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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

February 3, 2017

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 3rd day of February, 2017, between the hours of 8:58 a.m. and 4:28 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

17-02 Discovery Subcommittee Proposed Amendments (January 2017)

17-03 2017 Evidence Rules Materials

17-04 Filing Documents Under Seal (October 24, 2016)

17-05 TRCP 76a (December 20, 2016)

17-06 Rule 9.2 (December 20, 2016)

17-07 Rule 193.4(a) and (b) (December 19, 2016)

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CHAIRMAN BABCOCK: Welcome, everybody. Glad to have you here. We have one announcement, from me anyway, if the professors will come to order. Professor Albright, we won't be calling "professor" much longer because she has --

PROFESSOR ALBRIGHT: I will always be professor.

CHAIRMAN BABCOCK: You'll always be professorial, but you may not be professor. She has resigned from the law school and is going full-time with Alexander Dubose, and we wish her well in that endeavor.

PROFESSOR DORSANEO: Students can't stop calling you "professor."

CHAIRMAN BABCOCK: We can?

PROFESSOR DORSANEO: Even if you say, "That's not my name."

CHAIRMAN BABCOCK: Okay. Well, then I won't call you "professor" anymore. And so we'll move right into the report from the Chief Justice. Justice Hecht.

CHIEF JUSTICE HECHT: I don't have much this morning. The Court joined with the Court of Criminal Appeals in some minor changes to rules affecting their cases in the Rules of Appellate Procedure, and just for people who are new, newer, like last five or ten years,

the two courts adopt each other's rules in the Texas Rules of Evidence and the Rules of Appellate Procedure because if we don't then the publishers publish the rules separately, say, "This rule is adopted by the Supreme Court" and "This rule is adopted by the Court of Criminal Appeals." So even though the rules don't affect us, we adopt their changes, so we did that.

We have decided to change course a little bit on language access. This group talked about proposed Rule of Civil Procedure 183 a couple of meetings ago, and as we got to the end of the discussion it seemed like that what we needed was different -- something different than a rule, and so we've decided instead to approach the regional presiding judges, Judge Evans and others, to work up some standards of what a language access plan should look like. Most of the big counties already have them, and we would then require all of the counties -- all of the courts in all of the counties to have such a plan, and we would do that by order and under our administrative authority rather than having a Rule of Civil Procedure. It just doesn't seem to me to work very well in the Rules of Civil Procedure, so we'll be working on that. The issue is not gone. We've just kind of moved it over to look at a different way.

And then the only other thing was I gave the

required State of the Judiciary address on Wednesday and talked about a number of things that I hope the Legislature will be looking at this session, and importantly for us, electronic access. Office of Court Administration and the Legislature will be looking at access to electronically filed documents, which Justice Boyd talked about at the last meeting, but also some changes in bail reform and pretrial release in criminal cases and fees and fines and costs in Class C misdemeanors, which may require some Rules of Judicial Administration to help implement those. So we might talk about those even though they are criminal. If they need implementation we would probably do it through the Rules of Judicial Administration.

And I was pleased that the Legislature joined us in honoring Judge Kocurek, Julie Kocurek, here in Travis County, who was shot in November of 2015 and has recovered and has stayed on the bench, even though she's eligible to retire, because she wanted to make a statement that you can't shoot judges and scare them off the bench. So the Legislature was very generous in recognizing her, and I think it was good for her and her family, and that's all I've got. I'm happy to answer questions.

CHAIRMAN BABCOCK: She got a standing ovation.

CHIEF JUSTICE HECHT: Yeah, like two minutes, just went on and on and on, so and her -- let's go off the record for a second, Dee Dee.

(Off the record)

CHAIRMAN BABCOCK: Any questions? The Chief got a lot of very positive publicity about his comments. Levi.

HONORABLE LEVI BENTON: The proposed statute I read briefly. It's clear it protects or attempted to protect current and former Federal judges, but it isn't as clear whether the protection is intended to be available to former state judges. If you would look at that and perhaps call --

CHIEF JUSTICE HECHT: Sure.

HONORABLE LEVI BENTON: And if you read it as I do, perhaps your calling the senator will have a different impact than Levi Benton calling the senator.

CHAIRMAN BABCOCK: You think?

HONORABLE LEVI BENTON: Ha-ha.

CHIEF JUSTICE HECHT: Well, Senator Zaffirini is very supportive, and I don't think we will have any trouble with changes.

CHAIRMAN BABCOCK: Yeah. Yeah. Good.

HONORABLE STEPHEN YELENOSKY: We were off the record, so we probably should start off the record.

CHAIRMAN BABCOCK: Yeah, we can go off the record.

(Off the record.)

CHAIRMAN BABCOCK: Any other questions for the Chief? All right. Justice Boyd, any thoughts, comments?

HONORABLE JEFF BOYD: No. Actually, I will. Let me -- the Chief mentioned this and -- but only because you as well known lawyers and judges in your communities may hear about it. One of the issues we're dealing with, as I reported last meeting, is the new step in making all of the e-filings accessible online, and the process that we've been going through, the JCIT has made recommendations. Did you go into this a little bit when I stepped out just now?

CHAIRMAN BABCOCK: No.

HONORABLE JEFF BOYD: So JCIT recommended a three-step phase-in for that e-access program. First for all judges, and then second for all attorneys on the case of which they're attorney of record, and then thirdly, a registered user access, a more broad access, and so we charged JCIT with coming back with recommendations on various issues that all of that plan raises, and they've come back at their last meeting a couple of weeks ago and recommended that we go ahead and roll out for judges and

for attorneys on the case now, but hold off because they want to keep vetting some issues like how you charge fees and without the county losing money that they're used to getting, how you deal with redacting sensitive information. There are legitimate issues that are not insurmountable but need to be carefully resolved, and so they said give us until March 3rd to come back, having tried to tie up a few loose ends on those issues. So that's the status of that. We are not yet rolling out broader registered user access and instead are waiting on JCIT to come back with their specific recommendations on the issues.

Meanwhile, several of the clerks and then ultimately the clerks association, Association of District and County Clerks, have just really decided they don't want this at all, and so they've really activated. They've got some 75 different county commissioners courts to pass a resolution opposing it. They've now got Travis -- a representative of Travis party to file a bill that would prohibit anyone other than a clerk charging anything for access to a court document, which I bet Westlaw and Lexis will start getting involved in at some point, so and we've started having conversations with them. OCA has, and it appears as if there's just some real misinformation out there, but I give you that information just because

you may be approached by your clerk or by others. 98 point something percent of the lawyers surveyed late last year want this, and probably most of y'all would like to have it, too, and so we think every issue that they raise has -- many of their issues are based on incorrect information and where OCA is in the process of addressing those, but if you hear anything or need information to respond on this, just reach out to me and let me know. Thank you.

CHAIRMAN BABCOCK: Who at OCA is the point person?

HONORABLE JEFF BOYD: Well, David Slayton is kind of the key point person on communicating on the process where we are now. Another great contact is Justice Simmons, who chairs JCIT and is very active in it. Of course, we on the Court are really choosing to stay above all of that fray, you know. We're exploring and looking at it and then OCA and JCIT are kind of helping communicate.

CHAIRMAN BABCOCK: Okay. Great. Thank you. Yeah, Justice Gray.

HONORABLE TOM GRAY: May I ask a related question?

CHAIRMAN BABCOCK: Absolutely.

HONORABLE TOM GRAY: As I know Nathan is

aware, our court has been reluctant to post anything to TAMES and that we, the court, did not create for liability related reasons because if the court is involved in the discretionary decision there's some question of whether or not immunity applies to an improper release of information. Can we anticipate -- and I did not realize that the potential was there that the clerks at the trial court level were going to be in opposition to this, but for the protection of the appellate court judges and our clerks and their staff, can we anticipate a rule that requires us to post those documents? And in particular I'm thinking of the portal for the attorneys, which is the first hurdle we're going to be looking at, because our court feels very uncomfortable with a discretionary adoption of the portal and the posting without a mandate to do it, as long as it's our discretion.

So I'm not asking for a response necessarily to that, but I needed to make sure that it was communicated in this context because it's a different reason for a pushback from the clerk and the court than is the county clerks' pushback that is financial related for their revenue stream.

HONORABLE JEFF BOYD: Well, in their defense, it's not only financial. They have other concerns, including the one you raised, and I think two

sort of preliminary responses are, number one, the basis for your concern is one of the issues that we have JCIT very thoroughly exploring to figure out how to eliminate that concern. Redaction, auto redaction, certain kinds of pleadings in certain cases don't get in the database to which there would be public access. There are various ways they're looking at alleviating that concern.

HONORABLE TOM GRAY: If we get to the rules today, I've got a proposal in one of those sealed --

HONORABLE JEFF BOYD: Right.

HONORABLE TOM GRAY: -- deals where it actually, but I'm sorry. I interrupted you.

HONORABLE JEFF BOYD: And the other -- the second response is, yeah, the system as it's going to -- as you probably all know, right now it's currently filed through a electronic filing vendor that the lawyer contracts with and then it goes through the state portal that OCA through the state vendor maintains, and that would be the basis of the access point, not the individual courts and clerks, so you would not be putting it out. It would be going out through the state database, not through each individual county or court database.

HONORABLE TOM GRAY: We still have a toggle, however, of whether or not it gets put into TAMES and they reach -- can reach into our data and get it, and that's

the toggle point at which we're concerned about liability, because --

HONORABLE JEFF BOYD: Right.

HONORABLE TOM GRAY: I know y'all are both aware, OCA in just a simple coding change inadvertently published all of the comments of the justices on the courts of appeals out on the web. It was available for everybody that was looking at the cases for a period of time several months ago, and so, you know, we don't want liability in that situation.

HONORABLE JEFF BOYD: Right.

HONORABLE TOM GRAY: And there's got to be some way that compels us to post it. Then we're covered. It's not discretionary. I know Nathan has been concerned about why we are not on the wagon with everybody else, so --

HONORABLE JEFF BOYD: The issues you raised are the ones we're looking at.

CHAIRMAN BABCOCK: Thank you. Any other questions? All right. We are again honored to have Judge Newell of the Court of Criminal Appeals with us, and, Judge, is there anything that you would like to talk to us about with respect to your Court or anything else?

HONORABLE DAVID NEWELL: Well, I guess I could take the opportunity just to say, I mean, there has

been some discussion about moving towards mandatory e-filing for criminal cases. We have -- our rules committee is going to be looking at proposed mandatory rules, and that's coming up on Wednesday, and so hopefully we'll have some proposed rules that we can get into the Bar Journal for the April issue. So that's where we're at.

CHAIRMAN BABCOCK: Okay. Perfect. Thank you. All right. Well, let's move to the agenda, and first on the agenda is the discovery rules, and the plan is to talk about these until lunchtime. We will not -- we will not finish with these rules today at this meeting, and we will talk about them again at our April meeting. I've had some inquiry from both the Attorney General's office and the Governor's office asking for the opportunity to weigh in on the discovery rules. They were worried that we were going to, you know, slap them out today, and they obviously don't know how we work. I assured them that there would be careful deliberation over a number of meetings before we finally were ready to recommend something to the Court, and so they seemed relieved by -- relieved by that. So without further adieu, the hard-working chair of the subcommittee, Bobby Meadows.

MR. MEADOWS: Thank you, Mr. Chairman. The

first -- before we jump into this, let me just again thank Kayla Carrick. She has continued to work closely with me and our discovery subcommittee in moving this project forward, and so I just want to express my gratitude for some really outstanding work. The fact that we can't finish today and the fact that we only have a limited amount of time presents us with some choices about how to spend the time. You will remember in September we began a march through our recommendations on discovery rule changes, but we didn't finish. We got up to Rule 194. I think it's fair to say that the full committee agreed that we should have mandatory disclosures for all the cases, all parties, all levels of cases, but we didn't talk about the content of Rule 194. So that's something we could make good use of our time doing today.

There's some other issues that we have not addressed. They were in my letter that outlined basically where we are in our work. We could talk about some of the expert issues or changes that are associated with the expert rules, objections, and so forth. The other course we could take is we could go back over what we discussed in September and examine how we responded to the remarks and comments we got from the full committee in making those changes in the rules, but given the fact that we're probably not going to be able to even conclude that with

any kind of finality, it's my fault, although we will be directed by the Chair, that we spend some time talking about issues that would be informative to the discovery subcommittee that we haven't addressed in this full committee; and for example, the content of Rule 194.

So, as I say, it's -- if there's a -- I've discussed with the other members of the discovery subcommittee who are here today. We're prepared to go either direction, but I think that might be the best use of our time.

CHAIRMAN BABCOCK: Yeah. I think so, too, so let's plow into the new ground before we replow the old ground.

MR. MEADOWS: So Rule 194, as I said, I believe there was an agreement and in this committee in September that we would impose mandatory disclosures on all parties in all cases and that they would be due 30 days after the filing of the defendant's answer, so I suppose the next question to focus our attention is what those mandatory disclosures are. They essentially include all of the initial requests for disclosure, plus parts that we've harvested from the Federal rules, so maybe we just begin looking at them in terms of Rule 192 -- 194.2(b) content; and I'll just note, we can just, you know -- Chip, if you like, we can go one by one and see if

there's discussion or any reason for --

CHAIRMAN BABCOCK: Why don't you just give us an overview and then we'll go back?

MR. MEADOWS: Well, I think the first thing we should look at is basically -- is paragraph -- subparagraph (4), the amount of calculated economic damages because the discovery subcommittee in that instance elected not to follow the Federal rule, which is much more descriptive and detailed in terms of what is required in disclosure about a damage case. I think the first -- the first few items are noncontroversial, part of our existing rules. So in my view, we really only run into an issue in terms of if we've gotten it right in terms of what the discovery subcommittee wants to do with regard to the amount -- calling for the amount in calculation of damages. You will see in the materials that we have provided you -- and you'll see this throughout our proposal in a right-hand column, the thinking behind what we did, some alternatives to what we considered, and the parallel Federal rules that we borrowed from or did not; and so in this instance you can see and read for yourself what the Federal rules, Rule 26(a)(1)(A), would call for.

CHAIRMAN BABCOCK: Okay. Bobby, on this issue, did the subcommittee share any experiences about

how the -- how our rule is working in practice today?

MR. MEADOWS: I don't recall any -- I mean, Jane and Tracy are here and probably can speak to that from their own recollection, but I don't remember any real discussion around it other than the fact that everyone felt that the way -- the simplicity around the way we called for it worked just fine.

CHAIRMAN BABCOCK: Okay. Anybody -- anybody on the committee -- my experience, actually in both state and Federal, is that disclosure is nine times out of ten from the plaintiff very inadequate; and it's always, "Oh, we'll let you know when we know," and "We'll let you know when we have expert testimony," and "An expert is going to do that" and, you know, "Let's wait until then"; and you get very little information early on in the case. So that may be all right, but Tom.

MR. RINEY: My experience is the same as yours, and it depends upon the trial judge. Oftentimes you're right. It's kind of like hide the ball. "Well, it's in our expert's report" or "It's in previous documents we've provided" or so forth; and unless you have a strong judge who is willing to say, "No, you've got to set it out or you don't put on evidence of it," it really becomes sort of meaningless; and I think there should be a little more direction.

CHAIRMAN BABCOCK: Okay. Anybody else on that? Kennon.

MS. WOOTEN: I agree that it's oftentimes very short of detail, and you have an obligation, I think, to try to resolve cases early if you can. It's difficult to engage in meaningful settlement discussions without knowing the extent of your exposure, so I think increasing the required disclosure could be beneficial.

CHAIRMAN BABCOCK: Yeah, it seems to me it's a matter of timing, and there probably are some cases that the plaintiff or the party doesn't know, really doesn't know, and needs expert analysis; and so unless you can have an expert hired ahead of time before you file a lawsuit who does it and is ready to go. Frank, what's your -- you're smirking.

MR. GILSTRAP: Well, I mean, I guess this goes back to the decision apparently we made last time to require mandatory disclosures. I mean, there's huge amounts of cases that the suit is filed and it settles.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: And without -- or suit is filed and it mediates, the suit is filed and it goes to arbitration. We're talking about -- we heard last time that they were going to -- the Governor was going to maybe suggest we have a 12(b)(6) rule. Well, 12(b)(6), you

know, all of this where the case is either some -- or litigated without the need of any of this stuff. So, you know, do we really want to have this comprehensive disclosure for every single suit?

CHAIRMAN BABCOCK: Uh-huh. Yeah. Levi.

HONORABLE LEVI BENTON: I think the first wave of disclosures on both sides of the docket, not just the plaintiff's, are very poor generally; and I think what might help isn't necessarily the changes in the rule, but commentary in the rules about the consequences or the remedies the court might use to encourage getting the disclosures to a sufficient point earlier rather than later. It's not just the plaintiffs. It's defendants. They do the same thing with their first wave, and it's not until the eve of trial that they really clean them up, and you know, we just need commentary to tell those trial judges, "You shouldn't take this from Buddy Low. You need to tell him 'Get with the program.'"

CHAIRMAN BABCOCK: The serial violator of the rule, but Buddy.

MR. LOW: Frank, let me be sure I understand what you're saying. Chapter 27 anti-SLAPP says there shall be no discovery. It's basically a 12(b)(6) in those kind of cases. So what you're saying, if we have a defense like a 12(b)(6) then that should delay discovery.

You should have a provision similar to what you have in Chapter 27 anti-SLAPP. Is that what you're saying?

MR. GILSTRAP: They deal with this in the proposed rules by saying the parties can agree or you can get a court order, but the default position is you've got to make the disclosure.

MR. LOW: But what I'm saying, under chapter -- if you filed an answer, you come within an -- you know, as anti-SLAPP, and you come within Chapter 27, and it's off. If you get any discovery you have to go to the judge and show why you need it, so I guess until we have a 12(b)(6) we can't deal with it, but we do have to recognize there are other statutes like Chapter 27 that deal with discovery.

MR. GILSTRAP: Which would control over the rule.

MR. LOW: That's right.

CHAIRMAN BABCOCK: Well, we do have a 12(b)(6). We have a motion to dismiss, Rule 91.

MS. WOOTEN: 91a.

CHAIRMAN BABCOCK: 91a. It's just nobody uses it.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: So on this point the -- so

hearing the discussion, perhaps the argument could be made that it's an empty requirement because people are just going to -- parties are going to avoid it up front because they're not in a position to declare or they don't want to, but we didn't see it as part of our task to make a judgment about that; and we did not see that adopting the Federal rule, which simply just calls for more, would fix the problem.

CHAIRMAN BABCOCK: Yeah. Yeah. I think you're right. The issue I'm raising is a matter of timing and not -- and I think under the current rule -- Judge Evans, Judge Wallace, may be able to enlighten us, but under the current rule it's up for -- up to one of the parties to come into court and say, "This disclosure is inadequate, Judge, make them" --

MR. MEADOWS: Right.

CHAIRMAN BABCOCK: "Make them tell me. Make them tell me." Judge Evans.

HONORABLE DAVID EVANS: If the nexus between the request for disclosure, response for request for disclosure, and the application of the exclusionary rule were stronger, compliance with the intent of request for disclosure will improve. When I receive a motion to -- for more adequate response to the request for disclosure, I explain to the parties that's the first document that

I'm going to put in my trial notebook at trial, and it's the first document I'm going to read to rule on an exclusionary objection that it wasn't revealed in discovery, and the second one is to go down through the request for productions and the response and the interrogatories, and I'm not interested in reading e-mails with a jury in the box.

The first reaction is to hide the ball on the first request for disclosure.

(phone ringing)

HONORABLE DAVID EVANS: It's not me. I'm not going off. But it's the trial judge in administering the trial, if that's the primary document that they can use, then that helps them rule on the request for disclosure, and it consolidates many of the issues that come up. Expert reports, damages, the whole thing, and people with knowledge of relevant facts and all of that; and if there's a potential cliff they're going to fall off, generally those request for disclosures immediately improve after that discussion; and they become better for the parties; and there is just no nexus in the rule that says that's the primary document the court relies on. I don't know that it should say that, but there's got to be a consequence that's real.

CHAIRMAN BABCOCK: You think it should be in

the rule?

HONORABLE DAVID EVANS: Here's the -- I would prefer -- I would prefer something be in the rule. The most frustrating thing in the middle of a trial is somebody gets up, say, "They never told us this during discovery," got 12 people in the box, got a witness on the stand. "Well, show me."

"Yes, we did." You're not going to have a swearing match between two lawyers, and you don't want to send the jury out of the room, and -- but if it's in the request for disclosure, responses to the request for disclosures, and you can show -- or a few documents. Exhibit list always gets rid of a lot of those issues early on in a trial management by having an adequate exhibit list because you sort those out in pretrial as to whether they were turned over or not. That would be my theory about it.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: You've asked if it should be in the rule. If you are looking in the rules, the discovery rules, for the remedy for when someone fails to respond to request for disclosure, you really won't find it expressed, and yet that is the only remedy, exclusion.

HONORABLE DAVID EVANS: Right.

MR. FULLER: I mean, if you look at 215, it

tells you what happens if someone doesn't answer an interrogatory, someone doesn't respond to request for production, someone doesn't answer a question in response to a deposition. I mean, there are very specific remedies for particular failures to respond to discovery. Response to request for disclosure is not there, but when you dig through all of those rules that's it. Yeah.

HONORABLE DAVID EVANS: It's a lot easier to read the request for -- response to request for disclosure on the expert witness and what they're going to testify about and the opinions they're going to give than it is to sort through a deposition and see if it was adequate, how that works.

MR. MEADOWS: We did make a change last time under Rule 193.5 that you cannot use material or information at a hearing or trial that you did not disclose.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: So 193.5(c). That's the Tracy Christopher addition.

CHAIRMAN BABCOCK: Professor Dorsaneo. Or Bill, as he prefers to be called. Professor Dorsaneo.

PROFESSOR DORSANEO: I just wanted to say, on 215 it should have guidance with respect to Rule 194. The reason it doesn't is a result of the history of the

process, is that 215 did not get changed when the last big set of developments occurred. Maybe it wasn't ready to be changed or people couldn't -- could only do the rules up to Rule 215. I think that's an oversight that does need to be corrected, and it's one of the things that needs to be on the list to be corrected.

CHAIRMAN BABCOCK: Okay.

PROFESSOR HOFFMAN: Chip?

CHAIRMAN BABCOCK: Yeah, Lonny. Professor Hoffman. Which do you want to be called, Lonny or Professor Hoffman?

PROFESSOR HOFFMAN: Professor Dorsaneo, actually.

CHAIRMAN BABCOCK: The younger.

PROFESSOR HOFFMAN: So Bill's right that -- sorry, Professor Dorsaneo is right that 215 wasn't specifically changed, but 215.3, I've always thought is sufficiently broad. "If the Court finds a party is abusing the discovery process in seeking, making, or resisting discovery," and then it goes on, there are consequences. So that plus the change that Bobby points out, the new addition in 193.5(c), seems to me to be plenty of ammunition in the rule for consequences when you don't comply with the 194 mandatory disclosures.

CHAIRMAN BABCOCK: Okay. Yeah, Peter, and

then we'll go to Justice Brown.

MR. KELLY: If I could make a change to sub (4) it would be to make clear that the defendant has to make disclosures as well as to what their theory of the plaintiff's damages are. A lot of times you have cases where in PI the big fight is going to be what is the extent of the life care plan, or in commercial cases is it lost profits versus benefit of the bargain; but you look at the defendant's disclosures; and they say, "We're not claiming any damages, and we're not saying anything." I think it would be worthwhile if the defendant were to come forward with their theory, you know, and they can put in there whatever exculpatory language, "and we're not conceding that there are any damages, but if there are, this is our theory of how they should be calculated," because the defendants almost never have to do that in disclosure. You have to look at what the expert testimony disclosures are going to be, and they're not always clear on what the theory of the plaintiff's damages are.

CHAIRMAN BABCOCK: Yeah, good point. Justice Brown.

HONORABLE HARVEY BROWN: I was just going to point out that when we get to (c) that Rule 215 we have a suggestion to add some language about Rule 194. That's on page 68 of the handout.

CHAIRMAN BABCOCK: Okay. Great. Professor Dorsaneo, then Justice Christopher.

MR. MEADOWS: Side bar.

CHAIRMAN BABCOCK: Bill, do you want to say anything?

PROFESSOR DORSANEO: No. I mean, the only thing I --

PROFESSOR ALBRIGHT: He just couldn't hear.

PROFESSOR DORSANEO: The only one brief thing I'll say is that 215.3 provision is itself historically a bit of an odd development. That's the work I think of Justice Kilgarlin from many years ago without benefit of this committee's advice, and we do have just a general statement that you need to behave in not only resisting discovery, but in making discovery. It's not just tripping. It's a pushing as well, to use the academic vernacular, but it would be better if we had something clearer that people could follow rather than just, "You don't behave here then really bad things can happen."

CHAIRMAN BABCOCK: Yeah. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, two points. First, we're trying to write a rule that applies to all cases, all right, and a lot of the people in this

room only deal with the top, top, top civil cases that have a lot of experts and a lot of concerns and a lot of, you know, work that needs to be done. So what we envisioned was with the level three conference, you-all would make these kind of rules. So you would have an initial disclosure. Then you might want to say, "Okay, in, you know, six months we're going to have another level of disclosure," so that the bigger cases can be handled on a case by case basis.

For the vast majority of cases, this works. You know, the plaintiff says, "See my medical bills," and "I lost wages in the amount of $2,000, because I was off work for, you know, three weeks." So I think we have to keep that in mind when we're talking about putting more and more stuff in the rule that is not necessary for 95 percent of the cases. Plus I'd also like to point out we did add 194.2, pretrial disclosures for everybody, which is a 30-day before trial requirement where you've got to get all of your documents, you've got to tell who your witnesses are, all of those sort of things, so I think that will sort of fill in the gap that people are talking about, but I would really urge us to think that with these high level cases that most of the people in this, you know, room deal with, we should handle that through the level three scheduling conference, and you can put in as

many, you know, requirements as you need.

PROFESSOR HOFFMAN: Tracy meant 194.4 when she was talking about the 30 days before trial.

HONORABLE TRACY CHRISTOPHER: Oh, I'm sorry.

PROFESSOR HOFFMAN: And amen to what Tracy said.

CHAIRMAN BABCOCK: Yep. Got it. Judge Wallace, I skipped over you. Did you have anything you wanted to say about this?

HONORABLE R. H. WALLACE: No, sir.

CHAIRMAN BABCOCK: Okay. Richard Orsinger.

MR. ORSINGER: The family law perspective is that we have a lot of form book driven practice in family law because the family law practice manual published by the State Bar is very widespread. The answers you get to these request for disclosures tend to be very general and look a lot like your pleadings, and the Family Code requires that you don't plead facts in your divorce petition. So the disclosures are pretty general and pretty useless except with regard to expert disclosures; and if you don't have expert reports, which are not automatically required, then the only thing you're going to know about the other side's experts is what their response to request for disclosure, unless you take a deposition; and the deposition practice in family law has

dropped off a lot in recent years. I mean, I take maybe one deposition a year or two depositions a year, and we just get the discovery in a different way. From the family law practice, which may be more than half the docket in some courts, may be more than 80 percent of the docket or a hundred percent of the docket in the family law courts, more useful than detailed general disclosures would be disclosures that are oriented toward the family law kinds of issues. If you have kids, you need to state what you want in terms of possession, primary residence, or relocation. If you have child support, you need to put down your net resources. If it's a property case, you have to identify separate or community. That would be very helpful for us, not so much more detail in the general obligation.

The other thing I wanted to say -- just a minute, Tracy. The other thing I wanted to say was if we make these disclosure requirements automatic, let's be careful that we don't trip up the pro se litigants, because they -- if they are a respondent, even a petitioner, and they don't have a set of rules and this discovery obligation goes into force without notice to them, they won't make the necessary disclosures, and then when they get to trial someone can say they didn't respond to the automatic disclosures, so they can't call any

witnesses. Now, the Constitution and an opinion that Justice Hecht wrote as well as now in the rules the parties have a constitutional right to testify even if they don't disclose themselves, which was a very good development, because there were periods of time where people couldn't testify in their own case. But at any rate, I would suggest if we're going to have automatic disclosure that's going to trigger preclusion that we put notice of it in the divorce pleadings or in the citation that's served or something, so that there is some assurance that these self-represented litigants will know that they have a duty and, therefore, will comply with it and then call witnesses.

CHAIRMAN BABCOCK: Are you suggesting that there ought to be a subsection in the general discovery rules that addresses family law cases?

MR. ORSINGER: Yes. And I want to be very careful about that. There was a period of time when we explored med mal, family law, and some other things, and I was on the committee of the family law section that wrote up some requests for disclosure or some automatic disclosures of documents and whatnot, and we realized that there's a balancing act that goes on in a family law case. We want to make it simple and streamlined and keep the fees down by requiring essential information to be

automatically produced, but we don't want to overregulate cases because some people don't want to have any discovery at all. Some people file a divorce without the intention of getting divorced. They just use the divorce petition to get their husband to stop seeing his girlfriend or whatever. I mean, there's a lot of stuff that goes on in family law cases, so I think it would be -- my personal preference would be to ask the family law council to come forward with some modernized suggestions.

This came up a few months ago. I dug up my work from the 1990's, and I forwarded it to the family law council to start. They haven't actually put the committee together because we don't have a green light, but they will do it if we do, and I think it would be good especially for family law for us to have something that's more tailored to the needs and also the financial abilities of the litigants.

CHAIRMAN BABCOCK: Okay. Judge Christopher, did you have your hand up?

HONORABLE TRACY CHRISTOPHER: Yes. We have a placeholder for that on page 25 of our draft, because we discussed that issue back in 2001 when the discovery rules were new, and the rule never got amended, and we did think it was a good idea on the discovery subcommittee that there would be a separate set of rules for disclosures for

family law cases. We also discussed the problems with pro ses not knowing the rules; and, you know, that's a perennial problem, whether it's an automatic disclosure or a request for disclosure; and to the extent that the Court thinks that some sort of a notice provision, separate notice provision, would be useful, you know, we're for that. I'm not sure where we would put it, but I mean, it was an issue that we discussed, and if people think we should have it, we'll work on it, figure out where it needs to be.

CHAIRMAN BABCOCK: Great. Professor Albright.

PROFESSOR ALBRIGHT: Yeah, I was going to address the issue of pro se parties or, you know, other times -- you know, I don't think it's unique to family law. I think there are many cases where there are pro se parties who don't know they have an obligation or there are lawyers that ignore their obligation to the detriment of their client. I think we can talk about this when we get to Rule 215. One issue that is always an issue with sanctions is whether you're going to require a motion to compel before you have a motion for sanctions that imposes significant, severe sanctions, such as excluding important evidence.

So one way that can solve your problem,

Richard, is before a court can impose the exclusion sanction, it could require a motion to compel that gives them notice that they haven't responded and only then can you sanction them. In Texas right now we do not require a motion to compel, because way back in the Eighties when I first started practicing law I remember you never got any response to anything until you filed a motion to compel. So it was just, you know, oh, there's no need to respond until they file their motion and then we'll get busy. But I think in the way that 215 is revised I think that's taken care of. We would also say if there is a motion to compel or if the discovery is provided after -- I guess if they violated an order to compel or if the discovery is provided after the motion is filed, you can get at least attorney's fees for filing that motion. So there is some sort of sanction for having to file that motion because they didn't comply in the first place, but we can deal with that when we get to Rule 215 also.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Peeples.

HONORABLE DAVID PEEPLES: You know, Tracy mentioned a few minutes ago the difference, and I think she said the five percent that are big, big dollar cases, and then other cases, and Richard Orsinger said pretty much the same thing in family law. There are some of them

that are the kinds he handles and then there are the pro ses and the others. I will say that one of the hardest, most gut-wrenching decisions a trial judge has to make is to exclude testimony or exclude a witness, especially in a nonjury case where -- but in any case, just because somebody didn't follow the rules, and I think in family law especially I would like for us to look at other ways than sanctions in order to make people follow the rules, and let me just -- a thought that occurred to me.

In an ordinary civil lawsuit, the parties are usually strangers to each other. Now, it might be a corporate situation where they contracted and so forth, but in an injury case, you know, they didn't know each other before the lawsuit, and the danger of surprise is great in a case like that. But in family law, they're not strangers. They know each other, by definition, and so -- and most of it is nonjury, and so the danger of being surprised by testimony, it seems to me, is -- it happens, but it's very rare, and I mean, so when someone can't call a grandmother because they didn't disclose her, goodness, there's no surprise there, and what you lose by excluding testimony as a sanction is huge.

So I would like for us to look for creative ways to get people to say, you know, "I'm going to call three witnesses, and here's who they are," and that kind

of thing, but to sanction people with the ultimate sanction, which is exclusion of the testimony, in family law, the lower level, which is most of it, I would like for us to get away from that.

CHAIRMAN BABCOCK: Great point. Yeah, Kennon.

MS. WOOTEN: On that point, I think existing Rule 193.6 addresses what might happen if you don't respond properly or amend or supplement as you should, and it addresses considerations of unfair surprise or prejudice, and that seems like a less Draconian way, as Judge Peeples was saying, to address the problem.

CHAIRMAN BABCOCK: Yes, Professor Carlson.

PROFESSOR CARLSON: I think if a pro se didn't answer any request for disclosures and the trial court was going to rule you can't put on any proof except your party can testify, in my mind that is akin to the case where a pro se failed to answer request for admissions and the court deemed them all admitted, and the Texas Supreme Court said, "Look, this was inadvertent, and you have to look at that preclusive sanction under our due process sanction body of law." So it seems to me, David, there would be an ability of the trial court to -- and maybe even obligation to allow the testimony.

CHAIRMAN BABCOCK: Okay. Professor

Dorsaneo.

PROFESSOR DORSANEO: Well, getting back to this -- the initial thing that I heard people say is that there's kind of stonewalling or a lack of cooperation in reading the request for disclosure, particularly related to 3(b)(3), the legal theory, maybe not that, and in general the factual basis, et cetera. Now, I agree that probably the best place to deal with these kinds of problems is Rule 215, by orders to compel or the like, but -- but I wonder if we should take a look at the legal theories and in general the factual bases. You know, I think, my recollection, which is perhaps flawed, is that Richard years ago came up with this approach "in general," the factual bases, but I wonder if "in general" has been interpreted to mean very generally and not very clearly with respect to notice. Okay.

And in addition to that, I realize everybody knows that this parenthetical is true, "The respondent party need not marshal all evidence that may be offered at trial," and is that being used as a device to avoid fair compliance with this request for disclosure in the context of no provision in Rule 215 to deal with the problem? And I wonder if the "in general" should go or at least if "the responding party need not marshal all evidence" is more harmful than helpful. Huh? That's the difficulty, is we

don't know what "factual" means. Okay. Because we've never been exactly sure what's factual enough in a great many contexts.

CHAIRMAN BABCOCK: Well, I don't know if people are using that as a device, but I know I've always read that language to say, you know, you don't have to put down in your disclosures, "Mr. Smith is going to testify and he's going to say X, Y, and Z, and he's going to rely on documents 1, 2, 3, 4, and 5, and Mr. Jones is going to say this." I've always taken that as an indication that you give a general factual summary of what -- of what you're hoping to prove in the case and not -- you know, not to have a 20-page document marshaling everything you're going to do at trial.

PROFESSOR DORSANEO: Even that --

CHAIRMAN BABCOCK: I don't know if that's right or not.

PROFESSOR DORSANEO: The explanation that you just gave for what the parenthetical ought to mean might be better than what the parenthetical now currently says. "Without disclosing the identity and substance of the testimony of individual witnesses."

CHAIRMAN BABCOCK: Didn't the marshaling language come in, Bill, because way back when, when we first did these, because the plaintiff's bar was worried

that -- just what I said, that they would have to, you know, put on every witness and everything? I mean, that marshaling language came up from somebody. Alex, maybe you know.

PROFESSOR ALBRIGHT: Yeah. I remember there were lots of cases back then where because a witness' testimony was not detailed or a specific fact that a witness was testifying to, a detail fact, was not in a -- you know, give all of the facts that support your legal theories in interrogatory, and they would all be excluded by some judges. So this was an attempt to make clear exactly what you just said.

MR. MEADOWS: I think it's well understood. I don't know that there is a problem with this language. I mean, is that --

CHAIRMAN BABCOCK: Peter, and then Judge Wallace.

MR. KELLY: Isn't it the same language that was used in describing the summary judgment standard, saying that the plaintiff need not marshal their proof?

CHAIRMAN BABCOCK: Interrogatory rule, too, I think, isn't it?

MR. KELLY: Right, but it seems like that language could be borrowed from the summary judgment standard, but that was back when plaintiffs didn't have to

marshal all of their proof to defeat summary judgments.

PROFESSOR DORSANEO: Well, wherever it came from, if it is being used to avoid compliance, fair compliance with the rule, it ought to be looked at.

CHAIRMAN BABCOCK: Okay. Judge Wallace.

HONORABLE R. H. WALLACE: Well, in my experience this is probably about the least contested of the disclosure issues. It's just not usually an issue. I mean, after all -- and I'm not sure that, frankly, the need for it, because we've got pleadings that you've got to allege your causes of action. We don't have to plead a lot of facts, but if there isn't sufficient notice given then there's this special exception. I don't -- this has not been a problem in my view.

CHAIRMAN BABCOCK: Yeah. Professor Carlson.

PROFESSOR CARLSON: Yeah, I think that was Paul Gold's suggestion that we include the marshaling language, if I remember correctly, and Alex is right. The automatic preclusive was much more Draconian than it is today, but I favor keeping the language in.

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: In my own experience this marshaling provision is not an issue with request for disclosure, but does become an issue with interrogatories. That is an objection I've seen a lot, and you have to go

back to the other side and request that the response be fleshed out in more detail.

CHAIRMAN BABCOCK: Uh-huh. Richard.

MR. ORSINGER: I agree with all of the comments about the severe preclusive environment we were in in the late 1980's and the 1990's, and I just checked it out again. Kudos to then Justice Hecht for the Transamerican opinion because at that time people were having their case thrown out of court because of technical violation of discovery rules; and Transamerican said due process of law requires that before you throw out a case, first of all, there has to have been pretty much almost an intentional abuse of discovery; and, secondly, if you're going to sanction somebody, it has to be based on the fact that their failure to disclose reflects a lack of merit in their case. We don't decide cases on discovery mistakes. We decide cases on the merits, and if you hide evidence that affects the merits then maybe your case should be dismissed.

Later on -- the only excuse at the time I think was that you had good cause. Now we have good cause or lack of surprise, and the lack of surprise is a very important escape clause that's used nowadays that didn't exist then. But I think it's inherent in the thinking, if not personality of lawyers, that if you put a standard

down and somebody misses the standard, the other side is going to try to give preclusive effect to that mistake, and so if we don't have a weak standard of disclosure, I'm afraid that some judges are going to be chopping off witnesses and keeping out evidence and exhibits because, "Look, it says you're supposed to state the evidence and support your case. This isn't disclosed in discovery, it's not coming into my courtroom." And I was very much in favor of those escape clauses, especially in the hostile environment we have, but even today I'm worried that on a judge-by-judge basis some judges may say, "You're right, that was an important thought. It's not in your pleadings. It's not in your discovery, so I'm not going to let it into evidence."

So if Bill or other people don't like this particular wording, that's fine, but somewhere I think we ought to state our policy is that technical violations or even minor violations shouldn't have a preclusive effect, and what we really are trying to do is we're trying to motivate either bad lawyers or -- either inattentive lawyers or ill-motivated lawyers. We're trying to frighten them into being good lawyers, but we don't want to punish innocent people, and that balance is a difficulty. So I'm in favor of having some escape language that gives you some room when you're in front of

a judge that's about to keep out evidence.

MR. MEADOWS: But all noncompliance is with the innocent. I mean, there ought to be some consequences for failure.

MR. ORSINGER: I agree.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: I just wanted to point out one other reason that we put this in here. Before we had these mandatory disclosures, there were interrogatories that asked some form of "Provide each and every fact that supports your legal theories," but they were all different, and people didn't -- were not sure as to the standard for compliance for each one, depending on how it was worded. So this was also an attempt for uniformity so that when people ask these they're basically contention interrogatories instead of differing contention interrogatories. There is this one single general contention interrogatory. The interrogatory rule allows for some specific -- more specific contention interrogatories, and then so that's how this was all put into the format of what we've got. Now that we're doing a mandatory disclosure, the Federal rules don't have any -- anything like this on their mandatory disclosure. I think they have -- their requirements for fact pleading is higher than ours is currently, and but what I fear is that

by taking it out we would encourage these contention interrogatories that have differing standards that are hard to respond to. So I would favor just leaving it in, and it apparently has caused no problem going forward. People are used to it, so why not keep it in?

PROFESSOR DORSANEO: What's the rule you're talking about?

PROFESSOR ALBRIGHT: 194.2(b)(3), disclosure.

PROFESSOR DORSANEO: But at the very start of this discussion people said they're not getting any -- Chip started the whole thing by saying this is a waste of time. We're not getting any information.

PROFESSOR ALBRIGHT: I don't remember him saying that, but --

CHAIRMAN BABCOCK: I didn't say it quite that way. I was talking specifically about 194.2(b)(4) --

PROFESSOR DORSANEO: Oh, well --

CHAIRMAN BABCOCK: -- which had to do with damages and that specific subset. Our discussion has morphed over into other areas.

PROFESSOR DORSANEO: If there's no problem with (b)(3), I take back what I said based upon your misleading initial comments.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. HARDIN: Is that Bill or professor?

CHAIRMAN BABCOCK: That's your -- it's the good professor or the bad Bill, I'm not sure which.

MR. MUNZINGER: The rule in Texas in pleadings is that if you're going to complain about a defect of a party's pleading you must file a special exception, and if you don't file the special exception you have waived the defect in pleading. What would the harm be in adopting a rule in these disclosures that a disclosure is acceptable unless excepted to? I am very jaded by my experience in many Federal courts where the Federal judges take a very active role in squashing evidence and squashing parties' positions to force a settlement.

I've shared with this group what happened to me in the Northern District of Virginia. It was astounding to clear the docket, and so I am very concerned that if -- and this would apply to a pro se or anybody. A, if you don't file a disclosure and somebody doesn't complain about it, you want to wait until the time of trial and ambush them? I don't know that that's fair. If you don't think that my disclosure has been forthcoming enough, raise it with the trial judge or be in a position that you've accepted my disclosure, and you're not trapped by some of these things. I don't -- I've never marshaled

my evidence. My rule -- the way I read the current rule for request for disclosure is it says "identify people and their connection to the case," and I might put down "Plaintiff's brother." Well, I didn't say anything about what the guy testifies to. I might do that intentionally, and so you're my adversary. You've got to figure out for yourself, well, does the plaintiff's brother have something to say and do I need to depose him or not.

Now, if we're going to adopt a rule that says I've got to make all of disclosures about what he's going to say and what have you, what have we done to the cost of litigation? What have we done to the cost of discovery? We're doing it in every case. We're doing it in every court in the state, and the litigants themselves may be content with what they're doing, so give some thought to perhaps saying that if a disclosure is not excepted to or objected to it's deemed satisfactory. Judge Evans' method is a darn good method, and people in your court know that you do that. A lot of us practice at different places in the state, and we find sometimes the judges aren't all that forthcoming, and you get hometowned a lot. If you come from El Paso and go to another town you may get hometowned, and if you come from Dallas to El Paso you get hometowned.

HONORABLE DAVID NEWELL: I like that verb.

That's pretty awesome.

MR. MUNZINGER: Well, I've said my piece.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: Are we in a position to move to a new -- the new subsection yet?

CHAIRMAN BABCOCK: Well, we've been wandering all around, but if --

PROFESSOR DORSANEO: Can I wander around to (5)?

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: (b)(5).

MR. MEADOWS: It's actually next.

CHAIRMAN BABCOCK: Would be next.

PROFESSOR DORSANEO: That's what I thought. This rule gives me trouble on its own, but more -- this part of the rule gives me trouble on its own, but more in the context of witness statements and work product issues. Okay. Now, originally in Rule 166b that went into effect April 1, 1984, we had the issue as to whether we would continue to use knowledge of relevant facts as the standard for learning the identity of persons. Okay. In lieu of, for example, in those days, the identity of persons who would be called to testify, and what we did was to retain knowledge of relevant facts. Okay. But we

adopted the Federal approach kind of by indirection, by saying, "A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter," and that's, you know a way for us to say we mean the same thing as the Federal rules even though we're talking about it in a more complicated historical fashion. That's fine.

CHAIRMAN BABCOCK: Let me just stop you for a minute. Are you saying that our rule is the same as the Federal rule, which is limited to only those witnesses you're going to use to support your claim?

PROFESSOR DORSANEO: No.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: This is knowledge of any discoverable matter.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: It could be discoverable matter to support a claim or discoverable matter that can be used against your claim.

CHAIRMAN BABCOCK: Right. Okay.

PROFESSOR DORSANEO: Okay. So I'm definitely not suggesting that that Federal approach is a good idea. Okay. Now, the next parts are more problematic. "The person need not have admissible information." Yeah, I think that's fine, but then in the

same sentence somehow or another the words got added "or personal knowledge of the facts." Okay, now, I have a little trouble as to what personal knowledge is all -- you know, sometimes, but I wonder if that's a good idea to have personal knowledge -- say that personal knowledge of the facts, you know, doesn't matter, huh? When we get into witness statements and whether or not they're discoverable, if personal knowledge of the facts, you know, doesn't matter then lots of things are -- a lot more things are witness statements than if it did matter. Okay. So I don't even -- I don't know where that came from or why it's in there, and I think it needs to be thought about and re-examined.

And then the next sentence, "An expert is a person with knowledge of relevant facts only if that knowledge was obtained firsthand," like, you know, firsthand personal knowledge, are those things the same or a little bit different anyway? "Or if it was not obtained in preparation for trial or in anticipation of litigation." Now, there's a very troublesome case that exists still causing trouble called *Axelson vs. McIlhany* that involved an explosion of a gas well or, you know, in West Texas; and the question was in that case whether somebody who worked for one of the companies involved could be a consulting witness if he had -- they were all

he's -- if he had knowledge of relevant facts, if he knew, you know, the facts and could be a fact witness; and there's a whole big discussion about consulting witnesses, information they have, who can be a consulting witness, can you depose them to find out the facts that they know; and it's a quite confusing case. And this language was, I think meant -- I didn't go to Galveston to discuss this language at Susman's place with you and others, Alex, but this language is meant to deal with that.

PROFESSOR ALBRIGHT: And there's a -- I think there's a comment that says that.

PROFESSOR DORSANEO: Well, the comment is odd, because the comment, putting aside the question of whether the comments are all gone, okay, but the comment says this is meant to be consistent with *Axelson vs. McIlhany,* and my case book says what part? Okay. What part of *Axelson vs. McIlhany,* because it says several different things, but I don't like this -- I'm basically saying I don't like this language. It doesn't help me. I'm not sure how to fix it, but it needs further attention in my view, and particularly in connection with the witness statements and work product in relationship to this subsection or paragraph of 194.2(b).

PROFESSOR ALBRIGHT: So how would you fix it?

PROFESSOR DORSANEO: Well, the first thing I would do to fix it is take it out.

HONORABLE TRACY CHRISTOPHER: Well, you know it's in the current rules.

PROFESSOR DORSANEO: I know. It's been causing trouble all of this time. I've been waiting for the Supreme Court to fix this.

HONORABLE TRACY CHRISTOPHER: Okay.

PROFESSOR DORSANEO: Since the last century, and they haven't.

MR. MEADOWS: He thinks he can do it through the discovery subcommittee's work.

CHAIRMAN BABCOCK: Well, we're talking about --

PROFESSOR DORSANEO: I would certainly be willing to work on this, and I have ideas, but I don't have a cure.

CHAIRMAN BABCOCK: We've moved on to 194.2(b)(5) of the proposed rule. Are there any further comments about 194.2(b)(4), the amount and any method of calculating economic damages? Any more comments about that? And then we can continue our discussion about subpart (5). Yeah, Peter.

PROFESSOR HOFFMAN: I think my question for the subcommittee or maybe to kind of raise as a discussion

point is what Tracy is talking about is this was moved -- the language in part (5) here was moved from 192.3(c). It's verbatim from what is already now in 192.3(c). So 192.3(c) is the scope of discovery. I mean, that's what it's been, and so my question to -- here to the subcommittee so you can inform us is what's the thinking about moving that language from scope and putting it into the disclosure rule? I think that would be helpful to talk about.

CHAIRMAN BABCOCK: Professor Hoffman, are you talking about the red underlined language? Is that what you're talking about?

PROFESSOR HOFFMAN: Right. So just to be clear, I'm talking about in the draft that we have in front of us 194.2(b)(5), the section you were asking about.

CHAIRMAN BABCOCK: Right.

PROFESSOR HOFFMAN: All that is underlined there in (5) is verbatim from what is now in scope of discovery, 192.3(c).

PROFESSOR DORSANEO: And it's no longer in scope of discovery.

PROFESSOR HOFFMAN: And the subcommittee is proposing moving it.

CHAIRMAN BABCOCK: Got it.

PROFESSOR HOFFMAN: And so my question, I thought it would be helpful for us to discuss what the thinking is.

CHAIRMAN BABCOCK: Good point. Bobby.

MR. MEADOWS: My appreciation of the change is just it was for just context. We're talking about disclosing persons with knowledge of relevant facts, and we just want to illuminate what that means under the rules, and so that language that we find in scope of discovery is better situated where we now put it, in our view.

CHAIRMAN BABCOCK: Professor Dorsaneo, and then Levi.

PROFESSOR DORSANEO: I think 192.3 ought to cover all of the things that are within the scope of discovery, even though, you know, it makes sense for your committee to do what it did. I think it would probably work out better if the scope of discovery, you know, except to the extent we specifically want to change it, included all of the things in the scope of discovery now. You know, maybe -- you know, and I think certainly some of them need to be worked on, and maybe some of them need to be omitted, but I wondered the same thing that Lonny wondered, why isn't this in there anymore? And I don't think it's adequate to say, "It's somewhere else," if the

somewhere else is initial disclosures.

PROFESSOR HOFFMAN: And just to add just a little to this, Bobby, just to be clear, I'm not sure I'm opposed to this change. I think the danger or the thing we want to be wary of is when you make changes to scope of discovery, that's the -- that's the beginning, right? I mean, it's scope of discovery is what you're allowed, and so when you make changes there the first question that everyone is going to ask is, "Is the Court intending to change the playing field of what's allowed?" This is the same reason, Bobby, that I have expressed concern before. Just to flag this again, if everyone will look in the committee's draft at 192.3(a), I am very much an opponent of including the proportionality language in there, and I don't want to revisit that now, but I just want to say I know we had a discussion before, and my sense was the committee was more strongly about not including it and including it the way that the subcommittee initially proposed.

MR. MEADOWS: Well, actually, even though we're not going back to what we've already done, we have made -- we are proposing that -- we are proposing -- there's several things in this discussion.

PROFESSOR HOFFMAN: Yeah. Yeah.

MR. MEADOWS: One is the scope of discovery,

whether or not it should include the proportionality --

CHAIRMAN BABCOCK: Concept.

MR. MEADOWS: -- element. We think that now it should, even though we also keep it in the limitations on scope of discovery in order to impose the burden on the party challenging the discovery as not being proportional or relating to the subject matter. So that was -- we took the discussion from this committee, went back, talked about it further, met earlier this week; and I think it's the view of the discovery subcommittee now that the proportional language should also be in the description or the language around scope of discovery; and it should say "proportional and relevant to the subject matter."

PROFESSOR HOFFMAN: To be clear, I wasn't trying to change the topic of the discussion. As Bobby says, these things are linked together.

CHAIRMAN BABCOCK: Yep.

PROFESSOR HOFFMAN: So I hope, because I think it warrants it, the discussion on proportionality is way more significant by an order of magnitude of tenfold than whether we keep the language of 192.3(c) where it is or move it to the disclosure rule. I mean, this is a -- this is a little technical thing, frankly, with a little bit of philosophical concern about are we going to mess with scope of discovery. Leaving that small piece aside,

proportionality is the big question, frankly. So my big point is simply if we're going to change scope of discovery, we should recognize that it could be perceived as a big deal because that's the starting point.

CHAIRMAN BABCOCK: Yeah. Professor Carlson.

PROFESSOR CARLSON: Yeah, because I -- in justice courts, if I understand it correctly, the only discovery you get is what the trial court allows, so you can envision a trial judge only allowing interrogatories in JP court. So that person is going to go to the scope of discovery rule and look to see the scope of discovery, so I agree that it's better to include this language in the scope of discovery.

MR. MEADOWS: Which language, Elaine?

PROFESSOR CARLSON: (b).

MR. MEADOWS: Persons with knowledge or the proportional language?

PROFESSOR CARLSON: No, persons with knowledge, the same concern Lonny expressed first. In (b)(5).

CHAIRMAN BABCOCK: Levi, did you --

HONORABLE LEVI BENTON: Yeah, I have a comment on a different topic about this same provision, something that wasn't changed, and it's something that causes people to spend 2 or $300 in every case; and it

doesn't surprise me that Justice Christopher and Bland, being removed from the trial court now, didn't think about it. I say that with all due respect. And that is, lawyers in answering this will give the law firm's address for the person with knowledge of relevant facts. They won't give the witness' address. You see that a lot, I'm sure.

CHAIRMAN BABCOCK: Yeah.

HONORABLE LEVI BENTON: Judge Evans, I bet you see it a lot, and you know --

HONORABLE DAVID EVANS: I never figured out how many of them live in one place.

HONORABLE LEVI BENTON: So we ought to say parenthetically "the witness' address and not the law firm's address" because it's not in any case thousands of dollars, but it's a few hundred dollars in every single case. "Richard, please give me the witness' address."

MR. LEVY: Can I?

CHAIRMAN BABCOCK: Yeah, Robert.

MR. MEADOWS: I think we changed that, but let me look it up and see. I'll address that.

MR. LEVY: I'm going to point out an odd issue with that. If you list a witness' address and that witness happens to be in a European country, which could be the case, that raises significant data privacy issues.

Even the name is personally identified information, but the address would definitely be, and since these pleadings are going to be publicly available it's going to put some parties in a very difficult moment.

CHAIRMAN BABCOCK: Yeah, and I've always thought that -- and maybe I haven't thought this through, but I've always thought that when I see that, that's a signal to me that that lawyer is representing that person, and so I just can't haul off and go talking to them without the lawyer's knowledge or permission.

HONORABLE LEVI BENTON: Well, then we need some clarity in the rule, because that tactic is used a lot, even when there is no representation between the person with knowledge of facts and the lawyer, just to thwart the opposing lawyer's opportunity to communicate with the witness, and so I don't have language, but it is a few hundred dollars in every case, and it's I think nagging to trial court judges. Judge Evans has walked away. I don't know how Judge Peeples feels about this. It's just it's a -- it could be clarified or fixed with some parenthetical language.

CHAIRMAN BABCOCK: Okay. Lamont.

MR. JEFFERSON: I appreciate the problem. I'm not sure I would deal with it in the rule. I mean, it seems -- and we often will designate our firm as the -- a

point of contact for a witness who we're designating if the witness is an employee of a client, for instance -- and in some instances, and it's not a very bright line -- when opposing counsel can contact a employee of a client company or a former employee of a client company; but if I put down the -- if I put down my law firm as a point of contact for that witness, what I'm saying is I have control over the witness. If you want to subpoena, if you want to depose the witness, contact me; if you want to interview the witness, contact me; but, yeah, don't go contact the witness.

Now then, there may be instances when you're entitled to, because like I say, I don't think it's a very bright line when either that witness is your employee or whether opposing counsel can contact them, but I think that doesn't have to be addressed in the rule. I mean, I think you can address that on a case-by-case basis; and just, by the way, on this whole topic of person with knowledge of relevant facts, I'm kind of surprised that it hasn't generated more controversy at least in actual litigation than it has because that's a very, very vague phrase. You know, persons with knowledge of relevant facts of any fact that could be admissible in evidence, you know, that's a telephone book basically. But lawyers seem to get it, and I haven't seen, at least in my

practice, a lot that -- you know, the notion is if they're on the list we can call them as a witness. If they're not on the list we can't, so we better make sure we include everybody who we might possibly want to call as a witness at trial. And because I think it's worked so far I wouldn't change the rule too much to make folks think there's some kind of change of practice going on with the rule, and for that reason I think the additional language from the scope section just raises more questions than problems it solves.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, we have moved everything from the scope of discovery other than the first -- other than three paragraphs to a different part of the proposed rule. So if people don't want us to do that, we can go back and cross-reference. We were trying to avoid cross-references or trying to avoid repeating the same thing over and over again. So we could leave persons with knowledge of relevant facts in scope of discovery, but then we also have it in the automatic disclosures, persons with knowledge of relevant facts. So either we repeat or cross-reference. We thought a better system was to move, and we have moved (c), (d), (e), (f), (g), (h), (i). We have moved all of those in connection with our work. So it would be useful to find out whether

people don't want us to make that move at all and then we can revise it.

MR. MEADOWS: But thinking about it, if these are mandatory disclosures as opposed to information you obtained by a request, they are by definition part of the scope of discovery. You know, if we're talking about scope of discovery in broader, more inclusive terms, relating to the subject matter and that which is proportional, that's where we start. And then you've got mandatory disclosures. Those are by nature part of the scope of discovery. I -- so I'm of the view that it's cleaner this way. It is a little bit of a re-adjustment in terms of where the language appears, but these are not wholesale changes in what we do, and it avoids a lot of cross-referencing and repetition.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I agree with what you said, but if you look at it another way, I mean, can you get the -- when taking a deposition can you get the identity of a person having knowledge of relevant facts by asking a question? Sure, you can, because that's within the scope of discovery, but it's not within the scope of discovery if it's because it's in initial disclosures. It's in the scope of discovery because it is, and then initial disclosures is a way.

PROFESSOR ALBRIGHT: But it's within the broad definition of scope.

MR. MEADOWS: Generally. Look at the general.

HONORABLE TRACY CHRISTOPHER: Relative to the subject matter, that would be a witness.

PROFESSOR DORSANEO: You don't even want to say relevant to subject matter, actually, but --

MR. MEADOWS: That's another discussion.

PROFESSOR DORSANEO: I know. It's almost impossible. I'll have to digress, but I just think it's better to leave a rule that talks about the scope of discovery to catch things that -- that are not things you find out necessarily in disclosures, and I think deposition practice is an example, that, you know, in deposition practice now under Rule 195 we revert back to the general scope of discovery rule in talking about depositions and enforcement of them -- enforcement of a deposition practice.

MR. MEADOWS: Excuse me, but I just don't see the point of concern. Because the very first paragraph under scope of discovery it's very clear whatever the discovery device you can obtain discovery regarding any nonprivileged matter that we're going to add that is proportional and relevant to the subject matter of

a pending action, information within the scope of discovery need not be admissible in evidence. So, yes, in a deposition you can ask about persons with knowledge of relevant facts. You can ask them about documents. You can ask them about all sort of things that relate to the subject matter.

CHAIRMAN BABCOCK: Getting back to this 194.2(b)(5) of the proposed rule, let me posit a hypothetical. Levi has got a case. He's representing the defendant, and he talks to his client and does his investigation and thinks that there is six people with relevant -- relevant knowledge under this definition. Four of them are employees or former employees of his company and are generally favorable to his case, so he's going to disclose those. But the others, there are two others that just kill his case. They're independent witnesses. They don't work for his client. So what happens if he doesn't disclose those two?

MR. MEADOWS: Okay. It seems to me that we've now gone to the issue that we were spending a lot of time on earlier, and that is the consequences of failure as opposed to what he's required to do. He's required to identify those witnesses.

CHAIRMAN BABCOCK: The consequences with a twist, though, because even though we have intentionally I

think not followed the Federal rule, under the Federal rule Levi would be fine because he only has to disclose people that's going to help him and then whether it would be a sanction of exclusion, he's not going to have -- he's not going to fail to list anybody that would be excluded if he inadvertently or intentionally doesn't include them, but the two people that are going to kill his case he says, yeah, exclude them all you want.

PROFESSOR ALBRIGHT: That's a problem now.

HONORABLE TRACY CHRISTOPHER: Yeah. It's in the current rule.

CHAIRMAN BABCOCK: Say that again, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I mean, under the request for disclosure, you're supposed to prevent -- to already provide the name, address, and telephone number of people having knowledge of relevant facts.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: So we have not made a single change to obligation.

CHAIRMAN BABCOCK: I understand that. I'm not suggesting that --

MR. MEADOWS: He's inviting one.

CHAIRMAN BABCOCK: I'm just saying, though, that in practice what has I think gone on under our

discovery rule is that more often than not the practitioners have followed the Federal rule and not the state rule, and is that okay? Or since we're now re-examining all of this, should we take that into account, because in my hypothetical, the two witnesses that Levi doesn't disclose, who are very powerful to his case, what's the consequence for him of failing to disclose them?

PROFESSOR ALBRIGHT: It would be abuse of discovery.

PROFESSOR CARLSON: Rule 215.

CHAIRMAN BABCOCK: What?

PROFESSOR DORSANEO: 215(b)(3), like Lonny said.

CHAIRMAN BABCOCK: All right. And what happens under 215(b)(3)?

PROFESSOR CARLSON: He would be sanctioned. He would be sanctioned.

CHAIRMAN BABCOCK: He would be sanctioned, and what would the sanction be?

PROFESSOR CARLSON: It's in the discretion of the court. Each party is making -- resisting the discovery, who didn't file a response.

CHAIRMAN BABCOCK: Anybody know what -- Rusty.

MR. HARDIN: No, you just grafted a Brady obligation into the civil world. I mean, if there is a penalty for me not telling you about people that are going to help your case --

CHAIRMAN BABCOCK: Right.

MR. HARDIN: -- we're over in criminal court. I mean, there should be no Brady obligation. I wasn't aware there was a Brady obligation in civil matters. Isn't that what we're really -- your example --

CHAIRMAN BABCOCK: Yeah.

MR. HARDIN: -- if we're going to sanction somebody for not telling the other person, "Hey, there are a couple of people out there that could help you" --

CHAIRMAN BABCOCK: Yeah.

MR. HARDIN: -- in all due respect, that's crazy.

CHAIRMAN BABCOCK: Well, and that's why I raised the issue, because we had -- just a second, Richard. We had a big debate years ago about whether we were going to follow the Federal non-Brady.

MR. HARDIN: Absolutely follow the Federal rule.

CHAIRMAN BABCOCK: Non-Brady, or whether we would depart from the Federal. We just -- we decided to depart from the Federal, but what I'm saying is in

practice, I don't know that there are too many lawyers that go Brady, go all Brady. So, anyway, Richard.

MR. MUNZINGER: Well, that's the beauty of an interrogatory. It's answered under oath, and if you don't -- if Levi doesn't identify those two witnesses, he's perjured himself, his client has; and if Levi is his counsel and lets him do it knowingly, Levi has supported perjury, and they could both be indicted if anyone were interested.

CHAIRMAN BABCOCK: Well, the witness --

MR. MUNZINGER: That's the beauty of the interrogatory practice, and this business about "Here I am" in the Federal courts, whether it works or doesn't work, I don't know, but --

CHAIRMAN BABCOCK: His client says --

MR. MUNZINGER: -- it's beauty of the interrogatory.

CHAIRMAN BABCOCK: His client says, "I've never heard of these guys." I answered truthfully, "I don't know these guys. Who are these guys? I don't know."

MR. MUNZINGER: And Levi doesn't know them either then.

CHAIRMAN BABCOCK: Yeah, he's done work product. That's his work product. He's gone out and

investigated and found that there are two guys out there that hurt his case, but the client is not under --

MR. MUNZINGER: Yeah, but I don't think that's core work product under the rules, the identity of a witness with relevant knowledge. I don't believe that's core work product. I believe that's a fact that has to be disclosed under the current rules.

CHAIRMAN BABCOCK: Well, the feds think so. The feds think that's work product. That was the whole nature of the debate in Federal court. Anyway --

MR. MUNZINGER: But do they distinguish between core work product as our rules do?

CHAIRMAN BABCOCK: I don't know. Judge Peeples.

HONORABLE DAVID PEEPLES: To carry this all the way, Chip, are you suggesting that when the plaintiff shops the case around to some experts and they say, "You don't have a case," they're now consulting experts? We're going to require that to be disclosed?

CHAIRMAN BABCOCK: I'm sorry. I didn't hear what you said.

HONORABLE DAVID PEEPLES: To take what you're saying --

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: -- all the way, we

would say that when either side, often the plaintiff, shops the case to an expert, the expert says, "The other side is right, you have no case." They're going to make them a consulting expert, don't have to talk about it. Are we going to go there and make them cough up that information? I mean --

CHAIRMAN BABCOCK: I don't know. I hadn't thought of that. What do you think? You think they would have to disclose that person?

HONORABLE DAVID PEEPLES: They certainly don't now, do they?

CHAIRMAN BABCOCK: I wouldn't think so.

HONORABLE DAVID PEEPLES: Well, in a criminal case, of course, the defendant has got the Fifth Amendment and doesn't have to tell about all of the people who know he's guilty, if he is.

CHAIRMAN BABCOCK: Right, but the prosecutor does.

HONORABLE DAVID PEEPLES: The prosecutor does because of the Constitution. But --

CHAIRMAN BABCOCK: Yeah. Rusty.

HONORABLE DAVID PEEPLES: And the --

MR. HARDIN: The problem with following through on it, if the state rule is really interpreted the way you're discussing, is the criminal system is just full

of eons of litigation now as to what is and what is not Brady, and once you start down that track of saying that one party has the obligation to tell the other party of people they think might help their case then it gets into such gray areas as to whether something really does help or hurt, and the judgment is in the eye of the beholder, and I just think it's full of mischief.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: I haven't been involved as an attorney in a case in 18 years now, but in the 13 years that I practiced under the discovery rules that were then existing I interpreted the rule to mean that if I knew that a person had knowledge of relevant facts, whether it was good for my case or bad for my case, it was required to be disclosed. I never worked for anybody that didn't have that view of the discovery obligations of an attorney in Texas courts, and so I'm surprised -- it is sort of like Brady in a way. It's unlike Brady in that you don't have to evaluate it so much, is it good or bad. If you just know they have knowledge of relevant information, you're obligated to produce it. That's the way I always thought it was. In the cases that have come to our court that have that as an issue, that's certainly the way I have interpreted the required disclosure.

Now, the more -- the thing that we thought

was being done to us was not the hiding of the information. We thought more likely that we may get buried in information. We may get the phone book instead of the people that really had knowledge of relevant facts, and it caused me to ask myself a question under the existing rule even -- I don't know the answer to this, but in any case involving accident reconstruction or engineering expertise or anything like that, the laws of physics apply. Does every person that knows the laws of physics have knowledge of relevant facts? And I think somebody else kind of paired that down, and I think it was Lamont. In practice we know that we designate those people that are likely to be witnesses or that actually do have knowledge of relevant facts, and that's where the experts come in on the engineering aspects or --

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: -- you know, but as far as the designation -- and I'm talking about fact information and not expertise information -- if they have knowledge of relevant facts we always disclosed them, and we felt like -- we may have felt incorrectly, but we felt like that's what the other side was doing as well.

CHAIRMAN BABCOCK: Yeah. And I don't -- I've -- in my practice I know that there are some lawyers that take the position that "I'm going to tell you who is

going to help me, and, you know, maybe you'll find out the other people, maybe you won't, but there's no consequence to my not telling you."

HONORABLE TOM GRAY: Do you draw a distinction between --

MR. MEADOWS: Do lawyers not produce documents that are harmful?

CHAIRMAN BABCOCK: I'm sorry, who asked that question?

MR. MEADOWS: I'm just saying that, you know, you carry that logic to the point where you don't produce documents that are harmful.

CHAIRMAN BABCOCK: No. And a lot of the people that they may should have disclosed will show up in the documents because they do have to respond to request for documents, and so, you know, you oftentimes will --

MR. MEADOWS: Yeah, but you -- I don't doubt at all you're describing a practice, but I don't think you can read our rules any differently than the justice just explained it.

CHAIRMAN BABCOCK: Oh, no, I don't disagree with that at all. No. I'm just saying that our rule is different than the Federal rule, and yet I think in practice a lot of lawyers are following the Federal approach and not the literal mandates of our rule, and is

that okay, or is that something we should think about? Judge Evans.

HONORABLE DAVID EVANS: I think you asked the question what can you do about it? I think the only safe sanction right now for failure to disclose unfavorable witnesses or documents is to determine if there were costs that were spent in discovery or that will be incurred in discovery in the future or preparation costs for trial if you have to cancel a trial because that disclosure comes late, and that's the only sanction I think is safe under the current rulings of the Court because there's no automatic penalty that can be imposed. You can't say, "Well, since you didn't disclose these two, you can't use two favorable witnesses, and I'm going to strike that." And that takes a long time to wade through in the way of testimony, but it can be effective as a carried sanction when it happens, and it happens not frequently, but it's not rare. Some of it's inadvertent and claimed to be inadvertent; but it's just a lack of diligence on the parties complying with discovery who just hit it a hit and a lick and say to their IT department, "Turn over everything," but don't go through and carefully sort through it or tell their lawyer "Here's some information"; and they don't really review it and think it through; and when it comes through it could be four or

five months of tedious discovery that's just blown out of the water because now the case has to be rediscovered and tried on a different set of facts. And then the trial judge has to kind of segregate what costs are appropriate for redoing it, and I don't know that there is any better solution than that, but that's all that can be done as far as I know.

CHAIRMAN BABCOCK: Yeah, the real risk or the biggest risk I think for the lawyer who knows of a witness that is material and has bad information for his side and he doesn't disclose and they go all the way through trial and then after the -- an adverse verdict, the party discovers the witness and also discovers that the lawyer has interviewed him, knew about him, and didn't disclose him, and so they get a new trial because of it, maybe. But Frank.

MR. GILSTRAP: As I understand this rule, subdivision (5) doesn't change anything. We've still got the old rule, and we've just transposed the language about a person having knowledge of relevant facts, but now that we look at it we say, "Holy cow, what does this really mean?" And one thing, does it mean that you have to disclose your consulting experts?

And then I'll add one more thing about this. You know, we mentioned, as Lamont said, he didn't think

this is a problem. I see this as a problem all the time, and that's the problem of disclosing everybody, like Justice Gray saying the laws of physics, but you sue a governmental agency, and sometimes they give you every -- every official, every city council person, every bureaucrat, and it's the old obfuscation problem. Like you remember they said once you make so many objections to the charge we're not going to count your objection because you've covered it up with a bunch of irrelevant objections. Same thing here, and I don't know what the answer is, but the problem is alive and well.

CHAIRMAN BABCOCK: Yeah. Okay. Any more comments about the proposed Rule 194.2(b)(5)? Yeah. Scott.

MR. STOLLEY: Just a question. Several times when we talk about disclosure of people we've got name, address, and telephone number. Does it make sense to include e-mail address?

CHAIRMAN BABCOCK: What's everybody think about that?

MR. JEFFERSON: Scary.

MR. STOLLEY: Well, if it's a third party, completely independent it may be the best way for everybody to reach that person, and why shouldn't the parties be required to do things the easy way rather than

the expensive way? If it's somebody who is willing -- one of your witnesses under your control, obviously you've got to rely on opposing counsel not to abuse the use of that e-mail address.

HONORABLE TOM GRAY: What about their Facebook handle? I don't do Facebook, so I maybe used the wrong terminology, but --

CHAIRMAN BABCOCK: Or their tweeter. Professor Hoffman.

PROFESSOR HOFFMAN: So I know we're really close to a break, and it's always a bad idea to be the person standing before a break, but I just want to take maybe one second to try to summarize where at least in my head I think we are.

CHAIRMAN BABCOCK: We're four minutes from a break.

PROFESSOR HOFFMAN: What did you say?

CHAIRMAN BABCOCK: We're four minutes from a break.

PROFESSOR HOFFMAN: Four minutes. So my view is that I don't think this whether you put the 192.3 stuff that they've taken out and put in 194 is that big a deal. As I've said before, and so I would be fine with what they did. That said, I think my slight preference, and I think at least I heard a number of other people

share this view, is leave it where it is and just have a simpler cross-reference than the one you have in the disclosure rule so it doesn't appear to the unsuspecting world that we've made dramatic changes in scope. That's that point.

The other point is, I will repeat, the much bigger question here, the much, much bigger question, the one that matters in my view, is the proportionality question, whether you put that in 192.3(a), which the subcommittee is now recommending. That is exact opposite of what they recommended at our last meeting. So we shouldn't -- yes, it is. Well, okay.

CHAIRMAN BABCOCK: No, it's not. Yes, it is.

PROFESSOR HOFFMAN: It is in there now, regardless of what their position was before and I think --

CHAIRMAN BABCOCK: They maintain they're totally consistent.

PROFESSOR HOFFMAN: And if you want to talk about confusing, Chip, now what we're going to have is the first part of our rule will look like the anti-Federal rule. Right, instead of saying "limited to claims" or "disclosing people with knowledge of claims or defenses that support your case," 26(b)(1), we have "relevant to

subject matter." So we've made this clear -- you know, we're staying away from the Federal side, but then we're going to borrow the December 2015 changes to the Federal rules and put proportionality into scope. It's like my head is spinning, and I'm paying attention. So this strikes me as a major mixed message, and then secondly, and more importantly, bad policy. We shouldn't be putting proportionality into scope. We should put it -- we should keep it where it's always been, which is scope is scope, and then when there are limits, when we're worried that someone has done too much or the general scope rule needs to be tinkered with, then we have them in limitations on discovery, which is where they operate today. We don't use the word "proportionality," but that's where it is today. And so those are my thoughts.

MR. MEADOWS: So just a couple of things if you don't mind.

CHAIRMAN BABCOCK: Yeah, go ahead, Bobby.

MR. MEADOWS: I want to answer the question that was raised earlier. The language around disclosing persons with relevant knowledge does not require the disclosure of consulting experts. We deal with that explicitly in Rule 195. So that's not a concern. Now, as to the question about proportionality, it can just be as big a discussion as we want. We continue to leave it in

limitations on discovery, and then there is a argument that if it's there then there should be some recognition that proportional discovery is part of what we understand as scope. But that's -- it's -- to me that's an open discussion that the discovery committee remains tolerant of all views on this.

CHAIRMAN BABCOCK: Okay. You done? Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I just wanted to say that the change that we made was in our first draft we had "relevant to the claims." All right. And it seemed to be the consensus of the group to keep it relevant to the subject matter. So we changed it back to "relevant to the subject matter," and we had proportionality in the scope with the big definition of proportionality, and what the change that we made was is to leave proportionality in the scope, but refer down to limitations for the definition, and in our opinion, that then would put the burden on the person claiming that it was not proportional to come in and say it's not proportional. So that was how we revised in connection with the previous discussion.

CHAIRMAN BABCOCK: Okay. Robert.

MR. LEVY: I do disagree with Professor Hoffman's view, and the issue about proportionality I

think is important to include in the scope rather than putting it on the party who, in effect, is aggrieved by what could be overbroad requests, and then that party has to then seek the court's intervention, and it should be on the party making the request to ask discovery that is appropriate and that includes proportional discovery within the scope, and I also do think that the claim -- "related to the claims or defenses" is really the better approach, because there could be a wide panoply of people or topics that might relate to the subject matter, which could be extraordinarily broad, that won't help find information that will advance the ball at the trial, so if it relates to claims or defenses then you're focusing on information that will actually matter in the case.

CHAIRMAN BABCOCK: Okay. Anything else? Okay. We will take our morning break. Thank you.

(Recess from 10:45 a.m. to 11:10 p.m.)

MR. HARDIN: Chip, I've been convinced I was wrong, and so I'm going to let everybody know about all the people on other side.

CHAIRMAN BABCOCK: On the record, Mr. Hardin has confessed error.

MR. HARDIN: That's true.

MR. RINEY: Admitted to discovery abuse, I believe.

CHAIRMAN BABCOCK: As his counsel, I wouldn't advise him to go quite that far, but, all right, we're going to shift topics here and spend -- still on discovery, though, and spend a half an hour on experts and then a brief maybe half hour or so on sanctions and spoliation, and we were requested or the subcommittee chair was requested to defer spoliation and sanctions until Kent Sullivan could be here, and so we're going to shrink that down so that he can be heard because I gather that Kent has got a minority view on the subcommittee or maybe --

MR. MEADOWS: He has got a view that has not been fully adopted.

MR. JACKSON: Nice way to put it.

MR. MEADOWS: But we have -- on spoliation and sanctions we as a discovery subcommittee have agreed on, for example, to add the language of Federal Rule 37(e) to our Rule 215. There are other issues associated with a broader spoliation rule that are under consideration in our committee. I think it would be worthwhile to get a reaction from this room in terms of the direction we should take. Similarly, we've got questions around experts. The Federal rules, as you know, do not require the disclosure of expert reports or communications with lawyers and their experts, and our discovery subcommittee

is largely of the view that we should adopt that. There is a minority view, and she's here today to speak to that. So I think that, just kicking that off, we should maybe begin with experts, as you said, and then work our way from the last time remaining and talk about spoliation at large.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: And I invite Jane to just introduce this topic because she was largely responsible for superintending the work of the discovery subcommittee on experts. So, Jane, unless you want me to throw it out there, go ahead.

HONORABLE JANE BLAND: Okay. So we'll start I guess with Rule 195.

PROFESSOR DORSANEO: Page 29.

HONORABLE TRACY CHRISTOPHER: Sorry, it goes out of order. It's page 29.

HONORABLE JANE BLAND: There are some -- the two main substantive suggested revisions to 195 are that we adopt -- we recommend that we adopt the Federal rule that protects from disclosure draft reports to the extent that reports are required and exempts expert communications from disclosure, those communications the expert has with the attorney, and -- unless they're about factual matters; and if you can look at 190 -- most of

these changes are incorporated in Rule 195.5, which is on page 30. 195.5 starts out first with the requirements for disclosure for experts, and in this it's similar to what we have had in the past in connection with experts and the requirements for disclosure, but a little bit broader in that it includes more specific information about the basis for the expert's opinions, more specific information about the witness' qualifications, and specific information about compensation and past testimony. And then all of that, we are adopting the Federal Rule 26 requirements for experts.

And if you go on, part (c) of that rule is the part that exempts expert communications from disclosure. The idea behind the rule is that there was a lot of gamesmanship associated with the disclosure of draft reports and then avoidance of disclosure of draft reports, and because many people that have worked on these rules are of the view that having experts discuss their drafts and changes to their drafts is really diverting the fact finder from the focusing on what the -- you know, focusing on the merits of the actual opinions and instead to changes to drafts; and it tends to be somewhat of a wild goose chase and that, you know, it will not be -- it will be self-evident to the jury that lawyers assist in preparing these reports and that experts are compensated

by these lawyers and have a sort of an advocacy point of view when their testimony is presented so that, you know, the idea that this is the only way of cross-examining an expert for potential bias associated with being employed by one side of the case, you know, we felt like it was a distraction and not a particularly fruitful area of cross-examination; and that's what the Federal committee concluded when they adopted a rule that does not require drafts to be produced; and so that's why the committee ultimately -- the subcommittee ultimately determined that we should adopt the Federal rule.

MR. MEADOWS: I think there is more, but I think this is the main discussion piece.

CHAIRMAN BABCOCK: Okay. Discussion. Richard Orsinger.

MR. ORSINGER: Yes, I vividly remember when this -- when Justice Bland made this presentation several years ago, and I remember asking several questions that the Chair permitted, and I asked eventually if the lawyer drafts the entire report from start to finish and the expert only signs the report and doesn't write the rest of it, is that discoverable and is that fair game in court? And as I recall, the answer was it's not discoverable, and it's not fair game in court. Did I remember that correctly?

HONORABLE JANE BLAND: Well, I don't know, because that was five years ago, and this committee rejected this proposal five years ago, but anecdotally in speaking with other members of the committee over the years people have become more comfortable with the practice, having had it in Federal court, and people have switched in view. I take it you have not, Richard.

MR. ORSINGER: Well, I was going to say, I try to have an open mind, as difficult as it is; and you know, I'm very open to the process; and the way -- in my practice I deal a lot with expert witnesses. I tell the expert witness that the second that I start talking to them about changing their reports they need to save their drafts, so that under the Texas rule as it now exists they can demonstrate the part they did on their own and the part that they did as a result of my editing. You know, maybe that's an unnecessary way to practice defensively. I do -- I am concerned, though, because I inherently believe that experts should be independent, not just sworn advocates for a party's view; and if you allow the lawyers to write or influence what the expert reports say, you're moving the expert into the realm of an advocate, which I don't personally like for the system; and so I would prefer that experts be independent and that they be responsible for their words and they be held accountable

for their words; and I'm afraid that this change in this rule, which may work successfully in the Federal court system, maybe there will be more unscrupulous practices that are more widespread if we implement it at the state court level; but, I mean, I have an open mind.

I agree. I think it's kind of a waste of time what -- you know, to go into the various drafts of the expert reports, although I find that the experts say they don't save drafts. It's all done on the computer and, you know, the second draft replaced the first draft and the third draft replaced the second draft. So the truth is they never have anything but their last draft, but at any rate, I'm probably less -- feel less strongly than I did if that was five years ago, but I do --

HONORABLE JANE BLAND: Well, then we're making progress.

MR. ORSINGER: I do think that it introduces a tone of advocacy or a reality of advocacy if you allow the lawyers to interactively help the expert state their opinion, and I don't like that just as a matter of policy, still.

HONORABLE JANE BLAND: Well, take the opposite look. Does it decrease the tone of advocacy to have a whole avenue of cross-examination devoted to the lawyer's participation in preparation of the report rather

than the underpinnings of that expert's opinions and where those might be faulty?

MR. ORSINGER: Yeah, I agree that a lot of -- it's a waste of everyone's time to try to impugn an expert because they had different drafts or because they had conversations. So I think that that's a deplorable practice on the part of lawyers. It's kind of a cheap, below the belt attack on expert opinions. I would rather that we all deal with the merits. So I know -- yeah, I agree that's an abuse. So which is worse, lawyers up to their, you know, typical tricks of trying to discredit somebody for nonmeritorious cross-examinations versus lawyers who get in there and write their advocacy into those reports and then put the expert up as if they're independent. To me it's a balancing.

So at any rate, my opinion is probably the same as it was, but, you know, I just recall vividly walking away from saying, my goodness, does this mean that the lawyers are going to be writing the expert reports and just paying for a signature?

CHAIRMAN BABCOCK: You seem to concede that the Federal practice is okay.

MR. ORSINGER: Yeah, Federal practice is okay in Federal court.

CHAIRMAN BABCOCK: Well, yeah, that's where

it is.

MR. ORSINGER: Because the kinds of cases that are in Federal court have different kinds of judges, different kinds of lawyers, and different kinds of subject matter and litigants and money, but the state court is where everybody else goes that doesn't have a Federal case, and that's where the lawyers who can't or won't practice in Federal court practice, and that's where the practicalities of practice vary from community to community and even from judge to judge, so it's not necessary -- it doesn't necessarily follow that because a practice works well at the Federal court level with the court supervision and the money and the high quality lawyers and all of that, that doesn't always translate well to the kind of pandemonium we have in a lot of our state courts.

CHAIRMAN BABCOCK: Well, I'll stack our state judges up against Federal judges.

MR. ORSINGER: I think the Texas judges are the best of all the state judges.

CHAIRMAN BABCOCK: I just wanted to get that on the record there, Richard.

HONORABLE DAVID EVANS: I like you, too, Richard.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Couldn't you ask the expert what influence or what part of this was aided -- you were aided by the lawyers suggesting. You can ask them that, can't you?

CHAIRMAN BABCOCK: I would think so. I've always asked that in Federal court. Nobody has ever shut me down.

MR. LOW: And, you know, ultimately what the report is is what he's swearing is going to be the truth, and you just need to know whether he changed it or didn't, did the lawyer, and if he wants to lie about it, sometimes witnesses do lie, I've heard.

CHAIRMAN BABCOCK: Not in my experience. Yeah, Judge Wallace.

HONORABLE R. H. WALLACE: To follow up on what Buddy was saying, I don't read that as necessarily saying you cannot cross-examine an expert on who drafted this report; and if it does, then I think that would not necessarily be good, but just because you don't get the drafts in your hand doesn't necessarily mean you can't question the expert.

CHAIRMAN BABCOCK: Yeah. Here's in my experience, Richard and Justice Bland, where the rubber may hit the road. You get a draft, and the initial draft has the expert opining that there are $5,000 worth of

damages; and then the second draft, it's up to 50; and then it's up to 500; and by the time you get the last draft it's 5 million; and that is probative of something I've always thought, but --

HONORABLE JANE BLAND: Well, there are exceptions, if you look at (c), and one of them is that you can cross-examine the expert about facts or data provided by the attorney to the expert and upon which the expert relies for his or her opinions. So I think in your case if you're saying that will I be able to ask if you go from $5,000 to $5 million based on something in this case or something that counsel told you.

CHAIRMAN BABCOCK: No, but, see, I don't know, Jane. I don't know because I don't have the first draft. So I don't know that he started at 5,000; and if I say to him, "Well, was the number always 5 million?"

"I think it was in that area."

"Well, was it less than that or more than that?"

"Just in that area."

"Well, was it ever as low as 500?"

"I don't remember."

HONORABLE JANE BLAND: But isn't the more important question, "How did you get to 5 million?"

CHAIRMAN BABCOCK: Yeah, of course, and

that's the answer to my hypothetical.

HONORABLE JANE BLAND: Yes.

CHAIRMAN BABCOCK: Because you waste a ton of time for that marginal little cross-examination, but, I mean, jurors would react to that I think if they saw that progression in a document as opposed to the way -- but I don't know if it's worth it. I personally don't think it is worth it, but you're giving up something for sure. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I'm the dissenter on the committee and was the dissenter five years ago, and it was a very close vote, because I went back and looked at it to see.

CHAIRMAN BABCOCK: Five years ago?

HONORABLE TRACY CHRISTOPHER: In terms of we actually took a vote in this committee about changing the rule, and it was a very close vote against changing it. To me it's one thing to say, "Well, I just need to know how you got to the 5 million," all right, versus "Your first opinion was 5,000." I mean, those are two very different things, and the first opinion to me is very indicative of, you know, the influence that the lawyer had in changing the expert's opinion, and I think a juror ought to know that. I mean, the Supreme Court has all of these cases over and over again about we have to be so

careful about experts because, you know, jurors are just going to believe anything that you tell them. So to me you need to be able to cross-examine the expert about the lawyer's involvement in the number so that it -- that the juror understands that this is not an independent expert. That's what I'm afraid of, and everyone says, "Oh, well, jurors always know that experts are bought and paid for and they're just parroting back the opinion that the lawyer has come up with," and I don't think jurors know that.

CHAIRMAN BABCOCK: Justice Christopher, could I ask one clarifying question? You said the vote was close in the subcommittee. Are you talking about this time or five years ago?

HONORABLE TRACY CHRISTOPHER: No, I'm a lone dissenter in this subcommittee. The vote in the whole group the last time was close.

CHAIRMAN BABCOCK: Yeah. Okay. I'm with you. Thank you. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, if that's true, how does any expert get past a Daubert challenge? If they're all just parroting what the lawyers say I just should preclude experts. I mean, if that's really true, why do we allow them?

CHAIRMAN BABCOCK: A rhetorical question

apparently. Skip.

MR. WATSON: The thing that I wish I could see and that I always look for in records and that would be really helpful in determining, you know, the efficacy of a Daubert/Robinson challenge is a combination between (b) and (c). It would really help me and I think it would help trial judges and appellate judges if the exemptions in (c) weren't just exemptions, but if they needed to be part of the expert report. If the report itself said, "These are the facts that I don't know personally but were supplied by the lawyer," or "This is the basis for my opinion," whatever --

CHAIRMAN BABCOCK: Yeah.

MR. WATSON: -- then you can apply standards like Justice Boyd's in Mel Acres of was this an opinion in which the lawyer said, "Don't consider this" or "Do consider this," and it's literally tailored for facts that are not necessarily the facts of this case because they're selective, and that's really what -- where the cutting edge is on these things, and it would be so helpful if instead of being exempted it was just in there. "This is where I got the" -- "these are the facts I'm relying on. This is where I got them."

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Okay. A couple of

things. One is we have kept the Texas practice that is an opt-in for expert reports. In other words, the trial court may order reports to be produced. Under the Federal rule it's the other way. Reports must be produced unless -- absent a court order, and that's because we think there are many cases where there will be no expert reports needed in Texas state practice. So that's just an aside.

If a report is ordered or the parties agree to produce reports, you have to identify in the report all documents and tangible things that you have relied on or reviewed, and a couple of other words and then under the exemption -- I mean, I'm sorry, what's not exempt is "Where did this come from? Did your lawyer provide you this information, or did you get this information from elsewhere?" So I think the way the rule works, you've got that solution if you want to depose the expert or cross-examine the expert about where they got the factual data that they're relying on for their opinion.

MR. WATSON: Yeah, I got that. I'm just saying it would save a lot of time and money if that were front-end loaded, and you would be surprised how often those questions aren't asked in the deposition of the expert. It just cleans up the whole Daubert process if that's in black and white and the judge is sitting down and looking at it.

MR. MEADOWS: But I really do see that as an issue of not much concern because at the end of it all the expert -- let's just take Richard's example that the lawyer wrote the whole report, and the expert signed it and testified as to it. At the end of the day it's either going to be credible testimony or it's not. It's going to be something that expert is going to have to defend and justify based upon the facts and assumptions that are included in it. So I really think that we're fighting over something that really is just not that valuable because the expert is going to have to stand on his or her own in terms of supporting the opinion. They don't have any personal knowledge, so they're basing everything on facts and assumptions that were provided to them by somebody. They're going to almost always find them in the documents or some other place. You could press the witness in terms of if the lawyer gave him this or that, but at the end of it all the expert is going to have to be credible in issuing the opinions that are in the report or in his testimony.

MR. WATSON: You're talking about credibility. I'm talking about whether it gets in or not at all. That's a question of law, not a question of credibility.

MR. MEADOWS: Well, it's -- they're related

because if it gets in at all it depends upon whether or not it's an appropriate methodology, whether or not it's the sort of thing that experts can rely upon. I mean, if it's just something that turns out to be based on a wholesale set of materials provided by the lawyer, I mean that's a point of attack.

MR. WATSON: Well, I agree, Bobby. I just think it's a -- we're to the point now in our jurisprudence that there is a baseline determination of both reliability and even relevance that has to be made, and that's a question of law, and that needs to be made on articulable standards, and it would be helpful if we're going to be saying that the leap in analysis between facts and conclusion is too great to know what the facts are and to know where they came from and to know what was left out.

MR. MEADOWS: Well, just to finish, you know, the counterpoint to that, we're not suggesting that that's not discoverable.

MR. WATSON: I understand. I'm just saying if it were in the -- on the paper, the world would be a simpler place. That's all. Just a suggestion.

MR. KELLY: The rule would be simpler if all experts were unbiased and we had an inquisitorial judicial system, but we don't. It's adversarial, and the experts

are paid for by one party or the other, so I don't think there's an easy solution to it by just having mandatory disclosure of everything.

MR. MEADOWS: There's even a more fundamental fact, which is if the expert is not going to say what the lawyer needs for him or her to say that expert is going to become a consulting expert.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: With respect to the words of this thing, (c)(2), for example, "facts or data" -- there's always a problem with "facts," but let's leave that aside -- "that the party's attorney doesn't" -- does the party's attorney include party?

CHAIRMAN BABCOCK: Does the party's attorney include party?

PROFESSOR DORSANEO: I mean, what if a party says? I have lots of parties who, you know, they may even be attorneys, but they're not their own attorney.

HONORABLE JANE BLAND: Communications from the party are not part of the exemption from disclosure, and so this is the exception to the exemption.

PROFESSOR DORSANEO: Okay. All right. We're all right. But then what about "considered"? Over the years we had issues about expert testimony, and ultimately we ended up with "reviewed by," okay, because

people would say, "Well, yeah, I looked at that, but I didn't rely on it. It didn't form the basis of my opinion." What does "considered" mean? I'm worried about sneaky guys.

HONORABLE JANE BLAND: "Reviewed by" is included in the list of -- the litany of things that have to be produced in terms of if you've reviewed it you have to produce it.

PROFESSOR DORSANEO: Okay. And then is there a word somewhere that I've missed?

HONORABLE JANE BLAND: Yeah, on page 31. 195.5(a)(4)(A). (a)(4)(A).

PROFESSOR DORSANEO: (a)(4)(A). Okay. Thank you.

HONORABLE JANE BLAND: You're welcome.

CHAIRMAN BABCOCK: Okay. Yeah, Richard Munzinger.

MR. MUNZINGER: Do you think your rule as written now addresses a situation where you have an expert and you discuss with the expert -- he's first a consulting expert, and you discuss subjects A, B, C, D, and E with him, and he concludes that he can testify -- or you conclude that his testimony on subjects A, B, and C is helpful to you but on subjects D and E is not. Can you designate him as a testifying expert on subjects A, B, and

C, but claim he is a consulting expert on subjects D and E and not disclose those communications, those subjects, or that issue? I don't think your rule as presently written addresses that. I don't know that it has to or should. I just raise the question.

MR. MEADOWS: Good question, I wouldn't think you could do that, but --

MR. MUNZINGER: I couldn't hear you.

MR. MEADOWS: I think if you're a testifying expert --

PROFESSOR ALBRIGHT: Sometimes you can.

MR. MEADOWS: You do?

MR. MUNZINGER: Your answer was what?

PROFESSOR ALBRIGHT: He doesn't think you can. I think you can.

MR. MEADOWS: I think if you're a testifying expert, you are exposed to examination on all topics.

PROFESSOR ALBRIGHT: It says in anticipation of his testimony --

MR. MUNZINGER: Even though the other topics were consulting topics.

MR. MEADOWS: That's what I think.

PROFESSOR ALBRIGHT: But, see, I think it's related to his testimony.

MR. MUNZINGER: Assume for a moment with me,

though, that the topics are discrete.

PROFESSOR ALBRIGHT: Right.

MR. MUNZINGER: They are not necessarily interrelated.

PROFESSOR ALBRIGHT: Right.

MR. MUNZINGER: So I've got to go get two experts to get my testimony on subjects A, B, and C.

PROFESSOR ALBRIGHT: Well, I thought you just said you don't want him to testify to A, B, and C.

MR. MUNZINGER: I first contact Joe Schmoe. I say to him, "I've got this case. I think that there are several things that your discipline allows you to testify that could help me in this case, and I would like you to study subjects A, B, C, D, and E." He does so. He gets back to me and says, "This is my opinion on these five subject matters," and I make a tactical decision that his testimony will -- on balance will hurt me on D and E, but will help me on A, B, and C.

PROFESSOR ALBRIGHT: Right.

MR. MUNZINGER: So I designate him as a testifying expert on A, B, and C. My communication with him on all five are not discoverable, et cetera, and he's only going to testify on A, B, and C. Your rule doesn't address that situation, and I don't know why. Given the way the rule is written, I should have to disclose the

subjects D and E, my communications D and E, his thoughts concerning D and E. I'm paying him, and I'm putting him on the witness stand. He's going to give honest answers to A, B, and C, but I don't want you to talk about D and E, and you don't have to do so.

PROFESSOR ALBRIGHT: I think the rule does address that because you have to provide in 195.5(a)(4)(A) all the documents, et cetera, reviewed by, prepared by, or for the expert in anticipation of his testimony, and his only testimony -- his testimony is only on -- I can't remember which letters, but it's only on two of the five letters that you -- the subject matter.

MR. MUNZINGER: But that's my point. His testimony is on -- he's my witness. I called him. Give me your opinion on A, B, and C. I ask him nothing about D and E.

PROFESSOR ALBRIGHT: Right. Well, so I don't understand what your problem is.

MR. MUNZINGER: Well, my problem is can you -- does he have to say, if asked, I'm -- or is he a consulting expert on D and E?

MR. MEADOWS: I don't think so.

PROFESSOR ALBRIGHT: I think he is. Bobby doesn't think so.

MR. MUNZINGER: That's why I'm raising the

point, because I don't know the answer either, and do we want to have a rule that addresses that situation? I've had that come up in my practice over my lifetime.

CHAIRMAN BABCOCK: Well, the first thing, Richard, you shouldn't hire an expert named Dr. Joe Schmoe, but Justice Bland.

HONORABLE JANE BLAND: But if you do hire Joe Schmoe and you plan to put him on the witness stand, all of his opinions are fair game, and we -- under (e) if you continue down, 195.5(e), it has the test for a consulting expert versus a testifying expert, and it is not according to subject matter. It is according to whether or not Joe Schmoe will be called to the witness stand. If you designate --

MR. MUNZINGER: Which -- what section is it?

HONORABLE JANE BLAND: On page 32. That -- if you go down to (e), "Expert employed for trial preparation." You see that?

MR. MUNZINGER: My personal belief is I don't think (e) applies to my situation in the context of the rule in its entirety because he is not testifying to the jury on subjects D and E, only on subjects A, B, and C.

HONORABLE JANE BLAND: But it is whether or not the person will be called as a witness at trial. If

you designate a person to be called as a witness at trial, they are not a consulting expert, and their opinions are not exempt from discovery. If the person is not expected to be called as a witness at trial, you may consider that expert to be a consulting expert unless one of the experts that you are going to have testify at trial relies on information from that consulting expert, at which point -- and the Texas Supreme Court has grappled with that, so it goes by the person, not the subject matter.

PROFESSOR ALBRIGHT: But, Jane, you're only entitled to discover the documents and the opinions, et cetera, for his testimony.

MR. MUNZINGER: No, I understand. I understand my duty of disclosure.

PROFESSOR ALBRIGHT: He's only testifying on -- I mean, I think it's an issue. I think there have been some cases that have grappled with this, and I think it -- I'm not sure we want to deal with it in a rule, actually.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: As a practical matter it seems to me it's going to be very hard to parse out what -- you know, okay, "I've got these opinions," and then you start asking other questions. "Well, we're not going to talk about that. I'm a consulting expert in that

area." I just don't see -- that would be hard --

MR. MEADOWS: It doesn't work.

HONORABLE R. H. WALLACE: -- to work.

PROFESSOR ALBRIGHT: Yeah.

HONORABLE R. H. WALLACE: I mean, I --

PROFESSOR ALBRIGHT: Actually, where this has come up is when you have a witness -- expert witness who is also a party, and there are several cases that have grappled with that.

MR. MUNZINGER: So I'm a lawyer, and I get hired in a case. I get hired in a case, and I know nothing about widgets, whatever the subject matter of the expert's testimony is. I don't know. He's a physicist, he's an economist, whatever he is. And I raise questions searching for the truth for my side of the case to help a jury, et cetera, et cetera, and this guy tells me, "Munzinger, you can't do that because of so-and-so." Now, it's a different subject matter than he's testifying on.

What you're telling me is that I need to go hire a second expert and just ask him about A, B, and C, having already paid the first expert to give me the answers on A, B, and C and D and E. I can't use that guy anymore, and I don't know -- I don't see how that reduces the costs of litigation. I don't see how it impacts a jury as concealing any pertinent material fact from the

jury. My adversary is certainly free to go off and get testimony on D and E, et cetera, but I haven't done anything -- I don't think I have done anything wrong. You've told me I don't have to give my communications to the guy. I mean, I say you haven't. The rule has.

And I'm being educated by the expert. I don't know anything about widgets, and so I've got a guy that's telling me about widgets. "For God's sakes, Munzinger, widgets do so" -- "Oh, I didn't know that. Damn." You know, so to me it's a real question.

CHAIRMAN BABCOCK: You live an interesting life for sure. Justice Bland.

HONORABLE JANE BLAND: The difference is the rule requires the expert to disclose automatically if a report is required, the opinions and mental impressions that he is going to give -- testify about at trial. So there's your affirmative duty of disclosure. That duty doesn't circumscribe the other side's ability to cross-examine any expert who appears at trial about any matter that they want that's relevant to the litigation.

MR. MEADOWS: See, that's the point. You can't cloak a testifying expert with the consulting expert's privilege.

MR. MUNZINGER: And I understand. And I understand what you're telling me. My point again is I

think everybody in this room that practices law first retains an expert and says to him in writing or otherwise, "You are a consulting expert. I'm not going to have to tell the judge and my adversary that I ever consulted with you in this case unless and until I designate you as a testifying expert. When I designate you as a testifying expert, I have to designate you and the subject matters that you're going to testify on and the documents and everything that lead to your opinions on the subjects you're going to testify on." And what you in essence are telling me is I can't use one expert to be a consultant on multiple facets of the case. I've got to go hire two experts because I can't take the risk that in the course of his discovery a question is asked, has nothing to do with testimony he's giving in front of the court and jury and in his report. It has something to do with something else where I was trying to learn something.

HONORABLE JANE BLAND: That's right.

MR. MUNZINGER: And so now he was a consulting expert. No longer. He's now a testifying expert, but on subjects not related to what he consulted on. It doesn't make sense to me.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: Justice Bland, the plaintiff's designated a doctor on A, B, and C opinions,

and the defense takes him on E and F that are not designated by the defense as expert opinions from that witness. There's been no Daubert, no challenge on it, and the trial judge is in the middle of trial trying to figure out if it's a valid opinion or not. I didn't think that would be the way the rule would work. If you're going to designate the opposing party's expert -- and then I'm going to try to move away from treating physicians, hired physicians; and let's use automobile accident reconstruction expert, going to testify to speed; but he's not going to testify about impact and what that might have meant on impact. So we'll just segregate it that way. It's doubtful that would ever come up, but I'm just trying to find an example. He's designated to testify as to speed the vehicles were traveling at but not on the energy transfer hoochamagooch. That's a technical term in the 48th, by the way, which means it's not coming in, but -- and then suddenly he's on cross-examination, and you start picking up other opinions and say, "Now, do you have an opinion about this," and it's never been part of the pretrial discovery or designation. I don't think that gets in.

HONORABLE JANE BLAND: Well --

HONORABLE DAVID EVANS: I don't think it should get in.

HONORABLE JANE BLAND: If the plaintiff's lawyer objects and says, "This calls for speculation" --

HONORABLE DAVID EVANS: It doesn't call for speculation. "Do you have an opinion about the energy transfer?"

MR. MEADOWS: But if it's an issue in the case --

HONORABLE DAVID EVANS: Well, if he --

HONORABLE TRACY CHRISTOPHER: He --

THE REPORTER: Guys, one at a time, please.

HONORABLE DAVID EVANS: -- hasn't been designed by either side, he hasn't been designated on that. I mean, that's --

MR. MUNZINGER: So if it's in a deposition and the question comes up, the lawyers -- I say to my expert, "Don't answer that question. That's not within your testimony," and we go to court, and now we're in front of Judge Evans, and the issue comes up. "He's a consultant on that subject, Judge."

HONORABLE DAVID EVANS: I didn't put the part he was a consultant. I don't believe that you can force somebody to be your expert, a hired expert, without paying them.

MR. MUNZINGER: I agree with that.

HONORABLE DAVID EVANS: You can go hire your

own expert and let the plaintiff then sit there silent after you put on the evidence on that area that his witness is not going to testify on, but you can't -- I don't think -- I think you've got to designate the witness and the opinions they're going to testify under the rule even if they're opposing party.

MR. MUNZINGER: You've got to pay for them. You've got to pay for them.

HONORABLE DAVID EVANS: That would be my read of it, and that would be the way I would think -- that way you get the challenges on experts up early.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: Well, we've got designation issues and then we have what in effect is a privilege; that is, a privilege from disclosing opinions of a consulting expert. Privileges are generally fairly limited, and I think it has to be on a witness basis, not a subject matter, because otherwise you're going to run into a situation where the expert says, okay, let's say plaintiff says the widget is defective in five different respects. First witness will say -- expert might say, "Yeah, I agree with A through C," but he won't go D and E. Well, that's pertinent. It would be a fraud on the court to have an expert say, "I think it's defective in A, B, and C. I invoke a privilege to testify as to D and E,"

and then we go get another expert who agrees on D and E but not A, B, and C. I mean, that is really --

CHAIRMAN BABCOCK: Well, how about --

HONORABLE DAVID EVANS: That's same subject matter.

MR. RINEY: And same thing, too, about you might get -- if the expert has an opinion on liability, he's designated on liability, but if he doesn't think there's causation there, there ought not to be a privilege and say, "He's a consulting expert on causation. He can't give an opinion on that.

HONORABLE DAVID EVANS: I'm not talking about privilege. I'm just saying whether or not he's designated by the other side.

MR. RINEY: And perhaps the opposing party after the deposition has to go back and designate him on that ground, but I think we're talking about -- we're talking about consulting expert. We're talking about a privilege that should be limited. I think it is limited, and I think there is no practical basis and no basis in justice at all for restricting it by subject matter. I think that would lead to all kinds of problems.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: What happens if I get hired in a case and I call my first expert, he's a consultant.

We agree he's a consultant with me, and he says to me, "Munzinger, widgets do X," and that's the end of my lawsuit. And I say, "Why do you say widgets do X?" He says, "A, B, C."

"Well, thanks very much. Good-bye," and I call expert B. Expert B has a different opinion. They're both honest men. They're both physicists or whatever they are, economists, but it's expert opinion testimony. It's not fact testimony. It's not God created lemons yellow. It's "My opinion is that this is yellow" or whatever. So now I hire expert number two, and he comes to court. Is that a fraud on the court? Did I do something wrong because I found an expert who helps my case? Is that a fraud on the court?

If it isn't a fraud on the court, why do I have to -- if I'm not putting sworn testimony before the jury -- go out and hire two experts to get to where I was with the second expert.

CHAIRMAN BABCOCK: Richard, what if your expert says, "Here's my name. Here's my credentials, and Mr. Munzinger, you've asked me to look at A, B, and C, and I've got opinions on all of that." You say, "What are they?" and he testifies beautifully about that, and then on cross the other lawyer says, "Well, what about D and E?" And he says, "I wasn't -- that's not part of my

assignment. I'm here to testify about A, B and C."

"Okay, fine, but you have opinions about D and E, don't you?"

"You know, I may have."

"Well, what are they?"

"Well, I don't choose to provide those to you because I haven't studied it thoroughly for my testimony. I don't want to put my reputation on the line. I don't know any of the facts under D and E. I just don't want to share my opinion because it could be misleading, and I haven't studied it enough, and that wasn't my assignment."

"Well, have you talked to Munzinger about D and E?"

"Yeah, I've talked to him about D and E."

"Well, what did you tell him?" How's that? Is that okay?

MR. MUNZINGER: Well, and maybe I have to object at some point during that cross-examination on the basis that "Your Honor, the man has been proffered as a testifying expert on subjects A, B, and C. We have complied with the rules. We served our report. Every single thing the law requires regarding subjects A, B, and C has been given. I paid for whatever else is D and E. I'm not going to let him testify to that." And I don't

think that's a fraud on the court.

CHAIRMAN BABCOCK: Okay. Well, Judge Evans, how are you going to rule on this objection?

HONORABLE DAVID EVANS: Well, if the group says -- if it is as Tom said, you know, if it's a consulting issue and you can just say, "We're consulting on that. We don't have to disclose it" or whatever you're going to say, that may be one area. All I was trying to get into is that if on cross-examination you expect to take the witness into another area and ask for an opinion then you need to designate that witness on that opinion in the pretrial discovery. Where else would you get the challenges on Daubert? Where else would you get that, at the trial level or on the NOV, after your duck soup?

CHAIRMAN BABCOCK: And the lawyer is going to --

HONORABLE DAVID EVANS: You know, when the seven of you or nine of you are reading it over.

CHAIRMAN BABCOCK: The lawyer is going to argue to you, Judge Evans, that "Judge, his opinions on D and E, which he has discussed with Munzinger, are pertinent to A, B, and C."

HONORABLE DAVID EVANS: Well, you haven't seen the basis for it, you haven't tested it against the case law. You haven't read the -- you haven't analyzed it

for peer acceptance, none of those things, and you're in the middle of a trial with a lot of money going on and 12 people sitting in the box, so you say here comes the challenge. "All right. Ladies and gentlemen, go over there and sit in the jury room for the next two hours while we argue about this."

CHAIRMAN BABCOCK: So you're going to sustain the objection.

HONORABLE DAVID EVANS: Well, if I have to test out the expert's opinion as the gatekeeper -- Mr. Brown, I still keep that article there -- you know, I'm going to send them out and test it while they're outside, and that's a problem in management of a trial.

CHAIRMAN BABCOCK: Justice Christopher, and then Judge Estevez.

HONORABLE TRACY CHRISTOPHER: Well, I think reasonable minds can differ on this point as to whether or not if you're going to elicit opinions via cross-examination whether you have to designate ahead of time that opinion.

HONORABLE DAVID EVANS: A new subject.

HONORABLE TRACY CHRISTOPHER: A new -- well, you know, just I'm testifying that, you know, the man needed surgery, and I want to ask you about pre-existing conditions.

HONORABLE DAVID EVANS: That's a different issue.

HONORABLE TRACY CHRISTOPHER: Well --

HONORABLE DAVID EVANS: Anything that goes into the surgery and what was necessary for the surgery and when he went in it, but if it's a completely different topic, and if it's different it's hard to come up with those examples. That's what I'm trying to -- the follow-up treatment or something like that. That might be an issue, is what I'm trying to --

CHAIRMAN BABCOCK: Judges.

HONORABLE TRACY CHRISTOPHER: Well, and I mean, I do understand that. Okay. Let's say you're designated for treatment in what you did, and I'm going to ask you some questions about this life care plan, okay, while you're up here. "Do you really think he needs this or this or this, you know, that they have provided via this life care plan?"

Now, I think reasonable minds can differ, but I always thought that cross-examination was fair game; and if you got a new opinion on cross-examination that helped you, you didn't have to designate them. I know some people take the opposite view, not only for experts but also fact witnesses.

HONORABLE DAVID EVANS: Well, if --

HONORABLE TRACY CHRISTOPHER: And, you know --

HONORABLE DAVID EVANS: I think it comes right out of the box on what the objections are. "Have you reviewed the life care plan?"

"Well, I haven't." End of discussion. I don't think at that point you go up and hand him the life care plan and say -- start then having him look it over and render an opinion, or if he gives the life care plan, "Do you have an opinion about it?" He says, "No, I don't." As the gatekeeper you cut it off.

HONORABLE TRACY CHRISTOPHER: Right, and I think the plaintiff's lawyer who put the witness up says, "Judge, he hasn't reviewed the life care plan. We're not proffering him as an expert on the life care plan. He's not a witness. You know, he's not qualified to talk about the life care plan," and then it ends. I don't think it's more complicated than that.

HONORABLE DAVID EVANS: Maybe not.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I was just going to say that we're presuming that they've deposed all of these experts, and many, many times we're not talking about the billion-dollar case. We're talking about the $10,000-dollar case; and no one has been deposed; and no

one knows what everyone is going to say; and, you know, they did the basic disclosures; and so they said he's going to -- "The doctor is going to testify that the accident caused the injuries"; and then when they get in there on cross-examination they go into pre-existing and other areas that nobody has even discussed; and I don't really know that there's always a valid objection. I mean, sometimes there wasn't any way of knowing what other areas they were going to get into. Doors are opened. There's so many different ways that they get into it that it doesn't seem like -- I guess I just don't know that this is extremely fruitful because, yes, I do, I go and I do a Daubert challenge right there.

I've done it before. We got into another area. We had some great physicist that was talking about this accident, and they're asking for $25 million. I give my jury the rest of the day off, and we come back in the morning because I don't know if it's going to take one hour or three hours, but sometimes you have to do that, and I don't know that that's bad. I mean, we would have had to take the time anyway. It's bad if they're waiting in the jury room, but if they got the rest of their afternoon I don't know that that's bad. I think it ends up about even.

CHAIRMAN BABCOCK: Yep. Well, it sounds to

me like, Richard, if we're going to give you complete peace of mind we're going to have to rewrite the rule, but it sounds like you're in pretty good shape.

MR. MUNZINGER: Well, and my only other comment, if I may --

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: The rule as drafted in 190 -- whatever this is, 195, page 32, expert communication exempt from disclosure. All of my experts' communications are exempt from disclosure except those listed in subparagraphs (1), (2), and (3); and so if my subject -- if my communications with the expert are on subject matters D and E, which aren't disclosed, et cetera, they should be protected from disclosure.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: And that's my operative assumption as I read this rule, and my point in raising it is because the rule itself doesn't address that situation other than in those three, and it raises the problem, because Tom says it's a fraud on the court, and I respect that. I mean, again, reasonable minds can differ, and it's a -- you know, the lawyer walks a tightrope sometimes.

CHAIRMAN BABCOCK: Yeah. Well, Fort Worth is where the west begins. Amarillo is where it continues,

and El Paso is where it ends in this state, so you can figure it out. Let's go talk briefly about -- about sanctions and spoliation, without prejudice to Kent.

MR. MEADOWS: Right. And before we move to that topic, should -- I'm just trying to understand exactly what we should take away from this discussion in terms of our continued work on this topic. So right now I think -- I can be corrected by any member of our discovery subcommittee, but right now I would say we're going to press on with the Federal rule in terms of protected communications and what needs to be disclosed as enumerated in our proposed rule, and we're not going to make any changes to this treatment of what is different between testifying and consulting experts.

CHAIRMAN BABCOCK: That's my sense of the room, but maybe we should take a vote. Kennon has got a comment.

MS. WOOTEN: It's more of a question. I'm not clear from the draft whether there's an intent to reduce the amount and type of information you can get from consulting experts whose opinions and impressions have been reviewed by a testifying expert. Because right now in Rule 192.3(e) there's a list of things you can get from those categories of consulting experts. In the proposed rule on page 32, you're able to get facts known and

opinions held by consulting expert whose mental impressions have been reviewed, but it's unclear to me whether there's an intent to reduce what you can now get from those categories of consulting experts.

MR. MEADOWS: I don't think we're intending to reduce. I mean, we'll look at it and just make sure that those are reconciled, but I think Jane said it pretty well. If you're a consulting expert, everything is protected unless some other expert has worked with you and is relying in part on what --

PROFESSOR ALBRIGHT: Reviewed.

MR. MEADOWS: -- you've reviewed.

MS. WOOTEN: Well, and that makes sense. That makes sense, but in the rule right now in disclosures it specifies what you can get from the testifying expert, and maybe I could be missing something, but it just doesn't lay out as cleanly as what you have in the current rule what you can get from the category of consulting experts whose mental impressions have been reviewed.

PROFESSOR ALBRIGHT: I thought the reviewed consulting it just said you get the same thing you can get from a testifying expert. I didn't know that it was set out --

MR. MEADOWS: Right.

PROFESSOR ALBRIGHT: Where is it set out in

the current rule?

MS. WOOTEN: It is the same. In the current rule it's in 192.3(e).

PROFESSOR ALBRIGHT: So it's the same, right?

MS. WOOTEN: Uh-huh.

PROFESSOR ALBRIGHT: Yeah. So it just says you can get -- those are treated like testifying experts, right?

MS. WOOTEN: So facts known or opinions held.

MR. MEADOWS: Okay.

MS. WOOTEN: You get everything that's listed in (a) for disclosures that refers to testifying experts specifically. Does that make -- you see where I'm coming from?

CHAIRMAN BABCOCK: Let's take a vote since we haven't voted in a while, and it doesn't feel right, and the vote will be -- Bobby, would you put it in the affirmative? Everybody who approves of the subcommittee's moving toward the Federal rule on experts raise their hand.

MR. MEADOWS: Good enough.

CHAIRMAN BABCOCK: That works for you? All right. So everybody that approves of the subcommittee's

effort to approximate the Federal rule regarding expert -- testifying expert disclosure, raise your hands.

Everybody who is opposed, raise your hand. A fairly unclose vote. 27 in favor and 4 against, so I think you've --

MR. MEADOWS: Thank you.

CHAIRMAN BABCOCK: -- got direction, so can we please talk about sanctions? We don't need to sanction somebody.

MR. MEADOWS: And I'm just going to let Alex take the topic.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: Well, I mean, I'm happy to set it up. She's worked long and hard on Rule 215 and has focused most recently on the issues that are being raised around a new spoliation rule.

CHAIRMAN BABCOCK: Okay. And this is without prejudice to Kent?

MR. MEADOWS: Absolutely. In fact, I didn't even circulate Kent's materials because he wanted more time with them. He wanted the discovery subcommittee to spend more time discussing them, and so this discussion is just generally about a reaction to a rule in general and the overall potential scope of it.

CHAIRMAN BABCOCK: Great. All right. Alex,

take it away.

PROFESSOR ALBRIGHT: Okay. So Rule 215 is rewritten with a view towards Federal Rule 37, since our marching orders said to look at Federal rules that were changed. Our current rule is largely based on the Federal rule. There is not much that is different. The Federal rule had a plain language rewrite several years ago, so it tends to be easier to read and pretty well organized. So most of these changes that you'll see in 215 are just looking at the Federal rule, including things in our rule that are different that are not addressed in the current Federal rule, and so there are notes all along, just, you know, where revisions are based on the Federal rule to -- just more language and then where we have moved some of our current rule around.

I think the one thing that we definitely need to change with Rule 215 is we have to deal with disclosures because now we have mandatory disclosures and not just responses to requests. So we definitely need to make that change to Rule 215 if we're making the mandatory disclosure rule effective. Another thing to think about, which I mentioned earlier, is changing the practice that sanctions -- the usual situation is to have sanctions only after an order compelling, other than reimbursement of expenses, and that's the way this rule is written. I do

think -- this is something I looked at yesterday, and I didn't have time to follow through completely, but I believe this rule and the Federal rule if you fail to make disclosures, it mentions the word "sanction," so I need to look at that more carefully, but I think in general it's a reimbursement sanction, then more extreme sanctions after an order to compel.

But I think the big issue that we would like some guidance on is spoliation. So in Texas our duty to preserve evidence was stated in the Texas Supreme Court -- it's a Wal-Mart opinion. I can't remember the full name. Huh?

HONORABLE JANE BLAND: Curtis.

PROFESSOR ALBRIGHT: No.

MR. KELLY: *Brookshire V. Aldridge.*

PROFESSOR ALBRIGHT: No, it's the Wal-Mart case --

MR. LEVY: The reindeer.

PROFESSOR ALBRIGHT: -- with the reindeer. The reindeer case. I just call it the reindeer case. It's Wal-Mart.

MS. WOOTEN: *Wal-Mart Stores V. Johnson*.

PROFESSOR ALBRIGHT: Huh?

MS. WOOTEN: *Wal-Mart Stores V. Johnson*.

HONORABLE STEPHEN YELENOSKY: How many cases

against Wal-Mart can there possibly be?

PROFESSOR ALBRIGHT: So in that case it was an issue of whether the reindeer that fell on the plaintiff's head was a great big, heavy wooden reindeer or a little tiny, paper mache reindeer. The question was whether the plaintiff -- I mean, whether Wal-Mart had a to keep the reindeer, which they had not. The plaintiff had gone home that day and said, "I'm fine" and then sued later on. The Court in that case held that there was no duty to keep the reindeer, but it annunciated the standard as being if it's -- if you reasonably anticipate litigation, which is the same standard for work product, if you're claiming work product privilege then you also need to keep -- keep evidence. So that's our common law duty to preserve evidence.

Then in the *Brookshire Brothers vs. Aldridge* case, the Court talked about sanctions for spoliation and talked about the -- about intentional spoliation and negligent spoliation, and generally the Court talked about the spoliation sanction of an instruction to the jury can only be used for intentional spoliation, but then there is a little sentence that says sometimes it can be used in other egregious situations. So that's -- and so the question is what to deal with in the rule. We have -- our subcommittee has decided -- the majority has decided that

we should not deal with the duty to preserve evidence in this rule; that is, duties are generally more common law issues. The Supreme Court has some language that makes restatement of what was said in that opinion, in the Brookshire Brothers opinion, difficult to restate in a rule, and so we think the -- the majority thinks we should not get into that, and that's the same resolution that the Federal rules committee had.

The new Federal rules do not address the duty to preserve. They say whatever that duty is, you know, that common law duty, that's what it is. Most places it's reasonably anticipate litigation. Then the way they deal with that is they address only the sanctions that are imposed when you have been determined to have spoliated evidence. So under the Federal rule, which we recommend adoption -- and Kent is in favor of this as well. Kent's -- what he will talk about later is he wants to deal with the duty to preserve and how you give notice of your duty to preserve. So but he is in favor of adopting the Federal rule on the sanction itself, the punishment.

So if you look at Rule 215.7 on page 77 and 78, this is generally a restatement of the Federal rule on sanctions. One, we think it's a good rule. Two, we think there is a lot to be said to have a -- the same standard

in Federal courts as in state courts, so the parties can make decisions about preserving evidence with the knowledge that the same standard will be applied in both courts. So generally what this rule does is it says there can only be severe sanctions such as the -- the jury instructions about the presumption that the evidence that was spoliated is unfavorable. Those kind of severe sanctions can only be imposed if there is a finding of intentional spoliation. So negligent or grossly negligent spoliation will not get you an instruction to the jury. This is consistent with not only the Federal rule, but also pretty much with Brookshire Brothers with this little other Pandora's box, as some people have called it, that's in Brookshire Brothers.

Also, no sanctions -- even for negligent or grossly negligent spoliation there can be -- the court can take action, but no sanction can be imposed unless there is a prejudice from the failure to preserve, and the evidence has to actually have been lost. It can't have been recovered, and three, only if the evidence has not -- you have not found other evidence to substitute for this. So that's, you know, the equivalent to prejudice to some degree. So it's that -- so if you look on 77, it has to be the evidence is lost because the party failed to take reasonable steps, and it can't be restored or replaced

through additional discovery, and the trial court denies prejudice. So in order to impose any kind of sanctions there has to be those three findings. If it's not intentional the party may present evidence concerning the laws of evidence, and (b), the court may order other measures no greater than necessary to cure the prejudice, and this is Justice Brown's addition to make it clearer as to what that means. This is new. It's not in the Federal rule, beginning with the "but," "but must not comment on the failure to preserve the evidence or instruct the jury that a duty to preserve the evidence existed or the consequences of the failure to produce the evidence." That's for negligence or gross negligence spoliation.

And then (c) is the intentional spoliation where you can get the presumption and the instruction or possibly even a default judgment or dismissal. These are the severe sanctions.

MR. MEADOWS: So the -- so a number of questions. The -- what we've been talking about primarily in terms of what was borrowed from the Federal Rule 37(e) deals with ESI only.

PROFESSOR ALBRIGHT: Right.

MR. MEADOWS: So that's an initial some sort of threshold question. The question is do we want a broader spoliation rule that would deal with the Wal-Mart

deer. The -- and then the issues that kind of encompass the whole range of a spoliation question start with, one, duty, what's the -- what triggers the duty to preserve evidence? Two, what's the mechanism for the application of, you know, agreements around spoliation? What is the -- what's the scope of the punishment? Do we deal with just intentional behavior, or are there circumstances under which negligent behavior would justify the imposition of -- so we've got duty, kind of the scope of the rule, do we limit it to ESI the way 37(e) does or make it -- give it a broader application. And then for the mechanism, the application of the rule, how it would be applied and, more importantly, the punishment. So those are the things on which that I think we would -- is there any I missed in terms of where we would appreciate thinking and guidance on?

CHAIRMAN BABCOCK: Yeah. Thanks, Alex. Thanks, Bobby. The State Bar Committee on Court Rules has weighed in on this, too, have they not?

MR. MEADOWS: Right. And we considered, carefully considered, their proposal, and it was -- our unanimous view was that it was -- that it was not what -- it was not the rule that we needed. It was too much all encompassing and essentially a rewrite of Brookshire Brothers, and I believe it also dealt with negligent

spoliation in a way that we would not recommend. So we moved on past that proposed rule.

CHAIRMAN BABCOCK: Okay.

PROFESSOR ALBRIGHT: It also had a detailed procedure that was a duplicate of sanction procedure generally that we felt like wasn't -- wasn't necessary.

CHAIRMAN BABCOCK: Right.

PROFESSOR ALBRIGHT: So, I mean, they did a great job of raising the issue and dealing with Brookshire Brothers, but we went a little different direction.

MR. MEADOWS: And we would be -- I mean, we would be very interested in continuing to work with those on that committee who have a continued interest, and I think there's been a change in terms of who was proposing that and maybe your committee can just still focus on this, in which case we would definitely want to partner.

CHAIRMAN BABCOCK: Yeah. And then Kent has got a different or a --

MR. MEADOWS: Right.

CHAIRMAN BABCOCK: And could you articulate for us, even though he's not here, what that is?

MR. MEADOWS: Yes. I will, and again, I invite other members of the committee to make sure I've got it right because I don't -- he feels strongly about this, and he's done a lot of work. He's communicated with

a number of interested parts of the bar --

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: -- and the Legislature, and what he is -- I think it's fair to say that he is most interested in the duty application. That is, he would prefer that we look at something more concrete in terms of the duty to preserve. And not to pin him down on this, but that would either be a lawsuit itself or written notice indicating an obligation to preserve and would not rely upon our understanding of anticipation of litigation.

CHAIRMAN BABCOCK: Okay. Yeah, Robert.

MR. LEVY: This is a topic I have had a lot of involvement in because I was involved for the full process on the Federal rules, and I'm sorry, in 2010, so a couple of comments. On the issue of preservation and the duty to preserve, the reason why the Federal rules did not address that issue is because of the Rules Enabling Act where they felt that they could not impose a rule that would involve issues that happened before the trial court assumes jurisdiction over the case, which would trigger, you know, preservation could under some views trigger before the lawsuit is filed. So that's why they did not touch it.

I don't think that issue impairs the Texas Supreme Court, and therefore, the reason that the Federal

rules don't touch preservation should not be a reason why we wouldn't do it. Now, there might be other reasons not to deal with preservation but don't follow the Federal rules approach on that.

Another issue that you talk about, which is a key issue, is on the question of ESI. Why do the Federal rules only deal with ESI and then for non-ESI you're still left with common law? I think that's a problem, and it's already starting to be a problem in Federal cases where there are spoliation questions involving things like videotapes. Brookshire Brothers was a videotape case, and some judges are saying, well, that's physical. It's on a physical thing, so ESI doesn't apply, but it is ESI. It's electronically stored information that happens beyond a physical media, which all ESI ultimately is on physical media.

So there's a hole now. There's going to be an inconsistency in how to apply the rule, and the reason why they did not go to a full scope rule was the Silvestri case, which is a case involving General Motors and an expert witness for the plaintiff that they destroyed a vehicle or parts of a vehicle and General Motors didn't have a chance to inspect it, and there were sanctions issued, and the court felt that adopting 37(e) for all forms of evidence would overrule the Silvestri case, and

they were uncomfortable in doing that, so that's why they took the middle ground and said just ESI.

Again, I don't think that that issue applies here, but it does kind of touch back to the Wal-Mart case that you referenced. That would be an analogous situation, but I think the rule covers the same ground and gives the same guidance and the guidance that's necessary, but I suggest that going with ESI only will only cause problems for judges trying to figure out what to do, and then what do you do with non-ESI? Do you just go back to Brookshire Brothers and then you're going to have two lines of cases?

Another question in terms of the proposed rule, it's actually a -- I think a problem with another issue or problem gap in the Federal rules, which is the intentional spoliate question. That's the reason why the language in (e)(2) is reference to what would be 215.7(c) under this, that the idea that the Federal rules advisory committee had was we wanted sanction for somebody who tries to destroy evidence but fails. So that's where you get to the fact that under (c) there's no reference to prejudice. I think that also is a mistake. There should be a reference to prejudice under (c). You shouldn't have to deal with the issue unless there's some harm done, but they wanted to have the opportunity to sanction a party

who tries to destroy information, but fails.

The idea of putting a hard drive in a microwave, which actually happened and it doesn't actually destroy the information; but the problem is the rule doesn't kick in at all under that scenario, because there is no loss of information; and so they're not solving that problem; and I think that ultimately you don't want a situation where a judge is trying to punish a party who is -- hasn't caused harm to the other side so that there should be a requirement to show under (c) that there was prejudice before you deal with what are considered to be the death penalty sanctions.

CHAIRMAN BABCOCK: Okay. Thank you. Yeah, Peter.

MR. KELLY: What I find troubling is the requirement that there be specific intent to deprive another party of the information, in that what happened to the gross negligence, the standard of knew but did not care; and historically we've had a detachment of the state of mind required for gross negligence from the state of mind required for just regular negligence in the assessment of punitive damages in the common law, later codified in Chapter 41; but to say that -- to excuse someone from spoliating evidence when they knew they had to preserve it but did not care, even though they did not

have the specific intent to deprive the other party, I think is giving far too much leeway, far too much room for mischief and destruction. Especially if we're talking about something that Kent Sullivan was talking about, that you had to have -- you have to have written notice of a claim. Something happens, everybody knows they're going to get sued; and they don't care and they destroy it anyway, there needs to be some penalty for that; and to limit it to essentially a level of malicious intent essentially renders it no remedy at all; and you'll have very, very few instances of spoliation, even when you do have nefarious conduct.

CHAIRMAN BABCOCK: Okay. I think Alex had her hand up first, Richard, and then you.

PROFESSOR ALBRIGHT: Yeah, I just wanted to respond to that. That's the Sara Shinlin view of this that was the dissenting view on the Federal rules amendments. You know, one thing that we decided was that there was a benefit to having the same standard in Federal and state court to guide action, preservation action. I think there is -- for gross negligence, you don't get these severe sanctions of (c), but there -- you can get sanctions of -- of (a) and (b), so I mean, there is -- you know, it can be called to the jury's attention as to -- that they lost evidence, and you know, I understand that

you and others don't think that's enough.

Another thing that our rule does is require prejudice for all three. We have prejudice above --

MR. LEVY: Oh, I'm sorry. I missed that. I apologize.

PROFESSOR ALBRIGHT: Yeah.

CHAIRMAN BABCOCK: Great. Richard.

MR. ORSINGER: Just briefly, I think it would be helpful to have you articulate the duty to preserve because it's one thing when someone is injured in an event and it's self-evident that the circumstances are significant. Maybe even pictures should be taken, but certainly the reindeer head should be preserved, but when you get over to just the routine destruction of old e-mails or a security video that records over itself every 30 days, which is kind of an industry norm, there shouldn't be -- if there's no event, you shouldn't have a duty to save all of your e-mails for an unknown reason or to save all of your videos for an unknown reason. So to me the duty should be spelled out, and the duty should be different if you're talking about an event that occurred versus just the routine practice of recording all communications or all videos.

Secondly, I'm not really happy about the idea that sanctions can only be imposed for proof of mens

rea intent to hide evidence. I agree that that's what you should show before you dismiss a case, but to allow the jury to receive an instruction that they can make an inference about destroyed evidence or to allow a district judge to refer the -- reverse the burden of proof where evidence was destroyed to me should be available even for negligence and not just --

PROFESSOR ALBRIGHT: It's not in Brookshire Brothers.

MR. ORSINGER: Well, I'm not on the Supreme Court, so I'm not encumbered by that really. So it seems to me that the subject you test going into the mind of the person who deleted or destroyed the information takes us to an area where we don't know what we're going to find. We're almost never going to get an admission of intentional destruction of evidence. It's going to be speculative what their motive was. I kind of think we should just stay out of the subjective analysis of the thinking of some person or some three people and stay with an objective test of reasonableness. That's built into the negligence standard. What would an ordinary person do if someone is bleeding from a reindeer head? An ordinary person would save the reindeer head, and so I prefer allowing the trial court to permit a jury to infer based on negligence or to even reverse the burden of proof based

on negligence.

CHAIRMAN BABCOCK: Peter, last word.

MR. KELLY: I just think there is a value in the global coherence in terms of assessment of state of mind and penalty for state of mind; and if gross negligence is sufficient for the assessment of punitive damages, it should also be sufficient in this context for sanctions for spoliation; and generally I agree with Richard that negligence should be enough for some level of spoliation obstruction, but the Supreme Court has decided otherwise.

CHAIRMAN BABCOCK: All right. Let's take our lunch break and be back at 1:30.

(Recess from 12:30 p.m. to 1:45 p.m.)

CHIEF JUSTICE HECHT: Back on the record. Chip is dealing with a problem, so let's keep going. Turning to something completely new, the evidence rules. Buddy.

MR. LOW: Chip told me really that's why he put this off until noon because he was not going to be here. Okay. Let me first explain to you how we're here and what we're trying to do on the evidence rules. As you will recall, sometime back we redid the style, or Professor Goode and his crew did, without making substantive changes; and they were invited to take a look

when they were going through and if they saw any substantive changes we would take that up later. Justice Hecht appointed a committee, their committee. I call it AREC, Administration of the Rules of Evidence Committee, to take a look, and so I went through and I compared Texas Rules of Evidence to the Federal rules and each one that was different. I wasn't inviting them to adopt them, reject, but look and see as a starting point do we need to make any changes, and so that's where we are.

We are not here to suggest you follow the Federals, because I know there might be some of you here that don't like to follow the Federals. In fact, it used to be a kiss of death. We're here to examine our rules, compare them to the Federals, and see if we need to be different, if we need to be the same, and my committee has worked on this. We first got reports from Professor Goode's committee. They made certain recommendations, and we agreed or where we disagreed there were no strong disagreements, so the recommendations that you will see were approved or not strongly objected to by the evidence committee.

Now, one of the first rules -- and I will take it. You remember we had a proposal to change the rule on foreign law from 30 days to 45 days, and the basis was that Rule 1009 gave 30 days for interpretation of a

foreign document. Was it 30?

PROFESSOR HOFFMAN: 45.

MR. LOW: Yeah, 45, I'm sorry, and so it was proposed that we go to 45. Then the committee, Steve's committee, took it back, and they examined it again and still recommend that. So you will find in your book the rule, if there's a Federal rule like it, and then Steve's committee's recommendation, you'll find that. They recommended changing that and making it 45 days consistent with the other, but they also have a provision "unless otherwise approved by the court." Now, I got a brief from a clerk on the court of criminal appeals, said, well, wait a minute, criminal cases come up pretty quickly, and that might not -- that might not fit in a criminal case. So I talked to a judge, district judge, who tried over 500 criminal cases, said he never had it come up. I talked to some white collar lawyers in Dallas and Houston. They had never seen it. I looked in the books, and I couldn't find a criminal case under that, and then my own imagination told me how would it ever come up as a defense or as a crime, you know, so they're convinced it's not a problem, so I propose that we change that to 45 days, unless otherwise ordered by the court.

CHIEF JUSTICE HECHT: Professor Goode, glad to have you with us.

PROFESSOR GOODE: Thank you, glad to be here.

CHIEF JUSTICE HECHT: Comments on that proposal?

HONORABLE DAVID NEWELL: Well, I guess I -- I guess I would point out that I can think of circumstances where foreign -- the applicability of foreign law might come up, but I agree with you that it would probably be very, very rarely; but, you know, there is certain cases we've had where confessions are taken in a foreign jurisdiction; and, in fact, there was another on a deal with authentication of priors from a foreign jurisdiction as well, so I don't know if this would be a situation where they're having it mentioned, that kind of a thing.

MR. LOW: What do you think? Do you have any objection to our amending that rule, because otherwise ordered by the judge, I mean, wouldn't that take care of it?

HONORABLE DAVID NEWELL: Well, the judge isn't -- it depends, if the judge has like a standing -- standing order for how trials are going to proceed or something like that, but a lot of times they'll just call the docket, and so there would not necessarily be an otherwise order, and so my fear would be -- and I'm not

speaking on behalf of -- because you're right. I think that this is something that is maybe the exception rather than the rule. My fear would be a situation where they get to -- they get to try -- they want to try and introduce some discussion -- the state wants to try and introduce some discussion of foreign law, and they say, "Well, you didn't give us 45 days notice and so this evidence would be excluded," but again, you're right, it's kind of theoretical.

MR. LOW: The reason I felt it was, there wasn't one single criminal case --

HONORABLE DAVID NEWELL: Right.

MR. LOW: -- out of your court that had ever cited that.

HONORABLE DAVID NEWELL: Well, I just got there, so I mean, I can take that.

PROFESSOR HOFFMAN: Give you time.

HONORABLE DAVID NEWELL: Give me some time. I'm sure I can screw that up, but I would just say since I feel like everyone is looking at me to say something, so that's what I would offer.

MR. LOW: Okay.

PROFESSOR HOFFMAN: It might be helpful for everyone, Buddy is referring to -- I guess the best place to look are in the packet on evidence, so the title is in

bold, "Administration of Rules Committee (AREC)." That big packet, and he has handwritten numbers, so starting on page 22 you'll find the current version of little 203.

MR. LOW: See, what I did, I took the pages -- the report, our report was several pages, but I took those pages that pertained to this rule, so they wouldn't be repetitive I just put them all on one page. All right.

PROFESSOR HOFFMAN: And then the proposed rule appears at page 26.

MR. LOW: And those are the changes, the 45 days, and, Steve, do you have any comment about that?

PROFESSOR GOODE: No, I would just add that this is only dealing with judicial notice of foreign law --

MR. LOW: Right.

PROFESSOR GOODE: -- as opposed to Rule 1009, which deals with if you are trying to admit into evidence some document that needs to be translated, that gets covered by Rule 1009.

MR. LOW: That's right, and that one is 45 days always.

HONORABLE DAVID NEWELL: Okay.

PROFESSOR GOODE: And that's 45 days. This is the judge's decision about what foreign law is, and so it's really not a matter of admitting into evidence

something, but it's the procedure that has to be followed for the judge to take judicial notice of foreign law.

HONORABLE DAVID NEWELL: Right. The scenario I was imagining was -- I mean, it's a general conflict of laws issue, but trying to figure out what the law -- if a situation is a confession needs to be admitted, was the confession taken properly under the laws of that country. That's the example I would -- just off the dome; but, I mean, the only other thing I might add, which is not a reason to deviate from the recommendation either, is that my sense is that practitioners know two deadlines. There's 10 and 30, and so now there's a 45, and they may be like, what, 45? But that's about it, but I don't think that's a reason to -- that's just my own anecdotal experience.

MR. LOW: Judge, you want any more discussion on that?

CHIEF JUSTICE HECHT: Well, we'll see. Anybody else got a comment? Yes, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Any thought about the timing in connection with a summary judgment motion?

MR. LOW: If there was a thought, it wasn't by me.

MR. KELLY: Does the summary judgment motion

count as trial? That's exactly what I was thinking. I've had this come up in summary judgment issues but never a trial, but we might want to clarify that they are the same.

CHIEF JUSTICE HECHT: Professor Goode.

PROFESSOR GOODE: I was just going to say that the notice may be given by a pleading, and that certainly includes -- there's actually a little case law that says that includes summary judgment.

HONORABLE TRACY CHRISTOPHER: Well, but my point is you do a motion for summary judgment that's based on foreign law, and they only have 21 days notice -- 21 days to respond to that motion for summary judgment, so they didn't get 45 days notice before the trial of the summary judgment hearing.

PROFESSOR GOODE: Right.

MR. LOW: That's the thing, they didn't put "except for good cause." They say "unless otherwise ordered by the court."

PROFESSOR GOODE: The judge can overrule the time limit.

CHIEF JUSTICE HECHT: What's next?

MR. LOW: All right. What's next? Next is 301 and 302 of the presumptions the Federal court had, and we have no 301 or 302, and 301 and 302 has been condemned

by many of the writers. It's not favored. The Federal courts have used it, and it's very difficult to follow how they used it because what is the difference between a presumption and inference, and if it's presumed then if they don't rebut it then what, and you have got to instruct what it is, and Texas has always followed the rule that if you say a man comes in and he's wet, must be raining. Well, the man said, "No, I walked under a sprinkler." I mean, let the jury weigh it, put it all in, and there are many statutory presumptions, too, aren't there, Steve?

PROFESSOR GOODE: Hundreds.

MR. LOW: Hundreds of statutory presumptions. You put that in a rule and if I'm not mistaken, we've turned that down before, but I think we should turn it down. If we have before we should do it again.

CHAIRMAN BABCOCK: Okay. Sorry I was late, Buddy.

MR. LOW: Well, I heard you left. You thought I'd be through by now.

CHAIRMAN BABCOCK: Yeah, right. I said, "Buddy's got this covered." Anyway --

MR. LOW: Steve, can you comment on that? You have some feelings, too, on that, don't you?

PROFESSOR GOODE: Strong feelings in the sense that I think it's inadvisable to have a rule that covers all presumptions. As you mentioned, we have statutory presumptions. I just had a research student last year go through the statutes, and with a simple Westlaw search she came up with over 300 statutory presumptions, and I'm sure she didn't catch them all. They go from the Agriculture Code all the way to the Water Code, and then there are lots of common law presumptions, and different presumptions have different effects.

Some presumptions shift the burden of persuasion, some shift the burden of persuasion and require clear and convincing evidence to rebut them. Some just shift the burden of production, and it never seemed feasible to us when we were first drafting the rules to have a single rule that governed what effect presumptions should have, and so it's been left in Texas to a case-by-case adjudication ever since the Rules of Evidence were adopted back in 1983, and we saw no reason to change that.

MR. LOW: And you know of no writers that really brag about it in Federal court, do you, in any articles that -- I've not heard of any. All right. The next thing is the expert witnesses, and back in 2000 or maybe longer than that --

MR. GILSTRAP: What number, Buddy?

MR. LOW: Oh, I'm sorry. 701, 2, 3, 4, and 5.

MR. GILSTRAP: Thank you.

MR. LOW: I'm sorry. We had a presentation from Steve's committee back then that -- that we draw a 702 that would be similar to what we have now, and we drew one or Steve's committee drew one. My committee made a couple of changes and went back, and we kind of agreed on one and submitted it to the Court, and it was passed, but it was not passed by the Supreme Court, because I understand the rule was being applied pretty uniformly, and the rule was just so long as you aid the jury. And you take that to its literal extent, you go to my county and anybody can aid the jury, so but that's not the way the cases construe that, and even at that time we were asked to draft a procedural rule because people were making the Daubert attack during trial. The jury was delayed and so forth, and then I talked to Judge Phillips, and there was -- the judges were handling it, and it was just left alone.

Now, the feds have passed a rule -- which 702, I'll go to 702 first. They've passed a rule which is very similar to what Justice Brown wrote back in 2000, and I'm going to let him take the lead. He can start with

701, 2, or whatever, however you'd like to do it.

HONORABLE HARVEY BROWN: All right. So if you want to see the proposal it's on page 15 of the packet, proposed amendments, redlined version. The memo from the -- Steven Goode's committee is page nine. That has a side-by-side comparison of the text. So of the five rules in the 700 series the committee suggested to us changes to four of them. We have agreed to all of those. I'll say they're fairly minor. You might even call them stylistic. I wouldn't quite call them stylistic, but I would say that they would not change any substantive law in civil cases in any way, in my view. I don't think they would change the law in criminal cases, but there is some room for discussion about that that we'll talk about as we go through each rule, but the bottom line is because of these issues with the Criminal Court of Appeals and their initial thoughts that there may be some potential conflict, that while I think these are good changes, they're not changes that are necessary, and they are changes that if we were to reject them I don't think they would really change much in the way expert practice is done and motions are made today.

So with that intro, let me turn you to page -- I mean to Rule 701, and in 701 the Federal rules have a subpart (c) that makes it clear that when somebody

testifies as a lay witness and gives an opinion that is based on their perception, they are testifying not as an expert. In other words, it's to make it clear that an expert witness and a lay witness are different. Now, I really misstated that a little bit, but it's the way it's generally discussed. To be a little more precise, there is not a lay witness and expert witness. There is lay testimony and expert testimony. So this rule is making it clear that when somebody gets on the stand they -- you need to look at whether they're giving lay testimony or whether they're giving expert testimony.

So, for example, if a doctor in a medical malpractice case is sued and they are asked lots of opinion testimony, that would fall under Rule 702, but if they're asked -- I mean, the factual testimony about what they said or did, that would fall under Rule 701. That's what (c) is designed to do, is just to make that clear that we're not talking about witnesses. We're talking about testimony, and each is under a separate rubric. So this happens a lot in trial. Police officers is a good example. Doctors, professionals, architects, et cetera, so we think this is not a change in the law. I feel very strongly about that.

I will say that Holly Taylor for the Court of Criminal Appeals was here today, was asked by the Court

of Criminal Appeals to look at it, and she expressed some concern about that. She thought it might create some confusion for witnesses like police officers that because they're giving testimony that's both lay and expert in some cases that this might cause some confusion. I think that sometimes practitioners are confused about this, but I think, frankly, the rule helps clarify the confusion that we're looking at the testimony and not the label of the witness, so I think those are -- she's recognizing that the bar needs a little bit of education there, and I think she's right about it, but I think the rule actually clarifies this potential confusion in the bar. So our committee recommended it. There is comment that was recommended by Professor Goode's committee, and that also I think helps make it clear. It expressly states this is not intended to change substantive law. So that's kind of our presentation on 701.

CHAIRMAN BABCOCK: Okay. Comments about 701, or does Professor Goode want to say something?

MR. LOW: Let me say, Steve, you found no problem in the cases that would hold that you can't be both an expert and a lay witness, right? Didn't you?

PROFESSOR GOODE: In terms of it changing the law, I don't think it changes the law at all. Just to be clear, the payoff on this, the reason why this is

important, is because of disclosure requirements. And so what happens is a witness is called and the party hasn't disclosed them as an expert beforehand, and so even though they're testifying as an expert, they're coming in and saying, "Oh, no, this is just a lay witness and they're only giving lay opinion, so they were offered under 701, therefore, the fact that we didn't disclose them shouldn't be held against us," and the Federal rules enacted 701(c) so that parties would not be able to present expert opinion in lay opinion guise. So that's what this is all about.

You have lots and lots of instances of, for example, police officers testifying in Federal court under this rule where the court says some of the stuff they're testifying about would be -- should be considered expert testimony, because, for example, the expert is not testifying about the particulars of the case they investigated, but they are testifying in general about how crimes -- how crimes of this sort are ordinarily done by other people in other instances. "This is how this kind of crime is arranged." That's expert testimony, and if you're going to testify as an expert, you've got to be designated as an expert, but if that same expert is testifying, "I was in on the investigation, and here is what we uncovered" and starts to give testimony about that

person's role in the case, that's lay witness testimony. And so the courts are just trying to make this distinction between whether somebody is giving expert testimony and they should have been designated for purposes of that expert testimony, or are they giving lay witness testimony, and to prevent parties from not living up to the designation the disclosure requirement and then subverting it by saying, "This is just lay witness testimony."

CHAIRMAN BABCOCK: So, Professor Goode, you've got an expert -- or you've got a fact witness, a lay witness, Officer Schmoe, and you -- in a civil case you would have to disclose him if somebody with knowledge -- with relevant information.

PROFESSOR GOODE: Right.

CHAIRMAN BABCOCK: But you're saying that you would also have to disclose him as an expert if, even though a lay witness with factual testimony, you're going to ask expert type questions of him.

PROFESSOR GOODE: If some of the testimony he's going to give would be expert testimony, he's got to be disclosed as an expert for purposes of that, and the opinions he's going to give have to be disclosed just as any other expert.

CHAIRMAN BABCOCK: Mister -- you don't know

this, but Mr. Munzinger's expert is Officer Schmoe.

MR. MUNZINGER: Officer Schmoe owns property.

CHAIRMAN BABCOCK: He was a doctor this morning.

MR. MUNZINGER: So is Dr. Schmoe. They are brothers. In any event, as I understand the common law and Texas law, a property owner is permitted to give opinion testimony regarding property's value so long as it is based upon his perception. Does such a person fall within the disclosure rules, and how do these rules affect that person?

PROFESSOR GOODE: These rules don't affect the property owner rule at all. Again, this, putting (c) into this rule doesn't change anything in Texas. We already have the rule that if someone is going to present expert testimony they've got to be disclosed as an expert. This is just saying it in another place.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR GOODE: So I view, personally, this as inconsequential as, by the way, I think most of the changes in the expert rules that we're proposing are. If you read the committee's memorandum, you'll see the committee is endorsing these changes rather tepidly; that is, we're saying we were asked to look at the differences

between the Federal and the Texas rules. We don't think with regard to most of the recommendations that there's any difference substantively. Stylistically we think it's probably a little bit better to change them, but we're not changing any law in Texas, and just on balance, if given the choice between conforming the rules and stylistically to one another and not, we prefer conforming them stylistically, but this is not designed to affect any substantive change in law in Texas.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: It's confusing to me. I mean, if you've got a treating doctor who is obviously a fact witness and expert witness, what can they not say? The rule says they can testify, they're not designated as an expert so they're called because they actually treated the personal injury plaintiff. What is it that they're prohibited from testifying about?

PROFESSOR GOODE: Again, this rule doesn't answer that question. This is a consistent problem and a problem already in Texas cases, and its's a problem still in the Federal cases when you have a witness who is sort of on the borderline of whether they're using expertise or not. So you can read the Federal cases, and they are going off and trying to split hairs and say when this police officer is testifying as an expert and when they're

not testifying as an expert. It's the same thing we have in Texas when the property owner testifies and when we allow the property owner to give an opinion about the value of the property and when they're not allowed to give the value or when a police officer comes. We have those cases in Texas already, regardless of the fact that we don't have this provision (c) in there.

MR. JEFFERSON: But adding --

PROFESSOR GOODE: It's the disclosure rules that create the problem as opposed to this provision (c).

MR. JEFFERSON: Adding (c), though, you've got a doctor nobody has designated. Everybody knows they're a treating doctor, or make it an accountant or somebody -- you know, how does this help the litigators know what the witness is restricted from saying? I mean, if they're testifying to something within a profession, licensed profession, pick your profession, there's probably going to be something they're going to testify to that's going to have, you know, both a factual component and an expert component that's based on this standard, but we don't know what it is they -- this says there's something they cannot say because they are not designated as an expert, so they're restricted from talking about -- testifying to things based on scientific, technical, or other specialized knowledge, but how does adding -- what

does that -- I just don't see how that directs or guides the court in what this witness is allowed to say, not -- or to not say, what they're restricted from saying.

PROFESSOR GOODE: I think you're absolutely right. It doesn't. All this is is a reminder that we have this distinction we draw between lay opinion and expert opinion, and you're absolutely right. There are gray areas. I have students writing papers on this all the time. This rule doesn't help answer the question, but it also doesn't create the problem. The problem is created by the fact that we have rules that say if someone is going to give an expert opinion, they have to be designated as an expert and have to make certain disclosures; and if they don't, the other party is entitled to object to their testimony; and in many cases that testimony is thrown out.

The feds put 701(c) in there just as a reminder we're not going to allow someone to come in after not complying with the disclosure requirement and say, "Oh, we're not offering them as an expert. We've offering them as a lay witness giving lay opinion," and it's just saying, "No, if somebody is basing testimony on expertise that's covered by Rule 702, then they have to be judged according to Rule 702."

MR. JEFFERSON: Well, why not just say they

have to be designated? So anybody who has got specialized knowledge who you expect to elicit opinion testimony has to be designated and leave the rule alone, because, I mean, if the idea is just to account for the fact that people are getting away with offering expert testimony when they haven't been designated, you know, make them say they can't -- they must be designated to offer such opinions; but I mean, as they are testifying from the stand, I would be lost to try to figure out what it is I could object to that they can't say on the stand, based on the language that's added to the rule here.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I have long supported this change, even though I generally don't like the way the feds do anything, but I think there is confusion. These are written in the context of there is a lay witness and there is an expert witness, and they are two completely kinds of witnesses, and that's not true. It's true that a lay witness can't give expert opinion, but an expert witness can give lots of factual testimony and lots of lay opinions in addition to expert opinions, and when I have written and talked on this before I use a typical example of family law cases of a psychologist who is doing a home visit.

The psychologist can describe what the house

looks like or the yard. The psychologist can describe the behavior of the child that either acts -- you know, sits on the lap of the parent or is afraid to sit on the lap of the parent. Those are all observations of fact, or they might even just say there was a loving relationship or it seemed to be the child was not afraid of the father. That's probably a lay opinion, but when they start saying that "I believe that this indicates something" and get off into psychology, then you're off into the expert witness world, and it's not only an issue on disclosure. It's also an issue if you have a Daubert/Robinson challenge; and some or all of the expert's testimony on expert opinion is excluded, that doesn't mean that they can't testify to what they saw, and that doesn't mean they can't testify to lay opinion; and so I think that it's confusing to pretend like we have a lay witness and expert witness and expert witnesses are not also lay witnesses. So I would go even further by saying, let's -- let's rename this, and I know we won't, but it could be called "Non-expert Opinion Evidence and Expert Opinion Evidence."

PROFESSOR GOODE: Over the --

MR. ORSINGER: And, by the way, I want to say "evidence" rather than "testimony" because this applies to written records, like medical records. There are going to be some medical records that have eyewitness

testimony. Some may contain -- eyewitness information. Some may be lay opinions reflected in the medical records, and some may be medical opinions reflected, so it's not just testimony. It's evidence. So "Non-expert opinion evidence is limited to," and then you come down here to the traditional standards of (a) and (b), and (c) makes it clear that even though they are testifying to opinions they can't go off into a realm of specialized knowledge because if they do that, now they're outside of lay opinion and now they're into expert opinion. And then on Rule 702 I would call it "Expert Opinion Evidence" and make it clear, and I agree. I think it's very unclear, and it would be very helpful, and I don't think it will change the practice other than to maybe make a little more sense.

CHAIRMAN BABCOCK: Judge Newell.

HONORABLE DAVID NEWELL: Yeah, I think that is actually a very clever idea to rename it to say "lay opinion testimony" because you're right, and I agree with much of what has been said. The confusion is not -- is the designation of someone as a type of witness and failing to disclose them is what excludes their testimony; and so, I mean, having been there, what my experience has been, that I will put a police officer or somebody on the stand; and basically any time I would start to get into

something the argument would come up that it is, in fact, expert testimony, and then I will have to qualify this, when he's only giving lay testimony. But be that as it may, I appreciate the argument that this is something that is already codified or this already exists. My fear might be from a stylistic standpoint that if this already exists and that (c) wasn't there, putting (c) there might suggest a greater divide than had previously been there, when it -- when there wasn't really a divide. It was about -- it was about the types of testimony that lay witnesses can give lay opinion, but they could also give expert opinion if they are qualified. So I guess that would be -- it's sort of dovetailing on what Mr. Jefferson said here, is if it's not helping and it's really only reflecting something like what exists, the fact that we're adding it may signal a divide that we don't mean to signal.

CHAIRMAN BABCOCK: Okay. Any other comments? Okay. Justice Brown, you want to go on to --

HONORABLE HARVEY BROWN: All right. Going on to Rule 702, newly named "Opinion evidence." The additions here are to make explicit what the Texas Supreme Court has already done in its opinions and is in the Federal rule, and that is to have these three subparts (b), (c), and (d), that are the three reliability tests used by the Texas Supreme Court and used by Federal

courts. This language has been applied in many, many cases, and this will not be a change in the law at all for civil cases.

For criminal case it's certainly a little bit different wording than what the Court of Criminal Appeals has done. Subpart (c) and (d) are pretty similar to language, but slightly different, used by the Court of Criminal Appeals in its Kelly case which sets forth its reliability test for scientific evidence and the Nenno opinion that sets forth a three-part test for reliability for experienced-based and nontechnical evidence. In Nenno, the third part of it says "whether the expert testimony properly relies upon and/or utilizes the principles involved in the field." So you can see that has some similarity to the language in (c) and (d). In Kelly the Court said for the more technical type of scientific evidence, "The technique applying the theory must be valid. The scientific theory must be valid, and the technique must have been properly applied on the occasion in question." So that's also pretty similar to (c) and (d).

(b) is new for the criminal cases in a sense that it's not mentioned explicitly in the Court of Criminal Appeals opinions on expert testimony; but it seems to be the part that is usually the least

controversial discussion, at least in civil cases; and from my reading of the criminal cases, which I am certainly no expert on, it seems to not be the area of most controversy. It seems like the second and third parts of Kelly and the last part of Nenno, which are in this rule, are the ones that are usually spent more time on in criminal cases.

So, again, I don't think this is something that's absolutely necessary. I do think it helps practitioners to kind of see the threefold test. The Court of Criminal Appeals uses the threefold test. Texas Supreme Court uses threefold Texas. Slightly different language, but I think you end up in the same place.

CHAIRMAN BABCOCK: Any comments on this rule?

MR. LOW: Yeah, and this is supposed to really codify what interpretation of the Court has been given. It doesn't change any caselaw, but it's to put in our rule the way the courts have interpreted this rule.

CHAIRMAN BABCOCK: Professor Goode, any --

PROFESSOR GOODE: I would just add one other point, and that goes to the (b) requirement. That is actually consistent with what is now Rule 705(c).

HONORABLE HARVEY BROWN: Yes, right.

PROFESSOR GOODE: Which talks about the need

to have sufficient facts or data.

HONORABLE HARVEY BROWN: Yeah.

PROFESSOR GOODE: In fact, the proposal from AREC was if 702 were amended would repeal Rule 705(c) as being then superfluous.

HONORABLE HARVEY BROWN: Yeah, that's a good point.

CHAIRMAN BABCOCK: Any other comments? Richard.

MR. ORSINGER: Yes, following up on Professor Goode, I am wondering if 705(c) is the same as 702(b), and when both of these amendments came down the pike I remember at the time thinking that we put part of Federal Rule 702 in 705 for reasons that I don't remember, and we left part of it up in 702. But is it the same thing to say in 702 the "testimony is based on sufficient facts and data" as it is in 705 to say that "the underlying facts or data do not provide a sufficient basis for the opinion"? Are they the same, or does one have to do with the quality of data and the other is the inferences from the data? Are they different, or are they the same?

PROFESSOR GOODE: Let me just say the reason why this is in 705 in our rules is because we beat the feds to this, because our Rule 705 covered this before the

feds ever had Rule 702(b), (c), and (d). In addition, our Rule 705 also covers the issue about the disclosure of the underlying facts or data, and we did that before the feds amended their Rule 703 to address that issue. So we were the cutting edge on that.

MR. ORSINGER: Well, is there a distinction between "the underlying facts or data providing sufficient basis" and that "the testimony is based on sufficient facts or data"? Are they the same?

PROFESSOR GOODE: Yes. I think they're the same, and I think that is quite basic to any Daubert type decision now, that there has to be sufficient facts or data underlying the opinion and that those sufficient facts or data are then taken by the expert, applied to the reliable facts or principle in a reliable manner to come to the conclusion.

MR. ORSINGER: Okay. An argument in favor of leaving 705(c) is that we in Texas have set up Rule 705 to be the data-oriented rule. This is the data of the expert. 702 is our Daubert/Robinson test, and if we take this data component away from our data rule and stick it over in the Daubert/Robinson test, then we've taken one crucial part of the data rule and put it in a rule that doesn't directly relate to data, and is that -- is that good, or should we leave it in both places, or do you

disagree that it's even important?

PROFESSOR GOODE: Let's see. I think it's unimportant.

MR. ORSINGER: Okay.

PROFESSOR GOODE: I think the reason why the feds put this in there is because that has become part and parcel of the Daubert analysis, and so when they were sort of trying to summarize at the most general of levels the principles that are the core of Daubert and the cases in Federal courts that extend Daubert to nonscientific evidence, these are the three basic statements of principle. Again, to my mind these are at a very high level of generalization and, to be honest, are not terribly helpful. I think we could easily exist without them. We've been doing it. I don't think if we put these in our rules it will shake the foundations of Texas practice.

Again, you'll see our recommendation was sort of, well, on the whole we think it's probably better, but if you read our report you'll see this is not an enthusiastically we really need to do this recommendation. It's an improvement, but we're not saying it's a vast improvement.

CHAIRMAN BABCOCK: Okay.

HONORABLE HARVEY BROWN: And I have one

slight tweak, and that is I agree with all of that, but I would say that for lawyers who do a lot of expert practice this isn't anything new, but for lawyers who they haven't done a lot of it I think setting it out in a three-part test like this rather than kind of having to put together some case law is helpful, because 702 as it's currently written is one long sentence that doesn't talk about reliability at all, so I think for the practitioner who doesn't do this regularly this is somewhat helpful.

CHAIRMAN BABCOCK: Judge Newell.

HONORABLE DAVID NEWELL: The only -- I see exactly what the arguments are. To say, particularly with regard to 702, that this test is not really doing anything new, it's really touching on the same stuff, and I do get that, but my -- I guess I come back to a similar point about the stylistic thing. By rewording it in different ways I think that encourages people -- I think it will encourage criminal practitioners to see this as a change or maybe a move away from the Nenno test, which is considerably broader worded and maybe unhelpful in that regard. So but it covers our soft sciences. This might see a shift towards attributing more of a hard science approach to some of our soft sciences, which we have a lot of. So that would be my concern, but I do understand, and I appreciate the argument. I think that there is some

valid -- it's valid to say that this is really not intended to be a substantive change. I fear that if you get too far away from the words that are already being used in criminal law it looks like a substantive change, and that might cause confusion in litigation.

CHAIRMAN BABCOCK: Okay. All right. Any other comments? Justice Boyce.

HONORABLE BILL BOYCE: I was focusing on the last sentence of the comment, which is the disclaimer that this is not intended to effect any substantive change of Texas law, should not change the way courts rule on the admissibility of expert opinion testimony, and one thought occurs to me that the line between when you're fighting about expert testimony in terms of admissibility and when you're fighting about it in terms of sufficiency --

HONORABLE DAVID NEWELL: Sufficiency.

HONORABLE BILL BOYCE: -- is sometimes not a bright line, and so I look at (b), (c), and (d), and maybe some of those look more like admissibility criteria, maybe some look like sufficiency criteria, maybe it depends on the circumstances in the case. So the observation is would it be helpful to reference in the disclaimer that it is not intended to effect a change in the way that courts rule on the admissibility or sufficiency of experts?

PROFESSOR GOODE: May I reply to that? The

rules of evidence don't deal with issues of sufficiency of evidence. They deal with the admissibility of evidence. The rules of evidence don't say what evidence is sufficient. All they say is whether it comes in or not, so I think it -- I don't think it would be appropriate to say we're talking about sufficiency of the evidence. All we're talking about is when expert testimony is admissible.

CHAIRMAN BABCOCK: Right. Right. Any other comments? All right. Moving to 703, Justice Brown?

HONORABLE HARVEY BROWN: All right. 703, if you'll turn the page, you'll see there's only a suggestion to remove one word, which is not in the Federal rule; and that is the word "reviewed"; and the committee, Professor Goode's committee, included that that word was unnecessary, essentially repetitive of the phrase immediately before it that "the expert has been made aware of," been made aware of something that you have been -- if you've reviewed it, so "been made aware of" is broad enough that the "reviewed" was unnecessary, so why don't we make the rule the same as the Federal rule? They added another comment again to say this is not a substantive change and the Court of Criminal Appeals has -- at least Holly, doing research for the court, had no problem with that.

HONORABLE DAVID NEWELL: I think we should keep "reviewed" because it holds the entire rules of evidence together. No, I don't have any problem with that. Yeah.

CHAIRMAN BABCOCK: Note the levity of --

HONORABLE DAVID NEWELL: I haven't reviewed this, though. That's not true.

CHAIRMAN BABCOCK: All right. Any comments? Any additional comments on 703? All right. Justice Brown, 704.

HONORABLE HARVEY BROWN: All right. And 704, there's no change, so going to 705, Professor Goode's committee was asked to look at whether subpart (b) should be changed in light of the provisions of the Michael Morton Act. They recommended not making any change. They noted that the Court of Criminal Appeals Rules Advisory Committee had studied the issue, and they had recommended no change in light of the Michael Morton Act. We agreed, and so there was no controversy in either Professor Goode's committee or our committee about whether that needed to be changed, so we left it.

CHAIRMAN BABCOCK: Okay. Any comments? Buddy.

MR. LOW: No. That's it really.

CHAIRMAN BABCOCK: Anybody else? All right.

HONORABLE HARVEY BROWN: And we've already talked about 705(c), the taking 705(c) out has been suggested by Professor Goode's committee and by our committee is dependent on adding in 702(b), which we view as the same requirement; that is, that the expert's opinion must be based on sufficient facts or data. So leave it in if you don't make the changes in 702, but if you do make the changes in 702 we thought it was unnecessary.

CHAIRMAN BABCOCK: Okay. Any comment on that? All right. Justice Brown, do you have anything more?

HONORABLE HARVEY BROWN: That's all the 700 series.

CHAIRMAN BABCOCK: Great. Buddy, what do we do next?

MR. LOW: Lonny will lead us in 403, I believe.

PROFESSOR HOFFMAN: 408. Unless you want to talk about 403.

MR. LOW: We can talk about 403, wasting time.

PROFESSOR HOFFMAN: Do we need to --

HONORABLE DAVID NEWELL: How meta. That would be so meta. Let's waste time talking about wasting

time.

MR. LOW: If we're going to talk about wasting time, we need to talk about it.

HONORABLE DAVID NEWELL: At length.

MR. LOW: Basically in 403 the feds have in there "wasting time," and we think it's not necessary, it's covered with this language, and we would be right and the feds would be wrong. That's what we would propose.

PROFESSOR HOFFMAN: So there is no recommended changes on 403.

MR. LOW: No.

CHAIRMAN BABCOCK: All right. So --

PROFESSOR HOFFMAN: Shall we go to 408?

CHAIRMAN BABCOCK: Are we talking about 403 or --

MR. LOW: 403. We looked at it. The feds have added a word "wasting time." We don't have that. We don't waste time putting "wasting time." We think we ought to leave it like it is.

CHAIRMAN BABCOCK: Okay. The feds say wasting time should be a ground, an additional ground for excluding relevant evidence.

MR. LOW: We have "delay." If that's not wasting time, well, then --

CHAIRMAN BABCOCK: All right. Anybody want

to argue the differences between "delay" and "wasting time"? Or would that be a waste of time? Richard.

MR. ORSINGER: They may not waste a lot of time in Federal court, but I waste a lot of time in state court, so I don't think it would change the practice any, because when the judges get sick of it they shut it down no matter what this rule says, but I think we do waste a lot of time. That's all I'm going to say. I mean, I'm willing to defend the concept, but I'm not saying it will change the practice.

CHAIRMAN BABCOCK: So are you in favor of having the words in there?

MR. ORSINGER: I'm okay with it. I think that a lot of time is wasted, but I think the judge kind of knows when he or she is sick of it, and that's when it stops.

CHAIRMAN BABCOCK: Anybody else have any comments? Okay.

MR. LOW: Lonny has 408 and four prongs to 408.

PROFESSOR HOFFMAN: All right. So for this discussion you take your big packet, you go to the back of it, the quickest way to get there. Turn it back to the end and go back two pages. You will see a page that begins with 408 at the top, and it has Buddy's handwritten

number five in the right-hand corner. There are four issues we are going to talk about. There are three recommended changes, one recommended no change. So I know it's getting late so we're going to try to make this short and interesting, but it is important to begin the same -- just to repeat, the same thing that Buddy has said and that Professor Goode has said, which is that this was begun as an effort to ask should the state and the Federal rules be harmonized. That was a question that Buddy asked the State Bar Evidence Committee. Having been given that task, they took a look. They, I think it's probably fair to say, again, kind of come back with tepid endorsements of making three changes here, but none for which they feel strongly. So that's -- again, Professor Goode can elaborate on that, but I think that's a fair characterization as it was for some of the others before.

So the first one to look at is on the very first line, the additions of the words "on behalf of any party." So the idea is that everyone agrees that 408 excludes offers of compromise when they are being offered against the party who made the settlement. The question is whether there should be a similar concern when a party wants to introduce evidence of the settlement not -- in their favor in some matter. And the folks on the Federal side decided that they should not be able to, there should

be a blanket rule that says you can't introduce it for any reason, and so they added the words "on behalf of any party."

Now, a little more background here. It's a policy choice that they made, but it is in some ways a strange policy choice because the policy that we have about worrying about deterring people from entering into settlements, if there's a danger that that settlement will be used against you, clearly doesn't apply when you're using that settlement offensively; and so there is certainly an argument to be made on the policy side that it ought to be allowed in and not excluded by 408. Moreover, there is an analogy to subsequent remedial measures in 407 where the way the case law has developed is that there are certainly a number of cases that have justified allowing in subsequent remedial measures when someone has offered it favorably, and it's been allowed in. Again, on the theory that they aren't going to be deterred from doing a subsequent measure by that, but that isn't how the case law has gone with 408. Okay. So right now it's generally not allowed in. There are really, I think, maybe no cases, or if there are they are so few that you can count them quite quickly, and that nevertheless the Federal rule makers decided that it was a good idea to both put language in that says that, and

again they're making the policy choice that even though there is not a similar policy concern, they err on the side of excluding it entirely.

Now, I can say a bit about why they did that from looking at the advisory note. There's essentially sort of two reasons. One, there was some general concern about one party being able to unilaterally waive the disclosure since there were at least two prior parties to the settlement, and then there was a second kind of practical concern about lawyers having to testify and that could lead to disqualification. And so I think, at least based on the advisory committee notes, those were the primary reasons prompted.

Okay. So fast forward to where we are in Texas is the State Bar committee is recommending that we go ahead and make the change and be consistent with the Federal rule, and our committee I guess tepidly endorsed that tepid recommendation.

CHAIRMAN BABCOCK: Tepidly, eh.

PROFESSOR HOFFMAN: Tepidly. Okay. So that's one attempt at describing where we are.

CHAIRMAN BABCOCK: Okay. Comments?

They say the blood sugar level goes down in the afternoon.

PROFESSOR HOFFMAN: Yeah.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: No. Nothing.

HONORABLE TOM GRAY: I'm trying to figure out what impact this has on a plea bargain that's rejected and you wind up in a trial, and I'm just -- you know, as the blood sugar went down I guess I'm below the level where it's affecting my cognitive ability, but --

PROFESSOR GOODE: This rule deals with offers to settle civil cases.

HONORABLE TOM GRAY: Only.

PROFESSOR GOODE: Rule 410 deals with the plea bargains.

PROFESSOR HOFFMAN: And I'll just add one other thing, is there was a proposed change. You will see it in (2), (a)(2), the bracketed language that begins with "except when" in (2) that is not being recommended, but there is some overlap involving criminal law that is not being recommended here. So, therefore, 410 would be the only place that you would look.

HONORABLE TOM GRAY: Just because I'm real dense at this time of day, can you tell me where it limits it to civil cases?

PROFESSOR GOODE: Rule 410 is the rule governing plea bargains, so you have a separate rule that deals with the plea bargain process.

PROFESSOR HOFFMAN: Tracy, did you have --

HONORABLE TRACY CHRISTOPHER: I did. I had a question about "on behalf of any party." I did actually have a case where it was a personal injury lawsuit, and the defendant was on the stand, and the plaintiff was out of work, and the defendant says, "Well, we'll hire him back," and so is that an offer of settlement? Would that -- you know, and no one really objected, so any error was waived, but it didn't really fit into a classic category there, and, in fact, it was funny. I mean, they like took a break to talk about hiring the guy back in the middle of the trial and then they came back and told the jury, "Oh, well, it didn't work out." But nobody objected to it, so, you know, I didn't have to get into did it actually violate this rule, but, you know, would something like that have violated this rule?

PROFESSOR GOODE: Something qualifies as an offer to settle a case only if there's a quid pro quo. If someone says, "We'll hire them back" without any sort of terms as to what that involves then it's not an offer to settle.

HONORABLE TRACY CHRISTOPHER: But it would limit the man's claim for future lost wages if the defendant hired him back, so, you know, if it had been completed his future lost wages would have ended on, you

know -- and they would have told the jury that, so, I mean, to me it felt like a settlement, but if the defendant wanted to offer that, now you're saying that they couldn't under this change.

PROFESSOR GOODE: Well, again, I'm not sure that's covered by this rule at all because I'm not sure that that's a settlement offer. A unilateral statement of what we are going to do is not an offer to settle a case or to compromise the case and so --

HONORABLE TRACY CHRISTOPHER: Well, I mean, we normally keep out things like "I paid their medical bills." I mean, we keep that out under Rule 408, regardless of whether there was any quid pro quo on that. I mean, everybody just keeps that out of evidence, that the defendant paid the medical bills.

PROFESSOR HOFFMAN: I don't think that's a 408 issue.

PROFESSOR GOODE: That's not a 408 issue.

HONORABLE TRACY CHRISTOPHER: Practitioners think it's a 408 issue.

CHAIRMAN BABCOCK: Peter, did you have your hand up?

MR. KELLY: I just had a question as to why does it say "on behalf of any party"? That seems almost surplusage.

PROFESSOR HOFFMAN: So the idea was -- the idea was it would -- the Federal idea was to try to find some language to make it clear that it didn't matter whether it was being offered for -- against you or against a party or on a party's behalf, and so the language that they came up with was that language, and it sort of is -- the idea is it kind of covers the waterfront.

MR. KELLY: Doesn't "evidence of the following is not admissible" cover the waterfront?

PROFESSOR HOFFMAN: It does, and to underline, there is not a problem in Texas law right now. The cases are all consistently not allowing in evidence of offers to settle even when offered by the party that settled it wants it in, so this is not currently a problem. There is, however, a difference in the language between the Federal and the state rule because of the Federal rule makers choice to be more explicit and to take a policy position on this.

PROFESSOR GOODE: If I may, here's the basis of the problem. Rule 407, which deals with subsequent remedial measures, and Rule 408 are both written with parallel construction in the passive voice and both exclude a certain kind of evidence if offered for a certain purpose. Rule 407, which says, "evidence of a subsequent remedial measure is not admissible" has

nevertheless been interpreted to allow, for example, the fact that a third party made a subsequent remedial measure, to be admitted to show that there was, in fact, a dangerous condition. The idea being the policy that underlies Rule 407, we don't want to deter parties from taking safety measures, is not offended if some third party's subsequent remedial measure is offered into evidence against somebody else. They're not going to be deterred from taking a safety measure by the threat it's going to be used against, say, the manufacturer, if it's a third party construction company that made the subsequent change.

The same argument can be made with regard to Rule 408; that is, so long as it's not offending the policy. For example, the fact that a third party settled the suit with one of the parties to this case could be offered by the third party -- the party to this case as evidence. The third party is the one who is liable, not me, and this rule says you can't do that. That is, it's excluding that sort of extra textual argument that it prevailed in Federal court and in Texas court under Rule 407 from being made under Rule 408.

MR. KELLY: It's either blood sugar or a tepidness issue, I'm trying to figure out. What we're seeing now is insurance companies going behind the

plaintiff's back and purchasing, say, hospital liens that they would otherwise be introducing as evidence to establish their damages, and so it's not necessarily on behalf of the defendant that they're doing that. They're kind of doing that to -- on their own behalf, but does evidence of this purchase of the lien come in? I haven't quite figured out how it works with this phrase, "on behalf of any party," but that's my concern, is you have these almost tortious interferences with a contract to try to reduce the amount of damages that the insurance company would ultimately be liable for.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: I think Rule 409 addresses specifically paying the medical expenses, but on Rule 408, maybe I'm missing something here, but a compromise settlement agreement, that is, a release, may be an affirmative defense to a claim. There can be disputes as to whether something was released, and if we say that it "can't be admitted on behalf of any party to prove or disprove the validity of a disputed claim by furnishing, promising, offering, or accepting a valuable consideration," do we run into a problem then of proving that affirmative defense of release?

CHAIRMAN BABCOCK: Anybody have a thought on that question?

PROFESSOR HOFFMAN: Just that if it is a problem -- I mean, I don't think that is -- I don't think 408 excludes it, but if it does, it's a problem under the existing law. I mean, that language isn't being touched.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: Well, I don't think it's an absolute prohibition on a release because you have to read the end of the first line where it says "either to prove or disprove the validity or amount of a disputed claim," so this isn't a compromise being offered for a release. It's being offered to show, "Oh, well, you think you were hurt this bad. Well, you offered to only settle for this amount. You must not be hurt that bad." That's one form in which this compromise is offered to help the defendant show the plaintiff is not so hurt; but the other way is kind of like Justice Christopher's example, only where there's a release that's part of it, where the witness gets on the stand and says, "Yeah, we'll employ you. We told you we would employ you if you would just let us out of the lawsuit." Now, that is an offer of settlement, and that is excluded under this rule, because defendant is trying to offer to make himself or itself look good, and it would fall under this rule as revised.

CHAIRMAN BABCOCK: Yeah, Lamont.

MR. JEFFERSON: I agree with Peter on the

language that it's confusing to add the "on behalf of any party" because that suggests -- I mean, unintentionally that it could be used against a party. I mean, that just "on behalf of any party" doesn't -- isn't clear enough. Now, I would just say, if you want to add anything, it's not admissible by anyone or words to that effect, but that "on behalf of" suggests could it be used for some other purpose than on behalf of a party.

CHAIRMAN BABCOCK: Yeah. Professor Hoffman, I -- you may have covered this, but the language you're adding here "or to impeach by a prior inconsistent statement or a contradiction," can you give me an example of what the contradiction would be that you can't put the settlement in?

PROFESSOR HOFFMAN: Well, again, this language, Chip, comes from the Federal change.

CHAIRMAN BABCOCK: Right.

PROFESSOR HOFFMAN: I think my guess is that most of the time we're talking about, you know, the prior inconsistent statement. I'm not sure that -- and Steve may be able to speak to this, if there's other examples for something that's a contradiction but not a prior inconsistent statement.

MR. GILSTRAP: What's its purpose? What's the purpose of that phrase, "or to impeach by a prior

inconsistent statement or contradiction"? I understand the, you know, the relation to the validity or the amount of the claim, but what about impeachment? What's the purpose?

PROFESSOR GOODE: Here is the issue that this is dealing with. Suppose during the course of a settlement negotiation the party makes some factual statement. "I ran the red light." That's protected by the rule. The rule says statements made during the course of compromised negotiations can't be used in evidence. The question is, okay, so this party then gets up on the stand and says, "I didn't run the light." The other side says, "Now I want to impeach you with the statement you made during settlement negotiations because it's a prior inconsistent statement"; and there's, again, very little case law on this; but there was certainly a split in the commentary about whether that was an appropriate thing to do under Rule 408; and to resolve that question the Federal rule said you can't use a statement made during settlement negotiations to impeach a person who testifies in a manner inconsistent with that on the stand. By the same token, if the person never testifies but his side takes the position that he didn't run the red light, you can't use that statement to contradict that position as a substantive matter.

So it's just saying if you say something during compromised negotiations, that's going to be protected, and we're not going to create an exception to that protection on the grounds that you've now testified in a manner inconsistent or taken a subsequent position inconsistent with what you said during compromised settlement negotiations.

CHAIRMAN BABCOCK: What about this? You've got a provision of an employment contract, identical provision applies to 50 employees. Five bring suit. Separate courts, separate cases. In the first one, the defendant takes the position this doesn't apply. It's -- you know, it's not applicable, your theory is crazy, but they pay him a million dollars, settlement before trial.

Case two the defendant goes, and they go to trial on that, and the defendant says, "Crazy, don't owe them anything, doesn't apply. The amount they want is crazy." Absent this language, could they have brought in the prior settlement saying, you know, "This is inconsistent" or "This is a contradiction from what you did over here"?

PROFESSOR GOODE: Typically Rule 408 was seen as designed to exclude exactly that kind of thing, and so that's not where sort of the idea that this is addressing came up. Again, most of what this amendment

that the feds put in was addressing was something that rarely, if ever, came up but was certainly talked about in the literature, and just to foreclose that they put this language in. This is not addressing a problem, to my knowledge, that has arisen in any reported case in Texas at all.

CHAIRMAN BABCOCK: Okay.

PROFESSOR GOODE: It's a prophylactic rule, if you will.

MR. GILSTRAP: Well, how often does a witness participate in settlement negotiations? I mean, don't the -- aren't the lawyers the one negotiating, and why would you want to get your witness out there to even have him talk?

CHAIRMAN BABCOCK: Mediation.

PROFESSOR GOODE: Yeah.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: The clients are usually there.

MR. GILSTRAP: Well, I understand. Okay.

CHAIRMAN BABCOCK: And contrary to the advice of their lawyers, sometimes open their mouths.

PROFESSOR HOFFMAN: Should we press on?

CHAIRMAN BABCOCK: Let's press on.

PROFESSOR HOFFMAN: The next one is I think

going to be a quick. If you'll go to (b), 408(b), you'll see that what's happening here is the words, "The court may admit the evidence for another purpose, such as" -- and the words are being deleted, "parties and" -- "or interest." So it will now just read "such as proving a witness' bias or prejudice." Those will become the basis. So what's going on here? So this is -- will then exactly mirror Federal Rule 408(b). Texas had those other words in there, "party or interest," when Mary Carter agreements were still okay. Although it is amazing to me that 1992 was as far away as it is, it has been a long time since those have been allowed, and so this has no change in the law. Since they're not allowed it's just eliminating it, and it has the salutary effect of making us line up with the Federal 408(b).

CHAIRMAN BABCOCK: Any other comments?

HONORABLE DAVID NEWELL: Could you put "reviewed" in there somewhere?

PROFESSOR HOFFMAN: And then the final issue is a non -- recommended for no change, and if you'll go backwards to 808.2 -- and again, I highlighted that language before in brackets, and I -- there was a description of what AREC's thinking was on this that begins on that next page, if you would turn the back and read it on your own, but better yet I'm going to turn to

Steve and let him try to be more succinct. I will say my colleague at U of H described the Federal change as a power grab by the Department of Justice, and she was delighted that we didn't follow. I don't know if that's how you see it, but that's what she said.

PROFESSOR GOODE: What this language in the Federal rule deals with was the problem that arose in Federal court, which was suppose you have a settlement of a civil case which is of relevance in a parallel criminal piece of litigation. To take a hypothetical, suppose you had a hypothetical state official who was facing criminal charges on a form of securities fraud, and this hypothetical state official had previously settled a civil piece of litigation and had admitted engaging in some form of securities fraud. This is purely hypothetical. The question might come up, would that admission made in the course of -- for the settlement of the civil piece of litigation be admissible as proof in the criminal litigation that, in fact, he's guilty of the criminal act.

HONORABLE DAVID NEWELL: Do I need to leave the room?

PROFESSOR GOODE: It's purely hypothetical.

HONORABLE DAVID NEWELL: Okay.

PROFESSOR GOODE: The Federal rule courts had no answer to that under their Rule 408. In fact,

there was a split in case law. Some courts said civil settlements were not admissible in criminal cases at all. That is, Rule 408 applied in criminal cases as well as in civil cases. Some courts said, no, Rule 408 only deals with admissibility in civil cases, and so the feds decided they would try to resolve this. They came up with I think a rather bizarre compromise, which is the language that we did not include, where they say some stuff comes in, but some stuff doesn't come in, and it depends on whether you were -- your civil compromise was with a governmental agency or whether it was with a private party and distinguishes between the two, and it depends on whether we're talking about a statement in which you admitted doing something or whether you just settled it.

I think it's a bizarre rule, but AREC took the position, first, we haven't had this problem in Texas because when the Texas Criminal Rules of Evidence were adopted in 1986, the Texas criminal rules had Rule 408 in it. So it's always been clear in Texas since 1986 that Rule 408 applied in criminal cases. When the rules were consolidated in 1998, there wasn't any express intent to change that. Rule 408 stayed on the books, and it's part of a consolidated rule that applies both in criminal and civil cases, and so our position was this issue is relatively clear in Texas.

We don't see any particular argument for changing it along the lines of the Federal rule, but AREC is mostly a civil practitioners committee, and we also said we're open to hearing what criminal lawyers have to say, and if they want to make an argument that it should be changed, we would certainly be open to hearing that argument, but the case has not yet been made for recommending a change.

CHAIRMAN BABCOCK: Okay. All right. Any other comments? Okay. Do we have --

MR. LOW: We had 509 and 510, and two days after I got this and assigned it, the Supreme Court passed it, so I didn't want to waste time by talking about it.

CHAIRMAN BABCOCK: Okay.

MR. LOW: Elaine will be our next presenter, and she'll talk about what 804, 803, right, Elaine?

PROFESSOR CARLSON: Uh-huh, and Federal Rule 807.

MR. LOW: Yeah, 807. And we don't have a 807.

PROFESSOR CARLSON: Right. So for this if you look at the beginning of the packet, you'll see the Texas versus the Federal rule, and if you flip back about five pages to what is designated as page two in a beautiful mine, you'll see the report from Professor

Goode's committee. These rules deal with exceptions to the hearsay rule, and we concur with the State Bar evidence committee's recommendation not to amend Texas rules to conform to the few differences that we have with the Federal counterpart. Texas Rule 804 deals with the former testimony exception to hearsay, and our Texas rule requires that you show unavailability of the witness, not only by the witness not being able to attend the trial but also that they were unable to be available for deposition; and the Federal courts don't have the deposition prior, but of course, our Texas practice has generally allowed the use of depositions in civil cases without the requirement of availability. So we thought that the committee's recommendation of no change made sense for that difference.

There is also the dying declaration exception to hearsay. In Federal rule it applies only in a homicide -- homicide prosecutions and in civil cases, but not in non-homicide criminal cases. Texas it extends to all cases, and so we recommended no change on that either. There is a difference between Federal and Texas practice dealing with statements against interest exception to the hearsay rule. In Texas you would find that in evidence Rule 803, subsection 24, not in evidence Rule 804 as in the Federal practice. The distinction

being Rule 803 does not require unavailability of the witnesses for those exceptions to be triggered for admissibility.

The Federal rule has -- 804(b)(6) has another exception to the hearsay rule called "Statement offered against a party that wrongfully caused the declarant's unavailability." We don't have a counterpart in our rules, but the Legislature adopted a counterpart for criminal cases in the Code of Criminal Procedure. So that is 804. And 803, which is -- I already covered that. 807 is a Federal Rule of Evidence that allows for a catchall residual exception to the hearsay rule, and it provides that a hearsay statement is not excluded, even though it doesn't fall under any other specific hearsay exclusion specifically delineated in the rules, if you can convince the court that the statement has -- and I'm going to quote here -- "equivalent substantial guarantees of trustworthiness, it's offered as evidence of a material fact as probative value for which it is offered than any other evidence the proponent could obtain through reasonable efforts and admitting it would serve the interest of justice"; and the Federal rule requires you give notice to the other side, "Here's the person and statement that we intend to offer because it's so reliable otherwise."

We don't have any counterpart to that in our Texas rules. The report of Steve's committee -- Professor Goode's committee points out that there originally was a recommendation to include the residual exception to the hearsay rule and that the Supreme Court did not choose to adopt that. So this has been rejected once before. There are other states that have -- don't include the residual exception either. According to the report from the advisory committee -- and I thought this was very interesting. They said there's a concern that despite the purported safeguards regarding guarantees of truthfulness, that this rule is stated in such a vague way it leaves open for trial judges to utilize their discretion in a way that could differ greatly, leaving practitioners without very much predictability when you have that type of evidence that is -- has equivalent circumstantial guarantees of trustworthiness or is probative more than any other evidence the proponent could offer.

And they also point out in their report that the definition of hearsay in Texas is broader than the Federal rules, yet they say, "It does not appear to the committee" -- and we did not think so otherwise -- "that there was some categories of evidence out there that was hearsay and was being excluded that shouldn't be excluded," and we really weren't -- couldn't find the

cure, why we needed a cure, and so we concurred in the recommendation of Steve's committee, Professor Goode's committee, that we not change our Texas rules in those few instances where they differ in 804, 803, and we don't have an 807.

CHAIRMAN BABCOCK: Okay. Any comments on that?

MR. LOW: Elaine, wasn't there at one time a prior proposal to have 803.25 in Texas entitled "Other exceptions" was rejected, was it not?

PROFESSOR CARLSON: Yes.

MR. LOW: Yeah. The feds have changed it around. 804 used to be -- I mean, 24 used to be other exceptions. They changed it. They changed it around, and our rules and theirs are different in more ways than what we've been talking about.

CHAIRMAN BABCOCK: Yep. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I'm not saying that I like 807, the way it's written, but there does seem to be a class of documents that is sort of defying expectation on how to prove them up in connection with internet records. Because so many governmental agencies now, you know, put everything on the internet, it's extremely difficult to go to the agency to get a certified

copy of anything to prove it up; and so if you had a little exception like this where you understand that you can't get certified copies of anything anymore and this is the official government website that shows, you know, what it's purporting to show, you know, I would like to have -- or for the people to consider some sort of an exception to cover that.

MS. WOOTEN: I just want to say I support that fully because I've run into that issue in at least two cases where it's a document that may be on the website. I get a challenge to authenticity. I say, "It's from your website," not a certified copy, and that should not be a problem in terms of admissibility.

HONORABLE TRACY CHRISTOPHER: I don't know whether Peter ended up making it a case or a point of error in that one case we had, but we were trying to prove when was someone -- the defense was trying to prove when was someone actually licensed as an architect or an engineer, and the person didn't, like, have their little certificate to show and was not on the witness stand, and the only way to prove that was through the records of the agency, and the agency wouldn't give certified records for anything. I mean, it was an extremely difficult thing because now governmental agencies are all like "It's all on our website. It's on our website. You know, we're not

cooperating with you on these trying to get a certified copy of something."

MR. LOW: Chip, could --

CHAIRMAN BABCOCK: Professor Goode.

MR. LOW: -- Professor Goode respond?

PROFESSOR GOODE: Yeah, I think it's a real problem, but it's not a hearsay problem. It's an authentication problem, and so Rule 807 would not be the vehicle to deal with that, but it would be how to authenticate a government record that appears on the internet as being what -- as you say, what it purports to be. I'm not fully sure that that should be as much of a problem as you're saying because I think in some instances it may be self-authenticating, but there's also some proposals to the Federal rules about authenticating internet -- electronic documents that might address that. I haven't looked at them really carefully yet, but I understand exactly the problem you're talking about, but the stuff is within the hearsay exception.

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR GOODE: It's just proving that it's from that record.

HONORABLE TRACY CHRISTOPHER: Correct, proving that it's a public record. But normally to prove it's, you know, authentic you get the certified copy of

it. You know, you don't just print out something off of a website and offer it into evidence.

PROFESSOR GOODE: Government reports are self-authenticating.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I mean, it seems to me that the problem that Justice Christopher has identified is both a hearsay and an authentication problem. Because if they won't sign the certification, you can't get the proof to meet 803(a) to prove it's a public record in the first place, so it's still hearsay. And sometimes this happens not just with public records, but there's a corporation, you go on their website, and they're not a party to the case, so it's not an admission, and you want to prove up what's on the internet, and what I had to do is I brought my computer. I put it on the screen in front of the judge and said, "Judge, there it is. Now may I print it and offer it?" It seemed kind of silly, frankly, but I thought there was both a hearsay and an authentication problem because I had no witness to prove up the 803(6) or 803(8), and I was the one essentially authenticating it, which I ended up doing by just using the computer, so I think it's a problem.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: It may not be part of

this, but to build on the problem of the internet, Facebook pages wind up getting introduced in many cases, and how do you authenticate a photograph that somebody printed off of a Facebook page, and, you know, there it is. I mean, you don't have the person that took it. Normally you have somebody that was there at the time and can say, but in the context in which we see them on appeal it's frequently a third party that went out to the internet and found this -- you know, this photograph that's pertinent either to a crime or a domestic relations issue or something, and they are -- they just print it and bring it in, and it's a problem in how to get it proved up that what it shows, authentication first, and then hearsay if there's, you know, other things attached to it.

CHAIRMAN BABCOCK: Okay. Anybody else on this topic?

HONORABLE HARVEY BROWN: Well, just as a final comment I would say I think this is an area that I -- from my limited reading on it the Federal courts have had a little bit of struggle with computer records and electronic records and internet records. We've been a leader before in getting out ahead of the Federal courts. I think this is an area that might be helpful for people with expertise like Professor Goode to get out ahead and help the Texas courts. Not to volunteer you for another

task.

CHAIRMAN BABCOCK: All right. Anything else? Elaine?

PROFESSOR CARLSON: No.

CHAIRMAN BABCOCK: Any other comments about this? Buddy.

MR. LOW: I just want to thank Professor Goode and the presenters, and I've shown that if you're given an assignment and you can't do it, give it to people that can, and that's what I did, and I want to thank them.

CHAIRMAN BABCOCK: That's very good of you.

PROFESSOR GOODE: And if I may say, it has been referred to as "Professor Goode's committee" numerous times. It's really not my committee. I'm not even the chair of the committee.

PROFESSOR CARLSON: It is now.

CHAIRMAN BABCOCK: Now, Professor Goode, thank you very much.

PROFESSOR GOODE: If you don't like what we produced, lots of other people were involved in producing it.

CHAIRMAN BABCOCK: Okay. So, Buddy, you're done, right?

MR. LOW: I'm through.

CHAIRMAN BABCOCK: Okay. That's good.

Let's move on to Bill Dorsaneo's proposed appellate sealing rule, 76a.

PROFESSOR DORSANEO: Well, that's part of it, and really this stems from our assignment to do a procedure, a rule that provides for a procedure to file documents under seal and maybe to get them ordered sealed in the appellate courts, and from our first discussion of this it became clear or somewhat clear that the matter would involve coordination and sequencing of the procedures that are provided for in trial courts with respect to trying to get -- filing documents under seal in the trial courts and trying to get them ordered sealed in the trial courts and then doing whatever you would need to do in order to continue the sequencing of the analysis in the -- in the courts of appeals, which requires you to get the documents to the courts of appeals.

Okay. So that also was related and is related to Rule 76a, which in my experience has been largely ignored for many years, but that is now being given more attention, and it provides for temporary sealing and sealing of court records contemplating that there would be an appeal of an order sealing or not sealing court records. So if I can ask you to find a document that I prepared, assuming I can find it, in September of last year I put in that little memo

information about how this sequencing would be done. Okay. And it's a memo dated October 24, 2016, which is related to the draft of 9.2(d), the proposed sealing rule in the courts of appeals as it existed in October of 2016, and this is the idea, if you have it in front of you. If you don't, you can just listen. That will be fine.

It has become increasingly clear to me that the procedures followed in the trial courts probably should be sequenced and coordinated with the procedures followed in the appellate courts. So I have revised the proposed draft of 9.2(d) to coordinate with civil procedure rules, particularly civil procedure Rules 76a and Rule 193.4, which is a rule that we crafted sometime ago talking about how rulings would be conducted and how procedures would be handled with documents involving discovery disputes that are reviewed in camera by trial courts.

Okay. So what I wanted to talk about first, because I think it may be the easiest idea, is how this would work in the trial court and how that would connect up with sealing procedures in the courts of appeals. So that takes me first to Rule 193.4, which again, has existed for a considerable period of time even in the predecessor appellate rules, and it deals with hearings and rulings on objections and assertions of a privilege,

and the idea primarily is in the paragraph called "In camera review" followed by "Custody of material or information." So if we're going to have an in camera review, the proposed rule says that the way that will be done is that the requested discovery, that material or information would be segregated and produced to the court in a sealed envelope at a certain point in time and that the material reviewed in camera would be protected by law from discovery in public disclosure, pending the trial court's determination of the discovery objections or claims of privilege.

So what happens next? What happens to these -- what happens to these documents? And I think we have examined it in this committee at hearings early last year or in the middle of the year that it's very unclear what happens next from court to court and that that's bad, because if we're not sure what happened, we're not sure we're going to preserve any kind of confidentiality or protection from public disclosure. So here's what I drafted. "The material information submitted to the trial court for in camera review" -- and there are several alternatives to that -- "or reviewed by the court in camera must be placed in the custody of the official court reporter or filed with the clerk of the trial court before or following the hearing." Take your pick. And here it's

unclear as to who -- who should be involved in keeping track of this material; and at our very first discussion of all of this Judge Evans talked about this, said that he thought that putting it with the court reporter is good, a good idea. Huh? Because that provides security and is just the best way to handle it. Am I close, Judge Evans, to what you said?

HONORABLE DAVID EVANS: I conferred with Mr. Schmoe and you are.

PROFESSOR DORSANEO: All right. So but then again some other people think the clerk would be the right person, and the way this rule is drafted is it could be the clerk or the reporter. Take your pick if you're the trial judge. Huh? But the idea is that the documents should be kept by the trial court official under seal, okay, until the trial court or an appellate court having jurisdiction of the appeal or original proceeding orders the reporter or the court clerk to transmit the material or information under seal to the appellate court, and that would be the handoff. Okay. That would be the handoff.

A similar provision is written into proposed amendments for 76a, okay; and I don't think I need to go over that comparative language; but the idea is to say, okay, if we have something that's subject to being evaluated in an appellate court under seal then it's going

to stay under seal in the trial court and get to the appellate court in due course under provisions in the rules. And, Judge Wallace, what did you say about how you handle that?

HONORABLE R. H. WALLACE: On getting to the court of appeals?

PROFESSOR DORSANEO: Yeah.

HONORABLE R. H. WALLACE: The court reporter uploads it on their -- whatever that platform is called.

PROFESSOR DORSANEO: Do you tell the court reporter to do that, or does the court of appeals do it?

HONORABLE R. H. WALLACE: The court of appeals does.

PROFESSOR DORSANEO: Okay.

HONORABLE R. H. WALLACE: My understanding.

PROFESSOR DORSANEO: Huh?

HONORABLE R. H. WALLACE: That's my understanding, the court of appeals does. Of course, you have to understand we're right there with the court of appeals, so sometimes they might pick up the phone, there could be an order, or whatever. My understanding is, yeah, it's just handled between the clerk and the court of appeals and the court reporter.

PROFESSOR DORSANEO: Okay. So that's the basic idea of sequencing and coordinating. The provision

in 9.2 that's about that, proposed 9.2(d), is 9.2(d)(2). If the -- which provides on page two of 9(d)(2), "If the official court reporter or the trial court clerk have retained custody of the document or documents filed under seal or a sealed document" -- and more about that later "under civil procedure Rules 76a(4) or 193.4 and the clerk or the" -- "or the reporter are ordered to file the documents by the trial court" -- "ordered by the trial court or by the appellate court having jurisdiction of the appeal, the clerk or the reporter responsible for properly filing the document or documents in the appellate court."

So that to me sequences and kind of coordinates the process in the trial court and in the court of appeals at least on the front end, and again, my understanding is that that happens however it happens from place to place now, and it would be better if it was -- if it was more uniform. I realize the trial judges don't like uniform rules, but this provides a lot of opportunity for doing it the way you want. Huh?

HONORABLE DAVID EVANS: You know, you can tell he doesn't appear at benches.

PROFESSOR DORSANEO: Well, that is what I do, but be that as it may, so that's the starting point and then I wanted to go talk about 9.2, another place in 9.2 where I think part of this problem -- part of the

problem of doing all of this is addressed and may be resolved.

CHAIRMAN BABCOCK: Okay. Any comments on what Professor Dorsaneo has said? Frank.

MR. GILSTRAP: Could you clarify? The documents come in, are they paper or electronic?

PROFESSOR DORSANEO: Well, we're going to get to that.

MR. GILSTRAP: When they go to the court of appeals are they paper or electronic? How do they get converted? Who pays for it? Does the court reporter keep a copy? Who pays for that?

PROFESSOR DORSANEO: Well, I can't answer all of those questions, but whether they're paper or electronic needs to be decided. Okay. And that's a second big issue, and when we considered that in the appellate rules subcommittee and I asked y'all whether it should be paper or electronic, I got no -- I got no answer from anybody, so I made up my own mind about how I would draft it for the committee as a whole to evaluate.

HONORABLE TRACY CHRISTOPHER: I'm pretty sure I sent you an e-mail on that.

PROFESSOR DORSANEO: Okay.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Okay. A

couple of things. You know, I think the judge should retain custody of in camera documents, which is different from documents that are sealed under 76a. Those are two so fundamentally different documents that we're kind of confusing the two the way this rule is written. Okay. So in camera documents are one side's documents that only they -- they only want the judge to look at. Right? It's not like something that's sealed under 76a where both sides have seen that document, they just don't -- and the judge has seen the document and maybe the court reporter has heard about the document in connection with the hearing, but they don't want the public to see the document in 76a, and it seems to me we're kind of confusing those two different categories of documents in this rule.

So, you know, for me, the true -- the privileged documents, the judge should keep it, the judge looks at it, the judge gives it back. If -- unless somebody is going to appeal and then the judge keeps it and the judge gets it to the court of appeals in some manner; and if it came in paper they, you know, send it. They might get their court reporter to do it electronically, but a lot of times now the judge's documents that they're reviewing in camera are on a computer disk. They're electronic.

So to me that is sort of a fundamental problem with the way it's written, and so the -- you know, there's a use of the word "under seal," and it's different from 76a versus a privilege document.

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: One thing that might be worth looking at is existing Appendix C to the Texas Rules of Appellate Procedure because that addresses the clerk's record, and as part of that appendix there's a provision about what to do with sealed materials, so it's addressed --

PROFESSOR DORSANEO: Kennon, could you repeat that?

PROFESSOR CARLSON: Where is that?

MS. WOOTEN: It's Appendix C to the Texas Rules of Appellate Procedure.

PROFESSOR DORSANEO: Yeah. It's right here. Well, that has to do with what it -- how it's -- with Frank's question as to whether it's -- or it's related to Frank's question as to whether this is paper or it's electronic, and I do think that is a separate issue, huh, that we haven't -- that we haven't resolved yet.

MS. WOOTEN: And the other thing it addresses is that the materials are, at least in my mind, with the clerk. It's not -- I mean, sorry, with the court

reporter. And so that's one area where there's at least a partial -- partial attention given to it, and then I agree with the difference between the sealed documents, and for example, the privileged documents, because I wouldn't want privileged documents to be filed anywhere. The idea is that maybe you're going to keep them out of the record altogether. If they are, in fact, privileged they would never actually be filed potentially, and so they would just stay with the judge.

And in terms of timing, whenever I've had a hearing, I take the documents with me to the hearing, and unless it's voluminous the judge just reviews the materials at the hearing and makes a ruling there.

PROFESSOR DORSANEO: But it's not -- not regarded as a problem that the judge has them?

MS. WOOTEN: No. What I've done before --

PROFESSOR DORSANEO: At least when they were in paper form they would be in a box on the floor, huh?

MS. WOOTEN: Well, and I've never had like a situation where the volume was so extensive that it couldn't just be dealt with at the hearing. So I've had a disk that the judge opens up, and maybe he or she will call us back, and we go over the materials, or it's an envelope, hand it to the judge there. Judge goes back, comes out with a ruling, and then we get the materials

back if they're determined to be privileged. So the possession is --

PROFESSOR DORSANEO: Maybe it's more frequent that these in camera inspections involve only a few pieces of paper, but that's not uniformly true.

MS. WOOTEN: Yeah.

CHAIRMAN BABCOCK: Judge Yelenosky, then Judge Evans, and then Tom.

HONORABLE STEPHEN YELENOSKY: I wasn't on the subcommittee, but I played one on all the phone conferences and participated in e-mails. I think the subcommittee, as I saw it or heard it, understood that distinction and wrestled with it. At one point we talked about -- I suggested calling it restricted access, which would be an umbrella for sealed and privileged, but -- and I think this is probably just an oversight, but you'll see in here conflation of the two, those two, as you just discussed on page five. And I didn't see this earlier or I would have pointed it out to you, Bill. Page five, 6(c) says, "The documents submitted to the appellate court are subject to in camera inspection by the appellate court, but are not subject to inspection by other parties or the public." That, if I understand the construct of the rule, would apply to sealed documents as well as privileged documents, right?

PROFESSOR DORSANEO: Right. Well, the --

HONORABLE STEPHEN YELENOSKY: And it can't be true that, as Tracy just said, a sealed document cannot be withheld from a party. That's a privileged document. So I think there is a conflation there in that particular one, and in -- I know it was understood that they're different, but there is some difficulty working through that.

CHAIRMAN BABCOCK: Okay. Judge Evans.

HONORABLE DAVID EVANS: Well, I agree with Justice Christopher, except for one point, and as the distinction I regard the court reporter as an agent of the judge for storage of that in camera material, because she has -- he or she will generally have an evidence room that is secure and is used in keeping records up and filing them. It doesn't just go on the judge's floor or in a desk. It's not subject to courthouse personnel who are cleaning and stuff like that getting to it; and so that's why I think it should be the court reporter acting on behalf of the judge; and my belief is is that you have to retain the document until the end of the case, the submission until the end of the case, because some party could complain on direct appeal as opposed to taking a writ up about the discovery process and then there's a destruction of discovery afterwards. And so I thought the

reporter was easier to deal with, and you could withdraw the exhibits and thus remains under the judge's real control.

We're having some problems with the clerks believing that they're under the judge's control anyway; and that's a different debate; but we don't have standards for sealing statewide; and we've got 400 clerks, county and district, is what I was told last weekend. So we've got a number of judges, but I do agree with you. It's a court's job to retain them. I just don't agree that it should be in the judge's drawer, and that's where I am, so, I mean, that's all I would try and make a distinction about.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: I agree with Justice Christopher. We've got some confusion between two different issues, and with this we would have two different rules about in camera inspections. First of all, under the proposed addition to subpart (4) of 76a, it says, "The information must be segregated and produced to the court in a sealed envelope seven days before the hearing or a reasonable time before the hearing." That's different than in 193.4(b), and also I would think that it would have to be after the hearing, because the court at the hearing would determine in either situation whether or

not an in camera inspection was necessary, because it's not in every case. Same Rule 193.4(b), we're saying seven days before the hearing or within a reasonable time following the hearing. So there would be differences for the two different types of cases or situations, which I think will lead to confusion, and I would think in both instances it should be within a reasonable time following.

PROFESSOR DORSANEO: I think that's meant to be an option, with the brackets in there.

MR. RINEY: Well, I think that would be the better option.

PROFESSOR DORSANEO: Well, that's, you know, reasonable -- a reasonable viewpoint.

MR. RINEY: Thank you.

CHAIRMAN BABCOCK: Okay. Any other comments? Frank.

MR. GILSTRAP: Okay. Everybody is skittish about the privileged documents. They're not even going to be filed. When they go to the court of appeals, are they not going to be filed? What about the court of appeals? I thought everything was filed there.

PROFESSOR DORSANEO: I think everything should be filed, you know, and not somebody, "Here, take it home and burn it," right?

MR. GILSTRAP: So at some point it's going

to be probably reduced to electronic form and filed for the court of appeals? And that's where it's going, even though it's -- these are privileged documents, they're just going to have to be handled differently.

CHAIRMAN BABCOCK: Judge Wallace, and then Lisa Hobbs, and then Justice Bland.

HONORABLE R. H. WALLACE: I didn't raise my hand.

CHAIRMAN BABCOCK: You didn't? Okay. Well, then Lisa did.

MS. HOBBS: Well, I think the courts of appeals do receive certain documents. They receive amicus briefs, and they don't file them, even though you actually do e-file them, and I don't know, do y'all receive the record or do y'all file the report?

HONORABLE JANE BLAND: We file the record.

PROFESSOR HOFFMAN: You do file the record.

CHAIRMAN BABCOCK: Justice Bland, you had a comment?

HONORABLE JANE BLAND: Well, I don't know if this is right or wrong, but the way that courts of appeals do this is if it's something filed under seal then that -- that's how we all think about having it filed under seal, it's accessible to the parties to the case unless the order sealing it directs otherwise; and if it's filed with

in camera, it may be -- it may be electronically filed the same way, but because it's in camera it's not disclosed to anybody at all except the court.

HONORABLE STEPHEN YELENOSKY: But that word is used loosely, too, because just talking about in camera review of a motion to seal, I don't call that in camera, just a nonpublic review, because the parties are all there.

HONORABLE JANE BLAND: Right.

HONORABLE STEPHEN YELENOSKY: So we're using "in camera" loosely, and we're using "sealed" loosely, and it should be "in camera" goes with privileged and "sealed" goes with nonpublic --

HONORABLE JANE BLAND: In camera usually has something like "for the court's eyes only" or something on it that designates that it's different than a typical sealed record.

PROFESSOR DORSANEO: Well, but it really isn't. You just are talking about it as if it's some sort of different thing.

HONORABLE JANE BLAND: It really is, because a sealed record is accessible by counsel of record to the case, although not public. An in camera record -- at least in our practice, and right or wrong it's our practice, in camera record is not available to anybody.

We only -- except for the three judges.

PROFESSOR DORSANEO: What a sealed record ought to be accessible to should be in the order, and it shouldn't just make this like you do it this way and in El Paso they may not. Huh? I mean --

HONORABLE JANE BLAND: I agree.

PROFESSOR DORSANEO: It's just a mess is what I think, but if you don't want to straighten it out that's okay.

CHAIRMAN BABCOCK: Munzinger is in favor of cleaning up messes in El Paso. That's for sure.

MR. MUNZINGER: Judge Schmoe.

PROFESSOR DORSANEO: Or wherever they may be.

MR. ORSINGER: It would be helpful to me if we could identify who we want to see the records at each level and then decide what to call it, whether it's receiving, filing, marking and offering, or whatever. So along those lines, in the trial court we have the option of the court clerk, the court reporter, and the judge; and then at the appellate level, I think we only have the clerk as the option, at least as a practitioner, because I can't communicate directly with the judges and there is no court reporter. So in the trial court we ought to decide who is going to see and then who is going to keep the

sealed records and then at the appellate court level it all goes to the clerk and then the clerk will have some kind of internal rule to follow about, you know, court employees can or cannot see this or only three justices can see this or six justices can see this; and if we could decide that, then maybe we could figure out what label to put on it and write an easier rule, a rule that's easier to understand.

CHAIRMAN BABCOCK: Let's let Dee Dee take a little break.

PROFESSOR DORSANEO: This is much easier to understand than what you just said.

CHAIRMAN BABCOCK: Let's let Dee Dee -- let's keep it short this time. The last long break was my fault. So be back at 10 of 4:00.

(Recess from 3:40 p.m. to 3:56 p.m.)

CHAIRMAN BABCOCK: We're back on the Dorsaneo item on the agenda, one of several. This one being on the proposed appellate sealing rule and Rule 76a, and we've had some discussion, and let's see if there needs to be any more. Yeah, Justice Gray.

HONORABLE TOM GRAY: I agree with Justice Christopher that the problems of sealing or a sealed record are very different than an in camera, and I focused primarily on the in camera because that's what we see the

most of at the intermediate appellate court, at least the little country court that we have in Waco. I don't know about those big city courts in Houston, how they might operate. I know they want theirs electronic, and I kind of like mine in paper, but we can get to that.

CHAIRMAN BABCOCK: All right.

HONORABLE TOM GRAY: But with an in camera document, to me, the first thing that I think we need to address as a policy decision is whether or not a document, whether you use the term delivered, tendered, filed, whatever -- I don't like the word "filed," and I'll get to the reason why, but does that document ever become a court record? Because that's real important to the individual, because I -- this is my personal belief. I don't know if really if it has an effect in practice, but the concept that just, say, my tax returns, if they became pertinent to a case and I did not want to disclose them for some reason, or they were argued to be pertinent, and the trial court ordered me to produce them. I would think that as the plaintiff in the case I have the right to say, "Give me my documents. I'm dismissing the suit. I'm going home. Because they're my documents. They're not public records. I submitted them for in camera inspection. You've now ordered me to produce them. I don't want to do that. I don't want to go forward." I just feel strongly

that a person should be able to do that.

PROFESSOR DORSANEO: That's a nice question.

HONORABLE TOM GRAY: If they go forward, if they're ever filed, they become -- and I'm talking about in the technical sense of filed -- then they become the court record, and you probably lose that ability to in effect get them back. The other problem once a document is filed is there is a whole host -- whether you file it with the trial court clerk or you file it with an appellate court clerk, if it becomes the court's record, it triggers a whole riff of document retention requirements. On policy, statutes, you cannot destroy those documents for some period of time. We had a case, 12 boxes of documents. They were -- I, frankly, as I sit here I don't remember if they were a sealed question, but I'm pretty sure they were an in camera question; and they did get filed; and we had to worry about those documents, because they go to offsite storage, who gets access to them, just a whole host of problems that a regular public document we did not have to worry with; but those we did, because they were -- I believe them to have been in camera; and we had to deal with them for the minimum retention period, six years for criminal cases, less than 20 years sentence. You get 25 years retention for a capital offense, you're talking about permanent storage,

and so you're talking about real dollars for retention periods.

I do agree with Professor Dorsaneo. There is a problem and an inconsistency, and it would be helpful, but the ones that we see the most are the in camera. And I've got lots of specific comments on the proposal, word choice options and that kind of stuff that I don't think you're wanting to get into right now, but from a fundamental perspective, I do think we have to separate entirely the in camera production and how it comes up as being very different than a document, as Judge Yelenosky points out, I mean, it comes in and both sides have the document. They may be arguing about whether or not it's going to be publicly released, but at least that document everybody knows what it is in dealing with it. When you bring up an in camera document for the protection of the person that is wanting that document, I prefer to get the in camera submission directly from the trial court judge. That way the party that wants the document, not the one that tendered it in camera, knows for sure that the appellate court either by direct appeal or by a mandamus has the exact same document in front of it that the trial court looked at in camera, and it's organized and presented in the same fashion.

HONORABLE STEPHEN YELENOSKY: Justice Gray,

there is an answer to your question about a in camera document, and it's in much maligned 76a, which I think obviates a lot of this. It defines "a document of any nature filed in connection before any court in a civil court, except documents filed with the court in camera solely for the purpose of obtaining a rule on the discoverability of such documents." They are not court records by definition.

HONORABLE TOM GRAY: Excellent. Drives home the point that we cannot treat them the same as sealed records, and so we've got to split the two in the way that we treat them going forward, and I do think that we need the discussion one and then the other, and I do think Professor Dorsaneo is correct in bringing the two Rules of Civil Procedure first that then flow up to how we treat the documents at the court of appeals.

CHAIRMAN BABCOCK: Could I ask a favor? If you have some specific word comments, could you just put that in an e-mail to Martha and myself?

HONORABLE TOM GRAY: Absolutely.

CHAIRMAN BABCOCK: That would be great.

PROFESSOR DORSANEO: Well, Chip, the one thing, it is difficult to do 76a and 193.4 as if they can work the same way, and, you know, frankly, if 76a just got separated from this it wouldn't bother any of us on the

appellate rules subcommittee. Okay. And, you know, maybe that's a way to go and to just deal with the 193.4 situation and just coordinate those procedures with whatever sealing procedure would be involved. Now, one of the things that's part of that is if the document is ruled privileged, okay, does it make sense to give it back to the person who wanted that order instead of keeping it part of the court record to be determined, with the real answer -- ultimate answer being determined in the appellate court. And, I don't know, but it seems to me that it doesn't make sense to just hand it over any more than it makes sense to hand it over to the other party. I mean, it's part of the -- it is -- it seems to me that it is part of the record in the case.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, every time we say a word we're going to have to define it, because you said "court record." In camera is not a court record. It's defined away. It's not a court record. Is it in the record? Well, it's up there for review, but --

PROFESSOR DORSANEO: You're talking about 76a's definitions now.

HONORABLE STEPHEN YELENOSKY: Well, yeah, but --

PROFESSOR DORSANEO: I'm talking about it

really is a court record, okay, even if 76a said it's not going to be treated as a court record.

HONORABLE STEPHEN YELENOSKY: Okay, well, all right, it's a court record, but none of the 76a rules apply. I do agree they should be treated separately, and when it's time I don't think we need an appellate rule for sealing documents other than for documents that are first seen at the appellate court, as infrequently as that is.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Well, I mean, I think -- I'm on the committee, and I think we get the distinction, and I think we're all coming around to the idea that maybe we just need separate rules and a separate path. It might be that that might be the simplest way, but Judge Yelenosky touched on the next issue, and that's this. We started out as our charge was to deal with the need to seal documents filed in the appellate court, and we're not talking about -- there's one kind of documents I guess that have been in the trial court and have not been sealed and somehow go to the appellate court and get sealed. I think there's a feeling that you can't do that because they're already public record, but what about the set of documents that get filed in the court of appeals for the first time, and what are those documents? What kind of case -- what kind of documents can be filed in the court

of appeals for the first time? We've been able to think up a couple of examples, but I'd like to hear what people say. When does that happen? What kind of documents are we talking about?

CHAIRMAN BABCOCK: Okay. Any other comments? Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, you and I have talked about this a little bit, but you mentioned that it may be a problem with something that wasn't sealed in the trial court.

MR. GILSTRAP: I agree.

HONORABLE STEPHEN YELENOSKY: I think there are multiple problems with that, and I'll just tick them off. One is it's moot because it's already public. They didn't seal it. Two, if they didn't move to seal it, they have waived it, haven't preserved error. Three, why should anybody who failed to do any of those things be allowed to start seeking a sealing order at the court of appeals when they had a mechanism down below? And four, it's never going to happen because sealed documents considered for sealing come up early in the case, at the latest a dispositive motion. So you can't wait for the merits appeal for the court of appeals to take a motion to seal. That's going to come at the time of the summary judgment, and because 76a allows it to be severed and

appealed it's going to get to the court of appeals that way before the merits appeal ever gets there, and that should be the case. Otherwise, the trial court has to say, "Well, you moved to seal this on summary judgment, and I don't think it should be sealed, but so I can preserve the jurisdiction of the court of appeals when you get up there on the merits, I'm going to seal this document for the next two years while this case is pending."

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo, and then Justice Bland.

PROFESSOR DORSANEO: I thought our directive in the referral letter was to deal with filing documents under seal in the court of appeals, and that included documents that were not filed in the trial court at all as well as documents that were filed in the trial court but were not made subject to a motion to seal or a sealing order, and I thought myself that this is looking a little different from what I'm used to, okay, but I proceeded to follow that directive.

Now, the hardest one to deal with is a document that somebody tried to get sealed or ruled privileged, which, you know, I see as the same kind of a process, okay, and they failed. Then does that mean when they failed that those things are not available to be made

subject to a motion to seal in the court of appeals? Because you kind of picked your poison and you lost and --

HONORABLE STEPHEN YELENOSKY: No, you --

PROFESSOR DORSANEO: -- game's over.

HONORABLE STEPHEN YELENOSKY: You appeal under 76a at that moment, and it goes up solely on that issue.

PROFESSOR DORSANEO: And you file the document under seal in connection with 76a.

HONORABLE STEPHEN YELENOSKY: Provisionally. If I -- if I deny a motion to seal and they want to go under 76a on an appeal of a severed judgment, I will say, "I'm going to grant you a" -- "I'm going to grant an order to seal long enough for you to get to the court of appeals and ask them if they want to continue that order." That's fine, but the idea that I would grant a motion to seal just because they might want to file a motion along with the merits appeal is crazy to me.

CHAIRMAN BABCOCK: Justice Bland, and then Levi, and then Justice Christopher.

HONORABLE JANE BLAND: I agree with Judge Yelenosky that to the extent we're making determinations that require testimony or some sort of proof for determining what is or is not part of the record on appeal, the trial court should make those determinations

in the first instance, and any motion filed in the appellate court seeking to seal the record on appeal ought to be referred in the first instance to the trial court to make that determination subject to review, but we also need some sort of protection to allow that review to take place. And in the case of in camera documents we need something in Rule 193.4 that's similar to Rule 76a that preserves the in camera nature of those documents pending -- I think Rule 76a says something like "anticipated appellate review." That avoids the problem of the trial judge who has made a ruling on the privilege, ordered disclosure, from turning to the other side and handing them the documents before the --

HONORABLE STEPHEN YELENOSKY: Well, motion to seal, remember they haven't. So it prevents --

HONORABLE JANE BLAND: No.

HONORABLE STEPHEN YELENOSKY: -- the trial judge from saying -- oh, on 193.

HONORABLE JANE BLAND: I'm talking about 193, and that's where it happens. Many, many other kinds of sealing orders come about by the parties' agreement. Then at the appellate court if the problem is that parties filed something that's not part of the record on appeal in the appellate court, there needs to be, you know, the ability to strike it from the record and send it to the

trial court for a determination of whether it's part of the record on appeal.

Finally, there are documents filed in the appellate court that are not part of the record on appeal or the mandamus record but are motions, briefs, and things like that, where we have specific -- right now we have specific rules dealing with, you know, redaction of those motions and briefs; and to the extent that those are implicated, that's a completely different analysis, and that's something that the appellate court can be tasked with. Chris Prine, I hope you're not reading this, so but the bottom line is that the effort to determine the record on appeal has to happen at the trial court level with the appellate court's, you know, cooperation and supervision, but the appellate court is not in a position to make a determination about whether the -- whether 76a has been met, and we ought to just have something like we do with every other sort of determination where we need findings. We ought to just say, you know, if somebody files a motion to seal in the appellate court, send it back, remand it to the trial court for determination and ruling, which will then be reviewed by the appellate court.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: Yeah, I thought I understood Stephen to say something about records filed in

the court of appeals that were not sealed that had previously been filed in the trial court. I don't know why you can't have -- we have inadvertent production in discovery. You can have inadvertent filing of documents, and we ought to be able to --

HONORABLE STEPHEN YELENOSKY: But you do that in the trial court.

HONORABLE LEVI BENTON: Right. Sure.

HONORABLE STEPHEN YELENOSKY: You inadvertently filed it. You can ask the trial court and then the trial court has the question as to whether or not it can seal something that's already been public, but that's a problem we can't resolve, but it's the trial court. I don't see any reason to allow somebody to find out that they have inadvertently filed something not under seal and they go on a motion to the court of appeals. To me that's contrary to all notions of what we require people to do in the trial court before they go to the court of appeals. I don't understand why there would be an exception here, and in defense of Bill, the charge was to write a rule for all of that, but I think whenever we have a charge we write what we're asked to write, but we are also entitled to say but we don't think you should do this, and that's what I think we are saying.

CHAIRMAN BABCOCK: Okay. Who was next?

HONORABLE LEVI BENTON: Christopher.

CHAIRMAN BABCOCK: Christopher.

HONORABLE TRACY CHRISTOPHER: I would like to speak out against requiring the trial judge to keep custody of documents unless they plan to mandamus in connection with the privileged documents. I just don't think that the judge needs to have those unless a mandamus is going. So they come in, they show me the documents, and I say, "Privileged. Are you going to appeal? Are you filing a mandamus?"

"No."

I give them back to the party whose documents they are. They -- you know, you don't have to worry about them anymore. They're gone. All right. I look at the documents. I order them produced in 30 days. "Are you going to mandamus?"

"Yes."

"Okay. I will hold onto them. I will stay my order pending the ruling by the appellate court." And somehow we have got to get those documents to the appellate court. I mean, that's really as simple as it needs to be.

HONORABLE TOM GRAY: Or as complicated.

PROFESSOR DORSANEO: You are doing all of these things that many judges would not do. They just

say, "Good luck."

HONORABLE TRACY CHRISTOPHER: Maybe, you know.

HONORABLE DAVID EVANS: I think that works. There is a case where the ruling could be to -- could be taken up on appeal, but if you set a deadline by which you must take an intermediate appeal or show why you shouldn't turn it back over, I don't have a problem with that idea.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Two quick things. If it's a document that is sealed under 76a or otherwise sealed in the trial court, I have it on expert authority that the method of getting that to the court of appeals is really simple. She says all you do is when it comes in the portal you check a box. It actually asks you if it is sealed, and you check a box if it is. We actually had one that came in from a termination case. It had been inadvertently checked. We sealed it. We got a motion by the parties to unseal it. The clerk -- or the court reporter recognized that she had inadvertently checked the wrong box. We unsealed it, and we went on. So there is a procedure in place of how to get a document that is sealed, not talking about in camera stuff here. I'm talking about a sealed document up to the court of appeals and dealt with.

The other wrinkle in this for the TRAP and the charge that the subcommittee is going to have to deal with is these are the TRAPs, and they're going to affect criminal cases as well, and criminal cases have some unique problems in them. There is a -- for example, in the child pornography statute, there's a provision where the trial court is supposed to go through the record and seal certain exhibits, and they don't come to us, and they don't become part of the record that is publicly available. We got a record in a case, went all the way through the appellate process. It got fully processed, and then the inmate is working on his writ, and he asked for copies of the entire record, and that was the -- we realized, wait a minute, we can't send 4,000 pages of child pornography back to the prison. That's probably not a good idea, and so we abated it to the trial court, and the trial court, you know, did what they were supposed to do originally, notified the clerk, and cleaned it up that way. So there are some other issues that come up on appeal that we won't see coming out of either of the Rules of Civil Procedure, so and the 202 question comes up as well, but --

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Under Rule 193.4, Justice Christopher's idea that the party that's seeking

the privilege keep custody of those and be responsible, that could work. What would need to be done then is to add something into the rule. Right now the rule says something like the trial judge must order the -- well, if the trial judge overrules the objection based on privilege, the party is ordered to produce those documents within 30 days, but what it doesn't have is the opposite, which is if the trial judge orders the production instanter, what keeps -- what keeps -- you know, how do we get that automatic stay that Judge Christopher does and many judges do, but occasionally --

HONORABLE STEPHEN YELENOSKY: Elected judges. I mean, we have to preserve error all the time. I mean, preserve jurisdiction.

HONORABLE JANE BLAND: Right. It would be good to have something in the rule that says that if a party plans to appeal they may retain custody of those documents.

PROFESSOR DORSANEO: Suppose the one who wants to appeal is the one who was trying to discover the document, and if it's ruled privileged and you give it back to the person who doesn't want it discovered, maybe that's the end of it, because isn't that why, Judge Wallace, you don't let that happen?

HONORABLE R. H. WALLACE: I'm not sure

what --

HONORABLE DAVID EVANS: The problem with what Judge Christopher -- you have to set some deadlines when they -- you're assuming everybody is going to seek mandamus, and I am sitting here thinking I've had one case where they said -- I didn't allow the discovery, but I held the records because I thought there's going to be an appeal at the end of the case, and if they lose the case to the jury, they're going to want to go back and review this discovery ruling. So before the trial judge releases it, you've got to have some sort of notice to the party who didn't get the discovery, "I'm going to turn these back over unless you file an objection, unless you show me why I shouldn't turn them back over," and at that point Richard will fly in from San Antonio, says, "We're going to hold this over your head until the case is over and see if we can make an appellate point out of it," and at that point you've got to hold onto it. But there would have to be some notice to the party denied the discovery that you're going to deliver it back to the litigant, and the litigant cannot be the custodian pending an appeal. That just can't happen.

PROFESSOR DORSANEO: Yeah. That's what I'm thinking.

HONORABLE DAVID EVANS: That just can't

happen.

PROFESSOR DORSANEO: And the way it works now -- forget 76a, but the way it works now is it's just, "Okay, we've made our ruling, and everybody just do what you need to do." Huh? And that's not right? Huh? Because you might not have somebody who, you know, likes you or your case.

HONORABLE DAVID EVANS: If you turn over the privileged material you know it's going to go up. You usually build in a 30-day notice just to say, "I give you 30 days to seek relief, and if you don't, you've got to" -- I hold it, but I could just as well tell the parties, "I'm going to turn it back over to the tendering party in 30 days unless you tell me why I need to retain custody."

PROFESSOR DORSANEO: I have a question, and I need to have answered to work this forward through 193.4. That's what I wanted to do is to take 193.4 and say what happens next? Okay. It kind of stops, and everybody is scrambling. You can use 52.10 of the appellate rules to go get relief from the appellate court, if you can get it. Huh? And you could get time to do that from the trial judge, if you can get it. Okay. But there's no rule requiring either of those courts to exercise discretion in your favor. That is bad. Okay.

In some places. Huh? That's bad. So I think 193.4 needs more work.

Now, there's a thing we were discussing up here that, if I may, that needs -- that I need to know about, and the way this rule was drafted -- and if we take 76a out of it it probably doesn't matter, but the way this was drafted, documents filed under seal on our definition was a document that somebody filed in an envelope, sealed wrapper, and they marked sealed. Okay. And there was no court order. Now, a sealed document was one where you've got -- was one that was sealed by law or by a court order. All right. I can accept for the sake of argument that it can't be filed under seal unless it's -- there's a court order, but I know y'all were telling me that in camera inspection is different. If I file something for in camera inspection, okay, I don't need a court order to do that. Huh? All right. I don't see that as different myself, but if everybody wants to go on with the idea that, well, this is an in camera inspection and it's different from filing a motion under a document under seal, that's fine. I don't need -- if I don't have to deal with 76a, I don't need to resolve that conundrum. I can just take those definitions out and give a definition of "in camera inspection," huh? And if that works it works. Okay. We've got in camera inspection and then

you've get some nice questions as to how a motion to seal practice would work in connection with that, and it ends up working roughly the same. Okay. That can be -- that can be -- you know, that can be done. But 76a, if it's going to be separate, I don't want to work on it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Judge Evans.

PROFESSOR DORSANEO: I'll work on it, but I don't want to.

HONORABLE JANE BLAND: You have convinced me that we really -- you're right. We can't have the trial judge rule on a universe of privileged documents and then give them back to the party, because we want to make sure that the record on appeal is the same record that the trial judge reviewed.

HONORABLE DAVID EVANS: That's right.

HONORABLE JANE BLAND: So that's right.

HONORABLE DAVID EVANS: And the judge can leave little notes, "Read this, please."

HONORABLE JANE BLAND: No. No.

HONORABLE DAVID EVANS: You know, I'm sorry. Okay. Now you're going to get paranoid, and say, "No, no" to that. Okay.

HONORABLE JANE BLAND: This part of the mechanics of the record under 193 hasn't really presented

the problem that the other side of 193 has presented, which is the trial judge ordering production instanter or in some amount of time that does not allow the party that is trying to assert the privilege to seek temporary relief in the appellate court before the production of the documents, and it happens frequently, and I think it happens not in a few jurisdictions. So we need to --

HONORABLE TRACY CHRISTOPHER: We added that 30-day period fairly recently and most people after that I mean --

HONORABLE JANE BLAND: Yeah. It's

CHAIRMAN BABCOCK: Hey, hey, one at a time. Hold it, hold it, hold it. One at a time.

HONORABLE JANE BLAND: Well, I mean, court, there are trial courts, and one routinely in a big piece of litigation that engendered, you know, 50 mandamuses, I mean, the trial judge routinely said, "I order you to produce it."

PROFESSOR DORSANEO: "Get on with it."

HONORABLE JANE BLAND: You know, and they're in Galveston County, and they've got to get to the -- it was to the point where they were, you know, doing things like calling the clerk at the appellate court saying, "We have a hearing today in Galveston."

CHAIRMAN BABCOCK: All right. We're going

to quit a little bit early today --

HONORABLE LEVI BENTON: No.

CHAIRMAN BABCOCK: -- on motion, and it looks like our next meeting is going to be a two-day meeting on April 28th and 29th. Orsinger is going to mention that there's an appellate seminar that day on the 28th, so we're going to start at 10:00 o'clock on the 28th instead of our usual 9:00 o'clock so that the Chief can speak to the appellate seminar on the 28th.

MR. ORSINGER: Oh, thank you so much.

CHAIRMAN BABCOCK: And we'll send -- we'll send notice out on it and a new agenda, and thank you everybody for all of your work and for hanging in there. Not everybody has, but thank you, and we'll be adjourned.

PROFESSOR ALBRIGHT: Chip, that is the week of the -- weekend of the Women in the Law Power Summit at the Four Seasons.

CHAIRMAN BABCOCK: Yeah, that's the -- we've got conflicts all over April, Alex. Sorry.

PROFESSOR ALBRIGHT: I just didn't know if there would be room at the Four Seasons.

CHAIRMAN BABCOCK: Yeah, we're checking on that, and we're going to try to reserve them, but thank you, and by the way, there are photographs for those of you who didn't get them last time, of ourselves. But

anyway, a two-day meeting next time, the 28th and 29th. So thanks, everybody. Have a good weekend.

(Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 3rd day of February, 2017, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,601.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 12th day of March, 2017.

/s/D'Lois L. Jones
D'Lois L. Jones, Texas CSR #4546
Certificate Expires 12/31/16
3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

#DJ-428