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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

OCTOBER 18, 2013

(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 18th day of October,  
2013, between the hours of 9:02 a.m. and 3:51 p.m., at the  
State Bar of Texas, 1414 Colorado, Suite 101, Austin,  
Texas 78701.

**INDEX OF VOTES**

No votes were taken by the Supreme Court Advisory Committee during this session.

**Documents referenced in this session**

13-15 Restyling TRE, Current TRE to Restyled TRE, 10-2-13

13-16 Restyling TRE, Restyled FRE to Restyled TRE, 10-2-13

13-17 Restyled TRE, revised version 10-2-13

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2                   CHAIRMAN BABCOCK: Welcome, everybody. Nice  
3 to be back at the State Bar. Everybody down at the -- at  
4 that end will need to speak up so that Dee Dee can hear  
5 you; and with that, we'll turn it over to the Chief  
6 Justice to give us a report about what's happened the last  
7 two and a half weeks.

8                   HONORABLE NATHAN HECHT: Senate Bill 825 in  
9 the last session required the Court to change part --  
10 Section 15.06 of the Rules of Disciplinary Procedure to  
11 change the statute of limitations on Brady violations to  
12 run from the release on a wrongfully imprisoned person, so  
13 we did that. In the process we rewrote 15.06 to make it a  
14 little clearer, and so that rule will become -- or that  
15 section will become effective November 1st, and the  
16 statute required it to be done by December. And  
17 otherwise, I have nothing else to report except that the  
18 formal investiture of myself and new Justice Brown is on  
19 November 11th at 11:00 a.m., so 11-11-11 at the -- in the  
20 House chamber over in the capitol, and you're all invited  
21 to attend. Justice Scalia is going to come down to make  
22 sure the oaths really stick, and so you're all invited. I  
23 think the State Bar is going to have a reception  
24 afterwards. That's all I've got.

25                   CHAIRMAN BABCOCK: Okay. Great. Well,

1 thank you, we'll now wade back into the Rules of Evidence,  
2 and I think we stopped at 409, so we'll go to 410, and  
3 we're happy to have Judge Darr and Professor Goode and  
4 Fields Alexander back with us to help in this project and  
5 Buddy, as always, the able leader of the evidence rules.

6 MR. LOW: Don't go too far.

7 CHAIRMAN BABCOCK: So any comments about  
8 410, which deals with pleas, plea discussion, and related  
9 statements.

10 MR. ALEXANDER: Chip, can we rewind for just  
11 a second?

12 CHAIRMAN BABCOCK: Yeah, sure, rewind.

13 MR. ALEXANDER: First of all, good morning.  
14 In light of some of the thoughtful comments that were made  
15 at our last meeting, we have submitted -- and hopefully  
16 they've been circulated -- a slightly revised version of  
17 the restyled rules with a few changes in light of -- in  
18 light of the previous discussions, so if y'all don't have  
19 those --

20 MS. SENNEFF: October 2nd?

21 MR. ALEXANDER: Yes, exactly.

22 MS. SENNEFF: That's what everybody has.

23 MR. ALEXANDER: All right. So 101(f) has  
24 been changed slightly, 103(c), 105(b), 203(b), and  
25 408(a)(2) were all revised, most fairly clerically, 203(b)

1 hopefully somewhat substantively to address some of the  
2 concerns that were raised at the last meeting. I didn't  
3 know if anybody wanted to revisit those before we move on.

4 CHAIRMAN BABCOCK: We're not going to  
5 revisit them right now.

6 MR. ALEXANDER: Okay.

7 CHAIRMAN BABCOCK: If anybody has comments  
8 about that, though, they can either submit it in writing  
9 or at the end of our meeting they can bring it up, but  
10 let's see if we can move -- get one pass through the  
11 remaining rules, starting with 410. So any comments about  
12 410? Yeah, Justice Brown.

13 HONORABLE HARVEY BROWN: Chip, last time we  
14 asked if the committee could kind of just tell us if  
15 they've changed the Federal rule and if so, why, just kind  
16 of a quick summary as to where we are. Would that be all  
17 right if we did that again?

18 CHAIRMAN BABCOCK: I think that would be a  
19 great idea. Anybody want to address that?

20 MR. ALEXANDER: Go ahead.

21 PROFESSOR GOODE: Yes, Texas Rule 410, we  
22 essentially have a separate rule for the civil and the  
23 criminal. They have been sort of mashed together, and  
24 it's hard to read, but the Texas civil Rule 410 is very  
25 much like the Federal Rule 410. The Texas criminal Rule

1 410 was slightly different from the Federal Rule 410, but  
2 just in one detail that made the drafting rather  
3 complicated, and so what we did is essentially separate  
4 out Rule 410 into a rule for the admissibility of pleas in  
5 civil cases and the admissibility of pleas in criminal  
6 cases. You know, it's just a lot more comprehensible to  
7 understand it. If you're in a civil case, you can look at  
8 410(a), and if you're in a criminal case, you look at  
9 410(b), but basically it tracks the Federal -- restyled  
10 Federal language with just the accommodations to take care  
11 of the sort of idiosyncrasy of the criminal rules.

12 CHAIRMAN BABCOCK: Is anybody coordinating  
13 with the Court of Criminal Appeals on 410(b)?

14 PROFESSOR GOODE: We haven't done that as of  
15 yet.

16 MR. LOW: If you write them, you never hear  
17 from them.

18 HONORABLE NATHAN HECHT: But we do plan to  
19 visit with them about it.

20 MR. LOW: They would probably respond to  
21 Justice Hecht better than they would to me.

22 CHAIRMAN BABCOCK: You think?

23 MR. LOW: Yeah.

24 CHAIRMAN BABCOCK: Okay. Any other -- any  
25 other comments about this Rule 410? Okay. Sounds like

1 perfection. Let's try 411, "Liability insurance." Any  
2 change in the Federal rule?

3 MR. ALEXANDER: The only difference between  
4 the Federal rule and the Texas rule is this language, "if  
5 disputed," at the bottom, which tracks the current Texas  
6 rule and is not in the analogous Federal rule.

7 CHAIRMAN BABCOCK: And what language are you  
8 talking about? Oh, "if disputed," I see.

9 MR. ALEXANDER: "If disputed," right. Other  
10 than that I think this tracks the Federal rule.

11 MR. LOW: The reason for "if disputed," some  
12 people want to prove agency or control by insurance  
13 policy, and I haven't stipulated. I say, "Wait a minute,  
14 I don't want insurance in it. I'll stipulate agency  
15 then," so it's not disputed so they can't just, you know,  
16 offer it. So that's why we have it that way.

17 CHAIRMAN BABCOCK: Okay. Good point.  
18 Anything else about 411? Any other comments? Okay.  
19 Let's go to 412, "Evidence of previous sexual conduct in  
20 criminal cases." Any changes, Fields, from the Federal?

21 MR. ALEXANDER: There are. Go ahead, Steve.

22 CHAIRMAN BABCOCK: Or, I'm sorry, Justice  
23 Goode. I mean Professor Goode. We'll get this straight  
24 in a minute.

25 PROFESSOR GOODE: I was going to say, a

1 promotion.

2 HONORABLE TOM GRAY: Not really.

3 PROFESSOR GOODE: Yes, the Texas rule is  
4 quite different from the Federal rule. The Federal rule  
5 applies -- more broadly applies to civil as well as  
6 criminal cases. The Texas rule only applies to criminal  
7 cases. Again, what we did is we took the language of the  
8 Texas rule, and to the extent that the Texas criminal rule  
9 reflected language that was in the Federal civil rule, we  
10 used that language. Where it was different we just took  
11 the Texas language, and it's pretty much the same as the  
12 current rule, a little bit reorganized and some fairly  
13 simple grammatical clarifications, but essentially it's  
14 the same rule.

15 CHAIRMAN BABCOCK: Okay. Any comments on  
16 412, "Evidence of previous sexual conduct in criminal  
17 cases"?

18 MS. HOBBS: I do.

19 CHAIRMAN BABCOCK: Yeah, Lisa.

20 MS. HOBBS: So on the subsection (d) where  
21 we're talking about sealing the record, I think it's an  
22 odd concept in Texas to have the trial court have an  
23 obligation to preserve the record, and I understand why  
24 you used that term. Like when I reread the old Texas rule  
25 it talks about the trial court having to send it up to the



1 appellate court, which implicates some duty to preserve,  
2 but that is a new concept in Texas because he's not -- the  
3 judge is not really going to -- I mean, that's going to  
4 be -- that's going to be in the reporter's hands, court  
5 reporter's hands typically, so I wonder if we just want to  
6 say the court must order the records sealed, and then  
7 he -- it's an obligation to order it sealed and not an  
8 obligation to preserve it.

9           And then secondly, I know this is a little  
10 bit of a change in current Texas -- at least the wording  
11 of it. I don't know if it's a change in practice, but I  
12 really like the idea in the Federal rules that the motion  
13 and all the surrounding papers are sealed automatically,  
14 too. Our rule implies that we would present orally this  
15 evidence to the -- like in a motion in limine, an oral  
16 motion in limine kind of thing, but the Federal rule  
17 indicates that this is usually filed by motion, and I  
18 don't practice in this area, but my guess is a lot of  
19 times this is filed with a motion, and if so, don't we  
20 want to seal all of the documents surrounding this.

21           MR. LOW: I mean, your job was not to make  
22 any substantive changes. Are those suggestions that -- we  
23 were not to -- if we want to take that up, that would  
24 be -- I mean, we were just to not make substantive changes  
25 to clarify where and follow the Federal rule where it was

1 the same basically as ours.

2 MS. HOBBS: Yeah, I guess my question is, is  
3 it current Texas practice to seal it all; and if so,  
4 should we reflect that current practice in the rule  
5 itself, and then the "preserve," it's just a verbiage  
6 choice. That's an odd verbiage choice for Texas.

7 MR. ALEXANDER: And, like you, I don't  
8 practice enough in this area to know current Texas  
9 practice on that, so we really did try to just mirror the  
10 best we could the existing Texas rule. Your other point I  
11 think is apt. We did our best to restyle it in accordance  
12 with the current Texas rule, but I take your point, in  
13 regards to sealing of the records and the court's  
14 obligation in that regard.

15 PROFESSOR GOODE: I can't swear to this. I  
16 believe the language in (d) comes from another rule.

17 MS. HOBBS: Oh.

18 PROFESSOR GOODE: It's taken from another  
19 restyled Federal rule, which is the same obligation. I  
20 don't think I made that up, but I will need to double  
21 check that.

22 CHAIRMAN BABCOCK: I think it's in the  
23 current rule, it looks like.

24 PROFESSOR GOODE: It says, "The court shall  
25 seal the record."

1 MR. ALEXANDER: Yeah, right, it's worded  
2 slightly -- I think the issue is with the wording of it.

3 PROFESSOR GOODE: We say "preserve under  
4 seal."

5 MS. HOBBS: I mean, this seems like the  
6 trial courts in the room -- the trial judges in the room  
7 might have a -- you know, what happens if they don't  
8 preserve it, what happens if it's lost, you know, it's  
9 just not in the trial court's normal duty to preserve  
10 that, so --

11 CHAIRMAN BABCOCK: Judge Evans, you have any  
12 thoughts about this?

13 HONORABLE DAVID EVANS: None. I'm keeping  
14 my thoughts to myself.

15 PROFESSOR GOODE: I will say, current Texas  
16 Rule 615(c) talks about "any portion withheld over  
17 objection shall be preserved and made available to the  
18 appellate court."

19 MS. HOBBS: What rule is that?

20 PROFESSOR GOODE: Current Rule 615(c).

21 MS. HOBBS: Okay.

22 CHAIRMAN BABCOCK: Justice Gray.

23 HONORABLE TOM GRAY: Well, given Buddy's  
24 comment I was not going to make this one, but given the  
25 current text of the rule then versus this change, there is

1 a statute in the -- I believe it is the Penal Code, and  
2 I've been dealing with it recently. I'm sorry that I  
3 can't give you the specific reference off the top of my  
4 head, but that requires a trial judge when this type  
5 evidence has come in, including photographs, in these type  
6 cases that puts an affirmative duty on the trial judge to  
7 seal the record; and I had never seen that done in any  
8 cases that were coming up to the Waco court of appeals;  
9 and so I was struggling with a request by an inmate who  
10 had been convicted of possession of pornography, kiddie  
11 porn; and he was requesting the record; and he wanted --  
12 he was willing to pay for it. He was trying to do a  
13 post-conviction writ, and he was trying to get it down to  
14 the penitentiary, and he was going to have his mother pick  
15 up the copy, and we figured out there were problems with  
16 that and how was this supposed to be done, and given that  
17 statute the current language in the rule makes more sense  
18 that the judge is to do that affirmatively and in effect  
19 keep that part of the record sealed, and so maybe a little  
20 bit closer to the current language may be important.

21 CHAIRMAN BABCOCK: Judge Estevez.

22 HONORABLE ANA ESTEVEZ: Well, I have had to  
23 do it before because I have a general jurisdiction, and I  
24 mean, as far as the court reporter goes, we just say,  
25 "This part is sealed," and then we say, "This is the end

1 of the seal." I don't know what she does for the record,  
2 but, you know, we just follow the rule, and it doesn't go  
3 up in the -- I don't believe it -- it doesn't go up in the  
4 public record, but it -- I don't know that it was my duty,  
5 as she said, to seal it, but it is, because if they ask  
6 for that hearing and I read the rule then I know that it  
7 has to be sealed and in camera, and so it does become my  
8 duty.

9 CHAIRMAN BABCOCK: Lisa.

10 MS. HOBBS: I do think you have a duty to  
11 seal it. I just don't know that you have a duty to  
12 preserve it, and going back to your point on 615, that is  
13 actually in the passive tense, which would make me feel  
14 more comfortable with this, if we somehow worded this in  
15 the passive tense that says, "It shall be preserved" or  
16 "It will be preserved," or something so that you're not  
17 telling the trial court that it's his obligation to do  
18 something to his court reporter that ensures that, you  
19 know, her house doesn't burn down or that her hard drive  
20 doesn't crash, or, I mean, it just seems like the trial  
21 court doesn't want that duty on him, and I don't know.

22 CHAIRMAN BABCOCK: Okay. Any other thoughts  
23 about this?

24 PROFESSOR HOFFMAN: Chip, my only other  
25 thought is just a quick question. So the Federal rules

1 have a 413, a 14, a 15, and I think a 16 for other kind of  
2 sexual child molestation. Just talk for a second, Steve,  
3 about why we didn't put those in -- so they didn't exist  
4 in Texas law before and so we just sort of decided not to  
5 be more detailed?

6 PROFESSOR GOODE: This was a total  
7 nonsubstantive restyling of the rules. That was our  
8 charge. It was also our view that if we started tinkering  
9 with substance, the restyling effort would crash because  
10 we would fight about the substance. So our view was let's  
11 restyle, get these rules as consistent as possible with  
12 the Federal rules, and then we'll spend the next 20 years  
13 fighting about the substance; and, in fact, during the  
14 course of our several years of doing this we identified a  
15 lot of rules that, in fact, under Judge Darr we were going  
16 to start to look at this coming year in terms of the need  
17 for substantive changes.

18 CHAIRMAN BABCOCK: Okay. Anything more  
19 about that rule? Okay. Yeah.

20 HONORABLE NATHAN HECHT: Just a question.

21 CHAIRMAN BABCOCK: Justice Hecht.

22 HONORABLE NATHAN HECHT: I take it then,  
23 just to be sure I understand, the "preserve under seal"  
24 was intended by the draftsmen to be the same as "sealed"?  
25 The existing rule just says "the court shall seal," and

1 the restyled rule says "preserve under seal," and that was  
2 meant to be synonymous?

3 MR. ALEXANDER: It was.

4 PROFESSOR GOODE: It was meant to be  
5 "preserve under seal" as synonymous for "seal for delivery  
6 to the appellate court."

7 HONORABLE NATHAN HECHT: Yeah.

8 PROFESSOR GOODE: Yes.

9 HONORABLE TOM GRAY: Chip, this is going to  
10 become a lot more serious as to how it's sealed and noted  
11 as sealed come January 1 with all electronic filing and  
12 what -- depending on what gets posted on the web and how  
13 quickly and whether courts default to posting of the  
14 record automatically or not. The preservation  
15 requirement, I think Lisa is right on the issue, but it --  
16 that nuance is going to be very important.

17 CHAIRMAN BABCOCK: Sarah.

18 HONORABLE SARAH DUNCAN: And I share Lisa's  
19 concern. Isn't it resolved if we just say instead of  
20 "must preserve," "must order the record sealed," just  
21 because there --

22 CHAIRMAN BABCOCK: Could you say that a  
23 little louder, Sarah? I don't think everybody heard that.

24 HONORABLE SARAH DUNCAN: Rather than saying  
25 "must preserve," just say, "The trial court must order the

1 record of the in camera hearing sealed," because I'm not  
2 uncomfortable with telling the trial court --

3 MS. HOBBS: No.

4 HONORABLE SARAH DUNCAN: -- and Lisa is  
5 nodding her head that she's not either, telling the trial  
6 court you have to order it sealed. It's the preservation  
7 requirement that's troubling.

8 CHAIRMAN BABCOCK: Yeah. Okay. Yeah, Judge  
9 Evans.

10 HONORABLE DAVID EVANS: Well, it would be  
11 nice if you would just modify the word "record" with the  
12 word "reporter's record," then you don't have to worry  
13 about it being in the clerk's record. It gets up on  
14 appeal, and that would be helpful under 76a, Rules of  
15 Civil Procedure, to clarify that in camera documents are  
16 part of the reporter's record and not part of the district  
17 clerk's record under that structure, and it would make it  
18 a little bit easier on trial judges. I don't do criminal  
19 cases, but I think since the -- since it's not clear that  
20 it specifies clerk or reporter's record, I don't know that  
21 it's a substantive change, but we can certainly clarify  
22 that it's going to be the reporter, and that gives all the  
23 proper safeguards. Parties have to order the reporter's  
24 records. Somebody from the outside comes in to order it,  
25 all the parties are given notice that it's going to be



1 offered, and the trial judge can step in and intervene  
2 from it being disclosed to the public, and so I'd just  
3 like to suggest that might be an appropriate change.

4 CHAIRMAN BABCOCK: Richard.

5 MR. MUNZINGER: What happens if a party  
6 decides to inform the court outside of the jury's presence  
7 by filing a motion with the clerk? The rule doesn't  
8 forbid that. The rule doesn't comment on that  
9 possibility. High feelings between parties could lead a  
10 party to attempt to hurt someone or do something else by  
11 filing some kind of a motion, whether it's specific or  
12 otherwise, that alludes to that party's intent to offer  
13 evidence of a sexual impropriety or sexual history of the  
14 adversary. The rule is silent about what happens, A, if  
15 such motion is filed, how does the court and the clerk  
16 treat it, and, B, what happens to that motion on appeal.  
17 Was that considered?

18 PROFESSOR GOODE: Again, we were doing a  
19 nonsubstantive revision of the rules. If there are  
20 unanswered questions, we didn't feel that we could rewrite  
21 the rule to answer questions. Again, I would say this is  
22 a rule that has been in existence for almost 30 years, 27  
23 years now, and that problem has not cropped up to my  
24 knowledge, and so we certainly didn't -- not only did we  
25 not go out of our way to deal with questions that came to

1 us, but we didn't try to deal with questions that didn't  
2 come to us and didn't seem to have arisen because they are  
3 hypothetical.

4 Just as a point of information, Justice  
5 Gray, I think the statute you are referring to is Article  
6 38.45 of the Code of Criminal Procedure, which says the  
7 court -- "The court shall place property described in  
8 subsection (a) under seal of the court," and so you're  
9 quite right.

10 HONORABLE TOM GRAY: That's not the one,  
11 but -- and I'm trying to get it back from one of my staff  
12 attorneys, but I'll interject that when I get it.

13 PROFESSOR GOODE: The point is we do have  
14 statutory provisions directing the court to place things  
15 under seal already.

16 MR. LOW: When we first got your work and I  
17 sent it out to my committee, we had all kinds of  
18 suggestions and this doesn't work or that doesn't work,  
19 and I said, "Let's look at our charge," so when we had the  
20 same charge, you know, that you had and we went to that.  
21 Then there were a number of things we would have changed,  
22 but the Court wanted to get it done this century, and so  
23 we decided to, you know, do what the Court ordered.

24 MR. ALEXANDER: And we had the identical  
25 issue when we first started looking at this restyling

1 effort in our committee and fell back on the charge, and  
2 that's why we did it the way we did it.

3 CHAIRMAN BABCOCK: Okay. Lisa, and then  
4 Judge Estevez.

5 MS. HOBBS: I was going to change topics a  
6 little bit.

7 CHAIRMAN BABCOCK: Well, then let's have the  
8 judge weigh in.

9 HONORABLE ANA ESTEVEZ: Well, I think  
10 Professor Goode was going to find if he had used "the  
11 court must preserve." Did you find whether that was used?  
12 I didn't find it in the Federal rule.

13 MS. HOBBS: It was in 612.

14 PROFESSOR GOODE: Let me take a look.

15 CHAIRMAN BABCOCK: 412(c)(2)?

16 HONORABLE ANA ESTEVEZ: Yeah, whether it was  
17 in the Federal rule.

18 PROFESSOR GOODE: The Federal rule actually  
19 is written in the passive voice, 612(b), "any portion over  
20 objection to must be preserved for the record."

21 HONORABLE ANA ESTEVEZ: Does it say -- I'm  
22 sorry, 612(b)?

23 PROFESSOR GOODE: Restyled 612(b).

24 CHAIRMAN BABCOCK: Okay.

25 PROFESSOR GOODE: And then in, excuse me,

1 in -- in restyled Federal rule -- this is 26.2, which is  
2 Rules of Criminal Procedure, which is the equivalent of  
3 our Rule 615, the Feds use the language, "The court must  
4 preserve the entire statement with the excised portion  
5 indicated under seal as part of the record." I think  
6 that's where the language came from.

7 HONORABLE ANA ESTEVEZ: The number again,  
8 I'm sorry?

9 PROFESSOR GOODE: That is Federal Rule of  
10 Criminal Procedure 26.2, which is the equivalent to our  
11 Rule of Evidence 615. And that's where the language comes  
12 from, but the Federal Rule of Evidence 612 writes in the  
13 passive voice and talks about "must be preserved," so, you  
14 know, if this is a big issue we can certainly change this  
15 to a passive voice. I don't see a massive problem.

16 MR. ALEXANDER: We tried to avoid passive  
17 voice under the restyling -- the restyling effort the Feds  
18 had used and the desire to avoid passive voice whenever  
19 possible, but so you'll find very little, if any, passive  
20 voice in our restyled rules. That doesn't mean we can't  
21 use it as needed.

22 CHAIRMAN BABCOCK: Lisa.

23 MS. HOBBS: In subsection -- looking at  
24 restyled subsection (c) and current subsection (c) in the  
25 procedure for offering evidence, the sentence in the

1 current rule says, "The court shall determine what  
2 evidence is admissible and shall accordingly limit the  
3 questioning," and that phrase has been excluded from the  
4 current restyled draft, and I don't know if that has any  
5 meaning, "and shall accordingly limit the questions," but  
6 it may have some implications about not letting things go  
7 too far down any one road even if it is admissible, and we  
8 might like that implication.

9 MR. ALEXANDER: Yeah, our feeling was that  
10 the language in the restyled rule that "the court must  
11 determine whether proposed evidence is admissible"  
12 sufficed for what was intended in the current rule, so we  
13 did look at that issue, and that's how at least we came  
14 down on it, was the initial language was surplusage, but I  
15 take your point.

16 MS. HOBBS: Yeah, I just wonder if it's  
17 worth talking to some prosecutors or something to see if  
18 that's addressing some -- you know, sometimes these words  
19 have implications that cause trial courts to listen a  
20 little bit more closely, and I just wonder if there's  
21 something there.

22 HONORABLE SARAH DUNCAN: As we all learned  
23 from the recodifications, taking words -- I mean, I would  
24 think that's significant.

25 MR. ALEXANDER: Right.

1 HONORABLE SARAH DUNCAN: It empowers the  
2 trial court even if the evidence is admissible to limit  
3 the questioning --

4 MS. HOBBS: That's what I'm worried about.

5 HONORABLE SARAH DUNCAN: -- and I think  
6 that's totally missing on the restyled language. But  
7 Professor Goode thinks I'm crazy.

8 PROFESSOR GOODE: I don't understand. It  
9 says the court shall determine what's admissible and the  
10 defendant shall not refer to anything that's inadmissible  
11 without first going to the judge.

12 HONORABLE SARAH DUNCAN: Right, but -- I'm  
13 sorry.

14 PROFESSOR GOODE: So I'm sort of at a loss  
15 for what I'm missing here.

16 HONORABLE SARAH DUNCAN: There could be  
17 reasons to limit the questioning other than admissibility  
18 of the topic.

19 MR. ALEXANDER: The current rule authorizes  
20 a court to limit questioning only in the context of  
21 admissibility. It says, "The court shall determine what  
22 evidence is admissible and shall accordingly limit the  
23 questioning," so I don't think the court has discretion in  
24 the current rule to limit the questioning other than  
25 admissibility, as I read this. That was certainly the

1 intent of our restyling.

2 HONORABLE SARAH DUNCAN: That's not how I  
3 read it.

4 PROFESSOR GOODE: Why would you limit  
5 questioning for reasons other than admissibility?

6 HONORABLE TOM GRAY: "We've heard that  
7 testimony a thousand times. Move on, Counsel."

8 PROFESSOR GOODE: That's admissibility.  
9 That's Rule 403, admissibility.

10 HONORABLE SARAH DUNCAN: Well, I think it  
11 could be a lot of things, badgering, embarrassment, it's a  
12 very sensitive topic; and I can't imagine all the  
13 circumstances that a court might say, "You get four  
14 questions to establish that it happened, but that's as far  
15 as I'm going to let you go."

16 PROFESSOR GOODE: I guess to my mind that's  
17 all admissibility because of Rules 401, 402, and 403, and  
18 611.

19 MS. HOBBS: I think that you may be correct,  
20 but I think there might be people out there who would take  
21 the elimination of this phrase as perhaps having some  
22 meaning if -- you know, because we're -- we're thinking  
23 that phrase does have meaning, and you've taken it out,  
24 and we just are concerned that other people might wonder  
25 why it was removed.

1 HONORABLE TOM GRAY: And I think you're  
2 using admissibility more -- I don't know if it would be  
3 broader or narrower than -- but you're talking about what  
4 the trial court has decided to let in, and the person  
5 making this argument is, yeah, the trial court may have  
6 excluded it, not let it in, but it was admissible. It  
7 just didn't get admitted because it was duplicative and,  
8 you know, unduly embarrassing or whatever. It was  
9 admissible. It just didn't get into evidence, and we  
10 would be arguing that we could talk about it under this  
11 context, but I also owe you an apology, the penal -- Code  
12 of Criminal Procedure that you referenced was the right  
13 one that I was referring to, the 38.45 I believe.

14 MR. LOW: But Steve --

15 CHAIRMAN BABCOCK: Will you accept that  
16 apology?

17 PROFESSOR GOODE: For the record, under  
18 advisement. Thank you very much. I appreciate that.

19 CHAIRMAN BABCOCK: I'm not calling you  
20 "justice" anymore. All right. Everything -- we exhausted  
21 that topic? Let's go on to privileges, and I don't think  
22 we'll see too much overlap with the Federal here, will we?

23 PROFESSOR GOODE: Absolutely not.

24 PROFESSOR DORSANEO: No.

25 PROFESSOR GOODE: This was in some ways the



1 most difficult because the Federal rules don't have  
2 privilege rules beyond 501 and 502, and so we were  
3 drafting from scratch. I've got three documents I'm going  
4 to pass around.

5 MR. LOW: 502 was just recently done, and  
6 that's where we had the difference in the two committees.

7 PROFESSOR GOODE: We've got Federal Rule 502  
8 which deals with limited waiver of attorney-client work  
9 product privilege.

10 MR. LOW: But we have 502 and 511 now,  
11 right?

12 PROFESSOR GOODE: Correct, and been codified  
13 in two different versions. Our committee did a version of  
14 511, and we sent it to y'all. You did the second version  
15 of 511. I'm going to pass around both of those versions.  
16 This committee in this restyling effort did not reconsider  
17 511, given that we had two competing versions, both  
18 consistent with the restyling effort --

19 MR. LOW: What happened was --

20 PROFESSOR GOODE: -- already before the  
21 Supreme Court.

22 MR. LOW: Was it came from your committee,  
23 we took it -- we were charged when the Feds passed 502,  
24 and your committee came up with one version, we came up  
25 with another, we got together, and there was some basic

1 difference on waiver and so forth. I've forgotten now. I  
2 have the notes on it, and so we submitted both. You came  
3 and my people came, and we submitted both, and this  
4 committee did vote. We submitted both of them to the  
5 Supreme Court. This committee voted to go with the  
6 Supreme Court Advisory Committee's version, but the  
7 Court -- we wanted the Court to have both versions, and  
8 both versions have been with the Court.

9           PROFESSOR GOODE: And this last document I'm  
10 going to pass around, we're not going to get to this for a  
11 while; but in Rule 509, which is the physician-patient  
12 privilege, there are a bunch of statutory references in  
13 the current rule; and a bunch of those are outdated or  
14 even difficult to figure out exactly what they're  
15 referring to; and so this is sort of just a background  
16 memo on how we came up with the revised statutory  
17 references that we placed in our draft of Rule 509; but  
18 we're not going to get to that for quite a while I  
19 suspect.

20           CHAIRMAN BABCOCK: The record can reflect  
21 that we're passing stuff around the old-fashioned way, not  
22 doing it on the internet, but we're passing paper around.

23           HONORABLE TOM GRAY: But we didn't really do  
24 it the old-fashioned way. The old-fashioned way is take  
25 one, hand it down.

1                   CHAIRMAN BABCOCK: Well, we started that,  
2 Justice Hecht and I started that.

3                   HONORABLE TOM GRAY: Oh, okay.

4                   CHAIRMAN BABCOCK: And then that was going  
5 too slowly.

6                   HONORABLE NATHAN HECHT: We weren't sure you  
7 could handle it without some assistance.

8                   CHAIRMAN BABCOCK: Okay. Professor Goode or  
9 your colleagues on the committee, do you want to just go  
10 in order, 501, 502, et cetera, or do you want to --

11                  PROFESSOR GOODE: That's fine.

12                  CHAIRMAN BABCOCK: Okay. Well, let's start  
13 with 501 and see if anybody has got comments about 501.  
14 Yes, Pete.

15                  MR. SCHENKKAN: Same one we talked about a  
16 couple of weeks ago, "prescribed under statutory  
17 authority" is an unwise limitation. There is a question  
18 about whether all the relevant rules are prescribed under  
19 statutory authority as opposed to potentially the Court's  
20 constitutional authority.

21                  CHAIRMAN BABCOCK: Speak up, Pete.

22                  MR. SCHENKKAN: I beg your pardon. I did  
23 not realize that wasn't loud enough. There is the same  
24 problem with this one as we talked about three weeks ago,  
25 "prescribed under statutory authority," as an unnecessary

1 and unwise qualification on rules since some of the rules  
2 may be prescribed under the Court's constitutional  
3 authority.

4 PROFESSOR GOODE: I would just say that's in  
5 the current rule.

6 MR. SCHENKKAN: Yes, I understand.

7 CHAIRMAN BABCOCK: Richard Orsinger.

8 MR. ORSINGER: It does appear to me that  
9 this reference about "rules prescribed under statutory  
10 authority" probably is talking about administrative  
11 regulations, that -- where the Legislature has delegated  
12 quasi-legislative authority to an administrative agency or  
13 something, but I believe that there is a common law of  
14 privilege that's slowly developing, certainly in the First  
15 Amendment area, and I don't think it's wise to have this  
16 limitation. I can understand why they would want  
17 regulatorily created privileges to be presumed statutory  
18 authority, but I think there's a lot of common law out  
19 there, and it may derive from the Constitution in one  
20 instance or it may derive from English law in another, so  
21 I know I guess we're not allowed to make suggestions that  
22 are other than modernizing, but I would favor limiting  
23 that.

24 CHAIRMAN BABCOCK: Harmonizing.

25 MR. ORSINGER: Harmonizing.

1           CHAIRMAN BABCOCK: Although, there's nothing  
2 to harmonize here because this is different from the  
3 Federal. It doesn't look to me like you've changed the  
4 language of 501, have you?

5           MR. ORSINGER: No, they just -- 1, 2, and 3  
6 is (a), (b), and (c). Isn't that it?

7           PROFESSOR HOFFMAN: It is the case, kind of  
8 following Pete's comments, that the current rule, because  
9 of where the comma is, it's "by these rules," with a  
10 comma, "or other rules prescribed pursuant to statutory  
11 authority" fits exactly with what Richard just said; and  
12 that revised version lumps "these and other rules"  
13 together; and so it sort of exacerbate's Pete's point, the  
14 problem of Pete's point. Whether or not that's enough to  
15 make a difference I don't know, but to sort of highlight  
16 that.

17           CHAIRMAN BABCOCK: Well, Richard's quite  
18 right in two respects. One, I don't think the charge is  
19 to try to fix substantive problems with the rules, but  
20 you're also quite right that there are common law  
21 privileges or at least there -- there are some courts that  
22 think there are common law privileges in the First  
23 Amendment area, not only with respect to confidential  
24 sources in unpublished information, but also in the area  
25 of academic and medical associations and ability to speak

1 to each other in private, so -- so for future reference,  
2 that's a hole in this rule perhaps.

3 PROFESSOR HOFFMAN: And for the record,  
4 Chip, that really wasn't Pete's point. Pete's point was  
5 limited more narrowly to we ought not to suggest that  
6 these rules -- the only source of either Supreme Court  
7 rule-making authority or perhaps even administrative  
8 rule-making authority is limited only to a statute.

9 CHAIRMAN BABCOCK: Yeah.

10 PROFESSOR HOFFMAN: Slightly different.

11 CHAIRMAN BABCOCK: Yeah, I was speaking more  
12 to Orsinger's point than Pete's, but Pete, as usual, makes  
13 an excellent point, whatever it was.

14 Okay. Anything more about 501? Okay. That  
15 was easy since you didn't change the language.

16 PROFESSOR DORSANEO: Well, they did change  
17 it.

18 MR. HAMILTON: They did.

19 MR. ALEXANDER: Just slightly.

20 PROFESSOR DORSANEO: Why did you?

21 HONORABLE SARAH DUNCAN: It makes me  
22 question --

23 PROFESSOR DORSANEO: It says "or these rules  
24 or other rules," "by these rules or other rules." Why did  
25 you take out "rules" the first time?

1 HONORABLE SARAH DUNCAN: It's the --

2 MR. ALEXANDER: Just to shorten the language  
3 and modernize it a little bit. We didn't think it  
4 affected any substantive change, not to mention "rules"  
5 twice.

6 PROFESSOR DORSANEO: You know what always  
7 happens when you do that?

8 MR. ALEXANDER: You get it right.

9 PROFESSOR DORSANEO: No, you find out why  
10 the word that you took out was there.

11 CHAIRMAN BABCOCK: Okay. Sarah.

12 HONORABLE SARAH DUNCAN: And I -- I think  
13 the parenthetical has meaning. I at least would use it as  
14 it's currently in Rule 501. I would use that to say,  
15 well, these rules were prescribed by statutory authority  
16 because there's no -- otherwise there's no reason to  
17 include other rules prescribed pursuant to statutory  
18 authority. "Other" implies that these are. I'm just --  
19 I'm having a hard time without a redline as usual, and  
20 this has changed the wording, and I don't -- I don't know  
21 if it has meaning or not to say -- change "except as  
22 otherwise provided" to "unless the constitution, statute,  
23 or rule provides." It's bothersome to me.

24 CHAIRMAN BABCOCK: Okay. Professor Hoffman.

25 PROFESSOR HOFFMAN: So I want to maybe say a

1 little bit more because I don't actually agree with  
2 anything Sarah just said, and so by pointing out the  
3 difference I wasn't actually endorsing that we adopt a  
4 change. I was pointing out that one could see the change  
5 from current Texas Rule 501 to the restyled rule as  
6 exacerbating the problem that Pete raises. The problem  
7 Pete raises is one we talked about three weeks ago, that  
8 it feels strange to in a rule describe the source of the  
9 Supreme Court's rule-making authority as limited only to a  
10 statute. It may not be. It may derive from some inherent  
11 power. It may derive from the constitutional authority,  
12 which in turn breathes life into inherent, who knows, and  
13 the only point I was making is that as it's currently  
14 written it actually doesn't say that.

15           It only says "by these rules," period, and  
16 there's a comma, and it says, "by other rules prescribed  
17 pursuant to statutory authority," and so there is a  
18 change, whether the Court wants to go back to what it says  
19 right now in 501, it just ought to be aware that there is  
20 a modest difference. Having said that, the other place I  
21 would just disagree with Sarah for the record is I thought  
22 this was actually yeoman's work in showing the redlined  
23 versions. I mean, it's not redlined, but the left to  
24 right, I mean, this is an incredibly daunting project to  
25 look at the Federal rules and then look at the current



1 Texas rule or the restyled in both cases. So for what  
2 it's worth, my own view is this was terrifically helpful  
3 to have the side by side.

4 MR. ALEXANDER: Could we have that read back  
5 into the record?

6 CHAIRMAN BABCOCK: And, by the way, he has  
7 violated rule one of this committee, no sucking up.

8 PROFESSOR HOFFMAN: I thought that was no  
9 sucking up to you.

10 CHAIRMAN BABCOCK: Oh, you're right, but we  
11 need to restyle that with a broad prohibition against  
12 sucking up. Richard, did you have your hand up?

13 MR. ORSINGER: No.

14 CHAIRMAN BABCOCK: Did somebody over there?  
15 No. Sorry. Professor Goode.

16 PROFESSOR GOODE: This was the one privilege  
17 rule where we actually had a Federal rule to work off.  
18 The old version of the Federal rule started out "except as  
19 otherwise required" just as our old rule starts "except as  
20 otherwise," and the Federal rule changed that "except as  
21 otherwise" to an "unless any of the following." So we  
22 tracked sort of the way the Federal rule was restyled in  
23 Federal Rule 501 and accommodated it for our version of  
24 501. That was the reason why that change was made.

25 CHAIRMAN BABCOCK: Okay. Carl.

1 MR. HAMILTON: I'm still confused about this  
2 common law thing. Are we supposed to look at the Federal  
3 rules, too?

4 CHAIRMAN BABCOCK: Well, yeah, but the  
5 Federal rules don't really track the Texas rules on the  
6 privilege.

7 MR. HAMILTON: Well, but if the Federal rule  
8 was different, I thought the charge was that we were  
9 supposed to try to follow more closely the Federal rules.

10 PROFESSOR HOFFMAN: Yeah, but they can't do  
11 that here because the Federal rules are -- I mean, the  
12 Federal rules say essentially state law provides the  
13 privilege.

14 MR. LOW: Yeah.

15 PROFESSOR HOFFMAN: Here we're dealing with  
16 the state law.

17 MR. HAMILTON: Well, except that the Federal  
18 rule does incorporate the common law and our rule doesn't.

19 MR. LOW: Our common law was codified by the  
20 other rules.

21 CHAIRMAN BABCOCK: Richard.

22 MR. ORSINGER: I haven't looked at this  
23 recently, and I'm sure that there are others here that can  
24 say this, but I believe that the committee that was  
25 working for the Federal rules actually did have an Article

1 V and did lay out a bunch of privileges, and they were  
2 rejected by the U.S. Congress, so they didn't make it into  
3 the Federal rules, but they're out there as a model, and I  
4 think they may have served as a model for the Texas rules.  
5 Do you remember, Judge -- or Professor? Is that --

6 CHAIRMAN BABCOCK: You called him "judge,"  
7 too.

8 MR. ORSINGER: Sorry.

9 PROFESSOR GOODE: I'm going to be called a  
10 lot worse by the end of today. The -- when the Federal  
11 rules were drafted, yes, there was a proposed set of  
12 privilege rules that Congress did not adopt, instead  
13 adopted Federal Rule 501, which said privileges are  
14 covered by common law and by recent experience and  
15 essentially punted privileges to the courts. When the  
16 Texas rules were originally drafted back in 1981, the  
17 proposed Federal privilege rules as well as the uniform  
18 Rules of Evidence which had privilege rules were to some  
19 extent used as a basis when we were doing the  
20 physician-patient and psychotherapist-patient privilege.  
21 We had statutory provisions that were the core of the --  
22 or became Texas Rules 509 and 510, and so it's an amalgam.  
23 Those proposed Federal rules, however, were in the  
24 old-styled drafting and would have been restyled, and  
25 Federal Rule 501 was restyled as part of the effort, so

1 our view was take what we've got, don't make any  
2 substantive changes from current Texas law, but try to  
3 restyle so that a privilege article reads as much as  
4 possible like the rest of the rules in a restyled more  
5 modern version and hopefully a clearer version. Again,  
6 this was a daunting task, and we are doing 501, which is  
7 the easy one. When we get to attorney-client privilege  
8 you'll see how challenging it was.

9 MR. LOW: And --

10 CHAIRMAN BABCOCK: Buddy, yeah.

11 MR. LOW: When 502, 502 was always  
12 considered under 501 in the Federal rule, work product and  
13 attorney, that was just a part of that. What gave rise to  
14 them actually coming up with 502? Are you familiar?  
15 Because it's been ever since I practiced in Federal court,  
16 work product, attorney-client privilege was common law  
17 recognized. Why did they single that out, do you know,  
18 and put it in 502?

19 PROFESSOR GOODE: Yes, I know. We'll --  
20 that's what is now our 511.

21 MR. LOW: Yeah.

22 PROFESSOR GOODE: Because of particularly  
23 electronic discovery and the massive quantity of  
24 documents --

25 MR. LOW: Right.

1 PROFESSOR GOODE: -- that are now being  
2 sought in discovery and issues of selective waiver partly.

3 MR. LOW: Okay.

4 PROFESSOR GOODE: Because of investigations  
5 by Federal agencies there was a push to limit the waiver  
6 provisions.

7 MR. LOW: Okay.

8 PROFESSOR GOODE: But --

9 MR. LOW: Okay.

10 CHAIRMAN BABCOCK: Okay. Anything else on  
11 501? All right. Should we go to 502? Yeah. Professor  
12 Hoffman.

13 PROFESSOR HOFFMAN: So my comment about 502  
14 is this: Did we -- did the committee consider moving what  
15 is now 502 on the required reports someplace else so that  
16 we could now have 502 track 502 of the Federal rules on  
17 the waiver?

18 PROFESSOR GOODE: We didn't for two reasons.  
19 One is, again, the -- or the default rule in the Federal  
20 restyling as well as ours was try to change rule numbers  
21 and rule subsections as little as possible. So if  
22 somebody is doing research on Rule 502, they're doing  
23 research on Rule 502 the way Rule 502 has been for the  
24 last 30 years. The second is that Federal Rule 502 is a  
25 waiver provision. It's 502 because they only had a 501,

1 and 502 came next. We already have a waiver rule, 511,  
2 and so the idea was to put the waiver substance of Federal  
3 502 as part of our waiver Rule 511.

4 CHAIRMAN BABCOCK: Okay. Buddy, did you  
5 have your hand up?

6 MR. LOW: No, no.

7 CHAIRMAN BABCOCK: Okay. All right.  
8 Anything more on 502? Okay. Let's go to 503,  
9 lawyer-client privilege. Any comments about 503?  
10 Professor Hoffman.

11 PROFESSOR HOFFMAN: A very small comment.  
12 So it's a grammar question about "who" and "that." So in  
13 the current rule it's "a person, officer," et cetera, et  
14 cetera, "who has rendered professional legal services by a  
15 lawyer," and so there's a grammar problem in the existing  
16 rule in that "who" should refer to an individual and  
17 "that" would refer to the corporation or association, et  
18 cetera. In the revised rule there's a -- the  
19 corresponding on the other side grammar point that we use  
20 "that." I guess I don't care very much. Did y'all talk  
21 about if there was a way to less -- without a mouthful say  
22 it where we included both, so "who" as to individuals and  
23 "that" as to entities? I know this is super interesting  
24 for the entire committee that I raised this point.

25 PROFESSOR GOODE: You really want to hear

1 the answer? I mean, the general idea is when you've got a  
2 problem like that or you have some individual who would  
3 take "who" and then some organizations that would take  
4 "that," you use the "who" or "that" that refers most  
5 closely to the noun that's closer in the sentence to it.

6 PROFESSOR HOFFMAN: Okay.

7 PROFESSOR GOODE: And so it just works  
8 better, although, you're correct that, you know, we could  
9 say, "A person, public officer, who, or corporation," but  
10 that just gets more awkward.

11 PROFESSOR HOFFMAN: Okay.

12 CHAIRMAN BABCOCK: Okay. Any other comments  
13 about 503? Yeah, Gene.

14 MR. STORIE: I may have missed this, but in  
15 the current rule it's "a consultation to obtain legal  
16 services from that lawyer," and it looks like it's dropped  
17 from the revised rule. I wondered if there was a reason  
18 for that.

19 PROFESSOR GOODE: Yes, we talked about this  
20 at length actually, and the feeling was that "from that  
21 lawyer," we couldn't imagine a situation where someone  
22 consults a lawyer with a view toward obtaining  
23 professional legal services or was it "from that lawyer"  
24 that would be affected by the privilege; that is, even if  
25 you go to a lawyer to ask for advice and perhaps a

1 recommendation of another lawyer, you are consulting that  
2 lawyer for professional legal services; that is, you're  
3 getting professional advice is "You need to go see Jan  
4 Patterson," that -- and so we didn't see that "from that  
5 lawyer" really added anything.

6 MR. STORIE: Okay. I just -- you know, I  
7 think about the cocktail conversation and didn't know if  
8 there was any -- and I think you mentioned that when  
9 you're actually not thinking that that lawyer would be the  
10 one to provide services but there would be no change in  
11 the privilege.

12 CHAIRMAN BABCOCK: Justice Brown.

13 HONORABLE HARVEY BROWN: Well, I understand  
14 Professor Goode's point, but it seems to me that that's  
15 something that could be argued either way, that if you go  
16 see a lawyer and all that lawyer is doing is telling you  
17 "Go see this person," maybe someone might argue that's not  
18 legal advice, and maybe discretion is better here to leave  
19 in the phrase, therefore, so an argument can't be made  
20 that way. I mean, I know a lawyer in Houston now who does  
21 not provide, quote, "legal services." He is only there to  
22 help other lawyers find the right lawyer. That's his job  
23 now. Is that legal services? I think it's at least  
24 arguable as to whether that is or not. A nonlawyer could  
25 certainly give that kind of advice, too.



1                   PROFESSOR GOODE: Are you proposing if  
2 someone went to that person and said, "I've got this legal  
3 problem," and the person says -- and that's a lawyer that  
4 they're talking to and the person says, "You need to go  
5 see so-and-so," that would not be a privileged  
6 conversation under the current rule?

7                   HONORABLE HARVEY BROWN: I'm saying that  
8 under the current rule it's clear that -- well, good  
9 point.

10                  CHAIRMAN BABCOCK: Yeah, Buddy.

11                  HONORABLE HARVEY BROWN: Yeah, it could be  
12 arguable it seems like to me. So yours might actually be  
13 an improvement then because it broadens the privilege.

14                  PROFESSOR GOODE: If you think it's  
15 different then we should put it back in, because, again,  
16 our position is we don't want to change the law. In fact,  
17 we did some things in here where, to be honest, if I were  
18 writing from scratch, I would have taken certain phrases  
19 out because I could see someone could make an argument  
20 that might say this was or was not privileged and that  
21 would be different under the restyled version, and so we  
22 went through a lot of drafting because we came up with  
23 exactly those type of problems, and so if you think "from  
24 that lawyer" makes a difference I think it should be back  
25 in there.

1 HONORABLE HARVEY BROWN: I think it could  
2 make a difference in that it could be an argument today  
3 under the current rule that that is not privileged.

4 CHAIRMAN BABCOCK: Robert.

5 MR. LEVY: While I agree that the scope  
6 should be broader, I believe that it would make a  
7 difference in a context where lawyers are in roles that do  
8 not involve them acting as a lawyer, particularly in  
9 companies, and they might be included in an e-mail that  
10 while there might be another basis to claim privilege,  
11 just because they are a lawyer doesn't necessarily mean  
12 that that communication would be privileged under the  
13 current rule.

14 CHAIRMAN BABCOCK: Professor Dorsaneo.

15 PROFESSOR DORSANEO: I think it could make a  
16 difference, but I would leave it out. I would ignore the  
17 difference that it could make because it takes you to bad  
18 places.

19 CHAIRMAN BABCOCK: Buddy.

20 MR. LOW: Steve, did y'all consider, I mean,  
21 I might tell somebody, advise somebody, something to go to  
22 somebody or do that. I might not think of it as legal  
23 advice, but don't you look at it from a client when they  
24 get some kind of advice from a lawyer I'm afraid they  
25 think they've gotten legal advice. Was that --

1                   PROFESSOR GOODE: In fact, that's the way  
2 the rule is stated because it talks about who a client is.

3                   MR. LOW: Yeah.

4                   PROFESSOR GOODE: All this is talking about  
5 is who a client is.

6                   MR. LOW: Right.

7                   PROFESSOR GOODE: "A client is someone who  
8 consults a lawyer with a view towards obtaining  
9 professional legal services. Not all communications  
10 between a client and a lawyer are privileged," and I think  
11 that goes to the point that was just made, because the  
12 privilege only protects certain communications between a  
13 client and a lawyer. They've got to be confidential,  
14 they've got to be made for the purpose of rendering  
15 professional legal services, so all we're talking about is  
16 the definition of a client here.

17                  HONORABLE SARAH DUNCAN: But if the lawyer  
18 with whom this consultation is occurring is not able to  
19 provide professional legal services for one reason or  
20 another and that's known to the person trying to be a  
21 client, it seems to me that that phrase does make a  
22 difference. If Joe goes to Tom, knowing that Tom is not  
23 able, for whatever reason, to provide legal services but  
24 is a lawyer, how can he go with the view of -- to  
25 obtaining professional legal services legitimately? If

1 that phrase is still in, he can't, because he would have  
2 to go to the lawyer with a view of obtaining professional  
3 legal services from that lawyer, which we've already  
4 established he didn't do because he knows the lawyer can't  
5 provide professional legal services.

6 PROFESSOR GOODE: The lawyer can't provide  
7 professional legal services because?

8 HONORABLE SARAH DUNCAN: Well, there are any  
9 number of reasons, they're disbarred --

10 HONORABLE ANA ESTEVEZ: We're a judge.

11 HONORABLE SARAH DUNCAN: They're a visiting  
12 judge.

13 HONORABLE ANA ESTEVEZ: People try to talk  
14 to judges all the time.

15 HONORABLE SARAH DUNCAN: Yeah, I can't  
16 practice law in the courts of the state.

17 HONORABLE ROBIN DARR: But nobody knows  
18 that.

19 HONORABLE SARAH DUNCAN: Sure, they do.  
20 Sure, they do.

21 HONORABLE ROBIN DARR: People ask judges all  
22 the time for legal advice, and they have no idea that you  
23 can't give legal advice.

24 HONORABLE SARAH DUNCAN: Well, but I'm -- as  
25 someone who is subject to visiting I'm in a slightly

1 different situation and lots of people know that I can't  
2 represent them or give legal advice.

3 PROFESSOR GOODE: There's a definition of  
4 lawyer as well in the rule, which is that it's a person  
5 who's authorized to practice law or who the client  
6 believes is authorized to practice law in any state or  
7 nation, so if somebody comes to a person they know is  
8 disbarred then they are not consulting a lawyer within a  
9 definition of the rule because that person is not  
10 authorized to practice and the person doesn't believe  
11 they're authorized to practice.

12 HONORABLE SARAH DUNCAN: Somebody who is  
13 subject to assignment is authorized to practice for  
14 friends and family or not in Texas state courts.

15 PROFESSOR GOODE: Someone who is disbarred,  
16 is what I'm saying.

17 HONORABLE SARAH DUNCAN: I know.

18 PROFESSOR GOODE: They came to you and,  
19 believing you are authorized to practice, you would be a  
20 lawyer for purposes of the attorney-client privilege.

21 CHAIRMAN BABCOCK: Richard Munzinger, and  
22 then Justice Gray.

23 MR. MUNZINGER: An inventor calls me on the  
24 telephone knowing that he has something that may or may  
25 not be required to have a patent to copyright, et cetera.

1 He knows that I personally am not a patent or copyright  
2 lawyer, and he calls me for me to make a referral, and in  
3 the course of doing that makes disclosures that are  
4 substantive. He knows when he calls me that I'm not going  
5 to be his lawyer, and he's asking me for a referral. This  
6 is Judge Brown's issue as well. Is that or isn't that a  
7 privileged communication under the redrawn rule, and is it  
8 or isn't it a privileged communication under the original  
9 rule?

10 PROFESSOR GOODE: And I --

11 MR. MUNZINGER: And it seems to me that the  
12 change is -- the change in the rule to drop the words  
13 "from that lawyer" has a substantive effect arguably.

14 HONORABLE SARAH DUNCAN: Could.

15 PROFESSOR GOODE: I agree with that. That  
16 is, I mean, I think that is a privileged conversation  
17 under the rule, but I can see that someone could argue  
18 it's not a privileged conversation under the rule. That's  
19 why I said if you think that is a substantive change I  
20 think those words should be put back in the rule.

21 CHAIRMAN BABCOCK: Okay.

22 MR. MUNZINGER: My personal view about it  
23 is, is that it ought to be a privileged communication and  
24 that the original rule unnecessarily restricts the  
25 privilege. I'm not lobbying to put the words back in.

1 I'm trying to point out that an argument can be made that  
2 it is a substantive change.

3 CHAIRMAN BABCOCK: Justice Gray.

4 HONORABLE TOM GRAY: I was just going to say  
5 that given the conversation and that Bill Dorsaneo's  
6 acknowledgement that, as we've just said, it probably is a  
7 change and given the scope of the task, it seems to need  
8 to go back in, but, you know, just given the scope of the  
9 task.

10 CHAIRMAN BABCOCK: But policywise it may be  
11 a better idea to leave it out.

12 HONORABLE TOM GRAY: But that's changing the  
13 scope of the task.

14 CHAIRMAN BABCOCK: Okay. All right. Any  
15 other -- any other comments about 503? Yeah. Professor  
16 Dorsaneo.

17 PROFESSOR DORSANEO: I'm getting way, way  
18 down the road in the draft, but we may not even want to  
19 talk about it, and it may raise a substantive problem kind  
20 of, but special rule in criminal case, in a criminal case,  
21 that rule seems to me to be a criminal version of an  
22 investigative information privilege like we once had in  
23 the Rules of Civil Procedure. If you want to call it work  
24 product, it's a kind of a criminal work product. There  
25 are statutes that deal with criminal work product, and it

1 would just be better to just cross this out.

2 CHAIRMAN BABCOCK: Are you talking about  
3 503(b)(2)?

4 PROFESSOR DORSANEO: Yes. I think this is  
5 a -- something that hasn't gone away and almost nobody  
6 knows that.

7 PROFESSOR GOODE: Well, you're preaching to  
8 the choir, but you're also preaching to someone who tried  
9 to do this, and the Court of Criminal Appeals considered  
10 doing it a few years ago, and it met vociferous opposition  
11 from the criminal defense bar.

12 PROFESSOR DORSANEO: Well, but they're not  
13 here.

14 PROFESSOR GOODE: But just as background,  
15 the Court of Criminal Appeals at least for several years  
16 ago had a criminal rules advisory panel. I was a member  
17 of that panel. I suggested exactly what you have  
18 suggested, which is cross it out. It is -- it does not  
19 represent the law.

20 PROFESSOR DORSANEO: Yes.

21 PROFESSOR GOODE: I mean, there are actually  
22 Court of Criminal Appeals cases that say, "This rule does  
23 not mean what it says."

24 PROFESSOR DORSANEO: I just used it,  
25 however, in favor of a district attorney.



1           PROFESSOR GOODE: Well, and so the Court of  
2 Criminal Appeals proposed deleting it, and it created such  
3 a fire storm it wound up on the front page of the *Texas*  
4 *Lawyer*, and the Court of Criminal Appeals promptly  
5 retreated and left it in, and our charge was not to change  
6 anything, and I think politically it is highly unlikely  
7 the Court of Criminal Appeals would take that on again  
8 they got burned so badly just a few years ago.

9           PROFESSOR DORSANEO: To add a little  
10 history, in November of 1982 when Rule 66b, which has now  
11 been replaced by other rules, was added to the rule book  
12 this committee voted to eliminate the investigative  
13 information privilege at the suggestion of one of our  
14 members who is no longer personally with us, Rusty  
15 McMains, and that was on purpose. The same thing that I'm  
16 recommending for this rule was done for the civil  
17 procedure rule that -- that they're -- that has a common  
18 source with this rule. It was a good idea then, it's a  
19 good idea now, would be a good idea whenever.

20           CHAIRMAN BABCOCK: Okay. Any other comments  
21 about 503? And I'm sure Rusty is looking down on us.

22           MR. LOW: He would probably comment.

23           CHAIRMAN BABCOCK: As he always did.

24           PROFESSOR DORSANEO: It was a great moment  
25 in Texas civil procedure. It was a great moment.

1 CHAIRMAN BABCOCK: Lisa.

2 MS. HOBBS: I guess I have a question for  
3 the committee as to whether they researched what in  
4 subsection (1)(C) in the common interest provision --

5 PROFESSOR GOODE: Say your question -- say  
6 it again, please. (c)(1)(C)?

7 MS. HOBBS: Yeah, in (C), with the common  
8 interest. My question is did y'all research what "in the  
9 pending action" currently means under current law?  
10 Because it's been several years since I looked at the  
11 common interest privilege, but I recall there being a  
12 debate about what is a pending action, do they have to be  
13 in the same pending action, can they be in different  
14 pending actions; and what seems like an innocuous change  
15 here by changing "therein" to "in the pending action"  
16 might actually lead someone to believe that we resolved  
17 that conflict by saying "in the pending action" in that  
18 last line instead of "therein," which is vague and nobody  
19 really knows what it means. So I just -- I haven't  
20 researched it. I just point it out that there is some  
21 case law about this, and I -- if anything, I would like  
22 the record to reflect if y'all did not intend to address  
23 that issue, at least let it be said on the record, and I  
24 wonder if it's worth exploring more if it hasn't been  
25 explored.

1                   PROFESSOR GOODE: There's not a lot of case  
2 law on what "the pending action" means, and it's a  
3 requirement that's in the Texas rules but not in Federal  
4 -- not in Federal rules but Federal common law, and so  
5 there's very little case law about that. We certainly  
6 didn't intend to change anything, and I'd really  
7 appreciate it if you sort of could explain to me what you  
8 see as the change, because I'm not sure I got the drift of  
9 what you were saying.

10                  MS. HOBBS: Well, the first time you use "in  
11 a pending action," it's "a party in a pending action," so  
12 that might be a party who is in a lawsuit somewhere. In  
13 other words, another litigant, but when you say "if the  
14 communications concern a matter of common interest in the  
15 pending litigation" that implies the litigant is actually  
16 sharing a common interest in the -- that same litigation,  
17 which implies that the litigants are codefendants or  
18 coplaintiffs, and I'm not sure that implication is in the  
19 current rule, and I think there might be a debate about  
20 that in the case law that we don't want to resolve in our  
21 rule making.

22                  PROFESSOR GOODE: Well --

23                  CHAIRMAN BABCOCK: Go ahead, Professor, and  
24 then Robert.

25                  PROFESSOR GOODE: The way the rule is

1 currently written is it talks about "communication by a  
2 client," blah, blah, blah, "to a lawyer representing  
3 another party in a pending action and concerning a matter  
4 of common interest therein that is concerning a matter of  
5 common interest in the pending action."

6 MS. HOBBS: So right now "therein" is vague  
7 in whether it refers to a pending litigation in which both  
8 parties are counsel together or codefendant -- I'm just  
9 going to use codefendants because it could be co -- I'm  
10 not picking a side here, but whatever, so therein, they  
11 concern a matter of common interest therein means in their  
12 respective lawsuits. They might not be the same lawsuit.  
13 When you say -- when you repeat "in the pending action,"  
14 that implies they have -- share a common interest in the  
15 same pending action, which is arguably a substantive  
16 change.

17 MR. LEVY: And I --

18 CHAIRMAN BABCOCK: Robert, sorry.

19 MR. LEVY: This is tough for me because  
20 I'm discussing this with my evidence professor, but I do  
21 think it is a material difference, and the reference to  
22 "the pending action" versus "a pending action" itself  
23 implies that it has to be in the same case; whereas we  
24 would argue that a common interest privilege would apply  
25 if another party in another action has the same issue in

1 our action and we could therefore communicate and argue  
2 that that was subject to the common interest privilege.  
3 So even the word "a" versus "the" could be a material  
4 change.

5 CHAIRMAN BABCOCK: Fields.

6 MR. ALEXANDER: I see your point, and I  
7 think the issues would be acutely raised in, for example,  
8 a mass tort context where there are a number of plaintiffs  
9 pursuing similar claims; and the current version of the  
10 rule talks about "a matter of" -- "in a pending action"  
11 meaning, you know, there could be a case in Arkansas and a  
12 case in Texas, and those are all pending actions, as  
13 opposed to "in the pending action," which implies that  
14 they would be -- seems to imply they would be in the same  
15 case. I do see -- Steve's now going to disprove me as  
16 well, but I see the point you're making, I think.

17 PROFESSOR GOODE: It's -- both rules talk  
18 about "a pending action."

19 MR. ALEXANDER: Right.

20 PROFESSOR GOODE: The only question is what  
21 "therein" at the end of --

22 MR. LEVY: No, I think it's also because you  
23 add in your version at the end "the pending action";  
24 whereas the current rule says "a pending action." You see  
25 the last --

1 MR. ALEXANDER: You still don't see it.

2 PROFESSOR GOODE: Here's what I see, and  
3 you-all can just tell me I'm wrong, and we'll go from  
4 there. The current rule says "a pending action" and then  
5 says "concerning a matter of common interest therein."  
6 What does "therein" refer to? It refers to --

7 MS. HOBBS: "A pending action" not "the  
8 pending action."

9 PROFESSOR GOODE: "The pending action" here  
10 refers back to "a pending action" above, which is the same  
11 as the current rule, but maybe I'm just --

12 MR. ALEXANDER: No, I --

13 PROFESSOR GOODE: Fields, you can explain it  
14 to me later.

15 MR. ALEXANDER: I think grammatically you're  
16 correct, but I also think this could be misinterpreted  
17 that the second pending action refers to --

18 MR. LEVY: The current case.

19 MR. ALEXANDER: -- the same cause. I think  
20 probably grammatically you're accurate, but I see the  
21 point that's being made, and I --

22 PROFESSOR GOODE: Well, let's take it out  
23 and work on it then.

24 MR. ALEXANDER: Okay.

25 CHAIRMAN BABCOCK: Richard.

1                   MR. MUNZINGER: I think in essence the  
2 concern is that in the original rule "a pending action"  
3 could be interpreted any pending action; and in the new  
4 rule, if that is the interpretation, the limitation is to  
5 the action in which the parties are involved. That's  
6 where the problem comes in, and that's why she perceives a  
7 possible substantive change, and I agree with you. I  
8 think it is arguably a substantive change and thought  
9 needs to be given to it.

10                  MR. ALEXANDER: I think Lisa's point makes  
11 sense, and let us go back and look at this, and we may  
12 submit an alternate version to y'all.

13                  CHAIRMAN BABCOCK: Okay. Professor  
14 Dorsaneo, then Professor Hoffman.

15                  PROFESSOR DORSANEO: All I wanted to say is  
16 I'm sure the word -- if you look up the word "therein" in  
17 Garner's dictionary of modern usage he will say that it  
18 doesn't mean anything very clearly, so I probably would  
19 say add the word "same" in, even though "the" does -- or  
20 does suggest that it means the same, but I have a problem  
21 with, you know, tending -- I have a problem with the word  
22 "accurate." Does it really have to be the same case  
23 number? I mean, or can it be the same --

24                  MR. ALEXANDER: Well, I think that's the  
25 exact issue we're talking about. In the current version

1 of the rule it talks about "a pending action," so I don't  
2 think it necessarily arguably implies the same cause  
3 number and the exact same case, so let us look at that,  
4 and we'll see if we can come up with a revision that is  
5 consistent with --

6 PROFESSOR DORSANEO: It probably shouldn't  
7 mean the exact same number.

8 MR. ALEXANDER: Right.

9 PROFESSOR DORSANEO: Shouldn't be restricted  
10 to that.

11 MR. ALEXANDER: No, I think I take the  
12 point.

13 CHAIRMAN BABCOCK: Professor Hoffman, then  
14 Gene.

15 PROFESSOR HOFFMAN: Fields, while y'all are  
16 looking at that you might also look at the very, very end  
17 of the rule, subsection (d) part (5) under the joint  
18 client exception, and in particular the word I was looking  
19 at is in (C), so this is if the communication was made,  
20 "if the communication is offered in an action between  
21 clients."

22 MR. ALEXANDER: Uh-huh.

23 PROFESSOR HOFFMAN: "Was made by any  
24 clients" and then in (C) it says "is relevant to a matter  
25 of common interest." Should that be "was"? Should it be



1 both? I think that raises the same issue we've been  
2 talking about, because it could be a current action or a  
3 prior action as to where the common interest came from.  
4 Or is it always "was," past tense, because it was common  
5 interest they had before they were fussing with each  
6 other. That make -- am I not making sense?

7 MR. ALEXANDER: Well, let me -- let us look  
8 at it, Lonny. I'm trying to see. It looks to me like the  
9 current version of the rule is in -- is in present tense,  
10 right, "has to be a matter that is relevant concerning a  
11 matter of common interest." I don't see where the past  
12 tense -- I'm not sure I see this issue yet, but we will  
13 take a look at it.

14 CHAIRMAN BABCOCK: Gene, do you have a  
15 comment?

16 MR. STORIE: I guess I do. I'm not sure if  
17 it's worth anything, but would it work to just drop the  
18 "therein," or would that also be a substantive change?  
19 Because I think "the focus is on the matter of common  
20 interest" is not a specific trial or litigation pending or  
21 to come up in the future.

22 MR. ALEXANDER: You mean keep the current  
23 language but drop the "therein" from it? The "therein" is  
24 not in the restyled version, unless I'm --

25 MR. STORIE: Correct, and you've got "in the

1 pending action" instead of "therein," so I would say how  
2 about just ending the sentence "matter of common  
3 interest"?

4 MR. ALEXANDER: Right. Okay.

5 PROFESSOR GOODE: That would be a  
6 substantive change.

7 MR. ALEXANDER: Let us work on this. We'll  
8 send a -- we'll try to send a revised version out.

9 CHAIRMAN BABCOCK: Justice Gray, you want to  
10 pile on some more? Okay. Richard. Never hesitant about  
11 piling on.

12 MR. ORSINGER: Yeah, I may be retreading  
13 ground or I may be off in left field, but the old language  
14 has to do with "between or among two or more clients."

15 MR. ALEXANDER: I'm sorry, where?

16 MR. ORSINGER: I'm on section -- same  
17 section, joint client section.

18 MR. ALEXANDER: Okay.

19 MR. ORSINGER: And the previous language  
20 said "between or among two or more clients." The 5(a)  
21 version is "an action between clients." And I don't know  
22 whether that was just an effort to eliminate redundancy  
23 "between" and "among," or are you thinking "among" means  
24 the same thing as "between," or does it actually mean  
25 something different from "between"?

1           PROFESSOR GOODE: Well, I know there are  
2 grammatical purists who would say "between" is two and  
3 "among" is more than two.

4           MR. ORSINGER: Is that the only difference?

5           PROFESSOR GOODE: That was the -- I think  
6 that's why "between and among" was included in the  
7 original version.

8           PROFESSOR DORSANEO: But people don't think  
9 "between" is limited to two anymore.

10          PROFESSOR GOODE: That's right.

11          CHAIRMAN BABCOCK: Really?

12          PROFESSOR DORSANEO: So stop thinking that.

13          CHAIRMAN BABCOCK: Sorry, wow.

14          PROFESSOR GOODE: Certainly I don't think  
15 anyone would read this and think this is restricted to two  
16 joint clients as opposed to three or four.

17          MR. ORSINGER: Well, my concern was slightly  
18 different than that; and it was that in some of these  
19 complicated situations you may, in fact, have everybody in  
20 the same lawsuit, or you may have some people in one  
21 lawsuit and maybe one or two of those parties in a lawsuit  
22 with a third person; and to me the "among" might open up  
23 the possibility that a shared communication in one lawsuit  
24 should be privileged even if it's offered in another  
25 lawsuit; and maybe that's wrong, but to me "among" is

1 broader than "between" because it allows for the  
2 possibility that one party might be in two lawsuits, might  
3 have a joint defense agreement that should be -- create a  
4 privilege in lawsuit number one, but if it's offered in  
5 lawsuit number two and it's not the same parties then it's  
6 not really between anymore, but it might be among. I  
7 don't know if that makes any sense to you at all.

8 MR. ALEXANDER: It does. And we'll look at  
9 that as well.

10 MR. ORSINGER: Okay.

11 CHAIRMAN BABCOCK: Just not to beat that  
12 dead horse, but is the rule of grammar still that between  
13 is between two people and among is more than two?

14 HONORABLE KEM FROST: Yes.

15 HONORABLE SARAH DUNCAN: According to the  
16 University of Arizona, for whatever that's worth. It's  
17 just the first thing that came up on my search.

18 CHAIRMAN BABCOCK: Man, I was thinking  
19 you're on top of this.

20 MR. ORSINGER: My concern is really not  
21 grammatical at all. My concern is when you have  
22 multiplicity of lawsuits, whether the "between" is too  
23 narrow to cover that situation when it should.

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

25 MR. ORSINGER: Maybe we ought to find a

1 different word than "between" or add another word to  
2 "between."

3 CHAIRMAN BABCOCK: The point I was going to  
4 make is if this is an accepted rule of grammar that  
5 "between" is two and "among" is more, but Dorsaneo says  
6 it's not, Sarah says it is, so I think we ought to strive  
7 to be grammatically correct, whatever the rule is.

8 HONORABLE SARAH DUNCAN: I would like to  
9 improve my source to the OED.

10 CHAIRMAN BABCOCK: Okay. You have leave to  
11 do that.

12 HONORABLE SARAH DUNCAN: Because that's what  
13 the University of Arizona is relying on.

14 CHAIRMAN BABCOCK: Okay. What other  
15 comments? Lisa.

16 MS. HOBBS: On subsection (2), "claimants  
17 through same deceased client," I don't talk like that. Do  
18 cases still talk like that in probate that we're claiming  
19 through a decedent? I just wonder if there's some room to  
20 modernize that language without changing its meaning, and  
21 I don't have any -- I'm not here to offer some language.  
22 I just wonder if that strikes anybody else as not modern  
23 English.

24 MR. ALEXANDER: It does slightly, and this  
25 was one of many titles that we looked at trying to

1 modernize and ultimately decided we couldn't easily do it  
2 without arguably effecting some change, so we didn't.

3 CHAIRMAN BABCOCK: Can't improve on that  
4 language. All right. Any other comments about 503? All  
5 right. Let's go to 504, "Spousal privileges." Comments  
6 about 504? Yes, Professor Hoffman.

7 PROFESSOR HOFFMAN: In current (a) (2) it  
8 talks about a person "whether or not a party," and we took  
9 out the "whether or not a party" language. Can you talk  
10 about that for a second? Is it just that kind of since it  
11 could be a party or not, it's everything, so just take it  
12 out, it's redundant?

13 PROFESSOR GOODE: Meaningless language, yes.

14 PROFESSOR HOFFMAN: Got it.

15 CHAIRMAN BABCOCK: Okay. Anything else?  
16 Lisa.

17 MS. HOBBS: Similarly on subsection (D) you  
18 now talk about "a mental or physical condition" instead of  
19 "an alleged mental or physical condition."

20 CHAIRMAN BABCOCK: I'm sorry, which section?

21 MS. HOBBS: Subsection (4) (D), (a) (4) (D),  
22 "Commitment or similar proceeding in a proceeding to  
23 commit either spouse," the last phrase in the current  
24 version is "an alleged mental or physical condition." And  
25 you took out the word "alleged."

1                   PROFESSOR GOODE: The idea behind that was  
2 because if you have a proceeding to commit someone because  
3 of a mental condition then you are alleging that they have  
4 a mental condition. That "alleged" was just redundant  
5 there.

6                   CHAIRMAN BABCOCK: Professor Hoffman.

7                   PROFESSOR HOFFMAN: So in (b)(1) I thought  
8 about this for a while, and I want to just take a second  
9 and describe for the whole committee what my thought  
10 process is. I ended up -- I started unsure whether or not  
11 what you were suggesting in the change and in the comment  
12 did indeed substantively alter law and ultimately ended up  
13 in the same place you did, but I just want to take a  
14 minute and talk about it. So the current rule as -- the  
15 helpful place to look here is to start at 504(b)(1) or  
16 look at the comment they have in the restyled rule.

17                   So under current Rule 504(b)(1) the rule --  
18 it only says "A spouse who testifies on behalf of an  
19 accused," so the place to highlight is the "on behalf of"  
20 is subject to cross-examination as provided by 611(b),  
21 which basically says you can be cross-examined about  
22 anything. So you've got the privilege not to testify, but  
23 if you choose to you're kind of opening yourself up, and  
24 what their committee did was to say that that's actually  
25 not the law, it's whether you testify on behalf of or even

1 against an accused, if you choose to do so. And they  
2 simply -- so they modernize the rule to reflect that the  
3 current version did not reflect current law. So it  
4 certainly is a change in the rule. It is technically I  
5 guess right to say it's -- it is correct to say it's not a  
6 change in Texas substantive law, and so I guess, again, I  
7 end up at the same place you do, but I kind of wanted to  
8 air that, at least my thinking on that point.

9 CHAIRMAN BABCOCK: Okay. Richard.

10 MR. ORSINGER: I just want to comment on the  
11 title changing from "husband and wife" to "spousal  
12 privilege" and put it in the record, you know, the U.S.  
13 Supreme Court cited in the *United States vs. Windsor* that  
14 the Federal government cannot discriminate against a same  
15 sex marriage that's recognized as valid in the state of  
16 residence. The executive department has extended that  
17 ruling now to the Federal government cannot disregard the  
18 validity of a same sex marriage that was valid in the  
19 place of celebration, which is an extension beyond the  
20 current constitutional law; but it's probable that it's  
21 where we will all end up; and by calling this "spousal" we  
22 don't have a definition of "spouse" in the rules.

23 The Family Code I don't think talks in terms  
24 of spouses. I think it talks in terms of marriage, so  
25 this is wise, I think, to use a more general word,



1 "spousal," and it's probably smart that it's not -- that  
2 it not be defined, but I have a question that I'd like to  
3 pose professor. From a conflict of law standpoint, if  
4 parties are spouses in another state, but the -- and a  
5 communication occurs there, but the litigation is  
6 occurring in a Texas court, would the conflict of law  
7 rules say to apply the Texas definition of spouse to our  
8 proceeding, or would it be the jurisdiction where the  
9 communication occurred, or do you have an idea?

10 PROFESSOR GOODE: I don't know the answer to  
11 that, but I don't think changing title to the rule changes  
12 anything because the text of the rule currently uses  
13 "spouse."

14 MR. ORSINGER: Uh-huh.

15 PROFESSOR GOODE: So I don't think  
16 there's -- that this is any substantive change. How that  
17 issue would get resolved, I really don't know the answer  
18 to that.

19 PROFESSOR DORSANEO: The other place.

20 CHAIRMAN BABCOCK: Okay. Anything else on  
21 504? Yeah.

22 MS. GREER: I have a question about the term  
23 "communicating spouse," because I think it could be  
24 ambiguous in this context, because it's the communication  
25 that's privileged, and so if somebody repeats a privileged

1 communication, they could be a communicating -- I mean, it  
2 might get kind of complicated there. I kind of got lost,  
3 so I was thinking, even though I know it's more words,  
4 using "spouse making the communication" would be clearer  
5 to me than "the communicating spouse." And that's in  
6 subsection (a) (3) (A), (B), and (C).

7 CHAIRMAN BABCOCK: 504(a) (3) (A).

8 MS. GREER: (3) (A) through (C).

9 MR. ALEXANDER: I'm sorry. Would you  
10 repeat -- what's the issue you have with it?

11 MS. GREER: Well, I think the term  
12 "communicating spouse" is a little -- it could be subject  
13 to different interpretations. It's the spouse making the  
14 privileged communication or the confidential  
15 communication.

16 MR. ALEXANDER: Right.

17 MS. GREER: And so I know you're trying to  
18 shorten the words, but there I think it would be better to  
19 have the actual words to make it clearer.

20 MR. ALEXANDER: I guess our thinking was  
21 that it naturally refers back up to the definition of  
22 "communication" so that the spouse who can claim the  
23 privilege is the one who made the communication at issue.  
24 Maybe I'm not -- am I missing your point?

25 MS. GREER: No, I mean, I just think that

1 since the focus is on "the communication" and  
2 communications can be repeated, it would be clearer to say  
3 "the spouse making the communication" to be consistent  
4 with the definition. Because your mind starts getting  
5 wrapped around like who said what and which one is the  
6 communicating spouse as opposed to if you made it clear  
7 that it's -- because a communication can be repeated.

8 CHAIRMAN BABCOCK: Thanks, Marcy. Pete.

9 MR. SCHENKKAN: Backing up Marcy's point,  
10 she first noticed this and at least called my attention to  
11 it in (3) (C), in (a) (3) (C), "the personal representative  
12 of a deceased communicating spouse." That strikes the ear  
13 as very odd, and it is curable with -- by her solution,  
14 "deceased spouse who made the communication."

15 CHAIRMAN BABCOCK: All right. Anything else  
16 on 504? Okay. Let us move to 505, "Privilege for  
17 communications to a clergy member." And Munzinger  
18 immediately raises his hand, concerned about this  
19 privilege.

20 MR. MUNZINGER: I'm looking, I'm still back  
21 on 504, and I may be making a problem where there isn't  
22 one, but it says subsection (a) (3) in the old rule, "Who  
23 may claim the privilege. Confidence, communication  
24 privilege may be claimed by the person or the person's  
25 guardian or representative," and over here we have in

1 (3) (B) "The guardian of an incompetent communicating  
2 spouse." Is that necessarily the same? I'm not sure that  
3 is necessarily the same.

4 PROFESSOR GOODE: You have to go back and  
5 look at (a) (2), because that's where that language comes  
6 from. There is some confusion in the drafting of the  
7 current rule. That's where the representative  
8 incompetence comes from.

9 MR. MUNZINGER: So that it is limited to  
10 persons who are incompetent.

11 MR. ALEXANDER: Which is?

12 MR. MUNZINGER: The person who can claim the  
13 privilege can -- if it's not the communicating spouse must  
14 be the guardian of an incompetent person, and previously  
15 we said person -- their representative. Is that limiting  
16 the identity of the people who can make the claim? I'm  
17 not sure that it is or it isn't. I don't know, it just  
18 threw me when I read it.

19 MR. ALEXANDER: Is your question whether or  
20 not you can have a representative of an incompetent  
21 person? Because I don't think --

22 MR. MUNZINGER: Other than a guardian.

23 MR. ALEXANDER: Yeah, but I think if someone  
24 is going to be -- if someone is actually legally  
25 incompetent, there would have to be a guardian to speak

1 for them. I couldn't just declare myself their  
2 representative. I think that was certainly our intent in  
3 modernizing the language.

4 PROFESSOR GOODE: That is --

5 HONORABLE SARAH DUNCAN: I thought your  
6 question is whether somebody could be guardian under the  
7 cause for the reason that the person is incompetent.

8 MR. MUNZINGER: I'm just thrown by at one  
9 time we have "guardian or representative" in the rule as a  
10 person who can claim the privilege on behalf of an  
11 incompetent communicating spouse.

12 PROFESSOR GOODE: What you have to -- the  
13 way that sentence is structured is it's guardian or  
14 representative of an incompetent or deceased person.  
15 "Guardian" is referring to the incompetent.

16 "Representative" is referring to deceased person. We  
17 wouldn't talk about a guardian of a deceased person.

18 MR. ALEXANDER: Right.

19 MR. MUNZINGER: As I said, I didn't know if  
20 I was creating a problem, there was a problem, or wasn't.  
21 It just threw me when I saw it.

22 MR. ALEXANDER: Well, no, if we're missing  
23 something or you think it's still unclear then we  
24 should -- that was certainly the intent, was to break up  
25 those two modifiers where they belong.

1                   CHAIRMAN BABCOCK:   Kent Sullivan.   Justice  
2 Sullivan.

3                   HONORABLE KENT SULLIVAN:   I may change  
4 directions a little bit, but I just want to follow up on  
5 Pete and Marcy's point, and it does seem to me that we're  
6 using this new term of art, "communicating spouse," a  
7 little bit, and I wonder if the easier and perhaps more  
8 precise wouldn't be just to define it and have it as a  
9 defined term so there's no confusion.

10                  CHAIRMAN BABCOCK:   Okay.   Justice Moseley.

11                  HONORABLE JAMES MOSELEY:   Under the old rule  
12 would a representative who could claim the privilege  
13 include an attorney, and would that still be the case  
14 under the new rule?

15                  PROFESSOR GOODE:   Attorneys may always claim  
16 a privilege on behalf of a client, so -- and that's not  
17 prevented by the current rule, which doesn't talk about  
18 the attorney; but certainly if you represent someone in a  
19 proceeding, the spouse who holds the privilege is your  
20 client, the attorney can claim it on behalf of the client.

21                  HONORABLE JAMES MOSELEY:   So the rule, the  
22 word "representative" under the old rule does not include  
23 attorney or is not limited to representatives under a  
24 probate or administration of an estate.   Or does it?

25                  PROFESSOR GOODE:   This is talking about who

1 the holder of the privilege is and who may claim it on  
2 behalf, so if you go -- this is actually -- I should back  
3 up. Doing these who may claim provisions was extremely  
4 difficult. I was trying to the extent possible to  
5 standardize the who may claim language across the  
6 privilege rules. At one point I even had a chart for  
7 myself of all the who may claim provisions under the  
8 current rules because it's a jumble.

9           MR. MUNZINGER: My question really I guess  
10 is, is the guardian the only authorized representative of  
11 an incompetent person? A guardian is a person -- I'm not  
12 a probate lawyer, but the probate court appoints X as the  
13 guardian for Y, who is incompetent. Now, Y, the  
14 incompetent person apparently was the communicating  
15 spouse, and there may -- is the only guardian -- is the  
16 guardian the only representative; or could the guardian,  
17 for example, say to somebody, a nonattorney, "Go do this  
18 for the incompetent person," and there's litigation or  
19 some complication. May that person claim the privilege,  
20 or is it limited to the guardian? I don't know whether it  
21 would make a difference or not, but I do note that the  
22 word "or representative" has been deleted in the new rule,  
23 and I don't know if that has a substantive effect. That's  
24 my concern.

25           PROFESSOR GOODE: It was our view that

1 "representative" in (a) (2) referred to deceased person and  
2 "guardian" referred to incompetent. That was the only  
3 sensible way of reading that sentence. Because it makes  
4 no sense to talk about a guardian of a deceased person.

5 MR. MUNZINGER: I understand.

6 CHAIRMAN BABCOCK: Lisa.

7 MS. HOBBS: In the next section on the -- on  
8 the clergy privilege it talks about a communicant's  
9 guardian or conservator. Again, I don't practice here, I  
10 don't know what those words mean, but it seems like we  
11 might want them to be consistent.

12 CHAIRMAN BABCOCK: Buddy.

13 MR. LOW: Professor Goode, what about a  
14 situation, I know I have a doctor who takes off for a  
15 couple of years and signs a general power of attorney if  
16 something comes up. Would the person holding that power  
17 then be -- did you discuss whether he would be a  
18 representative? He's not a guardian. So that he could  
19 claim a privilege for that person. In other words,  
20 general power of attorney, you know, can act for and on  
21 behalf.

22 PROFESSOR GOODE: Right.

23 MR. LOW: So there are other situations  
24 other than a guardian that could act, and there might be  
25 other kinds of representatives, but he might be considered



1 a representative, so was that discussed, or do you  
2 remember?

3 PROFESSOR GOODE: Again, it wasn't discussed  
4 in the sense that -- I hate to keep falling back on this.  
5 All we were trying to do is -- is take the language that's  
6 there and not change the meaning of anything.

7 MR. ALEXANDER: Why don't we, though --  
8 there are enough issues raised by this. Why don't we take  
9 another look at this and see if we can craft some  
10 revisions that might help some of these concerns?

11 CHAIRMAN BABCOCK: Richard.

12 MR. ORSINGER: Also, I agree kind of with  
13 your distinction between a guardian and a representative,  
14 but I can imagine a situations in which you have a  
15 guardian ad litem, and so I'd like at least this record or  
16 at some point for you-all to indicate whether by  
17 "guardian" you mean only a probate court guardian of the  
18 person or guardian of the estate or whether "guardian"  
19 also means a guardian ad litem that's appointed just for  
20 purposes of a particular lawsuit.

21 MR. ALEXANDER: Well, I can say for the  
22 record we mean "guardian" in the way the current rule  
23 means "guardian," and no other way.

24 MR. ORSINGER: I was trying to get a  
25 little -- I was trying to get a little --

1                   PROFESSOR GOODE: I wholeheartedly agree  
2 with Fields.

3                   MR. ALEXANDER: Beyond that it would be up  
4 for the courts.

5                   CHAIRMAN BABCOCK: All right. How about  
6 quickly -- well, not quickly, as much as we need for  
7 communications to a clergy member under 505, and after  
8 we're done with this we'll take our break? Yeah, Justice  
9 Brown.

10                  HONORABLE HARVEY BROWN: You have changed  
11 the phrase "professional character" to "professional  
12 capacity" in (b) and you've added that phrase as part of  
13 the definition of a communicant in (a)(2) where you again  
14 have "professional capacity," and I just wondered what  
15 was -- if you know, what the intent was for the word  
16 "character" originally because it's a little -- it's a  
17 phrase I wouldn't normally see, and I'm wondering what  
18 they're trying to get at in the original rule when they  
19 say "character" rather than "capacity."

20                  MR. ALEXANDER: I think Steve can add to  
21 this perhaps. From my standpoint this was just an attempt  
22 to modernize the language. "Character" seems like kind of  
23 an anachronistic way to describing what we're talking  
24 about, so that was the only intent from my perspective.

25                  HONORABLE HARVEY BROWN: Well, I ask because

1 I was thinking about a hypothetical question. Let's say  
2 somebody is a member of a congregation and good friends  
3 with the priest and plays golf with the priest and talks  
4 with the priest on the golf course about something that he  
5 would or she would consider confidential. Is that in a  
6 professional capacity? Is that the same thing as in a  
7 professional character? I wonder if "character" has a  
8 little broader meaning than "capacity" there. I don't  
9 know, but I just raise the question.

10 MR. ALEXANDER: From -- we didn't see a  
11 meaningful distinction other than "capacity" seemed to be  
12 clearer; and to my mind, in answer to your question, if  
13 you're talking to the priest in a penitent role, it's  
14 covered. If you're talking to the priest about something  
15 just because you have a friendly relationship with him or  
16 her, that could be a separate issue. So to my mind it's  
17 encompassed by the language we chose in the new rule, the  
18 revised rule.

19 HONORABLE HARVEY BROWN: So going back to my  
20 hypothetical, if you're talking to your priest on the golf  
21 course, who is your friend, about a spiritual matter, that  
22 would fall within a professional capacity or not?

23 MR. ALEXANDER: I think it generally would.

24 HONORABLE HARVEY BROWN: Okay.

25 MR. PERDUE: That's where most of my

1 spiritual lessons come.

2 MR. MUNZINGER: Yeah, but they're alone.

3 CHAIRMAN BABCOCK: Okay. Anything more on  
4 this? You guys just want a break, right? All right. If  
5 there are no more comments on 505, we will take our  
6 morning break.

7 (Recess from 10:41 a.m. to 10:59 a.m.)

8 CHAIRMAN BABCOCK: All right. Let the  
9 beating continue. Rule 506, "Political vote privilege."  
10 Any comments on this?

11 PROFESSOR HOFFMAN: You know, you really  
12 discourage people from raising their hand.

13 CHAIRMAN BABCOCK: Professor Hoffman.

14 PROFESSOR HOFFMAN: So note there's one  
15 difference that I noted that may not make a difference,  
16 but I'll note the language, so it's the current rule has  
17 "the tenor of a person's vote," "a person has a privilege  
18 to refuse to disclose the tenor of their vote," and the  
19 revised rule is "a person has a privilege to disclose that  
20 a vote" -- sorry, "to disclose the person's vote," is what  
21 it says. So my first is a question, is that tenor  
22 language ever been -- is there much case law on that?  
23 Let's start with that.

24 PROFESSOR GOODE: No.

25 PROFESSOR HOFFMAN: Yeah, I didn't think so.

1 Okay. So --

2 PROFESSOR GOODE: I -- this is suggested by  
3 one of our subcommittee members, and I actually went back  
4 and did some research on it, and it's clear that the tenor  
5 of the person's vote means how the person voted.

6 PROFESSOR HOFFMAN: Okay. So, of course, my  
7 only comment then or question is, is whether or not this  
8 potentially ends up being a change in that -- I mean, so  
9 here's one possibility I would imagine, that the tenor  
10 could be broader and that that could include, for example,  
11 whether the person voted at all.

12 PROFESSOR GOODE: That is clearly not what  
13 the privilege is designed to protect.

14 PROFESSOR HOFFMAN: So that question has to  
15 be answered, "Did you vote?"

16 PROFESSOR GOODE: Yes.

17 CHAIRMAN BABCOCK: Could you say, "Hey, I'm  
18 not going to ask you how you voted, but, you know, did you  
19 kind of mostly favor liberal candidates, or, you know,  
20 what was the tenor of your voting pattern here? I don't  
21 want to know what you voted for or who you voted for"?  
22 Could you do that?

23 PROFESSOR HOFFMAN: So I think that -- that  
24 that helps. I mean, so the question is only whether or  
25 not by changing those words we're somehow unintentionally

1 constricting it.

2 CHAIRMAN BABCOCK: So you can't ask them if  
3 they voted liberal mostly?

4 PROFESSOR GOODE: That's like asking -- I'm  
5 not -- "I don't want you to tell me what you told your  
6 lawyer, but just tell me whether the lawyer said you're in  
7 a heap of trouble." Because in a lot of jurisdictions,  
8 the Federal courts, for example, it says the privilege  
9 protects communications from the client to the lawyer but  
10 not from the lawyer to the client.

11 PROFESSOR DORSANEO: Bad.

12 PROFESSOR GOODE: You can see that in a lot  
13 of places, but of course, if the communication would -- if  
14 revealing what the lawyer said is tantamount to revealing  
15 what the client said, it's privileged, and I think it's  
16 the same kind of --

17 CHAIRMAN BABCOCK: Thought.

18 PROFESSOR GOODE: Or "Don't tell me what the  
19 person said, just tell me what your reaction was to avoid  
20 hearsay."

21 CHAIRMAN BABCOCK: Well, I'm figuring we're  
22 going to practice a long time without that ever coming up,  
23 but -- all right. Anything more on 506? Okay. Let's go  
24 to 507, "Trade secrets," something that does come up a  
25 fair amount. Richard.

1                   MR. ORSINGER: Just a matter of note, the  
2 Legislature adopted the Uniform Trade Secret Act in the  
3 last session --

4                   MR. ALEXANDER: Yes.

5                   MR. ORSINGER: -- and I think that some of  
6 these concepts are archaic. I know that all we're trying  
7 to do is conform and modernize, but maybe one definition  
8 of modernizing is to stay consistent with the legislation.  
9 At the time this rule was adopted we just had common law  
10 concepts and very poor definitions of what constituted a  
11 trade secret, and I don't know whether there's anything  
12 about that statute that we might borrow some language to  
13 make it more modern or conform more to the current law.  
14 Also, I'm concerned about the word "owned," and I don't  
15 litigate trade secret stuff much. I deal with  
16 confidentiality a lot, but not trade secret per se, but I  
17 think that trade secrets can be licensed and there can be  
18 different contractual rights allocated in trade secrets  
19 that are different from ownership, and I'm a little  
20 concerned about us perpetuating this oversimplification of  
21 ownership in a world where really they slice and dice  
22 rights. So I'm wondering if we could take this  
23 opportunity to find a different word from "owned" that  
24 would be global enough to actually match the practice of  
25 today's economy.

1 MR. ALEXANDER: I think those are both valid  
2 points. We used "owned" because the current rule used  
3 "owned" and --

4 MR. ORSINGER: Well, I know that, and if  
5 we're condemned to carry the past into the future then  
6 we'll have to do that, but if we can actually look at the  
7 statute and think about this, it would be a great  
8 opportunity to modernize this rule.

9 MR. ALEXANDER: Yeah, I certainly think it  
10 makes sense to make this rule consistent -- as consistent  
11 as possible with the new trade secret legislation that  
12 passed, so I agree.

13 CHAIRMAN BABCOCK: Okay. Yeah, Professor  
14 Hoffman.

15 PROFESSOR HOFFMAN: So another  
16 nonsubstantive kind of thinking about the restyling  
17 effort, so in 502(3) and (4) when you had exceptions, the  
18 way it's set up is general rule and then exceptions are  
19 actually set up differently. Here you actually put the  
20 "unless," the exception into the general rule. I assume  
21 you probably did it because the exception is so short.

22 MR. ALEXANDER: Right.

23 PROFESSOR HOFFMAN: So I just throw out,  
24 though, maybe as the committee is taking another pass,  
25 given these other comments, think about it. I mean, there



1 are two. There's fraud or otherwise injustice, and so  
2 tracking the same approach you would have separate  
3 exceptions there, but maybe not because it just is so  
4 short.

5 MR. ALEXANDER: Our thinking was to look at  
6 it both ways and if it was more ungangly to do it that way  
7 then we just incorporated it into the body of the rule.

8 CHAIRMAN BABCOCK: Professor Dorsaneo.

9 PROFESSOR DORSANEO: This maybe needs to go  
10 on the substantive list, but, I mean, the case law that  
11 talks about trade secrets basically says it's not  
12 sufficient that the trade secret is relevant, but it  
13 must -- but disclosure of it must be, you know, necessary,  
14 you know, in some fairly significant sense; and the rule  
15 doesn't say anything about what the current law talks  
16 about when it's talking about, you know, whether the trade  
17 secret should be disclosed. Maybe it's not meant to, but  
18 I think this "unless the court finds that nondisclosure  
19 will tend to conceal fraud" -- well, that's not true --  
20 "or otherwise work injustice" doesn't really match what  
21 the cases say the standard is.

22 PROFESSOR GOODE: I think the cases are  
23 interpreting the language of the current rule, which is  
24 "otherwise work injustice."

25 PROFESSOR DORSANEO: Well, yeah, but that's

1 like --

2 PROFESSOR GOODE: So we kept the language of  
3 the rule.

4 PROFESSOR DORSANEO: That's something you  
5 would say if you didn't know what else to say, is "We need  
6 to have justice here."

7 MR. ALEXANDER: Somebody else didn't know  
8 what else to say, and we just copied them.

9 CHAIRMAN BABCOCK: Robert.

10 MR. LEVY: This, again, might be parsing  
11 words too much, but when you talk about protective  
12 measures, "If a court orders a person to disclose a trade  
13 secret," "person" in the context of the rule is the person  
14 that owns the trade secret, but there could be disclosure  
15 required by others, including others who might be  
16 licensees, so should "person" or another word be  
17 referenced in that provision (c)?

18 MR. ALEXANDER: If I'm catching your intent,  
19 I thought that was captured by our use of "a person," not  
20 necessarily "the person" that owns the privilege, but  
21 if --

22 MR. LEVY: Right, but that's -- I'm focusing  
23 on the fact that "person" is used in the rule as the  
24 person who owns it or somebody else who might have that  
25 information so that a potential question could arise that

1 person -- the protective orders only apply if the owner of  
2 the privilege is required to disclose, not a scenario  
3 where somebody else like a licensee is planning on  
4 disclosing and the owner says, "You may not"

5 MR. ALEXANDER: And, again, maybe I'm  
6 missing this; but it addresses who can claim the  
7 privilege, which is the person who owns the trade secret,  
8 which is exactly what the previous rule says; and then  
9 with regard to what the court can do, the court can order  
10 the person -- if the court orders a person, not  
11 necessarily the person who owns it, but if the person that  
12 owns it asserts the privilege, the court can then order a  
13 person or "orders any person to disclose, it must take  
14 protective measures," so it's not -- by using "a person"  
15 it's not restricting it, at least wasn't intended to  
16 restrict it.

17 MR. LEVY: I agree that's not the intent. I  
18 was just focusing on the fact that "person" in the rule  
19 seems to talk about the person that owns it, even though  
20 "a person" is intended to be broader.

21 PROFESSOR GOODE: Later on in the sentence  
22 we refer to "the privilege holder," not the person. In my  
23 mind it's fairly clear that a person is not the same as  
24 the privilege holder later on in the sentence.

25 MR. ALEXANDER: I specifically remember

1 addressing this exact issue in our committee and  
2 concluding that this was clear enough to effectuate its  
3 function, but it sounds like you're at least questioning  
4 that.

5 MR. LEVY: Well, and I just want to make  
6 clear that that is the intent --

7 MR. ALEXANDER: Right.

8 MR. LEVY: -- and I'm not sure there's a  
9 better way to word it, but --

10 MR. ALEXANDER: It's a valid issue because  
11 we looked at this exact same thing.

12 CHAIRMAN BABCOCK: All right. Anything more  
13 on trade secrets? Okay. Let's go to 508, "Informer's  
14 identity privilege." Any comments about the informers?  
15 Lisa.

16 MS. HOBBS: I just don't know this -- "The  
17 privilege does not apply if the informer's identity or the  
18 informer's interest in the communication subject matter  
19 has been disclosed to a person who would have cause to  
20 resent," which is the same language as in the current  
21 rule, but does that mean you just resend?

22 PROFESSOR GOODE: Resent.

23 MS. HOBBS: Oh, resent.

24 PROFESSOR GOODE: That language comes from  
25 an original Supreme Court opinion that recognized the

1 informer's privilege way back 50 years ago.

2 MR. ALEXANDER: We had this discussion, too.

3 MS. HOBBS: I'm glad I'm in good company.

4 MR. ALEXANDER: So don't worry.

5 CHAIRMAN BABCOCK: Okay. Any other comments  
6 about 508? You okay with it, Richard?

7 MR. ORSINGER: 508, I have nothing more  
8 about 508. I'm fine.

9 CHAIRMAN BABCOCK: Okay. Well, if Orsinger  
10 is okay with it, I'm okay with it. We'll go to 509, which  
11 is the physician-patient privilege.

12 MS. HOBBS: Can I go back to 508 real  
13 quickly?

14 CHAIRMAN BABCOCK: Where do you want to go?

15 MS. HOBBS: Back to 508 real quick.

16 CHAIRMAN BABCOCK: 508, sure.

17 MS. HOBBS: I just want the record to state  
18 that you did not include any change to the order of the  
19 testimony about the merits. You've broken it down into  
20 testimony in a criminal case and testimony in a civil  
21 case, and I understand why based on how this is written in  
22 the current provision, but the current rule starts with  
23 civil, and it says you can -- if you find that the -- if  
24 you find that disclosure is going to happen, the identity  
25 is going to be disclosed, "The court may make any order

1 that justice requires." It's permissive, it's broad, it  
2 gives the court lots of discretion on what they're going  
3 to do; and then the rule says and in a criminal case you  
4 shall do this; and they're like death penalty things,  
5 right, you're going to dismiss the case; and I just want  
6 to be clear that by switching the order of that you didn't  
7 mean to imply that in a criminal case you can do the  
8 ultimate, which is dismissal, but in a civil case -- it  
9 seems like the trial court would still have discretion to  
10 ultimately dismiss the case if that was what justice  
11 required; and you did not mean to suggest anything  
12 differently by switching that order.

13 MR. ALEXANDER: We did not, no. No. And  
14 the court may make any order that justice requires up to  
15 and including death penalty.

16 MS. HOBBS: Yeah, and the way it's currently  
17 drafted with the starting with the permissive and then  
18 going with the mandatory, it doesn't seem to imply that  
19 you could do the mandatory under the permissive, and the  
20 way you restructured it there could be an argument there,  
21 but that was not your intent.

22 MR. ALEXANDER: I think there might -- that  
23 was not our intent, and I think that argument might have  
24 more teeth if it wasn't broken between the criminal issue  
25 and the civil issue. So to me you look at what the court

1 can do in a civil case wholly independently from what  
2 we've said under (2) (A) that a court can do in a criminal  
3 case.

4 CHAIRMAN BABCOCK: Okay. 509,  
5 "Physician-patient."

6 PROFESSOR GOODE: If I may, I would just say  
7 that this is a rule where we actually have presented two  
8 versions of 509(b) because, frankly, we couldn't figure  
9 out exactly what current 509(b) does. Rule 509(b)  
10 currently talks about privilege and then arguably in the  
11 rest of current Rule 509(b) talks about it not as a rule  
12 of privilege but as a rule of admissibility, and so we  
13 presented one version, which expresses Rule 509(b) as a  
14 rule of inadmissibility and the second one as a rule of  
15 privilege, and we just couldn't decide as a committee  
16 which was a more accurate capture of the current language.  
17 Both are absolutely consistent with whatever case law  
18 exists.

19 MR. ALEXANDER: Or perhaps we couldn't agree  
20 as a committee.

21 CHAIRMAN BABCOCK: Anybody have any  
22 preferences between the (b) the first and (b) the second?

23 PROFESSOR HOFFMAN: So this doesn't help  
24 decide between the two different versions of (b), but let  
25 me note you've added the word "confidential" to the

1 restyled version. The current doesn't talk about the  
2 communication being confidential, the communication to any  
3 person involved in the treatment or examination of alcohol  
4 or drug abuse.

5 PROFESSOR GOODE: Where are you?

6 PROFESSOR HOFFMAN: In the same place you  
7 were.

8 PROFESSOR GOODE: Okay.

9 PROFESSOR HOFFMAN: So you'll see that it  
10 talks about that "a confidential communication is not  
11 admissible if" and the word "confidential" isn't in the  
12 current rule. So can you just talk about that for a  
13 minute? Is it that you assumed that the communication had  
14 to be confidential?

15 MR. ALEXANDER: Yes, because if you go up to  
16 definitions and what kind of communications are at issue,  
17 unless it's a confidential communication under (a), (b)  
18 would -- the communication at issue wouldn't apply to what  
19 this rule is trying to do.

20 PROFESSOR HOFFMAN: Okay, but doesn't that  
21 suggest then that you don't need the word "confidential"?

22 MR. ALEXANDER: Well, no, because -- well,  
23 it didn't to us because we wanted to make it clear that  
24 this limited privilege or whatever that they're doing in  
25 (b) applies to confidential communications, and



1 "confidential" is defined up in (a)(3), so that was --  
2 that was the -- that's the limiting predicate, in our mind  
3 at least, to what's being addressed in 509(b) as opposed  
4 to -- if 509(a)(3) had defined "communication" as opposed  
5 to defining what "confidential" means, then I would think  
6 we wouldn't need to repeat "confidential" in (b), but  
7 that's not the way it was structured. Does that make  
8 sense?

9 PROFESSOR GOODE: I would add this is  
10 also -- it's something that comes up in Rule 510 as well.  
11 Rule 510, there is a definition of "confidential" for  
12 communication, but the current statement of privilege  
13 doesn't refer to "confidential communications." It just  
14 refers to "communications," although it's clear that the  
15 privileges only apply to confidential communications, not  
16 nonconfidential communications, and so this was a matter  
17 of, I think, just clarification. I know of no case that's  
18 ever held that a nonconfidential communication is  
19 privileged.

20 MS. HOBBS: Rule 509 is especially --

21 CHAIRMAN BABCOCK: I'm sorry, Professor  
22 Dorsaneo.

23 PROFESSOR DORSANEO: Go ahead, Lisa.

24 CHAIRMAN BABCOCK: He yields to you, Lisa.

25 MS. HOBBS: Just to that point, it's an

1 especially odd structure in Rule 509, and I haven't  
2 studied 510 yet, but because it's in the civil cases where  
3 it's in the civil section of that rule that you do state  
4 that the confidential communication is privileged. You  
5 start with the criminal that says it's generally not  
6 privileged and then you go to the civil, so that's the  
7 general rule is in the section (c) before you finally  
8 reference a general privilege against a confidential  
9 communication as defined in (a). It's just a really odd  
10 structured rule.

11           PROFESSOR GOODE: Absolutely. We were just  
12 trying to retain section numbers.

13           CHAIRMAN BABCOCK: Professor Dorsaneo.

14           PROFESSOR DORSANEO: I'm looking at this,  
15 and these two sentences in your two versions of (b),  
16 "There is no physician-patient privilege in a criminal  
17 case." And like, what am I reading here, right, if that's  
18 not what this rule is about? Where does that sentence  
19 come from and what's it doing there? What's it  
20 accomplish?

21           PROFESSOR GOODE: It's in the current rule.

22           PROFESSOR DORSANEO: I know it's in the  
23 current rule. What does it accomplish in the current  
24 rule?

25           HONORABLE ROBIN DARR: It clarifies there is

1 not one in a criminal case, but there is one in a civil.

2 PROFESSOR DORSANEO: Limited privilege in a  
3 criminal case.

4 PROFESSOR GOODE: This is -- again, there's  
5 a long history.

6 PROFESSOR DORSANEO: There is only a limited  
7 physician-patient privilege in a criminal case. I can  
8 cope with that, but to say there isn't one, I'm not sure  
9 how that helps me at all.

10 CHAIRMAN BABCOCK: Buddy. Buddy is going to  
11 answer this.

12 MR. LOW: Steve, you remember when -- no,  
13 I'm going to -- as things come up I have to speak or I'll  
14 forget it. You remember when sometime your committee and  
15 my committee dealt with HIPAA and pertaining to this, and  
16 anything less restrictive than HIPAA was no good, and we  
17 worked out a rule on that. I don't think it was ever  
18 passed, that HIPAA -- did that come up in your discussion?  
19 We worked out a joint thing on waiver, because used to you  
20 waived, but you had to get the information from the doctor  
21 through subpoena and then there was some cases held that  
22 you can just go ahead and ex parte the doctor and HIPAA --  
23 did that come up in any of this?

24 PROFESSOR GOODE: No. Again, we weren't --  
25 the whole effect of HIPAA on this and the context of ex

1 parte communications with the patient's doctor --

2 MR. LOW: Yeah, right.

3 PROFESSOR GOODE: -- by the other side, and  
4 the extent to which HIPAA would allow that, we did come up  
5 with a rule about that, but --

6 MR. LOW: But it's not encompassed here,  
7 okay.

8 PROFESSOR GOODE: Again, this is a bizarre  
9 rule in the way this rule is structured, I agree, and this  
10 part about communications and drugs used to be in Rule  
11 510. It came from a criminal provision in the Code of  
12 Criminal Procedure. It was jammed in there, and at one  
13 point I guess in the consolidation, I think, Justice  
14 Hecht, in 1998 it was moved from 510 to 509. As I say, we  
15 had a hard time with this because I don't know whether  
16 this is a rule of really saying someone who makes a  
17 communication in the course of alcohol or drug abuse  
18 treatment or examination has a privilege to prevent that  
19 communication from being revealed or whether it is simply  
20 a rule of inadmissibility so that if the defendant wants  
21 to reveal that communication and the prosecution doesn't  
22 want the defendant to reveal that communication, the  
23 prosecution can say it's inadmissible. If it's a rule of  
24 privilege, it's the defendant's privilege. If it's a rule  
25 of inadmissibility it's just a statement of

1 inadmissibility. Again, since it's called "limited  
2 privilege" it implies it's a privilege, but it's written  
3 in terms of a rule of inadmissibility, and that's where we  
4 just threw up our hands and said, "Y'all are smarter than  
5 us, you can decide."

6 CHAIRMAN BABCOCK: Are you talking about us?

7 PROFESSOR GOODE: Absolutely.

8 MR. ALEXANDER: You hear the sucking up  
9 going on?

10 CHAIRMAN BABCOCK: Yeah, that sounds like  
11 sucking up to me. Orsinger.

12 MR. ORSINGER: My comment is not on the  
13 criminal part. Are we ready to talk about another part?

14 CHAIRMAN BABCOCK: I think we're more than  
15 ready.

16 MR. ORSINGER: I know that the committee did  
17 not try to do anything substantive, so I'm going to  
18 preface my comment.

19 CHAIRMAN BABCOCK: Can we just stipulate to  
20 that?

21 MR. ORSINGER: Yeah, we can stipulate to  
22 that. I think the committee, subcommittee, some  
23 subcommittee or some task force, should try to do  
24 something substantive with this; and one of my big  
25 concerns is that this is all styled from the standpoint of

1 a physician licensed to practice medicine; but in reality,  
2 in this day and time nurse practitioners and other  
3 intermediaries are actually licensed to deliver medical  
4 services and do deliver medical services, frequently  
5 without the intervention of a doctor, medical doctor  
6 license. They're just provided oversight, but, you know,  
7 a patient can go see a nurse practitioner and leave with  
8 medicine and never see a doctor, and so really this should  
9 say "Licensed to provide medical services" rather than a  
10 physician. Another thing is under the lawyer-client rule  
11 they have a representative of a lawyer who will pick up  
12 the paralegals and other people that are in the staff. We  
13 have no such thing as a representative of the doctor that  
14 would pick up any of their support staff, so this rule is  
15 gravely deficient in terms of applying to the modern  
16 practice of medicine.

17           Let me also say with regard to HIPAA, which  
18 is something I run into in my practice all the time, if  
19 you don't have a HIPAA release, which frequently the  
20 doctors will require a court order that you have complied  
21 with HIPAA, you can't get anything from these guys in  
22 discovery. Now, if a doctor is on the witness stand, I'm  
23 not sure what happens if we comply with Rule 503 in order  
24 to breach a privilege -- or, pardon me, Rule 509 to breach  
25 a privilege but we haven't complied with HIPAA. Then the

1 testifying physician is now in a situation where a judge  
2 is applying a Rule of Evidence and you've got a Federal  
3 law that has standards that haven't been met, and that's a  
4 dilemma, so it does seem to me that this rule needs to be  
5 substantively looked at.

6 CHAIRMAN BABCOCK: Okay. Gene, and then  
7 Buddy.

8 MR. STORIE: Yeah, my comment is on the  
9 criminal things, although I know absolutely nothing about  
10 them, but I notice the change in word from "proceedings"  
11 to "case," which seems to me as narrowing the application  
12 of the privilege, and I don't know why that was. And then  
13 I went back to look at Rule 101(e), which seems to talk  
14 about a number of proceedings, and I don't know if they're  
15 cases or not, but it seems to me that you wouldn't want to  
16 change the scope of the rule.

17 PROFESSOR GOODE: Criminal -- excuse me,  
18 Rule 101(h)(2) defines "criminal case" to mean "a criminal  
19 action or proceeding" including an examining trial.

20 MR. STORIE: Ah, okay. Thank you.

21 CHAIRMAN BABCOCK: Buddy, still got that  
22 thought?

23 MR. LOW: Yeah.

24 CHAIRMAN BABCOCK: I know you had to hold it  
25 for a minute.

1 MR. LOW: I did -- well, I just lost it.  
2 The committee has been asked to make notes of things that  
3 they think are real key substantive changes that should be  
4 considered, so when we get through with this, if and when  
5 we do, then with these substantive changes we're all  
6 talking about here will be renewed, and we'll get together  
7 and consider recommendations to the Court what we should  
8 consider.

9 CHAIRMAN BABCOCK: Okay. Great. Justice  
10 Brown.

11 HONORABLE HARVEY BROWN: On (b) about the  
12 criminal case, two questions. Number one, it says there's  
13 no physician-patient privilege in a criminal case. Is  
14 that for the criminal defendant to claim, or is that any  
15 witness? If you're a witness called in, does that mean  
16 that your privilege is lost?

17 PROFESSOR GOODE: I'm sorry.

18 HONORABLE HARVEY BROWN: On the first  
19 sentence of (b) where it says there's no privilege in a  
20 criminal case, does that mean just for the accused, or  
21 does it mean for any witness?

22 PROFESSOR GOODE: You mean a witness comes  
23 in and someone cross-examines them and wants to ask about  
24 medical stuff?

25 HONORABLE HARVEY BROWN: Yes.



1                   PROFESSOR GOODE: What you said to your  
2 doctor?

3                   HONORABLE HARVEY BROWN: Yes.

4                   HONORABLE ANA ESTEVEZ: Well, serious bodily  
5 injury, bodily injury, rape, a lot of those are medical  
6 issues that you have to prove up in your case in chief.

7                   PROFESSOR GOODE: There is no -- the law is  
8 clearly stated there is no doctor-patient privilege.

9                   HONORABLE HARVEY BROWN: For any witness who  
10 comes.

11                  PROFESSOR GOODE: In criminal case at all,  
12 yeah.

13                  HONORABLE HARVEY BROWN: And second, you  
14 said your committee wasn't smart enough to figure it out.  
15 I'm not sure we are either --

16                  MR. ALEXANDER: The rest of the committee  
17 takes issue with that, by the way.

18                  HONORABLE HARVEY BROWN: I'm not sure we are  
19 either, and it seems like to me this is one where you may  
20 need to talk to some criminal lawyers or criminal judges  
21 because it seems like to me this might affect the  
22 practice. I could see the DA subpoenaing records, and the  
23 DA might subpoena the entire records from a medical  
24 provider, and then who is going to have the burden of  
25 objecting to keeping out any privileged information, or is

1 that best handled as a practical matter as give us all the  
2 records and we'll work it out through admissibility later?  
3 So this could have an impact on just the way they go about  
4 their daily affairs of getting medical records. It seems  
5 like to me you need to look at that practical impact as  
6 part of the question.

7 CHAIRMAN BABCOCK: Okay. Anything else on  
8 this rule? 509? All right. Let's go to 510, "Mental  
9 health information privilege in civil cases." Any  
10 comments about 510? Let the record reflect that Orsinger  
11 is out of the room, which may explain why there's silence  
12 here.

13 MR. ALEXANDER: Can we hit Article VI real  
14 quick?

15 CHAIRMAN BABCOCK: Say again.

16 MR. ALEXANDER: Can we hit Article VI real  
17 quick?

18 MS. GREER: Although, if he were here  
19 Richard would probably point out that it's limited to the  
20 practice of medicine and not medical professionals, so if  
21 you make a change to the prior rule --

22 CHAIRMAN BABCOCK: Are you adopting that  
23 comment by Orsinger as your own?

24 MS. GREER: I think it is a good change just  
25 to be clear, but he would probably be better to advocate

1 it than am I.

2 MR. SCHENKKAN: There he is.

3 MS. GREER: There he is.

4 CHAIRMAN BABCOCK: Speak of the devil.

5 Richard, we're on Rule 510, "Mental health information  
6 privilege in civil cases."

7 MR. ORSINGER: Oh, yeah, I run into that all  
8 the time.

9 CHAIRMAN BABCOCK: We had a feeling that you  
10 did.

11 MR. ORSINGER: What --

12 CHAIRMAN BABCOCK: Marcy has made a comment  
13 in your name.

14 MR. ORSINGER: I'll endorse it, whatever it  
15 was.

16 CHAIRMAN BABCOCK: Do you have any other  
17 comments? Robert.

18 MR. LEVY: This might be a substantive  
19 comment, but I could perceive of a situation where a  
20 patient could be somebody who is neither interviewed or is  
21 affirmatively seeking treatment but is like involuntarily  
22 committed and is being evaluated or treated by a doctor,  
23 but has no intent to do that. Again, I know you've used  
24 "interviewed" from the current rule. I think it's  
25 anachronism, so I don't know if that would be a

1 substantive change in terms of what the rule intends.

2 CHAIRMAN BABCOCK: Okay. Yeah, Tom.

3 MR. RINEY: At the end there's a footnote  
4 reference, "Comments to 2013 restyling" that gives the  
5 history and basically the codification, and it says that  
6 that statute provided the privilege applied. There's a  
7 separate statute that deals with mental health records  
8 that parallels this rule, but it also has some additional  
9 provisions about how the patient can obtain copies of the  
10 record and so forth. I'm just wondering if we should  
11 consider referencing that statute. I don't know if it's  
12 the same one or not, but the way this is phrased it acts  
13 as if that statute provided that when we might want to  
14 actually direct them to the statute if it is the same  
15 thing. Because you really can't give -- you cannot answer  
16 the issue about how can you get the records absent taking  
17 a look, I think, at both the statute and this rule.

18 PROFESSOR GOODE: And there actually is a  
19 statutory physician-patient privilege as well as a  
20 statutory psychotherapist-patient privilege, and the  
21 statutory privilege and the rule are not necessarily  
22 consistent, and there's a really tortured history because  
23 of the doctor-patient privilege. When the rules were  
24 promulgated the statutory doctor-patient privilege was  
25 repealed, but the Legislature then in a nonsubstantive

1 codification put the repealed doctor-patient privilege in  
2 the law, so you had a repealed section reenacted by the  
3 Legislature as a nonsubstantive revision of the statutes,  
4 and that has since been amended. I think Richard's  
5 comment that 509 and 510 deserve a real thorough  
6 re-examination is very much on point here.

7 CHAIRMAN BABCOCK: Richard.

8 MR. ORSINGER: Will the existing comment to  
9 Rule 510 be carried forward, or is it only the 2013  
10 restyling comment that will be carried forward, because  
11 there's some very important language in existing comments  
12 about parent-child relationships and a balancing test,  
13 which -- and the negotiation between the family law  
14 section and the Supreme Court ended up in a comment rather  
15 than in the rule, and that will not disappear, will it?  
16 Or will it? Because if it's going to disappear, I would  
17 advocate that we continue with it because it's a very  
18 substantive comment.

19 PROFESSOR GOODE: It was certainly never in  
20 my mind that all the comments that are already existing  
21 would disappear.

22 MR. ORSINGER: Okay.

23 MR. ALEXANDER: Right.

24 CHAIRMAN BABCOCK: Okay. Professor  
25 Dorsaneo.

1                   PROFESSOR DORSANEO: I've got the same issue  
2 related to the exceptions in 509 and in 510. Since we're  
3 on 510, the exception that's at the bottom of page 57, the  
4 (d) (5), "If any party relies on the patient's physical,  
5 mental, or emotional condition as part of the party's  
6 claim or defense and the communication or record is  
7 relevant to that condition," the existing language inverts  
8 those two aspects of the exception. It talks about as to  
9 a communication or record "relevant to an issue of the  
10 physical or mental in any" -- and "in any proceeding," and  
11 I think I like the new language better, but the genesis of  
12 the old language I recall is that some people on the  
13 committee, particularly John O'Quinn in years past, wanted  
14 to eliminate these privileges altogether by making the  
15 exceptions do that. So the proposal was to make an  
16 exception to the pertinent privilege whenever there was a  
17 -- as to a communication or record relevant to an issue of  
18 the physical, mental, or emotional condition of a patient,  
19 you know, meaning whenever the information is relevant in  
20 the case, there's no privilege. All right. That was the  
21 idea behind it and then it got worked and massaged more,  
22 and we had this additional language added, which  
23 ultimately is interpreted by the Supreme Court in that  
24 case called R.K., or you know, and I think all of that --  
25 I think all of that, you know, probably works out, but

1 every time I teach this I have trouble with it because of  
2 its genesis and the additional language and how that  
3 language limited the attempt by John O'Quinn and others to  
4 dispose of the privileges altogether in litigation. I  
5 just bring that -- you know, bring that up. I don't know  
6 whether that's of any use to anybody, but just inverting  
7 it may, in fact, make the R.K. case make better sense.

8 CHAIRMAN BABCOCK: Lisa, did you have your  
9 hand up? Somebody down there did. Anybody? Okay. Any  
10 other comments on 510? Okay. Moving right along, 511 is  
11 a handout, "Waiver by voluntary disclosure," and these  
12 competing drafts, Buddy, are already before the Court?

13 MR. LOW: Yeah, Chip, what happened, the  
14 committees had different versions, and Steve's committee  
15 followed the Federal on ways to follow the Federal. We  
16 went and applied waiver to not just attorney-client  
17 privilege. It was voted on. The latter one was approved  
18 by the full Supreme Court Advisory Committee. The Supreme  
19 Court hasn't decided, and we wanted the Supreme Court to  
20 have both versions before them. They have them, and those  
21 versions are the result of so much work that it wouldn't  
22 really be constructive to have further comment about them.

23 CHAIRMAN BABCOCK: Notwithstanding Buddy's  
24 plea, does anybody want to make further comment about  
25 them? All right. Justice Frost, are you wringing your

1 hands for --

2 HONORABLE KEM FROST: No.

3 CHAIRMAN BABCOCK: Okay.

4 MR. LEVY: You're talking about the  
5 proposed?

6 CHAIRMAN BABCOCK: 511, the two versions.

7 MR. LEVY: Well, a question that might be of  
8 interest is in the proposed 511(b)(1), do we want to  
9 consider disclosures that are made to government  
10 authorities that are not just U.S., state, or Federal;  
11 i.e., a foreign jurisdiction authority that would not  
12 constitute a waiver?

13 CHAIRMAN BABCOCK: The European Union, for  
14 example.

15 MR. LEVY: That would be one, yes.

16 MR. LOW: I think that was discussed, I  
17 don't remember, when we talked about it at length the last  
18 time.

19 CHAIRMAN BABCOCK: Buddy thinks that we  
20 talked about it at length at some point.

21 MR. LOW: We did.

22 CHAIRMAN BABCOCK: And if we talked about  
23 it, I bet it was at length.

24 MR. LOW: Yeah.

25 CHAIRMAN BABCOCK: But that's a good point,



1 Robert. Anything else? Okay. Well, then let's move to  
2 512, "Privilege matter disclosed under compulsion or  
3 without opportunity to claim privilege." Yeah, Judge  
4 Estevez.

5 HONORABLE ANA ESTEVEZ: I have a quick  
6 question just on 511. You know, we've changed all -- I  
7 didn't see the word "ought" in any of the other rules. I  
8 know you guys fight over "should" and "must," but just on  
9 511(b) (C) they have an "ought in fairness be considered."  
10 I don't know what word they prefer, but I think just to be  
11 consistent it should be "should" or "must."

12 MR. LOW: "Should" or "must" wasn't really  
13 discussed back then. That's true.

14 CHAIRMAN BABCOCK: "Ought" is the word of  
15 choice at the time.

16 MR. LOW: Right.

17 PROFESSOR GOODE: That's the language in  
18 Federal Rule 502.

19 CHAIRMAN BABCOCK: You ought to do it, but  
20 you must not.

21 HONORABLE ANA ESTEVEZ: So it's "should"  
22 maybe.

23 CHAIRMAN BABCOCK: Okay. 512.

24 MR. ALEXANDER: I think in 512 we changed a  
25 "which" to a "that," and that's it, so I'm hopeful --

1 hopefully we won't get bogged down on this one.

2 CHAIRMAN BABCOCK: Oh, my goodness. All  
3 right. 513. Comment? Professor Hoffman. Are you on 513  
4 or 512?

5 PROFESSOR HOFFMAN: Yeah, 513.

6 CHAIRMAN BABCOCK: 513, all right, progress.

7 PROFESSOR HOFFMAN: Okay, so I just want to  
8 point out some different words here, so start over on the  
9 current Texas rule, the word "occasion." So except as  
10 that other rule provides "a claim of privilege, whether  
11 the present proceeding or upon a prior occasion." Okay.  
12 Then that gets changed to just the word "proceeding" in  
13 the restyle, so "except as permitted by 504(b)(2) neither  
14 the court" -- "can comment on a privilege whether made in  
15 the present or an earlier proceeding." Okay. And then  
16 jump ahead.

17 MR. ALEXANDER: Hey, Lonny, maybe I'm  
18 missing something, the language "in a present proceeding  
19 or upon a prior occasion" has been modified to read "made  
20 in a present proceeding or previously."

21 MR. LOW: After our comments they revised.

22 PROFESSOR HOFFMAN: Oh, am I in the --

23 MR. ALEXANDER: Do you have the October 2  
24 draft?

25 PROFESSOR HOFFMAN: Apparently I have the

1 wrong draft. Okay. So never mind. If I could pick up,  
2 though, so this links up to one other thing, I think looks  
3 like this is the same. Jump over to (c).

4 MR. ALEXANDER: 513(c)?

5 PROFESSOR HOFFMAN: Yeah, same thing, 513.  
6 "Paragraphs (a) and (b) shall not apply with respect to  
7 the party's claim in the present civil proceeding" and  
8 that gets changed to "(a) and (b) don't apply to a party's  
9 claim in the present civil case."

10 MR. ALEXANDER: That's right. That's the  
11 current language.

12 PROFESSOR HOFFMAN: So -- okay, so, because  
13 I just saw the change on (a) I'm not sure I've processed  
14 this through. The question I think I have is does the  
15 change from "proceeding" to "case" in (c) matter, and also  
16 how does that link up to that we're using the word  
17 "proceeding" in (a)?

18 PROFESSOR GOODE: Because we've defined in  
19 Rule 101(h) "civil case" to include proceeding. We define  
20 criminal case, but we don't have a generic definition for  
21 "case" meaning proceeding. So we kept the language of  
22 "proceeding" in (a), but we changed "civil proceeding" to  
23 "civil case" to conform with our definition. I can't  
24 promise you that we were consistent throughout the rules  
25 in using "civil case" as opposed to "proceeding," but we

1 tried, and if anybody finds places where we didn't --  
2 weren't consistent, please point them out.

3 CHAIRMAN BABCOCK: Anything else about 513?  
4 Okay. Let's move on to witnesses, Article VI, and Rule  
5 601, which is not completely the same as Federal Rule 601.  
6 Would that be right?

7 MR. ALEXANDER: That would be right, yes.  
8 They are quite different.

9 CHAIRMAN BABCOCK: You want to just give us  
10 a little background about how they're different, Fields?

11 MR. ALEXANDER: It would be easier to talk  
12 about the ways they're similar.

13 CHAIRMAN BABCOCK: Okay. How are they  
14 similar?

15 MR. ALEXANDER: In very few respects. They  
16 both --

17 CHAIRMAN BABCOCK: Okay, well, that's  
18 helpful. Let's move on from there.

19 MR. ALEXANDER: Steve, you want to add  
20 anymore to that?

21 PROFESSOR GOODE: Yeah, one difference is we  
22 have the dead man's rule in our 601, which the Federal  
23 rules mercifully do not, and the other difference is the  
24 Federal rule just has a general rule of everybody is  
25 competent to be a witness except if some other rule

1 provides, whereas the Texas rule starts out with that as a  
2 general rule but then has some exceptions. So those are  
3 the two basic differences in 601.

4 CHAIRMAN BABCOCK: Just out of curiosity, is  
5 this dead man's rule peculiar to Texas, or do other states  
6 have similar rules?

7 PROFESSOR GOODE: It used to be much more  
8 widespread. There are still some states that have it, but  
9 many don't. My recollection is that when the committee  
10 originally proposed the rules -- civil Rules of Evidence  
11 to the Supreme Court back in 1981 it did not include the  
12 dead man's rule, and the Supreme Court stuck it back in.

13 CHAIRMAN BABCOCK: Okay. I don't think  
14 there are any members of the Court that were there.

15 HONORABLE NATHAN HECHT: Not even me.

16 CHAIRMAN BABCOCK: Not even you. I remember  
17 that. Okay. Any comments on this rule? Judge Yelenosky,  
18 that is you over there, isn't it?

19 HONORABLE STEPHEN YELENOSKY: Yes, down here  
20 somewhere. We're on of 601, right?

21 CHAIRMAN BABCOCK: 601.

22 HONORABLE STEPHEN YELENOSKY: Yeah. Is the  
23 language on the "insane persons," is that from the prior  
24 rule?

25 CHAIRMAN BABCOCK: Is the language on

1 "insane persons" the same?

2 HONORABLE STEPHEN YELENOSKY: Yeah, and I  
3 don't know what that means. I mean, we don't define it,  
4 do we, or does it?

5 PROFESSOR GOODE: It's the same. We didn't  
6 make it up.

7 HONORABLE STEPHEN YELENOSKY: We know what  
8 competence is, right, to testify, but I don't know what  
9 this means.

10 MR. ALEXANDER: We carried this over, so it  
11 was not defined previously and --

12 HONORABLE STEPHEN YELENOSKY: Okay. All  
13 right. Well, we have the same problem we did then.

14 MR. ALEXANDER: Right. Right. We're trying  
15 not to create any new problems for you.

16 CHAIRMAN BABCOCK: Yeah, Carl, I'm sorry.

17 MR. HAMILTON: (3), exception -- well, it  
18 would be 601(b)(3)(B), "Opposing party causes the opposite  
19 party to testify at trial." I think there's some  
20 confusion in the rules -- law now about whether or not a  
21 deposition is such that the exception applies. I think  
22 that should be cleared up in the rules.

23 CHAIRMAN BABCOCK: Professor Dorsaneo.

24 PROFESSOR DORSANEO: Yeah, and I think it's  
25 more general confusion about that. We don't really know

1 what the word -- various people have different  
2 understandings of what the word "trial" means. Does it  
3 mean, you know, any evidentiary hearing?

4 CHAIRMAN BABCOCK: Or summary judgment.

5 PROFESSOR DORSANEO: Or is it -- you know,  
6 is it restricted to a conventional jury trial or  
7 conventional bench trial concerning the merits of the  
8 claims and defenses?

9 CHAIRMAN BABCOCK: Yep.

10 PROFESSOR DORSANEO: It's a totally  
11 ambiguous word whenever it appears in many parts of the  
12 procedural rule book, and it would at least be improved by  
13 saying "at a hearing or trial." I think. Huh?

14 CHAIRMAN BABCOCK: Yeah.

15 MR. ALEXANDER: I don't necessarily  
16 disagree. It's -- we -- "trial" was used previously,  
17 "trial" is used in the restyled rule. The courts can  
18 determine what it means unless we -- unless someone wants  
19 to make a substantive change to clarify it.

20 PROFESSOR DORSANEO: Put it on the  
21 substantive change list.

22 MR. ALEXANDER: Right.

23 CHAIRMAN BABCOCK: Anything more about 601?  
24 Richard Munzinger.

25 MR. MUNZINGER: 601(a)(1), the original

1 version talked about the court forming an opinion  
2 regarding the person's sanity. The revised version leaves  
3 all of that out about the court drawing opinions, and I  
4 know that the judge has to reach a conclusion regarding  
5 the person's sanity, but I'm just curious why that was  
6 done and whether it has a substantive effect. Is there  
7 some judgment of incompetency that's now required? Is  
8 there discretion with the trial court or a duty for the  
9 trial court to form an opinion? The old rule seemed to  
10 say so, the new rule doesn't.

11           PROFESSOR GOODE: That's because Rule 104(a)  
12 invests in the judge the obligation to make decisions  
13 about preliminary questions of admissibility, which  
14 include the qualifications of someone to be a witness.

15           CHAIRMAN BABCOCK: Justice Brown. Justice  
16 Brown.

17           HONORABLE HARVEY BROWN: I think Professor  
18 Goode's point is a good one, but then I wonder why in  
19 subpart (2) we have "The court examines and finds." Why  
20 can't we just say "who lacks"?

21           PROFESSOR GOODE: Originally that's what we  
22 did, and the objection was made that the language of the  
23 current -- let me go back to it. Whether it's the  
24 language, that there is case law that talks about the  
25 court examining --



1 MR. ALEXANDER: The Rule 601(a)(2) --

2 PROFESSOR GOODE: Yes --

3 MR. ALEXANDER: -- specifically includes  
4 that the court must examine the child. That's an  
5 additional burden here that's not in (a)(1), so we felt  
6 that relying on 104 to set the predicate wasn't sufficient  
7 in this instance.

8 PROFESSOR GOODE: And there is case law  
9 discussing courts examining children.

10 HONORABLE HARVEY BROWN: Well, a trial court  
11 can examine under Rule 104. So are you saying that what  
12 this does is it makes it that a trial court does not have  
13 discretion to examine but is required to examine, because  
14 if so, it doesn't say that. It still sounds like to me  
15 it's permissive examination. And what if the parties ask  
16 all the questions? The trial judge may not ask a  
17 question, and clearly in a Rule 104(a) hearing the judge  
18 can ask questions and frequently does.

19 PROFESSOR GOODE: As I say, originally we  
20 took that out and then we put it back in because the  
21 language was in here and some people raised it as taking  
22 it out might be perceived as a substantive change, and  
23 there is case law talking about courts examining children,  
24 and so we just thought it was safer to leave it back in  
25 there, but I agree, I think if the language were deleted

1 it would not be a substantive change.

2 CHAIRMAN BABCOCK: Lisa.

3 MS. HOBBS: I have a preference for leaving  
4 the title of subsection 601(a)(2) to remain "Children"  
5 because I think the point of this is that we're talking  
6 about children or people who have the intellectual  
7 capacity of a child, and I think that some of my Facebook  
8 friends lack sufficient intelligence, but I don't think  
9 that's what we're going at here, and I think that leaving  
10 the title "Children" sort of has an implication that this  
11 expansive title might lose.

12 MR. ALEXANDER: I think that's a good point.  
13 I will tell you that there was a strong sentiment in the  
14 committee as we were doing this work to help trial lawyers  
15 in the thick of the battle, and when you're scanning a  
16 rule in trial trying to figure out which one applies,  
17 "Persons lacking sufficient intellect" would be more  
18 likely to capture your attention if it's an adult there  
19 that you're trying to deal with rather than the subtitle  
20 of "Children," and that was our thinking, and we made a  
21 few changes like that so lawyers wouldn't skip over a  
22 potentially relevant provision.

23 CHAIRMAN BABCOCK: How about "Children and  
24 child-like adults"?

25 MR. ALEXANDER: That was too broad. There's

1 so few exceptions to that.

2 CHAIRMAN BABCOCK: Well, that's true. That  
3 would be most of Lisa's friends.

4 PROFESSOR DORSANEO: We're all children  
5 anyway, all of us are children.

6 CHAIRMAN BABCOCK: Okay. Gene.

7 MR. STORIE: Two things, first one is petty,  
8 which is in (a)(2). Would it now be "whom" rather than  
9 "who"? "The court examines whom"? So anyway, petty,  
10 forget about it.

11 MR. ALEXANDER: It's not that petty. I  
12 think it's correct.

13 MR. STORIE: Okay. And the other one is in  
14 (2) it looks like it's focused more on testimony about a  
15 particular matter that relate to transactions --

16 MR. ALEXANDER: I'm sorry, I apologize.  
17 Could you back up? I missed that part.

18 MR. STORIE: Sure, and another one on  
19 (a)(2), the original rule seems to relate to particular  
20 transactions, testimony on particular transactions, and  
21 the new version looks more general. So is that any  
22 difference, because, you know, a child can testify  
23 accurately about some things but not about others, and  
24 that's part of the determination of what their  
25 intellectual capacity is.

1                   MR. LEVY: I agree. I think that is a  
2 substantive change because the new version is "generally  
3 incompetent to testify" versus "in the particular case on  
4 the issue about which they would testify."

5                   MR. ALEXANDER: Our intent there obviously  
6 was to modernize the language, but I take the point you're  
7 making. Why don't we take another -- why don't we take  
8 another look at that?

9                   CHAIRMAN BABCOCK: Professor Dorsaneo.

10                  PROFESSOR DORSANEO: Professor Goode's  
11 statement that the dead man's rule was put back in by an  
12 earlier version of the Texas Supreme Court makes me  
13 suggest that we put that on the list of something to look  
14 at carefully to see if it's got a problem. Steve probably  
15 knows about some of these things, but it struck me as odd  
16 that in the applicability part we're talking about  
17 executors, administrators, or guardians, and then we start  
18 talking about heirs or legal representatives in (b). I'm  
19 thinking like heirs or legal representatives, aren't they  
20 up there in (a), the legal representatives, and is there  
21 something perhaps that needs to be looked -- studied; and  
22 probably like a lot of people, you know, I'd put this in  
23 the same category as the rule against perpetuities, or the  
24 Rule in Shelley's Case, something that I know something  
25 about but not enough to make any recommendation at this

1 point other than look at it.

2 CHAIRMAN BABCOCK: Watch the movie Body  
3 Heat.

4 MR. ALEXANDER: I was just thinking that.

5 PROFESSOR DORSANEO: One of my favorites.

6 CHAIRMAN BABCOCK: It's the greatest.

7 Anything else on 601? Okay. 602. And I think now  
8 we're --

9 MR. ALEXANDER: 602.

10 CHAIRMAN BABCOCK: -- getting back to the  
11 Federal, right?

12 MR. ALEXANDER: This is identical to the  
13 Federal version.

14 CHAIRMAN BABCOCK: Okay. Anybody want to  
15 talk about that in light of that comment? 603.

16 MR. ALEXANDER: Also identical to the  
17 Federal version, Chip.

18 CHAIRMAN BABCOCK: 604.

19 MR. ALEXANDER: Same thing, identical.

20 CHAIRMAN BABCOCK: 605.

21 MR. ALEXANDER: Once again, your Honor,  
22 identical.

23 CHAIRMAN BABCOCK: 606.

24 PROFESSOR DORSANEO: Not identical.

25 MR. ALEXANDER: 606(a) is identical. 606(b)

1 is identical, the exceptions. The Federal version has a  
2 third exception. I think that's the only difference.

3 CHAIRMAN BABCOCK: Okay. And the Fed  
4 exception is "a mistake was made in entering the verdict  
5 on the verdict form."

6 PROFESSOR DORSANEO: No. The one that's  
7 missing is --

8 MR. ALEXANDER: Steve's pointing out another  
9 difference that I've missed.

10 PROFESSOR GOODE: Right, in the exceptions  
11 the Federal rule has "extraneous prejudicial information  
12 was improperly brought to the jury's attention," and  
13 that's not an exception in Texas. That was deleted from  
14 the Texas one.

15 CHAIRMAN BABCOCK: Professor Dorsaneo.

16 PROFESSOR DORSANEO: And it should be. The  
17 cases that have come up that, you know -- that are  
18 interesting is that it's not an outside influence if a  
19 juror picks up the *Corpus Christi Caller Times* and takes  
20 it into the jury room in a medical malpractice case and  
21 reads a letter written by a plaintiff's lawyer saying that  
22 the reason why we have all of these malpractice cases is  
23 not because of us, it's because the doctors stink, okay,  
24 and that's not an outside influence. That's fine. Or  
25 somebody reading a dictionary definition that's not the

1 definition in the charge, some juror who picks out the  
2 dictionary definition that's not in the charge to say that  
3 this is the definition of the term, and it's always seemed  
4 to me that the Federal language about extraneous  
5 prejudicial information would allow jurors to testify  
6 about those things that happened in a motion for new trial  
7 hearing, okay, assuming other procedural requirements were  
8 satisfied, so I don't know why our rule doesn't have that  
9 in it or -- other than maybe somebody thought it wasn't  
10 necessary, but I think it is necessary.

11 CHAIRMAN BABCOCK: Who said -- Judge  
12 Yelenosky, and then Justice Christopher.

13 HONORABLE STEPHEN YELENOSKY: When we  
14 instruct a jury we tell them it's a -- it's jury  
15 misconduct if they do any of these things and it may lead  
16 to another trial, and among those things are, you know,  
17 don't look up anything in a dictionary. So isn't it true  
18 that you have to be able to testify to -- or about any of  
19 the things that you were prohibited from doing under the  
20 instructions of the court?

21 PROFESSOR DORSANEO: No, you're not allowed  
22 to testify about most of those things.

23 HONORABLE STEPHEN YELENOSKY: So -- so how  
24 is it that the court would find out? I mean, if a juror  
25 comes and says, "Well, there was a violation of the rule,"

1 whether it leads to a new trial or not, they can't be  
2 testifying as to what we brought into the jury room in  
3 violation of the instructions of the court?

4 CHAIRMAN BABCOCK: Justice Christopher.

5 PROFESSOR DORSANEO: Yes.

6 HONORABLE TRACY CHRISTOPHER: I think I  
7 mentioned this maybe six months or so ago, but the Court  
8 of Criminal Appeals has a new opinion that interprets Rule  
9 606 in a way that seems to be different from the way the  
10 civil courts have been interpreting this rule, and in the  
11 criminal cases you could allow a juror to say, "I brought  
12 this -- I read this newspaper article to the other members  
13 of the jury." You would not be allowed to ask the jurors  
14 whether that influenced their verdict, but instead you  
15 would use a reasonable man standard as to whether that  
16 information would have influenced a reasonable juror. So  
17 you can't get into jury deliberations, but the fact that  
18 something was read to the jury that was outside the  
19 evidence in the case was considered an outside influence.

20 CHAIRMAN BABCOCK: Buddy.

21 MR. LOW: What gave rise to this, the Feds  
22 amended, and there was not -- and we were asked to amend,  
23 which we did, but the Feds didn't have anything in there  
24 about whether a juror could testify as to whether he  
25 qualified or not. That was the only difference we



1 originally had. Then, I won't name the person, somebody  
2 had a suggestion we could do away with all of this by  
3 filming and recording the jury deliberations. That was  
4 when Justice Phillips was the Chief Justice, but that  
5 didn't really get very far.

6 CHAIRMAN BABCOCK: Well, and Judge Poe  
7 attempted to do that, and he got mandamused.

8 MR. LOW: I didn't name him, you did.

9 CHAIRMAN BABCOCK: Well, I was involved in  
10 that, so, okay, anything more about 606? Okay.  
11 Okey-dokey, then we're going to break for lunch right now  
12 because Justice Hecht has got to get down the street for  
13 something, and then at around 12:45 or so Marisa Secco,  
14 our former rules attorney, will be back and -- does she  
15 know about this, about the pie in her face?

16 MS. SENNEFF: She doesn't know about that.

17 CHAIRMAN BABCOCK: She doesn't know about  
18 that. Anyway, we're going to have a little cake for her  
19 and thank her for her service to the Court and the  
20 committee and to welcome Martha and Shanna. Okay. Carl.

21 MR. HAMILTON: I'll bring it up after --

22 CHAIRMAN BABCOCK: Okay. We'll do it after  
23 lunch, and we're now in recess until 1:00.

24 (Recess from 12:00 p.m. to 1:03 p.m.)

25 CHAIRMAN BABCOCK: We are at Rule 607, "Who

1 may impeach a witness," and I'm guessing that that's got  
2 no change.

3 MR. ALEXANDER: It's identical to Federal.

4 CHAIRMAN BABCOCK: Okay. So we're just  
5 going to go through these. If anybody has a comment to a  
6 no change rule, by all means speak up, but 608, "A  
7 witness' character of the truthfulness or untruthfulness."

8 MR. ALEXANDER: 608(a) is identical to the  
9 Federal version, 608(b) is not. Obviously there were  
10 substantive differences between the current Texas version  
11 and the Federal version.

12 CHAIRMAN BABCOCK: Okay. Any comments about  
13 that, about 608(b)? Okay. 609, "Impeachment by evidence  
14 of a criminal conviction."

15 MR. ALEXANDER: 609 is an example of where  
16 our Texas rule differs from the Federal rule, so this is  
17 different from the restyled Federal version.

18 CHAIRMAN BABCOCK: Okay. Anybody have any  
19 comments on 609?

20 MR. HAMILTON: Chip, can I --

21 CHAIRMAN BABCOCK: Richard, and then Carl.

22 MR. MUNZINGER: I've got two comments on  
23 609(b) .

24 MR. ALEXANDER: (d) ?

25 MR. MUNZINGER: (b) as in boy,

1 MR. ALEXANDER: (b), all right.

2 MR. MUNZINGER: (b) as in boy. Whether you  
3 intend it to or not, I think that the amendment to (b)  
4 weakens what I would say was either a presumption or  
5 almost a mandatory prohibition against the use of  
6 convictions 10 years old or older, except under the  
7 circumstances. As a matter of style, I think that the  
8 rule should make it clear, as the old rule did, that you  
9 really have to have some special circumstances to get past  
10 the 10-year bar, and I don't think that the revision  
11 carries near the strength of the prohibition that the  
12 original did.

13 As to 609(c)(1), it appears to me that you  
14 may have made a substantive change in the rule.  
15 "Effective pardon, annulment, or certificate of  
16 rehabilitation." I'm reading from the old rule, "Evidence  
17 of a conviction is not admissible under this rule if based  
18 on the finding of the rehabilitation of the person  
19 convicted, the conviction has been the subject of a  
20 pardon." If the governor pardoned me because I made a  
21 large contribution and not because I had been  
22 rehabilitated, that would have an effect on the  
23 applicability of that rule. The way you have changed it  
24 in my opinion makes that ambiguous because you now have  
25 the phrase "based on a finding that the person has been

1 rehabilitated," arguably modifying only "other equivalent  
2 procedure" as distinct from all of the foregoing, which  
3 had been "pardon, annulment, certificate of  
4 rehabilitation." So I think -- at least I think that  
5 arguably could constitute a substantive change if my  
6 cynicism about pardons by public officials were to be born  
7 out.

8 CHAIRMAN BABCOCK: Carl.

9 MR. HAMILTON: Before we broke for lunch I  
10 had a question on 606. 606. Why -- since the Federal  
11 rules allows a juror to testify about a mistake made in  
12 entering the verdict, why do we not have that in our  
13 rules?

14 MR. ALEXANDER: That's a substantive change  
15 that obviously can be visited by the subcommittee, and I'm  
16 sure Judge Darr's committee will be happy to do that, but  
17 that wasn't our task for today's meeting.

18 MR. HAMILTON: Another substantive change.

19 CHAIRMAN BABCOCK: Okay.

20 MR. ALEXANDER: You want to turn back to  
21 609?

22 CHAIRMAN BABCOCK: Yeah, let's go back to  
23 609.

24 MR. ALEXANDER: With regard to 609, the  
25 issues you raised in 609(b) and (c), I believe the

1 language in both of those provisions tracks the Federal  
2 restyled rule exactly, and we didn't -- it was our  
3 conclusion that tracking the rule would not impair the  
4 meaning of the rule in this instance, so we tracked what  
5 the Feds did. I understand the point you're making,  
6 though.

7 MR. MUNZINGER: Well, can I at least say  
8 that from my perspective -- and I don't mean this in an  
9 ugly way towards you, but copying the Federal government  
10 is not necessarily a good thing.

11 CHAIRMAN BABCOCK: Now, now. They were shut  
12 down, they just got reopened.

13 MR. ORSINGER: That's when it functions.

14 MR. MUNZINGER: The reopening that troubled  
15 me more than anything else.

16 MR. ORSINGER: He started, they reopened.

17 CHAIRMAN BABCOCK: I know.

18 MR. PERDUE: I'm reading 609(b) over and  
19 over.

20 MR. ALEXANDER: Yes.

21 MR. PERDUE: And it may be exactly what the  
22 Federal rule is, but it doesn't say that it's  
23 inadmissible.

24 MR. MUNZINGER: That's part of my point,  
25 Jim. I think the change has made --

1 MR. PERDUE: You and I agree on a lot of  
2 things.

3 MR. MUNZINGER: There is a change in the  
4 tone of the rule, for sure.

5 MR. PERDUE: Yeah. The declarative just is  
6 gone.

7 MR. ALEXANDER: Well, it says -- well, it  
8 says it's admissible only if the court makes a finding  
9 that the probative value substantially outweighs its  
10 prejudicial effect.

11 MR. PERDUE: So it's implied.

12 MR. ALEXANDER: Well, there's only one way  
13 to --

14 MR. PERDUE: Which is an exception, isn't  
15 it? I mean, that's really the exception to the rule. I  
16 mean, the rule is not stated, as I read it.

17 I'd like to have at least agreed with Mr.  
18 Munzinger once a meeting.

19 MR. MUNZINGER: Twice, we played golf, and  
20 we both had spiritual experiences playing golf, mostly  
21 purgatorial.

22 MR. PERDUE: Y'all did the work and --

23 MR. ALEXANDER: No, I mean, I take your  
24 point. We were comfortable with the Federal restyling,  
25 both with the title, "Limiting the use of evidence after

1 10 years," and with the language that specifically tells  
2 the reader when this evidence comes in and what kind of  
3 finding must be made before it can come in. So to our  
4 mind, adding another sentence that says "otherwise it's  
5 inadmissible" would have been redundant, but I mean, I  
6 understand what you're saying.

7 MR. PERDUE: Yeah, y'all have been  
8 second-guessed enough, but --

9 MR. ALEXANDER: I don't mind being  
10 second-guessed. I'd rather get this right.

11 MR. PERDUE: It's just weird that the  
12 declarative is gone.

13 MR. ALEXANDER: Right.

14 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

15 HONORABLE STEPHEN YELENOSKY: You mentioned  
16 the "only if." I see the "only if" in prior versions, and  
17 maybe it's because I don't have my reading glasses, but is  
18 there an "only if" in the revised?

19 MR. ALEXANDER: There is, Judge, if we're  
20 looking in the right place. "Evidence of the conviction  
21 is admissible only if its probative value," et cetera, et  
22 cetera, et cetera, and I'm looking at 609(b). Is that --

23 HONORABLE STEPHEN YELENOSKY: Maybe I'm  
24 looking at the wrong version. 609 what?

25 MR. ALEXANDER: 609(b).

1 HONORABLE ROBIN DARR: Boy.

2 MR. ALEXANDER: (b) as in boy, right.

3 HONORABLE STEPHEN YELENOSKY: Okay, what I'm  
4 looking at is "limit on using evidence after 10 years," so  
5 I must have the wrong --

6 HONORABLE ROBIN DARR: That's it, second  
7 sentence.

8 MR. ALEXANDER: No, you -- that's it, Judge.

9 HONORABLE ROBIN DARR: Second sentence.

10 HONORABLE STEPHEN YELENOSKY: Oh, okay.  
11 Well, I guess I was thrown off by the title because that  
12 second sentence is supposed to apply, isn't it,  
13 to convictions less than 10 years?

14 HONORABLE ROBIN DARR: Older than 10 years.

15 MR. ALEXANDER: Using the evidence after 10  
16 years. It says, "This subdivision (b) applies if more  
17 than 10 years have passed since the witness' conviction or  
18 release from confinement, whichever is later," and then  
19 the second sentence explains when such evidence would be  
20 admissible.

21 HONORABLE STEPHEN YELENOSKY: Well, 609(a),  
22 the old Rule 609(a) says "only if," right, "but only if,"  
23 and I don't see anything in the revised 609(a) that says  
24 "only if."

25 MR. ALEXANDER: Oh, I'm sorry. Maybe I



1 misunderstood what you were talking about in the first  
2 place.

3 HONORABLE STEPHEN YELENOSKY: Well, I don't  
4 know, maybe I misunderstood what I was talking about, but  
5 I guess I was looking for an "only if" under (a), "must be  
6 admitted only if."

7 CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.

8 PROFESSOR DORSANEO: Is there something in  
9 the Federal rules the way that they're drafted that  
10 prefers to say "only if" or rather, you know, "only if its  
11 probative value," blah, blah, blah, "outweighs its  
12 prejudicial effect," rather than saying, you know, "unless  
13 the court determines that the probative value"; and I  
14 think the "unless" formulation is clearer than the "only  
15 if" formulation; but is that just a choice that's been  
16 made in the Federal drafters that they don't like to use  
17 "unless"?

18 PROFESSOR GOODE: The old version of the  
19 Federal 609(b) in the first -- this long sentence is  
20 identical to the current Texas 609(b). The restyled  
21 Federal 609(b) is what you see here, "Limit on using  
22 evidence after 10 years." We took the identical language  
23 in the two rules, and if they restyled that, we restyled  
24 it accordingly.

25 PROFESSOR DORSANEO: Okay. I'm not making

1 myself clear. Is one of the restyling principles that we  
2 don't say "unless"? Is it we say "only if" and make it an  
3 affirmative proposition? Okay.

4 PROFESSOR GOODE: It is not a restyling  
5 principle never to say "unless."

6 PROFESSOR DORSANEO: Okay. Then I like the  
7 "unless" language better, the old language.

8 CHAIRMAN BABCOCK: Okay. Anybody else?  
9 Yeah. Who is that? Judge Yelenosky.

10 HONORABLE STEPHEN YELENOSKY: Well, (a) as  
11 it reads right now only states the conditions when it must  
12 be admitted, and literally reading that, I would be  
13 allowed to admit it in other circumstances, it's just that  
14 I wouldn't be required to admit it.

15 PROFESSOR GOODE: That's the current rule.  
16 The current rule is "evidence shall be admitted subject to  
17 Rule 403," "evidence shall be admitted."

18 HONORABLE STEPHEN YELENOSKY: Okay. Well,  
19 so that's just another one of those substantive problems,  
20 because the rule doesn't prevent its admission.

21 PROFESSOR GOODE: That's right, Rule 609,  
22 "shall be admitted."

23 HONORABLE STEPHEN YELENOSKY: So it only  
24 tells you when a judge must do it. It doesn't tell a  
25 judge when he or she must not.

1 MR. ALEXANDER: Right. That's right.

2 CHAIRMAN BABCOCK: Okay. Anything else on  
3 this rule? All right, let's go to 610, "Religious beliefs  
4 or opinions."

5 MR. ALEXANDER: This one is identical to the  
6 Federal version.

7 CHAIRMAN BABCOCK: 611, "Mode and order of  
8 examining witnesses and presenting evidence."

9 MR. ALEXANDER: And 611(a) and (c) I believe  
10 are identical to their Federal counterparts. 611(b) is  
11 not.

12 CHAIRMAN BABCOCK: Scope of  
13 cross-examination.

14 MR. ALEXANDER: Right.

15 CHAIRMAN BABCOCK: Just looking at it, it  
16 doesn't look very controversial to me, but why is it  
17 different?

18 PROFESSOR GOODE: The --

19 CHAIRMAN BABCOCK: I said, just looking at  
20 it, it doesn't look very controversial to me, but why is  
21 it different?

22 PROFESSOR GOODE: Texas has traditionally  
23 had wide open cross, whereas the Federal procedure has  
24 been cross is limited to matters of credibility and what's  
25 raised on direct, so if you want to go into matters

1 outside of direct, court had discretion to let you do it,  
2 but ordinarily you just have to call the witness yourself.

3 CHAIRMAN BABCOCK: Honor didn't breach in  
4 Texas in Federal court. All right. Any other comments  
5 about -- is (b) the only one that's changed, Fields?

6 MR. ALEXANDER: (b) is the only one  
7 different from its Federal counterpart. Obviously we  
8 modernized all of it, but (b) is the only one that differs  
9 from what the Feds did.

10 CHAIRMAN BABCOCK: Okay. Any comments at  
11 all about 611, including subpart (b)? Everybody okay with  
12 wide open cross? Perdue is nodding his head.

13 MR. ALEXANDER: Depends on the witness.

14 CHAIRMAN BABCOCK: All right. 612, "Writing  
15 used to refresh a witness' memory."

16 MR. ALEXANDER: This 612(a) differs, 612(b)  
17 is very similar but not, I believe, identical, and 612(c)  
18 is identical.

19 CHAIRMAN BABCOCK: Okay.

20 MR. LEVY: I've got a question. It seems  
21 like 612(a) is now going to be limited to an adverse party  
22 using or the rights of the adverse party on a writing to  
23 refresh memory, but wouldn't -- under the current rule it  
24 seems like it's broader, that it would apply to both  
25 the --

1           MR. ALEXANDER: We weren't trying to change  
2 the substance. I think what we did is move adverse party  
3 from the big block paragraph, which we tried our best to  
4 avoid those, and moved it up to the front, so instead  
5 of -- instead of setting forth first what the witness --  
6 when it applies, we stated what right -- what options an  
7 adverse party has when this occurs, so all we did was move  
8 adverse party up out of that big block and into (a).

9           CHAIRMAN BABCOCK: Okay. Anything else  
10 about this? 612? Okay. 613, version one.

11           MR. ALEXANDER: Right, so -- I'm sorry, did  
12 I interrupt?

13           CHAIRMAN BABCOCK: No, it just suggested to  
14 me there might be more than one version.

15           MR. ALEXANDER: There are two versions of  
16 this rule. This was one of the places where we thought we  
17 really needed to present two alternate versions for  
18 consideration. We wrestled with this rule a lot, and it  
19 went back, and it was redrafted several times before it  
20 finally made its way here in these alternate versions.  
21 The issue is there was some thought on the committee that  
22 the current version of Rule 613(a) and (b) as drafted  
23 really don't correspond to actual Texas practice, and what  
24 it boils down to in a nutshell is what predicate must be  
25 laid before you can go into -- before you can

1 cross-examine the witness further about practices and  
2 statements or bias or interest. If you read the current  
3 rule literally, you're not allowed to cross-examine the  
4 witness further about these matters unless they're given  
5 an opportunity to explain or deny the statement, and  
6 before you can delve further into cross-examination.

7           That did not seem to us to be consistent  
8 with the way this rule is handled in actual Texas state  
9 court practice. So -- but we didn't want to ignore it  
10 completely, so we created version two, which tracks the  
11 predicate as we read it, identically from the current rule  
12 613(a) and (b); but then we created version one, which  
13 takes out that part of the predicate; and we think more  
14 closely corresponds, at least in my view, to actual state  
15 court practice.

16           CHAIRMAN BABCOCK: And what is your view,  
17 Fields, on what actual state court practice is?

18           MR. ALEXANDER: Well, it would correspond to  
19 the foundation that's required under version one of 613,  
20 where if you look at the foundation requirement, "When  
21 examining a witness about prior inconsistent statement,  
22 whether oral or written, a party must first tell the  
23 witness the contents of the statement, the time and place  
24 of the statement, and the person to whom the witness made  
25 the statement," but you don't need to give the witness at

1 that time in the middle of your cross-examination the  
2 opportunity to explain or deny. That's for the other side  
3 to do when they rehabilitate. At least that's the way --  
4 that's the way I've always seen it done.

5 CHAIRMAN BABCOCK: So let's say that the  
6 witness has said something in his deposition that he's  
7 just contradicted in his direct, direct examination. Then  
8 you -- and it's a video deposition. Do you play the  
9 deposition for him and say, "Didn't you say this in your  
10 deposition?"

11 MR. ALEXANDER: Well, I've seen it done  
12 several different ways, but, yes, impeachment from a prior  
13 deposition, I have seen done in the manner you're talking  
14 about where if the witness admits that he said it  
15 differently in the deposition, that's the end of it. But  
16 in all other circumstances of prior inconsistent  
17 statements or bias or interest, I've never seen the  
18 litigant -- the trial lawyer have to let the witness tell  
19 his side of the story in the middle of cross-examination.

20 CHAIRMAN BABCOCK: Okay.

21 MR. ORSINGER: Chip?

22 CHAIRMAN BABCOCK: Yes, sir.

23 MR. ORSINGER: It's a little complicated  
24 when you're contradicting with prior deposition testimony  
25 because there's another rule that allows you to use

1 deposition testimony for any purpose, so if the prior  
2 inconsistent statement is a written statement, this rule  
3 would apply very well; but if you're trying to impeach out  
4 of a deposition you really have two rules that allow you  
5 to use one -- has this elaborate requirement; and the  
6 other one says you can use deposition testimony basically  
7 any way you want. So that particular instance confuses, I  
8 think, two rules.

9 CHAIRMAN BABCOCK: Good point. Good point.  
10 I've seen this rule -- I've seen this rule applied to --

11 MR. ORSINGER: To a deposition?

12 CHAIRMAN BABCOCK: To a deposition.

13 MR. ALEXANDER: As have I.

14 MR. ORSINGER: When we get to that rule we  
15 can talk about that. I don't want to say anything that  
16 will be embarrassing, but it does seem to me that this is  
17 a substantive change.

18 MR. ALEXANDER: Well, that's why we did one  
19 version that we thought corresponded with the actual state  
20 court practice, you know, what is the -- how is the rule  
21 being applied, but obviously we have a version two which  
22 we think corresponds more closely to the literal reading  
23 of the rule.

24 MR. ORSINGER: I would just like the Chair  
25 to note that perhaps a little tolerance would be



1 appropriate for the members of the committee that keep  
2 coming up with substantive changes because even this  
3 committee came up with a substantive change.

4 CHAIRMAN BABCOCK: Hey, I haven't stepped on  
5 you.

6 MR. ORSINGER: Oh, okay.

7 CHAIRMAN BABCOCK: Judge Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Well, I guess  
9 I'm to some extent echoing Richard, because I don't really  
10 see the difference between a substantive change in saying,  
11 well, this is conforming to current practice, because  
12 there are a lot of things in the rules that don't conform  
13 to current practice, and we're not changing all of those.  
14 So if that's the rationale, I think it's probably too  
15 broad and it will lead us, Richard and I, to make a lot of  
16 comments about substantive changes.

17 MR. ALEXANDER: Well, and, frankly, I agree  
18 with that, and it was only in the rarest of circumstances  
19 where we did this, so we decided -- and there was a lot of  
20 debate about this rule, and we decided at the end of the  
21 day that we ought to just submit alternate versions, but  
22 there's no doubt but that version one is a substantive  
23 change from the literal reading of the rule. We included  
24 it because it didn't seem to be a substantive change from  
25 current practice, but your point is very well taken.

1 CHAIRMAN BABCOCK: Justice Brown.

2 HONORABLE HARVEY BROWN: Since you're  
3 deleting that requirement of the opportunity to explain  
4 from subpart (a) (1) I'm not sure I understand what (a) (3)  
5 is doing. I take it you're saying that if the witness  
6 asks to be given an opportunity that you have to give it  
7 to him at that point, but that you don't have to sua  
8 sponte offer that opportunity. Is that what you're trying  
9 to say?

10 MR. ALEXANDER: Well --

11 HONORABLE HARVEY BROWN: Because it does say  
12 here under (a) (3), "opportunity to explain or deny," the  
13 language is almost the same in version two, only you have  
14 it at subpart (b).

15 MR. ALEXANDER: Right. We definitely didn't  
16 want to take that out because it is clearly part of the  
17 rule that the witness is allowed to explain or deny. The  
18 question is one of timing and foundation and whether or  
19 not the witness has to be given that opportunity before  
20 you're allowed to delve further into cross-examination.

21 HONORABLE HARVEY BROWN: So you're saying  
22 "upon request by the witness" basically. It doesn't have  
23 to be done as part of your offer, but if they say, "Can I  
24 explain," you have to say "yes."

25 MR. ALEXANDER: Right. Right. Or in

1 redirect. At some point the witness is allowed clearly to  
2 explain or deny.

3 HONORABLE HARVEY BROWN: Well, if you're  
4 trying to do that, I don't think it reads very clearly  
5 that way, because I think right now when practitioners  
6 read version one without your explanation it reads kind of  
7 like the old rule. All you've really done is move that to  
8 a separate subsection but not made it clear that you're  
9 affecting their timing, I think.

10 CHAIRMAN BABCOCK: Richard Munzinger.

11 MR. MUNZINGER: Maybe the problem is because  
12 you have -- I think you have added foundation requirement  
13 as part (a)(1), and unless I'm wrong, that isn't clearly  
14 set forth in the prior version in subsection (a). Did I  
15 miss that?

16 MR. ALEXANDER: Well, what's -- you're  
17 talking about in the current version?

18 MR. MUNZINGER: Yes, the current version --

19 MR. ALEXANDER: Go ahead, I'm sorry.

20 MR. MUNZINGER: The current version when  
21 you're talking about an opportunity to explain or deny the  
22 statement in version two, you have that as part of the  
23 foundation requirement so that before I can show or  
24 impeach or do what have you I must give that person an  
25 opportunity to explain.

1 MR. ALEXANDER: Right.

2 MR. MUNZINGER: But you've added these words  
3 "foundation requirement" to the rule, have you not?

4 MR. ALEXANDER: Well, we -- we didn't -- we  
5 added the title as a subsection, but the rule itself  
6 states that as a -- "Before further cross-examination  
7 concerning extrinsic evidence may be allowed" -- in other  
8 words, the foundation for cross-examination is you must do  
9 (a), (b), (c), and (d), so that is a foundational  
10 requirement as I read the rule, which is why we -- that's  
11 why we named that subsection as we did.

12 CHAIRMAN BABCOCK: Any other comments?  
13 Yeah, Richard.

14 MR. ORSINGER: I think that version one,  
15 which as everyone acknowledges is a substantive change, is  
16 a good one, so I'm in favor of that substantive change.

17 CHAIRMAN BABCOCK: See, you were able to  
18 make that statement without any repercussions but  
19 scowling.

20 MR. ORSINGER: So far.

21 CHAIRMAN BABCOCK: Professor Dorsaneo.

22 PROFESSOR DORSANEO: Well, I'm interested in  
23 what Fields said about the -- if you say, "Yeah, that's  
24 right, it's different in the deposition than what I just  
25 testified to," that things are done and whether moving

1 this opportunity to explain around would make any  
2 difference to that result.

3 MR. ALEXANDER: In what way? I want to make  
4 sure I understand your question.

5 PROFESSOR DORSANEO: Well, it's not so much  
6 an opportunity to explain or deny, but kind of like I want  
7 to ask him, well, how do you explain -- well, I guess the  
8 deny part, explain or deny the statement. I guess it's  
9 the deny the statement part, deny the statement. How  
10 could you deny the statement that you made? Deny the  
11 truth of the statement?

12 MR. ALEXANDER: Or deny you said it. I  
13 mean, it doesn't have to be a deposition. It could be  
14 that so-and-so comes in and says, "Well, he told me he  
15 didn't run the red light" or whatever it might be. The  
16 witness is clearly going to get the opportunity to say, "I  
17 didn't say that to her, I don't know what she's talking  
18 about."

19 PROFESSOR DORSANEO: So the "deny" would be  
20 deny that you made it or the truth of it.

21 MR. ALEXANDER: Or that the court reporter  
22 got it down right or any other variables.

23 PROFESSOR DORSANEO: But the important thing  
24 is the truth of it. I mean, you could say, "I said that,  
25 but I don't think it's true now."

1                   MR. ALEXANDER: You can do either -- no, not  
2 just the truth of it. Whether the statement was made in  
3 the first place, either one. You're allowed -- the  
4 witness is allowed full range to explain what that -- what  
5 that adverse evidence really means, either "I didn't say  
6 it" or "she didn't hear me right" or "I was lying when I  
7 said it," whatever the case may be. You've got that  
8 opportunity. "The court reporter took it down wrong,"  
9 "they didn't hear me," "the person who heard" -- whatever.  
10 There are a zillion explanations, and you're entitled as a  
11 witness to give them. That's in the current version of  
12 the rule, and we were obviously not going to take that  
13 out. The question to us was one of what -- whether it's  
14 part of the foundational requirement before further  
15 cross-examination is allowed or whether it's just a right  
16 the witness has in the rule, whether that comes out in  
17 your cross-examination at some point or when the witness  
18 is rehabilitated by the other side.

19                   CHAIRMAN BABCOCK: Judge Yelenosky.

20                   HONORABLE STEPHEN YELENOSKY: Well, one  
21 thing I see a lot, Fields, is "Didn't you say blah, blah,  
22 blah" and then maybe the witness or the lawyer stands up  
23 and says, "Well, the question was different." I mean, you  
24 can only read it in context; and so I suppose if that's  
25 the complaint, they would have to hold that until later,

1 right? I mean, they can't explain. They can't -- they  
2 have no right to say anything at that point to explain,  
3 "Well, the question was different."

4 MR. ALEXANDER: They would -- well, I mean,  
5 they have the right to answer questions that are asked by  
6 the cross-examiner and --

7 HONORABLE STEPHEN YELENOSKY: Sure.

8 MR. ALEXANDER: But under version one --  
9 and, again, we submitted two different versions for  
10 consideration, but under version one, the cross-examining  
11 -- the examining lawyer would not be required to let them  
12 explain why they said what they said or whether they deny  
13 it or anything of that in the middle of his or her  
14 cross-examination. You would be entitled to cross-examine  
15 the witness to your heart's content about this  
16 inconsistent statement or this prior inconsistent  
17 statement or the bias or interest, and the lawyer who is  
18 sitting there taking it cannot stand up and object that  
19 you haven't laid the foundation because you haven't given  
20 him or her a chance to explain or deny it first.

21 HONORABLE STEPHEN YELENOSKY: Right. And I  
22 guess I think that at least sometime they ought to be able  
23 to do that, and it shouldn't have to wait like in optional  
24 completeness, although that's the wrong term for it, where  
25 it can't wait because it leaves the wrong impression with

1 the jury for too long.

2 MR. ALEXANDER: Right. And, I mean, to my  
3 mind the witness would certainly be allowed to answer any  
4 of these questions with "You're taking that out of  
5 context" or "That's not what I meant," but that doesn't  
6 stop -- that wouldn't stop -- under version one that  
7 wouldn't stop the lawyer from probing the issue if the  
8 witness doesn't first get an opportunity to explain or  
9 deny. It doesn't mean that they can't try to do that.

10 CHAIRMAN BABCOCK: Richard.

11 MR. ALEXANDER: It's just an issue of  
12 foundation. I'm sorry.

13 CHAIRMAN BABCOCK: No, no, no.

14 MR. ORSINGER: To me the issue here is the  
15 sequence because, Steve, what you're suggesting is I would  
16 think that the trial judge should have the discretion to  
17 let the witness in the middle of the cross-examination  
18 explain the prior inconsistent statement; and it reminds  
19 me very much of the rule of optional completeness and the  
20 rule of related writings, which I think doesn't the judge  
21 have the discretion as to whether you get to stand up in  
22 the middle of someone else's case and put in other  
23 documents or wait until you get the floor back?

24 HONORABLE STEPHEN YELENOSKY: The judge  
25 decides whether it can wait essentially.



1                   MR. ORSINGER: Right. This rule  
2 unfortunately is written originally that you must stop  
3 what you're doing until you get an explanation. You're  
4 advocating the judge should have discretion -- you can go  
5 forward unless the judge makes you stop, and version one  
6 is you're free to finish your cross-examination and then  
7 they come back and clean it up on redirect. So to me  
8 we've got three choices. You can either make them stop  
9 every time, not require them to stop ever, or give the  
10 judge discretion to stop; and I think in other rules that  
11 are similar, I think the optional completeness and other  
12 related writings, don't we leave it discretionary with the  
13 judge as to whether it's then or later; or am I wrong? Do  
14 you-all remember?

15                  PROFESSOR GOODE: Yeah, the optional  
16 completeness, the judge has to decide whether in fairness  
17 at the time you need to have them -- the other part of the  
18 statement is introduced.

19                  MR. ORSINGER: Right.

20                  PROFESSOR GOODE: So that's judge's  
21 discretion. I would say actually with regard to version  
22 one, putting (a)(3) where it is actually gives some  
23 flexibility because it doesn't prescribe the timing as to  
24 when the witness must be given the opportunity to explain  
25 or deny. What this does is just make it clear that it is

1 -- the lawyer doesn't have to wait for further  
2 cross-examination as a rule until the lawyer has given the  
3 witness the opportunity to explain or deny. I would think  
4 in most instances there should not be such a great time  
5 gap that the lawyer will do the cross-examination and the  
6 opposing lawyer will then get up and say, you know,  
7 "Explain yourself."

8 HONORABLE STEPHEN YELENOSKY: Well, but --

9 PROFESSOR GOODE: But if there were such a  
10 gap, I think (a) (3) would allow the judge to say, "Give  
11 the witness an opportunity to explain or deny now."  
12 Because it doesn't set a specific time frame. All it  
13 does, it says it's not an automatic part of the foundation  
14 requirement for further cross-examination; and I think the  
15 committee's thought was that that most closely reflects  
16 what goes on in most courtrooms in Texas as opposed to  
17 what the rule says literally; and part of the problem is  
18 it's very difficult to plow through the rule and figure  
19 out exactly what the rule says; and we thought that was  
20 part of the confusion that was creating the disparity  
21 between practice and the literal language in the rule.

22 CHAIRMAN BABCOCK: Judge Estevez, and then  
23 Carl, and then Justice Brown.

24 HONORABLE ANA ESTEVEZ: I just wanted to, I  
25 guess if we're voting, vote for version two; and the

1 reason is I don't think you're handing it over to the  
2 other side. It's one question for foundational purposes  
3 or whatever. "Are you denying you made that statement,  
4 yes or no," and they may not deny it. "Well, will you  
5 explain it?" They can explain it in one sentence, and  
6 then you move on, and you can keep going; and the jurors  
7 and the judge, it's very frustrating to me to find out  
8 that I've been misled for two and a half or three hours  
9 and then all of the sudden I'm hearing the explanation  
10 later; and so the stuff that emotionally got me mad at the  
11 beginning and maybe I wasn't listening as carefully later  
12 because I'm so mad he was lying and he didn't have an  
13 opportunity to explain it; and it might not be a good  
14 explanation, but just a minute of hearing what he's going  
15 to say to get rid of it you can decide whether or not  
16 you're going to believe it, weigh it, know what's going to  
17 come later, makes a huge difference on how you're  
18 receiving the rest of the evidence.

19               So, I mean, as far as a judge goes, I'm  
20 going to vote for version -- you know, I would go with  
21 version two; and I think that was probably the intent of  
22 the original rule, whether or not people practice that  
23 way; and the other thing is, well, maybe the judge can or  
24 cannot, but the reality is you get really good attorneys  
25 out there, there is no way they're going to let them

1 answer that question. You know, when the witness tries to  
2 go back to it, "Objection, your Honor, nonresponsive."  
3 Sustained. "Objection, your Honor, he's going to get his  
4 cross-examination, your Honor. Objection, nonresponsive,"  
5 and I will never hear -- when I have two good attorneys, I  
6 will never hear the explanation until the  
7 cross-examination if this -- if we adopt the other rule.

8           It's not the same with all attorneys. Lots  
9 of them just let them go and talk and explain and go, but  
10 when you have two good attorneys on both sides or at least  
11 just one or the other side, they're going to make sure it  
12 doesn't come in because they're going to follow the rules.  
13 They're going to use the rules to object. You will never  
14 know how it was explained until three hours later, four  
15 hours later. Someone might forget to explain it because  
16 they've had so many other issues come up by then on  
17 cross-examination it may not even be addressed.

18           MR. ALEXANDER: Right.

19           HONORABLE ANA ESTEVEZ: So in the interest  
20 of finding the truth I would go with version two. I think  
21 that might not be how people practice, but I think it's  
22 certainly probably the better practice.

23           MR. ALEXANDER: And let me say from the  
24 committee's perspective we think there are rational  
25 arguments in favor of both versions. That's why we

1 submitted them both. We did think version one tracked  
2 closer to current general Texas practice, but the rule as  
3 written with this as a foundational requirement, which is  
4 why we have it in version two.

5 CHAIRMAN BABCOCK: Carl.

6 MR. HAMILTON: As I understand version one  
7 under (a)(3), there's no time period that the explanation  
8 has to come. It can come from the cross-examining lawyer  
9 or from the other lawyer. Now, what if on  
10 cross-examination the inconsistent statement is discovered  
11 and brought out and the other lawyer does nothing? Is the  
12 judge then obligated to say something or do something to  
13 bring about an explanation?

14 MR. ALEXANDER: No. No. Judge would not  
15 be.

16 MR. HAMILTON: Well, it says that he must be  
17 given an opportunity.

18 MR. ALEXANDER: Well, opportunity doesn't  
19 mean that evidence has to be presented to the jury. It  
20 just means the witness has to be able to tell it. Still  
21 answering questions.

22 MR. HAMILTON: It doesn't mean the judge has  
23 to say, "Nobody asked the right questions, so I'm going to  
24 ask that he explain this"?

25 MR. ALEXANDER: Right. And we -- right. I

1 mean, the witness is going to have to answer questions  
2 presented to the witness just like any other part of the  
3 trial, but with regard to this -- whether you put this  
4 provision in as a separate component or as part of the  
5 foundational component under one, it's in the current  
6 Texas rule, this exact provision that -- I mean, we've  
7 modernized the language. The current version says, "The  
8 witness must be afforded an opportunity to explain or deny  
9 such a statement," so we were not going to take that out  
10 obviously. The question is only where it belongs.

11 CHAIRMAN BABCOCK: Professor Dorsaneo. Oh,  
12 I'm sorry, Justice Brown had his hand up.

13 PROFESSOR DORSANEO: Okay, go ahead.

14 HONORABLE HARVEY BROWN: On (a)(3), so if on  
15 cross they bring up the prior inconsistent statement and  
16 the witness says, "I'd like to explain my answer" and the  
17 lawyer objects and says, "Nonresponsive," can the judge  
18 say, "Yes, he may explain, but he can do that on  
19 cross-examination"?

20 MR. ALEXANDER: I think the judge would have  
21 wide -- broad discretion to handle it in any number of  
22 ways, including that one, yes.

23 HONORABLE HARVEY BROWN: And so if a lawyer  
24 says, "Judge, I'd like to do it now and I have a right to  
25 do that under subpart (3)," we say, "You have a right, but

1 the right is not at a certain time."

2 MR. ALEXANDER: That's the way I read the  
3 rule.

4 HONORABLE HARVEY BROWN: Okay.

5 CHAIRMAN BABCOCK: Professor Dorsaneo, and  
6 then Justice Christopher.

7 PROFESSOR DORSANEO: What happened to the  
8 sentence -- the next to the last sentence in current Texas  
9 613(a)? Is it somewhere hiding from my vision, or is it  
10 gone?

11 PROFESSOR GOODE: (4), (a)(4).

12 MR. ALEXANDER: Right. The substance of  
13 that sentence is in (a)(4).

14 PROFESSOR DORSANEO: Okay. "Fails to  
15 unequivocally admit."

16 CHAIRMAN BABCOCK: Hiding in plain sight.

17 PROFESSOR DORSANEO: This doesn't seem to be  
18 as --

19 CHAIRMAN BABCOCK: Justice Christopher.

20 HONORABLE TRACY CHRISTOPHER: Well, I think  
21 kind of going on to what Richard said about the difference  
22 between cross-examining with a deposition versus reading  
23 the deposition, you get these sort of -- I mean, we all  
24 think of it in terms of a deposition when a lot of times  
25 there are other statements that this could refer to; and

1 the rule is designed to those other statements, too; but  
2 just by way of example, you'll get sort of funny things.  
3 It will be time for somebody to do cross-examination of a  
4 witness; and I've had lawyers stand up and say, "I would  
5 like to read from this witness' deposition first before I  
6 begin my cross-examination." And then they will read the  
7 stuff that they want to get out, you know, if someone  
8 doesn't object to it, and then it comes in as substantive  
9 evidence right here when you're cross-examining someone  
10 about a prior inconsistent statement. It doesn't even  
11 come in as substantive evidence. It's only cross -- you  
12 know, it's only impeachment evidence essentially. So  
13 it's -- we have to think of this rule in terms of sort of  
14 broader, not just the deposition testimony.

15 CHAIRMAN BABCOCK: Judge Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: Are we also  
17 talking about version two at the same time?

18 CHAIRMAN BABCOCK: Yeah.

19 HONORABLE STEPHEN YELENOSKY: Okay. On  
20 version two, Fields, it does say "before offering  
21 extrinsic evidence," which is from the current rule, but  
22 it doesn't say before you go to cross-examination or  
23 inquiry; and is that implicit in the title, "Foundation  
24 requirements"? Is that what you -- why you left that out?

25 MR. ALEXANDER: Yes. Well, hang on, I'm



1 sorry. Let me try to answer it and then you tell me if I  
2 didn't, but it is part of -- under either version there's  
3 a foundation requirement. The only question is what's  
4 included in it, and before you're allowed to offer  
5 extrinsic evidence of the statement you've got to do the  
6 following. So tell me again what your question was. I'm  
7 sorry, Judge.

8 HONORABLE STEPHEN YELENOSKY: Well, the  
9 current rule says, again, if I'm reading it correctly,  
10 "Before further cross-examination concerning or extrinsic  
11 evidence of." So the first part of that phrase.

12 PROFESSOR GOODE: The witness under version  
13 two gets the opportunity to explain or deny during the  
14 impeaching party's examination. That's the purport of  
15 version two; whereas, version one, the opportunity to  
16 explain or deny may not come until the witness' proponent  
17 gets to do the redirect.

18 HONORABLE STEPHEN YELENOSKY: Well, all I'm  
19 saying is that in the current rule it looks like you  
20 can't -- it says explicitly no further cross-examination  
21 until you've done these things, and the version two  
22 doesn't say that. It just says no extrinsic evidence  
23 until you've done these things.

24 CHAIRMAN BABCOCK: Judge Wallace.

25 HONORABLE R. H. WALLACE: At the risk of

1 proving myself a fool, here's what I think it means by  
2 extrinsic evidence. An example would be what -- "What  
3 color was the light when you entered the intersection,"  
4 and the witness says, "It was green," and then going back  
5 again to the deposition, okay, the extrinsic -- "Do you  
6 recall giving your deposition on such and such day," "Do  
7 you recall who was present," and "Didn't you say in your  
8 deposition when you entered the intersection that the  
9 light was red?" If the witness says, "Yes, that's what I  
10 said," then you don't introduce any extrinsic evidence.  
11 He's just been impeached.

12 HONORABLE TRACY CHRISTOPHER: He's just been  
13 impeached.

14 HONORABLE R. H. WALLACE: If he says, "No, I  
15 didn't say that" or "I don't remember," then you get to go  
16 to the extrinsic evidence. What lawyers usually do,  
17 without objection, is they just go straight to the  
18 deposition. The guy says, "Well, when I entered it was  
19 green."

20 "Well, let me get your deposition and let's  
21 look at page seven," and that's what normally happens; and  
22 if it's without objection, it happens; but that's not the  
23 problem there.

24 MR. ALEXANDER: Right.

25 HONORABLE R. H. WALLACE: But sometimes you

1 don't ever -- you shouldn't ever get to the extrinsic  
2 evidence. He would be impeached.

3 CHAIRMAN BABCOCK: All right. 614,  
4 "Excluding witnesses."

5 MR. HAMILTON: What does this word  
6 "unequivocally commence" mean? Do we need that word in  
7 there?

8 CHAIRMAN BABCOCK: What section are you  
9 talking about?

10 MR. HAMILTON: Can't introduce it unless a  
11 witness unequivocally admits.

12 MR. ALEXANDER: We used that word because  
13 it's in the current rule, specifically.

14 MR. HAMILTON: Number (4), (b) (4).

15 CHAIRMAN BABCOCK: Okay. What about 614?  
16 How does that compare to the Federal rule?

17 MR. ALEXANDER: 614 is the same except for  
18 614(a) is, I believe, slightly different. (b) is  
19 different as well.

20 PROFESSOR GOODE: (b) is slightly different.

21 MR. ALEXANDER: I'm sorry, (a) and (b) are  
22 both slightly different.

23 PROFESSOR DORSANEO: Mr. Chairman?

24 CHAIRMAN BABCOCK: Yes, sir.

25 PROFESSOR DORSANEO: Richard and I are

1 consulting with each other about the word "extrinsic" in  
2 613. It's confusing me. I mean, you have the foundation  
3 requirement, and it's presumably the foundation  
4 requirement for the admission of the prior inconsistent  
5 statement, right? And then we go down here, "extrinsic  
6 evidence of a witness' prior inconsistent statement." I'm  
7 thinking like what the hell does that mean, "extrinsic"?  
8 Why doesn't it just mean evidence of the prior  
9 inconsistent statement? What does "extrinsic" add? It's  
10 an unnecessary adjective to suggest that it's something  
11 other than the prior inconsistent statement itself.

12 MR. ALEXANDER: Right. I suppose that's  
13 right.

14 PROFESSOR GOODE: Well --

15 PROFESSOR DORSANEO: It's not helpful.

16 PROFESSOR GOODE: It's the language of the  
17 current rule.

18 PROFESSOR DORSANEO: Not exactly. It's in  
19 there, it says, "Extrinsic evidence of the same shall be  
20 admitted," but if it's a substantive change, at least my  
21 confusion would be dispelled if the word "extrinsic" was  
22 removed from (4) or whatever number it would be; and, you  
23 know, I like the second version anyway, too; but it has  
24 the same problem.

25 PROFESSOR GOODE: The reason "extrinsic" is

1 there is because there are two ways of evidencing a  
2 witness' prior inconsistent statement. One way is you ask  
3 the witness, and the witness says, "Yes, that's my prior  
4 inconsistent statement." You get to extrinsic evidence if  
5 the witness doesn't admit that it's his prior inconsistent  
6 statement. Then you need to resort to other evidence.

7 PROFESSOR DORSANEO: That's what I'm  
8 wondering --

9 PROFESSOR GOODE: Other witnesses or  
10 documentary evidence to prove that the prior inconsistent  
11 statement was made. That's extrinsic evidence.

12 PROFESSOR DORSANEO: Is the extrinsic  
13 evidence in (a)(4) on version one the second kind of  
14 extrinsic evidence for the second kind of evidence that  
15 you're talking about, or is it both the prior inconsistent  
16 statement and the other evidence when the witness denied  
17 making a statement?

18 PROFESSOR GOODE: Extrinsic evidence is  
19 using other witnesses or documentary evidence to prove  
20 that the witness made the prior inconsistent statement.  
21 That's what (a)(4) is referring to, and you can't do that  
22 unless you first ask the witness about it and the witness  
23 fails to unequivocally make the statement, the idea being  
24 if the witness admits "I made the prior inconsistent  
25 statement," which is evidence of the prior inconsistent

1 statement, there is no need to resort to other witnesses  
2 or documentary proof of that. So we limit other witnesses  
3 or documentary proof of a witness' prior inconsistent  
4 statement until after the witness has been asked about it  
5 and failed to admit it.

6 PROFESSOR DORSANEO: Okay.

7 PROFESSOR GOODE: Does that help?

8 PROFESSOR DORSANEO: Yes, helps a lot.

9 CHAIRMAN BABCOCK: So you've got a witness  
10 there, and you say, "Isn't it a fact, sir, that you just  
11 testified that you first learned about this back in 1988?"  
12 He says, "Yeah, that's right."

13 "Well, isn't it true that you found out  
14 about it in 1980?"

15 "No, that's not right."

16 "Well, take a look at your deposition here  
17 on page seven, line 14. Don't you say right here that you  
18 found out about it in 1980, not 1988?" He goes, "Well,  
19 that's what it says." Then what do you do? Then you say,  
20 "Which is it? Is it '88 or is it '80," and he goes, "'88,  
21 like I said in my trial testimony." So then do you play  
22 the video of his deposition? Is that extrinsic evidence?

23 PROFESSOR GOODE: If he admits making the  
24 statement, "Yes, I said 1980, but it's 1988," then he's  
25 admitted making the prior inconsistent statement, and

1 there's no need to resort to the extrinsic evidence to  
2 prove he made the prior inconsistent statement, even  
3 though he's now taking the position that the prior  
4 inconsistent statement is inaccurate.

5 MR. ALEXANDER: I think that's right,  
6 although, I've said that rule is honored as often in the  
7 breach as in the observance, but I think that's actually  
8 correct.

9 CHAIRMAN BABCOCK: Buddy.

10 MR. LOW: But you're still not shut off. I  
11 mean, when he says, "Yes, that's what I said" then it  
12 doesn't prevent you from saying, "Well, man, you were  
13 under oath and swear to tell the truth just like you were  
14 here, and you swore, and one of those is a lie, which one  
15 is it?"

16 MR. ALEXANDER: Right.

17 MR. LOW: I mean, you're not just bound by  
18 accepting that and just letting it -- say, "Okay, since,  
19 let's go on."

20 MR. ALEXANDER: Right. Right.

21 CHAIRMAN BABCOCK: Yeah, Richard.

22 MR. ORSINGER: All right. I would agree  
23 with Bill that I don't think the word "extrinsic" really  
24 adds anything here; and the confusion that it's created in  
25 my mind is that I usually hear the term "extrinsic" come

1 up in connection with testimony about a contract; and we  
2 know that under the parol evidence rule, for example,  
3 extrinsic evidence is excluded; and you're really limited  
4 to the contract itself. If you have a written prior  
5 inconsistent statement and you mark it and offer it into  
6 evidence, to me that is the prior inconsistent statement.  
7 It's not extrinsic.

8           What would be extrinsic is someone coming in  
9 and saying, "I saw him say," or "I heard him say this" or  
10 "I saw him sign a piece of paper saying this"; and to me  
11 I'm probably confused about the meaning of "extrinsic";  
12 but in the contract realm, "extrinsic" means beyond the  
13 document itself here; and here it's beyond the admission  
14 of the witness; and so does the word "extrinsic" help  
15 here? Could we clarify by just dropping it and saying  
16 "evidence of the prior inconsistent is admissible"?

17           CHAIRMAN BABCOCK: Hey, he's the professor.  
18 He's not the student.

19           PROFESSOR GOODE: I'm happy to answer it.

20           MR. ORSINGER: That's right, only professors  
21 get to ask questions.

22           CHAIRMAN BABCOCK: Yeah. What are you  
23 putting him on the spot like that for?

24           MR. ORSINGER: I forgot.

25           MR. SCHENKKAN: Professors and judges.



1 CHAIRMAN BABCOCK: He can answer that.

2 PROFESSOR GOODE: Again, if you don't  
3 qualify then you can't ask the witness a question, because  
4 asking the witness a question is asking for evidence of  
5 the prior inconsistent statement.

6 HONORABLE STEPHEN YELENOSKY: All  
7 "extrinsic" means is something other than the admission  
8 itself. So you could say "other evidence" or you could  
9 say -- you could reword this, but that's the sense of it,  
10 and you can't admit the prior inconsistent statement  
11 itself if they've admitted it orally.

12 PROFESSOR GOODE: This is one of the  
13 problems, by the way, of writing the rules more clearly,  
14 is that people get to look at the words because the words  
15 "extrinsic evidence" have been there for the last 30 years  
16 and apparently haven't caused a lot of problems.

17 MR. ORSINGER: The rule's been there, and  
18 we've been ignoring it anyway.

19 PROFESSOR GOODE: Yes, it has.

20 CHAIRMAN BABCOCK: Judge Evans.

21 HONORABLE DAVID EVANS: It is a nonaspect  
22 about the rule when it comes down to oral statements that  
23 aren't the subject of a deposition or a written statement.  
24 It allows the interrogator to say to witness A on the  
25 stand about a conversation with witness B, taking it out

1 of the party operation, "Witness A, didn't you tell  
2 witness B that you saw the plaintiff run a -- run the red  
3 light right after the accident?"

4 "Well, no I didn't." And then this other  
5 witness never shows up, never been deposed. In fact, you  
6 can't find him. The foundation on this as to oral  
7 statements is extremely weak when you think about the fact  
8 that there's no basis -- you're not putting the burden  
9 upon anybody to show that they actually have that proof.  
10 Now, that's a rare problem, but it does happen; and it  
11 allows the interrogator to feed in a, quote, version of an  
12 oral statement that may or may not be found by a jury.  
13 Then you get down to final argument and you have the  
14 instruction and the rule that you cannot argue the failure  
15 to bring somebody, the failure to bring somebody as a  
16 witness, and so I know that this is a substantive change.  
17 R. H. confirmed it for me, and Tom did, too; but in any  
18 event, this is a problem with this rule; and it's why a  
19 lot of trial judges always want to see some proof of what  
20 the inconsistent statement when the witness is floundering  
21 there on the stand and says, "No, no, that didn't happen"  
22 because they suspect that there may be something that's  
23 not a correct version of the statement. It's a  
24 paraphrasing of it, or it may not be the witness is  
25 available.

1 CHAIRMAN BABCOCK: Judge Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: Well, the way  
3 I see that taken care of is in the motion in limine  
4 typically and --

5 HONORABLE DAVID EVANS: True.

6 HONORABLE STEPHEN YELENOSKY: And I think it  
7 may even be in our standing motion in limine that you  
8 can't refer to the testimony of a witness, you know, who  
9 isn't there and isn't intended to be there. That's not a  
10 good faith basis for asking it, and I think there are  
11 other instances where this rule doesn't apply, and that  
12 limine issue would still come up, so I prefer to have it  
13 dealt with.

14 HONORABLE DAVID EVANS: It could be handled  
15 by limine, but sometimes -- we don't have as refined a  
16 limine up here in Cowtown as you do down here in the  
17 Capital. We just are slinging guns.

18 CHAIRMAN BABCOCK: Those comments lead us  
19 nicely into Rule 614, called "Excluding witnesses."  
20 Anybody got any comments about 614? Robert.

21 MR. LEVY: A couple of questions. One, I  
22 was trying to recall how it was that experts are exempt  
23 from the rule, but it's not in the rule. I don't know  
24 if -- I know that's a substantive issue, but it certainly  
25 seems to be our practice, and I'm not sure why the rule

1 wouldn't include it, but I did note a -- I think this is a  
2 recurring issue, but in sub clause (3), now (c), the word  
3 "claim" -- or "cause" is in the current version, and it's  
4 changed to "claim or defense," and the question is whether  
5 that would potentially narrow that exception somehow in  
6 terms of whether the person's presence might assist the  
7 overall lawsuit versus a specific claim that is  
8 annunciated in the lawsuit.

9 MR. ALEXANDER: We did not -- we did not see  
10 this as a substantive change or really altering what the  
11 current version does, and it also is the way that the  
12 restyled Federal rule handles it.

13 CHAIRMAN BABCOCK: Richard Orsinger.

14 MR. ORSINGER: I would respond to Robert's  
15 comment that I think subdivision (c) of 614 is the one you  
16 rely on to get your experts in, and most often there is no  
17 objection. Frequently both sides have experts that they  
18 want to exempt from the rule, but occasionally you have to  
19 make at least a nominal showing that you have to rely on  
20 your expert to help you do your examination, so I think  
21 that practice of letting experts in, while it's not an  
22 unqualified right, as a practical matter, (c) works and  
23 hadn't been changed, so I would expect the practice to  
24 continue fundamentally the way it is. Are you, Robert,  
25 suggesting that it should be not discretionary, that you

1 should always be allowed to have your experts in?

2 MR. LEVY: At least in my experience that's  
3 always been the practice, and I don't think anyone really  
4 questions it, so should the rule conform to that? If that  
5 might not be the universal experience, there might be  
6 cases where an expert you could argue shouldn't be there  
7 for everything. If you're talking about medical issues  
8 and you've got a causation expert, you could argue that  
9 perhaps they shouldn't be part -- you know, in the trial.

10 MR. ORSINGER: And you may have an expert  
11 that's also a fact witness.

12 MR. LEVY: Right.

13 MR. ORSINGER: And you may have a decent  
14 argument that they shouldn't hear about the fact part.

15 HONORABLE STEPHEN YELENOSKY: Right.

16 MR. ORSINGER: So I would think that this  
17 (c) perpetuates existing practice, which is acceptable.

18 CHAIRMAN BABCOCK: Professor Dorsaneo.

19 PROFESSOR DORSANEO: Yeah, I -- I've always  
20 thought that the word "essential" was an unfortunate word  
21 to add into Texas jurisprudence when transported from  
22 Federal jurisprudence, and I say this. I don't really  
23 have firsthand knowledge that this is so, but on the  
24 theory that in criminal cases investigators and other  
25 people are the ones who actually tell the criminal defense

1 lawyer -- or maybe not criminal defense lawyer but the  
2 prosecutor what you have to do. Now, that has pretty much  
3 zero to do with civil cases. We have -- you know, we have  
4 the Drylex opinion which says, you know, that, in effect,  
5 that you better get your expert excluded or exempted from  
6 the operation of the rule, otherwise -- you know,  
7 otherwise, good luck to you. So it's very different from  
8 an officer or employee of a party or a natural person or  
9 that person's spouse, where you just don't have any  
10 preliminary drill, so I'm back to where I started. I  
11 don't like the word "essential." "Essential" means like  
12 indisputably necessary, and that's just not true for many  
13 experts. They're just helpful.

14 MR. ORSINGER: Just for the record, what  
15 word would you use?

16 HONORABLE ANA ESTEVEZ: "Helpful."  
17 "Helpful."

18 MR. ORSINGER: "Important," "helpful."

19 MR. LEVY: I think "helpful" is not enough.

20 PROFESSOR DORSANEO: I'm just making  
21 comments. I'm not making suggestions.

22 CHAIRMAN BABCOCK: Oh, you've got questions,  
23 not solutions.

24 PROFESSOR DORSANEO: I know that "essential"  
25 isn't good.

1 CHAIRMAN BABCOCK: Robert.

2 MR. LEVY: Okay. Another question in  
3 this -- the scenario is that you have a witness that is in  
4 a deposition and hears the testimony. The Rule hasn't  
5 necessarily been invoked, but then later on -- or I guess  
6 you could even argue it has been invoked, and later on a  
7 argument is made that that witness should not have been  
8 there, and then the question is -- or the lawyer says,  
9 "Well, that's my expert" -- "That's my corporate rep."  
10 The way the current rule seems to be worded, that would be  
11 okay, but under the new rule that designation would have  
12 to be made in advance, or at least it seems to be, that --  
13 and that would be a potential basis to say that witness  
14 is -- can't testify for the party. That witness' presence  
15 violated the rule because the witness was in the  
16 deposition and had not been previously designated as the  
17 corporate rep. Does that make sense?

18 PROFESSOR GOODE: I think --

19 MR. LEVY: I'm seeing the language after  
20 being --

21 PROFESSOR GOODE: After being designated.

22 MR. LEVY: That's what I'm focusing on.

23 PROFESSOR GOODE: As opposed to "not a  
24 natural person designated."

25 MR. LEVY: Right.

1                   PROFESSOR GOODE: This is one where this  
2 language, again, reflects current Texas rule, previous  
3 Federal rule being identical, taking the Federal language,  
4 but I understand the point you're making, that there may  
5 be a time change.

6                   MR. LEVY: Right.

7                   CHAIRMAN BABCOCK: Okay. Professor  
8 Dorsaneo, then Justice Frost.

9                   PROFESSOR DORSANEO: "Reasonably needed."

10                  CHAIRMAN BABCOCK: "Reasonably needed." Or  
11 "reasonably needy." Justice Frost.

12                  HONORABLE STEPHEN YELENOSKY: Substantive  
13 change.

14                  HONORABLE KEM FROST: I had a comment that  
15 went to subsection (d) in 614. The structure that is used  
16 in (b) (2) that begins "in a criminal case," we might want  
17 to use that same structure in (d) because as it's  
18 currently worded it says "the victim in a criminal case,"  
19 which might suggest the only predicate being you need to  
20 be a victim in some criminal case. It's not unusual to  
21 have one perpetrator that has several victims in various  
22 proceedings, and I believe the intent of this is that the  
23 only person excluded would be the complainant in the case  
24 actually being tried.

25                  CHAIRMAN BABCOCK: Okay. Justice Brown.



1 HONORABLE HARVEY BROWN: Nothing.

2 CHAIRMAN BABCOCK: Okay. Anybody else? All  
3 right. 615, "Producing a witness' statement in criminal  
4 cases." Change from the Federal?

5 MR. ALEXANDER: Chip, (a) and (b) are the  
6 same, (e) is the same, (c) is I think very similar, as I  
7 recall, and (d) is different.

8 CHAIRMAN BABCOCK: Okay. Comments about  
9 this rule, 615? Richard.

10 MR. ORSINGER: It's been many decades since  
11 I tried a criminal case, but why do we have to wait until  
12 the prosecution rests for the defense attorney to see the  
13 witness' statements, or I mean, after they turn the  
14 witness over for cross. I misstated that, and I'm just  
15 wondering why because on the civil side we don't have  
16 trial by ambush, and the state is there, and the witness  
17 is on the witness stand. I guess that's a substantive  
18 change.

19 CHAIRMAN BABCOCK: Buddy.

20 MR. LOW: Richard, we've made attempts to  
21 change that, and the Court of Criminal Appeals doesn't  
22 want to touch it.

23 HONORABLE TOM GRAY: I think the Texas  
24 Legislature changed that with Brady and discovery this go  
25 around.

1 MR. ALEXANDER: Can I interject? I'm sorry  
2 to interrupt.

3 CHAIRMAN BABCOCK: No, no, no, go ahead.

4 MR. ALEXANDER: In conjunction with this  
5 rule, after this rule was drafted by us the Michael Morton  
6 Act was put into effect concerning this very issue, and  
7 it's, in my opinion, very likely that there's some  
8 inconsistencies between this rule and the brand new  
9 Michael Morton Act. Our suggestion is that we have Steve  
10 work with the Court of Criminal Appeals Advisory Rules  
11 Committee to come up with revisions to this that would be  
12 consistent with that new act, so I'm not sure that --

13 MR. LOW: We've had several requests to  
14 review this, review it, and I made the request to the  
15 Court, and they won't do anything, so I follow your  
16 suggestion. I think it's a good one.

17 CHAIRMAN BABCOCK: Judge Wallace.

18 HONORABLE R. H. WALLACE: That took care of  
19 my comment.

20 CHAIRMAN BABCOCK: Okay. Any other comments  
21 about this? All right. Let's go to the 700 rules. 701,  
22 "Opinion testimony by lay witnesses."

23 MR. ALEXANDER: And 701(a) is the same as  
24 the Federal counterpart except the Feds have a component  
25 of subpart (c).

1                   CHAIRMAN BABCOCK: Okay. Any comments about  
2 701? 702, "Testimony by expert witnesses."

3                   MR. LOW: Chip, let me give you some history  
4 on that.

5                   CHAIRMAN BABCOCK: Yeah, Buddy. 702?

6                   MR. LOW: Yes. The -- that has come up with  
7 when the Feds changed their rule. I can't remember when  
8 it was. We took a look at that, and we were told to  
9 follow that. We drew -- Harvey Brown was the draftsman,  
10 drew a rule that said the same thing the Fed did except  
11 clearer, it was styled properly and almost with what we're  
12 trying to do here in mind, but no substantive changes from  
13 702, the Fed. That has not been changed, so this  
14 committee, I believe y'all just followed the existing,  
15 even though it doesn't include -- the Fed includes current  
16 practice, but you had to follow the words so we have  
17 reviewed -- we have this. I gave it to you, Angie, and  
18 the Court will have this 702 that has been approved by  
19 this committee.

20                  CHAIRMAN BABCOCK: Okay. Any other comments  
21 about 702? 703.

22                  MR. ORSINGER: Oh.

23                  CHAIRMAN BABCOCK: Richard.

24                  MR. ORSINGER: I would just make the comment  
25 that the predicate to this long sentence is that what

1 makes a expert -- what makes a witness an expert could be  
2 knowledge, skill, experience, training, or education, but  
3 then in the "if" clause halfway through it we say "if the  
4 scientific, technical, or other specialized knowledge,"  
5 which is not in the first part as to what makes you an  
6 expert, which is -- well, knowledge I guess would be, but  
7 skill, experience, training, or education makes you an  
8 expert, but then it says, "The expert's scientific,  
9 technical, or other specialized knowledge." Isn't there a  
10 lack of parallelism there that's confusing?

11 MR. ALEXANDER: I don't think so. I think  
12 at least when it's trying -- first of all, it mirrors in  
13 that regard what the current Texas rule does. Second of  
14 all, the question is the first component of this is the  
15 witness has to be qualified in one of these various ways  
16 to become an expert; and once they are so qualified, if  
17 they've got knowledge in one of these areas, scientific,  
18 technical, or other specialized knowledge; and if that  
19 will help the trier of fact then it's admissible  
20 generally. You see what I'm saying? That's why they  
21 don't parallel.

22 CHAIRMAN BABCOCK: Justice Brown.

23 HONORABLE HARVEY BROWN: I know that they  
24 did not want to get into looking too much at the Federal  
25 rule because it might be viewed as substantive; but I

1 would argue that at least most of this rule is stylistic  
2 in the sense that Daubert was really interpreting the word  
3 "knowledge" and the phrase "assist"; and so there is  
4 reliability and components are a part of that; but more  
5 importantly, if we're going to limit ourselves to simply  
6 stylistic completely, I think that 705(c), which deals  
7 with reliability in the sense of the underlying facts or  
8 data, I think that doesn't fit in 705; and some Federal  
9 commentators in 703 had a similar issue in their wording,  
10 so sometimes it's a little confusing; and this should  
11 probably be part of 702 because 702 is laying the  
12 admissibility. Whereas 705, just the title is "Disclosing  
13 the underlying facts or data." (c) really has nothing to  
14 do with disclosure. It has to do with admissibility, and  
15 702 is the admissibility rule. So if we do nothing else I  
16 think it would be helpful to move (c) into 702 where it  
17 logically belongs in my view.

18 CHAIRMAN BABCOCK: Okay. Sticking with 702,  
19 anymore comments about that? 703, "Basis of an expert's  
20 opinion testifying."

21 MS. GREER: I just have a question, and  
22 actually I think your comment about moving it to 702, it  
23 might fit even better in 703 because that's where you're  
24 talking about the bases.

25 HONORABLE HARVEY BROWN: Yeah, it could.

1 MS. GREER: And I understand we did not  
2 adopt the part of the Federal rule that talks about  
3 basically the probative effect and prejudicial effect. Is  
4 that because you were thinking that would be treated by  
5 403, or is there another reason for that?

6 PROFESSOR GOODE: Let me just respond to  
7 both, I think.

8 MS. GREER: Okay.

9 PROFESSOR GOODE: My understanding is Rule  
10 705(c) is probably unnecessary, doesn't even have to be  
11 placed any place, could be eliminated; but, again, we did  
12 not follow the restyled Federal Rule 702 with the (b),  
13 (c), and (d) because that's not in our current rule and we  
14 thought it could be viewed as a substantive change.  
15 Personally, I think (b), (c), and (d) are fairly  
16 innocuous. I don't think they're terribly helpful. I  
17 don't think they're misleading, and if we put it in there  
18 I don't think it would really change Texas practice.

19 Our Rule 705 is the way it is because we  
20 were sort of ahead of the game. We covered Rule 705(d)  
21 about the disclosure of inadmissible things. We had a  
22 provision there long before the Federal rules had a  
23 provision, and they put it in Rule 703. The problem is  
24 they didn't follow us, which is what they should have  
25 done, but they didn't.

1                   In any event, if we wanted to restructure  
2 our expert testimony rules in accordance with the Federal  
3 rules, it would certainly make sense to take what we have  
4 in Rule 705(b) and shift it into Rule 703 and eliminate  
5 Rule 705(c) because that doesn't add anything any longer.  
6 The voir dire examination usually we put in there because  
7 that was before there were discovery rules about expert  
8 witnesses, and it may be that that even is not terribly  
9 necessary any longer. So part of what we're doing is,  
10 again, we were just nonsubstantively codifying, but this  
11 may be another set of rules that that would stand some  
12 examination as to a rewriting of the rules and changing  
13 where certain things are.

14                   CHAIRMAN BABCOCK: Okay. Any more on 703?  
15 Justice Brown, then Gene.

16                   HONORABLE HARVEY BROWN: I was going to  
17 comment that I think 705(c) was relied on in the Pollock  
18 case. I may be wrong, but I'm pretty sure 705(b) was  
19 relied on in Arkoma case, so but I agree with your  
20 sentiments that kind of a reorganizing for how things are  
21 now actually being played out would be very helpful for  
22 the bar, because people don't look at 705(c) and don't  
23 realize how it interplays with 703 and 702 a lot of times.

24                   CHAIRMAN BABCOCK: Gene.

25                   MR. STORIE: Yeah, I just wondered why the

1 phrase "at or before the hearing" was taken out. I don't  
2 see it in the revision.

3 MR. ALEXANDER: Which rule are we on now?

4 CHAIRMAN BABCOCK: 703.

5 MR. STORIE: On 703, "were made to the  
6 expert at or before the hearing," which I don't see the  
7 "at or before the hearing" in the revision.

8 PROFESSOR GOODE: That's because, again, we  
9 were tracking the language of the Federal rule, and the  
10 idea was if it's not at or before the hearing when would  
11 it be?

12 MR. ALEXANDER: It seemed like surplusage.

13 MR. STORIE: Okay. I mean, because I know  
14 we just talked a minute ago about having the experts there  
15 despite the exclusion rule, so I don't know if this helps  
16 to bolster that.

17 CHAIRMAN BABCOCK: Okay. Anything more on  
18 703?

19 MS. GREER: I did ask the question about the  
20 sentence that's left out of the -- from the Federal rule  
21 about balancing the probative value and the prejudicial  
22 effect. It's in 703.

23 PROFESSOR GOODE: That's in 705(d).

24 MS. GREER: Oh, you put it in 705. Okay.

25 MR. ORSINGER: It's already there.



1                   PROFESSOR GOODE: That's the thing where we  
2 had that rule before the Feds had it.

3                   MS. GREER: Okay. I misunderstood. Thank  
4 you.

5                   CHAIRMAN BABCOCK: 704. Richard.

6                   MR. MUNZINGER: Why did you drop "otherwise  
7 admissible"?

8                   PROFESSOR GOODE: I'm sorry.

9                   MR. MUNZINGER: The new rule doesn't have  
10 the qualification that the testimony must be otherwise  
11 admissible, and I'm curious why you dropped that. I like  
12 it. It's a cautionary reminder to trial courts that this  
13 isn't an independent ground of admissibility, that you  
14 still have to have admissible evidence, and you don't have  
15 that in here.

16                  MR. ALEXANDER: It -- go ahead. It was our  
17 belief that the general Rules of Evidence otherwise  
18 dictate what is or isn't admissible and that this  
19 language -- this revised language of 704 doesn't affect  
20 that, and to us it was clear enough that making this one  
21 statement as to the ultimate issue was enough to satisfy  
22 the purpose of this rule without trying to tell the trial  
23 court what it already knows from other rules, which is  
24 evidence has got to be admissible generally anyway.

25                  PROFESSOR GOODE: This is also a situation

1 where we, again, tracked -- we had identical language in  
2 our rule and the pre-restyled Federal rule. We took the  
3 restyled Federal language and just adopted it for our 704.  
4 So it's the same language, and the reason -- the  
5 underlying reason for why they did it when they restyled  
6 the Federal rules is exactly what Fields explained.

7 CHAIRMAN BABCOCK: Professor Dorsaneo.

8 PROFESSOR DORSANEO: Does anybody ever think  
9 it would be a good idea to define the term "ultimate  
10 issue" in the context of this rule? You talk --

11 PROFESSOR GOODE: Yes.

12 PROFESSOR DORSANEO: Well, why -- wouldn't  
13 it be a good idea?

14 PROFESSOR GOODE: I thought you asked  
15 whether somebody had ever suggested that, and the answer  
16 is "yes."

17 CHAIRMAN BABCOCK: That was rhetorical.

18 PROFESSOR DORSANEO: Well, would it be a  
19 good idea to define it? It means a lot of things in the  
20 jury charge context. I could talk for about 25 minutes  
21 about why most of those things aren't worth knowing, but  
22 does everybody have no trouble with ultimate issue? It's  
23 just like --

24 HONORABLE STEPHEN YELENOSKY: Take 25  
25 minutes.

1 MR. LEVY: It's essential.

2 MR. ALEXANDER: I know it when I see it.

3 MR. LEVY: It's essential.

4 CHAIRMAN BABCOCK: Orsinger has had trouble  
5 with it.

6 MR. ORSINGER: I remember when this all came  
7 up, because before the Rules of Evidence were adopted  
8 experts were not allowed to testify in terms of ultimate  
9 issues, and I think in the *Birchfield vs. Memorial*  
10 *Hospital* case, which is famous for a whole lot of reasons,  
11 the Supreme Court said it is okay for an expert witness to  
12 talk in terms of ultimate issues as long as using proper  
13 legal concepts and definitions, and I think that this rule  
14 picked up on that. So in the context of the history of  
15 what happened, I think that I always understood ultimate  
16 issue meant jury question, jury instruction, but that may  
17 be lost. That may be only people like Bill and me that  
18 can remember that long ago.

19 PROFESSOR GOODE: The reason for this rule  
20 is, in fact, the problem you're alluding to, that is, it  
21 was never clear when people objected and said a witness  
22 can't testify because it goes to an ultimate issue, what  
23 that meant, and so all this rule does is says that's not a  
24 good objection any longer.

25 MR. ORSINGER: Kind of like you can't have

1 a --

2 PROFESSOR GOODE: It doesn't matter if you  
3 define it because it's just not a good objection.

4 CHAIRMAN BABCOCK: Okay. 705, "Disclosing  
5 the underlying facts and data and examining an expert  
6 about them." Yeah, Justice Brown.

7 HONORABLE HARVEY BROWN: I have a issue with  
8 changing a phrase from 705(d). In the new version we say,  
9 "If the probative value is outweighed by the prejudicial  
10 effect." In the old version we say, "If the value has  
11 explanation or support for the expert's opinion is  
12 outweighed by that value." The only value for the witness  
13 who is otherwise putting in this inadmissible evidence is  
14 the value of support; i.e., this is what my opinion is  
15 based on. I got hearsay that I heard from some witness  
16 that's not otherwise before us; and so we're admitting  
17 that just to support the expert's opinion; but when we  
18 take that concept and we narrow it to the phrase  
19 "probative value," it reads much better. It's a lot  
20 shorter, but I think when you're in the middle of a trial  
21 trying to determine the probative value of that,  
22 inadmissible evidence can get lost. So I like the phrase  
23 "as explanation or support for the expert's opinion"  
24 because that is by definition here the probative value of  
25 that otherwise inadmissible evidence, I think.

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE HARVEY BROWN: So I think when  
3 you're trying cases quickly, the judge is trying to figure  
4 out what the probative value is, this laser-like focuses  
5 the judge on what that is under the old rule.

6 MR. ALEXANDER: We actually discussed this  
7 exact issue in our committee, and so I understand the  
8 point acutely, and I think -- I don't -- I don't -- it's a  
9 valid point. We ended up concluding that read in the  
10 context this says what it needs to say, but I also  
11 understand that you certainly have to think a little  
12 harder about it, but our ultimate conclusion was it is  
13 consistent with the current rule, and it's a little  
14 cleaner in language, but I fully understand the point.

15 CHAIRMAN BABCOCK: Okay. Any other  
16 comments? Okay. 706, "Audit in civil cases."

17 MR. ORSINGER: Excuse me, Chip, can we go  
18 back to 705?

19 CHAIRMAN BABCOCK: Sure.

20 MR. ORSINGER: Okay. To me prejudicial  
21 effect is not really what's important about the balancing  
22 test under 705(d). What's really important is the danger  
23 that the jury will use inadmissible evidence as if it's  
24 substantive. In other words, when an expert is allowed to  
25 put hearsay evidence in in front of the jury to support

1 their opinion it's only for the limited purposes for  
2 explaining or supporting the expert's opinion, but the  
3 truth is a lot of that expert testimony may be substantive  
4 if the jury were to consider it for more than just the  
5 credibility of the expert, so to me the really important  
6 part of the balancing test is not prejudicial effect.  
7 It's the danger that it will be used for a purpose other  
8 than explanation or support, and is that concept carried  
9 forward or lost, or is it subsumed in the language here?  
10 Because I see prejudicial effect has been used to supplant  
11 the danger of misuse, and to me they're different things.

12           PROFESSOR GOODE: To me using evidence for  
13 impermissible purpose is a form of prejudicial effect.  
14 That is, if the jury uses -- or if a hearsay statement,  
15 for example, is offered for a nonhearsay purpose, if the  
16 jury were to use it for the hearsay purpose, that would be  
17 a form of prejudicial effect; and a judge in deciding  
18 whether to admit the hearsay statement for its -- give a  
19 limiting instruction for its nonhearsay purpose would have  
20 to consider the danger the jury is going to use it as  
21 hearsay.

22           MR. ORSINGER: Okay, the thing that concerns  
23 me about --

24           PROFESSOR GOODE: So that is subsumed in  
25 prejudicial effect.

1                   MR. ORSINGER: Okay. I'm nervous about that  
2 because we deal with prejudicial effect in Rule 403 all  
3 the time, and that usually in my experience has to do with  
4 evidence that's just very emotional. It could be a bloody  
5 photograph, it could be a bunch of bloody clothes, or  
6 there's a lot of different things that could be very  
7 prejudicial that don't have anything to do with misuse,  
8 and so to me the biggest danger is not prejudice in the  
9 sense that we normally think of it, as, my God, I'm having  
10 a reaction to this that's going to overload my intellect  
11 or something. I'm talking about a subtle distinction when  
12 a jury is told you can listen to this expert give you all  
13 this inadmissible evidence, but you can't consider it for  
14 any purpose other than the credibility of the expert. To  
15 me that's not prejudice. To me that's the jury actually  
16 misusing the evidence because they don't get the  
17 distinction between something that's offered for  
18 impeachment purposes or bolstering, but not as substantive  
19 evidence. I think we lose a lot by dropping that sentence  
20 out. I don't think it is necessarily folded into the  
21 concept of prejudicial, and it makes me nervous because to  
22 me the biggest risk of letting an expert put all of this  
23 hearsay in is that the jury will not know that they can't  
24 consider it as substantive evidence.

25                   MR. ALEXANDER: We tried to handle this --

1 MR. LOW: They do know.

2 CHAIRMAN BABCOCK: Buddy.

3 MR. LOW: Because what you do, you say,  
4 "Your Honor, I want you to instruct the jury that they  
5 can't consider this for the truth of that matter, but only  
6 that he relied upon it, only he relied upon it." It  
7 doesn't prove -- and instruction. As far as 403, it  
8 doesn't come in at all because of the prejudicial effect,  
9 doesn't have to weight that. It just doesn't come in, but  
10 here you can cure it by instructions. You have a pretty  
11 good instruction that, you know, it might not cure it, but  
12 it's sure there.

13 MR. ALEXANDER: That's exactly what I was  
14 going to say. We tried to handle this through both  
15 requiring in the rule that the court make the requisite  
16 finding that they're allowed to do this in the first  
17 place, and then if the finding is made, if the other party  
18 asks, the court's got to limit the evidence to its proper  
19 scope before the jury.

20 MR. LOW: Right.

21 CHAIRMAN BABCOCK: Justice Brown.

22 HONORABLE HARVEY BROWN: Well, one problem  
23 is that by using the same words we have in 403 it's even  
24 easier now to confuse this with 403 than it was before,  
25 and many people confused this with 403 even before. So



1 now we're using the exact same phrase "probative value"  
2 and "prejudicial" from 403. So I think that's going to be  
3 part of the confusion here, is judges and practitioners  
4 are going to treat this just like 403 because we use  
5 similar phrases when we're trying not to do that. We're  
6 trying to say it's for a specific purpose, i.e., it's of  
7 support for the expert's opinion.

8 CHAIRMAN BABCOCK: Professor Dorsaneo.

9 PROFESSOR DORSANEO: I'll wait until he  
10 finishes 700. I had a small suggestion on the ultimate  
11 issues 704 thing.

12 CHAIRMAN BABCOCK: Okay.

13 PROFESSOR DORSANEO: I thought it would wait  
14 until the end of the 700s.

15 CHAIRMAN BABCOCK: Okay. We're almost to  
16 the end. 706. Oh, Judge Yelenosky, sorry.

17 HONORABLE STEPHEN YELENOSKY: I agree with  
18 the professor. I agree with the professor, I agree with  
19 Justice Brown. I can see some confusion there, but  
20 prejudice is using some information for the wrong purpose,  
21 even if it's emotional. You're using your emotional  
22 reaction for the wrong purpose, and so they really -- I  
23 mean, academically they are the same. You could use a  
24 limiting instruction with the emotional thing, "Don't let  
25 this affect your emotion," probably not very effective,

1 but neither are most instructions. So I think  
2 academically they're the same thing, and I guess we either  
3 recognize that and use the same terms or if, in fact, in  
4 practice it means something different, I'm not sure that  
5 it shouldn't.

6 CHAIRMAN BABCOCK: Justice Gaultney.

7 HONORABLE DAVID GAULTNEY: Maybe I'm missing  
8 the point, but doesn't the current rule use the word  
9 "unfairly prejudicial"? I mean, usually probative  
10 evidence is going to be prejudicial to the other side.

11 CHAIRMAN BABCOCK: Yeah.

12 HONORABLE DAVID GAULTNEY: I mean, so I  
13 think the concept of unfairly prejudicial would inject  
14 that. That's the current language, I think, and I think  
15 we should use the word "unfairly prejudicial."

16 CHAIRMAN BABCOCK: Okay. You want to move  
17 on to "Audit in civil cases," 706? Anything different  
18 about that?

19 MR. ALEXANDER: There is no Federal  
20 counterpart for that.

21 CHAIRMAN BABCOCK: So it's totally  
22 different.

23 MR. ALEXANDER: It is.

24 CHAIRMAN BABCOCK: Yeah, Professor.

25 PROFESSOR DORSANEO: Is this just civil

1 procedure Rule 172 put in the evidence rules?

2 MR. ALEXANDER: More or less. I don't have  
3 172 in front of me, but obviously the reference is just  
4 like it.

5 PROFESSOR DORSANEO: Well, I think it -- two  
6 things, if it isn't and something was left out that's  
7 important, it probably should be put in here. If it is,  
8 then the whole rule should go into the civil procedure  
9 rules and not be repeated here.

10 CHAIRMAN BABCOCK: Okay. Anybody else got  
11 any comments on "Audit in civil cases"? Okay. Then,  
12 Bill, you wanted to say something at the end of the 700  
13 rules.

14 PROFESSOR DORSANEO: My consternation about  
15 there not being a clearer statement of what an ultimate  
16 issue is in restyled 704 is easily remedied just by adding  
17 the language that's at the end of the current rule,  
18 because I think an ultimate issue is one that's decided by  
19 the trier of fact, and the current rule says, "An ultimate  
20 issue to be decided by the trier of fact." I think that's  
21 a very solid definition that's completely accurate.

22 CHAIRMAN BABCOCK: Okay. Yeah, Judge  
23 Yelenosky.

24 HONORABLE STEPHEN YELENOSKY: But as the  
25 professor said, we don't need to define it. All it means

1 is the lawyer stands up and says, "Judge, I object, that's  
2 an ultimate issue."

3 "Overruled." I mean, we don't need to know  
4 what it is. That's all it does, is eliminates the  
5 objection.

6 PROFESSOR DORSANEO: With all due respect, I  
7 think that that's not helpful.

8 CHAIRMAN BABCOCK: What, getting your  
9 objection overruled?

10 PROFESSOR DORSANEO: Well, that, too, but  
11 saying that this is all about something that you say in  
12 court and that you can't say anymore, people used to say  
13 in court that they can't say anymore, and regardless of  
14 what it means, that's good enough. It's not good enough  
15 for me.

16 HONORABLE STEPHEN YELENOSKY: Well, how  
17 would it make a difference, Professor Dorsaneo?

18 CHAIRMAN BABCOCK: Well, he would say, "Your  
19 Honor, the ultimate issue as meant by this rule is not  
20 what I'm talking about. I'm talking about something  
21 else." That's what you would argue, right?

22 PROFESSOR DORSANEO: Well, maybe. I think  
23 it's important to know that the definition of ultimate  
24 issue is something to be decided by the trier of fact. It  
25 is a mixed question of law and fact under our system now

1 and that that's something the expert can give an opinion  
2 about.

3 MR. ORSINGER: It will be very clear if we  
4 just put *Birchfield vs. Memorial Hospital* in the comment  
5 to the rule, and then they'll go read it, and it will make  
6 perfect sense.

7 PROFESSOR DORSANEO: We could say that was  
8 Frank Branson's blind babies case.

9 MR. ORSINGER: But that's not the reason.  
10 It's a Supreme Court opinion is the reason it's important.

11 CHAIRMAN BABCOCK: There we have it. All  
12 right. "Hearsay," 801.

13 MR. ORSINGER: This ought to be easy,  
14 hearsay.

15 CHAIRMAN BABCOCK: This should be easy.  
16 Don't they have those buttons you can get, "That was  
17 easy"? What do you have to say about this, Fields?

18 MR. ALEXANDER: I hope it's pretty  
19 straightforward. We certainly didn't intend to change the  
20 rules of hearsay. Anybody have any questions?

21 CHAIRMAN BABCOCK: Any comments about 801?  
22 Bobby.

23 MR. MEADOWS: Not here.

24 CHAIRMAN BABCOCK: You stretch like that  
25 again and I'll call on you again. Okay. Everybody happy

1 with this 801? Going once. Okay. 802. Any comments on  
2 802? 803, "Exceptions to the rule against hearsay  
3 regardless of whether the declarant is available as a  
4 witness." What handiwork did you guys do on this?

5 PROFESSOR GOODE: 803(1) through (4),  
6 803(7), (9) through (21), and 803(23) are all exactly the  
7 same as the Federal rule. That is, the current Texas and  
8 the pre-restyled Federal rule are the same, so the draft  
9 here is the same as the restyled Federal rule, so 801(1)  
10 through (4), (7), (9) through (21), and (23).

11 HONORABLE SARAH DUNCAN: I'll ask -- I don't  
12 care.

13 PROFESSOR GOODE: Do you have a question  
14 about those, or we can just start with the ones that are  
15 different, however you want to do it.

16 CHAIRMAN BABCOCK: Ones that are different,  
17 (5) and (6).

18 PROFESSOR GOODE: (5) is the first one  
19 that's different, and it's -- the difference is quite  
20 slight.

21 CHAIRMAN BABCOCK: We'll be the judge of  
22 that.

23 PROFESSOR GOODE: I meant the difference  
24 between the Federal and the Texas rule were quite slight,  
25 and the drafting is fairly straightforward.

1                   CHAIRMAN BABCOCK: Any comments on (5)? How  
2 about (6)?

3                   PROFESSOR GOODE: (6) was actually one place  
4 where we deviated from what the Feds did because of some  
5 things the committee members raised, even though the  
6 appropriate language in the current Texas rule was the  
7 same as the language in the Federal rule, and that has to  
8 do with 803(6)(E).

9                   PROFESSOR DORSANEO: (6) what?

10                  MR. LOW: (E).

11                  PROFESSOR GOODE: That is, the first four  
12 requirements that are necessary to establish a business  
13 record, (6)(A), (B), (C), and (D) are all the same, with  
14 only the cross-reference of Rule 902(10), being the  
15 difference in the cross-reference in the Federal rule.  
16 Notice the -- if you have the comparison between the  
17 Federal and the Texas rule, the restyled Federal rule in  
18 (E) sets as the fifth element for introducing a business  
19 record under this exception, "Neither the source of  
20 information nor the method or circumstances of preparation  
21 indicate a lack of trustworthiness." The committee viewed  
22 that as placing the burden of showing that the record was  
23 trustworthy on the proponent; whereas, most Federal  
24 courts, but not all Federal courts, and Texas courts have  
25 said once the proponent of the business record establishes

1 the first four requirements the burden falls to the  
2 opponent to show the lack of trustworthiness.

3           We thought this was curious. I actually got  
4 in communication with a reporter for the Federal rules  
5 restyling project, and his position was when we were  
6 restyling we didn't want to change anything, and by  
7 changing we meant if there was any court opinion out  
8 there, may have been a circuit court opinion out there,  
9 that -- where there was a split we weren't going to touch  
10 it. Their view was the way they drafted it did not shift  
11 the burden. Our committee read the rule quite  
12 differently. People on our committee looked at this and  
13 said, "This looks like you're placing the burden on the  
14 proponent to show that the record is trustworthy," and so  
15 that's where we deviated from the Federal rule. You'll  
16 notice instead of saying "neither the source nor  
17 information nor method of circumstances indicate a lack  
18 of" -- we say, "The opponent fails to show," so we clearly  
19 placed the burden on the opponent of the business record  
20 to show the lack of trustworthiness.

21           MR. ALEXANDER: Feds blew it.

22           PROFESSOR DORSANEO: I'd say the Federal  
23 drafter didn't carry his burden.

24           MR. ALEXANDER: For all those of you who say  
25 we slavishly follow the Feds, we present (E). There you



1 go.

2 CHAIRMAN BABCOCK: Yeah. Munzinger, wake up  
3 for that.

4 MR. MUNZINGER: I heard.

5 CHAIRMAN BABCOCK: You're keeping your head  
6 down, though, aren't you?

7 MR. MUNZINGER: No, I'm reading.

8 CHAIRMAN BABCOCK: Yeah, Richard.

9 MR. ORSINGER: I'm just quickly looking at  
10 the Federal language, and I don't have the grounds really  
11 to disagree with y'all's assessment, but it doesn't seem  
12 to me that that places the burden. To me it's neutral;  
13 but this proposed provision that y'all are tendering here  
14 to the committee clearly places the burden on the opposing  
15 party; and what makes me nervous about that is frequently  
16 the opposing party will not have any more information  
17 other than just a predicate that was laid; but sometimes  
18 that predicate will show, it's just evident, that the  
19 document may have been prepared for litigation purposes  
20 rather than in the ordinary course of business; or it may  
21 be clear that the document is not an original and no one  
22 can authenticate it against the true original or whatever.  
23 So in my experience when you raise this  
24 circumstances thing you're usually using the information  
25 that was put on as the predicate for admission. This

1 makes it look like to me that the opposing party has to  
2 come forward with something more than just the  
3 circumstances that were proven as part of the prove up to  
4 show that it should be excluded because of suspicion. I  
5 would prefer that it was neutrally stated so that any --  
6 any opposing party could argue that the surrounding  
7 circumstances question its reliability, bad word I guess,  
8 but whether it should be an exception to the hearsay rule.  
9 I would prefer that be neutrally stated and -- go ahead.

10 MR. ALEXANDER: I didn't mean to interrupt  
11 you.

12 MR. ORSINGER: No.

13 MR. ALEXANDER: The problem we ran into is  
14 it was -- basically we concluded it was impossible to read  
15 the Federal version of (6) without placing the burden on  
16 the proponent for (A), (B), (C), (D), and (E). There's  
17 nothing in the Federal version of (E) that says anything  
18 other than implying that if you want to get a document as  
19 a business record you've got to establish all of this, and  
20 it was our clear opinion -- and I think Texas case law  
21 supports this -- that it's not the proponent's burden to  
22 establish that the document doesn't lack trustworthiness  
23 for some reason. That's never been my experience, and I'm  
24 aware of no Texas case that says that, so we felt that to  
25 accurately comport with Texas law on this issue we had to

1 place the burden on the opponent. Now, as to your point,  
2 I think quite often the lawyer opposing the document can  
3 stand up and say, "Your Honor, it's clear from this  
4 document, X, Y, or Z" or "Your Honor, I want to take this  
5 witness on voir dire," and there are a lot of ways to  
6 handle it; but regardless, it's up to the opponent, at  
7 least my view of Texas law, to establish this element if  
8 you want to keep the document out after the proponent has  
9 put forth the basic business rule predicate.

10 MR. ORSINGER: Well, in my view the original  
11 language that is being changed now was neutral as to a  
12 burden. It was just whether the court was concerned about  
13 the lack of trustworthiness. Obviously the party keeping  
14 it out needs to make the objection that the predicate or  
15 the circumstances of the source indicate that it's really  
16 not -- that it's not trustworthy. So clearly the burden  
17 to object is on that person, but you-all are moving what I  
18 consider to be a -- a condition that is not the burden of  
19 anyone. The evidence can speak for itself, and you're now  
20 saying that it's the opposing party that has to prove it's  
21 not trustworthy; and to me it's changed from just a judge  
22 saying, "Hey, I don't like those circumstances, I don't  
23 like the way this came together, and you've objected to it  
24 that it's not trustworthy, and I agree." So I'm nervous  
25 because I feel like you've moved it from a neutral the

1 circumstances themselves suggest something to the other  
2 party has to suggest it and they really don't have any new  
3 evidence at all, so I feel like it's a substantive change.

4 CHAIRMAN BABCOCK: Richard.

5 MR. MUNZINGER: I agree with Richard. If  
6 you look at the old rule, it just says -- it talks about  
7 untrustworthiness of the circumstances, et cetera; and now  
8 the rule says the opponent fails to do something, which  
9 clearly to me at least implies that he has to bring  
10 forward evidence attacking the trustworthiness of the  
11 underlying data or the methods of collection, et cetera,  
12 et cetera, when the prior Texas rule didn't have any of  
13 that obligation on him; and the logic of the hearsay rule,  
14 hearsay at common law, as I understood it if I was awake  
15 in my evidence class, all hearsay was not admissible; and  
16 then we've crafted these exceptions because we've said,  
17 well, there are some exceptions to hearsay evidence where  
18 the data should be admissible because it's acceptable,  
19 it's trustworthy; but this rule says "removes any  
20 obligation of the trustworthiness unless the opposing  
21 party brings forward contrary evidence." I think it's a  
22 substantive change, and I'm like Richard, it bothers me a  
23 great deal, because I can argue all day long to a judge,  
24 "Well, Judge, these guys did so-and-so" or whatever it  
25 might be, say, "Well, you didn't come forward with any

1 evidence and the rule says the opponent fails to show,"  
2 not to argue, to convincingly argue, to persuade, to  
3 attack. I think it's a substantive change, and I join  
4 Richard.

5 CHAIRMAN BABCOCK: Judge Yelenosky, and then  
6 Justice Brown, then Pete.

7 HONORABLE STEPHEN YELENOSKY: Well,  
8 surprisingly, I agree with the Richards. You know, I  
9 mean, we don't put rules in to tell lawyers when they can  
10 argue something. That's always the case. So when you put  
11 a rule in that says "to show," I tend to read that as "to  
12 show through some evidence as well."

13 CHAIRMAN BABCOCK: Justice Brown.

14 HONORABLE HARVEY BROWN: Well, I read it the  
15 other way, because my understanding of the rule is that  
16 once you make a prima facie case of the first four  
17 elements, it's considered to be trustworthy because of the  
18 way the business is practiced, and that's the reason we  
19 fit this within the hearsay rule. It seems like to me in  
20 the old rule we had the "unless," and the "unless" was an  
21 exception, and in the exception the burden of proof is the  
22 party to come forward and show, "I fit within an  
23 exception, and therefore the general rule shouldn't  
24 apply," and so if you treat the "unless" as an exception,  
25 that shows where the burden of proof lies under the text

1   itself.

2                   CHAIRMAN BABCOCK:   Pete.

3                   MR. SCHENKKAN:   How are these matters  
4 usually fought out when someone wants to -- as Judge  
5 Yelenosky just said, wants to argue that the circumstances  
6 indicate a lack of trustworthiness?  How do they usually  
7 do it?  I'm more familiar with this with the next one, two  
8 down, the public records, and when you're dealing with  
9 that and somebody is offering against you a government  
10 agency's report after their legally authorized  
11 investigation and you don't know what it says about your  
12 client, what you usually have to work with is other parts  
13 of the same report that indicate that the person that  
14 prepared it wasn't qualified to make the kind of statement  
15 that's actually nullified what we've talked about, though  
16 he was perfectly well qualified to make some other  
17 statement contained in the same report.  What do you do  
18 about this in the business records case?  What is the  
19 difference here between arguing and offering separate  
20 evidence other than in the business records context of  
21 lack of trustworthiness?

22                   HONORABLE STEPHEN YELENOSKY:  Well, I mean,  
23 I suppose some of the evidence -- and if it's testimonial  
24 evidence you could get it out through cross-examination.  
25 That would still be evidentiary.

1 MR. SCHENKKAN: Yes.

2 HONORABLE STEPHEN YELENOSKY: And sometimes  
3 I guess -- I guess I suppose you would have to have a  
4 custodian there to get that, right, so I don't normally  
5 see that.

6 MR. SCHENKKAN: That's the leading question.

7 CHAIRMAN BABCOCK: Justice Brown, then  
8 Richard Orsinger.

9 HONORABLE HARVEY BROWN: Well, I think it's  
10 shown the same way that you do for public records. You  
11 don't have to bring another witness to do it. You can  
12 show the document itself on its face, show something about  
13 the lack of trustworthiness or just the circumstances in  
14 which it was created. It was created, you know, by a  
15 witness who wasn't there at the time or really doesn't  
16 know the practices, et cetera, so it's -- although it says  
17 "fails to show" it doesn't necessarily mean fails to show  
18 from new independent evidence. Sometimes a party makes  
19 its best case through the other side's witness or through  
20 the other side's evidence, and I think that's how it's  
21 usually shown under this rule.

22 CHAIRMAN BABCOCK: Richard Orsinger.

23 MR. ORSINGER: Pete, there's a lot of  
24 different ways it can come up, but the two that come to  
25 mind to me right now is when a document is created

1 purportedly in the ordinary course of business after the  
2 business has become aware of the possibility of a lawsuit  
3 then you lose this reliability of the routine business  
4 practice, and you start having a taint of the company or  
5 defendant trying to position themselves for the lawsuit.  
6 So that's not any additional evidence. You just show that  
7 from -- when they first had notice of the claim and then  
8 these memos start showing up that appear to create an  
9 impression. You're arguing from the evidence itself that  
10 was offered by the proponent, nothing that you did, so  
11 that's why I like the idea that the circumstances suggest  
12 a lack of trustworthiness.

13           Another problem, and I'll just use an  
14 example that I had within the last year, I subpoenaed a  
15 bank to bring all of the loan documents related to a loan  
16 transaction, and what was in those loan documents was  
17 incredibly important to the outcome of my case, and the  
18 banker brought with him a big stack of Bates stamped  
19 documents, and then he also had another little folder over  
20 here that had a little side agreement that reversed the  
21 meaning of the documents that were Bates stamped. Now,  
22 that was just a deposition. We settled that case, and we  
23 didn't have to try it, but if we had tried that case I  
24 would have argued that the circumstances suggested that  
25 that document was not reliable because it was not part of



1 the main office records. It was produced in a separate  
2 file, it wasn't Bates stamped, and I'm using the evidence  
3 they give me. It's just that the way it's stated now,  
4 it's if the circumstances suggest; whereas, under the new  
5 language it's if I can prove it, and I don't like that. I  
6 feel like it's making it harder for me to use the evidence  
7 they give me to try to show a lack of trustworthiness.

8 CHAIRMAN BABCOCK: Richard Munzinger.

9 MR. MUNZINGER: What if a judge takes  
10 seriously, as he will or she will, the obligation to  
11 review evidence to make sure that it is going to bring out  
12 the truth in the case? Now you've got a rule here that  
13 says the opponent has to attack the underlying validity,  
14 et cetera, of the sources. I think the judge -- in the  
15 old rule, the judge certainly -- if I were a judge and I  
16 read the old rule, I would read the words "unless the  
17 source of information or the method or circumstances of  
18 preparation indicate lack of trustworthiness" as being  
19 part of the offering party's burden. It's part of a  
20 condition to admissibility of the testimony. I don't view  
21 that as being something that in the old rule that's  
22 something that had to be attacked, but in the new rule  
23 it's clear that it has to be attacked and has to be  
24 attacked by the opponent.

25 PROFESSOR GOODE: Let me read you a couple

1 of quotes. This is from a Houston court of appeals  
2 opinion 2011. "When records meet the requisite for  
3 admissibility under Rule 803(6), the opponent of the  
4 evidence bears the burden of establishing  
5 untrustworthiness." Another one, "Once the necessary  
6 predicate was laid under 803(6), it became the opponent's  
7 burden to show there was some underlying reason why the  
8 records were inadmissible." Eastland, "Medical records  
9 otherwise satisfied rule I think were admissible because,"  
10 quote, "there was no evidence showing that the source of  
11 information or the method or circumstances was not  
12 trustworthy, but case law is the opponent of the record  
13 has the burden of showing."

14 MR. MUNZINGER: Were they three court of  
15 appeals opinions?

16 PROFESSOR GOODE: Those are all court of  
17 appeals.

18 MR. MUNZINGER: Were they refused? Was the  
19 petition and the writ refused? Did the Supreme Court  
20 adopt that? This is the Supreme Court that is now  
21 promulgating a rule.

22 PROFESSOR GOODE: Petition refused. That's  
23 the case law in Texas. All I'm saying is the law in  
24 Texas, as the courts have interpreted it, placed the  
25 burden on the opponent. That is also, by the way, the

1 overwhelming, but not universal, case law under the  
2 Federal.

3 CHAIRMAN BABCOCK: Go back to your corners,  
4 guys. Buddy.

5 MR. LOW: 902, isn't that basically the  
6 same? Once you meet the threshold it's prima facie proof  
7 unless -- and then the burden shifts once you do that.  
8 Isn't that what this rule does? That's basic.

9 CHAIRMAN BABCOCK: Yeah, that's what they're  
10 trying to do.

11 MR. LOW: Well, we do that in 902(10).

12 MR. ALEXANDER: There's been some suggestion  
13 about addressing the court's obligation to look at whether  
14 or not the evidence is trustworthy. This is not a  
15 situation like Dowdle where the court has got an  
16 independent gatekeeping function, once the proponent meets  
17 his burden or her burden the evidence is coming in unless  
18 the other side objects, and if the other side objects the  
19 other side has got to have a grounds for it, and this  
20 provides one of the grounds, and it could be through --  
21 I'm sorry.

22 MR. LOW: You're not even entitled to  
23 cross-examine. It says that you swear in affidavit to  
24 that, you prove that basic thing, and then the burden  
25 shifts.

1 MR. ALEXANDER: Right.

2 MR. LOW: If it's untrustworthy or not, the  
3 burden is on you.

4 CHAIRMAN BABCOCK: I'm sorry. Justice  
5 Christopher, did you write one of those opinions?

6 HONORABLE TRACY CHRISTOPHER: Maybe. I  
7 think as a practical matter someone -- you know, either  
8 you've got a business records affidavit or you have a  
9 custodian on the stand that says, "These are the records  
10 of our business" and then it is the opponent's job to  
11 object, to say, "Okay, I'm objecting to this document  
12 that's in this claimed business records because it has the  
13 letterhead of a different company on it. It's clearly not  
14 a business record of the, you know, company at issue," or  
15 "It's a doctor report that is clearly made for the  
16 purposes of litigation." And you just -- you look at the  
17 records, and you make that determination, but it -- it is  
18 based on an objection, and someone has to bring it to your  
19 attention that there's something going on here.

20 CHAIRMAN BABCOCK: Justice Gaultney, did you  
21 write one of those opinions?

22 HONORABLE DAVID GAULTNEY: I don't think I  
23 heard the Beaumont court in that, but I suspect that those  
24 cases dealt with situations where there was no indication  
25 of lack of trustworthiness, and so it showed -- it

1 probably looked on its face like a regular document, and  
2 the court says, "Well, they didn't come forward with, you  
3 know, something that would show it was untrustworthy." In  
4 that context you can see that, but what if you have a  
5 situation where the judge sees something in the document  
6 that he considers untrustworthy? I mean, does he have to  
7 admit it unless there's additional evidence?

8 CHAIRMAN BABCOCK: Judge Yelenosky, and then  
9 Kent.

10 HONORABLE STEPHEN YELENOSKY: Well, I think  
11 there are different things going on here. The question  
12 about whether the judge is obligated to do something sua  
13 sponte, like a gatekeeping function, and you've addressed  
14 that, and then there seems to be -- the first question was  
15 does "to show" mean that the opponent of the business  
16 record has to present his or her evidence in addition to  
17 just pointing out evidence that already came before the  
18 court through the business record or the custodian, and I  
19 think consistent with that case law, it's clear that you  
20 don't have to bring forward your own evidence. It just  
21 has to be before the court. It's also clear, I think,  
22 there has to be an objection, so it's not sua sponte, but  
23 an objection itself may be enough. "Your Honor, I object,  
24 this is untrustworthy," and the judge, having heard the  
25 things that make it untrustworthy, says "sustained," so

1 but the problem is "to show" to a lot of people means they  
2 have to present their own evidence, and the current rule  
3 doesn't say "to show," and so it causes consternation.

4 CHAIRMAN BABCOCK: Kent.

5 HONORABLE KENT SULLIVAN: I was just going  
6 to say, much like what I think Judge Yelenosky is saying,  
7 is that the fact that it would perhaps pass muster under  
8 803 is not the end of the inquiry. It seems to me that  
9 the sort of objection that he suggested the judge could  
10 then resort to 403 and say, "It might pass muster under  
11 803, but it does not under 403, and I will exclude it on  
12 that basis." 403 gives broad discretion to the trial  
13 judge if there's going to be unfair, prejudice, misleading  
14 the jury. I mean, there's a laundry list, so I was just  
15 going to say that the mere fact that you -- that you're  
16 able to make it past one particular rule doesn't  
17 necessarily mean it's admitted.

18 CHAIRMAN BABCOCK: Okay. Justice Brown.

19 HONORABLE HARVEY BROWN: One other point is  
20 that if we put the burden of proof on the proponent it's  
21 kind of difficult because we're asking them to prove a  
22 negative, lack of trustworthiness, and it makes it hard  
23 for an affidavit under 902(10), because 902(10) gives them  
24 this form for explaining why it comes in. It's pretty  
25 easy, and so then we're asking them to explain why this

1 does not have a lack of trustworthiness, which necessarily  
2 would require some explanation that wouldn't fit very well  
3 into a form.

4 CHAIRMAN BABCOCK: Yeah, great point. Pete.  
5 No, no, no, I can tell you're getting -- your heart's  
6 racing because we're about to get to subsection (8) here,  
7 "Public records."

8 MR. SCHENKKAN: The only comment I have  
9 about subsection (8) is -- and I gathered these were just  
10 repeating themselves from some other version of it, but  
11 the grammar of (8)(A), little (iii), follow that. "A  
12 record or statement of a public office, if it sets out in  
13 a civil case factual findings from a legal" -- this makes  
14 it sound like it's the public office's record in a civil  
15 case, so the public office is setting -- is either  
16 conducting the investigation in the civil case or offering  
17 the record in a civil case, and I think the problem is  
18 we're trying to cram it all into (A), but I think we  
19 probably all know what's intended, so --

20 CHAIRMAN BABCOCK: Okay. Richard.

21 MR. MUNZINGER: Just a last comment, because  
22 all of these rules -- not all, but (8) certainly does,  
23 includes the addition of the language, "The opponent fails  
24 to show that the source was" -- "indicates a lack of  
25 trustworthiness," et cetera. We all know that if the

1 Legislature or the Court adds words to a rule we may not  
2 ignore those words; and we must assume that the Court  
3 meant something by inserting them; and so if this is not a  
4 substantive change, I would have the concern that it works  
5 a substantive change because practitioners and judges  
6 reading it say, "Surely the Court meant something by  
7 adding these words."

8                   CHAIRMAN BABCOCK: Yeah. Yeah. Okay.  
9 Anything on (8)? Anything else on (8)? We got all the  
10 way through (21). How about (22)? Anything to talk about  
11 on subpart (22), "Judgment of a previous conviction"?

12                   Okay. (23), "Judgments involving personal,  
13 family, or general history." (23) is the same as (22)?

14                   MR. ALEXANDER: No, same as the Federal  
15 counterpart.

16                   CHAIRMAN BABCOCK: Oh, okay. How about  
17 (24)?

18                   PROFESSOR GOODE: 803(24) is taken from the  
19 Federal Rule 804(b)(3), which is the statement against  
20 interests, et cetera.

21                   CHAIRMAN BABCOCK: Okay. Any comments on  
22 (24)?

23                   MR. ORSINGER: Could I ask a question?

24                   CHAIRMAN BABCOCK: Yes, you may.

25                   MR. ORSINGER: Was the Federal language



1 before its modernization pretty close to the Texas  
2 language before its modernization?

3 PROFESSOR GOODE: Of the statement against  
4 interests?

5 MR. ORSINGER: Yes.

6 PROFESSOR GOODE: Yes, they were identical,  
7 but then actually, once again, we preceded the Feds in  
8 adding what is the last sentence of our current 803(24).  
9 The Feds had a rule about declarations against penal  
10 interest in criminal cases that went only one way in terms  
11 of when the prosecution could use it as opposed to the  
12 defendant. We did it evenhandedly. The Feds have come  
13 around to our position, so our rules are now the same,  
14 with the one exception of we have one form of declaration  
15 against interest that the Feds don't have, which we have a  
16 statement that tends to expose the declarant or to make  
17 the declarant an object of hatred, ridicule, or disgrace,  
18 is in our rule, current and restyled, but not in the  
19 Federal rule, current or restyled.

20 MR. ORSINGER: Well-suited to the Texas  
21 temperament, I think.

22 MR. ALEXANDER: Precisely.

23 CHAIRMAN BABCOCK: Okay. Anything else on  
24 (24)?

25 HONORABLE TOM GRAY: Chip, I don't know if

1 this fits in the -- and it may fit better back with (22)  
2 or even back to the 01 or 02 part of the 600's, but the  
3 hearsay rules have undergone substantial change in the  
4 criminal law with the Crawford decision.

5 CHAIRMAN BABCOCK: Uh-huh.

6 HONORABLE TOM GRAY: And I don't know if  
7 y'all discussed that in my absence this morning, but --

8 CHAIRMAN BABCOCK: Spent about an hour on  
9 it, didn't we?

10 HONORABLE TOM GRAY: Okay, well, in that  
11 case --

12 CHAIRMAN BABCOCK: I'm just kidding.

13 MR. ORSINGER: No, I don't know what you  
14 mean.

15 CHAIRMAN BABCOCK: Just kidding.

16 HONORABLE TOM GRAY: Are you not familiar  
17 with the Crawford decision? Okay. Crawford decision,  
18 United States Supreme Court case that basically said Sixth  
19 Amendment right to confrontation basically wipes out all  
20 the hearsay exception except in very limited  
21 circumstances, and this subdivision (22) happens to be  
22 the -- one of the items in Crawford that's not  
23 specifically wiped out. Basically they said, you know,  
24 this may all work in civil cases, but not in criminal  
25 cases, and so we have been dealing at the court of appeals

1 level with the -- and I'm sure that if there's -- Ana for  
2 sure has been dealing with it. Anybody that's been trying  
3 criminal cases or reviewing them in the last -- Crawford's  
4 four years old now probably.

5 HONORABLE ANA ESTEVEZ: Or a little older,  
6 about like that.

7 HONORABLE TOM GRAY: Something like that,  
8 but it has substantially changed that. There was a long  
9 footnote or comment to 601 dealing with the restyling.  
10 There may be a point there at which to mention Crawford or  
11 this may be like the 615 discussion that it's just going  
12 to have to be taken up by the Court of Criminal Appeals as  
13 some type of amendment to the Rules of Evidence, but  
14 somewhere that needed to be on the record about Crawford  
15 and what it's going to do to the exceptions, the hearsay  
16 exceptions.

17 CHAIRMAN BABCOCK: Yep, thank you. That's  
18 great. Judge Estevez.

19 HONORABLE ANA ESTEVEZ: I'm not necessarily  
20 disagreeing or agreeing, but just for the record, you  
21 know, they've made both objections to hearsay, and they  
22 say it falls under one of these sections, and the next  
23 thing they say is Crawford. So I'm not sure that you  
24 don't still have hearsay exceptions because if they don't  
25 go to Crawford then it's in, and you have ineffectiveness

1 of counsel as opposed to inadmissible evidence, so I don't  
2 know that it will be an issue.

3 HONORABLE TOM GRAY: I accept her friendly  
4 amendment to my comment. Very definitely they have to  
5 make the Crawford violation of the right to confrontation  
6 objection and then that affects whether or not the hearsay  
7 exception overrides the basic rules.

8 CHAIRMAN BABCOCK: Okay. Great. All right.  
9 Let's take our afternoon break. We'll come back and start  
10 on Rule 804, and you know, don't get cocky, but it looks  
11 like maybe we're going to get done with these today, which  
12 will avoid the necessity of a meeting tomorrow morning,  
13 unless y'all just want to get together.

14 MR. STORIE: Will there be cake?

15 CHAIRMAN BABCOCK: We can have a vote, Jim,  
16 if you want. All right. So we'll be in recess for 15  
17 minutes.

18 (Recess from 3:00 p.m. to 3:22 p.m.)

19 CHAIRMAN BABCOCK: Okay. Let's start with  
20 804, and is this a -- is this a change from the Federal?

21 HONORABLE ROBIN DARR: On 804?

22 CHAIRMAN BABCOCK: Yeah.

23 PROFESSOR GOODE: Rule 804 is largely the  
24 same as the Federal. We have 804(a)(5) is slightly  
25 different from the Federal, but, again, the drafting part

1 was fairly -- just a little technical change in  
2 accommodating the change between the Federal and Texas.

3 CHAIRMAN BABCOCK: Okay. Any comments on  
4 804?

5 MS. HOBBS: Oh, I do.

6 CHAIRMAN BABCOCK: Yeah, Lisa.

7 MS. HOBBS: On the former testimony  
8 provision of the second page of 804.

9 PROFESSOR GOODE: I'm sorry, I was just  
10 talking about 804(a). I didn't mean to --

11 MS. HOBBS: Okay, sorry. I should just hold  
12 my comment.

13 CHAIRMAN BABCOCK: Okay.

14 PROFESSOR GOODE: I didn't mean to get us  
15 ahead.

16 CHAIRMAN BABCOCK: Why don't you just go  
17 through 804 and tell us what's changed from the Federal.

18 PROFESSOR GOODE: 804(a)(1), our rule is  
19 somewhat different from the Federal rule, so --

20 CHAIRMAN BABCOCK: I think Lisa --

21 PROFESSOR GOODE: 804(B)(i), the former  
22 testimony section.

23 CHAIRMAN BABCOCK: Lisa, what's your comment  
24 on?

25 MS. HOBBS: Well, on 804(1)(a)(i) in a civil

1 case and then there's a corresponding verbiage in (B) (i)  
2 in the criminal case. In the civil case you talk about "a  
3 trial or hearing of the current or a different  
4 proceeding." In (B) (i) you talk about "a trial or  
5 hearing," comma, "whether given during the current or a  
6 different proceeding." The criminal line seems to follow  
7 more what the Fed line was, and I was just curious why  
8 there's a difference in language.

9 PROFESSOR GOODE: The criminal line seemed  
10 to follow more -- I just didn't hear you. I'm sorry.

11 MS. HOBBS: What the Feds did seems more in  
12 line with the criminal one, (B) (i). Where is it? They  
13 say (1) (A), "whether given during the current proceeding  
14 or a different one," so it's really the language in the  
15 civil subsection of the former testimony statute uses just  
16 slightly different language there, and I was curious if  
17 there was a reason.

18 MR. ALEXANDER: I think the reason is that  
19 the current Texas rule differs in the way it refers to  
20 criminal and civil procedures and --

21 MS. HOBBS: Does it have a meaning? They  
22 seem to be saying the same thing to me.

23 MR. ALEXANDER: It looks similar. But so we  
24 track what the current Texas rule does. As to whether you  
25 could make them synonymous, I don't recall whether we

1 discussed that issue or not quite frankly.

2 CHAIRMAN BABCOCK: Satisfied, Lisa?

3 MS. HOBBS: Completely unsatisfied.

4 CHAIRMAN BABCOCK: Why are you unsatisfied?

5 MS. HOBBS: Well, I think they mean the same  
6 thing. It's just weird to have two different ways of  
7 saying the same thing. It's bothering me. I want to know  
8 if they have different meaning and I just don't realize  
9 the meaning or --

10 PROFESSOR GOODE: I'm not sure but the  
11 civil, the current -- if you look at the current civil  
12 (B) (i) --

13 MS. HOBBS: Yeah.

14 PROFESSOR GOODE: It talks about "Testimony  
15 given as a witness at another hearing of the same or a  
16 different proceeding or in a deposition taken in the  
17 course of another proceeding."

18 MR. RODRIGUEZ: And in criminal cases you  
19 don't have depositions.

20 PROFESSOR GOODE: In the criminal language  
21 it talks about "Testimony given as a witness at another  
22 hearing of the same or different proceeding" and then does  
23 not include the deposition language.

24 MS. HOBBS: Okay, but it's really just the  
25 phrase "of the current or different proceeding" versus,

1 comma, "whether given during the current or different  
2 proceeding." It's not the deposition part of that.

3 PROFESSOR GOODE: Okay.

4 MS. HOBBS: It's the trial or hearing  
5 description uses two different languages, and I don't know  
6 why or what they would mean -- why their meaning would be  
7 different. So (1)(A)(i) says "trial or hearing of the  
8 current or a different proceeding"; whereas, (B)(i) says  
9 "trial or hearing," comma, "whether given during the  
10 current or a different proceeding."

11 PROFESSOR GOODE: Actually, I think -- I  
12 think you're working off a slightly older version.

13 MS. HOBBS: Oh.

14 PROFESSOR GOODE: Because one of the  
15 suggestions we got and we adopted was we changed that  
16 "whether given during the current proceeding or a  
17 different one." Is that the language you've got?

18 MS. HOBBS: Sorry. I guess I'm working off  
19 a different draft.

20 PROFESSOR GOODE: But that doesn't change  
21 your --

22 CHAIRMAN BABCOCK: You still have the same  
23 complaint.

24 MS. HOBBS: Oh, okay.

25 MR. ALEXANDER: Well, I think your point is



1 well taken. Why don't we look at making these more  
2 similar and we'll submit a new draft?

3 CHAIRMAN BABCOCK: Okay. What else about  
4 804? Any other comments? No, you won that one clearly,  
5 Lisa. You don't have to celebrate.

6 MS. HOBBS: Really, Texas is the winner  
7 here.

8 CHAIRMAN BABCOCK: Whoa.

9 MR. RODRIGUEZ: What is she running for?

10 HONORABLE KEM FROST: Pause for the victory  
11 lap.

12 CHAIRMAN BABCOCK: She's been to too many  
13 campaign rallies. Texas is the winner of that.

14 MR. RODRIGUEZ: She got taken up with what's  
15 going on in Washington.

16 CHAIRMAN BABCOCK: Okay. All right, what  
17 else about 804? Any other comments? There will be a  
18 prize, by the way, at the end of the day. Lisa so far has  
19 it. I don't think anybody can catch her. All right.  
20 805, "Hearsay within hearsay."

21 PROFESSOR GOODE: 805 is the same current  
22 Texas pre-restyled, same restyled Federal, proposed  
23 restyled Texas.

24 CHAIRMAN BABCOCK: Okay. 806, "Attacking  
25 and supporting the declarant's credibility."

1           PROFESSOR GOODE: Those are similar. We had  
2 to make adjustments because of -- we have provisions in --  
3 well, first we have a different citation to the rule, but  
4 then also the difference because we have a foundation  
5 requirement for prior inconsistent statements that you may  
6 have heard about that they don't have in the Federal rule,  
7 so we had to accommodate that as well, but essentially  
8 it's the same rule, just slightly -- slight tinkering.

9           CHAIRMAN BABCOCK: Okay. Any comments on  
10 806? Where did Orsinger go?

11           MR. LOW: He's not been excused.

12           MR. ALEXANDER: I locked him in the  
13 bathroom.

14           HONORABLE JAMES MOSELEY: That's a great  
15 idea.

16           CHAIRMAN BABCOCK: I wondered what that  
17 squeal was. Any other comments on 806? Okay. Go to  
18 Article IX, "Authentication and identification," Rule 901.

19           PROFESSOR GOODE: Rule 901(a) is identical.  
20 Again, pre-restyled Federal, current Texas are identical,  
21 and so the restyled Federal, restyled Texas were  
22 identical. The same is true for 901(b)(1) and (2) and  
23 (b)(4) through (10). So the only provision here that  
24 we're talking about is (3), and the only difference in (3)  
25 is we have a very slight difference between the -- a Texas

1 and the Federal rule on comparison by trier or expert.  
2 The Federal rule talks about "specimens which have been  
3 authenticated"; and the Texas rule, the current, talks  
4 about "specimens which have been found by the court to be  
5 genuine." So there was a little substantive difference  
6 between the Federal and Texas, and this drafting just  
7 accommodates that slight difference.

8 CHAIRMAN BABCOCK: Okay. Any comments on  
9 subpart (3)? Like that okay, Lisa?

10 MS. HOBBS: I do.

11 CHAIRMAN BABCOCK: All right. 902.

12 PROFESSOR GOODE: 902(1) and (2) and (4)  
13 through (9) are the same, and our 902(11) is the Federal  
14 Rule 902(10); and that leaves 902(3), which is largely the  
15 same; but we have a provision in the Texas rule in 902(3)  
16 that is not in the Federal rules, which is the last  
17 sentence of our current 902(3), dealing with final  
18 certifications being dispensed when you've got a treaty,  
19 and that provision caused a bunch of tinkering with the  
20 drafting. The great bulk of the rules is actually the  
21 same, so if you look at what's in our restyled 902(3)(A),  
22 all that language the document must be accompanied down to  
23 the end of our 902(3)(A) is the same and then it start --  
24 the rules start to change a little bit. The beginning of  
25 Rule 902(3)(B), "if all parties have been given a

1 reasonable opportunity," that language is taken from the  
2 last sentence of the Federal 902(3), and then once you get  
3 past that you'll see the -- our little (i) and little (ii)  
4 are also the same as the Federal 902(3)(A) and (B), and  
5 then we finally get to this (C) provision which deals with  
6 this last sentence in the Texas rule, which is not up here  
7 in the Federal rule, and if anybody can follow that you're  
8 better than me because I'm totally confused.

9 CHAIRMAN BABCOCK: Why wouldn't that be --  
10 why wouldn't (C) be in the Federal, dealing with a treaty  
11 with the United States?

12 MS. HOBBS: Judge Cochran in her *Texas Rule*  
13 *of Evidence* suggests that it may be unnecessary, so maybe  
14 the Feds think that it's not necessary to have that in the  
15 Rules of Evidence.

16 CHAIRMAN BABCOCK: Okay. Any other thoughts  
17 about that?

18 MR. LEVY: I can't recall on the Hague  
19 Convention whether --

20 CHAIRMAN BABCOCK: Speak up, Robert.

21 MR. LEVY: I'm sorry. I can't recall on the  
22 Hague Convention whether there is that certification  
23 requiring that.

24 PROFESSOR GOODE: This is dealing with the  
25 Hague Convention exactly.

1 CHAIRMAN BABCOCK: Okay. Anything else?

2 Okay. Now, you said everything was the same through (9)  
3 but then that suggested (10) was not the same.

4 MR. LOW: (10) we've already voted on. (10)  
5 is what we redrafted last time.

6 CHAIRMAN BABCOCK: Judge Estevez.

7 HONORABLE ANA ESTEVEZ: Well, they weren't  
8 here, I don't think, when we talked about some of the  
9 things, and just on (10)(C), I just want to reiterate  
10 since you guys are here, I would suggest that should be a  
11 separate rule, and it should be 904 or a different one  
12 since it's not in the Federal rules anyway, but it is  
13 doing more than just proving to be a form for business  
14 records. It's actually proving up the medical expenses.

15 CHAIRMAN BABCOCK: Okay. And, Buddy, what  
16 were you saying, that --

17 MR. LOW: No, that was redrafted, and,  
18 Harvey, didn't you send to the Court all of the  
19 suggestions and so forth, and it's been finished, and we  
20 don't want to rehash it.

21 CHAIRMAN BABCOCK: So it's pending before  
22 the Court.

23 MR. LOW: Yeah. See, that was not -- when  
24 their assignment was made, that was not something we were  
25 talking about revising, so they were never involved in

1 that.

2 CHAIRMAN BABCOCK: Okay.

3 PROFESSOR GOODE: But this Rule 902(10) is  
4 designed to conform to the language and the -- of Rule  
5 803(6), which has been restyled, and the form is designed  
6 to conform to the new restyled language.

7 MR. LOW: Well, what you did, when you  
8 restyled we had a long paragraph in our evidence rule, a  
9 long paragraph that -- and it has to comply with 803(4) or  
10 whichever one, and y'all combined that paragraph and put  
11 everything they had in much shorter form. You did all of  
12 that, and we took that and then put the other  
13 requirements. So we took the form that y'all had and then  
14 redid this rule and presented it to the committee last  
15 time.

16 CHAIRMAN BABCOCK: Right.

17 MR. LOW: And it's been mailed to the Court.

18 CHAIRMAN BABCOCK: Right. Professor  
19 Dorsaneo.

20 PROFESSOR DORSANEO: Well, Harvey, did you  
21 make these -- I recall that the -- there wasn't a  
22 conformity between 803(6)'s language and the one we looked  
23 at before. Did you fix that?

24 HONORABLE HARVEY BROWN: Yes, I tried to.  
25 What I did was, for those --

1                   PROFESSOR DORSANEO: And you would be the  
2 right one to tell us what you did then.

3                   HONORABLE HARVEY BROWN: For those that  
4 weren't here last time, we did this Friday morning before  
5 your committee started because there was some legislation  
6 that required the Court to look at not including medical  
7 records be filed. So that was the impetus to that, and I  
8 took all the comments that were made here that had at  
9 least a couple of people saying them, worked them in, and  
10 we started off of yours, and then worked off of 803(6),  
11 and frankly, Bill, I don't remember all of the changes  
12 that we made, but we did look at all the comments and  
13 particularly the comments that tracked 803(6), and where  
14 there were some comments that overlapped 803(6) I just put  
15 a comment on the side for the Court to refresh the Court's  
16 recollection of what the discussion was so that the Court  
17 could go either way.

18                  MR. LOW: See, when y'all were assigned the  
19 Court had not amended -- put (C) in the affidavit. The  
20 Court did that, what, in April, didn't you, your Honor,  
21 something like that? So when y'all were working on it  
22 this was not done, but we took your form and then we redid  
23 it, and the Court needed to do this in a hurry, and we  
24 took your form and then adapted it to what we drafted.

25                  CHAIRMAN BABCOCK: Yeah.

1                   HONORABLE NATHAN HECHT: But the point is  
2 (10) has been done.

3                   MR. LOW: Yeah, that's the point. That's  
4 what I was trying to say.

5                   CHAIRMAN BABCOCK: All right. And (11) is  
6 the same, you said?

7                   PROFESSOR GOODE: (11) is the same as  
8 Federal (10). Right.

9                   CHAIRMAN BABCOCK: So that will take us to  
10 903. Bill. I'm sorry.

11                  PROFESSOR DORSANEO: This looks like it's a  
12 lot closer, but it doesn't exactly match 803(6), and it  
13 uses the term, for example, as was pointed out last time  
14 by Richard, and I could be just -- I didn't study this  
15 before the meeting, so I am embarrassed to be pointing out  
16 something that maybe doesn't really exist, but there was  
17 some concern that we had the use of the words "occurrence  
18 of the matters stated herein" and when we're talking about  
19 an act, "the record of an act, condition, event, opinion,  
20 or diagnosis." It seems like the word "occurrence" was  
21 substituted for that, and we had little kind of quibble  
22 things about the form of business records affidavit.

23                  HONORABLE HARVEY BROWN: Bill, if I can  
24 interrupt you, I did make a note on that to the Supreme  
25 Court about the "occurrence" versus "act, diagnosis," et



1 cetera, so the Court would have that in front of it.

2 PROFESSOR DORSANEO: Oh, okay. So I'll be  
3 quiet. I just want to make sure that somebody paid  
4 attention to what we talked about last time and reported  
5 it.

6 PROFESSOR GOODE: Did you-all include the  
7 unsworn declaration?

8 HONORABLE HARVEY BROWN: Yes, we did.

9 MR. LOW: Yeah. We put that in a footnote,  
10 didn't we, Harvey?

11 HONORABLE HARVEY BROWN: Yes. Rather than  
12 saying "unsworn declaration," you know, five or six times,  
13 we put down something in the comment to cover that, but we  
14 did cover it.

15 MR. LOW: Because there are many others that  
16 have "affidavit," and we didn't want to go back and put  
17 "affidavit or unsworn declaration" in all of those, so we  
18 just threw that in as a footnote.

19 CHAIRMAN BABCOCK: Okay. 903.

20 PROFESSOR GOODE: That's one of the  
21 identical ones.

22 CHAIRMAN BABCOCK: Article X, 1001. 1001.

23 PROFESSOR GOODE: 1001, 1002, 1003, 1005,  
24 1006, 1007, and 1008 are all the same.

25 CHAIRMAN BABCOCK: You skipped 1004.

1 MR. ALEXANDER: We were hoping you wouldn't  
2 notice.

3 PROFESSOR GOODE: And 1009. And 1004 is  
4 only different in that we have one more provision in our  
5 1004 than the Feds have in theirs, which is an original is  
6 not located in Texas. For some reason the Feds don't have  
7 that in their rule. They should.

8 CHAIRMAN BABCOCK: Any comments about 1004?  
9 Hearing none, does that bring us to the end of the road  
10 here?

11 PROFESSOR GOODE: 1009.

12 CHAIRMAN BABCOCK: 1009, sorry.

13 PROFESSOR GOODE: There is no corresponding  
14 Federal rule.

15 CHAIRMAN BABCOCK: Bill, this gets into your  
16 question of a trial, what is a trial, because if there's a  
17 summary judgment motion that is relying on a foreign  
18 document, do you have to serve it 21 days before the  
19 hearing or 45?

20 MR. ORSINGER: That sounds like an exam  
21 question. Did you get that down, Professor?

22 PROFESSOR DORSANEO: 21.

23 CHAIRMAN BABCOCK: You think 21.

24 MR. ORSINGER: No.

25 MS. HOBBS: It seems like there's a statute.

1 CHAIRMAN BABCOCK: Lisa.

2 MS. HOBBS: I think there's a statute, too,  
3 that relates to this, so I don't think Texas law is very  
4 clear on when you have to serve it because I feel like  
5 there's also a statute you have to comply with and it's in  
6 a different timetable.

7 CHAIRMAN BABCOCK: What about when you have  
8 a statute that says your hearing has to be set and a  
9 decision by the court has to be made within a very short  
10 period of time, like 30 days from the time of the hearing,  
11 and so you don't have 45 days to get the translation?

12 MS. HOBBS: Sounds like we need a good cause  
13 exception.

14 HONORABLE DAVID GAULTNEY: That's in (f),  
15 isn't it?

16 CHAIRMAN BABCOCK: What's that?

17 HONORABLE DAVID GAULTNEY: That's (f), time  
18 limits may be modified.

19 MR. ALEXANDER: Good cause exception.

20 HONORABLE TOM GRAY: Ask and you shall  
21 receive.

22 MR. ALEXANDER: That's a fitting blessing on  
23 which to end this discourse.

24 CHAIRMAN BABCOCK: Somebody is going to have  
25 to be on their game to figure out all of these conflicting

1 times. I guess that's why we get paid the big bucks, huh?

2 All right. Any other comments about 1009? Carl.

3 MR. HAMILTON: Is there anything that tells  
4 us what a qualified translator is anywhere?

5 MS. HOBBS: There is a statute that talks --  
6 it may get -- translators get certified by the State of  
7 Texas.

8 MR. HAMILTON: They are certified? That's  
9 the same.

10 HONORABLE ANA ESTEVEZ: They don't all have  
11 to be. They don't all have to be certified. There's  
12 different rules regarding different languages. If they're  
13 Spanish, it has to be a certified translator, but other  
14 ones don't necessarily have to be, depending on how far  
15 away you live from the first certified person.

16 MS. HOBBS: That's true.

17 MR. HAMILTON: I was just wondering why we  
18 say "certified" there if maybe they're not all certified.

19 HONORABLE STEPHEN YELENOSKY: The statute is  
20 for interpreters, certified interpreters.

21 MR. HAMILTON: Does that mean they may not  
22 be certified?

23 CHAIRMAN BABCOCK: Judge Yelenosky.

24 HONORABLE STEPHEN YELENOSKY: I think  
25 there's a difference between the interpreter statute in

1 certain cases. This is translation, and maybe you know,  
2 but I didn't think that the statute covered translation.

3 MS. HOBBS: You're right. If you were just  
4 going to translate your document, you could get a  
5 translator, and it would be up to your opponent to  
6 challenge the translator's qualifications or whatnot.

7 HONORABLE STEPHEN YELENOSKY: Right. And  
8 that's what we're talking about here, right?

9 CHAIRMAN BABCOCK: Okay. David Jackson.

10 MR. JACKSON: There are a lot of areas in  
11 the state that don't have certified translators. Do we  
12 have a problem if there isn't --

13 CHAIRMAN BABCOCK: Can you speak up a  
14 little, David?

15 MR. JACKSON: I'm sorry?

16 CHAIRMAN BABCOCK: Will you speak up a  
17 little bit?

18 MR. JACKSON: I'm sorry. There are areas in  
19 the state that have a problem getting certified  
20 translators, so in those areas you might not be able to  
21 get a document translated if you required it to be by a  
22 certified translator.

23 HONORABLE STEPHEN YELENOSKY: But documents  
24 can be sent around easily.

25 CHAIRMAN BABCOCK: Okay. Yeah, Gene, is

1 that you? Yeah.

2 MR. STORIE: It is. It's sort of  
3 half-hearted me, but is there a difference in time between  
4 the Rule 203 that we talked about earlier, determining  
5 foreign law, which I think says at least 30 days before  
6 trial, and 1009(a), which says at least 45 days before  
7 trial when you serve a translation?

8 CHAIRMAN BABCOCK: What's the 30-day time  
9 limit you're talking about, Gene?

10 HONORABLE KENT SULLIVAN: 203.

11 MR. STORIE: In 203(b).

12 CHAIRMAN BABCOCK: Of the evidence rules?

13 MR. STORIE: Yes. Restyled.

14 MR. ORSINGER: About judicial notice.

15 CHAIRMAN BABCOCK: Yeah, Richard.

16 MR. ORSINGER: What I took away from our  
17 discussion on that was that Rule 203 has to do with  
18 translations of foreign laws, and this probably is  
19 translations of foreign language documents that are not  
20 laws.

21 MR. STORIE: Okay.

22 MR. ORSINGER: And I don't know that anyone  
23 else took that away, and I don't know if that's right or  
24 wrong, but it did make it -- it made it fit to me. You  
25 have a complicated, long timetable for contracts and

1 deeds, and you had a different one for a judge deciding  
2 what a statute means.

3 PROFESSOR GOODE: Right.

4 CHAIRMAN BABCOCK: Okay. Anything else on  
5 this rule? Well, it's not 5:00 yet, so I think we ought  
6 to just stay here until 5:00.

7 MR. ORSINGER: Why don't we take up  
8 substantive changes?

9 HONORABLE STEPHEN YELENOSKY: We can finish  
10 that by 5:00.

11 CHAIRMAN BABCOCK: Buddy.

12 MR. LOW: I want to thank this committee for  
13 doing such fine work.

14 CHAIRMAN BABCOCK: Unbelievable.

15 MR. ORSINGER: Yeah, what a job.

16 MR. LOW: And just say "Amen."

17 (Applause)

18 CHAIRMAN BABCOCK: When's our next meeting?  
19 Our next meeting is December 6th and 7th, and that's at  
20 TAB, back at TAB, which apparently will have parking by  
21 then but not today. By the way, do people prefer being  
22 here -- we can't get in here often -- or the other place?

23 MR. HAMILTON: Other place.

24 CHAIRMAN BABCOCK: The other place? Okay,  
25 yeah, they're pretty accommodating and seem --

1 MR. HAMILTON: The tables are bigger, too.

2 MR. LOW: Chairs are different.

3 HONORABLE STEPHEN YELENOSKY: And they have  
4 windows.

5 MS. SENNEFF: Make sure you validate your  
6 parking ticket if you parked over at that Wells Fargo  
7 garage.

8 CHAIRMAN BABCOCK: Are you going to tell  
9 them how to do that?

10 MS. SENNEFF: Write "G. Major, SCAC,  
11 10-18-13."

12 MR. JACKSON: Once we've done that, that's  
13 validated?

14 MS. SENNEFF: Yeah, that's the validation  
15 part.

16 CHAIRMAN BABCOCK: So thank you, everybody.  
17 We're in recess until December.

18 (Adjourned)

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