it.  
3 I'm going to go to those first, and it says "Rule 735-736  
4 history." So if you have that, that's what I'm going to  
5 be going down. Kind of sad when we come here and we have  
6 to talk about history, but these rules have been around  
7 for a while, and Judge Hecht just told me they've never  
8 been appealed, and I said "Good, maybe they'll stay that  
9 way." So, anyway, these deal with foreclosure. They're  
10 as much about the foreclosure process as they are what  
11 happens in this proceeding, so probably a little bit of  
12 that will help understand how it all fits.

13 First, this first came about 1996, '97, '98  
14 when the voters in Texas for the first time approved home  
15 equity lending. We were the only state in the union that  
16 didn't have it, so we got it. As a part of that approval  
17 in the Texas Constitution there was a requirement for the  
18 Texas Supreme Court to draw the rules to have -- result in  
19 an order that allows you to proceed with foreclosure, and  
20 so we did that back in 1996, '97, '98. We had a task  
21 force then. That task force, like the one that continues,  
22 is very diverse. We have representations on the  
23 consumer's side, the lender's side, the Bar, pro bono. In  
24 fact, many of the pro bono lawyers participate actively in  
25 this. The mortgage companies, title companies, it's a

1 very, very broad-based committee that we try to get every  
2 possible interest that might be in there under the tent so  
3 we can get it all done together and everybody will agree  
4 on it so we can make a recommendation here after all those  
5 various components have weighed in.

6           One of the things that we're going to be --  
7 we have to be very careful about is we've got 150 years of  
8 law, real estate law on titles to property, et cetera.  
9 Obviously foreclosures impact those titles, so we've got  
10 to be very careful that we don't do anything that  
11 interferes with the certainty and marketability of titles,  
12 however we come out, and I think everybody on those  
13 committees has agreed with that. So basically what  
14 happened on 735 and 736 originally back in the home  
15 equity, the only issue that we have before us is whether  
16 you get an order. That's the only issue, and the order,  
17 all the order says is that you proceed with foreclosure,  
18 and you do all the things you would have done anyway. So  
19 it's an extra order on the front end to make sure people  
20 know what's happening, they get notice, they get a chance  
21 to come in and fuss if they want to and so forth. So all  
22 we're doing is adding to the process, not taking away from  
23 it.

24           And if there is a contest of a foreclosure,  
25 in this case what this really does contemplate is if you

1 get a volume of these and there's no answer filed, you  
2 don't want to clog up the dockets and create problems, but  
3 if somebody has a real issue with anything, they can file  
4 a lawsuit in another district court that -- and they file  
5 a notice of that in the court where this order application  
6 is pending, it's automatically abated and dismissed  
7 without prejudice, automatic, and you flip over there to  
8 the court that's got all the normal issues you've got in a  
9 foreclosure. So it's designed in essence to help with the  
10 dockets and so forth, and what's happened is we've  
11 gotten a lot of judges, a lot of clerks, coordinators,  
12 presiding judges, and so forth to get involved in this so  
13 we'll know mechanically how it's working and not working  
14 for the benefit of moving it through the court and the  
15 people who are affected by it. So those passed and became  
16 law back in the '96, '97, '98 time frame.

17           The '98 Legislature then came along and  
18 added to it reverse mortgages; and if you have a reverse  
19 mortgage and you want to foreclose on it, we added to the  
20 Rules 735 and 736 the applicability to reverse mortgages,  
21 still the same concept, the same structure, and the same  
22 process.

23           And then as we went along we started seeing  
24 issues and so forth, so we -- ad valorem taxes is what  
25 this is really triggered by. It's going to be added to

1 it, so if you have a foreclosure of ad valorem taxes  
2 you've got to go in now and get an order first from the  
3 court allowing you to go forward with foreclosure, and now  
4 it's being applied to ad valorem taxes, so after we  
5 finished home equity and reverse mortgages we got the  
6 committee back together again and worked on ad valorem  
7 taxes, and the interesting part about ad valorem taxes --  
8 transfer of tax liens, okay.

9           The interesting part about that is these ad  
10 valorem taxes have priority on other liens, and if they're  
11 coming in and being foreclosed and the other lienholders,  
12 the lenders or whoever who would otherwise be first and  
13 prior, are primed by these liens. So there's a real need  
14 to give a lot more notice to make sure everybody knows  
15 that and they can come in and take care of it. They used  
16 to be totally judicially foreclosed, but that got changed  
17 to nonjudicial like the rest of them, so this is going  
18 back in and adding -- all we're doing here is adding an  
19 order again now applicable additionally to ad valorem tax  
20 liens that have a priority on the property. So that's  
21 really what we're doing. That's sort of the history and  
22 how we got here.

23           Now, the second page for the rules  
24 committee, at the top talked about a little bit to give  
25 you a little background on foreclosure and how they fit

1 with all this. Texas has nonjudicial foreclosure  
2 historically, which means the judiciary doesn't really get  
3 involved in it. We got involved in it under these rules,  
4 home equity, and as I talked about, reverse mortgages and  
5 now ad valorem tax liens, but basically it's covered by  
6 51.002 of the Property Code in the contractual documents.  
7 We've had that for 150 years. Now, as I said earlier, all  
8 we're doing to this -- this whole process still has to  
9 proceed in the same fashion it has for 150 years, just on  
10 the front end you've got to go get this order, and all the  
11 order does is allow you to proceed with foreclosure.

12           The reason I emphasize this is a lot of  
13 judges who see this think when they sign that order,  
14 that's the foreclosure. It is not the foreclosure. All  
15 it is is an additional order you get to allow you to go  
16 through the process that we've been going through for 150  
17 years. Obviously when the economy gets bad and homeowners  
18 are more at risk of defaulting, et cetera, the judges,  
19 everybody, is more concerned about that because they don't  
20 want the newspapers obviously coming down to say, "Why did  
21 you do this" and "Why did you do that," but most of them  
22 didn't really understand that all we're doing is adding  
23 more due process, more protections by doing this, and  
24 we're not taking anything away from the old system we had  
25 already.



1                   And to give you more of an idea, the bullet  
2 point, the way it works on foreclosures, big picture,  
3 Tommy has got a lot more detail about all the notices that  
4 have got to be given and so forth, but basically the way  
5 it works, you have a contractual relationship, you have a  
6 note, and the deed of trust, and there has to be an event  
7 of default. If there's an event of default, sometimes  
8 monetary, sometimes not paying taxes, whatever it might  
9 be, that event of default triggers the right to start the  
10 foreclosure process, but you've got to have that event of  
11 default first.

12                   Texas, we're a lien state, not a title  
13 state. You cannot -- a lender can't do anything to the  
14 property unless there is a clear event of default that  
15 allows the process to start, so the way this works is  
16 there's an event of default, whatever it might be as  
17 defined by the documents. Once that happens and you want  
18 to proceed with a home equity, reverse mortgage, ad  
19 valorem tax lien, you've got to file this application  
20 under 735 and 736, and you'll see a lot of detail in those  
21 rules, and what we've done to a certain extent is extend  
22 the details in the papers that have got to be filed.

23                   And if you'll look at all those materials,  
24 more than half of that is just the form, and the form  
25 covers all the things that a lender needs to do in order

1 to establish that default to proceed, and it's really  
2 protecting the borrowers more than anything else, but we  
3 had a lot of input from the court coordinators, the  
4 clerks, the presiding judges, how do we do this the best  
5 way we can possibly do it to facilitate it, not clog it  
6 up, because the judges, a lot of them don't understand how  
7 it works and they don't want to be reading about it in the  
8 paper, which I thoroughly understand. So you'll see more  
9 detail in what's filed, and if what's filed is properly  
10 done, then they just -- should just issue this order, and  
11 the order, all the order says is you can go forward with  
12 the right to proceed with foreclosure, period. That's all  
13 it is, and that's what this rule says.

14           So once they get their order, they do what  
15 they do normally otherwise, and that's what it's all  
16 about, and a lot of the confusion and angst about it from  
17 the judiciary was "If I sign this and you go out and  
18 foreclose on the house tomorrow, I'm going to read about  
19 it in the paper." Well, that's not factually what  
20 happens. In fact, we're helping the process, giving more  
21 notice and so forth, so all that's very important.

22           So once that order is done then you do what  
23 you normally do, and most of you probably know this, you  
24 give notice of foreclosure on the first Tuesday, 21 days  
25 notice. Then you go out and have it at the courthouse and

1 you foreclose, but it's after there's an event of default,  
2 which has got to be sworn to in this paper. The order is  
3 issued and then they give another notice that the  
4 foreclosure is 21 days before the first Tuesday of every  
5 month, so none of that's changed.

6           So big picture, 735 and 736 are working. I  
7 think this has helped make them work better with a lot of  
8 different input from different people, and I guess we do  
9 too good a job, Judge, and maybe we don't want to keep  
10 adding orders all the time, but that's kind of what's  
11 happened, and as we add them, every time we go back and we  
12 see all the constituents that are involved and get their  
13 input and clean it up a little bit more as we go along, so  
14 that's what's happened.

15           In the ad valorem taxes in particular, it's  
16 very important that there's really good due process notice  
17 sent out, because these ad valorem taxes statutorially  
18 have priority over other liens and deed of trusts against  
19 the property. So you've got to give very good notice to  
20 other people who -- other lenders who have a lien on that  
21 property, and they have a right to come in and do whatever  
22 they want to do to protect their liens, and so it's very  
23 important that you do that. That's one of the issues we  
24 spent a lot of time with, so I think it's working.

25           You will see the changes that we made. The

1 committee was unanimous with all the these various  
2 components, and it took a long time. We've been working  
3 on this for about two years, and the problem is, is we  
4 wanted to get everybody in there and get everybody to  
5 agree and agree to go forward, and we wanted the input of  
6 about how's it working and what can we do to make it work  
7 better and improve it and so forth. So that's what you've  
8 got today, is the third iteration directed by the  
9 Legislature to go forward with these rules. I do think  
10 they're working, and I do think they help the courts and  
11 facilitate the process, but they add -- add some expense,  
12 some notice, some due process, but, you know, we need  
13 that, and that's kind of where it is. That's what we did,  
14 and it's an overgeneralization, but that's what it is.  
15 You want to add anything, Tommy?

16 MR. BASTIAN: No. No, we will certainly  
17 answer any questions, because as you see, it's a 26-page  
18 rule, though I will tell you that 14 pages of that are  
19 promulgated forms to try to channelize the process. So  
20 again, this rule works on the premise that the applicant,  
21 which is basically the lender, is going to get their order  
22 to go forward with the foreclosure if the borrower never  
23 files a response. If the borrower files a response then  
24 there is a hearing. Mike didn't talk about that. There  
25 is a hearing, though the only issue to be considered is

1 whether you can proceed. The borrower always has the  
2 opportunity any time in this process up to the Monday  
3 before the foreclosure sale to go file a lawsuit in  
4 district court, Federal court, wherever it is, that  
5 automatically abates this order. So there's all sorts of  
6 protections in this particular rule. It doesn't change  
7 the process in foreclosure like it's always been done. It  
8 only adds this one little piece right after the loan has  
9 been accelerated that you have to go get the order, and  
10 you get the order only if the borrower doesn't file a  
11 response or if they've had their day in court the judge  
12 overrules them, so that's how this rule is set up.

13           You have this colored -- basically a Power  
14 Point slide. We talked to lots of judges, lots of court  
15 coordinators, lots of clerks. It was very interesting  
16 that a lot of the court coordinators told us -- and Mike  
17 kind of hit on this -- a lot of judges thought when they  
18 signed that order that was the foreclosure, and so that's  
19 why we have this colored chart to show or try to emphasize  
20 everything that you see in blue is the normal foreclosure  
21 process. Then you get down into the green triangles,  
22 that's where this particular rule comes into play, and  
23 then it goes back to the regular foreclosure process. So  
24 this hasn't changed Texas law in any fashion, except for  
25 this little piece where you have to get the order to go

1 forward.

2 Now, I think I would like to kind of put  
3 some more meat on the ad valorem taxes that Mike was  
4 talking about. That's probably -- well, let me tell you  
5 how the process really works. A taxpayer hasn't paid  
6 their taxes, a -- and I'm going to use the word  
7 "investor," because that's really who is doing this.  
8 Investor can go to the taxing authority and he can find  
9 out all of the people who hadn't paid their taxes.

10 Immediately there is a telemarketing campaign or there is  
11 a print campaign to everybody on that list, and these  
12 investors say, "Hey, I've got a deal for you. The sheriff  
13 is going to come out and foreclose your home if you don't  
14 pay these taxes, and my deal for you is I'm going to go  
15 pay your taxes," and that's exactly what they do. With  
16 the permission of the taxpayer they go pay the taxes.

17 Let's say the tax bill is \$5,000. They pay  
18 the taxing authority \$5,000. The taxing authority has to  
19 come up with this fancy little receipt that's required by  
20 the Tax Code, goes and gets it recorded in the real  
21 property records, but behind the scenes the investor who  
22 loaned the \$5,000 to the borrower to go pay the taxes has  
23 that tax lien transferred to him or her, but the borrower  
24 now signs a brand new note and a deed of trust, and that's  
25 what gets foreclosed. It's not under the Tax Code. I

1 mean, if a taxing authority had to do a foreclosure, it  
2 would have to be a full blown judicial foreclosure because  
3 they have this new note and this new deed of trust, and  
4 they can come in and do this nonjudicial foreclosure under  
5 the power of sale under that deed of trust.

6           Now, the interesting thing is, the taxing  
7 authority was paid \$5,000. Lots of times you'll see the  
8 note that the borrower signs, 7,500, 8,000, \$9,000.  
9 Borrower doesn't pay. When he doesn't pay, that taxing --  
10 that investor tax lien or transferred tax lien, property  
11 tax lien, is called a bunch of different things, and they  
12 come in and foreclose. When they come and foreclose, it  
13 used to be that they could foreclose and wipe out a first  
14 lien that had been on the land title records for 10 years  
15 before because they have this priority. That's what this  
16 rule is trying to get at. If you have one of these  
17 transferred tax liens, one of these property loan liens,  
18 you can no longer foreclose without getting a court order  
19 from the court. You also have to have personal service on  
20 that first lienholder that would have no reason in the  
21 world to go back and look at the land title records to see  
22 that somebody came in, paid this taxpayer's taxes 10 years  
23 later, and now has a lien that's superior to theirs.  
24 That's why there's personal service on the first  
25 lienholder.

1                   So you can kind of see how all the pieces  
2 fit in. It's really a transferred tax lien of the ad  
3 valorem tax lien. If it stayed over here as an ad valorem  
4 tax lien, you would have to have a judicial foreclosure.  
5 **This treats that situation where there is this new note**  
6 **and this new deed of trust with the borrower that has the**  
7 **power of sale sitting over in the deed of trust that lets**  
8 **you come in and do a nonjudicial foreclosure. Now you**  
9 **can't do that.** You have to get an order, just like you  
10 have to do in a home equity, home equity line of credit,  
11 or reverse mortgage.

12                   CHAIRMAN BABCOCK: Great. Thanks, Tommy.  
13 Justice Johnson, any --

14                   HONORABLE PHIL JOHNSON: I think they did  
15 all right.

16                   CHAIRMAN BABCOCK: Yeah, they did fine.  
17 Kennon, you were involved in this process at some point,  
18 right?

19                   MS. PETERSON: Yes. Very recently got  
20 involved. I went to the meeting, the last meeting of the  
21 task force on May 26th, and assisted with incorporating  
22 the edits at that meeting.

23                   MR. BAGGETT: You had a -- Kennon did a  
24 great job.

25                   MR. BASTIAN: Absolutely.



1 HONORABLE PHIL JOHNSON: She understates  
2 what she does, significantly.

3 MR. BASTIAN: She had the computer.

4 MS. PETERSON: Yeah, I made the mistake of  
5 bringing my laptop to the meeting.

6 MR. BASTIAN: One other interesting point  
7 that you might be interested in for this committee, the  
8 clerks are going to have to serve this notice. They serve  
9 it by simply preparing a citation, sending out the notice  
10 by regular mail, but somehow I got tagged with the  
11 responsibility of going and explaining how this rule was  
12 going to work to the county attorney and -- or county  
13 clerk and district clerks association, and I understand  
14 you-all have had some interesting times talking to the  
15 clerks. For about three hours I was in a hot seat like  
16 you'll never believe, but the most interesting thing after  
17 it was all over and they had a lot of input in this rule  
18 was that, you know, "Somebody came and talked to us," and  
19 they were very complimentary that we went and talked to  
20 them about this rule. I just pass that on.

21 CHAIRMAN BABCOCK: Great, thanks.

22 MR. BASTIAN: So there's a whole lot of  
23 input from clerks. Lots of them have different opinions.  
24 Let's see, what are there, 254 clerks? About 254  
25 different opinions.

1 CHAIRMAN BABCOCK: Okay. Thanks, Tommy.  
2 The subcommittee has not -- Kennon, has not looked at this  
3 yet; is that right?

4 MS. PETERSON: It has not gone to the  
5 subcommittee separately from the full committee.

6 CHAIRMAN BABCOCK: All right. Well, unless  
7 anybody wants to make comments now, having just received  
8 these things, I think what we'll do is ask the  
9 subcommittee to look over it. They probably won't have  
10 any comments, but that would be unusual given this crowd  
11 of lawyers, and then we'll bring it back for discussion  
12 for the full committee at the next meeting, and we would  
13 love to have you guys here if you're available. Carl.

14 MR. HAMILTON: I just wanted to ask one  
15 question. You said if the tax was only \$5,000 and the  
16 investor made him sign a note for eight, does the first  
17 lienholder have to pay the full eight to protect his lien  
18 or just the five?

19 MR. BASTIAN: The full eight plus all the  
20 foreclosure expenses, all the other expenses that get  
21 tacked on. Regular foreclosure, if a regular attorney was  
22 doing a foreclosure -- or basically the foreclosure mills,  
23 it costs about a thousand dollars to do a foreclosure.  
24 The foreclosures that you see that the transfer of tax  
25 lien folks may be 3, 4, \$5,000, so the lender, if they

1 want to come in and protect them they have the right to  
2 redeem. When they come in and redeem they have to pay all  
3 of the things, that's the \$8,000 plus all the foreclosure  
4 fees, plus the 25 percent premium or the 50 percent  
5 premium depending when they come in and redeem.

6 Oh, I forgot to tell you that the statute  
7 says that the transfer of tax lien can charge up to 18  
8 percent on these liens by statute.

9 CHAIRMAN BABCOCK: Okay. Yeah, Frank.

10 MR. GILSTRAP: Just one general comment that  
11 might be helpful to air at this time. The thing that  
12 strikes me about this rule is it's so doggone long. I  
13 mean, Rule 736 is already the longest rule in the rule  
14 book. This is going to kick it out to 12 pages in the  
15 rule book and be about half as long as the Rules of  
16 Evidence for one rule. I just -- and it seems to me the  
17 result is kind of -- while the goal is due process, it's  
18 kind of an opaque rule because there's just so much of it.  
19 I'm just wondering if maybe any thought was given to maybe  
20 moving the forms into an appendix or something like that.  
21 Would that tamper with the goals?

22 MR. BASTIAN: No, not at all.

23 MR. BAGGETT: No, not at all. We would have  
24 no problem with that.

25 MR. BASTIAN: The reason for the promulgated

1 form is -- and this is kind of interesting. The Court  
2 ordinarily has told us what typically happens when one of  
3 these got filed. The court coordinator was instructed by  
4 most judges, "Well, you go get the rule and get the  
5 pleading and you look at them and you go off your  
6 checklist and if it meets the rule, then bring it to me as  
7 the judge." Then the judges -- and really we didn't have  
8 that much problem until you started seeing all the  
9 foreclosures in the headlines. Then things kind of  
10 changed.

11           There is, I believe, 442 district judges.  
12 Our law firm or part of our law firm does foreclosures,  
13 and so we kind of have to keep up with all the judges. We  
14 have a matrix of 103 judges that have their own special  
15 requirements that they add to the rule that they won't  
16 even consider one of your applications unless it meets  
17 these other requirements. We were told by Judge Davison  
18 and Judge Priddy, those are the two judges on our thing,  
19 "If you give me a promulgated form, I mean, where it's set  
20 out, and basically I can come in and say, okay, did the  
21 applicant follow the form, it has all the stuff in there  
22 that it's almost a summary judgment proof as far as the  
23 application and the declaration, then I'll feel  
24 comfortable in signing it because you've locked down all  
25 the loopholes to keep that newspaper or the media from

1 coming in and saying I foreclosed on somebody's house."

2 So that's why the rule is so specific.

3 There's also a portion to this that's --

4 that kind of underlines the rule. Securitization has

5 changed the whole world of lending. Most folks are still

6 in the world when the bank and the local savings and loan

7 made the loan, where they made the loan, they originated

8 it, they serviced it, and they foreclosed it. In the days

9 of the world of securitization the loan is originated, and

10 it's now stuck over in a security with a special purpose

11 entity that nobody even knows anything about. This rule

12 comes in and takes care of that and puts it into the real

13 world, how it works now with securitization, and it even

14 has a definition of "investor." The investor is actually

15 the person who is going to suffer the risk of loss instead

16 of that owner or holder of that note. That concept is

17 almost obsolete in today's world with securitization.

18 This rule takes care of that.

19 Texas is the first state that basically said

20 we're going to change our foreclosure process so that it's

21 the mortgage servicer that does the foreclosure, because

22 in the real world that's who does the foreclosure. It is

23 not the person who owns the note or the holder of the

24 note. You can't even find out who that is. Michigan has

25 followed that so that in Texas we don't have the problems

1 you're seeing in all these other states where they're  
2 having problems with foreclosures because you have to  
3 plead it is the owner and holder of the note, and nobody  
4 knows who the owner and holder of the note is because it's  
5 securitized, and most states are now going to the point of  
6 it's the mortgage servicer that does it. This rule is  
7 going to be leading all the other 50 states on how you do  
8 a foreclosure in a securitization.

9 MR. BAGGETT: Securitization, the long and  
10 short of it, you take a hundred different loans, put them  
11 in a pool, and they're administered by a servicer. That  
12 doesn't fit any of our old processes and so forth. This  
13 rule, the reason it's that way, is it makes sure that you  
14 cover those bases so that servicer knows what's going on,  
15 and otherwise you can't even find who the holder or owner  
16 is because it's got a hundred properties in it sold all  
17 over the world.

18 CHAIRMAN BABCOCK: Okay, great. Thank you  
19 very much. Great report. Yeah, Judge Christopher.

20 HONORABLE TRACY CHRISTOPHER: I just have a  
21 couple of questions of the task force group. I see here  
22 in 736.15 that the judge has to state a reason why they're  
23 denying the application, and I'm -- I don't have a problem  
24 with that. I do that already, but that usually then lets  
25 the mortgage company amend to cure whatever it is I saw as

1 a defect. You're not letting them do that under this  
2 rule, is my reading of it, so they're just going to have  
3 to file an entirely new proceeding if, for example, they  
4 forget to attach the nonmilitary affidavit. Is that my  
5 understanding of how it works?

6 MR. BASTIAN: That is correct, because after  
7 you turn them down two or three times they're going to  
8 learn, well, maybe we need to follow the rule instead of  
9 doing sloppy lawyering. That's the bottom line.

10 HONORABLE TRACY CHRISTOPHER: That strikes  
11 me as a waste of judicial resources if all it is is the  
12 failure to include one document that they then send in and  
13 then I can sign the application, that, you know, we have  
14 to close the file, we have to reopen the new file, we've  
15 got to serve everything again, just for the failure of one  
16 document that is easily corrected. So I just wonder why  
17 the committee thought that that would be better.

18 MR. BASTIAN: Because it is a promulgated  
19 rule that says this is what you've got to do, and if you  
20 can't do it, then pox on you, because that's the  
21 self-discipline. If you say you're going to have to do it  
22 again, they have to do it three times. They're going to  
23 have clients on their back and say, "Why am I having to  
24 redo it because you didn't attach this?" Then your job is  
25 going to be taken care of, and you're not going to have to

1 go back and hold somebody's hand and say, "You've got to  
2 do this extra." That's the real reason behind it. I  
3 mean, you have a great argument, but that's the flip side,  
4 is if you're told exactly what to do and you can't do it,  
5 then you need to suffer the consequences. Accountability  
6 was part of this rule. That was part of the basis of  
7 this.

8 HONORABLE TRACY CHRISTOPHER: And then I saw  
9 in here that you included a provision of what happens when  
10 the person dies, which is good, because that had been a  
11 hole in the previous rule, but I -- maybe I just missed  
12 it. Is there anything in here about when the property has  
13 already been sold? Because sometimes we'll get these  
14 foreclosure proceedings, and the property has already been  
15 sold, and so I'm not really sure why they're attempting to  
16 foreclose on a debtor who has already sold the property.  
17 Is that covered in here?

18 MR. BASTIAN: Well, in that particular case  
19 it's not part of that dead person's estate to begin with,  
20 and number two --

21 HONORABLE TRACY CHRISTOPHER: No, no. The  
22 debtor is still alive, and they sold the property, and  
23 they're still coming in trying to foreclose.

24 MR. BASTIAN: Well, in that particular case  
25 has the person been released from their obligation?



1 Because the way the rule is set -- I mean, the way  
2 foreclosure is set up, everybody who is obligated for the  
3 debt, even though you've sold the property to somebody  
4 else, you have to be named as part of the pleadings. You  
5 may have sold it to somebody else, but if you're still  
6 obligated for the debt, you're going to be served with  
7 this order because you're still obligated for the debt.  
8 That lien wasn't released. Now, if the lien was released  
9 and somebody is suing you then it was a mistake and  
10 somebody -- it's just a mistake.

11 HONORABLE TRACY CHRISTOPHER: I guess I  
12 wasn't clear. My question is -- and perhaps I was wrong  
13 in how I view this -- if the property has already been  
14 sold to a third person, it seems to me that the third  
15 person needs to get notice of this expedited foreclosure  
16 proceeding, and they're not giving notice --

17 MR. BASTIAN: Well, they will if they're  
18 obligated for the debt, but if they aren't obligated for  
19 the debt, no, they won't, because the lender won't know --  
20 you won't know about that.

21 MR. BAGGETT: But if you sell property the  
22 liens stay in place against the property. They don't get  
23 released, and they've got to go get a title policy. It  
24 will show all those liens, and they know just because it's  
25 sold doesn't impact the liens against the property. It's

1 sold subject to those liens, so it doesn't really impact  
2 it, just a sale.

3 MR. BASTIAN: You'll see it two ways.  
4 Somebody can assume the note. If they assume the note,  
5 but that -- the person that they bought it from still may  
6 be liable on that note; and under the foreclosure process  
7 because it has to be so specific, that person who is still  
8 obligated for the debt has to be made a party to the  
9 foreclosure process because they're still obligated under  
10 the deed of trust; and this new person, unless they  
11 assumed that obligation they don't get notice because they  
12 aren't obligated for the debt. That debt was in the real  
13 property -- really what happened is probably some title  
14 company missed it or it was a deal that wasn't closed at a  
15 title company. Somebody sold it to somebody else and  
16 never told them, "Well, wait a minute, you also got to  
17 take care of that lien that's still sitting out there."  
18 What you're talking about is really the rescue scam folks  
19 that are coming in and doing nasty stuff.

20 HONORABLE TRACY CHRISTOPHER: Right. Well,  
21 and I don't know how it ends up, but sometimes the  
22 property is sold and the lien is not taken care of, and I  
23 always thought that you should notify the new buyer of the  
24 property, but you're telling me that they don't have to  
25 here.

1           MR. BASTIAN: Because that person isn't  
2 obligated for the debt. If you sued that person they  
3 weren't obligated for the debt. Now, you've violated Fair  
4 Collection Practices Act, because you're trying to collect  
5 from somebody who is not obligated for the debt.

6           HONORABLE TRACY CHRISTOPHER: They're going  
7 to get to foreclose on the third person's property,  
8 without notice.

9           MR. BAGGETT: But when they buy it, they're  
10 going to get a title policy. They're going to run the  
11 records when they buy it. They'll get all that.

12           MR. BASTIAN: Yeah, they have constructive  
13 knowledge that that loan is in the land title records,  
14 that third person that you're talking about. Now, whether  
15 they know it or not, they have constructive knowledge  
16 because that lien is recorded in the real property  
17 records, and it has not been released.

18           HONORABLE TRACY CHRISTOPHER: Oh, no, no. I  
19 know that the original mortgage company has the right. I  
20 just thought you had to give notice to the third person.  
21 If you're telling me I don't have to then that's okay. I  
22 just thought that was a hole in the old statute that  
23 doesn't seem to be corrected in this new proceeding.

24           MR. BAGGETT: You don't have to.

25           MR. BASTIAN: That's basically foreclosure

1 law for 150 years.

2 MR. BAGGETT: Yeah.

3 MR. BASTIAN: You only give notice to the  
4 person who's obligated for the debt.

5 HONORABLE TRACY CHRISTOPHER: Well,  
6 that's -- when you -- I mean, I see people that the third  
7 parties get brought into the lawsuits all the time, so  
8 someone's giving them notice, but if you're saying we  
9 don't have to that's fine.

10 MR. BASTIAN: Well, to be safe, I mean,  
11 again, you don't want to have any title -- it's simpler to  
12 do notice if you know about it than getting into a  
13 lawsuit. I mean, that's really what it comes down to, but  
14 the law is very clear and for 150 years, you only give  
15 notice to somebody who is obligated for the debt except  
16 for in the transferred tax lien situation where that first  
17 lienholder that had that lien on the property didn't even  
18 know about the transferred tax lien that appeared 10 years  
19 later. This Rule says you get notice, because there  
20 wasn't any reason in the world for you to go look at the  
21 land title records. If you buy property from that person,  
22 you're put on notice that you need to go down to the land  
23 title records and find out the state of that property. If  
24 you're -- you know, out of ignorance or whatever it is, if  
25 it went through a title company, title company messed up

1 because they would have pulled that lien and said, "That  
2 lien hasn't been released. You've got to take care of  
3 it."

4 HONORABLE TRACY CHRISTOPHER: Right. And  
5 then the last question I had was in terms of this  
6 certified mail that the clerk's office is going to be  
7 sending out.

8 MR. BASTIAN: It's regular mail.

9 HONORABLE TRACY CHRISTOPHER: Oh, I'm sorry.  
10 I thought it was certified. Under the old statute they  
11 send them out certified mail, and a lot of times they'll  
12 attach notices that clearly show that the homeowner has --  
13 is gone, all right, so the notice never actually went to  
14 anyone because it will say "unclaimed" or "moved, no  
15 forwarding address" or whatever, and if that evidence is  
16 in the file, what effect does that have?

17 MR. BASTIAN: Well, there's two ways we  
18 tried to attack that, and basically we adopt what happens  
19 in eviction, the property gets served. So if somebody is  
20 living in that house they are going to get served. That's  
21 going to trip the wire that somebody better go pay  
22 attention because this house is about to be foreclosed.  
23 So if that's a tenant that didn't know anything about it,  
24 that property is going to get served.

25 The part about the clerk, though, is there

1 is a Supreme Court case that says it is better service to  
2 send somebody -- United States Supreme Court case -- it is  
3 better to send somebody notice by regular mail than  
4 certified mail because what you see a lot of times,  
5 they've gotten so many certified mail letters from lawyers  
6 they ignore. One of our members did a test, and he had I  
7 think it was 38 cases where it looked like nobody had  
8 responded. He had the -- he had his court coordinator  
9 send out notices from his office about this hearing for  
10 the home equity loan, and what you thought was nobody was  
11 responding, I think 18 people showed up.

12                   That's why the notice comes from the clerk,  
13 not the law firm that is initiating the foreclosure. It  
14 is coming from the clerk in the clerk's stationery regular  
15 mail. So you have two ways to try to get to what you're  
16 doing, is it's coming from the clerk and then also the  
17 property gets served.

18                   HONORABLE TRACY CHRISTOPHER: What happens  
19 if the letter comes back and shows up in the court's file  
20 as a returned letter?

21                   MR. BASTIAN: You're talking about the Jones  
22 case out of Arkansas, and we went around and around and  
23 around and around and around on how a practical matter to  
24 do that. Part of the problem is in Texas foreclosure is  
25 so quick, but because the time -- you get that unclaimed

1 letter, many times in Texas the foreclosure process is  
2 already done. Because it goes through the -- I don't know  
3 if you've fooled with the green card stuff, because what  
4 happens, there's a whole set of rules from the post office  
5 on what happens if they attempt delivery, and those tape  
6 things that you see that says "unclaimed" or all of that,  
7 what you probably don't know is those don't appear until  
8 the person has been gone for 18 months. If that person  
9 who moved gave a forwarding address to the post office,  
10 the post office automatically under their rule sends it to  
11 that new address.

12 CHAIRMAN BABCOCK: Tommy, hang on for a  
13 second. I'm going to yield to Justice Hecht here for a  
14 few minutes, and I will return to you guys in progress.  
15 Thanks. Sorry, Tommy.

16 MR. BASTIAN: Judge Christopher, since  
17 you're the administrative law judge in Houston --

18 HONORABLE TRACY CHRISTOPHER: Oh, no, just  
19 civil, civil administrative judge.

20 MR. BASTIAN: Well, your input would be very  
21 nice on this, because we're trying to make this rule work.

22 I mean, it still comes down to a kind of business by  
23 exception. If we can head off 90 percent of the problems  
24 with this rule, then we've hit a home run. If there's  
25 aberrations like you're talking about then they'll just

1 have to come up -- you know, there's just no -- if you  
2 tried to take care of every aberration it would be a  
3 hundred pages long.

4 HONORABLE TRACY CHRISTOPHER: Well --

5 MR. BAGGETT: We don't need a hundred pages.

6 HONORABLE TRACY CHRISTOPHER: Well, for  
7 example, there's a brand new Texas Supreme Court case that  
8 talked about certified mail, which is good unless it shows  
9 in the record that it wasn't accepted, so I just -- it  
10 seems to me it's still a hole.

11 MR. BASTIAN: Wasn't accepted or it was  
12 unclaimed? I mean, there's --

13 HONORABLE TRACY CHRISTOPHER: I can't  
14 remember which it was truthfully, but they reversed a  
15 default recently on that point, and I can't remember  
16 exactly what the notation said, so I just -- because this  
17 is kind of a weird hybrid, it seems to me that we should  
18 address what happens if the letter does come back.

19 MR. BASTIAN: Let me make this suggestion.

20 HONORABLE TRACY CHRISTOPHER: That's all.

21 MR. BASTIAN: This chart, this tells you --  
22 this is kind of a -- it's kind of the business practice of  
23 the mortgage servicing industry, but if you'll go through  
24 there you'll see how many times that borrower has been  
25 contacted because this loan has been in default. One of



1 the reasons people ignore it is simply because I've  
2 gotten so much stuff, and they just -- it's unclaimed  
3 because they already know what that is, and so they're not  
4 going to claim it. Yes, ma'am.

5 HONORABLE JANE BLAND: But the problem with  
6 that is that the trial judge that's signing this is not  
7 going to be concerned about the other notices that the  
8 borrower got. They're going to be concerned about whether  
9 the borrower got the notice of this proceeding, and so  
10 what are you-all contemplating, if you're going to have  
11 service by first class mail, what are you contemplating  
12 equates to what you describe as the return of service?  
13 Just that it's been placed in the first class mail and a  
14 certain number of days has passed and that counts as a  
15 basis for --

16 MR. BASTIAN: The way it works is --

17 HONORABLE JANE BLAND: -- completion of a  
18 form that says "return of service" or something like that?

19 MR. BASTIAN: The way it works is the clerk  
20 prepares a normal citation. The clerk mails it just like  
21 they mail anything else. The 38 days and the next -- and  
22 the next Monday starts running from the date that they put  
23 it into the mail. They have mailed it first class mail.  
24 They have control of the notice process instead of the  
25 applicant or the lender's lawyers.

1           There was a real concern on a lot of judges'  
2 parts that maybe some of the folks weren't really sending  
3 the notices to the borrowers. I mean, we have a number of  
4 consumer plaintiff's lawyers. Fred Fuchs is on there.  
5 Judge Priddy, who, as many of you probably know, was the  
6 guy who represented ACORN in the home equity litigation.  
7 I mean, he's a judge member, too. I mean, all those  
8 people were involved on trying to figure out how do we  
9 make sure people get good notice so that it meets due  
10 process, but it also doesn't bog down everything.

11           MR. BAGGETT: But you as a judge can deny  
12 the order.

13           MR. BASTIAN: That's exactly right.

14           MR. BAGGETT: It's without prejudice. They  
15 can file it again, try it again, so just deny it.

16           HONORABLE TRACY CHRISTOPHER: Well --

17           MR. BASTIAN: I mean, if you have a concern  
18 about sewer service, deny it and make somebody do it  
19 again. You might just say, you know, "I suggest in this  
20 particular instance because of some circumstances, maybe  
21 Mr. Attorney, Miss Attorney, you might want to do this to  
22 assuage my concerns about whether there's good service."

23           HONORABLE TRACY CHRISTOPHER: Well, I  
24 totally support and understand the frustration of this  
25 group that you're dealing with 442 district judges that

1 are -- or however many we have -- that all have different  
2 peculiarities and --

3 MR. BAGGETT: Only 103.

4 MR. BASTIAN: Only 103.

5 HONORABLE TRACY CHRISTOPHER: -- we're  
6 making a really long rule, and it seems to me that we  
7 ought to cover all bases, and that adding in another  
8 sentence or two about what happens if that does show back  
9 up into the court's file wouldn't hurt anything, and that  
10 way you wouldn't have some of us saying it's okay and some  
11 of us saying it's not okay.

12 MR. BASTIAN: Well, frankly, there isn't any  
13 -- there isn't any certified mail service on anybody  
14 because the clerk is the one who serves it.

15 HONORABLE TRACY CHRISTOPHER: No, but still,  
16 like, for example, when my -- when we mail out notices to  
17 people, sometimes they get returned to us because it's a  
18 bad address or the guy has moved or whatever, and it comes  
19 back, and it's in my file. The envelope comes back to me  
20 and, you know, shows that it was not served.

21 MR. BASTIAN: You have a lawyer that hadn't  
22 taken and shown you the U.S. Post Office rules that says  
23 -- I mean, everything depends on whether that borrower has  
24 actually given the U.S. Post Office a new change of  
25 address, because that's kind of the key, but when -- for

1 18 months, the first 18 months after somebody has moved  
2 and given that change of address, the post office  
3 automatically -- or they're supposed to. I mean, their  
4 rules say you send it. It only kicks back where you start  
5 getting that -- the notice "moved," "no address" or  
6 something like that, it only comes up after that 18  
7 months. Now, if it comes back unclaimed, it just means  
8 that the person refused to either go -- just refused to  
9 take it. That's a different story.

10 HONORABLE TRACY CHRISTOPHER: No, I'm  
11 talking about our regular mail notices that we send out to  
12 lawyers or pro ses right now, just regular mail, which is  
13 what this rule contemplates. Sometimes the envelope comes  
14 back, and I can't imagine that that won't happen at some  
15 point, and I just think we ought to address it. That's  
16 all I'm saying.

17 MR. BASTIAN: Okay.

18 HONORABLE NATHAN HECHT: Tom Lawrence.

19 HONORABLE TOM LAWRENCE: There's another  
20 problem related to that. A lot of these foreclosures that  
21 I see, the evictions after the foreclosures, the tenant  
22 shows up in court and the question is, "Did you know that  
23 your landlords have been foreclosed on?"

24 "No, I didn't have any idea, but we did  
25 receive a lot of mail, but we didn't open it," or "We just

1 threw it away, it wasn't addressed to us," and they don't  
2 know anything about the foreclosure until they get a  
3 three-day notice to vacate because the true owners are  
4 living somewhere else and have rented the property.

5 MR. BASTIAN: That's covered two ways.  
6 Number one is that property is served on their front door  
7 that is addressed "to the resident of," doesn't say "the  
8 debtor." It says "the resident of" that property address.  
9 That's on the front door, so that tenant has that notice.  
10 It says "resident." It doesn't say "debtor" or anything  
11 like that.

12 Number two, for every Federally related  
13 loan, whatever that really means, is there is a new U.S.  
14 provision that says the -- you have to have -- the tenant  
15 has to have 90 days notice if you have one of these  
16 foreclosures before they have to move out. It's no more  
17 three days or the 30 days if you're a tenant. That is a  
18 new Federal law. It's pretty badly drafted, and I think  
19 it's S896, but for every -- and just about every loan now  
20 is going to be a VA, FHA, Freddie Mac -- a Freddie Mac,  
21 Fannie Mae loan, so that new law is going to affect it to  
22 protect those tenants.

23 MR. DOGGETT: Hey, Tommy --

24 HONORABLE TOM LAWRENCE: But I'm not sure  
25 that the -- I'm not sure that anyone knows that there is a

1 tenant in that property necessarily, because in some cases  
2 the owner will have rented and moved off and not told  
3 anybody.

4 MR. BASTIAN: Oh, here is Robert. Robert  
5 knows that rule better than anybody.

6 MR. DOGGETT: I was just going to say, it  
7 applies to all loans, and it means that a foreclosed  
8 property, the tenant gets to live out their full term of  
9 the lease. If the lease is up or expired, they still get  
10 90 days, just so you know. The law is even broader than  
11 what Tommy is talking about. In other words, it's not  
12 just Federally-related. It's actually any, any, mortgage  
13 loan whatsoever. The law does sunset, though, in 2012,  
14 FYI.

15 HONORABLE TOM GRAY: Dee Dee is going need  
16 you to identify yourself for the record.

17 MR. DOGGETT: I'm sorry. Robert Doggett. I  
18 do whatever Tommy says.

19 MR. BASTIAN: Yeah.

20 HONORABLE NATHAN HECHT: Any other -- yes,  
21 Judge Christopher.

22 HONORABLE TRACY CHRISTOPHER: Sorry.

23 HONORABLE NATHAN HECHT: Again.

24 HONORABLE TRACY CHRISTOPHER: Just reading  
25 over the rule, the clerk sends by first class mail, then

1 the applicant does regular service and -- under 736.6 to  
2 the property address, right? And both of those returns  
3 have to be on file before I can sign the default.

4 MR. BASTIAN: That is correct. You'll have  
5 all this whole litany of citations there so you can check  
6 them and make sure it's done.

7 HONORABLE TRACY CHRISTOPHER: So that's more  
8 due process than is currently given.

9 MR. BASTIAN: Absolutely.

10 MR. BAGGETT: Right.

11 MR. BASTIAN: With the clerk sending out the  
12 notice instead of the way it is right now where the  
13 applicant's attorney or the applicant sends out the  
14 notice.

15 MR. BAGGETT: And the clerks have agreed to  
16 this.

17 MR. BASTIAN: Yes.

18 HONORABLE TRACY CHRISTOPHER: Okay, and so  
19 if we're going through that process, you know, the hearing  
20 won't be held within a short period of time because it  
21 takes a while to get service, real service, as opposed to  
22 just mailing people stuff, so it's going to delay things.  
23 I mean, as long as everyone understands that, I'm okay  
24 with it.

25 MR. BASTIAN: Well, what happens is --

1 HONORABLE TRACY CHRISTOPHER: It's going to  
2 be a lot slower than the current system.

3 MR. BASTIAN: The notice that the clerk  
4 sends out is 38 days and the next Monday. The notice that  
5 is posted on the property, I mean the property gets  
6 served, it's 20 days from -- and the next Monday from the  
7 date it was served, and so it may not slow down the  
8 process. Right now it's 38 days if the lawyer sends it  
9 out. Clerks say you're going to give me -- this rule also  
10 says the lawyer has to supply everything that the clerk  
11 needs to do these notices so they don't have to have  
12 somebody sit down and try to figure out, okay, who is the  
13 last known address, all of that other kind of stuff.

14 Clerks said "Give us that information," and  
15 they're going to get that under the rule so they can just  
16 prepare the citation. It goes out almost the same day.  
17 They told us, "We think we can send out the citation the  
18 same -- if you give us this information, we can send out  
19 the same day that application is filed." Then that means  
20 under this rule 38 days and the next Monday is when the  
21 response date is. Under the old rule it was 38 days and  
22 the next Monday when the attorney supposedly mailed it,  
23 and then if nobody files a response you can go on and sign  
24 the order.

25 So I'm not -- you're right, it may. It may



1 only because somebody didn't get on the ball until my  
2 process server or the sheriff or the constable didn't go  
3 out and get that property sold the same day they got the  
4 citation from the clerk or from the attorney who had the  
5 clerk prepare it and then send it to the process server  
6 under 103 to go get it served.

7 HONORABLE NATHAN HECHT: Richard.

8 MR. MUNZINGER: I was looking at the  
9 definition of "investor" means for "a loan agreement that  
10 is securitized." There is no definition of "securitized,"  
11 which is not a verb that we would find in Webster's, and I  
12 understand -- I think I understand what it means. I'm  
13 just curious if you gave any thought to whether that verb  
14 or some synonym for it should be defined and whether the  
15 absence of a definition could create problems of a  
16 substantive nature.

17 MR. BASTIAN: Of course. I mean, I guess we  
18 get back to I think most folks kind of understand what  
19 security -- I mean, we can go around and around on that.

20 MR. MUNZINGER: I don't mean it as a  
21 criticism. I was just asking you whether you-all debated  
22 it and looked at it and --

23 MR. BAGGETT: Oh, yeah, we debated it.

24 MR. BASTIAN: This rule has gone -- it  
25 started out because very few people even understand

1 securitization. They don't understand all the pooling,  
2 they don't understand the special purpose entity, they  
3 don't understand the GSC and how all those people fit in  
4 the process, and this rule tries to bring us into the --  
5 in the 20th century of lending, and securitization is this  
6 kind of amorphous idea of you pool all these loans and  
7 then you sell the right basically to receive the income  
8 stream that's coming off of those loans, and that's what  
9 we're trying to get at. I mean, one of our definitions  
10 would have taken up a half a page on "investor."

11 MR. MUNZINGER: Are there Federal  
12 regulations that apply to these, either existing or  
13 contemplated? I was under the impression they were  
14 contemplating some.

15 MR. BASTIAN: Well, if it is a private label  
16 securitization you've got to record everything with  
17 the SEC. I mean, there will be a prospectus, there will  
18 be a pooling and servicing agreement. Everything that has  
19 to do with that particular securitization is filed with  
20 the SEC. Now, if it's a Fannie or Freddie, they don't  
21 have to file the stuff with the SEC, but their website --  
22 I mean, all of their documents are basically the same.  
23 You can go on their website and pull up a sample of every  
24 kind of securitization that they do.

25 MR. MUNZINGER: Which is one of the reasons

1 -- I mean, I don't work in this area, but it just occurred  
2 to me that I think we all know what securitized means, but  
3 it was odd to me that the word is not defined and that it  
4 can have, I would suspect, substantive effects; and if a  
5 purpose of the rule is to avoid problems, perhaps a  
6 definition would be helpful; and I mean no criticism at  
7 all to the prior work. I'm just doing what I'm supposed  
8 to do.

9                   MR. BASTIAN: I mean, if that's -- we've  
10 spent so much time we want it right, and if that's going  
11 to be a problem, I think we debated it and didn't think  
12 that particular term, again, because it is kind of this  
13 generic term didn't need that kind of definition, because  
14 really the key to that definition is who suffers the risk  
15 of loss and who gets the money. Because that's what it's  
16 all about, who suffers the risk of loss and who gets the  
17 money, and that's the investor.

18                   HONORABLE NATHAN HECHT: Any other  
19 questions, comments? Okay. Well, this will go to the  
20 subcommittee and back at our next meeting, and we thank  
21 Tommy and Mike and Justice Johnson for their efforts.

22                   MR. BASTIAN: And Kennon.

23                   HONORABLE NATHAN HECHT: And Kennon.

24                   MR. BASTIAN: Kennon with the computer.

25                   HONORABLE NATHAN HECHT: And we -- just

1 another note on the process, we had a similar task force,

2 I think Mike was on it, Mike Baggett. I mean Mike --

3 MR. BAGGETT: Tommy.

4 HONORABLE NATHAN HECHT: No.

5 MR. BASTIAN: Barrett.

6 MR. BAGGETT: Yeah, Barrett. Barrett.

7 HONORABLE NATHAN HECHT: Mike Barrett was on  
8 it, and -- but the whole idea from the very beginning was  
9 to get people who are involved in the process to structure  
10 the rule that works, so we appreciate this input, and  
11 we'll be back with details at the next meeting. Thank you  
12 all for being here. You're welcome to stay or go.

13 MR. BAGGETT: Thank you.

14 MR. BASTIAN: Thank you.

15 HONORABLE NATHAN HECHT: The next item on  
16 the agenda is poverty law issues, and just a word of  
17 introduction, the -- as part of the Court's continuing  
18 interests in access to justice issues, the Court has a  
19 hearing periodically to hear from those who are active in  
20 those efforts about progress that's being made, problems  
21 they're encountering, and what can be done to help. At  
22 the last meeting last fall it was suggested that there  
23 might be a couple of rules changes that would help with  
24 access to justice, and so we encouraged people -- someone  
25 to write in about those issues to us, and when we got that

1 letter I referred it to the committee back in April and  
2 asked the committee to take a look at it. Meanwhile, the  
3 State Bar has done some looking at some of these issues,  
4 and Chuck Herring, an alumnus of this group -- is Chuck  
5 here? Yep, an alumnus of this very committee, has been  
6 involved in this, and we'll hear from Chuck.

7 MR. HERRING: Thank you, Judge. I think  
8 survivor of the committee is how I view it, and actually,  
9 Pete Schenckan I think is your subcommittee chair who is  
10 going to raise some questions on this proposal, but I did  
11 I think survive 11 years on this committee in the Eighties  
12 and Nineties, and it's a little disturbing to look around  
13 and see people who were here then still here, but I am  
14 glad that I'm not. It's wonderful work that you do, but,  
15 boy, it's a lot of time and a lot of labor. What I've  
16 been doing the last few years is serving on the Legal  
17 Services to the Board and Civil Matters Committee of the  
18 State Bar, and that's why I'm here today. We have a  
19 proposal before you on behalf of that committee and the  
20 State Bar, which the State Bar board has adopted the same  
21 proposal and recommended it for your consideration.

22 I'm speaking only on my -- on my own behalf  
23 today, but at the request of the committee, at the request  
24 of the chair, Andrew Strong, who is the new general  
25 counsel of Texas A&M system, and on behalf of Judge

1 Livingston, Laura Livingston, who, of course, is the local  
2 district judge here in Travis County who is an expert on  
3 legal services and has spent a lot of time on this and is  
4 on the ABA standing committee and has worked on this.

5           Here is the proposal. I'm so glad to come  
6 after that long rule that just has been proposed because  
7 we're talking 20 or 30 words. In my experience on the  
8 committee, we can only spend two or three days talking  
9 about 20 or 30 words, but the idea is this. We have  
10 sanctions rules that permit certain monetary penalty  
11 sanctions, and the idea of this proposal is to give an  
12 option. Those monetary penalty sanctions now go into the  
13 general fund of the county. You'll see there's some  
14 question about why, but that's what happens to them, is to  
15 give an option that is explicit in the rules that just  
16 says in the alternative, another alternative, another  
17 option, the court may direct those funds to the benefit of  
18 legal services to the poor in civil matters, and we have a  
19 number of different options, and there's not -- from our  
20 committee's perspective -- a great deal of magic in which  
21 option to consider, but we have provided one, and then  
22 Randy Chapman from the Texas Legal Services Center here,  
23 who has spent huge amounts of time at the Legislature  
24 working on the legal funding issues this session, is here  
25 and has -- always has some important insight.

1           In the materials that I hope have been  
2 handed out, the State Bar resolution is on page one,  
3 numbered page one of those materials, and you don't need  
4 to read all the "whereas" clauses, but the bottom part of  
5 that, the last paragraph really lays it out, and then the  
6 language that we have proposed is on page two. And the  
7 rationale, just for a moment, and all of you know this  
8 very viscerally because you're involved and sensitive  
9 lawyers in the community, I can't state it any better I  
10 think really than Justice O'Neill did in her recent  
11 opinion piece during the session, and the Supreme Court  
12 deserves huge credit from the legal services community for  
13 the work that the Chief Judge and the other judges did in  
14 helping to get a general appropriation from the  
15 Legislature, which, subject to that bill being signed, has  
16 passed, and we hope that we'll have those funds.

17           Judge O'Neill, Justice O'Neill, said in her  
18 recent opinion piece during these tough economic times  
19 Legal Aid can help people housed and employed and keep  
20 family's stable. More than a hundred thousand low income  
21 Texans are served by Legal Aid providers annually,  
22 including victims of domestic violence, the elderly and  
23 disabled. It's a safety net in Texas. Without it they  
24 might never recover. She also points out that for every  
25 dollar that is spent on legal services for the poor,

1 according to the Perryman study, there's a multiplier  
2 effect, and the overall annual gain to the economy is  
3 \$7.42.

4           However, she says the Texas Legal Aid system  
5 is in danger of being decimated, and we all know that in  
6 general terms the numbers are incredibly startling. In  
7 2007 the projected revenue from IOLTA was going to be \$28  
8 million. We have an eight million-dollar shortfall.  
9 There's 20 million. That's 2007. Interest rates, as you  
10 know, plummeted after that. The IOLTA revenue in 2008 was  
11 down to 12.2 million, and the projected revenue for this  
12 year from that 28 million projected in 2007, projected  
13 revenue is 1.5 million on IOLTA, so nine percent decrease.  
14 Huge impact on families, on individuals, on legal services  
15 providers. She in her opinion piece recommended a general  
16 appropriation of \$37 million, and darned if we didn't get  
17 a large one. It's 20 to 22 million, depending on a  
18 contingency, but we're still 15 million to 17 million  
19 short of what it was viewed as necessary.

20           So we have scrambled, and I'm on the funding  
21 subcommittee of the Legal Services to the Poor Committee,  
22 and we have scrambled to come up with as many creative  
23 ideas as we can to try to bridge the gap as much as we  
24 can, and that's why we're here with this proposal. I've  
25 spent an unhealthy amount of time on sanctions practice in



1 the past. I chaired the Supreme Court's statewide Task  
2 Force Sanctions with Justice Pemberton. We wrote the West  
3 Discovery Manual with Professor Albright as well, and  
4 annually for some reason I do the sanctions talk for the  
5 advanced discovery and evidence course, and I end up  
6 reading hundreds of sanctions decisions. I don't know why  
7 I ever got into this, but I want to mention just a little  
8 context for this proposal.

9           There are lots of sanctions rules and  
10 statutes in Texas. Most of them aren't used a lot, but  
11 there are quite a few. There are four I want to mention,  
12 and they are pages 5 to 12 of the materials. I put the  
13 key ones in there that I want to talk about. Rule 215, as  
14 you know, is general sanctions rule for discovery abuse.  
15 It has multiple subdivisions, which is part of the  
16 problem, and then Rule 191.3, that's the rule we adopted  
17 in 1998, the 1999 "new" rules as we call them, still do.  
18 That's the discovery certification rule, which says every  
19 time you sign a discovery request or a response you  
20 certify to certain things, basically that there is a  
21 reasonable basis in fact and law and no improper purpose,  
22 and the rule has its own sanction, Rule 191.3(e), and that  
23 says that when that certification is false without  
24 substantial justification, a sanction may be imposed under  
25 Chapter 10 of the Civil Practice and Remedies Code.

1 That's the frivolous pleading statute in the Civil  
2 Practice and Remedies Code.

3           Then we have Rule 13, which is, as you know,  
4 the groundless bad faith or groundless for harassment  
5 sanctions rule for pleadings in the Rules of Civil  
6 Procedure, and it incorporates the sanctions out of Rule  
7 215.2(b). So Rule 13 allows the same sanctions as in Rule  
8 215.2(b). Rule 191.3 allows the sanctions as provided as  
9 in Chapter 10 of the Civil Practice and Remedies Code, and  
10 Rule 215 itself is very broad, and as you know, 215.2 says  
11 "sanctions." It has some itemizations for the type of  
12 violations addressed, says, "orders as are just," very  
13 broad authorization. So that's sort of the background.

14           Chapter 10, Civil Practice and Remedies  
15 Code, has, as you know, two sections of sanctions. One is  
16 in 10.002(c), sort of the convoluted legislative  
17 compromise we ended up with, and then section 10.004(c),  
18 and (c)(2) is the provision that says one sanction a court  
19 may levy if there is a violation of those certifications  
20 under Chapter 10 is a penalty paid into court, penalty  
21 paid into court, because 191.3, the discovery  
22 certification rule, incorporates those sanctions;  
23 therefore, a penalty paid into court could be a remedy if  
24 there were a violation of 191.3, the discovery  
25 certification. So that's the background. Those are the

1 basic rules.

2           None of the rules, of course, at present  
3 mention anything about legal services to the poor.  
4 Probably Rule 215.2(b), which is so broad, "such orders as  
5 are just," is broad enough to permit that now. It has  
6 been construed in the case law to permit fines. Nothing  
7 mentioned about fines in that rule expressly, but it's  
8 been construed to permit that. The idea behind this is to  
9 create an alternative to sending that money to a penalty  
10 paid into court, which goes to the county general fund,  
11 does not benefit the courts directly, and certainly  
12 doesn't benefit legal services to the poor, but in an  
13 appropriate case to permit a judge to make that monetary  
14 award to benefit legal services to the poor in one of the  
15 various options that we have set out.

16           The language that's in the resolution and  
17 the language that's on the first option that we've set out  
18 ties into the statute that exists that permits the  
19 payment -- requires the payment of pro hac vice fees into  
20 that particular fund, that the -- it's called the basic  
21 civil legal services account of the judicial fund. That's  
22 where pro hac vice fees are paid to by statute for lawyers  
23 that come in to get pro hac vice admitted now in Texas, so  
24 we used that same language because courts are familiar  
25 with it, the administration is pretty obvious, and that's

1 the particular option that we have initially suggested,  
2 though, as I say, there is no magic to that.

3           Pete Schenkkan, who if I make any errors,  
4 they are all his fault because I took heed in law school  
5 and taught me how to do this. Pete is a great friend. I  
6 know he's in charge of your subcommittee that's looked at  
7 this and has raised some questions, and, Pete, do you want  
8 to articulate those or do you want me to try anticipate  
9 the ones you've sent to me?

10           MR. SCHENKKAN: Whichever you prefer, Chuck.  
11 The only clarification I need to make immediately is I'm  
12 not the subcommittee chair. It's Judge Yelenosky, but he  
13 couldn't be here today. I was just the one who worked on  
14 this particular issue. Our subcommittee was tasked with a  
15 bunch of other things that Judge Lawrence and others will  
16 be --

17           MR. HERRING: I stand corrected, as so many  
18 times before.

19           MR. SCHENKKAN: But other than that, you  
20 know, you handle it as you think best, Chuck.

21           MR. HERRING: Let me try and anticipate sort  
22 of the big issues that Pete and I have exchanged e-mails  
23 on and talked about, and then Pete can chime in as he  
24 likes. One question is, well, do we need statutory  
25 authorization to do this? We would have to have a statute

1 that will allow the Court to have this sanctions remedy  
2 that could be devoted to legal services to the poor in  
3 civil matters, and our belief as we looked at it was, no,  
4 we didn't. Pete has a little different view or at least  
5 raises the question.

6           The reason we thought we didn't is, number  
7 one, there is precedent already in one sense for the Court  
8 under its very broad rule-making authority, which I'll  
9 talk about in a moment, but there's precedent already to  
10 have a monetary sanction that is directed to a government  
11 fund. What is that? Rule 191.3(e). When we adopted --  
12 the Court adopted, this committee recommended -- in 1998,  
13 191.3(e) it incorporated the statutory remedies in Chapter  
14 10, but it had no separate specific statutory  
15 authorization. So in effect the Court said, "Hey, if  
16 there's a discovery certification violation, the court may  
17 impose a penalty," one of which is a penalty paid into the  
18 court which goes to, which we'll see, the general fund of  
19 the county. So the Court by rule without any underlying  
20 specific statute has already adopted a remedy that directs  
21 payment of monetary sanctions to a state fund, a  
22 government fund, and that's the general fund in counties  
23 the way it's administered at least in most counties, but  
24 not all. So we've already done it back then in one sense.

25           Secondly, we set out to -- on page, you

1 know, 15, what you know, which is the underlying statutes  
2 that authorize the rule-making authority of the Court, and  
3 as you've read those in the past, those are very, very  
4 broad statutes, as is the constitutional provision, but  
5 when the Court adopts a rule it stays in effect until and  
6 unless the Legislature changes it, and that's exactly the  
7 language from the statute.

8           Well, it seems unlikely that the Legislature  
9 as busy as it has been in attending to state business is  
10 going to care too much about this rule, which doesn't  
11 increase sanctions, it doesn't change conduct to sanction  
12 or anything. It's just which government fund does the  
13 money potentially go to, subject to the discretion of the  
14 court, of the judge, and it's sort of hard to think about  
15 how you challenge that. "Judge, I don't want to be  
16 sanctioned in the form of a penalty that would be paid to  
17 the legal services designated fund. I want to be  
18 sanctioned with a penalty that would be paid to the  
19 general fund of the county." I'm not sure where that gets  
20 you if you're in front of a court to make that argument.

21           The -- again, under Rule 215.2(b), our case  
22 law in Texas, and this appears in Justice Gonzales'  
23 concurring opinion in TransAmerican, goes all the way back  
24 there, and as Elaine knows, TransAmerican, the birthday is  
25 next week, seven days from today it will be 18 years old,

1 and I'm sure she'll still have a party for it, but in that  
2 opinion, in a concurring opinion of Justice Gonzales, he  
3 recommended you can have a -- he recognized you can have a  
4 fine. There have been other cases, *Clark V. Brass* and  
5 Citibank and others that have recommended you can have a  
6 fine. What is a fine? It's a monetary sanction that is  
7 directed. It's paid to a government fund. What's the  
8 government fund? The general fund of the county where the  
9 money sort of disappears into ether.

10           And then, of course, we have a wide -- now,  
11 after *Chambers V. NASCO*, also decided in 1991, and *In Re:*  
12 *Bennett*, decided by the Texas Supreme Court in 1997, and  
13 those progeny -- we have lots of inherent power sanctions  
14 cases. And as you know, inherent power is the  
15 interstitial doctrine that applies for bad faith conduct  
16 in litigation when there is no specific rule that  
17 addresses it; and those cases, many of those cases, have  
18 addressed fines and monetary penalties. Again, no  
19 specific statutory authorization, but that is, the courts  
20 conclude, part of the inherent power of administering the  
21 judicial system.

22           And then, you know, Pete really focused on  
23 another argument or another point that I think is  
24 pertinent, and that's this, and I really don't want to get  
25 bogged down into the detail, but we asked the question --

1 we started looking at this. We said, well, where did the  
2 money go? If there's a penalty, if the judge imposes a  
3 financial penalty sanction under 10.004(c)(2) paid into  
4 court, what does that mean? You write a check to the  
5 judge, the court, county or what? And we talked to the  
6 district judges, a couple of them here. They said, "Well,  
7 it goes into the county, the general fund." You know, we  
8 got -- very kindly, David Escamilla, who is our county  
9 attorney for a couple of decades now here, researched that  
10 for us and said -- we asked him, "Well, how come? Why  
11 does it go there?" And that's a good question as to why  
12 it goes there.

13           He has said this, that traditionally there  
14 were salary funds; and way back when, and it's still true  
15 in some areas, some of those penalty funds go to support  
16 the salary of the employees; and we have in the materials  
17 we've handed out page 17 and following are the statutes  
18 that his office has relied upon to say when somebody has a  
19 monetary sanction, goes to the general county fund,  
20 general fund of the county, you'll see these sections.  
21 I'm not going to go through them in detail, but they don't  
22 mention sanctions, court sanctions, at all. Don't even  
23 mention fines. They mention fees, commissions, funds, and  
24 other monies belonging to a county.

25           And then the last section we cite there,



1 what happens in the urban counties he says -- he confirmed  
2 this last week at the -- whatever the conference was, the  
3 county attorneys -- the urban counties provide by this  
4 last statute, Section 154.007 of the local Government  
5 Code, that that money gets transferred into the general  
6 fund. It doesn't stay in the salary fund, so we don't  
7 self-fund for those officers who collect those penalties  
8 and fines. And I said, "Well, David, that doesn't really  
9 seem to talk about court sanctions or penalties or even  
10 fines. How does that apply?" And he said, "Well, it's  
11 like a lot of county law, it's very ambiguous, and that's  
12 what we do." So one could argue there's a legal challenge  
13 right now to what happens under the existing 10.004(c)(2)  
14 of the Civil Practice and Remedies Code or 191.3(e) when  
15 it tracks that.

16           But the point is we know under 10.004(c)(2)  
17 that there can be a penalty paid into court. Pete raised  
18 the question, which I thought was excellent, well, court,  
19 how do you pay to a court? Is that the judge? Is that  
20 the particular court? It would suffice, presumably as the  
21 Court construes the word "court" to say "a  
22 court-designated fund," which is what happens now. The  
23 court-designated fund by default has been the general fund  
24 of the county, but there's no reason for the Court not to  
25 say "paid into court" also includes as an option payment

1 into a designated fund. So that's sort of our shorthand  
2 or longhand, I guess, analysis of do you have  
3 authorization to do it. Yes, we've done it before. We've  
4 done it in similar settings, inherent power, Rule  
5 215.2(b). We think it can be done legally and properly.

6 Another alternative, though, let me talk  
7 about the alternatives, and we have some alternative  
8 language set out on pages three to four, and that's just  
9 other language as to where the money could go, if you're  
10 not going to use the language that's out of the pro hac  
11 vice statute, that particular fund; and the other  
12 provisions in there, one of them -- and our committee  
13 doesn't really care. It just wants to get some legal  
14 services funds in the Court's discretion if the Court  
15 wants to. One of the options is just to say "pay monetary  
16 sum to a nonprofit provider of legal services to the poor  
17 in civil matters." That sort of leaves it up to the trial  
18 court to pick wherever, may or may not be a good thing.

19 Another option is "pay a monetary sum to a  
20 nonprofit entity selected by the trial court from a list  
21 compiled by the State Bar of Texas of providers of legal  
22 services to the poor in civil matters." I kind of like  
23 that one myself. Pete has raised the question, well, once  
24 we do that, aren't we using government funds for private  
25 benefit, and isn't there an issue there? And I'm not

1 going to go back through the Sterling decision unless he  
2 raises it, but the Sterling decision in essence said if  
3 you have 10.004(c)(2) penalty paid into court, you can't  
4 designate it after you've done that, and it says to --  
5 under that you can't designate for the benefit of the  
6 minors in the case, which was what was done in that court.

7           This is different in our view. I think Pete  
8 joins issue on this probably, but in our view that's a  
9 reason to create this option, is so it doesn't just have  
10 to be a penalty paid into court. It can be a penalty paid  
11 to another designated government fund or other -- or these  
12 first two options are nongovernment funds, just legal  
13 service providers, nonprofit entities.

14           A third option -- well, let me actually  
15 mention at this point an issue -- well, third option, then  
16 I'm going to get Randy Chapman to speak on a particular  
17 option. The third option is payment of a monetary sum to  
18 the State Bar of Texas for providing legal services to the  
19 poor in civil matters. The State Bar is defined under the  
20 Government Code under the State Bar Act as "a public  
21 corporation and administrative agency of the judicial  
22 department of government." Any of you who have ever  
23 litigated with the State Bar know that it's sort of a  
24 quasi-governmental entity in some settings and perhaps not  
25 in others, but it is clearly a department of -- agency of

1 judicial department of government.

2           Randy Chapman, who spends huge amounts of  
3 time and understands far better than I ever would how the  
4 money flows in legal services in Texas has raised the  
5 question about the fund we had proposed, the pro hac vice  
6 fund. That's the language in the first option and said,  
7 "Well, you know what, that actually takes a statutory  
8 appropriation authorization each session for that money to  
9 come out of that fund and to be expended." Otherwise, it  
10 would just accumulate. So we're sort of back in the boat  
11 that we collect it to go in there for that designated  
12 purpose, would have to be spent for that purpose, well,  
13 we've got to get a legislative act each time on the  
14 appropriation end.

15           The reason we ended up with the language,  
16 the pro hac, was the analog to the pro hac vice statute  
17 fund was that when one deals with the State Bar and the  
18 Access to Justice Commission sometimes there are different  
19 perspectives on how things operate and should operate and  
20 how funds should flow, and this was sort of compromised  
21 language that everyone was familiar with. It doesn't mean  
22 that's the way it needs to be done, but, Randy, you want  
23 to mention your option, the other language you had as to  
24 how you would have the money flow?

25           MR. CHAPMAN: Certainly. Thank you, Chuck.

1 And looking at page one -- I'm Randy Chapman, Texas Legal  
2 Services Center Executive Director. Good morning. The  
3 other option that basically would simplify it and would  
4 provide additional oversight and not raise the issue about  
5 the judge deciding on one nonprofit provider versus  
6 another, if you look at the resolution of the bottom  
7 paragraph there, "for be it resolved," my suggestion is  
8 where it says "permitting an award to be paid into" and  
9 then just scratch the rest of that language and say  
10 instead "to be paid to the IOLTA grant fund administered  
11 by the Texas Access to Justice Foundation."

12 MR. HERRING: And for clarity, he's used the  
13 resolution, but that would be the language you'd  
14 substitute in the rule that's on the next page or instead  
15 of the rule, option language we have on the following  
16 pages. Just a different designation. Instead of to the  
17 pro hac vice designated fund it would be to this, and  
18 you've cleared that with the commission and foundation  
19 and --

20 MR. CHAPMAN: Yeah. The rationale here is  
21 the foundation, which is overseen by the Supreme Court,  
22 has two thoughts of money. One is public funds that come  
23 through the appropriation process, and the other are the  
24 IOLTA funds and some donations and miscellaneous items  
25 that come in. The IOLTA grant fund is overseen. The

1 problems are monitored. They make decisions that kind of  
2 clears up that issue about a judge picking a particular  
3 entity, and the funds therefore become immediately  
4 available as opposed to waiting for the appropriation  
5 process and then sending someone like me over to the  
6 Legislature to get them to add an appropriation rider to  
7 take care of this issue. So just for simplicity that is  
8 my recommendation.

9 MR. HERRING: And the committee and the Bar  
10 board to my knowledge have no problem with that, and  
11 really, that's a detail that really we prefer to leave up  
12 to the Court and to you, but you have a number of options  
13 that accomplish the same purpose within the context that  
14 I'm sure Pete will lay out of the legal issues.

15 The next question Pete asked was is this  
16 going to raise much money, is it going to matter? Well,  
17 the short answer is we only meet about 20 percent of the  
18 legal need now for Texas indigents as we know. These  
19 folks work on shoestring budgets, and we have a couple of  
20 Legal Aid lawyers here today from Rio Grande Legal Aid I  
21 know to work on another issue, and they are in my mind  
22 saints, nobel, and both of those guys have devoted careers  
23 at very, very low pay to just doing this. They can do  
24 huge amounts with small amounts of money, and this isn't  
25 going to change what most courts do, in my view, for

1 sanctions, and I've done a lot of sanctions cases. I  
2 don't like them, but I have worked on some. Most  
3 sanctions are paid to compensate for attorney's fees and  
4 expenses, and that's just what judges mostly do. There  
5 are very few reported decisions that actually have  
6 monetary penalties.

7           Would judges be a little more amenable to  
8 doing -- to designating money in that direction instead of  
9 the county general fund? Perhaps. But I think the  
10 largest sanctions case I worked on was the  
11 Kugle/DaimlerChrysler case, million-dollar sanctions  
12 basically at the end of the day. Every penny -- and  
13 egregious conduct. The lawyer, chief lawyer, got  
14 disbarred as a result of that case. I worked on that,  
15 too. Egregious misconduct, as the Fourth Court of Appeals  
16 said in its en banc opinion. Egregious misconduct,  
17 fabrication of evidence, suborning perjury, coercion of  
18 witnesses. You name it, lawyers did it, as reported in  
19 the opinions. Not a penny of penalty. Just commiserate,  
20 and that's going to continue to happen. That's what most  
21 judges do, and if you think about the politics of it you  
22 can understand that as well, but in some instances there  
23 are these, and we have listed on page 13 to 14 examples  
24 of, you know, large sanctions awards ranging from millions  
25 of dollars, and most of those are Federal cases elsewhere.

1 A couple of million-dollar awards in Texas. *Low V. Henry*,  
2 the Texas Supreme Court's landmark decision in 2007,  
3 addressed \$50,000 in penalty sanctions.

4           So there are some instances where it  
5 happens, and some of that money in an appropriate case a  
6 judge might decide would be better directed in this  
7 direction. One reason for that is if you look at *Low V.*  
8 *Henry*, the Texas Supreme Court decision that addressed the  
9 sections under Chapter 10, that was the lawsuit that got  
10 filed against a bunch of folks. A lawyer withdrew the  
11 same day it was filed. Two of the doctors who were sued  
12 had never prescribed the medication at issue and got  
13 sanctioned \$25,000 apiece. Supreme Court ultimately  
14 remanded and said, "Well, we need to know how you got to  
15 that penalty amount" and set out some standards; and in  
16 setting out its standards it went back to the concurring  
17 opinion of Justice Gonzales in *TransAmerica*, which in turn  
18 had quoted from the ABA standards under Federal Rule 11,  
19 the Federal rule analog to Rule 13; and it lists all those  
20 factors; and some of those factors address the conduct of  
21 the injured party.

22           Did the injured party contribute to all  
23 these expenses that were accumulated, that sort of thing,  
24 and there may be an instance where a court says, "You done  
25 bad, Respondent," either lawyer or party or both, "but I



1 don't think all that money should go to the other side."  
2 In the Federal case law the example that comes up  
3 occasionally is the pro se litigant. You can't give  
4 attorney's fees under Federal law to the pro se litigant  
5 in a sanctions case. So what do you do if the other party  
6 has abused discovery? So there's some instances when  
7 it -- when I think it does make sense, when it's possible.  
8 I don't think this is going to raise a huge amount of  
9 money. Every little bit helps, and we are in a time of  
10 dire, dire need.

11           The last question, specific question that I  
12 have written down, and Pete and I had a number of  
13 discussions, but is should the Court -- or should you  
14 recommend, should the Court adopt, guidelines for how to  
15 divide money, either penalty money or monetary sanction  
16 money, either on the one hand expenses and attorney's fees  
17 contrasted with penalty money or penalty paid into the  
18 general fund, if that's where it's supposed to go, versus  
19 penalty money that would be paid for legal services to the  
20 poor.

21           My answer to that, and I've worked on  
22 sanctions a long time on this committee, my answer is no,  
23 not now certainly. We have a lot of guidance from the  
24 Court. I mean, TransAmerican is a great, great decision,  
25 and I would say that even if Justice Hecht were not here.

1 I mean, it truly was. It solved a lot of the problems  
2 that we had, and it continues to be the landmark. I read  
3 over 300 sanctions decisions a year, wade through them to  
4 do my sanctions talk, and it's because we have broad,  
5 good, principles that require a specific factual  
6 application, but they're good principles.

7           *Low V. Henry*, which itemized these factors  
8 under the ABA standards. There's a lot for litigants and  
9 courts of appeals and trial courts to work with if there  
10 is a situation of abuse or to evaluate how to do that, but  
11 it has to be fact-specific. I think it's very difficult  
12 to draft guidelines that would say, well, here are the  
13 specific considerations you should take into account if  
14 you're thinking about money to the legal services to the  
15 poor fund versus penalty paid into court. I think that's  
16 very difficult to do, and think about all of the other  
17 sanctions we have in the ABA guidelines. Again quoting  
18 Justice Gonzales' concurring opinion, there are 12  
19 categories of sanctions that are considered authorized  
20 under our rules, from reprimands to the fines to orders to  
21 do this and do that. All kinds of sanctions.

22           In a particular case the trial court, it  
23 seems to me, must have discretion, broad discretion, to  
24 address how to fashion those sanctions. In *Braden V.*  
25 *Downey*, decided the same day as *TransAmerica*, the Supreme

1 Court said creative sanctions, we do not disapprove of  
2 them. In fact, we encourage creative sanctions. And you  
3 may recall one of two sanctions in Braden was an order  
4 that a lawyer engage in 10 hours of community service with  
5 the Harris County protective services agency, and we  
6 have -- we have cases that have required lawyers do CLE,  
7 to do pro bono, to do all kinds of things.

8           It seems to me as the Supreme Court has  
9 encouraged creative sanction use by trial judges is to  
10 be -- is the way it should be, and to try to write  
11 specific guidelines that would be applicable to this one  
12 setting is difficult, and I would say let's try it and see  
13 if there's any abuse. I don't think there will be. I  
14 don't think you're going to see a lot of sanctions. I  
15 think you'll see some that go in this direction. I don't  
16 think it will increase sanctions, no new conduct involved;  
17 but I think it would be very, very salutary; and for those  
18 reasons, you know, our committee, State Bar board, we  
19 respectfully request your favorable consideration at least  
20 of the proposal. I've talked too long, but thank you.

21           HONORABLE NATHAN HECHT: Thanks, Chuck.  
22 Pete, I guess it makes sense to hear from you.

23           MR. SCHENKKAN: At your pleasure and the  
24 pleasure of the committee, but did you want to take our  
25 morning break at this point first or would you like me to

1 start up?

2 HONORABLE NATHAN HECHT: Maybe it will help  
3 us move along if you go ahead and then we'll take our  
4 break.

5 MR. SCHENKKAN: Let me say first that our  
6 subcommittee was just tasked with this only a few weeks  
7 ago, and so our -- we saw our mission on this issue as  
8 simply to try in the short time we had to identify the  
9 issues that this committee would want to talk about rather  
10 than really make a strong push for a particular answer.  
11 In looking at our proposal in addition to the document  
12 that Chuck handed out, what you need is a document that  
13 was available over at the sign-in desk that's entitled  
14 "Initial SCAC subcommittee report on problems and  
15 proposals of poverty law section," and most of that is  
16 about the other items we were tasked with, which will be  
17 taken up later today. For the part that's relevant to the  
18 issues we're talking about right now, that begins at page  
19 14 of that document, and so in effect I'm going to be  
20 working through beginning at page 14 of 17 of our  
21 document.

22 The proposal is to add to two rules,  
23 193.3(e) and 215.2(b)(2), the language that's underlined  
24 there, and it's the same language. "In monetary sanction  
25 to be paid into the basic civil legal services account of

1 the judicial fund for use in programs approved by the  
2 Supreme Court that provide basic legal services to the  
3 indigent," and as Chuck -- Chuck's materials point out,  
4 that language has been preblessed. It is taken from a  
5 different statute, the pro hac vice statute, and that  
6 statute says what the comptroller is supposed to do with  
7 those fees, and so what the proposal is, is to take this  
8 language that the Legislature used in the Government Code  
9 for that type of fee for the comptroller to do with that  
10 money and put it in these two sanctions rules and say when  
11 the court is ordering sanctions under either of these two  
12 rules it has the additional option of ordering as a  
13 sanction money to be paid into this same fund.

14           And while we didn't talk about it in any  
15 great detail at the subcommittee level, I think that's  
16 because inside our subcommittee we think it -- assuming  
17 you want to do this at all, assuming the Court wants to  
18 have additional penalty sanction authority to trial courts  
19 in the rules and you want that money to go to legal  
20 services to the poor, which again seems a perfectly  
21 reasonable concept, if you want to do that, this is a good  
22 way to do it, because the -- the basic civil legal  
23 services account of the judicial fund is one in which  
24 there is an established process for dividing up the money  
25 appropriately to the programs that provide basically civil

1 legal services to the poor. You don't have to reinvent  
2 that wheel, and you've got an established process that  
3 has, you know, proper people in charge of it and systems  
4 for taking applications from programs that are worthy and  
5 then citing how to allocate the scarce resources. So we  
6 are not raising any question about if you want to do this  
7 is this a good place to send the money.

8           The first question that we have is do you  
9 need statutory authority for a monetary penalty sanction  
10 to be put anywhere other than to the injured party in the  
11 lawsuit, and we think that's a fair question because of  
12 general law that's quoted at the beginning of page 15 of  
13 17 of our memo. Under the Texas Constitution and some  
14 case law there is a legitimate question about whether  
15 anybody other than the Legislature is supposed to decide  
16 where public funds go. Now, we didn't dig very deeply  
17 into this, and Chuck rightly points out if the Texas  
18 Supreme Court exercises its rule-making authority and  
19 exercises it in a way that sends some money to an account  
20 that looks pretty reasonable for a purpose that a lot of  
21 people might think is reasonable, it may be that nobody  
22 ever challenges this as a practical matter, and it may  
23 also be that if anybody ever challenges it, they lose.  
24 But it is a fair question, and it started out as -- in my  
25 mind, as a big question.

1 I've gotten a lot more comfortable with the  
2 answer to the question being that we already have the  
3 statutory authority in Texas Civil Practice and Remedies  
4 Code section 10.004(c)(2), which Chuck has already pointed  
5 out to you. Now, that is a statute, and it is a statute  
6 about sanctions, and it says in it in (c), it says that  
7 one of the options in addition to a language -- a version  
8 in language in the statute of the traditional option of  
9 paying the injured party, it has in it that the court has  
10 the option of ordering an order -- of issuing an order,  
11 quote, "to pay a penalty into court." I was concerned  
12 when Chuck and I were talking about this that that might  
13 not be adequate because Chuck was telling me that David  
14 Escamilla said there's a statute that says "court" as used  
15 here means county treasurer, and if that's true then I  
16 think we're stuck with the statute. If the Legislature  
17 has defined "court" for this purpose to mean "county  
18 treasurer" then that's the end of it, that's what it  
19 means.

20 But I've now -- we didn't have before our  
21 subcommittee finished our work the statutes that Chuck  
22 understood David understood said that, and they're in the  
23 materials that Chuck has handed out, and I don't think  
24 they say that. I don't think those statutes are about the  
25 definition of "court" in Civil Practice and Remedies Code

1 10.004(c)(2). I don't think they're about the definition  
2 of the word "court" at all, and so I'm presently of the  
3 view -- though, a lot of people in the room with a lot of  
4 different kinds of experience may have thought of some  
5 other aspect of this situation, but if this is all we've  
6 got, I think where we are is the Legislature has decided  
7 that trial courts in Texas can order a penalty paid into  
8 court, and there is no definition of "court," and who  
9 better than the Texas Supreme Court to decide what we mean  
10 by "paid into court." Thus, I think probably the Court  
11 does have the statutory authority to decide what we mean  
12 by "a penalty paid into court," with one exception that is  
13 worth at least pausing on.

14           That statutory authority is in 10.004.  
15 10.004 is not unlimited in its scope. It is not about all  
16 possible sanctions. It is about sanctions for specific  
17 kinds of sanctionable conduct and specifically signing a  
18 pleading or motion that contains a certificate that is  
19 false in certain important ways, and that's an important  
20 category of sanctions, but it is not the full universe of  
21 sanctions. Chuck described the Daimler case where there  
22 was some, you know, truly outrageous conduct, some of  
23 which probably didn't involve signing false pleadings or  
24 motions, others of which might have; and so if all we've  
25 got in the way of statutory authority is Civil Practice



1 and Remedies Code 10.004, it's going to allow penalties to  
2 be paid into court and the Texas Supreme Court to say what  
3 we mean by court, meaning the basic legal services account  
4 of the judiciary fund, if they decide that's a good idea  
5 for situations in which either the statute defines this as  
6 a signing of a pleading or motion that's false in these  
7 ways or where by rule the Court is fairly implementing  
8 that same statute and applying it to a context that is  
9 also a signing of a false motion or pleading, and we've  
10 already crossed that bridge in Rule 191.3.

11           191.3 is a -- when it says that in (e) that  
12 the trial court can order a sanction under Chapter 10,  
13 that's under Chapter 10 for a violation of the rule that  
14 is about signing things, signing disclosures and discovery  
15 responses. I think the Court's already crossed that  
16 bridge in that context. So I'd certainly -- when we get  
17 to it I want to, you know, have a wide open discussion  
18 about is there a statutory authority problem, but I  
19 think -- I now think with what Chuck's provided, probably  
20 not, as long as we're only talking about sanctions that  
21 are fairly contemplated by Chapter 10.

22           The next question is do we need -- if the  
23 Court's going to do this do they need -- should they  
24 supply standards for these sanctions, and that may tie to  
25 the third question, which is is this thing a good idea as

1 a policy matter. They tie because, as Chuck points --  
2 correctly states, as far as we know now there are no  
3 significant numbers or dollar amounts of Chapter 10  
4 sanctions or Rule 191.3 sanctions. By the time we had  
5 done the committee report I had found four appellate cases  
6 addressing such sanctions. I think three or maybe all --  
7 two or maybe all three of them reversing them on grounds  
8 irrelevant to this, and a -- I've since found a fourth and  
9 a fifth in which they were reversed on ground that the  
10 sanctionable conduct occurred before Chapter 10 was  
11 enacted, so it didn't apply, and no Rule 191.3(e) court  
12 sanctions; and I think that's probably because as Chuck --  
13 who I defer to on this certainly because he has this  
14 enormous array of practical experience with the sanctions  
15 context, what normally happens is that trial court judge  
16 orders some amount of money paid to the injured party or  
17 takes some other action, like striking a particular  
18 defense or prohibiting admission of a particular exhibit  
19 or whatever to address the problem.

20                   Well, why isn't that good enough? Maybe it  
21 is. But what TransAmerica said and what one of the  
22 reasons why TransAmerica is such a landmark case in  
23 sanctions is it reigned in a world of abuses that were  
24 going on in sanctions before it was issued, and it did so  
25 not by referring to a list of 13 factors to be taken into

1 account in deciding the sanctions. It did so by saying  
2 sanctions should be limited to the minimum necessary to  
3 achieve the purposes of sanctions, and those are to punish  
4 the guilty and deter repetition of the abusive conduct  
5 either by the guilty or by anybody else who might be  
6 tempted to do the same and that the court needed to  
7 demonstrate that it had thought about and had chosen the  
8 sanction that was the minimum necessary to achieve those  
9 worthy goals; and then, of course, having done that, you  
10 want first in some of the rules and statutes, including  
11 Chapter 10, requiring the trial court to think about  
12 compensating the injured person. So if you're going to  
13 order a sanction that's the minimum necessary to achieve  
14 the goals and you're going to compensate the injured  
15 person then you don't have any money left over to be paid  
16 into court unless the amount required to compensate the  
17 injured party is less than the amount required as a  
18 minimum to achieve the goals. If it is less, then you can  
19 perhaps just, you know, order the full compensation first  
20 and then whatever is leftover goes to the court, but maybe  
21 that doesn't follow automatically, and of course, the  
22 question of what's needed to compensate is not  
23 self-evident either.

24                   So the standards question that I am raising  
25 for the full committee's discussion and for the Court's

1 benefit is the question should the Court through any such  
2 rule equip the trial courts with some kind of guidance as  
3 to when you do something other than just order the  
4 attorney's fees or nonmonetary sanctions having to do with  
5 the evidence or pleadings that are sufficient that they  
6 are the minimum required to achieve the goals of  
7 sanctions. And if you are, what are they going to be, and  
8 with respect to Chuck, I think this may be the thing we  
9 disagree the most about it. I do not think the ABA list  
10 of 13 factors is of any use whatsoever on that. It is a  
11 list of all the different kinds of things you should  
12 consider, but the court in *Low vs. Henry* was careful to  
13 say it's a nonexclusive list and we do not require the  
14 trial judge to show that the trial judge has considered  
15 all of them. It's just something you might want to think  
16 about.

17           And that takes us back to the policy  
18 question. If that's all we're going to have, think about  
19 this list of 13 factors and any others you can think of  
20 and decide about dividing up the money between these two  
21 purposes any way you want, and then the only other thing  
22 that we've required, write up something about it, then  
23 that decision is going to be reviewed on appeal under  
24 abuse of discretion standard; and, as you know, that means  
25 did the trial court act without reference to find the

1 standards and relevant factors or did the trial court act  
2 with reference to those. As long as the trial court  
3 writes, "I considered some of the 13 factors, including  
4 one and five, and in light of those I've decided this much  
5 money to the injured party and a million dollars" or "a  
6 hundred thousand dollars" or "\$10,000" or whatever the  
7 number is "to basic legal services fund" at least on the  
8 face of the abuse of discretion appeal review standard,  
9 that's bulletproof. Maybe it won't turn out to be in a  
10 particular case, but I would regard that as an invitation  
11 to some of the dangers that the Supreme Court had to deal  
12 with in TransAmerica, and this time it would be a lot  
13 harder to back down on because this time the money would  
14 be going to a cause that would be as worthy as one could  
15 ask.

16           If it's not going to raise any money anyway  
17 to speak of, if the fundamental problem of the legal  
18 services to the poor in civil matters is it is a basic  
19 part of the judicial function of our society that any  
20 person have access to legal services or at least essential  
21 legal services in need, is it the right answer that one or  
22 another of the legislative -- or one or another of the  
23 levels of the government legislative branch appropriate  
24 money for that function rather than add a small token  
25 through this with these other uses. So that's the policy

1 question at the end of the day that ties to the standards  
2 issue.

3           So I don't know whether any of the other  
4 members of our subcommittee -- Judge Yelenosky was  
5 actively involved in this, but he couldn't be here today,  
6 and that's the only reason I'm presenting this portion of  
7 it, but there were other members of our subcommittee, and  
8 I don't know whether they feel like I have adequately  
9 covered our discussions as opposed to the discussions I've  
10 had back and forth with Chuck, and then I think after that  
11 Chuck needs a chance at rebuttal, because I'm quite sure  
12 I've left out some stuff from our discussion.

13           CHAIRMAN BABCOCK: Okay. Judge Lawrence,  
14 and then Chuck.

15           HONORABLE TOM LAWRENCE: Yeah, I only had  
16 one comment, and that is the mechanism by which this would  
17 be done in the rules. There is a potential conflict with  
18 the Code of Judicial Conduct on the way these different  
19 options are structured on pages three and four. There's a  
20 Canon 2(b), which says, "A judge should not use the power  
21 or prestige of his office to advance the public or private  
22 interest of another," and that's the canon that judges who  
23 say that someone has to go to a particular bondsman or go  
24 to a particular defensive driving or as a term of  
25 probation or deferred adjudication have to contribute

1 money to a specific charity, that's the code provision.  
2 that they're sanctioned under because judges are not  
3 supposed to select certain providers or certain charities  
4 and earmark those, and there's a long history of judges  
5 being sanctioned for that particular activity. So I would  
6 say that if the decision is made to do this, that on page  
7 three, for example, the top option, just to pay it to a  
8 nonprofit provider where the judge would presumably be  
9 able to select from a number of those and just pick one, I  
10 think that would cause a potential conflict.

11           No. 2, where they would pay it into a list  
12 compiled by the State Bar, really the same issue, the  
13 judge is using their discretion to earmark one. Now, the  
14 last one where they just pay it to the State Bar or the  
15 options on page two where it is determined in the rule  
16 where the money goes, I think that avoids the conflict.

17           CHAIRMAN BABCOCK: Chuck, any last words  
18 before we take a break?

19           MR. SCHENKKAN: Well, I think maybe Frank  
20 had --

21           CHAIRMAN BABCOCK: Oh, Frank, sorry.

22           MR. SCHENKKAN: Frank is on the subcommittee  
23 and is part of our discussion.

24           MR. GILSTRAP: Well, let me just talk about  
25 the elephant in the room, and that's this. I think I

1 wasn't alone on the subcommittee as having, you know, real  
2 concerns about whether this is an appropriate use of the  
3 rule-making process and an appropriate rule for the  
4 judiciary. Now, that's not our call. You know, we don't  
5 wear the robes, we don't stand for election, we don't sign  
6 the opinions. We work for the Supreme Court of Texas, and  
7 if it's not our purpose here to talk about those concerns,  
8 then, you know, maybe we say so, because it's a huge  
9 issue.

10                   CHAIRMAN BABCOCK: We've talked about that  
11 issue before in connection with many other rules, so it's  
12 totally an appropriate topic in my opinion.

13                   MR. GILSTRAP: It's totally inappropriate to  
14 talk about it?

15                   CHAIRMAN BABCOCK: It is appropriate to talk  
16 about it.

17                   MR. GILSTRAP: Okay. All right.

18                   CHAIRMAN BABCOCK: Chuck.

19                   MR. HERRING: Yeah, a couple of comments. I  
20 concur with the judge's comment, and that's why I had the  
21 reservation about that first option. I think that's good.  
22 The more you take it out of the specific selection of the  
23 judge's hand, I think it's better for appearance of  
24 propriety, or impropriety, avoiding that, and I think if  
25 you use one of these general funds, state funds that the



1 Court designate, that solves that problem. Of course, the  
2 courts now in theory give the penalty money to local  
3 government, which indirectly could benefit the judge, but  
4 clearly that's permissible and has to go somewhere, and it  
5 has to go somewhere that is permitted by statute -- by  
6 statute alone.

7           Pete's first point -- and I'm not going to  
8 talk all of his points. I think he laid out the issues  
9 well, and he said, well, the 10.004(c)(2) permits payment  
10 into court. The Supreme Court can certainly identify what  
11 is an appropriate way to do that, what an appropriate  
12 court fund is, but beyond that statutory authorization  
13 perhaps there is more question. Well, again, coming back  
14 logically, the Court's already done that, because under  
15 191.3(e) the Court said by rule in this other setting --  
16 and Chapter 10 doesn't apply to discovery. Section 10.001  
17 applies to -- as it says, applies to pleadings and  
18 motions. 191.3 applies to discovery. So the Court by  
19 rule has said "We like those remedies, those sanction  
20 remedies, applied to discovery in the 191.3 settings."  
21 The Court's already done that. We've gotten over that  
22 hurdle or at least done it in the past. So I think that's  
23 logically that same issue has already been addressed.

24           In terms of, well, how much will this raise,  
25 and, you know, no one knows, and it hasn't been used much

1 in Chapter 10. That's certainly true. There aren't many  
2 Chapter 10 decisions, which is a little bit, I think, the  
3 function of how Chapter 10 came about, which was a  
4 compromise, and, of course, Rule 13 was addressed at the  
5 same time. Rule 191.3 was added as the analog in 1998 to  
6 Federal Rule 26(c), I guess, but the basic certifications  
7 track Rule 11, Federal Rule 11. There are thousands of  
8 decisions, as anyone who has looked at the case law in  
9 Rule 11 knows, addressing that kind of certification.

10           When I've given talks on sanctions I'll  
11 often ask how many people know how many decisions there  
12 are under 191.3. Hardly anybody asks a question like  
13 that, but I do, and there are none, there are almost none,  
14 where I get these hundreds of decisions under Rule 215  
15 because most of us grew up with Rule 215, and that's what  
16 you see in the discovery sanction arena. So I think in  
17 the future we will see more use of 191.3; and if you ever  
18 look at it, it actually has some better uses than 215,  
19 some broader applicability, so I think there will be some.  
20 I think he is absolutely right. Judges are going to  
21 continue -- most sanctions money is going to be  
22 compensatory for attorney's fees and expenses, but in some  
23 rare cases we do see judges that impose monetary  
24 sanctions, and this is just better than it disappearing  
25 into the ether of the general fund of the county, I

1 respectfully submit.

2           In terms of guidance, I think Pete's point  
3 there really addresses Low, and what the Supreme Court  
4 held in Low is there's not adequate explanation or  
5 analysis by the trial court of why it reached these  
6 25,000-dollar penalties for each of these defendants,  
7 total of fifty, here are some factors for the trial court  
8 to consider. In 1996, I believe it was, on this committee  
9 we came up with a set of extensive proposed comments to  
10 Rule 215 of the sanctions rules, the idea being we would  
11 put some more guidance in the rules, and we had long  
12 debates about that and finally decided, you know,  
13 TransAmerica is a pretty good decision. So much of that  
14 is so fact-specific it's best to allow that to be fleshed  
15 out by case law, and in terms of further guidance, that's  
16 exactly what the Texas Supreme Court did in Low. It said,  
17 "We're not going to say this is exactly how it works, but  
18 here are factors to consider," and that's I think the way  
19 sanctions law must develop and must be applied in trial  
20 courts.

21           Whether it's appropriate rule-making, I  
22 think that's a very valid question, but we've already made  
23 rules, and we've already made rules that give money to one  
24 government fund. This is a worthy government fund, and in  
25 some cases would be an appropriate one, and it would have

1 a very salutary effect in an area of dire need right now  
2 in our justice system. Thank you.

3 CHAIRMAN BABCOCK: Anybody interested in a  
4 morning break?

5 MR. HAMILTON: The court reporter is.

6 CHAIRMAN BABCOCK: I bet the court reporter  
7 is. Let's take one. Ten minutes.

8 (Recess from 11:12 a.m. to 11:32 a.m.)

9 CHAIRMAN BABCOCK: All right. Pete, you got  
10 anything else to say?

11 MR. SCHENKKAN: Maybe just one thing that's  
12 about Rule 191.3. I think we ought to be focused on the  
13 extent to which the Court has already crossed the bridge  
14 there and be specific on what bridge they've crossed and  
15 what one they haven't. 191.3 that has (e) in it that says  
16 that sanctions can include -- in addition to the other  
17 kind of sanctions can include an appropriate sanction  
18 under Chapter 10, which therefore includes both the  
19 compensatory sanction and the penalty sanction. That's in  
20 a rule that is about the signing of disclosures, discovery  
21 requests, notices, responses, and objections; and it  
22 starts out, "Every disclosure, discovery request," et  
23 cetera, "must be signed"; and then it has a provision  
24 about the effect of the signature and that the signature  
25 constitutes this kind of a certification. So the bridge

1 that's been crossed is Chapter 10 says "pleading or  
2 motion," and Rule 191.3 extends that to something that  
3 somebody might argue is not a pleading or motion, but it  
4 certainly is a signed document that, you know, takes a  
5 position, either seeks relief or responds that is signed  
6 and has a certificate like that.

7           So I don't think it's a very big step, and  
8 all I was really saying about that, and I want to be  
9 clear, is that's not the same thing as an inherent powers  
10 sanction by a court that says, you know, you've sworn  
11 perjury or whatever and, you know, on that I'm with the  
12 sanction, but this -- I think Rule 191.3 is easily  
13 defensible as an extension or reading of the term "motion  
14 or pleading" in Chapter 10 that's reasonable, and that's  
15 different from carrying it onto some other context.  
16 That's the only additional comment I had. Otherwise I  
17 thought what Chuck said on rebuttal, if that's what it  
18 was, was very appropriate, and I agree with him.

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

21           MR. WATSON: Well, just -- I was listening  
22 to hear how much of the current financial crisis in Legal  
23 Aid this was going to solve. I think I heard the question  
24 asked twice. I never heard the answer. I think the  
25 answer was "We don't have any idea." As Pete pointed out,

1 you know, it's going to have to be above -- at least I  
2 hope it's above the amount necessary to compensate the  
3 victim of the abuse, and I think what I finally heard at  
4 the end is the ultimate reason was we just don't want  
5 whatever it is disappearing into the ether of the county  
6 funds, but we don't have any idea of what amount that is.  
7 I suspect it's a minuscule amount above what's necessary  
8 to compensate the victim.

9           I mean, that's usually the garden variety  
10 sanction, "What were your fees" and bring in the motion to  
11 compel and "what were your fees" and bring in the motion  
12 for sanctions. "That's what I award." And it just -- I  
13 mean, this is just, you know, an initial reaction, but it  
14 sounds like we're biting off some very heavy potential  
15 rule-making problems here, not knowing what the risk  
16 benefit is. And that's my only comment. I just really  
17 wonder why we're going here to keep something from  
18 disappearing into the ether when we don't know whether  
19 it's worth a nickel's worth of time or not.

20           CHAIRMAN BABCOCK: Okay. Justice Gray.

21           HONORABLE TOM GRAY: I'm going to pick on  
22 Judge Livingston since she's a recognized advocate of the  
23 service to be benefited by the proposed changes, but this  
24 to me presents -- the proposed change presents another  
25 point or basis to fight about venue and a whole lot of

1 other issues regarding the appearance of fairness, because  
2 if I'm a sympathetic plaintiff and I can get into Laura  
3 Livingston's court, who has now encouraged and will freely  
4 impose some sanction for marginally determinable  
5 inappropriate behavior to provide an ancillary revenue for  
6 her pet charity or purpose, which is the legal services to  
7 the indigent, did she abuse her discretion? No. But does  
8 it make a difference or give the appearance at least to  
9 the public that I got treated differently because of what  
10 court I was in, and what is -- in balancing whether or not  
11 we need to do this, what's the adverse effect on the  
12 public perception of the basic fairness of the legal  
13 system of, you know, did -- was this done for a particular  
14 purpose to serve a personal agenda as opposed to truly  
15 punishing bad behavior.

16           I think funding of the legal services for  
17 indigents is a legislative issue appropriate for the third  
18 branch of government. If the Legislature wants to earmark  
19 a particular source of funds for a particular purpose,  
20 that may or may not be considered appropriate depending  
21 upon individual political or personal points of view. I  
22 also note that in response to the how are you going to  
23 challenge this, it won't be Justice Hecht or me on the  
24 court of -- or court of appeals that they bring this  
25 complaint to. It's going to be Mary Alice Robbins or a

1 local reporter, and they're going to ask them, you know,  
2 why did you do -- you know, they're going to come to the  
3 judge and they're going to stick a microphone in their  
4 face and ask them why they, you know, allocated money to,  
5 you know, their personal preference charity and -- or for  
6 use for that charity, and of course, the judge is not  
7 going to be able to answer that question under the canons.  
8 And then further, if it's a local reporter, they're going  
9 to follow up with the question, "And isn't it true that  
10 this would have otherwise been available for a pay raise  
11 for the sheriff's deputies or to -- for other local  
12 expenses?"

13                   And then finally, I would ask that if we do  
14 this for this purpose and this worthy purpose, whose next  
15 worthy purpose is going to be in for a percentage of the  
16 punishment type sanctions, and so in case it wasn't clear  
17 from that, I would probably prefer to leave well enough  
18 alone and not get into the business of revising these  
19 rules for that purpose.

20                   CHAIRMAN BABCOCK: Elaine.

21                   PROFESSOR CARLSON: Just two cautionary  
22 concerns. One is the separation of powers issue that's  
23 been raised. This committee -- gosh, Buddy, you'll have  
24 to help me out here -- five or six years ago looked at the  
25 issue of where class action proceeds to unnamed members --



1 MR. LOW: Right.

2 PROFESSOR CARLSON: -- whether it might be  
3 directed to -- I think it was legal services. I don't  
4 recall.

5 MR. LOW: Right.

6 PROFESSOR CARLSON: But we had a pretty  
7 lengthy discussion of separation of powers and rule-making  
8 authorities, and it was the vote of that majority of that  
9 committee that that not --

10 MR. LOW: Right.

11 PROFESSOR CARLSON: -- we recommend to the  
12 Court they not do it, and whether directing this through  
13 IOLTA would cure that as far as being sufficiently  
14 governmental, I don't know, but I'm sure the Court would  
15 work its way through that issue.

16 The second thing, and I'm not sure about  
17 this, Pete, but my recollection is that Chapter 10 of the  
18 Civil Practice and Remedies Code when it was enacted by  
19 the Legislature, the Legislature was I think dissatisfied  
20 with our court rule, sanction rule, Rule 13 at the time,  
21 which allowed a lawyer who had a pleading that was deemed  
22 to be inappropriate or frivolous to withdraw the pleading  
23 and amend it within 90 days, and I think the Legislature  
24 felt that was not sufficient in their view to address what  
25 they perceived as frivolous litigation, and my

1 recollection, again, Buddy -- you're the closest in age to  
2 me, it looks like here -- that the legislative provision  
3 in Chapter 10 is one of those odd provisions that says  
4 "and the Supreme Court may not promulgate any rule  
5 contrary to this chapter." I'm not sure, but I think it's  
6 in there.

7 MR. MUNZINGER: It is.

8 PROFESSOR CARLSON: And the Court wants to  
9 be very careful.

10 MR. LOW: That is the rule we got in trouble  
11 over where the legislative act the Court wrote said  
12 "Legislative act such and such is unconstitutional," and  
13 after that the Legislature started frowning on our Court  
14 and our committee. You're right.

15 CHAIRMAN BABCOCK: Richard Munzinger.

16 MR. MUNZINGER: I share the sentiments that  
17 are expressed. Nobody who has spoken to the need for this  
18 rule can give any of us any indication of how much money  
19 might go to fund poor legal services. There's no data,  
20 there's nothing at all. Everybody's experience tells you  
21 that the sanctions go to compensate the attorney. It  
22 seems to me it's much ado about nothing. Why would the  
23 Court risk involvement in the separation of powers issues,  
24 why would the Court risk getting into a fight with the  
25 Legislature over something that none of us know how much

1 money is involved? Raising money and determining who it  
2 goes to is a legislative function, so here we're going to  
3 tell the Court to enact a rule which says using section 10  
4 of the Civil Practice and Remedies Code, you give this  
5 money to ACORN of Houston to help them do something for  
6 the poor. I can't imagine such a thing. I think we ought  
7 to move on to the next subject, and I so move.

8 CHAIRMAN BABCOCK: Let's see if you get a  
9 second. Frank.

10 MR. GILSTRAP: Well, let me pile on here.

11 HONORABLE TOM GRAY: I take it that's a  
12 second.

13 MR. GILSTRAP: Yes, we all know that revenue  
14 is supposed to be raised by the Legislature, you know, no  
15 taxation without representation, but we know that  
16 governments raise money in other ways, like user fees, and  
17 but at least those are set either directly or indirectly  
18 by the Legislature, and they go -- they have some, you  
19 know, rational connection to the service that's being  
20 provided, but they also raise money through fines and  
21 penalties, and that's always troublesome. You know, the  
22 classic issue is traffic fines. You know, we just saw  
23 this thing in the Legislature of red light cameras where  
24 cities are all saying, "We are so concerned about safety,"  
25 you know, and everybody knows they're not. They're

1 concerned with raising this money, and, you know, we've  
2 all heard stories about -- I'm familiar with stories when  
3 I was younger where, you know, the city manager calls  
4 the -- is not raising enough money through traffic fines,  
5 and they have a meeting with the police chief and the  
6 municipal judge. I mean, the problem is that everybody is  
7 concerned.

8                   There is a rational concern that the  
9 process, the judicial process, is somehow being skewed by  
10 the need to raise money, but nobody talks about it. Here  
11 we're doing something really unprecedented. We're talking  
12 about it. We're actually saying that we're -- we are  
13 doing this as a revenue measure, and while it might be  
14 something we can do under the law of the State of Texas, I  
15 have real concerns as whether -- when the courts are  
16 overtly raising money through imposing fines or penalties  
17 or sanctions, whether that really does implicate some  
18 issues, not only a separation of power but due process.

19                   CHAIRMAN BABCOCK: Okay. Justice Bland, and  
20 then Lamont.

21                   HONORABLE JANE BLAND: I was going to ask  
22 Mr. Herring did the State Bar consider going to the  
23 Legislature and seeking amendment of Chapter 10 or the  
24 Government Code; and if you did, why did you-all opt to do  
25 this -- go this route instead -- rule amendment instead?

1 MR. HERRING: You've addressed that to me?

2 HONORABLE JANE BLAND: Yes.

3 MR. HERRING: Did the State Bar consider  
4 that? I'm not on the State Bar legislative committee, so  
5 I don't know, but my guess is no, and what happened this  
6 last year, as you know, because of the precipitous decline  
7 in the revenue, we've looked all over. There was a fairly  
8 aggressive, ambitious legislative agenda, which, again,  
9 the Supreme Court did a wonderful job with, and that's how  
10 we got this -- as Randy and his team -- the general  
11 appropriation, which actually surprised a lot of us that  
12 that came through, but this to my knowledge -- and Randy  
13 is -- he's really the whiz at the Legislature -- was not  
14 even on the radar screen at that time. What we saw was  
15 during the session we weren't going to get the money  
16 that's needed. Because money now is already going as  
17 penalties to other purposes, why not some portion of that  
18 potentially be available. That was the rationale. That's  
19 really all I can say, unless Randy knows something more.  
20 That's all I have.

21 CHAIRMAN BABCOCK: Lamont.

22 MR. JEFFERSON: I share a lot of the  
23 sentiments of what everyone is saying, but I think the one  
24 point that I disagree about is whether this is a pure  
25 separation of powers issue because I think the judiciary

1 has a very vital role to play in access to justice for the  
2 poor, and while I think this is a poor revenue raising  
3 measure, just because we don't have enough information to  
4 know how much revenue is being raised or what all the  
5 other implications are for it, I would -- I don't think  
6 this should end the debate about whether -- what role the  
7 judiciary ought to play in ensuring access to justice for  
8 civil litigants.

9 CHAIRMAN BABCOCK: Okay. Yeah.

10 MR. RODRIGUEZ: Just a couple of comments.  
11 I have gone the last five years on behalf of the State Bar  
12 to Washington during ABA days where we go and lobby  
13 Congress to continue funding for legal services. This is  
14 the first year in five years that the budget, the proposed  
15 budget, will have an increase in funding. It will get us  
16 to the level of about 1985 in dollars. With respect to  
17 the monies that was appropriated this year by the  
18 Legislature, it was asked as a stop gap measure to help  
19 during this year that we know -- where we know that the  
20 IOLTA funding is not going to give our legal services  
21 corporation the monies that will allow us to stay open. I  
22 mean, the truth of the matter is if we did not get this  
23 funding from locally, you know, we would have to close  
24 down three quarters of all of the legal services in  
25 operation across the state.

1           With respect to the obligation of the Court,  
2 I think it's the obligation of the Court to provide a  
3 system to have everybody access to the justice system. I  
4 don't think this is a separation of powers issue at all.  
5 I think it's an important issue that -- as I read the  
6 proposal it's not mandating any court to do anything.  
7 It's giving them an option to add additional sanctions if  
8 they feel appropriate and giving them an option to send  
9 them where they go. With respect to whether Judge  
10 Livingston will get in trouble because she sends it to her  
11 favorite -- to her favorite charity, well, that's  
12 something Judge Livingston will have to meet with  
13 the voters in her district.

14           I don't know -- you know, we discussed this  
15 outside a little while ago. Not knowing how much money is  
16 involved, I have a -- I have a concern about whether or  
17 not we'll -- the benefit will outweigh the harm that could  
18 come to the legal services system in terms of the  
19 perception that the lawyers in the state may get, but I  
20 don't -- I see this as an opportunity, and I think a lot  
21 of us that are not intimately involved with the provision  
22 of legal services to the poor -- and I am not in that  
23 field other than James Sales has gotten me to go with him  
24 for the last five years to Washington, but, you know,  
25 we've got to find somewhere, and I think the way this came

1 about is that people are looking to see how they can raise  
2 funds to keep -- to allow poor people to have access to  
3 the courts. Whether this is the best way to do that or  
4 not, I don't know, but I think it's -- that's what's  
5 behind the whole purpose of this rule, is it's an  
6 opportunity for judges to, if they feel it's appropriate,  
7 to do that.

8 CHAIRMAN BABCOCK: All right. Yeah, Roger.

9 MR. HUGHES: I would like to join with  
10 Mr. Rodriguez. I think it's a worthy goal. It may not  
11 get a great deal of money. I suspect it will be none less  
12 a popular option to give judges. I'm not so much worried  
13 about due process and separation of powers. From the  
14 legal perspective I think it's -- the ultimate problem is  
15 not a constitutional problem of due process, et cetera.  
16 The courts have the inherent power to sanction, and I'm  
17 not sure due process somehow requires that monies paid by  
18 the way of penalties must somehow by divine origin or  
19 something belong to the county, but I think there's a  
20 political issue there, and I think earlier it was put the  
21 finger right on it, is that local government expects that  
22 money to go into their coffers. They want it, and right  
23 now they're politically -- they have -- they're strapped.  
24 Ultimately I think it may be of some  
25 advantage to have legislation in order for the judges to



1 at least talk to the local officials to explain why it is  
2 they have the option and what they can do about it, but I  
3 think as a goal, I think it's worthy, and I also think  
4 that the rule should specify somewhat. I do not think it  
5 should be left to the local judge for exactly the reasons  
6 that have been talked about earlier.

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

9 HONORABLE EVA GUZMAN: You know, I had a  
10 concern about if it is a popular option for judges and if  
11 judges are more willing to impose sanctions that then the  
12 propensity for larger sanctions and the fairness issue to  
13 the parties, to the litigants that are ultimately having  
14 to pay these sanctions, if it becomes a very popular  
15 option and the judge decides that I'm very passionate  
16 about legal services to the poor, and then there's a  
17 propensity for larger awards, and so the review of those  
18 awards, I guess the rule would really have to be very  
19 specific about ensuring -- notwithstanding TransAmerica,  
20 that an award was proportionate to the offense and not  
21 motivated by a desire to make a difference in an area  
22 where action is truly needed obviously.

23 CHAIRMAN BABCOCK: Judge Christopher.

24 HONORABLE TRACY CHRISTOPHER: I agree with  
25 that. What we're talking about here is really a fine, not

1 a sanction, and if we're talking about a fine then it  
2 ought to be set out how much it is, if it's \$250, if it's  
3 a thousand dollars, whatever it is, because otherwise  
4 we're left -- we, the trial judges, are left in this sort  
5 of ether world of what is an appropriate amount.

6           Secondly, if you fine someone or sanction  
7 them and require the payment to someone other than  
8 opposing counsel, I'm curious as to who is going to defend  
9 my order on appeal. Because what motivation would the  
10 person who got the sanction have to really fight it? It's  
11 not going to them. They're going to have to expend more  
12 money to defend my sanction.

13           Finally, what happens if someone doesn't  
14 pay? Who moves forward to make sure that money gets paid?  
15 The opposing counsel, again, has no incentive to move  
16 forward. Now, you know, normally in a criminal situation  
17 you have fines, and the district attorney moves forward to  
18 make sure fines get paid. We don't have that here.

19           CHAIRMAN BABCOCK: Okay. Richard.

20           MR. MUNZINGER: The judge is a hundred  
21 percent correct. I'm passionately devoted to separation  
22 of powers, and the first of my clients that's sanctioned  
23 under a rule that gives a trial court unfettered authority  
24 to set the amount of money to fine me for having signed a  
25 discovery pleading or to fine my client, I'm going to take

1 it to the Texas Supreme Court, and I'm going to raise all  
2 the issues that Judge Christopher just raised, and the  
3 Texas Supreme Court is going to have to resolve the  
4 separation of powers issue. It's going to have to resolve  
5 the due process issue. It's a government that is taking  
6 money from citizens and from litigants. Government is  
7 saying "give me money," and they take it, and it's done  
8 because they wear a black robe and because they say, "Gee,  
9 I want to help the poor." Well, let the Legislature set  
10 the rules, appropriate the money.

11           Mr. Rodriguez went to Washington to lobby  
12 Congress, not the Supreme Court, and people don't come to  
13 the Supreme Court to raise money. That isn't the function  
14 of the Supreme Court. The Court's going to -- there's no  
15 way the Court can avoid passing upon the constitutional  
16 issues that are raised in this discussion in litigation  
17 sometime down the road. Why do you want to get into such  
18 a fight? Why do you want -- why would this committee urge  
19 the Court to get into such a morass? I think we are  
20 personally working against the Court's interest in  
21 suggesting the thing.

22           I mean no disrespect to anybody, but to me  
23 it's just as plain as the nose on my face that government  
24 is taking money from somebody and giving it to somebody  
25 else, and they're doing it as a court. What gives the

1 courts the power to do that for god sakes?

2 CHAIRMAN BABCOCK: Well, we can all agree  
3 it's a cute nose, but anybody else? Yeah, Gene.

4 MR. STORIE: I just wonder what trial judges  
5 are doing now when they really think that both sides are  
6 being jerks, because a couple of people have commented on  
7 the fact that, you know, the victim should be compensated.  
8 I absolutely agree with that, but what is a reasonable  
9 option when both sides are being jerks? Do you have to  
10 let both go? And this, it seems to me, would be one other  
11 option that would in some way promote professionalism  
12 without rewarding either of the jerks.

13 CHAIRMAN BABCOCK: I was trying a case in  
14 Illinois, and both sides were being a little obstreperous,  
15 and the judge said, "What's your favorite charity?" I  
16 thought he said, "What's your favorite jerk?"

17 "I don't know, number five." He's smiling  
18 at me, but his threat, which he never executed, was that  
19 lawyers could pick their favorite charity and that he  
20 would fine you and then you would pay that money to your  
21 favorite charity, but I'm not proposing that. I'm just  
22 giving that as a war story. Buddy.

23 MR. LOW: Were you going to get a tax  
24 deduction if you do that?

25 CHAIRMAN BABCOCK: I was going to insist on

1 it. Yeah, Judge Christopher.

2 HONORABLE TRACY CHRISTOPHER: That was one  
3 more point I wanted to raise, that my understanding is if  
4 you award sanctions against a lawyer they have to report  
5 that in terms of their malpractice premiums, and so often  
6 I try to make an award just of attorney's fees and strike  
7 out any mention of the word "sanctions" in the order just  
8 because of that sort of unintended consequence, so just a  
9 thought.

10 CHAIRMAN BABCOCK: Yeah, same thing if  
11 you're applying pro hac in some other jurisdiction,  
12 they'll always ask you if you've ever been sanctioned.  
13 Okay. Any other comments?

14 We probably ought to take a vote on this.  
15 How many people think that, without regard to the details,  
16 which we maybe should talk more about, but how many think  
17 generally this is a good idea? If you do, raise your  
18 hand.

19 How many think it's a bad idea? All right.  
20 The vote is six think it's a good idea, 18 think it's a  
21 bad idea. Is there any further discussion about the  
22 versions of 191.3(e), assuming the Court think it's a good  
23 idea and wants our advice on that?

24 I heard somebody say that they thought  
25 that -- Judge Lawrence said that he thought the first two

1 versions might conflict with Canon 2(b). Anybody else  
2 have a thought about that? Anybody got a preference for  
3 these three?

4 MR. HAMILTON: I thought there was a  
5 suggestion that that be changed to the IOLTA fund.

6 CHAIRMAN BABCOCK: That was --

7 MR. HERRING: I think you were out then.

8 CHAIRMAN BABCOCK: Huh?

9 MR. HERRING: I think you were out then, but  
10 that was Randy Chapman's language.

11 CHAIRMAN BABCOCK: Okay.

12 MR. HERRING: And I can give you that  
13 language. I'll write it down and give it to the Chair.

14 CHAIRMAN BABCOCK: Okay. Did you-all  
15 discuss the various versions of 215.2(b)(2)? Was that  
16 discussed? Pete.

17 MR. SCHENKKAN: We moved over them pretty  
18 quickly. I think the one point that was made in your  
19 absence I think that may be useful for your focusing any  
20 further discussion in case the Court is interested in  
21 this, is if we do the way Chuck and the poverty law  
22 committee originally proposed, that when we use the term  
23 "paid into court" we now mean by that paid to the basic  
24 legal services fund of the -- or account of the judicial  
25 fund. That's good because that's an existing system that

1 is policed, you know, that has a structure for appropriate  
2 people processing, appropriate applications to divide up  
3 the scarce resource for that very goal, and it gets away  
4 from this an individual trial judge choosing the  
5 particular recipient of the money.

6           So I don't know that we discussed this much  
7 in terms of a consensus, but I didn't hear any objection  
8 to the notion that if the Court were to do this at all,  
9 that's the best way to do it, and then the only thing I  
10 would add that it seems to me has come out of our  
11 discussion just now that, Chip, that you might wish to see  
12 if there's a consensus on is I really liked what Judge  
13 Christopher said, that, again, if the Court is going to do  
14 it at all, why doesn't the Court by rule fix the amount so  
15 there isn't an argument about that and there's less  
16 concern about abuse. You know, if the amount is fixed at  
17 \$500 or a thousand dollars or whatever it is, then a lot  
18 of my concern about this is -- it doesn't go away because,  
19 you know, having -- being sanctioned has consequences  
20 independent of the amount, including the malpractice  
21 carrier and the, you know, legal specialization  
22 certification and the pro hac and all kinds of contexts,  
23 but it certainly goes down a lot if the dollar amount has  
24 been fixed in the rule. So those two points I think go to  
25 if you did this at all what would the language be.

1           CHAIRMAN BABCOCK: Okay. When you and Judge  
2 Christopher were talking about fixing the amount, are you  
3 saying that if there is a -- if there's a violation then  
4 it's always 500 or it's always 200 or maybe because --

5           MR. HAMILTON: It could be up to 500 or up  
6 to --

7           CHAIRMAN BABCOCK: Up to 500.

8           HONORABLE NATHAN HECHT: A thousand or, oh,  
9 500. Yeah.

10          MR. HAMILTON: 500 or --

11          CHAIRMAN BABCOCK: Do I hear 2,000?

12          MS. PETERSON: A million dollars.

13          CHAIRMAN BABCOCK: We have one. It seems to  
14 me aren't there sort of gradations of sanctionable  
15 pleadings? I mean, some are a little bit sanctionable and  
16 some of them are way sanctionable.

17          MR. SCHENKKAN: There certainly are.

18          CHAIRMAN BABCOCK: But we're going to have a  
19 one-size-fits-all fine?

20          MR. SCHENKKAN: We're going to have  
21 one-size-fits-all for the part that goes to the public  
22 fund, and then I'm assuming that the other part of the  
23 sanction, which includes both compensation to the injured  
24 party and all of these kind of, you know, make the  
25 punishment fit the crime in terms of the abuse here was



1 trying to make a particular exhibit look admissible when  
2 it's not or not admissible when it is, and we're just  
3 going to say that's been deemed, and we're going to give  
4 the other side their costs for having to go to the extra  
5 trouble to get there.

6 CHAIRMAN BABCOCK: Okay.

7 MR. SCHENKKAN: So I think that that part is  
8 still controlled by the whole body of, you know,  
9 TransAmerica and Low law that's emerged, and I don't know  
10 how people feel about how good that is, but there wasn't a  
11 proposal to change it.

12 CHAIRMAN BABCOCK: Yeah. Okay. So your  
13 suggestion is that we have an expression of support or not  
14 for a -- just to take a number, a 500-dollar --

15 MR. SCHENKKAN: I'm saying you might do two  
16 things. You might say, first, if the Court were to do it  
17 at all is everybody in agreement that to the basic legal  
18 services fund -- account of the judicial fund is the best  
19 language, one, and then, two, take a separate vote that  
20 said if you're going to do it at all should the public  
21 fund amount be set or capped in some number. I think  
22 those are two separate vote items that go -- that we've  
23 had some discussion about and people have different or at  
24 least some views about.

25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: The set amount could be like five  
2 percent of -- you know, which would fluctuate depending on  
3 like attorney's fees and so forth, and that would be more  
4 egregious than say, like, 10 percent in addition there to  
5 the fund or five percent and just say up to \$500. I mean,  
6 I'm not suggesting that, but that's a possibility.

7 CHAIRMAN BABCOCK: Yeah. Okay. Frank.

8 MR. GILSTRAP: Yeah, the percentage approach  
9 I think solves Judge Christopher's problem. In other  
10 words, I'm the person that succeeded with the sanctions,  
11 and if I want to get it I've got to get the money for the  
12 county, too.

13 CHAIRMAN BABCOCK: Okay. Anybody else have  
14 comments? Okay. Pete, why don't you restate proposition  
15 one, and we'll vote on that?

16 MR. SCHENKKAN: Proposition one would be  
17 that if the Court were to adopt a provision, extend a  
18 provision for monetary sanctions to the -- for legal  
19 services to the poor, that it be in the language that's  
20 adapted from the Government Code, the "pay monetary  
21 sanction into the basic civil legal services account of  
22 the judicial fund for use in programs approved by the  
23 Supreme Court that provide basic legal services to the  
24 indigent."

25 MR. JEFFERSON: Was that amended for the

1 IOLTA deal? Or I got kind of lost on the IOLTA part.

2 MR. SCHENKKAN: I was not proposing that. I  
3 think what this does, as I understand it, what this does  
4 is put it into the account from which the established  
5 system divides it up among the various programs that  
6 provide basically the services to the indigent, so it  
7 seems to me that maybe I misunderstood the IOLTA  
8 amendment, but I thought the IOLTA amendment had to do  
9 with the difference in -- I had understood the comment  
10 about the IOLTA program choice to be if you were letting  
11 the trial judge choose, you're going to limit the trial  
12 judge to choosing one of the programs that receives IOLTA  
13 money. I'm not proposing that. I'm proposing that we put  
14 any of this money into this account and let it be  
15 distributed using the processes that exist for it being  
16 distributed there.

17 CHAIRMAN BABCOCK: Elaine.

18 PROFESSOR CARLSON: Did I understand that  
19 that option would require legislative action,  
20 appropriation?

21 MR. CHAPMAN: It would require legislative  
22 action, and the alternative that I mentioned, the IOLTA  
23 foundation, of course, which is overseen by the Supreme  
24 Court has -- basically administers grants. They -- the  
25 three big ones are IOLTA, which, of course, was created by

1 the Supreme Court under its inherent authority. Secondly,  
2 appropriated funds, which are general revenue, and then  
3 the third is they also administer some crime victim  
4 services funds. Together they look at grant proposals,  
5 they weed them out, and most entities -- most of the  
6 organizations receive money from each of these pots  
7 because they go out and they look at one combined  
8 application and then they also go out and monitor based on  
9 all funds, all funds that are -- that an entity receives,  
10 and there are various restrictions.

11 I think the -- to answer your question, to  
12 go back, there is authority in the appropriation language.  
13 I mean, it required a special grant to administer \$19,000  
14 in Justice For All fees. It's in the state budget. To go  
15 back and begin to estimate and create a line item for  
16 these funds would be I think -- it would be difficult, and  
17 it would be slow. In the meantime they would just sit  
18 there in the state treasury, so my suggestion is that they  
19 be treated like IOLTA funds, which were an entity created  
20 by the Supreme Court -- by the Supreme Court to start  
21 with. Thank you.

22 CHAIRMAN BABCOCK: Okay. Any other  
23 comments? Pete, you want to restate the --

24 MR. SCHENKKAN: I don't, because now that --  
25 I clearly misunderstood that IOLTA one, and I'm now no

1 longer sure what I would be for if I were for this.

2 CHAIRMAN BABCOCK: All right. Well, how  
3 about --

4 MR. SCHENKKAN: I think somebody else needs  
5 to take a crack at this.

6 CHAIRMAN BABCOCK: Well, the one thing  
7 that's a little easier is to have it set or capped at --  
8 maybe we ought to vote on whether it should be set at a  
9 fixed amount.

10 MR. SCHENKKAN: Yeah. As far as I know, I  
11 think it would be appropriate to take a vote on that.

12 CHAIRMAN BABCOCK: Okay.

13 MR. SCHENKKAN: And the cap, it might --  
14 given the point made that Buddy's percentage proposal, as  
15 Frank points out, does address one of Judge Christopher's  
16 concerns in that it ties the incentives of the party  
17 getting compensated to the incentive to defend the whole  
18 sanction and includes this fine part. I guess taking that  
19 into account, instead of saying set at a fixed amount, I  
20 would say set at a fixed percentage of any compensatory  
21 sanction.

22 CHAIRMAN BABCOCK: Okay. A fixed percentage  
23 of any compensatory award? Yeah, Carl.

24 MR. HAMILTON: I guess I disagree with that.  
25 If we're going to fine somebody, it ought to be like a

1 criminal statute, which says how much the fine is so  
2 people know in advance what their exposure is if they do  
3 something wrong.

4 CHAIRMAN BABCOCK: Yeah, maybe somebody will  
5 take a -- you know, take one for the Legal Aid team, just  
6 file some bad pleadings and know you're going to get a  
7 500-dollar -- just facetious about that. Yeah, Skip.

8 MR. WATSON: As we are kind of morphing this  
9 from a sanction into a fine, I'm just -- just to be clear  
10 for my personal vote, are we saying that -- that this,  
11 what I will call a fine, just a fixed amount, whatever it  
12 is, is or is not subject to the TransAmerican criteria?  
13 Is this above the sanctionable conduct that is subject to  
14 scrutiny by the Court under TransAmerican, and so it's  
15 just a quasi-legislative enactment by the Court that we're  
16 proposing this fixed fine without any constitutional  
17 constraints, or is it to be carved out of the sanction  
18 that is to be imposed under TransAmerican criteria? I  
19 don't think that's a small matter.

20 CHAIRMAN BABCOCK: Okay. Roger.

21 MR. HUGHES: Picking up on what was just  
22 said, the two problems I see, if you're going to start  
23 saying that what would be -- be given to charity will be a  
24 fixed percentage of the compensatory damages, one, if  
25 you're saying, well, we're really taking a portion of

1 compensatory damages and giving them to IOLTA, that is  
2 kind of a due process problem. It almost amounts to a tax  
3 of a sort. You're taking part of somebody's compensatory  
4 damages and giving it to somebody else.

5           The next thing is, is if it's not treated as  
6 a fine or something or other, not only is there the  
7 problem of, well, are you going to evaluate it under  
8 TransAmerica or not. It almost becomes more like a tax as  
9 opposed to anything else, which is going to bother some  
10 people. But I think if it's going to be anything, it's  
11 going to have to be treated as something according to a  
12 fine, which just is -- or the like that is -- and we're  
13 just happening to give the money to IOLTA instead of the  
14 county treasury. I think that's the only way it's going  
15 to fly, in which case it's going to have to be subject to  
16 the TransAmerica standards.

17           CHAIRMAN BABCOCK: Okay. Anything else?  
18 All right. It's Pete's motion, and that is everybody that  
19 is in favor of having the amount fixed as a percentage of  
20 any compensatory award, raise your hand.

21           Everybody against? Three were in favor, 20  
22 were against. Pete Schenkkan not voting.

23           HONORABLE TRACY CHRISTOPHER: Can I have a  
24 clarification of the vote, please? I want to make sure  
25 that people voting against were not just voting against

1 the idea at all. Because my understanding of it is we  
2 have to put aside the 18 of us that said, "No way, we  
3 don't like it," and vote on the idea of should we leave it  
4 open-ended like it is or have it fixed in some way.

5 CHAIRMAN BABCOCK: Yeah, I assumed that, but  
6 maybe I'm wrong --

7 HONORABLE TRACY CHRISTOPHER: So I'm asking  
8 Jane if her vote was to say let's leave it open-ended, and  
9 she says, no, she just doesn't like the idea of it.

10 HONORABLE JANE BLAND: My vote would not  
11 change this discussion.

12 CHAIRMAN BABCOCK: Okay. Buddy.

13 MR. LOW: Chip, one of the things, I wasn't  
14 voting that it be exactly, but set a limit not to exceed  
15 so much, not just say it's automatic, but --

16 CHAIRMAN BABCOCK: Well, Judge Christopher,  
17 as a proponent of the thought maybe you could frame a vote  
18 that would be more palatable to some of the members.

19 MR. DAWSON: I don't think so.

20 HONORABLE TRACY CHRISTOPHER: I don't think  
21 so. Here's the vote. Here's the vote.

22 CHAIRMAN BABCOCK: I'm trying to help you  
23 here.

24 HONORABLE TRACY CHRISTOPHER: Here's the  
25 vote. Here's the vote. Should the penalty sanction be



1 unlimited in the trial court's discretion or should it be  
2 fixed in some manner?

3 CHAIRMAN BABCOCK: All right.

4 MR. HAMILTON: By rule you mean?

5 HONORABLE TRACY CHRISTOPHER: You have to  
6 pick either one of those two choices.

7 MR. WATSON: No, I don't.

8 MR. JEFFERSON: And on that point if you  
9 look at Chapter 10, there are two different provisions.  
10 One is the compensatory provision and the other is the  
11 penalty, so I mean, if what we're doing is setting a limit  
12 on the penalty I don't think it necessarily implicates the  
13 problem that Roger mentioned about taking compensation  
14 away because a penalty is by nature not compensatory.

15 CHAIRMAN BABCOCK: Okay. I feel like that  
16 we're about to have a less filling/tastes great vote.

17 HONORABLE TRACY CHRISTOPHER: Should the  
18 penalty sanction be unlimited in the trial court's  
19 discretion --

20 CHAIRMAN BABCOCK: Or fixed.

21 HONORABLE TRACY CHRISTOPHER: -- or should  
22 it be fixed in some manner?

23 CHAIRMAN BABCOCK: Okay. Everybody for  
24 unlimited, raise your hand.

25 HONORABLE JAN PATTERSON: How about limited

1 by the trial court's discretion?

2 HONORABLE TRACY CHRISTOPHER: Limited in the  
3 trial court's discretion.

4 CHAIRMAN BABCOCK: Hang on.

5 HONORABLE JAN PATTERSON: Or what's the  
6 choice?

7 CHAIRMAN BABCOCK: Wait a minute. People  
8 are voting. Don't talk while we've got a vote going.

9 HONORABLE TRACY CHRISTOPHER: Okay.

10 CHAIRMAN BABCOCK: The first vote is going  
11 to be unlimited. Okay. Everybody unlimited people, raise  
12 your hands.

13 MR. DAWSON: I don't like the way this is  
14 going.

15 CHAIRMAN BABCOCK: And raise your hand if  
16 you think it should be fixed in some manner.

17 HONORABLE TRACY CHRISTOPHER: Clear vote.

18 CHAIRMAN BABCOCK: Well, 10 were for  
19 unlimited, 8 were for fixed in some manner, and a number  
20 of people were sitting on the sidelines on this momentous  
21 vote. Pete, anything else you want to vote on? You did  
22 so well on that last one.

23 MR. SCHENKKAN: Yeah. You know, first  
24 withdrawing my own motion the first time and then standing  
25 out from my own motion the second time around, I'm really

1 on a roll here.

2 CHAIRMAN BABCOCK: Yeah, you're on a roll.

3 MR. SCHENKKAN: But, you know, this is, in  
4 fact, a serious matter, and I am a little embarrassed at  
5 the way we're kind of ending this, and I think I want to  
6 at least see if there's some ground for the notion that  
7 the -- how should this be framed -- that the -- that if it  
8 was the Court's pleasure, the Supreme Court Advisory  
9 Committee would be prepared to address the question of  
10 what measures are within our sense of the Court's inherent  
11 powers and its rule-making powers that could be used for  
12 the purpose of improving the funding of access -- of legal  
13 services for the indigent in civil matters. I'd like --  
14 if we were to, you know, do that, and obviously it's only  
15 if the Court wants us to look into that, I would like us  
16 if we were asked that question to be asked that question  
17 in the most open-ended fashion. What is it that we think  
18 might be within the Court's inherent and rule-making  
19 powers for this purpose and might be a good idea, rather  
20 than narrowly limited to any one of these specific tasks?

21 Now, you know, I've been down this road  
22 before in previous decades. I remember writing a brief to  
23 the Texas Supreme Court myself individually urging  
24 mandatory pro bono. That may get me kicked off any  
25 committee that would be appointed to this if we considered

1 it, but that would be what I would be interested in doing  
2 if the Court were interested, a more open-ended, not  
3 focused on the use of sanctions money to help fund this  
4 problem, but instead addressing -- seeing what is within  
5 the Court's power and might be desirable to address what  
6 I think everyone agrees is a dire need, and there is some  
7 doubt as to whether the respective Legislatures will step  
8 up and do their appropriate duty.

9 CHAIRMAN BABCOCK: Okay. Well, we will --  
10 we will caucus about that and figure it out. Justice  
11 Patterson.

12 HONORABLE JAN PATTERSON: I want to second  
13 that notion and also this whole concept of how the judges  
14 can best contribute to solving this problem, and I think  
15 some sort of think tank, which I know you-all have  
16 sponsored in the past, would work, but we just need to be  
17 creative as well with the judges.

18 CHAIRMAN BABCOCK: Okay. Anybody else?

19 MR. LOW: Can I ask one question?

20 CHAIRMAN BABCOCK: Yeah.

21 MR. LOW: Did the committee consider instead  
22 of the judge setting this or saying to whom it goes or  
23 doesn't go, was there any consideration of giving the  
24 violator an option of, you know, go to the county or at  
25 the option of the violator to IOLTA? Was there any

1 consideration of that?

2 MR. HERRING: I don't recall that being --

3 MR. LOW: But I'm going to pay, I don't care  
4 which one.

5 MR. HERRING: I don't recall that ever being  
6 suggested before you just suggested it.

7 MR. LOW: And that would take it off the  
8 pressure of the judge and the county saying, "Look, we pay  
9 part of your salary, and you're giving away money that the  
10 sheriff needs" and so forth, and if you left it up to the  
11 violator, I don't know if it can be done, but it would be  
12 an option.

13 CHAIRMAN BABCOCK: Okay. Anybody else? All  
14 right. Maybe this happened while I was out, but I don't  
15 think it did. We were referred the letter from Brenda  
16 Willett for consideration, and, Kennon, have we talked  
17 about that yet?

18 MS. PETERSON: No.

19 CHAIRMAN BABCOCK: Okay. Who is going to  
20 lead that?

21 MS. PETERSON: I'm going to lead it, only  
22 because Judge Yelenosky is not here, and so I'll give a  
23 little bit of background and then we'll talk about the  
24 issues that Judge Yelenosky focused on and then turn it  
25 over to other subcommittee members who focused on other

1 issues. So the letter, just for the record, is from the  
2 poverty law section of the State Bar of Texas to the  
3 Court, Supreme Court of Texas. It is dated January 23rd,  
4 2009, and it was written after the hearing that Justice  
5 Hecht referred to earlier today. It basically lists a  
6 total of seven problems and contains proposed solutions as  
7 well.

8           Judge Yelenosky grouped problems one through  
9 three and six together because he felt they were related,  
10 and those are the problems that he looked at, and again,  
11 for the record, problem one is "E-filing requires the  
12 payment of various fees for filing that can total more  
13 than \$10 per document. Fees are charged by the state,  
14 county, and service provider, and there is no exception  
15 for e-filing in forma pauperis. So the proposed solution  
16 is "The Court should issue a miscellaneous order enabling  
17 free e-filing access for poor litigants. This will  
18 provide important court access to poor Texans and avoid  
19 inevitable open courts and due course of law challenges."

20           And one of the discussions that the  
21 subcommittee had is quite similar to the discussion that  
22 the full committee is having today. It's about whether  
23 the Court can mandate TexasOnline and the electronic  
24 filing service providers to waive the e-filing fees, and  
25 as a reminder, I thought it might be helpful to reiterate

1 what was said at the last meeting. There are three fees  
2 associated with e-filing a document in Texas. There's a  
3 fee from TexasOnline, which is \$4. There's a fee from the  
4 county, and according to someone from Bearing Point, that  
5 tends to be anywhere from zero to \$5, with most county  
6 fees being approximately \$2, and then there is the fee  
7 that the EFSP charges, which is quite a broad range here,  
8 \$1.08 to \$10, and I think that that range is there in part  
9 because the fee structure will depend greatly on the  
10 services being provided and also on whether you've  
11 contracted for a flat annual fee or some, you know, per  
12 filing fee.

13           So those are the basic fees, and if you look  
14 at the subcommittee report on page one, e-filing is  
15 addressed in the third paragraph and says a lot of what  
16 I've said already, spells out the problem, basically says  
17 that there are local rules now that have exceptions for  
18 pro se filers, but they don't have exceptions for  
19 indigents, and so the issue is that these individuals who  
20 are represented cannot go on and file without paying the  
21 fee, and another issue is just general access to courts,  
22 and so the big concern being that maybe the Court can't  
23 mandate waiver of the fees out there, what Judge Yelenosky  
24 has proposed on page two, the top paragraph, basically  
25 saying that the clerk must notify TexasOnline and all

1 certified EFSPs of the filing of the affidavit of  
2 indigency and of the filing of any order sustaining  
3 contest of the affidavit.

4           And to put this into context, this is in  
5 Rule 145 of the Rules of Civil Procedure, and I think it  
6 would probably make the most sense, if it's okay, Chip, to  
7 talk about the other recommendations as well because they  
8 all go to the same rule.

9           CHAIRMAN BABCOCK: Right.

10           MS. PETERSON: So the other problems spelled  
11 out by the State Bar poverty law section, problem three  
12 is -- oh, sorry, two is included. Two, problem two,  
13 "While courts have allowed indigent clients to file new  
14 cases with pauper's affidavits and avoid the initial  
15 filing fees, some courts are not allowing final judgments  
16 or temporary orders to be entered until court fees are  
17 paid," and the proposed solution was the Court could issue  
18 a comment or modification to Rule 145 such as, quote,  
19 "costs addressed by this rule may not be imposed as  
20 prerequisites to entry or rendition of a temporary or  
21 final order or other activity in the case."

22           And then problem three is very related, I  
23 think. It's "Some court clerks are requiring clients who  
24 have filed an affidavit of indigency to pay court fees set  
25 out in Chapter 110 of the Texas Family Code, including for



1 the issuance of withholding orders, suits or motions to  
2 modify the parent-child relationship, motions for  
3 enforcement, notice of application for judicial writ or  
4 withholding, motions to transfer, motions for contempt in  
5 filing transferred cases," and the solution was to amend  
6 Rule 145(a) to say in lieu of paying or giving security  
7 for costs of an original action the new language would be,  
8 "or any other motion petitioner requests for issuance or  
9 service of an order" and then the rule as it stands now.

10           And so what Judge Yelenosky has proposed  
11 instead is on page one of the committee -- subcommittee's  
12 report. In the last paragraph he proposes striking of "an  
13 original action" to make it clear that this affidavit of  
14 indigency applies not just to the fee for filing the case  
15 initially but to any fee that's incurred along the way;  
16 and, specified even more clearly on the top of page two,  
17 new language is, reading from the top, "Upon the filing of  
18 the affidavit the clerk must docket the action, issue  
19 citation," and here's the new language, "throughout the  
20 pendency of the suit unless and until any contest to the  
21 affidavit is sustained by written order"; and then he  
22 suggests some other tweaks, "provide all customary  
23 services without charge." So these are the proposed  
24 solutions to the issues of filing fees being charged later  
25 on down the line and to the e-filing fees associated --

1 that are charged by TexasOnline, EFSPs, and the courts.

2           The final problem that Judge Yelenosky  
3 addresses is problem six, and that's on page four of the  
4 State Bar section's letter. It's "Courts are requiring  
5 indigent litigants to provide information in pauper's  
6 affidavits that is not only unnecessary, but intrusive."  
7 The proposed solution was the Court should modify Rule 145  
8 and 749a and other rules allowing these affidavits so that  
9 it is clear that an affidavit calling for information such  
10 as this should be avoided, or in the alternative the Court  
11 should provide in the rules the actual form of the  
12 affidavit indigent Texans should use, and so Judge  
13 Yelenosky felt it would be more appropriate to basically  
14 say what should not be in the form.

15           He said on page one of the report, "Even if  
16 the rule were to provide a form affidavit, unless it  
17 prohibits this information it would not be clear to courts  
18 that they could not modify the form to require the  
19 sensitive information," so that is the reason why he went  
20 with basically saying what should not be in the forms, and  
21 that's on page two of the subcommittee's initial report.  
22 Basically adds a new sentence, "The affidavit must not  
23 contain a Social Security number, a checking account  
24 number, or a place of birth," and one thing I wanted to  
25 note about this recommendation is that if the Rules of



1 Judicial Administration regarding sensitive data and  
2 remote access go through it might take care of this  
3 problem without amendment to 145.

4 CHAIRMAN BABCOCK: Okay. Let's break for  
5 lunch and come back at 1:15.

6 (Recess from 12:30 p.m. to 1:15 p.m.)

7 CHAIRMAN BABCOCK: Okay. We're back on the  
8 record at exactly 1:15. You heard Kennon's report about  
9 problems one through three and six, and does anybody have  
10 comments on the proposed fixes for those things? Okay,  
11 let's move -- yeah, Richard.

12 MR. MUNZINGER: May I ask a question?

13 CHAIRMAN BABCOCK: Yeah.

14 MR. MUNZINGER: Could someone tell me again,  
15 refresh my memory of the structure of e-filing? I know we  
16 have private party electronic service providers with whom  
17 we interface and they interface with TexasOnline. I don't  
18 know if TexasOnline is a government company, a private  
19 company, et cetera, because it would seem to me that  
20 saying that people must accept indigent filings for free  
21 may implicate contractual issues and other issues.

22 MS. PETERSON: Exactly, and that's what I  
23 was hitting on earlier when I said the subcommittee was  
24 concerned about whether the Court can mandate either  
25 TexasOnline or the EFSPs to waive basically what's called

1 the convenience fees for e-filing.

2 MR. MUNZINGER: Well, EFSPs are private  
3 enterprise.

4 MS. PETERSON: Yes.

5 MR. MUNZINGER: Is Texas online private  
6 enterprise?

7 MS. PETERSON: It is through -- isn't it now  
8 NIC? Bearing Point was the company before that handled  
9 the e-filing and now it's NIC.

10 HONORABLE NATHAN HECHT: It contracts with  
11 the state to handle all the e-filing.

12 MR. MUNZINGER: But it would seem to me that  
13 were the Court to adopt then a rule mandating something,  
14 that that would implicate the contracts with those  
15 agencies --

16 MS. PETERSON: That's right.

17 MR. MUNZINGER: -- and those agencies'  
18 requirements to provide things for free. It's almost like  
19 a taking.

20 MS. PETERSON: That's the problem, and if  
21 it's okay, Chip, I wanted to recognize Nelson Mock, who is  
22 here to give a little bit more background about the  
23 e-filing issue because he and I talked yesterday about  
24 this, and as I understand it, the recommendation stems in  
25 part from problems that have been incurred in Travis

1 County where e-filing is mandatory for a lot of documents,  
2 not all, but a lot.

3 MR. MOCK: That's right. I mean, and I'm --  
4 my name is Nelson Mock. I'm an attorney with Texas Rio  
5 Grande Legal Aid, and I am also on the poverty law  
6 section. I am currently the vice-chair of the poverty law  
7 section, and I was involved in the letter that you have  
8 before you that outlines some of our concerns about access  
9 to justice issues and our clients. Many of our members  
10 are legal services attorneys, but we also include, of  
11 course, academics, private attorneys, people who practice  
12 in the area of poverty law, but this issue has come up,  
13 and it came up for me personally in Travis County, but  
14 this issue is a statewide issue for anyone who is  
15 practicing poverty law representing someone who is  
16 indigent and would like to use the e-filing system.

17 And, you know, I remember talking to  
18 somebody about the e-filing system and saying, you know,  
19 this is the wave of the future, everybody is going that  
20 way, but truly this is the wave of the present, and Texas  
21 Courts Online reports that 72 percent of our population in  
22 Texas is now within a district that has e-filing, and in  
23 my example of Travis County, it is mandatory for many  
24 types of cases. That's a problem if you cannot e-file,  
25 and it's a complicated issue, but not that complicated.

1           There are three parties involved. There's  
2 the private parties, the service providers. There are --  
3 there is the state involved and, of course, the courts,  
4 but what we're asking for is direction from the Court to  
5 ensure that we have access as attorneys representing  
6 people who are indigent, have access to this court system  
7 which is going to be -- which is the wave of the present,  
8 but also, you know, where everybody is going. My  
9 understanding is that the way that the Court directs  
10 e-filing is through the Government Code 77.031, which  
11 directs the Judicial Committee on Information Technology  
12 to create -- to recommend to the Court, you know, a  
13 process for e-filing; and my understanding is that the  
14 committee, in fact, it's one of their three big tasks at  
15 this point is to deal with e-filing; and, in fact, in  
16 2004, May of 2004, these are -- this is from the Judicial  
17 Committee on Information Technology, from the website of  
18 the committee, and there's an FAQ from May of 2004; and  
19 one of the questions is in the FAQ, "What about people who  
20 are indigent," and they reported at that point, "The JCIT  
21 in coordination with the Access to Justice Commission has  
22 developed a requirement and processes for e-filing by and  
23 for indigent parties. Attorneys who e-file for indigent  
24 parties as well as indigent pro se filers will be able to  
25 file through a special service provider," and this may be

1 where we need to go.

2           JCIT's proposal to waive e-filing  
3 transaction fees is currently pending before TexasOnline  
4 Authority. I can tell you now because we have spoken with  
5 TexasOnline, we've spoken with private providers, nobody  
6 waives the fee at this point, and this puts us at a  
7 disadvantage. You know, as TexasOnline points out on the  
8 website, it's fast, it's efficient, it's cost effective  
9 both for the courts and, of course, for us. We talk about  
10 -- you know, your last vote addressed our scrambling for  
11 fees, and I almost -- you know, when I heard the first  
12 vote I almost thought I felt like -- I feel like Evil  
13 Knievel trying to jump the Grand Canyon here, but I know  
14 the Court is -- and I know you are. I know the Court is  
15 concerned about access to justice issues, and this is an  
16 access to justice -- access to courts issue. We, if we're  
17 going to use e-filing, have to pay for it, and so if we're  
18 talking about funding for legal services, we're talking  
19 about costs that we incur in order to be able to use this,  
20 and sometimes we just bite the bullet and we pay for it,  
21 and our clients have to pay for it if they can or we do.

22           There are a couple of other issues I'd like  
23 to raise, and that is, as is must be clear, if we follow  
24 down the path that we're following right now and the  
25 concern for the private -- you know, the private service



1 providers and such, if we're following down the path we're  
2 following right now, we are going to create -- we are  
3 creating a two-tier system, a system for people who have  
4 the resources to pay for filing fees and a system for  
5 people who do not have that, and since this is where we  
6 all are going, again, this is, you know, fairly an access  
7 to justice issue.

8           Now, I'm not quite sure what the fix is, and  
9 I think -- I think this is obviously a point of discussion  
10 you-all will be touching on, but there are a couple of  
11 possibilities. One is if we cannot touch the private  
12 service providers, perhaps the Court can order the state  
13 in the form of a miscellaneous order, the state and the  
14 courts, to waive the fees; and there is one option that  
15 could also be discussed, and that is the creation as in  
16 the JCIT of a separate service provider or allowing  
17 entities to be service providers. I had dragged along  
18 Robert Doggett because he -- I asked him a couple of years  
19 ago when this issue first came up to look into this issue,  
20 and he actually has a lot more knowledge about the  
21 process, and with your permission I'll let him talk more  
22 about that and anything else I've missed.

23           MR. DOGGETT: I think you've covered it,  
24 frankly, Nelson. E-filing, I mean, I practice in Federal  
25 court as well as state court, and e-filing for indigents

1 is easy in Federal court. You file your pauper's oath  
2 online from start to finish, and it's not a problem at  
3 all. So what we're trying to do is, you know, if the  
4 Federal courts can manage to get this done, I know that  
5 this state can get it done, and it's been five years since  
6 the JCIT recommended this get done. You know, we've been  
7 waiting, and many programs don't let you bite the bullet  
8 and pay to do this, and thus, we don't use it. I haven't  
9 gotten permission to do it, and I know that it would be  
10 very helpful if we could get it done, and I know there may  
11 be some issues involved with the private entities, but if  
12 we could find a way or take some direction to find a  
13 provider that would be willing to do this and work this  
14 maze, I think it's possible.

15           Rather than finding problems with why we  
16 can't do something I'm hopeful that this committee can  
17 help us find a way to do this, because right now indigents  
18 under Rule 145 are supposed to have their filing fees  
19 waived and other costs waived, and this is clearly one of  
20 those costs, and so we're hopeful with all of our  
21 expertise in this room that we can find a solution to this  
22 problem rather than just finding roadblocks on why we  
23 can't do that. I really hope for that being done.

24           CHAIRMAN BABCOCK: Yeah, are you saying that  
25 indigents, even if they have a pauper's oath that is not

1 challenged, that today indigents are paying the fees or  
2 not?

3 MR. DOGGETT: Right. We're not allowed to  
4 file. You have to go online with a credit card right now  
5 to file anything. Let me give you my --

6 CHAIRMAN BABCOCK: So they are paying.

7 MR. DOGGETT: If you want to use the system  
8 you have to pay, period. No other solution.

9 MR. MONK: My experience in Travis County,  
10 this was like a year and a half ago when they first had  
11 their first order having to do with foreclosures, and I  
12 was dealing with a foreclosure. An emergency client came  
13 in. I had to file -- it was a Rule 736 procedure, and I  
14 had -- I had an affirmative case that I was going to file  
15 that would abate the whole -- the whole application  
16 process, and so I was concerned about the local order  
17 because I had read it, and it was very clear that I would  
18 have to ask for permission from a judge in order to file  
19 my affidavit of inability to pay and my affirmative case,  
20 and there was confusion on the part of all parties  
21 involved, because when I first went to e-file the day  
22 before I thought "This is going to be easy. I'll just  
23 e-file with the affidavit of inability to pay."

24 Little did I know there was no way to do  
25 that, and I was on the line with ProDoc, I was on the line

1 with the district clerk's office, and everybody was  
2 pointing fingers. There was clearly no way to file online  
3 without me having to pay. The ProDoc, the person at the  
4 service provider suggested maybe I could ask for a  
5 reimbursement from the county after filing it, which I was  
6 not inclined to do. It's a problem, and especially as I  
7 think counties are -- and courts are going to be going  
8 towards mandating e-filing, and they already are in other  
9 states.

10 Washington, D.C., for example, has a  
11 required e-filing process, and I don't know the  
12 particulars of what the courts have done there, but I can  
13 tell you that Case File Express, which is one of our  
14 service providers, if you go onto the D.C. portion of  
15 their website, has -- describes how they deal with people  
16 who are filing in forma pauperis, the pauper's affidavit,  
17 and there is a process that people have in D.C., Legal  
18 Aids have in D.C., to sign up for that and not have to pay  
19 and yet be able to e-file. So there's got to be a  
20 solution. We don't want a two-tier process, and I think  
21 now is the time to resolve it.

22 CHAIRMAN BABCOCK: Speaking of a solution,  
23 Judge Yelenosky proposes language that says, "The clerk  
24 must also immediately notify TexasOnline and all certified  
25 electronic filing service providers of the filing of the

1 affidavit and of the filing of any orders sustaining a  
2 contest to the affidavit." Is that a solution? I mean,  
3 you just sent a notice to TexasOnline and they say, "Well,  
4 thanks very much for telling us that, now where's your ten  
5 bucks?"

6 MR. MONK: That is exactly right. That is  
7 our primary concern. If the Court really can do  
8 absolutely nothing, that's better than absolutely nothing,  
9 but not much. Our real concern is that we're still going  
10 to be charged the fees, which puts us back into the same  
11 two-tier system.

12 CHAIRMAN BABCOCK: Has anybody talked to  
13 TexasOnline about this?

14 MS. PETERSON: Yes.

15 CHAIRMAN BABCOCK: Huh?

16 MS. PETERSON: Well, I've spoken with what  
17 was then Bearing Point and what's now NIC about the FAQ  
18 referenced earlier and what happened with JCIT's proposal,  
19 and the response I got is that if e-filing is optional,  
20 not just for indigent filers but across the board, it's  
21 unlikely that TexasOnline will either waive its fees or  
22 press EFSPs to waive its fees for indigent filers. Stated  
23 differently, if e-filing is required for non-indigent  
24 filers it is more likely that e-filing for indigent filers  
25 could be waived; and as I understand it, the reason this

1 is the case is because as of now, according to what's  
2 now NIC, e-filing hasn't achieved a break even on its  
3 investment costs, so they're not making money; and until  
4 e-filing is mandated -- and right now we have it mandated  
5 in Travis County. I'm not aware of any other county in  
6 Texas, and I believe Travis County it's by local order,  
7 but until that's the case they just haven't had the type  
8 of numbers they expected, even though you're hearing that  
9 e-filing is happening in Texas across all these counties.

10 CHAIRMAN BABCOCK: Right.

11 MS. PETERSON: The number of e-filings  
12 hasn't reached a point to be profitable for the parties  
13 involved. Specifically this was Bearing Point, so I --  
14 the message I'm receiving is until it's something where we  
15 have more filings and we're making more money on this it's  
16 hard for us to make the business decision to waive the  
17 fees associated with it. And another thing I've heard is  
18 it's a comparison to postage charges, that the e-filing  
19 fee is kind of like the charge you would incur if you went  
20 to the post office and mailed something. I'm not  
21 defending it. I'm providing it as information.

22 CHAIRMAN BABCOCK: Yeah. How long has  
23 Travis County been mandatory? Do you know how long Travis  
24 County has been mandatory?

25 MR. MONK: For foreclosures I think it's

1 about a year and a half, maybe slightly longer, and then  
2 more recently I think in 2008 it was mandated for many  
3 other -- many other different types of cases. But, again,  
4 my focus is completely on the statewide problem, you know,  
5 rather than Travis County. I think the real problem --  
6 and, again, with regard to the private service providers,  
7 it's more than a postage stamp when you have to pay filing  
8 fees, and when you're charging \$10 a document, that's a  
9 little more than it would cost in order to stick it in the  
10 mail, but what we're talking about is access to a  
11 procedure that everybody else has access to that is fast.

12 I mean, that -- you know, we all know the  
13 benefits of e-filing. You get to file at 11:59 at night.  
14 You don't have to leave your office. It's cost effective.  
15 It's swift. You don't have to travel, you know, the 40  
16 miles if you're in a rural county to the court in order to  
17 file; and to deny people who don't have money, you know,  
18 is -- it's creating a two-tier system.

19 The last thing I'll say is I think one of  
20 the issues about e-filing that -- and I don't know the  
21 numbers, but I would not imagine from a business  
22 perspective that we're talking about a whole lot of people  
23 filing affirmative cases or being able to file online with  
24 an affidavit of inability to pay. There are -- you know,  
25 I can get into all the specifics about access to justice

1 and how, in fact, if you look at real estate and property  
2 issues, and my law firm, which covers a third of Texas and  
3 is really the only law firm or one of the few law firms  
4 that provides services to the poor in that area for a  
5 third of Texas. There are 12 of us attorneys, so we're  
6 not talking about flooding the service providers with, you  
7 know, incredible fees. This is a small percentage of the  
8 number of people who are filing cases, and that's -- I  
9 think that would be a response to that.

10 MS. PETERSON: And I just want to -- because  
11 nobody from NIC is here, I want to provide more  
12 information from the response I got via e-mail. One of  
13 the statements was that it requires making and maintaining  
14 application and code changes, both of which add expenses,  
15 so there was a statement that it's not only the --

16 CHAIRMAN BABCOCK: Loss of revenue.

17 MS. PETERSON: -- loss of revenue, it's what  
18 the fees you will incur and making code changes associated  
19 with this, just to give all the information.

20 CHAIRMAN BABCOCK: Munzinger, and then  
21 Gilstrap.

22 MR. MUNZINGER: I think everybody in the  
23 room is sympathetic with your goal. Even though I spoke  
24 as I spoke the last time, I'm sympathetic with your goal.  
25 The problem is we have laws, and we have to address this



1 under the law. Why can't the Supreme Court just tell  
2 TexasOnline, "Do what you have to do to allow truly  
3 indigent people equal access to your service?" Why can't  
4 we do that? The Supreme Court it seems to me can do that  
5 unless TexasOnline is somehow a creature of the state or  
6 some kind of a private creature that is beyond the  
7 authority of the Court to do that, because why can't the  
8 Court say "do this"? I don't know why they can't.

9 CHAIRMAN BABCOCK: I thought you said it was  
10 a taking a minute ago.

11 MR. MUNZINGER: Well, it would be if you  
12 told an electronic service provider "You must take this  
13 filing." Clearly TexasOnline, somebody is going to have  
14 to open up a portal for the people or the service  
15 providers are going to have to agree to waive it or  
16 somebody is going to have to litigate the point. I, for  
17 one, if I were an electronic service provider, I would --  
18 not for the dollars but for the principle. Who in the  
19 heck are you to take my property? It's mine. It's mine,  
20 and you can't have it unless due process is honored.  
21 Okay. That's fine.

22 So maybe we need to have a new portal. That  
23 solves that problem. Doesn't solve the problem of  
24 identifying whether the person is or isn't truly indigent,  
25 and that is a problem. That's a problem that has to be

1 solved, but if TexasOnline is the person that's receiving  
2 everything from all these electronic service providers and  
3 is, in fact, a government agency, why can't the Texas  
4 Supreme Court just say, "You take them and you figure out  
5 how to do it"; and then the electronic service providers,  
6 these fellows, you're going to have to pay an electronic  
7 service provider, which they can't do, or someone is going  
8 to have to set up a portal for them to do it; and the  
9 Court doesn't have the power to appropriate the money, in  
10 my opinion --

11 CHAIRMAN BABCOCK: Frank, then Judge  
12 Lawrence.

13 MR. MUNZINGER: -- to do it. Everybody  
14 loves your goal. The problem is how do you go about doing  
15 it lawfully.

16 MR. GILSTRAP: Let me just throw this out  
17 here. I mean, aren't we talking about doing this for  
18 justice courts?

19 CHAIRMAN BABCOCK: Well, we're going to hear  
20 from Judge Lawrence on that.

21 MR. GILSTRAP: And it seems to me once you  
22 get into justice courts the chances of a lot of, you know,  
23 pauper's -- electronic pauper's affidavits would go up  
24 dramatically, and simply because there are a lot of pro se  
25 litigants, possibly the chance of a number of spurious

1 pauper's affidavit. I mean, you know, look, I can file it  
2 free if I just press this button. Judge Lawrence could  
3 probably answer that question, but I just wanted to raise  
4 it.

5 HONORABLE TOM LAWRENCE: It seems to me  
6 we've got two separate issues. One is where e-filing is  
7 mandated, the issue of what to do about that, and then the  
8 second issue is should you give indigents free e-filing.  
9 The first issue, why couldn't you simply attack it from  
10 the opposite way, and I'm assuming that mandatory e-filing  
11 is done by local rule which the Supreme Court approves.  
12 No?

13 MS. PETERSON: Travis County was not, I  
14 don't think.

15 HONORABLE TOM LAWRENCE: Okay, well, if it's  
16 not done by a local rule you would have the ability I  
17 would think in the Rules of Judicial Administration or  
18 maybe the Rules of Procedure to prohibit mandatory  
19 e-filing for indigents, wouldn't you?

20 HONORABLE NATHAN HECHT: Yes.

21 HONORABLE TOM LAWRENCE: Well, that to me is  
22 the more egregious problem. The other issue as to whether  
23 or not you give indigents free e-filing when they have  
24 access to file it by mail or a walk-up document is another  
25 problem to me.

1           CHAIRMAN BABCOCK: That's a different issue.  
2 Justice Bland.

3           HONORABLE JANE BLAND: Well, currently we --  
4 first of all, I don't think we have a huge problem, and  
5 this may be just me, and the other judges should comment.  
6 I don't think there's a huge problem with spurious  
7 affidavits of indigency. If anything, I think we have a  
8 bigger problem with district clerks sometimes contesting  
9 affidavits of indigency that they shouldn't be contesting,  
10 but that's just been my experience, but we currently have  
11 user -- people that need to proceed as indigents that need  
12 a reporter's record, need the clerk's record, all at some  
13 cost, and right now I'm guessing the court reporter  
14 doesn't get paid for the record. I think on the criminal  
15 side there is some kind of fund for the record, but why  
16 wouldn't whatever monies associated with the online filing  
17 be treated similarly to the kinds of monies that have to  
18 be expended to prepare the clerk's record and the  
19 reporter's record now for indigent people? And to me,  
20 unlike the earlier question we were taking up, this does  
21 seem something within the bailiwick of the courts to  
22 dictate.

23           CHAIRMAN BABCOCK: Buddy.

24           MR. LOW: Chip, Judge Lawrence raises a good  
25 question, and then they say, well, the indigent don't have

1 the luxury of being able to file at 11:00 something and so  
2 forth. When they get to court, they might not have the  
3 luxury of hiring an expert that somebody does. We can't  
4 eliminate things like that. As long as we give them the  
5 vehicle to get to court, and if the court mandated that if  
6 they qualify, they can file like they always have then  
7 they can't complain they're being kept out of court.

8 CHAIRMAN BABCOCK: Yeah. Yeah, Hayes.

9 MR. FULLER: Three thoughts. First of all,  
10 do we know the differences between the Federal e-filing  
11 and the state filing and how are they different to where  
12 this apparently is not a problem in the Federal system and  
13 yet it is a problem with the state system? Is that  
14 because the state has private providers involved or --

15 HONORABLE NATHAN HECHT: No. The state --  
16 the Federal government owns the Federal filing system.

17 MR. FULLER: Okay. And that answers that  
18 question. Second issue is would it alleviate the  
19 situation somewhat if the agencies that you are employed  
20 by qualified as electronic filing service providers? That  
21 eliminates at least one of the three possible fees you're  
22 going to get.

23 MR. DOGGETT: And we've actually considered  
24 doing that, and the state said it still wouldn't waive  
25 their fees.

1 MR. FULLER: Okay.

2 MR. DOGGETT: So we actually absolutely  
3 think that's the solution, is that if we've got this  
4 three-tier system, one solution is that we could -- all  
5 these different groups could collaborate and have one  
6 provider and then if TexasOnline, which is run by the  
7 state, Department of Information Resources, I think, the  
8 state has the key to this.

9 MR. FULLER: So the question is --

10 MR. DOGGETT: The state says, no, they won't  
11 do it, so we're needing help.

12 MR. FULLER: Who can tell the TexasOnline  
13 and the clerks to waive their fees? Okay, I don't know --  
14 the last point is as far as the electronic filing service  
15 providers are concerned, which you may have already solved  
16 that problem by becoming one yourselves, to hit the point  
17 that you said, if it was mandatory, they're making enough  
18 money that it's a profitable concern for them that they  
19 have an interest in keeping that contract, at which point  
20 the state can sit down with them and say, "You know, if  
21 you want this contract as opposed to you, you're going to  
22 have to waive fees for the poor." That addresses the  
23 takings issue, because then you've got the market  
24 regulating the debate there. It's like we want it so bad  
25 we'll waive those fees. You've got some negotiating

1 power. Right now I'm not sure -- it doesn't sound like  
2 it's profitable enough to where if you add any more  
3 constraints to it they can just say "none of us want it,"  
4 but I don't know.

5 CHAIRMAN BABCOCK: David.

6 MR. JACKSON: There's an issue -- you know,  
7 Judge Bland brought up something about indigency not being  
8 a problem. Going in if we know that someone is indigent  
9 it's not a problem. If they've filed their certificate  
10 and they've gotten their IOLTA certificate then the court  
11 reporters don't have a problem with that because they came  
12 in that way, we know they're in the system, and they're  
13 doing it. Maybe you could tie the e-filing with the IOLTA  
14 certificate. If they've gone through the process to get  
15 declared indigent, they have an IOLTA certificate, they  
16 could use that certificate the same way they use it to get  
17 their transcript at the end of the trial versus the guy  
18 who loses his lawsuit and is now indigent because he lost.  
19 He drives off in his Mercedes and wants a free transcript.

20 CHAIRMAN BABCOCK: Kennon.

21 MS. PETERSON: I think -- and please,  
22 subcommittee members, correct me if I'm wrong. I think  
23 that the proposal on the table from Judge Yelenosky sort  
24 of does that. It's doing that in regard to the fee  
25 charged by the court, because there are three different

1 fees, the e-filing fee charged by the court, the e-filing  
2 fee charged by the EFSP, and the e-filing fee charged by  
3 TexasOnline. I think this proposal would speak to the  
4 e-filing fee charged by the court, but like I said,  
5 subcommittee members, please correct me if I'm wrong, but  
6 the way it's worded it's talking about -- let me find the  
7 language. "All customary services," and this goes to  
8 filing fees. I don't know why e-filing fees would be  
9 treated differently under this language.

10 HONORABLE TOM LAWRENCE: You say "set by the  
11 court," isn't that in essence set by the county, though?  
12 Doesn't the county set that fee?

13 MS. PETERSON: The e-filing fee?

14 HONORABLE TOM LAWRENCE: Yeah. You've got  
15 TexasOnline. You've got the fee that the county charges.  
16 I thought the county set that, not an individual court.

17 MS. PETERSON: It is a county fee.

18 HONORABLE TOM LAWRENCE: And you've got the  
19 service provider fee.

20 CHAIRMAN BABCOCK: Well, can I -- I'm sorry,  
21 Elaine. Go ahead.

22 PROFESSOR CARLSON: Yeah, I've got a  
23 question. What's the current state of the law on open  
24 courts provision and filing fees?

25 MR. DOGGETT: Broad question.



1                   PROFESSOR CARLSON: I mean, am I mistaken  
2 that the courts have held that indigents have a  
3 constitutional right under the open courts provision and,  
4 therefore, when you comply with the rules for establishing  
5 indigency, you have a legal right to have fees waived,  
6 filing fees waived; is that not correct, or am I --

7                   MR. DOGGETT: I believe so.

8                   PROFESSOR CARLSON: Sax vs. Votteler or  
9 something.

10                  MR. DOGGETT: I mean, litigation hasn't been  
11 brought, but maybe it would be best to work this out  
12 rather than --

13                  PROFESSOR CARLSON: Well, I'm just wondering  
14 about if there's mandatory e-filing and if that is the  
15 state of the case law -- and I haven't looked at that in a  
16 long, long time, since we looked at Rule 145 -- it seems  
17 to me that there is a constitutional issue there for at  
18 least mandatory e-filing, unless Judge Lawrence's  
19 provision or suggestion got picked up where you would be  
20 excused from e-filing, and then it becomes a question of  
21 whether you have sufficient equal access to the court.

22                  MR. DOGGETT: We certainly considered it,  
23 but we think that since the JCIT five years ago thought  
24 that it was a good idea to do and Texas Equal Access to  
25 Justice Commission and the providers that I've talked to,

1 the folks I've talked to, think that we could probably  
2 figure out a way to put together a provider, you know,  
3 have a provider do it, that the solution might be best and  
4 quicker if we could find an avenue to solve it, because  
5 the courts ultimately could declare the current situation  
6 to be unconstitutional, but we're still stuck with the  
7 problem of how we do it.

8                   PROFESSOR CARLSON: It might have an  
9 implication on the contract that the Court has with their  
10 -- the legality clause in their contract.

11                   MR. DOGGETT: True.

12                   CHAIRMAN BABCOCK: Justice Bland, and then  
13 Lamont.

14                   HONORABLE JANE BLAND: Is the Travis County  
15 mandatory e-filing without exception? Are you saying that  
16 now if a particular type of case has to be e-filed and  
17 you've got an IOLTA certificate, your plaintiff still must  
18 e-file, or does Travis County carve out the exception and  
19 you're just saying it puts you on unequal footing with  
20 other litigants in terms of convenience and access after  
21 hours and that sort of thing?

22                   MR. MONK: I mean, I think it always puts  
23 you on unequal -- I mean, it's less convenient, you don't  
24 have the same tools available to you, but in Travis  
25 County, and again, I don't mean to focus on Travis County

1 at all. Travis County kind of -- the rules just kind of  
2 brought that issue to a head.

3 HONORABLE JANE BLAND: Except it sounds like  
4 it's mandatory there, so I'm sure they thought through  
5 this.

6 MR. MONK: It's mandatory, and there is a  
7 provision that allows for you to request an exception. It  
8 doesn't specifically -- it's not detailed specifically for  
9 people without the ability to pay. I think it's for good  
10 cause shown you can ask for an exemption for that, but I  
11 think there's a hearing required. It's not a -- it is --  
12 and to be fair to the district clerk's office, while they  
13 were very confused about this at first, and we -- you  
14 know, and when I was dealing with the service providers in  
15 Travis County, now I show up -- I'm always a little  
16 worried because they have a list, and they say, "This is  
17 an e-filed case."

18 But now I show up and they say, "This is an  
19 e-filed case," and I say, "I have an affidavit of  
20 inability to pay on file," and they say, "Okay,"  
21 hopefully; but, you know, for -- clearly that's not  
22 consistent necessarily with the court's order; but again,  
23 I don't -- and I don't think -- and this is obviously my  
24 opinion and I think -- and I think probably a lot of our  
25 younger lawyers would agree that I don't think that the --

1 you know, allowing us to always hand-deliver filings is  
2 the answer, because I think where all of us are going is  
3 e-filing; and I can't stress enough, I think what we're  
4 creating here is a two-tier way of accessing the courts.

5           And I know that -- and I feel I was  
6 mentioning this at lunch. I think I'm kind of in the  
7 middle because I use books for research and kind of later  
8 was introduced to the whole idea of, you know,  
9 e-researching or getting online, and there are attorneys  
10 in our office who will always hand file and then there are  
11 attorneys in our office who all they want to do is e-file,  
12 but I think where we're moving is all of us are going to  
13 e-filing. You look at Federal court, you look at kind of  
14 where things are going, and I think this is where we all  
15 need to go as a fairness issue and an access to justice  
16 issue.

17           CHAIRMAN BABCOCK: Lamont.

18           MR. JEFFERSON: Yeah, I was just going to  
19 underscore that point. You know, I mean, these two guys  
20 are the youngest guys in the room, right?

21           CHAIRMAN BABCOCK: Hey.

22           MR. JEFFERSON: Except for Justice Bland.  
23 But, I mean, I think it is -- access to the court is  
24 fundamental, and once you have the affidavit of indigency,  
25 I mean, if you qualify, you should have the same access to

1 the court as any other litigant, and it really is a huge  
2 advantage to be able to file electronically, and we need  
3 to find a way to solve this. It's not like hiring an  
4 expert, Buddy. I mean, I appreciate that there are  
5 different -- I mean, if you have more resources you have a  
6 better ability to fight your case, but we're not talking  
7 about advocacy. All we're talking about here is access to  
8 the courts, filing, something that is fundamental to a  
9 piece of litigation, and there's just got to be a solution  
10 to this that puts -- that gives everybody who has access  
11 to the courts equal access to the courts and not some  
12 litigants, you know, better access to the courts. That's  
13 fundamentally offensive.

14           The notion that they suggested that I think  
15 is a really elegant solution is having even the threat to  
16 these service providers that there's going to be some  
17 other service provider out there that's going to do the  
18 free stuff and we're going to use that service provider  
19 instead of anybody who is unwilling to waive their fees,  
20 that, I think just the threat is going to bring them  
21 around, and they're going to say, "We don't want some  
22 other competitor out there that's going to offer, you  
23 know, services to folks." I mean, "We want to be the  
24 one" -- you know, "We'll do that and we'll market  
25 ourselves as being the service provider that does that,

1 and we'll get more business that way or we'll get more  
2 publicity that way" or whatever, but I think absolutely  
3 we've got to find the solution that allows everybody at  
4 least the equal opportunity to file stuff at the court.  
5 That's just a fundamental right to the litigant.

6 CHAIRMAN BABCOCK: Buddy.

7 MR. LOW: But I wasn't just getting to that.  
8 I see it as having the court open to them. Now, I might  
9 drive a Chevrolet to get to court and one of my friends  
10 might fly a jet plane, but it's open to me, and it may  
11 take -- and I understand your point that now e-mail is not  
12 a luxury. That's just not really open unless you do. I  
13 see that argument, but I was using it in the sense that  
14 the courts are open if you're allowed to file it. It's  
15 just a question of the convenience and so forth. Does  
16 that make it really not open?

17 MR. JEFFERSON: Yeah, I think there's  
18 degrees of openness. You shouldn't be able to have an  
19 advantage in access to the court based on wealth.  
20 Everybody's access to the court -- and I'm not talking  
21 about, you know, how you get there, whether it's by car or  
22 by bus, but especially in this instance where all it's got  
23 to be is an electronic connection. An indigent person  
24 should have the ability to have an electronic connection  
25 just like anybody else.

1           CHAIRMAN BABCOCK: Richard Munzinger, and  
2 then Tom, and then Carl.

3           MR. MUNZINGER: Rule 145 as presently  
4 written applies to every district and county clerk in the  
5 state of Texas, and it says that an indigent does not have  
6 to pay costs or put up security for costs, whether  
7 plaintiff or defendant, by the execution of a particular  
8 affidavit, which if it survives a challenge then applies  
9 to that case. Am I correct in that?

10           MR. MONK: I think so.

11           MR. MUNZINGER: What distinguishes the  
12 problem at present is that TexasOnline stands between the  
13 district and county clerks and the litigant, and that is  
14 because of the unique arrangement that the state of Texas  
15 has chosen to solve the problem of e-filing, whether it's  
16 administrative or elsewhere. It does seem to me that a  
17 very strong argument can be made that the Texas Supreme  
18 Court has it within its authority and its rule-making  
19 authority to require that TexasOnline not adopt policies  
20 or insist on payments that preclude the application of  
21 Rule 145 in the electronic filing and the electronic  
22 practices.

23                   That still doesn't solve the problem of a  
24 fourth portal, if I am correct in my analysis, which is  
25 that the Supreme Court would have the authority to say --

1 it may be litigated, but certainly it passes more than the  
2 blush test in my opinion to say we have a situation in  
3 which litigants are in a two-tier system. The gentleman's  
4 point is correct. It is a two-tier system or fast  
5 approaching that, especially so in Travis County where  
6 e-filing is mandatory. It's a two-tier system. Not  
7 right. We're all equal in the eyes of the law. Supreme  
8 Court says, "TexasOnline, change your rule. You stand  
9 between the district clerk and the litigant, and it's our  
10 job to write rules that make litigants come to court  
11 equally. Fix this."

12 CHAIRMAN BABCOCK: Mr. Due Process Taking.

13 MR. MUNZINGER: TexasOnline is a government  
14 agency. It's a government agency.

15 HONORABLE NATHAN HECHT: Here's God, and  
16 here's the bureaucracy, somewhere kind of, and here's the  
17 Supreme Court of Texas. (Indicating)

18 CHAIRMAN BABCOCK: Tom.

19 MR. RINEY: There may be an open access to  
20 courts issue, but on a more pragmatic level I think it's  
21 undisputed from today from what we've heard that the  
22 funding for legal services is down drastically, that these  
23 folks are doing a good job with a very limited budget, and  
24 we can make them more efficient and make their dollars go  
25 farther if we can get them free online filing. We know



1 that it's a tremendous cost-saver. Anybody in private  
2 practice knows that. It's also a tremendous cost-saver  
3 for the courts, and what really happens is the Legislature  
4 has failed to fund the courts properly to allow for  
5 online, and we can't solve that today, but I don't have  
6 enough information about TexasOnline to know how we as a  
7 committee can advise the Court how to solve that problem.  
8 I mean, I'm open to hearing, but I don't know if we've got  
9 that within our power.

10 CHAIRMAN BABCOCK: Well, can I make a  
11 comment for just one second? It seems to me that we've  
12 identified the problem, but I don't think that this rule  
13 that Judge Yelenosky has -- or the language he's proposed  
14 comes even close to fixing the problem, and so it seems to  
15 me we have to think a little deeper if we're going to fix  
16 the problem by rule, and I wonder, I mean, we're just  
17 talking about a method of getting the papers from point A  
18 to point B. Could the Court by rule tell the post office  
19 that as long as this affidavit is on file you can't charge  
20 an indigent the cost of a stamp?

21 MR. LOW: Right.

22 HONORABLE TOM GRAY: Yes, we can tell the  
23 post office that.

24 CHAIRMAN BABCOCK: Well, we can tell them.

25 HONORABLE TOM GRAY: But they won't listen.

1 CHAIRMAN BABCOCK: We can tell them that.

2 MR. LOW: Can we effectively tell them?

3 CHAIRMAN BABCOCK: Can you tell Fed Ex or  
4 UPS that, "Hey, this package of pleadings, because there  
5 is an affidavit of indigency on file you can't charge  
6 them." So -- and we wouldn't think about doing that.  
7 It's just because electronic filing is a new thing, but  
8 it's really just a method of getting stuff from point A to  
9 point B, and it is a problem if there's -- if there's  
10 mandatory. I mean, that's much more serious than if it's  
11 not mandatory, but still indigents today bear the cost of  
12 postage. They bear the cost of any other method of  
13 getting stuff to the courthouse, so is it the policy of  
14 the Court to try to step in and fix that when they're  
15 going to have to deal with a private entity, that  
16 being NIC or Bearing Point, and a public entity? A pretty  
17 serious issue that's going to be very hard to do by rule,  
18 at least by Rule 145, it seems to me, and let me finish by  
19 saying I'm very sympathetic to your situation, too. The  
20 last thing -- you know, you're trying to get a pleading  
21 filed and all the sudden, you know, you've got to whip out  
22 your own MasterCard to do it on behalf of an indigent, and  
23 you can only do that so many times before you become  
24 indigent. There were a couple of other hands up before  
25 you guys. Jeff had his hand up. Somebody else. Pete.

1 MR. BOYD: I just wanted to see if I could  
2 get clarification on Travis County, because Travis County  
3 has a local rule that governs e-filing and then has  
4 entered orders saying "The following kinds of cases are  
5 subject to mandatory e-filing, and you shall not -- you  
6 shall not file paper copies pursuant to our local rule,"  
7 but the local rule has this statement in it that says,  
8 "The district court shall handle electronically  
9 transmitted documents that are filed in connection with an  
10 affidavit of inability to afford court costs in the manner  
11 required by rule -- Rule of Civil Procedure 145," which if  
12 I had read that yesterday, I would have thought, oh, well,  
13 that means that even if it's mandatory under the order  
14 pursuant to the local rule, if it's filed with an  
15 affidavit of inability, then under Rule 145 you don't have  
16 to pay, but you're telling me that's not how it actually  
17 works out in Travis County?

18 MR. MONK: No. And if you look online there  
19 is an order that specifically has to do with e-filing. It  
20 sets out the mandatory e-filing, and so --

21 MR. BOYD: Right, but that's the order that  
22 I was -- the 2008 order that has that exhibit with all the  
23 list of types of cases says "in accordance with our local  
24 rule," so that order is subject to their local rule, and  
25 the local rule says if it's an affidavit of inability then

1 it's subject to 145, so --

2 MR. MONK: The problem with -- the problem  
3 with the waiver of the fees for e-filing is that no one  
4 does it, and while it's possible that after -- I mean,  
5 I'll give you an example, because I went through this  
6 whole discussion with -- this is like a year and a half  
7 ago or whenever it was -- with the district clerk's office  
8 and with the service provider; and the problem is you go  
9 online and it says, "What's your credit card number,"  
10 right? It doesn't say, "Are you filing with an affidavit  
11 of inability to pay?" And when I found that I said,  
12 "Well, something has to be wrong here. Maybe there's  
13 another way I can do this." You know, called up the  
14 service provider.

15 Service provider says, "Well, no, we can't  
16 do that. You need to talk to the district clerk." I  
17 called the district clerk, and the district clerk says,  
18 "Well, no, if you're going to be e-filing that's the way  
19 you have to do it," and I never had to -- I was in a bit  
20 more of a rush, and so I ended up hand-filing it, which  
21 was a little bit of a problem at the time, but there is no  
22 mechanism by which you can do that.

23 Now, I suppose, as I mentioned initially, I  
24 could e-file, pay for it all, and then seek reimbursement.  
25 I would be the first person probably to do it in Travis

1 County, and I don't know how amenable they would be to us  
2 always doing that, e-filing, and I think that there are  
3 open courts arguments. I think that there are Rule 145  
4 arguments. The problem is there is not a mechanism at  
5 this point by which we can do that, so we're stuck with --  
6 you know, we're stuck with paying, and --

7 MR. DOGGETT: And all the local rules are --  
8 I mean, I saw a local rule, I was like, "Oh, good, I'll be  
9 able to e-file," and I get on and look for the spot where  
10 I check "affidavit of inability," just like in Federal  
11 court, right? Federal court, same thing, you file an  
12 affidavit, you check the thing, and it lets you go  
13 through. I mean, I thought it was --

14 MR. BOYD: Well, what that sounds like is  
15 it's not -- it's not a problem created by the rules. It's  
16 a problem created by implementation, inadequate  
17 implementation of the rules.

18 MR. DOGGETT: Knowingly, knowing we've asked  
19 -- remember, TexasOnline has been asked to change their  
20 systems, and they will not do it, and it's not just simply  
21 postage we're talking about. Postage takes three days to  
22 get there or four or maybe it never gets there. I don't  
23 know how many times you've ever filed a response to a  
24 motion for summary judgment three days before and hope it  
25 gets there. I don't do it that way for my clients because

1 I really want to make sure that response gets timely  
2 filed. So I really care about my clients, and I really  
3 want to make sure something gets there, and putting  
4 something in the post office and hoping that it gets there  
5 and I can make the motion later if it doesn't get there, I  
6 don't know, maybe that's how you practice, but that's not  
7 the way I practice at all.

8           And I want to have the same ability that my  
9 opposing counsel has to file something and make sure it's  
10 timely filed, and, frankly, trial judges prefer it. They  
11 want it that way because they can look at their cases  
12 beforehand, and so they're going to be able to look at the  
13 other guy's motion and not mine, because they're not going  
14 to bring it home, not going to bring that file home. They  
15 can access it online, so, I mean, we're not talking about  
16 -- this is not just postage. This is how it's fair, if  
17 it's fair for poor people not to have the same system as  
18 everybody else. This is not about postage.

19           CHAIRMAN BABCOCK: Pete.

20           MR. SCHENKKAN: First I want to say that the  
21 discussion we've been having for the last whatever it is  
22 now, 30, 45 minutes, an hour, is the reason why our  
23 subcommittee's thing is drafted the way it is, because we  
24 worked our way through this too and concluded this is not  
25 clear that this is a question of the rule. It's a

1 question of who has the authority to make TexasOnline and  
2 the private providers let people who are poor, defined by  
3 rule, not pay this fee, and it's not clear to us that this  
4 is a question of the rule.

5           It seems to me, if I can return to that in  
6 just a minute, what can we do by rule, now look at it in  
7 terms of the problem, which is TexasOnline and the  
8 electronic filing service providers. If they are allowed  
9 to increase the fee charged to those who are not indigent  
10 by enough to cover all the filing fees of those who are  
11 indigent, do they care? I would think not. So I believe  
12 the practical question is what is the cycle and the  
13 mechanism by which the deal under which the fee is set for  
14 the paying customers is up for review again? Who has  
15 authority over that and when, and then we're now ready to  
16 return to the question of what we can do by rule, and I  
17 think what we can do by rule is to say the first time it  
18 comes up you've got to set the fee at a level for the  
19 paying customers that will cover the cost of the free  
20 ones, because that's the deal.

21           CHAIRMAN BABCOCK: Justice Bland.

22           MR. SCHENKKAN: Only because we --

23           HONORABLE JANE BLAND: I want to ask --

24           MR. SCHENKKAN: -- because it is a matter of  
25 open courts.

1 CHAIRMAN BABCOCK: Whoa, whoa, whoa. One at  
2 a time.

3 HONORABLE JANE BLAND: I was going to ask  
4 David what makes a court reporter file a record when a  
5 party can't pay for it? I mean, I know they all do it,  
6 but is there some kind of enforcement mechanism or is it  
7 just --

8 MR. JACKSON: No, what happens, if they have  
9 an IOLTA certificate coming in, we don't. I mean because  
10 we know coming in --

11 HONORABLE JANE BLAND: Right. Right.

12 MR. JACKSON: -- it's a done deal.

13 HONORABLE JANE BLAND: I'm just saying it's  
14 a done deal that you're going to provide the free record.

15 MR. JACKSON: Exactly.

16 HONORABLE JANE BLAND: But why is that a  
17 done deal? Is there something that governs the court  
18 reporters that requires it, or, you know, I'm trying to  
19 figure out because court reporters are sort of independent  
20 contractors that are quasi-state employees, but then are  
21 paid for their time to prepare a record --

22 MR. JACKSON: Right.

23 HONORABLE JANE BLAND: -- when the party can  
24 afford it, but have to file it when the party can't, and  
25 how do we do that? How do we make them do that, because



1 why would -- you know, if we're trying to find out how to  
2 make it happen.

3 MR. JACKSON: Well, if we didn't have to do  
4 it we wouldn't, but the Court tells us we have to do it,  
5 so we do it. But our problem with it is if they are truly  
6 indigent we want to be part of that process to help them.

7 HONORABLE JANE BLAND: Right. No, no, and  
8 when I was saying -- I wasn't saying that there weren't  
9 any problems with indigency.

10 MR. JACKSON: Oh, okay.

11 HONORABLE JANE BLAND: I was just saying  
12 there are not a lot of problems about people lying in  
13 their affidavit if they get that far.

14 MR. JACKSON: Yeah, so --

15 HONORABLE JANE BLAND: But my issue is I  
16 know that if a court reporter who normally makes, you  
17 know, X amount of money for filing a record --

18 MR. JACKSON: Right.

19 HONORABLE JANE BLAND: -- doesn't make that  
20 money --

21 MR. JACKSON: And sometimes it can be a lot  
22 of money, several thousand dollars. Yeah.

23 HONORABLE JANE BLAND: Right. And so how is  
24 it that we don't pay the court reporter to do that when  
25 it's a case when someone has filed an affidavit of

1 inability to pay?

2 MR. JACKSON: Because you've told us that's  
3 what we're going to do, and we're going to do it.

4 HONORABLE NATHAN HECHT: They're paid to  
5 provide the record. If they don't do it, they go to jail.

6 MR. LOW: We had one that completed the  
7 record in Beaumont in jail. That's how you get them to do  
8 it.

9 CHAIRMAN BABCOCK: Roger, then Carl.

10 MR. HUGHES: I think the court reporter  
11 example shows pretty much what the core of the problem is.  
12 Court reporters are court officials. We have a section of  
13 the Government Code, and they can eventually if they don't  
14 perform their duties be held in contempt. TexasOnline  
15 unfortunately is not an officer of the court in any way,  
16 shape, or form, and certainly the electronic filing  
17 service providers are not officers of the court who can be  
18 ordered on paying contempt to perform services. I can see  
19 that perhaps the Court has the authority to tell the  
20 district and county clerks "waive your fees," but until  
21 I -- unless I were to study the statutes more, I'm not  
22 sure what the authority of the judiciary is to tell  
23 TexasOnline "waive your fees or else," and it may be that  
24 this is a -- I'm going to use the word again, a political  
25 thing where we will persuade the executive branch what the

1 benefits of doing this are, but as they say, sometimes you  
2 have to have an alternative, and maybe the alternative to  
3 take to them is, "Well, if you don't do it, somebody is  
4 going to file a class action and you'll be refunding a  
5 whole bunch of money at the end of the day, so let's work  
6 this out now," and I guess -- and so I end up with a  
7 question of how would -- you know, how can we approach the  
8 executive and be persuasive about the need to do this now  
9 rather than when things get desperate.

10 CHAIRMAN BABCOCK: Carl, and then Buddy.

11 MR. HAMILTON: I assume that most indigents  
12 don't have computers to file themselves, and in Federal  
13 court where it's mandatory I have to have some kind of a  
14 code to even file anything, so how does an indigent in  
15 Federal court file a pauper's affidavit? I mean, and  
16 something else after that, don't they have to go through a  
17 lawyer or somebody that's authorized to file to do that?

18 MR. LOW: You just don't see many of them.

19 MR. WALLACE: I think at least in the  
20 Northern District the rules just exempt them from  
21 e-filing, I think.

22 MR. RINEY: That's correct.

23 MR. WALLACE: They just file like everybody  
24 -- they just do a paper filing, and that's according to  
25 rule.

1 CHAIRMAN BABCOCK: Buddy.

2 MR. LOW: These people, they like it when  
3 they see each district going to mandatory e-filing because  
4 that increases.

5 CHAIRMAN BABCOCK: Right.

6 MR. LOW: But what if the Court says, "Okay,  
7 3(a) says no local rule can be inconsistent with these  
8 rules. We're going to pass a rule in these rules that  
9 says it's not mandatory anymore," and they say, "Well,  
10 wait a minute, maybe we'll consider" -- I mean, you know,  
11 because that's the only way, if the Court said that it's  
12 not mandatory, no court can pass -- even though they've  
13 approved the rule, it would be inconsistent with these  
14 rules.

15 CHAIRMAN BABCOCK: Well, but you'd want to  
16 add something to that. "It can't be mandatory unless you  
17 provide."

18 MR. LOW: Well, I just meant they can figure  
19 that out, you know, that "unless."

20 CHAIRMAN BABCOCK: Yeah.

21 MR. LOW: I'm talking about bargaining, and  
22 that's all we have is bargaining power.

23 CHAIRMAN BABCOCK: Yeah. R. H.

24 MR. WALLACE: Well, I agree with Tom while  
25 ago saying we don't know enough. I mean, I think every

1 one of us here, if we had a client in our office saying,  
2 "Here's a problem, how do we solve it," we would want to  
3 know, well, what's your deal with TexasOnline, how long  
4 does it last, when can you renegotiate it, and who -- you  
5 know, it's a business issue, like Pete said. It can be  
6 solved. TexasOnline will let them file for free. They're  
7 going to want more money for the people who do file.

8 CHAIRMAN BABCOCK: Yeah.

9 MR. WALLACE: So that's the answer, I think,  
10 but I don't know who can do that.

11 CHAIRMAN BABCOCK: Well, whoever it is it's  
12 not us. It's not us, so it seems to me there are two  
13 levels here. One is if e-filing is mandatory, then is it  
14 our recommendation to the Court that however they do it,  
15 whether it's by negotiation or by whipping them or  
16 whatever, that they try to get some concession from  
17 TexasOnline and from NIC to permit indigent e-filing upon  
18 the proper filing, or is it broader than that? Is it our  
19 recommendation that whether it's mandatory or not you want  
20 to allow indigents to have the same access to electronic  
21 filing that nonindigents have, and so we would recommend  
22 to the Court that they try to negotiate down the line  
23 whenever it's appropriate with TexasOnline and NIC to  
24 allow indigents, whether it's mandatory or not?

25 MR. LOW: Right.

1 CHAIRMAN BABCOCK: So how do we all feel  
2 about that?

3 MR. GILSTRAP: Chip, what's wrong with  
4 Buddy's idea?

5 CHAIRMAN BABCOCK: Nothing wrong with it.

6 MR. GILSTRAP: It sounds like it's a great  
7 idea. Just say, "No electronic filing unless you give it  
8 to -- free to indigent people."

9 CHAIRMAN BABCOCK: It can't be mandatory  
10 unless --

11 MR. GILSTRAP: Yeah, no mandatory filing  
12 unless you provide for free filing by indigents, and  
13 nobody gets it unless they do it.

14 MR. LOW: And then they figure out if they  
15 have to up the rates or what, and it doesn't look like  
16 somebody is paying for somebody else's filing.

17 CHAIRMAN BABCOCK: Okay. Gene.

18 MR. STORIE: You know, I don't know any of  
19 the details on this, but I think you've got to go through  
20 the Department of Information Resources, because all of  
21 this electronic stuff, it's more than just the courts.

22 CHAIRMAN BABCOCK: Yeah.

23 MR. STORIE: And it's done as sort -- as I  
24 understand it, as sort of a centralized block kind of  
25 program to get everybody everywhere onto the electronic

1 mode, so you may need to start there.

2 CHAIRMAN BABCOCK: Justice Gray.

3 HONORABLE TOM GRAY: Actually, I was headed  
4 right where he was going, that TexasOnline is not just the  
5 courts. It's this huge pipeline that is the interaction  
6 with all state agencies; and there's a contract, as I  
7 understand it, that is negotiated by the DIR, the  
8 Department of Information Resources, with what used to be  
9 Bearing Point, now I guess it's NIC; and so that is  
10 strictly a contract deal there.

11 What I was going to suggest, and this is  
12 based on my understanding that they come through the  
13 portal of TexasOnline, which is -- it's just a term for  
14 this pipeline that it comes through.

15 CHAIRMAN BABCOCK: Right.

16 HONORABLE TOM GRAY: And it goes through  
17 that to the district and county clerks of the 32 counties  
18 that are in the system. My question was why can't we --  
19 because OCA is an agency within the judicial branch that  
20 is not under DIR, why can't we do our own contract with  
21 some provider like NIC and say -- because I think we voted  
22 last time with regard to the TAMES project, and I say  
23 "we," me not voting for it, that it would be mandatory for  
24 the TAMES project in all of the appellate filings.

25 So, I mean, if that's an option with regard

1 to the appellate filings, it could be the same with regard  
2 to the county and district filings so that OCA makes a  
3 contract and we don't even use the TexasOnline portal, we  
4 do our own and take it out if NIC wants to negotiate it  
5 and -- but, again, that gets bigger than just writing a  
6 rule. It has to do with the contract provisions, but to  
7 go back to another comment, I think that Steve's comments  
8 and amendments to the rule address issues that are  
9 broader --

10 CHAIRMAN BABCOCK: Right. Right.

11 HONORABLE TOM GRAY: -- than just the  
12 e-filing.

13 CHAIRMAN BABCOCK: Yeah, I agree, and we're  
14 going to get to that in just a second. Alistair.

15 MR. DAWSON: I think that electronic filing  
16 should be available to all indigents. I wouldn't limit it  
17 just to those that -- where it's mandatory, and, secondly,  
18 it seems to me if the Court passes a rule that says if you  
19 have electronic filing it must be made available for free  
20 to those who qualify as indigents under the standards that  
21 we have, as a practical matter don't the people, whether  
22 it's TexasOnline or whomever, don't they then have to get  
23 in line and establish a procedure where it will be made  
24 free? Doesn't that put the burden on them to figure out  
25 how it's going to get done, and if the Court just -- if



1 the Court is inclined, just issues the rule and then those  
2 parties that have electronic filing, those entities or  
3 counties, however they have it, it would be up to them to  
4 figure out how to implement it, unless I'm missing  
5 something.

6 CHAIRMAN BABCOCK: Okay. Let me see if we  
7 can turn to page one of Judge Yelenosky's proposals and  
8 look at 145(a), the affidavit. He proposes striking the  
9 language "of an original action," and Kennon before lunch  
10 explained why that was proposed by the subcommittee. Do  
11 we have any comments on that proposal?

12 MR. SCHENKKAN: You need a motion?

13 CHAIRMAN BABCOCK: Did somebody say  
14 something?

15 MR. SCHENKKAN: I was asking do you need a  
16 motion?

17 CHAIRMAN BABCOCK: Not -- we don't, because  
18 since nobody is saying anything I assume that that's okay  
19 with everybody.

20 MR. LOW: Right.

21 CHAIRMAN BABCOCK: So speak now or forever  
22 hold your peace, and we'll recommend that with no dissent.  
23 Let's go to the second page. We've really been talking  
24 about the last sentence at the top of the second page  
25 about notifying TexasOnline, but let's focus instead on

1 the proposed language. "Throughout the pendency of the  
2 suit, unless and until any contest to the affidavit is  
3 sustained by written order" and then striking some  
4 language, say "provide all customary charges without  
5 charge." Justice Gray.

6 HONORABLE TOM GRAY: I would like to see  
7 "charge" changed to "advance payment" because that's the  
8 same language that's used in the appellate rule; and, in  
9 fact, at the end of the proceeding if the plaintiff hits  
10 the home run and they will pay as a result, it's  
11 actually the cost -- the payment is security for costs,  
12 and so "advance payment" covers that, and costs may be  
13 assessed against the loser.

14 CHAIRMAN BABCOCK: Very good point. Anybody  
15 else? Okay. Any dissent, with the friendly amendment  
16 from Justice Gray to this language? Hearing no dissent,  
17 we will move on.

18 I think we've beaten this last sentence to  
19 death, and I'm sure the Court knows what the problems are,  
20 and I think there's consensus this sentence won't fix it.  
21 Unless anybody thinks differently let's move on to the  
22 contents of the affidavit. Judge Yelenosky proposes that  
23 we add the sentence, "The affidavit must not contain a  
24 Social Security number, a checking account number, or a  
25 place of birth." Justice Gray.

1 HONORABLE TOM GRAY: With regard to the  
2 checking account number, the form that he attached as sort  
3 of an egregious example I think had some account  
4 information beyond just the checking account, so I would  
5 make that after "Social Security number," "and account  
6 number" so that it prohibits all account numbers, not just  
7 checking account numbers, and I didn't remember a need for  
8 a date of birth as well in an affidavit of indigency. So  
9 if you're going to start talking about things that it  
10 requires to leave out, I would require that it also leave  
11 out a place or date of birth.

12 CHAIRMAN BABCOCK: What is the reason for  
13 including this information to begin with?

14 HONORABLE TOM GRAY: The problem, as I  
15 understood it, from what Kennon had presented and what I  
16 was reading is that the counties were requiring the  
17 inclusion of that information in the form affidavit that  
18 they required the indigents to fill out, and therefore,  
19 Steve was trying to figure out a way to keep them from  
20 being able to ask that information.

21 CHAIRMAN BABCOCK: Yeah, but my question,  
22 were they just doing it to be mean or because they're  
23 curious or being voyeurous or what? I mean, was there a  
24 reason why they wanted -- Justice Christopher has the  
25 answer to that question.

1                   HONORABLE TRACY CHRISTOPHER: That's how  
2 they confirm that they're indigent, with their Social  
3 Security number and their date of birth. That's how they  
4 can check to see that they're really getting government  
5 aid or they're really, you know, who they say they are. I  
6 mean, you have to give your Social Security number now  
7 when you file a lawsuit. So the idea that we wouldn't  
8 require it in the affidavit here seems wrong to me.

9                   We have recently in Harris County, because  
10 we were having a lot of problems with our county attorney  
11 challenging every affidavit of indigency, we have recently  
12 done forms for people to fill out because those are not  
13 readily available. That was one of the suggestions of the  
14 poverty law person who wrote the letter, Ms. Willett, and  
15 I actually think that we should do that, that we should  
16 have forms that are in the rule book that are easy for  
17 people to get a hold of and know what they're supposed to  
18 do.

19                   We have solved the sensitive data problem by  
20 indicating -- by basically you've got your affidavit of  
21 indigency with your financial information attached, and we  
22 don't file that financial information in the public  
23 records for people to come look at it. So that's how  
24 we're getting away -- you know, moving away from -- that's  
25 sort of our first step in protecting sensitive data. We

1 don't file all of that information, but I would really  
2 recommend that we have -- that we have form affidavits for  
3 this, because, for one thing, the affidavit for appeal has  
4 different requirements than the affidavit for trial.  
5 They're slightly different. It's a weird -- you've got to  
6 have one -- you've got to have more information, less  
7 information between the two filings, and I just think it  
8 would be a lot clearer if we had forms in the trial court  
9 rules and a form in the appellate court rules, so rather  
10 than piecemealing saying, you know, "don't include this"  
11 let's address the issue head on and do a block.

12 CHAIRMAN BABCOCK: Be careful, your  
13 subcommittee's going to get in the middle of this.  
14 Richard Munzinger.

15 HONORABLE TRACY CHRISTOPHER: I don't think  
16 my subcommittee ever does anything that's good. Right,  
17 Bobby?

18 CHAIRMAN BABCOCK: I don't know, you're on  
19 the agenda still today.

20 HONORABLE TRACY CHRISTOPHER: Yeah, but I'm  
21 just like a visitor to that subcommittee. That's not even  
22 my subcommittee.

23 MR. MEADOWS: She has a starring role on our  
24 subcommittee.

25 CHAIRMAN BABCOCK: Yeah, you're going to be

1 our roving subcommittee person.

2 HONORABLE TRACY CHRISTOPHER: Well, I'll be  
3 glad to give you our affidavits to start with.

4 MR. MUNZINGER: I agree with the judge.  
5 Date of birth and Social Security number may be crucial to  
6 proper identity. I have a son with the same first and  
7 last name as mine. He's rich and I'm poor.

8 CHAIRMAN BABCOCK: Other way around.

9 MR. MUNZINGER: No, he's rich, and I'm poor.  
10 I said that intentionally, but the truth of the matter is  
11 those are pertinent subjects for inquiry to determine  
12 whether the person is telling the truth, whether he's the  
13 poor Richard Munzinger or the rich Richard Munzinger. In  
14 the rush to do this you can't disarm the people who are  
15 charged with the obligation to make sure that those who  
16 claim to be poor are, in fact, who they claim to be.

17 CHAIRMAN BABCOCK: Yeah, Roger.

18 MR. HUGHES: I mean, I like the judge's  
19 suggestion of having a separate form easily available. My  
20 only concern, and it's not one I like, but I know it's one  
21 that might be raised is, you know, open records and sealed  
22 records. I can still see somebody saying, "Well, if I  
23 give you this information, I don't care where you put it,  
24 somebody could make you turn it over because you can't  
25 seal that court's record." And I fully understand this

1 information is necessary to verify whether a person truly  
2 is indigent or not, but I could see the person turning it  
3 in going "I understand your need for it, but I don't want  
4 the whole world to have it," and then somebody, you know,  
5 newspaper, public-spirited person says, "I'm sorry, you've  
6 given this information in a government record, Rule 76.  
7 If you don't like it, get it sealed." So I'm wondering if  
8 anyone sees that as a problem, or maybe since I don't do  
9 Rule 76 work often there's something here I don't see.

10 HONORABLE TRACY CHRISTOPHER: No, we're just  
11 violating 76. Sorry.

12 MR. HUGHES: I sense it's practical, but --

13 HONORABLE TRACY CHRISTOPHER: That's just  
14 what we're doing at this point.

15 CHAIRMAN BABCOCK: It's actually 76a.

16 HONORABLE TRACY CHRISTOPHER: 76a.

17 CHAIRMAN BABCOCK: Yeah, Pete.

18 MR. SCHENKKAN: We were concerned about --  
19 in the subcommittee about the privacy problem of having  
20 this information available and not so much for either of  
21 the things you identified, but rather from the people who  
22 do identity theft and who would go to the courthouse and  
23 just scrub the files down and take these numbers for  
24 everybody and do with them whatever they can do with them.

25 We were of the view, which could be wrong,

1 and Judge Christopher explained why we might be wrong, but  
2 it could be wrong that the problem that meant you needed  
3 this information wasn't a big problem, and we were  
4 therefore prepared to run the risk that there were going  
5 to be some false affidavits. Once people knew they didn't  
6 have to give their Social Security number, there were  
7 going to be more false affidavits, and we were prepared to  
8 run that risk as not being very big, if I remember our  
9 discussion correctly enough, Kennon.

10           Now, if the risk is, in fact, appreciable  
11 and there are some people that are willing to put the time  
12 and energy into using the available information to check  
13 to bring it still lower then I think we're in this effort  
14 of trying to at least make it harder on the users by  
15 having the thing that is filed of the public record not  
16 have this information in it and the thing that is either  
17 kept confidential in violation of Rule 76a or is not kept  
18 in violation of Rule 76a, it's just not made as easily  
19 available.

20           HONORABLE TRACY CHRISTOPHER: It's here  
21 somewhere.

22           MR. SCHENKKAN: It's here somewhere.

23           HONORABLE TRACY CHRISTOPHER: It's here  
24 somewhere.

25           MR. SCHENKKAN: And if you want to come work



1 at it hard enough you can get it from us. That's my  
2 question, is it seems to me we ought still to have  
3 whatever is the publicly filed affidavit not have this  
4 privacy information in it, because if you need this stuff  
5 at all for checking, I have no opinion on that, we can at  
6 least put it in the second tier and make it harder.

7 CHAIRMAN BABCOCK: Judge Christopher.

8 HONORABLE TRACY CHRISTOPHER: I mean, we're  
9 kind of back to our old problem of the sensitive data and  
10 what we're going to do with it in court records, and this  
11 is just one of the many problems we have in terms of our  
12 court records, especially now that they're all, you know,  
13 online for people to look at.

14 CHAIRMAN BABCOCK: Well --

15 HONORABLE TRACY CHRISTOPHER: So I still  
16 think that rather than doing that the better thing would  
17 be to say the affidavit is going to be public, my  
18 affidavit that says I'm too poor, and the attached  
19 financial information that people need to look at to  
20 verify that, that the county attorney needs to verify  
21 that, in fact, they are poor, we make that a sensitive  
22 document somehow, some way, in some shape.

23 CHAIRMAN BABCOCK: Okay. Let's -- let's  
24 take a quick vote on this language and then we're going to  
25 move on to problem No. 4, and everybody who is in favor

1 of --

2 HONORABLE TOM GRAY: Chip? Chip?

3 CHAIRMAN BABCOCK: Yes.

4 HONORABLE TOM GRAY: Respectfully I think  
5 we're all saying the same thing, leave it out of the rule  
6 and put it in an attached affidavit. I mean, don't put it  
7 in the affidavit, but put it in an attachment if it's  
8 going to be anywhere, but we all would prefer promulgated  
9 form of affidavit.

10 CHAIRMAN BABCOCK: Well, if that's how you  
11 feel then you're going to vote --

12 HONORABLE TOM GRAY: Okay.

13 MR. JEFFERSON: On the language in the rule,  
14 though, where it says "the affidavit must not contain," I  
15 think that's kind of the wrong -- the wrong emphasis here.  
16 I mean, we're not -- I think what we're trying to say is  
17 the affidavit can't be deemed deficient if it contains  
18 this information. I mean, you --

19 CHAIRMAN BABCOCK: That's not the intent of  
20 the drafters, I don't think. The intent of the drafters  
21 is to exclude this information from the affidavit.

22 MR. LOW: Right.

23 MR. JEFFERSON: Well, I thought the intent  
24 was to say that if you want to prove that you're indigent  
25 you're not going to put your Social Security number in an

1 affidavit that you file with the court. You don't have to  
2 put your Social Security number in an affidavit that you  
3 file with the court.

4 CHAIRMAN BABCOCK: Well, that's not the way  
5 this is drafted.

6 MR. SCHENKKAN: We actually meant "must" and  
7 the reason is because it was our understanding in --  
8 subject to reality checks of people, but it was our  
9 understanding that the problem was that clerk by clerk,  
10 some clerks were saying this is required to be in it, and  
11 we're saying, no, you've got a statewide rule that you  
12 can't require that to be in it.

13 MR. JEFFERSON: Right, but that's not what  
14 this says. This doesn't say that you can't require it to  
15 be in it.

16 MR. LOW: No.

17 MR. JEFFERSON: It says it must not be in  
18 it.

19 MR. MUNZINGER: Not so.

20 CHAIRMAN BABCOCK: I sensed from the  
21 discussion that the intent was to tell the clerks you  
22 can't require that, and without getting hung up on the  
23 specifics of the language, because Lamont makes a good  
24 point, it's not exactly what it says, but can we vote on  
25 the intent of the subcommittee? Is it a good idea with a

1 statewide rule to tell the clerks that they may not  
2 inquire about Social Security number, checking account  
3 number, or place of birth?

4 MR. JEFFERSON: That's a slightly different  
5 question, though, isn't it? I mean, are we talking about  
6 now what's in the affidavit or what the attesting party  
7 can actually get in the form of information?

8 CHAIRMAN BABCOCK: We're talking about the  
9 affidavit.

10 MR. MUNZINGER: The problem with that is, is  
11 the affidavit just the sworn portion or does it include  
12 material attached to it and incorporated by reference  
13 explicitly or implicitly that includes the Social Security  
14 number, et cetera? Anything that identifies this person  
15 as the pauper that's used by the clerk to determine  
16 whether the person is or is not a pauper is the affidavit  
17 filed of record, so you're playing word games if you say,  
18 "Don't include it in an affidavit but include it in a form  
19 attached to the affidavit." It's a word game.

20 MR. LOW: Right. Right.

21 CHAIRMAN BABCOCK: Okay. So we're not into  
22 word games here on the rules advisory committee for sure.  
23 Judge Christopher.

24 HONORABLE TRACY CHRISTOPHER: Well, again, I  
25 still think this is a bad fix. The first sentence says,

1 "The affidavit must contain complete information as to a  
2 party's identity." Social Security, date of birth, place  
3 of birth, that's complete information to a person's  
4 identity.

5 MR. MUNZINGER: Absolutely.

6 HONORABLE TRACY CHRISTOPHER: So, I mean,  
7 that's what you need to show who you are.

8 CHAIRMAN BABCOCK: Okay.

9 MR. LOW: And if it has that, where can  
10 somebody say, "Look, this says I don't have to have an  
11 affidavit"? What tells you that you're entitled to that  
12 information at all? Because it implies it to me.

13 CHAIRMAN BABCOCK: That's right, I agree.  
14 Okay. So forget about the specific language, but  
15 everybody who is in favor of telling the clerks that they  
16 cannot ask for Social Security number, checking account  
17 number, or a place of birth, raise your hand.

18 Everybody that is against, raise your hand.  
19 All right. By a vote of 13 in favor and 18 against,  
20 that's the recommendation of the committee. Kennon, let's  
21 go on to problem four.

22 I'm sorry, did I say 13? I meant to say 3  
23 in favor, 18 against.

24 MR. SCHENKKAN: Our strength is the strength  
25 of 10 because our hearts are poor.

1           CHAIRMAN BABCOCK: It was -- the mistake was  
2 understandable. It was ballot box 13 that only had three  
3 votes in it, at one point in time anyway.

4           MS. PETERSON: This is the part that Judge  
5 Lawrence I think will speak to; is that correct, Judge?

6           HONORABLE TOM LAWRENCE: All right, problem  
7 four, in eviction cases, Rule 749a allows a tenant to  
8 appeal a justice court decision by filing a pauper's  
9 affidavit. However, there is no provision in eviction  
10 rules similar to Rule 145 to prohibit contests to the  
11 affidavit when an IOLTA certificate is filed, and that is  
12 true, there is not, and the reason I think is because the  
13 Legislature has spoken to this. Texas Property Code  
14 24.0052 has some pretty specific provisions for a pauper's  
15 affidavit appeal in an eviction, and they require a number  
16 of things that have to be in the affidavit, set forth the  
17 procedures. They're not necessarily in conflict with the  
18 Rules of Procedure that deal with appeals, but it's pretty  
19 clear what the Legislature wants, and they make no  
20 provision for an IOLTA certificate or a 145 certificate of  
21 any type to be filed.

22           They have their own specific mechanism, so I  
23 don't know that the Court can do much about this, but,  
24 however, assuming the next question that will be asked is  
25 if we thought it was a good idea what would the change be,

1 I think that you could simply add to paragraph 749a, in  
2 paragraph (3) add a No. (4) and track the language in Rule  
3 145 to allow that. That would be the fix, that would be  
4 the easy fix if the Court wanted to and felt they could do  
5 that. I don't know how you get around the Property Code,  
6 though.

7 CHAIRMAN BABCOCK: Okay. Richard.

8 MR. MUNZINGER: Well, I am opposed to a rule  
9 that would forbid a party from contesting somebody's  
10 pauper's affidavit because they had been screened or  
11 certified to have been screened by their own lawyer. I  
12 don't understand that. I do understand that those offices  
13 that provide free legal services are required to screen  
14 their clients and what have you, but why should I as a  
15 litigant be required to accept their screening? I don't  
16 trust them. I'm saying that -- I'm saying that for  
17 purposes of argument, why should I trust you? Why should  
18 I be deprived of a right that I have because you work for  
19 a poverty law office? Go fly a kite. I'm a litigant in  
20 Texas. I've got rights. That's a bad rule, has no place  
21 here.

22 CHAIRMAN BABCOCK: So you're against it.

23 MR. MUNZINGER: In your effort to help poor  
24 people -- in your effort to help poor people you're  
25 depriving other people of equal rights their rights. Why

1 should I be deprived of the right to make you prove your  
2 poverty, for god sakes. "I don't trust these people.  
3 Let's see what it is, Judge." Takes an hour of the  
4 judge's time, 30 minutes of the judge's time or the  
5 clerk's time. That's no rule. We don't need that rule.

6 CHAIRMAN BABCOCK: Professor Hoffman.

7 PROFESSOR HOFFMAN: I have a different  
8 question. After the IOLTA crisis and now a bunch of the  
9 funding is coming from the Legislature, are there now  
10 programs that are no longer funded by the IOLTA program  
11 because they're now funded by the Legislature and that's  
12 going to necessitate some clarification on that rule?  
13 Does anybody know the answer?

14 MR. DOGGETT: Response?

15 CHAIRMAN BABCOCK: Yeah.

16 MR. DOGGETT: The IOLTA program is the Texas  
17 Access to Justice Foundation is the IOLTA program.

18 PROFESSOR HOFFMAN: So if the money comes  
19 from the Legislature it --

20 MR. DOGGETT: It goes right into that  
21 program. That's who's going to actually end up doing it.

22 PROFESSOR HOFFMAN: Never mind.

23 CHAIRMAN BABCOCK: Justice Bland.

24 HONORABLE JANE BLAND: Well, to respond to  
25 Richard, I think that if they've got the certification



1 that means they've already been screened.

2 MR. MUNZINGER: No, I understand that.

3 HONORABLE JANE BLAND: And so the whole idea  
4 is once they get one of these certificates they've applied  
5 to the government for Legal Aid, and the government said,  
6 "You qualify," and so then we're talking about wasting  
7 judicial resources to go through a whole other hearing  
8 about it unless you think they've defrauded Lone Star  
9 Legal Aid or whoever.

10 MR. MUNZINGER: I was being argumentative  
11 when I said I don't trust them, but look at this for just  
12 a moment.

13 HONORABLE JANE BLAND: You were being  
14 argumentative?

15 MR. MUNZINGER: Forgive me. It is a  
16 judicial function to determine whether a person may come  
17 to court and not pay costs. There are distinguishing --  
18 you are distinguishing between citizens. This citizen  
19 must pay all court costs to seek justice in our courts.  
20 This citizen need not because this citizen is a pauper.  
21 Who makes that decision? It ought to be the court or an  
22 agency of the judicial department of the government that  
23 makes that decision and not a law office or somebody else.  
24 That's all I'm saying. How many people are going to  
25 contest the certification of the law office? I don't

1 know. But why would you on the front end of it deprive a  
2 litigant of the right to contest that point? You want  
3 people to be happy -- not happy, but at least accept --

4 HONORABLE JANE BLAND: Well, wouldn't this  
5 be --

6 MR. MUNZINGER: Let me finish my sentence,  
7 please.

8 HONORABLE JANE BLAND: I'm sorry. I'm so  
9 sorry.

10 MR. MUNZINGER: You want people to be happy  
11 with the judgment of the court and to respect the process.  
12 Why should I be deprived of my right to contest your claim  
13 in court, and when I'm told that I can't because the  
14 southern poverty law office has determined that this is a  
15 poor person and they're suing you for whatever it is that  
16 they're suing you and I can't contest this? "No, you  
17 can't."

18 Wow, seems to me the deck is stacked against  
19 me. Just let -- I don't have a problem with the  
20 certification. Just don't take away my right to contest  
21 it and make them prove it to the judicial branch of  
22 government, which is the branch you're in front of.

23 CHAIRMAN BABCOCK: Lamont, and then Justice  
24 Guzman.

25 MR. JEFFERSON: Right, I mean, I think the

1 point is Rule 145 already says that, but it doesn't apply  
2 to the circumstance of the new rule, but Rule 145 says  
3 that an IOLTA certificate can't -- if you have an IOLTA  
4 certificate provided by an attorney it can't be contested,  
5 and so what this --

6 MR. MUNZINGER: Bad rule.

7 MR. JEFFERSON: What this rule is designed  
8 to do is to make Rule 749a consistent with Rule 145 so  
9 that in justice courts you can do the same thing that you  
10 can do in district courts.

11 MR. MUNZINGER: Well, we ought to amend Rule  
12 145.

13 MR. JEFFERSON: Yeah, well, maybe, but we're  
14 beyond that, but I think -- I mean, we talked about this,  
15 and I think Judge Lawrence is exactly correct, that I  
16 don't see how we get beyond the statute because the  
17 statute doesn't -- there is a statute that specifically  
18 provides what you have to have to proceed in justice  
19 court, and it doesn't have an IOLTA exception to  
20 contesting a pauper's affidavit. So we can make a rule  
21 that provides for that, but I don't see how we can  
22 overrule what the Legislature has done.

23 CHAIRMAN BABCOCK: Justice Guzman.

24 HONORABLE EVA GUZMAN: I had a question  
25 about the Property Code, and, Judge Lawrence, I don't know

1 if you know this, but is the criteria or the information  
2 substantially different from that that would be obtained  
3 in the -- from the agency people, the IOLTA certifying  
4 agency?

5                   HONORABLE TOM LAWRENCE: Well, the procedure  
6 for handling the pauper's affidavit appeal is essentially  
7 the same in the Property Code as in the appellate rules  
8 for evictions. The eviction rules do not specify the  
9 information. They just say "an affidavit of inability."  
10 It's the Legislature that came in with the specifics as to  
11 exactly what has to be in that affidavit, and I would  
12 point out that you probably remember fondly seven years  
13 ago when we worked on the eviction rules revisions. This  
14 language in the Property Code was pretty much the exact  
15 language that this committee had adopted and sent up to  
16 the Supreme Court that was subsequently adopted by the  
17 Legislature in the Property Code. So this was actually  
18 the wording that we had to fix this, and we had some other  
19 things that we were changing. Number five we're going to  
20 talk about in a second, but the Legislature I think has  
21 essentially preempted the affidavit of inability for  
22 appeals.

23                   Now, no one asked the question about appeals  
24 of justice court suits under Rule 572, but there's also no  
25 provision for an IOLTA certificate in that either. Now, I

1 know anecdotally that some JPs accept the 145 IOLTA  
2 certificate and allow the appeal, and others may take the  
3 position that, no, there's no provision for it in these  
4 rules. So I don't know if -- the Court could if they  
5 wanted to make 145 applicable, clearly applicable, to Rule  
6 527. It's not clear now that it is.

7                   CHAIRMAN BABCOCK: Okay. Other than  
8 Richard's feeling about the last sentence of this  
9 proposal, are there any other comments to the proposal to  
10 add the subparagraph (4) derived from 145?

11                   HONORABLE TOM LAWRENCE: Now, wait a minute.  
12 The subcommittee is saying that it cannot and should not  
13 be changed. This language is -- is sort of to anticipate  
14 the question, "Well, if you thought it was a good idea,  
15 how would you change it," but the subcommittee doesn't  
16 think that you can do anything to change Rule 749a in this  
17 regard.

18                   CHAIRMAN BABCOCK: Sorry, I misread that,  
19 and I know we have at least one vote for not expanding the  
20 poison of 145 to Rule 749, but what does everybody else  
21 feel? Anybody else have an opinion about that?

22                   HONORABLE NATHAN HECHT: Assuming that it  
23 could be done legally within the Rules Enabling Act,  
24 should it be done?

25                   CHAIRMAN BABCOCK: Subcommittee felt what,

1 Judge?

2 HONORABLE TOM LAWRENCE: I'm sorry, I didn't  
3 catch the question.

4 HONORABLE NATHAN HECHT: Assuming that it  
5 could be -- assuming that the Rules Enabling Act allows  
6 the change and the modification in the Property Code and  
7 the Court thought that was a good idea in the abstract,  
8 should it be done in the sense that is this a good idea in  
9 749a?

10 HONORABLE TOM LAWRENCE: Well, if the Court  
11 thought it was a good idea, then this language at the  
12 bottom of page 13 where we add a paragraph (4) to Rule  
13 749a would be the way to do that.

14 CHAIRMAN BABCOCK: That's not the question.

15 HONORABLE TOM LAWRENCE: I'm sorry.

16 HONORABLE NATHAN HECHT: No, I'm asking, is  
17 (4) a good provision? I mean, if you could make the law  
18 any way you wanted it, would you add (4)?

19 MR. JEFFERSON: And I think that other than  
20 Richard's comments, I mean, if we're going to accept 145  
21 then I think we ought to change 749a if we've got the  
22 ability to do it, because there's no common sense reason  
23 why we wouldn't, why we would accept an IOLTA certificate  
24 in district court but not in justice court.

25 CHAIRMAN BABCOCK: Justice Gray.

1 HONORABLE TOM GRAY: My only comment on that  
2 is the same as I made back when we were talking about the  
3 change to 145. I wish that we would make it where once  
4 determined to be indigent or accepted as indigent in a  
5 court it continues on through the appellate process as  
6 well so that we don't have to revisit it under Rule 20  
7 again and again. I mean, it just -- until somebody comes  
8 in and shows evidence to the contrary, once indigent it  
9 goes through the system until that proceeding is over.

10 CHAIRMAN BABCOCK: Judge Lawrence, in your  
11 response to Justice Hecht's question, if you could do it,  
12 would you do it?

13 HONORABLE TOM LAWRENCE: Well, personally,  
14 no. I would rather have the ability to have a hearing and  
15 have the other party be able to present some evidence or  
16 testimony to rebut it. I would like to allow the court  
17 the discretion to rule on this, but I understand the  
18 Court's already adopted 145, so I don't know what the  
19 rationale would be to allow 145 in appeal on other types  
20 of cases and not be used for this.

21 CHAIRMAN BABCOCK: Okay.

22 HONORABLE TOM LAWRENCE: It wouldn't seem  
23 consistent.

24 CHAIRMAN BABCOCK: Anybody else have any  
25 reaction to Justice Hecht's question? If you could do it,

1 should you do it?

2 HONORABLE DAVID PEEPLES: I can think of one  
3 argument each way. In favor of what Richard Munzinger  
4 says, I think it's healthy when people know that their  
5 decisions in a law office can be reviewed in court. It  
6 just has a healthy influence on their decision-making if  
7 they know, you know, I'm not making a total decision, I  
8 may have to justify what I've done in court. That's an  
9 argument for Richard.

10 On the other hand, this applies only when a  
11 lawyer is representing someone for no fee and no  
12 contingent fee. How many times are lawyers going to do  
13 that unless the person really is indigent? So that's an  
14 argument for carrying it forward, and I'm not sure where I  
15 come down on it.

16 CHAIRMAN BABCOCK: So you feel strongly both  
17 ways?

18 HONORABLE DAVID PEEPLES: Just trying to  
19 look at all the angles.

20 CHAIRMAN BABCOCK: Justice Bland.

21 HONORABLE JANE BLAND: Well, and, you know,  
22 the fact that the attorney filed the certificate means  
23 that the court is not without recourse if it's been forged  
24 or faked. I mean, the idea is here we have an officer of  
25 the court filing this certificate because they've done the



1 necessary screening, and there is an inordinate amount of  
2 time spent by judges and their clerks on these issues, and  
3 so if this has all been done and an attorney is willing to  
4 represent that it's been done correctly, then, you know,  
5 that's a huge efficient -- from an efficiency standpoint  
6 it saves a lot of time, and if they're lying about it,  
7 they can be sanctioned and the trial judge can order them  
8 to pay money to the equal access for justice fund.

9 CHAIRMAN BABCOCK: It's all coming around, I  
10 can see that. Justice Patterson.

11 HONORABLE JAN PATTERSON: Another reason to  
12 allow it is because the process varies and practice varies  
13 so much among all of these courts, that for there to be a  
14 statement that it's permitted I think it's a healthy  
15 thing. It's a bright line practice, and so I would favor  
16 it.

17 CHAIRMAN BABCOCK: Okay. Any other thoughts  
18 about that? Okay. Who has got problem five?

19 HONORABLE TOM LAWRENCE: That would be me,  
20 too.

21 MS. PETERSON: Yes.

22 HONORABLE TOM LAWRENCE: All right. The  
23 issue is in the appeal process in eviction cases a  
24 conflict exists between Rule 749b and section 24.0053 of  
25 the Property Code resulting in indigent tenants being

1 unfairly denied the ability to stay in possession of their  
2 homes pending appeal. Well, the conflict is that in the  
3 Property Code if someone is granted a pauper's appeal then  
4 they are required to pay rent as it becomes due into the  
5 registry of the court, either JP court or county court,  
6 and under Rule 749b if the pauper's affidavit of appeal is  
7 granted they have to pay one month's rent immediately  
8 whether or not it's even actually necessarily owed again,  
9 but they have to pay one month's rent immediately and then  
10 another month's rent as it becomes due. So there is more  
11 of a burden on the indigent tenants to come up with more  
12 money for rent under the Rules of Procedure than under the  
13 Property Code.

14           I think frankly the Property Code provision  
15 makes more sense. They shouldn't have to pay rent until  
16 it's actually due. Now, there are a couple of ways to fix  
17 this. There actually is a provision in the Property Code,  
18 24.0053, that has provisions for this, and it sets out  
19 that in the judgment in an eviction you have to put what  
20 the monthly rent is. You also have to put whether or not  
21 any portion of that is paid by the government, what  
22 portion is paid by the government, what portion is paid by  
23 the tenant, so that's all in the judgments now or is  
24 supposed to be.

25           What is not currently in the judgments is

1 the date the rent is due because that's not required by  
2 the Property Code, but in order to really give effect to  
3 what the poverty law section wants to do, which is have  
4 rent paid as it becomes due, you also need to know when  
5 the rent is due and what day it's due. It's not always  
6 due the first of the month. It's due at varying times.  
7 It depends on the lease agreement. So you have to, first  
8 of all, amend Rule 748, which is the judgment and the  
9 writ, to at least put the date in; but in my opinion, if  
10 you're going to go ahead and amend Rule 748 then you might  
11 as well go ahead and put all the provisions for the  
12 judgment that are already in the Property Code that are  
13 required, go ahead and put those in there also.

14           Much of the language in 748 and the other  
15 rules comes from the eviction revisions that we approved  
16 seven years ago. Some of the things that really didn't  
17 apply were taken out. You could argue, I suppose, that  
18 not everything that is in these proposals is really  
19 necessary, and it's not necessarily necessary to solve  
20 this particular problem, but you've got to amend Rule 748,  
21 then you have to amend Rule 749, and there are some other  
22 conflicts we have we can go ahead and very easily solve in  
23 these, but in 748 the essence of those amendments is to go  
24 ahead and require that the judgment contain the  
25 information that you have to have to make a provision that

1 the county court at law -- because it's a de novo appeal,  
2 make a provision that the county court at law may rely  
3 upon the findings of the justice court in their judgment  
4 as to how much the rent is and when the rent is due, but  
5 then would not prohibit the county court from making  
6 independent inquiry if they wanted to do that.

7           Then 749 we talk about the form of the  
8 appeal bond and the final judgment and that the appeal  
9 bond is not just an appeal bond. It may also be cash, it  
10 may be a surety bond, and the other manner in which the  
11 rules already permit someone to post an appeal bond.  
12 749a, the affidavit of indigence, in essence the proposal  
13 would be to take the provisions already in the Property  
14 Code that we just talked about on a pauper's affidavit of  
15 appeal and go ahead and bring those into 749a so it's  
16 clear so that all of these rules are in one place, you  
17 don't have to refer to the Property Code and back to here,  
18 we just parrot that language so all of the rules for  
19 pauper's affidavit are in the same place.

20           And then 749c would have some language about  
21 the perfection of the appeal, which is something that has  
22 always been a problem. Now, this was done -- we had a  
23 short time fuse on this. I pulled this language out, and  
24 that's the proposal. If the committee says, no, that's  
25 too much, go back and just do the bear minimum, then I can

1 do that, but I think that if we adopted all of this -- and  
2 most of this, I think almost without exception, has  
3 already been approved and adopted by this committee, but  
4 if we just re-adopted that it would solve not only the  
5 problems in No. 5 but it would solve some other problems  
6 that we addressed seven years ago.

7                   CHAIRMAN BABCOCK: Judge, remind me, this  
8 language did look familiar to me, but has the Court ever  
9 approved what we recommended?

10                   HONORABLE TOM LAWRENCE: I don't believe so.

11                   CHAIRMAN BABCOCK: Yeah, that was -- that's  
12 what I thought. Yeah, Lamont.

13                   MR. JEFFERSON: Yeah, we had a little bit of  
14 discussion in the subcommittee about this, and, I mean, I  
15 think that the problem identified in the letter is the  
16 five-day requirement, the having to deposit one month's  
17 rent within five days of the date of the appeal, and --  
18 which does not tie that obligation to the lease. So even  
19 if it's -- as Judge Lawrence points out, even if the lease  
20 -- according to the lease rent's not due, you've got to  
21 deposit it in order to appeal, and so I think you can fix  
22 that pretty simply just by taking out the language that  
23 requires that deposit because the rule already says that  
24 the tenant has the obligation to deposit -- to pay rent as  
25 it becomes due under the terms of the rental agreement in

1 what was No. 2, the stricken -- or we can just strike the  
2 five days and say "pay rent as it becomes due under the  
3 rental agreement" in what is in the original subparagraph  
4 (2).

5           The rest of the revisions I think raise  
6 complicated questions about who ought to be the one to  
7 adjudicate these things, whether it's the justice court or  
8 the county court, and the framework that I guess the past  
9 committee worked on calls for the justice of the peace to  
10 make a number of findings that the county court would then  
11 rely on to some degree or another in determining the  
12 amount of rent that's due, when it's due, what you have to  
13 pay to catch up, and other things that right now I think  
14 under the rule scheme now those are matters that are  
15 handled in the appeal at the county court level. You ask  
16 for a hearing in front of the county court judge, and he  
17 says what rent's due and what you have to do if you want  
18 to stay in the premises. I think the easy fix to the  
19 problem identified by the letter is just removing the  
20 five-day requirement because that's not in the statute or  
21 anywhere else. It's just in a rule, so we can remove the  
22 five-day requirement from 749b pretty simply and solve  
23 that problem.

24           CHAIRMAN BABCOCK: Right. And Judge --  
25 thanks a lot. Judge Lawrence, that's a -- would you agree

1 that that is a specific fix to the problem that was  
2 identified?

3 HONORABLE TOM LAWRENCE: Well, except you  
4 don't know what day the rent is due, because that's not  
5 required by the Property Code right now and it's not  
6 required by the rules, so the -- you know, there's no way  
7 to be able to calculate when the rent is due and when it  
8 has to be paid unless it's --

9 CHAIRMAN BABCOCK: Wouldn't that be on a  
10 case by case basis?

11 HONORABLE TOM LAWRENCE: Pardon me?

12 CHAIRMAN BABCOCK: Wouldn't that be on a  
13 case by case basis?

14 HONORABLE TOM LAWRENCE: Well, the county  
15 court is going to have to hold a hearing, and there will  
16 have to be a hearing held on that. I mean, if nobody is  
17 concerned about that then I guess you don't have to put it  
18 in. It would seem to me it would make more sense to have  
19 the date the rent is due in the justice court judgment so  
20 that it's clear when there's been a breach and when the  
21 appellee can move for a writ of possession because it  
22 hadn't been paid.

23 CHAIRMAN BABCOCK: Yeah.

24 MR. DOGGETT: I represent tenants in  
25 various eviction cases, and, believe me, the landlords are

1 aware of the rules, and if the tenant hasn't deposited the  
2 rent per the lease they will be the first ones moving in  
3 court to default to throw your client out, so while the  
4 court and judge may not know when the rent is due per the  
5 judgment, the landlord, the other party does, and so they  
6 are watching the clock and making sure that we do what's  
7 right. What brought this problem to a head, of course, is  
8 even if we didn't owe rent the rules required us to  
9 deposit it anyway under a standard possession, and this  
10 fix I think is a good fix, but just so you know that while  
11 the judge right now in the judgment doesn't say when rent  
12 is normally due, the landlord absolutely does.

13 CHAIRMAN BABCOCK: Thank you. Judge, aside  
14 from that, the additional language of 748, 749, 749c,  
15 749a, is that ground that we plowed seven years ago?

16 HONORABLE TOM LAWRENCE: Yes, it is.

17 CHAIRMAN BABCOCK: I recognize some of this,  
18 although I wouldn't have said it was seven years ago. Is  
19 there -- is there an imperative to replot that now by the  
20 fact that we already did it or --

21 HONORABLE TOM LAWRENCE: Well, no, it's not.  
22 I mean, if you just want to solve this one specific  
23 problem, then we can solve that in Rule 748 probably. You  
24 know, we've been talking about affidavit of inability  
25 appeals in landlord-tenant cases. If you wanted to make



1 things a little clearer in the rules you would bring in  
2 those provisions of the Property Code into that section,  
3 and that would be another thing you could do if you wanted  
4 to. There are a number of other things that would solve  
5 other problems that we have with these rules that I  
6 believe are not that controversial. That's a dangerous  
7 thing to say in this committee but --

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE TOM LAWRENCE: But, no, we don't  
10 have to do this, and we could do just a bear minimum to  
11 solve that problem.

12 CHAIRMAN BABCOCK: I'm happy to spend the  
13 rest of the afternoon on it if that's productive. The  
14 charge we got from the Court was to address the specific  
15 problems that had been identified, but if the Court wants  
16 more on this then we'll keep going through it.

17 HONORABLE NATHAN HECHT: Well, we've got  
18 this, and we know that recommendation, but we needed to  
19 know about this, and I think that's enough for today.

20 CHAIRMAN BABCOCK: Okay.

21 HONORABLE NATHAN HECHT: But I gather the  
22 landlords would not be in favor of this change to 749b?

23 HONORABLE TOM LAWRENCE: 749b?

24 HONORABLE NATHAN HECHT: Yeah, the proposal  
25 on page four.

1 HONORABLE TOM LAWRENCE: I would think that  
2 they would not be in favor of that because it would be  
3 easier to go ahead and appeal and get the case up to  
4 county court because, I mean, that's a little bit of a  
5 burden on a tenant to pay that rent, a month's rent, when  
6 it's not necessarily due. So I would say the landlords  
7 probably wouldn't favor that. I think that's a fair  
8 statement.

9 MR. DOGGETT: If I could respond to that, I  
10 sent a copy of this letter to the Texas Apartment  
11 Association, and in fact, negotiated -- myself and Fred  
12 Fuchs, who worked on the foreclosure rules, worked on the  
13 Property Code provision that's here, 24.0053, and if you  
14 -- what we're asking is, that was a consensual, if you  
15 will, statute that was ultimately obviously agreed to by  
16 the Texas Legislature and the Governor. And, in other  
17 words, I would not at all be surprised if the apartment  
18 association had no problem with the suggestion here today  
19 because they -- they are very well aware of what's in the  
20 rules, and what was ultimately passed by the Legislature  
21 some years ago did not include that provision, and the  
22 apartment association is very much aware of our letter and  
23 request to the Supreme Court, and I will confirm that  
24 again, but I will tell you that they are very well aware  
25 of what we're asking and that is to make the rules

1 consistent with the Property Code to alleviate this  
2 problem, and so I will tell you that it's very well --  
3 very well may be, for example, one may not, but a fairly  
4 large one would not be opposed to this, but I will confirm  
5 to be sure this is not going on in a vacuum.

6           HONORABLE TOM LAWRENCE: Yeah, I don't know  
7 how they could really argue that much, because 24.0053  
8 already says they only have to pay the rent when it  
9 becomes due, so the Legislature has already spoken on it,  
10 so I don't know what their argument would be, but, of  
11 course, Texas Apartment Association, that's just one of  
12 the players. There are a lot of other landlords in this  
13 state that are not a member of that, but, I mean, I don't  
14 know what their position would be. I haven't talked to  
15 them about it.

16           CHAIRMAN BABCOCK: Okay. Who's got problem  
17 No. 7? Is that you again, Judge?

18           HONORABLE TOM LAWRENCE: Well, Frank, you  
19 want to talk about it or you want me to?

20           MR. GILSTRAP: I've got it. I've got it.  
21 The problem No. 7 is -- it's on page 12 of your handout,  
22 and the problem is well-described on page four of the  
23 letter from the poverty law section, and that is the fact  
24 that all courts aren't open all the time. This even  
25 happens in big cities. I can remember in Dallas, if you

1 wanted to file you had to file and get there before 4:00  
2 or you were out of luck. The problem comes that we're  
3 dealing with here is in justice court where people have  
4 the last day to file a document, like a document to  
5 appeal, and they go to the justice court and find that the  
6 sign is up, "Closed, come back tomorrow at 8:00," even  
7 though it's 3:30 in the afternoon; and this apparently  
8 happens in some of the smaller justice courts because they  
9 just don't have the personnel to be open or maybe they're  
10 closed for a funeral or something like that.

11           So how do you deal with it? Well, on the  
12 subcommittee we decided that we didn't want to reinvent  
13 the wheel, so we took -- there is a provision like this in  
14 the rules now in the appellate rules, appellate Rule  
15 4.1(b), which is in the middle of page 12, and it has a  
16 provision that says how you deal with the problem of the  
17 court being closed, and it says that if -- and I'll get  
18 into the words of it in a second, but basically it says if  
19 it's closed during part of the day you can file the next  
20 day. Your filing date is extended by one day until the  
21 next day the court is open. So what we did with that was  
22 we simply took that language and took it almost verbatim  
23 and proposed a new draft, Rule 523a, because that's where  
24 it fits in the justice rules, and that's the bottom  
25 paragraph on page 12.

1           Then we thought, well, if we're going to do  
2 it there, maybe in the interest of uniformity we need to  
3 do it for all the rules, so at the risk of stepping on the  
4 toes of the rule -- Rule 4 committee, we went ahead and  
5 prepared a draft, adding it to the bottom of Rule 4 of the  
6 Texas Rules of Civil Procedure, and if you adopt that you  
7 won't need 740 -- 523a, which appears on page 12. They  
8 read exactly the same. So the first question is, you  
9 know, do we do it -- first of all, do we do anything.  
10 Second, do we just do it just for justice courts or do we  
11 get ambitious and do it for all the courts, and finally,  
12 do we tinker with the language. The problem with  
13 reinventing the wheel here is that the wheel seems to be  
14 out of line and we don't have any road test data.

15           This rule was adopted -- Rule 4.1(b) was  
16 adopted back in 1997. I wasn't on the committee then, and  
17 I'm not aware of any litigation where that has been  
18 construed, and the language is problematic. Let me just  
19 kind of go through it here. It says -- and this is the  
20 same in all three drafts -- "If the act to be done is  
21 filing a document and if the clerk's office where the  
22 document is to be filed is closed or inaccessible during  
23 regular hours on the last day for filing the document."  
24 Well, that's got to mean at least during some of the  
25 regular hours because if it's closed from 3:00 to 5:00

1 then that's exactly the problem we're trying to deal with,  
2 so that language has got to be read to mean -- it can't  
3 refer to being closed all day. It has to include being  
4 closed for part of the day.

5           Then it says, "The period for filing the  
6 document extends to the end of the next day when the  
7 court's office is open and accessible." Well, the next  
8 day when the court's office is open and accessible might  
9 not be all day, but I think that kind of the feeling we  
10 had on the subcommittee was, you know, you can't cover  
11 every situation, so if the people show up at 4:00 o'clock  
12 on the last day and there is a sign hanging up there  
13 saying "Gone to a funeral, open tomorrow at 8:00," they  
14 should be there at 8:00, even though the court might close  
15 early that day, too. So that's the practical problem with  
16 the language, and we decided not to try to tinker with it  
17 and simply throw it out for the committee's consideration  
18 the way it is.

19           CHAIRMAN BABCOCK: Okay. Yeah, Judge.

20           HONORABLE TOM LAWRENCE: I have a minority  
21 view. The problem is that you have probably as many as 70  
22 JP courts in Texas that don't have a clerk assigned to it  
23 at all, so it's just the judge. You've got 64 counties  
24 with only one JP in the county and 48 or so with only two.  
25 The -- neither the commissioner's court nor anyone else

1 dictates to an elected official what hours they work, so a  
2 lot of JPs in the smaller counties are part-time. They  
3 have a full-time job, and being a JP is something because  
4 it's a limited case load that they don't do eight hours a  
5 day, five days a week, so they have sporadic hours.

6 I'm not sure if anybody actually knows what  
7 hours the JP courts in Texas are open. I've done a -- I  
8 did a survey in Harris County and found out to my surprise  
9 that of the 16 courts in Harris County mine is one of only  
10 six open from at least 8:00 to 5:00. Ten close at 4:00 --  
11 at 4:30, or nine at 4:30 and one at 4:00. I'm in the  
12 process of trying to get some information about the  
13 counties and the operations of the court to try to figure  
14 this out, because I'm not sure that a court is necessarily  
15 open everyday. I'm not sure the hours are the same  
16 everyday. I'm not sure that there's necessarily a sign  
17 posted that talks about this, and if we're going to talk  
18 about the problem with the 10th day to appeal because no  
19 one is there on that date, are we also going to talk about  
20 the day to answer, the day to file a motion for new trial,  
21 the day to ask for a jury trial?

22 There are one, two, three, four, five, six,  
23 seven, eight, nine, ten, eleven, twelve, thirteen,  
24 fourteen, fifteen other rules with the JP courts where  
25 this same question is going to come up. So I'm not in

1 favor of this proposed draft, although I don't criticize  
2 at all -- I mean, this is an impossible situation right  
3 now. I think it's about the best solution to come up  
4 with, but I'd like a little bit more time. I think  
5 that -- I think that we can draft a rule that maybe under  
6 the Court's judicial administration authority would  
7 require the JP court to post a sign with the hours that  
8 they were open. I think we can solve part of the problem  
9 with that.

10                   Part of the problem is we can allow -- if  
11 the court is closed, allow it to be mailed on the next  
12 business day. To do that, though, we're going to have an  
13 issue with evictions, because you only have five days to  
14 appeal an eviction, and on the sixth day you can come in  
15 and get a writ of possession. So you come in and get the  
16 writ of possession. If you mailed it on the sixth day you  
17 may not get it for a couple of days later, so we're going  
18 to have to do something with the eviction rules on that.  
19 We're going to have to decide if we want to talk about  
20 solving this problem for all of these other rules where  
21 there is a limit on the day that they have to file that.  
22 So I'd like a little more time to work on this one.

23                   Now, I will say that although you --  
24 intuitively you would think this must be a huge problem.  
25 It doesn't seem to be. I called the -- I called the staff



1 at the JP training center and said, "Have you ever heard  
2 of this problem coming up," and "no." You know, the staff  
3 attorney has been there for 15 years, and she's never  
4 heard of this being an issue, so somehow in these smaller  
5 counties where you would think it would be the most  
6 problem, somehow it gets resolved, and I suspect that when  
7 there's a deadline that they just informally let them  
8 appeal it the next day they're open. I don't know that,  
9 but somehow this doesn't seem to be a big problem, but I  
10 do think that we can improve it a little bit. I don't  
11 necessarily feel that this proposal here today is the best  
12 solution. I'd like a little more time to work on that.

13 CHAIRMAN BABCOCK: Justice Hecht.

14 HONORABLE NATHAN HECHT: The reason we  
15 changed -- the reason we put the provision in the  
16 appellate rules and not in the Rules of Civil Procedure is  
17 that in the appellate rules you only are dealing with 16  
18 or 18 clerks' offices, 17 if you don't count Edinburg, but  
19 maybe there's a couple of others sometimes in storms. A  
20 few offices. You put it in the civil rules, you're now  
21 dealing with about 700 offices, 600, something like that.  
22 If you put it in the JP rules, you've upped it to about a  
23 thousand offices, so the problem does get bigger the more  
24 offices that you look at, and that's just the reason. I  
25 don't say it's not a good idea, but it does get to be a

1 whole lot more difficult problem to know when a justice of  
2 the peace's office is going to be closed in a small  
3 community versus when the First Court of Appeals office is  
4 going to be closed.

5 CHAIRMAN BABCOCK: Justice Gray.

6 HONORABLE TOM GRAY: This is both intended  
7 as humor but also somewhat serious. How does e-filing  
8 impact this, because the JP office never closes for  
9 e-filing?

10 HONORABLE NATHAN HECHT: And I was just  
11 looking at that in the Federal rules, and even though the  
12 Federal rules are contemplating e-filing, they've kept the  
13 provision in Rule 6 that the end of a period is extended  
14 if the clerk's office is inaccessible, and I don't  
15 remember any discussion about that. The same provision is  
16 in the Federal Rules of Appellate Procedure Rule 26.

17 CHAIRMAN BABCOCK: So there.

18 HONORABLE NATHAN HECHT: But it's an  
19 interesting question, why you would keep it if you're  
20 doing e-filing.

21 HONORABLE TOM LAWRENCE: Yeah, I think in  
22 the e-filing rules for JPs, if I remember, it's considered  
23 filed on the date that it goes through the portal and the  
24 EFS gets it or something, if I remember, and I think that  
25 the JP clerk has or the court has one day or two days or

1 something to reject it, otherwise it's deemed as being  
2 filed. So I think that if something is e-filed, this is  
3 not a problem.

4 CHAIRMAN BABCOCK: Okay. Well, yeah, Frank.

5 MR. GILSTRAP: Well, and it's not a problem  
6 for e-filing, it's not a problem for mailing, and I guess  
7 the question that Judge Lawrence I think appropriately  
8 raises, is it a problem in the real world? I mean, the  
9 poverty -- the poverty law section sent it to us, and they  
10 said, well, it is true that the JP courts aren't always  
11 open, but they didn't have any information that connected  
12 that to litigants who actually missed it. You can  
13 certainly imagine that litigants miss it, so, you know,  
14 you have to judge, you know, the magnitude of the problem  
15 in the real world, and then you have to judge the  
16 magnitude of the solution. Is this a bad rule? I mean,  
17 how is it -- I mean, I think Judge Lawrence was correctly  
18 saying this wouldn't just be notice of appeal. It would  
19 be every day, every filing. So how is this going to gum  
20 up the works? You know, I'm not sure that it does by just  
21 saying, you know, if it's closed you get another day. Big  
22 deal.

23 MS. PETERSON: And one of the issues raised  
24 at the subcommittee level was whether this will apply to  
25 JP courts that do not keep regular hours, because you have

1 rule -- and this didn't convince Judge Lawrence, I don't  
2 think, but I'll say it anyway. Rule 523 of the Rules of  
3 Civil Procedure provides "All rules governing the district  
4 and county courts shall also govern the justice courts  
5 insofar as they can be applied." So if a JP court doesn't  
6 keep regular hours, I don't think this amendment would  
7 apply.

8 CHAIRMAN BABCOCK: Buddy.

9 MR. LOW: Yeah, I think --

10 HONORABLE TOM LAWRENCE: What's a regular  
11 hour?

12 MS. PETERSON: Well --

13 MR. LOW: Rule 6, doesn't the new Federal  
14 Rule 6 provides certain instances where you can't extend?  
15 It says there will be no extension like on certain things.  
16 Do we have any specific rules in here that prohibit  
17 extension of time that you know of? They have -- Rule 6  
18 makes some provision about that in Federal court. You may  
19 not extend the time, and I want to be sure that we don't  
20 have some rule mixed up in here that says basically the  
21 same thing. I don't know of any.

22 HONORABLE NATHAN HECHT: Well, we have a  
23 rule that --

24 MR. LOW: A new trial.

25 HONORABLE NATHAN HECHT: Well, this is a

1 rule that says you can't extend for certain kinds of  
2 filings.

3 MR. LOW: Yes.

4 HONORABLE NATHAN HECHT: And we have a rule  
5 that says I think you can't extend for a motion for new  
6 trial. Is there anything else? Professor Carlson would  
7 know, but I don't think that means that if the clerk's  
8 office is closed because of a hurricane on the last day  
9 you can't come in under the Federal rules and still file  
10 the next day it's open.

11 MR. LOW: I don't know what it means. I  
12 just know it's there.

13 HONORABLE NATHAN HECHT: Yeah.

14 MR. LOW: And a lot of them I don't know  
15 what they mean.

16 MR. GILSTRAP: Well, it can't be extended by  
17 the court order, but it can be extended by the rules for  
18 extending time. I mean, if your last day for filing a  
19 motion for new trial is Sunday, you get Monday.

20 MR. LOW: They do that. Federal Rule 6 does  
21 that all in one. The new Federal rule does it all in one,  
22 but it has a specific prohibition that we don't have in  
23 our rules, but there may be certain rules, like a motion  
24 for new trial, we have that prohibition, and if we say  
25 that if a clerk's office is not closed, that might be --

1 it's not open, that might be construed that then we have  
2 extended. I just raise the question.

3 CHAIRMAN BABCOCK: Yeah, Judge.

4 HONORABLE TOM LAWRENCE: Well, under this  
5 draft if it talks about regular hours -- and Kennon has a  
6 case I think she found in one respect, but if a court  
7 closes at 4:30 everyday and someone comes in at 4:45 to  
8 file the appeal and it's closed, then he can file it on  
9 the next -- the next day. Well, how long would this go  
10 on? Some courts may only be open in the morning, so if  
11 someone keeps coming in the afternoon there's just this go  
12 in ad infinitum, and where is the finality of the  
13 judgment? When do you finally lose your right to appeal  
14 so that you've got a final judgment, and not all -- I'm  
15 not convinced that offices -- that all JP courts have  
16 hours that they're necessarily there the same time  
17 everyday.

18 MR. LOW: That's right.

19 MR. GILSTRAP: I think the answer is the  
20 intent of the rule is to give you one day. If you go and  
21 the court's shut and then you've got to be on your toes to  
22 get it filed the next day, and it's up to you. You can't  
23 obviously extend it day after day if the court is not open  
24 all day everyday. I think the intent of the rule, and  
25 it's not very clear, is to give you one day.

1 HONORABLE TOM LAWRENCE: Well, if they're  
2 not open on that next day --

3 MR. GILSTRAP: If they're not open --

4 HONORABLE TOM LAWRENCE: -- or if they're  
5 open only for limited hours and you don't necessarily know  
6 what hours they are and you come when they're not open,  
7 does it go on another day?

8 MR. GILSTRAP: No. No. I think the  
9 intention is if they're closed at 4:00 o'clock then you've  
10 got to be on your toes and try to get it filed the next  
11 day when they're open. Now, I guess what happens if  
12 they're closed is an -- all day long is another thing.

13 MR. LOW: You might have to run the judge  
14 down at a funeral, a domino hall, because these county JPs  
15 they --

16 MR. GILSTRAP: You may have to learn about  
17 filing by mail, you know.

18 CHAIRMAN BABCOCK: The domino hall is the  
19 first place to look?

20 MR. LOW: That's one of the places. With a  
21 judge there in Jasper you go to the domino hall.

22 CHAIRMAN BABCOCK: All right. We're going  
23 to take our afternoon break, and when we come back, draft  
24 Rule 265.1, juror questions, Judge Christopher.

25 (Recess from 3:17 p.m. to 3:40 p.m.)

1                   CHAIRMAN BABCOCK: All right. On the home  
2 stretch here, Rule 265.1, we've talked about it a lot, and  
3 Judge Christopher is back with more. But wait, there's  
4 more.

5                   HONORABLE TRACY CHRISTOPHER: Actually,  
6 we've just made a couple of minor changes that we had  
7 voted on the last time, and we think it's a complete  
8 draft. Obviously the mandatory law didn't pass, so we  
9 think we're in a position of sending this to the Supreme  
10 Court to decide what they want to do with it at this  
11 point. We did get a couple of comments about the rule  
12 recently. One was from former Judge John Wooldridge, who  
13 didn't like the idea that we put in there "before voir  
14 dire," but that's something that we already discussed, so  
15 I don't think we need to talk about that again.

16                   We've got another comment from Judge John  
17 Delaney, who didn't like the word "about the testimony of  
18 the witness," but we've already discussed that also quite  
19 a bit. The only other suggestion that he made is that  
20 jurors should be told to submit their question as a  
21 question versus just kind of a comment or "ask him what he  
22 meant by this," you know, to say "ask what did you mean by  
23 this" versus asking what he meant by that, but he thought  
24 that that's something that the trial judge could just  
25 handle orally and that we didn't really need to change our



1 forms, but that was just sort of a comment, and as we  
2 discussed before it would be the sort of thing that would  
3 be good to have at sort of judicial CLEs, so I don't  
4 really think it would require a change in our forms or  
5 things like that unless we wanted to.

6           So I really didn't have anything more about  
7 that, but then Elaine brought up a point, and I think  
8 Kennon talked to Justice Hecht about it and wanted us to  
9 briefly discuss some issues concerning juror questions  
10 during deliberation, and the reason for that was a recent  
11 Supreme Court opinion, *Ford Motor Company vs. Castillo*,  
12 that in that case the jury sent -- the jury foreman sent a  
13 note to the judge asking, "What is the maximum amount that  
14 can be awarded?" The case promptly settled. Afterwards  
15 the defense found out that the presiding juror just asked  
16 that question on -- I can't remember whether it was his or  
17 her -- on her own accord, I believe, rather than it being  
18 a question that came from the jury, and the case got  
19 reversed to allow discovery with respect to the presiding  
20 jurors, whether there was any outside influence that was  
21 brought to bear on the juror that made that juror sort of  
22 send that kind of rogue question. Because apparently at  
23 that point in time the -- several liability questions had  
24 been answered in favor of the defendant, so that's why  
25 circumstantially the defense thought there was some

1 hanky-panky going on.

2           Anyway, the Court reversed. In a concurring  
3 opinion -- I'm not sure who wrote it because I don't have  
4 a copy of the case here. I apologize. The concurring  
5 opinion thought that "The Court should set parameters for  
6 when the jury may send questions to the judge about the  
7 case during deliberations. The Rules of Procedure and the  
8 instructions to the jury should be amended to specify that  
9 only the jury can send questions about the deliberations  
10 to the judge. At a minimum the entire jury should know  
11 that a question about deliberations is being sent to the  
12 judge. This will preclude an individual juror or a group  
13 of jurors from sending a question to the judge under  
14 circumstances that suggest, as in this case, that the  
15 question was from the jury." So that's the comment in the  
16 concurring opinion.

17           So what we currently have in Rule 226a about  
18 questions during deliberations is nothing. There's  
19 nothing in the actual rule. By -- through the Texas  
20 Center on the Judiciary the judges have always given a  
21 little bit of instructions about electing a presiding  
22 juror, and in those -- in that set of instructions -- and  
23 those instructions are also in the pattern jury charge,  
24 the judge says currently to the jury, "As one of the  
25 duties of the presiding juror is to write out any

1 questions you have to be delivered to the judge."

2           The proposed amendment that we have done for  
3 226a that we talked about many, many times currently  
4 contains this language as to the duty of the presiding  
5 juror: "To give written questions or comments to the  
6 bailiff, who will give them to the judge." So we do not  
7 currently address whether the question has to come from  
8 the jury and what does it mean to have a question come  
9 from the jury as opposed to just the presiding juror  
10 asking a question. Now, I will say that I don't think  
11 that we should attempt to draft such a rule, because I  
12 think that there are a lot more problems with it, and we  
13 could go on and on and give the jury this complicated set  
14 of instructions as to, you know, when they can or can't  
15 send out questions, but in light of that concurring  
16 opinion from the Supreme Court it was suggested that we  
17 discuss the issue here, and if the consensus of the group  
18 is to try and write such a rule we'll go back and start  
19 working on that.

20           So some of the things that -- some of the  
21 talking points that I came up with on this issue is should  
22 questions only come from the presiding juror, what if the  
23 presiding juror refuses to send a question, should the  
24 others be allowed to send a question, should all questions  
25 be agreed to by the entire jury, perhaps just a majority,

1 10-2 vote. Sometimes only one juror or a minority needs  
2 an answer, the other jurors know what the answer is, but  
3 to make it easier they ask the judge.

4 In my opinion we shouldn't be getting into  
5 who needs the answer to this question and how many people  
6 need the answer to that question. In my opinion the  
7 problem with that case is that the lawyers assumed that  
8 the question was from the entire jury. Why did they make  
9 that assumption? There's nothing in the rules about it,  
10 and in my opinion, and watching trials for 14 years, it's  
11 not unusual to get a question that does not represent a  
12 majority viewpoint during deliberations.

13 What if only the presiding juror needs the  
14 answer? Are we going to allow the other jurors to veto  
15 the question, or are we going to make them put some note  
16 on the question? "This is not a majority question."  
17 Sometimes jurors skip around, which can be misleading to  
18 lawyers, too. Sometimes they won't answer the liability  
19 question. They'll move to damages and start talking about  
20 damages and send a question out about damages even though  
21 they haven't found liability. Well, that's misleading  
22 again to the lawyers who are listening to these questions.  
23 Should we prohibit that in some way, shape, or form?  
24 Sometimes jurors will ask sort of a devil's advocate kind  
25 of question. You know, should we prohibit that? You

1 know, "Only ask questions you really believe in at this  
2 point."

3 I just think trying to put a set of rules on  
4 the jury as to what type of questions they can ask,  
5 whether it has to be from the majority, whether a minority  
6 can answer, whether we have to write down that it's a  
7 minority gets way too much into their internal  
8 deliberations, so that's why I come down on the point of  
9 we should leave it as it is, which is give written  
10 questions or comments to the bailiff, who will give them  
11 to the judge.

12 While we were discussing this I had a jury  
13 deliberating. Okay, it's the funniest thing, so the jury  
14 is deliberating. They send out a note on Question No. 11,  
15 which was an attorney's fees question, and the question  
16 was -- attorney's fees for the plaintiff. We had two  
17 attorney's fees questions, one for the plaintiff, one for  
18 the defense. The question was "Can the judge award a  
19 different amount on attorney's fees from what we award,  
20 and is zero an acceptable amount on attorney's fees?" So  
21 I wrote back my usual "Do not discuss nor concern  
22 yourselves with the effect of your answers, and please  
23 answer the questions as directed," and, you know, the  
24 plaintiff's lawyer was crestfallen, of course, thinking  
25 that he was about to get zero in attorney's fees. Two,

1 three, four hours later, the plaintiff gets \$470,000 in  
2 attorney's fees, and the defendant gets zero in attorney's  
3 fees.

4 So, you know, lawyers should not rely upon  
5 juror questions to truly inform them as to what the result  
6 will be because things like that happen a lot. So that's  
7 my suggestion, is that we leave it as-is, but if anybody  
8 wants to discuss further we can discuss further. But  
9 that's the concurring opinion. Maybe Justice Hecht can  
10 tell us who wrote it, because I don't think you wrote it,  
11 did you?

12 CHAIRMAN BABCOCK: Justice Wainwright.

13 HONORABLE TRACY CHRISTOPHER: Justice  
14 Wainwright wrote it. Well, he should have known better.

15 CHAIRMAN BABCOCK: Gee whiz.

16 HONORABLE TRACY CHRISTOPHER: He wasn't a  
17 trial judge long enough. Sorry. Sorry. Just kidding.  
18 Just kidding. Make sure my record is complete.

19 HONORABLE JAN PATTERSON: LOL.

20 HONORABLE TRACY CHRISTOPHER: That's right,  
21 LOL. We're laughing.

22 CHAIRMAN BABCOCK: I got a jury note from  
23 the presiding juror that said, "Can we have a dicktonary,"  
24 d-i-c-k-t-o-n-a-r-y. Didn't know what to read into that.

25 MR. WATSON: And you said, "By all means.

1 You can have mine."

2 CHAIRMAN BABCOCK: Yeah, Skip has one of  
3 those. All right. Alistair.

4 MR. DAWSON: Well, I guess I'll tell the  
5 story since you're telling stories. Years ago I tried  
6 this case in San Antonio, and it was breach of contract,  
7 damages, I guess causation damages on the breach of  
8 contract, and the rest were all fraud claims. They had  
9 like four or five fraud claims, and then there was malice  
10 and then punitives and all this stuff, so if you got past  
11 like question three it was bad for us. So they  
12 deliberate, deliberate, deliberate, and deliberate, and at  
13 5:00 o'clock on Saturday they say, "We're on question 21,  
14 and we're almost done. We want to stay."

15 Well, 21 was a punitive damage question, you  
16 know, for the plaintiffs, and so I tell my client, "You  
17 better go call PR, this is going to be ugly," and of  
18 course, what happened was they found breach of contract,  
19 awarded damages, but on all the punitive and all the fraud  
20 and malice they found for the defendants, and they were  
21 supposed to stop, but they didn't stop. They kept going,  
22 and so it would say, "Do you find fraud?" "No."

23 "And if you've answered 'no' then stop," but  
24 they go on to the next question. "Do you find malice?"  
25 "No," and then they had zero for all the punitive damage

1 awards, but they answered them anyway, which they do, and  
2 I guess, you know, my lesson is if you're trying to read  
3 the tea leaves on jury questions, you do so at your own  
4 peril.

5 CHAIRMAN BABCOCK: Alistair, how much did  
6 you pay?

7 MR. DAWSON: We did not settle until  
8 post-verdict, and we settled for something less than  
9 the --

10 CHAIRMAN BABCOCK: Professor Hoffman.

11 PROFESSOR HOFFMAN: So it was Justice  
12 Johnson's opinion, and Justice Wainwright wrote the  
13 concurrence. That said, I think I agree with what you  
14 said, that this seems like an issue, and you should -- you  
15 know, you take your chances. You shouldn't try to do it,  
16 except that the Court has now given Ford the ability to go  
17 back and discover whether or not there was some funny  
18 business going on.

19 MR. DAWSON: Well, that's a different issue,  
20 Lonny. You know, determining whether there was some  
21 external influence is different than limiting what  
22 questions jurors can and cannot ask. I mean, I think that  
23 we ought to give them as much freedom to ask questions  
24 that they need for purposes of their deliberations, and we  
25 ought not to tie their hands by saying it has to be a



1 majority or can only be this person or that person. If  
2 one juror -- if it's important to one juror's vote, some  
3 piece of information, and it's an otherwise proper  
4 question then we ought to have a system that allows that  
5 juror to obtain that information, in my opinion.

6 CHAIRMAN BABCOCK: Justice Hecht has a  
7 comment.

8 HONORABLE NATHAN HECHT: But it's that kind  
9 of question that the Court was interested in. Not do you  
10 take your lumps or those kind of things, but should there  
11 be some standard process? I mean, should the judge tell  
12 the jury as he's sending them to the jury room, "You can  
13 ask questions and here's how you do it. You tell the  
14 presiding juror this is what you want to ask." Does it  
15 have to be a majority of the jury, can it be any juror?  
16 And I thought, I've always thought, we all sort of did it  
17 the same way. At least when I was a trial judge I was  
18 under the impression that we always handled jury questions  
19 pretty much the same, and I guess we told the jury you can  
20 ask questions, but I don't have a specific memory of that,  
21 but they all -- you know, they did if they wanted to, and  
22 it seems like they always came from the presiding juror,  
23 although surely there must have been questions that a  
24 minority of the jurors was interested in.

25 But, query, is it working okay? We just

1 keep letting judges do it however they're doing it, which  
2 I'm not sure how it is, or should we say -- now that we're  
3 going through the 226a instructions, should we say this  
4 needs more definition, that the judge should actually tell  
5 the jury something about how to do it, write it on a  
6 particular piece of paper or not, vote on it or not, or  
7 just leave it alone?

8           CHAIRMAN BABCOCK: I've debriefed a lot of  
9 jurors after trial, and I think more often than not the  
10 presiding juror is sending a note that perhaps only one  
11 juror has this question about.

12           MR. LOW: Right.

13           CHAIRMAN BABCOCK: And it's not -- you know,  
14 I can't remember ever saying, "Oh, we all voted and we  
15 wanted to have this question" or even "a majority of us  
16 wanted this question."

17           MR. LOW: And then would you limit it to  
18 questions that would help you in your decision. I had a  
19 case where one juror, they knew they were going to have to  
20 find against me, the evidence was just overwhelming, and  
21 one juror said, "But we have the prerogative not to give  
22 them any damages." They said, "No, we don't." "Well,  
23 let's ask the judge." They already knew what they were  
24 going to do. They said, "Do we have to give plaintiff  
25 anything if we don't want to?" I mean, they're asking.

1 It had nothing to do with how they were going to decide  
2 the case. I withdrew my offer and got stuck over my  
3 policy limits, but that was just a question of just  
4 information.

5 HONORABLE NATHAN HECHT: There were  
6 discussions in the presentation of this case on appeal  
7 that maybe the other jurors did not know what the  
8 presiding judge was doing, so do --

9 CHAIRMAN BABCOCK: Presiding juror.

10 HONORABLE NATHAN HECHT: Presiding juror, so  
11 does the presiding juror have to tell the other jurors  
12 that he's sending out a question, or can he do it  
13 secretly, or just all of the sudden there's this area that  
14 just doesn't have any regulation, and maybe that's because  
15 it doesn't need any or maybe it needs some more. Of  
16 course, when the question gets out most judges do  
17 everything they can to not answer the question and say,  
18 "You'll remember the evidence however it was, and I'm sure  
19 if you continue you'll work it out," and, you know, but  
20 it's the -- it was the procedural aspect of the question  
21 posing that all of the sudden it occurred to us that maybe  
22 nobody really knew how that worked.

23 CHAIRMAN BABCOCK: Yeah. Justice Patterson.

24 HONORABLE JAN PATTERSON: Well, I agree with  
25 Judge Christopher that I don't think anything is

1 necessary. I do think the better practice is to go  
2 through the presiding juror, not so much so that they have  
3 control, but just so that there's sort of notice, but I  
4 think once you start down the slippery slope of does  
5 everybody agree or do you want to know, it does work to  
6 the detriment of the individual juror or the minority, or  
7 it really increases conflict. And since we're telling war  
8 stories, the best question I ever got was when I was  
9 trying an organized crime case in New York City, and the  
10 jury minutes into its deliberation sent out a note  
11 saying -- we had tried it to an anonymous jury because it  
12 was an organized crime case and there were murders  
13 involved, and so they sent out a note saying, "Do the  
14 parties know" -- "Do the defendants know our names?" That  
15 was a good question. And they were not out that much  
16 longer.

17 CHAIRMAN BABCOCK: Yeah.

18 MR. HUGHES: I'll preface this with a  
19 caveat. I was the appellate attorney for Castillo in that  
20 case, and looking at this from the procedural question,  
21 which is what's been putting -- what I found out from my  
22 research, and this is just mine, that from those narrow  
23 range of cases that even address the question, the whole  
24 issue is that those few states and Federal decisions, that  
25 if one juror wants to know the answer to something, you

1 answer the question. If one juror needs help, one juror  
2 needs information to help deliberate, it's entirely  
3 appropriate for that question to come out, and it's -- I  
4 guess at that point it ought to be just a traffic cop type  
5 situation as to how does that juror's question get out of  
6 the jury room.

7           The Texas rule, as has been said earlier,  
8 all it does is say the questions come through the  
9 presiding juror, and that's it. You know, whether they're  
10 from one juror or five jurors, whether they all know or  
11 they don't, the rule just doesn't address. What I really  
12 fear is if we go too far down a rule here is we're going  
13 to be having a situation where groups of jurors can hold  
14 the other jurors incommunicado. The Federal cases I've  
15 found were usually Fed cases where minority jurors were  
16 trying to signal the judge that the -- you know, the white  
17 jurors were oppressing or trying to keep questions from  
18 minority jurors from getting out or they were intimidating  
19 the jurors in the jury room.

20           And so that's I think what we're --  
21 certainly nobody wants, but the other thing is, is it made  
22 me when I sort of tried to think this through, is it made  
23 me get back to what's the purpose for letting jurors ask  
24 questions in the first place, and it was like as lawyers  
25 we felt, well, the purpose of letting them ask questions

1 is so we all know what they think and how they're going to  
2 vote. That's the purpose of letting them ask questions.  
3 It's like, no, the purpose of letting them ask questions  
4 is to help them make a decision, and we, the lawyers on  
5 the outside, get confused about what they're thinking  
6 because we can't figure it out. Well, that's an  
7 unfortunate byproduct of it.

8           So I agree with the comments earlier. I  
9 don't think we need a change for the rule, but if there  
10 were needed one, I think the only thing we ought to tell  
11 them is you don't have to vote. If one person has a  
12 question, the presiding juror needs to send it out. I  
13 think that's the only real change that might be needed,  
14 but I'm not sure that's a problem from what I've heard  
15 earlier, and that's it.

16           CHAIRMAN BABCOCK: Justice Bland.

17           HONORABLE JANE BLAND: I agree with Judge  
18 Christopher that I don't think we should squelch any  
19 juror's voice in the jury room, and it seems to me that  
20 the problem with the case that the Texas Supreme Court had  
21 is that the lawyers acted on information that was not  
22 binding. I mean, it's sort of like "Deal or No Deal," and  
23 they chose to make a deal, and the suitcase was, you know,  
24 what they wanted it to be, but, you know, I don't see how  
25 that would be a basis for changing our entire way of

1 handling juror deliberations that seems to have worked  
2 fine in the past.

3 CHAIRMAN BABCOCK: Justice Hecht.

4 HONORABLE NATHAN HECHT: Again, the question  
5 came up in the concurring opinion only incidental to the  
6 case. The question is not directed at the case. The  
7 question was just, oh, wait a minute, there's no rules  
8 here, should there be rules? Not to protect the one side  
9 or the other or more information or less, but just here we  
10 have a body, and if people are going to argue that the  
11 procedure was irregular or not or we should get to look at  
12 this over something else and there's no procedure  
13 governing how that's supposed to work, would it be better  
14 to have that or just use what we've got? And, you know,  
15 it's only come up -- it doesn't come up very often, but  
16 now that I think about it, I do think I used to tell  
17 jurors that they could ask me to have testimony read back  
18 if they disagreed, and they would always send me a note  
19 that said, "Would you please read back the testimony of  
20 such and so?" And I would send back a note that said,  
21 "I'm not going to read it back unless you disagree," and  
22 they would write me back and say, "We disagree." Rats.  
23 "Okay, we'll read it back," but, you know, that was just a  
24 fine point that I thought we -- maybe we all adhere to,  
25 but maybe people don't, so irrespective of the case, just

1 should there be these kinds of procedures?

2 CHAIRMAN BABCOCK: Lonny.

3 PROFESSOR HOFFMAN: Yes. I was answering  
4 the question. My view is that the answer is yes, that  
5 although it turns out I didn't think the outcome was  
6 right, I thought that these lawyers made a deal and they  
7 should have stuck with it, and I was pretty surprised at  
8 the outcome of that particular case, that's really not  
9 what we're talking about now.

10 HONORABLE NATHAN HECHT: Right.

11 PROFESSOR HOFFMAN: Did the case also have  
12 the byproduct of shedding light on an issue that maybe we  
13 should have been paying attention to a long time ago and  
14 haven't, and it turns out that maybe the most interesting  
15 issue in the case is not the presiding juror who is trying  
16 to influence the outcome, but the presiding juror -- by  
17 sending out a question, but the one that Roger raises, the  
18 one who tries to control by not sending out a question  
19 that maybe one or even multiple people wanted. So to me  
20 the answer to Justice Hecht's question is, yeah, we ought  
21 to write some rules here.

22 CHAIRMAN BABCOCK: Alistair.

23 MR. DAWSON: I mean, it makes sense to have  
24 some kind of instruction on notices, and apparently we  
25 don't have one now, but the new 226, as I understand it,



1 they've got language to address it. It's very general.  
2 "If you" -- you, members of the jury -- "have a question,  
3 write it down and give it to the bailiff," and I don't  
4 think we need any more than that.

5 PROFESSOR HOFFMAN: Alistair, what if you're  
6 a member of the jury, and you have a question, and the  
7 presiding judge doesn't give it? What recourse --

8 PROFESSOR CARLSON: Presiding juror.

9 PROFESSOR HOFFMAN: Presiding juror doesn't  
10 give it.

11 MR. DAWSON: But it doesn't say in this  
12 instruction that it has to be done through the presiding  
13 juror. They almost always do it that way, but there's no  
14 requirement that it -- I've had trials when we've had  
15 different questions from different jurors, and we're  
16 trying to figure out who they are.

17 MR. LOW: And you think that's the foreman.

18 MR. DAWSON: Pardon?

19 MR. LOW: And you think that's the foreman,  
20 and I've been wrong on that, too.

21 MR. DAWSON: It doesn't have to be the  
22 presiding juror.

23 MR. LOW: Right.

24 MR. DAWSON: The instruction --

25 PROFESSOR HOFFMAN: To be clear --

1 THE REPORTER: Wait, wait, wait.

2 CHAIRMAN BABCOCK: Whoa, whoa.

3 MR. DAWSON: The instruction as I understand  
4 it is, "You, members of the jury, if you have a question,  
5 write it down," and am I misunderstanding? Oh, I'm sorry.

6 HONORABLE TRACY CHRISTOPHER: The way it is  
7 currently drafted, the revised way that it is currently  
8 drafted, it's under a topic heading that says "Duties of  
9 presiding juror," and then it says, "Give written  
10 questions or comments to the bailiff, who will give them  
11 to the judge." It doesn't say --

12 MR. DAWSON: You have to write them down.

13 HONORABLE TRACY CHRISTOPHER: -- you have to  
14 write them, but it is under "Duties of presiding juror."

15 CHAIRMAN BABCOCK: Where, in 226a?

16 HONORABLE TRACY CHRISTOPHER: Under our  
17 proposed draft that's sitting at the Supreme Court.

18 CHAIRMAN BABCOCK: Justice Bland.

19 HONORABLE JANE BLAND: The problem with the  
20 Castillo case is not that an individual juror sent out the  
21 question and the lawyers acted on it. The problem would  
22 be if that individual juror acted the way she or he did  
23 because somebody told her to or alluded to her that she  
24 ought to do this to push it into settlement or if there  
25 was some outside influence that was brought to bear, and

1 that's what the Supreme Court said, "Well, go do discovery  
2 and find out if there was some outside influence," and  
3 that makes perfect sense, but that doesn't mean that, you  
4 know, an individual juror asking a question is -- and who  
5 is or is not the presiding juror, you know, is in and of  
6 itself a bad thing. It would be a bad thing if it was  
7 connected with some improper influence, and the presiding  
8 juror usually is the one that asks the questions as part  
9 of his or her duties, but sometimes delegates that job to  
10 the person with the best handwriting or to the person who  
11 is the person that's really interested in getting the  
12 answer to the question because they can phrase the  
13 question exactly how they want the judge to see it.

14           So jurors take care of, you know, the manner  
15 and means in which they deliberate, and they do a pretty  
16 good job, I think, of managing their deliberations, and I  
17 don't think we can craft a rule that will make them manage  
18 their deliberations better than they manage them  
19 themselves.

20           CHAIRMAN BABCOCK: Richard.

21           MR. MUNZINGER: I have a question before I  
22 make my comment. Are we going to discuss 265.1 at all  
23 today?

24           CHAIRMAN BABCOCK: Yes.

25           MR. MUNZINGER: Okay. Well, regarding Rule

1 226, I agree with the comments of the judges who don't  
2 want additional instructions to the jury regarding jury  
3 questions, and I disagree with those who want to have  
4 specific rules, principally because all the Castillo case  
5 did was to say there's enough in the record here to see if  
6 there's been improper influence, look at it and see if  
7 there has been. What happens if you start having these  
8 rules and then all of the sudden some juror comes out and  
9 says, "Yes, I wanted a question but the foreman wouldn't  
10 ask it" or "The foreman didn't ask it in the way that I  
11 wanted" or this or that or so forth.

12           All you're doing really is in my opinion  
13 maximizing the chances that people will file motions for  
14 new trial or motions for hearing in the hopes of getting a  
15 settlement or something like that when the current law  
16 regarding new trials and jury misconduct really doesn't  
17 contemplate any of that. It's improper influence from  
18 outside the jury room, and so I don't think that there is  
19 any need to have rules that the foreman must write the  
20 question down or do this or that or so forth. We've  
21 gotten along pretty well all these years with just this  
22 one question, and that's my vote, but I do want to discuss  
23 or I hope that we will discuss Rule 265.1 before we  
24 adjourn, which I understood was going to happen at 4:30 or  
25 4:45, something like that.

1 CHAIRMAN BABCOCK: Something like that.  
2 Gene.

3 MR. STORIE: That's what I wonder, is  
4 whether the instructions might imply that the presiding  
5 juror is some sort of gatekeeper, which I think we would  
6 not want.

7 CHAIRMAN BABCOCK: Elaine.

8 PROFESSOR CARLSON: Part of the reason I  
9 kind of pushed to get this on the agenda is twofold. I  
10 wanted to hear the collective wisdom of this group, and  
11 two, I didn't know how to teach this. I was like, well,  
12 what are the parameters, what are the practices? It seems  
13 to me at a minimum -- maybe it would be, but it seems it  
14 wouldn't be real harmful to include in that instruction  
15 "Any juror may ask a question. It's the job of the  
16 presiding juror to ask questions."

17 MR. STORIE: Right.

18 CHAIRMAN BABCOCK: Justice Bland.

19 HONORABLE JANE BLAND: Well, you know, I  
20 don't think we want to encourage questions.

21 PROFESSOR CARLSON: I know.

22 HONORABLE JANE BLAND: I mean, we want to  
23 be --

24 PROFESSOR CARLSON: I know.

25 HONORABLE JANE BLAND: You know, we want the

1 jurors to try to decide the case themselves and only go to  
2 questions as a last resort, and the thing about even the  
3 instruction that we currently have, which I think is  
4 pretty similar to the one we're proposing, even that one,  
5 for a jury that's having that difficult job of finding the  
6 facts, the first instinct is "Maybe we can get some help  
7 from the judge," and so you'll get, you know, a couple of  
8 questions, and once they figure out that the judge isn't  
9 going to give them any help and that they're the ones that  
10 have to come up with the answer on their own, they do.

11           But, you know, if we say anyone can ask a  
12 question, I have this -- you know, instead of a couple of  
13 questions and they get no help, and then they go "Oh,  
14 we're going to get no help, we'll figure it out on our  
15 own," we might start getting, you know, lots of questions,  
16 but maybe not. I mean, it just seems like we have the  
17 right balance in the rule as it exists, and we haven't  
18 really had much problem with jurors managing their own --  
19 at least that we know of, and I think the rules are  
20 purposefully, you know, geared toward us not really  
21 knowing how they manage their deliberations. We don't  
22 really want to know that, and so let's just let them  
23 manage.

24           CHAIRMAN BABCOCK: Alistair, Levi, and then  
25 Lonny.

1 MR. DAWSON: Would it be helpful to have  
2 language -- and I can't remember what language you-all  
3 have -- that says if you have a question --

4 THE REPORTER: Speak up, please.

5 MR. DAWSON: Add language "if you have a  
6 question that may assist you in your deliberations" or  
7 somehow narrow it a little bit. Would that be helpful?

8 HONORABLE LEVI BENTON: I want to go back to  
9 what Roger said, and I prefer to test a little bit what  
10 Justice Bland said. I'm not really sure that we have the  
11 right balance in our rules now, and I don't see what harm  
12 comes from modification of the rules to clarify or  
13 encourage to make certain all jurors know that they have a  
14 right to tender a question to the presiding juror and have  
15 the expectation that the presiding juror will submit it to  
16 the court. You know, if in a perfect system we would have  
17 juries that have a wide level or wide degree of education,  
18 income, ethnicities; and, you know, there's every chance  
19 that one or more jurors will feel a level of intimidation  
20 by some other juror or presiding juror; and you want the  
21 least educated, the most intimidated juror, to feel like  
22 they have a right to ask a question and to have the  
23 expectation that their question will be submitted to the  
24 court; and I don't know what harm could come from that.

25 Will it slow the system down? Sure it will.

1 But maybe justice -- the perception of justice is better,  
2 and just to touch on Alistair's concern or someone else's  
3 concern, if that juror gave an affidavit to someone  
4 post-verdict suggesting that they had a question that the  
5 presiding juror would not submit, that's not a necessarily  
6 improper or an outside influence. That's just a presiding  
7 juror who didn't follow an instruction, but that's -- you  
8 know, if the jury is polled afterwards, to the losing side  
9 it's sort of too bad, so sad that we didn't have a  
10 presiding juror that followed faithfully all of the  
11 instructions, but it's not a ground for new trial or  
12 evidence of misconduct.

13 CHAIRMAN BABCOCK: Lonny had his hand up  
14 earlier, and then Judge Christopher.

15 PROFESSOR HOFFMAN: Both Richard and Jane  
16 both assumed that we have -- the system has worked fine.  
17 My question is why do we know that? How do we know that?  
18 How do we know what voices haven't been squelched?

19 CHAIRMAN BABCOCK: Judge Christopher, how do  
20 we know that?

21 HONORABLE TRACY CHRISTOPHER: Well, the few  
22 times that we have had a lot of dissension in the jury  
23 room, other jurors write notes and give them to the  
24 bailiff. I mean, you know, that --

25 PROFESSOR HOFFMAN: They sometimes do that.



1 HONORABLE TRACY CHRISTOPHER: Yes. And I  
2 mean, we get notes in different people's handwritings, and  
3 we'll get notes that say, "The presiding juror is not  
4 acting right," and we'll get notes that say, "They're not  
5 letting me talk." You know, occasionally things get  
6 heated in there, and we do get that. I will say we  
7 actually do have two rules that are already in place about  
8 jury communicating with the court, one of which is on  
9 disagreement about the evidence. That's Rule 287, and the  
10 jury has to tell you they disagree about the evidence  
11 before you read them back testimony. But the other one,  
12 285, just says, "The jury will tell the officer in charge,  
13 who shall" -- "that they want to communicate to the court"  
14 and then they may "in open court and through their  
15 presiding juror communicate with the court either verbally  
16 or in writing."

17 So the current rule suggests that the  
18 presiding juror is the one who is supposed to be funneling  
19 the questions, which is why we have kept the instruction  
20 under "Duty of presiding juror," but I think it's written  
21 in such a broad way as to indicate that they can come from  
22 anyone. I don't have a problem with adding "If any juror  
23 wants to ask a question, the presiding juror will send it  
24 out," if that's what we think should be there.

25 CHAIRMAN BABCOCK: How many people think we

1 need a rule? Raise your hand.

2 How many people think we don't need a rule?

3 HONORABLE NATHAN HECHT: We should rename  
4 this the no rules advisory committee.

5 CHAIRMAN BABCOCK: Well, that foreshadows  
6 the election results. Three people think we should have a  
7 rule, and 16 people think we should not have a rule.

8 PROFESSOR CARLSON: Thank you for humoring  
9 me.

10 MR. GILSTRAP: How about no rules after 4:00  
11 o'clock?

12 CHAIRMAN BABCOCK: Yeah, take a vote after  
13 4:00. Well, we'll caucus with the Court and see where we  
14 go from here. We do need to talk about 265.1 because  
15 somebody is eager to talk about it. Somebody over here on  
16 the right wing.

17 MR. MUNZINGER: I have two questions. One,  
18 have we voted that we do want to recommend this rule to  
19 the Court, notwithstanding that the Legislature has not  
20 enacted the law that seemed to have prompted it in the  
21 beginning?

22 CHAIRMAN BABCOCK: Richard, my recollection  
23 is that we were sort of waiting to see what the  
24 Legislature did before we crossed that.

25 MR. MUNZINGER: That was my memory as well,

1 and so before we adjourn today I would hope there would be  
2 a vote as to whether we do or don't want to have such a  
3 rule since the Legislature has not chosen to require it,  
4 and then the other question or comment that I have is that  
5 there is a section in No. (6) on the last page, and I  
6 don't recall whether we discussed this or not. I'm sorry  
7 about my memory, but the last phrase of the first sentence  
8 of No. (6), "If the trial court allows a verbatim or  
9 reworded juror question, the trial court maybe either ask  
10 the question or allow a party to ask the question of the  
11 witness." Did we discuss that disjunctive clause?  
12 Because I think it could provide a tactical advantage for  
13 the trial court to allow one or the other lawyers to read  
14 such a question, and if we're going to adopt this rule I  
15 would like to debate the wisdom of that provision and ask  
16 that it be deleted.

17 CHAIRMAN BABCOCK: Judge Christopher.

18 HONORABLE TRACY CHRISTOPHER: I could be  
19 wrong, but I thought when we first started talking about  
20 this juror question rule we voted in favor of a  
21 discretionary juror question rule.

22 MS. PETERSON: That's my recollection as  
23 well.

24 HONORABLE TRACY CHRISTOPHER: Irrespective  
25 of the legislation.

1 CHAIRMAN BABCOCK: Okay. Well, you were in  
2 charge of that, so --

3 HONORABLE TRACY CHRISTOPHER: I thought we  
4 voted in favor of a discretionary rule as a body when more  
5 people were here, and then, secondly, I -- we did discuss  
6 allowing a party to ask the question of the witness  
7 because the thought was that it -- Judge Yelenosky was  
8 doing it that way in Austin, and he did a very persuasive  
9 discussion about it, and people said, yeah, that's a good  
10 option to put in, and so we put that in. I'm not sure if  
11 there was an official vote on the option or not.

12 MR. LOW: Judge, what we did discuss, I  
13 mean, it's happening all over the state, and so we're  
14 changing not what the -- it's happening anyway and going  
15 to go on happening unless we have a rule that prohibits  
16 it, and then we're going to have a role with the judges.  
17 The judges like that, so I thought we did vote the first  
18 paragraph discretion of the trial court, and that keeps  
19 what's going and then my memory is consistent with what  
20 Tracy said about the remainder.

21 CHAIRMAN BABCOCK: Okay. What else? Other  
22 comments about this rule? Anything further about  
23 subparagraph (6) that Richard Munzinger is talking about?

24 MR. MUNZINGER: Well, if we didn't vote, I  
25 would like to vote. If your memory is that we voted to

1 include that language and I've lost that vote once, I  
2 don't want to rehash it. If we didn't, I want to debate  
3 it.

4 HONORABLE TRACY CHRISTOPHER: I don't  
5 remember a vote. I just -- I remember a fairly long  
6 discussion about it, and we came back with this language,  
7 but I don't remember an official vote on having that  
8 option.

9 MR. LOW: It was merely an option.

10 MR. MUNZINGER: Yeah. Well, I don't see any  
11 reason to have the option. If the judge rules that the  
12 question is a proper question that can be asked, then the  
13 judge ought to read the question --

14 MR. LOW: I agree.

15 MR. MUNZINGER: -- as written or rewrite it  
16 himself. So now I've got a rule that says the judge can  
17 rewrite a question and let my adversary read it to the  
18 jury and obtain whatever tactical advantage there is that  
19 my adversary has cloaked as the person who solicited this  
20 question on behalf of the curious juror. Bull corn. Let  
21 the judge read the question and don't give advantage to  
22 either party. Who knows what a lawyer is going to do with  
23 reading that question, even though he may read it  
24 verbatim. There can be a tactical advantage to having  
25 read that question and being allowed to argue that "You'll

1 recall I read that question to you. Mr. Low is not  
2 interested in the truth. You'll recall -- you'll recall  
3 that I read that question to you." Well, I mean, that's  
4 the point.

5 MR. LOW: Well, it's the way you ask the  
6 question, I see now.

7 MR. MUNZINGER: There is no reason to give a  
8 trial court the discretion to let his friend ask the  
9 question.

10 MR. LOW: So in other words you want to take  
11 out and just say the question if asked --

12 MR. MUNZINGER: "Or allow a party to ask the  
13 question of the witness" deleted.

14 MR. LOW: Yeah.

15 MR. MUNZINGER: I practice law in different  
16 jurisdictions, and I've been hometowned a fair number of  
17 times.

18 CHAIRMAN BABCOCK: Even in El Paso, I might  
19 add.

20 MR. MUNZINGER: No, but I work around the  
21 state, and I've been hometowned in El Paso, but my point  
22 is there is some tactical advantage to -- possibly to  
23 asking such a question, and no reason for it to be  
24 incorporated into a rule adopted by the Supreme Court of  
25 Texas.

1 MR. FULLER: Richard, what about a  
2 situation, though, where it's a question that could be  
3 viewed as helping one side or the other? If it helps the  
4 other side would you rather the judge ask that question  
5 and cloak it with the aura of by god this is the  
6 determinative question, or would you rather the other side  
7 ask that question so that you can at least attribute it to  
8 your enemy? I don't know.

9 MR. MUNZINGER: It is a juror's question.  
10 It is a juror's question and is prompted by the juror.

11 MR. LOW: Right.

12 MR. MUNZINGER: If the lawyers didn't ask  
13 the question properly or if they've asked it but if the  
14 judge wants it to be repeated or what have you, it is  
15 still a juror's question. The rule says the judge is  
16 going to read the juror's question. I just don't want  
17 Buddy reading questions to the jury in a case against me  
18 or somebody else. I see a tact -- there is a potential  
19 tactical advantage to it. There are lots of ways of doing  
20 things in court, and I don't think that -- I know of no  
21 reason to allow a party to ask a question of a juror when  
22 he failed to ask it or didn't ask it right the first time,  
23 and now the judge is going to rule that he gets to ask it  
24 again? It doesn't make sense to me.

25 MR. LOW: Is Richard's position --

1 CHAIRMAN BABCOCK: Judge Peeples. I'm  
2 sorry.

3 HONORABLE DAVID PEEPLES: I think Richard's  
4 got a good point. There are some venues where this could  
5 be misused.

6 MR. LOW: Right.

7 HONORABLE DAVID PEEPLES: And I don't think  
8 we gain anything by having it in there. A lot of times,  
9 you know, you'll have the bench conference, and one lawyer  
10 will say, "I can clear that up very quickly," and the  
11 other side will say, "Fine with me," and it will be  
12 agreed, so it will happen that way, but if there's an  
13 objection to it, he's got a good point.

14 CHAIRMAN BABCOCK: Okay. How many people  
15 think that subsection (6) should remain as written, raise  
16 your hand?

17 And how many people think it should be  
18 changed in the way that Richard Munzinger suggests? All  
19 right. Three think it should remain, and 13 think it  
20 should be changed in the way Mr. Munzinger suggests. So  
21 Judge Patterson.

22 HONORABLE JAN PATTERSON: I'd like to  
23 suggest just a variation, that "Upon agreement of the  
24 parties either party may ask," because it has now been  
25 elevated to a juror question, so it comes within the rule,



1 but it may be more appropriate for that witness' lawyer or  
2 whomever -- I mean, I can imagine some circumstances where  
3 it might seem more natural, and I would like to leave some  
4 discretion with the trial judge and the lawyers, but I can  
5 see where it could be abused, but I'd like to see "upon  
6 agreement of the parties," and I think that would often  
7 happen, but it can't happen once it becomes a juror  
8 question unless you have something that addresses it.

9 CHAIRMAN BABCOCK: Okay.

10 HONORABLE JAN PATTERSON: So I didn't vote  
11 either way.

12 CHAIRMAN BABCOCK: You're talking about  
13 Munzinger's way. Anybody else? Any other comments about  
14 the rule? Yeah, Justice Bland.

15 HONORABLE JANE BLAND: Picking up with  
16 Justice Patterson, I was one of the dissenters on the last  
17 vote, and the whole thing ought to be only with the  
18 agreement of the parties because of the big problem that  
19 is associated that we can't really solve with having a  
20 juror's question put into the trial, whether the judge  
21 asks it or a party asks it, and those people on the Texas  
22 Supreme Court that have this concern, hang tough.

23 HONORABLE TRACY CHRISTOPHER: I respectfully  
24 dissent.

25 HONORABLE NATHAN HECHT: That person or

1 those people, right.

2 CHAIRMAN BABCOCK: Person or persons.

3 Anything else on this rule? Okay. We're done with this  
4 rule. Elaine, I know you were itching to get to Rule 296.

5 PROFESSOR CARLSON: No, I'm deferring to  
6 Judge Peeples on Rule 300.

7 CHAIRMAN BABCOCK: Well, I know that you're  
8 both itching to do it. Anything you want to say in five  
9 or ten minutes?

10 HONORABLE DAVID PEEPLES: Well, the problem  
11 is this is I think a seven-person committee and two of us  
12 are here.

13 CHAIRMAN BABCOCK: Yeah.

14 HONORABLE DAVID PEEPLES: Elaine and I. The  
15 other members are not. We've had a lot of conference  
16 calls, and I don't think the discussion -- if you're  
17 counting on the subcommittee to carry the ball very much,  
18 most of them are not here, and that's Dorsaneo, Duncan,  
19 Hatchell, Cortell, and Duggins, so we're without them. I  
20 can present the one I'm responsible for, which is 300.

21 MR. GILSTRAP: Chip? Chip?

22 CHAIRMAN BABCOCK: Yeah, Frank.

23 MR. GILSTRAP: Look, I've talked several  
24 people about -- that have been here a long time about this  
25 set of rule revisions, and they're all very pessimistic

1 that we'll really do any good. It's been tried before.  
2 It is a difficult problem, and I don't see how we can do  
3 any good in 15 minutes or a half hour at this juncture. I  
4 really don't.

5 CHAIRMAN BABCOCK: No, I wasn't suggesting  
6 that we try to get through it. I didn't know if anybody  
7 was just itching to get started, and I think we can defer  
8 it to next meeting, and maybe we'll have some more members  
9 of the subcommittee here then at that time. Is that okay  
10 with you, Elaine?

11 PROFESSOR CARLSON: Sure.

12 CHAIRMAN BABCOCK: Okay with you, Judge  
13 Peeples?

14 HONORABLE DAVID PEEPLES: Yes.

15 CHAIRMAN BABCOCK: Okay. Any other  
16 business? Yeah, Gene.

17 MR. STORIE: May I back up one? I was  
18 looking again at the subsection (6), and it says, "The  
19 parties will be allowed to ask any follow-up questions."  
20 Should that be "may," because I wonder if that's going to  
21 introduce the concerns that Richard had about sending off  
22 in some odd direction? I mean, are the parties then given  
23 an absolute right to ask follow-up questions?

24 CHAIRMAN BABCOCK: Yeah, I don't think so.  
25 Judge Christopher.

1 HONORABLE TRACY CHRISTOPHER: Oh, I'm sorry,  
2 I wasn't paying attention. I think -- I think we changed  
3 -- I can't remember whether we made everything "will"  
4 because that's more mandatory than "may," but I think the  
5 idea was to make it mandatory, but if we want to say  
6 "must." But we did find that we did vote before on  
7 whether the party can ask the question or not, and in  
8 February '09, 14 said judge only, 1 said lawyer only, and  
9 22 said discretion of the judge as to whether it should be  
10 judge or lawyer.

11 CHAIRMAN BABCOCK: So we're all over the  
12 map.

13 HONORABLE TRACY CHRISTOPHER: Yeah.

14 CHAIRMAN BABCOCK: Well, that will give the  
15 Court some direction.

16 HONORABLE TRACY CHRISTOPHER: Well, but, you  
17 know, "will" or "must," "must" is probably a better word,  
18 because I think it was intended to be mandatory.

19 CHAIRMAN BABCOCK: Okay. Our next meeting  
20 is September 25th and 26th at the TAB again, not here in  
21 our football length table arrangement. Anything else?

22 MR. HAMILTON: What month did you say?

23 CHAIRMAN BABCOCK: September 25th I believe  
24 is the next meeting. Right?

25 MS. PETERSON: Uh-huh.

1                   CHAIRMAN BABCOCK: September 25. Thanks  
2 everybody. Appreciate it.

3                   (Meeting adjourned at 4:30 p.m.)  
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2 **REPORTER'S CERTIFICATION**  
 3 MEETING OF THE  
 4 SUPREME COURT ADVISORY COMMITTEE

5 \* \* \* \* \*

6  
 7  
 8 I, D'LOIS L. JONES, Certified Shorthand  
 9 Reporter, State of Texas, hereby certify that I reported  
 10 the above meeting of the Supreme Court Advisory Committee  
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13 I further certify that the costs for my  
 14 services in the matter are \$ 1,799.00 .

15 Charged to: The Supreme Court of Texas.

16 Given under my hand and seal of office on  
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D'Lois L. Jones  
 20 **D'LOIS L. JONES, CSR**  
 Certification No. 4546  
 Certificate Expires 12/31/2010  
 21 3215 F.M. 1339  
 Kingsbury, Texas 78638  
 22 (512) 751-2618

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