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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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Taken before Patricia Gonzalez, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 30th day of March, 2001, between the hours of 2:00 p.m. and 5:00 p.m. at the Texas Broadcasting Association, 502 East 11th, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

CHAIRMAN BABCOCK: Okay. Back on the record. We're talking about recusal, for a change. And we have Subparagraph (b) here which has some language that came in here -- you'll see it boldfaced, "A judge must recuse in the following circumstances, unless provided by Subsection (c)."

Carrie and I went back to the transcript and couldn't find a source for that. Is that right, Carrie?

MS. GAGNON: The difference was, it's not by subsection. It's supposed to say "by Subdivision (c)."

CHAIRMAN BABCOCK: But beyond that, I thought we substantively couldn't find where that came out of. Maybe I'm wrong.

Subsection --

HON. McCOWN: Well, I remember that.

MR. HAMILTON: It could be "Subparagraph."

HON. McCOWN: I mean, I remember why we did that.

CHAIRMAN BABCOCK: Okay. Tell us why we did that, Scott.

HON. McCOWN: As I recall the discussion, if we just said, "A judge must recuse in the following circumstances," it appeared to suggest that the judge had no option and had to step aside, and we wanted to tie in the fact that if you call people in and disclosed it and they had no problem with it that you could move forward and you didn't have to recuse.

CHAIRMAN BABCOCK: Okay. Carrie's notes indicated --

HON. McCOWN: I mean, we did discuss it. I recall.

CHAIRMAN BABCOCK: Carrie's notes indicate that the language that we agreed upon was, "A judge must recuse in the following circumstances unless waived pursuant to Subdivision (c)."

HON. McCOWN: That's fine.

CHAIRMAN BABCOCK: That sounds more like what we were trying to get at.

HON. McCOWN: Yeah.

CHAIRMAN BABCOCK: It passed by a vote of 30 to nothing.

HON. McCOWN: Yeah.

CHAIRMAN BABCOCK: Okay. "Unless waived pursuant to Subdivision (c)."

Carrie, was there any other language that you caught that we had a concern about?

MS. GAGNON: There was just this, from "matter" to "motion" on (3) Referral.

CHAIRMAN BABCOCK: Okay. On (3) Referral, the first sentence, "The judge in the case in which the motion is filed, without further proceedings, promptly recuse or disqualify or refer the" -- and her notes suggest it should be "motion" instead of "matter."

What does everybody think about that?

MR. HAMILTON: I think it should, "motion."

CHAIRMAN BABCOCK: "Motion," I think so, too.

Okay. And then it's tracked later about ten lines down. Where it says, "the matter," it should be "the motion."

MR. LOW: Let me ask you, if there is a motion and before anything can be done there's something that has to be done in the case; that judge can't do it. So wouldn't he be

referring the entire matter to the presiding judge instead of just the motion?

CHAIRMAN BABCOCK: You mean, there could be some collateral things relating to the matter -- to the motion?

MR. LOW: There could be some circumstance where something had to be done; he can't do anything. And I can see why a matter would be there if it meant -- not just the motion. Maybe that would never arise. I don't know.

CHAIRMAN BABCOCK: It does say "without further proceedings," though.

MR. LOW: Okay.

CHAIRMAN BABCOCK: We use "motion" everywhere else.

MR. LOW: Okay.

CHAIRMAN BABCOCK: Judge McCown, guess what? This was your language.

HON. McCOWN: Where are we looking?

MS. GAGNON: Under "Referral," there was a vote of 31 to 0 last time to make the language say "motion" instead of "matter."

HON. McCOWN: Okay.

MS. GAGNON: And that was your language that was voted on.

HON. McCOWN: Okay. Motion is fine with me.

(Laughter)

CHAIRMAN BABCOCK: Yeah. I think that's the better way to do it.

Okay. With those changes -- and Carrie, I'm handing you my version here that's got everything we decided today, does anybody have anything else about recusal?

MR. HAMILTON: Did you make another change or two from some other letter?

CHAIRMAN BABCOCK: Yeah. We made some typographical changes, Carl.

MR. HAMILTON: Well, you changed the word "before" something.

CHAIRMAN BABCOCK: Yeah. I think there was a letter that came in.

HON. McCOWN: Buddy picked up that there's a second matter. Did you-all get that as well? You-all got both "matters" and turned them into "motions"?

CHAIRMAN BABCOCK: Right. That's correct.

HON. McCOWN: Okay.

CHAIRMAN BABCOCK: We got both "matters" and turned them into "motion."

MR. HAMILTON: The first sentence in (e)(3).

CHAIRMAN BABCOCK: First sentence in (e)(3). Okay.

MR. HAMILTON: "The judge...without further proceedings, promptly recuse...refer...to the presiding judge" -- without taking any further instead of "before."

CHAIRMAN BABCOCK: Yeah. We've made that change.

MR. HAMILTON: Okay. You got it?

CHAIRMAN BABCOCK: Yeah. Richard.

MR. ORSINGER: At the very end of Section (3) on Referral, we've added that all -- notwithstanding the local rules, the case can't be reassigned except by agreement of the parties as described above.

And I remember all of that discussion, but I'm wondering -- Bill and I have been talking in here about -- as described above where, is the only thing I'm asking, because I don't think we described that agreement here

inside --

HON. DUNCAN: We got so much done this morning.

(Laughter)

MR. ORSINGER: You're the third person to make that comment.

(Laughter)

MR. ORSINGER: I will point out that Bill was the one that asked me to bring this up, so...

(Laughter)

MR. ORSINGER: If everybody else is okay that it's described above somewhere, I'm okay.

(Laughter)

HON. DUNCAN: That's very trusting of you.

HON. McCOWN: Well, I think we say "described above" as opposed to naming a specific subsection, because it's in this very subsection. It's right up above where it says, "...The case shall be referred to the presiding judge of the administrative region for reassignment unless the parties agree that the case may be reassigned in accordance with the

local rules." So the "above" means right above.

MR. ORSINGER: Okay.

MR. YELENOSKY: You can say "in this paragraph."

CHAIRMAN BABCOCK: And once again, Judge McCown, this language is yours.

HON. McCOWN: Well --

HON. PEEPLES: Five or six lines down from the top of the page.

HON. McCOWN: And I don't mind adopting Steve Yelenosky. We could say, "except by agreement of the parties as described in this paragraph," or we can -- but "the above" is right above.

MR. LOW: Most people know what "above" means.

MR. ORSINGER: I think we maybe have different drafts, because I don't see --

(Simultaneous discussion)

PROFESSOR DORSANEO: It's not in this draft.

(Simultaneous discussion).

HON. McCOWN: I just read it.

HON. BROWN: Second full sentence.

(Laughter)

MR. ORSINGER: Never mind.

HON. McCOWN: I move we send this on to the Supreme Court.

MR. LOW: I second that motion.

(Laughter)

MR. HAMILTON: I second the motion.

CHAIRMAN BABCOCK: What was the motion?

JUSTICE HECHT: Send it on to the Supreme Court.

CHAIRMAN BABCOCK: Yeah. Okay. Bill.

HON. RHEA: One presumably very minor thing, but in (5), the second line, "interim proceeding" should be plural, I assume. "Proceedings." Not to suggest that there's one interim proceeding.

JUSTICE HECHT: It's plural three words before.

CHAIRMAN BABCOCK: Yeah. It's proceedings, plural.

MR. HAMILTON: It is plural.

CHAIRMAN BABCOCK: Should be plural.

HON. McCOWN: It should be plural? Shouldn't it be singular?

Well, we've got it singular in one place and plural in another.

HON. RHEA: Plural all of the way through.

CHAIRMAN BABCOCK: Plural except for that one spot.

HON. McCOWN: Shouldn't it be singular?

HON. RHEA: So it's one single interim proceeding that we're talking about?

HON. McCOWN: But there wouldn't be more than one at a time.

CHAIRMAN BABCOCK: It seems to me like it ought to be singular all of the way through. Shouldn't it?

HON. RHEA: All interim proceedings is what this is talking about, not just one at a time or one.

CHAIRMAN BABCOCK: Yeah. You're right.

HON. RHEA: "...The interim proceeding...abated pending a ruling." All of the interim proceedings are abated pending a

ruling on the motion.

HON. McCOWN: But you only have one at a time. It doesn't matter, but it ought to be one.

CHAIRMAN BABCOCK: Make it consistent. Yeah.

HON. McCOWN: It ought to be consistent.

CHAIRMAN BABCOCK: Okay. We'll make it plural.

HON. McCOWN: Or we should alternate, one or the other.

(Laughter)

HON. RHEA: And then more substantive on (6) -- and, obviously, if you've talked about this and made a decision about it, I'll yield to that.

When I read this, the last part about, "In any case where a judge has been disqualified, the judge assigned to hear the case shall declare void all orders entered by such judge and shall rehear all matters that were heard by the disqualifying judge," is it possible -- and it may not be -- that we could add "all substantive orders" to that?

I'm a little concerned about setting aside a 103 order back four years ago and having to redo service of process, for instance. Is it mandatory, given a disqualification, that we have to go back to square one and void every single order that ever existed in the case --

CHAIRMAN BABCOCK: Yeah. Richard, didn't we talk about -- or, Carl, didn't we talk about that because we were worried about getting into a fight about what's substantive and what's not substantive.

HON. RHEA: This is so absolute. As a trial judge, if I were reading this and -- or a presiding judge, I'd have to say, "Every order in the case is gone."

JUSTICE HECHT: Yeah. But then he can rehear it and say, "And I've thought about this for a few seconds and I think that 103 order" --

MR. BRISTEO: "Since you're present here in the courtroom, no need to serve you again."

JUSTICE HECHT: -- "103 order should stay in."

CHAIRMAN BABCOCK: Yeah.

HON. RHEA: But then is it retroactive back to -- is the service good or you've got to redo the service?

HON. McCOWN: Well, the service wouldn't be an order of the judge.

MR. BRISTEO: He was saying --

HON. RHEA: If the 103 order would precede that or a 106 order would precede that, that service?

MR. BRISTEO: But then they're present. I mean, disqualification cases are pretty clear, and they're really old. Everything that the disqualified judge signed is void, period.

CHAIRMAN BABCOCK: So your argument is, that's how long it's been the law?

MR. BRISTEO: That's always been the law. It's part of the constitution.

HON. RHEA: Well, that's why I said there may be nothing we can do about it.

CHAIRMAN BABCOCK: I might recommend we pass on this one.

Carl, you got anything?

MR. HAMILTON: Yes. There's another point in Judge Case's letter we

overlooked, and that is that he thinks that (e)(2) ought to include disqualification as well as recusal. He says that (e)(2) authorizes the filing of motions to disqualify and to recuse at any time.

I can't find it, but anyway, he thinks that it should be revised to require motions to disqualify filed within 10 days to comply with (e)(2), the same as the motion to recuse.

HON. McCOWN: I don't think you can. I think you can raise disqualification at any time under any circumstance.

MR. HAMILTON: Well, but his point is, if you don't raise it, except within the 10 days, it would kick in the interim proceedings. And if you wanted to go ahead, you could, on the risk that disqualification was really no good.

CHAIRMAN BABCOCK: But I thought that we were treating that like subject matter jurisdiction, that that could be raised at any time, even on appeal.

MR. ORSINGER: The question is: Do you have the parallel proceeding or not?

Clearly, it's void if the judge is disqualified, but you don't want to be in the

trap where a spurious motion to disqualify does not permit a parallel proceeding, even if it's filed the day before trial. Right? That's his point?

MR. HAMILTON: That's his point, yeah.

MR. ORSINGER: And we don't do that?

CHAIRMAN BABCOCK: That wouldn't be (e)(2).

MR. BRISTEO: I don't remember --

CHAIRMAN BABCOCK: Interim proceedings is (e)(4).

MR. BRISTEO: My recollection was we decided, since grounds for disqualification are objective matters -- you either have a financial interest or you don't or you're related to one of the parties or you're not -- that a party who's swearing to the motion that states the facts specifically is simply not going to be able to file a "frivolous motion," because it -- you know, things like bias and things like that don't disqualify.

MR. HAMILTON: His point is that --

MR. ORSINGER: Well, I don't see why the problem exists, because under (4)(A), the court can proceed "when the motion to recuse or disqualify is filed after the 10th day prior to the date the case is set for conventional trial," so --

MR. HAMILTON: Yeah. But (e)(2) says, "A motion to disqualify or recuse may be filed at any time." Then it says, "A motion to recuse" only, "if filed later than the 10th day must state one or more of the following."

MR. ORSINGER: But we don't care if it states any of that.

MR. HAMILTON: But his point is that (e)(2) ought to say, "A motion to recuse or disqualify if filed later than the 10th day." It ought to state those. Otherwise, it's going to kick in the interim proceeding.

HON. RHEA: Those aren't the same bases for disqualification.

MR. ORSINGER: Well, why wouldn't we want to kick in the interim proceeding for some motion filed one day before trial?

MR. HAMILTON: Did you say why wouldn't we?

MR. ORSINGER: Yeah. I would think we would want it, whether it's a motion to recuse or disqualify, if it's filed too quickly before a trial to have a hearing on it before the trial starts, we ought to have a parallel proceeding.

MR. HAMILTON: Where does it say you can have that in a motion to disqualify?

MR. ORSINGER: Under (4)(A), "...The judge...may proceed as though the motion had not been filed, pending a ruling on the motion: (A) when the motion to recuse or disqualify is filed after the 10th day prior to the date the case is set for conventional trial..." So whether it's recusal or disqualification, if it's filed within 10 days of trial, you have your parallel proceeding.

MR. HAMILTON: Well, then, that ought to be made consistent with (e)(2).

MR. BRISTEO: If the judge is disqualified and the ground existed two years before you got to trial and you lay behind the log and you file it the day before trial, the judge is still disqualified. There's nothing you can do about it. They are allowed to lay

behind the log. So it doesn't matter when they discovered it.

CHAIRMAN BABCOCK: Right. So I thought --

MR. ORSINGER: The point is, we don't want to stop the trial; so we have to have the parallel proceeding. But (e)(2) is kind of a waiver rule saying, "If you wait too late, you're going to waive it unless you can show you didn't know about it, it didn't occur," or something like that.

There is no waiver for disqualifications. So we don't need to have any kind of limitations or explanations or anything about a late-filed motion to disqualify.

CHAIRMAN BABCOCK: Yeah. I think this takes -- yeah. Bill.

PROFESSOR DORSANEO: I don't have -- I'm on a new subject.

CHAIRMAN BABCOCK: Okay. Anybody on the old subject?

(No response)

CHAIRMAN BABCOCK: Okay. Bill, the new subject.

PROFESSOR DORSANEO: Back to that

(b) that you started with. It would seem to me, after trying to work through this, that it would be better if it just said, "A judge may be recused in the following circumstances," or "A judge is subject to recusal in the following circumstances."

HON. McCOWN: No. No. We didn't want to put it that way. Because if you say that a judge "may be recused," then I as the judge can sit quietly, the only one with knowledge of the grounds. Because in the absence of a motion, I'm not required to do anything.

PROFESSOR DORSANEO: Well, then, you know, maybe, "A judge is recused in the following circumstances." It refers to Subsection (c) -- or Subdivision (c), but it really doesn't refer, then, to (e) which actually says that the judge, you know, should "promptly recuse or disqualify or refer," and then it talks about this agreement thing that you were talking about.

I mean, it seems like all we're trying to say in the grounds for recusal is what the grounds are rather than talking about, you know,

"The grounds are unless waived," or blah, blah.

HON. McCOWN: Well, I guess I have two points to make. One is a procedural point, which is, I think we're going beyond double-checking for little glitches that we want to correct before we send it to the Supreme Court. We're getting back into drafting, which I don't think we ought to do.

CHAIRMAN BABCOCK: There's a lengthy discussion on the record about this point.

HON. McCOWN: We wouldn't want to say "A judge is recused" because we wouldn't want to say the rule does the recusal. It's the order that does it or doesn't do it.

This says, "If you're a judge, you must recuse in the following circumstances." So you read this, you know if you're the only one that has the knowledge, you still have the duty to sua sponte enter an order of recusal, unless, under (c), you fully disclose it on the record and they waive it, and then you go forward. If you fully disclose it on the record and they don't waive it, you must recuse.

PROFESSOR DORSANEO: What about

the referral point (e)?

HON. McCOWN: If you don't think one of these exists, then you're saying, "I'm not recusing because one of these doesn't exist. But because a motion has been made that I'm not granting, I have to refer it." I find the duty to refer not under (b) but under (e).

I think we --

PROFESSOR DORSANEO: Okay. If you're telling me it's fine, I'll --

MR. HAMILTON: Well, you know, to be consistent, though, (a) says, "A judge is disqualified in the following circumstances."

HON. McCOWN: And the reason for that is because disqualification is something you either are or aren't. You are, in fact, disqualified --

MR. LOW: By statute.

HON. McCOWN: -- which is why all of your orders are void as opposed to voidable. Recusal is an action that has to be taken. Disqualification is a state that exists.

PROFESSOR DORSANEO: Then that's something different from what you just said a little while ago when I said to change it to

"may be recused" --

HON. McCOWN: No.

PROFESSOR DORSANEO: -- "or subject to recusal."

HON. McCOWN: No. It's not different, because disqualification is different than recusal.

CHAIRMAN BABCOCK: We're going back over old ground.

Anything else that we haven't discussed about recusal, since we've beat this dog to death?

(Simultaneous discussion)

PROFESSOR DORSANEO: Sorry.

HON. RHEA: I don't know if this is out of line or not, Chip, but just along the same topic, "A judge must recuse in the following circumstances...," there's something about that that gives me pause, just that particular language. It makes me wonder whether I'm going to be in violation of some code of judicial conduct if I have a different opinion about whether my impartiality might reasonably be questioned than some ultimate arbiter of that might have.

So I guess my preference, if it's not outside the scope of what we're supposed to do today, is to just set it forth as grounds for recusal, like the heading said -- "The following are grounds for recusal," instead of putting this pretty significant obligation on the judge.

CHAIRMAN BABCOCK: Yeah. You know, unless everybody wants to rediscuss that -- yeah, Buddy.

MR. LOW: I move that we don't get into that and we go on.

CHAIRMAN BABCOCK: The problem about rediscussing things is, we forget what we did before and it affects five other parts of the rule. And the idea today was just to try be faithful to our prior votes and to address the specific written comments that we got.

Anything else, Buddy?

MR. LOW: No. That's it. I just want to go on to something else.

CHAIRMAN BABCOCK: Okay. Anything else from anybody?

CHAIRMAN BABCOCK: Okay. Bill Dorsaneo, we're on to the final approval of TRAP changes. That will have the incidental benefit

of getting him off this other thing.

HON. McCOWN: Is this going to the Supreme Court --

CHAIRMAN BABCOCK: Yes.

HON. McCOWN: -- or has it gone?

CHAIRMAN BABCOCK: It hasn't gone, but it's going.

HON. McCOWN: It's going. All right.

PROFESSOR DORSANEO: Okay. The only thing we have to do on the rules of appellate procedure that we haven't already done is, the very last item, which is referred to in -- I have every memorandum here except the one that I need.

HON. DUNCAN: It's Page 2 of your January 15th. Isn't it?

PROFESSOR DORSANEO: Yeah. January 15th.

The January 15th memo incorporates the things that we had done and done to completion, including changes to Appellate Rule 46.5.

The "Note To Chris and to Bill Edwards" at the end reflects that there was one remaining piece of drafting that needed to be done in

order to finalize 46.5 in accordance with the committee's wishes. Bill Edwards on Saturday morning said that a voluntary remittitur ought to affect the appellate timetable in the same manner as a timely filed motion for rehearing and wanted that put in the rule. And I think, either by acquiescence or by vote, that was the plan.

Bill Edwards sent -- I sent him a memo -- an e-mail saying, "What kind of language would you like to add? What exactly did you say on Saturday morning that I did not copy down verbatim?" He sent me back an e-mail, which I think also many of you downloaded, recommending this language, "A voluntary remittitur filed with a court of appeals in accordance with this rule will be treated as a timely filed motion for rehearing for purposes of Rule 53.7," the petition for review rule -- okay -- in accordance with Rule 53.

I, this morning, wrote a different sentence which has been passed around. If it hasn't found its way to you, it's one sentence on one piece of paper, and keep passing it. It started in that direction.

I need for you to look at that sentence. Did it get there?

HON. DUNCAN: It's coming.

PROFESSOR DORSANEO: And if I can refresh your recollection on this whole subject, the first thing that we discovered in working on this at the subcommittee level the last go-round is that 46.5 is not drafted properly as it exists in the rule book right now. It confuses voluntary remittitur practice in order to salvage a trial court's judgment with ordinary remittitur practice.

What will happen before 46.5 comes into play is that the court of appeals will say, "This case is reversed and remanded for a new trial." And the appellee will want to say, "Pardon me. The error affects only part of the damages. Let me give you back those damages and get an affirmance of the judgment with the remittitur." And that's why we changed the first paragraph -- or the first subparagraph in 46.5 to say, "If a court of appeals reverses the trial court's judgment because of a legal error that affects only part...the affected party may - within 15 days after the court of appeal's

judgment - voluntarily remit the amount of the damages that the affected party believes will cure the reversible error."

That's an offer to the court of appeals, in effect, to say, "Okay. We accept your offer. We accept your remittitur. And we will do" -- look at the last paragraph, "If the court of appeals determines that the request for voluntary remittitur is not sufficient to cure the reversible error, but the remittitur is appropriate, the court must suggest a remittitur in accordance with subdivision 46.3." maybe it should go the other way around. If the remittitur is timely filed and the court of appeals determines that the voluntary remittitur cures the reversible error, then the remittitur must be accepted and the trial court judgment affirmed." Kind of like, "We accept your offer or we reject your offer and suggest a different cure."

All right. What does the procedural mechanism for getting this back-and-forth process accomplish? The appellate rule subcommittee thought the best procedural device to be used would be a motion for rehearing,

because, you know, that would be the sensible place to put this conditional request for exceptions by the court of appeals of a voluntary remittitur. And that's why that second full paragraph is in the draft.

And basically, to this point, we voted on everything. But Bill Edwards says, "Well, suppose somebody doesn't want to do the voluntary remittitur and a motion for rehearing or doesn't do it in a motion for rehearing, shouldn't the appellate timetable be stretched out the way a motion for rehearing would do?" And I think everybody said, "Yeah. That's a good idea to put that in there."

So this is the sentence I propose, because the problem isn't so much, I think, the petition for review timetable being extended, it's the court of appeal's plenary power -- okay -- over the case to be able to deal with this request for acceptance of a voluntary remittitur.

The first thing I've got to say, "court of appeal's," apostrophe "s," the second time "court of appeals" appears in the sentence in the second line. And I'm not sure whether we

need to say, "A conditional request for acceptance of a voluntary remittitur" as distinguished from just simply, "A voluntary remittitur filed within 15 days after the court of appeal's judgment extends the court of appeal's plenary power and the time for filing a petition for review in the same manner as a timely filed motion for rehearing."

I'm not sure I need all of that lingo up there at the beginning. But, in effect, if somebody just filed the remittitur, the rule -- filed and said, "Oh, I'm giving back," you know, "$100,000 and I'm voluntarily remitting that," the court of appeals still has the option of not accepting. Okay? So it's an offer whether it claims to be one or not. Okay? It's an offer whether it claims to be one or not.

I like the longer version with the apostrophe added between "l" and "s" in the second line. I think that gets the job done, although perhaps not as neatly as it could be done.

I would propose adding this sentence at the end of the first paragraph to say what the voluntary remittitur does and then say, "It can

be included in a motion for rehearing without waiving the movant's complaint that the court of appeals erred in ruling that a reversible error was committed in the court below," and then just continue.

I think, as far as this is concerned, that's the best I can do in one sentence. Otherwise, you have to go mess with the other rules that deal with petitions for review and court of appeal's plenary power. And I don't think we want to do that, even though this is a cheap and dirty kind of a fix.

CHAIRMAN BABCOCK: You're okay with that, Richard?

MR. ORSINGER: Grammatically, Bill, I think that it's "appeals'," s apostrophe.

PROFESSOR DORSANEO: Right. That's right.

MR. ORSINGER: And that appears the first time and that appears the second time in your second line --

PROFESSOR DORSANEO: I accept that, yes.

MR. ORSINGER: -- "court of

appeals' plenary power."

Secondly, is there any distinction between a request to accept a remittitur and just a filing of one, because your language recognizes that there's something short of filing one, and that's asking the court in advance if they'll accept one. Isn't that what this does?

It's, "Conditional request for acceptance of a voluntary remittitur." So you're saying, "I reserve my right to go to the Supreme Court to reverse you, but I'm willing to give back half of the punitive damages or all punitive damages if you'll affirm the trial court's judgment." That's one thing.

The other thing is, here's the remittitur. "I give up." Now, is there a distinction and should we preserve it?

PROFESSOR DORSANEO: I think if you just made the remittitur, the court of appeals doesn't have to change its judgment. Okay? It could just say, you know, "We're still reversing and remanding this case." So --

HON. DUNCAN: Go forth without a date.

PROFESSOR DORSANEO: Huh?

HON. DUNCAN: Go forth without a date.

MR. ORSINGER: Can that filing of the remittitur be conditional and still preserve the plaintiff's right to go to the Supreme Court, or by filing the remittitur are you, essentially, accepting the court of appeal's judgment?

PROFESSOR DORSANEO: No. The judgment is reversed or remanded by filing the -- I think if you file the remittitur you're making a request that they accept it.

MR. ORSINGER: Even if the remittitur is accepted, you can still -- or, I mean, if the remittitur is denied, you can still appeal it?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Okay. It's not like paying a judgment in the trial court, which probably does cut off your appeal.

HON. DUNCAN: Even if the remittitur is accepted, I think the whole point of this is that you preserve your right to complain of the court of appeal's finding error

as to that part of the damages.

PROFESSOR DORSANEO: In the Supreme Court.

HON. DUNCAN: Yeah.

MR. ORSINGER: So all remittiturs are conditioned. And by that --

PROFESSOR DORSANEO: At this level. At this level. Not at the level from trial court to court of appeals.

MR. ORSINGER: Right.

PROFESSOR DORSANEO: But at this level, that's the idea.

MR. ORSINGER: Well, if that's true, that all remittiturs are conditional, then there is no distinction between conditional motion to accept a voluntary remittitur and just a filing of a remittitur.

PROFESSOR DORSANEO: That's what I think. And what the lawyers ought to know is that when they file it, they need to get somebody to catch it. They need to get somebody to embrace it; need to get the court of appeals to act on it.

HON. DUNCAN: And by the same token, the court of appeals need to know it

doesn't have to accept it.

PROFESSOR DORSANEO: Yes. That's why I put a conditional request for acceptance.

CHAIRMAN BABCOCK: Any other comments?

Buddy.

MR. LOW: Let me ask a question. Why in 46.3, where it says, "The court of appeals may suggest a remittitur," then 45 says, "reverse," so forth. What does the court do as a practical matter? Don't they just suggest a remittitur and if it's filed --

PROFESSOR DORSANEO: Well, if the court of appeals, you know, is doing that because somebody has, you know, made a complaint --

MR. LOW: No.

PROFESSOR DORSANEO: That's a whole different --

MR. LOW: I know. But what I'm --

PROFESSOR DORSANEO: That's a whole different --

MR. LOW: -- saying is, the court thinks everything is right but the damages were too high. Okay? Then it would appear to me,

46.3, the court can suggest and say, "If you accept that we'll affirm" -- right -- and so forth. Then why would the court then say, "Okay. We reverse all" -- I mean, why wouldn't that be the thing that took care of it all. They just suggested --

PROFESSOR DORSANEO: Because they didn't do that. They just decided to reverse it.

MR. ORSINGER: Well, no. In Buddy's hypo, they issued an opinion --

MR. LOW: Right.

MR. ORSINGER: -- that says you have 15 days --

MR. LOW: Right.

MR. ORSINGER: -- to file a remittitur or else the case is remanded --

MR. LOW: Is remanded.

MR. ORSINGER: -- which the court of appeals can do. And if the remittitur is filed, there's not a reversal at that point.

MR. LOW: There's not.

MR. ORSINGER: There's a reaffirmation and an affirmance --

MR. LOW: Right.

MR. ORSINGER: -- or else they remand it to rewrite the judgment to conform with the lower damages.

MR. LOW: And so why would you ever get into this other 45 -- 46.5 again? Not knowing gives rise to a lot of questions.

PROFESSOR DORSANEO: It doesn't happen very often, but it would be a situation when the court of appeals didn't suggest a remittitur or order a remittitur, they just said, "The case needs to be," you know, "done over in the trial court."

And then somebody says, "Well, if you're not going to affirm it, why don't you take some of my money."

MR. LOW: So you're talking about, some courts of appeals may not have read closely 46.3 and know about --

PROFESSOR DORSANEO: No. It can happen, it may not even be preserved like a remittitur excessiveness complaint. Okay? It's not the same kind of an animal at all.

MR. LOW: Okay. I've asked all I need to. I just -- I still don't understand, but...

PROFESSOR DORSANEO: It would never -- it's quite possible for it never to occur to a court of appeals that they can fix this by reducing the number.

MR. ORSINGER: Well, they usually don't. The practice, I think they just reverse.

PROFESSOR DORSANEO: The other thing I would recommend doing with 46.5 is crossing it out, because it happens so rarely that --

CHAIRMAN BABCOCK: Well, we're not going to do that.

MR. LOW: That was my point.

(Simultaneous discussion)

(Laughter)

CHAIRMAN BABCOCK: All right. Nina.

MS. CORTELL: If we intend for all remits to be additional requests, then why speak of it differently in the first reference where you say "voluntarily remit" at one place and then the other two references are "conditional requests"? Shouldn't it all be parallel if we intend for it all to mean the same thing?

I'm looking at Line 3, 46.5.

HON. PATTERSON: And does conditional really add anything?

MR. ORSINGER: I would be scared to take the concept of conditional out of these rules and just have this transcript be the authority that we didn't mean to make them unconditional. That's just a little scary to me.

CHAIRMAN BABCOCK: Sarah.

HON. DUNCAN: Well, just to point out, where this whole discussion came from was that we wanted to recognize the right to make your remittitur -- that filing a voluntary remittitur did not foreclose your ability to complain of the court of appeal's ruling in the Supreme Court.

PROFESSOR DORSANEO: On Nina's question, we could change the parallel language and leave out "conditional" the first time if you wanted to by saying, "Within 15 days of the court of appeal's judgment, file a request for acceptance of a voluntary remittitur of the damages that the affected party believes will cure the reversible error."

Okay? We can make that -- that's easy

enough to talk about how you do it.

MS. CORTELL: Right.

PROFESSOR DORSANEO: Now, the conditional part, I would say, you know, it doesn't have to be conditional, but it can be conditional. The sentence that says, "A conditional request" -- well, maybe it doesn't completely get the job done if it doesn't talk about "without waiving the movant's complaint that the court of appeals erred in ruling."

The main intellectual problem I have with this is, if you're doing it like this sentence says, you're doing it the wrong way. Right? You should put it in a motion for rehearing.

MS. CORTELL: I thought we had gone that direction the last time.

PROFESSOR DORSANEO: No. I wanted to, but you wouldn't do it.

CHAIRMAN BABCOCK: Okay. What else?

MR. LOW: Let me ask one more question, please.

Richard raised the question about appealing, you know, to the Supreme Court. 46.2

says, "And if the party that gets the benefit of the trial court suggests a remittitur, they are not foreclosed from, on appeal, saying it should not have been required." There's no similar provision on voluntary remittitur from the court of appeals going to the Supreme Court.

Now, does that mean, since there isn't one, to say, "Well, there's not intended to be, so, therefore, you give up a right," because we expressly state it coming from one court to the court of appeals, but not from the court of appeals --

PROFESSOR DORSANEO: Well, no. You've got it backward.

MR. LOW: How come?

PROFESSOR DORSANEO: 46.2 says, "If the party makes the remittitur at the trial judge's suggestion and the party benefitting from the remittitur appeals" --

MR. LOW: Benefitting, that's right.

PROFESSOR DORSANEO: -- "then and only then" --

MR. LOW: That's right.

PROFESSOR DORSANEO: -- "the

remitting party is not barred."

MR. LOW: I know, but --

PROFESSOR DORSANEO: But otherwise, the remitting party is barred. It's a sentence that's written upside down.

MR. LOW: I understand, but that same sentence doesn't apply. What if the party that benefitted from it in the court of appeals appeals to the Supreme Court? It does not, then, have that provision that says that if that party appeals then the party that gave the remittitur is not barred from contending that it should not have been given.

PROFESSOR DORSANEO: Well, I think that would be unnecessary to say that.

MR. LOW: Why?

PROFESSOR DORSANEO: Because --

MR. LOW: You say it in one and it's in the other, so doesn't that by implication mean that that remedy is not available?

PROFESSOR DORSANEO: Not -- no. Because the reason it says it is available in 46.2 is because, what it's trying to say is that if you do a remittitur you can't appeal further

unless the other side appeals.

MR. LOW: That's right. Can't appeal from that point.

PROFESSOR DORSANEO: In 46.5 we're saying, "You can appeal further even if you remit." Even if the other side doesn't, you just can't. So if they do or they don't, it's irrelevant.

MR. LOW: And it says you can appeal to the Supreme Court?

PROFESSOR DORSANEO: Yeah.

MR. LOW: "Without waiving the movant's complaint" -- and it does at least in the second paragraph, "...Without waiving the movant's complaint that the court of appeals erred in ruling that a reversible error was committed in the court below."

MR. LOW: Okay.

PROFESSOR DORSANEO: That would be a complaint -- maybe it's too cryptic, but that would be a complaint to the Supreme Court.

MR. LOW: Okay. That's the only place you can go from there. No more questions.

CHAIRMAN BABCOCK: All right. Anybody else?

(No response)

CHAIRMAN BABCOCK: All right. If there's nothing else, do we -- any dissent from adopting the language that Bill has drafted?

(No response)

CHAIRMAN BABCOCK: Seeing no dissent, then we approve the language as revised to 46.5. Right?

PROFESSOR DORSANEO: (Nodding head)

CHAIRMAN BABCOCK: Mr. Dorsaneo is nodding his head yes, let the record reflect.

All right. Do you have anything else, Bill?

PROFESSOR DORSANEO: No.

CHAIRMAN BABCOCK: Okay. Now, with respect to the TRAP rules that we have approved, will you and Chris and Carrie make sure that we have accurate language to send to the court?

PROFESSOR DORSANEO: Yes. Pam Baron and Sarah Duncan and I were talking about this, and we're going to go through all of the memoranda and make certain that everything, you know, matches up to what this committee actually

did do.

I don't think there's any question that we have that -- capacity to accomplish that by looking at the particular memos that I did and looking at what Pam did on Rule 42.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: And we'll do that.

CHAIRMAN BABCOCK: Okay. At the end of the day, get the final version to Carrie so that I can send it to the court in final form.

PROFESSOR DORSANEO: End of the day meaning today?

CHAIRMAN BABCOCK: No. I mean when you and Pam and Chris --

MR. ORSINGER: You mean when the sun sets.

PROFESSOR DORSANEO: Oh, you're speaking in the British manner end of the day.

CHAIRMAN BABCOCK: In the British manner, right.

(Laughter)

CHAIRMAN BABCOCK: When you get it done, give it to Carrie, whatever day that may

be.

HON. McCOWN: As long as it's today.

(Laughter)

CHAIRMAN BABCOCK: Yeah. As long as it's today.

(Laughter)

CHAIRMAN BABCOCK: Yeah. As long as it's today.

Okay. Next on the agenda --

JUSTICE HECHT: So that's everything except TRAP 47. Right?

CHAIRMAN BABCOCK: Right. That's everything except TRAP 47.

JUSTICE HECHT: That you know about.

PROFESSOR DORSANEO: Yes. We have some -- the postage stuff, too, and there were some other little things here and there, but the subcommittee hasn't dealt with those yet. We'll never run out of these things.

JUSTICE HECHT: Right.

CHAIRMAN BABCOCK: And TRAP 47 is going to come back in May. We're going to talk about that in May.

CHAIRMAN BABCOCK: All right. Jenkins/Orsinger on Rule 194, family law disclosures.

MS. JENKINS: First of all, I do not know what happened when my drafts got translated to the form that went on the Web Site, but I had them in -- the wording is the same, but the format that I had had somehow got garbled. So I do have proper versions to give to Carrie and Chris today. So while the wording is the same, I did do a better job of cleaning up the format.

It's been so long since we addressed this. Let me just remind the committee that what we had done the last time we discussed this is, there was a number of suggestions that I shortened, the list of mandatory items that would be triggered to be produced by rule 194.2. I have done that. I also absorbed all of the comments I received regarding changes in wording, descriptions, that sort of thing, and have tried to come up with the most succinct list that I can think of to come up with and still address the issues that the members of Family Law Council felt needed to be tackled.

There was also an issue raised by Justice Duncan concerning her concept that it would be completely improper to require automatic production of these types of documents in a situation where you had a pre or post-marital agreement that might be dispositive of all issues in a case. I have solved that problem with proposed amendment to Rule 194.5.

There's a typo in that. I did not mean to have a slash between rule and except. That's supposed to be a comma. Other than that, the language is correct.

I thought, rather than try and place an exception in the actual rule, 194.2 itself, it's far better to be addressed at 194.5 where you state, "No objection or assertion of work product," by simply adding "except that a party to a pre or post-marital agreement may object to production under Subsection (m) if such objection would be proper under these rules."

And with that, that's the proposal as it stands. And I think I've incorporated everything that was suggested at the last -- I guess it was three meetings ago.

CHAIRMAN BABCOCK: Okay. Any

discussion about 194.2 or 194.5?

Buddy Low.

MR. LOW: One question. Why didn't you just ask for complete inventory that's kind of including all of that? Why don't you ask and then put in there, "If parties have reason to be relieved of it," you know, "they could be by the court," or something. An inventory would --

MS. JENKINS: Well, a complete inventory would not get that. A complete inventory would not provide deeds, deeds of trust or a promissory note. It would not provide financial information statements given to a lending institution. It would not provide --

MR. LOW: "Inventory and documents supporting."

MR. ORSINGER: Too vague.

MR. LOW: Okay.

MS. JENKINS: It's way too vague.

MR. LOW: Well, I don't engage in that --

MS. JENKINS: Yeah. Way too vague.

MR. LOW: -- and not being married --

(Laughter)

MS. JENKINS: That also would not resolve any of the problems that are addressed by (1), which has to do with the things that are needed for spousal or child support at issue.

MR. LOW: All right. Why didn't you include health and life insurance? You've got other insurance only in one case, why didn't you include -- because his wife may need to know what the health insurance is so she can carry it on for so many months and see if she can tack on the program. Life insurance can be pretty important. It's a big asset, life insurance.

MS. JENKINS: Because the comments that I received from the committee the two times that this has been previously discussed is that this needed to contain the bare minimum that has to be produced in every single solitary case and not to expand it to become a general request for production of documents.

Certainly, life insurance is something that's almost always requested in a family law case with any substance, but this was designed

to cover the bare-bones issues that we felt would come up in virtually every single solitary case.

MR. LOW: It's not going to give you very much. But if you're satisfied with it, I am.

MS. JENKINS: It's not going to give very much. But if you will remember, the original purpose of this was to eliminate some of the duplication of the requirements of this with local rules that require similar things and try to cut back on some of the expense of discovery in family law matters.

MR. LOW: I'll stop because you're reminding me now that I'm being inconsistent. I was one of those.

(Laughter)

MR. LOW: Thank you

CHAIRMAN BABCOCK: Okay. Who else?

Yeah. Carl.

MR. HAMILTON: I just had a question about item (1) on the insurance. Why is it limited to the party's employment? Why wouldn't it just be any?

MS. JENKINS: Well, we had discussed that also the last time. And the concern we had is, if you just ask for insurance that's available, that could cover a world of insurance. Almost any person can go out and get a private insurance policy, and to ask them to produce that would be -- you're talking about something that they have available to them at that point in time. And we had talked about that and had decided to limit it to employment.

MR. ORSINGER: Can I comment, too.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Actually, Carl is raising a slightly different conceptual argument, I think.

What if it's private insurance that's in place and it's not through employment? In those instances where there is private insurance, we're not asking for that to be produced. And some people elect not to have insurance through employment. And if that's, in fact, what's in place, then that ought to be produced.

MS. JENKINS: Well, I agree. And that's what I originally had, but I was asked to

change it. But I certainly think that could be very easily cured by simply stating "available through responding party's employment or other private carrier."

MR. ORSINGER: Well, there's a difference between "available" and "in place." The problem with "other private carrier" is that that's a whole universe of possible policies in the State of Texas, which is hundreds.

We're only interested in a policy that's in place as well as policies available through employment, whether they're in place or not. Do you see what I'm saying?

MS. JENKINS: Well, but one of the things that we had talked about the last time was that if health insurance was already in place -- in other words, they had it through their employment or they had it through a private carrier, that was likely something that was already known to the spouse. And what you were trying to pick up was a set of circumstances where a child or a spouse is not covered under insurance and you want to know what is available.

And then the issue was discussed as to,

"Well, if you ask them what's available to you when you don't limit it to employment, then you're opening up an entire universe of available policies." And if you go back and say that you want them to provide the insurance that's already in place, several members of the committee expressed that that was sort of requiring production of the obvious and most people already had access to that.

But if you are concerned about that, Richard, we certainly could try to work together to correct that.

CHAIRMAN BABCOCK: Yes, Scott.

HON. McCOWN: I'm not sure what we're calling for in (1) when we say, "all policies," because I've never seen the policy that covers me. I mean, to get the policy -- the actual --

MS. JENKINS: I think you're reading the wrong page, Scott. The version that's in front of the committee today does not have that. It reads, "The summary description of benefits provided through health insurance coverage available through responding party's employment to insure a spouse or child together

with" --

HON. McCOWN: Okay.

MS. JENKINS: Yeah.

HON. McCOWN: That's fine.

MS. JENKINS: That was the change that was made --

HON. McCOWN: Okay. Then to take care of Richard's suggestion, after you say, "available through responding party's employment," just add the words, "or in force to insure a spouse or child."

MS. JENKINS: I think that's a good suggestion.

HON. McCOWN: Because I agree with you -- I guess, generally speaking, Mom may know that there's insurance but may not have access to the documents and she wants to ask -- so it's either what's available through your employment or what's in force insuring a spouse or a child.

CHAIRMAN BABCOCK: Everybody okay with that change? Richard, you okay with that?

MR. ORSINGER: I'm afraid that I don't have Joe's current language, so I really don't know what we're debating.

MS. JENKINS: Richard, I have

numerous additional copies. And I'll be happy to pass --

CHAIRMAN BABCOCK: If you weren't so lazy, you could go down and get it.

(Laughter)

MR. ORSINGER: I didn't realize that.

HON. McCOWN: The other only question that I have, because we went a long way, when we wrote the mandatory disclosure, to say that you absolutely could not object on any ground, that the court wouldn't hear any objections, and we're folding this into that.

And in family law, there's a lot of times where you may be doing a divorce but you have -- the main issue is a protective order or it's a CPS case, and this would give you no way to protect addresses and identities of where people live. And I just wonder if we want to put a provision that upon motion that the court can provide for addresses to be redacted.

Well, I'll give you an example. In my CPS docket, I do a lot of divorces. Dad's committed some kind of child abuse mixed in with some kind of spousal abuse. CPS has picked up

the kids. The plan is to reunite the kids with Mom. That's what you're working for. And part of that is to get Mom and Dad divorced.

Dad's lawyer serves a request for disclosure demanding Mom's present -- all of this identifying information that has Mom's present address. You don't want to give Dad Mom's present address.

Is there a way we can just add a sentence that -- or you know, "Addresses and identifying information can be redacted upon court order."

HON. RHEA: You have an inherent power to do that anyway, don't you? I see some danger in describing those things. It might suggest that you can't redact other things that might be equally --

MS. JENKINS: Yeah. It seems to me that the easiest way to address that would be when you have someone in front of you requesting a protective order is that you could handle it at that level by simply saying that any information required to be exchanged during the case, whether by interrogatories, request for production, Rule 194, that the addresses may be

redacted from the information.

HON. McCOWN: Well, we just went a long way in Rule 194 to say that the court could not hear any objections, so --

MS. JENKINS: Well, the wording is "no objection or assertion of work product is permitted to this request." I don't know that that is an objection. I think that that -- that the court allowing someone to redact an address does not constitute an objection. I think that would be within the court's power to make that decision if someone were to apply for that relief or request that relief.

That, to me, does not seem to be an objection to producing the information. You're just asking for the ability to redact a small portion of the information that's totally irrelevant to the content of what you're actually looking for, which is the bank balance, the account number, the deed to the house, those sorts of things.

JUSTICE HECHT: Scott, Comment 1 to Rule 194 says, "In those extremely rare cases when information ordinarily discoverable should be protected such as when revealing the

person's residence might result in harm to the person" --

HON. McCOWN: A party may move --

JUSTICE HECHT: -- "a party may move for protection."

MR. LOW: Great minds run together.

HON. McCOWN: All right. Well, that satisfies me, then.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: On 194.5, I'd like to discuss in the record when an objection would be proper under these rules. And these rules will be the Rules of Civil Procedure, so that would include -- that would not include the Rules of Evidence, Article 7, privileges, or would it?

PROFESSOR DORSANEO: Not directly. It would by indirectly. But I think that this needs to be said what it is that you're trying to say.

MR. ORSINGER: Well, I'm also concerned that we have -- in discovery, we have limited the role of objections now to issues other than privilege. And I'm concerned, also,

if my client has remarried, under a premarital agreement, what exactly is my objection? It's that the income of the other party is not relevant. Is that a legitimate objection to a discovery request, that it's not relevant?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: It is?

HON. McCOWN: Yeah.

MR. ORSINGER: Okay. I just want to be sure.

So we need to be sure that this includes privileges, but it clearly wouldn't include an objection that's beyond the scope of discovery because it's not relevant or reasonably calculated to lead to the discovery of admissible evidence.

MR. SUSMAN: I sense that -- I don't know anything about family law, but I sense that most of the time if there's going to be -- if there's a pre or post-marital agreement, the information requested in (m) would not be fairly asked for -- most of the time.

So you should simply -- it says, "In suits for divorce or annulment," except where

there's a pre marital of post-marital agreement. You disclose the other thing.

It doesn't mean -- that you can't get it voluntarily doesn't mean you can't get it. You just can't -- I mean, the whole point of voluntary disclosure is to get information that's relevant in every case. Okay? And so, in the subcategory, just exclude them from the operation of the rule, I think is a better way to do it.

MR. ORSINGER: Okay. Well, there will be instances where a pre marital agreement --

MR. SUSMAN: I understand that, but --

MR. ORSINGER: -- needs passive income separate --

MR. SUSMAN: But you just don't get, where you have that, you don't get it automatically up front.

MS. JENKINS: And that's what's addressed in 194.5, and my suggested change to that, Richard, is exactly what Steve suggested, is that you --

HON. McCOWN: Yeah. But what

Steve is suggesting is that instead of changing 194.5, you just amend 194.2(m).

MR. SUSMAN: Right. "In suits for divorce or annulment where there is no pre or post-marital agreement," or something like --

HON. McCOWN: Or "In suits for divorce or annulment except where there is a pre or post-marital agreement."

MR. SUSMAN: Well, you need it under (1), don't you?

CHAIRMAN BABCOCK: No.

MS. JENKINS: No, because in that situation, Richard, you've got a spouse or a child support issue.

MR. ORSINGER: Well, if you've got child support after someone is remarried, and under the pre marital agreement the other spouse's income is their separate property, why are we allowing discovery on that?

MS. JENKINS: I didn't follow your question.

MR. ORSINGER: If under a pre marital agreement the stepparent's income is their separate property, why are we allowing discovery into the stepparent's income under

(1)?

MS. JENKINS: I don't think you are.

HON. McCOWN: This doesn't apply to the stepparent.

MR. ORSINGER: Sure, it does. On the tax return, it would.

HON. McCOWN: No.

MS. JENKINS: It's the responding parties.

MR. ORSINGER: Yeah. Under (1)(2), the tax return is going to include all of the stepparent's partnerships, Schedule C's, Schedule F's and E's.

HON. McCOWN: If they file jointly, it would. But you would be entitled -- that would be discoverable anyway.

MR. ORSINGER: You think so?

HON. McCOWN: Sure. How you figure it in, you might not use it to calculate the amount of child support, but it could still -- the size of the separate estate could still be a factor you use in determining what child support you're going to set, whether you're going to go above the guidelines, below the

guidelines.

JUSTICE HECHT: What about spousal support?

HON. McCOWN: It could be a factor.

MR. ORSINGER: It could -- I mean, it wouldn't be initial alimony, but it could be a modification. I believe you can modify it, can't you, in the family code, modify alimony for changed circumstances? I don't have the code with me, but --

MS. JENKINS: You can if it's court ordered maintenance.

MR. ORSINGER: But Scott has just said that if somebody remarries, their new spousal's income is discoverable no matter what the issue is. And if that's true, then we're not -- I mean, you're saying you can't add it into your mathematical calculation of child support but it's discoverable for purposes of exercising your discretion.

HON. McCOWN: Yes.

JUSTICE HECHT: But if you've got a prenuptial -- I don't really understand this either, but if you've got a prenuptial

agreement, why would you want the stuff under (l) regarding spousal support? Would that be covered by the agreement or not?

HON. McCOWN: No.

MS. JENKINS: Not --

HON. McCOWN: Not necessarily.

MS. JENKINS: Not necessarily. And many times you have pre or post-marital agreements that do not address the issue of temporary support, which is also spousal support. You'll have temporary support pending the divorce action that may or may not be covered by the agreement.

MR. ORSINGER: I don't see why (l) and (m) are different. I mean, it seems to me like the same policy is behind it. Either --

HON. McCOWN: Well --

JUSTICE HECHT: Why would your want, under disclosure, to require in every case, whether there's an agreement or not, federal income tax returns for two years but not the last bank statements you got? It looks to me like I'd rather have the last two years' tax returns anyway.

MS. JENKINS: Because what you're

dealing with in determining spousal or child support, generally under -- you're required to have most recent pay stubs and you're required to have tax returns because you're talking about income.

Now, certainly you have other types of income that can flow from bank accounts and that sort of thing, but that's going to be picked up in terms of your Schedule B on your federal income tax return. That's going to tell you what kind of interest income the party's been generating in the prior years.

MR. ORSINGER: The logic here is that (l) is for income and (m) is for assets. That's the apparent distinction between (l) and (m).

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: I thought the apparent distinction, one is for divorce and one is for child support. What's the fact situation in which you have a prenuptial agreement in connection with one (1)(l)? I mean, how does it come up?

MR. ORSINGER: It would not -- well --

MR. SUSMAN: I get married to someone. I have a prenuptial agreement. Now --

MR. ORSINGER: If you have a prenuptial agreement that makes all of your income and all of your existing property separate, when somebody files a divorce, you want to stop the discovery of the estate which may --

MR. SUSMAN: Wait a second. Someone is filing a divorce against me?

MR. ORSINGER: Yeah. Let's say you're married. Well, if you signed a prenuptial agreement that says that all of your income and everything is your separate property --

MR. SUSMAN: Right. And that's covered by (m)? I mean, when we're getting a divorce. My wife has signed a prenuptial; that's covered by (m).

Now, tell me how child support comes up in this. I don't have any children with this woman. She's got some children by --

MR. ORSINGER: I think that comes up only --

MR. SUSMAN: Well, how am I going

to deal with a prenuptial --

MR. ORSINGER: -- in the modification --

MR. SUSMAN: Can you, in a prenuptial agreement say, "I don't have any responsibility to support my own children"?

HON. McCOWN: No. That's why (l) requires you to produce this information whether you have a prenuptial agreement or not.

MR. SUSMAN: Yeah. That's --

HON. McCOWN: Right.

MR. SUSMAN: That's what I'm asking. What fact situation? Richard is saying the same exception ought to be for both (m) and (l), and I say maybe not because --

HON. McCOWN: Well, Richard has posited a very rare hypothetical, which is: Man and woman are getting divorced and will -- no.

(Simultaneous discussion)

MR. SUSMAN: My wife's former husband is suing her for child support --

HON. McCOWN: Right.

MR. ORSINGER: Exactly.

MR. SUSMAN: -- and asking for her joint tax returns which show my income.

HON. McCOWN: And you have a prenuptial.

MR. SUSMAN: I'd say that's tough. I mean --

MR. ORSINGER: That is not rare.

MR. SUSMAN: -- because you're subject to discovery because you can't separate the tax returns.

HON. McCOWN: That is rare.

MR. ORSINGER: It is not rare. That is why many of these are drafted, is because the marrying spouse does not want to be subject to the court processes of the old spouse. And that happens, Scott. I --

HON. McCOWN: Well, you're saying many are drafted that way, but it's rare -- the whole number is rare.

MR. SUSMAN: I'm saying, Richard, if -- you know, that may be very well, but if I go ahead, after getting an ironclad prenuptial agreement and nevertheless file a joint tax return with my wife, I think I assume the risk of having that tax return turned over to her former husband in a dispute over child support.

I mean, there's no discovery of me

under (1). It's just my tax returns that are subject to be turned over. I mean, they can't be cut up anyway. So I just think that's -- big deal. All you're talking about is tax returns.

MR. ORSINGER: Well, I'll tell you, I disagree with both of you on the substantive law. There is case law out there that says that tax returns are conditionally privileged except to the extent that you can show the information you want is relevant. The trial judge will get mandamus if they don't perform that discretionary evaluation before they order the release of tax returns.

And what they're supposed to do is, they're supposed to pick the information out of the return that's relevant and to hide the rest. And there must be three or four mandamus cases from the Texas Supreme Court on that very point.

Now, we are basically -- and this thing is saying that if you're involved in an alimony or child support litigation, even if it's modification; you're no longer married to this person and you married somebody else, that what's in the tax return that belongs to the other person that under the pre marital

agreement is not community property, it's still mandatary disclosure right here.

HON. McCOWN: Because it's a joint return.

MR. ORSINGER: Because it's a joint return. It won't show up on the return if the returns are separate, but it would if it was joint. And that's right.

And so you're saying, "Well, okay. If they file a joint return, then everything in the return is discoverable even if it's not relevant." And that's really not what the law says.

HON. McCOWN: Except it is relevant. Even if the ex spouse has no legal claim on the size of her new spouse's separate property estate, the size of her new spouse's separate property estate is still relevant when the trial judge determines how much child support she should pay, just like it's relevant whether her parents are multi millionaires.

That is a relevant factor, because you then decide whether you are going to cut her a break because she doesn't have any money and is going to starve or whether you're not going to

cut her a break because you know she's going to be well provided for.

MR. ORSINGER: There are other district judges that I've dealt with in the past that don't agree with that.

HON. McCOWN: Well, then --

MR. ORSINGER: And there's a different way to look at it. You could say, "It doesn't matter how many millions of dollars the stepfather has in the account. What matters is the bills that the mother doesn't pay" -- or the father, whoever it is.

If the other person has provided their separate property house to live in, then the parent of the child doesn't have any housing expense. If a parent -- the spouse they're married to provides them a vehicle for free, then they don't have any vehicle expense.

There's a lot of things you can figure out about what they don't have to pay for that will give you the information you need to set child support, whereas when you launch off into discovery of the new spouse's finances, you have a major issue on your hands. And this is an issue that's very important to people who have

remarried.

MS. JENKINS: Richard, assuming for a moment that you're correct, how would you remedy the problem? Because bear in mind that this is a greatly pared down version of what I originally received from the Family Law Council and from Georgeann Simpson -- and you had worked on that. So what it is that we would do to correct the problem with (1)(2)?

MR. ORSINGER: I would just say that we can put the pre marital agreement exception on there and then let it fall back on ordinary discovery. And if you feel like you want that return, you send a request. And if they think that it's not discoverable, then they have an opportunity to go into court and try to --

HON. McCOWN: Well, here's another way.

MR. ORSINGER: -- secrete the other spouse's wealth.

HON. McCOWN: You could say this: "Responding party's federal income tax turns (sic) unless filed jointly with the spouse protected by a pre or post-marital agreement for

the two previous years," --

MR. SUSMAN: He's real good.

HON. McCOWN: -- so that you can limit it to cover the hypothetical that happens many times.

MR. ORSINGER: It doesn't happen statistically many times in terms of the divorces, but --

HON. McCOWN: But they're rich people.

MR. ORSINGER: -- the prenup agreements that are out there, I promise you that many of them are written for this reason.

MR. SUSMAN: Talking -- I think that's a great idea. Talking about rich people, aren't you going to really create a problem with (m)(4)?

I mean, I can think of all kinds of ways in which a person with means would have an interest in real estate as to which there are a zillion promissory notes, leases, all kinds of deeds of trust. These are promissory notes not necessarily running to me as a payee or a payor.

I mean, let's say I have a royalty interest in a piece of land. There may be a lot

of leases -- I'm just trying to think out loud -- or an interest in a shopping center. I'm a general partner in a shopping center and every lease in the shopping center has got to be produced because I have an interest in a -- this one seems to me that it could take some work. I mean, you're thinking in terms of very simple ownership of property, but, you know, I guess rich people get divorced and this could be a real problem.

MR. LOW: There's just some disadvantage to being rich. That's one of them.

(Laughter)

MR. SUSMAN: Yeah. I'm wondering whether it can't be limited in some way to make it a little easier.

MS. JENKINS: You could limit it to homestead. I mean, you can limit it to the house.

MR. SUSMAN: That would be great, if that's what you're really interested in.

MS. JENKINS: And I think that's going to cover the vast majority of the cases. Again, what I was trying to do was twofold. First of all to pare down this 99-page

suggestion that the Family Law Council had originally --

MR. SUSMAN: Homestead would be great. I'd approve of that. I mean, that's -- if we could limit it.

MS. JENKINS: I'm sorry?

MR. SUSMAN: I think if you could limit it to homesteads that would be great because I think it's really going to cause problems, this automatic disclosure where people who have vast amounts of property were hit with one of these.

MR. LOW: Steve, there could be people that would have -- own two or three houses that they rent, not anything, you know, great and have a deed of trust here, four or five. I mean, it's hard to just limit it to household because that's --

MR. SUSMAN: Well, I'll give you an example. I own a ten percent interest in a shopping center. The shopping center has 45 tenants. All of them have various leases. And there are a lot of promissory notes, I'm sure, in connection with the shopping center, too. I mean, do I have to make some effort to produce

that?

MR. LOW: I'll bet if you produced evidence that you own that 10 percent, they'd be satisfied with it.

MR. ORSINGER: What if you put "direct interest"?

MR. SUSMAN: I'm sorry?

MR. ORSINGER: "In which the party claims a direct interest" so that it's through a limited partnership but it would not be triggered. Because aren't most of those -- where you're concerned about, they would be an interest in a partnership that owns the land?

MR. SUSMAN: I'm just wondering -- again, if you're really trying to do it to get in most cases this homestead or this home problem, why don't you word it in that way so it doesn't cause mischief everywhere.

MS. JENKINS: And, Buddy, you can, of course, go back under just a standard request for production.

MR. LOW: No. I understand that. But I'm talking about, it's not uncommon for people that divide property -- or owe on it and they're not --

(Simultaneous discussion)

CHAIRMAN BABCOCK: Hang on, guys. She can't get it down.

MR. LOW: -- and not own a lot of property.

HON. McCOWN: Can I ask a question, because what I think what Richard's problem with the spouse that has the pre marital agreement and Steve's problem about the real estate raises larger policy issue -- and I don't know if we've already voted on this because I missed this meeting, but, you know, the first time this came up I argued against it. And I just don't think family practitioners need this. And I think, family law, it's so intricate what records you get and people are getting divorced at all kinds of different socioeconomic levels with all kinds of different privacy interests and all kinds of different attorney fee arrangements.

Have we decided as a matter of policy that we want to do this? Have we crossed that bridge?

CHAIRMAN BABCOCK: Judge Patterson, then Steve.

HON. PATTERSON: I think the mandate was to make it a bare-bones discovery plan.

HON. McCOWN: From who?

JUSTICE HECHT: Well, this came to us from family lawyers themselves.

MR. ORSINGER: Family law section forwarded a proposal because the existing request for disclosure is not well adapted to family law, and so you're asked to document, you know, economic claims and stuff. The family lawyers are having a hard time with the standard disclosure so they wanted to get a set of disclosures that suited our issues. And this is what -- the genesis of this was the family law section's proposal -- Family Law Council's proposal. And then it's been refined by Joan as a result of feedback from this committee.

JUSTICE HECHT: And secondly, there's a bunch of local rules on it.

CHAIRMAN BABCOCK: Yeah. You talk about the rich people in Harris County. I mean, they've got to produce all documents pertaining to real estate; all documents pertaining to any pension, retirement; all documents pertaining to

life casualty, liability and health; most recent account statement. I mean, there's a lot of stuff in Harris County.

So this is shrinking --

HON. McCOWN: But what I'm asking is whether the entire concept -- I know that the mandatory disclosure rule doesn't fit well for family law. And what I'm asking is whether the concept of mandatory disclosure fits for family law. Maybe this is something that we don't want in family law.

MR. ORSINGER: One good thing about mandatory disclosure in family law, Scott, is that, number one, you can't bill somebody $1,000 for doing a 25-page deal if you can get by with just sending a letter, say, invoking this rule. I mean, that's a $50 charge for this rather than -- the other thing is, you can't make objections to this. And there are some practitioners that will object to every discovery request you send.

And so, these are bulletproof, which is why we need to be so careful what they say. But if you allow the mainstream case to have its discovery on the basis of a letter request with

no hearing on objections, I think you move the ball forward.

CHAIRMAN BABCOCK: Buddy, then Joan.

MR. LOW: One of the things -- I mean, we've got discovery that fits all of the cases that we think exist. But 60 percent of the cases in Texas are family law cases, aren't they, Richard?

MR. ORSINGER: (Nodding head)

MR. LOW: So our discovery rule surely ought to have -- we ought to be able to have some provision that would fit 60 percent of them. I think that's not unreasonable. It doesn't prevent them from getting local rules to get more, but to have some bare-bone discovery that's going to get -- that affects 60 percent of the cases filed in Texas, seems to me to be without question something we ought to do.

CHAIRMAN BABCOCK: Joan, did you have something?

MS. JENKINS: Yes. Just to echo what Chip had said a moment ago, since you missed that meeting, Judge McCown -- and, Steve, I think you weren't there also -- one of the

things that I tried to do and did do was to go back and get the local rules from every major jurisdiction. And what I found in doing that is that there are two major metropolitan jurisdictions -- Harris County being one of them -- where we have these rather onerous local rules.

And what I'm hoping will happen -- and I've had a commitment from at least some of my judges in Harris County -- that if we are able to enact this, that they will try to repeal the local rules.

Because what's happened now in family law is, in every case in which there is any amount of property -- I mean, the smallest amount -- we're having to do a Rule 194 request just strictly to pick up experts because there's nothing else in that rule that helps us. I have to do my local rules disclosure in Harris County. I have to do interrogatories and request for production of documents. And we felt like that one of things that we were charged with responsibility for was trying to eliminate some of the duplicity or the duplication -- duplicity, probably, also --

(Laughter)

MS. JENKINS: -- in the discovery requirements under the average family law case.

And Chip's exactly right. If you think what is onerous here under (m)(4), you ought to read what's going to happen to you automatically if you file for divorce in Harris County.

HON. PATTERSON: But we can't have statewide mandatory rules that arise only in response to one set of local rules. That can't be a proper approach.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: I mean, I agree with Buddy. I mean, when this first came in to the discovery subcommittee we were asked to look at it. Since none of us were family lawyers, we thought, you know, "This is a great idea, but we don't know enough to say whether it's good or bad. Send it back to the family" -- I mean, as long as we have an assurance here that this has got the broad support of the family law group and is not slanted to one side or the other, which is what I think is our obligation -- it doesn't look like this is -- and as long as it doesn't, on its face, appear to make unnecessary

work -- as long as it appears to simplify and lessen the expense of discovery rather than make it more expensive, I think it's something that we ought to support.

MR. LOW: I totally agree.

MR. SUSMAN: And my only question on (m)(4) was -- not aware that it's already terrible in Harris County, but I wouldn't make it worse anywhere else.

(Laughter)

MS. JENKINS: I understand that. And I'm not so sure that it wouldn't be proper to limit that in some way not to encompass all real estate.

MR. SUSMAN: That would be great.

HON. McCOWN: What would you suggest?

MS. JENKINS: Honestly, having had this thrown out, I don't know that I would want to sit here and try, conceptually, to rewrite that without thinking it through.

JUSTICE HECHT: Do you want the documents, really, in disclosure or just a list?

MS. JENKINS: Well, you need the documents because you have to have those

instruments in order to be able to draft the transfer documents at the conclusion of the case, and that's what you're trying to pick up. Especially for the family homestead, you've got to have the deed. You need the correct legal description. You need the promissory note in order to know what to do with respect to the debt. It's a little different for leases, but...

HON. PATTERSON: But isn't Steve right, that for purposes of mandatory, that really the goal is to get the homestead?

MS. JENKINS: I certainly think it would limit it to homestead. That's something that the family lawyers could probably live with. Would you agree, Richard?

MR. ORSINGER: Well, let's just remember that there might be two homesteads, because if they've separated --

HON. PATTERSON: You could --

MR. SUSMAN: It would almost seem to solve the problem if you say, "an instrument on which the party's name appears." I mean, it's almost --

MR. ORSINGER: I think the family

lawyers --

MR. SUSMAN: That's almost easy enough to solve.

MR. ORSINGER: I think the family lawyers can live with homestead --

(Simultaneous discussion)

THE REPORTER: Hold on. Hold on. One at a time.

MR. ORSINGER: I think the family lawyers could live with the homestead concept, because if the case has multiple real estate interests, you will naturally want to send a production request, I would think.

HON. McCOWN: Well, then could we say, we take Rule 194.2, this proposed rule. We forget about the amendment to 194.5 and just incorporate that and change (1)(2) so that we say, "Responding party's federal income tax returns unless filed jointly with the spouse protected by a pre or post-marital agreement." We change (m) to say, "In suits for divorce or annulment except when a party has a pre or post-marital agreement," colon. And then we change (m)(4) to say, "All deeds, deeds of trust or promissory notes on the homestead of any

party."

MR. LOW: Or Steve had a suggestion, "on which a party's name appears," because you get away from the company where -- I mean, if you get -- Mel gets divorced, it's pretty much going to be tailored discovery, I would imagine, or somebody, you know, real wealthy.

So they're trying to save work and get things cheaper that's going to fit the majority of the cases. So that might do it or what Steve suggested might do it, whatever the family law section would like.

HON. McCOWN: Or you could say, "All deeds, deeds of trust, promissory notes or leases in the name of any party."

MR. LOW: Yeah. How about that, Richard?

MR. ORSINGER: I think that's great.

MR. SUSMAN: That's great.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: So you'd strike the remaining language. Correct?

HON. McCOWN: Right.

MR. HAMILTON: I have a question.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Why are we limiting (m) to say "unless protected by a prenuptial agreement"? I mean, what's wrong with (m)(2)? What's wrong with -- if the spouse has an interest in some bank account or brokerage firm, you ought to be entitled to get that.

HON. McCOWN: Not if they have -- the idea is this would be automatic. If they have a pre marital agreement, then there shouldn't be any reason to do discovery if the agreement governs.

MS. JENKINS: And I think all this is designed to do is to work around the problem, Carl, of having no available objections. Certainly, in 90 percent of our cases where there's a pre marital agreement, we are requesting discovery, but often it's met with objections and then those have to be decided as to whether or not the pre marital agreement overrides our ability to do discovery, or there may be a pending motion for summary judgment on the validity of the pre marital.

So I understand that issue. And I

think that the reason for it really is not to eliminate discovery in a pre or post-marital situation. It's just to eliminate discovery where there's no objection allowed.

CHAIRMAN BABCOCK: So we've basically come up with three revisions to 194.2 -- your version of 194.2 as articulated by Judge McCown.

MS. JENKINS: Actually, I counted four.

CHAIRMAN BABCOCK: All right.

MS. JENKINS: First one being (1)(1) following the word "responding party's employment" --

CHAIRMAN BABCOCK: Right. Okay.

MS. JENKINS: -- "or in force to insure..."

HON. McCOWN: Right.

MS. JENKINS: The second being the "unless jointly filed with a spouse protected by a pre or post-marital agreement."

CHAIRMAN BABCOCK: That's number two.

MR. ORSINGER: Where does the unless clause go?

HON. McCOWN: Right after returns. "Responding party's federal income tax returns unless filed jointly with the spouse protected by a pre or post-marital agreement."

CHAIRMAN BABCOCK: That's number two. Number three.

MS. JENKINS: "(M) In suits for divorce or annulment, except where there is a pre or post-marital agreement" -- and probably should say "between the parties."

CHAIRMAN BABCOCK: That's number three. And then the fourth.

MS. JENKINS: And then the last one is in (m)(4), "All deeds, deeds of trust, promissory notes or leases for any real estate in the name of any party."

CHAIRMAN BABCOCK: Okay. Does that capture everything that we've discussed?

(No verbal response)

CHAIRMAN BABCOCK: All right. Does anybody have a problem with that?

(No verbal responded)

CHAIRMAN BABCOCK: As amended, is there any opposition to proposed addition to Rule 194.2? Anybody opposed to that?

(No verbal response)

CHAIRMAN BABCOCK: Okay. Then, Joan, will you incorporate these changes and get the final language and then get that to Carrie and we'll transmit it to the court.

MS. JENKINS: Yes, I will.

CHAIRMAN BABCOCK: Okay. Great.

MS. JENKINS: I'll take care of that right away.

PROFESSOR DORSANEO: I don't know if I want to encourage the addition of proliferation of comments. But might there be a comment here talking about this issue of pre and post-marital agreements and what in the world that has to do with anything?

MR. LOW: If you put a comment, you just want to remind them that this does not preclude a party's right to discovery or something.

PROFESSOR DORSANEO: That's the comment I had in mind.

MR. LOW: Yeah. Well, that's what I thought you had in mind.

CHAIRMAN BABCOCK: Is that-- Richard or Joan, is that necessary?

MS. JENKINS: I don't think it's necessary. Anybody who's going to be representing someone with a pre or post-marital agreement is going to be aware of that.

CHAIRMAN BABCOCK: All right. Moving right along, this would be Judge Brown and Buddy Low, Texas Rule of Evidence 701 and 702.

MR. LOW: Again, through ignorance, I'm going to let the man speak that knows all about this.

701, we've already voted on it. And I've given -- if anybody says that's not what we voted on, then they're wrong.

(Laughter)

MR. LOW: So you need to move on to 702, Harvey.

HON. BROWN: 702 we -- two votes at the last meeting.

First, there was some debate about whether we should do anything on 702 at all. And the committee voted that we should try to come up with a rule. Then we went through, what is in Tab 1, under Rule 702 at the top of the page was the rule that was presented last

meeting. There were a number of comments and discussion principally about three topics.

One, the part in brackets -- in bold, each opinion, there was some concern by Stephen and Bill Edwards about that and we were asked to put in a comment and to take that out. The comment we have added, if you'll turn to the last page of the comment, which is fourth page of this section, the last paragraph before "Alternative Comments" is language that Stephen said to me and I thought worked well and was based on some things that he suggested at the meeting.

It reads, "Particular opinions or portions of the testimony of an expert may be admissible under this rule even though other opinions or portions of the testimony from the same witness are inadmissable under this rule." So this deals with the Green case that we talked about last time. And I thought that was good language and put it directly into the comment. And Justice Hecht had also suggested a comment.

So we fixed that. There were some concerns about whether we should say "a witness may testify" or "a witness may give expert

testimony." Frankly, I didn't totally follow that, but I didn't see any harm in clarifying it. So we did make that change as well.

The last thing I was asked to do was to make Section (4), the reliability section, track the federal rules. We debated a lot about Section (4), various provisions in it, the word "foundation," the words "reasonable assumption," et cetera.

At the end of the day, everybody said, you know, there might be some unintended consequences. Justice Hecht noted that there is some benefit to using the federal rule because of the federal case law. And so I was told to go back and try to make Section (4) of 702 follow the federal rule. And I've done that in two different ways.

The second way on the second page underneath "OR" is literally word for word from the federal rules. I just didn't like the way it looks on the page or the way it reads, stylistically. So the way before that is meant to be the same as the federal rules just worded a little bit differently so that it makes sense, the form and flows a little better.

MR. ORSINGER: Harvey, we just got a new packet passed out with Bates numbered pages. Can you refer to the Bates number page you're talking about, because you're skipping through here pretty fast.

HON. BROWN: Okay.

CHAIRMAN BABCOCK: 136 and 137.

HON. BROWN: The Bates number 137, under "OR" is directly from the federal rule.

MR. LOW: Richard, also in your package is a copy of the national -- what -- the uniform rule.

HON. BROWN: National Conference of Commissioners on Uniform State Laws.

MR. LOW: We have copies of both rules, but we went with the federal.

HON. BROWN: Right. 136 to 137, Subparts (A), (B) and (C) are my attempts to make it flow a little bit smoother into the Texas format of the rule.

And you remember, the format we agreed on the last time for (1), (2) and (3) was taken from a national commission and Justice Hecht and some others noted that -- broke out those things a little easier, and they were entirely

consistent with Texas law.

So that's what I did. And we really just have a choice of, "Do we want to track the federal language verbatim, which is on Page 137, or do we want to make it more into a one-sentence flowing, which is 136 through 137?"

CHAIRMAN BABCOCK: Well, I personally like the way yours reads better.

But, Justice Hecht, is there any reason to verbatim-go the federal language?

JUSTICE HECHT: Oh, some reason, but I don't think it's compelling here, I think. I don't think this is a big enough change that -- a big enough difference from the federal rule that would cause any problem.

MR. ORSINGER: What Bates page is the federal rule on?

CHAIRMAN BABCOCK: 137.

MR. ORSINGER: The actual federal rule itself?

HON. BROWN: The actual federal rule itself -- give me a second. 146. And I just took 1, 2 and 3, which are the underlined portions, the new part of the rule, and stuck them on Page 137, verbatim.

MR. LOW: The underlined portion is the new amendment.

MR. ORSINGER: December 1st amendment, I guess.

HON. BROWN: Yes, December 1st. So that's what I was told to do by a 16 to 4 vote. It's just trying to take the federal rule and put it into our state rule. And that's what I've done in these two formats.

CHAIRMAN BABCOCK: Everybody's worried that Carrie's got the real votes here.

(Laughter)

HON. BROWN: I did read the transcript. Thank you.

MR. LOW: Why do you think I called on him?

(Laughter)

MR. LOW: I didn't remember we did it.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I don't guess it really makes any difference, but in the federal (4)(C), Bates 137, the witness is in there. I guess the witness is in your (C)(2), Harvey, but it really put them in there by

saying, "The product of a reliable application by the witness of the data" --

MR. ORSINGER: What if one expert is working off of another expert's report?

PROFESSOR DORSANEO: Well, that's what I was thinking about. The federal rule presumably says "by the witness" because it --

CHAIRMAN BABCOCK: Yeah. "Witness has applied the data."

PROFESSOR DORSANEO: We want to be the same, but not use their language. Put the witness back in there.

MR. LOW: Where is that? What page is that, Bill?

CHAIRMAN BABCOCK: 137.

HON. RHEA: That's the witness' testimony.

CHAIRMAN BABCOCK: The witness is testifying.

PROFESSOR DORSANEO: Well, it may be that. That's how it reads. But it is subject to what Richard just said, thinking that it doesn't have to be this witness.

MR. ORSINGER: Well, sometimes you're going to call an expert witness to

validate someone else's methodology even if they don't ask them to arrive at an opinion. I mean, that's, in fact, what happens when you have a struggle over whether reliable standards are used. So --

CHAIRMAN BABCOCK: Yeah. But both the federal and Judge Brown's formulation of it anticipate that the person testifying is going to have to make an application that is sound, that's reliable.

MR. ORSINGER: Only if you're asking them to conclude the issue in the case.

The way it comes up in situations that I'm familiar with is that you can have an expert who's asked to give an opinion that's at issue in the case, but you can also have an expert testify that someone else's methodology is reliable but you never asked the second expert to arrive at an opinion -- an ultimate opinion.

So if there's a Daubert challenge on your expert, you might be calling one witness just to talk about methodology.

CHAIRMAN BABCOCK: Well, yeah. But that's still an opinion. It's my opinion that this guy doesn't know what he's talking

about.

MR. ORSINGER: Well, if you think that's allowed, I'm okay with that.

PROFESSOR DORSANEO: All I was trying to say is, if you want it to mean the same thing in English without ambiguity, you put it "by the witness."

CHAIRMAN BABCOCK: I'm not opposed to that.

MR. LOW: On (4)(C).

CHAIRMAN BABCOCK: Yeah. What does everybody think about inserting the phrase "by the witness" after "application" to Judge Brown's (4)(C)?

MR. HAMILTON: So moved.

CHAIRMAN BABCOCK; Harvey, what do you think?

HON. BROWN: I think that's fine.

CHAIRMAN BABCOCK: Perhaps unnecessary, but fine.

MR. ORSINGER: Is that a typo on 136, under "Revised Rule 702. Testimony by Experts," and it starts with "(b) general rule." Is that supposed to be an (a) or am I missing something here?

HON. BROWN: Yeah. That should be an (a). I don't know how that happened. Sorry. I'm my own secretary.

HON. PEEPLES: Is there a (b)?

(Simultaneous discussion)

HON. PEEPLES: If that's an (a), is there a (b)?

CHAIRMAN BABCOCK: Is there a (b) to Revised 702?

HON. BROWN: No.

HON. PEEPLES: Shouldn't we take out the (a) then?

CHAIRMAN BABCOCK: So shouldn't you take the (a) out altogether?

MR. ORSINGER: Well, why do we have "general rule"? Can we take "general rule" out as long as we're taking (a) out?

CHAIRMAN BABCOCK: Yeah.

HON. BROWN: Yes.

CHAIRMAN BABCOCK: Well, now we're really wandering away from the federal rule.

JUSTICE HECHT: You mean the federal rule has an (a) and no (b)?

HON. BROWN: Yes. I think this is because early on the drafting -- the

subcommittee had a (b) -- another idea that we were throwing out and that just never got deleted.

CHAIRMAN BABCOCK: The federal rule doesn't have an (a) or a (b).

HON. BROWN: The federal rule does not have an (a).

PROFESSOR DORSANEO: The enumeration is, then, probably different. Probably (1), (2), (3) or (A), (B), (C).

MR. ORSINGER: Well, it's on Bates page 146. And so just look at it.

But are we doing more than just putting a paragraph break before (1), (2) and (3).

HON. BROWN: Well, we're not intending to.

MR. ORSINGER: Okay.

HON. BROWN: Remember, the last time we debated whether (1), (2) and (3), i.e., the basis for the testimony, assistance to trier of fact and qualifications, whether that was a good way of breaking up the rule. And we seemed to agree the last time that that was. It didn't add anything substantively.

702 is a long sentence that people have

a hard time getting through.

CHAIRMAN BABCOCK: Yeah. Let's not go back over that. We've already done that once.

Okay. So we're going to strike "(b)" and "General rule." We're going to insert the phrase "by the witness" in (4)(C).

What else are we going to do?

Bill.

PROFESSOR DORSANEO: Well, why do we have (1), (2) and (3) 3 in this order? I always thought that qualification is the first thing.

MR. ORSINGER: It picks up the order in the federal rule, doesn't it?

HON. BROWN: Yeah. I think it follows the federal rule order, one. Two, it's the order that's in the National Conference of Commissioners. And three, I do think the first question is whether it's expert testimony. And that's what part one is asking, basis. Is it based on scientific --

PROFESSOR DORSANEO: I don't know. That's not a big point to me.

MR. ORSINGER: I withdraw my

comment.

PROFESSOR DORSANEO: I guess I'd say (1), (3), (2).

CHAIRMAN BABCOCK: Are we going to change the order or not?

MR. ORSINGER: I prefer to. I don't know. It makes more sense to me.

PROFESSOR DORSANEO: Yeah. I think --

HON. PEEPLES: If the witness is not qualified, you don't get to the other two.

HON. BROWN: If it doesn't assist the jury, you don't get to them either.

MR. ORSINGER: And I think there's a lot of confusion between qualifications and reliability. And here we have qualification stuck between Reliability (1) and (2) and Reliability (4) are.

CHAIRMAN BABCOCK: So (3) should become (1).

MR. ORSINGER: I would prefer that.

HON. PATTERSON: I agree.

CHAIRMAN BABCOCK: And (2) should become --

HON. BROWN: Well, no. (1) has to be (1). I mean, maybe you want (3) to be (2).

MR. ORSINGER: Okay. I'll buy that, too.

HON. BROWN: Basis for the testimony, it's only expert testimony if it's based on scientific, technical or other specialized knowledge. That's the first inquiry. "Is this expert testimony?"

MR. ORSINGER: I'm with you. I agree.

CHAIRMAN BABCOCK: Right. So (3) becomes (2)?

HON. McCOWN: Wait. Wait. Wait.

MR. BRISTEO: No. No. No. (2) is a great idea. (2) should be ahead of (3).

HON. McCOWN: Yeah. I mean, it ought to be a funnel here. I mean, the first thing you decide is whether it's expert testimony. The next thing you decide is, "Well, assuming they had somebody qualified and reliable, would this be the kind of thing that would assist the fact finder?" And then you decide, "Well, if it would, is this person qualified?" And then if he's qualified, "Is it

reliable?" You need to funnel down.

PROFESSOR DORSANEO: I think the testimony will assist the trier of fact because you're thinking about this witness' testimony, not about the general subject.

I think the first question, is, you know, "Is it scientific, technical or other specialized knowledge?"

HON. McCOWN: Right. I have no problem with the order here.

MR. ORSINGER: You don't even get to (2) if you haven't got (3), Scott.

HON. McCOWN: Well, you don't get to (3) if you haven't got (2). I mean, all of these, you have to have all of them before it's admissible. The question is, "What's the logical order to consider them in?" And you would -- you narrow yourself down to the hardest questions.

I'm never going to sit and ponder whether this particular witness is qualified if I wouldn't let anybody talk about this.

CHAIRMAN BABCOCK: Judge Peeples.

HON. PEEPLES: There are still people who think, "This witness is very well

qualified; therefore, I'm going to let him or her talk about anything." And I think the way that the priorities -- or the order they're in right now helps emphasize that it's got to have a basis and be reliable and so forth.

I think it's good the way it is. It helps highlight those things that we need to be taught to change long-settled ways of thinking.

HON. BROWN: And it's the order of the federal rule.

MR. LOW: And they debated at length. And if you'll read the proceedings...

CHAIRMAN BABCOCK: Okay. What else? Anybody else got anything?

(No response)

CHAIRMAN BABCOCK: Well, with these modifications, is anybody opposed to this rule -- taking the Judge Brown variation?

(No response)

CHAIRMAN BABCOCK: Okay. Nobody seems to be opposed, so this will pass unanimously.

JUSTICE HECHT: Is that Revised Rule 702?

CHAIRMAN BABCOCK: Revised Rule

702 with the Judge Brown variation and not the "OR" alternative.

MR. ORSINGER: Chip, can I ask, did we adopt the federal rule on 701?

HON. BROWN: No.

MR. ORSINGER: We have not done that?

HON. BROWN: No. We did adopt a rule in 701. We did not adopt the federal rule. We adopted the National Commissioner's which we thought it was an improvement on the federal rule.

MR. ORSINGER: The change on 131 -- is that what we're going to take as our Rule 701, is on Page 131?

CHAIRMAN BABCOCK: I think so.

HON. BROWN: I believe so.

MR. LOW: Yeah. That's what we voted on.

MR. ORSINGER: The middle of 131 is our Proposed Rule 701.

MR. LOW: Right.

CHAIRMAN BABCOCK: Okay. Judge Brown, would you make sure that the minor changes that we made today are incorporated, get

that to Carrie and then transmit it the court.

Judge Patterson.

HON. PATTERSON: I just have one question. Judge Brown, I see "otherwise" in both the federal rule and our rule, does that contemplate testifying to fact -- or what specifically does "otherwise" mean in 702?

HON. BROWN: The "or otherwise" in the first part?

HON. PATTERSON: Right.

HON. BROWN: Yeah. That would be if an expert was talking about, say, scientific principles that are opinion; they're just giving testimony about some basic facts.

HON. PATTERSON: Okay.

HON. BROWN: Now, we have comments.

CHAIRMAN BABCOCK: Comments. Let's go to the comments.

HON. BROWN: We have, basically, two major points that we need to decide.

One, if you'll look at the new federal rule, it has long comments that begin -- they begin on Page 146 and they go through Page 152, like six pages of comments -- seven pages.

We debated whether we should have, essentially, no comment or a very short comment that does not enumerate any of the factors under Robinson and Daubert and their progeny or whether we should list some of the factors.

CHAIRMAN BABCOCK: Judge, when you say "we debated," you mean the --

HON. BROWN: The subcommittee.

CHAIRMAN BABCOCK: The subcommittee. Okay.

HON. BROWN: At the end of the day we thought it would be helpful, just like the federal rule has the long comment, to have a more extensive list of factors. Ours, however, is shorter than the federal rules because we thought it was too long. And then, of course, we put a Texas twist on it by using Texas case law rather than federal case law.

We started out with the "assist" because that's the newest Supreme Court opinion; that's the most logical in order, as we just talked about. So that's the first paragraph with the Honeycutt case.

We explain that the changes in (1), (2) and (3) were just stylistic, which we've talked

about here. And we then went to the (4), the reliability, and basically gave the factors and the source for the three-prong test. And that's probably a good place to break just to see what people think. Should we have comments that talk about the factors or should we not?

PROFESSOR DORSANEO: No.

MR. LOW: And Harvey, the alternate is on 139, the shorter -- isn't that the shorter one we came up with, alternate comment?

HON. PEEPLES: I will say that it's so much easier to look in your rule book as opposed to having to go pick down two or three cases and dig through them and find the factors and sift it out. And I think to have a committee like this sift it out and organize it and put it in a rule book that could just be grabbed off your bench or your shelf at the office is much more helpful than being referred to two or three or four cases and having to look it up.

HON. BROWN: We did try and make it clear that the factors are nonexclusive and they might not all apply, because obviously

that's one concern about listing factors is, some people might think that they are determinative, and we try to make it clear they're not.

CHAIRMAN BABCOCK: Linda.

MS. EADS: There's a philosophical concept that the committee is going to have to deal with about comments through the Rules of Evidence, which is significantly different than the Rules of Procedure, at least in the federal system.

If we want these Rules of Evidence to be analyzed as if they are statutes or very precise Rules of Procedure, then we shouldn't have comments. But if we want the courts to realize that these Rules of Evidence are always subject to the facts and to the fact analysis of a case and that they were -- when the federal rules were promulgated, it was a big point of contention. And when you promulgate rules, what you do is, you ossify the development of the law.

And that it's a very dangerous thing in evidence to ossify, because evidence is a free-flowing thing where applications come from

facts and there's a lot of common law applications. And so comments were originally intended to give some kind of sense that is not to be ossified, but there is to be some application. So there's a worry that I have.

Now, I have to say, the federal system has now created comments -- like the one you are rightly saying on this one is ridiculous -- that tend to make people believe that this is almost a statute, that the comments are like legislative history.

HON. BROWN: I thought they've had comments for years.

MS. EADS: Oh, they've always had comments. Okay?

But the point is that if we don't have any comments to give some indication that there's cases that have to be looked at and there's applications that have to be looked at, that we might be misleading the average practitioner into believing that this is -- there is no liberalization of the concept, and, in fact, that these rules are somehow written in stone as if a Rule of Procedure, "You have to file something in 15 days. You have to do

something in a certain amount of time." And really, the Rules of Evidence are a different kind of procedure.

And so that's a philosophical issue when you deal with the comments. We have to choose what we're going to do about that. I mean, I personally think that ossifying the Rules of Evidence is a big mistake. And I think we see some of that in the federal system where we now have the Supreme Court of the United States making statements on Rules of Evidence as reading it as if they are statutes and that there is no room for common law development by trial courts.

CHAIRMAN BABCOCK: So where do you come down on these alternatives?

MS. EADS: I have to read the comment more thoroughly. I believe there should be some kind of commentary that indicates, as Judge Peeples says, there is a common law aspect of this that we need to know about through the case law.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: I think that the comments -- this has been such a key issue with

the Bar and the court. And they've struggled handling this issue until, just to say, "What we say, got to be relevant; got to be that."

It doesn't really tell that this is not to be exclusive, but it tells you factors. And it is helpful to tell you factors, and it tells you it's not all of them. But I think it is helpful to give you some guidance. And the courts have -- the federal went to that.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, what I don't see in here, which would make this misleading to me, based on what I think I know at least, is, I don't see Gammill vs. Jack Williams Chevrolet or the idea --

MR. LOW: Well, Harvey and I discussed that. That's where Judge Hecht set forth the factors. And I thought we'd included Gammill, that you wrote the opinion --

PROFESSOR DORSANEO: Where?

MR. LOW: I'm not saying we did. I could have made a mistake, but it would be my first one.

(Laughter)

MR. LOW: But I thought that we

had.

PROFESSOR DORSANEO: And, to me, Gammill says you don't have to slog through all of the Daubert factors in the cases that mostly people will have -- cases that don't involve novel scientific testimony.

HON. PATTERSON: Gammill says that these are nonexclusive factors and no attempt has been made to codify the specific factor -- it incorporates the Gammill concept.

CHAIRMAN BABCOCK: Well, Gammill is mentioned under subpart (5), but only as Gammill.

PROFESSOR DORSANEO: But do you understand what I'm saying? I think Gammill means -- tell me if I'm wrong. It means that you don't have to deal with peer review or rate of error or that kind of stuff that's required for novel scientific testimony.

MR. LOW: We started out with Gammill and then we went back to Daubert, went to Kelly -- and I can't remember the other one we came up with. And then Jim Sales' committee had -- Mark Sales -- I'm sorry -- had certain ones. It came up with like eight things that

were included in all of that. And then something else came along and somebody had this to add and that. And every one of them they added were good.

PROFESSOR DORSANEO: But what Gammill says is that they don't need to be used in most cases.

MR. LOW: I know. It --

PROFESSOR DORSANEO: And if you state this big long list, it suggests exactly the opposite.

MR. LOW: No. We're not suggesting that. We are suggesting that these are factors that we know of that would be considered in all cases, not just most cases.

HON. BROWN: With all due respect to a professor who probably knows more than I do about this, I don't think Gammill says that. I don't think Gammill says, "Those factors don't apply in most cases." I don't think it quantifies. It doesn't say, "Majority or minority of cases." It says, pretty much what we tried to say here, "It doesn't apply to all." And it rejected the distinction between novel science and other science.

PROFESSOR DORSANEO: For relevance and reliability, but not for the factors.

HON. BROWN: I read it differently.

CHAIRMAN BABCOCK: Judge Patterson.

HON. PATTERSON: Gammill speaks to the fact that it is case specific and that the factors are nonexclusive. And I think this essentially incorporates that.

The only one that concerns me is number (5) which speaks to qualifications, because this is an attempt to enumerate reliability factors and here we go back to confusing qualifications of expert and reliability. While I think that that may be a factor that can be incorporated, I think to include it among the notes is to confuse those two concepts which we've carefully drawn out.

But I think this does -- I mean, if you wanted to cite Gammill, you could do that. But I think this really does capture it, because it doesn't say that it's not to be applied in most cases. It does say that it's a flexible standard and these are nonexclusive factors

and...

CHAIRMAN BABCOCK: Yeah. This paragraph seems to say that.

Richard.

MR. ORSINGER: I share Linda's concern about ossifying the law at this point in time. But since we've decided to ossify the law at this point in time, I think --

(Laughter)

MR. ORSINGER: -- we ought to have comments that help us to ameliorate that ossification, because if you don't, it looks like Moses' Ten Commandments without any kind of comprehension of why we have the Ten Commandments.

I don't like this list, though, for the same reason that I find that Daubert and Robinson do not work well in the kind of litigation that I have. Both of those cases are hard science cases that lend themselves very well to empirical evaluation, but there are some areas, for example, in lost profits cases where there is almost no empirical evidence. There are cases involving business evaluation where there is almost no empirical evidence and

there's really not even much in the way of an agreement as to what proper standards are.

In the mental health science, there are empirical methods about some issues, but there are tremendous doctrinal disputes about causation. In other words, we can agree on how to diagnose something, but there is no agreement on what causes something, and there is not very good agreement on what treatment is.

And then you have another area, which concerns me, apart from the ones that don't fit well into the empirical science, and that is this issue in Moore vs. Ashland Chemical out of the Fifth Circuit where a treating physician testified to the cause of a condition, but because there was no research to support that, the court en banc ruled that the clinician could not testify to his conclusions on causation.

Three or four other circuit courts have disagreed with the Fifth Circuit. And the issue is, if you have a clinician who is not a researcher, and if they're dealing with a medical condition that happens rarely enough that it's not researched, because all medical research is funded either by the federal

government or by the industry that allegedly causes the problem that you're researching. Okay?

Now, if thousands of people are not affected by it, the feds and the industries are not funding the research. So you have doctors that are treating people that have problems that simply haven't been researched.

Clinical medicine has a recognized reliable methodology called differential etiology where the physician -- or whoever the diagnosing person is, writes down all possible causes and then tries to go through and eliminate each one until they get it down to just three or two and one. And then they pick between those three or two or one and come up with what they think is the cause of the condition. And then they go about treating that cause.

Now, Moore vs. Ashland Chemical basically says, "If you don't have research to back up your conclusion, you can't testify to it." The other circuits, though, say, "If you're using reliable clinical methodology of differential etiology, you should be able to

testify to causation even if there's no research."

Now, our comments here are very much weighted to the same point of view that Daubert and Robinson have, which is that we're dealing with something that's physical, something that's subject to empirical validation. And yet, in much of the litigation, and especially in the family law litigation, which is 55 or 60 percent of our docket, there's nothing empirical.

So I feel like we do need comments because the rules are too dogmatic, but I think our comments are too dogmatic and that we should seriously consider expanding the awareness that simply because most of our cases are coming out of biological poisoning that not everything that experts deal with is subject to that kind of empirical.

And I would like to add, maybe next time, two or three that are more broad-minded. Let me also point out that I personally think the best opinion I've ever read on this subject is by the court of criminal appeals in Nenno vs. State, which had to do with mental health testimony and criminal prosecutions, and they

articulated a three-prong test which is easy to understand and which they, in fact, do apply.

These rules apply on the criminal side as well as the civil side. And I think we ought to mention Nenno vs. State in here.

HON. PATTERSON: It is.

MR. ORSINGER: It is? Okay. Good. I'm glad to hear that. I didn't see it when I --

MR. CHAPMAN: For all of the reasons that have been stated, actually by people who are proponents of the long comments, as well as Richard's comments, I'm persuaded that we ought to go with the alternative.

And the reason why is because the long laundry list tends to suggest that this is the concrete non-flowing and stagnate law. As opposed to the shorter comment, which clearly is just giving you library guides so that you can understand the concepts and you can go out and research it as it applies to your particular case, understanding the basic concepts.

I'm afraid that if we adopt the long list, that as the law continues to grow and develop, this list will not be as relevant.

Whereas the shorter list only gives you the concept that this -- points you toward the concept and then you go and you do the research to make sure that you apply the rule within the context of your particular fact situation.

And so I would argue for the more abbreviated comment.

CHAIRMAN BABCOCK: Judge Patterson, then Judge Brown, then Bill Dorsaneo.

HON. PATTERSON: I guess I don't mind that it's more abbreviated. I agree with Richard that Texas appears to be moving towards a slightly more flexible standard than Ashland, which may not be reflected here, but the other aspect of it is that these notes do not capture the experience-based expert testimony which has been clearly adopted within the state and does allow for a certain amount of more flexibility. So whether we speak to the beekeeper, Harvey, or some more experience-based testimony, we may want to reflect that, if we include these factors.

But I think, you know, it clearly says they're nonexclusive factors and may include -- and I think it's helpful to people to see some

kind of list, but some people may argue that -- I mean, I think the list is helpful to practitioners.

CHAIRMAN BABCOCK: Judge Brown.

HON. BROWN: A few points. One, if you'll look on Page 137, third full paragraph, it says, "when required." I mean, I think that's a significant phrase. It tells you that these aren't always required in addition to saying it earlier.

And it says, "relevant additional factors." Some of these aren't relevant in some cases; sometimes they are. "Which may include," I mean, I think those are significant words.

The beekeeper portion is in Section (5). That's why these various sources that are in brackets have this as an item of reliability. In some cases, under Gammill, experience will be enough. And that's what (5) is meant, to capture that idea.

Go to Richard's question about --

HON. PATTERSON: Well, experience by testimony, though, is still different than qualifications.

HON. BROWN: Right. Yeah. We've

explained qualification means experience and qualifications. If you want to say, "Experience of expert" as the title for that, that would be fine to me. But that's what we're trying to capture.

HON. PATTERSON: Okay.

HON. BROWN: For the person testifying lost profits, you would look at, for example, experience of the person. Acceptance within the field, is he doing it like other economists. That's Factor (6). Clarity, can he explain how he got to those numbers. That's Number (11). Whether there are other alternatives for the lost profits or for the increase in earnings. That would be Factor (12). Whether he does it just like the other people in his field do it, Factor (13).

So I think those would be helpful. And frankly, the reason I think a list is helpful is, a lot of practitioners right now don't know of any list other than Robinson. You know, you may know about the Gammill and you may understand that Kumho talks about the same level of rigor of analysis. But I get Daubert motions a few times a month and I never see other

factors other than the Daubert factors. So I think it would be helpful to the Bar.

All that said, I can live without it.

CHAIRMAN BABCOCK: Linda. Then Steve, I think. And then Bill and then Buddy.

MS. EADS: Just a clarification, am I right that we did not receive this until today, the proposed comment or did it come earlier?

HON. BROWN: No. They were here last month.

MS. EADS: Oh, last month.

HON. BROWN: Or last meeting. Two months ago.

MS. EADS: That's all I need.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: What I don't understand is how the factors relate to the (4)(A), (B) and (C).

I mean, are (A), (B) and (C) as important as the factors? Are these just other factors? What's the relevance of (A), (B) and (C)? I mean, what are the factors under? Are they under (4)(A) or (4)(B) or (4)(C)? Where are they?

HON. PEEPLES: Factors help tell you what's reliable.

MR. SUSMAN: I mean, you could just say "Reliable" and eliminate (A) (B) (C), couldn't you? I mean, I, frankly, get no meaning out of (A), (B) and (C) at all. It's just words. I mean, "The testimony is based upon sufficient facts or data," I mean, who's to decide that? The judge, I guess.

MR. LOW: It has to be that the facts on that case has to be based on that a data, and that data must be based on reliable principles. And they must have applied it properly, is what it is.

HON. BROWN: (A) is Habner where the court reads the data, reads the articles. Says, "Does it really say that Benzine causes this birth defect?" That's what (A) goes to.

PROFESSOR DORSANEO: Well, I prefer the alternative even though it's less informative, because I think this list, because it was developed, you know, over time, starts out with some things that are not usually going to be necessary and that aren't going to be available, like peer review.

Rather than say I want to move things around because of what I perceive to be, you know, the more common cases and how I read Gammill, I just would rather not have a list that's as misleading as it is informative, which is what I think this list is. Although, I'm talking to the average person reading it. I'm not talking to, you know, misleading in the sense of misstating the law or not accurately reading the cases or anything like that at all.

I just don't think it's all that helpful to tell people that the first factor on the list is something that will ordinarily not be a factor -- or the first two, three -- two or three are factors that ordinarily aren't go to be factors. That's how I see it.

Then also in your lead-in paragraph, leads up to the fact, courts have -- and this gets to be quibbly -- "Courts have established a number of nonexclusive facts for assessing the reliability." Well, I guess this list, these are all facts. They're not exclusive, but they're all in the list.

What I'm saying is, "Some of them are not in the list in the case that you're working

on, Mr. Lawyer," and that this suggests that they are and that there may be other ones, when I think that some of these count in some cases, and et cetera.

CHAIRMAN BABCOCK: Well, but it says -- but you're not reading the second and third sentence.

PROFESSOR DORSANEO: I know. I'm reading the first sentence first, though. And "when required" -- and I understand that this is not trying to be misleading. Okay? I just wonder how helpful it is.

CHAIRMAN BABCOCK: Okay. Buddy. Then Judge McCown. Then Judge Patterson.

MR. LOW: Back when this thing first started, everybody thought this applies only to "junk science." Justice Gonzalez wrote a concurring opinion, which he asked this committee to take a look at where we'd have different factors in repressed memory -- I don't remember the name of the case.

(Simultaneous discussion)

(Laughter)

MR. ORSINGER: You never knew the names, Buddy.

(Laughter)

MR. LOW: I just learn what I want to learn and discard the other.

So then we raised the question, "We can't do that." We're going to then get in the category of saying, "My Lord, what factors if it's junk science, what factors if he's a doctor, what factors if repressed memory."

So we said, "Okay. What I'm going to do is tell you, 'These aren't inclusive. These are the ones we can think of. They may be relevant to your case. They may not be relevant. We don't weigh them. These are things you may want to consider, if applicable.'"

And then the courts came out and said, "That's right." They've made it clear that you don't have different rules where you establish this factor for this kind of expert. The trial judge has to determine whether or not there has to be research or what.

And so, these are merely factors. And there's no way in God's earth this committee could meet for ten years and decide what priority they ought to be in. I mean, even if

we could decide.

So these are just things that people are going to have to read. And then the whole thing is, "Do we want the list or do we want something that's kind of like the rule, that is just small and short comments?" That's the question.

CHAIRMAN BABCOCK: Judge McCown.

HON. McCOWN: I think we want a small, short comment. The less said here, the better. And the comment should collect up whatever cases that anybody thinks are very instructive and put them for ease of reference.

And I'll give you the two reasons why I think the less said the better. First, I agree with Linda, generally, that we don't want to ossify evidence, but I think that applies with particular force to this area which has been controversial in developing from the very beginning. And it's going to continue to develop because it has to do with science. And it's going to continue to develop and I don't think we should say too much about it except to give people the general idea of how it works inside the cases.

And then second, I think if we have a long comment, we're making too big a deal out of this. I remain convinced that nine out of ten times these expert challenges, at bottom, don't have any merit to them. And the judge needs to let it in, have people testify, move on. And we need to hold the cost down, both by not encouraging these motions when they're not real and by not spending a lot of time on them when they're made when they're not real.

And there's a whole lot of cost to going through and building a record with all of these factors in it. And if you've got a big old long comment there, then you're saying to the trial judge, "This is a big old deal that you've got to spend a lot of time on and spend a lot of money on." And I think we ought to have a short comment and let the law develop.

CHAIRMAN BABCOCK: Okay. Judge Patterson. And then Linda. And then Richard.

HON. PATTERSON: Gosh, I don't know how to respond to that because --

(Laughter)

HON. PATTERSON: I mean, I will tell you that we had a case recently where it

was clear that there was only one person in the courtroom who knew who Mr. Daubert was. There are many people who still do not know about Daubert. And I agree with Steve that when you read the rule, it does make sense -- and I think we've got the rule correct -- but you have to parse through it fairly carefully to understand what the three parts are.

So then if you look to the comment, it helps confutize what this nonexclusive set is. And I think it's helpful to people to be able to say, "Well, I can't meet testing because that's not here, but I could meet literature or experience-based testimony." I mean, they can sort of pick and choose and see how it fits their type of evidence. It gives them that kind of flexibility.

HON. McCOWN: But what I'm saying, the fewer people that know about Daubert, the better.

(Laughter)

HON. PATTERSON: But there still are people, including appellate judges, who say, "Let's just throw it to the jury and it doesn't matter" -- but that's not what the law is.

HON. McCOWN: But if you've got a real issue, then the lawyers are going to bring that to you and develop it. But to suggest that every expert challenge is real and that we have to spend a lot of money and time developing a record --

HON. PATTERSON: Well, I agree with that comment, but --

HON. McCOWN: You know, there are lots clinicians who can give you 100 percent accurate information but who would not be able to take you through a Daubert challenge if one was made. And the judge sitting there knows it's accurate and the lawyers know it's accurate. And they're driving up the cost of litigation. And I just don't think we ought to indicate, with a long comment, that this is -- you know, cite whatever case. This alternative comment is fine.

HON. PATTERSON: But you see, this area is working itself out. For example -- and they do it all of the time on criminal cases because you have toxicology tests and DWI tests. And so that area has worked itself out very well that there's a certain amount of established

practice that they deal with it almost secondhand. And I think it's becoming that way. But for people who aren't familiar with it, I think it's helpful.

I'm not opposed to including cases where they can see those factors. That may be a good alternative, but I think that they need to be able to see some concrete alternative there other than (4)(A), (B) and (C).

CHAIRMAN BABCOCK: Linda.

MS. EADS: I mean, I agree with both of you in this sense, is that I think that a -- the way the comment is written out, the longer one, I would have to disagree with it because it does not give a person who's reading it the flavor of -- for example, this is a quote from the federal comment, "A review of the caselaw after Daubert shows that the rejection of expert testimony is the exception rather than the rule. Daubert did not work a 'seachange over federal evidence law,' and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'".

So there's language in the federal rule

comment that says, "The list of factors we just enumerated are there to help you, but this does not change that fact that most expert challenges are rejected." Our comment doesn't have that. It just has the list of factors, which I think leads to the judge's worry that what this does is prompt people to think they should be making challenges all of the time.

And so there has to be -- we have to come to a realization of what we want this comment to do, which I think is to accurately reflect that the law is in a state of change, especially in this area, and that if we're going to have a comment, it would have to reflect that accurately to the practitioners that they shouldn't take this list as something that is set in stone.

HON. PATTERSON: I agree with that. I think that's a good point.

CHAIRMAN BABCOCK: Judge Bristeo had his hand up first. Then Steve.

MR. BRISTEO: I may be on the opposite side as a trial judge. 75 percent of the experts I struck, nobody objected to them. Let's remember, you couldn't have experts at all

for most of American history because they weren't eye witnesses and they weren't parties. This is just somebody who's being paid, usually a nice fee per hour, who comes in to volunteer how the jury ought to decide the case. There's big problems with that.

MR. SUSMAN: Very harsh.

MR. BRISTEO: And even if both of the sides want to call their hired experts for $250 an hour, do you know what 90 percent of jurors say? "They're just hired guns. They cancel out." They pay no attention to them.

This is the most expensive part of litigation, not the challenges. It's the hiring of them. That's what costs money. It didn't take me much money to strike them.

(Simultaneous discussion)

(Laughter)

MR. BRISTEO: What costs the money was you-all flying out to San Diego to take all of their depositions. People -- "I want to go to Connecticut." Well, sure you do. And that's a great way for associates to get frequent flier. But this is the problem, and it needs --

MS. EADS: So you don't want to

have anything in --

MR. BRISTEO: -- to get addressed. And I don't think you ought to put names of cases in because that dates your rules, because then there's just -- when you put the name of -- you know, what was the school district case? Well, those of you that practiced in the '60s may know what such and such school district versus so and so --

HON. PATTERSON: Brown vs Wooler.

MR. BRISTEO: No. No. No.

(Laughter)

MR. BRISTEO: For 20 years from now, you don't want a bunch of cases in here that nobody has ever heard of. You want the principles in the list. If you need to add -- principles ought to be, you ought to think about peer review because in certain areas that is the test. And lots of areas, you shouldn't.

But there is no harm in -- because otherwise, what the trial judge, when you just have one lawyer telling me, "Oh, that's unreliable," and the other one is saying, "Oh, it is too reliable." What's the harm in having in a comment list of things to look at?

CHAIRMAN BABCOCK: Steve Susman.

MR. SUSMAN: Do we want is Texas law -- in the first place, is Texas law the same as federal law the subject?

PROFESSOR DORSANEO: Federal law is not the same as federal law, so I don't --

(Laughter)

(Simultaneous discussion)

MR. BRISTEO: It's pretty close. It's pretty close.

MR. SUSMAN: Do we want it to be different?

HON. McCOWN: No.

MR. SUSMAN: If the answer is no, which I suspect that it would be, because I don't know the difference. Why should I have to learn two areas of the law? Unless there's a real good reason, I shouldn't have to do it.

Why don't we just copy the federal thing? That's the law that's going to apply all over the country in every state. Why are we doing this individual crafting, to show our genius? Just copy the federal rule and the federal comments and let it go at that and you will do the deal, unless you give me a

persuasive case why Texas should be different and then explain to me on what point.

MS. EADS: Well, we need to set Texas cases.

JUSTICE HECHT: There's a very strong feeling, particularly in the laws of evidence, that there should not be a difference with the federal rules, unless there's some historic difference in our law such as inconsistent statements of a witness, impeachment with an inconsistent statement.

Texas has always had a different rule from the federal system, and that remains in our juris prudence. But otherwise, we don't -- it's bad enough that there are so many differences in the systems as it is, you would hate that cases would come out a different way or be tried differently depending on whether you went to federal court to try the very same case or the state court to try the very same case. That's going to happen some anyway, but there's no reason to multiply that.

Keep in mind that this comment was approved by the Judicial Conference of the United States, which is the chief judge of every

circuit and a district judge from every circuit and the chief justice. So, I mean, there was a lot of thought. I was not privy to it, but it's public record -- a lot of thought given to that comment when it was put in.

CHAIRMAN BABCOCK: Okay. Richard, I think, and then Judge Brown.

MR. ORSINGER: I'm going back and forth on this issue, but if we do go with the long list, I would like to have the opportunity to add to it. And the reason that I'm against having a long list like this is because it's been my experience -- and I don't know whether it's these kind of people that are attracted to law or whether law does this to people, but when you list something, it becomes an exclusive listing. And that's exactly what happened to Daubert, and that's why we had to have Kumho Tire. And that's exactly what happened to Robinson, and that's why we had to have Gammill. And that's exactly what happened to Kelly vs. State, and that's why we had to have Nenno vs. State.

When lawyers see a list, it becomes a checklist. And so I just ran this checklist and

applied it to family law litigation. And I think that most psychological testimony and most accounting testimony and most family law cases is going to meet three of these things on this list.

So I can tell you right now what the motion -- the Daubert challenge is going to say, "The opposing party's expert has only met 3 of the 14 listed factors for the admissibility of expert witness testimony." And you can go on and on and on and on. And, yes, that's true, and that's because psychologists and CPAs don't have -- in the area where their opinions are applied to family law, they don't have relevant testing.

They don't have peer review. They can't calculate a rate of error. Their opinions are subjective. There may be some prior use of principles. There's very little literature on the general principles of accounting or psychology as it applies to the best interest of the child, on and on and on.

And I'm scared of a list because I have seen it become a checklist. And I saw Daubert become a checklist. And I saw -- it happened in

the criminal side, the state side and the federal side. The listing nature scares the heck out of me. And if we are going to have a list, then I want to have an opportunity to add to this list because I don't think it's fair to the clinical side of reality.

You know, as Scott McCown said, "If you want to get somebody to help you, whether you're a judge or a jury, you want someone whose opinion you respect and know." And that's the way I am as a lawyer. So when I hire a psychologist or I hire a CPA, I hire them based on my personal assessment of their wisdom of their experience, their knowledge or familiarity with the litigation testimony. And yet, they may not meet Daubert criteria, but by God, I send clients out there for therapy. I send clients over there to have their accounting work done. I myself go to accountants. We all go to professionals that we respect because we respect their experience and their judgment. But an opinion that's based on experience and judgment is one of the ones that's discredited by this list.

So I feel like this is very heavily

weighted against experience and clinical assessment, and I understand that those are the areas of greatest abuse, and yet, that is also where some of our greatest wisdom is to help us. And it's just not juries that are influenced by this. Judges will sometimes appoint psychologists that they have respect for.

And I just really don't like the tilt of this list and I'm afraid that it's going to be dogmatically applied.

CHAIRMAN BABCOCK: After we're finished today, would you give a little seminar on the clinical side of reality?

(Laughter)

CHAIRMAN BABCOCK: Judge Brown.

HON. BROWN: I was just going to address Steve's comment about why don't we just take the federal commentary and -- it's just that the federal commentary is too federal-case specific. I mean, it's very heavily weighted toward what federal cases have said that Texas has not yet addressed. You might predict Texas will go the same way, but to cite a bunch of circuit court opinions from all over the country, in my view, is binding authority in

Texas. It won't be a good idea.

I do think that the suggestion to change (5) to say "Experience of experts" rather than "qualifications" would probably make that clear, both for Richard's comments and for Jan.

But I, frankly, think we've debated this enough.

CHAIRMAN BABCOCK: Yeah. I do, too.

MR. LOW: I would just ask one question to Richard, and that is: What cases give us guidelines as to factors in your family law cases?

MR. ORSINGER: The closest is Nenno vs. State because it was a court of last resort that was dealing with mental health testimony. Now, that doesn't help us on the accountants. And I just don't think the accountants can be helped.

MR. LOW: Well, don't accountants just come under general principles? I mean, in --

HON. PATTERSON: The fact is, those experts aren't being excluded, Richard. They're --

MR. ORSINGER: It depends on your judge. I mean, we are having -- we're having less problems now, now that Gammill has come out than we did before, but we definitely had some exclusions.

And we can get right down to it. Somebody is testifying what's in the best interest of the child based on 15 psychological tests and 25 years of being in business, it's hard for you to meet these criteria. And yet, you may have the most qualified custody expert in your community on the witness stand, but they can probably make only three or four out of these 14 or 15 factors.

CHAIRMAN BABCOCK: Okay. Here's what I think we should do everybody. Let's have a vote on whether or not if a majority of our committee present and voting want the short alternative comment. And if that passes, then we're done. If it doesn't and we want the longer list, then we'll talk a little bit more about whether the longer list, as drafted here, has some deficiencies.

Judge Brown.

HON. PATTERSON: What is the short

alternative?

HON. BROWN: The short alternative comments is on Page 139. I do think there's one or two sentences from the long comment that we would want to pick up and add to it, because, really, the shortness was addressed to the issues of the factors. But, for example, Stephen's comment is in the long list; we should put it into the short list.

CHAIRMAN BABCOCK: Okay. But basically we're voting on the short alternative. And we might tinker with that a little bit, too.

So everybody in favor of the short alternative, raise your hand.

(All those in favor, so responded)

CHAIRMAN BABCOCK: Okay. Everybody opposed to the short alternative.

(All those opposed, so responded)

CHAIRMAN BABCOCK: The short alternative passes by a vote of 12 to 9. Pretty close.

Judge Brown, what would you suggest?

HON. BROWN: I would suggest two sentences be added. The first being the comment at the end of the first full paragraph in the

long list explains what we've done, that this is a stylistic change rather than a substantive change as far as setting up the subparagraph numbers.

CHAIRMAN BABCOCK: I'm not with you. What page are you at?

HON. BROWN: Page 137, first full paragraph of comments, the last sentence, it says, "Subdivisions (a)(1), (2) and (3) retain the substance...".

CHAIRMAN BABCOCK: Got you. Okay. Anybody opposed to that?

(No verbal response)

CHAIRMAN BABCOCK: Okay. What else?

HON. BROWN: And then Stephen's suggested a sentence which is on Page 139 that talks about that part of the opinions might be admissible but not all of the opinions -- and that's the last full paragraph and the sentence before the alternative.

Anybody opposed to that?

Bill.

PROFESSOR DORSANEO: What about the first two paragraphs on Page 137?

HON. BROWN: I'm fine with that, too. I just got the sense the committee wanted very little.

PROFESSOR DORSANEO: Well, I do think that your alternative was really just talking about the factors.

HON. BROWN: True.

PROFESSOR DORSANEO: I don't have any problem with the first two sentences, I don't think.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: No, I don't.

PROFESSOR DORSANEO: First two paragraphs, no.

CHAIRMAN BABCOCK: First two paragraphs at 137 and followed by the paragraph at 139 that says "Particular opinions," and then "The relevant factors for determining," et cetera.

MR. LOW: May I ask Harvey a question?

CHAIRMAN BABCOCK: Yes, sir.

MR. LOW: Would you incorporate also that "expert is subject to review, abuse of discretion" so as to -- what we had intended --

HON. BROWN: I mean, I think that's an important paragraph, too, but the judge isn't supposed to be deciding -- or agree with the expert. They're supposed to be looking at the methods used by the expert.

MR. LOW: That's on Page 139. It's the first paragraph. "The role of the trial court is not to determine the validity..."

CHAIRMAN BABCOCK: Okay. You want to add that, too?

MR. LOW: I would.

MR. HAMILTON: I have a question about the last sentence in that paragraph, whether or not that is saying the same thing that Rule 104 says.

CHAIRMAN BABCOCK: I don't know, but we talked about that a lot and instructed Judge Brown to put it in. You're talking about the "Particular opinions"?

MR. HAMILTON: "Courts may consider inadmissible evidence pursuant to Rule 104(a)..."

(Simultaneous discussion)

MR. HAMILTON: 104(a) is preliminary questions on -- one of them has to

do with qualifications of a person to be a witness.

MR. ORSINGER: Well, Rule 104 says that when you're evaluating admissibility of evidence you're not bound by any of the Rules of Evidence except privileges, which means hearsay is admissible, and authentication is not a problem either because everything is going to be out of authentication order in a hearing on a particular witness.

HON. BROWN: And the courts have applied 104(a) to Daubert hearings.

MR. ORSINGER: I know. When you're having an admissibility hearing, the only Rule of Evidence that binds the court is privilege. And that's all this says. Isn't it?

Now, it really doesn't need to say this because Rule 104 says it, but there's no harm in saying it --

MS. EADS: Well, it's helpful to say it, because people don't -- they won't go back to 104.

CHAIRMAN BABCOCK: Okay. Making these additions to the alternative comment, is everybody on board?

Linda.

MS. EADS: Can I ask, Richard, since you've been so articulate --

MR. ORSINGER: Well, thank you.

MS. EADS: -- about clinicians, are you satisfied with that comment and how it would be that short a comment?

I mean, I don't think it really gives much flavor to the average practitioner to know that the law is changing moment by moment in this area. I mean, the federal rule comment does a lot better job of doing that, frankly.

I mean, I agree we can't use the federal rule in total because citing all of the circuit cases is not very helpful. But in terms of the flavor of it, it's much more -- if you read that as a practitioner, you'd go, "Oh. I've got a lot of room here to argue."

MR. ORSINGER: I think that the federal comment is more balanced, but it's so long and I'm scared that we're, you know, ossifying. I really don't like ossifying --

HON. PATTERSON: If we look at the bottom of Page 150, "Nothing in this amendment is intended to suggest that experience

alone...may not provide a sufficient" -- that paragraph is very helpful on your flexibility concern and accurately reflects what the law is now on that.

MR. ORSINGER: I support that 100 percent.

PROFESSOR DORSANEO: There it is right there.

HON. BROWN: Well, the reason we didn't use that exact language is that -- those that keep up with this area know that reliability of experience is the most undeveloped area of the law in Daubert right now. And so, all we said, instead of trying to codify some rule was, in some cases, the extent of the expert's personal experience will be an important factor.

HON. McCOWN: We can't flavor the rule because some of us want salt and some of us want pepper. I mean, that's the problem. So we can't let Richard flavor it because then other people would want to flavor it.

CHAIRMAN BABCOCK: I think that's a point well taken.

MS. EADS: But then that goes back

to Justice Hecht's point which is, really, the federal drafters have looked at this closely, and certainly there's salt and pepper in the federal system between who wants one approach and who wants another approach. So that not that we use it verbatim, but that rather we look at what each paragraph provides to decide whether or not we should include something of that in our comment.

HON. McCOWN: We haven't said that our rules are different than the federal rule, and certainly people are going to cite the federal cases. They can cite the federal comment.

We just want it -- it seems to me, Linda, you're arguing against yourself right now because we just wanted a short rule to orient you and point out where to go. We didn't want to flavor it. And we're not going to get agreement -- if we go through and pick out paragraphs, we're not going to get agreement and we're not -- then it won't be short.

MR. LOW: And we cite Kumho, which shows --

HON. BROWN: I would suggest maybe

one thing, based on our conversation here, and that is that I should cite or add the Gammill cite to this paragraph.

CHAIRMAN BABCOCK: Does everybody agree to that?

MR. WATSON: I thought somebody said we were going to add all of the relevant --

HON. BROWN: Well, I think Gammill is the only one we're missing. We already have Kelly, Robinson, Nenno. If we add Gammill, I think we've got all of the main cases.

CHAIRMAN BABCOCK: Anybody else got any other comments?

MS. EADS: The other point about the federal comments are, I'm worried that if our comments don't include at least the points made in the federal comments, that we will be getting arguments from practitioners saying that the Texas rule is different than the federal rule because in the Texas comments they don't talk about the fact, for example, that most tax on experts are rejected; that, you know, Texas must have meant something different by its rule if it doesn't have that comment, but it has some comment.

I'm just throwing that out whether or not -- because indirectly, I think that will result.

MR. ORSINGER: Would it be appropriate to us to cross refer to the comment to the federal rule or is that unorthodox?

CHAIRMAN BABCOCK: I think it would be unorthodox. But what I just heard Justice Hecht and Judge Brown say, that that's very heavily federally flavored, and Texas will probably go that direction, but it may not. And a lot of these issues are not decided.

HON. PATTERSON: If you cite the federal cases along with the state cases like Kumho and Daubert, isn't that the same message, that they're cited interchangeably?

MR. LOW: Right. And Kumho includes those factors that they're talking about. So if they do their homework, they're going to see those. And how they're going to say, "Well, you're inconsistent with the federal court," when we've cited the Bible on the factors -- the federal Bible, not the state Bible.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: I mean, let me be clear about earlier. I don't suggest that Texas interpret -- that any particular court of appeal's interpretation of Rule 702 in Texas is going to follow any particular circuit court's interpretation in the federal system. But generally speaking, they're going to try to resolve their differences eventually. And we'll be trying to resolve our differences eventually. And hopefully, we'll be trying that process to end up in the same place.

MR. LOW: Well, they're heading that way now with the --

CHAIRMAN BABCOCK: Anything else?

HON. BROWN: If that finishes that, we have another issue. I don't know if you want to get to it or not.

CHAIRMAN BABCOCK: Yeah. I do want to get --

HON. BROWN: Are we the last thing on the agenda?

CHAIRMAN BABCOCK: You're the last thing on the agenda, so I do want to get to it for sure. But before we leave that last one, will you incorporate all of these changes to the

comments?

HON. BROWN: Yes.

CHAIRMAN BABCOCK: Now, is anybody -- Linda, we can put it to a vote if you want to --

MS. EADS: No. I'm persuaded by what Justice Hecht said, that the comments probably are not as important for that.

CHAIRMAN BABCOCK: Okay. So are we --

(Phone ringing)

CHAIRMAN BABCOCK: Are we all either on the phone or in agreement?

(Laughter)

CHAIRMAN BABCOCK: Okay. So the record should reflect that the comment, as we've discussed, taking the alternative comment and then adding certain paragraphs from the original comment will be our comment. And that's passed unanimously by the committee.

So now you can go on to the next thing.

HON. BROWN: The next thing we debated about -- and this could be short or long, depending on how everybody wants to do it.

HON. McCOWN: Short.

(Laughter)

HON. BROWN: Or we can defer it.

(Laughter)

HON. BROWN: Should we have a procedural rule? Maritime Overseas makes the point that these motions of challenge should be filed early on in the process but also makes the point that there's no procedure in Texas right now for doing that, for when they should be filed; once they're filed, how should they be handled; if an expert is struck, should a continuance be granted; what should courts do with that.

The committee debated that and decided in the end that a comment was the best way to handle that, which basically encourages trial judges to do it early. A minority view, which may have been a view of one, frankly, me, was that we should have a rule that a challenge in expert can oftentimes be dispositive of the case.

If not dispositive, can have almost as much practical significance as being dispositive; therefore, we should look to the rules for summary judgment, for some guidance,

and should require some people to have procedures for how much notice they give -- more than seven days notice, for example; time for response; affidavits following certain rules, et cetera.

And so we worked on a rule. We've drafted a rule. Buddy, you correct me if I get this wrong. I think the rule was the best we could come up with as a committee. It wasn't perfect, but it was moving that direction -- if we wanted a rule, but like I said the majority of the committee did not want a rule.

MR. LOW: And the comment is on Page 140.

CHAIRMAN BABCOCK: Let me just tell you from my own experience, the way the courts in this state and the federal system handle Daubert motions is -- I mean, it's from here to here. I mean, nobody handles it the same way.

MR. BRISTEO: And they feel strongly about it. I mean, a former colleague, "I am not doing those until trial. I am not doing those anywhere near trial."

CHAIRMAN BABCOCK: Some of them do

them during trial.

HON. McCOWN: I strongly think we should not have a rule, because you're not going to want to do it the way I do it and so I --

(Laughter)

CHAIRMAN BABCOCK: I don't want a rule.

And that, you know, goes to the art of judging and it goes to the judge's style and it goes to the docket and local conditions and the case and the nature of the case.

CHAIRMAN BABCOCK: Well, and it keeps the excitement alive in litigation.

(Laughter)

MR. LOW: One thing also that's a problem, the rule included -- there was some suggestion that we consider sanctions, you know, that discourage people from making frivolous challenges and so forth. So it does include that. It's a procedural rule as well as a sanctions rule.

And on Page 140 is the comment -- proposed comment and also the beginning of the proposed rule.

CHAIRMAN BABCOCK: Okay. Alex.

HON. BROWN: Can I just explain real quickly what we --

CHAIRMAN BABCOCK: Sure.

HON. BROWN: The comment is pretty short. It's just basically saying, "Try to do it early if you can." The challenge should say more than, "We challenge every expert on Robinson grounds," which we're getting some of those now. And then reminds practitioners that sanctions are available. So it's pretty short.

CHAIRMAN BABCOCK: Alex.

MS. ALBRIGHT: My only comment was that if it's written in the Rules of Procedure, then we'll have to deal with this in evidence classes and procedure classes. I've been able to stay away from these.

MR. LOW: See, if we had one, we'd call it 195 in the Rule of Evidence. And then we would have another one and we could call it rule -- I mean, procedure or evidence.

CHAIRMAN BABCOCK: Carlyle.

MR. CHAPMAN: I do not propose that we make a comment, certainly not a rule. But I would, in the interest of full disclosure, say that in the State Bar's Advanced Evidence

and Discovery Seminars that Judge Brown and I are speakers in, at the evidence grab-bag section of that presentation where the audience was asked to give comments and/or ask questions, consistently both in Houston and in Dallas, one of the questions that have been asked by the lawyers is: When should we expect that the court will want to hear Daubert/Robinson motions?

So it's on the Bar's mind. And I just throw that out for the committee's consumption. I don't propose that we have a comment, but we should understand that that's something that the Bar is struggling with.

CHAIRMAN BABCOCK: Justice Hecht, did you have a comment?

JUSTICE HECHT: No. I think that's right. I mean, the reason -- I mean, it may not be possible to resolve it at this point. We may just have to suffer longer until we get more consensus on it, but I do think if we were wise enough to come up with a procedure and it happened to be Scott's, the Bar would feel better that they knew what was coming than they don't know at all.

CHAIRMAN BABCOCK: Judge Bristeo.

MR. BRISTEO: Part of the problem is, it depends on what the challenge is and what kind of expert it is. You know, in the Bohatch, Boger & Binion case, came in, I found out they were fixing to fly all over the country taking expert opinions about whether it's bad for attorneys to pad their bills.

And I can tell you right now, don't spend any time, you know, talking to Professor Hazard or any other ethics expert about whether it's bad for lawyers to pad their bills. It is bad to pad the bills, and we're not going to have any experts on that.

But on the other hand, on a lot of the scientific stuff, you don't know whether you're going to strike them or not until after their deposition has been taken out and the other side has taken their depositions.

So, you know, on K-Mart/Honeycutt experts, you can strike them first time -- you know, right after the request for disclosure comes back for response. We're not having an expert on that.

In others, really, until all of the

discovery is done, you can't tell whether you can -- I just think it's going to be impossible to write a rule. It's certainly, as early as possible is better, because the longer they're there, the more money everybody spends.

MR. CHAPMAN: My comments in response to the questions at the seminars has been that I encourage the use of a Level 2 and Level 3 discovery process for the lawyers to set forth a discovery deadline or a discovery order to the court that the lawyers have agreed upon and require the lawyers -- or suggest that the lawyers try to come to a conclusion as to what would be an appropriate time in their case to have the motions to exclude or challenges to experts considered, because that's the way I've done it.

In a case where I think that's going to be a problem, I pretty much insist on, certainly, to try to get the court to go along with it that we ought to have a discovery on it.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: There's another concept in here -- I don't want to quash the discussion about timing, but it has to do with

specificity of the objection. And I think that warrants some discussion.

Most people think, from reading Robinson and Daubert, that all you have to do is object Daubert/Robinson and then the burden is on the other side to make all of the predicate laid to get the testimony in.

But there's a case out of, I believe, Texarkana called Scherler vs. State, S-c-h-e-r-l-e-r, where this defense lawyer was trying to object to DWI information, breathalyzer results, and he objected based on Daubert, Rule 702, Kelly vs. State, and Hartman vs. State. And Hartman vs. State is a DWI breathalyzer reliability case.

And the Texarkana Court of Appeals ruled that that was not an adequate objection to preserve error because a Daubert objection is a predicate objection. And the predicate objection has to be so specific that the court and the opposing party knows what part of the predicate is missing.

Now, I think that's an excessive stricture to put on an objecting party, personally, but that's published case law. And

I think that we ought to discuss the proposition in the comment about whether we want to leave it alone and just let it develop through case law or whether we want to say this, that you must state the specific ground, which is more than just invoking the applicable authority, I would think, or whether we actually could be a little bit less specific and say that once you challenge reliability, then the burden is on the other side to prove all aspects of reliability, which, frankly, is what I would prefer.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: See, one of the things that Harvey drew in the rule is, there's a timing for when you must make your challenge, and that's not the same as when you must be heard.

And it's pretty reasonable that you have to make it within so many days after you get a meaningful report. You can't do it -- or a deposition. And then, that way, you've got to -- you should make your challenge. Then when the judge hears it, that's set at a separate time.

"The challenge must be specific," he

says that, and goes on. And the rule, if you're going to have a rule, is well thought out and followed. Basically what the courts are doing now and gives the courts authority to do, basically, what they're doing. That's all.

CHAIRMAN BABCOCK: You know, in practice, lots of times these motions are filed in compliance or in accordance with this proposed rule, but the problem is -- to the extent it's a problem, the trial judges don't always do anything with them. They just either let them sit there or --

MR. LOW: But then, see, the trial -- the person, we could have -- and I've forgotten what this says, that suggests when it should be heard. Sometimes the parties don't want it heard until later. But it's an imposition on the court and a jury to have a jury wait while the witness is on the stand, you send them out and then you make your challenge. I mean, that's not fair to the jury or to our system.

CHAIRMAN BABCOCK: That puts a pressure on everybody, too, because you tend to want to hurry up to get through your challenge

because the jury is sitting and you don't want them to think it's your fault.

MR. LOW: That is right. And the more detail you get on comment -- on factors, the closer you get to a rule, but you're calling it a comment.

HON. PATTERSON: The other problem is, if you wait until trial, there's so much pressure riding on whether that witness is permitted to testify or not that that influences the decision very often.

MR. LOW: Whether you get that witness, or if not, you might have to get another. And one of the things that -- I mean, you'll know early whether he makes the grade or not.

CHAIRMAN BABCOCK: I sense that -- hang on one second, Richard.

I sense that there's not much appetite here for a comment, but I'm not sure if there's any appetite for the proposed rule.

Judge Brown.

HON. BROWN: Before we give up the comment, because I don't think you're going to get the rule, I think the comment is helpful.

The first sentence of the comment, about "this amendment" is taken directly from the federal rule -- or the federal comment. Excuse me. This kind of goes to one of Linda's points about flexibility and that this isn't meant to encourage people to file these.

I don't think there's anything in the second paragraph about timing that is controversial. All this is doing is kind of nudging the trial judge, just the way Maritime Overseas does, to do it early if you can. It doesn't say you have too, but it's certainly something that a litigant could try to use. Often a trial judge is reluctant in doing it earlier, certainly not in the middle of trial. So I don't think there's any harm in this; and, therefore, I think it does kind of advance the ball.

CHAIRMAN BABCOCK: And would it be another paragraph to the evidence rule. Is that --

HON. BROWN: No. We can just -- yeah. We can put this in as another paragraph to the comments we just did.

CHAIRMAN BABCOCK: That's what I'm

talking about.

HON. BROWN: Yeah.

CHAIRMAN BABCOCK: Okay.

HON. BROWN: And on the objection part, Richard, we took that language primarily from Rule 103 already about the specific ground. And Robinson, Kumho and Daubert all have some language about specificity --

HON. RHEA: I'd like to say that, amazingly, when I hear these motions, it's mainly determined by when the objections are made, and that oftentimes -- and I think it's one of the concerns that folks have about the timing issue -- it oftentimes is made strategically right before trial by a defendant, typically, trying to knock out a plaintiff's expert. And I think there are some legitimate concerns about that.

I like the idea of putting some kind of a deadline by rule -- I would presume we would have to do it -- that's tied more to a report that's given or a deposition taken as you suggest. I haven't seen that before and hadn't heard it before, but I think that is worth looking at and seriously exploring. It could

solve those kind of problems.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Every time we pass a rule or make a comment that's directory, we are taking something away from the trial judges in the way they run their courtroom.

And I think we need to be real careful about that. Different judges have different kinds of dockets. And some of the cities have judges with exclusively family law dockets, and they have a different perspective, perhaps, on all of this.

If you require all of this to be done in advance of trial, you're going to require a deposition of every expert that might be subject to a Daubert challenge. And so, you're going to put the pressure on the lawyers even though they may, based on their familiarity with the witness, or whatever, they may have a feeling that they can make a legitimate -- take a witness on voir dire, find some reliability problems and try to keep out some part of their testimony.

If you force all of this to be done so many days before trial, then you're going to

require people to take the depositions or to make the step in advance. And any big case is going to have that. I know that. But there are a lot of family law cases where the people, they just walk in and they shoot from the hip. And so, we're going to deprive them of the opportunity in trial from making a suggestion, if you're required to be done, and it makes sense to do that in commercial litigation and personal injury litigation, maybe, but it doesn't make sense to do that in maybe 50 percent of the cases that are in our trial court.

And I think we ought to leave it with the trial judges to decide whether they, as a monitor of the way their juries work and as a monitor of their own personal time and handling of cases whether they feel like it's okay to do it during trial or whether they feel like it ought to be done 30 days before trial or 60 days before trial.

MR. CHAPMAN: Do most of the witnesses not have reports?

MR. ORSINGER: No. Usually, in family law, we wouldn't. Sometimes we do.

HON. McCOWN: I don't have any problem with the proposed comment, and I could see some good of the comment being in the rule.

But one of my frustrations is, we ought to be writing the rule book, not the play book. And the game is played differently in every area, geographically, in every area of law. And I don't think we're going to be able to write the play book.

CHAIRMAN BABCOCK: Carl was next. Then Buddy.

MR. HAMILTON: I agree with Richard because there's a lot of times, too, where you have expensive experts all over the country, and then they have to come twice. They have to come once for the Daubert hearings and then they have to come back for trial. When actually, it could be done quickly at the time of trial, and some judges will allow that. And I think the comment almost is telling the judges, "You have to do this before trial."

MR. LOW: If you look at -- I mean, that was -- in the rule, it says, "There will be no oral testimony." In other words, you make the challenge. You don't get to go to

Singapore and take depositions and so forth. It's to cut down on -- I'm, again, arguing the rule.

MR. ORSINGER: I don't know what rule you're talking about.

MR. LOW: The proposed rule, 195.

(Simultaneous discussion)

MR. LOW: The proposed rule to cut down on expenses, it's on 140. And that's what we're talking about. We've been arguing for 30 minutes about whether the rule or comment. Well, that is "the rule."

Now, as far as every court doing things different, you know, that's one reason I thought we had these rules and procedures, so every court couldn't do -- you can go to Harris County and you'd have the same evidence rules, basically. They may make different applications and not understand as well as we do in Beaumont, but it would be the same rule.

So I think there would be nothing wrong with uniformity.

HON. McCOWN: Except, there's no other place in the law where we say to the trial judge what order and what time you have to make

decisions about motions.

MR. LOW: No. But it says -- you certainly do have deadlines where you have to rule on certain things. Won't you have a deadline when you have to rule on motion for a new trial. If you don't, the law rules for you. You do have to have --

CHAIRMAN BABCOCK: Mr. Watson. Then Judge Peeples. Then Judge Patterson.

MR. WATSON: I agree with the judges on this. To me, this is sort of a classic example of what you'd use a scheduling order for. And if lawyers on either side of the case are concerned about running up against trial and having their experts knocked out or if you think you have a shaky expert, to me, it's to the advantage of the lawyer that's in the box to request a scheduling conference, request a scheduling order if it doesn't routinely come out. And it may be that the judges in the heavier civil dockets will routinely kick out scheduling orders that do exactly what's been talked about of schedule -- "Daubert challenges must be made within 30 days after the date scheduled for the report, or upon call shown,

within 30 days after the deposition."

To me, it's easily handled by giving control to the trial judge to manage his or her docket. And I don't think they need to be encouraged to use that. And if they do, again, the lawyer that stands to lose under this by having it jammed up against trial, is behooved to get in and say, "I need a scheduling order so this doesn't happen."

CHAIRMAN BABCOCK: Judge Peeples, Judge Patterson and Judge Brown. And then we're going to vote on whether we want the comment or a rule.

HON. PEEPLES: On the issue of whether to nudge judges to do this before trial, did the committee talk about the possibility that a lot of hearings might take place before trial in cases that were going to settle.

HON. BROWN: Yes.

HON. PEEPLES: And again, some of these motions are serious and some of them are not so serious. And I'm just wondering if we make people or encourage judges to do them before trial if we're going to have a lot of hearings that we never would have had because

the cases would ultimately have settled?

HON. BROWN: That is a very good question. And we don't know the answer to that.

There's an argument judges are making all across the state, and it might be valid. On the other hand, there are some judges who say, "Because of that, I will not decide it until the middle of trial." And it doesn't matter if you promise that expert voir dire. It doesn't matter if you talked about the expert in opening. It doesn't matter if other witnesses talk about that expert. "I'm going to strike them in the middle of trial, and that's just too bad."

CHAIRMAN BABCOCK: Judge Patterson.

HON. PATTERSON: I was going to just make a motion that I agree with Skip. I think this is a decision for scheduling orders and practice tips and not for a rule.

CHAIRMAN BABCOCK: Judge Brown, final word.

HON. BROWN: I see no harm in the comment. I don't see how anybody could disagree with --

CHAIRMAN BABCOCK: We're about to test that.

(Laughter)

CHAIRMAN BABCOCK: John Martin.

MR. MARTIN: If voting on whether to have a comment or a rule, I do have some problems with each one, depending on which way we would go.

HON. PATTERSON: The three options. Right?

(Simultaneous discussion)

CHAIRMAN BABCOCK: We'll tinker with the language, but if everybody says, "I don't want a comment," then, you know, why spend any more time. Right?

So everybody that thinks we ought to have a comment to be appended to the comments we already have on Rule 702, along the lines of the proposed comment on Page 140, raise your hand.

MR. BRISTEO: What are our alternatives first, comment, rule or nothing?

CHAIRMAN BABCOCK: Right.

MR. BRISTEO: So we get three alternatives. Right?

CHAIRMAN BABCOCK: Comment, rule

or nothing.

HON. McCOWN: Shouldn't you start with nothing, comment, rule?

CHAIRMAN BABCOCK: Is that the funnel?

(Laughter)

HON. McCOWN: Yes. That's the funnel.

Because if nothing wins, we don't have --

(Laughter)

(Simultaneous discussion)

CHAIRMAN BABCOCK: All right. How many people want a comment appended to the comments we've already approved for Rule 702 along the lines of the proposed comment on Page 140, raise your hand.

(All those in favor so responded)

CHAIRMAN BABCOCK: How many opposed?

(All those opposed so responded)

HON. McCOWN: I want nothing.

CHAIRMAN BABCOCK: 11 to 5, no comment.

How about a rule along the lines of the

proposed rule on Page 140 and 141, who's in favor of that?

(All those in favor so responded)

CHAIRMAN BABCOCK: Everybody opposed?

(All those opposed so responded)

CHAIRMAN BABCOCK: So that's no rule by a vote of 15 to 2. The funnel is now --

HON. McCOWN: It's closed.

(Laughter)

CHAIRMAN BABCOCK: Judge Peeples.

HON. PEEPLES: Can it be understood that as we get more experience with this we may want to have a rule later on. That's understood, isn't it?

HON. PATTERSON: Without prejudice.

CHAIRMAN BABCOCK: All of the votes are without prejudice, I should think.

Well, amazingly enough, for this group, we've gotten all of the way through our agenda. So unless somebody feels we have to get together tomorrow morning just for the sake of togetherness, I would say we are due until May.

The agenda items I have for May are the

Rule 47, Dorsaneo; the parental notification rules, McClure; the Rule 103, Rule 536, Orsinger; Rule 9.2, Dorsaneo; and the finale rule, Duncan and Peeples.

HON. PATTERSON: May we request that Richard not come in the morning next time as well.

(Laughter)

CHAIRMAN BABCOCK: Yeah. That will be so ordered.

And if anybody else has an agenda item that they want --

HON. McCOWN: I commend the chairman for no Saturday meeting.

CHAIRMAN BABCOCK: We will be in recess.

(Proceedings concluded at 5:08 p.m.)

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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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I, Patricia Gonzalez, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 30th day of March, 2001, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $1,084.50 charged to Charles L. Babcock.

Given under my hand and seal of office on this the 10th day of April, 2001.

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