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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 18, 2013

(FRIDAY SESSION)

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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 18th day of October, 2013, between the hours of 9:02 a.m. and 3:51 p.m., at the State Bar of Texas, 1414 Colorado, Suite 101, Austin, Texas 78701.

INDEX OF VOTES

No votes were taken by the Supreme Court Advisory Committee during this session.

Documents referenced in this session

13-15 Restyling TRE, Current TRE to Restyled TRE, 10-2-13

13-16 Restyling TRE, Restyled FRE to Restyled TRE, 10-2-13

13-17 Restyled TRE, revised version 10-2-13

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CHAIRMAN BABCOCK: Welcome, everybody. Nice to be back at the State Bar. Everybody down at the -- at that end will need to speak up so that Dee Dee can hear you; and with that, we'll turn it over to the Chief Justice to give us a report about what's happened the last two and a half weeks.

HONORABLE NATHAN HECHT: Senate Bill 825 in the last session required the Court to change part -- Section 15.06 of the Rules of Disciplinary Procedure to change the statute of limitations on Brady violations to run from the release on a wrongfully imprisoned person, so we did that. In the process we rewrote 15.06 to make it a little clearer, and so that rule will become -- or that section will become effective November 1st, and the statute required it to be done by December. And otherwise, I have nothing else to report except that the formal investiture of myself and new Justice Brown is on November 11th at 11:00 a.m., so 11-11-11 at the -- in the House chamber over in the capitol, and you're all invited to attend. Justice Scalia is going to come down to make sure the oaths really stick, and so you're all invited. I think the State Bar is going to have a reception afterwards. That's all I've got.

CHAIRMAN BABCOCK: Okay. Great. Well,

thank you, we'll now wade back into the Rules of Evidence, and I think we stopped at 409, so we'll go to 410, and we're happy to have Judge Darr and Professor Goode and Fields Alexander back with us to help in this project and Buddy, as always, the able leader of the evidence rules.

MR. LOW: Don't go too far.

CHAIRMAN BABCOCK: So any comments about 410, which deals with pleas, plea discussion, and related statements.

MR. ALEXANDER: Chip, can we rewind for just a second?

CHAIRMAN BABCOCK: Yeah, sure, rewind.

MR. ALEXANDER: First of all, good morning. In light of some of the thoughtful comments that were made at our last meeting, we have submitted -- and hopefully they've been circulated -- a slightly revised version of the restyled rules with a few changes in light of -- in light of the previous discussions, so if y'all don't have those --

MS. SENNEFF: October 2nd?

MR. ALEXANDER: Yes, exactly.

MS. SENNEFF: That's what everybody has.

MR. ALEXANDER: All right. So 101(f) has been clanged slightly, 103(c), 105(b), 203(b), and 408(a)(2) were all revised, most fairly clerically, 203(b)

hopefully somewhat substantively to address some of the concerns that were raised at the last meeting. I didn't know if anybody wanted to revisit those before we move on.

CHAIRMAN BABCOCK: We're not going to revisit them right now.

MR. ALEXANDER: Okay.

CHAIRMAN BABCOCK: If anybody has comments about that, though, they can either submit it in writing or at the end of our meeting they can bring it up, but let's see if we can move -- get one pass through the remaining rules, starting with 410. So any comments about 410? Yeah, Justice Brown.

HONORABLE HARVEY BROWN: Chip, last time we asked if the committee could kind of just tell us if they've changed the Federal rule and if so, why, just kind of a quick summary as to where we are. Would that be all right if we did that again?

CHAIRMAN BABCOCK: I think that would be a great idea. Anybody want to address that?

MR. ALEXANDER: Go ahead.

PROFESSOR GOODE: Yes, Texas Rule 410, we essentially have a separate rule for the civil and the criminal. They have been sort of mashed together, and it's hard to read, but the Texas civil Rule 410 is very much like the Federal Rule 410. The Texas criminal Rule

410 was slightly different from the Federal Rule 410, but just in one detail that made the drafting rather complicated, and so what we did is essentially separate out Rule 410 into a rule for the admissibility of pleas in civil cases and the admissibility of pleas in criminal cases. You know, it's just a lot more comprehensible to understand it. If you're in a civil case, you can look at 410(a), and if you're in a criminal case, you look at 410(b), but basically it tracks the Federal -- restyled Federal language with just the accommodations to take care of the sort of idiosyncrasy of the criminal rules.

CHAIRMAN BABCOCK: Is anybody coordinating with the Court of Criminal Appeals on 410(b)?

PROFESSOR GOODE: We haven't done that as of yet.

MR. LOW: If you write them, you never hear from them.

HONORABLE NATHAN HECHT: But we do plan to visit with them about it.

MR. LOW: They would probably respond to Justice Hecht better than they would to me.

CHAIRMAN BABCOCK: You think?

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Okay. Any other -- any other comments about this Rule 410? Okay. Sounds like

perfection. Let's try 411, "Liability insurance." Any change in the Federal rule?

MR. ALEXANDER: The only difference between the Federal rule and the Texas rule is this language, "if disputed," at the bottom, which tracks the current Texas rule and is not in the analogous Federal rule.

CHAIRMAN BABCOCK: And what language are you talking about? Oh, "if disputed," I see.

MR. ALEXANDER: "If disputed," right. Other than that I think this tracks the Federal rule.

MR. LOW: The reason for "if disputed," some people want to prove agency or control by insurance policy, and I haven't stipulated. I say, "Wait a minute, I don't want insurance in it. I'll stipulate agency then," so it's not disputed so they can't just, you know, offer it. So that's why we have it that way.

CHAIRMAN BABCOCK: Okay. Good point. Anything else about 411? Any other comments? Okay. Let's go to 412, "Evidence of previous sexual conduct in criminal cases." Any changes, Fields, from the Federal?

MR. ALEXANDER: There are. Go ahead, Steve.

CHAIRMAN BABCOCK: Or, I'm sorry, Justice Goode. I mean Professor Goode. We'll get this straight in a minute.

PROFESSOR GOODE: I was going to say, a

promotion.

HONORABLE TOM GRAY: Not really.

PROFESSOR GOODE: Yes, the Texas rule is quite different from the Federal rule. The Federal rule applies -- more broadly applies to civil as well as criminal cases. The Texas rule only applies to criminal cases. Again, what we did is we took the language of the Texas rule, and to the extent that the Texas criminal rule reflected language that was in the Federal civil rule, we used that language. Where it was different we just took the Texas language, and it's pretty much the same as the current rule, a little bit reorganized and some fairly simple grammatical clarifications, but essentially it's the same rule.

CHAIRMAN BABCOCK: Okay. Any comments on 412, "Evidence of previous sexual conduct in criminal cases"?

MS. HOBBS: I do.

CHAIRMAN BABCOCK: Yeah, Lisa.

MS. HOBBS: So on the subsection (d) where we're talking about sealing the record, I think it's an odd concept in Texas to have the trial court have an obligation to preserve the record, and I understand why you used that term. Like when I reread the old Texas rule it talks about the trial court having to send it up to the

appellate court, which implicates some duty to preserve, but that is a new concept in Texas because he's not -- the judge is not really going to -- I mean, that's going to be -- that's going to be in the reporter's hands, court reporter's hands typically, so I wonder if we just want to say the court must order the records sealed, and then he -- it's an obligation to order it sealed and not an obligation to preserve it.

And then secondly, I know this is a little bit of a change in current Texas -- at least the wording of it. I don't know if it's a change in practice, but I really like the idea in the Federal rules that the motion and all the surrounding papers are sealed automatically, too. Our rule implies that we would present orally this evidence to the -- like in a motion in limine, an oral motion in limine kind of thing, but the Federal rule indicates that this is usually filed by motion, and I don't practice in this area, but my guess is a lot of times this is filed with a motion, and if so, don't we want to seal all of the documents surrounding this.

MR. LOW: I mean, your job was not to make any substantive changes. Are those suggestions that -- we were not to -- if we want to take that up, that would be -- I mean, we were just to not make substantive changes to clarify where and follow the Federal rule where it was

the same basically as ours.

MS. HOBBS: Yeah, I guess my question is, is it current Texas practice to seal it all; and if so, should we reflect that current practice in the rule itself, and then the "preserve," it's just a verbiage choice. That's an odd verbiage choice for Texas.

MR. ALEXANDER: And, like you, I don't practice enough in this area to know current Texas practice on that, so we really did try to just mirror the best we could the existing Texas rule. Your other point I think is apt. We did our best to restyle it in accordance with the current Texas rule, but I take your point, in regards to sealing of the records and the court's obligation in that regard.

PROFESSOR GOODE: I can't swear to this. I believe the language in (d) comes from another rule.

MS. HOBBS: Oh.

PROFESSOR GOODE: It's taken from another restyled Federal rule, which is the same obligation. I don't think I made that up, but I will need to double check that.

CHAIRMAN BABCOCK: I think it's in the current rule, it looks like.

PROFESSOR GOODE: It says, "The court shall seal the record."

MR. ALEXANDER: Yeah, right, it's worded slightly -- I think the issue is with the wording of it.

PROFESSOR GOODE: We say "preserve under seal."

MS. HOBBS: I mean, this seems like the trial courts in the room -- the trial judges in the room might have a -- you know, what happens if they don't preserve it, what happens if it's lost, you know, it's just not in the trial court's normal duty to preserve that, so --

CHAIRMAN BABCOCK: Judge Evans, you have any thoughts about this?

HONORABLE DAVID EVANS: None. I'm keeping my thoughts to myself.

PROFESSOR GOODE: I will say, current Texas Rule 615(c) talks about "any portion withheld over objection shall be preserved and made available to the appellate court."

MS. HOBBS: What rule is that?

PROFESSOR GOODE: Current Rule 615(c).

MS. HOBBS: Okay.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Well, given Buddy's comment I was not going to make this one, but given the current text of the rule then versus this change, there is

a statute in the -- I believe it is the Penal Code, and I've been dealing with it recently. I'm sorry that I can't give you the specific reference off the top of my head, but that requires a trial judge when this type evidence has come in, including photographs, in these type cases that puts an affirmative duty on the trial judge to seal the record; and I had never seen that done in any cases that were coming up to the Waco court of appeals; and so I was struggling with a request by an inmate who had been convicted of possession of pornography, kiddie porn; and he was requesting the record; and he wanted -- he was willing to pay for it. He was trying to do a post-conviction writ, and he was trying to get it down to the penitentiary, and he was going to have his mother pick up the copy, and we figured out there were problems with that and how was this supposed to be done, and given that statute the current language in the rule makes more sense that the judge is to do that affirmatively and in effect keep that part of the record sealed, and so maybe a little bit closer to the current language may be important.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, I have had to do it before because I have a general jurisdiction, and I mean, as far as the court reporter goes, we just say, "This part is sealed," and then we say, "This is the end

of the seal." I don't know what she does for the record, but, you know, we just follow the rule, and it doesn't go up in the -- I don't believe it -- it doesn't go up in the public record, but it -- I don't know that it was my duty, as she said, to seal it, but it is, because if they ask for that hearing and I read the rule then I know that it has to be sealed and in camera, and so it does become my duty.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: I do think you have a duty to seal it. I just don't know that you have a duty to preserve it, and going back to your point on 615, that is actually in the passive tense, which would make me feel more comfortable with this, if we somehow worded this in the passive tense that says, "It shall be preserved" or "It will be preserved," or something so that you're not telling the trial court that it's his obligation to do something to his court reporter that ensures that, you know, her house doesn't burn down or that her hard drive doesn't crash, or, I mean, it just seems like the trial court doesn't want that duty on him, and I don't know.

CHAIRMAN BABCOCK: Okay. Any other thoughts about this?

PROFESSOR HOFFMAN: Chip, my only other thought is just a quick question. So the Federal rules

have a 413, a 14, a 15, and I think a 16 for other kind of sexual child molestation. Just talk for a second, Steve, about why we didn't put those in -- so they didn't exist in Texas law before and so we just sort of decided not to be more detailed?

PROFESSOR GOODE: This was a total nonsubstantive restyling of the rules. That was our charge. It was also our view that if we started tinkering with substance, the restyling effort would crash because we would fight about the substance. So our view was let's restyle, get these rules as consistent as possible with the Federal rules, and then we'll spend the next 20 years fighting about the substance; and, in fact, during the course of our several years of doing this we identified a lot of rules that, in fact, under Judge Darr we were going to start to look at this coming year in terms of the need for substantive changes.

CHAIRMAN BABCOCK: Okay. Anything more about that rule? Okay. Yeah.

HONORABLE NATHAN HECHT: Just a question.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: I take it then, just to be sure I understand, the "preserve under seal" was intended by the draftsmen to be the same as "sealed"? The existing rule just says "the court shall seal," and

the restyled rule says "preserve under seal," and that was meant to be synonymous?

MR. ALEXANDER: It was.

PROFESSOR GOODE: It was meant to be "preserve under seal" as synonymous for "seal for delivery to the appellate court."

HONORABLE NATHAN HECHT: Yeah.

PROFESSOR GOODE: Yes.

HONORABLE TOM GRAY: Chip, this is going to become a lot more serious as to how it's sealed and noted as sealed come January 1 with all electronic filing and what -- depending on what gets posted on the web and how quickly and whether courts default to posting of the record automatically or not. The preservation requirement, I think Lisa is right on the issue, but it -- that nuance is going to be very important.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: And I share Lisa's concern. Isn't it resolved if we just say instead of "must preserve," "must order the record sealed," just because there --

CHAIRMAN BABCOCK: Could you say that a little louder, Sarah? I don't think everybody heard that.

HONORABLE SARAH DUNCAN: Rather than saying "must preserve," just say, "The trial court must order the

record of the in camera hearing sealed," because I'm not uncomfortable with telling the trial court --

MS. HOBBS: No.

HONORABLE SARAH DUNCAN: -- and Lisa is nodding her head that she's not either, telling the trial court you have to order it sealed. It's the preservation requirement that's troubling.

CHAIRMAN BABCOCK: Yeah. Okay. Yeah, Judge Evans.

HONORABLE DAVID EVANS: Well, it would be nice if you would just modify the word "record" with the word "reporter's record," then you don't have to worry about it being in the clerk's record. It gets up on appeal, and that would be helpful under 76a, Rules of Civil Procedure, to clarify that in camera documents are part of the reporter's record and not part of the district clerk's record under that structure, and it would make it a little bit easier on trial judges. I don't do criminal cases, but I think since the -- since it's not clear that it specifies clerk or reporter's record, I don't know that it's a substantive change, but we can certainly clarify that it's going to be the reporter, and that gives all the proper safeguards. Parties have to order the reporter's records. Somebody from the outside comes in to order it, all the parties are given notice that it's going to be

offered, and the trial judge can step in and intervene from it being disclosed to the public, and so I'd just like to suggest that might be an appropriate change.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: What happens if a party decides to inform the court outside of the jury's presence by filing a motion with the clerk? The rule doesn't forbid that. The rule doesn't comment on that possibility. High feelings between parties could lead a party to attempt to hurt someone or do something else by filing some kind of a motion, whether it's specific or otherwise, that alludes to that party's intent to offer evidence of a sexual impropriety or sexual history of the adversary. The rule is silent about what happens, A, if such motion is filed, how does the court and the clerk treat it, and, B, what happens to that motion on appeal. Was that considered?

PROFESSOR GOODE: Again, we were doing a nonsubstantive revision of the rules. If there are unanswered questions, we didn't feel that we could rewrite the rule to answer questions. Again, I would say this is a rule that has been in existence for almost 30 years, 27 years now, and that problem has not cropped up to my knowledge, and so we certainly didn't -- not only did we not go out of our way to deal with questions that came to

us, but we didn't try to deal with questions that didn't come to us and didn't seem to have arisen because they are hypothetical.

Just as a point of information, Justice Gray, I think the statute you are referring to is Article 38.45 of the Code of Criminal Procedure, which says the court -- "The court shall place property described in subsection (a) under seal of the court," and so you're quite right.

HONORABLE TOM GRAY: That's not the one, but -- and I'm trying to get it back from one of my staff attorneys, but I'll interject that when I get it.

PROFESSOR GOODE: The point is we do have statutory provisions directing the court to place things under seal already.

MR. LOW: When we first got your work and I sent it out to my committee, we had all kinds of suggestions and this doesn't work or that doesn't work, and I said, "Let's look at our charge," so when we had the same charge, you know, that you had and we went to that. Then there were a number of things we would have changed, but the Court wanted to get it done this century, and so we decided to, you know, do what the Court ordered.

MR. ALEXANDER: And we had the identical issue when we first started looking at this restyling

effort in our committee and fell back on the charge, and that's why we did it the way we did it.

CHAIRMAN BABCOCK: Okay. Lisa, and then Judge Estevez.

MS. HOBBS: I was going to change topics a little bit.

CHAIRMAN BABCOCK: Well, then let's have the judge weigh in.

HONORABLE ANA ESTEVEZ: Well, I think Professor Goode was going to find if he had used "the court must preserve." Did you find whether that was used? I didn't find it in the Federal rule.

MS. HOBBS: It was in 612.

PROFESSOR GOODE: Let me take a look.

CHAIRMAN BABCOCK: 412(c)(2)?

HONORABLE ANA ESTEVEZ: Yeah, whether it was in the Federal rule.

PROFESSOR GOODE: The Federal rule actually is written in the passive voice, 612(b), "any portion over objection to must be preserved for the record."

HONORABLE ANA ESTEVEZ: Does it say -- I'm sorry, 612(b)?

PROFESSOR GOODE: Restyled 612(b).

CHAIRMAN BABCOCK: Okay.

PROFESSOR GOODE: And then in, excuse me,

in -- in restyled Federal rule -- this is 26.2, which is Rules of Criminal Procedure, which is the equivalent of our Rule 615, the Feds use the language, "The court must preserve the entire statement with the excised portion indicated under seal as part of the record." I think that's where the language came from.

HONORABLE ANA ESTEVEZ: The number again, I'm sorry?

PROFESSOR GOODE: That is Federal Rule of Criminal Procedure 26.2, which is the equivalent to our Rule of Evidence 615. And that's where the language comes from, but the Federal Rule of Evidence 612 writes in the passive voice and talks about "must be preserved," so, you know, if this is a big issue we can certainly change this to a passive voice. I don't see a massive problem.

MR. ALEXANDER: We tried to avoid passive voice under the restyling -- the restyling effort the Feds had used and the desire to avoid passive voice whenever possible, but so you'll find very little, if any, passive voice in our restyled rules. That doesn't mean we can't use it as needed.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: In subsection -- looking at restyled subsection (c) and current subsection (c) in the procedure for offering evidence, the sentence in the

current rule says, "The court shall determine what evidence is admissible and shall accordingly limit the questioning," and that phrase has been excluded from the current restyled draft, and I don't know if that has any meaning, "and shall accordingly limit the questions," but it may have some implications about not letting things go too far down any one road even if it is admissible, and we might like that implication.

MR. ALEXANDER: Yeah, our feeling was that the language in the restyled rule that "the court must determine whether proposed evidence is admissible" sufficed for what was intended in the current rule, so we did look at that issue, and that's how at least we came down on it, was the initial language was surplusage, but I take your point.

MS. HOBBS: Yeah, I just wonder if it's worth talking to some prosecutors or something to see if that's addressing some -- you know, sometimes these words have implications that cause trial courts to listen a little bit more closely, and I just wonder if there's something there.

HONORABLE SARAH DUNCAN: As we all learned from the recodifications, taking words -- I mean, I would think that's significant.

MR. ALEXANDER: Right.

HONORABLE SARAH DUNCAN: It empowers the trial court even if the evidence is admissible to limit the questioning --

MS. HOBBS: That's what I'm worried about.

HONORABLE SARAH DUNCAN: -- and I think that's totally missing on the restyled language. But Professor Goode thinks I'm crazy.

PROFESSOR GOODE: I don't understand. It says the court shall determine what's admissible and the defendant shall not refer to anything that's inadmissible without first going to the judge.

HONORABLE SARAH DUNCAN: Right, but -- I'm sorry.

PROFESSOR GOODE: So I'm sort of at a loss for what I'm missing here.

HONORABLE SARAH DUNCAN: There could be reasons to limit the questioning other than admissibility of the topic.

MR. ALEXANDER: The current rule authorizes a court to limit questioning only in the context of admissibility. It says, "The court shall determine what evidence is admissible and shall accordingly limit the questioning," so I don't think the court has discretion in the current rule to limit the questioning other than admissibility, as I read this. That was certainly the

intent of our restyling.

HONORABLE SARAH DUNCAN: That's not how I read it.

PROFESSOR GOODE: Why would you limit questioning for reasons other than admissibility?

HONORABLE TOM GRAY: "We've heard that testimony a thousand times. Move on, Counsel."

PROFESSOR GOODE: That's admissibility. That's Rule 403, admissibility.

HONORABLE SARAH DUNCAN: Well, I think it could be a lot of things, badgering, embarrassment, it's a very sensitive topic; and I can't imagine all the circumstances that a court might say, "You get four questions to establish that it happened, but that's as far as I'm going to let you go."

PROFESSOR GOODE: I guess to my mind that's all admissibility because of Rules 401, 402, and 403, and 611.

MS. HOBBS: I think that you may be correct, but I think there might be people out there who would take the elimination of this phrase as perhaps having some meaning if -- you know, because we're -- we're thinking that phrase does have meaning, and you've taken it out, and we just are concerned that other people might wonder why it was removed.

HONORABLE TOM GRAY: And I think you're using admissibility more -- I don't know if it would be broader or narrower than -- but you're talking about what the trial court has decided to let in, and the person making this argument is, yeah, the trial court may have excluded it, not let it in, but it was admissible. It just didn't get admitted because it was duplicative and, you know, unduly embarrassing or whatever. It was admissible. It just didn't get into evidence, and we would be arguing that we could talk about it under this context, but I also owe you an apology, the penal -- Code of Criminal Procedure that you referenced was the right one that I was referring to, the 38.45 I believe.

MR. LOW: But Steve --

CHAIRMAN BABCOCK: Will you accept that apology?

PROFESSOR GOODE: For the record, under advisement. Thank you very much. I appreciate that.

CHAIRMAN BABCOCK: I'm not calling you "justice" anymore. All right. Everything -- we exhausted that topic? Let's go on to privileges, and I don't think we'll see too much overlap with the Federal here, will we?

PROFESSOR GOODE: Absolutely not.

PROFESSOR DORSANEO: No.

PROFESSOR GOODE: This was in some ways the

most difficult because the Federal rules don't have privilege rules beyond 501 and 502, and so we were drafting from scratch. I've got three documents I'm going to pass around.

MR. LOW: 502 was just recently done, and that's where we had the difference in the two committees.

PROFESSOR GOODE: We've got Federal Rule 502 which deals with limited waiver of attorney-client work product privilege.

MR. LOW: But we have 502 and 511 now, right?

PROFESSOR GOODE: Correct, and been codified in two different versions. Our committee did a version of 511, and we sent it to y'all. You did the second version of 511. I'm going to pass around both of those versions. This committee in this restyling effort did not reconsider 511, given that we had two competing versions, both consistent with the restyling effort --

MR. LOW: What happened was --

PROFESSOR GOODE: -- already before the Supreme Court.

MR. LOW: Was it came from your committee, we took it -- we were charged when the Feds passed 502, and your committee came up with one version, we came up with another, we got together, and there was some basic

difference on waiver and so forth. I've forgotten now. I have the notes on it, and so we submitted both. You came and my people came, and we submitted both, and this committee did vote. We submitted both of them to the Supreme Court. This committee voted to go with the Supreme Court Advisory Committee's version, but the Court -- we wanted the Court to have both versions, and both versions have been with the Court.

PROFESSOR GOODE: And this last document I'm going to pass around, we're not going to get to this for a while; but in Rule 509, which is the physician-patient privilege, there are a bunch of statutory references in the current rule; and a bunch of those are outdated or even difficult to figure out exactly what they're referring to; and so this is sort of just a background memo on how we came up with the revised statutory references that we placed in our draft of Rule 509; but we're not going to get to that for quite a while I suspect.

CHAIRMAN BABCOCK: The record can reflect that we're passing stuff around the old-fashioned way, not doing it on the internet, but we're passing paper around.

HONORABLE TOM GRAY: But we didn't really do it the old-fashioned way. The old-fashioned way is take one, hand it down.

CHAIRMAN BABCOCK: Well, we started that, Justice Hecht and I started that.

HONORABLE TOM GRAY: Oh, okay.

CHAIRMAN BABCOCK: And then that was going too slowly.

HONORABLE NATHAN HECHT: We weren't sure you could handle it without some assistance.

CHAIRMAN BABCOCK: Okay. Professor Goode or your colleagues on the committee, do you want to just go in order, 501, 502, et cetera, or do you want to --

PROFESSOR GOODE: That's fine.

CHAIRMAN BABCOCK: Okay. Well, let's start with 501 and see if anybody has got comments about 501. Yes, Pete.

MR. SCHENKKAN: Same one we talked about a couple of weeks ago, "prescribed under statutory authority" is an unwise limitation. There is a question about whether all the relevant rules are prescribed under statutory authority as opposed to potentially the Court's constitutional authority.

CHAIRMAN BABCOCK: Speak up, Pete.

MR. SCHENKKAN: I beg your pardon. I did not realize that wasn't loud enough. There is the same problem with this one as we talked about three weeks ago, "prescribed under statutory authority," as an unnecessary

and unwise qualification on rules since some of the rules may be prescribed under the Court's constitutional authority.

PROFESSOR GOODE: I would just say that's in the current rule.

MR. SCHENKKAN: Yes, I understand.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: It does appear to me that this reference about "rules prescribed under statutory authority" probably is talking about administrative regulations, that -- where the Legislature has delegated quasi-legislative authority to an administrative agency or something, but I believe that there is a common law of privilege that's slowly developing, certainly in the First Amendment area, and I don't think it's wise to have this limitation. I can understand why they would want regulatorily created privileges to be presumed statutory authority, but I think there's a lot of common law out there, and it may derive from the Constitution in one instance or it may derive from English law in another, so I know I guess we're not allowed to make suggestions that are other than modernizing, but I would favor limiting that.

CHAIRMAN BABCOCK: Harmonizing.

MR. ORSINGER: Harmonizing.

CHAIRMAN BABCOCK: Although, there's nothing to harmonize here because this is different from the Federal. It doesn't look to me like you've changed the language of 501, have you?

MR. ORSINGER: No, they just -- 1, 2, and 3 is (a), (b), and (c). Isn't that it?

PROFESSOR HOFFMAN: It is the case, kind of following Pete's comments, that the current rule, because of where the comma is, it's "by these rules," with a comma, "or other rules prescribed pursuant to statutory authority" fits exactly with what Richard just said; and that revised version lumps "these and other rules" together; and so it sort of exacerbate's Pete's point, the problem of Pete's point. Whether or not that's enough to make a difference I don't know, but to sort of highlight that.

CHAIRMAN BABCOCK: Well, Richard's quite right in two respects. One, I don't think the charge is to try to fix substantive problems with the rules, but you're also quite right that there are common law privileges or at least there -- there are some courts that think there are common law privileges in the First Amendment area, not only with respect to confidential sources in unpublished information, but also in the area of academic and medical associations and ability to speak

to each other in private, so -- so for future reference, that's a hole in this rule perhaps.

PROFESSOR HOFFMAN: And for the record, Chip, that really wasn't Pete's point. Pete's point was limited more narrowly to we ought not to suggest that these rules -- the only source of either Supreme Court rule-making authority or perhaps even administrative rule-making authority is limited only to a statute.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR HOFFMAN: Slightly different.

CHAIRMAN BABCOCK: Yeah, I was speaking more to Orsinger's point than Pete's, but Pete, as usual, makes an excellent point, whatever it was.

Okay. Anything more about 501? Okay. That was easy since you didn't change the language.

PROFESSOR DORSANEO: Well, they did change it.

MR. HAMILTON: They did.

MR. ALEXANDER: Just slightly.

PROFESSOR DORSANEO: Why did you?

HONORABLE SARAH DUNCAN: It makes me question --

PROFESSOR DORSANEO: It says "or these rules or other rules," "by these rules or other rules." Why did you take out "rules" the first time?

HONORABLE SARAH DUNCAN: It's the --

MR. ALEXANDER: Just to shorten the language and modernize it a little bit. We didn't think it affected any substantive change, not to mention "rules" twice.

PROFESSOR DORSANEO: You know what always happens when you do that?

MR. ALEXANDER: You get it right.

PROFESSOR DORSANEO: No, you find out why the word that you took out was there.

CHAIRMAN BABCOCK: Okay. Sarah.

HONORABLE SARAH DUNCAN: And I -- I think the parenthetical has meaning. I at least would use it as it's currently in Rule 501. I would use that to say, well, these rules were prescribed by statutory authority because there's no -- otherwise there's no reason to include other rules prescribed pursuant to statutory authority. "Other" implies that these are. I'm just -- I'm having a hard time without a redline as usual, and this has changed the wording, and I don't -- I don't know if it has meaning or not to say -- change "except as otherwise provided" to "unless the constitution, statute, or rule provides." It's bothersome to me.

CHAIRMAN BABCOCK: Okay. Professor Hoffman.

PROFESSOR HOFFMAN: So I want to maybe say a

little bit more because I don't actually agree with anything Sarah just said, and so by pointing out the difference I wasn't actually endorsing that we adopt a change. I was pointing out that one could see the change from current Texas Rule 501 to the restyled rule as exacerbating the problem that Pete raises. The problem Pete raises is one we talked about three weeks ago, that it feels strange to in a rule describe the source of the Supreme Court's rule-making authority as limited only to a statute. It may not be. It may derive from some inherent power. It may derive from the constitutional authority, which in turn breathes life into inherent, who knows, and the only point I was making is that as it's currently written it actually doesn't say that.

It only says "by these rules," period, and there's a comma, and it says, "by other rules prescribed pursuant to statutory authority," and so there is a change, whether the Court wants to go back to what it says right now in 501, it just ought to be aware that there is a modest difference. Having said that, the other place I would just disagree with Sarah for the record is I thought this was actually yeoman's work in showing the redlined versions. I mean, it's not redlined, but the left to right, I mean, this is an incredibly daunting project to look at the Federal rules and then look at the current

Texas rule or the restyled in both cases. So for what it's worth, my own view is this was terrifically helpful to have the side by side.

MR. ALEXANDER: Could we have that read back into the record?

CHAIRMAN BABCOCK: And, by the way, he has violated rule one of this committee, no sucking up.

PROFESSOR HOFFMAN: I thought that was no sucking up to you.

CHAIRMAN BABCOCK: Oh, you're right, but we need to restyle that with a broad prohibition against sucking up. Richard, did you have your hand up?

MR. ORSINGER: No.

CHAIRMAN BABCOCK: Did somebody over there? No. Sorry. Professor Goode.

PROFESSOR GOODE: This was the one privilege rule where we actually had a Federal rule to work off. The old version of the Federal rule started out "except as otherwise required" just as our old rule starts "except as otherwise," and the Federal rule changed that "except as otherwise" to an "unless any of the following." So we tracked sort of the way the Federal rule was restyled in Federal Rule 501 and accommodated it for our version of 501. That was the reason why that change was made.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: I'm still confused about this common law thing. Are we supposed to look at the Federal rules, too?

CHAIRMAN BABCOCK: Well, yeah, but the Federal rules don't really track the Texas rules on the privilege.

MR. HAMILTON: Well, but if the Federal rule was different, I thought the charge was that we were supposed to try to follow more closely the Federal rules.

PROFESSOR HOFFMAN: Yeah, but they can't do that here because the Federal rules are -- I mean, the Federal rules say essentially state law provides the privilege.

MR. LOW: Yeah.

PROFESSOR HOFFMAN: Here we're dealing with the state law.

MR. HAMILTON: Well, except that the Federal rule does incorporate the common law and our rule doesn't.

MR. LOW: Our common law was codified by the other rules.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I haven't looked at this recently, and I'm sure that there are others here that can say this, but I believe that the committee that was working for the Federal rules actually did have an Article

V and did lay out a bunch of privileges, and they were rejected by the U.S. Congress, so they didn't make it into the Federal rules, but they're out there as a model, and I think they may have served as a model for the Texas rules. Do you remember, Judge -- or Professor? Is that --

CHAIRMAN BABCOCK: You called him "judge," too.

MR. ORSINGER: Sorry.

PROFESSOR GOODE: I'm going to be called a lot worse by the end of today. The -- when the Federal rules were drafted, yes, there was a proposed set of privilege rules that Congress did not adopt, instead adopted Federal Rule 501, which said privileges are covered by common law and by recent experience and essentially punted privileges to the courts. When the Texas rules were originally drafted back in 1981, the proposed Federal privilege rules as well as the uniform Rules of Evidence which had privilege rules were to some extent used as a basis when we were doing the physician-patient and psychotherapist-patient privilege. We had statutory provisions that were the core of the -- or became Texas Rules 509 and 510, and so it's an amalgam. Those proposed Federal rules, however, were in the old-styled drafting and would have been restyled, and Federal Rule 501 was restyled as part of the effort, so

our view was take what we've got, don't make any substantive changes from current Texas law, but try to restyle so that a privilege article reads as much as possible like the rest of the rules in a restyled more modern version and hopefully a clearer version. Again, this was a daunting task, and we are doing 501, which is the easy one. When we get to attorney-client privilege you'll see how challenging it was.

MR. LOW: And --

CHAIRMAN BABCOCK: Buddy, yeah.

MR. LOW: When 502, 502 was always considered under 501 in the Federal rule, work product and attorney, that was just a part of that. What gave rise to them actually coming up with 502? Are you familiar? Because it's been ever since I practiced in Federal court, work product, attorney-client privilege was common law recognized. Why did they single that out, do you know, and put it in 502?

PROFESSOR GOODE: Yes, I know. We'll -- that's what is now our 511.

MR. LOW: Yeah.

PROFESSOR GOODE: Because of particularly electronic discovery and the massive quantity of documents --

MR. LOW: Right.

PROFESSOR GOODE: -- that are now being sought in discovery and issues of selective waiver partly.

MR. LOW: Okay.

PROFESSOR GOODE: Because of investigations by Federal agencies there was a push to limit the waiver provisions.

MR. LOW: Okay.

PROFESSOR GOODE: But --

MR. LOW: Okay.

CHAIRMAN BABCOCK: Okay. Anything else on 501? All right. Should we go to 502? Yeah. Professor Hoffman.

PROFESSOR HOFFMAN: So my comment about 502 is this: Did we -- did the committee consider moving what is now 502 on the required reports someplace else so that we could now have 502 track 502 of the Federal rules on the waiver?

PROFESSOR GOODE: We didn't for two reasons. One is, again, the -- or the default rule in the Federal restyling as well as ours was try to change rule numbers and rule subsections as little as possible. So if somebody is doing research on Rule 502, they're doing research on Rule 502 the way Rule 502 has been for the last 30 years. The second is that Federal Rule 502 is a waiver provision. It's 502 because they only had a 501,

and 502 came next. We already have a waiver rule, 511, and so the idea was to put the waiver substance of Federal 502 as part of our waiver Rule 511.

CHAIRMAN BABCOCK: Okay. Buddy, did you have your hand up?

MR. LOW: No, no.

CHAIRMAN BABCOCK: Okay. All right. Anything more on 502? Okay. Let's go to 503, lawyer-client privilege. Any comments about 503? Professor Hoffman.

PROFESSOR HOFFMAN: A very small comment. So it's a grammar question about "who" and "that." So in the current rule it's "a person, officer," et cetera, et cetera, "who has rendered professional legal services by a lawyer," and so there's a grammar problem in the existing rule in that "who" should refer to an individual and "that" would refer to the corporation or association, et cetera. In the revised rule there's a -- the corresponding on the other side grammar point that we use "that." I guess I don't care very much. Did y'all talk about if there was a way to less -- without a mouthful say it where we included both, so "who" as to individuals and "that" as to entities? I know this is super interesting for the entire committee that I raised this point.

PROFESSOR GOODE: You really want to hear

the answer? I mean, the general idea is when you've got a problem like that or you have some individual who would take "who" and then some organizations that would take "that," you use the "who" or "that" that refers most closely to the noun that's closer in the sentence to it.

PROFESSOR HOFFMAN: Okay.

PROFESSOR GOODE: And so it just works better, although, you're correct that, you know, we could say, "A person, public officer, who, or corporation," but that just gets more awkward.

PROFESSOR HOFFMAN: Okay.

CHAIRMAN BABCOCK: Okay. Any other comments about 503? Yeah, Gene.

MR. STORIE: I may have missed this, but in the current rule it's "a consultation to obtain legal services from that lawyer," and it looks like it's dropped from the revised rule. I wondered if there was a reason for that.

PROFESSOR GOODE: Yes, we talked about this at length actually, and the feeling was that "from that lawyer," we couldn't imagine a situation where someone consults a lawyer with a view toward obtaining professional legal services or was it "from that lawyer" that would be affected by the privilege; that is, even if you go to a lawyer to ask for advice and perhaps a

recommendation of another lawyer, you are consulting that lawyer for professional legal services; that is, you're getting professional advice is "You need to go see Jan Patterson," that -- and so we didn't see that "from that lawyer" really added anything.

MR. STORIE: Okay. I just -- you know, I think about the cocktail conversation and didn't know if there was any -- and I think you mentioned that when you're actually not thinking that that lawyer would be the one to provide services but there would be no change in the privilege.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: Well, I understand Professor Goode's point, but it seems to me that that's something that could be argued either way, that if you go see a lawyer and all that lawyer is doing is telling you "Go see this person," maybe someone might argue that's not legal advice, and maybe discretion is better here to leave in the phrase, therefore, so an argument can't be made that way. I mean, I know a lawyer in Houston now who does not provide, quote, "legal services." He is only there to help other lawyers find the right lawyer. That's his job now. Is that legal services? I think it's at least arguable as to whether that is or not. A nonlawyer could certainly give that kind of advice, too.

PROFESSOR GOODE: Are you proposing if someone went to that person and said, "I've got this legal problem," and the person says -- and that's a lawyer that they're talking to and the person says, "You need to go see so-and-so," that would not be a privileged conversation under the current rule?

HONORABLE HARVEY BROWN: I'm saying that under the current rule it's clear that -- well, good point.

CHAIRMAN BABCOCK: Yeah, Buddy.

HONORABLE HARVEY BROWN: Yeah, it could be arguable it seems like to me. So yours might actually be an improvement then because it broadens the privilege.

PROFESSOR GOODE: If you think it's different then we should put it back in, because, again, our position is we don't want to change the law. In fact, we did some things in here where, to be honest, if I were writing from scratch, I would have taken certain phrases out because I could see someone could make an argument that might say this was or was not privileged and that would be different under the restyled version, and so we went through a lot of drafting because we came up with exactly those type of problems, and so if you think "from that lawyer" makes a difference I think it should be back in there.

HONORABLE HARVEY BROWN: I think it could make a difference in that it could be an argument today under the current rule that that is not privileged.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: While I agree that the scope should be broader, I believe that it would make a difference in a context where lawyers are in roles that do not involve them acting as a lawyer, particularly in companies, and they might be included in an e-mail that while there might be another basis to claim privilege, just because they are a lawyer doesn't necessarily mean that that communication would be privileged under the current rule.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I think it could make a difference, but I would leave it out. I would ignore the difference that it could make because it takes you to bad places.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Steve, did y'all consider, I mean, I might tell somebody, advise somebody, something to go to somebody or do that. I might not think of it as legal advice, but don't you look at it from a client when they get some kind of advice from a lawyer I'm afraid they think they've gotten legal advice. Was that --

PROFESSOR GOODE: In fact, that's the way the rule is stated because it talks about who a client is.

MR. LOW: Yeah.

PROFESSOR GOODE: All this is talking about is who a client is.

MR. LOW: Right.

PROFESSOR GOODE: "A client is someone who consults a lawyer with a view towards obtaining professional legal services. Not all communications between a client and a lawyer are privileged," and I think that goes to the point that was just made, because the privilege only protects certain communications between a client and a lawyer. They've got to be confidential, they've got to be made for the purpose of rendering professional legal services, so all we're talking about is the definition of a client here.

HONORABLE SARAH DUNCAN: But if the lawyer with whom this consultation is occurring is not able to provide professional legal services for one reason or another and that's known to the person trying to be a client, it seems to me that that phrase does make a difference. If Joe goes to Tom, knowing that Tom is not able, for whatever reason, to provide legal services but is a lawyer, how can he go with the view of -- to obtaining professional legal services legitimately? If

that phrase is still in, he can't, because he would have to go to the lawyer with a view of obtaining professional legal services from that lawyer, which we've already established he didn't do because he knows the lawyer can't provide professional legal services.

PROFESSOR GOODE: The lawyer can't provide professional legal services because?

HONORABLE SARAH DUNCAN: Well, there are any number of reasons, they're disbarred --

HONORABLE ANA ESTEVEZ: We're a judge.

HONORABLE SARAH DUNCAN: They're a visiting judge.

HONORABLE ANA ESTEVEZ: People try to talk to judges all the time.

HONORABLE SARAH DUNCAN: Yeah, I can't practice law in the courts of the state.

HONORABLE ROBIN DARR: But nobody knows that.

HONORABLE SARAH DUNCAN: Sure, they do. Sure, they do.

HONORABLE ROBIN DARR: People ask judges all the time for legal advice, and they have no idea that you can't give legal advice.

HONORABLE SARAH DUNCAN: Well, but I'm -- as someone who is subject to visiting I'm in a slightly

different situation and lots of people know that I can't represent them or give legal advice.

PROFESSOR GOODE: There's a definition of lawyer as well in the rule, which is that it's a person who's authorized to practice law or who the client believes is authorized to practice law in any state or nation, so if somebody comes to a person they know is disbarred then they are not consulting a lawyer within a definition of the rule because that person is not authorized to practice and the person doesn't believe they're authorized to practice.

HONORABLE SARAH DUNCAN: Somebody who is subject to assignment is authorized to practice for friends and family or not in Texas state courts.

PROFESSOR GOODE: Someone who is disbarred, is what I'm saying.

HONORABLE SARAH DUNCAN: I know.

PROFESSOR GOODE: They came to you and, believing you are authorized to practice, you would be a lawyer for purposes of the attorney-client privilege.

CHAIRMAN BABCOCK: Richard Munzinger, and then Justice Gray.

MR. MUNZINGER: An inventor calls me on the telephone knowing that he has something that may or may not be required to have a patent to copyright, et cetera.

He knows that I personally am not a patent or copyright lawyer, and he calls me for me to make a referral, and in the course of doing that makes disclosures that are substantive. He knows when he calls me that I'm not going to be his lawyer, and he's asking me for a referral. This is Judge Brown's issue as well. Is that or isn't that a privileged communication under the redrawn rule, and is it or isn't it a privileged communication under the original rule?

PROFESSOR GOODE: And I --

MR. MUNZINGER: And it seems to me that the change is -- the change in the rule to drop the words "from that lawyer" has a substantive effect arguably.

HONORABLE SARAH DUNCAN: Could.

PROFESSOR GOODE: I agree with that. That is, I mean, I think that is a privileged conversation under the rule, but I can see that someone could argue it's not a privileged conversation under the rule. That's why I said if you think that is a substantive change I think those words should be put back in the rule.

CHAIRMAN BABCOCK: Okay.

MR. MUNZINGER: My personal view about it is, is that it ought to be a privileged communication and that the original rule unnecessarily restricts the privilege. I'm not lobbying to put the words back in.

I'm trying to point out that an argument can be made that it is a substantive change.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I was just going to say that given the conversation and that Bill Dorsaneo's acknowledgement that, as we've just said, it probably is a change and given the scope of the task, it seems to need to go back in, but, you know, just given the scope of the task.

CHAIRMAN BABCOCK: But policywise it may be a better idea to leave it out.

HONORABLE TOM GRAY: But that's changing the scope of the task.

CHAIRMAN BABCOCK: Okay. All right. Any other -- any other comments about 503? Yeah. Professor Dorsaneo.

PROFESSOR DORSANEO: I'm getting way, way down the road in the draft, but we may not even want to talk about it, and it may raise a substantive problem kind of, but special rule in criminal case, in a criminal case, that rule seems to me to be a criminal version of an investigative information privilege like we once had in the Rules of Civil Procedure. If you want to call it work product, it's a kind of a criminal work product. There are statutes that deal with criminal work product, and it

would just be better to just cross this out.

CHAIRMAN BABCOCK: Are you talking about 503(b)(2)?

PROFESSOR DORSANEO: Yes. I think this is a -- something that hasn't gone away and almost nobody knows that.

PROFESSOR GOODE: Well, you're preaching to the choir, but you're also preaching to someone who tried to do this, and the Court of Criminal Appeals considered doing it a few years ago, and it met vociferous opposition from the criminal defense bar.

PROFESSOR DORSANEO: Well, but they're not here.

PROFESSOR GOODE: But just as background, the Court of Criminal Appeals at least for several years ago had a criminal rules advisory panel. I was a member of that panel. I suggested exactly what you have suggested, which is cross it out. It is -- it does not represent the law.

PROFESSOR DORSANEO: Yes.

PROFESSOR GOODE: I mean, there are actually Court of Criminal Appeals cases that say, "This rule does not mean what it says."

PROFESSOR DORSANEO: I just used it, however, in favor of a district attorney.

PROFESSOR GOODE: Well, and so the Court of Criminal Appeals proposed deleting it, and it created such a fire storm it wound up on the front page of the *Texas Lawyer*, and the Court of Criminal Appeals promptly retreated and left it in, and our charge was not to change anything, and I think politically it is highly unlikely the Court of Criminal Appeals would take that on again they got burned so badly just a few years ago.

PROFESSOR DORSANEO: To add a little history, in November of 1982 when Rule 66b, which has now been replaced by other rules, was added to the rule book this committee voted to eliminate the investigative information privilege at the suggestion of one of our members who is no longer personally with us, Rusty McMains, and that was on purpose. The same thing that I'm recommending for this rule was done for the civil procedure rule that -- that they're -- that has a common source with this rule. It was a good idea then, it's a good idea now, would be a good idea whenever.

CHAIRMAN BABCOCK: Okay. Any other comments about 503? And I'm sure Rusty is looking down on us.

MR. LOW: He would probably comment.

CHAIRMAN BABCOCK: As he always did.

PROFESSOR DORSANEO: It was a great moment in Texas civil procedure. It was a great moment.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: I guess I have a question for the committee as to whether they researched what in subsection (1)(C) in the common interest provision --

PROFESSOR GOODE: Say your question -- say it again, please. (c)(1)(C)?

MS. HOBBS: Yeah, in (C), with the common interest. My question is did y'all research what "in the pending action" currently means under current law? Because it's been several years since I looked at the common interest privilege, but I recall there being a debate about what is a pending action, do they have to be in the same pending action, can they be in different pending actions; and what seems like an innocuous change here by changing "therein" to "in the pending action" might actually lead someone to believe that we resolved that conflict by saying "in the pending action" in that last line instead of "therein," which is vague and nobody really knows what it means. So I just -- I haven't researched it. I just point it out that there is some case law about this, and I -- if anything, I would like the record to reflect if y'all did not intend to address that issue, at least let it be said on the record, and I wonder if it's worth exploring more if it hasn't been explored.

PROFESSOR GOODE: There's not a lot of case law on what "the pending action" means, and it's a requirement that's in the Texas rules but not in Federal -- not in Federal rules but Federal common law, and so there's very little case law about that. We certainly didn't intend to change anything, and I'd really appreciate it if you sort of could explain to me what you see as the change, because I'm not sure I got the drift of what you were saying.

MS. HOBBS: Well, the first time you use "in a pending action," it's "a party in a pending action," so that might be a party who is in a lawsuit somewhere. In other words, another litigant, but when you say "if the communications concern a matter of common interest in the pending litigation" that implies the litigant is actually sharing a common interest in the -- that same litigation, which implies that the litigants are codefendants or coplaintiffs, and I'm not sure that implication is in the current rule, and I think there might be a debate about that in the case law that we don't want to resolve in our rule making.

PROFESSOR GOODE: Well --

CHAIRMAN BABCOCK: Go ahead, Professor, and then Robert.

PROFESSOR GOODE: The way the rule is

currently written is it talks about "communication by a client," blah, blah, blah, "to a lawyer representing another party in a pending action and concerning a matter of common interest therein that is concerning a matter of common interest in the pending action."

MS. HOBBS: So right now "therein" is vague in whether it refers to a pending litigation in which both parties are counsel together or codefendant -- I'm just going to use codefendants because it could be co -- I'm not picking a side here, but whatever, so therein, they concern a matter of common interest therein means in their respective lawsuits. They might not be the same lawsuit. When you say -- when you repeat "in the pending action," that implies they have -- share a common interest in the same pending action, which is arguably a substantive change.

MR. LEVY: And I --

CHAIRMAN BABCOCK: Robert, sorry.

MR. LEVY: This is tough for me because I'm discussing this with my evidence professor, but I do think it is a material difference, and the reference to "the pending action" versus "a pending action" itself implies that it has to be in the same case; whereas we would argue that a common interest privilege would apply if another party in another action has the same issue in

our action and we could therefore communicate and argue that that was subject to the common interest privilege. So even the word "a" versus "the" could be a material change.

CHAIRMAN BABCOCK: Fields.

MR. ALEXANDER: I see your point, and I think the issues would be acutely raised in, for example, a mass tort context where there are a number of plaintiffs pursuing similar claims; and the current version of the rule talks about "a matter of" -- "in a pending action" meaning, you know, there could be a case in Arkansas and a case in Texas, and those are all pending actions, as opposed to "in the pending action," which implies that they would be -- seems to imply they would be in the same case. I do see -- Steve's now going to disprove me as well, but I see the point you're making, I think.

PROFESSOR GOODE: It's -- both rules talk about "a pending action."

MR. ALEXANDER: Right.

PROFESSOR GOODE: The only question is what "therein" at the end of --

MR. LEVY: No, I think it's also because you add in your version at the end "the pending action"; whereas the current rule says "a pending action." You see the last --

MR. ALEXANDER: You still don't see it.

PROFESSOR GOODE: Here's what I see, and you-all can just tell me I'm wrong, and we'll go from there. The current rule says "a pending action" and then says "concerning a matter of common interest therein." What does "therein" refer to? It refers to --

MS. HOBBS: "A pending action" not "the pending action."

PROFESSOR GOODE: "The pending action" here refers back to "a pending action" above, which is the same as the current rule, but maybe I'm just --

MR. ALEXANDER: No, I --

PROFESSOR GOODE: Fields, you can explain it to me later.

MR. ALEXANDER: I think grammatically you're correct, but I also think this could be misinterpreted that the second pending action refers to --

MR. LEVY: The current case.

MR. ALEXANDER: -- the same cause. I think probably grammatically you're accurate, but I see the point that's being made, and I --

PROFESSOR GOODE: Well, let's take it out and work on it then.

MR. ALEXANDER: Okay.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I think in essence the concern is that in the original rule "a pending action" could be interpreted any pending action; and in the new rule, if that is the interpretation, the limitation is to the action in which the parties are involved. That's where the problem comes in, and that's why she perceives a possible substantive change, and I agree with you. I think it is arguably a substantive change and thought needs to be given to it.

MR. ALEXANDER: I think Lisa's point makes sense, and let us go back and look at this, and we may submit an alternate version to y'all.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo, then Professor Hoffman.

PROFESSOR DORSANEO: All I wanted to say is I'm sure the word -- if you look up the word "therein" in Garner's dictionary of modern usage he will say that it doesn't mean anything very clearly, so I probably would say add the word "same" in, even though "the" does -- or does suggest that it means the same, but I have a problem with, you know, tending -- I have a problem with the word "accurate." Does it really have to be the same case number? I mean, or can it be the same --

MR. ALEXANDER: Well, I think that's the exact issue we're talking about. In the current version

of the rule it talks about "a pending action," so I don't think it necessarily arguably implies the same cause number and the exact same case, so let us look at that, and we'll see if we can come up with a revision that is consistent with --

PROFESSOR DORSANEO: It probably shouldn't mean the exact same number.

MR. ALEXANDER: Right.

PROFESSOR DORSANEO: Shouldn't be restricted to that.

MR. ALEXANDER: No, I think I take the point.

CHAIRMAN BABCOCK: Professor Hoffman, then Gene.

PROFESSOR HOFFMAN: Fields, while y'all are looking at that you might also look at the very, very end of the rule, subsection (d) part (5) under the joint client exception, and in particular the word I was looking at is in (C), so this is if the communication was made, "if the communication is offered in an action between clients."

MR. ALEXANDER: Uh-huh.

PROFESSOR HOFFMAN: "Was made by any clients" and then in (C) it says "is relevant to a matter of common interest." Should that be "was"? Should it be

both? I think that raises the same issue we've been talking about, because it could be a current action or a prior action as to where the common interest came from. Or is it always "was," past tense, because it was common interest they had before they were fussing with each other. That make -- am I not making sense?

MR. ALEXANDER: Well, let me -- let us look at it, Lonny. I'm trying to see. It looks to me like the current version of the rule is in -- is in present tense, right, "has to be a matter that is relevant concerning a matter of common interest." I don't see where the past tense -- I'm not sure I see this issue yet, but we will take a look at it.

CHAIRMAN BABCOCK: Gene, do you have a comment?

MR. STORIE: I guess I do. I'm not sure if it's worth anything, but would it work to just drop the "therein," or would that also be a substantive change? Because I think "the focus is on the matter of common interest" is not a specific trial or litigation pending or to come up in the future.

MR. ALEXANDER: You mean keep the current language but drop the "therein" from it? The "therein" is not in the restyled version, unless I'm --

MR. STORIE: Correct, and you've got "in the

pending action" instead of "therein," so I would say how about just ending the sentence "matter of common interest"?

MR. ALEXANDER: Right. Okay.

PROFESSOR GOODE: That would be a substantive change.

MR. ALEXANDER: Let us work on this. We'll send a -- we'll try to send a revised version out.

CHAIRMAN BABCOCK: Justice Gray, you want to pile on some more? Okay. Richard. Never hesitant about piling on.

MR. ORSINGER: Yeah, I may be retreading ground or I may be off in left field, but the old language has to do with "between or among two or more clients."

MR. ALEXANDER: I'm sorry, where?

MR. ORSINGER: I'm on section -- same section, joint client section.

MR. ALEXANDER: Okay.

MR. ORSINGER: And the previous language said "between or among two or more clients." The 5(a) version is "an action between clients." And I don't know whether that was just an effort to eliminate redundancy "between" and "among," or are you thinking "among" means the same thing as "between," or does it actually mean something different from "between"?

PROFESSOR GOODE: Well, I know there are grammatical purists who would say "between" is two and "among" is more than two.

MR. ORSINGER: Is that the only difference?

PROFESSOR GOODE: That was the -- I think that's why "between and among" was included in the original version.

PROFESSOR DORSANEO: But people don't think "between" is limited to two anymore.

PROFESSOR GOODE: That's right.

CHAIRMAN BABCOCK: Really?

PROFESSOR DORSANEO: So stop thinking that.

CHAIRMAN BABCOCK: Sorry, wow.

PROFESSOR GOODE: Certainly I don't think anyone would read this and think this is restricted to two joint clients as opposed to three or four.

MR. ORSINGER: Well, my concern was slightly different than that; and it was that in some of these complicated situations you may, in fact, have everybody in the same lawsuit, or you may have some people in one lawsuit and maybe one or two of those parties in a lawsuit with a third person; and to me the "among" might open up the possibility that a shared communication in one lawsuit should be privileged even if it's offered in another lawsuit; and maybe that's wrong, but to me "among" is

broader than "between" because it allows for the possibility that one party might be in two lawsuits, might have a joint defense agreement that should be -- create a privilege in lawsuit number one, but if it's offered in lawsuit number two and it's not the same parties then it's not really between anymore, but it might be among. I don't know if that makes any sense to you at all.

MR. ALEXANDER: It does. And we'll look at that as well.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Just not to beat that dead horse, but is the rule of grammar still that between is between two people and among is more than two?

HONORABLE KEM FROST: Yes.

HONORABLE SARAH DUNCAN: According to the University of Arizona, for whatever that's worth. It's just the first thing that came up on my search.

CHAIRMAN BABCOCK: Man, I was thinking you're on top of this.

MR. ORSINGER: My concern is really not grammatical at all. My concern is when you have multiplicity of lawsuits, whether the "between" is too narrow to cover that situation when it should.

CHAIRMAN BABCOCK: Yeah, I'm with you.

MR. ORSINGER: Maybe we ought to find a

different word than "between" or add another word to "between."

CHAIRMAN BABCOCK: The point I was going to make is if this is an accepted rule of grammar that "between" is two and "among" is more, but Dorsaneo says it's not, Sarah says it is, so I think we ought to strive to be grammatically correct, whatever the rule is.

HONORABLE SARAH DUNCAN: I would like to improve my source to the OED.

CHAIRMAN BABCOCK: Okay. You have leave to do that.

HONORABLE SARAH DUNCAN: Because that's what the University of Arizona is relying on.

CHAIRMAN BABCOCK: Okay. What other comments? Lisa.

MS. HOBBS: On subsection (2), "claimants through same deceased client," I don't talk like that. Do cases still talk like that in probate that we're claiming through a decedent? I just wonder if there's some room to modernize that language without changing its meaning, and I don't have any -- I'm not here to offer some language. I just wonder if that strikes anybody else as not modern English.

MR. ALEXANDER: It does slightly, and this was one of many titles that we looked at trying to

modernize and ultimately decided we couldn't easily do it without arguably effecting some change, so we didn't.

CHAIRMAN BABCOCK: Can't improve on that language. All right. Any other comments about 503? All right. Let's go to 504, "Spousal privileges." Comments about 504? Yes, Professor Hoffman.

PROFESSOR HOFFMAN: In current (a)(2) it talks about a person "whether or not a party," and we took out the "whether or not a party" language. Can you talk about that for a second? Is it just that kind of since it could be a party or not, it's everything, so just take it out, it's redundant?

PROFESSOR GOODE: Meaningless language, yes.

PROFESSOR HOFFMAN: Got it.

CHAIRMAN BABCOCK: Okay. Anything else? Lisa.

MS. HOBBS: Similarly on subsection (D) you now talk about "a mental or physical condition" instead of "an alleged mental or physical condition."

CHAIRMAN BABCOCK: I'm sorry, which section?

MS. HOBBS: Subsection (4)(D), (a)(4)(D), "Commitment or similar proceeding in a proceeding to commit either spouse," the last phrase in the current version is "an alleged mental or physical condition." And you took out the word "alleged."

PROFESSOR GOODE: The idea behind that was because if you have a proceeding to commit someone because of a mental condition then you are alleging that they have a mental condition. That "alleged" was just redundant there.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: So in (b)(1) I thought about this for a while, and I want to just take a second and describe for the whole committee what my thought process is. I ended up -- I started unsure whether or not what you were suggesting in the change and in the comment did indeed substantively alter law and ultimately ended up in the same place you did, but I just want to take a minute and talk about it. So the current rule as -- the helpful place to look here is to start at 504(b)(1) or look at the comment they have in the restyled rule.

So under current Rule 504(b)(1) the rule -- it only says "A spouse who testifies on behalf of an accused," so the place to highlight is the "on behalf of" is subject to cross-examination as provided by 611(b), which basically says you can be cross-examined about anything. So you've got the privilege not to testify, but if you choose to you're kind of opening yourself up, and what their committee did was to say that that's actually not the law, it's whether you testify on behalf of or even

against an accused, if you choose to do so. And they simply -- so they modernize the rule to reflect that the current version did not reflect current law. So it certainly is a change in the rule. It is technically I guess right to say it's -- it is correct to say it's not a change in Texas substantive law, and so I guess, again, I end up at the same place you do, but I kind of wanted to air that, at least my thinking on that point.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I just want to comment on the title changing from "husband and wife" to "spousal privilege" and put it in the record, you know, the U.S. Supreme Court cited in the *United States vs. Windsor* that the Federal government cannot discriminate against a same sex marriage that's recognized as valid in the state of residence. The executive department has extended that ruling now to the Federal government cannot disregard the validity of a same sex marriage that was valid in the place of celebration, which is an extension beyond the current constitutional law; but it's probable that it's where we will all end up; and by calling this "spousal" we don't have a definition of "spouse" in the rules.

The Family Code I don't think talks in terms of spouses. I think it talks in terms of marriage, so this is wise, I think, to use a more general word,

"spousal," and it's probably smart that it's not -- that it not be defined, but I have a question that I'd like to pose professor. From a conflict of law standpoint, if parties are spouses in another state, but the -- and a communication occurs there, but the litigation is occurring in a Texas court, would the conflict of law rules say to apply the Texas definition of spouse to our proceeding, or would it be the jurisdiction where the communication occurred, or do you have an idea?

PROFESSOR GOODE: I don't know the answer to that, but I don't think changing title to the rule changes anything because the text of the rule currently uses "spouse."

MR. ORSINGER: Uh-huh.

PROFESSOR GOODE: So I don't think there's -- that this is any substantive change. How that issue would get resolved, I really don't know the answer to that.

PROFESSOR DORSANEO: The other place.

CHAIRMAN BABCOCK: Okay. Anything else on 504? Yeah.

MS. GREER: I have a question about the term "communicating spouse," because I think it could be ambiguous in this context, because it's the communication that's privileged, and so if somebody repeats a privileged

communication, they could be a communicating -- I mean, it might get kind of complicated there. I kind of got lost, so I was thinking, even though I know it's more words, using "spouse making the communication" would be clearer to me than "the communicating spouse." And that's in subsection (a)(3)(A), (B), and (C).

CHAIRMAN BABCOCK: 504(a)(3)(A).

MS. GREER: (3)(A) through (C).

MR. ALEXANDER: I'm sorry. Would you repeat -- what's the issue you have with it?

MS. GREER: Well, I think the term "communicating spouse" is a little -- it could be subject to different interpretations. It's the spouse making the privileged communication or the confidential communication.

MR. ALEXANDER: Right.

MS. GREER: And so I know you're trying to shorten the words, but there I think it would be better to have the actual words to make it clearer.

MR. ALEXANDER: I guess our thinking was that it naturally refers back up to the definition of "communication" so that the spouse who can claim the privilege is the one who made the communication at issue. Maybe I'm not -- am I missing your point?

MS. GREER: No, I mean, I just think that

since the focus is on "the communication" and communications can be repeated, it would be clearer to say "the spouse making the communication" to be consistent with the definition. Because your mind starts getting wrapped around like who said what and which one is the communicating spouse as opposed to if you made it clear that it's -- because a communication can be repeated.

CHAIRMAN BABCOCK: Thanks, Marcy. Pete.

MR. SCHENKKAN: Backing up Marcy's point, she first noticed this and at least called my attention to it in (3)(C), in (a)(3)(C), "the personal representative of a deceased communicating spouse." That strikes the ear as very odd, and it is curable with -- by her solution, "deceased spouse who made the communication."

CHAIRMAN BABCOCK: All right. Anything else on 504? Okay. Let us move to 505, "Privilege for communications to a clergy member." And Munzinger immediately raises his hand, concerned about this privilege.

MR. MUNZINGER: I'm looking, I'm still back on 504, and I may be making a problem where there isn't one, but it says subsection (a)(3) in the old rule, "Who may claim the privilege. Confidence, communication privilege may be claimed by the person or the person's guardian or representative," and over here we have in

(3)(B) "The guardian of an incompetent communicating spouse." Is that necessarily the same? I'm not sure that is necessarily the same.

PROFESSOR GOODE: You have to go back and look at (a)(2), because that's where that language comes from. There is some confusion in the drafting of the current rule. That's where the representative incompetence comes from.

MR. MUNZINGER: So that it is limited to persons who are incompetent.

MR. ALEXANDER: Which is?

MR. MUNZINGER: The person who can claim the privilege can -- if it's not the communicating spouse must be the guardian of an incompetent person, and previously we said person -- their representative. Is that limiting the identity of the people who can make the claim? I'm not sure that it is or it isn't. I don't know, it just threw me when I read it.

MR. ALEXANDER: Is your question whether or not you can have a representative of an incompetent person? Because I don't think --

MR. MUNZINGER: Other than a guardian.

MR. ALEXANDER: Yeah, but I think if someone is going to be -- if someone is actually legally incompetent, there would have to be a guardian to speak

for them. I couldn't just declare myself their representative. I think that was certainly our intent in modernizing the language.

PROFESSOR GOODE: That is --

HONORABLE SARAH DUNCAN: I thought your question is whether somebody could be guardian under the cause for the reason that the person is incompetent.

MR. MUNZINGER: I'm just thrown by at one time we have "guardian or representative" in the rule as a person who can claim the privilege on behalf of an incompetent communicating spouse.

PROFESSOR GOODE: What you have to -- the way that sentence is structured is it's guardian or representative of an incompetent or deceased person. "Guardian" is referring to the incompetent. "Representative" is referring to deceased person. We wouldn't talk about a guardian of a deceased person.

MR. ALEXANDER: Right.

MR. MUNZINGER: As I said, I didn't know if I was creating a problem, there was a problem, or wasn't. It just threw me when I saw it.

MR. ALEXANDER: Well, no, if we're missing something or you think it's still unclear then we should -- that was certainly the intent, was to break up those two modifiers where they belong.

CHAIRMAN BABCOCK: Kent Sullivan. Justice Sullivan.

HONORABLE KENT SULLIVAN: I may change directions a little bit, but I just want to follow up on Pete and Marcy's point, and it does seem to me that we're using this new term of art, "communicating spouse," a little bit, and I wonder if the easier and perhaps more precise wouldn't be just to define it and have it as a defined term so there's no confusion.

CHAIRMAN BABCOCK: Okay. Justice Moseley.

HONORABLE JAMES MOSELEY: Under the old rule would a representative who could claim the privilege include an attorney, and would that still be the case under the new rule?

PROFESSOR GOODE: Attorneys may always claim a privilege on behalf of a client, so -- and that's not prevented by the current rule, which doesn't talk about the attorney; but certainly if you represent someone in a proceeding, the spouse who holds the privilege is your client, the attorney can claim it on behalf of the client.

HONORABLE JAMES MOSELEY: So the rule, the word "representative" under the old rule does not include attorney or is not limited to representatives under a probate or administration of an estate. Or does it?

PROFESSOR GOODE: This is talking about who

the holder of the privilege is and who may claim it on behalf, so if you go -- this is actually -- I should back up. Doing these who may claim provisions was extremely difficult. I was trying to the extent possible to standardize the who may claim language across the privilege rules. At one point I even had a chart for myself of all the who may claim provisions under the current rules because it's a jumble.

MR. MUNZINGER: My question really I guess is, is the guardian the only authorized representative of an incompetent person? A guardian is a person -- I'm not a probate lawyer, but the probate court appoints X as the guardian for Y, who is incompetent. Now, Y, the incompetent person apparently was the communicating spouse, and there may -- is the only guardian -- is the guardian the only representative; or could the guardian, for example, say to somebody, a nonattorney, "Go do this for the incompetent person," and there's litigation or some complication. May that person claim the privilege, or is it limited to the guardian? I don't know whether it would make a difference or not, but I do note that the word "or representative" has been deleted in the new rule, and I don't know if that has a substantive effect. That's my concern.

PROFESSOR GOODE: It was our view that

"representative" in (a)(2) referred to deceased person and "guardian" referred to incompetent. That was the only sensible way of reading that sentence. Because it makes no sense to talk about a guardian of a deceased person.

MR. MUNZINGER: I understand.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: In the next section on the -- on the clergy privilege it talks about a communicant's guardian or conservator. Again, I don't practice here, I don't know what those words mean, but it seems like we might want them to be consistent.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Professor Goode, what about a situation, I know I have a doctor who takes off for a couple of years and signs a general power of attorney if something comes up. Would the person holding that power then be -- did you discuss whether he would be a representative? He's not a guardian. So that he could claim a privilege for that person. In other words, general power of attorney, you know, can act for and on behalf.

PROFESSOR GOODE: Right.

MR. LOW: So there are other situations other than a guardian that could act, and there might be other kinds of representatives, but he might be considered

a representative, so was that discussed, or do you remember?

PROFESSOR GOODE: Again, it wasn't discussed in the sense that -- I hate to keep falling back on this. All we were trying to do is -- is take the language that's there and not change the meaning of anything.

MR. ALEXANDER: Why don't we, though -- there are enough issues raised by this. Why don't we take another look at this and see if we can craft some revisions that might help some of these concerns?

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Also, I agree kind of with your distinction between a guardian and a representative, but I can imagine a situations in which you have a guardian ad litem, and so I'd like at least this record or at some point for you-all to indicate whether by "guardian" you mean only a probate court guardian of the person or guardian of the estate or whether "guardian" also means a guardian ad litem that's appointed just for purposes of a particular lawsuit.

MR. ALEXANDER: Well, I can say for the record we mean "guardian" in the way the current rule means "guardian," and no other way.

MR. ORSINGER: I was trying to get a little -- I was trying to get a little --

PROFESSOR GOODE: I wholeheartedly agree with Fields.

MR. ALEXANDER: Beyond that it would be up for the courts.

CHAIRMAN BABCOCK: All right. How about quickly -- well, not quickly, as much as we need for communications to a clergy member under 505, and after we're done with this we'll take our break? Yeah, Justice Brown.

HONORABLE HARVEY BROWN: You have changed the phrase "professional character" to "professional capacity" in (b) and you've added that phrase as part of the definition of a communicant in (a)(2) where you again have "professional capacity," and I just wondered what was -- if you know, what the intent was for the word "character" originally because it's a little -- it's a phrase I wouldn't normally see, and I'm wondering what they're trying to get at in the original rule when they say "character" rather than "capacity."

MR. ALEXANDER: I think Steve can add to this perhaps. From my standpoint this was just an attempt to modernize the language. "Character" seems like kind of an anachronistic way to describing what we're talking about, so that was the only intent from my perspective.

HONORABLE HARVEY BROWN: Well, I ask because

I was thinking about a hypothetical question. Let's say somebody is a member of a congregation and good friends with the priest and plays golf with the priest and talks with the priest on the golf course about something that he would or she would consider confidential. Is that in a professional capacity? Is that the same thing as in a professional character? I wonder if "character" has a little broader meaning than "capacity" there. I don't know, but I just raise the question.

MR. ALEXANDER: From -- we didn't see a meaningful distinction other than "capacity" seemed to be clearer; and to my mind, in answer to your question, if you're talking to the priest in a penitent role, it's covered. If you're talking to the priest about something just because you have a friendly relationship with him or her, that could be a separate issue. So to my mind it's encompassed by the language we chose in the new rule, the revised rule.

HONORABLE HARVEY BROWN: So going back to my hypothetical, if you're talking to your priest on the golf course, who is your friend, about a spiritual matter, that would fall within a professional capacity or not?

MR. ALEXANDER: I think it generally would.

HONORABLE HARVEY BROWN: Okay.

MR. PERDUE: That's where most of my

spiritual lessons come.

MR. MUNZINGER: Yeah, but they're alone.

CHAIRMAN BABCOCK: Okay. Anything more on this? You guys just want a break, right? All right. If there are no more comments on 505, we will take our morning break.

(Recess from 10:41 a.m. to 10:59 a.m.)

CHAIRMAN BABCOCK: All right. Let the beating continue. Rule 506, "Political vote privilege." Any comments on this?

PROFESSOR HOFFMAN: You know, you really discourage people from raising their hand.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: So note there's one difference that I noted that may not make a difference, but I'll note the language, so it's the current rule has "the tenor of a person's vote," "a person has a privilege to refuse to disclose the tenor of their vote," and the revised rule is "a person has a privilege to disclose that a vote" -- sorry, "to disclose the person's vote," is what it says. So my first is a question, is that tenor language ever been -- is there much case law on that? Let's start with that.

PROFESSOR GOODE: No.

PROFESSOR HOFFMAN: Yeah, I didn't think so.

Okay. So --

PROFESSOR GOODE: I -- this is suggested by one of our subcommittee members, and I actually went back and did some research on it, and it's clear that the tenor of the person's vote means how the person voted.

PROFESSOR HOFFMAN: Okay. So, of course, my only comment then or question is, is whether or not this potentially ends up being a change in that -- I mean, so here's one possibility I would imagine, that the tenor could be broader and that that could include, for example, whether the person voted at all.

PROFESSOR GOODE: That is clearly not what the privilege is designed to protect.

PROFESSOR HOFFMAN: So that question has to be answered, "Did you vote?"

PROFESSOR GOODE: Yes.

CHAIRMAN BABCOCK: Could you say, "Hey, I'm not going to ask you how you voted, but, you know, did you kind of mostly favor liberal candidates, or, you know, what was the tenor of your voting pattern here? I don't want to know what you voted for or who you voted for"? Could you do that?

PROFESSOR HOFFMAN: So I think that -- that that helps. I mean, so the question is only whether or not by changing those words we're somehow unintentionally

constricting it.

CHAIRMAN BABCOCK: So you can't ask them if they voted liberal mostly?

PROFESSOR GOODE: That's like asking -- I'm not -- "I don't want you to tell me what you told your lawyer, but just tell me whether the lawyer said you're in a heap of trouble." Because in a lot of jurisdictions, the Federal courts, for example, it says the privilege protects communications from the client to the lawyer but not from the lawyer to the client.

PROFESSOR DORSANEO: Bad.

PROFESSOR GOODE: You can see that in a lot of places, but of course, if the communication would -- if revealing what the lawyer said is tantamount to revealing what the client said, it's privileged, and I think it's the same kind of --

CHAIRMAN BABCOCK: Thought.

PROFESSOR GOODE: Or "Don't tell me what the person said, just tell me what your reaction was to avoid hearsay."

CHAIRMAN BABCOCK: Well, I'm figuring we're going to practice a long time without that ever coming up, but -- all right. Anything more on 506? Okay. Let's go to 507, "Trade secrets," something that does come up a fair amount. Richard.

MR. ORSINGER: Just a matter of note, the Legislature adopted the Uniform Trade Secret Act in the last session --

MR. ALEXANDER: Yes.

MR. ORSINGER: -- and I think that some of these concepts are archaic. I know that all we're trying to do is conform and modernize, but maybe one definition of modernizing is to stay consistent with the legislation. At the time this rule was adopted we just had common law concepts and very poor definitions of what constituted a trade secret, and I don't know whether there's anything about that statute that we might borrow some language to make it more modern or conform more to the current law. Also, I'm concerned about the word "owned," and I don't litigate trade secret stuff much. I deal with confidentiality a lot, but not trade secret per se, but I think that trade secrets can be licensed and there can be different contractual rights allocated in trade secrets that are different from ownership, and I'm a little concerned about us perpetuating this oversimplification of ownership in a world where really they slice and dice rights. So I'm wondering if we could take this opportunity to find a different word from "owned" that would be global enough to actually match the practice of today's economy.

MR. ALEXANDER: I think those are both valid points. We used "owned" because the current rule used "owned" and --

MR. ORSINGER: Well, I know that, and if we're condemned to carry the past into the future then we'll have to do that, but if we can actually look at the statute and think about this, it would be a great opportunity to modernize this rule.

MR. ALEXANDER: Yeah, I certainly think it makes sense to make this rule consistent -- as consistent as possible with the new trade secret legislation that passed, so I agree.

CHAIRMAN BABCOCK: Okay. Yeah, Professor Hoffman.

PROFESSOR HOFFMAN: So another nonsubstantive kind of thinking about the restyling effort, so in 502(3) and (4) when you had exceptions, the way it's set up is general rule and then exceptions are actually set up differently. Here you actually put the "unless," the exception into the general rule. I assume you probably did it because the exception is so short.

MR. ALEXANDER: Right.

PROFESSOR HOFFMAN: So I just throw out, though, maybe as the committee is taking another pass, given these other comments, think about it. I mean, there

are two. There's fraud or otherwise injustice, and so tracking the same approach you would have separate exceptions there, but maybe not because it just is so short.

MR. ALEXANDER: Our thinking was to look at it both ways and if it was more ungangly to do it that way then we just incorporated it into the body of the rule.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: This maybe needs to go on the substantive list, but, I mean, the case law that talks about trade secrets basically says it's not sufficient that the trade secret is relevant, but it must -- but disclosure of it must be, you know, necessary, you know, in some fairly significant sense; and the rule doesn't say anything about what the current law talks about when it's talking about, you know, whether the trade secret should be disclosed. Maybe it's not meant to, but I think this "unless the court finds that nondisclosure will tend to conceal fraud" -- well, that's not true -- "or otherwise work injustice" doesn't really match what the cases say the standard is.

PROFESSOR GOODE: I think the cases are interpreting the language of the current rule, which is "otherwise work injustice."

PROFESSOR DORSANEO: Well, yeah, but that's

like --

PROFESSOR GOODE: So we kept the language of the rule.

PROFESSOR DORSANEO: That's something you would say if you didn't know what else to say, is "We need to have justice here."

MR. ALEXANDER: Somebody else didn't know what else to say, and we just copied them.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: This, again, might be parsing words too much, but when you talk about protective measures, "If a court orders a person to disclose a trade secret," "person" in the context of the rule is the person that owns the trade secret, but there could be disclosure required by others, including others who might be licensees, so should "person" or another word be referenced in that provision (c)?

MR. ALEXANDER: If I'm catching your intent, I thought that was captured by our use of "a person," not necessarily "the person" that owns the privilege, but if --

MR. LEVY: Right, but that's -- I'm focusing on the fact that "person" is used in the rule as the person who owns it or somebody else who might have that information so that a potential question could arise that

person -- the protective orders only apply if the owner of the privilege is required to disclose, not a scenario where somebody else like a licensee is planning on disclosing and the owner says, "You may not"

MR. ALEXANDER: And, again, maybe I'm missing this; but it addresses who can claim the privilege, which is the person who owns the trade secret, which is exactly what the previous rule says; and then with regard to what the court can do, the court can order the person -- if the court orders a person, not necessarily the person who owns it, but if the person that owns it asserts the privilege, the court can then order a person or "orders any person to disclose, it must take protective measures," so it's not -- by using "a person" it's not restricting it, at least wasn't intended to restrict it.

MR. LEVY: I agree that's not the intent. I was just focusing on the fact that "person" in the rule seems to talk about the person that owns it, even though "a person" is intended to be broader.

PROFESSOR GOODE: Later on in the sentence we refer to "the privilege holder," not the person. In my mind it's fairly clear that a person is not the same as the privilege holder later on in the sentence.

MR. ALEXANDER: I specifically remember

addressing this exact issue in our committee and concluding that this was clear enough to effectuate its function, but it sounds like you're at least questioning that.

MR. LEVY: Well, and I just want to make clear that that is the intent --

MR. ALEXANDER: Right.

MR. LEVY: -- and I'm not sure there's a better way to word it, but --

MR. ALEXANDER: It's a valid issue because we looked at this exact same thing.

CHAIRMAN BABCOCK: All right. Anything more on trade secrets? Okay. Let's go to 508, "Informer's identity privilege." Any comments about the informers? Lisa.

MS. HOBBS: I just don't know this -- "The privilege does not apply if the informer's identity or the informer's interest in the communication subject matter has been disclosed to a person who would have cause to resent," which is the same language as in the current rule, but does that mean you just resend?

PROFESSOR GOODE: Resent.

MS. HOBBS: Oh, resent.

PROFESSOR GOODE: That language comes from an original Supreme Court opinion that recognized the

informer's privilege way back 50 years ago.

MR. ALEXANDER: We had this discussion, too.

MS. HOBBS: I'm glad I'm in good company.

MR. ALEXANDER: So don't worry.

CHAIRMAN BABCOCK: Okay. Any other comments about 508? You okay with it, Richard?

MR. ORSINGER: 508, I have nothing more about 508. I'm fine.

CHAIRMAN BABCOCK: Okay. Well, if Orsinger is okay with it, I'm okay with it. We'll go to 509, which is the physician-patient privilege.

MS. HOBBS: Can I go back to 508 real quickly?

CHAIRMAN BABCOCK: Where do you want to go?

MS. HOBBS: Back to 508 real quick.

CHAIRMAN BABCOCK: 508, sure.

MS. HOBBS: I just want the record to state that you did not include any change to the order of the testimony about the merits. You've broken it down into testimony in a criminal case and testimony in a civil case, and I understand why based on how this is written in the current provision, but the current rule starts with civil, and it says you can -- if you find that the -- if you find that disclosure is going to happen, the identity is going to be disclosed, "The court may make any order

that justice requires." It's permissive, it's broad, it gives the court lots of discretion on what they're going to do; and then the rule says and in a criminal case you shall do this; and they're like death penalty things, right, you're going to dismiss the case; and I just want to be clear that by switching the order of that you didn't mean to imply that in a criminal case you can do the ultimate, which is dismissal, but in a civil case -- it seems like the trial court would still have discretion to ultimately dismiss the case if that was what justice required; and you did not mean to suggest anything differently by switching that order.

MR. ALEXANDER: We did not, no. No. And the court may make any order that justice requires up to and including death penalty.

MS. HOBBS: Yeah, and the way it's currently drafted with the starting with the permissive and then going with the mandatory, it doesn't seem to imply that you could do the mandatory under the permissive, and the way you restructured it there could be an argument there, but that was not your intent.

MR. ALEXANDER: I think there might -- that was not our intent, and I think that argument might have more teeth if it wasn't broken between the criminal issue and the civil issue. So to me you look at what the court

can do in a civil case wholly independently from what we've said under (2)(A) that a court can do in a criminal case.

CHAIRMAN BABCOCK: Okay. 509, "Physician-patient."

PROFESSOR GOODE: If I may, I would just say that this is a rule where we actually have presented two versions of 509(b) because, frankly, we couldn't figure out exactly what current 509(b) does. Rule 509(b) currently talks about privilege and then arguably in the rest of current Rule 509(b) talks about it not as a rule of privilege but as a rule of admissibility, and so we presented one version, which expresses Rule 509(b) as a rule of inadmissibility and the second one as a rule of privilege, and we just couldn't decide as a committee which was a more accurate capture of the current language. Both are absolutely consistent with whatever case law exists.

MR. ALEXANDER: Or perhaps we couldn't agree as a committee.

CHAIRMAN BABCOCK: Anybody have any preferences between the (b) the first and (b) the second?

PROFESSOR HOFFMAN: So this doesn't help decide between the two different versions of (b), but let me note you've added the word "confidential" to the

restyled version. The current doesn't talk about the communication being confidential, the communication to any person involved in the treatment or examination of alcohol or drug abuse.

PROFESSOR GOODE: Where are you?

PROFESSOR HOFFMAN: In the same place you were.

PROFESSOR GOODE: Okay.

PROFESSOR HOFFMAN: So you'll see that it talks about that "a confidential communication is not admissible if" and the word "confidential" isn't in the current rule. So can you just talk about that for a minute? Is it that you assumed that the communication had to be confidential?

MR. ALEXANDER: Yes, because if you go up to definitions and what kind of communications are at issue, unless it's a confidential communication under (a), (b) would -- the communication at issue wouldn't apply to what this rule is trying to do.

PROFESSOR HOFFMAN: Okay, but doesn't that suggest then that you don't need the word "confidential"?

MR. ALEXANDER: Well, no, because -- well, it didn't to us because we wanted to make it clear that this limited privilege or whatever that they're doing in (b) applies to confidential communications, and

"confidential" is defined up in (a)(3), so that was -- that was the -- that's the limiting predicate, in our mind at least, to what's being addressed in 509(b) as opposed to -- if 509(a)(3) had defined "communication" as opposed to defining what "confidential" means, then I would think we wouldn't need to repeat "confidential" in (b), but that's not the way it was structured. Does that make sense?

PROFESSOR GOODE: I would add this is also -- it's something that comes up in Rule 510 as well. Rule 510, there is a definition of "confidential" for communication, but the current statement of privilege doesn't refer to "confidential communications." It just refers to "communications," although it's clear that the privileges only apply to confidential communications, not nonconfidential communications, and so this was a matter of, I think, just clarification. I know of no case that's ever held that a nonconfidential communication is privileged.

MS. HOBBS: Rule 509 is especially --

CHAIRMAN BABCOCK: I'm sorry, Professor Dorsaneo.

PROFESSOR DORSANEO: Go ahead, Lisa.

CHAIRMAN BABCOCK: He yields to you, Lisa.

MS. HOBBS: Just to that point, it's an

especially odd structure in Rule 509, and I haven't studied 510 yet, but because it's in the civil cases where it's in the civil section of that rule that you do state that the confidential communication is privileged. You start with the criminal that says it's generally not privileged and then you go to the civil, so that's the general rule is in the section (c) before you finally reference a general privilege against a confidential communication as defined in (a). It's just a really odd structured rule.

PROFESSOR GOODE: Absolutely. We were just trying to retain section numbers.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I'm looking at this, and these two sentences in your two versions of (b), "There is no physician-patient privilege in a criminal case." And like, what am I reading here, right, if that's not what this rule is about? Where does that sentence come from and what's it doing there? What's it accomplish?

PROFESSOR GOODE: It's in the current rule.

PROFESSOR DORSANEO: I know it's in the current rule. What does it accomplish in the current rule?

HONORABLE ROBIN DARR: It clarifies there is

not one in a criminal case, but there is one in a civil.

PROFESSOR DORSANEO: Limited privilege in a criminal case.

PROFESSOR GOODE: This is -- again, there's a long history.

PROFESSOR DORSANEO: There is only a limited physician-patient privilege in a criminal case. I can cope with that, but to say there isn't one, I'm not sure how that helps me at all.

CHAIRMAN BABCOCK: Buddy. Buddy is going to answer this.

MR. LOW: Steve, you remember when -- no, I'm going to -- as things come up I have to speak or I'll forget it. You remember when sometime your committee and my committee dealt with HIPAA and pertaining to this, and anything less restrictive than HIPAA was no good, and we worked out a rule on that. I don't think it was ever passed, that HIPAA -- did that come up in your discussion? We worked out a joint thing on waiver, because used to you waived, but you had to get the information from the doctor through subpoena and then there was some cases held that you can just go ahead and ex parte the doctor and HIPAA -- did that come up in any of this?

PROFESSOR GOODE: No. Again, we weren't -- the whole effect of HIPAA on this and the context of ex

parte communications with the patient's doctor --

MR. LOW: Yeah, right.

PROFESSOR GOODE: -- by the other side, and the extent to which HIPAA would allow that, we did come up with a rule about that, but --

MR. LOW: But it's not encompassed here, okay.

PROFESSOR GOODE: Again, this is a bizarre rule in the way this rule is structured, I agree, and this part about communications and drugs used to be in Rule 510. It came from a criminal provision in the Code of Criminal Procedure. It was jammed in there, and at one point I guess in the consolidation, I think, Justice Hecht, in 1998 it was moved from 510 to 509. As I say, we had a hard time with this because I don't know whether this is a rule of really saying someone who makes a communication in the course of alcohol or drug abuse treatment or examination has a privilege to prevent that communication from being revealed or whether it is simply a rule of inadmissibility so that if the defendant wants to reveal that communication and the prosecution doesn't want the defendant to reveal that communication, the prosecution can say it's inadmissible. If it's a rule of privilege, it's the defendant's privilege. If it's a rule of inadmissibility it's just a statement of

inadmissibility. Again, since it's called "limited privilege" it implies it's a privilege, but it's written in terms of a rule of inadmissibility, and that's where we just threw up our hands and said, "Y'all are smarter than us, you can decide."

CHAIRMAN BABCOCK: Are you talking about us?

PROFESSOR GOODE: Absolutely.

MR. ALEXANDER: You hear the sucking up going on?

CHAIRMAN BABCOCK: Yeah, that sounds like sucking up to me. Orsinger.

MR. ORSINGER: My comment is not on the criminal part. Are we ready to talk about another part?

CHAIRMAN BABCOCK: I think we're more than ready.

MR. ORSINGER: I know that the committee did not try to do anything substantive, so I'm going to preface my comment.

CHAIRMAN BABCOCK: Can we just stipulate to that?

MR. ORSINGER: Yeah, we can stipulate to that. I think the committee, subcommittee, some subcommittee or some task force, should try to do something substantive with this; and one of my big concerns is that this is all styled from the standpoint of

a physician licensed to practice medicine; but in reality, in this day and time nurse practitioners and other intermediaries are actually licensed to deliver medical services and do deliver medical services, frequently without the intervention of a doctor, medical doctor license. They're just provided oversight, but, you know, a patient can go see a nurse practitioner and leave with medicine and never see a doctor, and so really this should say "Licensed to provide medical services" rather than a physician. Another thing is under the lawyer-client rule they have a representative of a lawyer who will pick up the paralegals and other people that are in the staff. We have no such thing as a representative of the doctor that would pick up any of their support staff, so this rule is gravely deficient in terms of applying to the modern practice of medicine.

Let me also say with regard to HIPAA, which is something I run into in my practice all the time, if you don't have a HIPAA release, which frequently the doctors will require a court order that you have complied with HIPAA, you can't get anything from these guys in discovery. Now, if a doctor is on the witness stand, I'm not sure what happens if we comply with Rule 503 in order to breach a privilege -- or, pardon me, Rule 509 to breach a privilege but we haven't complied with HIPAA. Then the

testifying physician is now in a situation where a judge is applying a Rule of Evidence and you've got a Federal law that has standards that haven't been met, and that's a dilemma, so it does seem to me that this rule needs to be substantively looked at.

CHAIRMAN BABCOCK: Okay. Gene, and then Buddy.

MR. STORIE: Yeah, my comment is on the criminal things, although I know absolutely nothing about them, but I notice the change in word from "proceedings" to "case," which seems to me as narrowing the application of the privilege, and I don't know why that was. And then I went back to look at Rule 101(e), which seems to talk about a number of proceedings, and I don't know if they're cases or not, but it seems to me that you wouldn't want to change the scope of the rule.

PROFESSOR GOODE: Criminal -- excuse me, Rule 101(h)(2) defines "criminal case" to mean "a criminal action or proceeding" including an examining trial.

MR. STORIE: Ah, okay. Thank you.

CHAIRMAN BABCOCK: Buddy, still got that thought?

MR. LOW: Yeah.

CHAIRMAN BABCOCK: I know you had to hold it for a minute.

MR. LOW: I did -- well, I just lost it. The committee has been asked to make notes of things that they think are real key substantive changes that should be considered, so when we get through with this, if and when we do, then with these substantive changes we're all talking about here will be renewed, and we'll get together and consider recommendations to the Court what we should consider.

CHAIRMAN BABCOCK: Okay. Great. Justice Brown.

HONORABLE HARVEY BROWN: On (b) about the criminal case, two questions. Number one, it says there's no physician-patient privilege in a criminal case. Is that for the criminal defendant to claim, or is that any witness? If you're a witness called in, does that mean that your privilege is lost?

PROFESSOR GOODE: I'm sorry.

HONORABLE HARVEY BROWN: On the first sentence of (b) where it says there's no privilege in a criminal case, does that mean just for the accused, or does it mean for any witness?

PROFESSOR GOODE: You mean a witness comes in and someone cross-examines them and wants to ask about medical stuff?

HONORABLE HARVEY BROWN: Yes.

PROFESSOR GOODE: What you said to your doctor?

HONORABLE HARVEY BROWN: Yes.

HONORABLE ANA ESTEVEZ: Well, serious bodily injury, bodily injury, rape, a lot of those are medical issues that you have to prove up in your case in chief.

PROFESSOR GOODE: There is no -- the law is clearly stated there is no doctor-patient privilege.

HONORABLE HARVEY BROWN: For any witness who comes.

PROFESSOR GOODE: In criminal case at all, yeah.

HONORABLE HARVEY BROWN: And second, you said your committee wasn't smart enough to figure it out. I'm not sure we are either --

MR. ALEXANDER: The rest of the committee takes issue with that, by the way.

HONORABLE HARVEY BROWN: I'm not sure we are either, and it seems like to me this is one where you may need to talk to some criminal lawyers or criminal judges because it seems like to me this might affect the practice. I could see the DA subpoenaing records, and the DA might subpoena the entire records from a medical provider, and then who is going to have the burden of objecting to keeping out any privileged information, or is

that best handled as a practical matter as give us all the records and we'll work it out through admissibility later? So this could have an impact on just the way they go about their daily affairs of getting medical records. It seems like to me you need to look at that practical impact as part of the question.

CHAIRMAN BABCOCK: Okay. Anything else on this rule? 509? All right. Let's go to 510, "Mental health information privilege in civil cases." Any comments about 510? Let the record reflect that Orsinger is out of the room, which may explain why there's silence here.

MR. ALEXANDER: Can we hit Article VI real quick?

CHAIRMAN BABCOCK: Say again.

MR. ALEXANDER: Can we hit Article VI real quick?

MS. GREER: Although, if he were here Richard would probably point out that it's limited to the practice of medicine and not medical professionals, so if you make a change to the prior rule --

CHAIRMAN BABCOCK: Are you adopting that comment by Orsinger as your own?

MS. GREER: I think it is a good change just to be clear, but he would probably be better to advocate

it than am I.

MR. SCHENKKAN: There he is.

MS. GREER: There he is.

CHAIRMAN BABCOCK: Speak of the devil. Richard, we're on Rule 510, "Mental health information privilege in civil cases."

MR. ORSINGER: Oh, yeah, I run into that all the time.

CHAIRMAN BABCOCK: We had a feeling that you did.

MR. ORSINGER: What --

CHAIRMAN BABCOCK: Marcy has made a comment in your name.

MR. ORSINGER: I'll endorse it, whatever it was.

CHAIRMAN BABCOCK: Do you have any other comments? Robert.

MR. LEVY: This might be a substantive comment, but I could perceive of a situation where a patient could be somebody who is neither interviewed or is affirmatively seeking treatment but is like involuntarily committed and is being evaluated or treated by a doctor, but has no intent to do that. Again, I know you've used "interviewed" from the current rule. I think it's anachronism, so I don't know if that would be a

substantive change in terms of what the rule intends.

CHAIRMAN BABCOCK: Okay. Yeah, Tom.

MR. RINEY: At the end there's a footnote reference, "Comments to 2013 restyling" that gives the history and basically the codification, and it says that that statute provided the privilege applied. There's a separate statute that deals with mental health records that parallels this rule, but it also has some additional provisions about how the patient can obtain copies of the record and so forth. I'm just wondering if we should consider referencing that statute. I don't know if it's the same one or not, but the way this is phrased it acts as if that statute provided that when we might want to actually direct them to the statute if it is the same thing. Because you really can't give -- you cannot answer the issue about how can you get the records absent taking a look, I think, at both the statute and this rule.

PROFESSOR GOODE: And there actually is a statutory physician-patient privilege as well as a statutory psychotherapist-patient privilege, and the statutory privilege and the rule are not necessarily consistent, and there's a really tortured history because of the doctor-patient privilege. When the rules were promulgated the statutory doctor-patient privilege was repealed, but the Legislature then in a nonsubstantive

codification put the repealed doctor-patient privilege in the law, so you had a repealed section reenacted by the Legislature as a nonsubstantive revision of the statutes, and that has since been amended. I think Richard's comment that 509 and 510 deserve a real thorough re-examination is very much on point here.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Will the existing comment to Rule 510 be carried forward, or is it only the 2013 restyling comment that will be carried forward, because there's some very important language in existing comments about parent-child relationships and a balancing test, which -- and the negotiation between the family law section and the Supreme Court ended up in a comment rather than in the rule, and that will not disappear, will it? Or will it? Because if it's going to disappear, I would advocate that we continue with it because it's a very substantive comment.

PROFESSOR GOODE: It was certainly never in my mind that all the comments that are already existing would disappear.

MR. ORSINGER: Okay.

MR. ALEXANDER: Right.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: I've got the same issue related to the exceptions in 509 and in 510. Since we're on 510, the exception that's at the bottom of page 57, the (d)(5), "If any party relies on the patient's physical, mental, or emotional condition as part of the party's claim or defense and the communication or record is relevant to that condition," the existing language inverts those two aspects of the exception. It talks about as to a communication or record "relevant to an issue of the physical or mental in any" -- and "in any proceeding," and I think I like the new language better, but the genesis of the old language I recall is that some people on the committee, particularly John O'Quinn in years past, wanted to eliminate these privileges altogether by making the exceptions do that. So the proposal was to make an exception to the pertinent privilege whenever there was a -- as to a communication or record relevant to an issue of the physical, mental, or emotional condition of a patient, you know, meaning whenever the information is relevant in the case, there's no privilege. All right. That was the idea behind it and then it got worked and massaged more, and we had this additional language added, which ultimately is interpreted by the Supreme Court in that case called R.K., or you know, and I think all of that -- I think all of that, you know, probably works out, but

every time I teach this I have trouble with it because of its genesis and the additional language and how that language limited the attempt by John O'Quinn and others to dispose of the privileges altogether in litigation. I just bring that -- you know, bring that up. I don't know whether that's of any use to anybody, but just inverting it may, in fact, make the R.K. case make better sense.

CHAIRMAN BABCOCK: Lisa, did you have your hand up? Somebody down there did. Anybody? Okay. Any other comments on 510? Okay. Moving right along, 511 is a handout, "Waiver by voluntary disclosure," and these competing drafts, Buddy, are already before the Court?

MR. LOW: Yeah, Chip, what happened, the committees had different versions, and Steve's committee followed the Federal on ways to follow the Federal. We went and applied waiver to not just attorney-client privilege. It was voted on. The latter one was approved by the full Supreme Court Advisory Committee. The Supreme Court hasn't decided, and we wanted the Supreme Court to have both versions before them. They have them, and those versions are the result of so much work that it wouldn't really be constructive to have further comment about them.

CHAIRMAN BABCOCK: Notwithstanding Buddy's plea, does anybody want to make further comment about them? All right. Justice Frost, are you wringing your

hands for --

HONORABLE KEM FROST: No.

CHAIRMAN BABCOCK: Okay.

MR. LEVY: You're talking about the proposed?

CHAIRMAN BABCOCK: 511, the two versions.

MR. LEVY: Well, a question that might be of interest is in the proposed 511(b)(1), do we want to consider disclosures that are made to government authorities that are not just U.S., state, or Federal; i.e., a foreign jurisdiction authority that would not constitute a waiver?

CHAIRMAN BABCOCK: The European Union, for example.

MR. LEVY: That would be one, yes.

MR. LOW: I think that was discussed, I don't remember, when we talked about it at length the last time.

CHAIRMAN BABCOCK: Buddy thinks that we talked about it at length at some point.

MR. LOW: We did.

CHAIRMAN BABCOCK: And if we talked about it, I bet it was at length.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: But that's a good point,

Robert. Anything else? Okay. Well, then let's move to 512, "Privilege matter disclosed under compulsion or without opportunity to claim privilege." Yeah, Judge Estevez.

HONORABLE ANA ESTEVEZ: I have a quick question just on 511. You know, we've changed all -- I didn't see the word "ought" in any of the other rules. I know you guys fight over "should" and "must," but just on 511(b)(C) they have an "ought in fairness be considered." I don't know what word they prefer, but I think just to be consistent it should be "should" or "must."

MR. LOW: "Should" or "must" wasn't really discussed back then. That's true.

CHAIRMAN BABCOCK: "Ought" is the word of choice at the time.

MR. LOW: Right.

PROFESSOR GOODE: That's the language in Federal Rule 502.

CHAIRMAN BABCOCK: You ought to do it, but you must not.

HONORABLE ANA ESTEVEZ: So it's "should" maybe.

CHAIRMAN BABCOCK: Okay. 512.

MR. ALEXANDER: I think in 512 we changed a "which" to a "that," and that's it, so I'm hopeful --

hopefully we won't get bogged down on this one.

CHAIRMAN BABCOCK: Oh, my goodness. All right. 513. Comment? Professor Hoffman. Are you on 513 or 512?

PROFESSOR HOFFMAN: Yeah, 513.

CHAIRMAN BABCOCK: 513, all right, progress.

PROFESSOR HOFFMAN: Okay, so I just want to point out some different words here, so start over on the current Texas rule, the word "occasion." So except as that other rule provides "a claim of privilege, whether the present proceeding or upon a prior occasion." Okay. Then that gets changed to just the word "proceeding" in the restyle, so "except as permitted by 504(b)(2) neither the court" -- "can comment on a privilege whether made in the present or an earlier proceeding." Okay. And then jump ahead.

MR. ALEXANDER: Hey, Lonny, maybe I'm missing something, the language "in a present proceeding or upon a prior occasion" has been modified to read "made in a present proceeding or previously."

MR. LOW: After our comments they revised.

PROFESSOR HOFFMAN: Oh, am I in the --

MR. ALEXANDER: Do you have the October 2 draft?

PROFESSOR HOFFMAN: Apparently I have the

wrong draft. Okay. So never mind. If I could pick up, though, so this links up to one other thing, I think looks like this is the same. Jump over to (c).

MR. ALEXANDER: 513(c)?

PROFESSOR HOFFMAN: Yeah, same thing, 513. "Paragraphs (a) and (b) shall not apply with respect to the party's claim in the present civil proceeding" and that gets changed to "(a) and (b) don't apply to a party's claim in the present civil case."

MR. ALEXANDER: That's right. That's the current language.

PROFESSOR HOFFMAN: So -- okay, so, because I just saw the change on (a) I'm not sure I've processed this through. The question I think I have is does the change from "proceeding" to "case" in (c) matter, and also how does that link up to that we're using the word "proceeding" in (a)?

PROFESSOR GOODE: Because we've defined in Rule 101(h) "civil case" to include proceeding. We define criminal case, but we don't have a generic definition for "case" meaning proceeding. So we kept the language of "proceeding" in (a), but we changed "civil proceeding" to "civil case" to conform with our definition. I can't promise you that we were consistent throughout the rules in using "civil case" as opposed to "proceeding," but we

tried, and if anybody finds places where we didn't -- weren't consistent, please point them out.

CHAIRMAN BABCOCK: Anything else about 513? Okay. Let's move on to witnesses, Article VI, and Rule 601, which is not completely the same as Federal Rule 601. Would that be right?

MR. ALEXANDER: That would be right, yes. They are quite different.

CHAIRMAN BABCOCK: You want to just give us a little background about how they're different, Fields?

MR. ALEXANDER: It would be easier to talk about the ways they're similar.

CHAIRMAN BABCOCK: Okay. How are they similar?

MR. ALEXANDER: In very few respects. They both --

CHAIRMAN BABCOCK: Okay, well, that's helpful. Let's move on from there.

MR. ALEXANDER: Steve, you want to add anymore to that?

PROFESSOR GOODE: Yeah, one difference is we have the dead man's rule in our 601, which the Federal rules mercifully do not, and the other difference is the Federal rule just has a general rule of everybody is competent to be a witness except if some other rule

provides, whereas the Texas rule starts out with that as a general rule but then has some exceptions. So those are the two basic differences in 601.

CHAIRMAN BABCOCK: Just out of curiosity, is this dead man's rule peculiar to Texas, or do other states have similar rules?

PROFESSOR GOODE: It used to be much more widespread. There are still some states that have it, but many don't. My recollection is that when the committee originally proposed the rules -- civil Rules of Evidence to the Supreme Court back in 1981 it did not include the dead man's rule, and the Supreme Court stuck it back in.

CHAIRMAN BABCOCK: Okay. I don't think there are any members of the Court that were there.

HONORABLE NATHAN HECHT: Not even me.

CHAIRMAN BABCOCK: Not even you. I remember that. Okay. Any comments on this rule? Judge Yelenosky, that is you over there, isn't it?

HONORABLE STEPHEN YELENOSKY: Yes, down here somewhere. We're on of 601, right?

CHAIRMAN BABCOCK: 601.

HONORABLE STEPHEN YELENOSKY: Yeah. Is the language on the "insane persons," is that from the prior rule?

CHAIRMAN BABCOCK: Is the language on

"insane persons" the same?

HONORABLE STEPHEN YELENOSKY: Yeah, and I don't know what that means. I mean, we don't define it, do we, or does it?

PROFESSOR GOODE: It's the same. We didn't make it up.

HONORABLE STEPHEN YELENOSKY: We know what competence is, right, to testify, but I don't know what this means.

MR. ALEXANDER: We carried this over, so it was not defined previously and --

HONORABLE STEPHEN YELENOSKY: Okay. All right. Well, we have the same problem we did then.

MR. ALEXANDER: Right. Right. We're trying not to create any new problems for you.

CHAIRMAN BABCOCK: Yeah, Carl, I'm sorry.

MR. HAMILTON: (3), exception -- well, it would Be 601(b)(3)(B), "Opposing party causes the opposite party to testify at trial." I think there's some confusion in the rules -- law now about whether or not a deposition is such that the exception applies. I think that should be cleared up in the rules.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Yeah, and I think it's more general confusion about that. We don't really know

what the word -- various people have different understandings of what the word "trial" means. Does it mean, you know, any evidentiary hearing?

CHAIRMAN BABCOCK: Or summary judgment.

PROFESSOR DORSANEO: Or is it -- you know, is it restricted to a conventional jury trial or conventional bench trial concerning the merits of the claims and defenses?

CHAIRMAN BABCOCK: Yep.

PROFESSOR DORSANEO: It's a totally ambiguous word whenever it appears in many parts of the procedural rule book, and it would at least be improved by saying "at a hearing or trial." I think. Huh?

CHAIRMAN BABCOCK: Yeah.

MR. ALEXANDER: I don't necessarily disagree. It's -- we -- "trial" was used previously, "trial" is used in the restyled rule. The courts can determine what it means unless we -- unless someone wants to make a substantive change to clarify it.

PROFESSOR DORSANEO: Put it on the substantive change list.

MR. ALEXANDER: Right.

CHAIRMAN BABCOCK: Anything more about 601? Richard Munzinger.

MR. MUNZINGER: 601(a)(1), the original

version talked about the court forming an opinion regarding the person's sanity. The revised version leaves all of that out about the court drawing opinions, and I know that the judge has to reach a conclusion regarding the person's sanity, but I'm just curious why that was done and whether it has a substantive effect. Is there some judgment of incompetency that's now required? Is there discretion with the trial court or a duty for the trial court to form an opinion? The old rule seemed to say so, the new rule doesn't.

PROFESSOR GOODE: That's because Rule 104(a) invests in the judge the obligation to make decisions about preliminary questions of admissibility, which include the qualifications of someone to be a witness.

CHAIRMAN BABCOCK: Justice Brown. Justice Brown.

HONORABLE HARVEY BROWN: I think Professor Goode's point is a good one, but then I wonder why in subpart (2) we have "The court examines and finds." Why can't we just say "who lacks"?

PROFESSOR GOODE: Originally that's what we did, and the objection was made that the language of the current -- let me go back to it. Whether it's the language, that there is case law that talks about the court examining --

MR. ALEXANDER: The Rule 601(a)(2) --

PROFESSOR GOODE: Yes --

MR. ALEXANDER: -- specifically includes that the court must examine the child. That's an additional burden here that's not in (a)(1), so we felt that relying on 104 to set the predicate wasn't sufficient in this instance.

PROFESSOR GOODE: And there is case law discussing courts examining children.

HONORABLE HARVEY BROWN: Well, a trial court can examine under Rule 104. So are you saying that what this does is it makes it that a trial court does not have discretion to examine but is required to examine, because if so, it doesn't say that. It still sounds like to me it's permissive examination. And what if the parties ask all the questions? The trial judge may not ask a question, and clearly in a Rule 104(a) hearing the judge can ask questions and frequently does.

PROFESSOR GOODE: As I say, originally we took that out and then we put it back in because the language was in here and some people raised it as taking it out might be perceived as a substantive change, and there is case law talking about courts examining children, and so we just thought it was safer to leave it back in there, but I agree, I think if the language were deleted

it would not be a substantive change.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: I have a preference for leaving the title of subsection 601(a)(2) to remain "Children" because I think the point of this is that we're talking about children or people who have the intellectual capacity of a child, and I think that some of my Facebook friends lack sufficient intelligence, but I don't think that's what we're going at here, and I think that leaving the title "Children" sort of has an implication that this expansive title might lose.

MR. ALEXANDER: I think that's a good point. I will tell you that there was a strong sentiment in the committee as we were doing this work to help trial lawyers in the thick of the battle, and when you're scanning a rule in trial trying to figure out which one applies, "Persons lacking sufficient intellect" would be more likely to capture your attention if it's an adult there that you're trying to deal with rather than the subtitle of "Children," and that was our thinking, and we made a few changes like that so lawyers wouldn't skip over a potentially relevant provision.

CHAIRMAN BABCOCK: How about "Children and child-like adults"?

MR. ALEXANDER: That was too broad. There's

so few exceptions to that.

CHAIRMAN BABCOCK: Well, that's true. That would be most of Lisa's friends.

PROFESSOR DORSANEO: We're all children anyway, all of us are children.

CHAIRMAN BABCOCK: Okay. Gene.

MR. STORIE: Two things, first one is petty, which is in (a)(2). Would it now be "whom" rather than "who"? "The court examines whom"? So anyway, petty, forget about it.

MR. ALEXANDER: It's not that petty. I think it's correct.

MR. STORIE: Okay. And the other one is in (2) it looks like it's focused more on testimony about a particular matter that relate to transactions --

MR. ALEXANDER: I'm sorry, I apologize. Could you back up? I missed that part.

MR. STORIE: Sure, and another one on (a)(2), the original rule seems to relate to particular transactions, testimony on particular transactions, and the new version looks more general. So is that any difference, because, you know, a child can testify accurately about some things but not about others, and that's part of the determination of what their intellectual capacity is.

MR. LEVY: I agree. I think that is a substantive change because the new version is "generally incompetent to testify" versus "in the particular case on the issue about which they would testify."

MR. ALEXANDER: Our intent there obviously was to modernize the language, but I take the point you're making. Why don't we take another -- why don't we take another look at that?

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Professor Goode's statement that the dead man's rule was put back in by an earlier version of the Texas Supreme Court makes me suggest that we put that on the list of something to look at carefully to see if it's got a problem. Steve probably knows about some of these things, but it struck me as odd that in the applicability part we're talking about executors, administrators, or guardians, and then we start talking about heirs or legal representatives in (b). I'm thinking like heirs or legal representatives, aren't they up there in (a), the legal representatives, and is there something perhaps that needs to be looked -- studied; and probably like a lot of people, you know, I'd put this in the same category as the rule against perpetuities, or the Rule in Shelley's Case, something that I know something about but not enough to make any recommendation at this

point other than look at it.

CHAIRMAN BABCOCK: Watch the movie Body Heat.

MR. ALEXANDER: I was just thinking that.

PROFESSOR DORSANEO: One of my favorites.

CHAIRMAN BABCOCK: It's the greatest. Anything else on 601? Okay. 602. And I think now we're --

MR. ALEXANDER: 602.

CHAIRMAN BABCOCK: -- getting back to the Federal, right?

MR. ALEXANDER: This is identical to the Federal version.

CHAIRMAN BABCOCK: Okay. Anybody want to talk about that in light of that comment? 603.

MR. ALEXANDER: Also identical to the Federal version, Chip.

CHAIRMAN BABCOCK: 604.

MR. ALEXANDER: Same thing, identical.

CHAIRMAN BABCOCK: 605.

MR. ALEXANDER: Once again, your Honor, identical.

CHAIRMAN BABCOCK: 606.

PROFESSOR DORSANEO: Not identical.

MR. ALEXANDER: 606(a) is identical. 606(b)

is identical, the exceptions. The Federal version has a third exception. I think that's the only difference.

CHAIRMAN BABCOCK: Okay. And the Fed exception is "a mistake was made in entering the verdict on the verdict form."

PROFESSOR DORSANEO: No. The one that's missing is --

MR. ALEXANDER: Steve's pointing out another difference that I've missed.

PROFESSOR GOODE: Right, in the exceptions the Federal rule has "extraneous prejudicial information was improperly brought to the jury's attention," and that's not an exception in Texas. That was deleted from the Texas one.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: And it should be. The cases that have come up that, you know -- that are interesting is that it's not an outside influence if a juror picks up the *Corpus Christi Caller Times* and takes it into the jury room in a medical malpractice case and reads a letter written by a plaintiff's lawyer saying that the reason why we have all of these malpractice cases is not because of us, it's because the doctors stink, okay, and that's not an outside influence. That's fine. Or somebody reading a dictionary definition that's not the

definition in the charge, some juror who picks out the dictionary definition that's not in the charge to say that this is the definition of the term, and it's always seemed to me that the Federal language about extraneous prejudicial information would allow jurors to testify about those things that happened in a motion for new trial hearing, okay, assuming other procedural requirements were satisfied, so I don't know why our rule doesn't have that in it or -- other than maybe somebody thought it wasn't necessary, but I think it is necessary.

CHAIRMAN BABCOCK: Who said -- Judge Yelenosky, and then Justice Christopher.

HONORABLE STEPHEN YELENOSKY: When we instruct a jury we tell them it's a -- it's jury misconduct if they do any of these things and it may lead to another trial, and among those things are, you know, don't look up anything in a dictionary. So isn't it true that you have to be able to testify to -- or about any of the things that you were prohibited from doing under the instructions of the court?

PROFESSOR DORSANEO: No, you're not allowed to testify about most of those things.

HONORABLE STEPHEN YELENOSKY: So -- so how is it that the court would find out? I mean, if a juror comes and says, "Well, there was a violation of the rule,"

whether it leads to a new trial or not, they can't be testifying as to what we brought into the jury room in violation of the instructions of the court?

CHAIRMAN BABCOCK: Justice Christopher.

PROFESSOR DORSANEO: Yes.

HONORABLE TRACY CHRISTOPHER: I think I mentioned this maybe six months or so ago, but the Court of Criminal Appeals has a new opinion that interprets Rule 606 in a way that seems to be different from the way the civil courts have been interpreting this rule, and in the criminal cases you could allow a juror to say, "I brought this -- I read this newspaper article to the other members of the jury." You would not be allowed to ask the jurors whether that influenced their verdict, but instead you would use a reasonable man standard as to whether that information would have influenced a reasonable juror. So you can't get into jury deliberations, but the fact that something was read to the jury that was outside the evidence in the case was considered an outside influence.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: What gave rise to this, the Feds amended, and there was not -- and we were asked to amend, which we did, but the Feds didn't have anything in there about whether a juror could testify as to whether he qualified or not. That was the only difference we

originally had. Then, I won't name the person, somebody had a suggestion we could do away with all of this by filming and recording the jury deliberations. That was when Justice Phillips was the Chief Justice, but that didn't really get very far.

CHAIRMAN BABCOCK: Well, and Judge Poe attempted to do that, and he got mandamused.

MR. LOW: I didn't name him, you did.

CHAIRMAN BABCOCK: Well, I was involved in that, so, okay, anything more about 606? Okay. Okey-dokey, then we're going to break for lunch right now because Justice Hecht has got to get down the street for something, and then at around 12:45 or so Marisa Secco, our former rules attorney, will be back and -- does she know about this, about the pie in her face?

MS. SENNEFF: She doesn't know about that.

CHAIRMAN BABCOCK: She doesn't know about that. Anyway, we're going to have a little cake for her and thank her for her service to the Court and the committee and to welcome Martha and Shanna. Okay. Carl.

MR. HAMILTON: I'll bring it up after --

CHAIRMAN BABCOCK: Okay. We'll do it after lunch, and we're now in recess until 1:00.

(Recess from 12:00 p.m. to 1:03 p.m.)

CHAIRMAN BABCOCK: We are at Rule 607, "Who

may impeach a witness," and I'm guessing that that's got no change.

MR. ALEXANDER: It's identical to Federal.

CHAIRMAN BABCOCK: Okay. So we're just going to go through these. If anybody has a comment to a no change rule, by all means speak up, but 608, "A witness' character of the truthfulness or untruthfulness."

MR. ALEXANDER: 608(a) is identical to the Federal version, 608(b) is not. Obviously there were substantive differences between the current Texas version and the Federal version.

CHAIRMAN BABCOCK: Okay. Any comments about that, about 608(b)? Okay. 609, "Impeachment by evidence of a criminal conviction."

MR. ALEXANDER: 609 is an example of where our Texas rule differs from the Federal rule, so this is different from the restyled Federal version.

CHAIRMAN BABCOCK: Okay. Anybody have any comments on 609?

MR. HAMILTON: Chip, can I --

CHAIRMAN BABCOCK: Richard, and then Carl.

MR. MUNZINGER: I've got two comments on 609(b).

MR. ALEXANDER: (d)?

MR. MUNZINGER: (b) as in boy,

MR. ALEXANDER: (b), all right.

MR. MUNZINGER: (b) as in boy. Whether you intend it to or not, I think that the amendment to (b) weakens what I would say was either a presumption or almost a mandatory prohibition against the use of convictions 10 years old or older, except under the circumstances. As a matter of style, I think that the rule should make it clear, as the old rule did, that you really have to have some special circumstances to get past the 10-year bar, and I don't think that the revision carries near the strength of the prohibition that the original did.

As to 609(c)(1), it appears to me that you may have made a substantive change in the rule. "Effective pardon, annulment, or certificate of rehabilitation." I'm reading from the old rule, "Evidence of a conviction is not admissible under this rule if based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon." If the governor pardoned me because I made a large contribution and not because I had been rehabilitated, that would have an effect on the applicability of that rule. The way you have changed it in my opinion makes that ambiguous because you now have the phrase "based on a finding that the person has been

rehabilitated," arguably modifying only "other equivalent procedure" as distinct from all of the foregoing, which had been "pardon, annulment, certificate of rehabilitation." So I think -- at least I think that arguably could constitute a substantive change if my cynicism about pardons by public officials were to be born out.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Before we broke for lunch I had a question on 606. 606. Why -- since the Federal rules allows a juror to testify about a mistake made in entering the verdict, why do we not have that in our rules?

MR. ALEXANDER: That's a substantive change that obviously can be visited by the subcommittee, and I'm sure Judge Darr's committee will be happy to do that, but that wasn't our task for today's meeting.

MR. HAMILTON: Another substantive change.

CHAIRMAN BABCOCK: Okay.

MR. ALEXANDER: You want to turn back to 609?

CHAIRMAN BABCOCK: Yeah, let's go back to 609.

MR. ALEXANDER: With regard to 609, the issues you raised in 609(b) and (c), I believe the

language in both of those provisions tracks the Federal restyled rule exactly, and we didn't -- it was our conclusion that tracking the rule would not impair the meaning of the rule in this instance, so we tracked what the Feds did. I understand the point you're making, though.

MR. MUNZINGER: Well, can I at least say that from my perspective -- and I don't mean this in an ugly way towards you, but copying the Federal government is not necessarily a good thing.

CHAIRMAN BABCOCK: Now, now. They were shut down, they just got reopened.

MR. ORSINGER: That's when it functions.

MR. MUNZINGER: The reopening that troubled me more than anything else.

MR. ORSINGER: He started, they reopened.

CHAIRMAN BABCOCK: I know.

MR. PERDUE: I'm reading 609(b) over and over.

MR. ALEXANDER: Yes.

MR. PERDUE: And it may be exactly what the Federal rule is, but it doesn't say that it's inadmissible.

MR. MUNZINGER: That's part of my point, Jim. I think the change has made --

MR. PERDUE: You and I agree on a lot of things.

MR. MUNZINGER: There is a change in the tone of the rule, for sure.

MR. PERDUE: Yeah. The declarative just is gone.

MR. ALEXANDER: Well, it says -- well, it says it's admissible only if the court makes a finding that the probative value substantially outweighs its prejudicial effect.

MR. PERDUE: So it's implied.

MR. ALEXANDER: Well, there's only one way to --

MR. PERDUE: Which is an exception, isn't it? I mean, that's really the exception to the rule. I mean, the rule is not stated, as I read it.

I'd like to have at least agreed with Mr. Munzinger once a meeting.

MR. MUNZINGER: Twice, we played golf, and we both had spiritual experiences playing golf, mostly purgatorial.

MR. PERDUE: Y'all did the work and --

MR. ALEXANDER: No, I mean, I take your point. We were comfortable with the Federal restyling, both with the title, "Limiting the use of evidence after

10 years," and with the language that specifically tells the reader when this evidence comes in and what kind of finding must be made before it can come in. So to our mind, adding another sentence that says "otherwise it's inadmissible" would have been redundant, but I mean, I understand what you're saying.

MR. PERDUE: Yeah, y'all have been second-guessed enough, but --

MR. ALEXANDER: I don't mind being second-guessed. I'd rather get this right.

MR. PERDUE: It's just weird that the declarative is gone.

MR. ALEXANDER: Right.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: You mentioned the "only if." I see the "only if" in prior versions, and maybe it's because I don't have my reading glasses, but is there an "only if" in the revised?

MR. ALEXANDER: There is, Judge, if we're looking in the right place. "Evidence of the conviction is admissible only if its probative value," et cetera, et cetera, et cetera, and I'm looking at 609(b). Is that --

HONORABLE STEPHEN YELENOSKY: Maybe I'm looking at the wrong version. 609 what?

MR. ALEXANDER: 609(b).

HONORABLE ROBIN DARR: Boy.

MR. ALEXANDER: (b) as in boy, right.

HONORABLE STEPHEN YELENOSKY: Okay, what I'm looking at is "limit on using evidence after 10 years," so I must have the wrong --

HONORABLE ROBIN DARR: That's it, second sentence.

MR. ALEXANDER: No, you -- that's it, Judge.

HONORABLE ROBIN DARR: Second sentence.

HONORABLE STEPHEN YELENOSKY: Oh, okay. Well, I guess I was thrown off by the title because that second sentence is supposed to apply, isn't it, to convictions less than 10 years?

HONORABLE ROBIN DARR: Older than 10 years.

MR. ALEXANDER: Using the evidence after 10 years. It says, "This subdivision (b) applies if more than 10 years have passed since the witness' conviction or release from confinement, whichever is later," and then the second sentence explains when such evidence would be admissible.

HONORABLE STEPHEN YELENOSKY: Well, 609(a), the old Rule 609(a) says "only if," right, "but only if," and I don't see anything in the revised 609(a) that says "only if."

MR. ALEXANDER: Oh, I'm sorry. Maybe I

misunderstood what you were talking about in the first place.

HONORABLE STEPHEN YELENOSKY: Well, I don't know, maybe I misunderstood what I was talking about, but I guess I was looking for an "only if" under (a), "must be admitted only if."

CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: Is there something in the Federal rules the way that they're drafted that prefers to say "only if" or rather, you know, "only if its probative value," blah, blah, blah, "outweighs its prejudicial effect," rather than saying, you know, "unless the court determines that the probative value"; and I think the "unless" formulation is clearer than the "only if" formulation; but is that just a choice that's been made in the Federal drafters that they don't like to use "unless"?

PROFESSOR GOODE: The old version of the Federal 609(b) in the first -- this long sentence is identical to the current Texas 609(b). The restyled Federal 609(b) is what you see here, "Limit on using evidence after 10 years." We took the identical language in the two rules, and if they restyled that, we restyled it accordingly.

PROFESSOR DORSANEO: Okay. I'm not making

myself clear. Is one of the restyling principles that we don't say "unless"? Is it we say "only if" and make it an affirmative proposition? Okay.

PROFESSOR GOODE: It is not a restyling principle never to say "unless."

PROFESSOR DORSANEO: Okay. Then I like the "unless" language better, the old language.

CHAIRMAN BABCOCK: Okay. Anybody else? Yeah. Who is that? Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, (a) as it reads right now only states the conditions when it must be admitted, and literally reading that, I would be allowed to admit it in other circumstances, it's just that I wouldn't be required to admit it.

PROFESSOR GOODE: That's the current rule. The current rule is "evidence shall be admitted subject to Rule 403," "evidence shall be admitted."

HONORABLE STEPHEN YELENOSKY: Okay. Well, so that's just another one of those substantive problems, because the rule doesn't prevent its admission.

PROFESSOR GOODE: That's right, Rule 609, "shall be admitted."

HONORABLE STEPHEN YELENOSKY: So it only tells you when a judge must do it. It doesn't tell a judge when he or she must not.

MR. ALEXANDER: Right. That's right.

CHAIRMAN BABCOCK: Okay. Anything else on this rule? All right, let's go to 610, "Religious beliefs or opinions."

MR. ALEXANDER: This one is identical to the Federal version.

CHAIRMAN BABCOCK: 611, "Mode and order of examining witnesses and presenting evidence."

MR. ALEXANDER: And 611(a) and (c) I believe are identical to their Federal counterparts. 611(b) is not.

CHAIRMAN BABCOCK: Scope of cross-examination.

MR. ALEXANDER: Right.

CHAIRMAN BABCOCK: Just looking at it, it doesn't look very controversial to me, but why is it different?

PROFESSOR GOODE: The --

CHAIRMAN BABCOCK: I said, just looking at it, it doesn't look very controversial to me, but why is it different?

PROFESSOR GOODE: Texas has traditionally had wide open cross, whereas the Federal procedure has been cross is limited to matters of credibility and what's raised on direct, so if you want to go into matters

outside of direct, court had discretion to let you do it, but ordinarily you just have to call the witness yourself.

CHAIRMAN BABCOCK: Honor didn't breach in Texas in Federal court. All right. Any other comments about -- is (b) the only one that's changed, Fields?

MR. ALEXANDER: (b) is the only one different from its Federal counterpart. Obviously we modernized all of it, but (b) is the only one that differs from what the Feds did.

CHAIRMAN BABCOCK: Okay. Any comments at all about 611, including subpart (b)? Everybody okay with wide open cross? Perdue is nodding his head.

MR. ALEXANDER: Depends on the witness.

CHAIRMAN BABCOCK: All right. 612, "Writing used to refresh a witness' memory."

MR. ALEXANDER: This 612(a) differs, 612(b) is very similar but not, I believe, identical, and 612(c) is identical.

CHAIRMAN BABCOCK: Okay.

MR. LEVY: I've got a question. It seems like 612(a) is now going to be limited to an adverse party using or the rights of the adverse party on a writing to refresh memory, but wouldn't -- under the current rule it seems like it's broader, that it would apply to both the --

MR. ALEXANDER: We weren't trying to change the substance. I think what we did is move adverse party from the big block paragraph, which we tried our best to avoid those, and moved it up to the front, so instead of -- instead of setting forth first what the witness -- when it applies, we stated what right -- what options an adverse party has when this occurs, so all we did was move adverse party up out of that big block and into (a).

CHAIRMAN BABCOCK: Okay. Anything else about this? 612? Okay. 613, version one.

MR. ALEXANDER: Right, so -- I'm sorry, did I interrupt?

CHAIRMAN BABCOCK: No, it just suggested to me there might be more than one version.

MR. ALEXANDER: There are two versions of this rule. This was one of the places where we thought we really needed to present two alternate versions for consideration. We wrestled with this rule a lot, and it went back, and it was redrafted several times before it finally made its way here in these alternate versions. The issue is there was some thought on the committee that the current version of Rule 613(a) and (b) as drafted really don't correspond to actual Texas practice, and what it boils down to in a nutshell is what predicate must be laid before you can go into -- before you can

cross-examine the witness further about practices and statements or bias or interest. If you read the current rule literally, you're not allowed to cross-examine the witness further about these matters unless they're given an opportunity to explain or deny the statement, and before you can delve further into cross-examination.

That did not seem to us to be consistent with the way this rule is handled in actual Texas state court practice. So -- but we didn't want to ignore it completely, so we created version two, which tracks the predicate as we read it, identically from the current rule 613(a) and (b); but then we created version one, which takes out that part of the predicate; and we think more closely corresponds, at least in my view, to actual state court practice.

CHAIRMAN BABCOCK: And what is your view, Fields, on what actual state court practice is?

MR. ALEXANDER: Well, it would correspond to the foundation that's required under version one of 613, where if you look at the foundation requirement, "When examining a witness about prior inconsistent statement, whether oral or written, a party must first tell the witness the contents of the statement, the time and place of the statement, and the person to whom the witness made the statement," but you don't need to give the witness at

that time in the middle of your cross-examination the opportunity to explain or deny. That's for the other side to do when they rehabilitate. At least that's the way -- that's the way I've always seen it done.

CHAIRMAN BABCOCK: So let's say that the witness has said something in his deposition that he's just contradicted in his direct, direct examination. Then you -- and it's a video deposition. Do you play the deposition for him and say, "Didn't you say this in your deposition?"

MR. ALEXANDER: Well, I've seen it done several different ways, but, yes, impeachment from a prior deposition, I have seen done in the manner you're talking about where if the witness admits that he said it differently in the deposition, that's the end of it. But in all other circumstances of prior inconsistent statements or bias or interest, I've never seen the litigant -- the trial lawyer have to let the witness tell his side of the story in the middle of cross-examination.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Chip?

CHAIRMAN BABCOCK: Yes, sir.

MR. ORSINGER: It's a little complicated when you're contradicting with prior deposition testimony because there's another rule that allows you to use

deposition testimony for any purpose, so if the prior inconsistent statement is a written statement, this rule would apply very well; but if you're trying to impeach out of a deposition you really have two rules that allow you to use one -- has this elaborate requirement; and the other one says you can use deposition testimony basically any way you want. So that particular instance confuses, I think, two rules.

CHAIRMAN BABCOCK: Good point. Good point. I've seen this rule -- I've seen this rule applied to --

MR. ORSINGER: To a deposition?

CHAIRMAN BABCOCK: To a deposition.

MR. ALEXANDER: As have I.

MR. ORSINGER: When we get to that rule we can talk about that. I don't want to say anything that will be embarrassing, but it does seem to me that this is a substantive change.

MR. ALEXANDER: Well, that's why we did one version that we thought corresponded with the actual state court practice, you know, what is the -- how is the rule being applied, but obviously we have a version two which we think corresponds more closely to the literal reading of the rule.

MR. ORSINGER: I would just like the Chair to note that perhaps a little tolerance would be

appropriate for the members of the committee that keep coming up with substantive changes because even this committee came up with a substantive change.

CHAIRMAN BABCOCK: Hey, I haven't stepped on you.

MR. ORSINGER: Oh, okay.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I guess I'm to some extent echoing Richard, because I don't really see the difference between a substantive change in saying, well, this is conforming to current practice, because there are a lot of things in the rules that don't conform to current practice, and we're not changing all of those. So if that's the rationale, I think it's probably too broad and it will lead us, Richard and I, to make a lot of comments about substantive changes.

MR. ALEXANDER: Well, and, frankly, I agree with that, and it was only in the rarest of circumstances where we did this, so we decided -- and there was a lot of debate about this rule, and we decided at the end of the day that we ought to just submit alternate versions, but there's no doubt but that version one is a substantive change from the literal reading of the rule. We included it because it didn't seem to be a substantive change from current practice, but your point is very well taken.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: Since you're deleting that requirement of the opportunity to explain from subpart (a)(1) I'm not sure I understand what (a)(3) is doing. I take it you're saying that if the witness asks to be given an opportunity that you have to give it to him at that point, but that you don't have to sua sponte offer that opportunity. Is that what you're trying to say?

MR. ALEXANDER: Well --

HONORABLE HARVEY BROWN: Because it does say here under (a)(3), "opportunity to explain or deny," the language is almost the same in version two, only you have it at subpart (b).

MR. ALEXANDER: Right. We definitely didn't want to take that out because it is clearly part of the rule that the witness is allowed to explain or deny. The question is one of timing and foundation and whether or not the witness has to be given that opportunity before you're allowed to delve further into cross-examination.

HONORABLE HARVEY BROWN: So you're saying "upon request by the witness" basically. It doesn't have to be done as part of your offer, but if they say, "Can I explain," you have to say "yes."

MR. ALEXANDER: Right. Right. Or in

redirect. At some point the witness is allowed clearly to explain or deny.

HONORABLE HARVEY BROWN: Well, if you're trying to do that, I don't think it reads very clearly that way, because I think right now when practitioners read version one without your explanation it reads kind of like the old rule. All you've really done is move that to a separate subsection but not made it clear that you're affecting their timing, I think.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Maybe the problem is because you have -- I think you have added foundation requirement as part (a)(1), and unless I'm wrong, that isn't clearly set forth in the prior version in subsection (a). Did I miss that?

MR. ALEXANDER: Well, what's -- you're talking about in the current version?

MR. MUNZINGER: Yes, the current version --

MR. ALEXANDER: Go ahead, I'm sorry.

MR. MUNZINGER: The current version when you're talking about an opportunity to explain or deny the statement in version two, you have that as part of the foundation requirement so that before I can show or impeach or do what have you I must give that person an opportunity to explain.

MR. ALEXANDER: Right.

MR. MUNZINGER: But you've added these words "foundation requirement" to the rule, have you not?

MR. ALEXANDER: Well, we -- we didn't -- we added the title as a subsection, but the rule itself states that as a -- "Before further cross-examination concerning extrinsic evidence may be allowed" -- in other words, the foundation for cross-examination is you must do (a), (b), (c), and (d), so that is a foundational requirement as I read the rule, which is why we -- that's why we named that subsection as we did.

CHAIRMAN BABCOCK: Any other comments? Yeah, Richard.

MR. ORSINGER: I think that version one, which as everyone acknowledges is a substantive change, is a good one, so I'm in favor of that substantive change.

CHAIRMAN BABCOCK: See, you were able to make that statement without any repercussions but scowling.

MR. ORSINGER: So far.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I'm interested in what Fields said about the -- if you say, "Yeah, that's right, it's different in the deposition than what I just testified to," that things are done and whether moving

this opportunity to explain around would make any difference to that result.

MR. ALEXANDER: In what way? I want to make sure I understand your question.

PROFESSOR DORSANEO: Well, it's not so much an opportunity to explain or deny, but kind of like I want to ask him, well, how do you explain -- well, I guess the deny part, explain or deny the statement. I guess it's the deny the statement part, deny the statement. How could you deny the statement that you made? Deny the truth of the statement?

MR. ALEXANDER: Or deny you said it. I mean, it doesn't have to be a deposition. It could be that so-and-so comes in and says, "Well, he told me he didn't run the red light" or whatever it might be. The witness is clearly going to get the opportunity to say, "I didn't say that to her, I don't know what she's talking about."

PROFESSOR DORSANEO: So the "deny" would be deny that you made it or the truth of it.

MR. ALEXANDER: Or that the court reporter got it down right or any other variables.

PROFESSOR DORSANEO: But the important thing is the truth of it. I mean, you could say, "I said that, but I don't think it's true now."

MR. ALEXANDER: You can do either -- no, not just the truth of it. Whether the statement was made in the first place, either one. You're allowed -- the witness is allowed full range to explain what that -- what that adverse evidence really means, either "I didn't say it" or "she didn't hear me right" or "I was lying when I said it," whatever the case may be. You've got that opportunity. "The court reporter took it down wrong," "they didn't hear me," "the person who heard" -- whatever. There are a zillion explanations, and you're entitled as a witness to give them. That's in the current version of the rule, and we were obviously not going to take that out. The question to us was one of what -- whether it's part of the foundational requirement before further cross-examination is allowed or whether it's just a right the witness has in the rule, whether that comes out in your cross-examination at some point or when the witness is rehabilitated by the other side.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, one thing I see a lot, Fields, is "Didn't you say blah, blah, blah" and then maybe the witness or the lawyer stands up and says, "Well, the question was different." I mean, you can only read it in context; and so I suppose if that's the complaint, they would have to hold that until later,

right? I mean, they can't explain. They can't -- they have no right to say anything at that point to explain, "Well, the question was different."

MR. ALEXANDER: They would -- well, I mean, they have the right to answer questions that are asked by the cross-examiner and --

HONORABLE STEPHEN YELENOSKY: Sure.

MR. ALEXANDER: But under version one -- and, again, we submitted two different versions for consideration, but under version one, the cross-examining -- the examining lawyer would not be required to let them explain why they said what they said or whether they deny it or anything of that in the middle of his or her cross-examination. You would be entitled to cross-examine the witness to your heart's content about this inconsistent statement or this prior inconsistent statement or the bias or interest, and the lawyer who is sitting there taking it cannot stand up and object that you haven't laid the foundation because you haven't given him or her a chance to explain or deny it first.

HONORABLE STEPHEN YELENOSKY: Right. And I guess I think that at least sometime they ought to be able to do that, and it shouldn't have to wait like in optional completeness, although that's the wrong term for it, where it can't wait because it leaves the wrong impression with

the jury for too long.

MR. ALEXANDER: Right. And, I mean, to my mind the witness would certainly be allowed to answer any of these questions with "You're taking that out of context" or "That's not what I meant," but that doesn't stop -- that wouldn't stop -- under version one that wouldn't stop the lawyer from probing the issue if the witness doesn't first get an opportunity to explain or deny. It doesn't mean that they can't try to do that.

CHAIRMAN BABCOCK: Richard.

MR. ALEXANDER: It's just an issue of foundation. I'm sorry.

CHAIRMAN BABCOCK: No, no, no.

MR. ORSINGER: To me the issue here is the sequence because, Steve, what you're suggesting is I would think that the trial judge should have the discretion to let the witness in the middle of the cross-examination explain the prior inconsistent statement; and it reminds me very much of the rule of optional completeness and the rule of related writings, which I think doesn't the judge have the discretion as to whether you get to stand up in the middle of someone else's case and put in other documents or wait until you get the floor back?

HONORABLE STEPHEN YELENOSKY: The judge decides whether it can wait essentially.

MR. ORSINGER: Right. This rule unfortunately is written originally that you must stop what you're doing until you get an explanation. You're advocating the judge should have discretion -- you can go forward unless the judge makes you stop, and version one is you're free to finish your cross-examination and then they come back and clean it up on redirect. So to me we've got three choices. You can either make them stop every time, not require them to stop ever, or give the judge discretion to stop; and I think in other rules that are similar, I think the optional completeness and other related writings, don't we leave it discretionary with the judge as to whether it's then or later; or am I wrong? Do you-all remember?

PROFESSOR GOODE: Yeah, the optional completeness, the judge has to decide whether in fairness at the time you need to have them -- the other part of the statement is introduced.

MR. ORSINGER: Right.

PROFESSOR GOODE: So that's judge's discretion. I would say actually with regard to version one, putting (a)(3) where it is actually gives some flexibility because it doesn't prescribe the timing as to when the witness must be given the opportunity to explain or deny. What this does is just make it clear that it is

-- the lawyer doesn't have to wait for further cross-examination as a rule until the lawyer has given the witness the opportunity to explain or deny. I would think in most instances there should not be such a great time gap that the lawyer will do the cross-examination and the opposing lawyer will then get up and say, you know, "Explain yourself."

HONORABLE STEPHEN YELENOSKY: Well, but --

PROFESSOR GOODE: But if there were such a gap, I think (a)(3) would allow the judge to say, "Give the witness an opportunity to explain or deny now." Because it doesn't set a specific time frame. All it does, it says it's not an automatic part of the foundation requirement for further cross-examination; and I think the committee's thought was that that most closely reflects what goes on in most courtrooms in Texas as opposed to what the rule says literally; and part of the problem is it's very difficult to plow through the rule and figure out exactly what the rule says; and we thought that was part of the confusion that was creating the disparity between practice and the literal language in the rule.

CHAIRMAN BABCOCK: Judge Estevez, and then Carl, and then Justice Brown.

HONORABLE ANA ESTEVEZ: I just wanted to, I guess if we're voting, vote for version two; and the

reason is I don't think you're handing it over to the other side. It's one question for foundational purposes or whatever. "Are you denying you made that statement, yes or no," and they may not deny it. "Well, will you explain it?" They can explain it in one sentence, and then you move on, and you can keep going; and the jurors and the judge, it's very frustrating to me to find out that I've been misled for two and a half or three hours and then all of the sudden I'm hearing the explanation later; and so the stuff that emotionally got me mad at the beginning and maybe I wasn't listening as carefully later because I'm so mad he was lying and he didn't have an opportunity to explain it; and it might not be a good explanation, but just a minute of hearing what he's going to say to get rid of it you can decide whether or not you're going to believe it, weigh it, know what's going to come later, makes a huge difference on how you're receiving the rest of the evidence.

So, I mean, as far as a judge goes, I'm going to vote for version -- you know, I would go with version two; and I think that was probably the intent of the original rule, whether or not people practice that way; and the other thing is, well, maybe the judge can or cannot, but the reality is you get really good attorneys out there, there is no way they're going to let them

answer that question. You know, when the witness tries to go back to it, "Objection, your Honor, nonresponsive." Sustained. "Objection, your Honor, he's going to get his cross-examination, your Honor. Objection, nonresponsive," and I will never hear -- when I have two good attorneys, I will never hear the explanation until the cross-examination if this -- if we adopt the other rule.

It's not the same with all attorneys. Lots of them just let them go and talk and explain and go, but when you have two good attorneys on both sides or at least just one or the other side, they're going to make sure it doesn't come in because they're going to follow the rules. They're going to use the rules to object. You will never know how it was explained until three hours later, four hours later. Someone might forget to explain it because they've had so many other issues come up by then on cross-examination it may not even be addressed.

MR. ALEXANDER: Right.

HONORABLE ANA ESTEVEZ: So in the interest of finding the truth I would go with version two. I think that might not be how people practice, but I think it's certainly probably the better practice.

MR. ALEXANDER: And let me say from the committee's perspective we think there are rational arguments in favor of both versions. That's why we

submitted them both. We did think version one tracked closer to current general Texas practice, but the rule as written with this as a foundational requirement, which is why we have it in version two.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: As I understand version one under (a)(3), there's no time period that the explanation has to come. It can come from the cross-examining lawyer or from the other lawyer. Now, what if on cross-examination the inconsistent statement is discovered and brought out and the other lawyer does nothing? Is the judge then obligated to say something or do something to bring about an explanation?

MR. ALEXANDER: No. No. Judge would not be.

MR. HAMILTON: Well, it says that he must be given an opportunity.

MR. ALEXANDER: Well, opportunity doesn't mean that evidence has to be presented to the jury. It just means the witness has to be able to tell it. Still answering questions.

MR. HAMILTON: It doesn't mean the judge has to say, "Nobody asked the right questions, so I'm going to ask that he explain this"?

MR. ALEXANDER: Right. And we -- right. I

mean, the witness is going to have to answer questions presented to the witness just like any other part of the trial, but with regard to this -- whether you put this provision in as a separate component or as part of the foundational component under one, it's in the current Texas rule, this exact provision that -- I mean, we've modernized the language. The current version says, "The witness must be afforded an opportunity to explain or deny such a statement," so we were not going to take that out obviously. The question is only where it belongs.

CHAIRMAN BABCOCK: Professor Dorsaneo. Oh, I'm sorry, Justice Brown had his hand up.

PROFESSOR DORSANEO: Okay, go ahead.

HONORABLE HARVEY BROWN: On (a)(3), so if on cross they bring up the prior inconsistent statement and the witness says, "I'd like to explain my answer" and the lawyer objects and says, "Nonresponsive," can the judge say, "Yes, he may explain, but he can do that on cross-examination"?

MR. ALEXANDER: I think the judge would have wide -- broad discretion to handle it in any number of ways, including that one, yes.

HONORABLE HARVEY BROWN: And so if a lawyer says, "Judge, I'd like to do it now and I have a right to do that under subpart (3)," we say, "You have a right, but

the right is not at a certain time."

MR. ALEXANDER: That's the way I read the rule.

HONORABLE HARVEY BROWN: Okay.

CHAIRMAN BABCOCK: Professor Dorsaneo, and then Justice Christopher.

PROFESSOR DORSANEO: What happened to the sentence -- the next to the last sentence in current Texas 613(a)? Is it somewhere hiding from my vision, or is it gone?

PROFESSOR GOODE: (4), (a)(4).

MR. ALEXANDER: Right. The substance of that sentence is in (a)(4).

PROFESSOR DORSANEO: Okay. "Fails to unequivocally admit."

CHAIRMAN BABCOCK: Hiding in plain sight.

PROFESSOR DORSANEO: This doesn't seem to be as --

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think kind of going on to what Richard said about the difference between cross-examining with a deposition versus reading the deposition, you get these sort of -- I mean, we all think of it in terms of a deposition when a lot of times there are other statements that this could refer to; and

the rule is designed to those other statements, too; but just by way of example, you'll get sort of funny things. It will be time for somebody to do cross-examination of a witness; and I've had lawyers stand up and say, "I would like to read from this witness' deposition first before I begin my cross-examination." And then they will read the stuff that they want to get out, you know, if someone doesn't object to it, and then it comes in as substantive evidence right here when you're cross-examining someone about a prior inconsistent statement. It doesn't even come in as substantive evidence. It's only cross -- you know, it's only impeachment evidence essentially. So it's -- we have to think of this rule in terms of sort of broader, not just the deposition testimony.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Are we also talking about version two at the same time?

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: Okay. On version two, Fields, it does say "before offering extrinsic evidence," which is from the current rule, but it doesn't say before you go to cross-examination or inquiry; and is that implicit in the title, "Foundation requirements"? Is that what you -- why you left that out?

MR. ALEXANDER: Yes. Well, hang on, I'm

sorry. Let me try to answer it and then you tell me if I didn't, but it is part of -- under either version there's a foundation requirement. The only question is what's included in it, and before you're allowed to offer extrinsic evidence of the statement you've got to do the following. So tell me again what your question was. I'm sorry, Judge.

HONORABLE STEPHEN YELENOSKY: Well, the current rule says, again, if I'm reading it correctly, "Before further cross-examination concerning or extrinsic evidence of." So the first part of that phrase.

PROFESSOR GOODE: The witness under version two gets the opportunity to explain or deny during the impeaching party's examination. That's the purport of version two; whereas, version one, the opportunity to explain or deny may not come until the witness' proponent gets to do the redirect.

HONORABLE STEPHEN YELENOSKY: Well, all I'm saying is that in the current rule it looks like you can't -- it says explicitly no further cross-examination until you've done these things, and the version two doesn't say that. It just says no extrinsic evidence until you've done these things.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: At the risk of

proving myself a fool, here's what I think it means by extrinsic evidence. An example would be what -- "What color was the light when you entered the intersection," and the witness says, "It was green," and then going back again to the deposition, okay, the extrinsic -- "Do you recall giving your deposition on such and such day," "Do you recall who was present," and "Didn't you say in your deposition when you entered the intersection that the light was red?" If the witness says, "Yes, that's what I said," then you don't introduce any extrinsic evidence. He's just been impeached.

HONORABLE TRACY CHRISTOPHER: He's just been impeached.

HONORABLE R. H. WALLACE: If he says, "No, I didn't say that" or "I don't remember," then you get to go to the extrinsic evidence. What lawyers usually do, without objection, is they just go straight to the deposition. The guy says, "Well, when I entered it was green."

"Well, let me get your deposition and let's look at page seven," and that's what normally happens; and if it's without objection, it happens; but that's not the problem there.

MR. ALEXANDER: Right.

HONORABLE R. H. WALLACE: But sometimes you

don't ever -- you shouldn't ever get to the extrinsic evidence. He would be impeached.

CHAIRMAN BABCOCK: All right. 614, "Excluding witnesses."

MR. HAMILTON: What does this word "unequivocally commence" mean? Do we need that word in there?

CHAIRMAN BABCOCK: What section are you talking about?

MR. HAMILTON: Can't introduce it unless a witness unequivocally admits.

MR. ALEXANDER: We used that word because it's in the current rule, specifically.

MR. HAMILTON: Number (4), (b)(4).

CHAIRMAN BABCOCK: Okay. What about 614? How does that compare to the Federal rule?

MR. ALEXANDER: 614 is the same except for 614(a) is, I believe, slightly different. (b) is different as well.

PROFESSOR GOODE: (b) is slightly different.

MR. ALEXANDER: I'm sorry, (a) and (b) are both slightly different.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yes, sir.

PROFESSOR DORSANEO: Richard and I are

consulting with each other about the word "extrinsic" in 613. It's confusing me. I mean, you have the foundation requirement, and it's presumably the foundation requirement for the admission of the prior inconsistent statement, right? And then we go down here, "extrinsic evidence of a witness' prior inconsistent statement." I'm thinking like what the hell does that mean, "extrinsic"? Why doesn't it just mean evidence of the prior inconsistent statement? What does "extrinsic" add? It's an unnecessary adjective to suggest that it's something other than the prior inconsistent statement itself.

MR. ALEXANDER: Right. I suppose that's right.

PROFESSOR GOODE: Well --

PROFESSOR DORSANEO: It's not helpful.

PROFESSOR GOODE: It's the language of the current rule.

PROFESSOR DORSANEO: Not exactly. It's in there, it says, "Extrinsic evidence of the same shall be admitted," but if it's a substantive change, at least my confusion would be dispelled if the word "extrinsic" was removed from (4) or whatever number it would be; and, you know, I like the second version anyway, too; but it has the same problem.

PROFESSOR GOODE: The reason "extrinsic" is

there is because there are two ways of evidencing a witness' prior inconsistent statement. One way is you ask the witness, and the witness says, "Yes, that's my prior inconsistent statement." You get to extrinsic evidence if the witness doesn't admit that it's his prior inconsistent statement. Then you need to resort to other evidence.

PROFESSOR DORSANEO: That's what I'm wondering --

PROFESSOR GOODE: Other witnesses or documentary evidence to prove that the prior inconsistent statement was made. That's extrinsic evidence.

PROFESSOR DORSANEO: Is the extrinsic evidence in (a)(4) on version one the second kind of extrinsic evidence for the second kind of evidence that you're talking about, or is it both the prior inconsistent statement and the other evidence when the witness denied making a statement?

PROFESSOR GOODE: Extrinsic evidence is using other witnesses or documentary evidence to prove that the witness made the prior inconsistent statement. That's what (a)(4) is referring to, and you can't do that unless you first ask the witness about it and the witness fails to unequivocally makes the statement, the idea being if the witness admits "I made the prior inconsistent statement," which is evidence of the prior inconsistent

statement, there is no need to resort to other witnesses or documentary proof of that. So we limit other witnesses or documentary proof of a witness' prior inconsistent statement until after the witness has been asked about it and failed to admit it.

PROFESSOR DORSANEO: Okay.

PROFESSOR GOODE: Does that help?

PROFESSOR DORSANEO: Yes, helps a lot.

CHAIRMAN BABCOCK: So you've got a witness there, and you say, "Isn't it a fact, sir, that you just testified that you first learned about this back in 1988?" He says, "Yeah, that's right."

"Well, isn't it true that you found out about it in 1980?"

"No, that's not right."

"Well, take a look at your deposition here on page seven, line 14. Don't you say right here that you found out about it in 1980, not 1988?" He goes, "Well, that's what it says." Then what do you do? Then you say, "Which is it? Is it '88 or is it '80," and he goes, "'88, like I said in my trial testimony." So then do you play the video of his deposition? Is that extrinsic evidence?

PROFESSOR GOODE: If he admits making the statement, "Yes, I said 1980, but it's 1988," then he's admitted making the prior inconsistent statement, and

there's no need to resort to the extrinsic evidence to prove he made the prior inconsistent statement, even though he's now taking the position that the prior inconsistent statement is inaccurate.

MR. ALEXANDER: I think that's right, although, I've said that rule is honored as often in the breach as in the observance, but I think that's actually correct.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But you're still not shut off. I mean, when he says, "Yes, that's what I said" then it doesn't prevent you from saying, "Well, man, you were under oath and swear to tell the truth just like you were here, and you swore, and one of those is a lie, which one is it?"

MR. ALEXANDER: Right.

MR. LOW: I mean, you're not just bound by accepting that and just letting it -- say, "Okay, since, let's go on."

MR. ALEXANDER: Right. Right.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: All right. I would agree with Bill that I don't think the word "extrinsic" really adds anything here; and the confusion that it's created in my mind is that I usually hear the term "extrinsic" come

up in connection with testimony about a contract; and we know that under the parol evidence rule, for example, extrinsic evidence is excluded; and you're really limited to the contract itself. If you have a written prior inconsistent statement and you mark it and offer it into evidence, to me that is the prior inconsistent statement. It's not extrinsic.

What would be extrinsic is someone coming in and saying, "I saw him say," or "I heard him say this" or "I saw him sign a piece of paper saying this"; and to me I'm probably confused about the meaning of "extrinsic"; but in the contract realm, "extrinsic" means beyond the document itself here; and here it's beyond the admission of the witness; and so does the word "extrinsic" help here? Could we clarify by just dropping it and saying "evidence of the prior inconsistent is admissible"?

CHAIRMAN BABCOCK: Hey, he's the professor. He's not the student.

PROFESSOR GOODE: I'm happy to answer it.

MR. ORSINGER: That's right, only professors get to ask questions.

CHAIRMAN BABCOCK: Yeah. What are you putting him on the spot like that for?

MR. ORSINGER: I forgot.

MR. SCHENKKAN: Professors and judges.

CHAIRMAN BABCOCK: He can answer that.

PROFESSOR GOODE: Again, if you don't qualify then you can't ask the witness a question, because asking the witness a question is asking for evidence of the prior inconsistent statement.

HONORABLE STEPHEN YELENOSKY: All "extrinsic" means is something other than the admission itself. So you could say "other evidence" or you could say -- you could reword this, but that's the sense of it, and you can't admit the prior inconsistent statement itself if they've admitted it orally.

PROFESSOR GOODE: This is one of the problems, by the way, of writing the rules more clearly, is that people get to look at the words because the words "extrinsic evidence" have been there for the last 30 years and apparently haven't caused a lot of problems.

MR. ORSINGER: The rule's been there, and we've been ignoring it anyway.

PROFESSOR GOODE: Yes, it has.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: It is a nonaspect about the rule when it comes down to oral statements that aren't the subject of a deposition or a written statement. It allows the interrogator to say to witness A on the stand about a conversation with witness B, taking it out

of the party operation, "Witness A, didn't you tell witness B that you saw the plaintiff run a -- run the red light right after the accident?"

"Well, no I didn't." And then this other witness never shows up, never been deposed. In fact, you can't find him. The foundation on this as to oral statements is extremely weak when you think about the fact that there's no basis -- you're not putting the burden upon anybody to show that they actually have that proof. Now, that's a rare problem, but it does happen; and it allows the interrogator to feed in a, quote, version of an oral statement that may or may not be found by a jury. Then you get down to final argument and you have the instruction and the rule that you cannot argue the failure to bring somebody, the failure to bring somebody as a witness, and so I know that this is a substantive change. R. H. confirmed it for me, and Tom did, too; but in any event, this is a problem with this rule; and it's why a lot of trial judges always want to see some proof of what the inconsistent statement when the witness is floundering there on the stand and says, "No, no, that didn't happen" because they suspect that there may be something that's not a correct version of the statement. It's a paraphrasing of it, or it may not be the witness is available.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, the way I see that taken care of is in the motion in limine typically and --

HONORABLE DAVID EVANS: True.

HONORABLE STEPHEN YELENOSKY: And I think it may even be in our standing motion in limine that you can't refer to the testimony of a witness, you know, who isn't there and isn't intended to be there. That's not a good faith basis for asking it, and I think there are other instances where this rule doesn't apply, and that limine issue would still come up, so I prefer to have it dealt with.

HONORABLE DAVID EVANS: It could be handled by limine, but sometimes -- we don't have as refined a limine up here in Cowtown as you do down here in the Capital. We just are slinging guns.

CHAIRMAN BABCOCK: Those comments lead us nicely into Rule 614, called "Excluding witnesses." Anybody got any comments about 614? Robert.

MR. LEVY: A couple of questions. One, I was trying to recall how it was that experts are exempt from the rule, but it's not in the rule. I don't know if -- I know that's a substantive issue, but it certainly seems to be our practice, and I'm not sure why the rule

wouldn't include it, but I did note a -- I think this is a recurring issue, but in sub clause (3), now (c), the word "claim" -- or "cause" is in the current version, and it's changed to "claim or defense," and the question is whether that would potentially narrow that exception somehow in terms of whether the person's presence might assist the overall lawsuit versus a specific claim that is annunciated in the lawsuit.

MR. ALEXANDER: We did not -- we did not see this as a substantive change or really altering what the current version does, and it also is the way that the restyled Federal rule handles it.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I would respond to Robert's comment that I think subdivision (c) of 614 is the one you rely on to get your experts in, and most often there is no objection. Frequently both sides have experts that they want to exempt from the rule, but occasionally you have to make at least a nominal showing that you have to rely on your expert to help you do your examination, so I think that practice of letting experts in, while it's not an unqualified right, as a practical matter, (c) works and hadn't been changed, so I would expect the practice to continue fundamentally the way it is. Are you, Robert, suggesting that it should be not discretionary, that you

should always be allowed to have your experts in?

MR. LEVY: At least in my experience that's always been the practice, and I don't think anyone really questions it, so should the rule conform to that? If that might not be the universal experience, there might be cases where an expert you could argue shouldn't be there for everything. If you're talking about medical issues and you've got a causation expert, you could argue that perhaps they shouldn't be part -- you know, in the trial.

MR. ORSINGER: And you may have an expert that's also a fact witness.

MR. LEVY: Right.

MR. ORSINGER: And you may have a decent argument that they shouldn't hear about the fact part.

HONORABLE STEPHEN YELENOSKY: Right.

MR. ORSINGER: So I would think that this (c) perpetuates existing practice, which is acceptable.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Yeah, I -- I've always thought that the word "essential" was an unfortunate word to add into Texas jurisprudence when transported from Federal jurisprudence, and I say this. I don't really have firsthand knowledge that this is so, but on the theory that in criminal cases investigators and other people are the ones who actually tell the criminal defense

lawyer -- or maybe not criminal defense lawyer but the prosecutor what you have to do. Now, that has pretty much zero to do with civil cases. We have -- you know, we have the Drylex opinion which says, you know, that, in effect, that you better get your expert excluded or exempted from the operation of the rule, otherwise -- you know, otherwise, good luck to you. So it's very different from an officer or employee of a party or a natural person or that person's spouse, where you just don't have any preliminary drill, so I'm back to where I started. I don't like the word "essential." "Essential" means like indisputably necessary, and that's just not true for many experts. They're just helpful.

MR. ORSINGER: Just for the record, what word would you use?

HONORABLE ANA ESTEVEZ: "Helpful." "Helpful."

MR. ORSINGER: "Important," "helpful."

MR. LEVY: I think "helpful" is not enough.

PROFESSOR DORSANEO: I'm just making comments. I'm not making suggestions.

CHAIRMAN BABCOCK: Oh, you've got questions, not solutions.

PROFESSOR DORSANEO: I know that "essential" isn't good.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: Okay. Another question in this -- the scenario is that you have a witness that is in a deposition and hears the testimony. The Rule hasn't necessarily been invoked, but then later on -- or I guess you could even argue it has been invoked, and later on a argument is made that that witness should not have been there, and then the question is -- or the lawyer says, "Well, that's my expert" -- "That's my corporate rep." The way the current rule seems to be worded, that would be okay, but under the new rule that designation would have to be made in advance, or at least it seems to be, that -- and that would be a potential basis to say that witness is -- can't testify for the party. That witness' presence violated the rule because the witness was in the deposition and had not been previously designated as the corporate rep. Does that make sense?

PROFESSOR GOODE: I think --

MR. LEVY: I'm seeing the language after being --

PROFESSOR GOODE: After being designated.

MR. LEVY: That's what I'm focusing on.

PROFESSOR GOODE: As opposed to "not a natural person designated."

MR. LEVY: Right.

PROFESSOR GOODE: This is one where this language, again, reflects current Texas rule, previous Federal rule being identical, taking the Federal language, but I understand the point you're making, that there may be a time change.

MR. LEVY: Right.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo, then Justice Frost.

PROFESSOR DORSANEO: "Reasonably needed."

CHAIRMAN BABCOCK: "Reasonably needed." Or "reasonably needy." Justice Frost.

HONORABLE STEPHEN YELENOSKY: Substantive change.

HONORABLE KEM FROST: I had a comment that went to subsection (d) in 614. The structure that is used in (b)(2) that begins "in a criminal case," we might want to use that same structure in (d) because as it's currently worded it says "the victim in a criminal case," which might suggest the only predicate being you need to be a victim in some criminal case. It's not unusual to have one perpetrator that has several victims in various proceedings, and I believe the intent of this is that the only person excluded would be the complainant in the case actually being tried.

CHAIRMAN BABCOCK: Okay. Justice Brown.

HONORABLE HARVEY BROWN: Nothing.

CHAIRMAN BABCOCK: Okay. Anybody else? All right. 615, "Producing a witness' statement in criminal cases." Change from the Federal?

MR. ALEXANDER: Chip, (a) and (b) are the same, (e) is the same, (c) is I think very similar, as I recall, and (d) is different.

CHAIRMAN BABCOCK: Okay. Comments about this rule, 615? Richard.

MR. ORSINGER: It's been many decades since I tried a criminal case, but why do we have to wait until the prosecution rests for the defense attorney to see the witness' statements, or I mean, after they turn the witness over for cross. I misstated that, and I'm just wondering why because on the civil side we don't have trial by ambush, and the state is there, and the witness is on the witness stand. I guess that's a substantive change.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Richard, we've made attempts to change that, and the Court of Criminal Appeals doesn't want to touch it.

HONORABLE TOM GRAY: I think the Texas Legislature changed that with Brady and discovery this go around.

MR. ALEXANDER: Can I interject? I'm sorry to interrupt.

CHAIRMAN BABCOCK: No, no, no, go ahead.

MR. ALEXANDER: In conjunction with this rule, after this rule was drafted by us the Michael Morton Act was put into effect concerning this very issue, and it's, in my opinion, very likely that there's some inconsistencies between this rule and the brand new Michael Morton Act. Our suggestion is that we have Steve work with the Court of Criminal Appeals Advisory Rules Committee to come up with revisions to this that would be consistent with that new act, so I'm not sure that --

MR. LOW: We've had several requests to review this, review it, and I made the request to the Court, and they won't do anything, so I follow your suggestion. I think it's a good one.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: That took care of my comment.

CHAIRMAN BABCOCK: Okay. Any other comments about this? All right. Let's go to the 700 rules. 701, "Opinion testimony by lay witnesses."

MR. ALEXANDER: And 701(a) is the same as the Federal counterpart except the Feds have a component of subpart (c).

CHAIRMAN BABCOCK: Okay. Any comments about 701? 702, "Testimony by expert witnesses."

MR. LOW: Chip, let me give you some history on that.

CHAIRMAN BABCOCK: Yeah, Buddy. 702?

MR. LOW: Yes. The -- that has come up with when the Feds changed their rule. I can't remember when it was. We took a look at that, and we were told to follow that. We drew -- Harvey Brown was the draftsman, drew a rule that said the same thing the Fed did except clearer, it was styled properly and almost with what we're trying to do here in mind, but no substantive changes from 702, the Fed. That has not been changed, so this committee, I believe y'all just followed the existing, even though it doesn't include -- the Fed includes current practice, but you had to follow the words so we have reviewed -- we have this. I gave it to you, Angie, and the Court will have this 702 that has been approved by this committee.

CHAIRMAN BABCOCK: Okay. Any other comments about 702? 703.

MR. ORSINGER: Oh.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would just make the comment that the predicate to this long sentence is that what

makes a expert -- what makes a witness an expert could be knowledge, skill, experience, training, or education, but then in the "if" clause halfway through it we say "if the scientific, technical, or other specialized knowledge," which is not in the first part as to what makes you an expert, which is -- well, knowledge I guess would be, but skill, experience, training, or education makes you an expert, but then it says, "The expert's scientific, technical, or other specialized knowledge." Isn't there a lack of parallelism there that's confusing?

MR. ALEXANDER: I don't think so. I think at least when it's trying -- first of all, it mirrors in that regard what the current Texas rule does. Second of all, the question is the first component of this is the witness has to be qualified in one of these various ways to become an expert; and once they are so qualified, if they've got knowledge in one of these areas, scientific, technical, or other specialized knowledge; and if that will help the trier of fact then it's admissible generally. You see what I'm saying? That's why they don't parallel.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I know that they did not want to get into looking too much at the Federal rule because it might be viewed as substantive; but I

would argue that at least most of this rule is stylistic in the sense that Daubert was really interpreting the word "knowledge" and the phrase "assist"; and so there is reliability and components are a part of that; but more importantly, if we're going to limit ourselves to simply stylistic completely, I think that 705(c), which deals with reliability in the sense of the underlying facts or data, I think that doesn't fit in 705; and some Federal commentators in 703 had a similar issue in their wording, so sometimes it's a little confusing; and this should probably be part of 702 because 702 is laying the admissibility. Whereas 705, just the title is "Disclosing the underlying facts or data." (c) really has nothing to do with disclosure. It has to do with admissibility, and 702 is the admissibility rule. So if we do nothing else I think it would be helpful to move (c) into 702 where it logically belongs in my view.

CHAIRMAN BABCOCK: Okay. Sticking with 702, anymore comments about that? 703, "Basis of an expert's opinion testifying."

MS. GREER: I just have a question, and actually I think your comment about moving it to 702, it might fit even better in 703 because that's where you're talking about the bases.

HONORABLE HARVEY BROWN: Yeah, it could.

MS. GREER: And I understand we did not adopt the part of the Federal rule that talks about basically the probative effect and prejudicial effect. Is that because you were thinking that would be treated by 403, or is there another reason for that?

PROFESSOR GOODE: Let me just respond to both, I think.

MS. GREER: Okay.

PROFESSOR GOODE: My understanding is Rule 705(c) is probably unnecessary, doesn't even have to be placed any place, could be eliminated; but, again, we did not follow the restyled Federal Rule 702 with the (b), (c), and (d) because that's not in our current rule and we thought it could be viewed as a substantive change. Personally, I think (b), (c), and (d) are fairly innocuous. I don't think they're terribly helpful. I don't think they're misleading, and if we put it in there I don't think it would really change Texas practice.

Our Rule 705 is the way it is because we were sort of ahead of the game. We covered Rule 705(d) about the disclosure of inadmissible things. We had a provision there long before the Federal rules had a provision, and they put it in Rule 703. The problem is they didn't follow us, which is what they should have done, but they didn't.

In any event, if we wanted to restructure our expert testimony rules in accordance with the Federal rules, it would certainly make sense to take what we have in Rule 705(b) and shift it into Rule 703 and eliminate Rule 705(c) because that doesn't add anything any longer. The voir dire examination usually we put in there because that was before there were discovery rules about expert witnesses, and it may be that that even is not terribly necessary any longer. So part of what we're doing is, again, we were just nonsubstantively codifying, but this may be another set of rules that that would stand some examination as to a rewriting of the rules and changing where certain things are.

CHAIRMAN BABCOCK: Okay. Any more on 703? Justice Brown, then Gene.

HONORABLE HARVEY BROWN: I was going to comment that I think 705(c) was relied on in the Pollock case. I may be wrong, but I'm pretty sure 705(b) was relied on in Arkoma case, so but I agree with your sentiments that kind of a reorganizing for how things are now actually being played out would be very helpful for the bar, because people don't look at 705(c) and don't realize how it interplays with 703 and 702 a lot of times.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, I just wondered why the

phrase "at or before the hearing" was taken out. I don't see it in the revision.

MR. ALEXANDER: Which rule are we on now?

CHAIRMAN BABCOCK: 703.

MR. STORIE: On 703, "were made to the expert at or before the hearing," which I don't see the "at or before the hearing" in the revision.

PROFESSOR GOODE: That's because, again, we were tracking the language of the Federal rule, and the idea was if it's not at or before the hearing when would it be?

MR. ALEXANDER: It seemed like surplusage.

MR. STORIE: Okay. I mean, because I know we just talked a minute ago about having the experts there despite the exclusion rule, so I don't know if this helps to bolster that.

CHAIRMAN BABCOCK: Okay. Anything more on 703?

MS. GREER: I did ask the question about the sentence that's left out of the -- from the Federal rule about balancing the probative value and the prejudicial effect. It's in 703.

PROFESSOR GOODE: That's in 705(d).

MS. GREER: Oh, you put it in 705. Okay.

MR. ORSINGER: It's already there.

PROFESSOR GOODE: That's the thing where we had that rule before the Feds had it.

MS. GREER: Okay. I misunderstood. Thank you.

CHAIRMAN BABCOCK: 704. Richard.

MR. MUNZINGER: Why did you drop "otherwise admissible"?

PROFESSOR GOODE: I'm sorry.

MR. MUNZINGER: The new rule doesn't have the qualification that the testimony must be otherwise admissible, and I'm curious why you dropped that. I like it. It's a cautionary reminder to trial courts that this isn't an independent ground of admissibility, that you still have to have admissible evidence, and you don't have that in here.

MR. ALEXANDER: It -- go ahead. It was our belief that the general Rules of Evidence otherwise dictate what is or isn't admissible and that this language -- this revised language of 704 doesn't affect that, and to us it was clear enough that making this one statement as to the ultimate issue was enough to satisfy the purpose of this rule without trying to tell the trial court what it already knows from other rules, which is evidence has got to be admissible generally anyway.

PROFESSOR GOODE: This is also a situation

where we, again, tracked -- we had identical language in our rule and the pre-restyled Federal rule. We took the restyled Federal language and just adopted it for our 704. So it's the same language, and the reason -- the underlying reason for why they did it when they restyled the Federal rules is exactly what Fields explained.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Does anybody ever think it would be a good idea to define the term "ultimate issue" in the context of this rule? You talk --

PROFESSOR GOODE: Yes.

PROFESSOR DORSANEO: Well, why -- wouldn't it be a good idea?

PROFESSOR GOODE: I thought you asked whether somebody had ever suggested that, and the answer is "yes."

CHAIRMAN BABCOCK: That was rhetorical.

PROFESSOR DORSANEO: Well, would it be a good idea to define it? It means a lot of things in the jury charge context. I could talk for about 25 minutes about why most of those things aren't worth knowing, but does everybody have no trouble with ultimate issue? It's just like --

HONORABLE STEPHEN YELENOSKY: Take 25 minutes.

MR. LEVY: It's essential.

MR. ALEXANDER: I know it when I see it.

MR. LEVY: It's essential.

CHAIRMAN BABCOCK: Orsinger has had trouble with it.

MR. ORSINGER: I remember when this all came up, because before the Rules of Evidence were adopted experts were not allowed to testify in terms of ultimate issues, and I think in the *Birchfield vs. Memorial Hospital* case, which is famous for a whole lot of reasons, the Supreme Court said it is okay for an expert witness to talk in terms of ultimate issues as long as using proper legal concepts and definitions, and I think that this rule picked up on that. So in the context of the history of what happened, I think that I always understood ultimate issue meant jury question, jury instruction, but that may be lost. That may be only people like Bill and me that can remember that long ago.

PROFESSOR GOODE: The reason for this rule is, in fact, the problem you're alluding to, that is, it was never clear when people objected and said a witness can't testify because it goes to an ultimate issue, what that meant, and so all this rule does is says that's not a good objection any longer.

MR. ORSINGER: Kind of like you can't have

a --

PROFESSOR GOODE: It doesn't matter if you define it because it's just not a good objection.

CHAIRMAN BABCOCK: Okay. 705, "Disclosing the underlying facts and data and examining an expert about them." Yeah, Justice Brown.

HONORABLE HARVEY BROWN: I have a issue with changing a phrase from 705(d). In the new version we say, "If the probative value is outweighed by the prejudicial effect." In the old version we say, "If the value has explanation or support for the expert's opinion is outweighed by that value." The only value for the witness who is otherwise putting in this inadmissible evidence is the value of support; i.e., this is what my opinion is based on. I got hearsay that I heard from some witness that's not otherwise before us; and so we're admitting that just to support the expert's opinion; but when we take that concept and we narrow it to the phrase "probative value," it reads much better. It's a lot shorter, but I think when you're in the middle of a trial trying to determine the probative value of that, inadmissible evidence can get lost. So I like the phrase "as explanation or support for the expert's opinion" because that is by definition here the probative value of that otherwise inadmissible evidence, I think.

CHAIRMAN BABCOCK: Okay.

HONORABLE HARVEY BROWN: So I think when you're trying cases quickly, the judge is trying to figure out what the probative value is, this laser-like focuses the judge on what that is under the old rule.

MR. ALEXANDER: We actually discussed this exact issue in our committee, and so I understand the point acutely, and I think -- I don't -- I don't -- it's a valid point. We ended up concluding that read in the context this says what it needs to say, but I also understand that you certainly have to think a little harder about it, but our ultimate conclusion was it is consistent with the current rule, and it's a little cleaner in language, but I fully understand the point.

CHAIRMAN BABCOCK: Okay. Any other comments? Okay. 706, "Audit in civil cases."

MR. ORSINGER: Excuse me, Chip, can we go back to 705?

CHAIRMAN BABCOCK: Sure.

MR. ORSINGER: Okay. To me prejudicial effect is not really what's important about the balancing test under 705(d). What's really important is the danger that the jury will use inadmissible evidence as if it's substantive. In other words, when an expert is allowed to put hearsay evidence in in front of the jury to support

their opinion it's only for the limited purposes for explaining or supporting the expert's opinion, but the truth is a lot of that expert testimony may be substantive if the jury were to consider it for more than just the credibility of the expert, so to me the really important part of the balancing test is not prejudicial effect. It's the danger that it will be used for a purpose other than explanation or support, and is that concept carried forward or lost, or is it subsumed in the language here? Because I see prejudicial effect has been used to supplant the danger of misuse, and to me they're different things.

PROFESSOR GOODE: To me using evidence for impermissible purpose is a form of prejudicial effect. That is, if the jury uses -- or if a hearsay statement, for example, is offered for a nonhearsay purpose, if the jury were to use it for the hearsay purpose, that would be a form of prejudicial effect; and a judge in deciding whether to admit the hearsay statement for its -- give a limiting instruction for its nonhearsay purpose would have to consider the danger the jury is going to use it as hearsay.

MR. ORSINGER: Okay, the thing that concerns me about --

PROFESSOR GOODE: So that is subsumed in prejudicial effect.

MR. ORSINGER: Okay. I'm nervous about that because we deal with prejudicial effect in Rule 403 all the time, and that usually in my experience has to do with evidence that's just very emotional. It could be a bloody photograph, it could be a bunch of bloody clothes, or there's a lot of different things that could be very prejudicial that don't have anything to do with misuse, and so to me the biggest danger is not prejudice in the sense that we normally think of it, as, my God, I'm having a reaction to this that's going to overload my intellect or something. I'm talking about a subtle distinction when a jury is told you can listen to this expert give you all this inadmissible evidence, but you can't consider it for any purpose other than the credibility of the expert. To me that's not prejudice. To me that's the jury actually misusing the evidence because they don't get the distinction between something that's offered for impeachment purposes or bolstering, but not as substantive evidence. I think we lose a lot by dropping that sentence out. I don't think it is necessarily folded into the concept of prejudicial, and it makes me nervous because to me the biggest risk of letting an expert put all of this hearsay in is that the jury will not know that they can't consider it as substantive evidence.

MR. ALEXANDER: We tried to handle this --

MR. LOW: They do know.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Because what you do, you say, "Your Honor, I want you to instruct the jury that they can't consider this for the truth of that matter, but only that he relied upon it, only he relied upon it." It doesn't prove -- and instruction. As far as 403, it doesn't come in at all because of the prejudicial effect, doesn't have to weight that. It just doesn't come in, but here you can cure it by instructions. You have a pretty good instruction that, you know, it might not cure it, but it's sure there.

MR. ALEXANDER: That's exactly what I was going to say. We tried to handle this through both requiring in the rule that the court make the requisite finding that they're allowed to do this in the first place, and then if the finding is made, if the other party asks, the court's got to limit the evidence to its proper scope before the jury.

MR. LOW: Right.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: Well, one problem is that by using the same words we have in 403 it's even easier now to confuse this with 403 than it was before, and many people confused this with 403 even before. So

now we're using the exact same phrase "probative value" and "prejudicial" from 403. So I think that's going to be part of the confusion here, is judges and practitioners are going to treat this just like 403 because we use similar phrases when we're trying not to do that. We're trying to say it's for a specific purpose, i.e., it's of support for the expert's opinion.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I'll wait until he finishes 700. I had a small suggestion on the ultimate issues 704 thing.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: I thought it would wait until the end of the 700s.

CHAIRMAN BABCOCK: Okay. We're almost to the end. 706. Oh, Judge Yelenosky, sorry.

HONORABLE STEPHEN YELENOSKY: I agree with the professor. I agree with the professor, I agree with Justice Brown. I can see some confusion there, but prejudice is using some information for the wrong purpose, even if it's emotional. You're using your emotional reaction for the wrong purpose, and so they really -- I mean, academically they are the same. You could use a limiting instruction with the emotional thing, "Don't let this affect your emotion," probably not very effective,

but neither are most instructions. So I think academically they're the same thing, and I guess we either recognize that and use the same terms or if, in fact, in practice it means something different, I'm not sure that it shouldn't.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Maybe I'm missing the point, but doesn't the current rule use the word "unfairly prejudicial"? I mean, usually probative evidence is going to be prejudicial to the other side.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID GAULTNEY: I mean, so I think the concept of unfairly prejudicial would inject that. That's the current language, I think, and I think we should use the word "unfairly prejudicial."

CHAIRMAN BABCOCK: Okay. You want to move on to "Audit in civil cases," 706? Anything different about that?

MR. ALEXANDER: There is no Federal counterpart for that.

CHAIRMAN BABCOCK: So it's totally different.

MR. ALEXANDER: It is.

CHAIRMAN BABCOCK: Yeah, Professor.

PROFESSOR DORSANEO: Is this just civil

procedure Rule 172 put in the evidence rules?

MR. ALEXANDER: More or less. I don't have 172 in front of me, but obviously the reference is just like it.

PROFESSOR DORSANEO: Well, I think it -- two things, if it isn't and something was left out that's important, it probably should be put in here. If it is, then the whole rule should go into the civil procedure rules and not be repeated here.

CHAIRMAN BABCOCK: Okay. Anybody else got any comments on "Audit in civil cases"? Okay. Then, Bill, you wanted to say something at the end of the 700 rules.

PROFESSOR DORSANEO: My consternation about there not being a clearer statement of what an ultimate issue is in restyled 704 is easily remedied just by adding the language that's at the end of the current rule, because I think an ultimate issue is one that's decided by the trier of fact, and the current rule says, "An ultimate issue to be decided by the trier of fact." I think that's a very solid definition that's completely accurate.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: But as the professor said, we don't need to define it. All it means

is the lawyer stands up and says, "Judge, I object, that's an ultimate issue."

"Overruled." I mean, we don't need to know what it is. That's all it does, is eliminates the objection.

PROFESSOR DORSANEO: With all due respect, I think that that's not helpful.

CHAIRMAN BABCOCK: What, getting your objection overruled?

PROFESSOR DORSANEO: Well, that, too, but saying that this is all about something that you say in court and that you can't say anymore, people used to say in court that they can't say anymore, and regardless of what it means, that's good enough. It's not good enough for me.

HONORABLE STEPHEN YELENOSKY: Well, how would it make a difference, Professor Dorsaneo?

CHAIRMAN BABCOCK: Well, he would say, "Your Honor, the ultimate issue as meant by this rule is not what I'm talking about. I'm talking about something else." That's what you would argue, right?

PROFESSOR DORSANEO: Well, maybe. I think it's important to know that the definition of ultimate issue is something to be decided by the trier of fact. It is a mixed question of law and fact under our system now

and that that's something the expert can give an opinion about.

MR. ORSINGER: It will be very clear if we just put *Birchfield vs. Memorial Hospital* in the comment to the rule, and then they'll go read it, and it will make perfect sense.

PROFESSOR DORSANEO: We could say that was Frank Branson's blind babies case.

MR. ORSINGER: But that's not the reason. It's a Supreme Court opinion is the reason it's important.

CHAIRMAN BABCOCK: There we have it. All right. "Hearsay," 801.

MR. ORSINGER: This ought to be easy, hearsay.

CHAIRMAN BABCOCK: This should be easy. Don't they have those buttons you can get, "That was easy"? What do you have to say about this, Fields?

MR. ALEXANDER: I hope it's pretty straightforward. We certainly didn't intend to change the rules of hearsay. Anybody have any questions?

CHAIRMAN BABCOCK: Any comments about 801? Bobby.

MR. MEADOWS: Not here.

CHAIRMAN BABCOCK: You stretch like that again and I'll call on you again. Okay. Everybody happy

with this 801? Going once. Okay. 802. Any comments on 802? 803, "Exceptions to the rule against hearsay regardless of whether the declarant is available as a witness." What handiwork did you guys do on this?

PROFESSOR GOODE: 803(1) through (4), 803(7), (9) through (21), and 803(23) are all exactly the same as the Federal rule. That is, the current Texas and the pre-restyled Federal rule are the same, so the draft here is the same as the restyled Federal rule, so 801(1) through (4), (7), (9) through (21), and (23).

HONORABLE SARAH DUNCAN: I'll ask -- I don't care.

PROFESSOR GOODE: Do you have a question about those, or we can just start with the ones that are different, however you want to do it.

CHAIRMAN BABCOCK: Ones that are different, (5) and (6).

PROFESSOR GOODE: (5) is the first one that's different, and it's -- the difference is quite slight.

CHAIRMAN BABCOCK: We'll be the judge of that.

PROFESSOR GOODE: I meant the difference between the Federal and the Texas rule were quite slight, and the drafting is fairly straightforward.

CHAIRMAN BABCOCK: Any comments on (5)? How about (6)?

PROFESSOR GOODE: (6) was actually one place where we deviated from what the Feds did because of some things the committee members raised, even though the appropriate language in the current Texas rule was the same as the language in the Federal rule, and that has to do with 803(6)(E).

PROFESSOR DORSANEO: (6) what?

MR. LOW: (E).

PROFESSOR GOODE: That is, the first four requirements that are necessary to establish a business record, (6)(A), (B), (C), and (D) are all the same, with only the cross-reference of Rule 902(10), being the difference in the cross-reference in the Federal rule. Notice the -- if you have the comparison between the Federal and the Texas rule, the restyled Federal rule in (E) sets as the fifth element for introducing a business record under this exception, "Neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness." The committee viewed that as placing the burden of showing that the record was trustworthy on the proponent; whereas, most Federal courts, but not all Federal courts, and Texas courts have said once the proponent of the business record establishes

the first four requirements the burden falls to the opponent to show the lack of trustworthiness.

We thought this was curious. I actually got in communication with a reporter for the Federal rules restyling project, and his position was when we were restyling we didn't want to change anything, and by changing we meant if there was any court opinion out there, may have been a circuit court opinion out there, that -- where there was a split we weren't going to touch it. Their view was the way they drafted it did not shift the burden. Our committee read the rule quite differently. People on our committee looked at this and said, "This looks like you're placing the burden on the proponent to show that the record is trustworthy," and so that's where we deviated from the Federal rule. You'll notice instead of saying "neither the source nor information nor method of circumstances indicate a lack of" -- we say, "The opponent fails to show," so we clearly placed the burden on the opponent of the business record to show the lack of trustworthiness.

MR. ALEXANDER: Feds blew it.

PROFESSOR DORSANEO: I'd say the Federal drafter didn't carry his burden.

MR. ALEXANDER: For all those of you who say we slavishly follow the Feds, we present (E). There you

go.

CHAIRMAN BABCOCK: Yeah. Munzinger, wake up for that.

MR. MUNZINGER: I heard.

CHAIRMAN BABCOCK: You're keeping your head down, though, aren't you?

MR. MUNZINGER: No, I'm reading.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I'm just quickly looking at the Federal language, and I don't have the grounds really to disagree with y'all's assessment, but it doesn't seem to me that that places the burden. To me it's neutral; but this proposed provision that y'all are tendering here to the committee clearly places the burden on the opposing party; and what makes me nervous about that is frequently the opposing party will not have any more information other than just a predicate that was laid; but sometimes that predicate will show, it's just evident, that the document may have been prepared for litigation purposes rather than in the ordinary course of business; or it may be clear that the document is not an original and no one can authenticate it against the true original or whatever.

So in my experience when you raise this circumstances thing you're usually using the information that was put on as the predicate for admission. This

makes it look like to me that the opposing party has to come forward with something more than just the circumstances that were proven as part of the prove up to show that it should be excluded because of suspicion. I would prefer that it was neutrally stated so that any -- any opposing party could argue that the surrounding circumstances question its reliability, bad word I guess, but whether it should be an exception to the hearsay rule. I would prefer that be neutrally stated and -- go ahead.

MR. ALEXANDER: I didn't mean to interrupt you.

MR. ORSINGER: No.

MR. ALEXANDER: The problem we ran into is it was -- basically we concluded it was impossible to read the Federal version of (6) without placing the burden on the proponent for (A), (B), (C), (D), and (E). There's nothing in the Federal version of (E) that says anything other than implying that if you want to get a document as a business record you've got to establish all of this, and it was our clear opinion -- and I think Texas case law supports this -- that it's not the proponent's burden to establish that the document doesn't lack trustworthiness for some reason. That's never been my experience, and I'm aware of no Texas case that says that, so we felt that to accurately comport with Texas law on this issue we had to

place the burden on the opponent. Now, as to your point, I think quite often the lawyer opposing the document can stand up and say, "Your Honor, it's clear from this document, X, Y, or Z" or "Your Honor, I want to take this witness on voir dire," and there are a lot of ways to handle it; but regardless, it's up to the opponent, at least my view of Texas law, to establish this element if you want to keep the document out after the proponent has put forth the basic business rule predicate.

MR. ORSINGER: Well, in my view the original language that is being changed now was neutral as to a burden. It was just whether the court was concerned about the lack of trustworthiness. Obviously the party keeping it out needs to make the objection that the predicate or the circumstances of the source indicate that it's really not -- that it's not trustworthy. So clearly the burden to object is on that person, but you-all are moving what I consider to be a -- a condition that is not the burden of anyone. The evidence can speak for itself, and you're now saying that it's the opposing party that has to prove it's not trustworthy; and to me it's changed from just a judge saying, "Hey, I don't like those circumstances, I don't like the way this came together, and you've objected to it that it's not trustworthy, and I agree." So I'm nervous because I feel like you've moved it from a neutral the

circumstances themselves suggest something to the other party has to suggest it and they really don't have any new evidence at all, so I feel like it's a substantive change.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I agree with Richard. If you look at the old rule, it just says -- it talks about untrustworthiness of the circumstances, et cetera; and now the rule says the opponent fails to do something, which clearly to me at least implies that he has to bring forward evidence attacking the trustworthiness of the underlying data or the methods of collection, et cetera, et cetera, when the prior Texas rule didn't have any of that obligation on him; and the logic of the hearsay rule, hearsay at common law, as I understood it if I was awake in my evidence class, all hearsay was not admissible; and then we've crafted these exceptions because we've said, well, there are some exceptions to hearsay evidence where the data should be admissible because it's acceptable, it's trustworthy; but this rule says "removes any obligation of the trustworthiness unless the opposing party brings forward contrary evidence." I think it's a substantive change, and I'm like Richard, it bothers me a great deal, because I can argue all day long to a judge, "Well, Judge, these guys did so-and-so" or whatever it might be, say, "Well, you didn't come forward with any

evidence and the rule says the opponent fails to show," not to argue, to convincingly argue, to persuade, to attack. I think it's a substantive change, and I join Richard.

CHAIRMAN BABCOCK: Judge Yelenosky, and then Justice Brown, then Pete.

HONORABLE STEPHEN YELENOSKY: Well, surprisingly, I agree with the Richards. You know, I mean, we don't put rules in to tell lawyers when they can argue something. That's always the case. So when you put a rule in that says "to show," I tend to read that as "to show through some evidence as well."

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: Well, I read it the other way, because my understanding of the rule is that once you make a prima facie case of the first four elements, it's considered to be trustworthy because of the way the business is practiced, and that's the reason we fit this within the hearsay rule. It seems like to me in the old rule we had the "unless," and the "unless" was an exception, and in the exception the burden of proof is the party to come forward and show, "I fit within an exception, and therefore the general rule shouldn't apply," and so if you treat the "unless" as an exception, that shows where the burden of proof lies under the text

itself.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: How are these matters usually fought out when someone wants to -- as Judge Yelenosky just said, wants to argue that the circumstances indicate a lack of trustworthiness? How do they usually do it? I'm more familiar with this with the next one, two down, the public records, and when you're dealing with that and somebody is offering against you a government agency's report after their legally authorized investigation and you don't know what it says about your client, what you usually have to work with is other parts of the same report that indicate that the person that prepared it wasn't qualified to make the kind of statement that's actually nullified what we've talked about, though he was perfectly well qualified to make some other statement contained in the same report. What do you do about this in the business records case? What is the difference here between arguing and offering separate evidence other than in the business records context of lack of trustworthiness?

HONORABLE STEPHEN YELENOSKY: Well, I mean, I suppose some of the evidence -- and if it's testimonial evidence you could get it out through cross-examination. That would still be evidentiary.

MR. SCHENKKAN: Yes.

HONORABLE STEPHEN YELENOSKY: And sometimes I guess -- I guess I suppose you would have to have a custodian there to get that, right, so I don't normally see that.

MR. SCHENKKAN: That's the leading question.

CHAIRMAN BABCOCK: Justice Brown, then Richard Orsinger.

HONORABLE HARVEY BROWN: Well, I think it's shown the same way that you do for public records. You don't have to bring another witness to do it. You can show the document itself on its face, show something about the lack of trustworthiness or just the circumstances in which it was created. It was created, you know, by a witness who wasn't there at the time or really doesn't know the practices, et cetera, so it's -- although it says "fails to show" it doesn't necessarily mean fails to show from new independent evidence. Sometimes a party makes its best case through the other side's witness or through the other side's evidence, and I think that's how it's usually shown under this rule.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: Pete, there's a lot of different ways it can come up, but the two that come to mind to me right now is when a document is created

purportedly in the ordinary course of business after the business has become aware of the possibility of a lawsuit then you lose this reliability of the routine business practice, and you start having a taint of the company or defendant trying to position themselves for the lawsuit. So that's not any additional evidence. You just show that from -- when they first had notice of the claim and then these memos start showing up that appear to create an impression. You're arguing from the evidence itself that was offered by the proponent, nothing that you did, so that's why I like the idea that the circumstances suggest a lack of trustworthiness.

Another problem, and I'll just use an example that I had within the last year, I subpoenaed a bank to bring all of the loan documents related to a loan transaction, and what was in those loan documents was incredibly important to the outcome of my case, and the banker brought with him a big stack of Bates stamped documents, and then he also had another little folder over here that had a little side agreement that reversed the meaning of the documents that were Bates stamped. Now, that was just a deposition. We settled that case, and we didn't have to try it, but if we had tried that case I would have argued that the circumstances suggested that that document was not reliable because it was not part of

the main office records. It was produced in a separate file, it wasn't Bates stamped, and I'm using the evidence they give me. It's just that the way it's stated now, it's if the circumstances suggest; whereas, under the new language it's if I can prove it, and I don't like that. I feel like it's making it harder for me to use the evidence they give me to try to show a lack of trustworthiness.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: What if a judge takes seriously, as he will or she will, the obligation to review evidence to make sure that it is going to bring out the truth in the case? Now you've got a rule here that says the opponent has to attack the underlying validity, et cetera, of the sources. I think the judge -- in the old rule, the judge certainly -- if I were a judge and I read the old rule, I would read the words "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness" as being part of the offering party's burden. It's part of a condition to admissibility of the testimony. I don't view that as being something that in the old rule that's something that had to be attacked, but in the new rule it's clear that it has to be attacked and has to be attacked by the opponent.

PROFESSOR GOODE: Let me read you a couple

of quotes. This is from a Houston court of appeals opinion 2011. "When records meet the requisite for admissibility under Rule 803(6), the opponent of the evidence bears the burden of establishing untrustworthiness." Another one, "Once the necessary predicate was laid under 803(6), it became the opponent's burden to show there was some underlying reason why the records were inadmissible." Eastland, "Medical records otherwise satisfied rule I think were admissible because," quote, "there was no evidence showing that the source of information or the method or circumstances was not trustworthy, but case law is the opponent of the record has the burden of showing."

MR. MUNZINGER: Were they three court of appeals opinions?

PROFESSOR GOODE: Those are all court of appeals.

MR. MUNZINGER: Were they refused? Was the petition and the writ refused? Did the Supreme Court adopt that? This is the Supreme Court that is now promulgating a rule.

PROFESSOR GOODE: Petition refused. That's the case law in Texas. All I'm saying is the law in Texas, as the courts have interpreted it, placed the burden on the opponent. That is also, by the way, the

overwhelming, but not universal, case law under the Federal.

CHAIRMAN BABCOCK: Go back to your corners, guys. Buddy.

MR. LOW: 902, isn't that basically the same? Once you meet the threshold it's prima facie proof unless -- and then the burden shifts once you do that. Isn't that what this rule does? That's basic.

CHAIRMAN BABCOCK: Yeah, that's what they're trying to do.

MR. LOW: Well, we do that in 902(10).

MR. ALEXANDER: There's been some suggestion about addressing the court's obligation to look at whether or not the evidence is trustworthy. This is not a situation like Dowdle where the court has got an independent gatekeeping function, once the proponent meets his burden or her burden the evidence is coming in unless the other side objects, and if the other side objects the other side has got to have a grounds for it, and this provides one of the grounds, and it could be through -- I'm sorry.

MR. LOW: You're not even entitled to cross-examine. It says that you swear in affidavit to that, you prove that basic thing, and then the burden shifts.

MR. ALEXANDER: Right.

MR. LOW: If it's untrustworthy or not, the burden is on you.

CHAIRMAN BABCOCK: I'm sorry. Justice Christopher, did you write one of those opinions?

HONORABLE TRACY CHRISTOPHER: Maybe. I think as a practical matter someone -- you know, either you've got a business records affidavit or you have a custodian on the stand that says, "These are the records of our business" and then it is the opponent's job to object, to say, "Okay, I'm objecting to this document that's in this claimed business records because it has the letterhead of a different company on it. It's clearly not a business record of the, you know, company at issue," or "It's a doctor report that is clearly made for the purposes of litigation." And you just -- you look at the records, and you make that determination, but it -- it is based on an objection, and someone has to bring it to your attention that there's something going on here.

CHAIRMAN BABCOCK: Justice Gaultney, did you write one of those opinions?

HONORABLE DAVID GAULTNEY: I don't think I heard the Beaumont court in that, but I suspect that those cases dealt with situations where there was no indication of lack of trustworthiness, and so it showed -- it

probably looked on its face like a regular document, and the court says, "Well, they didn't come forward with, you know, something that would show it was untrustworthy." In that context you can see that, but what if you have a situation where the judge sees something in the document that he considers untrustworthy? I mean, does he have to admit it unless there's additional evidence?

CHAIRMAN BABCOCK: Judge Yelenosky, and then Kent.

HONORABLE STEPHEN YELENOSKY: Well, I think there are different things going on here. The question about whether the judge is obligated to do something sua sponte, like a gatekeeping function, and you've addressed that, and then there seems to be -- the first question was does "to show" mean that the opponent of the business record has to present his or her evidence in addition to just pointing out evidence that already came before the court through the business record or the custodian, and I think consistent with that case law, it's clear that you don't have to bring forward your own evidence. It just has to be before the court. It' also clear, I think, there has to be an objection, so it's not sua sponte, but an objection itself may be enough. "Your Honor, I object, this is untrustworthy," and the judge, having heard the things that make it untrustworthy, says "sustained," so

but the problem is "to show" to a lot of people means they have to present their own evidence, and the current rule doesn't say "to show," and so it causes consternation.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I was just going to say, much like what I think Judge Yelenosky is saying, is that the fact that it would perhaps pass muster under 803 is not the end of the inquiry. It seems to me that the sort of objection that he suggested the judge could then resort to 403 and say, "It might pass muster under 803, but it does not under 403, and I will exclude it on that basis." 403 gives broad discretion to the trial judge if there's going to be unfair, prejudice, misleading the jury. I mean, there's a laundry list, so I was just going to say that the mere fact that you -- that you're able to make it past one particular rule doesn't necessarily mean it's admitted.

CHAIRMAN BABCOCK: Okay. Justice Brown.

HONORABLE HARVEY BROWN: One other point is that if we put the burden of proof on the proponent it's kind of difficult because we're asking them to prove a negative, lack of trustworthiness, and it makes it hard for an affidavit under 902(10), because 902(10) gives them this form for explaining why it comes in. It's pretty easy, and so then we're asking them to explain why this

does not have a lack of trustworthiness, which necessarily would require some explanation that wouldn't fit very well into a form.

CHAIRMAN BABCOCK: Yeah, great point. Pete. No, no, no, I can tell you're getting -- your heart's racing because we're about to get to subsection (8) here, "Public records."

MR. SCHENKKAN: The only comment I have about subsection (8) is -- and I gathered these were just repeating themselves from some other version of it, but the grammar of (8)(A), little (iii), follow that. "A record or statement of a public office, if it sets out in a civil case factual findings from a legal" -- this makes it sound like it's the public office's record in a civil case, so the public office is setting -- is either conducting the investigation in the civil case or offering the record in a civil case, and I think the problem is we're trying to cram it all into (A), but I think we probably all know what's intended, so --

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: Just a last comment, because all of these rules -- not all, but (8) certainly does, includes the addition of the language, "The opponent fails to show that the source was" -- "indicates a lack of trustworthiness," et cetera. We all know that if the

Legislature or the Court adds words to a rule we may not ignore those words; and we must assume that the Court meant something by inserting them; and so if this is not a substantive change, I would have the concern that it works a substantive change because practitioners and judges reading it say, "Surely the Court meant something by adding these words."

CHAIRMAN BABCOCK: Yeah. Yeah. Okay. Anything on (8)? Anything else on (8)? We got all the way through (21). How about (22)? Anything to talk about on subpart (22), "Judgment of a previous conviction"?

Okay. (23), "Judgments involving personal, family, or general history." (23) is the same as (22)?

MR. ALEXANDER: No, same as the Federal counterpart.

CHAIRMAN BABCOCK: Oh, okay. How about (24)?

PROFESSOR GOODE: 803(24) is taken from the Federal Rule 804(b)(3), which is the statement against interests, et cetera.

CHAIRMAN BABCOCK: Okay. Any comments on (24)?

MR. ORSINGER: Could I ask a question?

CHAIRMAN BABCOCK: Yes, you may.

MR. ORSINGER: Was the Federal language

before its modernization pretty close to the Texas language before its modernization?

PROFESSOR GOODE: Of the statement against interests?

MR. ORSINGER: Yes.

PROFESSOR GOODE: Yes, they were identical, but then actually, once again, we preceded the Feds in adding what is the last sentence of our current 803(24). The Feds had a rule about declarations against penal interest in criminal cases that went only one way in terms of when the prosecution could use it as opposed to the defendant. We did it evenhandedly. The Feds have come around to our position, so our rules are now the same, with the one exception of we have one form of declaration against interest that the Feds don't have, which we have a statement that tends to expose the declarant or to make the declarant an object of hatred, ridicule, or disgrace, is in our rule, current and restyled, but not in the Federal rule, current or restyled.

MR. ORSINGER: Well-suited to the Texas temperament, I think.

MR. ALEXANDER: Precisely.

CHAIRMAN BABCOCK: Okay. Anything else on (24)?

HONORABLE TOM GRAY: Chip, I don't know if

this fits in the -- and it may fit better back with (22) or even back to the 01 or 02 part of the 600's, but the hearsay rules have undergone substantial change in the criminal law with the Crawford decision.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE TOM GRAY: And I don't know if y'all discussed that in my absence this morning, but --

CHAIRMAN BABCOCK: Spent about an hour on it, didn't we?

HONORABLE TOM GRAY: Okay, well, in that case --

CHAIRMAN BABCOCK: I'm just kidding.

MR. ORSINGER: No, I don't know what you mean.

CHAIRMAN BABCOCK: Just kidding.

HONORABLE TOM GRAY: Are you not familiar with the Crawford decision? Okay. Crawford decision, United States Supreme Court case that basically said Sixth Amendment right to confrontation basically wipes out all the hearsay exception except in very limited circumstances, and this subdivision (22) happens to be the -- one of the items in Crawford that's not specifically wiped out. Basically they said, you know, this may all work in civil cases, but not in criminal cases, and so we have been dealing at the court of appeals

level with the -- and I'm sure that if there's -- Ana for sure has been dealing with it. Anybody that's been trying criminal cases or reviewing them in the last -- Crawford's four years old now probably.

HONORABLE ANA ESTEVEZ: Or a little older, about like that.

HONORABLE TOM GRAY: Something like that, but it has substantially changed that. There was a long footnote or comment to 601 dealing with the restyling. There may be a point there at which to mention Crawford or this may be like the 615 discussion that it's just going to have to be taken up by the Court of Criminal Appeals as some type of amendment to the Rules of Evidence, but somewhere that needed to be on the record about Crawford and what it's going to do to the exceptions, the hearsay exceptions.

CHAIRMAN BABCOCK: Yep, thank you. That's great. Judge Estevez.

HONORABLE ANA ESTEVEZ: I'm not necessarily disagreeing or agreeing, but just for the record, you know, they've made both objections to hearsay, and they say it falls under one of these sections, and the next thing they say is Crawford. So I'm not sure that you don't still have hearsay exceptions because if they don't go to Crawford then it's in, and you have ineffectiveness

of counsel as opposed to inadmissible evidence, so I don't know that it will be an issue.

HONORABLE TOM GRAY: I accept her friendly amendment to my comment. Very definitely they have to make the Crawford violation of the right to confrontation objection and then that affects whether or not the hearsay exception overrides the basic rules.

CHAIRMAN BABCOCK: Okay. Great. All right. Let's take our afternoon break. We'll come back and start on Rule 804, and you know, don't get cocky, but it looks like maybe we're going to get done with these today, which will avoid the necessity of a meeting tomorrow morning, unless y'all just want to get together.

MR. STORIE: Will there be cake?

CHAIRMAN BABCOCK: We can have a vote, Jim, if you want. All right. So we'll be in recess for 15 minutes.

(Recess from 3:00 p.m. to 3:22 p.m.)

CHAIRMAN BABCOCK: Okay. Let's start with 804, and is this a -- is this a change from the Federal?

HONORABLE ROBIN DARR: On 804?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR GOODE: Rule 804 is largely the same as the Federal. We have 804(a)(5) is slightly different from the Federal, but, again, the drafting part

was fairly -- just a little technical change in accommodating the change between the Federal and Texas.

CHAIRMAN BABCOCK: Okay. Any comments on 804?

MS. HOBBS: Oh, I do.

CHAIRMAN BABCOCK: Yeah, Lisa.

MS. HOBBS: On the former testimony provision of the second page of 804.

PROFESSOR GOODE: I'm sorry, I was just talking about 804(a). I didn't mean to --

MS. HOBBS: Okay, sorry. I should just hold my comment.

CHAIRMAN BABCOCK: Okay.

PROFESSOR GOODE: I didn't mean to get us ahead.

CHAIRMAN BABCOCK: Why don't you just go through 804 and tell us what's changed from the Federal.

PROFESSOR GOODE: 804(a)(1), our rule is somewhat different from the Federal rule, so --

CHAIRMAN BABCOCK: I think Lisa --

PROFESSOR GOODE: 804(B)(i), the former testimony section.

CHAIRMAN BABCOCK: Lisa, what's your comment on?

MS. HOBBS: Well, on 804(1)(a)(i) in a civil

case and then there's a corresponding verbiage in (B)(i) in the criminal case. In the civil case you talk about "a trial or hearing of the current or a different proceeding." In (B)(i) you talk about "a trial or hearing," comma, "whether given during the current or a different proceeding." The criminal line seems to follow more what the Fed line was, and I was just curious why there's a difference in language.

PROFESSOR GOODE: The criminal line seemed to follow more -- I just didn't hear you. I'm sorry.

MS. HOBBS: What the Feds did seems more in line with the criminal one, (B)(i). Where is it? They say (1)(A), "whether given during the current proceeding or a different one," so it's really the language in the civil subsection of the former testimony statute uses just slightly different language there, and I was curious if there was a reason.

MR. ALEXANDER: I think the reason is that the current Texas rule differs in the way it refers to criminal and civil procedures and --

MS. HOBBS: Does it have a meaning? They seem to be saying the same thing to me.

MR. ALEXANDER: It looks similar. But so we track what the current Texas rule does. As to whether you could make them synonymous, I don't recall whether we

discussed that issue or not quite frankly.

CHAIRMAN BABCOCK: Satisfied, Lisa?

MS. HOBBS: Completely unsatisfied.

CHAIRMAN BABCOCK: Why are you unsatisfied?

MS. HOBBS: Well, I think they mean the same thing. It's just weird to have two different ways of saying the same thing. It's bothering me. I want to know if they have different meaning and I just don't realize the meaning or --

PROFESSOR GOODE: I'm not sure but the civil, the current -- if you look at the current civil (B)(i) --

MS. HOBBS: Yeah.

PROFESSOR GOODE: It talks about "Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in the course of another proceeding."

MR. RODRIGUEZ: And in criminal cases you don't have depositions.

PROFESSOR GOODE: In the criminal language it talks about "Testimony given as a witness at another hearing of the same or different proceeding" and then does not include the deposition language.

MS. HOBBS: Okay, but it's really just the phrase "of the current or different proceeding" versus,

comma, "whether given during the current or different proceeding." It's not the deposition part of that.

PROFESSOR GOODE: Okay.

MS. HOBBS: It's the trial or hearing description uses two different languages, and I don't know why or what they would mean -- why their meaning would be different. So (1)(A)(i) says "trial or hearing of the current or a different proceeding"; whereas, (B)(i) says "trial or hearing," comma, "whether given during the current or a different proceeding."

PROFESSOR GOODE: Actually, I think -- I think you're working off a slightly older version.

MS. HOBBS: Oh.

PROFESSOR GOODE: Because one of the suggestions we got and we adopted was we changed that "whether given during the current proceeding or a different one." Is that the language you've got?

MS. HOBBS: Sorry. I guess I'm working off a different draft.

PROFESSOR GOODE: But that doesn't change your --

CHAIRMAN BABCOCK: You still have the same complaint.

MS. HOBBS: Oh, okay.

MR. ALEXANDER: Well, I think your point is

well taken. Why don't we look at making these more similar and we'll submit a new draft?

CHAIRMAN BABCOCK: Okay. What else about 804? Any other comments? No, you won that one clearly, Lisa. You don't have to celebrate.

MS. HOBBS: Really, Texas is the winner here.

CHAIRMAN BABCOCK: Whoa.

MR. RODRIGUEZ: What is she running for?

HONORABLE KEM FROST: Pause for the victory lap.

CHAIRMAN BABCOCK: She's been to too many campaign rallies. Texas is the winner of that.

MR. RODRIGUEZ: She got taken up with what's going on in Washington.

CHAIRMAN BABCOCK: Okay. All right, what else about 804? Any other comments? There will be a prize, by the way, at the end of the day. Lisa so far has it. I don't think anybody can catch her. All right. 805, "Hearsay within hearsay."

PROFESSOR GOODE: 805 is the same current Texas pre-restyled, same restyled Federal, proposed restyled Texas.

CHAIRMAN BABCOCK: Okay. 806, "Attacking and supporting the declarant's credibility."

PROFESSOR GOODE: Those are similar. We had to make adjustments because of -- we have provisions in -- well, first we have a different citation to the rule, but then also the difference because we have a foundation requirement for prior inconsistent statements that you may have heard about that they don't have in the Federal rule, so we had to accommodate that as well, but essentially it's the same rule, just slightly -- slight tinkering.

CHAIRMAN BABCOCK: Okay. Any comments on 806? Where did Orsinger go?

MR. LOW: He's not been excused.

MR. ALEXANDER: I locked him in the bathroom.

HONORABLE JAMES MOSELEY: That's a great idea.

CHAIRMAN BABCOCK: I wondered what that squeal was. Any other comments on 806? Okay. Go to Article IX, "Authentication and identification," Rule 901.

PROFESSOR GOODE: Rule 901(a) is identical. Again, pre-restyled Federal, current Texas are identical, and so the restyled Federal, restyled Texas were identical. The same is true for 901(b)(1) and (2) and (b)(4) through (10). So the only provision here that we're talking about is (3), and the only difference in (3) is we have a very slight difference between the -- a Texas

and the Federal rule on comparison by trier or expert. The Federal rule talks about "specimens which have been authenticated"; and the Texas rule, the current, talks about "specimens which have been found by the court to be genuine." So there was a little substantive difference between the Federal and Texas, and this drafting just accommodates that slight difference.

CHAIRMAN BABCOCK: Okay. Any comments on subpart (3)? Like that okay, Lisa?

MS. HOBBS: I do.

CHAIRMAN BABCOCK: All right. 902.

PROFESSOR GOODE: 902(1) and (2) and (4) through (9) are the same, and our 902(11) is the Federal Rule 902(10); and that leaves 902(3), which is largely the same; but we have a provision in the Texas rule in 902(3) that is not in the Federal rules, which is the last sentence of our current 902(3), dealing with final certifications being dispensed when you've got a treaty, and that provision caused a bunch of tinkering with the drafting. The great bulk of the rules is actually the same, so if you look at what's in our restyled 902(3)(A), all that language the document must be accompanied down to the end of our 902(3)(A) is the same and then it start -- the rules start to change a little bit. The beginning of Rule 902(3)(B), "if all parties have been given a

reasonable opportunity," that language is taken from the last sentence of the Federal 902(3), and then once you get past that you'll see the -- our little (i) and little (ii) are also the same as the Federal 902(3)(A) and (B), and then we finally get to this (C) provision which deals with this last sentence in the Texas rule, which is not up here in the Federal rule, and if anybody can follow that you're better than me because I'm totally confused.

CHAIRMAN BABCOCK: Why wouldn't that be -- why wouldn't (C) be in the Federal, dealing with a treaty with the United States?

MS. HOBBS: Judge Cochran in her *Texas Rule of Evidence* suggests that it may be unnecessary, so maybe the Feds think that it's not necessary to have that in the Rules of Evidence.

CHAIRMAN BABCOCK: Okay. Any other thoughts about that?

MR. LEVY: I can't recall on the Hague Convention whether --

CHAIRMAN BABCOCK: Speak up, Robert.

MR. LEVY: I'm sorry. I can't recall on the Hague Convention whether there is that certification requiring that.

PROFESSOR GOODE: This is dealing with the Hague Convention exactly.

CHAIRMAN BABCOCK: Okay. Anything else? Okay. Now, you said everything was the same through (9) but then that suggested (10) was not the same.

MR. LOW: (10) we've already voted on. (10) is what we redrafted last time.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, they weren't here, I don't think, when we talked about some of the things, and just on (10)(C), I just want to reiterate since you guys are here, I would suggest that should be a separate rule, and it should be 904 or a different one since it's not in the Federal rules anyway, but it is doing more than just proving to be a form for business records. It's actually proving up the medical expenses.

CHAIRMAN BABCOCK: Okay. And, Buddy, what were you saying, that --

MR. LOW: No, that was redrafted, and, Harvey, didn't you send to the Court all of the suggestions and so forth, and it's been finished, and we don't want to rehash it.

CHAIRMAN BABCOCK: So it's pending before the Court.

MR. LOW: Yeah. See, that was not -- when their assignment was made, that was not something we were talking about revising, so they were never involved in

that.

CHAIRMAN BABCOCK: Okay.

PROFESSOR GOODE: But this Rule 902(10) is designed to conform to the language and the -- of Rule 803(6), which has been restyled, and the form is designed to conform to the new restyled language.

MR. LOW: Well, what you did, when you restyled we had a long paragraph in our evidence rule, a long paragraph that -- and it has to comply with 803(4) or whichever one, and y'all combined that paragraph and put everything they had in much shorter form. You did all of that, and we took that and then put the other requirements. So we took the form that y'all had and then redid this rule and presented it to the committee last time.

CHAIRMAN BABCOCK: Right.

MR. LOW: And it's been mailed to the Court.

CHAIRMAN BABCOCK: Right. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, Harvey, did you make these -- I recall that the -- there wasn't a conformity between 803(6)'s language and the one we looked at before. Did you fix that?

HONORABLE HARVEY BROWN: Yes, I tried to. What I did was, for those --

PROFESSOR DORSANEO: And you would be the right one to tell us what you did then.

HONORABLE HARVEY BROWN: For those that weren't here last time, we did this Friday morning before your committee started because there was some legislation that required the Court to look at not including medical records be filed. So that was the impetus to that, and I took all the comments that were made here that had at least a couple of people saying them, worked them in, and we started off of yours, and then worked off of 803(6), and frankly, Bill, I don't remember all of the changes that we made, but we did look at all the comments and particularly the comments that tracked 803(6), and where there were some comments that overlapped 803(6) I just put a comment on the side for the Court to refresh the Court's recollection of what the discussion was so that the Court could go either way.

MR. LOW: See, when y'all were assigned the Court had not amended -- put (C) in the affidavit. The Court did that, what, in April, didn't you, your Honor, something like that? So when y'all were working on it this was not done, but we took your form and then we redid it, and the Court needed to do this in a hurry, and we took your form and then adapted it to what we drafted.

CHAIRMAN BABCOCK: Yeah.

HONORABLE NATHAN HECHT: But the point is (10) has been done.

MR. LOW: Yeah, that's the point. That's what I was trying to say.

CHAIRMAN BABCOCK: All right. And (11) is the same, you said?

PROFESSOR GOODE: (11) is the same as Federal (10). Right.

CHAIRMAN BABCOCK: So that will take us to 903. Bill. I'm sorry.

PROFESSOR DORSANEO: This looks like it's a lot closer, but it doesn't exactly match 803(6), and it uses the term, for example, as was pointed out last time by Richard, and I could be just -- I didn't study this before the meeting, so I am embarrassed to be pointing out something that maybe doesn't really exist, but there was some concern that we had the use of the words "occurrence of the matters stated herein" and when we're talking about an act, "the record of an act, condition, event, opinion, or diagnosis." It seems like the word "occurrence" was substituted for that, and we had little kind of quibble things about the form of business records affidavit.

HONORABLE HARVEY BROWN: Bill, if I can interrupt you, I did make a note on that to the Supreme Court about the "occurrence" versus "act, diagnosis," et

cetera, so the Court would have that in front of it.

PROFESSOR DORSANEO: Oh, okay. So I'll be quiet. I just want to make sure that somebody paid attention to what we talked about last time and reported it.

PROFESSOR GOODE: Did you-all include the unsworn declaration?

HONORABLE HARVEY BROWN: Yes, we did.

MR. LOW: Yeah. We put that in a footnote, didn't we, Harvey?

HONORABLE HARVEY BROWN: Yes. Rather than saying "unsworn declaration," you know, five or six times, we put down something in the comment to cover that, but we did cover it.

MR. LOW: Because there are many others that have "affidavit," and we didn't want to go back and put "affidavit or unsworn declaration" in all of those, so we just threw that in as a footnote.

CHAIRMAN BABCOCK: Okay. 903.

PROFESSOR GOODE: That's one of the identical ones.

CHAIRMAN BABCOCK: Article X, 1001. 1001.

PROFESSOR GOODE: 1001, 1002, 1003, 1005, 1006, 1007, and 1008 are all the same.

CHAIRMAN BABCOCK: You skipped 1004.

MR. ALEXANDER: We were hoping you wouldn't notice.

PROFESSOR GOODE: And 1009. And 1004 is only different in that we have one more provision in our 1004 than the Feds have in theirs, which is an original is not located in Texas. For some reason the Feds don't have that in their rule. They should.

CHAIRMAN BABCOCK: Any comments about 1004? Hearing none, does that bring us to the end of the road here?

PROFESSOR GOODE: 1009.

CHAIRMAN BABCOCK: 1009, sorry.

PROFESSOR GOODE: There is no corresponding Federal rule.

CHAIRMAN BABCOCK: Bill, this gets into your question of a trial, what is a trial, because if there's a summary judgment motion that is relying on a foreign document, do you have to serve it 21 days before the hearing or 45?

MR. ORSINGER: That sounds like an exam question. Did you get that down, Professor?

PROFESSOR DORSANEO: 21.

CHAIRMAN BABCOCK: You think 21.

MR. ORSINGER: No.

MS. HOBBS: It seems like there's a statute.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: I think there's a statute, too, that relates to this, so I don't think Texas law is very clear on when you have to serve it because I feel like there's also a statute you have to comply with and it's in a different timetable.

CHAIRMAN BABCOCK: What about when you have a statute that says your hearing has to be set and a decision by the court has to be made within a very short period of time, like 30 days from the time of the hearing, and so you don't have 45 days to get the translation?

MS. HOBBS: Sounds like we need a good cause exception.

HONORABLE DAVID GAULTNEY: That's in (f), isn't it?

CHAIRMAN BABCOCK: What's that?

HONORABLE DAVID GAULTNEY: That's (f), time limits may be modified.

MR. ALEXANDER: Good cause exception.

HONORABLE TOM GRAY: Ask and you shall receive.

MR. ALEXANDER: That's a fitting blessing on which to end this discourse.

CHAIRMAN BABCOCK: Somebody is going to have to be on their game to figure out all of these conflicting

times. I guess that's why we get paid the big bucks, huh? All right. Any other comments about 1009? Carl.

MR. HAMILTON: Is there anything that tells us what a qualified translator is anywhere?

MS. HOBBS: There is a statute that talks -- it may get -- translators get certified by the State of Texas.

MR. HAMILTON: They are certified? That's the same.

HONORABLE ANA ESTEVEZ: They don't all have to be. They don't all have to be certified. There's different rules regarding different languages. If they're Spanish, it has to be a certified translator, but other ones don't necessarily have to be, depending on how far away you live from the first certified person.

MS. HOBBS: That's true.

MR. HAMILTON: I was just wondering why we say "certified" there if maybe they're not all certified.

HONORABLE STEPHEN YELENOSKY: The statute is for interpreters, certified interpreters.

MR. HAMILTON: Does that mean they may not be certified?

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I think there's a difference between the interpreter statute in

certain cases. This is translation, and maybe you know, but I didn't think that the statute covered translation.

MS. HOBBS: You're right. If you were just going to translate your document, you could get a translator, and it would be up to your opponent to challenge the translator's qualifications or whatnot.

HONORABLE STEPHEN YELENOSKY: Right. And that's what we're talking about here, right?

CHAIRMAN BABCOCK: Okay. David Jackson.

MR. JACKSON: There are a lot of areas in the state that don't have certified translators. Do we have a problem if there isn't --

CHAIRMAN BABCOCK: Can you speak up a little, David?

MR. JACKSON: I'm sorry?

CHAIRMAN BABCOCK: Will you speak up a little bit?

MR. JACKSON: I'm sorry. There are areas in the state that have a problem getting certified translators, so in those areas you might not be able to get a document translated if you required it to be by a certified translator.

HONORABLE STEPHEN YELENOSKY: But documents can be sent around easily.

CHAIRMAN BABCOCK: Okay. Yeah, Gene, is

that you? Yeah.

MR. STORIE: It is. It's sort of half-hearted me, but is there a difference in time between the Rule 203 that we talked about earlier, determining foreign law, which I think says at least 30 days before trial, and 1009(a), which says at least 45 days before trial when you serve a translation?

CHAIRMAN BABCOCK: What's the 30-day time limit you're talking about, Gene?

HONORABLE KENT SULLIVAN: 203.

MR. STORIE: In 203(b).

CHAIRMAN BABCOCK: Of the evidence rules?

MR. STORIE: Yes. Restyled.

MR. ORSINGER: About judicial notice.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: What I took away from our discussion on that was that Rule 203 has to do with translations of foreign laws, and this probably is translations of foreign language documents that are not laws.

MR. STORIE: Okay.

MR. ORSINGER: And I don't know that anyone else took that away, and I don't know if that's right or wrong, but it did make it -- it made it fit to me. You have a complicated, long timetable for contracts and

deeds, and you had a different one for a judge deciding what a statute means.

PROFESSOR GOODE: Right.

CHAIRMAN BABCOCK: Okay. Anything else on this rule? Well, it's not 5:00 yet, so I think we ought to just stay here until 5:00.

MR. ORSINGER: Why don't we take up substantive changes?

HONORABLE STEPHEN YELENOSKY: We can finish that by 5:00.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I want to thank this committee for doing such fine work.

CHAIRMAN BABCOCK: Unbelievable.

MR. ORSINGER: Yeah, what a job.

MR. LOW: And just say "Amen."

(Applause)

CHAIRMAN BABCOCK: When's our next meeting? Our next meeting is December 6th and 7th, and that's at TAB, back at TAB, which apparently will have parking by then but not today. By the way, do people prefer being here -- we can't get in here often -- or the other place?

MR. HAMILTON: Other place.

CHAIRMAN BABCOCK: The other place? Okay, yeah, they're pretty accommodating and seem --

MR. HAMILTON: The tables are bigger, too.

MR. LOW: Chairs are different.

HONORABLE STEPHEN YELENOSKY: And they have windows.

MS. SENNEFF: Make sure you validate your parking ticket if you parked over at that Wells Fargo garage.

CHAIRMAN BABCOCK: Are you going to tell them how to do that?

MS. SENNEFF: Write "G. Major, SCAC, 10-18-13."

MR. JACKSON: Once we've done that, that's validated?

MS. SENNEFF: Yeah, that's the validation part.

CHAIRMAN BABCOCK: So thank you, everybody. We're in recess until December.

(Adjourned)

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