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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 18, 2009

(SATURDAY 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 18th
day of April, 2009, between the hours of 9:01 a.m. and
12:00 p.m., at the Texas Association of Broadcasters, 502
East 11th Street, Suite 200, Austin, Texas 78701.

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Document referenced in this session

09-11 TAMES, TRAP amendments

1 wonder if any of this overlaps that. We'll look. Okay.
2 I'll pass it on.

3 CHAIRMAN BABCOCK: Doesn't seem like it. I
4 tell you what if you just send it -- well, Angie already
5 has it, right?

6 MS. PETERSON: She has it, but I'll send it
7 to you, Frank. I'll send it to everybody in the
8 subcommittee, and I'll copy Angie just to make sure she's
9 got it again.

10 MS. SENNEFF: With all the pages?

11 MS. PETERSON: Yes, with all the pages.

12 HONORABLE NATHAN HECHT: The Court had a
13 hearing, as it does periodically, on access to justice,
14 and during that hearing several people said, you know,
15 there might be some rules changes that would improve
16 access to justice, and this is an outgrowth of that.

17 MS. PETERSON: And the Texas Access to
18 Justice Commission has chimed in and supported at least
19 one, if not two, of the recommendations made by the
20 poverty law section of the State Bar. There's also a
21 recommendation coming from Chuck Herring, who used to be
22 on this committee, so I'll send it all to you.

23 MR. GILSTRAP: Looking forward to it.

24 CHAIRMAN BABCOCK: Okay. Well, yesterday we
25 stopped at 9.2(c), and we had been talking about that,

1 that subdivision of 9.2, and, Kennon, did you have any
2 thoughts over the evening about where we are, where we
3 ought to go?

4 MS. PETERSON: I do have --

5 CHAIRMAN BABCOCK: Thoughts you want to
6 share with us.

7 MS. PETERSON: Yeah, sure, double --

8 CHAIRMAN BABCOCK: As opposed to the beating
9 that you got yesterday.

10 MS. PETERSON: Yeah. Well, one of the
11 things that I don't know if it was made clear enough
12 yesterday, the reason for using the JP rules as a model
13 when drafting the amendments to the Rules of Appellate
14 Procedure is because the JP rules are so close to the
15 district court and county court rules that have been in
16 place since January 1 of 2003, and although they're not
17 perfect and we did try to make revisions along the way to
18 improve the clarity and also to strip out unnecessary
19 text, I think maybe we should all keep in mind it's a
20 system that's been working since 2003, and so something is
21 right about the rules, and they could I'm sure be clearer,
22 but I think the process is working.

23 And the other thing I wanted to comment on
24 is there was a suggestion at one point to have a separate
25 committee to focus on the technology before the rules come

1 before this larger committee, and if I'm not mistaken, the
2 rules have gone through -- when I say "the rules," the
3 district court and county court rules have gone through
4 the Judicial Committee on Information Technology at one
5 point before coming to this committee; and also, the rule
6 amendments that you're looking at now have gone before
7 several members of the Office of Court Administration who
8 know the ins and outs of TAMES; and the reason that we did
9 that is so that when we got here some of those issues that
10 people were grappling with yesterday would have been
11 addressed and resolved to the best of OCA's ability.

12 And the final thing I wanted to say in
13 response to yesterday is that I can definitely see the
14 benefit of putting things like DPI requirements and other
15 issues that are going to change, other aspects of
16 technology that are going to change probably within the
17 near future, putting those into a separate document like
18 an order of the court that can be amended more readily
19 than the rules themselves, but I guess there's a part of
20 me that's concerned about not telling people how to file a
21 document electronically in the Rules of Appellate
22 Procedure because the Rules of Appellate Procedure tell
23 you how to file a document in paper, and it seems to me
24 they ought to tell you how to file it electronically as
25 well.

1 So I'm wondering whether when going through
2 we could think about maybe what should be in the Rules of
3 Appellate Procedure in terms of filing electronically and
4 what should be in a separate document, and maybe that's
5 off the table because everybody thinks everything should
6 be in a separate stand-alone document, but I just wasn't
7 entirely clear where we were on that point yesterday.

8 CHAIRMAN BABCOCK: The good thing about this
9 committee is it's very shy, and they're very unwilling to
10 express their views. Just kidding. I think you'll
11 probably hear if people have views on that. Yeah, Hayes.

12 MR. FULLER: Would it be fair to assume that
13 the reason why you're putting all of this in the appellate
14 rules is because that's really the only area we can reach
15 out and touch at this point in time because the district
16 courts are really off on a different deal and are -- it's
17 kind of piecemeal, if you will, to some extent. They
18 either adopted the template or they haven't or they can or
19 can't, because I think really where I understood Tracy to
20 be coming from is if we're going to have these rules for
21 electronic filing, electronic filing is electronic filing.
22 It doesn't matter whether it's in justice court, it
23 doesn't matter whether it's in the Supreme Court, it's
24 basically really ought to all more or less be the same to
25 some extent.

1 MS. PETERSON: Uh-huh.

2 MR. FULLER: And I think that's where she
3 was going, and so it would be very easy in rules
4 applicable to each level of court to simply say, you know,
5 "must be filed in accordance with the rules of electronic
6 filing." I think that's really kind of where -- at least
7 where I understood her to be going in that. It seems that
8 would be fairly easy to do, and I think -- but I
9 understand where you're trying to get. You need something
10 now in the appellate rules because that's all we're really
11 able to deal with at this point in time. I understand
12 where Tracy is trying to get.

13 It seems to me we ought to be able to do
14 both, because I think in the long run if we're going to
15 bring these other courts along to where everybody is doing
16 the same thing, they might as well know where it is
17 they're trying to get; and to the extent there are courts
18 out there, district courts out there or whatnot or the
19 counties that have not adopted the template, okay, let's
20 don't adopt something that's going to change or that's
21 going to be different, let's have them adopt the rules of
22 electronic filing.

23 MS. PETERSON: Uh-huh.

24 MR. FULLER: So I think we're doing good
25 work going through here, if this is all we can do, approve

1 this, but, you know, I really do think we ought to be
2 putting it --

3 MS. PETERSON: And I think that's right, and
4 I think like the standards and all the ins and outs of how
5 it gets from one party to another party along the chain
6 and how something should be scanned, there are certain
7 things that I think can apply to every single court in the
8 state. If it's all going to go through an EFSP and
9 TexasOnline I think there are provisions that apply to all
10 courts, but there are other things that are specific to
11 the courts, and so having a stand-alone document for all
12 the courts, I think you would still have to have
13 provisions particular to the district and county courts
14 and the appellate courts.

15 For example, you know, you have different
16 documents that go through, and we were talking a little
17 bit yesterday about the citation that's served in the
18 original suit, and there are different issues involved
19 with that than a brief, and that's just an example of
20 where I think you might not be able to create just a
21 standard set to address every single issue that applies to
22 all of the courts, and so I could be wrong, but that's
23 just my concerns about having a stand-alone document,
24 general and applicable to all courts in the state.

25 CHAIRMAN BABCOCK: Okay. Let's see if we

1 can get through these rules this morning, and are there
2 any other comments on 9.2(c), the introductory paragraph,
3 other than what was discussed yesterday? Anybody have
4 anything else? Yeah, Judge Christopher.

5 HONORABLE TRACY CHRISTOPHER: We were
6 talking about the digital/digitized signature.

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE TRACY CHRISTOPHER: Could I
9 suggest a different word for digitized signature? Because
10 that's confusing, I mean, and if we're not going to have
11 one uniform set of rules, let's use something that's
12 better in the appellate court rules. I mean, I still can
13 rebut anything that Kennon said this morning, but I'm not
14 gonna.

15 MS. PETERSON: Well, I think you should. I
16 mean, I'm not --

17 CHAIRMAN BABCOCK: No. No, no, no, she
18 shouldn't. Your instinct is right.

19 HONORABLE TRACY CHRISTOPHER: But it seems
20 to me that, you know, digitized signature is too close to
21 digital --

22 MS. PETERSON: Uh-huh.

23 HONORABLE TRACY CHRISTOPHER: -- and is
24 confusing, and it is an unnecessary word. You know, I'd
25 rather call it a graphic image of a signature or a scanned

1 signature.

2 MS. PETERSON: Scanned signature.

3 MR. GILSTRAP: Facsimile. Facsimile.

4 HONORABLE TRACY CHRISTOPHER: Just, you
5 know, I mean, if we're going to start over I think we
6 should really make some changes.

7 MS. PETERSON: Uh-huh.

8 CHAIRMAN BABCOCK: Okay. Justice Sullivan.

9 HONORABLE KENT SULLIVAN: It occurs to me
10 that most practitioners in the state of Texas are set up
11 and have been set up to deal with electronic filing
12 because they have to file with the Federal courts. I
13 mean, that's been required for years, and it occurs to me
14 that it really makes sense to make this as user-friendly
15 and as consistent as possible, and whether we're talking
16 about technical requirements in terms of dots per square
17 inch or whatever the DPI standard is or whether we're
18 talking about language like Judge Christopher is bringing
19 up, I think it makes a whole lot of sense for us to the
20 extent possible to adopt the standards that are already in
21 use in the Federal courts, as opposed to the prospect of
22 reinventing the wheel and having standards and language
23 that deal with the same issues and perhaps having two
24 entirely different systems that people have to comply
25 with. I just think it makes a lot of sense. It's just a

1 whole lot easier for the people who use our system to the
2 extent possible to be able to think there's largely a
3 unified system with similar standards for compliance.

4 CHAIRMAN BABCOCK: Yeah, Sarah.

5 HONORABLE SARAH DUNCAN: And following up on
6 that, where do the terms "digital signature" and
7 "digitized signature" come from? Are those in the JP and
8 the district court and the Federal courts?

9 HONORABLE TRACY CHRISTOPHER: "Digitized
10 signature" is, and "digital signature" is later in their
11 rules somewhere.

12 HONORABLE SARAH DUNCAN: And are those in
13 the Federal rules?

14 MS. PETERSON: They're from the district
15 court and JP rules.

16 HONORABLE SARAH DUNCAN: But do they use
17 those in the Federal rules?

18 MS. PETERSON: I don't think they use
19 "digitized signature" in the Federal rules, but I'll have
20 to go back through and refresh my memory.

21 CHAIRMAN BABCOCK: Bill.

22 PROFESSOR DORSANEO: There is legislation
23 about this, too, and I haven't read it for some years. I
24 wonder what terminology the legislation uses.

25 HONORABLE NATHAN HECHT: They use "digital."

1 PROFESSOR DORSANEO: The UTA, I think it is.

2 HONORABLE NATHAN HECHT: But they're only
3 concerned with (f). They're only concerned with the
4 transmission. We've got two problems. We've got the
5 authentication of the transmission and the tracing back to
6 somebody responsible, and then we've got what is
7 perceived, at least has been perceived so far, to be a
8 different requirement for Rule 11 agreements and
9 affidavits and things that require an actual signature so
10 that you can actually point to this guy and say, "You're
11 responsible," and so if something like that is required,
12 we have to have a name for it, but when it is required, it
13 has nothing to do with the other thing. And that may be
14 confusing that the two words are so similar because they
15 don't have anything to do with one another.

16 The signature, the graphic image of your
17 signature, is just a scan, just a photocopy of your
18 signature on a page and reduced to an electronic image so
19 that when somebody looks at it, they see it on a screen,
20 "Bill Dorsaneo," and then if they want to hold you -- they
21 want to sanction you or hold you in contempt they've got
22 your signature on something, or hold you to an agreement.
23 But there are other problems with trying to make the
24 electronic signature do that because people's secretaries
25 and paralegals send things in and so you -- you know,

1 they're not responsible for the content.

2 MS. PETERSON: And I see in the Federal
3 rules they use the SI slash and then the typed name to
4 indicate a signature, at least in Northern and Southern
5 District.

6 CHAIRMAN BABCOCK: What do they call it?

7 MS. PETERSON: They don't have a term.

8 PROFESSOR DORSANEO: They probably call it a
9 signature.

10 CHAIRMAN BABCOCK: In our scheme that would
11 be a digital signature, would it not?

12 MS. PETERSON: No.

13 MR. GILSTRAP: No, digitized. Digitized.

14 MS. PETERSON: It's neither.

15 CHAIRMAN BABCOCK: It's a third thing?

16 HONORABLE TRACY CHRISTOPHER: It's nothing.

17 CHAIRMAN BABCOCK: It's nothing.

18 PROFESSOR CARLSON: It's a signature line.

19 HONORABLE TRACY CHRISTOPHER: It looks good
20 though, because like the first time you get a pleading
21 that has a blank signature page you're like, "Oh, somebody
22 forgot to sign," and then you flip back and you see that
23 it was electronically filed, and you know it's deemed to
24 have a signature on it, but it is a little shocking the
25 first time you look at a pleading without a signature.

1 CHAIRMAN BABCOCK: Yeah, but it has S slash
2 Slash and then the name.

3 HONORABLE TRACY CHRISTOPHER: No, nothing.
4 I mean, some people will do that slash Slash, but you
5 don't have to. It's not required, and sometimes it's just
6 blank when it comes in.

7 MS. PETERSON: Uh-huh.

8 CHAIRMAN BABCOCK: Yeah, Carl.

9 MR. HAMILTON: Why doesn't it have a scanned
10 signature?

11 HONORABLE TRACY CHRISTOPHER: It's not
12 required under the rules.

13 MR. HAMILTON: Why not?

14 HONORABLE TRACY CHRISTOPHER: We don't
15 require that.

16 HONORABLE NATHAN HECHT: Scanning something
17 takes more room. It's a hugely bigger file than if you
18 just send the typed words to the clerk, so if we send this
19 document -- if we want to make an electronic copy of this
20 document, which is the TRAP rules, it's about 250,000
21 kilobytes, but if we scan this whole hundred pages or
22 however much it is, the file will be gigantic, so you
23 don't want to scan things if you don't have to because it
24 just takes more room. But there's some thought, which we
25 have to get away from at some point, but I don't know if

1 we're ready yet, that for Rule 11 agreements and
2 affidavits and things like that, maybe return of service,
3 I'm not sure, you've actually got to have a judge's
4 signature on a judgment, you've actually got to have the
5 scrawl on the paper, which means you're going to have to
6 scan it in.

7 CHAIRMAN BABCOCK: Alex.

8 PROFESSOR ALBRIGHT: Well, obviously there's
9 some concern about who signed the brief or who signed the
10 pleading. You know, we were concerned about whether
11 people had scanners or not. Scanning a signature is a
12 much more technical process than just making a PDF out of
13 a Word document. What if our rule said someone has to
14 sign the brief by going S slash Slash --

15 MS. PETERSON: Right.

16 PROFESSOR ALBRIGHT: -- name.

17 HONORABLE TRACY CHRISTOPHER: Well, I mean,
18 that's fine. It could be a good addition.

19 PROFESSOR ALBRIGHT: Then you wouldn't have
20 scanned images of signatures.

21 MS. PETERSON: And you wouldn't have the
22 issue with somebody receiving a document and seeing no
23 signature at all and just wanting to be absolutely certain
24 this document has, in fact, been signed with a digital
25 signature. You wouldn't have that inquiry --

1 PROFESSOR ALBRIGHT: Right.

2 MS. PETERSON: -- anymore.

3 CHAIRMAN BABCOCK: Would you still have the
4 problem with --

5 PROFESSOR ALBRIGHT: It would be signed just
6 like -- you know, it would be a signature is either a
7 handwritten signature or S slash Slash name.

8 MS. PETERSON: Uh-huh.

9 CHAIRMAN BABCOCK: Justice Bland.

10 HONORABLE JANE BLAND: It doesn't seem to me
11 like we need that. If we're doing it by Texas -- by
12 electronic filing, the very fact that there's a
13 confirmed -- a confirmation that the document's been
14 filed, it's like this electronic password substitutes for
15 a signature.

16 MS. PETERSON: And that's how it's been
17 working, yeah.

18 HONORABLE JANE BLAND: Right, and I think
19 that's fine.

20 PROFESSOR ALBRIGHT: But hasn't that been
21 what Tracy's been saying, is she doesn't know who signed
22 it?

23 HONORABLE TRACY CHRISTOPHER: No, I mean,
24 the first time I saw it I was surprised, but now I'm used
25 to it.

1 PROFESSOR ALBRIGHT: But if there's a list
2 of six lawyers you don't know which one signed it.

3 HONORABLE TRACY CHRISTOPHER: No, I won't
4 know that. I mean, maybe in the metadata it says it.

5 PROFESSOR ALBRIGHT: You could find it if
6 you needed it.

7 CHAIRMAN BABCOCK: Even if we had that slash
8 S, double slash S and the name, it still doesn't solve the
9 Rule 11 problem. Right?

10 MS. PETERSON: It doesn't really speak to
11 that problem.

12 CHAIRMAN BABCOCK: Right.

13 MS. PETERSON: I think it solves -- if there
14 is a problem, it solves the problem of seeing a document
15 with no John Hancock on it, and so you have that certainty
16 of signature.

17 CHAIRMAN BABCOCK: Justice Bland.

18 HONORABLE JANE BLAND: Well, and Rule 11
19 agreements are different because there are disputes that
20 arise about whether or not somebody signed the Rule 11
21 agreement.

22 CHAIRMAN BABCOCK: Right.

23 HONORABLE JANE BLAND: And whether the
24 signature is genuine, et cetera.

25 CHAIRMAN BABCOCK: Yeah. Judge Christopher.

1 HONORABLE TRACY CHRISTOPHER: I speak in
2 favor of modern practices and an exchange of e-mails
3 equaling a Rule 11 agreement. We routinely enforce an
4 exchange of e-mails in the district court as a Rule 11
5 agreement, so keeping some vestige of signed handwritten
6 signatures in the appellate rules strikes me as silly. If
7 you have an agreement with co-counsel for -- that they are
8 not opposed to your request for extension of filing the
9 brief, an exchange of e-mails ought to, you know, be
10 enough. I don't know what other Rule 11 agreements you've
11 got up there in the appellate court, but -- other than
12 that.

13 MR. GILSTRAP: How about a Rule 13 sanction?

14 HONORABLE NATHAN HECHT: Well, that's not
15 always been this committee's view.

16 HONORABLE TRACY CHRISTOPHER: I know it's
17 not. That's why I'm saying -- I'm speaking in favor of
18 the modern position.

19 HONORABLE JANE BLAND: Well, what we get is
20 somebody has their letter that they've signed, and there's
21 a signature in the bottom indicating that they've agreed,
22 and I think an exchange of e-mails would show it because
23 it would come from the person who agreed better than, you
24 know, a scrawl at the bottom and somebody says, "I didn't
25 sign this."

1 MR. FULLER: I would sure hate to argue that
2 to Judge Christopher. Oh, didn't sign that.

3 HONORABLE TRACY CHRISTOPHER: I'm just
4 saying that --

5 HONORABLE JANE BLAND: Well, in a lot -

6 HONORABLE TRACY CHRISTOPHER: -- as a
7 practical matter.

8 HONORABLE JANE BLAND: -- of cases there's
9 really good evidence that they didn't sign it.

10 CHAIRMAN BABCOCK: What about this concept
11 in 9.1(b)(4) about notarized, sworn to, or made under
12 oath, that that's got to be -- that's got to be
13 electronically filed in a way that you can see the scanned
14 signature?

15 HONORABLE NATHAN HECHT: I think for
16 purposes -- you know, we've had this discussion with
17 regards to perjury briefly, I think at the last meeting.

18 CHAIRMAN BABCOCK: Uh-huh.

19 HONORABLE NATHAN HECHT: And we had a
20 proposal from the Court Rules Committee at the Bar to
21 change the the Rules of Evidence to provide that signed
22 under penalty of perjury is enough to subject you to that
23 criminal punishment.

24 CHAIRMAN BABCOCK: Right.

25 HONORABLE NATHAN HECHT: Which is not

1 doable, probably not doable, because the way the statutes
2 are constructed. You can't -- perjury is defined, and
3 that's not one of the things it's defined to be, so until
4 the Legislature changes the statute, which they did for
5 inmates, but they don't do it for everybody else. The
6 Feds have a statute that does change it for everybody
7 else. So I think we could accomplish most of what's
8 necessary in the appellate rules, which is sanctions,
9 which nobody ever opposes anyway, just on the basis of the
10 signature, and we wouldn't have to worry about the perjury
11 statute, but every once in a while something has to be
12 notarized in the appeal for some reason, and so there
13 would have to be -- you would have to consider what to do
14 about that.

15 CHAIRMAN BABCOCK: Probably writs have to be
16 sworn?

17 HONORABLE NATHAN HECHT: I don't think so.
18 I'm trying to remember what -- didn't we change the rule
19 about the mandamus record? Does the lawyer have to swear
20 to that?

21 HONORABLE SARAH DUNCAN: Huh-uh.

22 HONORABLE NATHAN HECHT: He just has to say
23 that there's a good faith belief that it's in the
24 evidence.

25 CHAIRMAN BABCOCK: Right.

1 HONORABLE NATHAN HECHT: So I don't really
2 know if there is anything other than the Rule 11.

3 HONORABLE SARAH DUNCAN: It's more than good
4 faith.

5 HONORABLE NATHAN HECHT: Yeah.

6 HONORABLE SARAH DUNCAN: I think the lawyer
7 has to certify that the facts in the petition are
8 reflective of what's in the mandamus record.

9 MR. WATSON: Yeah, it's not good faith. I
10 mean, it's a verification without being sworn.

11 HONORABLE SARAH DUNCAN: It's absolute.

12 MR. WATSON: Whatever that difference is,
13 but you were affirmatively stating it's accurate.

14 CHAIRMAN BABCOCK: Yeah, Sarah.

15 HONORABLE SARAH DUNCAN: What concerns me
16 about this is, you know, it's possible to -- for me to
17 send an e-mail to you, but not send it to you and send an
18 e-mail back from you to me as though it were from you, but
19 it's not, and Bill Pakalka --

20 CHAIRMAN BABCOCK: I'm a lot more suspicious
21 of you than I used to be.

22 HONORABLE SARAH DUNCAN: Bill Pakalka, he
23 caused many stirs at Fulbright because he had figured out
24 how to send an e-mail as though it was from Jim Sales when
25 it -- Jim didn't know anything about it, but he was able

1 to use Jim's e-mail address, and the recipient of the
2 e-mail couldn't tell that Sales hadn't sent that e-mail.
3 So what happens if we're going to let e-mails be Rule 11
4 agreements if we can ghost one another's e-mails.

5 HONORABLE JANE BLAND: You just have a
6 hearing on it. I mean, you enforce the 99.999 percent of
7 the e-mails that are exchanged by the right people and
8 are --

9 HONORABLE KENT SULLIVAN: People can claim
10 that a signature was forged.

11 HONORABLE JANE BLAND: And then the .001
12 where somebody falsifies or cuts and pastes or, you know,
13 you have to have a hearing.

14 PROFESSOR ALBRIGHT: Or forges. It's easier
15 really to forge a signature than it is to do that. If
16 you're evil enough to do that, you're evil enough to forge
17 a signature. Remember forging your mom's signature on
18 notes in high school?

19 MS. PETERSON: I never did that.

20 CHAIRMAN BABCOCK: We're having some
21 confessions here.

22 HONORABLE TRACY CHRISTOPHER: Now it's via
23 e-mail, and your child intercepts your e-mail.

24 CHAIRMAN BABCOCK: Okay. Well, where are
25 we? Are we -- Judge Christopher says we ought to change

1 the phrase "digitized," "digitized signature." That ought
2 to be called something else in Rule 3.1(g)

3 MS. PETERSON: "Scanned signature" is an
4 option.

5 HONORABLE TRACY CHRISTOPHER: Well, and, you
6 know, if it's in 9.1, the whole signing issue, which I
7 think we were still struggling with yesterday in that
8 paragraph that is so difficult to understand between
9 digital and digitized, 9.1(c)(2), and I just think it
10 would be so much clearer if we used a different word.

11 MS. PETERSON: I agree.

12 PROFESSOR ALBRIGHT: We really don't want
13 one? Do you want to even include it, because it sounds
14 like you-all really don't want them?

15 MS. PETERSON: What's that? Sorry.

16 PROFESSOR ALBRIGHT: It sounds like you-all
17 really don't want digitized signatures.

18 HONORABLE TRACY CHRISTOPHER: So let's not
19 have them.

20 HONORABLE NATHAN HECHT: I don't.

21 PROFESSOR ALBRIGHT: Yeah, so if you put it
22 in here it makes it sound like it's better if you put it
23 in here, if you use it.

24 HONORABLE TRACY CHRISTOPHER: Just say all
25 briefs are filed with a digital signature, not a

1 digitized, not a scanned.

2 MS. PETERSON: What if you have a
3 certificate of conference that the associate has signed
4 and a brief that the lead counsel is submitting and
5 signing with his or her digital signature? What do you do
6 in that instance?

7 HONORABLE SARAH DUNCAN: Two signers.

8 PROFESSOR ALBRIGHT: Can't you do S slash
9 slash?

10 MS. PETERSON: You could. Yeah. We just
11 have to incorporate something like that into the rules.
12 Right now there's -- if we took out the provision, the
13 reason the provision is there is because of the
14 possibility that two different people's signatures would
15 need to be on one electronic transmission.

16 CHAIRMAN BABCOCK: I may be missing
17 something, but yesterday on 9.1, 9.1(b) -- no, (c)(4) and
18 (5) I thought, Judge Christopher, you suggested we have
19 another subsection (6) that covered anything else where a
20 signature had to be there.

21 MS. PETERSON: Richard Munzinger --

22 CHAIRMAN BABCOCK: Was it Munzinger?

23 MR. PETERSON: -- made that suggestion, I
24 think.

25 HONORABLE TRACY CHRISTOPHER: It wasn't my

1 suggestion.

2 CHAIRMAN BABCOCK: Okay. So --

3 HONORABLE TRACY CHRISTOPHER: I want them
4 all out of here.

5 CHAIRMAN BABCOCK: Huh? So you want (4) and
6 (5) out.

7 HONORABLE TRACY CHRISTOPHER: Yeah.

8 CHAIRMAN BABCOCK: And Munzinger wants (4),
9 (5), and an additional one, (6). So --

10 HONORABLE TRACY CHRISTOPHER: I mean, I just
11 think we need to really think through how we want the
12 brief signed. I mean, for me, different certificate of
13 service versus signing the brief, I mean, again, how many
14 times is that ever, ever, ever an issue.

15 HONORABLE SARAH DUNCAN: Everyday.

16 MS. PETERSON: It happens a lot.

17 HONORABLE SARAH DUNCAN: Everyday.

18 MS. PETERSON: It does, it happens a lot.

19 HONORABLE JANE BLAND: What happens is
20 multiple people work on the brief, and so the lead counsel
21 wants to sign the brief, but the actual scrivener of the
22 brief, who had done most of the work on the brief, gets to
23 sign the certificate of service because -- to show that
24 they actually worked on the brief.

25 MS. PETERSON: Yeah. Yeah.

1 HONORABLE JANE BLAND: They actually wrote
2 the brief that lead counsel is signing, but -- and that
3 doesn't bother me that we get rid of that practice because
4 we should include everybody that's in the signature block
5 as having participated in representing the client on the
6 appeal, and I think that will solve the problem. I mean,
7 I think we already do that, so but the bigger problem is
8 when you have multiple appellees who file a joint brief or
9 you have a dismissal, because then you actually need the
10 representation by each party's counsel that they are
11 joining in the brief and agree with it and, you know, or
12 agree to dismissing the appeal. So it does come up where
13 you have, you know, four true signature blocks from
14 different law firms all saying that this is the brief.

15 The way to fix that maybe is to say that
16 who -- the person that electronically files represents
17 that he has, you know, confirmation that this brief is the
18 brief for these multiple appellees or these multiple
19 appellants.

20 MS. PETERSON: Or we have the signature
21 line.

22 HONORABLE JANE BLAND: Because I don't know
23 if it would have to be a certification in the brief or it
24 just would be some kind of recordkeeping that the person
25 that actually electronically files the brief would hold

1 onto, e-mail communication, "Yes, file the brief on behalf
2 of my client."

3 CHAIRMAN BABCOCK: We're talking about two
4 different problems, it seems to me. One is the brief and
5 how we're going to sign or not or whatever, but this
6 subsection (4) and (5) deals with things that are not the
7 brief.

8 HONORABLE JANE BLAND: Well, or dismissal or
9 anything that multiple people are joining in on. It is
10 the same thing, because ultimately you only want one
11 electronic password -- you only want one copy of this
12 thing being filed.

13 CHAIRMAN BABCOCK: Yeah, but 9.1(c)(4) and
14 (5) talk about things that are going to be scanned so that
15 you have an actual signature, and it's not -- and these
16 things are not the brief. It's something else.

17 Hayes, and then Justice Sullivan.

18 MR. FULLER: We are talking about two
19 separate things. Basically all indication of filing, and
20 that's going to be one filing, because there's no reason
21 to file multiple ones, and it's whoever logs in on that
22 user name and password, and then we're also talking about
23 who we might hold responsible for what has been filed, and
24 that may be a photographic reproduction of a digital
25 signature. Why can't we say -- I mean, I know on the one

1 hand you may not want to encourage that, but if people are
2 going to put it on there anyway for just the reasons that
3 Justice Bland said as far as I've got my name signed on
4 this brief somewhere, why don't we just do "digital
5 signature means a confidential and unique electronic
6 signature" like we've got it defined and then put "and may
7 include a graphic image of a handwritten signature."

8 Because what you're getting for sure is the
9 authentication of filing. That's what's really important,
10 that this document has been filed at this time. Of
11 secondary importance is who all may have signed, whether
12 they signed certificate of service, whether it's one or
13 more signature blocks, and you're going to have a picture
14 of those which may come through with the document. It
15 doesn't have to include that, but it may, but what's
16 really important I think is that digital signature.

17 HONORABLE JANE BLAND: See, I feel exactly
18 the opposite. I don't think we need anything on the paper
19 to reflect anything.

20 MR. FULLER: And you may not.

21 HONORABLE JANE BLAND: It's just the fact of
22 filing tags you, the filer, with having signed an -- you
23 know, what constitutes as signing in earlier days the
24 brief or the motion or whatever else.

25 CHAIRMAN BABCOCK: Justice Sullivan.

1 HONORABLE KENT SULLIVAN: At the risk of
2 becoming very predictable, the question comes up again,
3 how did the feds resolve this? The signature issue in
4 Federal court --

5 HONORABLE TRACY CHRISTOPHER: They do the
6 slash thing.

7 MS. PETERSON: Yeah, that's the slash.

8 HONORABLE KENT SULLIVAN: Well, why don't we
9 adopt that? I mean, they've got years of experience. The
10 lawyers are used to doing that. They apparently think it
11 resolved this issue. It's a bigger issue in Federal court
12 than in state court, I think, vis-a-vis the sanctions
13 issue.

14 CHAIRMAN BABCOCK: Well, let me ask you
15 this. You file a motion for summary judgment in Federal
16 court electronically. You've got affidavits supporting
17 your summary judgment. Angie, what do you file? Do you
18 file something that is an image of the affidavit that
19 shows the signature?

20 MS. SENNEFF: Uh-huh. You have to scan that
21 in.

22 CHAIRMAN BABCOCK: And you've got to scan
23 that in?

24 MS. SENNEFF: (Nods head.)

25 CHAIRMAN BABCOCK: So it's not all that

1 different than what is being proposed by 9.1(c)(4) and (5)
2 here in the Federal system. Because whereas in the
3 Federal system you can file your motion and your brief
4 that may have a S double slash name or may have nothing,
5 but for something that requires a sworn signature you've
6 got to scan that in. That's your affidavit in support of
7 your summary judgment.

8 MS. PETERSON: But --

9 CHAIRMAN BABCOCK: Yeah. But what?

10 MS. PETERSON: Oh, I was just going to say
11 so really the question is what you do about what is not
12 scanned in, because there probably will still be these
13 scanned signatures for certain documents, but in the
14 absence of that do you have nothing and it's just the
15 electronic unique identifier, or do you have the slash S
16 slash and then typed name?

17 CHAIRMAN BABCOCK: And Justice Bland says
18 that it doesn't matter, you can have nothing because the
19 chances of somebody filing a brief in an appellate court
20 when they didn't want to is infinitesimally small, so it
21 doesn't matter.

22 HONORABLE JANE BLAND: But I'm okay with
23 Kent's suggestion about conforming to the Federal rule,
24 either one, but I don't think we need to have the
25 confusion -- I agree with Judge Christopher that this idea

1 of trying to tell people about a digitized signature
2 versus a digital signature is confusing.

3 HONORABLE KENT SULLIVAN: It's just a whole
4 lot easier for the practitioner if there's --

5 HONORABLE JANE BLAND: I mean, to the extent
6 we can copy --

7 HONORABLE KENT SULLIVAN: -- effectively one
8 standard --

9 HONORABLE JANE BLAND: -- the Federal --

10 THE REPORTER: Wait, wait, wait. Guys,
11 don't talk at the same time.

12 HONORABLE JANE BLAND: Sorry, that was my
13 fault.

14 CHAIRMAN BABCOCK: Okay. Judge Christopher,
15 you had something to say.

16 HONORABLE TRACY CHRISTOPHER: Well, okay,
17 going back to what doesn't belong in the appellate rules,
18 No. (3) doesn't belong in the appellate rule, talking
19 about authorizing payment of the fees, okay, I don't
20 think.

21 CHAIRMAN BABCOCK: What rule are you on,
22 Judge?

23 HONORABLE TRACY CHRISTOPHER: 9.1(c)(3).
24 And the problem with (4) and (5) is that it's confusing
25 how to actually file something versus what do you do with

1 a filing that has to have a notarized affidavit, like a
2 summary judgment affidavit. Okay, so you've got your
3 brief that you file, and you sign it through the
4 electronic signature process.

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE TRACY CHRISTOPHER: Your
7 attachments might have to be notarized, and that's a
8 scanned image. So by putting (4) and (5) in under (c)
9 we're confusing the issues, I think, and making it more
10 difficult to understand.

11 MS. PETERSON: The reason it's there, for
12 what it's worth, is because 9.1 is the signing rule.
13 That's the only reason it's there, but maybe even though
14 this refers to signing it would be better placed elsewhere
15 with all the other mechanics of e-filing, but that's the
16 reason for its location.

17 CHAIRMAN BABCOCK: Frank.

18 HONORABLE TRACY CHRISTOPHER: But it's
19 confusing because it's under electronically filed -- I
20 mean, this appears to say, you know, the effect of your
21 signatures, and that's how we start getting confused
22 between digital, digitized, notarized, scanned, et cetera.
23 I mean, I just think the whole placement of it there is
24 confusing.

25 MR. GILSTRAP: Let me try this. The only

1 place -- what we're hanging up on is that some documents
2 have to actually be signed, you know, with pen and ink and
3 notarized, but the only place in the appellate rules is
4 the mandamus provision. Briefs don't. All the other
5 stuff we're talking about is in the trial court. It comes
6 up in the record.

7 CHAIRMAN BABCOCK: Right.

8 MR. GILSTRAP: So let's get rid of the
9 verification requirement in mandamus and go to straight S
10 slash, S double slash signatures, in the appellate rules.
11 Doesn't that solve the problem?

12 CHAIRMAN BABCOCK: Yeah, Justice Gray.

13 HONORABLE TOM GRAY: 42.2(a) deals with
14 voluntary dismissals in criminal cases and requires that
15 the appellant and the attorney must sign the written
16 motion to dismiss before you can voluntarily dismiss a
17 criminal case, and that will need to be dealt with if
18 that's done.

19 CHAIRMAN BABCOCK: And there's something
20 where you really would want a signature from --

21 HONORABLE TOM GRAY: Criminal defendant.

22 CHAIRMAN BABCOCK: -- the incarcerated
23 criminal defendant who was dismissing an appeal.

24 HONORABLE TOM GRAY: Because we -- believe
25 it or not, we have had those occasions when they come back

1 and say, "I did not want my appeal dismissed."

2 CHAIRMAN BABCOCK: Amazing.

3 HONORABLE TRACY CHRISTOPHER: I thought this
4 was just civil. The Court of Criminal Appeals doesn't
5 want the electronic stuff.

6 HONORABLE NATHAN HECHT: It's the Court of
7 Criminal Appeals, but there are 14 courts of appeals.

8 HONORABLE TRACY CHRISTOPHER: Oh, that's
9 right. Sorry.

10 MR. GILSTRAP: So if we could fix that
11 problem then we could -- it would fix our problem, but we
12 probably can't fix that problem.

13 CHAIRMAN BABCOCK: Sarah.

14 HONORABLE SARAH DUNCAN: There are other
15 things that are filed in the appellate courts that require
16 affidavits.

17 MR. GILSTRAP: Good time to get rid of them.
18 Isn't that where we're headed?

19 CHAIRMAN BABCOCK: I don't know.

20 HONORABLE SARAH DUNCAN: If my motion for
21 extension of time depends on something outside a fact,
22 outside the record, or some other type of motion, I have
23 to -- I have the right to file an affidavit to establish
24 that fact. I don't want to get rid of the ability to do
25 that.

1 MR. GILSTRAP: I don't want to either. I
2 think you ought to be able to do that just based on your
3 signature. You know, you're a lawyer and if you signed it
4 and if you're not telling the truth then you can be
5 sanctioned.

6 HONORABLE SARAH DUNCAN: Well, but I don't
7 have personal knowledge of this fact. I'm not going to --

8 MR. GILSTRAP: So you need to --

9 HONORABLE SARAH DUNCAN: -- commit perjury
10 by --

11 MR. GILSTRAP: You need some third party
12 maybe to talk about the fact that --

13 HONORABLE SARAH DUNCAN: Whatever.

14 CHAIRMAN BABCOCK: Justice Bland.

15 HONORABLE JANE BLAND: Well, it sounds like
16 for the filer we don't -- I mean, I think Hayes was right,
17 it's two different issues. For the filer, if the filer
18 is the one having to make a verification together with
19 signing the pleading, the action of electronically filing
20 the document should constitute both the signature on the
21 pleading and any necessary verification, and we could say
22 that, and then for these cases where we need signatures
23 from other people we have to think about how we handle
24 that, whether we're going to require those to actually be
25 signed and scanned or -- but it's, you know, we file -- as

1 officeholders we have to file reports electronically, and
2 we don't ever sign them, and they're in -- you know, and
3 they have all kinds of I don't know what will happen to
4 me --

5 HONORABLE NATHAN HECHT: Yeah.

6 HONORABLE JANE BLAND: -- if I mess them up,
7 but it's serious, I know that, and I don't sign it, but
8 because I file it under a password that's unique to me,
9 should they be wrong, you know, I'm in trouble just like
10 -- just as if I had signed it.

11 CHAIRMAN BABCOCK: Justice Hecht.

12 HONORABLE NATHAN HECHT: But there's a
13 statute.

14 HONORABLE JANE BLAND: Right, no, I know,
15 but, I mean, I think we could do the same for our rule for
16 the filer of any -- I mean, if we're talking about the
17 problems with verification or any kind of support for a
18 continuance or, you know, anything that the filer has to
19 sign, the action of filing it electronically should
20 constitute -- or have the same force and effect of a
21 signature.

22 HONORABLE NATHAN HECHT: But you can't
23 prosecute someone for perjury based on Rules of Procedure.

24 HONORABLE JANE BLAND: Well, that's a
25 different issue, but if we're just talking about whether

1 or not we can sanction people about it and whether we're
2 going to accept these things, I think you said --

3 HONORABLE NATHAN HECHT: Right.

4 HONORABLE JANE BLAND: -- that we couldn't
5 do a thing about that, that we would have to wait for the
6 Legislature to do something about that.

7 CHAIRMAN BABCOCK: Bill, and then Sarah.

8 PROFESSOR DORSANEO: It seems to me what
9 we're talking about is changing the ways that we've
10 historically, you know, formalized the process of
11 preparing and submitting a document into something
12 entirely different, and we do -- you know, the signature,
13 people sign the signature, they probably think a little
14 bit more about it than otherwise. I at least think I
15 ought to read things that I sign, and kind of people know
16 that, and then the -- doing it under oath just adds
17 another layer of formality that makes the person
18 participating in that think this is a more serious
19 endeavor than some other kinds of things.

20 What we're doing in this thing is just kind
21 of do it the old way in a new way, but there are problems
22 with scanning, just takes too much energy, too much space.
23 We just need to come up with something -- some other
24 formality, whether it's a certification or just some sort
25 of a statement at the end that might be regarded as

1 boilerplate, maybe put it in capital letters that says --
2 that reminds the person who is filing this or reminds the
3 person who is involved in submitting it for filing, that
4 this is serious stuff and you could be held accountable if
5 it's -- if it's flawed in some way, rather than having
6 signature blocks that don't have signatures in them. I
7 mean, I can imagine explaining that to people, you know,
8 50 years from now. They say, "What is that?"

9 "Oh, that's the scafford [phonetic]. That's
10 where we used to sign these things," okay. "Oh, how
11 interesting." You just need to come up with a whole new
12 -- a whole new way of doing it that fits the technology.
13 I don't think it's very hard to do that either.

14 CHAIRMAN BABCOCK: Sarah.

15 HONORABLE SARAH DUNCAN: You may -- Bill may
16 be right. What concerns me about this is I take signing
17 very seriously. Some people take it less seriously, which
18 it's their right to do. I can be more than willing to
19 sign the signature block of a mandamus petition, but I'm
20 not signing the verification, because I haven't been
21 through every single page of the record. I'm relying on
22 somebody else that has done that, and they will sign that.
23 I can't sign a certificate of conference because I didn't
24 talk to the other lawyer. I can't sign the certificate of
25 service because I wasn't there that day. I was in France,

1 hopefully.

2 So I do think the formalities are important,
3 and I think an electronic system has to accommodate them,
4 and I'm not willing to have -- if it's my -- if I am the
5 filer, I'm not willing to have attributed to me all of --
6 signing all the blanks on that document, and I think we
7 better be careful if we're going to go down that road.

8 CHAIRMAN BABCOCK: Justice Gaultney.

9 HONORABLE DAVID GAULTNEY: I think my take
10 on it is that the rules do recognize -- as they're
11 currently drafted, recognize that we're using the password
12 and the scanned signatures as signatures for different
13 purposes in the rules, and I think that's kind of what
14 we're talking about; that is, there are some things where
15 you want delivered to "I'm swearing under oath," and
16 perhaps it is important to have that as a scanned image,
17 and so the rules make that distinction.

18 I think to me part of the problem is the one
19 identified by Justice Christopher right at the beginning.
20 "Digitized," "digital" your mind starts going "Now, which
21 is which?" I think we should just call it "password" and
22 "scanned image signature," and then in rule -- I mean, I
23 think that would add some clarification and then in Rule
24 6.1, I think it is -- not 6.1. In the definitions rule
25 where we talk about -- I'm sorry, that's 3.1(f) and (g).

1 You have "digital signature," and you define it. To me
2 what you're really saying is what's a signature, and
3 you're saying signature is an actual signature and
4 includes, unless otherwise specified in these rules, a
5 password signature or a scanned signature.

6 So you could define "signature" as including
7 these two subcategories, password and scanned, and then
8 the rules as you go through distinguish when -- sometimes
9 when you need one and when you need the other, but, you
10 know, if you're going to swear to a document, you need the
11 scanned, you need the scanned signature, otherwise you're
12 going to be stuck with the password signature.

13 The Rule 6.1 where it talks about lead
14 counsel, doesn't -- it says the first name that appears in
15 the signature block, so it already recognizes that we've
16 gotten away from, you know, a signing. That anticipates
17 that there's going to be some name in the signature block.

18 CHAIRMAN BABCOCK: What if we called (f)
19 "electronic signature" and we called (g) "scanned
20 signature"? Now, that might be conflict --

21 PROFESSOR ALBRIGHT: But don't you-all not
22 want scanned signatures?

23 CHAIRMAN BABCOCK: We don't want scanned
24 signature?

25 PROFESSOR ALBRIGHT: That's what Justice

1 Hecht said.

2 HONORABLE TRACY CHRISTOPHER: On briefs he
3 doesn't want them.

4 CHAIRMAN BABCOCK: Well --

5 MR. GILSTRAP: The fewer the better.

6 CHAIRMAN BABCOCK: But wait a second. What
7 Justice Gray just talked about seems to me is a serious
8 problem. You've got a motion to dismiss a criminal
9 appeal, and it's electronically filed, and the Court of
10 Criminal Appeals says, "I know that the defendant has got
11 to sign this thing, but I don't see any signature."

12 PROFESSOR ALBRIGHT: Oh, okay, so that's a
13 scanned document with a signature.

14 HONORABLE TRACY CHRISTOPHER: Right. That's
15 a scanned signature.

16 CHAIRMAN BABCOCK: It has a scanned
17 signature on it, which is important for the court of
18 appeals.

19 PROFESSOR ALBRIGHT: Right, but do you
20 want -- but that's different from a scanned signature
21 that's placed on an electronic document. If I -- I
22 thought that was what a digitized signature was.

23 CHAIRMAN BABCOCK: The digitized signature
24 means a graphic image of a handwritten signature.

25 PROFESSOR ALBRIGHT: Okay, so I can sign --

1 if I want to, I can have my criminal client come in and
2 sign a piece of paper the first day he comes in, and then
3 any time I want to I can put it on a Word document, and
4 that signature appears there.

5 HONORABLE TRACY CHRISTOPHER: Right.

6 PROFESSOR ALBRIGHT: I thought this was
7 talking about --

8 CHAIRMAN BABCOCK: Physically you could do
9 that. Would a criminal defense lawyer ever do that?

10 PROFESSOR ALBRIGHT: Well, I don't know.
11 I'm just talking about that's --

12 CHAIRMAN BABCOCK: I mean, I can't imagine.

13 PROFESSOR ALBRIGHT: That's how a lot of
14 signed documents are signed now, is because people --

15 CHAIRMAN BABCOCK: I know, but you're a
16 criminal defense lawyer, you've got an appeal, and your
17 client is in jail, and you're now going to dismiss the
18 appeal, and the criminal defense lawyer is for sure going
19 to get him to sign the --

20 PROFESSOR ALBRIGHT: Well, yeah, I'm just --

21 CHAIRMAN BABCOCK: -- motion to dismiss.

22 PROFESSOR ALBRIGHT: But we always talk
23 about the what ifs, and so I guess maybe what I'm saying
24 is perhaps the digitized signature is not as clear as --
25 because apparently you and I had different ideas as to

1 what a digitized signature was. I think there is -- I was
2 thinking that there was a third option that was -- there
3 are some things that have to be hand signed that you scan
4 the entire document and you file that document. A
5 digitized signature at law firms -- I mean, even at the
6 law school I have a digitized signature, and my secretary
7 can put it on letters that are electronically filed, you
8 know, like recommendations for judges, which are all done
9 on the computer now.

10 CHAIRMAN BABCOCK: Yeah, I'm with you.

11 MR. FULLER: If we're not going to use -- if
12 the Federal practice has not already solved this for us
13 and if we're not going to use this and if we're going to
14 stick with the scheme that we've proposed here, I think
15 Justice Gaultney is correct. Probably the simplest thing
16 to do is if you go back to the definition page, stick with
17 digital -- I would change "digital signature" to "digital
18 password" because a password is a confidential and unique
19 identifier, okay; and I would change "signature" to that,
20 and on the next one rather than get into the digital
21 versus digitized I might go with either "digital
22 signature," which is a facsimile reproduction or if you
23 want to say "electronic signature" you can; but if we go
24 with "digital password" and "digital signature" as
25 defined, I think those are less confusing than what we're

1 seeing here; and you could keep that scheme throughout as
2 you've currently got it proposed. I think we could do
3 something like that.

4 CHAIRMAN BABCOCK: Justice Gaultney, and
5 then Justice Bland.

6 HONORABLE DAVID GAULTNEY: Well, I agree
7 with Judge Gray. There are going to be situations where
8 we're going to have to have actual signatures. I don't
9 know if that's what you said or not, but the criminal
10 defendant may be one of them. I mean, there are some
11 filings that we recognize are going to have to be
12 exceptions to our electronic filing rules. Pro se where
13 the inmate handwrites and files this thing. He doesn't
14 have access to a scanner or a computer or a typewriter, so
15 he handwrites his whatever and files it. There are going
16 to be exceptions in the rules anyway, and perhaps the
17 signature of a criminal defendant who is in jail and is
18 getting ready to file his motion to dismiss may be one of
19 those.

20 CHAIRMAN BABCOCK: Yeah.

21 HONORABLE DAVID GAULTNEY: So I don't think
22 we ought to get caught up on the exceptions.

23 CHAIRMAN BABCOCK: Yeah, but just to follow
24 up on what Hayes said, it sounds to me like the Federal
25 system has solved this problem, because for filing of

1 motions and briefs and everything you can do it with a
2 password, but they require a scanning of things like
3 affidavits that require a signature and a notary.

4 HONORABLE DAVID GAULTNEY: No, I agree with
5 that.

6 CHAIRMAN BABCOCK: And that's all we're
7 trying to do -

8 HONORABLE DAVID GAULTNEY: No, I agree with
9 that.

10 CHAIRMAN BABCOCK: -- with 9.1(c)(4), (5),
11 and (6).

12 MR. FULLER: And somebody will have -- in
13 the situation that Justice Gray raised, somebody will have
14 an original signature in their file. If the criminal
15 defense attorney is smart --

16 CHAIRMAN BABCOCK: Well, they better.

17 MR. FULLER: -- he's going to have that
18 original signature. He may file a scanned image, and if
19 the inmate later comes back and says, "I don't know where
20 that I came from. I didn't authorize that." You can whip
21 out your -- at the hearing. "There's your signed copy.
22 Yes, you did."

23 PROFESSOR ALBRIGHT: Yeah.

24 CHAIRMAN BABCOCK: Well, but why would we
25 want to lead anybody into that subterfuge?

1 MR. FULLER: Right.

2 CHAIRMAN BABCOCK: You would want to allow
3 the criminal defense lawyer to file the motion to dismiss
4 that his client signed.

5 MR. FULLER: Right, sure. Sure.

6 CHAIRMAN BABCOCK: And that he signed. You
7 would never want to just get a signature that you had in
8 your back pocket that you could whip it out anyday. Judge
9 Christopher.

10 HONORABLE JANE BLAND: Okay, could we get
11 rid of the --

12 CHAIRMAN BABCOCK: I'm sorry, Justice Bland.

13 HONORABLE JANE BLAND: Get rid of the two
14 definitions in 3.1, and in 9 just say "except when
15 otherwise provided by law or these rules, the electronic
16 filing of the document is the signature on the document by
17 the filer for the purposes of the signature requirements
18 in these rules or other law. If a signer other than the
19 filer is necessary on the document, the document must
20 contain a scanned image of that signature" -- I mean, "a
21 scanned image of the signature of that signer, which
22 controls."

23 CHAIRMAN BABCOCK: In black and white, with
24 a resolution of 300 dots per --

25 HONORABLE JANE BLAND: Well, you know, with

1 all that if you want, you know, but it seems to me like we
2 don't need to define these terms. We don't even need to
3 use these terms.

4 CHAIRMAN BABCOCK: Okay. Judge Christopher.

5 HONORABLE TRACY CHRISTOPHER: I think that's
6 a really good suggestion, and I'd also like us to look
7 back at Rule 3.4, the electronic filing rules of the
8 district clerks, the local rules, because I think that we
9 could use this 3.4(a) through (d) as a sort of the --
10 because this goes through every instance where you've got
11 to have a real signature and says it's got to be a scanned
12 image, and it also says you've got to keep the original,
13 which is nowhere here in the appellate rules that I see.
14 Unless I missed it.

15 MS. PETERSON: Well, you didn't miss it.
16 The reason that it's not here is because of the provision
17 saying the electronically filed document is deemed to be
18 the original document. What we were talking about
19 yesterday about --

20 HONORABLE TRACY CHRISTOPHER: But I still
21 think you need to keep, you know, what you signed and then
22 scanned in case there is an issue. To the extent that
23 signing, you know, physical signing, means anything. I
24 mean, sudden -- I think you need to be like the criminal
25 defense lawyer. He needs to keep the original in his file

1 with his client's signature on it in case some issue comes
2 up.

3 CHAIRMAN BABCOCK: Right.

4 HONORABLE TRACY CHRISTOPHER: I mean, I
5 don't think suddenly by scanning it and filing it that
6 should morph it into something more than it is.

7 CHAIRMAN BABCOCK: Yeah, what you're saying,
8 it would be rarer in the court of appeals to have to file
9 a scanned image signature, but in those circumstances,
10 like the motion to dismiss the criminal case where you do,
11 then you've got to file a scanned image and the lawyer
12 should retain the original in his files just like he's
13 required to do in the district court.

14 HONORABLE TRACY CHRISTOPHER: Right.

15 CHAIRMAN BABCOCK: That makes sense.

16 HONORABLE TRACY CHRISTOPHER: But I --
17 because, I mean, we could take the way 3.4 is and like
18 maybe even specifically reference the appellate rules that
19 it would apply to. The -- you know, in terms of the
20 signature of the criminal defendant.

21 CHAIRMAN BABCOCK: Yeah. As long as we
22 don't miss anything.

23 HONORABLE TRACY CHRISTOPHER: Well, I mean,
24 we don't have to, but if we want to be clear.

25 MS. PETERSON: And just so I'm clear, I'm

1 sorry, I think I missed something, because I thought you
2 wanted to take out 9.1(c)(4) and (5), which are modeled
3 after district --

4 CHAIRMAN BABCOCK: Yeah, but that's a bad
5 idea.

6 MS. PETERSON: Okay.

7 HONORABLE TRACY CHRISTOPHER: I think it's
8 confusing where it is.

9 MS. PETERSON: So don't take it out. Take
10 it out of where it is, but don't take it out of the rules
11 altogether.

12 HONORABLE TRACY CHRISTOPHER: Right. Right.
13 It's confusing where it is.

14 MS. PETERSON: Okay.

15 CHAIRMAN BABCOCK: And you're going to need
16 a (6), too, as Munzinger pointed out yesterday.

17 MS. PETERSON: I have that note, yes.

18 CHAIRMAN BABCOCK: Okay. There is a
19 introductory language on 9.2(c) that says, "A document may
20 be electronically filed in an appellate court. By
21 electronically filing a document in an appellate court a
22 party agrees to provide information regarding any change
23 in his or her e-mail address to TexasOnline, the appellate
24 court, and all other parties in the case within 24 hours
25 of the change," right. "The electronically filed document

1 as maintained by the clerk will be deemed to be the
2 original document." Any comments on that provision?

3 MS. PETERSON: I think yesterday
4 professor --

5 CHAIRMAN BABCOCK: Any new comments on that
6 provision?

7 MS. PETERSON: Oh.

8 CHAIRMAN BABCOCK: Okay. Huh? Sarah.

9 HONORABLE SARAH DUNCAN: If a motion that is
10 electronically filed is deemed to be the original and
11 we're going to have this hearing to decide the
12 authenticity of the criminal defendant's signature --

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE SARAH DUNCAN: -- how am I going
15 to get that into evidence if it's not the original?

16 MS. PETERSON: That was what I was getting
17 at earlier.

18 HONORABLE TRACY CHRISTOPHER: I don't
19 understand the purpose of that "will be deemed to be the
20 original."

21 HONORABLE SARAH DUNCAN: Because you've got
22 to have one original court record.

23 PROFESSOR ALBRIGHT: It's the appellate
24 record.

25 CHAIRMAN BABCOCK: That's getting back to

1 what we talked about yesterday where you can
2 electronically file, but you can -- you also file in
3 paper, either because of a local rule or because you just
4 feel like it, or although I don't know why anybody would,
5 but --

6 PROFESSOR ALBRIGHT: Isn't the issue that
7 it's the official record?

8 MS. PETERSON: Yes.

9 PROFESSOR ALBRIGHT: Instead of the
10 original.

11 HONORABLE TRACY CHRISTOPHER: Yeah. I mean,
12 "original" is a troubling --

13 CHAIRMAN BABCOCK: Yeah.

14 HONORABLE TRACY CHRISTOPHER: -- word. I
15 mean, that's the official document for the record, but --

16 PROFESSOR ALBRIGHT: For the court's record.

17 HONORABLE TRACY CHRISTOPHER: -- if you
18 bring back in some of the things that was in 3.4 with
19 respect to if you've got to keep a real signature, you've
20 got to keep that in your back pocket in case there is some
21 question about it, rather than trying to call it an
22 original.

23 PROFESSOR DORSANEO: Uh-huh.

24 HONORABLE SARAH DUNCAN: Official court
25 record.

1 MS. PETERSON: Blake.

2 MR. HAWTHORNE: Well, I was going to say if
3 this is a problem it's also a problem because it's in the
4 statute.

5 MS. PETERSON: Right.

6 MR. HAWTHORNE: So we're going to need to
7 fix that quickly. The Senate Bill 1259 states basically
8 what the rule states, so if we need to change "original"
9 to "official," then we need to hurry up and do something
10 over at the Legislature, because, I mean, the idea, again,
11 was that we are going to be altering these documents
12 because we are adding metadata to them so that we can
13 manage the documents, and in some cases we may try to fix
14 some of the scanning problems that have been talked about,
15 so we did not want to have to maintain every version of
16 that document, and we want to make it clear that whatever
17 the clerk ends up with that the clerk is maintaining is
18 the official or the original.

19 CHAIRMAN BABCOCK: But Sarah's point is
20 absolutely right, it seems to me, that if you deem
21 everything that's electronically filed to be the original,
22 then the real original, which there may be a question
23 about, you know, I don't know what you do with it.

24 HONORABLE SARAH DUNCAN: You would have to
25 amend the Rules of Evidence.

1 HONORABLE KENT SULLIVAN: I don't think it's
2 difficult. I mean, the reality is that there would be a
3 legal question as to whether or not person X signed the
4 document, and that piece of paper would be evidence in
5 that hearing. That would be the end of it. I agree, of
6 course, the word, the term, "official" is much better.
7 There's no question about it.

8 CHAIRMAN BABCOCK: Right.

9 HONORABLE KENT SULLIVAN: That's plain
10 language. It communicates what it's trying to
11 communicate, but I don't see a huge issue in terms of
12 having an evidentiary hearing as to whether or not there
13 was a forgery.

14 CHAIRMAN BABCOCK: Justice Gaultney.

15 HONORABLE DAVID GAULTNEY: Well, Blake, what
16 I heard you say is that you're worried about changes in
17 the document, and what you want that as the subsequent
18 document being understood to be the original document that
19 needs to be maintained --

20 MR. HAWTHORNE: Yes, sir, that's correct.

21 HONORABLE DAVID GAULTNEY: -- by the clerk,
22 correct? Well, that -- if what you're really saying is
23 then the emphasis is on "as maintained by the clerk."
24 Right?

25 MR. HAWTHORNE: Right.

1 HONORABLE DAVID GAULTNEY: So aren't you
2 really saying that will be deemed to be the original filed
3 document, not the original document whatever it is, the
4 affidavit or whatever, but the document that was filed
5 with the clerk. Any subsequent metadata changes doesn't
6 make that a different document. It's still the same
7 document. That's what this is trying to say, right?

8 MR. HAWTHORNE: Well, yes, I guess in a way
9 that's what we're trying to say, and I have no qualms with
10 "original" or "official." I don't particularly care. I
11 just bring it up because there is legislation that's
12 proposed, and if we want to make it clear, we also need to
13 make that change on the legislative change.

14 CHAIRMAN BABCOCK: Bill, what would be wrong
15 with having "official court document" instead of --

16 PROFESSOR DORSANEO: I like "official"
17 better, and the idea that this sentence has a lot of
18 hidden meaning in it, I mean, it basically is a -- as
19 drafted here the electronically filed document as
20 maintained, that is to say modified by the clerk, is the
21 official record. I mean, it's on its face it's saying
22 something inaccurate at the moment. I mean, it's not the
23 original document if it's changed, even though the changes
24 are beneficial and helpful.

25 MS. PETERSON: It's deemed to be.

1 PROFESSOR DORSANEO: It's a process. Huh?

2 MS. PETERSON: It's deemed to be, see.

3 PROFESSOR DORSANEO: Well, it's not. I
4 mean, we don't want sentences like that that say -- you
5 know, it's like Lewis Carroll kind of sentences. We don't
6 need that.

7 CHAIRMAN BABCOCK: Would it --

8 PROFESSOR DORSANEO: "Official" is a lot
9 better, and I don't know whether "maintained" is the right
10 word, because "maintained" suggests that you're not
11 changing it.

12 MS. PETERSON: Well, he's not. I think
13 you're talking about the changes that happen before the
14 document gets to you; is that right?

15 MR. HAWTHORNE: Well, no.

16 CHAIRMAN BABCOCK: That's what I thought.

17 MR. HAWTHORNE: And just to be clear, the
18 clerks are not the technical folks, and we're not running
19 the computer system, and we're not making any of the
20 changes. The system is making it, so but we are on the
21 hook for maintaining those records, of course, and we just
22 want to make it clear that if someone -- we want to be off
23 the hook for these other versions of the document that may
24 not have been stored and saved, so we just want to make it
25 clear there's going to be one copy of it, and that last

1 copy or version of it is the one that's the official or
2 the original document for all purposes, so if we have to
3 certify a document we know that we can certify that
4 document without any problems, and that is the official
5 record of the court. So --

6 CHAIRMAN BABCOCK: Yeah, Judge Christopher.

7 HONORABLE TRACY CHRISTOPHER: Well, I have a
8 problem with 24 hours notice on change of e-mails in that
9 beginning paragraph. I don't know why we have 24 hours
10 notice truthfully. It's not in the lower court rules.

11 MS. PETERSON: I think it is.

12 HONORABLE TRACY CHRISTOPHER: Well, I
13 couldn't find it.

14 MS. PETERSON: I'll find it.

15 HONORABLE TRACY CHRISTOPHER: I mean,
16 because the whole thing about the e-mail address -- and
17 maybe I just missed it here in the appellate rules.
18 There's two ways to -- you know, you can electronically
19 file something without agreeing to accept documents via
20 electronic service, right?

21 MR. GRIFFITH: Right.

22 HONORABLE TRACY CHRISTOPHER: Okay. So, I
23 mean, there's -- you can file something electronically,
24 but you don't have the capacity, for example, in your law
25 firm to receive things electronically and you don't want

1 to sign up for that option, okay, so you don't, and I
2 don't know if that -- if we're somehow requiring it now in
3 the appellate rules, that if you file something
4 electronically you have to accept things electronically.

5 Also, my understanding of the way e-mail
6 addresses work in various law firms, if you do sign up to
7 receive something electronically, it's a different e-mail
8 address than a person's personal e-mail address, so I'm
9 not really sure what we're capturing with this e-mail
10 address either.

11 MS. PETERSON: Well, that goes back to the
12 definition, and perhaps it should be changed, but the
13 definition of "registered e-mail address" is there to
14 basically by default say an e-mail address in there is
15 referring to registered e-mail address.

16 HONORABLE TRACY CHRISTOPHER: But, see, I
17 think that's a bad idea.

18 MS. PETERSON: Okay.

19 HONORABLE TRACY CHRISTOPHER: Okay. Because
20 if I'm a practitioner, and I see Chip's, you know, brief
21 comes in, and I want to send Chip an e-mail. Well, he has
22 put down some -- his registered e-mail address is -- well,
23 maybe not at Jackson Walker, but at a lot of firms is
24 something different from his personal e-mail address.

25 CHAIRMAN BABCOCK: You mean my personal

1 business e-mail address or --

2 HONORABLE TRACY CHRISTOPHER: What?

3 CHAIRMAN BABCOCK: Yeah, see, I was confused
4 a minute ago. Jackson Walker has got an e-mail
5 address, jw.com. I have got an address at Jackson Walker,
6 which is cbabcock@jw.com.

7 HONORABLE TRACY CHRISTOPHER: Right.

8 CHAIRMAN BABCOCK: I could have a personal
9 e-mail address called, you know, chipbabcock@gmail.com.

10 HONORABLE TRACY CHRISTOPHER: No, what I'm
11 talking about is your registered one would be
12 jacksonwalker.com.

13 CHAIRMAN BABCOCK: cbabcock@jw.com.

14 HONORABLE TRACY CHRISTOPHER: No. Which one
15 do you -- what do you accept service at?

16 MS. SENNEFF: jw.com is just the website
17 address.

18 CHAIRMAN BABCOCK: Yeah. I accept it at
19 cbabcock@jw.com.

20 PROFESSOR ALBRIGHT: But some people may
21 have --

22 HONORABLE TRACY CHRISTOPHER: Different.

23 PROFESSOR ALBRIGHT: -- like babcockservice
24 at --

25 HONORABLE TRACY CHRISTOPHER: Right.

1 PROFESSOR ALBRIGHT: -- jw.com.

2 HONORABLE TRACY CHRISTOPHER: So, I mean,
3 like, do you get daily notices of e-mails that are filed
4 in your court -- in your cases?

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE TRACY CHRISTOPHER: In your
7 personal e-mail?

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE TRACY CHRISTOPHER: But a lot of
10 firms don't work that way.

11 CHAIRMAN BABCOCK: Okay.

12 HONORABLE TRACY CHRISTOPHER: A lot of them
13 go to a separate box and then get parceled out, you know,
14 electronically to various people. So, again, so that,
15 whatever that registered e-mail address, for service
16 purposes is different if I actually wanted to communicate
17 to someone via e-mail.

18 CHAIRMAN BABCOCK: Okay.

19 HONORABLE TRACY CHRISTOPHER: So I'm not
20 really sure what e-mail address we're trying to capture
21 here, why we would want to capture it here, and why we
22 would want to require changing it in 24 hours.

23 CHAIRMAN BABCOCK: Kennon.

24 MS. PETERSON: Two things, I found the
25 language in the JP rules, 5.1(c), and it says, "By virtue

1 of electronically filing or serving a document or by
2 agreeing to receive electronic service, a party
3 additionally agrees to provide information regarding any
4 change in his or her e-mail address to TexasOnline, JP
5 court, and all parties in the case within 24 hours of the
6 change."

7 In the district court rules the 24-hour
8 period is not there. It's similar language, but does not
9 contain any statement about when you have to provide this
10 notice, and I think that could be problematic because, you
11 know, maybe I make a change and then I don't tell somebody
12 for three weeks, and so I think there should be some time
13 period when you notify about a change in your e-mail
14 address. And the second thing, and maybe, Mike, you could
15 help me with this, but I think the communication through
16 the registered e-mail address isn't just receipt of
17 documents. I think it's for communication with
18 TexasOnline as well.

19 MR. GRIFFITH: That's correct. Exclusive of
20 electronic service, if I file electronically, I receive
21 notice back from the clerk. If the filing is rejected,
22 for example, that comes to wherever my registered e-mail
23 address is.

24 HONORABLE TRACY CHRISTOPHER: But my point
25 is why does the -- the registered e-mail address deals

1 with the mechanics of filing. It's not really necessary
2 to be at your signature block, and a 24 -- and, like I
3 said, it's not a particularly useful signature if you
4 actually wanted to communicate with opposing counsel
5 because a lot of times, my understanding is, it's like
6 this global box in a law firm versus an individual's
7 e-mail.

8 MS. PETERSON: And I -- maybe Mike could
9 help with this, too, because that wasn't my understanding
10 of it, but maybe that is the case, and if it is the case
11 then the rules do need to be amended. My understanding
12 was that you were going to use your e-mail address that
13 you use on an everyday basis at your profession, and that
14 would be your registered e-mail address, but maybe I'm
15 wrong.

16 HONORABLE TRACY CHRISTOPHER: People use
17 different ones for service than for communication.

18 CHAIRMAN BABCOCK: Mike, what's your
19 experience on that?

20 MR. GRIFFITH: I think there are several
21 ways that the e-mail address is used. As Judge
22 Christopher said, sometimes it's a common e-mail address
23 that all service, for example, will go to, and paralegals
24 may sort through it and filter them out by attorney. Some
25 obviously solo practitioners will use their gmail address

1 because that's what they use for their official
2 correspondence.

3 CHAIRMAN BABCOCK: Yeah.

4 MR. GRIFFITH: That address, though, is not
5 exposed to the other parties. If I'm going to
6 electronically serve Kennon, I will select her name and
7 her firm and see that she will receive electronic service,
8 but I don't see her e-mail address. That's transparent to
9 the filer.

10 HONORABLE TRACY CHRISTOPHER: So again --

11 MS. PETERSON: That needs to be corrected.

12 CHAIRMAN BABCOCK: All right. But wait a
13 second. Let me just follow this through. If my firm or
14 me personally says I want to be -- if I've got a case with
15 Bobby. I want to get served at my personal e-mail
16 address, cbabcock@jw.com. If my firm next week says,
17 "Hey, that's a bad idea. We're going to set up an e-mail
18 account where all of these -- all the service of all the
19 pleadings in all the cases that we have come in and then
20 we'll have somebody sort them out and get them to the
21 right people," that seems to me incredibly stupid, but a
22 firm, if they want to do it that way, I guess they can do
23 it that way, and why should we get it -- why should we get
24 into that debate.

25 HONORABLE TRACY CHRISTOPHER: Well, I think

1 it's capacity, because if you're actually getting, you
2 know -- at least my e-mail, you know, if I get more than
3 five pleadings or, you know, PDFs, my e-mail says, "Oh,
4 you've exceeded your capacity," and you can't get anymore
5 e-mails until you start deleting stuff. So it's a real
6 issue out there in terms of capacity, which is why my
7 understanding is law firms have that sort of storage
8 place.

9 CHAIRMAN BABCOCK: Yeah, well, but why
10 should we as a matter of rule-making get into that issue?

11 HONORABLE TRACY CHRISTOPHER: Well, we
12 shouldn't, which is why, you know, putting "registered
13 e-mail address" on anything is not what we want to do.

14 CHAIRMAN BABCOCK: Well, but isn't it -- if
15 I'm going to file an appeal in the court of appeals,
16 wouldn't I say, "Here's the e-mail address that I want to
17 register. It's cbabcock@jw.com."

18 HONORABLE TRACY CHRISTOPHER: Not according
19 to Mike. You just register that address with them. You
20 don't need to put it on your pleading --

21 CHAIRMAN BABCOCK: No, no, no. But --

22 HONORABLE TRACY CHRISTOPHER: You don't need
23 to tell the court of appeals.

24 CHAIRMAN BABCOCK: -- I register with them,
25 because that's what I want coming back to me.

1 HONORABLE TRACY CHRISTOPHER: Right. But it
2 doesn't need to be on your brief, which is what we're
3 talking about here.

4 PROFESSOR ALBRIGHT: The point is you have
5 an obligation to keep TexasOnline apprised --

6 CHAIRMAN BABCOCK: Right..

7 PROFESSOR ALBRIGHT: -- of your e-mail
8 address.

9 CHAIRMAN BABCOCK: Right.

10 PROFESSOR ALBRIGHT: And isn't that one of
11 the deals that you make when you sign up with it?

12 CHAIRMAN BABCOCK: Right.

13 PROFESSOR ALBRIGHT: And it's like if I put
14 an address on a brief, a physical address on the brief, I
15 understand that it's my professional obligation to make
16 sure everybody knows where to send this stuff. So do we
17 have a rule that says you have to update your physical
18 address within 24 hours? So it seems like it's the same
19 thing. I have a professional obligation by dealing with
20 TexasOnline to make sure they know where to find me so I
21 get what I need, so --

22 CHAIRMAN BABCOCK: So, Alex, and, Judge
23 Christopher, you think we ought to take this out?

24 HONORABLE TRACY CHRISTOPHER: Yes. And, you
25 know, frankly, requiring an e-mail address in all of these

1 various spots where you've said "an e-mail address" just
2 kind of raises the question of what e-mail address are you
3 providing at that point? And like Mike says, you know,
4 that e-mail address isn't even a public e-mail address.
5 That's just something you register with them.

6 MS. PETERSON: Well, it may or may not be.

7 HONORABLE TRACY CHRISTOPHER: It may or may
8 not be.

9 PROFESSOR ALBRIGHT: And we don't need to
10 get into that business.

11 CHAIRMAN BABCOCK: Right.

12 MS. PETERSON: Right.

13 HONORABLE TRACY CHRISTOPHER: Unless there's
14 some reason -- like for me, actually, I do -- I would like
15 to have the actual e-mail address if I wanted to
16 communicate with the parties on a -- but we just ask them
17 for it, but that's a very different e-mail address than
18 the e-mail address you've got to give to TexasOnline.

19 MS. PETERSON: Maybe. Maybe.

20 HONORABLE TRACY CHRISTOPHER: Maybe. So it
21 just gets confusing between the various e-mail addresses.

22 PROFESSOR ALBRIGHT: Yeah, because that
23 capacity issue is huge, because I would imagine you have
24 to have basically unlimited capacity to be getting all of
25 these briefs and filings.

1 CHAIRMAN BABCOCK: That's my story. Justice
2 Gray.

3 HONORABLE TOM GRAY: Chip, just to kind of
4 explain why some firms choose to use the single address
5 for receipt of documents for all the attorneys, it's much
6 like a -- you think of it like a post office box or a fax
7 machine and then there's another form of getting stuff
8 into the firm, e-mails, and the dissemination when you're
9 absent can be more easily accomplished from that central
10 location of, okay, I need to send anything on this case to
11 these three lawyers, not just to Chip Babcock's e-mail
12 address, and that's the reason it's --

13 HONORABLE TRACY CHRISTOPHER: And you
14 probably have like one secretary. In lots of law firms a
15 lawyer shares. You know, there's like three or four
16 lawyers on one secretary, so I mean, they kind of delegate
17 the passing around of stuff to somebody else, not a
18 qualified secretary.

19 CHAIRMAN BABCOCK: Okay. Justice Gray. I
20 mean, Chief Gaultney. You both had your hands up.

21 HONORABLE DAVID GAULTNEY: I'll sit over
22 there next time. Well, I understand the -- I think I
23 understand the concern about putting that in here, but the
24 way the system currently operates is a lead counsel does
25 have an obligation to the court and to the other parties

1 to let the court know where they are, know their physical
2 address, and if it changes, to let us know so that we can
3 mail it to it.

4 HONORABLE TRACY CHRISTOPHER: But it's sure
5 not 24-hour notice.

6 HONORABLE DAVID GAULTNEY: Well, I agree
7 with that, but --

8 PROFESSOR ALBRIGHT: Is it in a rule?

9 HONORABLE DAVID GAULTNEY: Well, I would
10 suspect that the clerk would anticipate that lead counsel
11 would comply with 6.1. It says you give the address and
12 everything else, and I suspect if there was a change, the
13 court would want to know that there was a change so we
14 could notify the parties. We're going to a different
15 system of electronic filing, and I think perhaps the
16 lawyers ought to know that this address is now through
17 TexasOnline. Maybe, I mean, that's the way I envision the
18 reason for the rule here.

19 HONORABLE TRACY CHRISTOPHER: But Mike just
20 told us that nobody has to know what your service address
21 is at TexasOnline, that that's not, you know, in the
22 paperwork. That's just you register, you put that address
23 in, the other people register, they put that address in,
24 and then your -- is it online or the service provider that
25 actually serves?

1 MR. GRIFFITH: It's both. It comes through
2 TexasOnline and back through the service provider.

3 HONORABLE TRACY CHRISTOPHER: So like goes
4 to TexasOnline and then back and then out.

5 CHAIRMAN BABCOCK: Kennon.

6 MS. PETERSON: I don't know if this is a
7 good suggestion, but it might be good to put this
8 discussion on hold until we get to service, because right
9 now the way the service rule is drafted it just allows
10 service through TexasOnline, whereas the rules for the
11 lower courts allow service via e-mail, and if this
12 committee thought service via e-mail outside of the
13 TexasOnline system is a good idea or bad idea, and that's
14 to be decided, but if they like the idea of service via
15 e-mail outside of TexasOnline then there is good reason to
16 provide an e-mail address and to update people of the
17 changes in a certain amount of time.

18 CHAIRMAN BABCOCK: Okay. 9.2(c), we've got
19 two suggestions. One, we eliminate the obligation to
20 notify TexasOnline within 24 hours about a change. Is
21 everybody comfortable with that? Is that a view of the
22 majority here? Yeah, Ralph.

23 MR. DUGGINS: I think you ought to have to
24 notify them, but I agree it shouldn't have to be in 24
25 hours.

1 CHAIRMAN BABCOCK: Well, there was some
2 indication that we ought to eliminate the notification
3 altogether.

4 MR. DUGGINS: Yeah, I don't agree with that.

5 CHAIRMAN BABCOCK: And rely on professional
6 responsibility to do that, not have it in a rule, so Ralph
7 is against that. Yeah.

8 MR. HAWTHORNE: Blake Hawthorne, with the
9 Supreme Court.

10 CHAIRMAN BABCOCK: I know, Blake.

11 MR. HAWTHORNE: One thing that concerns me
12 is that we would very much like to send notices to
13 attorneys by e-mail, and if there is no clear statement in
14 the rules about updating e-mail addresses, I can tell you
15 a lot of attorneys don't update their mailing addresses
16 through the State Bar as they're required to, and it
17 causes us all kinds of problems.

18 CHAIRMAN BABCOCK: Okay. So you're on
19 Ralph's team on this one. Alex.

20 PROFESSOR ALBRIGHT: I'm all for that, but
21 that should be in 6.1(b) where you have -- you give your
22 name, mailing address, phone number, fax number, e-mail
23 address, and State Bar identification, and then you say
24 "if there are any changes you need to notify" --

25 CHAIRMAN BABCOCK: Okay. So you're in

1 favor, but you just want it somewhere else.

2 PROFESSOR ALBRIGHT: Yeah. It's just funny
3 that you have your e-mail address suddenly brings this
4 24-hour rush, but, you know, we've got the same
5 identification problem.

6 CHAIRMAN BABCOCK: Judge Christopher, are
7 you still in favor of eliminating the requirement
8 altogether, or was that somebody else?

9 HONORABLE TRACY CHRISTOPHER: Well, again,
10 because of the two different e-mail addresses, we're
11 confusing the issues. Like an e-mail address that the
12 clerk might use to notify somebody is not necessarily the
13 TexasOnline e-mail address for service.

14 CHAIRMAN BABCOCK: Okay.

15 HONORABLE TRACY CHRISTOPHER: So that's
16 where the problem is.

17 CHAIRMAN BABCOCK: Okay. How many people
18 are in favor of eliminating altogether the requirement
19 that is currently in 9.2(c) that requires a party to
20 notify TexasOnline, the appellate court, and all other
21 parties of the change of electronic address?

22 PROFESSOR ALBRIGHT: Can I have a friendly
23 amendment to that?

24 CHAIRMAN BABCOCK: Uh-huh.

25 PROFESSOR ALBRIGHT: And include some kind

1 of updating requirement in 6.1(c).

2 CHAIRMAN BABCOCK: Well, yeah, but if we
3 include that then some people might vote on that instead
4 of -- why don't we just say whether we eliminate it.

5 HONORABLE DAVID GAULTNEY: Can I raise --
6 ask a question?

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE DAVID GAULTNEY: I understood
9 Kennon to say just now that she suggested we defer until
10 we decide -- Blake would like to notify people through
11 their e-mail address, right?

12 MR. HAWTHORNE: Right.

13 HONORABLE DAVID GAULTNEY: Without
14 necessarily going through the service requirement, right?

15 MR. HAWTHORNE: That's right, and I
16 understand from talking to Mike that -- yes.

17 HONORABLE DAVID GAULTNEY: So if we give
18 them an e-mail address under 6.1, that's what you could
19 use.

20 MR. HAWTHORNE: Correct.

21 HONORABLE DAVID GAULTNEY: But as I
22 understand it, there's a possibility we could use -- we
23 have to use online, TexasOnline for service?

24 MS. PETERSON: Yes.

25 HONORABLE DAVID GAULTNEY: So what I

1 understood Kennon to be saying is maybe we ought to delay
2 this discussion until we decide that issue.

3 CHAIRMAN BABCOCK: Okay. The other thing
4 that -- the other comment about this subparagraph was that
5 we ought to change the "deemed to be original document,"
6 we should change it to be "deemed to be the court record"
7 or "official court record" or something.

8 PROFESSOR DORSANEO: "Official."

9 MR. DUGGINS: "Official."

10 CHAIRMAN BABCOCK: "Official."

11 MS. PETERSON: Should it be "official court
12 record" or "official document for purposes of the
13 appellate record"?

14 PROFESSOR ALBRIGHT: "Official court
15 record."

16 MS. PETERSON: What's that?

17 CHAIRMAN BABCOCK: "Official court record"?

18 MS. PETERSON: "Official court record"?

19 CHAIRMAN BABCOCK: Okay. Is there a
20 consensus on that, or are there people opposed to that?

21 Okay. Hearing -- Sarah.

22 HONORABLE SARAH DUNCAN: I've been queasy
23 ever since Blake started talking about changing filed
24 documents. I would like to understand better what changes
25 are being made.

1 MR. HAWTHORNE: I'm going to defer to Bruce,
2 our technical expert, who is the person that will be
3 changing the documents, not me.

4 MR. HERMES: The changes apply to scanned
5 documents when they come in.

6 HONORABLE SARAH DUNCAN: Only scanned
7 documents?

8 MR. HERMES: Only scanned documents. If
9 they are -- if they feed through the scanner a little
10 sideways, the software straightens it; or if there are
11 speckles on the page or we sometimes see a vertical strip,
12 dark strip through a page, those kinds of things are
13 cleaned up; and all of that is so that the optical
14 character recognition, which changes a scanned image of
15 text into actual text, can work; and so then underlying
16 the picture of the page goes the text as searchable data,
17 so those are the kinds of changes. They are not at all
18 intended to be substantive changes.

19 HONORABLE SARAH DUNCAN: But how do I know
20 that -- and I'm not remotely suggesting that you or
21 anybody in your department would do this. How is it not
22 possible to make textual changes if you are making
23 changes? With the text underneath the picture, how do I
24 know that some mischievous person isn't going to put in a
25 "not" where there's not one?

1 MR. HERMES: How do you know that?

2 MR. HAWTHORNE: Well, I think one thing is
3 that you will be able to see as the attorney what you
4 submitted to the court, so if someone did come in and
5 alter your document, of course, you would be able to see
6 that, just like you would be able to see that there's a
7 change.

8 HONORABLE SARAH DUNCAN: Well, do I have to
9 run a compare documents on everything I file?

10 MR. HERMES: No, but, you know, the document
11 doesn't pass through the hands of anyone who has an
12 incentive to do that sort of thing, and so there's that,
13 and, frankly, the software that will be used for that sort
14 of thing, our job is to make sure that it doesn't sneak
15 "nots" in and it just cleans up speckles and lines and
16 straightens.

17 CHAIRMAN BABCOCK: Let's talk about this
18 offline, so to speak. Yeah, Skip.

19 MR. WATSON: I just have one very quick
20 question. If, for example, you have a, you know, computer
21 Word-produced document that comes in, let's say it's
22 in PDF form, I understand cleaning up things in that
23 context, but I'm wondering about things like if I've
24 attached let's say a motion in an appendix to something
25 that actually the trial judge at the hearing, everybody

1 has agreed that even though it was proofread 10 times the
2 word "not" was left out, you know, it's got to be in
3 there, and the judge has caret in, has inserted it by
4 hand, is that going to be picked up as a speckle or a dot
5 in the character recognition when it's by hand and
6 inserted into otherwise printed type text?

7 MR. HERMES: No, that would not, and --

8 MR. WATSON: To coin a phrase, yeah.

9 MR. HERMES: And while certain nontextual or
10 at least nonprint type inclusions on the page would not
11 necessarily be picked up unless it looked very much like
12 say the original Courier font or Times Roman font, it
13 would not be picked up, but in any case, the original
14 image is retained even after it's straightened. So while
15 it may not be picked up by the optical character
16 recognition process, the original image is still there
17 available. So it's just a given that the optical
18 character recognition is imperfect, so that's why the
19 original image has to be retained.

20 CHAIRMAN BABCOCK: Okay. We're not going to
21 talk about this anymore. This is not advancing the
22 rule-making process. It's interesting, but it's not
23 advancing the rule-making process. 9 --

24 HONORABLE TOM GRAY: Skip, I just wanted to
25 make sure that by the use of the term "original" or

1 "official" in 9.2(c) you were not attempting to designate
2 the form of the record or the methodology by which the
3 clerk is complying with the record retention statute,
4 because that's a whole other issue with regard to the
5 clerk and statutorily created duties for archival.

6 CHAIRMAN BABCOCK: Okay.

7 HONORABLE TOM GRAY: And so I'm just going
8 to put that on the record.

9 CHAIRMAN BABCOCK: Put it on the record, and
10 we'll check that. Good, thank you. 9.2(c)(1) says --
11 there's a typo in the first word, but it should say, "an
12 electronically filed document must be sent in a computer
13 format that TexasOnline specifies pursuant to standards
14 approved by the Supreme Court and the Court of Criminal
15 Appeals." Any comments on that subparagraph? Judge
16 Christopher.

17 HONORABLE TRACY CHRISTOPHER: That is where
18 we talked about yesterday.

19 CHAIRMAN BABCOCK: Okay.

20 HONORABLE TRACY CHRISTOPHER: That --

21 CHAIRMAN BABCOCK: Anything new about that?

22 HONORABLE TRACY CHRISTOPHER: No, it just --
23 again, you know, if the filer is going to submit it
24 already in a PDF format, they need to know how to do it.

25 MS. PETERSON: Right.

1 HONORABLE TRACY CHRISTOPHER: If they're
2 going to send it to the e -- the service provider, the
3 service provider already has some standard, I guess.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE TRACY CHRISTOPHER: So nothing
6 new.

7 CHAIRMAN BABCOCK: Okay. Anything else on
8 that? Okay. 9.2(c)(2) says, "Only one document may be
9 included in each electronic transmission to TexasOnline,
10 but attachments to an electronically filed document, such
11 as an appellate appendix to the petition or brief are
12 considered part of the electronically filed document and
13 may be transmitted along with the electronically filed
14 document." Comments about that? Sarah.

15 HONORABLE SARAH DUNCAN: Should that be
16 "may" or "must"?

17 MS. PETERSON: Probably "must." Well, no, I
18 take that back.

19 HONORABLE SARAH DUNCAN: Because I'll tell
20 you why I raise this, is not getting appendices with
21 electronic versions of briefs and petitions.

22 HONORABLE LEVI BENTON: Sarah, speak up.

23 HONORABLE SARAH DUNCAN: Not getting -- I
24 seem to get a lot of electronic versions of briefs and
25 petitions and things like that and don't get the appendix,

1 and the appendix really is part of the brief or the
2 petition, and I want it to be mandatory, because it is one
3 document physically generally. I mean, it can be two
4 documents.

5 MS. PETERSON: Uh-huh. So --

6 HONORABLE SARAH DUNCAN: But then when I say
7 say that, I think about, you know, there are some, for
8 instance, mandamus records that are sufficiently large
9 that they are a separate document.

10 MS. PETERSON: So would you prefer something
11 that as a general rule --

12 HONORABLE SARAH DUNCAN: I still think --

13 MS. PETERSON: -- required the inclusion of
14 the appendices, but if it's a certain size then it can be
15 separate from the other?

16 HONORABLE SARAH DUNCAN: I don't know, are
17 there size limitations?

18 MS. PETERSON: There are.

19 HONORABLE SARAH DUNCAN: On electronic
20 filings?

21 MS. PETERSON: Uh-huh.

22 CHAIRMAN BABCOCK: That's a "yes."

23 MS. PETERSON: Yes.

24 CHAIRMAN BABCOCK: Alex.

25 PROFESSOR ALBRIGHT: I guess I just don't

1 understand this. Is this to say that if these are filed
2 separately they are considered for the court's purpose one
3 document? Because if you -- only one document may be
4 included in each electronic transmission, but if
5 attachments, attachments are considered a part of the
6 electronically filed document and may be transmitted along
7 with the electronically filed document. That doesn't make
8 any sense to me. Are you saying if they're filed in two
9 separate transmissions?

10 MS. PETERSON: No. The idea is to state the
11 general rule that you can only file one document at a time
12 when you're electronically filing something, but if you've
13 got an appendix or something else that ought to be
14 attached, like, for example, a certificate of conference
15 or a certificate of service, that that can be included.
16 So general rule is only one document, but if you've got
17 these other things that are typically part of that
18 document, just attached to the back of it, then you can
19 group them all together.

20 PROFESSOR ALBRIGHT: So you put them in the
21 same file.

22 MS. PETERSON: Yes. Yes.

23 CHAIRMAN BABCOCK: Hayes.

24 PROFESSOR ALBRIGHT: So you're calling -- so
25 only one file may be included in each electronic

1 transmission, or is it different -- see, I've never used
2 this before, so can you put like three PDFs in one
3 transmission, or I guess --

4 MS. PETERSON: Yes.

5 PROFESSOR ALBRIGHT: -- I just don't
6 understand the purpose of this sentence.

7 MR. FULLER: I think I can speak to that.

8 CHAIRMAN BABCOCK: Hayes.

9 MR. FULLER: I think this really needs to be
10 consistent with the policies of the filing service
11 provider, because as I understand, like Lexis, they're a
12 filing service provider. The way we're doing it in MDL,
13 they refer not to filing but they refer to transaction,
14 and they charge per transaction.

15 MS. PETERSON: Uh-huh. That's right.

16 MR. FULLER: And you can file in the MDL, we
17 call it like an answer packet. It may be a motion to
18 transfer venue, it may be a defendant's original answer,
19 it may a motion to dismiss. I realize some of these can
20 all go in an answer under our rules, but it may also
21 include responses to master set of interrogatories, expert
22 witness designations, stuff like that. That is considered
23 one -- they are listed as separate, they are downloadable
24 as separate instruments.

25 MS. PETERSON: Uh-huh.

1 MR. FULLER: They are listed and itemized as
2 separate instruments by Lexis/Nexis, but they are
3 considered one transaction, one transaction number, and
4 there is one charge.

5 MS. PETERSON: Uh-huh.

6 CHAIRMAN BABCOCK: Judge Christopher.

7 HONORABLE TRACY CHRISTOPHER: This shouldn't
8 be in the TRAP rule. This belongs with, you know, your
9 agreement with the service provider, and it deals with how
10 they're going to charge you for it, exactly.

11 MR. FULLER: Exactly.

12 HONORABLE TRACY CHRISTOPHER: I mean, this
13 doesn't need --

14 MS. PETERSON: Is it more than that, though?
15 I mean, should I know as the practitioner how many
16 documents can I file electronically at a time?

17 HONORABLE TRACY CHRISTOPHER: I mean, that's
18 what they'll tell you.

19 MR. FULLER: Exactly.

20 HONORABLE TRACY CHRISTOPHER: If you want to
21 file -- now, the MDL thing is different, but most of the
22 time, if you want to file a motion to compel and a summary
23 judgment and a, you know, whatever, those are three
24 different documents, three different fees, and attachments
25 to a motion for summary judgment is not a separate fee,

1 but motion to compel versus a motion for summary judgment,
2 those are two different documents, but that doesn't need
3 to be in the rule of procedure. You figure that all out
4 when you file.

5 CHAIRMAN BABCOCK: Mike Griffith, you're
6 nodding your head. Do you agree with that?

7 MR. GRIFFITH: I agree with what Judge
8 Christopher said. It's really -- it's almost a technical
9 issue as the way the documents are processed and ingested
10 into the court system along with file stamping.

11 CHAIRMAN BABCOCK: So you don't think we
12 need it in the TRAP rules?

13 MR. GRIFFITH: I don't.

14 MS. PETERSON: I just wonder why it was in
15 the JP rules and the district and county court rules, and
16 maybe that's a nonissue at this point.

17 CHAIRMAN BABCOCK: Well, we don't need to
18 speculate about that.

19 MR. GRIFFITH: Yeah, when those were
20 developed back in 2002, 2003 we thought it was important
21 to put in there, but perhaps it's not now because the
22 system is a little more mature.

23 CHAIRMAN BABCOCK: Okay. So that's helpful.
24 Carl.

25 MR. HAMILTON: What happens if I put, say,

1 two motions back to back and push the button? I've got --

2 HONORABLE TRACY CHRISTOPHER: Two fees.

3 MR. HAMILTON: -- two documents now instead
4 of one.

5 MR. FULLER: This is an area where the free
6 market is going to be important, because as these filing
7 service providers compete for your business, like they do
8 in the -- the MDL is different. They'll let you file a
9 whole lot for a little bitty charge because you are filing
10 a whole lot and they want your business.

11 CHAIRMAN BABCOCK: So the TRAP rules really
12 don't need to manipulate the free market, so that's
13 another reason.

14 MR. FULLER: If someone wanted to give me
15 five instruments for one price and another one is only
16 going to give me two instruments for one price, guess who
17 is going to be my filing service provider.

18 CHAIRMAN BABCOCK: Okay. 9.2(c)(3).

19 MR. HAMILTON: I'm not talking about price.
20 I'm talking about what happens to the document. Does it
21 not get filed if I put two together or does it get filed?

22 MS. PETERSON: Mike, when you're filing, if
23 you were to attempt to file two motions at the same time
24 and you're with your EFSP, would it let you do that, or
25 would it say you can only do one at a time?

1 MR. GRIFFITH: The service provider would
2 let it go. When it got to the district clerk, for
3 example, right now they would reject that because it's two
4 main documents, and they can't ingest that into their
5 system.

6 CHAIRMAN BABCOCK: Okay.

7 HONORABLE JANE BLAND: And that's what we do
8 with paper, too. When somebody combines and there's
9 sometimes, you know, discretion about whether something is
10 two separate things, because if it's one thing and
11 alternatively another thing, it's just one thing, but if
12 it's one thing and a completely separate other thing, the
13 clerk rejects the paper or requests the second filing fee.
14 So I don't think it's different than what practitioners
15 are used to.

16 CHAIRMAN BABCOCK: Okay. 9.2(c)(3) says --

17 HONORABLE TOM GRAY: I think that practice
18 is different among different courts of appeals right now.

19 CHAIRMAN BABCOCK: That's not helpful right
20 now. 9.2(c)(3) says, "A document may be electronically
21 transmitted through an EFSP to TexasOnline 24 hours per
22 day each day of the year except during brief periods of
23 state-approved scheduled maintenance which will usually
24 occur in the early hours of Sunday morning."

25 MS. PETERSON: Can I just say what Judge

1 Christopher is going to say? This does not belong in the
2 rules. I'm fine with taking it out. It's just there
3 because it was in other rules.

4 HONORABLE TRACY CHRISTOPHER: That little e
5 thing.

6 MS. PETERSON: Yeah, I like it.

7 CHAIRMAN BABCOCK: But when you say it out
8 loud --

9 MS. PETERSON: Yeah.

10 CHAIRMAN BABCOCK: Okay. 9.2(c)(4) says, "A
11 document that is electronically transmitted to an EFSP on
12 or before the last day for filing is considered timely
13 filed if it is transmitted to an approved EFSP with
14 instructions to forward it to the proper appellate court.
15 Though it may consider other proof, the appellate court
16 will accept an EFSP's transmission report as conclusive
17 proof of the date and time of transmission." Comments on
18 that? Sarah.

19 MR. GILSTRAP: Stop.

20 HONORABLE SARAH DUNCAN: I think we just
21 skipped over one of the most important rules in this rules
22 package.

23 CHAIRMAN BABCOCK: What?

24 HONORABLE SARAH DUNCAN: If I can file 24
25 hours a day electronically, but I can only file until 5:00

1 o'clock by paper, I want to know that, and I want to know
2 that that filing is considered good on the day that I get
3 my notice back from TexasOnline.

4 CHAIRMAN BABCOCK: Well, but that's a
5 different --

6 HONORABLE TRACY CHRISTOPHER: That's (4).

7 CHAIRMAN BABCOCK: -- rule.

8 HONORABLE TRACY CHRISTOPHER: What we're
9 just about to talk about.

10 CHAIRMAN BABCOCK: That's what --

11 HONORABLE TRACY CHRISTOPHER: That does
12 belong in there.

13 CHAIRMAN BABCOCK: -- we're now about to
14 talk about.

15 MR. GILSTRAP: Well, in (4) the last
16 sentence is problematic.

17 CHAIRMAN BABCOCK: Okay.

18 MR. GILSTRAP: Because it says, "Though it
19 may consider other proof, the appellate court," does it
20 say, "must accept the transmission report as conclusive
21 proof"? Well, that doesn't make sense, or maybe it says,
22 "Though it may consider other proof, the appellate court
23 may consider the transmission report as conclusive proof."
24 I don't understand.

25 MS. PETERSON: May I just point out that

1 that is from not the JP rules, it's from the TRAP rule
2 right before that, 9.2(b)(2). "Though it may consider
3 other proof, the appellate court will accept the following
4 as conclusive proof of the date of mailing."

5 MR. GILSTRAP: Where is that again?

6 MS. PETERSON: It's 9.2(b)(2). So this is
7 just modeled after --

8 MR. GILSTRAP: Okay. Well, neither one of
9 them makes sense. I mean, if it's conclusive proof, how
10 can you consider other proof? You know, that's the
11 problem.

12 MS. PETERSON: So just take out --

13 MR. GILSTRAP: I think it needs to say -- I
14 think you need to change "will" to "may." It works that
15 way.

16 PROFESSOR ALBRIGHT: How do you "may" -- how
17 could a court "may consider"?

18 MR. GILSTRAP: The court's got to decide,
19 you know, was this filed -- if somebody raises the issue,
20 the court's got to decide this on time. Well, okay, we'll
21 just decide that it was transmitted at that time, that's
22 it. Or you can look at something else.

23 CHAIRMAN BABCOCK: Well, from a policy
24 standpoint it seems to me important to decide whether the
25 EFSP transmission report is of such reliability that we

1 can give it conclusive status.

2 MR. GILSTRAP: That's why you say "may."

3 They can. They can figure it out at the time.

4 CHAIRMAN BABCOCK: Sarah.

5 HONORABLE SARAH DUNCAN: (4) does not answer
6 the question.

7 CHAIRMAN BABCOCK: Okay. What is the
8 question?

9 HONORABLE SARAH DUNCAN: Do I get the
10 benefit of the rules for mailing paper if I electronically
11 file? In San Antonio I can file up until -- I can mail
12 until 11:59:59.

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE SARAH DUNCAN: I want to know if I
15 can do that if I file electronically.

16 CHAIRMAN BABCOCK: Well, and there's another
17 issue there, too, if you start uploading at 11:59 but you
18 don't finish --

19 HONORABLE SARAH DUNCAN: Then I'm not going
20 to get my receipt.

21 CHAIRMAN BABCOCK: -- until after. Well,
22 maybe. That's not necessarily true, by the way.

23 HONORABLE SARAH DUNCAN: That's what it says
24 here.

25 CHAIRMAN BABCOCK: I know, but in practice

1 that's not necessarily true.

2 MR. WATSON: Sounds like the voice of
3 experience.

4 CHAIRMAN BABCOCK: Huh?

5 MR. WATSON: Sounds like the voice of
6 experience.

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE SARAH DUNCAN: It's not
9 necessarily true that you will get --

10 CHAIRMAN BABCOCK: You'll get a receipt at
11 11:59 in some instances.

12 HONORABLE SARAH DUNCAN: When you start to
13 upload it?

14 CHAIRMAN BABCOCK: Yes. But that's another
15 issue. What question are we trying to answer in
16 subparagraph (4), Kennon?

17 MS. PETERSON: It's basically when a
18 document is considered filed.

19 CHAIRMAN BABCOCK: Okay.

20 MS. PETERSON: And the proof of filing date,
21 and that's just mirroring what's happening -- not
22 mirroring. It's there to address proof of mailing in the
23 electronic world since we have proof of mailing in the
24 paper world. It seems like we need something for the
25 electronic.

1 CHAIRMAN BABCOCK: Okay. And Sarah agrees,
2 she says it's important. Ralph.

3 MR. DUGGINS: I agree with Frank. I think
4 you ought to change "will" to "may," and I would take out
5 "conclusive."

6 MR. GILSTRAP: Yeah, that works.

7 CHAIRMAN BABCOCK: Sarah, what do you think
8 about that? Change "will" to "may."

9 HONORABLE SARAH DUNCAN: I want to know -- I
10 know now what I have to have if I filed by mail, and if I
11 have a certificate of mailing that's postmarked by the
12 post office --

13 CHAIRMAN BABCOCK: Right. Right.

14 HONORABLE SARAH DUNCAN: -- that's all I
15 have to have.

16 CHAIRMAN BABCOCK: And this doesn't answer
17 that question. (4) doesn't answer that question.

18 HONORABLE SARAH DUNCAN: (4) doesn't tell me
19 what I have to have.

20 MS. PETERSON: (4) I think tells you that
21 you have to have the transmission report.

22 CHAIRMAN BABCOCK: I know, but it -- she
23 wants to be able -- she wants something to say that if I
24 have a transmission report that says 11:59 on June 12,
25 that that is --

1 MR. WATSON: That controls.

2 CHAIRMAN BABCOCK: That controls. That's
3 what Sarah's asking for. Is there any other place down
4 the road where that's going to say that?

5 MR. GRIFFITH: I think it's in (8).

6 MS. PETERSON: Yeah, I think it is in (8).

7 CHAIRMAN BABCOCK: It's in where?

8 MS. PETERSON: (8), I believe.

9 PROFESSOR DORSANEO: (8) and (9). There is
10 an ambiguity in all of these that is really patent on -- I
11 mean (4) seems to suggest we're trying to say that you can
12 count on having filed it and filed it at a particular date
13 and time. Then when we get down here to (8) we say, well,
14 it can be -- you're supposed to be notified if it's
15 accepted, and then in (9) say it can be rejected, and it
16 doesn't exactly say what happens then, and I can't tell
17 from reading this whether you can rely on the filing with
18 the ESP or not. The other things have to happen, and I'm
19 not sure at the end of the process when you get this alert
20 whether times up, you're done, and we've discussed this
21 every time we've discussed this, and it's never gotten any
22 clearer.

23 CHAIRMAN BABCOCK: Yeah.

24 PROFESSOR DORSANEO: But I know we discussed
25 it for hours. At least I recall discussing it for hours.

1 CHAIRMAN BABCOCK: It may have seemed like
2 hours.

3 MS. PETERSON: That was a bad dream, though.

4 CHAIRMAN BABCOCK: Justice Gray.

5 HONORABLE TOM GRAY: The problem comes up
6 because of a very fundamental difference of philosophy, I
7 think, at the courts of appeals. I know that the Twelfth
8 Court addressed y'all's directly with regard to a
9 difference in their procedures that they use as opposed to
10 the way the Tenth Court has approached the problem,
11 although not necessarily by a majority, anything other
12 than a majority vote. The fundamental issue is whether a
13 document is filed when it is submitted or is it filed when
14 the clerk decides it is compliant and filed.

15 In the former it should be filed and then
16 stricken if it's not compliant, and you have some timing
17 protections, whereas if it is, quote-unquote, "received,"
18 which is sort of the term that is bandied about, then you
19 can have a document that is received and then deemed filed
20 as of the date of receipt, which I actually think is a
21 very dangerous practice because the filing party has no
22 protection of what's going on, and so I noticed and I've
23 highlighted the terminology when you start with subsection
24 (4) all the way through (9), is that is a problem that is
25 intricately interwoven in all of these, and the

1 fundamental question I think could be most easily
2 addressed if we simply said that a document is either
3 filed or not filed when it is tendered. It has to be
4 filed by the clerk, and then if it is subsequently deemed
5 to be noncompliant, it is stricken from the record as
6 opposed to it enters this --

7 CHAIRMAN BABCOCK: Netherworld.

8 HONORABLE TOM GRAY: Yeah, there's a word
9 that's used in Catholicism.

10 MR. HAMILTON: Purgatory.

11 HONORABLE TOM GRAY: Purgatory. It enters
12 purgatory until it crosses the River Styx or not.

13 MR. KELLY: I object as a Catholic. The
14 word is "limbo."

15 HONORABLE TOM GRAY: Limbo, limbo. You're
16 right. Thank you. Thank you. But anyway, it enters this
17 world where no decision has been made and --

18 CHAIRMAN BABCOCK: Blake.

19 MR. HAWTHORNE: First, I completely agree
20 with everything you've just said. I will say this is a
21 very controversial issue with the appellate court clerks
22 and with some of our courts, specifically the Court of
23 Criminal Appeals. I think that this received versus filed
24 practice may have begun a long time ago when you had to
25 file a motion for leave to file certain things, and that

1 practice I think has continued over in our appellate
2 courts, and often times what you see some of our appellate
3 court clerks do is, for example, if you file a motion for
4 extension of time to file your brief, your brief is
5 received until such time as the court grants the motion to
6 extend time, and at that point then your brief is deemed
7 filed.

8 They say that part of the reason for this
9 practice is that if you read the rule about when the
10 appellee's brief is due, the time runs from when the
11 appellant's brief is filed, so if you need to extend the
12 time to file then they don't want to cheat the appellee
13 out of any of their time.

14 The other reason I think that you see a lot
15 of receiving is that we have to deal with folks that don't
16 really understand the rules oftentimes, and we may get
17 some folks that that are filing third and fourth motions
18 for rehearing, and instead of trying to communicate to
19 some of these folks who are rather obstinate that you
20 can't do that, they will just simply receive it. I don't
21 agree with that practice myself. I think you just need to
22 tell them the rule says this, file it, and strike it.
23 That's what we do at the Supreme Court. I understand that
24 Justice Johnson did away with this practice when he was
25 the chief on his court, so it's no longer done there, and

1 I believe that perhaps the First Court does not do it,
2 either.

3 MS. PETERSON: That's right.

4 MR. HAWTHORNE: But the other courts, this
5 practice is very entrenched, and we are having to -- we're
6 discussing actually what this electronic file stamp is
7 going to say for these other courts. What they have asked
8 for is that it say "received," so everything is going to
9 have to say "received" instead of saying "filed." I
10 personally would like to see it done away with, everything
11 says "filed," but I will tell you that there are very
12 strong feelings about this issue.

13 CHAIRMAN BABCOCK: Justice Bland. Then
14 we're going to take a break because Dee Dee's been typing
15 furiously for almost two hours.

16 HONORABLE JANE BLAND: If we are going to
17 push people like Justice Jennings and, to a lesser extent,
18 me into electronic filing, and I'm going to go there, and
19 I'm excited about doing it --

20 MS. PETERSON: Woo-hoo.

21 HONORABLE JANE BLAND: -- I can think of no
22 better time than to push a uniform rule about documents
23 and that they're filed on everybody so that we all -- so
24 that when you file a document it's treated the same way in
25 every court or every -- we'll just try the appellate

1 courts right now, but every appellate court across the
2 state, and all these arguments about received or filed
3 need -- just show that there needs to be some overarching
4 guidance from the Texas Supreme Court about this because
5 it will end the debate.

6 HONORABLE SARAH DUNCAN: Here, here.

7 CHAIRMAN BABCOCK: So if I understand it,
8 like any good democrat, you're using a crisis to solve an
9 unrelated societal problem. Let's take a break.

10 HONORABLE JANE BLAND: Note laughter on the
11 record. No, I'm serious.

12 (Recess from 10:49 a.m. to 10:59 a.m.)

13 CHAIRMAN BABCOCK: Okay, everybody. Justice
14 Bland, chop-chop.

15 MR. WATSON: They're caucusing.

16 CHAIRMAN BABCOCK: I know they're caucusing.
17 We want to try to get through Rule 9 today, and we're
18 going to have to pick up the pace a little bit. Now, this
19 is not going to be our last shot at this rule because --

20 MR. GILSTRAP: I'm so glad to hear that.

21 CHAIRMAN BABCOCK: Huh?

22 MR. GILSTRAP: I'm glad to hear that.

23 CHAIRMAN BABCOCK: Yeah, I know. Because
24 Kennon is going to try to take everything we've said and
25 produce a new draft. Yeah, Sarah.

1 HONORABLE SARAH DUNCAN: Can I report on our
2 OTP, that is, on-the-porch conversation?

3 CHAIRMAN BABCOCK: Your OTP conversation,
4 certainly.

5 HONORABLE SARAH DUNCAN: On filing and
6 received, apparently a big part of the problem, I
7 understand from Blake, is documents that are tendered for
8 filing and there is no pending case and frequently no way
9 to discern what the appropriate filing fee for that
10 document is, but I think we're all okay, the people on the
11 porch are okay, if there is a pending case, the clerk
12 shouldn't have discretion to not file something that's
13 tendered for filing in that case, and I'm fine with
14 getting a notice that says that my brief has been rejected
15 for filing, but I need an opportunity to cure, period. I
16 think everybody -- not me, everybody.

17 CHAIRMAN BABCOCK: Judge Benton.

18 HONORABLE LEVI BENTON: Well, I think
19 Sarah's statement helps us with revenue. We ought to
20 accept all of these documents, and the Court should craft
21 a 250-dollar fee for all documents that a litigant seeks
22 to file where there's no pending case just to help us
23 generate revenue.

24 HONORABLE SARAH DUNCAN: I love that idea.
25 You could generate some money.

1 CHAIRMAN BABCOCK: Okay.

2 MR. GILSTRAP: Chip, having criticized the
3 language of the second sentence of 9.2(4), well, section
4 (4).

5 CHAIRMAN BABCOCK: (c) (4).

6 MR. GILSTRAP: Yeah, (c) (4), I went back and
7 looked at 9.2 of the appellate rules, and it says the same
8 thing. It says --

9 CHAIRMAN BABCOCK: Yeah, that's what Kennon
10 told you.

11 MS. PETERSON: Maybe I said it too quickly.

12 MR. GILSTRAP: But then we -- you know, we
13 decided it didn't make sense. It says, "Though it may
14 consider other proof, the appellate court will accept the
15 following as conclusive proof." I think what they're
16 trying to say is if you can produce a certificate, end of
17 story, and maybe "will" should be "must" there, but if you
18 can't produce a certificate, we'll take something else.

19 CHAIRMAN BABCOCK: Yeah.

20 MR. GILSTRAP: Okay.

21 PROFESSOR DORSANEO: That's what I thought
22 it meant when you were having trouble with it.

23 MR. GILSTRAP: Okay, but "will" is the wrong
24 word, Bill. You know, it should say "must." Remember,
25 isn't that part of your canon of "may" and "must"?

1 PROFESSOR DORSANEO: I always have trouble
2 fitting "will" into this A, B, C convention.

3 CHAIRMAN BABCOCK: 9.2(c)(5) says, "Upon
4 receiving a document from a party an EFSP" -- and, by the
5 way, I noticed that you referred to it a minute ago as
6 ESP, which may be a way to solve all these problems, but
7 anyway, "Upon receiving a document from a party an EFSP
8 must send the document to TexasOnline in the proper format
9 along with a transmission report indicating the date and
10 time the document was received and the filing party's
11 payment information." Any comments about this, other than
12 why is it here? Judge Christopher.

13 HONORABLE TRACY CHRISTOPHER: That's it,
14 doesn't belong in the TRAP rule.

15 CHAIRMAN BABCOCK: All right. I would tend
16 to agree with this.

17 MS. PETERSON: Yeah, I agree.

18 CHAIRMAN BABCOCK: So would Kennon. End of
19 story. 9.2(c)(6) says --

20 HONORABLE TRACY CHRISTOPHER: Same thing.

21 CHAIRMAN BABCOCK: Same.

22 MS. PETERSON: Same issue.

23 CHAIRMAN BABCOCK: See, we're making
24 progress now. 9.2(c)(7).

25 HONORABLE TRACY CHRISTOPHER: Same thing.

1 PROFESSOR DORSANEO: Wait, wait, wait.

2 MS. PETERSON: 9.2(c)(7) is a little bit
3 different.

4 CHAIRMAN BABCOCK: "If an electronically
5 filed document is directed to the proper appellate court
6 and complies with all filing requirements, the appellate
7 court must accept the document."

8 HONORABLE JANE BLAND: That's where we need
9 to say "filed."

10 MS. PETERSON: This is getting back to the
11 attempt to address all of the issues, and so --

12 CHAIRMAN BABCOCK: Okay. Well, let's finish
13 the sentence. If an -- I'll start over, (7), "If an
14 electronically filed document is directed to the proper
15 appellate court and complies with all filing requirements,
16 the appellate court must accept the document. The
17 appellate court must also accept electronically filed
18 documents that are filed in connection with a certificate
19 or affidavit of indigence in the manner required by Rule
20 20.1." Okay. Now, comments about this? Yeah, Justice
21 Gray.

22 HONORABLE TOM GRAY: You've -- you have
23 walked into the issue because the electronically filed
24 document contains the word "filed," so is it already
25 filed, and if it's directed to the proper court and

1 complies with all filing requirements, is that filing
2 requirements for filed as in the context of the EFSPN, or
3 is it all filing requirements as determined by the clerk
4 of the appellate court that has accepted the document, and
5 I think that goes back to the need to simply make a
6 determination of when is a document filed and then what
7 can be done with it thereafter, stricken or otherwise, and
8 I'm not going to revisit that issue again.

9 CHAIRMAN BABCOCK: Bill.

10 PROFESSOR DORSANEO: Yeah, the words, "and
11 complies with all filing requirements" are unsatisfactory
12 because you don't know whether it's going to be accepted
13 until you get a notice to that effect. I mean, it's -- it
14 shouldn't work like that. Even with the "directed to the
15 proper appellate court," I would like to see the appellate
16 court to send it where it should have been sent. On one
17 of -- our other provisions in our rules are perfectly
18 consistent with that, for filing notice of appeal
19 improperly, and this shouldn't be tricky.

20 CHAIRMAN BABCOCK: Okay. Justice Gaultney.

21 HONORABLE DAVID GAULTNEY: I guess I'm
22 wondering why this is here at all. The clerk has a duty
23 to accept filed documents anyway. Why do we say it again?

24 MS. PETERSON: It's a carryover from the
25 other rules. Maybe we don't need it. Maybe it's

1 required, I don't know.

2 CHAIRMAN BABCOCK: Justice Christopher would
3 say ditch it.

4 HONORABLE JANE BLAND: Ditch it.

5 CHAIRMAN BABCOCK: Justice Bland is nodding
6 her head. So is Alex. Blake.

7 MR. HAWTHORNE: I just want to point out
8 that there is case law on the subject of when a document
9 is filed, and I think generally speaking the Supreme Court
10 has said when it's delivered to the clerk that it's filed,
11 so I think that's something to consider.

12 CHAIRMAN BABCOCK: So you're agreeing with
13 them it doesn't need to be here?

14 MR. HAWTHORNE: I'm not taking any position.
15 I'm just pointing out.

16 CHAIRMAN BABCOCK: Oh, courageous, very
17 courageous.

18 MR. HAWTHORNE: Yes, I'm just pointing out
19 that there is legal authority out there, and the Supreme
20 Court has spoken on the issue of when a document is filed,
21 so I think we have to keep in mind we could be changing
22 something here when we're talking about when a document is
23 filed.

24 CHAIRMAN BABCOCK: Changing by rule a
25 Supreme Court holding.

1 MR. HAWTHORNE: Exactly.

2 PROFESSOR DORSANEO: Well, I don't think we
3 want to do that, but I do think, you know, you can also
4 file at the post office, you're filing by mail, and I
5 think it makes sense to file with the -- I don't like
6 saying -- I'm transitioning from words to letters, but I
7 can't say all of these letters. I think filing it with
8 the ESP ought to be just like filing it at the post
9 office. I mean, that --

10 CHAIRMAN BABCOCK: Sarah.

11 HONORABLE SARAH DUNCAN: That's right. I
12 can file a brief with the post office, and it cannot
13 conform to any of the requirements.

14 CHAIRMAN BABCOCK: Are you in the camp that
15 says this doesn't need to be here?

16 HONORABLE SARAH DUNCAN: Except that I'm
17 concerned that I need to get my notice back saying it's
18 been filed, and if I get a notice back that says it's been
19 rejected, I need something in the rules to say, no, it's
20 been filed. I may get a notice from you to TexasOnline.

21 CHAIRMAN BABCOCK: Okay. Yeah, Justice
22 Gaultney.

23 HONORABLE DAVID GAULTNEY: My point is, is
24 if you look at Rule 12, which is --

25 CHAIRMAN BABCOCK: The TRAP rules.

1 HONORABLE DAVID GAULTNEY: There's been some
2 proposed changes to that as well. The clerk has a duty to
3 receive an electronically filed document and notify the
4 parties, so I'm just wondering why we're repeating it
5 here.

6 CHAIRMAN BABCOCK: Okay. Any other comments
7 about (7)? All right. Hang with me on (8) here. 9.2(c).

8 MS. PETERSON: I think it's going to be the
9 same issue, so I could save you some time in reading it,
10 but --

11 CHAIRMAN BABCOCK: It's going to be the same
12 issue?

13 MS. PETERSON: In terms of moving this
14 somewhere else.

15 CHAIRMAN BABCOCK: Okay. But there may be
16 comments about it substantively.

17 MS. PETERSON: Uh-huh.

18 CHAIRMAN BABCOCK: Yeah, Ralph.

19 MR. DUGGINS: I think the first part should
20 say "when the appellate court receives," and that goes
21 back to 12.1, too, because it uses the word "received."

22 CHAIRMAN BABCOCK: We're on 9.2(c)(8) now,
23 right?

24 MR. DUGGINS: Yeah.

25 CHAIRMAN BABCOCK: And you say "when an

1 appellate court receives" --

2 MR. DUGGINS: "Receives" instead of "if" and
3 "accepts."

4 CHAIRMAN BABCOCK: Okay. Any other comments
5 about subparagraph (8)? See, if I read it out loud,
6 Kennon, it allows them all time to --

7 MS. PETERSON: That's it. Yes.

8 HONORABLE SARAH DUNCAN: Then it references
9 (9), and (9) permits an appellate court to reject an
10 electronically filed document.

11 PROFESSOR DORSANEO: Well, the word -- I
12 don't like the word "accepted" down here either,
13 consistent with what Ralph just said. The confirmation
14 that the appellate court received the document, I mean, if
15 that's necessary. What we don't like is this -- the
16 document being, okay, I filed it, but guess what, it
17 didn't work and --

18 HONORABLE SARAH DUNCAN: Rejectable.

19 PROFESSOR DORSANEO: -- good luck.

20 HONORABLE SARAH DUNCAN: We don't like it
21 being rejectable. We won't stand for it being rejectable.

22 HONORABLE NATHAN HECHT: Let me ask --

23 CHAIRMAN BABCOCK: Justice Hecht.

24 HONORABLE NATHAN HECHT: Mike, we had the
25 same issue with the trial court filings. Is there any way

1 of knowing whether trial court clerks have been rejecting
2 documents that they've received?

3 MR. GRIFFITH: Yes. The experience we're
4 seeing is about three percent of the filings are
5 ultimately rejected by the clerk, and again, some of the
6 reasons typically they do that is wrong jurisdiction,
7 filed in county courts as opposed to should have been
8 district courts. Discovery, which should not be filed
9 with the court, is rejected, and wrong cause number on the
10 document. I think those are probably the biggest three.

11 CHAIRMAN BABCOCK: Okay. Any other comments
12 about (8)? Let's go to (9). Yeah, Bill.

13 PROFESSOR DORSANEO: Didn't you say
14 yesterday, but there's kind of AN informal procedure to
15 work out at least some of that?

16 MR. GRIFFITH: Yes. We've had experience
17 where a filer in good faith -- there's a rule that says if
18 it's filed in good faith the filer won't be held in undue
19 prejudice for mistakes. If a filer, for example, leaves a
20 cause number off or has the wrong cause number or files it
21 -- typically the wrong cause number, then the clerk will,
22 if they were up against a filing deadline, will many times
23 allow them to refile and give them credit for a timely
24 filing.

25 CHAIRMAN BABCOCK: Okay. 9.2(c)(9).

1 9.2(c)(9) says, "If the appellate court rejects an
2 electronically filed document, the appellate court must
3 notify TexasOnline of its action and the reason for its
4 action on the same day it takes action. Upon receiving
5 notice from the appellate court, TexasOnline must
6 electronically transmit to the EFSP an alert" -- with
7 quotes around "alert" -- "that the appellate court
8 rejected the document and all information the appellate
9 court provided regarding the rejection. Upon receiving
10 the alert and information, the EFSP must electronically
11 transmit the alert and information to the filing party."
12 Comments about that?

13 HONORABLE TOM GRAY: "Alert" is not a
14 defined term in our definitions.

15 CHAIRMAN BABCOCK: But it has quotes around
16 it.

17 HONORABLE TOM GRAY: Hence my comment.

18 CHAIRMAN BABCOCK: Sarah.

19 HONORABLE SARAH DUNCAN: I don't want them
20 to be able to reject.

21 CHAIRMAN BABCOCK: What?

22 HONORABLE SARAH DUNCAN: I don't want them
23 to be able to reject if there's a pending case.

24 CHAIRMAN BABCOCK: Okay. Any other
25 comments? Justice Sullivan.

1 HONORABLE KENT SULLIVAN: Do we have some
2 clear sense of whether people want to get rid of this
3 process of rejecting? Because it seems to me that really
4 is a big deal in terms of user-friendliness to have a
5 uniform system where either you know when you've tendered
6 it, it's been filed, or there is some risk of it being
7 rejected; and I heard, of course, what Blake said. There
8 is, of course, apparently disagreement among the clerks.
9 I'm curious among this group and trying to move forward if
10 there's some unanimity of sentiment.

11 CHAIRMAN BABCOCK: Blake. What --

12 MR. HAWTHORNE: Well, let me just suggest
13 how this might work in the practical world. I think, for
14 example, say you needed a certificate of conference on
15 your motion, and there's no certificate of conference.
16 How am I going to get that into the system? I assume I'm
17 going to have to have you then e-file a certificate of
18 conference later and enter that as a separate event. I
19 think at our court the way that would most likely work is
20 you would get a friendly phone call from someone in our
21 clerk's office saying, "By the way, you forgot your
22 certificate of conference. I tell you what, I can reject
23 this document. Your money will be refunded back to you
24 through the system so you're not charged for having filed
25 it, and we would just like for you to resubmit that to

1 us."

2 HONORABLE KENT SULLIVAN: What I'm more
3 worried about, just to be clear, are documents that have
4 greater significance, like you're filing the appellant's
5 brief, and someone decides later that that somehow doesn't
6 conform, and it's been rejected as if it was never filed.
7 That's much more significant, it seems to me; or even in
8 the district courts, you filed the original petition. I
9 mean, there are things like statutes of limitation and the
10 like, and someone decides that it doesn't conform, so they
11 can reject it as opposed to the clerk ministerially filing
12 it, and if there's some problem, that it can be taken up
13 later through some orderly process. It just seems to me
14 it needs to be uniform so that everyone understands with
15 some real clarity as to how this happens.

16 CHAIRMAN BABCOCK: Okay. Angie pointed out
17 something, Kennon, that when the -- on this rule,
18 subparagraph (9). When the EFSP electronically transmits
19 the alert and information, shouldn't it be to all parties,
20 not just the filing party? Because if I'm thinking I may
21 have to respond to something that's been rejected, you
22 know, I ought to know it because that way I won't respond
23 to it because I know it's been rejected. Unless we do
24 away with rejections.

25 MS. PETERSON: Right.

1 CHAIRMAN BABCOCK: Which I'm in favor of, by
2 the way. I've been rejected many times in my life. Okay.
3 So that's an issue. All right.

4 HONORABLE TRACY CHRISTOPHER: Chip, if it's
5 rejected, opposing party won't get notice that it's filed.

6 CHAIRMAN BABCOCK: Oh, that's a point.

7 HONORABLE TRACY CHRISTOPHER: Was I wrong?

8 MR. GRIFFITH: I'm sorry, I think I gave you
9 -- I didn't understand your question. If I electronically
10 file and electronically serve currently, the service is
11 completed even if the filing is rejected.

12 HONORABLE TRACY CHRISTOPHER: Oh, well, then
13 that is an issue.

14 CHAIRMAN BABCOCK: Okay. Good catch, Angie.
15 Okay. Let's go on to the next one. 9.3(a).

16 MS. PETERSON: Chip?

17 CHAIRMAN BABCOCK: Yes.

18 MS. PETERSON: I think this rule because of
19 what was voted on yesterday to require --

20 CHAIRMAN BABCOCK: 9.3(a)?

21 MS. PETERSON: 9.3 about number of copies.

22 CHAIRMAN BABCOCK: Right.

23 MS. PETERSON: And I think yesterday there
24 was a vote taken, if I recall correctly, to require a hard
25 copy of every document that's electronically filed.

1 MR. DUGGINS: No.

2 PROFESSOR DORSANEO: No.

3 MS. PETERSON: I thought that was --

4 MR. DUGGINS: The vote was to require
5 electronic filing and at the option by local rule any
6 judge or any clerk to require hard copies, one or more
7 hard copies to be filed.

8 MS. PETERSON: I like that better. That
9 wasn't what I remembered, but --

10 HONORABLE NATHAN HECHT: So-called the
11 Duggins motion.

12 HONORABLE SARAH DUNCAN: If that's not what
13 we voted on, that's what we meant to vote on. Make that
14 correction to the record.

15 CHAIRMAN BABCOCK: Well, we'll see.

16 MS. PETERSON: Okay. Sorry, my faulty
17 recollection.

18 CHAIRMAN BABCOCK: Okay, but what you're
19 saying is that based upon that vote 9.3 is going to have
20 to be reworked.

21 MS. PETERSON: Yes.

22 CHAIRMAN BABCOCK: So there's no sense
23 talking about it now.

24 MS. PETERSON: Yes. I'm going to add
25 language that is consistent with the vote taken. I will

1 refer to the record to ensure that I do that correctly.

2 CHAIRMAN BABCOCK: Okay. Great. Let's go
3 to 9.4, form. And in 9.4(a) and (b) and (c) it looks like
4 the word "paper" has been replaced with the word "page."

5 MS. PETERSON: Yes.

6 CHAIRMAN BABCOCK: Any comments about that?
7 No comments? Okay.

8 Let's go to subpart (g), contents of the
9 cover, and it says you've added "e-mail address, if any."
10 Any comments about that? Yeah, Alex.

11 PROFESSOR ALBRIGHT: What's the purpose of
12 the e-mail address? Is there a later that allows service
13 by e-mail?

14 MS. PETERSON: That's getting back to the
15 issue I addressed earlier and the need for this committee
16 to address whether you should allow service by e-mail.
17 Right now the rules as drafted allow service, electronic
18 service, which must be through TexasOnline. If the
19 committee were to decide to allow service via e-mail, then
20 I think there would be a need for e-mail addresses to be
21 provided, understanding that there is also the issue about
22 the difference between registered e-mail addresses and
23 other e-mail addresses, and finally, Blake, if the clerk's
24 office wants to provide notice via e-mail, I think there's
25 a need to provide e-mail addresses.

1 PROFESSOR ALBRIGHT: So is this the place to
2 talk about it, or is it someplace else?

3 MS. PETERSON: Probably we could talk about
4 notice by e-mailing.

5 CHAIRMAN BABCOCK: Okay. Any other comments
6 about this?

7 HONORABLE SARAH DUNCAN: If I could just
8 point out one thing.

9 CHAIRMAN BABCOCK: Yes.

10 HONORABLE SARAH DUNCAN: (j), 9.4(j).

11 CHAIRMAN BABCOCK: Yeah.

12 HONORABLE SARAH DUNCAN: I think is where
13 Bill and I at least think that the rejection --

14 PROFESSOR DORSANEO: Yes.

15 HONORABLE SARAH DUNCAN: -- is implicitly
16 rejected.

17 CHAIRMAN BABCOCK: Rejection is rejected in
18 9.4(j).

19 HONORABLE SARAH DUNCAN: The court has to
20 file, and it can strike, but it can't refuse to file.

21 CHAIRMAN BABCOCK: Okay. Let's go back up
22 to (h)(1), paper appendix, and you've added "must be
23 tabbed and indexed" as opposed to "should," and then
24 you've added the language "for scanning purposes, each
25 page that has a protruding tab," sounds dirty, "must

1 contain the title of the document immediately following
2 the tabbed page as well as the content on the protruding
3 tab." Comments about that? Judge Christopher.

4 HONORABLE TRACY CHRISTOPHER: Well, A, I
5 don't understand it, and, B, if we're going to do
6 mandatory electronic filing we don't have to worry about
7 what the paper copy looks like.

8 MS. PETERSON: That's true.

9 CHAIRMAN BABCOCK: Okay. Sarah.

10 HONORABLE TRACY CHRISTOPHER: And we can say
11 it the way it always was.

12 HONORABLE SARAH DUNCAN: I hadn't really
13 thought about this. This is a reason I would request a
14 paper brief. If I can't -- if I can't --

15 CHAIRMAN BABCOCK: Tab it?

16 HONORABLE SARAH DUNCAN: -- use the tabs on
17 the index, the index ceases to have much use.

18 CHAIRMAN BABCOCK: Okay.

19 HONORABLE SARAH DUNCAN: Is there not some
20 way to technologically overcome this?

21 PROFESSOR ALBRIGHT: Your PDF can have an
22 index and you can in effect tab. I don't know how to do
23 it, but I know it -- I get them all the time where you get
24 a PDF with something, and you can go to an index and go to
25 different things.

1 HONORABLE SARAH DUNCAN: You mean, you can
2 go electronically?

3 PROFESSOR ALBRIGHT: You can do it
4 electronically.

5 CHAIRMAN BABCOCK: Okay. Other comments
6 about this? Justice Gray.

7 HONORABLE TOM GRAY: I'm not sure where
8 we're going with the electronic and the paper, but
9 remember that the mandatory, as I understand it, mandatory
10 electronic filing is for attorneys, meaning that we will
11 still have paper appendices for pro ses. The purpose of
12 this rule is to allow the courts of appeals or all the
13 appellate courts to be able to scan the pro se paper
14 filings commensurate with capturing for our system, so we
15 cannot jettison this rule.

16 CHAIRMAN BABCOCK: Okay.

17 PROFESSOR ALBRIGHT: Yeah, and so you really
18 don't even need to say "for scanning purposes" because --

19 HONORABLE TOM GRAY: Actually, I think that
20 adds something to it, because you're explaining to the
21 filer, the person that's preparing the document, tendering
22 it for filing, what's going to happen. The truth of the
23 matter is most of those filers don't comply with this rule
24 anyway.

25 PROFESSOR ALBRIGHT: Right.

1 HONORABLE TOM GRAY: So but at least it's
2 there, and we can explain it, and the clerks and deputy
3 clerks will know what to do to cause a document to be able
4 to be better scanned.

5 PROFESSOR ALBRIGHT: Yeah, I guess when I
6 first read it, it was almost like if it's going to be
7 scanned you need to do this, which I wouldn't -- if I was
8 pro se I wouldn't really know, so but it's -- so what you
9 want, because we're going to scan every paper document
10 that comes in, we need this to be on every paper document.

11 MS. PETERSON: I wonder if this explanation
12 might be better placed in a comment.

13 PROFESSOR ALBRIGHT: No. I think if you
14 want this in every -- if you want every paper one to look
15 like this --

16 MS. PETERSON: Not that, sorry. The "for
17 scanning purposes," that you would explain why you're
18 requiring this information in the comment rather than
19 saying "for scanning purposes" in the rule or --

20 PROFESSOR ALBRIGHT: Yeah.

21 CHAIRMAN BABCOCK: Okay. Bill.

22 PROFESSOR DORSANEO: Is that -- I'm having a
23 little trouble understanding what that's meant to mean,
24 too. If the tab says "Exhibit A," you put "Exhibit A" on
25 the sheet that's in between or do you put the title of

1 Exhibit A, which is the document that Exhibit A is about?
2 How much information do you want and why do we have to go
3 to this trouble?

4 CHAIRMAN BABCOCK: Because they can't scan
5 the tab, right?

6 MS. PETERSON: That's right.

7 MR. HERMES: That's exactly it.

8 PROFESSOR DORSANEO: So don't scan it.

9 MR. HERMES: If it's on the protruding tab
10 it's not in the eight and a half by eleven area that's
11 scanned, so you basically lose that little tiny bit of
12 text.

13 CHAIRMAN BABCOCK: So in other words unless
14 "Exhibit A" is on the next page, you won't know that it's
15 Exhibit A because they haven't scanned the protruding tab.
16 Can you believe we're talking about this? Elaine.

17 PROFESSOR CARLSON: So, Kennon, is what you
18 want is a duplicate of the page with the tab without a
19 tab? Is that what you want?

20 CHAIRMAN BABCOCK: Basically.

21 PROFESSOR DORSANEO: You want the
22 information on the tab to be on the page.

23 MS. PETERSON: Here's the concern. People
24 who wanted paper, some people thought, you know, I still
25 want -- like Sarah, I want that thing I can put my -- the

1 protruding tab to be able to turn the page, but then when
2 you scan the document you're going to lose what's on that,
3 so the idea is to have --

4 CHAIRMAN BABCOCK: This is a protruding tab.

5 HONORABLE SARAH DUNCAN: Exhibit A.

6 CHAIRMAN BABCOCK: And if on the next page
7 it doesn't say "B," "Exhibit B," I won't know that that's
8 Exhibit B.

9 MR. HARDIN: You're just putting a front
10 page on the attachment.

11 MS. PETERSON: You could do a separate page,
12 and we had that in there for a while, but you would have
13 behind the tab another page that had the information on
14 the tab. We thought this would be easier.

15 CHAIRMAN BABCOCK: Justice Bland.

16 HONORABLE JANE BLAND: I think we need to
17 take out anything about tabbing. It's nice. It's a
18 convenience. Half the people, including lawyers, not just
19 pro ses, don't tab their appendixes now, and you can
20 muddle through, and if everything is going toward
21 electronic filing, and people are going to learn how to
22 use these separator pages, let's encourage that. I mean,
23 tabbing is difficult to Xerox, trying to capture the
24 little information on the little tabs so that we look at
25 the exact image that the hard copy has is -- so I'm not in

1 favor of requiring an appendix to be tabbed and indexed,
2 and as far as I'm concerned, let's just take the whole
3 idea of tabbing out of this rule, and the practitioners
4 that know how to do it for the convenience of the court
5 will continue to do it.

6 CHAIRMAN BABCOCK: But in --

7 HONORABLE JANE BLAND: Just like those that
8 do the nice bindings will continue to do the nice bindings
9 and that kind of stuff. It's just prettiness. It's not
10 necessary to the appellate brief or the appendix, I mean.

11 CHAIRMAN BABCOCK: But if you have an
12 appendix and it's got a Tab A-1, for example, and then in
13 the brief it refers to something from, you know, Tab A-1
14 at page six, and if you're looking at it electronically
15 and you can't tell what Tab A-1 is, isn't that a problem?

16 HONORABLE JANE BLAND: Yeah, and it happens
17 all the time, "See Appendix Tab 1" and you go to the
18 appendix, there are no tabs. You see appendix 1. They
19 haven't even marked anything in the appendix, you know, so
20 at some point you just have to hope that the person
21 reading the document can muddle through.

22 CHAIRMAN BABCOCK: Okay. Bill.

23 PROFESSOR DORSANEO: We like the index,
24 right, even though --

25 HONORABLE JANE BLAND: I like all of this

1 stuff. I like tabs. I like indexes. I like the idea
2 that I can punch a button and go right to where I want to
3 go --

4 CHAIRMAN BABCOCK: But an index is helpful.

5 HONORABLE JANE BLAND: -- but if we're
6 talking about the minimum requirements for somebody to
7 properly file their brief, and I don't think that
8 requiring a brief, a paper copy of a brief, to be tabbed,
9 and then all the additional work that takes to convert
10 those tiny words to the scanned product makes any sense at
11 all.

12 CHAIRMAN BABCOCK: So you're against --

13 HONORABLE JANE BLAND: I'm against all --

14 CHAIRMAN BABCOCK: -- "must."

15 HONORABLE JANE BLAND: I'm against "must."
16 I'm against putting all this stuff about scanning
17 purposes. I think we should just let the practitioners
18 figure it out.

19 CHAIRMAN BABCOCK: Anybody else feel that
20 way? R. H., you feel way?

21 MR. WALLACE: I don't know enough about the
22 Texas appellate rules to know this, but in an appendix,
23 can you -- would it be easy to just require that the
24 appendix be numbered each page sequentially and you don't
25 worry about Tab A, Tab B, Tab C, just appendix page

1 such-and-such?

2 CHAIRMAN BABCOCK: Appendix page 1.

3 MR. WALLACE: That's the way most of the
4 Federal courts require it and then you don't have to worry
5 about where's the tab. It's at page 150. I don't know if
6 that would be easy to incorporate in there or not.

7 PROFESSOR DORSANEO: That's a good idea. I
8 think the tab part needs to come out, and is this
9 so-called index, is this at the front of the appendix? It
10 is, right?

11 CHAIRMAN BABCOCK: I don't know. I assume
12 it is, yeah.

13 HONORABLE SARAH DUNCAN: Yes.

14 PROFESSOR DORSANEO: Well, then index, I
15 remember when we used to call the table of contents in a
16 brief the subject index. I remember thinking when I first
17 moved to Texas that isn't the index at the back? So if
18 we're going to have that in here and if it is at the
19 front, I would call it a table of contents.

20 CHAIRMAN BABCOCK: Judge Christopher, and
21 then Justice Bland.

22 HONORABLE TRACY CHRISTOPHER: Well, this
23 happens all the time in the district court, and we don't
24 have any rule requiring tabs or not requiring tabs.
25 Sometimes they get tabbed, and when a document comes in

1 with tabs, the clerk pulls it out and has a preprinted
2 piece of paper that says "Exhibit A," and they just put it
3 right there, and they scan it in. It's like it doesn't
4 need to be in a rule. It can be handled.

5 CHAIRMAN BABCOCK: So you are not a tabbist.
6 Justice Bland.

7 HONORABLE JANE BLAND: And in terms of
8 citing to the appendix, that happens in mandamuses where
9 the appendix is the record, but in appeals, the appendix
10 is for the convenience of the court. It's not even really
11 required. I guess maybe it is in the Texas Supreme Court,
12 and the citations in our brief are to the actual clerk's
13 record and very rarely -- and it's great when they do it,
14 but very rarely does somebody cite the clerk's record and
15 then cite the same contract that they've attached as a
16 convenience in the appendix.

17 CHAIRMAN BABCOCK: Okay. Let's go to
18 9.4(h)(2), electronic appendix. "An electronically filed
19 appendix must be transmitted either with the document to
20 which it is related or separately."

21 HONORABLE SARAH DUNCAN: "May."

22 CHAIRMAN BABCOCK: "The appendix must be
23 indexed and include a separator page before each document.
24 The separator page must contain the title of the document
25 immediately following the separator page as well as the

1 content that would have been on the protruding tab if the
2 appendix had been filed on paper."

3 PROFESSOR DORSANEO: Are there any
4 nonprotruding tabs? I've been wondering if there are any
5 tabs that don't protrude.

6 PROFESSOR CARLSON: It wouldn't be a tab.

7 MR. HERMES: Tabs also mean index.

8 PROFESSOR DORSANEO: They do?

9 CHAIRMAN BABCOCK: Kennon was laughing.

10 MS. PETERSON: Yeah, because I knew if they
11 don't like the other one, they're going to hate this.

12 HONORABLE JANE BLAND: Well, my comments
13 were directed to both (1) and (2).

14 CHAIRMAN BABCOCK: Okay.

15 MS. PETERSON: Like I said, if they don't --

16 CHAIRMAN BABCOCK: So we can incorporate by
17 reference since your comments were not protruding in a
18 tab-like form.

19 HONORABLE JANE BLAND: Just take (h) out.

20 CHAIRMAN BABCOCK: Take (h) out.

21 HONORABLE JANE BLAND: Or just have (h) say
22 -- don't break out between paper and electronic. Just
23 say, "An appendix may be bound either with the document to
24 which it was originally bound" -- or "filed," you can say,
25 "bound or filed with the document to which it's related or

1 separately."

2 CHAIRMAN BABCOCK: Okay. Yeah.

3 MR. HERMES: I think I might have a bit --

4 CHAIRMAN BABCOCK: Bruce.

5 MR. HERMES: -- of language that solves all
6 this in an abstract enough way that, "A tabbed page may
7 not replace any title page."

8 CHAIRMAN BABCOCK: Okay. That was Bruce.
9 Did you get that?

10 THE REPORTER: Yes.

11 CHAIRMAN BABCOCK: All right. Any other
12 comments on this?

13 MS. PETERSON: I just want to be clear with
14 the recommendation of Judge Bland, so it would be "An
15 appendix may be bound or filed," and then would you delete
16 the sentence that's currently in the rule that says, "An
17 appendix should be tabbed and indexed"? Is that what
18 you're suggesting?

19 HONORABLE JANE BLAND: (Nods head.)

20 CHAIRMAN BABCOCK: Okay.

21 HONORABLE TOM GRAY: Just for clarity, there
22 are those of us who still like the rule the way it's
23 drafted, because I --

24 CHAIRMAN BABCOCK: (h)? You're talking
25 about (h)?

1 HONORABLE TOM GRAY: (h). Because I think
2 that you're talking to two different groups of people.
3 The folks that are looking for the minimum to comply with
4 the rules now will try to put tabs in it. If they don't
5 have to put tabs, they're not going to put tabs. Tabs are
6 useful.

7 CHAIRMAN BABCOCK: Okay.

8 PROFESSOR ALBRIGHT: I like the page number
9 idea.

10 HONORABLE TOM GRAY: I -- that has a certain
11 appeal that fixes some of these problems, but also, when
12 I'm looking at a brief, I will frequently flip through the
13 appendices without regard to a reference in the brief
14 because I know that in my civil briefs that the charge
15 should be one of the first documents attached as an
16 appendices and that the judgment should be the very first,
17 and I may want to go there first without a specific
18 reference in the brief to it, so I don't have a page
19 number in the appendix for those documents and the tabs
20 are easier to find, but, you know, it appears that I may
21 not have anything to hold in my hands until I print it
22 anyway, so --

23 CHAIRMAN BABCOCK: R. H.

24 MR. WALLACE: Well, you can do both. In
25 fact, I think the Fifth Circuit, I'm pretty sure they

1 require the sequential page numbering, but you could also
2 do tabs for the people who want to say, "I want to see
3 what the motion for summary judgment said." You could tab
4 it and still have sequential page numbers.

5 CHAIRMAN BABCOCK: Sarah.

6 HONORABLE SARAH DUNCAN: That would be okay.
7 I wouldn't want to get to the point of just sequential
8 page numbers, because if someone is citing a court of
9 appeals opinion I want to know that that's what they're
10 citing. I don't want to just see "Appendix at 76."

11 CHAIRMAN BABCOCK: Okay. Yeah. Justice
12 Bland.

13 HONORABLE JANE BLAND: I am in favor of
14 getting this stuff out of the appendix rule because if we
15 make the appendix too difficult for the practitioner to
16 prepare and in the courts of appeals in civil cases or in
17 criminal cases, they just will not file an appendix. I'd
18 rather have the appendix as a useful tool in whatever form
19 they can get it to me than not have it at all.

20 CHAIRMAN BABCOCK: Okay. All right. Let's
21 look at 9.4(i), electronic filing. Wait a minute. We
22 just looked at that, didn't we?

23 MS. PETERSON: We did electronic appendix.

24 CHAIRMAN BABCOCK: That's right. I'm sorry.
25 Electronic filing. "Electronically filed document must

1 comply with the provisions of this rule except
2 subdivisions" -- is that (i) or (l)?

3 MS. PETERSON: (f).

4 CHAIRMAN BABCOCK: "(f) and (h)(1), "but a
5 bound copy of an electronically filed document submitted
6 in accordance with Rule 9.3(b) must comply with
7 subdivisions (f) and (h)(1) and must provide in bold font
8 on the cover page that it is a copy of an electronically
9 filed document." Comments on that?

10 MR. DUGGINS: Hard to follow.

11 CHAIRMAN BABCOCK: It's hard to read, too.

12 PROFESSOR ALBRIGHT: We're not going to need
13 that anymore, are we? If you have to file electronically,
14 all paper copies are going to be disposable, right?

15 HONORABLE TRACY CHRISTOPHER: Right.

16 PROFESSOR ALBRIGHT: So this would only be
17 to -- so, you know, which one is the official copy and
18 which one is not.

19 CHAIRMAN BABCOCK: Skip.

20 MR. WATSON: Huh?

21 CHAIRMAN BABCOCK: Did you have your hand
22 up?

23 MR. WATSON: Not knowingly.

24 CHAIRMAN BABCOCK: Okay. Any other comments
25 about (i)? All right. Moving on to electronic service,

1 which will be 9.5. Yes, sir.

2 MR. DUGGINS: I think you ought to look back
3 at (j) and switch that first sentence to say, "If a
4 document fails to conform to these rules, the court may
5 strike," consistent with the notion that we're going to
6 file it and then strike it.

7 CHAIRMAN BABCOCK: Okay. Okay. Okay,
8 service. In 9.5(b) you've made a change by adding, "by
9 fax or by electronic means in accordance with this rule."
10 Any comments on that? Yeah, Alex.

11 PROFESSOR ALBRIGHT: Isn't fax electronic?

12 MS. PETERSON: Well, we said earlier in the
13 rule that electronic filing --

14 PROFESSOR ALBRIGHT: Oh, okay.

15 MS. PETERSON: -- does not include --

16 PROFESSOR ALBRIGHT: Fax.

17 MS. PETERSON: -- that.

18 PROFESSOR ALBRIGHT: Okay.

19 CHAIRMAN BABCOCK: Okay. 9.5(c), electronic
20 service. (c)(1), "To be served by electronic means a
21 party must consent to electronic service by opting into
22 electronic service through TexasOnline. By consenting to
23 electronic service, a party agrees to provide information
24 regarding any changes in the party's e-mail address to
25 TexasOnline, the appellate court, and all other parties in

1 the case within 24 hours of the change." Similar to what
2 we just talked about, another rule. Any comments on this?
3 Other than what we talked about before, obviously. Okay.

4 MS. PETERSON: May I ask for a little
5 feedback on what would be a reasonable amount of time
6 within which to notify others of a change in an e-mail
7 address?

8 MR. MEADOWS: And what are the consequences
9 of failure to do it in 24 hours?

10 CHAIRMAN BABCOCK: It seems to me that's
11 what motivates everybody to do it, because if you don't
12 get notice of something you could be in trouble or your
13 client could be in trouble or both. Yeah, Justice Bland.

14 HONORABLE JANE BLAND: Well, I know our
15 earlier comments went to not including the deadline, and I
16 don't see why you couldn't just say "in the case," period,
17 and not put some amount of time.

18 CHAIRMAN BABCOCK: That's an idea.

19 HONORABLE JANE BLAND: I mean, if you're
20 going to have this, if you want to keep it in here, just
21 stop "in the case," period, and then, you know, the rules
22 will imply a reasonable amount of time.

23 CHAIRMAN BABCOCK: Yeah.

24 HONORABLE JANE BLAND: Which is probably the
25 amount of time it takes for the practitioner to get a

1 bunch of e-mails bounced back or TexasOnline to notify him
2 that, you know, their e-mail bounced back or --

3 HONORABLE TRACY CHRISTOPHER: It's just like
4 if you don't tell somebody you've moved.

5 CHAIRMAN BABCOCK: Yeah. Yeah.

6 HONORABLE TRACY CHRISTOPHER: You don't get
7 the brief.

8 CHAIRMAN BABCOCK: Right. Right.

9 Okay. I think that's a good suggestion.
10 (c) (2).

11 MS. PETERSON: Before you start reading, may
12 I say something?

13 CHAIRMAN BABCOCK: Yes.

14 MS. PETERSON: This is modeled after an
15 explanation that Mike Griffith provided for how electronic
16 service works. I'm anticipating that, like the provisions
17 about how electronic filing works, this may be better
18 placed elsewhere.

19 CHAIRMAN BABCOCK: You're so defensive.

20 Ms. peterson: No, I'm just acknowledging,
21 just acknowledging the concerns.

22 CHAIRMAN BABCOCK: Okay. Well, maybe I
23 don't have to read this. Are you saying that --

24 HONORABLE JANE BLAND: She wants to save
25 some of her Saturday.

1 MS. PETERSON: And yours.

2 HONORABLE JANE BLAND: And mine.

3 CHAIRMAN BABCOCK: Yeah, right. Are you
4 saying that it's going to be moved somewhere else, like
5 the trash bin, or electronically speaking, or that you're
6 going to move it somewhere else in the rules, in which
7 case maybe some comments might be helpful?

8 MS. PETERSON: Comments are welcome, yes.

9 CHAIRMAN BABCOCK: Okay. Anybody have --
10 and we're almost done, so anybody have any comments on
11 this? You want me to read it?

12 PROFESSOR DORSANEO: No.

13 CHAIRMAN BABCOCK: Alex.

14 PROFESSOR ALBRIGHT: Well, don't we need to
15 say somewhere that you can -- okay, you can serve by
16 electronic service if your opponent has consented to be
17 served through TexasOnline?

18 HONORABLE NATHAN HECHT: If that's what
19 the --

20 PROFESSOR ALBRIGHT: Because apparently I
21 can't serve you through TexasOnline unless you have
22 consented, right?

23 HONORABLE TRACY CHRISTOPHER: Right.

24 MS. PETERSON: Uh-huh.

25 PROFESSOR ALBRIGHT: So this just tells us

1 how to do it.

2 HONORABLE NATHAN HECHT: But you're going to
3 have to consent.

4 PROFESSOR ALBRIGHT: You need to have a
5 statement that says you can serve someone electronically,
6 but the only service is through TexasOnline is what we're
7 saying. I can't just attach my brief to an e-mail and
8 send it to you.

9 MS. PETERSON: Right.

10 MR. FULLER: But the consent provision is in
11 (c)(1), to be served.

12 PROFESSOR ALBRIGHT: Yeah, but, I mean,
13 somewhere it needs to say that effective service is
14 through -- okay. Oh, okay, wait. Never mind.

15 Okay. Service, is there a definition of --
16 okay, service is by -- okay, by electronic means in
17 accordance with this rule. Okay. I don't want to be
18 drafting here. That's just a thought that I had.

19 MS. PETERSON: Uh-huh.

20 CHAIRMAN BABCOCK: Judge Christopher.

21 HONORABLE TRACY CHRISTOPHER: I think we
22 ought to discuss at some point in time mandating the
23 acceptance of electronic service and not having this
24 option, because you get cost savings if you do the
25 electronic service, but I understand from practitioners

1 that, you know, some lawyers just don't want to get
2 service electronically, and then the other party to the
3 lawsuit doesn't get the cost savings of, you know, just
4 shooting it to the opponent electronically and then
5 they've got to have the paper copy and they've got to send
6 it certified, et cetera. Now, I don't know why some
7 lawyers say, "I don't want to have electronic service." I
8 know a lot, but if we really want to encourage and be the
9 most efficient system, mandating the service.

10 CHAIRMAN BABCOCK: Sarah.

11 HONORABLE SARAH DUNCAN: I can tell you why
12 I will not -- I will not opt in. I want my protruding
13 tabs. I want my adversary to pay for the paper and the
14 tabs and the covers and all of that --

15 HONORABLE TRACY CHRISTOPHER: That's not a
16 good reason.

17 HONORABLE SARAH DUNCAN: -- because
18 otherwise my law firm is going to be paying it.

19 PROFESSOR ALBRIGHT: But you're paying to
20 send them one.

21 HONORABLE TRACY CHRISTOPHER: But you're
22 paying to send the other way.

23 HONORABLE SARAH DUNCAN: I'm sorry?

24 HONORABLE TRACY CHRISTOPHER: When your
25 opponent thinks the same way you do, you've got to pay.

1 HONORABLE SARAH DUNCAN: That's right.
2 That's right. But I'm telling you I'm not going to take
3 those costs on for myself with all the disadvantages that
4 come with them --

5 HONORABLE TRACY CHRISTOPHER: If both of
6 you --

7 HONORABLE SARAH DUNCAN: -- if I have a
8 choice.

9 HONORABLE TRACY CHRISTOPHER: -- have to do
10 it, it's cost neutral.

11 HONORABLE SARAH DUNCAN: I'm just telling
12 you what I would do and what I think any sensible
13 practitioner would do.

14 CHAIRMAN BABCOCK: Hayes.

15 MR. FULLER: I think the issue right now is
16 kind of a confidence, one of confidence. I get e-mails
17 from folks all the time -- I shouldn't say all the time.
18 I get some where they're requesting that I agree to
19 electronic, you know, service by e-mail, and I generally
20 don't. I have not accepted those. I will do it through
21 like an MDL where everybody is basically posting online,
22 and I've got some assurance that I am really truly getting
23 everything that's being served upon me, but when it's
24 computer to computer and we're not going through an online
25 TexasOnline process or a Lexis/Nexis, with the differences

1 between spam filters and what gets through and what
2 doesn't get through, I just -- to me I don't have
3 confidence that I'm actually getting the document.

4 HONORABLE TRACY CHRISTOPHER: No, I'm not
5 talking about computer to computer. I'm talking about
6 service through online.

7 MR. FULLER: Once people get confident and
8 comfortable with that system, I will agree that the only
9 way we'll ever move to it is to mandate that they move to
10 it.

11 CHAIRMAN BABCOCK: Justice Bland.

12 HONORABLE JANE BLAND: Okay. So I need to
13 lower my voice two octaves and say it occurs to me that we
14 ought to see what the Federal rule does, do they mandate
15 electronic service.

16 MR. HAWTHORNE: It's opt-in.

17 MR. WALLACE: In bankruptcy courts --

18 CHAIRMAN BABCOCK: Blake, they don't --

19 MR. HAWTHORNE: I'm very confident that the
20 Fifth Circuit rules, that it's opt-in.

21 CHAIRMAN BABCOCK: Justice Sullivan.

22 HONORABLE KENT SULLIVAN: I agree with Judge
23 Christopher that we ought to begin proactively thinking
24 about a system that is -- that we will need to have within
25 years. I do think, just as a quick aside, that consistent

1 with Hayes' point, is that we will probably need something
2 that is centralized that provides for some uniformity. A
3 completely decentralized system is one who's lowest common
4 denominator would be too low, given 85,000 lawyers in
5 Texas, but I think that eventually we're going to get
6 there, and we'll need to get there, and it would be useful
7 to start thinking now as opposed to just waiting and being
8 behind the curve.

9 CHAIRMAN BABCOCK: R. H., and then Bill.

10 MR. WALLACE: I'm not sure, but I think if
11 the Federal courts designate a case for electronic filing,
12 then I think if you enter an appearance you get served
13 electronically. I don't think there's an opt-out
14 provision. I don't think. I may be wrong.

15 MR. HAWTHORNE: I think, Justice Bland,
16 you're saying Fifth Circuit's behind what the district
17 courts are doing?

18 MR. WALLACE: As a practical matter --

19 MR. HAWTHORNE: Yeah, so the Fifth Circuit
20 rule may be behind.

21 MR. WALLACE: District, I'm talking about
22 the district courts.

23 HONORABLE SARAH DUNCAN: But there are
24 reasons to treat the two systems differently. In any
25 given appeal I may get two documents, maybe, or three, but

1 I don't get a hundred like I would if I were in the trial
2 court, and that's -- and every one I get in an appeal is
3 significant. It's not just a notice of deposition or one
4 of the things you get in the trial court, so to me it
5 makes sense to treat them differently.

6 CHAIRMAN BABCOCK: Bill, sorry.

7 PROFESSOR DORSANEO: Why do we have the
8 ESSPs and TexasOnline involved in this? I get served
9 electronically with briefs. I'm happy to be served
10 because I get served on the day that they're filed pretty
11 consistently. They just look exactly like what was filed,
12 and, you know, I don't care that much about the tabs,
13 frankly, but then I get a brief later. I get a written
14 brief a few days later, and I'm not really sure what I do
15 with that written brief about half the time because I've
16 already read what was sent to me by e-mail, and I probably
17 stick it in a box and may look back at it later, but why
18 do we have all of this -- I can see for filing things, but
19 why do we have it for serving things? Why wouldn't the
20 certificate of service be okay on the brief that was
21 filed?

22 HONORABLE NATHAN HECHT: Because you push a
23 button, and it goes automatic, and you don't have to worry
24 about it.

25 CHAIRMAN BABCOCK: Kennon, did you have

1 something to say?

2 MS. PETERSON: I was going to say that the
3 rules for the lower courts, as I read them, do allow
4 service by e-mail, and originally I had included
5 provisions for that. There was some concern at the task
6 force level about a lack of certainty if it's just e-mail
7 to e-mail. With TexasOnline you have a trail through the
8 EFSP and TexasOnline of everything that happens, and like
9 Justice Hecht just said, you hit send, and it takes care
10 of it and creates this detailed report about when the
11 other side gets the notice of service and when the other
12 side actually accesses the document, and so people express
13 increased comfort with that as opposed to just going
14 e-mail to e-mail.

15 CHAIRMAN BABCOCK: Justice Hecht.

16 HONORABLE NATHAN HECHT: Mike, is there an
17 extra charge for service?

18 MR. GRIFFIN: There is one flat fee for the
19 electronic service regardless of number of parties.

20 CHAIRMAN BABCOCK: All right. 9.5(d)(4)
21 says, "Electronic service is complete when the filing
22 party electronically transmits the document to the filing
23 party's EFSP. When electronic service is complete after
24 5:00 p.m.," paren, "recipient's time," paren, "then the
25 date of service is the next day that is not a Saturday,

1 Sunday, or legal holiday."

2 MR. GILSTRAP: That's a problem.

3 CHAIRMAN BABCOCK: Comments about that,
4 Ralph.

5 MR. DUGGINS: I think that the -- I don't
6 believe "transmits" is a defined term, so I would suggest,
7 even though it is not perfect, because of -- but the
8 alternative is worse, that after "electronically" we
9 consider inserting "completes transmission of" and take
10 out "transmits" so that you have to complete it, and I
11 think, of course, if you say "begins" then somebody might
12 just send the first page and not have the rest of the
13 brief ready.

14 CHAIRMAN BABCOCK: A lot of these documents
15 take a long time to send, too.

16 MR. DUGGINS: They do, but I think if you
17 start it, you just -- you could drag it out forever and
18 say -- anyway, I would suggest we firm that up.

19 CHAIRMAN BABCOCK: Yeah, I think that's a
20 good idea. Frank.

21 MR. GILSTRAP: Well, here, with electronic
22 service you've got to get it by 5:00, and with paper
23 service you can mail it by midnight. That's a big change.
24 I mean, why can't we -- why can't we send it by midnight?

25 CHAIRMAN BABCOCK: Good point. Sarah.

1 HONORABLE SARAH DUNCAN: And why is it
2 different for fax?

3 CHAIRMAN BABCOCK: Yeah, and different for
4 fax, so shouldn't they all be the same.

5 MR. GILSTRAP: Yeah.

6 CHAIRMAN BABCOCK: Good point. Justice
7 Bland.

8 HONORABLE JANE BLAND: Well, I think there's
9 a problem with having the date of service be the next day
10 when the date of filing is that day at midnight, because
11 even with the mailbox rule we do everything from the date
12 of filing and then we add in the time for when something
13 is served by mail. We don't try to calculate deadlines
14 from the date of service, and so it seems like we ought to
15 just have the service date be the same day as the filing
16 date.

17 PROFESSOR DORSANEO: Uh-huh.

18 CHAIRMAN BABCOCK: Okay.

19 HONORABLE JANE BLAND: And the other thing
20 is if the party submits -- transmits the document to the
21 filing party's EFSP, that constitutes -- that completes
22 electronic service, but can't you also electronically
23 serve outside the TexasOnline system if you choose to,
24 because there is an extra charge for service, so you could
25 file it with TexasOnline and electronically serve it just

1 via e-mail to the other parties.

2 HONORABLE TRACY CHRISTOPHER: Not under the
3 current rule.

4 HONORABLE JANE BLAND: Are we not going to
5 allow that, and that's what I'm trying to find out.

6 MS. PETERSON: That's the issue I raised
7 earlier.

8 HONORABLE JANE BLAND: Because I think I
9 heard him say that it doesn't matter how many parties you
10 serve, it's one flat fee, but there is an additional fee
11 for TexasOnline or the EFSP to provide you with service as
12 opposed to filing. ;

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE JANE BLAND: So I don't think we
15 should require that cost be imposed on practitioners who
16 just want to e-mail it themselves and save that cost.

17 CHAIRMAN BABCOCK: Ralph.

18 MR. DUGGINS: I thought Kennon said that
19 there was concern at her committee level that there was no
20 proof of service unless you went through the Texas -- the
21 EFSP.

22 HONORABLE JANE BLAND: Well, that's true.

23 MR. DUGGINS: And that's why I think we
24 ought to probably do that. It doesn't prevent you from
25 doing it on your own, and there's no extra charge for

1 doing it that way, as I understood it.

2 CHAIRMAN BABCOCK: Okay.

3 PROFESSOR DORSANEO: No, there is an extra
4 charge.

5 CHAIRMAN BABCOCK: All right. 9.5(d) -- no,
6 (f)(4) says, "If the document is served by electronic
7 means, the filing party's registered e-mail, the recipient
8 party's registered e-mail address, and a statement either
9 that the document has been served by electronic means or
10 that the document will be served by electronic means
11 concurrent with the electronic filing of the document."
12 Any comments about that? Sarah.

13 HONORABLE SARAH DUNCAN: I have a comment
14 about that and a response to what Jane was saying on
15 subsection (4).

16 CHAIRMAN BABCOCK: (d)(4)?

17 HONORABLE SARAH DUNCAN: Yeah. I don't know
18 that -- I mean, I don't file something concurrent with
19 serving it now. I may send a runner to the Supreme Court
20 with a petition and then it gets served by mail when the
21 mail goes out that afternoon, but with an electronic
22 filing we're sort of expanding time to 24-hour days, and
23 what do I do if I -- and this is truly a question. I'm
24 not trying to presage the answer. I get my brief filed
25 electronically at 11:59. I have to serve the next day if

1 I can't serve -- finish my transmission by electronic
2 service or whatever in a minute, so I don't think it
3 necessarily can be the same day with electronic.
4 Sometimes it might be the next day, but it's got to be
5 soon after, and I'm not sure --

6 MS. PETERSON: Mike, is it -- is my
7 understanding correct that you can as the filing party
8 say, "I want to file," check, and "I want to serve," check
9 these parties, and then you hit the button and all of it
10 gets done?

11 MR. GRIFFITH: That's correct.

12 HONORABLE SARAH DUNCAN: But I can't do that
13 if they haven't consented --

14 MS. PETERSON: Right, they would have to
15 have consented.

16 HONORABLE SARAH DUNCAN: -- to electronic
17 service.

18 MR. GRIFFITH: I think at least at the trial
19 court level it was based upon the rule that says that
20 service must be completed before or at the time of the
21 filing, so it can't be postfiled.

22 HONORABLE SARAH DUNCAN: Well, the appellate
23 rules say exactly the opposite. The appellate rule is
24 at -- well, at or before, so I -- that's right, but we
25 don't in practice do that.

1 CHAIRMAN BABCOCK: Justice Bland.

2 HONORABLE JANE BLAND: Well, if you decide
3 to serve by another means then you're under the rules that
4 govern that other means. Example, you try to put it in
5 the mail, you're under the rules that govern the mail, and
6 that tacks on the time for your choice to serve by other
7 means. And I honestly don't think -- I think if you file
8 one day you're supposed to serve that day. You're
9 suppose -- so if you file a brief at 11:59 electronically,
10 you better have somebody ready to put it in the post
11 office mailbox by 11:59 that night.

12 I don't think, you know -- I don't think
13 we've ever had this practice of file one day, serve
14 another day. It's file one day, and then your means of
15 service determines whether or not it's actually received
16 the day you file it, and we have rules that provide for
17 that.

18 CHAIRMAN BABCOCK: Yeah. Justice Gaultney.

19 HONORABLE DAVID GAULTNEY: What's wrong with
20 saying like we do with fax, "service by electronic service
21 is complete on receipt"?

22 MS. PETERSON: And that goes back to
23 subdivision (d)(4).

24 HONORABLE DAVID GAULTNEY: Right.

25 CHAIRMAN BABCOCK: Right. Alex, did you

1 have something?

2 PROFESSOR ALBRIGHT: I was just -- you know,
3 again, if we're not allowing -- if we're not saying that
4 e-mail service is a designated proper service unless you
5 agree to it, you shouldn't have to put the e-mail address
6 because you're doing it all through TexasOnline, so you
7 can take (1) and (2) out.

8 CHAIRMAN BABCOCK: Okay. Sarah.

9 HONORABLE SARAH DUNCAN: I'm just trying to
10 figure out how this works. I file electronically at
11 11:59. My adversary has not consented to electronic
12 service, wants service by mail. Service by mail is
13 complete on mailing. The post office is closed at 11:59,
14 so I can't mail it the same day that I file it. How does
15 this work?

16 HONORABLE TRACY CHRISTOPHER: That's a
17 problem.

18 HONORABLE JANE BLAND: I think you have to
19 be able to serve it when you file it.

20 MS. PETERSON: Well, that's --

21 PROFESSOR ALBRIGHT: Put it in the mail box
22 down the street.

23 MS. PETERSON: -- 9.5(a) --

24 (Simultaneous conversation.)

25 THE REPORTER: Wait, wait. We've got two

1 conversations. Please stop doing that.

2 CHAIRMAN BABCOCK: Stop talking over each
3 other.

4 THE REPORTER: I didn't get anything you
5 said. I'm sorry.

6 MS. PETERSON: In speaking to -- I think it
7 was you, Justice Bland, who said it, 9.5(a), "service of
8 all documents required," it says, "at or before the time
9 of the document's filing, the filing party must serve a
10 copy on all parties to the proceeding."

11 HONORABLE TRACY CHRISTOPHER: Right. And
12 you've signed a certificate of service saying I signed --
13 "I served today" on the day you're filing --

14 HONORABLE SARAH DUNCAN: But --

15 HONORABLE TRACY CHRISTOPHER: -- by mail, so
16 sounds like you're not doing it.

17 PROFESSOR ALBRIGHT: Why can't you say, "I'm
18 serving it the next day?" Okay, if you say, "I filed it
19 on the 15th," do the rules say you have to do it the same
20 day?

21 HONORABLE TRACY CHRISTOPHER: Yeah. She
22 just read it out, "at or before."

23 CHAIRMAN BABCOCK: Justice Gaultney.

24 HONORABLE DAVID GAULTNEY: I think the
25 courts go off filing dates, yes, but we also want

1 assurance that you gave the other side a copy of what you
2 filed. That's what service is all about. So at least
3 with fax we've taken the position that, for whatever
4 reason, we want service that it was received. Is there no
5 way that we can do that same thing with electronic
6 service, just say when it's -- is there some confirmation
7 of receipt that can be received, that can be included that
8 would treat that the same way? I mean, what we're really
9 after, is proof that it was served on the other party, the
10 proof part.

11 HONORABLE SARAH DUNCAN: The discrepancy
12 only comes about because my adversary cannot consent to
13 accept electronic service, but they can't prevent me from
14 serving by mail, so if I can get to San Antonio at 11:59
15 with my brief and my service copies and give them to the
16 clerk and they're all postmarked, that's fine, and they
17 can't say -- my adversary can't say, "I won't accept
18 service by mail." They don't have a choice.

19 CHAIRMAN BABCOCK: Right.

20 HONORABLE SARAH DUNCAN: So we're creating
21 this discrepancy by permitting people like me to not
22 accept electronic service, and I don't -- I don't know
23 what the answer is.

24 HONORABLE TRACY CHRISTOPHER: Mandate.

25 CHAIRMAN BABCOCK: Well, with that we're

1 going to continue this discussion in the green room, but
2 we're out of time for now. Everybody that was here today
3 gets a gold star for being here, and this is important
4 work, although it seems somewhat tedious. We're going to
5 finish these rules at the next meeting, which is June
6 12th, and it's at the State Bar apparently.

7 HONORABLE SARAH DUNCAN: Thank you.

8 MS. SENNEFF: The one and only meeting this
9 year.

10 CHAIRMAN BABCOCK: The one and only meeting
11 this year at the State Bar because of their renovation or
12 booking policies or whatever it may be, but anyway, that's
13 where we are next, June 12.

14 MR. MEADOWS: So no votes today. We acted
15 by consent.

16 CHAIRMAN BABCOCK: We actually acted by
17 consent today. Thanks, everybody.

18 (Meeting adjourned at 12:00 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 18th day of April, 2009, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,004.50 .

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the 7th day of May, 2009.

D'Lois L. Jones
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