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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 20, 1996

(MORNING SESSION)

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Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 20th day of September, A.D. 1996, between the hours 8:30 o'clock a.m. and 12:30 o'clock p.m., at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

SEPTEMBER 20, 1996
MORNING SESSION

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MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Donald M. Hunt
David E. Keltner
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Charles L. Babcock
David J. Beck
Hon. Ann T. Cochran
Hon. Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Hon. Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring, Jr.
Tommy Jacks
Franklin Jones Jr.
Thomas S. Leatherbury
Hon. F. Scott McCown
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Paula Sweeney

EX OFFICIO MEMBERS:

Hon Sam Houston Clinton
Paul N. Gold
O.C. Hamilton
David B. Jackson
Doris Lange
Mark Sales
Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Justice Nathan L. Hecht
Hon. William Cornelius
W. Kenneth Law
Hon. Paul Heath Till

INDEX OF VOTES

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

CHAIRMAN SOULES: Okay. It's 8:30, and we'll begin. Our welcome to everybody. I appreciate your being here so punctually today, and we'll be sending around a signup list for you to sign.

As the week matured, Holly and I started checking to find what we could reliably expect out of this meeting out of the agenda. It became pretty apparent that we're not going to need to work tomorrow, so I hope you got your fax that we would work today but not tomorrow. Some of you may have hotel rooms that you have to pay for anyway, and I regret that, but I think nonetheless that ought to be turned in as an expense. I have a hotel room that I have to pay for, but I didn't cancel it. I figured if I was going to have to pay for it, there might be some chance somebody here might need it. It's at the Four Seasons. So if anyone needs that room, if you will let me know, even if I have to go by and check you in at the end of this meeting, it's no problem for me and I'd be happy to accommodate anybody who might need that.

We only have three areas to cover today.

The Rules of Evidence Buddy Low is going to talk about; there are just a few items that are left on the 216 to 295 Rules which Judge Peeples is going to cover, since Paula won't be here; and then a report by Richard Orsinger, which he thought would take a half a day. It may take longer; it may take shorter. But from the looks of things, there's probably a pretty good chance that we'll be able to get out of here very shortly after lunch, but obviously not trying to push the train faster than it needs to be pushed. Except for some things that Richard will be talking about, I think most of these other items have been at least discussed before.

Since we're not on the clock, I don't suppose making the day any longer than shorter helps anything as long as we get our work done. Buddy Low just mentioned that if we get done by 3:00 he can get transportation, so I imagine that's pretty much the case with everybody. There's a better chance to get out of here if we do, but nonetheless, it's important what we do and that we fully debate all of these items and get everybody's ideas

on the table and on the record for consideration.

So Buddy, with that, let me just turn to you for your committee report. And we'll cover evidence first since Judge Clinton is here and may not be able to stay for the duration of the meeting after we cover those items that his court is interested in.

MR. LOW: Let me go to the end first and comment, and then we'll come back to that last, and that's the Unified Rules. One of the clerks in the Supreme Court went through sometime back and tried to unify the rules but also to clean them up, correct gender, grammar, things of that nature, strike out "he" and put "the judge," but make no substantive changes.

Now, Mike has worked with us on that. He's kind of been in charge of that and got a copy and I got a copy to Luke. We sent them out with the order to make no substantive changes other than two or three things that I'll comment on at the end. And I think the best thing to do there is just everybody has a copy. We'll look them over, I'll relook at

them and see if there are any corrections or anything that we need to do or anything that we've done that we shouldn't have.

And Judge Clinton is here, and I've explained to him what we did, and he will look those over.

For instance, they didn't take out or just segregate 407. It applies to civil only. The federal rules don't do that. I mean, if it doesn't apply, you're not going to have a problem with it if it doesn't apply to criminal, so in the Unified Rules we didn't go that far.

Now, where they differ, then we did have to show in the criminal, but we didn't change the substance. And you get into like some of the deposition rules and so forth and you'll see that. Bill.

PROFESSOR DORSANEO: At the last meeting we got a draft of the proposed Unified Rules along with two disposition tables. Is that the same thing?

MR. LOW: That's basically it. And we will comment on some things the subcommittee voted on.

PROFESSOR DORSANEO: Is what we have right here the same thing as the other thing, or is this different?

CHAIRMAN SOULES: It's more recent. It's been revised.

MR. LOW: It's been revised in about four little minor areas. We had a little tune-up, put a little baling wire on four little areas. But if it's not right, we can cut it off pretty quick.

CHAIRMAN SOULES: This says "Draft," and it said August 6th, and you struck through that, and it says September 12, 1996. That's what you're looking at, right?

MR. LOW: Right.

CHAIRMAN SOULES: And this is the Proposed Unified Rules, and that's the latest thing.

HON. SAM HOUSTON CLINTON: I didn't get one.

CHAIRMAN SOULES: They're back up here. And then along with that there are -- well, anyway, let's just get to that and you can tell us what you did.

MR. LOW: Well, that's not -- I

want to go back in logical order. I'm merely commenting on that so everybody would not feel like at the end that we're going to spend three hours on those, because they're the longest portion, but really they're the shortest as far as time requirements.

Our committee met recently and we went back and I prepared a table. You'll see charts showing action taken by the Supreme Court Advisory Committee No. 2, and that reflects action that was taken at the last meeting on 509(d)(6), 510(d)(6) of the Civil Rules.

The first time we met we discussed how Richard was going to his committee to try to get some kind of agreement. I understand that his committee was not prepared to make any type of agreement. The committee at that time voted to delete (6) from both rules, and (6) is, as I put in my outline, that portion "when the disclosure is relevant in any suit affecting the parent-child relationship."

And then we wanted to make the rules consistent. One had --- 509 or 510, I've forgotten, didn't include administrative

proceedings. The committee voted to put that in so they would be consistent. So we've really done nothing there, but I point that out so that it brings things to focus as to where we've been. Richard.

MR. ORSINGER: Let me just make one clarification that the family law council voted not to recommend a change, and the consensus of the majority was not to change the rule in any way. But based on our debate here, I think the committee decided to delete that "suit affecting the parent-child relationship" exception.

MR. LOW: No, I understand that.

CHAIRMAN SOULES: That's correct

MR. LOW: And maybe I misstated it, and to the extent you've corrected me, I agree with you, because I wasn't there.

The next thing is a new rule to limit compensation paid to experts. That was voted down by the committee, it's my understanding, and I've so reflected that.

Then there was a new rule allowing the

court to appoint experts and a judge to comment and so forth. It's my understanding the committee voted that down, thank goodness, and so that is that.

Now, turn to previously considered matters, and let's see, these are cleanup matters we've already discussed even before then. 412 Criminal, do you have that, Judge?

HON. SAM HOUSTON CLINTON: I don't have what you have, that's for sure.

Oh, yes. Oh, indecency. Well, yeah, we discussed that here this last meeting.

MR. LOW: Right. It was voted no change.

HON. SAM HOUSTON CLINTON: Right.

MR. LOW: Now, these were matters that were considered by the State Bar Committee, Mark, I believe your committee, and so we went back and considered those things. The committee here had already determined no change on 412 Criminal, 503, no change on 705 Civil.

On 1009 Criminal there was a draft. The committee made a change to the draft by Mark's

committee. The Evidence Subcommittee met and drew up a new rule which should be discussed generally, and we're going to discuss that on today's agenda. I'll get to that. That's at the end of the today's agenda, but the Evidence Subcommittee did meet on that.

407 Criminal and Civil, we considered that and voted against the proposal of Mark's committee, so there will be no change.

On 702, 703, 704 and 705, duPont vs. Robinson, that was voted against. I believe Mark's committee wanted a comment. The comment was voted against, but we will discuss that on today's agenda. There is a question of whether or not there should be a rule, and if so, what the rule should be. If there is going to be a rule, should there be a procedure, and would the procedure come within that rule or the procedure rules, or how?

So that brings us up to date as to what is on today's agenda. We first considered 606 Civil and Criminal. Mark's committee voted to amend the rule and follow amendment to Rule 327. Our committee voted to follow Rule 327 with one change, and I believe that

change was made in 327, so it's moot.

As you will see here attached on 327, Procedure for Misconduct, where it says -- it did have the words "any other juror's mind," and it should have just said "any juror's mind," because the one that's talking shouldn't be able to reflect what's on his own mind.

And I believe I'm correct that 327, Holly, was corrected? The word "other" was taken out, was it not?

MS. DUDERSTADT: Yes.

MR. LOW: Okay. So the first time our committee voted on that, we voted to follow Rule 327, so that rule as drawn should be totally consistent word for word with 327 and consistent with what we previously voted on.

CHAIRMAN SOULES: What is this rule?

MR. LOW: 327 on jury misconduct. It said "may not testify as to any matter." The first part was not changed.

CHAIRMAN SOULES: Now, you're talking about 606, right? Evidence Rule 606?

MR. LOW: Yes, I'm sorry.

CHAIRMAN SOULES: Okay. And we've changed that to track Rule of Civil Procedure 327?

MR. LOW: Right.

CHAIRMAN SOULES: Gotcha.

MR. LOW: I don't remember the change, but there were some -- it is broader, because they're not overlapping or not totally overlapping. And we did make some changes which we voted, and those are reflected in there, and the only other thing left to be done was to follow Civil Rule 327.

All right. The next was 702. The SCAC voted to table this at the first meeting. At the second meeting we voted not to have a comment on 702, as Mark's committee had voted. It was voted -- just a minute, let me go back. This was -- hold on...

MR. MARKS: Buddy, can you talk up a little bit?

MR. LOW: All right. Two members of our committee voted -- no, wait a minute. I misspoke. Let me take it back. 702 is the duPont vs. Robinson situation. All

right. We discussed that once, and that was tabled. We, the Evidence Subcommittee voted that no rule be drawn. You know, just to leave it. It's still in the making, because there's a case up in the Court now. duPont vs. Robinson has finally been overruled. But in the event that we want a rule, then we've got one that can be a model, and we can decide how to correct that, whether we want to accept it as it is, and we've even drawn up a procedure as such, you know, for when you have to make objections. But our recommendation has been that we do nothing on that.

CHAIRMAN SOULES: Okay. Buddy, so I'm looking at your chart here, going back about -- there's a yellow page behind that about three or four pages back, and then it says Rule 702 Civil and Criminal, and then the second page of that starts a rule that has a lot of redlining and additions to it?

MR. LOW: Right.

CHAIRMAN SOULES: Now, that's the addition that could be used if the Committee chooses to go along with it?

MR. LOW: That it true. Now,

let me clarify that. Our committee -- I drew this. Our committee didn't try to substitute word for word. This was just something we knew if we did try to draw a rule, since we are voting that there be no rule, that there would be a lot of corrections, and we decided we would just go with this. But this is not something that my committee is necessarily pushing.

CHAIRMAN SOULES: Okay. You're just following the instructions of the Chair to bring something that the Committee can consider in case they want to do it?

MR. LOW: Correct.

CHAIRMAN SOULES: And if they do want to do it, we've got something to start on. And if they don't want to do it, then we can scratch it?

MR. LOW: Right.

CHAIRMAN SOULES: Okay. That's what's here.

MR. LOW: And you'll see behind there, Luke, is a procedural type rule. And that again is my creation along with Hadley Edgar's. I got Hadley to just help me draw up

a procedural rule, if we wanted one on that, and Hadley and I worked on that. Again, that's not something that the Evidence Subcommittee had just said, "Okay, I want to have this word that way," that is just a form rule which would form a basis for this committee to work from and make suggestions.

CHAIRMAN SOULES: All right. Your subcommittee recommends no change to 702?

MR. LOW: Right. It was a unanimous vote, wasn't it, John?

MR. MARKS: Pardon?

MR. LOW: We all agreed on that, all four of us?

MR. MARKS: Yes, we did.

CHAIRMAN SOULES: Okay. That doesn't need a second since it comes from subcommittee. Do we need any discussion on this? Those who agree no change to 702 show by hands. 11.

Those who think we should change 702 show by hands.

11 to nothing for no change.

MR. LOW: Okay. Now, next is 503(a)(2) Civil. At the first meeting it was

tabled by this committee. Mark's committee voted for an amendment. The proposal was to extend the control group test. Now, that's really National Tank. That's what it is.

Two people on my committee voted not to change it. Two people voted to change it and proposed a rule. Basically the argument against changing it was that we're going to more open discovery now, even to where an attorney takes a statement, and we don't need to then close discovery here.

The argument for changing it was that if a lower-echelon person hired a lawyer, there still ought to be a privilege.

Am I somewhat correct on that?

MR. MARKS: Yeah. Do you want me to --

MR. LOW: Yeah, you may address that, because John was in favor of it.

CHAIRMAN SOULES: Okay. John Marks.

MR. MARKS: In a lot of corporate situations you have risk managers or people who are actually dealing with lawyers and dealing with litigation who technically

would not be under the cloak of the privilege as it is written now. And it seems grossly unfair that those people working with lawyers, dealing with them, that sort of thing on a day-to-day basis don't have the ability to have that sort of privilege.

And it seemed to us that that was a problem with our rule and perhaps maybe the federal rule; that you had people working on law cases, getting involved in the strategy of the case, getting involved in all that sort of thing without really having that cloak of privilege around it, and it just seems wrong for that to be the result.

And I think the problem was raised in National Tank vs. Brotherton, and the Court mentioned and talked about this and what it meant. And that's really the reason why we felt that the change needed to be made.

CHAIRMAN SOULES: What is the effect of the change, John?

MR. MARKS: The effect of the change is -- well, let me just read to you what we proposed.

Right now it reads, the definition, "A

client is a person, public officer, or corporation, association, or other organization or entity either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer."

(2), "A representative of a client other than a legal entity is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client."

What we're suggesting is that that be broken down into two subparts, and the first subpart would be, "If the client is a legal entity other than a natural person, a representative of such a client is: (A), a partner, officer, director, or employee having authority either to obtain professional legal services or to act on advice rendered pursuant thereto on behalf of the entity; or

"(B), an agent or employee of the entity who has been requested by such partner, officer, director, or such superior employee to communicate with a lawyer on a subject

matter within the scope of the employee's or agent's duties in connection with securing legal advice by the entity. The term 'agent' in this Rule does not include independent contractor."

So it actually expands it. It broadens the cloak of privilege within the corporate setting.

CHAIRMAN SOULES: Discussion. We'll start with Richard Orsinger and then go around the table here.

MR. ORSINGER: Okay. Luke, I've got more than one thing.

But John, the first thing I would like to ask is that in looking at my copy of the Rules of Civil Evidence 503(a)(2), I see that there's a difference here between your nonunderlined part of (a)(2). The rule in my rulebook says, "A representative of the client is one having authority to."

Your rule, the committee proposed draft says "A representative of a client other than a legal entity is one having."

Now --

HON. SCOTT A. BRISTER: Don't

you mean other than a natural person?

MR. ORSINGER: Well, it appears from the proposed draft that we would not, absent this change, have a definition for what the client is when it's a nonperson, but in reality we do. We have a rule right now. It says a representative of a client is so and so, and it doesn't have mismatched or unequal treatment for a non-natural person.

And I'm wondering if I'm right in my thinking, and if so, then what's wrong with the current definition of a representative of a client?

MR. MARKS: I'm not sure I'm following you.

MR. ORSINGER: Well, if you look at 503(a)(2) in the current rules, it reads just like the committee draft 503(a)(2), a representative of a client. But the committee draft that says "other than a legal entity," does not reflect that that's new language. If you look at the current rule, that phrase "other than a legal entity" is not in the current rule.

Well, that phrase "other than a legal

entity" leaves the rule undefined or nonapplicable to businesses, to corporations. But the current rule does not do that. The current rule does not say that corporations are treated differently from natural persons.

Do you see what I'm saying?

MR. MARKS: Well, I think so. But I think the whole point is that if you treat a corporation like an individual, there may be only one individual in the corporate structure that can authorize the retention of lawyers and act on lawyers' advice, when in fact there are a lot of people that deal with lower-echelon folks, not the president, not the vice president, not the corporate officers, but risk managers and people like that who have responsibilities with respect to litigation that don't fall into that category.

That's the whole reason for trying to expand it so that someone that deals with that sort of thing is protected.

MR. LOW: Luke, let me explain one thing before you get to the discussion on the history of it.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: I did not draw this. I think the State Bar Committee drew it, and they had input from John Sutton, who had a rule, and I'm going to get around to your point. I don't favor this. I'm just telling you this from a historical point of view and what they were trying to do from my understanding.

Witherspoon was considered. What was the other one, Mark?

MR. SALES: Meredith. Meredith was the key case on this which this was based

MR. LOW: Yeah, Meredith and Witherspoon. So they attempted to make it where it would be like a representative of a client. There's no question about the client, but they attempted just to focus on the representative of a client. Okay? So a representative of a client other than a legal entity, and a client of a legal entity; in other words, an individual or a corporation or a legal entity, partnership or whatever.

So that was what they were trying to divide. The rule -- "client" is defined here, and that's -- but they wanted it to apply to

individuals as well as corporate clients or that type thing. Now, whether that is the way it's drawn, I don't know, but that was what was intended.

Now, I'm sorry, Luke, I turn it back over to you.

MR. ORSINGER: Well, I can go back and say I think we need to go back and underline the phrase "other than a legal entity," because the committee report is recommending deferential treatment.

And secondly, I think 503(a)(2)(A) is pretty much tantamount to the current rule, and that the real change that's being proposed is in 503(a)(2)(B), and that if you analyze 503(a)(2)(B), it's quite a bit broader than just someone who has to consult with the lawyer or someone who can act on the advice of the lawyer. It would include anyone who talks to the lawyer at the request of the employer, perhaps about just the factual details of a situation, without regard to whether the lawyer is going to give that person advice or is going to be receiving that information and formulating legal advice.

And so I see this pretty much colliding with what we've done on our work product, you know, with our discovery on work product and things like that. I mean, I'm not necessarily speaking against it.

Secondly, something that people seem to forget is that National Tank Lines case was a plurality opinion. It was not a majority opinion, and it does not constitute stare decisis and it is not the law of this state unless we make it the law of this state in this rule.

That's my opinion, and I don't think there's been any subsequent Supreme Court activity that would make it so. It's the opinion of four justices and with sufficient concurrences in the result to where it had more votes than anyone else, but it really doesn't represent the law, and we need to look at this as being in my view a change in the law.

MR. LOW: Bill, I think.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I would

just recommend that if we don't vote this down altogether that the phrase "other than a legal entity" that's now underlined in the first line be changed to "who is a natural person."

MR. MARKS: "Other than someone who is a natural person"?

PROFESSOR DORSANEO: Yeah. A representative of a client who is a natural person as one having authority. And then I would recommend that the underlined sentence be changed to say "if the client is a legal entity rather than a natural person." I prefer "rather" than "other." I realize that you could say a person is a legal entity or a natural person is a legal entity, but I think we're really talking about legal entities who are not natural persons.

CHAIRMAN SOULES: Okay. Going down the table here, who is next? Rusty? Don Hunt? Mark Sales?

MR. SALES: First, I was the chairman of the Rules of Evidence Committee the year that this proposal came up. I think it was 1994, so it was shortly after the National Tank case. We had a subcommittee put

together, and I'm not sure whether all of the materials that were generated by that subcommittee got to Buddy or not. I'm not sure if you got --

MR. LOW: Yeah, I got it. I've got more materials than I can digest.

MR. SALES: Dee and Sutton did a lengthy memo, I believe. Lee Currington, who was the chairperson of that committee, also did a report. There was quite a bit of work product that went into it.

The idea behind it was to analyze how the control group test related to what other courts were doing, whether it recognized the reality of practice when you're representing a corporation.

To begin with, the National Tank case, and there may be some issues, I think Richard pointed out, about whether it's the law or not, but it basically says that it adopts the control group test, which most courts have said basically limits the scope of your privilege to upper echelons of corporate management.

Now, that decision is a minority view

among the states. Most states have followed what the federal courts do, which is the Upjohn case. Upjohn basically, also sometimes called the subject matter test, deals with basically, if it's in the scope of the employ's duties and he consults with the attorney, that is a privileged communication.

The federal courts apply Upjohn, including the federal courts in this state. Obviously, the problem we've got, especially if you're in federal court and you've got mixed claims here, you've got two different tests on privilege.

If you're the lawyer representing a company, you're not exactly sure with who, other than probably the president, you can safely communicate without worrying about whether that matter can become a matter of disclosure.

The subcommittee had made a recommendation of a test that was somewhat in between the control group and the Upjohn test, which was based on a decision by the Eighth Circuit in the Meredith case. I don't have a cite on it, but it's in the materials.

And basically what the Meredith said was that if the communication was at the direction of a superior or upper-echelon management, you may talk to this lawyer so that he may act and advise us about the matter, then that would covered. That is different than just the broad Upjohn test, which is if the management tells the lawyer to go talk to whoever they want and there's a privilege that attaches.

So the recommendation by the Rules of Evidence Committee which is before you basically follows the Meredith line, which was sort of a middle ground, I would say, but which still recognizes the fact that most corporations, when they secure legal advice, don't do it through the president or the CEO or the vice president. And it makes sense.

Some of the other materials in the memo note that if an employee's actions were in response to a superior, if the corporation can be held liable for something that he does in the course and scope of his employment or if under the rules he makes a statement, a public statement within the course and scope that is an admission against the company, then

certainly the lawyer should be able to communicate with that employee in connection with the matter and feel that he has a privilege with that communication.

So this rule tries to take that into consideration. It does not go as broad and the intent was not to go so broad as to simply say any communication with any low level employee of the company would be covered by the privilege.

So it's a middle ground that tries to recognize the reality of representing companies, and that you don't usually deal with the president or the CEO, so that's sort of the history behind the rule. It was a unanimous vote -- well, I think there may have been one dissent out of the entire committee, which included people from both sides of the bar. So I don't think it's really, to me, a plaintiffs versus defendants issue here.

CHAIRMAN SOULES: Okay. If you want to find those materials there in your first supplement, it's Page 610 indicating that this all begins with an inquiry from Dee Kelly to then Lee Currington, I guess, the

chair, and it was followed up. Page 610. It's about a 12-page or longer, 12 or 13-page memorandum. But that's what we have been addressing, Mark, is your very material. That's what that is right here.

MR. SALES: I wasn't sure what was in the packet.

MR. LOW: No. It's all been -- your committee considered like three different --

MR. SALES: -- versions.

MR. LOW: -- versions, yeah. And I think they're all -- go ahead.

CHAIRMAN SOULES: Bill, why don't you go ahead with your thoughts.

PROFESSOR DORSANEO: Well, I haven't read all of this material in the supplement, and it may not make that much difference, but it's my view that Meredith is actually Upjohn, because Upjohn was a directive from the corporate officer in charge of the investigation, and that it is not accurate, technically accurate to say that the subject matter test is Upjohn. Upjohn is a third approach.

MR. SALES: That's correct.

PROFESSOR DORSANEO: I would also say that our current rule without this change would in my view cover a situation where a representative of the client -- if you really did have somebody who was in the control group who had a representative, they would be able to talk to their lawyer or the lawyer's representative, and that would be privileged. Okay? And I realize some courts might get that wrong, but if it is a situation where you have a representative of the client and someone who is acting for the president who is the client, then I think that representative could talk to the lawyer's representative and that would be privileged, recognizing that I may not be right that all courts would reach that conclusion.

The problem I have with our current rule is not so much with communications that come upstream. I have a real problem with our control group test if it requires the lower level person to say what I told him. I don't like that. Okay? I think somebody ought to be able to be the recipient of legal advice

without having that legal advice subject to disclosure. I'm less concerned about factual information coming from somebody out in the field being, you know, discoverable, because frankly, that's the kind of stuff that ought to be available. So I don't like the control group test, but I don't like this draft either.

CHAIRMAN SOULES: Richard, we've heard from you. Let me hear from some others. Mark, anything else from you?

MR. SALES: I just wanted to point out one other thing on that Meredith decision. That is also -- I think Bill is correct that Upjohn does not technically follow the subject matter test. It's more of an ad hoc determination on what the employee did and what were his responsibilities at the time. So I think he's correct in that.

The other thing I was going to point out is that Meredith is supported also by Judge Weinstein in his treatise on evidence as well, as supporting the use of this type of language to take into consideration where the employee is someone not the president or CEO of the

company. So it's not just Meredith. There are a lot of other people out there.

And I want to point out that the control group test is the minority view among the states and certainly is not followed by any of the federal courts.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I just wanted to respond a little bit to what Richard was talking about about the rules of discovery and whether this particular rule would collide with the others. I don't think that think do as I recall that rule, because the rule now says that any fact is discoverable. And regardless of where that fact may be, you're entitled to get it. And this doesn't really address that. It addresses legal advice and consultation. So just because a lawyer took a statement and there are facts in that statement that would be discoverable, I don't think it affects that at all.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Well, I just wanted to save my spot. I overcame all sorts of things to get down here for this. I just want

to read this real quick, and then I'll speak.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I want to talk about the interrelationship between the attorney-client privilege and the work product privilege. Everybody has been talking, and it sounds almost as when people talk about the attorney-client privilege and the control group, people tend to say, "Well, then there is no privilege for these discussions with lower-echelon employees."

Well, that is not true. And when you read National Tank vs. Brotherton, that's exactly what happens in that case. Those communications, when they're concerning litigation matters, are not privileged under the attorney-client privilege, but they are privileged as work product, so the attorney-client privilege gives absolute protection to all of these communications between the lawyer and the control group person, or if we're rejecting the control group person, with whomever is the representative of the client.

That means that you cannot get a copy of the memo or the statement that represents a communication between an employee and the lawyer. So if it's a completely factual investigation in a litigation related matter, you have an explosion like in National Tank, a lawyer goes and gets statements from the people on the floor who saw the explosion. Under this test those would be attorney-client privilege and they would not be subject to discovery, even under our work product rule, because what our rule says is "unless they are protected by some other privilege," which means that if they're protected by an attorney-client privilege, you cannot get those statements. So this is a very important part of the work product privilege.

If we leave the attorney-client privilege subject to the control group test, then those statements would be protected under work product or those communications would be protected under work product, but under our new work product rule, those statements would be discoverable.

Any communications that contain strategy

under our work product rule are absolutely protected. We make very clear in our work product rule that strategy discussions are not discoverable. And it doesn't matter whether those discussions are with high-level employees or low-level employees. They cannot be discovered.

Only in situations of need and hardship where those people are dead and you can't get what they know anymore are the factual parts of those communications discoverable. The notes where there are only factual renditions of what was said between the lawyer and the low-level employee, not strategy. But in that situation you've got to have a showing of need and hardship, which I'm not sure there has been any case in Texas that I've seen where they've talked about need and hardship really, so that's what we're talking about here.

In litigation situations you do have protection for those communications, and it seems to me that people here are more concerned about the litigation situation because we're all involved in litigation.

I think another thing which you really

have to be thinking about is what about the nonlitigation situation where the corporate type lawyer is giving advice to the corporation, and I think in those situations it is the control group that is getting legal advice. A lawyer is not going to go talk to a guy on the line about securities and contracts, and that's the kind of advice that is protected only by the attorney-client privilege. In those situations the work product privilege doesn't come into play.

Work product comes into play anytime there is an anticipation of litigation. What National Tank vs. Brotherton did is it moved up the "in anticipation of litigation" so that we can rely on work product, where there was a period of time where we only had the attorney-client privilege.

So the control group test I think was overly restrictive then if we had a very restrictive work product rule. But now our work product rule has been broadened to where in anticipation of litigation is at an earlier point in time so that we don't need a broader attorney-client privilege, which I think is

overly protected because I think it insulates things that I think may need to be produced in litigation situations.

And I've talked to Steve Good and Guy Wellborne about this rule also, and both of them, they together wrote the original control group rule, and they're very much favor of leaving it with the control group because they think that it's overly protective to make the attorney-client privilege broader.

Maybe they didn't write it; they told me they wrote it.

CHAIRMAN SOULES: Referring to what, 503(a)(1)?

PROFESSOR ALBRIGHT: The Rules of Evidence, right.

CHAIRMAN SOULES: And (a)(2), the original ones?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Okay. Coming on up the table then, Robert, did you have your hand up?

MR. MEADOWS: No, I'm fine.

CHAIRMAN SOULES: Okay. Judge Brister.

HON. SCOTT A. BRISTER: Yeah, I'm very much in favor of going to at least a subject matter test and away from the control group test.

For instance, in the related but different situation, which is basically who can the lawyer for the other side talk to, if the nurse that works in the doctor's office, the driver who works for the company, the family member of the plaintiff, you know, most attorneys don't think of just picking up the phone and chatting with these people informally before, after and during the trial because they see them as the opposing client and it's at odds with the rules.

And that National Tank case just seems odd, that, "Well, we just decided they're not the client." So does that mean it's all right to just call up and chat with the driver the day before he goes on the stand on your trucking case, or call up and chat with the gas buyer on a tank case for the other side? No attorney-client privilege.

Maybe that's what you want to do, and maybe the world would be safer for all of us

if that's what happened, but that's not what most people think of as ethical or not ethical.

For instance, especially with lower level people, one of the main functions of the trial lawyer, because our training, our lives are focused on the precise use of words, we use worlds more precisely than everybody else in the world does. That's why they think we're nitpickers. And part of woodshedding a witness is not getting them to lie but getting them to be as precise in the use of their words at trial that they won't get in trouble by somebody from their view twisting or somebody else construing what they said which is not what they meant to say.

Now, the people that need that most are the lower level employees, not the upper level employees or the person who that's hiring the lawyers, who is usually a lawyer themselves. None of that discussion is protected. The woodshedding of this bus driver, I don't see how that's work product any more than woodshedding, you know, a third-party witness, and it's not under the control group test

protected by attorney-client. And it just seems to me that that's what most everybody thinks of as being privileged but is odds with what the Court has construed this rule to be.

And I think we ought to at least go to some subject matter or client/entity type privilege definition.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: First of all, as to who a lawyer can talk to, Ethics Opinion 464 makes it pretty clear that you can't talk to anybody for whose conduct the defendant may be liable or responsible. Now, as to whether or not they can talk to the driver, if I've got a driver, I'm going to tell him "Don't talk to anybody," I mean, whether he's going to or not. But I think our system promotes being able to talk to factual witnesses. If the driver knows something, they can depose him, so I think that's covered.

HON. SCOTT A. BRISTER: You're talking about depositions. Depositions are one thing. We're talking about picking up the phone and chatting without the other attorney being there.

MR. LOW: All right. How does this rule protect that?

HON. SCOTT A. BRISTER: If it's the client, it makes it clear you can't call up the other side's client and chat with them.

MR. LOW: Well, I understand. But why shouldn't you be able to talk to somebody if they have factual knowledge? I mean, you know, that's what we're going to.

CHAIRMAN SOULES: You mean even the client? Even the adverse client?

MR. LOW: No, no, no. I'm not talking about --

CHAIRMAN SOULES: See, that's where you and Judge Brister are miscommunicating.

MR. LOW: He's extending it to that. I understand we're miscommunicating. But my point is, if we mess with this, this rule as drawn -- look, the basic thing is pretty broad. It says "General Rule of Privilege." Now, that's going to apply now to a whole bunch of lower people. And that says, "The client has a privilege to refuse to disclose and to prevent any person from

disclosing confidential communications."

Now, confidential communications are just communications made not intended to be related. Well, I mean that's everything. I think in the rule what is protected is real broad, and I think if we take it down to these lower people that every communication -- I tell you that this is 50 feet from here. I'm out there investigating with you. That can't be -- well, I didn't measure it.

I mean, I think there was a time when they even claimed that pictures were a communication. I mean, that was a big issue and everything. I think basically that we're getting away from trying to protect just everything. I mean, even if I take a statement or something. And my objection to it was when you take and add lower level people to this broad protection of any communication. And who decides that it is not to be communicated? The lawyer? Who? That it goes too far. It prevents people from getting facts. Now, that's my interpretation, that it will be expanded. I know that's not what's intended, and that's all.

CHAIRMAN SOULES: Okay. Richard, do you have something you want to add?

MR. ORSINGER: No, nothing.

CHAIRMAN SOULES: Okay. Rusty McMains.

MR. McMAINS: Well, I agree with Buddy. I believe that the rule as expanded to lower level people overrides and trumps the work product exceptions that we have with regards to discovery for factual information. This doesn't just protect communications made by lawyers to these individuals, it protects what people tell a lawyer at any time, and not relating to any transaction that's in litigation or related anytime. All they have to do is they're just to assert the attorney-client privilege, they're my lawyer, and that just means that they're looking for full employment for lawyers for other services other than being what they should be, which is lawyers. This is an absolute protection.

And the way our privilege rules are drawn they don't have to produce that material.

They don't even have to identify the withholding of it if it's an attorney-client under our rules. I mean, they don't have to do any of the things with regards to withholding statements if it's an attorney-client statement until there are lots of demands made on them.

So I find this to be a considerable intrusion into the work product area and the displacement of it, as Alex said. And that's the real problem. We've already made some of those policy choices, and this is a reversal of it.

CHAIRMAN SOULES: Mark Sales.

MR. SALES: I just want to add, first of all, it's not just anybody talking. They have to be requested by the superior to talk.

Secondly, this state is the one that's not in line. Nationally, the test that's being used is more along the subject matter test. The federal courts in this state are using that test. There is a big policy choice here on uniformity. Corporations don't deal solely in Texas. They are all over.

If somebody in Ohio has what they think is a privileged communications and they're sued in Texas, it may be privileged in Ohio but it's not in Texas. There is a definite need for some uniformity. Corporate, in-house counsel and lawyers outside who deal with companies know that. And it's very difficult when we have a situation where you can only talk to the upper-echelon people, which is just not the reality of dealing with companies. If you deal with them, if it's a bank, if you deal with an officer, fine maybe. But if you deal with some guy who is running a branch office, is that protected? Who knows.

And I'm not talking about the situation where we're in litigation. It could be putting together a deal. It could be discussing the risks of an employment benefits plan with some low-level guy. It doesn't have to be -- and the focus here, I think, is true, since we're all litigators here; we're thinking of risk management and investigation or whatever. But most companies, despite what we think, are dealing with lawyers day-to-day

on matters that don't involve litigation whatsoever. The question is, do those people and do those lawyers have some protected communication there? Can they advise their client safely knowing that that's not going to come to the light of day because a lawsuit shows up five or 10 years down the road.

So I think there's a question here about uniformity, national uniformity, what the federal courts are doing and what most other states in this country do. And this rule does not go as broad as what I think is being read. It's certainly not intended to be that broad. But it still gives reasonable protection to the attorney knowing that he can advise a client without that communication being disclosed.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I just want to go back to Judge Brister's comments, because I think Judge Brister focused on two different issues.

One is the attorney-client privilege and the definition of who the client is for

purposes of promoting the public policy of unfettered communication between a client and an attorney, both ways, and that wouldn't include just factual information but it might include opinions from the client to the attorney, and of course, the attorney's opinion backwards.

The different thing he focused on was the prohibition on contact from an adverse attorney to the client. And what Judge Brister was talking about was the need to protect an adverse attorney from essentially woodshedding the adverse client. And I don't think that that gives -- the rationale for the prohibition on contact between an attorney and an adverse party really focuses around in my mind on preventing an adverse attorney from coming up with some kind of arrangement or deal with a client who has authority to make a decision. It's not there to protect an attorney from getting the facts from that adverse client that they might in a deposition or from trying to turn around or twist what that client has to say, which is what the attorney will always do in depositions or

trial anyway. And granted, the representative's attorney won't be there to protect him or her, but I don't think that that's the purpose of the rule, to prevent an attorney from talking to an adverse client who has factual witnesses, factual information or a representative or employee or lower level employee who has factual information.

And so I don't think you can decide whether or not the attorney-client privilege ought to extend all the way down by being concerned about what an employee might say to an adverse attorney. Moreover, as a practical matter, I think as some people said, most people are going to be told not to talk to the adverse attorney.

So I think that as Alex pointed out, I think the work product rule should govern for lower level employees' information, not an absolute privilege like the attorney-client privilege.

And as far as any disparity with other states, I don't know if that's really true or not. I think Paul may have something to say about that. But if there is any disparity, I

doubt the disparity in our Evidence Rules is the biggest disparity or of most concern to corporations in interstate law disparities. I imagine it doesn't even register on their charts.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I can't even believe we're addressing this. The last time --

CHAIRMAN SOULES: We're addressing because someone from the State Bar of Texas sent it to this committee to be studied, Paul, and we always address those matters fully and completely, because that's our job.

MR. GOLD: Well, then as part of that job -- and I dropped a bunch of stuff to come down here to talk about it. I think that it is incredible that at the last meeting we voted down the self-critical analysis privilege by a vote of something like 21 to three. And a lot of discussion was held about why that was such an egregious proposal.

This is worse, because all this is is a self-critical analysis with no exemption. What this would do is essentially with regard

to any discussion that a corporation wanted to protect, all they would have to do is get the in-house attorney to ask the questions or have an upper echelon individual request the employees to talk to the attorney. And to think or to suggest that corporations do not have this evil motive I think is to be in nah-nah land.

If you look at Ford Motor Company vs. Leggitt, which completely obliterates the argument about uniformity, the Ford Motor Company specifically did not make the claim of party communication. It talks about that in footnote 5. And the reason that Ford Motor Company doesn't is because Ford Motor Company has figured out that in the State of Texas that if they make a claim for party communications, there may be an exemption for undue hardship and substantial need. So they specifically couched their affidavits solely in terms of attorney-client privilege.

This Supreme Court, when confronted once again with Ford Motor Company making the argument that they needed uniformity with their argument with regard to the privilege,

adopted for the first time a substantial, significant contacts analysis on conflict of laws with regard to attorney-client privilege, holding that with regard to attorney-client privilege that you look to the state of the entity raising the privilege and see what that law holds. And they specifically held that Michigan's law on attorney-client privilege trumped Texas' in Leggitt vs. Ford. There is no problem with uniformity. That issue was dealt with by the Texas Supreme Court conclusively in Leggitt.

But this issue -- I'm sorry, Brotherton was decided in 1993. We're not talking about a case that was written by Justice Kilgarlin. We're talking about a case that was authored by the Chief Justice, Justice Phillips. And they point out in 1993 that the control group test has historically been adopted by the majority of the federal courts.

And then if you look at the annotation by Black that the Supreme Court cites in Leggitt, the annotation points out that Upjohn has created more confusion in the federal courts than any other case and that the confusion is

that Upjohn, while rejecting the control group test, didn't put anything in its place. And then they go on to cite in incredibly lengthy annotation that there's absolutely no uniformity in the federal courts or in the state courts with regard to this.

So to suggest that the control group test is the minority and this rule that's being proposed is the trend I think is misleading. I do not think that.

And besides, we have a whole body of law in this state, as Alex points out, that's based upon party communications, attorney work product and attorney-client privilege that none of these other states have. And what we will do is completely extinguish the party communications exception. And in Texas it protects communications between attorneys, between parties, between employees for the pending litigation, and the only way that you can get it is through undue hardship and substantial need.

If you adopt this rule, as the Supreme Court has pointed out in the trilogy of cases that they just wrote on with regard to

hospital committee privilege, you will never get it. What this is essentially doing is burying, once and for all, all discussion, all evidence, all fact witnesses. And for those who think that it doesn't include fact witnesses, all you have to do is look at Leggitt where what was protected as attorney-client privilege was Failure Analysis' inspections because an attorney, an in-house attorney requested it.

All it does is make the in-house attorney the virus. All the in-house attorney has to do is touch somebody or talk to somebody and it's going to become privileged. All we are doing here, if we adopt this, is adopt what we rejected so vehemently at the last meeting.

With regard to Judge Brister's argument about the driver, that's a different issue. What we're talking about, and when you read the annotation, what this rule is, it's who personifies the corporation, it's not how many people can you go out and employ and take off the street.

It's anomalous that we should be talking about efficiency in discovery and cutting the

number of depositions, the number of interrogatories you can send and whatever at the same time that you'll be completely eliminating the ability to do informal discovery. Anybody that you potentially talk to may be a violation of the canons of ethics; whereas now you know at least if you talk with a director or a manager or a supervisor, you know that that's an individual who may be in a control group. If you even so much as talk to the cleaning people now, who are employees of the corporation, if somebody has had the wherewithal to just say, "Well, all of you up and down the line go talk to the in-house attorney about what you saw or what you may have heard," you may be violating a canon of ethics.

I disagree with Judge Brister that the rule is supposed to protect the driver and everyone else. It's only supposed to protect those who can bind the corporation. And Texas has Rules of Evidence that before someone can bind a corporation certain things have to be proven.

I'm sorry, I'm being too passionate about

this, and I apologize to the Chair for asking why we're here. I know why we're here, and I know it's an important topic. I just don't think anything has happened since Brotherton. I don't think anything has happened since this Court adopted the control group test. I don't think anything has happened that warrants making a wholesale change in our code of privileges when it's already protected. I just don't see it. And that's why I think everybody should vote against this just as aggressively as they did against the self-critical analysis.

CHAIRMAN SOULES: Judge Peeples.

HON. DAVID PEEPLES: The statement was made awhile back by Buddy that this rule would keep people from getting the facts. I want to be sure that I understand. This would simply prevent discovery of lawyer statements and conversations as communications between lower level employees, and we that have right now. You can always depose people and call them adverse. And if they tell the truth, you know, whatever they told the lawyer

two years ago presumably they will tell it again. I'm just wondering if the opposition to this rests on the premise that there's going to be widespread perjury by low level employees.

MR. LOW: That's just one of the -- that's just --

CHAIRMAN SOULES: Buddy Low.

MR. LOW: No, I'm sorry.

HON. DAVID PEEPLES: The low level employees that have had these conversations with lawyers can be deposed and questioned about everything. You just can't say, "What did you and the lawyer or the lawyer's representative talk about?"

MR. LOW: Let me tell you what, if you ever represent somebody that gets hurt on the railroad, you face all kinds of obstacles. Everything is confidential. And if you put this in there, they're going to -- measurements and all that, "Well, he told me that. I can't say. He told me that." That's intended to be. Well, the rule is not intending to cover that. I'm not saying that. But you're going to have hearing after

hearing on these things. That was just one of the reasons.

The second -- but let me go back to a point. I understand what Judge Brister is talking about, but I think the place to correct that is in our Canons of Ethics and not here, because our canons say you can't communicate with a person represented by a lawyer. And maybe we need to do that. But I don't think we need to take a Rule of Evidence to deal with a canon of ethics.

HON. DAVID PEEPLES: Just to follow up on that, Luke. A foreman talks with a lawyer or a lawyer's representative but it's before litigation is anticipated, let's say, before that can be proven to a judge. You can still depose the foreman and find out what he knows in his personal knowledge, can't you? Surely, you can. You just can't say, "What did you and the lawyer talk about?" I mean, that's going to be hard to get at. I mean, am I wrong about that?

MR. LOW: No. But what they're going to say, the way they do that, they say, "Okay. How far was it from here?"

"Well, I don't know. The lawyer told me that distance. He looked at it."

I mean, you just don't understand. Just sue a railroad one time.

CHAIRMAN SOULES: Okay. Elaine, and we'll go down the table.

PROFESSOR CARLSON: I just want to to follow-up with what Paul was saying about the Ford Motor vs. Leggitt decision. I have served as a discovery master in several cases where conflict of law assertions on attorney-client privilege have been invoked. And I concur a thousand percent with Paul's description that certainly the federal standard that's used in Upjohn is not consistent. There's a reason it's called "ad hoc." It is very unpredictable in its application.

Insofar as applying other state's privileges, those states that have used a more generous standard, my experience has been that there is much more protection for the communication for the corporation, and it is very problematic. And I would agree with Alex that the work-product privilege that we have

goes a long way in protecting the lower level employee communications. I also agree with Bill about attorney communications to the lower level employees. At least we need to clarify in some way that there is that protection in our rule.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I think after the conversation I've become convinced that this basically permits people, if they wish, to use a lawyer to circumvent our work product doctrine that we worked out and voted and have already adopted. Because all you have to do is to pass a memo out to everyone in your organization to answer whatever questions the lawyer may have and then put the lawyer in charge of it and then the work product standard is completely gone, and it's completely preempted by the attorney-client privilege. And this tool is going to be used. I mean, it's probably designed to be used this way, and it will be used this way, and I think it really is contrary to the position that the Committee has taken in its

earlier vote on the discovery rule.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, we made a specific decision along that same line that witness statements should be producible, should be discoverable. And if a witness statement was taken by a lawyer and this rule was changed in this fashion and the only thing that the president does, or whoever you want to call the control entity, is send out memos saying "Talk to the lawyer," sends out a general memo, "Talk to the lawyer," those witness statements are protected specifically under this rules. Those communications cannot be made.

And the idea that you're going to get to talk to somebody two years down the road when they finally disclose him to you and that that's going to substitute for having a statement that he made right after the event and be able to look at, that is basically nonreality in the litigation game.

CHAIRMAN SOULES: Anyone else down this side of the table? Mark Sales.

MR. SALES: I think the

committee ought to get away from thinking about the litigation context a minute and think about the privilege in connection with the day-to-day workings of the company. Let's say it's an SEC filing. Let's say it's dealing with an employee benefit plan. There are a multitude of things. And most legal advice, when you're dealing with companies, and that's why most firms have corporate departments and tax departments, there is a multitude of advice that goes into day-to-day operations of a company that have nothing to do with litigation.

And the question is, if I go talk to a branch manager at some bank about some statement regarding an SEC filing or a UCC filing, is that statement -- is my discussion with him to be disclosed or is that privileged? Now, if this employee said, "The lawyer is coming down to talk to you about that," is this going to be something privileged or not?

And I think the focus is too hard on the issue about work product. And the concern I think most companies have that do business

here is what about the day-to-day stuff? What about those things? And I don't see any protection in this rule that helps you on those types of issues, and that's what the normal day-to-day business of these companies is, not litigation. And so I don't think this rule has any protection for that, and I think that's the concern here.

CHAIRMAN SOULES: Are you suggesting we consider adopting this rule only for nonlitigation matters?

MR. SALES: Well, I think the focus of this committee was not to even deal with the issue of work product and litigation. The focus of the committee, and it's in the materials, you can see where they've written in there, we are not trying to address or discuss this in the context of litigation or work product. We're talking about what happens day-to-day outside of that context, no litigation is anticipated, and if a lawyer is going to talk to a branch manager at a bank or going to talk with some head of a plant or facility about whether, you know, this complies with the ADA or whatever it is,

is that communication going to be privileged or not. And I think that's where we break off with the control group test from what most other states and the federal courts are doing.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I think Mark made a very important point. And we've been looking at this from the standpoint of litigation, and of course, the Rules of Evidence so far as they deal with lawyer/client privilege are much broader than that. And I certainly want to echo what he says. I think that's the point. They need that kind of protection. And for people to sit around here and say that corporations don't need to talk with lawyers and lawyers don't need to talk with the corporate people and the securities people or whatever in the corporate context is just ridiculous and really not reality.

And a lot of times people will be talking to lower-echelon folks before they even know that a case is going to come down the pike. I mean, they may be seeking legal advice. I think (B) even talks about "in connection with securing legal advice by the entity."

So I think the rule as proposed takes care of the situation that Paul was talking about and what they're talking about around this room.

If I go out and get a statement from an employee as a lawyer and that person signs that statement, that becomes his statement. I don't see how under the rule as it has now been drafted by the Advisory Committee and sent to the Supreme Court would keep -- how we could keep that from being produced simply because the lawyer asked for the statement if the guy signs it and adopts it and makes it his own?

PROFESSOR ALBRIGHT: John, can I answer that really quickly?

CHAIRMAN SOULES: Alex Albright. Speak up, please.

PROFESSOR ALBRIGHT: I think our rule, the work product rule, says that that statement is discoverable unless protected by another privilege; that a statement given to a lawyer would be a communication protected by the attorney-client privilege under here. The only way you could

get out of that is somehow except statements in this Rule 503.

MR. MARKS: Well, does it? I don't know that it does. Because it says here in the proposed rule that is protected, if the communication is for the purpose of securing legal advice by the entity. Now, a lawyer going out and taking a statement to preserve evidence is not in my view securing legal advice by an entity, is he?

ALEX ALBRIGHT: Well, I think most people would claim it would be.

MR. MARKS: Well, of course they would claim it, but I don't know what the cases about that. Most lawyers, I suspect, would try every way in the world to protect that, but that doesn't necessarily mean that we shouldn't try to make a rule, because that's something that the court is going to have to deal with ultimately anyway as the interpretation.

CHAIRMAN SOULES: Rusty, do you have the language?

MR. McMAINS: Well, the General Rule of Privilege does not say that. It says,

"A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications," which are defined as simply not to be disclosed to third parties, "made for the purpose of facilitating the rendition of professional legal services to the client."

That has nothing to do with rendition of legal advice or anything. It has to do with defending the son of a bitch. So that's a misstatement and a misnomer to suggest that it isn't that broad. It is that broad. It trumps the work product privilege. It undoes everything we have done otherwise and is a disaster.

The suggestion is that we should do it in nonlitigation matters. Then let them draw a rule that says, "In cases that don't involve litigation." Let them do a rule which says basically that the work product stuff trumps this insofar as attorney-client privilege. We've considered that. But that's not what it's for. It's for a number of reasons, and it's the so-called unintended consequences that I think warrant the rejection of it.

MR. MARKS: Well, we could address the unintended consequences then, because I think the idea is a good idea, and that is to protect the communications with lower-echelon people who have a need to obtain legal advice from lawyers in behalf of their company. Right now they can't do that, so maybe we ought to address those things.

CHAIRMAN SOULES: It seems to me that there may be a division over this rule because there's not enough focus on all the other privileges that we have. The party communications privilege, so-called in the rule, has also been interchangeably described as the investigative privilege, which is the privilege pursuant to which lawyers and anybody representative of the client is going to go and investigate fully all of the circumstances and have all sorts of communications. And those communications can only be penetrated for good cause and undue hardship. We don't have to shroud everything under attorney-client in order to protect it.

Why don't these other privileges -- it's just not correct to say that communications

with lower level employees are not protected. They are. They're protected under investigative or party communication privileges, but they have some -- there are windows you can get through too.

MR. MARKS: But that's in the context, Luke, of litigation. I mean, we start talking about communications that take place long before any litigation.

CHAIRMAN SOULES: I haven't heard anybody make a motion that this be restricted altogether to nonlitigation matters.

MR. MARKS: Well, it becomes a litigated matter when -- that's the only time it's important, is when somebody gets sued or sues somebody.

CHAIRMAN SOULES: Well, of course.

MR. MARKS: And if that's the case, then all of these work product and party communication privileges don't apply, because those are in the context of anticipating litigation or in litigation. That's what Mark's point is.

CHAIRMAN SOULES: Okay. Let's hear from Paul Gold and then Robert Meadows.

MR. GOLD: I want to reemphasize the insidiousness of the problem in terms of the self-critical analysis privilege in terms of what you're saying. What would happen is any time, even if there weren't any litigation pending, if there were discussions in terms of self-critical analysis, if employees talked to the in-house attorney and gave statements or the attorney took a statement where somebody up above asked the employees to give statements about what they thought about the design of a particular component of a Ford truck or a gas tank or whatever before someone had filed a lawsuit, then under this rule, once a lawsuit were filed, all of those statements would become privileged. There would never be any exemption to obtaining them. That's exactly the point.

What you're trying to do, or what unwittingly is happening, is you are obliterating the party communication privilege that we have and replacing it with something

that, even if it's not the intent, will effectively bury all of the evidence that is communicated at the time that it was all happening, to be replaced only with testimony later on that will be coached by attorneys, after woodshedding by attorneys and what have you. I just think it's a wrong result.

And in response to those that say, "Well, there are innocent activities conducted by our corporations," I refer you to Steenbergen vs. Ford in which Justice Enoch, when he was on the Dallas Court of Appeals, held that when the plaintiff made the argument that only documents that aren't made in the ordinary course of business are protected, observe that it is the business of Ford Motor Company to prepare for litigation. All corporations prepare for litigation.

To suggest that activities are undertaken by in-house attorneys with an eye for what will happen in litigation at some point, if it arises, I think is not evil. And I think that if there are problems with the current rule, the problems that are created by this rule are far worse. And if there are benefits that are

squelched by the present rule, they are minimal compared to the harm that will be created by the requested change.

CHAIRMAN SOULES: Okay. Let's make one more pass around the table and then we'll get to a vote on this. Robert Meadows.

MR. MEADOWS: The point I'm concerned about is the point that Mark made, which is, you've got a need in a corporation or business for legal advice.

Let's take the ARISA example, that a lawyer working with a company on an ARISA plan is dealing with lower-echelon employees or representatives of the company. And those discussions are held. Advice is given. Comments are made. Alternatives are considered. The plan is put into effect. Several years later there's litigation over that very plan. What privilege protects the communications between the lawyer working with the company to develop the plan and the employee who was involved with the lawyer in that context?

No statement is taken, so this problem about the statement that keeps getting

injected gets pushed aside. We deal with that in other places anyway.

We've got a situation work where a lawyer is working with a company, dealing with people throughout the company up and down, and then the subject matter becomes a matter of litigation. What privilege protects those communications and that advice? It's not going to be a work product privilege.

PROFESSOR ALBRIGHT: Well, is the lawyer really going to be talking with lower-echelon employees when he's putting together an ARISA plan? I mean, is he going to be giving legal advice to the lower levels?

MR. SALES: You've got actuarials. You're going to be dealing with banks on investments. There are all kinds of things that go into a plan. You're never going to be dealing, except when the plan is approved, with the upper-echelon people.

In the typical plan you have actuarials. You're going to have all kinds of people who are figuring out how they're going to invest it. Do we have an in-house program we want to

talk to? What's the interest rate going to be? Is this plan funded within the ARISA provisions? Is it too low, too high?

PROFESSOR ALBRIGHT: Why should that be privileged?

MR. SALES: Because you're advising whether that plan is acceptable and meets ARISA or not. Do you have an ARISA violation or not? You're securing legal advice.

PROFESSOR ALBRIGHT: Well, the advice is clearly privileged. The advice that you're giving to the corporate executives is privileged.

MR. MARKS: Not to the lower-echelon people.

MR. YELENOSKY: Why would you be advising lower-echelon people? They don't have any ability to --

CHAIRMAN SOULES: One at a time. We can't get a record here.

MR. YELENOSKY: Why would you give that advice to lower-echelon employees, that this doesn't comport with ARISA? You give that advice to the executives who can

make that decision.

CHAIRMAN SOULES: And anyway, is it confidential? Is it rendered for purposes -- if you're advising somebody how to set up an ARISA plan, is that confidential legal advice?

MR. MARKS: If it's privileged, it is. But if it's in litigation --

HON. SCOTT A. BRISTER: Let me change it a little bit.

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: Like in Upjohn, a company gets concerned that some of our foreign salespeople are bribing folks around the world, so they hire a lawyer. Now, we don't have any objective signs of litigation so there's no work product, no investigative privilege. He goes and asks people, "Are you bribing folks here?" The lawyer comes in to the lower level and says, "Are you bribing people here?" Then when litigation comes around, skip any depositions, just call the lawyer. "What did the people tell you in this country, that country and

that country?"

Now, our criminal defense attorney brothers and sisters go to jail rather than disclose those kind of things because they feel that is their professional duty as an attorney, to protect those kind of things. And this rule says save your money on depositions, just depose the attorney. He'll tell you everything, as long as he doesn't make the mistake of writing it down so it's work product, just ask him everything everybody told you.

I see more clearly than you the things that are cloaked by attorney-client privilege because I look at in camera documents. I've had a half dozen times some of my newer colleagues, not that I've been around so long, call me up and say, "Brister, what do I do on this? I've got a guy on the stand who is saying one thing and I've looked at the in camera documents and from what he told us, he is lying. What's the exception?"

There is no exception. That's what it protects.

PROFESSOR DORSANEO: No, that's

a crime, fraud, Judge.

HON. SCOTT A. BRISTER: No. If he's willing -- if the deal is there's an exception to attorney-client privilege because you think they're committing perjury because they're saying something different, then there's no attorney-client privilege, because everybody is going to allege that. I'll say, "Let me look at it and make sure he's not."

I mean, the whole reason we protect it is so people go to their attorneys, they tell them the whole truth without the fear that it may be used against them. Now, there are good reasons from my point of view to say forgot that. We don't give that to doctors when they get sued. We don't give that to accountants and lots of other people. But we've got several hundred years that say when you talk to the attorney you should be at ease. You shouldn't be guessing whether what you say is ging to appear on the front page of the paper or not, because it's an attorney. And it's probably in the law a more protected thing than talking to the priest. You should feel comfortable in saying everything and baring

your heart telling all the facts, because this guy or gal is on your side. This is an attorney.

Now, that may be a bad idea, but that's the way it's been for hundreds of years, and that is what these lower-echelon people think when they're talking to the attorney. If you want to throw it out, that's fine, but understand it's not just -- I understand there are going to be some bad things that you just can't get sometimes, but that's because we value something.

It's like all evidence rules. All evidence rules exclude something that might be very valuable, very useful, very telling at trial, but because of several hundred years of experience we've decided that the whole thing is privileged because there's a different public policy, and the fact that it may help you in your case ain't good enough.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: But allowing a man to lie on the stand when the lawyer knows it's a lie and everybody, I just don't want any kind of rule that would protect that. That would

be like saying I can go to my priest and just confess everything to my lawyer and I've told him now. I think that goes way too far.

MR. MARKS: Well, if the lawyer doesn't disclose the lie, isn't that supporting perjury or something like that?

MR. LOW: I understand.

MR. MARKS: I mean, doesn't he commit a criminal act?

CHAIRMAN SOULES: Okay. Let's get around the table and get this rule voted on. Anybody else on this side? Paul, anything you need to add new?

MR. GOLD: Yeah, because it's something that no one has talked about and I just thought about it. The only way that you can impute gross negligence to a corporation is through a vice-principal, if you stop and think about it. It has to be a manager. It has to be a supervisor. It has to be a director. The only way that an admission can bind an employer, the rule sets out, it has to be in the course and scope and the person has to be put in a position to be able to impute that statement against the corporation, just

not any employee.

When we go changing these rules, it's the law of unintended consequences. You just don't change this, you change a whole body of things. Why should you have a vice-principal in gross negligence to bind a corporation if you're going to say that any employee is a representative of the corporation. Then any employee should be able to bind the corporation with regard to gross negligence. Why should there be a difference?

CHAIRMAN SOULES: Anything new on this side of the table here on but Buddy Low's side of the table? Anything new at the head of the table? Okay. Anything new on the right side? Down at the end? John Marks, your last words.

MR. MARKS: I would just like to make one request in voting on this. I would like to ask that you do two things. First of all, should we change the rule; and then two, should this be the way we change it. Because I would like to get a sense around the room as to whether or not people in principle agree with some protection in the

area that we're talking about, as opposed to just not liking this rule.

CHAIRMAN SOULES: Okay. The committee has recommended that there be no change to Rule 503. It doesn't need a second. Those in favor of the committee's --

MR. MARKS: Excuse me, no, the committee didn't.

MR. LOW: It was two to two tied.

CHAIRMAN SOULES: Okay. Then we need a motion. We've already discussed it, though.

MR. LOW: Well, I would move that we make no change.

CHAIRMAN SOULES: Is there a second?

MR. HUNT: Second.

CHAIRMAN SOULES: Don Hunt seconded it.

MR. GOLD: What was it?

CHAIRMAN SOULES: No change.

MR. LOW: Where is Rusty?

PROFESSOR DORSANEO: I'm authorized to vote for him.

CHAIRMAN SOULES: Okay. Those who agree, no change to 503, show by hands. Eight.

Those who would change 503 show by hands. Seven.

Okay. Eight to seven no change. Any further motions?

Okay. Next, Buddy.

MR. LOW: Okay. Let me see if I can get back on track. 504, Criminal Rule. Remember, Justice Clinton advised us a couple of meetings before of 38.10 in the Code of Criminal Procedure. We wanted to be consistent with that, and we've drawn the rule consistent with that exactly following that same language that you'll see attached. Do you see it, Judge? And we followed that precisely so you can see what we did there. And I'm open to questions about it.

CHAIRMAN SOULES: Okay. The committee's materials start with a copy of Rule 504, Husband-Wife Privileges, followed by a copy of Statute 38.10, followed by a proposed rule change under the exceptions, which would be under 504(b), Exceptions.

MR. LOW: Right.

CHAIRMAN SOULES: And would this take the place of (1) and (2), current (1) and (2)?

MR. LOW: No.

CHAIRMAN SOULES: Or is this a third one?

MR. LOW: No. This would be -- I mean, we're only dealing with the exceptions. And you can see the way the redlined version shows the way it -- it shows (b), Exceptions. I put it on both, the (a) and (b). We're only dealing with (b). And you can see what we've done. It just adds to the second "as to matters occurring prior to the marriage," whaich was already there.

CHAIRMAN SOULES: It's 504(2)(b)?

MR. LOW: Right.

CHAIRMAN SOULES: Is what we're changing?

MR. LOW: Right.

CHAIRMAN SOULES: And that is to make it conform textually to 38.10.

MR. LOW: Right.

CHAIRMAN SOULES: Does it differ from 38.10 in any way?

MR. LOW: No, not in the way we've drawn it.

CHAIRMAN SOULES: Okay. Any opposition to this change? No opposition to this change. It's passed unanimously.

MR. LOW: Does that look okay to you, Justice Clinton?

HON. SAM HOUSTON CLINTON: Yeah. We've been over this half a dozen times, I think. And the Legislature has already spoken, so you really don't have much choice.

CHAIRMAN SOULES: Okay. That will be done.

MR. LOW: All right.

CHAIRMAN SOULES: Thank you, Judge Clinton.

MR. LOW: Now, next is a new rule, 1009 Civil and Criminal. Mark's committee made a draft of the new rule. At the last meeting we made some changes. The subcommittee met, and our subcommittee has made -- we implemented the changes that you

suggested, and we have made some changes.

Basically the change we made is to make it flexible so that it doesn't have to be as a matter of law for the court to decide or it doesn't have to be a matter of fact for the jury to decide. It makes it flexible, so we're not really dealing with a red-line version of anything.

CHAIRMAN SOULES: All right. Step us through the process of new Rule 1009. This is a brand-new rule, right, 1009?

MR. LOW: Right. And it pertains to translation of foreign records. And basically you get into a situation, and we discussed this, you might get into situations like, say, in the Honda cases. There's the Japanese version of the Honda and their booklet and the warnings they give. And your translator may say the Japanese call this the "Wild Thing" or something like that and your translator doesn't say that.

Well, we've tried to draw the rule flexible so that the judge just doesn't say okay. But if the judge wants to and he feels comfortable, he may just say, "Okay. This is

the version." Or if the judge wants to, he can let you put your translator up and say, "This is what it means," and the other translator, like other disputed things, which I think they perhaps ought to do when you get into such just different versions.

But if it's something like, Well, this means "quick" and this means "fast," well, the judge doesn't have to -- I mean the way we tried to draw the rule was the judge may just submit the translation and it's not going to make any difference rather than getting up and arguing about something that's insignificant.

So you can see the change that we made. You all have considered this. You see the change that we made is to (f), "When there are either conflicting translations filed by more than one party under subparagraph (a), or objections to another party's translation filed under subparagraph (b), nothing in this rule requires or precludes the automatic admission into evidence of the conflicting translations or requires that the issue of the correctness of the translation is an issue for the finder of fact other than the court or for

the court rather than the finder of fact."

We just put it vice versa. That's the difference. That's the thing my committee added that is different from what you've before. Mark's committee drew it up, and you all have made some minor corrections before, and those have been -- we made those corrections.

CHAIRMAN SOULES: Mark, let's have your comments on this now.

MR. SALES: The idea was in the discussion we had I think back in July about this was what the situation is; that is, is it a matter of law for the court to decide which translation is right, or is that something that you can just put before the jury and let them decide? And the concern was to draw the rule so that it doesn't necessarily force the court to make the decision nor preclude the court from saying this is a fact issue for the jury.

And I think Buddy's committee has done that. And that was really the intent when we drafted this, was we were not trying to tell the court that this is something the court has

to determine. It could well come down to a battle of translators.

If it's the key word in a contract that determines whether there's been a breach or not, I could see a situation where that would be for the fact finder. In other cases, where maybe it's just obvious and whatever, maybe it's a determination about whether it makes a contract ambiguous or not, maybe that's something that's more for the court to decide. So I think this provision that they've put in there probably takes care of that concern, so I think it works fine with what we had intended.

CHAIRMAN SOULES: What do you mean "automatic admission into evidence of the conflicting translations"?

MR. LOW: Well, that was I think in there before. What I understand it means is just the fact that you file it and it's just automatically admitted. But the court may --

CHAIRMAN SOULES: Without further authentication, is that what you mean?

MR. LOW: I'm not sure. That

was in there before. We didn't really discuss that.

MR. SALES: Well, I don't think that part was in there before. Once you've done basically the pretrial affidavit or whatever we had required, then they cannot attack the correctness of it unless they do certain things. If they do certain things to contradict it so that we know we really have a dispute, then basically this provision (f) then says at that point the court will decide whether it's something for the fact finder or if this is a matter of law for the court to decide.

CHAIRMAN SOULES: Okay. But that doesn't get to --

MR. LOW: I'm not sure I understand the question. Do you mean on (f)?

CHAIRMAN SOULES: On (f), the middle part of it, "Nothing in this rule requires or precludes the automatic admission into evidence of the conflicting translations."

MR. LOW: Well, we're again trying to be consistent with whether or not

it's the finder of fact or the court, "automatic" meaning that the court just automatically submits it.

CHAIRMAN SOULES: Without further authentication?

MR. LOW: Well, no. It's got to already -- it's without further authentication because the translation has already been authenticated by the translator, so there would be no further authentication that I know of that you could make.

CHAIRMAN SOULES: Okay. That's probably nitpicking anyway. Joe Latting.

MR. LATTING: I just have a question, Buddy or Mark, either one. Under this rule, if you have a vehicle case and you have an argument about the advertising of the vehicle, and the plaintiff has an expert from University A that says in Japanese this means "Wild Ride," and the defense has an expert from University B that says this means "Steadfast Ride," does this mean that the judge can decide that this means Wild Ride?

MR. LOW: No. What this means is that it doesn't preclude the judge from

doing it; it doesn't say he has to do it. It doesn't put it one way.

MR. LATTING: But he could decide it?

MR. LOW: He could decide it, and it may be error for him to do that, but you've got to have a situation where like I'm saying, one means quick, one means fast. The judge doesn't have to -- certainly that's going to the extreme, but the judge doesn't have to submit -- he can submit either one and it's not going to be error.

But we can't draw the differences in the versions. They can be this far apart or this close together (indicating). So the court -- and we have many great judges in the state of Texas that usually use discretion. Now, whether that would be subject to review on the abuse of discretion, I don't know.

MR. SALES: I was going to say we went to that because the problem here is that it's hard to draft a rule that would take up every particular situation. Let's say the dispute is over a contract and the key word here decides whether there's been a breach or

not, that sounds like a fact issue to me, as opposed to whether or not there is even an ambiguity in the contract depending on a translation, which is something you would generally think the judge would have to rule on first.

MR. LATTING: My concern on it is that if there is a dispute about what something means and if it's material, then it seems to me that ought to go to a jury. I don't think the judge ought to get to decide that. If it's more like what you're talking about, it wouldn't be a material fact dispute.

But I'm nervous about judges. For instance, let's say there was an area of the state where the judges were very pro plaintiff and let's say I was a defendant, just for the example's sake. And the judge says, "I'm going to submit this version of the contract. I think this is what it means."

But I've got two guys from University of San Francisco and one from UCLA that say that's not what it means.

And the judge says, "Well, I think it is.

Let's submit it."

Now, under the way this is written, it says that nothing requires that he submit that to the jury. That bothers me.

MR. LOW: Well, but one of the things, like for instance, I've got one that says "fast" and another one "quick," and I might argue. I say, "Look, 'quick' means just as soon as you get to it. 'Fast' means" -- you know, and then you get into it. And then I give you Webster's definition of "quick" and Webster's definition of "fast" and they're not the same, you know, textually. Lawyers do -- I don't know. We had just agreed -- I'm not disagreeing. But when it comes down to it, it would almost mean that every one you had to just submit both versions and let the jury, and that might be what I'd do as a judge, but I don't know.

MR. SALES: I think that's the situation that we've got right now, though, if you submit your translation, rather than have this thing where people just show up at trial with their translator and you have a fight. I mean, the court right now can make that

decision whether it is or it isn't. I don't know. But are you worried that is somehow changing the practice as it is?

MR. LOW: I don't know.

MR. SALES: I mean, I think right now if you do that the court is going to say, "Is this something that smells like an issue of law that I decide, or does this smell like something for the fact finder?"

CHAIRMAN SOULES: The Supreme Court were to adopt this rule, it seems to me that it becomes a matter of the trial court's discretion whether to decide this fact issue without a jury or with a jury, because the rule is saying that the trial judge can do it either way.

MR. LATTING: Yeah, that's what I was saying.

CHAIRMAN SOULES: Now, I don't know whether that gets to the constitutional question of denial of a jury trial, but it may be. Maybe the Supreme Court can't pass a rule that says the judge can take a fact question away from a jury when there really is a fact question.

JOHN MARKS: Well, is interpreting a contract or interpreting a writing traditionally a law question?

CHAIRMAN SOULES: What we've got here is a contract that says three little things and two things across the top and none of them are connected and you can find it on a pagoda somewhere in the middle of China. That's what the contract says. Nobody in the courtroom, except two interpreters who differ on what that means, can possibly construe that contract. So now we've got an interpreter saying "this is the contract," but it's really not, because it's not the paper that the party signed or e-mailed or whatever they do anymore, and the other one says, "No, this is the contract" and it's really not either the contract itself. It's a translation of the contract. Okay? Assume there's a material difference, if there's a difference in the translations which is material to the judgment in the case, the ultimate judgment in the case.

MR. LATTING: Well, that's a fact question then. What does that document

say in Chinese? That's a fact question that ought to be submitted to the trier of facts, it seems to me. Once we know what it says and what it means in English, then we're right back to the traditional role of the court to decide whether it's material or whether it's anything that ought to go it a jury.

CHAIRMAN SOULES: Well, it's certainly within the purview of this Committee to recommend to the Court whether it be one or the other. And there may be some constitutional implications of one that are not present in the other. I don't think this -- to say it can go either way, if it adds anything, then it probably only adds that the Supreme Court is telling the trial judge that that difference in translations material to the judgment can be resolved by the trial judge without submitting it to the jury.

MR. LATTING: And we take away from the jury the ability to judge the credibility of the translators.

CHAIRMAN SOULES: That's what this would say, so...

MR. SALES: But you can have

issues, though -- let's say it was proof of foreign law and you have a statute in Arabic and you have a translator come in. You're not saying that's something that you're going to give the jury. The judge would have to decide that under 203. I'm just saying there's a whole range here and it's going to be very difficult to say without having the context of the situation whether this is an issue of fact or an issue of law. I don't know how you can give a hard and fast rule here, is the problem.

MR. MARKS: Well, I thought the intent here had to do with the court's determination. First he has to determine whether it's material and should go to the jury or should not go to the jury. This just was intended to make it clear that if it should go to the jury, it can. I don't think anybody was trying to play with words or make something other than that. It's just that it is sort of a gray area, and there are situations where it would be a court call and there are situations where it would be a jury call. And ultimately the court is going to

have to make that decision.

PROFESSOR DORSANEO: It says nothing in this rule.

CHAIRMAN SOULES: Okay. Anything else on this rule? Rusty McMains.

MR. McMAINS: It seems to me that we basically still have this 30-day time limit which is absolute, and there doesn't appear to be any discretion whatsoever. That is, if somebody files a translation under (a) and you don't object with an objection that has all the components of (b) and that is served within 30 days, then you don't even have the right to call live witnesses to contest that, as I read this rule. So that is just an absolute 30-day default without regard to anything else, which means they can sneak it in and you can somehow get by the 30 days and then that's it and you cannot contest that that is in fact what it says and they will should receive any oral testimony to the contrary. That's the hardest default rule we've got in the rules, and that's all right if that's what you want to do.

MR. SALES: Well, you've got

that with medical records to prove up. You already have that. This is very similar to that.

MR. McMAINS: It doesn't keep the doctor from testifying. This does.

MR. SALES: You can't contest the value of the charge if you don't do something, if you don't file it.

MR. McMAINS: It doesn't mean you can't cross-examination the doctor or call his.

CHAIRMAN SOULES: We can't get a record on this. Mark, you've got the floor.

MR. SALES: I'm just saying the whole point of this rule is, and there's no question there's a lot of this going on as we get into more international litigation, is this is something to try to save the trial court and the parties a lot of time and expense and to put some -- if you're going to do this, if there is really going to be an issue about a translated document, it seems like it needs to be handled before you get down to the courthouse and you put on a bunch of translators and you've got a real mess down

at the courthouse with this thing. It could be dealing with Arabic. It could be Chinese. Who knows what it is. And if you don't have some mechanism to do it up in front, then you've lost the total value of the rule. There's no point to having one.

CHAIRMAN SOULES: Judge Brister, did you have remarks on this? Bill Dorsaneo.

PROFESSOR DORSANEO: What is the time on the medical?

MR. SALES: 14 days.

PROFESSOR DORSANEO: 14 days. One would think if we're going to have a time, it ought to be the same time rather than a whole series of things that you have to memorize to do this by such and such time.

CHAIRMAN SOULES: Do you mean if I get --

PROFESSOR DORSANEO: If I have to do things before trial, I in my head want to know that I have to do them 30 days or 14 days before, not that I have to do some things 30 days before, some things 60 days before, some things 14 days before. I could probably

deal with that if I was smart enough in my office to do all those things, you know, in the longest period before. But it's hard to remember all these details if they're different, and I have some concern about this being a good idea because there will be people who don't hit the ball because they're not at the plate.

MR. SALES: I'd be interested in what the judge -- I mean, my view is that this is the kind of stuff you've just got to get out of the way and you can't wait until the end. First of all, especially if it's translation, and if you've ever dealt with this, it's not an easy task to get a translator on some of these deals and have them translated. It's a very expensive process to have someone translate a 50-page document charging you $10 a word or something, I don't know, and then to turn it around and you go get your translator and have them spend a whole bunch of money. And then at this point we don't know whether we even have a dispute or not.

I think it's something that -- you know,

I'm not saying we have to be wed to 60 days, but I think it has to be a reasonable enough period of time ahead of trial. 14 days to me is not going to get it.

MR. McMAINS: Wait a minute, I think you're missing the deadline point. He's talking about that you shouldn't have to file the objection until 14 days before trial, not that you shouldn't have to file the affidavit 60 days before trial. What Bill is suggesting is kind of a compromise, that up to 14 days prior to trial you still have an ability to object. And everything he's saying actually suggests that you should have more than 30 days.

The problem with this rule is basically it's a 30-day game. You only have to go 60 days before trial to file that affidavit and you've got to wait 30 days and the other side is bound after that 30 days. That means that you could be working with a translator for two years, and 60 days prior to trial you file a half a million pages of records and you've got 30 days to do something, and there ain't no discretion and no limitation here

with regards to being able to relieve you from that period. What that translator says is in the records, is the records, and is indisputable, and you've got 30 days to deal with it.

HON. SCOTT A. BRISTER: No. It says the time limits can be varied by order of the court.

MR. SALES: It's not hard and fast. If you've got a situation where you know it's going to be an issue, you can address that with the court through a scheduling order.

CHAIRMAN SOULES: I haven't had much experience with translations but I've had a little bit, and 30 days is not very long to get a counter-translation done.

MR. McMAINS: Part (c) says in a civil case no objection is timely served, and (b) says in a civil cases objections shall be served upon all parties 30 days prior to the commencement of the trial, and the objection shall point out the specific inaccuracies of the original translation and what the objecting party contends would be an

accurate translation.

HON. SCOTT A. BRISTER: It seems to me there are two paradigms you could follow here. Chapter 18 on proving bills reasonable and necessary, the assumption is there that doctors are always going to say they're reasonable and necessary because there's going to be some kind of government fraud usually if they don't. And let's save having to do a deposition on written questions on every one or calling the doctor to trial to prove it up, because almost always the evidence is going to be these are the bills and they're reasonable and necessary.

The other paradigm is just a standard expert report. File a motion, order the other side to give me the expert reports at such and such a time and I do my expert reports at such and such a time, and we decide at the hearing what times those are going to be.

I don't have a lot of experience either with translations, but my experience has been more often the first rather than the second; that usually there's not a dispute about what the translation says; that the cases where you

have experts swearing that the contract says two different things are pretty rare.

And so it seems to me, if it's almost always an agreed thing, you ought to do it like Chapter 18. If you think it's something that's going to be contested, then you ought to do it like under the motion to put the burden on the parties to get a report and do it on an individual basis, which I guess since I think there's usually not a contest, I usually think the first is going to go. I don't have a problem with doing this one, the format of doing it, you know, because that assumes it's usually not going to be contested.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I have one other question here. When it says here that "the time limit set forth herein may be varied by order of the court," is it possible to read that as that Judge Brister could let -- if he really believed that the translation was inaccurate because he speaks that language -- let it happen at trial?

"I'll vary the time limit. I'll let you call the witness. Do it at the trial." Does it go that far, Mark?

MR. SALES: The intent of this is to keep this from coming up at trial, let's decide it before. I think the intent of that language was to say if you have an unusual case.

Let's say the whole case is in German and every document and everything, where you might have a lot, maybe you need to go to the court and say, "We're going to need to back this time up a lot more because there's a lot more translation issues here." Whereas maybe if it's a single document, then there's not a big problem. I think the intent is clearly not to preclude that from being varied if you have a really serious translation issue.

CHAIRMAN SOULES: Richard, you had your hand up first.

MR. ORSINGER: I've got a number of problems with this. One is that I don't think it's smart to say any accurate translation is admissible, because you don't know whether it's accurate or not until you

have -- I mean, it begs the question. It says an accurate translation of a foreign language record is admissible upon a certification that it's accurate, but the truth is that the certification doesn't establish its accuracy.

It's still subject to objection disputes, so I think we ought to take the word "accurate" out of the first line.

CHAIRMAN SOULES: Very first line. Any objection to that? No objection. That's done.

MR. ORSINGER: We talk here about the admissibility of the document, but we don't mention anything about experts relying on it without offering it into evidence. And I can tell you right now that if I miss my deadline, if I had made proper disclosure, then I would make the response to Bill that you're going to have to have an expert, if you're dealing with a foreign language, and you're going to have to disclose the existence of the expert as soon as practical but no less than 30 days prior to trial or whenever our supplementation deadline is, so there will be disclosure of the

possible existence of a contrary language expert just under our regular Discovery Rules.

But if I was caught in a crack under this rule, I would call in an expert that I had disclosed early in the case and have them rely on their own interpretation of it, even though the translation itself might not be admissible. And I'm wondering if we're really accomplishing our purpose there to confine our admission of a literal written translation when experts can run circles around this rule by relying on it and relating their opinion.

And then another problem I have with this rule is what do you do if you have controverting expert affidavits? Are those affidavits in the toilet, and now we're talking about live testimony? Or do we let both affidavits in and let the jury decide which affidavit to believe, or does the judge decide which affidavit to believe and let in only the translation that he or she thinks is accurate? You know, normally the judge doesn't let in evidence that the judge doesn't think is accurate, unless it's a fact issue. In other words, if evidence is not competent,

it's not supposed to come into evidence. But if it's something that's subject to debate as to its competence, then I think the trial judge is supposed to let the jury resolve that. And we don't say whether, if there are controverting affidavits, whether the judge decides which translation is accurate or whether the judge requires oral testimony and the jury decides which translation is accurate.

I would point out that if this was an English contract, the meaning of the document is to be determined from the four corners of the document and is not a fact issue for the jury, unless there's some ambiguity in its meaning, so to me we have to address this question of whether controverting opinions of the meaning of a document is a fact issue for the jury to resolve or whether it's a preliminary admissibility issue for the judge to resolve or whether it's based on affidavits or sworn testimony.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Two

things. The first is the 60-day deadline. When we were working on the Discovery Rules, every time we had a 60-day deadline people went nuts because you could have 45-days' notice of trial, so nowhere in the Discovery Rules do we require anything more than 45 days before trial.

Secondly, this just keeps recurring, is the problem with (f) that Richard just brought out, which is what to do next. I would move that we just delete (f). It seems to me that what we're doing is maybe saying this is kind of a pretrial procedure to determine if there is an issue or not. And if there is an issue, then you address it just like you do now, so I would just take (f) out. I don't think it helps us resolve anything.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: I see that as an alternative. I also see and have heard a suggestion that perhaps where there is material conflicting that it will be submitted to the jury subject to the -- you know, I hear what Richard is saying that some things may be questions for the judge to decide. But that

might be an alternative; that if there are material differences, they would be submitted to the jury. I've heard that suggestion, so I'm trying to summarize the suggestions of what we might do so we can focus on which direction we want to vote rather than change this language or that.

CHAIRMAN SOULES: Okay. Having heard the discussion, Buddy, what questions do you have that you would like to have answers to in order to redraft this for the November meeting?

MR. LOW: Well, first of all, I would like to know whether or not (f) should be changed so as to state -- and I'm not stating it perhaps the way whoever advocates it would have stated it -- state that where there were material differences in the translation that, you know, if they are authenticated translations, you know, and they have been certified and so forth, that both will be submitted to the jury for their determination of which is accurate. Of course, it would be a court trial if it's a court trial, so it would be different.

The other thing is then if they -- first would be whether to leave (f) as it is. Then that. And then the third thing is to delete (f), I guess. Those are the three alternatives that I see, and the first one would be to leave (f) as is.

CHAIRMAN SOULES: Okay. How many in favor of leaving (f) as it is written here in the proposed Rule 1009? One.

MR. LOW: All right. The next one would be do we want to go to the next alternative about if there are material differences, then they would be submitted to the jury.

CHAIRMAN SOULES: To the trier of fact.

MR. LOW: To the trier of fact, yeah.

MR. ORSINGER: Well, can I propose an alternative? Because I don't like warring affidavits going to the jury. I mean, how in the hell is a jury supposed to know what Chinese is when it's got two different affidavits. I think that you ought to require oral testimony if the trial judge believes

there'a bona fide dispute about the translation.

CHAIRMAN SOULES: But isn't that up to the advocates?

MR. LOW: If I've got one and I want my version, I'm going to have my man there, and man, I'm going have him looking Japanese, feeling Japanese, drinking Japanese, and I'm not going to just have his piece of paper. Now, I hope the other side would.

MR. ORSINGER: But to me that's more than trial strategy. To me we're making a decision here about turning the admissibility of evidence over to a jury, which is a very unusual thing. In my opinion this is an admissibility question, number one. And number two, how is the jury supposed to evaluate the credibility of affidavits when there's no cross-examination?

CHAIRMAN SOULES: As I'm understanding it, the threshold question of admissibility is dependent upon the judge finding that there are differences in the two translation that may be material to the judgment. If that is found, they are

admissible.

MR. ORSINGER: No, that's not -- we're discussing what should happen if that is found. We're discussing whether we ought to let the affidavits in, whether we ought to require oral testimony at that point, or what we should we do? My proposal is it makes no sense to put in two contradictory affidavits with no right of cross-examination and turn these affidavits and translations over to a jury who doesn't speak the language? Why does that make any sense?

MR. LOW: But that's like a contract. You're going to talk about the people that -- you're going to question people. There's going to be other evidence. I mean, it's just going to question -- somebody that takes the approach you do that comes in is just going to get out-lawyered by the other lawyer. I mean, that's just a point-blank. I don't think you ought to say that you've got to have oral testimony, I mean.

CHAIRMAN SOULES: Bill Dorsaneo on this point.

PROFESSOR DORSANEO: It seems to me that if you did have the unusual situation where some experts had a very large disagreement about what something meant and under our normal principles that being the only information that you could take into account presumably, what they said it meant, that you would run into the situation where you would have to conclude that the language is ambiguous. If two people say it means two completely different things, then that would require, I think, Richard, it would require the people to come forward and say what they intended.

MR. LATTING: I don't agree with that.

CHAIRMAN SOULES: Don Hunt.

MR. HUNT: It seems to me that we're dealing here with admissibility and that we ought to trust our trial judges to determine by whatever basis they need to the question of whether the translation is admissible or not. I feel very comfortable in trusting Judge Brister or Judge Peeples to look at two affidavits and say, "There is a

conflict here. What do we do, Advocates?"

And I trust the advocates to have their partisan affiants there to explain the two warring positions. But it ought to be the trial judge who makes this decision. We ought not to be submitting to juries competing affidavits or competing explanations by the experts as to what the Chinese in the contract means.

We've got to keep in mind that there's a difference between submitting ambiguity to a jury in an ordinary English contract. We're not submitting what the words mean, which is what we're talking about here; rather, we are submitting what did the parties intend, because we are trying to figure out what was the underlying intent of the parties when they chose these words and we don't understand the words. So submitting intent when there's ambiguity really is resolving what did the parties mean and what did the parties intend. That's not the preliminary question that has to be decided on admissibility. It solely ought to be a trial judge question to rule by whatever is available. And once the trial

judge has ruled that this translation is correct, it comes in; the other one doesn't. And if that's wrong, that's a point of error on appeal.

CHAIRMAN SOULES: Why don't we just show a consensus on this. Don has stated the proposition head on, whether it should be a question of law for the court or a question of fact for the trier of fact; that is, the resolution of competing translations of the same foreign language contract.

MR. LATTING: May I speak on that briefly?

CHAIRMAN SOULES: Okay. Joe.

MR. LATTING: It's not always that, because when we have an English contract, we know what it says and we know what the words are. But we have a Chinese contract and we don't know what it even says, and so therefore what the contract says and how it should be translated into English is the threshold question before we can know whether there was an ambiguity.

For example, we don't know whether this symbol that Luke described means the 13th or

the 14th, and we have a notice that was given on the 14th. So was this deadline or was this date the 14th that it was required by or was it the 13th? We have a professor from one university that says this and one from another that says that, and I don't think we need a trial judge to decide which of the two is the more believable. We're not asking a jury to resolve an ambiguity in the contract. We're asking them there what does this contract say in English. Now, once we get to that, then we decide whether that's ambiguous. The trial judge decides whether that's an ambiguous document. And if it is, he submits that to the jury, what did they intend? If it's not, he rules as a matter of law.

But we've got a new wrinkle if we've got a foreign because we don't even know what the document says.

CHAIRMAN SOULES: David Keltner, we haven't heard from you yet.

MR. KELTNER: The only thing I would say that we're dealing with on the initial question of admissibility is the question of whether the translation is

accurate. And we don't use the term "accuracy" in the rule. If we use the term "accuracy," it takes out the problem of the intent of the document, which is a legal question based on what was admitted already. So why don't we talk in terms of accuracy and then make it a judge, I feel personally, a judge decision.

MR. LOW: Luke, let me elaborate on that. See, when we took out that term "an accurate translation," then we've gone to the thing of all you've got to do is have somebody and they say it is, then a translation shall be admissible. So you've got two different translations, so when you take out the word "accurate," that --

MR. KELTNER: Couldn't we put "accuracy" in (f), and then when there's a question about accuracy of the translation, the judge or jury, whichever one it's going to be, determines the accuracy for the threshold admissibility?

MR. LOW: That's was the real thing.

CHAIRMAN SOULES: The jury

can't determine admissibility.

MR. KELTNER: That's why I'm going to suggest it's got to be the judge that makes that determination. But it seems to me --

CHAIRMAN SOULES: But what if he can't? I've been in Judge Peeples' court a lot and I agree with him most of the time, and I think he's as incisive as any judge I've seen, and Judge Brister too, but how do they the accuracy of a translation from a foreign language document unless they understand that foreign language, comprehend that foreign language?

HON. DAVID PEEPLES: Well, if we can't do it, how is the jury going to do it? I'm going to hold a hearing. And if one guy teaches Chinese at Trinity University and the other guy lived for there six months and never studied it, that might bear upon the question, but you have to decide those qualifications maybe.

CHAIRMAN SOULES: Well, it seems to me that the other evidence in the trial is probably going to have some bearing

on what's really correct and what's really accurate in the translation. In other words, somebody does something, people are doing things, they're headed towards the 14th. Somebody else says, no, you drop dead on the 13th. No, this says the 14th.

Can't the conduct of the parties that are going along there maybe have some bearing on what the correctness is of the translation? I don't know. Rusty.

MR. McMAINS: Well, you ask how is the judge going to do it. The judge under this rule has the power to appoint a translator himself, so he actually has a vehicle for doing it. The jury doesn't have that power.

And secondly, this is a predicate issue. I mean, it's not unlike any other predicate that judges make factual determinations on all the time. We don't submit predicate issues to the jury. Predicate issues are fact issues resolved at the discretion of the trial judge. And the predicate here is a question solely of accuracy. Now, what it means is a legal issue, and I agree with what Buddy was

saying, that we're not determining legal issues per se, but we are foreclosing questions of accuracy under the way this rule operates, and so that's all the rule is designed to do. So I don't have that much of a problem with letting the judge do it, because that's what the judge should be doing.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I agree totally. I think this is a judge issue. But the difficulty in my opinion in international translations is different from what we're dealing with in English, and I'm trying to think of an example.

And the best one I think think of is a United States Supreme Court case that involved an airplane that almost crashed but didn't and lawsuits that were filed based on infliction of emotional distress without bodily injury. And it was controlled by the Warsaw agreement or treaty on international air travel and it was translated into 100 different languages, but the controlling translation was French.

Now, the English translation said that if

you suffer an injury, you can recover for it. The French translation said that if you are "blesser" you can recover for it. If you study the French and the background of the French, "blesser" means that you are wounded. Usually, at least traditionally, that means that you bled in French. They use a different word to describe an injury that does not lead to blood. And since the French translation was the controlling one, the Supreme Court of the United States decided that if you didn't suffer a wound, you were not entitled to compensation, even though if English had been controlling and the word "injury" had been used, you might have been able to recover just for your psychological fright.

Now, that points out to me the difficulty. You can take a word like "blesser" and you can say that means wounded. That means injured, sure. And in German it means whatever the Germans think about it. But when it gets right down to it, we might all agree that it's a similar concept, but whether "blesser" means that you must bleed before you can recover or whether

you can recover for a bruise or whether it's only emotional distress becomes a very sophisticated question and having Ph.D.s doesn't help you answer that.

So I feel strongly, number one, that this decision shouldn't be based on affidavits. I think it's ludicrous to think that you can decide this based on affidavits. And secondly, if it is sworn testimony, it ought to be decided by the judge.

MR. LOW: But that would be like determining -- there would be a difference. That's determining like a statute or something as distinguished from Honda putting out this and it goes to the public, what it means to the public and so forth. That's a law. I consider that as a law, an interpretation of a law for the court.

And may I ask one question? You know, you wanted to take out the word "accurate translation." Look and see, would you take it out also on (d), the second page, "This rule does not prohibit the admission of an accurate translation." Do you see that again on the second page? Do you see (d)?

MR. McMAINS: The point of taking it out in the first was that it assumed the very fact in dispute; that is, the point in taking it out in (a) was that we say, "an accurate translation is admissible if it's accurate." And you take it out and you say, "a translation is admissible if it's accurate."

The purpose in (d), I mean, a translation is admissible, we're talking about live testimony here, and so we say, "an accurate transcription of a foreign language record is admissible." Now, if you haven't complied with the other procedure, then you're going to have to have some predicate testimony that this is an accurate translation of the record. And that's all that (d) is required. It's just saying that a translation is not good enough, because the seminal issue is accuracy.

CHAIRMAN SOULES: Okay. We're going to take a 10-minute break and give the court reporter a break here and everybody else. We'll be back at 10 after.

(Recess.)

CHAIRMAN SOULES: Let's resume, please. What I have decided to do with 1009 is to take volunteers who want to have interim input into 1009 and just try to form a little bit larger group than the Evidence Subcommittee for that. And some people have been more vocal on that, and the concepts seem to be so fluid, at least at this time, that I don't think we're really going to get very far in terms of any resolution on 1009 at this meeting.

MR. LOW: One thing, Luke, though, is I think we've got some direction that we're going to leave off (f), and then the only question then is do we want to put in its place that it will always be decided, if it's controverted or material, by the jury. And I think if we leave it as it is and leave off (f), I think most people here would be satisfied with it. I really do.

CHAIRMAN SOULES: Is everybody ready to vote on (f), to delete (f)?

HON SAM HOUSTON CLINTON: Let me ask a question.

CHAIRMAN SOULES: Judge

Clinton.

HON. SAM HOUSTON CLINTON: Part (a) deals with kind of the general approach to it. In the case of civil cases, it says that the submission of the affidavit and all shall be promptly served upon all parties at least 60 days prior. Then when it gets to criminal cases, however, it says that the papers will be filed with the clerk and that notice will be given to the other parties that it's been filed.

Now, why is there a differentiation there? Why are you not also serving a copy on the opposite party in a criminal case like you are in a civil?

MR. LOW: Because I think it's probably presumed that any time you file something you've got to give the other side a copy. I don't know why the language is different. Do you know why, Mark?

MR. SALES: We had a number of criminal lawyers, and if you remember, this thing started out in two separate rules. There was a civil and a criminal. And the criminal lawyers had drafted their version of

1009, and then this was some kind of merger that Mike Prince's group did of the two. I can't tell you why there's a difference, but I think whoever the criminal practitioners were on the committee thought there must be some difference in the two practices.

CHAIRMAN SOULES: Well, this allows the translation to be served and not filed in civil cases. Not filed. It may need to be filed in a criminal case, or it may need to be both in a criminal case. Tell us which is better for purposes of criminal cases. Filing and serving?

HON. SAM HOUSTON CLINTON: Frankly I think it's so rare that I don't know if anything is better.

CHAIRMAN SOULES: Assume it happens.

HON. SAM HOUSTON CLINTON: I was just curious to know why there was different treatment, that's all. And you've explained, I guess, that that was drawn from some prior criminal rule?

MR. SALES: Or practice, yes.

HON. SAM HOUSTON CLINTON:

Which escapes me, because I don't believe we've ever had a question on this.

MR. LOW: No, no, the criminal lawyers on the committee divided this. The criminal lawyers drew this.

HON. SAM HOUSTON CLINTON: Oh, they were divided?

MR. LOW: Yes.

CHAIRMAN SOULES: No, no. He's not saying that the criminal lawyers were divided among themselves. He's saying that there were criminal lawyers writing one rule and a divided group or a different groups of other lawyers writing another rule, and they used both paragraphs for giving notice.

MR. SALES: And maybe that's something else that needs to be looked at. I can't explain it except to say that I think they must have thought there was some difference procedurally or due process or whatever the argument might be why they've drafted it lightly different. So when they did the mechanical merger of these two rules, rather than try to make a substantive change, they just included in criminal cases or in

civil cases.

CHAIRMAN SOULES: We've got to get to Richard Orsinger's report, so without further discussion I'm going to take -- first, Buddy believes that the committee is ready to vote up or down on 1009 two points: Delete or keep (f), and then pass or reject the rule.

Those who think we're ready for that show our hands.

MR. LOW: We've already voted to delete (f).

CHAIRMAN SOULES: I don't think so.

MR. LOW: I'm sorry.

CHAIRMAN SOULES: Does anybody think we're ready? We're at that stage?

MR. ORSINGER: Not to pass the rule.

CHAIRMAN SOULES: Okay. So Buddy, those who want to assist in the interim the revisit to this rule show by hands so we can make assignments to Buddy's subcommittee. Anybody who really wants to have an input into this needs to be on this interim working committee, because we can't spend this much

time next time reworking through the same problems. Okay. Joe Latting. Anyone else? There were a lot of people doing a lot of talking about this.

MR. LATTING: I didn't feel like I had a right to gripe anymore unless I held up my hand.

MR. ORSINGER: If I didn't have so many fish to fry, I'd do it.

CHAIRMAN SOULES: Okay. Mark, you're already working with Buddy, right?

MR. SALES: Right. And we'll continue to work on a lot of this stuff

MR. LOW: We just need direction.

CHAIRMAN SOULES: John, you're already on this?

MR. MARKS: Right.

CHAIRMAN SOULES: Does anyone else want to participate? Okay. As soon as we have the transcript of this discussion, Buddy, I'll send it to you, and you all can pore over it and try to figure out how to deal with the concerns that got raised. I would say come back and maybe write two alternatives

on how to handle it, and one would be that the judge would make the call on which translation would be used. And then the next would assume that in some circumstances, and you all can muse about that, that in some circumstances a jury would decide which translation would control the case and under what circumstances.

MR. LOW: All right.

CHAIRMAN SOULES: And then also in that context, what's the judge's role in determining the admissibility of the evidence of the translation.

MR. LOW: In determining what?

CHAIRMAN SOULES: The admissibility of the evidence, of the translation.

And then finally what evidence of the translations would be admissible.

MR. ORSINGER: Luke, I would propose that we address the question of whether an expert can rely on a translation that cannot be admitted, because if we don't address that, they will end-run it every time.

CHAIRMAN SOULES: Okay. That's on the record, so that needs to be looked at.

MR. LOW: Richard, I'm sorry, what was the last one?

MR. ORSINGER: I'll tell you.

MR. LOW: I was still writing. I have trouble reading my writing. If I write too fast, I can't read it at all.

CHAIRMAN SOULES: Okay. Now, that's a nonexclusive list, because when you get the transcript you're going to have the whole debate.

MR. LOW: And Judge, you want us to go back and look and see if we can make the criminal the same; in other words, the days, the filing and all?

HON. SAM HOUSTON CLINTON: I really think in this instance it could be the same.

CHAIRMAN SOULES: There's no reason for a difference.

HON. SAM HOUSTON CLINTON: It strikes me that it would be more economical in terms of time if it were served rather than, as it says, given prompt notice. And I would raise a question about the definition of "prompt" in these circumstances.

MR. LOW: Right.

HON. SAM HOUSTON CLINTON: I think "service" would accomplish it.

MR. McMAINS: I do think Buddy needs to determine what Alex was pointing out. I mean, the requirement is that we file something 60 days before notice of trial, and yet we only need to have 45 days' notice, so I don't know what --

CHAIRMAN SOULES: Why don't we change it to 45 and 15 for now, because when we get to notice of trial, amendment of pleadings, and all these other things we're going to -- that we've reserved the right to go back to the Discovery Rules and maybe make some adjustments. We've at the present time written time deadlines that are consistent with the existing rules, the exiting deadlines in other rules. If those deadlines change, then this will be one place we can go back and look. But for now 45 and 15. Leave 30 days for the counter-translation. Any objection to that?

MR. LOW: 45 and 15 for the calendar.

CHAIRMAN SOULES: Okay. Rusty.

MR. McMAINS: The only other thing is that when we put this statement in there that said that the judge can change the times, can alter the times, we don't really say what that means in terms of, you know, whether it has to be done in advance. Because when we talk about the objections and we talk about the filing, we say it must be at least this and it must be at least that, and then we say that he can alter the times. Well, if that means he can't alter the times when it says it has to be at least 30 days before trial at the moment, and you changed that to 15, we need to know what that "alter the times" means.

CHAIRMAN SOULES: Mark has indicated that in his mind that means the judge can make it earlier but not later.

MR. SALES: Just like for interrogatories or whatever.

CHAIRMAN SOULES: And if that's where you come down, that's fine. If you change your mind for that and have a reason for it, that's fine too, but go ahead and

address that issue.

MR. McMAINS: Well, it needs to be explicit, I think.

CHAIRMAN SOULES: Okay. Buddy, can you give us a somewhat concise report on the merged rules so that we at least have that on the table, and then we'll move to Richard's report.

MR. LOW: All right. The merged rules are no substantive changes. We did put some places where the civil was different from the criminal, and we put in criminal rules that might not even apply in criminal cases. We didn't say "in civil only," because if they don't apply, they're just not going to be used, like the federal courts. And so there are no substantive changes, quite frankly. There may be a few word changes, like for instance -- there just aren't any substantive changes.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: If the answer is short, then give it by number: How does this draft differ from the August 6th draft"?

MR. LOW: All right. How it differs in about -- there were five -- well, we had some comments from one of Lee's clerks, you know, and you made some comments. We went went through all those comments, and most of them were like word changes and should we do this or that. We considered some of those; some we referred back to Mark's committee.

What you have here basically -- if you want me to go through and point out, I've got two lists. I would prefer like "in accordance with" instead of "in accord" or something like that. There just aren't any changes that mean anything other than clearing up.

CHAIRMAN SOULES: Let me ask you a question, Buddy. Is the redline that we see here for September 12th redlined against the August 6th draft?

MR. LOW: Yeah.

PROFESSOR DORSANEO: Fine. Thank you.

CHAIRMAN SOULES: Anything else on the merged rules? It looks like we're making progress on that, and that's good.

Okay. Richard, you have the floor.

MR. ORSINGER: Thank you, Luke.

CHAIRMAN SOULES: Thank you.

MR. ORSINGER: We have three important things to talk about today. One is the general agenda on the subcommittee on Rules 15 through 165a. One is the rewrite on the rules relating to the duties of clerks. And one is our proposal, subcommittee proposal on the recusal and disqualification rule.

And I would propose that we take up the rules relating to district clerks first, and that is a fairly thick packet that was brought this morning that says Clerks Committee Report to Supreme Court Advisory Committee by Bonnie Wolbrueck, dated 9-20-96, so you'll need this. And then what I'm going to do is turn it over to Bonnie and ask her to explain what the Clerks Committee is, and then let's go through these.

I'll tell you generally that we're trying to consolidate all the clerks rule into one place, eliminate some anachronisms that exist under the rules and to consolidate other things under. And with that predicate,

Bonnie.

CHAIRMAN SOULES: Bonnie Wolbrueck.

MS. WOLBRUECK: Thank you. To begin with, as Richard said, we did combine probably in whole or part in this first section about 17 or 18 rules. And in doing so we have tried to come up with a section just concerning the duties of the clerk.

Just as a note, initially the Clerks Committee had received a directive from the subcommittee to include every rule into this section that had anything to do with any duties of the clerk, which meant the issuance rules like the citations and writs. And I had proposed that, and in fact our last committee handout included some of that information. The more we got into that, especially into the writs, the more difficult it became to single those out into a section for clerks without completely repeating the rules in the clerks rule and then repeating them again in the regular rules. So we have since made a decision before the last subcommittee meeting to pull those back out again and keep those

separate and apart. It became more difficult, as we continued, to be able to do that.

Yes, Richard.

MR. ORSINGER: Would you tell everybody what the Clerks Committee is?

MS. WOLBRUECK: The Clerks Committee has been made up of Doris and myself along with several other county clerks and district clerks around the state, and so they have had some input into this as we have continued through this process. Okay, Richard?

MR. ORSINGER: Yeah, fine. Thank you.

MS. WOLBRUECK: Okay. I will continue, just if you have any questions at any time, because many of these are complete rewrites of the rules. And there's a comment underneath each rule, if it is a new rule, as a complete rewrite. There is some redlining for some of the rules where there have just been a few changes.

But beginning on the first page we have added -- starting with Rule 23, which has been deleted and then added as "Custodian of the

Record." We made it very clear that the clerk shall be custodian of the record and have put a statement to that effect in section (a).

Section (b), then, concerns the assignment of case numbers, and it's real interesting to note that in Rule 23, in that one short sentence, that the words suits, case, cause and file were all used in that one sentence, and we decided to call it a case. The subcommittee had made that recommendation, so we have made an assignment of case numbers. It clearly states that the case numbers shall be assigned in order, and then we have added a rule concerning severance, severed causes and consolidated causes.

Right now, severed cases are assigned by local rule, and in many counties they're either dash-A, dash-B, all the way to dash-AAA all the way through the alphabet. Some counties assign a new case number. The subcommittee made the recommendation to have all severed causes to bear an entirely new case number, so that recommendation is in this.

And also there's a statement on

consolidating cases: Unless otherwise directed by the court, all matters shall be consolidated under the oldest pending case number, so that is the other recommendation in the assignment of cases.

MR. ORSINGER: I'd like to make a comment, if I may, that Rusty has stepped out of the room, but when this issue was discussed before, he expressed some concern that if the severed cause has a new case number and not a hyphenated case number, that it will lose its position on the docket. And that's probably a practical problem, and everyone needs to understand that by specifying a new case number, that probably means it will be treated as if it was a case that was initiated on the day of severance, which may be two years after it was initially filed, and that may have a lot to do with where you are in priority on trial settings and things of that nature. If we don't do that, I don't know how we're going to computerize it, as a practical matter.

Bonnie, can you comment on that? Do you --

MS. WOLBRUECK: Excuse me, Richard. I double-checked with several counties and the two largest counties in the state. Dallas County has a rule that assigns a completely new case number, and it's my understanding that Harris County does the dash-A, and the problem with that being that it gets to dash-ZZZ or ZZZZ and trying to keep that all separate and apart, and so I'm not sure.

In my county we assign an entirely new case number. It actually does not affect any orders of the case because the judge may take up that matter along with any other matters as far as the severed cause is concerned. But I realize that that's an issue from county to county.

The clerks felt that it would be better to have uniformity in that so that the attorneys knew. I know that I receive orders sometimes on severed causes that suggest it shall be a dash-A when we have a local rule that says it shall be an entirely new number.

CHAIRMAN SOULES: Why is it better to have an entirely new number than a

dash-A?

MS. WOLBRUECK: I think just for trying to keep up with it. Attorneys don't always know exactly what -- assigning a dash-A or dash-AA or dash-AAA to a severed cause is real difficult whenever pleadings start coming in and the attorney possibly hasn't affixed the right designation to those pleadings so that they get placed into the right file. It becomes a clerk issue or problem of filing.

HON. SCOTT A. BRISTER: But then if it's an entirely -- I agree there's lots of confusion. Attorneys file summary judgments in the wrong case all the time. But in Harris County at least the files, if it's in the A, B or C, it's in the same part of the courthouse, as opposed to if it's a number two years later, it's going to be frequently in a different part of the courthouse.

MS. WOLBRUECK: We had discussed that issue and were wondering, because we did not make a determination of what court that should be assigned to. I think the time assignment of the court has to

be done by local rule, and maybe that will address that issue. I mean, I think a local rule can address where a severed cause should be placed as far as what court and why.

MR. ORSINGER: Well, Judge Brister is actually talking about where the file is stored.

HON. SCOTT A. BRISTER: I'm assuming it's staying in the same court.

MS. WOLBRUECK: Then I think that could be addressed by local rule then, if it stays in the same court.

HON. SCOTT A. BRISTER: Well, I'm assuming that it is staying in the same court. But just because it's in my court doesn't mean that half of your files are there and half are over there and half are downstairs. I guess that's three halves; I should have said thirds. But they're spread all over. And the nice thing about having the A, B and Cs is they're together.

But it's not anything I want to get very worked up about.

CHAIRMAN SOULES: Okay. Bonnie, go ahead.

MS. WOLBRUECK: Would you like to address that, Luke? Should we take a consensus?

CHAIRMAN SOULES: It doesn't seem like it's causing anybody any concern other than a comment, so let's just go forward with it. Carl Hamilton.

MR. HAMILTON: I have a question about why is it perceived that the court in which a case gets assigned has to be controlled by local rule.

MS. WOLBRUECK: It's not controlled by these rules, so we make the assumption that it's controlled by local rule, because most local rules make that determination.

MR. HAMILTON: I'm just wondering if we shouldn't have that in the rule, some direction about how the cases are assigned to courts to prevent forum shopping.

CHAIRMAN SOULES: There are so many ways that's done, Carl. Some of us with a sick curiosity have looked at the local rules of a lot of counties, and the way cases get assigned is just a myriad of ways.

HON. SCOTT A. BRISTER: And some of them are really bad.

CHAIRMAN SOULES: Some of them are bad. More and more they're just random. Anyway, maybe let's hold that thought and just get to the end.

DORIS LANGE: I think we would like to see some uniformity in this, but if you want to leave it up to local rules, that's up to you all. But we as clerks were trying to get uniformity, and the only way you're going to get uniformity is to tell us, "This is the way you're going to have to do it."

MS. WOLBRUECK: I think the issue had come before the subcommittee at one point in time, and there was a concern of trying to make that determination, because it's real difficult. You have counties that have courts that are in different areas and they're not just in the courthouse, and the assignment of cases are handled possibly differently than a county that has all of their courts within the same county, and there are reasons for it. Possibly the reason why they do things as far as local rules are

concerned -- I mean, this is not an issue that the clerks would like to address. If this committee would like to make that designation, that's fine, Luke.

CHAIRMAN SOULES: I don't think we can ever resolve that anyway. In Bexar County it makes no difference what the court assignment is. In Harris County, at least at one point, if you had extraordinary relief on the ancillary docket in a case, even though it might be assigned to Judge Brister, if it went to the ancillary court, then the old case got transferred to the ancillary court for trial.

HON. SCOTT A. BRISTER: Now it's even more confusing than that.

CHAIRMAN SOULES: So we probably can't -- and these local practices have grown up. At least let's get through what we've got here today, and if we can hold that thought, maybe somebody can figure out how to make case assignments uniform effectively.

MS. WOLBRUECK: Section (c) just had to do with the filing and it had to with Rule 24, and it just clarifies that all

documents received by the clerk shall be file marked. Rule 24 had basically just noted that the petition shall be filed, and this was just to clarify that all documents received by the clerk shall be filed.

Going on to the next page, section (d), this is a consolidation of several different rules. It's actually a consolidation of Rule 25, which had to do with the clerk's file docket; Rule 26, the clerk's court docket; Rule 27, the order of cases; Rule 218, the jury docket; and also Rule 656, the execution docket.

And basically what we have determined here is we are trying to put together what is called a clerk's record. And this rule actually requires the clerk to keep a record of all filings, all issuance, pleadings, orders, et cetera. With consideration of the resources from county to county, the rule would allow the record to either be kept manually in books and/or on docket sheets or to be kept electronically. And basically we have tried to consolidate that into this one rule.

It basically changes the way things are done a little bit, but actually it doesn't. Actually it just combines them all to where basically it just combines those rule into this one area and sort of clarifies the way recordkeeping can be done. And with technology moving today is one of the reasons why this has been done.

Section (e) has added an index, and actually these rules didn't have an index in them. I thought that was very unusual that we considered a great deal as far as keeping the clerk's filing and filing petitions and the like and there was not an index, so we have added an index to this rule and designate that the clerk shall keep that index.

And (f) on the next page has to do with the permanent record. Basically this states -- and the subcommittee has assisted with this as to what shall be included in the permanent record.

For your information, the state library sets guidelines for clerks and for other entities as far as what is permanent and what is not. They do that by their advisory

committee, but it is done by reviewing all rules and statutes pertaining to that. And basically all dockets which include minutes of the court and judgments of the court and like are considered permanent records, so this just clarifies what is to be permanent, which shall be the case number, the names of parties and attorneys, the final judgment or other court order disposing of any party, claim or case, and any writs of execution and returns thereon. This is what should be permanently maintained by the clerk.

MR. HAMILTON: It there some time period that it's not permanent that you dispose of the rest of the records?

MS. WOLBRUECK: Yes. In fact, the state library sets that, and it's 20 years after judgment, unless the judgment has been revived by execution, and there are some guidelines on that, but that's set by the state library. All of the court pleadings and the like, the other pleadings in the file, are set by the state library, and they continue to review that through their advisory committee.

MR. ORSINGER: I might mention

that one thing that occurs to me that we don't put in here is payments made on the judgment. In Bexar County, my experience is that you have to go handwrite on the minutes the payments that you've received on the judgment. And if there's execution and the sheriff sale generates the money, it goes into the permanent record. We don't require -- the rules don't require that we keep track of what part of a judgment has been paid, and I don't know whether we should or shouldn't. I assume the practice in Bexar County is just a local practice.

MS. WOLBRUECK: There are some other practices around the state similar to that.

MR. ORSINGER: Just go handwrite on the minutes?

MS. WOLBRUECK: I'm wondering if the writs of execution with the return thereon should clarify it?

MR. ORSINGER: No, because the return would occur before the sale. I think the return of the writ of execution means that you've levied on the property, but later on

you're going to have an order of sale and you're going to have something that reflects money was received by the state on behalf of the holder of the judgment, and I'm not sure what that is, frankly, and we don't provide for it to be kept permanently and we probably should.

CHAIRMAN SOULES: What evidences the proceeds received from the sheriff's sale?

MS. WOLBRUECK: I'm sorry, Luke, I didn't hear you.

CHAIRMAN SOULES: What evidences -- what document, if any, evidences proceeds received from a sheriff's sale?

MS. WOLBRUECK: Just the order of sale itself. It will have that information on that, and that's to be kept. See, that's part of the court's file that's kept for 20 years after judgment.

CHAIRMAN SOULES: And does that say how much money was gotten, the order of sale?

MS. WOLBRUECK: Yes. And like I said, again, that's part of the court file

that has to be kept at least 20 years after judgment, and if that judgment has been revived by execution, there's an additional time period.

MR. ORSINGER: Well, if the record is kept as long as the judgment is collectible, then we don't need to worry about keeping it permanently, because once the judgment is no longer collectible, who cares how much of it was paid?

MS. WOLBRUECK: And it is. According to the guidelines by the state library, it is.

CHAIRMAN SOULES: Okay. Going forward.

MS. WOLBRUECK: (g) then goes into the issuance, and this is the section that we have revised since the last meeting in the information that was handed out. Basically it just talks about the clerk issuing all writs and process, and then it has an additional statement that actually has to do with Rule 145 that the clerk shall endorse thereon "affidavit of inability" if in fact it has been filed. And we have purposely not

tried to make reference to other rule numbers if we could. There are some instances in here where we have, but it makes it much easier whenever rule numbers change.

Going on to (h), this has to do with the transfer or change of venue. And basically this combines Rule 89, which had to do with a transfer on a motion and also Rule 261 on a change of venue. And these two have been combined to just include the clerk's duties as far as preparing the transcript and forwarding on to the other clerk. And it puts in here the notice that the clerk shall notify the plaintiff of the transfer and any filing fees that are due, and that comes out of Rule 89.

Going on then --

MR. ORSINGER: Bonnie, for clarification, does the transferring court retain anything other than court orders?

MS. WOLBRUECK: Yes. It says here what we shall do. Basically you make a transcript of all original papers and certified copies of all court orders. We send on the originals and only retain with the transferring clerk the minutes of the court,

which are the court orders.

MR. ORSINGER: So the original pleadings are actually shipped out? There's no further record of it other than just your index?

MS. WOLBRUECK: That's right.

CHAIRMAN SOULES: Why do you have "a transcript of" in there? Why shouldn't you say "all original papers of the cause"?

MS. WOLBRUECK: That probably came out of Rule 89.

MR. ORSINGER: Let's take it out.

CHAIRMAN SOULES: "Send to the clerk of the court to which the venue has been changed all original papers and certified copies" -- all the.

DORIS LANGE: Well, the transcript is the summary.

MS. WOLBRUECK: I think it will be all right. I think that will be fine, Luke. It was just wording that happened to be taken out of the other rules.

CHAIRMAN SOULES: I think we

talked about having orders filed. We may have even voted to do that, so I guess that would read "all original papers in the case other than orders and copies of all orders."

MS. WOLBRUECK: Yeah. We'll change that wording to make that work.

CHAIRMAN SOULES: Okay. Good enough. Go forward.

MR. KELTNER: We've got one potential problem with this due to the rule change back in the '70s. Remember, this rule read when there was no venue appeal -- or it was changed when we decided that there wouldn't be any interim appeal of venue. Now what you have is you have an order to transfer and the court, as part of that order, is going to be directed to send everything to the new court. That's going to be reviewable, though, by an interim appeal now, not awaiting final judgment.

The old rule said that you kept them with the court for the time period for the appeal, and we probably ought to do so now again, because we've got family law cases in which you have an interim appeal. We have now tort

reform statutes giving interim appeal.

The question is, where do you appeal from? And you have to appeal from the court that ordered the transfer or didn't order the transfer, as the case might be.

MR. ORSINGER: Better add a sentence that says if an appeal is taken that the physical transfer will not occur until the appeal is resolved.

PROFESSOR ALBRIGHT: You mean an interlocutory appeal?

MR. ORSINGER: There is an interlocutory appeal in certain circmstances on a denial of venue.

PROFESSOR ALBRIGHT: But you don't want to say any appeal.

MR. KELTNER: Right. That's a good point. Let me do this: I think I have a copy of the prior rule. Let me get that to Bonnie. I think that served us well for years. It ought to serve us well here, and I'll get her a copy of that.

CHAIRMAN SOULES: Okay. So (h) needs to be modified, Bonnie, so that if there is an interlocutory appeal taken, the papers

don't go to the transferee court until that's resolved. How you handle that, David is going to give you some assistance on.

MS. WOLBRUECK: Okay. (i) then talks about just the filed exhibits. This is a new rule from 75b which basically just clarifies that the exhibits shall remain in the custody of the clerk.

And (j) then has to do with the disposition of exhibits, depositions and discovery. This is basically what comes out of Rule 14b and Rule 209. 14b had to do with exhibits, and Rule 209 had to do with depositions and the clerk's ability to dispose of these. This was done by Supreme Court order, and we're proposing this to be a rule. There are two changes within this proposal from the original rule. One of them adds discovery, all discovery to this rule as far as being disposed of after the time periods listed on Page 4 under (1) and (2). Our concern, of course, for clerks is that we have a great deal of information as far as discovery in these files.

In light of the Supreme Court's rule, the

Dallas County rule as far as discovery not being filed, it would be very beneficial for clerks whenever all matters are disposed of in the court case and the clerk is microfilming the case that we would not have to microfilm the discovery also. And there are millions of pages in Harris County alone that are discovery that are having to be microfilmed today and stored permanently on microfilm. And thus, that's the reason for this discovery to be added to the disposition of not only exhibits and depositions but all other discovery.

On top of Page 5 there is -- one of the other things that we were concerned about in this rule was the notice that's required of clerks to be sent. Each of you have probably received a notice from a clerk that says we're going to dispose of some exhibits, and that case has been disposed of for many, many years. You don't even know what the case is about anymore. You took your archives -- you had to take your archives or else you called the clerk and said, "What is this case? What are these exhibits that you're fixing to

dispose of?" That happens to me every single day.

And what we have proposed here -- and there's an error here that needs to be corrected. On Page 5, third line down, underlined, it says, "clerk of the court may without notice to the parties of their attorneys," if you would take that out, please. And then note that on the next page on Page 6 -- and this came out of the subcommittee recommendation and I think it's a good recommendation -- on Page 6, under "Notices to be Mailed by the Clerk," under number (3) is a disposition notice.

Whenever the clerk sends out a notice on a default judgment or other appealable order, just include in that notice also that all exhibits and discovery will be disposed of by the clerk of the court according to the time periods and according to these rules, so that attorneys are notified at that time that if in fact you would like to recover these exhibits, you may do so according to these rules.

CHAIRMAN SOULES: Why don't you just change "without" to "with notice."

MS. WOLBRUECK: Okay. With notice. Do I need to reference what that notice is?

CHAIRMAN SOULES: I don't think so. I think you can pick it up where you say "Disposition Notice," right where you took us.

MR. ORSINGER: Comment. In reading this, I realize that I'm not comfortable that any party can request any exhibit. I think that parties ought only be able to take the exhibits they offered in the depositions that they filed.

MS. WOLBRUECK: Richard, that had been in the original order also to where they were allowed to do that, if you will read --

MR. ORSINGER: Because this last sentence in the top paragraph permits any party to get any exhibit.

MS. WOLBRUECK: Yes.

MR. ORSINGER: And I would like certainly to have the opportunity to get back all of the exhibits I tendered and not let the other party go down and get them all. That's

just a preference. I mean, it's usually not an issue, but sometimes they're original documents that you failed to get. If nobody cares, I can live with it. It's not a big issue. But it seems to me that since this is all just between a lawyer and a clerk and there's no intervening judge that we ought to say you can get your own exhibits in the depositions that you filed, but you can't get the other party's exhibits without a court order.

MS. WOLBRUECK: Richard, would you like that to be rewritten to where the party that submitted the exhibit may request the release of it, and if they do not, then it may be released to any others? And I can see, because you do family law, that that can certainly happen with pictures, family pictures and the like. And if you haven't requested it, could they be not then be released to somebody else?

CHAIRMAN SOULES: The next paragraph says, "If more than one party requests the exhibit, the court will make copies and prorate the cost." Does that take

care of the rare circumstances where more than one party --

MR. McMAINS: Why isn't any party entitled to an exhibit if they want it?

MR. MARKS: What about just a provision that requires notice to the other party if the request is made?

CHAIRMAN SOULES: Well, all parties get -- I don't think we ought to do that, John. That just puts another burden on the clerk. Everybody gets notice. If you want your exhibits, come get them. Two people show up. This says the clerk makes a copy. Maybe there ought to be some other --

MR. McMAINS: The other problem is that it's not always the party's document even though it's the party's exhibit. I mean, it's not unusual that I as a plaintiff will offer as an exhibit a defendant's original document, or more likely a copy, so it's my exhibit but it happens to be somebody else's documents. It's more likely that the defendant is the one that doesn't want it circulated. So I'm not sure how you can have the clerk or anybody else messing around with

whose it is.

MR. ORSINGER: Well, if it's an exhibit, if it was offered, it's going to have "Plaintiff's Exhibit" or "Defendant's Exhibit" on it, and that's pretty simple. Now, where you go beyond that, I don't know.

CHAIRMAN SOULES: Let me suggest this, Bonnie, or to everybody. Let's make the second paragraph, "If the court has ordered or any party has requested," make it parallel the last one: If the exhibit is a document, the party who offered it shall be entitled, but the other party can get a copy at the other party's expense. That may need to be an additional paragraph.

MR. ORSINGER: And what is the consequence of your change?

CHAIRMAN SOULES: Well, do you see the very last paragraph, not capable of reproduction, well, if it is capable of reproduction, the party who offered it gets it, and if the other party wants it, they have to pay for the copy.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: And you still

may need the middle paragraph there for the situation where two parties want the exhibit, neither of whom offered it. Then you would make a copy and prorate the cost. That takes care of I guess all the permutations.

MS. WOLBRUECK: Okay. We'll make those changes.

MR. GOLD: Question.

CHAIRMAN SOULES: Paul.

MR. GOLD: Is there some sort of provision about how the clerk disposes of the documents?

DORIS LANGE: Shred or burn.

MR. GOLD: My question is, if neither party claims the exhibits and some third entity wanted the exhibits, is there anything that prevents the clerk from releasing the exhibits to the third entity?

CHAIRMAN SOULES: The answer to that is no, there's nothing that precludes it. The clerk can do whatever they want to if nobody wants them.

MR. ORSINGER: Well, what do the rules promulgated for the destruction of documents say? Are you required to destroy

them, or can you give them to whoever you want.

MS. WOLBRUECK: It depends on what it is. It just basically tells us how to destroy something.

MR. ORSINGER: It doesn't require you to destroy it? You could just give it away?

MS. WOLBRUECK: That's right.

MS. LANGE: It depends upon what it is. I mean, I can't give the local historical society records because I no longer want them. The county clerk is required to either burn or shred.

CHAIRMAN SOULES: By statute.

MS. LANGE: We can't give documents, like I said, to anyone that we want to.

CHAIRMAN SOULES: That's by statute?

MS. WOLBRUECK: That's by statute.

CHAIRMAN SOULES: Okay. Well, there's nothing in the rules. Maybe there is something else somewhere. Okay.

MS. WOLBRUECK: Okay. Continuing then, (k) has to do with -- this is Rule 119a, copy of the decree. Basically this just directs the clerk to mail a copy of the final decree. We have taken out "or order of dismissal," because that's actually addressed under "appealable order" and that notice is already being mailed, so there's no reason for the clerk to be required to do that.

I have one question of this Committee. I think this comment has come up before. This seems to be a Family Code issue, and if this Committee would like it, the Clerks Committee would pursue trying to place this into the Family Code through legislative action, or would you prefer that this stay in the rules?

PROFESSOR DORSANEO: Family Code.

MR. ORSINGER: Don't just assume that if you take it out of here it's going to show up. It might show up or it might not show up, or it might show up with an entirely new list of amendments stuck on to it that you've never dreamed of. If you want this to happen, my recommendation is let's

leave it here until it's already in the Family Code and then let's take it out.

MS. WOLBRUECK: If we try to duplicate it in the Family Code, that shouldn't cause any problems then if it's just duplicated, and then we can remove from the rule.

CHAIRMAN SOULES: Agreed.

MS. WOLBRUECK: Everything else concerning -- you know, this is really a Family Code matter and I think it would probably be easier for the clerks if it was there.

MR. McMAINS: Do you only send a copy of the decree in a waiver situation?

MS. WOLBRUECK: That's correct. That's the only time.

Okay. (l) has to do with the notices required of the clerk. The first one is the default judgment, and this is just some clarification of that. It really doesn't change anything. It just sort of -- and I think this rule has been addressed under 239a and basically it's the same just with some cleanup.

Number (2) has to do with the appealable order, and I think 306a has been addressed before, and we wanted to duplicate it in the clerks rule. It probably, and correct me if I'm wrong, on the second line it should probably say "give notice of the signing to each party or the party's attorney" instead of "to the parties." Is that the correct language instead of just "to the parties"?

PROFESSOR ALBRIGHT: I thought we were doing "parties," and then there was going to be a rule that if a party was represented by a lawyer, you give notice to the lawyer.

CHAIRMAN SOULES: "Parties" should be good enough. We ought to fix that in a general rule.

MS. WOLBRUECK: Okay. I remember going back in notes and I know it's been addressed both ways and I wanted to make sure that we addressed it right.

Number (3) is that disposition notice that we want to include concerning the exhibits and discovery, and we will include that. It basically states that it shall be

included in the default notice and the appealable order notice.

Number (4) has to do with something that we were requested to look at which has to do --

CHAIRMAN SOULES: Let me ask you this. Are you talking about putting (3), making it part of the default notice or a part of the appealable order notice?

MS. WOLBRUECK: Yes.

CHAIRMAN SOULES: Why don't you just say in (3) this may be given in the notice of default or appealable order. Then you can give either way and it doesn't affect the validity of the other.

MR. ORSINGER: What is your purpose in doing that, Luke?

CHAIRMAN SOULES: Well, the clerk may or may not give this notice with the default notice or the appealable order notice.

MR. McMAINS: If they don't give a disposition notice, it doesn't affect the validity.

CHAIRMAN SOULES: It doesn't have to be a part of the default notice; it

can be. It doesn't have to be a part of the appealable order, but it can be. And if it is, it's effective to cover (3), which is what the purpose of it is, is to get (3) out.

MS. WOLBRUECK: Yes. But before the clerk disposes of anything, wouldn't you want the clerk to make this notice?

CHAIRMAN SOULES: Right. All you're saying is this number (3) notice, disposition notice, may be given with the other notices.

MR. ORSINGER: Yeah. She's going further with that. She's saying it must be given with one or at least one of the other notices. If you're going to send the notice, you have to include the statement about the destruction of the records.

PROFESSOR ALBRIGHT: Richard, I think what Luke is saying is you don't want that notice to be defective just because it doesn't give you notice of disposal of exhibits 20 years later.

CHAIRMAN SOULES: Well, why should we burden the clerk? If I'm

understanding Richard to be saying, if this number (3) notice, disposition notice, is not given with one of those other notices, it can never be given.

MR. KELTNER: Right.

CHAIRMAN SOULES: That's not what we want.

MR. ORSINGER: Well, this rule says that should never happen, what you just said.

CHAIRMAN SOULES: But that's the way it is done now and that's probably the way it's going to continue to be done until clerks adjust to this new practice, I think. I don't know. Next, Bonnie. Or Rusty, excuse me.

MR. McMAINS: Well, we kind of went over it real quick, but on the appealable order, does our rule now say you give notice of the final judgment or an appealable order?

MS. WOLBRUECK: It actually says "or other appealable order." And I apologize, I've made myself a note of that.

MR. McMAINS: I'm just curious. That places a rather significant

burden on the clerk to determine what an appealable order is. That's fine if that's in there and if it's been in there, but I don't know if there is some other way that we could deal with it.

CHAIRMAN SOULES: We've been around and around that issue even in these sessions.

MR. McMAINS: Well, we know within 306a in terms of what the effect of not getting the notice is. But in South Texas, a lot of counties in South Texas, they don't give you notice of final judgments, let alone any other orders. Never.

CHAIRMAN SOULES: I know. But it's there, and it works in both places. Don Hunt.

MR. HUNT: Proposed Rule 304(e), which deals with effective dates and beginnings of periods, which was old Rule 306a, I think, was written in terms of final judgment or appealable order to comply with the definition of final judgment but leaves the ideas that there can be orders that are appealable. But the rule doesn't try to

determine whether the order is appealable or not because the rule doesn't speak to that. The other rules and statutes speak to that. But it is written in terms of notice to the party or party's attorney, but it just simply says each party or the party's attorney.

Now, what you have written here talks about "to the parties." I don't know that we need to change this, but at least this just says "to the parties" where the proposed rule on notice of judgment says when the final judgment or appealable order is signed, the clerk shall immediately give notice of the signing to each party or the attorney.

CHAIRMAN SOULES: Or the party's attorney.

MR. HUNT: Well, it should say party's attorney. I'm sure we left the word "party's" out of the language.

MS. LANGE: So it should say "of the signing to the attorneys of record or the parties." That way the attorney would have first priority notice. And then if you don't have an attorney, then you do it to the parties.

CHAIRMAN SOULES: Well, Doris, we've already passed this language here, and I think what we want to do is, the suggestion is we make it identical.

MR. ORSINGER: How would it read, Don?

CHAIRMAN SOULES: Notice of the signing to each party or the party's attorney.

MR. HUNT: Give notice of the signing to each party or the party's attorney.

MR. ORSINGER: Shouldn't we say attorney of record?

MR. HUNT: We've struck "of record" before.

MR. ORSINGER: Okay. Then how do we know who their attorney is if he or she is not of record?

MR. HUNT: Well, we don't. But that's not a problem of the clerk. The clerk either knows or the clerk doesn't know, and if it's in the record, the clerk can send it to the attorney of record. But we don't want to get into a fight over who was of record and who wasn't.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: One of the things that's happening consistent with what we've talked about probably some three years ago now is that all of these reports, including the Hunt Committee report, are being reorganized in terms of the task force organization. And we're planning on putting everything together with due regard for these general principles. And obviously we'll need to have a lot of people read and make certain that we follow that, but the wording of any one of these things is really subject to some manipulation in accordance with the overall attitude of the committee about whether it should say "party" or "party's attorney," or you know, general ideas.

CHAIRMAN SOULES: Why don't we just have a general rule, "notice to an attorney of record or an attorney is notice to a party."

PROFESSOR DORSANEO: I just made a note to go and take that out of your Rule 304, because in section (2), in service

of citation, pleadings and motions, it will say that you serve on counsel if there is counsel.

CHAIRMAN SOULES: But keep in mind that this is not talking about what the parties do, this is talking about what the clerk does, which is not covered in service.

MR. McMAINS: It also doesn't say "service," it says "give notice."

CHAIRMAN SOULES: Right. So that may have to be broadened some. Going forward.

MS. WOLBRUECK: Okay. Going on to (4) now on the settings, this has to do with -- we were asked to address Rule 246, which is actually on the last page of this handout, but basically it talks about a notice of setting.

And if you would like to go back to -- go to 246, which is on Page 22 and 23. Basically this has to do with that notice. We were requested to address this, and in doing so, if you would look at (c) on "Notice," it has to do with "Any party setting a case for trial shall immediately notify all other parties of

the trial setting by written notice and shall file a copy of such notice with the clerk of the court. If the court on its own initiative sets the case for trial, the clerk of the court shall notify all parties of the setting by first class mail."

And basically that notice thing is repeated in the clerk's duties under number (4). And this would then be a change in what was 246 and what's been combined now as Rule 245(a), (b) and (c).

CHAIRMAN SOULES: Where is the first piece of that old rule?

MS. WOLBRUECK: It was Rule 246 on the last page. Rule 246 started off, "The clerk shall keep a record in his office," the part that is struck there, and then what has happened there, which we've added in (c), which is Notice under Rule 245.

PROFESSOR DORSANEO: 245 and 246 now overlap, so they were combined.

MS. WOLBRUECK: They were combined.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Luke, there was

no (a) or (b) to Rule 246. That (c) is because it's now been folded into Rule 245.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: I think it probably should be said for the record that it's not our conception that this would prohibit the court from dismissing a case for want of prosecution at a regular docket setting or trial. This requirement of notice of settings would be if you're going to set it on the dismissal docket per se. But if you have a trial setting that the party fails to show up for, this doesn't in any way impair the court's ability to strike it, to dismiss it.

CHAIRMAN SOULES: All right.

MS. WOLBRUECK: So that number (4) then requires the clerk to give that notice of any setting either when the court has set it for trial or if there is a dismissal for want of prosecution.

MR. ORSINGER: Well, I mean, that gets back -- you know, in some counties you have an order setting all pending cases that says if you don't appear at the docket

call, your case will be dismissed. There are other counties where, if the case comes up for trial and you're not there, they just dismiss it based on you not appearing at the trial setting. And I don't think this rule is meant to preclude a trial judge when the case is called for trial from dismissing it for want of prosecution because the plaintiff didn't appear. But I think maybe we ought to have an agreement that that's what that means. I said it so it would be in the record, and I assume that people would agree with me.

CHAIRMAN SOULES: What rule are you talking about right now?

MR. ORSINGER: (4).

CHAIRMAN SOULES: It doesn't say that, does it?

MS. WOLBRUECK: And Rule 165a is still there concerning the procedures for that.

PROFESSOR DORSANEO: I have one question about 245 and 246. I realize that 246 as currently worded talks about what the clerk should do. 245 as currently worded talks about what the court should do. It says

the court may set contested cases and then it says "with reasonable notice of not less than 45 days."

If you didn't talk to anyone, you probably would conclude that the court or some part of the court is meant to give reasonable notice of not less than 45 days, rather than having that be left to the party. And if you weren't a clerk, you would probably think that the part of the court that would do that would be the clerk, not just when the case is set on the court's initiative, but all the time.

I realize after talking with you, Bonnie, that the district clerk may not actually know unless there's some procedure set up to check and have that information transferred, you know, to a different floor in the building. But shouldn't it be the case that the clerk does this all the time, notices of settings all the time, or just on the court's initiative?

MS. WOLBRUECK: Of all settings?

CHAIRMAN SOULES: Trial settings. This is trial settings, not motion

settings.

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: The issue here is clerk versus coordinator.

PROFESSOR DORSANEO: Well, there are no coordinators in a lot of places.

MR. ORSINGER: Well, in the outerlying counties the trial dockets are maintained by the coordinator that follows the district judge around, not by the clerks. So if you have a district judge with four counties, the trial setting comes from the coordinator whose office is next to the trial judge, and the clerk over there doesn't find out about it for a week or so, if then.

MS. WOLBRUECK: Right.

MR. ORSINGER: If ever. So we're trying not to say that it's just the clerk that does it when in reality in a lot of instances it's the coordinator who does it. So it was intentionally left that it's a duty of the court, and then the court is going to decide whether it's the clerk or the coordinator that does it.

PROFESSOR DORSANEO: But it's

the clerk if the court does it on its own initiative.

MR. ORSINGER: No, it shouldn't be.

PROFESSOR DORSANEO: Well, that's what it says.

MR. ORSINGER: Well, then that slipped through, Bonnie.

MS. WOLBRUECK: No, I think that our discussion in our subcommittee was, when we discussed this, that whenever the court only sets it on their own initiative, like the parties aren't notified or for some reason or another they aren't in court and they don't know, the court has determined that on their own initiative they have decided that the court is going to set this case, somebody has to notify them.

CHAIRMAN SOULES: But Bill's point with his sharp eye is that in the second line of this number (4), Settings, it says "the clerk shall notify." It doesn't say the coordinator or somebody else.

MS. WOLBRUECK: Which is the way we had intended it, because that's only

when the court sets it on his own initiative.

CHAIRMAN SOULES: Then the clerk must notify?

MS. WOLBRUECK: Then the clerk notifies. Because otherwise, if the party has set the case, they notify each other according to Rule 245.

MR. ORSINGER: But the distinction I'm drawing, and I could be wrong or maybe we changed our mind later, but we were not saying that the clerk necessarily was the arm of the court that gave the notice, because in many instances it's the coordinator who is the arm of the court that does it. And therefore, we stayed away from saying "clerk, clerk, clerk" and said "court, court, court," and then let the courts decide whether it's the coordinator that does it when it's on the court's own initiative or whether it's the clerk that does it when it's on the court's own initiative.

MS. WOLBRUECK: So would you be prefer that number (4) then be taken out of the clerks rule?

MR. ORSINGER: No.

CHAIRMAN SOULES: Is the coordinator a deputy clerk?

PROFESSOR DORSANEO: They should be.

MS. WOLBRUECK: They are not, only -- they should not be. I disagree. They're not hired by the clerk and not under the clerk's bond, so they cannot be deputy clerks.

CHAIRMAN SOULES: Well, let's leave it this way. This just shares notice of the setting.

MR. ORSINGER: This is different from what the committee decided. And I don't care, but Bonnie, I want to be sure that we're reading from the same page. This requires the clerk to issue the notice even though the local practice might be for the judge's coordinator to issue the notice. And if we go to the books with this, there are going to be a lot of people that are in noncompliance.

MR. KELTNER: Richard, it may even be worse that that. When we're using the term "on the court's own initiative," let's

assume that the judge is in a hearing and he says, "All right. I'm tired with all of this. This case is going to go to trial on March 20th. That's when it's going to trial." And it's in front of all counsel. That's obviously on the court's own initiative, but now we're going to have the clerk having to tell them to get the reasonable notice situation. Now, that doesn't make a whole lot of sense. The clerk is probably not the one set up to do this, unfortunately, under our practice now.

MS. WOLBRUECK: I agree. And the subcommittee had tossed this around a great deal and was concerned about how to handle this issue, because that same issue had arisen as far as the court sets it on their own initiative and all parties are in the courtroom and they know that it's being set, and that's where our concern was, and I agree with you in trying to come up with that determination.

CHAIRMAN SOULES: But there's a deputy clerk in the courtroom, isn't there?

MS. WOLBRUECK: Not in all

counties, though. In the smaller counties it's very often that there's not a clerk or a deputy clerk in the courtroom.

MR. KELTNER: And I've got to tell you, in Tarrant County there isn't.

MR. ORSINGER: Well, there isn't in San Antonio either. They're always in the office doing administrative work.

MS. WOLBRUECK: The Clerks Committee, in answer to Richard's concern, the Clerks Committee had decided that one of our issues with 246 was the "require the clerk to keep a record," number one, if you go back to for 246, "of all cases set for trial," which in reality today is not happening, because court administrators or court coordinators are setting the cases for trial. And it required the clerk to give notice if an attorney had requested that. So in lieu of that, we tried to work out a compromise as to how this could be addressed, and then in doing so, this notice that this compromise had come up as far as if the party sets the case, which seems to be a common practice throughout the state, if the party sets the case, they are to notify

the other party of that setting. I'm not sure that that happens in every county, but in many counties it does.

But the issue then becomes if the parties did not set the case and it's set on the court's own initiative, how are the parties going to be notified? And possibly leaving the clerk in the circle, the clerk is going to have to coordinate that with their court then in every county to try to determine how number (4) can take place, and it may be a local issue on how it can take actually place.

MR. ORSINGER: Well, in my view we ought to say "court." And in my experience in a multicounty district, I can never find out when there's a trial setting by calling a district clerk. I can only find out by calling the court coordinator. And I think that we're going to try to change practices that will not be respected by our rule change, or maybe this isn't a change in the rule. I can't tell. But to me, if we say "court," the court has the duty to issue it. The court can meet that duty through a coordinator or meet that duty through a clerk. And maybe we ought

to have an additional exception like David said that notice to all parties in open court obviates the need for first class mail, or maybe we don't want to do that. I don't know.

MR. KELTNER: My only objection, Richard, is going to having the clerk do it, because the clerk is the only person in many instances -- and I'm not saying this is right -- who doesn't know when it's set and has no mechanism in many instances to know when it's set.

MS. WOLBRUECK: I'm agreeing.

MR. KELTNER: Through no fault of the clerk.

MS. WOLBRUECK: This has been discussed a great deal, I want you to know. The clerks are willing to do whatever we can do to facilitate this, but I realize that there is a problem, because understandably, there's 254 counties in the state and it's done 254 different ways. And from the urban counties to the smaller counties the issues are quite different as far as who has that information.

PROFESSOR DORSANEO: Why

couldn't this be rewritten to make reference to the court coordinators?

MS. LANGE: Because court coordinators are not bonded and --

PROFESSOR DORSANEO: No, I don't mean that. I mean, say, "The clerk of the court shall notify all parties by first class mail unless the court coordinator handles it or is in charge of it."

DORIS LANGE: That's why we would like it to say "the clerk of the court." If it's a coordinator doing it, then it's up to the coordinator to let them know of the setting, but it needs to be up to the court where the case is filed that has the information so you as attorneys know where you can call.

MR. ORSINGER: Well, should we understand that the clerks are happy taking over this additional responsibility to hunt down someone that's not an employee and be sure they know when the trial settings are?

MS. WOLBRUECK: The majority of the clerks, yes.

CHAIRMAN SOULES: Right now

under 246, "The clerk shall keep a record in his," it says, "office of all cases set for trial." The coordinator is supposed to be telling the clerk that and the clerk is supposed to have a record of that under 246 right now. And they're willing to do --

MS. WOLBRUECK: But in reality, you know -- I'm sorry, but in reality that doesn't happen.

CHAIRMAN SOULES: Okay. Let's take 30 minutes and have our lunch and then try to be back here shortly after 1:00 o'clock. Lunch is served back at the back of the room here.

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on September 20, 1996, Morning Session, and the same were thereafter reduced to computer transcription by me.

Charges for preparation
of original transcript: $ 1,066.50.
Charged to: Soules & Wallace.

Given under my hand and seal of office on this the 25th day of September, 1996.

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