****

HEARING OF THE SUPREME COURT

ADVISORY COMMITTEE

****

Taken before Anna L. Renken, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 14th day of May, 2004, between the hours of 9:10 a.m. and 4:59 o'clock p.m. at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

I N D E X

CHAIRMAN BABCOCK: Okay. We're on the record here. Thanks everybody for coming. The first order of business is to introduce to you Angie Senneff who is my new assistant who you may have corresponded with by e-mail and otherwise. Angie is going to be helping us, and here she is to my right. And with that I guess we'll get into Justice Hecht's report.

JUSTICE NATHAN HECHT: Just a couple of things: I understand that Mike and Molly Hatchell and Skip Watson have moved over to the Locke, Liddell firm.

HONORABLE LEVI BENTON: Justice Hecht, we're having a hard time hearing you, sir.

JUSTICE NATHAN HECHT: Mike and Molly Hatchell and Skip Watson have moved over to the Locke, Liddell firm. Judge Peeples has announced that he is retiring later this year. I think that's correct, although he's going to stay on judging and do some teaching at St. Mary's and I hope stay on the committee for a while.

HONORABLE DAVID PEEPLES: Oh, sure.

JUSTICE NATHAN HECHT: Justice Brister was confirmed by the Texas Senate I guess earlier this week. Chief Justice Phillips, as you've probably heard, has announced that he will retire on September 3rd of this year, so we plan nonstop celebrations for Tom between now and Labor Day. And he's excited about he's going to teach at

South Texas for a while and then go on to great things he says, and so we're excited for him. And I hired a new Rules attorney who is Lisa Boling Cox. She was at Vinson, Elkins for several years, and she was a law clerk to Justice Baker and an intern in my chambers a couple of years before that. So Lisa comes highly recommended; and she is arranging her life and will be here for the July meeting. And I think that's all I have, Chip.

CHAIRMAN BABCOCK: Okay. Great. Well, the first order of business today is apparently the report that only you and I want which is the Rule 202 issue; and I think Bobby Meadows who is the chairman of that subcommittee is not here; but Judge Christopher is prepared to lead our discussion on this. And I guess you and I will have to pay careful attention while everybody else listens or not. Justice Jefferson has just arrived.

HONORABLE TRACY E. CHRISTOPHER: Well, what I included for your review, and it should be in the packet in front of you, is the copy of the current rule and its predecessors which would be Rule 737, the Bill of Discovery and Rule 187, a Deposition to Perpetuate Testimony just so if anyone is interested in seeing what it looked like before you-all created 202.

The last time we were here the full committee looked at a bunch of issues and asked that we separate out

again the rule to perpetuate testimony from the rule to investigate a potential claim. So that's what I have done in the piece of paper entitled "Subcommittee Draft, May 13th, 2004."

09:13 So what I did was to make Rule 202 a deposition to perpetuate testimony; and then I just picked a new rule number, Rule 206 for depositions to investigate claims.

And the subcommittee would like to say that they're not in favor of this change. And one thing that we

09:14 would like to mention despite the fact that I have asked for a rule change myself; but when the rules keep changing a lot I think it makes it very difficult for the practitioners to keep up, and we have had so many changes in this past year, and we still think that the changes to this rule are not

09:14 particularly necessary, that you know, we think it would be a good idea not to change it.

But what we did is went through what the full committee had voted for the last time and did what you asked us to do. So on the Rule 202 deposition to perpetuate

09:14 testimony what I basically did is used the old Rule 202, but took out the sections that related to a deposition to investigate claims. And so you can compare them side by side and see, for example, in 202.1 I just eliminated subsection (b) to investigate a potential claim. Then in

09:15 202.2 I eliminated again the references to the investigation

of a claim and telescoped (d), (e) and (f) together just because it made more sense to me. And then everything else was basically the same in 202.3. And 202.4, the required finding, was changed because the last time we talked about what the required findings should be; and we all agreed that subsection number (1) of the current order is the one that related to a deposition to perpetuate testimony. So I put that in there that the deposition may prevent a failure or delay of justice in an anticipated suit. Everyone had agreed before that that was the finding that we needed on the deposition to perpetuate testimony; and it pretty much tracks I think what the old Rule 187 was with respect to the required finding.

So that's how I changed 202.4 or 202 to make it solely relate to depositions to perpetuate testimony. So I don't know if you want to discuss what I did or have questions about it. I think I pulled out everything about investigating a claim and otherwise kept the rule the same.

CHAIRMAN BABCOCK: Okay. Does anybody have any comments? Buddy.

MR. LOW: Was the sole thing just to divide those two things, to perpetuate testimony and to investigate? But what else was broken about the rule or we thought, I mean, the committee thought was broken that needed to be changed? Anything else?

HONORABLE TRACY E. CHRISTOPHER: Well, people in particular in the "required finding" sections the last time we discussed it people thought it was confusing between the deposition to perpetuate testimony versus the deposition to investigate claims. So that's why --

MR. LOW: It all relates back really to that?

HONORABLE TRACY CHRISTOPHER: Right. So that's why the suggestion was that we split the rule up into two different rules, so that's what I've tried to do here.

MR. LOW: Okay.

CHAIRMAN BABCOCK: Okay. Any other comments about 202 as amended? Still digesting it, Richard?

MR. ORSINGER: Nothing.

CHAIRMAN BABCOCK: Okay. Do you want to go on to 206 then, judge?

HONORABLE TRACY E. CHRISTOPHER: Okay. Then again for 206 I kept the same format that the old 202 was, but put at 202.1 that "The purpose of this rule was to investigate a potential claim or suit" and essentially kept the same format of the old 202 that we had, deleting the few references to "perpetuating testimony" that were in there to make it a separate suit. And then what I did was I noted that we had previously voted in connection with that section, 206.2 eliminating the word "adverse" or changing "adverse interest of potential parties" and requiring a

statement as to why suit cannot now be filed or why you cannot wait until after the suit to take the deposition.

So I just wanted everyone to remember that we had made that vote before, so that's why I put those little notes there in connection with that section. Then there wasn't any change to the notice and service. No one had made any comments or suggestions to that.

The next big change would be in 206.4, the required findings; and here's where we tightened up the required findings. The committee recommended that the section be made stronger and/or reviewed; and these were the potential changes that we came up with based upon the prior discussion. So that would be changing in number one that it will prevent a failure or delay of justice and in number two changing it to that the petitioner has shown a substantial need to take the deposition to make it a stronger finding.

And that was, I can't remember to tell you the truth, whether those were the words that the subcommittee or the full committee came up with or whether those are just my suggestions at this point; but that was my attempt to make those findings stronger.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY E. CHRISTOPHER: So I don't know whether we want to talk about that.

CHAIRMAN BABCOCK: I don't see a need to

revisit what we've already decided on what is now 206.2, the boldfaced note talking about how we've eliminated the word "adverse" and/or changing "adverse interest to potential parties." Does anybody see a need to revisit that? Carl.

09:20 MR. HAMILTON: Where is the part about requiring a statement to why you cannot wait? I don't see that in the rule.

HONORABLE TRACY E. CHRISTOPHER: That was previously rejected. Both of those things were previously

09:21 voted on and rejected; and I just made a little note that they had been at our last meeting.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I wasn't at our last meeting. But two meetings ago when we discussed this I

09:21 believe I then expressed my opposition to making the Rule stronger. If the purpose of the Rule is to facilitate the investigation of claims and discourage persons from filing what some might describe as a frivolous suit, we are going in the wrong direction. I note my dissent.

09:21 CHAIRMAN BABCOCK: Yes. I think there were -- I don't remember how close the vote was; but I thought there were several people that expressed that feeling at our last meeting.

Any other discussion on that? Yes, Richard.

09:21 MR. ORSINGER: I might just say in response

to that, not that I advocate the opposing position; but the complaint that was raised at the last meeting was that some lawyers use this as a way to kind of get preliminary, surprise discovery in a case that they fully intended to file and they were using this just as a device to try to get early disclosure, but before the defense has had the opportunity to interview its witnesses and decide its defensive position.

I'm not saying I agree with that position; but I think that was the misuse of the rule that probably prompted some people to want to change it. And then the question was do you leave it entirely to the discretion of the trial judge, or do you stiffen up what must be shown to the trial judge before you can do it?

CHAIRMAN BABCOCK: Justice Gray.

JUSTICE TOM GRAY: Indeed the objection is that to not making the change I guess is that the rule allows a circumvention of some protections that are statutory in nature or rule in nature that are designed to prevent certain things from happening particularly in the medical field of the expert or the taking the deposition of the doctor. And in the time that I've had to study I don't remember or don't see how this will prevent the circumvention of what used to be the 4590(i), now whatever provision it is, that you can't take the doctor's testimony

prior to the expert affidavit. And I know that we had a long discussion during the course of the last meeting, Sarah, about that scope of the deposition, whether it was going to be about the events that occurred. You're looking like you don't recall it.

JUSTICE SARAH B. DUNCAN: I wasn't here.

(Laughter.)

JUSTICE TOM GRAY: Well, it may have been --

JUSTICE SARAH B. DUNCAN: So I don't recall it.

JUSTICE TOM GRAY: -- two meetings ago.

CHAIRMAN BABCOCK: Actually somebody was posing as you at the last meeting.

(Laughter.)

JUSTICE TOM GRAY: And you have changed your appearance a lot, so maybe it was somebody else sitting there. But there was the general discussion, and it may have been even from two meetings ago, about whether the deposition of a doctor could be taken under this rule and get into reasons why a particular procedure was negligent versus the events that actually occurred in the course of the treatment. And is this designed to prevent that type of circumvention of the rule?

HONORABLE TRACY E. CHRISTOPHER: Well, what I tried to do and what the committee tried to do is to make

the findings stronger to begin with, "substantial need" rather than "likely benefit" in terms of taking the deposition; and then we also included a specific sentence that the judge may limit the scope of discovery in the deposition so that it, you know, puts the trial judge on notice that you can specifically define and craft how far the deposition is going to go. We did talk about the idea of expert versus fact questions.

JUSTICE TOM GRAY: Right.

HONORABLE TRACY E. CHRISTOPHER: And I don't believe that that was voted in favor of, and the idea was to because it was going to be too hard to craft really the rule for it. So the idea was that to tell the judge through this that the judge can limit the scope of discovery and let the judge craft the order for the particular case. I'm open to other suggestions in terms of how you would want to word that; but that's what I came up with. That's what we came up with.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I think you said earlier we weren't going to revisit this; but this comment now was calculated to revisiting this. If the purpose of the rule is to facilitate early resolution of claims and to defer the filing of frivolous lawsuits, what we might do instead of the language that the committee has proposed is

strengthen up the notice requirements and set out days, set out a minimum number of days or weeks that must transpire before the deposition is taken so Richard's concern is addressed, defense counsel has the opportunity to visit with the witnesses. It's not something that can happen on three days notice. The language we have does not facilitate early resolution of claims, doesn't necessarily deter filing of frivolous suits.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN P. PATTERSON: I wonder whether the word "substantial" really adds anything to this, because I think that "need" is enough of the opposite direction from "benefit" that that gives you the showing that you need to make, and you've got the balancing in the latter part of the sentence. And I wonder if the word "substantial" doesn't add some unknowable calculation in quantifying that will only add confusion when what you really want is a showing of some type.

CHAIRMAN BABCOCK: Yes. My recollection of how this all got kicked off many meetings ago was that the Court had an inquiry or a communication from the Govenor's Office worried about the surprise element that somebody articulated that people were taking these depositions in advance of suit in order to get all their discovery out of the way and not giving defendants notice of what the claims

were going to be that they were being deposed on and so basically creating a sworn record and then filing a lawsuit and saying "Ah-ha, I got you, because you've already admitted to many of the elements of the claim." That's what I recall as being the concern. Professor Dorsaneo.

09:28

PROFESSOR DORSANEO: If that's the concern, I don't know whether "substantial" adds anything. But what's the need to take the requested deposition to investigate the potential claim? Is it before filing suit or just some other need to take it because you like taking depositions or? If that's the problem, why not add "before filing suit"?

09:28

CHAIRMAN BABCOCK: Yes. Carlos.

MR. LOPEZ: The argument that always got raised in front of me was the need to investigate whether or not it was a decent claim or not before filing. Many times I had lawyers say "Judge, just deny it, and they won't be able to say it's a frivolous claim, because I came here trying to seek discovery before filing it. You didn't give it to me, so I filed my case. I found out later that it wasn't a great case, but I tried."

09:29

09:29

So they felt like it was a safe harbor to sort of use the 202. They often raised the exact issue of, you know, or the issue was always at the forefront of is it really just a blind sighted discovery. So what I would do

09:29

is just put notice provisions in there that made it difficult to happen. I think that's an easy way to fix it. Not easy, but a way to fix it.

CHAIRMAN BABCOCK: Yes. The problem is that some, I think I raised three or four meetings ago, in the defamation area, for example, I mean, there may be multiple publications that are candidates for a liable claim. There may be particular statements within those various publications that could be a candidate; but you don't know going in, so you've got to spend weeks preparing your witness on everything that could potentially come up. And I actually had a case like that where that was very troublesome, very hard to deal with.

MR. LOPEZ: It's usually not somebody dying or anything like that.

CHAIRMAN BABCOCK: Right.

MR. LOPEZ: You can usually craft it in a way that protects the other side; but it wasn't in the rule.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I sure don't want to go back to the drawing board on this rule; but maybe some of the concerns could be addressed by requiring the party seeking this relief to state in their application what specific areas of inquiry. Right now we just have a kind of a -- you have to identify the potential targets and people who might

ought to be given notice of the deposition; but we don't really make them say "The reason I want to file this lawsuit is to find out whether a certain device was used or find out who in the operating room actually participated in the specific event or something like that." And if you were to do that, make them state what they are trying to find out, you'd give the trial judge a kind of leverage on limiting it to that and the defendants would be put on notice that that was the nature of the inquiry.

09:31

CHAIRMAN BABCOCK: Okay. Judge Christopher.

JUSTICE TOM GRAY: I thought that's what (g) did.

MR. ORSINGER: Do you think (g) does that?

HONORABLE TRACY E. CHRISTOPHER: Yes. That's what I was about to say. We didn't discuss making (g) any stronger the last time. They are supposed to state the substance of the testimony that they hope to get.

09:31

MR. ORSINGER: Okay. I mean, that would be one way to protect the defendant, to tighten that up, if you feel like that is good enough. This whole rule is addressed to the discretion of the trial judge anyway. The whole point here is that trial judges were maybe a little too lax in what they required to permit these. So what we're basically trying to do is to give the judges a more concrete standard by which to exercise their discretion, and if this

09:32

09:32

is enough.

CHAIRMAN BABCOCK: Well, in fairness too, I mean, it is only anecdotal that the judges have been too lax in exercising their discretion.

09:32 MR. ORSINGER: Yes. I don't agree with that. I don't see it in my practice.

MR. LOW: You don't see the ones that got denied.

MR. ORSINGER: There may be some lawyers that 09:32 do this as a routine; but I bet percentagewise of all the lawsuits filed I bet it's a small percentage.

CHAIRMAN BABCOCK: Well, the trial judges here would do what Carlos has brought up.

MR. LOPEZ: I saw them probably for sure no 09:33 more than once a month in the Dallas district court. That is probably not very often. And considering how infrequent it was it seemed like there were some attorneys that used it more than others. You start to get a feel for -- in fact, the one Ralph was referring to I can probably tell you who 09:33 that was without even knowing. But I always found the harder part discretionary wise was to figure out whether they were really trying to find out whether they had a claim or whether they knew full well they were going to file a lawsuit. When I denied them generally it was because I felt 09:33 like this was obvious. I told them "Go file your lawsuit.

You clearly have a lawsuit. This person's leg got -- they cut off the wrong leg. You're going to suit. So what is with the 202?" And I think this rule clearly has discretion to do that; but it doesn't give much guidance how to exercise that discretion.

CHAIRMAN BABCOCK: Any other? David.

MR. JACKSON: Chip, I just have a question. I mean, I've read this and I feel pretty comfortable that we have at least a Court order to act on as a court reporting firm. We have gotten some calls about this, and they want to try to get us to issue a subpoena without anything, and we won't issue a subpoena without a notice. And they say "Well, there won't be a notice because there isn't a lawsuit filed." And we still try to shy away from that anyway. As long as we're going to have a Court order along with this to act on, I feel comfortable with it.

CHAIRMAN BABCOCK: Okay. That there is an Order though on a Rule 202 application?

MR. LOPEZ: Yes.

CHAIRMAN BABCOCK: Judge Christopher, does this come up in your court?

HONORABLE TRACY E. CHRISTOPHER: Once a month maybe. So 12 cases a year out of 1,000 cases filed in my court.

CHAIRMAN BABCOCK: Yes. Judge Bland, before

you abandoned the friendly confines of the district court?

JUSTICE JANE BLAND: About once a month. They were usually cases that involved higher dollars, so I would say that they may be more complicated cases, cases involving higher amounts of money.

CHAIRMAN BABCOCK: Okay. Do any of the trial judges have any different experience on this?

HONORABLE LEVI BENTON: I have not had one this calendar year; and I don't recall having one in 2003.

HONORABLE KENT SULLIVAN: They come up infrequently; but that's not to say that someone will not develop a CLE speech in the future and then we'll suddenly see the flood gates open.

JUSTICE JANE BLAND: There seemed to be more of them five years ago when it first came out than there are now. Would you say that?

MR. ORSINGER: On that theory, if you amend the rule, we're going to create a flurry of activity.

(Laughter.)

HONORABLE TRACY E. CHRISTOPHER: Because we did have a Bill of Discovery; but nobody used it. And then Rule 202 came about; and people are like "Oh, we can do this."

CHAIRMAN BABCOCK: Yes.

HONORABLE TRACY E. CHRISTOPHER: So but I

agree. I think the numbers have gone down.

CHAIRMAN BABCOCK: We made it understandable. Carl.

MR. HAMILTON: I assume it contemplates a written order; but it doesn't say "written."

CHAIRMAN BABCOCK: It says "The Order must state."

HONORABLE TRACY E. CHRISTOPHER: Yes. I didn't change that. That's what the current rule says.

MR. HAMILTON: Could the Court just do it on the record with an oral Order?

CHAIRMAN BABCOCK: It sounds like you'd have trouble with the court reporter if that happens.

HONORABLE TRACY E. CHRISTOPHER: I mean, everyone gives us an Order to sign.

CHAIRMAN BABCOCK: Okay. Well, I hear discussion; but I don't hear an overwhelming groundswell for revisiting the issue that we decided before, that we would not require a statement as to why the petitioner could not wait until after the suit was filed to take a deposition. Does anybody -- is that a fair read of our committee? Does anybody disagree with that?

Okay. So I think we'll move to what Tracy suggests as strengthening the language in 206.4(a)(2) to a "substantial need" and having "the need outweigh the burden

or expense of the procedure." Judge Gaultney.

HONORABLE DAVID B. GAULTNEY: Before you do that I just had a question on 206.4(a) Required Finding. It says "The Court must." I wonder if that should be "may."

09:37 CHAIRMAN BABCOCK: Right. Using the word "must" makes it sound like the world prefers or encourages it.

HONORABLE DAVID B. GAULTNEY: It suggests the Court may order the deposition. The only time he or she is

09:38 going to have to do it is if these exist. So if you change it to "may," you're saying the authority is limited to the existence of these circumstances.

CHAIRMAN BABCOCK: What do you think about that, Judge Christopher?

09:38 HONORABLE TRACY E. CHRISTOPHER: I have a vague recollection that we talked about whether this should be "may." But, I mean, if we make it "may," it obviously will weaken the rule. And so if that's the intent of the committee, then that's the intent of the committee.

09:38 CHAIRMAN BABCOCK: How do people feel about "may" versus "must"?

MR. MUNZINGER: "Must" makes in mandatory.

CHAIRMAN BABCOCK: Huh?

MR. MUNZINGER: "Must" makes it mandatory. It

09:38 takes all discretion away from the trial judge. If these

factors are established, the trial judge has no discretion at all.

MR. ORSINGER: It doesn't prohibit the Court from granting it when the standards are not met. The "may" and "must" doesn't change that. What if I miss it? Can the judge still order it?

JUSTICE TOM GRAY: It's says "but only if."

MR. ORSINGER: I think that means that it cannot be ordered unless these standards are met then.

HONORABLE TOM GRAY: (Nods affirmatively.)

MR. BROWN: Question.

CHAIRMAN BABCOCK: Yes.

MR. BROWN: If you want to say the Court may not order a deposition unless it finds that, I mean, is that what we're trying to accomplish?

HONORABLE DAVID B. GAULTNEY: That's what I was, that's the way I was reading it; and that's why I suggested "may." You may order it only if you find these things. If we say "You must order it if you finds these things," it's like if these are proven, then all discretion is removed. However discretion remains if they're not proven. So that's the problem.

MR. BROWN: I think it would be clearer if you say "The Court may not order a deposition unless it finds" to make your point.

CHAIRMAN BABCOCK: "The Court may not order a deposition to be taken unless it finds."

MR. BROWN: "Unless it finds."

MR. ORSINGER: But see, that doesn't require the Court to order it if it does find. So how do you make them do it when the standard is met and prohibit them from doing it when the standard is not met?

MR. YELENOSKY: Is that what we wanted?

CHAIRMAN BABCOCK: Ann McNamara.

09:40 MS. MCNAMARA: How can you not order it if you make these findings? Because the findings sort of tell you what the outcome is going to be. What else would you be finding to cause you not to order it if you find these other things?

09:40 HONORABLE DAVID B. GAULTNEY: That's why I would say "The Court may order it if it finds these, but only if it finds these."

MR. YELENOSKY: But that doesn't answer her concern, which is that you also may not. You could find it

09:40 is going to cause a failure of justice; but "I ain't going to do it."

MS. MCNAMARA: Authorizing a miscarriage.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I have a problem with

09:41 206.4(a)(1). It sounds like -- I don't know that I know

what it means to start with "to prevent a failure or delay of justice." It almost sounds like that ought to go with the part about "perpetuating testimony."

HONORABLE TRACY E. CHRISTOPHER: Well, that's -- I think subsection (1) was designed, you know, more specifically for the deposition to perpetuate testimony; but I think we thought we should leave it in as a potential alternative finding. But I don't have a problem deleting (1) from that section.

MR. HAMILTON: When you talk about an anticipated suit the applicant then is already saying "I anticipate suit." So why then can't we wait until the suit is filed before we do the deposition? It almost sounds like that necessarily goes with perpetuating testimony because somebody is about to die or something like that.

CHAIRMAN BABCOCK: Yes. And the balancing that you're asking the Court to do in (2) is not the balancing of the perceived harm.

MR. HAMILTON: Right.

CHAIRMAN BABCOCK: Because the substantial need would be on the part of the petitioner; but the harm is you're sneaking up on me in litigation without giving me notice about what it is you are going to ultimately sue me about and trying to get my testimony on the record before I have notice of that. And that's not the flip side of

subpart (2). It's just that the need outweighs the burden. Burden I suppose could be read broadly to encompass the surprise almost.

MR. LOPEZ: Unfairness in there.

09:42 CHAIRMAN BABCOCK: Yes.

HONORABLE KENT SULLIVAN: Chip.

CHAIRMAN BABCOCK: Yes, Judge Sullivan.

HONORABLE KENT SULLIVAN: In 206.5 is it possible that we would want to enhance the discretion there

09:42 for just the reasons that you're suggesting and say that if with hindsight it is clear that a deponent was not given proper notice of the substance matter and the deponent and/or party was ultimately blind sighted, that the Court could explicitly disallow the use of the deposition? The

09:43 implication I think currently in 206.5 is if you weren't given notice, as in there is proper service of the Order, deposition notice, whatever on someone, that party could object just as you could I think just in the context of civil, any civil litigation under the rules.

09:43 But I wonder about the unfairness element. To someone who was there and did participate, is it possible that we would want to leave open that possibility?

CHAIRMAN BABCOCK: I know we did talk about that at one of our prior meetings where, you know, the

09:44 witness has said "yes," and then later finds out "Oh, you

mean, that's what I was saying yes to" and you can strike that and now say "no." And I don't think people were too enthusiastic about that. But Richard.

MR. ORSINGER: On the 206.4(a) I still think that using "must" with "given only" leaves us in an ambiguous situation; and I'm going to propose that we leave the "must" in there and say "must order the deposition if the following is shown" and then have (1) and (2), or just (2), and then end with the sentence "Unless the findings are made, the Court cannot" so that it's clear that if the findings are made, you must allow it and if the findings are not made, you cannot allow it, because right now I think it's real ambiguous.

PROFESSOR DORSANEO: I agree with Carl that (1) doesn't seem to help me very much and it doesn't seem particularly pertinent to what we're talking about here. Basically I think it's even more unintelligible than (2) and not helpful.

I think (2) is very ambiguous, because I still don't know what you need it for. Is it because you don't have the information and you want to verify the information that you had before filing suit? Is it because you need the information in order to make the determination that you're going to file suit? I need to know that. But that balancing needs against burden doesn't help me unless I know

what the target is that I'm dealing with.

Frankly, I don't like this Rule and I've never liked it; and I would like it to be the way you didn't vote for last time, that you need to make some showing that you can't file suit. So that's my mind set; but we've already gotten past that, and I don't want to revisit it, I suppose. But I would add "before filing suit." That seems to me to be the pertinent need. Not that I need it because I need it in a sense that it's relevant information with respect to the claim that I'm thinking about.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: What if you're a defendant? I realize that this witness, he's on his death bed and I think he's going to die, you know, fairly soon. So and the plaintiff won't file his lawsuit because he's waiting until he leaves. I know there is going to be a lawsuit. But what? As a defendant don't I have a right? I can't wait to file suit. I mean, why can't I get the deposition of that person at that time when I just I'm not sure what he's going to say; but I anticipate and I hear that the plaintiff is waiting until he dies before he files his lawsuit so then I lose that testimony.

PROFESSOR DORSANEO: Isn't the other rule about that?

MR. ORSINGER: It's under 202 now.

MR. LOW: All right. But that would really be investigation, because I'm not -- I don't know what he's going to say, so I'm investigating. But I have a suspicion, and I'm not going to file a lawsuit. And it might not be to perpetuate testimony; but I just hear a rumor that that's what they're waiting on. And I haven't talked to him; but I want to go out, so I anticipate, so this is for investigation for the defendant.

PROFESSOR DORSANEO: I don't think adding the words "before filing suit" would be a problem then for the defendant, because the defendant could just say "I'm not filing the suit."

MR. LOW: In other words, you shouldn't. Okay. But you shouldn't require somebody that doesn't want a lawsuit to say they're going to file one.

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID B. GAULTNEY: I agree that I think (1) doesn't add a lot. I think (1) helps in the situation where you're trying to perpetuate testimony and there is a need for that and it suggests that by saying "in an anticipated suit."

And actually (2) swallows (1). (2), substantial need, if you've got (1), you're going to be able to show a substantial need. So I think eliminating (1) doesn't hurt the rule in any way. It emphasizes that you're talking

about investigation. And I look the Professor's suggestion that we add the words "prior to filing a lawsuit," whatever the language was, I like that as well then too.

CHAIRMAN BABCOCK: Okay. Justice Christopher, what do you think about that, that (1) really is not needed in this 206 Rule because it really applies more to a 202 situation?

HONORABLE TRACY E. CHRISTOPHER: I think that that's reasonable. I think that was one of the problems that we talked about last time and why we wanted it split into two separate sections, so I wouldn't have any problem. I can't think of a reason why we'd have to keep that (1) in there. And if people think it's confusing, let's take it out and just go with (2).

CHAIRMAN BABCOCK: Okay. Judge Patterson.

MR. GILSTRAP: Just take "anticipation of suit" out.

CHAIRMAN BABCOCK: We'll get to that in a minute.

HONORABLE JAN P. PATTERSON: If you add the phrase "before filing suit," it seems to me it either needs to be put in at 206.1 or perhaps both, 206.1 and 206.2 to make those parallel. If you put it in 206.1, you may not need it in subparagraph (2); but if you have it in (2), you need it in (1).

CHAIRMAN BABCOCK: Okay. I'm not -- did you say that --

HONORABLE JAN P. PATTERSON: The phrase "before filing suit."

09:49 CHAIRMAN BABCOCK: "Prior to filing suit" should be in what is now 206.4(a)(2)?

HONORABLE JAN P. PATTERSON: No. 206.1 which sort of generally states the purpose of the Rule.

HONORABLE TRACY CHRISTOPHER: You know, I

09:50 think we have to rewrite it completely if we wanted to put that idea into the rule that there has to be a showing why you can't file the lawsuit. I mean, we did talk about that before and we did reject it. But if we want to put that concept back in the Rule, I don't think just by putting a

09:50 little "before filing suit" in a couple of places is going to do it. I think we ought to be more specific and state specifically that you need to show why you can't file the lawsuit.

HONORABLE JAN P. PATTERSON: My point really

09:50 goes to Bill's, to accommodating Bill's concern, if we were to add it; but I kind of like the more open-ended nature because I think there may be more flexible reasons why you might want it and it unnecessarily narrows the rule. So I think that's a point well taken.

09:51 CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Listening to what Buddy said and thinking about it, maybe it should say "before a suit is filed" making it passive rather than acting as if the person who wants to do this discovery needs to talk about filing suit.

CHAIRMAN BABCOCK: And where would you propose doing that?

PROFESSOR DORSANEO: Where Judge Christopher said, as you may well be right. But I think it would be adequate to put it in 206.4; but I may be wrong. I haven't been working on this.

HONORABLE TRACY E. CHRISTOPHER: Well, I mean, the whole idea of the deposition is to investigate a potential claim. So by its very nature it is before suit is filed. So adding those words in here doesn't strike me as a benefit unless our intent is to add a requirement that you have to show why you have to take that deposition before suit is filed. And if that's our intent, I think we need to be more specific.

PROFESSOR DORSANEO: Why wouldn't it? It modifies your words "substantial need." Why wouldn't it be clear enough? I have a substantial need to take the deposition to investigate the claims now before suit is filed rather than waiting.

HONORABLE TRACY E. CHRISTOPHER: Okay. So

what you're suggesting is that the substantial need is to take it now as opposed to before suit is filed?

PROFESSOR DORSANEO: As opposed to after suit is filed.

HONORABLE TRACY E. CHRISTOPHER: I mean, after the suit is filed. Versus what I understood the intent of the Rule was to investigate the claim and that's why I needed to take the deposition ahead of time so I could figure out what was going on. I mean, I just think as a matter of construction of the Rule that just throwing that in there is going to cause problems with how you would interpret that language. Is it substantially to take it before the lawsuit, or is it a substantial need to take it at all to investigate the claim?

HONORABLE TERRY JENNINGS: Because your point is that that's the deal. If you're trying to stop a lawsuit that shouldn't occur, well, you need to take the deposition to investigate the claim, not that you're in anticipation of a lawsuit at that point in time.

HONORABLE TRACY E. CHRISTOPHER: Right. I mean, most of time people can file their lawsuit and take the deposition. I thought the intent of this was to give people the chance to take a deposition to find out some key facts and then make a decision whether the lawsuit should be filed or not.

CHAIRMAN BABCOCK: What kind of things would they say in their petition to demonstrate substantial need?

HONORABLE TRACY E. CHRISTOPHER: Well, I had one recently where it was a claim of racial discrimination. And so they wanted to take the deposition to get the person's complete claim file, you know, the personnel file of the fired employee, and they wanted to make sure that the person who replaced the plaintiff was white and wanted to find out how much that person was getting paid.

09:54 You know, the plaintiff had been fired. The plaintiff thought they had been replaced by a white person; but there was like a change in the title of the position, so there was a question about whether the position had been eliminated or whether, because that position didn't exist anymore. And so the question was "Well, have they just like renamed it and put a white person in there?" That was the intent of it, to get those facts for the plaintiff's lawyer to then be able to sit down with the plaintiff and say, you know, "I don't think you have a case here. Look at X, Y Z things." So that was an example that I just had.

HONORABLE JAN P. PATTERSON: And how are you able to evaluate the difference between "need" and "substantial need" in that situation?

HONORABLE TRACY E. CHRISTOPHER: Well, you know, I don't have a problem with saying "need" if you don't

like "substantial need."

CHAIRMAN BABCOCK: Was that, was your example was that opposed?

HONORABLE TRACY E. CHRISTOPHER: It was, because the original request was way, way broad. And so the lawyer came in and said "Look. They don't need all this. They just need this and they just need that and, you know, we can probably agree to just that and that although we really don't think they needed that at all." But they basically agreed to a limited amount of information, and so I ordered that.

And that's often what happens on these petitions. They'll get filed and we'll never see them, because the lawyers will get together and work out something where if what they need to find out in the medical records is the names of the various people because they can't read it in the medical records, you know, they'll provide that information to them voluntarily without ever taking a deposition.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY E. CHRISTOPHER: I mean, it does have a benefit because the plaintiff's lawyer has the threat of coming to court to get the information if the defense isn't going to cooperate and provide some of this stuff to them voluntarily.

CHAIRMAN BABCOCK: Yes. But of course, if the information it favorable to the defense, if it destroys the claim, they're obviously going to give it to them before suit --

HONORABLE TRACY E. CHRISTOPHER: Right.

CHAIRMAN BABCOCK: -- whether there is a 206 petition or not.

HONORABLE TRACY E. CHRISTOPHER: Right. But see, that is a benefit to the rule. Well, like for example in my racial discrimination case, if we didn't have this Rule, the plaintiff's lawyer would have to file the lawsuit before they could get the discovery; and then they could possibly be subject to the contention that it was a frivolous claim. I mean, your client comes in with a set of facts to you, and you know, they may or may not have all the facts; and I mean, I do see some benefit to the rule as it's been playing out in my court.

CHAIRMAN BABCOCK: Yes, Judge Bland.

JUSTICE JANE BLAND: To address Justice Patterson's difference between "need" and "substantial need," I think "substantial" is helpful in the rule, because in Tracy's example, you know, if they asked for, they may have a need for in addition to the things they really needed they may have a need for six or seven other things that could be helpful, but they don't have a real need for it to

prove an element of their claim. In addition "substantial need" says to me it's a need that you can't get anywhere else, that you can't discover without the use of this tool. So I think putting "substantial" in there conveys to the trial judge that it's not wholesale discovery prior to the instigation of suit. So I would like to leave it in.

CHAIRMAN BABCOCK: Ann McNamara.

MS. MCNAMARA: I just want to agree with Tracy. I think this is one of those things that does kind of hold off litigation, because a lot of times in business people will be thinking that they have been somehow cheated or wronged or whatever. It's a way to get enough information for a lawyer to head off litigation; and so I think it does serve a good purpose, like she says.

HONORABLE TERRY JENNINGS: I think that's the point. If we're going to have this rule, we have to recognize the purpose behind the rule. And if we get to a point where we're crafting it to the point where it is not affecting it's purpose, then why have it?

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: The comment about the need may be for one aspect, but not another, does the wording need some clarification on that? Because it just says "substantial."

JUSTICE JANE BLAND: I like it the way it is.

We evaluated administrative judges' findings on substantial evidence. It's more than a scintilla.

MR. YELENOSKY: I don't mean the standard. I mean it just says "substantial need for the deposition." And is that language sufficient to say "You can do this in the deposition, but not that. You don't need to do" --

JUSTICE JANE BLAND: I think it would say "You're entitled to the personnel file of your plaintiff and you're entitled to find out who she was replaced by; but if you want these 25 other personnel files, I'm not ready to give those to you right now." And that's usually how these things come up, you know.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think where we are is there is general agreement that pre suit depositions are useful and should be retained for investigating a claim; but there is some perception that there is some type of abuses that go on in some cases. And so we've been exploring ways to cure that problem. And all we can come up with is beefed up, generalized language that can easily be circumvented.

And I think I go back to Judge Christopher's comment which I think was the understanding of the subcommittee: You know, we're going to change the rule. Are we really going to gain anything by this? And we're going to pay a price because we are going to have new

confusing language that's got to be construed. I just wonder if we're getting anywhere with this. Are we really going anywhere, or is this just a cosmetic fix?

CHAIRMAN BABCOCK: Buddy.

10:00 MR. LOW: The same safeguard to the abuse has got to be the trial judge as is your safeguard in many rules, and it's hard to improve on that. So I agree with Frank.

CHAIRMAN BABCOCK: Judge Peeples.

10:00 HONORABLE DAVID PEEPLES: Levi mentioned something a half hour ago that I think we need to talk about; and that is if the abuse is catching the defendant unprepared, why not lengthen the time frames on this? The only one I see is you can't have the hearing quicker then 15 10:01 days. That could be lengthened. And I think in the situation where there is an insurance doctor or nurse or something, it may take them longer than that to find out who is going to defend and so forth. And so we could do a lot of good I think by saying maybe 30 days. You have got to 10:01 wait that long to have your hearing.

And then I don't see anything in here -- maybe it is -- that says how quickly the deposition can take place after the judge has ordered it. Maybe say you can't do it faster than 20 days or 30, in other words, slow down this 10:01 hurry-up process and I think a lot of the abuse might go

away.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, I'm not sure why this got in the Rule to start with under the Discovery Rule.

10:01 HONORABLE LEVI BENTON: Carl, we can't hear you, sir.

MR. HAMILTON: I'm not sure why this rule got in the new Discovery Rules in place of Rule 737. Before this new rule we didn't have these problems. We hired

10:02 investigators to investigate the facts. We didn't do depositions to investigate facts. The old Rule 737 required a suit to be filed in the nature of a Bill of Discovery. I haven't researched it; but I assume if you filed suit, you have to give everybody the appropriate notice and service

10:02 and so on; and there weren't depositions taken without proper notice and without lawyers on the other side.

So I think we've created something here that wasn't maybe intended; and now it's caused more problems with the abuse. And I think we ought to somehow try to work

10:02 toward reducing it or eliminating it, maybe go back to the old Rule.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Under this discussion about "need" versus "substantial need" I'd like to ask anyone

10:02 including Judge Christopher if I am like the plaintiff in

your racial discrimination case, if I don't know whether I have a claim or not, is that a need? If it is a need, is it a "substantial need"?

HONORABLE TRACY E. CHRISTOPHER: Well, I think as Jane said, you have a substantial need to find out were you replaced by a white person. You think you were; but because of the way the titles changed you're not 100 percent positive. So I would think that that would be a substantial need. You don't need -- there is a not a substantial need to take a bunch of other depositions and do a whole bunch of other discovery.

MR. ORSINGER: But not knowing enough to know whether you have a lawsuit is a substantial need? Is that? Because if it's not, then I don't like the word "substantial need," because I think that this rule should be used by people to do something short of filing a lawsuit. If I need some information to give my client good advice, I ought to be able to get it somehow short of just suing everybody and running a risk of Rule 13 sanctions later on.

And so I'm a little bit worried about it. If we all agree that not knowing whether you have a claim or not knowing whether certain defendants are part of your claim, if that's a "substantial need," then I'm okay with that language.

CHAIRMAN BABCOCK: Bill, then Judge Patterson

and then Carlos.

PROFESSOR DORSANEO: That's get back to the need question again; and that's a very low threshold, that I know don't whether I really do have a claim that I can prove, because I don't actually know all of the truth about what happened and how I was treated. It is a very low standard for frivolous lawsuits that Chapter 10 of the Civil Practices & Remedies Code doesn't require you to know the truth of these things to file a lawsuit. You're merely supposed to assert that you expect after discovery that your claim will be validated and to put that in your petition. If we want to have a really low standard, that's fine. But you know, I wonder why we have this procedure to begin with then.

CHAIRMAN BABCOCK: Judge Patterson had her hand up first.

HONORABLE JAN P. PATTERSON: It may be that you might want to specify what the showing should be, because I, whatever we do, I don't think that the word "substantial need" gets us there. It particularly worries me if we now equate it to "substantial evidence" meaning more than a scintilla, because that, well, that's -- I mean, you raised that; and I feel that --

JUSTICE JANE BLAND: I just meant that using the word "substantial" is not unknown. I didn't mean that

the two standards are the same. I'm sorry.

HONORABLE JAN P. PATTERSON: Well, that has a judicial gloss on it; and that's thrown us now into a whole different area, because it can't possibly be equated to that. If it is, then what does the word "need" mean? And so that's, I think that that was very confusing.

CHAIRMAN BABCOCK: Carlos had his hand up next and Judge Christopher.

MR. LOPEZ: There is a difference between a sentence that says "need to take a deposition" versus "need to take the deposition in order to investigate the claim." I mean, to me I read that to mean you need to investigate the claim. "Need" means you can't get it somewhere else. In other words, you may have thought about hiring the investigator or you may have done other things; but it turns out the only way you're going to get the information is asking for a depo. That to me that's "need" as opposed to "wants." And so that's the way I read it; and I realize that's just my reading. It makes pretty good sense.

I mean, I could certainly in Dallas five years ago we had a rash of people filing sanctions claims claiming they were frivolous. And I could see an argument in that case "You mean you filed a racial discrimination case and they replaced a black woman with a black woman and you didn't bother to check that out first before filing a

lawsuit?" I could already hear that argument; and it sounds like a pretty good argument actually.

So there is an interplay there between this rule clearly and how much investigation you have to do before it's enough to avoid the sanction under Rule 10. And that's why I went back to the attorneys were using it as a safe harbor. "I tried to figure out before the case; but Judge Lopez, didn't grant the 206 deal, Rule 206."

CHAIRMAN BABCOCK: Judge Christopher and then Justice Bland.

HONORABLE TRACY E. CHRISTOPHER: I just wanted to say that there is an advantage to not requiring the suit to be filed, because let's look at my racial discrimination case. So they can't get this information, so they sue the company. They might even sue the individual who fired the plaintiff. And there's a stigma to being sued; and if you get information that causes the plaintiff's lawyer to say to the plaintiff "You don't have a case, you should not file it" through a pre suit deposition, that's an advantage. Or a doctor, if they get some information before through this pre suit deposition that causes the plaintiff and the attorney to say, you know, "We're not filing a lawsuit, I mean that's an advantage. They don't have to report they've been sued.

CHAIRMAN BABCOCK: Judge Bland.

JUSTICE JANE BLAND: On "substantial need" I didn't mean to convey or imply that it was to mean the same thing as "substantial evidence." I just was trying to articulate that "substantial" is a word that is used to indicate a matter of degree and one that people are familiar with. And I certainly wasn't meaning to say that this had any other context other than the fact that the word "substantial" conveys a degree and that it's not unknown, the word is not unknown in the judicial context.

With respect to Judge Peeples' comment about changing the timing, the timing is usually not the problem in these cases, because the lawyers can work out when the deposition shall take place and make sure that there is adequate time to prepare. But the problem is the fact that the defendant goes first or testifies first before the filing of the petition or the claims, so the defendant who is going or the putative defendant I should say is being required to testify under oath about facts before they have had an opportunity to review a petition or something else that would indicate the claims against the defendant.

And I don't think it's that the defendants feel rushed to comply with the judge's order or that they don't have any adequate time to prepare their witness. It's more a question of they're not sure how to prepare their witness because they're not sure exactly what facts the plaintiff is

interested in asking about and what claims the plaintiff may potentially be after once suit is filed.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I agree with what Judge Christopher said a while ago. And but it seems to me if you believe that, then what we should do is take the word "need" out and just have the rule say "If a petitioner wants to investigate a potential claim, let them do that." Because there is the stigma.

10:11 And this language about the need outweighing the burden or expense, Chip, your clients are concerned about being sued; and maybe what comes out of this deposition is no lawsuit. To protect the defendant I understand your observation about -- I don't wholly agree, Jane. I think 10:11 the timing does help. We should push back the time and then expressly limit it to one deposition.

CHAIRMAN BABCOCK: Stephen and then Allistair had his hand up.

MR. YELENOSKY: I think if the policy is to 10:11 avoid suits that otherwise wouldn't be filed, it's not necessary to focus on the adjective in the current word "need." It's not the degree of need. It's the need for what. And either you need it to figure out whether to file the suit or you don't. That's what you need to specify, the need for what; and that avoids "Well, I need it so that I 10:12

can figure out what the damages are." Well, you wouldn't grant that because you don't need to know that in order to figure out whether or not you have a potential suit.

I also disagree with Judge Benton, because I may want to investigate the racial discrimination case; and on your rule I would automatically get a deposition when the proper response from the judge may be "Well, what did the the EEOC files show?" You don't need a deposition.

So if the question is need or not, there is no other way you can figure out to file the suit and the policy objective is to avoid suit, then you specify "need that in order to figure out whether to file a suit" in whatever words you want.

CHAIRMAN BABCOCK: Allistair, you were next.

MR. DAWSON: I guess my observation first is that there is a lot of benefit apparently that comes from this Rule; and I haven't heard anyone articulate that in reality people are abusing this. I heard that there is a perception that people are abusing it; and I wonder whether the perception is realty, because no one at this table that I've heard says "Yes, I have experienced these situations where it has been abused." And so given that, one, I start with what Judge Christopher said at the outset: Why don't we just leave it the way it is? Number two, if you are going to change it, then it would seem to me you do not want

to create a disincentive to use this rule. To the contrary, I think you want to encourage people to use this rule and not strengthen it in a way people are not going to use it and then just file a lawsuit.

10:13 That's what is going to happen. If you don't go through this process, the lawyers are just going to file the suit and you're going to have more and more frivolous suits filed. Hopefully people, you know, file these petitions and investigate their claims and convince their clients either 10:14 not to sue certain defendants or not bring the lawsuit at all.

And finally, on the "substantial need" issue my concern is that some trial judges are not going to allow the use of this procedure because they're going to hold the 10:14 petitioner to a standard higher than I think they should be held to. So I wonder whether if you're going to change the rule, you might have language that just says that the petitioner has shown a need to take a requested deposition prior to the filing of the lawsuit and that that need 10:14 outweighs the burden and expense. And then that way the petitioner has to come in and say "Here's why I need to take this deposition before I file this lawsuit." I would advocate if you're going to change the rule, that change in language.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I think one way to effectuate this the more I think about it the more I agree that investigate, "I need it because I need to investigate a potential claim," that's pretty darn broad. I mean, you know, maybe we need to make that you need it because you need it to investigate whether a claim had merit or not. That's really when we say "investigate a claim" we mean find out whether it's frivolous or not. Maybe we need to say that.

MR. LOW: Merit against whom? If 10 people -- I'm sorry. There is a road contractor out there. You know, the state highway is out there and you have an accident. You don't know the contract; and I guarantee you none of those people are going to talk to you. We don't have a relations back doctrine like that do in federal court where you can sue Contractor 1, 2 and 3, John Doe 4, 5, 6 and it relates back like they do in federal court. The statute of limitations is about to run, so you better get out there. They're not going to talk to you. And so that's a need to investigate just to see against whom or who or maybe nobody, because you can't sue the state.

MR. LOPEZ: I guess I'm just having real trouble, because I can't think of a judge that would deny that under that circumstance.

MR. LOW: Well, I can't think and I hope

wouldn't any do it. But they've got to have the right procedural tool before they'll do it.

CHAIRMAN BABCOCK: Judge Jennings.

HONORABLE TERRY JENNINGS: Along those lines and what Allistair was saying, it seems to me the emphasis needs to go from "need" to "what do you need," "the information you need." So what I was going to suggest is take out the word "substantial" before "need" and add the words in before "to" and "investigate" "need to take the requested deposition to obtain information necessary to investigate." I don't know if that would help tighten it up.

CHAIRMAN BABCOCK: I'm sorry, Judge. What are you saying?

HONORABLE TERRY JENNINGS: Take out the word "substantial" before need and then add in the word "obtain information necessary to" before the word "investigate." So it would read "Has shown a need to take the requested deposition to obtain information necessary to investigate a potential claim."

MR. YELENOSKY: That's a good articulation of what I was trying to say, a better articulation.

CHAIRMAN BABCOCK: So that was seconded. Carl.

MR. HAMILTON: I would suggest that we add

"information not otherwise reasonably available" or something like that, because I think there needs to be a showing that you can't get the information in ordinary methods of investigation.

10:17 HONORABLE TERRY JENNINGS: "Otherwise unobtainable."

MR. HAMILTON: Something like that.

HONORABLE TERRY JENNINGS: "Necessary and otherwise unobtainable."

10:17 MR. LOW: But some of the information you can get might be available; but some of the key might not. So can you not depose him on things that are available otherwise?

CHAIRMAN BABCOCK: Nina Cortell.

10:17 MS. CORTELL: A few comments. First I basically agree with what Allistair said. I do think that we need to remember that at a prior meeting though that Ralph Duggins did give a long story to explain where there was an abuse under the rule and even though we haven't had 10:18 someone give a similar story today, that our record will reflect that.

It seems to me, picking up on what has been said, that the basic thing is we always need the applicant to show is a need to take discovery prior to the filing of suit, 10:18 that there is some reason why that has to happen outside of

the normal context of filing a suit. I don't think it needs to be any more specific than that. I don't know that I would use all the additional verbiage we've been talking about. And I like that better than talking about a weighing between "need" and "burden," because I'm not sure what that even means, "burden or expense."

What we're saying is the applicant coming forward has established a reason why we should have a somewhat extraordinary circumstance where a pre suit discovery is taken. And I don't want the word "extraordinary" in the rule; but that's the basic idea. Why should we trigger discovery pre suit?

CHAIRMAN BABCOCK: Justice Gray.

JUSTICE TOM GRAY: I'm going to just make a pitch. I like it the way it's worded. And part of the reason is everybody has kicked around the word "substantial." We're talking about the ability to compel this particular deposition under oath. Anything that the parties can do by agreement is going to be done anyway. And what you're talking about is giving the parties the tool to go to a trial judge and say "Here is what I want to do."

From what the trial judges, what I've heard them say today is that where we get this is when somebody is wanting to take more than what is reasonable, and they're trying to cut it back to something and they usually work it

out. And in a few situations they don't; and more than likely when it comes to me I do less than what is being initially asked for. That's kind of what I heard you-all kick around what happens.

And so it seems to me that that word being in there gives that trial judge the ability to do the "Oh, come on. You don't really need that at this stage of trial to determine whether or not you have a lawsuit." So, you know, it just seems to me this is the rule that is going to kick into gear when they can't do it by agreement and somebody is asking for more than they need and it's well worded to accomplish that objective.

CHAIRMAN BABCOCK: Is that a show stopper? No more comments after that speech? Harvey.

MR. BROWN: I just want to say I have seen abuse, not often; but I did see it abused when I was a trial judge. And the real abuse was the lack of notice, not in time, but what are they going to get into and how do I prepare my witness?

One case in particular was med mal'; and of course they were arguing "We don't have a 4590(i) letter. We don't know what part of the medical procedures you're going to get into; and essentially we have to cover the whole gamut guessing what they're going to do," which sounds similar to your experience when you had a liable case and they wanted

depositions.

So I think the most important provision in here in some ways is the provision that tells the Court what the substance of the sought after testimony is. If I was going to beef anything up, I might beef that up; but I think that's the biggest complaint that defendants have is they don't want to go in blind.

CHAIRMAN BABCOCK: Yes. And I recounted two or three meetings ago what I thought was an abusive situation, and there were like six or seven depositions taken. The plaintiff didn't need any more discovery after this was done. I mean, we were ready to go to trial as far as he was concerned.

MR. LOPEZ: Could we not write something like that? It's going to be awful cumbersome I think at the initial hearing; but that's kind of how the judges ended up most of the time in the hearings getting into that anyway, asking the plaintiff's lawyer "What exactly are you really, what are you getting at here? What are going to be the issues here?"

I remember one hearing actually I made them say "Tell me what the subject of the deposition is going to be." And the defendant said "Judge, if you'll limit it to that, we're okay." And I said "Okay. We will limit it to that." And so I wasn't there to referee the deposition when it

happened; but it gets a little cumbersome; but you could put something like that in the rule if that is really what we're concerned about.

CHAIRMAN BABCOCK: Buddy.

10:22 MR. LOW: But it's discovery. How are you going to be able to tell what you want to develop? It's discovery. One thing leads to another and something else. So how are you going to tell? I mean, I can't even a lot of times tell my witnesses after I've been in a lawsuit a 10:22 couple of years what the plaintiff's lawyer is shooting at. So, you know, I don't know that you can do that.

(Laughter.)

PROFESSOR DORSANEO: Whether somebody intends to abuse this or not, I think it's inherently abusive to 10:23 eliminate all of the procedural protections that normally are involved in the litigation process and to just do this to see what happens, to see what comes up. As a proceduralist I just don't like this whole idea. It just seems upside down to me. And at least say you can't do it 10:23 unless you have a need to do it before suit is filed. At least say that rather than some need to do it because I need to find out whether I have some sort of a potential claim that I have been possibly just imagining.

CHAIRMAN BABCOCK: Yes. Well, yes. I mean, 10:23 you know, the way it's written you could go in and say, you

know, "I think I've got a defamation claim against this defendant. There's a publication that on its face is defamatory. I say it's false; but the actual malice is going to be an issue and I need to find out about that. So give me five depositions to see whether I'm going to be able to prove actual malice because it's very hard to prove." Carlos.

MR. CARLOS: The original comment too to Rule 202 we always used to argue about whether that meant -- I wasn't at the last meeting; but I heard someone talk about it -- which is you can restrict the use of that depo later on in a way that tries to establish fairness. The issue becomes if the guy said "yes" under oath originally and now he's saying "no," even if you say that deposition never happened, you can impeach them now with sworn testimony.

But I think the other side of that coin people would say "Truth is truth. Truth doesn't change based upon how good your lawyer is. If you gave a sworn answer, you gave a sworn answer." And we had that come up as well. But I don't know. That's a philosophical argument there.

CHAIRMAN BABCOCK: Yes. Kent.

HONORABLE KENT SULLIVAN: I just wanted to say I had one Rule 202 proceeding in which the respondent did file special exceptions on the issue of lack of specificity. So there is some improvisation going on out

there.

CHAIRMAN BABCOCK: We filed one in my case. We filed a special exception and it was denied.

MR. GILSTRAP: I think we need to distinguish a couple of the examples that have been brought out so far. Chip has talked about this requirement apparently in common law that the plaintiff in a defamation case has to particularize his allegations in his pleadings. And Harvey talked about the situation of a medical malpractice case whereby statute the plaintiff has to particularize his allegations in some letter or report prior to filing suit.

Those cases are different from Buddy's case. In your negligence case you go and you say the defendant is negligent. That's all you have to say and you get discovery. So I don't think that in your ordinary case we have this problem. We have this problem of the defendant going in there blind, not knowing what the allegations are in these particular two kinds of cases, but not in ordinary cases because often the defendant doesn't know what the allegations are when he gives his deposition in a regular case.

CHAIRMAN BABCOCK: Justice Bland.

JUSTICE JANE BLAND: Well, these Rule 202 depositions don't come up in regular cases. If all the plaintiff has to do is allege general negligence, there

usually isn't a Rule 202 request. When they come up is when there is a need to get some particular facts for, in order to plead the lawsuit.

MR. LOW: If you don't know who is negligent and you've got a whole bunch of people out there.

JUSTICE JANE BLAND: That's true. And I'm not saying that, you know, there shouldn't be. I'm just saying in reality with notice pleading if you can make a general allegation of negligence based on the facts that are in front of you, then usually they're not going and getting a bunch of Rule 202 or making a bunch of Rule 202 requests. It's when they're trying to find out information about either another defendant or they need some particular allegations in order to satisfy the elements of the claim.

CHAIRMAN BABCOCK: Okay. I think we've got two issues here: First whether under 206.4(a) we ought to fiddle with the "must" and turn it into a "may." And secondly, whether the subparagraph which is currently 206.4(a)(2) should keep the word "substantial" or whether we should modify it in some way.

And I'd like to see if we can get the sense of the committee on these two issues unless somebody else has got something more to say about it. How many people think that we ought to leave the "must" language as it is? Raise your hand. How many people think it should be changed to "may"?

Thirteen to nine with the chair not voting leave it as "must." Now how many people think that we should leave Judge Christopher's "substantial need" language in the rule? Raise your hand.

10:28 MR. HAMILTON: As opposed to what?

CHAIRMAN BABCOCK: As opposed to taking "substantial" out. All right. As written? How many people are as written? How many people think we should take the word "substantial" out? "Substantial" stays in by a vote of 13 to 11, the chair not voting. Do you want to take our morning break and then we'll go try to finish the rest of the rule?

(At this time there was a recess and the hearing continued as follows.)

10:50 CHAIRMAN BABCOCK: All right. Shall we get going? All right. Where I think we are is 206.4 we've gotten through the language in subpart (a) that deals with "may" versus "must." I think there was a consensus to delete subparagraph (1) with the concurrence of the chair of the subcommittee; and we've gotten through subpart (2) on "substantial" versus "not substantial."

On the break Carl wanted to take another stab at getting the language before suit is filed put in here. And 10:50 of course, I'm willing to discuss anything for however long

we need to discuss it. My sense is that has been rejected before; but maybe not. So Carl, make the case for putting "before a suit is filed" in 206.4(a)(2).

MR. HAMILTON: Well, I think before we talk about whether one would have to make a showing that the suit could not be filed before discovery was obtained. This is slightly the same thing. I think it's slightly different to say that you have to show a substantial need before suit is filed. Maybe we're saying the same thing; but there's been a lot of people that have commented about that language, so...

CHAIRMAN BABCOCK: Yes. It seems to me it's implicit in this rule that you're having to show "substantial need," because it is coming before a suit is filed. That's the whole preface of the rule. So unless we want to make a wholesale shift substantively, which Judge Christopher says and I think properly so, would require a different philosophy with respect to all of the parts of this rule, then I think we're probably okay where we are. Although Carl, as you know, I'm more on your side on this one than what the majority was. Does anybody else have any other comments on that? If not, why don't we go to the contents part; and I think the language involved had been added by the subcommittee.

HONORABLE TRACY E. CHRISTOPHER: Right.

CHAIRMAN BABCOCK: The judge may limit the scope of discovery in the deposition.

HONORABLE TRACY E. CHRISTOPHER: And I had to scratch out the provision in 206.5 that the scope is as if, just as if the lawsuit had been filed to make those consistent.

CHAIRMAN BABCOCK: Okay. What comments do you have here? Carlos, did you have comments on the contents?

HONORABLE CARLOS LOPEZ: Yes. I just was going to throw out as a suggestion that if part of the -- there does seem to be a consensus about a danger to the defendant, the deponent I guess, of sort of not knowing what it is they're supposed to be preparing for. And without suggesting whether it's good or bad, there does seem to be an obvious place to put that. This last sentence of (b) where it says "The order must contain the protection the Court finds necessary to protect the witness," we could I suppose specifically reference one of those protections which would be to define the subject matter of the deposition in some way; and by "define" obviously I mean restrict, but that would be an obvious place to do it.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: This rule I think came out before we had the ability to require third parties to

produce records by subpoena. And I'm assuming it's inherent that you could do a subpoena duces tecum with the Rule 206 deposition; but we really don't really comment on the production of documents relative to it. And in the contents area we don't specifically say that the Court can narrow or specify documents to be produced. Does that go without saying? Am I right that they can duces tecum and that inferentially the Court can limit the production of documents?

CHAIRMAN BABCOCK: 206.5 says that "Depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit." So wouldn't that cover it?

MR. ORSINGER: I guess if limiting the scope of discovery in the deposition means also the documents produced incident to the deposition, then the answer to that is "yes." I guess this rule has always been written from the standpoint of what questions will people answer and it doesn't even specifically say you can require the production of documents; but I think we're assuming you can. And if we're all okay leaving it inferential that the Court can narrow the scope of production of documents, that's fine. This rule doesn't mention documents; but I know it will be used to require the production of them.

CHAIRMAN BABCOCK: It has been in the past.

MR. LOPEZ: Most of the 202 requests I got, I'm not sure about the ones in Houston, were accompanied by a subpoena duces tecum and there was fairly regular wording like "Bring documents that deal with X, Y, Z."

10:55 CHAIRMAN BABCOCK: Yes. Bill.

PROFESSOR DORSANEO: Why was it? I missed why the second sentence of 206.5 was eliminated.

HONORABLE TRACY E. CHRISTOPHER: Well, it seemed to me that that was contradictory. I mean, normally

10:56 we have pretty broad discovery in depositions. And so if the scope is just as if the lawsuit had been filed, but on the other hand we're limiting the scope of the discovery, I mean, if we were going to make a rule that the only thing you could ask in a deposition is, you know, who, what, when,

10:56 where and no opinion questions, that would be contrary to the normal type of deposition that we have. So I thought they were contradictory, so that's why I scratched out that sentence.

PROFESSOR DORSANEO: You thought what was

10:56 contradictory? The last part of 206.4(b), "the judge may limit"?

HONORABLE TRACY E. CHRISTOPHER: Right.

PROFESSOR DORSANEO: It doesn't say the judge "must find." It says the judge "may limit." Suppose the

10:57 judge doesn't? Just the notice and scope of discovery is

unlimited?

HONORABLE TRACY E. CHRISTOPHER: Yes. I mean, if you don't put a limit on a deposition, then people get to ask whatever questions they want in a deposition subject to the normal objections in a deposition versus a judge being able to say ahead of time "I'm limiting this deposition to this area only." And it struck me as contradictory to have on the one hand the ability to limit the scope of discovery and on the other hand in 206.5 to say the scope of discovery is just your regular deposition, because normally we don't limit depositions like that in a lawsuit ahead of time.

CHAIRMAN BABCOCK: Yes, Justice Gray.

JUSTICE TOM GRAY: Judge, wasn't this sort of the language as I recall that, or addressed the concern that I had articulated earlier from the prior meeting that I erroneously attributed to Sarah?

(Laughter.)

JUSTICE TOM GRAY: But that we do want to at least give the trial judge the ability to prevent a person in be it a liable case or med mal' case from getting into those areas protected from discovery by some other rule or provision. In particular as I recall, the conversation in med mal' was we didn't want getting deep into the opinion aspect of the doctor's opinions --

HONORABLE TRACY E. CHRISTOPHER: Right.

JUSTICE TOM GRAY: -- if what the pretrial deposition should be about was who was in the operating room.

10:58 HONORABLE TRACY E. CHRISTOPHER: Right.

JUSTICE TOM GRAY: And so that gives, this as worded would give the judge ordering this deposition the ability to limit that without running into a conflict with themselves in the rule.

10:58 HONORABLE TRACY E. CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But back to Bill's point, you could leave the sentence in "except as limited by the judge under" such and such. That wouldn't be inconsistent, would it?

10:59 HONORABLE TRACY E. CHRISTOPHER: No. But I guess I didn't see the necessity for that.

MR. LOW: And he may not limit. So then if if he doesn't limit very much, you're at least governed by the same rule that applies if suit had been filed.

10:59 HONORABLE TRACY E. CHRISTOPHER: Okay. I see what you mean.

CHAIRMAN BABCOCK: Justice Duncan who is here has something to say about that.

JUSTICE SARAH B. DUNCAN: As I understand

10:59 what Bill was saying, and I'm sure he will correct me; but,

yes, (b) says the judge can limit the scope of discovery. Once you take out the second sentence in 206.5 there is no limit on discovery in one of these depositions. So unless the judge limits it.

10:59 HONORABLE TRACY E. CHRISTOPHER: Okay. I understand.

JUSTICE SARAH B. DUNCAN: So I think what needs to happen for clarity sake is there needs to be a separate subsection that says "Scope of Discovery: The

11:00 scope of discovery is the same as in an ordinary deposition unless limited by the trial Court."

HONORABLE TRACY E. CHRISTOPHER: Or we could just leave that sentence in there in 206.5 and add the words "Unless limited by the judge, the scope of discovery is"

11:00 blah, blah, blah.

CHAIRMAN BABCOCK: Okay. Carlos.

MR. LOPEZ: Is there a way or is there a reason to limit the scope of that deposition or whatever the depositions are or somehow reference subsection (2)? In

11:00 other words, the only reason the deposition was going forward pre suit presumably there was a reason for that. There was a need, as we talked about. Shouldn't the scope of discovery be limited to the extent that that need is there? Once Buddy in an hour of deposition has figured out

11:00 what he needs to know to file lawsuit, shouldn't that be the

end of it and let him go file the lawsuit and then everybody gets notice and is served and have depositions? Shouldn't we be limiting the scope of this in the first place to the need for it in the first place?

11:01 CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I agree, counselor. But if you put this sentence back into it, in essence you're taking a deposition for the trial and you've opened every subject matter that is going to be used in the trial if there is 11:01 going to be a trial and there's no restriction on it. It's counterintuitive to say you may take this deposition only if you have a need to discover whether you have a claim; but having persuaded the judge of that you may do the whole thing as if you were in court. I think the sentence should 11:01 be left out.

HONORABLE TRACY E. CHRISTOPHER: The sentence in 206.5?

MR. MUNZINGER: Yes, ma'am.

HONORABLE TRACY E. CHRISTOPHER: Okay.

11:01 CHAIRMAN BABCOCK: Yes, Bill.

PROFESSOR DORSANEO: Well, really I think the judge needs to define the scope of discovery. Otherwise we get people saying, meaning the same thing and saying something opposite should be done. You and I agree with 11:02 each other about this ought to be limited; but I think

leaving the sentence in limits it more than leaving it out. If the judge doesn't define the scope and if we don't really have the issues defined otherwise, I don't know how there is any way to keep control of this process. I start asking somebody questions about something and I say "Well, now I have a few other questions on some other subjects that I'd like to ask you about that don't have anything to do with anything in this paperwork; but since there are no limits on this discovery why don't we start talking about this."

CHAIRMAN BABCOCK: "While you're here."

(Laughter.)

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I think, I agree with Bill; and I think that at the end of (b) we should require the judge to limit the scope of discovery to fit the need that was shown. We ought to make them do that in connection with their orders. They should also set a scope consistent with that showing. And then you don't need to worry about this sentence here. You ought to take it out. It would be counterproductive.

MR. GILSTRAP: What if they don't? What if they just give you an extremely -- what if they don't do it?

MR. ORSINGER: Well, if the trial judge, even if the rule tells them they have to, refuses to do it, then you are just going to have to make your objection and

instruct your client not to answer, run the risk of being sanctioned and then go to the court of appeals. What is your other choice?

CHAIRMAN BABCOCK: Okay.

11:03 MR. GILSTRAP: Answer the question.

MR. ORSINGER: If the trial judge isn't going to play ball with this, this isn't going to work right. What I'm saying is make the trial judge set a limit consistent with the showing of the need. I mean, isn't

11:03 that -- what is the argument against that?

MR. LOPEZ: That's what I was saying to do. I don't have the language right now to do that; but we need to reference the scope of the subject matter of the discovery to the need that was used to justify the taking of

11:03 the deposition in the first place, which is whatever it is, 206.4(2). The problem is that we haven't -- I'm not sure how specific we're making them get in showing that need in the first place. It's sort of a Catch-22. In order to limit the depo to the needs they've identified you're going

11:04 to have to force them to identify their needs very specifically. And that works fine in some cases and it's a little tougher in, for example, one of Buddy's cases with subcontractors and all other. But that needs to be very simple: "I need to know who did what."

11:04 MR. LOW: But if in a truck accident and

you're really talking about that and then you're questioning the driving record of the driver or something, then you know, you just say, "Well, the action is out there." Well, that's relevant to that because it's relevant. So it's got to be one of those things or something that's relevant thereto, because your record might be relevant to whether he was qualified or something like that and tie back. So it's pretty difficult to really know and be just specific what it is you want.

CHAIRMAN BABCOCK: Could you add something to the first sentence here so the sentence would read "The order must state whether a deposition will be taken on oral examination or written questions and must limit the scope of the deposition to the needs shown in 206.4(a)"?

MR. ORSINGER: Great.

MR. LOW: "Matters relevant"?

MR. LOPEZ: Taking Buddy's somewhat expanded version of it, does that make sense? "Relevant" has a definition that we all know.

PROFESSOR DORSANEO: It has several definitions is the problem.

MR. ORSINGER: A definition we know, but a meaning we don't know.

PROFESSOR DORSANEO: Do you mean discovery relevance or 401 relevance? I think probably the latter.

MR. LOPEZ: I think the latter.

CHAIRMAN BABCOCK: What does everybody think about that, limit the scope of the deposition to the --

HONORABLE CARLOS LOPEZ: We could use the everyday language which is "related to."

MR. LOW: Right.

MR. LOPEZ: Which is a little better maybe, because that is probably not opening up too broad a list. You could argue "Well, how related"? Lawyers can play games all day.

MR. LOW: It is discovery too.

HONORABLE CARLOS LOPEZ: I agree. You have to have some latitude. You don't want to come back to court.

MR. MUNZINGER: It shouldn't be discovery. It is being taken to investigate the potential of a claim, not to gather evidence when the lawsuit has been filed, if you're honest with the rule.

MR. LOW: Anything to obtain testimony, we call it "discovery." Depositions are "discovery." I'm using the term in the same way it's used in the rules.

MR. MUNZINGER: But the point of this particular proceeding is to investigate facts and determine whether you do or don't have a claim; and to allow the deposition then to be expanded beyond that for use in

discovery it seems to me perverts the rule and runs the risk of prejudicing persons who are not present. That's the great concern you have. You have to give notice under this rule to those persons whom you expect have "an adverse interest" but not all persons who have "an interest." And those persons who have "an interest" may very well be prejudiced in some way in a trial of the case by not having been present to ask questions or do otherwise because a judge tells a jury "Well, you can't use that against Mr. Munzinger's client." We all know that that's silly. It's meaningless. It's meaningless. We all know that. I mean, we've got people whose rights are being affected by some of these proceedings. It ought to be limited the way it says.

MR. LOW: Limited as to discovery? That's what we're talking about. Not limited -- I mean, I've not heard any discussion of limited as against whom is admissible. That's what you're talking about. We're talking about limited, that. So you've mixed an apple and an orange; and I've not heard --

MR. MUNZINGER: No. What I'm talking about is what is the scope of the questions that the person may ask at this particular proceeding?

MR. LOW: Right.

MR. MUNZINGER: And I'm in favor of language

which limits the use of this proceeding to the purpose stated on the face of the rule: To obtain information necessary to determine whether a claim is to be filed as distinct from going beyond that and asking questions that would be used as if the case were pending in court and it was discovered.

MR. LOW: You're talking about --

CHAIRMAN BABCOCK: What if we say "must limit the scope of the deposition to information related to the needs shown in 206.4(a)"?

MR. LOW: I'm for that.

JUSTICE TOM GRAY: Where are you talking about adding that, Chip?

CHAIRMAN BABCOCK: At the end of the first sentence. So the sentence would read "The order must state whether the deposition will be taken on oral examination or written questions and must limit the scope of the deposition to information relevant to the need shown in 206.4(a)." Richard, does that get is done?

MR. MUNZINGER: I'm in favor of that. Sure.

CHAIRMAN BABCOCK: Does that give you enough latitude, Buddy?

MR. LOW: Yes. I agree.

CHAIRMAN BABCOCK: Judge Benton?

HONORABLE LEVI BENTON: I agree with that.

And to address Richard's concern, what about language like this, if in the event the trial court judge, to use Richard's words, doesn't play ball: "A failure of the judge to so order" -- any testimony taken outside of the provisions of 204(a) can't be used at the time of trial even if the judge fails to set out the limits in the order.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I think you used the word "limit." Right?

CHAIRMAN BABCOCK: "Must limit."

PROFESSOR DORSANEO: I would prefer "must specify" or "must define."

CHAIRMAN BABCOCK: Okay. How would you say it then, Bill?

PROFESSOR DORSANEO: I don't have in mind exactly what you said; but my concept is that I don't want the Order to just say "You are limited to do what you need. Go for it." I want the Order to say that you can inquire about whether the person who was terminated was replaced by a person of the same race or a different race. I would want it to say what the information is that you can ask about rather than just saying "Get out there and be relevant."

CHAIRMAN BABCOCK: If you say it this way, "must limit the scope of the deposition to the information related to the needs shown in 206,4(a)," you would have a

petition with a showing of substantial need; and then the order would, whatever he felt was proper, whatever the judge, he or she thought was proper, then the rule would order, would require the judge to limit the scope of the deposition to what the judge felt was proper.

PROFESSOR DORSANEO: You're thinking along the same lines I am, I think.

CHAIRMAN BABCOCK: I think so.

PROFESSOR DORSANEO: Would you want the judge to be able to do that by putting the Order words like this? "You are limited to the information" and then you follow your language? Or would you want the Order to say "You are limited to the following information"?

CHAIRMAN BABCOCK: I think we're saying the same thing. Buddy.

MR. LOW: The only thing, I mean, you don't want to get so limited saying "You're limited to the following questions. Only ask this and that." Otherwise you just do written questions.

CHAIRMAN BABCOCK: Go ahead, Carlos.

MR. LOPEZ: It could be a compromise. You don't want to be so specific that it turns into deposition on written questions; but at the same time you could say "information related to these questions." That way you don't have to come back to the judge every 10 seconds and

say "Judge, here's what you told us to ask; but we really want to ask," a tiny variance.

CHAIRMAN BABCOCK: "I didn't get the answer I wanted, so I want to ask it another way."

11:12 MR. LOPEZ: I think Professor Dorsaneo is right. We ought to identify the subject matter areas somewhat broadly with the understanding that it's going to be areas related to those topics.

MR. LOW: But in a negligence case it is so 11:12 difficult to just outline it.

MR. LOPEZ: Buddy, that negligence language that is so broad is clearly going to encompass broader areas of inquiry, areas related to whether it was this guy's negligence or this guy's negligence. That's pretty broad, 11:12 you have to admit.

JUSTICE SARAH B. DUNCAN: It seems to me what we need is a finding of what the substantial need is. Once the Court makes a finding then this language is okay. But the problem is this language is -- I think it encourages 11:13 orders that just say you're limited to the substantial need that you've shown that has not be defined or restricted or confined.

And on the "must," we really don't need any more mandamus actions. Why don't we just make the order void if 11:13 it fails to do what it's got to do under (b)?

MR. BROWN: What happens if it's void?

JUSTICE SARAH B. DUNCAN: If it's void.

HONORABLE LEVI BENTON: I agree with what Sarah just said. We don't want to cause there to be more mandamuses, which is why I suggested even if the trial Court doesn't play ball, as Richard suggested, you could just say flat out in the rule you can't use it at the time of trial.

JUSTICE SARAH B. DUNCAN: I think make it void for all purposes.

MR. ORSINGER: But then the subpoena was wrongfully issued and then you have a lawsuit over that, I mean, if it's void.

JUSTICE SARAH B. DUNCAN: Yes. I think if the Order doesn't state whatever it has to state in here so that it's void, --

HONORABLE LEVI BENTON: Well, no. You want to go ahead and let --

HONORABLE SARAH B. DUNCAN: -- then I as the receiving party to a notice of deposition or subpoena or whatever, I can easily say Look, it's void. I don't have to produce my person, produce any documents. I don't have to do anything."

MR. ORSINGER: So then we'd get a writ of habeas corpus and the witness goes to jail instead of a mandamus. Right?

JUSTICE SARAH B. DUNCAN: Not --

MR. ORSINGER: Because the trial judges are going to say that "You can just disregard my orders because you don't like what I say."

11:14 HONORABLE SARAH B. DUNCAN: No. That's not what we're saying. We're saying its void.

MR. ORSINGER: I know that. So the witness comes in --

JUSTICE SARAH B. DUNCAN: Are you saying that 11:14 there are trial judges who don't understand what "void" means?

MR. ORSINGER: No. What I'm saying is that some lawyer could say "There is no parameter on this Order, so it's void, so you don't have to appear." So you don't 11:14 appear. So you dishonor the subpoena. So there is a motion for contempt or a bench, a capias or something like that; and now you're in front of a trial judge on a contempt for failing to obey an Order or subpoena and the defense is it's void.

11:15 JUSTICE TOM GRAY: And you might point out, the trial judge that you're in front of is the same judge that wrote the Order in the first place that ordered your client to appear.

MR. MUNZINGER: You're still going to end up 11:15 with an appeal to determine whether it's void or not.

MR. ORSINGER: I'd rather have a mandamus than have a habeas corpus.

HONORABLE SARAH B. DUNCAN: Me too.

(Laughter.)

11:15 CHAIRMAN BABCOCK: Here, here. Judge Bland.

JUSTICE JANE BLAND: There is lots of case law that says a mandamus will lie from based on a contention that an Order is void, so that would right away give you a shot at a mandamus. So if the idea is to reduce mandamuses, 11:15 putting a sentence in this rule that the Order is void with will not achieve that purpose, because it will be the basis for lots of mandamuses.

And as far as Judge Benton's idea, as a trial judge I never wanted to be put in a position of having to 11:16 review a deposition that might be an inch and a half thick taken before suit is filed and compare it with, you know, what was in my Order and then determine whether or not what has been then testified to later somehow is barred because it exceeded the bounds of the Order. And I think this 11:16 committee voted earlier not to try to incorporate into this rule any new or different sanction for a violation of the rule than what already exists within the discovery rules themselves.

And I think let's just abide by our earlier 11:16 decision and stay away from characterizing misconduct under

this rule and let the trial judge rely upon and the litigants rely upon sanctions rules that already exist for failure to comply with the rule and appellate remedies that already exist, if there are any, for a trial judge's failure to enforce the rule.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH B. DUNCAN: The void Order mandamus is the easiest mandamus you can get. I don't mind those. What I don't want is "must mandamus." Those are hard contentions. And what we're trying to do here as I understand it is what we can to coerce the parties and the trial judge to make the required statement or finding in the Order. And I'm just saying I think the easiest way to do that is to make the Order void if it's not in there.

And Richard's scenario, while chilling, I think is unlikely. I think what is more likely is the trial judge and the party who wants the deposition is going to put what is required in the Order.

CHAIRMAN BABCOCK: Judge Bland and then Elaine.

JUSTICE JANE BLAND: A trial judge has jurisdiction to issue an Order under Rule 202, and we can't by rule say that their action is void, I mean, absent statute. And, I mean, it just seems like if we start saying that "the trial judge's failure," because obviously in this

case the trial judge does not believe the order that he or she signed is void because presumably the trial judge wouldn't sign an order that he or she thought was void. And if we start, you know, incorporating that an order becomes void every time the trial judge's view or interpretation of the rule is different from what a litigant's interpretation is, I mean, I just don't think that's a good idea. And I don't think encouraging easy mandamuses is a good idea. I think that mandamuses ought to be hard. They ought to be hard to get. They ought to, you know, be the harm ought to be self evident and serious and it shouldn't be a situation where there has been a technical, and I understand that others might not say this is technical, but a defect in the wording of the Order. And I think this is just putting this rule on a higher plain than we've put any of the other rules of discovery that the trial judge must follow. And we can't anticipate every situation that the trail judge may encounter with the interpretation of this rule. And so to put that kind of an onerous language in the rule just I think is unhelpful.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: I favor requiring the trial judge to delineate in the order the scope of the deposition. And it seems to me what we're describing is at least conceptually similar to what we already have in 683

for temporary injunction. That rule is not terribly wordy. It requires that "The temporary injunction be specific in terms and describe in reasonable detail" blah, blah, blah. So I don't think that it would require a great deal of work to get that incorporated into the proposal. And of course temporary injunctions that don't meet that requirement are void under the case law; but I understand injunctions have different Constitutional concerns than this procedure might have.

11:20 CHAIRMAN BABCOCK: So Elaine, you would say put the language of Rule 683 into this rule, or are you saying --

PROFESSOR CARLSON: Something akin to it.

CHAIRMAN BABCOCK: Something like it. The 11:20 language that I suggested, do you think does it or doesn't do it or kind of does it?

PROFESSOR CARLSON: Kind of.

CHAIRMAN BABCOCK: Kind of does it.

PROFESSOR CARLSON: It's a B plus.

11:20 CHAIRMAN BABCOCK: Which is high praise. She doesn't give out As. So how would you suggest the language be? See, that's a great thing. You never get to say "Professor, how would you do it?"

(Laughter.)

11:21 PROFESSOR CARLSON: I would use something

like "shall be specific in terms, describe in reasonable detail the scope of the deposition" tying it back to the need demonstrated in subsection (4)(a).

CHAIRMAN BABCOCK: 206.4(a). Judge Christopher, what do you think about that?

HONORABLE TRACY E. CHRISTOPHER: Well, I like the --

CHAIRMAN BABCOCK: That's not a look of disgust on your face, is it?

HONORABLE TRACY E. CHRISTOPHER: I like what the subcommittee drafted; but my second favorite proposal is what you suggested, and my absolutely least favorite proposal is to make the requirement be as specific as a TI Order.

CHAIRMAN BABCOCK: Okay. Judge Bland is nodding in agreement. Carl.

MR. HAMILTON: All these problems that we have are because we're doing a deposition that traditionally has other safeguards and can be used at the time of trial. So why don't we just create a new animal? Call it an investigative statement or something that is taken under oath but cannot be used at the time of trial. All the person wants is to discover facts relating to the claim that he wants to file, so let's don't call it a deposition. Call it something else and say it's not usable at the time of

trial.

CHAIRMAN BABCOCK: The problem I think we talked about a couple meetings ago with that is in the thing, the investigative thing which is not a deposition it's like the artist's four million dollar prints. He says "yes" in response to a question and at trial he says "no." I mean, what do you do with the "yes" answer? There has to be some consequences to that.

MR. HAMILTON: Perjury under oath.

CHAIRMAN BABCOCK: Have you advanced the ball very much if that happens? Judge Benton.

HONORABLE LEVI BENTON: Well, if it's truly to investigate whether a claim exists, that person will be deposed again likely pretrial.

I agree with Carl's proposal; and then we can therefore make it an easier device to use. Just don't -- that makes the most sense. That makes more sense than anything else said this morning in my view.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I agree if that were doable, that would be a great solution. The problem I think is the original rule and this one as well talks about it not being admissible until somebody says something that is impeachment. And all of a sudden it's admissible. So that's really the real problem.

HONORABLE LEVI BENTON: Just say that it can't be used for impeachment, it can't be used for any purpose. It's to investigate. All of your TV stations and media folks benefit from this rule if no suit is filed. You know, Carlos comes in and says, you know, "Joe Shapiro really had the goods on me. He didn't make this stuff up."

CHAIRMAN BABCOCK: The thing though is that what if Tracy's example, you know, the pretrial, this thing that was in the Rule 206, they answer and they say "Yes. We hired a white replacement," and then it gets to trial or it gets to suit and they say "This is a frivolous lawsuit because we filed -- because we replaced a person with an African American"?

MR. LOPEZ: Under Levi's, Judge Benton's and Carl's deal what would happen is you would absolutely have to take that person's deposition after suit is filed. And what you're basically doing is turning it into a not-under-oath situation. You can ask them all this stuff; but it's not under oath, which is fine.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY E. CHRISTOPHER: We have taken a vote on this before and it was rejected.

CHAIRMAN BABCOCK: That's true.

HONORABLE TRACY E. CHRISTOPHER: Last time we took a vote and we rejected the attempt to completely limit

the use of a deposition. I think it is a terrible idea to allow a deposition where you're giving a sworn statement and there's no consequences to law. So...

HONORABLE LEVI BENTON: Okay.

11:25 CHAIRMAN BABCOCK: Let's get a sense. Yes, Judge Benton.

HONORABLE LEVI BENTON: I remember when I was an insurance defense lawyer before a suit was filed taking statements of fact witnesses with a court reporter who might 11:25 swear the witness and there is no consequences of a change in testimony.

HONORABLE TRACY E. CHRISTOPHER: You can impeach with that.

HONORABLE LEVI BENTON: Well, yes, you can 11:25 impeach them; but there no penalty of perjury but other than you can impeach them.

MR. YELENOSKY: That's probably more important in the lawsuit.

MR. LOPEZ: And that doesn't talk about the 11:25 issue of how you use that deposition against someone's client, some other client who wasn't even at the depo.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think Judge Christopher is right. We've been over this ground before. I think we 11:26 ought to vote on, one, whether or not we require the trial

judge to specify the scope of discovery and, two, what the consequences are. Is it void or not? I think that's where we ought to be.

CHAIRMAN BABCOCK: The subcommittee chair has I think accepted my friendly amendment to this first sentence. So why don't we vote on --

HONORABLE TRACY E. CHRISTOPHER: No. That was my second favorite.

(Laughter.)

HONORABLE TRACY E. CHRISTOPHER: I didn't accept it; but it was my second favorite.

CHAIRMAN BABCOCK: Okay. So we probably ought to vote on leaving the sentence as it is. That's a good point. And I guess there are three options, we can leave the sentence as it is and we can add the language that I suggested, or we can add language that goes further than the language that I suggested.

PROFESSOR ALBRIGHT: What is the language that you suggested? Can you repeat the language you suggested?

CHAIRMAN BABCOCK: Yes. That the whole sentence would read "The order must state whether a deposition will be taken on oral examination or written questions and must limit the scope of the deposition to information related to the needs shown in 106.4(a)." And

then Elaine suggested a third alternative which the subcommittee chair liked the least, and that was to put temporary injunction language into this.

MR. BROWN: Procedural question.

11:27 CHAIRMAN BABCOCK: Yes, Harvey.

MR. BROWN: Rather than voting on three, it seems to me it might be better to vote on two first, that is, no limites verus limits; and then if we're going to have limits, decide what kind of limits.

11:27 CHAIRMAN BABCOCK: Yes. Good point. Richard.

MR. MUNZINGER: I just question the language "related to the needs shown" as distinct from "to satisfy the needs shown." And I'd like to let's think about that as an alternative as well unless I'm the only one who has that concern.

CHAIRMAN BABCOCK: Okay. One of our votes should be limits versus no limits. Everybody who is in favor --

11:28 HONORABLE TRACY CHRISTOPHER: Excuse me. Can we define limits versus permissive limits? Because, I mean, I think we're all in agreement with permissive limits should be in there.

CHAIRMAN BABCOCK: Right.

11:28 HONORABLE TRACY E. CHRISTOPHER: The first

sentence, "The judge may limit the scope of discovery."

CHAIRMAN BABCOCK: Okay. Good point. Why don't we vote on the first sentence as is coupled with the last sentence which is in bold face here, "The judge may limit the scope of discovery in the deposition." So that's one concept. And the other concept would be the first sentence with an additional "must" requirement limiting in a certain way, and we'll get to the certain way later.

So everybody in favor of the subparagraph (b) first sentence and last sentence as written as proposed by the subcommittee raise your hand. Is that a half vote, Ann?

MS. MCNAMARA: No. (Raising hand.)

CHAIRMAN BABCOCK: Everybody who thinks it ought to be more limitations raise your hand. All right. So 16 are in favor of more limitations. Eight are in favor of as is, the chair not voting. So the more limitations have it.

And now should we do it by adding the language that I suggested which would necessarily strike the last sentence, or should we tinker with my language some more? And Richard Munzinger suggests one thing. You say it ought to be information --

MR. MUNZINGER: Necessary to satisfy the needs shown or words to that effect as distinct from "related to," because "related to," let's just take a

medical malpractice case. I want to find out who was in the operating room. It would be related to who was in the operating room as to who did what, said what, when and why. And now you've converted a need deposition into a fact deposition by the use of the word "related."

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Bill Dorsaneo left, I guess. I thought his point was whether or not the Order would say you're limited to doing what is necessary to satisfy the need or whether instead the rule required that the order state what the judge thinks that is. Isn't that a distinction and are we going to vote on that?

HONORABLE SARAH B. DUNCAN: That's a big distinction.

MR. LOPEZ: We had to get where we got first.

CHAIRMAN BABCOCK: Right. And I'm willing to do it any way people think is appropriate. We have got some language that we can talk about. Or Judge Christopher.

HONORABLE TRACY E. CHRISTOPHER: Well, rather than saying "information related to or necessary to satisfy" couldn't we just say the Order must limit the scope of the deposition to the needs shown in 206.4(a)?

CHAIRMAN BABCOCK: That's where we started; and then Buddy --

HONORABLE TRACY E. CHRISTOPHER: You added

"information related to."

CHAIRMAN BABCOCK: That is Buddy and Richard.

MR. LOW: If I'm the one that started all that confusion, forgive me, and I'll vote with you.

11:31 (Laughter.)

CHAIRMAN BABCOCK: We could go back to "must limit the scope of the deposition to the needs shown in 206.4(a): We could do that.

MR. GILSTRAP: That doesn't make a lot of

11:32 sense. How do you limit something to the need? Information about the need is what we're talking about.

CHAIRMAN BABCOCK: Fischer comes into court and says "I need this because A, B and C." And you say "Okay. I think A is okay. I think B is okay. I don't like

11:32 C. You haven't shown that to my satisfaction, so I'm going to grant your petition limiting it to A and B."

MR. LOPEZ: Is all that in writing?

HONORABLE SARAH B. DUNCAN: No.

CHAIRMAN BABCOCK: Yes. It says "the order

11:32 must."

MR. LOPEZ: Is the --

COURT REPORTER: I could hear you. I'm sorry?

CHAIRMAN BABCOCK: Carlos is saying "Is the

11:32 initial showing in writing?" And I don't know. Maybe not.

Sarah.

JUSTICE SARAH B. DUNCAN: As I understand the language, and we'll call it the "Chip language."

CHAIRMAN BABCOCK: Oh.

11:32 JUSTICE SARAH B. DUNCAN: As I understand the Chip language it just requires a recitation in the Order. It doesn't require the trial judge to identify A and B, but not C at stated in the petition. It just says the scope of the deposition is limited to information necessary to

11:33 satisfy or related to the needs shown in 206.4(a).

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: I propose this: "The Judge shall limit the scope of discovery to conform with the needs shown in connection with the Court's finding under 206.4(a)."

11:33 CHAIRMAN BABCOCK: Yes. Justice Jennings.

JUSTICE TERRY JENNINGS: I keep coming back to the words "information necessary," because it's one thing to say you need to investigate something, and that could be very broad. It's another thing to say "I need" and for a

11:33 person to come to a trial court and get a finding that he actually needs or she actually needs certain information and to limit the scope of the discovery to that certain information.

So I think it's even broader. I would even go

11:33 back to the very first sentence of 206.1 and say "to obtain

information necessary to investigate the claim" and then craft the rule in such a way that they'd have to show the court, the trial court "I need X information." Here is why I need it and then to say in the Order "You're limited to obtaining that information," because I think that's what this is all about, obtaining not just anything and everything, the kitchen sink.

So I've kind of evolved in my view of this. I was kind of against any change at all; and after hearing Munzinger and some other folks talk that to address some of these abuses, "Well, let's limit it very specifically to certain information"; but on the same token you want to give that trial court the discretion they need, you know, to craft an order pertinent to a specific situation. So that's what I would propose.

CHAIRMAN BABCOCK: Subpart (g) does say that the petition has got to say the substance of the testimony the petitioner expects to elicit and each petitioner's reasons for desiring to obtain the testimony of each witness.

HONORABLE TERRY JENNINGS: And I would even suggest changing that to state the names, address, telephone number and the information necessary to investigate their claim, because that's what we're focusing on. And people keep coming back to the word: What information are you

looking for; what is it exactly that you want to find out?

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: To refer to an earlier point that I made, (g) is way too oriented towards oral testimony and not the production of documents. And I think that the Order ought to talk about information necessary and that you should be required to state the substance of the information that you seek rather than the testimony that you seek so that it is clear that if this is primarily a document production, that the -- your justification has to do with why you want to see certain documents so that when the Court makes its finding the finding will be related to the documents you can look at as well as the questions you can answer.

This rule came I think out of the context purely of sworn answers. In reality all of our discussions reflect it is going to be a combination of documents produced and sworn answers.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, as long as we're talking about 206.2, which I think is what we're talking about, as I read that there is problem. We've been talking about all of this in terms of investigating a potential claim. And 206.2 talks about anticipation of a suit or investigating a claim, and (f) strictly has to do within anticipation of suit.

This may be holdover language from the deposition to perpetuate testimony; and I think we need to reexamine that language to see if we really need the "anticipation of execution of suit in there," and if not, make (f) apply to, some of the stuff in (f) apply to investigation of suit, because that's what we're talking about. Investigation deposition, that's what we're talking about here.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: That's what I was saying. (f) and (g), the interplay may work; but the dichotomy that is established under (d) which is one or the other, (f) only is triggered if suit is anticipated rather than if it's under (d)(2) which is seeking to investigate a potential claim, which is at least in my experience what most of those were about. So we could I think -- I don't have the solution, although I have identified the problem. But if we make (f) apply either way, maybe that; and then we can tie the order to needs that were identified in (g).

CHAIRMAN BABCOCK: In (g)?

HONORABLE CARLOS LOPEZ: In (g).

CHAIRMAN BABCOCK: Yes.

HONORABLE TERRY JENNINGS: Or the information.

MR. LOPEZ: Right. The problem is the need to have a (g) is only triggered under (d)(1) rather than

both (d)(1) and (d)(2). I'm not sure if that's on purpose or just from an importing it from the prior rule.

CHAIRMAN BABCOCK: Judge Christopher, do you have any reaction to what they just said?

11:38 HONORABLE TRACY E. CHRISTOPHER: Well, I don't read (g) -- (g) has to be stated no matter what.

CHAIRMAN BABCOCK: Right. That's how I read it.

HONORABLE TRACY E. CHRISTOPHER: (g) is one of 11:38 the requirements. It doesn't fall under (d)(1) or (2) or (f)(1) or (2). It has to be in every petition the way I read it.

HONORABLE CARLOS LOPEZ: She is right.

CHAIRMAN BABCOCK: Carlos concedes.

11:38 MR. LOPEZ: I read it wrong. I was looking at (g) as a subset of -- yes. You're right.

HONORABLE TRACY E. CHRISTOPHER: Well, if we eliminate the "suit is anticipated" language, then it's like not requiring notice to anyone.

11:39 CHAIRMAN BABCOCK: Right,

MR. LOPEZ: Yes. She's right.

HONORABLE TRACY E. CHRISTOPHER: I mean, the idea is if you want to depose a doctor, but you know, the hospital might be deposed too or might be sued too somewhere 11:39 down the line, you should notice both the doctor and the

hospital even though all you want to depose is the doctor at this point.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY E. CHRISTOPHER: So, I mean, I think that's why "if suit is anticipated" should stay in there.

CHAIRMAN BABCOCK: Yes.

HONORABLE CARLOS LOPEZ: Yes. I agree. I'm just wondering if (g) can't be used as the reference point for the specificity of the Order. If we've made them be specific about why they need it and what they expect to happen, why should it be any broader than that? Like professor Carlson is saying, under a TRO if we just say "The Order shall be specific," then I think that may be the way to do that. Because if not, I think Professor Dorsaneo's point is well taken. We have an Order that just says, a very broad Order that says you can ask about whatever, you know, whatever you need to ask about. That doesn't tell them anything.

CHAIRMAN BABCOCK: So taking the language to add to the first sentence of (b) context would your proposal be to not only incorporate 206.4(a), but also to somehow put 206.(2)(g)?

MR. LOPEZ: I could try to work on some language. I kind of like Professor Carlson's deal that's

just saying that the Order must be specific. We're not going to tell the judge exactly what they have to do; but we are going to tell them that whatever it is it has to be specific.

11:41 CHAIRMAN BABCOCK: Are you going to Justice Spector's luncheon today?

MR. LOPEZ: It sounds like I'm not.

CHAIRMAN BABCOCK: Well, maybe over the extended lunch we're about to take in deference to Justice Spector maybe you could --

MR. LOPEZ: Could I ask if Professor Carlson is planning on going?

PROFESSOR CARLSON: I am now.

(Laughter.)

11:41 MR. LOPEZ: I'll give it a shot.

CHAIRMAN BABCOCK: I think we told everybody we're going to break a little early to in deference to Justice Spector's luncheon which many of us are attending. And is this a good place to stop? I belive it probably is.

11:41 So why don't we adjourn and we'll be back at 1:30. And I think we'll have plenty of time to finish up the rest of the agenda. We're in recess.

(Lunch recess.)

CHAIRMAN BABCOCK: Back on the record. Sorry

01:47 this took longer than we thought. The program ran over by

a considerable amount and is still going on. That's why some of our members are still not back. But Justice Hecht asked us to continue; and he and Justice Jefferson will be back just as soon as they can.

01:47 And I understand over the lunch hour there was some additional work done. And Judge Christopher, what's the thought of the working group over lunch?

HONORABLE TRACY E. CHRISTOPHER: Well, the thought really is that we could either have the committee

01:48 vote for a quick fix along the line of your suggested language or perhaps this suggested language, "The Order must set forth in reasonable detail the permissible scope of the deposition." Or if people are really unhappy enough with the way the whole rule is laid out including a lot of the

01:48 requirements of 206.2, that you need to remand it back to the subcommittee to work on it.

CHAIRMAN BABCOCK: Okay.

MR. LOW: I move that we vote her first proposition.

01:48 HONORABLE TRACY E. CHRISTOPHER: The two suggestions that I'm happy with if we want to do just a quick fix is either "The order must limit the scope of the deposition to the needs shown in 206.4(a)," or this was also okay with me, "The Order must set forth in reasonable detail

01:49 the permissible scope of the deposition."

MR. LOW: If we vote, we could vote on that as opposed to the other and then if that wins. First, we decide which of those two which are run together.

CHAIRMAN BABCOCK: It works for me.

HONORABLE TRACY E. CHRISTOPHER: So I guess the question is whether, you know, a quick fix with one line and move on or send it back for further work.

CHAIRMAN BABCOCK: How many people are in favor of adding one of the two versions of the language that 01:49 has been proposed? How many people are in favor of that? The opposite of that is remand it back for more substantial work. How many are in favor of the one line? And opposed?

MR. TIPPS: You can assume the Levi will be a "no" because they voted "yes."

01:50 CHAIRMAN BABCOCK: Twelve to four in favor of adding a sentence, the chair not voting. So let's decided which of the sentences you like. And I'm fine with "must set forth in reasonable detail." I think that's good language. But what does everybody think? Yes, Stephen.

01:50 MR. MUNZINGER: It still doesn't limit the subject matter and the scope of the deposition to the need shown to take the deposition and doesn't again take into account the potential effect in trial on absent parties. It's always possible that the plaintiff subsequently learns 01:50 that there is a defendant or a person who has an interest

adverse who didn't know about when the first deposition was taken. So it's not always an innocent person, or it's not always. The problem is that it can substantially affect the rights of an absent party if the discovery goes beyond that which is necessary and triggered the need in the first place. If you don't need to take this deposition and can take it in the ordinary discovery process, why would you have two of these? I think there should be a limitation of the subject matter to the need prompting the proceeding in the first place.

MR. LOW: Chip, I have a suggestion. Why can't you add to that "consistent with the need expressed", what Tracy is talking about and say "consistent with the need expressed in the motion"?

MR. MUNZINGER: Well, because there were two alternatives proposed by the chair, one of which did have that language and one which didn't; and I understood Chip to be saying that when we're talking about the first alternative it did not have the limitation on need in it.

MR. LOW: Okay. All right.

CHAIRMAN BABCOCK: Let's get the language down. The first one, which is the language I suggested, "and must limit the scope of the deposition to the needs shown in 206.4(a)" and the second proposal and Carlos, could you help me or Judge Christopher, "must set forth in

reasonable detail" --

HONORABLE TRACY E. CHRISTOPHER: -- "the permissible scope of the deposition."

MR. LOW: Why couldn't you have both? "Consistent with," add "consistent with the need"?

MR. LOPEZ: You could.

MR. LOW: And that would take care of both of them.

CHAIRMAN BABCOCK: Okay. So the sentence would read "The order must state whether a deposition will be taken on oral examination or written questions and must limit the scope of the deposition to the needs shown in Rule 206.4(a) and must set forth in reasonable detail the permissible scope of the deposition." So all one sentence?

MR. TIPPS: That's a long sentence.

HONORABLE TRACY E. CHRISTOPHER: Actually three sentences, no "ands."

CHAIRMAN BABCOCK: Okay. All right. So we have got, we can do it with Version 1, Version 2, or we can combine 1 and 2. How many people are in favor of combining 1 and 2?

HONORABLE CARLOS LOPEZ: The very last one you just did?

CHAIRMAN BABCOCK: Yes. People in favor of combining it? Buddy, it's your idea.

MR. LOW: Wait a minute. That's not what I really suggested. I had -- the way I would have done it would have been "specify" and so forth comma, "consistent with the need expressed," comma, offsetting commas, and then you'd have it all, and I think it would be less cumbersome.

CHAIRMAN BABCOCK: Okay. All right. Judge Christopher wants to have more than one sentence.

MR. LOW: Okay.

CHAIRMAN BABCOCK: So subpart (b) would say "The order must state whether a deposition will be taken on oral examination or written questions." "The Order must limit the scope of the deposition to the need shown in 206.4," that's a potential second sentence.

MR. LOW: All right.

CHAIRMAN BABCOCK: There is another potential second sentence which is "The Order must set forth in reasonable detail the permissible scope of the deposition." That alternative sentence could also be a third sentence, if we wanted to.

MR. LOW: Why couldn't you --

MR. LOPEZ: Buddy suggested the second sentence say "setting forth the scope of the deposition, considering the need," the second sentence you had there.

MR. LOW: Right.

MR. ORSINGER: The problem is that's a little

vague.

CHAIRMAN BABCOCK: Justice Gray.

JUSTICE TOM GRAY: I was just going to see if I had the idea of what he's saying here, the sentence "Must set forth in reasonable detail the permissible scope of the deposition limited to the need shown."

MR. LOPEZ: Or "considering the need shown" or "in light of the need shown."

MR. MUNZINGER: "And be limited to the need shown."

CHAIRMAN BABCOCK: Let me see if I have got it right. "The order must set forth in reasonable detail the permissible scope of the deposition and be limited to the need shown." Do you want to add "in 206.4(a)"?

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Let me try it again. After the first sentence we would say "The order must set forth in reasonable detail the permissible scope of the deposition and be limited to the need shown in 206.4(a)." Does that satisfy everybody or not? Carl.

MR. HAMILTON: In addition to 206.4 one of these provisions requires the showing of the reasons why petitioner needs the information.

CHAIRMAN BABCOCK: That's 206.2(g), I think.

MR. HAMILTON: Should that be in the order

too, define what the reasons are?

MR. GILSTRAP: You don't have to cite the reasons to limit the scope. The important thing is what the scope is, not the reasoning process.

01:56 MR. HAMILTON: The reasons relate to the need for the deposition before suit is filed.

MR. GILSTRAP: Related to it. I just don't think you need to recite them.

CHAIRMAN BABCOCK: Stephen.

01:56 MR. TIPPS: I'd suggest we talk about what was "found" in 206.4(a) rather than "shown," because 206.4 is about a finding.

MR. BROWN: I agree.

MR. TIPPS: So I'd say "found" rather than

01:56 "shown."

CHAIRMAN BABCOCK: That sounds like a good change. "The order must set forth in reasonable detail the permissible scope of the deposition and be limited to the need found in 206.4(a)." Does anybody think we need to

01:57 incorporate 206.2(g), or is that subsumed within the need?

MR. LOW: You don't have a necessity without reasons.

CHAIRMAN BABCOCK: Right.

MR. LOW: So you don't have to put the

01:57 reasons.

CHAIRMAN BABCOCK: Okay. Tracy, is it okay if we vote on this sentence?

HONORABLE TRACY E. CHRISTOPHER: That's fine.

CHAIRMAN BABCOCK: Okay. All in favor of adding a sentence to subparagraph (b) here right after the first sentence that reads "The Order must set forth in reasonable detail the permissible scope of the deposition and be limited to the need found in 206,4(a)" raise your hand. All opposed? Unanimous, the chair not voting. Twenty to no dissenting votes. So that's a good resolution there.

MR. GILSTRAP: How can it be unanimous if the chair doesn't vote?

CHAIRMAN BABCOCK: I'll vote then. The chair voting. Sarah is not here, so don't anybody tell her.

(Laughter.)

CHAIRMAN BABCOCK: 206.5, have we decided that this sentence ought to come out, or should it stay in?

MR. ORSINGER: We don't need it now in light of the change we just made.

MR. MUNZINGER: It would repeal what you just adopted if you leave it in.

CHAIRMAN BABCOCK: Okay. Then we'll keep out. How about the bold faced sentence, is that going to be okay?

HONORABLE TRACY E. CHRISTOPHER: That's the new issue that we voted on the last time to include the time limits. So if you took two hours of the limits pre suit, you'd only get four hours of the limits after the suit was filed.

But I did make a note that we're going to have to change 190.6 which specifically excluded Rule 202 depositions and time limits.

CHAIRMAN BABCOCK: Angie, could you make a note that we be sure to let Justice Hecht and Lisa Hobbs, the new rules attorney know that if the Court adopts these, they're going to have to do something with Rule 190.6?

MS. SENNEFF: Yes.

MR. BROWN: And at the subcommittee level we talked about that while there is good reasons to change this rule to make it that the time limits should include this time, the confusion created by continuing to tinker with the discovery rules might outweigh that since the judge can do this anyway.

CHAIRMAN BABCOCK: Right.

MR. BROWN: So I don't know if we actually decided or not whether we favored this in the subcommittee. I guess we thought it was the main committee's recommendation.

HONORABLE TRACY E. CHRISTOPHER: It was a

main committee recommendation.

CHAIRMAN BABCOCK: It was something we talked about a lot at the last meeting. Richard.

MR. ORSINGER: I want to make an inquiry about the use of the word "nonparties" in the second line. I assume that we treat these people as nonparties because there is no lawsuit and there may be some procedural safeguards or something for nonparties. But if I'm not mistaken, the 50-hour limit per side applies to parties and their controlled witnesses and their testifying experts. And so if we say that the rules applicable to depositions of nonparties apply, even if we're deposing a party for six hours, if we apply that nonparty rule, it doesn't come out of the 50 hours per side, I think. Maybe somebody else knows those levels better than I do. But if it's not a controlled witness and not a party, it doesn't count against your 50 hours.

So when we say "nonparties" here we may be not affecting the 50-hour limit, if I'm right. And if I am right, do we care? Is that what we want, or do we not care if that happens inadvertently? I mean, they could take six depositions of six people in the operating room for 30 hours all of whom will be parties when the suit is filed and still have 50 hours of deposition time if this is interpreted to treat them all as nonparties for this purpose.

CHAIRMAN BABCOCK: Is your premise right?

MR. ORSINGER: I don't know. We have one procedure professor. We used to have three.

PROFESSOR DORSANEO: I think you're right.

02:01 MR. HAMILTON: One out of one.

MR. ORSINGER: Okay. That's pretty good odds.

CHAIRMAN BABCOCK: One out of three, two not voting.

02:01 MR. ORSINGER: So is that -- do we intend that, or should people be burning up their 50 hours if they do take a substantial series of depositions in this format?

MR. LOW: But if you didn't, if you had it apply not just to Rule 199.5(c), but apply and it also

02:02 applies to deposition time limits expressed anyplace else in the rules and overall or what. So it would just comply not just simply to that witness; but any rule applying to deposition times that would apply against it.

MR. MUNZINGER: You would accomplish Buddy's

02:02 result by deleting the words "of nonparties" from the sentence as it is.

MR. LOW: Right.

MR. ORSINGER: Well, that's what I wondered, if that was intentional. Are there additional safeguards to

02:02 give notice of a deposition to a nonparty that we're trying

to invoke there? Or why are we saying let's pretend they're nonparties even though it's highly likely they will be parties? Is that intended, or just...

HONORABLE TRACY E. CHRISTOPHER: I have no idea. It was a holdover from the original 202.

CHAIRMAN BABCOCK: Justice Bland.

JUSTICE JANE BLAND: Richard, I think to address your concern, if they're described as nonparties in Rule 202, but they become a party later on in the suit and they have had a deposition, their deposition is taken for two hours, I don't see how that is inconsistent to say that that two hours is going to be charged against the other side as part of their 50 hours because they are indeed a party. In other words, if they've take a Rule 202 deposition and that party is never named as a party in the suit, then you know, that doesn't count against their 50 hours; but if they end up suing that party, then it does count against their 50 hours. And it would seem to me that, you know, they weren't a party at the time of the Rule 202, but they are during the suit.

MR. LOW: Well, why don't you treat it just as if that you treat it now as it is at the time or as later on? In other words, you treat them as a party if they're later a party and you depose them.

And I mean, you shouldn't get a double bite. The

times should be limited.

MR. ORSINGER: The problem I have is that we're by our bolded sentence we're essentially saying explicitly that the six-hour limit per witness applies; but in the first sentence I think we're saying explicitly that the 50 hours per side doesn't apply unless you make that decision retroactivity at the time of trial. But our first sentence says "The rules applicable to depositions of nonparties in the pending suit apply." Well, if they are a nonparty and they are not a controlled employee or a hired expert, then it's not charged against the side's 50 hours.

MR. LOPEZ: But that's not a pending suit anymore.

JUSTICE JANE BLAND: But they become a party when they're sued.

MR. LOPEZ: It's not a pending suit anymore.

MR. ORSINGER: Okay. So this rule, how is this rule implemented at the time of lawsuit if you're going to take it literally? Because someone would say "You can't charge that against my 50 hours. The rules applying to nonparties apply. It says that right here."

CHAIRMAN BABCOCK: Richard, you're being deposed, and before suit is filed we're pretty sure you're going to be a defendant, but you're not yet and you're deposed for two hours. Then you become a defendant. Now

they want to take your deposition again. They can only take it for four hours under the boldfaced language. Right?

MR. ORSINGER: True.

CHAIRMAN BABCOCK: Now the four hours would clearly count on the 50, because they're taking your deposition for four hours in the lawsuit.

MR. GILSTRAP: Do the two hours count to the 50?

MR. ORSINGER: I don't know that I agree with that, Chip, because this says "The deposition time limits of Rule 199.5(c)." Fifty hours is not in 199.5(c), so they're not applying explicitly.

CHAIRMAN BABCOCK: Right. But now there is a lawsuit. Right? And now you say "Richard, come down and take your deposition again." This would be the second deposition. "We're going to take it for four more hours." That would count against the 50 because now you're a party.

MR. ORSINGER: Sure. The second deposition would.

CHAIRMAN BABCOCK: The question is whether the two hours counts or not.

MR. ORSINGER: Let me make it worse. It's a hospital operating room. There were four people in there. You don't know whether you're going to sue the nurse, two or three doctors in the hospital or not, so you depose

everybody for four or five hours and you get 20 hours of depositions before you even file your lawsuit and then go into a lawsuit and you've still got 50 hours.

I don't know that I'm right; but I think that that's a reasonable argument. And many lawyers are going to make it unless everyone else in this room feels like it's clear that you can't. And so if you-all have that concern like I do, then let's say something in here to make it clear that you don't gain any leverage on your 50-hour discovery limits by trying to put part of it pretrial.

MR. LOPEZ: You may incentivise the use of it if they could get extra.

COURT REPORTER: I couldn't hear; you.

CHAIRMAN BABCOCK: A Dallas word, "incentivise."

(Laughter.)

PROFESSOR DORSANEO: I don't remember, and Alex may remember better; but I think she is dealing with students this afternoon and mostly likely won't be back. But it looks to me like the policy choice was made the last go round and not crafted all that well that this suit is not going to have any effect on the discovery limits in the later proceeding; and it looks like this committee has decided it doesn't agree with that. So if that's so, because I think Richard is exactly right on what that says

in English, not withstanding some obscurity by "in the pending suit being added," that's the issue. Do we want to have this count against the later suit or not?

CHAIRMAN BABCOCK: Buddy.

02:08 MR. LOW: How do you answer this? Assume, I mean, your time limits and you take your deposition times and you go by the party/nonparty time limits and so forth; and then about three weeks before trial you've already taken all your depositions you make them a party. What do you do about that, make somebody else a party? Does that mean some of the hours you've spent you have to take away?

I'm saying that you can't just say you consider it as to what you, how it's aligned at trial. You've kind of got to consider it at the time that the depositions are taken. And I don't know exactly how it's worded. I'm just trying to -- I believe in sticking with the time limits and that this shouldn't add to the time limits. I mean, you should give up a little something just by being able to do this. We don't really encourage it.

02:09 PROFESSOR DORSANEO: I think the way it's drafted it doesn't affect the time limit in the subsequent suit.

MR. ORSINGER: Except for the six hours per witness.

02:09 PROFESSOR DORSANEO: It's not in the current

rule. It's in the draft. So it looks like the committee decided that it didn't like what the current rule says and changed it some.

MR. ORSINGER: Wasn't the current rule written before we had all these time limits?

PROFESSOR DORSANEO: No. Time limits were incorporated in the rules at the same time.

MR. ORSINGER: No. This procedure of pre lawsuit depositions existed in the rules before we --

PROFESSOR DORSANEO: But it was rewritten.

MR. ORSINGER: But it wasn't rewritten with any express intent to say it was exempt from time limits, was it?

PROFESSOR DORSANEO: I think it was.

MR. ORSINGER: I thought the old language just carried forward.

PROFESSOR DORSANEO: I don't know. Alex would know best.

MR. GILSTRAP: Why don't we just decide that the 50-hour rule limit should apply, decide that and go on.

HONORABLE TRACY E. CHRISTOPHER: So we could just eliminate the first sentence, I mean, if no one else can come up with a reason why we had that in there to begin with.

PROFESSOR DORSANEO: Okay. So the vote is

should we eliminate the first sentence. Okay. How many people think we should eliminate the first sentence, raise your hand. Opposed? Another unanimous vote. 17 to nothing with the chair not voting. I'm scared. Sarah may come back. Okay. So we have dropped the first sentence?

MR. ORSINGER: No. That means that the first sentence now, the bolded sentence is narrow in its reference. We need to broaden it up.

HONORABLE CARLOS LOPEZ: Take out the specific reference to 199.5. Just say "deposition time limits."

CHAIRMAN BABCOCK: Is that precise enough?

MR. LOPEZ: I think it's just vague enough.

HONORABLE TRACY E. CHRISTOPHER: Well, I mean, I thought the idea was specifically so we would make sure that six hours was six hours for the witness.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY E. CHRISTOPHER: That's why it was specific and why I put this note about 190.6. There is a whole provision in 190.6 that says all the time that you took in 202 depositions doesn't apply to your hours. We have to get rid of that. And I mean, I don't think we need to put anything else back in. Do we?

MR. ORSINGER: Well, I mean, there is an argument that if you state only one exception, that there

must be no others. So if we say specifically that the time, the six-hour time limit per witness applies and don't say that other time limits apply, it's a natural argument there must have been a reason that only one time limit was applied and not all of them.

HONORABLE TRACY E. CHRISTOPHER: My understanding was that there were problems in The Valley, of course, which is what everyone always says, that there were no time limits at all in connection with the depositions, that you know, the parties, you know, that there was no six-hour limit construed in connection with this rule. So that's what we were trying to fix. If we want to make sure that the time of this deposition is included in the other 50 hours, then we'll need to write another sentence.

MR. GILSTRAP: Or put an express reference to that provision.

MR. ORSINGER: The time limits in Rule 190.

CHAIRMAN BABCOCK: 190.6 say somewhat ambiguously "This rule's limitations on discovery do not apply to or include discovery conducted under Rule 202; but Rule 202 cannot be used to circumvent the limitations of this rule." Yes.

PROFESSOR DORSANEO: Like a lot of these discovery Rules that are much ballyhoo. They're not drafted very well. 190.6 needs to go away.

COMMITTEE MEMBER: I thought you drafted this.

PROFESSOR DORSANEO: No. I drafted the predecessor rules.

02:13 MR. ORSINGER: The Supreme Court did not adopt the proposal that the committee drafted. That's what he's saying.

CHAIRMAN BABCOCK: So with the Justices absent.

(Laughter.)

MR. LOPEZ: I think I can figure out what that means.

HONORABLE TRACY E. CHRISTOPHER: Well, the only question, I mean, you could just say "The deposition 02:13 time limits of Rule 190 and 199 apply." Except then does that cause a problem in figuring out whether this is a party or a nonparty again?

CHAIRMAN BABCOCK: No, because you'll know in the suit whether it's a party or a nonparty.

02:14 MR. ORSINGER: Unless they do more than 50 hours of deposition before trial, they're not going to hit that wall until they file the lawsuit. Now if they try to take more than 50 hours of deposition before trial, there ought to be a limit on it.

02:14 MR. LOPEZ: The way it's written there is.

That's what I read that second sentence to mean. That's the only thing I can figure out that it might mean, because the first sentence seems to say the regular 50 hours and that doesn't apply during the 202. If you need more time to figure it out, I guess you need more time; but you can't circumvent the ones for the pending suit by doing a bunch of 202 stuff. That's what the last sentence seems to say.

CHAIRMAN BABCOCK: Yes. But, of course, I'll hand it to Bill on this one, because circumvention can be done a bunch of different ways. You can circumvent 30 hours of the 50-hour rule. Under your interpretation it would be only if they exceeded 50 hours would they be prohibited.

MR. LOPEZ: I'm not claiming to understand exactly what the second sentence means, Rule 202 cannot be used to circumvent Rule 190.

CHAIRMAN BABCOCK: Look what you started.

HONORABLE TRACY E. CHRISTOPHER: I'm just pointing out the inconsistencies.

PROFESSOR DORSANEO: Nonsense.

MR. LOW: Tracy, what would happen if you just said "The deposition time limits set forth in these rules apply"?

HONORABLE TRACY E. CHRISTOPHER: I think that would be fine.

MR. LOW: And that includes every rule that

has a time limit; and you don't specify any particular one. But "All the deposition time limits as stated in these rules apply to these depositions" or something like that, and that includes every deposition time limit and go further.

02:15 HONORABLE CARLOS LOPEZ: You have to amend 190.6.

HONORABLE TRACY E. CHRISTOPHER: That's fine.

CHAIRMAN BABCOCK: How does everybody feel about that?

02:15 MR. HAMILTON: The problem with that language is there are no deposition time limits for nonparties.

MR. ORSINGER: What that's going to boil down to is you could have reached that point, which I think the only point is the 50-hour limit total. You'll probably have

02:16 to tell the judge that this is someone who is a likely defendant or someone who is clearly not going to be a defendant. But if you're going to hit this 50-hour wall in Rule 202, then I think you're misusing 202. I think you'll hit your wall when you file your lawsuit and you've burned

02:16 half of your time before trial; and then it's going to be a matter for the trial judge to decide whether you get more time or not.

CHAIRMAN BABCOCK: Something Buddy just said, is 199.5(c) only applicable to parties, or is it nonparties

02:16 as well? I always thought it was both.

HONORABLE TRACY E. CHRISTOPHER: It's all witnesses.

CHAIRMAN BABCOCK: All witnesses.

HONORABLE TRACY E. CHRISTOPHER: 199.5(c).

02:16 MR. ORSINGER: The 50 hours applies to parties, hired experts and controlled witness; but the six hours applies to everybody.

CHAIRMAN BABCOCK: But Buddy's sentence that could be added here would be "All deposition time limits 02:17 included in these rules apply to depositions taken under this rule." Is that something we want to add?

MR. LOPEZ: Does he mean the converse? Time spent under this rule applies to limits or other limits in the rule? Isn't that really what you're trying to say?

02:17 MR. LOW: No. You're trying to say that, we started out wanting to say that the time limits, that this applies, the time you spent here applies. Well, we don't want to increase it. So what we want say, and just as to a party or nonparty we want it to also apply two hours here 02:17 against the 50 hours. So every rule that has a time limit the time spent here goes against it. So therefore you'd say "These rules, the deposition time limits set forth in these rules apply," you know, "against it." That's what I'm saying.

02:18 CHAIRMAN BABCOCK: That is what he's

proposing.

MR. LOPEZ: I know what he's trying to do.

MR. HAMILTON: It doesn't do it as to the 50 hours.

02:18 MR. LOPEZ: "Time spent in a 202 Deposition shall be included for purposes of the calculation of the time spent under 190 point" whatever.

MR. LOW: I'm not sure how to say it. I know what I want.

02:18 CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: It can be written whether we write it here at this minute.

MR. LOW: Yes.

PROFESSOR DORSANEO: And it's a completely 02:18 different concept than what is in the rule book right now, which seems to be a little bit schizophrenic anyway, because we don't want to go by this rule, but we don't want to circumvent it either. Give me a break.

CHAIRMAN BABCOCK: There is something in 02:18 there for everybody.

MR. LOW: Are you proposing that the committee redraft it this way and then take a look at 196 that he's talking about, or what rule is it we don't want to circumvent?

02:19 PROFESSOR DORSANEO: 190.6.

MR. LOW: 190.6, take a look at that. And I think we can't make recommendations with regard to one without addressing the other. We've got to...

HONORABLE TRACY E. CHRISTOPHER: I think we have to eliminate 190.6.

MR. LOW: Yes.

PROFESSOR DORSANEO: I agree.

MR. LOW: That's what I mean, yes.

MR. LOPEZ: I agree with Buddy that it should count. Maybe we should vote on that as a general idea.

PROFESSOR DORSANEO: Have 190.6 say exactly the opposite of what it says now.

HONORABLE TRACY E. CHRISTOPHER: That's true. We could do it that way.

CHAIRMAN BABCOCK: Well, how many? Justice Gray.

JUSTICE TOM GRAY: This goes back to the comment that I was going to make some time ago. Now that you-all have come full circle back to 190.6, it does talk about Rule 202. And I don't know what you-all are going to number the rule that you-all are talking about now. Right now we're talking about Rule 206 for purposes of the record. 202 is for perpetuation of testimony. We may want to leave that rule untouched as far as the time limits. Whatever you do for that may be different than what we want to do for

discovery depositions.

So don't forget that we are talking about two different rules. The one we've been talking most about is not the one specifically referenced here.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I will say to the committee one of the worst things about the discovery rules that we have right now is that they make too many cross references to each other; and that's maddening in and of it itself. But it's also maddening when you see that it doesn't fit together very well because somebody substituted cross referencing for language that somebody could understand. So if you want to try to say that somebody is on the clock or governed by the time standards in Rule 190, say it plainly and simply instead of cross referencing.

HONORABLE TRACY E. CHRISTOPHER: Okay.

HONORABLE TERRY JENNINGS: And because this proposed Rule 206 is for a limited purpose why not say a limited amount of time unless a party, unless a person seeking the information can show an extraordinary circumstance requiring more time? Set a time limit of two hours time limit unless they show, you know, a compelling need to go further than that.

HONORABLE TRACY E. CHRISTOPHER: Well, I just wanted to say, because I wasn't around when we talked about

the -- when you got 190.6 to begin with, if it is a deposition to perpetuate testimony, for example, your plaintiff is dying and you take your deposition, why shouldn't that count in your 50 hours? I don't understand why it was ever accepted to begin with.

MR. LOW: I don't either.

MR. ORSINGER: Well, you know, I mean, I might say if your own client is dying, you might have intended to have your client on the witness stand for half a day or a day or even more than a day and you wouldn't even take your own client's deposition. If they're dying, then you're going to have to do a video deposition and play that for the jury; and I think the concept of six hours per witness was in the context of finding out what somebody else has to say.

Perpetuating the testimony of someone who won't be available at trial, I think the policy weighs a little differently. And I'm not saying that we should say there are no time limits on the deposition to perpetuate; but I think we ought to have a discussion about saying the trial judge has a lot of latitude or maybe just not even trying to impose the ordinary time limits on a perpetuation deposition.

MR. GILSTRAP: This rule doesn't involve a perpetuation deposition though.

MR. ORSINGER: Well, the cross reference does, as Justice Gray pointed out. Our perpetuation deposition now is Rule 202 and our investigation deposition is now Rule 206.

02:23 MR. GILSTRAP: Yes.

MR. ORSINGER: So if we leave it as written, 202 will not have the six-hour limit or even the 50-hour limit. And maybe that's appropriate for a perpetuation deposition. Maybe it's not. But if we just take it out or 02:23 if we just change 202 to 206, I mean, I'm a little worried here, because if I was a plaintiff and I wanted to put on my whole case to a jury in a deposition, I wouldn't want to have to do it in six hours.

CHAIRMAN BABCOCK: Why don't we stay on 206 02:23 for a moment, because 202 I think we all agree raises different concerns. Why don't we stick on 206, do that fix, and then we'll start worrying about 202 if we have to.

MR. HAMILTON: Do you want comments on other sections of 206?

02:24 CHAIRMAN BABCOCK: Yes, we can. Whatever you want to do; but the issue right now is the time limit.

MR. HAMILTON: I'll wait if you want me to wait.

CHAIRMAN BABCOCK: Why don't we fix the time 02:24 limit thing first. And I think everybody agrees the

sentence about 199.5(c) is a good idea.

MR. LOW: Right.

CHAIRMAN BABCOCK: So now the issue is whether or not we ought to do what Buddy suggests and make the 50-hour time limit apply to a 206 deposition. As a general proposition without voting on specific language how many are in favor of that? How many are opposed?

MR. HAMILTON: That's without regard to whether they are a party or if they still remain a witness?

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: They have to be a party for the 50 hours to apply.

CHAIRMAN BABCOCK: Right. How many opposed? By a vote of 16 to nothing, the chair not voting, that passes.

How are we going to write it? Bill, you're the advocate of plain and simple language. How would you do it?

MR. BROWN: How about Carlos' suggestion, deposition time limits?

PROFESSOR DORSANEO: "Deposition discovery limitations contained in Rule 190 apply to depositions taken under this rule" or something like that. Just say the 190 deposition time limits are applicable. The only place that they appear in 190.2 and end in 190.3. In 190.2 the limitations are, you know, more strict. "Each party may

have no more than six hours in total to examine and cross examine all witnesses." And that can be expanded by agreement to no more than 10. Richard is thinking that this case probably ought to be a default case, a normal case, a 190.3 case and not a Level 1 case.

MR. GILSTRAP: We'd include 199.5 in there as well.

PROFESSOR DORSANEO: Yes. Frankly I would say what 199.5(c) says in the sentence. It's harder to do that with 190, because there are several sentences.

MR. GILSTRAP: I see.

CHAIRMAN BABCOCK: I'm sorry. What is that? 190?

MR. ORSINGER: He's saying write out the limitations in the three levels, that there are three levels and just cross reference.

PROFESSOR DORSANEO: No. I would just refer to Rule 190 and say "The deposition time limitations provided in Rule 190 apply to depositions taken in accordance with this rule."

MR. GILSTRAP: Then you would write out language of 199.5(c).

PROFESSOR DORSANEO: And then add the 199 language whether it's this language or the exact same language that does appears in 199 which is not, well, it's

not even as long at the sentence that's moved over here. 199 point --

MR. ORSINGER: Can't you get by with just saying that the time limits apply without saying that they have to be included in the subsequent calculations? I mean, the second half of that sentence does nothing but repeat the first half. "The time limits of Rule 195(c) apply and are to be included in the time limits of any subsequent deposition of the same person." Can't we just say the time limits of Rule 190 and 199 or 199.5 shall apply"?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: That's not hard to understand.

GAULTNEY: Is one reading of that though, Richard, that it applies in the 202 proceeding, but not in the subsequent proceeding?

HONORABLE TRACY E. CHRISTOPHER: Right. You have to get the --

MR. ORSINGER: In Rule 206 it won't.

HONORABLE DAVID B. GAULTNEY: I mean, 206 -- I'm sorry. I'm sorry. One possible reading of that is that the limitations govern in the Rule 206 proceeding. And I think what I heard Buddy's suggestion, which I agree with, is that you want to apply it to the subsequent proceeding.

CHAIRMAN BABCOCK: Right. I think you need that sentence.

PROFESSOR DORSANEO: Okay.

MR. LOPEZ: Not that the time limits apply. The time spent counts toward the limit.

CHAIRMAN BABCOCK: Right. Justice Gray.

02:28 JUSTICE TOM GRAY: I've been actually working on another problem over here I'll get back to. But coming back to what you-all are talking about, are we working on the wrong aspect of this? Should we be as Justice Jennings suggested to put a flat limit on these, amend the other rule 02:29 that talks about the 50-hour limit or so much in hours per party and say that the depositions taken under 202 or 206, whatever we decide, are included in these limits, change the other rule, not make this rule add into the our one, limit these deposition taken under this rule, and then make the 02:29 other rule include these hours, maybe include these hours if the trial Court determines they should be included or something of that nature? But are we trying to add this to the wrong part of the rule?

CHAIRMAN BABCOCK: I hear what you're saying.

02:29 PROFESSOR DORSANEO: I think you're right.

CHAIRMAN BABCOCK: You would say we ought to stop with what we have right now which is the boldfaced language, "deposition time limits," et cetera, and then we ought to go to Rule 190.6 and make an addition there?

02:29 JUSTICE TOM GRAY: Yes.

GAULTNEY: One alternative way of thinking about that though is somebody wanting to do a 206 proceeding, I mean, that's where they're going to look in terms of how it's going to impact their later proceeding. Don't you want to put them on notice here that whatever they're doing is going to count in the subsequent lawsuit?

JUSTICE TOM GRAY: I'd rather trick them.

(Laughter.)

CHAIRMAN BABCOCK: 190.6 has certain types of discovery excepted, and we're saying it's not excepted. And we are going to say that -- wouldn't you want to put that in the rule where the guy is looking to see where his right to take it is?

HONORABLE DAVID B. GAULTNEY: I think that's what I'm suggesting, that we look at that.

CHAIRMAN BABCOCK: Right. Justice Christopher, do you have an answer?

HONORABLE TRACY E. CHRISTOPHER: I still want to get to the jury charge. So I'm willing to have you remand it back to me to work on a little bit more. If the intent is we want the time in 206 to apply, I'll work on some language. And whether it's changing 190.6, I can come up with something there. I can come up with something in 206, although Kent just walked out.

CHAIRMAN BABCOCK: Why did he do that?

HONORABLE TRACY E. CHRISTOPHER: I don't know.

CHAIRMAN BABCOCK: He thought we bogged down for another hour. Okay. Do you want to -- I think that's a 02:31 good idea, because drafting by a committee this size --

HONORABLE TRACY E. CHRISTOPHER: -- is very hard.

CHAIRMAN BABCOCK: But you have a good sense of direction of where we want to go.

HONORABLE TRACY E. CHRISTOPHER: Right.

MR. GILSTRAP: Chip, can we not also go back and try to clean up this problem of suits in anticipation versus -- a deposition in anticipation of a suit versus a deposition for investigative purposes? I mean, we touched 02:31 on that earlier; and I just don't see what really the language about deposition in anticipation of suit really adds to all this. We're talking about depositions for purposes of investigation. And it's a carryover from the deposition to perpetuate testimony; and I just it seems like 02:31 it's kind of an appendage that is going to cause problems.

CHAIRMAN BABCOCK: Are you talking about 206.2(d)(1)?

MR. GILSTRAP: Yes.

MR. ORSINGER: And also (f) really has no 02:32 reason to be separate from d)(2).

MR. LOPEZ: Right.

MR. ORSINGER: (f) and (g) kind of overlap. But I mean, will we ever be taking an investigatory deposition where litigation is not anticipated?

02:32 MR. HAMILTON: Well, that raises another question here. The way this is worded it includes claims which could be administrative claims that never gets to a suit. Do we want to include claims or limit it just to anticipated suits?

02:32 MR. ORSINGER: If "claims" means administration, does it also mean arbitration? So I could take a Rule 206 deposition in anticipation of initiating arbitration?

MR. HAMILTON: If that's a claim, yes.

02:33 MR. ORSINGER: That's pretty scary.

MR. LOW: Do you anticipate litigation or not? Your discovery, if you're not thinking about that, the potential of that, you shouldn't be doing the discovery.

CHAIRMAN BABCOCK: Right.

02:33 MR. LOW: And so whether you call it anticipation of litigation investigation, that's what the investigation is for is potential litigation. So if we talk about it as anticipated, unanticipated or what it doesn't make any difference.

MR. GILSTRAP: But the way this rule is

written it raises the possibility that there is a suit in anticipation of litigation that is not investigation and the possibility there is an investigation that is not in anticipation of litigation. We have two different categories. If that's not so, why do we need two categories?

MR. LOW: I don't think we do.

CHAIRMAN BABCOCK: So would you collapse them to say "must state" strike either, "that the petitioner anticipates the institution of a suit and seeks to investigate a potential claim by or against petitioner"?

MR. GILSTRAP: I think Judge Christopher did a good job of collapsing the language in 202. Maybe she could take a shot at collapsing it here.

HONORABLE TRACY CHRISTOPHER: Okay. And we want to make it "suit," not "claim." I mean, if I'm collapsing it, is the language we would want to use is "anticipated lawsuit"? Correct?

MR. MUNZINGER: For 206?

MR. ORSINGER: I think we ought to collapse it into "investigation of a claim" rather than "anticipation of a lawsuit."

CHAIRMAN BABCOCK: Why? I thought you said it's scary if you could do 206 discovery for arbitration.

MR. ORSINGER: Yes. I have a problem with

that, because --

CHAIRMAN BABCOCK: Why couldn't you do it?

MR. ORSINGER: Okay.

MR. GILSTRAP: That's a problem. But I think Carl's point is well taken. You could also take it, it could be taken in anticipation of an administrative proceeding that is not a lawsuit.

CHAIRMAN BABCOCK: Aren't the Rules of Civil Procedure at least an adjunct to lawsuits under the rules?

MR. ORSINGER: They're not an adjunct to arbitration unless their agreement says that or the arbitrator decides that.

CHAIRMAN BABCOCK: Any more than as to administrative claims.

HONORABLE TRACY E. CHRISTOPHER: I think we've actually, Kent, you had that one where there was an arbitration provision, and the question was should you be able to allow a 202 deposition when it was clear that the matter was going to have to go to arbitration.

HONORABLE KENT SULLIVAN: It's come up a couple of times; and the issue is whether or not something would be arbitratable. There was always some controversy about that.

MR. ORSINGER: What is the answer?

HONORABLE KENT SULLIVAN: The answer is

always "it depends."

(Laughter.)

MR. ORSINGER: If your decision is that it is an arbitrable claim, is a deposition under Rule 202 in advance of arbitration even available?

HONORABLE TRACY E. CHRISTOPHER: I guess it depends on the type of arbitration, because some arbitrations allow depositions.

MR. ORSINGER: Are we creating a pretrial discovery procedure that can exist when once the lawsuit is filed and it's referred to arbitration would not exist?

HONORABLE TRACY E. CHRISTOPHER: Right.

MR. ORSINGER: We are doing that?

HONORABLE TRACY CHRISTOPHER: I mean, yes, under the logic of this language I think you could argue that.

CHAIRMAN BABCOCK: But Kent if your case, if you were convinced that the claim that the 206 investigation was going to cover was a claim that must go to arbitration, is your view that you would allow the deposition anyway?

HONORABLE KENT SULLIVAN: No. It was clear that there was no controversy about whether any aspect of it was arbitratable; and it seems to me that's a decision for the arbitrator.

CHAIRMAN BABCOCK: Yes. Right. And if they

want to file a lawsuit and the other side is presumably going to move to dismiss or stay based on an arbitration decision, then you're going to decide that before you allow any discovery.

MR. MUNZINGER: Chip.

CHAIRMAN BABCOCK: Yes.

MR. MUNZINGER: I have clients who intentionally avoid arbitration. I just had a case with a very large corporate client that had the right to demand arbitration and chose not to do so because it has had better results with juries than it has with arbitrators.

The purpose of arbitration is the same thing as the purpose of litigation. It's to resolve disputes between parties. It should be based upon truth. The same thing is true, for example, of a claim before the Motor Vehicle Board which has its own rules and now has exclusive jurisdiction of all claims between automobile dealers, manufacturers, et cetera. It's a whole different world.

Why would you take away the right of a citizen to obtain evidence for use in any proceeding? As to the argument you wouldn't do it in arbitration, arbitration is not self activating. Both or all parties to a potential arbitration dispute are free to waive it at any time; and most often, I won't say "most often," but frequently you file a lawsuit and then you're kicked out of court because

the party wants to arbitrate. I've been in them both ways.

But I would say that the rules should address claims to allow citizens a vehicle to determine whether they have a claim or not. Why would you take that right away because someone may arbitrate or may not? Why would you take it away because they would be in front of an adjudicative, administrative agency as distinct from a court? It seems to me it makes not sense and you ought to have a broader word and use the word "claim."

02:38 HONORABLE KENT SULLIVAN: I will say this to follow up on that, if I might. A couple of times when it has come up one of the first questions I ask the respondent is whether or not they are moving to compel arbitration; and that just seems to clear out some of the smoke.

02:39 CHAIRMAN BABCOCK: If they say "no," whether they have a right to or not, then you move forward. If they say "yes" though, then --

MR. GILSTRAP: If they say "yes," I think you ought to be able to raise it and stop the 202 deposition.

02:39 MR. LOW: I do too.

MR. GILSTRAP: I mean, if the arbitration clause would stop the deposition of the lawsuit, then the arbitration clause ought to stop the 202 deposition.

MR. MUNZINGER: Yes. But you're going to

02:39 have to write that into the rule. Or I mean, the rule as I

understand it to be I don't waive my right to arbitrate unless and until I've asked for affirmative relief and the court has jurisdiction over my claim. And I can sit around and go for months and not waive my right to arbitration so long as I do nothing to waive the claim. And now I'm being told that we need to do something to this rule.

I respectfully disagree. I think we should leave it alone and let each case be handled on its merits; but give to people the right to investigate a claim under oath if that's what they want to do.

MR. LOW: Yes. I mean, I think that the way we have it written if somebody thinks they have a potential claim or a potential suit, even though there is an arbitration agreement, if they feel that they are not bound by it and they say there is a potential lawsuit, they should be able to investigate. But if they admit that it is an arbitration they're looking at, the Federal or the State Arbitration Act itself addresses many different things about how they go about that. So I don't think we ought to write something that could possibly conflict with the Federal or State. We don't know which arbitration Act. And I don't know what they say; but I don't think we should recognize somebody that says "I have a potential arbitration and I ought to investigate." If it's a lawsuit, yes.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: The predecessor Rule 187 as written said "When any person may anticipate the institution of an action." That's where all this comes from. And I think that we should limit it to that; and I think (1) and (2) of 206.2(d) ought to be combined to say that "The petition must identify the information needed before petitioner can file the anticipated suit" and leave it at that and take "claims" out.

CHAIRMAN BABCOCK: Harvey.

MR. BROWN: When I first heard this I thought I agreed with Buddy; but then I thought Richard made a pretty good case. To take the hypothetical of the discharged employee that we talked about earlier who wants to know if she has been replaced by another African American or not, she might want to know that before she files for arbitration, which might require a $2500 filing fee.

So I don't know that we should have a black-and-white rule necessarily. This suggests to me maybe we should leave this to the trial Court to hear these arguments and to decide this case whether it should go straight to arbitration or in this case a narrow deposition. The fee is a lot you have got to pay and those are factors the judge might want to consider.

CHAIRMAN BABCOCK: Carlos.

HONORABLE CARLOS LOPEZ: Also she has got to

discharge her administrative remedies before she can file suit, which would help decide to do that or decide whether to do that.

The other argument, I wasn't here. The rule, current Rule 202 in its title talks about "claims." And then in 202.1(b) it says "investigate a potential claim or suit." So it's there. I mean, this intersection or potential problem with expanding arbitration or discovery during arbitration, the rule has been there, and we haven't seemed to have a problem so far that I'm aware of. So I'm just thinking before we make that kind of change we need to be careful about why did the people have it in here. And I don't know the answer to that general question.

HONORABLE TERRY JENNINGS: I just wanted to point out again just turning to Rule 1, the objective of the rules, "The proper objectives of the Rules of Civil Procedure is to obtain a just, fair," et cetera, "impartial adjudication of the rights of litigants." So it occurs to me that when we're drafting the new rule it needs to be in regard to potential litigants. Otherwise I think we're going outside the scope of where we should be.

MR. LOW: And before I do anything about arbitration I'd have to know more about the Federal or State; and sometimes I don't know which applies. And I can't comment on how on those, because I don't know about

it; but before we include it I would want somebody to have looked at it and see what their provisions are.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Having just finished negotiating a collective bargaining agreement in which I represented management, --

CHAIRMAN BABCOCK: Wow.

(Laughter.

MR. YELENOSKY: -- I mean, at least in the labor context part of the agreement or our agreement and I would imagine most deals with the steps prior to arbitration; and universally that's going to include some kind of grievance procedure in the labor context. And I don't know if it's universal or not; but typically it would also include what kind of information the employee or in some instance the union can demand as the grievance process goes along.

If this were to permit depositions at that point, I guess that would have been news to us as we were negotiating, because we never thought somebody could step outside the collective bargaining agreement and go down to court and do a deposition or we wouldn't have tried to craft the language that specifies what you could get.

I don't know as a policy reason one way or the other; but we never anticipated that that could happen, and

the contract was predicated on the assumption on that point that it couldn't.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: If we go back to the rule as originally written, 202.1, we have two types of pre suit depositions. 202.1(a) was "a suit to perpetuate or obtain a person's own testimony for use in an anticipated suit." That's the language for in an anticipated suit. That's the deposition to perpetuate testimony. The second was "to investigate a potential claim or suit."

Now it seems to me if we're going to be consistent, let's use the second language for the new Rule 206.

Richard's comment gives me pause. You can certainly make an argument that we're opening up administrative claims and arbitration suits or arbitrations to pre suit depositions; but I think Carlos I think answered that. It hasn't been a problem. It hasn't been a problem under the old rule. That was the language. So let's "It ain't broke. Don't fix it." Let's just try to, let's keep the language from 202.1(b) in the new rule, the new Rule 206; and that's consistent and it hasn't been a problem, so let's do it that way.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: Another reason for doing that is

206(d)(1) represents an independent basis for seeking this deposition. Then we're suggesting that all you have to show to get the deposition is that you anticipate filing a lawsuit. And that could lead to all sorts of misuse. I mean, if your purpose is not to conduct some kind of investigation, I don't think you ought to be able to use this 206 provision. So I would be in favor of taking out (d)(1) and just having (d)(2).

MR. MUNZINGER: I only wanted to respond respectfully to Justice Jennings. I think "litigation" is a word that the courts have defined to mean people who are in court seeking judicial relief. I believe that to be the case. I don't have a case with me; but I believe that to be the case. And I'm not sure that a person in a 206 proceeding is a litigant by definition nor am I sure that a person in a 202 proceeding is a litigant by definition. Nobody is in a case in which juducial relief is being sought in a Rule 202. You're taking a deposition to perpetuate testimony for the possible use in subsequent litigation so that I don't think the purpose of the rules or the scope of the rules in Rule 1 would prohibit the Committee from adopting a rule that would allow people to investigate a claim for use in any forum. I don't believe that that would deprive that.

Whether it's wise, I don't know. And whether it's

something that people in labor disputes or elsewhere would be concerned about, I don't know that either. I do think that it would be wrong to preclude people from investigating a claim if the object, one of the objects here was to avoid unnecessary litigation. So if I don't have this rule, then I have no choice but to file a lawsuit.

CHAIRMAN BABCOCK: Yes. It seems to me on the arbitration thing that there are different circumstances where it can come up; but probably the most common is where perhaps the claim could be subject to arbitration, but there is an argument that maybe it's not. And in that circumstance I think you'd allow a 206 deposition; but there may be other incidences where a claim is clearly subject to consensual arbitration, but neither side wants to arbitrate. They want to opt into the judicial system. And in that case I think 206 would apply.

But there may be other circumstances where a claim is clearly subject to an agreed upon arbitration provision and one seeks to enforce that arbitration provision. That's the person against whom the 206 petition is being filed. And in that circumstance it seems to me that it would be inappropriate to use rules that are designed for the litigation process to aid what is not going to be litigation, because it's clearly going to be an arbitration process that the parties have agreed to and one side seeks

to enforce it.

MR. MUNZINGER: But in that situation the party who wanted to enforce the arbitration it seems to me would then be in a position of having to file some kind of motion with a trial Court that has been confronted with a Rule 206 petition saying "You can't do this, because you're violating my right to arbitration. Don't." And the judge says "The heck with you. You've got to mandamus them or do something else to resolve the tension that that rule creates that I don't think that we should be in the position of writing that law at this time.

CHAIRMAN BABCOCK: It may be the rule as written is okay and covers that. Judge Sullivan had that situation and dealt with it.

MR. LOPEZ: It's already in there? Where did we do that in there already?

MR. ORSINGER: The debate about whether we should go with "claim" or "litigation," we have invested the strengthening or weakening of argument use in procedure even in the face of administration or arbitration. And maybe that's right or maybe that's wrong; but I think the choice of words I think we think is enhanced in one position or the other.

CHAIRMAN BABCOCK: Yes. And I frankly, and my memory may be totally wrong about this. Richard, you

were there at the time we adopted 202.1(b); but I thought that "to investigate a potential claim or suit," the suit was meant to apply to the plaintiff, potential plaintiffs, and the claim was meant to apply to potential defendants. The defendant seeking the 202 relief is not thinking he's going to file a lawsuit. He's worried about investigating a claim against him. So that's why that there were different choices of words there.

MR. LOPEZ: Or a counterclaim.

CHAIRMAN BABCOCK: Or a counterclaim.

MR. LOPEZ: Or a cross claim.

CHAIRMAN BABCOCK: Right. And not that it was intended to broaden outside the context of litigation in the Texas state court.

MR. ORSINGER: Well, it seems to me like the issue, the first issue is do we try to anticipate these questions and fix them in this rule language, or do we just leave the rule where it is where there haven't been any mandamuses anyway and then let somebody get some kind of common law on it through the litigation process?

CHAIRMAN BABCOCK: I adhere to the David Peeples school of let's not just go make a rule because we've dreamed up some hypothetical.

MR. ORSINGER: Because if we start down the road of regulating the use of arbitration, I know that

Richard Munzinger and are going to have a disagreement; and there may be others too. And then all of a sudden we now have a spinoff disagreement on the esoteric subject of whether the rare 206 proceedings are impacting arbitration and how, and then we can do this for months. And I know David Peeples would love that. Right?

MR. LOW: He's retiring.

CHAIRMAN BABCOCK: He's got all the experience between Richard I and Richard II. Well, my inclination is to let it alone.

HONORABLE CARLOS LOPEZ: Second.

CHAIRMAN BABCOCK: Does everybody concur with that?

BOARD MEMBERS: Yes.

CHAIRMAN BABCOCK: Okay. So then Judge Christopher's charge is perhaps more modest, which is to work on the time limit issue. And Justice Gray.

JUSTICE TOM GRAY: I would like to actually -- the project I was working on was related to two votes ago that was unanimous; but I wasn't participating in the vote because I was trying to figure out more about what it meant to choose whether these, the sentence that you-ll voted to strike about nonparties in pending suits. And I just didn't remember how much of the discovery rules were dedicated towards nonparties or parties. And I'll point out

to the entire committee that Rule 205 is discovery from nonparties; and I would urge the entire committee to reconsider their vote upon the strength of 205.3(f) and the certainty that it brings to this potential process. And it is that one provision is cost of production. It has to do with producing copies in this type of proceeding would be affected, "A party requiring production of documents by a nonparty must reimburse the nonparties reasonable costs of production."

02:53 And in other words, somebody that is at this point not a party, somebody else wants discovery from them under this proceeding, the party that wants that discovery is going to have to bear the burden of the cost; and I think that is reason enough to leave the sentence in the rule. So 02:54 at least there was one dissenter to that previous vote if you-all choose not to reconsider it entirely.

CHAIRMAN BABCOCK: Which vote are you talking about?

HONORABLE TOM GRAY: It was the one where 02:54 you-all voted to take out the first sentence of 206.5 as currently drafted.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Before we go on to that, I mean, when you say "leave it as it is" I understand we're 02:54 talking about Judge Christopher is going to redraft the rule

using the language 202.1(b), "investigate a potential claim or suit" and get rid of "anticipation of litigation" in 202.1(a), we excise that out of Rule 206. Is that what we're talking about?

02:54 CHAIRMAN BABCOCK: You lost me. 206.2(b)?

MR. GILSTRAP: We're talking about in the new Rule 206 in (d) and in (f) we had a reference to "anticipation of institution of suit."

CHAIRMAN BABCOCK: Right.

02:55 MR. GILSTRAP: And that comes out of 202.1(a), --

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: -- the old one. And I think where we were headed was we were just going to go with 02:55 202.1(b), "investigate a potential claim or suit" and leave that language in the new Rule 206. Is that where we wound up and not have the reference to "anticipation of suit"?

CHAIRMAN BABCOCK: I'm not sure.

HONORABLE TRACY CHRISTOPHER: I thought 02:55 that's where we ended up.

MR. TIPPS: We voted on it.

MR. GILSTRAP: Okay. All right. I'm sorry. I didn't mean for that -- I just wanted to clarify that.

CHAIRMAN BABCOCK: Judge Christopher, do you 02:55 have any other questions of the full committee? If you

don't, then Judge Sullivan can spend some time on the material.

HONORABLE TRACY E. CHRISTOPHER: Okay.

HONORABLE DAVID B. GAULTNEY: I just had one question. Would it be wise, and I know we've already voted on it; but would it be wise to incorporate the cost portion that Justice Gray referred to in this rule as to who pays the cost?

CHAIRMAN BABCOCK: I don't know that it --

MR. LOW: Would it be necessary?

CHAIRMAN BABCOCK: I don't know that it's necessary. I don't think the sentence that was taken out here affects in my view 205.3(b).

MR. LOW: We were just talking about time limits. But now we're talking about costs.

CHAIRMAN BABCOCK: Right.

MR. LOW: So I don't know that if the rule stated like it is, I guarantee --

HONORABLE CARLOS LOPEZ: It's good.

CHAIRMAN BABCOCK: If the guy wants documents, he'll deal with 205.3 in my opinion.

HONORABLE CARLOS LOPEZ: Okay.

CHAIRMAN BABCOCK: Is that all right? Okay. This will be on the agenda for the last time next meeting. This is the dewop docket.

(Laughter.)

CHAIRMAN BABCOCK: All right. The next issue is pattern jury charge, Rule 226(a). And apparently there was some confusion as to whether or not the Court had charged the subcommittee, which I believe is chaired by Paula Sweeney, to look into this or not. And Justice Hecht has confirmed that he thought it was on the record; but if it wasn't, it was certainly intended by the Court that the subcommittee look at this. And they have not as I understand it met formally, but have had an informal discussion and will be ready to report fully by next meeting. For the moment Judge Sullivan will tell us where we are on this.

HONORABLE KENT SULLIVAN: Or will try to. I hope everyone has a handout. There is a one-page, brief summary, a copy of the statutory changes that are at issue and then some attachments reflecting Versions 1 through 3.

The starting point I guess is that Rule 226(a) and Rule 292 will need to be revised to reflect the 2003 amendments to the Texas Civil Practice & Remedies Code, Section 41.003. Those statutory changes now require a unanimous vote of jurors to find liability for exemplary damages and any amount of exemplary damages. As you may recall, Rule 226(a) includes the instructions to jurors that allows a verdict by 10 or more jurors. Rule 292 is the

parallel rule setting forth the requirements for a legal verdict including allowing a verdict by 10 out of 12.

Now as we move into this let me start with one caveat and say that like most people in the legal profession everything I have given to you is actually not my work product. I have stolen virtually everything from various other sources. As the chairman has pointed out, this is all for really introductory discussion purposes. It's not my intent, and I cannot speak for the entire subcommittee; but it's not anyone's intent to put forth a specific proposal at this time. It's really all for illustration purposes.

I think what the Chair had asked me to do in our telephone conversation earlier this week is to at least touch on some of the issues that were covered in the discussions of the Pattern Jury Charge Committee. I served last year on the Pattern Jury Charge Oversight Committee this last year. And so the PJC in trying to get something together that it could publish has struggled mightily with these issues. And one result is the proposal that is labeled Version Number 1 which we'll touch on here in just a second.

I'll attempt to distinguish between the issues that are relevant to the rules and not issues that have come up only in the context of instructions and jury questions; but as you're going to see, I think, some entanglement is

inevitable.

I will try and tell you what some of the viewpoints were of the PJC; but they're a fairly informal group. There are fairly few formal votes taken. So I want to add the other caveat that whatever I characterize has happened in the PJC Committee certainly those characterizations are colored by my own views.

One of the first issues that we did was what I will call the statutory construction issue; and that is while the statute makes clear what is required for a "yes" vote on exemplary damage liability and an amount of exemplary damages, we quickly had to struggle with the issue of what was required for a "no" vote, that is, there were at least initially three different opinions expressed.

One is that the statute required a unanimous "yes" vote, and by implication it required a unanimous "no" vote. The second construction was that Rule 292 was not otherwise changed except for requiring 12 votes for a "yes," that is, for finding of exemplary damage liability and an award of exemplary damages, so that by default a jury could vote "no" as to exemplary damage liability with only 10 votes. And then finally there was another opinion expressed that it was really only necessary to have one vote "no" in order to compel a "no" answer in response to the exemplary damage liability question.

After much discussion we concluded, I think it was an overwhelming majority of the people concluded that the proper construction was that 10 votes were required to reach an answer of "no" in response to the exemplary damage liability question as is otherwise required elsewhere throughout the charge.

I'm going to move through this. So Mr. Chair, I mean, I don't know whether you want to have some discussion on this point. And I realize that these are topics that are somewhat obtuse; and now I fear that I've spent so much time with them that I may not be explaining them as well as would be required.

CHAIRMAN BABCOCK: The only guy with his hand up is Dorsaneo.

HONORABLE KENT SULLIVAN: Okay. Well, I'm in trouble already.

CHAIRMAN BABCOCK: Everybody else understands it.

PROFESSOR DORSANEO: I guess you had to be there to come up with that conclusion or understanding. Was that based on some sort of textual comparison or any consideration of policy issues or what?

HONORABLE KENT SULLIVAN: Which? The 10-vote requirement?

PROFESSOR DORSANEO: The 10:2 vote "no," but

unanimous vote "yes." You're reading too close to the page if it's textual it seems to me.

HONORABLE KENT SULLIVAN: The ultimate consideration was based on the fact that the only change in the current law or current rule was a requirement of unanimity in voting for exemplary damage liability or for an amount of exemplary damages. So the group came to the conclusion that the default was to the current law with respect to any other answer in the charge.

03:05 CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Chip, I share Professor Dorsaneo's concerns. I mean, I'm not sure that that is the way you would ultimately construe the litigation, I mean, the legislation. It does say that to get exemplary damages you have got to have a jury verdict that is unanimous with regard to liability for exemplary damages. But what the converse of that is I don't know; but having thought about this a little while it seems to me that the solution the committee came up with is the only way to do it. I mean, practically speaking how are you going to do it any other way rather than 10 vote for "no" and unanimous for "yes" since we require 10 votes for liability for actual damages? I mean, that's got to be the outcome, because that's the only practical outcome. Otherwise it's too complicated.

03:06 MR. ORSINGER: I think the 10 to 2 dichotomy

is also supported by the legislature's quoted instruction that says "In order for you to find exemplary damages." The legislature did not say that in order to reject you must be unanimous. So to me it's tipping us off that there's -- it takes more votes to find damages than it does to reject them.

MR. GILSTRAP: Although the legislature only said "amount of."

MR. ORSINGER: Well, they forgot about the premise.

MR. GILSTRAP: I think it was more than forgetting. I think they couldn't do it and they left it for us.

MR. YELENOSKY: I don't think they even thought about it.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I think, the legislature, because they call on me so often; --

(Laughter.)

MR. LOW: -- But here is what they intended to do: No. I think say, for instance, you don't get a unanimous verdict on exemplary damages. Okay. And then and the rule is it has just got to be unanimous both ways. Then the judge has to declare a mistrial, because you can't bring another jury to do that. So it would seem most unlikely

that you want to go through or anybody when the Supreme Court is not going to let exemplary damages stand anyway, you would want to good through a new trial just for that.

(Laughter.)

03:07 MR. LOW: So it gives them an out so that you don't have to have that same standard; and it could prevent a mistrial where you have to have a whole trial again if you get 10 people that say that no exemplary damages, they don't vote for them.

03:07 HONORABLE KENT SULLIVAN: And perhaps this is a point where I can transition to the next point, because I think Buddy touched on it. There was very quickly a concern about, well, what is the procedural effect here and particularly does this, how will it impact the potential for 03:08 mistrial. And specifically the question is what is the effect of having less than 10 jurors who are willing to vote "no," but have otherwise voted at least 10 to 2 in finding liability for actual damages and actual damages. And are you at that point in a position where there is a mistrial 03:08 because you don't have 10 that say "no" in response to the question of exemplary damage liability, or procedurally would you want to be able to ignore that and have a verdict based on the 10:2 affirmative findings for liability for actual damages and actual damages. That in turn, and I'll 03:09 stop here in just a moment; but that in turn led to a

discussion about procedurally how do you want to deal with the new issues relative to a certificate and can all of this be done in one certificate as we were all used to the context of the 10:2 requirement, or do you need to in effect have more than one certificate?

MR. LOW: You don't need to do that. You can't split the trial. And so you split and say "All right. I'm going back to trial on exemplary damages." I mean, if you get a trial, it's going to be a whole new trial. So what would be wrong with saying that if you don't get a unanimous verdict on exemplary damages within a jury that the judge let's deliberate and deliberate, that the judge instead of declaring a mistrial he finds "no." I mean, in other words, don't require just 10 for a "no"; but just if the plaintiff can't get 12 votes, just kick them out on it.

MR. GILSTRAP: Let me ask you this question: And I don't know the answer to it. Probably somebody does. But under the current postmorial bifurcated procedure suppose you have 10:2 on actual damages. Then you go and you try the second part and they can't agree. They can't agree. It's nine to three. What happens? Is it a mistrial on the whole thing?

MR. LOW: No. That's what I'm saying. It's not. If the plaintiff can't get 12 votes on that, he's gone. He's out.

HONORABLE TRACY E. CHRISTOPHER: Right now there would be a mistrial.

HONORABLE DAVID PEEPLES: Or a partial verdict.

CHAIRMAN BABCOCK: One at a time, guys. Carlos.

HONORABLE CARLOS LOPEZ: The way they wrote it if it's 10 to 2 on the trigger question, you don't have a second. The jury had to be unanimous in regard to the liability trigger.

MR. GILSTRAP: But he's asking under the current procedure if you have a 10:2 and then you can't get 10:2 on the second bifurcated part, is that a mistrial or does just the plaintiff just get his actual damages?

HONORABLE TRACY E. CHRISTOPHER: It's a mistrial.

HONORABLE KENT SULLIVAN: Yes.

MR. GILSTRAP: Does anybody know?

HONORABLE DAVID PEEPLES: The judge would have the discretion to say "I'm going to accept a partial verdict. I shouldn't have submitted the exemplary damages anyway. I was just putting it out there so that we could get the finding and wouldn't have to try the thing again" and have the jury take a look at it. But I think some judges would do that if it's been a long trial especially,

say "I was just submitting it because we already tried it; but I don't think the evidence was there to raise it. I'm going to accept a partial verdict and render judgment." And then the plaintiff would have to appeal that if they wanted to go further.

CHAIRMAN BABCOCK: But you're granting a directed verdict on the punitive damages.

HONORABLE DAVID PEEPLES: Or accepting a partial verdict though as really authorized by the law.

MR. ORSINGER: It's only authorized by the law if there is no evidence to support the submission.

HONORABLE DAVID PEEPLES: Right.

MR. ORSINGER: But if there is some evidence, then as Tracy is saying, at that point you have to basically grant a new trial on liability too.

MR. GILSTRAP: That's for the plaintiff. The plaintiff may say "No. I don't want that. I want to take another shot at the whole thing." What if the plaintiff doesn't say anything? Can the defendant then require a new trial?

MR. ORSINGER: Unless the plaintiff non suits their portion of their case for exemplary damages, I think the defendant is entitled to the same rights.

HONORABLE CARLOS LOPEZ: Why can't they nonsuit?

MR. ORSINGER: They can. It's the plaintiff's choice. And the plaintiff would like to know what their actual damages are before they decide whether to waive their punitive damages; but I don't know whether we want to allow that or not.

HONORABLE TRACY E. CHRISTOPHER: We do now.

MR. ORSINGER: We do?

HONORABLE TRACY E. CHRISTOPHER: In a bifurcated case we do now. You get a verdict back with the actual damages before you send them back again.

MR. ORSINGER: Then the plaintiff might say "I'd rather waive my exemplaries than to retry liability."

MR. GILSTRAP: If that's the case, then it seems to me it's not as important that we require a 10 to 2 verdict under the new procedure. Maybe we ought to require a unanimous verdict under the new procedure.

MR. ORSINGER: How do we have that choice?

MR. MUNZINGER: It seems to me that the law is what the law is. And prior to the enactment of this amendment you had a 10:2 verdict was required on punitive damages for the verdict to be complete. This statute doesn't change that and it shouldn't change it by implication. How can you say that you're interpreting the statute to accomplish something that the legislature specifically did not say, though they could have?

I think it's largely an academic discussion and that we ought to proceed on the basis of what the current law is, that if the jury is not unanimous on punitive damages, there still must be a 10:2 "no" verdict and go on about your business and quit discussing it, because the legislature has not intended to change that portion of the law and it's sure not up to this committee or the Supreme Court to do it.

CHAIRMAN BABCOCK: Any other comments on this? Carlos.

MR. LOPEZ: What would you suggest happens under that application if you can't?

MR. MUNZINGER: I think all we have to do at the moment is make up our minds how best do we accomplish a law that says you must have a unanimous verdict, unanimous answer to the question "yes, punitive damages ought to be awarded in the case," subsection (b), "All 12 of us agree that punitive damages is 60 trillion dollars" or whatever.

MR. LOW: What happened if it's 9:3?

MR. MUNZINGER: You've got nine people that sign it, three people that didn't, and the trial judge is now faced with what Judge Peeples said he wants to do. He looks at a motion to disregard the answer, or he says "I'm going to accept a partial verdict. I made a mistake. There was no evidence." And everybody goes on with case, appeals

it, and says "There was evidence of malice" or "there was evidence of gross negligence."

MR. LOPEZ: Do they keep their actuals?

MR. MUNZINGER: Sure.

MR. GILSTRAP: It's just like the current law.

COURT REPORTER: I'm sorry. What was your question?

MR. MUNZINGER: "Do they keep their actuals?"

COURT REPORTER: Okay. You all need to be recognized.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY E. CHRISTOPHER: I guess I don't understand this construction, that I mean, "unanimous" strikes me as unanimous. And I don't understand how a rule that says the verdict has to be unanimous can somehow be construed to mean 10:2 "no." I don't understand that.

I assume that that doesn't happen over on the criminal side. Unanimous is unanimous. All 12 people have to agree in the verdict. I don't understand what people have done here to say 10:2 "no."

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: 10:2 is in a rule, is it not?

MR. ORSINGER: Yes.

PROFESSOR DORSANEO: And we are in the business of making the rules or advising the Supreme Court with respect to what the rules should be. So to treat 10:2 as kind of fixed in concrete because of what the legislature didn't do if they didn't mean to doesn't make a convincing argument to me.

What does make a convincing argument to me is at least to consider the fact that telling the jurors "If you vote this way, it's unanimous; if you vote that way, it's 10:2," seems to me is going the wrong direction in terms of how you operate a jury system is too complicated.

CHAIRMAN BABCOCK: Is Rule 292 not compelled by statute? I thought it was.

PROFESSOR DORSANEO: No.

MR. ORSINGER: You can see the reference in Kent's memo that the Constitution, Article Five, Section 13 requires nine jury members to render a verdict. That's a minimum that we couldn't go below; but it's not a prescription that it's only nine.

PROFESSOR DORSANEO: The 10:2 was a rule change, I believe. There was no statute that was recodified. It's unlike equalization of preemptory challenges.

HONORABLE KENT SULLIVAN: My understanding, for what it's worth, and I did not do the research myself,

was that the original Constitutional provision provided for verdicts by 9 out of 12. The Constitutional provision specifically granted the authority to the legislature to change that. The legislature did change that and required a unanimous verdict.

And then I'm shaky on the history here. But if my recollection is clear, the Court through its rulemaking authority did have the authority to change the required vote. And the 10:2 vote is really a fairly recent origin.

HONORABLE DAVID PEEPLES: 1973.

HONORABLE KENT SULLIVAN: That's right.

MR. LOW: A "no" is not a finding. It's a failure to find. A "no" vote doesn't mean no, you should not get. It's merely a failure to find.

All right. On anything if you don't -- you get -- everybody votes. And if you don't get what is required, you don't recover. So don't say that in order for the defendant to win it's got to be at least 10 "no"s. I've never heard of a "no" winning. Yes, we have two. But it was not in that sense.

CHAIRMAN BABCOCK: Which means not losing.

MR. LOW: So why not just like the jury, they return a verdict. Seven of them say exemplary damages, five "no," nine say exemplary damages. You didn't win. You don't -- or 11 of them say it and one of them doesn't. He

has voted. A "no" is not a finding. And the legislature says in order to recover you have to have a unanimous vote. You don't have it. You don't have a mistrial. You don't have a new trial and it ends it.

03:19 MR. HAMILTON: Amen.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: The law of statutory construction as I understand it is that the legislature is presumed to know the law as it exists; and the legislature 03:19 if that is a rule of statutory construction, and I'm confident it is, knows that the Supreme Court's current rules require a 10 to 2 verdict on punitive damages prior to the time that they enacted this statutory change. By enacting a statutory change that requires unanimity only if 03:19 there is to be an award of damages and unanimity only as to the amount of damages does not work a change in preexisting law under standard statutory construction rules. It seems to me you have to say the Supreme Court is well aware that the 10:2 "no" verdict would result in a judgment of no 03:20 punitive damages. They did not intend to change that rule.

And therefore the task of this Committee and the Supreme Court is to write a rule and a jury charge that accommodates this statute and requires unanimity both as to a "yes" on punitive damages and the amount of punitive damages.

CHAIRMAN BABCOCK: Allistair.

MR. DAWSON: Couldn't you resolve this by laying out the question as follows: And I'm not a jury charge expert. "Do you find a preponderance of the evidence that Company ABC should pay exemplary damages? Answer: Yes or no. The instruction: In order to answer this question yes all 12 of you must agree." And you don't have to address the issue of whether it is a 10:2 for a "no." That has the implication that one person can kill the "yes" vote. But it seems to me that that language is consistent with what the legislature put in the statute.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, you have to have a threshold for "no" whether it's 10:2 or unanimous. Otherwise you keep deliberating.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: And that's the point. And anybody who has done any significant amount of jury trial work will know that over time people who are for it and against it can change. I mean, you could go from nearly winning to completely losing, as I'm sure a number of you have done over the years. But this idea that Richard has that the legislature knows about Rule 292 and has by implication said it should not be changed to conform to what we have done or whatever, I don't really understand that at

all.

And I still think the main point is this can't be made so complicated that it looks ridiculous. And it does look ridiculous to me if you're going to vote "yes," it's 12; but if you vote "no," it's some other combination just because that's too complicated.

CHAIRMAN BABCOCK: Kent Sullivan and then Richard Orsinger.

HONORABLE KENT SULLIVAN: Perhaps what I should do is fast forward through what the issues were and considerations were by the PJC Committee and I can roll a few additional hand grenades into the discussion.

(Laughter.)

HONORABLE KENT SULLIVAN: And then people can comment on the totality, because some of the comments are sort of getting ahead of that, because these are issues that at least were considered.

CHAIRMAN BABCOCK: I think that's fine. But you did ask for this.

HONORABLE KENT SULLIVAN: You're right. You're right. I totally agree.

MR. GILSTRAP: Can I ask one question? Professor Dorsaneo, would you then require a unanimous "no"?

PROFESSOR DORSANEO: Yes. Require unanimity for whatever the answer is.

MR. GILSTRAP: So the jury goes along. We've got a 10:2; but two people just ain't going to agree. We've got 10:2 for "yes" and we've got actual damages. Then we go in a bifurcated portion. They can't agree on unanimous. So we don't have a verdict. We have a mistrial on the whole thing?

MR. ORSINGER: That's right. Bill is in favor of replacing all of our verdicts with mistrials.

(Laughter.)

MR. GILSTRAP: It seems to me that requiring the 10:2 for "no" makes a lot of practical sense since you've already gotten 10:2 for actual damages. That's just a practical requirement of it.

PROFESSOR DORSANEO: Well, --

HONORABLE KENT SULLIVAN: It gets more interesting, I think, because the next discussion that we had was whether or not the statutory change in effect now requires a unanimous vote on the issue of liability for actual damages in order to find liability for exemplary damages and award exemplary damages. Now this is perhaps somewhat counterintuitive since we all know that the rule is 10:2 and not unanimous. But if you'll allow me one quick example.

Suppose we have an old fashioned negligence and gross negligence case with gross negligence being the

predicate finding for an award of exemplary damages. If you had a 10:2 vote on negligence, query, how could the two people who voted "no, there was no negligence" find the same conduct constituted gross negligence? So that created an issue for the committee as to whether or not that should be in some way landmarked, if you will, in the context of either the instructions or perhaps by way of a predicate so that unless there was a unanimous vote on that issue relative to actual damages, perhaps the jury should not go on and consider an award of exemplary damages at all.

And there were at least at various points in time three different considerations given. One was predicate unanimity for liability on actual damages so that it's sort of dealt with, if you will, on the front end, that is, the jury never actually goes to the point of deliberating on exemplary damages. Or create as part of the certification process a certification that among other things there was a unanimous finding on liability for actual damages. That's, if you will, doing it on the back end of the process. Or the third possibility was simply to ignore this consideration and just say it's 10:2, 12:0 and literally completely leave it out of the process all together.

If you assume that there is a legal defect, as I've suggested in my example of having a 10:2 finding of liability for actual damages, but suddenly same jury, same

conduct finding 12:0 liability for exemplary damages, and you believed it would be improper to allow that because it is a legal defect, then many of us thought that it would be most appropriate to consider the use of a predicate to avoid having the jury continue its deliberation on exemplary damages if it was only 10:2 and there was a hard two votes against liability for actual damages. At that point the deliberative process, again, if you assume it would be legally defective, the deliberative process becomes an exercise in futility.

I don't know whether I've completely lost everybody by how obscure this discussion becomes. In the end we had a group with PJC I think that was very concerned about deviating to any significant extent from what is currently contemplated by Rule 226(a). Version 1 that you see is the current version that the PJC had voted for; but I say that with the caveat that everyone was extremely concerned about doing anything that was too significant a departure from existing law without some guidance either from this committee and from the Supreme Court.

Version 2 which we offered was another version that was considered by the PJC Committee and rejected. It's a more aggressive approach that does contemplate some of the additional legal issues that we have discussed today.

Version 3 is really simply a prototype of

something that is under discussion, and really Judge Peeples and I discussed it, which was an attempt to create at least a format that was user friendly. It was an attempt to adopt the Dorsaneo doctrine of plain and simple; but I'll let you
03:29 be the judge when you look at it in terms of the format as to whether it accomplishes that objective. The point being was that it segregated the deliberative process so that there was no question for the jurors as to what questions were covered by a 10:2 vote, what question required a
03:30 different voting process, requires two very clear certifications, and was something that -- I don't want to speak for Judge Peeples -- something I thought we ought to explore as potentially was the most user friendly option.

Let me circle back around to the point raised
03:30 earlier and the concern about mistrials. And I will say that was one of the reasons that, I do hesitate to speak for other people -- I'll speak for myself -- one of the reasons why I thought using the predicate and not having the jurors engage in deliberation about potential liability for
03:31 exemplary damages unless they had voted 12:0 on a predicate finding for liability for actual damages.

I thought it was useful, because otherwise you do have a situation where I think the chance of mistrial goes up significantly; and I think that's something that is
03:31 something that is important to avoid if at all possible and

it also has the salutary effect of trying to avoid the legal defects that we discussed earlier. I know Judge Peeples may want to add something to this now that I've confused the issue as much as possible.

HONORABLE DAVID PEEPLES: Not really.

CHAIRMAN BABCOCK: Judge Peeples anything to add?

HONORABLE DAVID PEEPLES: No. Not right now.

HONORABLE KENT SULLIVAN: And I think the last point that I would make is that, and I think what we're trying to do today is to get some sense from the Committee as to which general path it would want to take so whatever drafting efforts are made can at least follow those general directions.

HONORABLE DAVID PEEPLES: I would add a couple of things. Are you through?

HONORABLE KENT SULLIVAN: Yes.

HONORABLE DAVID PEEPLES: I'm looking forward to the discussion. But my tentative view is that if you get a 10 to 2 verdict of negligence and if you let the jury then answer gross negligence and they answer it 12 to 0 gross negligence, that would be a conflict. And so the prudent thing to do would be to condition the gross negligence question on a 12 to 0 answer on negligence. In other words, say something like "If you've answered yes to question one

by a 12 to 0 vote, then answer the next question." I mean, it just seems to me that's the way to guide their deliberations so that you don't have to send them back and say there was a conflict or you don't have to declare a mistrial.

CHAIRMAN BABCOCK: I'm sorry. Why is that again?

HONORABLE DAVID PEEPLES: Well, if you grant the premise, which I think is true, that it would be a conflict for the jury to say 10:2 negligence, that is, two people think there wasn't even negligence as a proximate cause, then how could those two then say there was gross negligence as a proximate cause? And, I mean, if you grant that that would be a conflict, then I think you need to do something to predicate the questions so that they don't answer gross negligence if two of them or one said "no" to the original liability question.

CHAIRMAN BABCOCK: What if you have a predicate that is a predicate for both liability and for punitive damages and it's the same predicate? Do you have to have unanimous "no"?

MR. GILSTRAP: No. I don't think so. You don't. I think I know the answer to that. You know, we've got two or three different types of claims that require some heightened, something more than negligence to recover.

Fraud is one. A suit by a trespasser against a landowner which requires a finding of gross negligence in order to establish liability. I think maybe malicious credentialing might be another; but I'm not sure. I think the way you do that is answer the question "Was there fraud?" And if it's a 10 to 2 verdict, you don't go into the second portion of it. You don't go into the bifurcated portion. If it's 12:0, then you go in and determine exemplary damages. I think that's how you handle that. I think that's really simpler than the one you're talking about where you have a finding of negligence and gross negligence in the same, in the damages, the liability portion.

MR. LOW: Right.

PROFESSOR DORSANEO: But you're going to have to tell them the effect of 10:2 is if you have answered these other questions which we haven't asked you to answer yet; and I mean, they have to know the effect of a 10:2 verdict is that there is not going to be any further recovery.

MR. GILSTRAP: Why do they have to know? The jury is not supposed to know.

HONORABLE KENT SULLIVAN: Let me speak to that briefly, because --

PROFESSOR DORSANEO: They have to know to know whether they're through.

HONORABLE KENT SULLIVAN: -- that's something that was given consideration.

CHAIRMAN BABCOCK: Hold it. Hold it. Judge Sullivan.

03:35 HONORABLE KENT SULLIVAN: Just very briefly: Because the rules require you to read the entire charge to the jury and the instructions generally require that you elect the presiding juror and they're supposed to read it again, they will know that. They will have heard it 03:35 arguably twice that the effect of the failure to unanimously find liability for actual damages means they cannot award exemplary damages.

MR. MUNZINGER: Why is that true if you have a bifurcated trial? If you have a bifurcated trial, the 03:36 jury answers all liability and damage questions and then you go to the punitive damages trial, the first question of which is do you stick the Defendant A for punitive damages with the definition and the statutory constitutional standards for that award.

03:36 So if, I mean, I don't know what other people's experience is. My personal experience is I'm unaware of a single case that I've ever heard of that was not bifurcated since bifurcation was permitted. I don't know if you-all trial judges do it all the time or not; but if --

03:36 CHAIRMAN BABCOCK: I can tell you a bunch.

HONORABLE CARLOS LOPEZ: Everybody does.

HONORABLE TRACY E. CHRISTOPHER: I generally don't.

CHAIRMAN BABCOCK: I don't bifurcate.

03:37 MR. MUNZINGER: Do you let the evidence of net worth in?

CHAIRMAN BABCOCK: Yes. Carl.

MR. HAMILTON: I think as Bill points out, if you predicate the punitive damage and liability issue on a 03:37 unanimous finding of the actual damages, you are telling the jury the effect of their answer, which would be improper.

I agree with Buddy that it isn't that complicated. All you have to do is instruct the jury that they have to unanimously answer the liability issue "yes"; and if they 03:37 don't have a unanimous agreement on that, that they should answer it "no."

I don't know why we have to have any -- either unanimous on that or a 10:2 on that. Because that's what the legislature said. They can only have a finding if it's 03:37 unanimous; and if it isn't unanimous, there is just no finding, so the answer is "no."

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: Two issues: I tend to agree with that analysis, which is to state in order to recover you 03:38 have got to have unanimous. To me that means anything less

than unanimous you don't.

PROFESSOR DORSANEO: On the first vote?

MR. ORSINGER: Well, on the final vote.

HONORABLE CARLOS LOPEZ: How long do they deliberate before they decide how they're going to vote is something that we don't know. You know, juries decide that in the secrecy of deliberations. I don't know how long they stick to their guns before they decide "Here is our ultimate decision." I don't know.

But real quickly, the second issue is whatever instruction we come up with you have to be cognizant of the fact that you may have 11 jurors -- or sorry. You may have 12 jurors that all agree that there was simple negligence and you've got six who think the damages should be $10,000 and you've got six that think damages should be $15,000. And the way it's written right now that's not a verdict. But under the way -- but it ought to be enough no trigger punitive. Or should it? I'm just -- we've got to be careful that in the simple negligence question it's not the damages part that you have to go back and see whether it's unanimous. There is nothing that asks them that right now.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: I just wanted to raise one other consideration that was discussed. And that is the notion of one person voting "no" means the answer to

exemplary damage liability is "no." There are a number of people that indicated that they thought it would significantly change the deliberative process.

I'm not sure I can do justice to the discussion; but it goes something like this: If the threshold now is, say, 10 that is required either "yes" or "no" to render a verdict, if you take the first vote in the jury room and it's 11 to 1, arguably it's over. You have gotten the threshold. So, you know, you can you certify that answer.

MR. GILSTRAP: Without deliberation.

HONORABLE KENT SULLIVAN: Without further deliberation. But there is a reason for 10 being required for a "yes" and 10 being required for "no," because until you get to one threshold or the other the group is required to interact and to deliberate and to persuade.

Arguably one person could command a very quick vote in the room and say "It is 11 to 1. My one vetoes everyone else." I mean, certainly the Supreme Court could decide that was a good idea or the legislature could. I simply wanted to point out that that was an important consideration policy wise in thinking that we shouldn't be so quick to adopt that.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY E. CHRISTOPHER: I think unanimous means unanimous. But I like the idea of

bifurcating the punitive question and the punitive damages and basing it on a 12:0 underlying verdict. And I don't know if that's possible for us to do it as a matter of rulemaking authority; but it has a lot of symmetry to it.

03:41 MR. GILSTRAP: Mandatory bifurcation.

HONORABLE TRACY E. CHRISTOPHER: Mandatory bifurcation. And so you ask the question "Here is liability. Here is the answer." They answer. They might answer 10:2. They might answer 11:1. They might answer 03:41 unanimous. If they answer unanimous, they get back and they get to consider the gross negligence question and damages.

MS. CORTELL: Bifurcation of the charge or the trial?

03:41 HONORABLE TRACY E. CHRISTOPHER: The charge.

HONORABLE KENT SULLIVAN: Version 3 is a quick attempt to show what something like that would look like.

HONORABLE TRACY E. CHRISTOPHER: Well, and 03:41 the reason why I say this and even to comment about, well, what if they weren't, you know, do they have to be unanimous for damages? Considering the fact that we base our multiplier of exemplary damages on the amount of actual damages there is some logic into requiring actual damages to 03:42 also be unanimous to support a, you know, doubling or

whatever the current version is in terms of your maximum amount of exemplary damages. There is some symmetry there. And if you're 12:0 underlying, then you work 12:0 in the second half. And if you're not 12:0, the game is over. We don't have a mistrial. We accept the first verdict and we're done.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: You know, I don't want to sound too much like a literalist here; but to me when it says "unanimous in regard to finding liability for an amount of exemplary damages" it means unanimous on actual damages. I think that's what is says. It doesn't imply it. It says it. If you got zero on actual damages or no finding of actual damages, you're not going to have any liability for exemplary damages period.

So I think it's harder to say that the actual damages part is just handled by a set of different 10:2 rules than it is to say that a "no" vote doesn't need to be unanimous, frankly. If you want to get the exemplary damage, then you have to get a unanimous liability verdict top to bottom.

HONORABLE CARLOS LOPEZ: Liability, or liability and damages?

PROFESSOR DORSANEO: Liability and damages, everything.

MR. GILSTRAP: Liability for --

MR. ORSINGER: Amount of actual damages?

PROFESSOR DORSANEO: If you want to use that for exemplary damages.

03:43 MR. GILSTRAP: And liability for actual damages. You could read that statute that literally and that aggressively. It's possible the Texas Supreme Court may take that aggressive posture; but I don't think we can do that here.

PROFESSOR DORSANEO: I think that we'd have to, you people would say that's what it says, and that's the end of the argument. I think that's what it does say.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I do not think that the

03:44 statute requires unanimous verdict on liability for ordinary damages. I do not think the statute requires that the jury be unanimous for the amount of actual damages. I do think that the jury requires a finding, that the statute requires the jury to be unanimous on whether there was gross

03:44 negligence; but it only -- it does not effect the rule that otherwise requires a 10 to 2 verdict to return a no verdict. And I believe that a unanimous verdict is required on a dollar figure for exemplary damage. So I do not think that because everyone in here is talking that it's obvious that

03:45 you have to have a unanimous verdict on everything to get

punitive damages and that you have to have unanimity on the amount of actual damages this is not obvious to me. And so I don't want want the record to reflect that we all seem to think that's obvious.

03:45 CHAIRMAN BABCOCK: Everybody but you. I'm just kidding.

(Laughter.)

MR. LOW: We now predicate damages on liability so that they don't have to go to that. Why 03:45 wouldn't you predicate exemplary damages or find only exemplary damages on the verdict for actual damages being unanimous, the amount of actual damages being unanimous; and if you don't do that, then you know, you can -- in other words, you don't get there unless it's unanimous. But it 03:45 doesn't change the 10 to 2 vote on damages. It just you predicate this so you just don't get to exemplary damages. But we can't start changing basic liability to 12 and 0. Man, we're going to catch a lot of static on that.

CHAIRMAN BABCOCK: We could have mandatory 03:46 bifurcation. Why don't we just do that instead.

MR. LOW: All right.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: We did not think it was appropriate to predicate on the basis of a requirement 03:46 of unanimity on actual damages. And the reason was as

follows:

MR. YELENOSKY: 10:2.

HONORABLE KENT SULLIVAN: Well, you begin I think intuitively I think that if you have 10:2, two are perhaps voting saying there either shouldn't be damages or there should be lesser damages or whatever.

MR. YELENOSKY: They might want more.

HONORABLE KENT SULLIVAN: Unfortunately the two could have said "We want more damages," in which there is no real inconsistency there. It's not the same conflict, if you will, that is posed by two saying there was no negligence. So that's why we came out on that issue.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: And similarly you could have a situation in which the two thought that it should not be $100,000. It should only be $75,000 because they didn't think that particular medical bill was reasonable or necessary, yet they agree that the exemplary damages given the offensiveness of the conduct should be $500,000, or arguably you could -- well, that's that point.

HONORABLE KENT SULLIVAN: Well, it's just not the same conflict.

MR. TIPPS: Right.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I would take that one step

further and say it's not a conflict at all. Under that scenario if you've got a 12:0 verdict for liability for simple negligence and you've got 11 -- and you have unanimous 12:0 say the damages should be $15,000, you get punitives. But if 11 of them say $15,000, and instead of that twelfth one agreeing to fifteen he thinks it should be $30,000, you don't. That makes no sense at all.

HONORABLE TRACY E. CHRISTOPHER: Well, it doesn't. But there is also the flip side that if your amount of exemplary damages are tied by the Civil Practice & Remedies Code to the amount of the actual damages and all 12 of them didn't agree that $100,00 was the actual damages, how then could we apply the cap of the two, of the two times the actual? How could we do that?

MR. LOPEZ: How can we do that now?

MR. YELENOSKY: The person who lost the argument that it should have been $30,000 on the actuals then just has to concede while they're deliberating on the exemplary that they're basing it on what the 10 agreed or the 11 agreed it should be.

HONORABLE TRACY E. CHRISTOPHER: They're not told that though. They just get to come up with a number, and we as the judge figure out based upon the amount of actual damages what the final exemplary damages number is. And we don't know what they've done in the actual damages

and we don't know why they've had a disagreement on the actual damages. We don't know whether two of them were higher or two were lower or what it was.

CHAIRMAN BABCOCK: Carlos.

03:49 HONORABLE CARLOS LOPEZ: Right. We don't know, and it doesn't matter, and it doesn't change the outcome as long as there are 10.

MR. YELENOSKY: Yes. Why does it matter?

MR. GILSTRAP: Yes.

03:49 PROFESSOR DORSANEO: I think I need to study exemplary damage statute more carefully or I would have to, because in my mind all of what precedes the award of exemplary damages is part of liability for exemplary damages if you're talking about somebody getting exemplary damages rather than talking about just getting the actual damages. But maybe the statute, even the headings could provide more guidance on that.

It does seem to say liability for and the amount of exemplary damages liability for exemplary damages 03:50 includes liability, a finding of liability for actual damages. It's just all part of the same process. Malice or gross negligence is not the only prerequisite to awarding exemplary damages.

CHAIRMAN BABCOCK: Frank Gilstrap.

03:50 MR. GILSTRAP: I agree with Professor

Dorsaneo. I think we need more time. I wish we had more time. I wish the legislature had taken more time. The problem is this new statute applies to suits filed after September 1st. And you know, I suspect especially in county court where you can have a five- or six-man verdict and can't award exemplary damages in some county courts these cases are hitting the judges' desks. And if we can't figure it out, how is the individual district judge going to figure it out or county court judge?

MR. ORSINGER: The Supreme Court is going to have to figure it out.

MR. GILSTRAP: But we need some type of provisional answer right now because we're in a mess.

MR. ORSINGER: Even if it's the wrong one?

MR. GILSTRAP: Yes.

(Laughter.)

MR. ORSINGER: Even a wrong answer is better than further deliberations?

MR. GILSTRAP: In this case I think so. Yes.

CHAIRMAN BABCOCK: Judge Jennings.

HONORABLE TERRY JENNINGS: Well, it seems to me that we need to to the extent we can come to a consensus on how to interpret the statue, because is seems to me that, and Judge Sullivan started out the discussion with three different ways, I guess, to interpret it, one of which was

that, and I guess it was the minority vote, was that it could be interpreted to say that if you didn't get a unanimous verdict, there would be no award, not a hung jury, but no award. And given the problems raised during this discussion on how to read it otherwise it seems to me that that might be what the legislature intended given the climate of the legislature, et cetera and their hostility to exemplary damages. They can take that ability away with the stroke of a pen. They can say "Well, you can't get exemplary damages."

And what they've said in the statute is exemplary damages may be awarded only if the jury was unanimous. One way to read that it seems to me is that "Exemplary damages may not be awarded unless." So it seems to me the legislature may have taken that ability away and said "Unless you get a unanimous verdict on exemplary damages, you get no exemplary damages period. That's the award." It's not a hung jury.

And I don't know if we need to -- I may not be right in that interpretation. The Supreme Court is going to ultimately interpret the statute; but I wonder if we can kind of come to a consensus on which of these versions we think is the appropriate way to interpret it and then work from there.

MR. ORSINGER: If I might say, there is a

quoting of the Constitution here that requires the concurrence of nine jury members to render a verdict, so that's a suggestion that you can't return a verdict unless at least nine people agree to it. So to say that the failure to get 12 results in a "no" answer to me has Constitutional difficulties.

HONORABLE TERRY JENNINGS: Right. But I think we need to at least come to some consensus as to what we think is the correct interpretation that is working there. I mean, I just throw that out as a suggestion.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: I'm not sure that we ever can resolve the statutory construction issue; but for what it is worth, I read 41.003(d) as drawing a distinction between liability for exemplary damages on the one hand and liability for actual damages on the other hand. And so I would construe that provision as relating to as far as the liability question is concerned, not the negligence finding, but the gross negligence finding, because that's the liability finding that entitles one to get exemplary damages.

And my guess would be that if we looked at the legislative history, it would support that view. I understand Bill's point. As a matter of law you can't get exemplary damages unless you've also gotten actual damages;

but I don't think that's what the legislature meant.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I don't think there is a Constitutional impediment to a 10:0 (SIC) 12:0 verdict. Or frankly, I don't think there is a Constitutional impediment to a "no" answer on exemplary damages and a less than unanimous answer on the amount of damages resulting in a judgment.

The legislature presumptively has the power to delineate what are and are not damages, actual as well as exemplary. So what the legislature has done here is just simply said "If you're going to get exemplary damages, you've got to have a unanimous verdict and it now has to be unanimous."

What would prevent the courts, for example, from asking this question? "Do you unanimously find that Southwestern Bell should be punished by an award of exemplary damages in this case? Answer yes or no." The hypothetical that you gave, the 11:1 vote first time out "no" and I'm the "no," "I'll never change my mind. The answer is "no." If they answer "no," you have a valid verdict that results in a judgment and it has honored the Supreme Court's rules. The next question if you've answered that question "yes": "What sum of money do you unanimously find will punish Southwestern Bell appropriately in taking

into consideration the following facts?" And if one guy holds out, you've got no verdict and everybody goes home and you've satisfied the law.

CHAIRMAN BABCOCK: What do you mean "There is no verdict and everybody goes home"?

MR. MUNZINGER: Well, you have no -- there is no number to put in. So everybody says to the judge "Judge, we can't find a number unanimously."

HONORABLE TERRY JENNINGS: The answer is you don't get an award.

MR. MUNZINGER: So the answer is "Judge," --

CHAIRMAN BABCOCK: But you get a verdict.

MR. MUNZINGER: -- "an acceptable verdict has been rendered because the answer is no. We can't unanimously find this amount." There is not the problem that Judge Peeples was talking about accepting a partial verdict because you have in fact accepted a verdict.

I don't think there is a Constitutional limitation to that, and I think it is perfectly consonant with the statutory interpretation. How can you possibly say in this section of the Civil Practices & Remedies Code where the legislature has defines damages, they defined compensatory damages, economic damages, et cetera, et cetera and exemplary damages, and they changed the statutory definitions of malice and what have you? A number of

changes were made in this chapter of Civil Practices & Remedies Code. And now what they've said to all of us is "Folks, you have got to have a unanimous verdict on both of these subjects."

03:56 I think we are overcomplicating it terribly; and frankly, the answer may be just to put the word "unanimous" in the two questions. "Do you unanimously find that punitive damages should be awarded against Defendant A under these standards?"

03:57 MR. YELENOSKY: Is that consistent with the statute's required instruction?

MR. MUNZINGER: Sir?

MR. YELENOSKY: The statute has required instructions.

03:57 MR. MUNZINGER: Only to the amount. And then the next question is "What sum of money?" Well, it would not be. You would have to say it both times for my solution to work. You'd have to say "What sum of money if paid would you unanimously find in punitive damages?"

03:57 CHAIRMAN BABCOCK: Bill was next.

PROFESSOR DORSANEO: My answer to Frank's question would be that the short-term solution, even though I don't think it makes a great deal of sense, is to just do what, interpret the statute conservatively and just do what it says. Don't be changing anything other than the

instruction that accompanies the exemplary damage issue and put that sentence in there and tell these trial judges that they can probably receive 10:2 verdicts on the exemplary damage question and that wouldn't be sufficient for an award of exemplary damages and don't mess with the rest of it.

Maybe that's what Kent was saying really; but I'd make the fewest changes possible and do what the legislature said to do; and if it's wrong, then find out later.

CHAIRMAN BABCOCK: Yes. Carlos, did you have something?

MR. LOPEZ: I was kind of agreeing with that mode of thought until Judge Sullivan mentioned how it sort of affects, it has the potential effect on what we assume is the deliberative process about how considered your verdict is supposed to be. And I think that's the reason why 10:2 says what it says. The decision not to be unanimous about punitives is a verdict. It is a decision. And there are other rules that say it has to be done by no less than 10.

PROFESSOR DORSANEO: I would agree with that. I would agree that the 10:2 is still, 10:2 is the game plan, although I think it would be better if it was all unanimous.

MR. LOPEZ: Okay.

PROFESSOR DORSANEO: Just on the statute the short-term answer, and that's as good an answer as any and it's the most simple fix.

MR. LOPEZ: If you don't agree that the unanimous "no" or 11?

PROFESSOR DORSANEO: No, we're not.

MR. LOPEZ: That it's over.

03:59 PROFESSOR DORSANEO: And then somebody in the jury would say "Well, that means they're not going to get exemplary damages. Do we need to go further?" Say "No. We're through."

CHAIRMAN BABCOCK: Buddy.

03:59 MR. LOW: But I still don't see what would be wrong with what Richard said, because you've got your, you don't change anything up here; and you so now you've reached the question "If you've done such, exemplary damages. I instruct you" and give that instruction and "ask you the 03:59 following questions:" And then you've had the instructions. And they said "We must give," and you've had the questions as asked by Richard. How would that do anything but be consistent with what the legislature had told us to do? It hasn't disrupted the system on 10:2. The jury is told that 04:00 now this is governed under different rules and "You're instructed as follows. You must follow." And then instruct them on what exemplary damages are and all that and give the legislative instruction and the questions. I don't see anything wrong with that.

04:00 CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: I just wanted to respond briefly to Richard's proposal. It might be a perfectly good result; but when we discussed it I think we pretty well overwhelming came to the conclusion that we didn't think we could do that. And here is why: Maybe I can illustrate it by example. And that is Richard's example was something to the effect of "Do you unanimously find exemplary damage liability" or words to that effect.

To circle back around and discuss that in the context of sort of the verdict you would get for actual damages, you could theoretically write a question "Do 10 or more of you find that the defendant was negligent?" They vote five to five and the say "no." Well, of course, under our rules I don't think there is any disagreement here that you can't do that. You have to get to 10 for there to be an answer of "no."

And again, arguably there was a policy consideration behind that about what the deliberative process should be all about and what the real function is of the jury and jury deliberations. So our thought at the end of the day was, absent some specific directive to the contrary, that you really were stuck, if you will, with the 10 vote requirement to find "no" in response to exemplary damage liability.

CHAIRMAN BABCOCK: Yes. Last comment before

we take a break. Frank.

MR. GILSTRAP: The problem with Richard's approach is if you ask the jury "Do you unanimously find the answer to this question and one person votes "no," nobody can vote "yes," because they didn't unanimously find it. Logically it doesn't make sense. I mean, practically it might work that way; but logically it doesn't. Nobody can answer "yes." But the question "Did you find it yes, did you unanimously find it," well you didn't. Somebody voted "no."

HONORABLE DAVID B. GAULTNEY: Essentially they are voting on their vote.

MR. YELENOSKY: "10 to 2, we're unanimous."

HONORABLE KENT SULLIVAN: It's interesting, because I think at the end of the day it defines the length of deliberation in that sense. How long does the jury deliberate? I think the answer is "Until they get to 10" with respect to most questions. That's the real answer.

With respect to this question because you have the one-person veto the question "How long do you deliberate "becomes much more amorphous, because one person as soon as you have something you call a vote it's over. And things can be much more informal in the jury room as to, you know, counting votes and the like until you hit that necessary threshold of 10. I'm not sure I'm being clear; but it's

something we discussed at some length.

CHAIRMAN BABCOCK: This subcommittee, correct me if I'm wrong, Judge Sullivan, consists of yourself and Paula Sweeney and Judge Peeples and Judge Brister and Bill Edwards and Windell Hall and Carl Hamilton and Tommy Jacks and Bobby Meadows and Allistair Dawson. Is that right? Have I missed anybody?

HONORABLE KENT SULLIVAN: No.

CHAIRMAN BABCOCK: Anybody that wants to jump on, of course, is free to do so. Judge Sullivan, in Paula's absence today could you be sure that this subcommittee meets and reports back to us? And I talked to Justice Hecht about this; and I think his feeling which is certainly mine, is any source material that you want all the way from a State Bar committee to anything else, you know, you rely upon and give weight whatever you want to give it, but that your report ought to be your report back to the full Committee.

And we'll put that first on the agenda for the next meeting. We will get into this first so we'll give it plenty of time. Judge Peeples.

HONORABLE DAVID PEEPLES: Do I take it from your remarks we're getting ready to leave this?

CHAIRMAN BABCOCK: Unless you have got something else.

HONORABLE DAVID PEEPLES: Well, I just want

to see what we have consensus on, because that might help us in the subcommittee. Do we have consensus that we ought to do what we can to avoid a conflict of a 10 to 2 vote on primary liability? If you get only 10 to 2 or 11 to 1, do we want to predicate it so that you don't go to gross negligence?

MR. LOW: I would.

HONORABLE DAVID PEEPLES: Does anybody disagree with that?

MR. GILSTRAP: I don't think we discussed it. I don't think we discussed that particular question.

MR. ORSINGER: He's asking for a showing of hands. We could give them that.

HONORABLE DAVID PEEPLES: I understand. I mean, I expressed this before: It does seem to me that if you get less than a unanimous vote on the underlying predicate liability and causation questions, that's one person or two saying "I don't even think there is negligence here or causation." And could you with the vote that way accept a verdict that is 12 to 0 on gross negligence and causation?

MR. ORSINGER: But there is a difference between predicating it and sending them back to deliberate. If you predicate it, you don't ever get to the second phase of the trial. If you get to the second phase of the trial

and somebody changes their mind and joins a unanimous vote, then you have to tell them you need to go back and revote the previous question.

HONORABLE DAVID PEEPLES: One of these has to change.

MR. ORSINGER: So one juror might say "Hey, after going through the evidence of punitive damages I've decided these guys were negligent. I'm changing my vote." So do you want to give them the opportunity to reconsider that, or do you want to not give it to them by bifurcating and predicating it?

HONORABLE DAVID PEEPLES: Let me ask it this way: Does everybody agree that it would be conflict? The only issue is whether you solve it by predicating or by sending them back to resolve the conflict, that's what you're saying?

MR. ORSINGER: Right.

HONORABLE DAVID PEEPLES: Maybe we should vote on what people think about predicating as opposed to going ahead and letting a conflict happen and then trusting the trial judge to send them back and say "Hey guys, this is inconsistent. You have got to resolve it."

MR. GAULTNEY: I think to the extent you can avoid conflicts.

HONORABLE TRACY E. CHRISTOPHER: Predicating

is a lot better.

HONORABLE DAVID PEEPLES: I like predicating better too.

CHAIRMAN BABCOCK: By predicating you mean you have a question that says "If your answer is less than unanimous, don't answer the next one"?

HONORABLE DAVID PEEPLES: Right. Or "Answer the next one only if you've been unanimous on the first one."

04:07 CHAIRMAN BABCOCK: Right.

MR. ORSINGER: Or if it's a bifurcated trial, when the verdict comes --

HONORABLE DAVID PEEPLES: Sure.

MR. ORSINGER: -- back you don't have a

04:07 second phase --

HONORABLE DAVID PEEPLES: You don't have a second phase.

MR. ORSINGER: -- if you don't have unanimous for liability.

04:07 HONORABLE DAVID PEEPLES: Yes. We'll get to that in a minute. And I don't think we -- maybe. Do we have consensus on whether the actual damage finding has to be unanimous in order for you to go on to the next phase? I think we were pretty split on that.

04:07 CHAIRMAN BABCOCK: Yes. And I think too that

reaching consensus, even if we were to reach it, is on a somewhat of a shallow record. Although we've had a nice discussion, we haven't had materials to review in advance of this meeting. If we take a vote, I'm not sure what weight.

04:07 HONORABLE DAVID PEEPLES: It may be possible when the subcommittee meets to hash it out and come back. Now do we have consensus on what we have today on whether 11 to 1 means no gross negligence or it has to be 10 to 2? I'm persuaded.

04:08 You know, the Constitution, I don't have the language here. We have a summary here. It does I think say you have got to have nine people voting to get an answer. And right now the Supreme Court has gone and said 10 to 2. Back in 1973 they'd even go with nine to three.

04:08 MR. YELENOSKY: At least nine.

HONORABLE DAVID PEEPLES: Yes, at least nine.

CHAIRMAN BABCOCK: To get a verdict you've got to have 10 votes "yes" or "no."

HONORABLE CHRIS E. TRACY: No. If three

04:08 people die, you can have a nine vote.

MR. ORSINGER: No. But Munzinger is saying that one holdout gives you a "no" verdict.

HONORABLE DAVID PEEPLES: Maybe we need to have a show of hands on whether, I'll put it this way: If

04:08 it's less than unanimous, of course, you can't have a

liability finding. But if it's less than that, can you have a verdict of no gross negligence if it doesn't reach the level of 10 to (2)?

MR. GILSTRAP: Why don't we vote on 10 to 2 versus unanimous. I think that's the vote.

HONORABLE TRACY E. CHRISTOPHER: I don't understand the question.

MR. ORSINGER: You've got a breakdown of 10 to 2. You might have 10 people in favor of liability and two against, or you might have 10 people against liability and two for it. Under one interpretation it takes 10 people to vote for "no" to come back with a verdict. Under another interpretation is takes only 10 people to vote for "yes." And two or one holdout you'd still get a verdict back 10 "yes," but not unanimous, so you come back with a "no" verdict.

HONORABLE DAVID PEEPLES: And the issue there is do you have to declare a mistrial, or can you accept that verdict and say "They got 10; but they didn't get 12"?

MR. ORSINGER: And the 10 there is the question is which 10? Are 10 in favor of exemplary damages a sufficient 10 to say "Unanimity failed, return the verdict," or does it have to be 10 that voted against exemplary damages in order to return a verdict? That's a sub vote.

HONORABLE DAVID PEEPLES: That's the issue.

CHAIRMAN BABCOCK: That's the issue. Carl.

MR. HAMILTON: Well, it's got to be the same 10 that vote on that affirmatively one way or another as the same 10 that voted on the predicate issue. So that instruction has to be in there too.

CHAIRMAN BABCOCK: What you're saying is pretty unlikely.

MR. GILSTRAP: That's not going to happen.

MR. ORSINGER: It's not going to happen.

MR. GILSTRAP: You're not going to have 10 people vote for liability and come back and then come back and say 10 people vote "no" on exemplary damages.

MR. TIPPS: Sure. It happens all the time.

MR. ORSINGER: That's not true at all.

MR. TIPPS: Otherwise you'd never have a verdict.

JUSTICE SARAH B. DUNCAN: You don't necessarily have 10 people vote in favor of actual, liability for actual damages and necessarily have 12 people vote for liability for punitive damages.

MR. ORSINGER: And an argument could be made that you should be able to return a verdict under this statute if 10 people are in favor of exemplaries and two are against. You've got 10 people that agree; and it ain't

unanimous so the answer is "no." Or do you not return a verdict unless you get 10 "no"s? To me that's -- and of course, some people are saying if you don't get unanimous, you return the verdict. That's what Munzinger is saying; and I disagree with that position.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY E. CHRISTOPHER: I hadn't thought of what Richard said; but I think that makes perfect sense. What you should ask the jury for is they have to reach at least a 10:2 verdict in answering that question; and if they reach a 12:0 verdict, then you recover; but it has to be a 10:2 answer.

MR. ORSINGER: And if it's 11:1, either way.

HONORABLE TRACY E. CHRISTOPHER: And to recover it would have to be 12:0. So it could be 10 "yes."

MS. CORTELL: 10 "yes" could support a verdict of "no"?

HONORABLE TRACY E. CHRISTOPHER: Would support a verdict. You could take it, put it in the bank, and you there would be no award of punitive damages; but you could take that with you and it wouldn't be a mistrial.

CHAIRMAN BABCOCK: And it could be 11:1.

HONORABLE TRACY E. CHRISTOPHER: Does that make more sense?

MR. ORSINGER: Yes, it would. It just can't

be nine to three.

HONORABLE TRACY E. CHRISTOPHER: Right.

MR. HAMILTON: It can be nine to three.

MR. ORSINGER: Well, under the rule it can't be nine to three. Under the Constitution it can't be less than nine.

CHAIRMAN BABCOCK: If it's eight "yes," it's punitives and four "no"s, we're saying you don't get to a verdict.

PROFESSOR DORSANEO: Mr. Chairman.

CHAIRMAN BABCOCK: Yes.

PROFESSOR DORSANEO: That's what I was trying to say earlier; but I made a mistake when I was looking at the instructions. The most puzzling thing about the statute to me it says, it gives the instruction which is "In order for you to find exemplary damages your answer for the question regarding the amount must be unanimous." It's puzzling to me why there isn't a similar instruction with respect to liability.

MR. GILSTRAP: Because they couldn't figure it out, just like we can't. That's the problem.

(Laughter.)

PROFESSOR DORSANEO: But adding that instruction to Richard's, what I call Richard's interpretation would seem to give the jury enough

information for them to know that if they don't get to 12, they can return a verdict, but there's not going to be an award of exemplary damages.

Earlier I did not, because I don't see very well, quite frankly, didn't notice it just says "regarding the amount." I'd take out -- add another instruction. People are afraid of taking words out. Add another instruction that says "liability for," you know, or this question must be unanimous for the predicate question whether it's gross negligence or malice or fraud or whatever it is. And at least then people would know what their responsibility is.

Somebody might say "Well, you're then telling them the effect of their answer on the judgment to be rendered." I think that's -- I think you have to tell them at least that much.

MR. ORSINGER: Predicating always tells a smart juror what their answer is -- the outcome is.

PROFESSOR DORSANEO: So my recommendation in keeping it simple would be to add an additional instruction to the exemplary damage liability question like this one, monkey-see monkey-doing this one, and let them render a verdict 10 to 2 and assume that they understood the instruction.

CHAIRMAN BABCOCK: We need to take a break in deference to our court reporter and other things. Let's

keep it to 10 minutes though.

(Recess.)

CHAIRMAN BABCOCK: Ready to go? Common, guys. Judge Peeples has asked for a vote of consensus; and I propose that everybody who thinks that he's got a really cute flower in his coat raise their hand.

(Laughter.)

CHAIRMAN BABCOCK: We're unanimous on that. And Judge Sullivan, I think I said this: But if I didn't, since you are working with the State Bar Committee on this, and since you have be leading this effort for our group, if you could organize the subcommittee, our subcommittee and take it and report back at our August meeting. That's the next time we meet. So you've got plenty of time to have lots of meetings.

HONORABLE KENT SULLIVAN: I'm instructed to call a meeting.

CHAIRMAN BABCOCK: Be sure to call a meeting. If you could do that on this issue, that would be great.

HONORABLE KENT SULLIVAN: I'll be happy to.

CHAIRMAN BABCOCK: And obviously everybody else on the subcommittee will pitch in. In addition I heard that perhaps there is an issue with respect to accelerated appeals and parental termination cases that sounds to me that it's pretty serious; and in lieu of Justice Hecht being

here and seconding this I'll just take it on my own initiative that perhaps our appellate subcommittee could look at this and report in August and if you could put that on the agenda. And Judge Gaultney knows, Bill, the issue and brought it to my attention. So if you guys could look at that through the subcommittee, that would be great. And that takes us to Buddy Low.

JUSTICE SARAH B. DUNCAN: Can we add another item?

CHAIRMAN BABCOCK: Yes.

JUSTICE SARAH B. DUNCAN: I mentioned it to Bill. We need a rule to implement 5401.4(d) --

BOARD MEMBER: We can't hear you.

JUSTICE SARAH B. DUNCAN: We need a rule to implement 5401.4(d) which authorizes permissive interlocutory appeals.

CHAIRMAN BABCOCK: Okay. Yes. So Bill, if you could put that on your subcommittee's agenda, we will talk about that in August as well.

PROFESSOR DORSANEO: It fades in and out of my consciousness, so I better write it down.

CHAIRMAN BABCOCK: Buddy, we're up to you on the ex parte rule; and I think you're just in a reporting mode today.

MR. LOW: Our committee has met three times.

We always meet with the chairman of the State Bar Evidence Committee or their person so designated to discuss the ex parte doctor-patient privilege. The last time we met John Martin met with us. He had some concern about the peer review that hospitals have to conduct; and of course there are federal statutes on that that favor that, and he didn't want us to pass something that would interfere with that.

HIPPA is 178 pages or something like that; and we came up with something that John proposed. The State Bar wanted to go back and study their proposal which I had given last time, and they promised they would get me a report. I was supposed to get it last week. I didn't get it until after I had already gotten to Austin in the Fifth Circuit Judicial Committee. So my committee has not studied nor I their report. They put a lot of work in it; and I would like, what I propose to do is have my committee study this report. Then instead of meeting a fourth time on this just vote by phone and we'll have certain proposals we can give you. We can give you their proposal. You can give John's proposal basically is to change nothing, but to have a footnote that says "beware of federal statutes" and so forth.

HIPPA is hard to understand; but there is one thing clear. HIPPA is preemptive; but it doesn't change, quote, "existent state law" that is not as prohibitive as

HIPPA. And there's one thing HIPPA requires is notice. You do have to have notice. And one of the alternatives we could have is that, and this is kind of the State Bar's proposal, that you can have ex parte if you get an Order of the Court, notice. That otherwise you can't have it. You have to get the information from a subpoena or traditional discovery means.

As we've said before, the federal courts interpreting federal law just hold you can't have ex parte conversations with the doctor. It's doubtful now that any doctor is going to give you an ex parte conference with him because they're all afraid of HIPPA. The waiver that the rule talks about says it's waived; but it doesn't say to what extent, that you can get it by ex parte, but the Texas courts of appeal upheld that you can have ex parte conversations.

I think if we do what John says, it will just flag the thing. There's another school of thought that we ought to say "Okay. Here it is. You can only have ex parte by order of the Court with notice and so forth. So there are several alternatives, I think three, that we can come up with and we'll vote on; but it's true that ex parte, that HIPPA preempts any contact like that without notice and quote, "a chance to object," you know, the language you and I saw, Judge, that said it doesn't change existing law. But

it has in there and we presume that the patient will have notice and attempt to object.

There are a number of articles people have written; and I've read articles about HIPPA that said "HIPPA really does nothing" and articles that say "After HIPPA you can't do anything." You know, you can't -- it's on both sides of the ledger; but I think some reasonable construction means that we can't do anything without giving some notice to the patient. And we will come up with probably three proposals that you can vote on next time. And I'm sorry that we can't this time; but this report, I hope you will look at it, because the State Bar, there committee spent a lot of time on this.

MR. GILSTRAP: Chip, one question.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Buddy, and it may be in your report. I apologize if it is there. But would it be possible to actually see the language in the HIPPA regs that it is referring to?

MR. LOW: Yes. Yes. It -- I did not bring my HIPPA file, because my back was kind of hurting.

(Laughter.)

MR. GILSTRAP: That's the point.

MR. LOW: And I didn't think we'd get to it.

MR. GILSTRAP: That's the point. I mean,

I've tried to wade through it; and if someone has waded through it and actually found the operative language, it would be nice to see that.

MR. LOW: I will give you -- let me write myself a note. I'll give you the language I'm talking about that says there is some -- the starting-out language says that it "preempts anything contrary hereto" or something. But there is other language that Judge Gaultney pointed out to me that says it doesn't change what existing law or something, doesn't it, Judge?

JUSTICE DAVID B. GAULTNEY: Well, I claim to be even less an expert than you.

MR. LOW: You can't know less than me.

HONORABLE DAVID B. GAULTNEY: I think what I was looking at was a *Law Review* article discussing a document which expressed the intent of the regulator. So I'm not sure how strong it is; but it was the intent was expressed as being something along the line of not intending to interfere with state laws.

And there are some state laws that require if one is going to file a suit, that they essentially consent to access to their medical information. I'm not stating anything for the record as to what the regulation is or what any other state law is. I'm just responding to your question that what I was looking at was a *Law Review* article

trying to analyze how it fit in with what I viewed as our existing law when you file a lawsuit and what happens to the privilege.

MR. LOW: But Judge, maybe it cited that provision; and I have it also marked. But then there is a provision that says -- it goes on and says but it is presumed that the patient will be given proper notice and an opportunity to object. So I don't know how you can have proper notice and opportunity to object if you just go out quietly and have ex parte. I think --

MR. GILSTRAP: I think it's going to be important for us to actually look at the actual language of the regs, because from what I have seen there is a lot of different interpretations coming out of HIPPA and a lot of it may be interpretations of what people who are experts in HIPPA have had to say. And it would really be nice to actually get down to the language itself before we decide.

CHAIRMAN BABCOCK: The dumb old common folk interpretation.

MR. LOW: There is also a shorter publication, government publication that gives a summary, and it's only 42 pages. Do you want the whole 178? I'll just mark the language I'm talking about.

MR. GILSTRAP: Yes. I just want the language that somebody says "This a what HIPPA said. This is what

we're relying on out of the HIPPA regs" and drawing all the inferences from.

CHAIRMAN BABCOCK: And Buddy, if you could get that to Angie so that she can --

MR. LOW: All right.

CHAIRMAN BABCOCK: -- get it on the website so everybody can have access to it, that would be good.

MR. LOW: I will do that, because I have it in my file.

04:44 CHAIRMAN BABCOCK: Okay.

MR. BOYD: For coordination purposes, I think I mentioned this once before; but in the case I didn't, I'll mention it again. Last year, early 2003 the legislature passed, I forget what it was; but one of the statutes they 04:44 passed ordered the Attorney General to convene a HIPPA preemption analysis task force and charged the Attorney General with the duty of providing the legislature by November of this year a report based on the task force's work identifying all state laws which include Constitutional 04:45 statutes, rules and case law that conflict with HIPPA, and if they conflict, then an analysis of whether they are preempted in that they don't have as stringent a requirement as HIPPA, and if they are preempted, a recommendation how they should be amended statutorily in order to comply with 04:45 HIPPA. And that task force that began meeting last fall is

in the process of continuing to meet to prepare this draft report that will go the Attorney General who will issue a formal report in November.

And it seems to me there is an overlap in their charge as it relates to this issue and what this committee and the Bar committee is doing; and if nothing else, we ought to get our work product to that task force and perhaps see if we can't get their work product back to us. It may be we want to defer to and see what they come up with before we do anything on this; but I think it's important to know that that process is underway and is statutorily required.

CHAIRMAN BABCOCK: Okay. Good. Richard.

MR. ORSINGER: I can't remember right now what has happened to the previously discussed proposed exception to the doctor-patient privilege when it has come up for discussion here at the Committee. Have we ever voted in favor or against amending the rule to prevent ex parte communications?

CHAIRMAN BABCOCK: I don't believe we ever had.

MR. LOW: No. We started, we were going to vote; and that was the day Scott had a 15-minute talk and we went to something else after that.

MR. ORSINGER: So is this an issue we're ever going to vote on?

CHAIRMAN BABCOCK: That remains to be seen, Richard. That's what makes life so interesting.

MR. LOW: But let me make it clear. There is no question that we can just totally, if we don't want it, we can totally prevent it. It's not in violation of HIPPA. We can be less restrictive. I mean, there is no commentator that says we can't do that. It's just a question of what.

MR. YELENOSKY: Can't do what?

MR. LOW: We could just say there will be no ex parte conversations with plaintiff's doctor without consent, without Court order or proper notice. That wouldn't -- we can do that. We don't have to do that.

MR. YELENOSKY: Whether we do it or not, aren't the doctors going to do that?

MR. LOW: Well, see, the Bar -- not the Bar. But the Medical Association of Texas won't take a position.

MR. YELENOSKY: No. I mean, the individual doctors. Has anybody been able to have an ex parte?

MR. LOW: And they're afraid to do it. So as a practical matter they're not going to do it; but the medical association in 37 states have taken a position that it is unprofessional to have ex parte conversations with somebody without the consent of the patient.

MR. YELENOSKY: Well, all I'm saying is if as a practical matter the individual doctors aren't going to

talk to you ex parte without a Court order, what's the point?

MR. BOYD: The doctors say that there is confusion among their ranks.

04:48 MR. LOW: Right.

MR. BOYD: Because, for example, you know, under state privilege law if the medical condition is relevant to the damages claims of the plaintiff, then there is an implied consent for disclosure of that information. 04:49 And so there is confusion about, "Well, can I as a doctor sit down and talk to you about these, but not these issues?" And so the doctors say, you know, "There is no way for us to know how to comply and we don't know what to do, so we need everyone to say just no more."

04:49 MR. YELENOSKY: Right. So as a practical matter they're going to want a Court order of some sort.

MR. LOW: The doctors in Texas probably do; but if we came out with a rule which said something, well, maybe a doctor would say "Okay. I can" --

04:49 MR. YELENOSKY: Do you really think so? I think their lawyers are going to be telling them.

MR. LOW: It might be that we're --

MR. YELENOSKY: I can --

CHAIRMAN BABCOCK: Not all at one time, guys.

04:49 MR. LOW: It might be that we're wasting our

time.

MR. YELENOSKY: I don't want you to waste your time.

MR. LOW: But if we do, we ought to know what we're doing or try to know.

MR. YELENOSKY: The presumption is we're going to make a difference by this rule as to what we can do in talking to doctors about a Court order; and I'm not sure that's a good assumption.

MR. LOW: Well, I can tell you one thing: Any rule we pass here is not going to be in effect if you got a case in federal court, because the Fifth Circuit and the federal courts is following Texas law. The federals don't have a privilege. They operate under the state privilege; and they have interpreted, their cases are uniform in interpreting that you can't have ex parte without a Court order or without permission of the plaintiff. So it's not going to effect any lawsuit in federal court.

So but there is a split. The Supreme Court has never addressed it. In *Mutter* they said that a broad authorization or requiring a broad authorization was abuse of discretion; but the Supreme Court has never addressed the issue. The courts of appeals have and they have pretty well uniformly held that there is waiver when you file a lawsuit and you can have ex parte conversations with the doctor.

HONORABLE DAVID B. GAULTNEY: Did I understand you to say the federal courts look to state privilege law?

MR. ORSINGER: Yes.

04:51 HONORABLE DAVID B. GAULTNEY: So why would it not have an impact in federal court if we clarified the privilege law of Texas?

MR. LOW: Because every Fifth Circuit and district court case that has decided that has decided it is 04:51 improper.

MR. ORSINGER: That's based under the current language. But if we change the current language, that would change their holdings.

MR. LOW: But you would have to change the 04:52 language so that you allowed it, because their interpretation --

MR. ORSINGER: Right.

MR. LOW: -- is that it's waived; but that's not the method, the proper method to get it. You've have to 04:52 get it through discovery. I mean, that's their interpretation.

CHAIRMAN BABCOCK: Okay. So this letter which was dated May 10th to you from Jack London has a substantial body of research in it.

04:52 MR. LOW: Right.

CHAIRMAN BABCOCK: We'll put that on the website and get that to everybody. And you'll get the HIPPA regs to Angie.

MR. LOW: I will. I will get the particular language that I'm talking about. The whole HIPPA regs is 180 something pages.

CHAIRMAN BABCOCK: Frank just wants the Clift notes.

MR. LOW: Yes. I made a note to do that.

CHAIRMAN BABCOCK: Okay. We'll put that on the agenda for next time.

MR. ORSINGER: Can I make another suggestion? I think there is state statute that imposes confidentiality on doctors in addition to Rule 509.

MR. LOW: Oh, really.

PROFESSOR DORSANEO: Yes. The Occupations Code, yes.

MR. ORSINGER: So it would be helpful if at the next meeting if that section of the statute was in the packet.

MR. YELENOSKY: Well, there is more than one statute.

MR. ORSINGER: There is.

MR. LOW: There's one statute that talks about and it quotes the federal law on peer review and they

favor that and so forth; and there is in the Occupation Code there is a provision about confidentiality.

PROFESSOR DORSANEO: Health & Safety Code too.

04:53 MR. LOW: Yes. I've seen it.

MR. ORSINGER: Authorization to release information has to meet certain criteria in the statute; isn't that right?

MR. LOW: I don't think it's -- I've read it, 04:53 and I don't remember, and our committee looked at it. I don't remember it being, having been that closely related to it. Now there is also a statute that makes it a fine if you give away information pertaining to somebody that had drug and alcohol treatment, one of those facilities.

04:54 MR. YELENOSKY: That's federal law.

MR. LOW: No.

MR. YELENOSKY: Well, there is a federal law.

MR. LOW: But this is a state law that makes it. So on those kind of cases couldn't --

04:54 MR. ORSINGER: If there is going to be any consideration by this committee of authorizing ex partes, we better be reading all the statutes that apply. If we're just going to prohibit them, then maybe it doesn't matter.

MR. LOW: Well, I've looked at every one I 04:54 can find and the committee has; and I don't -- I think we

could do it by Court order or consent or, you know, routine provisions; but I don't think any of them -- I just don't think ex parte without notice will cut the mustard.

CHAIRMAN BABCOCK: Okay. We'll have that on the agenda for next time.

MR. LOW: All right.

CHAIRMAN BABCOCK: We also Justice Hecht asked that each subcommittee chair re review his June 16th, '03, letter to be sure that we haven't missed any House Bill 4 rule changes. And the permissive interlocutory appeal would be one such issue. And does anybody right now have any others? Carlos?

MR. LOPEZ: Mine was a housekeeping question.

CHAIRMAN BABCOCK: Okay. If all of the subcommittee chairs could do that. And let me just make sure everybody is here. Probably some people aren't. The Rule 1 through 14(c) is Pam; and she was here, but is not here. Stephen, you're the vice chair of that. So if you could take that upon yourself and report next time.

MR. YELENOSKY: Yes.

CHAIRMAN BABCOCK: Richard Orsinger you've got 15 through 165, so if you'd take a look at that and report next time. And then the next Rule is 166 through 166(a), that's Judge Peeples. If you could look at that. And 171 to 205 is Bobby Meadows, and Bill Edwards is the

vice chair, Alex. Harvey, is he still here? Tracy, down to you. If you could make sure that somebody on your subcommittee, preferably the chair, does that, that would be great. Subcommittee 215, Duggins, Brister, Pam, Meadows, Levi. Carlos, you're on that subcommittee.

MR. LOPEZ: I'll be happy to get Ralph to do it.

CHAIRMAN BABCOCK: Great. And Judge Peeples, you're the subcommittee chair on 216 through 299. If you could do that. Justice Duncan --

HONORABLE DAVID PEEPLES: Am I the vice chair, or is that Paula?

CHAIRMAN BABCOCK: You're the vice chair. Either you or Paula would be great. Subcommittee 300 through 330, Justice Duncan, if you could do that with the rest of the committee.

HONORABLE SARAH B. DUNCAN: And Dorsaneo.

CHAIRMAN BABCOCK: And Dorsaneo. So split it up as you desire. Is Judge Lawrence still here? He was here. Jeff, you're on that one. So if you could make sure that gets done. And Elaine, you're the subcommittee on 735 through 822. And Buddy, you're the Rules of Evidence. And Bill, you're the Rules of Civil Appellate Procedure. So if everybody could make sure that they report back.

There is one other agenda item, which is the class

action; and Bill has written a memo that I think we'll take under submission. My reading of the transcript from last time was that Justice Hecht asked us to table the proposed amendments to Rule 42 for the time being; but at the time he didn't have the benefit of your memo. So I'm going to make sure that he has that and will put it on the agenda if the Court wants to discuss this issue next time unless you have something you want to say about it.

PROFESSOR DORSANEO: All I can say about it is if I had been at the last meeting and heard the table, I wouldn't have prepared the memo.

CHAIRMAN BABCOCK: Okay. Does anybody else have anything? Carlos.

HONORABLE CARLOS LOPEZ: I'm confused a little bit about my schedule. I see us as meeting in August.

CHAIRMAN BABCOCK: Okay.

HONORABLE CARLOS LOPEZ: And I show us, I've got blocked off late October and early November. Are we talking about which one of those two days?

CHAIRMAN BABCOCK: They're both on the list. It may be that we'll get everything done in October; but the statute requires that we meet six times a year.

MR. LOPEZ: Got it.

CHAIRMAN BABCOCK: And that's the way it just

worked out. Yes, Buddy.

MR. LOW: One other thing: We will on Evidence the State Bar has recommended an amendment to 407. When we changed 407 they wanted to amend 407(b) because there is a question whether, what effect the amendment that we made has on that; and we'll have their report and we'll take that up.

CHAIRMAN BABCOCK: If you have it in time so everybody can look at it, --

MR. LOW: Yes. We will.

CHAIRMAN BABCOCK: -- tell Angie and we'll put it on the agenda.

HONORABLE SARAH B. DUNCAN: What statute requires us to meet six times a year?

CHAIRMAN BABCOCK: What is what?

HONORABLE SARAH B. DUNCAN: What statute requires us to meet six time a year?

CHAIRMAN BABCOCK: The 1938 enabling statute of this committee.

HONORABLE SARAH B. DUNCAN: Six times a year?

CHAIRMAN BABCOCK: Yes.

JUSTICE SARAH B. DUNCAN: I was just curious.

CHAIRMAN BABCOCK: All right. Thanks everybody.

****

CERTIFICATE OF THE HEARING OF

SUPREME COURT ADVISORY COMMITTEE

****

I, ANNA RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 15th day of May, 2004, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 2190.00 charged to Charles L. Babcock.

Given under my hand and seal of office on this the 8th day of June, 2004.

ANNA RENKEN & ASSOCIATES
610 West Lynn
Austin, Texas 78703
(512) 476-7474

Anna Renken

ANNA RENKEN, CSR
Certification 2343
Cert. Expires 12/31/04
Firm Registration No. 299
Cert. Expires 12/31/04