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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

January 28, 2011

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 28th day of January, 2011, between the hours of 9:05 a.m. and 4:23 p.m., at the State Bar of Texas, Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78711.

INDEX OF VOTES

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

Documents referenced in this session

10-13 Proposed amendment to TRE 511

11-01 Restyling of TRE - TRE 504

11-02 Restyling of TRE - TRE 511 (1-20-11 draft)

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

11-03 TRCP based on FRCP 26 - Memo from J. Perdue (1-20-11)

11-04 Ancillary Proceedings Task Force draft (January 2011)

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CHAIRMAN BABCOCK: Okay. Everybody, let's get going. Everybody ready? Skip? Levi, ready to go?

HONORABLE LEVI BENTON: Yes, sir.

CHAIRMAN BABCOCK: All right, welcome, everybody, back home at the State Bar for the first time in how long?

MS. SENNEFF: Couple of years.

CHAIRMAN BABCOCK: Couple of years. Welcome, everybody, and we will start the program with, as usual, a report from Justice Hecht.

HONORABLE NATHAN HECHT: The changes in the jury instruction rules have been put out for comment, and the comments are due March the 4th. Kennon will be here later, but I don't think we've gotten very many comments on them. Then the disciplinary rules are in a referendum of the bar that started January 18 and will continue until February 17, so if you haven't voted, please be sure to vote on those.

The Court is working with the Houston courts of appeals and others to implement electronic filing in those courts, and we already have at the Supreme Court and maybe some other places the requirement that lawyers send electronic copies of things by e-mail to the Court, but that's just a courtesy copy. We do require it, but it's

not the filing. The filing still has to be done in paper. We're trying to migrate to an electronic filing system, but the state has set up the process for that where the filing goes through a central portal called tx.gov. We've been working with them to develop software to handle the filing when it gets to the courts so that it doesn't have to be manually moved around between the judges and law clerks and the clerk and whoever, and that software has been in development for a couple of years, and like most software developments, it's kind of -- the end is not yet in sight, but we're working on that, and meanwhile, I hope we'll have the Houston courts doing as much e-filing and at least e-copying as they want, and some of the other courts are moving -- seem to be moving in that direction, too. So anyway, I'm still thinking that maybe in a year or so most of the Texas appellate system will be electronic one way or another. Even the Court of Criminal Appeals seems to be moving in that direction, although they're still thinking about it, so that's the status on that, and I believe that's all I have to report, except that since we last met Jeff Boyd is now counsel for the Governor, and that's Judge Medina's old job --

HONORABLE DAVID MEDINA: Congratulations.

HONORABLE NATHAN HECHT: -- in a former life, so I think if you need anything from the Governor's

office why all you have to do is call Jeff. That's what we're going to do, and congratulations to him.

CHAIRMAN BABCOCK: Well, one other personnel matter.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Yet another member of our committee has been elevated to the judiciary. Judge Wallace in Tarrant County is now on the bench.

HONORABLE NATHAN HECHT: Right. We pointed that out in his absence in December, but that's right, good to have you.

CHAIRMAN BABCOCK: Yeah. Yeah, Levi.

HONORABLE LEVI BENTON: Justice Brown has gone back to the bench since we last met.

CHAIRMAN BABCOCK: Did we point that out?

HONORABLE NATHAN HECHT: We pointed that out, too.

CHAIRMAN BABCOCK: And he was here, but not today. So any other -- Justice Medina, anything, now that you put some food in your mouth, anything you want to say?

HONORABLE DAVID MEDINA: No, I'm here just to observe.

CHAIRMAN BABCOCK: Okay. All right. First up today is Buddy and Lonny Hoffman talking about Texas Rule of Evidence 504.

MR. LOW: Yeah. Lonny wrote to me some couple or three months back, a friend of his was looking at 504, and the language was a little bit clumsy, and I think he corrected it pretty well. It doesn't -- there's no substantive change, so if you will direct -- you should have the material on it, and if you will direct your attention to the last part you'll see what he's adding by the "accused spouse" or that spouse's guardian. It's unclear, the old rule. I think it just clarifies. If you want to look at the old rule, let me see how it read. I wrote to Judge Keller and asked her her thoughts on it back in December, and I haven't heard from her, so I guess they don't have strong objections, but you can see what they're recommending. It's not -- I think it clarifies what spouse they're talking about, what person. So does anybody have any questions?

CHAIRMAN BABCOCK: And you're referring to --

MR. LOW: Yeah, to (3) and -- to (3) and then (4)(a).

CHAIRMAN BABCOCK: All right, so --

MR. LOW: My only two changes. That identifies instead of the person's spouse, it means the accused person's spouse.

CHAIRMAN BABCOCK: All right. Anybody have

any comments about it? Talking about Rule 504(b)(1)(3) and (4)(a).

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: Is there a reason why in (3) or rather (4)(a) you continue to use "accused person," but in the changes in (3) you use "accused" and drop the word "person"?

MR. LOW: It was unclear, as I understand it -- Lonny, do you remember, did you talk to your friend about --

PROFESSOR HOFFMAN: That's a good question. I don't have anything to add on that. I don't know. I think you're -- Richard, I think you're probably right. Maybe to be consistent it would be "accused person's spouse."

MR. MUNZINGER: Or delete "person," but they are not consistent, and I didn't know if that was an intentional inconsistency or not.

MR. LOW: That wasn't intentional. I'm often inconsistent, but not intentionally inconsistent.

CHAIRMAN BABCOCK: All right. Any other comments about it?

MR. LOW: So that change may be made, and I would also recommend, of course, that the Court as they will talk to the Court of Criminal Appeals about it

because I've gotten no response. I did get a response from them on another matter on restyling the rules, and she said Judge Womack would probably be the one that would work with that.

CHAIRMAN BABCOCK: And I think he's our liaison, isn't he?

HONORABLE NATHAN HECHT: (Nods head.)

CHAIRMAN BABCOCK: Yeah.

MR. LOW: So I gather we want to be consistent and put accused -- you know, put both the same and then other than that I hear no objections.

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: So are you going to take out the "person," the word "person" in (4)(a)?

MR. LOW: I would, wouldn't you, Lonny?

HONORABLE TOM GRAY: In (4)(a)?

MR. LOW: Yeah. Yeah.

HONORABLE TOM GRAY: Okay.

CHAIRMAN BABCOCK: All right. Anything else on that rule, Buddy?

MR. LOW: No, that's all.

CHAIRMAN BABCOCK: Okay. And, Lonny, do you have something on Rule 511?

PROFESSOR HOFFMAN: I do.

CHAIRMAN BABCOCK: Okay, want to get to

that?

PROFESSOR HOFFMAN: You want to go there now?

CHAIRMAN BABCOCK: Yeah.

MR. LOW: Let me give you a little background. We've met -- Lonny has done the labor -- we met in Houston on this rule about five times and --

HONORABLE TRACY CHRISTOPHER: Buddy, would you talk a little louder?

MR. LOW: Okay. And as you will recall, the State Bar still recommends that we adopt, except some changes, the 502 that the Feds passed, which is only work product and attorney-client privilege. We voted overwhelmingly not to do that. They still want their draft to go to the Supreme Court for consideration, which they're entitled to, but our committee has recommended a broader approach, which you have voted on and since we've met Professor Goode and Lonny have had a number of conversations, and Lonny has done a lot of work on this, and now we'll turn it over to him.

PROFESSOR HOFFMAN: Okay, thanks, Buddy. Okay, so, so, so again, maybe to kind of set the table here, and get -- you know, get everyone focused on what we're talking about, so, a few years ago the Federal Rule 502 went into effect, and the administration of Rules of

Evidence committee of the State Bar of which Robert Burns is the chair, Steve Goode is a member, took it upon themselves to say, hey, we should draft a comparable version of 502 into state law, and so they put a lot of time, a lot of effort into that proposal. It eventually wound its way to the Court, which routed it to the evidence subcommittee that Buddy chairs. And so our subcommittee, our evidence subcommittee, has been looking at it, and what Buddy was just alluding to a second ago is one of the places that we diverged -- we on the evidence subcommittee of this group -- diverged from the State Bar's proposal was -- is that they wanted it only to apply to -- as the Federal rule does, only to the attorney-client privilege and to the work product protection.

So at our last meeting in December, this committee as a whole, we debated that issue. That was the only issue we talked about, and we voted, as Buddy said correctly, overwhelmingly to have it apply to all of the privileges that are in the Texas Rules of Evidence. So that's as far as we got. So moving forward, what I want to do is I want to highlight the one place that we are -- that we on the subcommittee for this group diverge from the State Bar. I'm going to highlight that, but then I'll go backwards and I'll just kind of walk through what is

new here in the rule. So, so, just to kind of as a preview of what's to come, the one place that we diverge from the State Bar folks is in section (3) on the controlling effect of a court order. So our subcommittee currently favors alternative number one, which is virtually identical to the Federal rule. It had to be modified, of course, for the state, but it's virtually identical, and we'll talk about that, and the State Bar folks are now favoring either two or three, although they voted precisely for three, and so, again, we'll plow through that in a second.

All right. So backing up, let's go to the top again. So what 511(a) is, what you see there is just a -- as a reminder, that is simply existing Rule 511 today. So that's under Tab 7 if you want to see it in the packet that Buddy prepared. So 511 as it currently exists is unchanged by this rule. It has simply been converted into 511(a). So the setup is, is that there can be waiver whenever there is a voluntary disclosure of a communication or an information, and (a) sets out that general rule. So everything after (a) is new and is meant to track Federal 502.

So starting with (b), the limit -- there are limitations on the general rule of waiver. So "Notwithstanding paragraph (a), the following provisions

apply in the circumstances set out to disclosure of a communication or information privileged by these rules or covered by the work product." So that's the framework, and then there are these four scenarios. The first is what is referred to as subject matter waiver; and I'm not going to read through it all, but the basic idea in the Federal rule here is, is that disclosure of one communication or information can result in subject matter waiver as to another communication or information; and so the Federal rule, as this does here in (b)(1), which is identical to the Federal rule, is meant to say these are the limited circumstances in which we -- the rule would allow subject matter waiver to occur to some other communication or information.

Section (2) is not in the Federal rule of 502 at all. The Federal Rule 502 has no snapback provision in it, so what the thought was of the State Bar folks that we on this committee have -- we in our subcommittee have adopted is that it would be helpful to have a reference to our existing snapback rule in 193.3(d) in the event of inadvertent disclosure.

MR. LOW: The Feds have their own separate snapback rule --

PROFESSOR HOFFMAN: That's right. That's right.

MR. LOW: -- but don't refer to it.

PROFESSOR HOFFMAN: I'm sorry, Buddy is quite right, just to clarify it. Of course, there is a Federal snapback rule in the Federal Rules of Civil Procedure. It's just 502 doesn't make reference to it.

MR. LOW: Reference to it.

PROFESSOR HOFFMAN: The feeling on both the State Bar folks' -- and our subcommittee agreed -- was that there was some marginal value to kind of having it all in the same place, and so we put in -- we concurred in their view that having the reference to 193.3(d) should be there. That said, you'll note that this provision, subsection (b)(2), doesn't do any work. I mean, it's just saying, hey, don't forget there's a section on dealing with inadvertent disclosure that's 193.3(d).

MR. LOW: And both snapback rules are general, not just the rule. They're all the privileges.

PROFESSOR HOFFMAN: Okay. So I don't know whether it makes sense to stop and see if there are questions on that or whether we should plow ahead to the place where we diverge from the State Bar. Why don't we stay -- why don't we stop for a second maybe and maybe break it apart that way?

CHAIRMAN BABCOCK: You want to talk about subparagraph (1) and see if there are questions on that?

I'm talking about (b)(1). Yeah, Gene.

MR. STORIE: I had some concerns generally about how this would work with disclosures to state officials or agencies, so -- and I've got maybe two or three questions on that, because I think generally now you're protected because your disclosure is likely to be privileged by some statutory privilege. So, for instance, when the comptroller is getting tax information that's still protected by privilege because there's a statutory privilege for information the controller learns in an audit, and I'm not sure what subsection (b) does to that protection.

MR. LOW: Lonny, that was one of the first things -- this thing came to me under 503, and -- from the State Bar, and I looked through it and said, look, you need to make it part of 511, because basically what we have -- we have privileges. Not every privilege is in the rules. Work product is in the procedure, there might be statutes. Then from privilege then we have waiver. Work product has its own waiver and so forth we deal with on the rules. Now we're dealing with limitation on waiver, so it's a three stage thing, and I raised -- I said why didn't y'all put that -- and I'm sorry, it was more than two days ago, so I can't remember their reasons, but they had some pretty good reasons why they didn't want to

put -- put that in there, and that committee worked like longer than I did, and whatever their reasons I kind of abandoned it after that. That's not an answer, I realize.

PROFESSOR HOFFMAN: The only other thing I'd say, if I understand your question correctly is -- let me back up and make sure I understand your question. You're saying if you made a disclosure and it wasn't a waiver of the privilege because there's a specific statute that grants immunity, it says -- it says, you know, you give this document to the agency it will not be deemed to have been a waiver of the privilege. Is that -- do I understand you right?

MR. STORIE: Yeah, it's fairly global actually. In the example it's information the comptroller learns in the course of an audit, so that would be Federal tax returns, contracts, trade secrets, anything like that.

PROFESSOR HOFFMAN: So, so if that's the case then I think the answer to your question most directly is that (b) doesn't speak to that. In other words, (b) is only speaking about limitations on things that would otherwise be waived, so just look at the beginning language then in (b)(1). "When the disclosure is made in" -- and let's take your example, "a state agency, and waives the privilege or protection," well, if the statute doesn't result in waiver of the privilege or

protection then (b)(1) just has no application, and so the opening sets the framework on that. So I think that's the most direct answer.

MR. STORIE: I hope it is, and that's what I was thinking, too, would be one possible way out of it, and then my follow-up question would be what is the value of the phrase "notwithstanding paragraph (a)"? Because that's what caused me some concern that that was taking out the protection that's in (a)(1) right now.

MR. LOW: I think it means that whatever interpretation you give this is to apply, but, see, basically Rule 1 says -- of evidence says, "Except otherwise provided these rules govern civil and criminal proceedings," and I think that means court, court proceedings.

CHAIRMAN BABCOCK: Justice Gray, and then Richard.

HONORABLE TOM GRAY: To follow up on the first question, it seems to me that if the privilege is from a statute the problem still exists that was raised because in the lead-in under (b) it says, "communication or privilege by these rules," and if the statute or the regulations of the IRS or some other government agency is defining the privilege, that privilege is not under these -- recognized or not created by these rules, and the

disclosure is not made under these rules, and therefore, it wouldn't seem to be protected by this limitation, if I've got the stairstep correct, and Gene's concern seems to continue to exist because of that phrase in the lead-in.

CHAIRMAN BABCOCK: Notwithstanding, yeah. Richard.

MR. MUNZINGER: I was going to make the same point the judge made.

CHAIRMAN BABCOCK: Great minds think alike. Okay. So, Lonny, is that a problem?

PROFESSOR HOFFMAN: I don't know. I mean, I'll give you, again, my sort of immediate answer and then we could -- others could jump in, but, you know, there certainly may be a statute that grants an affirmative grant of a privilege, but I think more often the example that -- and indeed to stay with the example that you use, Gene, I think the privilege is granted by the rules, and then the statute only ensures that the disclosure of a document doesn't result in the loss of that privilege; and so, again, there could be a statute that grants a specific privilege that is outside of the rules to which, if that were to be the case, then 511 simply has no application to that, because the provision is limited only to communications or informations, you know, privileged by

the rule.

So, so as I say, just to break that down, I think there's two answers. One is to the extent the privilege is created by the rules itself, which I think is most often likely to be the case, and you just have the statute that does whatever cloaking, you know, immunity cloaking that it does, so that the disclosure doesn't result in the waiver of that rule-based privilege, then I think that's the immediate answer. The second point is to the extent that the privilege comes from outside of the rules, I think 511 is inapplicable. We don't purport to reach privileges not covered by the Rules of Evidence. You know, they are created by some other law.

CHAIRMAN BABCOCK: Buddy, and then Richard Munzinger.

MR. LOW: That language came from the State Bar after much deliberation. Now, they deviated -- you look at Tab 1 of what you have, the Federal Rule says -- it does not say that. The Federal rule doesn't say, well, notwithstanding because they don't have that paragraph. They say, "The following provisions apply." Now, because -- they don't have Rules of Evidence. The only rule they had was 501, which said when Federal would apply. They don't have listed rules like we do, and so I'm assuming that's why they didn't refer to that, because

they don't have an (a). They had 501 and now they've got 502, but you'll notice they don't have that -- that "notwithstanding paragraph (a)" because they have no paragraph (a). In fact, paragraph (a) I at one time thought, well, you know, it said that "Under these rules" and I wanted to put "work product" or under the civil and then it was pointed out to me that -- that many of the waivers are not or privileges are not in these rules and we need to deal strictly with what 502 did, put limitation on waiver. 502 doesn't create privileges or anything. It limit -- it just says "waiver" and refers if something is attributable to another thing or related to then that's waived, so it just puts a limitation on waiver, but --

CHAIRMAN BABCOCK: Orsinger, then Munzinger.

MR. ORSINGER: My comment is at a very general level, and that is that I've always been troubled by the fact that the work product doctrine is not covered by a rule of privilege, and those of you who are scholars on the Rules of Evidence, correct me if I'm wrong, but as I recall way back to the Texas Rules of Evidence, we adopted the chapter on privileges that had been proposed at the Federal level but was rejected by the U.S. Congress, and the U.S. Congress' attitude was privilege ought to be something that's derived out of state law and if there are any Federal privileges they ought to develop

under the common law concept of incremental court decisions. So we had a model at the Federal level that never got implemented but we adopted it at the Texas level.

In the meantime, the work product doctrine pre-existed the adoption of the Rules of Evidence and, therefore, the rules of privilege in Texas, and it existed in the case law and under the Rules of Civil Procedure, which I believe is where the work product doctrine still is defined, is in the Rules of Civil Procedure.

MR. LOW: 192.5.

MR. ORSINGER: So I've always looked at the waiver rule, 511, a person upon whom these rules confer a privilege as not actually applying to the work product doctrine because the work product doctrine is not a privilege under these rules; and as Lonny was saying a minute ago, really literally, if you read this, if it doesn't arise under these Rules of Evidence then it's not waived under Rule 511; and that's always bothered me, but the courts in Texas have treated the work product doctrine, which is actually part of the discovery rules, as if it's a rule of privilege. A discovery rule might keep you from doing discovery about work product, but a discovery rule wouldn't keep you from raising on cross-examination in the middle of a trial some issue

that's protected by work product that has nothing to do with discovery now that you're in trial and you're in under the Rules of Evidence.

And so the Texas courts have kind of just treated work product as if it was a privilege that applied in trial as well as to pretrial discovery, and we've just kind of carried on and not worried about it, but now all of the sudden under this amendment (b) we have a general Rule 511(a) that says waiver occurs for privileges under this rule, but now (b) says but that's limited insofar as work product is concerned, and now so for the first time our Rules of Evidence under 511 proposed (b) limit the scope of a waiver as applied to work product that isn't even governed by Rule 511(a). And so in my opinion we now have reached the point where we can no longer continue to ignore this dichotomy that the work product doctrine is under the Rules of Procedure and privileges are under the Rules of Evidence. We're now bringing the procedural-based privilege as an exception to a waiver that doesn't even apply to it, and it's -- it makes no sense.

So if we're going to do this, in my opinion, we ought to go ahead and just lift the stuff out of the Rules of Procedure that define the work product doctrine and stick them here in Chapter 5 of the Rules of Evidence

and then it will all make sense. That's always bothered me, and now I think it's acute.

CHAIRMAN BABCOCK: Okay.

MR. LOW: Richard, would you put the snapback rule here, too? I mean, the snapback rule, would you put that -- where would you put it?

MR. ORSINGER: Well, the snapback rule naturally to me is an issue of discovery because that's when you're producing records, not so much --

MR. LOW: It is discovery, but privilege is a part of discovery, too. You don't discover privileged things.

MR. ORSINGER: Well, I'm not in favor of bringing all of the discovery procedural rules into the Rules of Evidence.

MR. LOW: Okay, all right.

MR. ORSINGER: But in my personal opinion the work product doctrine is really a privilege, and we treat it like a privilege even though it's not defined as a privilege.

MR. LOW: Well, it was not a privilege at first.

MR. ORSINGER: It wasn't?

MR. LOW: No. It was -- and the Supreme Court called it a privileged -- that language is used, but

it was called work product protection. It was not listed as a privilege, and we face that because it technically originally was not a privilege. It was protection, and the Supreme Court -- we treat it as a privilege, and the Supreme Court called it a privilege in one of the hospital cases. I have a copy of it. I don't remember the case, but it's not truly -- traditionally it was not a privilege. Now, I call it a privilege, but I call a lot of things something they're not.

CHAIRMAN BABCOCK: What did the U.S. Supreme Court refer to it in *Hickman V. Taylor*? Did they call it a privilege, or did they just say it's a doctrine?

MR. LOW: I can't remember. I need to go --

MR. ORSINGER: I think they call it a doctrine.

CHAIRMAN BABCOCK: Alex, do you know?

PROFESSOR ALBRIGHT: I think they call it a doctrine. It's a doctrine of common law that protects against disclosure, so I would argue that even in trial you can invoke it to protect it against disclosure, even though we now -- it's codified, the common law doctrine was codified in the Rules of Procedure. One reason it's in the Rules of Procedure instead of the Rules of Evidence is the work product doctrine protects the adversary system. It does not protect a relationship where the

privileges -- the evidentiary privileges protect confidential relationships like the attorney-client privilege. The work product doctrine only really protects the adversary system. It's an adversarial issue, so I think that's one reason that it's kind of getting chipped away in some ways, because we're trying to get kinder and gentler and less adversarial, but it's still a very important privilege for our adversary system.

MR. ORSINGER: Maybe a better solution is to not limit the 511 waiver under (a) to privileges under the rules and let's just go ahead and treat 511 as a general waiver of privileges wherever they derive from, whether they be a statutory privilege or whatever. That's another possibility.

PROFESSOR HOFFMAN: So on that particular point, Buddy actually suggested that exact one, and we looked at it and Steve Goode and I talked about it. One of the challenges is, is that the general rule on when something is waived by voluntary disclosure is different for work product than it is for other privileges. In other words, there is a work product waiver that is -- you know, as you know, it has other features to it, and it's not captured by (a)(1) and (a)(2).

CHAIRMAN BABCOCK: Yeah. You can overcome it for good cause, work product.

MR. ORSINGER: Well, the justified court-supported discovery is different from voluntary waiver. Are you saying, Lonny, that you can't voluntarily waive the work product doctrine without meeting some peculiar standards to that doctrine?

PROFESSOR HOFFMAN: I guess I'm probably not saying that, but what I am saying is, is that we aren't accurately describing the law if we -- I think we run into a problem. It just doesn't fit if you just add in work product to this long-standing rule about waiver of other privileges, and so --

MR. LOW: There's nothing in the rule that says -- I mean, work product, I share a joint defense. That's not in the waiver rules. That's just -- I don't know where it is, but you can engage in joint defense, you don't have to give it up. There's so much that are not in the rules that are just out there, it would take a big rope to try to reach around and grab all of them.

CHAIRMAN BABCOCK: Richard Munzinger, you had your hand up before.

MR. MUNZINGER: Just to point out that there are privileges obviously that are not just privileges created by these rules.

MR. LOW: Right.

MR. MUNZINGER: There are statutory

privileges, common law privilege, and both subsections (a) and (b) limit themselves to privileges either created by -- to privileges created by these rules and on their face would not apply to --

MR. LOW: Right.

MR. MUNZINGER: -- statutory privileges, any common law privilege were there to be such a thing, and obviously the work product privilege, and that -- I don't know if that is an intent that we want to carry forward and the Court wants to carry forward, but it's there.

MR. LOW: But, see, Richard, the reason is some of these privileges are created -- we don't know all of them, statutory, and they have their own remedies and waiver, and we don't want to get into those things, and like work product has -- as they pointed out to me, I wanted to change (a), and they said, no, work product has a different connotation. It originally wasn't even a privilege. It has -- it has its own body of law where we can share with somebody else the common defense and so forth. So that's why we tried to limit it, and we didn't want to go into creating -- there's waiver -- I mean, there's privileges. We didn't want to mess with whatever is out there. There's waiver. Some of those we didn't want to do. We wanted to confine ourselves to the rules and to what the Federal court did, and that is limitation

on these waivers, and that's what we're trying to do. You can get into a whole ball of wax, and I'm not saying it doesn't need to be done. You know, I'm not -- okay, I'm sorry.

MR. MUNZINGER: No, no, I just was -- I would like to comment along with what you're saying.

MR. LOW: Yeah, go ahead.

MR. MUNZINGER: When you go -- anybody who goes to court and pleads a privilege, whether the privilege is one created by a statute or one created by the rules, the visceral reaction of the judge is going to administer the claim of privilege or the argument over privilege by application of these rules, and the judge should because these are rules that govern the courts and the court's activities, and so whether or not the rule specifically or doesn't specifically mention or recognize privileges, be it work product or a statutory privilege, these rules are going to be applied by the court, and they would have to be applied by the court.

MR. LOW: It applies only to the privilege that is created by these rules under the 500 series.

MR. MUNZINGER: If I were a judge and you made that argument to me, I would say, "Fine, we're dealing with a statutory privilege here from the Comptroller of Public Accounts. What's the rule that

tells me how to handle this, Mr. Low?"

MR. LOW: I would refer that to a court with more knowledge.

MR. MUNZINGER: Yeah, but my point is a judge is going to say, "Well, this is a rule I'm supposed to honor."

MR. LOW: Well, if he reads it, it wouldn't. If it's a statutory privilege and it says "governed by these rules," you say "It's not in these rules."

"Well, I don't understand what that means." Yeah, he does.

CHAIRMAN BABCOCK: Well, Buddy, doesn't that get back to the discussion we were having a minute ago, that if Richard is coming into court and arguing that the statutory privilege or the work product privilege is governed by 511(b), his argument would be, sure, 511(a) says "under these rules," but then (b) says "notwithstanding paragraph (a)."

MR. LOW: Well, I can't answer that question, "notwithstanding paragraph (a)." That may need to go. I don't know.

MR. MUNZINGER: It still says "privileged by these rules," though, in the opening paragraph to subparagraph (b).

CHAIRMAN BABCOCK: "Or covered by the work

product protection."

MR. MUNZINGER: Yes.

CHAIRMAN BABCOCK: So it expands it to that degree.

Okay. Good point. Yeah, sorry. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I understand that what we're trying to address in (b) is subject matter waiver, is my understanding --

PROFESSOR HOFFMAN: In (b)(1).

HONORABLE TRACY CHRISTOPHER: -- and we're talking about undisclosed --

PROFESSOR HOFFMAN: In (b)(1).

CHAIRMAN BABCOCK: In (b)(1).

HONORABLE TRACY CHRISTOPHER: Yeah, in (b)(1). But we don't explain that there is subject matter waiver in (a). (a) only talks about things you've actually disclosed.

MR. LOW: See, (a) was not --

HONORABLE TRACY CHRISTOPHER: So to say that (b) is a limitation on waiver when in (a) we don't have subject matter waiver, it doesn't logically make sense.

HONORABLE TOM GRAY: In fact, as I read it, it seems to me that (b)(1) is an expansion of what the waiver reaches, not a limitation, and that's part of the

confusion I think that is created with the labels and where it is located.

CHAIRMAN BABCOCK: Lonny, do you think it's an expansion on (a)?

PROFESSOR HOFFMAN: I mean, I think both are good comments. I mean, the subject matter waiver is as a common law. It's not from 511.

MR. LOW: Right.

PROFESSOR HOFFMAN: And, of course, on the Federal side they had no -- there was no equivalent to 511(a), so that, again, was a subject matter; and the effort was to limit where the case law was going, because the case law was split; and there were some courts that allowed subject matter waiver to happen in circumstances where the waiver wasn't intentional, where there weren't fairness considerations, et cetera; and so the bid, of course, at the Federal side was the reason they call it a limit was it was a limit beyond the somewhat expansive reaches that at least some of the courts had reached as to when you could have subject matter waiver; and so that's why they called it what they did; but at the same time I think both comments are well-taken.

There is no subject matter waiver here, and we don't reference the fact that it could happen by common law already. I mean, I think the answer to your question,

the reason why it's still a limitation again, is, again, the common law could be more expansive as to what would count as a subject matter waiver and it now would have to yield to 511(b), and I think that that's the way it would work, but it's a little hard to get there, so I don't have an answer, but that's -- I agree with the problem.

CHAIRMAN BABCOCK: Yeah, Richard Orsinger.

MR. ORSINGER: I think that the concept works okay on the Federal side because they don't purport to limit the source of the privilege, but on the state side the whole premise to this waiver concept is the rules of privilege that are in the Rules of Evidence, and it seems to me like we've got to do something. We either need to deal with the concept of waiver in the Rules of Evidence and broaden it out, or we've got to decide what we're going to bring into the Rules of Evidence that's not already there. But if we adopt a rule like this, where it has logical inconsistencies and invokes common law and statute indirectly on limitation of a waiver that doesn't even apply, all that, that's going to lead to litigation and confusion I think for a long time.

MR. LOW: Richard, how do you construe 501 of the Feds?

MR. ORSINGER: I don't have a copy of that in front of me.

MR. LOW: You do, too, because it's in the material I gave.

PROFESSOR ALBRIGHT: Can I correct some -- Richard, 502, Federal Rule 502, applies only to attorney-client privilege or work product.

MR. ORSINGER: Yeah, but they don't source it. I mean, that comes out of the common law, state law.

PROFESSOR ALBRIGHT: Right, because they don't have privilege rules.

MR. ORSINGER: Exactly.

MR. LOW: 501.

PROFESSOR ALBRIGHT: So, yeah, so it's -- so they have attorney -- so this is -- it doesn't apply to statutory, other statutory privileges or any other kind of privileges, the way I read it.

CHAIRMAN BABCOCK: Yeah, Lonny.

PROFESSOR HOFFMAN: So, again, I guess my question that I would throw back to both Tracy and Tom, and I think it would be the same question back to you, Richard, is recognizing that it's not perfect, I mean, that there are these sort of clumsy places in which (a) doesn't quite fit with (b) and (b) is not only a limitation in sort of the way Tracy was describing, all those various ways, what are the practical consequences of adopting it this way, and let me ask that question again.

So, so imagine the circumstances you were describing. Let's stay with the subject matter for a second. Okay. So we now have a rule that says this is when there is subject matter waiver. That's (b)(1). What is the -- what's the concern by not making any reference, such as Tracy was suggesting a minute ago, to having what the terms are for subject matter waiver in (a)? As I see it, I think the way it plays out is the common law results in waiver or it doesn't, you know, of -- you know, that happens, and now the question is, is there waiver that would extend to some other thing, you know, in subject matter, some other communication or information, and you go to (b)(1) and you get your answer there. If it was intentional and disclosed together in fairness then, yes, there is, and if you don't meet those three elements then, no, you're not, and you're done.

Again, it isn't -- so, again, my question is, I understand that it isn't perfect, I understand that there's sort of a square peg/round hole or whatever problems we have in trying to take 502 and put it into a system that isn't set up the same way fundamentally because the rules are in there, but what's the downside to it?

CHAIRMAN BABCOCK: Yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, isn't

(b)(1) -- the idea of (b)(1) is already in our common law in connection with subject matter waiver, isn't it?

PROFESSOR HOFFMAN: So I'm not an expert on that. I can't tell you whether the states -- our state courts have diverged in the same way that the nationwide courts were doing, so I'd have to defer to someone else. I don't know what the law is.

HONORABLE TRACY CHRISTOPHER: To me it would make more logical sense to say there is subject matter waiver, and it can be limited, you know, for A, B, C, because otherwise we're referring back to case law to determine whether there was subject matter waiver to begin with, which isn't even called that here anywhere.

PROFESSOR HOFFMAN: No, no, I don't know. In other words, whatever the law is on subject matter would now be superseded by (b)(1). In other words, I don't know where the law is, but this is where it would go. We would now have subject matter waiver only in these circumstances.

HONORABLE TRACY CHRISTOPHER: Well, then this should be called an extension on waiver, that it extends to undisclosed communications, if -- you know, if certain things are met. I mean, the way it's written is confusing to me.

MR. LOW: The reason many courts applied

that if you -- one document, attorney-client, you waive the whole attorney-client privilege. All right. It should be related to. This is a limitation on it, so the courts were all over the board on that, and many of them applied, well, is it necessary to go with this, and some said, "No, you waived it, waiver can't be retracted." I mean, you waived everything, so they were trying to limit what was waiver. It had to be related to or necessarily to follow. In other words, to add further to the confusion, which I don't understand, the Texas Supreme Court under Musgrove says the Rules of Evidence are procedural provisions, pretty substantive to me. The Fifth Circuit says the same thing. What does that mean? I don't know.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Don't you eliminate the confusion if you just make (b)(1) a standalone?

MR. MUNZINGER: Couldn't hear you, Judge.

HONORABLE NATHAN HECHT: Don't you eliminate the confusion if you just make (b)(1)(b) and then put (2) and (3), if they fit, under (4), notwithstanding?

MR. ORSINGER: And take away the title "Limitations on waiver" in the process --

HONORABLE NATHAN HECHT: Yeah.

MR. ORSINGER: -- because it's really

defining the waiver and limiting it.

HONORABLE NATHAN HECHT: Maybe it applies to (2), (3), and (4), but it seems to me it removes all the confusion if you just have a standalone paragraph on subject matter waiver.

HONORABLE TOM GRAY: Maybe we could even call it "Subject matter waiver."

PROFESSOR HOFFMAN: Well, an early draft of ours did that, exactly what you just said.

MR. LOW: We've been all over the board on this, I can tell you.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Why -- and maybe I just don't understand subject matter waiver well enough, but why is this a disclosure limited to a disclosure made in a Federal or state proceeding? What if, you know, before litigation begins a client reveals some attorney-client communication?

MR. LOW: Rule 1 says it applies only to court proceedings.

HONORABLE TRACY CHRISTOPHER: But --

MR. LOW: That rule is -- what we put in the rules --

HONORABLE TRACY CHRISTOPHER: But, like, I mean, we -- attorney-client privilege exists before a

lawsuit is filed and we look to the attorney-client privilege rule to determine its extent, so --

MR. BOYD: (a)(1) isn't limited that way.

PROFESSOR ALBRIGHT: It's not confidential, though.

MR. BOYD: (a)(1).

PROFESSOR ALBRIGHT: It would not be privileged because it's not confidential.

CHAIRMAN BABCOCK: You've got to talk up.

HONORABLE TRACY CHRISTOPHER: What I mean is, is so the client reveals, "My lawyer told me A before the case ever goes to trial." Well, then they want to say, "Well, what else did your client" -- you know, "What else did your lawyer tell you," and it seems to me that we would -- we would still want to have these same rules, the disclosed and undisclosed communications concerning the same subject matter, and they ought in fairness to be considered together, but the disclosure was not made in a Federal or state proceeding. It was -- it happened before that. I just wonder why we're limiting it to a disclosure made in a proceeding.

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: I'm also concerned about the whole concept of Federal and state proceedings when it comes to arbitration. Some arbitrations are preceded by a

lawsuit filed in a court with a referral and some wait until after the arbitration is concluded to file in a court to have the arbitration award reduced, but the same standard seems to me would apply in an arbitration context as it would in a courtroom hearing or trial as well as to the pretrial events that Justice Christopher is talking about, so it seems to me if the concept is valid it shouldn't apply to just waivers that occur in the courtroom. They ought to apply to waivers that occur before a lawsuit is filed or that occurs in an ancillary proceeding like arbitration.

CHAIRMAN BABCOCK: That's what Judge Christopher was saying, I think. Right?

HONORABLE TRACY CHRISTOPHER: Yeah. We're agreeing.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: And he was giving another example, I think.

CHAIRMAN BABCOCK: Yeah. Justice Hecht.

HONORABLE NATHAN HECHT: Well, there is a difference. I mean, a disclosure made in a proceeding might be to gain advantage in a proceeding. You're only disclosing part of it and you're trying to conceal part of it so that you can gain advantage, but a disclosure that's made apart from any litigation, there's no way to know if

you're gaining advantage or not. So why should that have broader effect because -- when it's just in the abstract and there's no way to gain advantage from it?

HONORABLE TRACY CHRISTOPHER: So are you saying there's no subject matter waiver if the disclosure is before litigation?

HONORABLE NATHAN HECHT: Well, maybe not, but I'm just saying they're different.

CHAIRMAN BABCOCK: But if Lonny and Carl have got an attorney-client relationship, Carl's the client; and he gets a bunch of advice from Lonny and then he goes to Buddy, who is a third party not related to that, and says, "Hey, my lawyer just told me that A, B, and C and D, and so therefore, I'm going to do something"; and now I call Buddy as a witness at trial and say, you know, "Mr. Low, isn't it a fact that Mr. Hamilton, you know, told you what his lawyer said about what we're at trial at?" And now can he testify or can Lonny jump up and say, "No, your Honor, that's privileged, and that was done before there was ever a lawsuit, and there's no waiver, and you can't -- you can't have that testimony"?

PROFESSOR HOFFMAN: I mean, I think there probably is waiver in that circumstance because it was a disclosure of a third party, but I guess maybe a more immediate answer is, is that nothing in (b) would apply to

that, meaning (b) only kicks in when there has been a waiver already, governed by some other law.

CHAIRMAN BABCOCK: And Tracy and Richard's point are why not, why wouldn't (b) cover that?

PROFESSOR HOFFMAN: I guess it could. As Justice Hecht was just saying, it feels like those aren't exactly the same, but whether they are or not, I mean, this is just -- this is making the choice to say in these circumstances. In other words, we're going to deal with subject matter when the disclosure has been made in a proceeding. We could make a bigger rule, so that one of the biggest contexts this arises in I've discovered is it turns out that -- and this came as a total shock to me, so it may come as a shock to many of you that, you know, a business issue -- let's say a merger. One company wants to look at the other company's stuff, in the course of due diligence learn about the company. It turns out that that law is remarkably unprotective of the information you share with that other company. You would think, "Well, you know, tell me if you're involved in any lawsuits, let me see what your lawyers have said to you about potential liabilities. I need to know before I buy your company." It turns out that there's some protection there, but it's not as absolute as maybe I would have thought in the abstract it ought to be.

That's all preproceeding, and the answer to whether that's good or bad law turns out to be a totally different conversation if we go with (b)(1), which is to say (b)(1) only applies when there's been a proceeding and so wouldn't govern, for instance, in that merger example I just gave or any others preproceeding. Now, maybe we should expand it and try to bite off more than we've already bitten off. It just feels like we already have a mouthful, so --

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: Chip, there's no rule of waiver. Waiver is out there all over. There's not one place you can go to and said, you know, this is a waiver of this, this is a waiver, so there are certain privileges that are created by the Rules of Evidence, but as to exactly what is a waiver, work product, that's not -- I mean, the joint defense, so forth, that's not a waiver, but there's no body that says that. That's just a court law thing.

CHAIRMAN BABCOCK: Common law.

MR. LOW: Common law, yeah.

CHAIRMAN BABCOCK: Okay. So where does this leave us, Lonny? It looks like a mess.

PROFESSOR HOFFMAN: Well, I mean, as I said in my question before when I was asking to -- when I was getting -- you know, these are things that are somewhat

inelegant, but I still haven't heard why we shouldn't -- in other words, I'm happy to hear, but so far all I've heard is, well, it could create some confusion. I think Justice Hecht's suggestion, which again we toyed around at one point about, of making (b)(1) its own standalone and then having what are now (b)(2), (b)(3), and (b)(4) be three different examples of limitation on waiver might be one way to go, and we could tinker with that, but even leaving it as it is, you know, there's all kinds of things that are sort of confusing in life that lawyers just sort of figure out. I mean, the one thing that jumps out about this is this is the -- you know, if we adopt -- if the Court were to adopt this, this is -- I think the largest message out of this, the headline, you know, in the *Texas Lawyer* would be "Rule 502 Comes To Texas," and so the big message here I think isn't confusing. It's there are now ways that you can reduce your discovery costs in terms of -- you know, the whole purpose of 502, right, is to try to reduce these privilege review costs that are astronomical in big cases, and so here -- here's the Supreme Court's effort to, you know, adopt that at the state level.

CHAIRMAN BABCOCK: Let's talk about that for a minute. I'm sorry, Alex. Go ahead.

PROFESSOR ALBRIGHT: I just -- I mean, just

looking at it again, I think one reason this is so confusing is because it's kind of written in Federal rule speak, which gets more and more dense as time goes on I've found. Tracy and I have been talking, and I think I've finally kind of figured out what this rule is talking about, is okay, (a), the general rule is a general rule of disclosure that applies to all privileges of the -- in the Texas rules, all relationship privileges. If you disclose it then you in effect destroy the confidential relationship and, therefore, you've waived the privilege. It does not say the extent to which that waiver -- apparently we have left that to common law to the courts to decide the extent of that waiver.

MR. LOW: Right.

PROFESSOR ALBRIGHT: (b), it's called "Limitations on Waiver," which is a little weird, but then what it really is talking about is litigation waiver, discovery waiver, whether it be in a Federal or state court or agency, so if you're in a dispute and in a proceeding before a governmental body and you are doing discovery and making disclosures and if you give over in discovery something that's privileged, under the Federal rule it's only attorney-client or work product. Here it's -- could be husband-wife, penitence, you know, whatever all those privileges are, but so the -- so I am

producing documents, and I produce a document that's protected by the attorney-client privilege.

Then the rule says, well, subject matter waiver applies if it's an intentional disclosure and you should -- that's subject matter waiver, but if it's an inadvertent disclosure, go look at the state rules. If it's in a -- actually should be "Texas state court proceeding." I mean, it doesn't really apply to the rules of -- or any proceeding in which the Texas Rules of Civil Procedure apply? I don't know. So but that kind of helps me understand the purpose of this rule. Is that correct?

PROFESSOR HOFFMAN: Yeah, everything you said.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: The scope of proceeding was another question I had about state agency practice. You'll almost certainly have an administrative hearing, you may have some other sort of proceeding which would not invoke any of those Rules of Civil Procedure, so whether it be a deliberate or an accidental disclosure, I think you might possibly have some vulnerability under the rule as drafted.

PROFESSOR HOFFMAN: I'm sorry.

CHAIRMAN BABCOCK: Judge Christopher.

PROFESSOR HOFFMAN: Can he elaborate on that

point? I didn't follow.

MR. STORIE: Yeah. I was thinking in particular of (b)(2). If it's an inadvertent disclosure, if you could snap it back under 193.3(d) that would be peachy, but if you're in an administrative proceeding with a state agency you don't have that option. So even your mistaken disclosure of attorney-client privileged communication might all of the sudden be open because you don't have a way to snap it back under the agency rules.

CHAIRMAN BABCOCK: Justice Christopher, then Carl.

HONORABLE TRACY CHRISTOPHER: I think to answer Lonny's question, my response would be does this rule help us in any way, or will it make it more complicated? Has our case law gotten to the point where we have expanded subject matter waiver too much or if -- you know, is there a case out there that says if you snap it back in one proceeding it's not privileged in a second proceeding. I mean, that's my question, does it advance the ball. I mean, y'all are talking about inconsistencies, but I think that's in, you know, Federal court.

MR. LOW: Well, one of the things you get by it is the -- we call it a limitation. Maybe that's not what it should be called, but it is when the courts want

to say you've waived everything, has to be related to. That provision is not -- I mean, there's some confusion on that --

HONORABLE TRACY CHRISTOPHER: But that's my question. I don't know of cases that say you waive everything.

MR. PERDUE: Yeah, I don't know of a state case that says that.

HONORABLE TRACY CHRISTOPHER: I mean, all the state cases, you know, it's pretty tailored as to what they say, you've waived if you disclose this.

MR. LOW: No, I don't think -- and that is exactly what the Federal committee said. It was, you know, all across the board.

HONORABLE TRACY CHRISTOPHER: In Texas? Not other states. I'm talking about in Texas is our case law confusing and too broad.

MR. LOW: I haven't researched it. I assume that if it exists all over the United States that possibly Texas would not be an exception. Maybe they are. Maybe the Texas courts are so clear, but that was one of the things that I accepted, and maybe I shouldn't have.

MR. JEFFERSON: But the goal, the one good -- maybe very good thing about the rule is it does allow litigants to enter into agreements with the cover of a

rule that can allow for freer discovery, and that is a huge problem now.

MR. LOW: Right.

CHAIRMAN BABCOCK: Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: Lonny, would it look more like a limitation if instead of saying "waiver extends" you say "waiver does not extent unless"? And then along the lines of simplifying the language and maybe making a broader rule, what if you just started with the word "waiver" and take out when disclosure occurs. So now you're limiting -- you've said what occurs in (a) is a waiver, and now you're coming here and saying waiver does not extend unless. Does that make it look more like a limitation, or is that just going too far?

CHAIRMAN BABCOCK: Lonny.

PROFESSOR HOFFMAN: I don't know how to answer. I mean, I don't have a good answer in the abstract. I mean, at one point early we toyed around with using that same header, just "Waiver" and that produced a very strong reaction from the State Bar folks --

MR. LOW: Right. Right.

PROFESSOR HOFFMAN: -- that we were not only departing from the Federal rule but misunderstanding -- we were -- we were now distorting Texas law on waiver, and ultimately our group was convinced that we weren't trying

to change the law of waiver, we were trying -- in what creates a waiver, though, obviously the obverse of what we do sort of has that effect in a sense, so we ultimately became convinced it was better to track the Federal rule as it is. I don't have an answer for Tracy's comment that -- it's a good one as well.

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: I was going to make two points. I'm not clear right now whether this actually is an expansion of existing waiver law in Texas or not, could be, and if we do adopt a rule that's identical to the Federal rule then what that means is that the Federal decisions are going to lead our decisions here in Texas because as these circuit courts start handing down their interpretation of Federal law they're going to get quoted in Texas courts, and so Texas is going to get to follow the Federal law on the subject. I'm not sure we want to do that. I think we should ask ourselves whether we want to adopt all the circuit court rulings as part of the important common law of Texas.

And if this is a separate standalone thing, I'm concerned that the concept of voluntariness is no longer included. Voluntariness is an essential element of waiver under 511. If this is a separate waiver rule, which it appears to me -- I'm confused as to whether this

is a limitation of a waiver rule or a creation of a new waiver claim that has a definition -- that has limits defined, but I'm concerned about a court ruling that requires someone to reveal information incorrectly and in compliance with the court order they obey, and therefore, it was intentional but it wasn't voluntary. So if we're going to draft this so that it's not derivative of 511(a) then I would like to see the word "voluntary" inserted in 511(b)(1)(a) so it says the waiver is voluntary and intentional because voluntariness is in my opinion extremely important.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: We've already said that the Federal rule doesn't have an (a) in it, and the Federal rule specifically says it's work product and attorney-client privilege, but when you go over to the comment, it says that 511(b) makes clear that it only governs waiver of the lawyer client and work product the failure to address other waiver issues regarding other privileges, so by the comment the rule is not intended to address other privileges other than attorney-client or work product, and I'm not sure whether that's just an incorrect comment or --

PROFESSOR HOFFMAN: That's a mistake. In other words, that's pre-our vote from our last committee

meeting. We should have dropped that out of the comments.

MR. HAMILTON: Okay.

MR. LOW: Chip?

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: With regard to Richard's point about voluntary and inadvertent and so forth, I invite him to read Grenada Corporation by the Supreme Court and --

CHAIRMAN BABCOCK: I love it when you cite the law.

MR. LOW: -- 844.223, and it shows you the confusion. It says inadvertent production is distinguished from involuntary production, "A party who permits access to unscreened documents," and it adds to the confusion, so we dealt with that, inadvertent, voluntary, the Supreme Court -- I mean, the State Bar committee dealt with that, and we were aware of the confusion that these terms create. Read that opinion, and you'll -- you'll be more confused.

CHAIRMAN BABCOCK: Well, was -- were one of the authors of that opinion here?

MR. LOW: No, it was no member of the Court right now.

CHAIRMAN BABCOCK: Okay. Lonny, something that you said I think might merit a little bit of discussion, which was the -- one of the purposes behind

this rule is to alleviate the burden of screening these masses of documents that are produced now in discovery with electronic discovery. Could you elaborate on that?

PROFESSOR HOFFMAN: Sure. I mean, that's the primary motivation behind 502. The primary motivation that the Federal rule-makers had was a concern that there wasn't enough protection to deal with that problem that when you had inadvertent disclosures because there was just too much stuff to look at that, there was nothing that could be done about that, and so now it sets up a system, you know, as Lamont was talking about, where you have, you know, express grant authority for parties to agree and if you get that agreement incorporated into a court order at the front end it can even prevent against waiver in other proceedings when there's been that not as careful review in an effort to save costs, so that's the idea. That's the -- that's probably the animating idea behind 502.

CHAIRMAN BABCOCK: Okay. Yeah, there's -- as some of you know, probably most of you know, there's a huge debate going on about review of electronic information, and some clients are saying that the law firm should not review it at all. I mean what you just were talking about, the situation where there's, you know, two million documents or pieces of data and something slips

through and there ought to be protection for that. There are companies, clients, that say, "Well, we don't want lawyers looking at this at all, and if something slips through then you're going to get it back for us," and that's to me dangerous for the law firm if you accede to that without some sort of agreement.

And then there are other clients that say, "Look, we're going to" -- "We're going to outsource this." You know, "We're going to have lawyers in India doing our" -- I'm not kidding, this goes on -- "doing our privilege review," and, again, that raises a big issue; and my thinking about this rule is not to change the duty of the reviewing lawyer not to screen for privilege, but rather just to protect the lawyer and the client if in a million pieces of data some privilege slips through, but maybe not. Which is it, or do you know?

PROFESSOR HOFFMAN: I don't know that we can ascribe one motivation, but I think what you've described is two very real scenarios that happen and that there's pressure being put on, so and the rule could serve two purposes in that sense. The rule gives space to allow parties to agree and get a court to -- as well as to get a court to bless that agreement with an order at the outset of the case that you could just turn over everything, save those costs of production, and if it turns out that you

turned over something you shouldn't have you can always get it back, and there's no waiver that resulted and no subject matter waiver that would result as to other documents as well.

CHAIRMAN BABCOCK: Okay. Good. Any other -- any other comments about (b)(1)? Judge Christopher, were you raising your hand?

HONORABLE TRACY CHRISTOPHER: No, I was just --

CHAIRMAN BABCOCK: Flipping your hair?

HONORABLE TRACY CHRISTOPHER: No. Given the problems that we've identified with (b)(1), but other people are speaking in favor of the other aspects of it, maybe we can jettison (1) and leave it to the common law to explain subject matter waiver and restrictions on subject matter waiver and then take what people apparently like out of the rule.

CHAIRMAN BABCOCK: Okay. All right. Why don't -- if there are no more comments about (b)(1), why don't we talk about (b)(2)? Any comments about incorporating the discovery snapback rule into the evidence rules?

PROFESSOR HOFFMAN: I mean, I think the comment that Gene raised before is one that I thought about and we even talked about in our subcommittee, so

maybe just to reframe what Gene said or to say it again is 193.3(d) just as it exists in the law now only applies in cases in which the Texas Rules of Civil Procedure apply, and so if an agency doesn't recognize their application then an inadvertent disclosure that happens in the course of an agency proceeding you get no protection by 193.3(d). The way we've written proposed 511(b)(2) it says, "When made in a Texas state proceeding," and then we go on to reference 193.3(d). That sounded to me like the effect of that could potentially be that the litigant in the agency -- the party in the agency matter could say, hey, look, they changed the law and now 193.3(d) applies whether the rules of -- Texas Rules of Civil Procedure generally apply in this agency proceeding or not, and I don't have any more to say about it other than I thought the same thing.

CHAIRMAN BABCOCK: Gene, would that be a good thing or a bad thing?

MR. STORIE: I'm not sure honestly, because you've got the State Office of Administrative Hearings is going to conduct most of those. You could certainly have a high volume of production in an administrative case, and it wasn't clear to me, frankly, whether "proceeding" would include those. I thought that it would, but potentially without that protection, so I'm, frankly, not aware of a

specific rule of state agency proceedings that would track 193.3.

CHAIRMAN BABCOCK: But whether it does or not, do you think it would be a good thing if we wrote an expansive rule that did apply to agency proceedings?

MR. STORIE: I do. I think an inadvertent disclosure should be able to come back.

CHAIRMAN BABCOCK: Yeah. It seems to me that that has been a very successful feature of our discovery rules, and other people are following us rather than criticizing us. Yeah, Richard.

MR. MUNZINGER: The use of the past tense "followed the procedures of Texas Rules of Civil Procedure" suggests that the procedure had to have been followed in the administrative hearing, as distinct from being raised for the first time in the proceeding in which this rule is invoked, and if the administrative agency did not -- was not bound by the Texas Rules of Civil Procedure, the past tense creates a problem. I wonder if it would be -- it "follows the procedure," "followed" or "follows," if there is such a situation in Texas where an administrative agency wouldn't follow the Texas Rules of Civil Procedure. My understanding is that SOAH incorporates the Rules of Civil Procedure but changes the time limits to some extent. That's my understanding of

the State Office of Administrative Hearings.

PROFESSOR HOFFMAN: I'm sorry, I don't follow -- I don't follow your comment. Let me --

MR. MUNZINGER: Okay.

PROFESSOR HOFFMAN: Hang on. Before you restate it, let me see if I can take the part that I thought I understood or didn't. So, so leaving it just as it is, wouldn't the way that it would happen, assuming that Gene's reading of this is right, is that you're a party in a state agency proceeding and you discover you inadvertently disclosed something, so you now go to 193.3(d), and in that state agency proceeding you do these things. You -- within 10 days you, you know, amend your response you identify any material produced and, you know, you ask for it back. You follow the 193.3(d) procedures. Wouldn't that shield it, or are you making a different point?

MR. MUNZINGER: I think it would if the agency followed the Texas Rules of Civil Procedure, but his comment was are we certain that all agencies follow the Texas Rules of Civil Procedure in their proceedings? The SOAH, if I understand the State Office of Administrative Hearings rules correctly, at least I've worked before them in proceedings involving the motor vehicle division, and my understanding is at least in

those proceedings in which I am involved and have been involved, the Rules of Civil Procedure are followed by SOAH, although the discovery time limits are shortened to some extent. I think from 30 days to 20 days. That's fine, but suppose I'm in front of some agency other than the State Office of Administrative Hearings which has not specifically adopted the Texas Rules of Civil Procedure, if there is such a thing.

PROFESSOR HOFFMAN: Just to be clear, is the question have they adopted the Rules of Procedure or have they adopted the Rules of Evidence? If they're bound to follow the Rules of Evidence and the Rule of Evidence says assuming that that party complied with the procedures laid out in this Rule 193.3(d) then they did what they needed to do from an evidentiary standpoint. Am I understanding that right or wrong?

MR. MUNZINGER: Well --

PROFESSOR HOFFMAN: In other words, isn't the question whether the agency follows the Rules of Evidence, which here would then incorporate 193.3?

HONORABLE STEPHEN YELENOSKY: Not all do.

MR. STORIE: Right.

MR. MUNZINGER: And that's part of the problem. Not all do honor the Rules of Evidence. They honor them, except they also -- they are more liberal.

PROFESSOR HOFFMAN: Then this rule would have no application in that circumstance, but in any agency proceeding that is governed by the Rules of Evidence it, as Gene says, potentially could.

MR. MUNZINGER: And that was the point I was raising by the use of the past tense. It contemplates that the agency has adopted the Rules of Evidence and the Rules of Civil Procedure, whether directly or indirectly, but in those situations where it has not then the use of the past tense could work some restriction on the snapback application, it seems to me.

CHAIRMAN BABCOCK: So you would propose just saying "follows" rather than "followed"?

MR. MUNZINGER: Yeah.

CHAIRMAN BABCOCK: "When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder follows the procedures of 193.3(d)."

MR. GILSTRAP: What happens if we take out "when made in a Texas state proceeding"? Just leave it "An inadvertent disclosure does not operate as a waiver if the holder follows the procedures of 193.3(d)"?

MR. LOW: And it wouldn't apply to a state agency.

MR. GILSTRAP: It won't apply in the state

agency because they don't follow the Rules of Civil Procedure, but I'm concerned about the disclosure in the state agency and then using it in the lawsuit where the rules do apply, and you would still have this snapback provision that could keep the waiver -- you could pull it back in the state court proceeding, you see. In other words, I did it, I wanted to pull it back, the state agency didn't honor it, but the court should.

CHAIRMAN BABCOCK: But what are you pulling back, Richard, because you haven't -- presumably you haven't produced it in the litigation.

MR. LOW: Right.

CHAIRMAN BABCOCK: And then come in and they say, "Well, wait a minute, you produced this in the agency."

MR. GILSTRAP: You produced it in the agency proceeding.

CHAIRMAN BABCOCK: And so it's not a snap back if you limit it just to court proceedings.

MR. LOW: One of the problems the State Bar raised is state agencies have so many different rules on different things, it's very difficult to know -- some of them might have their own selective waiver part or -- well, that's another thing.

CHAIRMAN BABCOCK: Well, Buddy, was the

intent -- or Lonny, when you said "Texas state proceeding," were you trying to capture agency proceedings --

PROFESSOR HOFFMAN: So we -- so you can't attribute this to us. You can attribute all kinds of bad acts to us. I'm not making this a bad act.

CHAIRMAN BABCOCK: You're responsible for it.

PROFESSOR HOFFMAN: So the State Bar -- let me just talk about what they did. They tried to track the Federal rule whenever they could.

MR. LOW: Right.

CHAIRMAN BABCOCK: Right.

PROFESSOR HOFFMAN: So if you were to go look at 502, which is Tab 1 of the Buddy packet that he gave you, you will see that their equivalent to this is -- so, so, so, Frank, in answering your question, they didn't begin where you potentially suggested. I'm not saying they should or shouldn't. I'm just saying they didn't, with "an inadvertent disclosure does not operate." Rather they began with "When made in a Federal proceeding or to a Federal office or agency," comma, "the disclosure does not operate," and so what the State Bar folks did was, tracking that, they wrote, "When made in a Texas state proceeding," comma.

MR. GILSTRAP: Let me continue with my example. Let's suppose I'm before some state board, and I inadvertently produce something, and I say, "Whoops, I shouldn't have done that," and within 10 days I go through the snapback procedure. The administrative judge says, "Doesn't apply here." You know, "The snapback procedure doesn't apply here." Well, I'm stuck there, but then when I turn around and someone tries to use it in a state court proceeding, the state courts aren't bound by the administrative judge's determination. I snapped it back, and so I can say, "It wasn't disclosed, don't use it in the state court proceeding."

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, I'm looking at the Administrative Procedure Act. Section 2001.083 says, "In a contested case a state agency shall give effect to the rules of privilege recognized by law," and 2001.081 says "Rules of Evidence as applied in a nonjury civil case in a district court shall apply to a contested case," with a few exceptions, so agencies are bound to the Rules of Evidence and the rules of privilege.

CHAIRMAN BABCOCK: Judge Yelenosky, then Richard.

HONORABLE STEPHEN YELENOSKY: Well, in a contested case, which doesn't apply to unemployment

compensation hearings, for one thing; and my question, Lonny, is, is this intended to protect what was just described by, I think, Frank? Because how does it do that if an agency doesn't have a snapback provision and, therefore, the document is in? How is that any different from the document being in the public domain through some other means? I mean, how does it become privileged? It's out there. I mean, the snapback doesn't work if you -- if you inadvertently leave your privileged document at the newspaper and they publish it, you can't go to court and say, "snapback." I couldn't use it there, but I'm using it now. I don't understand how that works.

MR. GILSTRAP: Unless the rule states you could.

HONORABLE STEPHEN YELENOSKY: Well, sure. Okay, if it's privileged, it's in the *New York Times,* but it can't be used in court.

MR. GILSTRAP: Yeah.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Only pointing out what the judge just pointed out, "contested case" is a defined term in the Government Code, which is -- I mean, it's an adversarial proceeding in which there's an administrative law judge and the parties --

HONORABLE STEPHEN YELENOSKY: To which the

administrative procedures act applies.

MR. MUNZINGER: -- are represented by counsel. Sir?

HONORABLE STEPHEN YELENOSKY: To which the Administrative Procedures Act applies, but there are a lot of things that don't.

MR. MUNZINGER: Yes. I agree with that, and that's part of the problem in relying on the definition of "a contested case."

CHAIRMAN BABCOCK: Okay. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, also sometimes in the state court we're asked to essentially review what an agency has done, and we have to look at everything they've looked at, so I'm not really sure how we could suddenly not look at something that they looked at in connection with our review.

HONORABLE STEPHEN YELENOSKY: And how is it that it applies -- as Frank just said, it would apply in court, so you could snap it back because it was revealed in a proceeding where there was no snapback, right? But are you saying that would also operate, it could not be used in court if you left it at a newspaper, which has no Rules of Procedure or Rules of Evidence? If I leave something at a newspaper and they publish it and then I

come to court, there's no administrative proceeding, and I want to claim something is privileged.

MR. GILSTRAP: What if it's leaked to a newspaper, somebody stole it out of the files and gave it to the newspaper?

HONORABLE STEPHEN YELENOSKY: Well, but your argument that it's privileged would not be based on any snapback analysis.

MR. GILSTRAP: Well, I think everything in the public domain -- just because it's in the public domain doesn't mean it's not privileged.

HONORABLE STEPHEN YELENOSKY: Right, but you don't use the snapback analysis to explain why what you left at the *New York Times* is not -- is still privileged. You use another body of case law. So how is it that the snapback privilege or snapback procedure would apply to some adjudicative body that's an administrative body which doesn't have that rule but doesn't apply in any other context?

MR. GILSTRAP: Because the court says -- because the rule says it does. There's all sorts of stuff in the public domain that the rules say is privileged or can't be used in evidence.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I would just point out that

both Federal Rule 502 and this subparagraph (b), the language is different, but they both apply to a disclosure made in a state proceeding, which is undefined, or a Federal proceeding, which is undefined, and then it goes on to say "or to a Federal or state office or agency." There is a distinction between me making available to the Railroad Commission documents relating to a particular field in a particular activity in a particular field, et cetera, because I am required to do so under their rules, and that may or may not be made in a disclosure which is adversarial in nature. It may or may not be a contested case where there's a judge and lawyers representing parties. It may just be a disclosure to a regulatory agency required by that agency's law.

And so 502, Federal Rule 502 contemplates my giving documents to the SEC, for example, and 511 does the same, and our discussion right now is focusing as if there has been some adversarial proceeding, and that's not necessarily the case. So the snapback, okay, wait a second, for me to maintain my license and to drill my well in field X I had to give the Railroad Commission these documents, and they may or may not have been in the -- available to the public, because the state Open Records Act permits me to claim privileges, even though there are things that have been disclosed to governmental agencies,

and that can be litigated. So now I've made this stuff available, which I had to, which of course was Richard's point about voluntariness also. It's a morass.

CHAIRMAN BABCOCK: Lonny, it looks to me on your point about how the State Bar tried to track the Federal language as much as they could, that maybe that was their intent, but I'm not sure they did.

MR. MUNZINGER: They didn't.

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: The two rules are different.

PROFESSOR HOFFMAN: In other words, by leaving out -- it would have said, "When made in a state proceeding or to a state office or agency." Is that what you're talking about?

CHAIRMAN BABCOCK: Right. Yeah, that's the point.

MR. MUNZINGER: Yeah.

CHAIRMAN BABCOCK: Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: Also, isn't the 502(b) under Tab 1 the Federal rule -- it looks like it anticipates that the Federal Rule of Civil Procedure might not be applicable, right, and provides that if the disclosure is inadvertent and took reasonable and proper steps and things of that nature, so did the committee consider that language, or was it thought that 192.3(d)

would be incorporated into "any agency proceeding" and would be an issue by itself?

CHAIRMAN BABCOCK: He's asking you, Lonny, because I certainly don't know the answer.

PROFESSOR HOFFMAN: (b)(2) is not meant to create additional privilege or protection, so you have to go elsewhere. I mean, again, that's Richard's point about, you know, you have to go to Rule 192.5 again.

CHAIRMAN BABCOCK: Okay. Any more comments about (b)(2)?

MR. ORSINGER: I just have a little structural comment. I think that with (b)(2) and maybe some of these subsequent ones we probably are dealing with limitations on waiver. I don't agree that (b)(1) is a limitation on waiver. I just wanted to point out that we actually I think are here in an area where we are limiting the waiver, so in case we pull (b)(1) out, I just want to make that comment so we're all conscious of it.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: Number (3), "Controlling Effect of a Court Order," on its face excludes controlling effects of administrative agency orders and the State Office of Administrative Hearing order.

CHAIRMAN BABCOCK: We're about to get to (3).

MR. MUNZINGER: I'm sorry, I thought you were moving on to a different rule. I apologize.

CHAIRMAN BABCOCK: But if we don't have any more comments about (2), now we've dealt with the easy stuff, let's get to (3).

PROFESSOR HOFFMAN: You want to keep going now?

CHAIRMAN BABCOCK: You want to take a -- you want to take our morning break before we get to (3)? Yeah, let's do that. Take a 15-minute break.

(Recess from 10:31 a.m. to 10:47 a.m.)

CHAIRMAN BABCOCK: All right. Lonny and Buddy.

MR. LOW: Lonny.

CHAIRMAN BABCOCK: Yeah, Lonny. We now have three alternatives on subsection (3), and why don't you remind everybody what our options are here?

PROFESSOR HOFFMAN: Yeah, okay. Well, you said remind. This is the first time around, so, so --

CHAIRMAN BABCOCK: Well, why don't you tell us for the first time what our options are?

PROFESSOR HOFFMAN: Yes. So, so alternative one, as I say, is basically 502(b), so if you want to kind of track it you can, but I'm just going to kind of go through -- I think it's worth reading through the language

slowly on the first time around here so we can talk about it, where the State Bar people wanted to diverge. So "A disclosure that's made in litigation pending before a Federal court or any state court, state court of any state, that has entered an order that the privilege of protection isn't waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding." So the idea behind this section, which as I say, is virtually identical to 502(b) is that the court can enter an order and that the effect of an order declaring that a disclosure is not a waiver will be binding in a state court, in a Texas state court.

So if that order comes from a Federal court or if that order comes from a state court in Montana it will be -- the effect of this provision will be that that order will have to be honored and so it will not be considered to be a waiver here in Texas. So the State Bar people like the rule, but they worry that it may be misinterpreted in the following hypertechnical way. Imagine, they say, that you have the following sequence of events: Order in place that says you turn stuff over, anything you turn over it will not be considered a waiver if it's in the course of litigation, some broad protective order, and thereafter there's a disclosure that's made. Okay. So order first, disclosure comes second, and yet

that disclosure wasn't made kind of pursuant to and under the auspices of the order.

Okay. So Goode gives an example in the comment, which is imagine there's a protective order in place and then in the middle of trial one of the parties goes online. He has a blog, and he blogs about something that is itself a disclosure, you know, "My lawyer told me so-and-so and so-and-so" or something, you know, right? The concern of the State Bar people is that the rule literally read could potentially protect against that disclosure they think, and the way they do that is this: Go back to the language. So a disclosure -- so think of the blogger, okay, right? So you've got this protective order in place and then he's blogging. "A disclosure made in litigation pending before the court that has entered an order," has previously entered an order, "that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding," and so the worry is, is that it doesn't say anything about like "pursuant to" or something like that, and so you could have the circumstance that would be bad -- the State Bar people say -- that you get a disclosure that comes later that somehow gets to tag along to that earlier protective order, and we don't want that.

So their -- but, I'm sorry, not "so" -- but they were hamstrung they felt because the Federal rule under section (f) makes it binding on us in state court. So 502(f) says whatever 502 says, you've got to follow it in state court. You know, supremacy clause is our hammer here, and so they try both in alternative two and alternative three -- it's really in many ways the same thing -- to disaggregate, to distinguish between orders that first come from a Federal court, which we're stuck with. We've got to live with that they say under 502(f), but if it's coming from another state court we don't have to be stuck with that, because that's us. We can do whatever we want, and so they've changed the rule, and so without diving into it yet, alternatives two and three are just efforts to try to articulate circumstances in which we don't have to live with that potential problem when the original order comes from state court. So maybe I'll stop there.

CHAIRMAN BABCOCK: Okay. Anybody have any comments? Thoughts about this? Yeah, Richard.

MR. ORSINGER: Just a simple comment, the word "entered" is not a good word, as we've learned in the litigation judgment drafting process for the last 30 years, but old habits die hard. Entry occurs when the clerk copies or now scans the order of decree into the

minutes of the court, which is three days to seven days after it's signed, so I would propose if we use the word "issue" rather than "entered" every time we have an inclination to use the word "entry," resist it and instead use "issue."

PROFESSOR HOFFMAN: Okay.

CHAIRMAN BABCOCK: Okay. Other comments?

HONORABLE TOM GRAY: I guess I just have a general question. Since they gave effect to the supremacy clause was there any discussion of the full faith and credit clause of a state court order from another state? It seems that we're taking a position that a state court could not apply a final state order from another state.

PROFESSOR HOFFMAN: I think the immediate answer to that question is, you know, full faith and credit is we give full faith and credit to the order to what we think it kind of properly applies to, you know, without controversy; and so if it says, you know, anything you did in that case in Montana wasn't a waiver, well, then it wasn't a waiver in Montana, and we honor that, and if somebody were to come here and try to get something related to that case we would honor that order. But if it comes to a state proceeding here, I think the feeling is, is that our own rules are applicable, and we can decide whatever we want to do, not as it affects the Montana case

but as it affects all subsequent litigation in the state in that that -- so that's a distinction. I don't know whether that's particularly clean distinction or not, but I think that's the distinction that would be made.

CHAIRMAN BABCOCK: Kent, there's a place down here if you want. Yeah, Richard.

MR. ORSINGER: Well, if that's, in fact, what this is about, it bothers me, what Lonny just said, because privileges are protected or waived, or court orders requiring disclosure or protecting disclosure are all done in the context of the forum and the source of the privilege law that is brought to bear when that question is decided, and I don't think it's fair to take the expectations of the parties that are governed by whatever the rule of privilege is that applies and then at a later time in a different lawsuit in another state that may have different privilege rules to say we're going to evaluate your decisions about what's voluntary or what's not voluntary or what's protected and what's not according to a completely different standard that was in no one's mind at the time that all of these decisions and orders were issued, and I would propose that a better rule is that any waiver that is made in litigation subject to a court order that says it's protected has to be protected and cannot be reconsidered by us to be unprotected at a later time.

PROFESSOR HOFFMAN: Just to be clear, I agree with everything you said, but I didn't say -- you're not disagreeing with me, except for the part that you're disagreeing with me I don't agree with. All I said to Tom was, is that's the theoretical difference, but everything you just said is exactly how the rule is written. The rule says that a disclosure made pursuant to an order -- take, for example, alternative two, if you want to separate them out. A disclosure made pursuant to an order of a state court, that the privilege is not waived, is also not a waiver in any Texas state proceeding. Go ahead.

HONORABLE STEPHEN YELENOSKY: But it's by policy, not by full faith and credit.

MR. ORSINGER: Well, in my opinion it shouldn't be full faith and credit, and it shouldn't even be supremacy clause. It ought to be just our rule that if somebody else made a required disclosure or made a disclosure that was protected in that court that we must by necessity not reconsider, reevaluate, redo that whole analysis and decide that it's not protected, and it ought to be our rule, not a Federal rule, not the supremacy clause, not full faith and credit. Our rule should say if that court in that proceeding said that's not a waiver then it's not a waiver, end of story.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: How does this affect our Rule 76a sealing issues? Did you-all discuss that at all in terms of there's certain requirements that have to be met in 76a. This seems to allow a judge to sign a confidentiality order that says all of those things are protected and privileged without going through 76a to the extent that anything gets filed, you know, it will be filed under seal. I mean, did you discuss that at all?

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, it's privileged, I mean, it's not --

HONORABLE TRACY CHRISTOPHER: Well, like a trade secret.

HONORABLE STEPHEN YELENOSKY: Well, if it's -- if you're saying it's privileged and the other side can't see it then there's no 76a issue, right?

HONORABLE TRACY CHRISTOPHER: No, I think the idea was that we're all going to look at all these documents and even -- even if it is a privileged document, the privilege isn't waived, we won't use it in the litigation.

HONORABLE STEPHEN YELENOSKY: We will use it?

HONORABLE TRACY CHRISTOPHER: I don't know.

HONORABLE STEPHEN YELENOSKY: Well, if it's used in the litigation, then, I mean, I don't see how it's privileged. I mean, it may be sealed under 76a, but it's not privileged. If it's privileged then the court isn't using it. I mean, there are trade secrets that are sealed under 76a, pursuant to 76a, because you don't want them out there generally, but they're not privileged at that point.

CHAIRMAN BABCOCK: Richard Munzinger.

PROFESSOR ALBRIGHT: There's a trade secret provision.

HONORABLE TRACY CHRISTOPHER: It's a privilege.

PROFESSOR ALBRIGHT: Yeah.

HONORABLE STEPHEN YELENOSKY: Well, the trade secret privilege may lead to the -- the policy reason besides trade secrets may lead to a sealing order, but if the court considered something that's -- considered something that was a trade secret, there was no application of a privilege in my understanding of it. How is it privileged?

HONORABLE TRACY CHRISTOPHER: I think that's what it's called, the trade secret privilege.

PROFESSOR ALBRIGHT: Yeah, it's in the rules.

HONORABLE STEPHEN YELENOSKY: Well, you have a trade secret privilege, yeah, but if the court determines that the trade secret issue is pertinent and has to be -- and those facts have to come in because they're pertinent despite the trade secret privilege then they may be protected by a sealing order.

PROFESSOR ALBRIGHT: But they're not privileged anymore.

HONORABLE STEPHEN YELENOSKY: But they're not privileged at that point.

PROFESSOR ALBRIGHT: There's that cost-benefit analysis.

CHAIRMAN BABCOCK: Munzinger.

MR. MUNZINGER: I would just point out that subdivision (b)(1), that speaks of state regulatory agencies. (b)(2) seems to speak to state regulatory agencies, but (b)(3) mentions court orders only, and there's a whole lot of activity that goes on before administrative agencies, and the failure to mention agencies in subparagraph (3) can only be considered intentional when you look at it, and so, therefore, if you're in court and you're a judge and you look at this rule you would have to say that, well, there was a contested case before the motor vehicle division in which the administrative law judge told General Motors, "Turn

over document X."

"No, Judge, I'm not going to do that, it's privileged."

"Turn it over, I will rule that you have not waived the privilege, and here is my order so stating." General Motors turns the document over. Whether it's used in the proceeding or not, it was part of the discovery. That disclosure becomes a waiver under this rule if I'm the judge because the Supreme Court when it adopted the rule didn't include any provision respecting administrative agencies, and it's clear that they intended to do that because they talk about administrative agencies in subdivision (1) and (2) but not in subdivision (3).

CHAIRMAN BABCOCK: Buddy.

MR. LOW: That's the language -- they just followed the language of the Federal rule.

MR. MUNZINGER: Yes, but the Federal rule --

MR. LOW: I'm not arguing pro and con. I'm merely -- I'm telling you what they did, and you can criticize what they did. I'm just telling you what they did.

MR. MUNZINGER: Yeah, but the Federal rule is different. If you look at 502(d) and subparagraph (3) I think they are different. "A Federal court may order that the privilege or protection is not waived."

MR. LOW: But "in litigation pending before the court."

MR. MUNZINGER: Regardless of what they did or why they did it, it is my belief that the effect is what I just articulated.

MR. LOW: Well, maybe if it's before the court it had been before an agency, so now it's before the court, maybe they can go back. I don't know. I didn't help draft that language. That was the Federal rule that we were kind of ordered to follow the best we could.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: Well, I'm going to speak on behalf of the State Bar proposal a little bit because obviously the Federal rule works differently than the state rule, so let's say you've got a patent litigation and the defendant in Texas has litigated that case in a friendly jurisdiction, in Ohio or Delaware and through a friendly judge got an order protecting something by determining that it was trade secret privilege. As I read this, and therefore, then all of this gets filed, it's available, and you as a party now have it. That decision by that trial court judge in another jurisdiction subject to the trade secret privilege rules of that state cannot be revisited in state court litigation in Texas. You are bound by that determination, as I read the difference

between your (3) and their (3). Because their (3) at least limits it to the concept that you have an agreement of the parties that the disclosure will not waive, which makes sense if you -- if you're doing it by agreement, but if you've been the subject of kind of a friendly court's ruling and then to say that you're now precluded from, you know, revisiting the merits of that in litigation subject to the rules of our state, I don't know why we would be surrendering essentially our substantive law and revisiting that substantive issue in discovery.

HONORABLE STEPHEN YELENOSKY: You mean where another state court said it was privileged?

MR. PERDUE: Yeah.

HONORABLE STEPHEN YELENOSKY: That's not the intent here, is it?

PROFESSOR HOFFMAN: I don't think so.

HONORABLE STEPHEN YELENOSKY: I didn't understand this to give preclusive effect to a determination that something is not privileged, but rather to give preclusive to a determination -- I mean, that it was privileged -- a determination that something is used in litigation and that's not a waiver; therefore, when you get to our state court the fact that it was used there is not a waiver here; but if another state court says, "Hey, that's privileged, they don't have to produce it," I don't

think this is intended to preclude me as a state court judge in Texas from saying, "I judge whether or not it's privileged based on our rules." There's no preclusive effect to that.

PROFESSOR HOFFMAN: Correct.

HONORABLE STEPHEN YELENOSKY: Is that right?

MR. PERDUE: I read it a lot more broad than that, at least in the language in the proposed (3). "Entered an order that the privilege or protection is not waived by disclosure."

HONORABLE STEPHEN YELENOSKY: But he didn't enter it -- an order that it was not waived by disclosure. He entered an order that it was privileged.

MR. PERDUE: All the more concern.

HONORABLE STEPHEN YELENOSKY: But that -- "that the privilege or protection is not waived by disclosure." It doesn't say in any way I read it that the order of a state court finding something to be privilege, blah-blah-blah. It's only an order finding that a disclosure is not a waiver that's given preclusive effect.

MR. PERDUE: That would be extremely narrow. And that would make sense, but that --

HONORABLE STEPHEN YELENOSKY: Narrow and makes sense, that sounds good.

MR. PERDUE: Well, yeah, I mean, I think

that the concern is the breadth of deference to what another state court has done.

HONORABLE STEPHEN YELENOSKY: Well, all we want to defer to is the fact that somebody in another state court produced something because they had to or wanted to with the protection of that court saying that's not a waiver and preventing them from coming to Texas and, lo and behold, ah, it's a waiver, but we're not in any way trying to say --

HONORABLE LEVI BENTON: But what if it is?

HONORABLE STEPHEN YELENOSKY: -- a determination that something is privileged in another state binds a district court in this state. Isn't that right?

MR. PERDUE: But isn't that a substantive question?

HONORABLE STEPHEN YELENOSKY: Well, I just don't see how this language does what you're afraid of. Where does it say that --

MR. PERDUE: If a -- if another state court determines that your production of claimed trade secrets therefore is not a waiver because it is a, quote, "trade secret," well, that's a substantive decision looking at the merits of what has been disclosed; and now you're in state court in Texas or, heck, Federal court in Texas, and

you're litigating a patent dispute, and you've got that information and say, they -- "It's not trade secret, and I can use it. I should be able to use it."

HONORABLE STEPHEN YELENOSKY: Right. You wouldn't --

MR. PERDUE: Doesn't this preclude your ability to use it?

PROFESSOR HOFFMAN: I don't think so. It's only giving honor to the order that says --

HONORABLE STEPHEN YELENOSKY: I don't think so.

PROFESSOR HOFFMAN: -- to the order that says disclosing it now in our case, first -- case one, doesn't amount to a waiver of whatever privilege closed that document.

PROFESSOR ALBRIGHT: But it's a decision -- to have the decision of no waiver, you have to first decide it's privileged in the first place.

HONORABLE STEPHEN YELENOSKY: You're saying the other state court determined it was privileged and therefore did not have to be disclosed.

PROFESSOR ALBRIGHT: It was privileged, and it was not waived.

HONORABLE STEPHEN YELENOSKY: It was privileged --

MR. PERDUE: Therefore, the privilege wasn't waived.

PROFESSOR HOFFMAN: By the way, they may or may not have done that. I mean, they might have said we have no idea whether this thing is trade secret or not but we're just going to have a blanket protective order that says if you give it to the other side you haven't waived it, you know, to facilitate efficient discovery, et cetera.

You may also be right that they might also in that same thought process say, you know what, I'm looking at this exact document. I'm going to do an analysis of whether I think it's privileged in the first place, because if it isn't, there's nothing more to talk about. I do the analysis. I decide it is privileged by whatever it is in Montana, and let's say a trade secret privilege, and also by giving it to them you didn't waive it. That could happen, too, and there's nothing in the rule as written, I don't think -- although, again, I could have you revisit the language that's bothering you, but there's nothing in the rule, Jim, I think, that says anything about the determination about the -- that we're bound to a determination as to its trade secret status under Montana law and whether we're bound by that in Texas.

HONORABLE STEPHEN YELENOSKY: Right. You come in, you've got an order that says -- out of Montana -- it's privileged, and your disclosure doesn't waive it, and somebody wants to say, oh, the disclosure waives it because here in Texas we don't have to pay attention to that. Wrong. This Rule precludes that. The other person says, okay, I lost that, but I want to argue that it's not privileged. I entertain that argument. I don't defer to the Montana court as to whether it's privileged or not.

PROFESSOR HOFFMAN: Correct.

MR. PERDUE: You just don't entertain the argument that it's been waived.

HONORABLE STEPHEN YELENOSKY: Exactly.

MR. LOW: Right.

MR. PERDUE: Why not?

HONORABLE STEPHEN YELENOSKY: Because this rule says I can.

MR. PERDUE: Well, that might be my question. I mean, why --

PROFESSOR HOFFMAN: Here's the -- I think what's driving this, okay, so just imagine you're plaintiff, Jim. I'll put you in a familiar role, with -- against big, bad corporation, and it's in Montana. I don't know why you would be in Montana, but let's put you there.

MR. PERDUE: It's lovely in the winter.

PROFESSOR HOFFMAN: You're there. You've got this case, and you want them to turn over oodles and oodles of documents, and they say, "We're not going to do it without a protective order, it's going to cost us too much money." You say, "That's fine, we'll agree." So you reach an agreement, get the court to enter the protective order, and then they turn over oodles and oodles of documents to you. Then you've got this buddy here in Texas. You've got Buddy, who is also on the same side of the fence as you, and he's got a similar case against big, bad corporation. So you sue them, and you say, "By the way, Buddy, they turned it over in Montana, you ought to be able -- you ought to try to argue that that turning over waived it."

And what the Federal rule-makers said is, well, that's terrible, whether it's a set-up like that or whether it's just, you know, we want to protect it, the idea is, is that if we're going to allow orders, protective orders, to bless from waiver, to immunize from waiver disclosures that are pursuant to protective orders then we have to have other proceedings recognize the -- you know, the validity of that, not as to the determination of whether it's privileged but as to whether it was not waived by the act of giving it pursuant to the

order, and that's the intent of this.

HONORABLE STEPHEN YELENOSKY: Yeah.

PROFESSOR HOFFMAN: Maybe I'll stop there because I'm sure others want to comment.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, I mean, it's like in a criminal case, somebody testifies with immunity in one jurisdiction and then the other jurisdiction says, "Oh, no, you don't get immunity." Well, then nobody would ever testify with immunity because they can't count on it applying in the other jurisdiction. It's just like that. Nobody would ever be in a situation where they want to turn over documents subject to immunity from waiving their privilege in one jurisdiction if it's just going to turn up in another one, and that's all this addresses, but it doesn't preclude a -- in fact, it says nothing and cannot say anything in my opinion about whether or not the document is privileged under state law, because your finding in Montana that it was privileged, there's no reason -- there's no policy reason why Texas should respect that, because it may have different substantive law of privilege, and when you litigate in Montana -- it isn't the litigation in Montana that's put you in the position that those documents might yet be released in Texas. It's the difference in substantive law

and privilege between the two states. So on the one hand somebody is put in a position where they're giving something up in return for immunity, which is then pulled out from under them in another jurisdiction. In the other situation it's simply different substantive law in different states.

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: It's my belief that this rule is to set up a process whereby two litigants in some other state can safely agree to defer the question of privilege until disclosure has occurred, not pay for lawyers or Indian lawyers or anyone else to go through 10 million pieces of paper to find out if there's a privilege to keep it. In other words, the agreement is we're going to give you 20 million documents. If there's something in there that's privileged, we haven't waived the right to assert it; and if you use it, find it, call it to my attention, then I may assert a privilege at that time; and if I'm successful then you can't use it, even though I gave it to you. That's an agreement we reached to avoid having to cull all the document production to avoid waiver.

Okay. Assume for a moment that that's a good public policy, which it seems to me like it would be. If you can't have the assurance that that protection that producing does not waive then you can't enter into that

agreement because you may get sued in another jurisdiction that says voluntary production of information in a pretrial discovery is a waiver --

HONORABLE STEPHEN YELENOSKY: Right.

MR. ORSINGER: -- and, therefore, even though you had this agreement up there and even though you saved millions of dollars and the court approved it and there was event a court order saying that it was required, we're going to dishonor that. So anyone who might be forced to litigate in another state in another case can't enter into such an agreement out of fear that a judge elsewhere is going to dishonor that agreement and they're going to have been found to have waived all of their privileged documents. So it seems to me that we need some kind of ironclad assurance in all of the states -- but the only one we control is Texas -- is that if you have such a agreement, or maybe we require that it be an agreement blessed by a court order, then we guarantee you it will apply if you're in our state court here, and that encourages people all over the country to enter into these agreements, and if every state adopted a rule that said this then you would have a hundred percent security that you could produce without waiver in the current lawsuit and that protection will be afforded to you in subsequent lawsuits.

CHAIRMAN BABCOCK: Lonny, and then Judge Yelenosky.

PROFESSOR HOFFMAN: So let me use this discussion also as a way of circling back around to the differences between alternative one and two and three, because actually when I started talking about the blogging example I remembered that's actually not capturing it all, and I want to -- this discussion will help bring it back. So there's another sort of policy concern that the State Bar people had that we ultimately shared the policy concern. We just weren't worried about the language, which is why our subcommittee is fine with one, but let me describe the policy concern, and it speaks a little bit, Jim, to a variation on your idea.

Change the circumstances to the following. Okay. Case begins. There's no protective order in place. Somebody discloses a document and waives the privilege. A few months later they either realize that or they realize it all along but they now think, whoa, that was a big deal, I need to end this lawsuit, and I want to see if I can by ending the lawsuit buy back the waiver. Okay. So you go to the other side and say, "I'll pay you a million bucks for your case," and they say "That's terrific, my case is only worth 10,000" -- "but you've got to agree that what I gave you before wasn't a waiver, and you've

got to agree we're being to go to the judge and jointly ask him to enter an order to that effect," so it would bind all future parties.

Guy said, "Million bucks, 10,000-dollar case, I'll do it." You do it. You get the judge -- and the judge isn't paying attention or whatever, and he blesses it and unrings the bell. All right. No longer a waiver, it purports to say. Both our group and the State Bar people think we don't like that. That feels like a bad outcome, seems like a bad policy to endorse. Maybe you could make an argument for it, but we didn't like it. So the place we diverge is not in our view about that policy but in whether or not we need to change the language of the Federal rule or whether you don't have that bad policy outcome in the language given.

What Steve Goode in particular was concerned about was is that the language in one would let that happen, and just to give voice to his concern, if you'll look in alternative one, "A disclosure made in litigation," so imagine that disclosure, again, happens preorder, right, so you now have waiver. "A disclosure that's made in litigation pending before a court that has" -- and it doesn't say when, so at some point in time, "entered an order that the privilege or protection isn't waived by disclosure is also not a waiver in Texas state

proceeding."

He says, "Oh, man, that's bad. I can't change that outcome if the order comes from a Federal judge because of 502(f), the supremacy clause, but I can at least soften the potential effect of that when the order comes from a state court"; hence, alternative two and three, which, again, are really very similar, just slightly different formulated. Our view, just to give voice to our view, was that's not what (3) does, that that would be a gross stretching of the language in alternative one, the language now in 502.

Among other things notice that it's in the past tense. See where it says -- it says, "A disclosure made in litigation that has entered an order is not waived." I'm sorry it's in the present tense. "The disclosure is not waived." That suggests that the disclosure follow it is order, not a disclosure that was before, you know, was not waived by disclosure, and so I don't know whether that's too thin of a reed to hang our hat, but it is certainly not -- it wasn't the intent of the Federal rule-makers, and presumably Congress by extension, to have blessed that policy circumstance, but if you're worried about it then alternative two or alternative three is the alternative for you.

HONORABLE STEPHEN YELENOSKY: Because it

says "pursuant to."

PROFESSOR HOFFMAN: Because it says "pursuant to," yes.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Do you anticipate that this would come about other than an agreed order? So one side says, "You know, they've asked for 10 million e-mails and we don't really want to look through them, so, Judge, we want this blanket order that says, you know, we can produce them all and we're not waiving any privilege," and -- because when you have two companies, both sides producing, you know, a million e-mails they're glad to agree to it, but if you have an individual plaintiff versus big, bad company, individual plaintiff is not so interested in agreeing to that order. So do you anticipate that this could be a one-sided not agreed order?

PROFESSOR HOFFMAN: Yes. I mean, obviously a court could on its own, you know, enter whatever pretrial protective orders it wants to do, and those may or may not be with the willingness of both parties. So, I mean, (4), subsection (4), clearly contemplates what you were describing when everybody agrees, though you've then got to get the court to bless it if you want to bind

everybody else in the world. But as to three, it contemplates the possibility of a court order without the agreement of all the parties.

CHAIRMAN BABCOCK: Munzinger, and then Judge Yelenosky.

MR. MUNZINGER: I just want to ask another question, and I'm not trying to beat my dead horse into the ground, but is it my understanding that the subcommittee -- and I take it the State Bar -- has not addressed the question of whether orders of regulatory agencies with jurisdiction would have the same protection?

PROFESSOR HOFFMAN: That's correct.

MR. MUNZINGER: If that is the case then I think this committee needs to study it in some detail before we recommend to the Supreme Court that it adopt a rule that would provide protection to court orders but not agency orders. Just think of the number of administrative agencies, Federal and state, whether it's in Texas -- the San Francisco Commission on Happy Meals, for god sakes, you know, I mean --

CHAIRMAN BABCOCK: They do good work, Richard, come on.

MR. MUNZINGER: The administrative agencies are -- they're everywhere, and you get before an administrative law judge, and the administrative law judge

is focused on doing what they have to do, and they say, "Give me that, and it's not a waiver of -- I need to see this." What are you going to do? Are you going to say "no"? Are you going to tell the Nebraska Commission on Corn, "No, sir, you can't see it," so they sanction you? This is -- in my opinion this is a very serious problem, drafting problem here, that we have not considered the effect of administrative agency orders.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I just wanted to confirm with Lonny when we were talking earlier about 76a and looking at the language again, this all speaks about the effect of a disclosure and only a disclosure. It doesn't speak at all to the effect of filing in court, which is where 76a comes in, correct? So this is limited to disclosure, meaning whatever exchange happens between the parties in a protective order and has nothing to do with filing under seal or otherwise, which is 76a, although I know lots of protective orders in state court track the Western District protective order, which doesn't have a 76a and I think wrongly import what's improper in state law and call it a protective order when actually it also constitutes a sealing order because it says this is not only confidential, but if anybody files it it's to be filed under seal. I always X that out and

say you have to follow 76a, but I just want to make clear there's no intent here to do that, right?

PROFESSOR HOFFMAN: Yes.

CHAIRMAN BABCOCK: Okay. Yeah, Lamont.

MR. JEFFERSON: I mean, Lonny, I think if I'm understanding the question right -- I might not be -- the question is the State Bar wants to guard against the hypothetical that you pose where the parties after the fact say, "We want to undo what's been done and get the court to go along with it," right, and so they want to draft a rule around that, and I think I would be against that just because we can't envision all the circumstances -- possible circumstances where a judge might have a legitimate reason to do it. I know, you know, in the abstract it sounds like a bad idea, and in reality judges often sign things that are put in front of them as agreed without really examining them, but I think if we're going to fashion a rule we've got to presume that the judge is going to -- is not going to sign an order unless there is a reasonable basis to do it. I wouldn't try to construct a rule to guard against an errant judge.

CHAIRMAN BABCOCK: Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: Lonny, is one distinction between the proposal of your committee and the alternatives that the first one would protect

post-disclosure orders? In other words, if there was a disclosure made inadvertently or if -- I think the example was given at the last meeting if the parties agreed at a deposition to disclose it and the order was presented later, the first disclosure order would be honored in this state, right, regardless of whether it was post-disclosure or whether the judge entered -- in other words, the alternatives say "made pursuant to an order," which I understood from the discussions last time would only envision an order that was entered before the disclosure, not one in which the trial court ruled after the disclosure. Am I confusing the issue unnecessarily?

PROFESSOR HOFFMAN: No, I don't think you are. You may be getting a little bit ahead in insofar as you're now specifically talking now about agreements and kind of, you know, what the sequence of agreement order has to be, but, I mean, everything you said is quite right. That's a -- that's a hard kind of issue for us to deal with. It was Judge Brown who brought up that, that you're talking about a couple of meetings ago and -- the last meeting, and I -- you know, whether you chose alternative one or two or three, the idea would be that the order would need to be -- that the disclosure would have to be pursuant to the order. So, so to use Judge Brown's example, if you go to a deposition, you agree that

they can say something that may be privileged and it doesn't waive it or turn over a document that may be privileged, but it doesn't waive that, we can fight about that another day, he said, but you haven't gotten the judge to approve that in advance, there is some risk that one takes. Now, certainly one could say, "Well, I did it pursuant to an anticipated order to follow that we were going to go to the judge together the next day after the deposition, in that afternoon," but I think the sort of view kind of at the end of the day came out to be that the better practice was, is to get that order in place first.

HONORABLE DAVID GAULTNEY: What about if there's an inadvertent disclosure? Would the first cover that? Say you have an inadvertent disclosure. It's taken to the court. The court rules that that disclosure is not a waiver.

PROFESSOR HOFFMAN: Inadvertent disclosure, I think part of the answer is inadvertent disclosures are governed by the prior section, in 193.3(d).

HONORABLE DAVID GAULTNEY: In another court in another state.

HONORABLE STEPHEN YELENOSKY: Where is that?

HONORABLE DAVID GAULTNEY: Is that -- you know what I'm saying? I mean, I view the first proposal as broad enough to include a determination by a court in

the proceeding that a disclosure in the proceeding --

PROFESSOR HOFFMAN: Uh-huh.

HONORABLE DAVID GAULTNEY: -- is not a waiver.

PROFESSOR HOFFMAN: I think that speaks to Lamont's point actually. That's a good illustration of what Lamont was talking about. Maybe in that sense the inadvertent disclosure you're describing wasn't pursuant to any order because there wasn't one, but the order later comes down that, you know, we bless this as inadvertent and so it wasn't a waiver, and so thus, part (3) would kick in.

HONORABLE DAVID GAULTNEY: Right, but the alternatives might not protect that, right?

HONORABLE STEPHEN YELENOSKY: What if there's never an order? It's just a snapback. It's pursuant to a snapback rule, and nobody argues about it. Would you have to have an order?

PROFESSOR HOFFMAN: In another proceeding you're talking about?

HONORABLE STEPHEN YELENOSKY: Yeah. Another state has a rule like ours. You inadvertently disclose it. The other side -- you snap it back, and the other side says, "Yeah, you're right, you can snap it back." Is there always an order that it's done pursuant to, or are

they just doing it pursuant to the rule, and if they're doing it just pursuant to the rule don't we need to have something in here that recognizes that?

CHAIRMAN BABCOCK: That's a good one. Anything else?

PROFESSOR HOFFMAN: Well, it's not a waiver then under that law.

HONORABLE STEPHEN YELENOSKY: Maybe that's the answer. I don't know. I just didn't see it.

PROFESSOR HOFFMAN: If Montana has a rule just like we do that says if you inadvertently disclose something you didn't waive it, assuming you within 10 days ask for it back and dot your I's and cross your T's.

CHAIRMAN BABCOCK: Well, what if Montana says, you know, "Snapback is fine in Texas, but we don't have that, and it's quite clear that you produced that in Texas. Now, you snapped it back, but you did produce it, and we say that's a waiver." That's what Judge Yelenosky is getting at, I think.

PROFESSOR HOFFMAN: Then it's a waiver in the -- in the Montana proceeding. Now you come back to Texas in case number two -- when you were saying the waiver was in -- the disclosure was in Texas you meant physically in Texas, but you were talking about in connection with a proceeding elsewhere.

CHAIRMAN BABCOCK: Well, in connection with a proceeding in Texas and then the Montana judge says, "Snapback doesn't work here."

HONORABLE STEPHEN YELENOSKY: Well, actually, I was thinking of -- maybe that's another problem, but I was thinking of a slightly different scenario.

PROFESSOR HOFFMAN: I have no idea the answer to that question, but we have no sort of standing to answer -- I mean, yeah, that happens -- what happens in Montana stays in Montana.

CHAIRMAN BABCOCK: Stays in Montana.

HONORABLE STEPHEN YELENOSKY: Well, my scenario was Montana has exactly the same snapback provision as we have in Texas, right, and so in Montana something gets inadvertently disclosed, and I'm not sure I know exactly how that works, because -- and it gets snapped back. Now, in Texas would there always be an order?

PROFESSOR HOFFMAN: No, I think there -- I mean, in your example there is no order, but I mean --

HONORABLE STEPHEN YELENOSKY: Right. So they come from Montana, and the person in Montana says, "Well, you disclosed it in Montana, so it's not privileged here," and they say, "Well, but we disclosed it pursuant

to the snapback rule," and the other side says, "Well, all we honor are pursuant to court orders. You don't have a court order." That's my scenario.

CHAIRMAN BABCOCK: Yeah, that's the --

PROFESSOR HOFFMAN: I understand, and my answer, again, is so the question you're raising is should we have a specific provision that applies to whatever the law says about snapback or, for example, many other scenarios that they may have thought of that we haven't, or should we just leave it as it is and assume that the rule only applies when there has been waiver? And so, for instance, if the Montana snapback rule would mean there is no waiver, then there's no waiver in -- then there's nothing to talk about here in Texas. I mean --

HONORABLE STEPHEN YELENOSKY: Well, does the rule read that way so that when you work through the rule you would determine under my scenario that there's been no waiver, because I haven't examined it to see if it does that?

PROFESSOR HOFFMAN: Maybe this is the full faith and credit point that Justice Gray was talking about earlier. Maybe that's where it becomes relevant. I don't know.

HONORABLE TOM GRAY: When they come back to Texas and arguing about what Montana did or didn't do,

that's where you wind up with your full faith and credit clause.

HONORABLE STEPHEN YELENOSKY: But Montana didn't do anything in my scenario, other than have a rule on snapback. It did nothing case-specific. So there isn't a full faith and credit issue, I think.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Rather than change this rule maybe the better thing is to have a separate provision that says that if an event that occurred in another state does not constitute waiver under that state's law then it does not constitute waiver under our law and do that as a separate rule that doesn't interfere with this court order business.

HONORABLE STEPHEN YELENOSKY: Well, I don't know if you can do that and also do what Lonny wants to do, which is preclude a court from saying, "You know that thing you did before that you've now bought back for a million dollars, that's not a waiver." Because the rule that you just described to me would say in that state it's not a waiver, so it would have to allow one, which we think is good, somebody did a snapback in another state, and disallow the other, at least which Lonny thinks is bad, which is paying a million dollars to buy back the privilege.

CHAIRMAN BABCOCK: Justice Sullivan.

HONORABLE KENT SULLIVAN: I was just going to say that I think that Judge Yelenosky's point is why we shouldn't do that. It seems to me that a court order from another state should be dispositive as to what took place in that state, and when we start going behind that court order and saying we're going to second guess it or re-examine it, we're asking for trouble. This rule, the set of rules, is going to provide us with enough wrinkles as to interpretation. We don't need to add more, and so that's maybe a long-winded way of saying I agree with Lamont's earlier point.

CHAIRMAN BABCOCK: Okay. One thing we haven't talked about that I wondered if there's any -- if there's any legislative history, so to speak, the Federal Rule 502(d) uses the phrase "connected with the litigation," and we -- each one of our alternatives has that -- what does it mean to be connected with the litigation? Did you have any discussion about that?

PROFESSOR HOFFMAN: (Shakes head.)

CHAIRMAN BABCOCK: Lonny is shaking his head no, let the record reflect.

MR. LOW: No, there's some criticism of the Federal rules. Sometimes they talk about "Federal proceeding" and then they talk about "the litigation" and

then I was going to point that out later as you get to nitpicking, but I don't know the answer to your question, but --

CHAIRMAN BABCOCK: Surely same party, same subject matter would be -- would be connected with, but what about beyond that? Anybody know?

MR. LOW: What way would it be connected with the litigation if it's not the parties or the subject matter?

CHAIRMAN BABCOCK: I don't know.

MR. LOW: See, that's what I don't know.

CHAIRMAN BABCOCK: I mean, you could obviously think of some things if you studied hard enough.

MR. LOW: Well, yeah, I could, but I haven't thought of them.

HONORABLE STEPHEN YELENOSKY: Some lawyer will.

CHAIRMAN BABCOCK: Yeah, some lawyer will. Okay. All right. Yeah, Justice Gray.

HONORABLE TOM GRAY: I just don't want to pass over Richard Munzinger's concern about this part not addressing administrative agencies and know that he has articulated a concern that applies -- or that at least other members of the committee share, I mean, because I think that is a very valid concern, and, I mean, a court

would be more or less obligated to interpret it as he indicated that by including it in the first two and not in the third exception that that was intentional.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: And so --

CHAIRMAN BABCOCK: Right. As among the three alternatives, do we have a consensus as to which alternative we would recommend to the Court?

MR. LOW: Our committee recommended the first; isn't that correct? The state --

CHAIRMAN BABCOCK: Door number one is what the subcommittee --

MR. LOW: Right.

CHAIRMAN BABCOCK: -- recommends? After this discussion, how many people follow the subcommittee's recommendation?

PROFESSOR HOFFMAN: Are you taking a vote?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR HOFFMAN: Can you give us time to get out our photo IDs so that we can --

HONORABLE DAVID MEDINA: I'll need to see your papers to make sure you're not from Canada.

CHAIRMAN BABCOCK: Actually, we're doing retina scans, so photo IDs would not be necessary. So everybody that agrees with the subcommittee's

recommendation of alternative number one, raise your hand.

And how many people prefer either alternative two or alternative three? So by a --

HONORABLE NATHAN HECHT: Rare moment.

CHAIRMAN BABCOCK: In a rare moment for our committee, unanimously favor alternative one, with some members abstaining. The vote is 19 to nothing, Chair not voting.

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I just wanted to --

HONORABLE TRACY CHRISTOPHER: We still haven't voted on whether we want it or not.

MS. BARON: Right.

HONORABLE TRACY CHRISTOPHER: That was not a vote for wanting it.

HONORABLE STEPHEN YELENOSKY: Just the alternatives.

CHAIRMAN BABCOCK: Yeah, true. And wanting it in what sense, Judge?

HONORABLE TRACY CHRISTOPHER: Thinking it's a good idea.

CHAIRMAN BABCOCK: Are you talking about just subparagraph (3)?

HONORABLE TRACY CHRISTOPHER: Yeah.

CHAIRMAN BABCOCK: Okay. How many people think that subparagraph (3) is a bad idea for our rules, raise your hand?

HONORABLE TRACY CHRISTOPHER: You're changing the vote.

MR. DAWSON: Very carefully crafted there.

HONORABLE DAVID EVANS: Skewed for a result.

HONORABLE STEPHEN YELENOSKY: You want to switch the burden to whether it's a good idea?

MR. ORSINGER: I think you need to say it's a good idea and then you can more comfortably vote.

MR. DAWSON: Quit arguing with the Chair. He gets to frame the question.

MS. BARON: The question that I was waiting for and I didn't vote on the prior question because isn't the larger question is do we think the rule needs to be changed at all? Right? Is that what you're saying?

CHAIRMAN BABCOCK: Yeah. I think that's -- we can vote on that, but if the rule -- it's going to be changed and we're going to change it with one of these three alternatives, which is the one that we want, and I think that question has been asked to change.

MR. STORIE: And I'd also like to know if the group agrees with Richard's suggestion to include

state agency orders, because I would.

CHAIRMAN BABCOCK: Yeah, I sensed that there was wide support, but we could take a vote on that. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, segueing off of that and Justice Sullivan and Lamont Jefferson's point is that raises another context, I guess, to think about, Lonny, as to whether we're going to respect something other than just the court orders, because if we're thinking here in Texas about whether our law prescribes a particular waiver or not to administrative agency disclosures then presumably they're doing the same thing in Montana, our example here, and so if Montana law says whatever you disclose in administrative proceeding is not a waiver or says the opposite and things happen in the Montana case but there's no order in the court, out of the court, and then they come to Texas, are we respecting Montana law with respect to how they deal with agencies? So maybe Justice Sullivan and Lamont's point is we just respect everything, but I don't know.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I'd like as a parting comment to repeat what I said at the beginning, that my concern is that this does -- this ignores entirely arbitration, and you're, of course, probably arbitrating because you agreed

to arbitrate in a contract that was signed months or years before the dispute arose, and you don't have a judge. You have a retired judge or a panel of lawyers or whatever, and so in order for people in arbitration to have the benefit of this rule they are going to have to get an arbitrator's award and run that over on a kind of an interlocutory basis to the -- to some trial judge somewhere so that they can get a court order making it a court order, and that's because we require there to be a court order and not just an agreement between parties, and I think that's a little antithetical to the whole idea of arbitration, but I just want to put it in the record that there's a lot of arbitration that's going on right now all over the country and even all over the world, and we're just ignoring that and pretending it's all in some district court somewhere, and the only fix may be for the arbitrators to be put on notice that they better run over there and get a court order to back up the arbitration agreement and the arbitrator's ruling in order to have this protection.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

MR. MUNZINGER: I just want to second what Richard just said. It's not so much that you're worried about the arbitrator. It's that you're worried about the lawyers who are representing the parties. It's a trap for

the lawyers representing the parties. It's the same thing as before an administrative agency. The arbitrator is the decider of your fate, and so if the arbitrator tells you to do A, B, C or "I will consider A, B, C," you have to behave in front of the arbitrator as if you would and he were the -- a forum with jurisdiction, a judge or an administrative agency, and for us not to address the problem of arbitration I think is a real problem here given the amount of arbitration and the stakes that are involved in some of these cases. A lot of the cases that are arbitrated are arbitrated because there is so much money involved and so much complexity, so you've got a problem with a lawyer who doesn't see the problem that Richard has seen, and we're writing a rule that leaves a trap in it for those persons.

CHAIRMAN BABCOCK: Okay. Kent, yeah.

HONORABLE KENT SULLIVAN: What's wrong with the broad principle that an order or a decision in a particular forum ought to be dispositive as to what occurred in that forum? It's a nice, neat, bright line.

HONORABLE STEPHEN YELENOSKY: Because it doesn't deal with the situation where you don't have a court order. It would have to go further to me and say if there's a disclosure in Montana and there's no court order on it, whether or not that disclosure constitutes a waiver

is determined by Montana law, because you may not have a court -- a case specific. You may have Montana law saying, well, what you did is not a waiver. You relied on Montana law, and so you should be able to come to Texas and say, "What I did in Montana was not a waiver. If I do it here it's a waiver, but I did it there."

HONORABLE KENT SULLIVAN: So let me just make sure I understand. So your proposal would incorporate all of mine and extend it further?

HONORABLE STEPHEN YELENOSKY: Well, I'm not saying that's my proposal --

HONORABLE KENT SULLIVAN: Or your point.

HONORABLE STEPHEN YELENOSKY: -- but I think that's a logical -- I think that -- because I don't really know where I come down on this, but I think that the logical consequence of what you're arguing would require that to be complete.

CHAIRMAN BABCOCK: Okay. Any other comments about that? Yeah, Alex.

PROFESSOR ALBRIGHT: This is different. I'm just wondering why the language was changed from the Federal rules language. I think this draft beginning with "A disclosure" --

THE REPORTER: Speak up. I can't hear you.

PROFESSOR ALBRIGHT: This language

beginning, "A disclosure made in litigation pending before a Federal court" is not as clear as the Federal language, but it seems to have the exact same intent, so I'm just wondering why the language was changed. If we want to do the same thing the Federal rule is doing why don't we use their language?

PROFESSOR HOFFMAN: I guess I don't have an answer for you. I tinkered with changing the language, and we had troubles at -- every time we tried to redraft. So if there's a -- is there some language, Alex, that you --

PROFESSOR ALBRIGHT: Well, I just looked at the Federal rule, and it would say, "A Federal court or a state court of any state may enter an order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court," dash, "in which event the disclosure is also not a waiver in a Texas state proceeding."

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I guess where I've gotten is, is this not just a choice of law question? Something's happened in Montana, and the question is what's the consequence of that? Why am I not just -- I'm in Texas, why am I not applying Montana law to the question of whether or not there was a waiver for what was

done in Montana, and if the choice of law answer is I apply Montana law then I don't need anything else. I pull in orders. I pull in statutes. I pull in common law.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: Two things, is that, number one, let's also remember that with choice of law clauses in contracts that sometimes the Montana court may be applying the law of California or New York, but secondly, to me --

HONORABLE STEPHEN YELENOSKY: Well, then I am following Montana law because Montana law is following the law of California.

MR. ORSINGER: Well, then we'll talk about renvoi over lunch, but to me the important reason to take it out of conflict of laws or choice of law problems is because there's no certainty in outcomes since every state has its own concept of the choice of law rules, and what we're seeking here is a uniform assurance to litigators in every forum that their agreement backed up by a court order will be honored in every other forum in America, and if you leave that up to choice of law principles, that's no guarantee.

HONORABLE STEPHEN YELENOSKY: Well, you could have that guarantee but then also say the choice of law, because yours may give that guarantee, but without

some statement about choice of law or something that's equivalent to it then I have no guarantee that what I do, fully knowing it's okay in Montana and it's not a waiver, will be a nonwaiver in Texas; and so if the policy issue is I should be able to freely act in Montana under Montana law without fear that what I do here in disclosure will be treated as waiver in another state then I need more than just an order of the court. It may be that I need to be explicit that an order of the court will be respected, but that's not good enough.

MR. ORSINGER: To me this is like an effort to adopt a uniform law like Uniform Commercial Code or Uniform Premarital Agreement Act or anything -- if it's truly uniform then you've got your guarantee. If there's one state like Louisiana that holds out, you better not do business with somebody in Louisiana. So what the effort here, as I see it -- and I'm not part of it, but the effort I see is to leverage off of the uniformity of the Federal rule backed up by the supremacy clause that forces all other jurisdictions to recognize such a Federal court order; and we're now trying to add -- force to that on an interstate level where there is no supremacy clause and all we have is comity; and by going around to each committee in each state and getting something like the Federal rule adopted then eventually over a period of

years we'll have the uniformity that you need to enter into these kind of agreements in one state with a hundred percent confidence that you're not jeopardizing yourself in another state.

HONORABLE STEPHEN YELENOSKY: Well, if it goes like this I guess you could say it is silent as to the question of whether or not I can apply Montana law in the absence of a court order, and if that's true then I would entertain arguments as to choice of law question. There's no court order, but the argument is what I did under Montana law was not a waiver. If this could be read as silent to that question and that's open to a common law, open to argument, then maybe we ought to recognize that. If we want to foreclose that, maybe we should foreclose it. If we want to affirm it, maybe we should affirm it.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Under *Francis vs. Arrant*, the procedural matters are to be governed by -- you're not bound by them. They're to be governed by the state. All right. The Rules of Evidence are procedural, Supreme Court has so said. I mean, they might sound substantive, but they are. I had -- or have seen cases where a particular document, same document, comes up in some of the asbestos litigation, and one judge in Beaumont rules

that it is privileged, and another judge is not bound by that. He rules it's not privileged, so how far are we going to take it? Ordinarily you have to give full faith and credit to decrees, not rulings on substantive -- on evidentiary things.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Well, the rule speaks of disclosures. It is the fact that I have given a document to somebody or information to somebody because I was ordered to do so by a forum with jurisdiction. That is a disclosure.

MR. LOW: Right.

MR. MUNZINGER: That does not address whether or not that jurisdiction ruled on whether it was or was not a trade secret, and so if I -- here's -- this is a trade secret.

MR. LOW: Right.

MR. MUNZINGER: It's immaterial to me whether it's a trade secret. "That's not here, Mr. Munzinger. I'm going to enter an order that says you disclosed that." Okay, now I come to Texas. Is it or isn't it a trade secret? The Texas court is not precluded from addressing that substantive law question.

MR. LOW: That's right.

MR. MUNZINGER: What the Texas court is

precluded from doing is saying your disclosure made pursuant to an order of a forum with jurisdiction is not a waiver of your claim that that's a privileged document. That's the distinction that --

MR. LOW: Right.

MR. MUNZINGER: At least it's a distinction that I see.

MR. LOW: I don't disagree with what you're saying.

CHAIRMAN BABCOCK: Okay. Somebody called for a vote on whether subsection (3) ought to be extended to agency proceedings, and that I think would be helpful, so how many people here think that it should be? Raise your hand.

HONORABLE STEPHEN YELENOSKY: Let the record reflect Lonny's hand is halfway up and so is mine. Okay. Now it's fully up. I'm following his lead.

CHAIRMAN BABCOCK: How many people think it should not?

MR. LOW: I'll go with the State Bar on that.

CHAIRMAN BABCOCK: By a vote of 17 to 3, 17 people think it should be extended to agency proceedings and three think it should not.

MR. ORSINGER: Chip, can I ask, do you mean

an agency proceeding in Montana will be honored in Texas, or do you mean that a Texas agency proceeding will trigger this rule in a state district court? I mean, I'm confused.

MR. LOW: Where you have "court" you would have "or state agency." You would have "agency."

MR. ORSINGER: In other words, we would apply this Rule of Procedure to state agencies even --

MR. LOW: Right.

MR. ORSINGER: -- or this Rule of Evidence to state agencies of Texas?

MR. LOW: Right.

MR. MUNZINGER: Of any state.

MR. LOW: Any state.

MR. ORSINGER: So a state agency ruling in Montana would have the same import as a district court ruling in Montana when it comes to this waiver issue?

MR. LOW: That's right.

MR. MUNZINGER: A state agency ruling that had jurisdiction that said, "You must disclose and it's not a waiver," the fact of disclosure pursuant to that order is now covered by the rule, and it would -- the fact of disclosure as distinct from the merits of whether it is or isn't privilege, the fact of disclosure would not amount to waiver under this rule.

CHAIRMAN BABCOCK: Do we need to tell the -- yeah, Buddy, sorry.

MR. LOW: No, if Professor Goode were here we would be here another 15 minutes telling why that's bad. I mean, I can't duplicate what he said, but I first suggested that first time, I said, "Wait, y'all ought to include" -- man, he had such good reasons I backed off.

CHAIRMAN BABCOCK: Yeah, well, his report Justice Hecht told me is going to be before the Court --

MR. LOW: Good, all right.

CHAIRMAN BABCOCK: -- and considered by the Court, so they can get the benefit of his --

MR. LOW: Right.

CHAIRMAN BABCOCK: -- thinking about it, but we have a different perspective --

MR. LOW: No, I understand.

CHAIRMAN BABCOCK: -- just by virtue of where we're -- you know, what our practices are. Richard Orsinger, you've been the big arbitration guy. Should we have a vote on that, whether it should be -- the rule, this subpart (3), should also incorporate arbitrations into it?

MR. ORSINGER: You know, I think that that's probably okay in principle, but drafting that would require a whole lot of thinking because you're just going

to have an arbitrator's award on a preliminary matter that's not ever forwarded to a court for approval and all that, so --

MR. LOW: Yeah, sometimes you -- they just pay it. You don't have to have a court order.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

MR. MUNZINGER: I want to take issue with what Richard just said. I'm a party -- representing a party before -- in an arbitration, and the arbitrator has jurisdiction, and there is discovery, and the arbitrator has ruled after hearing motions and arguments and what have you, and he says, "Give it to them, it is not a waiver." I'm faced with a problem now if we don't include arbitration, regardless of the difficulties of drafting. I've got a real problem. I either obey this fellow or I don't, and I have to tell General Motors or whoever, "You have no certainty and assurance that your disclosure under these circumstances is going to be protected subsequently in a court -- in any court," because my adversary can pick up the phone and call his friend in Houston and say, "Aha, the arbitrator just made him -- or told him to do so-and-so, and they gave it to them. Now it's a waiver, go get it." I've got real problems with that.

MR. ORSINGER: Well, how are you going to define the kind of decision by the arbitrator that will

trigger the application of this rule? In court it's easy. You either have a court order or you've got nothing, but in arbitration you've got letters, you've got conversations, you've got no court reporter. I mean, so are we just -- how are we even going to prove that something happened in arbitration? I mean, I agree with you in policy that arbitration is just as deadly as litigation.

MR. MUNZINGER: I understand that, and in the arbitrations in which I have participated when an arbitrator hears arguments I've had them do it where they have a little similar to a court order, I've had them do it in the letter; but there's no doubt but that the arbitrator has ruled unambiguously; and it's my job as a lawyer to make sure that I have a ruling. "Wait a minute, Mr. Arbitrator, did you or didn't you say this? Is that the ruling?" Force the ruling. You know, I don't know how you draft it, a ruling by an arbitrator, I don't know, or a ruling by an administrative agency, I don't know; but I know that the risk to lawyers and to parties is present in both the arbitral forum and the regulatory forum, and these rules as drafted do not anticipate problems with either, and they don't solve the problem of millions of electronic documents having to be reviewed in arbitration or in an administrative hearing, and they should.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: I'm going to try a maybe bright line idea. Radical, I hope. "A disclosure that is not a waiver in the jurisdiction where the disclosure is made is not a waiver in a Texas state proceeding."

HONORABLE STEPHEN YELENOSKY: Choice of law.

CHAIRMAN BABCOCK: You want to read that one more time?

MR. STORIE: "A disclosure that is not a waiver in the jurisdiction where the disclosure is made is not a waiver in a Texas state proceeding."

HONORABLE STEPHEN YELENOSKY: That's the same as saying the choice of law is the law in the state where it's heard.

MR. STORIE: I think it is, but it covers your snapback thing and hopefully covers arbitration and mediation and whatever else, state agencies.

CHAIRMAN BABCOCK: Jim, did you have your hand up?

MR. PERDUE: Well, I was just going to say that I think for this committee to weigh in on the concept of policy where a state court proceeding with an elected government official subject to the laws passed by our Legislature would now be bound by private litigants who are undergoing contractual arbitration with a private

arbitrator of their choice, who is specifically not bound by the procedural rules of discovery, has issued an order saying, "You're good, give it. It's not waived," makes -- that is a huge deference of the civil justice system set up under our laws to a private decision by somebody who has zero accountability.

HONORABLE STEPHEN YELENOSKY: But it's only a deference to what they did in that jurisdiction. It doesn't protect them in any way if they do it again in this jurisdiction. They did it under the rules of that jurisdiction.

MR. PERDUE: But there are no rules.

MR. JEFFERSON: He's referring to arbitration. I'm exactly with him on that point. Private parties when they contract to arbitrate they contract away their rights under law, and that's one of the things that they need to factor in, is that they're not going to have the protection of Rules of Procedure if they're under rules of arbitration, and then so maybe if they produce something by disclosure, if there's no obligation for the state court system to protect them in that instance they need to do it themselves contractually.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: I agree with Lamont. Look at all the rights -- when you agree to arbitrate you're

giving up all kinds of rights, including an appeal. If you're willing to give up the right to appeal, this is such a -- I think, a minor issue compared to all the other rights you give up. If you choose to go to arbitration, that's just one of the downsides.

CHAIRMAN BABCOCK: Tough. Richard.

MR. MUNZINGER: Yeah, the problem with all that is, is that first the United States Supreme Court and the U.S. Congress has said, "We want you to arbitrate as often as you possibly can." The Texas Legislature and the Texas Supreme Court has said the same thing. Now, what happens in arbitration is, is that the forum with power to make the decision or the authority with power to make the decision has changed from the courts to an arbitrator, theoretically the procedural rules change, but the substantive rules do not. So Jim says you're letting an arbitrator determine whether this is a trade secret. Not so.

You're letting an arbitrator determine whether disclosure of this document is a waiver, and that's where you're getting hung up on the problem. It's not a substantive ruling that something is or isn't a trade secret. It isn't a substantive ruling that something is or isn't privileged. It is a recognition that a person with jurisdiction to decide the issue in

accordance with law or agreed rules has ruled that a disclosure in that circumstance is not a waiver. It is unfair to people to encourage them to go to a forum and have them -- or require them to go to a forum in the case of regulatory agencies and have them be faced with the problem of obeying or not obeying, cooperating or not cooperating, and then later coming to a different forum in a different circumstance and be told that you have waived.

And I do want to say regarding Gene's language, it's fine except he says, "A disclosure in a jurisdiction," and the arbitrator is in Texas, is it the Texas jurisdiction or is it the forum? "A forum having jurisdiction." Obviously these are definitional problems if the rules are redrafted, but I think that the problems created by arbitration and regulatory agencies are extremely real and meaningful to litigants and lawyers who face malpractice claims. "Well, you didn't tell me that."

CHAIRMAN BABCOCK: Yeah. Frank, you look like you're winding up to say something.

MR. GILSTRAP: One further comment about Gene's proposal, it leaves out an order. I mean, it's one thing to have an order saying it wasn't a waiver, but under your proposal you could come to the Texas court and say, "Well, yeah, I produced it in Idaho, but it wasn't a waiver there." You see what I'm saying?

HONORABLE STEPHEN YELENOSKY: That's what he intends.

MR. GILSTRAP: So the Texas court is going to look at the Idaho law and decide was it a waiver under Idaho procedure.

HONORABLE STEPHEN YELENOSKY: Yeah, I don't understand the problem with that. I really don't understand it because --

MR. GILSTRAP: It removes certainty.

HONORABLE STEPHEN YELENOSKY: -- in a jurisdiction you have to play by that jurisdiction's rules; and the question is will playing by the rules of that jurisdiction, even though it causes you no disadvantage there, inevitably cause a disadvantage in another jurisdiction such that you're put in the position of choosing between playing by the rules there or foregoing rights because once it's -- if it's released, it's released. It's not like it can be put back in the bottle. So I really don't understand what the problem is with saying I played by the rules there. Those aren't the rules here. If I -- if I played by the rules there, it should not disadvantage me here. It's a different rule here. I can't do that here, but I could do it there, and I shouldn't be disadvantaged by that. I don't understand the problem.

MR. GILSTRAP: All right. I produce the document in Idaho, and there's an order saying it's not a waiver.

HONORABLE STEPHEN YELENOSKY: Right.

MR. GILSTRAP: And then so I can -- then in Texas I'm confident that I -- if we have a rule that talks about an order, I'm confident that it wasn't a waiver -- that the Texas court can't use it. I produce --

HONORABLE STEPHEN YELENOSKY: Can't use that disclosure.

MR. GILSTRAP: Right.

HONORABLE STEPHEN YELENOSKY: The subsequent disclosure in Texas could be.

MR. GILSTRAP: But I produce -- I produced the document in Idaho, and there's no order. There's not even talk about privilege or waiver --

HONORABLE STEPHEN YELENOSKY: Right.

MR. GILSTRAP: -- and then they say, "Okay, I want to use it in court here in Houston." They say, "Wait a minute, wait a minute, that -- I didn't waive anything under Idaho law. That wasn't a waiver."

HONORABLE STEPHEN YELENOSKY: Right. That's his proposal, and that's choice of law.

MR. GILSTRAP: But that's -- it's so uncertain. I mean, with an order you have certainty.

Without an order you're arguing Idaho law in Texas.

HONORABLE STEPHEN YELENOSKY: Well, do you want certainty with respect to an order and to exclude the possibility of an argument on other things, or do you want both?

MR. GILSTRAP: I want certainty.

HONORABLE STEPHEN YELENOSKY: You want certainty and an order, and if you don't have an order you're certain that you're going to be disadvantaged in the other jurisdiction. You won't even be able to argue it.

MR. GILSTRAP: I don't know.

MR. PERDUE: That to me just exposes the nature of Federalism. We've got 50 states with 50 different sets of rules, and that -- I mean, unless you're going to make every single state uniform or -- and that's the beauty of a Federal rule, is it applies to everybody, but there are different substantive laws or different procedural rules per the states, and I thought that's --

HONORABLE STEPHEN YELENOSKY: Yeah, but I can't --

MR. PERDUE: I thought that was the states rights.

HONORABLE STEPHEN YELENOSKY: But my actions in Montana, criminal actions in Montana, can't lead to

criminal prosecution in Texas under Texas law. I play by the rules in Montana, I can be prosecuted there. Essentially what we have is an action within a particular jurisdiction under those rules, a civil action, but like a criminal action the laws can be different but you have to look at the jurisdiction that had jurisdiction when the act was done.

CHAIRMAN BABCOCK: Eduardo.

MR. PERDUE: Right.

MR. RODRIGUEZ: Well, my concern with the last few comments is if I'm operating in Idaho and I think under Idaho law I've got to produce something and I produce it, you know, if I don't have the protection of having the court enter an order requiring me to produce it then, you know, I may have --

MR. MUNZINGER: That's right.

MR. RODRIGUEZ: -- waived it in Texas, but --

MR. MUNZINGER: Exactly so.

MR. RODRIGUEZ: -- I mean, it doesn't preclude me from going to the court and saying, "Would you order this -- order me to produce this." I mean, I don't have to -- I don't have to agree to produce something even though I may think that, you know, I have to. I can submit to the court that if I produce it voluntarily

in your court I may be jeopardizing my client in other states, and I can't do that. So just order me, and then if I'm ordered then when I come to Texas I can go to the judge and say, "You know, they ordered me to produce that. I didn't voluntarily waive it." But, I mean, at some point there's some responsibility that we have as lawyers to be aware of that.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: Well, what's wrong with giving a party the right to assert waiver in court regardless of whether it's been produced anywhere else for any reason? There may be reasons why you wanted to produce it in another court or the court ordered you to and there was an order or no order or whatever, but why shouldn't you be able to assert waiver today if you're in this court regardless of where you produced it?

CHAIRMAN BABCOCK: And you would be -- you would want to be able to argue that, yeah, the judge up in Montana ordered him, but, hey, it's out there now so that's waived.

MR. HAMILTON: Well, it doesn't matter whether he ordered it or what.

CHAIRMAN BABCOCK: Yeah. Yeah.

MR. HAMILTON: But you ought to be able to assert it in the new case at any time.

CHAIRMAN BABCOCK: Okay. All right. Are we at a point where anybody wants to vote on whether arbitration should be included in this rule? Everybody in favor, raise your hand.

HONORABLE STEPHEN YELENOSKY: What's the question? I'm sorry.

CHAIRMAN BABCOCK: Whether arbitration should be in subsection (3).

How about opposed to arbitration being in? Okay. Closer vote, 11 in favor, 14 against, the Chair not voting. So why don't we move on to subsection (4) here, Lonny?

PROFESSOR HOFFMAN: Okay. I think there isn't really much more to add. Maybe I'll just quickly say the issue, but --

CHAIRMAN BABCOCK: You underestimate us.

PROFESSOR HOFFMAN: Yeah. No, there's nothing more for me to add. I'm quite sure there's more for us to add, but, I mean, I think we've already been talking about agreements already, so all (4) says is if you have an agreement, it's binding on the parties to that agreement, and that's it, unless it's incorporated into a court order. We talked about whether we should specifically cross-reference section (3) at the end of that, saying, you know, "court order pursuant," you know,

"see subsection (3) above as to the effects of court orders," and we just ended up with the view that it was sort of more self-evident than not --

CHAIRMAN BABCOCK: Yeah.

PROFESSOR HOFFMAN: -- that (4) cross-references (3), so that's it. So, again, now we open up the discussion of the policy issues, of which there are many, but that's the rule.

MR. LOW: Yeah, Lonny, wasn't there something about when the court order -- we make an agreement and then get a court order, it has to be when the court order had to come.

PROFESSOR HOFFMAN: So that relates to the point we were talking about earlier and that policy issue about timing. You know, again, just to use that example I used before, you disclose something and you've waived it. There's no order anyway. Just first thing that happens is that.

MR. LOW: Right.

PROFESSOR HOFFMAN: And then you go, "Oh, man," and you want to somehow unring the bell. (4) seems like it might be read to say we would honor that, but except for that very last --

MR. LOW: Part.

PROFESSOR HOFFMAN: -- phrase that says

unless it's incorporated in a court order and then you've got to go back to (3) and see that you can't do that, because --

MR. LOW: Right.

PROFESSOR HOFFMAN: -- the disclosure has to be pursuant to the order, which couldn't come in that hypothetical in that way.

CHAIRMAN BABCOCK: Okay. Any comments about (4)? Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: No, I don't have any.

MR. ORSINGER: I have to ask a question about --

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Lonny?

PROFESSOR HOFFMAN: Yeah.

MR. ORSINGER: Is the reason that we are only saying this about state proceedings is because we feel like in a Federal proceeding a private agreement that's not backed up by a court order is entitled to recognition? I don't see a copy of the Federal rule, but our version of the Federal rule, which is version one, does require a court order. It says -- our version one.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I'm sorry.

It's on a different point, so if he's not done.

MR. ORSINGER: Our version one says, "Federal or state court that has entered an order," and so I'm wondering why there's no mention of an agreement alone in the Federal proceeding. Does that have to do with -- does it have to do with the supremacy clause, or is it a policy distinction or --

PROFESSOR HOFFMAN: I'm not sure I'm following, but, I mean, so this is a rule that would obviously -- it doesn't apply in a Federal court. It applies only in a Texas state court, so we said an agreement --

MR. ORSINGER: Why does it only apply in --

PROFESSOR HOFFMAN: Because these are Texas Rules of Evidence, not Federal. Again, I may be misunderstanding your point, Richard, but to back up, this is an agreement --

MR. ORSINGER: In another state before the current Texas lawsuit.

PROFESSOR HOFFMAN: On the effect of a disclosure in -- oh, of any state.

MR. ORSINGER: My question is, to go back to Montana, apparently a private contract in a Montana state court doesn't cut it in Texas under this rule, but a private contract in a Montana Federal court does cut it

under this rule. Are you intending that, or am I missing something or what?

PROFESSOR HOFFMAN: Okay. You're raising a point that I hadn't focused on before. Yeah, actually, I guess I could think of no reason why that shouldn't say, "In a Federal or state proceeding of any state."

CHAIRMAN BABCOCK: Richard.

PROFESSOR HOFFMAN: At least one is not coming to me right now.

MR. MUNZINGER: Rule 502(e) of the Federal rules makes it clear that such an agreement is not enforceable in the Federal courts unless approved in a court order.

PROFESSOR HOFFMAN: Right. So maybe the answer is, is that 502(e) already says it.

MR. MUNZINGER: It already says that.

PROFESSOR HOFFMAN: And by virtue of 502(f) we don't need to say --

MR. MUNZINGER: So there is no uncertainty as to any Federal court anywhere in United States. You already know if you're in the Federal court your agreement is not binding unless incorporated into a court order.

MR. ORSINGER: It's not binding in Federal court, but that rule right there, which is a Federal rule, doesn't govern what the courts in the states do.

MR. LOW: No, they intend to.

PROFESSOR HOFFMAN: That's what 502(f) does. It does intend to do that.

MR. LOW: They intend to --

PROFESSOR HOFFMAN: But, I'm sorry, just to be clear, though, but Richard is raising a good point, which is there is an inconsistency in drafting here because in (3) we bring in the Federal rule into the state rule, but we don't do the same thing in (4). I can't say whether that was an oversight or whether that was a choice. Again, too many drafts.

CHAIRMAN BABCOCK: Judge.

HONORABLE STEPHEN YELENOSKY: I'm just concerned that the view of this whole waiver issue and privilege has focused solely on trade secrets, and it's sort of divided along the lines of, well, the defendants are always going to have things that they want to protect, and coming from my background prior to being a judge where I represented people with disabilities, what I'm thinking of with waiver is psychiatric records.

So I'm in Montana. The judge orders my client to turn over his psychiatric records but says it's not a waiver of privilege, and you're telling me that person can come to Texas and argue that what I did in Montana means that my psychiatric records are available to

everyone?

PROFESSOR HOFFMAN: Where does it say that? It's the opposite of that.

HONORABLE STEPHEN YELENOSKY: Right. Well, that's what I -- I'm not arguing -- I'm arguing the position that, well, you ought to have a do over in the other state, seems when you look at it that way fundamentally unfair to both sides of the docket. Why should what I did in Montana pursuant to their law releasing my client's psychiatric records pursuant to their law leave their psychiatric records open, disclosed in any other state?

CHAIRMAN BABCOCK: Okay. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, we were just looking at 512, which might answer some of those issues. "The claim of privilege is not defeated by a disclosure which was compelled erroneously or made without opportunity to claim the privilege." So you could probably use that.

HONORABLE STEPHEN YELENOSKY: Not in my example because it was compelled correctly under Montana law.

HONORABLE TRACY CHRISTOPHER: Well, erroneously under our law.

HONORABLE STEPHEN YELENOSKY: Well, that -- well --

HONORABLE TRACY CHRISTOPHER: And same thing with the arbitrator if you didn't have the opportunity to claim the privilege. Although, I know under the Texas Arbitration Act people come into state court and get court orders all the time about privileged documents and, you know, compelling witnesses and stuff like that. I mean, it's specifically allowed. I couldn't briefly find it under the Federal Arbitration Act to see whether it has that same sort of ability to, you know, pop into the Federal district court when you need a real order.

HONORABLE KENT SULLIVAN: Has "pop in" ever been used in that context?

HONORABLE TRACY CHRISTOPHER: That's the way I feel when they show up and want an order after they've been arbitrating for years, and you're going, "Okay, here you go."

CHAIRMAN BABCOCK: Any other comments about subparagraph (4)? Somebody called for a vote about whether or not this is all a good idea or not. Pam, maybe you thought we should vote on that?

MS. BARON: I did. I thought other people at this end of the table also felt that way.

CHAIRMAN BABCOCK: Yeah. Well, I'm not

limiting it to you.

MS. BARON: Okay, thank you.

CHAIRMAN BABCOCK: Your one of the people that thinks --

MS. BARON: I'm not just a crank down here.

CHAIRMAN BABCOCK: A well-known crank on our committee.

MR. LOW: Is it a good idea to --

MR. GILSTRAP: What is this?

MR. LOW: -- change at all?

CHAIRMAN BABCOCK: To change at all.

MR. LOW: The Rule 511 as it reads now.

CHAIRMAN BABCOCK: Yeah, the concept is that the comments talk about --

MR. LOW: No, I understand. I just wanted to be sure what we were voting on.

CHAIRMAN BABCOCK: Follow Federal Rule 502 --

MR. LOW: Right.

CHAIRMAN BABCOCK: -- and is that a good idea? Have I stated it correctly by the cranks at the end of the table there?

MS. BARON: As far as I'm concerned, yes.

CHAIRMAN BABCOCK: Okay. How many people think that this effort to try to align ourselves with the

Federal Rule 502 is a good idea? Raise your hand.

PROFESSOR ALBRIGHT: Are we talking about the effort or this rule?

MR. ORSINGER: More good than bad.

CHAIRMAN BABCOCK: I'm sorry, Alex, what?

PROFESSOR ALBRIGHT: The effort or this rule?

CHAIRMAN BABCOCK: I think the effort is in fairness because we've talked about a lot of things.

PROFESSOR ALBRIGHT: Okay.

CHAIRMAN BABCOCK: But the effort to align ourselves with 502 is a good idea. Pam, is that okay with you?

MS. BARON: I guess so.

HONORABLE TOM GRAY: So we're voting on the qualitative performance of Lonny at this point?

CHAIRMAN BABCOCK: No, we're not voting on that. We're excluding --

HONORABLE TRACY CHRISTOPHER: Perhaps the question should be whether we think we want to go that way.

MS. BARON: Right.

CHAIRMAN BABCOCK: Yeah.

MS. BARON: That's the question.

CHAIRMAN BABCOCK: Yeah. And which is sort

of what Alex is saying of the effort. So do we want to go in that direction, that's what we're voting on. Everybody that wants to go in that direction, raise your hand.

Everybody that does not want to go in that direction, raise your hand. Thanks. The vote is 18 in favor of going in that direction and six of not going in that direction.

Okay. Let's talk for 10 or 15 minutes about the comments. Comment one, the first paragraph seems to me is gone based on what we've done, so we don't need to talk about that. Do you agree, Lonny?

PROFESSOR HOFFMAN: Yeah.

CHAIRMAN BABCOCK: Not just the last sentence.

PROFESSOR HOFFMAN: Yes, yes, yes, yes.

CHAIRMAN BABCOCK: Okay. All right. Okay, the second paragraph.

PROFESSOR ALBRIGHT: Where are we?

HONORABLE TRACY CHRISTOPHER: Where are you?

CHAIRMAN BABCOCK: Comments.

MR. ORSINGER: You're on page three of the handout.

CHAIRMAN BABCOCK: Page three of the handout.

PROFESSOR HOFFMAN: Yeah, I mean, what we

should have done and didn't do is we probably should have had an alternative paragraph one that said something like -- something to the effect of, you know, the addition of 511(b) is designed to align Texas law with 502. One of the ways that it differs, you know, is that 502 only applies to work product and attorney client -- yeah, but ours applies to all the privileges under the rules.

CHAIRMAN BABCOCK: Gotcha.

PROFESSOR HOFFMAN: So, sorry, we should have done that, so there would be some substitute comment that would be an introductory, "This is what the effort is about."

MR. LOW: Right.

CHAIRMAN BABCOCK: Okay. And I think it would be helpful to the Court if the subcommittee would draft that language, unless -- Justice Hecht at least before he had to go give a CLE presentation at lunch was of the opinion that this discussion today would be sufficient for the Court's purposes in conjunction with Professor Goode's report or his committee's report, but I think he would want a redraft of that and the benefit of the discussion on the rest of the comments to the extent there is any, so let's try to do that. Paragraph two.

MR. ORSINGER: You know, I have a comment on that.

CHAIRMAN BABCOCK: Yeah, go ahead.

MR. ORSINGER: It seems to me like that's wrong. I may not understand it, but I think that (b)(2) says that a snapback inadvertent disclosure does not waive privilege, and I read this comment to say that this rule doesn't say that it doesn't waive a privilege, so I'm not sure what that's designed to say, but to me it's contradictory to what we're actually doing. We're applying privilege law to what was previously a procedural mechanism.

CHAIRMAN BABCOCK: Okay. Anybody else have a comment on the second paragraph?

PROFESSOR HOFFMAN: I guess I would just add that if we follow what Gene was saying earlier about this language of "when made in a Texas state proceeding" that it broadens this so it's not -- so we now have the circumstance where we may be bringing 193.3(d) into play in agency proceedings when they -- when it wasn't before. In that sense the comment is --

CHAIRMAN BABCOCK: Yeah.

PROFESSOR HOFFMAN: -- both confusing and inconsistent or may be reading the provision wrong, but that suggests something about redrafting may be in order.

HONORABLE TRACY CHRISTOPHER: I don't think it adds anything, that particular comment.

CHAIRMAN BABCOCK: What about the third paragraph? Anybody have any comment about that?

All right, how about the fourth paragraph?

MR. ORSINGER: Well, the fourth paragraph appears to me to say that we do purport to apply the rule to agencies, which I think we felt like it didn't, so it should or else we ought to state that it doesn't rather than that it does.

PROFESSOR HOFFMAN: In sections (3) and (4).

CHAIRMAN BABCOCK: Right. Right. Okay. Any other comments on that? All right. The fifth paragraph.

HONORABLE TRACY CHRISTOPHER: Well, but --

CHAIRMAN BABCOCK: That's going to have to be redrafted, it looks to me like. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, but, again, I mean, everybody puts in a confidentiality order that has a sealing provision in it, and I -- you know, I know you say this doesn't affect it, but, I mean, the trial judges see it over and over and over again. It's always in your confidentiality orders, some attempt to seal on top of things. So, I don't know, I'm just not wild about having that in there as, you know, sort of the agreed confidentiality order as opposed to what we're

talking about here, a specific order about disclosure not waiving. Confidentiality, to me they're different things. A confidentiality order is a different thing from this disclosure that -- this particular order that says we've agreed that we're going to exchange discovery and if we accidentally produce privileged documents it's not a waiver.

MR. ORSINGER: Isn't that just going to be a paragraph in a confidentiality order?

HONORABLE TRACY CHRISTOPHER: It is. It is going to be a paragraph in a confidentiality order, but this rule is not about confidentiality orders. It's not about confidential documents. It's about privileges.

HONORABLE STEPHEN YELENOSKY: Are you talking about confidentiality or do you mean sealing orders? Do you mean it's not about sealing orders?

HONORABLE TRACY CHRISTOPHER: It's not about a confidentiality order. It's about protecting a privilege, which are -- can be totally different things. They can be the same, but they can be totally different, and my understanding of this rule is only limited to we're not waiving privilege by producing 10 million e-mails to you without looking at them.

HONORABLE STEPHEN YELENOSKY: I see.

HONORABLE TRACY CHRISTOPHER: That's not a

confidentiality order, so I don't think we should mix --

CHAIRMAN BABCOCK: Richard Munzinger.

HONORABLE TRACY CHRISTOPHER: -- the two up in our comments.

MR. MUNZINGER: I think part of her concerns could be addressed by changing "confidentiality" to some other word, "protective" or "discovery," by way of example, but I'm concerned by saying that our courts are bound by such confidentiality orders as distinct from the effect of such confidentiality orders in a Texas court, because I don't think there are too many judges who would say I'm going to be bound by what Judge Smith did in Montana in my proceeding under Texas law, and I wouldn't want to suggest that judge -- my Texas judge would be bound.

CHAIRMAN BABCOCK: Okay. All right. Any more on that? All right, last paragraph. Any comments on that?

HONORABLE TRACY CHRISTOPHER: Same comment, it's not a confidentiality agreement.

HONORABLE STEPHEN YELENOSKY: What about "nonwaiver agreement"?

MR. HAMILTON: How about "disclosure agreement"?

MR. JEFFERSON: Or just "agreement."

MR. PERDUE: Yeah.

CHAIRMAN BABCOCK: All right. So the sentence that says "Rule 511(b)(4) makes clear that a confidentiality agreement entered into between parties that has not been incorporated into a court order binds only the parties to the agreement," we don't like the word "confidentiality"?

MR. JEFFERSON: Yeah.

HONORABLE TRACY CHRISTOPHER: Right.

MR. PERDUE: In the e-discovery that I'm doing it's called a discovery agreement or, I mean, that's kind of what -- because you're not trying to -- you don't want to get into 76a. You want to stay away from it.

HONORABLE KENT SULLIVAN: Right.

HONORABLE STEPHEN YELENOSKY: Well, more specifically, though, it has to do with nonwaiver of privileges.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE STEPHEN YELENOSKY: If you say "discovery" that's pretty broad. People will think you're talking about scheduling orders.

HONORABLE TRACY CHRISTOPHER: I mean, a lot of people want to protect things as confidential that have absolutely no privilege.

CHAIRMAN BABCOCK: Yeah. Okay. Any other

comments about the comments? Okay. Well, this one is in the book. Let's go eat.

(Recess from 12:23 p.m. to 1:25 p.m.)

CHAIRMAN BABCOCK: Okay. Let's get back to work, and we're going to take up the Federal Rule 26 issue here in a second, but just for the record and so the Court has the benefit of this additional wisdom, Richard Munzinger has some language for a proposed Rule 511, subparagraph (3), that would say, "A disclosure made pursuant to an order of a forum having jurisdiction, whether Federal, state, judicial, regulatory or arbitral is not a waiver of a privilege." So the Court can have the benefit of that additional suggestion when it takes up the matter.

So now Justices Bland and Christopher once they get here --

MR. KELLY: I'm sorry, because I had to leave -- sorry.

HONORABLE TRACY CHRISTOPHER: I'm here, but Justice Bland is leading the discussion.

CHAIRMAN BABCOCK: She's got an eating what?

PROFESSOR CARLSON: She's leading the discussion.

HONORABLE JANE BLAND: I'm a farm girl. Okay. Bobby Meadows sends his regrets because he and his

wife had planned a celebratory trip out of town so he couldn't be here today, but he's done some work on this, and what we're looking for from the entire committee today is guidance on whether we want to go ahead with drafting a Texas rule that will mirror the Federal -- the new Federal rule that made some changes with respect to expert reports. We discussed this at our last meeting. We had several committee members weigh in, but nobody had really had an opportunity to review the Federal rule and think about it, and so the hope is that today we could get a vote on whether or not to proceed.

CHAIRMAN BABCOCK: Okay.

HONORABLE JANE BLAND: There are two changes to the Federal rule that -- that we could consider incorporating in Texas. I plan to spend the time here today on the second change because the first change involves an expert report requirement, and it was the consensus of the subcommittee and of this committee at our last meeting that the current Texas rule with respect to expert depositions and reports is more cost-effective and has worked well in state court practice, and in canvassing lawyers after our meeting in December that is what we're hearing back from them as well. So if no one on the committee is interested in pursuing the first area regarding expert reports, I think we will just table that

and not try to incorporate that in our rule.

The second difference between the Federal rule, the new Federal rule, and our rule, is a wholesale change from the way the Texas rule is set up. The new Federal rule puts the communications between a lawyer and his hired expert under the umbrella of the attorney work product privilege, with a couple of exceptions. You can still ask about facts provided by the attorney to the expert that the expert considered. You can still ask about assumptions that an attorney gave the expert in forming his opinions, and of course, you can ask about qualifications, payments, and any documents that the expert considered in forming his opinion, but communications -- and that would include drafts of the report and oral conversations between an attorney and an expert would fall under the work product privilege and not be required to be produced.

Like the work product privilege has now for things that are protected by it, a party that would want to see documents that were protected by the privilege drafts or anything of that nature or ask about conversations that did not involve facts or assumptions provided by the attorney could go into court and show the same sorts of exceptions that are available for other kinds of work product, like substantial need and crime and

fraud and that kind of stuff.

So it's a little -- it's a different rule because our current rule is open disclosure. Everything that an expert sees or reviews is subject to production. The Federal -- and we -- Judge Christopher and Bobby Meadows and I met with Lee Rosenthal on Tuesday evening to -- or Wednesday to talk about why the Federal courts made the decision to have expert reports included in the work product privilege, and it was really one of trying to improve the process for litigants in terms of costs, in terms of having the experts' opinions tested based on the underlying data and assumptions that the expert used and sort of getting rid of the side show of the lawyer on trial.

It was the Federal committee's conclusion that the transactional costs for requiring an expert to produce every draft and details of every conversation they had with an attorney was just very costly and sort of a distraction in the litigation. They looked at states that had this rule, this work product rule, and as Judge Rosenthal described it, the rule worked beyond their wildest expectations in terms of streamlining the expert process, making it less expensive for the litigants, and ultimately in their view getting a better product because it was one that came from a collaborative process that

didn't have to be shadowed in this kind of false dichotomy that you're not helping the expert shape his or her opinion.

She pointed out that there's still fruitful areas of cross-examination about the lawyer's involvement in shaping the opinion because you can ask about every fact that the expert considered and every assumption that the lawyer provided that the expert considered. It was really more of an effort to get rid of all of this satellite discussion of drafts and what led to then people trying to work around the satellite discussion of drafts, and it was a practical solution to the problem that they saw of just an increasing amount of distraction from the main -- as she described it, as the main event, which should be can the expert defend his opinion in a deposition or in court.

So that is really the issue for our committee, is if we would like to undertake a process where we would draft a rule or change our Rule 192 to incorporate this idea of work product extending to the work that an expert does collaboratively with the attorney during the process of preparing a report.

CHAIRMAN BABCOCK: Okay. And we -- we had some discussion about it last time, but either ran out of time or ran out of ideas. I think it was maybe a

Saturday. Was it a Saturday morning when we brought this up?

HONORABLE JANE BLAND: I can't remember, but I don't -- we didn't take a vote.

CHAIRMAN BABCOCK: Yeah, we didn't take a vote. So I think the Court would benefit from some additional discussion. Is Jim Perdue here?

HONORABLE LEVI BENTON: He's outside.

HONORABLE JANE BLAND: I think he's coming back in, and I will say that after our meeting we asked various lawyers to weigh in, and Jim did a lot of work sort of canvassing the plaintiff's bar, and he found in his memo that he can discuss better when he comes in that there is support for this in that bar. Bobby Meadows, Harvey Brown support it as well, and the Federal rule committee found that lawyers of all stripes by and large supported it, but in our committee meeting last month there were people that questioned whether it was a good idea, and I think Judge Christopher has some comments about it as well.

CHAIRMAN BABCOCK: Okay. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I don't think it's a good idea personally, because I think -- well, lawyers have done this artificial construct to prevent the discovery of experts' opinion, so because --

and they're spending a lot of time and money doing that, rather than just sucking it up and talking to their expert and knowing that everything they say to the expert is discoverable and if they manipulate the expert's opinion that's discoverable, so they spend all this time and money trying to hide that. All right. So by enacting this rule we're going to sanction the hiding of it rather than sanctioning the bad conduct to begin with, which was the hiding of the information and the attempt to influence the report without telling anyone that they're doing it or without providing an electronic trail that they're doing it.

So that's my philosophical complaint with this rule, by it we're hiding and rewarding the bad conduct that has started out in connection with the lawyers. In a case where both sides have experts the two of them can agree to this, and Bobby Meadows was telling me that's routinely done, Alistair was telling me that's routinely done. So nothing is stopping people in high-powered litigation where everybody has experts to agreeing to this procedure. Where I see that it might have the greatest impact is where only one side to the litigation has an expert, and generally that's the plaintiff. Sometimes the defense will have an expert, but generally it's the plaintiff and if we have this one area

of potentially tasking down on an expert's opinion has been foreclosed through this rule, and, you know, it strikes me that we have this whole procedure in place about discovering the qualifications of an expert and make his opinion reliable and, you know, make sure that it's for nonlitigation purposes is one of the things we're sort of discovering and to suddenly cloak all of this information between a lawyer and an expert just strikes me as not getting to the truth of the matter. Now, you know, I had a long -- Judge Rosenthal and I went back and forth for two hours.

HONORABLE JANE BLAND: I wish y'all could have seen it. It was a sight to behold.

HONORABLE TRACY CHRISTOPHER: And she says to me, "Well, you're not being practical." You know, "You need to be practical. This is a practical. Don't let the perfect be the enemy of the good."

HONORABLE JANE BLAND: I said that.

HONORABLE TRACY CHRISTOPHER: This is -- well. "This is a really practical thing," and, you know, "It's going to make things a lot smoother and better." Well, it might make things a lot smoother and better, but I'm not really sure that it's advancing truth or justice, because we are hiding manipulation by lawyers of their experts.

CHAIRMAN BABCOCK: You were on the trial bench for --

HONORABLE TRACY CHRISTOPHER: 15 years.

CHAIRMAN BABCOCK: 15 years. Can you recall examples where the communications between the lawyer and the expert either by e-mail or letter or discussion was used by the other side and what impact it had on the jury, if any?

HONORABLE TRACY CHRISTOPHER: Used all the time. Now, whether it made a difference or not, I don't know, because I didn't interview the jurors afterwards. Do I enjoy watching it and think it's a really fun process? Yes, I do. So --

CHAIRMAN BABCOCK: Ah, so it's all about sport.

HONORABLE TRACY CHRISTOPHER: So do I think that the jurors probably enjoy watching it? I think they probably enjoy watching it also, but, you know, that's just me. That's my opinion from watching it for 15 years.

CHAIRMAN BABCOCK: And what was the -- what was the line of cross that was effective in your view watching the fur fly?

HONORABLE TRACY CHRISTOPHER: Well, to me it was selective information given, you know, a draft opinion that says A and the next version says A, B, C, only after

having talked to the lawyers. I mean, you know, that's fun to watch, and to me it shows experts for what they can be, hired guns. There's a more pejorative term that we all use for our experts that everyone knows.

HONORABLE STEPHEN YELENOSKY: I don't know, what --

HONORABLE TRACY CHRISTOPHER: I'll tell you later. You know, and I think there's something to be said for demonstrating that they're hired guns.

CHAIRMAN BABCOCK: You still could say, "Isn't it a fact," you know, "Dr. X you're being paid $600 an hour for your testimony here today, aren't you?"

HONORABLE TRACY CHRISTOPHER: Yeah, but it's just not the same as "You sat down with," you know, "Attorney Perdue, and you've had 20 hours of meetings with him," and, you know, "The first time you talked to him you thought it was plaintiff A or defendant A, and now you're pretty sure it's defendant A, B, and C," and you know, a lot of the drama of trial will be gone.

CHAIRMAN BABCOCK: Oh, no.

HONORABLE TRACY CHRISTOPHER: And, again, you know, I think it's important for jurors to know that lawyers manipulate these experts' opinions.

HONORABLE DAVID MEDINA: They already know that.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE TRACY CHRISTOPHER: You know, so it's a philosophical position.

HONORABLE JANE BLAND: A couple of things. The jurors will know still that the experts were hired by the party, paid for by the party, that the expert speaks for the party. The jurors will know every fact that the lawyer gave the expert, that the expert considered in the opinion, and any assumption that the lawyer provided to the expert, and I thought Bobby Meadows had a good analogy. When this committee debated the discovery rules way back when and one of the discussions was about the six-hour time limit on taking a deposition, and the counter to that was always, "But it could be in that seventh hour that I get to the truth, that I get to that perfect answer from the witness -- the perfect question and the perfect answer that reveals the truth."

And so philosophically, yes, the truth-seeking function is best served by allowing limitless depositions and here philosophically allowing a vigorous cross-examination to include everything that the lawyer said and every draft that the lawyer and the expert reviewed, but it's costly, and it's expensive for the parties and the attorneys, and it's expensive to hire the experts, and what you're losing in this theoretical

cross-examination that you have is sort of this side show about the lawyer's involvement that the expert is still going to have to defend the opinion and the facts and the assumptions that underlie that opinion, and the jurors are still going to know that the expert is doing it with the lawyer, that the experts didn't just come from out of the blue and he's not neutral. Everybody knows that an expert's not neutral, and he can be cross-examined about the fact that he's not. So that's sort of the rebuttal to the --

CHAIRMAN BABCOCK: Yeah, the best answer I got from an expert cross-examining him was when he said, "Mr. Babcock, if you had called me first I would have testified for you," which led to other questions. Richard.

MR. MUNZINGER: Well, Justice Bland I think may have misspoken, and I'm sure it was not intentional. She said everything that the lawyer says to the expert is discoverable. Not so.

HONORABLE JANE BLAND: No, I did misspeak then, yes. Not everything.

MR. MUNZINGER: Exactly.

HONORABLE JANE BLAND: I said "every fact."

MR. MUNZINGER: That's what you said first. The second time you said "everything," but I know that you

didn't --

HONORABLE JANE BLAND: I'm sorry.

MR. MUNZINGER: -- intend to misstate.

HONORABLE JANE BLAND: I correct the record. Yeah. No, I misstated it. The whole point is that not everything the lawyer says. Yeah, I'm sorry.

MR. MUNZINGER: I know that you did not intend to misstate the rule.

HONORABLE JANE BLAND: Thank you for correcting me.

MR. MUNZINGER: But look at this: If you have a lay witness -- if you had a lay witness, "Mr. Smith, did you say X on the first of the month?"

"Yes."

"And then you met with Mr. Brown?

"Yes."

And Mr. Brown took -- not a lawyer, just "Mr. Brown told you whatever the fact is?"

"Yes."

"After you met with Mr. Brown, did you say Y," which is the antithesis of X? Is that fair cross-examination for the jury not involving an expert? Of course it is. It opens the question of why did the person change their testimony. They're sworn to God to tell the truth, or they're sworn to tell the truth,

depending upon the court, but they're sworn to tell the truth. So now the witness has changed his or her story based upon a conversation, meeting, transaction or whatever it was with someone. Is that fair use of a lawyer to affect the credibility of the witness? Of course it is. Why is the rule different for experts? Experts put on a tuxedo, "I'm a professor. My god, I'm a professor," whatever it is.

PROFESSOR CARLSON: Excuse me.

HONORABLE STEPHEN YELENOSKY: Now, that I've never seen.

MR. MUNZINGER: I mean it figuratively.

PROFESSOR HOFFMAN: For the record, I am not wearing a tuxedo right now.

MR. MUNZINGER: They come into court dressed with the aura of a professor who has spent his life studying bone structure or petroleum geology, or whatever it is. The man has devoted his life to this subject matter, and he gives you his opinion, and here you are and you're a juror and you're -- "Oh, my god, that's science. Oh, my god, that man is this, that, and so forth," and I can't in state court under Rule 513 get into a lot of the communications between the lawyer because it's a claim of privilege. Under Rule 513 we're not supposed to -- trial judges are supposed to say, "You can't ask that question,

Munzinger. It's privileged by the work product privilege."

So I can't show that Professor Truth Teller on Monday said X, met with plaintiff's lawyer or defense lawyer, and on Wednesday said Y, which is the antithesis of X. I can't get into that communication. I'm not permitted to do so. Now, why? I think, philosophical or otherwise, justice is based upon truth. If you don't have truth, you don't have justice, by definition. It must be based upon truth. Why do you want to hide the truth? It's cheaper. Gee, but this is what we do in court, look for truth. We're after justice. No, no, no, no, no, we're not after justice. We're after wholesale resolution of economic disputes among parties to do things in an efficient manner, that's what courts are all about. That isn't what courts are all about. It's what we've made them all about. It's what many of our judges make them all about, and they do a disservice to themselves and to the society at large.

Courts are to pursue the truth to determine justice, and when they don't do that they aren't doing what they're supposed to do, and for us to adopt a rule because the Feds have adopted such a rule, and they, by the way, do not have an analog to Rule 513. They don't have a Rule 513 in the Federal Rules of Evidence. Even if

they had it, they have done themselves and us, society at large, a disservice. It's a bad rule.

CHAIRMAN BABCOCK: You've thought about this, haven't you?

MR. MUNZINGER: A great deal.

CHAIRMAN BABCOCK: I can tell. Okay. Who else wants to talk about this? Jim, at some point you need to share with us what --

MR. PERDUE: I apologize for being out. It's amazing that Susman Godfrey lawyers always think their problems are the most important problems, so I apologize for being taken out.

HONORABLE DAVID EVANS: Most important problems.

HONORABLE JANE BLAND: Richard, could --

CHAIRMAN BABCOCK: No, he's about to speak.

HONORABLE JANE BLAND: 513 is not where -- can you tell me where you are on Rule of Evidence?

MR. MUNZINGER: Texas Rule of Evidence, I think it's 513.

MR. RINEY: Yeah, common law, assert a claim of privilege.

HONORABLE JANE BLAND: Can you draw that for me?

MR. MUNZINGER: "Comment upon or inference

from claim of privilege. Instruction," subparagraph (a), "Except as permitted in Rule 504(b)(2), the claim of a privilege whether in the present proceeding or upon a prior occasion is not a proper subject of comment by judge or counsel and no inference may be drawn therefrom. (b), claiming privilege without" --

HONORABLE JANE BLAND: Yeah, I know what it says. Can you relate that then to the concern?

MR. MUNZINGER: Well, sure. If you make the communication between the expert and the lawyer part of the work product privilege, when I begin to ask questions about what the lawyer and the expert discussed, except to the extent that it's a fact communication or an assumption given by the lawyer to the witness, that conversation becomes a work product privilege and the jury is not to be told that.

So that, for example, in the most egregious case, the expert says, "My god, Munzinger, if you say that I lose the case." Well, how do -- "Well, don't worry about the truth, say this." That's the most egregious example, but nobody gets to find out that this colloquy went on between the lawyer and the expert if they're honest and tell about it, which is questionable, but nevertheless, we've even -- we've shut the door on even asking about it.

CHAIRMAN BABCOCK: Jim, were you about to say something?

MR. PERDUE: I was similarly trying to understand how 513 came into play. That's all.

CHAIRMAN BABCOCK: Okay. All right. Yeah, Judge Wallace.

HONORABLE R. H. WALLACE: I think I tend to side with Richard a little bit. I mean, I can see the benefits, but I've always assumed that everything you ever said or told an expert was subject to being repeated in court, and as a result I tried to deal with them accordingly. Now, I know there's ways around that. I know there's ways that, you know, some experts have fancy deals where they'll do a report and you get together on a telephone conference call, or you go to their website, there's the report, you make changes. There's never a printed draft and all that kind of stuff, but you could certainly question them about that process, and I've seen instances. I've been co-counsel with people who virtually change every sentence of an expert's report. I mean, from "happy" to "glad," right on down the list, so I tend to agree that the more open disclosure, it may take more time.

And I also wonder, the sentence of you can go into -- "except to the extent communications identify

facts or data that the party's attorney provided." That could be argued almost to the point where the rule to me would almost be meaningless. I'm not suggesting any better wording. I'm just saying that you could almost argue, "Well, Judge, if they had this big conference and sat down and discussed the report and discussed revisions to be made, that had to be based upon facts that the attorney was giving him." So I don't know. That's my thoughts.

HONORABLE TRACY CHRISTOPHER: But Judge Rosenthal said that question would not be allowed.

HONORABLE JANE BLAND: No. No. It would be anything that the expert considered, is the way the rule is written.

HONORABLE TRACY CHRISTOPHER: But you wouldn't be allowed to say, "Now, while you were going over this draft of this report and changing the draft of this report, you were looking at X factor, Y factor." She said you couldn't ask that question.

HONORABLE R. H. WALLACE: Well, I don't know.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: No, I have a question. Say I'm the lawyer for General Motors. I try a lot of their cases over the state and different lawyers try steering cases

and others, and I work with the same expert. Now, I have a case here, and his report is a little bit different, and I get him kind of to change it, but now I go to Houston and his report is consistent with what he had changed. Does that attorney-client -- does that work product follow me and that expert? Where does it end?

HONORABLE STEPHEN YELENOSKY: Montana.

MR. LOW: That doesn't seem right. I agree with Richard. I mean, is the Feds -- where do they end that? Does it have to be in that case? What if it's the same expert, the same attorney? I just -- I think we're going too far. We have to pay a price for freedom, and we have to pay a price for this.

CHAIRMAN BABCOCK: Richard.

HONORABLE JANE BLAND: I don't know how to butter you up at all, Buddy.

MR. ORSINGER: I don't know who the spokesman for the change is. It may be Justice Bland, but I wanted to throw out two hypotheticals and see how the proposed rules, which hadn't been written yet, would apply. The first hypothetical is, is that an expert does a report, and a lawyer edits it extensively, and the expert makes all of the requested edits and then signs the report. The other hypothetical is that the lawyer writes the entire report, and the expert signs it without making

any changes. Those are different degrees of the same thing, and I'm just wondering under this rule if the lawyer makes all the edits and the expert adopts them all, can we find out that that happened or not under this new rule? And whoever knows what the rule means.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Under the new rule you would not find out that the lawyer edited the report --

CHAIRMAN BABCOCK: Or wrote it.

HONORABLE JANE BLAND: -- or that the lawyer had a hand in drafting the report.

MR. ORSINGER: Okay, so right --

HONORABLE JANE BLAND: You would find out what the expert was told in adopting the report in terms of facts and assumptions to support the opinion that the expert is giving.

MR. ORSINGER: And is that also true that if the lawyer writes the entire report and all the expert does is sign it, you can't find that out either?

HONORABLE JANE BLAND: Yes.

MR. ORSINGER: Okay. Then we're going to have lawyers writing these reports and experts adopting them, and the experts may be able to justify them. They might have even arrived at the same opinion if it hadn't

been written by the lawyer that hired them, but is that really what experts are supposed to be doing, adopting what the lawyer's litigation position is, and we can't prove that?

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Well, and I think a jury -- if I can ask an expert, "Did you write this report or did the lawyer write the report," I mean, if the jury -- if the witness says, "Well, the lawyer wrote the report," that's going to have a very different effect on the jury than -- or at least I can argue a great deal with that more than I can if the -- if the expert wrote it, and if we can't ask them that an -- that a lawyer wrote a report I think that we're keeping the truth from the jury, and that's not what we're about. I ought not to be able to write a report for my expert that he adopts unless the jury knows that that's what happened.

CHAIRMAN BABCOCK: Lamont, and then Tom.

MR. JEFFERSON: I'm going to take the other side. I mean, I've been involved in a lot of cases, and I guess everybody else here has, too, and Judge Christopher has acknowledged that in cases where there are experts on both sides, routinely the parties agree that they're not going to force the other side to produce drafts or communications between a party and an expert. Is that

hiding the truth from the jury? Or is it the lawyers acknowledging that, you know, in every case the lawyer is going to have some influence on what the expert -- especially what the expert puts in a report, which I think we're placing way too much importance on here.

An expert's report is just -- is just of very little probative value. I mean, what matters is how he testifies and how he gets cross-examined on the stand. The contents of the report is something the experts has to do because the Rules of Civil Procedure require it, but, you know, to go into -- to have all of this effort and all of this time and money spent in trying to uncover how the words in a report got written I think is not justified. The cost of it is not justified.

CHAIRMAN BABCOCK: Tommy and --

MR. RODRIGUEZ: I just wanted to --

CHAIRMAN BABCOCK: Yeah, go ahead.

MR. RODRIGUEZ: With all due respect to my colleague, I've never made that agreement with anybody that, you know --

MR. JEFFERSON: Have you refused it?

MR. RODRIGUEZ: Never been asked.

HONORABLE R. H. WALLACE: I started to say, that may be a regional thing, Lamont, because I've never --

MR. MUNZINGER: I've never been asked and never done it.

HONORABLE R. H. WALLACE: I've never been asked. But it may not be a bad deal.

MR. JEFFERSON: If you were asked, would you agree?

MR. MUNZINGER: No.

MR. GILSTRAP: If I thought you were going to dummy up the report, no.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: First of all, my experience is similar to theirs. I've been asked once or twice, and I did not agree to it. I generally agree with what Judge Christopher says, but let's look at the Federal Rule because I think it's more that we're talking about than just a report. It says what it protects is "communication between the party and the witness required to provide the report." So it's the communications that are protected, and then the thing that is excepted is "identify facts or data that the party's attorney provided and that the expert considered in forming opinions to be expressed," so if I go and depose that expert I think the question, if I ask them, "Well, what data did your -- did the attorney provide to you," I mean, I think that would be legitimate to object and say unless it was considered by him in

forming the opinion I can't get to it.

Well, do you think that adverse facts are going to turn out to be the basis of his opinion? No, they're just going to stand on that privilege, and I don't get to those facts. What are you going to do in a situation where an expert issues a report in which there are multiple defendants, and it places blame on perhaps more than one or primarily on one of two, but both are said to be at fault to cause some event, and then whether that report is discoverable or not, okay, let's just say that it happens, but then one of the defendants either settles or it turns out they don't have any insurance or any assets and then all of the sudden you get a new opinion by the expert, it makes no difference whether it's in a report or whether it's in deposition or whether it's in trial, and it's a total change. Now I can at least now ask, "Well, gee, you were told by the lawyer that hired you that that happened, that the party that you were primarily critical of has settled or has no assets." I can't get to that communication under this rule. I think that creates a lot of problems.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, I don't understand the cost factor, because a lot of experts put them on computer and all they've got to do is hit a button, or they keep a file

if they want to destroy and don't have, well, they don't have, or they keep a file and then all they've got to do is make a copy of their prior reports and so forth. I don't see the cost factor that great. Maybe there's something I'm missing.

CHAIRMAN BABCOCK: Well, I know one of the things that's been cited, and I've seen this myself, you get into discovery battles over this. I mean, you send a request and you say, you know, "Give me all the e-mails between the two of you, give me all drafts, give me, you know, everything he relied on, give me everything, you know, you've sent him," and then they send you back some, you know, objections and try to fight you on it and try to sharp shoot you and so then you've got to get into back and forth on that. You've got to meet and confer in most jurisdictions. You've got to exchange proposals, and then finally you go to court to move to compel them, and the judge says, "Yeah, give them the stuff," and then they don't give it to you timely and, you know, 10 months down the road and you still haven't advanced the ball.

MR. LOW: Then go to the other way, just say everything is wide open, and then there's nothing to argue about. In other words, anything --

CHAIRMAN BABCOCK: Maybe the lawyers you're dealing with don't argue even though there's nothing to

argue about, but I've been litigating in California recently, so -- yeah, Jim.

MR. PERDUE: I was going to ask the trial judges or the courts of appeals judges if -- maybe I'm confused. Are reports considered hearsay?

HONORABLE JANE BLAND: That's right. They're hearsay. They're not admitted.

CHAIRMAN BABCOCK: They're not admitted.

MR. PERDUE: I mean, does anybody admit reports into evidence?

HONORABLE STEPHEN YELENOSKY: Sometimes both sides will agree.

MR. PERDUE: Sometimes both sides will agree.

HONORABLE DAVID EVANS: Only if it's inconsistent, yeah. If it's immaterial, sometimes they agree to it.

MR. ORSINGER: I have a different perspective as a family lawyer. We routinely let reports into evidence and judges routinely overrule objections, and just so you'll have a better idea of -- we deal with psychological evaluations and custody evaluations that are usually done by court-appointed but sometimes done by privately hired people, and there's even provisions in the Family Code for them to be admitted into evidence.

HONORABLE STEPHEN YELENOSKY: Yeah, you're talking family law, you know, it's like the administrative law. The rules apply but everything is the best interest.

MR. ORSINGER: Well, but the problem is is that except for the areas where the Legislature has overridden the Rules of Procedure, the things we do here affect what I would guess is probably 90 percent of the litigation that actually occurs in Texas courts, so I think we should just stop for a second and let's think about what the impact of our discussion is going to be on 90 percent of the litigation.

CHAIRMAN BABCOCK: You always pull out that family card, you know that? We're moving along nicely --

MR. ORSINGER: Let me finish my story, please.

CHAIRMAN BABCOCK: -- and then you pull out the family card.

MR. ORSINGER: Okay. Another area is business valuations, which are very complex. Sometimes they involve very large businesses, and it would be foolish to think that a jury is going to be able to sort through the problems they have to value, especially a multifaceted business, without having the business valuation reports marked in evidence and admitted.

And the third thing is what we call

commingled separate and community property and tracing reports where people try to go back in and uncommingle mixed funds, and I promise you that millions of dollars are spent in this state hiring CPAs to go uncommingle separate community property, and you'll get tracing sheets that are this long or ten of these that are this high, and if you don't put them into evidence you don't have any evidence because the tracing report is the evidence that you're relying on for your tracing.

So in the family law arena, I don't think anybody even bothers to object to the admission of reports because the judges always overrule it because you can't get that information to a jury in a usable way without letting the report in, so I don't think that we're overfocusing on the reports. The reports are basically testimony that's backed up by an affirmation made under oath from the witness stand that goes into the jury room; and, in fact, I might argue that the expert reports actually should have more weight or carry more weight or we should be more concerned about them than we are than what the expert says from the witness stand. Okay. I'll --

MR. PERDUE: Do all the drafts on a business valuation go into evidence?

MR. ORSINGER: I was going to say that, too.

I both examine experts and I serve as an expert frequently, and the rule that I use is that I do not consider preliminary drafts that I have not shown to the lawyers to be -- that I have a duty to save them or that I have a duty to disclose them, and that's what I say with my experts, and that's what most of the experts that I deal with agree with. My rule and I think the rule that a lot of lawyers use is once you show your report to the lawyer and they start making suggestions about how you change your report, that's when you need to start saving your drafts, and it's been my view -- and I don't know if Buddy agrees with this or not based on his statement, but I've always thought that everything a testifying expert sees is subject to discovery in Texas. That's what I think the current rule is.

It's real simple. If you saw it and you're a testifying expert, you divulge it in discovery. But I don't think -- I think I have seen much misleading examination where every expert has to start out with the first sentence, and the report is initially going to be very preliminary, and sometimes it's going to make assumptions that need to be verified, and if we make our experts save every draft -- and, by the way, I don't even know what a draft is if the expert is doing it on a computer and constantly saving it over itself, but if

every single iteration of the preliminary report must be produced, you will spend days over arguing over words that are not important, so I do believe that drafts of reports that are truly just the internal workings of the experts' minds should not be in the field of play.

CHAIRMAN BABCOCK: But you just said we're entitled to get everything.

MR. ORSINGER: Well --

CHAIRMAN BABCOCK: It sounds to me like spoliation, to me.

MR. ORSINGER: It may be, and I thank God, thank God, people like you are not litigating in the family law arena and making it spoliation.

CHAIRMAN BABCOCK: There's several reasons for that, actually.

MR. ORSINGER: But I think there's a valid distinction that's being overlooked because of the way the Feds have approached this that, you know, we truly shouldn't make experts' internal thinking and their private drafts as they get their report along the way, that shouldn't be discovered and that shouldn't be in play, but once the lawyers start influencing the words that are in the report, perhaps the public policy shifts.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: While I agreed with

Richard that it would mean that you wouldn't discover that it was the lawyer sitting at the typewriter and not the expert, with respect to Tom's examples those would still be discoverable. You would still be able to ask the expert about an adverse fact and the fact that he didn't consider it or include it in his opinion. You would still be able to ask the expert about a change in the expert's opinion because of the settlement of a party. Those are not -- those are facts and assumptions that the expert considered in connection with making his opinion.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: Well, but only if the first opinion was produced already.

MR. MUNZINGER: Exactly.

MR. LOW: You wouldn't know about it.

HONORABLE TRACY CHRISTOPHER: You wouldn't know about it if the first opinion says, "It's party A," and then you settle with A, and a second opinion is party B and he hadn't produced the A, the first opinion to anybody.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Exactly the point. Whether there was a settlement or there wasn't a settlement there's a time limit to file the -- file and serve the expert's report. In Tom's example, the expert changes his

mind after he learns that the initial target of the report is bankrupt, penniless. He now changes his mind. The time limit for filing or serving the report hasn't taken place. Under Tom's example that change is not discoverable or admissible in the Federal system unless it is a fact or a data or assumption that the expert relied upon, and under Tom's hypothetical example or under the current Texas rules we would be able to find out that fact, and if I were a juror I think that would be a significant fact. Might not affect my jury -- I mean, my verdict, but on the other hand, to find out that this wonderful professor who is this paragon of truth, virtue, justice, the American way, changed his mind when he found out that his first target was bankrupt, come on, that's not for a jury to hear? Good lord.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I don't mean to good lord you, but the jury would still hear that. "Mr. Expert, did you ever consider that party A was to blame for this case, for this horrible disaster that took place," whatever. And the expert would say, "Yes, I did." And, "Now, Mr. Expert, did you -- now you're blaming party B?"

"Yes, I am."

"Why?" Let the expert say why. "My lawyer

told me to," party B -- "party A is now in bankruptcy," you can ask all those things.

MR. RINEY: I can answer that.

CHAIRMAN BABCOCK: Judge Evans, will you yield to Tom who's got an answer to that?

MR. RINEY: The expert will say, "Because I have re-evaluated it, and after I saw some additional depositions of your witness, that's what I based it on."

MR. PERDUE: And that's what they say now.

HONORABLE JANE BLAND: Yes.

MR. RINEY: That's what they're going to say, but what I lose is the opportunity to say, "Well, the fact of the matter is when you gave this opinion you didn't have from Mr. Lawyer this information that was provided to you on such and such a day, did you?"

"No."

"So this was your opinion before you got that information, and this was your opinion after that information?" I'm prohibited from even asking the expert about whether he had that information unless I can prove that is a basis of his opinion, and he's not likely to admit that. Now, does that happen in every case? No. But it does happen. It happens a whole lot more often than the waiver issue we talked about this morning, in my judgment.

CHAIRMAN BABCOCK: Yeah, well, we're going to spend just as much time on this. Judge Evans.

HONORABLE DAVID EVANS: I'm a little bit concerned that the only way to verify that the expert is testifying truthfully is that it have to be done by in camera inspection by the trial judge to verify that he did get the information from some other form, and that role, that process, is currently being carried out by advocates who look at the information being exchanged and they winnow out what they think will be good for the jury and the fact finder and what won't, so there could be some there.

Also, I'm trying to understand why a witness wouldn't be -- a fact witness who talks to a lawyer and then is asked about his conversations with a lawyer and what kind of communications they had back and forth about what happened and don't you recollect this and when they got woodshedded, how that's really different from coaching an expert witness and why we have one rule for a neutral fact witness that gets coached and an expert that gets coached. I don't understand why the Federal rules make that distinction. And we do give witnesses that are coached within organization, sometimes they're not third parties, they're just employees that get asked right after the accident, "Are you sure it really happened this way?

And that's -- that's really good ground for examination if the lawyer can handle it in cross in front of a jury. I don't know that I see much difference between that and a person who is going to testify on an outcome determinative opinion. So I'm kind of cautious about this adoption.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: A couple of things. The cross-examination that he just did could be done under the Federal rules, because it's talking about facts. The fact of the matter is, as he started out, is that party A is no longer a party. And if the expert lies and says, "I re-evaluated," "I re-evaluated," "Oh, so it had nothing to do with the fact that party A is now in bankruptcy?" That happens under either rule, because it's not about wordsmithing. It's about facts and data and what the basis of the expert's opinion was, and that's not gone away.

CHAIRMAN BABCOCK: Yeah, Judge Wallace.

HONORABLE R. H. WALLACE: Yeah, but the problem I have is the second part of that sentence that gets into "identify facts or data that the party's attorney provided and that the expert considered in forming those opinions." I've almost never deposed an expert who relied upon anything that the lawyer told him. "No, I didn't rely on that. I didn't rely on that." I

think we have the same problem here. If you wanted to get into the fact that he changed his opinion, say, after a party filed bankruptcy, would he be precluded from doing that if the expert just says, "Judge, I didn't rely on that, I didn't consider that in formulating my opinion. I don't know, when I first read this I thought it would make more honest people out of lawyers and experts, but now I'm not so sure.

CHAIRMAN BABCOCK: Has anybody done any studies or have any data on how much juries rely on experts?

HONORABLE R. H. WALLACE: Probably very little. Especially dueling experts.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I think it's not so much how much they rely but how an expert can destroy your case when you impeach him. The credibility of the expert is the real key thing, I think, when I put an expert on that needs to say the right thing, but when his credibility is destroyed, zap, and that's the best way you can destroy credibility.

CHAIRMAN BABCOCK: Credibility. So if your expert is up there and the other side destroys it, that hurts your case?

MR. LOW: Yeah, it hurts me, too.

CHAIRMAN BABCOCK: And hurts you.

MR. LOW: Yeah.

MR. ORSINGER: Especially if it's on a contingent fee basis.

CHAIRMAN BABCOCK: Yeah, based on how much money you paid him.

MR. LOW: Yeah, but, you know, I will point out one other thing. I notice a number of worthwhile organizations support this, and one of them is the Federation of Defense, Corporate Counsel, International Association of Defense, but I don't see where ATLA or some of those people support it.

MR. ORSINGER: You said worthy. That's why.

HONORABLE JANE BLAND: I can answer that. ATLA does support it. It's A --

PROFESSOR HOFFMAN: Association for Justice.

HONORABLE JANE BLAND: Yes, and they did support the rule.

MR. LOW: American Trial Lawyers?

HONORABLE JANE BLAND: Yes, sir. It's a new acronym.

MR. LOW: Man, then I'm way behind there, too.

MR. PERDUE: Well, and the American College and AC --

MR. LOW: Well, American College is pretty conservative, but --

CHAIRMAN BABCOCK: Now, now. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I think Alex and I were talking about this a little bit this morning. This might be the kind of thing where we let the Federal system try it for a few years and get some reports back from them as to how it works, talk to the judges to see if there's a bunch of, you know, disputes over this ruling on, you know, what's been relied upon; and unless we're really clamoring for the change we can just let them see how it works for a while. Just a suggestion.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Yeah, let me -- and I'll ask, you know, to me at least, it was my practice if I had an expert who was being deposed and you get a document request for all documents reflecting any communication, right on down, there was nothing to object to. I mean, or at least I didn't think there was. You're obligated to produce it, you know, reflecting communications you had with the expert related to his opinion. Do you think -- I mean, it seems to me that, again, this paragraph, "identify facts and data the party's attorney provided and that the expert considered"

is -- may lend itself to those discovery disputes over someone saying, "Well, I'm not going to produce this because the expert didn't consider it." I don't know. I'm just -- it seems to me that that may be an area that would lend itself to discovery disputes that we didn't have before.

CHAIRMAN BABCOCK: Judge Yelenosky, then Tom.

HONORABLE STEPHEN YELENOSKY: I just have a question, because there seems to be a different reading of this, and I'm not sure which reading is intended, but I'm hearing some lawyers say that what you will do is you'll go before the judge without the jury, and if the expert says, "Well, I didn't rely on that," then the question cannot be asked in front of the jury; and the other way I guess that I'm reading this and I think Justice Bland is arguing it is in front of the jury you can ask the expert, "Did you rely on this? Did you rely on that?"

HONORABLE JANE BLAND: Right.

HONORABLE STEPHEN YELENOSKY: And it isn't that it's privileged because he didn't rely on it. What it allows -- the privilege is for communication, so the question is "Did you rely on the fact that so-and-so dropped out of the lawsuit?"

"No, I didn't." Well what's the objection

to that question? The objection would be that he found out about the bankruptcy from the attorney, and the response is, well, the question goes to what he relied on. So my question is, is Justice Bland's reading what's intended or what I'm hearing from other people, which is essentially that the witness would control what -- the extent of the privilege by simply saying, "I relied on that" or "I didn't." And I don't think that's right, but we haven't had that debate.

HONORABLE JANE BLAND: The word "considered" is used because the idea is that it's discoverable if the expert considered it.

HONORABLE R. H. WALLACE: It's broader.

HONORABLE JANE BLAND: It's broader than used it, included in the report. It's basically was it mentioned, and if it was and it's a fact or it's an assumption then you can ask about it.

HONORABLE TRACY CHRISTOPHER: You can ask about this -- given this fact, you know, how do you explain away this fact? But what you can't ask about is "Did you and the lawyer talk about how to explain away this fact?"

HONORABLE STEPHEN YELENOSKY: Right, but I heard over here something brought --

HONORABLE TRACY CHRISTOPHER: That's what

you can't ask.

HONORABLE STEPHEN YELENOSKY: But what I was hearing over here was essentially you go in front of the judge, the expert says, "No, I didn't consider that. You're not going to be able to ask about it." That's not your view of this?

HONORABLE TRACY CHRISTOPHER: Right.

MR. PERDUE: I don't read the rule to say you can't ask about it. It's just that you don't get the hearsay correspondence that goes underneath it. As I read the rule it's just that you don't get all that correspondence that is the -- what was said and the timing of it, but there's nothing about the rule that prohibits you asking about it. I don't read anything in the discovery rules that limits the scope of cross-examination.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: Well, it protects communications, and what I'm really getting at and what I was talking about is I want to be able to find out what did you know and when did you know it. That's an important part of cross-examination, and I think this could create some problem places, in a sense fair disclosure. Jim Perdue and I talked about this after the last meeting, and while I didn't do nearly as thorough a

study as he did, Hayes and I did do some talking, and my opinion is in minority of the defense lawyers. Most of us seem to think that that was okay, and also reading that last night I was surprised to find out I belong to three of the organizations that supported the Federal rule, so maybe I've just got a strange situation, but I do think that the kind of discussion we're having here today, kind of what Judge Christopher is suggesting, maybe we see how this develops under the Federal rules might be a wise idea.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: A rule proposed -- or rather Federal Rule 26.4(c) severely restricts discovery by making all communications between the lawyer and the expert privileged under the work product privilege unless they relate to the expert's compensation, number one; two, identify facts or data that the party's attorney provided and the expert considered; or three, identify assumptions that were relied upon. So when you say I can't see all of the hearsay correspondence and e-mails and what have you that went through there, or rather that I can see them, that doesn't appear to be the case under the rule. I would ask the trial judges, I'd ask all of us, to think back to what we had before we had Robinson and Daubert. Robinson and Daubert were sea changes in trial practice

and were ostensibly designed to ensure that courts and especially juries were not misled by false science. Do you have any less interest in seeing that they're not misled by purchased science?

It's the integrity of the science that you're after, and it's integrity of the science that the jury is after, and I think a trial judge who has the gatekeeping function under Robinson and Daubert, the trial judge has that same function. One of the prongs of Robinson and Daubert is the reliability of the expert's testimony, and admittedly, you as a judge aren't going to make a pretrial ruling on credibility of the witness. On the other hand, if I as a lawyer were able to bring to you a communication that proved that the expert changed his opinion from black to white based upon a letter written by the plaintiff's attorney saying "If you say that, I lose the case," what are you as a trial judge going to do in making your gatekeeping ruling on reliability? As a trial judge you are foreclosed from looking at that letter, you are foreclosed from any deposition testimony about that communication. You have chained yourself. You can't get into that discussion because of a rule that was adopted that said that that's a work product privileged communication. You'll never hear it. You'll never see it, and have you enhanced the quality of the scientific

evidence that goes to the jury, whether it's financial, petroleum, geology, whatever the subject matter is? Are you getting better information on which the verdict and judgment are based?

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: This just goes back to the --

CHAIRMAN BABCOCK: I'm sorry, Jim, I missed you. I'll get you in a minute.

HONORABLE STEPHEN YELENOSKY: This goes back to the smaller point I was making or asking about, and would it not, consistent with the interpretation I'm hearing, be better if it read "identify facts or data that the party's attorney provided, identify assumption that the party's attorney provided," and simply leave out the reference to "and the expert considered"? Why is that even in there? The communication is the attorney providing facts or data or assumptions that the -- the funnel is they have to be facts, data, or assumptions. Now, whether -- then you get to ask, "Did you consider this?" It isn't -- it isn't a criterion that they be considered in order to be asked about. That's what you're going to ask. So why is that in there?

CHAIRMAN BABCOCK: Jim, I'm sorry.

MR. PERDUE: I completely agree with that.

That's the -- we don't have a proposed rule before us, we just have the Federal rule, but I would agree that if we did adopt something you would take that out. But as to the substance of just the practice with experts, one of the Robinson criteria is that the opinion is supposed to be of something that is used in a nonjudicial universe. The reality is -- and this is not just unique to medical malpractice in the state of Texas. It is common in everything else. If you've got an expert who supposedly is supposed to be qualified because they work in the field of epidemiology or they work in medicine, well, they're not supposed to be trained in how to write a qualifying expert report under substantive Texas law. That's not what they're supposed to do. Hopefully you get experts that that's not what their profession is, or we would have the word that has gone unspoken.

So the practice, the practice, I think has been on both sides of the bar that anybody who interacts with experts understands that the legal burdens are outside and made substantive within the system outside the field of science, and a lawyer who then works with an expert who is a scientist or doctor or economist must satisfy those legal burdens. Well, why is then the helping process of getting an expert from a nonjudicial use into what is a judicial use that you can use and get

qualified, of which it's still hearsay and only used for the purpose of discovery into what he's going to say, why is that thought process or exercise something which then adds, from my personal experience and I think most people and the reason why most people were on board with the Federal rule, an immense amount of time and expense in the process.

Now, you know, I'll be -- apparently everybody has kind of said the plaintiff's lawyers are the only one who manipulate expert reports, but without taking issue to that, I do think that everybody can agree that discovery into what did you find out then, how much time did you use then, who talked to you then, how long did you talk, what did you talk about, has created this kind of comical fiction in two hours of deposition time where an expert is asked all these things, and nine times out of ten he or she says, "Well, I don't remember exactly what we talked about."

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: I agree wholeheartedly with Jim, and I mean, I -- the assumption here is that there's no such thing as an honest expert, right? I mean, that the expert -- all experts are subject to manipulation just based upon what the lawyer says, so we're trying to craft a rule to expose all these lying experts where the bottom

line is -- I mean, there's not a significant case that's been litigated anywhere where the lawyer doesn't talk extensively with the expert in one way or another before the expert produces their opinion. I mean, it's almost as if they're -- what we're saying here is the litigants on the other side ought to be in on those discussions, ought to be privy to those discussions and ought to hear them and ought to be able to have their input so that we can get to the truth as opposed to a lawyer really, as Jim says, assisting the expert in packaging an opinion in a way that is useful in court, which happens on every case where there is an expert in one way or another. Now, sometimes you can't discover it, there's nothing written to discover, but that goes on every single time, and why should we spend all this time trying to figure out the underpinnings of the communications between the lawyer and the expert as opposed to just what are the opinions and can you support them?

CHAIRMAN BABCOCK: Judge Yelenosky, then Buddy, then Richard.

HONORABLE STEPHEN YELENOSKY: Well, I don't know where I come down on the issue, but I don't think it's as simple as saying that people assume all the experts are going to lie. All you've got to assume is that some will, and the question is, is the game worth the

candle, and it seems like something that perhaps requires -- Richard Munzinger would say it requires no empirical investigation because even if there's one you should have the right to investigate that, but there will be somewhere sometime an expert who says, "I think A is responsible," and the lawyer says, "Well, I need it to be B," and the expert says, "Okay, B," and so the question is, is it okay to avoid all this unnecessary stuff let's say for 99.9 percent of the experts in order to find that .1 percent. That seems to me to be the big question. Richard Munzinger answers it on principle.

MR. JEFFERSON: Even more narrow than that because what you're looking for is the documentation of that change in opinion. It's not -- experts change their opinion all the time, and we never hear about it. So now what we're going to do -- what we're spending all this time doing is trying to find the documentation where we can prove that this expert took one position one day and another position the next day.

HONORABLE STEPHEN YELENOSKY: Well, not necessarily, because you're ignoring the chilling effect of the fact that people might be able to discover it. Some lawyers may properly change their behavior knowing that if I tell him that it's discoverable, so I'm not going to tell them to change the report.

MR. JEFFERSON: You tell them. There's just no documentation of it.

HONORABLE STEPHEN YELENOSKY: Well, then you're assuming all lawyers are improper.

MR. JEFFERSON: No. Well, if the rule is -- if the rule is that all communications are discoverable there won't be -- in fact, that's the -- that's kind of how lawyers who are concerned about this manage their practice now. You have WebExes where you just share words, and there is no draft of a document. There are ways to communicate the same thing that you're going to do every case whether or not there's a rule about it or not. If there's a rule that says it's all discoverable, there's not going to be anything to discover. If there's a rule that says it's discoverable -- that it's not discoverable then the parties are going to efficiently trade communications and they're not going to spend a lot of time trying to go through all of these -- play these games in all of these machinations to make sure they're not documenting things and then having to fight about what's documented or not is discoverable.

CHAIRMAN BABCOCK: Buddy, Richard, and then Hayes.

MR. LOW: I have a question. Who is the gatekeeper who decides if the expert is relying on this?

Does the expert say, "Well, I heard that, I didn't rely on it." The expert considered. He said, "Yeah, I heard that. I didn't consider it." So is he the gatekeeper?

HONORABLE STEPHEN YELENOSKY: That's what we were discussing, and I think the opinion I heard and -- was that, no, that's not -- that's not a threshold question for the privilege question. Consideration doesn't enter in -- the expert's consideration or not is not a threshold question for determining the application of privilege.

MR. LOW: How do you determine it if you can't get to it?

HONORABLE STEPHEN YELENOSKY: Well, it -- it's really a nullity, I mean, the way I read the rule. The consideration really shouldn't even be in the rule if we were to write the rule, and the way I would read the rule right now it isn't really operative but -- and I think that's the way -- Justice Bland can speak for herself, and I asked her, and I think that's the way she would read it.

HONORABLE DAVID EVANS: I was just going to ask Justice Bland, is this -- isn't this going to lead to a request for production for all communications, then a privilege log and said, "We're producing everything except those that relate to the three factors, and we're

tendering the rest of them"? I understand what Jim says about the deposition and the waste of time about "Did you get a call then and what happened then," and all of that, but I'm still trying to figure out how much time we're going to save in the end because the communications are producible if they identify compensation, identify facts or data. So there is going to be a series of redacted documents that are going to come up to the trial court for some sort of inspection, or did I miss that?

HONORABLE JANE BLAND: I don't think that the anticipation is that you'd have to produce a privilege log in every case. I think the idea is if you suspected some sort of fraud you could, like the work product, go into the trial judge and say, "I have a substantial need for this stuff," and at that point you might have that kind of a thing.

HONORABLE DAVID EVANS: I guess what I would say is that I --

HONORABLE JANE BLAND: The idea is just don't produce your drafts, and at depositions we're going to ask about your assumptions, we're going to ask about your facts, we're going to ask about --

HONORABLE STEPHEN YELENOSKY: Data.

HONORABLE JANE BLAND: -- what you've considered, what you haven't considered, and we're going

to make the opinion and your ability to defend it based on your assumptions and the underlying facts of the case the main attraction --

HONORABLE DAVID EVANS: I think ideally --

HONORABLE JANE BLAND: -- and stop the cheap shots at the lawyers.

HONORABLE DAVID EVANS: I agree, and ideally I think that may be the way it would work, but I would perceive the first thing that both the party that wants to depose that witness is going to do is craft some sort of request for production for any document that reflects the things that are discoverable and then going to go into deposition, ask questions about those. "Is that all you've got?"

"No, that's not all I've got. I've got other communications."

"Well, what did they identify if they didn't identify facts or things to be considered by you in your opinion?" And then you're back down at the trial court with -- which is fine. There needs to be something to do at times, and there's nothing more fun than an in camera inspection. I enjoy them immensely, but, you know, I do think that although it's a table type motion it might be good to watch what the experience is with this while we go along.

CHAIRMAN BABCOCK: Okay. Richard, then Hayes, and then Judge Christopher.

MR. MUNZINGER: I have --

HONORABLE DAVID EVANS: Normally it's just done different in state court than Federal court, I guess, and I apologize for interrupting.

HONORABLE NATHAN HECHT: But let me just say in response to that the -- and you can go back and look at the Federal court record, the committee's record on this, but they felt like there was already enormous experience in different jurisdictions which have different rules, and that was the only reason they did it in the first place, was to see -- is because they felt like people in New Jersey were doing one thing, people in California were doing another, you know, and so everybody was coming in saying, "This is what we found, this is what we found," and as a result of that could then come to the conclusion that this was good. So --

HONORABLE DAVID EVANS: And I think --

HONORABLE NATHAN HECHT: It's fine to watch how the Federal rule plays out, but I think the response would be it's already played out quite a ways already before.

HONORABLE DAVID EVANS: I think it's a good point. I just think there's a different level of

sophistication in Federal litigation versus state district court and county court at law jurisdiction in civil cases, and there's a different level of play, and it may not make that much difference, but it's going to be --

HONORABLE STEPHEN YELENOSKY: Well, just because we're more sophisticated than Federal, I wouldn't harp on that.

HONORABLE DAVID EVANS: Yes, that's true.

CHAIRMAN BABCOCK: Richard, you still got something to say?

MR. MUNZINGER: Only that my client -- clients, when they spend money with me, I never have had a blank check with clients at any time in my life. I've always had clients that have been concerned with their attorney's fees, so I as a trial lawyer have to make a decision as to whether I'm going to investigate a particular subject or not and how much time I'm going to spend on it. That's an expense that my client should be free to make. I don't burden the Federal court system unless and until I -- or a state court system unless and until I bring a motion to the court, and I have to make up my mind whether or not when I bring the motion to the court I affect my -- the court's perception of me and my client, whether it's worth the court's fight.

My experience is, is that Texas judges hate

discovery disputes, and they don't like the people that hold out, and they don't like the people that file spurious motions or stupid motions. Neither side is favored by discovery dispute in state court or Federal court, so I have to make all these judgments myself. Then when I come in Texas court I have a six-hour deposition. If I choose to spend two hours attempting to investigate some subject of a communication between the attorney I've used a third of my time. The two hours was in somebody's example over here. All of these things are things that I as a trial lawyer must make up my mind as to whether I can judiciously use my time and my effort for my client and my client's case within the financial constraints imposed upon me by my client and by the circumstances.

The bottom line, however, is the Federal rule forecloses an area of inquiry to me and to my client. It does so with experts. No other witness is -- has this. If a lawyer says to a fact witness and communicates with a fact witness about the importance of changing their testimony from changing the word "blue" to "carolina blue" or whatever it might be, that is open to discovery and open to the jury and open to the fact finder in every case.

It is one area that the Federal rule takes that away from the lawyers, and that's the experts, and

this is the one area where people come in and give things other than facts. They give opinions, and they dress their opinions up in their expertise, whether they're a professor or whatever they are, astronaut, doesn't make any difference. They're now being permitted -- it's an exception to the evidence rules you are permitted to share your opinion because of your greater knowledge and expertise in this particular area, so you walk in with a tuxedo on, you're to be respected, you're a professor or doctor or whatever you are, and we have foreclosed inquiry into an area that would allow us to ask whether this witness's testimony to the jury under oath for a jury to decide a litigants' rights under our law, we should foreclose this area of communication to determine what the truth is.

HONORABLE STEPHEN YELENOSKY: But we've done that for attorney-client privilege for --

MR. MUNZINGER: I understand that.

HONORABLE STEPHEN YELENOSKY: You can't ask what the attorney told his client.

MR. MUNZINGER: I understand we have, but we've always done that because it's the attorney and the client and you wouldn't get truth from the client. The basis of the attorney-client privilege is truth, the same as it is if I go to my doctor. You assume I'm going to

tell my doctor my symptoms. If I lie to my doctor, I'm a damn fool, and if I lie to my lawyer, I'm a damn fool. So the privilege protects truthful -- presumptively it's designed to protect truth. Here what you're doing is covering something up whether it's truthful or not, and the justification, saves time and money. But the time and money is the time and money of the litigants.

Is the court system overwhelmed by all of this? I don't know. I don't think trial judges are going to tell me. They know more than I do about this. I'm just a lawyer, and I don't know how they spend their time, but if it's with the judges I spend my time in front of, by god, I don't take unnecessary discovery disputes to a judge, and I don't think any good lawyer in this room does. You take the ones that you know are worth fighting about, but here you have a subject matter which is foreclosed, and it is directed at truth, and truth is the pillar of justice.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: I want to speak to the issue of full and frank discussion between the expert and lawyer. I want to follow-up on something that Lamont said. The assumption underlying the current Texas practice is that all experts are bad and all lawyers are going to influence their opinions to say things that support their case,

which may or may not be true. Okay. I think that's there. What that compels you to do under current Texas practice is you've almost got to retain -- and we forget that the lawyers need educating as much as the jurors do in some of these cases, okay, and so we're almost required to retain a consulting expert to educate the lawyer with whom the expert -- with whom the lawyer can have a full and frank discussion about the good, the bad, and the ugly of the case, you know, before you decide to retain the testifying expert to emphasize the good.

And I think, you know, if we can encourage that discussion, you know, you're at least going to eliminate one expert, you know, or decide who you're going to designate and who you're not going to designate, but right now you've almost got this fiction, this two-tier approach. You're consulting -- you're hiding your education behind a consulting expert and then you're going to be looking at a situation where, you know, you may or may not then get a testifying expert.

I think I like this proposal in the Federal system because I think you can have that full and frank discussion and then you can present the testimony that is as important and it can be cross-examined. There's a lot of stuff that doesn't form the basis of their opinion, it's simply education between the lawyer and the expert.

CHAIRMAN BABCOCK: Judge Christopher, you've had your hand up.

HONORABLE TRACY CHRISTOPHER: Well, I did ask Judge Rosenthal what other states had this rule already, and she said New Jersey and Arizona --

HONORABLE JANE BLAND: Those were two examples.

HONORABLE TRACY CHRISTOPHER: But she wasn't sure how many others did. There are a lot of people agreeing to this already, which is a different question from what Judge Evans said in terms of once we've implicated -- once we've put a rule down how do we handle the discovery disputes, you know, and everything about that. And, Jim, I've seen a lot of really bad defense experts, too, so it's not just on the plaintiff's side, but -- and, yes, it is absolutely true that in today's appellate scrutiny of expert opinions you really have to prepare your expert to make sure your expert knows what the standard is, knows what the law is, and knows what he or she is expected to bring to the deposition or to have in the back of their head before they give their opinion, and -- but to me -- and when I give a speech to lawyers on getting your experts prepared, I tell them to do that day one. Go in and say to them, "Okay, this is the law. This is the law of products liability. This is what I have to

prove. This is the legal issue that will be given to the jury. For you as an expert, these are the things that you will have to show to support your opinion," and, you know, just lay it out. Okay, you've got to show your qualifications, you've got to have studies, you've got to have -- you know, depending on the type of case it is, if it's a pharmaceutical case you've got to tell them all about, you know, studies and double the risk and all of that, and you just lay it out for them so you don't get into that they start out with one opinion. Well, you didn't have this, you didn't have this, and so then you go back and they give another opinion because, well, now they're adding in all of these things that, "Oh, suddenly the lawyer told me I really needed to make my report legally sufficient." So, I mean, I do understand -- I do understand your frustration, but to me, giving the expert the legal parameter for his opinion is totally permissible. A jury would understand that, and I don't see why it shouldn't be discoverable, that I have told him this is what he has to do.

MR. GILSTRAP: Let's vote.

CHAIRMAN BABCOCK: Okay. Anybody inclined to vote? Richard.

MR. ORSINGER: Almost all of our discussion has been on (4)(c), and if there is going to be any

consideration of (4)(b), I wanted to just say that I'm not sure that the entire dividing line for expert reports ought to be either you see every draft or you see only the final draft, and I tried to propose one that I think is workable that I've been using for years and many of the experts that I use have used, which is that as long as the expert is formulating his or her own ideas and successive drafts that they need not be saved or disclosed, but once they start being edited by an attorney for the party then I think the policy that you want to see what influence the advocates have had on the expert might come into play. So if we are writing our own version of the rule rather than just copycatting what the Federal courts have done I'm thinking that we should consider some dividing line besides either all reports or no reports.

There's another thing I'd like to toss out in case there is any rule writing to be done, and that is that in my practice -- and may not be just unique to family law, we use the same experts for mediation that we use for trial, and we frequently are mediating within a month or two before we go to trial, and so we have this unsupportable distinction in our minds as family lawyers that the work that our experts do to get settlement offers together and then they sit in -- they're not actually -- mediation hadn't started yet so they're probably not

covered by the mediation privilege yet maybe, but there's work that experts should do that have to do with making offers and evaluating offers that shouldn't be subject to disclosure even if they are testifying experts.

That's not in our mediation statute. It's not in our Texas case law. As long as we're writing a rule about what part of the thinking process of the expert is off limits and what is on limits I would ask that we consider specifically saying that work that experts do for purposes of mediation or during mediation are not subject to routine discovery rules, because I've even seen a couple of times, not often, where they have a different person participate in mediation because they were afraid that all of their mediation analysis and the succession of offers would be disclosed, so if we're writing something, I would like to toss that out for consideration about protecting or carving out a safe haven for the work the expert does to support the mediation process.

CHAIRMAN BABCOCK: Okay. Let's do our vote on what we've been talking about first, which is communications between an expert and an attorney, and everybody can see what the Federal Rule (4)(c), 26(4)(c), and everybody who thinks Texas should have a rule like that raise your hand.

MR. LOW: Chip, would that include some

amendments like --

CHAIRMAN BABCOCK: Yeah, it could include amendments, but it would be following that --

MR. LOW: But following that pattern.

CHAIRMAN BABCOCK: That model. Everybody --

HONORABLE STEPHEN YELENOSKY: Can you tell us what all the votes are we're going to take? Are we going to take wait on the Federal, you know, or is that among the choices or --

CHAIRMAN BABCOCK: What's the --

HONORABLE STEPHEN YELENOSKY: Well, I mean, people were saying we should wait on the Federal model.

CHAIRMAN BABCOCK: No, we're not taking a vote on that. Not yet. We may.

HONORABLE STEPHEN YELENOSKY: All right.

CHAIRMAN BABCOCK: This is whether or not we should now --

HONORABLE STEPHEN YELENOSKY: Okay.

CHAIRMAN BABCOCK: -- have a rule like the Federal rule on communications between attorneys and experts. Everybody in favor of that, raise your hand. Everybody against that, raise your hand.

MR. LOW: Richard, you got your hand raised?

CHAIRMAN BABCOCK: Okay. There is 6 in favor, 17 against, the Chair not voting. Now let's talk

about the other part of the Federal rule that deals with drafts and excludes drafts from discovery, and do we want any more discussion on that, or have we covered that adequately? Richard, your views would not be changed, I take it.

MR. MUNZINGER: I think that's correct, yes.

CHAIRMAN BABCOCK: Okay. Everybody that's in favor of the Federal rule, something like the Federal rule, that protects drafts --

MR. LOW: Other than the final?

CHAIRMAN BABCOCK: -- other than the final, which wouldn't be a draft. It would be the final.

MR. LOW: Yeah, that's true I guess.

CHAIRMAN BABCOCK: Raise your hand. Okay. All those opposed? That was slightly closer, 8 in favor, 16 against, the Chair not voting. So I think we have a good sense of the group about Federal Rule 26, and, Justice Hecht, do you want any more votes, any more discussion?

HONORABLE NATHAN HECHT: No, but I think the Court would, as usual, like to know if there were a rule what it would look like.

CHAIRMAN BABCOCK: Which gives you a hint of where the Court may be going with this, so Tom.

MR. RINEY: Well, hypothetically if the

Court were drafting a rule I would think that Judge Yelenosky's suggested modification would go a long ways towards preventing abuse.

HONORABLE STEPHEN YELENOSKY: And that's to take out "and the expert considered."

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: What about on subdivision (3), "and relied," would you take that out also?

HONORABLE STEPHEN YELENOSKY: Right.

CHAIRMAN BABCOCK: Okay. Well, it falls to the subcommittee.

HONORABLE JANE BLAND: We'll get something drafted for the next meeting.

CHAIRMAN BABCOCK: Okay, thank you. Thank you. Let's take our afternoon break, and just for planning purposes, if it's all right with everybody, I think we might end around 4:30 today. Is that okay?

HONORABLE SARAH DUNCAN: That would be great.

(Recess from 2:52 p.m. to 3:12 p.m.)

CHAIRMAN BABCOCK: Okay. Let's get going. Richard Munzinger has proposed a motion of the Federal rules such that everybody in court will now be required to wear tuxedos, so we'll tone up the court nicely.

Elaine has been working with a task force

appointed by the Court on proposed amendments to ancillary proceeding rules under the -- and Judge Lawrence as well -- Rules 592 to 734, and Dulcie Wink and David Fritsche are here, who have been working on the task force, who have done terrific work, and we've got about an hour and 15 minutes or so to talk about this in an overview way and then we'll be back next time to talk about it more, but, Elaine, why don't you --

PROFESSOR CARLSON: Yeah, I'm just going to give you a short overview and then we're going to hopefully, Chip, go ahead and look at the injunction rules or start to look at them.

CHAIRMAN BABCOCK: Yeah. Right.

PROFESSOR CARLSON: As you know, the ancillary proceeding rules deal principally with the issuance of writs mostly in a debtor-creditor relationship, but not exclusively. Many of the writs that are affected under those rules deal with prejudgment remedies where creditors are attempting to seize property, creditors are seeking to seize property under a writ, hoping they can secure a potential judgment, attachment and garnishment, and sequestration, similar provision for limited situations with a landlord with a tenant who has not paid in a distress warrant situation. These rules also deal with post-judgment seizure of assets to satisfy

judgments, including execution and receivers and turnovers, and these rules also deal with writs of injunctions and mandamus at the trial court level.

If you look through that series of rules you'll see that most of them are the rules as adopted originally by the Texas Supreme Court when the Rules of Civil Procedure were enacted in 1939, 1940, and they were principally taking statutes and putting a rule number on them, so there hasn't been a real refined review of these rules in quite sometime, with the exception that in the 1970's the United States Supreme Court handed down a trilogy of decisions in *Fuentes vs. Shevin* and *Mitchell vs. W.T. Grant* and *North Georgia Finishing vs. Di-Chem*, which were all cases looking at whether or not the prejudgment seizure of property under a writ violated the due process rights of the debtor, because it was often done ex parte and often issued by a clerk, not even a judge, without a hearing.

And so as a result of those three decisions there were due process safeguards that the Supreme Court suggested -- U.S. Supreme Court suggested in those opinions would be necessary, such as the party seeking the writ must do so on a verified petition; they have to post a bond; the judge, not a clerk, issues the writ; there has to be a hearing with proof, even though it may be still ex

parte; the defendant has to be notified on the writ that they have a right to seek to challenge the validity of the writ and the grounds for issuance, seek to dissolve it, put up replevy bonds, et cetera; and there's a tort if the writ is wrongfully issued, and the basis for that tort is if the facts made to obtain them were false it's a basis for a tort claim and potentially for even malicious -- I mean, for punitive damages.

And after those decisions came down there was a reworking of some of these rules in 19 -- like '75, '76, with very few of them, and I just tell you that's the background of the last time there was a look-see that I know of of this body of rules, and so flash forward 30 some years, and we were asked as a task force to take on looking at the rules and to suggest necessary modernization and recommendation and to update the rules in light of the case law and to make sure they don't conflict with other rules.

The task force that was appointed was approximately 30 individuals, almost all who do creditor-debtor type practices, and there were just -- I have to say for the record an incredibly outstanding group of people who gave of their time extensively. We had over 10 meetings of the full task force over a two-year period, and we then broke into an editing subcommittee of which

David and Dulcie, Tom and I, Kennon -- poor Kennon, and Pat Dyer worked on --

CHAIRMAN BABCOCK: Poor Kennon.

MS. PETERSON: Poor Kennon.

PROFESSOR CARLSON: Poor Kennon. Trying to make sure the rules were harmonized and that they, in accordance with the Court's charge, contain plain English; and we did the best we could on that. So we've rewritten the rules after all of this extensive debate. That work product is on the Supreme Court web page, and it's very extensive, I think 132 pages. Didn't think that was pretty fair to throw on you today in its entirety, so we would like to begin by looking at injunctions and then I would like to ask each of you before our next meeting if this is on the agenda, which I assume it will be, to please take the time to look at that. I've asked Dulcie and David to be here today because they're really people who do this on an ongoing regular basis, and Dulcie was the subcommittee chair on injunctions, so she was the principal scrivener as well as the brains behind the rules, so I'm going to turn it over to you, Dulcie, to kind of walk through the rules with the committee.

MS. WINK: Thank you. I tend to be -- I have a high voice, and so if you have trouble hearing me, just start waving, and I'll make sure to speak up. Those

of us who were involved in the subcommittee for injunctions, I had a co-chair, brilliant, the Honorable Randy Wilson. We also had Bill Dorsaneo, Kent Hale of Lubbock, Chris Wrampelmeier of Amarillo, Raul Noriega of San Antonio, and Clyde Lemon, who has worked in the district clerk offices both in Harris County and in Galveston County. There are a few overarching principles that occurred throughout the injunctive rules that you'll also see folding over into the other groups of rules.

The first -- and we didn't talk about it in the task force before breaking into subcommittees, but it seemed like almost every subcommittee said, "Can we just get rid of the writ system and turn to a less -- a less archaic system," and the good news was Judge Wilson decided to look into that and immediately came back and said "no" for our subcommittee. There are simply so many references to writs throughout not just the case law but the statutes that it would be very difficult unless we were going to have a statute out there that said prior references to a writ now means both before and now, so we took that out of the equation. The task force as a whole and the subcommittees elected to put more specifics in the rules as opposed to more skeletal rules. The reason being is that a lot of these ancillary rules are very, very sketchy. They work in tandem with statutes that have been

enacted over the years, and we have a history of a lot of case law that has engrafted things that are required of the practitioner that a young practitioner or even a well-experienced lawyer who has never stepped into dealing with these writs could be tripped up to his or peril. So to make it easier not just for the next generation of lawyers but for those of us who don't live in the debtor-creditor world, we thought that would be helpful. That also means commenting. A lot of the subcommittees have recommended comments to some of these rules.

Throughout the rules and what you'll see today is many of the writs and parts of the writs required two or more good and sufficient sureties while others said "one or more," and the general task force said we'll go with "one or more," that gives all the judges the flexibility. When these were enacted back in the Thirties or before we had a different banking system. Let's not think about the last couple of years, because I recognize the problems, but it does give the judges a lot of flexibility.

Similarly, we have also throughout the rules and here you'll find provisions for the posting of a cash in lieu of bond or other security in lieu of bond. If you've never done this before, if you're representing a young company that doesn't have a long history of

financials, they're probably not going to qualify for bond. It's a very difficult procedure, but if they can post the cash or the proper amount of security otherwise, we tried to give more availability to the writs for the parties.

And, finally, for -- once the harmonizers got together and started trying to make them sound as if they were all written by the same people, you'll find that we added some things back and forth more to the other writ rules than here in injunctions. I think injunctions came first because it's a little bit different than the rest. It will have some of the easier to accept changes if you like them, harder to accept changes if you don't, and it really shows how we tried to bring the case law into the rules.

Looking at the first rule, you'll see that we talk about temporary restraining orders, and throughout not only injunctions but the other writ rules we've gone through the -- through a standard where we say here's what has to be in the application, if it has to be verified or supported by affidavits we've talked about that, then we've moved on for hearing issues, specifics as to orders, et cetera. Looking at this particular rule, you'll find that the application for the TRO, it literally lists the elements, and we did that for a reason. As a practitioner

who likes to do injunctive practice, it is great to take pot shots at the other side that didn't know that you need to, you know, verify certain specifics; and if they didn't, well, we just beat them for that day and then we have more time to deal with the next, so we put it all here. Some of it comes from case law.

We also specified, you'll notice (a)(5), that if it's sought without notice to the adverse party or its attorney you demonstrate through specific facts supported by verification or an affidavit that notice was not possible or practicable or the applicant is going to sustain substantial damage before notice can be served and hearing held. Now, this really reflects not only some of the written rules, I think the Dallas County rules, the local rules say that, but also a lot of the larger counties the judges are saying, "I think we have a less likelihood of issuing a TRO improperly if we have the other side here, so go talk to them, I'll give you time to come back." By putting this here, it puts the party to a burden of saying could I have -- do I have sufficient situation where we can go ex parte, so we brought that forward.

Under the verification, there were huge monumental discussions about the difference between a verification and affidavit. I'm not going to fascinate

you with that. We simply left the existing rule where you could file a verified pleading when requesting a TRO. We hope the practitioners will be careful to be verifying the facts, not the legal assertions, but that's not always the way people do things. We're hoping that people will be able to see that the specific facts that are being supportive of the application for an injunction are sworn. That's our key concern, and that's what the judge needs. At the TRO stage it's especially important because the judges are most often just listening to the word of counsel and the affidavits of parties and witnesses.

Notice in the verification point in Rule 1(b), the proposed Rule 1(b) of the injunctive rules, "Pleading on information and belief is insufficient to support the granting of the application." The funny thing about this is I seemed to have been the only person on the subcommittee that even knew that there was case law on that issue when it first came up. The reason we're not allowed to do pleadings on information and belief only at the TRO stage is, again, because the judge is going to be responding to affidavits and the argument of counsel. We're not often going to have live testimony. There are cases out there that say, yes, if you're going to be doing it at the injunction stage, at the temporary injunction or the permanent injunction stage, in those pleadings, it may

be defective under the rules if you didn't make these specific and if you didn't -- if you just pled on information and belief and didn't perhaps say the basis for the information and belief, but once we're in an evidentiary proceeding, that defect can be remedied through the evidence. So we've made that clear. Actually, this is one of the things that I actually got somebody on, and, you know, so I'm hoping this will prevent that from happening to somebody else at the TRO stage another day.

We left all the possible flexibility for the judge on setting the hearing, "notice, if any, as directed by the court." When it came to the order -- and this was a suggestion specifically from Judge Randy Wilson in our subcommittee. He wanted the orders in these rules to be very specific. Practitioners are asked by the court to present orders; and proposed orders, he said he had in his practice almost never received one that met all of the specifics that were in even the existing rules; and the problem is there's great case law out there for, you know, nerds that says if you foul up that order then the injunction may be void or void ab initio or voidable. So we're trying to get the gotchas out of the rules. We're putting that into the order so that the practitioner as well as the judges are getting notice of all of the things

that need to be specific. We're still requiring the specifics of the fact findings that are necessary for a TRO. You'll find parallels in temporary injunctions and in permanent injunctions. We've got to have the fact findings, and notice that it also brought the issue that of if it was granted without notice the whys of that, but we tried to give all the specifics there.

We tried to write the duration and extension part of the rule more clearly. The rules have always provided that the temporary restraining order cannot initially be for more than 14 days and then it can be extended for one like period by the judge, so that meant if the first one was only 10 days the judge could only extend it for another 10 days, and again, we wanted it to be clear in the rules. Whatever it is, you've got up to 14 days for the first one. The judge can extend it for that same like period one time. After that it must be on the agreement of the parties. There is clear case law, and that is a well-decided situation. The judge cannot impose a second extension over the objection of any party.

HONORABLE STEPHEN YELENOSKY: Do you want questions now or later?

MS. WINK: Yes. Any time.

HONORABLE STEPHEN YELENOSKY: Well, right above that, is this from the existing rule or something

new, "If granted without notice, setting hearing of the application for a TI that is the earliest possible date, taking precedence over all other matters" -- "older matters of the same character"? If that's new, my questions are why to the first part and how to the second part.

MR. GILSTRAP: I think it's in the rule.

MS. WINK: No, it's --

HONORABLE STEPHEN YELENOSKY: Is it in the existing rule?

MS. WINK: It is in the existing rule.

HONORABLE STEPHEN YELENOSKY: Well, then it's honored in the breach.

MS. WINK: I'll have to agree with you there, and I've always wondered how you judges did that, Judge Yelenosky, but --

HONORABLE STEPHEN YELENOSKY: We just don't.

MS. WINK: Well --

HONORABLE STEPHEN YELENOSKY: And nobody complains.

MS. WINK: That's --

HONORABLE STEPHEN YELENOSKY: Well, it would be hard to say what that is. I mean, what is "the earliest possible setting," and "taking precedence over all matters except older matters," I don't even know what

that means in this context, so --

MS. WINK: I would have to agree with you. I think the rule tries to give some flexibility to the judges. In other words, if we've got somebody docketing, I think the import of the rule, if we're looking for what it feels like, it's saying move these injunctive matters as early as possible once they're ready to go ahead of other types of things. From an honest docketing standpoint, I honestly don't know how that is being done.

CHAIRMAN BABCOCK: Eduardo, you want to --

HONORABLE STEPHEN YELENOSKY: Well, my comment would be --

CHAIRMAN BABCOCK: -- say something?

HONORABLE STEPHEN YELENOSKY: -- can we change that?

CHAIRMAN BABCOCK: Hang on. Eduardo.

MR. RODRIGUEZ: Yeah. I just wanted to ask, is it anticipated with these new rules that the order is actually going to state why the applicant had no adequate remedy of law and why immediate and irreparable injury will result and not just that language that they all have now, I mean, now, the orders all say, you know, the -- you know, there's no adequate remedy at law, but they don't say why, and so I'm just asking if y'all are anticipating that you're going to require judges to require them to

show them that and put it in the order, or is this just the way it's -- the way it was.

MS. WINK: You brought a great question forward, and this was already existing. The rules tell us that the order must say -- the existing rules tell us that the orders must say --

MR. RODRIGUEZ: Oh, I know. I realize what the rules say.

MS. WINK: Yes.

MR. RODRIGUEZ: I don't know that I've ever gotten an order on a temporary restraining order that ever tells me anything other than there's no adequate, you know --

MS. WINK: Right.

MR. RODRIGUEZ: -- remedy at law.

MS. WINK: You're quite correct, and I think that's very true on many orders that have been issued in the past. Similarly, if this information is provided to the practitioner then the practitioner -- when I draft an order proposed for the judge, I'm going to put my general basis for why I think my party has irreparable injury. Now, the judge may disagree with me, and he or she may mark through that red line and red pen and start all over, but at least that information is there so it will be there. Sadly, there are rules that say -- you know, or

case law where wonderful otherwise circumstances evidently justified an injunctive order and because the order did not comply with the technical terms of the rule, it was thrown out. What a loss and a lost huge expense to the parties.

MR. GILSTRAP: Another question.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: In part -- Rule INJ 1 in part (b) you have a general verification requirement. Why then do we have a second requirement for verification in (a)(5)?

MS. WINK: Wait a minute. I missed --

MR. GILSTRAP: I'm sorry, look in Rule 1.

MS. WINK: Yes, sir.

MR. GILSTRAP: And part (b) has the old -- the general verification requirement, and then why do we have a second verification requirement in (a)(5)? Is that because they're different facts from the ones referred to in (b)?

MS. WINK: Yes, we have an existing -- (a)(1) through (4) relate to the elements of an injunction. (a)(5) is not part of the elements of an injunction as it exists in current case law and the rules. (a)(5) is attempting to bring the rules compliant, especially with larger jurisdictional practice, which is

we judges -- or judges want to know whether or not the parties have conferred and had an opportunity to be present, so that's why there's a separate statement on the verification in (a)(5).

MR. GILSTRAP: Okay. I do have -- are we ready to talk about these rules, or are we going to keep going?

CHAIRMAN BABCOCK: If Dulcie is done.

MS. WINK: At any time.

CHAIRMAN BABCOCK: Go ahead, Frank.

MR. GILSTRAP: First of all, with regard to parts (2), (3), and (4), those generally state the requirements of a temporary injunction or temporary restraining order. I don't really see what (1) adds to it. If you have a current -- if it contains an intelligible statement of the grounds for injunctive relief it's going to say why there's immediate and irreparable injury, why you have no adequate remedy of law, and why you have -- that you have a probable right of recovery. It seems to me that (1) is just redundant of (2), (3), and (4).

Additionally, there's the old problem that some types of injunctions don't have to have irreparable harm. There's some statutory -- if it's an injunction provided by statute you don't have to prove irreparable

harm, and that's always been an exception to the rule, and it might need to be written into the rule.

Additionally, adequate remedy at law, you don't have to prove adequate remedy at law if you have injury to property. I think that's 65.0115, so, again, that's an exception. If you're codifying the law, it seems to me you've got to have exceptions for that.

CHAIRMAN BABCOCK: Okay. Somebody else have a comment? Richard.

MR. ORSINGER: Are we going to comment on the whole Rule 1 right now or -- because I don't want to stop you before you finish.

MS. WINK: It's fine with me. It's absolutely fine.

CHAIRMAN BABCOCK: She's okay with it.

MR. ORSINGER: On the very first line of Rule 1(a) I think that there's a lot of confusion in all of these injunction rules where we sometimes mention "motion," sometimes mention "application," and sometimes mention "pleading" and sometimes mention "petition," and I think that what we ought to do in footnote 2 as well as in the comment to Rule 1 and Rule 2 is say that "application means a pleading or motion." In my world, which is the family law world, we don't usually have a separate application apart from the petition. We file a petition.

We have a paragraph that covers the TRO. We have a paragraph that covers temporary injunction. We have a paragraph that covers special orders under the Family Code, and I don't think we want to indicate to anyone that there needs to be anything in addition to the pleading; and if you were to define the word "application" to include pleading, motion, or other filing, it would smooth all of this out and then it would be elective whether somebody wants to file something separate from their pleading or not, and that's going to be a comment that would appear in various different lines I can get to you later and show you, but I'm sure you probably know.

MS. WINK: Can I address that one before you go to the next issue?

MR. ORSINGER: Yeah, go ahead.

MS. WINK: First of all, like you we have agreed that -- and we have recommended at the end of the rule that there be a comment saying, first of all, when we refer to a motion we don't care if it's a motion, application, we're saying the same thing. Like you, even though I'm not a family court practitioner, my application or motion is part of my pleading. I simply give it that name and give the background. The other reason you'll sometimes see references to the application or motion as well as the pleading is because a person cannot seek a

temporary restraining order unless they are seeking either temporary or permanent injunctive relief in their pleadings, so that's an existing -- you know, it is within the current rules and at least as they have been interpreted by case law. So that's when we refer to those differently.

MR. ORSINGER: Well, then a possible suggestion would be to go ahead and define "application" as including a pleading, but then in other terms use the word "pleading" when you mean pleading and don't mean motion or separate standalone application. But right now some of the requirements that are -- it's the plaintiff's choice whether they're going to have a separate application or whether it's going to be a motion or whether they're just going to stand on their pleading, and I think there's a lot of confusion about that in my opinion reading through this. Another thing is --

CHAIRMAN BABCOCK: Yeah, before you go on to that, Richard, I do think that Richard's suggestion is a pretty good one, because I had noticed that up here in (a) we say, "A temporary restraining order may be sought by a motion or application." And then in (b), "Verification, all facts supporting the application must be verified." Well, somebody could say, "Well, I didn't do it by application. I did it by motion."

HONORABLE STEPHEN YELENOSKY: But footnote two takes care of that.

MS. PETERSON: In the comment.

MR. ORSINGER: Footnote two says, "Application refers to a motion or an application," but it doesn't refer to a pleading, which in my opinion is where most of the applications are. They're built into the pleading. So we're leaving out the most frequent application from the definition of what "application" means.

CHAIRMAN BABCOCK: My point is by distinguishing them up here in (a), Judge Yelenosky, by distinguishing it there but not distinguishing it in (b) you might leave some ambiguity, so you take care of it by a footnote as Richard suggests.

MR. ORSINGER: And it's in the comment, too, Chip.

CHAIRMAN BABCOCK: And it's in the comment, too.

MR. ORSINGER: But the comment is too narrow because it only defines application as an application or a motion --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- and it really should be pleading, but that point's been made.

MR. FRITSCHE: And, Richard, one follow on, one of the reasons we used "application" here is in the harmonization process application is the commencement of whether it's a sequestration, an attachment, or garnishment. The word "application" as a defining term in (a) with every set of rules was intended to be the initial pleading or the initial document that is filed to achieve that particular ancillary remedy, so I think part of the struggle here is the fact that in the harmonization process we tried to begin with the word "application" for each --

MR. ORSINGER: And I have no problem with that. All I'm telling you is I think a pleading should be considered to be an application, but your definition does not say that, and I think that doesn't -- it creates confusion because the words are used in different ways at different times; and secondly, and I don't -- I hesitate to speak for all areas of the law, but in my experience most of the applications for TROs in family law are in the petition or the counter-petition. So I think it's just a problem to define "application" and not include pleading, but only include motion.

HONORABLE STEPHEN YELENOSKY: Unless, unless judges think that applications in pleadings is applications, which we do.

MR. ORSINGER: Well, you know, I don't know what to say. If you guys don't get my point then just reject it.

HONORABLE STEPHEN YELENOSKY: This has never been an -- it's just never been an issue.

HONORABLE DAVID MEDINA: I've never seen you give up so easy.

MS. PETERSON: Don't you have a response?

MR. ORSINGER: Okay. A broader issue --

CHAIRMAN BABCOCK: Hold on for a minute. Judge Christopher.

MR. ORSINGER: Oh, I'm sorry.

HONORABLE TRACY CHRISTOPHER: The verification paragraph, is that supposed to be a codification of current law, or is that broader? Because I know a lot of TROs, people will come in and say, you know, "I have a noncompete with my employee attached. He's left and customer A has told me that client is competing." All right, well, that is not admissible into evidence because it's hearsay. So do I then have to go get customer A's affidavit? I mean, I always accepted that kind of an affidavit at the TRO stage, knowing that at the TI stage they would have to come in with admissible evidence, they would have to have the customer come in and say, "Your employee came and called on me," but at the TRO

stage it's not good enough.

CHAIRMAN BABCOCK: Hugh Rice.

MR. KELLY: Every time I've filed one of these -- I had the misfortune of filing many -- we always said, well, you know, the employee possesses a sales list, possesses trade secrets which if shared with others would immediately lose our trade secret status, or in the case of customers it would immediately begin impairing our ability to retain our customers, and clients were never willing to call on the customers. They didn't want to alienate them. So that's just a minor point.

CHAIRMAN BABCOCK: Well, but Justice Christopher's point is well-taken.

MS. WINK: Yes.

CHAIRMAN BABCOCK: Do you have to have -- is this an expansion of existing law?

HONORABLE TRACY CHRISTOPHER: Of a verification?

MS. WINK: Well, the existing rules -- let me be very clear. The existing rules require sworn or verified pleadings to support any injunction. That's the first thing. The level of what am I going to require as far as how detailed are the affidavits of the verification. I have always erred on the side of caution and have very clear affidavits; and the difficult thing,

as you say, is going to be at this, you know, TRO stage. I generally have required people to bring the affidavit of the person who is giving the information, not the hearsay affidavit.

HONORABLE TRACY CHRISTOPHER: But is that required now under the law, because I don't think that's common practice?

HONORABLE STEPHEN YELENOSKY: Well, it's required, but we never -- it never gets reversed because there is no appeal.

HONORABLE R. H. WALLACE: How is it required?

HONORABLE TRACY CHRISTOPHER: Yeah, that's the question. Is it -- I mean, to have a verified complaint --

HONORABLE STEPHEN YELENOSKY: Based on --

THE REPORTER: Wait.

HONORABLE TRACY CHRISTOPHER: -- is it different than --

HONORABLE R. H. WALLACE: How is it verified?

HONORABLE TRACY CHRISTOPHER: -- verifying every fact based on personal knowledge that's admissible in evidence? The fact that -- I mean, I had personal knowledge that my customer called me and said, "Your

employee is calling on me," but that's not admissible in evidence.

MR. GILSTRAP: Well, Judge Christopher, there aren't any decisions on TROs, but with regard to temporary injunctions I think there are a number of decisions that say a verified petition has got to be based on personal knowledge, and information and belief won't cut it, and heretofore the same rules applied to both, so, you know, and but there's no law on TROs because there's no appellate decisions.

HONORABLE STEPHEN YELENOSKY: Yeah, I would take personal knowledge as -- as requiring personal knowledge other than just somebody told me. On the other hand, I, like you, have probably granted TROs based on some hearsay. Probably it's error. Probably is error.

HONORABLE TRACY CHRISTOPHER: Well, I mean, hearsay is admissible unless objected to, so but, you know, I mean --

HONORABLE STEPHEN YELENOSKY: Well --

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, but I think personal knowledge is different from admissible in evidence. You could have personal knowledge that the customer called and said, "Your guy is coming out here and calling on me," but, you know, "and he's told me

such-and-such and such-and-such."

HONORABLE STEPHEN YELENOSKY: Well, the fact that somebody told you is not a relevant fact. The relevant fact is did it happen, so you don't have personal knowledge of relevant facts.

HONORABLE R. H. WALLACE: Well, I mean, it appears to me that would be a substantial expansion of -- I mean, I've seen TROs presented and granted based upon a verification that everything in the petition is based upon my personal knowledge and is true and correct.

HONORABLE STEPHEN YELENOSKY: Yes, and I've probably granted them, too, but the specific question was is that consistent with the law, and probably not.

HONORABLE R. H. WALLACE: Okay. And also, is it intentional that the verification for the temporary injunction does allow -- if I can find it --

MS. WINK: Yes, it does allow --

HONORABLE R. H. WALLACE: -- based upon personal knowledge if explained.

MS. WINK: Yes. The reason we went ahead and said that at the temporary injunction or permanent injunction stage is because there are cases where the courts have said very clearly because we're going to have to have an evidentiary hearing we can deal with the information and belief and address that as it comes before

the judge at the time.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: While we're back on the order, part (c) on page 2, Judge Yelenosky points out that nobody pays any attention to that. Maybe we ought to take it out. (d) is more problematic for me. First of all, and I don't think it makes any difference at the TRO provision -- level, but it requires the order to say -- to find that -- to find in effect that there's a probable right of recovery. I think that's just loaded with problems, because it's -- and it won't come up here. It will come up in the temporary injunction phase because that's an invitation for the trial court to get into the merits of the underlying cause, and they're not supposed to do that at the temporary injunction phase. (7) seems to say --

HONORABLE STEPHEN YELENOSKY: I'm sorry, could you explain that?

HONORABLE TRACY CHRISTOPHER: Yes, you do.

MR. GILSTRAP: Well, at the temporary injunction you're not supposed to decide the underlying merits of the case.

HONORABLE STEPHEN YELENOSKY: Yeah, but probability.

MR. GILSTRAP: No, that's in the pleadings.

In other words, if -- look at Davis against Huey. It says where this all comes from, "the merits of the underlying cause are not presented for appellate review in review of a temporary injunction." If I'm -- let's suppose I'm -- I buy -- I buy property from you, and I'm -- land in the country. I want to build my dream house. It's going to have a lake, white fence, and a beautiful white house, and then you decide you don't want to sell, and you then turn around and you say, "I'm going to put a gravel pit there." I sue you on the contract for specific performance. I also seek a temporary injunction. It's enough that my petition verifies that you've breached your contract and I'm entitled to specific performance. You don't have to make a preliminary determination of that at the injunction level. You only have to decide if you're about to build the house on it. That's the irreparable harm.

HONORABLE STEPHEN YELENOSKY: No probability of success?

HONORABLE LEVI BENTON: No, actually, you know, let's say he had an illegality, a rock solid illegality defense against your client. The trial judge ought to think about that, because why would a trial judge or trial court issue the restraining order or the injunction knowing there's no probability you can defeat his illegality defense?

MR. GILSTRAP: Because the petition doesn't state a probable right of recovery in that case. If there's a lay down illegality defense that everybody knows about.

HONORABLE LEVI BENTON: Well, I'm sorry, I've been dozing today. I thought you just said the court shouldn't look at the probable right of recovery, but now you're confessing the court should.

MR. GILSTRAP: The court should not make a decision on probable right of recovery --

HONORABLE LEVI BENTON: The court is not making a decision --

MR. GILSTRAP: Right.

HONORABLE LEVI BENTON: -- but the court has to make -- has to form some evaluation.

MR. GILSTRAP: Yeah, but it shouldn't make the finding. That's the problem we've got here.

HONORABLE LEVI BENTON: Well, I mean, but the court has to express that it has gone through this mental exercise and concluded that there's some probable right of recovery.

MR. GILSTRAP: I think that is established by the verified petition.

CHAIRMAN BABCOCK: Yeah, Dulcie.

HONORABLE LEVI BENTON: That's -- okay.

I --

MS. WINK: This is -- I respectfully disagree. I hear what you're saying, because there have been a lot of cases written on this very issue. Judges Benton and Yelenosky, I think we're all coming close to the same issues. The bottom line is the cases are very clear that the court is not making a final determination on the merits in its finding, only finding that there is a probable right of recovery on at least one cause of action. As that has been interpreted throughout the cases throughout history, what the Texas courts have said is just like Judge Benton brought up. The plaintiff may have pled a good prima facie cause of action. That leads one to say, hey, there's a probable right of recovery, but for the other side pleading a prima facie defense that kills it. That's what can make the difference to the judge. The judge isn't saying that they're going to win on that defense at trial or that the plaintiff is going to win or lose on his case at trial, but the judge is going to have to be making that preliminary determination if there's a probable right of recovery. Yes.

HONORABLE STEPHEN YELENOSKY: Well, I mean, the problem I see is really -- is more extensive than that. They draft the order to say, "The Court finds that blah-blah has merit," which is clearly wrong.

MR. GILSTRAP: But that's what they do.

HONORABLE STEPHEN YELENOSKY: What's wrong with the court saying the court finds that there's a probable right of recovery and understanding that it means exactly what it says, and, in fact, that is the analysis that every judge I know goes through.

MR. GILSTRAP: Because it's such an invitation to decide the case on the merits that on appeal the court is going to find that there's no probable right of recovery and, therefore, they're going to pour you out on the merits of your case.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I agree with the judges. I mean, we look at the merits of the case. If somebody comes in, they plead a noncompete, and they verify it and say the employee is competing, but then we go to the TI hearing and they don't put on evidence that the employee is competing, I don't grant a TI.

CHAIRMAN BABCOCK: Or even --

HONORABLE TRACY CHRISTOPHER: I mean, so that's merit-based.

CHAIRMAN BABCOCK: Even at the TRO stage you may look at the contract and say there's no way.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: It doesn't have consideration or whatever it may be.

HONORABLE STEPHEN YELENOSKY: Yeah, and I don't understand the risk. I don't understand the risk of stating what, in fact, happens, which is you make a determination on probability. I don't understand how that increases the risk of reversal.

MR. GILSTRAP: I had a case recently where we proved -- it was a citizens group that was trying to stop the demolition of a public building, and, you know, the court found that -- the trial court found that the building was going to be demolished, that was irreparable harm. On appeal the court of appeals said, "Well, that's really not enough because the court didn't find that your people, the citizens group, would be harmed," so basically it went ahead and decided a case, the issue of the merits, that is, the standing, rather than the -- rather than the possibility of injury, whether there was going to be irreparable harm, which is what you're supposed to be deciding in a temporary injunction.

HONORABLE STEPHEN YELENOSKY: Well, I guess I think you're supposed to be deciding probability on the merits, too.

MR. GILSTRAP: So what you're proposing is some type of intermediate evidentiary standard which says,

well, it's probable. Is that right?

HONORABLE STEPHEN YELENOSKY: Judges, isn't that what we do?

HONORABLE LEVI BENTON: Yeah. That 10 reasonable --

HONORABLE STEPHEN YELENOSKY: That's the law.

HONORABLE LEVI BENTON: Ten reasonable people might get to where the plaintiff wants to go.

MR. GILSTRAP: Is that some evidence?

HONORABLE LEVI BENTON: That's all it takes.

MR. GILSTRAP: So if there's some evidence, Judge Yelenosky is going to grant the TRO.

HONORABLE STEPHEN YELENOSKY: No, I wouldn't say it that's that cut and dried.

HONORABLE LEVI BENTON: No, but I think all it does is memorializes that the trial court has undertaken a mental exercise and tried to perform a good faith mental exercise so that a layperson isn't left with the impression that the judge just signed the order nilly-willy.

CHAIRMAN BABCOCK: Is it -- Frank, in Federal court isn't it substantial likelihood of success on the merits?

MR. GILSTRAP: I don't know. I don't know.

CHAIRMAN BABCOCK: It is.

MR. GILSTRAP: But here it's probable right and, you know, I've never seen an appellate court formulate some type standard for probable right.

MS. WINK: There are lots of cases on that.

MR. KELLY: There are lots of cases there.

MR. GILSTRAP: Where they say here's a standard for probable right of recovery?

MR. KELLY: Yeah. There's hundreds of them, Frank.

MR. GILSTRAP: Well, what do they say? What is the standard of probable right?

MR. KELLY: They basically say just what you see here. It's just very -- yeah, they show that they had a probable right, namely, for example, they owned the building, and somebody else is going to tear it down. That's probable right. And that's also --

MR. GILSTRAP: So there's no standard for it. It's just they find it.

MR. KELLY: Well, it's like, you know, you have a shot at winning the case, without taking the case.

HONORABLE LEVI BENTON: Yeah, another way of looking at it is what are the elements of the plaintiff's claims? What evidence is there in the record to support or satisfy the elements that have to be proved? Okay.

Well, there's some evidence of the elements. Well, there's some chance 10 out of 12 people might go with the plaintiffs.

MR. GILSTRAP: Is that how you -- when you were judge you said, "Well, they may believe the plaintiff, there's a probable right," or "I believe the plaintiff, there's a probable right." Because it's not -- I mean, I haven't ever seen anything that makes me -- tells me what the standard is.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I think you weigh the credibility of the witnesses at a TI hearing. You have to.

MR. GILSTRAP: Okay.

HONORABLE JANE BLAND: They come in, and they testify, and so part of your consideration is whether you believe them.

HONORABLE STEPHEN YELENOSKY: And very often it's question of law. I mean, differing on how --

MR. GILSTRAP: Well, we're talking about the question of fact here. It's just reviewed by abuse of discretion standard.

HONORABLE LEVI BENTON: You know, that's -- it's interesting, I never got hung up on this. The thing that I think people get tripped up on is whether or not

there's an adequate remedy at law.

MR. GILSTRAP: I understand. I understand.

CHAIRMAN BABCOCK: But since we're on probable right, that's not only factual, it could be legal as well.

HONORABLE STEPHEN YELENOSKY: Right. It very often is. They differ on what the statute means.

CHAIRMAN BABCOCK: Right. Richard.

MR. ORSINGER: I think our discussion has mixed temporary injunctions in with temporary restraining orders. At the temporary restraining order stage most often the plaintiff has appeared and the defendant hasn't, at least in my experience. Is that true in the rest of the world?

MS. WINK: Not so in the world of other civil courts outside of the family situation. In fact, I've had only -- of all the TROs that I've had there's only been one occasion when both parties were not present. In smaller counties they may be more willing to go ex parte. I grew up in a small -- I should say when I say small I'm talking about lower numbers of population. I grew up in a county like that, and you're more often going to have things issued ex parte with less concern because, frankly, the time I call the judge, I actually have called the clerk and the clerk -- the judge answered the phone.

Bottom line is everybody is on vacation, and the judge is asking about my family. I hadn't been in town in 20 years, right, so it's a little different, the judges tend to know the people of their jurisdiction in the smaller, less populated areas, but in the larger more populated counties, generally the judges -- in fact, the Dallas County local rules --

HONORABLE STEPHEN YELENOSKY: Travis County as well.

MS. WINK: Travis County. They also require that you confer with the other side.

MR. ORSINGER: No, wait a minute. You're talking about a TRO that's issued after the answer is filed.

MS. WINK: No, sir. I'm talking about the day it's filed.

MR. ORSINGER: Okay. So let's say that somebody is about to do something awful.

MS. WINK: Yes.

MR. ORSINGER: And they don't have a lawyer yet. They haven't been served with anything yet.

MS. WINK: Yes.

MR. ORSINGER: And on the way to the courthouse to file a lawsuit against them I have to call these people up on the telephone and tell them I'm headed

to the courthouse --

HONORABLE STEPHEN YELENOSKY: In Travis County you would.

MR. GILSTRAP: Yeah, you do in most counties. A lot of them say only if it's a lawyer, if they're represented by a lawyer you have to call the lawyer up.

HONORABLE STEPHEN YELENOSKY: Well, the local rule in Travis County says you have to certify that you don't know of a lawyer on the other side, but we read 680 as requiring you to still establish why you shouldn't give notice to the other side even if they're unrepresented --

MR. GILSTRAP: So you're requiring them to call the party.

HONORABLE STEPHEN YELENOSKY: -- and so you have to schedule to come in on your TRO, and you're going to be asked by staff have you notified the other side, if not, why not? The judge may or may not find that to be a sufficient reason not to.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I think it, you know if you've got a case of violence, that gets done ex parte; and if that's what the allegation is, that you need to, you know, have some sort of a temporary

restraining order to keep somebody away from somebody, all right, no, I don't expect you to have called the other side; or if you have real evidence that someone is about to steal, you know, your $50,000, okay, you don't have to call the other side on that. I mean, yes, we sort of have a standing rule that you call the other side, but if you've got a situation that you really can't call the other side, you just, you know, present it to the court.

MR. HAMILTON: Question.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: If you call the other side and the other side shows up, do you have like a temporary injunction hearing then?

MR. GILSTRAP: No. Just a conference.

MS. WINK: No.

MR. GILSTRAP: You talk to a judge.

MS. WINK: Generally what happens is we appear. The affidavits are before the judge. The other side may bring an affidavit as well if they have time or they may bring a party. Sometimes the judges listen to people. They rarely put people under oath. Sometimes they do. But it's very flexible to the judges, and I've seen all kinds of discussions. Sometimes just the lawyers sitting with affidavits, sometimes lawyers and clients or witnesses, and the judge decides how much he or she wants

to hear.

CHAIRMAN BABCOCK: Yeah.

MS. WINK: But it's not a full evidentiary hearing at the TRO stage.

HONORABLE STEPHEN YELENOSKY: In the family law context, for instance, people will come in wanting an order to take the kid from the other parent. I always want to know what the other parent has to say about that.

MR. ORSINGER: So do you put them under oath and just let them talk to each other, or there's one lawyer and one without a lawyer, and do you put them under oath, or do you just talk to them without being under oath?

HONORABLE STEPHEN YELENOSKY: Usually in the family law context it would not be -- you have to -- I mean, the affidavit has to be sufficient to act on it alone in my opinion, but I might want to hear the other parent say, "Wait a minute, you don't know that he's been convicted of a sex offense, and, in fact, he's not allowed to have any contact with the children."

MR. ORSINGER: Are they saying that under oath, or are they just having a conversation?

HONORABLE STEPHEN YELENOSKY: Well, at that point it would be a conversation, but that would certainly cause me to check and see if, in fact, this guy has a sex

offense before I turn the child over to him.

MR. ORSINGER: So whether the TRO is granted is not based on the affidavits and verifications that support --

HONORABLE STEPHEN YELENOSKY: No, if it's granted it's based on that, but I might deny it because of something I heard from the other party and then found out or inquired into because I certainly have discretion to deny it.

CHAIRMAN BABCOCK: Dulcie, I have a question. On this proposed Rule 1 where are the changes in current law? One seems to be -- that we've identified is that the -- that the verification has to be as would be admissible in evidence. That's not in the -- it may be in case law, but it's not in the rule.

MS. WINK: Correct. It's not in the rule. That is in the case law.

CHAIRMAN BABCOCK: Okay.

MS. WINK: So we've got that current.

CHAIRMAN BABCOCK: Okay. And what other changes to existing -- the existing rules --

MS. WINK: (a)(5). (a)(5) of injunction Rule 1, (a)(5) is asking people to state, you know, if they're seeking it ex parte, the reasons for that. That satisfies a lot of the larger jurisdictional issues, so

that is new. Otherwise -- otherwise what we're talking about is for the most part in the rule. Information and belief, we made that specific because, again, practitioners were getting, you know, targeted and were losing on technicalities instead of understanding the standards required of them, or parties would get a TRO or a temporary injunction and then they would be -- it would be void ab initio and the other party could violate it.

CHAIRMAN BABCOCK: The extending it, (e)(2), for a like period?

MS. WINK: Yes, sir, that is in the existing rules.

CHAIRMAN BABCOCK: That's in the existing rules.

MS. WINK: In fact, that's the language, and that's why we were a little more specific here because people tended to think, oh, I can get an extension for 14 days. You can if the first one was for 14 days.

CHAIRMAN BABCOCK: Okay. Gotcha. Richard.

MR. ORSINGER: On (a)(4), it seems that to get a TRO you have to be a plaintiff, but I can envision situations where a defendant who isn't seeking to recover on a claim might want a TRO to stop the destruction of evidence or something, and so how would you ever if you're a defendant who's seeking a TRO prove a probable right to

recover on a cause of action?

MS. WINK: One, if the defendant has a counterclaim, and basically if somebody is destroying evidence, the judge always has the ability to address that, but it doesn't --

MR. ORSINGER: Based on what?

MS. WINK: -- have to be like TRO. Just I've never had trouble having judges take action on that. In other words --

MR. ORSINGER: What do you call it?

MS. WINK: -- if we look at spoliation, and I would have to look back at the other rules as to whether or not there's a final decision as to whether spoliation is a cause of action or a motion --

CHAIRMAN BABCOCK: There is a Supreme Court case on it.

MS. WINK: What is the answer, do you know?

MR. ORSINGER: I think it's a sanction. It's a sanction, but you can get damages like a tort.

MS. WINK: Right. Right. But the existing rules and the existing case law states you must provide -- if you want an injunction, you must show a probable right to recovery on at least one cause of action.

MR. ORSINGER: So if I'm a defendant and I've been sued and I find out that somebody is about to

destroy some evidence, I can't get an injunction to stop that unless I can sue them for something and recover against them; is that right?

MS. WINK: No, you would move for sanctions. You would ask the judge to take action to avoid spoliation.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I think you might say, "I have a probable right of winning the case and recovering a take nothing judgment."

MR. ORSINGER: Well, that's not what (4) says, though. It says "recover on a cause of action."

HONORABLE STEPHEN YELENOSKY: Well, but are you even proceeding under this?

MR. ORSINGER: I don't know.

HONORABLE STEPHEN YELENOSKY: I issue a TRO that says, "Don't destroy the evidence" --

HONORABLE JANE BLAND: I've never had a defendant come in --

THE REPORTER: Okay, wait.

HONORABLE STEPHEN YELENOSKY: And then when --

CHAIRMAN BABCOCK: Okay, hold it.

THE REPORTER: Wait, stop. I cannot get all of this.

CHAIRMAN BABCOCK: Yeah, we've been -- and I notice this has gotten worse over the day today. People are just like jumping into the conversation. It's very hard for our court reporter, so I'll try to call on you in a way that makes sense, but Justice Bland had the floor, so --

HONORABLE JANE BLAND: Just that I have never had -- it's never been the defendant seeking that instruction about not destroying evidence, but it would seem like if you needed to preserve the trial court's jurisdiction and you were -- had some basis for believing there was going to be destruction of evidence, you could get it that way.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: Never mind. Sorry.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: No, I was going to say inherent power of the court would seem to be that you can preserve evidence and you don't have to go through this procedure.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I've got to just point out a couple more changes. On page 2, (d)(5), "Describe in reasonable detail and not by reference to petition the acts sought to be restrained." The rule, current rule,

says -- precedes that, that the order has got to be specific in its terms and describe the reasonable detail. Apparently "specific in its terms" was viewed as unnecessary, and it may be.

In (10), the order has to state that the order is binding on the parties to the action, their officers, blah-blah-blah. The rule says it's binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and persons that act in concert. It seems to me that might change the rule somewhat, with only it's a limitation on the terms of the injunction. If you take it out it seems like it kind of expands the terms of the injunction. I don't know whether that's worth messing with or not.

HONORABLE TRACY CHRISTOPHER: Well, and I noticed it's not in the TI rule, order, which I thought was kind of weird.

MR. GILSTRAP: It's in what?

HONORABLE TRACY CHRISTOPHER: It's in the TRO part, but it's not in the TI part.

MR. GILSTRAP: Right.

HONORABLE TRACY CHRISTOPHER: And I agree with you. The idea that it's only binding on those doesn't mean that you have to put that in every single TRO. I mean, you could put it in, but it's not mandated

that it be in there.

MR. GILSTRAP: Yeah, it's an in terrorem type, you put it in there to scare the people off, the employees from destroying the evidence or destroying property or something like that.

CHAIRMAN BABCOCK: Yeah. Yeah. And if I could just butt in for a second, Judge Yelenosky, I had a case hotly contested, kind of a very high profile thing, and the other side moved for an order to prevent the defendants, and there were tons of them, from destroying evidence. No basis other than, hey, we don't want evidence destroyed, and the judge denied that on the basis that -- our argument, that, look, there's no -- we're not destroying evidence. There's no evidence, but we're going to get a headline in the paper tomorrow like "ABC Company Ordered Not To Destroy Evidence." Wait a minute, we never were, so --

HONORABLE STEPHEN YELENOSKY: Well, that's a good reason to deny it, but it's not a good reason to deny a request for that to say, well, they don't have a cause of action.

CHAIRMAN BABCOCK: Right, I agree.

HONORABLE STEPHEN YELENOSKY: That's my point.

CHAIRMAN BABCOCK: Yeah, I agree. Yeah.

Carl.

MR. HAMILTON: I still have a problem with this notice thing. The current rules just provide for the (5)(b), if it's -- if irreparable damage will result before notice, but it doesn't provide the (5)(a) that it was impracticable. That's a condition.

CHAIRMAN BABCOCK: Yeah, I think Dulcie admitted that that was new, so the question is what is that -- is that bad policy?

MR. HAMILTON: It's bad policy.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: On 1(a)(4) about the probable right to recover on a cause of action, I don't see that that's required under the current rules for a TRO. All that 680 requires is that about immediate and irreparable injury, loss, or damage will result before notice can be served and the hearing had thereon, which by the way, suggests to me you can get a TRO before notice, but I guess in limited circumstances everyone missed that, and then later on they -- I mean, the focus is on the immediacy of the risk and irreparability of the harm and not the likelihood that you're going to win the lawsuit a year and a half later after a jury trial. It seems to me like that's a standard that's being imported into the TROs, not in the rules already. And is it in the case law

already or is it --

MS. WINK: Texas Supreme Court case law. It is out there. It is not a question.

MR. GILSTRAP: On TROs?

MS. WINK: On TROs as well as temporary injunctions. Absolutely.

MR. ORSINGER: You have to show a probable right of recovery to get a TRO?

MS. WINK: Yes.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: It's not a probable recovery. It's a probable right to recovery, so if you've pled your prima facie case then you've got a probable right.

MR. GILSTRAP: Wait a minute. I was just told you had to have evidence.

MR. STORIE: That's so the judge can evaluate the request.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, there has -- whether it's right of recovery or probable right, I mean, there has to be some test, otherwise what you're saying, Richard, is somebody comes in with a lawsuit with no recognized cause of action under Texas law and they show that they will be harmed if something happens and I'm supposed to issue a TRO. At the very

least I have to determine if there's a recognized cause of action under Texas law, and that's part of the probable right of recovery, and then it does go to the next step. Does the affidavit state at least some evidence -- and maybe it's not a some evidence standard, but evidence that when applied to the cause of action shows the probable right of recovery.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I'll pass.

CHAIRMAN BABCOCK: Dulcie.

MS. WINK: I want to address the issue that was brought up earlier about in Rule 1(d), number (10), stating that the order is binding on the parties to the action. There was a question as to whether or not that was a change or more limited than existing law. Current existing Rule 683 states that the form and scope of injunction orders or restraining orders. This is existing law, and we took the language directly from that -- from that -- from our rule, so I just wanted to make sure you guys knew that that's no change. That is specific --

HONORABLE TRACY CHRISTOPHER: No, but saying something is binding only on those people is different from saying it is binding on those people no matter what. There's a difference between those two.

MS. WINK: I agree. It's just in the

existing rule. If we want to make a change --

MR. GILSTRAP: You're saying the rule only is not there?

MS. WINK: Yes. In Rule 683 existing, the beginning says, "Every order granting an injunction and every restraining order shall set forth the reasons for issuance." You get down to the bottom and it says -- it says "and is binding only upon" --

MR. GILSTRAP: "Only," yeah.

MS. WINK: -- "the parties to the action," et cetera.

MR. GILSTRAP: But you left "only" out of (10).

MS. WINK: That was not intended. We should catch that. Thank you.

MR. KELLY: It was supposed to be in there.

MS. WINK: It was supposed to be in there. I apologize.

MR. GILSTRAP: Apology doesn't fly well here. Just hang in there.

MS. WINK: My sword is outside. I'll fall on it happily.

CHAIRMAN BABCOCK: No, no, no. Never show weakness. Carl.

MR. HAMILTON: I have to agree with Richard

on this probable right, probable cause. A lot of TROs are issued on just an ancillary writ to maintain the status quo, and they might even be brought by a defendant, so I think it's a little strange -- I mean, I know that's a requirement in temporary injunction, but I just question whether it ought to be in the temporary restraining order.

CHAIRMAN BABCOCK: Well, if Munzinger were here I'm sure he would say that, you know, as citizens we all have a right to live our lives unless we've done something that mandates our liberty being restrained, and a temporary restraining order delimits our ability to live our life in some fashion, so maybe before a court -- maybe before the government comes in and tells you, "You can't do anything anymore," there ought to be some standard by which the court acts as opposed to just willy-nilly saying, "By the way, don't do something for 14 days," when I want to do it.

HONORABLE STEPHEN YELENOSKY: Exactly.

CHAIRMAN BABCOCK: And I'm not as eloquent. Richard would have a "good lord" and a couple other things.

MS. PETERSON: "By god."

CHAIRMAN BABCOCK: But I'm trying to live in his spirit even though he's not here. Where did he go, by the way?

MR. GILSTRAP: He actually -- since we're leaving early he took an early flight.

CHAIRMAN BABCOCK: Well, I'm not going to let him do that again. Yeah. Judge Gray -- Justice Gray.

HONORABLE TOM GRAY: This is one of those that I no longer practice in this area, and since it's a TRO I don't review this, so take it for what it's worth, but the discussion earlier on the fact that the existing law is that you can have an extension for a like period and that be the period that was granted in the first part under (e)(1) would seem to me that the trial court in this discussion that y'all were having while ago where everybody was in there, I could see a trial judge wanting the latitude of saying, "Okay, don't do anything until tomorrow. We're going to consider this, we're going to take this up, and we're not going to have the injunction hearing tomorrow, but why don't y'all come -- just everybody stay where you are today. We're going to take this up tomorrow," and tomorrow they come back or within a day or two, whatever he tells them, and then he has a TRO for a period of time up to 14 days. I understand that that may not be the existing law, but what I am suggesting is that (e)(2) just strike the word "like," and therefore, you could have one extension up to 14 days regardless of what the original period of the TRO was. It just seems to

be practical to me.

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I agree. I mean, I do these now, and, I mean, the concern is that it's just going to be too long. There's no logical reason why it should be a like period.

CHAIRMAN BABCOCK: But the like period is meant to squeeze it.

HONORABLE STEPHEN YELENOSKY: Right, but the point that he makes is a good one, which is I may say, "You're enjoined until tomorrow, at which point I may continue it or not," and under this rule, all I could do is sign a TRO for one more day, and that makes no sense. The concern is that people not be restrained too long without an evidentiary hearing, not that I do the same thing the second time I did the first time.

MR. GILSTRAP: And is -- does the current rule say "like"?

CHAIRMAN BABCOCK: Yeah, it does.

MS. WINK: Yes, sir.

HONORABLE STEPHEN YELEŃOSKY: Yeah, it's a change.

CHAIRMAN BABCOCK: No, no, no. It's not a change.

HONORABLE STEPHEN YELENOSKY: No, to do this

would be a change.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: This is on a slightly different subject, but on --

CHAIRMAN BABCOCK: Is it on injunctions at least?

MR. ORSINGER: Yes. It's Rule 1, and it's division (d)(10) about the order is binding on the parties, officers, persons acting in concert. I noticed in going over your rules on Rule (6), (6)(b), service of writ, subdivision (1) says "temporary restraining order or other writ of injunction is not effective until served upon the persons to be enjoined."

MS. WINK: Yes, sir.

MR. ORSINGER: So I don't know which side I'm on as to which of those statements is right, but they seem to be inconsistent to me, and why do we tell them in the writ that it's binding on everybody when we know and are telling each other that it's not binding unless it's served?

MS. WINK: Well, first, this is existing rule language, so I want to make sure you understand this is not a change.

MR. ORSINGER: Right.

MS. WINK: Second, I think the import is to

do two things. One, if we are going to enjoin the parties before us, our Texas rules and statutes have always required that we give -- that we serve -- we have to post security and then we have to serve the injunctive order on that party. Now, they can go through the usual things if someone wants to waive service and do an affidavit of waiver, that still works like anything else. The reason it -- the other thing is it is out here to make sure that people who are thinking about conspiring or doing something indirectly that they can't do directly, it makes clear that anyone who might be a coconspirator or might be acting in concert with the party is subject to it, even if they aren't served except by a fax copy, and so routinely what I was taught to do was make sure that you've got the party served and then if you're concerned about people that are doing business with them that have been shady on the deals, you give them fax copies with copies to the lawyer.

CHAIRMAN BABCOCK: Hugh Rice Kelly.

MR. KELLY: On one case we just got on the telephone and called people and said, "Don't move that bulldozer. There's a writ out. You may be in contempt."

"Well, what do you mean?" You know, it says you gain knowledge by any means. So the first thing you do is call, then you give them a letter, then you hit them

with a writ, you know.

MS. WINK: Absolutely.

MR. KELLY: But you want to make sure that they don't say, "Whoops, there's an injunction. Knock that building down quick, so that" -- "before they get here," you know.

MR. ORSINGER: But what do we do about the fact that we all say here in the rule that the injunction is not actually effective?

MR. GILSTRAP: I don't think there's an inconsistency.

MR. ORSINGER: You don't?

MR. GILSTRAP: No. It becomes effective when you serve the defendant, and when you serve the defendant it also affects the officers or employees who receive notice, but if they receive notice, say, before the defendant gets served, I guess they're not bound. That's when the injunction becomes effective, but the scope involves other people.

CHAIRMAN BABCOCK: Makes some sense.

MR. KELLY: It's effective right immediately, and not, you know, because you get the -- what if the party can't be found in the building and the bulldozer's against the building?

MS. WINK: Stand in front of the bulldozer

with the writ.

MR. GILSTRAP: They've got to be served with a writ, or as long as we're going to have writs they've got to be served with the writ. I mean, I'm for getting rid of writs, but that's a different question.

CHAIRMAN BABCOCK: Justice Christopher.

MR. ORSINGER: On (d)(7), "State the amount and terms of applicant's bond if a bond is required."

MS. WINK: Yes.

HONORABLE TRACY CHRISTOPHER: I mean, I know there are some statutory situations where a bond is not required, but this would seem to me to let a judge write an order that says bond is not required, and my understanding is bond is required.

CHAIRMAN BABCOCK: Dulcie.

MS. WINK: Actually, and that is directly addressed in injunction Rule 4 that we have not gotten to. It talks about "bond or other security." It also references by way of proposed comment or footnote that there are certainly statutes that -- and Family Code is one of those, where bond may not be required, but it does specify otherwise that bond absolutely, positively is required even if it's an agreed TRO.

HONORABLE TRACY CHRISTOPHER: Well, I agree with you, which is why I would delete "if a bond is

required," and people can argue that they have a statutory right to it without a bond. Because that makes it confusing.

MR. GILSTRAP: Yeah, I agree. I was confused, too.

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, I just suggest a rewording, which would be "State the amount in terms of the bond, unless a bond is not required by statute and none is set." "Unless a bond is not required."

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: On 1(d)(6), it has to do with setting the time in the TRO for the application on the temporary injunction, which I think is routine, but does it make any sense to say that you have to set the -- the trial on the permanent injunction in the TRO that's issued perhaps before the defendant has even appeared of record?

MS. WINK: It is a perfect question. The --

CHAIRMAN BABCOCK: Enough said.

MS. WINK: This has come up. No, this has been raised. If you are asking for a TRO and only a temporary injunction, there are occasions when that happens. There are occasions when parties seek all three, temporary restraining order, temporary, and permanent.

Sometimes the party makes a dollar-based, if nothing else, decision to seek immediate TRO relief, and they're only seeking permanent because there is so little to be tried. There are some cases where there is not a lot of evidence to exchange. So there are cases where you may have a TRO and be asking to go directly to the full trial on the merits. It's rare, but we didn't want to take that possibility out.

MR. ORSINGER: So am I required to or not required to set the date for the permanent trial -- permanent injunction trial in my TRO order?

MS. WINK: It's either-or, either the temporary injunction --

MR. ORSINGER: Or if there's not one?

MS. WINK: Yes. It's rare that it's going to be a situation that they'll be seeking a temporary -- that they'll skip over the TI stage. It is very rare.

CHAIRMAN BABCOCK: Okay. Anything else right now on 1? Okay.

MR. ORSINGER: Oh --

CHAIRMAN BABCOCK: Richard. Should have known.

MR. ORSINGER: On the -- this is perhaps not worth even discussing, but on page three in the comment it talks about "the request for temporary" -- "for permanent

injunction must be in live pleadings." I assume that means pleadings that have not been amended and you don't have any continuing pleading requirement. Is it necessary to say that "live pleadings" or can we just say "pleadings"?

MS. WINK: I'd have to look back at the rule. I'm not sure if it said -- are we looking at --

MR. ORSINGER: The comment to Rule 1.

MS. WINK: I think we could just say "pleadings," but I think the reason we said "live" is just to address the possibility that someone might have something by amendment that gets rid of the injunctive issue.

CHAIRMAN BABCOCK: Okay. Well, thanks, everybody. We will adjourn until March 25th, and our next meeting is back at the TAB, and we will see everybody then. Thanks for your hard work today.

(Adjourned at 4:23 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 28th day of January, 2011, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $1,840.75.

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the 16th day of February, 2011.

D'Lois L. Jones

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