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7 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
8 November 18, 2000
9 (SATURDAY SESSION)
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20 Taken before *D'Lois L. Jones*, Certified
21 Shorthand Reporter in Travis County for the State of
22 Texas, reported by machine shorthand method, on the 18th
23 day of November, 2000, between the hours of 8:36 a.m. and
24 11:36 a.m., at the Texas Association of Broadcasters, 502
25 East 11th Street, Suite 200, Austin, Texas 78701.

# INDEX OF VOTES

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1 *-*-*-*-*
2 CHAIRMAN BABCOCK: Okay. We're on the
3 record, and we're up to Pam Baron. Because, Pam, we got
4 194a done yesterday, so we're up to you.
5 MS. BARON: All right. Our subcommittee was
6 asked to look at Rule 3a because the rule came up during
7 the recusal discussion, and I'll give you a little
8 background. You should have a packet of materials, and
9 the top page is on my letterhead, and it's a memo dated
10 November 9th, and I will be referring to the packet. And
11 if you turn just to what the current local rule is right
12 now, this is a rule governing local rules.
13 What happened in the recusal context, as you
14 might remember, there was a case out in the Valley where
15 the administrative transfer rules that were incorporated
16 into the local rules basically evaded the recusal process
17 that the rules had established, and one argument that was
18 made -- I guess Carl Hamilton brought this up in the
19 course of the discussion to Judge Hester -- was that if
20 you look at paragraph (1) of Rule 3a, it only prohibits
21 proposed local rules that are inconsistent with the Texas
22 Rules of Civil Procedure, and it doesn't prohibit adopted
23 rules being inconsistent with the Rules of Civil
24 Procedure.
25 What I found from the case law is certainly

1 the courts have not viewed it as only applying to proposed
2 rules in the Sterns vs. Holloway case out of the Dallas
3 Court of Appeals in 1989. They struck down a local rule
4 which presumably had been adopted and applied as being
5 inconsistent with the Rules of Procedure, but what our
6 committee found in looking at the rules is that it was
7 trying to do too many things in too many time periods
8 under a single heading because it dealt with, first, the
9 process for getting local rules adopted, then how they're
10 made available, and then how they're to be applied.
11 And what we did is we reviewed the
12 transcript which is included in your packet. We looked at
13 the dissent in that recusal case. We also talked with
14 Judge Hecht, and we identified three concerns that we
15 wanted to govern the way we looked at the rule. The first
16 was it was our view that rules, even if they are adopted
17 and approved by the Supreme Court, still should not be
18 inconsistent with the Rules of Procedure or statute.
19 Second, that it was our understanding that the Supreme
20 Court in reviewing these rules really didn't flyspeck them
21 for all possible inconsistencies, that they might pick up
22 obvious glitches; and, third, that the Court did need some
23 flexibility because sometimes they do approve local rules
24 that are, in fact, inconsistent with the Rules of Civil
25 Procedure in order to allow pilot programs or

1 experimentation in certain areas.
2 So if you will turn to -- the next page of
3 your packet is the recodification draft where Rule 3a
4 becomes Rule 2, and that's where we began, and then if you
5 turn to the next page it shows our marked changes from the
6 recodification draft of Rule 2. What we tried to do is
7 preserve as much of the existing language of Rule 2 while
8 dividing the rule into three distinct areas or time
9 periods. You can see that reflected in the heading. The
10 first is "Procedure for adoption," where the provisions
11 take only those two parts of 3a that really related to
12 that procedure, which were previously, I guess, (c) and
13 (d); and now they are 2.1(a) and (b), but that part of the
14 rule is basically unchanged.
15 The next part is that we broke out how local
16 rules should be made available, which is an ongoing
17 responsibility and not just the responsibility with
18 respect to proposed rules during the adoption process.
19 I've already had a friendly amendment offered, which I'd
20 like to accept, because right now that says, "The local
21 rules must be available on request to the members of the
22 Bar." That was actually the language in the
23 recodification draft. It sounds like you ask the members
24 of the Bar for the local rules, so the "upon request"
25 should be moved to the end of the sentence so that it now

1 would read, "The local rules must be available to the
2 members of the Bar upon request."
3 And then the third issue, which is really
4 where we changed the rule, deals with the validity and
5 applicability of local rules, and what we have provided --
6 and, again, we have tried to preserve as much of the
7 existing language as possible. There is still a
8 prohibition against local rules being inconsistent with
9 the rules and changing time periods. Those are moved
10 over, but they are not limited just to proposed rules.
11 They are all local rules, and then we added a new
12 subsection (b) that would recognize that if the Supreme
13 Court explicitly states in its order approving adoption of
14 local rules that they are inconsistent, but we still want
15 to approve them anyway. The inconsistency at that point
16 may be forward, and the rule can be applied in a valid
17 way.
18 And that's pretty much what we tried to do.
19 Steve is, I think, the only member of my subcommittee
20 who's here. Do you want to add anything to that, Steve?
21 MR. YELENOSKY: No. I mean, we had worked
22 out the -- Pam and I agreed on this language. The only
23 thing that I guess I didn't convince you of, Pam, I would
24 like to mention it, see if anybody wanted to bite, was
25 this (c) says, "No local rule, order, or practice of any

1 court" and then it concludes "can be applied in
2 determining the merits of any matter." That section?
3 MS. BARON: Uh-huh.
4 MR. YELENOSKY: By including "no local rule"
5 in that sentence it implies to me that local rules not
6 adopted through this procedure are okay as long as they're
7 not applied to the merits, and do we mean that?
8 MS. BARON: Okay. This is where we had a
9 little bit of just difference in approach, and I guess
10 that provision has been in the rule unchanged for
11 sometime. It doesn't seem to have created a problem, and
12 my inclination was just to carry it forward, but obviously
13 the will of the committee would be helpful on that and all
14 of the rest of the changes.
15 CHAIRMAN BABCOCK: Pam, could I ask, on some
16 numbering here, we have 2.1.
17 MS. BARON: Right.
18 CHAIRMAN BABCOCK: (a) and (b). And then
19 2.2
20 MS. BARON: Uh-huh.
21 CHAIRMAN BABCOCK: Then we have 2.3
22 MS. BARON: Uh-huh
23 CHAIRMAN BABCOCK: And then it skips to (b).
24 Should that be (a)?
25 MS. BARON: Which --

1 CHAIRMAN BABCOCK: I'm looking at the
2 highlighted copy.
3 MS. BARON: Are you looking at the same --
4 CHAIRMAN BABCOCK: I'm looking at Proposed
5 Revisions to Recodification Draft Rule 2 highlighted copy,
6 and the same numbering picks up on the clean copy, too
7 MS. BARON: Oh, there should be an (a) in
8 front of "no local rule may." For some reason I have a
9 copy that's correct and you don't, but...
10 CHAIRMAN BABCOCK: Well, what goes in front
11 of "unless specifically provided"? Anything?
12 MS. BARON: Okay. There's 2.3, validity and
13 applicability. Then there is "no local rule may," colon.
14 Do you have that?
15 CHAIRMAN BABCOCK: No.
16 MR. ORSINGER: The very next line.
17 MR. EDWARDS: Should say, "(a), no local
18 rule."
19 CHAIRMAN BABCOCK: Mine just says
20 "applicability."
21 PROFESSOR CARLSON: Look at Carrie's packet.
22 MS. BARON: You may be looking too far in
23 the back.
24 MR. ORSINGER: His draft is even more
25 dysfunctional than mine

1 MR. YELENOSKY: You may be looking at an
2 original draft.
3 CHAIRMAN BABCOCK: Okay. I have got the
4 right one now. Thanks.
5 MS. BARON: Okay. There should be an (a) in
6 front of "no local rule may." I guess it's not in your
7 copy, but it is in mine.
8 CHAIRMAN BABCOCK: Gotcha.
9 MS. BARON: And then you have (1) in paren,
10 (2) in paren, and then a (b) and (c)
11 CHAIRMAN BABCOCK: I have got it now. Let
12 me ask you another question. On 2.2, availability, is it
13 your intention to provide a special rule of access to the
14 Bar? In other words, if the public came in and wanted to
15 get a copy of the local rules but somebody wasn't a member
16 of the Bar, are you trying to give the Bar greater access
17 than --
18 MR. ORSINGER: I think we ought to delete
19 that. My suggestion is it ought to just say "should be
20 available upon request." We have a lot of pro se
21 litigants who can legitimately want -- and the members of
22 the press should be able to get them, too.
23 MS. BARON: I think that's a good comment.
24 We were just carrying forward the existing provision which
25 now says "to members of the Bar," but I don't see why --

1 these are public rules, and they should be available upon
2 request under some statutory or other provision
3 CHAIRMAN BABCOCK: Yeah. Is it okay if we
4 just put a period after "request" then?
5 MS. BARON: Yes. Unless somebody else
6 has --
7 CHAIRMAN BABCOCK: Unless somebody else
8 wants to limit the right to get these
9 MS. BARON: Well, we don't have a clerk's
10 representative here, I guess, so we can make them do
11 whatever. How much of a burden is this on the clerks?
12 But --
13 MR. ORSINGER: The other alternative would
14 be to make it available only to local members of the Bar
15 CHAIRMAN BABCOCK: Yeah. Anybody from New
16 York is not invited.
17 MR. YELENOSKY: The hometown rule.
18 MS. BARON: People living within 20 miles of
19 the courthouse
20 CHAIRMAN BABCOCK: What other comments about
21 this rule?
22 MR. HAMILTON: I have a question
23 CHAIRMAN BABCOCK: Yeah, Carl.
24 MR. HAMILTON: Well, looking on the clean
25 copy of this, you have (a), (b), and (a), so I guess that

1 last one should be (c); but that last one, I guess,
2 bothers me a little bit because it includes the word
3 "practice," and I suppose there are practices of some
4 courts that are not embodied in rules, and I guess I think
5 that if there is a rule that doesn't comply with this, it
6 ought not to be effective, but whether we want to speak to
7 the practice of the courts I don't know.
8 CHAIRMAN BABCOCK: What was the thinking
9 about that, putting the word "practice" in there, Pam?
10 MR. YELENOSKY: That's from the original
11 rule.
12 CHAIRMAN BABCOCK: From the original?
13 MR. YELENOSKY: Yeah, and the idea was -- I
14 guess, was that otherwise you could get around the local
15 rule adoption procedure by just making it oral and not
16 written anywhere.
17 CHAIRMAN BABCOCK: Yeah. Judge Brown.
18 HONORABLE HARVEY BROWN: I guess I'm not
19 quite sure what that paragraph (c) means now that I have
20 thought about it a little more. For example, in Harris
21 County we have a Daubert cutoff rule. Or an expert
22 designation cutoff rule. If you designate late you cannot
23 use that expert. Well, that certainly could go to the
24 merits of the case, not having an expert, say on liability
25 in a med mal case. Does that mean that that rule falls

1 aside, it's not in place? Does that, quote, "determine
2 the merits"?
3 MR. YELENOSKY: Pam and I talked about that
4 a little bit, and I said I assume the case law makes clear
5 what determines the merits, and that's as far as I got on
6 it because it's been in the rule.
7 MS. BARON: Well, there are no cases on this
8 that I was able to find, and I guess the issue is if we
9 delete it are we somehow authorizing local rules that
10 haven't gone through this process to be applied to cases,
11 and that's my concern.
12 MR. ORSINGER: You could eliminate "in
13 determining the merits" and just say "can be applied to
14 any matter."
15 MS. BARON: Well, I think that goes to Judge
16 Brown's comment. He's concerned that they do have local
17 practices that aren't local rules that are being applied.
18 HONORABLE SCOTT BRISTER: And he was
19 specifically talking about, for instance, an order in
20 asbestos cases or a scheduling order governing Phen-Phen
21 cases. We don't mean to say, surely, a Track 3 scheduling
22 order doesn't have to meet the dates. Obviously it
23 doesn't have to. That's the whole purpose of scheduling
24 3. Should we drop "order" or make some note that we're
25 not talking about --

1 CHAIRMAN BABCOCK: Elaine has got something
2 to add.
3 PROFESSOR CARLSON: There are cases
4 construing Rule 3a with Rule 166, the pretrial order rule,
5 that uphold the validity of what you're describing, Judge
6 Brown. So they have to be read together. I think that
7 paragraph -- I have (6) was -- if my memory is correct,
8 was just an attempt to draft on local rules the same
9 limitations that apply in the Rules Enabling Act to
10 statewide rules, that no rule can enlarge, abridge, or
11 modify the substantive rights of the litigants. Of
12 course, The Rules Enabling Act somehow got translated to
13 this language, but there's also a lot of cases that speak
14 to the validity of practice, local practice
15 HONORABLE SCOTT BRISTER: Yeah. You
16 wouldn't want a court to have a rule, unwritten or
17 written, to say, "In all cases discovery is cut off 60
18 days before trial rather than 30," but if the judge signs
19 it in a particular case --
20 PROFESSOR CARLSON: Then Rule 166, the way I
21 read the cases, trumps 3a. You have to read them together
22 HONORABLE SCOTT BRISTER: I guess you would
23 say that order does not conflict with these rules.
24 JUSTICE HECHT: A pretrial order is not a
25 local rule.

1 HONORABLE SCOTT BRISTER: Yeah.
2 CHAIRMAN BABCOCK: Anybody else? Yeah,
3 Frank.
4 MR. GILSTRAP: In that last paragraph I
5 think you need a couple of commas. I think you need to
6 set off the phrase "other than local rules and amendments
7 that comply with the requirements of this rule" in commas.
8 CHAIRMAN BABCOCK: That was a good comment.
9 Okay. What else? Richard.
10 MR. ORSINGER: Well, I'm a little concerned
11 if this means that you can have nonconforming rules that
12 determine things that are outcome determinative but not on
13 the merits, like suppressing expert testimony.
14 MR. YELENOSKY: Well, that is encompassed
15 within my concern, because it seems to create two classes
16 of local rules; whereas, at the beginning the procedure
17 for adoption does not admit to there being two classes of
18 local rules. It says there is one class of local rules,
19 and this is how you get them adopted, and at the very end
20 it implies at least that there are two classes of local
21 rules, some of which have been adopted and can be applied
22 to the merits and others which don't have to have gone
23 through this procedure as long as they don't determine the
24 merits.
25 MR. EDWARDS: You're reading that as the

1 merits of the case. This says "merits of any matter." I
2 would presume that a motion to compel is a matter.
3 CHAIRMAN BABCOCK: Buddy.
4 MR. LOW: But often the judges may be
5 uniform in their application of the rules. For instance,
6 Justice Hecht, you remember we had in Beaumont some judges
7 that were saying that the new discovery rules didn't apply
8 to certain existing cases and others, and so they got
9 together to agree what they would do. So you might have
10 some local agreement, like they're talking about in
11 Houston, that they're going to have this in these cases,
12 which that's their application of a rule or allows them to
13 do that. So there's a distinction between uniform
14 application of a rule and then, quote, a local rule that
15 goes beyond.
16 CHAIRMAN BABCOCK: Well, you know, I'm
17 worried about when we're trying to fix one thing and then
18 we go starting to fix things that there hadn't been any
19 problem with.
20 MR. LOW: Right.
21 CHAIRMAN BABCOCK: Sometimes the unintended
22 consequences of doing that causes more problems than we've
23 solved by making the fix that we have. So if this
24 language has been there for a long time and it hasn't
25 caused any problems that anybody is aware of and the local

1 courts are doing what they're doing without controversy, I
2 would be hesitant to try to change the language that's
3 been there for so long. But -- Alex.
4 PROFESSOR ALBRIGHT: What if you said "other
5 than local rules or amendments" -- or you said "no local
6 rule, order, or practice of any court other than those
7 that comply with these rules"? Then, you know, the
8 pretrial order complies with these rules, a discovery
9 control plan order complies with these rules, a local rule
10 that has gone through this process complies with these
11 rules.
12 MS. BARON: Well, I think what that does is
13 it eliminates the prohibition against local rules that
14 don't go through the approval process. I think that's the
15 intent of this provision, because the rule contains a
16 procedure, but it doesn't make that procedure exclusive
17 until you get to this provision.
18 MR. YELENOSKY: Maybe what we're doing --
19 again, here is two different things in one sentence that
20 if we really want to change it that maybe has to be broken
21 out, but maybe Chip is right, though, that it hasn't been
22 a problem. But what we're trying to say, I thought, was
23 this is the exclusivity provision which says that when
24 you're talking about merits the way you've got to do it is
25 you've got to have a local rule that's been adopted

1 through these procedures, and you can't get around it by
2 some oral practice or some general order, so that makes it
3 exclusive.
4 And then separately, if we want to have it,
5 is the question of whether or not there are some local
6 rules that don't need to go through this procedure,
7 because they don't affect it
8 CHAIRMAN BABCOCK: Anybody else have
9 comments about this?
10 HONORABLE SCOTT BRISTER: And what that
11 means to say is "no rule other than those that comply with
12 these rules."
13 MS. BARON: Well, I think you can argue that
14 you could adopt a local rule that complies with other
15 rules but hasn't been through the approval process. I
16 mean, it doesn't say --
17 HONORABLE SCOTT BRISTER: "No local rule,
18 order, or practice that does not comply with the
19 requirements of this rule."
20 MS. BARON: Right.
21 HONORABLE SCOTT BRISTER: That wouldn't
22 comply with the requirements of the rule, but again, I am
23 not sure you need to fix it, but that's what you mean to
24 say.
25 PROFESSOR ALBRIGHT: Should it be an

1 "unless" instead of "other than"? "No local rule, order,
2 or practice of any court can be applied in determining the
3 merits of any matter unless the local rules and amendments
4 complies with" --
5 CHAIRMAN BABCOCK: You're going to have to
6 speak up, Alex. We can't hear you.
7 PROFESSOR ALBRIGHT: "No local rule, order,
8 or practice of any court can be applied in determining the
9 merits of any matter unless it complies with the
10 requirements of this rule."
11 The point is that you don't want to have
12 courts issuing these blanket orders and then say, "This is
13 not a local rule. This is just an order that applies to
14 every case that gets filed in this court," right?
15 MS. BARON: Right.
16 MR. YELENOSKY: Well, couldn't we -- I mean,
17 again, this would be changing it and maybe fixing
18 something that's not a problem, but we don't say at the
19 beginning why you need to have a local rule. We just
20 start talking about procedure for adoption and then it's
21 almost an afterthought at the end, and we call it
22 "applicability," but really what we may be -- if we wanted
23 to change it, we would be saying up front is that
24 essentially that nothing that determines the merits can be
25 done except through a local rule.

1 Secondly, this is how you adopt a local
2 rule, and then go on down from there, because at the top
3 it just sounds like, well, if you want a local rule, you
4 can have one. You may adopt local rules, and at the
5 bottom as an afterthought we say, "If you're going to do
6 this, it's got to be a local rule adopted through this
7 procedure."
8 HONORABLE SARAH DUNCAN: If that's a motion,
9 I second it.
10 MR. YELENOSKY: Thank you. But I'm
11 sensitive to Chip's and Pam's concern about making too
12 many changes, but, I mean, that seems more logical to me.
13 HONORABLE SARAH DUNCAN: It's the whole
14 context. 2.3(c) it seems to me is the entire context for
15 everything else in the rule, and I can understand how just
16 chronologically it got tacked onto the end.
17 MR. YELENOSKY: Right.
18 HONORABLE SARAH DUNCAN: But it really is
19 the beginning point for everything that comes after
20 CHAIRMAN BABCOCK: How long has this been
21 here, Elaine?
22 PROFESSOR CARLSON: I think '84
23 CHAIRMAN BABCOCK: Since '84?
24 MS. BARON: I guess it was not carried over
25 from the statute. I mean for the old Rule 800 and

1 something.

2 CHAIRMAN BABCOCK: Did this language come

3 from this committee?

4 JUSTICE HECHT: Uh-huh.

5 CHAIRMAN BABCOCK: Justice Hecht says that

6 this language came from this committee.

7 JUSTICE HECHT: 6, the old 6, didn't we just

8 add that on in either '84 or '90?

9 MR. ORSINGER: You know, you could say that

10 this -- there is not an existing problem simply because

11 people are not appealing on the basis of a violation of

12 this rule, but there are definitely courts out there that

13 have standing orders that are equivalent to local rules

14 that are not in compliance and don't have the Supreme

15 Court permission, so if we don't want that as a matter of

16 policy, I think that's going on out there.

17 HONORABLE SARAH DUNCAN: Well, listen to the

18 comments to the 1990 change. "To make Texas Rules of

19 Civil Procedure timetables mandatory and to preclude use

20 of unpublished local rules or other," in quotes,

21 "'standing orders or local practices' to determine issues

22 of substantive merit," so I think that's precisely what it

23 was designed to do.

24 MR. ORSINGER: Well, "substantive merit"

25 bothers me because the procedure is where you're going to

1 get killed, not on substantive merit. You know, I've got
2 a case in a court in Houston, and Houston says your
3 Daubert hearing has to be ruled on by the pretrial
4 hearing. Well, I mean, that's fine, and there are
5 different judges have orders like that, but that is a
6 standing order in that court, and it's not in compliance
7 with this -- with the set of rules, and it doesn't have
8 the Supreme Court's permission. So I live with it,
9 obviously, but, I mean, if the policy is that judges
10 shouldn't be doing that then maybe we ought to, you know,
11 say they shouldn't be doing that. I mean, better than we
12 are.
13 CHAIRMAN BABCOCK: Any recollection about
14 how this came to be?
15 JUSTICE HECHT: Well, I remember some
16 discussion. I think it was in the '90 changes that some
17 members of the committee had had bad experiences with the
18 local rules, and they wanted to tone them down basically.
19 CHAIRMAN BABCOCK: Bill.
20 MR. EDWARDS: From my standpoint the worry
21 is not what the local rules are, whether they are approved
22 or not approved. It's whether you know about them or not.
23 I mean, you tell me what the rules of the game are I will
24 play the game, but, you know, I come in from out of town
25 and I don't know the little sides that you give in there

1 to get certain things done, you know, and somebody else
2 does, and I don't like that.
3 CHAIRMAN BABCOCK: Yeah, Alex.
4 PROFESSOR ALBRIGHT: Well, I have this on my
5 computer, so I have the advantage of being able to move
6 this around, and it really looks pretty good to have
7 applicability as 2.1 and then just use these exact words
8 so we are not messing with these words and then 2.2 is
9 procedure for adoption.
10 MR. YELENOSKY: Put it at the front
11 PROFESSOR ALBRIGHT: Yeah, you just put it
12 at the front.
13 MS. BARON: I want to make sure I
14 understand, Alex. So you're going to put a new 2.1 in,
15 which is now subsection (c)?
16 PROFESSOR ALBRIGHT: Right.
17 MS. BARON: And it would be titled
18 "applicability"?
19 PROFESSOR ALBRIGHT: Isn't that what you had
20 down here, "applicability"?
21 MS. BARON: And then 2.1 would be 2.2, 2.2
22 would be 2.3, and 2.3 would be 2.4?
23 PROFESSOR ALBRIGHT: Right.
24 MS. BARON: And we would change that to
25 "validity" and not "applicability"?

1 MR. YELENOSKY: You're talking about just
2 moving (c) up?
3 PROFESSOR ALBRIGHT: Maybe I was just -- all
4 I did was move (c).
5 MR. YELENOSKY: She was just going to move
6 (c) up.
7 MS. BARON: Right. That's what I
8 understood.
9 MR. YELENOSKY: And I wouldn't -- I mean,
10 applicability, it's under the subheading of "validity and
11 applicability," but that's not the concept, I don't think.
12 MS. BARON: It may be "exclusivity" is the
13 title for it.
14 MR. YELENOSKY: Yeah, "exclusivity" was what
15 I always thought was the concept.
16 PROFESSOR ALBRIGHT: I was just using your
17 words, but I have it all on my computer if you-all want to
18 play with it during a break.
19 MS. BARON: Well, hopefully we don't need to
20 do that. I think that would be fine
21 CHAIRMAN BABCOCK: Is that okay with -- so
22 the language would be the same?
23 MS. BARON: Well, I think we can talk about
24 the language, but I think there would be a new 2.1, which
25 is now subsection 2.3(c). It would have the word in front

1 of it, "exclusivity," period. And then Alex's language
2 suggestion -- if we're agreed on this as a concept, which
3 I am not clear on -- would shorten it and change it a
4 little bit, and it would now say, "No local rule, order,
5 or practice can be applied in determining the merits of
6 any matter unless it complies with the requirements of
7 this rule." Do you want me to read it again?
8 CHAIRMAN BABCOCK: Yeah.
9 MS. BARON: 2.1, "Exclusivity. No local
10 rule," comma, "order," comma, "or practice can be applied
11 in determining the merits of any matter unless it complies
12 with the requirements of this rule," period.
13 CHAIRMAN BABCOCK: How does everybody feel
14 about that? Carl?
15 MR. HAMILTON: Well, I join with Richard. I
16 think we ought to delete the phrase "in determining the
17 merits" and just say "applied in any case" and leave out
18 the merits aspect because it could be applied, as he said,
19 in procedural matters and get you. You don't know about
20 it
21 CHAIRMAN BABCOCK: Yeah. Buddy.
22 MR. LOW: I agree, because you have things
23 you say are procedural, substantive, and you get into all
24 kind of arguments, what is the limitation; and when you
25 talk about the merits, I would delete that.

1 CHAIRMAN BABCOCK: So you would strike "in
2 determining the merits of any matter"?
3 MR. LOW: Right. If we're going to have it
4 as it is, because then you get into a big argument about,
5 well, that's not really the merits.
6 CHAIRMAN BABCOCK: "No local rule, order, or
7 practice of any court can be applied unless it complies
8 with the requirements of this rule." That's how you would
9 say it?
10 MR. LOW: I don't really like that, but I
11 don't like "merits" more.
12 JUSTICE HECHT: I think the idea, though, is
13 the "local" is supposed to modify in some way, "rule,
14 order, or practice"
15 MR. LOW: Right.
16 JUSTICE HECHT: So it's not really just any
17 order, but it's a standing order, as the comment indicates
18 is the problem. You could put -- the trial judge can
19 always have a case-specific order, and he can use the same
20 or similar order that he's used in a thousand other cases,
21 and that's not a problem. The problem is if you have
22 something out on the bulletin board that says "standing
23 order" that doesn't comply with this, that's not in your
24 case. It's just supposed to govern everything.
25 MR. LOW: But an order that says you do this

1 within so many days or that, is that merits? I mean, what
2 does that mean? It doesn't really get to the merits. It
3 just means when you have got to be at the courthouse and
4 make your announcement or do this or that, and I think
5 when you get into micromanaging, that's what I don't like.
6 The trial judges, they know their issues and so forth.
7 You can't do that. You have to have broad rules, and I
8 don't see anything wrong with the way it is now. That's
9 the way it's been applied.
10 MR. ORSINGER: Well, I will give you an
11 example. The Dallas family law judges decided a few years
12 ago that they didn't like people with children moving out
13 of Dallas County, so they just put this thing on the door
14 of their courts that said that before they will approve an
15 agreed decree of divorce it has to include the language
16 that you can't move out of Dallas County, and there were
17 three or four -- well, there were a couple of Dallas
18 judges that didn't believe that, but the rest of them all
19 did that, and they even had a stamp, and they would stamp
20 it on their decrees before they -- or when they were
21 signing them.
22 CHAIRMAN BABCOCK: Did it say, "This is a
23 final judgment"?
24 MR. ORSINGER: No. You can control
25 children. You just can't control adults. And so it got

1 into an uproar. It really did, and finally somebody went
2 to the Legislature, and now the Legislature has imposed on
3 everybody, but my point was is that the Dallas -- some of
4 the Dallas district judges wouldn't sign an agreed decree
5 of divorce without that clause in it. Well, that's a
6 local rule. It's a standing order. It didn't comply with
7 the Supreme Court requirements or anything, and it applied
8 to some of the courts and not all of them.
9 And, I mean, I guess that's okay, but that's
10 the kind of thing we are trying to eliminate. We don't
11 want special procedures where a few judges get together
12 and say, "This is the way the law is applied in our
13 courts," and I don't know, maybe that affected the merits.
14 I don't know. Is that the merits? I guess it is the
15 merits. I don't know.
16 PROFESSOR CARLSON: It's a substantive
17 right.
18 MR. ORSINGER: Well, I sure would hate to
19 say, well -- I'm in an argument with somebody who just,
20 you know, nailed me to the wall, and I'm trying to
21 convince them that it's the merits and not a procedural
22 thing and they look at it as a procedural thing.
23 HONORABLE SARAH DUNCAN: To me the
24 interesting thing is that the Dallas -- this rule has been
25 in effect since 1990, and apparently it's not very

1 effective in precluding the use of standing orders.
2 MR. ORSINGER: Well, let me tell you, I have
3 never gone to a district judge and said, "I'm not going to
4 obey your local rule because you don't have the approval
5 of the Supreme Court." I have never done that
6 CHAIRMAN BABCOCK: Well, that wouldn't be
7 the approach, Richard. You say, "Perhaps you're unaware
8 of this."
9 Well, Judge Brown and Judge Brister, do
10 you-all have any thoughts about this?
11 HONORABLE HARVEY BROWN: I mean, I'm
12 concerned about if it's worked for the language so far,
13 and Elaine is telling us that it has worked, that there's
14 case law that says scheduling orders are okay, that if we
15 take that away I'm not sure what that does to that
16 pre-existing case law, frankly
17 CHAIRMAN BABCOCK: Right. And that's what
18 worries me.
19 HONORABLE HARVEY BROWN: I do think we need
20 the ability to have scheduling orders, and they need to be
21 standing scheduling orders in some cases.
22 MS. BARON: Well, I think there's a
23 difference between a scheduling order with a particular
24 docket number at the top of it and scheduling orders that
25 apply to every case that comes in the courthouse door, and

1 that's what this is trying to draw the distinction
2 between.
3 HONORABLE HARVEY BROWN: What about -- I
4 mean, we have a thousand Phen-Phen cases. We have a
5 standing order for Phen-Phen cases.
6 HONORABLE SCOTT BRISTER: Yeah, standing
7 orders on asbestos don't have a case number. They are not
8 filed in any particular case. I'm not sure where they're
9 filed. They are just around, and everybody that does
10 those cases has a copy.
11 HONORABLE SARAH DUNCAN: Well, you hope.
12 Right? I mean, that to me is precisely what this rule is
13 supposed to preclude.
14 HONORABLE HARVEY BROWN: Do we want the
15 Supreme Court to have to micromanage every asbestos order
16 across the state that's going to have scheduling orders?
17 HONORABLE SARAH DUNCAN: No, but if it's an
18 order that applies to a particular case, shouldn't there
19 be a copy of that order in the file --
20 HONORABLE HARVEY BROWN: Oh, there is.
21 HONORABLE SARAH DUNCAN: -- and shouldn't the
22 attorneys be given --
23 HONORABLE SCOTT BRISTER: I'm not sure that
24 there is.
25 HONORABLE HARVEY BROWN: Yeah, we have

1 copies in the files.
2 HONORABLE SCOTT BRISTER: Asbestos cases do?
3 HONORABLE HARVEY BROWN: Not in the
4 individual files, but there is a master file.
5 JUSTICE HECHT: I remember seeing the
6 asbestos order some years ago, but it was mostly how the
7 case got managed. I mean, the problem here would be if
8 you had a standing order in all Phen-Phen cases that
9 discovery must be completed in three months or all
10 dispositive motions must be filed within some period of
11 time versus some way that the management -- "We're going
12 to try them in these courts on these months, this way."
13 "This judge is going to handle this many of them" or
14 something like that.
15 HONORABLE HARVEY BROWN: Well, we do -- I
16 mean, just to be direct about it, Phen-Phen cases, an
17 order that was negotiated by probably 50 attorneys and a
18 three-judge panel has motions for summary judgment be
19 filed by X date before trial, Daubert motions have to be
20 filed by X days, experts have to be designated by X days.
21 Of course, there is good cause exceptions, but they govern
22 a thousand cases.
23 JUSTICE HECHT: The problem here, I mean, I
24 can tell you the Supreme Court has no desire to
25 micromanage or get involved in those kinds of issues, but

1 it wants to be sure that there's not issue. For example,
2 we just had a local rule issue from El Paso County the
3 other day. They proposed a local rule that you either
4 have to -- if you appear in El Paso, in a court in El
5 Paso, you either have to subscribe to the legal services
6 payment requirements of the local Bar or you have to hire
7 local counsel who does, and as much as we're in favor of
8 legal services, I don't know that you can just put up a
9 toll booth up in front of the courthouse and charge
10 everybody for coming in, but it would just be to keep
11 stuff like that out.
12 Some years ago some of the family courts
13 wanted to do some sort of mandatory mediation or
14 counseling, and everybody that -- before you could get a
15 divorce you had to go through this particular course or
16 training, or I don't know exactly what it was, and we were
17 concerned about that, but the family judges said, "No, no.
18 This is going to work," and "Let us try it at least," and
19 so we did. It's just to keep stuff like that out of local
20 practices, not to decide that 45 days is too many or too
21 few or something like that.
22 MS. BARON: But it strikes me that orders
23 like that that apply to any new case that's filed by
24 anybody from anyplace, who may or may not know about it,
25 should be a local rule and should go through the process,

1 but maybe other people have different views, but there is
2 certainly an opportunity for people to get blindsided by
3 some deadlines in those standing orders that they don't
4 know about, if all they -- if they came from Massachusetts
5 and have a copy of the Texas Rules of Civil Procedure.
6 HONORABLE HARVEY BROWN: Well, as a
7 practical matter there isn't because they are suing the
8 same defendants, and there's an order in there to give a
9 copy to any new attorneys, but I understand your point
10 CHAIRMAN BABCOCK: Buddy then Richard.
11 MR. LOW: Yeah, you know, there's a fine
12 line. The judges often get together in rural areas where
13 they have -- and they kind of decide how they are going to
14 do certain things, and if you go there you're not going to
15 know that, you know, if you go from outside, but that's
16 just their practice. All right. And it is important.
17 You know, you've got to meet those deadlines or do those
18 things. That's just the way they are going to handle it.
19 They don't write it as a rule. It doesn't come through
20 the Supreme Court, but if you go there you don't tell
21 them, "Wait, you can't to do that because that's not in
22 writing."
23 It's under the guise of the real rules, the
24 big rules, that they can set these things; and so then
25 when you have that going on and then you have, quote,

1 rules that you write. There's a fine line between what is
2 just practice in asbestos cases or Phen-Phen or something
3 and what is a really rule that should be written, and I
4 don't know that I can draw that line. I don't know. I
5 know where that line goes is what I'm saying. And that's
6 why I think nobody really does, and it seems like
7 people -- it's working pretty good right now.
8 CHAIRMAN BABCOCK: Richard.
9 MR. ORSINGER: You know, in San Antonio we
10 have a rule that the judges won't sign a decree of divorce
11 involving children unless you have seen a particular
12 videotape and have a certificate to prove that, and you've
13 literally got to show it to them if you want to get
14 divorced, and now that you mention it, you know, that's
15 not part of a formal local rule. That's just if you want
16 to get divorced you have to watch that videotape, and is
17 that -- should we be having that, and every community has
18 their own idea of what videotape to watch, or should we
19 not have that?
20 CHAIRMAN BABCOCK: Well, is there any
21 appetite on our committee to eliminate this provision?
22 MR. ORSINGER: No, I think we ought to beef
23 it up.
24 HONORABLE SARAH DUNCAN: Just the opposite
25 CHAIRMAN BABCOCK: Yeah. Somewhat of a

1 rhetorical question, but --
2 Well, is there appetite to beef it up?
3 MS. JENKINS: Yes.
4 HONORABLE SARAH DUNCAN: Yes. Yes.
5 MR. HALL: I wonder if even adding the term
6 of art "standing order" would be helpful, because that
7 seems to be, you know, a term of art that somehow district
8 judges are carving out from the rest of this, just to
9 highlight the issue.
10 CHAIRMAN BABCOCK: Well, what does that do
11 to the Phen-Phen cases or the asbestos cases?
12 MR. HALL: Well, standing order purportedly
13 applicable to all cases, the standing order that's posted
14 on the bulletin board but doesn't go through the process
15 CHAIRMAN BABCOCK: Well, how does that
16 differ from the word "order" that was in this?
17 MR. HALL: Well, I don't think it does, but
18 I'm just saying I think it might bring attention to the
19 district court judges who are otherwise thinking they can
20 for whatever reason get around it by just using a standing
21 order.
22 CHAIRMAN BABCOCK: Elaine, do you think that
23 the case law as it exists now takes into account the
24 Phen-Phen cases and the asbestos cases?
25 PROFESSOR CARLSON: I think it does under

1 Rule 166, but you have to give notice, like you've
2 described, to every party or lawyer brought in.
3 HONORABLE HARVEY BROWN: Those cases, can I
4 ask, do they also talk about Rule 3? In other words, has
5 anybody raised this argument that Rule 3 trumps?
6 PROFESSOR CARLSON: I think the attack was
7 made on scheduling orders as being inconsistent with the
8 statewide rules, in particular with things like discovery
9 deadlines, my recollection. And those were upheld under
10 Rule 166, so that is a pre-trial order. That's not a
11 local rule, and under Rule 166 the court had the authority
12 to modify the deadlines
13 CHAIRMAN BABCOCK: Okay. Carl, just one
14 second. Is there appetite to by rule overturn the
15 holdings of those cases that Elaine has discussed? People
16 are shaking their head "no."
17 Carl.
18 MR. HAMILTON: Can't we just add a phrase to
19 that that this doesn't apply to case-specific orders? It
20 applies to local rules, practices, and standing orders,
21 but not to case-specific orders
22 CHAIRMAN BABCOCK: Yeah, Alex.
23 PROFESSOR ALBRIGHT: Or it doesn't apply
24 to -- it doesn't apply to orders under Rule 166 or Rule --
25 how quickly we forgot. Rule 190.

1 HONORABLE SCOTT BRISTER: 190.3 or 4.
2 PROFESSOR ALBRIGHT: Right. It could be any
3 order -- it would be 191, any 191 order or 190.4.
4 MS. BARON: Could we do that by a comment?
5 CHAIRMAN BABCOCK: Yeah. That's probably
6 better.
7 MS. BARON: And the page you have does not
8 have the comments on here. We were just trying to fit it
9 on one page. It's not like the comments, old comments,
10 would go away, but we could add a new comment that
11 basically says this rule is not intended to bar scheduling
12 and similar orders issued under whatever rule numbers
13 happen to be --
14 MR. EDWARDS: Why do you want to just make
15 it specific rule numbers? Under the Rules of Civil
16 Procedure.
17 MS. BARON: Right. That's what I was
18 saying.
19 MR. EDWARDS: Rather than just by numbers
20 CHAIRMAN BABCOCK: Okay.
21 MR. HAMILTON: I would like to move that we
22 delete the phrase "determining the merits of."
23 MR. ORSINGER: Second
24 CHAIRMAN BABCOCK: Okay. Second that. Any
25 discussion about that? Delete the phrase "in determining

1 the merits of any matter."

2 MR. HAMILTON: Not the word "in." Just

3 "determining the merits of."

4 CHAIRMAN BABCOCK: Okay. It's been moved

5 and seconded. No discussion.

6 How many people are in favor of deleting the

7 phrase "determining the merits of"? Raise your hand.

8 How many are against? It carries by a vote

9 of 18 to 4. So we will strike that.

10 MS. BARON: Okay. Can I read the provision

11 that I think we've got now?

12 CHAIRMAN BABCOCK: Yeah.

13 MS. BARON: 2.1, "Exclusivity. No local

14 rule, order, or practice of any court can be applied in

15 any matter unless it complies with the requirements of

16 this rule."

17 CHAIRMAN BABCOCK: Alex.

18 PROFESSOR ALBRIGHT: I move to delete "of

19 any court."

20 MR. YELENOSKY: Yeah.

21 MS. BARON: That's fine.

22 CHAIRMAN BABCOCK: Okay. Everybody okay

23 with that?

24 Okay. Read it again now, Pam.

25 MS. BARON: 2.1, "Exclusivity. No local

1 rule, order, or practice can be applied in any matter
2 unless it complies with the requirements of this rule."
3 CHAIRMAN BABCOCK: Elaine.
4 PROFESSOR CARLSON: So what would happen to
5 the -- and I know, Judge Hecht, we saw a lot of those when
6 we looked at the local rules back in the Eighties. What
7 would happen to like rules of decorum that a particular
8 judge might adopt? And there were a lot of them. You can
9 do this, but you can't do this. You've got to wear a suit
10 and tie, all of that.
11 MR. YELENOSKY: That was the one example I
12 could think of under the old formulation that wouldn't
13 affect the merits, and have we now included that by taking
14 out "the merits"?
15 HONORABLE SCOTT BRISTER: A lot of judges
16 have an unwritten rule if you want to withdraw or a
17 continuance your client has to sign on the request for
18 continuance to make sure it's not just the lawyer. It's
19 to make sure the judge doesn't get blamed for the
20 continuance because the lawyer wants -- tells me the
21 client needs it and tells the client "The judge can't get
22 to us."
23 PROFESSOR CARLSON: Well, the way I read the
24 scheme of this is you have the statewide rules or the
25 Rules Enabling Act. The local rules are like the gap

1 fillers for what's not covered by the statewide rules, but
2 Rule 166 allows for case-specific management, contrary to
3 the rules, and then judges on an individual basis, at
4 least according to the case law, do have some right to --
5 have the right to adopt some things like local rules of
6 decorum under inherent power and controlling their court.
7 Now, where you draw the line there, like Buddy said a
8 moment ago, is sometime not clear at all
9 CHAIRMAN BABCOCK: Could you put in a
10 comment that this is not intended to affect rules of
11 decorum?
12 MR. ORSINGER: Well, this is just the Rules
13 of Procedure, and so not chewing gum and not chewing
14 tobacco and not reading magazines really is not a
15 procedural question, and it seems to me like a rule of
16 decorum wouldn't violate this because it's really not a
17 procedure.
18 CHAIRMAN BABCOCK: Buddy.
19 MR. LOW: We had -- our local rules in
20 Beaumont included a phrase about lawyers being gentlemen
21 and not hostile to each other or something like that, and
22 I remember the Supreme Court wouldn't sign on it. They
23 didn't want to get involved in that. That was struck out.
24 You know, I mean, and we understood, you know, the court
25 -- when you start drawing all these things, you'll wear a

1 tie or you do that, the Supreme Court probably has better
2 things to do than get involved in that, so that's not
3 something that you've necessarily changed that you're
4 going to see in your local rules, and that's just going to
5 be practice of what the people want.
6 CHAIRMAN BABCOCK: Yeah.
7 MS. BARON: Go ahead, Sarah.
8 HONORABLE SARAH DUNCAN: Because, as Buddy
9 says, the line is not only difficult to draw, but it can
10 shift.
11 MR. LOW: Right.
12 HONORABLE SARAH DUNCAN: Richard, if some
13 judge had a rule or practice or standing order that if you
14 have a cell phone in my courtroom I will sign a judgment
15 against your client, there it may be a rule of decorum,
16 but it's moved into a rule of procedure --
17 MR. ORSINGER: Sure, it would if it hurts a
18 client.
19 HONORABLE SARAH DUNCAN: -- and a case
20 dispositive matter, so I'm not sure you can really --
21 MR. ORSINGER: Well, then by ruling on
22 somebody's rights as a litigant you've suddenly made it a
23 procedural thing, but there's one judge that has a policy
24 that if your cell phone goes off his bailiff will take
25 custody of it and you don't get it back, and there's

1 others that will fine you, and you just have to know who
2 they are.
3 MS. BARON: I'm wondering if, Elaine and
4 Sarah, your concerns could be resolved if we put part of
5 what we struck back in, which is we took out "in
6 determining," and so now it says it can't be applied in
7 any matter, but I think what we're concerned about is more
8 local rules in determining a matter, that have some
9 consequence on the matter, rather than how you're supposed
10 to dress when you appear in the court. Would that help --
11 HONORABLE SARAH DUNCAN: It would help.
12 MS. BARON: -- or would it just create more
13 confusion?
14 CHAIRMAN BABCOCK: Steve.
15 MR. YELENOSKY: Well, and, I mean, who's
16 going to contest a true rule of decorum? They are going
17 to contest a supposed rule of decorum that causes them to
18 lose the case because the judge didn't like the cell phone
19 and therefore signed a judgment, but if it's a true rule
20 of decorum who's going to contest it? Do we really need
21 to worry about it?
22 JUSTICE HECHT: I mean, this has not caused
23 a problem, and you-all don't to have to be -- I don't
24 think the problem can be solved. On the one hand, you
25 don't want a standing order that unfairly takes advantage

1 of the litigants. On the other hand, you might as well
2 know that if a trial judge says, "I am not going to grant
3 a divorce unless you've seen this videotape," that's
4 always going to be important to him, you might as well
5 know that that's the case because you can't stop him from
6 saying, "Have you seen the videotape?"
7 "No."
8 "Well, then I am not granting a divorce."
9 Unless you want to take that up
10 CHAIRMAN BABCOCK: Yeah, mandamus.
11 MR. ORSINGER: Yeah, you can appeal that,
12 but --
13 MS. BARON: I think this rule, though, is
14 geared toward those situations in which you don't know
15 about the local rules, you get your pleading struck, you
16 get a default against you, or something terrible happens,
17 and the case is over, and it goes up on appeal, and you're
18 saying, "This local rule that I didn't know about because
19 it wasn't approved by the Supreme Court and wasn't made
20 available has deprived my clients of substantive rights,"
21 and we want to be able to correct that situation. I don't
22 think we are going to be able to correct all situations,
23 but I think we are more concerned about rules that affect
24 the determination of the matter and not just any rules
25 applied in any matter, and if there's interest, I'd like

1 to put those two words back in.
2 MR. ORSINGER: I'm happy with that
3 CHAIRMAN BABCOCK: Yeah. I think that's
4 good. "In determining any matter"?
5 MS. BARON: Yes.
6 CHAIRMAN BABCOCK: So now it would read
7 "2.1. Exclusivity. No local rule, order, or practice can
8 be applied in determining any matter unless it complies
9 with the requirements of this rule." Okay?
10 MS. BARON: And then, Alex, how are we
11 doing?
12 PROFESSOR ALBRIGHT: It's done
13 MS. BARON: Okay. Alex has drafted a
14 comment
15 PROFESSOR ALBRIGHT: Friendly amendment to
16 "applied in determining," whatever the language was. What
17 if it said, "No local rule, order, or practice, can be
18 applied to determine any matter"?
19 HONORABLE SARAH DUNCAN: No.
20 PROFESSOR ALBRIGHT: No?
21 MR. YELENOSKY: That's too narrow, I think,
22 because it seems to eliminate procedural rules.
23 MR. ORSINGER: It's only case dispositive
24 CHAIRMAN BABCOCK: The friendly amendment
25 turned out to be hostile.

1 PROFESSOR ALBRIGHT: Okay. Excuse me. I
2 withdraw it.
3 CHAIRMAN BABCOCK: Judge Brown.
4 HONORABLE HARVEY BROWN: What does
5 "practice" mean? I mean, I handle certain motions certain
6 ways. It's just kind of my practice. I have a routine.
7 It's not a written order. It's something you learn about
8 when you come into my court. I say, "Well, I have had a
9 thousand of these already and I kind of do them the same
10 way. Is there some reason I shouldn't do it that way?"
11 And that's my, quote, practice, but it's not enforceable
12 until I sign an order, frankly.
13 MS. BARON: Then that's fine.
14 HONORABLE HARVEY BROWN: But even if my,
15 quote, practice is inconsistent, it's the order that I
16 sign that's what's important. It's not the way I handle
17 it. It's what I actually sign, so I think the word
18 "practice" doesn't add anything except confusion.
19 CHAIRMAN BABCOCK: Well, isn't that designed
20 to get at the county or the counties where the judges get
21 together and have a cup of coffee and say, "Hey, here's
22 how we're going to do it, and we're not going to tell
23 anybody"?
24 MR. HALL: Exactly
25 CHAIRMAN BABCOCK: And it's done in a way

1 that's inconsistent with the rules?
2 MR. LOW: Under Lundell and Comanche
3 practice and custom are kind of -- in fact, if that's your
4 custom and that's what you're going to do then that's what
5 we want people to know.
6 HONORABLE HARVEY BROWN: Well, let's go back
7 to Justice Hecht's and Richard's divorce decree. I have a
8 practice that I will not sign a divorce decree until you
9 see the videotape. Okay. Now, that practice isn't
10 written anywhere. What's appealed on that? How is it
11 inconsistent for me to have a routine, if you will, of
12 what I expect the litigants to do?
13 It seems like to me what the problem is is
14 when I articulate that in some type of order or I refuse
15 to do something and say something on the record that can
16 be mandamused, but just my having a routine does not
17 itself violate any rule.
18 CHAIRMAN BABCOCK: Steve.
19 MR. YELENOSKY: Well, I don't think we're
20 going to solve that one with language either. I think
21 that probably some things that nobody would object to
22 would meet a definition of practice, and some things that
23 people would object to will also meet the definition of
24 practice, and I don't think by defining "practice" one way
25 or the other we're going to solve that. It's going to

1 sift out by the practices that truly are objectionable
2 enough and determinative enough that somebody wants to
3 make a beef about them either at the time or when they
4 lose the case.
5 CHAIRMAN BABCOCK: Yeah. And your practice
6 is going to find expression in individual cases, as you
7 say. For example, let's say just in your head you say,
8 you know, as a practice, as a general rule I'm going to
9 limit voir dire to 60 minutes per side.
10 HONORABLE SCOTT BRISTER: Generous.
11 CHAIRMAN BABCOCK: It seems in your court.
12 MR. TIPPS: Paula heard that all the way
13 from Dallas.
14 CHAIRMAN BABCOCK: But if you impose that in
15 a case then that's okay.
16 HONORABLE HARVEY BROWN: Right, but it's
17 when I impose it in a case that I have done something
18 wrong.
19 CHAIRMAN BABCOCK: Well, I don't know that
20 you have, unless the rule says --
21 HONORABLE HARVEY BROWN: Well, yeah, I mean,
22 arguably done something wrong if somebody perfects the
23 point. I just can't think of some practice that causes
24 somebody harm until I sign an order or do something
25 effectuating that practice for that case.

1 CHAIRMAN BABCOCK: Probably as you're
2 articulating it, but what I heard other lawyers saying is
3 that it's when the judges of the county get together and
4 they say, "We're going to have this practice, we're not
5 going to tell anybody," and it's kind of a countywide, not
6 case-specific, local practice.
7 MS. BARON: If you don't use 13-point font
8 in your pleadings they're going to be struck.
9 HONORABLE HARVEY BROWN: What happens is
10 it's struck. That's when they have done something wrong.
11 MR. HALL: Well, but in Richard's example
12 it's a failure to sign an order is the practice. It's
13 that the judge won't sign the decree of divorce until
14 you've watched this video, so the judge hasn't actually
15 done anything. He just refuses to sign the decree.
16 HONORABLE HARVEY BROWN: He's refused to act
17 in a particular case, though. Again, it's not his
18 practice that's being appealed. It's that case he won't
19 sign an order that you mandamus. You don't mandamus
20 because what he's done in other cases. You mandamus
21 because of what he did in this case.
22 MR. GILSTRAP: You can mandamus him because
23 he's following the practice. That could be the basis of
24 the mandamus. Not that it's particularly wrong in this
25 case, but he's following a practice that's contrary to the

1 rule.

2 HONORABLE SARAH DUNCAN: But I think where
3 the rule is headed, as I've always understood it, is that
4 litigants shouldn't have to go mandamus you to sign their
5 divorce judgment because they haven't watched the
6 videotape or go through an appeal to get their 12-point
7 type font pleading reinstated. You need -- if you have
8 got practices that affect -- that are a consequence to the
9 litigation, you need to give the lawyers and the litigants
10 notice that those are going to be applied in their case.

11 HONORABLE HARVEY BROWN: I don't disagree
12 with that.

13 HONORABLE SARAH DUNCAN: So that they can
14 avoid having their 12-point pleading stricken, if that's
15 what they want to do, if they don't want to challenge that
16 practice.

17 HONORABLE HARVEY BROWN: But this rule does
18 much more than that, and that's my issue with it. It
19 sounds like I'm losing so I'm about to shut up, but, for
20 example, we have a judge in Harris County who has bad
21 vision, no longer on the bench, but he wanted larger than
22 12-point font. Now, does he have to go to the Supreme
23 Court to get approval to have an order that says, "I want
24 more than 12-point font"? I think he just has to post it
25 and let everybody know. If it comes in wrong, his clerk

1 calls and says, you know, "We need it in 15-point font."
2 I don't think we should be bothering the Supreme Court
3 with every, quote, little practice.
4 JUSTICE HECHT: No. But the problem is --
5 the problem is not that. The problem is if you don't know
6 that and you submit your response to the motion for
7 summary judgment in smaller type and they say, "Well, it's
8 too late. It was the wrong type. It's too late. You're
9 out. No response. You're gone." And that's what you
10 don't want to have happen.
11 It seemed like to me Luke or somebody had
12 had an experience where he shows up for trial and they
13 say, "Well, you didn't announce ready," and he said,
14 "Well, I didn't know I was supposed to announce ready,"
15 and they said, "Well, oh, yeah. Everybody in this county
16 always announces ready on Thursday before Monday." Well,
17 you know, "Nobody told me." They say, "Well, that's too
18 bad. We get rid of a lot of cases that way."
19 And that's -- it's not a bad practice to
20 announce on Thursday or Wednesday or any day. It's just
21 that the consequences of that can't be other than, you
22 know, come the next time or you should have known or
23 whatever.
24 HONORABLE HARVEY BROWN: Well, this will be
25 my last comment, but then wouldn't that be fixed by a

1 notice provision?
2 MR. YELENOSKY: Yeah.
3 HONORABLE HARVEY BROWN: Can't we fix
4 practices by a notice provision rather than outlawing
5 them?
6 MS. BARON: That's what this is.
7 MR. YELENOSKY: Dare I suggest the
8 uncoupling approach to this as well, because we are
9 talking about two different things. You're saying --
10 people are saying everybody needs to know about that, but
11 we're also saying the Supreme Court doesn't necessarily
12 need to review it. So we have some things like larger
13 font that shouldn't be a practice in the sense of no
14 notice provided but also shouldn't have to go through the
15 Supreme Court.
16 CHAIRMAN BABCOCK: There are practices that
17 even with notice would be contrary to the rules --
18 MR. YELENOSKY: Right.
19 CHAIRMAN BABCOCK: -- and not sanctioned.
20 HONORABLE SARAH DUNCAN: Well, every local
21 rule is going to become a practice.
22 CHAIRMAN BABCOCK: Yeah. Right. That's
23 right.
24 PROFESSOR ALBRIGHT: Well, it seems to me
25 that this is all fixed by Pam's including "in determining

1 in the matter." If you send in a 12-point type pleading
2 and it's not struck, nothing is determined. If you just
3 say, "Okay, you filed your response timely, but we need it
4 in bigger type. Can you send us another copy?" then
5 that's a practice that doesn't determine anything.
6 MR. HALL: Right.
7 PROFESSOR ALBRIGHT: If you appear in pants
8 instead of a dress and the judge says, "Next time wear a
9 dress," or "We're continuing this hearing until next
10 week," nothing is determined. If I wear pants and the
11 judge says, "You lose," then that rule determines the
12 matter and then -- I'm not sure. You know, I think we
13 want notice of all these things. We want it on the
14 bulletin board, but is that something that these rules
15 need to say, anything a judge thinks needs to be on the
16 bulletin board? I don't think we want to get into that
17 kind of detail.
18 CHAIRMAN BABCOCK: Yeah. I agree. Okay.
19 Any other comments?
20 PROFESSOR ALBRIGHT: Yes, I have my comment
21 CHAIRMAN BABCOCK: Didn't you have a comment
22 to the rule?
23 MS. BARON: Alex has written a comment.
24 PROFESSOR ALBRIGHT: Comment, "This rule
25 does not prevent orders applicable to specific cases that

1 comply with these rules." I guess that --
2 MR. YELENOSKY: "Orders that comply"?
3 PROFESSOR ALBRIGHT: "This rule does not
4 prevent orders that comply with these rules applicable to
5 specific cases, including Rules 166, 190, and 191." That
6 needs to move.
7 The three things are the rule doesn't
8 prevent orders that apply to specific cases and the orders
9 that comply with these rules, including Rules 166, 190,
10 and 191. And the reason I said "including" is because in
11 case there are some other ones in there.
12 CHAIRMAN BABCOCK: Yeah. I don't like the
13 idea of referencing specific rules.
14 MR. LOW: Specific rules
15 CHAIRMAN BABCOCK: I think your first
16 sentence is just -- is sufficient.
17 MR. EDWARDS: Yeah. The way that's done the
18 order has to comply with all three rules.
19 CHAIRMAN BABCOCK: Yeah. Yeah.
20 PROFESSOR ALBRIGHT: "This rule does not
21 prevent orders that comply with these rules." You want to
22 say -- is there a sense of wanting to say "applicable to
23 specific cases"?
24 MR. LOW: I think what you want to avoid is
25 somebody saying, "Well, wait a minute, you can't have a

1 scheduling order that" --
2 CHAIRMAN BABCOCK: Right.
3 MR. LOW: -- "we're going to apply in every
4 asbestos case" or something like that
5 CHAIRMAN BABCOCK: Right.
6 MR. LOW: And you want to make that clear,
7 but when you start being specific on one thing you exclude
8 maybe something else that you don't intend to exclude
9 CHAIRMAN BABCOCK: You know, if the case law
10 has already taken care of this, why do we even need a
11 comment? I mean, the more you start adding to that --
12 MR. LOW: I wouldn't add one.
13 MS. JENKINS: I wouldn't
14 MS. BARON: Well, that's fine. I thought
15 the will was that we wanted a comment, but if we don't,
16 I'm quite happy not to have one.
17 CHAIRMAN BABCOCK: Anybody else? Can we --
18 the changes I have is that we have added this paragraph
19 2.1 and then we have renumbered and then we struck the
20 words "to the members of the Bar" in what used to be 2.2,
21 availability, now will be 2.3, availability, and that's
22 the only changes I have. Is that what you show?
23 MS. BARON: Yes. That's right.
24 CHAIRMAN BABCOCK: Anybody want to move the
25 adoption of this rule as amended?

1 MR. HALL: So moved.
2 MR. LOW: Second
3 CHAIRMAN BABCOCK: Okay. All in favor of
4 adopting this rule as amended raise your hand. And
5 opposed?
6 25 to 12 it is adopted. Thanks, Pam. Very
7 well done.
8 MR. TIPPS: We're going to start challenging
9 practices in your court on Monday.
10 HONORABLE HARVEY BROWN: I look forward to
11 it.
12 MR. TIPPS: You've had your last
13 opportunity.
14 CHAIRMAN BABCOCK: Next, Buddy.
15 MR. LOW: All right. You-all sit back and
16 relax. Your evidence subcommittee has done such a good
17 job you won't have to -- really going to be smooth. Do
18 each of you have the packet here? And I put it in the old
19 format. You will see 103 was a comment that was proposed
20 to us by the Supreme Court -- the State Bar Committee; and
21 all they wanted to do was to clarify the preservation of
22 error and obtaining a ruling of the trial court by making
23 a reference to the Rules of Appellate Procedure; and my
24 committee felt like, you know, that's further information
25 and they recommended it and we went along with it. It's

1 on Tab 1, under Tab 1.
2 CHAIRMAN BABCOCK: So this would just be a
3 comment to Rule 103?
4 MR. LOW: Right. That's all.
5 CHAIRMAN BABCOCK: Okay. Anybody have any
6 questions or comments about this?
7 MR. LOW: And we checked out we did refer to
8 the proper rules.
9 CHAIRMAN BABCOCK: All right. Anybody
10 opposed to making this change? I hear no opposition, so
11 that will pass unanimously.
12 MR. LOW: The second one is comments under
13 Tab 2. Again, the State Bar Advisory Committee -- the
14 comment referenced articles of the Code of Criminal
15 Procedure, and they wanted a reference to -- there are
16 specific things involving a crime against a child under
17 the age of 17, and so we merely point out and reference
18 that and refer to Article 3837 of the Code of Criminal
19 Procedure of certain acts involving that child. Again,
20 it's just an informational thing
21 CHAIRMAN BABCOCK: Okay. Any comments,
22 questions about this? Any opposition? Then this will
23 pass unanimously.
24 MR. LOW: The third one was referred by
25 Justice Hecht, and that has to do with something that

1 we've already done, and that is not disclosing -- when
2 you've got your expert, not disclosing certain things
3 unless the probative value outweighs the prejudicial
4 effect, and we had already addressed that in 705 back in
5 1998, and you'll see under your Tab 4 is the 703. Tab 5
6 is 705 that we made the change effective in 1998, so
7 that's really something that was taken care of, and we
8 didn't recommend fooling with it again.
9 CHAIRMAN BABCOCK: Any opposition to that?
10 Then that recommendation will pass unanimously.
11 MR. LOW: Next is 409, the Texas Bar
12 Committee, and we have 409 which says medical and similar
13 expenses, if you pay medical or similar expenses, it's not
14 admissible and so forth. The committee wanted to include
15 other payments, not just medical, because the policy is
16 the favor of being able to pay without being prejudiced by
17 it, and that would be under the next tab, and you'll see
18 under Tab 6 is the way the rule would read now, and then
19 under that is a redlined version, you see what we've
20 changed. We've added "any damages or expenses."
21 The example, I had a client who had -- a man
22 was killed on his premises, and he wanted to go and just
23 give that widow some money. Just he didn't know if he was
24 liable or not. He just wanted to go give her some money
25 because, you know, for the funeral or for everything.

1 Well, the other lawyer -- her lawyer didn't want him to do
2 that because that might make him -- so we agreed that it
3 wouldn't be admissible. It was just a gift, but my
4 committee agreed with this rule that it would include
5 damages.
6 CHAIRMAN BABCOCK: Okay. Bill, you have a
7 comment about this?
8 MR. EDWARDS: Isn't there a statute that
9 says any advance payments of any kind is not admissible?
10 I thought there was.
11 MR. LOW: There may be. It wasn't called to
12 our attention in our committee.
13 MR. EDWARDS: I thought there was a statute
14 that affected this.
15 CHAIRMAN BABCOCK: John Martin.
16 MR. MARTIN: I think they repealed that
17 statute and put it in the Rules of Evidence.
18 MR. EDWARDS: Is that right? I just know
19 there was a statute.
20 MR. MARTIN: There was, and it was called
21 "advance payment to tort claimants." I think that's been
22 repealed and rolled into these rules
23 CHAIRMAN BABCOCK: These guys with gray hair
24 remembering all this old law.
25 MR. MARTIN: It's not that old.

1 MR. EDWARDS: It's just a question of where
2 it is. I just know that you can't do it, and I thought it
3 was all payments and not just damages.
4 CHAIRMAN BABCOCK: Okay. Anybody have any
5 other comments to this proposal?
6 MR. EDWARDS: My thought is if you're going
7 to make the change that you ought to -- the old statute
8 was pretty -- if it's gone, was pretty explicit and pretty
9 well understood, and I think it was broader than -- you
10 get into arguments what's damages and --
11 MR. LOW: Well, but what we said, Bill, is
12 that --
13 MR. MARTIN: You can't deal with that in the
14 Rules of Evidence. The old statute made it clear that the
15 defendant gets a credit for what they have paid, and now
16 you have to go by case law on that, and there is case law
17 that you get a credit for it, but you can't put that in a
18 Rule of Evidence.
19 MR. EDWARDS: No, I'm not talking about the
20 credit. I'm talking about what it was you couldn't put
21 into evidence.
22 MR. MARTIN: Yeah
23 CHAIRMAN BABCOCK: Yeah, Carl.
24 MR. HAMILTON: That word "furnishing"
25 doesn't seem to fit.

1 MR. LOW: Okay.
2 MR. HAMILTON: "Furnishing to pay."
3 MR. LOW: No. "Furnishing expenses" --
4 MR. HAMILTON: How about "paid"?
5 MR. LOW: Well, we did. We could change it
6 to "paying" or "offering to pay," but sometime you may do
7 other things. They might be damaged because you give them
8 something that's not money.
9 CHAIRMAN BABCOCK: Well, not only that.
10 Isn't the distinction here between, you know, I may offer
11 you something, I may promise, I may not carry through with
12 it --
13 MR. LOW: Right.
14 CHAIRMAN BABCOCK: -- but if I furnish it to
15 you I have carried through with it, so that's why you have
16 the word "furnishing."
17 MR. TIPPS: Chip, I don't have the Federal
18 rules here, but I think this is based on the Federal rule,
19 and my bet is that that contained the same words.
20 MR. LOW: See, the old rule had the
21 "furnishing" in there. I didn't think it caused a lot of
22 problems.
23 CHAIRMAN BABCOCK: Okay. Frank.
24 MR. GILSTRAP: The order as originally drawn
25 pretty clearly had to do with kind of a personal injury

1 context

2 CHAIRMAN BABCOCK: Yeah.

3 MR. GILSTRAP: And now we have significantly

4 broadened it to damages resulting from any occurrence or

5 occasioned by any occurrence. I can't think of one, but I

6 have got a question. Maybe, you know, in a commercial

7 context or something like that, is there some type of

8 offer that we may not want to exclude? I just wonder if

9 that's kind of the unintended consequence of that. I

10 can't think of one, but maybe someone can.

11 CHAIRMAN BABCOCK: Mike.

12 MR. HATCHELL: I was just thinking about

13 contract formation is an area that will be very --

14 MR. DUGGINS: I was going to make the same

15 observation Frank did, that because of that "occurrence,"

16 and I don't know what that covers or means.

17 MR. GILSTRAP: What it's intended to cover

18 is the notion like in a tort case where the thing that

19 causes the damage is not -- is the occurrence, it's the

20 damaging event, but it could sure be construed to include

21 something like, you know, contracts or something like

22 that. And I'm just kind of at sea on that, but I'm

23 wondering if someone could think of an example that

24 there's a problem

25 CHAIRMAN BABCOCK: Sarah.

1 HONORABLE SARAH DUNCAN: What if you had a
2 mitigation problem, and you've got evidence -- or a lease,
3 a rental problem, and you've got evidence that a third
4 party unconnected with the litigation offered to pay for a
5 lesser amount for the lease property during the term of
6 the lease and you need to get that in to show that you
7 have used, you know, diligence in mitigating your damages.
8 CHAIRMAN BABCOCK: Well, because this says
9 to prove liability. That would be a damage issue.
10 HONORABLE SARAH DUNCAN: Okay.
11 CHAIRMAN BABCOCK: It says it's inadmissible
12 for liability.
13 HONORABLE SARAH DUNCAN: Right.
14 CHAIRMAN BABCOCK: Yeah.
15 MR. ORSINGER: And if we're wondering about
16 the source of the occurrence thing, this reminds me of the
17 debate under the pattern jury charge 1 and 4, about the
18 difference between injury and occurrence, which was an
19 issue for the Supreme Court, wasn't it, Justice Hecht,
20 that the occurrence is the car accident but the injury
21 might be hitting the dashboard because you -- your air bag
22 malfunctioned or because you didn't have your seat belt
23 on. And they fought over whether they wanted proximate
24 cause for the injury or proximate cause for the
25 occurrence, and the plaintiffs were on one side and the

1 defendants were on the other, and I've forgot which, but
2 there was a big difference, and they fought about it for
3 years.
4 MR. GILSTRAP: You're right on that,
5 Richard, and that's the word of art, "occurrence," that's
6 what we're talking about, but I'm just wondering if
7 "occurrence" might mean "the fraud."
8 CHAIRMAN BABCOCK: Yeah, Carl.
9 MR. HAMILTON: Well, if you're arguing about
10 a lease, for example, and someone has made a payment
11 pursuant to what they understood the agreement to be, that
12 could well be evidence of what the agreement is, what the
13 liability is, so --
14 MR. GILSTRAP: Under an extension of note,
15 yeah, they kept taking your payments, something like that.
16 MR. HAMILTON: It seems to me that
17 "occurrence" might not work in there
18 CHAIRMAN BABCOCK: Bill then Stephen.
19 MR. EDWARDS: As written, 409 clearly
20 applies to personal injury.
21 MR. LOW: Yeah.
22 MR. EDWARDS: And what this amendment does
23 is to take out the personal part of it. It does away with
24 what was medical, hospital, or similar expenses, which
25 clearly related to personal injury, and turns it into a

1 very general rule; and I don't know whether that's the
2 intent of what the Bar was talking about or what we want
3 to do.
4 CHAIRMAN BABCOCK: Yeah. Steve and then
5 Buddy.
6 MR. TIPPS: That's exactly what I was going
7 to say. I think the intent was to expand the kind of
8 personal injury damages that you can pay beyond medical
9 and hospital bills and to allow Buddy's client to pay the
10 widow some money to take care of the funeral or whatever,
11 and I wonder in light of that if we shouldn't just simply
12 say "evidence of furnishing or offering or promising to
13 pay any kind of personal injury damages is not admissible
14 to prove liability for the injury" or "occurrence" or
15 whatever
16 CHAIRMAN BABCOCK: Buddy.
17 MR. LOW: I read the transcript of what the
18 State Bar -- and they were speaking of it in terms of
19 personal injury. You're absolutely right about that, and
20 I didn't see anything in reference to other things.
21 "Occurrence" was brought up because somebody said, "Well,
22 it wasn't really damage, I'm just paying because the
23 occurrence gives a potential liability," and so that's the
24 context, and my committee did not discuss, nor do I
25 believe the State Bar Committee -- Mark Sales is head of

1 that and presented it to my committee. We didn't discuss
2 how it may affect commercial litigation or things of that
3 nature.
4 So you're absolutely right. It could have
5 an effect, and we might be broadening it more than we had
6 thought we were.
7 CHAIRMAN BABCOCK: Carl.
8 MR. HAMILTON: I think what they're trying
9 to get at is the phraseology in insurance policies which
10 says "accident or occurrence," and you could fix it by
11 "agreeing to pay personal injury damages occasioned by an
12 accident or occurrence," by that they would have to be
13 personal injury damages.
14 MR. LOW: But, see, they don't want it just
15 personal injury. What if I'm not hurt but my car is
16 damaged and I have to carpool, and so they say, "Well, I'm
17 going to" -- the defendant said, "Well, I'm not liable,
18 but I have got an extra car. I'm going to furnish you
19 with a car," and then later on like some of the plaintiffs
20 I've seen, they finally realize later on they're hurt
21 pretty bad.
22 MR. ORSINGER: After they see a lawyer.
23 MR. LOW: Well, I didn't make that comment.
24 MR. EDWARDS: You could fix that by using
25 the terms of Chapter 33, which is the personal injury,

1 property damage, or death, Chapter 33 of the Civil
2 Practice and Remedies Code.
3 MR. LOW: I tell you what I would recommend
4 that we do, is send it back to the State Bar for them to
5 take a further look at it and see, you know, and let them
6 come up with what their answer to this is, because I don't
7 have an answer.
8 CHAIRMAN BABCOCK: Yeah. I think that's a
9 good idea. Before we go doing something that's not
10 intended I think we ought to get their sense of things.
11 MR. LOW: But I would recommend referring
12 it back to them since they are the ones that brought it
13 up, take a look and see what
14 CHAIRMAN BABCOCK: Richard.
15 MR. ORSINGER: If you are going to send it
16 back to them, maybe they could consider is there any
17 policy reason why this is limited to personal injury
18 damages?
19 CHAIRMAN BABCOCK: Yeah. That's one of the
20 questions that they're going to have to deal with.
21 MR. ORSINGER: If it's a good principle it
22 should apply --
23 CHAIRMAN BABCOCK: Right.
24 MR. GILSTRAP: Maybe it should apply in a
25 commercial context. I just can't think of it right now at

1 10:00 o'clock on Saturday morning.
2 CHAIRMAN BABCOCK: Nina
3 MS. CORTELL: I just wanted to make sure we
4 thought it through that the general principle of giving
5 someone a payment, if that's the right thing to do. It
6 might be something we would want to look at in the
7 commercial context.
8 MR. LOW: We are facing more and more
9 commercial-type litigation, and tort reform has kind of
10 knocked some of us out of the loop, but we are going to
11 other areas, and this would encompass it
12 CHAIRMAN BABCOCK: Yeah.
13 MR. EDWARDS: And the salutary principle
14 behind all of this is if you allow people to pay damages
15 that have been caused without it affecting them later on
16 if it doesn't dispose of the matter is a good principle.
17 It gets rid of a lot of things. That's the underlying
18 principle
19 CHAIRMAN BABCOCK: Right.
20 MR. LOW: I will so do that.
21 Now I've got somebody that really knows what
22 he's talking about that's going to present the rest of our
23 report, Judge Brown. 701.
24 HONORABLE HARVEY BROWN: We were asked to
25 look at Rule 701, which is the lay opinion testimony rule.

1 Basically we had three alternatives to consider; one,
2 leaving the rule as it is right now; secondly, going with
3 the Federal rule which will, unless some big surprise
4 occurs in the next two weeks, go into effect December 1st;
5 or, third, adopt a rule that has been suggested by the
6 National Conference of the Commissioners on the Rules of
7 Evidence.
8 Now, just a brief historical note, there has
9 been a suggestion for changing the rules to the Federal
10 system. Justice Hecht I know is a member of one of the
11 committees that's dealt with that, and it is expected to
12 pass or be enacted as of December 1st, but it looks pretty
13 good, and Justice Hecht has confirmed that for me.
14 The National Commissioners is an
15 ABA-sponsored group with some evidence reporters from
16 some -- you know, evidence attorneys, judges from across
17 the country, and some ABA members; and they have made
18 recommendations on a number of rules. If you want to see
19 the existing rule, the existing rule would be in Tab 13.
20 Tab 13 actually is the new proposed Federal rule, but the
21 existing rule there is the part that's not underlined. In
22 other words, the new rule as proposed for Federal court
23 adds part (c). Everything up to there is identical.
24 The National Conference suggestion is under
25 Tab 12. We have recommended that the committee adopt the

1 National Conference rule for a couple of reasons. First
2 of all, if you'll look at Tab 13 you'll see that the
3 Federal rule starts with the phrase "if the witness is not
4 testifying as an expert." The comments say that you
5 really should not look at the label for the witness but
6 you should look at the label for the witness' testimony,
7 so we thought that was a bad phrase.
8 For example, a doctor might testify in a
9 case as an expert but also as a lay witness. The doctor
10 may see somebody after an accident who is intoxicated,
11 testify as a layperson giving an opinion that the person
12 was intoxicated, which clearly falls under the traditional
13 rubric of Rule 701, but then also testify about the
14 effects of alcohol, which would be expert testimony. So
15 rather than saying, "Is he an expert?" we should look at
16 the opinion and say, "Is that expert opinion or is that
17 lay opinion?" So we suggest that that first phrase in 701
18 created some ambiguity, so we didn't like that, and the
19 National Conference dropped that phrase because of that
20 issue.
21 Additionally, the Federal rule has the "not
22 based on scientific, technical, or other specialized
23 knowledge" under the scope of Rule 702 as a third subpart
24 of the test; and we really thought that was more
25 consistent and logical to treat it the way the National

1 Conference did, which is that's really not part of the
2 test. It's really part of the predicate to determine
3 whether it is, in fact, lay opinion testimony versus
4 expert opinion testimony.
5 So we thought the National Conference rule,
6 which had the Federal rule in front of it when they met
7 and made these suggestions, is actually a better rule.
8 The reason for both rules trying to grapple with this is
9 the problem with Daubert and the issue about whether you
10 have to meet Daubert for opinion testimony, and some
11 people have tried to avoid the Daubert reliability
12 requirement by saying, "This really isn't an expert. This
13 is just lay opinion testimony," and so that's created this
14 debate about how to label people with 701 through these
15 two commentators or these two proposed rule fixes.
16 In the interest of fair disclosure, the
17 subcommittee from the State Bar has not actually made a
18 definitive decision about this, but Dean Sutton, who is
19 the chair of that committee, does disagree with both the
20 Federal proposed rule and the National Conference; and
21 Mark Sales and I have tried to ascertain the reasons and,
22 frankly, could not ascertain the reasons, in a way we
23 could understand at least.
24 CHAIRMAN BABCOCK: Wasn't Dean Sutton's
25 objection because of the notice, because of the notice

1 issue?

2 HONORABLE HARVEY BROWN: I really was not

3 clear.

4 MR. ORSINGER: What do you mean by that?

5 HONORABLE HARVEY BROWN: But I do have -- in

6 my packet, I gave a second packet out -- in Tab B some of

7 his correspondence on a variety of issues. I can't

8 remember if 701 is in that. I think that's just 702.

9 CHAIRMAN BABCOCK: You've got to designate

10 experts by a certain period of time, but there would be

11 confusion if you got a layperson who all the sudden pops

12 up with specialized knowledge and that hasn't been

13 disclosed.

14 HONORABLE HARVEY BROWN: In addition to

15 trying to avoid the Daubert reliability issues sometimes

16 if you forget to designate an expert, sometimes people

17 say, "That's really not an expert, so I that's why I

18 didn't designate."

19 CHAIRMAN BABCOCK: Right.

20 HONORABLE HARVEY BROWN: So you are right

21 about the notice issue

22 CHAIRMAN BABCOCK: Right. Okay. So it's

23 the recommendation that we adopt the language behind Tab

24 12?

25 HONORABLE HARVEY BROWN: Yes.

1 CHAIRMAN BABCOCK: And let's have
2 discussion, if any.
3 MR. LOW: One other thing. What we were
4 trying to do is make it clear -- sometimes there's a lot
5 of confusion between the qualification of the witness. He
6 may be a doctor and so forth, but it's not there --
7 there's a difference in that and the qualification of his
8 testimony, and we thought this made it clearer, and then
9 the Supreme Court in the United Way case had held that,
10 you know, you might be both, but you can only testify as a
11 fact witness or if you're going to testify as an expert
12 then you've got to meet qualifications.
13 CHAIRMAN BABCOCK: Okay. Good. Any
14 comments? Discussion?
15 Elaine, what do you think?
16 PROFESSOR CARLSON: I'm on the committee,
17 and I think the subcommittee did a great job.
18 MR. LOW: I am, too, but I'm going to --
19 CHAIRMAN BABCOCK: Sounds like everybody
20 here was on that subcommittee. Richard.
21 HONORABLE HARVEY BROWN: Richard wasn't.
22 MR. ORSINGER: I'd like to question
23 whether -- of the two proposals I prefer the
24 Commissioners' draft, too, but does the Commissioners'
25 draft actually change the operation of 701, or does it

1 just clarify what an expert is? I mean, the change I see
2 in Tab 12, you're taking out "testifying as an expert" and
3 substituting "testimony based on scientific, technical, or
4 other specialized knowledge," which is just a more literal
5 way of saying "testifying as an expert."
6 HONORABLE HARVEY BROWN: Yeah, and that
7 thought occurred to me, too. It's the next phrase I think
8 that makes it clear that we're distinguishing between
9 types of testimony versus types of labels of witnesses,
10 because it says "the witness' testimony in the form of
11 opinions or inferences."
12 MR. ORSINGER: Well, I think arguably 701
13 doesn't change the operation -- pardon me, the
14 Commissioners' suggestion doesn't actually change the
15 operation or scope of 701. I'm not sure that the Federal
16 rule doesn't. I think that the Federal rule gets closer
17 to actually changing what 701 has meant. Do you feel that
18 the Commissioners' proposal is essentially just a better
19 written version of 701 that doesn't actually change 701?
20 MR. LOW: Right.
21 HONORABLE HARVEY BROWN: Yes.
22 MR. ORSINGER: Okay. Okay.
23 MR. LOW: That was the intent.
24 HONORABLE HARVEY BROWN: While clarifying
25 this issue about you can't just call somebody a lay

1 witness to avoid designating them as an expert for Daubert
2 issues.
3 CHAIRMAN BABCOCK: Okay. Any other
4 comments?
5 MR. ORSINGER: I sure like that reporter's
6 note, if we're going to pick this rule change up then --
7 HONORABLE HARVEY BROWN: Well, we have got a
8 comment. I was going to talk about the comment after we
9 get through the rule
10 MR. ORSINGER: Okay.
11 CHAIRMAN BABCOCK: Any other discussion
12 about it? Do we want to have a motion?
13 MR. HALL: So moved
14 CHAIRMAN BABCOCK: Second?
15 MS. BARON: I'll second.
16 CHAIRMAN BABCOCK: All right. Everybody in
17 favor of adopting the subcommittee's recommendation for
18 Rule 701 raise your hand. All opposed?
19 It passes by a vote of 20 to 0. Okay. You
20 want to talk about the comment?
21 HONORABLE HARVEY BROWN: Yes. The comments
22 are -- and Richard has already picked up on this. The
23 comments are largely based on -- in fact, they are almost
24 entirely based on the comments either in the National
25 Conference or in the Federal.

1 HONORABLE SCOTT BRISTER: The comments are
2 Tab 7?
3 HONORABLE HARVEY BROWN: Yes. The comments
4 are still in Tab 7. You'll see down toward the bottom of
5 the page it says "comment." All the language in the first
6 paragraph is -- and I can't remember whether it was from
7 the Federal rule or the National Commission, frankly, but
8 it's identical; and it's pretty straightforward, frankly.
9 So I don't think the first paragraph is
10 really controversial at all. The second paragraph is also
11 based on the language from the other rules. If you'll
12 look at, again, Tab 12, we basically took this second
13 paragraph of the reporter's note where they quote a case
14 outside of Texas, found a Texas case that said something
15 similar, and paraphrased that. This goes over -- by the
16 way, the comment goes over to Tab 8, the next page. And
17 just added it here by having a Texas case and then
18 paraphrasing the case and restating it a little bit from
19 another state so we didn't rely on foreign jurisdictions.
20 CHAIRMAN BABCOCK: Yeah. Okay. Any
21 discussion about the comment? Other than Richard who's
22 already said he likes it --
23 MR. ORSINGER: Well --
24 CHAIRMAN BABCOCK: -- and will have no
25 further comment about the comment.

1 MR. DUGGINS: Chip, I have something
2 CHAIRMAN BABCOCK: Yeah, Ralph
3 MR. DUGGINS: In the second paragraph,
4 what's "7021"?
5 CHAIRMAN BABCOCK: I think that's a typo.
6 HONORABLE HARVEY BROWN: That's a typo.
7 MR. DUGGINS: Oh, I'm sorry. I didn't hear
8 that.
9 MR. TIPPS: Harvey, where does the quote
10 from Denham vs. State begin?
11 MR. ORSINGER: There's a tab in between the
12 two pages. Just ignore Tab 8 and --
13 MR. TIPPS: No, I'm there. There's just not
14 a beginning quotation.
15 HONORABLE HARVEY BROWN: It's gotten lost in
16 the translation somewhere.
17 MR. TIPPS: Okay.
18 HONORABLE HARVEY BROWN: I will have to find
19 it. I will go back. Buddy and I translated this from
20 e-mail and somehow it got lost.
21 CHAIRMAN BABCOCK: Richard.
22 MR. ORSINGER: I know. I really wonder
23 about the use of the words "sanity" and "insanity,"
24 because so far as I can tell that's not really used. I
25 don't even think they use it in the criminal side anymore,

1 do they?

2 HONORABLE HARVEY BROWN: I think that is

3 part of the quote, but we can certainly change that

4 CHAIRMAN BABCOCK: Part of the quote from

5 the case.

6 MR. ORSINGER: Ah. Okay. Well...

7 HONORABLE HARVEY BROWN: I will check,

8 though.

9 MR. ORSINGER: I mean, I really wonder

10 whether a layperson should be saying that they are insane

11 or they are sane. Those are not legal words, and I'm just

12 saying -- it's just a comment, but even the mental health

13 people don't talk in terms of insane anymore

14 CHAIRMAN BABCOCK: The en banc Texas Court

15 of Criminal Appeals apparently did.

16 JUSTICE HECHT: 1978.

17 CHAIRMAN BABCOCK: It's been sometime ago.

18 MR. ORSINGER: Okay.

19 MS. BARON: I think they are now called

20 mental incompetency hearings to impose guardianships,

21 mental competence.

22 HONORABLE HARVEY BROWN: We can either take

23 "sanity" and "insanity" and replace them with something of

24 mental health, or we can just take them completely off and

25 just start the quote after the numbers with the word

1 "value."

2 HONORABLE SCOTT BRISTER: Why don't you just

3 summarize them, because some of this is a little -- I

4 mean, physical condition, health and diseases.

5 HONORABLE SARAH DUNCAN: But we still have

6 insanity.

7 HONORABLE SCOTT BRISTER: Just summarize it

8 and say, "see the appellate transcript."

9 CHAIRMAN BABCOCK: Oh, it's rampant.

10 HONORABLE SARAH DUNCAN: We still have an

11 acquittal based on not --

12 MR. YELENOSKY: You do in the criminal

13 context, but do we really want to say that here because,

14 for instance, you refer to mental health. I mean,

15 obviously a lot of observations about mental health really

16 do require an expert, and in the civil context I don't

17 think we use "sanity" or "insanity." We use "mental

18 competence" or "competence capacity."

19 HONORABLE SCOTT BRISTER: "Capacity"

20 normally.

21 MR. ORSINGER: Well, the Commissioners'

22 report uses the words "competency of a person," which is

23 certainly more modern, but do we want a layperson saying,

24 "In my opinion under oath that person is insane"?

25 HONORABLE SCOTT BRISTER: Sure. For will

1 contests you do it all the time.

2 MR. ORSINGER: "Competency" is something I

3 can comprehend, but "sanity" --

4 HONORABLE SCOTT BRISTER: Yeah. I've got to

5 make that call before they get on the stand, and I don't

6 have to have them declared NCM or anything. You know, you

7 tell me is this a child, is this a person who has had

8 brain injury, competent to testify, and you can use

9 psychologists or psychiatrists, but under Daubert I am not

10 sure they are that much better than a lay opinion.

11 HONORABLE HARVEY BROWN: Well, rather than

12 answer that debate why don't we skip that and rephrase?

13 HONORABLE JAN PATTERSON: Yeah, I just urge

14 you delete the reference to the Denham case because it

15 seems to me you could have expert testimony on any of

16 those matters or nonexpert testimony on any of those

17 matters, and it really goes to the form and the

18 methodology and the nature of the testimony more than the

19 substance, which is highlighted by Denham, and shows how

20 the discussion can easily get off track to the substance.

21 HONORABLE HARVEY BROWN: I could just

22 shorten the list to some that are pretty easy, like

23 "estimates of weight," etc., and just say, "such as

24 opinions concerning age, size, weight," a couple of others

25 and take out the Denham cite.

1 HONORABLE JAN PATTERSON: You know, I really
2 think that even that begs the issue because, I mean, for
3 example, you could have a psychologist testify to
4 assessment of relationships or whatever but also testify
5 to perceptions of conversations or, I mean, it may be
6 concerning the same substance, but the nature of the
7 testimony is different, and I think that that case is not
8 a good case for the difference between expert and
9 nonexpert testimony or lay
10 CHAIRMAN BABCOCK: What if we -- oh, I'm
11 sorry.
12 HONORABLE JAN PATTERSON: I would urge
13 reconsideration of the comment.
14 HONORABLE HARVEY BROWN: We could put a
15 period after "701."
16 CHAIRMAN BABCOCK: What if we just put a
17 period after "Rule 701"?
18 HONORABLE HARVEY BROWN: Right. That will
19 work.
20 CHAIRMAN BABCOCK: Okay. Stephen.
21 MR. TIPPS: One thing that we kind of talked
22 about on the committee, but this option didn't occur to
23 me, this State vs. Brown decision, which is in the
24 National Conference tab or version behind Tab 12, really
25 does a good job of capturing the essence of what we're

1 talking about by drawing a distinction between testimony
2 resulting from a process of reasoning familiar in everyday
3 life on the one hand from a process of reasoning that can
4 be mastered only by specialists in the field on the other;
5 and while I concur that it's a little cumbersome to be
6 citing an out-of-state case, that may well be good
7 commentary nevertheless that we could include in the
8 comment without citation.
9 HONORABLE HARVEY BROWN: Yeah. Well, I
10 think we did that.
11 MR. TIPPS: Did we?
12 HONORABLE HARVEY BROWN: If you'll look at
13 the next tab.
14 MR. TIPPS: Okay.
15 HONORABLE HARVEY BROWN: That's what I tried
16 to do after our last subcommittee meeting.
17 MR. TIPPS: Oh, okay. I'm sorry for not
18 reading the last sentence.
19 CHAIRMAN BABCOCK: Okay. Any other
20 discussion?
21 HONORABLE HARVEY BROWN: We had a little
22 debate on that last sentence, whether to leave the word
23 "facts" in there or not. That's why it's in brackets.
24 MR. HAMILTON: I thought everything after
25 "701" was going to be stricken

1 CHAIRMAN BABCOCK: No. Just up through the
2 citations.
3 MR. HAMILTON: Well, I have a question then
4 about the last sentence. It ends with "or a reasoning
5 process used by specialists in the field." Does that
6 arguably change the standard set out in 702 because that's
7 not in 702?
8 HONORABLE HARVEY BROWN: We're going to talk
9 about 702 in a minute, so maybe we should come back to
10 this, but 702 does not have that language in the rule
11 right now. We are proposing something -- to add something
12 about the expert's reasoning because case law has clearly
13 done that and the Federal new proposed rule does that in a
14 way and so does the National Conference proposed Rule 702,
15 so I don't mind if we hold that and come back to that
16 reasoning process language after 702 if you want.
17 CHAIRMAN BABCOCK: Okay. Steve.
18 MR. YELENOSKY: Could we just take that out
19 since you're dealing with that elsewhere and just say,
20 "Lay testimony is based on common and everyday
21 observations and inferences," period, and don't make the
22 contrast with expert testimony?
23 HONORABLE HARVEY BROWN: You could, although
24 the sentence is emphasizing the distinction between the
25 two, so it's nice to have -- if you are going to

1 distinguish between the two to have the two together.
2 MR. YELENOSKY: Well, I was just saying take
3 out the distinction and just say what lay testimony is.
4 HONORABLE HARVEY BROWN: Could do that
5 CHAIRMAN BABCOCK: Richard
6 MR. ORSINGER: I actually probably disagree
7 with this sentence because a layperson can use facts that
8 a specialist might use but not be using special expertise,
9 and I don't think that it's a valid distinction to say
10 that the difference between lay and expert testimony is
11 that laypeople are based on common and everyday
12 observations and experts are based on data used by a
13 specialist.
14 The psychologist who's interviewing for
15 someone for a mental health is going to use the same kind
16 of information that a layperson would. An accountant
17 who's looking at accounting records would use the same
18 arithmetic, they use the same ledger sheets, they read the
19 same lines on the same tax returns.
20 This may come from some National Committee
21 or something, but I don't agree that this is an accurate
22 description of what an expert does. Or what makes the
23 difference between an expert and the layperson is not the
24 information. It's how the information is used.
25 CHAIRMAN BABCOCK: So you would advocate

1 striking that last sentence?
2 MR. ORSINGER: I agree with Steve's
3 suggestion that we just talk about -- well, yeah. Yeah.
4 HONORABLE SCOTT BRISTER: I disagree. I
5 mean, there's certainly cases one can imagine that might
6 get very difficult to decide, but in general there's no
7 question that's the distinction, and the fact that you
8 can't write a rule that defines every fine detail doesn't
9 mean you shouldn't have any standard in the rule that
10 says, "The general difference is this is common, everyday
11 knowledge, and this is something you have to go to school
12 to learn," and it seems to me it does not help to just --
13 because we can't draw that fine line for every case just
14 to throw it out altogether.
15 HONORABLE HARVEY BROWN: Well, Richard, I
16 didn't think the language was perfect, frankly.
17 MR. ORSINGER: Well, I would feel better --
18 HONORABLE HARVEY BROWN: But I did think it
19 was helpful to help people distinguish between lay and
20 expert testimony, and in the two examples you gave I would
21 just point to the word "used" is in here. It doesn't just
22 say that it's the facts, but it's used by a specialist, so
23 I think your accountant and doctor would, in fact, fall
24 under that definition of expert testimony.
25 MR. ORSINGER: My complaint is the "data"

1 and "facts" part. A layperson may use the same data or
2 the same facts to arrive at a lay opinion that an expert
3 would use to arrive at an expert opinion. It's the
4 reasoning process that differentiates it.
5 HONORABLE SCOTT BRISTER: I agree with part
6 of that. That's why I didn't like "facts."
7 MR. ORSINGER: And I don't like "data"
8 either.
9 HONORABLE HARVEY BROWN: "Data" was meant to
10 be like studies, literature. That's what the word "data"
11 was meant to be.
12 MR. YELENOSKY: Why don't we just focus on
13 the difference in the reasoning process, because it could
14 be exactly the same information, and say the distinction
15 is lay testimony is based on reasoning from common and
16 everyday observations and inferences while expert
17 testimony is based on reasoning -- however you want to
18 define it and leave out what the facts or the predicate
19 information is?
20 HONORABLE HARVEY BROWN: Well, again, I
21 agree with you about "facts." I think that's confusing.
22 That's why it's in brackets, but data, for example, a
23 doctor testifying about medical studies. The doctor may
24 have not done any studies himself, may not really have any
25 personal knowledge, but he relies on data of studies, and

1 that's how he comes up with an expert opinion.
2 MR. TIPPS: In support of Steve's
3 observation --
4 CHAIRMAN BABCOCK: It's not an "either/or,"
5 though. I mean, he's taking the data, the studies, and
6 then he's applying a reasoning process used by specialists
7 in his field.
8 HONORABLE HARVEY BROWN: Sometimes.
9 Sometimes they are just getting on the stand basically and
10 repeating what studies have said. "My opinion is X causes
11 Y. Why is that my opinion? Because there's a study that
12 says it." There is no reasoning process. It's just,
13 "Here's a study and it says it."
14 MR. YELENOSKY: But it's based on reasoning
15 used in the field, even if it's not the expert's own
16 reasoning.
17 HONORABLE HARVEY BROWN: True
18 CHAIRMAN BABCOCK: Right. Yeah, and you
19 pick that up by saying "a reasoning process used by
20 specialists in the field." You don't necessarily say it's
21 the expert.
22 HONORABLE SCOTT BRISTER: But an attorney's
23 opinion of hourly rates is not really a reasoning process.
24 CHAIRMAN BABCOCK: Let's not get into that
25 debate.

1 MR. YELENOSKY: Yeah. That's the ultimate
2 question.
3 HONORABLE SCOTT BRISTER: It's what the
4 market will bear or what I can get away with or --
5 CHAIRMAN BABCOCK: Now, now.
6 HONORABLE SCOTT BRISTER: There's no
7 question it's an expert testimony, and a layperson can't
8 just say what the attorneys fees are or ought to be.
9 HONORABLE JAN PATTERSON: Why not use the
10 language that we have come to use, which is the "based on
11 scientific, technical, or other specialized knowledge"
12 rather than focusing strictly on the reasoning process?
13 Everybody knows what that means.
14 HONORABLE SCOTT BRISTER: Well, the waffle
15 factor on there is "specialized knowledge."
16 HONORABLE JAN PATTERSON: But doesn't that
17 speak to your concern that we don't know exactly what the
18 line is but we can identify what's on either side of it?
19 CHAIRMAN BABCOCK: Judge Brister, do you --
20 if we lose "methods and data," do you think that we just
21 emasculate the sentence?
22 HONORABLE SCOTT BRISTER: Well, methods and
23 reasoning is the main thing that's talked about in the
24 Robinson and Daubert standard, isn't it, Harvey?
25 HONORABLE HARVEY BROWN: Well, I mean,

1 Havner really does not talk about the methods very much,
2 and reasoning is not the main point of Havner. It's the
3 data, bad data and bad studies. That themeology did not
4 support the expert's opinion
5 CHAIRMAN BABCOCK: Is there any sentiment to
6 just strike this sentence altogether?
7 MR. ORSINGER: Boy, I would support that.
8 MR. TIPPS: None from me because I think
9 this sentence is helpful, but I would suggest we go back
10 to the observation made by the court in State vs. Brown in
11 which the court did draw a distinction between the methods
12 of reasoning involved, one kind of reasoning with regard
13 to lay testimony, another kind of reasoning with regard to
14 specialists. I think that's helpful, and I don't think
15 it's harmful that we don't in this one sentence capture
16 all of the alternatives. I mean, and I think maybe we may
17 be trying to do too much in our paraphrased sentence, and
18 I would suggest we cut it back to just contrasting the two
19 kinds of reasoning.
20 CHAIRMAN BABCOCK: And what you're talking
21 about is behind Tab 12?
22 MR. TIPPS: Yes
23 CHAIRMAN BABCOCK: Where it says, "As
24 observed by one state court, the distinction between lay
25 and expert witness testimony is that lay testimony,"

1 quote, "'results from a process of reasoning familiar in
2 everyday life,'" quote, "while expert testimony," quote,
3 "'results from a process of reasoning which can be
4 mastered only by a specialist in the field.'"
5 MR. TIPPS: I would do that, but I would
6 paraphrase it rather than quote it since it's an
7 out-of-state case.
8 HONORABLE HARVEY BROWN: Would you cite it?
9 MR. TIPPS: No. But, I mean, we could, but
10 I would say "no."
11 CHAIRMAN BABCOCK: Sarah has a pained look
12 on her face.
13 HONORABLE SARAH DUNCAN: I have a -- I have
14 just been listening to all of this, and it doesn't seem to
15 me that that formulation any more than any of the others
16 gets to what is different about expert testimony. I mean,
17 I can as a lay witness -- and we would all agree I am not
18 an expert in real estate value, but I can use exactly the
19 same data and the same reasoning process as someone who is
20 an expert, and my testimony is going to be lay testimony,
21 and the real estate expert's is going to be expert
22 testimony
23 HONORABLE SCOTT BRISTER: No, you can't.
24 You can tell the value of your own property, but you
25 cannot do a market analogy. You cannot get comparables

1 and testify to the jury about comparables unless you're a
2 realtor.
3 HONORABLE SARAH DUNCAN: I understand that,
4 and I'm not saying that it's admissible. I'm getting at
5 what is the distinction between lay and expert testimony,
6 and it's not necessarily the data or the reasoning process
7 or the method. There's something -- I can't articulate
8 it, but there's something that we're not capturing in
9 these formulations of the distinction.
10 MR. ORSINGER: Well, the problem is, is that
11 we're trying to restate Rule 702 in this sentence when
12 Rule 702 has been written on by every court of last resort
13 in the United States of America in the last six years.
14 CHAIRMAN BABCOCK: Yeah.
15 MR. ORSINGER: And we're trying to get all
16 of that narrowed down into one phrase, and it just scares
17 the hell out of me because --
18 HONORABLE SCOTT BRISTER: Well, that's --
19 and the reason we're doing that is because it's not
20 helpful to have a 702 that says "Go read Daubert,
21 Robinson, Havner," da-da-da-da-da, "so you know what the
22 rule is." That's why you have a rule of evidence, is to
23 try to summarize -- not perfectly. You have to use broad,
24 general language, but it's not helpful to a new
25 practitioner or somebody that does not read all these

1 cases every week to say, like our sanctions rule, "Go read
2 TransAmerican and the 20 cases that have followed it and
3 then you will know what the sanction rule is."
4 MR. ORSINGER: But what's wrong with telling
5 them, "If you want to find out what lay testimony is, read
6 Rule 701; and if you want to find out what expert
7 testimony is, read 702," but don't find out what 702 is by
8 reading one sentence in a comment to 701
9 MR. LOW: But 701 doesn't tell you what lay
10 testimony is. It just tells you that a lay witness may
11 testify.
12 MR. ORSINGER: You know, I'm not troubled by
13 the description of what lay testimony is. I'm troubled by
14 the description of what expert testimony is and the way
15 that it's mixed in. I think that Rule 701 ought not to be
16 trying to define in one clause Rule 702.
17 MR. LOW: One problem is that we're trying
18 to show that a person may be both. I mean, and really and
19 telling people they are not just invoking 701, but then
20 when he's going to be an expert you're invoking 702 as
21 well, and the relationship between them is pretty clear
22 once you put the same witness on that may be a factual --
23 have factual knowledge but is also an expert.
24 HONORABLE SCOTT BRISTER: The company
25 engineer --

1 MR. LOW: Right.
2 HONORABLE SCOTT BRISTER: -- who has facts of
3 what we did --
4 MR. LOW: Of what we did.
5 HONORABLE SCOTT BRISTER: -- but also
6 opinions about why we did it
7 MR. LOW: Right.
8 CHAIRMAN BABCOCK: Let's get a sense of the
9 house. How many people, like Richard, want to ditch this
10 last sentence? Everybody who wants to, raise your hand.
11 MS. BARON: Can I make one statement? I
12 mean, I don't know that Richard thinks we need to ditch
13 the whole last sentence but only the part that addresses
14 what expert testimony is. Do you have a problem with
15 leaving in --
16 MR. YELENOSKY: Lay witnesses.
17 MS. BARON: -- "Lay testimony is based on
18 common and everyday observations and inferences," period?
19 MR. ORSINGER: No. I don't have a problem
20 with that at all
21 CHAIRMAN BABCOCK: What do you think about
22 that, Judge Brown?
23 HONORABLE HARVEY BROWN: That's fine. I
24 think some people said it's not an all inclusive
25 definition, so we might want to add something like a

1 "generally," "is generally based."
2 CHAIRMAN BABCOCK: "Generally, lay testimony
3 is based on common and everyday observations and
4 inferences," period. Okay.
5 MR. HAMILTON: Are you going to leave in
6 "distinction"?
7 CHAIRMAN BABCOCK: No.
8 HONORABLE HARVEY BROWN: No.
9 HONORABLE SCOTT BRISTER: Then should we put
10 that in 702 somewhere?
11 CHAIRMAN BABCOCK: Here's how it would read.
12 We have got the first part of it. "The phrase
13 'scientific, technical, or other specialized knowledge' is
14 intended to have the same meaning as the identical phrase
15 in Rule 702. However, the language does not change the
16 standards for admissibility of evidence traditionally
17 offered under Rule 701. Generally, lay testimony is based
18 on common and everyday observations and inferences," and
19 then going onto the amendment, "distinguishes between
20 expert and lay testimony and not between expert and lay
21 witnesses since it is possible for the same witness to
22 give both lay and expert testimony in the same case."
23 So that's how the comment would read as
24 revised. Is that okay with you, Judge Brown?
25 HONORABLE HARVEY BROWN: That's fine.

1 CHAIRMAN BABCOCK: All right. Everybody
2 who's in favor of the comment as revised raise your hand.
3 All opposed?
4 It passes by a vote of 21 to 2, and with
5 that we will take our morning break, but let's make it a
6 short one, ten minutes if we can, so we can get back and
7 finish up the last two items on this. And, if possible,
8 I'd like to try to get out of here by around 11:30 this
9 morning.
10 (Recess from 10:28 a.m. to 10:43 a.m.)
11 CHAIRMAN BABCOCK: Okay, Judge Brown, we're
12 on 702.
13 HONORABLE HARVEY BROWN: Well, a little bit
14 of historical information for those who are new to the
15 committee. I don't know this as personal knowledge, but
16 I've actually read some of the legislative history about
17 it. The advisory committee did consider changing Rule 702
18 two or four years ago, I don't remember which, and at that
19 time decided not to, decided basically to let case law
20 develop further, and there have been a lot of
21 developments. I think it was four years ago.
22 MR. LOW: It came up about three times and
23 each time that was --
24 HONORABLE HARVEY BROWN: Voted down, and
25 then the evidence subcommittee that Mark Sales is on have

1 also made some suggestions for Rule 702, so we considered
2 their suggestions. We considered doing nothing. We
3 considered, again, the National Committee or the National
4 Conference suggestion and the Federal rules suggestion.
5 The Federal rules suggestion, again, is going to be
6 effective December 1st, it looks like.
7 I'm not sure how you want to proceed because
8 I do think there's one big debate, and that is should we
9 touch 702 at all. And there are members of the Bar who,
10 frankly, I think don't like Daubert, hope that if we don't
11 touch 702 eventually Daubert will be overruled and,
12 therefore, it's best just do do nothing.
13 There's other members of the Bar who think
14 that Daubert is here to stay and the best thing to do is
15 to clarify it and make it as fair to everybody as it can
16 be, and I think that that is probably in some ways a
17 preliminary question because there's some people, it
18 doesn't matter what we talk about, they just don't want to
19 touch 702 because they hope it will eventually be changed
20 through court decision
21 CHAIRMAN BABCOCK: Well, when you say
22 Daubert is either here to stay or not here to stay, are
23 you including Robinson?
24 HONORABLE HARVEY BROWN: Yes, Robinson
25 CHAIRMAN BABCOCK: Isn't really Robinson the

1 operative case for our purposes?

2 HONORABLE HARVEY BROWN: Yes. But I think

3 that's the first issue, is do people want to just leave

4 702 the way it is, let it just be handled completely

5 through case law, or are you more on the side of the fence

6 of we should try to address some of the problems created

7 by Daubert and make the rule clearer and more fair?

8 CHAIRMAN BABCOCK: Could I ask a preliminary

9 question? Is there any case that any of us are aware of

10 that is in the system right now which would be a vehicle

11 for overturning Robinson? Are there any court of appeals

12 decisions that have suggested that Robinson ought to be

13 overturned?

14 HONORABLE HARVEY BROWN: None that I've

15 seen, and I have read dozens. Now, there are some states

16 that have rejected Daubert and the Robinson type of

17 arguments.

18 CHAIRMAN BABCOCK: But as a first matter,

19 right? I mean, they didn't adopt Daubert and then turn

20 around and change their mind?

21 HONORABLE HARVEY BROWN: Correct.

22 MR. ORSINGER: Right.

23 CHAIRMAN BABCOCK: Is there any petition

24 before the Court that you're aware of, Justice Hecht, to

25 do that?

1 JUSTICE HECHT: No.
2 CHAIRMAN BABCOCK: Would it be safe to say
3 that there's probably no immediate likelihood that
4 Robinson is going to be overturned?
5 HONORABLE HARVEY BROWN: I think so. I
6 mean, it's certainly the clear majority in the states.
7 It's a clear majority among commentators. I think it's
8 here to stay, and the best thing is to make it better and
9 clearer.
10 CHAIRMAN BABCOCK: I can't remember. Were
11 there dissents in Robinson?
12 MS. BARON: Yes, there were.
13 JUSTICE HECHT: Yeah.
14 MS. BARON: It was five-four.
15 CHAIRMAN BABCOCK: Five-four.
16 MS. BARON: Either five-four or six-three.
17 Judge Cornyn wrote the dissent. Judge Gonzalez wrote the
18 majority
19 CHAIRMAN BABCOCK: Gonzalez, the elder?
20 MS. BARON: Yes. I'm sorry
21 MR. ORSINGER: Yes.
22 MR. LOW: But there was no dissent in
23 Gammill, was there? You wrote the opinion
24 JUSTICE HECHT: No
25 CHAIRMAN BABCOCK: Okay. Richard.

1 MR. ORSINGER: For me it's not so much a
2 question of overturning it. It's what Judge Brown said
3 intially, it's that it's evolving; and I agreed before, I
4 think that Mark's committee was too quick to try to take
5 an evolving concept and put it into words; and I think
6 that the Gammill case and the Kumho Tire case, and on the
7 criminal side Nenno vs. State, were an important step
8 forward in understanding how we would apply reliability
9 concepts to non-hard-science areas.
10 I think there's still an evolution process
11 going on outside the areas that are really susceptible to
12 objective measurement, and I still feel philosophically
13 it's too early for us to set it in concrete; but, you
14 know, I want to hear the rest of the explanation here,
15 because this is pretty general, so maybe it's not so
16 limited. But I'm worried that we're taking an evolving
17 process that's being contributed to by the United States
18 Supreme Court, the Texas Supreme Court, and the Texas
19 Court of Criminal Appeals and saying, "Now in November of
20 2000 we're going to lock it in place and we're going to
21 put it in black and white where we are today."
22 CHAIRMAN BABCOCK: If I can ask, what is the
23 desires of the Court, Justice Hecht? I know this was
24 referred to the subcommittee on your request. So does --
25 is the Court looking for us to give them language, or is

1 the Court looking for us to say just what Richard said,
2 this is an evolving deal and you guys figure it out when
3 you get a case that's appropriate?
4 JUSTICE HECHT: Well, both, I think. I
5 mean, we'd like -- Richard's point is a matter of concern,
6 but the Federal system is going to change its rule in two
7 weeks no matter what, unless Congress comes back in
8 session, and they are not supposed to come back until
9 December, and then it's too late. And I don't know
10 whether that -- is that behind Tab 14?
11 HONORABLE HARVEY BROWN: Yes, Tab 14. Tab
12 11 is the National Conference.
13 JUSTICE HECHT: And so we may want to wait
14 some to see how that shakes out or not. I don't think
15 there's much chance that we'll go backwards to some --
16 HONORABLE SCOTT BRISTER: It's okay to have
17 unreliable opinions.
18 CHAIRMAN BABCOCK: Right. The good old
19 days.
20 JUSTICE HECHT: The good old days of
21 unreliability, but I do agree with Richard. I mean, there
22 are obviously a lot of issues that are yet to be worked
23 out, but the change in the Federal rule is pretty general
24 and I think just motivated to try to get lawyers now to
25 thinking in terms of the changes that have been made so

1 far.

2 HONORABLE HARVEY BROWN: And the proposal we

3 made is, in my view, pretty general.

4 MR. ORSINGER: Yeah.

5 HONORABLE HARVEY BROWN: It's based largely

6 on the Federal rule. It's kind of a combination, frankly,

7 of the National Conference and the Federal rule.

8 CHAIRMAN BABCOCK: Okay.

9 MR. LOW: Chip?

10 CHAIRMAN BABCOCK: Well, any more discussion

11 on the general principle to have a rule or to not have a

12 rule? Buddy.

13 MR. LOW: Let me say this. I mean, you can

14 say that products liability is still evolving. We have

15 got restating the third that's been for many years, and I

16 guess we could go through all my whole practice and it

17 would be evolving because that's the way the law is, but

18 this thing has been going on for a long time. Judges are

19 dealing with it. Lawyers are dealing with it, and we know

20 pretty clear certain standards.

21 Now, we can't draw every fine line, but --

22 and other courts are able to do that, the Federal courts,

23 and so I think it is time. I didn't recommend before, but

24 I think it's time that we do have a rule on 702. It might

25 not be all-inclusive, and I am not for one that includes

1 every element because the law is developing, but I think
2 it's time to have a rule.
3 CHAIRMAN BABCOCK: Yeah. Daubert was '93, I
4 think.
5 MR. LOW: Right.
6 CHAIRMAN BABCOCK: So it's been around for
7 seven years.
8 MR. LOW: Right.
9 CHAIRMAN BABCOCK: Okay. Any others?
10 MR. ORSINGER: If you look at this proposal,
11 it really doesn't change anything because it doesn't
12 define the word "reliable," and you still have to go to
13 the case law to figure out what "reliable" is, and so I
14 really don't think this is a big substantive change, but I
15 think there is some virtue in staying parallel to the
16 Federal rule. And I don't always feel that way, and I
17 certainly don't feel that way about the Rules of
18 Procedure, but since this is such an important area, and I
19 think a lot of states do copy the Federal Rules of
20 Evidence when they do their own rules that, you know,
21 there is some virtue in our adopting the changes that the
22 Federal people are making rather than deviating from them.
23 MR. LOW: The State Bar Committee -- and
24 they weren't all in accord, and I don't sit on that
25 committee, but I read what they did. They were in favor

1 of general but kind of outlining in the comment all kind
2 of elements and things, and they wanted to be maybe more
3 specific, and there are different approaches. Judge.
4 JUSTICE HECHT: The good thing about the
5 proposed Rule 702 behind Tab 8 that is different from the
6 proposed Federal rule is that it breaks out elements of
7 the rule that have generated confusion.
8 MR. LOW: Right.
9 HONORABLE HARVEY BROWN: Right.
10 JUSTICE HECHT: There has been confusion in
11 some courts over the difference between qualifications of
12 the expert, the nature, the subject matter of the
13 testimony, the reliability of the testimony, and a good
14 bit of confusion over what does it take to prove which and
15 the idea that you can be qualified as some kind of expert
16 and still not be able to give this particular kind of
17 testimony because it's not going to assist the trier of
18 fact or because it's not reliable or for some other
19 reason. And while I agree with Richard that generally we
20 ought to try to, particularly in the evidence rules, kind
21 of stay with the Federal rules, pretty much all they do is
22 break up the elements of it.
23 MR. LOW: We felt like this would clarify
24 more than the Federal rule did, but not -- and focus where
25 focus should be. That's why this was recommended.

1 HONORABLE HARVEY BROWN: And, again, this
2 isn't our creation. 702, the breakdown into (1), (2),
3 (3), and (4), that's from the National Conference; and
4 lawyers do get confused about this. They are frequently
5 arguing about reliability and start talking about "assist"
6 or the qualifications; and it just becomes a hodgepodge.
7 So all the language from (1), (2), and (3)
8 is in the Federal rules. It's just broken into subparts
9 to make it easier to read and see.
10 MR. LOW: National Conference is Tab 11.
11 CHAIRMAN BABCOCK: Let's have a -- before we
12 get into the specifics of the rule let's have a vote so
13 the Court can see what our split is on this as to everyone
14 in favor of amending Rule 702 now and not waiting for
15 further case law development. Raise your hand. All
16 opposed?
17 It passes by 13 to 8. Okay. Let's go into
18 the specifics of the proposal. Is there discussion on any
19 of the language that we find here in the rule?
20 We will get to the comment in a minute, but
21 why don't we --
22 HONORABLE HARVEY BROWN: Can I take people
23 through it just a little bit?
24 CHAIRMAN BABCOCK: Yeah. Please.
25 HONORABLE HARVEY BROWN: All right. (a) is

1 from the National Conference, Tab 11, except the bold
2 part. The bold part I added, or the committee added. The
3 bold part is because Broder says we're supposed to look at
4 each opinion separately, and a case here in Austin called
5 Green, recently the judge kind of got tricked by this.
6 The judge struck an expert because he had all of this
7 unreliable testimony according to the court, not realizing
8 he had some other perfectly good testimony that should
9 have come in but struck the witness. So that's why we
10 added for each opinion you're supposed to look at it
11 separately.
12 (1), (2), and (3) then are identical to the
13 Federal rule. I mean to the National Conference rule.
14 (4), you'll see the language is in bold. That's because
15 what we did was we took ideas from the Federal rule,
16 which has (1), (2), and (3), if you'll look at Tab 14, and
17 we reworded them a little bit to make them a little more
18 consistent with Texas law. So that's the change we made
19 there.
20 For example, Texas in the Havner case talks
21 about foundation. That's kind of magic language in Texas.
22 So we have the word "foundation" in ours. We added the
23 words "assumptions" because there's the Cry case about
24 experts testifying on assumptions, so we added that. So
25 basically the thought behind part (4) was basically to

1 track the Federal rule three parts and just adding a
2 little more Texas flavor.
3 CHAIRMAN BABCOCK: Okay. Any discussion
4 about this rule? Richard.
5 MR. ORSINGER: Yeah. The word "foundation"
6 frightens me just a little bit, and I'd like to discuss
7 it. To say that as the Commissioners -- or, pardon me,
8 the proposed Federal rule says, "Based upon sufficient
9 facts or data and based upon a foundation," to me if they
10 mean the same thing I'm very comfortable; but if the
11 foundation has something to do with a structure of
12 reasoning or some philosophical school of thinking or
13 something like that, then I think we are making a change.
14 I understand you to be saying that
15 "foundation" here doesn't mean the structure or the
16 intellectual framework in which you put your facts.
17 You're just talking in this subdivision about the facts
18 and data themselves; is that right?
19 HONORABLE HARVEY BROWN: As I understand the
20 question, I think yes. I think that's what Havner was
21 talking about when we talk about "foundation."
22 CHAIRMAN BABCOCK: Yeah. Any other
23 comments? Yeah.
24 MR. HAMILTON: Is there some reason why
25 these definitions of reliability were not included? That

1 are on Appendix B to 702, "established by controlling
2 legislation or judicial decision."
3 HONORABLE HARVEY BROWN: Oh, okay. I'm glad
4 you brought that up. Which appendix are you looking at?
5 MR. HAMILTON: It's under Tab 11.
6 HONORABLE HARVEY BROWN: Tab 11, yes. We
7 had a debate -- first, if you'll look at Part B,
8 reliability deemed to exist. I frankly wanted that, but
9 the committee was concerned about codifying something that
10 there really is no case law on in Texas right now. That's
11 why that fell aside.
12 The presumption of reliability, I argued
13 for. In fact, I've written about that, but I think that's
14 a good idea because it simplifies the process.
15 If a doctor comes in and says, "This is the
16 way I always diagnose a sore back case. This is the way
17 we always do it," then I don't have to have a Havner
18 hearing through this presumption. It simplifies it a lot,
19 but that lost in our subcommittee.
20 The same thing about the presumption of
21 unreliability. What that would have done is basically
22 taken the old acceptance test to Fry and made it a
23 presumption but not determinative, which arguably was what
24 Daubert was trying to do, but not necessarily. But that
25 was rejected at our subcommittee level.

1 MR. LOW: Harvey, there is no Texas case
2 that says there is deemed.
3 HONORABLE HARVEY BROWN: Exactly.
4 MR. LOW: And so it -- that's evolving, and
5 if that comes about, we can amend the rule, but I felt
6 like we shouldn't do it, we shouldn't get ahead of where
7 we are.
8 HONORABLE HARVEY BROWN: Those were way
9 ahead of the case law.
10 MR. LOW: Right.
11 CHAIRMAN BABCOCK: Bill, you had your hand
12 up.
13 MR. EDWARDS: Going back to the very
14 beginning where we talked a minute about "for each
15 opinion."
16 CHAIRMAN BABCOCK: Yeah.
17 MR. EDWARDS: I don't think that makes it
18 clear that the expert is entitled to testify as to those
19 opinions on which he qualifies as opposed -- not what he's
20 not qualified as opposed to he has to be qualified on all
21 of them before he can give any. I have a problem with
22 that language.
23 I can see somebody arguing and saying he has
24 to be able to testify as to each of these opinions, and if
25 he doesn't qualify to testify to each of them, he doesn't

1 get to give any. So there's something that we're missing,
2 to me at least, in the language
3 CHAIRMAN BABCOCK: Yeah, I don't read it as
4 open to argument the way you're articulating it.
5 MR. EDWARDS: I know what's trying to be
6 said
7 CHAIRMAN BABCOCK: Right.
8 MR. EDWARDS: And we were given what was
9 trying to be said as we sit here and read it, so you have
10 got a preload on what it means, but if you're on the other
11 side of a case from me, and I have got some expert that
12 you don't want to testify, you're going to read it the way
13 I'm now suggesting, and there's going to be an argument
14 over it, and I think we can clear that up somehow.
15 CHAIRMAN BABCOCK: Okay.
16 MR. EDWARDS: And it's really "A witness may
17 testify in any" -- "in the form of an opinion or otherwise
18 on any matter that satisfies the following rules." That's
19 really what you're saying. Or "on any matter where the
20 following rules are satisfied with respect to that issue
21 or matter," whatever you're talking about, but it's not
22 clear to me; and, obviously, Judge Brown made reference to
23 a case here, I think in Austin, where that didn't happen.
24 CHAIRMAN BABCOCK: Richard.
25 MR. ORSINGER: I'm going to comment on a

1 different point, back to (b), reliability is deemed to
2 exist. There are instances where the Legislature has
3 prescribed that certain evidence is admissible. In the
4 Family Code, for example, if you have a parentage testing
5 by qualified expert, it is specified in the Family Code
6 that that report is admissible without bringing the expert
7 or taking their deposition.
8 On the criminal side there is a statute that
9 says if the operator of the Breathalyzer has been
10 certified by the Texas Department of Public Safety then
11 the results are deemed to be -- I think it says
12 "admissible." It's been a while since I read that
13 statute.
14 The Court of Criminal Appeals dealt with
15 that specific statute in the case of Hartman vs. State,
16 and they kept out testimony about how intoxicated someone
17 was on the street because they didn't take their blood
18 alcohol measure until they got them downtown, and even
19 though the blood alcohol measure downtown was admissible,
20 that wasn't what would support a conviction. It was where
21 they were on the street. And you can't -- a licensed,
22 certified operator of a Breathalyzer machine cannot
23 extrapolate backwards to what the blood alcohol content
24 was without some training and without information based on
25 the weight, how recently food was eaten, and all that

1 stuff.

2 Here I am preaching to Sarah. She's

3 probably -- Hartman came out of your court.

4 HONORABLE SARAH DUNCAN: I wrote Hartman.

5 MR. ORSINGER: Oh, you wrote Hartman, okay.

6 HONORABLE SARAH DUNCAN: I got reversed in

7 Hartman.

8 MR. ORSINGER: Okay. Now you know what I'm

9 talking about. And Sharon Keller had an opinion in

10 Hartman -- I believe it was Sharon's opinion in which she

11 says, you know, over a period of time there are going to

12 be some processes that are so well-established or so

13 well-known that you shouldn't have to prove them up over

14 and over again. At some point the law just doesn't make

15 the proponent re-prove up that methodology, and so we have

16 both instances where the Legislature has prescribed

17 admissibility and instances where the court of last resort

18 in our state may announce that as a matter of law this

19 methodology is reliable in all cases and you can take

20 judicial notice of it.

21 To me that's what B says. I don't think we

22 need B because I think we have a procedure for judicial

23 notice, and obviously if a statute says something is

24 admissible we have a constitutional issue here about

25 whether a statute can override a Rule of Evidence, but at

1 any rate --
2 CHAIRMAN BABCOCK: Are you talking about
3 4(b)?
4 MS. BARON: No.
5 MR. ORSINGER: I'm talking about B under the
6 Commissioners'. Carl had referred to this reliability
7 deemed to exist, and Judge Brown said that he personally
8 favored including it --
9 CHAIRMAN BABCOCK: Okay.
10 MR. ORSINGER: -- but they found no Texas
11 case endorsing the principle, even though I think that the
12 principle is really not arguable.
13 HONORABLE HARVEY BROWN: Yeah, I agree, and
14 we don't need it at this point
15 MR. ORSINGER: Okay.
16 CHAIRMAN BABCOCK: Yes, Pam.
17 MS. BARON: On 4(a) I'm concerned about the
18 first word, which is "sufficiently."
19 HONORABLE HARVEY BROWN: I have to tell you
20 I saw that when I was rereading this to get ready and I
21 thought, "Why do we have that word here?" and I couldn't
22 remember why we did that.
23 MS. BARON: I think it changes the standard,
24 so I'm concerned about it.
25 HONORABLE HARVEY BROWN: Yeah. I thought it

1 was wrong last night in looking at it again, but I
2 couldn't remember for sure if it was something I forgot
3 from our subcommittee.
4 CHAIRMAN BABCOCK: Buddy.
5 MR. LOW: Don't some of the cases refer to
6 sufficiently? Isn't that in DuPont or "sufficiently" --
7 MR. HAMILTON: The Federal rule says "based
8 on sufficient facts or data."
9 HONORABLE HARVEY BROWN: And we use the word
10 "reliable" rather than "sufficient" later in the clause,
11 so --
12 CHAIRMAN BABCOCK: So the word
13 "sufficiently" should come out?
14 HONORABLE HARVEY BROWN: I couldn't remember
15 why we had it in.
16 CHAIRMAN BABCOCK: Anybody remember why it
17 was in? Pam, you think it should come out?
18 MS. BARON: Yes, definitely.
19 CHAIRMAN BABCOCK: Definitely should come
20 out.
21 MR. ORSINGER: Can I make a cross-reference?
22 I don't know that you have Rule 705 in your proposal, but
23 Rule 705, which has to do with disclosure of facts or data
24 underlying expert opinion, subdivision (c) is very
25 analogous to this.

1 HONORABLE HARVEY BROWN: Uh-huh.
2 MR. ORSINGER: It says, "If the court
3 determines that the underlying facts or data do not
4 provide a sufficient basis for the expert's opinion under
5 Rule 702 or 703, the opinion is inadmissible." And I
6 think that that's very close to what you're accomplishing
7 here with this 4(a), only that rule says "a sufficient
8 basis for the opinion," and we're talking about a reliable
9 foundation, but, you know, it's already covered in 705(c).
10 You could arguably leave it out of here.
11 HONORABLE HARVEY BROWN: Yeah, I'm not
12 opposed right now to leaving out the word "sufficiently."
13 CHAIRMAN BABCOCK: Okay. Let's get back to
14 Bill's point. Is anybody else troubled by what Bill says
15 in the subpart (a), general rule, that it's not clear that
16 you could be qualified on one opinion but not others and,
17 therefore, would be entitled to testify on the one that
18 you're qualified on?
19 MR. LOW: If somebody is worried about that,
20 you know, like the witness is going to --
21 CHAIRMAN BABCOCK: Well, Bill is worried
22 about it.
23 MR. LOW: Okay. More than one opinion, "a
24 witness may testify in the form of opinion or opinions or
25 otherwise if the following are satisfied for each

1 opinion." In other words --

2 JUSTICE HECHT: Or you could just clarify it

3 in a comment.

4 MR. EDWARDS: Or you could say "each opinion

5 to be testified to."

6 MR. LOW: Right.

7 MS. CORTELL: I have a word suggestion. I

8 think you could say "may testify in the form of opinion or

9 otherwise if as to that opinion the following are

10 satisfied."

11 HONORABLE HARVEY BROWN: Yeah, that's good.

12 CHAIRMAN BABCOCK: What about that, Bill?

13 MR. EDWARDS: That's okay.

14 CHAIRMAN BABCOCK: "If"?

15 MS. CORTELL: After "if" say "as to that

16 opinion the following are satisfied," colon.

17 MR. YELENOSKY: Except for the other --

18 well, I am not sure what the "otherwise" means, but...

19 MR. ORSINGER: Well, you know, an expert

20 might testify to established principles of a discipline or

21 something that really don't involve opinion, like, you

22 know, the principles of finance, the principles of

23 economics; and they are not really -- you are educating

24 the jury about the intellectual framework rather than

25 giving them an opinion. At least that's what I think that

1 means.

2 CHAIRMAN BABCOCK: Judge Patterson.

3 HONORABLE JAN PATTERSON: Where does the

4 phrase "reasonable assumptions" come from, Harvey?

5 HONORABLE HARVEY BROWN: The assumptions

6 comes from the Cry case where the court struck an expert

7 opinion because there was no basis for the assumptions.

8 In fact, the assumption was contrary to the evidence, and

9 then there is a lot of Federal case law on if the

10 assumptions are just from nowhere then the opinions should

11 fall out.

12 HONORABLE JAN PATTERSON: But don't they

13 also involve data, facts, studies? I mean, I wonder --

14 "reasonable assumptions" doesn't add a lot of information

15 to me, and it seems so vague and open-ended and introduces

16 a category that's different from facts, data, study.

17 HONORABLE HARVEY BROWN: It is different.

18 HONORABLE JAN PATTERSON: And they are

19 usually based on facts, data, studies if you are making

20 assumptions. I wonder whether -- to me it doesn't seem to

21 fit, and it just seems to be open-ended and confuse an

22 element that I don't see is in the case law.

23 HONORABLE HARVEY BROWN: Well, it is in the

24 case law in the sense of the Cry case. He did strike the

25 expert because the assumptions were not a basis for the

1 opinion, but there is not a lot of case law on that, I
2 agree with you.
3 MS. BARON: I think there are a couple of
4 cases where the expert testifies to an ultimate opinion
5 that assumes facts that are not in the record. The
6 classic is the Schaefer case, where the expert testified
7 that the plaintiff had a work-related injury because he
8 had a certain type of tuberculosis that was an avian
9 strain, although there were six various types, and only a
10 few were actually caused by birds. And he was working
11 near bird droppings, but there was nothing that said he
12 was actually exposed to the bird droppings or that he had
13 one of the strains that was related to birds, but the
14 expert nonetheless testified that his work caused his
15 injury.
16 So he's assuming, one, that was a
17 bird-related tuberculosis and, two, that the bird
18 droppings that the plaintiff worked near had that strain
19 carried in it. So there were just too many assumptions in
20 the chain.
21 HONORABLE JAN PATTERSON: Right. And that's
22 the leap, the inferential gap that the cases talk about,
23 and I wonder if this doesn't encourage that gap.
24 MS. BARON: Uh-huh.
25 HONORABLE JAN PATTERSON: Which is the -- I

1 mean, the cases seem to speak against allowing that type
2 of leap
3 MS. BARON: Right. You think this actually
4 gives credence to making those kinds of assumptions?
5 HONORABLE JAN PATTERSON: (Nods head.)
6 HONORABLE HARVEY BROWN: It's meant to do --
7 MS. BARON: The opposite.
8 HONORABLE HARVEY BROWN: -- exactly the
9 opposite.
10 HONORABLE JAN PATTERSON: I know. I know
11 MR. ORSINGER: But the word "reasonable"
12 qualifies it. So if the assumption is unreasonable it
13 will be excluded, and if it's reasonable should we say --
14 should we omit to say you can make reasonable assumptions?
15 CHAIRMAN BABCOCK: Justice Hecht.
16 JUSTICE HECHT: Well, I agree with Jan. I
17 think this could be read fairly open-endedly. I think if
18 an expert said, "Well, I think it's reasonable to assume
19 A, B, C, D, and E, and based on that I think this." I
20 mean, all those assumptions have to be tested by the same
21 reliability test applied to the whole process, so I am not
22 sure it shouldn't be just "reliable foundation of facts,
23 data, or studies."
24 CHAIRMAN BABCOCK: Okay. Bill.
25 MR. EDWARDS: You know, every approach to

1 this problem is fought with the distrust of the capacity
2 and intelligence of jurors, and we spend hours seeing how
3 we can cut down on giving information to jurors and assume
4 that the jurors, who may be all engineers and chemists,
5 don't have the capacity to make these decisions that the
6 judge who's got a B.A. in ancient Mandarin art does.
7 You know, and it seems to me that we need
8 some gatekeeping for sure, but we shouldn't have the -- we
9 shouldn't -- I don't think we should just assume that
10 jurors ought to be thrown out the window, and that's what
11 we tend to -- we keep saying, "Well, we're going to let
12 something in." Well, isn't the jury capable of doing
13 something? I think it is.
14 HONORABLE JAN PATTERSON: I agree with that.
15 MR. HAMILTON: If there is not any
16 difference in "reliable foundation of facts" and "reliable
17 facts and data," I don't favor the word "foundation." I
18 think you just ought to say "reliable facts or data."
19 Unless there is some distinction between the two
20 CHAIRMAN BABCOCK: I think that came up a
21 minute ago, didn't it?
22 MR. ORSINGER: Yeah. I'm scared of the word
23 "foundation" because I think it means something more than
24 just facts and data.
25 MR. LOW: But facts and data must be

1 sometimes based upon an accepted foundation, I mean, you
2 know, that's just accepted, that you don't go back and
3 recreate the wheel. This is just a foundation that's
4 accepted in the world, and it's the foundation of the
5 testimony, and then you put specifically the facts and
6 data. So I think you would be losing if you take out
7 "foundation."
8 CHAIRMAN BABCOCK: What about taking out
9 "reasonable assumptions"? There seems to be some support
10 for that, but --
11 MR. ORSINGER: I'd like to defend the use of
12 "assumptions." I think experts do make reasonable
13 assumptions frequently; and sometimes they make
14 assumptions along the lines of, "Well, if we assume
15 so-and-so then we ought to have the following result" and
16 "if we assume so-and-so, we have a different result"; and,
17 in fact, the scientific process itself is based on
18 assumption, the idea of developing a hypothesis, which is
19 an assumption, and then hold it against the facts and see
20 if it measures up or not; and you're now writing that
21 unless it meets these criteria, it doesn't come in.
22 That's what this rule is now saying; and if
23 you don't include assumptions in there, I think that we're
24 closing off a lot of area that experts legitimately rely
25 upon in arriving at an explanation or an opinion and that

1 the word "assumption" shouldn't be frightening to us if
2 it's qualified by "reasonable." Or if you want to qualify
3 it, say "reliable" so that the standards of Daubert are
4 folded into the assumption, and if it's not a reliable
5 assumption, you can't make it. But I really do think that
6 experts have assumptions in what they do; and as long as
7 the assumptions are reliable they should be permitted to
8 go forward.
9 MR. LOW: And you ask "hypothetically
10 assume" and then, of course, the lawyer objects if that's
11 not true. In other words, you could have that protection.
12 Assume hypothetically such-and-such. "I'm not a doctor,
13 but assume hypothetically this, that, and the other, so
14 forth, and now, give me..."
15 Well, then if those facts don't exist you do
16 just like we do now. "Your Honor, I object to that.
17 That's not in the evidence" and so forth, but so you can't
18 do away with reasonable assumptions, and certainly it's a
19 reasonable assumption if the lawyer doesn't object when
20 you ask him to assume something
21 CHAIRMAN BABCOCK: Judge Brown then Judge
22 Patterson.
23 HONORABLE HARVEY BROWN: Maybe a way to
24 break the impasse is just to say "based upon a
25 reliable" -- "based upon reliable facts, data, studies, or

1 assumptions." Take out "reasonable" because it's already
2 in the word "reliable." "Reliable" describes all these,
3 "facts, data, or studies" and "assumptions," takes out the
4 "foundation" that Richard is concerned with, which I think
5 is in the case law anyhow, so I don't think it's a
6 deal-breaker if we take it out
7 CHAIRMAN BABCOCK: If we take it out are we
8 changing the case law?
9 HONORABLE HARVEY BROWN: No. I don't think
10 so. The case law, that word is not in the rule to begin
11 with. The case law just uses that to explain the rule, so
12 I think taking out the word "foundation" doesn't really
13 change anything.
14 MS. BARON: Well, it is used in both Havner
15 and Robinson.
16 HONORABLE HARVEY BROWN: Right. It's used
17 in the opinions, yes.
18 CHAIRMAN BABCOCK: Why wouldn't we use it
19 then?
20 MR. LOW: And it's used in the Supreme
21 Court, the -- what's it, Kumho or --
22 HONORABLE HARVEY BROWN: Yes.
23 CHAIRMAN BABCOCK: You weren't elected,
24 Richard
25 MR. ORSINGER: I think that the word

1 "foundation" as used in case law means that you have to
2 have a factual foundation for your opinion. I think they
3 mean a basis for your opinion is facts.
4 As used in this rule, I'm concerned that it
5 may be broader than that and it may go to introducing the
6 conceptual framework of the expert when what this clause
7 is supposed to do is just look at the data itself, and it
8 has nothing to do with the -- the facts and data are not
9 in the expert's head. They are admitted through
10 independent evidence and that's -- the word "foundation"
11 to me gets us into the reasoning processes associated with
12 it, and I don't like it. It bothers me
13 CHAIRMAN BABCOCK: Pam, have you got the
14 cases there?
15 MS. BARON: Well, I have excerpts from the
16 cases, and Havner talks about "foundational data," and
17 what Robinson says is it has to be based on a reliable
18 foundation but then there is nothing after the word
19 "foundation" that would indicate what that means.
20 CHAIRMAN BABCOCK: Okay. Judge Patterson.
21 I'm sorry. I overlooked you.
22 HONORABLE JAN PATTERSON: Well, I think
23 where the cases come down when they talk about "reliable
24 foundation" -- and this is where I agree with Bill
25 Edwards. I think the virtue of the cases and what we want

1 to capture is a know-it-when-you-see-it kind of test.
2 Everybody agrees that it has to be reliable,
3 and the virtue of the cases which we haven't captured here
4 but which the Federal rule captures is the variety of ways
5 in which you can establish that, which lends itself to
6 flexibility in each individual situation. And they talk
7 about in terms of reliability factors, you know, the
8 testing and the six factors, peer review, rate of error,
9 and they talk about all that.
10 I think what we have here, (a), (b), and (c)
11 is going to spawn litigation and is confusing because you
12 can't tell whether it's new or old, but it's different
13 than what we have been looking at and what the case law --
14 I mean, even though some of the words are the same,
15 granted, but then what happens to the various factors that
16 the main cases have talked about and the manners in which
17 you can prove it?
18 So I really think that maybe reliability is
19 you know it when you see it, and the cases don't so much
20 try to establish a definition for it as the framework for
21 how you can show it, which is a flexible standard, and I
22 think which respects both points of view, you know, those
23 who think that Daubert is a good thing and that you need
24 the gatekeeper function and those who think it should be
25 given to the jury, that it is a flexible standard. And I

1 can just see a whole new series of arguments arising out
2 of this that may not contribute to the dialogue
3 CHAIRMAN BABCOCK: Judge Brown.
4 HONORABLE HARVEY BROWN: Just to clarify,
5 the Federal rule does not have the factors. You're
6 looking I think at the National Conference --
7 HONORABLE JAN PATTERSON: Oh, okay.
8 HONORABLE HARVEY BROWN: -- which is Tab 11.
9 HONORABLE JAN PATTERSON: Tab 11.
10 HONORABLE HARVEY BROWN: Right. The Federal
11 rule is Tab 14. It has nothing about the factors.
12 HONORABLE JAN PATTERSON: Okay.
13 HONORABLE HARVEY BROWN: There has been a
14 debate about whether the factors should be in the rule,
15 and we really thought that was an area that is still
16 developing even more than some other areas and that should
17 be a comment. That's why it's not in our rule. We could
18 put it in the rule easily, but most people thought and the
19 State Bar committee thought that should be a comment, not
20 a rule.
21 MR. LOW: Aren't some of these things in
22 Gammill where they list -- Judge Hecht lists these things?
23 So we are not getting away -- I mean, we are not just
24 trying to include everything, but these things you're
25 objecting to are -- some of those are elements that have

1 been listed in Gammill.

2 HONORABLE HARVEY BROWN: Yeah. There is a

3 three-part test there and --

4 MR. LOW: Right.

5 HONORABLE HARVEY BROWN: And Havner has a

6 three-part test as well.

7 MR. LOW: So it's not getting away from the

8 case law. It's following the case law.

9 HONORABLE JAN PATTERSON: Are these the

10 three factors that are set forth in Gammill?

11 MR. LOW: Gammill set forth six, I believe.

12 I don't remember right off

13 MR. ORSINGER: This is not language out of

14 the Gammill case.

15 MR. LOW: It's not a quote.

16 MR. ORSINGER: This is not at all language

17 out of the case.

18 MR. LOW: It's not a quote

19 MR. ORSINGER: No, I know, and when you pick

20 words --

21 HONORABLE JAN PATTERSON: Yeah.

22 MR. ORSINGER: -- you know, they may have

23 meanings to people that are different from what you think

24 when you pick them.

25 HONORABLE JAN PATTERSON: Yeah. They sound

1 good, but I think we're kind of evolving into a good,
2 sensible area, and I think that Gammill and Kumho have
3 made a great contribution, really, to the dialogue of
4 flexibility while at the same time respecting reliability.
5 So, I mean, if we can utilize some of the same language so
6 that we are not litigating this whole issue all over
7 again.
8 MR. LOW: But we're doing that in the
9 comment
10 MR. GILSTRAP: The problem with (4) is, is
11 that it's circular. If we put (4) and said, "The
12 testimony is reliable," everybody would say, "Well, what
13 does 'reliable' mean?" But now what we have done is put
14 (a), (b), and (c), and that tells you what it is, but when
15 you look at each one you ultimately have got to find out
16 what does reliable mean, and I don't know that that really
17 advances the ball at all. It seems like it creates some
18 possibilities for clever advocates to make arguments that
19 maybe we're not seeing here.
20 CHAIRMAN BABCOCK: Okay. Carl.
21 MR. HAMILTON: What is the difference in --
22 I mean, what is the purpose of (c)? Isn't that the same
23 thing as we've already said in (a) and (b)?
24 HONORABLE HARVEY BROWN: Part (c), again,
25 it's stylistic, but this is application. That is in

1 Gammill. That is in Havner.

2 MR. LOW: Right.

3 HONORABLE HARVEY BROWN: It's subpart (3) of
4 the proposed Federal Rule 702. You can't just have a good
5 method in the abstract. You have to apply that method to
6 the facts of the case.

7 MR. ORSINGER: It's what some courts call
8 the fit, the fit of your opinions and methodology to the
9 issue in the case.

10 I think I have an example -- if "assumption"
11 is in danger at all in this discussion of an example of a
12 reasonable assumption that's not facts or data. When
13 people are dealing with statistics, they have a principle
14 called sampling, and it's all, you know, well-established
15 in methodology, but they select a group that they think is
16 representative of the entire spectrum

17 CHAIRMAN BABCOCK: Like three or four
18 precincts maybe.

19 MR. ORSINGER: And they take a sample. They
20 do a survey. It's supposed to be random, and there are
21 standards that are well-established for that, and then
22 they generalize to the entire population based on the
23 sample. Now, people should be able to get up and testify
24 to opinions about an entire population based on legitimate
25 sampling methods, and there's an example I think where --

1 HONORABLE JAN PATTERSON: That's a great
2 example, Richard, but that's using "assumption" as a term
3 of art. That is specialized knowledge in and of itself,
4 that's the use of that word.
5 MR. ORSINGER: But if you are limited to the
6 data, could you not tell a statistician, "I'm sorry, you
7 cannot testify to the entire community because you only
8 surveyed 1,500 of the community"?
9 MR. YELENOSKY: That's a reliable principle
10 of statisticians that you do a sampling of particular
11 people.
12 MR. ORSINGER: No, but wait a minute. The
13 problem with (a) -- and, remember, if you don't qualify by
14 making (a), (b), or (c) you don't get to testify. It has
15 to be based on facts and data or studies. Now, if a
16 statistician is talking about a million people based on a
17 survey of 1,500 people, is he really testifying on facts
18 and data, or is he making an assumption that the sampling
19 is representative of the million people?
20 CHAIRMAN BABCOCK: But the assumption is
21 based on studies that have gone before that enables him to
22 say --
23 MR. LOW: Right. Right.
24 CHAIRMAN BABCOCK: -- "This is reliable
25 because I know I can extrapolate from 1,500 to a million."

1 I don't see that there's a problem. Justice Hecht.
2 JUSTICE HECHT: Well, this discussion raises
3 an alarm in my mind because the last thing I think the
4 Court wants to get into is what is the difference between
5 our Rule 702 and Federal Rule 702, but we -- one of the
6 geniuses of the Rules of Evidence that has carried them
7 along as far as they have gotten is that the Rules of
8 Evidence ought to be basically the same in the state and
9 Federal and civil and criminal courts throughout the
10 country, and they have not achieved that, but they have
11 gotten maybe 85 percent of the way there. And I would
12 hate to see a bunch of cases trying to decide the
13 difference between 702(a)(4)(a) of our rule and 702.1 of
14 the Federal rules.
15 HONORABLE HARVEY BROWN: One idea along that
16 line is to take part (4) and just make it the new addition
17 to 702, which has a three-part test anyway, and just --
18 CHAIRMAN BABCOCK: What was the rationale,
19 Harvey, for wandering away from the Federal rules?
20 HONORABLE HARVEY BROWN: We just thought
21 that the Federal rule wasn't as precise, wasn't quite as
22 close to Texas law. But I think it's a big improvement, I
23 mean, and I personally would be satisfied with it.
24 MR. ORSINGER: So would I.
25 HONORABLE JAN PATTERSON: So would I.

1 CHAIRMAN BABCOCK: Yeah. But you got
2 reversed.
3 HONORABLE SARAH DUNCAN: Yeah, I got
4 rejected all over the place on this issue, and that's kind
5 of what I want to point out in a way. Since I now know
6 more about blood alcohol extrapolation reverse and
7 otherwise than I ever wanted to know, under the Federal --
8 in my opinion, under the Federal rule proposal for 702 it
9 is only by the Texas Supreme Court authority that
10 Intoxilyzer results would come into evidence, because
11 effectively what the Supreme Court said in its per curium
12 in Morales, if you boil a whole lot of it down, is "The
13 Legislature said these things are admissible and that's
14 the end of the discussion." Because if you actually go
15 into the reliable scientific evidence, you cannot
16 backwards extrapolate a blood alcohol result taken two
17 hours after a stop.
18 So if you're going to go with 702 as the
19 Federal rule is proposed to be amended, there's going to
20 have to be a whole lot of case law interpretation that
21 adds to it because it alone is not sufficient to make
22 these kinds of reliability determinations that are being
23 made
24 CHAIRMAN BABCOCK: Steve.
25 MR. YELENOSKY: Well, I didn't vote earlier

1 about whether we ought to even make a change because I
2 didn't know enough, and I probably still don't know
3 enough, but having listened to Justice Hecht, I wonder
4 whether we want to do anything, and I probably would vote
5 against that at this point.
6 And then just a minor point on this, what's
7 proposed here -- it doesn't get into any real big issue,
8 but what's proposed here and Appendix B both literally on
9 their terms forbid lay opinion testimony because, unlike
10 the Federal rule, they say start out by saying, "A witness
11 may testify in the form of opinion" and then list the
12 conditions; whereas, the Federal rule talks about and ties
13 it to scientific, technical, or other specialized
14 knowledge opinion. In the proposed rule it's a condition
15 for giving any opinion, it appears, literally on its face.
16 So on that point I prefer the Federal rule language.
17 CHAIRMAN BABCOCK: Based on this discussion
18 -- and we're going to recess in a little bit, in a few
19 minutes, but based on this discussion, is there an
20 appetite to perhaps just go to the Federal rule?
21 HONORABLE HARVEY BROWN: I suggest as a
22 compromise that we keep (a)(1) through (3), which seemed
23 to be just stylistic clarification and better organized.
24 I mean, it takes this huge, long sentence and breaks it
25 down

1 CHAIRMAN BABCOCK: Right.
2 HONORABLE HARVEY BROWN: And then the
3 subpart (4) just track 702.
4 CHAIRMAN BABCOCK: Track the Federal rules?
5 HONORABLE HARVEY BROWN: Yes.
6 HONORABLE JAN PATTERSON: I second that
7 motion.
8 CHAIRMAN BABCOCK: Second that motion. All
9 in favor raise your hand.
10 MR. ORSINGER: Can we comment on that before
11 we take the vote?
12 CHAIRMAN BABCOCK: Sure.
13 MR. ORSINGER: I agree totally with Steve.
14 The way the Federal rule is written, the new Federal rule
15 which we're about to adopt, it only by its terms only
16 applies to expert opinion. The way the Texas rule is
17 written, even though the section is labeled "testimony by
18 experts," the sentence applies to all opinion; and so I'm
19 nervous, just like Steve is, is that we ought to qualify
20 that by saying something to make clear that it's only
21 expert opinions that have to meet these standards.
22 HONORABLE HARVEY BROWN: Well, I think
23 that's part (1). That's part (1).
24 (Three members talking at once.)
25 CHAIRMAN BABCOCK: Hold it, guys. Now,

1 don't talk over each other. The court reporter can't get
2 it.
3 Steve.
4 MR. YELENOSKY: Well, part (a) says you may
5 testify to an opinion if you meet the three following
6 things. So literally what that means is if you're
7 testifying about something that's scientific or technical
8 or not scientific or technical, boom, you don't meet
9 criteria number one. You can't give an opinion. That
10 excludes --
11 CHAIRMAN BABCOCK: You don't qualify as No.
12 (3) either.
13 MR. YELENOSKY: I'm sorry?
14 CHAIRMAN BABCOCK: You don't qualify as No.
15 (3) either.
16 MR. YELENOSKY: Well, whatever. I mean, I
17 have a suggestion to fix it, but I think we have to
18 basically put (1) into (a) and then under (a) we only have
19 what is now (2) and (3). Because that's sort of the first
20 sentence of the Federal rules.
21 HONORABLE HARVEY BROWN: So you're saying a
22 witness testifying based on a scientific, technical, or
23 other specialized knowledge --
24 MR. YELENOSKY: Right, and "a witness may
25 give testimony based on scientific, technical, or other

1 specialized knowledge if" and then (2) and (3), but then
2 you also have to take into account Nina's point about how
3 we might clarify or put in a comment to clarify that
4 different parts of testimony or different opinions may
5 qualify while others don't.
6 CHAIRMAN BABCOCK: Joan.
7 MS. JENKINS: Wouldn't it be much simpler to
8 satisfy Steve just to simply have (a) read "an expert
9 witness may testify." I mean that's the title of 702
10 CHAIRMAN BABCOCK: Or "a witness may testify
11 as an expert."
12 MS. JENKINS: Yes. I mean, to me that would
13 solve Steve's problem without having to reword everything
14 else.
15 MR. YELENOSKY: I thought of that, but I
16 just -- I'm not sure I can articulate it, but I like the
17 Federal rule version better which specifies what you mean,
18 because just saying "may testify as an expert," it may be
19 kind of circular there. I don't know
20 CHAIRMAN BABCOCK: Okay. Richard, any more
21 discussion that you want?
22 MR. ORSINGER: No.
23 CHAIRMAN BABCOCK: Okay. You okay? Bill.
24 MR. EDWARDS: Before I start voting on
25 something I'd like to see what I'm voting on.

1 CHAIRMAN BABCOCK: Yeah. Well, this is not
2 going to be a final vote. This is just to give Judge
3 Brown some direction to come up with language which we'll
4 talk about at the next meeting; but having said that, how
5 many people are in favor of the proposal that Judge Brown
6 made with Steve's friendly amendment? Everybody
7 understand what we're voting on?
8 MR. EDWARDS: No.
9 CHAIRMAN BABCOCK: Everybody raise your hand
10 who's in favor of that. And everybody opposed?
11 It passes by a vote of 16 to 4, so at the
12 next meeting --
13 HONORABLE HARVEY BROWN: I'll change it.
14 CHAIRMAN BABCOCK: -- if you could come up
15 with the language so we can all take a look at it.
16 HONORABLE HARVEY BROWN: I'll do it.
17 CHAIRMAN BABCOCK: Thanks for your work, and
18 thanks, everybody, for --
19 HONORABLE HARVEY BROWN: Wait, wait, before
20 we leave --
21 CHAIRMAN BABCOCK: Yeah.
22 HONORABLE HARVEY BROWN: Can I touch on one
23 other thing?
24 CHAIRMAN BABCOCK: Yes.
25 HONORABLE HARVEY BROWN: We have got

1 comments, which I assume we will do next time, but we have
2 got one big issue we would like a little bit of guidance
3 on, and that is whether -- we don't have to talk about it
4 today, if people will at least read about it and think
5 about it for next time, and that is do we want a rule of
6 procedure for how to handle Daubert hearings? Do we want
7 a rule to talk about when you should file them? Do we
8 want a rule that sets up some sort of guidelines for the
9 court, or do we just want a comment that maybe tracks the
10 Maritime Overseas suggestion that says, "Do it as early as
11 possible"?
12 CHAIRMAN BABCOCK: And that's your Tab 10.
13 HONORABLE HARVEY BROWN: We can propose
14 both.
15 CHAIRMAN BABCOCK: And that's your Tab 10;
16 is that correct?
17 HONORABLE HARVEY BROWN: Yes. Tab 9 is the
18 proposed comment, if we just do it by way of comment. Tab
19 10 is a proposed rule based largely on the motion for
20 summary judgment since striking an expert can often be
21 dispositive, but if people will at least give some thought
22 to that for the next meeting that would be very helpful.
23 MR. LOW: And the rule is not final. I
24 mean, the committee, that's just --
25 HONORABLE HARVEY BROWN: Right. It's just a

1 first draft, needs a lot of work.
2 MR. LOW: -- the form that we have come up
3 with.
4 CHAIRMAN BABCOCK: Carrie has got an
5 announcement about --
6 MS. GAGNON: If you parked in the parking
7 garage, you have to come in the same gate you came in at,
8 leave the same gate, but you have to get within six inches
9 or it won't open, so pull up close enough so you can get
10 out.
11 CHAIRMAN BABCOCK: Don't give up too quick.
12 MS. GAGNON: Yeah. Don't give up too quick.
13 (Meeting adjourned at 11:36 a.m.)
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2 CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

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7 I, D'LOIS L. JONES, Certified Shorthand

8 Reporter, State of Texas, hereby certify that I reported the

9 above meeting of the Supreme Court Advisory Committee on the

10 18th day of November, 2000, Morning Session, and the same was

11 thereafter reduced to computer transcription by me.

12 I further certify that the costs for my

13 services in the matter are $ 871.00 .

14 Charged to: Jackson Walker, L.L.P.

15 Given under my hand and seal of office on

16 this the 2nd day of December, 2000.

17

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