* * * * * * * * * * * * * * * * * * * *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

December 3, 2010

* * * * * * * * * * * * * * * * * * * *

Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 3rd day of December, 2010, between the hours of 9:08 a.m. and 3:49 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

10-13 Restyling of TRE/Materials for TRE 511

10-14 Proposed Amendments to Rules 296-299a (12-2-10)

10-15 Memo from Bill Dorsaneo, Rule 301 (12-1-10)

10-16 Rule 301 revisions (12-1-10)

10-17 FRCP 26 - 12-1-10 memo from subcommittee

--*-*-*

CHAIRMAN BABCOCK: Okay. Ready to go on the record, everybody. Please have a seat. Or not. We're just going to go ahead and get started.

MR. MUNZINGER: You have a lot of authority, Chip.

CHAIRMAN BABCOCK: I know, I have a lot of authority, don't I? Maybe if you start speaking they'll -- welcome, everybody, to our last meeting of the year. Angie has a schedule for next year that we'll read at the end of the meeting. There will be no meeting tomorrow on Saturday this time, and so we'll go to our first agenda item, which as always is the report from Justice Hecht.

HONORABLE NATHAN HECHT: The Disciplinary Rules of Professional Conduct were presented for a referendum by the bar. We issued the order on November 16, and the referendum is to take place between January 18 and February 17, and those rules represent an extraordinary effort by a very large number of people who have worked on them for 10 years, not to mention the effort that went into the ABA revisions which led to this revision cycle in Texas, so the bar has had extensive input into the rules already. They'll be published in a day or two, or they're already out.

PROFESSOR DORSANEO: They're out now.

HONORABLE NATHAN HECHT: So you can take a look at them, and Kennon has done enormous work on those, so please take a look at them and be mindful of the referendum coming up in January and February.

Then we are working on e-filing in the appellate courts, and this committee has worked on that extensively. One of the things that the appellate courts need is a software interface to gather the filings as they come in and then put them in a structure that the judges and staff can use, and that interface, called TAMES, T-A-M-E-S, is still being developed, and we thought it would be ready this last spring, but it's not, and we still think it might be ready this winter or early spring, but it probably won't be.

So the Supreme Court has gone to requiring submission of electronic copies of filings by e-mail, so we have briefs and motions and virtually everything that gets filed lawyers are required to transmit to us by e-mail, and it's already affecting the internal working of our Court because judges and staff are now using more and more the electronic versions of briefs and motions and things that come in. So there is an order in place and has been for nine months requiring that, and the Houston courts of appeals want to do the same thing and want to also take advantage of the e-filing system, which doesn't involve

just sending a copy of the filing by e-mail but the actual filing of the document itself, and so we're working on that, and I think we had hoped to have that ready last month, but I hope in the next actually few days or weeks the Houston courts will be ready to begin implementing that, and I look for some of the other courts to do that as well as we wait for the TAMES software to be complete.

So I think you'll see in the next few months more of these orders coming out, local rules of courts of appeals requiring submission of electronic copies and in some instances allowing e-filing through the texas.gov portal that is operated under the state Department of Information Resources, DIR. So that is kind of an update on that. It's kind of proceeded in fits and starts because of the lack of the software.

The Court was pretty far along on the recusal rule when we stopped to go back to the disciplinary rules in October, November, but I just told Judge Peeples that I think we'll have something on that this month, so probably before the next meeting; and just a minor thing but important, also in October we issued a rule under the rules governing admission to the bar of Texas which allows military lawyers who are stationed in Texas but not licensed to practice here to represent military personnel on a limited basis as part of the ongoing push by President

Tottenham of the State Bar of Texas and others to try to accommodate veterans and their lawyers in the Texas legal system. So that's kind of an update on the rules.

Then by way of a personal note, Harvey Brown was just appointed to the court of appeals for the First District of Texas in Houston, and we welcome him back to the bench. R. H. Wallace, Jr., who I don't see here today, but has just been appointed to the 96th District Court in Fort Worth, so we're glad to hear that; and I don't see Judge Christopher here, but in one week in early November she was re-elected with 59 percent of the vote, her daughter Sarah passed the Texas bar, and most importantly she had her first grandchild, Claire Elizabeth. So that's what I know of our personal goings on.

CHAIRMAN BABCOCK: Just a sec. Are there -- the Legislature of course is convening soon. Are there any -- anything on the horizon in prefiled bills that will affect our work or the rules?

HONORABLE NATHAN HECHT: Well, there's one already, a bill filed by Representative Rodriguez of Travis County that would require the Supreme Court to do a cost benefit analysis of every rule adopted, and I don't know this, I think perhaps it may be in reaction to some comments made on the disciplinary rules during that process, but that -- that's the short of it. The -- that

would require a lot of extra resources to do that, and this is a biennium in which we anticipate the resources will be in short supply, so I doubt if there's a fiscal note on the bill, as I would think there would be, that it has much of a chance, but other than that we haven't heard of anything that's been prefiled.

CHAIRMAN BABCOCK: Okay. Great. Before we get to our business, Professor Hoffman, Lonny Hoffman, asked for the floor for a very worthwhile comment, so --

PROFESSOR HOFFMAN: I just wanted to make a brief remark. I attended Greg Coleman's funeral yesterday. Many of us in the room may have known him. Greg and I went to law school together, and I guess it was a combination of being there listening to all the remarkable accomplishments that he's had in a career cut short and being in Austin now that it made me think it was appropriate to say something at the beginning of this meeting. He was one of our truly bright stars, and the world is surely a little dimmer, if not a lot dimmer, now that he's gone.

CHAIRMAN BABCOCK: Okay. Thank you.

HONORABLE NATHAN HECHT: Justice Thomas attended -- spoke at the funeral yesterday and as well as Chief Judge Jones and lots of friends and family.

CHAIRMAN BABCOCK: Well, Lonny, you and Buddy are right up front, so --

MR. LOW: Let me start out, the person that knows the least usually speaks first, and the people with knowledge fill in with the facts, and so it's appropriate for me to speak first and then I'll let the two professors explain to you. We've got Professor Goode and, of course, Professor Hoffman. For a little background, the Federal courts passed Federal Evidence Rule 502, and 502 pertained only to work product protection that is known, but the courts have called it work product privilege, and attorney-client privilege. As you know, the Texas rules have listed a number of privileges. Our work product is not listed in the evidence rules but is listed in the Rules of Procedure. So a couple of years ago Professor Goode's committee took on to revise and follow Federal Rule 502, and I worked with them. We started out under 503, we're going to amend 503. We ended up 511, and his committee has spent a lot of hours and a lot of time on this.

My committee then took it, reviewed it. We went back with them. We made a number of revisions. They pointed out the errors of our way in many cases, and we substantially changed. In fact, we made a change yesterday, and what I have done, I have attached for you so you can see 502, the reasons for 502, the Federal Evidence Rule 501, so you can see what they did. They just broadly -- they had common law. They had privileges, but they were

common law and for state cause of action then they followed the state rules. Then I had the snapback rule, which is all privileges, if you give something inadvertently, and incidentally there are -- there is a case, an older Supreme Court case, that goes into a lot of detail of what is voluntary, involuntary, inadvertent, and so we had a lot of trouble with that kind of language at first. I attached the version that Professor Goode recommends, the version that our committee recommends, but we've made one amendment that Lonny will tell you about, and then to show you what current Rule 511 was I've attached that and, of course, the snapback rule, the work product rule, and then I've attached a form of selective waiver, which was not adopted by the Federal. Professor Goode's committee didn't recommend it, and we don't either.

So it was our intent, our committee, that there would only be one difference between -- and this is a philosophical difference. Professor Goode's committee followed just almost in toto 502, Federal 502. There's provision in that -- it's the first time we've had it. We have snapback rules, but first time we've had this, where if I give a document up and waive pertaining to a certain thing then the other documents lose that privilege, and we were concerned that if we have it only pertain to work product and attorney-client privilege, that if somebody

gave up a document that's like a trade secret or something then the related documents weren't waived, and we felt it ought to be across the board. And the amendment that we made, we originally -- there's a definition of work product in the Texas rules, but there's also one and we just adopted that -- there's also one in the Code of Criminal Procedure, so we followed what our latest -- our latest amendment is to follow what Professor Goode's committee did on that, just work product generally. All right. Lonny.

PROFESSOR HOFFMAN: Okay. I guess there are a lot of ways we could begin, but let me sort of suggest this is a way to start, is why don't everyone turn to current Rule 511, which so if you're working just off this packet, that's Tab 7 that Buddy put together. And what I'll propose to do is just sort of talk about how -- where the differences are, and really I want to maybe drill down a little bit more on what Buddy was just talking about about differences between the State Bar's version and ours, which now turns out to be quite modest, literally one issue, and then frankly, although Steve and I, we haven't talked about this, I would be inclined to then in terms of the details beyond I would rather frankly turn it over to you since the work is largely your committee's work. Rather than have me do it, why don't we have you do it since you're here. But we can kind of get to that as we

get to it.

So starting with 511, 511 of course has, you know, simply provisions (1) and (2). Waiver of privilege by voluntary disclosure, and then frankly when you go to highlight 512 of course as well, which 512 talks about the privilege not being defeated when the disclosure was either compelled erroneously or made without opportunity to claim the privilege, the counterpost to 511 in that sense, and so what the State Bar folks did was they took what's currently in 511, and they changed the title slightly, very slightly, and then took what's currently in 511 now, left it unchanged, and it becomes subsection (a) of the new rule.

So if you would turn back with me now to Tab 6, and we will work off this committee, subcommittee's, version, and I'll point out differences as we go. So if you're now with me at Tab 6 you will see that the title of the new rule being proposed is "Waiver by Voluntary Disclosure" as opposed to "Waiver of Privilege By Voluntary Disclosure," but other than that the titles are the same, and there's no difference between our title and the State Bar's title. Again, you should assume there are no differences between our -- this evidence subcommittee's version and the State Bar unless I point it out and then you'll see under subsection (a) the general rule is exactly what's in current 511, and so that's where that is.

All right. So (b) then, the way that (b) works is (b) is everything after is new, of course, and so starting with (b) we have the beginning of what's being proposed to be added. So (b) is limitations on waiver, and this is the first place both in the title and in the text -- this is the one place in the text of the rule where there is a difference between what this evidence subcommittee is proposing and what the State Bar folks have proposed. Now, you will see that under (b) we actually have two alternatives, and I think it is fair to say that Buddy and I at least -- and I'll let the rest of the subcommittee each speak because we haven't had a meeting on this point --

MR. LOW: No, yeah.

PROFESSOR HOFFMAN: -- prefer the alternative language, so not the first language you see, but let me walk through the first one first since it's there. "Notwithstanding paragraph (a), the following provisions apply to privileges recognized by these rules or to the protection that Texas law provides for tangible material or its intangible equivalent under 192.5," so in other words, work product. The difference between what I just read and what the State Bar proposes is exactly what Buddy was talking about a few moments ago, which is that our subcommittee felt that this new 511 should apply to -- the

limitations on waiver should apply to all privileges and not be limited to attorney-client and work product, and so the opening, "The following provisions apply to privileges recognized by these evidentiary rules," would cover husband-wife, patient-physician. Anything covered by the evidentiary rules would be covered here, unlike the State Bar folks who would limit it as 502 is limited, Federal Rule 502 is limited, to attorney-client and work product.

So we don't have a redline version of differences between this and the State Bar, so this is a little clumsy, but if I could suggest to see the difference now while we're here, turn back with me to Tab 5 -- to tab -- what is it, three? No. Where is the --

MR. LOW: Which one?

PROFESSOR HOFFMAN: Where is the State Bar's?

MR. LOW: State Bar proposal is five.

PROFESSOR HOFFMAN: Tab 5.

MR. LOW: And ours is six.

PROFESSOR HOFFMAN: So turn to Tab 5, if you would. So what you're looking at at Tab 5 now is Professor Goode's State Bar committee, and if you'll again just go to subsection (b) you will see that where our committee had titled this "Limitations on Waiver," they have following the Federal rule "Lawyer-client Privilege and Work Product," semicolon, "Limitations on Waiver." And then

beyond that title difference you'll see that their paragraph says, "Notwithstanding paragraph (a), the following provisions apply in the circumstances set out to disclosure of a communication or information covered by the lawyer-client privilege or work product protection." So again, to underline, the State Bar change would limit the limitation on waiver to attorney-client and work product. The version that we are proposing, whether you adopt the first or the alternative language, it makes no difference there. That's a subissue. I haven't gotten there yet -- is that the rule apply to all privileges recognized by the rules.

So I don't know whether it's appropriate to stop at this point and open it up. I'll sort of follow whatever folks want to do.

MR. LOW: Lonny, explain that the alternative is something that Lonny and I got together on yesterday, and we did it. I think that's consistent with what Professor Goode's committee wanted because we refer only to the civil rule of work product, and there the Code of Criminal Procedure, 39.14, talks about discovery, except written statements of witnesses and except work product of counsel. So just work product, if you put it that way, it would include whatever Texas recognized, civil, criminal, Federal and otherwise, and so for Lonny and I that -- our

committee hadn't had a chance to vote on that. We didn't get educated till yesterday on that point.

PROFESSOR HOFFMAN: So let me amplify what Buddy has said. So what I have been talking about so far has nothing to do with this difference in -- again, if you'll go back to Tab 6, nothing to do with the difference between the first paragraph and the alternative. That's a new issue that Buddy is talking about. So, but, again, to underline, the first issue is that there is a difference -- it's both a difference in language and a difference in policy between this evidence subcommittee's recommendation that the proposed 511 cover more than attorney-client and work product, it cover all the privileges recognized by the rules.

So that's point one, and then the other thing for us to consider is this business about the alternative language; and again, to amplify what Buddy just said, the first paragraph that you have there under Tab 6 is the initial language that the subcommittee considered, which is to have it apply to all the rules; but then to make a specific reference to work product as it's defined by 192.5 of the Rules of Civil Procedure. An issue that had been out there that we hadn't talked about that Professor Goode and others raised is that that was potentially a problematic citation for, among other reasons, because

192.5 doesn't apply in criminal cases. And so the alternative language, the "Notwithstanding paragraph (a), the following provisions apply to disclosure of a communication or information privileged by these rules or covered by the work product protection" is meant in that sense to track entirely or at least our intent was to track entirely what the State Bar did, and so maybe actually it is appropriate to jump over to -- Steve, to you and say at least picking up on that alternative language for a minute and leaving aside for a moment this policy debate about whether it should apply to all the privileges or just lawyer-client and work product, do you think we've at least captured what the State Bar would like with that alternative language, or do you see anything that you would dissent on there?

MR. LOW: Steve, why don't you get --

PROFESSOR GOODE: I'm not sure exactly what you're asking me --

PROFESSOR HOFFMAN: Yeah.

PROFESSOR GOODE: -- but because there are really two things going on here, and it's hard to disentangle the policy change from the language -- thank you. So let me just start with why we -- what we did with regard to limiting this to attorney-client privilege and work product. The genesis of this, of course, is the

Federal rule, and what we were trying to do is essentially incorporate in the Texas rules -- we were trying to do two things. One, because the Federal Rule 502, unlike all the other Federal rules, Federal Rule 502 actually has to be applied in state court at certain times. Federal Rule 502 says if there's -- under the terms of Rule -- Federal Rule 502, if there's not a waiver in Federal court then there's not a waiver in state court either, and so we are stripped of the ability to apply our rules regarding waiver with regard to the waivers set forth in Federal Rule 502. The limitations of waiver in Federal Rule 502 when they occur in Federal proceedings have to be applied in state court, and so the committee thought we need to put into our rules language that is going to tell Texas state judges essentially you've got to follow Federal Rule 502 when it's appropriate.

The committee then also said, well, we ought to consider whether we want to as a policy matter extend this to disclosures that are made in state proceedings, state offices and agencies, both of this state and other states, and create similar limitations in our rules with regard to state disclosures, both in Texas and then in other states, and incorporate those in the rules, and the committee did that as well. So to that extent the AREC's version of the rule doesn't simply incorporate the Federal

law, but it also extends the policy of the Federal law as it pertains to attorney-client privilege and work product to disclosures made in state proceedings in Texas courts, to state offices or agencies of Texas agencies, and to disclosures made in proceedings in Nebraska or to Nebraska offices or agencies, as we embraced the philosophy behind Federal Rule 502 and incorporated it into Texas and extended it.

What the committee did not do is extend it to other privileges that we recognize, just as the drafters of Federal Rule 502 did not extend it to other privileges that are recognized in the Federal courts. Federal courts, as Buddy pointed out, all the privileges are common law except the statutory privileges. And the drafters of the Federal rule created these special rules for waiver for attorney-client and work product because it was attorney-client and work product that presented the problem, particularly in massive discovery or massive turning over of documents to Federal agencies, of screening out all the attorney-client and work product materials, and it was the cost of doing that that was the impetus for Federal Rule 502. They did not extend it to other privileges because that's just never been a problem. To the extent that you need to screen out trade secrets, that's relatively easy. Or doctor-patient communication,

that usually doesn't present a big problem.

So the drafters of this Federal rule kept this special limitation about waiver to the problem area, attorney-client privilege and work product, and that's what the AREC committee decided to do as well. It's not that we have other privileges listed in our rules that makes a difference, and the Federal rules don't -- Federal rules don't have any privileges listed in the rules. The drafters of Federal Rule 502 said, "Here's the problem, we'll create special waiver rules with regard to attorney-client privilege and work product." So that's what the impetus behind the AREC debate was, and we -- we went over this for two years.

Now, to go to your question specifically, Lonny, the alternative that you've got here says not -- two comments I want to make. One is a relatively minor one and one is a more major one. "Notwithstanding paragraph (a), the following provisions apply to a disclosure of a communication or information privileged by these rules or covered by work product." I've got the right language, right? Just a very minor thing. The Federal rule says, "The following provisions apply in the circumstances set out." To be honest, in AREC we didn't particularly like that language. We thought it was sort of clunky. We decided ultimately after much debate to leave it in there

just because we were tracking the Federal rule as carefully as possible. We didn't want to create a situation where someone might say, "Well, the Federal rule on which this is based has this language. You've dropped it. That must be significant," and the more I've gone on the more I've actually seen what they were trying to do because what's going on here is that this rule is creating special rules of waiver for particular circumstances and saying other situations where parties might disclose privileged material are just going to be judged by the standard waiver rules that we've got. And so the language in the circumstances set out is just designed to emphasize these are special rules for very particular circumstances. So I would urge you to put that language back in, but that's not, I don't think, a major issue.

Just looking at this language, the problem I see is that what you've done is we've got a general rule that is applicable to all privileges and waivers in 511 -- what is it -- under this proposal (a)(1) that is contradicted by (b), because what you've got is the general rule is you waived the privilege if you voluntarily disclose a significant part of the privileged matter. So the general rule for waiver that we've had in Texas under these rules since they've been in place since 1983 is that if you voluntarily disclose a significant portion of a

privileged matter you've waived the privilege as to the whole, and then what (b) then does is says, well, here's the new rule for waiver, and it's not what you have in (a). It's not what you have in (b), and so it's not really so much a limitation on (a) as it is basically a gutting of (a).

And so I would suggest if, in fact, the policy decision is made that these waiver provisions ought to apply to all privileges -- and I don't feel strongly about that on the whole. I agree with the AREC decision that it ought not to, but if the decision is made that it ought to apply to all privileges, I think we need to go back and revisit the language of 511(a)(1), because what you've done is set out a general rule about subject matter waiver and essentially gutted it by creating a new rule with regard to all privileges in almost all situations in (b)(1) and (b)(2).

PROFESSOR HOFFMAN: If I could ask you a question about that to follow up on that then. So that -- so AREC does that, and that's exactly what AREC does as to lawyer-client and work product?

PROFESSOR GOODE: That's correct.

PROFESSOR HOFFMAN: And so but the point you're making now is you think that if you do it to everything, well, then what is the point of giveth with one

hand, with (a), and taketh away with (b). Why not one potential way to deal with that would be to just get rid of (a) and get right to the heart of it, and it becomes less confusing perhaps?

PROFESSOR GOODE: Of course, it doesn't totally gut it because there are some disclosures that take place outside these circumstances.

PROFESSOR HOFFMAN: So I guess my -- I had two reactions. Tell me what you think to this. I mean, the first reaction that I have to that -- I mean, that's the first time we've talked about this before, is, one, there are certainly circumstances, some of which we can think of and maybe some of which, you know, haven't yet become fact patterns that we haven't thought of that could be outside of (b)(1) through (4), and so -- so better to leave it in; and then, two, I'll return to a point that you've made to me more than once, which is doing any tinkering with (a) is tinkering with something -- maybe sacrosanct is a little too strong, but only a little too strong. Right? I mean, this is -- (a) is the rule. It's been around for a long time. In your view it's worked reasonably if not quite well, so what are we -- what do we -- another question is what do you gain by following that potential suggestion that you have of this, you know, you giveth and then take away, and so we ought to take out

(a), and what do we lose by doing that?

PROFESSOR GOODE: I'm not advocating taking out (a). What I'm suggesting is that (a) is a general rule that under this formulation is largely gutted. There may be some residual places where the general rule applies, but, in fact, the general rule becomes the exception under this formulation as opposed to the general rule, because it would only apply to disclosures outside Federal proceedings, state proceedings, to Federal agencies, state agencies, offices, any state of the union.

PROFESSOR HOFFMAN: Okay.

PROFESSOR GOODE: So that's my comment here.

PROFESSOR HOFFMAN: Okay.

PROFESSOR GOODE: And, again, the AREC thing is only limited to attorney-client and work product. The general applies to all the other privileges and to work product and attorney-client privileges in circumstances that are not set forth in (b). That's a policy issue, but I'm just alerting you to that fact, that if, in fact, that's where you go, the general rule of (a)(1) is effectively limited to marginal situations. That may or may not be the consequence. So I don't know.

PROFESSOR HOFFMAN: Okay, so I guess --

PROFESSOR GOODE: Did I answer your question?

PROFESSOR HOFFMAN: You have, and I guess

what I would say at that point is unless anyone wants to talk now, maybe it would be helpful to have in a sense sort of Steve finish the story by -- as I said at the beginning of my remarks, everything else is exactly the same as the State Bar has done, and so why don't we have the State Bar talk about the specifics of (1), (2), (3), and (4) rather than us do it.

PROFESSOR GOODE: Right. As I said, the State Bar essentially followed the Federal Rule 502 terms of trying as faithfully as possible to incorporate language of this rule, all the commands of the Federal rule, that is where the Federal rule says we've got to honor the waiver of the termination of the Federal courts, Federal Rule 502. We put it in there either expressly or in the comment. We don't recapitulate the Federal language on inadvertent disclosure because all it does is talk about reasonable steps, and we made reference to it in the comment again in the second paragraph. Then, as I said, we tried to address how we should deal with disclosures in state courts and to state offices and agencies, and we tried largely to replicate for disclosures to Texas courts or in Texas court proceedings, to Texas offices and agencies, and to other state's courts and state office -- other state's offices and agencies the same rules that the Federal Rule 502 has and with one possibly significant difference. We only

address -- the language in (b)(1) basically comes from the Federal rule again, with the addition of language that covers other state's offices, Texas and other state offices or agencies. There's a grammatical change I would suggest that I came across that would help the language of this, and I'll come to that later.

In (b)(2) we only addressed in the rule inadvertent disclosures in state civil proceedings because we have the clawback provision in the Texas Rules of Civil Procedure. Inadvertent disclosures in criminal proceedings, inadvertent disclosures to administrative agencies would just be dealt with as to whether or not there were waiver or not by traditional waiver doctrine. The State Bar committee did not feel that we could write rules that would cover those situations with any degree of confidence, so we just didn't address those.

CHAIRMAN BABCOCK: Steve, can I stop you for a second?

PROFESSOR GOODE: Sure.

CHAIRMAN BABCOCK: Would the inadvertent disclosure language of Federal Rule 502 apply in a Federal criminal proceeding?

PROFESSOR GOODE: In a --

CHAIRMAN BABCOCK: Federal criminal proceeding.

PROFESSOR GOODE: Presumably, yes.

CHAIRMAN BABCOCK: And was there any reason not to think about using that language for a Texas state criminal proceeding?

PROFESSOR GOODE: We -- we thought about and we went through drafts with language, and we ultimately decided in terms of inadvertent disclosures there is a body of case law and it's very hard to capture that, particularly given the range of situations, and so we just chose not -- to try not to codify, but leave it to -- to the courts to deal with those on a case-by-case basis.

CHAIRMAN BABCOCK: I know you've had conversations with Judge Keller and maybe Judge Womack, who I think is -- is Judge Womack still the liaison to our committee?

HONORABLE NATHAN HECHT: I don't think so.

PROFESSOR GOODE: Judge Womack is on the AREC committee.

CHAIRMAN BABCOCK: Yeah, and did they have any view about just kind of staying silent on the criminal side and leaving it to case law?

PROFESSOR GOODE: Judge Womack was fine with that. He's a committee member, and he's been at these meetings, and he's had no problem with that.

CHAIRMAN BABCOCK: Okay. Did Judge Keller

have a view on it?

PROFESSOR GOODE: I haven't spoken to Judge Keller. Judge Womack certainly didn't report back that there were any problems.

CHAIRMAN BABCOCK: Very good.

PROFESSOR GOODE: I'm heading over to a meeting at the Court of Criminal Appeals as soon as I get done here.

CHAIRMAN BABCOCK: Well, you could ask them.

PROFESSOR GOODE: I'll ask when I get there.

CHAIRMAN BABCOCK: Okay. Sorry to interrupt.

PROFESSOR GOODE: Not at all. It's a good question. As I said, we tried to come up with language, and we just couldn't get what we thought was good language that we felt comfortable with. In (b)(3) we actually did diverge a little bit from the Federal rule, not with regard to what happens in Federal proceedings but we're bound by Federal rule. The language of Federal Rule 5-0 -- I don't know if you've got that in your packet.

PROFESSOR DORSANEO: No, it's not in here.

HONORABLE NATHAN HECHT: Yeah, it is.

PROFESSOR GOODE: The first tab, the language of Federal Rule 502(d) says, "The Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the

court, in which event the disclosure is also not a waiver of any other Federal or state proceeding." We're bound by that. If there is a disclosure and a Federal court order says it's not a waiver, we've got to honor that in Texas state court.

A concern that was raised in our committee was the following: Suppose a party during the course of discovery turns over a bunch of documents, perhaps intending to waive the privilege, perhaps inadvertently turning them over, but without taking any precautions or failing to make use of the clawback provisions, realizes that it has waived the privilege and then decides there's only one thing to do, settle, and but part of the settlement is you've got to go to the court and say, "We want to settle, we want an order from the court that says we didn't waive the privilege."

The language of the Federal court -- Federal Rule 502 seems to authorize that, because it doesn't say that the disclosure has to be made pursuant to an order. It's not that the Federal court enters an order, tells the party, "You can disclose this stuff and don't worry about privilege." At least the language will seem to allow the Federal court at the end of the day to accommodate the parties' settlement desires after such an order and negate the waiver; and AREC ultimately decided that was not a good

idea, that we did not want -- we wanted parties to be able to rely on a court order and disclose documents, but not have a court order at the last second be used as a means of covering up disclosures that were perhaps advertent or disclosures that were inadvertently made but people didn't take advantage of the clawback provisions; and so in our language of (d)(3) we say, "A disclosure made pursuant to an order of a state court of any state," that the privilege protection is not waived; that is, the disclosure has to be pursuant to the order of the court. That does not constitute a waiver in a Texas state proceeding.

"A disclosure made in litigation pending before a Federal court that has entered such an order is likewise not a waiver," so that we've incorporated the Federal Rule 502 that any order entered by the Federal court that says disclosure is not a waiver is not a waiver in Texas court, but we have taken away from Texas courts or Texas parties the ability to use the court as a means of undoing the waiver as part of the settlement. That's -- that's the policy determination, and again, you may want to look at that, but that's a difference from the Federal rule.

Now, I will say it's not clear to me from reading everything I've read about the drafting of the Federal rule that the drafters of the Federal rule intended

to allow these post hoc court orders to negate a waiver. They seem to be talking about having courts enter these orders and then the parties disclosing pursuant to the order, but the language is broader than that, and so we did not want that loophole.

PROFESSOR HOFFMAN: Can I suggest on that -- we haven't talked about this either, but you and I have talked about this point. I'll just say for my part of those of you who are struggling and you didn't notice that, I didn't notice that and I've dealt with this for a while, that there was that difference. We ought to think about the possibility of putting in a comment. We currently don't have one that draws attention to that for practitioners. I guess the alternative of not putting in the comment and thus we maybe --

PROFESSOR GOODE: People can buy my book.

PROFESSOR HOFFMAN: Yeah.

MS. PETERSON: Oh, they will anyway.

PROFESSOR HOFFMAN: They'll get there eventually, right, by hook or crook. Maybe something to think about. That's a distinction that is not obviously picked up.

PROFESSOR GOODE: No, and I will say it's something that did not come up in the first or second go around of our drafting, but it's something we've been

spending a lot of time talking about, but I did want to highlight it because it is a place where we made a policy decision that may or may not be different from the policy decision made by the drafters of the Federal rule, but it's certainly a policy decision that reflects something different from what the language of Federal Rule 502 says.

CHAIRMAN BABCOCK: Steve, let me ask you one other question. The Federal rule subparagraph (d), 502(d) --

PROFESSOR GOODE: (d) or (b)?

CHAIRMAN BABCOCK: (d) as in dog, purports to make whatever happens under (d) applicable in a state proceeding.

PROFESSOR GOODE: Right.

CHAIRMAN BABCOCK: And you commented a minute ago that our courts are bound by that.

PROFESSOR GOODE: That's correct.

CHAIRMAN BABCOCK: And what's the theory on how a state court judge would be bound by a Federal Rule of Procedure?

PROFESSOR GOODE: Well --

CHAIRMAN BABCOCK: I mean, just because it says so, but --

PROFESSOR GOODE: Federal Rule 502 actually is an act of Congress. The Federal -- the Supreme Court

actually does not have -- U.S. Supreme Court does not have the power to promulgate privilege rules. That was taken away from the Supreme Court in 1975, and so this actually was enacted as a act of Congress.

CHAIRMAN BABCOCK: Okay.

PROFESSOR GOODE: Now, it may be an unconstitutional act of Congress, but at least we were proceeding on the theory that it was not unconstitutional. The intent throughout Federal Rule 502 was that Federal Rule 502 would not work unless practitioners were guaranteed not just that if they disclose documents pursuant to a court order in a Federal proceeding that it would be privileged in other Federal courts, they had to know that it would also be privileged in state court proceedings as well. Otherwise, they have to go back and do the same costly screening in order to avoid potentially waiving a privilege not only in this litigation but for litigation down the road. That was the interest that the drafters thought was sufficient to bear the weight of applying this in state courts.

CHAIRMAN BABCOCK: I take it there hasn't been any case law on that, either state or Federal?

PROFESSOR GOODE: There is case law under Federal Rule 502 but none challenging its applicability in state courts that I'm aware of.

CHAIRMAN BABCOCK: That's what I meant. Okay.

MR. LOW: Steve -- I mean, Chip, one of the things, 502 controlling effect says it applies even in state in the circumstances set out in the rules, but (c) talks about disclosure made in state proceedings when it's made in state proceedings and is not the subject of a court order, then it is, but if there's a court order I don't believe -- I mean, that's just whether you can go back and say, well, it was a waiver, but I think under these rules they would be bound, the Feds would be bound by a state order, so it's only that it controls in the circumstances set out. So I don't think the Federal rule does away with a state judge to order that there's a waiver and then it looks like under this rule they would be bound by it.

CHAIRMAN BABCOCK: Yeah, I agree with you on (c), but I was focusing on (d). I'm not for sure, but --

MR. LOW: Okay, (d) maybe.

CHAIRMAN BABCOCK: I didn't mean to get off on that track. Justice Hecht. You were there when all of this nonsense happened.

HONORABLE NATHAN HECHT: I wasn't on the evidence committee; but I was on the civil committee when they were discussing whether to have a Federal clawback rule like Texas does; and one of the concerns was that it

would mislead lawyers into thinking that if they got it back in the Federal proceeding they were okay, when if there were parallel state court proceedings or if just some other proceeding arose, whatever happened under the Federal rules would offer no protection at all; but then it got everybody to thinking, well, shouldn't there be some protection in those circumstances; and that led to the evidence committee adopting Rule 502. But if you remember back when the Federal Rules of Evidence were proposed, there was a 500 series on privileges, and they were very controversial with the Congress, and so they didn't -- they were not approved, and that process was delayed actually because in part of the controversy over the privilege rule, so that's why there aren't any in the Federal rules. They just left it to state law, but there were lots and lots of discussions about whether 502 could apply in state proceedings, and the view of the participants was that if Congress passed it, excuse me, then it could, and I guess we'll see. I expect the U.S. Supreme Court would say since it's their rule, that it can, but who knows.

CHAIRMAN BABCOCK: But you could easily see a state district judge in this state or any other state saying, you know --

HONORABLE NATHAN HECHT: Right.

CHAIRMAN BABCOCK: -- that the Federal Rule

of Evidence is not going to bind me. If I want to find a waiver then I'll, by god, find one.

HONORABLE NATHAN HECHT: Yeah. So, I mean, and in that regard I think it's very useful to have a corresponding provision in the Texas rules to take that issue off the table.

CHAIRMAN BABCOCK: Right. Exactly. Yeah. Buddy.

MR. LOW: Judge Hecht mentioned the snapback rule, that there's no evidence rule, but Federal Rule 26(b) does have a snapback rule. That's not in the Rules of Evidence, but it's a little different than our snapback rule.

HONORABLE NATHAN HECHT: Right.

MR. LOW: Did they discuss having a snapback rule in the evidence rule?

HONORABLE NATHAN HECHT: Well, yes, it was -- when they were talking about electronic discovery, the way that it all came up, whether to have civil rules on electronic discovery, and so they were looking at the Texas rule on electronic discovery, but Judge Rosenthal and I said, "Why don't you look at the clawback rule as well," and so then that led to the concern, and they -- the evidence committee picked it up, and so here's their draft, and there is a clawback rule in the civil rules.

MR. LOW: Theirs is a little simpler. You just give notice, and in Texas you have to do a little bit more than that.

HONORABLE NATHAN HECHT: Right. But the idea was -- that was adopted, but the thought was it's not going to give people enough protection. There needs to be an evidence rule.

MR. LOW: Okay.

CHAIRMAN BABCOCK: Okay. Yeah, Professor Goode.

PROFESSOR GOODE: If I may just talk about the difference between (c) and (d).

CHAIRMAN BABCOCK: Yeah.

PROFESSOR GOODE: The purpose of (c) is (c) is a provision that tells Federal courts how to deal with waiver issues if the waiver took place in a state court proceeding so that if a party discloses privileged material, attorney-client privileged material in a state court proceeding, does the Federal court have to recognize the state court ruling or not; and the rule in (c) is that the Federal court is going to apply either the state court rule that was more protective of privilege or the Federal approach to waiver if that is more protective of privilege. But (c) doesn't address what state courts have to do --

CHAIRMAN BABCOCK: Right.

PROFESSOR GOODE: -- in dealing with waivers that apply in Federal court. That's the province of (d), and (d) tells state courts you've got to follow our rule with regard to waiver if it occurs in a state proceeding or to a Federal office or hearing.

CHAIRMAN BABCOCK: And one could see how a state, perhaps not Texas, but some state might be resistant to a Federal Rule of Evidence telling them how to conduct their privilege decisions determinations. So here there is an effort to take that issue away and say we're just going to do this the same way the Feds are, right?

PROFESSOR GOODE: Indeed. We're actually concerned as much with the ignorance factor as the resistance factor, that judges just wouldn't know about Federal Rule 502 and wouldn't apply it.

CHAIRMAN BABCOCK: But you can easily see a party pointing it out and saying, "Judge, look at this Federal rule. It applies to you. It binds you."

PROFESSOR GOODE: Right.

CHAIRMAN BABCOCK: And you can hear some judge saying, "No, it doesn't."

PROFESSOR GOODE: Exactly.

CHAIRMAN BABCOCK: And then or you go to the court of appeals and then they say, "Oh, it's an act of Congress, yes, it does," or you know, "We're, by god,

Texans and the Feds are not going to tell us what to do." Munzinger is wanting to say that himself, but --

MR. LOW: We hit something that got a response out of him. We're getting him going now.

CHAIRMAN BABCOCK: He's not quite revved up enough yet, but he will be. Justice Gray.

HONORABLE TOM GRAY: I guess I would like to hear Steve -- and maybe I'm just a little slow this morning, but the -- as I understood what you were saying, the Federal rule (d) would apply to the situation where a person is successful in having an order made by the Federal judge at the end of the proceeding that says "Your disclosure in this did not waive any privileges," and yet in the proposed draft you attempt some way to -- I don't want to put words in your mouth -- circumvent that result, and I'm trying to figure out how in one way we're going to abide by the Federal order and then one particular factual circumstance we might be trying to avoid, avoid it. And maybe I just didn't understand, so --

PROFESSOR GOODE: What we tried to do was write our 511(b)(3) in such a way that we did not circumvent the Federal rule. That is, if a disclosure is made and there is a Federal court order that says it is not a waiver, that's binding on the Texas courts.

HONORABLE TOM GRAY: Even if it's made in

this unusual circumstance at the end of the litigation and is intended to cloak the proceeding or the disclosure with privileges.

PROFESSOR GOODE: That's correct. To the extent that that ultimately will be deemed permissible under the Federal rule.

HONORABLE TOM GRAY: Okay. I misunderstood.

PROFESSOR GOODE: What we tried to do is say you can't do that in Texas. We're not going to honor -- we're not going to allow Texas courts to do that and/or a Texas court, another Texas court, is not going to be bound by it, or if another state court does it, we're not going to be bound by that.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: The Federal rule and the state rule both address an order entered by a court, and the state -- proposed state rule talks about state offices or agencies without defining them. I'm not concerned about a state agency, for example, the Public Utility Commission obviously would be a state agency under this rule, but then when you get to the controlling effect of a court order, it's limited to a court and not, for example, the PUC. The PUC let us -- I don't practice before that agency, but let's pretend it's some other state agency which says, "You must give me this" or you give it to them to persuade them

and then ultimately get an order from the PUC or someone else saying that wasn't a waiver. That does not seem to fall within the protective, if it is meant to be protective, or at least doesn't fall within the language of subparagraph (3) of the proposed rule because it's limited to a court. And I understand it was copied from the Federal government or from the Federal rule.

I want to know why that -- why you wouldn't expand it to include such protection and then I want to come back and ask a question. Municipally you can work before a city council or for some regulatory agency where you have a franchise, for example, and certain material must be produced in connection with your application for a franchise or your exercising a franchise and that information could be a trade secret. Customer lists, for example, are -- in my opinion are a trade secret. To get my franchise I must identify my customers. This rule on its face doesn't protect that, and I'm curious whether we want to -- or you have given consideration to -- the problem of limiting the protection of the rule to state offices or agencies under the circumstances of a municipal disclosure that I've outlined, and secondly, the regulatory agency problem that I've -- I hope I've raised.

PROFESSOR GOODE: Let me address the first one because, as I understand what you're saying, what that

really is going to is another issue that the Federal committee considered and ultimately decided to pass on and that Congress did nothing about it, which is the issue of selective waiver. That is when a party turns over voluntarily material to a Federal agency and the Federal agent says -- either says or doesn't say, "You turn it over to us and it will be privileged." There is a lot of case law about that. There are a couple of cases that have recognized this concept of selective waiver, but by and large it has been rejected in most jurisdictions and by most Federal courts.

This was an issue that came up and was the most controversial part of Federal Rule 502, and if you look at the minutes of the April 2007 meeting of the committee, you can see a discussion of this, but on -- really what you had on the one hand was the government agencies wanting a selective waiver rule, wanting to be able to go to mostly corporations and say, "Turn over this stuff. We're investigating you, turn over this stuff as a sign that you're acting in good faith, and by the way, it will be privileged," and government agencies, of course, love that idea. The bar and the committee members who are largely representatives of big law firms hated that idea and fought it and as a result it did not go through.

The situation that you're mentioning is not a

new situation. That's the regime we've been living under since we had these Rules of Evidence and before that, but, again, we weren't trying to do a massive rewrite of the law of privilege. What we were trying to do is take this particular issue that arose to us as a result of the passage of Federal Rule 502 and in as limited a way as possible incorporate it into the Texas rules and deal with the same exact problem that Texas lawyers face that the Federal lawyers face, and so we were trying to do a massive rewrite and deal with these problems that, again, we've been dealing with for 30 years under the Texas Rules of Evidence and before the Texas Rules of Evidence came along.

CHAIRMAN BABCOCK: Professor Dorsaneo.

MR. LOW: Steve, Tab 10 also covers -- that's the selective. What Richard's talking about is under Tab 10, I believe, isn't it? Selective waiver, talking about agencies. That was the proposed -- the Feds said if you want one, this is what it would be, but we don't think we should have selective waiver, but that's under Tab 10.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Steve, I'm still having a lot of trouble with the -- with (b)(3). I think maybe you had to be at all of your committee meetings and read your prior drafts in order to be able to understand what this language, which is very difficult language, means, and

I -- when I compare it to the language in Federal Rule 502, and I have a hard time seeing how you get from 502(d) to (b)(3). I mean, could you take us through that a little bit better? I don't think I'm the only one --

PROFESSOR GOODE: Okay. That's fine.

PROFESSOR DORSANEO: -- that has trouble with this language.

PROFESSOR GOODE: Again, here is the problem that the AREC committee members saw, which is there are two ways in which you might have a court order come into play here. One is the way that I think the drafters of the Federal rule were thinking about, which is early on discovery is just gearing up and the parties go to the court or the court on its own motion enters an order that says, "Look, you can disclose in response to discovery without worrying about waiving a privilege," so if you turn over stuff in response to discovery and you turn over privileged stuff, even though you haven't done a search you can just turn everything over that you want, and it's not going to be waiver of the privilege, so when the time comes later on and the other side wants these documents you can assert the privilege, and you turn it over in this thing --

PROFESSOR DORSANEO: Let me stop you. So that's what your committee or the State Bar committee thinks 502 -- Federal 502(d) is about?

PROFESSOR GOODE: Well, I think that's what they were aiming at. The language, however, is broader than that, because the language also --

PROFESSOR DORSANEO: How do we know what they were aiming at if we don't go by the language that they're using?

PROFESSOR GOODE: From reading the minutes of their deliberations. Now, there may have been some sub rosa motivation. I don't know. Our concern was that the language is broader than that. The language would also allow the situation where the parties, not having any court order to rely on, one of the parties turns over a bunch of really juicy privileged stuff either deliberately or, more likely, inadvertently.

PROFESSOR DORSANEO: Right.

PROFESSOR GOODE: Doesn't take advantage of the clawback, even after it discovers it's turned this over. It has acted in a way that everyone would say would have waived the privilege, and of course, once waived, forever waived, and so the lawyer realizes this in a panic, realizes this is terrible, that, you know, not only is it going to kill me in this suit, it's going to kill me in a bunch of other suits, offers to settle the case. Part of the settlement is the other side agrees we'll get a court order that says you haven't waived the privilege. No skin

off the settling party's back. The only people who aren't going to get those documents are the other people that might be suing this defendant.

That seems to be allowed under the Federal Rule 502(d) or at least the language, because it doesn't say that the disclosure has to be pursuant to the court order. It just says, "A court may order that the privilege is not waived by disclosure connected with the litigation pending before the court." That would have been a disclosure in connection with litigation pending before the court, and I have a court order that says there is no waiver, and it is now binding not only on parties there, it's binding on everybody. We're stuck with that, because if the Federal court does that, we're stuck with that in Texas. There's no waiver under the terms of Federal Rule 502(d). What the AREC people wanted to do was just say you can't do that in a state court proceeding.

PROFESSOR DORSANEO: Well, with all due deference, I think this language is still very clumsy language to make that point. I mean, I can see where you add the words "pursuant to an order of the state court" -- "of a state court of any state," I see what that language is meant to accomplish. It's talking about a limitation on the disclosure, but then you keep going --

PROFESSOR GOODE: Right.

PROFESSOR DORSANEO: -- "that the privilege or protection is not waived." The words don't work well for me. "Disclosure made pursuant" and then "to a court order," is the court order stating that the privilege or protection is not waived? Is that the idea, the court order both orders disclosure or talks about disclosure or authorizes disclosure, whatever word you want to use, and also states that the privilege or protection is not waived? That's what the order does? The order does two things?

PROFESSOR GOODE: The order says if you disclose in connection with litigation pending before this court you're not going to waive the privilege.

PROFESSOR DORSANEO: Okay.

CHAIRMAN BABCOCK: Justice Brown, and then Richard Munzinger.

HONORABLE HARVEY BROWN: I had a question about the relationship between (3) and (4), because (4) also talks about the court order in the last phrase, and let me put this more concretely with an example. I'm in a deposition, and I'm producing a witness. They ask a question I think is privileged. They think it's not privileged. We go back and forth awhile, and after awhile I say, you know, "I don't really care. I'm willing to let him answer the question as long as you agree there's no waiver." He says, "I'll agree." I now know about this

rule, and I say, "But I'm going to have to get this agreement into a court order later." Okay, obviously I'm not going to get a court order that day before the deposition is finished, so we have an agreement, and it's put into a court order, but the court order is after the fact, the disclosure is not, quote, "pursuant to court order." Is it protected?

PROFESSOR GOODE: No -- first, the language that you're talking about is the language of the Federal rule (e). So I think we're really back to (d), the Federal rule (d), and our (b)(3).

HONORABLE HARVEY BROWN: Okay.

PROFESSOR GOODE: Because the language in (d)(4) is exactly the language of the Federal rule. We're just saying parties can't agree on their own and create an agreement that is binding not just on them but as to other people.

HONORABLE HARVEY BROWN: Right. So my hypothetical --

PROFESSOR GOODE: Your hypothetical --

HONORABLE HARVEY BROWN: -- is protected from waiver not only in this case but in subsequent cases.

PROFESSOR GOODE: No, in this case.

HONORABLE HARVEY BROWN: Just in this case.

PROFESSOR GOODE: Under the language of the

50 -- 511(b)(3).

HONORABLE HARVEY BROWN: Okay. What about the language under (b)(4)?

PROFESSOR GOODE: (b)(4), again, the purport of (b)(4) is that -- to say parties can't do it themselves. They have to have a court order.

HONORABLE HARVEY BROWN: Right. What if the court order is after the fact is my question?

PROFESSOR GOODE: Right. I think the court order after the -- the controlling effect of the court order is controlled by the previous paragraph.

HONORABLE HARVEY BROWN: So you think that (4) is incorporating this idea that you're trying to get at that the court order has to be before the disclosure.

PROFESSOR GOODE: Right.

HONORABLE HARVEY BROWN: I don't think that's very clear, at least in (4), that you're saying that a court order has to be before the disclosure. Because if I didn't feel comfortable in a deposition saying, you know, "We've got an agreement and we're going to get a court order later." You're saying, no, you're in trouble.

PROFESSOR GOODE: Yeah, I think what the drafters of the Federal rule were trying to do in their paragraph there is to make the point parties can't do this themselves, but they also want to say, by the way, parties

can certainly agree and get a court order, and that's the way that you do it. And, again, because of the language, either intentionally or unintentionally, that's in the Federal rule it doesn't require the disclosure be made pursuant to the court order. That's -- your hypothetical is not a problem under the Federal rule.

HONORABLE HARVEY BROWN: Federal rule, right.

PROFESSOR GOODE: But it could be a problem insofar as you're concerned with not waiver in this litigation, but waiver in other litigation under the AREC version of (b)(3).

CHAIRMAN BABCOCK: Richard, then Justice Gray.

MR. MUNZINGER: I don't want to beat a dead horse, but --

CHAIRMAN BABCOCK: But it's still twitching, so let's go.

MR. MUNZINGER: The Federal rule is applicable to the attorney-client privilege only and work product privilege.

PROFESSOR GOODE: Correct.

MR. MUNZINGER: The proposal is to make the state rule applicable to all privileges, not just the attorney-client and work product privileges.

PROFESSOR GOODE: The AREC proposal is to

make it applicable only to work product and attorney-client. Lonny's committee's proposal is to make it applicable to all privileges.

PROFESSOR HOFFMAN: Buddy's committee's proposal. He may not -- he may have said he didn't know much, but it still had his name at the top of the letterhead.

PROFESSOR GOODE: My apologies to both of you.

MR. MUNZINGER: Again, my --

HONORABLE JAN PATTERSON: But you're not backing off from it, Lonny, right?

MR. MUNZINGER: My question about disclosure, again, of trade secrets, for example, to a municipal agency or to a state agency. If you draft a rule that is applicable to all privileges but the logic of the rule and the circumstances that justify the rule are aimed at the attorney-client and work product privileges, the work product arising in litigation, only in litigation, if I understand the work product privilege correctly. Then what you're doing, it seems to me, is creating a serious problem for people who are -- whether it's voluntary or involuntary, a rule-making proceeding. "Gee, PUC, it would help you to do this if you knew how many kilowatt hours we are doing on A, B, and C. It will help you write this

rule," and I make a disclosure to that, and I attempt to make it confidential or what have you. Wasn't coerced, but now I have an evidentiary rule that seems to say that I've lost my privilege and there's no way of protecting the privilege, and it just bothers me that you have this rule that is going to apply to all privileges, but it has been written -- it's been -- and I don't use this in an argumentative way. You've told us we must do this because Congress has told us that, assuming that it's constitutional, what have you, that's not the debate.

We're taking a rule that the Feds wrote to protect, or to govern rather, the attorney-client and work product privileges, and we're making it applicable to the accountant privilege, the husband-wife privilege, the trade secret privilege, and all the privileges that are enumerated in the Federal -- in the state Rules of Evidence that are not enumerated in the Federal Rules of Evidence, and I think we may be having some substantive effects that we don't anticipate in the way that these are written and in the way that they're applied.

CHAIRMAN BABCOCK: Justice Gray, and then Judge Evans.

HONORABLE TOM GRAY: From a -- just a construction point of view, the -- since we're dealing with two different entities and sort of a related issue, my

suggestion would be to break (3) into the two parts as the Federal rule did, the controlling effect of a state order and then the controlling effect of the Federal order even though they ultimately may be the same, and basically I'm just talking about the first sentence would fall under probably the new (4), and the second sentence would fall under a new subsection (3), the controlling effect of a Federal order, so that it's more clear that we're trying to break out a arguably but very subtle distinction between the effect of the Federal order and the state order and then with Lonny's recommendation that a explanatory note accompany it or a comment.

I think that would help achieve what Bill Dorsaneo and I are struggling with of how to structure this so that it makes -- so that the reader when they read it really understands the subtleties of the distinction that's being made, that there may not really be a distinction, but if ultimately the Federal rule is construed the way you think it ought to be, which is the way you've structured this rule for the state orders, so just a suggestion.

CHAIRMAN BABCOCK: Great. Judge Evans.

HONORABLE DAVID EVANS: A couple of comments, and I wondered if there were any standards for a state court to enter such an order in a disputed situation and what those standards would be and if they would have to be

discussed. And could a state court somehow order that it's going to be confidential and only for this proceeding and somehow override somebody's privilege over their protest? So I think there's some work that might be considered on the rule there.

How would you do this order without violating 76a? You would have to post it. Then you would have to have the material put in the record and then you have to enter an order, so I think there is some interplay with 76a on the practicalities of how a state judge would get to that point in doing it; and the other thing is, I'm just -- I may -- I'm surprised. I thought parties could enter into private contracts on privileged information and that's what they did in anticipation of a lot of business deals and that that didn't waive it to the world, and so I don't know why under Rule 11 parties can't enter into agreements if they trust the other party, so I just wasn't aware of that.

PROFESSOR GOODE: I think the short -- sorry.

CHAIRMAN BABCOCK: No, go ahead, Steve.

PROFESSOR GOODE: I think the short answer to your last question is parties can enter into agreements that are binding between themselves, but they can't change the law of privilege. The law of privilege is that if you voluntarily disclose, you've waived your privilege, and that's the selective waiver document that's been rejected.

HONORABLE DAVID EVANS: So if two businesspeople enter into a transaction to merge a couple of companies and they trade all types of confidential information and privileged information up and down the line, then any other competitor can come in and get that information? I don't think so.

PROFESSOR GOODE: You've waived the privilege.

HONORABLE DAVID EVANS: I just don't think so. Otherwise there's no joint defense privilege.

CHAIRMAN BABCOCK: That speaks to Richard's point that if you -- if you expand this waiver concept to privileges other than attorney-client and attorney work product, for example, his example of trade secrets, you get NDAs all the time when companies are disclosing substantial trade secrets and proprietary information; and if we impose this scheme on, for example, trade secret privileges, perhaps you're saying that, no, you can't just agree to that. You've waived it by disclosure.

HONORABLE DAVID EVANS: Well, you have three parties to a litigation, and you have two of them commonly aligned, and they communicate all through the case, and they assert the joint defense privilege, as it's commonly called, common interest privilege. That's an agreement between the parties to share privileged information in

litigation. That doesn't waive anything.

CHAIRMAN BABCOCK: Steve.

PROFESSOR GOODE: The answer to that is because that's the Texas Rule 503 includes in the definition of attorney-client privilege --

HONORABLE DAVID EVANS: Okay.

PROFESSOR GOODE: -- what you call the joint defense privilege. That's covered. Let me just make clear, though, this is limiting waiver doctrine, not expanding waiver doctrine. The purpose of the Federal Rule 502 was to cabin waiver doctrine and make it smaller than it already is.

CHAIRMAN BABCOCK: Right.

PROFESSOR GOODE: And the purpose of Rule 511(b), either Buddy's committee's version or the AREC version, is to limit waiver, because waiver is now currently governed by Rule 511, in our thing Rule 511(a). That's the general waiver provision, and what this is doing is saying we are going to narrow the circumstances under which waiver will be found, in the AREC version, for attorney-client and work product privileges in these particular situations. That is, situations where otherwise you might find waiver, there's not going to be waiver, and so this is limiting the extent to which waiver occurs as opposed to expanding the way waivers occurs.

PROFESSOR HOFFMAN: So if I could just piggyback on that one thought and so that's why I got confused, Richard, what you were talking about. In other words, the -- at least our committee's intent on expanding it to include the other privileges is that we were trying to be more protective of those privileges, not less, and so unless there was something I missed in what you were describing I didn't understand how making the rule broader than AREC is proposing to cover accountant privilege or husband-wife or whatever, patient-physician, would be worse off. The world would be -- there would be less protection of waiver of those privileges.

MR. MUNZINGER: The only response I would have is -- would be to look at proposed Rule 511(a), "A person upon whom these rules confer a privilege against disclosure waives the privilege if" -- and it continues on, so it defines waiver, and if the intent of the rule is only to restrict the ways in which it can be waived, that may be the intent of the rule, but it seems to me that the proposed rule defines waiver.

PROFESSOR HOFFMAN: Just to be clear, that's current law. In other words, (a) is exactly what's in 511 now. There's no difference. So all we're adding is -- all we're doing is taking away when there would be waiver.

MR. LOW: We made no changes to (a).

MR. MUNZINGER: Well, but the limitations on disclosure, it seems to me, are more limited than the definition in (a), and so if there is a limitation on waiver in (b) and it is intended to restrict the waiver in (a), the limitation seems to me to be less broad than the definition because at least it appears to me that, one, it limits it to state offices and agencies without reference to municipal offices and agencies; two, it has the same problem that we've talked about in agreements between parties and in working with these agencies in that only a court order can protect against the waiver of privilege and not the order of a regulatory agency when much of the disclosures of privileged information will occur in a regulatory scheme.

I mean, I represent somebody right now who is involved in a situation with an ordinance, and the draft of the ordinance that the city council is proposing requires the production of information which is clearly trade secret information, and I understand that if I give that arguably there is an open records statute that says someone can come in and get that information from the city and then I have to go to court, what have you, and do all these things, but nevertheless the privilege is implicated by the command of the ordinance, and so that's one scenario that -- I've read this one or two times and I haven't given it the study that

you fellows have, but it does seem to me that the language raises that problem, and it goes beyond just the situation where the city commands the production of the information.

It may be of benefit to private enterprise to cooperate with government regulators. "Gee, government, don't make a rule that says the pipe has to be three inches wide. For god's sakes, do you understand that if the pipe is only three inches wide that the pressures created will cause an explosion when it turns left at less than 40 degrees," and the government doesn't know that. So here I'm running out and I'm showing them all of this information, and it's trade secret, and it's protected, and here I've got a rule which seems to me to say now that it applies to every privilege and not just the attorney-client privilege, that I've waived it unless I've met these rules, but there is no rule that lets the agency protect it.

PROFESSOR HOFFMAN: And so just to be clear, though, that's current law. Without arguing the content of whether that's good or bad law, that's current law. Everything that Richard said is what applies -- if that's a problem, it's a problem today, and there's nothing in the proposal that makes that any worse.

MR. MUNZINGER: And that's where you and I may part company, because I may be wrong in this, but does the current rule limit protection of privileges to court

orders? "Controlling effect of a court order," is that existing language?

PROFESSOR HOFFMAN: No. Everything -- and, again, if you're looking at Tab 6 at draft 511, everything after (a) is new. It's new to the state. So -- so, again, if you want to just retrace everything, start with existing 511. Existing 511 is 511(a) in the proposed rule. That's it. That's all there is.

CHAIRMAN BABCOCK: Professor Dorsaneo and then Justice Brown and then Justice Bland.

PROFESSOR DORSANEO: Well, I'm -- let me see if I am understanding this and then I have a question. 502(d) is the controlling effect of a Federal court order, and there isn't anything in new 511 that talks about that at all. That's just dealt with by Federal law.

PROFESSOR GOODE: No.

PROFESSOR DORSANEO: Right?

PROFESSOR GOODE: No, that's not right. That's the last sentence and the one that apparently is giving -- part of the 511(b)(3) that's giving people such difficulty.

PROFESSOR DORSANEO: Oh, okay. The last sentence.

PROFESSOR HOFFMAN: The last sentence of 511(b)(3) is AREC's version of 502(d).

PROFESSOR DORSANEO: Yeah, I understand that, and the last sentence, which I hadn't been focusing on, is what tells us about 503 -- 502(d), "disclosure made in litigation" -- this preceding sentence, which I at least now have reworded on -- in my little notebook so that I can understand it, is talking about pursuant to an order of a state court of any state, and that's not in Federal Rule 502 anywhere, right? Or is it?

PROFESSOR GOODE: That's correct.

PROFESSOR DORSANEO: Which one? Which question that I asked you?

PROFESSOR HOFFMAN: It's not in there.

PROFESSOR GOODE: It is not -- 502(d) is saying when a Federal --

PROFESSOR DORSANEO: It's only in Federal orders. All right.

PROFESSOR GOODE: The state has to follow Federal court order.

PROFESSOR DORSANEO: Why -- so this controlling effect of a sister state court orders is a new idea that's added into this Texas rule.

PROFESSOR GOODE: Correct.

PROFESSOR DORSANEO: It's kind of a full faith and credit principle, perhaps consistent with a full faith and credit clause, perhaps not, if there would be

some policy exception. So any committee that's recommending adoption to this rule probably should address whether that's a good concept, as to whether to give full faith and credit to a court order of a sister state saying that something is -- that the disclosure doesn't waive a privilege.

PROFESSOR GOODE: As I said, one of the policy determinations that this rule embraces is the idea that not only would Texas courts -- first, that we would say essentially the same regime that the Federal courts have and now employ under Federal Rule 502 is going to apply in Texas courts; that is, Texas courts can enter these orders and disclosures made to Texas offices and agencies are covered, but we went further and said and we're going to have the same rule with regard to disclosures made pursuant to an order of a Nebraska court, or a disclosure made to a Nebraska state office or agency. That was a policy decision.

PROFESSOR DORSANEO: All right. That's because that's a good idea, not because you think it's some kind of Federal law requires it.

PROFESSOR GOODE: Exactly.

PROFESSOR DORSANEO: All right. Although the full faith and credit clause arguably, you know, would cover it.

PROFESSOR GOODE: Perhaps. I'm not an expert on the full faith and credit. We weren't doing it on basis of full good faith in credit. We did it strictly on the grounds that we thought we ought to honor those same kind of --

PROFESSOR DORSANEO: Full faith and credit covers court orders. It seems to me it would cover it unless there is a public policy exception to giving full faith and credit to the sister state court order.

PROFESSOR GOODE: Right.

PROFESSOR DORSANEO: Which is debatable about whether the public policy exception, you know, is even constitutional, but, you know, it's assumed to be constitutional.

Okay. So I agree with Tom Gray. I think this -- at a minimum this (b)(3) should be broken down into two parts, and I think it could be reworded so it's -- so an average person could understand it.

CHAIRMAN BABCOCK: How about a highly intelligent person?

PROFESSOR DORSANEO: Well, sometimes highly intelligent people want to write things in a way that nobody can understand them. And we've done that here after many, many --

CHAIRMAN BABCOCK: More than once.

PROFESSOR DORSANEO: -- meetings, many meetings. Then you look back at it years later and you say what the -- what does that mean?

CHAIRMAN BABCOCK: What were we thinking? Justice Brown.

HONORABLE HARVEY BROWN: Since we're debating two things simultaneously here, I wanted to go back to Richard's questions, maybe something that might be a little helpful. If there was nothing done by the committee today, in your scenario with your city there would be a waiver. Only if we do something today is there an argument that there is no waiver.

The best way to address your situation, although I don't agree with it, but if you wanted it, is the last page of this packet. If you look in the middle of that last page of the packet there's a paragraph that says, quote, "Selective waiver," and that paragraph specifically addresses the issue of providing things to governmental agencies because you either, A, think it would be helpful or, B, they try to compel you to do so. I think the arguments against that were that by enacting that it would give the government another ability to force you to do that. In other words, the government say, "Well, we're going to make you waive your privilege."

A lot of companies I think sometimes like the

fact they have a privilege and want to claim the privilege, but if there was a selective waiver for everything going to government, then you couldn't say to the government, "I have a privilege and I'm invoking it," because they would say, "Well, we'll protect you still." So that's part of the reason this was rejected, but that's the area that I think you really -- based on your argument you would want this additional selection of waiver. You might want to read that language, but I don't think anything in (b) changes your scenario one way or the other. I think it's a (c) issue.

CHAIRMAN BABCOCK: Justice Bland and then Buddy Low.

HONORABLE JANE BLAND: Well, turning back to the difference between the subcommittee of this group's report and the AREC report, it sounded like our subcommittee was recommending extending this to other sorts of privileges, but given Professor Goode's comments that really the waiver problem -- the waiver by inadvertent disclosure problem happens in the lawyer-client privilege context and the work product context and not in other contexts, does, you know, extending it to other sorts of privileges, does the benefit that we might get from that outweigh the cost associated with it from lack of conformity between the Federal rule and the state rule and

sort of make it difficult for practitioners who are trying to figure out these rules of privilege, and to the extent we can keep them the same in Federal court and state court, maybe we should do that since it really doesn't seem to be a problem with other sorts of privilege.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: Back to Harvey's point, that was the reason -- one of the reasons the Federal court did not adopt that in 10 is so these agents say, "Well, that's not a waiver, just give it to us," you know, they can -- you can't say, "Well, no." In other words, it opened the door for them to get things.

Now, as to Judge Bland's question, the biggest problem we had with limiting it to those two is the provision in the rule for the first time we say that the waiver extends to an undisclosed communication or information. Now, if we don't include trade secret or other things, does that mean we've excluded that it doesn't? That was one of the problems. I'm not arguing pro or con. That was a question that we had.

HONORABLE JANE BLAND: And that tripped me up, too, because when I read that that says to me you're waiving more than you've waived. You've not only waived the things you've disclosed, but you potentially have waived undisclosed communications, but it looks like it's

only in a proceeding to a Federal or state agency, and presumably you're only going to waive what you intended to waive.

MR. LOW: That is the law now. If I waive something, and there are other documents relating to it, isn't that true, Professor, I've waived it?

HONORABLE JANE BLAND: Okay, so then --

MR. LOW: But now we've codified the law, and we had no great argument with it. We just thought it would create confusion. They say, "Well, wait a minute, I've given this for trade secret, but these other documents, I haven't waived them, and they are related to it." That was our problem.

HONORABLE JANE BLAND: But isn't the difference intent there?

MR. LOW: A different intent?

HONORABLE JANE BLAND: The difference in intent element. One is intended to address inadvertent waiver, waiver by accident.

MR. LOW: That's what most of it does, it addresses.

HONORABLE JANE BLAND: Well, and this section that you point out codifies existing law is intended to address true waiver, true intentional waiver. Inadvertent waiver, you give one document an idea that you -- by

accident unintentionally --

MR. LOW: I don't really follow that. Maybe I don't --

HONORABLE JANE BLAND: -- you're not supposed to then have to give related documents that you didn't disclose, because the one that you did disclose was a mistake.

HONORABLE JAN PATTERSON: But, Buddy, if it expressly references attorney-client and work product, doesn't that exclude the other areas and make it clear, and doesn't this allow for a more narrow rule as opposed to giving us a whole new rule, as Professor Goode pointed out earlier?

MR. LOW: Well, I mean, I totally agree. Only thing is if you read that and it's not codified that it relates to documents related to that then are you going to say, well, wait a minute, just by rule we now have excluded those trade secrets and other things? That's the problem. I don't know the answer, but that was one of our concerns.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: I just wanted to make two points. When the committee -- when our committee was discussing this, one concern was what the -- the polite phrase might be scope of the waiver. I call it damage

control. Okay, I've waived it as to that e-mail or that memo, but how much further can it go, and that's why that was codified into the rule, to give you something to latch onto to say this is what you get, but this -- no further, and I think the goal was basically to codify existing law.

But going back to the problem of using a court order to preclude arguing waiver in any other cases, I tend to favor our rule because sort of I'm of the philosophy the rain falls on the just and the unjust, and the real problem of this rule is the judge who is going to make a decision about whether you waived it because it was turned over is not going to be the judge in your case. It's going to be -- it's going to be a new litigation in a different court, and there would be, I think, a temptation for the party trying to get around it in that case to pick on whatever can be picked on.

So to use Justice Brown's hypothetical, if it has to be pursuant to a court order we're going to start playing games, or shall we say sharp practices or sharp arguments about what's "pursuant to," and the parties in the first case may have thought the disclosure was pursuant to it. The judge who entered the order may have, in fact, thought that, but that judge's order is not going to be binding on the party who is raising the argument in another case, and now you've got to go back and litigate in the

first case whether in the first case it was pursuant to that or not. And the stakes can be pretty high. So that was the reason for my -- speaking from my own point of view, that's why I tended to favor an overinclusive rule rather than a limited rule.

CHAIRMAN BABCOCK: Okay. Yeah, Lonny.

PROFESSOR HOFFMAN: Can I make a suggestion, which the Chair is free to reject, is we've been going for about an hour and a half. Maybe if we took our morning break and then maybe when we returned kind of focus issue-by-issue. We're kind of covering a few things at once and going back and forth --

CHAIRMAN BABCOCK: As is our habit.

PROFESSOR HOFFMAN: -- it might give the Court a little more guidance if we --

CHAIRMAN BABCOCK: Yeah, Steve.

PROFESSOR GOODE: I've got another meeting to go to, so --

CHAIRMAN BABCOCK: So we're well rid of you, but thanks. No, is that an argument to keep going or --

PROFESSOR GOODE: It was an argument so I could run.

MR. LOW: Could I say one thing?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Steve, what I'm going to propose is

that we come back and vote whether it is limited to those two things or to other and then you and Lonny get together to draft, you know, how -- because we don't know that the Court's going to follow what we suggest. They may want to go the other way. So -- so you get together. You've heard -- I've heard one suggestion about a footnote or a comment, and I've forgotten now what it was, and y'all get together and draft something, but let's give the Court some idea of which we favor and then if it's overwhelming one way or the other, I want certainly everything we do your input, because you've been -- and we're very thankful for you and your committee and your work. You've been very dedicated and done an excellent job, and we thank you for it.

CHAIRMAN BABCOCK: Yeah. Yeah, I'll second that, and before we do take our morning break, because we have been going about an hour 45, which is our court reporter's outer limits, right, but thank you for coming, and I think we have had a fulsome discussion about whether it ought to be limited to the two areas or whether broadly expanded to cover all privileges, and we can come back and vote on that, and we may have some more discussion, but I think the work is going to continue, and thanks for coming, and leave any time you want or stay as long as you want.

PROFESSOR GOODE: Thank you. Thank you for

having me and taking the time to listen to me. I wish I could stay, but I did promise Judge Womack that I would go over there.

CHAIRMAN BABCOCK: That's okay. We'll be in recess. Thanks.

(Recess from 10:45 a.m. to 11:25 a.m.)

CHAIRMAN BABCOCK: All right. We're back on the record, and it's hopelessly muddled, so, Lonny and Buddy, get us out of this.

MR. LOW: I suggest that we -- we've had pretty much discussion on the philosophical differences, the ups and the downs of following only attorney-client, having a rule on attorney-client and work product, or having the rule however it evolves apply to all privileges as listed, and I understand why the Federal court did that. They don't have specific privilege rules, and although they have all the same privileges we do, they're common law, and I would just get a vote on that, and then next thing would be to have -- there have been certain suggestions made by Professor Goode and Lonny as to certain changes that may be made --

CHAIRMAN BABCOCK: Yeah.

MR. LOW: -- they've heard that and get them together to come back with something; and whatever it is, if we decide to go full course or just limit it to two, we

can come up with a rule and the Court can adjust that rule to include, you know, more or less.

CHAIRMAN BABCOCK: Yeah, that makes sense to me, Buddy.

MR. LOW: And now this selective waiver is something else. We haven't discussed -- Richard has talked about it, and you -- and I'm not familiar with all of the whole report on selective waiver. I am familiar that companies did not like that, the government wanted it, and they were arguing for and against. Like you can't say, "Well, I waive it if I give it to you," to the government, and then others say, "Well, it doesn't make any difference, the government will say, 'We're going to indict you if you don't give it,' so you're going to give it," but selective waiver has been turned down by everybody that it's faced, and I know of no state or anybody that has that, so if we open it up to selective waiver we've opened a can of worms that most of us, including me, are not going to know a lot about it. So I would suggest a vote to including all privileges or just attorney-client and work product.

CHAIRMAN BABCOCK: Okay. Lonny, that work for you? Okay. Yeah, Bill.

PROFESSOR DORSANEO: Well, I have, you know, some threshold issues to me that are significant, at least it seems to me. We have the snapback rule for -- in

193(3)(d) for -- you know, for written things, but we don't have any -- we don't really have any such rule for statements made orally at a deposition. Until we do or unless we do this you can't snapback the waiver of a privilege that's -- that occurs at a deposition, and that's a big change. I mean, if that's what this means, you know, would it be arguing that I didn't intend to -- I didn't intend to -- what's "intentional" mean in (b)(1)(a)? I mean, I didn't intend to waive the privilege, I didn't intend to be so stupid, you know, at the time. It's a huge change, and I --

CHAIRMAN BABCOCK: Involuntary stupidness. I think we ought to work that concept into the rule.

PROFESSOR DORSANEO: There's a lot of that going on, but --

CHAIRMAN BABCOCK: Absolutely.

PROFESSOR DORSANEO: And is this whole thing worth doing, or should we just live with the Federal rule?

PROFESSOR HOFFMAN: Bill, just a quick question on that. Without taking a position on the point you raise, why do we need to consider that before we consider whether -- if we were to have this rule or some version of it we would have it apply only to attorney-client and work product or to all the privileges?

PROFESSOR DORSANEO: You don't necessarily.

I mean, it might affect how people feel -- you know, if you feel that the rule itself is not well-considered, just kind of monkey-see, monkey-do a Federal rule, which, you know, sometimes happens, then maybe you don't want to have it apply to very much.

PROFESSOR HOFFMAN: So you should be careful when you take the vote that nobody is committing to any change, only if there were to be a change would it apply.

CHAIRMAN BABCOCK: Yeah, good point. Yeah, Lamont.

MR. LAMONT JEFFERSON: Can I make sure I understand what we're talking about here? I mean, isn't this all focused on the voluntary -- like Justice Bland said, a voluntary disclosure of privileged information, and so the idea behind a rule is if you voluntarily disclose a part of it you can't not -- you waive as to those other parts that are significant to the part you voluntarily disclosed so that you can't take advantage of an offensive use of the situation.

PROFESSOR HOFFMAN: I'm not totally sure how to answer you because it turns out there's a lot behind what you just asked, Lamont. But so let me try to answer it first by saying this way: The question of whether the rule should apply only to two privileges or to more is not implicated by your question. So that's just a what is the

scope, and so, again, I'll return to if -- if Chip wants to get our assessment of that question, we can do that independently of that. As to the question of what do we mean by voluntary and all this, that turns out to be part of what took our committee a while to deal with and we went around with, and we really haven't -- we've only begun to scratch the surface, frankly, as to those questions in this larger committee discussion. So I don't know whether it would be helpful to do that now. I'm inclined to think it wouldn't be because --

CHAIRMAN BABCOCK: Yeah, what Lonny is saying, Lamont, is hold that thought.

MR. LAMONT JEFFERSON: Well, I hear that, but I'm not sure -- I mean, we're trying to manage a problem, and I'm not sure I'm understanding the problem. Yeah, I mean, in general why treat one privilege different than another privilege and when I can say "yeah" to that abstract concept, but I kind of have to understand what problem we're trying to address.

CHAIRMAN BABCOCK: Well, the problem we're trying to address and the scope of what the subcommittee was instructed to do is in Justice Hecht's letter of referral to us, and that letter asked us to focus on the interplay between the Federal rule and our rule and to attempt to harmonize our rule with theirs, given the fact

that the Federal Congress and its advisory committee had decided to have a Federal Rule of Evidence that imposed duties on state courts, which it does, and we can either let that -- just let that dangle or we can harmonize our rule to say we're going to do the same thing that we may be ordered to do anyway. Yes, Professor Dorsaneo.

PROFESSOR DORSANEO: I think all of us need to understand what those duties are that the Federal rule imposes on state courts. They seem to be, you know, relatively limited to me. Duties are imposed with respect to, you know, paying attention to what the Federal courts are doing or have done in their cases. And that's -- you know, that's significant, but it's much less significant than us doing the same thing in our cases that the Federal courts do in theirs with respect to a waiver of privilege.

CHAIRMAN BABCOCK: Okay.

MR. LOW: Chip?

CHAIRMAN BABCOCK: So does anybody want to have further discussion on whether the limitation on waiver proposal in proposed Rule 511(b) should be confined to two privileges or should it be made applicable to all the currently recognized Texas privileges?

HONORABLE DAVID PEEPLES: Yes, I want more discussion. I think we have not even gotten close to talking about this enough. We spent half our time

explaining, you know, how things work together and so forth, and I didn't find a whole lot of policy discussion in what we had earlier this morning.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: That was just me.

CHAIRMAN BABCOCK: Got any comments about it?

HONORABLE DAVID PEEPLES: Well, yeah. To what extent is this driven -- and I understand we need to be consistent with the Federal rules, but --

CHAIRMAN BABCOCK: If we want.

HONORABLE DAVID PEEPLES: Yeah, I want that. Certainly don't want to be inconsistent with them, I mean, at least in the area where they can make us -- where we're supposed to follow them, we certainly need to not be at odds with them, but to what extent out there on the streets, so to speak, is this driven by mass document production and to what extent is it something else? That's one question I have, because we've got the discovery rules that deal with that, and I'm just having trouble thinking of any involuntary waiver situation that I have any sympathy with, you know, the snapback other than mass document production or the government agency issue. Are there some situations where we would want to let someone take back an inadvertent disclosure that is not a mass document production and/or a government agency?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: If anybody is interested in reading distinction between terms voluntary, involuntary, and inadvertent, I invite them to use *Grenada Corporation vs. First Court*, Supreme Court 844, page 223; and they say inadvertent is distinguished from involuntary and they go through all of that, so I can't tell you that's still the law, but that's the only case I could find on it, so it's -- I mean, is it voluntary if the Rules of Procedure require me to give it up? I mean, you know, so we had trouble with that, and we just said we couldn't answer it.

PROFESSOR HOFFMAN: David, let me try to -- maybe I'll try to address -- I'm sot sure -- it seemed like you jumped into Chip's question and said, "No, I don't think we've had enough discussion about whether we should have this rule apply only to the way the Federals have theirs apply or not" and then you asked --

HONORABLE DAVID PEEPLES: Well, but I'm thinking also about limiting it to attorney-client and work product or not. I didn't think we had much discussion on that.

PROFESSOR HOFFMAN: Right, that was the first thing you said, and then you -- it seemed to me, unless I misunderstood you, you started talking about another, again, important but another substantive point.

HONORABLE DAVID PEEPLES: Related, yeah.

PROFESSOR HOFFMAN: So maybe staying on the question for a moment that you asked in the beginning, so where is the discussion now, I mean, I'll make an attempt at trying to summarize, and for those who have more that I've missed, by all means jump in. So I think that Steve Goode and the State Bar folks felt that the highest principle here guiding them was following the Federal rule so that state and Federal law would be consistent with one another, and so to that end -- which is a principle that they have followed and would say the Court has followed consistently over the years, very consistently over the years is what they would say. And so to that end, they amended 511 to track Federal Rule 502, which only limits waiver of attorney-client and work product privileges.

In addition, they were led to that place not only by that principle of action, following the Federals, but they were also similarly motivated because, like the Federal rule makers, they believe that when these problems show up with waiver they almost always show up in the context of waiver of a document covered purportedly by the attorney-client or work product, and so not only can we have consistency with the Federals by just limiting it this way, but in addition that's where the problem is, and so why do more if there's really no major reason to do more.

Indeed if -- okay, so that's that.

And then the final point that I think Steve made today that he hadn't made before, but let me just summarize it, is that he then went on to say if you have (b) apply to all the privileges then it may have the quirky effect that what will now be 511(a), what is existing law, but what would be 511(a), will basically be a general note that is largely gutted, I think was his words. And so that's a little bit strange and perhaps in a sense a little misleading to the bar to even have (a) out there. Okay. I think I have now summarized the State Bar -- by contrast, the other side of that, I think that our evidence subcommittee for this group felt that while following the Federals makes sense as a general principle, it shouldn't be the only principle, and if there are reasons to depart then that could be a justification for doing so.

Indeed, even the State Bar people recognize that, see the discussion "Re: Proposed 511(b)(3)" where they didn't follow the Federal rule verbatim, and so we felt that there is an obvious difference between state and Federal law, again Buddy and Steve have both talked about it, which is state law has the rules of privilege in the Rules of Evidence and Federal law does not, and it struck us as peculiar to -- and there was no principled reason that we could come up with -- to have 511 apply to all

privileges, but a limitation on waiver in (b) only apply to a couple of them, albeit the two most important ones, that is to say where the problem lies.

And so I think I'm correctly summarizing that our subcommittee felt that if we're going to make this change it may be that we ought to apply it to all, and it may be that as a practical matter it only gets kicked around, right, it only gets dealt with by the courts, that is to say most of the time, with attorney-client and work product issues because those are the problem childs; but if once in a while there is a patient-physician privilege question that comes up or a trade secret question that comes up, we couldn't think of a principled reason not to have the limitations on waiver apply to those privileges the same way they would apply to the -- to the work product, attorney-client. So let me stop. I don't know whether I've summarized everything, but I think I've got --

HONORABLE HARVEY BROWN: I think one other point our subcommittee was concerned about is trade secret cases, that they do involve mass productions, and so we could easily see the same problems that come up with attorney-client communications and mass production occurring in trade secret cases. Those are -- there aren't as many cases on that concern, trade secret cases, but when they do occur, they tend to have massive discovery.

MR. LOW: And one other -- one other thing was that we were concerned where it says "undisclosed information is waived," and we felt like that should be applied to trade secret, any other thing undisclosed, and if we only put it in the rule, which presently it does apply now, but if we put it in and codify that in the rule that we have, they say, "Wait a minute, they didn't put that in the rule, they've excluded that." That was another reason.

CHAIRMAN BABCOCK: Yeah, and the snapback provision applies to all privileges.

MR. LOW: To all. Both the Federal and state snapback provision applies to all. The application is different, but it says all privileges.

CHAIRMAN BABCOCK: Right. Okay. Anybody else have comments on this limited issue? Public comments, that is. Yeah, Justice Gray.

HONORABLE TOM GRAY: And I don't know -- what I struggled with was in an example, and I don't know that it would impact the decision of the two versus all, and I'm trying to visualize how it would affect the privilege, but, for example, if another state issued an order that a communication was privileged that Texas would not otherwise recognize as a privilege by putting it in our rules that that order recognizing the privilege will be -- or not

recognizing but that that communication was not a waiver of the privilege, therefore protecting it.

PROFESSOR HOFFMAN: I would think that the answer that you're asking -- I don't know if it's the right answer, but I think that the answer would --

HONORABLE TOM GRAY: I haven't gotten to the question yet.

PROFESSOR HOFFMAN: Oh, sorry. Sorry.

CHAIRMAN BABCOCK: That was a pregnant pause.

PROFESSOR HOFFMAN: Sorry.

HONORABLE TOM GRAY: Is that inclusion in our rules a statement of public policy that we will recognize the privilege in deference to any other public policy. And the one that just on, you know, physician privilege -- physician-client or patient, some other states have attorney -- or not attorney, accountant-client privileges, but -- and the spousal privilege or marriage privilege is the one that probably is the most, I guess you would say, volatile, but, now, with that question, Lonny, where do we go?

PROFESSOR HOFFMAN: What about the opening language where we have in either alternative version it says "privileges by these rules"?

CHAIRMAN BABCOCK: Right.

PROFESSOR HOFFMAN: "Apply to disclosure of

privileges recognized by these rules."

HONORABLE TOM GRAY: So what you're saying is they would not -- and in Texas, if I remember right, we do not currently have an accountant-client privilege, but if a state did and there was an order protecting some communication from being a waiver, we would not recognize it because of this rule. But we do have a spousal privilege. What if in another state that recognizes same sex marriages, are we going to now protect a privileged communication in another state that may be contrary to a otherwise stated public policy in the state of Texas through this exception to the waiver?

CHAIRMAN BABCOCK: But that issue is in our rule -- is in (b)(3), it seems to me, whether it applies to attorney-client or work product or is more broadly applied to our privileges, because of the wording in (b)(3), but I think we can address that substantive issue, but that's outside the scope of the debate we're having now, I think.

HONORABLE TOM GRAY: Well, I thought it was squarely within it because if we don't include anything more than attorney-client and work product then we're not talking about incorporating another state's order regarding a spousal privilege.

CHAIRMAN BABCOCK: Maybe so.

HONORABLE TOM GRAY: Which is why I brought

that subject up at this point.

CHAIRMAN BABCOCK: Maybe so. The language is so broad in (3), I don't know. But anyway, yeah, Bill.

PROFESSOR DORSANEO: As I'm understanding that -- and it took me a while to understand it -- as I'm understanding that (b)(3), all that says is that if there's a disclosure in some other state during the litigation process of privileged information, that that doesn't -- that that won't waive a privilege, that disclosure won't waive a privilege recognized by the Texas rules in a Texas case, so it isn't like recognizing their privilege. It's like recognizing that -- it's like saying that if it's -- if the disclosure is privileged in the other state or the court rules that, then a Texas court couldn't say that there's a waiver of our privilege because of what happened in Nebraska.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: And some Nebraska judge says, you know, that -- you know, makes an order.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: So it is more limited than recognizing privileges of other states.

CHAIRMAN BABCOCK: Yeah. I think that's right. Okay. Any more comments on this? All right. How many people think we should follow the lead of our

subcommittee, chaired by Buddy Low and assisted by Professor Hoffman, that the proposed Rule 511(b) should be extended to all Texas privileges? Everybody that thinks that, raise your hand.

And how many people think it should be limited, as the Federal rules are, to only attorney-client and attorney work product privileges?

The vote is 17 in favor of the subcommittee, that is, applying it to all privileges, and five against, five saying that we should follow the Federal example and only apply it to attorney-client and attorney work product. So -- the Chair not voting. So with that decisive victory under your belt, Lonny, what do you want to do now?

PROFESSOR DORSANEO: I have a question.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Lonny, when you talked about extending it to other privileges, you talked about -- and the draft talks about privileges recognized in these evidence rules. Now, we have other statutes, a number of other statutes. Are they left out on purpose or left out by accident, and --

MR. LOW: No.

PROFESSOR DORSANEO: -- shouldn't the committee know what you decided on that either way?

MR. LOW: We don't know all of those. Many

of those statutes, like the doctor review, they have their own -- their own thing. We didn't want to get into conflict with those, so we felt like we should limit it to the evidence rules and those deal with themselves, and we couldn't limit it to that because work product is not in the evidence rules, so we decided those have to be dealt with on their own. You're right. There are other privileges. We had nobody that could say "I know all of them." We don't.

PROFESSOR DORSANEO: I know where you could look to read about a lot of them.

MR. LOW: Well, I know, but how are you going to tell me I haven't overlooked something? That was the reason.

PROFESSOR DORSANEO: Well, there are many of them that are just like the privileges in the Rules of Evidence, and restricting it to the Rules of Evidence because that's convenient is not convincing to me.

MR. LOW: Well, but we just -- we felt like that if we say all other privileges and then we've got a statute that says here is a waiver and here is what you do on doctor -- on peer review, that we would be in conflict with a statute, and we might -- we didn't want to take a chance of doing that. That was why we did it. Right or wrong, that's the reason.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: No, that's okay.

MR. LOW: Chip, what I suggest is that I talked to Steve as he left, and he said he and Lonny, whichever way we went, they would work because there was a notation to put further comment and some other things. They're going to consider what was suggested here today and draw such a rule, which would be as the committee here now voted, with the Court being able -- they can take that rule and just limit it, just -- I mean, it can be very easily adjusted, so Steve will work with us on doing that.

CHAIRMAN BABCOCK: Yeah.

MR. LOW: Now, the other thing that we've got before us, unless we want to be here for a couple of days, I would not get into that too deeply, and that's the disclosure, the selective waiver rule, unless you want to go to it now and have some preliminary vote on that.

CHAIRMAN BABCOCK: Well, hang on for a second on that, but with respect to 511(b), which we've now voted is going to be applicable to all privilege -- all evidentiary privileges.

MR. LOW: In the rules.

CHAIRMAN BABCOCK: In the rules. Are there other issues that need discussion about the language? I know Bill had some concerns about (3), which I think were

well-taken. But is there a timing issue? Do we have to get this done right away? I know the Federal rule doesn't go into effect for --

HONORABLE NATHAN HECHT: Well, this has been in effect for a year.

MR. LOW: Yeah, it's been in effect. Yeah. But my suggestion is that we let Lonny and Professor Goode consider these different things and then draft something for us to consider at our next meeting.

CHAIRMAN BABCOCK: Okay. Okay. Okay, everybody okay with that? Yeah, Pete.

MR. SCHENKKAN: In that -- I think that's fine. In that connection, maybe I missed it, but is there a considered reason why the sort of structure of the -- our committee's -- our subcommittee's language that's going to be the introduction to (b) is different from the structure of the State Bar committee's? The State Bar committee's has "The following provisions apply to disclosure of a communication or information privileged by" and ours is "apply to privileges recognized by."

MR. LOW: Pete, let me answer your question this way to address it -- to clarify something here. So if you're looking at Tab 6 --

MR. SCHENKKAN: I am.

PROFESSOR HOFFMAN: -- you're looking at the

business that has that bracket that says "alternative."

MR. SCHENKKAN: Yeah.

PROFESSOR HOFFMAN: That is not their language. That's our language. So if you want to see their language exactly, you have to go to Tab 5.

MR. LOW: Right.

MR. SCHENKKAN: And it does -- theirs is drafted in terms of "disclosure of a communication or information covered by," whereas the one that we voted for 17 to 5 does not -- is not worded in terms of applying to a disclosure of communication or information. I'm not suggesting we need to debate this in committee as a whole. I'm just asking unless you want our guidance on some considered reason that you could talk about that when you and Professor Goode get together on the wording --

PROFESSOR HOFFMAN: Yes. I think -- so I guess what I would say is if you have a particular concern about the language in the alternative --

MR. SCHENKKAN: I would just like to go as close to the Federal language as possible unless there was a considered reason not to. We have decided to broaden it beyond attorney-client privilege and attorney work product for reasons we have discussed. I don't know why we want to change it from "this applies to disclosures" to "this applies to privileges." If there is a reason why we want

to do that, fine, let's talk about it. If there's not a reason, can we track the Feds on that?

MR. LOW: It was our intent -- no, it was our intention to follow the Federal rule as closely as we could, which would be not inconsistent with the other privileges. I think, isn't that true, we wanted to follow it as closely, and if we failed to do so then we won't do so, but that was our intent, to follow it except where you couldn't.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I have no interest in belaboring this either, but I just want to say three things. Based upon our vote a minute ago and after looking at this for the last couple of hours, it does seem pretty clear to me that if we have a 511(b)(1), not to mention (b)(2) just cross-referencing our 193.3(d) provision in play for all or nearly all now of the privileges, but not statutory privileges, point number one, I do think the general rule is just incompatible philosophically and technically with the approach provided by (b), which is much more nonwaiver-friendly than (a), the Grenada case and the earlier regime. When we teach this subject now we pretty much don't talk about Rule 511 or the Grenada case or its counterparts because our snapback rule supersedes it for all written things.

The second thing, I'll say again, (b)(1) is a huge change because it provides for -- for eliminating waiver or limiting waiver to when we're talking about not just writings, but when we're talking about communications or information, so it's a much broader thing than our snapback provision, and that's a big change, and I think it will be a big change that might cause a lot of extra activity in dealing with waivers that occur during depositions, for example. And it might be a good change, might not, but we spent about -- well, I don't think we talked about it at all. You know, I talked about it.

And then the third thing, this control -- this court order provision, which is a difficult thing to understand, it seems to me -- it seems to me that I would ultimately disagree with the Rules of Evidence committee about all of this -- all of the things that Steve talked about. I mean, this language "pursuant to an order of a state court," I was thinking did I ever even have a case or read a case where there was an order of a court saying that the disclosure of a privilege wouldn't be a privilege, wouldn't be a waiver of the privilege? I mean, I don't ever remember reading any such order that the disclosure of a privilege wouldn't be a waiver of the privilege. I'm unfamiliar with those kinds of orders, so I'm not even sure what the -- what (b)(3) would be about as a practical

matter, and I don't like the way it's worded in almost all respects. It's hard to understand, I don't think it applies to anything necessarily, and it needs to be -- it needs to be -- you need to fight with them about it.

PROFESSOR HOFFMAN: Can I --

CHAIRMAN BABCOCK: Lonny.

PROFESSOR HOFFMAN: -- not respond but kind of react, because maybe I need some more feedback if we're going forward. As always, you cover a lot of ground, so let me see if I followed you. You made three points. The first point you made I think was if we do this and have (b) apply to all the privileges, you sort of agree with Steve in saying that (a) has been largely gutted. In fact, I think you've said it a little bit more. You've said it eliminates -- we may not even need an (a).

PROFESSOR DORSANEO: Right. And it's certainly not Federal law either. So why it guts -- it would have become Federal law if they didn't decide not to put privileges into Federal law, but it's not Federal law either, so it's an outlier. It's old time religion in our rule book. It's inconsistent with the snapback rule's philosophy. It's inconsistent with 502 -- Federal Rule 502's philosophy about limiting waiver. It just -- it just is -- needs to go. It needs to be retired.

PROFESSOR HOFFMAN: Okay. So I guess my

reaction to that is, Bill, is -- I guess I have two reactions. One, there is still a space for 511(a) when it's -- when the voluntary waiver happens and it's outside of either intentional subject matter or an inadvertent waiver, so like an example that Justice Hecht and I were talking about at the break was, you know, you pick up the document and you affirmatively use it as a sword in the case. You disclose the privilege on purpose for some reason. You're hoping to help your case by doing that, so you make a strategic choice to do so. (a) says you waived it, which is what we would all expect to be the case, and it's certainly not -- that waiver is not limited by anything in proposed (b). You're in agreement about that, right?

PROFESSOR DORSANEO: I suppose I am. I mean, it's kind of an odd hypothetical.

PROFESSOR HOFFMAN: Well, okay. Okay. I don't know how often it happens that people selectively choose to waive things, you know, for affirmative purposes.

MR. JEFFERSON: Happens all the time.

PROFESSOR DORSANEO: And you're saying they couldn't snap it back under those circumstances.

PROFESSOR HOFFMAN: Yes, I think it happens -- I think it happens a good bit.

PROFESSOR DORSANEO: Yeah.

PROFESSOR HOFFMAN: But in any event, whether it does or doesn't as an empirical matter, as a matter of reading the rule, that would be a waiver and it wouldn't be protected by anything in proposed (b) is all I'm saying.

The other point I would make is one that Steve made to me a number of times, which is (a) is the law. It's out there. It's been out there for a long time, and whether we like it or not we've been living with it for a while. I want to make sure I'm not hearing you say you want to get rid of (a) and rethink all of the law of voluntary waiver, or maybe I misheard you and you do want to --

PROFESSOR DORSANEO: I do want to do that.

PROFESSOR HOFFMAN: Okay.

PROFESSOR DORSANEO: I think that what we're doing these days is completely incompatible with that philosophy.

PROFESSOR HOFFMAN: Okay. So what I would say is talk to them, and if they give us some directive to do that, but that is like selective waiver only times ten. That is a much bigger --

MR. LOW: Yeah.

PROFESSOR HOFFMAN: -- undertaking, and again I'm agnos -- right now I hadn't -- but we hadn't thought about that, and it certainly wasn't our intent to, you

know --

CHAIRMAN BABCOCK: You almost said agnostic.

PROFESSOR HOFFMAN: Yes, I almost did.

CHAIRMAN BABCOCK: Bringing religion into this waiver issue here.

MR. LOW: Chip, Bill had a question about communication. Of course, that's the attorney-client, and we had the control group, and we amended that, that test, so that's usually communications where I relate to somebody in the company, so that's why communication is included, but it's not included in snapback because you can't take back what you said. I mean, that's my understanding.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Just in the writing and editing, I would -- I was going to suggest that the subsection (b) limitations on waiver be retitled "Protections of Privilege," but then when you look at subsection (b)(1), notwithstanding the title, this is a compelled extension of the waiver. Now, it may be in line with existing law, but, I mean, this is -- there's a partial waiver has been made and now you're going to compel the rest of the waiver, and so it's really not a protection. But going back to something that Professor Dorsaneo said, the first sentence of (b)(3) as rewritten by the committee, I never fathomed that to be a waiver if I am

disclosing something pursuant to an order, because it is involuntary.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: So I don't understand how the first sentence could ever be a protection of the waiver because I didn't waive anything to begin with, and I've now stirred up the dragon.

HONORABLE NATHAN HECHT: Well, no. As I recall the committee's discussions, the lawyers said we routinely enter into orders that they -- that expedite discovery but we're not waiving any privileges, I'll show you everything and you show me everything, but we're not waiving any privileges, and the court blesses that. And the court says, "Fine, you can do that, and I agree you're not waiving any privileges," but they say, but we don't want to do that because then we'll go to state court and they say, "Well, that was that court's order, that's not my order," and the court didn't make you do it. The court just said, "I'm not going to treat that as a waiver," and so that was the reason for the concern.

Because the whole idea grew out of how can we make discovery faster and get everybody to agree to lower the paranoia and the legitimate concern that if we don't look at every word of every document we're going to waive something and it's going to be all over, how can we do that

and give people the assurance that if they're litigating in multidistrict litigation, the Florida court and the Oregon court and the state court and the Federal court are all going to be on the same page, because we can't be sure -- and this frequently happens that there's litigation in Federal court and corresponding litigation in state court. We can't be sure that if the Federal court agrees with this that the state court will agree with it, and so that was the reason, but I agree with you. I mean, it's hard to imagine that a court would say "Turn this over, no matter what, and you're not waiving the privilege," although I guess they could, but --

CHAIRMAN BABCOCK: Yeah, and, Justice Gray, following up on what Justice Hecht said, in trade secret litigation it happens a lot, I think, where the defendant will say, you know, "Tell me what trade secrets you're trying to protect and then produce documents that show you really have these things," and the plaintiff says, "Hell, I'm not going to do that. That's my trade secrets. I'm not going to do that." And so rather than get into a big fight about it you enter into a protective order that's very strict and has two levels, attorneys eyes only and all that stuff, but the defendant's lawyer and plaintiff's lawyer agree to that to avoid a big discovery fight where the judge may or may not -- you know, may rule one way or

the other on that, and if you don't allow that practice to continue, you're going to really ratchet up the number of contested motions you've got in the district courts.

HONORABLE TOM GRAY: Well, you may read that level of protection into this and cover that situation, but that wasn't the way that it hit me when I read it and particularly in pursuit of Harvey's discussion about trying to work out the agreement in the course of the deposition and cover it later. I mean, there's no protection for that, it doesn't seem like --

CHAIRMAN BABCOCK: No, I agree, and I think that's an issue.

HONORABLE TOM GRAY: -- the way the rule is drafted.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I wanted to address Justice Gray's comment that he thinks that (b)(1) extends the waiver to undisclosed communication. I don't think that's what's occurring. I think in part (a) the waiver is of the privilege, so if I waive my attorney-client privilege because I let you find out about one conversation I've had with my lawyer, that privilege is gone from all my communications with my lawyer. It's not just that one communication. It's the whole thing, I think, that says it waives the privilege. (b) then says, no, we're not going

to take it that far. We're going to say it only goes to all communications only if you -- only if you meet these additional three criteria, so that's why I think (b) is taking that broader waiver and limiting it.

HONORABLE TOM GRAY: I think I would agree with Justice Bland's head nod or nonverbal communication that I never thought the waiver of one part of a communication with an attorney waived every communication I ever had with that attorney, so there may be some disagreement just on that, but --

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Well, that's true, but you -- there are cases where you strategically waive the part that helps you and hold back the part that hurts you, and the idea is that, no, you can't dribble it out there.

CHAIRMAN BABCOCK: Carl. I'm sorry, Elaine, did you have your hand up?

PROFESSOR CARLSON: I had a question, Lonny.

CHAIRMAN BABCOCK: Hang on, Carl.

PROFESSOR CARLSON: Does (b)(3) only apply to pending litigation? I can't really tell when I read it.

PROFESSOR HOFFMAN: It's not my language. I don't know how to answer that. In other words, just to be clear, you're reading "in connection with litigation

pending" and it makes it sound like it has to be in the present tense.

PROFESSOR CARLSON: Right.

PROFESSOR HOFFMAN: And so what would happen if the litigation -- if it was disclosed at the time it was pending but is no longer? I don't know.

PROFESSOR CARLSON: Okay. And the second question I had on (b)(3) was are we saying -- or is our intent here that if a court has ordered in an order, as Chip was just describing, that that's not going to be a waiver in Texas by virtue of the disclosure, but we may or may not otherwise recognize the privilege?

HONORABLE NATHAN HECHT: Right.

PROFESSOR CARLSON: Okay. Thank you.

CHAIRMAN BABCOCK: Carl. I'm sorry.

MR. HAMILTON: The rule would make better sense to me if the (a) part dealt with waiver and would include the opening paragraph of (b) and (b)(1) so that everything to do with what constitutes a waiver is in the first paragraph, and then the (b) part would be exemptions or limitations on waiver, which would include (b)(2), (3), and (4) and have everything to do with waiver in the first paragraph and everything to do with the exceptions in the second paragraph, but the way they're put together now they're kind of mixed up.

CHAIRMAN BABCOCK: Okay.

MR. LOW: I think it was intended to -- (a) is to give the general rule on waiver and (b) places the limitation on it.

MR. HAMILTON: Yeah, but in (b) you add waiver to other communications, which are waived.

MR. LOW: But we have limitations on those under that. I mean, that was the intent, I think, of the -- well, first of all, it's been said about 15 times, now 16, we were not charged with looking at (a). We didn't touch (a). State Bar didn't touch (a). We didn't criticize (a), we didn't try to revise (a). We tried to follow -- leave (a) as is and follow the Federal other than when we deviated, and if the Court is interested in us looking at (a) and seeing if we need to do away with it, modify it or something, we will do whatever the Court says.

CHAIRMAN BABCOCK: Okay. Any other -- yeah, Justice Bland.

HONORABLE JANE BLAND: Well, just along the lines of what we were talking about in terms of waiver by offensive use, I guess it's a question of under (a) whether the privileged matter means the subject, the document, or the privilege as it exists for everything, and I've always -- I see the privileged matter as meaning the subject -- you know, obviously the parties and the court

can decide the extent of a confidential communication, but I don't think it's ever been that if you waive -- even by offensive use, waive some piece, every single thing is waived. You may have -- because you've tried to use something offensively you may have waived other confidential communications that are associated with that piece that you're associating offensively but not the whole privilege, and I guess we have communication -- confidential communication defined in our rule, but we don't have the privileged matter defined. So I don't know if we need to think about adding that to the definition.

CHAIRMAN BABCOCK: Okay. Anybody else have their hand up? Yeah, Justice Brown.

HONORABLE HARVEY BROWN: To try to clarify what I said earlier, I agree with Justice Bland, but I think that's really by virtue of case law where we've limited to subject matter. I think the language doesn't quite read that way in (a), and courts have thought that wasn't fair to be a waiver, for example, of all attorney-client communication, so they basically adopted through case law something very similar to (b)(1), that it has to be subject matter and it has to be intentional. So I think (b)(1) is a narrowing of what looks like pretty broad language.

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I hope I'm not going to confuse issues further, but, Lonny, is it your understanding that (b)(3) is essentially trying to deal with -- is talking about a predisclosure order and is trying to address Professor Goode's comment that you don't want an agreement after the fact to enter into an order, so it's a predisclosure versus post-disclosure provision?

PROFESSOR HOFFMAN: That's my understanding of what they were getting at, yes.

HONORABLE DAVID GAULTNEY: But might there be some post-disclosure orders that we want to give that effect? I mean, it seems to me a very harsh distinction if all you're trying to solve is a situation of the parties settling. I mean, there might be a dispute that arises, for example, where you would have a post-disclosure order that you want to be given effect; and the other thing I want to say -- I wanted to comment on was something that I said earlier. I think there is some tension, isn't there, between section (4) and section (3) in terms of agreement of the parties? So if you had an agreement at a deposition and then you disclose something and then you later got a court order entered protecting it then that would be binding even though it's a post-disclosure order, right, under (4)? And so I'm not sure -- am I right? You think I'm right about that?

PROFESSOR HOFFMAN: Well, I think what Steve said earlier is that he doesn't read it that way. So, in other words, he would say that all (4) does is say that parties make agreements, that's just between themselves, and you can't bind somebody who is not a party to your agreement, and then it says "unless covered by a court order" and he would say that that language, that very tail of (4) takes you back to (3), and then we are going to honor court orders only in certain circumstances, and that's this, you know, pre- and post-.

HONORABLE DAVID GAULTNEY: Predisclosure. I think there's some ambiguity there in the rule.

PROFESSOR HOFFMAN: I would agree.

CHAIRMAN BABCOCK: Any other comments? All right. So, Buddy, you and Lonny and --

MR. LOW: Yeah, we will do such a job that it will receive no criticisms.

CHAIRMAN BABCOCK: There will be no criticism. Well, there's never any criticism. There's only --

MR. LOW: Or comment.

MS. PETERSON: Meaning you won't bring them back to the committee.

MR. LOW: Face blank. They say y'all did such a good job we can't --

CHAIRMAN BABCOCK: You guys are not quite off the hook yet because --

MR. LOW: Oh, yeah. Okay.

CHAIRMAN BABCOCK: -- Justice Hecht referred a matter to our committee, and it was referred to your subcommittee regarding the restyling of the Federal rules.

MR. LOW: Yes.

CHAIRMAN BABCOCK: Do you have anything to report on that to us today?

MR. LOW: Justice Hecht and I have both talked to the State Bar committee. They have volunteered to start it out and run things through our committee, and they have begun work on that I'm told.

CHAIRMAN BABCOCK: Okay. So you don't have anything to report today?

MR. LOW: No. And I talked to Steve, and he said they would -- they would do that. They have been most cooperative when we've referred things to them, and I have no doubt they will do that.

CHAIRMAN BABCOCK: Okay.

MR. LOW: And I will follow up with their chairman.

CHAIRMAN BABCOCK: Okay. Justice Hecht.

HONORABLE NATHAN HECHT: And just to elaborate on the letter a little bit, as you may know, day

before yesterday the text of the Federal Rules of Evidence changed to hopefully read better, and so, question, shouldn't we change the state rules in the same way since they were modeled on the Federal rules to start with, and we think that's a good idea. The Federal committees were charged with not changing the meaning in any respect with their restyling, and my experience on the civil committee is they are pretty careful about doing that. We may or may not feel so constrained, and I know the Court of Criminal Appeals has already indicated to me that they have some changes -- some substantive changes that they want to make at the same time the rules are being restyled, so the idea would be that the State Bar committee would take the Federal text, look at the state text, to the extent the state rule was identical to the Federal rule before, just use the Federal restyling unless somebody wants to rethink about whether that's a substantive change, and then if it's not -- if the two rules aren't substantively the same, of which there are a large number, then you would use the same restyling protocols to rewrite the current state text, but then, thirdly, along the way if there are substantive changes that we want to make we would consider those as well. So this would be on the one hand an editing of the Texas Rules of Evidence top to bottom, but which is a fairly formidable task, but secondly, a consideration of

any substantive issues that pop up along the way.

CHAIRMAN BABCOCK: Okay.

MR. LOW: Okay, let me be sure that I followed. Your first approach is to look at how the Federal courts have restyled their Rules of Evidence, and if a Rule of Evidence is the same, state and Federal, we would recommend or we would restyle that rule accordingly. If they are different, then we would first consider whether we wanted to make substantive changes to conform and then deciding on that whether it would be restyled or what. So we would be considering -- and then if we see in any point the rules should be changed then -- substantively changed, we would consider that. So three things we would consider. I'll --

HONORABLE NATHAN HECHT: Right.

MR. LOW: That's what we'll do.

HONORABLE NATHAN HECHT: And the Court of Criminal Appeals is in agreement with this approach.

MR. LOW: Right. I will follow-up on that because the initial task you and I both I think have been in communication with Bob Burns who is the chairman, and I think our original task we thought about was just re -- restyling, but it's expanded twofold -- I mean threefold now.

CHAIRMAN BABCOCK: Okay. All right. So for

our next meeting -- and I'm going to give everybody the list of next year's meetings. On the agenda for the next meeting, we will have further discussion about rule -- Texas Rule of Evidence 511.

MR. LOW: 511.

CHAIRMAN BABCOCK: That will be one thing, and then should we put on the agenda, Buddy, what I'll call the restyling issue?

MR. LOW: We can have a report, but I can rest assured that we won't really be making much recommendation by then. Because it's --

CHAIRMAN BABCOCK: Why don't we put you on the agenda for the purposes of reporting where you are?

MR. LOW: Right. That will be fine.

HONORABLE NATHAN HECHT: And maybe if I could just add to that, maybe you could take an easy rule and bring it back and show everybody what it looks like. Like one that's exactly the --

MR. LOW: Will you show me what an easy rule is?

HONORABLE NATHAN HECHT: I'll show you one. Take 101 or 102 or something and then bring it back and just to show the Federal rewrite and then we'll have an idea.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: I could suggest one that's exactly the opposite which is Rule 30(e) requiring signature of the witness. Federal rule is if no one says anything, signature is waived. Our rule is you have to waive it -- everybody in the room has to waive the signature. 30(e).

MR. LOW: That's not an evidence rule.

MR. JACKSON: Oh, okay, that's a discovery rule.

CHAIRMAN BABCOCK: Yeah. Okay. So that's what we'll do agendawise for the next meeting, and somebody -- I don't know if, Buddy, it's you or Lonny or Kennon or somebody, but what I heard Professor Goode say was that Judge Womack had been at their meetings and he had voiced no opposition. It might be a good idea if somebody checked with Judge Keller, about 511 I'm talking about.

MR. LOW: Okay.

CHAIRMAN BABCOCK: And specifically the part on 511 -- 511(b)(2) where we're incorporating the civil -- the civil procedural rule but we're not incorporating whatever the law is of the Court of Criminal Appeals on snapback or however they do it.

So with that, the meeting dates that we have come up with, with Justice Hecht and Kennon and Angie, are as follows: January 28-29, March 25-26, May 13-14, August

26-27, October 21-22, and December 9-10. Obviously everybody in this room are going to have conflicts -- some conflicts, but if anybody knows of like a huge conflict that we haven't thought about, like, you know, they've moved the UT-OU game to Austin --

MR. HAMILTON: Super Bowl Game.

MR. SCHENKKAN: Please schedule a meeting here so we don't have to go.

CHAIRMAN BABCOCK: But you know what I'm saying. So those are the dates, and I think it would probably be a good idea to take lunch, if that's all right with everybody, before we continue on with Elaine and Professor -- Professor Carlson and Professor Dorsaneo on the Rules 296 through 329b. So we're in recess.

(Recess from 12:26 p.m. to 1:20 p.m.)

CHAIRMAN BABCOCK: Let's take up these appellate issues, which we have taken up before, as everybody knows.

PROFESSOR DORSANEO: Go faster.

CHAIRMAN BABCOCK: So we'll go faster today because we still have the important work that Bobby Meadows has done that needs to be talked about today as well, so let's get after it.

PROFESSOR CARLSON: Okay. I think I'm going to start. You should have a handout that starts with Rule

296. In the bottom lefthand corner it should be dated in the footer 11-26-10 or "what I did the day after Thanksgiving." We took a couple votes last time. One of them, after we talked about the pros and cons of having the trial court discretion to make oral findings of facts and conclusions of law, the majority vote was that the trial court should have that authority to make findings of fact and conclusions of law orally on the record at the close of the evidence.

The second vote was that it would be discretionary of the trial court to do so, and that the litigants would retain the right if the court did not make oral findings of facts and conclusions of law to make the normal written request for findings of fact and conclusions of law. We also discussed at the prior meeting before that that any additional or amended findings, whether they were oral or amended -- oral or written, I'm sorry, should be in writing. We discussed concerns about findings of facts orally on the record, about the parties' necessity to obtain a transcript of the court's oral pronouncement of findings of facts, and we had some concerns about that that I hopefully have addressed in Rule 296. So Rule 296 is in essence a new rule that allows the trial court the discretion to orally state its findings of facts and conclusions of law on the record in the presence of counsel

promptly after the close of the evidence.

The next sentence is to respond to our concern about the transcript, that the trial court should cause the court reporter to promptly transcribe the findings of facts and conclusions of law, file the same, and send a copy to each party; and what that does is it allows the litigants to know, okay, the judge is viewing these as findings of fact; and secondly, it allows for a trigger date to make additional amended findings with the official filing by the court as the court officially would file additional or amended. So it's worked as a trigger date in that context and hopefully it will in this as well.

Rule 297 has not changed except -- well, actually, it's old Rule 296, so it has changed in that vein, and I added to the title, "Request for findings of facts and conclusions of law," I added "when no oral findings of fact are made" and then what follows is what we already voted on, and that is the ability of the parties to make the usual written request for findings of fact, the court's duty to make them, and the time frame. We voted on all of that several meetings ago.

Then over on Rule 298 I incorporated the vote from last meeting that whether the trial court makes its findings of fact orally on the record at the conclusion of the evidence or the trial court makes its findings of facts

in writing -- That's the Rule 296 or Rule 297 -- any party can make a request for additional or amended findings of fact. The rest of that rule is the same in that it states the court must -- I'm sorry, "The request must state the specific additional or amended findings that are requested and be made no later than 20 days after the filing of the court's original findings of fact and conclusions of law." Comma, the proviso I added since the last meeting to attempt to accommodate the concern of triggering too much of an accelerated time frame, if there is such a thing, when the trial court chooses to make oral findings of fact. Put another way, it seems to me it would be inappropriate to require a litigant to make a request for findings of facts, additional findings of facts or amended findings of fact, after the court makes oral findings of fact if the judgment hasn't been signed yet, right, because you need to in theory see the judgment to know, okay, this is what the judgments are, otherwise you can't figure out deeming principles, for one thing.

HONORABLE STEPHEN YELENOSKY: You want minor points or you want all of them?

PROFESSOR CARLSON: Sure.

HONORABLE STEPHEN YELENOSKY: Just I think this is the current rule, "Duty to Make Additional," that title?

PROFESSOR CARLSON: Yes.

HONORABLE STEPHEN YELENOSKY: I just -- there is no duty to make additional, all it does is state a deadline if you're going to make them. I just don't like the title.

PROFESSOR CARLSON: Okay. So you would be happy with "Additional or Amended Findings and Conclusions"?

HONORABLE STEPHEN YELENOSKY: Right.

PROFESSOR CARLSON: You're absolutely right. The court doesn't have to make any additional or amended findings if they're not proper. If the court already found this the other way I don't have to find it the opposite way or the court doesn't have to amend its findings if it thinks its original finding was just fine. So if there's a consensus on that we'll strike the words "duty to make" in (d).

We left off last meeting discussing Rule 299, and we did not take any votes on it.

CHAIRMAN BABCOCK: Uh-huh.

PROFESSOR CARLSON: Rule 299 deals with the situation where the trial court makes some findings but not all. The trial court might make findings on some elements of a ground but not all elements of a ground, or in a multiple ground case the court might make findings that

pertain to one ground and not make any findings that pertain to a second or other ground. This is reflective of our current practice with the language, we hope, updated a bit, and is parallel with the practice in the jury charge. That is, under subsection 299(a), if the trial court fails to make findings of fact when it makes findings of facts on an entire ground of recovery or defense or the court makes findings on ground A but makes no findings at all on ground B, if no request is made for additional or amended findings to establish that ground, that ground is waived unless the ground is conclusively established under the evidence. Subsection -- and I'll come back to that in just a second because that was a controversial.

Subsection (b) of 299 deals with the situation where the trial court has made findings on some elements of a ground but has failed to make findings of all elements of that ground. And again, it reflects current practice in parallel with the -- what we do in a jury case with that situation. When the trial court has made findings on some but not all elements of the partially determined ground without a request for those -- I call them missing or additional elements, then those elements are deemed found in support of the judgment, provided they're supported by factually sufficient evidence, but there is no presumed finding on an omitted element if a

finding on an element was requested. If you ask the court to find the missing element and the court doesn't do it after you make the request for additional or amended, there is no deeming because you made the request.

And paragraph (c) of Rule 299 is unchanged and is our current practice. "A trial court's failure to make a requested additional finding will not result in a presumed finding. Refusal of the court to make a requested finding is reviewable on appeal."

We -- I had a couple of comments last meeting and a couple of comments the meeting before, and I had in our subcommittee a concern raised by Mike Hatchell where people -- where learned people question the wisdom of Rule 299a. Should there be the parallel practice in a bench trial of holding a ground is waived when the trial court makes findings of facts on some grounds but not that ground when in a bench trial you already have your judgment. So I think some would question the wisdom of the rule, but it is our current practice, so with that I'd open it up for discussion.

CHAIRMAN BABCOCK: Okay. Let's talk about 299. Yeah, Alex.

PROFESSOR ALBRIGHT: This is just a very minor comment on (c). The first sentence says, "A trial court's failure to make a requested additional finding" and

the second sentence says "refusal to make an additional finding." Is a failure and a refusal the same thing?

PROFESSOR CARLSON: Yes.

PROFESSOR ALBRIGHT: It seems like we should use the same word.

PROFESSOR CARLSON: All right.

CHAIRMAN BABCOCK: Okay. What else on 299? Any other comments? Yeah, Pete.

MR. SCHENKKAN: In (a), first sentence "embraced therein," what is the -- to which does "therein" refer, the findings or the judgment?

PROFESSOR CARLSON: Embraced within the judgment.

MR. SCHENKKAN: Could we say that, so that others who had the same confusion I have don't have it?

CHAIRMAN BABCOCK: Yeah, good. What else on 299?

MR. SCHENKKAN: Also in (a), the second sentence, "If no request is made for a finding on any element or ground of recovery or defense and the ground has not been found," do we mean "and no element of the ground has been found"?

PROFESSOR DORSANEO: Yes.

PROFESSOR CARLSON: Yes.

CHAIRMAN BABCOCK: Man, three for three.

Pete.

MR. SCHENKKAN: Shall I push my luck?

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: Wait. Hang on. No element, I thought elements could be implied but grounds can -- if they're not found are waived. In other words, if you have -- when I think of elements I think of duty, breach, proximate cause, damages. I think of ground as like negligence, res judicata.

PROFESSOR ALBRIGHT: Yeah, so this is the waived ground part of the rule, not the omitted element part of the rule, right?

PROFESSOR CARLSON: It is, but it's a situation where the court has not made findings on any element of the ground.

HONORABLE JANE BLAND: On any element. Meaning that none, there's not -- he's not made -- he didn't find duty -- he didn't even mention negligence or any aspect of negligence, but if the trial judge mentions duty, breach, damages, but doesn't say anything about proximate cause, isn't that typical that it will imply it to support the finding of negligence if he ultimately concludes there's negligence?

PROFESSOR CARLSON: Yeah, (b).

MR. SCHENKKAN: And if he names some of the

elements but not all then we go to (b) to see what happens, but if he doesn't name any of them, the ground is waived. No request and no element -- no request for any element and no finding of any element, that's (a).

PROFESSOR CARLSON: Yeah, you know, and, Pete -- I'm sorry, Justice Bland, were you wanting to say more?

HONORABLE STEPHEN YELENOSKY: You're saying it should say "no element of the ground"?

MR. SCHENKKAN: I'm asking the question, and I'm understanding that's the answer. I don't know the right answer.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: May I respond just a little bit further, Pete?

MR. SCHENKKAN: Yeah, please.

PROFESSOR CARLSON: That is the current law. Now, remember, back in Rule 297(b), which we've already voted on, and I pray we are not going to revisit --

CHAIRMAN BABCOCK: We will not.

PROFESSOR CARLSON: -- that the finding should be in broad form whenever feasible, the court must include only so much of the evidentiary facts as are necessary to disclose the factual basis for the court's decision, unnecessary voluminous evidentiary findings are not to be made, so -- but when you read that rule together

with 299 it tells the court you can make broad form findings but you need to be finding all elements on the ground. So I'm happy with your language. I think it means the same as what is there, but if that's clearer.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I read 299(a) differently, and I think it may be I'm not reading it right. It may be me, but I thought that it's when there's a missing ground. Like you don't do anything. They've -- in other words, they've -- you know, if you're the plaintiff and you sought a judgment on negligence and fraud and the trial judge enters judgment on fraud and makes findings on fraud and doesn't say anything about negligence, that's a ground for recovery that could have supported the judgment. He didn't make any findings. If he doesn't make any findings at all on it then it's out.

PROFESSOR ALBRIGHT: And none are requested.

HONORABLE JANE BLAND: And none are requested.

PROFESSOR CARLSON: That is correct.

HONORABLE JANE BLAND: Then it's out. It's waived. You can't argue on appeal he should have waived on --

PROFESSOR CARLSON: The only exception to that, Justice Bland, is I understand if you conclusively

establish by your evidence all of those elements.

HONORABLE JANE BLAND: So if we switch ground -- if we switched the word "element" for "ground," though, I see that as saying something different, which is trial judge finds in favor of you on fraud but in his findings he's missing a element of -- you know, of the elements of fraud. Normally that would not be waived. It would be implied in favor of the trial court's judgment of fraud and would not be waived. Just because he didn't mention a particular -- you would have to -- I mean, assuming there is evidence to support it and it could be implied in favor of his judgment.

PROFESSOR CARLSON: So you would prefer sticking with "ground."

HONORABLE JANE BLAND: Yeah, or I guess Stephen was saying, you know, no element of any -- you know, the first part of it means finding on any element of a ground, meaning there's nothing in there at all about this particular theory of recovery or this particular defense. And if we stick with that concept, there's nothing in it, then I think it's right, but if we say -- if we say -- if we say "and an element has not been found by the trial court," that to me could be read to say that if you're missing an element your judgment's no good.

HONORABLE STEPHEN YELENOSKY: Well, couldn't

it say, "If no request is made for a finding on any element and no finding has been made on any element of a ground of recovery"?

MR. SCHENKKAN: That's what I was getting at by the question. I just was trying to establish is that what we were intending to do here because it's --

HONORABLE STEPHEN YELENOSKY: "If no request is made for a finding on any element and no finding is made on any element" --

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I guess I had a question. In that situation why isn't the ground entirely waived? In other words, if you don't submit a theory to the jury, you can't resurrect it on appeal just on the theory that it was conclusively established. I mean, it's waived. So why wouldn't the findings be the same way?

PROFESSOR CARLSON: I'm not sure I agree with you, Nina.

MS. CORTELL: Okay.

PROFESSOR CARLSON: I think it -- if you have that state of nirvana in your evidence where you conclusively establish every element of a ground, you have the opposite of no evidence. You have conclusive evidence, and there's nothing for the jury to decide. If you truly have evidence that rises to the level --

MS. CORTELL: But you can waive a theory. Can you waive your negligence theory? I mean, if you -- the theory, not an element, but a theory is not submitted.

PROFESSOR CARLSON: Would you move for a JNOV or a motion for judgment based on that theory, or have you waived it do you think when you conclusively establish? You're not supposed to go to the jury on something that's conclusive. They don't -- there's nothing for them to do.

MS. CORTELL: But if you don't get that acknowledged by the court precharge aren't you at risk?

MR. WATSON: You shouldn't be.

PROFESSOR CARLSON: I don't think so. I think you can still --

MS. CORTELL: Just resurrect it.

MR. WATSON: That's why we have JNOVs.

HONORABLE STEPHEN YELENOSKY: I think you're right.

PROFESSOR CARLSON: The more thorny problem, working off of your example, Justice Bland, is let's say you have two theories, fraud and negligence, and the court states in its judgment, "We find for one of the parties based on fraud and not on negligence" and then there's a request for findings of fact and conclusions of law and the court doesn't make any findings on that ground. It seems oxymoronic to say, "Well, you waived that ground." We say,

"It was in the judgment, so I had to get findings on it?" I think that's what Michael was saying in our phone conversation.

CHAIRMAN BABCOCK: Uh-huh.

PROFESSOR CARLSON: There's slightly different situations that can arise when you already have the judgment.

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: And that's the thorn. That's the little problem in --

CHAIRMAN BABCOCK: Hey, Pete, did you have another problem with 299?

MR. SCHENKKAN: Not a problem, but a couple more questions on (b).

CHAIRMAN BABCOCK: Well, aren't your questions provoking problems?

MR. SCHENKKAN: Sometimes.

CHAIRMAN BABCOCK: What's your next question?

MR. SCHENKKAN: My next question is in (b), in the first sentence of (b), "the omitted elements that are necessarily referable to the elements found," that's new verbiage, and I don't understand what it means. So what is necessarily referable, and what would not be necessarily referable elements?

PROFESSOR CARLSON: Bill, am I wrong that

that language is in there currently? I know it's either there and/or in --

PROFESSOR DORSANEO: No, it's not in the findings of fact rule, and it would be -- the concept comes from the deemed finding rule and the jury charge rule, 279, and the idea -- and it should say if it's retained "necessarily referable to the ground of recovery or defense," okay, rather than "to the elements found." It's "necessarily referable to the ground of recovery or defense."

MR. SCHENKKAN: The language in 279 is "When a ground of recovery or defense consists of more than one element," comma, "if one or more of such elements necessary to sustain such ground of recovery or defense and necessarily referable thereto are submitted to and found by the jury and one or more are omitted from the charge without request or objection and there's factually sufficient evidence, the trial court on the request of any party may make findings."

PROFESSOR DORSANEO: Let me get -- yeah. Let me get the --

MR. SCHENKKAN: It seems to me quite a bit more ambitious concept.

PROFESSOR DORSANEO: -- concept out. The idea is that if there's a finding on negligence but no

finding on proximate cause, the finding on negligence is necessarily referable to the ground of recovery, negligence, okay, but if there is a finding on proximate cause but no finding on any breach of duty question then that finding is not necessarily referable to any particular ground, or if there is just a damage question that's answered that normally perhaps always would indicate nothing about the ground of recovery or defense that was partially submitted, so I didn't read all of this. I should have, but that's the concept, and I wonder if the concept is here. "Trial court has made findings on one or more but not all elements. The omitted elements that are necessarily referable" -- no, it's really -- it's really the submitted elements that have to be necessarily referable to the ground in order to give notice, okay, in order to give notice to the court and the parties --

MR. SCHENKKAN: Yeah.

PROFESSOR DORSANEO: -- as to, you know, what's been submitted and what hasn't.

MR. SCHENKKAN: Yet we've got -- we're using 299(b) draft, we're using "necessarily referable" differently from the way it is used in 279. In 279 we're talking about elements necessarily referable to grounds, and in 299(b) it's necessarily referable to elements. Those are not the same concepts. If we want to use the 279

concept we're going to need to work on the wording some, because the concept as I understand it from what Bill just said is we're trying to say if you have made a finding that is distinctive to a particular ground, it tells you this is about the ground of negligence because it uses the duty -- negligence/duty words, then we can get you to a proximate cause even though you don't have a proximate cause finding, but if we make a proximate cause element finding, which is not necessarily a distinctive particular theory and doesn't apply to the same theories, then that doesn't get you there; and we don't have that predicate set up in 299(b); and I'm not sure, you know, sitting here in a committee as a whole how you would go about doing that.

PROFESSOR DORSANEO: No, and maybe what we ought to do for this is to just take out "that are necessarily referable to the elements found" and just kind of leave it the way it is. You know, "the omitted elements are presumed in support of the judgment when supported by factually sufficient evidence," because that's what the current rule says.

CHAIRMAN BABCOCK: Uh-huh. How does that work for you, Pete?

MR. SCHENKKAN: You know, now I'm worried about is do you have a situation in which the trial court has made findings on some but not all elements or ground,

but the finding that it has made is proximate cause, do you now say we're going to supply duty and breach of duty and for negligence specifically or some other -- and I'm not -- I don't know enough about this. Is that what we want to do?

PROFESSOR DORSANEO: Well, it hasn't been in there for all this time. Okay?

MR. SCHENKKAN: Yes.

PROFESSOR DORSANEO: Since 1941. And I think the committee tried to put it in there, but it's not in there right now.

MR. SCHENKKAN: Okay.

PROFESSOR DORSANEO: I don't know if I could fix it immediately.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: What if we said -- strike "necessarily referable" and say, "The omitted elements are presumed in support of the ground of recovery or defense."

MR. JACKSON: I'm sorry, I can't hear you.

MS. CORTELL: Strike "that are necessarily referable to the elements found" and say, "The omitted elements are presumed in support of," strike "the judgment" and say "the ground of recovery or defense," so it's referable up to the first clause.

PROFESSOR DORSANEO: But that's not accurate.

MS. CORTELL: Can't do it that way?
PROFESSOR DORSANEO: No.
MS. CORTELL: Okay.
PROFESSOR DORSANEO: Because it's the judgment --
PROFESSOR CARLSON: That tells you which way to find them.
PROFESSOR DORSANEO: -- which -- you see the judgment might be for the wrong party, okay, might be for the defendant and then you would presume the finding of no, okay, rather than yes.
MR. SCHENKKAN: Can I try a different version then that at least is consistent I think in the spirit of 279? How about "the omitted elements that are necessarily referable to a ground of recovery" -- "to that ground of recovery or defense"?
PROFESSOR DORSANEO: But it's the submitted elements that have to be necessarily referable. Like it's the submitted thing --
MR. SCHENKKAN: Okay. Then you're right, that doesn't work.
PROFESSOR DORSANEO: Submitted and found. Huh?
MR. SCHENKKAN: You're right. That doesn't work.

PROFESSOR DORSANEO: It has to be -- the thing that's submitted and found in the findings of fact has to be necessarily referable, you know, to a ground of recovery that's partially submitted, because that's the submitted findings -- I mean, the findings that you get are what clue you in to what the ground is and to what's missing.

CHAIRMAN BABCOCK: Yeah, David.

HONORABLE DAVID PEEPLES: Suppose there's a wrongful termination case, and let's say four statutory violations are pleaded, and the judge finds in the findings of fact the employee was terminated on such-and-such a date. That's not necessarily referable to anything, and you wouldn't want anything deemed as a result of that finding, would you? But isn't that part of the cause of action for every one of those wrongful termination theories? I mean, I think that kind of thing is the reason for this necessarily referable concept. I think.

PROFESSOR DORSANEO: Yes. I reiterate, it's not -- it's not -- and I think it's not, based upon historical study, in Rule 299 now because of a mistake that was made in 1940, but it's a mistake that we've lived with for all these many years, and maybe we shouldn't have tried in the committee to fix it.

PROFESSOR CARLSON: It was your idea,

Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I know.

CHAIRMAN BABCOCK: So he's the guilty party.

PROFESSOR CARLSON: He had the idea. I did the --

CHAIRMAN BABCOCK: It's been a smooth 70 years or so.

PROFESSOR DORSANEO: The teachers at the University of Texas left it out.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: I hate to draft in the full committee, but just let me see if this would satisfy you, Pete. "When the trial court has made findings on some, but not all, elements of a ground of recovery or defense, the omitted elements that are necessarily referable to the ground of recovery or defense that's partially determined are presumed in support of the judgment when supported by factually sufficient evidence."

MR. SCHENKKAN: Sound goods to me.

MS. CORTELL: The concept is good. It's the words.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I'm not crazy about "partially determined" because I think the trial judge determined the ground when the trial judge said, "I find

you committed negligence." So it got determined. It just didn't -- those underpinnings didn't make their way to the bubble up.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: You know, these rules were fashioned, I believe, at a time when we had separate and distinct submission.

PROFESSOR DORSANEO: Sure.

PROFESSOR CARLSON: Meaning we submitted every element and every ground supported by some evidence. And that's why they're so --

HONORABLE JANE BLAND: But current Rule 299 doesn't have "partially determined" in it. It only says "omitted findings," and it doesn't -- it doesn't do this --

HONORABLE STEPHEN YELENOSKY: Can we just call them "presumed findings"?

CHAIRMAN BABCOCK: Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: Why doesn't the word "found" work? I mean, that's partially determined. I mean, you've already said that it's omitted, that there's something omitted from the ground found, so the judge has found something. He's partially determined something. Why doesn't the word "found" work for the same purpose rather than substituting "partially determined" for it?

PROFESSOR CARLSON: So, Justice Gaultney, do

I hear you saying that your preference would be "necessarily referable to the ground of recovery or defense found"?

HONORABLE DAVID GAULTNEY: Right.

PROFESSOR DORSANEO: Uh-huh.

HONORABLE DAVID GAULTNEY: How does that -- what's the problem with that?

CHAIRMAN BABCOCK: That work? Sarah.

HONORABLE SARAH DUNCAN: I think this is just my bias, but it seems to me that part of the problem with drafting this comes from separating "omitted elements" from the verb that -- from the verb that they act on. "Omitted elements are presumed if another necessarily referable element of that ground of recovery or defense has been found."

PROFESSOR CARLSON: I think that would work.

HONORABLE SARAH DUNCAN: Huh?

CHAIRMAN BABCOCK: Say that louder.

HONORABLE SARAH DUNCAN: I think that it's separating the subject and verb in the sentence that's causing all of us to have different problems, not the same problem but different problems, because we're not sure what "necessarily referable" modifies, we're not quite sure what the verb is and what is the subject, but I think if we get the subject and the verb together I think we're all talking

about the same concept being implemented.

PROFESSOR CARLSON: Okay. Any other comments?

CHAIRMAN BABCOCK: Any other comments? Yeah, Bill.

PROFESSOR DORSANEO: I think the omitted element has to be unrequested to -- that's not in there, is it?

PROFESSOR CARLSON: Well, no, but there's a last sentence there. I was just trying to get a word or two out.

PROFESSOR DORSANEO: Okay. Well, I like putting "unrequested" in there. It's in the current rule.

PROFESSOR CARLSON: Okay.

PROFESSOR DORSANEO: And I miss it. And instead of saying "some" I would say "one or more" in the first line, because "some," is "some" one or is "some" two? What do you think? I think it's two and some -- "some" is not one.

PROFESSOR CARLSON: Well, with --

PROFESSOR DORSANEO: It's like some chocolate, you know, cake is maybe a piece of cake, but some people, some person.

PROFESSOR CARLSON: You're real frightening.

PROFESSOR DORSANEO: I don't like "some."

Maybe "some" is just ambiguous.

HONORABLE SARAH DUNCAN: Why don't you just say "less than all"?

PROFESSOR DORSANEO: "One or more" is not ambiguous.

HONORABLE JANE BLAND: You're some fun.

PROFESSOR DORSANEO: Used to be.

PROFESSOR CARLSON: With the Chair -- I'm sorry.

HONORABLE TOM GRAY: I'm just curious, Elaine, if my reading of the last sentence is correct that if I have won the judgment in my client's favor and there is an element that has been found and I make the request for an additional element that was omitted, so I won the judgment, the judgment is what I want it to be, but there's one element found, and I know that there's an omitted element and I am foolish enough to request that omitted element and it's not found -- it's not presumed, and I lose my judgment on appeal.

PROFESSOR CARLSON: It's just not presumed.

HONORABLE TOM GRAY: If it's not presumed then there's no finding on that element.

PROFESSOR CARLSON: You can't presume it either way.

HONORABLE TOM GRAY: And so if I have the

burden of proof to get the judgment, which then I've -- I've cost myself the judgment on appeal.

PROFESSOR CARLSON: Well, I'll back up and say you're right. I don't know why you ask for it because it would be presumed in support of the judgment if no one asked for it.

HONORABLE TOM GRAY: Okay.

PROFESSOR CARLSON: It was a partially determined ground, but it certainly was not the intent that you would lose your judgment if you didn't -- if you asked and didn't receive the omitted finding.

MR. SCHENKKAN: So the practice is you should ask for negligence finding and not ask for proximate cause because you don't need to request proximate cause, and if you ask for proximate cause also and don't get it, you've lost your judgment.

PROFESSOR CARLSON: If you tee up the necessarily referable argument, yeah.

Let's -- let me respond further to you, Justice Gray. Bill has suggested that we put in the first sentence after the comma, "the omitted," insert "unrequested element." If we do that, do we need the last sentence?

HONORABLE SARAH DUNCAN: Why just -- I don't understand Bill's insert of "unrequested."

PROFESSOR DORSANEO: If somebody requests -- if somebody requests a finding then you avoid this paragraph. That is one way to avoid a presumed finding, is if a party requests that the court finds it and the court doesn't find it then the deeming -- or the presumed findings rules just don't apply, and that is current law.

PROFESSOR CARLSON: But then, Justice Gray, subsection (c), because we're not going to presume it, but a trial court's refusal to make a requested finding is reviewable on appeal, so it would be the trial court erred in not making a find on my requested omitted element, and it's supported by the evidence. I think that's how you circle it around. Right?

HONORABLE TOM GRAY: And you wouldn't need to file a notice of appeal because you're not asking for a more favorable judgment, you're just -- it would be in a counterpoint. Okay.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Wouldn't it have to say, Bill, instead of "requested," the "unrequested"?

PROFESSOR DORSANEO: Yeah, I said "unrequested."

MR. HAMILTON: Oh, I thought you said "requested."

PROFESSOR DORSANEO: "Unrequested."

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Elaine, did we think about refusal of the court to make any requested findings shall be reviewable on appeal? My only concern about the way it's drafted now is that you could read "refusal of the court to make a requested finding" to refer to requested additional finding, because that's the sentence before it, and under old Rule 299 it was referable to any requested finding, not just additional findings.

PROFESSOR CARLSON: Just one second, I'm sorry. So, Justice Bland, if that second sentence was a trial court's failure to make a requested finding or requested findings of fact.

HONORABLE JANE BLAND: Just something that would show the reader that it's not just the failure to make additional findings because I think a lot of people understand that trial judges don't have to do anything with additional findings.

MR. SCHENKKAN: Is it that decision or the decision to strike "additional"?

HONORABLE JANE BLAND: Well, that's fine with me, too.

PROFESSOR CARLSON: You know, part of the reason it's in (c) is (c) is dealing with the partially determined situation. I'm wondering if it would be better

to weave that in somewhere else. I understand what you're saying.

HONORABLE STEPHEN YELENOSKY: Could it go in (b)?

HONORABLE JANE BLAND: I like Pete's idea of taking out "additional," because that's not -- you're not really trying to get to a concept of additional in the sense of that second series of findings that get requested in that section, are you?

PROFESSOR CARLSON: I'm sorry. I'm rereading it.

HONORABLE STEPHEN YELENOSKY: How does the first sentence of (c) differ from the last sentence of (b)? Is it different?

PROFESSOR CARLSON: No, and that's what I was saying, they're really tying in that concept.

HONORABLE STEPHEN YELENOSKY: Why can't you just add to the last sentence of (b) refusal of the court to make -- add that sentence to (b)?

PROFESSOR CARLSON: We could do that and just have (c) address the trial court's failure to make.

HONORABLE STEPHEN YELENOSKY: No, you don't need it.

HONORABLE JANE BLAND: You don't need it.

HONORABLE STEPHEN YELENOSKY: You don't need

it.

PROFESSOR CARLSON: Don't need it at all. Okay.

MR. HAMILTON: Taking "additional" out?

MR. LOW: Taking the first sentence, aren't you?

CHAIRMAN BABCOCK: What are you doing, Elaine?

PROFESSOR CARLSON: I think Judge Yelenosky's suggestion was to take the first sentence of (c) and --

HONORABLE STEPHEN YELENOSKY: Throw it away.

PROFESSOR CARLSON: -- throw it away and rely upon the last sentence that now exists in (b) --

HONORABLE STEPHEN YELENOSKY: Right.

PROFESSOR CARLSON: -- of Rule 299.

HONORABLE STEPHEN YELENOSKY: Basically take the second sentence of (c), put it at the end of (b), and throw (c) away.

PROFESSOR CARLSON: Take the last sentence of (c) and --

HONORABLE STEPHEN YELENOSKY: Put it in (b).

PROFESSOR CARLSON: -- insert it at the end of (b), as in boy?

HONORABLE STEPHEN YELENOSKY: Right. So (b) says there's no presumed finding on the omitted element if

a finding on that element has been requested. Next sentence, "Refusal of the court to make a requested finding shall be reviewable on appeal," period, end of Rule 299.

PROFESSOR CARLSON: Okay.

HONORABLE STEPHEN YELENOSKY: I have suggested language on (a), too, if you want it.

PROFESSOR CARLSON: Sure.

HONORABLE STEPHEN YELENOSKY: You want it now?

PROFESSOR CARLSON: Sure.

HONORABLE STEPHEN YELENOSKY: "If no request is made for a finding on any element of a ground of recovery or defense and no finding on any element has been made, the ground is waived unless every element of the ground has been conclusively established by the evidence."

PROFESSOR DORSANEO: That's good.

PROFESSOR CARLSON: Yeah.

HONORABLE SARAH DUNCAN: Is that current law?

HONORABLE STEPHEN YELENOSKY: That changes one other thing than what we were talking about before. Rather than saying "unless the ground has been conclusively established" it continues with the term "element" and says "every element has been conclusively established" and rather than "under the evidence," "by the evidence" because that's more plain-speaking.

MR. MUNZINGER: Could you repeat that?

HONORABLE STEPHEN YELENOSKY: Sure. "If no request is made for a finding on any element of a ground of recovery or defense and no finding on any element has been made, the ground is waived unless every element of the ground has been conclusively established by the evidence."

PROFESSOR CARLSON: Thank you.

HONORABLE STEPHEN YELENOSKY: You're welcome.

CHAIRMAN BABCOCK: Okay. So we solved that problem, huh? Sarah.

HONORABLE SARAH DUNCAN: Is that current law?

CHAIRMAN BABCOCK: Is that current law?

PROFESSOR CARLSON: Yes.

PROFESSOR DORSANEO: Uh-huh.

PROFESSOR CARLSON: Yeah.

CHAIRMAN BABCOCK: Everybody says "yes."

HONORABLE SARAH DUNCAN: Okay.

CHAIRMAN BABCOCK: That's what they say.

HONORABLE SARAH DUNCAN: I'm just looking in the current rules, and I don't see that.

PROFESSOR CARLSON: I e-mailed all those cases.

HONORABLE SARAH DUNCAN: I know.

PROFESSOR CARLSON: Did you read them?

HONORABLE SARAH DUNCAN: Probably not.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Current Rule 299 says that.

HONORABLE SARAH DUNCAN: Thank you.

CHAIRMAN BABCOCK: Okay. What's next? Pete, you got any more questions?

MR. SCHENKKAN: Nope.

CHAIRMAN BABCOCK: Thank goodness. All right. Anybody have any other comments on 299?

MR. LOW: Elaine?

CHAIRMAN BABCOCK: Or questions? Yeah, Buddy.

MR. LOW: If we do away with (c) and just put it all under (b), would you have to change the caption of (b) to somehow include failure to make findings?

PROFESSOR CARLSON: Yeah.

MR. LOW: Because it does include that, so you might have to consider some modification of the caption of (b).

HONORABLE STEPHEN YELENOSKY: Can't you just call it "Presumed Findings"? Because you get rid of Justice Bland's concern that grounds aren't partially determined by the court. They're determined, and the court either explicitly states all the elements or presumably and implicitly by virtue of this rule has found the others. So

I'd just call it "presumed findings."

PROFESSOR CARLSON: The reason for the caption is having taught this over the years.

HONORABLE STEPHEN YELENOSKY: Because they use --

PROFESSOR CARLSON: Is that concept seems to work -- now, that's not a very good reason for me to put it in the rule. One is you've totally omitted a ground, and the other is, oh, the court has partially determined that ground, and it just sort of I think does tip off the reader of the distinction between the two concepts, but I may have just used them so much I'm wrong.

HONORABLE STEPHEN YELENOSKY: Well, it's Justice Bland's concern. I'm just a scrivener.

CHAIRMAN BABCOCK: All right. Any more comments on 299? Okay. How about 299a? Any comments, questions, humorous remarks?

PROFESSOR CARLSON: We have not -- we talked about this last time. We did not take any votes on it. It would have to read in the third sentence -- and I apologize I didn't catch that until today -- "Pursuant to Rules 296, 297, and 298." We have to weave in 296.

CHAIRMAN BABCOCK: Okay. Anything else? Justice Bland.

HONORABLE JANE BLAND: Are we talking about

299a now?

CHAIRMAN BABCOCK: Yes, we are.

HONORABLE JANE BLAND: Okay. Didn't we have a discussion last time about whether -- why we had to have findings of fact filed as a separate document?

PROFESSOR CARLSON: Yes.

HONORABLE JANE BLAND: And what -- remind me why we have to have them as a separate document, why a trial judge can't -- and I'll tell you in family law cases they often do, and I think under the Family Code they sort of have to in some --

PROFESSOR CARLSON: We had a pretty extensive discussion on this. A lot of it were comments by Richard Orsinger.

HONORABLE STEPHEN YELENOSKY: How can we talk about this without Richard?

PROFESSOR DORSANEO: More quickly.

CHAIRMAN BABCOCK: He is on the way.

PROFESSOR DORSANEO: Let's finish this.

HONORABLE JANE BLAND: And I'm talking about parental termination and those kinds of cases. So what is -- I mean, what is this separate document, and why do we have to have it? Because I think a lot of conflicts arise because they're separate documents, and they may not -- and so shouldn't we be encouraging trial judges to do these

things all at once so they don't have conflicts between what they say in their judgment and what they have in their findings?

PROFESSOR CARLSON: We started out the discussion with those -- some folks making that observation.

HONORABLE JANE BLAND: I'm probably repeating myself. Sorry.

PROFESSOR CARLSON: No, no. That's all right. We didn't vote, as I said, but I understood the conversation, the comments, to be leaning the opposite way, saying we really want to keep a judgment very succinct and we don't want to in any way compromise the judgment by gumming it up with findings of facts that might be attacked and that the judgment should be distinct and separate, as I understood Richard's comments for that main purpose.

PROFESSOR DORSANEO: Well, I think there's also the problem that we -- we don't have findings when we have the judgment. They only come later, so --

HONORABLE JANE BLAND: Well, not always.

PROFESSOR DORSANEO: Maybe they shouldn't, but that's the normal idea, is that the trial judge can or cannot make findings in the judgment, but they don't -- that's just --

HONORABLE JANE BLAND: Can or cannot. Why

are we requiring a separate document? I understand the need -- you know, and I think I now remember Richard saying there's a lot of sensitive information that might be in findings that we don't want in a judgment and it's easier to extract a judgment that's not lengthy, but why are we requiring it? Why aren't we letting the trial judge decide how to do it, and a lot of trial judges will do findings and attach -- I mean, do a judgment and attach the findings as Exhibit A, and a lot of trial judges get proposed findings ahead of drafting judgment, partly because they don't want to be subject to the deadlines. They want to enter the judgment and the findings at the same time, and I think we should encourage them to enter the judgment and the findings at the same time.

PROFESSOR DORSANEO: Me, too.

CHAIRMAN BABCOCK: Justice Gaultney, then Roger, then Judge Yelenosky.

HONORABLE DAVID GAULTNEY: Isn't the problem when you have a conflict? It's not necessarily that we just don't want to see findings in a judgment. It's just that we don't want a conflict between something that's said in a judgment and something later in the findings of fact, but let's say, for example, that you have findings of fact in a judgment and nothing else. Okay. Nothing else. No written findings, just the findings of fact and the

judgment. Now, what's the choice? You can look at the findings of fact that express findings that the court has made, or what? You could, perhaps, imply findings that are in conflict with -- I mean, if you ignored the findings in the judgment because you can't make them, what if they -- the express findings would conflict with what you -- see what I'm saying?

PROFESSOR CARLSON: Yeah.

HONORABLE DAVID GAULTNEY: So it might -- I think I agree with Justice Bland. I don't see that there needs to be a prohibition against findings in the judgment. I think there needs to be a tiebreaker, so to speak, that if there's a -- a later finding controls over whatever you have.

PROFESSOR CARLSON: I think we discussed this a little bit last time.

HONORABLE DAVID GAULTNEY: We did. We did.

PROFESSOR CARLSON: I believe there's a split, isn't there, in the court of appeals on this issue?

HONORABLE DAVID GAULTNEY: I believe there is.

HONORABLE SARAH DUNCAN: There's a majority and dissent. I don't think there's a split. There's definitely a dissent.

PROFESSOR CARLSON: I think there may be

both.

HONORABLE SARAH DUNCAN: A split?

PROFESSOR CARLSON: Both.

HONORABLE SARAH DUNCAN: Good.

PROFESSOR CARLSON: With some -- as I understand it, please correct me, because it's been a while since I read those cases, that in some courts of appeals they will not consider any findings in a judgment. They just look at the --

HONORABLE DAVID GAULTNEY: Even in the absence of anything else.

PROFESSOR DORSANEO: Right.

PROFESSOR CARLSON: Uh-huh. Yes. And then there are other courts that take your view.

CHAIRMAN BABCOCK: Roger, then Judge Yelenosky, then Justice Bland.

MR. HUGHES: Well, I like the rule, and I'll give a practical reason and then perhaps a legal one. The practical is sometimes time is of the essence and we need to get a judgment out now and we'll give you our reasons later, and because lawyers, if they realize they can hold up a judgment by arguing over the findings and quibbling back and forth -- I mean, we're trained to do that -- hold up the entry of a judgment not -- not because -- you know, we're all agreed that, no matter what, the judge has made a

decision plaintiff gets X number of dollars. Now we're going to argue over the reasons, so we're going to hold up the judgment, hold up collection.

The legal reasoning is if you start saying findings are in the judgment when the judge issues new or additional findings of fact has the judgment been amended? Are we now going to say that additional findings of fact constitute an amendment of the judgment when they have some findings in it, in which case the whole thing gets triggered all over again? I think that may be a sound legal or practical reason why we want them separate.

CHAIRMAN BABCOCK: Judge Yelenosky, then Justice Bland.

HONORABLE STEPHEN YELENOSKY: Well, I guess mine sort of coincides with that from a judge perspective. I agree with Justice Bland. I mean, the judge can or should be able to determine whether he or she wants to put them in there, but in a -- in the practical sense when there's any pressure to get a judgment out and the judge wants to get the judgment out, it's nice to know that if there's something in there other than the decretal part it's not going to have any effect and I don't really need to worry about it. So, I mean, it's not a prohibition. I mean, there's -- if I put findings in there I'm not going to get in trouble. It's just that they're not going to

have any effect, and if they're in there and I don't see them, they're not going to have any effect. I guess you could say, well, I just need to do a better job and make sure they're not in there, but it gives me some comfort.

CHAIRMAN BABCOCK: Justice Bland. Then Bill.

HONORABLE JANE BLAND: Well, I guess I just think of it from a cost perspective, and you've got a judgment, and you've got no findings, and the judgment has findings in it, and we're supposed to pretend those findings don't exist because they're not in a separate document, and it just seems to me to be one of the things that people would scratch their head at if they weren't lawyers about we're going to send a case back to the trial judge who found this way and made some findings because it wasn't on a separate piece of paper.

And we now put all kinds of stuff in judgments in terms of -- you know, you'll have -- often you'll have the judgment will have the entire jury charge incorporated in it. Some people do that when they have the judgment, here's every question and every answer of the jury. So I'm not saying that I think it's the best practice or it will work in every practice to do it, but to make it a requirement that it be in a separate document to me elevates form over substance.

CHAIRMAN BABCOCK: Professor Dorsaneo. Then

Sarah.

PROFESSOR DORSANEO: I find myself not being able to say why and when findings had to be made separate and apart from the draft of the judgment. I frankly don't know when that happened or why it happened, but I'm convinced by what you've said and by what Justice Gaultney said that maybe -- and by the split of authority in cases that maybe it should say -- and I would move this -- "Findings of fact may be made in the judgment or may be filed apart from the judgment in a separate document," and then have the other language deal with the conflict. Okay. I don't see what mischief that would cause except for possibly -- I really -- I think it causes less mischief than more mischief. Because you're writing -- when I'm doing my forms, for example, now, I mean, you have the recitals in the judgment, and they don't -- they say, well, we had a trial and something happened and now, therefore, and the decretal paragraphs.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: But that doesn't resolve Judge Yelenosky's concern about --

PROFESSOR DORSANEO: I can't even hear you.

HONORABLE SARAH DUNCAN: That doesn't resolve Judge Yelenosky's concern that he not be held accountable for findings that are embedded in the judgment. But my

response to that concern is read the judgment --

HONORABLE STEPHEN YELENOSKY: More carefully, and I admitted that's an answer.

HONORABLE SARAH DUNCAN: -- because to me the rule only has import if there's a conflict. That's when it -- the only time it should have any import. To me if there --

HONORABLE STEPHEN YELENOSKY: Well, if there are no subsequent findings.

HONORABLE SARAH DUNCAN: If there are findings in a judgment and no findings apart from the judgment, those findings are as good as any other finding, and they ought to be given impact, and I'm sorry if you've got too many judgments to sign and you can't get them all read, but to ignore findings that have been made and signed by a judge is to me ludicrous.

CHAIRMAN BABCOCK: So let's take a vote on that.

HONORABLE STEPHEN YELENOSKY: Well, I think -- yeah.

CHAIRMAN BABCOCK: Should -- the language here is that the findings must be filed apart from the judgment. Everybody in favor of that, raise your hand.

MR. HUGHES: What was the question?

CHAIRMAN BABCOCK: The question is findings

of fact must be filed apart from the judgment. Everybody in favor of that, raise your hand.

CHAIRMAN BABCOCK: And everybody opposed to that, think it ought to be something else, discretionary or whatever.

The vote is 10 in favor of the "must" language, 14 against, the Chair not voting, so the Court now has some sense of the committee, which is slightly against "must." What other comments about 299a? Professor Dorsaneo.

PROFESSOR DORSANEO: Professor is my job, not my name. Call me Bill.

CHAIRMAN BABCOCK: The esteemed Bill Dorsaneo.

PROFESSOR DORSANEO: Yeah. Elaine, does the last sentence -- if that 14 vote holds up, does the last sentence need to change, or is it fine either way?

PROFESSOR CARLSON: I think if that vote holds up the last sentence needs to go.

CHAIRMAN BABCOCK: Needs to go?

PROFESSOR CARLSON: Yes, needs to go, if that is the sense of the Court, because it's not --

CHAIRMAN BABCOCK: Okay. Anything else about 299a? Okay. Let's move right along to 301. That's next, right?

PROFESSOR DORSANEO: Yes.

HONORABLE TOM GRAY: Chip, I'd like to make one comment about 299a that kind of bleeds over into another issue that I raised with regard to letter rulings.

CHAIRMAN BABCOCK: Sure.

HONORABLE TOM GRAY: There are occasionally you'll see a judge send a letter out that says, "I find X, therefore, the judgment" or maybe it's -- it happens particularly in family law cases. They may be finding that something is separate property early on in the disposition, and there would be an argument then raised later. It just -- there may be a question of what is the finding, particularly in those cases when you have letters that pass between the judge and the parties regarding discrete parts of cases, and so as the Court's looking at that I don't want to forget about the interplay between this findings rule and potentially anything that we do later with regard to finality regarding letter orders.

CHAIRMAN BABCOCK: Okay. Thank you.

HONORABLE TOM GRAY: I apologize for the delay.

CHAIRMAN BABCOCK: That is now noted in the record. Bill. The Honorable Bill.

PROFESSOR DORSANEO: Oh, you're so kind to me.

MR. MUNZINGER: It's Professor Dorsaneo you were calling on; is that right?

PROFESSOR DORSANEO: No.

CHAIRMAN BABCOCK: The guy in the gray suit over there.

PROFESSOR DORSANEO: Well, I've enjoyed working at -- this is a prologue. I've enjoyed working on the 15 drafts of this rule over a long period of time.

CHAIRMAN BABCOCK: Careful, it will be 16 if you're not careful.

PROFESSOR DORSANEO: Yeah, I know. And what I tried to do in this draft was to -- and what I think I did was to go back and read very carefully the transcripts of the two meetings at which the draft rule was -- was discussed to make sure that I -- as best I could that I incorporated everything that needed to be incorporated based upon the discussion at those meetings and at the same time copied or preserved some issues for consideration at this meeting that hadn't actually been resolved by any votes, and I was chagrined to discover that there actually are no votes that were taken at the earlier meetings, although there were a lot of things that the committee members seemed to agree about from -- from the fact that there wasn't -- wasn't much controversy.

So this posttrial -- or this motions relating

to judgments draft is here with some bracketed information. I revised my memorandum dated December 1, and what you should have is a December 1, 2010, revised draft Rule 301 and a revised memo to the advisory committee dated December 1, 2010, and from my perspective we gave due consideration and I followed the suggestions with respect to items -- posttrial motions items, you know, (1), (2), and (3), which, you know, we can discuss, but I think those parts are finished, even though not the subject of a committee vote.

The item (4), the first sentence is in the same category, but the bracketed information is new in item (4), particularly the duty of the clerk. And in all of the earlier drafts I did not include this clerk's duty in posttrial prejudgment motions, but my sense from reading the transcripts was that that was a mistake on my part, and the last sentence of (4) speaks about that and tries to correct what I consider to be a mistake, saying, "The clerk must promptly call such a written motion to the attention of the judge, but the failure to do so does not affect the preservation of complaints made in the motion."

That same -- that same sentence is included in the disposition of postjudgment motions paragraph in subdivision (b), Postjudgment motions." "The trial court must promptly call the postjudgment motion for new trial or

to modify a final judgment to the attention of the court, but the failure of the clerk to do so does not affect the preservation of complaints made in a motion." It's slightly different, but the same concept is applied to both posttrial prejudgment motions and postjudgment motions, and that's -- if we're in a position to take votes on that we could -- you know, I would recommend, you know, voting on that issue to see whether I cross that sentence out or not.

Now, there is an additional sentence that I added in the bracket on my own. It was not the subject of any discussion, but it -- at the prior meetings, but I think it's a good sentence, but I might be wrong. "A posttrial motion for judgment may be made in open court on the record or may be made in writing and filed with the clerk of the court," because it seemed to me it's -- it seemed to me that all of them don't need to be made in writing, but one way or the other the -- you know, it ought to be said. You know, the formal motion ought to be in writing or if it's required to be -- stated that it needs to be in writing, if it needs to be in writing.

If it doesn't need to be in writing -- and certainly motions for judgment after nonjury trials, according to Richard Orsinger, you know, are typically made orally. Because I asked him what do they look like? And he said, well, you just make them orally in open court, so

that's -- that's so some of the time. Okay. That's so some of the time. I'm less sure, but I think it's also the case that motions for judgment notwithstanding the verdict or to disregard jury findings, you know, have been made orally, although when you read them they -- it's like somebody is making a written motion orally. Sometimes they're made in writing. So those are two important things that aren't that big of a deal, but I think they needed to be erred or discussed by the committee or voted on or discussed or whatever.

CHAIRMAN BABCOCK: Which one do you want to take up first, the posttrial motion for judgment in open court?

PROFESSOR DORSANEO: Yeah, let's take them chronologically. It doesn't matter to me whether that sentence is in there, but if it isn't in there then the first sentence needs to be adjusted.

CHAIRMAN BABCOCK: Okay. That's 301(a)(4), right?

PROFESSOR DORSANEO: Yes, sir.

CHAIRMAN BABCOCK: Okay. Any discussion on that? Judge Evans.

HONORABLE DAVID EVANS: Many motions are made orally, and -- for judgment, and they're simple, and they're easy to rule on, but there's been a couple that

have been made that I've said I'd rather see it in writing and have the briefing with it. Does this foreclose me from asking that?

PROFESSOR DORSANEO: No, I wouldn't think so, no.

HONORABLE DAVID EVANS: I'm not sure if "may" means "shall."

PROFESSOR DORSANEO: No, it means "may."

HONORABLE DAVID EVANS: Well, "may" means -- it gives the right to the movant as opposed to the trial judge, "may make it orally," and I may want to look at it pretty closely; and you're right, many of those motions are already written and are dictated into the record, especially when we're doing -- getting into the charge. We live with that, but this is a motion on judgment after a verdict. I just want to make sure the trial judge can ask for it in writing if he wants it -- he or she wants it in writing.

PROFESSOR DORSANEO: We could add, you know, just a phrase "in the discretion of the court" or something like that. Maybe that's not --

HONORABLE DAVID EVANS: I think it's already there. We do it in practice.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE DAVID EVANS: I don't know that you

need the rule, but that's just my thought.

MR. MUNZINGER: "Unless the trial court required otherwise, a posttrial motion for judgment may be made in open court on the record."

HONORABLE STEPHEN YELENOSKY: But that's not always going to --

CHAIRMAN BABCOCK: I can't imagine that if a litigant is in front of you, Judge Evans, and you say, "Hey, I want this in writing," and they say, "Hey, read my man Dorsaneo's work, draft 15." And --

PROFESSOR DORSANEO: And then the response will be "Well, that will be denied."

HONORABLE DAVID EVANS: And I'll get it in writing because I will turn to my reporter and say, "All right, type it up and freeze it," and I can go through that, but it may not -- it's just there's no response that can be filed to that except an oral response, so I just want you to think about that. You're going to get an oral motion, and most of those oral motions are pretty simple on simple cases.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID EVANS: "We move for judgment based on this verdict," and this verdict is pretty clear.

CHAIRMAN BABCOCK: Judge Yelenosky, you beat Justice Bland by a hair.

HONORABLE STEPHEN YELENOSKY: Oh, okay. Well, I just don't want to go down the road of having to write in every time the court has discretion because I think it's got to be understood most of the time. We start writing it in, then we leave it out somewhere. There are times when the court doesn't have discretion, but that's pretty clear. Otherwise it goes just like Chip said.

CHAIRMAN BABCOCK: Yeah. Yeah. The brave litigant who wants to rely on the Honorable Dorsaneo and tell Judge Evans where to go can look to --

PROFESSOR DORSANEO: This is committee work here. This is committee work.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: On the subsection (2) on the motions for judgments after nonjury trials, people move for judgment after the close of the plaintiff's -- after the plaintiff rests but before the evidence is closed. In other words, the plaintiff's evidence wasn't convincing, they didn't get beyond -- they didn't get to a preponderance of the evidence, and so the defendant will move for judgment without having put on their case yet.

PROFESSOR DORSANEO: That's a good point.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: First time I read (3) today -- and I know where (3) comes from, Bill. I'm

not being critical, but maybe it's the comma after "verdict." It occurred to me that that could be read that I can't even move for a JNOV unless I -- unless a directed verdict would have been proper, and really all we're trying to say is that it's the same ground or grounds. I don't -- I don't have to get a judicial determination --

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE SARAH DUNCAN: -- that a directed verdict would have been proper to be able to move for JNOV.

CHAIRMAN BABCOCK: Yeah. What do you think about that, Bill?

PROFESSOR DORSANEO: Would you -- would you say that again? I was doing two things. What do you want me to do to fix it?

HONORABLE SARAH DUNCAN: I would like it "A party may move for judgment notwithstanding the verdict after receipt of the jury's verdict." I don't see why "if a directed verdict would have been proper" is even necessary. If it is necessary -- I don't see why it's necessary.

MR. MUNZINGER: It's almost a substantive law statement.

HONORABLE SARAH DUNCAN: We don't list all the grounds that --

PROFESSOR DORSANEO: It's in there -- maybe

the comma shouldn't be in there, but it's -- the reason it's in there is because it's in Rule 301 now, and it's the basic standard for a judgment NOV as distinguished from the other 301 motion to disregard one or more jury findings. I don't -- I think it's helpful for it to be in there; otherwise, you know, on what basis would you move for a judgment notwithstanding the verdict? You know, maybe there's some other wording. That's not the wording used in Federal Rule 50, for example, which is perhaps more informative to beginners, but -- and, you know, at this point I wouldn't -- don't mind taking it out, but I think it's a good idea for it to be in there. It just sets the standard. Basically if you don't have -- if you don't have evidence of each component element of your liability claim then a directed verdict would have been proper.

HONORABLE SARAH DUNCAN: Well, but that's one basis. If the evidence conclusively establishes that limitations has run, if the evidence conclusively establishes an affirmative defense is another --

PROFESSOR DORSANEO: Well, under those circumstances a directed verdict would have been proper.

HONORABLE SARAH DUNCAN: I understand that. I understand that, but I'm saying we're not really --

PROFESSOR DORSANEO: What you're saying is you don't find the language very informative and actually

you find it misleading.

HONORABLE SARAH DUNCAN: Well, I think a lot of us find the language informative because we know when a directed verdict is proper, but I think this sentence as written could be erroneously interpreted to mean that you can't even move for judgment NOV unless it's already been established that a directed verdict would have been proper.

PROFESSOR DORSANEO: No, it's not meant to mean that.

HONORABLE SARAH DUNCAN: I understand that.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, isn't it -- I think part of it comes from -- and I may be wrong on this. The Federal court, you can't make a motion for judgment NOV unless you've made your motion for directed verdict or a certain verdict; isn't that correct?

PROFESSOR DORSANEO: Right.

MR. LOW: And so I think here you're just trying to set a standard. You're not saying you have to have made that motion, but judgment NOV is not valid unless a motion for directed verdict would have been valid, so you're trying to establish a standard but not a prerequisite to filing an NOV; is that correct?

PROFESSOR DORSANEO: Yes.

MR. LOW: Okay.

CHAIRMAN BABCOCK: Okay. Anything more about 301(a)(1) through (4)?

HONORABLE TOM GRAY: Just out of curiosity, in (a)(1) and (2) does the phrase "at any time" really add anything to the sentence, and doesn't it create the potential of the argument that there is no time frame, no limit? "A party may move for judgment on the verdict after rendition of the verdict," period.

PROFESSOR DORSANEO: "At any time" doesn't help. I'm taking it out.

HONORABLE TOM GRAY: Okay. Thanks.

PROFESSOR DORSANEO: And I'm going to make the change about after plaintiff rests, but it will take me more language to capture Justice Bland's accurate point.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Bill, if you take "any time" out it may sound like it may on the verdict after rendition. Is that immediately after? Or do you have some time element?

PROFESSOR DORSANEO: Well, there is no time element.

MR. LOW: Well, I know, but if you don't say "any time" it just says after -- I mean, I think "any time after that" means you don't have to do it right then. It's any time, but it has to be following that.

PROFESSOR DORSANEO: I guess it's a question

of which one do you think is more -- which one do you think is more misleading, saying "any time" or --

MR. LOW: Well, I'm misled by a lot of things, so I can't tell you that.

CHAIRMAN BABCOCK: Now, we're not going to debate that. Okay. Anything else on (a)(1) through (4)? How about (a)(5) through (7)?

PROFESSOR ALBRIGHT: (a)(5) is the one that we had the most trouble with, and it's the thing that got this drafting started to begin with. It's -- right now the 301 motions subject of (a)(3) are not overruled by operation of law, that under Rule 301 you have to have a signed written order, and the Court Rules Committee suggested that, as I said at the earlier meetings, that -- that the overruling by operation of law that's applicable to postjudgment motions for new trial and postjudgment motions to modify should be made applicable to 301 motions and that -- I don't -- I think we all hashed that out at our earlier meetings and were happy ultimately with that approach as long as the provision in (a)(4) that the clerk must call such a written motion to the attention of the judge is added into the rule. I think Justice Brown, Justice Christopher, Justice Bland, Judge Evans, all suggested that that would be an improvement of just having things overruled by operation of law without them even

knowing that they had been filed. So those two things go together.

Now, what we then have left is, well, when. Okay, when is this posttrial principally (a)(3) motion overruled by operation of law, and the committee's recommendation is the first option, "On the date the final judgment under Rule 300 is signed as to any requested relief not granted in the judgment." An alternative that was discussed at the various meetings would be "On the date the court's plenary power expires as provided in Rule 304," which Frank Gilstrap liked and at some points I liked that better and some other people liked it better and perhaps we liked it better, particularly if we don't read Rule 304 to see when that is, and Rule 304 -- 304 comes later, and it occurred to me while revising this draft that maybe our current draft of Rule 304 needs some work as to when that is, when plenary power expires. Maybe it's too complicated under current law and under that draft, but that's -- you know, that's an option.

Operationally do I think that it makes a -- that big of a difference as to when the posttrial motions are overruled by operation of -- operation of law? No, I don't think so in this context. I guess until they're overruled by -- until -- when they're overruled by operation of law they can be reconsidered if there's still

plenary power, okay, over the judgment, so I would be happy with either of the first two things. But, again, we have to look at Rule 304 to really understand what we're talking about.

Then the third alternative was discussed because some members of the committee thought 75 days is a familiar time for things to be overruled by operation of law. That is to say -- that is to say the postjudgment motions that are overruled by operation of law now, and we discussed that at some length, and I think the committee had some resistance to that, but I clearly said that we were going to put it in the list of things to be considered at this meeting. If that option is selected we will have to change the plenary power rule because you won't have 75 days under the current draft of the plenary power rule unless there's a postjudgment motion that extends plenary power. So it will -- plenary power will have run out on the expiration of 30 days in the absence of a postjudgment motion, but the more I thought about it, I mean, it's -- this rule could dictate what Rule 304 says and not vice-versa, so those are the -- you know, those are the three choices that we discussed so far.

CHAIRMAN BABCOCK: Which do you prefer?

PROFESSOR DORSANEO: Without feeling strongly about it, I think it makes the most sense for it to be the

first one.

MS. BARON: Yeah, can I ask a question?

CHAIRMAN BABCOCK: Pam.

MS. BARON: In what circumstance would a prejudgment motion need to be extant after the judgment is signed? Is there any reason?

PROFESSOR DORSANEO: Well --

MS. BARON: You asked for it in the judgment, you didn't get it in the judgment. It's over. So I don't see why signing the judgment doesn't overrule it by operation of law.

PROFESSOR DORSANEO: Well, I think the idea would be -- and I'll let other people speak -- is if it's not overruled -- you get the judgment that the motion is still alive, okay, still alive even after the judgment, and could be granted if somebody forgot to do something else that they could do later to challenge the judgment.

CHAIRMAN BABCOCK: Carl.

PROFESSOR DORSANEO: That's the kind of thing that I would be thinking about.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I don't think 304 is the right rule, Bill.

PROFESSOR DORSANEO: Huh?

MR. HAMILTON: 304.

MS. CORTELL: It's a --

PROFESSOR DORSANEO: It's in the draft. It's a proposed rule.

MS. CORTELL: It's a new rule that's not before you. It's been before you at other meetings.

CHAIRMAN BABCOCK: Okay. Yeah, Roger.

MR. HUGHES: Well, I tend to -- I tend to favor what Pam just advocated, that, you know, if the judge -- if it's not in the judgment, the judge didn't give it to you, that disposes of your motion; and my feeling is, is if you want to come back and urge it, well, then you've always got what's in the next section called a postjudgment motion to modify and come back. My only concern -- and I would like to hear from the trial judges -- is whether there is the possibility of being sandbagged; that is, you know, there's going to be a hearing on the plaintiff's motion for judgment. It will be Friday, so Thursday you file a 30-page motion for JNOV, which, of course, won't make it up to chambers in time for review and maybe the other side really won't see it, but under this rule it's disposed of, and I know recently I had a case where I filed a motion for JNOV three days before the hearing, so it couldn't be heard the day of the motion for judgment, and the trial judge was a little testy because she wanted to hear both of them, and so it all got reset,

but so I would like to hear -- I mean, my only concern is I don't like trial judges being sandbagged, but I do want some cutoff date so that you know that it's over with. I mean, I -- on the rules committee I was one that advocated having an operation of law for prejudgment motions, and I still do. I just want to make sure the trial judges don't feel like they're being sandbagged.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: Well, I understand the need and I agree with the need for some rule that overrules all of these by operation of law when the trial judge won't set it or it doesn't get set and all of that, so I'm in favor of that rule. I've seen that recently in a case where somebody was overly concerned that there hadn't been a ruling yet, and so we made sure they got it.

I regret to say this because I know that this duty of the clerk to inform the judge is a result of my advocacy, but having gone over and looked at the clerk and looked at the titles on the documents, we're doing something pretty vain here asking these people to review these documents, and we'll hear from all of our district clerks that this won't work and that they don't want to be in contempt of court of any judge, so I'm about resolved to those who want to have it heard are going to get it set, and the only thing that troubles me is, is that there will

be something that goes to the court of appeals that the trial judge never had an opportunity to rule on and that someone gets an appeal and a reversal and a remand because rendition is fine, but a remand is worse. Just get it right and get it completely out of my hair, seriously, but that doesn't seem right. That doesn't seem right to the winning party, that doesn't seem right to the judge, and it just doesn't seem right in the sense of justice that a posttrial post-verdict motion could never be set and raise something the trial judge never had an opportunity to rule on, that you didn't even show you requested a setting.

So I have to go catch my airplane, having said that you shouldn't have this duty on our clerk. I really think you ask a district clerk to read the titles of the motions I get in my court and determine the relief being requested and putting it in position with whether there's a judgment in the case or not is a waste of our paper. But it doesn't solve the problem that, you know, somebody is going to sandbag the case.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I don't -- I don't have any comment on that, but the prejudgment sandbagging I'm not worried about because were it my attention, I can -- I've got plenary jurisdiction for 30 days. I can set another hearing on the JNOV. You know,

even if I couldn't consider it at that moment, if I know ahead of time I may reset the whole thing. I may go ahead and hear the motion that was set and then, you know, consider the other one later.

CHAIRMAN BABCOCK: Okay. Let me see if we can get a sense of how many people like the first -- the first one, which says in 301(a)(5), "On the date the final judgment under Rule 300 is signed as to any requested relief not granted in the judgment." How many people are in favor of that one, raise your hand?

How many people like either of the other two alternatives, the date the court's plenary power expires or the 75 days? Raise your hand. There is a clear preference for the first one, 18 in favor of that, 2 in favor of one of the other two.

HONORABLE STEPHEN YELENOSKY: 19 in favor. I was just trying to catch up. I just figured out what the vote was. I was on the first one.

CHAIRMAN BABCOCK: So 19 to 1. So let's move on to the rest of 301(a), subpart (6) or (7). Any comments on that? Stephen.

MR. TIPPS: My comment's on 301(a) generally.

CHAIRMAN BABCOCK: (a) what?

MR. TIPPS: 301(a) generally.

CHAIRMAN BABCOCK: Generally.

MR. TIPPS: It seems to me that "Posttrial Motions" is a vague and ambiguous term. I think we're either talking about posttrial motions for judgment, which is what we refer to in (4) or maybe just motions for judgment, but technically a postjudgment motion is also a posttrial motion, and I can see -- I mean, I could see the possibility of confusion --

HONORABLE STEPHEN YELENOSKY: And a motion for judgment --

MR. TIPPS: -- in (a) and (b).

HONORABLE STEPHEN YELENOSKY: And a motion for judgment when the plaintiff rests I guess is a posttrial motion in some sense, but --

PROFESSOR DORSANEO: See, to me I don't know what to call it. I think technically the trial ends when the last -- you know, the cases would probably say the trial ends when the last witness finishes.

MR. TIPPS: Right, but aren't all of these -- isn't 301(a) intended to address only motions that are filed before judgment?

PROFESSOR DORSANEO: Yes.

MR. TIPPS: I think it needs to say that in some way, because I'm not sure that it does. Maybe as a practical -- maybe by way of application it does, but --

PROFESSOR DORSANEO: Would it be -- I don't

mind adding "for judgments," or I don't mind calling it anything you want to call it. You know, we could call it Bob --

MR. TIPPS: I mean, I would recommend we either call it "Posttrial Motions for Judgment" or "Motions for Judgment."

MS. BARON: How about "Prejudgment Motions"?

MR. TIPPS: That would be fine, too.

PROFESSOR CARLSON: There's a lot of prejudgment motions.

MS. BARON: Oh, that's true, too.

CHAIRMAN BABCOCK: Okay. What about 301(b)? Any comments? Roger.

MR. HUGHES: Well, it was a comment I guess on (a) that I don't see the rule expressly dealing with the problem of what happens when you want some judgment entered but you're not completely happy with the verdict. There's a recurring problem of the verdict doesn't quite completely favor everybody. You're the plaintiff, you got some relief, but some of the findings you're really unhappy with, so you want to make a motion for judgment, but you don't want to lose your right to contest certain findings, and I don't see that the form of the rule disposes of the problem. Right now your only solution is to look at the case law and how to draft a motion for judgment that walks

the line between asking for entry of judgment without losing the right to enter -- to get a more favorable judgment than the verdict. I'm not sure that can be solved, but I'm just wondering if it's worth taking a stab to try to deal with. Something along the lines that a motion for judgment can be combined with a JNOV without waiver of each.

PROFESSOR DORSANEO: All right.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I think if you -- under Rule (a)(1) you could move for judgment on the verdict and (a)(3) you could move to disregard jury findings.

PROFESSOR DORSANEO: I think Roger is talking about for a long time -- and I think we still have confusion, a little bit of confusion, if you move for judgment on the verdict you embrace the verdict and you can't challenge any of the findings on which the -- in the verdict on which the judgment rests, and that's -- that concept seems to me to be, you know, 25 -- probably a much more popular concept 25 years ago than now.

MR. HUGHES: Amen.

PROFESSOR DORSANEO: I wonder if it's -- maybe it is a problem in some places, but I don't think it would even occur to most people that you couldn't proceed,

you know, alternatively in a combined motion for judgment and a motion for judgment to disregard jury findings, but maybe a sentence to that effect would be useful because that concept still hangs around although in a less popular way and then we have the cases that say you can just -- you can just ask for judgment, even an unfavorable judgment, and that's fine as long as you say in your motion that what you really want is a judgment, and you don't want to embrace the verdict.

CHAIRMAN BABCOCK: Bill, you're on the 7:00, right?

PROFESSOR DORSANEO: Huh?

CHAIRMAN BABCOCK: The 7:00 o'clock flight, you're on the 7:00?

PROFESSOR DORSANEO: Am I? I hope not.

CHAIRMAN BABCOCK: Anybody got comments about 301(b)?

PROFESSOR DORSANEO: All right. We can finish 301(b) quickly.

CHAIRMAN BABCOCK: Well, good.

PROFESSOR DORSANEO: Because everything that's in there we have considered. The things that are in brackets are not that big of a deal. It occurred to me that it would be better to say in (b)(2) "requesting" rather than "moving for," but that's a quibble. It

occurred to me that it would be better to take the word "final judgment" out just to talk about judgments along the way. That's an issue that's related really to whatever we end up doing with Rule 300.

CHAIRMAN BABCOCK: Okay. Any comments on those things? Anybody feel strongly? Hearing nothing, then I think we're done, right?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Okay. We're going to take a little afternoon break. Let's keep it to nine minutes, and so we'll be back at 3:00, and we'll take up Bobby Meadows' efforts on Rule -- Federal Rule 26 and its interplay with our disclosure rules.

(Recess from 2:51 p.m. to 3:01.)

CHAIRMAN BABCOCK: All right, kids, let's get back at it. This is a really important issue, so let's get after it. Bobby Meadows, Rule 26. And maybe if Judge Yelenosky will --

HONORABLE STEPHEN YELENOSKY: It's her fault. It's her fault.

MS. BARON: I'll take the blame. Happy holidays, everybody.

CHAIRMAN BABCOCK: Order in the room. It's not appellate, so it's too good for Pam, she's got to leave.

MR. MEADOWS: So now we come to Rule 26, Federal Rule 26, that was amended, effective this week, December the 1st; and Justice Hecht asked us to look at and see whether or not this committee would recommend similar changes to the rule; and there are two primary differences, principal differences between new Federal Rule 26 and the existing or current Texas expert discovery practice. Jane did a very nice job, I think, of kind of capturing the differences between what we find now in Federal Rule 26 and the Texas rules, but they really boil down to, as I said, two principal differences. One is under Federal Rule 26 certain kinds of experts, primarily those experts that are retained for the case to testify at trial, must file written reports, and those reports have prescribed elements or things that must be included, and for all other testifying reports under Federal Rule 26 now disclosures must be filed, revealing the opinions that are going to be offered by the second category of expert, typically someone like a treating physician and some other additional information about the facts that are -- and data being relied upon.

So that's one difference, because Texas doesn't require a written report from any expert unless it is requested by the opposing party or it is ordered by the court if the responding party wants to -- offers the

witness for a deposition, so if you have an expert and you want discovery of the opposing party's expert in Texas you have to request it, the responding party has the opportunity to offer the -- that expert for a deposition. If you want the deposition and a report you go to the court, so there's no requirement in Texas for a written report absent this process.

The other big difference between Federal Rule 26 as we now have it and the Texas practice is the Federal rule extends the attorney work product privilege to all drafts of expert reports and the disclosures that will now be made available in connection with this second category of testifying experts and all communications between the attorney and its representatives and the expert, except for three categories, that having to do with compensation, facts, and data relied upon -- I mean, provided to the expert by the attorney, and assumptions the expert made at the request of the attorney. All other communications can be considered privilege under the attorney work product.

Texas protects none of this. All of it's fair game, communication with the expert, draft of reports, and to the extent that there would be disclosures they would be fair game, too. So those are the two big differences, and I don't know how you want to proceed, and so in some ways it would be good if we could proceed within

these two categories in terms of getting an expression of interest from the committee and what we need to talk about because we're going to lose my subcommittee in a moment. I think Jane has to leave. She's driving back to Houston, and Harvey has to catch a plane, and you'll just be left with Alex and me, but just to kind of sum up where we came out, we talked about all of this at length and then, of course, Jane did a nice job of putting this on paper.

Our committee I think generally thinks the Texas procedure for expert reports is just fine. We like it. We're not recommending a change to comport with the Federal rules, and on the second part, that is this protection of the -- of communications with the expert and drafts and so forth, I mean, that's a pretty -- I mean, people can really disagree about that, and some of the material that was provided by Justice Hecht along with the question to our committee, there was a nice discussion about, you know, why open discovery is a good thing, that is because you can really get behind the expert opinion and find out ostensibly how much the lawyer or his representative or her representatives influenced the opinion.

But as was stated in the discussion piece, as a practical matter -- and this rule changes really as a result of a practical decision supported by a variety of

lawyer groups. It's -- this type of discovery really doesn't yield very much, and so it's pretty much a common practice I think for a lot of us that we agree that we're not going to exchange drafts or we're not going to have discovery on draft expert reports. And then there's a belief by some that having communication with the lawyer and expert so heavily curtailed by the threat of discovery inhibits a full exchange with the expert and the fair development of the expert's opinions and so forth, and so all of that led to this recommended -- or this ultimate change in Federal Rule 26, and as I say, it is absolutely the opposite of the way we practice in Texas under our rules.

So those are the two general areas of difference, and we're not -- we didn't -- our subcommittee, unlike the -- as to the first part we're not making a recommendation. We thought it was important enough and the views on this by practicing lawyers would be important enough that we ought to have some fuller discussion of it in this committee.

CHAIRMAN BABCOCK: Okay. I want to, if you'll let me, ask Justice Hecht in a second which of the two issues he would like the more fulsome discussion, given the fact we're going to lose a lot of people in about an hour, maybe less. Before I ask him that, though, I will

tell you that just from my personal experience I very much agree with the recommendation of the subcommittee about how we handle experts with respect to reports, written reports or et cetera. So I don't know if at least that's going to be controversial or not, but I for one agree with you-all. On number two --

MR. MEADOWS: You support without voting?

CHAIRMAN BABCOCK: Huh?

MR. MEADOWS: You supported without voting.

CHAIRMAN BABCOCK: Right, supported without voting. But on No. 2, I think the Federal change is much a change for the better because I have seen enormous resources expended toward trying to find drafts of expert reports and e-mails; and at the end of the day, even if you get all of that stuff, even if it looks like the lawyer wrote the report, even if draft one is different than draft two, the impact on a jury in 90 percent of the cases, in my experience anyway, is negligible. They figure lawyers are writing these things anyway. I don't know that jurors put a lot of stock in experts in most cases, or at least cases that I'm involved in; and it's just much better to take the expert straight up and take his report and Daubert him if you feel it's appropriate to do so and then beat him up in front of the jury based on what he says, whether it's done by the lawyer or not. So -- and the other thing is that

over the years lawyers and law firms have developed strategies for not creating documents.

MR. MEADOWS: Right.

CHAIRMAN BABCOCK: I mean, sometimes you say "Give me all your e-mails," there are none. It's all been oral.

MR. MEADOWS: Right. Especially now with the use of, you know, developing, of course, electronically you find that there are no drafts when the drafts were overwritten and so forth.

CHAIRMAN BABCOCK: Right. Yeah.

MR. MEADOWS: Then you search around for the communications between the expert and the lawyer or his or her staff about how they -- the opinions of the report were developed and you don't get anything. So your view is my view, but I want to just get it out for discussion that Tracy Christopher, who is on our committee and who is very thoughtful about these things, pushed back on that a little bit and said, "Well, you lawyers that are doing these kind of cases with sophisticated clients and, you know, practiced experts and, you know, you do things your way, but there are a lot of cases and situations that I see where I think lawyers would be reluctant to give up the opportunity to pursue this kind of discovery." So I just put that out there because it was at least raised in our

subcommittee discussion as part of the reason we did not come with a recommendation on this today.

CHAIRMAN BABCOCK: Okay. So having taken the prerogative of the Chair to give my own personal views on this, Justice Hecht, is there one part of this that the Court is more interested in or both issues, or would you decline to comment?

HONORABLE NATHAN HECHT: Well, the Court has not expressed a view that I know about, but the second issue is the -- was the more troubling to me than the first issue. It all arose during the Federal committee's discussion about electronic discovery, and right away pretty close to the beginning of the discussion there was a concern about the second issue, because if you're going to be discovering all of this metadata and stuff then you may be getting into multiple copies of reports and deletions and additions and all of these things that are available to you in electronic discovery that would have been harder to get to if it was all paper.

And it seemed to me -- but I was not aware that that was much of a problem, and I was asked whether I had noticed it was a problem in Texas, and I had not, but I don't really know, and on the first part it seemed to me that our practice was better from a cost efficiency point of view, so but the Court just wanted the input of the

committee on it, and I think they would be -- I think the Court would be satisfied with the answer that they probably believe anyway that the first procedure is working better and we should leave it alone, but I don't know about the second problem. Because the argument was made this favors wealthy clients who can get around the problem by having layers of experts to shield the drafts, and that is -- would be a concern.

CHAIRMAN BABCOCK: Okay. Having heard the Court and Bobby and myself, is there a consensus on this committee that on the first issue, that is, our practice with respect to experts and written reports and depositions and go to the judge and all that as Bobby outlined it, is the consensus on this committee that that's a preferable way to do it as opposed to the way the Federal courts are now as of a couple of days ago doing it? Tom.

MR. RINEY: I think the Federal rule is actually a little clearer. I think most -- the practice of most people under the Texas rules is you enter into the scheduling order, and as part of the scheduling order you agree that when you disclose your experts you're going to produce a report. At least that's the way I normally see it. I think it's just a little simpler this way because I personally don't believe in deposing all the experts, so as long as I've got something that can give me a good report

that's probably going to be enough for me on certain experts. Not all, of course. Having said that, it's not really a problem under the current Texas practice most of the time. Occasionally you get to someone that just doesn't want to give a report, and it's a bit of a problem, and I think it's a little bit easier. So I would say I think we ought to be consistent with the Federal rules where we can unless there's a reason otherwise, so I really wouldn't have any objection to making it like the Federal rules on that first one.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, in the broad range of type of cases I think it is -- it is a burden on those -- some of the smaller cases to require an expert report.

CHAIRMAN BABCOCK: Anybody else? Buddy.

MR. LOW: We faced a similar thing when we did disclosure. You know, the Federal courts for a long time went through everything is automatic. You've got to do this, do that, and you had to do so much that you didn't want to try the case, it was too much work involved and you'd settle it, and their disclosure was automatic, and we chose that there might be cases people don't want that. So we choose not to generate a cost unless the parties really want it, and any party can get it by requesting. So we

differed from the Federal courts even in disclosure, and I agree with that, too.

CHAIRMAN BABCOCK: Okay. Any other comments on that? If I could have a show of hands for the purpose of the record, how many people are satisfied with the Texas rule regarding experts and reports and depositions? In other words, the current rule.

PROFESSOR ALBRIGHT: On just whether you have to make a report?

MR. MEADOWS: Yeah.

HONORABLE SARAH DUNCAN: Can I --

CHAIRMAN BABCOCK: So 20.

HONORABLE SARAH DUNCAN: Can I add an except?

CHAIRMAN BABCOCK: And Sarah wants to say "but."

HONORABLE SARAH DUNCAN: But I would be in favor of requiring a report if it were tied to the higher discovery control orders.

CHAIRMAN BABCOCK: Fair enough. Okay. Anybody dissatisfied with the Texas rule on experts with regard to requiring reports and depositions, that type of thing? No hands are shown, Chair not voting, but making his views known. Okay. So let's talk about the discovery, the second issue, and let's talk about that. Justice Bland, you got something you want to say?

HONORABLE JANE BLAND: No, I'm really neutral on this, and really I think -- you're shocked.

CHAIRMAN BABCOCK: I really am, yeah.

HONORABLE JANE BLAND: I think it really comes down to, you know, hearing some of the views of practicing lawyers to find out sort of the risks and the benefits of putting the -- the expert consultant under the work product privilege for lots of the discussions that they have with an attorney.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: There's more to it than just protecting drafts. When you look at the materials from the Federal rules they also talk about that this is going to -- it's aimed at stopping having to have a consulting expert separate from a testifying expert, that now you have a consulting expert because that's the person that you talk to about what's the good and what's the bad about this case, but you can't have those conversations with your testifying expert because then it becomes discoverable. What this does is make all attorney communications with the expert in anticipation of litigation work product, except the report I guess and facts known.

MR. MEADOWS: Except for those --

PROFESSOR ALBRIGHT: And so you won't need to

hire a consulting expert, and so that's a big change. I'm not saying it's a bad change, but it's more than just protecting drafts.

MR. MEADOWS: That is a point that was made, that is, that Rule 26, the new Rule 26, does nothing with regard to how consulting experts are handled and protected; and the rule went on to say, to Alex's point, that this change allows perhaps the avoidance of a consulting expert for those who can't afford it. It's an expense that not every case can justify.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But what about -- I mean, I always want to know everything an expert who is testifying against me has heard or done or what he relies upon and so forth. How do you get -- if the lawyer comes in and tells him some stuff, that's confidential. In Federal court you can't -- is that true, and it's like he's a consultant but yet he's testifying. Maybe I don't understand it.

CHAIRMAN BABCOCK: Justice Bland, I knew you would have an opinion.

HONORABLE JANE BLAND: Well, Judge Christopher I think voiced some of the concerns that you're voicing, Buddy; and she said, you know, in Texas what happens is you present an expert for deposition, you take a break, you come back in, and the first question the lawyer

asks, "Well, what did you talk with your lawyer about during the break," you know, that kind of thing; and they're treated more as a witness; and you can really find out everything that's kind of crossed their mind, so you lose a little bit of that ability to cross-examine and test the expert and where they really did come up with their opinions.

On the other hand, there were a number of lawyer groups of all stripes that supported the adoption of the Federal rule and I think in part because you can game around this cross-examination of the expert by, you know, not creating any drafts and by how you talk about things and by using consulting experts, and I think it was the view of the Federal committee that it had become just a place for kind of satellite gamesmanship and didn't really provide any substantive, you know, truth seeking of the experts' opinions.

CHAIRMAN BABCOCK: And no matter which way you do it, whether you're aggressive in trying to go out and discover your opponent's expert and dig into the metadata and dig into the drafts and do all of that or you set up all of these elaborate defenses so that the other side can't get to it, any way you go about it it's enormously expensive and I think unproductive. But to Buddy's point, Buddy, if nobody is going to put up an

expert if they're thinking about it whose testimony is going to be, okay, "What did you rely upon?"

"Okay, I relied upon this report. I relied upon that. I relied upon -- and I relied upon a bunch of things that the lawyer told me."

MR. LOW: See, I always ask, "Who all you talk" -- I mean, "This must be pretty important. You're an expert. Who all did you talk to? I mean, you listened to them, didn't you? They told you something." I mean, I just --

CHAIRMAN BABCOCK: If the expert says, "I relied upon -- for a bunch of things on the lawyer."

"What did he tell you?"

"Well, I'm not going to" -- you know, "Privilege, I'm not going to tell you." You're going to put that guy up in front of a jury and let him say that? Most experts aren't going to do that. They're going to say, "Everything in my report is based upon the study I did" or "the article that that guy wrote."

MR. LOW: Maybe I'm old school.

CHAIRMAN BABCOCK: You are old school.

MR. LOW: I think if you put somebody up on the stand he is fair game.

CHAIRMAN BABCOCK: Well, sure. I agree. Justice Bland.

HONORABLE JANE BLAND: Well, but to further Buddy's view of it, there are times where a draft will say an expert thinks, you know, that the plaintiff's wages, you know, lost wages, should be 500,000, and then go down, say it's a defense expert, and then go a few months down the road. They've met with the lawyer or whatever, and there's all of the sudden a new report with different assumptions and then all of the sudden the plaintiff's lost wages are 50,000 or, you know, far, far reduced from the expert's initial take and if that expert can be made to change opinions, change assumptions, lawyers sometimes want to know, well, what was it that made you change your assumptions, and then, I mean -- and then play up to the jury that this isn't an expert that is giving you an independent evaluation of the case kind of thing, so I think there's really good arguments on both sides, and it's just a question of what Texas --

CHAIRMAN BABCOCK: Well, but on that example, "And what did you do between 500,000 and 50,000 other than talk to the lawyer? Did you do anything?"

"No, I didn't."

"What did the lawyer tell you?"

"Well, I can't tell you that."

HONORABLE JANE BLAND: Exactly. Exactly.

CHAIRMAN BABCOCK: A jury is going to eat

that up.

HONORABLE JANE BLAND: Exactly, but --

HONORABLE STEPHEN YELENOSKY: But that wouldn't be discoverable.

HONORABLE JANE BLAND: -- under the new Federal rule you would never see that initial draft.

CHAIRMAN BABCOCK: Oh, I see.

HONORABLE STEPHEN YELENOSKY: That's the big difference.

HONORABLE JANE BLAND: That's a difference.

CHAIRMAN BABCOCK: Okay. David Jackson.

MR. JACKSON: Sometimes I see consulting experts used in a deposition to help the lawyer take the deposition of the other side's expert.

CHAIRMAN BABCOCK: Right.

MR. JACKSON: And they protect the consulting expert under our current rules but actually get the benefit of an expert to help the lawyer examine the expert.

CHAIRMAN BABCOCK: Yeah. Yeah. True enough. Yeah, Richard.

MR. MUNZINGER: You know, expert comes in, and he's allowed to give his opinion because the rule says he has greater knowledge by experience, knowledge, or training than does the average person.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: And so here comes a guy and he's going to tell you that whatever the area of expertise is this is the God's truth, this is science, whatever it might be. The Feds have apparently now recognized what they said in Daubert, you can buy expert testimony on any subject and know what you're going to get in advance because you're paying for it. We knew that with Daubert so we set up all the Daubert rules to stop that, but we're now surrendering we're going to protect the communications between the party's lawyer and the expert who comes in now and says, "I'm an expert, and I clothe myself in truth."

"Yeah, but wait a second, did you talk with the lawyer?"

"You can't talk about that, Judge. That's a privilege. That's work product." In Texas you can't bring a claim of privilege to the jury under the Rules of Evidence, as I understand them. So now, as Buddy says, here you've got this guy and he's telling the jury, "Oh, my this is science, and this is truth, and this -- a computer told me that" when, in fact, it's the lawyer who told him that. The lawyer said, "For god's sakes, man, if you tell him that my case is over."

"Well, I won't tell them that." Come on, let's be serious.

CHAIRMAN BABCOCK: Judge Peeples.

MR. MUNZINGER: Are trials shows, or are they pursuits of truth? If they're pursuits of truth, if justice has any meaning at all, it's based on truth. It's based on truth, or it's a game. It's a game to exchange money from people.

MR. LOW: That's right.

MR. MUNZINGER: Or it's justice. If it's justice, it has to be based on truth, and if it's truth, let's get at it and quit protecting this charade that the Feds want to give on. The heck with it. Let's ask the questions.

CHAIRMAN BABCOCK: Richard, you can't handle the truth.

MR. LOW: Amen.

HONORABLE DAVID PEEPLES: It pays to read the rules. On the next to the last page of the handout we have the provisions of new Rule 26, and it makes express exception, Buddy, for what you're talking about. It just says you can ask about communications that identify facts, et cetera, that the party's attorney provided and assumptions that the party's attorney provided. I mean, that's exactly what you're talking about, isn't it?

MR. LOW: Well, but it's not necessarily facts. I mean, they -- you get into the conversation, "Oh, no. Oh" -- and you say, "That's improper," and sustained,

and I look like a fool.

CHAIRMAN BABCOCK: Judge Yelenosky, and then Richard.

HONORABLE STEPHEN YELENOSKY: Well, I don't think it would get you -- as I understand it, it wouldn't get you to the first draft, and that is the point that Justice Bland makes, was there an earlier draft that was 10 times what you're now trying to sell to the jury, and in principle I agree with Richard. I guess what I don't know the answer to is the practicalities of it. Philosophically it's a huge change because these experts present themselves as, you know, you hear them, "I'm not being paid for my opinion, I'm being paid for my time," and we allow them to be presented to the jury as completely objective, and so philosophically we would have to concede that's no longer true because they're allowed to keep confidences with one side, and so that's a philosophical difference that I would only be willing to accept if it were clear to me that there's no way around the gamesmanship, and then it's just a concession to the practicalities, and it's an unfortunate evil we have to accept, but that's the way I look at it.

CHAIRMAN BABCOCK: Yeah, Justice Brown, and then Richard Munzinger, then Bill Dorsaneo, and then Tom Riney.

HONORABLE HARVEY BROWN: It seems to me we

should separate this into two separate questions. The draft question is somewhat different than the communications. On the draft question I really do think it's a question of saving costs and gamesmanship in the vast majority of the cases. I mean, when you're dealing with experts now you just are very careful to not create drafts. You can -- actually there's computer software where you can actually watch the expert type the changes while you are watching them simultaneous so you don't even have to do it orally. You can call and talk about it, what you want. They can type it, so it's all on their computer, never on your computer. There's lots of games lawyers play on this that just really add to the cost, and so I think the draft thing, while you lose the benefit of the expert who changes from 500,000 to 50,000, to me that's a rare case, and the main case is what you're doing is you're decreasing the cost of all the games that people play.

If you don't do that, I think someday what we're going to get into is the metadata fights, which I have not had any lawyers get into it. Sounds like, Chip, you have. But, you know, a lot of these experts they say, "Well, I don't have the drafts anymore," and so what we're going to do is if we get into metadata then they're only going to start writing their reports by hand trying to figure out ways to avoid metadata, and we'll just have a

new game people will play to avoid this discovery.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I just wanted to reply briefly to Judge Peeples' comment that, yes, you can get the facts that the expert relied on and the assumptions that he relied on, and the rule does say that. I don't know whether the rule is going to -- if an expert makes a claim that it was still an attorney-client privilege whether you're saving money or not, but I come back to the point that Judge Yelenosky made as well just now. You have confidence -- confidence is shared with an expert who purports to be dispassionate and fair. Not so. He's not dispassionate and fair, and yet we are hiding from the parties and the juries any opportunity to establish facts that would show that he's not dispassionate and fair, and so you've got a trial that's conducted as a charade. It ought not to be that way, and you really should just be able to find out.

And this business about them sharing, my last expert -- you know, I don't want to say my last expert, but an expert that I had, he had -- we met on the computer and I watched him type the changes. You bet I did that with him. But no one ever asked him, "Did you ever show this draft to Richard Munzinger or anybody in his office? Did you ever discuss it with him? What were the changes that

were made?" If he had done what I had told him, he would have answered honestly, and it might have been disastrous, might not have been. I don't know. I wouldn't ask him to lie, and he -- I don't know what his memory would be. It was done shortly before his report was filed, so his memory would be good, brilliant man; and, yes, these games are played, but I'm not sure that you do yourselves any favor to say, well, we, the Supreme Court of Texas and Texas law know that games are being played so we're going to facilitate to save money.

MR. LOW: One more ground.

MR. MUNZINGER: That doesn't make sense.

CHAIRMAN BABCOCK: Tom. Wait, hang on. Justice Hecht.

HONORABLE NATHAN HECHT: Let me just add one thing to Richard's. It wouldn't be just to save money. The concern that was raised in the Federal discussions that triggered the Court's interest was that some people can afford to present a charade that you can't look behind and other people can't and should -- is that a real -- is that realistic? Do people really do that, and if so, is that unfair enough that something should be done to prevent it? But that was the -- the concern was that why would you let somebody get consulting experts and communicate with them and thereby shield the communications when the guy on the

other side couldn't afford to do that, and then he's taken advantage of because it looks like he's doing what the other guy is doing, but you can't prove the other guy is doing it.

CHAIRMAN BABCOCK: Tom, will you yield to Munzinger for a second?

MR. RINEY: Sure.

MR. MUNZINGER: My only response to that would have been had I been at the Federal meeting -- and I mean no disrespect, anybody is --

CHAIRMAN BABCOCK: "You dumbasses."

MR. MUNZINGER: -- for god's sakes what you're doing is saying we all ought to be able to get away with lying because some can afford to lie and some can't. To heck with that. If it's truth, let's find out about it.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: Well, first of all, I think the drafts of reports is a separate issue, and I really wouldn't have any objection if we said you just get the final draft. I don't really care that strongly about it. My point is there are other issues. I've had cases, particularly involves causation generally, where the theory was entirely cooked up by opposing counsel; and if you can get that complete expert's file, including communication with the lawyer, sometimes you can find that out. Now,

sometimes they're not. They could have done it in discussion and it comes up that way, but if all communications are privileged between the lawyer and the expert I have serious concerns about the independence of the expert. I think we are sort of misleading the jury, but how many times do you have an expert that's waving some article in front of you, some industry publication, some journal publication, and you say, "Where did you get that?" Well, if all the sudden if he can't -- you know, it says that he has to identify the facts or the data, but it doesn't necessarily need to say, "All the sources of the information wanted that supports it," and we oftentimes see where all that stuff was given by opposing counsel, and I don't think that's a cost issue. I think asking the expert to bring his entire file, including all communications with the party that hired that expert, and then to be able to ask about, you know, the conversations, I don't think that significantly adds to the expense of the case. To the contrary, I think putting that roadblock there may then make it more expensive to go back around and get that information to challenge the expert's opinion.

CHAIRMAN BABCOCK: Okay. Roger. And then Buddy.

MR. HUGHES: Well, I'd be interested in studying and discussing the issue some more, because I

think the type of experts you run into in the cases that are in Federal court are a different kind of animal than the ones we run into in routine state court litigation. I mean, maybe it's just the venue I worked in, but most of the cases that were routine or frequently tried, the reason the experts were hired was is they didn't cost a great deal of money, and so you -- finding the experts is like, "Okay, what do you need me to say" and "Don't worry, I'll get you the ammunition." Perhaps they may be more prevalent in the state court cases because the nature of the cases and the amounts of money involved.

On the other hand, I am sensitive to the argument that because perhaps in a small percentage of the cases you have experts who go "Give me" -- "Tell me what you want me to say and hand me the bullets and I'll shoot them for you." I'm not sure -- I mean, there are sometimes we just pass -- we have a rule that prohibits stuff. Yeah, it's -- we're keeping out the truth, but, you know, the goose chases we go on tie up the courts forever, and I'm thinking about, you know, the, you know, juror testimony post-verdict about what went on in the jury room.

I bet you -- you know, I can remember the games that were played trying to prove up all kinds of just blatant misconduct that caused verdicts, or at least the movant thought they were pretty blatant. But the judges

almost always went "Nope, nope, nope, nope" and so a great deal of time and energy was spent chasing this stuff in order to bring misconduct to the light of day, only to find out maybe there wasn't as much as we thought there was, was it really worth it. So I'm not -- I'm not sure where I would end up on it. I just think it's worth studying some more.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: An expert is not supposed to be an advocate, I mean, and when you get on the stand -- I tried a number of plaintiffs cases and never hired a consulting expert. The defendants had money to hire consultants. I never felt disadvantaged and never suffered. I just went to an expert, had him do his work, testify. I played by the rules, and I don't feel like I have been disadvantaged because they got to hire three or four experts and consulting witnesses.

CHAIRMAN BABCOCK: Well, but did you engage in substantial discovery on their experts?

MR. LOW: Yes, I did.

CHAIRMAN BABCOCK: And did you ever find anything?

MR. LOW: The other side always tried to hide things from me. No, not really.

CHAIRMAN BABCOCK: That's why I gave up on

it.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Okay. Richard, yeah.

MR. MUNZINGER: I don't give up on it, and I'm like Buddy and like you, I haven't found -- I've found helpful things, but nothing that ever in my opinion won the case or anything like that, but I still come back to the basic point, and I don't mean to be a flag waver, but my God, we're supposed to be doing justice. Some Supreme Court judge one time I -- had a plaque that I saw, "The handmaiden of justice is procedure." Wow, that's true. And so he's not talking about the handmaiden of how to get money from the rich to the poor or to shift economic loss or whatever it is. His rules, that isn't what he says. He says justice, and justice has got to be based on truth or it's not justice, and that's what we're doing, and I darn sure don't want to adopt a rule that says, "We surrender to people who are willing to play games with truth. We're going to let you do it and we're just -- we're not going to do it and save money." It doesn't make sense to me.

CHAIRMAN BABCOCK: Well, not to be the counterpoint to that argument, but there was a time when we didn't do discovery. We went and tried cases, and some people argue that that was better justice because now we've made it so expensive to get to trial that it's denying

justice to some people, particularly the people who can't afford it.

MR. MUNZINGER: And may I respond briefly? I had a case once with a French oil company --

CHAIRMAN BABCOCK: Well, that doesn't count.

MR. MUNZINGER: -- and the whole issue was over jurisdiction, and the guy from the French oil company said, "You Americans, you spend so much money on discovery. Look at us. We are only working on the competence of the court to hear the case, and we wasted all this money on discovery, but on the other hand, you get to the truth better than we do." Wow, that's what it's all about. Truth.

CHAIRMAN BABCOCK: So there you go, Roger.

MR. HUGHES: Well, come back to the, you know, for every thrust there is a parry. You know, we had discovery --

CHAIRMAN BABCOCK: Are you thrusting him or parrying me?

MR. HUGHES: Well, no, it's an observation. You know, first we didn't have discovery, and when you look at how cases were tried at the beginning of the 20th Century it is fascinating that, you know, the -- how they were done, and then we invented discovery, and what happened? We developed a whole breed of lawyer that was

not necessarily expert at trying cases or even conducting discovery, but they were expert at making everybody else look like they were obstructing discovery, and cases then got tried by sanction, and it wasn't about discovery. It was about avoiding sanctions for not participating. I think there is a point where you just have to say "Justice, though the heavens fall, is not justice at all."

So I'm sensitive to the argument, yeah, we ought to get to the truth. Jurors ought to know about it. I mean, for crying out loud, every other attorney show I see on TV where they hire an expert, you know, you always have the expert, it's like, "I'm going to tell you what I think, hire me or fire me," and then there's the expert that's like "What do you want? Give me the bullets, I'll shoot them for you." And I don't like that public perception, so I mean, I'm just saying I'm willing to discuss and look at it some more.

CHAIRMAN BABCOCK: Okay. Anybody else have any comments? No more thrusting from you, Munzinger.

MR. MUNZINGER: I haven't said a word.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: One thing I like about the destroying of drafts is I think there is an incentive created for experts to destroy drafts and play the games right now, and I don't like creating those

incentives for that. I think those incentives, if anything, impair trying to find, quote, "truth and justice" because you might have one side where the expert is much more forthright, saves drafts, does his normal practices, and the other expert is much more experienced and doesn't -- and plays the game and destroys things; and, you know, and my experience is almost all the experts you ask them of their conversations with the lawyers, they don't remember very much. It was, you know, weeks ago. You know, "They told me to tell the truth." You know, you don't normally get much out of that, and so I just think we're creating an incentive on experts that I don't like by having the draft discovery.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Fair enough.

MR. LOW: Chip, the only thing I conclude the judge can tell the other judges is nobody really had strong feelings about it, about this issue.

HONORABLE NATHAN HECHT: I wouldn't be telling the truth.

MR. HAMILTON: Richard does.

MR. LOW: Richard and I just --

CHAIRMAN BABCOCK: Okay. Any more comments about this, any more talk about it? Justice Hecht, has the discussion here been fulsome enough, or do you want us to

put it on the agenda for January and have a larger group?

HONORABLE NATHAN HECHT: I think we should get a full discussion of it and also think through what difference it makes, if any, that there will be a different rule in the Federal courts in Texas than there is in the state courts in Texas. It might not, but this is the kind of issue where I'm fairly certain the Court has no predilection one way or the other. I mean, they just want to do whatever works the best. My own sense when it was raised in the Federal committee was that it was much ado about nothing, but that's not what all the bar people came in and said. They said, "Oh, no, we all agree this will make the world a better place," so I just don't know, but I think the Court would benefit from an hour of discussion of, you know, people's different perspectives.

CHAIRMAN BABCOCK: Yeah. Yeah, I'll tell you that in advance of the Federal rule in the Eastern District of Texas in IP litigation parties were routinely agreeing to the Federal rule, you know, in the year before it was --

HONORABLE NATHAN HECHT: Right.

CHAIRMAN BABCOCK: -- implemented. So that's some indication about what the IP bar thought anyway. Yeah, Carl.

MR. HAMILTON: What does the Federal have to do yet for this to be approved? It's just proposed, right?

CHAIRMAN BABCOCK: No, no, no. I think it's --

HONORABLE NATHAN HECHT: No, it's done.

MR. HAMILTON: Oh, it's done now.

CHAIRMAN BABCOCK: Went into effect two days ago.

HONORABLE NATHAN HECHT: Yeah, and I misspoke earlier. The restyling of the evidence rules takes effect next year. It's done, but it doesn't take effect until a year from December the 1st, but this rule took effect this month.

CHAIRMAN BABCOCK: Yeah, it's in effect now. Bobby.

MR. MEADOWS: Thank you, Chip. I mentioned to you at the break that because of a family commitment I'm not going to be here for the January 27th and 28th meeting, and my presence certainly is not essential. I do ask whether or not the -- you or Justice Hecht think that there is additional work that needs to be done by the subcommittee in advance of the next meeting because we could certainly take that up, and Tracy or Jane or Alex and --

HONORABLE NATHAN HECHT: Other than just if you have any thoughts about what will be the practical effect of having two different rules in Texas.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: One issue that Harvey and I were just talking about, what do y'all think about the possibility of breaking out the issues of whether drafts are discoverable? You know, it may be that some people think that drafts should not be discoverable, but not want to go the full way of saying all communications with counsel are discoverable.

HONORABLE NATHAN HECHT: Right.

CHAIRMAN BABCOCK: I think we can talk about that for sure.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: I thought that the work that y'all -- the written work that y'all did was terrific. If your subcommittee wants to meet again and talk about, okay, we've got one thing on the Federal side and one thing on the state side, is that a good or a bad thing.

MR. MEADOWS: I mean, for example, which law would apply in a diversity case is a quick question. I mean, I think it would be Federal procedural law, but --

CHAIRMAN BABCOCK: Federal, wouldn't it?

HONORABLE NATHAN HECHT: Yeah, I guess Federal law would be --

MR. MEADOWS: You know, because this is not -- would not be substitutable. I mean, I think it would be

the Federal rule, but --

HONORABLE NATHAN HECHT: But what if you had a state and Federal case?

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: Right. I mean, I do want to point out, I mean, you know, if truth is the objective and cross-examination is the greatest device for obtaining the truth, you could certainly come down largely where I think we hear Richard and Buddy. This piece -- I invite everyone to read this piece that Justice Hecht sent with his letter charging us with examining this question because it's a very, I think, straightforward discussion of what led to this change; and the reason for it was a practical outcome as opposed to some decision about policy or principle; and I just want everyone to notice that this is a position. This rule change in terms of protecting this sort of material work product privilege is supported by the American Bar Association, the counsel to ABA litigation section, the American Association for Justice, the American College of Trial Lawyers, the Federal Rules Committee, the American Institute of Certified Public Accountants, and that's only half the paragraph. So it's been looked at --

HONORABLE STEPHEN YELENOSKY: And Good Housekeeping.

CHAIRMAN BABCOCK: Yeah, but it was opposed

by the American College of Pretrial Lawyers.

MR. MEADOWS: So we'll -- again, I'll be sorry to miss the continuation of this discussion, but I think it's a very interesting question, and that's why obviously it's a sensitive point that where there is a complete conflict between the way we do it presently and what will happen under Rule 26, and we felt we should talk about it.

CHAIRMAN BABCOCK: Yeah, absolutely, and you did terrific work as always. Let me ask one other question. Justice Gray's letter about letter rulings, where are we on that?

MS. PETERSON: I think Professor Dorsaneo needs a little bit more time -- I mean, the Honorable Bill -- was my understanding.

CHAIRMAN BABCOCK: Okay. Do you know if that's going to be on the agenda for next time? Well, Angie, find out if that's going to be on the agenda for next time. We'll put this on the agenda for next time, and we can stay till 5:00 for sure if anybody wants to, but do we have anything else that we want to talk about?

MR. LOW: No, the effect of the Federal rule being different, I go to Southern District, Northern District, and Western District, the same rule and I don't even recognize the rule. They all have each administered,

so uniformity doesn't exist in -- I mean, you know, they can't do something that's contrary to that, but the way they administer the rules are totally different.

HONORABLE NATHAN HECHT: No, I need to be clear. I wasn't asking about that. I was asking since you can't get it in the Federal court, would you file suit in Texas so you could get it?

MR. LOW: Oh, oh, okay. I'm sorry.

HONORABLE NATHAN HECHT: If you file the same suit in the state court, you ask the same question. You can't ask them in Federal court, but you can ask them in state court to get around the Federal. I mean, would you do that? I mean, I don't know. That sounds kind of farfetched to me, but I don't know.

MR. LOW: I see what you're talking about.

HONORABLE NATHAN HECHT: And it might be a Federal court in Florida or someplace else, but you would go look for a state where you could --

MR. LOW: More invitation for forum shopping.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Well, you know, and any time you have a difference, for example, on personal jurisdiction --

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Personal jurisdiction

rules are different in Federal and state. There's interlocutory appeals in state.

MR. LOW: Right.

CHAIRMAN BABCOCK: I mean, that comes into consideration for sure.

MR. LOW: In the old day they would file the comp suits for $4,900 because if you got five it would go to Federal court, so they -- I mean, there's always been reasons, and we don't want to give them another one.

CHAIRMAN BABCOCK: Yeah, Tom.

MR. RINEY: I would just say in terms of forum shopping, regardless of which way this rule is I think that would be pretty low on the factors for determining to go to state and Federal court as opposed to the voir dire that you're going to get to have, whether you want an eight-person jury or six or eight or twelve. I mean, all of those factors and the jurisdiction issues you mentioned, all of that is going to come into play I would think before, gee, am I going to be able to ask the expert about what he talked to the lawyer about or get his entire file.

CHAIRMAN BABCOCK: Way down the list.

MR. RINEY: Yeah.

CHAIRMAN BABCOCK: Way down the list. So well, Skip, what do you think? Anything else?

MR. WATSON: I think that's it.

CHAIRMAN BABCOCK: Okay. Anybody else got anything else? Stephen?

MR. TIPPS: (Shakes head.)

CHAIRMAN BABCOCK: Okay. Motion to drink.

HONORABLE NATHAN HECHT: Merry Christmas.

(Adjourned at 3:49 p.m.)

* *

REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 3rd day of December, 2010, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $_____.

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the _____ day of _____, 2010.

_____
D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2010
3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

#DJ-295