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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 1, 2005

(FRIDAY SESSION)

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COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 1st
day of April, 2005, between the hours of 9:00 a.m. and
5:45 p.m., at the Texas Association of Broadcasters, 502
East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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Documents referenced in this session

20 05-6	Rules 14 & 15, 3-30-05 subcommittee draft
21 05-7	Minority report on bulk distribution 3-30-05
22 05-8	Letter from Judge Paul Womack, 4-1-05

1 *--*--*--*

2 CHAIRMAN BABCOCK: The first order of
3 business is to note what everybody sees, which is Justice
4 Hecht is not here, but I just got a call from him, and he
5 is on his way, and he said to start without him, so we
6 will. There are two cars that may belong to us that need
7 to get moved because if they're not they will be towed.
8 One is a black Ford Explorer, license plate P, as in
9 Peter, 45BKS, and the second one is a red Ford Mustang --
10 that's probably Elaine's -- convertible?

11 HONORABLE LEVI BENTON: That's mine, but the
12 next one is going to be a convertible.

13 CHAIRMAN BABCOCK: P72MAK. There are some
14 reserved spaces that you can park in.

15 MR. MEADOWS: What about the visitors spots,
16 Chip? Are they okay?

17 CHAIRMAN BABCOCK: I think they're okay.
18 But 24, 25, 20 and 22, so any one of those you can --

19 HONORABLE SARAH DUNCAN: Say those again.

20 CHAIRMAN BABCOCK: 24, 25, 20 and 22.

21 HONORABLE BOB PEMBERTON: They will tow
22 members of the Supreme Court Advisory Committee.

23 CHAIRMAN BABCOCK: Apparently they will.

24 HONORABLE BOB PEMBERTON: Yes, they will.

25 CHAIRMAN BABCOCK: You have personal

1 experience of that?

2 HONORABLE BOB PEMBERTON: I have personal
3 experience.

4 CHAIRMAN BABCOCK: Okay. We'll defer -- we
5 will defer the status report from Justice Hecht until
6 Justice Hecht gets here and go right into the Rule 15
7 situation. Paul Billingsley from the Harris County
8 clerk's office is here and has some remarks for us. Our
9 standard in terms of speakers on this topic has been to
10 allow anybody who wants to, really, to come and to speak
11 once. I've had several requests from people to speak a
12 second time, and I've told them that they are happy to be
13 here as resources and if we have questions, they can
14 respond, but if we let everybody who wanted to speak
15 multiple times speak we would never get this thing done,
16 and we have to get this thing done this time.

17 Having said that, the subcommittee has done
18 a terrific job in a very short period of time, and I know
19 Mike Hatchell and Ralph Duggins, who cochaired this
20 subcommittee, can't be here, but Hatchell sent me an
21 e-mail that detailed just the incredible work that this
22 subcommittee has put into this, which he we all are
23 grateful for and I know the Court is grateful for.

24 In terms of the schedule, we'll put in a
25 full day today. I personally thought that we might need

1 to spill into tomorrow. I've heard other people say, no,
2 we couldn't possibly spend two days talking about this one
3 rule, but I think they underestimate this committee,
4 although I noticed Orsinger is not here, so we do get a
5 couple hour benefit by Orsinger not being here. But if we
6 meet tomorrow we'll meet between 9:00 and 11:00 if we need
7 it, but if we don't need it, that's great.

8 So without further ado, Paul Billingsley is
9 the technology director for Harris County District Clerk's
10 office, and he has a couple of comments. Paul.

11 MR. BILLINGSLEY: Thank you very much. I
12 guess there was a little breakdown in communication. I
13 really wasn't prepared to make a speech or anything today.
14 But since you gave me the floor, I'll be happy to take it
15 for a second or two.

16 CHAIRMAN BABCOCK: Okay.

17 MR. BILLINGSLEY: We just had a few comments
18 Mr. Bacarisse wanted me to talk about. The way the rule
19 is now there is no way the electronic -- sensitive data
20 forms can be sent in electronically. Our office is moving
21 a lot with Texas Online, working in conjunction with
22 Bearing Point. We're hoping to go live at the end of May,
23 start taking things in electronically through our office.
24 We would like to consider that process to be changed if
25 possible.

1 Also, the sensitive data sheet being on a
2 pink piece of paper causes some issues with us also. As I
3 said before, if we are taking things in electronically, if
4 that's the case then any time I print out a copy of this
5 for someone in the court we're going to have to be
6 stocking a lot of pink paper throughout Harris County. So
7 those are the main issues that we have with this.

8 Again, thank you for giving me the floor. I
9 really wasn't prepared to speak on this, but I did have
10 comments.

11 CHAIRMAN BABCOCK: That's okay. If the
12 issues come up as we move along, we'll call on you.

13 MR. BILLINGSLEY: All right. Thank you.

14 CHAIRMAN BABCOCK: And feel free to raise
15 your hand if you think we're way off track on something.

16 MR. BILLINGSLEY: Great. Thank you.

17 CHAIRMAN BABCOCK: Timing being impeccable,
18 Justice Hecht is here to give his status report. Anything
19 to status us on? Hardly fair to make you walk in and
20 start speaking.

21 HONORABLE NATHAN HECHT: I've got it right
22 here. Well, we have a ninth colleague if the Senate
23 confirms Chief Justice Johnson next week, as we hope they
24 will. I don't know if you know Phil Johnson. He's the
25 Chief Justice of the Amarillo court of appeals, has been

1 for a couple of years and was on that court for a couple
2 of years before then, before he was made chief. He is a
3 graduate of Texas Tech Law School and also the university.
4 I am no longer the oldest person on the Court, although
5 because Chief Justice Johnson served a term in Vietnam, I
6 still graduated from law school before anybody else, but
7 we are looking forward to having him with us.

8 This committee worked on protective orders
9 last time, and since then the group in California that
10 rewrites things so that simple people can understand it
11 better has worked their magic on the forms. The task
12 force has been through them again a couple of times, and
13 we think that they are in a position now where they can --
14 we feel comfortable putting them out and they'll do some
15 good. There's probably a lot more work to be done on
16 them, mostly in the sense of just making them plainer, but
17 I think they'll serve a good purpose now, and the Court is
18 going to consider approval of them Monday or Tuesday, and
19 I suspect they'll approve them.

20 There is a bill pending in the House that
21 should be voted out in the next few days on certified
22 question appeals that will fix the three things that this
23 committee was worried about with the statute, but will
24 also change the certified question appeal to allow for
25 questions to be certified without the agreement of the

1 parties if the case -- if the amount in controversy
2 exclusive of the usual things is \$100,000 or more, or more
3 than \$100,000, and still require the agreement of the
4 parties if it's less than that. So this is a move toward
5 the 1292b procedure in Federal court, but not completely
6 there, but it kind of resembles it since the cutoff for
7 Federal court jurisdiction is \$75,000. So maybe that
8 makes some sense, and that's in the House. There is no
9 bill in the Senate, but they seem to -- everybody seems to
10 have worked out their differences on this, so perhaps it
11 will go easily through the Senate.

12 And then finally, there is a joint
13 resolution in the Senate that would admonish, call on the
14 Court to write rules regarding the filing of cases in
15 courts of appeals where their districts overlap and in
16 determining how the applicable law is to -- is to be
17 determined. So the Legislature has had this on their
18 plate, but they at this point have decided that it would
19 be better for this group to deal with it in rule-making
20 rather than to try to pass a bill, which was their
21 first -- which was their first effort. So that seems to
22 be moving along smoothly, and I expect that it will
23 probably pass. So I think that's all we have, but if
24 there are any questions, I will be happy to try to answer
25 them.

1 CHAIRMAN BABCOCK: Great. Any questions?
2 Okay. The subcommittee's work is going to be discussed or
3 led by Justice Duncan and Justice Gray, and have you-all
4 decided who is going to speak first?

5 HONORABLE TOM GRAY: I think it defaulted
6 this direction.

7 CHAIRMAN BABCOCK: So not the senior justice
8 but the junior justice got to --

9 HONORABLE SARAH DUNCAN: He's a chief.

10 HONORABLE TOM GRAY: Is that it? You're
11 ready?

12 CHAIRMAN BABCOCK: Yeah. Let's just -- I
13 mean, I assume -- well, why don't you tell us a little bit
14 about what the thought process was on the subcommittee
15 following our last meeting on the subject?

16 HONORABLE TOM GRAY: You'll recall when we
17 last left this topic we had a very large rule that
18 largely, as Mike kept reiterating, we did not feel
19 comfortable at the time in just jettisoning wholesale the
20 recommendations that had come to us in managing this
21 problem; and the more we talked about it, about what the
22 problem was, the more we realized we had multiple
23 problems; and Bonnie and Andy and myself, Sarah, Mike
24 Hatchell, Ralph Duggins, Stephen Tipps, and in one of the
25 early calls Alex Albright, we were all on conference calls

1 for many hours. I think -- should I tell them where you
2 were on one of them, Bonnie, or just let that go?

3 MS. WOLBRUECK: It's okay.

4 HONORABLE TOM GRAY: Bonnie was in Louisiana
5 in one of them. I was driving across East Texas for one
6 of them.

7 MS. WOLBRUECK: They were saving me money
8 actually.

9 HONORABLE TOM GRAY: And so we spent a lot
10 of time, and we really did try to address the problem, but
11 the more we worked on it the more we realized that this
12 didn't work in one rule because we had four fundamental
13 problems that we were dealing with; and that was the
14 attempting to, if you will, codify the common law doctrine
15 of the right of access to government records; we were
16 dealing with sensitive data that winds up in those
17 records; and then we were dealing with the remote access
18 issue; and then we were dealing with bulk distribution.

19 So we were really trying to write one rule,
20 four different problems, and so early on in the process,
21 shortly after we left here and we got a redlined copy back
22 with the changes and the votes from the last big committee
23 hearing, we realized or we felt like -- we took a vote and
24 it was unanimous -- that it didn't work to put it all in
25 one rule. We needed to break it out and address the

1 problems as opposed to trying -- and the biggest problem
2 was trying to work in the common law right of access to
3 court records, and so with that out of the rule we then
4 started working on a much simpler draft that had nothing
5 other than -- and a footnote here, you may recall that
6 there was a vote taken at the last big committee hearing
7 of whether or not we wanted to address bulk access, and
8 while there is some difference of exactly what the vote
9 was as to whether or not it was just take it out of the
10 definitional part at that point and revisit it later or
11 whatever, it was overwhelming to really not address the
12 bulk access at that point in that draft of the rule, and
13 for those of you-all that have the papers today you'll see
14 that we have got a minority report from the subcommittee
15 that will come back and address bulk access, but what we
16 really started working on then was the concept of the
17 sensitive data form and how to deal with the sensitive
18 data in pleadings and then the other problem of the remote
19 access.

20 And the more we worked on that, literally we
21 would be talking on the call for, you know, five minutes,
22 ten minutes, and realize that everything we had just
23 talked about that we really thought we were talking about
24 the sensitive data form, we had gotten off into another
25 area, which was the remote access, and that presented

1 another problem, and we decided that the easier way to do
2 it was to actually break out those two aspects, the
3 sensitive data form and its implications from the remote
4 access problem and its implications.

5 And so we bring to you-all today as
6 subcommittee drafts two rules, 14, dealing with the
7 sensitive data form and then -- or sensitive data. It's
8 much broader than just the form, but Rule 14 dealing with
9 sensitive data and then Rule 15 that deals with remote
10 access. And I guess we'll start with them in their
11 sequence, the sensitive data rule.

12 Well, let me talk about three or so what I
13 would characterize as known issues in 14 and 15. We
14 received several comments consistent with the comment
15 we've already heard this morning regarding the e-filing
16 and pink paper problem that we'll get to. One of the
17 other problems is still dealing with the date of birth --
18 and, Lisa, I have some other things to add to that since
19 you and I last talked -- and how much of that information
20 is included and then the bulk distribution, as I talked
21 about, and one thing that you want to think about as
22 you're dealing with the remote access question is whether
23 or not if the clerk sees something in a record that
24 doesn't have a label on it, whether or not that is an item
25 that can separately be in effect denied remote access

1 based upon the clerk's observation.

2 So we start with the rule, Rule 14, and I
3 mean, I've always been reticent to start with the
4 definitions, but there's only one here and that's the
5 definition of sensitive data, and you see that the listing
6 -- an observation, just to draw your attention to it maybe
7 to start some of the discussion, you'll notice in item
8 14.1(b), that's limited to bank account, credit cards, and
9 other financial account numbers. You may recall that the
10 original draft was much broader. It was a lot of other --
11 had professional license numbers, everybody other than
12 State Bar numbers, and there was just a lot of other
13 information that was going to be treated as sensitive
14 data, but we tried to focus on what it was we were worried
15 about, which was the Social Security number, credit card
16 information -- excuse me, bank account information, credit
17 card information, and other financial account information.
18 Sarah.

19 HONORABLE SARAH DUNCAN: We also started
20 thinking when we focused in -- someone focused in on the
21 exception for attorneys' State Bar numbers, and we started
22 having a discussion of, well, why are other people's
23 professional numbers, registration numbers, sensitive
24 data? I mean, you could be doing a -- preparing to do a
25 foundation for a house and you want to get the

1 registration -- you have a registration number of somebody
2 you're considering hiring to do this foundation. You
3 might very well want to run a search of that engineer's
4 registration number to see how many lawsuits that person
5 was involved in, so we decided to ditch the whole
6 professional registration number out of this rule.

7 CHAIRMAN BABCOCK: Judge Christopher had a
8 question.

9 HONORABLE TRACY CHRISTOPHER: Is it my
10 understanding that this rule is going to apply for civil
11 and criminal --

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE TRACY CHRISTOPHER: -- cases?

14 CHAIRMAN BABCOCK: Correct.

15 HONORABLE TRACY CHRISTOPHER: All right.
16 And will it -- I'm a little unclear as to what the case
17 record is. Like, for example, a ticket that has your
18 driver's license number on it that is, you know,
19 ultimately part of the court record, is that going to have
20 to be taken out? And maybe a criminal indictment that has
21 specific information about theft from bank account or
22 financial account, is that going to be taken out of an
23 indictment? I'm just a little unclear how this is going
24 to work, or is it only things that lawyers file?

25 HONORABLE TOM GRAY: The mechanics of -- I

1 mean, those are the kind of problems that if they are
2 there we need to know about so that we can draft them,
3 but, yes, I mean, that is -- would be covered.

4 HONORABLE TRACY CHRISTOPHER: So indictments
5 will have to have a sensitive data form attached to it? I
6 mean, indictments have a lot of this information in them.

7 HONORABLE TOM GRAY: At what point does the
8 indictment become public record? Unless it's sealed? I
9 mean, the day it's issued unless it's sealed?

10 MS. WOLBRUECK: That's correct.

11 HONORABLE TOM GRAY: Okay.

12 HONORABLE TRACY CHRISTOPHER: And I mean,
13 someone the last time we were here was talking about your
14 routine traffic tickets that, of course, have your
15 driver's license number on it. You know, what are you
16 going to do with that? That becomes part of the court
17 file.

18 I'm just -- before we even get into the
19 mechanics of this whole rule, I still have grave doubts
20 that we need the rule, and I know we've never discussed
21 that frankly, but I think the committee did a great job
22 with this rule. It's a much better draft than the last
23 one, and I think, you know, it's much clearer and it's a
24 good draft, but, you know, it seems to me have we ever sat
25 down and ever discussed whether we need it?

1 MR. HAMILTON: What are we trying to fix?

2 CHAIRMAN BABCOCK: Well, one thing we're
3 trying to do, as I understand it, is we're trying to have
4 a statewide rule so that the counties that decide to
5 implement electronic access to court records will do it in
6 this -- in a particular way, because now we have different
7 counties doing it differently. I mean, the difference
8 between Fort Bend County and Tarrant County, for example,
9 is dramatic. So one of the things we're trying to do is
10 have uniformity, but Judge Christopher raises a fine
11 point, which is you don't necessarily have to have a
12 sensitive data form in order to have a uniform rule about
13 how you're going to -- how you're going to permit
14 electronic access, but, Judge Gray, you had something
15 to --

16 HONORABLE TOM GRAY: Well, in connection
17 with the sensitive data form, it is in part designed to
18 facilitate the remote access or electronic access to
19 things that have been filed, but the sensitive data form's
20 real mission or objective is to keep the information that
21 the public -- and this is a reaction to a public
22 perception problem of identity theft, out of public view.
23 I mean, that is what we're trying to fix, and one of the
24 problems is if we don't fix it by rule it will be fixed by
25 legislation, and so that was my understanding of the

1 reason that we were approaching it as a rule-making
2 function to begin with, because there are a number of
3 bills that have been introduced that are quasi on hold
4 waiting to see what we do with protecting sensitive
5 information that are in case files, and so that was my
6 understanding of where we were coming from with the rule.

7 And the comment that I was going to make in
8 reference to Lisa, one of the problems that one of the
9 lawyers, literally as I was leaving the courthouse
10 yesterday, mentioned to me was that he has had some
11 problems in a case that was removed from state court to
12 Federal court because the pleadings had information in
13 them that the Federal court considered sensitive data, and
14 the pleadings were noncompliant, and they were still
15 struggling on how to get the file removed from state court
16 to Federal court because of the pleadings and how to get
17 those pleadings filed in compliance with the Federal rules
18 when they clearly originally complied with the state
19 rules, but there is a problem with having information in
20 them.

21 And so our rule as currently drafted
22 actually puts more information in the pleadings than the
23 Federal rule would allow, and so that's still another
24 problem, but --

25 HONORABLE TRACY CHRISTOPHER: Does the

1 Federal rule apply to all cases, criminal cases also?

2 CHAIRMAN BABCOCK: No.

3 HONORABLE TRACY CHRISTOPHER: Or is it just
4 civil cases?

5 HONORABLE TOM GRAY: That I don't know.

6 CHAIRMAN BABCOCK: Just civil cases I
7 believe. Is that right?

8 HONORABLE TRACY CHRISTOPHER: I don't think
9 we have enough criminal practitioners here.

10 CHAIRMAN BABCOCK: Lisa, is that wrong? Do
11 they apply to criminal?

12 MS. HOBBS: Originally when the Federal
13 model was implemented they excluded criminal cases to
14 study it further. My understanding is now criminal cases
15 are included in the program.

16 CHAIRMAN BABCOCK: Okay.

17 MR. MEADOWS: How does the name and address
18 of a minor child go to issues related to identity theft?

19 HONORABLE TOM GRAY: It doesn't in the sense
20 of the traditional identity theft, but that's another area
21 of public concern regarding the disclosure of private
22 information that the bills are directed towards and they
23 are going through.

24 MR. MEADOWS: Doesn't that kind of
25 information commonly appear in divorce proceedings?

1 HONORABLE TOM GRAY: Yes. And divorce
2 proceedings are -- when we get to the electronic data or
3 remote access, anything related to domestic relations is
4 exempted in total from electronic access.

5 CHAIRMAN BABCOCK: Buddy.

6 MR. LOW: Judge, why were driver's license
7 included? Because if you have a wreck, I mean, you know,
8 your driver's license, it's not hard to get somebody's
9 driver's license number. Is that usually included in
10 sensitive data, because you can find somebody's name, pull
11 up and get their driving record? I mean, driver's license
12 number is just -- you know, I don't know that mine doesn't
13 need protecting, but I never felt like anything protected
14 it. Why is that included?

15 HONORABLE TOM GRAY: My understanding based
16 on the draft and the work that had gone on before us, the
17 principal reason, driver's license, Social Security, date
18 of birth are the three identifiers, obviously in addition
19 to the name, that are used in connection with identity
20 theft; but, remember now, we're not excluding this from
21 being included in a pleading in its entirety. It is
22 defined as sensitive data and, therefore, has to be
23 included on a sensitive data form. To the extent that you
24 can leave the driver's license out of the pleadings, you
25 don't have to file the sensitive data form.

1 MR. LOW: You don't, but just the common
2 automobile accident, you have an accident. All right.
3 You file a lawsuit. You don't put it -- somebody wants to
4 know -- the adjusters go down and they get copies of the
5 police report. It's got my driver's license on it. I
6 mean, so I just wondered why it's included, and the only
7 other question I have, I notice that you don't list -- you
8 don't have kind of a catchall thing, because the Federal
9 government or the state government is working on this
10 constantly, and other things may be defined as sensitive
11 data.

12 If you're drawing a rule wouldn't you want
13 "and any other information made sensitive by Federal or
14 state statute"? I mean, because we're not the last ones
15 to deal with this. This is going to be continuing things,
16 and I don't know what else they could make sensitive. My
17 imagination is not creative enough to think, and maybe
18 there isn't anything, but I'm never amazed at what
19 Congress and legislators come up with. Never cease to be
20 amazed.

21 HONORABLE TOM GRAY: We talked about
22 including a provision, kind of a catchall, "anything else
23 defined by the party as sensitive data," which it doesn't
24 directly answer your question. Our fear was that we would
25 have too much information dumped off on the sensitive data

1 form.

2 MR. LOW: If you left it up to the parties,
3 but what if Congress passes some bill that says your -- I
4 don't know.

5 HONORABLE SARAH DUNCAN: Blood type.

6 MR. LOW: If they do then it's taken care
7 of, but if they don't it doesn't matter anyway. That was
8 the only question I had.

9 CHAIRMAN BABCOCK: There is a -- with some
10 of this there is a little bit of like putting the genie
11 back in the bottle.

12 MR. LOW: Yeah.

13 CHAIRMAN BABCOCK: Because I promise you I
14 can find out the date of birth of everybody in this room
15 like that.

16 MR. LOW: Absolutely.

17 CHAIRMAN BABCOCK: And probably most of the
18 other things, but Tom is right that there is substantial
19 pressure to protect -- to try to put the genie a little
20 bit back in the bottle, so I think we just have to give
21 our best --

22 MR. LOW: Right.

23 CHAIRMAN BABCOCK: -- shot about what should
24 and should not go in this list. And that --

25 MR. LOW: All right.

1 CHAIRMAN BABCOCK: It may make sense to go
2 item by item. What do you think, Judge Gray?

3 HONORABLE TOM GRAY: That's fine with me, at
4 the committee's pleasure.

5 CHAIRMAN BABCOCK: Why don't we talk about
6 Social Security numbers? Is there any reason to include
7 or exclude Social Security numbers from this sensitive
8 data list?

9 MR. LOW: Chip, wasn't there on something I
10 saw that said the last four numbers? Well, that's all
11 they ever -- you know, that you give nothing but the last
12 four numbers, and the last four numbers is what American
13 Express asks for or anybody else, but that's -- was that
14 in another draft of this that I saw?

15 HONORABLE TRACY CHRISTOPHER: No, it's
16 there.

17 MR. HARWELL: That's 14.2(b)(1).

18 MR. LOW: So I just as soon they give my
19 whole Social Security number as the last four numbers, I
20 mean --

21 CHAIRMAN BABCOCK: Okay. Carl.

22 MR. HAMILTON: Well, I'm trying to
23 understand the concept. As I read this, if you -- if for
24 some reason in a pleading you have to give, let's say the
25 Social Security number, in the pleading you only give the

1 last four digits but then you have to file a form which
2 gives the entire number. Now, why -- why do I need to
3 file a form with the court giving the entire Social
4 Security number? What is the purpose of doing that? I
5 don't quite understand.

6 HONORABLE TOM GRAY: There are a number of
7 statutes, and many of them come out of the family law
8 area, one, if the court needs that in connection with some
9 subsequent action, whatever it may be, but in those cases
10 where the Social Security number is required to be in a
11 pleading it's most often the result of a statutory
12 requirement. We are in hopes that this will be viewed as
13 compliant with that statute but at the same time keep the
14 information where it's not readily available to the
15 public.

16 In other words, if the Family Code provides
17 that -- I think it's the children and the parents of each
18 of the children, their Social Security number has to be
19 included; and that's for purposes, as I understand it, of
20 making sure we've got the right -- you know, identifying
21 them at a subsequent date with certainty and subsequent
22 withholding of child support; and the inclusion of the
23 four digits in the pleading then becomes compliance with
24 the statute because the entire Social Security number is
25 available to the court if need be in the sensitive data

1 form.

2 And that's the case on several of these
3 where what we're really trying to do is give the
4 practitioner a way to comply with the statute by including
5 the information in an abbreviated form in the pleading
6 while the full extent of the form is included in the
7 sensitive data form that is not publicly available. It's
8 a very limited list of people to get that.

9 MR. LOW: Chip, I think you raised the best
10 point. We can't -- in other words, we're not trying to
11 control what information might be out in other sources,
12 and you may be able to get all this information. We're
13 just going to say you can't get it from us, can't get it
14 from the court records.

15 CHAIRMAN BABCOCK: I think that's what
16 the --

17 MR. LOW: And I now understand.

18 CHAIRMAN BABCOCK: Okay. Yeah, Judge
19 Peeples.

20 HONORABLE DAVID PEEPLES: Could I just back
21 up and make sure I understand how these two rules work
22 together? 15 deals with me at my computer at my home and
23 I want to find out, let's say, about Gilbert Low. If I
24 have his name and he's been in a divorce case in Jefferson
25 County, I would find that out and then I could get some

1 information, but not what's on page one here, Social
2 Security number and so forth.

3 HONORABLE TOM GRAY: If you'll let me change
4 the kind of lawsuit he was in --

5 HONORABLE DAVID PEEPLES: Okay, not divorce
6 case.

7 HONORABLE TOM GRAY: If he was in a car
8 wreck case and you wanted to go in and see if Gilbert Low
9 has been intoxicated at the time that he was involved in
10 that lawsuit then, yes, you would be able to go in and
11 look at the pleadings and that kind of thing, but -- go
12 ahead.

13 HONORABLE DAVID PEEPLES: And remote, you
14 know, electronically I could get pretty much the same
15 thing that way as I could get by going physically and
16 looking at the file, but in no instance would I be able to
17 get things like Social Security number, bank account, that
18 kind of number that is sensitive here.

19 HONORABLE TOM GRAY: That is correct.

20 HONORABLE DAVID PEEPLES: Am I right?

21 HONORABLE TOM GRAY: Yes.

22 HONORABLE SARAH DUNCAN: Well, except that
23 15.4 contains a fairly long list of items that you
24 couldn't get remotely.

25 HONORABLE DAVID PEEPLES: Couldn't get what?

1 HONORABLE SARAH DUNCAN: Remotely. If you
2 walked into the courthouse you could get a copy --

3 HONORABLE DAVID PEEPLES: I see, yeah.

4 HONORABLE SARAH DUNCAN: -- of a pretrial
5 bail or presentence investigation report, but you couldn't
6 sit at home on your computer and get that report.

7 HONORABLE DAVID PEEPLES: And I guess part
8 of the reason for the way 15.3 is written, we don't want
9 people -- we don't want internet access to things like
10 driver's license number and so forth, get Buddy's driver's
11 license number and find out all over the country where
12 it's in some databank, at least you're not going to get it
13 in the court file in Jefferson County.

14 HONORABLE SARAH DUNCAN: You're not going to
15 get it remotely or by going to the courthouse.

16 HONORABLE DAVID PEEPLES: Or by going, yeah.

17 HONORABLE SARAH DUNCAN: Because that
18 sensitive data form is going to be filed separately, and a
19 very limited list of people can have access to it.

20 HONORABLE TOM GRAY: Okay. Anything more on
21 Social Security number?

22 CHAIRMAN BABCOCK: Anything else? Okay. I
23 don't know if this one requires a vote or not, but is
24 there dissent from including Social Security numbers in
25 the sensitive data category? Judge Christopher.

1 HONORABLE TRACY CHRISTOPHER: Can I just ask
2 a question?

3 CHAIRMAN BABCOCK: Yeah.

4 HONORABLE TRACY CHRISTOPHER: We have minor
5 settlement. Money gets put into the registry of the court
6 for minor. We routinely keep track of that through the
7 minor's Social Security number and full name, and we
8 require them to submit to us a W-9, which, of course,
9 again has their Social Security number on it. Are we
10 going to be required to create a sensitive data form for
11 every single one of those forms? Or I'm just trying to
12 understand mechanically how that's going to get done.

13 HONORABLE TOM GRAY: The answer to the first
14 part of the question, are we going to have to have a
15 sensitive data form for every one of those, no. The only
16 time you have to file the sensitive data form is the first
17 time that the information is included in a pleading or in
18 a filed document, and if -- then if it's subsequently used
19 in another one then you've already got the one on file, so
20 you don't have to have a sensitive data form for every
21 pleading that is filed.

22 HONORABLE TRACY CHRISTOPHER: Well, what,
23 for example, would you do with a W-9 form? It's just like
24 no longer part of the court record?

25 MS. WOLBRUECK: I'll answer that. That

1 actually is confidential now by statute.

2 HONORABLE TRACY CHRISTOPHER: Well, what do
3 you do with them physically?

4 MS. WOLBRUECK: Physically we do not keep
5 them with the file.

6 HONORABLE TRACY CHRISTOPHER: Where do you
7 keep them?

8 MS. WOLBRUECK: The information is kept in a
9 registry file, is the way we keep it, with all of the
10 accounting information for that. But it is -- it's
11 confidential now. Local Government Code Chapter 117 that
12 deals with the registry, minor's funds, now has that as a
13 confidential document.

14 HONORABLE TRACY CHRISTOPHER: So if I then
15 got a routine motion that says, "Okay, I'm 18, give me my
16 money," but the only order I have to look at is, you know,
17 "T. E. Christopher", without a Social Security number, I'm
18 going to have to -- my clerk is going to have to dig up
19 the sensitive data form, wherever we keep that, so that I
20 can then double-check that the minor who comes in -- and
21 when the minor comes in, they present their Social
22 Security number, their driver's license for
23 identification. I'm going to have to like pull all of
24 this sensitive data form in order to make my determination
25 that, yes, this is truly the person who is coming in

1 asking for this money.

2 HONORABLE TOM GRAY: Yes.

3 HONORABLE TRACY CHRISTOPHER: That's how it
4 will work?

5 MS. WOLBRUECK: Hopefully that will all be
6 electronically and you would have access on your computer.

7 HONORABLE TOM GRAY: You as the judge.

8 MS. WOLBRUECK: In Harris County.

9 HONORABLE TRACY CHRISTOPHER: Might happen.
10 Might not.

11 CHAIRMAN BABCOCK: Judge Benton.

12 HONORABLE LEVI BENTON: Well, Judge
13 Christopher, Tracy, actually addressed that because I
14 wondered whether she was going to get to the other end of
15 that minor settlement transaction and she did, but while I
16 have the floor there's something else that Tom said
17 concerns me. You said that the sensitive data form only
18 needs to be filed once. What about when there are amended
19 pleadings?

20 By way of example, let's say a minor is a
21 defendant in a car wreck. The minor and the next friend
22 are sued. The original pleading says "Tom Gray, Jr., can
23 be served by serving his next friend, Tom Gray, Sr. Tom
24 Gray, Sr., resides at 123 Y Street." Well, in that
25 pleading you've set out Tom Gray, Jr.'s address, and so

1 upon the filing of that pleading the sensitive data form
2 gets created. Then an amended pleading is filed and you
3 don't have to file another sensitive data form?

4 HONORABLE TOM GRAY: No. Under 14.2(c), if
5 new information is included in a subsequently filed
6 pleading then you have to in effect file a new -- if
7 additional, or I would contemplate if it had changed, then
8 that new information you would include in a new sensitive
9 data form. You could have multiple sensitive data forms
10 on the same case, but what we were trying to do is keep
11 from having a series of sensitive data forms with every
12 pleading that was filed. Only get a new sensitive data
13 form if you were providing new sensitive data.

14 HONORABLE LEVI BENTON: Okay. So what tells
15 the clerk's office that there is an amended pleading that
16 again includes sensitive data and they need to make sure
17 that this instrument, which was once identified, is set
18 out again and shouldn't be made available remotely?

19 HONORABLE TOM GRAY: No, the pleading itself
20 is accessible remotely, because the information in the
21 pleading is abbreviated information that is publicly
22 available. The sensitive data, the full Social Security
23 number, the full driver's license number, is all off in
24 the sensitive data form that is not available. None of
25 the sensitive data forms are going to be available

1 remotely.

2 The abbreviated information is included in
3 the pleadings. That pleading is -- if it otherwise
4 qualifies as a publicly available pleading, the entirety
5 of that pleading is available. Now, there may be other
6 reasons that that pleading is not remote access, but it is
7 not going to be because of the inclusion of sensitive data
8 in it because the sensitive data is off in the sensitive
9 data form.

10 I have not connected with Levi.

11 HONORABLE LEVI BENTON: Yeah, you have. You
12 have. Yeah.

13 HONORABLE TOM GRAY: Okay.

14 HONORABLE LEVI BENTON: But I do need more
15 coffee.

16 HONORABLE TOM GRAY: I do, too.

17 CHAIRMAN BABCOCK: Any other comments to
18 that --

19 HONORABLE TRACY CHRISTOPHER: Well, for
20 example, another just sort of procedural question so we
21 understand how the rule works. All right. I sign an
22 order that has sensitive data in it. Do we ever keep a
23 copy of the order with sensitive data in it intact
24 somewhere or are all my orders going to say, you know, "T.
25 E. Christopher," you know, "1234 Social Security number,"

1 or will there at some point be an order that says, you
2 know, the minor's full name and full number? Are we
3 always going to have to reference back and forth?

4 HONORABLE TOM GRAY: I think as drafted it
5 contemplates referencing back and forth.

6 HONORABLE TRACY CHRISTOPHER: You know, I
7 just --

8 HONORABLE TOM GRAY: But, see, again, if
9 you're --

10 HONORABLE TRACY CHRISTOPHER: But the
11 sensitive data form is not even my creation. You know, I
12 just -- referencing to something I didn't create as part
13 of my order?

14 HONORABLE TOM GRAY: But, see, if it's in
15 the context of domestic relations --

16 HONORABLE TRACY CHRISTOPHER: No, I'm
17 talking about cases I handle, name changes, minor
18 settlements --

19 HONORABLE TOM GRAY: Okay.

20 HONORABLE TRACY CHRISTOPHER: -- where this
21 kind of information shows up. More things than that, but
22 those come off, you know, the top of my head.

23 CHAIRMAN BABCOCK: Justice Duncan.

24 HONORABLE SARAH DUNCAN: I assume the rest
25 of the subcommittee will agree with this statement and the

1 rest of the committee will agree with this statement: If
2 somebody else has a better way, come up with it. This is
3 what we, I think, inherited from the Judicial Council, was
4 to have a sensitive data form. The effort is to permit
5 clerks to upload their documents onto the net so that the
6 public can have access to those documents. At the same
7 time we don't upload what many people consider sensitive
8 data that makes them vulnerable. If somebody else has a
9 better idea, I'm certainly open to it.

10 HONORABLE LEVI BENTON: Sarah, it's too
11 early to be sensitive. Too early. We're not even through
12 14.1. We need the rule.

13 HONORABLE SARAH DUNCAN: You should have
14 been in on our -- any one of you should have been in on --
15 we have had four-hour --

16 HONORABLE LEVI BENTON: We need the rule. I
17 just don't understand it.

18 HONORABLE SARAH DUNCAN: This is an
19 exceedingly difficult issue, and I think Judge Christopher
20 has brought up some very valid points of how is this going
21 to work in real life. Bonnie and Andy have done the same,
22 and it's just really hard. Once you start talking about
23 public access, immediate access to every document in a
24 courthouse, it's a really hard question.

25 CHAIRMAN BABCOCK: One of my senior

1 partners, once we were talking about a problem and he
2 said, "It's just too hard. Let's go have lunch."

3 HONORABLE SARAH DUNCAN: Well, that's kind
4 of what we did on bulk distribution.

5 CHAIRMAN BABCOCK: But we can't do that.
6 Lisa.

7 MS. HOBBS: I don't know, I haven't really
8 thought about this until now, but, Judge Christopher, I
9 don't know that the rule would prohibit Harris County from
10 having orders that -- one redacted order for public access
11 and one unredacted order for in-house access. I hadn't
12 thought about it, but it seems a little complicated and
13 I'm not sure the clerk's office in Harris County would
14 want to do it, but I don't know that it's prohibited from
15 being able to do that.

16 CHAIRMAN BABCOCK: Richard Munzinger.

17 HONORABLE SARAH DUNCAN: I think there might
18 be some constitutional issues.

19 MR. MUNZINGER: I'm going to confess how
20 limited my experience is, but I have practiced a long
21 time, and I don't recall ever having read the Rules of
22 Judicial Administration in a case, where I found it
23 necessary to read those rules in a particular case. In El
24 Paso at least, and I suspect elsewhere, most orders are
25 prepared by counsel, so that Judge Christopher's problem

1 that she raises really is my problem if I am a lawyer in
2 the case. I prepare the draft order and bring it to the
3 judge.

4 How are you going to acquaint the members of
5 the Bar with the requirements of these rules in a way that
6 makes it effective? It seems to me that you're almost
7 going to have to say something in the Rules of Civil
8 Procedure themselves cross-referencing to the Rules of
9 Judicial Administration unless judges and district clerks
10 are going to be preparing their orders, because I suspect
11 the practice statewide is what I just outlined. We
12 prepare the orders and we circulate them to opposing
13 counsel for approval, if they are of the nature requiring
14 approval, and then present them to the judge. So we're
15 going to have to step back in time, and it seems to me --
16 or step back in the process to do something to alert
17 counsel.

18 HONORABLE SARAH DUNCAN: At the last meeting
19 we pretty much had unanimous agreement that there is going
20 to have to be an amendment to the Rules of Civil Procedure
21 because these are pleading requirements. So that's
22 certainly contemplated.

23 CHAIRMAN BABCOCK: There's something about
24 having a judicial order that has a portion of it in effect
25 sealed that certainly, certainly contravenes 76a, but even

1 more fundamentally it doesn't seem to me that we should
2 have judicial orders that have a part of them that are
3 shielded from the public. It just doesn't seem like a
4 good thing to me, but anyway. Buddy.

5 MR. LOW: Yeah, you know, Richard is right,
6 because, I mean, there are a lot of lawyers that didn't
7 know and still some don't the administrative rule about
8 consolidation, if you have the same type case in different
9 counties and so forth. I mean, I've seen it, heard it,
10 and so they are not going to really know.

11 But the question I had was -- and it says
12 "The court clerk has no obligation to review cases" -- "a
13 case for sensitive data," and I just don't understand --
14 I'm not arguing with the rule. I just don't understand
15 how it would work. If later on an order is filed and it
16 has sensitive data in it, who sees that that order is not
17 posted on the website or something? How does that --
18 yeah.

19 CHAIRMAN BABCOCK: Judge Christopher.

20 HONORABLE TRACY CHRISTOPHER: You know, I
21 hate to suggest this, but I actually did send a draft to
22 Tom, but he never replied to me, so maybe it didn't go
23 through. I think you have to have court orders that
24 contain the information and then redact it, court orders
25 for public viewing. You know, I just -- I don't see how

1 -- like, for example, well, you know, just a typical name
2 change. In my name change I write down it's "Jane Smith,
3 now Jane Bland," and I put down TDL, Social Security
4 number, you know, address, race, date of birth, and then
5 the person can take that order to the driver's license
6 department, to Social Security, and get their
7 identification changed. This rule, they would be given an
8 order that's got, you know, "1234" and, you know, "July
9 '56" instead of the full date of birth. I mean, people
10 have a right to a full copy with all the information in it
11 of their own orders.

12 HONORABLE TOM GRAY: From where I was
13 looking at it, the order with the abbreviated information
14 would in effect have to be adequate for whatever we were
15 going to do. Obviously you've raised a point that -- I
16 mean, I hadn't considered whether or not that was going to
17 be enough for Department of Public Safety to change the
18 name on a driver's license or something of that nature.
19 But it -- I don't think, at least speaking for me, I did
20 not contemplate that there would be a order that contained
21 all the detail in one place and a redacted order somewhere
22 else. The order would follow the same lines as the
23 pleadings, using the abbreviated information and the
24 sensitive data form for those people that needed it would
25 be -- I mean, because there are those entities or agencies

1 that will have access, like the parties to the sensitive
2 data form, and I see a member of my subcommittee --

3 CHAIRMAN BABCOCK: Justice Duncan.

4 HONORABLE SARAH DUNCAN: The party can
5 always get a copy of their own sensitive data form.

6 MS. WOLBRUECK: And maybe the order could
7 just reference it, the sensitive data form. They can get
8 a certified copy, just attach that to the order if they
9 need it for any specific reasons.

10 MR. MEADOWS: Why is that better than having
11 a redacted copy of an order?

12 MS. WOLBRUECK: Because then we would have
13 -- like in divorce decrees now we have 50 and 75-page
14 divorce decrees. The clerk would have 150 pages of
15 divorce decrees. One would be redacted, the other one
16 would have the full information, which would be a
17 bookkeeping -- I mean, a records preservation nightmare.

18 HONORABLE TOM GRAY: The other thing it does
19 is it puts the party in control of who gets his
20 information and not the public, because the party has to
21 go get the sensitive data form and a copy of the order and
22 then go do something with it, and only the party -- the
23 party is then in control, and as to -- I mean, as to
24 whether or not it's better or not, you know, I don't know.
25 I mean, obviously from a clerk's standpoint of having two

1 forms of the order, that presents its own problem, but the
2 use of the sensitive data form as the backdrop, I guess,
3 is --

4 MS. WOLBRUECK: We actually do something
5 very similar in the rule today in the Jane Doe cases to
6 where the order does not have the information, but there
7 is a document that does, and Jane Doe has to have both of
8 them in order to get any further information. So really
9 to me the sensitive data form would be very similar to
10 that. If anybody required -- had reason to require the
11 sensitive data, they could get a certified copy of it from
12 the clerk's office and join that with the order for that
13 complete information.

14 MR. MEADOWS: So does the order in the
15 instance you're talking about reference the second
16 document?

17 MS. WOLBRUECK: Yes, it does, by cause
18 number. In the Jane Doe it's by case number.

19 MR. MEADOWS: So in Judge Christopher's
20 example of the name change she would enter an order and it
21 would reference a sensitive data form?

22 MS. WOLBRUECK: It possibly could. It would
23 just be a recommendation.

24 HONORABLE SARAH DUNCAN: If it has the same
25 cause number I don't know why you would need to reference

1 it. The way I would answer your question is the reason
2 it's better is because right now if your Social Security
3 number and financial account numbers are all in the
4 divorce decree in your case that was entered in Fort Bend
5 County last week, you have no control over what happens to
6 those numbers. They are on the web now, and a lot of
7 people don't want their financial account numbers on the
8 internet. That is the basic problem we're working with.
9 By creating a sensitive data form, it's going to be like
10 in the Jane Doe cases. It's going to be separate from the
11 file, it's going to be restricted access, and it's not
12 going to be on the internet.

13 MR. MEADOWS: I understand, but in the
14 hypothetical we were talking about it would be a redacted
15 copy available to the public, not the complete copy, not
16 the complete order, but I mean, I understand the point
17 and --

18 HONORABLE SARAH DUNCAN: There's not a
19 complete order under this rule.

20 MR. MEADOWS: I know, but under Judge
21 Christopher's question there was.

22 HONORABLE SARAH DUNCAN: I think having two
23 orders has big problems.

24 CHAIRMAN BABCOCK: Judge Bland, you had your
25 hand up a minute ago.

1 HONORABLE JANE BLAND: (Shakes head.)

2 CHAIRMAN BABCOCK: No? Elaine.

3 PROFESSOR CARLSON: I don't know if this
4 rule is implicated or not, but Rule 683 which deals with
5 injunctions and restraining orders specifically precludes
6 reference to a complaint or other document for purposes of
7 upholding a temp proceeding.

8 MR. MEADOWS: I'm sorry, Elaine. I can't
9 hear you.

10 PROFESSOR CARLSON: I'm sorry. I said I
11 don't know if this rule is implicated or not, but Rule 683
12 which deals with injunctions and restraining orders
13 specifically precludes the order referencing the complaint
14 or other document insofar as describing the conduct that's
15 restrained. So I don't know if that is implicated. If
16 you had a stalker, you're ordered not to stalk this person
17 and then you give their name, address, whatever.

18 HONORABLE TOM GRAY: Well, it seems to be
19 limited to the conduct that is restrained.

20 PROFESSOR CARLSON: It is.

21 HONORABLE TOM GRAY: And I wouldn't think
22 that would include necessarily the identifying
23 information.

24 HONORABLE TRACY CHRISTOPHER: Well, it could
25 include name and address of a minor child. It wouldn't be

1 in the order. "You are prohibited from, you know, any
2 contact with this minor child."

3 CHAIRMAN BABCOCK: Or going within 600 feet
4 of --

5 HONORABLE TRACY CHRISTOPHER: And they're
6 identified by initials.

7 MR. MUNZINGER: I sure would take the
8 position that the order was defective if I represented the
9 stalker. "You didn't tell me I couldn't go around that
10 child. You just said to quit following. You didn't tell
11 me who or where." It's due process. I've got a right to
12 due process. I'm a free citizen of a free country, and
13 you can't put me in jail or fine me because you didn't
14 give me fair notice. That's a real problem.

15 HONORABLE TOM GRAY: He does have access or
16 will get a copy of the sensitive data form.

17 HONORABLE TRACY CHRISTOPHER: But it's not
18 part of the order. I mean, that's the problem. You get
19 served with a restraining order, you're not going to get
20 served with that sensitive data form unless we, you know,
21 change it to that effect.

22 MR. MUNZINGER: Couldn't the order
23 incorporate by reference the sensitive data form?

24 CHAIRMAN BABCOCK: Well, that's what --

25 HONORABLE TRACY CHRISTOPHER: Well, then

1 that would violate 683.

2 CHAIRMAN BABCOCK: That's what Elaine
3 suggests is not appropriate.

4 HONORABLE NATHAN HECHT: We can trump the
5 rule, but the question is what statutes are out there and
6 particularly what Federal statutes might be out there. I
7 just don't know.

8 CHAIRMAN BABCOCK: It seems to me when you
9 get into the -- it's one thing when you're talking about
10 pleadings, which I think everybody has got in their head,
11 and I have not seen a whole lot of pleadings where there
12 are Social Security numbers, date of birth, that type of
13 thing, but when you get into orders that's a whole
14 different thing it seems to me, and when you have
15 vagueness in the orders you not only have due process for
16 the parties, but the public does have an interest in
17 knowing what the judges are doing, and if they can't get
18 behind to see what they're doing to whom, to me that seems
19 to raise a policy issue that is of concern. I don't know
20 how you fix that, but Sarah.

21 HONORABLE SARAH DUNCAN: I don't really see
22 the problem. Part of what -- I think part of the clerk's
23 motivation, those who have put their records on the net,
24 part of the motivation for that is public access and
25 accountability of the judiciary, which I applaud. I think

1 we all would. The problem is that by doing that they have
2 compromised this sensitive information. To know what a
3 judge is doing in a particular order or judgment you don't
4 need to know somebody's Social Security number, you don't
5 need to know necessarily their given names. You can tell
6 from an abbreviated order, with this sensitive data
7 abbreviated, you can tell what the judge is doing.

8 CHAIRMAN BABCOCK: Maybe not to whom,
9 though, and I mean, if it's Tom Smith, I mean, there are
10 lots of Tom Smiths running around. Rule 76a(1) says, "No
11 court order or opinion issued in the adjudication of a
12 case may be sealed."

13 HONORABLE SARAH DUNCAN: Right. And this
14 won't be sealed.

15 CHAIRMAN BABCOCK: Well, part of it will be.
16 Part of it will be.

17 HONORABLE SARAH DUNCAN: Sensitive data will
18 be sealed, and that's the policy issue, and I think that's
19 the policy issue that was raised by Judge Christopher when
20 we began this discussion, is -- and maybe we should just
21 take a vote on it -- should sensitive data be kept
22 confidential in court documents.

23 MR. MEADOWS: I thought we were past that.

24 HONORABLE TRACY CHRISTOPHER: Confidential
25 or sealed.

1 HONORABLE SARAH DUNCAN: Apparently we're
2 not.

3 CHAIRMAN BABCOCK: Richard.

4 MR. MUNZINGER: Well, the problem, again, is
5 the problem -- as I recall the beginnings of the
6 discussion, it's that we have people in Bangladesh who for
7 two cents an hour will peck away to find out my Social
8 Security number so that they can steal from me. The
9 problem is not to deprive the *El Paso Times* of access to
10 information concerning what the courts are doing. The
11 problem is to limit internet remote access to data that
12 can be used to the harm of a citizen.

13 And so I don't think we want to make these
14 orders sealed and what have you. I mean, we all have an
15 interest in knowing who is in jail and who is being held
16 in contempt of court because they've said something that
17 is contrary to political correctness, if that happens, so
18 I don't think that it's a problem of open court records.
19 It's a problem of internet access to information that
20 allows someone to hurt me because they have access to my
21 identity and my financial information, but I believe that
22 the problems that Judge Christopher has raised are
23 accurate because clearly when you have a name change where
24 this type of information is necessary, it in some fashion
25 has to be included, but I've said my piece.

1 HONORABLE SARAH DUNCAN: Can I ask a
2 question?

3 CHAIRMAN BABCOCK: Sure, and then Carl. Is
4 that okay, Carl?

5 HONORABLE SARAH DUNCAN: How do you propose
6 to keep all of this information in documents, whether
7 they're digital or paper, in the courthouse and available
8 for everybody to read and see and them not get on the
9 internet, because right now they're on the internet? How
10 do you propose to do that?

11 MR. MUNZINGER: I don't think that there is
12 a solution any better than the one that you have come up
13 with. I think what we're all trying to do is come up with
14 a method that allows us to protect the public's interest
15 in privacy of this sensitive information while at the same
16 time making sure that we remain a free country with access
17 to our court records and access to what judges do, because
18 I don't trust judges any more than I trust politicians,
19 and neither does the public.

20 HONORABLE TOM GRAY: That's because we are
21 politicians.

22 MR. MUNZINGER: No, I don't mean that in an
23 ugly way at all. I'm a free citizen in a free country. I
24 don't trust anybody.

25 HONORABLE SARAH DUNCAN: And that's why

1 these clerks -- that's in part the motivation for these
2 clerks putting all this information on the internet, and
3 that's -- that's the dilemma, is, okay, it's going to go
4 -- all this information -- I mean, I think we can all sit
5 here and assume that all Texas counties ultimately will
6 have all of their documents on the internet and available
7 to everybody in Australia and Bangladesh, so that the
8 question is, accepting that reality, how do we protect
9 this information? And that's the question.

10 MR. MUNZINGER: I think the concept that
11 you've come up with is the best one, that you segregate
12 the information. What we're doing is disclosing the
13 problems that arise with the draft that we're working
14 with. We're not arguing -- I don't argue with the
15 fundamental thesis, and I don't know how else to do it. I
16 just do think that as we go along we're uncovering
17 problems with the solution that we're proposing.

18 HONORABLE SARAH DUNCAN: And that's the
19 process we're supposed to be engaging in, but I think we
20 need to have a starting place.

21 CHAIRMAN BABCOCK: Yeah. One -- Carl has
22 had his hand up. It seems to me that one thing we've got
23 to do, it seems to me, is decide what sensitive data is.
24 You know, is it (a), (b), (c), (d), (e) and (f), or is it
25 (a) and (d) and (e), or is it something more than that,

1 and once we decide what sensitive data is then we can
2 understand better the implications of what we're going to
3 do with that, but right now we're bouncing around
4 between --

5 MR. LOW: Right.

6 CHAIRMAN BABCOCK: -- name and address of a
7 minor child and now we're talking about Social Security
8 numbers, and we're just bouncing around, and we haven't
9 made the fundamental decision about whether this laundry
10 list is in fact sensitive data.

11 I would argue that a date of birth is not
12 sensitive data. I mean, it's publicly -- I mean, I can go
13 down, if I can find out what county you-all were born in,
14 I can go down and I can get a public record on that.
15 Judges are all in the judicial -- your date of birth is
16 all in the directories of judges. My date of birth is in
17 -- Sarah is smirking at me like her date of birth --

18 HONORABLE SARAH DUNCAN: No, Lisa and I are
19 smirking at one another because we have had this
20 conversation how many times?

21 CHAIRMAN BABCOCK: But, anyway, it seems to
22 me we need to decide what sensitive data is, but Carl.

23 MR. HAMILTON: This report from the Judicial
24 Council in August of 2004 lists a page and a half of
25 current statutory protections which lists permanent

1 protection from public access. My question is how is
2 that -- those types of information protected now from
3 public access and why not just add to that list? Instead
4 of trying to define date of birth and Social Security
5 number, define types of proceedings like they've done in
6 the statute that are protected from public access. Those
7 are proceedings that normally contain that sensitive
8 information.

9 CHAIRMAN BABCOCK: Yeah, Sarah.

10 HONORABLE SARAH DUNCAN: That's sort of what
11 we discussed at the last meeting, was that before all
12 these documents got put on the internet there were levels
13 of practical obscurity. There are not a lot of people
14 from Bangladesh or Australia, were our two examples, who
15 are going to come over and go through every record in the
16 courthouse to find your Social Security, your bank account
17 numbers, et cetera. But once those are uploaded onto the
18 net there is no financial or other impediment to somebody
19 from Bangladesh and Australia getting all the numbers, and
20 that's what's created this problem. As well motivated as
21 putting it on the net is, as to my view, that's what's
22 created the problem.

23 MR. HAMILTON: But these items that are in
24 this statutory protection list now would not be put on the
25 net for any access. As I understand it from --

1 HONORABLE SARAH DUNCAN: Under this rule?

2 MR. HAMILTON: Beg your pardon?

3 HONORABLE SARAH DUNCAN: Under this rule?

4 MR. HAMILTON: Under any rule because these
5 statutes prohibit that.

6 CHAIRMAN BABCOCK: I don't think that this
7 list addresses the specific issue that we're talking
8 about. There are -- this list has a whole bunch of
9 different statutes that create some confidentiality and
10 some circumstances.

11 MR. HAMILTON: Yeah, for example, it says
12 "Final orders in SAPCR suits, Family Code, child support
13 lien notice, child support petition for modification,
14 suspension of license, name change, birth records," all of
15 these different types of proceedings that are now
16 protected from public access. It may be a simpler way to
17 do it is to add to this list rather than trying to define
18 items of information that may appear anywhere.

19 CHAIRMAN BABCOCK: Lisa.

20 MS. HOBBS: I think the list that you just
21 listed, the items you just listed, are documents in which
22 a Social Security number or driver's license number, name,
23 address, and phone number, date of birth, are required.

24 MR. HAMILTON: I know. But the first page
25 of that says these are all protected from public access.

1 As I read that. Maybe I'm reading it wrong.

2 MS. HOBBS: No, the first page you were
3 correct. (a), subsection (a) of that list is permanently
4 protected information, but (b), (c), and (d) are
5 different.

6 MR. HAMILTON: Oh, I see. (b) is temporary
7 protection.

8 MS. HOBBS: Uh-huh.

9 MR. HAMILTON: Okay. So it's just (a) then
10 that are the ones that are protected. "Includes
11 protective orders under the Family Code." Well, anyway,
12 the concept is the same. Maybe we need to identify
13 proceedings in which the documents are protected from
14 public access rather than items of information.

15 MR. LOW: But what if you leave out a
16 proceeding? I mean, you know, Social Security number is
17 going to be protected, I don't care what kind of
18 proceeding. That's what the public wants. Why go do
19 that? Why beat around and come through the back door?
20 Just come through the front door and say, "No, this is
21 protected." It's not contrary to that.

22 HONORABLE SARAH DUNCAN: That's the problem,
23 is that these items of information are not unique to any
24 type of proceeding.

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE SARAH DUNCAN: They cut across
2 many types of proceedings.

3 MR. LOW: Right.

4 HONORABLE SARAH DUNCAN: And if our goal is
5 to afford the greatest public access possible to the most
6 court documents possible, then you can't do it by type of
7 proceeding because they're going to be -- most of the
8 cases that are filed in Bonnie's court are going to be
9 sealed. I mean, didn't you say 85 percent of your cases
10 are family law cases?

11 MS. WOLBRUECK: About 70 percent of them
12 will be.

13 CHAIRMAN BABCOCK: Okay. Let's get back to
14 the proposed -- the subcommittee's rule.

15 HONORABLE DAVID PEEPLES: Chip, can I ask
16 this?

17 CHAIRMAN BABCOCK: Yeah, Judge Peeples.

18 HONORABLE DAVID PEEPLES: Is Texas the first
19 state to try to do this, and if not, what do the other
20 states do?

21 MS. HOBBS: Well, the feds have done it, so
22 and then in the Judicial Council list they go through each
23 state that has considered some state policy related to
24 remote access, and to be quite honest with you, the
25 Judicial Council recommendation and certainly the

1 subcommittee recommendation provides a lot more access
2 than any of the other states are allowing.

3 I mean, the subcommittee really adopted the
4 philosophy of we want to allow as much information on the
5 internet as possible while protecting very specific
6 amounts of information; and the other states, I mean,
7 Florida, for example, just shut down everything. "We
8 don't want anything on the the internet," so I think we
9 are leading the way in the nation as far as how to handle,
10 as Texas always has done, as much public access as
11 possible while still protecting very limited amounts of
12 sensitive information.

13 CHAIRMAN BABCOCK: Yeah, Ed Rains, would you
14 like to --

15 MR. RAINS: I might address that. Actually,
16 as you know, last week, the Florida Supreme Court ruled
17 for a very broad access, and so they are going to start
18 turning all of that stuff loose. They're going to have to
19 work through the same thing that you are doing. They have
20 an analogous committee down there right now. In fact, I
21 will be in Tallahassee next week talking to them.

22 Maryland about a year ago came up with a
23 public access policy that's a good model policy, too. The
24 appellate court in Washington, D.C., is doing the same
25 thing right now, so you-all have got lots of company in

1 terms of judicial bodies around the country who are
2 wrestling with this problem right now.

3 CHAIRMAN BABCOCK: Okay. Let's go over
4 these. Yeah, Justice Hecht.

5 HONORABLE NATHAN HECHT: I might just point
6 out that the proposed Federal rules use the sensitive data
7 form process, procedure, and we're checking here to see
8 how many of the states do and which ones don't. We don't
9 think all the states do. All the other states that are
10 worried about this, we don't think their rules or their
11 proposed rules all use this procedure, but we're looking
12 at that.

13 CHAIRMAN BABCOCK: Okay. Social Security
14 number. Any more comments on Social Security numbers?

15 All right. Everybody who is in favor of
16 including Social Security numbers in the data that is
17 sensitive raise your hand.

18 That is unanimous, Chair not voting.

19 All right. Bank account, credit card, or
20 other financial account numbers. Any discussion on that?
21 Yeah, Richard Munzinger.

22 MR. MUNZINGER: Shouldn't the word "or" be
23 "and"?

24 CHAIRMAN BABCOCK: I think -- I looked at
25 that. I think "account numbers" is meant to modify "bank

1 account, credit card," and "financial."

2 HONORABLE SARAH DUNCAN: I think it should
3 be "and."

4 CHAIRMAN BABCOCK: You think it should be?

5 HONORABLE SARAH DUNCAN: We talked a lot in
6 our subcommittee about "or" and "and," and I think you and
7 I agree. I think it should be "and."

8 MR. MUNZINGER: It's inclusive.

9 CHAIRMAN BABCOCK: We're talking about
10 numbers, bank account numbers, right? If somebody wants
11 to describe, "Hey, he's got a bank account at Chase and
12 he's absconded with the funds," that's okay, that wouldn't
13 be a sensitive data point; but if they say, "and he's
14 absconded with them from Chase account XYZ" that would be
15 sensitive, right?

16 HONORABLE SARAH DUNCAN: (Nods head.)

17 CHAIRMAN BABCOCK: Does that mean "yes"?

18 HONORABLE SARAH DUNCAN: Yes.

19 CHAIRMAN BABCOCK: Justice Hecht.

20 HONORABLE NATHAN HECHT: Why would you use
21 "or" in (b) and "and" in (c)?

22 MR. LOW: So we're diversified.

23 CHAIRMAN BABCOCK: Anybody have an answer to
24 that conundrum?

25 HONORABLE LEVI BENTON: I don't. I defer to

1 Justice Duncan. I always defer to Justice Duncan. But I
2 do have a question.

3 CHAIRMAN BABCOCK: Okay. So do we want to
4 change "and"?

5 HONORABLE LEVI BENTON: But I have another
6 question.

7 CHAIRMAN BABCOCK: Okay. Let's stay on "or"
8 or "and" for just one second. Judge Gray, "and"?

9 HONORABLE TOM GRAY: Macht nicht, matters
10 not.

11 HONORABLE SARAH DUNCAN: Makes no
12 difference.

13 CHAIRMAN BABCOCK: So "and"? Now Judge
14 Benton.

15 HONORABLE LEVI BENTON: "Other financial
16 account numbers" is too broad. It ought to be limited by
17 "other financial account numbers at third party
18 institutions."

19 CHAIRMAN BABCOCK: Sarah.

20 HONORABLE SARAH DUNCAN: I don't understand.

21 HONORABLE LEVI BENTON: Other than --

22 MR. MEADOWS: He's not going to defer
23 either.

24 HONORABLE LEVI BENTON: Yeah. Other account
25 numbers, other financial account numbers, okay, so the

1 Bobby Meadows Golf Company has a case on file and the
2 Bobby Meadows Development Company general ledger account
3 number is a "other financial account number," but it's
4 really not sensitive, but it still would fit within "other
5 financial account numbers." I mean, you're really trying
6 to limit access of like a brokerage account is what you're
7 trying to make sensitive.

8 CHAIRMAN BABCOCK: Carl.

9 MR. HAMILTON: Who are we protecting in
10 this? Suppose I file a pleading and I'm not giving my
11 client's account number, but I'm talking about some third
12 party's account number. Does this apply to anybody or
13 just the party?

14 HONORABLE SARAH DUNCAN: It applies to
15 everybody that files a document. Mike Hatchell used, when
16 we were talking about this, an example of a case that he
17 was involved in where it was the other side that was
18 trying to put -- just dump all this information in their
19 pleadings so that it would be accessible to the media
20 because they wanted to increase the media attention given
21 to this case; and, you know, according to Mike none of it
22 was true; but it was in a pleading, it was filed, and it
23 was quotable. So, yes, both parties, all parties, are
24 subject to this rule in all documents that they file.

25 HONORABLE TOM GRAY: All parties are subject

1 to it, and if it's not a party's information that you feel
2 needs to be in a pleading, that information is subject to
3 it as well.

4 MR. LOW: Right.

5 HONORABLE TOM GRAY: In other words, if
6 Sarah and I have a lawsuit going and we want to put Buddy
7 Low's Social Security number in it, it's going to have to
8 go in in abbreviated format as sensitive data.

9 CHAIRMAN BABCOCK: How would (b) work with
10 respect to a garnishment action?

11 HONORABLE TOM GRAY: You would put the
12 limited information, abbreviated information, in the
13 pleading. You would file the sensitive data form that had
14 the full account numbers, and the bank is a party. They
15 would have the sensitive data form. They would have the
16 pleadings. They're going to get the order. The order is
17 going to have abbreviated data in it. They're going to
18 have a copy of the sensitive data form. They know exactly
19 what accounts to garnish.

20 CHAIRMAN BABCOCK: Does that work okay?
21 Everybody satisfied with that? Judge Christopher, does
22 that work for you?

23 HONORABLE TRACY CHRISTOPHER: Well, so I
24 mean, yes, if we're attaching the sensitive data form to
25 all our orders. I mean, otherwise it doesn't work, but I

1 mean, it seems like it has to be attached for it to work.

2 HONORABLE SARAH DUNCAN: It can't be
3 attached because your order is going to be filed in the
4 case, right? And you can't attach the sensitive data form
5 and it not become available for public access.

6 HONORABLE TRACY CHRISTOPHER: Well, I mean,
7 it has to be attached when you serve it on the bank, or it
8 has to be attached when you serve it on the person sought
9 to be restrained. Or, you know, it ought to be attached
10 in a default.

11 CHAIRMAN BABCOCK: Judge Bland.

12 HONORABLE JANE BLAND: I think I understand
13 how a party could enforce a judgment or serve a writ or a
14 restraining order or something like that. What happens
15 when, you know, Bank One gets a judgment against me; Bank
16 One becomes Chase, or I can't figure out all these banks,
17 but anyway, it becomes a different entity and they want to
18 enforce a judgment against me? How do they go and get the
19 sensitive data form that they will need to slap together
20 with the order or the judgment to execute, to get my --
21 you know, to get information about my assets?

22 HONORABLE SARAH DUNCAN: Generally in my --
23 I'm thinking back to RTC days when a bank somehow acquires
24 another bank or merges, there are hundreds of pages of
25 documents about what assets get transferred.

1 HONORABLE JANE BLAND: Right, and how does
2 new bank go to the courthouse and say, "I'm now the person
3 that is entitled to get this sensitive data"?

4 HONORABLE SARAH DUNCAN: They're going to
5 have an agreement that shows, "I have acquired the assets
6 of this person, of this entity, that was a party to this
7 lawsuit." More likely they're going to have a copy of the
8 sensitive data file in their own file that they acquired
9 from now defunct predecessor.

10 HONORABLE JANE BLAND: Or in some other way
11 some judgment against me gets assigned to someone else.
12 How does the assignee have standing to go down to the
13 courthouse and get this information?

14 MR. LOW: Don't you have a substitution of
15 parties, just like you would have if somebody dies?
16 Wouldn't there be a substitution and they're a party?

17 HONORABLE SARAH DUNCAN: I think if you go
18 into Bonnie or Andy's office and you want a copy of the
19 sensitive data form and you weren't the actual party to
20 that lawsuit, they're going to require some fairly
21 stringent proof that you have a right to see that
22 sensitive data form, but they could answer that better
23 than I can.

24 CHAIRMAN BABCOCK: Richard.

25 MR. MUNZINGER: I don't want to get off on

1 subsection (c), but when you look down at 14.3(b) the
2 clerk is forbidden from sharing this information with
3 people, if I read it correctly, except those who are
4 identified in 14.3(b). So Judge Bland's question, maybe
5 we need to amend 14.3(b) to allow a court to order on good
6 cause, what have you, access to sensitive data forms.

7 HONORABLE SARAH DUNCAN: I think that
8 there's a "not" that's missing from (b), isn't there,
9 Lisa?

10 MS. HOBBS: I'm sorry.

11 HONORABLE SARAH DUNCAN: It says, "The court
12 or court clerk must limit access to a party or an attorney
13 of record in the cause in which the sensitive data form is
14 filed." I think that should read "must not limit access."

15 PROFESSOR CARLSON: Or "limit access only
16 to."

17 MS. HOBBS: Yeah, I think it's more "limit
18 access only to."

19 CHAIRMAN BABCOCK: Okay. Well, we'll get to
20 that in a minute. Justice Gaultney.

21 HONORABLE DAVID GAULTNEY: I was just saying
22 that I would think that 14.3(b), limiting to a party, if
23 the party has access you would think that the party
24 authorized by that party would have access, so I'm not
25 sure that with a bank acquiring something they would have

1 authorization from the prior party to have access.

2 HONORABLE JANE BLAND: I got us off track,
3 so I'll stand down.

4 CHAIRMAN BABCOCK: Let's go back to 14.1(b),
5 bank account, credit card, and other financial account
6 numbers.

7 HONORABLE TOM GRAY: If you're going to put
8 "and" in there I think Bonnie wants to strike the "s" on
9 the end of "numbers." Didn't you say that, Bonnie?

10 MS. WOLBRUECK: No, what I was saying, the
11 difference between (b) and (c) is that (c) says driver's
12 license numbers, passport numbers, and similar card
13 numbers. (b) says --

14 HONORABLE TOM GRAY: Okay. I knew there was
15 an "s" in there somewhere.

16 MS. WOLBRUECK: Yeah. (b) says "bank
17 account." If it says "bank account numbers, credit card
18 numbers, and other financial account numbers" --

19 CHAIRMAN BABCOCK: I think that would be
20 clearer if we put "numbers" in.

21 MS. WOLBRUECK: So it's the numbers, where
22 the word "numbers" is to do the "and" or the "or."

23 CHAIRMAN BABCOCK: Right. So (b) as amended
24 would be "bank account numbers, credit card numbers, and
25 other financial account numbers." Okay. We okay with

1 that? All right. Any other discussion on this?

2 All right. Everybody that thinks that bank
3 account numbers, credit card numbers, and other financial
4 account numbers should be included in data that is
5 sensitive raise your hand.

6 All opposed? By a vote of 18 to 1, Chair
7 not voting, that passes.

8 So let's go to driver's license numbers.

9 HONORABLE TOM LAWRENCE: Can I ask one
10 question about that?

11 CHAIRMAN BABCOCK: Yes, Judge Lawrence.

12 HONORABLE TOM LAWRENCE: Would it be
13 understood that a credit card would also include a debit
14 card?

15 HONORABLE TRACY CHRISTOPHER: That would be
16 a bank account.

17 CHAIRMAN BABCOCK: That would be a financial
18 account number.

19 All right. "Driver's license numbers,
20 passport numbers, and similar government-issued personal
21 identification card numbers." Discussion on this?

22 MR. LOW: Chip, I think that we've got to
23 remember, now, we can't keep somebody from getting this
24 information through other sources. It's just that you
25 can't get it through the court records and make it

1 massively available.

2 CHAIRMAN BABCOCK: Yeah, I think that,
3 however, your question or your statement assumes something
4 that I think is important. I'm not sure my own view is
5 that we should be declaring something sensitive when it
6 clearly isn't.

7 MR. LOW: Well, no.

8 CHAIRMAN BABCOCK: And I'm not saying the
9 driver's license falls into that category.

10 MR. LOW: Driver's license numbers have been
11 considered by some in some cases sensitive.

12 CHAIRMAN BABCOCK: Yeah.

13 MR. LOW: That's an identifying thing, and
14 what they're trying to do is anything that helps identify,
15 you know, so that somebody can -- that's one of the
16 elements they use in stealing your identity or something,
17 we want to include it. It's not that it may truly be so
18 sensitive that it's not available in many sources, but we
19 have no other way of doing it other than defining it
20 sensitive for purposes of this rule.

21 CHAIRMAN BABCOCK: Judge Lawrence.

22 HONORABLE TOM LAWRENCE: We did decide last
23 time that this rule was not going to apply to criminal
24 matters, correct?

25 HONORABLE TRACY CHRISTOPHER: No.

1 CHAIRMAN BABCOCK: No. This is going to
2 apply to criminal cases.

3 HONORABLE TOM LAWRENCE: Well, I don't know,
4 driver's license number, that's on every traffic ticket
5 written.

6 CHAIRMAN BABCOCK: That's Judge
7 Christopher's point.

8 HONORABLE TOM LAWRENCE: And a driver's
9 license number is very easily obtainable just by going to
10 DPS.

11 MR. LOW: It is, but that is one of the
12 things people use to steal identity, and they can go to
13 the DPS, but they can't get it from Hong Kong.

14 HONORABLE TOM LAWRENCE: So I would have to
15 take -- every traffic ticket filed you would have to go in
16 and, what, redact the driver's license number? How about
17 the driving records that we get from DPS and print those
18 out? I mean, that would have to be redacted?

19 CHAIRMAN BABCOCK: Yeah. I think we're on
20 something that's going to be a sticking point. Mike
21 Coffey wanted to make a comment.

22 MR. COFFEY: Just real quick, the Driver's
23 Privacy Protection Act, you can't -- prevents you from
24 just walking in DPS and asking for a driver's license
25 without a permissible purpose, but you're right about

1 tickets. I just wanted to clear up, DL as far as it comes
2 from the organization that issues those, the DMV, or DPS
3 in Texas, those are under the DPPA prohibited from release
4 without permissible purposes.

5 PROFESSOR CARLSON: I'm sorry.

6 CHAIRMAN BABCOCK: Elaine.

7 PROFESSOR CARLSON: I'm sorry. Did you say
8 that they may not be released without a permissible
9 purpose, or anyone can go in and get anyone else's
10 driver's license?

11 MR. COFFEY: Yeah, they can't be released
12 without a permissible purpose. Basically there's about
13 eight of those.

14 HONORABLE SARAH DUNCAN: Eight of what?

15 MR. COFFEY: Permissible purposes under the
16 Federal law from the department that issues them.

17 CHAIRMAN BABCOCK: Great, Mike. Thank you.
18 That's helpful.

19 Okay. So now Judge Lawrence says, okay,
20 we've got a lot of documents in our files that have
21 driver's licenses. What are we going to do about it?

22 HONORABLE TOM LAWRENCE: Well, virtually
23 every criminal case, warrants, that's one of the
24 identifiers. It's on the warrant. I mean, in any
25 particular case there would be a minimum of three

1 documents that would have a driver's license number on it.
2 This is going to be a nightmare.

3 CHAIRMAN BABCOCK: Ed Rains, do you have a
4 comment?

5 MR. RAINS: I know that in some
6 jurisdictions in which we gather data -- and I guess we've
7 got maybe 180 million records right now -- a lot of those
8 are driving records. In the wake of recent notoriety
9 about these things, we don't release them, we ourselves do
10 not, for either that or Social Security number. Even
11 though we still get those from some places, you can't get
12 to it. It's in my file, but our customers can't get to
13 it, can't see it.

14 CHAIRMAN BABCOCK: Somebody else have their
15 hand up? Bobby.

16 MR. MEADOWS: I did, Chip. I think this is
17 a real problem, because the structure that we're working
18 with that I think we've all come to terms with is the
19 segregation of sensitive information from things that are
20 filed, and now we're talking about something where
21 segregation is just not really a possibility. There is no
22 way you're going to have a traffic ticket without the
23 driver's license number on it. So all of the sudden we've
24 got a structural problem with what we're talking about.

25 CHAIRMAN BABCOCK: Okay. Judge Bland.

1 HONORABLE JANE BLAND: Aren't we talking
2 about doing the same thing, which is now you would put
3 just a few numbers, I guess of a driver's license and have
4 a sensitive data form that would have the full -- but what
5 you're saying, the charging instrument is developed out at
6 the scene.

7 MR. MEADOWS: Right. The police officer is
8 going to write it.

9 HONORABLE JANE BLAND: He doesn't have
10 any --

11 HONORABLE TRACY CHRISTOPHER: Right, he
12 writes the ticket.

13 HONORABLE JANE BLAND: -- part of our
14 procedure.

15 MR. MEADOWS: Right.

16 CHAIRMAN BABCOCK: Lisa.

17 MR. MEADOWS: He's not going to participate
18 in this.

19 HONORABLE TRACY CHRISTOPHER: He's not going
20 to fill out the pink sensitive data form.

21 MS. HOBBS: We're going to have the same
22 problem I think with --

23 HONORABLE JANE BLAND: Isn't there a
24 complaint that's done separate from the ticket?

25 HONORABLE TOM LAWRENCE: There is a

1 complaint.

2 HONORABLE JANE BLAND: Yeah, so --

3 HONORABLE TOM GRAY: If it goes to a
4 contested hearing, or at least in municipal court.

5 HONORABLE TOM LAWRENCE: Yeah, if there is
6 going to be a trial, there is going to have to be a
7 complaint generated somehow.

8 HONORABLE TOM GRAY: But on 99 percent of
9 them they just say it's based on the ticket or whatever
10 the percentage is, but that's probably what it was in my
11 court. There is no complaint generated. It is paid
12 directly -- on a Class C misdemeanor in municipal court
13 it's paid directly from the deal, but the easy fix for the
14 traffic tickets is to exclude the, you know, application
15 of this rule to municipal courts.

16 HONORABLE TOM LAWRENCE: And justice courts?

17 HONORABLE TOM GRAY: Yeah, and justice
18 courts.

19 CHAIRMAN BABCOCK: Lisa.

20 MS. HOBBS: Well, we're going to run into a
21 problem of certain documents that prove up a case, for
22 instance, a will, having sensitive data in it that are
23 necessary -- I mean, they are actually an instrument
24 necessary to the case, and the probate lawyers have raised
25 this with me already, and I don't know what the solution

1 is to that, but I pointed out that it is not just a JP and
2 municipal court problem. It's problems with certain
3 instruments that necessarily require -- they're not just
4 in a pleading. I mean, they're the proof itself.

5 HONORABLE SARAH DUNCAN: Right.

6 HONORABLE TOM GRAY: See, but that gets
7 into -- although, if it's an exhibit at that point then
8 that at least eliminates some of the problems with the
9 remote access. It's not part of the sensitive data.

10 HONORABLE TRACY CHRISTOPHER: So an exhibit
11 to a pleading is --

12 HONORABLE TOM GRAY: Don't go there yet.
13 That's way off. We'll get there.

14 HONORABLE SARAH DUNCAN: I think this is too
15 hard. We cannot write this rule, and we need to just
16 adjourn and go enjoy the beautiful weather. It's too
17 hard.

18 HONORABLE TRACY CHRISTOPHER: No, no.
19 Because I was asking, I was wondering that in connection
20 with, you know, a suit on a credit card. All right. And
21 the affidavit attached to it is always, you know,
22 blah-blah-blah, custodian of the records, here are the
23 records, this is the account number, this is what they
24 owe, this is what they paid, you know, and all the process
25 have been done, you know, boom, and they always attach all

1 of the records.

2 HONORABLE TOM GRAY: They do.

3 CHAIRMAN BABCOCK: Yeah, Skip Watson.

4 MR. WATSON: One of the problems I have been
5 concerned about as I have listened to this, I don't know
6 how many people have done title work, but you --

7 HONORABLE TOM GRAY: Skip, they can't hear
8 you over here.

9 MR. WATSON: When you go through in doing
10 title work trying to figure out an oil and gas title or
11 title to land, one of the things you're going to see
12 repeatedly is a divorce decree or a will filed verbatim as
13 a muniment of title where it's just saying "Title to the
14 house goes to the wife," and the wife has been identified
15 by name, driver's license, Social Security number; or the
16 will as saying "It's going to good son George, Jr., whose
17 Social Security number is X, but not to bad son or bad
18 grandson George, III, whose Social Security number is X.
19 Don't give it to George, III." I mean, that stuff is
20 everywhere, and it's out there now in the county clerk's
21 office.

22 HONORABLE SARAH DUNCAN: That's a whole
23 other problem. What's out there now is a whole other
24 problem. I mean, we're going to have to talk about it.

25 CHAIRMAN BABCOCK: We're going

1 prospectively.

2 MR. WATSON: Well, let's talk about
3 prospectively then. How are those things put in so that
4 you can identify the person from the public record when
5 you're trying to figure out who you buy the land from or
6 take the oil and gas lease from?

7 CHAIRMAN BABCOCK: Anne.

8 MS. McNAMARA: Lisa mentioned before that
9 other states have gone farther in this regard than we're
10 talking about going, and I would think some of these
11 issues have at least been grappled with and folks have
12 come up with solutions that may or may not work, but I
13 wonder if on some of these occasions we ought to see what
14 we do about traffic violations as opposed to reinventing
15 the wheel.

16 MS. HOBBS: Well, I'm trying to go through
17 now and come up with a short list of what states are
18 doing, but some of them now are just not allowing remote
19 access and then you don't have the problem.

20 CHAIRMAN BABCOCK: That solves this issue.
21 Judge Lawrence.

22 HONORABLE TOM LAWRENCE: Well, in any
23 routine traffic case I can identify a minimum of three
24 documents in the court's file that are going to have the
25 driver's license number and as many as six, possibly,

1 separate documents in the file. All of which are -- I
2 mean, you call it sensitive data, but the prosecution
3 calls it a critical piece of evidence that they're going
4 to have to introduce to make the case, so this is integral
5 to the case.

6 HONORABLE SARAH DUNCAN: As it's done now.
7 I mean, if this rule were to pass, there are a lot of
8 people that will have to change their ways of doing
9 things.

10 HONORABLE TOM LAWRENCE: I can't even
11 imagine how that would affect the trial of the case. I
12 would have to think about that, but it's going to
13 complicate things obviously.

14 CHAIRMAN BABCOCK: Well, and what benefit do
15 we get from that? I mean we can turn the world upside
16 down if there's a good reason. What's the reason for
17 14.1(c)?

18 HONORABLE TOM LAWRENCE: With all due
19 respect to the restrictions officially existing that make
20 it difficult to get a driver's license number, as a
21 practical matter it's not that difficult to go in and get
22 a driver's license number, so you're restricting something
23 that someone with a minimal amount of innovative thinking
24 can get anyway.

25 CHAIRMAN BABCOCK: Yeah. Buddy.

1 MR. LOW: You know, I totally agree, but the
2 thing is they're not going to get it from us. You put
3 that in a sensitive data form or something. I mean, you
4 ask the average person on the street, "Do you want
5 somebody just to be able to get my driver's license number
6 in El Paso?"

7 "Well, I sure don't." Well, I mean, you
8 know, maybe they can get it other places, so that's fine.
9 They can get it other places, but I just think the
10 committee is right in putting it here.

11 CHAIRMAN BABCOCK: Well, that's true unless
12 you're going to turn the world upside down.

13 MR. LOW: Well, I don't want to turn the
14 world upside down, but isn't it possible that anything
15 that has the driver's license number or date of birth
16 could be a sensitive data form that could be not given or
17 not on the internet?

18 CHAIRMAN BABCOCK: Judge Lawrence, Judge
19 Benton, and then Richard.

20 HONORABLE TOM LAWRENCE: So I would have to
21 generate a sensitive data form on every traffic case,
22 really not just traffic cases but a lot of other criminal
23 cases?

24 HONORABLE SARAH DUNCAN: No. You don't
25 generate a sensitive data form at all.

1 HONORABLE TOM LAWRENCE: Who would?

2 HONORABLE SARAH DUNCAN: The prosecutor.

3 MR. LOW: Prosecutor.

4 HONORABLE SARAH DUNCAN: Whoever wants to
5 enforce that ticket.

6 HONORABLE TOM LAWRENCE: Okay. Well, that
7 sounds good except for the fact that some courts are not
8 given prosecutors, so how would that work then?

9 MR. LOW: How do you prosecute somebody
10 without a prosecutor?

11 HONORABLE TOM LAWRENCE: It happens all the
12 time everyday. It's happening right now.

13 MR. LOW: The judge does?

14 HONORABLE TOM LAWRENCE: Absolutely. There
15 is even a provision in the Code of Criminal Procedure that
16 allows that because a lot of prosecutors won't send
17 prosecutors to the JPs and municipal courts.

18 And what happens when I need to issue a
19 warrant? That's one of the identifiers on the warrant, so
20 I'm going to not have the -- I'm going to generate a
21 separate pink form to --

22 CHAIRMAN BABCOCK: I'm buying stock in pink
23 paper, by the way. Judge Benton.

24 HONORABLE TOM LAWRENCE: There's just going
25 to be a tremendous paperwork burden on keeping up with

1 this in every case, and you're going to put that burden on
2 a lot of JP courts where they don't have any clerks, it's
3 just the judge.

4 CHAIRMAN BABCOCK: Judge Benton.

5 HONORABLE LEVI BENTON: I vote to just
6 abandon it for the reasons Bobby already expressed.

7 CHAIRMAN BABCOCK: Could you speak up a
8 little bit?

9 HONORABLE LEVI BENTON: Yeah, let's just
10 abandon this for the reasons already expressed by several
11 people and just state by rule you can't get this stuff
12 remotely. You've got to come to the courthouse and get
13 it.

14 CHAIRMAN BABCOCK: Well, that's another
15 solution. I've -- well, we'll get to that, I guess.
16 Richard.

17 MR. MUNZINGER: I just wanted to ask, how
18 many JPs and how many municipal courts maintain their
19 records online and how realistic is the problem for remote
20 access to a justice court or a corporation court? At
21 least in my jurisdiction the corporation courts are
22 completely separate from the county and district clerks,
23 there wouldn't be any tie to them. I assume there is some
24 kind of appeal trial de novo to county court, in which
25 event these rules would trigger and cause the problem, but

1 if -- the simple solution to the JP and municipal courts
2 is to exempt them from the rule, but I wonder if it's that
3 significant of a problem anyway if they are not online.

4 Are you online?

5 HONORABLE TOM LAWRENCE: (Nods head.)

6 MR. MUNZINGER: I could access your complete
7 records?

8 HONORABLE TOM LAWRENCE: No, not complete
9 records. You can access some records.

10 MR. MUNZINGER: I don't think most JPs are
11 that way. In El Paso there are some that don't speak
12 English, so I'm not sure --

13 CHAIRMAN BABCOCK: Lisa.

14 MS. HOBBS: Well, there is currently a
15 technology fund or there is a fee that you pay -- am I
16 right on this, Judge Lawrence? There is a fee that you
17 pay in JP court now that creates a technology fund so that
18 JPs can start having more technological advances, and so I
19 think that even if right now there is not a lot on the
20 way, they are getting funding from the Legislature just so
21 they can be on that path.

22 HONORABLE TOM LAWRENCE: Well, I don't know
23 the percentage, but in the urban areas there is a lot, and
24 so the number of cases percentagewise would far outnumber
25 the number of courts. The smaller urban courts -- or

1 smaller rural courts without significant case load, they
2 may not be on it, but all the major courts are with a
3 significant case load.

4 CHAIRMAN BABCOCK: Skip.

5 MR. WATSON: I would just urge not to lump
6 government-issued personal identification numbers in with
7 driver's license numbers. Federal ID cards, for example,
8 pilot's license, this type of thing, are routinely Social
9 Security numbers. That number, my pilot's license number,
10 is my Social Security number. Now, they have in the last
11 18 months have done a thing where I can go through and get
12 them to put a zero on each end, you know, if I want to.

13 HONORABLE SARAH DUNCAN: Really disguise it.

14 MR. WATSON: Yeah, which disguises it, but
15 that is different. The Federal government knows one
16 number, and that's your Social Security number for every
17 government-issued ID.

18 CHAIRMAN BABCOCK: Tracy.

19 HONORABLE TRACY CHRISTOPHER: Well, I was
20 just going to say from personal experience, a minor in my
21 household received 30 letters from lawyers in connection
22 with a ticket that that minor had gotten, so I know that
23 the information is readily available.

24 CHAIRMAN BABCOCK: 30? No kidding?

25 HONORABLE TRACY CHRISTOPHER: 30 letters

1 from lawyers offering to represent.

2 HONORABLE TOM LAWRENCE: They're becoming
3 very good at coming in and asking for all this
4 information, and it's not just online. We're talking
5 about people walking into the courthouse, even those not
6 online it's still going to be an issue because this rule
7 affects that also.

8 CHAIRMAN BABCOCK: Carl.

9 MR. HAMILTON: Do clerks that deal with
10 electronic filings and stuff now, do they put everything
11 that is generated out of a court, orders, motions,
12 everything? Does it go on a electronic format now or just
13 certain things?

14 MS. WOLBRUECK: Pretty well. It depends
15 upon the clerk's office. I know that there is a court in
16 -- where is it, Beaumont, in Jefferson County, that has
17 everything electronic, and so, yes, it's all in electronic
18 format. There is no paper in that court.

19 HONORABLE TOM LAWRENCE: We have electronic
20 docket books, and essentially everything is put
21 electronically. That doesn't mean the public has access
22 to that, but virtually everything is electronically kept.

23 CHAIRMAN BABCOCK: Well, and the point is,
24 of course, that this rule is going to go into effect, if
25 it does, months down the road; and technology is moving so

1 fast that, I mean, you know, we've got to anticipate some
2 things; and we've got to assume that technology will come
3 to these courts, so how do we fix this problem? It seems
4 to me that we either delete (c) or we except --

5 HONORABLE SARAH DUNCAN: All of (c)?

6 CHAIRMAN BABCOCK: We either delete (c) or
7 we except municipal/JP courts or we do something else. Or
8 we, of course, pass it as written. Which --

9 HONORABLE TOM LAWRENCE: You're saying
10 except municipal and JP courts from the entire Rule 14?

11 CHAIRMAN BABCOCK: No, no. (c), subpart
12 (c).

13 HONORABLE TOM LAWRENCE: Well, the driver's
14 license numbers is the only thing that I'm saying is a
15 problem.

16 CHAIRMAN BABCOCK: Okay.

17 HONORABLE SARAH DUNCAN: Well, if you except
18 one level of courts out of this rule you might as well not
19 have the rule because once they're available, they're
20 available. And if they're available from Tom's court, why
21 shouldn't they be available from David's court?

22 CHAIRMAN BABCOCK: Judge Christopher, then
23 Judge Benton.

24 HONORABLE TRACY CHRISTOPHER: You're going
25 to have the same problem with a name and address of a

1 16-year-old driver. The minor child in (f).

2 CHAIRMAN BABCOCK: Yeah, we're getting
3 there. Justice Gaultney.

4 HONORABLE DAVID GAULTNEY: I was just going
5 to second that. I think, you know, excepting municipal
6 courts because they're the largest source of this material
7 strikes me as a little difficult.

8 HONORABLE SARAH DUNCAN: Self-defeating.

9 HONORABLE DAVID GAULTNEY: Because it's the
10 biggest problem with implementation is why we're thinking
11 about excepting it. But if we're anticipating that
12 they're all going to be online at some stage --

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE DAVID GAULTNEY: -- and all of
15 these are going to be available through municipal court
16 records and if the private providers self-govern to not
17 provide this because of the risk of identity theft, then I
18 think that would argue in favor of not exempting municipal
19 courts from the process.

20 I recognize the severe problem. Is it a
21 situation where if someone came in and wanted to look at
22 your records, perhaps at that point they would not have
23 access to a driver's license?

24 HONORABLE TOM LAWRENCE: Well, they would
25 now because I have no way to keep that out. It's all part

1 of the file, and people do want to come in and look
2 through that for the express purpose of sending out these
3 letters to represent people or to offer them defensive
4 driving or whatnot, and we get them -- this information on
5 a daily basis all over the state.

6 HONORABLE TRACY CHRISTOPHER: Yeah, I think
7 we got about five defensive driving course brochures, too.

8 CHAIRMAN BABCOCK: Well, and there is that
9 commercial aspect to it, but there's also other reasons.
10 I mean, if you were trying to research the driving record
11 of somebody because you're going to let them drive a
12 school bus or some other purpose. I mean, there's reasons
13 to want to know what the person's driving record is.

14 HONORABLE TOM LAWRENCE: It would be
15 relatively easy just to delete the field from a document
16 dump, but it's more difficult to redact that and create a
17 sensitive data form on the case in the file, just sitting
18 in there. That's the real problem. You just don't give
19 them that field of information, the driver's license
20 number. That would be relatively easy. It's the
21 paperwork involved in having to redact that and to create
22 a sensitive data form and keep that separately and having
23 to figure out how to handle the warrants, which is a real
24 problem.

25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE TOM LAWRENCE: That's the more
2 difficult issue.

3 CHAIRMAN BABCOCK: Any more discussion on
4 subpart (c)?

5 All right. How many people believe that
6 subpart (c) as written, driver's license numbers, passport
7 numbers, and similar government-issued personal
8 identification numbers should be included as data that is
9 sensitive? Raise your hand.

10 And how many opposed? That passes by a vote
11 of 13 to 6. It is now time for our morning break, so
12 let's take a 15-minute break.

13 (Recess from 10:43 a.m. to 11:07 a.m.)

14 CHAIRMAN BABCOCK: We're back on the record.
15 We're very honored to have Judge Paul Womack from the
16 Court of Criminal Appeals with us, and Judge Womack has a
17 handout that has a number of concerns that we'll obviously
18 take into account and try to talk about as the day goes
19 on. I think some of us have copies of it, but Justice
20 Gray has it and he can incorporate Judge Womack's thoughts
21 as we discuss it and, Judge, do you have anything you
22 would like to say at the outset?

23 HONORABLE PAUL WOMACK: No, thanks for
24 letting me come in late on this. I've just got a couple
25 of specifically criminal-related points in here, and I

1 need some help on a couple of things because there is a
2 term in one of the rules I don't know what it means. The
3 statement of reasons is something that's not -- access is
4 not being given, and that's a term that I have not run
5 across in Texas criminal procedure, although I know it's
6 used in Federal courts.

7 But there is a thing I think you could fix
8 pretty easily, talking about the names of minors being
9 replaced by initials when they have to be used in a
10 pleading. Well, we have got a lot of 17-year-old
11 defendants because that's the age for criminal
12 responsibility, and so it's going to be kind of funny if
13 the indictments against them have to use their names as
14 initials rather than the full names. That was a thought.

15 And along the same lines on the other side,
16 we've got plenty of child victims whose names certainly
17 need to be in the pleadings of the state, the indictment
18 somehow. There is a statute that provides in the case of
19 sex offenses a whole procedure for them to choose
20 pseudonyms to be known by that go into a state registry,
21 and so that might supersede a rule, and I have cited that
22 in there. And then for other cases where children are
23 named where there are not sex offenses but victims of
24 homicides or other assaultive kinds of offenses, somehow
25 their full name is going to have to be conveyed to the

1 defendant. So I was thinking you might want to drop
2 indictments out of this rule about pleadings being done
3 with initials for children. That was my biggest point.

4 CHAIRMAN BABCOCK: Okay.

5 HONORABLE PAUL WOMACK: Thank you.

6 CHAIRMAN BABCOCK: Thank you, Judge. We're
7 going to get to that in a second, but to try to bring some
8 order to this, let's move on now to 14.1(d), which is
9 "date of birth, except the date of birth of a defendant in
10 a criminal matter." Judge Gray, any initial comments on
11 this before we throw it open?

12 HONORABLE TOM GRAY: This probably consumed,
13 as far as a single item, a relatively large amount of our
14 time because there are those of us that don't particularly
15 care one way or the other if people know when we were
16 born, but again, this comes back to one of the principal
17 identifiers used in connection with identity theft, and so
18 it was important in that context, and it is in that
19 context that the Legislature seems to be particularly
20 interested in this item as a sensitive data inclusion
21 because -- and I forget how many bills there were, but
22 there were several bills that included the date of birth
23 as a sensitive data item.

24 Also, just as background, there have been
25 many folks making impassioned arguments for the use of the

1 date of birth as an identifier in connection with
2 researching employment histories and things of that, and
3 it always is the explanation of, well, on John Smith you
4 get so many hits, but we haven't actually seen any of
5 those searches conducted based upon the inclusion of year
6 and month as opposed to just having the entire birth date;
7 and if you don't have the current redlined copy of what
8 came out late yesterday, which was on the table, it's not
9 just date of birth, but I think it's date of birth, except
10 the date of birth of a defendant in a criminal matter, so
11 it in effect exempts this in criminal cases.

12 Let's see, the -- again, I'll bring up what
13 the fellow told me yesterday is that in Federal court when
14 they're taking them over they are limited to the year of
15 birth, not even month and year, but the year of birth,
16 under the local rules or under the rules of the court that
17 he operates under, so with those general comments there it
18 is.

19 CHAIRMAN BABCOCK: Okay. Any discussion?

20 HONORABLE TOM GRAY: One other thing is
21 important on the date of birth, and I think it is more
22 applicable to understanding date of birth, but and if
23 you'll -- it's a little bit of a digression, but it does,
24 if you understand what 14.3, the last sentence of that
25 section, is designed to do, it reads, "However, a court or

1 court clerk may compare information provided by a third
2 party to information in a sensitive data form and confirm
3 or affirmatively negate that the third party's information
4 matches the data in the sensitive data form."

5 The whole point or a large part of the
6 purpose of that specific provision is so that if somebody
7 comes in and says, "I have a criminal -- I've got a hit on
8 a search with this name, the year and the month match. I
9 need to confirm that this is the same person, I need to
10 confirm that that birth date, the birth date that I have
11 is, you know, June 12, 1975," then that is, you -- you
12 know, "Is that the date that's in this record?"

13 "Yes, it is," and there you have your
14 confirmation.

15 CHAIRMAN BABCOCK: Great.

16 HONORABLE SARAH DUNCAN: That's the reason
17 for the double underlined.

18 CHAIRMAN BABCOCK: Right. Right. I gotcha.
19 Ed, can I ask you a question? It seems to me that with
20 those two changes, with those two changes that Justice
21 Gray just described, it goes a long way, maybe all the
22 way, to fixing the issue that you raised in your prior
23 testimony; is that right?

24 MR. RAINS: Well, I think, of course, if you
25 provide only a partial date of birth in terms of a month

1 and a year then you increase the chance of a false
2 positive by 30 to 31 times because there are 30 or 31 days
3 in a month, right?

4 CHAIRMAN BABCOCK: Yeah, but they're
5 exempting criminal.

6 MR. RAINS: Criminal, I am happy with that,
7 and I think if we can have full date of birth with our
8 criminal records, I think that's great, but for civil
9 records I have no quibble with that. I have no quibble
10 with that at all. Leave part of them out, truncate the
11 date of birth there, but with criminals -- and I'll give
12 you an example. Right before I came I ran through our
13 database all the criminal records on Frank Johnson, just
14 Frank Johnson without any date of birth. I came up with
15 302 criminals in Texas who -- these are convictions, named
16 Frank Johnson.

17 Since about five percent of the folks in
18 Texas have got a criminal conviction record, criminal
19 conviction record, that means there are 6,000 false
20 positives available on innocent people who would be denied
21 credit, be denied housing, be denied a job if we don't
22 have full date of birth on these criminal records. I
23 think it's very important. The other thing that you --

24 CHAIRMAN BABCOCK: Wait. Hang on for a
25 second.

1 HONORABLE SARAH DUNCAN: Stop right there.

2 CHAIRMAN BABCOCK: The change that we
3 propose fixes what you just said, right?

4 MR. RAINS: Right. Except full date of
5 birth.

6 CHAIRMAN BABCOCK: Sarah says "no."

7 HONORABLE SARAH DUNCAN: No. That's what I
8 was trying to point out a minute ago.

9 CHAIRMAN BABCOCK: Okay.

10 HONORABLE SARAH DUNCAN: The reason "except
11 the date of birth of a defendant in a criminal matter" has
12 the double underline under it, we didn't make a decision
13 on that. We're pitching that to the committee.

14 MR. RAINS: Yeah.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE SARAH DUNCAN: And what I would
17 like to know is why is it that you can't use the
18 confirmation procedure in 14.3(b)?

19 MR. RAINS: It would be cumbersome. It's
20 going to be cumbersome for the clerks because it's going
21 to be a call right back to them and --

22 HONORABLE SARAH DUNCAN: This whole thing is
23 going to be cumbersome.

24 MR. RAINS: Yeah. I understand that, but,
25 you know, here we are -- whose identity are we obscuring

1 here? We are obscuring the identity of someone who is
2 convicted of a crime, but here is the other thing I wanted
3 to add --

4 HONORABLE SARAH DUNCAN: Well, just
5 indicted. They don't have to have been convicted, they
6 just have to be indicted for the crime.

7 MR. RAINS: Here's what I was going to
8 suggest, is that instead of "a defendant in a criminal
9 matter," why don't you put "the name of the defendant in a
10 conviction record, criminal conviction record," and that
11 would solve that? That way, see, we're not interested in
12 finding out people who have been acquitted. I'm not
13 interested in finding out someone where the case has been
14 dismissed criminally. What you're looking for is somebody
15 that has got a conviction record, and that's what I always
16 ask for and whenever we can we get those and then we -- I
17 think that may solve it.

18 CHAIRMAN BABCOCK: Okay. Tom Wilder, you
19 had a comment?

20 MR. WILDER: Yes, Mr. Chairman. We would
21 respectfully ask that the date of birth be included for
22 all -- in all criminal records. All ChoicePoint does
23 apparently is look at the final judgment, but there are
24 many, many other people who want to look at the whole
25 record, including the news media; and if you're going to

1 disallow everything except if you have a final judgment,
2 that just isn't going to work in today's age. That's
3 going to severely impact our system as we have it up there
4 now. We'll have to take those other things off.

5 CHAIRMAN BABCOCK: So, Tom, I don't
6 understand. Are you in favor of the underlined language
7 which is up for discussion?

8 MR. WILDER: Absolutely. I was just taking
9 exception to Mr. Rains' statement about making it for
10 convicted persons only. We need to have it in there from
11 day one. Just on the indictments when the news media is
12 searching for those indicted, which they do on a daily
13 basis, they are going to want to be able to differentiate
14 between the ones that have been indicted.

15 CHAIRMAN BABCOCK: Fair enough. Mike
16 Coffey.

17 MR. COFFEY: Likewise, employers do care if
18 the person that they're about to hire is currently under
19 indictment or -- and they care about cases that are
20 dismissed. I mean, if somebody gets deferred
21 adjudication and that case is ultimately dismissed upon
22 completion of the deferred adjudication, they entered a
23 plea of guilty to get that deferred adjudication, and an
24 employer cares what the circumstances were. So just
25 looking at convictions really oversimplifies that issue.

1 Plus, you do -- if the court system just has
2 names when we're doing searches, you know, again, if I
3 search John Smith or Jose Garcia in Tarrant County, I'm
4 going to have hundreds of hits. Then you add court
5 systems that wisely give it a sound -- what they call
6 sound Xes, I type in "John Smith" and it's going to give
7 me all the Jonathans and all those. It just magnifies
8 that number by that many more, and I really need that date
9 of birth to reduce it.

10 And even if I just had a month and a year, I
11 don't have access to Tarrant County system to run the data
12 to see how many I'd get by -- you know, by applying with
13 different numbers, but it would be a giant burden on the
14 clerks if I started every time I got a whole bunch of hits
15 either going down to the clerk or calling and saying,
16 "Okay, you know, will you pull these 15 or 20 files for me
17 and verify if this information matches or not," because
18 apparently as it's written out if it's considered
19 sensitive data it can't be filed electronically, so I
20 assume that means it won't be on the computer system where
21 it's filed.

22 CHAIRMAN BABCOCK: Well, we're talking about
23 withdrawing things -- in 14.1 we're talking about
24 withdrawing information not only from the internet but
25 also from public availability, so -- Munzinger.

1 MR. COFFEY: We need a full date of birth.

2 MR. MUNZINGER: I was only going to point
3 out that a judgment of conviction is final when the Court
4 of Criminal Appeals or the U.S. Supreme Court says so, and
5 that has complicating factors if you were to limit it to a
6 judgment. The drift of the conversation seems to be at
7 the moment to leave it open in all things. There is a
8 good reason for that.

9 Suppose I have a son and he is indicted, and
10 it's important to -- and we have the same name, and it's
11 important to know his date of birth for the innocent
12 person as distinct from the person who has been indicted.
13 There is a plus side to allowing this information to be
14 made public.

15 CHAIRMAN BABCOCK: Fortunately some of us
16 only have daughters, but Judge Christopher, who has
17 daughters.

18 HONORABLE TRACY CHRISTOPHER: Well, I have
19 both. I don't think date of birth ought to be in there at
20 all.

21 CHAIRMAN BABCOCK: I agree.

22 HONORABLE TRACY CHRISTOPHER: And I
23 certainly think we ought to have date of birth in criminal
24 proceedings available, but I think date of birth in all
25 proceedings ought to be available because I think if we're

1 going to take out all these other identifying factors, at
2 least have the date of birth so that someone can know that
3 they have got the right person in a record that they're
4 looking at. We have to leave some thing to identify a
5 person with, and it seems to me that that would be the
6 least offensive identifier.

7 CHAIRMAN BABCOCK: Yeah. Carl.

8 MR. HAMILTON: I was just going to say the
9 same thing she said.

10 MR. MEADOWS: I agree.

11 MR. HAMILTON: It's almost public policy
12 that you have to have some identifying thing to go along
13 with the name.

14 CHAIRMAN BABCOCK: Bobby, did you have your
15 hand up?

16 MR. MEADOWS: No, but I agree.

17 CHAIRMAN BABCOCK: Okay. Anybody else?

18 Okay. Sarah, how do we want to vote on
19 this? Should we vote on just date of birth without the
20 underlined -- without the underlined language?

21 HONORABLE SARAH DUNCAN: (Nods head.)

22 CHAIRMAN BABCOCK: Okay.

23 HONORABLE SARAH DUNCAN: Don't you think,
24 Lisa? Tom?

25 CHAIRMAN BABCOCK: Tom, is that okay with

1 you?

2 HONORABLE TOM GRAY: I would say some part
3 of the date of birth or nothing at all and then talk about
4 -- because I get the sense that that may go down in flames
5 right there.

6 CHAIRMAN BABCOCK: I agree. So how many --
7 Richard.

8 MR. MUNZINGER: Why don't you just vote to
9 delete date of birth so that date of birth is publicly
10 available for all purposes and see where that takes us?

11 CHAIRMAN BABCOCK: That's what I was going
12 to suggest. So everybody that is in favor of including
13 date of birth as data that is sensitive raise your hand.

14 All those that are opposed raise your hand.
15 All right. The vote is 4 that are in favor of date of
16 birth as data that is sensitive and 15 are opposed, the
17 Chair not voting, so we will delete subpart (d) from
18 sensitive data.

19 Let's go to (e), the address and phone
20 number of a person who is a crime victim as defined in
21 Article 56.32, Code of Criminal Procedure, in the
22 proceeding in which the case record is filed or a related
23 proceeding. Tom, do you want to tell us what the thought
24 is on this?

25 HONORABLE TOM GRAY: My recollection is that

1 one came right over from the other committee, and I do not
2 recall any further discussion on that. It's basically to
3 protect the identity of crime victims.

4 CHAIRMAN BABCOCK: Okay. Justice Duncan,
5 nothing to add to that?

6 HONORABLE SARAH DUNCAN: No.

7 CHAIRMAN BABCOCK: Okay. Any -- yes,
8 Stephen Yelenosky, Judge Yelenosky.

9 HONORABLE STEPHEN YELENOSKY: Stephen
10 Yelenosky, 3-30-1958, by the way. What is Article 56.32?

11 CHAIRMAN BABCOCK: 1958 and you're a judge?
12 Are you kidding me? You're too young.

13 HONORABLE STEPHEN YELENOSKY: What is
14 Article 56.32? I mean, what does that say? I'm just
15 wondering if that includes all domestic violence.

16 CHAIRMAN BABCOCK: Anybody know what 56.32
17 is?

18 MR. BOYD: I'm getting it. I'm looking at
19 the Public Information Act which has this exception in it
20 with the same citation information about a criminal victim
21 as defined by that article is excepted from disclosure.
22 Let me see if I can get it.

23 CHAIRMAN BABCOCK: While Jeff is trying to
24 pull that up, any other comments about this? Richard
25 Munzinger.

1 MR. MUNZINGER: Well, I'm not sure I
2 understand the definition, and let me pose this to the
3 committee members. A newspaper or magazine wants to write
4 a story about a heinous criminal offense and does so.
5 There is a defamation or invasion of privacy action
6 brought by the crime victim, and pleadings are filed in
7 that case, and the crime victim is identified either by
8 the plaintiff's petition -- let's say by the defendant's
9 answer or some motion that the defendant files. Would the
10 identity of that crime victim be required to be considered
11 sensitive data in the case I have described, because it is
12 not apparently the proceeding in which the case record is
13 filed, or is it? And is it a related proceeding? I'm not
14 sure I understand the definition.

15 CHAIRMAN BABCOCK: So what you're saying is
16 the crime victim files a civil lawsuit where the victim is
17 a plaintiff, it could be for wrongful death or it could be
18 against a newspaper for invasion of privacy, but as an
19 essential element of the pleading it would be, you know,
20 "I was a victim of this crime."

21 MR. MUNZINGER: Or "my mother was" or
22 whoever, make it third person so I don't make it a little
23 bit harder, but I'm not quite sure I understand "a person
24 who is a crime victim in the proceeding in which the case
25 record is filed."

1 MR. LOW: Well --

2 CHAIRMAN BABCOCK: Yeah, that's fine, but
3 you say it could be -- by adding "or a related proceeding"
4 could expand it.

5 MR. MUNZINGER: I'm just not sure of the
6 definition. I'm not sure what it means. That's my
7 concern.

8 CHAIRMAN BABCOCK: Judge Lawrence had a
9 comment. Then Buddy.

10 HONORABLE TOM LAWRENCE: I'm not sure what
11 "crime victim" means. We get a case file where someone
12 has run a stop sign and hit somebody. Is the person that
13 got hit a crime victim? We're not going to necessarily
14 know who that is. They're going to list three or four
15 different witnesses on the citation. We're not going to
16 have the accident report. We're not going to know who the
17 victim is and who the witness is. I don't know how we're
18 going to -- I don't know.

19 MS. WOLBRUECK: It's by that statute.

20 HONORABLE TOM LAWRENCE: Well, I know, but
21 I'm not sure if that statute doesn't just raise another
22 issue.

23 HONORABLE SARAH DUNCAN: If you don't know
24 who it is you can't disclose it, right?

25 HONORABLE TOM LAWRENCE: Is this just

1 assault, someone that's been assaulted, or is that all
2 this statute refers to?

3 CHAIRMAN BABCOCK: Yeah, Justice Hecht has
4 beaten Jeff to the statute, showing why he is in his
5 exalted position. He knows how to work the computer.

6 MS. WOLBRUECK: They're already confidential
7 by law.

8 HONORABLE NATHAN HECHT: It's very long.
9 "Victim means, except as provided by subsection (c),"
10 which the statute doesn't appear to have a subsection (c),
11 but --

12 MR. BOYD: See why I wasn't speaking up yet.

13 HONORABLE NATHAN HECHT: "An individual who
14 suffers personal injury or death as a result of criminally
15 injurious conduct or as a result of actions taken by the
16 individual as an intervenor if the conduct or actions
17 occurred in this state and who is also a resident of this
18 state, another state of the United States, the District of
19 Columbia, the commonwealth of Puerto Rico" --

20 HONORABLE STEPHEN YELENOSKY: Couldn't be
21 clearer.

22 HONORABLE NATHAN HECHT: -- "or a possession
23 or territory of the United States; also, an individual who
24 suffers personal injury or death as a result of criminally
25 injurious conduct or a result of actions taken by the

1 individual as an intervenor, if the conduct of actions
2 occurred in a state or country that does not have a crime
3 victims compensation program that meets the requirements
4 of Section 14.03(b) of Federal statute and who is a
5 resident of this state and would be entitled to
6 compensation under this subchapter if the criminally
7 injurious conduct or actions occurred in this state; or,
8 thirdly, an individual who suffers personal injury or
9 death as a result of criminally injurious conduct caused
10 by an act of intentional terrorism" -- I'm sorry,
11 "international terrorism as defined by Federal statute
12 committed outside the United States and who is a resident
13 of this state."

14 HONORABLE STEPHEN YELENOSKY: No problem,
15 Bonnie, right?

16 MS. WOLBRUECK: No, I have no problem at all
17 with it.

18 HONORABLE TOM GRAY: Well, Bonnie does not
19 have to worry about that. The lawyer filing the pleading
20 does.

21 HONORABLE STEPHEN YELENOSKY: Oh, then we
22 have a problem.

23 MR. LOW: That describes crime victim,
24 but -- and where is the section that says that it's
25 protected. Does it protect it only in that proceeding or

1 in a related proceeding?

2 HONORABLE NATHAN HECHT: Well, it would just
3 be this rule, but it looks to me like what the rule was
4 trying to do was saying you shouldn't be able to find out
5 this information about the victim of a crime in the case
6 in which he was a victim.

7 MR. LOW: Right.

8 HONORABLE NATHAN HECHT: And so they define
9 out what -- how do you describe victim, they just lifted a
10 definition out of the Code of Criminal Procedure.

11 MR. LOW: What I'm getting at is what if the
12 victim then files a civil case or something like that?
13 Does that statute then protect that person, or is it that
14 person has -- they volunteered now to come into court?
15 Initially they were the subject of something, and now they
16 come into court voluntarily to seek redress, is that --
17 that's related, but are they protected under that statute?

18 MR. MUNZINGER: Or is it related?

19 MR. LOW: Well, it's related in the sense
20 that the same act gave rise to both lawsuits.

21 HONORABLE STEPHEN YELENOSKY: Well, why
22 wouldn't you want to be protected in a family violence
23 situation? You could have a criminal act and then the
24 woman comes back and wants a protective order or
25 something, and she doesn't want him to know where she is.

1 MR. LOW: I'm not making any suggestion.

2 I'm only asking questions. So --

3 CHAIRMAN BABCOCK: Judge Lawrence.

4 HONORABLE TOM LAWRENCE: If someone files a
5 citation and they list a number of witnesses and there is
6 no way to distinguish who the crime victim is then the
7 court would be under no obligation to protect that.

8 CHAIRMAN BABCOCK: Nor would the clerk, I
9 wouldn't think.

10 HONORABLE TOM LAWRENCE: Or the clerk.

11 CHAIRMAN BABCOCK: Right.

12 HONORABLE NATHAN HECHT: The court clerks
13 don't have any obligations anyway, right?

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE TRACY CHRISTOPHER: Why are we
16 doing this?

17 MR. BOYD: 56.09 says that "As far as
18 reasonably practical the address of a victim may not be a
19 part of the court file, except as necessary to identify
20 the place of the crime. The phone number of the victim
21 may not be a part of the court file."

22 MR. LOW: That's in that case, though.

23 MR. BOYD: That's right. In the court file
24 in the criminal case.

25 HONORABLE TOM GRAY: Chip, could I answer

1 the judge's question, or at least try to of why we're
2 doing this?

3 CHAIRMAN BABCOCK: Yeah.

4 HONORABLE TOM GRAY: Basically the real
5 focal point is the situation identified by Steve, is that
6 in a domestic violence situation where you're coming back
7 and the victim has moved.

8 HONORABLE TRACY CHRISTOPHER: But those
9 records are all out anyway.

10 HONORABLE TOM GRAY: Well, not if the victim
11 is now suing the aggressor.

12 HONORABLE TRACY CHRISTOPHER: Well, but
13 surely the victim can identify themselves in the pleading
14 if they want to.

15 HONORABLE TOM GRAY: Name. This is only
16 address and phone number.

17 PROFESSOR ALBRIGHT: But they're filing the
18 lawsuit, so why would they put their address and phone
19 number in the pleadings? There is no requirement in --

20 HONORABLE TRACY CHRISTOPHER: Right.

21 PROFESSOR ALBRIGHT: -- pleading injunction
22 that she put her address and phone number in the pleading.
23 If you're a plaintiff, you can choose not to put it in
24 there.

25 CHAIRMAN BABCOCK: Lisa.

1 MS. HOBBS: There is a Rule of Civil
2 Procedure that requires a pro se litigant to put their
3 name and address on the form, on their pleading, because
4 the clerk's office has to -- just like we put our lawyer
5 number on there.

6 PROFESSOR ALBRIGHT: So if they're pro se --

7 MS. HOBBS: Right.

8 PROFESSOR ALBRIGHT: -- you have to have a
9 place where you can find them to send mail to them.

10 HONORABLE TRACY CHRISTOPHER: You can't
11 possibly consider that protected if it's a pro se
12 plaintiff because how on earth are people going to give
13 them notice or, you know --

14 HONORABLE TOM GRAY: Actually, I've got this
15 situation on appeal. I've got this situation on appeal
16 right now where I've got a spouse outside prison and
17 another spouse that's in the prison, and they're trying to
18 sue one another, and all the correspondence is passing
19 through the court, and we get the copy that is sent to the
20 other party.

21 HONORABLE TRACY CHRISTOPHER: Well, we sure
22 don't want that to happen.

23 HONORABLE TOM GRAY: Well, but --

24 PROFESSOR ALBRIGHT: The way you deal with
25 that is through an order in that particular case --

1 HONORABLE STEPHEN YELENOSKY: Right.

2 PROFESSOR ALBRIGHT: -- as opposed to a rule
3 that applies to everybody, and I think if the question
4 that Buddy is asking is related proceeding, is that
5 included in the statute, or is related proceeding
6 something that's been added in this rule? Right?

7 I mean, there is apparently Article 56.32
8 has some prohibition on what you put in court records --

9 HONORABLE SARAH DUNCAN: Well, that was --

10 PROFESSOR ALBRIGHT: -- so are we adding to
11 it or just putting it in this rule?

12 HONORABLE SARAH DUNCAN: That was 56.09 that
13 Jeff read.

14 MR. BOYD: Yeah, actually .32 just defines
15 what a crime victim is and then .09 says you can't put the
16 address or telephone number of the victim in the criminal
17 court file and then the Public Information Act says that
18 any victim who applies for compensation under the Crime
19 Victims Compensation Program, their personal identifying
20 information is confidential if they choose to make it
21 confidential, but any victim who does not apply for
22 compensation or who does not elect to keep -- who, having
23 applied, does not elect to keep their information
24 confidential, their information is not.

25 CHAIRMAN BABCOCK: Couldn't we resolve this

1 problem by striking the phrase "or a related proceeding"?
2 Doesn't that fix it?

3 MR. HAMILTON: Well, if we do that it's
4 already covered by the statute. You just need to take it
5 out, it seems to me.

6 HONORABLE TRACY CHRISTOPHER: And then we go
7 back to the criminal indictment. We're not going to put
8 the name of a victim in the indictment?

9 HONORABLE STEPHEN YELENOSKY: It's address
10 and phone number. Just address and phone number.

11 HONORABLE TRACY CHRISTOPHER: Oh.

12 CHAIRMAN BABCOCK: Just address and phone
13 number.

14 HONORABLE TOM GRAY: I actually thought --
15 and remember this -- as I recall, this came over in this
16 verbiage from the report that we were working with.
17 Sarah, do you --

18 HONORABLE SARAH DUNCAN: Judicial Council.

19 HONORABLE TOM GRAY: Judicial Council. But
20 I don't remember there being any modification by us, but
21 looking at it now, I would suggest that where the -- once
22 you define it, "the address and phone number of a person
23 who is a crime victim as defined by the statute," period.
24 And you don't need --

25 HONORABLE STEPHEN YELENOSKY: Yeah.

1 HONORABLE TOM GRAY: -- "in the proceeding,"
2 any of that.

3 CHAIRMAN BABCOCK: Richard Munzinger.

4 MR. MUNZINGER: Yeah, but that's the problem
5 I was raising again. The media wants to do a story and it
6 results in litigation, invasion of privacy or defamation
7 or something else. What you're in essence saying is that
8 no person who has been a crime victim may ever be
9 mentioned in a civil pleading. That's a pretty serious
10 onus.

11 HONORABLE TOM GRAY: Just the address and
12 phone number. All we're talking about --

13 MR. MUNZINGER: It's still a serious onus.
14 It's a serious problem to a lawyer. I'm going to draft a
15 pleading. I'm going to sue the *Dallas Morning News*. I'm
16 not sure if this prohibition here binds me as a lawyer
17 writing a petition. I suspect the clerk would say, "You
18 can't file this petition if you put the address and phone
19 number in there."

20 CHAIRMAN BABCOCK: Well, and you have the
21 other problem of pro ses, and if you have venue issues you
22 would want to allege that part of the address that shows
23 what county the person lived in. Judge Lawrence.

24 HONORABLE TOM LAWRENCE: In a criminal case
25 who is going to make the determination and apply the

1 definition in that article to an individual to determine
2 they're the crime victim and then who is going to delete
3 the information? Is it going to be the prosecutor?

4 CHAIRMAN BABCOCK: I think so.

5 HONORABLE TOM LAWRENCE: And if there is no
6 prosecutor then who does it?

7 MR. BOYD: How do you have a criminal case
8 without a prosecutor?

9 CHAIRMAN BABCOCK: Well, we went throught
10 that earlier. There are criminal cases in municipal and
11 JP court.

12 Well, Justice Gray, wouldn't you need the
13 limiting language of "in the proceeding in which the case
14 record is filed"? No, that wouldn't do it either, would
15 it?

16 HONORABLE TOM GRAY: I really don't know
17 what the Judicial Council had in mind, but in looking at
18 it and trying to understand the problem that I have
19 described, I think that is the purpose, is to --

20 CHAIRMAN BABCOCK: If we limit it to only
21 the criminal case where there is a victim as defined in
22 the Code of Criminal Procedure then we are doing nothing
23 more than implementing what Jeff says is already in the
24 statute.

25 HONORABLE TOM GRAY: I think that may be

1 right. I don't know. I have not looked at it from that
2 angle, but it doesn't protect the crime victim when they
3 are bringing their separate suit or --

4 CHAIRMAN BABCOCK: Yeah, but as somebody
5 said, they're the master of their own pleadings. So if
6 they don't want to put their phone number in, they don't
7 have to, but if they want to -- Justice Bland.

8 HONORABLE JANE BLAND: The statute has an
9 exception for the address of the crime victim when the
10 crime took place at the victim's address, and to me that's
11 important because a lot of crimes happen at the victim's
12 residence, and so this would be requiring the prosecutor
13 to redact that out of the indictment and any other -- and
14 I'm just saying if what we're trying to do is repeat the
15 statute, why don't we take it out and let the statute
16 control the determination of when an address and phone
17 number can be used since there's already a statute on file
18 that applies specifically to proceedings in that
19 particular criminal case, and we -- the consensus seems to
20 be that we don't want to apply that rule outside of the
21 criminal case. Why don't we just let the statute do what
22 it does now and not --

23 CHAIRMAN BABCOCK: Yeah, this is the
24 opposite of the problem we've been worried about. We've
25 been worried about statutes that require certain

1 information to be in pleadings. This is a situation where
2 the statute precludes certain information from being in
3 pleadings, so why wouldn't we just let the statute operate
4 as it always has with people who presumably are familiar
5 with the operation of the statute and wouldn't put
6 those -- that information in pleadings if they're
7 prohibited from doing so? Judge Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Yeah, and I
9 think that maybe it's true that since the plaintiff is the
10 master of his or her own pleadings that that takes care of
11 it. I noted that in the protective order packet we have
12 for pro se litigants it says at the point of address
13 "unless you want to keep it confidential," so in that
14 context they signal what would generally be known to
15 somebody who is represented by virtue of attorney advice.

16 And one other unrelated minor point, it's
17 implicit we're talking about an alleged crime victim, but
18 maybe we could make that explicit as a nod to the
19 presumption of innocence.

20 MR. LOW: Chip?

21 CHAIRMAN BABCOCK: Yeah, Buddy.

22 MR. LOW: If you take that out wouldn't you
23 want some provision to the effect that recognizing they
24 are Federal and state statutes, that information is
25 protected. In other words, at least, if we're taking that

1 statute out and why not -- there might be other statutes.
2 There may some come along that it's prohibited by Federal
3 or state statutes.

4 CHAIRMAN BABCOCK: Yeah. I think that we
5 take care of that later in the rule.

6 MR. LOW: Okay. All right.

7 CHAIRMAN BABCOCK: When we talk about
8 "restricted by law or court order."

9 MR. LOW: Okay.

10 CHAIRMAN BABCOCK: Richard Munzinger.

11 MR. MUNZINGER: Isn't this redundant of the
12 Code of Criminal Procedure then if you remove the words
13 "related proceeding," and if it is redundant why would you
14 say it again? Just take it out of this rule entirely and
15 leave it up to that.

16 HONORABLE STEPHEN YELENOSKY: That's what
17 we're saying.

18 CHAIRMAN BABCOCK: That's what Justice
19 Bland's point was. Yeah.

20 MR. MUNZINGER: And leave it up to the
21 prosecutors who are familiar with that and is his job.
22 Can we vote on that?

23 CHAIRMAN BABCOCK: Any other discussion?
24 All right. The vote will be, again, in keeping with the
25 fact that the subcommittee has recommended this, everybody

1 that thinks subpart (e) should be included in the list of
2 things of data that is sensitive raise your hand.

3 All those opposed? Raise them again. I
4 maybe didn't get it. Okay. By a vote of three in favor
5 and nine opposed that will be deleted from our
6 recommendation to the Court.

7 Let's go on to (f), the name and address of
8 a minor child, and this is a subpart that Judge Womack had
9 substantial comments to, but, Justice Gray, why don't you
10 start us off and then we'll let --

11 HONORABLE TOM GRAY: Actually, in addition
12 to Judge Womack's comments, one other issue has come up
13 that I hadn't thought about as we were drafting the rule,
14 what happens in the event that you don't know a person is
15 minor, but I think that will be a self-correcting problem,
16 or at least I hope it is, but it pretty much speaks for
17 itself. I mean, you're talking about protecting minor's
18 information.

19 CHAIRMAN BABCOCK: Okay. Justice Duncan,
20 anything to add to that? Okay.

21 HONORABLE STEPHEN YELENOSKY: How does it
22 work, though, where you have the parents identified and
23 it's obvious through the pleading or whatever that that's
24 the residence? Is that a problem? Do you also have to
25 redact that?

1 HONORABLE TOM GRAY: Well, it's almost a sad
2 commentary on society, but I'm not sure that you can
3 assume that the child lives at the address of the parent,
4 but although that may be the norm.

5 HONORABLE STEPHEN YELENOSKY: No, but it
6 might be clear from the pleadings.

7 HONORABLE TOM GRAY: I'll have to say we
8 hadn't contemplated that. I mean --

9 HONORABLE SARAH DUNCAN: Well, I have to say
10 that bothers me right now just typing an opinion in a case
11 where we're required to use initials, to identify both
12 parents by first and last name --

13 HONORABLE STEPHEN YELENOSKY: And initials
14 for the kid.

15 HONORABLE SARAH DUNCAN: -- and then use
16 initials for the child. It seems to me self-defeating,
17 and I have tried to start not using first and last names.
18 I don't know that that helps. But, yeah, it's a problem.

19 CHAIRMAN BABCOCK: Judge Lawrence, sorry.

20 HONORABLE TOM LAWRENCE: Okay. So if I've
21 got a defendant that is under 18 then I would have to
22 redact his name on the traffic ticket or whatever is
23 filed. The probable cause affidavit, the complaint, would
24 just have his initials on it, and the warrant that is
25 generated would just have his initials on it?

1 CHAIRMAN BABCOCK: You're talking about a
2 defendant?

3 HONORABLE TOM LAWRENCE: Yes.

4 CHAIRMAN BABCOCK: Yeah. I think that's the
5 same issue that Judge Womack points out.

6 HONORABLE TOM LAWRENCE: Well, I'm
7 supporting what he's saying, and I would go a step further
8 that it's just going to be a tremendous burden on the JP
9 and municipal courts because we have so many cases.
10 Probably I would guess 25 percent of our case load,
11 criminal case load is probably under 18, just a guess.

12 CHAIRMAN BABCOCK: I've got a proposed fix
13 here in a second. Richard Munzinger.

14 MR. MUNZINGER: What is the evil that we are
15 attempting to avoid by deleting the names and addresses of
16 minor children in every pleading of every sort in every
17 court proceeding?

18 CHAIRMAN BABCOCK: This is not an identity
19 theft issue, right?

20 MR. MUNZINGER: I mean, that's part of my
21 question. What is the evil that we are attempting to
22 avoid here?

23 CHAIRMAN BABCOCK: I don't know. Lisa
24 thinks it's kidnapping.

25 MR. BOYD: According to the Attorney General

1 the name of a minor child is subject to the common law
2 right to privacy of the parent. That's what this Open
3 Records letter ruling says.

4 CHAIRMAN BABCOCK: Okay. Judge Lawrence.

5 HONORABLE TOM LAWRENCE: We have an Open
6 Courts Doctrine, so anybody can come into court and hear
7 the testimony. I'm not sure I understand what we're
8 protecting exactly.

9 HONORABLE SARAH DUNCAN: It's the practical
10 obscurity phenomenon again. We haven't been -- as society
11 we haven't been concerned about protecting this
12 information if somebody had to make the effort to go to
13 the court and listen to the testimony.

14 HONORABLE STEPHEN YELENOSKY: But you could
15 also have a protective order that wouldn't allow it to be
16 said in court.

17 HONORABLE SARAH DUNCAN: You could. But I'm
18 just saying that when somebody had to go in court and
19 listen to the testimony or go to the courthouse and look
20 at the documents, we weren't so concerned about this
21 information getting out. What I think has precipitated
22 the concern is the electronic availability of the
23 information away from the courthouse.

24 HONORABLE TOM LAWRENCE: I would yield to
25 Judge Womack on this, but just putting initials on the

1 complaint, is that going to cause -- aren't we going to
2 have some problems with that?

3 HONORABLE PAUL WOMACK: I would think so,
4 but I do want to point out that my concern -- as my letter
5 I hope makes clear, my remarks probably didn't, my concern
6 is not with 14.1. It's 14.2(b)(2). In other words, as a
7 general policy in your 14.1, names and addresses of minor
8 children could be a sensitive thing. I'm only concerned
9 about when it's with initials in pleadings in criminal
10 matters. That's what I'm concerned with.

11 HONORABLE TOM LAWRENCE: Right. I agree.

12 HONORABLE PAUL WOMACK: And I think that's
13 your concern, too.

14 CHAIRMAN BABCOCK: But the two are tied
15 together --

16 HONORABLE TOM LAWRENCE: Right.

17 CHAIRMAN BABCOCK: -- because 14.1 says that
18 you can never have the name and address of a minor child,
19 and 14.2 only kicks in if some statute or law requires.

20 HONORABLE TOM LAWRENCE: It's .1(f) that
21 requires 2(b)(2).

22 MS. HOBBS: It's 14.2(a) that says sensitive
23 data must not be filed or included in a case record.

24 CHAIRMAN BABCOCK: Right.

25 MS. HOBBS: And if it's needed then you

1 abbreviate it.

2 CHAIRMAN BABCOCK: Right. If it's required
3 then you abbreviate it.

4 HONORABLE PAUL WOMACK: My position is -- I
5 didn't mean to interrupt. My position is that -- my
6 analysis has been that in criminal cases a statute does
7 require the sensitive data of a child's name to be
8 included in the state's pleading, and that's the statute
9 that controls what has to be in an indictment, so that's
10 why I'm concerned with 14.2(b)(2).

11 HONORABLE TOM GRAY: And, Judge Womack, you
12 weren't here when we opened up, and maybe this satisfies
13 your concern, maybe it doesn't, but the concept was that
14 if a statute or other rule required something to be
15 included in a pleading that is defined by this rule as
16 sensitive information then the summary information would
17 be included in the petition. Obviously the parties, which
18 would be the state and the defendant, would have access to
19 the sensitive data form, and so they would have the
20 information and then thereby hopefully satisfy the statute
21 requiring the inclusion of that information,
22 quote-unquote, in the indictment.

23 HONORABLE SARAH DUNCAN: And to the extent
24 it doesn't I think we had talked about that this rule --
25 because there are statutes out there that require this

1 type of information to be in the petition or the pleading,
2 this rule would pretty much have to be interpreted as
3 trumping all those statutes. Either satisfied or trumped.

4 CHAIRMAN BABCOCK: Judge Lawrence.

5 HONORABLE TOM LAWRENCE: I would guess
6 conservatively just off the top of my head that you're
7 going to at least double the amount of time required to
8 process a case in JP and municipal court if you adopt it
9 like this. At least double.

10 CHAIRMAN BABCOCK: Buddy.

11 MR. LOW: What if we -- I mean, a child 17
12 is really -- we consider them a minor for our civil
13 purposes, but not for criminal, and really it's not a
14 theft identity thing. What if we say a child below the
15 age of 17 years, they can't be -- I mean, and why protect
16 a kid that that's --

17 HONORABLE TRACY CHRISTOPHER: Well, they
18 drive at 16, so at least we could make it below 16 and
19 some of them drive at 15.

20 MR. LOW: Or below a certain age, instead of
21 -- I mean, instead of just a minor, because the theft
22 identity thing is taken care of in other parts, and this
23 would take care of the criminal situation. What about
24 that, Judge Womack?

25 HONORABLE PAUL WOMACK: Yeah, that would

1 take care of it.

2 HONORABLE TRACY CHRISTOPHER: What's the
3 youngest we certify a minor to be in a felony court? Is
4 it 14? 12?

5 HONORABLE PAUL WOMACK: It's usually 15.
6 There are some statutory exceptions for things that never
7 happen like perjury.

8 HONORABLE TRACY CHRISTOPHER: So 15 is the
9 youngest?

10 CHAIRMAN BABCOCK: 12-year-olds lying their
11 butts off.

12 HONORABLE PAUL WOMACK: Yeah, little
13 three-year-old liars can be prosecuted for felonies.

14 CHAIRMAN BABCOCK: In little tiny handcuffs.

15 HONORABLE TOM LAWRENCE: Well, but you've
16 got misdemeanors, too, and there is some types of criminal
17 offenses that you can go down to 10 years old and
18 prosecute somebody for.

19 HONORABLE TRACY CHRISTOPHER: It would not
20 be in juvenile court, where those records are already
21 sealed?

22 HONORABLE TOM LAWRENCE: No, it would be in
23 JP court, municipal court. Some would be in juvenile
24 court, but you would also have those in JP and municipal
25 court.

1 CHAIRMAN BABCOCK: To get back to a question
2 that was partially answered, this is not an identity theft
3 issue. What is the -- what is the concern to categorize
4 this information as sensitive data? Lisa said maybe
5 kidnapping. What else?

6 MR. MEADOWS: Well, I asked --

7 CHAIRMAN BABCOCK: Bobby.

8 MR. MEADOWS: Well, I don't have the answer,
9 but when we started I asked the same question and what I
10 was told was this is an area of heightened sensitivity
11 that we've been asked to address, but without any fuller
12 explanation of that. I mean --

13 HONORABLE PAUL WOMACK: Maybe I wandered too
14 much at the bottom here, but I would -- and I'm not on the
15 committee, but I would have thought it's that you're
16 trying to make it harder for online perverts to find
17 children. Is that not right?

18 MR. LOW: Yeah.

19 CHAIRMAN BABCOCK: That would be a
20 legitimate reason.

21 HONORABLE TOM GRAY: That would be a good
22 thing.

23 CHAIRMAN BABCOCK: Lisa, how come you didn't
24 come up with that?

25 MS. HOBBS: I don't have a dirty enough

1 mind.

2 CHAIRMAN BABCOCK: You're suggesting Judge
3 Womack does?

4 MS. HOBBS: No, he deals with criminals.

5 CHAIRMAN BABCOCK: Judge, I think you should
6 object to that.

7 HONORABLE PAUL WOMACK: I have to plead
8 guilty, but my defense is it was by association, not by my
9 original nature.

10 PROFESSOR ALBRIGHT: So these online
11 perverts are going to find my children's names because
12 they've gotten tickets for all of their wilding around the
13 streets of Austin and then so they're going to come to my
14 house and find them?

15 HONORABLE JANE BLAND: No, they're going to
16 chat on the internet.

17 PROFESSOR ALBRIGHT: But to chat with my
18 children on the internet you have to know their screen
19 names because that's what they use.

20 HONORABLE SARAH DUNCAN: No, they're just
21 going to sit outside your house and wait till you leave
22 and then when your children decide to go play on the
23 swingset in the backyard -- and I realize your children
24 are too old to do this -- but go play on the swingset in
25 the backyard and then they're going to go and lure them

1 away.

2 PROFESSOR ALBRIGHT: But the perverts are
3 going to do that anyway without finding their --

4 HONORABLE TRACY CHRISTOPHER: They're going
5 to follow somebody home from school easier than looking up
6 records on the internet.

7 PROFESSOR ALBRIGHT: Yeah.

8 CHAIRMAN BABCOCK: Plus they've got to get
9 from Bangladesh all the way to Alex's house.

10 PROFESSOR ALBRIGHT: And if they're -- I
11 mean, I guess we have the criminal ones, which are
12 probably the 15 and 16 and 17 or 18-year-olds, or not the
13 18-year-olds because they're not minors anymore, but the
14 10-year-olds are more likely to be identified in family
15 law matters, which are confidential anyway, right? So it
16 seems to me --

17 HONORABLE SARAH DUNCAN: No. Only -- that's
18 only on remote. They are not remotely accessible. We're
19 talking about paper and remote here. And, actually, we
20 use juveniles -- in juvenile cases right now we use
21 initials. We don't use names.

22 PROFESSOR ALBRIGHT: But in family law
23 cases.

24 HONORABLE TRACY CHRISTOPHER: But the
25 juvenile records are sealed.

1 CHAIRMAN BABCOCK: Okay. Judge Lawrence.

2 HONORABLE TOM LAWRENCE: One of the problems
3 is that you're creating a new category here. You've got
4 juveniles that are under 17 and, you know, once you're 17
5 you're an adult and we treat them differently, but now
6 you're creating a new category of 17-year-olds that you're
7 going to treat differently than 18-year-olds and
8 differently than those under 17.

9 So you've got juvenile rules that apply to
10 those under 17. Normally once they're 17 the adult rules
11 apply, but you're going to create a different category for
12 those that are 17 that we've got to administratively
13 handle a little bit differently than we do when they turn
14 18.

15 CHAIRMAN BABCOCK: Okay. Judge Gray.

16 HONORABLE TOM GRAY: I just need to ask a
17 question, and maybe Tom Lawrence can answer this, because
18 I don't recall any distinction being made on a minor if
19 they got a traffic citation of their full name and address
20 being listed on the citation in a traffic offense or, you
21 know, Class C misdemeanor. I mean --

22 HONORABLE TOM LAWRENCE: You mean currently?

23 HONORABLE TOM GRAY: Yes.

24 HONORABLE TOM LAWRENCE: Well, currently
25 they would be listed. Their name and address would be

1 listed, their name would be on the complaint, their name
2 would be on the probable cause affidavit, on the warrant,
3 anything else. It would not be a restriction.

4 CHAIRMAN BABCOCK: Bonnie.

5 MS. WOLBRUECK: I mentioned this in the
6 subcommittee, and so since we're discussing the name of
7 minors, what this will do in my office with the family law
8 cases, which is 65, 70 percent of our case load, is that
9 the minor's name will not be shown in a public index, so
10 that I will -- one of our technical issues that I'll have
11 to deal with is right now we have minor's names listed in
12 the index, and the file will be open to the public but the
13 index will not concerning that minor child.

14 So we will have to have change -- make some
15 technical changes with our computers in order to have a
16 confidential index with the minors' names in the index
17 versus all of the other indexes that are open to the
18 public. Although the file will be open to the public, the
19 index will not.

20 CHAIRMAN BABCOCK: Any other comments about
21 this rule?

22 Okay. Let's vote on this. Everybody that
23 believes that the name and address of a minor child should
24 be included among the list of data that is sensitive raise
25 your hand.

1 All those opposed? Bonnie? All right. By
2 a vote of 5 to 13, subsection (f) will be stricken from
3 the proposed rule that we will recommend to the Court.

4 Let's go to 14.2(a). "Sensitive data must
5 not be filed or included in a case record as defined by
6 Rule of Judicial Administration 15.2, except in a
7 separately filed sensitive data form approved by the
8 Supreme Court of Texas and printed on pink paper.
9 Sensitive data forms must not be electronically filed."

10 Judge Gray, that's pretty self-explanatory.
11 Anything?

12 HONORABLE TOM GRAY: There were just a few
13 issues that came up with regard to that.

14 CHAIRMAN BABCOCK: I bet the pink paper.
15 Judge Bland.

16 HONORABLE JANE BLAND: Before we go to
17 14.2(a), Buddy had been talking about having something in
18 there about other laws that denote something as sensitive.

19 CHAIRMAN BABCOCK: We're going to get to
20 that.

21 HONORABLE JANE BLAND: Where is that?

22 CHAIRMAN BABCOCK: It is in 15.4(a).

23 MR. LOW: 4(a). Yeah, restricted by law or
24 court order.

25 CHAIRMAN BABCOCK: Yeah, there are a

1 couple -- Judge Bland, if that doesn't satisfy your
2 concern, remember that and let's bring it up at the end.
3 There's something else I want to bring up at the end, too.

4 HONORABLE SARAH DUNCAN: 15 is only remote
5 access, though.

6 CHAIRMAN BABCOCK: Right. I understand. If
7 it's not broad enough, we'll talk about it when we get
8 there. Judge Gray, how about pink paper?

9 HONORABLE TOM GRAY: The concept on not
10 filing electronically and pink paper are related, so I'll
11 talk about them together and we'll tear them apart. And
12 the common response among several people that responded
13 was that it's going to discourage filing of electronic
14 documents, and probably the most -- and maybe it was
15 because he didn't fully understand the differentiation
16 between a sensitive data form, but probably the most
17 astute person, most familiar with the electronic filing of
18 pleadings responded "Since attorneys will not be allowed
19 to e-file the sensitive data forms, their incentive to
20 e-file the remainder of the pleading is diminished," and
21 therein lies the fundamental problem, is that the
22 sensitive data form is not part of the pleading that is
23 being filed. It is a separate document that has to be
24 filed.

25 And if there is that level of confusion

1 among the most educated of the e-filers then I felt like
2 it ratified the decision of the subcommittee of the
3 recommendation that it be manually filed on a clearly
4 distinguishable piece of paper. As you-all I'm sure all
5 know, an electronically filed document can be printed, and
6 when printed on your routine piece of paper is going to
7 look something like this. (Indicating)

8 One of the responders said, "Well, you can
9 also print it where it prints in pink but you actually
10 have to have a color laser printer to do that." I do
11 recognize or the committee recognized that there would be
12 a lot of issues related to it, but we were trying to
13 balance the fact that on this piece of paper is going to
14 be the most sensitive of the information in the file and
15 that it was worthy of separate identification so that it
16 really did stand out, filed separately, dealt with
17 separately to prevent the very problem of one of the
18 responders of confusing what it was.

19 And so that was the reason both for the
20 physical separation, that it's not part of the other
21 document, as well as the differentiation in a color
22 format; and remember that you don't have to have a
23 sensitive data form with every filing, only the first time
24 the sensitive data is included in a filing and -- well,
25 only that document.

1 CHAIRMAN BABCOCK: Tom, did you have a
2 comment on that?

3 MR. WILDER: One, just a clarification, if I
4 may ask. For 10 years we've had fax filing blessed by the
5 Supreme Court. Are you including fax filing in this or is
6 that not included? Because we would sure like to keep the
7 fax filing because obviously when that comes in it won't
8 be on pink paper.

9 PROFESSOR CARLSON: Right.

10 MR. WILDER: And when it comes in we'll
11 obviously know to separate that from the paper.

12 CHAIRMAN BABCOCK: Justice Duncan.

13 HONORABLE SARAH DUNCAN: Well, that's the
14 whole point is that the pink paper actually was in
15 response to the clerks on the subcommittee who wanted to
16 be able to immediately identify that a sensitive data form
17 was attached to the front or the back or the middle of a
18 pleading and get it out of there and get it into a place
19 that's confidential, and electronically -- fax, to me, is
20 electronic.

21 MR. WILDER: Well, that's why I asked
22 because to some people it is.

23 HONORABLE SARAH DUNCAN: Yeah. And that's
24 precisely what the subcommittee ultimately agreed, was
25 that if you allow these to be electronically filed,

1 whether by fax or e-filing, the sensitive data forms are
2 going to get --

3 MR. WILDER: Well, could they mail it,
4 because there is some reference made to simultaneous
5 filing, and obviously if they're fax filing or e-filing,
6 then if they wouldn't be able to file the sensitive data
7 form, when should that come in and by what means?

8 HONORABLE SARAH DUNCAN: You just put it in
9 an envelope and put a stamp on it, properly addressed to
10 the clerk.

11 MR. WILDER: And just mail it?

12 CHAIRMAN BABCOCK: It doesn't say
13 "simultaneous." It says "separately." Richard Munzinger.

14 MR. MUNZINGER: The current rule uses the
15 phrase "telephonic document transfer" in Rule 21 for fax
16 filings, and I'm not sure that everybody would distinguish
17 between electronic and telephonic document transfer, and
18 you probably want to use common descriptions; but as a
19 practical matter, it would seem to me that the way this
20 rule is written, if the sensitive data form is not to be
21 filed electronically or by telephonic document transfer,
22 it pretty well stops electronic and telephonic filings of
23 those cases that have these in them.

24 HONORABLE SARAH DUNCAN: Just of that piece
25 of paper.

1 MR. MUNZINGER: Yeah. No, I'm not
2 complaining about it. It doesn't bother me a bit. I'm
3 just saying as a practical matter if I'm a lawyer I'm not
4 sure I'm going to send something by fax and then send it
5 by mail in the same case. I don't know.

6 HONORABLE SARAH DUNCAN: It's just this
7 piece of paper. It's just -- hold up that piece of paper.

8 MR. MUNZINGER: I understand. I understand.

9 HONORABLE SARAH DUNCAN: That piece of paper
10 that would have to be put in an envelope.

11 HONORABLE TOM GRAY: It wouldn't be the
12 15-page pleading that was being sent with it or the 30
13 pages of discovery or whatever.

14 MR. MUNZINGER: That causes problems to the
15 clerks as well. Which file does this go to? I don't have
16 a docket number yet if I'm filing an original petition,
17 for example.

18 HONORABLE TRACY CHRISTOPHER: No number on
19 it.

20 MR. MUNZINGER: So I don't know. How does
21 the clerk figure out which file this document goes to?
22 I'm not -- I don't know the solution.

23 HONORABLE SARAH DUNCAN: That's a good
24 question, and there's going to have to be some way to
25 match them up.

1 CHAIRMAN BABCOCK: Justice Bland.

2 HONORABLE JANE BLAND: Instead of doing -- I
3 mean, I think the goal is to keep this information
4 separately secure, and instead of talking about it as
5 keeping it separately secure by distinguishing it on pink
6 paper, why can't we just say "a sensitive data form
7 approved by the Supreme Court of Texas and kept separately
8 secure," because I think that we're going to find out in
9 the next 10 or 15 years that it is easier to secure
10 electronic files separately than it is to separate a piece
11 of -- one piece of paper from another.

12 In other words, a lawyer can electronically
13 file a sensitive data form. It can be coded in a
14 particular manner so as to keep it separately secured, but
15 linked with the file, and since we don't have the
16 mechanics of electronic filing down today, why would we
17 preclude that in the future as long as it could be kept
18 separately secured from the rest of the file?

19 CHAIRMAN BABCOCK: Bonnie, what's the
20 joinder to that?

21 MS. WOLBRUECK: Well, I agree. Our only
22 comment was during the subcommittee is that this form
23 needs to be very recognizable for the clerk. My concern
24 was that it would be attached to a 15-page pleading,
25 incorporated into the pleading at some point, and this was

1 the subcommittee's recommendation to deal with that.

2 Just as long as it's a recognizable form
3 promulgated by the Supreme Court, whatever, so that the
4 clerk can easily identify it and it be a separate piece of
5 paper and not stapled to the other pleadings.

6 CHAIRMAN BABCOCK: Okay. "Separately filed"
7 takes care of not stapled to?

8 MS. WOLBRUECK: Yes.

9 CHAIRMAN BABCOCK: "Pink" takes care of
10 easily recognizable, but if we don't do pink then --

11 HONORABLE SARAH DUNCAN: One of the people
12 responded, "separately filed" didn't solve the problem
13 because if they couldn't attach it to the front of the
14 pleading they would attach it to the back, and that's the
15 reason for -- and pink only came out because trying to
16 figure out what's actually going to be legible with
17 colored paper is difficult, but that's the problem, is
18 that people apparently think of this sensitive data form
19 as being something that's attached to a pleading in some
20 fashion.

21 CHAIRMAN BABCOCK: Andy.

22 MR. HARWELL: I agree with Bonnie. I think
23 the pink issue would be a problem because if you
24 electronically file or you fax file, I know I only have
25 black and white. I don't have color printers in the

1 office, and I don't know if you do, Bonnie.

2 MS. WOLBRUECK: We do.

3 MR. HARWELL: But that would be an issue. I
4 think my comment on the -- with the subcommittee was if
5 you came up with a symbol that we could recognize as
6 clerks that it's a sensitive data form, and it doesn't
7 have to be a different color. Once we start seeing them
8 come in electronically then we'll be able to -- the clerks
9 will be able to recognize that I think easily.

10 HONORABLE SARAH DUNCAN: If it's attached to
11 the back of a pleading and the symbol is on the front of
12 that piece of paper, how are you going to know that's a
13 sensitive data form? Are you going to look through? When
14 a petition comes in are you going to turn every page to
15 make sure there is not a sensitive data form in there?

16 MR. HARWELL: I would prefer not to, but if
17 this goes into effect I think we will be more acutely
18 aware maybe.

19 CHAIRMAN BABCOCK: Judge Christopher.

20 HONORABLE TRACY CHRISTOPHER: I just think
21 we're being way too old-fashioned by trying to exclude
22 this document from electronic filing or fax filing, and to
23 the extent that some lawyer doesn't understand that it
24 should be filed separately then we need to rewrite that
25 paragraph to make it stronger in some manner, but we're

1 going to have incredible problems with the original
2 petition getting filed electronically and the sensitive
3 data form coming in without a cause number on the top of
4 it. I mean, they need to be filed at the same time but
5 not attached, but, you know, to keep track of them.

6 One other thing, the rule itself says
7 "Duties of parties." 14.2, "Duties of parties." I'm not
8 a party, so I could technically read this as not requiring
9 me to do anything with respect to my court orders.

10 CHAIRMAN BABCOCK: What if we said this:
11 "Sensitive data must not be filed or included in a case
12 record as defined by Rule of Judicial Administration 15.2,
13 except in a separately filed" -- here's some new language
14 -- "clearly identifiable sensitive data form approved by
15 the Supreme Court of Texas and kept separately secured by
16 the clerk," period, and that's it. Andy, does that work
17 for you?

18 MR. HARWELL: Uh-huh.

19 CHAIRMAN BABCOCK: Bonnie?

20 MS. WOLBRUECK: That's fine.

21 CHAIRMAN BABCOCK: That works?

22 MS. WOLBRUECK: That works.

23 CHAIRMAN BABCOCK: Anybody else?

24 MR. WILDER: But no color?

25 MS. WOLBRUECK: No, there is no color.

1 CHAIRMAN BABCOCK: Pink is out. Pink is no
2 longer the color of the season.

3 MR. MUNZINGER: Your amendment also allows
4 electronic and telephonic filing of the document.

5 CHAIRMAN BABCOCK: That's correct. And this
6 form is going to be approved by the Supreme Court, and
7 they are going to have a big old, you know, cross on the
8 top of it or something.

9 HONORABLE NATHAN HECHT: Let me just point
10 out to you that the U.S. Supreme Court still requires that
11 briefs have particular colors.

12 HONORABLE SARAH DUNCAN: So does the
13 circuit.

14 HONORABLE NATHAN HECHT: So --

15 MR. HAMILTON: I think we should vote on the
16 color.

17 CHAIRMAN BABCOCK: So you like pink?

18 HONORABLE NATHAN HECHT: Well, I'm just
19 saying --

20 CHAIRMAN BABCOCK: I wouldn't admit that too
21 much on the record.

22 HONORABLE NATHAN HECHT: I'm just saying
23 there is a lot precedent here.

24 HONORABLE SARAH DUNCAN: I wish we had it in
25 our court.

1 HONORABLE NATHAN HECHT: Judge Scalia said
2 one time that they accidentally gave away a little part of
3 Virginia because the brief had the wrong color on it.

4 CHAIRMAN BABCOCK: Just don't mess with
5 Texas.

6 Okay. Well, how many people find the late
7 plea for color persuasive? Recognizing you're going to
8 get the final vote anyway, so you know, it could be
9 chartreuse by the time we're done with this rule. Justice
10 Gaultney.

11 HONORABLE DAVID GAULTNEY: Well, with your
12 "clearly identifiable" then I suppose the Supreme Court
13 could designate a form of particular color or whatever way
14 they want to identify it.

15 CHAIRMAN BABCOCK: Yeah. I think if we do
16 it the way I suggest then the Court still has some
17 discretion to say what the form looks like, so all right.

18 MR. MEADOWS: And you've got deniability on
19 the color.

20 CHAIRMAN BABCOCK: Yeah. I'll make and
21 second my own motion to amend this.

22 HONORABLE TRACY CHRISTOPHER: You could do
23 like a border on it so that it would stick out really
24 fast, get a border on it.

25 CHAIRMAN BABCOCK: The rule we're going to

1 vote on is 14.2(a) and will read as follows: "Sensitive
2 data must not be filed or included in a case record as
3 defined by Rule of Judicial Administration 15.2, except in
4 a separately filed, clearly identifiable sensitive data
5 form approved by the Supreme Court of Texas and kept
6 separately secured by the clerk," period.

7 How many are in favor of that rule as
8 modified? Raise your hand.

9 HONORABLE TRACY CHRISTOPHER: I like the
10 modification, but I don't like the rule. Is there a vote
11 for that?

12 CHAIRMAN BABCOCK: No. All opposed?

13 HONORABLE TRACY CHRISTOPHER: I'm still
14 asking for that vote.

15 CHAIRMAN BABCOCK: By a vote of 14 to 2 --

16 HONORABLE TOM GRAY: Make that three.

17 CHAIRMAN BABCOCK: -- the Chair not voting,
18 that passed. Let's go to (b), "If a court rule, court
19 order, or statute requires sensitive data to be" --

20 HONORABLE SARAH DUNCAN: No, you skipped the
21 last sentence of (a).

22 CHAIRMAN BABCOCK: We deleted the last
23 sentence of (a), that it could not be electronically
24 filed.

25 HONORABLE SARAH DUNCAN: Oh, that was part

1 of your --

2 CHAIRMAN BABCOCK: That was part of it, and
3 you voted against it. I guess doubly so now. Richard
4 Munzinger.

5 MR. MUNZINGER: We just adopted a rule that
6 says you may not file in a case record sensitive data and
7 then the opening phrase of subparagraph (b) permits any
8 court to negative that rule either by its individual rule
9 or by an order.

10 CHAIRMAN BABCOCK: Okay. So your point
11 about the --

12 MR. MUNZINGER: Well, my point is I'm not
13 sure what we've accomplished. I'm not -- I don't know
14 that we want to give that kind of leeway to court rules
15 or court -- local court rules or court orders. Why would
16 we do that? I can understand that we would yield to a
17 statute, but I don't know why we would yield to a local
18 court rule or a court order.

19 CHAIRMAN BABCOCK: Okay. I see what you're
20 saying.

21 MR. LOW: Yeah.

22 HONORABLE JANE BLAND: Richard, I don't
23 think this is saying that a court rule or order could
24 abrogate what we did in 14.1. I think it's saying if you
25 need this information in 14.1, here's how you're going to

1 refer to it so that you can use partial identifiers, like
2 initials or pieces of a number.

3 CHAIRMAN BABCOCK: Yeah, just so we know
4 what we're talking about, because of what we did in 14.1
5 the only thing at issue here now is (b)(1). So we're
6 talking about Social Security numbers and financial
7 account numbers.

8 HONORABLE TRACY CHRISTOPHER: And TDLs.

9 MR. LOW: But how can some court just order
10 somebody just to violate this rule?

11 CHAIRMAN BABCOCK: Yeah, that's Richard's
12 point.

13 HONORABLE SARAH DUNCAN: No. That's not the
14 court order that's contemplated by (b). The order that's
15 contemplated by (b) is a judge in a particular case, for
16 some reason that I can't imagine, issues an order saying,
17 "Mr. Low, if you are going -- you are going to be required
18 in every pleading you file in my court to include your
19 bank account number on that pleading," what this says is
20 if that court order requires you to put your bank account
21 number on every pleading, here's how you put your bank
22 account number in the pleadings. You see what I mean?

23 MR. LOW: Yeah, but I just don't see -- my
24 point is why shouldn't the court have to say, okay, your
25 bank account is sensitive data, it's filed there, you

1 don't have to put it in a pleading. Why would a court be
2 able to do that when we've gone to great lengths to draw a
3 rule that has sensitive data and should go on the data
4 sheet?

5 CHAIRMAN BABCOCK: Buddy's point is we
6 shouldn't suggest that the court has that power.

7 MR. LOW: Has that power.

8 CHAIRMAN BABCOCK: If a statute requires it
9 then that's one thing, but --

10 HONORABLE JANE BLAND: Take out "court
11 order."

12 MR. MUNZINGER: Maybe if you begin the rule,
13 "When sensitive data must be included in a court order" as
14 distinct from a court rule. "In a court order the
15 following abbreviations must be used." That takes away
16 the authority of a trial court to set aside Rule 14.2(a).

17 HONORABLE SARAH DUNCAN: No, we're not
18 communicating here.

19 CHAIRMAN BABCOCK: Apparently not.

20 HONORABLE SARAH DUNCAN: We're not
21 communicating. 14.2(b) does not give a court the
22 authority to abrogate 14.1 or 14.2. All 14.2(b) does is
23 recognize that there may be a court rule, a court order,
24 or a statute that requires you to put sensitive data in a
25 pleading. If there is a court rule, court order, or

1 statute that does require you to put sensitive data in a
2 pleading, you do it the way (b) tells you to do it, you
3 use the last four digits of the Social Security number and
4 financial account numbers.

5 MR. LOW: I agree with that, that a court
6 rule can do that. A statute can do that, but I don't
7 agree that the court ought to have the power just to issue
8 an order to say, okay, you're going to -- here's what's
9 going to happen. I think the court should follow the
10 basic mold of the rule, but if a court order -- I mean, if
11 a court rule or statute requires it then we do it. I just
12 don't see why included is court order.

13 HONORABLE SARAH DUNCAN: Lisa.

14 MS. HOBBS: The court order might -- the
15 court may need financial information or Social Security
16 numbers in their files, and the way for them to get it in
17 their files is to order it filed, but if we don't have an
18 exclusion here that says if a court order requires this
19 information in the case record, here's how you do it, then
20 you could never get this information to the judge who
21 needs it for whatever reason. He may need it to collect
22 child support or, I mean, there is a number of reasons why
23 he might need the financial records.

24 MR. LOW: But doesn't the judge have access
25 to the sheet?

1 CHAIRMAN BABCOCK: Sensitive data form?

2 MR. LOW: The judge has access to that.

3 Judge knows how to get that. I mean, the only thing, and
4 I don't mean -- you-all spent a heck of a lot more time
5 than I did, but I just see where some judge says, "Well,
6 okay, man, you know, I'm just going to order you to do all
7 this."

8 Well, you say, "Wait, Judge, you don't have
9 the authority to do that." But maybe the court would feel
10 that they did, and if some courts felt that they did, this
11 is the proper form to follow. I just think it's an
12 invitation maybe to a judge in El Paso, not in Beaumont,
13 to try to get around the rule.

14 CHAIRMAN BABCOCK: Bobby Meadows, then Judge
15 Benton.

16 MR. MEADOWS: Well, I can contemplate that
17 there would be an occasion where this needs to be done,
18 and more importantly, where is the harm with a partial
19 inclusion of the number? What harm is going to be done?
20 We're not talking about including the entire Social
21 Security number or other information. We're talking about
22 only a portion of it that's essentially useless in terms
23 of identity theft.

24 MR. LOW: I'm not talking about the harm,
25 what it does. I say it's a little bit I think

1 inconsistent, but I'm not going to -- well, I'll say no
2 more.

3 CHAIRMAN BABCOCK: You're not going to go to
4 war on that, huh?

5 MR. LOW: Yeah.

6 CHAIRMAN BABCOCK: Judge Benton.

7 HONORABLE LEVI BENTON: I think this kind of
8 relates back to what Professor Carlson said much earlier
9 about the requirements of Rule 683 where there might be
10 circumstances where a TRO or TI needs to have some
11 specific things, and so that sort of addresses that.

12 In addition, I don't really understand why
13 provision (b) is under the caption 14.2. And, finally,
14 going back to Buddy's concern, I mean, there are
15 circumstances or it's conceivable a court could order a
16 third party to file or a nonparty to file matters in the
17 court or case record. That's why you might want to have
18 this there.

19 CHAIRMAN BABCOCK: Yeah, Alex.

20 PROFESSOR ALBRIGHT: Isn't 14.2(b) really a
21 pleading rule which should be in the Rules of Civil
22 Procedure?

23 HONORABLE TOM GRAY: This applies to
24 criminal. That's why we had to deal with it over here as
25 well.

1 PROFESSOR ALBRIGHT: But this is where
2 you're -- I mean, you're telling people that I'm drafting
3 a pleading or an order and if it has to have sensitive
4 information, this is the way you do it, right?

5 HONORABLE TOM GRAY: Yes.

6 MR. LOW: Yeah.

7 MR. MEADOWS: See, I actually read this as a
8 control over the court as opposed to some kind of
9 unbridled opportunity to disclose confidential or
10 sensitive information. So --

11 HONORABLE LEVI BENTON: (b) needs to be out
12 of 14.2 and perhaps under 14.3.

13 CHAIRMAN BABCOCK: Lisa.

14 MS. HOBBS: I think it's just that 14.2 is a
15 bad title.

16 HONORABLE SARAH DUNCAN: Uh-huh.

17 HONORABLE LEVI BENTON: A bad what?

18 MS. WOLBRUECK: Title.

19 MS. HOBBS: You know, we could change that
20 title and leave the rule as is drafted and just figure out
21 what the title should be called rather than --

22 HONORABLE SARAH DUNCAN: "Pleading sensitive
23 data."

24 MS. HOBBS: Right.

25 HONORABLE TOM GRAY: Not "pleading." This

1 applies to orders.

2 MS. HOBBS: But something. We need to come
3 up with a different title.

4 HONORABLE TOM GRAY: We'll work on it.

5 HONORABLE LEVI BENTON: "Sensitive data in
6 case records."

7 HONORABLE SARAH DUNCAN: Yeah, that's good.

8 MR. BOYD: Separate from the title and
9 whether a court order ought to be able to do this, what
10 confuses me about (b) is (a) says you can't put this stuff
11 in a case record unless it's separately filed in a clearly
12 identifiable form and then (b) says if it does go into a
13 case record you have to use these abbreviations, leaving
14 the impression that even if it's in the sensitive data
15 form you've got to only do it with the abbreviations. I
16 know that's not the intent, but because of the way it's
17 worded --

18 MS. HOBBS: So it needs to say "in a case
19 record other than the sensitive data form"?

20 MR. BOYD: Yeah. "Other than as required
21 under subsection (a)" or something.

22 "If a court rule, court order, or statute
23 requires it to be filed or included in a case record in
24 some form other than as required under (a)" or something,
25 because otherwise it makes it sound like it's got to be

1 abbreviations no matter how it's in the case record.

2 PROFESSOR CARLSON: I'm confused.

3 CHAIRMAN BABCOCK: Elaine.

4 PROFESSOR CARLSON: Is 14.2(b) saying any
5 pleading or court order that wants to reference Social
6 Security numbers or financial account numbers may only do
7 so by using the last four digits? Is that what it means?

8 HONORABLE NATHAN HECHT: Uh-huh.

9 MS. HOBBS: It's a nod to the fact that
10 there are currently statutes out there that require Social
11 Security numbers to be in case records, and we need to
12 figure out what to do with that.

13 HONORABLE TOM LAWRENCE: Are we keeping out
14 the information in 14.1(c) out of this for a reason?

15 CHAIRMAN BABCOCK: I don't know about an
16 answer to that, but let's stick with (b) for a second.

17 HONORABLE TOM LAWRENCE: No. Well, in (b)
18 you list the things that are going to be -- the
19 abbreviations.

20 CHAIRMAN BABCOCK: We're going to get to
21 subpart (1) in a second, and if we need to add a subpart
22 (2) we can add that, but let's stay with (b).

23 HONORABLE LEVI BENTON: Somebody asked
24 earlier about how this would all work in the case of a
25 garnishment action and we deferred discussion on that, but

1 now it really is implicated here because in a court order
2 you have to have the full account number, and so if I
3 served -- if someone is -- if Bank of America is served
4 with an order I sign that has just the last four digits
5 and then they are provided separately with a sensitive
6 data form and they don't comply with the order, I mean, I
7 don't know how this works. I am just troubled by it. I
8 don't have a suggestion, but I don't see how this works.

9 MR. BOYD: I have a question. If a statute
10 requires a Social Security number to be in a case record,
11 can we by rule say, yeah, but you can only include the
12 last four digits in the case record?

13 HONORABLE TOM GRAY: We're going to try.

14 MR. LOW: But the statute probably only
15 requires that the Social Security number be given in the
16 case, and it's given in the sensitive data, I mean, I
17 would imagine, unless there is a statute that says the
18 pleading itself.

19 CHAIRMAN BABCOCK: I think there are such
20 statutes, aren't there, that say it has to be in the
21 pleading?

22 HONORABLE NATHAN HECHT: I don't know.

23 MS. WOLBRUECK: It's in the Family Code.

24 CHAIRMAN BABCOCK: It's in the Family Code
25 for sure.

1 MR. LOW: Okay. I don't know.

2 CHAIRMAN BABCOCK: Okay. Jeff's point about
3 how we need to modify (b) in some fashion to say that it's
4 got to be in some form other than in 14.2(a), does that
5 strike people as a reasonable modification or not?

6 HONORABLE SARAH DUNCAN: I don't understand
7 the problem.

8 MR. BOYD: Well, okay. (a) says you can't
9 file sensitive data in a case record unless it's in a
10 separately filed form.

11 CHAIRMAN BABCOCK: Clearly identifiable.

12 MR. BOYD: Right. Right. I'm shortcutting
13 it. Separately filed, clearly identifiable form is the
14 only way you can file it.

15 (b) then says, "If a rule, order, or statute
16 requires sensitive data to be filed or included in a case
17 record then only a portion of the data can be filed,"
18 leaving the impression that even if it's filed in this
19 separately filed, clearly identifiable form you can only
20 do the last four digits, even in that form. That's how
21 you would have to read this.

22 HONORABLE TOM GRAY: Chip, I think he does
23 raise a valid point because of the definition of case
24 record as drafted would currently include the SDF, and I
25 think the easy way to fix that is define case record --

1 HONORABLE SARAH DUNCAN: To exclude the SDF.

2 HONORABLE TOM GRAY: -- to exclude the SDF,
3 and that fixes that, but it is a very valid point once I
4 understood it.

5 CHAIRMAN BABCOCK: Okay. So keep that
6 thought. All right. Let's just talk about subparagraph
7 -- yes, Justice Gaultney.

8 HONORABLE DAVID GAULTNEY: Another possible
9 fix, wouldn't it be to say "in a case record other than an
10 SDF"?

11 CHAIRMAN BABCOCK: Yes. That's what Jeff
12 first suggested. I don't particularly care, but in the
13 interest of moving us along, why don't we vote -- why
14 don't we see how people feel about the language in (b) as
15 written?

16 HONORABLE SARAH DUNCAN: Well, it obviously
17 has to be changed since you've taken out (2) and (3).

18 CHAIRMAN BABCOCK: No, no, no. I'm not down
19 to the subparts yet. I'm not on subparts.

20 HONORABLE SARAH DUNCAN: They're part of a
21 whole, Chip, and you can't vote on the language of (b)
22 having taken out (2) and (3) and the language of (b) be
23 any good or make any sense.

24 CHAIRMAN BABCOCK: Well, I think we can,
25 because "If a court rule, court order, or statute requires

1 sensitive data to be filed or included in a case record
2 the following abbreviations must be used," that language
3 is either okay or it isn't and then we can discuss whether
4 subpart (1) is okay and whether or not we need a subpart
5 (2) because Judge Lawrence points out that we haven't
6 dealt with driver's license, passports, et cetera, that
7 are in (1), but they don't have a parallel in (2), and I'm
8 sure that somebody will explain why in a second, but does
9 anybody have a problem with the language -- the prefatory
10 language to (b)?

11 Sarah.

12 HONORABLE SARAH DUNCAN: I thought we were
13 just voting on it.

14 CHAIRMAN BABCOCK: You have a problem with
15 it?

16 HONORABLE SARAH DUNCAN: No, I'm voting.

17 CHAIRMAN BABCOCK: You have a problem with
18 it, nobody else does?

19 HONORABLE SARAH DUNCAN: Right.

20 CHAIRMAN BABCOCK: Okay. Now, what about
21 subpart (1), only the last four digits of Social Security
22 numbers and financial account numbers? Judge Benton.

23 HONORABLE LEVI BENTON: I'm voting.

24 CHAIRMAN BABCOCK: Huh?

25 HONORABLE LEVI BENTON: I'm voting.

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE SARAH DUNCAN: I am, too.

3 CHAIRMAN BABCOCK: All right. Let me back
4 up.

5 HONORABLE LEVI BENTON: I'm sorry, Chip. I
6 thought that's what the question was, does anyone --

7 HONORABLE TOM GRAY: I thought we were
8 discussing.

9 CHAIRMAN BABCOCK: Yeah, I didn't think that
10 there was a lot of controversy after we finished with
11 Jeff's problem about the prefatory language of subpart
12 (b), but I could be wrong.

13 All right. Everybody in favor of the
14 sentence that reads in subpart (b), "If a court rule,
15 court order, or statute requires sensitive data to be
16 filed or included in a case record, the following
17 abbreviations must be used," colon. Everybody that's okay
18 with that raise your hand.

19 MR. BOYD: I thought you added --

20 CHAIRMAN BABCOCK: No, I didn't because
21 we're going to deal with that later. So as written
22 everybody raise their hand that's in favor of that.

23 MR. HAMILTON: Is that with the modification
24 on case record?

25 CHAIRMAN BABCOCK: We're not at the subparts

1 yet. Everybody in favor of the sentence in (b) as
2 written?

3 HONORABLE TRACY CHRISTOPHER: But the
4 modification would be in the sentence of (b).

5 CHAIRMAN BABCOCK: Hang on for a second.

6 HONORABLE TRACY CHRISTOPHER: It wouldn't be
7 in the subparts.

8 CHAIRMAN BABCOCK: Jeff's language, it was
9 suggested by Justice Gray that we could deal with that in
10 the definitions of case record and not deal with it in
11 (b), and I thought that everybody sort of thought that was
12 okay.

13 MR. LOW: So it wouldn't be --

14 HONORABLE TRACY CHRISTOPHER: You mean in
15 (2)?

16 CHAIRMAN BABCOCK: Case records in
17 "Definitions," 15.2(a).

18 HONORABLE TRACY CHRISTOPHER: No, no, no,
19 no, no.

20 HONORABLE DAVID GAULTNEY: Chip, if our
21 concern is that some statutes require -- if our concern is
22 that some statutes require Social Security numbers to be
23 in a case record, why would we define case records to
24 exclude SDFs?

25 Now, I think the better fix is to put "a

1 case record other than SDF" and then I would agree with
2 the judge that that becomes part of this proposal and we
3 should vote on it.

4 CHAIRMAN BABCOCK: Okay. Good point. So,
5 Jeff, come up with the language again.

6 MR. BOYD: Well, I think he's got it, which
7 is "If a court rule, court order, or statute requires
8 sensitive data to be filed or included in a case record
9 other than in a sensitive data form, as described in
10 subparagraph (a)", comma, "the following abbreviations
11 must be used."

12 HONORABLE DAVID GAULTNEY: I agree.

13 CHAIRMAN BABCOCK: And other than as
14 described in --

15 MR. BOYD: "Other than in a SDF".

16 CHAIRMAN BABCOCK: "A sensitive data form as
17 described in"?

18 MR. BOYD: "Subparagraph (a)." "14.2(a)".

19 CHAIRMAN BABCOCK: Okay. Everybody okay
20 with that? Everybody agree that that's the way we ought
21 to do it?

22 HONORABLE SARAH DUNCAN: It's better.

23 CHAIRMAN BABCOCK: All right. Everybody in
24 favor of that then raise your hand.

25 Everybody opposed? Anybody opposed? All

1 right. 15 to 1, that passes.

2 Subpart (1), "only the last four digits of
3 Social Security numbers and financial account numbers."
4 Any discussion on that? Justice Gray.

5 HONORABLE TOM GRAY: Only in that it causes
6 me to revisit 14.1(b) and wonder if for symmetry we need
7 bank account and credit card in (b) so that (b) is
8 financial account numbers and (1) is last four digits of
9 Social Security numbers and financial account numbers,
10 because -- or otherwise I have the problem in (b)(1) that
11 I want to pull down for symmetry and include bank account,
12 credit card, and financial account numbers. One or the
13 other, I don't care. I prefer shorter rather than longer.

14 CHAIRMAN BABCOCK: Would it make sense to
15 have (1) be "only the last four digits of Social Security
16 numbers" and then have (2) be "only the last four digits
17 of bank account numbers, credit card numbers, and other
18 financial account numbers" to make them parallel?

19 HONORABLE TOM GRAY: As long as there is a
20 parallel between 14.1(b) and however we describe it in
21 14.2.

22 CHAIRMAN BABCOCK: Carl.

23 MR. HAMILTON: All we've got left in 14.1 is
24 numbers. So unless things are not going to have more than
25 four numbers, why can't we just say the last four numbers

1 of anything in 14.1?

2 CHAIRMAN BABCOCK: Good idea. Judge
3 Lawrence.

4 HONORABLE TOM LAWRENCE: I agree with that.
5 What if we just said "only the last four digits of all
6 those numbers found in 14.1(a), (b) and (c)"?

7 CHAIRMAN BABCOCK: Makes some sense.
8 Anybody else?

9 Yeah, Judge Christopher.

10 HONORABLE TRACY CHRISTOPHER: I do think
11 Buddy was right that people use the last four digits of
12 Social Security numbers now as identifiers in connection
13 with your credit cards, so I might suggest the first three
14 numbers or --

15 PROFESSOR ALBRIGHT: Suppose it's bank
16 numbers. The first numbers are bank numbers.

17 CHAIRMAN BABCOCK: Paula.

18 MS. SWEENEY: What about tax ID numbers?

19 CHAIRMAN BABCOCK: What about what?

20 MS. SWEENEY: Tax ID numbers. People use
21 those as an alternative to Social Security, but it's not a
22 financial account, it's not a Social Security account, but
23 it is something by which --

24 MR. LOW: Employer tax ID number.

25 MS. HOBBS: Is it not a government-issued

1 personal identification number?

2 MS. SWEENEY: No.

3 MR. BOYD: It's a corporate identification
4 number.

5 MS. SWEENEY: It's a corporate
6 identification number, but you could mess around with
7 corporate accounts just like you could with personal ones.

8 HONORABLE TOM GRAY: Can we fix that by
9 taking the word "personal" out of 14.1(c)?

10 HONORABLE LEVI BENTON: Take the word "card"
11 out.

12 MS. HOBBS: If you take personal numbers out
13 you might be back to license numbers.

14 HONORABLE TRACY CHRISTOPHER: Yeah.

15 HONORABLE TOM GRAY: That is why we included
16 personal. You're right.

17 MR. LOW: Put "tax identification numbers."

18 MS. HOBBS: We just need to add it
19 someplace.

20 HONORABLE TOM GRAY: Yeah, add a (d).

21 Paula, notwithstanding your late arrival
22 you've already contributed.

23 MS. SWEENEY: And it's on the record.

24 CHAIRMAN BABCOCK: Okay. Let's stick with
25 (b) (1) or however we're going to do it. There's been a

1 proposal that we just say, you know, only some digits of
2 the numbers that are in 14.1(a), or 14.1(a), (b), and (c).
3 How do people feel about that? No thoughts? Judge Gray.

4 MR. BOYD: Well, I just go back to the
5 question earlier. Maybe Lisa had a thought about this,
6 but if a statute says that you have to include -- I've
7 been looking at the Family Code to see and I haven't found
8 it yet, but if it says you have to include the Social
9 Security number in a document that goes in a case record
10 then can we by rule say, "No, you can't. You can only
11 include the last four digits of it"?

12 MS. HOBBS: I think the subcommittee thought
13 that we were just interpreting that statute so that it was
14 a -- in the Supreme Court's interpretation this satisfies
15 that requirement in the statute, that the purpose of the
16 statute is to have it so the judge or who needs that
17 information has that information, and putting that
18 information on a sensitive data sheet and otherwise
19 referring to it in the pleading would satisfy that
20 statute.

21 MR. LOW: And if we pass a rule and the
22 Legislature doesn't change it or something, you know, our
23 rule under the Government Code takes precedent.

24 HONORABLE NATHAN HECHT: Just not to let
25 that go past, you have to identify them in the order,

1 which would be a real problem here because it could be a
2 million of them and scattered around.

3 HONORABLE LEVI BENTON: Justice Hecht, we
4 can't hear you, sir.

5 HONORABLE NATHAN HECHT: Yeah, the rule has
6 to identify the statutes that are repealed, and here you
7 would have a problem with that because there are so many
8 of them.

9 MR. LOW: Well, not only that, but it can't
10 repeal something that's substantive.

11 HONORABLE NATHAN HECHT: Right.

12 MR. LOW: It has to be procedural, and there
13 could be arguing. I just pointed it out.

14 CHAIRMAN BABCOCK: Here is a thought,
15 perhaps radical --

16 HONORABLE TRACY CHRISTOPHER: Lunch?

17 CHAIRMAN BABCOCK: -- on the growling
18 stomachs that I hear, but what if you just said on (b),
19 "If a court rule, court order, or statute requires
20 sensitive data to be filed or included in a case record,
21 abbreviations must be used"? No, not specific enough?

22 MR. LOW: But how are they going to know
23 what to abbreviate and how to do it?

24 CHAIRMAN BABCOCK: Okay. Just a thought.
25 All right. So let's go back to the way we have it. So we

1 would say, "Only the last four digits of the sensitive
2 data in 14.1(a), (b) and (c)"? Does that work?

3 Richard Munzinger.

4 MR. MUNZINGER: Well, the only problem is
5 someone pointed out earlier -- and I know this has
6 happened to me. I'll call someone and they will say,
7 "Give me the last four numbers of your credit card" or the
8 last four numbers of what have you, and that is a commonly
9 used inquiry that's made by people who are asking you to
10 verify it so that if I reveal that in a court order I have
11 now given it to somebody that can use it in that
12 subsequent telephone call. Maybe you want to change the
13 four digits to the first four.

14 The practice could change from the people
15 who are asking me now to identify myself with my four
16 digits, but at least we know the practice today is that
17 you are frequently asked to give the last four digits of
18 your credit card. I am. I don't know if other people
19 are.

20 CHAIRMAN BABCOCK: Judge Christopher.

21 HONORABLE TRACY CHRISTOPHER: Well, I agree
22 with that. Is there a real reason that we need to have
23 part of the number? I mean, does that -- is that useful
24 to have part of the number there in the actual pleading or
25 order?

1 CHAIRMAN BABCOCK: Justice Hecht.

2 HONORABLE NATHAN HECHT: I think the only
3 question is do people who are accessing this information
4 for -- to check backgrounds and things need that much of
5 the number to be sure it's the real Joseph Smith, the same
6 as the birthday issue. I think just as a pleading
7 requirement the answer is no, you could just put the whole
8 notice and say, "See Social Security number No. 1."

9 HONORABLE TRACY CHRISTOPHER: You certainly
10 couldn't rely on the last four digits to confirm
11 somebody's Social Security number. I mean --

12 HONORABLE NATHAN HECHT: Well, I don't know.

13 MR. COFFEY: If I can address that, what we
14 would rely on is the last line of 14.3(b). We would go
15 and say, "I've got a potential case here, you know, civil
16 case or whatever that relates to John Smith. Here is John
17 Smith's Social Security number or whatever other number we
18 had for him" and ask the clerk under 14.3(b) to verify the
19 information I'm giving matches the information on the
20 sensitive data sheet, which I think is the point of that
21 in 14.3(b). But our problem there is 14.3(b), which we're
22 going to get to I know, says that the clerk may do it. It
23 doesn't say the clerk shall do it, and if we get a
24 contrary clerk then we don't know.

25 CHAIRMAN BABCOCK: Yeah. Well, we'll get to

1 that, but does it matter whether it's the last four digits
2 or the first four digits?

3 HONORABLE TRACY CHRISTOPHER: Alex said we
4 can't use the first four because of bank numbers.

5 HONORABLE NATHAN HECHT: I think the last
6 four is a problem for the same reason that has been
7 mentioned, and I raised it in the Federal rules meeting,
8 and they said "We're too far gone. We're going to use the
9 last four digits."

10 PROFESSOR ALBRIGHT: One thing, whenever you
11 get a printout like if you're at a gas station and you
12 charge your gas and you get the receipt, it always has the
13 last four digits printed out, I think, and that's when you
14 print something off the internet saying that you've
15 ordered it they always put the last four digits. I don't
16 think anybody can do anything with the last four digits
17 because you have to have the whole number and probably
18 that secret number on the back to actually charge
19 something on it, so I think the sense of the way the
20 commercial world works is that you use the last four
21 digits as just a confirmation so that you know that this
22 is the account that they're talking about.

23 If you have some order where you have 10
24 credit cards but this order only concerns one credit card,
25 then by having the last four digits it tells you that this

1 order only concerns that one credit card, and nobody can
2 do anything with that. You know, I feel comfortable with
3 that, and if you don't have to have a credit card number
4 in an order, don't put it in an order.

5 MR. LOW: When you deal with American
6 Express, they'll say, "I want to be sure, we protect theft
7 identity. Give me the last four digits of your Social
8 Security number and your date of birth." Isn't that what
9 you're talking about? And then I can order whatever I
10 want to. I've got the card number. That's all I need.

11 PROFESSOR ALBRIGHT: You're saying your
12 concern is the last four digits of your Social.

13 MR. LOW: Right. All I'm saying is that so
14 far, I mean, that's all they ask me, and I can order
15 whatever I want to and have it shipped.

16 MR. MEADOWS: You can purchase something
17 with four digits of your --

18 MR. LOW: No. I have my card number, which
19 people can get, a salesclerk or anybody else, you can
20 charge food or something like that, but that salesclerk
21 then can't -- or if they want to steal, they've got to
22 have my last four numbers of my Social Security and a date
23 of birth. And with that I can buy whatever I want with
24 American Express. I'm not saying it's a bad idea. We
25 can't prevent identity theft, but I'm saying it is

1 important, the last four numbers.

2 CHAIRMAN BABCOCK: Okay. Bonnie.

3 MS. WOLBRUECK: I was just going to say to
4 Alex's comments, there is a statute that requires only the
5 usage of the last four digits of a credit card whenever
6 it's in a printed form, whenever it is printed out.

7 PROFESSOR ALBRIGHT: So that's for the
8 credit card and then there is a separate issue maybe about
9 Social Security numbers.

10 MR. LOW: But if you lose your card or
11 something, I don't know, it's --

12 CHAIRMAN BABCOCK: Well, but what we're
13 talking about here is trying to satisfy --

14 MR. LOW: Right.

15 CHAIRMAN BABCOCK: -- some statutory or
16 court directive that this information be put into a
17 pleading outside of the sensitive data form, so we -- all
18 we're doing is trying to comply with the statute or court
19 rule, and in doing that are we somehow unwittingly
20 allowing the internet surfer in Bangladesh to steal our
21 identity if we have the last four digits versus the first
22 three digits? Isn't that the issue?

23 MR. LOW: Yeah. I don't know. Yeah.

24 CHAIRMAN BABCOCK: Carl.

25 MR. HAMILTON: That's the issue, is we're

1 trying to satisfy another statute, but it seems to me that
2 we're just kind of doing a fix in here anyway, so why
3 don't we just go back to case record and make the
4 sensitive data form a part of the case record and just say
5 that that case record document that has to contain it can
6 refer to the sensitive data form, and the sensitive data
7 form can still be kept a confidential record, but that
8 would satisfy the pleading requirement just as much as
9 putting four digits in there, just refer them back to the
10 sensitive data form.

11 HONORABLE TRACY CHRISTOPHER: Because we're
12 going to have to do that for our orders anyway, I think,
13 so that makes sense.

14 MR. BOYD: Say that again.

15 HONORABLE TRACY CHRISTOPHER: We have to do
16 that for our orders anyway if that information was
17 important for our order.

18 MR. BOYD: See, I'm looking here at the
19 Family Code, which says "A final order other than in a
20 proceeding under 161 or 162 must contain the Social
21 Security number and driver's license number of each party
22 to the suit," so how do you make that number go into a
23 sensitive data form unless you make the order itself a
24 sensitive data form?

25 I mean, what if you just got rid of (b)

1 completely and started subsection (a) by saying "except as
2 may be expressly required by statute, court rule, or court
3 order sensitive data must not be filed or included"? And
4 then forget about the four digits, forget about --

5 CHAIRMAN BABCOCK: Justice Bland.

6 HONORABLE JANE BLAND: Because then it's on
7 the internet. I mean, I agree.

8 MR. BOYD: What do you mean it's on the
9 internet?

10 HONORABLE TRACY CHRISTOPHER: That order
11 will be on the internet.

12 MR. BOYD: But the statute says it has to
13 be.

14 PROFESSOR CARLSON: Not on the internet.

15 HONORABLE JANE BLAND: I don't know. It
16 seems to me like that makes more sense, because I have the
17 same concerns that Buddy has about --

18 CHAIRMAN BABCOCK: What makes more sense?

19 HONORABLE JANE BLAND: About using four
20 Social Security numbers anywhere in anything that can be
21 accessed on the internet, because I agree. Every time I
22 lose a credit card or don't have it handy or the gas bill
23 or anything else, and it often happens to me, you know, I
24 have a little list of identifiable information that they
25 ask, and they always ask for the last four digits of the

1 Social Security, my date of birth, which we are going to
2 allow to be discovered and, you know, my address; and so
3 if we allow the last four digits of the Social Security
4 number to be included, we're not really providing any
5 protection from people using the internet to access our
6 sensitive information.

7 CHAIRMAN BABCOCK: Richard.

8 MR. MUNZINGER: The judge brought up the
9 question of garnishment orders. What also happens in the
10 situation where you have a third party who is the third --
11 a party who is not a party to the lawsuit, a bank, for
12 example, or a Merrill Lynch, and now it is the subject of
13 a discovery order which is required -- requires Merrill
14 Lynch to produce all of its records relating to account
15 No. X. That's a financial account number, and under this
16 rule you couldn't put the number in the order, and yet
17 Merrill Lynch must know the account which it is required
18 to produce, and the bank must know the account which it is
19 required to allow garnishment of.

20 CHAIRMAN BABCOCK: Yeah. I think, my own
21 view as I'm listening to this, is I think we're probably
22 at some point after we get through this whole rule are
23 going to have to think about orders and maybe have a
24 separate subsection regarding orders.

25 HONORABLE TRACY CHRISTOPHER: Why don't we

1 do the last two digits of the Social Security number and
2 financial account numbers and move on?

3 CHAIRMAN BABCOCK: Okay. How do people feel
4 about that? Lisa, last two is not good enough?

5 MS. HOBBS: I don't think it -- I mean, I
6 think the less numbers you have, the more likely you're
7 going to have a lot of 26s out there, so it doesn't really
8 do anything to identify anybody because it's so --

9 HONORABLE TRACY CHRISTOPHER: Well, we're
10 not really trying to identify anybody. We're just trying
11 to comply with that rule because the actual identification
12 is in our sensitive data form.

13 HONORABLE TOM GRAY: What we're really
14 trying to do is give enough information in the pleading or
15 order to tie back to a specific identifier in the
16 sensitive data form, the full number, and so --

17 HONORABLE TRACY CHRISTOPHER: Or first and
18 last.

19 HONORABLE TOM GRAY: Well, I like either the
20 last two or last three if you-all are worried about the
21 last four, but I think it's got to be the last four.

22 CHAIRMAN BABCOCK: Anne.

23 MS. McNAMARA: Chip, after listening to all
24 of this your first suggestion about calling for
25 abbreviations without saying what they are has a lot of

1 appeal, because that would give varied ability. Maybe
2 Houston would do it differently from Dallas or one judge
3 would do it different than another, which would thwart the
4 identity theft guys because they wouldn't know what the
5 number --

6 CHAIRMAN BABCOCK: Yeah, I sensed widespread
7 hostility to that, though.

8 MS. McNAMARA: And there was, but the more
9 you listen the more you think about the appeal it had.

10 CHAIRMAN BABCOCK: Nobody voted. I just
11 sensed it.

12 MR. BOYD: Chip, if the concern is with the
13 suggestion I had about saying "except as otherwise
14 required by law no sensitive information shall be included
15 except in a sensitive data form," if the concern is, yeah,
16 but then that court order that the Family Code requires to
17 include the Social Security number will be available on
18 the internet then why not address that in the next section
19 by including that kind of order, "Any order including
20 sensitive data shall not be" -- "shall be excluded from
21 remote access" under 15.4?

22 CHAIRMAN BABCOCK: So, Jeff, your
23 proposition would be to insert in 14.2(a), "except as" --

24 MR. BOYD: "May be expressly required."

25 CHAIRMAN BABCOCK: "Except as expressly

1 required by law."

2 MR. BOYD: "By statute, court rule" -- or
3 just "by law," yeah.

4 CHAIRMAN BABCOCK: "By law."

5 MR. BOYD: "By other law." Okay.

6 CHAIRMAN BABCOCK: How do people feel about
7 that?

8 MR. BOYD: Then you go on and say --

9 CHAIRMAN BABCOCK: Judge Benton gives a
10 thumbs up to that.

11 HONORABLE LEVI BENTON: I like that.

12 MR. BOYD: Then you go to 15.4, which is
13 "Case records excluded from remote access," and we say in
14 (f), "A case record in a Family Code proceeding other than
15 a case record such as a judgment, index, calendar, docket,
16 minute, or register of actions, created by a court."

17 CHAIRMAN BABCOCK: Let's not get ahead of
18 ourselves. How do people feel about inserting a phrase
19 that says "except as expressly" -- "except as otherwise
20 required by law"?

21 MR. BOYD: I would say "expressly" because
22 that gives judges guidance that it's got to be something
23 like this Family Code provision that says a Social
24 Security number must be in an order.

25 HONORABLE LEVI BENTON: Well, except for I

1 come back to -- and I don't know where Professor Carlson
2 is on this now, but I come back to the restraining orders
3 and injunction orders. I think they've got to expressly
4 set out the identifying information, and I don't -- and so
5 but it doesn't say "expressly." so I like your concept,
6 but I don't join you when you want to throw in the word
7 "expressly."

8 CHAIRMAN BABCOCK: Okay. Justice Duncan.

9 HONORABLE SARAH DUNCAN: So under Jeff's
10 proposal it would be okay if a data miner walked into
11 Bonnie's office, which I understand to be the case, or
12 let's say into an office that is completely digitalized so
13 all of their documents are in digital format, and because
14 they can't access this record on the internet because we
15 excluded it under Rule 15, they just walk in and say,
16 "That's fine. Just give me a disk or a series of disks
17 that contain every record in your office" and then they've
18 achieved the same thing.

19 CHAIRMAN BABCOCK: Justice Gaultney and then
20 Richard.

21 HONORABLE DAVID GAULTNEY: I guess I'm a
22 little confused about what we're trying to do because I
23 think if we say "unless required by statute," I mean, I
24 thought the whole purpose for the sensitive data form was
25 to try to comply with statutory requirements --

1 CHAIRMAN BABCOCK: But not really.

2 HONORABLE DAVID GAULTNEY: -- without
3 disclosing it. So if we say "unless required" I think
4 we're defeating the whole purpose of the rule.

5 HONORABLE TRACY CHRISTOPHER: Right. We
6 are.

7 HONORABLE DAVID GAULTNEY: But what I'm
8 thinking is that what we're doing is we're creating data
9 that the court and the parties can use but that is not
10 available on the internet or to the public. If that's
11 true, why can't we in the court rule or court order that
12 needs to reference that sensitive data have a reference
13 point on the form? So, for example, it would refer to
14 Item 1 on the sensitive data form or Item 2 on the
15 sensitive data form.

16 If, as Judge Gray says, the reason we're
17 using the four digits in the order is so that we know what
18 account is being referred to on the sensitive data form,
19 why can't we use a distinct identifying number that comes
20 from the sensitive data form that would serve no purpose
21 other than to identify the number?

22 HONORABLE SARAH DUNCAN: I think that's a
23 great idea.

24 HONORABLE TRACY CHRISTOPHER: I think that's
25 a good idea.

1 MR. BOYD: You think that would satisfy the
2 Code's requirement that the Social Security number be in
3 the order, the final order?

4 HONORABLE DAVID GAULTNEY: I'm hearing that
5 we could use the sensitive data form in conjunction with
6 the order, that the sensitive data form is in fact a
7 pleading, it is in fact a case record. It's just
8 something that we're keeping --

9 MR. MEADOWS: Segregated.

10 HONORABLE DAVID GAULTNEY: -- segregated.

11 CHAIRMAN BABCOCK: Richard, did you have
12 your hand up? And then Judge Gray.

13 MR. MUNZINGER: Only to say that if you use
14 the phrase "except as permitted by law" what do we mean?
15 Do we mean by statute only?

16 CHAIRMAN BABCOCK: "Except as otherwise
17 required by law."

18 MR. MUNZINGER: Sir?

19 CHAIRMAN BABCOCK: "Except as otherwise
20 required by law."

21 MR. MUNZINGER: I'm talking about his
22 proposal. What do you mean by "law"? Would that include
23 a court order or rule, or would it include only a statute?
24 And if the latter, have you made it unduly restricted?

25 MR. BOYD: Well, "by law" typically refers

1 to common law, constitutional law, or statutory law, all
2 of it.

3 MR. MUNZINGER: But it wouldn't include a
4 court order or a court rule.

5 MR. BOYD: Well, to the extent that that
6 would be common law it would. In other words, if you've
7 got some court ruling, some published decision that
8 constitutes the common law of the state then it would be
9 by law, but whether an individual district judge's order
10 would qualify I don't know.

11 CHAIRMAN BABCOCK: We're going to vote on
12 something and then we're going to have lunch. What do we
13 want to vote on?

14 PROFESSOR CARLSON: Justice Gaultney's
15 suggestion.

16 HONORABLE TRACY CHRISTOPHER: As-is.

17 CHAIRMAN BABCOCK: Huh?

18 HONORABLE TRACY CHRISTOPHER: As-is. Other
19 than the SDF.

20 CHAIRMAN BABCOCK: Okay. Only the last four
21 digits of the sensitive data in section 14.1(a), (b), and
22 (c)? Want to vote on that? Okay. How many are in favor
23 of that?

24 How many opposed? Okay. Well, that got us
25 far. It's seven to seven.

1 MR. BOYD: Chair not voting.

2 CHAIRMAN BABCOCK: Chair not voting. So I
3 suppose I'm supposed to vote when there's a tie, right?

4 Well, I'm going to vote in favor, so it's
5 eight-seven, and part of that is, frankly, timing. We
6 really have to pick up the pace here, guys. So let's have
7 lunch, and let's keep it to half an hour on lunch.

8 (Recess from 12:59 p.m. to 1:29 p.m.)

9 CHAIRMAN BABCOCK: Okay, Stephen, let's go.
10 We're now onto subpart (c) of 14.2.

11 MR. HAMILTON: What about (2) and (3)? Are
12 we skipping those?

13 CHAIRMAN BABCOCK: (b) (2) and (3) are cut
14 out because we cut out (d), (e), and (f).

15 MR. HAMILTON: I don't think necessarily,
16 because did Jeff say there was an Attorney General opinion
17 or something that said you had to use the initials of
18 minor children?

19 CHAIRMAN BABCOCK: Yeah, but we're not
20 trying to affect what the statutory requirements are or
21 are not. So we're onto (c), "A party must file the
22 sensitive data form at the same time the first case record
23 containing the abbreviated sensitive data is filed," and
24 "A party must file additional sensitive data forms in a
25 particular cause only if a case record is filed containing

1 abbreviated sensitive data not previously included in a
2 sensitive data form."

3 MR. LOW: Move to approve it.

4 HONORABLE TOM GRAY: Second.

5 CHAIRMAN BABCOCK: Any other discussion?

6 MS. SWEENEY: Call the vote.

7 MR. MUNZINGER: Chip, I'm confused by the
8 use of the word "abbreviated" in the second. Why is that
9 necessary? As a matter of fact, in both sentences. Why
10 is the word "abbreviated" necessary?

11 CHAIRMAN BABCOCK: I don't know. Judge
12 Gray.

13 HONORABLE TOM GRAY: Well, you don't put the
14 sensitive data in the form, and without having thought
15 about it more than two bites of my salad --

16 MR. LOW: But if you only put four numbers
17 of the Social Security, that would be abbreviated, but the
18 whole thing -- and that would be in the record, but the
19 whole thing would be in the sensitive data, so it would be
20 abbreviated in the record.

21 HONORABLE TOM GRAY: Yeah, the first case
22 record does not contain the sensitive data. It contains
23 only abbreviated sensitive data.

24 MR. MUNZINGER: I understand, and I
25 apologize for the question.

1 CHAIRMAN BABCOCK: Okay. Judge Lawrence.

2 HONORABLE TOM LAWRENCE: In the context of a
3 criminal case the term "party," who would be a party in a
4 criminal case? Obviously a defendant.

5 CHAIRMAN BABCOCK: Defendant and the state,
6 I would think. Wouldn't that be the party? Tom? Tom
7 Wilder.

8 MR. WILDER: Maybe I'm really missing this,
9 but I understood that the sensitive data form, if there
10 was any sensitive data in the original petition it had to
11 be filed at the time the original petition was, that only
12 the abbreviations would be used if there was a law or
13 court order or whatever, only then would the initials be
14 put in there. If you had an original petition, and let's
15 say all they had in there was a driver's license number,
16 then you wouldn't have any -- well, I forgot now whether
17 we took driver's license out. I guess that's still in,
18 but basically the sensitive data sheet as I understood it,
19 as your rule seems to say here in previous stuff, is that
20 has to be filed at the same time the other -- that the
21 original petition or the original pleading would be,
22 wouldn't it?

23 MR. LOW: It's filed at the same time that a
24 sensitive data becomes in the record.

25 MR. WILDER: Yeah, if they have any. Right.

1 If the original petition had none, you wouldn't file
2 anything.

3 HONORABLE TRACY CHRISTOPHER: Right.

4 MR. WILDER: It wouldn't have anything to do
5 with these other -- these initials, would it? Or would
6 it?

7 MR. LOW: Well, it only has to do when the
8 sensitive data arises when you make it a part of the
9 record.

10 HONORABLE TOM LAWRENCE: It's the police
11 officer that's going to file the traffic citation who
12 clearly is not going to be a party regardless of how you
13 define it, I wouldn't think. The defendant -- and all
14 he's going to do is file the traffic ticket that's going
15 to have the driver's license on the citation.

16 The district attorney in a Class C
17 misdemeanor case may or may not ever get involved in that
18 case. They are only going to get involved if it goes to
19 trial. So I presume then that the only party that's going
20 to be able to file something, at least initially, is going
21 to be the defendant, and he's not going to be able to file
22 something when the ticket is filed. There is an
23 appearance date 10 days later, so what is the time limit?

24 Can he file it at any time, and when can the
25 district attorney come in and file something if they

1 wanted to? Because it says "at the same time the first
2 case record is filed," which is going to be when the
3 traffic ticket is filed. I'm just not clear how this is
4 going to work for a traffic case.

5 CHAIRMAN BABCOCK: Yeah, Justice Gray.

6 HONORABLE TOM GRAY: I actually caught this
7 problem over in the Rule 15 and am going to be making some
8 recommendations with regard to references to parties in
9 that case. I missed it, Tom, frankly, in connection with
10 Rule 14. Because a person other than a party may actually
11 come into a case and file something, for example, a
12 witness that has been subpoenaed and wants to quash the
13 subpoena or something of that, I think that in this
14 context, "a party" needs to be changed to "a person" so
15 that it is broader.

16 And I understand that does not fix the
17 problem of the police officer having to do a sensitive
18 data form on all of the citations that he's just filed and
19 he's not going to do that, but I think we've got to at the
20 end of this process address the JP and -- well, basically
21 all the Class C misdemeanor cases separately. I've come
22 to that conclusion, that the mechanics of this are going
23 to be too complicated in the typical Class C, but I would
24 propose that in connection with 14.2(c) that in both
25 places where the reference is made to "a party" that it be

1 broadened to be "person." And then that way it picks up
2 corporations and that kind of thing, so --

3 HONORABLE TOM LAWRENCE: Would this allow
4 someone to file it after the case record is filed, because
5 it says at the same time the case record is filed? So can
6 someone come in later? It seems to presume that you can't
7 come in and file it later, it's got to be filed at the
8 same time.

9 MR. LOW: Well, what they're trying to do
10 is, I mean, if it's later, what if somebody comes in, they
11 want all this stuff? You know, they're going to get it.
12 So, I mean, if you didn't file your sensitive data form at
13 that time it's not going to be complete.

14 HONORABLE TOM LAWRENCE: Well, the police
15 officers I can guarantee you are not going to file these
16 things. So if they don't file it then this would seem to
17 preclude it ever being filed because they're going to file
18 the first case record.

19 MR. LOW: Well, it doesn't say you can't
20 file it. It's telling you you must, and that's certainly
21 the best appropriate time to have a complete record.

22 HONORABLE TOM LAWRENCE: Well, I mean, it
23 says "must file" and there is no provision for filing it
24 afterwards. So, I mean, the way this is done, you
25 would -- basically it would never happen, or almost never.

1 MR. LOW: Then what would be your
2 suggestion?

3 HONORABLE TOM LAWRENCE: Well, (c) just
4 doesn't make sense in the context of a Class C misdemeanor
5 case, the whole thing. I would think we would need to
6 address it in a different rule or something.

7 CHAIRMAN BABCOCK: Yeah, Tom, it may be, as
8 Justice Gray says, we're going to need to just have a
9 subsection that deals with JP and municipal court files.
10 Justice Hecht.

11 HONORABLE NATHAN HECHT: Let me ask Tom
12 Wilder, if -- do you know or Bonnie, either one, or Andy,
13 do you-all know if -- or, Judge Lawrence, if JP clerks are
14 putting this Class C misdemeanor sort of information on
15 the internet or not?

16 HONORABLE TOM LAWRENCE: I'm sorry, on the
17 what?

18 HONORABLE NATHAN HECHT: On the internet.

19 MR. WILDER: Not in my county, in Tarrant
20 County.

21 HONORABLE TOM LAWRENCE: We are not right
22 now, but we are getting to that this year, and there are
23 plans right now to put a lot of our case information on
24 this year that we're working on in Harris County, and I'm
25 not sure about all the other counties.

1 MR. WILDER: Appeals are. Appeals are on
2 there.

3 HONORABLE NATHAN HECHT: Yeah. And is there
4 any -- the people who do background studies, are they
5 interested in this information? Very much so?

6 MR. COFFEY: Yes, sir.

7 MR. WILDER: Probably.

8 MR. COFFEY: Collin County has theirs online
9 now.

10 HONORABLE NATHAN HECHT: This kind of
11 misdemeanor, Class C?

12 MR. COFFEY: Yeah, if I'm hiring somebody to
13 operate a forklift I care about their driving history, and
14 so we do in those cases -- and we also go to municipal
15 records, so I've got clients for whom we go actually to
16 the city and look through the city courts and all of that
17 for information, too.

18 HONORABLE TOM LAWRENCE: Military comes in a
19 lot looking for driver's records for people that are
20 enlisting.

21 CHAIRMAN BABCOCK: Okay. Anything else
22 about this? Justice Gray says we should switch "party" to
23 "person" in both sentences. Any other discussion about
24 this rule?

25 All right. All those in favor of subpart

1 (c) raise your hand.

2 All opposed? This one would be unanimous.

3 MR. HAMILTON: Did we change the title of
4 that yet?

5 CHAIRMAN BABCOCK: We have. It's now
6 supposed to be "Sensitive data in court case records,"
7 which I notice is also the title of the entire rule, so we
8 may want to think about that, but let's go on to 14.3(a).
9 "The court or court clerk must keep sensitive data forms
10 physically separated from case records."

11 Any discussion on this? Justice Bland.

12 HONORABLE JANE BLAND: I would suggest we
13 say, "The court or court clerk must secure sensitive data
14 form separately" for -- so as to allow for them to be kept
15 separately electronically.

16 CHAIRMAN BABCOCK: And that's the same word
17 we used up in 14.2(a), so that would bring some symmetry
18 to it. Any other comments? Richard Munzinger.

19 MR. MUNZINGER: Given the definition of case
20 records, as I understand the definition of case record,
21 it's any document filed in a case, so shouldn't that say
22 "separated from other case records"?

23 HONORABLE JANE BLAND: Yes.

24 MR. MUNZINGER: Case record is not a file
25 jacket. It's not a collection of pleadings. It's any

1 document filed in the case, if I understand 15.2(a)
2 correctly.

3 CHAIRMAN BABCOCK: Justice Gray.

4 HONORABLE TOM GRAY: Yeah, with the change
5 that you-all made to the other rule, where I was going to
6 change the definition of case record to not include the
7 sensitive data form, you do need the word "other" in it.

8 CHAIRMAN BABCOCK: Okay. Anything else?

9 MR. LOW: Well, wait, if you say must keep
10 them separated from other case records, would that mean
11 you keep them separated from that but not from that case
12 record? I mean that doesn't make sense because it's going
13 to be separated from that case record.

14 HONORABLE TOM GRAY: "Other case records in
15 that proceeding."

16 CHAIRMAN BABCOCK: Okay. "In that
17 proceeding"?

18 MR. LOW: Okay. All right. "In that
19 proceeding." Yeah.

20 CHAIRMAN BABCOCK: Okay. What else?
21 Anything on this? Yeah, Richard.

22 MR. MUNZINGER: Does that imply that -- is
23 there any obligation here that they be kept electronically
24 separate as well as physically separate, or does
25 physically separate include electronically separate?

1 CHAIRMAN BABCOCK: I think that was Justice
2 Bland's point in using the word "secure."

3 MR. MUNZINGER: Okay. I'm sorry.

4 CHAIRMAN BABCOCK: All in favor of 14.3(a)
5 as amended, which would now read "The court or court clerk
6 must secure sensitive data forms physically separated from
7 other court records in that proceeding," raise your
8 hand.

9 HONORABLE TOM GRAY: You took out the word
10 "physically."

11 HONORABLE JANE BLAND: "Must secure
12 sensitive data forms separately from other forms."

13 CHAIRMAN BABCOCK: All right. So strike
14 "physically"? Thank you.

15 HONORABLE JANE BLAND: Yeah, and change it
16 to "separately" because it doesn't make sense otherwise.

17 CHAIRMAN BABCOCK: Okay. "Separately." Let
18 me try it again. 14.3(a), "The court or court clerk must
19 secure sensitive data forms separately from other case
20 records in that proceeding." Everybody in favor of that
21 raise your hand.

22 All opposed? 17 to 1, it passes.

23 Subparagraph (b), "The court or court clerk
24 must limit access to the forms to a party or an attorney
25 of record in the cause in which the sensitive data form is

1 filed and court officials, court personnel" -- shouldn't
2 it be "must not"? Didn't we talk about that?

3 HONORABLE TRACY CHRISTOPHER: "Must allow
4 access."

5 HONORABLE TOM GRAY: Well, we had talked
6 about putting the word "only" after "access" earlier to
7 clarify the court or court clerk must limit access only,
8 and it ought to be to a party.

9 HONORABLE TRACY CHRISTOPHER: But limiting
10 access is -- could be construed both ways.

11 HONORABLE SARAH DUNCAN: Right.

12 HONORABLE TRACY CHRISTOPHER: You should say
13 you allow access to those people only, because limit could
14 mean to keep it away from them.

15 CHAIRMAN BABCOCK: Right. That's right.

16 HONORABLE TOM GRAY: Okay.

17 CHAIRMAN BABCOCK: So wouldn't it be "allow"
18 or "permit"?

19 MR. LOW: Yeah.

20 CHAIRMAN BABCOCK: "Allow"?

21 MR. LOW: Only to these people, not just --

22 HONORABLE TOM GRAY: At 3:00 o'clock in the
23 morning this read just fine.

24 CHAIRMAN BABCOCK: All right. So how --
25 Judge Gray, how should we say it? "The court or court

1 clerk must only allow access"? Or --

2 HONORABLE JANE BLAND: You've got to watch
3 "only," where you put it.

4 CHAIRMAN BABCOCK: Yeah.

5 MR. LOW: Yeah. "Allow access only to."

6 HONORABLE TOM GRAY: I think Buddy is right.
7 "The court or court clerk must allow access only to a
8 party or an attorney of record in the cause," so forth and
9 so on.

10 MR. MUNZINGER: Chip?

11 CHAIRMAN BABCOCK: Yeah, Richard.

12 MR. MUNZINGER: As of today my client, *Time*
13 *Magazine*, doing a research story on Justice Hecht --

14 CHAIRMAN BABCOCK: Whoops.

15 MR. MUNZINGER: -- is free to go to the
16 Travis County court records and review all court records
17 that reference Justice Hecht, a public official. If this
18 rule is adopted as it is now written, subsection (b), *Time*
19 *Magazine* may not do that research on Justice Hecht or any
20 other one person in the world.

21 We are creating a category of information
22 that has now been made secret to citizens, and I just want
23 everybody to be aware that's what we're doing here. We
24 are not limiting this to -- now to remote access. We are
25 now saying that a researcher, a citizen, maybe somebody

1 wants to come after me for an ugly reason, whatever, we've
2 now told our citizens, "You can't get this information,"
3 and if that's what we're going to do, so be it.

4 I would say that if that's what you're going
5 to do, the way the rule is written it offers no
6 exceptions. There is no court order exception, there is
7 no -- there is no exception at all. The people who are
8 identified here and the purposes for which they are
9 identified is absolute, and I just wonder if that's what
10 we want to do here. I do understand the need under modern
11 circumstances to protect remote access to information, but
12 I wonder if we're throwing the baby out with the
13 bathwater.

14 CHAIRMAN BABCOCK: Justice Duncan.

15 HONORABLE SARAH DUNCAN: How?

16 MR. MUNZINGER: Well, because you're now
17 saying I can't get Justice Hecht's bank account numbers.
18 I can't get his driver's license number. He's a public
19 official. I can't get it. He's a member of government,
20 and I can't get it for him. I can't get it for a
21 candidate running for office.

22 HONORABLE SARAH DUNCAN: Why would anyone
23 have a need for my Social Security number or bank account
24 number? A legitimate need.

25 MR. MUNZINGER: Well, suppose that I have a

1 situation where I'm a newspaper reporter and I have been
2 told that a candidate for public office was a conspirator
3 in some ugly conspiracy, and the only way that I can
4 verify the accuracy of that information or to unearth
5 other information is to have access to that person's
6 driver's license number.

7 HONORABLE SARAH DUNCAN: That's not going to
8 be in a pleading.

9 MR. MUNZINGER: My only point is today I can
10 get it.

11 HONORABLE SARAH DUNCAN: It's not in a
12 pleading. You can't get it.

13 MR. MUNZINGER: Today I can get it. I can
14 get the information, the bank accounts, what have you,
15 that are in pleadings today.

16 HONORABLE SARAH DUNCAN: That are in
17 pleadings.

18 MR. MUNZINGER: Pardon me?

19 HONORABLE SARAH DUNCAN: That are -- if the
20 number is in a pleading, yes, you can get it now.

21 MR. MUNZINGER: Yes, ma'am.

22 HONORABLE SARAH DUNCAN: But they're not in
23 pleadings.

24 MR. MUNZINGER: Well, I don't know that to
25 be a fact. I don't know that to be the fact as of today.

1 I'm talking about something filed a month ago, six months
2 ago, five years ago, before a rule such as this was
3 included that limits the public's access to court records.
4 As of today court records are open, except in limited
5 situations of the family law, et cetera. We are now
6 adopting a rule that says this stuff isn't open, sensitive
7 data.

8 CHAIRMAN BABCOCK: There is a trade-off that
9 is taking place here, and that is that in order to make
10 records, the whole of records, more accessible to people
11 so that somebody in Waco that's interested in Justice
12 Hecht doesn't have to drive down to Austin to look at
13 things, we're making things more accessible to them. The
14 trade-off is that with respect to these three categories
15 of information in 14.1(a) we are withdrawing them from
16 public scrutiny.

17 MR. MUNZINGER: I'm aware of that.

18 CHAIRMAN BABCOCK: And we're doing that
19 for -- we think for good reasons, but it is a trade-off,
20 because, you're right, if in those infrequent cases where
21 Justice Hecht's driver's license or passport number or
22 bank account might be in a pleading, from now on you're
23 not going to be able to get that, whereas before you
24 could.

25 HONORABLE SARAH DUNCAN: But you're going to

1 be able to get the gist of the allegations in the pleading
2 much more easily than you can now, and if you happen to
3 know Justice Hecht's driver's license number, you can go
4 to the clerk and get the clerk to confirm that the Justice
5 Hecht in that pleading is the Justice Hecht -- of course,
6 if they use "justice" you'll have a good clue -- is the
7 Justice Hecht you know about.

8 CHAIRMAN BABCOCK: You're taking this all in
9 silence over here.

10 HONORABLE SARAH DUNCAN: I don't understand
11 how this limits investigative reporting at all.

12 CHAIRMAN BABCOCK: Well, it withdraws some
13 information from the public domain, but not very much.

14 HONORABLE SARAH DUNCAN: I understand that,
15 but I don't understand how it would limit investigative
16 reporting.

17 MR. MUNZINGER: I only used it as an
18 example. My point is information is being withdrawn from
19 the public domain which heretofore has been public. I
20 only want people to understand, A, that that's what you're
21 doing. I don't know that that's a good thing. I don't
22 know. We ought to vote on it. But (b), when you look at
23 section 14.3(b), there are no exceptions. There is no
24 court-ordered exception to allow access to this
25 information, and I am raising the question of whether you

1 want to continue to adopt a rule that doesn't have a
2 court-ordered exception to it or some exception that
3 allows someone to make exceptions to this ironclad rule.

4 It is -- and I don't mean this in an ugly
5 way at all. God has been good to me. I do some work for
6 the media. This is a free country.

7 MS. SWEENEY: Was.

8 MR. MUNZINGER: I don't think this committee
9 or judges should have the right to tell me that I can't
10 get to something unless they have a good reason, because
11 it's my country, and I get to write what I want about my
12 country. And no judge or judges or group of 25 lawyers in
13 Austin ought to be able to tell me I can't get information
14 about my country.

15 MR. LOW: The problem is that you can go
16 down and get it, and that's an isolated thing, and now
17 we're in a different world. We're not in a world you and
18 I grew up in. I mean, we're computers, and now we're
19 trying to reach a balance.

20 MR. MUNZINGER: Yeah, but this is not remote
21 access, Buddy. This is any access.

22 MR. LOW: I understand, but we're trying to
23 reach a balance, and in order to reach a balance we have
24 to give a little and take a little, we've been doing all
25 our lives.

1 CHAIRMAN BABCOCK: Justice Bland, then
2 Justice Duncan.

3 HONORABLE JANE BLAND: Well, I think we
4 could consider some mechanism by which somebody might get
5 access to something if that's something that would make
6 this more palatable. I mean, if you think that you want a
7 chance to ask a court, for example, I don't know what the
8 standards would be, and we would have to think about that.

9 More specifically with respect to this rule,
10 in permitting access to a party or an attorney of record
11 do we want to include a party -- an attorney of record or
12 their designee?

13 MR. LOW: How do you know they're their
14 designee?

15 HONORABLE JANE BLAND: Because I envision
16 lawyers wanting to send somebody to get the sensitive data
17 form, you know, copy of the sensitive data form and the
18 order. I guess at some point they will be able to pull
19 that down electronically.

20 CHAIRMAN BABCOCK: Well, and plus we send
21 paralegals and associates and stuff down to court all the
22 time. I mean, they are deemed to be attorneys of record,
23 aren't they?

24 HONORABLE JANE BLAND: No.

25 HONORABLE TRACY CHRISTOPHER: No.

1 CHAIRMAN BABCOCK: No?

2 MS. SWEENEY: You have to produce your Bar
3 card to get the file in some courthouses.

4 HONORABLE TRACY CHRISTOPHER: Attorney of
5 record is one person.

6 CHAIRMAN BABCOCK: Okay. Justice Duncan.

7 HONORABLE SARAH DUNCAN: I think we're
8 talking about access to the paper record in the courthouse
9 now as it exists today, and we're creating a wall between
10 that and remote access, and Bonnie has convinced me that
11 there isn't such a wall, and I would like for her to give
12 her little talk on how it is that this information gets
13 distributed even without remote access. Would you give
14 that little talk?

15 MS. WOLBRUECK: I'm trying to remember which
16 one of the talks that was. We have people that come into
17 our office daily getting information out of our files, be
18 it with sitting at a computer, taking down information.
19 Some offices they actually -- sometimes they come in with
20 scanners and try to scan some information out of the file,
21 so that information is coming out of the files today in a
22 paper format also, not just in the remote world, that it's
23 being placed out there in the remote world, but it's
24 coming out of the clerk's offices today.

25 HONORABLE SARAH DUNCAN: So we don't have

1 the level of practical obscurity for our paper records
2 that we've traditionally had. I mean, if somebody can go
3 in with a scanner this size and run it across that piece
4 of paper they have now captured all of that information in
5 their scanner. It's not a digital either/or thing. It's
6 the two are merging.

7 MR. LOW: See, Richard, the only way to
8 solve Richard's problem would be to include that you can't
9 get this sensitive data sheet by the internet but if you
10 go down to the courthouse you can get it, and then you
11 would be getting the same information that he now has a
12 right to get. So you would have to include in order to
13 solve his problem -- I'm not saying I agree or disagree,
14 but to solve his problem you would have to have an
15 exception to who can get the sensitive data sheet. You
16 can't get it electronically but if you go to the
17 courthouse you can get it.

18 HONORABLE SARAH DUNCAN: Well, then it's
19 going to be --

20 HONORABLE TRACY CHRISTOPHER: Copied and
21 distributed.

22 HONORABLE SARAH DUNCAN: Once you say that
23 if you go to the courthouse you can get it -- I'm not
24 arguing one way or the other. I'm just trying to point
25 out if you say that somebody can get the sensitive data

1 form if they come to the courthouse then what's going to
2 happen is one of these guys is -- they're just going to go
3 to the courthouse and say, "Please give me all your
4 sensitive data forms," and they're going to scan them and
5 they're going to upload them, and I'm not speaking of
6 you-all individually.

7 MR. LOW: I know what can happen once the
8 cat gets out of the cage, so, I mean, but that's the only
9 way that problem I think could be solved.

10 CHAIRMAN BABCOCK: Richard, would you find
11 it palatable if somebody could come in and make a showing
12 to a court that the sensitive data information should be
13 released because -- and this is borrowing from 76a -- it
14 had a probable adverse effect on the general public health
15 and safety or the administration of public office or the
16 operation of government?

17 MR. MUNZINGER: Well, it makes it less
18 restrictive certainly, and my concern is obvious, that you
19 just need to be careful that we're creating a whole deal
20 here that's secret now that wasn't yesterday. We've taken
21 away freedom.

22 MR. MEADOWS: But I thought we were doing it
23 on purpose.

24 MR. MUNZINGER: And I understand, and I'm
25 not so sure that's what we want to do.

1 CHAIRMAN BABCOCK: We are doing it on
2 purpose.

3 MR. MUNZINGER: But we began saying it's a
4 problem that we're trying to protect from the Bangladesh
5 guy.

6 HONORABLE TRACY CHRISTOPHER: Richard and I
7 want a yes or no vote so the two of us can vote "no" to
8 this whole rule, okay, and then we'll move on.

9 MR. MUNZINGER: That is a better solution
10 from my standpoint, Chip, and the committee may think, you
11 know, I'm full of prunes, it's not all that important, but
12 I do think we need to be careful when we start saying that
13 we're taking data away from public access in a free
14 country. It's troublesome.

15 MR. LOW: If we want to do that --

16 CHAIRMAN BABCOCK: Justice Gray.

17 HONORABLE TOM GRAY: I'll deal with these
18 sort of in the reverse order of importance. Lisa, Richard
19 pointed out to me over here on sensitive data, we need it
20 capitalized in that one. I think we caught it everywhere
21 else. And just for the record, that in response to one of
22 Chip's comments, today I don't think there is anyone in
23 Waco that's interested in Justice Hecht.

24 CHAIRMAN BABCOCK: Whoa, you're going to
25 lose that by a wide margin.

1 HONORABLE TOM GRAY: But more substantive,
2 to address Richard's comment, we did talk some about
3 whether or not we wanted to be able to go to a judge and
4 say, "Here is something that is in abbreviated form in a
5 case record and we want access to it," and we frankly had
6 kicked it around a while, and we decided that we -- that
7 absent the situation where someone was using it abusively
8 to protect information that shouldn't be in the form,
9 which they can address through a sanction through the
10 court's inherent power and then also included under the
11 rule, we just weren't sure that we thought that it was --
12 or we felt like this was not a good idea to allow
13 individual courts, frankly, the flexibility to override
14 the really fundamental policy issue that was being reached
15 here, but that is the policy reason that has to be
16 addressed.

17 And so we contemplated the concept of a
18 court-ordered exception but thought it was adequately
19 addressed through the possibility of sanctions if someone
20 was abusively protecting information and by the very
21 limited amount of information that could be put on the
22 sensitive data form.

23 CHAIRMAN BABCOCK: Okay. Justice Duncan.

24 HONORABLE SARAH DUNCAN: That's my lingering
25 question, is how, how can my Social Security number, bank

1 account number, credit card number, financial account
2 number, driver's license number, passport number, those
3 are I think all of these that I have, how is that
4 information valuable for any legitimate purpose to someone
5 who doesn't already have that information? Why does my
6 Merrill Lynch account number -- why is that -- if I ever
7 were going to run for election again, why would that
8 number have any bearing on my election or my fulfillment
9 of my duties while in office or anything like that? I
10 just don't understand.

11 CHAIRMAN BABCOCK: Tracy.

12 HONORABLE TRACY CHRISTOPHER: Well, the
13 *Houston Chronicle* had all the Social Security numbers of
14 all the judges in Houston to check to see if we appeared
15 for jury duty. We're not exactly sure how they got them,
16 and that was one legitimate, I suppose, use of our Social
17 Security number to see whether we appeared for jury duty.

18 MR. MUNZINGER: The accusation is made that
19 the Carillo drug gang in Juarez, Mexico, is bribing the
20 mayor of Laredo, who is putting the money into bank
21 account X; and the mayor of Laredo says, "Hogwash, I don't
22 have bank account X, don't have any signature rights to
23 it, there is no such bank account X"; and no one can get
24 to that to find out if there is a bank account X because
25 the bank won't give you the information, that's a

1 violation of privacy; but the Carillo gang is putting
2 millions of dollars allegedly into this and how can a
3 newspaper verify whether the story is accurate or not
4 accurate without the bank account number? I don't know
5 the answer to the question, but I think I've given you a
6 hypothetical where the bank account information is
7 important.

8 HONORABLE TOM GRAY: But think how much
9 better that story will read, "And we have confirmed that
10 the last four digits of that number match."

11 MR. MUNZINGER: I don't know that I want to
12 take the afternoon to debate it. My purpose in raising
13 the question was what I've said. We are restricting
14 information in a free country. It could be very
15 important. I don't know, and I agree it's modest
16 information that we're restricting, but we are restricting
17 it.

18 CHAIRMAN BABCOCK: Carl.

19 MR. HAMILTON: One of the things that I
20 think we need to go back and do, which bears on what
21 Richard said, is that in defining sensitive data it ought
22 to be data that is only furnished incidental to some
23 identification of a person, but if that data is the
24 subject matter of the litigation, it ought not to be
25 protected. And I mean, suppose you're being sued for

1 filing some kind of a false Social Security number or
2 suppose you're garnishing a bank account, something like
3 that. Where these are the subject of the litigation they
4 ought not to be protected, only if there is some kind of
5 incidental for identification purposes. That may solve
6 some of these problems.

7 CHAIRMAN BABCOCK: Yeah. That's a good
8 point. Buddy.

9 MR. LOW: Chip, you raised a good point in
10 Rule 76a about public health or public interest and so
11 forth, because remember when 76a was passed people were
12 just sealing everything, and we had a meeting -- it was
13 the only one of these meetings where I've been to where
14 four or five Supreme Court judges were here because there
15 were a lot of newspapers here, and they were -- well, no,
16 it's true, and so they were very interested in what the
17 news media thought of them and so forth, and 76a -- I
18 won't burden you with the whole story, but 76a came about
19 over some objections, and so if we -- now we're going to
20 have people that are interested in getting this
21 information for employers, and they're going to say, well,
22 we can't -- we couldn't check and see about the Boy Scout
23 leader. If you had kept that -- given us that information
24 we could have checked and found certain things on him or
25 this schoolteacher or that, so there's going to be -- we

1 have to tie it some way like you're talking about.

2 HONORABLE SARAH DUNCAN: That's why we have
3 the process. If somebody is giving you an employment
4 application, you'll have their birth date and their Social
5 Security number, and you can go to the clerk, and you can
6 confirm it.

7 CHAIRMAN BABCOCK: Should we change "may" to
8 "must," Sarah?

9 HONORABLE TOM GRAY: Yes.

10 CHAIRMAN BABCOCK: Do you agree with that,
11 Sarah?

12 HONORABLE SARAH DUNCAN: (Nods head.)

13 CHAIRMAN BABCOCK: The clerk is not voting.
14 Judge Lawrence.

15 HONORABLE TOM LAWRENCE: I don't remember
16 what we decided, but in Levi's garnishment case at one
17 time we were talking about sending a copy of the sensitive
18 data form to the bank that would have the bank accounts on
19 it. If we're still talking about that, I don't see
20 anything in (b) that would permit it to be sent to the
21 bank. Wouldn't we need to put some inclusion for that?

22 CHAIRMAN BABCOCK: This is just one man's
23 solution, but I think we have to -- we have to address the
24 issue of what goes in orders, like, you know, injunctions
25 or restraining orders or any kind of order that really

1 isn't addressed here yet and, I think that's a subspecies
2 of what you're talking about.

3 HONORABLE TOM GRAY: Well, I thought banks
4 were part of garnishment proceedings, but it's been a long
5 time since I did one of those. I thought you had to serve
6 them and make them a part of it.

7 CHAIRMAN BABCOCK: I think not.

8 HONORABLE LEVI BENTON: No, you serve a
9 party.

10 HONORABLE TOM GRAY: If they're a party they
11 get the sensitive data.

12 CHAIRMAN BABCOCK: There was a case in San
13 Antonio, Judge Peeples, I don't know if it was in your
14 court, but it was just last week where Frost Bank was not
15 a party, but the restraining order froze an account in
16 Frost Bank, and obviously the account number had to be
17 identified for the bank even though they weren't parties.
18 I was peripherally involved in that case. Judge Bland.

19 HONORABLE JANE BLAND: Why don't we say
20 something like "The court clerk must permit access to
21 sensitive data forms, one, by a party, an attorney of
22 record or their designee; two, by court order in which the
23 court finds that access to sensitive data forms is
24 necessary" -- "or finds that failure to provide access to
25 sensitive data forms would have a probable adverse affect

1 upon the general public health or safety or the
2 administration of public office or the operation of
3 government or as necessary to facilitate service on a
4 nonparty."

5 CHAIRMAN BABCOCK: Okay. That captures a
6 bunch of concepts.

7 HONORABLE JANE BLAND: "Otherwise the court
8 clerk must not allow access to sensitive data forms,
9 except the court clerk may compare information provided by
10 a third party to information in a sensitive data form and
11 confirm or negate that the third party's information
12 matches the information in the sensitive data."

13 CHAIRMAN BABCOCK: Justice Duncan, what's
14 your take on that?

15 HONORABLE TRACY CHRISTOPHER: You didn't
16 mean to leave them out, did you?

17 HONORABLE JANE BLAND: No, I didn't mean to
18 leave them out.

19 HONORABLE SARAH DUNCAN: At the risk of
20 sounding paranoid, like Richard earlier --

21 MR. MUNZINGER: That's defamation.

22 HONORABLE SARAH DUNCAN: I don't much want
23 to give individual judges the discretion to release
24 sensitive data, and I don't think you can create a
25 standard by which sensitive data will be released in a

1 uniform fashion around the state. That's why the
2 committee ultimately -- we had an exception in there in
3 one of the drafts, and that's why we ultimately decided
4 not to have an exception.

5 HONORABLE TOM GRAY: Because one of the
6 first questions you run into is can a judge in Harris
7 County order that sensitive data form that's in a clerk's
8 file in Dallas County be made available. And that --

9 HONORABLE JANE BLAND: Why would a judge in
10 Harris County want to do that?

11 HONORABLE TOM GRAY: Not my problem. It's
12 the problem of the person whose information is on the
13 sensitive data form that's about to get done. That was
14 just one of the many problems that comes up with the
15 possibility of a judge ordering a sensitive data.

16 CHAIRMAN BABCOCK: Justice Bland.

17 HONORABLE JANE BLAND: Okay. Well, if we're
18 concerned about giving too much latitude to judges we
19 could make the standard by clear and convincing evidence;
20 we can, you know, provide appellate remedies like we do, I
21 think, with Rule 76a; we can do things to tighten up on a
22 judge's discretion. The question before us now is do we
23 ever want to provide an exception to a nonparty who isn't
24 in the list of government officials that are already
25 listed, a nonparty being able to seek access to a

1 sensitive data form.

2 CHAIRMAN BABCOCK: Buddy, then Andy.

3 MR. LOW: No, I think that's the vote,
4 whether we do want to make an exception and realizing that
5 we're giving away the rights that Richard says that he has
6 and his clients and we all have, or do we want to try to
7 have the balance that the committee has, knowing we've
8 given up certain things.

9 CHAIRMAN BABCOCK: Okay. Andy.

10 MR. HARWELL: I have some concern from the
11 clerk's standpoint because right now in my office our
12 records are open to the public, and now we are going to
13 ask the clerks to verify that someone meets this criteria
14 before they're allowed to see the sensitive data form.
15 What is -- what would the liability be on the clerk if we
16 make a mistake? Since we're putting so much importance
17 now on this data, I have a concern about verifying who
18 those people are and if they do actually have access to
19 the sensitive data form.

20 CHAIRMAN BABCOCK: Well, I don't know the
21 answer to that, but I'm pretty sure we can't give you
22 immunity in a rule.

23 HONORABLE TOM GRAY: We tried that.

24 MS. WOLBRUECK: It was there one time.

25 HONORABLE STEPHEN YELENOSKY: Chip, as a

1 media expert, don't we need to have some exception here or
2 don't we face some constitutional problem? I mean, we had
3 76a. You always had to have a court order -- I mean, you
4 always had to have a court order to seal something, right?
5 And then 76a changed it so that it was statutory and much
6 harder to do and any party could object to the sealing
7 thereof.

8 In this scheme at this point, unless you do
9 what Judge Bland said, a nonparty, for example, a member
10 of the media, wouldn't even have standing to complain; and
11 moreover, the list of reasons for releasing it may not go
12 far enough because paranoid Richard's example, which he
13 does convince me on one point, is the media may say,
14 "Well, we're investigating and we need this for this
15 reason." So, Chip, the expert, is there a First Amendment
16 issue?

17 CHAIRMAN BABCOCK: I think -- I think the
18 answer under the current state of the law is a qualified
19 no, but there is one case in Texas that elevated opinions
20 and orders and judgments of court to a state
21 constitutional level and said that there was an Article I,
22 Section 8 right to that information; and if the U.S.
23 Supreme Court ever faced that decision they may well say
24 that there is a constitutional component to that.

25 When you drop below that -- and that's why

1 76a makes it without exception that orders and opinions
2 and judgments are always open, never sealed. When you go
3 below that, though, and talk about court records in terms
4 of the pleadings and everything, the rights of the public
5 and the press is a common law right of access. The
6 strength of that right varies from case to case. In the
7 case that's been cited that the U.S. Supreme Court in the
8 Nixon vs. Times, at the time I think, or Warner -- Time
9 Warner case, they weighed -- they balanced competing
10 interests and did not rise it to a constitutional level.

11 You know, whether sometime later on they
12 might, who knows, but right now I think we're dealing with
13 -- for anything other than opinions, orders, and
14 judgments, I think we're dealing with a common law right
15 and not a constitutional right.

16 HONORABLE STEPHEN YELENOSKY: Thanks.

17 MR. LOW: The problem with following 76a is
18 we're coming from the other way. 76a goes on the
19 proposition that everything is open and if you want to
20 close it, you've got to jump through hoops, you've got to
21 do this and that. In our situation we start with this
22 certain information is private and then the question of do
23 they have to jump through hoops to get it.

24 CHAIRMAN BABCOCK: Right. Richard.

25 MR. MUNZINGER: I just would agree with

1 Buddy. I think it's a simple philosophical vote almost
2 for the committee to determine whether the committee does
3 or doesn't want to make an exception to subsection (b).
4 If the answer to that question is "no," we go on. If the
5 answer to the question is "yes" then we're going to get
6 into a lot of questions about notice, who gets the notice,
7 the timing, the publication, the record, et cetera, et
8 cetera, et cetera, because obviously the people whose
9 information is being given away have a right to argue that
10 it shouldn't, et cetera, et cetera.

11 So we're going to get into another morass,
12 and I know I was the one that brought the morass up, but I
13 do think if we vote on whether we even want to get there
14 we may not ever get there.

15 CHAIRMAN BABCOCK: Yeah. Well, I think that
16 if we have an exception, Judge Bland has a template to
17 deal with the exception.

18 MR. MUNZINGER: I agree.

19 CHAIRMAN BABCOCK: So I think it is
20 appropriate, unless somebody else wants to speak on the
21 issue of do we have an exception or don't we, and (b) as
22 written has some exceptions, so I'm talking about an
23 exception beyond what subparagraph (b) as written has.

24 How many people are in favor of engrafting
25 an exception along the lines that Justice Bland suggested

1 and that Richard advocates? How many in favor of that
2 raise your hand?

3 How many are opposed? By a vote of five to
4 nine, the nines are the opposed, so we won't get into the
5 morass, as you say.

6 So with that behind us, if we take the
7 current language and change the wording slightly to say,
8 "The court or clerk must allow access to the forms" -- add
9 the word "only" -- "to a party or an attorney of record"
10 -- add the words "or her designee in the cause in which
11 the sensitive data form is filed and court officials,
12 court personnel, or other governmental entities including
13 a Title IV-D agency and law enforcement agencies whose
14 duties require access to the sensitive data. However, a
15 court or court clerk must" -- instead of "may" -- "must
16 compare information provided by a third party to
17 information in a sensitive data form and conform or
18 affirmatively negate that the third party's information
19 matches the information in the sensitive data form." With
20 those modifications how many people are in favor of
21 subparagraph (b)?

22 HONORABLE SARAH DUNCAN: Can we discuss your
23 "or their designee" addition?

24 CHAIRMAN BABCOCK: Yeah. You don't like
25 that?

1 HONORABLE SARAH DUNCAN: No.

2 MR. HAMILTON: Judge Womack was suggesting
3 something, "expressly negate" instead of "affirmatively
4 negate." He thinks that's not proper.

5 HONORABLE STEPHEN YELENOSKY: If we're going
6 to make it a "must," Bonnie, don't we need to put -- I
7 mean, can somebody come in with 50 pages and say "match
8 these" and if so, the clerk has got a "must," "must by
9 when"?

10 MS. WOLBRUECK: The clerk will determine it.

11 HONORABLE STEPHEN YELENOSKY: Well, then we
12 need to put that in there.

13 MS. WOLBRUECK: It doesn't say now that the
14 clerk can't determine what the "must" means.

15 CHAIRMAN BABCOCK: Okay. Let's take Sarah's
16 point. You think the "or her designee" is misplaced or
17 just is not a good idea?

18 HONORABLE SARAH DUNCAN: I think it's not a
19 good idea. The reason we limited it to these people is
20 because these people are going to have the sensitive data
21 form to begin with, and the clerk's concern of being able
22 to definitively prove that the person who comes in and
23 wants to look at the sensitive data form is, in fact, a
24 person who is entitled to look at the sensitive data form,
25 once you say "or their designee," all I've got to do is

1 forge a letter from the attorney of record saying, you
2 know, "Please let Sarah Duncan, my designee, look at the
3 sensitive data form. Thank you very much, attorney of
4 record."

5 I show Bonnie my driver's license. I am
6 indeed Sarah Duncan, but I didn't have to be Sarah Duncan
7 because I could get a fake driver's license.

8 CHAIRMAN BABCOCK: Or steal Sarah Duncan's
9 identity.

10 HONORABLE SARAH DUNCAN: And then -- if
11 anybody wants it, they can have it. And then we release
12 the sensitive data to somebody that was not entitled to
13 get it.

14 CHAIRMAN BABCOCK: Okay.

15 HONORABLE SARAH DUNCAN: That's why I wasn't
16 for that.

17 CHAIRMAN BABCOCK: Andy.

18 MR. HARWELL: Sarah brings up a good point.
19 You know, like on our military discharge records, birth
20 and death records, the person that comes in has to be a
21 qualified applicant, has to be a family member or an
22 attorney for.

23 CHAIRMAN BABCOCK: Right.

24 MR. HARWELL: What would be wrong -- I mean,
25 because if they lie and we don't have -- the clerk has

1 nothing to show that they said who they say -- what they
2 said they were is truly -- we don't have any proof of
3 that. What would be wrong -- and I think I mentioned that
4 during our conference call, and I don't know how you go
5 about it, Bonnie, or Tom, but having some sort of an
6 application that you would have to fill out so we could
7 have a record of who that was, because I still feel that
8 this -- we're putting so much importance on this sensitive
9 data form, and you're asking the clerk to verify it. We
10 don't say, well, look we have this to show, and I don't
11 know. It seems like it could be a problem.

12 CHAIRMAN BABCOCK: Justice Bland.

13 HONORABLE JANE BLAND: Well, I envision if
14 my husband dies and there is a judgment against him that I
15 need to show or for him or in his favor, I need access to
16 an order that has everything in it including what's
17 referenced, cross-referenced in a sensitive data form; and
18 I don't think this provision provides a way for somebody
19 that's not the party or an attorney of record, but rather
20 a successor to a party, the associate that's working with
21 the attorney of record on the case, to get that form; and
22 I just think that that's going to create problems because
23 the party or the attorney of record or both may not be
24 available 10 years down the line when you want to get a
25 copy of the judgment or the order.

1 CHAIRMAN BABCOCK: The designee language
2 wouldn't help that, though.

3 HONORABLE JANE BLAND: Well, I mean, at
4 least there would be some way for me to get -- you know,
5 if I wanted, you know, someone that was working with me to
6 be able to go get the form, I could say, "I designate
7 so-and-so to go get the sensitive data form."

8 CHAIRMAN BABCOCK: I viewed the designee as
9 just a matter of convenience frankly. If I'm busy, you
10 know, at the Supreme Court Advisory Committee, I can tell,
11 you know, my paralegal back in Houston, you know, fax her
12 a letter, go down and get what I need.

13 HONORABLE JANE BLAND: Exactly. Exactly.

14 CHAIRMAN BABCOCK: But that's different from
15 what you're saying where time has passed, the spouse is
16 dead, the attorney has moved to El Paso, can't be found,
17 and, you know, what am I to do.

18 HONORABLE JANE BLAND: Well, my view was if
19 I was the successor or the administrator of the estate or,
20 you know, I need some way for this rule to include
21 successors in interest, I guess, whether they be future
22 corporations that are -- that don't exist on the date of
23 the judgment that take the judgment as an asset or --

24 HONORABLE STEPHEN YELENOSKY: Descendents.

25 HONORABLE JANE BLAND: Descendents, yeah,

1 heirs or whoever that would have standing to go have
2 access to the information. I ought to be able to bring my
3 guardianship papers or my administratrix papers and get a
4 copy of this information.

5 HONORABLE STEPHEN YELENOSKY: Or otherwise
6 after 50 years there is nobody living who will be able to
7 get access to these things.

8 HONORABLE SARAH DUNCAN: I mean, all we're
9 talking about are these numbers. You're going to have
10 your husband's Social Security number, I would think, or
11 something with your husband's Social Security number on
12 it, and if it's a successor in interest, they're going to
13 have the files of their predecessor. This is not 76a. We
14 are not talking about --

15 HONORABLE JANE BLAND: I need a copy of the
16 order.

17 HONORABLE TRACY CHRISTOPHER: With sensitive
18 data.

19 HONORABLE JANE BLAND: And somehow I need to
20 have a match to the order, with the order and whatever the
21 identifying information that is not included in the order,
22 I need to be able to put those two together so I --

23 HONORABLE SARAH DUNCAN: Well, if you
24 already have the numbers you can go to the clerk and get
25 them to confirm.

1 HONORABLE JANE BLAND: I can't execute a
2 judgment, though, presumably, without the judgment and the
3 sensitive data form together.

4 PROFESSOR CARLSON: That's true.

5 CHAIRMAN BABCOCK: Lisa says we ought to
6 handle that in the section we're writing on orders.

7 HONORABLE JANE BLAND: Okay.

8 MS. HOBBS: Well, it sounds like it's an
9 order -- I may be wrong. I might be misunderstanding you,
10 but it sounds like you're not talking about needing to
11 know your husband's Social Security number. You're
12 needing the judgment, the order, and you know, if we're
13 going to write a separate section that talks about
14 sensitive data in orders we can have a section that talks
15 about access to those orders that contain sensitive data,
16 too.

17 I mean, I think -- you raise a great point.
18 When you first raised it I thought you're right, I never
19 thought about what happens when someone dies and they need
20 a copy of an order that has sensitive data in it.

21 CHAIRMAN BABCOCK: But I think it's broader
22 than that because there are all sorts of situations where
23 a party may not exist, either by death, merger,
24 acquisition, you know, whatever.

25 HONORABLE JANE BLAND: Dissolution.

1 CHAIRMAN BABCOCK: Dissolution. So if we
2 said only to a party, its successors, or -- successors,
3 assignees, and survivors, something like that?

4 HONORABLE JANE BLAND: Now we're talking
5 about getting a corporate lawyer in here to draft.

6 CHAIRMAN BABCOCK: Yeah.

7 HONORABLE JANE BLAND: But I think that, you
8 know, something like -- yeah, I thought --

9 HONORABLE STEPHEN YELENOSKY: I mean, there
10 are going to be situations in which you don't want an
11 heir, just saying heir, to have access to it where there
12 is a conflict between the two, and there are situations
13 where you do, but this group has voted that there is no
14 court discretion, so you're going to have to define it
15 very precisely.

16 HONORABLE JANE BLAND: What do you do about
17 a corporation? If a corporation sues somebody on a sworn
18 account for failure to pay their Visa bill, and who are we
19 designating as the person that can go get this sensitive
20 data form and attach it to the judgment?

21 CHAIRMAN BABCOCK: Well, I would assume like
22 Sarah says, that if it's the successor corporation, as the
23 lawyer you would come in and say, "representing, you know,
24 the ABC Company as successor to the XYZ Company," and
25 presumably if you were the successor you would already

1 have that information because it would be in your file;
2 but if you needed it from the court for some reason, you
3 could show your -- it's like a Rule 12 thing. I mean, you
4 show your authority for being able to do that. Elaine.

5 PROFESSOR CARLSON: So, Bonnie, if it's XYZ
6 Corporation, or Andy, and someone shows up and says, "I'm
7 here for XYZ Corporation. I need the sensitive data
8 form," what do you do to verify they're XYZ Corporation?

9 MS. WOLBRUECK: And if they are a party to
10 it?

11 PROFESSOR CARLSON: Yes.

12 MS. WOLBRUECK: Probably just --

13 CHAIRMAN BABCOCK: If they show up as ABC,
14 successor to the XYZ Corporation.

15 PROFESSOR CARLSON: Or just XYZ to begin
16 with.

17 MR. HARWELL: I can tell you if you go in
18 and start showing the clerk the succession paperwork or
19 whatever, we're not going to be able to make heads or
20 tails of it.

21 PROFESSOR CARLSON: A reporter comes in and
22 says, "I work for XYZ Corporation."

23 "You show me your driver's license." Okay.

24 MS. WOLBRUECK: Probably just off the top of
25 my head what I would do is "Write me a request, sign your

1 name to it," say --

2 MR. HARWELL: That's an application.

3 MS. WOLBRUECK: Yeah, and especially for
4 somebody that's not easily identifiable.

5 CHAIRMAN BABCOCK: Justice Gaultney.

6 HONORABLE DAVID GAULTNEY: I think that
7 raises the question whether the agent is authorized, and I
8 think I guess my assumption in this (b), and maybe I was
9 missing the point, my assumption is it would include
10 someone who is authorized by law to speak for a party,
11 because you were a guardian or we have lots of
12 authorization laws.

13 This problem of a party dying or someone who
14 has the ability to do something is not unique to this
15 rule, and so we have procedures in the law for allowing
16 authorization. What you're referring to now is an example
17 of that. How does she determine that an agent walking in
18 for a corporation has the authority to speak for the
19 corporation? And so I think perhaps we let the rest of
20 the law dealing with authority deal with that rather than
21 try to write in.

22 HONORABLE STEPHEN YELENOSKY: Why is there
23 such --

24 MS. WOLBRUECK: I can only make my best
25 faith effort in identifying people. That's the best that

1 I can do is put forth a best faith.

2 CHAIRMAN BABCOCK: Judge Yelenosky.

3 HONORABLE STEPHEN YELENOSKY: Justice
4 Duncan, why is there such concern about court discretion
5 here? We seal adoption records, and people come in and
6 convince me that they should have a right to get them or
7 have an intermediary contact the parent. We make those
8 decisions all the time, and because we have those
9 discretions doesn't mean that it's, you know, wide open on
10 adoption records. People don't very often get those, and
11 I see this as parallel.

12 I don't see why having court discretion --
13 which to me can cover these exceptions, and you're not
14 going to be able to imagine all the exceptions and write
15 them precisely, based on this conversation, so I don't
16 understand why there is a concern about court discretion.

17 HONORABLE SARAH DUNCAN: It wasn't my
18 concern initially. I'm trying to remember.

19 HONORABLE TOM GRAY: If we have a paranoid
20 Richard on the bench and he just decides, no, there is no
21 such thing as a sensitive data form in my court or your
22 court.

23 HONORABLE STEPHEN YELENOSKY: He's going to
24 be mandamused.

25 HONORABLE TOM GRAY: Before he gets

1 mandamused what's going to happen to all those sensitive
2 data forms?

3 HONORABLE STEPHEN YELENOSKY: Well, if I
4 release adoption records, cat's out of the bag. Same
5 thing.

6 HONORABLE TOM GRAY: Well --

7 MR. LOW: Yeah, but we don't want to let two
8 cats out.

9 HONORABLE TOM GRAY: Because then we will
10 have a bunch of cats.

11 HONORABLE STEPHEN YELENOSKY: You have to
12 have a rational reason for distinguishing one cat from the
13 other.

14 CHAIRMAN BABCOCK: Richard.

15 MR. MUNZINGER: I'm looking at 14.4, which
16 says, "A court may impose appropriate sanctions for a
17 party's violation of this rule." Now, I presume the way
18 it's written it would apply to parties to litigation.

19 PROFESSOR CARLSON: Apply to what?

20 MR. MUNZINGER: Pardon me?

21 PROFESSOR CARLSON: I didn't hear that last
22 sentence.

23 MR. MUNZINGER: I assume the way the rule is
24 written, the sanctions portion of the rule, that it would
25 only apply to parties to litigation so that it would be

1 the sanction powers of a district court, for example, or a
2 court to sanction parties for misconduct, but at the same
3 time we've crafted a rule now -- and this isn't part of my
4 paranoia. I'm just looking at a rule that I'm bound by
5 now that says nobody may get this, and we've come up with
6 a problem. You've got a corporation that has been
7 dissolved and for whatever reason it doesn't have
8 particular information, although a partnership, a
9 partnership is dissolved, but it had an account with
10 Merrill Lynch three years ago and no one knew about it.

11 I've had situations where people die and
12 here comes the husband and he says, "My god, my wife
13 didn't trust me, and she kept a savings account at Bank X.
14 My son told me that."

15 "Do you have the number?"

16 "No, I don't know anything about it." So
17 now here is some money laying over there in the bank that
18 belongs to Mr. Smith. He's poor and needs it, but the
19 rule says he can't get that dad-gum bank account number
20 because he isn't the person that's listed on the form, and
21 we don't have an exception that allows him to get it.

22 HONORABLE SARAH DUNCAN: Why is that bank
23 account number in a sensitive data form?

24 MR. MUNZINGER: I couldn't hear your
25 question.

1 HONORABLE SARAH DUNCAN: Why is that bank
2 account number in a sensitive data form to begin with?

3 MR. MUNZINGER: Well, it's sensitive data.
4 It's a matter of the public record. I don't know the
5 answer to that question. It was part of a lawsuit between
6 he and the bank. It's something -- or she and the bank.
7 It's something that the widow or whoever does not have
8 ordinary access to. You often assume that people will
9 have access to this information. You may be right and you
10 may be wrong. My only point is, is that we have written a
11 rule that says only a party has access. Someone here has
12 come up with a problem, does a successor in interest or a
13 privy qualify as party? If they do, it's not written in
14 the rule.

15 Over here, we've got a sanctions rule that
16 says you can punish people for violating this. I'm a
17 clerk, do I give this to Mr. Munzinger who says it was his
18 widow? Am I going to get in trouble? This gentleman just
19 asked a question, "Do I have immunity for this," and the
20 answer was that we can't answer that question.

21 CHAIRMAN BABCOCK: Or we can't grant it.

22 MR. MUNZINGER: It may be that party needs
23 to be defined in some way to envision subsequent requests
24 for valid information. I agree with whoever it was that
25 said you can't figure out all the permutations of fact

1 situations that are going to arise in the future over this
2 rule, but I have had it in my practice where family
3 members suddenly discover a bank account. Hell, every
4 year the comptroller publishes a list of bank accounts by
5 the thousands that money is going to the state if people
6 don't come and claim it.

7 CHAIRMAN BABCOCK: Justice Gaultney.

8 HONORABLE DAVID GAULTNEY: That's why I
9 would urge that we not try to write all of the law of
10 authority into this rule, that we have it as-is and then
11 if someone can show that they have the authority to speak
12 for a party --

13 CHAIRMAN BABCOCK: Okay. Let's try to vote
14 on it. And, Sarah, I'll take out the "or her designee,"
15 which I viewed as more of a rule of convenience than
16 anything substantive and does not address Justice Bland's
17 issue, so --

18 HONORABLE JANE BLAND: Well, I have issues
19 with both. I think there ought to be some mechanism for
20 getting a form where the party and the lawyer are out of
21 town, and also I have concern about what happens when the
22 party transmodifies into something else.

23 CHAIRMAN BABCOCK: Okay. So the two issues
24 that are going to be unresolved --

25 HONORABLE JANE BLAND: I have this

1 nine-year-old who likes all those characters that --
2 sorry.

3 CHAIRMAN BABCOCK: There's going to be two
4 issues unresolved in the rule we're voting on. One issue
5 is going to be the successor issue, and the other issue is
6 going to be what I've now dubbed the rule of convenience,
7 when we're out of town and we need to authorize a designee
8 to go down and get this, but we will change "The court or
9 court clerk must allow" and then put word "only" after
10 "forms."

11 And then in the bottom line of the first
12 page, or "However, a court or court clerk must" and then
13 we'll make the judge that -- we'll make the change that
14 Judge Womack suggested on "expressly negate" rather than
15 "affirmatively negate," and let's vote on that rule. If
16 you feel strongly enough about the successor or rule of
17 convenience then you vote against it.

18 So everybody in favor of the rule with the
19 amendments that I just suggested raise your hand.

20 All against? All right. That passes by a
21 vote of 11 to 5, the Chair not voting.

22 MR. HAMILTON: Can I ask a question about
23 this rule?

24 CHAIRMAN BABCOCK: Yeah, Carl.

25 MR. HAMILTON: It says "limit access to the

1 forms." Over on the definition of remote access, that
2 includes copying, but do we envision that 14.3 does not
3 include copying of the sensitive data forms, just looking
4 at it?

5 CHAIRMAN BABCOCK: We've amended that to say
6 "must allow access."

7 MR. HAMILTON: But does access mean you can
8 copy it, or can you just look at it?

9 MR. LOW: Ordinarily the clerk will let you
10 copy anything you can look it.

11 CHAIRMAN BABCOCK: What do the drafters feel
12 about that? I would think you would be able to copy it.

13 MS. WOLBRUECK: Yes.

14 MR. HAMILTON: See, over on the definition
15 of remote access it defines that as copying, but --

16 CHAIRMAN BABCOCK: Yeah.

17 HONORABLE TOM GRAY: Well, see, I had a
18 proposal to add that -- it would now be moot -- that every
19 copy of the sensitive data form made by the clerk must be
20 on pink paper, but I'm not going to propose that any
21 longer.

22 CHAIRMAN BABCOCK: Okay. Well, there is
23 case law, Carl, that says when you allow access under the
24 common law right, that it's -- that the right you have is
25 to inspect and copy.

1 MR. LOW: And copy.

2 CHAIRMAN BABCOCK: Now, you know, I don't
3 know if that's helpful or not. Justice Duncan.

4 HONORABLE SARAH DUNCAN: I think when we
5 changed "limit" in the first sentence of 14.3(b) to
6 "allow" we created an ambiguity that I think Judge Bland
7 resolved by adding in the last line on the page after
8 "sensitive data," "otherwise a court -- the court and
9 court clerk must not allow access to the sensitive data
10 forms, except must compare information."

11 You see what I mean? When we use -- when
12 "limit" was used, it both created a class of people who
13 can look at that sensitive data form and limited it to
14 that class.

15 CHAIRMAN BABCOCK: Don't we fix that problem
16 by adding the word "only"?

17 HONORABLE SARAH DUNCAN: No.

18 HONORABLE STEPHEN YELENOSKY: Allow only.
19 Same as limit.

20 CHAIRMAN BABCOCK: Allow only. Justice
21 Bland.

22 HONORABLE JANE BLAND: Only is one of those
23 words that is really inherently ambiguous where you put it
24 in the sentence. It can mean only those people, it can
25 mean only those people and no others, which is I think

1 what we're trying to make it mean here.

2 HONORABLE STEPHEN YELENOSKY: It can mean
3 only allow, but not some other word.

4 HONORABLE JANE BLAND: Yeah. Exactly.
5 Allow.

6 HONORABLE STEPHEN YELENOSKY: It can modify
7 the verb or it can modify the --

8 HONORABLE SARAH DUNCAN: I agree. I think
9 what we've said here --

10 HONORABLE JANE BLAND: I think Justice
11 Duncan is right and we should take "only" out and say must
12 permit access to this group of people, must not permit
13 access to others except to confirm or deny, or negate, I'm
14 sorry.

15 HONORABLE SARAH DUNCAN: The way it reads
16 right now if I'm a clerk is I have to give this class of
17 people access.

18 HONORABLE STEPHEN YELENOSKY: That's right.

19 HONORABLE SARAH DUNCAN: It doesn't say
20 anything about who I may give access to or may not. It
21 just says I have to give access to these people.

22 HONORABLE TRACY CHRISTOPHER: Put it up in
23 (a).

24 MR. LOW: Sarah, what if you put "and none
25 other," no other, allow access to these and none other?

1 HONORABLE SARAH DUNCAN: Then it ought to
2 say "may."

3 HONORABLE TRACY CHRISTOPHER: Put it in (a).

4 HONORABLE STEPHEN YELENOSKY: Put it in (a)
5 and say "except for what's in (b)."

6 HONORABLE TRACY CHRISTOPHER: They have to
7 keep them separate and no one is allowed access except
8 this below.

9 CHAIRMAN BABCOCK: So how would you do that,
10 Tracy?

11 HONORABLE TRACY CHRISTOPHER: Well, I would
12 just say whatever our change is to (a), we have to keep --
13 they have to secure them, and "The court or court clerk
14 must not allow access" -- "must not allow public access to
15 the sensitive data forms except as outlined in 14.3(b)
16 below."

17 CHAIRMAN BABCOCK: Everybody agree with
18 that?

19 MR. HARWELL: Chip?

20 CHAIRMAN BABCOCK: Yeah, Andy.

21 MR. HARWELL: I hate to keep coming back to
22 this, but if you're going to sanction, 14.4, sanctions,
23 "Court may impose appropriate sanctions for a party's
24 violation of this rule," is the party the clerk or the
25 party of the person that's asking for the information, and

1 I think that's where it -- I think it becomes important to
2 have some type of documentation as to who that person was
3 that came in.

4 HONORABLE SARAH DUNCAN: You want a log.
5 You want a log of who you've given access to.

6 CHAIRMAN BABCOCK: Okay. Hang on. Let's
7 talk about whether we're going to --

8 MR. HARWELL: Something.

9 CHAIRMAN BABCOCK: Let's talk about 14.2(a).
10 Is everybody okay with the court or the clerk not allowing
11 access to a sensitive data form, except as set out in Rule
12 14.3(b)? Does that language solve the problem that we're
13 worried about?

14 HONORABLE TRACY CHRISTOPHER: It's more
15 affirmative.

16 CHAIRMAN BABCOCK: Excuse me?

17 HONORABLE TRACY CHRISTOPHER: I'm just
18 muttering.

19 MS. HOBBS: It solves the problem. I mean,
20 structurally the reason why it's drafted this way is (a)
21 is about storage of the document and (b) is about access
22 of the document, so that's why I would just defer -- I
23 mean, the way Judge Bland and Judge Duncan said it, it
24 made it kind of keep with the current structure of the
25 rule, is the only reason.

1 CHAIRMAN BABCOCK: Okay. So you put that
2 down in 14.3(b)? You could still put the same sentence
3 down there.

4 HONORABLE TRACY CHRISTOPHER: It's more
5 important to put it's not available to anybody first. It
6 shouldn't be at the end of the exception.

7 MS. HOBBS: Right.

8 HONORABLE TRACY CHRISTOPHER: It should be
9 first with the exception below.

10 HONORABLE STEPHEN YELENOSKY: Add an (a)(2).

11 MS. HOBBS: I would put it in the first
12 sentence of (b). It just needs to be reworked. It just
13 needs to be the first sentence of (b) needs to be no
14 access. The second seems to say these people can have
15 access, and the third sentence say "and the clerk can
16 compare."

17 CHAIRMAN BABCOCK: Okay. We know what we
18 want to do, so, Lisa, just --

19 HONORABLE TRACY CHRISTOPHER: Move on.

20 CHAIRMAN BABCOCK: -- get with whoever you
21 need to get with, and we'll do that.

22 All right. Let's move on to (c). "The
23 court or court clerk has no obligation to review a case
24 record for sensitive data." That, I assume, was at Andy
25 and Bonnie's --

1 HONORABLE TOM LAWRENCE: That's the only
2 part I do like.

3 CHAIRMAN BABCOCK: Surely this is not
4 controversial, or is it? Probably is? Anybody got any
5 complaint about this?

6 MR. HAMILTON: Shouldn't that be under 14.2?
7 Because it sounds like it's they don't have a duty to
8 review it to compare anything.

9 PROFESSOR CARLSON: Oh, you're right, Carl.

10 CHAIRMAN BABCOCK: Yeah. Yeah.

11 HONORABLE TOM GRAY: Well, we just put it
12 where it was based upon the captions, and based upon the
13 captions both then and now it still has to do with the
14 duty of the court and the court clerk.

15 CHAIRMAN BABCOCK: Yeah. What Carl's point
16 is, that they do have a duty under 14.3(b) and we don't
17 want to be confusing -- we don't want to give somebody
18 something in 14.3(b) and then take it away in 14.3(c).

19 HONORABLE SARAH DUNCAN: Can we just add
20 "except as provided in 14.3(b)"?

21 CHAIRMAN BABCOCK: Yeah. I think that
22 solves it.

23 HONORABLE SARAH DUNCAN: "Court and court
24 clerk have" --

25 CHAIRMAN BABCOCK: Good catch, Carl.

1 Anything else?

2 HONORABLE TOM GRAY: I'm still trying to
3 understand what you-all are working on.

4 CHAIRMAN BABCOCK: 14.3(c) says, "The court
5 or court clerk has no obligation to review a case record
6 for sensitive data."

7 HONORABLE TOM GRAY: That's right. That's
8 because you-all didn't go with my definition of case
9 record.

10 CHAIRMAN BABCOCK: "Except as provided in
11 14.3(b)." Any more discussion on that?

12 Okay. Let's go to 14.4, sanctions. "A
13 court may impose appropriate sanctions for a party's
14 violation of this rule." Yeah, Richard.

15 MR. MUNZINGER: Just again, the -- in all my
16 life I don't recall ever having had to read these Rules of
17 Judicial Administration in connection with a particular
18 case. Somehow or another the Rules of Civil Procedure
19 need to be amended to alert practitioners to the
20 provisions of these rules. If I file a motion for summary
21 judgment and I have an answer to an interrogatory that
22 includes this information and I attach it or if I take it
23 out of a deposition and stick it in here, now I'm subject
24 to sanctions for having violated this rule. We need to
25 alert practitioners to this problem.

1 Like Elaine's situation about the
2 injunction, that's going to obviously have to be modified
3 if an injunction is to contain this information. Somehow
4 or another we need to warn people that these rules have
5 changed on them.

6 MR. LOW: A lot of the court rule books
7 don't even contain administrative rules.

8 CHAIRMAN BABCOCK: Yeah. I think that -- I
9 think Lisa and Justice Hecht had told me that the Court is
10 more than a little sensitized to the fact that this rule
11 is going to impact the Rules of Civil Procedure, and I
12 think we're going to maybe offline work on that, but I
13 think that's a point. Justice Duncan and then Justice
14 Gray.

15 HONORABLE SARAH DUNCAN: I think "person"
16 needs to be used instead of "party."

17 CHAIRMAN BABCOCK: "For a person's violation
18 of this rule"? Judge Lawrence.

19 HONORABLE TOM LAWRENCE: What would be the
20 sanction in a criminal case?

21 CHAIRMAN BABCOCK: Go directly to jail, do
22 not pass go.

23 HONORABLE TRACY CHRISTOPHER: Yeah. I'm
24 pretty sure we can't sanction them, can we?

25 MR. LOW: Well, "person" could include -- I

1 mean, somebody could technically say the clerk or, I mean,
2 anybody, and really sanctions can be imposed only against
3 a party or an attorney.

4 HONORABLE STEPHEN YELENOSKY: How could you
5 go beyond a party?

6 HONORABLE TOM LAWRENCE: You wouldn't have
7 jurisdiction over them.

8 HONORABLE STEPHEN YELENOSKY: I can't
9 sanction him.

10 CHAIRMAN BABCOCK: Judge Lawrence, does the
11 judge have discretion to sanction a prosecutor who does
12 something bad?

13 HONORABLE TOM LAWRENCE: Well, there is
14 contempt of court, but, Judge Womack, I don't know what
15 else.

16 HONORABLE PAUL WOMACK: I don't know what
17 sanction -- what's the authority for sanctions in a civil
18 case other than --

19 CHAIRMAN BABCOCK: Well, there's a rule and
20 there's a statute and --

21 MS. HOBBS: And inherent.

22 CHAIRMAN BABCOCK: And inherent power.

23 HONORABLE PAUL WOMACK: I don't know any of
24 the first two for criminal cases, either one.

25 HONORABLE TOM LAWRENCE: I don't know if

1 contempt of court is really going to fly in something like
2 this.

3 CHAIRMAN BABCOCK: Well, it says "may" and
4 it says "appropriate," so if in a particular setting there
5 is no appropriate sanction then I assume the judge
6 wouldn't apply them, but Justice Duncan.

7 HONORABLE SARAH DUNCAN: Yeah, I don't want
8 to discount here inherent power. I mean, I don't --

9 MR. LOW: Right.

10 HONORABLE SARAH DUNCAN: I don't think I
11 have to have jurisdiction to enter a judgment against
12 someone to sanction them, and if -- and we have one
13 particular assistant district attorney in our district who
14 I can easily see creating a problem with one of these, and
15 I would certainly research it to determine whether I
16 thought I had inherent power to fine her, but if I thought
17 I did have inherent power to do it, I would do it and let
18 Judge Womack and his friends figure out whether I did it
19 appropriately or not, but don't discount inherent power.

20 HONORABLE STEPHEN YELENOSKY: You think you
21 could sanction a district clerk for violating the Rules of
22 Judicial Administration? It's not violating my order.

23 HONORABLE TOM LAWRENCE: Well, the Judicial
24 Conduct Commission could.

25 HONORABLE SARAH DUNCAN: I don't know if I

1 could, but I would like to have the rule to be flexible
2 enough to let me go research it and figure it out.

3 CHAIRMAN BABCOCK: Of course, if you have
4 inherent power you don't need a rule. Right?

5 MR. WATSON: Andy, you are on thin ice.

6 MR. HARWELL: I know it.

7 HONORABLE SARAH DUNCAN: It's better if it's
8 flexible enough to accommodate --

9 CHAIRMAN BABCOCK: If you want to have a
10 rule, you want it flexible enough to include inherent
11 power. Yeah, Justice Gray.

12 HONORABLE TOM GRAY: There was some
13 discussion in the subcommittee of whether or not we wanted
14 to expressly include the sanctions rule at all or leave it
15 to the more general discussion; and then after we had that
16 discussion and voted to include it, I was doing some other
17 research on Rule 166a(i); and that predated my tenure on
18 the committee, but I noted that in the comment to that
19 rule is where they did the sanctions language; and it just
20 says down at the end of the comment "a motion under
21 paragraph subsection (i) is subject to sanctions provided
22 by existing law" and then it does -- because it is a civil
23 rule identifies the statute and the rule. But whether
24 it's up there or not doesn't matter to me, but we did feel
25 that it was important to have something about sanctions.

1 CHAIRMAN BABCOCK: There are probably only
2 four or five people in this room that remember that debate
3 that spanned months, but there was a group of people on
4 this committee that very much wanted sanctions put in all
5 the rules, and there was a big philosophical debate about,
6 well, look, you've got specific sanctions rules, you've
7 got inherent authority, you've got contempt. There are
8 all sorts of ways for judges to get mad at people if they
9 want to, and it's a bad idea to put them in the rules, and
10 that comment was a compromise between those two competing
11 positions so it didn't go in the rule, but it did go in
12 the comment. Carl.

13 HONORABLE SARAH DUNCAN: That's not --

14 CHAIRMAN BABCOCK: No?

15 HONORABLE SARAH DUNCAN: It was in the rule
16 we sent to the Court. It wasn't in the rule that came out
17 of the Court. That's the Court's rule.

18 CHAIRMAN BABCOCK: That was Justice Baker
19 being sensitive to the committee's thought process on
20 that. It's a compromise the Court made.

21 HONORABLE SARAH DUNCAN: Right.

22 MR. HAMILTON: But at least the 166a comment
23 identifies the sanction rules or sections. This doesn't
24 tell you anything. If you're going to be subject to some
25 kind of a penal sanction I think we're entitled to know

1 what that's going to be.

2 HONORABLE TOM LAWRENCE: Yeah, that's my
3 problem. As I read this, I don't know what an appropriate
4 sanction is.

5 CHAIRMAN BABCOCK: Yeah. Well, okay. Yeah,
6 Judge Christopher.

7 HONORABLE TRACY CHRISTOPHER: Well, wouldn't
8 it really be better to instead of saying "an appropriate
9 sanction" would be to order the redaction of the
10 nonconforming court record and, you know, a sensitive
11 data -- require the sensitive data form to be filed? I
12 mean, you can't take the cart -- you know, whatever that
13 old saying is.

14 HONORABLE STEPHEN YELENOSKY: Can't unring
15 the bell?

16 HONORABLE TRACY CHRISTOPHER: Yeah, you
17 can't unring the bell.

18 HONORABLE STEPHEN YELENOSKY: Or unring the
19 cart, I don't know.

20 CHAIRMAN BABCOCK: You can't take the bell
21 off the cow pulling the cart.

22 HONORABLE TRACY CHRISTOPHER: That would be
23 an appropriate sanction. If a district attorney filed an
24 indictment that had a financial number in it instead of
25 half the number or something, the appropriate sanction

1 would be redaction of the offending document and the
2 filing of a sensitive data form.

3 CHAIRMAN BABCOCK: Justice Duncan.

4 HONORABLE TRACY CHRISTOPHER: I mean, what
5 are you going to do with something that doesn't comply?

6 HONORABLE SARAH DUNCAN: But what do you do
7 when you have somebody like Mike was talking about in this
8 case that he had where the intent is to harm the opposing
9 side, whether it's in a criminal case or a civil case, and
10 what do you do with a repeat violator who certainly knows
11 at this point the substance of the rule and chooses to
12 violate it?

13 HONORABLE STEPHEN YELENOSKY: That person
14 could also, though, just distribute the information. I
15 mean, as a party they're going to have it, right?

16 HONORABLE TRACY CHRISTOPHER: Right.

17 HONORABLE STEPHEN YELENOSKY: I mean, this
18 rule doesn't control that.

19 HONORABLE TRACY CHRISTOPHER: Put it on the
20 internet.

21 HONORABLE SARAH DUNCAN: No, and that's
22 another instance of -- we as a subcommittee kept having to
23 tell ourselves and make sure everybody else knows there is
24 a defined limit to what we can do in this rule, and we
25 simply can't control what people do outside of court

1 records, but we're making an effort to protect the
2 information that's in the records that we can control,
3 which is a very small amount of the information in the
4 world.

5 CHAIRMAN BABCOCK: I think there are a lot
6 of competing interests. On the one side, well, wait a
7 minute, we need to know what we can get sanctioned for,
8 you know, and therefore we ought to expand the rule. On
9 the other side, well, we've got all sorts of power anyway,
10 we don't need a rule. But this really cuts a nice balance
11 between the two competing positions, and it does put you
12 on notice that, hey, if you go willy-nilly and start
13 screwing around with this thing, you might be subject to
14 some problems.

15 On the other hand, it does say only
16 "appropriate," and so if the power of the court is found
17 by somebody not to exist then it's not appropriate and
18 it's not going to stand. But I think there are a lot more
19 important things to talk about here in this rule, so I
20 suggest we leave it as it is and move along. Buddy.

21 MR. LOW: Appropriate would mean under the
22 law and the facts.

23 CHAIRMAN BABCOCK: Right.

24 MR. LOW: And so how else can you put it?

25 CHAIRMAN BABCOCK: Yeah. Yeah. I mean, we

1 could spend a lot of time writing more, putting more into
2 it, but -- or with a flick of a pen we could delete it,
3 but I think it's best to keep it where it is, but let's
4 vote on this. How many people want to keep 14.4 as
5 written? Raise your hand.

6 How many opposed? Close vote, nine in
7 favor, eight against, Chair not voting, so we'll keep it.

8 Let's go to Rule 15.

9 HONORABLE TOM GRAY: Chip, there is actually
10 two other provisions that we need to talk about in
11 connection with Rule 14, if we may --

12 CHAIRMAN BABCOCK: Sure.

13 HONORABLE TOM GRAY: -- that you won't see
14 in your draft. One was a -- or they're both
15 afterthoughts, if you will, of the current drafts and so
16 they were not in what we presented. The first one has to
17 do with something that Andy has brought up several times
18 and was the reason really that I thought it might be worth
19 including, and it would be a provision of one sentence
20 that reads as follows: "The court clerk may obtain and
21 maintain a record of each person or entity to obtain a
22 copy of or access to the sensitive data form" or "to whom
23 that copy of or access to sensitive data form is
24 provided."

25 CHAIRMAN BABCOCK: Could you read that

1 again?

2 HONORABLE TOM GRAY: "The court clerk may
3 obtain and maintain a record of each person or entity to
4 whom a copy of or access to the sensitive data form is
5 provided."

6 HONORABLE SARAH DUNCAN: "Or" needs to be an
7 "and."

8 MR. LOW: Wouldn't you make a record,
9 because if there's not already one how are you going to
10 obtain it?

11 HONORABLE DAVID GAULTNEY: You make
12 authorization.

13 CHAIRMAN BABCOCK: You want to read it one
14 more time, Tom?

15 HONORABLE TOM GRAY: "The court clerk may
16 obtain and maintain a record of each person to whom a copy
17 of" -- it could read "a person or entity to whom a copy of
18 and access to the sensitive data form is provided." I
19 would have thought "or access to."

20 HONORABLE SARAH DUNCAN: "Access or copy."

21 HONORABLE TOM GRAY: "Copy of or access to
22 the sensitive data form is provided." And basically the
23 concept is, nothing more than allowing the clerk to
24 maintain the log of who has obtained copies or access to
25 the sensitive data form, basically for their own

1 protection if they feel like they need it.

2 CHAIRMAN BABCOCK: Okay. Wouldn't they have
3 inherent authority to do that anyway?

4 MR. HAMILTON: I was going to say, why do we
5 need a rule for that?

6 HONORABLE TOM GRAY: Well, what it actually
7 is, following up on what Andy was talking about, this
8 application process, if somebody comes in and they don't
9 want to do anything other than show their ID, I mean, does
10 the clerk have the authority at that point to take
11 possession of their ID and make a copy of it and maintain
12 it? And I'm not sure that that's all that clear. I
13 wouldn't have thought that a clerk would have felt
14 comfortable doing that without some express authorization.
15 If everybody thinks it's clear I'll --

16 MR. HARWELL: That's where the application
17 concept --

18 HONORABLE TOM GRAY: It may be some type of
19 application process, and you could Xerox whatever ID they
20 provided.

21 MR. HARWELL: I mean, I'm just one clerk.
22 Bonnie and Tom may --

23 CHAIRMAN BABCOCK: Tom had his hand up.
24 Maybe he had some thought on this.

25 HONORABLE TOM LAWRENCE: If someone refuses

1 -- oh, I'm sorry, go ahead.

2 CHAIRMAN BABCOCK: We have two Toms here.

3 HONORABLE TOM LAWRENCE: Go ahead.

4 MR. WILDER: Which Tom do you want?

5 CHAIRMAN BABCOCK: Clerk Tom. The -- we
6 believe that we have this power now because I use it, but
7 in this instance because it's a new type document, right
8 now today -- and, of course, I have counseled with my
9 judges on this to be sure they're happy with it -- we
10 require what's called a blue card for access to a file.
11 That's under the statute, and Bonnie could probably quote
12 it quicker than I, that we're supposed to maintain care,
13 custody, control and security of the records, and that's
14 pretty much what we operate under; however, it might not
15 be a bad idea to put this in here just because it's a new
16 kind of thing that we haven't done before.

17 CHAIRMAN BABCOCK: Judge Lawrence.

18 HONORABLE TOM LAWRENCE: Well, if someone
19 refuses to fill anything out or give you the information,
20 are you going to not give them the data form?

21 MR. HARWELL: That's what we do currently on
22 birth and death records and military discharge. You must
23 fill out the application, and by giving them an
24 application form you can say in there that there are
25 sanctions for someone who violates this rule or something

1 to that effect. That way --

2 CHAIRMAN BABCOCK: Mike, do have you a
3 thought about this?

4 MR. COFFEY: Well, if you're going to
5 collect my driver's license or if I give you my PI license
6 as proof of who I am, does that become sensitive data? I
7 mean, it's got a government-issued ID number that I carry
8 around. I mean, it's just a thought, if you're going to
9 start collecting --

10 HONORABLE STEPHEN YELENOSKY: Then you want
11 to have your ID to prove who you are and you can't get it
12 back.

13 HONORABLE SARAH DUNCAN: It's not a case
14 record.

15 MR. COFFEY: So that's going to be open?

16 PROFESSOR CARLSON: It's a long worm that
17 doesn't turn.

18 MR. HARWELL: It's just on a form which is
19 out of public --

20 HONORABLE SARAH DUNCAN: Yeah.

21 MR. COFFEY: If the party can access
22 records, I can get their ID, I can ask for a copy of the
23 people that accessed the sensitive data and get their
24 data. So you report a --

25 CHAIRMAN BABCOCK: Okay. What other little

1 surprise do you have for us?

2 HONORABLE TOM GRAY: That one I didn't think
3 was going to be controversial.

4 CHAIRMAN BABCOCK: Nothing will fail to be
5 controversial.

6 HONORABLE TOM GRAY: And the next one has
7 several sentences involved, so it could really be a
8 problem.

9 CHAIRMAN BABCOCK: What's the next one?

10 HONORABLE TOM GRAY: "The sensitive data
11 form shall not be included in the clerk's record. The
12 sensitive data form may be provided to the appellate court
13 only upon specific written order from the appellate court.
14 If the appellate court orders a copy of the sensitive data
15 form to be filed with the appellate court, the sensitive
16 data form must be maintained separately for the remainder
17 of the appellate court's file."

18 HONORABLE SARAH DUNCAN: Great.

19 CHAIRMAN BABCOCK: Okay. What's everybody
20 think about that?

21 HONORABLE SARAH DUNCAN: I think it's great.

22 HONORABLE JANE BLAND: I thought we decided
23 that it was a case record that would just be kept
24 separately from other things.

25 HONORABLE TOM GRAY: This is when it goes up

1 on appeal.

2 HONORABLE JANE BLAND: Didn't you say that
3 was not a case record?

4 HONORABLE TOM GRAY: I don't want this
5 sensitive data form at the appellate court.

6 HONORABLE JANE BLAND: Tom, what was your
7 first sentence? Wasn't it that it was not a case record?

8 MS. WOLBRUECK: Like exhibits.

9 HONORABLE TOM GRAY: I know, it's like
10 original exhibits. I don't want them. It says, "The
11 sensitive data form shall not be included in the clerk's
12 record."

13 HONORABLE STEPHEN YELENOSKY: Clerk's
14 record, what's the clerk's record?

15 HONORABLE SARAH DUNCAN: On appeal.

16 HONORABLE JANE BLAND: I don't see how you
17 can take out a record of the clerk from the clerk's
18 record.

19 CHAIRMAN BABCOCK: That's a conundrum there.

20 HONORABLE TRACY CHRISTOPHER: If the order
21 references the sensitive data form and you're reviewing
22 that order, you don't have a sensitive data form?

23 HONORABLE TOM GRAY: I bet you 999 times out
24 of a thousand I won't need it.

25 HONORABLE SARAH DUNCAN: And 999 times out

1 of a thousand we don't get the complete record anyway.

2 HONORABLE LEVI BENTON: They don't get the
3 record anyway.

4 HONORABLE SARAH DUNCAN: We're not Federal
5 court.

6 CHAIRMAN BABCOCK: Judge Bland.

7 HONORABLE JANE BLAND: If they want to
8 designate part of the record and only send part of the
9 record to the court of appeals -- by they I mean the
10 parties on appeal want to designate part of the record and
11 send it up on appeal, that's fine, but we should -- if
12 they want the whole record, they should be able to send
13 the whole record including the sensitive data form up to
14 the appellate court.

15 HONORABLE TOM GRAY: I respectfully
16 disagree.

17 CHAIRMAN BABCOCK: Okay. Lisa.

18 MS. HOBBS: I think I'm going to speak on
19 behalf of the Supreme Court clerk and hope he doesn't hate
20 me later, but he said to me that he did not want sensitive
21 data sheets in the record because he's hoping one day to
22 just get an electronic version of the record from the
23 trial court and then he can immediately put that online,
24 and he doesn't want to have to flip through the record and
25 see what information is sensitive or not. I mean, I'm

1 just expressing his view.

2 CHAIRMAN BABCOCK: Judge Peeples.

3 HONORABLE TRACY CHRISTOPHER: Making all the
4 district and county clerks do their work.

5 HONORABLE JANE BLAND: I know.

6 HONORABLE TRACY CHRISTOPHER: Golly.

7 HONORABLE DAVID PEEPLES: Why not let the
8 court of appeals ask for it if it needs it?

9 MS. HOBBS: That's the rule.

10 HONORABLE STEPHEN YELENOSKY: That's what he
11 said.

12 CHAIRMAN BABCOCK: Justice Bland.

13 HONORABLE JANE BLAND: I think there is a
14 problem with carving out a piece of a record.

15 HONORABLE TOM GRAY: But it's already in a
16 different place.

17 HONORABLE JANE BLAND: No, it may or may not
18 be in a different physical location, and presumably if it
19 was in an electronic form it would be filed in such a way
20 that the electronic form, there would only be certain
21 access to it, whether by passcode or however you want to
22 do it. But to say that, you know, we're going to keep a
23 piece of the record somewhere else because the appellate
24 court clerk and the Texas Supreme Court clerk don't want
25 to have to handle the record to me makes absolutely no

1 sense.

2 HONORABLE TOM GRAY: We've got the same rule
3 right now with regard to original exhibits.

4 MS. HOBBS: Don't they charge like a dollar
5 a page to create the record?

6 HONORABLE SARAH DUNCAN: Yeah, and we now
7 have authority to sanction people for including too much
8 of the record.

9 MR. WATSON: The rule explicitly carves out
10 trial briefs or briefs in support of motion for summary
11 judgment. I mean, we do it all the time. I mean, does
12 anybody else share that concern?

13 HONORABLE LEVI BENTON: I didn't hear the
14 first part of what you said.

15 MR. WATSON: The rules explicitly carve out
16 other things such as trial briefs are not to go up, briefs
17 in support of motions for summary judgment are not to go
18 up. This is nothing new. I can't believe anybody else
19 shares the concern.

20 CHAIRMAN BABCOCK: Well, but -- Judge Bland.

21 HONORABLE JANE BLAND: The parties can
22 designate the record on appeal if they want to, but
23 otherwise why wouldn't we send up the record, which would
24 include anything in the record?

25 CHAIRMAN BABCOCK: Justice Duncan.

1 HONORABLE SARAH DUNCAN: I will speak on
2 behalf of Justice Hecht since he's not here, because this
3 is usually his pitch. Because of storage problems. We
4 simply don't have room to store all of these pieces of
5 paper, and that's why we want only the record that we need
6 to decide the appeal. Now, a sensitive data form is only
7 one piece of paper.

8 HONORABLE TRACY CHRISTOPHER: Exactly.

9 HONORABLE SARAH DUNCAN: So I don't -- I
10 don't think our clerk will necessarily appreciate the
11 responsibility of making sure that he has gotten all of
12 the sensitive data forms out of the record and put them in
13 the safe, but he will do that if he's required to do that,
14 but what I'm trying to figure out is, Tom, what is that
15 one case in a hundred --

16 HONORABLE TOM GRAY: When we would ever --

17 HONORABLE SARAH DUNCAN: -- in which you're
18 ever going to need any of this information? I mean, I can
19 decide a custody case without knowing the Social Security
20 numbers of the children. I can decide a bank fraud case
21 without knowing the bank account number.

22 HONORABLE TOM GRAY: It's the one where the
23 attorney gets sanctioned for doing something with the
24 sensitive data.

25 HONORABLE SARAH DUNCAN: I don't understand

1 why --

2 HONORABLE TOM GRAY: I don't think we would
3 ever need it.

4 HONORABLE SARAH DUNCAN: If the appellate
5 court needs the sensitive data form, they can get it. I
6 don't even think we need a rule to say we can get it. I
7 think we can get it under the existing appellate rules,
8 but I think it's a good idea to say it doesn't
9 automatically go up because that does put a burden on the
10 clerks to pull it out and keep it secure.

11 CHAIRMAN BABCOCK: Justice Bland.

12 HONORABLE SARAH DUNCAN: When chances are
13 nobody is going to need it.

14 CHAIRMAN BABCOCK: Justice Bland.

15 HONORABLE JANE BLAND: My concern is that
16 the entire record goes to the court of appeals except this
17 piece of paper which gets left behind.

18 HONORABLE SARAH DUNCAN: No, it doesn't. It
19 doesn't. I can't -- the only cases in which the entire
20 record comes to us are those unfortunate cases in which we
21 have pro se litigants, and they designate every single
22 subpoena, notice of deposition, and everything, but we
23 don't get the full record. You don't get the full record.

24 CHAIRMAN BABCOCK: Judge Gray, can you read
25 your rule again, please?

1 HONORABLE TOM GRAY: "The sensitive data
2 form shall not be included in the clerk's record. The
3 sensitive data form may be provided to the appellate court
4 only upon specific written order from the appellate court.
5 If the appellate court orders a copy of the sensitive data
6 form to be filed with the appellate court, the sensitive
7 data form must be maintained separately from the remainder
8 of the appellate court's file."

9 CHAIRMAN BABCOCK: So if it's a wrongful
10 garnishment and one of the parties wants the sensitive
11 data form to be included in the court record under this
12 rule they would not have the right or any standing at all
13 to get that document before the appellate court.

14 HONORABLE SARAH DUNCAN: Sure. They file a
15 motion.

16 MS. HOBBS: They file a motion in the
17 appellate court.

18 CHAIRMAN BABCOCK: And they would have to
19 file a motion in the appellate court and then the
20 appellate court would have to say, "Yeah, send it up."

21 PROFESSOR CARLSON: That's a good trade-off.

22 CHAIRMAN BABCOCK: Judge Christopher finds
23 the concept amusing.

24 HONORABLE TRACY CHRISTOPHER: No, I'm sorry.
25 I was laughing at something else. Jane says it will be

1 struck for a defective certificate of service.

2 PROFESSOR CARLSON: That's a different rule.

3 HONORABLE SARAH DUNCAN: In Houston maybe.

4 HONORABLE JANE BLAND: I'm surprised that
5 applies to tell you for the record.

6 CHAIRMAN BABCOCK: Okay. Here we go.
7 Everybody that likes judge -- Justice Gray's appellate
8 rule raise your hand.

9 Everybody opposed?

10 HONORABLE TRACY CHRISTOPHER: Richard,
11 you're supposed to be for full access.

12 MR. MUNZINGER: I'm not that paranoid.

13 CHAIRMAN BABCOCK: Passes by a vote of 10 to
14 3.

15 What else? Judge Lawrence.

16 HONORABLE TOM LAWRENCE: While we're
17 talking about appeal -- and I'm going to continue to raise
18 unanswerable JP questions until you except us from this
19 rule. It's a trial de novo upon an appeal from justice
20 court --

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE TOM LAWRENCE: -- either civil or
23 criminal, so does that mean the process would start over
24 again new at the county court?

25 CHAIRMAN BABCOCK: You mean in terms of

1 filing a sensitive data form?

2 HONORABLE TOM LAWRENCE: Yeah. It's a trial
3 de novo, everything is moot.

4 CHAIRMAN BABCOCK: Yeah, I think so.

5 MR. WATSON: Nothing goes up.

6 HONORABLE TOM LAWRENCE: As a rule you would
7 have to start all over again.

8 CHAIRMAN BABCOCK: I think you would have to
9 start all over again. You would. Justice Duncan.

10 HONORABLE SARAH DUNCAN: I liked what
11 somebody over there, maybe it was Richard, said hours -- I
12 would say decades ago, but I'm sure it's only hours, that
13 we have a 14.1 -- it would now be (d) to make sensitive
14 for purposes of our rule "any other data defined as
15 sensitive by state or Federal law."

16 CHAIRMAN BABCOCK: Okay. Let's finish with
17 Justice Gray's surprises first.

18 HONORABLE TOM GRAY: My only other surprise
19 was the one before that that I think got laughed down
20 about that --

21 HONORABLE SARAH DUNCAN: I thought you only
22 had two.

23 CHAIRMAN BABCOCK: Let's be sure we have a
24 full record vote on the laughter.

25 HONORABLE TOM GRAY: That was the one, "The

1 court clerk may obtain and maintain a record of each
2 person or entity to whom a copy of or access is given to
3 the sensitive data form."

4 CHAIRMAN BABCOCK: You're right. We didn't
5 take a vote on that. How many people think that's a good
6 idea? Raise your hand.

7 And how many are opposed? That passes by a
8 vote of 15 to 1. Okay. So we have those two additions.
9 Any more surprises?

10 HONORABLE TOM GRAY: Not on Rule 14. And
11 Rule 14 was the easy one.

12 HONORABLE SARAH DUNCAN: Right.

13 CHAIRMAN BABCOCK: I know. All right.
14 Sarah, you want to add 14.1(d)?

15 HONORABLE SARAH DUNCAN: Uh-huh.

16 CHAIRMAN BABCOCK: All right. And what do
17 you want 14.1(d) to say?

18 HONORABLE SARAH DUNCAN: Any other data --
19 is it data or data, really?

20 CHAIRMAN BABCOCK: Is it --

21 HONORABLE SARAH DUNCAN: Tomato, tomato.

22 CHAIRMAN BABCOCK: Is it Grenada or Grenada?

23 HONORABLE SARAH DUNCAN: "Any other data
24 defined as sensitive by state or Federal law."

25 PROFESSOR CARLSON: What does that mean?

1 HONORABLE SARAH DUNCAN: I don't know.

2 PROFESSOR CARLSON: I mean, is that if SEC
3 says something is sensitive?

4 CHAIRMAN BABCOCK: Richard Munzinger.

5 MR. MUNZINGER: I don't know that I would
6 say "defined as sensitive." I would say "protected from
7 disclosure."

8 MR. HARWELL: That's what Buddy came up
9 with.

10 MR. LOW: Yeah, or I would say any other
11 data that would be sensitive under that definition or
12 something.

13 MR. HARWELL: You said "under court or
14 statute."

15 MR. LOW: In other words, the state law or
16 Federal law might define it as, quote, "sensitive." It
17 might not call it that.

18 CHAIRMAN BABCOCK: You're putting a burden
19 on litigants to know the whole panoply of law and telling
20 them to put it on a form that they have to file?

21 MS. HOBBS: But it has to be data. It can't
22 be something that's just a confidential document.

23 MR. LOW: Right.

24 MS. HOBBS: Because we're dealing with
25 numbers and stuff, not documents.

1 CHAIRMAN BABCOCK: What would be an example
2 of something that is data defined by state or Federal law
3 to be sensitive?

4 HONORABLE SARAH DUNCAN: Well, the reason --
5 what attracted my attention when that was said was, you
6 know, the Legislature is very interested in this topic
7 right now, and what if they decide, the Legislature
8 decides, that date of birth -- if they pass a statute that
9 says it is sensitive data under Texas law.

10 MS. HOBBS: I think we would have to amend
11 the rule.

12 MR. LOW: Or a schoolteacher, you can't get
13 certain information about a schoolteacher or something.

14 MR. WATSON: Or medical diagnosis.

15 MR. LOW: You never know what they're going
16 to say.

17 HONORABLE SARAH DUNCAN: Medical diagnosis.

18 CHAIRMAN BABCOCK: Well, we do have a rule
19 that we're coming up with. I mean, we're coming up to,
20 15.4(a), that talks about not permitting access to stuff
21 that's made confidential by law.

22 MR. LOW: Restricted by law or court order.

23 CHAIRMAN BABCOCK: By law or court order.

24 HONORABLE SARAH DUNCAN: Just a thought.

25 Because I think Lisa is right, we're going to have to

1 revisit this rule many times, I think, if the Legislature
2 gets as excited about sensitive data as they have gotten
3 about interlocutory appeals.

4 CHAIRMAN BABCOCK: Well, that keeps us in
5 business anyway. Buddy.

6 MR. LOW: In HIPAA, anybody who understands
7 HIPAA --

8 CHAIRMAN BABCOCK: Raise your hand.

9 MR. LOW: Yeah. And what you can give out
10 there, what they make sensitive and information about drug
11 and alcohol abuse and so many things, you get to reading
12 it, there is a lot out there we might not be aware of.

13 CHAIRMAN BABCOCK: Yeah, Carl.

14 MR. HAMILTON: I wanted to add something to
15 14.1, too, and that is that the sensitive data as listed
16 is not or does not include that information which is
17 essential to a proper adjudication of the case. If that's
18 the issue, it involves the credit card number, the bank
19 account number, or something else that we're fighting
20 over, but --

21 HONORABLE SARAH DUNCAN: But you're going to
22 have it. You're going to have it. You as a party.

23 MR. HAMILTON: I understand. I'm saying you
24 don't have to file that sensitive data form in that event.

25 HONORABLE SARAH DUNCAN: Oh, you want to get

1 around the sensitive data form?

2 MR. HAMILTON: Yeah. If that's the subject
3 matter that you have to adjudicate then you don't have to
4 file this sensitive data form on that.

5 CHAIRMAN BABCOCK: Okay.

6 MR. HAMILTON: I think that ought to be in
7 14.2.

8 CHAIRMAN BABCOCK: 14.2 or 1?

9 MR. HAMILTON: Well, I don't care where it
10 goes.

11 HONORABLE TOM LAWRENCE: Who would make that
12 determination, the court?

13 CHAIRMAN BABCOCK: Okay. I'm keeping a list
14 of things that we need to talk about. One of the things
15 that I've got down on my list is orders, how do we deal
16 with orders that may have to by law or otherwise contain
17 some of this sensitive data. I've got the issue of the JP
18 and the municipal courts. May I put that and Sarah's
19 thing in this list of things we've got to come back to,
20 because otherwise we're never going to vet this whole rule
21 and we've got to vet this whole rule and leave by 11:00
22 tomorrow so I can go to the Final Four.

23 HONORABLE LEVI BENTON: And your pick is?

24 CHAIRMAN BABCOCK: Illinois. Yeah, Tracy.

25 HONORABLE TRACY CHRISTOPHER: If we're ready

1 to talk about Rule 15 --

2 CHAIRMAN BABCOCK: Yes.

3 HONORABLE TRACY CHRISTOPHER: -- my
4 suggestion is, in an effort to move things along, is that
5 we move specifically to 15.4, because what records we
6 exclude from remote access will probably be sort of the
7 biggest sticking point, not the whole procedure.

8 CHAIRMAN BABCOCK: Yeah, I do agree that
9 that's a huge issue here and --

10 HONORABLE TRACY CHRISTOPHER: I mean, in 14
11 it was right up there at No. 1.

12 CHAIRMAN BABCOCK: Right.

13 HONORABLE TRACY CHRISTOPHER: But it's way
14 down here in 15.

15 CHAIRMAN BABCOCK: Yeah. That's a good
16 point, Judge. Any objection, Judge Gray, or Judge Duncan,
17 who is not here?

18 HONORABLE TOM GRAY: Well, I think that
19 probably taking 15.4 and 15.5 first will work, and
20 frankly, that's one of the things that -- yes. I think
21 that will be fine.

22 CHAIRMAN BABCOCK: Okay. The last time we
23 were here Hatchell talked about how there was an effort in
24 the previous draft to make courthouse access and remote
25 access coextensive, but the consequence of that was that

1 some information, which we have now gone down through in
2 14.1, would be withdrawn from both, from both courthouse
3 access and from remote access.

4 Now there has been added -- now you have
5 deviated from that template and now have information
6 withdrawn from courthouse access and remote access and in
7 addition withdrawn a laundry list of things from remote
8 access. Am I right about that? That's what's happened
9 historically?

10 MS. HOBBS: Only (g), (h), and (i) were
11 added. Well, (a), by necessity was added.

12 CHAIRMAN BABCOCK: Well, (a) you would have,
13 but --

14 MS. HOBBS: But the only thing the
15 subcommittee -- that's different from the 2-25 draft and
16 the 3-30 draft substantively is (g), (h), and (i).

17 CHAIRMAN BABCOCK: Okay. You're right.

18 HONORABLE TRACY CHRISTOPHER: But we never
19 voted on any of those before.

20 MS. HOBBS: No.

21 CHAIRMAN BABCOCK: No, we never dealt with
22 that at all. Okay. Well, let's dig into it. Is there
23 any -- well, do you want to say anything preliminarily
24 about it, Judge Gray?

25 HONORABLE TOM GRAY: There is one embedded

1 problem that I don't know if it's best to address on the
2 front end or the back end, so I'm going to address it on
3 the front end and see how it --

4 MS. HOBBS: Do I get a vote?

5 HONORABLE TOM GRAY: Pardon?

6 MS. HOBBS: Do I get a vote?

7 HONORABLE TOM GRAY: Yes. Where do you
8 think it will be?

9 MS. HOBBS: I think it would be better on
10 the back end. I just think it's going to confuse things,
11 if I'm thinking of the right one.

12 HONORABLE TOM GRAY: I'm sure we're thinking
13 about the same one, and so it was a problem that Lisa and
14 I had talked about after the subcommittee's draft came out
15 and I was looking at it, and she knows, and so I'm going
16 to defer to her presentation on this.

17 CHAIRMAN BABCOCK: Okay. Now we can't
18 concentrate on anything else.

19 MS. HOBBS: Because I think it's a procedure
20 issue and not a substantive issue.

21 CHAIRMAN BABCOCK: What is it that they're
22 hiding from us? Okay. Judge Gray, go ahead, sorry.

23 HONORABLE TOM GRAY: The only one that's
24 probably -- and actually it may not be in 15.4 is the --
25 in several places the word "party" needs to be

1 substituted -- I mean "person" needs to be substituted for
2 "party," and it may not actually come up in 15.4. No, it
3 doesn't come up till 15.5, so if you're going to start
4 with 15.4, just launch into them.

5 MR. MUNZINGER: Chip, is the definition of
6 case record in 15.2 still the same as the one we have in
7 the draft?

8 HONORABLE TOM GRAY: Which draft are you
9 looking at?

10 CHAIRMAN BABCOCK: On the one that's
11 redlined.

12 MR. MUNZINGER: Sir?

13 CHAIRMAN BABCOCK: There is a draft that has
14 the redlining, and that's the most recent.

15 HONORABLE TOM GRAY: You have the most
16 recent.

17 MR. MUNZINGER: Thank you.

18 CHAIRMAN BABCOCK: Okay. Yeah, Lisa.

19 MS. HOBBS: Before we talk about what is
20 going to be excluded from remote access I would like to
21 point out that the subcommittee made a major -- had a
22 different policy than the Texas Judicial Council, and the
23 Judicial Council's philosophy was that if we required a
24 subscriber system or some sort of register-with-me before
25 you see the court records, then we are less concerned with

1 what is in those records, and so our list of items to be
2 excluded from records would be shorter.

3 The subcommittee decided that we want to
4 give our clerks the option of a subscriber system or not,
5 and I think with that their list -- because they were
6 uncomfortable with some of this being on the internet for
7 anybody without knowing who was looking at it, their list
8 became longer. So I think I just want to kind of set the
9 tone for the issue in hopes of aiding this discussion
10 about that.

11 HONORABLE TOM GRAY: And I guess to follow
12 up on that, Chip, as far as the general comment before we
13 get started on the details, you almost have to divorce
14 yourself from the discussion we just had about sensitive
15 data. This is completely fundamentally different. This
16 is remote access.

17 CHAIRMAN BABCOCK: Right.

18 HONORABLE TOM GRAY: It is not about at this
19 point anything defined as sensitive data. The other thing
20 is, remember, this doesn't touch bulk distribution.
21 That's a different problem entirely. This is remote
22 access. This is from Bangladesh.

23 CHAIRMAN BABCOCK: Yeah. Can I suggest one
24 friendly amendment to what you just said? 15.4(a) would,
25 of course, subsume sensitive data under 14.1.

1 MS. HOBBS: That's right. You could not put
2 sensitive data on the internet.

3 HONORABLE TOM GRAY: Yeah, by definition
4 you're right, but --

5 CHAIRMAN BABCOCK: But other than that,
6 you're right, this is separate.

7 HONORABLE TOM GRAY: This is just a
8 different animal than the concept of sensitive data.

9 CHAIRMAN BABCOCK: Right. Okay.

10 HONORABLE TOM GRAY: Are you going to read
11 it or am I?

12 CHAIRMAN BABCOCK: Well, let's -- is there
13 anything about the preamble that is controversial?
14 "Notwithstanding anything in 15.3, a court clerk must not
15 allow remote access to the following case records."
16 Anything controversial about that?

17 Okay. (a) I wouldn't think would be
18 particularly controversial, "a document to which access is
19 restricted by law or court order," but maybe it is. Carl.

20 MR. HAMILTON: I just have a question.
21 People who are authorized to get sensitive data under
22 14.3 --

23 CHAIRMAN BABCOCK: Right.

24 MR. HAMILTON: -- can they access that by
25 remote?

1 HONORABLE TOM GRAY: Yes. There is a
2 provision if the clerk wants to allow it. I don't
3 remember which part of the rule it's under. 15.7(a), for
4 example.

5 MR. WILDER: It says if you're a party in
6 the case you can have access. You can't be excluded from
7 the record, but that presents a big problem.

8 MR. HAMILTON: So wouldn't that be
9 inconsistent with 15.4(a)?

10 CHAIRMAN BABCOCK: Wouldn't think so because
11 it wouldn't be restricted by law. It would be authorized
12 by law. You're authorized by this rule.

13 HONORABLE TOM GRAY: You're authorized to
14 have access to your own sensitive data form.

15 CHAIRMAN BABCOCK: Right.

16 MR. HAMILTON: Okay.

17 CHAIRMAN BABCOCK: Anything else about
18 15.4(a)? Yeah, Jeff.

19 MR. BOYD: I'm surprised the clerks aren't
20 speaking up more on this. They can't put anything -- they
21 can't allow remote access to anything that's restricted by
22 law, and I'm thinking what does that mean? It's the same
23 issue we talked about before. Restricted by what law? I
24 mean, I'm just looking at the Public Information Act and
25 all the exceptions under the Public Information Act, and

1 does that mean anything that fits within any of those
2 exceptions cannot be --

3 CHAIRMAN BABCOCK: The Public Information
4 Act doesn't apply to the judiciary.

5 MR. BOYD: Okay. It restricts information
6 by law, though.

7 CHAIRMAN BABCOCK: It restricts access to
8 information from a governmental body, but it does not --
9 it's not the same thing as saying that you can't -- I
10 mean, I could put all that stuff in a court record if I
11 wanted to.

12 MR. BOYD: The PIA doesn't apply to -- all
13 right. So then any law applicable to court records? Is
14 that what we're talking about?

15 CHAIRMAN BABCOCK: I think so. I think
16 we're talking about if there is a --

17 MR. BOYD: Or HIPAA.

18 CHAIRMAN BABCOCK: Or HIPAA. If a statute
19 says --

20 MR. BOYD: The courts can't --

21 CHAIRMAN BABCOCK: -- you may not reveal,
22 you know, X, Y and Z, then it wouldn't be appropriate to
23 put it --

24 MR. BOYD: Well, if it says the courts may
25 not or if a person has a proprietary or privacy interest

1 in X, Y and Z? If it says the latter then does that apply
2 or not, because I think that's sort of what the PIA says,
3 for example.

4 CHAIRMAN BABCOCK: Well, but the PIA is
5 different than this. Well, Judge Gray, I mean, you tell
6 us. You were the draftsman on it.

7 MS. HOBBS: The point is what's closed at
8 the courthouse can't be allowed on the internet.

9 CHAIRMAN BABCOCK: Right.

10 MS. HOBBS: That's the point. If we're not
11 saying it right then let's redraft it, but the point is
12 very simple, what's closed at the courthouse can't be on
13 the internet.

14 CHAIRMAN BABCOCK: That's what I was trying
15 to say.

16 MS. HOBBS: Right.

17 MR. BOYD: Well, how about any document to
18 which access is not -- think of a better way to say it.

19 CHAIRMAN BABCOCK: Judge Christopher.

20 HONORABLE TRACY CHRISTOPHER: I just don't
21 think we need it. It's apparently causing problems, and
22 you know, if there is some law out there that says you
23 don't, you know --

24 CHAIRMAN BABCOCK: Don't file it.

25 HONORABLE TRACY CHRISTOPHER: Don't

1 disseminate this, then everyone should be following that
2 law. You know, I think it's unnecessary.

3 CHAIRMAN BABCOCK: Yeah, Buddy.

4 MR. LOW: But what about tomorrow? I mean,
5 if we pass this rule and then the Legislature passes
6 something, you're talking about (a), restricted by law or
7 court order, okay, and then that's not in our list here,
8 but it is restricted. Then the lawyers should put that on
9 their confidential list and so forth, and they're allowed
10 to do that under this; whereas, we don't know what may be
11 tomorrow, so and maybe we haven't included everything
12 that's included now, but it wouldn't prevent a lawyer who
13 is smarter than we are from saying, "Wait a minute, I know
14 about this statute," and he should be able to include
15 that.

16 HONORABLE TRACY CHRISTOPHER: How is the
17 clerk going to know that?

18 CHAIRMAN BABCOCK: Jeff is right. The way
19 it's written could lead to endless fights.

20 MR. BOYD: "Cannot allow remote access to
21 any document to which access would otherwise not be
22 allowed." "Direct access would not otherwise" -- "would
23 otherwise not be allowed."

24 MS. HOBBS: What about "a document to which
25 public access is not allowed"?

1 CHAIRMAN BABCOCK: How about that?

2 MR. BOYD: A lot closer.

3 CHAIRMAN BABCOCK: Yeah, Carl.

4 MR. HAMILTON: This whole section is really
5 up to the clerk, isn't it? It's up to what the clerk puts
6 on the system that's available for remote access.

7 CHAIRMAN BABCOCK: Andy.

8 MR. HARWELL: I can see a challenging issue
9 for the clerks will be -- and I guess I didn't think about
10 it, about the sensitive data form being available by
11 remote access, because if we go with what we voted on
12 earlier about having a record of who sees that or who is
13 an applicant or what have you, that it's going to be
14 difficult for us to do that. I mean, we would almost have
15 to have a clerk, a deputy, sitting there monitoring who is
16 coming in to look at those records, and then I guess I
17 just didn't think about that enough when we were meeting.
18 Did you, Bonnie? Did you think about that sensitive data
19 being accessed remotely?

20 MS. WOLBRUECK: I think that would be up to
21 the clerk if they choose to do so.

22 MR. HARWELL: I mean, that would be the only
23 sensitive thing, except when we go down further here we
24 say that -- well, we'll get to that.

25 CHAIRMAN BABCOCK: Okay. Tom.

1 MR. WILDER: To speak to that for a minute,
2 this issue of turning somebody on and then turning them
3 off again if they're remote, if you're a party to the case
4 and you can see this document remotely, how do I turn them
5 off? Because once you scan the document it becomes
6 much -- you're going to have to sit there and monitor each
7 case.

8 And let's say, Chip, you had a case, but
9 once your case is adjudicated then I have to figure out
10 how to turn that off where nobody else can see it. I
11 mean, you can't do just individual parties.

12 MS. HOBBS: Well, Tom, you might not be able
13 to in your system, but the point was that there may be a
14 system out there that you would be able to do that. For
15 instance, you give a party a password and they have access
16 to all of your records or their records, and you are able
17 to do it, and then when the case is over the password is
18 dead. And we don't know whether you can or can't do it,
19 but we wanted to make sure that if you had the system to
20 do it you could do that.

21 MR. WILDER: You could give them a temporary
22 password. We're, in fact, doing that with criminal
23 attorneys right now under court order. I mean, we crafted
24 the court order. But if you're talking about the general
25 subscriber clients out there, that's going to be difficult

1 to be cutting them on and off. So as long as you leave it
2 up to the clerk, that's fine with me.

3 MS. HOBBS: Exactly. Because, Judge
4 Christopher, aren't you doing something like this with
5 your MDL cases? Are you trying to work with Lexis on
6 getting some system where everybody can look at all the
7 same documents or something?

8 HONORABLE TRACY CHRISTOPHER: Well, I've
9 kind of got two things going. One is hopefully if Harris
10 County has found the money to get the management going so
11 that we can start electronic filing, I'm going to go with
12 them, but otherwise I'm going to perhaps look for
13 something with Texas Online. At this point it's going to
14 just be service --

15 MS. HOBBS: Okay.

16 HONORABLE TRACY CHRISTOPHER: -- on all the
17 parties, although I put my own orders on the internet for
18 people to look at.

19 MS. HOBBS: I think that in Beaumont they
20 have something like that --

21 HONORABLE TRACY CHRISTOPHER: Right.

22 MS. HOBBS: -- where parties can get online
23 with a password, and at any given time you could kill that
24 password.

25 CHAIRMAN BABCOCK: Going back to 15.4(a),

1 Judge Gray, did you use the word "document" instead of
2 "case record" by design? Because document, it seems to
3 me, is at the heart of Jeff's problem that when you're
4 talking about documents, there are a whole bunch of
5 documents that might be exempted under the Public
6 Information Act, but once they're out there they might
7 also be put into a court record, and really aren't what
8 we're dealing with here is a --

9 HONORABLE TOM GRAY: I guess to shorten
10 the -- I don't think so. I don't recall it. Do you
11 recall any discussion about why we used "document" instead
12 of "record"?

13 CHAIRMAN BABCOCK: If you said "a case
14 record to which public access is restricted by law or a
15 court record" then you would capture what is
16 unquestionably protected, but you wouldn't be so broad as
17 to wander over into other areas.

18 HONORABLE SARAH DUNCAN: You also just
19 created a conflict because the access to a sensitive data
20 form is restricted by law.

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE SARAH DUNCAN: And so under your
23 rule you can't put it -- you can't get it from remote
24 access.

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE SARAH DUNCAN: Why do you want to
2 do that? If I can look at it in the courthouse, why can't
3 I look at it remotely?

4 CHAIRMAN BABCOCK: Sensitive data form you
5 cannot look at at the courthouse.

6 HONORABLE SARAH DUNCAN: Sure I can. I just
7 said I could. My hypothetical is I am one of the class of
8 people that is entitled to look at the sensitive data
9 form. Okay?

10 CHAIRMAN BABCOCK: Okay.

11 HONORABLE SARAH DUNCAN: If I go to the
12 courthouse. If I can look at it at the courthouse, why
13 can't I look at it sitting in my office in Bangladesh on
14 my computer?

15 CHAIRMAN BABCOCK: I see your point. Yeah.
16 "A case record to which" --

17 HONORABLE SARAH DUNCAN: "Public access is
18 denied." If a document is filed under seal the only
19 people who get to look at it are the people who filed it
20 and the judge.

21 CHAIRMAN BABCOCK: Okay. So --

22 MR. LOW: But, Chip, if you say a case
23 record, that means the whole record. Do you mean that the
24 whole record has to be or any part of a case record?

25 CHAIRMAN BABCOCK: You know, there is a

1 lot --

2 HONORABLE SARAH DUNCAN: Case record is
3 defined in 15.2(a).

4 CHAIRMAN BABCOCK: Case record is defined,
5 and case record means "a document filed in a matter before
6 a court."

7 MR. LOW: All right. All right.

8 CHAIRMAN BABCOCK: So something is filed
9 under seal because it's a trade secret, and the judge
10 says, "Fine, you know, we can't be having the trade
11 secret," and you wouldn't want that available at the
12 courthouse, you wouldn't want it available on the
13 internet.

14 MR. LOW: I agree. I was using it in the
15 sense that we now use case record, means any part of the
16 filed -- okay.

17 CHAIRMAN BABCOCK: Okay. Carl.

18 MR. HAMILTON: What we're working on here is
19 a court order, it's an administrative order, right? 14,
20 administrative order?

21 CHAIRMAN BABCOCK: Well, it's a rule.

22 MR. HAMILTON: Well, is it a rule or an
23 order?

24 HONORABLE SARAH DUNCAN: Rule of Judicial
25 Administration.

1 MR. HAMILTON: Huh?

2 MS. HOBBS: Rule of Judicial Administration.

3 MR. HAMILTON: Just a rule then.

4 CHAIRMAN BABCOCK: Yeah.

5 MS. HOBBS: It's one of a body of rules.

6 MR. HAMILTON: So that wouldn't be a court
7 order?

8 HONORABLE SARAH DUNCAN: It's adopted in a
9 court order.

10 MR. HAMILTON: If it's a court order then
11 this document restricts access to the sensitive data form,
12 so then if it's a court order you couldn't get it under
13 (a).

14 CHAIRMAN BABCOCK: How about if you say "a
15 case record to which public access is restricted by
16 law" -- that doesn't work.

17 MR. BOYD: What if -- there are some
18 subsections of 15.4 that we may have to deal with
19 separately, but generally speaking what Sarah is saying is
20 15.4 should just say, "Notwithstanding anything in Rule
21 15.3, a court may allow remote access to case records only
22 if and to the extent that they are accessible" -- what's
23 the right word -- "in person, directly at the courthouse."
24 Is that what you're saying?

25 HONORABLE SARAH DUNCAN: No.

1 MR. BOYD: I thought you were saying if I
2 can get it at the courthouse then I ought to be able to
3 get it remotely.

4 HONORABLE SARAH DUNCAN: I said that for
5 sensitive data forms. I didn't say that for everything.

6 MR. BOYD: Okay.

7 HONORABLE SARAH DUNCAN: Some of the
8 subsections under 15.4 are available to public access at
9 the courthouse.

10 CHAIRMAN BABCOCK: That's where I'm off
11 track on this. 15.4(a) -- 15.4(a) you shouldn't be able
12 to get either place, either at the courthouse --

13 HONORABLE SARAH DUNCAN: Right.

14 CHAIRMAN BABCOCK: -- or remotely.

15 HONORABLE SARAH DUNCAN: Right.

16 CHAIRMAN BABCOCK: Okay. And that's fine.
17 We want to do that. We don't want to overdo it, but we
18 want to do that.

19 HONORABLE SARAH DUNCAN: And I think the way
20 to do it is you say "a case record by which public access
21 is denied by law or court order."

22 CHAIRMAN BABCOCK: Okay. Yeah. That would
23 get it. Okay.

24 MR. BOYD: Why didn't you say that 10
25 minutes ago?

1 HONORABLE SARAH DUNCAN: I did.

2 CHAIRMAN BABCOCK: She did. She just didn't
3 say it loud enough.

4 MR. HAMILTON: What's the wording?

5 CHAIRMAN BABCOCK: "A case record to which
6 public access is denied by law or court order." "By law
7 or court order." Okay. So everybody okay with that?

8 HONORABLE TOM GRAY: Did you say "denied" or
9 "restricted"?

10 HONORABLE SARAH DUNCAN: "Denied."

11 CHAIRMAN BABCOCK: "Denied," because you
12 want to allow the parties to get their sensitive data
13 forms. Tom.

14 HONORABLE TOM LAWRENCE: Well, the
15 technology of this is going to be what? You're going to
16 have to have some special access or password to get that?

17 CHAIRMAN BABCOCK: No, no, no. No, no, no.
18 The example is, the example is I'm a plaintiff in a trade
19 secrets case, and I have to describe with particularity
20 for the judge my trade secrets. I'm not going to do that
21 if the guys in Bangladesh can say, "Oh, we can make a
22 cheap widget because now we know how to do it." So that's
23 going to be filed under seal under the appropriate
24 procedures, and so public access is going to be denied
25 that document.

1 HONORABLE TOM LAWRENCE: But are you talking
2 about allowing some parties to have access to that
3 document over the internet?

4 HONORABLE SARAH DUNCAN: Uh-huh.

5 MS. HOBBS: That's a separate issue.

6 CHAIRMAN BABCOCK: That's a separate issue.

7 HONORABLE TOM LAWRENCE: That's what I
8 thought we were talking about. Okay.

9 HONORABLE SARAH DUNCAN: If it's a sealed
10 document --

11 HONORABLE TOM LAWRENCE: Okay.

12 HONORABLE SARAH DUNCAN: -- if public access
13 is denied to the document, nobody can get it over the
14 internet.

15 HONORABLE TOM LAWRENCE: Okay.

16 HONORABLE SARAH DUNCAN: Even the person who
17 filed it.

18 HONORABLE TOM LAWRENCE: Okay. Good, I
19 agree with that.

20 CHAIRMAN BABCOCK: Judge Gray.

21 HONORABLE TOM GRAY: My concern now with the
22 use of the word "denied" is, is it denied only upon the
23 determination of the trial court that your trade secret is
24 worthy of protection, or is it denied when it is filed
25 under seal and that restriction denial, if you will, is

1 sought? In other words, do you have a time period in
2 there that you've got a problem because denied seems to
3 imply that a decision has been made?

4 MS. HOBBS: Is that not an (h) problem,
5 though?

6 HONORABLE TOM GRAY: An (h) problem?

7 MS. HOBBS: Uh-huh, 15.4(h).

8 CHAIRMAN BABCOCK: It could be an (h)
9 problem, but not necessarily, but the people trying to
10 protect information have a responsibility for protecting
11 it, so if I'm dumb enough to file my trade secrets, you
12 know, and allow a window of publicness until a judge
13 decides that they can be filed under seal then I'm an
14 idiot, and so my client ought to come get me.

15 MR. LOW: Temporary seal it.

16 CHAIRMAN BABCOCK: You can do it temporarily
17 or you wouldn't file it. You would file a motion to be
18 able to prospectively file it under seal.

19 HONORABLE LEVI BENTON: Well, what --

20 THE REPORTER: Can't hear. Can't hear.

21 HONORABLE LEVI BENTON: I'm sorry. What
22 about if you claim such privilege and then the court says,
23 "Mr. Babcock, I reviewed your trade secrets information in
24 camera. I'm overruling the claim of privilege" and from
25 the bench I hand them to Mr. Meadows.

1 CHAIRMAN BABCOCK: You know, "I think,
2 Judge, please stay your order until I can, you know, get
3 Justice Bland to, you know, tell you once again what an
4 idiot you are."

5 HONORABLE LEVI BENTON: There is such a case
6 out there. Out of the 215th.

7 CHAIRMAN BABCOCK: I'm going to cite that
8 one.

9 HONORABLE LEVI BENTON: In re: NITLA.

10 HONORABLE JANE BLAND: Not by me.

11 HONORABLE LEVI BENTON: Not by me, either.

12 CHAIRMAN BABCOCK: But if you say, "No, I'm
13 sorry" then I'm going to have to run across down to South
14 Texas and try to get an order, but you can't fix that with
15 a rule. You can't fix that with a rule.

16 Is this language okay then, "a case record
17 to which public access is denied by law or court order"?
18 Does that work for everybody?

19 HONORABLE DAVID GAULTNEY: I would argue
20 that a court order is the law, but I think it adds some
21 clarification that you might have a protective order.

22 CHAIRMAN BABCOCK: And it also adds it in a
23 situation that is most likely to come up, because that's
24 where the action is here, at least on the civil side,
25 because it's protective orders, it's stuff that people

1 have legitimate right to protect from public scrutiny.

2 HONORABLE JAN PATTERSON: Perhaps you ought
3 to say "by court order or law" and have law come last, "or
4 other law."

5 HONORABLE SARAH DUNCAN: I like that.

6 MR. HAMILTON: Does "court order or law"
7 include Rule 76?

8 CHAIRMAN BABCOCK: Sure.

9 MS. HOBBS: Yes.

10 CHAIRMAN BABCOCK: Okay. Okay, great. Now,
11 Judge Gray, am I right that (b) through (i) --

12 HONORABLE DAVID GAULTNEY: He left the room
13 for a minute.

14 CHAIRMAN BABCOCK: Okay. Well, let's take a
15 10-minute break.

16 (Recess from 3:39 p.m. to 3:58 p.m.)

17 CHAIRMAN BABCOCK: Okay. Except for
18 subparts (b) through (i), Justice Gray, confirm for me,
19 except for (h) we are talking about categories of
20 documents that would be available to people who went down
21 to the courthouse, but we are talking about restricting
22 access to these category of documents on the internet,
23 right?

24 HONORABLE TOM GRAY: With one exception that
25 Carl just pointed out to me.

1 CHAIRMAN BABCOCK: What's that exception?

2 HONORABLE TOM GRAY: If it is a document
3 that is sealed under 176a --

4 CHAIRMAN BABCOCK: Under 76a you mean?

5 HONORABLE TOM GRAY: 76a. It would be
6 available to one party at the courthouse and not the
7 other. But that is a --

8 CHAIRMAN BABCOCK: No, that's not right.

9 HONORABLE LEVI BENTON: That's not right.

10 CHAIRMAN BABCOCK: Even 76a documents are
11 available to all parties.

12 MR. LOW: But temporary sealing might not
13 be.

14 CHAIRMAN BABCOCK: Temporary sealing might
15 not be.

16 HONORABLE TOM GRAY: Okay. Okay.

17 CHAIRMAN BABCOCK: Although even that I'm
18 not sure.

19 HONORABLE TOM GRAY: Let's see, documents
20 submitted in camera, that's only going to be available to
21 one party.

22 CHAIRMAN BABCOCK: In camera? Well, that
23 could be true. That could be true.

24 MR. WATSON: Production requests for the
25 court to review.

1 CHAIRMAN BABCOCK: Attorney-client, or
2 arguably attorney-client. Sure. Right.

3 HONORABLE TOM GRAY: So, yes, the general
4 answer to your question is yes, there may be that
5 exception with regard to something under (h).

6 CHAIRMAN BABCOCK: Okay. And the -- are
7 there specific -- where do we get the list of (b) through
8 (i)? I guess that came from the task force report, right?

9 HONORABLE TOM GRAY: I think Lisa could be
10 more specific, but I think that is correct. There may
11 have been one or two that were generated by our group.
12 Specifically I'm thinking about (g) because of some guy on
13 the committee that was worried about criminal exhibits as
14 much as anything else.

15 CHAIRMAN BABCOCK: Okay.

16 MS. HOBBS: The (b), (c), (d), (e), and (f)
17 are recommendations from the Texas Judicial Council; (g)
18 was an addition by the subcommittee; (h) was in response
19 to the comments from this committee during the March
20 meeting that the definition of case records should track
21 76a as closely as possible, but we found it was easier to
22 do the case record definition like we did and then take
23 some of those subparts in 76a and exclude them from remote
24 access, so it was kind of a combination of your -- this
25 committee's recommendation is why that's in there.

1 CHAIRMAN BABCOCK: I think (h) would be
2 subsumed by (a), but I don't see any harm in having (h)
3 there, and it may clarify certain things.

4 HONORABLE SARAH DUNCAN: Well, but the
5 reason for (a) -- never mind. Okay.

6 CHAIRMAN BABCOCK: I don't know if we want
7 to take these in order, but I think there are some that
8 are less controversial than others. For example, Family
9 Code proceedings.

10 HONORABLE SARAH DUNCAN: Can we just take
11 them in order?

12 CHAIRMAN BABCOCK: Huh?

13 HONORABLE SARAH DUNCAN: Can we just take
14 them in order?

15 CHAIRMAN BABCOCK: Yeah, we can if you want.

16 HONORABLE SARAH DUNCAN: I do, please.

17 CHAIRMAN BABCOCK: Okay. (b), "medical,
18 psychological, or psychiatric record, including an expert
19 report based on a medical, psychological, or psychiatric
20 record." The reason for allowing this to be available at
21 the courthouse but not on the internet is?

22 HONORABLE TOM GRAY: No. You have to ask
23 that the other way, the reason for not allowing it on
24 the --

25 CHAIRMAN BABCOCK: Internet.

1 HONORABLE TOM GRAY: -- internet, or if it
2 is available at the courthouse, and most of this is
3 probably not going to be available at the courthouse under
4 this category, but if it is, we still didn't feel like it
5 was appropriate.

6 CHAIRMAN BABCOCK: Okay.

7 HONORABLE SARAH DUNCAN: And the reasoning,
8 our reasoning, I'm sure members of the subcommittee will
9 correct me if I'm wrong, but my reasoning was that because
10 of the practical obscurity that attaches to things filed
11 in the courthouse that you're not necessarily going to
12 have once they're put up on the internet. I mean, I would
13 consider my medical, psychological, or psychiatric records
14 to be fairly personal; and, you know, if I have to
15 disclose them because I'm involved in a lawsuit then I
16 have to disclose them, but that doesn't mean I want them
17 available to anybody with an internet connection and a
18 personal computer for casual reading. And that's the
19 reasoning on -- I can't say all of these. On several of
20 these.

21 CHAIRMAN BABCOCK: Okay. Let's stick with
22 (b). Typically this type of information if it's in
23 discovery would be subject to a protective order, but --
24 and so it wouldn't be available either way, but for some
25 reason the record has risen to the level of importance

1 that it is now an exhibit at a trial. Judge Christopher.

2 HONORABLE TRACY CHRISTOPHER: You don't do
3 enough PI cases. There is no protective order on this
4 medical information generally, and it comes up all the
5 time.

6 CHAIRMAN BABCOCK: Okay.

7 HONORABLE TRACY CHRISTOPHER: It gets
8 attached to motions to compel, it gets attached to motions
9 to exclude, it gets discussed in depositions. It is
10 everywhere in most of our civil personal injury cases, and
11 I just have a real problem with excluding all of that from
12 remote access. First of all, the clerks have said they're
13 not really sure that they're going to be able to allow the
14 parties to look at their own file and keep other people
15 away from it. They're not sure they have the technology
16 now, and obviously people to the lawsuit want to be able
17 to look at the records remotely.

18 Things like 4590i reports, which now have a
19 new number, people want to be able to see what report is
20 sufficient and what's not sufficient. You wouldn't be
21 able to do that unless you went down to the courthouse. I
22 just -- I can certainly see why some psychiatric records
23 might need to be protected or why some records involving
24 rape or sexually transmitted diseases or AIDS or, you
25 know, something of that nature; but, you know, did

1 so-and-so's lung cancer -- was it caused by exposure to
2 this chemical, which, you know, is in -- absolutely in the
3 motions for summary judgment, in all of the exhibits, I
4 mean, why that shouldn't be available remotely I don't
5 understand, and it would be a nightmare for the lawyers to
6 have to stamp every single page "excluded from remote
7 access."

8 CHAIRMAN BABCOCK: Okay. What other
9 comments? Judge Gray.

10 HONORABLE TOM GRAY: Well, they don't have
11 to stamp every single page. Only the caption on the first
12 page of whatever is filed.

13 HONORABLE TRACY CHRISTOPHER: See, that
14 makes it even worse. We're going to exclude the whole
15 motion because of one page of medical that gets attached?

16 HONORABLE TOM GRAY: Yeah.

17 CHAIRMAN BABCOCK: Wait a minute. You would
18 exclude the motion?

19 HONORABLE TOM GRAY: Uh-huh.

20 CHAIRMAN BABCOCK: Buddy.

21 MR. LOW: Chip, I mean, to list this with
22 psychological, psychiatric, I mean, psychological records
23 or mental health records are by statute protected.
24 Alcohol, drug, and so forth, HIV and those, so when I -- I
25 read this initially to mean medical records pertaining to

1 those things, but apparently this means any medical
2 record. I mean, was that -- and I can understand why it
3 shouldn't be, but some people may want a person's medical
4 reports to see the physical condition, hiring them or
5 something like that.

6 HONORABLE SARAH DUNCAN: Then they can go to
7 the courthouse.

8 MR. LOW: I mean, I understand.

9 HONORABLE SARAH DUNCAN: Part of what we
10 struggled with in the subcommittee, and I think the
11 Legislature is struggling with and the Court is going to
12 struggle with, is I don't think this is necessarily -- I
13 think the question almost becomes are you going to have
14 remote access or are you not, because if a lot of this
15 information is available by remote access then I think
16 we're going to see, like in the states that Lisa was
17 talking about earlier, the Legislature is just going to
18 say, "You're not going to have remote access."

19 MS. HOBBS: And I think it's interesting
20 that the Federal law, when I go to the doctor now, I
21 can't -- nobody can even see my sign-in name at the
22 doctor's office anymore, and so there is a policy by the
23 Federal government anyway that says some of this stuff is
24 sensitive and even my name on my sign-in sheet at the
25 doctor's office is sensitive, but the judiciary without

1 having this would be saying, yeah, but you're holding that
2 record online, who cares.

3 CHAIRMAN BABCOCK: Well, I was taken aback
4 by Judge Gray saying that the motion itself would be not
5 accessible because there was one of these things attached.

6 MS. HOBBS: It's a practical thing. The
7 clerks aren't going to --

8 HONORABLE SARAH DUNCAN: That's right.

9 MS. HOBBS: If it's filed on there the clerk
10 is going to click that button as off.

11 CHAIRMAN BABCOCK: What I was trying to
12 suggest inartfully was that if there is something like a
13 psychiatric record that is -- that is highly confidential,
14 it might get put under seal, but if I'm a plaintiff and I
15 put at issue in court my medical condition or my
16 psychological condition, and those records are used to
17 advance my position in court and are tendered to a judge
18 so that he or she can make a decision, make a ruling, one
19 cannot understand the ruling unless they see what the
20 ruling is based upon; and if we are going to withdraw from
21 public scrutiny -- and I understand that it's not
22 withdrawn from public scrutiny at the courthouse, but
23 we're going to make it -- we're going to keep this
24 whatever this doctrine of inscrutability is, then I wonder
25 if that's good public policy. I understand that there is

1 this dichotomy that it's available to the public but not
2 on the internet, but I don't buy into that I guess.
3 That's my problem. Judge Bland.

4 HONORABLE JANE BLAND: I think the
5 difference is if it gets transmitted over the internet or
6 viewed remotely it can be copied and distributed easily
7 remotely as well, and so you're talking about people's
8 private information, and I'm thinking in particular of
9 photographs. I mean, there are a lot of photographs that
10 are admitted into evidence that really have -- you know,
11 people would be horrified if they found out that a million
12 copies of them were floating around the world on the
13 internet, and so, you know, photographs, autopsy
14 photographs, photographs showing a medical condition,
15 plastic surgery before and after photographs, you know,
16 just all kinds of things that people just wouldn't want
17 distributed remotely.

18 CHAIRMAN BABCOCK: Okay. What else? Any
19 other comments about this? Carl.

20 MR. HAMILTON: Well, I'm intrigued by
21 Sarah's question of whether we even want to have remote
22 access to the public. Do other states allow that with the
23 public or just with the parties?

24 MS. HOBBS: Well, I mean, I've tried to sum
25 it up, but it's hard to. I mean, pretty much my summary

1 of it ended up just being a restatement of what's already
2 in the Judicial Council report, but generally Texas is
3 more open at the courthouse than all of these states are,
4 and most of these states, and I think I can say that
5 pretty -- I mean, there is not a lot of people having
6 remote -- like widespread remote access.

7 I mean, to the extent courts have adopted
8 rules in other states, they are severely limiting what is
9 going on the internet, if not outright forbidding remote
10 access, and the ones that are allowing remote access tend
11 to allow remote access to court-created records and not
12 party filings.

13 HONORABLE NATHAN HECHT: And one of the ways
14 it's limited is a practical way, which is that the rule
15 will be, well, you can put all the records you have on the
16 internet except you can't ever reveal this kind of
17 information; and since the clerk has no physical way, no
18 practical way of going through and culling all that out,
19 then you just can't put anything on the internet. If you
20 wanted to take the time to go through page by page then
21 you could comply with the rule, but since you can't, the
22 rule effectively bars doing that.

23 MS. HOBBS: Yeah. So even the ones that
24 seem to have a liberal remote access policy, when you
25 really get right into their law they're not putting a lot

1 up on the internet.

2 HONORABLE NATHAN HECHT: The Federal system
3 is pushing the other way. The Federal system is doing
4 something like what we're doing with a strong presumption
5 that there should be more access rather than less.
6 Although I have to say that when they get to the level of
7 frustration that we're at or maybe a good bit below that,
8 they just give up and say, "Well, we're just not going to
9 put that on." I don't think they have tried to go through
10 and separate it out as carefully as we're doing it here,
11 but there is -- they started with a strong idea that
12 whatever is at the courthouse ought to be on the internet.

13 MS. HOBBS: But they do have a subscriber
14 system that gives them some comfort on what's in there.

15 HONORABLE NATHAN HECHT: Right.

16 MR. HAMILTON: Of course, as you said, it
17 puts a tremendous burden on both the lawyers and the clerk
18 to figure out what can go on there and what can't.

19 CHAIRMAN BABCOCK: Buddy.

20 MR. LOW: You know, HIPAA, there is 176
21 pages, and I've read it a lot, and it's true that if you
22 file a lawsuit you waive what information is relevant only
23 to that suit, but there's other information that's not,
24 and HIPAA is real restrictive on giving out any medical
25 information, including that you're even a patient of that

1 doctor. And so I'm afraid HIPAA could be read to mean
2 that it's just merely necessary for this lawsuit and these
3 parties and not for the world. I think that there would
4 be certain information, and I can't segregate what it may
5 be, but, I think --

6 CHAIRMAN BABCOCK: If that's true it's going
7 to be --

8 MR. LOW: I would probably have to go along
9 -- I would go along with the way they've drawn it.

10 CHAIRMAN BABCOCK: If what you say is true,
11 though, it's going to be picked up by our 15.4(a).

12 MS. HOBBS: I think Buddy may be talking
13 about a policy choice, though, rather than whether or not
14 it's really restricted, but it's a policy conversation
15 that the feds consider this stuff essentially private as
16 much as possible.

17 CHAIRMAN BABCOCK: Yeah. Okay. Any more
18 comments on 15.4(b)? All right. How many people are in
19 favor of 15.4(b), "a medical, psychological, or
20 psychiatric record, including an expert report based on a
21 medical, psychological, or psychiatric record"? Raise
22 your hand.

23 How many opposed? By a vote of 18 to 1 that
24 will pass.

25 (c), "a pretrial bail or presentence

1 investigative report." Discussion on this. Judge Womack,
2 did you have anything you'd like to --

3 HONORABLE PAUL WOMACK: Only as I said in my
4 letter, that the presentence investigation report is
5 already restricted from public access at the courthouse
6 over the counter. It certainly doesn't hurt to have it in
7 here, I suppose.

8 CHAIRMAN BABCOCK: So that would be picked
9 up by (a) and this subparagraph (c). Okay.

10 HONORABLE NATHAN HECHT: But why have it in
11 twice?

12 CHAIRMAN BABCOCK: Why have it twice?
13 Richard.

14 MR. MUNZINGER: The judge has addressed the
15 presentence investigation report, but what about pretrial
16 bail reports? Are they --

17 HONORABLE PAUL WOMACK: No, they're not.

18 MR. MUNZINGER: See, that troubles
19 me because -- well, this is remote access, but a citizen
20 is put in jail or a bond is going to be set for a citizen.
21 Do his fellow citizens have an interest in knowing why the
22 bond is so high or so low? And I am concerned about
23 restricting access to pretrial bail reports. Good god,
24 we're taking people's freedom away if they don't put up a
25 million dollars. Why? Well, because he carried a

1 pro-life sign in front of Teddy Kennedy's house. Well,
2 put it at 10 billion.

3 You know, you need to be careful about the
4 kind of thing that you're concealing from people. This is
5 a free country where people say and do things, and if
6 somebody doesn't like it, you're going to put them in jail
7 and set bail.

8 CHAIRMAN BABCOCK: The *LA Times* wants to do
9 a survey, a national survey, on bail in 10 southern
10 states, or Texas and Virginia. Judge Gray.

11 HONORABLE TOM GRAY: I think, and I'm
12 somewhat speculating here, but remember that we do have a
13 presumption of innocence until proven guilty; and in a
14 pretrial bail report you're going to have a defendant's
15 financial information access in there; and although the
16 account information may be protected under the earlier
17 rule, the valuation of assets wouldn't be; and what in
18 effect you're going to be requiring if you don't limit the
19 remote access is you're going to have a person who has
20 been accused of a crime, their financial information
21 available for all the world to see; and so very definitely
22 you've got a trade-off; and we drew the line at rather
23 than no access to it, no remote access to it.

24 CHAIRMAN BABCOCK: Judge Christopher.

25 HONORABLE TRACY CHRISTOPHER: Oh, I'm sorry,

1 no.

2 CHAIRMAN BABCOCK: You were stretching?

3 HONORABLE TRACY CHRISTOPHER: I was
4 gesturing.

5 CHAIRMAN BABCOCK: Okay. If we took
6 presentence investigation report out as redundant and left
7 "(c), a pretrial bail report," would that be the
8 appropriate way to do it?

9 HONORABLE TOM GRAY: It works for me if
10 we're comfortable that the presentence investigation
11 report -- yes.

12 CHAIRMAN BABCOCK: Okay. Anybody else?

13 HONORABLE DAVID PEEPLES: What do we gain by
14 doing that? Sometimes it's helpful to have a list right
15 there in front of you that pretty well summarizes
16 everything, and even if it is redundant it might do some
17 good, and it certainly, it seems to me, does no harm.

18 CHAIRMAN BABCOCK: Okay. Which way do we
19 want to go?

20 HONORABLE TOM LAWRENCE: Leave it all in.

21 CHAIRMAN BABCOCK: Leave it all in?

22 MR. LOW: Leave it all in.

23 CHAIRMAN BABCOCK: Anybody dissent from
24 that? Okay. We'll leave it in. How many people are in
25 favor of subpart (c), raise your hand?

1 How many opposed? By a vote of 15 to 1 that
2 passes.

3 (d), "a statement of reasons or defendant
4 stipulations in a criminal case, including attachments."

5 HONORABLE TOM GRAY: The comment with regard
6 to this as far as the subcommittee is this is as it came
7 to us from the Judicial Council, and I don't think we
8 tweaked it at all. And we all said, "What is a statement
9 of reasons," and Lisa said, "I think that's something to
10 do with criminal cases from the Federal system," so that's
11 the closest we knew it, and I think with Judge Womack
12 here, if he confirms that, I don't know that that needs to
13 be in there because it just doesn't exist in Texas law,
14 and I don't want to confuse anybody.

15 CHAIRMAN BABCOCK: Judge Womack?

16 HONORABLE PAUL WOMACK: Yeah. That's in my
17 letter. That term is just not used, and I know it is used
18 in a couple of different contexts on the Federal side, one
19 of which would make sense for this purpose.

20 CHAIRMAN BABCOCK: Yeah. You say -- so I
21 think can we take statement of reasons out as something
22 that just wouldn't be applicable under Texas law?

23 HONORABLE TOM GRAY: Or is it something that
24 may actually wind up in a Texas case if they decided they
25 didn't have jurisdiction for some reason and it wound up

1 back over in a Texas case?

2 HONORABLE PAUL WOMACK: Short answer would
3 be no.

4 CHAIRMAN BABCOCK: Yeah, Judge Duncan.

5 HONORABLE SARAH DUNCAN: I've never
6 understood why these would be excepted from remote access.
7 Can somebody explain that to me?

8 CHAIRMAN BABCOCK: Judge Womack has the same
9 point in his letter.

10 MS. HOBBS: I think the Judicial Council
11 thought that there were a lot of witness -- hearsay
12 witness statements and stuff like that in them. I don't
13 know. That was my understanding of why they didn't want
14 it in there.

15 CHAIRMAN BABCOCK: Well, Judge Womack says
16 why would defendant stipulations be excluded? 97 percent
17 of felony convictions are the result of guilty pleas. I
18 mean, almost all of them are based on judicial confessions
19 and stipulation of evidence, which are routinely included
20 in clerk records.

21 HONORABLE TOM GRAY: Well, I don't read a
22 lot of those in connection with the guilty pleas, but when
23 you get further down you get into the evidence exhibits
24 where I had some problems, but if the same type
25 information is included in the stipulations of evidence as

1 to who the victim is and what the defendant did to the
2 victim and the victims' names and all the nine yards that
3 go with that, I would have a problem with all of that on
4 there, publicly available.

5 CHAIRMAN BABCOCK: Judge Duncan.

6 HONORABLE SARAH DUNCAN: Judge Womack would
7 know this better than I. I have never read one that was
8 that detailed.

9 HONORABLE TOM GRAY: And, see, the few that
10 I have read have not had that level of detail in it.
11 Usually it's almost the elements of the offense.

12 HONORABLE SARAH DUNCAN: It's just you
13 basically recite the charge in the indictment, right?

14 HONORABLE PAUL WOMACK: Well, it can run the
15 gamut, and the basic one is "I agree that I committed
16 every act alleged in the indictment," but in Bexar County,
17 unless things have changed very recently, they staple an
18 inch thick police offense report.

19 HONORABLE SARAH DUNCAN: Yeah, we do have
20 that.

21 MS. HOBBS: And that makes sense because I
22 remember it was Polly Spencer was the one who consulted
23 with some criminal --

24 HONORABLE SARAH DUNCAN: We did have that.
25 That's true.

1 HONORABLE PAUL WOMACK: And so I wasn't
2 aware of what your goal was here. Are you looking for
3 information that's going to be digitized? Because that's
4 not going to be --

5 CHAIRMAN BABCOCK: The goals are fluid.

6 HONORABLE PAUL WOMACK: I understand these
7 are high level policy decisions that are being made in the
8 public interest, but those things would certainly be
9 available in the clerk's --

10 HONORABLE SARAH DUNCAN: Yeah.

11 HONORABLE PAUL WOMACK: -- record, so it's
12 not that they're going to be -- you're not doing away
13 with --

14 HONORABLE SARAH DUNCAN: They're not going
15 to be sealed.

16 HONORABLE PAUL WOMACK: It's not a question
17 of complete privacy. You're just talking about the
18 Bangladesh investigator --

19 HONORABLE SARAH DUNCAN: Right.

20 HONORABLE PAUL WOMACK: -- I guess seems to
21 be the paradigm.

22 HONORABLE SARAH DUNCAN: Yeah, and I have
23 seen some of those offense reports that I think Tom and I
24 at least would agree we don't really --

25 HONORABLE TOM GRAY: I don't care for them.

1 HONORABLE SARAH DUNCAN: -- want to see on
2 the internet. There could be some really awful
3 illegitimate purposes put to some of that information.

4 CHAIRMAN BABCOCK: Buddy.

5 MR. LOW: But, Judge, in some criminal
6 cases, I know I have been involved in a couple of them
7 where we stipulated if John Jones were called to testify
8 he would say so-and-so and so-and-so and so forth, to save
9 from calling a witness, and I'll stipulate, and quite
10 often that's the whole case, and you let the judge kind of
11 decide the case. Is that -- I mean, I consider that a
12 stipulation of the defendant. It's really a stipulation
13 of the parties.

14 HONORABLE PAUL WOMACK: Yeah, I wasn't sure
15 what stipulation of the defendant is since you can't
16 unilaterally stipulate by your --

17 MR. LOW: Can't do it by yourself, but we do
18 stipulate, both parties agree to stipulate if so-and-so
19 were called he would testify to this, he would say this,
20 he would say that.

21 CHAIRMAN BABCOCK: Okay. Yeah, Judge
22 Patterson.

23 HONORABLE JAN PATTERSON: Well, I would say
24 that (d) as it's written is fairly unintelligible, but I
25 also think it's subject to great mischief and that the

1 same reasons we open up our court system in criminal
2 trials for all to see and that they are public trials is
3 the reason why we ought not to limit what's available in
4 criminal trial, particularly a plea.

5 HONORABLE PAUL WOMACK: Yeah, if you
6 consider it's been the public policy in Texas since 1931
7 that people couldn't be convicted of felonies on their
8 mere plea of guilty, there had to be some evidence, and as
9 I said, in 97 percent of the cases this is going to be it.
10 So to the extent that we want there to be a public
11 understanding of why this conviction took place, I don't
12 see why this would not be -- would not --

13 HONORABLE SARAH DUNCAN: Remember, this is
14 not public access. This is only remote access.

15 HONORABLE PAUL WOMACK: Right.

16 CHAIRMAN BABCOCK: Okay. Any other
17 comments? Richard Munzinger.

18 MR. MUNZINGER: I appreciate the distinction
19 between public and remote, but I once again wonder why the
20 remote access is forbidden but the public access is not.
21 It doesn't make sense to me. I can have it, but I can't
22 take advantage of the appropriate technology or the
23 technology that allows me to have it as I write my article
24 for the *Los Angeles Times* in Los Angeles rather than fly
25 to New Deal or wherever it might be in Texas to go look at

1 the court's records. I just don't understand it, and I
2 have a problem about restricting public information,
3 obviously.

4 HONORABLE JAN PATTERSON: I was a Federal
5 prosecutor, and this line makes no sense to me.

6 CHAIRMAN BABCOCK: Okay. Judge Lawrence.

7 HONORABLE TOM LAWRENCE: Yeah, I'm not sure
8 what a statement of reasons would be in Texas, but
9 defendant's stipulation, if you're talking about the plea,
10 I would think that would certainly be on there. If you're
11 talking about an evidence stipulation where we stipulate
12 to such and such, you're going to have to prove it up, and
13 I don't see why that can't be on there. The police
14 report, this doesn't say anything about that, but are we
15 talking about having police reports, which are not
16 necessarily court records, are they, on the internet?

17 HONORABLE SARAH DUNCAN: If they're attached
18 to the stipulation, yeah.

19 HONORABLE TRACY CHRISTOPHER: If they're
20 filed in your case file, they're a court record, they're a
21 case record.

22 CHAIRMAN BABCOCK: It seems to me that the
23 interests on (d) are a little different than they were on
24 -- certainly on (b), and that is that this is primarily
25 protecting someone who has either stipulated to or

1 otherwise been convicted of a crime.

2 HONORABLE SARAH DUNCAN: No. That's not the
3 intent.

4 CHAIRMAN BABCOCK: It may not be the intent,
5 but that's the effect of it.

6 HONORABLE SARAH DUNCAN: Well, that is an
7 effect of it. The intent is to --

8 HONORABLE TOM GRAY: Protect a victim. I
9 mean, that's really what --

10 HONORABLE SARAH DUNCAN: And not just the
11 victim, but to preclude the perverted illegitimate uses of
12 a lot of information in criminal cases. That's my
13 concern. I believe that's Judge Gray's concern.

14 CHAIRMAN BABCOCK: Judge Peeples.

15 HONORABLE DAVID PEEPLES: The judgment of
16 conviction in a criminal case is remotely accessible, is
17 it not?

18 HONORABLE TOM GRAY: Correct.

19 HONORABLE DAVID PEEPLES: What do we gain by
20 having the stipulations accessible if you've already got
21 the judgment of conviction? I mean, what Judge Womack
22 said is a lot of time there is hardly any information in
23 the stipulations beyond the -- what you could get in the
24 judgment itself. If, on the other hand, it is like San
25 Antonio and other places, too, where there is a lot of

1 information in there, there is a big difference.

2 HONORABLE PAUL WOMACK: Yeah. In those
3 situations there is a lot of personal evidence. I mean
4 personal information, too. You know, names and addresses
5 of witnesses and victims.

6 HONORABLE DAVID PEEPLES: Gory details.

7 HONORABLE PAUL WOMACK: It's all going to be
8 in this.

9 HONORABLE DAVID PEEPLES: I would say that
10 when there is something about a criminal case that kind of
11 cries out to be spread around and known, the news media
12 are pretty good about getting that to us. They know how
13 to do it, and they don't need computers to do it.

14 CHAIRMAN BABCOCK: Carl.

15 MR. HAMILTON: I just think we're going
16 about this the wrong way. I think from the public
17 perspective, we ought to be writing a rule that says
18 here's what we're going to make available to you remotely.
19 Don't put the burden on the clerk to figure out what all
20 laws are available that say you can't put it on there.
21 All this -- that's the burden of the clerk, and now we're
22 arguing about all these things that they can't see.

23 Why don't we just tell them they can see
24 everything generated by the court, the order, the indexes,
25 the docket, the register, all of those things that are

1 court-generated can be made available by remote public
2 access? Anything else you have to go the courthouse and
3 look at it, and then the burden is not on the clerk to
4 figure out how many laws are there out there that say we
5 can't put this document on there or that document and we
6 don't have the problem with the toggle switch or the
7 passwords or anything else.

8 MR. LOW: One of the theories behind the
9 stipulation being protected is that is the testimony, they
10 stipulate what the testimony would be. All right. You
11 couldn't put that on television. You couldn't -- you
12 know, so that it -- or ordinarily the judge can prevent
13 somebody from televising the trial, you know, putting
14 cameras -- well, they are under certain restrictions.

15 CHAIRMAN BABCOCK: I mean, cameras in a
16 courtroom is a whole other issue, but --

17 MR. LOW: No, what I'm saying is I'm not
18 agreeing or disagreeing with it being in there. I'm
19 saying that is kind of the trial and whether they could
20 put the trial on the internet or not. That's all.

21 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

22 HONORABLE STEPHEN YELENOSKY: Carl, I think
23 the reason we didn't do that from the prior meetings is
24 that at least some of us, including me, started with the
25 premise that it wasn't really a good reason to exclude

1 from remote access what was available locally, and I know
2 people disagreed with that, but apparently there was a
3 fair amount of sentiment about that and why there was a
4 debate about excluding altogether family law cases, and I
5 ended up voting for that, but I had some trouble doing
6 that, so that's why I think we're looking at what's
7 excluded as opposed to what's, you know, just minimally
8 included.

9 CHAIRMAN BABCOCK: Yeah. We need to -- it's
10 4:40. Judge, we need to move on. Judge Christopher, you
11 want to --

12 HONORABLE TRACY CHRISTOPHER: Can I just
13 ask this one question because Bonnie had mentioned this
14 earlier? Even if we designated something as excluded from
15 remote access someone can come down to the courthouse and
16 say, "I want to buy all these records," and they can put
17 them on a disk and they can put them on the internet. So
18 why we are preventing our district clerks from putting
19 these things in remote access is -- and making everyone's
20 life complicated is beyond me.

21 HONORABLE TOM GRAY: Because it's not there
22 until somebody does that.

23 HONORABLE TRACY CHRISTOPHER: Well, you
24 know, it will be, and it's happening now, so we are
25 creating this bureaucratic lawyer-sanctioned --

1 sanctionable because I see sanctions here at the bottom if
2 someone fails to put "excluded from remote access" at the
3 top of, you know, one of their documents, nightmare.

4 CHAIRMAN BABCOCK: Okay. Let's vote on this
5 one. Judge Womack, you get the final say if you want it.

6 HONORABLE PAUL WOMACK: What are you on?

7 CHAIRMAN BABCOCK: We're on (d).

8 HONORABLE DAVID PEEPLES: Chip, we're not
9 stuck with the wording of (d), are we? Like statement of
10 reasons, I haven't heard a good reason why that ought to
11 stay in there.

12 CHAIRMAN BABCOCK: Yeah, that probably ought
13 to go out.

14 HONORABLE TOM GRAY: My suggestion would be
15 take everything prior to "stipulations" out so that it
16 says "stipulations in criminal cases, including
17 attachments."

18 HONORABLE DAVID PEEPLES: Uh-huh.

19 CHAIRMAN BABCOCK: Okay. Fair enough. Any
20 thoughts, Judge Womack?

21 HONORABLE PAUL WOMACK: The only one I have
22 that's a big question -- I'm not even a member of the
23 committee, much less a member of the Supreme Court that's
24 going to write the rule, but so, is the big question,
25 well, yeah, we understand this is open -- this is open to

1 everybody in the world that can make it down to the
2 courthouse?

3 CHAIRMAN BABCOCK: The internet cafe.

4 HONORABLE PAUL WOMACK: The courthouse in
5 Beaumont.

6 CHAIRMAN BABCOCK: Yeah.

7 HONORABLE PAUL WOMACK: That's not for me.

8 CHAIRMAN BABCOCK: Okay. Let's vote.

9 Everybody if favor of (d), "stipulations in a criminal
10 case including attachments," raise your hand.

11 Everybody keep them up who's got them up.

12 All opposed? It passes by a vote of 11 to 7.

13 (e), "income tax returns." Any discussion
14 about income tax returns?

15 HONORABLE TRACY CHRISTOPHER: So a motion
16 for summary judgment that attaches an income tax return is
17 going to have "excluded from remote access" on the front
18 of it, and that motion will not be available? Just so I
19 understand how the rule works. I'm opposed.

20 CHAIRMAN BABCOCK: Okay.

21 MR. MEADOWS: Voting out of order.

22 HONORABLE TRACY CHRISTOPHER: I think it
23 will be a 10 to 1 again.

24 CHAIRMAN BABCOCK: Any other discussion
25 about income tax returns, return?

1 MR. LOW: Let's vote.

2 CHAIRMAN BABCOCK: All right. Everybody in
3 favor of (e), income tax return?

4 All opposed? 15 to 2, in favor.

5 (f), "a case record in a Family Code
6 proceeding other than a case record such as a judgment,
7 index, calendar, docket, minutes, or register of actions,
8 created by a court in its adjudicative function." Any
9 discussion on this? We had a lot of discussion about this
10 before.

11 HONORABLE STEPHEN YELENOSKY: Just on the
12 wording.

13 CHAIRMAN BABCOCK: Yeah. But anything --
14 Richard.

15 MR. MUNZINGER: Now as written it would
16 include any pleading in a family court case.

17 CHAIRMAN BABCOCK: That's correct.

18 MR. MUNZINGER: Original petition,
19 counterclaim, et cetera, so everything filed in a case
20 subject to the Family Code is exempt from remote access.

21 CHAIRMAN BABCOCK: I think that's the intent
22 of this, isn't it, Sarah?

23 HONORABLE SARAH DUNCAN: Uh-huh.

24 CHAIRMAN BABCOCK: Yes.

25 MR. MUNZINGER: Are there cases where Family

1 Code cases would be joined with something else?

2 HONORABLE SARAH DUNCAN: I'm sorry, would
3 be --

4 MR. MUNZINGER: Is it possible that there
5 may be some lawsuit in which more than the Family Code is
6 implicated?

7 MR. LOW: Personal injury, can't you combine
8 personal injury in a -- yeah.

9 HONORABLE DAVID PEEPLES: Tort cases can be
10 brought in a Family Code case.

11 MR. LOW: Right, they can be.

12 MR. MUNZINGER: And they would be excluded.

13 PROFESSOR CARLSON: Yes.

14 HONORABLE DAVID PEEPLES: Husband and wife
15 suing each other in tort in the context of a family
16 proceeding I guess would be swept in by this.

17 CHAIRMAN BABCOCK: Yeah.

18 MR. WILDER: So you're still leaving in
19 judgments?

20 MS. HOBBS: Yes.

21 CHAIRMAN BABCOCK: Yes.

22 HONORABLE STEPHEN YELENOSKY: And does this
23 include or subsume the sensitive case data, because if the
24 judgment has bank accounts in it and stuff?

25 CHAIRMAN BABCOCK: Separate problem.

1 HONORABLE STEPHEN YELENOSKY: Huh?

2 CHAIRMAN BABCOCK: That would be a separate
3 issue.

4 HONORABLE STEPHEN YELENOSKY: And that's
5 going to be an issue in a lot in family law cases.

6 CHAIRMAN BABCOCK: Yeah, we're going to have
7 to deal with orders separately.

8 HONORABLE DAVID PEEPLES: In support of
9 leaving this in I want to say that the family cases have
10 the most sensitive and private information of anything
11 we've been talking about and probably the least public
12 interest in knowing about it and, therefore, the least
13 justification for being on the internet.

14 MR. LOW: Right.

15 HONORABLE TOM GRAY: And probably the most
16 potential neighbor interest for abuse of what is your
17 neighbor doing.

18 HONORABLE DAVID PEEPLES: And extortion by
19 whoever wants to plead all the dirt against the other one.

20 HONORABLE SARAH DUNCAN: Right.

21 CHAIRMAN BABCOCK: True enough. Richard.

22 MR. MUNZINGER: Is there any need to define
23 "Family Code proceeding"? I guess that was the question I
24 was asking earlier in a stupid way.

25 MS. HOBBS: Well, we define it -- that's a

1 76a concept, and what's the verdict there? Are we having
2 a hard time knowing what Family Code proceedings are under
3 76a?

4 CHAIRMAN BABCOCK: I'm not aware of any
5 case.

6 MR. LOW: Any proceeding under the Family
7 Code.

8 CHAIRMAN BABCOCK: Okay. Any other
9 comments?

10 HONORABLE TOM GRAY: Would it make it
11 clearer if we said "a case record involving a Family
12 Code"?

13 MS. HOBBS: Huh-uh. I would track 76a.

14 CHAIRMAN BABCOCK: No. That's too broad.
15 All right. Everybody in favor of (f) raise your hand.

16 All opposed? That is unanimous.

17 (g), "an exhibit tendered or admitted at a
18 hearing or during a trial." Discussion?

19 HONORABLE TOM GRAY: I'll take it on unless
20 you just want to go straight to the vote.

21 MR. LOW: Let's go.

22 CHAIRMAN BABCOCK: For the record why don't
23 you --

24 HONORABLE TOM GRAY: We felt like it was too
25 difficult to protect the record, if you will, and keep out

1 all of the stuff that you would not want on remote access
2 or somehow independently protect it while you were trying
3 to worry about a hearing or a trial, and so as just a
4 broad category of documents -- and this really arose out
5 of the criminal law context of -- and then we found the
6 application in the civil law as well, but just the stuff
7 that gets into evidence during the course of the trial or
8 hearing that you just don't want to open it up to the
9 whole world, and it's all the same things that Sarah and I
10 have talked about before here, the photographs. I mean,
11 if it's a personal injury case, the ones where there is
12 dismemberment, and it was just a lot of stuff in there
13 that you didn't want readily available in the public
14 arena.

15 CHAIRMAN BABCOCK: Okay. Any other comment?
16 Judge Bland.

17 HONORABLE JANE BLAND: If we're presuming
18 that there ought to be open access and we have a provision
19 that allows the court for good cause shown to exclude
20 other documents, I don't see why we should blanketly
21 exclude exhibits from remote access as long as they're not
22 of the categories of the kind that we have been voting on
23 so far. I mean, it seems as though things that ordinarily
24 would otherwise be able to be accessible remotely, if
25 they're exhibits they're not, and I just think it's an

1 overbroad attempt when it would be easier just to exclude
2 exhibits that are excludible.

3 CHAIRMAN BABCOCK: Richard, then Sarah.

4 MR. MUNZINGER: Looking down to 15.5(a),
5 people who file something that's subject to -- that's
6 excluded from remote access have to label it in 36 point
7 font, so that means my trial exhibits in my lawsuit have
8 to have that cover page on them or I'm subject to
9 sanctions.

10 HONORABLE TRACY CHRISTOPHER: That's right.

11 MS. HOBBS: Tom's issue is coming up.

12 MR. HAMILTON: Also, a motion for summary
13 judgment would have to have that on there, too.

14 MR. MUNZINGER: Oh, well, we've already got
15 that. I mean, we already know that, but --

16 HONORABLE TRACY CHRISTOPHER: Everything we
17 file has an exhibit attached, almost everything. Are we
18 talking about just trial exhibits here or exhibits to
19 motions?

20 HONORABLE STEPHEN YELENOSKY: Summary
21 judgment.

22 MS. HOBBS: Well, the rule says "at a
23 hearing or during a trial," but --

24 HONORABLE JANE BLAND: So it would include
25 exhibits, and I take issue, Tom, with your interpretation

1 of the rule that says that because a exhibit is excluded,
2 you know, a medical record is excluded, anything that
3 refers to that medical record would also have to be
4 excluded. I don't think we should write the rule that
5 way.

6 MS. HOBBS: The rule isn't written that way.
7 I think it's a clerk's office thing, that the clerk's
8 office if there's a medical -- if anything in that
9 document is excluded from remote access, they don't have
10 the ability to go in and take out part of the document.
11 They're just going to have to click a button that it's
12 remote or not remote, so it's more of a practical effect
13 of the rule than the requirement of the rule.

14 CHAIRMAN BABCOCK: Judge Duncan.

15 HONORABLE SARAH DUNCAN: This is in answer
16 to Judge Bland's question about why don't we identify the
17 types of documents, exhibits that we don't want to be
18 remotely accessible. I remember with one of the first
19 criminal cases I worked on 10 years ago was a man who
20 videotaped his molestation of child victims in great
21 detail with the father and the mother watching. I don't
22 want to depend on that criminal defendant and I don't want
23 to depend on that prosecutor to get those documents sealed
24 from remote access. I want them just not available. I
25 don't want to have to depend on the parties to the

1 litigation to make a determination of what should be
2 remotely accessible and what shouldn't, and that's why the
3 subcommittee came up with a default of no exhibits.

4 HONORABLE TRACY CHRISTOPHER: But we are
5 depending upon the criminal defendant or the D. A. to
6 stamp on that tape or picture "excluded from remote
7 access."

8 HONORABLE TOM GRAY: That is the issue --

9 HONORABLE TRACY CHRISTOPHER: So that it's
10 identified.

11 HONORABLE TOM GRAY: That is the issue that
12 Lisa and I didn't lead with, is exactly that, of there's a
13 mechanical problem in the rule regarding whether or not
14 the issue that you and Richard are talking about, whether
15 those exhibits would have to be -- I think Lisa was right
16 in getting through the list of what needs to be excluded.
17 Then the next question is going to be of those that are
18 going to be excluded which ones have to have the caption
19 on it.

20 HONORABLE SARAH DUNCAN: I had never
21 contemplated that you would have that caption on an
22 exhibit.

23 HONORABLE TOM GRAY: This is --

24 HONORABLE SARAH DUNCAN: Maybe I read it,
25 but I never --

1 HONORABLE TOM GRAY: And it's the same thing
2 with Family Code cases. We did not anticipate that the
3 caption would be on every Family Code pleading because
4 they are going to be excluded as a category, but right now
5 we recognize that that is not clear in the rule, and we
6 need to mechanically address that, but I think Lisa was
7 right and we just need to decide first whether or not this
8 category of information document is going to be remote
9 access available or not and then decide whether or not it
10 has to get the label and the mechanics of the clerk's
11 operation.

12 HONORABLE STEPHEN YELENOSKY: Well, then is
13 it also underbroad because it doesn't deal with exhibits
14 filed like summary judgment exhibits?

15 HONORABLE TOM GRAY: Actually, in affect it
16 does because that's a pleading, and if the attachment to
17 that summary judgment contains information that would be
18 excluded then that filing it would be --

19 HONORABLE STEPHEN YELENOSKY: It won't be
20 excluded because it's not tendered at that point at the
21 hearing.

22 HONORABLE TOM GRAY: But it's going into the
23 court record, and it is a document that's excluded -- oh,
24 you're saying what exhibit?

25 HONORABLE STEPHEN YELENOSKY: The exhibit is

1 only excluded if it is offered at a hearing, so the very
2 same exhibit I attach to a summary judgment motion goes in
3 remote access.

4 HONORABLE SARAH DUNCAN: Now, I'm not
5 speaking just for myself and Tom may disagree or some
6 other member of the subcommittee, I'm not concerned about
7 written exhibits. I'm concerned about visual exhibits.

8 HONORABLE TRACY CHRISTOPHER: Well, then
9 let's make the rule visual exhibits. It is so overbroad.

10 HONORABLE STEPHEN YELENOSKY: Well, it's
11 overbroad and it's underbroad, because I mean I'm sure we
12 can imagine paper exhibits that we would be concerned
13 about being on remote access, and to say, well, okay,
14 we'll just draw the line of what's offered at a hearing
15 and what's not when the same document or whatever it is
16 might be offered or might be attached to the summary
17 judgment and offered at the hearing.

18 HONORABLE TOM GRAY: If the only reason that
19 it is not available by remote access is because it was not
20 offered during the course of the hearing or trial then
21 you're right. Some that have been filed, attached to a --
22 and we even discussed specifically the business records
23 exception and the need to file the affidavit with the
24 exhibits attached 14 days prior to trial. I mean, that's
25 your classic filing of exhibits that you know is going to

1 come in later. So if the only reason that that exhibit
2 that ultimately gets introduced at trial isn't there until
3 the day of trial, you've already excluded the exhibit,
4 but -- or you have excluded the exhibit because it was
5 admitted at trial, but it is remotely available because it
6 was attached to something that was filed and it doesn't
7 fall under one of the other categories.

8 HONORABLE STEPHEN YELENOSKY: Right.

9 HONORABLE TOM GRAY: So it is remotely
10 available as the filing, but as the category that it
11 ultimately fell under as an exhibit, that copy is not
12 going to be on remote access. And it may not make any
13 sense to do that, but it was the easy way to create a
14 basket of all the things that you didn't want out there,
15 which was the exhibits that were marked or tendered and
16 filed.

17 HONORABLE SARAH DUNCAN: And to clarify or
18 correct, because you're right, there are written exhibits
19 that I have seen and can imagine that I don't want
20 remotely accessible and I don't think many of us would
21 want remotely accessible.

22 CHAIRMAN BABCOCK: Justice Bland.

23 HONORABLE JANE BLAND: Can't we have a
24 mechanism where the parties can agree to not have
25 something accessible remotely and then submit it to the

1 judge and let the judge say "not for remote access" or is
2 that, you know, some sort of content-based restriction?

3 HONORABLE TOM GRAY: That would be (i).

4 HONORABLE JANE BLAND: I know, and I'm
5 saying if we have that and, you know, we rely on judges to
6 make those important decisions all the time. You know,
7 they tendered Beyonce' Knowles' diary to me to read and to
8 return, and they had to count on me not making it remotely
9 accessible to anybody, the parties did. That's an
10 example, but --

11 HONORABLE STEPHEN YELENOSKY: Could you
12 share it with us?

13 HONORABLE JANE BLAND: You know, I don't
14 think we're giving enough --

15 CHAIRMAN BABCOCK: What did it say?

16 HONORABLE JANE BLAND: I don't think we're
17 giving enough, you know, deference to the process that is
18 in place. The parties can enter into a protective order
19 to keep things from being remotely accessible, and the
20 judge can order it not remotely accessible for good cause
21 shown. Why would we want to blanketly exclude all
22 exhibits from remote access?

23 CHAIRMAN BABCOCK: Judge Patterson.

24 HONORABLE JAN PATTERSON: Just because it
25 sort of fell on silence and I feel this need, but I

1 understand the history of all of this, but as we struggle
2 with all of this I just wonder whether Carl's comment
3 while ago does not carry a great deal of wisdom that we
4 decide what limited documents should be made available by
5 remote. I just second his thought.

6 CHAIRMAN BABCOCK: Any other comments on
7 (g)?

8 HONORABLE DAVID PEEPLES: I want to agree
9 with what she said. If I understand what Carl said, is to
10 say court-generated documents you can get by remote and I
11 assume anything else the court specifically puts out there
12 for remote and nothing else. Was that basically it?

13 MR. HAMILTON: That's basically it.

14 HONORABLE DAVID PEEPLES: I think there's a
15 lot to be said for that.

16 CHAIRMAN BABCOCK: Anything more on (g)?
17 Okay. Everybody that's in favor of (g), "an exhibit
18 tendered or admitted at a hearing or during a trial,"
19 raise your hand.

20 All opposed? That passes by a vote of 12 to
21 6.

22 (h), "a document filed with the court in
23 camera solely for the purpose of obtaining a ruling on the
24 discoverability of such documents."

25 HONORABLE STEPHEN YELENOSKY: Come on,

1 somebody.

2 HONORABLE DAVID PEEPLES: Tracy, how about
3 that one?

4 HONORABLE TRACY CHRISTOPHER: I'm voting for
5 it.

6 CHAIRMAN BABCOCK: This is right out of 76a.
7 That passes unanimously on a voice vote.

8 (i), "any document excluded from remote
9 access by court order for good cause shown." Discussion
10 about this? Buddy.

11 MR. LOW: No. I'm voting for it. Sorry.

12 CHAIRMAN BABCOCK: Any other discussion
13 about this?

14 All right. Everybody in favor of (i), "any
15 other document excluded from remote access by court order
16 for good cause shown," raise your hand.

17 All opposed?

18 MR. HAMILTON: Chip, back to --

19 CHAIRMAN BABCOCK: Wait, wait. Hold it.
20 We're still taking a vote. Are you opposed?

21 MR. HAMILTON: No.

22 CHAIRMAN BABCOCK: Okay. Anybody opposed?
23 That's unanimous. Okay.

24 MR. HAMILTON: Back to (h), it says, "ruling
25 on discoverability," but it could be admissibility also at

1 the time of trial and they're in camera documents.

2 HONORABLE SARAH DUNCAN: Those are excluded
3 under (g).

4 HONORABLE STEPHEN YELENOSKY: Why not just
5 say "in camera"?

6 HONORABLE SARAH DUNCAN: It's tendered for
7 admission into evidence.

8 CHAIRMAN BABCOCK: Yeah. I think that's
9 covered. Let's go to 15.5.

10 HONORABLE DAVID PEEPLES: Chip, before we go
11 there, how is the end result of what we've just voted here
12 different from what Carl said in terms of what gets on the
13 internet?

14 CHAIRMAN BABCOCK: Well, David, we had a
15 fulsome discussion not only at the last meeting but the
16 one before that on the philosophical issue. This
17 subcommittee has had five or six meetings that took hours
18 and hours and came up with this, and I think we owe it to
19 the subcommittee and the Court to vote on this. We can
20 have another discussion on the philosophical issue if we
21 have time, but I think our time is better spent dealing
22 with the subcommittee's work because we're not going to
23 get to it all in the two minutes we have left today and
24 the two hours we have tomorrow, and we're going to miss --
25 we're going to lose half the people that are here. We've

1 already lost three or four.

2 HONORABLE JAN PATTERSON: And that's a good
3 plan, but we also ought to at least be open-minded because
4 we have been edified by the process.

5 CHAIRMAN BABCOCK: Sure.

6 HONORABLE JAN PATTERSON: And I think it's
7 all helped us to think about it.

8 CHAIRMAN BABCOCK: I agree. I just don't
9 want to spend a whole lot of time going back and replowing
10 ground. Carl's point was well-stated, and your seconding
11 of it is well-made, too, and David has had a speech about
12 it, but we are doing a disservice if we don't talk about
13 these other mechanical points.

14 HONORABLE JAN PATTERSON: We agree. We
15 agree.

16 HONORABLE DAVID PEEPLES: Are we on the
17 verge of quitting for the day?

18 CHAIRMAN BABCOCK: Define "verge."

19 HONORABLE DAVID PEEPLES: Okay. I do think
20 we are going to lose some people overnight, and I'm
21 wondering if we ought to have a sense of the house vote as
22 to whether we think generally this is a good idea or not
23 so the Court for whatever it cares would know. I've heard
24 a lot of people say -- they're going along and talking
25 about it line by line, but they don't like one bit of

1 this. I've heard that and I kind of feel that way myself,
2 and I just wonder if the Court would be interested in
3 knowing it. Because you could get the impression we're
4 all for this, we're just tinkering with the details, and I
5 don't think that would be an accurate impression.

6 CHAIRMAN BABCOCK: Well, David, we did have
7 a whole bunch of votes last time, including on that issue.
8 I can find it in the transcript if we want to take the
9 time, and we can also discuss it again today if we want
10 to, but we're not going to get to the procedures if remote
11 access is allowed, we're not going to get to third party
12 technology providers, we're not going to get to exempt
13 individuals and entities, and we're not going to get to
14 the other issues about how you deal with orders, how you
15 deal with the JP and the municipal courts. I mean --

16 HONORABLE JAN PATTERSON: Let's go forward.

17 CHAIRMAN BABCOCK: I would be happy to go
18 anywhere we want to go, but it seems to me we ought to
19 deal with what the subcommittee has given us.

20 MR. MEADOWS: Chip, I do think we're going
21 to lose a lot of people.

22 CHAIRMAN BABCOCK: No question we are.

23 MR. MEADOWS: I wonder if we shouldn't stay
24 at this a little bit longer.

25 CHAIRMAN BABCOCK: We're going to. I didn't

1 mean to suggest we were going to quit at 5:00. So let's
2 try to get through as much as we can. 15.5, "Procedures
3 if remote access allowed."

4 MR. MUNZINGER: You've skipped over 1, 2 and
5 3. Are we going to go back to those?

6 CHAIRMAN BABCOCK: The proposal was made by
7 somebody and seconded by others that we're going to do
8 15.4 and 15.5 and then we're going to go back to the
9 others.

10 MR. MUNZINGER: Okay, sorry.

11 HONORABLE TOM GRAY: On 15.5, Chip, I think
12 we've got to start actually with the title. The
13 "Procedures if remote access allowed," and in the
14 subcommittee we didn't spend a whole lot of time on the
15 titles themselves, and contemplate as we go through this
16 whether or not "Procedure to facilitate remote access"
17 would be a better caption, because the "Procedure if
18 remote access allowed" seems to only come about if the
19 clerk of a locality has already decided that they're going
20 to have remote access and, in fact, these procedures apply
21 whether the clerk has made that decision or not, so that
22 the documents will be in a state that if remote access is
23 ever allowed, this has already been done, and so the
24 procedure is really designed to facilitate remote access,
25 so bear that in mind as we go through it.

1 CHAIRMAN BABCOCK: Okay. Discussion on (a)?

2 HONORABLE TOM GRAY: With regard to the use
3 of the term "party" it probably should be "a person"
4 because you may have a person who is trying to quash a
5 deposition or something of that nature.

6 The actual caption, actually, because we use
7 the reference to it in a different rule, we need to decide
8 if it's going to be termed a caption, a notice, or a --
9 oh, darn, I haven't a third option. A warning. The
10 caption itself "contains information excluded from remote
11 access," leads to the confusion that I've seen here today,
12 and maybe I didn't understand when we were even doing it
13 in the subcommittee's proposal.

14 The way I looked at it is this goes on the
15 front of a document, and so if the document contained
16 that, ergo everything within the document was excluded
17 from remote access, and so I had proposed or kicked around
18 some ideas for some alternative language, and the one that
19 fits on the page the best was "remote access prohibited,"
20 because it just takes up one line in the size type
21 specified; whereas, the language in the rule can bleed
22 over to as many as three lines, and space being at a
23 premium on pleadings and courthouse filings.

24 And I don't know if you want me to just keep
25 going on comments, but on -- I would insert the words "the

1 following caption immediately prior to in 36 point" so
2 that it would read "must type or stamp the following
3 caption in 36 point font" and then whatever the caption
4 is, but generally what the purpose of 15.5(a) obviously is
5 is a label attached to the document as indicated at the
6 top of the first page of the case record, indicating that
7 that record, for the clerk's ease of identification, that
8 it is not going to be put on remote access.

9 HONORABLE STEPHEN YELENOSKY: The entire
10 record or just that they're supposed to look through it?

11 HONORABLE TOM GRAY: Well, the way I
12 interpreted it when I was working with the rule and -- was
13 that the entire record is -- in other words, it's -- and
14 it's like Lisa was talking about, the technology that we
15 were told was utilized for making these available or not
16 available was essentially a toggle switch with regard to
17 that record. It's either this record is either available
18 or not available by remote.

19 MR. WILDER: Needs to be the whole record.

20 HONORABLE STEPHEN YELENOSKY: Okay. Well,
21 that might affect how I feel about others. Because then
22 if one page is income tax, the other 50 pages are out, so
23 I mean, that might affect how I vote on a lot of things.

24 MS. HOBBS: I think if you left the language
25 "contains information excluded from remote access" you do

1 leave the option of a clerk's office who is willing to go
2 through and somehow get online --

3 HONORABLE STEPHEN YELENOSKY: Which clerk's
4 office would that be, that has the time to do that?

5 MS. HOBBS: Well, that's the point, right.
6 But if you do "remote access prohibited" then it makes it
7 like it's the party's decision, "Ha-ha-ha, here's my
8 income tax return attached as a document. You can't put
9 it online now."

10 HONORABLE STEPHEN YELENOSKY: Uh-huh.

11 CHAIRMAN BABCOCK: Carl.

12 MR. HAMILTON: This section doesn't put any
13 burden on the clerk to determine whether it should have
14 had that on there, and yet we say in 15.4 certain
15 documents are not going to be allowed, so if I don't stamp
16 my document "remote access prohibited," then that means
17 the clerk can put it on there. So either I've got to
18 determine that or I'm just going to stamp every document
19 that. If I stamp every document I file that, is that
20 going to be a violation of some kind?

21 HONORABLE SARAH DUNCAN: Yes.

22 CHAIRMAN BABCOCK: Somebody said earlier
23 that they thought yes.

24 MR. HAMILTON: And who is going to
25 sanction -- I mean, who is going to bring this up to the

1 court for sanctions I wonder?

2 MR. LOW: It's just like when people stamp
3 every document confidential. You take them down to the
4 judge. "We're supposed to go through this, they haven't
5 done it. They stamped this roll of toilet paper
6 confidential." The judge doesn't appreciate that, so if
7 you start doing that here, the other side, when the shoe
8 starts pinching you're going to hear them holler.

9 MR. HAMILTON: But the other side doesn't
10 care. The other side can get at this remotely.

11 MR. LOW: But it might be --

12 MR. HAMILTON: It's only the people in
13 Bangladesh that are going to --

14 CHAIRMAN BABCOCK: You probably don't have
15 to fear them too much. Skip.

16 MR. WATSON: Steve's comment about, you
17 know, one piece of paper knocking out the whole pleading,
18 it's not too hard to envision that some will use that to
19 their advantage to keep something from being remotely
20 accessed, but most of the people using the remote access
21 are going to be the lawyers who are going to try to get on
22 and find stuff or people who have definite interests.

23 It seems to me not too farfetched that
24 people who are interested in using it pretty soon develop
25 the practice of even, for example, in a motion for summary

1 judgment, if there is something that we all know is not
2 going to be remotely accessible, that it will be
3 separately filed as Addendum No. 1 with its own cover
4 sheet and it will be referenced in the summary judgment as
5 Addendum No. 1, Tab 1, and so the summary judgment is
6 going to be filed. Everything is going to be there, but
7 the specific parts that we all learn are going to not be
8 remotely accessible will be separately filed under
9 separate cover sheets and separately referenced so that
10 everybody knows what's going on. I just don't think it's
11 going to be that big a deal.

12 CHAIRMAN BABCOCK: Sarah.

13 HONORABLE SARAH DUNCAN: As I understand it,
14 there are two hitches. If an income tax return is
15 attached to an original petition and that income tax
16 return is never referenced and the only reason it's
17 attached is to keep that document from being remotely
18 accessed, there are two problems. One is does the clerk
19 have the technology to make part of that filing accessible
20 and part not accessible? I think that's technology that
21 will be developed by March.

22 The second problem is the clerk's people
23 power to physically separate the documents. I think that
24 can be handled by a court order telling the party who
25 filed that pleading to do precisely what Skip just said.

1 You file that tax return as a separate filing, and I'll
2 protect it, but your petition, there's nothing in your
3 petition that's protected from remote access, and it's
4 going up, and I think those procedures are just going to
5 develop.

6 MR. WATSON: Yeah.

7 HONORABLE TOM GRAY: And the third thing is
8 that anybody that attaches that tax return solely for the
9 illegitimate purpose of keeping it not available by remote
10 access risks the sanctions as well.

11 HONORABLE STEPHEN YELENOSKY: But none of
12 this requires any clerk to put on remote access. They
13 haven't yet had to deal with these rules, and so district
14 clerks looking at these rules may very well decide not to
15 put anything on remote access.

16 HONORABLE SARAH DUNCAN: Right.

17 CHAIRMAN BABCOCK: Tom, was the language "a
18 case record containing information" intentional, because
19 if I, for example, in my petition put information from an
20 income tax return or more likely what would be an exhibit
21 tendered or admitted at a hearing or trial, does that
22 preclude my -- do I have to stamp my petition?

23 HONORABLE TOM GRAY: I did not understand
24 your question.

25 CHAIRMAN BABCOCK: It says "a case record

1 containing information." It's not a case record attaching
2 income tax return or an exhibit that is being tendered,
3 but just the word "information," that seems --

4 HONORABLE TOM GRAY: Well, you could have
5 said "a case record containing information excluded from
6 remote access or to which a document containing
7 information excluded" -- that didn't -- in other words, it
8 could be either embedded in the document itself, for
9 example, where you're reciting the psychiatric condition
10 of your client that entitles you to mental anguish
11 damages, or it could be the attachment of some medical
12 report.

13 CHAIRMAN BABCOCK: Okay. So that was
14 intentional.

15 HONORABLE TOM GRAY: I don't know that it --
16 yes.

17 CHAIRMAN BABCOCK: Okay. Stephen.

18 HONORABLE STEPHEN YELENOSKY: Well, would
19 what Skip was suggesting work where you require the party
20 if they have something they think is excludable, to
21 separate that out and essentially make a separate
22 document, and you file your petition with Addendum A, but
23 it's not -- and then you have a separate document that's
24 the actual income tax. If the technology doesn't allow
25 you to split documents, force the parties to do it.

1 CHAIRMAN BABCOCK: Richard.

2 MR. WATSON: I think that's what will
3 happen, Steve.

4 HONORABLE SARAH DUNCAN: I do, too.

5 MR. MUNZINGER: The way I understand the
6 rule, 15.5(a), if I attach a document that is not
7 accessible remotely and I label my -- the cover sheet of
8 my motion for summary judgment or whatever it is
9 appropriately, then the attached document is not remotely
10 accessible, nor is the entire motion. That's what I've
11 understood so far as we've gone along here today.

12 When I look down at the sanctions paragraph
13 it says that you can impose sanctions for a violation of
14 the rule. I'm not optimistic -- I mean, I know in my
15 practice I have got a lot of clients aren't going to want
16 to pay me to do a lot of segregating. I'm going to take
17 the easy way out because I have got a client that doesn't
18 want to pay me, and I don't want to be thinking about
19 being sanctioned or anything else. I'm going to put that
20 36 point type on the front of it whether it's attached,
21 referenced, or anything else because that's the only
22 prudent thing to do if I face sanctions, and I suspect
23 that every lawyer is going to do that. I don't think all
24 lawyers are like Skip who are going to segregate those
25 things. I'm not one of them. I'm not going to segregate.

1 Why would I?

2 HONORABLE STEPHEN YELENOSKY: It's not just
3 sanctions, it's malpractice issues. Your client might sue
4 you for making that public.

5 MR. MUNZINGER: Why would I? And I don't
6 want to impose -- I have a problem already about this rule
7 putting the onus on lawyers. I've said it twice today and
8 I'll say it again. Somebody better do something about the
9 Rules of Civil Procedure and warning all these
10 practitioners that you guys are getting ready to change
11 your discovery practice, your motion practice, your trial
12 practice, everything at the expense of sanctions with this
13 rule which is going to take affect January 1st, 2006.
14 We're making a big step here, which is neither here nor
15 there. It's fine to make the step. We just need to be
16 careful.

17 CHAIRMAN BABCOCK: The label that we're
18 talking about here, and I may be plowing over old ground,
19 but did we say, Justice Gray, that the exhibit that is
20 referred to in (g) is only an exhibit that is physically
21 tendered to a judge at a hearing or trial and would not be
22 what is typically attached to a summary judgment or a
23 motion to compel or whatever? Those kind of exhibits?

24 HONORABLE TOM GRAY: If I understood your
25 question, yes, that is the understanding, if the exhibit

1 is attached to a pleading.

2 CHAIRMAN BABCOCK: Right.

3 HONORABLE TOM GRAY: And just because it is
4 attached to the pleading there is nothing about it that
5 limits it from remote access. It does not -- it was not
6 contemplated that that would catch a caption.

7 MR. LOW: The exhibit? The pleading?

8 HONORABLE TOM GRAY: Right. And actually,
9 this is the point at 15.5(a) where we have to make the
10 decision of how to break out the items from 15.4 that get
11 this caption and those that don't. As I read the rule and
12 the mechanics of the way it works, it would be from 15.4
13 (a), (b), (c), (d), (e), and (i) would get the caption.
14 The rest of -- which would leave (f), (g), and (h) that
15 would not get the caption.

16 CHAIRMAN BABCOCK: But -- I hear you, but
17 again, going back to Munzinger's point, if I'm a -- you
18 know, whether my clients want to pay me or not, if I've
19 got a summary judgment they always have exhibits. I can't
20 think of a summary judgment that doesn't, and if (g) means
21 any time there is an exhibit tendered in the sense that
22 I'm filing a motion for summary judgment, I'm also going
23 to use information from that exhibit in my motion. So on
24 each summary judgment I'm going to put "contains
25 information excluded from remote access" under what looks

1 like the terms of this rule because either (g) is
2 misleading to me because I'm tendering it to the court in
3 the sense that I'm filing it, saying, "Judge, look at
4 these exhibits," and I've certainly got information from
5 those exhibits in my motion, and is that what we intend to
6 do with this?

7 HONORABLE STEPHEN YELENOSKY: That's the
8 discussion we had, and you said it didn't unless you
9 actually tendered it at the hearing.

10 HONORABLE TOM GRAY: Yeah. Maybe it would
11 be better in (g) to move the word "during" to where the
12 word "at" appears so that it reads "an exhibit tendered or
13 admitted during a hearing or trial."

14 CHAIRMAN BABCOCK: That would help me out
15 some. Is everybody okay with that? Sarah, you okay with
16 that?

17 HONORABLE SARAH DUNCAN: Uh-huh.

18 MR. HAMILTON: Except that a motion for
19 summary judgment is a trial.

20 HONORABLE LEVI BENTON: That's right.

21 MR. HAMILTON: So I don't think that gets us
22 anywhere.

23 MR. MUNZINGER: Motions can be considered
24 without having a hearing, and they are tendered to the
25 judge or they're not part of the record. So, "Wait a

1 minute, I didn't tender that at a hearing." You got an
2 order, I got judicial relief from it, or I lost my motion,
3 but the use of "tendered at a hearing" is -- I think,
4 frankly, it's misleading given the practice that we have,
5 but if it's going to be submitted to a court in accordance
6 with a motion and it has any of the forbidden material in
7 it, what lawyer would not label it don't reveal it? He
8 has to.

9 CHAIRMAN BABCOCK: Bonnie.

10 MS. WOLBRUECK: I had mentioned this at the
11 subcommittee. The problem that the clerk can have with
12 this is you have a document that has been filed with the
13 clerk, the caption is not on it. It has some information
14 on it that later is tendered as an exhibit. It's been put
15 out at remote access and now it comes off of remote
16 because it's been tendered as an exhibit.

17 HONORABLE STEPHEN YELENOSKY: No, that's not
18 the way you described it.

19 MS. WOLBRUECK: No, but this is one of the
20 ways it can cause a problem for the clerk because it was a
21 document.

22 HONORABLE TOM GRAY: And that was the one
23 that generated the -- when Bonnie raised that, that was
24 the one where we really talked about the business records
25 exception and the fact that you filed a business records

1 affidavit and it has documents that attach that aren't
2 otherwise prohibited from remote access. Two weeks -- and
3 so that document is on remote -- or is remotely available.

4 Three weeks later when you get into trial
5 and you lay those up on the witness stand as an exhibit
6 because they were previously admitted through the rule or
7 through the procedure, in effect, that copy of it doesn't
8 get on remote access. But it's already out there.

9 HONORABLE STEPHEN YELENOSKY: Right. You
10 don't go back and retract it.

11 HONORABLE TOM GRAY: You don't go back and
12 take it off of remote access just because it's
13 subsequently tendered. That's the same way I would
14 address the motion for summary judgment exhibits. If
15 there's not something in that motion for summary judgment
16 exhibit that otherwise requires it to be limited or, you
17 know, not on remote access, then you're not going to put
18 the label on it. It's going to go out on remote access.

19 The fact that it's later considered by the
20 judge in chambers or on the bench or you, you know, hand
21 him another copy of it during the course of the hearing,
22 which you're not admitting the evidence at that point
23 because you're -- you know, really not even necessary to
24 take the record at the summary judgment hearing. You
25 know, that's not what triggers the fact that it's not

1 remote access.

2 CHAIRMAN BABCOCK: Okay. Judge Benton.

3 HONORABLE LEVI BENTON: Tom, I don't know
4 that you -- how do you respond to Carl's observation that
5 a summary judgment is a trial?

6 HONORABLE STEPHEN YELENOSKY: Well, if we
7 can't describe the difference between paper submissions
8 and a physical appearance in the courtroom then we do have
9 a problem, but I would think we could do that.

10 HONORABLE LEVI BENTON: I mean, yes, we can,
11 so we need to change it, but I don't have a suggestion for
12 you because what is the trial court --

13 HONORABLE TOM GRAY: What document are you
14 presenting to me that creates a problem for remote access
15 because a summary judgment is a trial? I guess I need a
16 better -- a concrete example to deal with, because if you
17 submit to me as part of the summary judgment motion an
18 exhibit that has psychiatric records in it --

19 HONORABLE LEVI BENTON: An affidavit. An
20 affidavit.

21 HONORABLE STEPHEN YELENOSKY: He's saying
22 every summary judgment has to be labeled as excludable by
23 virtue of the fact that literally it's tendered at a trial
24 because summary judgment is a trial. Isn't that what
25 you're saying?

1 HONORABLE LEVI BENTON: That's what I'm
2 saying.

3 HONORABLE TOM GRAY: Well, I would argue
4 that the filing of a motion for summary judgment is not a
5 trial.

6 HONORABLE STEPHEN YELENOSKY: But some
7 people think that, so --

8 HONORABLE TOM GRAY: I mean, it's a trial 21
9 days later when it's taken under consideration by the
10 judge.

11 CHAIRMAN BABCOCK: Carl, then Richard.

12 MR. HAMILTON: Well, I'm just trying to
13 figure out what we're trying to protect here. It doesn't
14 matter whether it's tendered or whether it's admitted,
15 we're just trying to protect exhibits, I guess. So what
16 does it matter where they are, whether they're on a motion
17 for summary judgment or a trial or a hearing, or why don't
18 we just say any exhibits that are attached to a motion or
19 hearing or tendered for trial or hearing?

20 CHAIRMAN BABCOCK: Richard.

21 MR. MUNZINGER: From the clerk's standpoint
22 if you file a motion for summary judgment that doesn't
23 have this legend on the top of it and then three weeks
24 later or a month later or whatever you decide that you're
25 going to have a hearing on the motion for summary

1 judgment, now you go down because you've had a hearing and
2 you have to label everything that was filed, what do you
3 do? Go file a piece of paper that says, "Mr. or Mrs.
4 Clerk, go back and label my motion for summary judgment
5 secret because I've now had a trial and a hearing"? I
6 don't think that's practical.

7 HONORABLE STEPHEN YELENOSKY: He's already
8 said you don't go back.

9 MR. MUNZINGER: Well, but --

10 HONORABLE STEPHEN YELENOSKY: The anomaly we
11 discussed was exactly that, but that's what they're
12 willing to live with.

13 MR. MUNZINGER: I'm looking at it from a
14 lawyer's standpoint. What lawyer would not label this the
15 moment he files it? Whether there's a hearing or not you
16 would label it.

17 CHAIRMAN BABCOCK: I think as a practical
18 matter the way that this is written right now, even with
19 Justice Gray's change, and particularly since there are
20 sanctions here, I think Richard is probably right that the
21 cautious lawyer is going to caption just about everything
22 that's got an exhibit on it.

23 MR. MUNZINGER: That would have any of this
24 information in the exhibit.

25 CHAIRMAN BABCOCK: Have any exhibit. Well,

1 (g) is not limited to specific subject matter of the
2 exhibit.

3 MR. MUNZINGER: You're right.

4 HONORABLE STEPHEN YELENOSKY: But, no, I
5 mean, that's not right, because, sure, the cautious lawyer
6 is going to label anything, any exhibit which might fall
7 under any of these other provisions except for (g), but
8 there is no reason to -- for precaution reasons to label a
9 summary judgment as excludable unless it falls under
10 something else because we've already said it -- if the
11 only reason to exclude it is tendering it at trial, the
12 fact that you've already got it in there before trial
13 doesn't subject you to any sanctions.

14 CHAIRMAN BABCOCK: I'm not sure if --

15 MR. MUNZINGER: What do I do if I have a
16 client that says, "I don't want that in there. You know,
17 I'm not in any of these subsections (g), but hell, I don't
18 want the world to know about that"?

19 HONORABLE STEPHEN YELENOSKY: Well, that's a
20 problem.

21 MR. MUNZINGER: Now, I file it, "I don't
22 want you to have access to this." Why can't I do that?

23 CHAIRMAN BABCOCK: Buddy.

24 MR. LOW: See, what we're doing, we have two
25 different things that we're trying to exclude. One is

1 sensitive data, and that's easily handled on a sensitive
2 data sheet because they get that information. Then we
3 have other data that you can't fill in with numbers and
4 blanks, which would only go in a, quote, sensitive exhibit
5 or data file that could be maintained by the clerk and
6 marked as an exhibit so that those things you would attach
7 when you file your motion for summary judgment and maybe
8 list that as Exhibit 1 in sensitive form file or
9 something, but the problem is you can't take care of it
10 with a sensitive data sheet.

11 CHAIRMAN BABCOCK: Yeah, but again, Buddy --
12 I'm sorry.

13 MR. LOW: It leads back to what Richard is
14 saying, and I don't know how you handle it because it
15 would be pretty cumbersome to file a motion for summary
16 judgment and say, "I rely on the exhibit in sensitive data
17 document 1" or something like that.

18 CHAIRMAN BABCOCK: But again, Buddy, we're
19 not talking about sensitive data in the sense that we were
20 in Rule 14.1.

21 MR. LOW: I understand.

22 CHAIRMAN BABCOCK: Or even in the sense that
23 we're talking about in a sealed document under 76a.

24 MR. LOW: I understand.

25 CHAIRMAN BABCOCK: We're just talking about

1 stuff.

2 MR. HAMILTON: Any exhibit.

3 MR. LOW: That's what I'm saying. We're
4 talking about two categories of things that we don't want
5 on the internet; one, sensitive data; now a whole broad
6 category of things which we can't just fill in. And so
7 what Richard says is probably right unless we come up with
8 some way to protect that, and I don't have the answer.

9 CHAIRMAN BABCOCK: Okay. Well, I think
10 we're beating a dead horse here, but (g), "exhibit
11 tendered or admitted during a hearing or trial" is a very
12 broad category. It's not limited to things like tax
13 returns, medical records, anything.

14 MR. LOW: That's right.

15 CHAIRMAN BABCOCK: You know, it can be an
16 affidavit that a witness -- or it can be a document that
17 the other side authored that's an admission, and we're
18 saying that if -- what Justice Gray is saying is it does
19 not necessarily mean that just because we attach that to a
20 motion to compel or a motion for summary judgment that
21 we've got to put the caption in there. That's what he's
22 saying.

23 MR. LOW: Don't have to put the caption on
24 the motion.

25 CHAIRMAN BABCOCK: Or on anything, because

1 Justice Gray is saying that the rule in (g) is not
2 implicated until we go in front of a judge and say,
3 "Judge, I'm handing you Exhibit A," which is whatever it
4 is, and that's -- that document is supposed to not be on
5 the internet.

6 That's what he's saying, but Munzinger says
7 this rule is not clear on that. Munzinger says if it's
8 me, I'm going to put the caption on any time I have a
9 motion within an exhibit. That's what he's saying, and I
10 think that's not a frivolous position. I mean, all of us
11 know what we're doing, but we've got 20 lawyers out of how
12 many in the Bar? Carl.

13 MR. HAMILTON: Why don't we have that just
14 say "an exhibit tendered in connection with a motion,
15 hearing, or trial"?

16 HONORABLE TOM GRAY: That makes it clear
17 that every exhibit that's -- every motion that has any or
18 every pleading that has -- no, would just be the motions
19 that have pleadings, or exhibits attached, but that's
20 going the opposite direction of what I thought we were
21 trying to do. In other words, that's going to capture
22 more documents that are excluded from remote access.

23 HONORABLE SARAH DUNCAN: That's going to
24 make it easier to abuse.

25 CHAIRMAN BABCOCK: Richard.

1 MR. MUNZINGER: Was the origin of this idea
2 about the exhibit the convenience of clerks or keeping and
3 copying exhibits?

4 HONORABLE TOM GRAY: Well, there's the
5 practical problem of during the course of the trial the
6 trial lawyer is not thinking about remote access, and in
7 the financial case there is all types of financial
8 information that's coming in, whether it's tax returns or
9 anything else, and it was how to as a group -- and again,
10 you know, we weren't trying to do this with a scalpel and
11 try to pick out individual little documents, but yet we
12 didn't want to do it with a chainsaw either to where we
13 just didn't give them anything. We were trying to hit a
14 balance, and we just -- the concept of trying to break up
15 the exhibits into multiple categories became too
16 cumbersome, and so we just said all exhibits if they are
17 in the course of a hearing or trial, that's an
18 identifiable category we can keep out.

19 We don't -- I mean, part of it was just the
20 nature of some of the exhibits, the graphic evidence that
21 could come in. You know, I wish Sarah was here because
22 she -- I kept wanting to call it those -- the exhibits
23 that were of interest to people's puritan interest, but
24 she finally told me it was not the puritans that I was
25 worried about, it was somebody else.

1 MR. MUNZINGER: Prurians.

2 HONORABLE TOM GRAY: Yeah. So, you know,
3 there are lots of problems that --

4 CHAIRMAN BABCOCK: Well, I mean, if that's
5 what we're trying to get at, though, Judge, I mean, you
6 can have a prurient exhibit can be as easily attached to a
7 motion to compel as it can be introduced at a trial.

8 HONORABLE TOM GRAY: Yes. No question. But
9 the question is how are you going to get it if -- how are
10 we going to protect it, I guess? It was easier to say
11 that the bulk of those, the majority of those, are going
12 to come in as exhibits during trial. I think that's where
13 the -- where you're going to see more of that type exhibit
14 introduced.

15 CHAIRMAN BABCOCK: Stephen.

16 HONORABLE STEPHEN YELENOSKY: I think
17 Justice Patterson was right. I have been edified by this
18 discussion. With all due respect to Al Gore, I'm now
19 wondering whether the internet is a good idea, but I
20 wanted to suggest that --

21 CHAIRMAN BABCOCK: At least you didn't
22 invent it.

23 HONORABLE STEPHEN YELENOSKY: What's that?

24 CHAIRMAN BABCOCK: I said at least you
25 didn't invent it.

1 HONORABLE STEPHEN YELENOSKY: Yeah, exactly.
2 It's possibly something to consider overnight or whatever
3 as a compromise between those of us who tend to want
4 everything to be open or justified if it's not open and
5 those who just want to put out what's new with the court
6 -- if the Court can consider doing this in a stepwise
7 fashion and saying "All we can figure out to do now given
8 the technology that we have and our concerns about remote
9 access is to make pleadings available, but we're not
10 foreclosing the possibility" -- because I don't see how
11 we're going to work through all these things, and I am
12 concerned about what the lawyers are going to do with all
13 these changes and worried; whereas, at this point if the
14 Court authorizes clerks to only put pleadings out, we
15 don't really have to worry much about that.

16 HONORABLE TOM GRAY: See, I think there's
17 going to be -- you know, you've got your psychiatric
18 information, your financial information --

19 HONORABLE STEPHEN YELENOSKY: In the
20 pleadings?

21 HONORABLE TOM GRAY: Yes.

22 HONORABLE STEPHEN YELENOSKY: Well, I mean,
23 sometimes that's, I guess, a concern without even remote
24 access, and I guess maybe you could deal with that by
25 allowing the parties to petition for something to be

1 unavailable on remote access.

2 CHAIRMAN BABCOCK: Skip Watson.

3 HONORABLE STEPHEN YELENOSKY: I just don't
4 see how we're going to work it out.

5 MR. WATSON: The point of this subsection is
6 that we don't care about anything that has its genesis in
7 the clerk's office. This is only the things that hits the
8 judge's hands first. Point? That's all we're talking
9 about is it's something that's being tendered at a hearing
10 or at trial that's being handed to the judge for admission
11 or exclusion.

12 CHAIRMAN BABCOCK: Yeah, that's why the
13 language change that we made I think makes it much
14 clearer.

15 MR. WATSON: We seem to continue to blur the
16 idea of filing and tender throughout the discussion of
17 this discrete rule.

18 CHAIRMAN BABCOCK: Yeah.

19 MR. LOW: Don't you have to file your motion
20 for summary judgment?

21 MR. WATSON: We're not talking about a
22 motion for summary judgment. That's the point. Because
23 that was first touched by the clerk. That's the point I'm
24 trying to get at. If I'm getting what Judge Gray is
25 saying is right, this has nothing to do with summary

1 judgments, period.

2 CHAIRMAN BABCOCK: Well, I don't think we
3 can beat this horse much deader than he already is, so and
4 we don't even have to give him a shot to put him out of
5 his misery. So let's vote on 15.5(a).

6 We've changed "party" to "person." We have
7 added the phrase on the second line "must type or stamp"
8 and added the phrase "the following caption," and other
9 than that the rule is ready to be voted on, except for
10 Justice Gaultney.

11 HONORABLE DAVID GAULTNEY: Well, I was going
12 to say, we were going to have some language including (f),
13 (g), and (h). I think Justice Gray proposed that.

14 HONORABLE TOM GRAY: Actually, you need --
15 the easiest fix to it is to put under Rule 15.4 (a), (b),
16 (c), (d), (e), and (i).

17 CHAIRMAN BABCOCK: Okay. Any discussion or
18 opposition to that? Jeff.

19 MR. BOYD: No. I agree.

20 MR. HAMILTON: What were those letters
21 again?

22 HONORABLE TOM GRAY: (a), (b), (c), (d),
23 (e), and (i).

24 MR. BOYD: It's cumbersome, but I believe it
25 should be done. This rule only applies if you're filing

1 in a county that has chosen to give remote access, and
2 that's what the title of the rule says, the label for the
3 section, but it doesn't say it in the rule, and I just
4 wanted to make sure we're clear.

5 HONORABLE SARAH DUNCAN: I don't think
6 that's right.

7 MR. BOYD: You do it in every county, no
8 matter where you're in litigation?

9 HONORABLE SARAH DUNCAN: Because you don't
10 ever know when that county is going to give remote access.

11 MR. BOYD: So we're trying to preserve for
12 the future, too. Then I would change the label of the
13 rule, of the subrule.

14 HONORABLE SARAH DUNCAN: I think Chief
15 Justice Gray has already proposed "Procedure to
16 facilitate." You can just say "procedure."

17 CHAIRMAN BABCOCK: Yeah, we'll get to that.

18 MR. BOYD: All right. That's all.

19 CHAIRMAN BABCOCK: Okay. 15.5(a) has been
20 modified slightly. Any other discussion about Justice
21 Gray's last -- or Justice Gaultney's last -- all right.
22 Everybody in favor of 15.5(a) raise your hand.

23 All those opposed? 14 to 2, in favor, so
24 that will pass. We have a receptionist who is staying on
25 overtime to facilitate our discussion, so we can't impose

1 too much longer on that, but let's try to talk about
2 15.5(b).

3 HONORABLE TOM GRAY: In 15.5(b) the word
4 "notice" there needs to now be changed to "caption."

5 CHAIRMAN BABCOCK: Okay. Any other
6 modifications? Any other discussion on 15.5(b)?

7 MR. MEADOWS: Does the clerk have a duty
8 with regard to documents that are not stamped? I mean,
9 unless there is a duty to review the stamped papers --

10 CHAIRMAN BABCOCK: I wondered about that.

11 MR. MEADOWS: -- it just doesn't make sense.

12 CHAIRMAN BABCOCK: Richard.

13 MR. MUNZINGER: Well, the opening sentence
14 of 15.4 is mandatory, "a court clerk must not allow remote
15 access to the following case records."

16 MR. MEADOWS: I noticed that, too. I think
17 if there is not a duty, which I'm asking about, I think
18 that should just simply be changed to "access to the
19 following case records is not allowed."

20 CHAIRMAN BABCOCK: Bonnie, do you want to
21 speak in favor of 15.5(b)?

22 MS. WOLBRUECK: Yes, I would like to as long
23 as there is no sanctions against the clerk for having
24 to --

25 MR. MEADOWS: For failure of duty?

1 MS. WOLBRUECK: For failure of the duty to
2 not.

3 HONORABLE JAN PATTERSON: Calls for the
4 death penalty.

5 CHAIRMAN BABCOCK: Andy, you have any
6 thoughts? I mean about this.

7 MR. HARWELL: I like (b). I like (b).

8 HONORABLE SARAH DUNCAN: Tell us something
9 you don't like.

10 MR. MEADOWS: Andy, not so fast, because the
11 way I read (b) it's saying that you do have a duty.

12 CHAIRMAN BABCOCK: Yeah.

13 MR. HARWELL: Well, we have a duty to -- in
14 this rule we would look and see if that notice is there or
15 that caption is there, and if it is not, I think what we
16 do not want to do is ask our deputies then to go within
17 the body of that document and for a clerk to decide
18 whether that should be --

19 MR. MEADOWS: I think what the clerks would
20 want is language "a court or clerk has no duty to review a
21 case record to determine whether it contains information,"
22 period.

23 MR. LOW: Right.

24 MR. MEADOWS: Unless we intend to impose a
25 duty under certain circumstances.

1 HONORABLE SARAH DUNCAN: Right. Part of our
2 discussion was -- and you can agree or disagree with this.
3 We don't want the clerk to look at a document, say, "Oh,
4 gee, this is not for remote access" and then put it on
5 remote access with no consequences.

6 HONORABLE STEPHEN YELENOSKY: Then there is
7 a duty. There is a duty.

8 MR. MEADOWS: There is a duty that has
9 consequences.

10 HONORABLE SARAH DUNCAN: That's why it is
11 written "no duty to review a case record that does not
12 contain this caption."

13 HONORABLE STEPHEN YELENOSKY: He's saying we
14 might as well be explicit about the duty if there is one.
15 There is a duty to review those that do have a caption.

16 HONORABLE SARAH DUNCAN: They don't have to
17 review it.

18 HONORABLE STEPHEN YELENOSKY: Well, to
19 recognize and act upon.

20 HONORABLE SARAH DUNCAN: That's why the
21 previous rule says "a clerk must not" --

22 CHAIRMAN BABCOCK: "Must not," yeah.

23 HONORABLE SARAH DUNCAN: -- "allow remote
24 access." That creates a duty.

25 HONORABLE STEPHEN YELENOSKY: Well, yeah,

1 but it's a little ambiguous still if you have something
2 saying you can ignore things that don't have a caption but
3 you never say that part of your "must not" duty is to at
4 least look for those things which are captioned.

5 HONORABLE DAVID GAULTNEY: Well, but 14.3 is
6 labeled "duty," isn't it?

7 MR. MEADOWS: What Sarah is saying is
8 something different. She's saying that a clerk must not
9 permit remote access to a stamped document.

10 HONORABLE SARAH DUNCAN: Right.

11 CHAIRMAN BABCOCK: That's what the rule
12 says.

13 MR. MUNZINGER: That's what the rule says.

14 HONORABLE SARAH DUNCAN: Right. And that's
15 intentional.

16 MR. HARWELL: Right.

17 CHAIRMAN BABCOCK: What the rule sets up, it
18 seems to me, is that if a lawyer, whether intentionally or
19 unintentionally, doesn't have the caption and so files it,
20 the clerk sees the document, there's no caption there, you
21 know, up it goes on the internet. Somebody comes back
22 later, says, "Wait a minute. This had my tax return and
23 my medical records and a bunch of exhibits. What are you
24 thinking about?" And the clerk says, "Hey, read 15.5(b),
25 brother, because the caption is not there and not my

1 fault. Go talk to your opponent. That's his fault."

2 By contrast, if the caption is there and the
3 clerk screws up and puts it up on the net anyway then they
4 can come to the clerk and say, "Man, you really did a bad
5 thing here, and we're going to complain to somebody about
6 it." But --

7 MR. MEADOWS: Just to finish the point then,
8 I think that it's that obligation to not post anything
9 that's marked as contained in the opening language of
10 15.4, and I would suggest that we clean up the language in
11 15.5(b) by just simply making it clear that a court or
12 clerk has no duty to review a record to determine whether
13 it contains information that's excluded.

14 HONORABLE STEPHEN YELENOSKY: Well, it's the
15 clerk's only duty to react to things which are captioned.

16 MR. MEADOWS: Right.

17 HONORABLE STEPHEN YELENOSKY: Well, if
18 that's true then 15.4 should say "a court clerk must not
19 allow remote access which begin with a caption in 36
20 points," blah-blah-blah, because that's the clerk's only
21 duty.

22 MR. MEADOWS: Right.

23 HONORABLE STEPHEN YELENOSKY: And then you
24 have a separate section that says "all family law cases,"
25 blah-blah-blah.

1 CHAIRMAN BABCOCK: Yeah.

2 HONORABLE TOM GRAY: As it is written the
3 clerk does not have the duty to look for a document that
4 should contain the caption, but there is -- as written,
5 whatever duties there are will be on the clerk to prohibit
6 the remote access if the caption is there, if it is a
7 trial exhibit, if it is a document filed in camera, and if
8 it's a Family Code proceeding.

9 HONORABLE STEPHEN YELENOSKY: But most
10 things are going to be reacting to captions, so shouldn't
11 we flip this? Because the way it is now it makes it look
12 like the court clerk is actually exercising discretion on
13 (a) through (i) when in fact it's just what you said the
14 clerk has discretion on, and they are reacting to the part
15 that you have under "procedures."

16 HONORABLE TOM GRAY: One of the mechanical
17 constructions that I was looking at was actually 15.4
18 would have four captions, the three that they don't have
19 to -- or the three that they do have to identify
20 themselves, which is currently (f), (g), and (h), and then
21 any captioned document.

22 HONORABLE STEPHEN YELENOSKY: Right.

23 HONORABLE TOM GRAY: And have four in that
24 group. I defaulted, though, back to be the laundry list
25 of I liked the listing of all the documents that were not

1 going to be available in one place in the rule, but that
2 is strictly mechanical.

3 CHAIRMAN BABCOCK: Okay. I mean, there are
4 two ways to do this obviously. We're going to vote on the
5 subcommittee's proposal, unless the Chairs withdraw it?

6 HONORABLE TOM GRAY: No.

7 CHAIRMAN BABCOCK: Okay. Let's vote on how
8 the subcommittee recommends. Everybody -- the only change
9 then would be instead of "notice" we would say "caption."

10 So everybody who is in favor of 15.5,
11 subparagraph (b), as the subcommittee proposes it raise
12 your hand.

13 HONORABLE SARAH DUNCAN: Could I make --
14 well.....

15 CHAIRMAN BABCOCK: All opposed? It passes
16 by a vote of nine to five.

17 And that's where we're going to stop for the
18 day. As many of you as can come back tomorrow, we'll have
19 fun, but we're going to get the TAB to shrink the table so
20 that we can all be intimate, and we'll get this thing done
21 tomorrow.

22 HONORABLE STEPHEN YELENOSKY: 9:00 to 11:00?

23 CHAIRMAN BABCOCK: 9:00 to 11:00.

24 HONORABLE JAN PATTERSON: Are we serving
25 breakfast?

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CHAIRMAN BABCOCK: Breakfast.

HONORABLE STEPHEN YELENOSKY: What's on the
menu?

CHAIRMAN BABCOCK: Thanks, everybody.

(Adjourned at 5:45 p.m.)

1 * * * * *

2 CERTIFICATION OF THE MEETING OF
3 THE SUPREME COURT ADVISORY COMMITTEE

4 * * * * *

5
6
7 I, D'LOIS L. JONES, Certified Shorthand
8 Reporter, State of Texas, hereby certify that I reported
9 the above meeting of the Supreme Court Advisory Committee
10 on the 1st day of April, 2005, Friday Session, and the
11 same was thereafter reduced to computer transcription by
12 me.

13 I further certify that the costs for my
14 services in the matter are \$ 2671.00.

15 Charged to: Jackson Walker, L.L.P.

16 Given under my hand and seal of office on
17 this the 11th day of April, 2005.

18
19 D'Lois L. Jones
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