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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

February 3, 2017

(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 3rd day of February,
2017, between the hours of 8:58 a.m. and 4:28 p.m., at the
Texas Association of Broadcasters, 502 East 11th Street,
Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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Discovery Rules - Expert Disclosure	28,007

Documents referenced in this session

17-02 Discovery Subcommittee Proposed Amendments
(January 2017)

17-03 2017 Evidence Rules Materials

17-04 Filing Documents Under Seal (October 24, 2016)

17-05 TRCP 76a (December 20, 2016)

17-06 Rule 9.2 (December 20, 2016)

17-07 Rule 193.4(a) and (b) (December 19, 2016)

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1
2 CHAIRMAN BABCOCK: Welcome, everybody. Glad
3 to have you here. We have one announcement, from me
4 anyway, if the professors will come to order. Professor
5 Albright, we won't be calling "professor" much longer
6 because she has --

7 PROFESSOR ALBRIGHT: I will always be
8 professor.

9 CHAIRMAN BABCOCK: You'll always be
10 professorial, but you may not be professor. She has
11 resigned from the law school and is going full-time with
12 Alexander Dubose, and we wish her well in that endeavor.

13 PROFESSOR DORSANEO: Students can't stop
14 calling you "professor."

15 CHAIRMAN BABCOCK: We can?

16 PROFESSOR DORSANEO: Even if you say,
17 "That's not my name."

18 CHAIRMAN BABCOCK: Okay. Well, then I won't
19 call you "professor" anymore. And so we'll move right
20 into the report from the Chief Justice. Justice Hecht.

21 CHIEF JUSTICE HECHT: I don't have much this
22 morning. The Court joined with the Court of Criminal
23 Appeals in some minor changes to rules affecting their
24 cases in the Rules of Appellate Procedure, and just for
25 people who are new, newer, like last five or ten years,

1 the two courts adopt each other's rules in the Texas Rules
2 of Evidence and the Rules of Appellate Procedure
3 because if we don't then the publishers publish the rules
4 separately, say, "This rule is adopted by the Supreme
5 Court" and "This rule is adopted by the Court of Criminal
6 Appeals." So even though the rules don't affect us, we
7 adopt their changes, so we did that.

8 We have decided to change course a little
9 bit on language access. This group talked about proposed
10 Rule of Civil Procedure 183 a couple of meetings ago, and
11 as we got to the end of the discussion it seemed like that
12 what we needed was different -- something different than a
13 rule, and so we've decided instead to approach the
14 regional presiding judges, Judge Evans and others, to work
15 up some standards of what a language access plan should
16 look like. Most of the big counties already have them,
17 and we would then require all of the counties -- all of
18 the courts in all of the counties to have such a plan, and
19 we would do that by order and under our administrative
20 authority rather than having a Rule of Civil Procedure.
21 It just doesn't seem to me to work very well in the Rules
22 of Civil Procedure, so we'll be working on that. The
23 issue is not gone. We've just kind of moved it over to
24 look at a different way.

25 And then the only other thing was I gave the

1 required State of the Judiciary address on Wednesday and
2 talked about a number of things that I hope the
3 Legislature will be looking at this session, and
4 importantly for us, electronic access. Office of Court
5 Administration and the Legislature will be looking at
6 access to electronically filed documents, which Justice
7 Boyd talked about at the last meeting, but also some
8 changes in bail reform and pretrial release in criminal
9 cases and fees and fines and costs in Class C
10 misdemeanors, which may require some Rules of Judicial
11 Administration to help implement those. So we might talk
12 about those even though they are criminal. If they need
13 implementation we would probably do it through the Rules
14 of Judicial Administration.

15 And I was pleased that the Legislature
16 joined us in honoring Judge Kocurek, Julie Kocurek, here
17 in Travis County, who was shot in November of 2015 and has
18 recovered and has stayed on the bench, even though she's
19 eligible to retire, because she wanted to make a statement
20 that you can't shoot judges and scare them off the bench.
21 So the Legislature was very generous in recognizing her,
22 and I think it was good for her and her family, and that's
23 all I've got. I'm happy to answer questions.

24 CHAIRMAN BABCOCK: She got a standing
25 ovation.

1 CHIEF JUSTICE HECHT: Yeah, like two
2 minutes, just went on and on and on, so and her -- let's
3 go off the record for a second, Dee Dee.

4 (Off the record)

5 CHAIRMAN BABCOCK: Any questions? The Chief
6 got a lot of very positive publicity about his comments.
7 Levi.

8 HONORABLE LEVI BENTON: The proposed statute
9 I read briefly. It's clear it protects or attempted to
10 protect current and former Federal judges, but it isn't as
11 clear whether the protection is intended to be available
12 to former state judges. If you would look at that and
13 perhaps call --

14 CHIEF JUSTICE HECHT: Sure.

15 HONORABLE LEVI BENTON: And if you read it
16 as I do, perhaps your calling the senator will have a
17 different impact than Levi Benton calling the senator.

18 CHAIRMAN BABCOCK: You think?

19 HONORABLE LEVI BENTON: Ha-ha.

20 CHIEF JUSTICE HECHT: Well, Senator
21 Zaffirini is very supportive, and I don't think we will
22 have any trouble with changes.

23 CHAIRMAN BABCOCK: Yeah. Yeah. Good.

24 HONORABLE STEPHEN YELENOSKY: We were off
25 the record, so we probably should start off the record.

1 CHAIRMAN BABCOCK: Yeah, we can go off the
2 record.

3 (Off the record.)

4 CHAIRMAN BABCOCK: Any other questions for
5 the Chief? All right. Justice Boyd, any thoughts,
6 comments?

7 HONORABLE JEFF BOYD: No. Actually, I will.
8 Let me -- the Chief mentioned this and -- but only because
9 you as well known lawyers and judges in your communities
10 may hear about it. One of the issues we're dealing with,
11 as I reported last meeting, is the new step in making all
12 of the e-filings accessible online, and the process that
13 we've been going through, the JCIT has made
14 recommendations. Did you go into this a little bit when I
15 stepped out just now?

16 CHAIRMAN BABCOCK: No.

17 HONORABLE JEFF BOYD: So JCIT recommended a
18 three-step phase-in for that e-access program. First for
19 all judges, and then second for all attorneys on the case
20 of which they're attorney of record, and then thirdly, a
21 registered user access, a more broad access, and so we
22 charged JCIT with coming back with recommendations on
23 various issues that all of that plan raises, and they've
24 come back at their last meeting a couple of weeks ago and
25 recommended that we go ahead and roll out for judges and

1 for attorneys on the case now, but hold off because they
2 want to keep vetting some issues like how you charge fees
3 and without the county losing money that they're used to
4 getting, how you deal with redacting sensitive
5 information. There are legitimate issues that are not
6 insurmountable but need to be carefully resolved, and so
7 they said give us until March 3rd to come back, having
8 tried to tie up a few loose ends on those issues. So
9 that's the status of that. We are not yet rolling out
10 broader registered user access and instead are waiting on
11 JCIT to come back with their specific recommendations on
12 the issues.

13 Meanwhile, several of the clerks and then
14 ultimately the clerks association, Association of District
15 and County Clerks, have just really decided they don't
16 want this at all, and so they've really activated.
17 They've got some 75 different county commissioners courts
18 to pass a resolution opposing it. They've now got Travis
19 -- a representative of Travis party to file a bill that
20 would prohibit anyone other than a clerk charging anything
21 for access to a court document, which I bet Westlaw and
22 Lexis will start getting involved in at some point, so and
23 we've started having conversations with them. OCA has,
24 and it appears as if there's just some real misinformation
25 out there, but I give you that information just because

1 you may be approached by your clerk or by others. 98
2 point something percent of the lawyers surveyed late last
3 year want this, and probably most of y'all would like to
4 have it, too, and so we think every issue that they raise
5 has -- many of their issues are based on incorrect
6 information and where OCA is in the process of addressing
7 those, but if you hear anything or need information to
8 respond on this, just reach out to me and let me know.
9 Thank you.

10 CHAIRMAN BABCOCK: Who at OCA is the point
11 person?

12 HONORABLE JEFF BOYD: Well, David Slayton is
13 kind of the key point person on communicating on the
14 process where we are now. Another great contact is
15 Justice Simmons, who chairs JCIT and is very active in it.
16 Of course, we on the Court are really choosing to stay
17 above all of that fray, you know. We're exploring and
18 looking at it and then OCA and JCIT are kind of helping
19 communicate.

20 CHAIRMAN BABCOCK: Okay. Great. Thank you.
21 Yeah, Justice Gray.

22 HONORABLE TOM GRAY: May I ask a related
23 question?

24 CHAIRMAN BABCOCK: Absolutely.

25 HONORABLE TOM GRAY: As I know Nathan is

1 aware, our court has been reluctant to post anything to
2 TAMES and that we, the court, did not create for liability
3 related reasons because if the court is involved in the
4 discretionary decision there's some question of whether or
5 not immunity applies to an improper release of
6 information. Can we anticipate -- and I did not realize
7 that the potential was there that the clerks at the trial
8 court level were going to be in opposition to this, but
9 for the protection of the appellate court judges and our
10 clerks and their staff, can we anticipate a rule that
11 requires us to post those documents? And in particular
12 I'm thinking of the portal for the attorneys, which is the
13 first hurdle we're going to be looking at, because our
14 court feels very uncomfortable with a discretionary
15 adoption of the portal and the posting without a mandate
16 to do it, as long as it's our discretion.

17 So I'm not asking for a response necessarily
18 to that, but I needed to make sure that it was
19 communicated in this context because it's a different
20 reason for a pushback from the clerk and the court than is
21 the county clerks' pushback that is financial related for
22 their revenue stream.

23 HONORABLE JEFF BOYD: Well, in their
24 defense, it's not only financial. They have other
25 concerns, including the one you raised, and I think two

1 sort of preliminary responses are, number one, the basis
2 for your concern is one of the issues that we have JCIT
3 very thoroughly exploring to figure out how to eliminate
4 that concern. Redaction, auto redaction, certain kinds of
5 pleadings in certain cases don't get in the database to
6 which there would be public access. There are various
7 ways they're looking at alleviating that concern.

8 HONORABLE TOM GRAY: If we get to the rules
9 today, I've got a proposal in one of those sealed --

10 HONORABLE JEFF BOYD: Right.

11 HONORABLE TOM GRAY: -- deals where it
12 actually, but I'm sorry. I interrupted you.

13 HONORABLE JEFF BOYD: And the other -- the
14 second response is, yeah, the system as it's going to --
15 as you probably all know, right now it's currently filed
16 through a electronic filing vendor that the lawyer
17 contracts with and then it goes through the state portal
18 that OCA through the state vendor maintains, and that
19 would be the basis of the access point, not the individual
20 courts and clerks, so you would not be putting it out. It
21 would be going out through the state database, not through
22 each individual county or court database.

23 HONORABLE TOM GRAY: We still have a toggle,
24 however, of whether or not it gets put into TAMES and they
25 reach -- can reach into our data and get it, and that's

1 the toggle point at which we're concerned about liability,
2 because --

3 HONORABLE JEFF BOYD: Right.

4 HONORABLE TOM GRAY: I know y'all are both
5 aware, OCA in just a simple coding change inadvertently
6 published all of the comments of the justices on the
7 courts of appeals out on the web. It was available for
8 everybody that was looking at the cases for a period of
9 time several months ago, and so, you know, we don't want
10 liability in that situation.

11 HONORABLE JEFF BOYD: Right.

12 HONORABLE TOM GRAY: And there's got to be
13 some way that compels us to post it. Then we're covered.
14 It's not discretionary. I know Nathan has been concerned
15 about why we are not on the wagon with everybody else,
16 so --

17 HONORABLE JEFF BOYD: The issues you raised
18 are the ones we're looking at.

19 CHAIRMAN BABCOCK: Thank you. Any other
20 questions? All right. We are again honored to have Judge
21 Newell of the Court of Criminal Appeals with us, and,
22 Judge, is there anything that you would like to talk to us
23 about with respect to your Court or anything else?

24 HONORABLE DAVID NEWELL: Well, I guess I
25 could take the opportunity just to say, I mean, there has

1 been some discussion about moving towards mandatory
2 e-filing for criminal cases. We have -- our rules
3 committee is going to be looking at proposed mandatory
4 rules, and that's coming up on Wednesday, and so hopefully
5 we'll have some proposed rules that we can get into the
6 Bar Journal for the April issue. So that's where we're
7 at.

8 CHAIRMAN BABCOCK: Okay. Perfect. Thank
9 you. All right. Well, let's move to the agenda, and
10 first on the agenda is the discovery rules, and the plan
11 is to talk about these until lunchtime. We will not -- we
12 will not finish with these rules today at this meeting,
13 and we will talk about them again at our April meeting.
14 I've had some inquiry from both the Attorney General's
15 office and the Governor's office asking for the
16 opportunity to weigh in on the discovery rules. They were
17 worried that we were going to, you know, slap them out
18 today, and they obviously don't know how we work. I
19 assured them that there would be careful deliberation over
20 a number of meetings before we finally were ready to
21 recommend something to the Court, and so they seemed
22 relieved by -- relieved by that. So without further
23 adieu, the hard-working chair of the subcommittee, Bobby
24 Meadows.

25 MR. MEADOWS: Thank you, Mr. Chairman. The

1 first -- before we jump into this, let me just again thank
2 Kayla Carrick. She has continued to work closely with me
3 and our discovery subcommittee in moving this project
4 forward, and so I just want to express my gratitude for
5 some really outstanding work. The fact that we can't
6 finish today and the fact that we only have a limited
7 amount of time presents us with some choices about how to
8 spend the time. You will remember in September we began a
9 march through our recommendations on discovery rule
10 changes, but we didn't finish. We got up to Rule 194. I
11 think it's fair to say that the full committee agreed that
12 we should have mandatory disclosures for all the cases,
13 all parties, all levels of cases, but we didn't talk about
14 the content of Rule 194. So that's something we could
15 make good use of our time doing today.

16 There's some other issues that we have not
17 addressed. They were in my letter that outlined basically
18 where we are in our work. We could talk about some of the
19 expert issues or changes that are associated with the
20 expert rules, objections, and so forth. The other course
21 we could take is we could go back over what we discussed
22 in September and examine how we responded to the remarks
23 and comments we got from the full committee in making
24 those changes in the rules, but given the fact that we're
25 probably not going to be able to even conclude that with

1 any kind of finality, it's my fault, although we will be
2 directed by the Chair, that we spend some time talking
3 about issues that would be informative to the discovery
4 subcommittee that we haven't addressed in this full
5 committee; and for example, the content of Rule 194.

6 So, as I say, it's -- if there's a -- I've
7 discussed with the other members of the discovery
8 subcommittee who are here today. We're prepared to go
9 either direction, but I think that might be the best use
10 of our time.

11 CHAIRMAN BABCOCK: Yeah. I think so, too,
12 so let's plow into the new ground before we replot the old
13 ground.

14 MR. MEADOWS: So Rule 194, as I said, I
15 believe there was an agreement and in this committee in
16 September that we would impose mandatory disclosures on
17 all parties in all cases and that they would be due 30
18 days after the filing of the defendant's answer, so I
19 suppose the next question to focus our attention is what
20 those mandatory disclosures are. They essentially include
21 all of the initial requests for disclosure, plus parts
22 that we've harvested from the Federal rules, so maybe we
23 just begin looking at them in terms of Rule 192 --
24 194.2(b) content; and I'll just note, we can just, you
25 know -- Chip, if you like, we can go one by one and see if

1 there's discussion or any reason for --

2 CHAIRMAN BABCOCK: Why don't you just give
3 us an overview and then we'll go back?

4 MR. MEADOWS: Well, I think the first thing
5 we should look at is basically -- is paragraph --
6 subparagraph (4), the amount of calculated economic
7 damages because the discovery subcommittee in that
8 instance elected not to follow the Federal rule, which is
9 much more descriptive and detailed in terms of what is
10 required in disclosure about a damage case. I think the
11 first -- the first few items are noncontroversial, part of
12 our existing rules. So in my view, we really only run
13 into an issue in terms of if we've gotten it right in
14 terms of what the discovery subcommittee wants to do with
15 regard to the amount -- calling for the amount in
16 calculation of damages. You will see in the materials
17 that we have provided you -- and you'll see this
18 throughout our proposal in a right-hand column, the
19 thinking behind what we did, some alternatives to what we
20 considered, and the parallel Federal rules that we
21 borrowed from or did not; and so in this instance you can
22 see and read for yourself what the Federal rules, Rule
23 26(a)(1)(A), would call for.

24 CHAIRMAN BABCOCK: Okay. Bobby, on this
25 issue, did the subcommittee share any experiences about

1 how the -- how our rule is working in practice today?

2 MR. MEADOWS: I don't recall any -- I mean,
3 Jane and Tracy are here and probably can speak to that
4 from their own recollection, but I don't remember any real
5 discussion around it other than the fact that everyone
6 felt that the way -- the simplicity around the way we
7 called for it worked just fine.

8 CHAIRMAN BABCOCK: Okay. Anybody -- anybody
9 on the committee -- my experience, actually in both state
10 and Federal, is that disclosure is nine times out of ten
11 from the plaintiff very inadequate; and it's always, "Oh,
12 we'll let you know when we know," and "We'll let you know
13 when we have expert testimony," and "An expert is going to
14 do that" and, you know, "Let's wait until then"; and you
15 get very little information early on in the case. So that
16 may be all right, but Tom.

17 MR. RINEY: My experience is the same as
18 yours, and it depends upon the trial judge. Oftentimes
19 you're right. It's kind of like hide the ball. "Well,
20 it's in our expert's report" or "It's in previous
21 documents we've provided" or so forth; and unless you have
22 a strong judge who is willing to say, "No, you've got to
23 set it out or you don't put on evidence of it," it really
24 becomes sort of meaningless; and I think there should be a
25 little more direction.

1 CHAIRMAN BABCOCK: Okay. Anybody else on
2 that? Kennon.

3 MS. WOOTEN: I agree that it's oftentimes
4 very short of detail, and you have an obligation, I think,
5 to try to resolve cases early if you can. It's difficult
6 to engage in meaningful settlement discussions without
7 knowing the extent of your exposure, so I think increasing
8 the required disclosure could be beneficial.

9 CHAIRMAN BABCOCK: Yeah, it seems to me it's
10 a matter of timing, and there probably are some cases that
11 the plaintiff or the party doesn't know, really doesn't
12 know, and needs expert analysis; and so unless you can
13 have an expert hired ahead of time before you file a
14 lawsuit who does it and is ready to go. Frank, what's
15 your -- you're smirking.

16 MR. GILSTRAP: Well, I mean, I guess this
17 goes back to the decision apparently we made last time to
18 require mandatory disclosures. I mean, there's huge
19 amounts of cases that the suit is filed and it settles.

20 CHAIRMAN BABCOCK: Right.

21 MR. GILSTRAP: And without -- or suit is
22 filed and it mediates, the suit is filed and it goes to
23 arbitration. We're talking about -- we heard last time
24 that they were going to -- the Governor was going to maybe
25 suggest we have a 12(b)(6) rule. Well, 12(b)(6), you

1 know, all of this where the case is either some -- or
2 litigated without the need of any of this stuff. So, you
3 know, do we really want to have this comprehensive
4 disclosure for every single suit?

5 CHAIRMAN BABCOCK: Uh-huh. Yeah. Levi.

6 HONORABLE LEVI BENTON: I think the first
7 wave of disclosures on both sides of the docket, not just
8 the plaintiff's, are very poor generally; and I think what
9 might help isn't necessarily the changes in the rule, but
10 commentary in the rules about the consequences or the
11 remedies the court might use to encourage getting the
12 disclosures to a sufficient point earlier rather than
13 later. It's not just the plaintiffs. It's defendants.
14 They do the same thing with their first wave, and it's not
15 until the eve of trial that they really clean them up, and
16 you know, we just need commentary to tell those trial
17 judges, "You shouldn't take this from Buddy Low. You need
18 to tell him 'Get with the program.'"

19 CHAIRMAN BABCOCK: The serial violator of
20 the rule, but Buddy.

21 MR. LOW: Frank, let me be sure I understand
22 what you're saying. Chapter 27 anti-SLAPP says there
23 shall be no discovery. It's basically a 12(b)(6) in those
24 kind of cases. So what you're saying, if we have a
25 defense like a 12(b)(6) then that should delay discovery.

1 You should have a provision similar to what you have in
2 Chapter 27 anti-SLAPP. Is that what you're saying?

3 MR. GILSTRAP: They deal with this in the
4 proposed rules by saying the parties can agree or you can
5 get a court order, but the default position is you've got
6 to make the disclosure.

7 MR. LOW: But what I'm saying, under
8 chapter -- if you filed an answer, you come within an --
9 you know, as anti-SLAPP, and you come within Chapter 27,
10 and it's off. If you get any discovery you have to go to
11 the judge and show why you need it, so I guess until we
12 have a 12(b)(6) we can't deal with it, but we do have to
13 recognize there are other statutes like Chapter 27 that
14 deal with discovery.

15 MR. GILSTRAP: Which would control over the
16 rule.

17 MR. LOW: That's right.

18 CHAIRMAN BABCOCK: Well, we do have a
19 12(b)(6). We have a motion to dismiss, Rule 91.

20 MS. WOOTEN: 91a.

21 CHAIRMAN BABCOCK: 91a. It's just nobody
22 uses it.

23 MR. LOW: Yeah.

24 CHAIRMAN BABCOCK: Okay.

25 MR. MEADOWS: So on this point the -- so

1 hearing the discussion, perhaps the argument could be made
2 that it's an empty requirement because people are just
3 going to -- parties are going to avoid it up front because
4 they're not in a position to declare or they don't want
5 to, but we didn't see it as part of our task to make a
6 judgment about that; and we did not see that adopting the
7 Federal rule, which simply just calls for more, would fix
8 the problem.

9 CHAIRMAN BABCOCK: Yeah. Yeah. I think
10 you're right. The issue I'm raising is a matter of timing
11 and not -- and I think under the current rule -- Judge
12 Evans, Judge Wallace, may be able to enlighten us, but
13 under the current rule it's up for -- up to one of the
14 parties to come into court and say, "This disclosure is
15 inadequate, Judge, make them" --

16 MR. MEADOWS: Right.

17 CHAIRMAN BABCOCK: "Make them tell me. Make
18 them tell me." Judge Evans.

19 HONORABLE DAVID EVANS: If the nexus between
20 the request for disclosure, response for request for
21 disclosure, and the application of the exclusionary rule
22 were stronger, compliance with the intent of request for
23 disclosure will improve. When I receive a motion to --
24 for more adequate response to the request for disclosure,
25 I explain to the parties that's the first document that

1 I'm going to put in my trial notebook at trial, and it's
2 the first document I'm going to read to rule on an
3 exclusionary objection that it wasn't revealed in
4 discovery, and the second one is to go down through the
5 request for productions and the response and the
6 interrogatories, and I'm not interested in reading e-mails
7 with a jury in the box.

8 The first reaction is to hide the ball on
9 the first request for disclosure.

10 (phone ringing)

11 HONORABLE DAVID EVANS: It's not me. I'm
12 not going off. But it's the trial judge in administering
13 the trial, if that's the primary document that they can
14 use, then that helps them rule on the request for
15 disclosure, and it consolidates many of the issues that
16 come up. Expert reports, damages, the whole thing, and
17 people with knowledge of relevant facts and all of that;
18 and if there's a potential cliff they're going to fall
19 off, generally those request for disclosures immediately
20 improve after that discussion; and they become better for
21 the parties; and there is just no nexus in the rule that
22 says that's the primary document the court relies on. I
23 don't know that it should say that, but there's got to be
24 a consequence that's real.

25 CHAIRMAN BABCOCK: You think it should be in

1 the rule?

2 HONORABLE DAVID EVANS: Here's the -- I
3 would prefer -- I would prefer something be in the rule.
4 The most frustrating thing in the middle of a trial is
5 somebody gets up, say, "They never told us this during
6 discovery," got 12 people in the box, got a witness on the
7 stand. "Well, show me."

8 "Yes, we did." You're not going to have a
9 swearing match between two lawyers, and you don't want to
10 send the jury out of the room, and -- but if it's in the
11 request for disclosure, responses to the request for
12 disclosures, and you can show -- or a few documents.
13 Exhibit list always gets rid of a lot of those issues
14 early on in a trial management by having an adequate
15 exhibit list because you sort those out in pretrial as to
16 whether they were turned over or not. That would be my
17 theory about it.

18 CHAIRMAN BABCOCK: Hayes.

19 MR. FULLER: You've asked if it should be in
20 the rule. If you are looking in the rules, the discovery
21 rules, for the remedy for when someone fails to respond to
22 request for disclosure, you really won't find it
23 expressed, and yet that is the only remedy, exclusion.

24 HONORABLE DAVID EVANS: Right.

25 MR. FULLER: I mean, if you look at 215, it

1 tells you what happens if someone doesn't answer an
2 interrogatory, someone doesn't respond to request for
3 production, someone doesn't answer a question in response
4 to a deposition. I mean, there are very specific remedies
5 for particular failures to respond to discovery. Response
6 to request for disclosure is not there, but when you dig
7 through all of those rules that's it. Yeah.

8 HONORABLE DAVID EVANS: It's a lot easier to
9 read the request for -- response to request for disclosure
10 on the expert witness and what they're going to testify
11 about and the opinions they're going to give than it is to
12 sort through a deposition and see if it was adequate, how
13 that works.

14 MR. MEADOWS: We did make a change last time
15 under Rule 193.5 that you cannot use material or
16 information at a hearing or trial that you did not
17 disclose.

18 CHAIRMAN BABCOCK: Okay.

19 MR. MEADOWS: So 193.5(c). That's the Tracy
20 Christopher addition.

21 CHAIRMAN BABCOCK: Professor Dorsaneo. Or
22 Bill, as he prefers to be called. Professor Dorsaneo.

23 PROFESSOR DORSANEO: I just wanted to say,
24 on 215 it should have guidance with respect to Rule 194.
25 The reason it doesn't is a result of the history of the

1 process, is that 215 did not get changed when the last big
2 set of developments occurred. Maybe it wasn't ready to be
3 changed or people couldn't -- could only do the rules up
4 to Rule 215. I think that's an oversight that does need
5 to be corrected, and it's one of the things that needs to
6 be on the list to be corrected.

7 CHAIRMAN BABCOCK: Okay.

8 PROFESSOR HOFFMAN: Chip?

9 CHAIRMAN BABCOCK: Yeah, Lonny. Professor
10 Hoffman. Which do you want to be called, Lonny or
11 Professor Hoffman?

12 PROFESSOR HOFFMAN: Professor Dorsaneo,
13 actually.

14 CHAIRMAN BABCOCK: The younger.

15 PROFESSOR HOFFMAN: So Bill's right that --
16 sorry, Professor Dorsaneo is right that 215 wasn't
17 specifically changed, but 215.3, I've always thought is
18 sufficiently broad. "If the Court finds a party is
19 abusing the discovery process in seeking, making, or
20 resisting discovery," and then it goes on, there are
21 consequences. So that plus the change that Bobby points
22 out, the new addition in 193.5(c), seems to me to be
23 plenty of ammunition in the rule for consequences when you
24 don't comply with the 194 mandatory disclosures.

25 CHAIRMAN BABCOCK: Okay. Yeah, Peter, and

1 then we'll go to Justice Brown.

2 MR. KELLY: If I could make a change to sub
3 (4) it would be to make clear that the defendant has to
4 make disclosures as well as to what their theory of the
5 plaintiff's damages are. A lot of times you have cases
6 where in PI the big fight is going to be what is the
7 extent of the life care plan, or in commercial cases is it
8 lost profits versus benefit of the bargain; but you look
9 at the defendant's disclosures; and they say, "We're not
10 claiming any damages, and we're not saying anything." I
11 think it would be worthwhile if the defendant were to come
12 forward with their theory, you know, and they can put in
13 there whatever exculpatory language, "and we're not
14 conceding that there are any damages, but if there are,
15 this is our theory of how they should be calculated,"
16 because the defendants almost never have to do that in
17 disclosure. You have to look at what the expert testimony
18 disclosures are going to be, and they're not always clear
19 on what the theory of the plaintiff's damages are.

20 CHAIRMAN BABCOCK: Yeah, good point.
21 Justice Brown.

22 HONORABLE HARVEY BROWN: I was just going to
23 point out that when we get to (c) that Rule 215 we have a
24 suggestion to add some language about Rule 194. That's on
25 page 68 of the handout.

1 CHAIRMAN BABCOCK: Okay. Great. Professor
2 Dorsaneo, then Justice Christopher.

3 MR. MEADOWS: Side bar.

4 CHAIRMAN BABCOCK: Bill, do you want to say
5 anything?

6 PROFESSOR DORSANEO: No. I mean, the only
7 thing I --

8 PROFESSOR ALBRIGHT: He just couldn't hear.

9 PROFESSOR DORSANEO: The only one brief
10 thing I'll say is that 215.3 provision is itself
11 historically a bit of an odd development. That's the work
12 I think of Justice Kilgarlin from many years ago without
13 benefit of this committee's advice, and we do have just a
14 general statement that you need to behave in not only
15 resisting discovery, but in making discovery. It's not
16 just tripping. It's a pushing as well, to use the
17 academic vernacular, but it would be better if we had
18 something clearer that people could follow rather than
19 just, "You don't behave here then really bad things can
20 happen."

21 CHAIRMAN BABCOCK: Yeah. Justice
22 Christopher.

23 HONORABLE TRACY CHRISTOPHER: Well, two
24 points. First, we're trying to write a rule that applies
25 to all cases, all right, and a lot of the people in this

1 room only deal with the top, top, top civil cases that
2 have a lot of experts and a lot of concerns and a lot of,
3 you know, work that needs to be done. So what we
4 envisioned was with the level three conference, you-all
5 would make these kind of rules. So you would have an
6 initial disclosure. Then you might want to say, "Okay,
7 in, you know, six months we're going to have another level
8 of disclosure," so that the bigger cases can be handled on
9 a case by case basis.

10 For the vast majority of cases, this works.
11 You know, the plaintiff says, "See my medical bills," and
12 "I lost wages in the amount of \$2,000, because I was off
13 work for, you know, three weeks." So I think we have to
14 keep that in mind when we're talking about putting more
15 and more stuff in the rule that is not necessary for 95
16 percent of the cases. Plus I'd also like to point out we
17 did add 194.2, pretrial disclosures for everybody, which
18 is a 30-day before trial requirement where you've got to
19 get all of your documents, you've got to tell who your
20 witnesses are, all of those sort of things, so I think
21 that will sort of fill in the gap that people are talking
22 about, but I would really urge us to think that with these
23 high level cases that most of the people in this, you
24 know, room deal with, we should handle that through the
25 level three scheduling conference, and you can put in as

1 many, you know, requirements as you need.

2 PROFESSOR HOFFMAN: Tracy meant 194.4 when
3 she was talking about the 30 days before trial.

4 HONORABLE TRACY CHRISTOPHER: Oh, I'm sorry.

5 PROFESSOR HOFFMAN: And amen to what Tracy
6 said.

7 CHAIRMAN BABCOCK: Yep. Got it. Judge
8 Wallace, I skipped over you. Did you have anything you
9 wanted to say about this?

10 HONORABLE R. H. WALLACE: No, sir.

11 CHAIRMAN BABCOCK: Okay. Richard Orsinger.

12 MR. ORSINGER: The family law perspective is
13 that we have a lot of form book driven practice in family
14 law because the family law practice manual published by
15 the State Bar is very widespread. The answers you get to
16 these request for disclosures tend to be very general and
17 look a lot like your pleadings, and the Family Code
18 requires that you don't plead facts in your divorce
19 petition. So the disclosures are pretty general and
20 pretty useless except with regard to expert disclosures;
21 and if you don't have expert reports, which are not
22 automatically required, then the only thing you're going
23 to know about the other side's experts is what their
24 response to request for disclosure, unless you take a
25 deposition; and the deposition practice in family law has

1 dropped off a lot in recent years. I mean, I take maybe
2 one deposition a year or two depositions a year, and we
3 just get the discovery in a different way. From the
4 family law practice, which may be more than half the
5 docket in some courts, may be more than 80 percent of the
6 docket or a hundred percent of the docket in the family
7 law courts, more useful than detailed general disclosures
8 would be disclosures that are oriented toward the family
9 law kinds of issues. If you have kids, you need to state
10 what you want in terms of possession, primary residence,
11 or relocation. If you have child support, you need to put
12 down your net resources. If it's a property case, you
13 have to identify separate or community. That would be
14 very helpful for us, not so much more detail in the
15 general obligation.

16 The other thing I wanted to say -- just a
17 minute, Tracy. The other thing I wanted to say was if we
18 make these disclosure requirements automatic, let's be
19 careful that we don't trip up the pro se litigants,
20 because they -- if they are a respondent, even a
21 petitioner, and they don't have a set of rules and this
22 discovery obligation goes into force without notice to
23 them, they won't make the necessary disclosures, and then
24 when they get to trial someone can say they didn't respond
25 to the automatic disclosures, so they can't call any

1 witnesses. Now, the Constitution and an opinion that
2 Justice Hecht wrote as well as now in the rules the
3 parties have a constitutional right to testify even if
4 they don't disclose themselves, which was a very good
5 development, because there were periods of time where
6 people couldn't testify in their own case. But at any
7 rate, I would suggest if we're going to have automatic
8 disclosure that's going to trigger preclusion that we put
9 notice of it in the divorce pleadings or in the citation
10 that's served or something, so that there is some
11 assurance that these self-represented litigants will know
12 that they have a duty and, therefore, will comply with it
13 and then call witnesses.

14 CHAIRMAN BABCOCK: Are you suggesting that
15 there ought to be a subsection in the general discovery
16 rules that addresses family law cases?

17 MR. ORSINGER: Yes. And I want to be very
18 careful about that. There was a period of time when we
19 explored med mal, family law, and some other things, and I
20 was on the committee of the family law section that wrote
21 up some requests for disclosure or some automatic
22 disclosures of documents and whatnot, and we realized that
23 there's a balancing act that goes on in a family law case.
24 We want to make it simple and streamlined and keep the
25 fees down by requiring essential information to be

1 automatically produced, but we don't want to overregulate
2 cases because some people don't want to have any discovery
3 at all. Some people file a divorce without the intention
4 of getting divorced. They just use the divorce petition
5 to get their husband to stop seeing his girlfriend or
6 whatever. I mean, there's a lot of stuff that goes on in
7 family law cases, so I think it would be -- my personal
8 preference would be to ask the family law council to come
9 forward with some modernized suggestions.

10 This came up a few months ago. I dug up my
11 work from the 1990's, and I forwarded it to the family law
12 council to start. They haven't actually put the committee
13 together because we don't have a green light, but they
14 will do it if we do, and I think it would be good
15 especially for family law for us to have something that's
16 more tailored to the needs and also the financial
17 abilities of the litigants.

18 CHAIRMAN BABCOCK: Okay. Judge Christopher,
19 did you have your hand up?

20 HONORABLE TRACY CHRISTOPHER: Yes. We have
21 a placeholder for that on page 25 of our draft, because we
22 discussed that issue back in 2001 when the discovery rules
23 were new, and the rule never got amended, and we did think
24 it was a good idea on the discovery subcommittee that
25 there would be a separate set of rules for disclosures for

1 family law cases. We also discussed the problems with pro
2 ses not knowing the rules; and, you know, that's a
3 perennial problem, whether it's an automatic disclosure or
4 a request for disclosure; and to the extent that the Court
5 thinks that some sort of a notice provision, separate
6 notice provision, would be useful, you know, we're for
7 that. I'm not sure where we would put it, but I mean, it
8 was an issue that we discussed, and if people think we
9 should have it, we'll work on it, figure out where it
10 needs to be.

11 CHAIRMAN BABCOCK: Great. Professor
12 Albright.

13 PROFESSOR ALBRIGHT: Yeah, I was going to
14 address the issue of pro se parties or, you know, other
15 times -- you know, I don't think it's unique to family
16 law. I think there are many cases where there are pro se
17 parties who don't know they have an obligation or there
18 are lawyers that ignore their obligation to the detriment
19 of their client. I think we can talk about this when we
20 get to Rule 215. One issue that is always an issue with
21 sanctions is whether you're going to require a motion to
22 compel before you have a motion for sanctions that imposes
23 significant, severe sanctions, such as excluding important
24 evidence.

25 So one way that can solve your problem,

1 Richard, is before a court can impose the exclusion
2 sanction, it could require a motion to compel that gives
3 them notice that they haven't responded and only then can
4 you sanction them. In Texas right now we do not require a
5 motion to compel, because way back in the Eighties when I
6 first started practicing law I remember you never got any
7 response to anything until you filed a motion to compel.
8 So it was just, you know, oh, there's no need to respond
9 until they file their motion and then we'll get busy. But
10 I think in the way that 215 is revised I think that's
11 taken care of. We would also say if there is a motion to
12 compel or if the discovery is provided after -- I guess if
13 they violated an order to compel or if the discovery is
14 provided after the motion is filed, you can get at least
15 attorney's fees for filing that motion. So there is some
16 sort of sanction for having to file that motion because
17 they didn't comply in the first place, but we can deal
18 with that when we get to Rule 215 also.

19 CHAIRMAN BABCOCK: Okay. Yeah, Judge
20 Peeples.

21 HONORABLE DAVID PEEPLES: You know, Tracy
22 mentioned a few minutes ago the difference, and I think
23 she said the five percent that are big, big dollar cases,
24 and then other cases, and Richard Orsinger said pretty
25 much the same thing in family law. There are some of them

1 that are the kinds he handles and then there are the pro
2 ses and the others. I will say that one of the hardest,
3 most gut-wrenching decisions a trial judge has to make is
4 to exclude testimony or exclude a witness, especially in a
5 nonjury case where -- but in any case, just because
6 somebody didn't follow the rules, and I think in family
7 law especially I would like for us to look at other ways
8 than sanctions in order to make people follow the rules,
9 and let me just -- a thought that occurred to me.

10 In an ordinary civil lawsuit, the parties
11 are usually strangers to each other. Now, it might be a
12 corporate situation where they contracted and so forth,
13 but in an injury case, you know, they didn't know each
14 other before the lawsuit, and the danger of surprise is
15 great in a case like that. But in family law, they're not
16 strangers. They know each other, by definition, and so --
17 and most of it is nonjury, and so the danger of being
18 surprised by testimony, it seems to me, is -- it happens,
19 but it's very rare, and I mean, so when someone can't call
20 a grandmother because they didn't disclose her, goodness,
21 there's no surprise there, and what you lose by excluding
22 testimony as a sanction is huge.

23 So I would like for us to look for creative
24 ways to get people to say, you know, "I'm going to call
25 three witnesses, and here's who they are," and that kind

1 of thing, but to sanction people with the ultimate
2 sanction, which is exclusion of the testimony, in family
3 law, the lower level, which is most of it, I would like
4 for us to get away from that.

5 CHAIRMAN BABCOCK: Great point. Yeah,
6 Kennon.

7 MS. WOOTEN: On that point, I think existing
8 Rule 193.6 addresses what might happen if you don't
9 respond properly or amend or supplement as you should, and
10 it addresses considerations of unfair surprise or
11 prejudice, and that seems like a less Draconian way, as
12 Judge Peebles was saying, to address the problem.

13 CHAIRMAN BABCOCK: Yes, Professor Carlson.

14 PROFESSOR CARLSON: I think if a pro se
15 didn't answer any request for disclosures and the trial
16 court was going to rule you can't put on any proof except
17 your party can testify, in my mind that is akin to the
18 case where a pro se failed to answer request for
19 admissions and the court deemed them all admitted, and the
20 Texas Supreme Court said, "Look, this was inadvertent, and
21 you have to look at that preclusive sanction under our due
22 process sanction body of law." So it seems to me, David,
23 there would be an ability of the trial court to -- and
24 maybe even obligation to allow the testimony.

25 CHAIRMAN BABCOCK: Okay. Professor

1 Dorsaneo.

2 PROFESSOR DORSANEO: Well, getting back to
3 this -- the initial thing that I heard people say is that
4 there's kind of stonewalling or a lack of cooperation in
5 reading the request for disclosure, particularly related
6 to 3(b)(3), the legal theory, maybe not that, and in
7 general the factual basis, et cetera. Now, I agree that
8 probably the best place to deal with these kinds of
9 problems is Rule 215, by orders to compel or the like,
10 but -- but I wonder if we should take a look at the legal
11 theories and in general the factual bases. You know, I
12 think, my recollection, which is perhaps flawed, is that
13 Richard years ago came up with this approach "in general,"
14 the factual bases, but I wonder if "in general" has been
15 interpreted to mean very generally and not very clearly
16 with respect to notice. Okay.

17 And in addition to that, I realize everybody
18 knows that this parenthetical is true, "The respondent
19 party need not marshal all evidence that may be offered at
20 trial," and is that being used as a device to avoid fair
21 compliance with this request for disclosure in the context
22 of no provision in Rule 215 to deal with the problem? And
23 I wonder if the "in general" should go or at least if "the
24 responding party need not marshal all evidence" is more
25 harmful than helpful. Huh? That's the difficulty, is we

1 don't know what "factual" means. Okay. Because we've
2 never been exactly sure what's factual enough in a great
3 many contexts.

4 CHAIRMAN BABCOCK: Well, I don't know if
5 people are using that as a device, but I know I've always
6 read that language to say, you know, you don't have to put
7 down in your disclosures, "Mr. Smith is going to testify
8 and he's going to say X, Y, and Z, and he's going to rely
9 on documents 1, 2, 3, 4, and 5, and Mr. Jones is going to
10 say this." I've always taken that as an indication that
11 you give a general factual summary of what -- of what
12 you're hoping to prove in the case and not -- you know,
13 not to have a 20-page document marshaling everything
14 you're going to do at trial.

15 PROFESSOR DORSANEO: Even that --

16 CHAIRMAN BABCOCK: I don't know if that's
17 right or not.

18 PROFESSOR DORSANEO: The explanation that
19 you just gave for what the parenthetical ought to mean
20 might be better than what the parenthetical now currently
21 says. "Without disclosing the identity and substance of
22 the testimony of individual witnesses."

23 CHAIRMAN BABCOCK: Didn't the marshaling
24 language come in, Bill, because way back when, when we
25 first did these, because the plaintiff's bar was worried

1 that -- just what I said, that they would have to, you
2 know, put on every witness and everything? I mean, that
3 marshaling language came up from somebody. Alex, maybe
4 you know.

5 PROFESSOR ALBRIGHT: Yeah. I remember there
6 were lots of cases back then where because a witness'
7 testimony was not detailed or a specific fact that a
8 witness was testifying to, a detail fact, was not in a --
9 you know, give all of the facts that support your legal
10 theories in interrogatory, and they would all be excluded
11 by some judges. So this was an attempt to make clear
12 exactly what you just said.

13 MR. MEADOWS: I think it's well understood.
14 I don't know that there is a problem with this language.
15 I mean, is that --

16 CHAIRMAN BABCOCK: Peter, and then Judge
17 Wallace.

18 MR. KELLY: Isn't it the same language that
19 was used in describing the summary judgment standard,
20 saying that the plaintiff need not marshal their proof?

21 CHAIRMAN BABCOCK: Interrogatory rule, too,
22 I think, isn't it?

23 MR. KELLY: Right, but it seems like that
24 language could be borrowed from the summary judgment
25 standard, but that was back when plaintiffs didn't have to

1 marshal all of their proof to defeat summary judgments.

2 PROFESSOR DORSANEO: Well, wherever it came
3 from, if it is being used to avoid compliance, fair
4 compliance with the rule, it ought to be looked at.

5 CHAIRMAN BABCOCK: Okay. Judge Wallace.

6 HONORABLE R. H. WALLACE: Well, in my
7 experience this is probably about the least contested of
8 the disclosure issues. It's just not usually an issue. I
9 mean, after all -- and I'm not sure that, frankly, the
10 need for it, because we've got pleadings that you've got
11 to allege your causes of action. We don't have to plead a
12 lot of facts, but if there isn't sufficient notice given
13 then there's this special exception. I don't -- this has
14 not been a problem in my view.

15 CHAIRMAN BABCOCK: Yeah. Professor Carlson.

16 PROFESSOR CARLSON: Yeah, I think that was
17 Paul Gold's suggestion that we include the marshaling
18 language, if I remember correctly, and Alex is right. The
19 automatic preclusive was much more Draconian than it is
20 today, but I favor keeping the language in.

21 CHAIRMAN BABCOCK: Kennon.

22 MS. WOOTEN: In my own experience this
23 marshaling provision is not an issue with request for
24 disclosure, but does become an issue with interrogatories.
25 That is an objection I've seen a lot, and you have to go

1 back to the other side and request that the response be
2 fleshed out in more detail.

3 CHAIRMAN BABCOCK: Uh-huh. Richard.

4 MR. ORSINGER: I agree with all of the
5 comments about the severe preclusive environment we were
6 in in the late 1980's and the 1990's, and I just checked
7 it out again. Kudos to then Justice Hecht for the
8 Transamerican opinion because at that time people were
9 having their case thrown out of court because of technical
10 violation of discovery rules; and Transamerican said due
11 process of law requires that before you throw out a case,
12 first of all, there has to have been pretty much almost an
13 intentional abuse of discovery; and, secondly, if you're
14 going to sanction somebody, it has to be based on the fact
15 that their failure to disclose reflects a lack of merit in
16 their case. We don't decide cases on discovery mistakes.
17 We decide cases on the merits, and if you hide evidence
18 that affects the merits then maybe your case should be
19 dismissed.

20 Later on -- the only excuse at the time I
21 think was that you had good cause. Now we have good cause
22 or lack of surprise, and the lack of surprise is a very
23 important escape clause that's used nowadays that didn't
24 exist then. But I think it's inherent in the thinking, if
25 not personality of lawyers, that if you put a standard

1 down and somebody misses the standard, the other side is
2 going to try to give preclusive effect to that mistake,
3 and so if we don't have a weak standard of disclosure, I'm
4 afraid that some judges are going to be chopping off
5 witnesses and keeping out evidence and exhibits because,
6 "Look, it says you're supposed to state the evidence and
7 support your case. This isn't disclosed in discovery,
8 it's not coming into my courtroom." And I was very much
9 in favor of those escape clauses, especially in the
10 hostile environment we have, but even today I'm worried
11 that on a judge-by-judge basis some judges may say,
12 "You're right, that was an important thought. It's not in
13 your pleadings. It's not in your discovery, so I'm not
14 going to let it into evidence."

15 So if Bill or other people don't like this
16 particular wording, that's fine, but somewhere I think we
17 ought to state our policy is that technical violations or
18 even minor violations shouldn't have a preclusive effect,
19 and what we really are trying to do is we're trying to
20 motivate either bad lawyers or -- either inattentive
21 lawyers or ill-motivated lawyers. We're trying to
22 frighten them into being good lawyers, but we don't want
23 to punish innocent people, and that balance is a
24 difficulty. So I'm in favor of having some escape
25 language that gives you some room when you're in front of

1 a judge that's about to keep out evidence.

2 MR. MEADOWS: But all noncompliance is with
3 the innocent. I mean, there ought to be some consequences
4 for failure.

5 MR. ORSINGER: I agree.

6 CHAIRMAN BABCOCK: Professor Albright.

7 PROFESSOR ALBRIGHT: I just wanted to point
8 out one other reason that we put this in here. Before we
9 had these mandatory disclosures, there were
10 interrogatories that asked some form of "Provide each and
11 every fact that supports your legal theories," but they
12 were all different, and people didn't -- were not sure as
13 to the standard for compliance for each one, depending on
14 how it was worded. So this was also an attempt for
15 uniformity so that when people ask these they're basically
16 contention interrogatories instead of differing contention
17 interrogatories. There is this one single general
18 contention interrogatory. The interrogatory rule allows
19 for some specific -- more specific contention
20 interrogatories, and then so that's how this was all put
21 into the format of what we've got. Now that we're doing a
22 mandatory disclosure, the Federal rules don't have any --
23 anything like this on their mandatory disclosure. I think
24 they have -- their requirements for fact pleading is
25 higher than ours is currently, and but what I fear is that

1 by taking it out we would encourage these contention
2 interrogatories that have differing standards that are
3 hard to respond to. So I would favor just leaving it in,
4 and it apparently has caused no problem going forward.
5 People are used to it, so why not keep it in?

6 PROFESSOR DORSANEO: What's the rule you're
7 talking about?

8 PROFESSOR ALBRIGHT: 194.2(b)(3),
9 disclosure.

10 PROFESSOR DORSANEO: But at the very start
11 of this discussion people said they're not getting any --
12 Chip started the whole thing by saying this is a waste of
13 time. We're not getting any information.

14 PROFESSOR ALBRIGHT: I don't remember him
15 saying that, but --

16 CHAIRMAN BABCOCK: I didn't say it quite
17 that way. I was talking specifically about 194.2(b)(4) --

18 PROFESSOR DORSANEO: Oh, well --

19 CHAIRMAN BABCOCK: -- which had to do with
20 damages and that specific subset. Our discussion has
21 morphed over into other areas.

22 PROFESSOR DORSANEO: If there's no problem
23 with (b)(3), I take back what I said based upon your
24 misleading initial comments.

25 CHAIRMAN BABCOCK: Richard Munzinger.

1 MR. HARDIN: Is that Bill or professor?

2 CHAIRMAN BABCOCK: That's your -- it's the
3 good professor or the bad Bill, I'm not sure which.

4 MR. MUNZINGER: The rule in Texas in
5 pleadings is that if you're going to complain about a
6 defect of a party's pleading you must file a special
7 exception, and if you don't file the special exception you
8 have waived the defect in pleading. What would the harm
9 be in adopting a rule in these disclosures that a
10 disclosure is acceptable unless excepted to? I am very
11 jaded by my experience in many Federal courts where the
12 Federal judges take a very active role in squashing
13 evidence and squashing parties' positions to force a
14 settlement.

15 I've shared with this group what happened to
16 me in the Northern District of Virginia. It was
17 astounding to clear the docket, and so I am very concerned
18 that if -- and this would apply to a pro se or anybody.
19 A, if you don't file a disclosure and somebody doesn't
20 complain about it, you want to wait until the time of
21 trial and ambush them? I don't know that that's fair. If
22 you don't think that my disclosure has been forthcoming
23 enough, raise it with the trial judge or be in a position
24 that you've accepted my disclosure, and you're not trapped
25 by some of these things. I don't -- I've never marshaled

1 my evidence. My rule -- the way I read the current rule
2 for request for disclosure is it says "identify people and
3 their connection to the case," and I might put down
4 "Plaintiff's brother." Well, I didn't say anything about
5 what the guy testifies to. I might do that intentionally,
6 and so you're my adversary. You've got to figure out for
7 yourself, well, does the plaintiff's brother have
8 something to say and do I need to depose him or not.

9 Now, if we're going to adopt a rule that
10 says I've got to make all of disclosures about what he's
11 going to say and what have you, what have we done to the
12 cost of litigation? What have we done to the cost of
13 discovery? We're doing it in every case. We're doing it
14 in every court in the state, and the litigants themselves
15 may be content with what they're doing, so give some
16 thought to perhaps saying that if a disclosure is not
17 excepted to or objected to it's deemed satisfactory.
18 Judge Evans' method is a darn good method, and people in
19 your court know that you do that. A lot of us practice at
20 different places in the state, and we find sometimes the
21 judges aren't all that forthcoming, and you get hometowned
22 a lot. If you come from El Paso and go to another town
23 you may get hometowned, and if you come from Dallas to El
24 Paso you get hometowned.

25 HONORABLE DAVID NEWELL: I like that verb.

1 That's pretty awesome.

2 MR. MUNZINGER: Well, I've said my piece.

3 CHAIRMAN BABCOCK: Okay. Professor
4 Dorsaneo.

5 PROFESSOR DORSANEO: Are we in a position to
6 move to a new -- the new subsection yet?

7 CHAIRMAN BABCOCK: Well, we've been
8 wandering all around, but if --

9 PROFESSOR DORSANEO: Can I wander around to
10 (5)?

11 CHAIRMAN BABCOCK: Okay.

12 PROFESSOR DORSANEO: (b)(5).

13 MR. MEADOWS: It's actually next.

14 CHAIRMAN BABCOCK: Would be next.

15 PROFESSOR DORSANEO: That's what I thought.
16 This rule gives me trouble on its own, but more -- this
17 part of the rule gives me trouble on its own, but more in
18 the context of witness statements and work product issues.
19 Okay. Now, originally in Rule 166b that went into effect
20 April 1, 1984, we had the issue as to whether we would
21 continue to use knowledge of relevant facts as the
22 standard for learning the identity of persons. Okay. In
23 lieu of, for example, in those days, the identity of
24 persons who would be called to testify, and what we did
25 was to retain knowledge of relevant facts. Okay. But we

1 adopted the Federal approach kind of by indirection, by
2 saying, "A person has knowledge of relevant facts when
3 that person has or may have knowledge of any discoverable
4 matter," and that's, you know a way for us to say we mean
5 the same thing as the Federal rules even though we're
6 talking about it in a more complicated historical fashion.
7 That's fine.

8 CHAIRMAN BABCOCK: Let me just stop you for
9 a minute. Are you saying that our rule is the same as the
10 Federal rule, which is limited to only those witnesses
11 you're going to use to support your claim?

12 PROFESSOR DORSANEO: No.

13 CHAIRMAN BABCOCK: Okay.

14 PROFESSOR DORSANEO: This is knowledge of
15 any discoverable matter.

16 CHAIRMAN BABCOCK: Okay.

17 PROFESSOR DORSANEO: It could be
18 discoverable matter to support a claim or discoverable
19 matter that can be used against your claim.

20 CHAIRMAN BABCOCK: Right. Okay.

21 PROFESSOR DORSANEO: Okay. So I'm
22 definitely not suggesting that that Federal approach is a
23 good idea. Okay. Now, the next parts are more
24 problematic. "The person need not have admissible
25 information." Yeah, I think that's fine, but then in the

1 same sentence somehow or another the words got added "or
2 personal knowledge of the facts." Okay, now, I have a
3 little trouble as to what personal knowledge is all -- you
4 know, sometimes, but I wonder if that's a good idea to
5 have personal knowledge -- say that personal knowledge of
6 the facts, you know, doesn't matter, huh? When we get
7 into witness statements and whether or not they're
8 discoverable, if personal knowledge of the facts, you
9 know, doesn't matter then lots of things are -- a lot more
10 things are witness statements than if it did matter.
11 Okay. So I don't even -- I don't know where that came
12 from or why it's in there, and I think it needs to be
13 thought about and re-examined.

14 And then the next sentence, "An expert is a
15 person with knowledge of relevant facts only if that
16 knowledge was obtained firsthand," like, you know,
17 firsthand personal knowledge, are those things the same or
18 a little bit different anyway? "Or if it was not obtained
19 in preparation for trial or in anticipation of
20 litigation." Now, there's a very troublesome case that
21 exists still causing trouble called *Axelsson vs. McIlhenny*
22 that involved an explosion of a gas well or, you know, in
23 West Texas; and the question was in that case whether
24 somebody who worked for one of the companies involved
25 could be a consulting witness if he had -- they were all

1 he's -- if he had knowledge of relevant facts, if he knew,
2 you know, the facts and could be a fact witness; and
3 there's a whole big discussion about consulting witnesses,
4 information they have, who can be a consulting witness,
5 can you depose them to find out the facts that they know;
6 and it's a quite confusing case. And this language was, I
7 think meant -- I didn't go to Galveston to discuss this
8 language at Susman's place with you and others, Alex, but
9 this language is meant to deal with that.

10 PROFESSOR ALBRIGHT: And there's a -- I
11 think there's a comment that says that.

12 PROFESSOR DORSANEO: Well, the comment is
13 odd, because the comment, putting aside the question of
14 whether the comments are all gone, okay, but the comment
15 says this is meant to be consistent with *Axelson vs.*
16 *McIlhany*, and my case book says what part? Okay. What
17 part of *Axelson vs. McIlhany*, because it says several
18 different things, but I don't like this -- I'm basically
19 saying I don't like this language. It doesn't help me.
20 I'm not sure how to fix it, but it needs further attention
21 in my view, and particularly in connection with the
22 witness statements and work product in relationship to
23 this subsection or paragraph of 194.2(b).

24 PROFESSOR ALBRIGHT: So how would you fix
25 it?

1 PROFESSOR DORSANEO: Well, the first thing I
2 would do to fix it is take it out.

3 HONORABLE TRACY CHRISTOPHER: Well, you know
4 it's in the current rules.

5 PROFESSOR DORSANEO: I know. It's been
6 causing trouble all of this time. I've been waiting for
7 the Supreme Court to fix this.

8 HONORABLE TRACY CHRISTOPHER: Okay.

9 PROFESSOR DORSANEO: Since the last century,
10 and they haven't.

11 MR. MEADOWS: He thinks he can do it through
12 the discovery subcommittee's work.

13 CHAIRMAN BABCOCK: Well, we're talking
14 about --

15 PROFESSOR DORSANEO: I would certainly be
16 willing to work on this, and I have ideas, but I don't
17 have a cure.

18 CHAIRMAN BABCOCK: We've moved on to
19 194.2(b)(5) of the proposed rule. Are there any further
20 comments about 194.2(b)(4), the amount and any method of
21 calculating economic damages? Any more comments about
22 that? And then we can continue our discussion about
23 subpart (5). Yeah, Peter.

24 PROFESSOR HOFFMAN: I think my question for
25 the subcommittee or maybe to kind of raise as a discussion

1 point is what Tracy is talking about is this was moved --
2 the language in part (5) here was moved from 192.3(c).
3 It's verbatim from what is already now in 192.3(c). So
4 192.3(c) is the scope of discovery. I mean, that's what
5 it's been, and so my question to -- here to the
6 subcommittee so you can inform us is what's the thinking
7 about moving that language from scope and putting it into
8 the disclosure rule? I think that would be helpful to
9 talk about.

10 CHAIRMAN BABCOCK: Professor Hoffman, are
11 you talking about the red underlined language? Is that
12 what you're talking about?

13 PROFESSOR HOFFMAN: Right. So just to be
14 clear, I'm talking about in the draft that we have in
15 front of us 194.2(b)(5), the section you were asking
16 about.

17 CHAIRMAN BABCOCK: Right.

18 PROFESSOR HOFFMAN: All that is underlined
19 there in (5) is verbatim from what is now in scope of
20 discovery, 192.3(c).

21 PROFESSOR DORSANEO: And it's no longer in
22 scope of discovery.

23 PROFESSOR HOFFMAN: And the subcommittee is
24 proposing moving it.

25 CHAIRMAN BABCOCK: Got it.

1 PROFESSOR HOFFMAN: And so my question, I
2 thought it would be helpful for us to discuss what the
3 thinking is.

4 CHAIRMAN BABCOCK: Good point. Bobby.

5 MR. MEADOWS: My appreciation of the change
6 is just it was for just context. We're talking about
7 disclosing persons with knowledge of relevant facts, and
8 we just want to illuminate what that means under the
9 rules, and so that language that we find in scope of
10 discovery is better situated where we now put it, in our
11 view.

12 CHAIRMAN BABCOCK: Professor Dorsaneo, and
13 then Levi.

14 PROFESSOR DORSANEO: I think 192.3 ought to
15 cover all of the things that are within the scope of
16 discovery, even though, you know, it makes sense for your
17 committee to do what it did. I think it would probably
18 work out better if the scope of discovery, you know,
19 except to the extent we specifically want to change it,
20 included all of the things in the scope of discovery now.
21 You know, maybe -- you know, and I think certainly some of
22 them need to be worked on, and maybe some of them need to
23 be omitted, but I wondered the same thing that Lonny
24 wondered, why isn't this in there anymore? And I don't
25 think it's adequate to say, "It's somewhere else," if the

1 somewhere else is initial disclosures.

2 PROFESSOR HOFFMAN: And just to add just a
3 little to this, Bobby, just to be clear, I'm not sure I'm
4 opposed to this change. I think the danger or the thing
5 we want to be wary of is when you make changes to scope of
6 discovery, that's the -- that's the beginning, right? I
7 mean, it's scope of discovery is what you're allowed, and
8 so when you make changes there the first question that
9 everyone is going to ask is, "Is the Court intending to
10 change the playing field of what's allowed?" This is the
11 same reason, Bobby, that I have expressed concern before.
12 Just to flag this again, if everyone will look in the
13 committee's draft at 192.3(a), I am very much an opponent
14 of including the proportionality language in there, and I
15 don't want to revisit that now, but I just want to say I
16 know we had a discussion before, and my sense was the
17 committee was more strongly about not including it and
18 including it the way that the subcommittee initially
19 proposed.

20 MR. MEADOWS: Well, actually, even though
21 we're not going back to what we've already done, we have
22 made -- we are proposing that -- we are proposing --
23 there's several things in this discussion.

24 PROFESSOR HOFFMAN: Yeah. Yeah.

25 MR. MEADOWS: One is the scope of discovery,

1 whether or not it should include the proportionality --

2 CHAIRMAN BABCOCK: Concept.

3 MR. MEADOWS: -- element. We think that now
4 it should, even though we also keep it in the limitations
5 on scope of discovery in order to impose the burden on the
6 party challenging the discovery as not being proportional
7 or relating to the subject matter. So that was -- we
8 took the discussion from this committee, went back, talked
9 about it further, met earlier this week; and I think it's
10 the view of the discovery subcommittee now that the
11 proportional language should also be in the description or
12 the language around scope of discovery; and it should say
13 "proportional and relevant to the subject matter."

14 PROFESSOR HOFFMAN: To be clear, I wasn't
15 trying to change the topic of the discussion. As Bobby
16 says, these things are linked together.

17 CHAIRMAN BABCOCK: Yep.

18 PROFESSOR HOFFMAN: So I hope, because I
19 think it warrants it, the discussion on proportionality is
20 way more significant by an order of magnitude of tenfold
21 than whether we keep the language of 192.3(c) where it is
22 or move it to the disclosure rule. I mean, this is a --
23 this is a little technical thing, frankly, with a little
24 bit of philosophical concern about are we going to mess
25 with scope of discovery. Leaving that small piece aside,

1 proportionality is the big question, frankly. So my big
2 point is simply if we're going to change scope of
3 discovery, we should recognize that it could be perceived
4 as a big deal because that's the starting point.

5 CHAIRMAN BABCOCK: Yeah. Professor Carlson.

6 PROFESSOR CARLSON: Yeah, because I -- in
7 justice courts, if I understand it correctly, the only
8 discovery you get is what the trial court allows, so you
9 can envision a trial judge only allowing interrogatories
10 in JP court. So that person is going to go to the scope
11 of discovery rule and look to see the scope of discovery,
12 so I agree that it's better to include this language in
13 the scope of discovery.

14 MR. MEADOWS: Which language, Elaine?

15 PROFESSOR CARLSON: (b).

16 MR. MEADOWS: Persons with knowledge or the
17 proportional language?

18 PROFESSOR CARLSON: No, persons with
19 knowledge, the same concern Lonny expressed first. In
20 (b)(5).

21 CHAIRMAN BABCOCK: Levi, did you --

22 HONORABLE LEVI BENTON: Yeah, I have a
23 comment on a different topic about this same provision,
24 something that wasn't changed, and it's something that
25 causes people to spend 2 or \$300 in every case; and it

1 doesn't surprise me that Justice Christopher and Bland,
2 being removed from the trial court now, didn't think about
3 it. I say that with all due respect. And that is,
4 lawyers in answering this will give the law firm's address
5 for the person with knowledge of relevant facts. They
6 won't give the witness' address. You see that a lot, I'm
7 sure.

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE LEVI BENTON: Judge Evans, I bet
10 you see it a lot, and you know --

11 HONORABLE DAVID EVANS: I never figured out
12 how many of them live in one place.

13 HONORABLE LEVI BENTON: So we ought to say
14 parenthetically "the witness' address and not the law
15 firm's address" because it's not in any case thousands of
16 dollars, but it's a few hundred dollars in every single
17 case. "Richard, please give me the witness' address."

18 MR. LEVY: Can I?

19 CHAIRMAN BABCOCK: Yeah, Robert.

20 MR. MEADOWS: I think we changed that, but
21 let me look it up and see. I'll address that.

22 MR. LEVY: I'm going to point out an odd
23 issue with that. If you list a witness' address and that
24 witness happens to be in a European country, which could
25 be the case, that raises significant data privacy issues.

1 Even the name is personally identified information, but
2 the address would definitely be, and since these pleadings
3 are going to be publicly available it's going to put some
4 parties in a very difficult moment.

5 CHAIRMAN BABCOCK: Yeah, and I've always
6 thought that -- and maybe I haven't thought this through,
7 but I've always thought that when I see that, that's a
8 signal to me that that lawyer is representing that person,
9 and so I just can't haul off and go talking to them
10 without the lawyer's knowledge or permission.

11 HONORABLE LEVI BENTON: Well, then we need
12 some clarity in the rule, because that tactic is used a
13 lot, even when there is no representation between the
14 person with knowledge of facts and the lawyer, just to
15 thwart the opposing lawyer's opportunity to communicate
16 with the witness, and so I don't have language, but it is
17 a few hundred dollars in every case, and it's I think
18 nagging to trial court judges. Judge Evans has walked
19 away. I don't know how Judge Peebles feels about this.
20 It's just it's a -- it could be clarified or fixed with
21 some parenthetical language.

22 CHAIRMAN BABCOCK: Okay. Lamont.

23 MR. JEFFERSON: I appreciate the problem.
24 I'm not sure I would deal with it in the rule. I mean, it
25 seems -- and we often will designate our firm as the -- a

1 point of contact for a witness who we're designating if
2 the witness is an employee of a client, for instance --
3 and in some instances, and it's not a very bright line --
4 when opposing counsel can contact a employee of a client
5 company or a former employee of a client company; but if I
6 put down the -- if I put down my law firm as a point of
7 contact for that witness, what I'm saying is I have
8 control over the witness. If you want to subpoena, if you
9 want to depose the witness, contact me; if you want to
10 interview the witness, contact me; but, yeah, don't go
11 contact the witness.

12 Now then, there may be instances when you're
13 entitled to, because like I say, I don't think it's a very
14 bright line when either that witness is your employee or
15 whether opposing counsel can contact them, but I think
16 that doesn't have to be addressed in the rule. I mean, I
17 think you can address that on a case-by-case basis; and
18 just, by the way, on this whole topic of person with
19 knowledge of relevant facts, I'm kind of surprised that it
20 hasn't generated more controversy at least in actual
21 litigation than it has because that's a very, very vague
22 phrase. You know, persons with knowledge of relevant
23 facts of any fact that could be admissible in evidence,
24 you know, that's a telephone book basically. But lawyers
25 seem to get it, and I haven't seen, at least in my

1 practice, a lot that -- you know, the notion is if they're
2 on the list we can call them as a witness. If they're not
3 on the list we can't, so we better make sure we include
4 everybody who we might possibly want to call as a witness
5 at trial. And because I think it's worked so far I
6 wouldn't change the rule too much to make folks think
7 there's some kind of change of practice going on with the
8 rule, and for that reason I think the additional language
9 from the scope section just raises more questions than
10 problems it solves.

11 CHAIRMAN BABCOCK: Justice Christopher.

12 HONORABLE TRACY CHRISTOPHER: Well, we have
13 moved everything from the scope of discovery other than
14 the first -- other than three paragraphs to a different
15 part of the proposed rule. So if people don't want us to
16 do that, we can go back and cross-reference. We were
17 trying to avoid cross-references or trying to avoid
18 repeating the same thing over and over again. So we could
19 leave persons with knowledge of relevant facts in scope of
20 discovery, but then we also have it in the automatic
21 disclosures, persons with knowledge of relevant facts. So
22 either we repeat or cross-reference. We thought a better
23 system was to move, and we have moved (c), (d), (e), (f),
24 (g), (h), (i). We have moved all of those in connection
25 with our work. So it would be useful to find out whether

1 people don't want us to make that move at all and then we
2 can revise it.

3 MR. MEADOWS: But thinking about it, if
4 these are mandatory disclosures as opposed to information
5 you obtained by a request, they are by definition part of
6 the scope of discovery. You know, if we're talking about
7 scope of discovery in broader, more inclusive terms,
8 relating to the subject matter and that which is
9 proportional, that's where we start. And then you've got
10 mandatory disclosures. Those are by nature part of the
11 scope of discovery. I -- so I'm of the view that it's
12 cleaner this way. It is a little bit of a re-adjustment
13 in terms of where the language appears, but these are not
14 wholesale changes in what we do, and it avoids a lot of
15 cross-referencing and repetition.

16 CHAIRMAN BABCOCK: Professor Dorsaneo.

17 PROFESSOR DORSANEO: Well, I agree with what
18 you said, but if you look at it another way, I mean, can
19 you get the -- when taking a deposition can you get the
20 identity of a person having knowledge of relevant facts by
21 asking a question? Sure, you can, because that's within
22 the scope of discovery, but it's not within the scope of
23 discovery if it's because it's in initial disclosures.
24 It's in the scope of discovery because it is, and then
25 initial disclosures is a way.

1 PROFESSOR ALBRIGHT: But it's within the
2 broad definition of scope.

3 MR. MEADOWS: Generally. Look at the
4 general.

5 HONORABLE TRACY CHRISTOPHER: Relative to
6 the subject matter, that would be a witness.

7 PROFESSOR DORSANEO: You don't even want to
8 say relevant to subject matter, actually, but --

9 MR. MEADOWS: That's another discussion.

10 PROFESSOR DORSANEO: I know. It's almost
11 impossible. I'll have to digress, but I just think it's
12 better to leave a rule that talks about the scope of
13 discovery to catch things that -- that are not things you
14 find out necessarily in disclosures, and I think
15 deposition practice is an example, that, you know, in
16 deposition practice now under Rule 195 we revert back to
17 the general scope of discovery rule in talking about
18 depositions and enforcement of them -- enforcement of a
19 deposition practice.

20 MR. MEADOWS: Excuse me, but I just don't
21 see the point of concern. Because the very first
22 paragraph under scope of discovery it's very clear
23 whatever the discovery device you can obtain discovery
24 regarding any nonprivileged matter that we're going to add
25 that is proportional and relevant to the subject matter of

1 a pending action, information within the scope of
2 discovery need not be admissible in evidence. So, yes, in
3 a deposition you can ask about persons with knowledge of
4 relevant facts. You can ask them about documents. You
5 can ask them about all sort of things that relate to the
6 subject matter.

7 CHAIRMAN BABCOCK: Getting back to this
8 194.2(b)(5) of the proposed rule, let me posit a
9 hypothetical. Levi has got a case. He's representing the
10 defendant, and he talks to his client and does his
11 investigation and thinks that there is six people with
12 relevant -- relevant knowledge under this definition.
13 Four of them are employees or former employees of his
14 company and are generally favorable to his case, so he's
15 going to disclose those. But the others, there are two
16 others that just kill his case. They're independent
17 witnesses. They don't work for his client. So what
18 happens if he doesn't disclose those two?

19 MR. MEADOWS: Okay. It seems to me that
20 we've now gone to the issue that we were spending a lot of
21 time on earlier, and that is the consequences of failure
22 as opposed to what he's required to do. He's required to
23 identify those witnesses.

24 CHAIRMAN BABCOCK: The consequences with a
25 twist, though, because even though we have intentionally I

1 think not followed the Federal rule, under the Federal
2 rule Levi would be fine because he only has to disclose
3 people that's going to help him and then whether it would
4 be a sanction of exclusion, he's not going to have -- he's
5 not going to fail to list anybody that would be excluded
6 if he inadvertently or intentionally doesn't include them,
7 but the two people that are going to kill his case he
8 says, yeah, exclude them all you want.

9 PROFESSOR ALBRIGHT: That's a problem now.

10 HONORABLE TRACY CHRISTOPHER: Yeah. It's in
11 the current rule.

12 CHAIRMAN BABCOCK: Say that again, Judge
13 Christopher.

14 HONORABLE TRACY CHRISTOPHER: I mean, under
15 the request for disclosure, you're supposed to prevent --
16 to already provide the name, address, and telephone number
17 of people having knowledge of relevant facts.

18 CHAIRMAN BABCOCK: Right.

19 HONORABLE TRACY CHRISTOPHER: So we have not
20 made a single change to obligation.

21 CHAIRMAN BABCOCK: I understand that. I'm
22 not suggesting that --

23 MR. MEADOWS: He's inviting one.

24 CHAIRMAN BABCOCK: I'm just saying, though,
25 that in practice what has I think gone on under our

1 discovery rule is that more often than not the
2 practitioners have followed the Federal rule and not the
3 state rule, and is that okay? Or since we're now
4 re-examining all of this, should we take that into
5 account, because in my hypothetical, the two witnesses
6 that Levi doesn't disclose, who are very powerful to his
7 case, what's the consequence for him of failing to
8 disclose them?

9 PROFESSOR ALBRIGHT: It would be abuse of
10 discovery.

11 PROFESSOR CARLSON: Rule 215.

12 CHAIRMAN BABCOCK: What?

13 PROFESSOR DORSANEO: 215(b)(3), like Lonny
14 said.

15 CHAIRMAN BABCOCK: All right. And what
16 happens under 215(b)(3)?

17 PROFESSOR CARLSON: He would be sanctioned.
18 He would be sanctioned.

19 CHAIRMAN BABCOCK: He would be sanctioned,
20 and what would the sanction be?

21 PROFESSOR CARLSON: It's in the discretion
22 of the court. Each party is making -- resisting the
23 discovery, who didn't file a response.

24 CHAIRMAN BABCOCK: Anybody know what --
25 Rusty.

1 MR. HARDIN: No, you just grafted a Brady
2 obligation into the civil world. I mean, if there is a
3 penalty for me not telling you about people that are going
4 to help your case --

5 CHAIRMAN BABCOCK: Right.

6 MR. HARDIN: -- we're over in criminal
7 court. I mean, there should be no Brady obligation. I
8 wasn't aware there was a Brady obligation in civil
9 matters. Isn't that what we're really -- your example --

10 CHAIRMAN BABCOCK: Yeah.

11 MR. HARDIN: -- if we're going to sanction
12 somebody for not telling the other person, "Hey, there are
13 a couple of people out there that could help you" --

14 CHAIRMAN BABCOCK: Yeah.

15 MR. HARDIN: -- in all due respect, that's
16 crazy.

17 CHAIRMAN BABCOCK: Well, and that's why I
18 raised the issue, because we had -- just a second,
19 Richard. We had a big debate years ago about whether we
20 were going to follow the Federal non-Brady.

21 MR. HARDIN: Absolutely follow the Federal
22 rule.

23 CHAIRMAN BABCOCK: Non-Brady, or whether we
24 would depart from the Federal. We just -- we decided to
25 depart from the Federal, but what I'm saying is in

1 practice, I don't know that there are too many lawyers
2 that go Brady, go all Brady. So, anyway, Richard.

3 MR. MUNZINGER: Well, that's the beauty of
4 an interrogatory. It's answered under oath, and if you
5 don't -- if Levi doesn't identify those two witnesses,
6 he's perjured himself, his client has; and if Levi is his
7 counsel and lets him do it knowingly, Levi has supported
8 perjury, and they could both be indicted if anyone were
9 interested.

10 CHAIRMAN BABCOCK: Well, the witness --

11 MR. MUNZINGER: That's the beauty of the
12 interrogatory practice, and this business about "Here I
13 am" in the Federal courts, whether it works or doesn't
14 work, I don't know, but --

15 CHAIRMAN BABCOCK: His client says --

16 MR. MUNZINGER: -- it's beauty of the
17 interrogatory.

18 CHAIRMAN BABCOCK: His client says, "I've
19 never heard of these guys." I answered truthfully, "I
20 don't know these guys. Who are these guys? I don't
21 know."

22 MR. MUNZINGER: And Levi doesn't know them
23 either then.

24 CHAIRMAN BABCOCK: Yeah, he's done work
25 product. That's his work product. He's gone out and

1 investigated and found that there are two guys out there
2 that hurt his case, but the client is not under --

3 MR. MUNZINGER: Yeah, but I don't think
4 that's core work product under the rules, the identity of
5 a witness with relevant knowledge. I don't believe that's
6 core work product. I believe that's a fact that has to be
7 disclosed under the current rules.

8 CHAIRMAN BABCOCK: Well, the feds think so.
9 The feds think that's work product. That was the whole
10 nature of the debate in Federal court. Anyway --

11 MR. MUNZINGER: But do they distinguish
12 between core work product as our rules do?

13 CHAIRMAN BABCOCK: I don't know. Judge
14 Peeples.

15 HONORABLE DAVID PEEPLES: To carry this all
16 the way, Chip, are you suggesting that when the plaintiff
17 shops the case around to some experts and they say, "You
18 don't have a case," they're now consulting experts? We're
19 going to require that to be disclosed?

20 CHAIRMAN BABCOCK: I'm sorry. I didn't hear
21 what you said.

22 HONORABLE DAVID PEEPLES: To take what
23 you're saying --

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE DAVID PEEPLES: -- all the way, we

1 would say that when either side, often the plaintiff,
2 shops the case to an expert, the expert says, "The other
3 side is right, you have no case." They're going to make
4 them a consulting expert, don't have to talk about it.
5 Are we going to go there and make them cough up that
6 information? I mean --

7 CHAIRMAN BABCOCK: I don't know. I hadn't
8 thought of that. What do you think? You think they would
9 have to disclose that person?

10 HONORABLE DAVID PEEPLES: They certainly
11 don't now, do they?

12 CHAIRMAN BABCOCK: I wouldn't think so.

13 HONORABLE DAVID PEEPLES: Well, in a
14 criminal case, of course, the defendant has got the Fifth
15 Amendment and doesn't have to tell about all of the people
16 who know he's guilty, if he is.

17 CHAIRMAN BABCOCK: Right, but the prosecutor
18 does.

19 HONORABLE DAVID PEEPLES: The prosecutor
20 does because of the Constitution. But --

21 CHAIRMAN BABCOCK: Yeah. Rusty.

22 HONORABLE DAVID PEEPLES: And the --

23 MR. HARDIN: The problem with following
24 through on it, if the state rule is really interpreted the
25 way you're discussing, is the criminal system is just full

1 of eons of litigation now as to what is and what is not
2 Brady, and once you start down that track of saying that
3 one party has the obligation to tell the other party of
4 people they think might help their case then it gets into
5 such gray areas as to whether something really does help
6 or hurt, and the judgment is in the eye of the beholder,
7 and I just think it's full of mischief.

8 CHAIRMAN BABCOCK: Okay. Justice Gray.

9 HONORABLE TOM GRAY: I haven't been involved
10 as an attorney in a case in 18 years now, but in the 13
11 years that I practiced under the discovery rules that were
12 then existing I interpreted the rule to mean that if I
13 knew that a person had knowledge of relevant facts,
14 whether it was good for my case or bad for my case, it was
15 required to be disclosed. I never worked for anybody that
16 didn't have that view of the discovery obligations of an
17 attorney in Texas courts, and so I'm surprised -- it is
18 sort of like Brady in a way. It's unlike Brady in that
19 you don't have to evaluate it so much, is it good or bad.
20 If you just know they have knowledge of relevant
21 information, you're obligated to produce it. That's the
22 way I always thought it was. In the cases that have come
23 to our court that have that as an issue, that's certainly
24 the way I have interpreted the required disclosure.

25 Now, the more -- the thing that we thought

1 was being done to us was not the hiding of the
2 information. We thought more likely that we may get
3 buried in information. We may get the phone book instead
4 of the people that really had knowledge of relevant facts,
5 and it caused me to ask myself a question under the
6 existing rule even -- I don't know the answer to this, but
7 in any case involving accident reconstruction or
8 engineering expertise or anything like that, the laws of
9 physics apply. Does every person that knows the laws of
10 physics have knowledge of relevant facts? And I think
11 somebody else kind of paired that down, and I think it was
12 Lamont. In practice we know that we designate those
13 people that are likely to be witnesses or that actually do
14 have knowledge of relevant facts, and that's where the
15 experts come in on the engineering aspects or --

16 CHAIRMAN BABCOCK: Right.

17 HONORABLE TOM GRAY: -- you know, but as far
18 as the designation -- and I'm talking about fact
19 information and not expertise information -- if they have
20 knowledge of relevant facts we always disclosed them, and
21 we felt like -- we may have felt incorrectly, but we felt
22 like that's what the other side was doing as well.

23 CHAIRMAN BABCOCK: Yeah. And I don't --
24 I've -- in my practice I know that there are some lawyers
25 that take the position that "I'm going to tell you who is

1 going to help me, and, you know, maybe you'll find out the
2 other people, maybe you won't, but there's no consequence
3 to my not telling you."

4 HONORABLE TOM GRAY: Do you draw a
5 distinction between --

6 MR. MEADOWS: Do lawyers not produce
7 documents that are harmful?

8 CHAIRMAN BABCOCK: I'm sorry, who asked that
9 question?

10 MR. MEADOWS: I'm just saying that, you
11 know, you carry that logic to the point where you don't
12 produce documents that are harmful.

13 CHAIRMAN BABCOCK: No. And a lot of the
14 people that they may should have disclosed will show up in
15 the documents because they do have to respond to request
16 for documents, and so, you know, you oftentimes will --

17 MR. MEADOWS: Yeah, but you -- I don't doubt
18 at all you're describing a practice, but I don't think you
19 can read our rules any differently than the justice just
20 explained it.

21 CHAIRMAN BABCOCK: Oh, no, I don't disagree
22 with that at all. No. I'm just saying that our rule is
23 different than the Federal rule, and yet I think in
24 practice a lot of lawyers are following the Federal
25 approach and not the literal mandates of our rule, and is

1 that okay, or is that something we should think about?

2 Judge Evans.

3 HONORABLE DAVID EVANS: I think you asked
4 the question what can you do about it? I think the only
5 safe sanction right now for failure to disclose
6 unfavorable witnesses or documents is to determine if
7 there were costs that were spent in discovery or that will
8 be incurred in discovery in the future or preparation
9 costs for trial if you have to cancel a trial because that
10 disclosure comes late, and that's the only sanction I
11 think is safe under the current rulings of the Court
12 because there's no automatic penalty that can be imposed.
13 You can't say, "Well, since you didn't disclose these two,
14 you can't use two favorable witnesses, and I'm going to
15 strike that." And that takes a long time to wade through
16 in the way of testimony, but it can be effective as a
17 carried sanction when it happens, and it happens not
18 frequently, but it's not rare. Some of it's inadvertent
19 and claimed to be inadvertent; but it's just a lack of
20 diligence on the parties complying with discovery who just
21 hit it a hit and a lick and say to their IT department,
22 "Turn over everything," but don't go through and carefully
23 sort through it or tell their lawyer "Here's some
24 information"; and they don't really review it and think it
25 through; and when it comes through it could be four or

1 five months of tedious discovery that's just blown out of
2 the water because now the case has to be rediscovered and
3 tried on a different set of facts. And then the trial
4 judge has to kind of segregate what costs are appropriate
5 for redoing it, and I don't know that there is any better
6 solution than that, but that's all that can be done as far
7 as I know.

8 CHAIRMAN BABCOCK: Yeah, the real risk or
9 the biggest risk I think for the lawyer who knows of a
10 witness that is material and has bad information for his
11 side and he doesn't disclose and they go all the way
12 through trial and then after the -- an adverse verdict,
13 the party discovers the witness and also discovers that
14 the lawyer has interviewed him, knew about him, and didn't
15 disclose him, and so they get a new trial because of it,
16 maybe. But Frank.

17 MR. GILSTRAP: As I understand this rule,
18 subdivision (5) doesn't change anything. We've still got
19 the old rule, and we've just transposed the language about
20 a person having knowledge of relevant facts, but now that
21 we look at it we say, "Holy cow, what does this really
22 mean?" And one thing, does it mean that you have to
23 disclose your consulting experts?

24 And then I'll add one more thing about this.
25 You know, we mentioned, as Lamont said, he didn't think

1 this is a problem. I see this as a problem all the time,
2 and that's the problem of disclosing everybody, like
3 Justice Gray saying the laws of physics, but you sue a
4 governmental agency, and sometimes they give you every --
5 every official, every city council person, every
6 bureaucrat, and it's the old obfuscation problem. Like
7 you remember they said once you make so many objections to
8 the charge we're not going to count your objection because
9 you've covered it up with a bunch of irrelevant
10 objections. Same thing here, and I don't know what the
11 answer is, but the problem is alive and well.

12 CHAIRMAN BABCOCK: Yeah. Okay. Any more
13 comments about the proposed Rule 194.2(b)(5)? Yeah.
14 Scott.

15 MR. STOLLEY: Just a question. Several
16 times when we talk about disclosure of people we've got
17 name, address, and telephone number. Does it make sense
18 to include e-mail address?

19 CHAIRMAN BABCOCK: What's everybody think
20 about that?

21 MR. JEFFERSON: Scary.

22 MR. STOLLEY: Well, if it's a third party,
23 completely independent it may be the best way for
24 everybody to reach that person, and why shouldn't the
25 parties be required to do things the easy way rather than

1 the expensive way? If it's somebody who is willing -- one
2 of your witnesses under your control, obviously you've got
3 to rely on opposing counsel not to abuse the use of that
4 e-mail address.

5 HONORABLE TOM GRAY: What about their
6 Facebook handle? I don't do Facebook, so I maybe used the
7 wrong terminology, but --

8 CHAIRMAN BABCOCK: Or their tweeter.
9 Professor Hoffman.

10 PROFESSOR HOFFMAN: So I know we're really
11 close to a break, and it's always a bad idea to be the
12 person standing before a break, but I just want to take
13 maybe one second to try to summarize where at least in my
14 head I think we are.

15 CHAIRMAN BABCOCK: We're four minutes from a
16 break.

17 PROFESSOR HOFFMAN: What did you say?

18 CHAIRMAN BABCOCK: We're four minutes from a
19 break.

20 PROFESSOR HOFFMAN: Four minutes. So my
21 view is that I don't think this whether you put the 192.3
22 stuff that they've taken out and put in 194 is that big a
23 deal. As I've said before, and so I would be fine with
24 what they did. That said, I think my slight preference,
25 and I think at least I heard a number of other people

1 share this view, is leave it where it is and just have a
2 simpler cross-reference than the one you have in the
3 disclosure rule so it doesn't appear to the unsuspecting
4 world that we've made dramatic changes in scope. That's
5 that point.

6 The other point is, I will repeat, the much
7 bigger question here, the much, much bigger question, the
8 one that matters in my view, is the proportionality
9 question, whether you put that in 192.3(a), which the
10 subcommittee is now recommending. That is exact opposite
11 of what they recommended at our last meeting. So we
12 shouldn't -- yes, it is. Well, okay.

13 CHAIRMAN BABCOCK: No, it's not. Yes, it
14 is.

15 PROFESSOR HOFFMAN: It is in there now,
16 regardless of what their position was before and I
17 think --

18 CHAIRMAN BABCOCK: They maintain they're
19 totally consistent.

20 PROFESSOR HOFFMAN: And if you want to talk
21 about confusing, Chip, now what we're going to have is the
22 first part of our rule will look like the anti-Federal
23 rule. Right, instead of saying "limited to claims" or
24 "disclosing people with knowledge of claims or defenses
25 that support your case," 26(b)(1), we have "relevant to

1 subject matter." So we've made this clear -- you know,
2 we're staying away from the Federal side, but then we're
3 going to borrow the December 2015 changes to the Federal
4 rules and put proportionality into scope. It's like my
5 head is spinning, and I'm paying attention. So this
6 strikes me as a major mixed message, and then secondly,
7 and more importantly, bad policy. We shouldn't be putting
8 proportionality into scope. We should put it -- we should
9 keep it where it's always been, which is scope is scope,
10 and then when there are limits, when we're worried that
11 someone has done too much or the general scope rule needs
12 to be tinkered with, then we have them in limitations on
13 discovery, which is where they operate today. We don't
14 use the word "proportionality," but that's where it is
15 today. And so those are my thoughts.

16 MR. MEADOWS: So just a couple of things if
17 you don't mind.

18 CHAIRMAN BABCOCK: Yeah, go ahead, Bobby.

19 MR. MEADOWS: I want to answer the question
20 that was raised earlier. The language around disclosing
21 persons with relevant knowledge does not require the
22 disclosure of consulting experts. We deal with that
23 explicitly in Rule 195. So that's not a concern. Now, as
24 to the question about proportionality, it can just be as
25 big a discussion as we want. We continue to leave it in

1 limitations on discovery, and then there is a argument
2 that if it's there then there should be some recognition
3 that proportional discovery is part of what we understand
4 as scope. But that's -- it's -- to me that's an open
5 discussion that the discovery committee remains tolerant
6 of all views on this.

7 CHAIRMAN BABCOCK: Okay. You done? Justice
8 Christopher.

9 HONORABLE TRACY CHRISTOPHER: I just wanted
10 to say that the change that we made was in our first draft
11 we had "relevant to the claims." All right. And it
12 seemed to be the consensus of the group to keep it
13 relevant to the subject matter. So we changed it back to
14 "relevant to the subject matter," and we had
15 proportionality in the scope with the big definition of
16 proportionality, and what the change that we made was is
17 to leave proportionality in the scope, but refer down to
18 limitations for the definition, and in our opinion, that
19 then would put the burden on the person claiming that it
20 was not proportional to come in and say it's not
21 proportional. So that was how we revised in connection
22 with the previous discussion.

23 CHAIRMAN BABCOCK: Okay. Robert.

24 MR. LEVY: I do disagree with Professor
25 Hoffman's view, and the issue about proportionality I

1 think is important to include in the scope rather than
2 putting it on the party who, in effect, is aggrieved by
3 what could be overbroad requests, and then that party has
4 to then seek the court's intervention, and it should be on
5 the party making the request to ask discovery that is
6 appropriate and that includes proportional discovery
7 within the scope, and I also do think that the claim --
8 "related to the claims or defenses" is really the better
9 approach, because there could be a wide panoply of people
10 or topics that might relate to the subject matter, which
11 could be extraordinarily broad, that won't help find
12 information that will advance the ball at the trial, so if
13 it relates to claims or defenses then you're focusing on
14 information that will actually matter in the case.

15 CHAIRMAN BABCOCK: Okay. Anything else?
16 Okay. We will take our morning break. Thank you.

17 (Recess from 10:45 a.m. to 11:10 p.m.)

18 MR. HARDIN: Chip, I've been convinced I was
19 wrong, and so I'm going to let everybody know about all
20 the people on other side.

21 CHAIRMAN BABCOCK: On the record, Mr. Hardin
22 has confessed error.

23 MR. HARDIN: That's true.

24 MR. RINEY: Admitted to discovery abuse, I
25 believe.

1 CHAIRMAN BABCOCK: As his counsel, I
2 wouldn't advise him to go quite that far, but, all right,
3 we're going to shift topics here and spend -- still on
4 discovery, though, and spend a half an hour on experts and
5 then a brief maybe half hour or so on sanctions and
6 spoliation, and we were requested or the subcommittee
7 chair was requested to defer spoliation and sanctions
8 until Kent Sullivan could be here, and so we're going to
9 shrink that down so that he can be heard because I gather
10 that Kent has got a minority view on the subcommittee or
11 maybe --

12 MR. MEADOWS: He has got a view that has not
13 been fully adopted.

14 MR. JACKSON: Nice way to put it.

15 MR. MEADOWS: But we have -- on spoliation
16 and sanctions we as a discovery subcommittee have agreed
17 on, for example, to add the language of Federal Rule 37(e)
18 to our Rule 215. There are other issues associated with a
19 broader spoliation rule that are under consideration in
20 our committee. I think it would be worthwhile to get a
21 reaction from this room in terms of the direction we
22 should take. Similarly, we've got questions around
23 experts. The Federal rules, as you know, do not require
24 the disclosure of expert reports or communications with
25 lawyers and their experts, and our discovery subcommittee

1 is largely of the view that we should adopt that. There
2 is a minority view, and she's here today to speak to that.
3 So I think that, just kicking that off, we should maybe
4 begin with experts, as you said, and then work our way
5 from the last time remaining and talk about spoliation at
6 large.

7 CHAIRMAN BABCOCK: Okay.

8 MR. MEADOWS: And I invite Jane to just
9 introduce this topic because she was largely responsible
10 for superintending the work of the discovery subcommittee
11 on experts. So, Jane, unless you want me to throw it out
12 there, go ahead.

13 HONORABLE JANE BLAND: Okay. So we'll start
14 I guess with Rule 195.

15 PROFESSOR DORSANEO: Page 29.

16 HONORABLE TRACY CHRISTOPHER: Sorry, it goes
17 out of order. It's page 29.

18 HONORABLE JANE BLAND: There are some -- the
19 two main substantive suggested revisions to 195 are that
20 we adopt -- we recommend that we adopt the Federal rule
21 that protects from disclosure draft reports to the extent
22 that reports are required and exempts expert
23 communications from disclosure, those communications the
24 expert has with the attorney, and -- unless they're about
25 factual matters; and if you can look at 190 -- most of

1 these changes are incorporated in Rule 195.5, which is on
2 page 30. 195.5 starts out first with the requirements for
3 disclosure for experts, and in this it's similar to what
4 we have had in the past in connection with experts and the
5 requirements for disclosure, but a little bit broader in
6 that it includes more specific information about the basis
7 for the expert's opinions, more specific information about
8 the witness' qualifications, and specific information
9 about compensation and past testimony. And then all of
10 that, we are adopting the Federal Rule 26 requirements for
11 experts.

12 And if you go on, part (c) of that rule is
13 the part that exempts expert communications from
14 disclosure. The idea behind the rule is that there was a
15 lot of gamesmanship associated with the disclosure of
16 draft reports and then avoidance of disclosure of draft
17 reports, and because many people that have worked on these
18 rules are of the view that having experts discuss their
19 drafts and changes to their drafts is really diverting the
20 fact finder from the focusing on what the -- you know,
21 focusing on the merits of the actual opinions and instead
22 to changes to drafts; and it tends to be somewhat of a
23 wild goose chase and that, you know, it will not be -- it
24 will be self-evident to the jury that lawyers assist in
25 preparing these reports and that experts are compensated

1 by these lawyers and have a sort of an advocacy point of
2 view when their testimony is presented so that, you know,
3 the idea that this is the only way of cross-examining an
4 expert for potential bias associated with being employed
5 by one side of the case, you know, we felt like it was a
6 distraction and not a particularly fruitful area of
7 cross-examination; and that's what the Federal committee
8 concluded when they adopted a rule that does not require
9 drafts to be produced; and so that's why the committee
10 ultimately -- the subcommittee ultimately determined that
11 we should adopt the Federal rule.

12 MR. MEADOWS: I think there is more, but I
13 think this is the main discussion piece.

14 CHAIRMAN BABCOCK: Okay. Discussion.
15 Richard Orsinger.

16 MR. ORSINGER: Yes, I vividly remember when
17 this -- when Justice Bland made this presentation several
18 years ago, and I remember asking several questions that
19 the Chair permitted, and I asked eventually if the lawyer
20 drafts the entire report from start to finish and the
21 expert only signs the report and doesn't write the rest of
22 it, is that discoverable and is that fair game in court?
23 And as I recall, the answer was it's not discoverable, and
24 it's not fair game in court. Did I remember that
25 correctly?

1 HONORABLE JANE BLAND: Well, I don't know,
2 because that was five years ago, and this committee
3 rejected this proposal five years ago, but anecdotally in
4 speaking with other members of the committee over the
5 years people have become more comfortable with the
6 practice, having had it in Federal court, and people have
7 switched in view. I take it you have not, Richard.

8 MR. ORSINGER: Well, I was going to say, I
9 try to have an open mind, as difficult as it is; and you
10 know, I'm very open to the process; and the way -- in my
11 practice I deal a lot with expert witnesses. I tell the
12 expert witness that the second that I start talking to
13 them about changing their reports they need to save their
14 drafts, so that under the Texas rule as it now exists they
15 can demonstrate the part they did on their own and the
16 part that they did as a result of my editing. You know,
17 maybe that's an unnecessary way to practice defensively.
18 I do -- I am concerned, though, because I inherently
19 believe that experts should be independent, not just sworn
20 advocates for a party's view; and if you allow the lawyers
21 to write or influence what the expert reports say, you're
22 moving the expert into the realm of an advocate, which I
23 don't personally like for the system; and so I would
24 prefer that experts be independent and that they be
25 responsible for their words and they be held accountable

1 for their words; and I'm afraid that this change in this
2 rule, which may work successfully in the Federal court
3 system, maybe there will be more unscrupulous practices
4 that are more widespread if we implement it at the state
5 court level; but, I mean, I have an open mind.

6 I agree. I think it's kind of a waste of
7 time what -- you know, to go into the various drafts of
8 the expert reports, although I find that the experts say
9 they don't save drafts. It's all done on the computer
10 and, you know, the second draft replaced the first draft
11 and the third draft replaced the second draft. So the
12 truth is they never have anything but their last draft,
13 but at any rate, I'm probably less -- feel less strongly
14 than I did if that was five years ago, but I do --

15 HONORABLE JANE BLAND: Well, then we're
16 making progress.

17 MR. ORSINGER: I do think that it introduces
18 a tone of advocacy or a reality of advocacy if you allow
19 the lawyers to interactively help the expert state their
20 opinion, and I don't like that just as a matter of policy,
21 still.

22 HONORABLE JANE BLAND: Well, take the
23 opposite look. Does it decrease the tone of advocacy to
24 have a whole avenue of cross-examination devoted to the
25 lawyer's participation in preparation of the report rather

1 than the underpinnings of that expert's opinions and where
2 those might be faulty?

3 MR. ORSINGER: Yeah, I agree that a lot
4 of -- it's a waste of everyone's time to try to impugn an
5 expert because they had different drafts or because they
6 had conversations. So I think that that's a deplorable
7 practice on the part of lawyers. It's kind of a cheap,
8 below the belt attack on expert opinions. I would rather
9 that we all deal with the merits. So I know -- yeah, I
10 agree that's an abuse. So which is worse, lawyers up to
11 their, you know, typical tricks of trying to discredit
12 somebody for nonmeritorious cross-examinations versus
13 lawyers who get in there and write their advocacy into
14 those reports and then put the expert up as if they're
15 independent. To me it's a balancing.

16 So at any rate, my opinion is probably the
17 same as it was, but, you know, I just recall vividly
18 walking away from saying, my goodness, does this mean that
19 the lawyers are going to be writing the expert reports and
20 just paying for a signature?

21 CHAIRMAN BABCOCK: You seem to concede that
22 the Federal practice is okay.

23 MR. ORSINGER: Yeah, Federal practice is
24 okay in Federal court.

25 CHAIRMAN BABCOCK: Well, yeah, that's where

1 it is.

2 MR. ORSINGER: Because the kinds of cases
3 that are in Federal court have different kinds of judges,
4 different kinds of lawyers, and different kinds of subject
5 matter and litigants and money, but the state court is
6 where everybody else goes that doesn't have a Federal
7 case, and that's where the lawyers who can't or won't
8 practice in Federal court practice, and that's where the
9 practicalities of practice vary from community to
10 community and even from judge to judge, so it's not
11 necessary -- it doesn't necessarily follow that because a
12 practice works well at the Federal court level with the
13 court supervision and the money and the high quality
14 lawyers and all of that, that doesn't always translate
15 well to the kind of pandemonium we have in a lot of our
16 state courts.

17 CHAIRMAN BABCOCK: Well, I'll stack our
18 state judges up against Federal judges.

19 MR. ORSINGER: I think the Texas judges are
20 the best of all the state judges.

21 CHAIRMAN BABCOCK: I just wanted to get that
22 on the record there, Richard.

23 HONORABLE DAVID EVANS: I like you, too,
24 Richard.

25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: Couldn't you ask the expert what
2 influence or what part of this was aided -- you were aided
3 by the lawyers suggesting. You can ask them that, can't
4 you?

5 CHAIRMAN BABCOCK: I would think so. I've
6 always asked that in Federal court. Nobody has ever shut
7 me down.

8 MR. LOW: And, you know, ultimately what the
9 report is is what he's swearing is going to be the truth,
10 and you just need to know whether he changed it or didn't,
11 did the lawyer, and if he wants to lie about it, sometimes
12 witnesses do lie, I've heard.

13 CHAIRMAN BABCOCK: Not in my experience.
14 Yeah, Judge Wallace.

15 HONORABLE R. H. WALLACE: To follow up on
16 what Buddy was saying, I don't read that as necessarily
17 saying you cannot cross-examine an expert on who drafted
18 this report; and if it does, then I think that would not
19 necessarily be good, but just because you don't get the
20 drafts in your hand doesn't necessarily mean you can't
21 question the expert.

22 CHAIRMAN BABCOCK: Yeah. Here's in my
23 experience, Richard and Justice Bland, where the rubber
24 may hit the road. You get a draft, and the initial draft
25 has the expert opining that there are \$5,000 worth of

1 damages; and then the second draft, it's up to 50; and
2 then it's up to 500; and by the time you get the last
3 draft it's 5 million; and that is probative of something
4 I've always thought, but --

5 HONORABLE JANE BLAND: Well, there are
6 exceptions, if you look at (c), and one of them is that
7 you can cross-examine the expert about facts or data
8 provided by the attorney to the expert and upon which the
9 expert relies for his or her opinions. So I think in your
10 case if you're saying that will I be able to ask if you go
11 from \$5,000 to \$5 million based on something in this case
12 or something that counsel told you.

13 CHAIRMAN BABCOCK: No, but, see, I don't
14 know, Jane. I don't know because I don't have the first
15 draft. So I don't know that he started at 5,000; and if I
16 say to him, "Well, was the number always 5 million?"

17 "I think it was in that area."

18 "Well, was it less than that or more than
19 that?"

20 "Just in that area."

21 "Well, was it ever as low as 500?"

22 "I don't remember."

23 HONORABLE JANE BLAND: But isn't the more
24 important question, "How did you get to 5 million?"

25 CHAIRMAN BABCOCK: Yeah, of course, and

1 that's the answer to my hypothetical.

2 HONORABLE JANE BLAND: Yes.

3 CHAIRMAN BABCOCK: Because you waste a ton
4 of time for that marginal little cross-examination, but, I
5 mean, jurors would react to that I think if they saw that
6 progression in a document as opposed to the way -- but I
7 don't know if it's worth it. I personally don't think it
8 is worth it, but you're giving up something for sure.
9 Justice Christopher.

10 HONORABLE TRACY CHRISTOPHER: Well, I'm the
11 dissenter on the committee and was the dissenter five
12 years ago, and it was a very close vote, because I went
13 back and looked at it to see.

14 CHAIRMAN BABCOCK: Five years ago?

15 HONORABLE TRACY CHRISTOPHER: In terms of we
16 actually took a vote in this committee about changing the
17 rule, and it was a very close vote against changing it.
18 To me it's one thing to say, "Well, I just need to know
19 how you got to the 5 million," all right, versus "Your
20 first opinion was 5,000." I mean, those are two very
21 different things, and the first opinion to me is very
22 indicative of, you know, the influence that the lawyer had
23 in changing the expert's opinion, and I think a juror
24 ought to know that. I mean, the Supreme Court has all of
25 these cases over and over again about we have to be so

1 careful about experts because, you know, jurors are just
2 going to believe anything that you tell them. So to me
3 you need to be able to cross-examine the expert about the
4 lawyer's involvement in the number so that it -- that the
5 juror understands that this is not an independent expert.
6 That's what I'm afraid of, and everyone says, "Oh, well,
7 jurors always know that experts are bought and paid for
8 and they're just parroting back the opinion that the
9 lawyer has come up with," and I don't think jurors know
10 that.

11 CHAIRMAN BABCOCK: Justice Christopher,
12 could I ask one clarifying question? You said the vote
13 was close in the subcommittee. Are you talking about this
14 time or five years ago?

15 HONORABLE TRACY CHRISTOPHER: No, I'm a lone
16 dissenter in this subcommittee. The vote in the whole
17 group the last time was close.

18 CHAIRMAN BABCOCK: Yeah. Okay. I'm with
19 you. Thank you. Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: Well, if
21 that's true, how does any expert get past a Daubert
22 challenge? If they're all just parroting what the lawyers
23 say I just should preclude experts. I mean, if that's
24 really true, why do we allow them?

25 CHAIRMAN BABCOCK: A rhetorical question

1 apparently. Skip.

2 MR. WATSON: The thing that I wish I could
3 see and that I always look for in records and that would
4 be really helpful in determining, you know, the efficacy
5 of a Daubert/Robinson challenge is a combination between
6 (b) and (c). It would really help me and I think it would
7 help trial judges and appellate judges if the exemptions
8 in (c) weren't just exemptions, but if they needed to be
9 part of the expert report. If the report itself said,
10 "These are the facts that I don't know personally but were
11 supplied by the lawyer," or "This is the basis for my
12 opinion," whatever --

13 CHAIRMAN BABCOCK: Yeah.

14 MR. WATSON: -- then you can apply standards
15 like Justice Boyd's in Mel Acres of was this an opinion in
16 which the lawyer said, "Don't consider this" or "Do
17 consider this," and it's literally tailored for facts that
18 are not necessarily the facts of this case because they're
19 selective, and that's really what -- where the cutting
20 edge is on these things, and it would be so helpful if
21 instead of being exempted it was just in there. "This is
22 where I got the" -- "these are the facts I'm relying on.
23 This is where I got them."

24 CHAIRMAN BABCOCK: Justice Bland.

25 HONORABLE JANE BLAND: Okay. A couple of

1 things. One is we have kept the Texas practice that is an
2 opt-in for expert reports. In other words, the trial
3 court may order reports to be produced. Under the Federal
4 rule it's the other way. Reports must be produced unless
5 -- absent a court order, and that's because we think there
6 are many cases where there will be no expert reports
7 needed in Texas state practice. So that's just an aside.

8 If a report is ordered or the parties agree
9 to produce reports, you have to identify in the report all
10 documents and tangible things that you have relied on or
11 reviewed, and a couple of other words and then under the
12 exemption -- I mean, I'm sorry, what's not exempt is
13 "Where did this come from? Did your lawyer provide you
14 this information, or did you get this information from
15 elsewhere?" So I think the way the rule works, you've got
16 that solution if you want to depose the expert or
17 cross-examine the expert about where they got the factual
18 data that they're relying on for their opinion.

19 MR. WATSON: Yeah, I got that. I'm just
20 saying it would save a lot of time and money if that were
21 front-end loaded, and you would be surprised how often
22 those questions aren't asked in the deposition of the
23 expert. It just cleans up the whole Daubert process if
24 that's in black and white and the judge is sitting down
25 and looking at it.

1 MR. MEADOWS: But I really do see that as an
2 issue of not much concern because at the end of it all the
3 expert -- let's just take Richard's example that the
4 lawyer wrote the whole report, and the expert signed it
5 and testified as to it. At the end of the day it's either
6 going to be credible testimony or it's not. It's going to
7 be something that expert is going to have to defend and
8 justify based upon the facts and assumptions that are
9 included in it. So I really think that we're fighting
10 over something that really is just not that valuable
11 because the expert is going to have to stand on his or her
12 own in terms of supporting the opinion. They don't have
13 any personal knowledge, so they're basing everything on
14 facts and assumptions that were provided to them by
15 somebody. They're going to almost always find them in the
16 documents or some other place. You could press the
17 witness in terms of if the lawyer gave him this or that,
18 but at the end of it all the expert is going to have to be
19 credible in issuing the opinions that are in the report or
20 in his testimony.

21 MR. WATSON: You're talking about
22 credibility. I'm talking about whether it gets in or not
23 at all. That's a question of law, not a question of
24 credibility.

25 MR. MEADOWS: Well, it's -- they're related

1 because if it gets in at all it depends upon whether or
2 not it's an appropriate methodology, whether or not it's
3 the sort of thing that experts can rely upon. I mean, if
4 it's just something that turns out to be based on a
5 wholesale set of materials provided by the lawyer, I mean
6 that's a point of attack.

7 MR. WATSON: Well, I agree, Bobby. I just
8 think it's a -- we're to the point now in our
9 jurisprudence that there is a baseline determination of
10 both reliability and even relevance that has to be made,
11 and that's a question of law, and that needs to be made on
12 articulable standards, and it would be helpful if we're
13 going to be saying that the leap in analysis between facts
14 and conclusion is too great to know what the facts are and
15 to know where they came from and to know what was left
16 out.

17 MR. MEADOWS: Well, just to finish, you
18 know, the counterpoint to that, we're not suggesting that
19 that's not discoverable.

20 MR. WATSON: I understand. I'm just saying
21 if it were in the -- on the paper, the world would be a
22 simpler place. That's all. Just a suggestion.

23 MR. KELLY: The rule would be simpler if all
24 experts were unbiased and we had an inquisitorial judicial
25 system, but we don't. It's adversarial, and the experts

1 are paid for by one party or the other, so I don't think
2 there's an easy solution to it by just having mandatory
3 disclosure of everything.

4 MR. MEADOWS: There's even a more
5 fundamental fact, which is if the expert is not going to
6 say what the lawyer needs for him or her to say that
7 expert is going to become a consulting expert.

8 CHAIRMAN BABCOCK: Professor Dorsaneo.

9 PROFESSOR DORSANEO: With respect to the
10 words of this thing, (c)(2), for example, "facts or
11 data" -- there's always a problem with "facts," but let's
12 leave that aside -- "that the party's attorney doesn't" --
13 does the party's attorney include party?

14 CHAIRMAN BABCOCK: Does the party's attorney
15 include party?

16 PROFESSOR DORSANEO: I mean, what if a party
17 says? I have lots of parties who, you know, they may even
18 be attorneys, but they're not their own attorney.

19 HONORABLE JANE BLAND: Communications from
20 the party are not part of the exemption from disclosure,
21 and so this is the exception to the exemption.

22 PROFESSOR DORSANEO: Okay. All right.
23 We're all right. But then what about "considered"? Over
24 the years we had issues about expert testimony, and
25 ultimately we ended up with "reviewed by," okay, because

1 people would say, "Well, yeah, I looked at that, but I
2 didn't rely on it. It didn't form the basis of my
3 opinion." What does "considered" mean? I'm worried about
4 sneaky guys.

5 HONORABLE JANE BLAND: "Reviewed by" is
6 included in the list of -- the litany of things that have
7 to be produced in terms of if you've reviewed it you have
8 to produce it.

9 PROFESSOR DORSANEO: Okay. And then is
10 there a word somewhere that I've missed?

11 HONORABLE JANE BLAND: Yeah, on page 31.
12 195.5(a)(4)(A). (a)(4)(A).

13 PROFESSOR DORSANEO: (a)(4)(A). Okay.
14 Thank you.

15 HONORABLE JANE BLAND: You're welcome.

16 CHAIRMAN BABCOCK: Okay. Yeah, Richard
17 Munzinger.

18 MR. MUNZINGER: Do you think your rule as
19 written now addresses a situation where you have an expert
20 and you discuss with the expert -- he's first a consulting
21 expert, and you discuss subjects A, B, C, D, and E with
22 him, and he concludes that he can testify -- or you
23 conclude that his testimony on subjects A, B, and C is
24 helpful to you but on subjects D and E is not. Can you
25 designate him as a testifying expert on subjects A, B, and

1 C, but claim he is a consulting expert on subjects D and E
2 and not disclose those communications, those subjects, or
3 that issue? I don't think your rule as presently written
4 addresses that. I don't know that it has to or should. I
5 just raise the question.

6 MR. MEADOWS: Good question, I wouldn't
7 think you could do that, but --

8 MR. MUNZINGER: I couldn't hear you.

9 MR. MEADOWS: I think if you're a testifying
10 expert --

11 PROFESSOR ALBRIGHT: Sometimes you can.

12 MR. MEADOWS: You do?

13 MR. MUNZINGER: Your answer was what?

14 PROFESSOR ALBRIGHT: He doesn't think you
15 can. I think you can.

16 MR. MEADOWS: I think if you're a testifying
17 expert, you are exposed to examination on all topics.

18 PROFESSOR ALBRIGHT: It says in anticipation
19 of his testimony --

20 MR. MUNZINGER: Even though the other topics
21 were consulting topics.

22 MR. MEADOWS: That's what I think.

23 PROFESSOR ALBRIGHT: But, see, I think it's
24 related to his testimony.

25 MR. MUNZINGER: Assume for a moment with me,

1 though, that the topics are discrete.

2 PROFESSOR ALBRIGHT: Right.

3 MR. MUNZINGER: They are not necessarily
4 interrelated.

5 PROFESSOR ALBRIGHT: Right.

6 MR. MUNZINGER: So I've got to go get two
7 experts to get my testimony on subjects A, B, and C.

8 PROFESSOR ALBRIGHT: Well, I thought you
9 just said you don't want him to testify to A, B, and C.

10 MR. MUNZINGER: I first contact Joe Schmoie.
11 I say to him, "I've got this case. I think that there are
12 several things that your discipline allows you to testify
13 that could help me in this case, and I would like you to
14 study subjects A, B, C, D, and E." He does so. He gets
15 back to me and says, "This is my opinion on these five
16 subject matters," and I make a tactical decision that his
17 testimony will -- on balance will hurt me on D and E, but
18 will help me on A, B, and C.

19 PROFESSOR ALBRIGHT: Right.

20 MR. MUNZINGER: So I designate him as a
21 testifying expert on A, B, and C. My communication with
22 him on all five are not discoverable, et cetera, and he's
23 only going to testify on A, B, and C. Your rule doesn't
24 address that situation, and I don't know why. Given the
25 way the rule is written, I should have to disclose the

1 subjects D and E, my communications D and E, his thoughts
2 concerning D and E. I'm paying him, and I'm putting him
3 on the witness stand. He's going to give honest answers
4 to A, B, and C, but I don't want you to talk about D and
5 E, and you don't have to do so.

6 PROFESSOR ALBRIGHT: I think the rule does
7 address that because you have to provide in 195.5(a)(4)(A)
8 all the documents, et cetera, reviewed by, prepared by, or
9 for the expert in anticipation of his testimony, and his
10 only testimony -- his testimony is only on -- I can't
11 remember which letters, but it's only on two of the five
12 letters that you -- the subject matter.

13 MR. MUNZINGER: But that's my point. His
14 testimony is on -- he's my witness. I called him. Give
15 me your opinion on A, B, and C. I ask him nothing about D
16 and E.

17 PROFESSOR ALBRIGHT: Right. Well, so I
18 don't understand what your problem is.

19 MR. MUNZINGER: Well, my problem is can
20 you -- does he have to say, if asked, I'm -- or is he a
21 consulting expert on D and E?

22 MR. MEADOWS: I don't think so.

23 PROFESSOR ALBRIGHT: I think he is. Bobby
24 doesn't think so.

25 MR. MUNZINGER: That's why I'm raising the

1 point, because I don't know the answer either, and do we
2 want to have a rule that addresses that situation? I've
3 had that come up in my practice over my lifetime.

4 CHAIRMAN BABCOCK: Well, the first thing,
5 Richard, you shouldn't hire an expert named Dr. Joe
6 Schmoe, but Justice Bland.

7 HONORABLE JANE BLAND: But if you do hire
8 Joe Schmoe and you plan to put him on the witness stand,
9 all of his opinions are fair game, and we -- under (e) if
10 you continue down, 195.5(e), it has the test for a
11 consulting expert versus a testifying expert, and it is
12 not according to subject matter. It is according to
13 whether or not Joe Schmoe will be called to the witness
14 stand. If you designate --

15 MR. MUNZINGER: Which -- what section is it?

16 HONORABLE JANE BLAND: On page 32. That --
17 if you go down to (e), "Expert employed for trial
18 preparation." You see that?

19 MR. MUNZINGER: My personal belief is I
20 don't think (e) applies to my situation in the context of
21 the rule in its entirety because he is not testifying to
22 the jury on subjects D and E, only on subjects A, B, and
23 C.

24 HONORABLE JANE BLAND: But it is whether or
25 not the person will be called as a witness at trial. If

1 you designate a person to be called as a witness at trial,
2 they are not a consulting expert, and their opinions are
3 not exempt from discovery. If the person is not expected
4 to be called as a witness at trial, you may consider that
5 expert to be a consulting expert unless one of the experts
6 that you are going to have testify at trial relies on
7 information from that consulting expert, at which point --
8 and the Texas Supreme Court has grappled with that, so it
9 goes by the person, not the subject matter.

10 PROFESSOR ALBRIGHT: But, Jane, you're only
11 entitled to discover the documents and the opinions, et
12 cetera, for his testimony.

13 MR. MUNZINGER: No, I understand. I
14 understand my duty of disclosure.

15 PROFESSOR ALBRIGHT: He's only testifying
16 on -- I mean, I think it's an issue. I think there have
17 been some cases that have grappled with this, and I think
18 it -- I'm not sure we want to deal with it in a rule,
19 actually.

20 CHAIRMAN BABCOCK: Judge Wallace.

21 HONORABLE R. H. WALLACE: As a practical
22 matter it seems to me it's going to be very hard to parse
23 out what -- you know, okay, "I've got these opinions," and
24 then you start asking other questions. "Well, we're not
25 going to talk about that. I'm a consulting expert in that

1 area." I just don't see -- that would be hard --

2 MR. MEADOWS: It doesn't work.

3 HONORABLE R. H. WALLACE: -- to work.

4 PROFESSOR ALBRIGHT: Yeah.

5 HONORABLE R. H. WALLACE: I mean, I --

6 PROFESSOR ALBRIGHT: Actually, where this
7 has come up is when you have a witness -- expert witness
8 who is also a party, and there are several cases that have
9 grappled with that.

10 MR. MUNZINGER: So I'm a lawyer, and I get
11 hired in a case. I get hired in a case, and I know
12 nothing about widgets, whatever the subject matter of the
13 expert's testimony is. I don't know. He's a physicist,
14 he's an economist, whatever he is. And I raise questions
15 searching for the truth for my side of the case to help a
16 jury, et cetera, et cetera, and this guy tells me,
17 "Munzinger, you can't do that because of so-and-so." Now,
18 it's a different subject matter than he's testifying on.

19 What you're telling me is that I need to go
20 hire a second expert and just ask him about A, B, and C,
21 having already paid the first expert to give me the
22 answers on A, B, and C and D and E. I can't use that guy
23 anymore, and I don't know -- I don't see how that reduces
24 the costs of litigation. I don't see how it impacts a
25 jury as concealing any pertinent material fact from the

1 jury. My adversary is certainly free to go off and get
2 testimony on D and E, et cetera, but I haven't done
3 anything -- I don't think I have done anything wrong.
4 You've told me I don't have to give my communications to
5 the guy. I mean, I say you haven't. The rule has.

6 And I'm being educated by the expert. I
7 don't know anything about widgets, and so I've got a guy
8 that's telling me about widgets. "For God's sakes,
9 Munzinger, widgets do so" -- "Oh, I didn't know that.
10 Damn." You know, so to me it's a real question.

11 CHAIRMAN BABCOCK: You live an interesting
12 life for sure. Justice Bland.

13 HONORABLE JANE BLAND: The difference is the
14 rule requires the expert to disclose automatically if a
15 report is required, the opinions and mental impressions
16 that he is going to give -- testify about at trial. So
17 there's your affirmative duty of disclosure. That duty
18 doesn't circumscribe the other side's ability to
19 cross-examine any expert who appears at trial about any
20 matter that they want that's relevant to the litigation.

21 MR. MEADOWS: See, that's the point. You
22 can't cloak a testifying expert with the consulting
23 expert's privilege.

24 MR. MUNZINGER: And I understand. And I
25 understand what you're telling me. My point again is I

1 think everybody in this room that practices law first
2 retains an expert and says to him in writing or otherwise,
3 "You are a consulting expert. I'm not going to have to
4 tell the judge and my adversary that I ever consulted with
5 you in this case unless and until I designate you as a
6 testifying expert. When I designate you as a testifying
7 expert, I have to designate you and the subject matters
8 that you're going to testify on and the documents and
9 everything that lead to your opinions on the subjects
10 you're going to testify on." And what you in essence are
11 telling me is I can't use one expert to be a consultant on
12 multiple facets of the case. I've got to go hire two
13 experts because I can't take the risk that in the course
14 of his discovery a question is asked, has nothing to do
15 with testimony he's giving in front of the court and jury
16 and in his report. It has something to do with something
17 else where I was trying to learn something.

18 HONORABLE JANE BLAND: That's right.

19 MR. MUNZINGER: And so now he was a
20 consulting expert. No longer. He's now a testifying
21 expert, but on subjects not related to what he consulted
22 on. It doesn't make sense to me.

23 CHAIRMAN BABCOCK: Judge Evans.

24 HONORABLE DAVID EVANS: Justice Bland, the
25 plaintiff's designated a doctor on A, B, and C opinions,

1 and the defense takes him on E and F that are not
2 designated by the defense as expert opinions from that
3 witness. There's been no Daubert, no challenge on it, and
4 the trial judge is in the middle of trial trying to figure
5 out if it's a valid opinion or not. I didn't think that
6 would be the way the rule would work. If you're going to
7 designate the opposing party's expert -- and then I'm
8 going to try to move away from treating physicians, hired
9 physicians; and let's use automobile accident
10 reconstruction expert, going to testify to speed; but he's
11 not going to testify about impact and what that might have
12 meant on impact. So we'll just segregate it that way.
13 It's doubtful that would ever come up, but I'm just trying
14 to find an example. He's designated to testify as to
15 speed the vehicles were traveling at but not on the energy
16 transfer hoochamagooch. That's a technical term in the
17 48th, by the way, which means it's not coming in, but --
18 and then suddenly he's on cross-examination, and you start
19 picking up other opinions and say, "Now, do you have an
20 opinion about this," and it's never been part of the
21 pretrial discovery or designation. I don't think that
22 gets in.

23 HONORABLE JANE BLAND: Well --

24 HONORABLE DAVID EVANS: I don't think it
25 should get in.

1 HONORABLE JANE BLAND: If the plaintiff's
2 lawyer objects and says, "This calls for speculation" --

3 HONORABLE DAVID EVANS: It doesn't call for
4 speculation. "Do you have an opinion about the energy
5 transfer?"

6 MR. MEADOWS: But if it's an issue in the
7 case --

8 HONORABLE DAVID EVANS: Well, if he --

9 HONORABLE TRACY CHRISTOPHER: He --

10 THE REPORTER: Guys, one at a time, please.

11 HONORABLE DAVID EVANS: -- hasn't been
12 designed by either side, he hasn't been designated on
13 that. I mean, that's --

14 MR. MUNZINGER: So if it's in a deposition
15 and the question comes up, the lawyers -- I say to my
16 expert, "Don't answer that question. That's not within
17 your testimony," and we go to court, and now we're in
18 front of Judge Evans, and the issue comes up. "He's a
19 consultant on that subject, Judge."

20 HONORABLE DAVID EVANS: I didn't put the
21 part he was a consultant. I don't believe that you can
22 force somebody to be your expert, a hired expert, without
23 paying them.

24 MR. MUNZINGER: I agree with that.

25 HONORABLE DAVID EVANS: You can go hire your

1 own expert and let the plaintiff then sit there silent
2 after you put on the evidence on that area that his
3 witness is not going to testify on, but you can't -- I
4 don't think -- I think you've got to designate the witness
5 and the opinions they're going to testify under the rule
6 even if they're opposing party.

7 MR. MUNZINGER: You've got to pay for them.
8 You've got to pay for them.

9 HONORABLE DAVID EVANS: That would be my
10 read of it, and that would be the way I would think --
11 that way you get the challenges on experts up early.

12 CHAIRMAN BABCOCK: Tom.

13 MR. RINEY: Well, we've got designation
14 issues and then we have what in effect is a privilege;
15 that is, a privilege from disclosing opinions of a
16 consulting expert. Privileges are generally fairly
17 limited, and I think it has to be on a witness basis, not
18 a subject matter, because otherwise you're going to run
19 into a situation where the expert says, okay, let's say
20 plaintiff says the widget is defective in five different
21 respects. First witness will say -- expert might say,
22 "Yeah, I agree with A through C," but he won't go D and E.
23 Well, that's pertinent. It would be a fraud on the court
24 to have an expert say, "I think it's defective in A, B,
25 and C. I invoke a privilege to testify as to D and E,"

1 and then we go get another expert who agrees on D and E
2 but not A, B, and C. I mean, that is really --

3 CHAIRMAN BABCOCK: Well, how about --

4 HONORABLE DAVID EVANS: That's same subject
5 matter.

6 MR. RINEY: And same thing, too, about you
7 might get -- if the expert has an opinion on liability,
8 he's designated on liability, but if he doesn't think
9 there's causation there, there ought not to be a privilege
10 and say, "He's a consulting expert on causation. He can't
11 give an opinion on that.

12 HONORABLE DAVID EVANS: I'm not talking
13 about privilege. I'm just saying whether or not he's
14 designated by the other side.

15 MR. RINEY: And perhaps the opposing party
16 after the deposition has to go back and designate him on
17 that ground, but I think we're talking about -- we're
18 talking about consulting expert. We're talking about a
19 privilege that should be limited. I think it is limited,
20 and I think there is no practical basis and no basis in
21 justice at all for restricting it by subject matter. I
22 think that would lead to all kinds of problems.

23 CHAIRMAN BABCOCK: Richard Munzinger.

24 MR. MUNZINGER: What happens if I get hired
25 in a case and I call my first expert, he's a consultant.

1 We agree he's a consultant with me, and he says to me,
2 "Munzinger, widgets do X," and that's the end of my
3 lawsuit. And I say, "Why do you say widgets do X?" He
4 says, "A, B, C."

5 "Well, thanks very much. Good-bye," and I
6 call expert B. Expert B has a different opinion. They're
7 both honest men. They're both physicists or whatever they
8 are, economists, but it's expert opinion testimony. It's
9 not fact testimony. It's not God created lemons yellow.
10 It's "My opinion is that this is yellow" or whatever. So
11 now I hire expert number two, and he comes to court. Is
12 that a fraud on the court? Did I do something wrong
13 because I found an expert who helps my case? Is that a
14 fraud on the court?

15 If it isn't a fraud on the court, why do I
16 have to -- if I'm not putting sworn testimony before the
17 jury -- go out and hire two experts to get to where I was
18 with the second expert.

19 CHAIRMAN BABCOCK: Richard, what if your
20 expert says, "Here's my name. Here's my credentials, and
21 Mr. Munzinger, you've asked me to look at A, B, and C, and
22 I've got opinions on all of that." You say, "What are
23 they?" and he testifies beautifully about that, and then
24 on cross the other lawyer says, "Well, what about D and
25 E?" And he says, "I wasn't -- that's not part of my

1 assignment. I'm here to testify about A, B and C."

2 "Okay, fine, but you have opinions about D
3 and E, don't you?"

4 "You know, I may have."

5 "Well, what are they?"

6 "Well, I don't choose to provide those to
7 you because I haven't studied it thoroughly for my
8 testimony. I don't want to put my reputation on the line.
9 I don't know any of the facts under D and E. I just don't
10 want to share my opinion because it could be misleading,
11 and I haven't studied it enough, and that wasn't my
12 assignment."

13 "Well, have you talked to Munzinger about D
14 and E?"

15 "Yeah, I've talked to him about D and E."

16 "Well, what did you tell him?" How's that?
17 Is that okay?

18 MR. MUNZINGER: Well, and maybe I have to
19 object at some point during that cross-examination on the
20 basis that "Your Honor, the man has been proffered as a
21 testifying expert on subjects A, B, and C. We have
22 complied with the rules. We served our report. Every
23 single thing the law requires regarding subjects A, B, and
24 C has been given. I paid for whatever else is D and E.
25 I'm not going to let him testify to that." And I don't

1 think that's a fraud on the court.

2 CHAIRMAN BABCOCK: Okay. Well, Judge Evans,
3 how are you going to rule on this objection?

4 HONORABLE DAVID EVANS: Well, if the group
5 says -- if it is as Tom said, you know, if it's a
6 consulting issue and you can just say, "We're consulting
7 on that. We don't have to disclose it" or whatever you're
8 going to say, that may be one area. All I was trying to
9 get into is that if on cross-examination you expect to
10 take the witness into another area and ask for an opinion
11 then you need to designate that witness on that opinion in
12 the pretrial discovery. Where else would you get the
13 challenges on Daubert? Where else would you get that, at
14 the trial level or on the NOV, after your duck soup?

15 CHAIRMAN BABCOCK: And the lawyer is going
16 to --

17 HONORABLE DAVID EVANS: You know, when the
18 seven of you or nine of you are reading it over.

19 CHAIRMAN BABCOCK: The lawyer is going to
20 argue to you, Judge Evans, that "Judge, his opinions on D
21 and E, which he has discussed with Munzinger, are
22 pertinent to A, B, and C."

23 HONORABLE DAVID EVANS: Well, you haven't
24 seen the basis for it, you haven't tested it against the
25 case law. You haven't read the -- you haven't analyzed it

1 for peer acceptance, none of those things, and you're in
2 the middle of a trial with a lot of money going on and 12
3 people sitting in the box, so you say here comes the
4 challenge. "All right. Ladies and gentlemen, go over
5 there and sit in the jury room for the next two hours
6 while we argue about this."

7 CHAIRMAN BABCOCK: So you're going to
8 sustain the objection.

9 HONORABLE DAVID EVANS: Well, if I have to
10 test out the expert's opinion as the gatekeeper --
11 Mr. Brown, I still keep that article there -- you know,
12 I'm going to send them out and test it while they're
13 outside, and that's a problem in management of a trial.

14 CHAIRMAN BABCOCK: Justice Christopher, and
15 then Judge Estevez.

16 HONORABLE TRACY CHRISTOPHER: Well, I think
17 reasonable minds can differ on this point as to whether or
18 not if you're going to elicit opinions via
19 cross-examination whether you have to designate ahead of
20 time that opinion.

21 HONORABLE DAVID EVANS: A new subject.

22 HONORABLE TRACY CHRISTOPHER: A new -- well,
23 you know, just I'm testifying that, you know, the man
24 needed surgery, and I want to ask you about pre-existing
25 conditions.

1 HONORABLE DAVID EVANS: That's a different
2 issue.

3 HONORABLE TRACY CHRISTOPHER: Well --

4 HONORABLE DAVID EVANS: Anything that goes
5 into the surgery and what was necessary for the surgery
6 and when he went in it, but if it's a completely different
7 topic, and if it's different it's hard to come up with
8 those examples. That's what I'm trying to -- the
9 follow-up treatment or something like that. That might be
10 an issue, is what I'm trying to --

11 CHAIRMAN BABCOCK: Judges.

12 HONORABLE TRACY CHRISTOPHER: Well, and I
13 mean, I do understand that. Okay. Let's say you're
14 designated for treatment in what you did, and I'm going to
15 ask you some questions about this life care plan, okay,
16 while you're up here. "Do you really think he needs this
17 or this or this, you know, that they have provided via
18 this life care plan?"

19 Now, I think reasonable minds can differ,
20 but I always thought that cross-examination was fair game;
21 and if you got a new opinion on cross-examination that
22 helped you, you didn't have to designate them. I know
23 some people take the opposite view, not only for experts
24 but also fact witnesses.

25 HONORABLE DAVID EVANS: Well, if --

1 HONORABLE TRACY CHRISTOPHER: And, you
2 know --

3 HONORABLE DAVID EVANS: I think it comes
4 right out of the box on what the objections are. "Have
5 you reviewed the life care plan?"

6 "Well, I haven't." End of discussion. I
7 don't think at that point you go up and hand him the life
8 care plan and say -- start then having him look it over
9 and render an opinion, or if he gives the life care plan,
10 "Do you have an opinion about it?" He says, "No, I
11 don't." As the gatekeeper you cut it off.

12 HONORABLE TRACY CHRISTOPHER: Right, and I
13 think the plaintiff's lawyer who put the witness up says,
14 "Judge, he hasn't reviewed the life care plan. We're not
15 proffering him as an expert on the life care plan. He's
16 not a witness. You know, he's not qualified to talk about
17 the life care plan," and then it ends. I don't think it's
18 more complicated than that.

19 HONORABLE DAVID EVANS: Maybe not.

20 CHAIRMAN BABCOCK: Judge Estevez.

21 HONORABLE ANA ESTEVEZ: I was just going to
22 say that we're presuming that they've deposed all of these
23 experts, and many, many times we're not talking about the
24 billion-dollar case. We're talking about the
25 \$10,000-dollar case; and no one has been deposed; and no

1 one knows what everyone is going to say; and, you know,
2 they did the basic disclosures; and so they said he's
3 going to -- "The doctor is going to testify that the
4 accident caused the injuries"; and then when they get in
5 there on cross-examination they go into pre-existing and
6 other areas that nobody has even discussed; and I don't
7 really know that there's always a valid objection. I
8 mean, sometimes there wasn't any way of knowing what other
9 areas they were going to get into. Doors are opened.
10 There's so many different ways that they get into it that
11 it doesn't seem like -- I guess I just don't know that
12 this is extremely fruitful because, yes, I do, I go and I
13 do a Daubert challenge right there.

14 I've done it before. We got into another
15 area. We had some great physicist that was talking about
16 this accident, and they're asking for \$25 million. I give
17 my jury the rest of the day off, and we come back in the
18 morning because I don't know if it's going to take one
19 hour or three hours, but sometimes you have to do that,
20 and I don't know that that's bad. I mean, we would have
21 had to take the time anyway. It's bad if they're waiting
22 in the jury room, but if they got the rest of their
23 afternoon I don't know that that's bad. I think it ends
24 up about even.

25 CHAIRMAN BABCOCK: Yep. Well, it sounds to

1 me like, Richard, if we're going to give you complete
2 peace of mind we're going to have to rewrite the rule, but
3 it sounds like you're in pretty good shape.

4 MR. MUNZINGER: Well, and my only other
5 comment, if I may --

6 CHAIRMAN BABCOCK: Yeah.

7 MR. MUNZINGER: The rule as drafted in 190
8 -- whatever this is, 195, page 32, expert communication
9 exempt from disclosure. All of my experts' communications
10 are exempt from disclosure except those listed in
11 subparagraphs (1), (2), and (3); and so if my subject --
12 if my communications with the expert are on subject
13 matters D and E, which aren't disclosed, et cetera, they
14 should be protected from disclosure.

15 CHAIRMAN BABCOCK: Right.

16 MR. MUNZINGER: And that's my operative
17 assumption as I read this rule, and my point in raising it
18 is because the rule itself doesn't address that situation
19 other than in those three, and it raises the problem,
20 because Tom says it's a fraud on the court, and I respect
21 that. I mean, again, reasonable minds can differ, and
22 it's a -- you know, the lawyer walks a tightrope
23 sometimes.

24 CHAIRMAN BABCOCK: Yeah. Well, Fort Worth
25 is where the west begins. Amarillo is where it continues,

1 and El Paso is where it ends in this state, so you can
2 figure it out. Let's go talk briefly about -- about
3 sanctions and spoliation, without prejudice to Kent.

4 MR. MEADOWS: Right. And before we move to
5 that topic, should -- I'm just trying to understand
6 exactly what we should take away from this discussion in
7 terms of our continued work on this topic. So right now I
8 think -- I can be corrected by any member of our discovery
9 subcommittee, but right now I would say we're going to
10 press on with the Federal rule in terms of protected
11 communications and what needs to be disclosed as
12 enumerated in our proposed rule, and we're not going to
13 make any changes to this treatment of what is different
14 between testifying and consulting experts.

15 CHAIRMAN BABCOCK: That's my sense of the
16 room, but maybe we should take a vote. Kennon has got a
17 comment.

18 MS. WOOTEN: It's more of a question. I'm
19 not clear from the draft whether there's an intent to
20 reduce the amount and type of information you can get from
21 consulting experts whose opinions and impressions have
22 been reviewed by a testifying expert. Because right now
23 in Rule 192.3(e) there's a list of things you can get from
24 those categories of consulting experts. In the proposed
25 rule on page 32, you're able to get facts known and

1 opinions held by consulting expert whose mental
2 impressions have been reviewed, but it's unclear to me
3 whether there's an intent to reduce what you can now get
4 from those categories of consulting experts.

5 MR. MEADOWS: I don't think we're intending
6 to reduce. I mean, we'll look at it and just make sure
7 that those are reconciled, but I think Jane said it pretty
8 well. If you're a consulting expert, everything is
9 protected unless some other expert has worked with you and
10 is relying in part on what --

11 PROFESSOR ALBRIGHT: Reviewed.

12 MR. MEADOWS: -- you've reviewed.

13 MS. WOOTEN: Well, and that makes sense.
14 That makes sense, but in the rule right now in disclosures
15 it specifies what you can get from the testifying expert,
16 and maybe I could be missing something, but it just
17 doesn't lay out as cleanly as what you have in the current
18 rule what you can get from the category of consulting
19 experts whose mental impressions have been reviewed.

20 PROFESSOR ALBRIGHT: I thought the reviewed
21 consulting it just said you get the same thing you can get
22 from a testifying expert. I didn't know that it was set
23 out --

24 MR. MEADOWS: Right.

25 PROFESSOR ALBRIGHT: Where is it set out in

1 the current rule?

2 MS. WOOTEN: It is the same. In the current
3 rule it's in 192.3(e).

4 PROFESSOR ALBRIGHT: So it's the same,
5 right?

6 MS. WOOTEN: Uh-huh.

7 PROFESSOR ALBRIGHT: Yeah. So it just says
8 you can get -- those are treated like testifying experts,
9 right?

10 MS. WOOTEN: So facts known or opinions
11 held.

12 MR. MEADOWS: Okay.

13 MS. WOOTEN: You get everything that's
14 listed in (a) for disclosures that refers to testifying
15 experts specifically. Does that make -- you see where I'm
16 coming from?

17 CHAIRMAN BABCOCK: Let's take a vote since
18 we haven't voted in a while, and it doesn't feel right,
19 and the vote will be -- Bobby, would you put it in the
20 affirmative? Everybody who approves of the subcommittee's
21 moving toward the Federal rule on experts raise their
22 hand.

23 MR. MEADOWS: Good enough.

24 CHAIRMAN BABCOCK: That works for you? All
25 right. So everybody that approves of the subcommittee's

1 effort to approximate the Federal rule regarding expert --
2 testifying expert disclosure, raise your hands.

3 Everybody who is opposed, raise your hand.
4 A fairly unclosed vote. 27 in favor and 4 against, so I
5 think you've --

6 MR. MEADOWS: Thank you.

7 CHAIRMAN BABCOCK: -- got direction, so can
8 we please talk about sanctions? We don't need to sanction
9 somebody.

10 MR. MEADOWS: And I'm just going to let Alex
11 take the topic.

12 CHAIRMAN BABCOCK: Okay.

13 MR. MEADOWS: Well, I mean, I'm happy to set
14 it up. She's worked long and hard on Rule 215 and has
15 focused most recently on the issues that are being raised
16 around a new spoliation rule.

17 CHAIRMAN BABCOCK: Okay. And this is
18 without prejudice to Kent?

19 MR. MEADOWS: Absolutely. In fact, I didn't
20 even circulate Kent's materials because he wanted more
21 time with them. He wanted the discovery subcommittee to
22 spend more time discussing them, and so this discussion is
23 just generally about a reaction to a rule in general and
24 the overall potential scope of it.

25 CHAIRMAN BABCOCK: Great. All right. Alex,

1 take it away.

2 PROFESSOR ALBRIGHT: Okay. So Rule 215 is
3 rewritten with a view towards Federal Rule 37, since our
4 marching orders said to look at Federal rules that were
5 changed. Our current rule is largely based on the Federal
6 rule. There is not much that is different. The Federal
7 rule had a plain language rewrite several years ago, so it
8 tends to be easier to read and pretty well organized. So
9 most of these changes that you'll see in 215 are just
10 looking at the Federal rule, including things in our rule
11 that are different that are not addressed in the current
12 Federal rule, and so there are notes all along, just, you
13 know, where revisions are based on the Federal rule to --
14 just more language and then where we have moved some of
15 our current rule around.

16 I think the one thing that we definitely
17 need to change with Rule 215 is we have to deal with
18 disclosures because now we have mandatory disclosures and
19 not just responses to requests. So we definitely need to
20 make that change to Rule 215 if we're making the mandatory
21 disclosure rule effective. Another thing to think about,
22 which I mentioned earlier, is changing the practice that
23 sanctions -- the usual situation is to have sanctions only
24 after an order compelling, other than reimbursement of
25 expenses, and that's the way this rule is written. I do

1 think -- this is something I looked at yesterday, and I
2 didn't have time to follow through completely, but I
3 believe this rule and the Federal rule if you fail to make
4 disclosures, it mentions the word "sanction," so I need to
5 look at that more carefully, but I think in general it's a
6 reimbursement sanction, then more extreme sanctions after
7 an order to compel.

8 But I think the big issue that we would like
9 some guidance on is spoliation. So in Texas our duty to
10 preserve evidence was stated in the Texas Supreme Court --
11 it's a Wal-Mart opinion. I can't remember the full name.
12 Huh?

13 HONORABLE JANE BLAND: Curtis.

14 PROFESSOR ALBRIGHT: No.

15 MR. KELLY: *Brookshire V. Aldridge*.

16 PROFESSOR ALBRIGHT: No, it's the Wal-Mart
17 case --

18 MR. LEVY: The reindeer.

19 PROFESSOR ALBRIGHT: -- with the reindeer.
20 The reindeer case. I just call it the reindeer case.
21 It's Wal-Mart.

22 MS. WOOTEN: *Wal-Mart Stores V. Johnson*.

23 PROFESSOR ALBRIGHT: Huh?

24 MS. WOOTEN: *Wal-Mart Stores V. Johnson*.

25 HONORABLE STEPHEN YELENOSKY: How many cases

1 against Wal-Mart can there possibly be?

2 PROFESSOR ALBRIGHT: So in that case it was
3 an issue of whether the reindeer that fell on the
4 plaintiff's head was a great big, heavy wooden reindeer or
5 a little tiny, paper mache reindeer. The question was
6 whether the plaintiff -- I mean, whether Wal-Mart had a
7 to keep the reindeer, which they had not. The plaintiff
8 had gone home that day and said, "I'm fine" and then sued
9 later on. The Court in that case held that there was no
10 duty to keep the reindeer, but it annunciated the standard
11 as being if it's -- if you reasonably anticipate
12 litigation, which is the same standard for work product,
13 if you're claiming work product privilege then you also
14 need to keep -- keep evidence. So that's our common law
15 duty to preserve evidence.

16 Then in the *Brookshire Brothers vs. Aldridge*
17 case, the Court talked about sanctions for spoliation and
18 talked about the -- about intentional spoliation and
19 negligent spoliation, and generally the Court talked about
20 the spoliation sanction of an instruction to the jury can
21 only be used for intentional spoliation, but then there is
22 a little sentence that says sometimes it can be used in
23 other egregious situations. So that's -- and so the
24 question is what to deal with in the rule. We have -- our
25 subcommittee has decided -- the majority has decided that

1 we should not deal with the duty to preserve evidence in
2 this rule; that is, duties are generally more common law
3 issues. The Supreme Court has some language that makes
4 restatement of what was said in that opinion, in the
5 Brookshire Brothers opinion, difficult to restate in a
6 rule, and so we think the -- the majority thinks we should
7 not get into that, and that's the same resolution that the
8 Federal rules committee had.

9 The new Federal rules do not address the
10 duty to preserve. They say whatever that duty is, you
11 know, that common law duty, that's what it is. Most
12 places it's reasonably anticipate litigation. Then the
13 way they deal with that is they address only the sanctions
14 that are imposed when you have been determined to have
15 spoliated evidence. So under the Federal rule, which we
16 recommend adoption -- and Kent is in favor of this as
17 well. Kent's -- what he will talk about later is he wants
18 to deal with the duty to preserve and how you give notice
19 of your duty to preserve. So but he is in favor of
20 adopting the Federal rule on the sanction itself, the
21 punishment.

22 So if you look at Rule 215.7 on page 77 and
23 78, this is generally a restatement of the Federal rule on
24 sanctions. One, we think it's a good rule. Two, we think
25 there is a lot to be said to have a -- the same standard

1 in Federal courts as in state courts, so the parties can
2 make decisions about preserving evidence with the
3 knowledge that the same standard will be applied in both
4 courts. So generally what this rule does is it says there
5 can only be severe sanctions such as the -- the jury
6 instructions about the presumption that the evidence that
7 was spoliated is unfavorable. Those kind of severe
8 sanctions can only be imposed if there is a finding of
9 intentional spoliation. So negligent or grossly negligent
10 spoliation will not get you an instruction to the jury.
11 This is consistent with not only the Federal rule, but
12 also pretty much with Brookshire Brothers with this little
13 other Pandora's box, as some people have called it, that's
14 in Brookshire Brothers.

15 Also, no sanctions -- even for negligent or
16 grossly negligent spoliation there can be -- the court can
17 take action, but no sanction can be imposed unless there
18 is a prejudice from the failure to preserve, and the
19 evidence has to actually have been lost. It can't have
20 been recovered, and three, only if the evidence has not --
21 you have not found other evidence to substitute for this.
22 So that's, you know, the equivalent to prejudice to some
23 degree. So it's that -- so if you look on 77, it has to
24 be the evidence is lost because the party failed to take
25 reasonable steps, and it can't be restored or replaced

1 through additional discovery, and the trial court denies
2 prejudice. So in order to impose any kind of sanctions
3 there has to be those three findings. If it's not
4 intentional the party may present evidence concerning the
5 laws of evidence, and (b), the court may order other
6 measures no greater than necessary to cure the prejudice,
7 and this is Justice Brown's addition to make it clearer as
8 to what that means. This is new. It's not in the Federal
9 rule, beginning with the "but," "but must not comment on
10 the failure to preserve the evidence or instruct the jury
11 that a duty to preserve the evidence existed or the
12 consequences of the failure to produce the evidence."
13 That's for negligence or gross negligence spoliation.

14 And then (c) is the intentional spoliation
15 where you can get the presumption and the instruction or
16 possibly even a default judgment or dismissal. These are
17 the severe sanctions.

18 MR. MEADOWS: So the -- so a number of
19 questions. The -- what we've been talking about primarily
20 in terms of what was borrowed from the Federal Rule 37(e)
21 deals with ESI only.

22 PROFESSOR ALBRIGHT: Right.

23 MR. MEADOWS: So that's an initial some sort
24 of threshold question. The question is do we want a
25 broader spoliation rule that would deal with the Wal-Mart

1 deer. The -- and then the issues that kind of encompass
2 the whole range of a spoliation question start with, one,
3 duty, what's the -- what triggers the duty to preserve
4 evidence? Two, what's the mechanism for the application
5 of, you know, agreements around spoliation? What is
6 the -- what's the scope of the punishment? Do we deal
7 with just intentional behavior, or are there circumstances
8 under which negligent behavior would justify the
9 imposition of -- so we've got duty, kind of the scope of
10 the rule, do we limit it to ESI the way 37(e) does or make
11 it -- give it a broader application. And then for the
12 mechanism, the application of the rule, how it would be
13 applied and, more importantly, the punishment. So those
14 are the things on which that I think we would -- is there
15 any I missed in terms of where we would appreciate
16 thinking and guidance on?

17 CHAIRMAN BABCOCK: Yeah. Thanks, Alex.
18 Thanks, Bobby. The State Bar Committee on Court Rules has
19 weighed in on this, too, have they not?

20 MR. MEADOWS: Right. And we considered,
21 carefully considered, their proposal, and it was -- our
22 unanimous view was that it was -- that it was not what --
23 it was not the rule that we needed. It was too much all
24 encompassing and essentially a rewrite of Brookshire
25 Brothers, and I believe it also dealt with negligent

1 spoliation in a way that we would not recommend. So we
2 moved on past that proposed rule.

3 CHAIRMAN BABCOCK: Okay.

4 PROFESSOR ALBRIGHT: It also had a detailed
5 procedure that was a duplicate of sanction procedure
6 generally that we felt like wasn't -- wasn't necessary.

7 CHAIRMAN BABCOCK: Right.

8 PROFESSOR ALBRIGHT: So, I mean, they did a
9 great job of raising the issue and dealing with Brookshire
10 Brothers, but we went a little different direction.

11 MR. MEADOWS: And we would be -- I mean, we
12 would be very interested in continuing to work with those
13 on that committee who have a continued interest, and I
14 think there's been a change in terms of who was proposing
15 that and maybe your committee can just still focus on
16 this, in which case we would definitely want to partner.

17 CHAIRMAN BABCOCK: Yeah. And then Kent has
18 got a different or a --

19 MR. MEADOWS: Right.

20 CHAIRMAN BABCOCK: And could you articulate
21 for us, even though he's not here, what that is?

22 MR. MEADOWS: Yes. I will, and again, I
23 invite other members of the committee to make sure I've
24 got it right because I don't -- he feels strongly about
25 this, and he's done a lot of work. He's communicated with

1 a number of interested parts of the bar --

2 CHAIRMAN BABCOCK: Yeah.

3 MR. MEADOWS: -- and the Legislature, and
4 what he is -- I think it's fair to say that he is most
5 interested in the duty application. That is, he would
6 prefer that we look at something more concrete in terms of
7 the duty to preserve. And not to pin him down on this,
8 but that would either be a lawsuit itself or written
9 notice indicating an obligation to preserve and would not
10 rely upon our understanding of anticipation of litigation.

11 CHAIRMAN BABCOCK: Okay. Yeah, Robert.

12 MR. LEVY: This is a topic I have had a lot
13 of involvement in because I was involved for the full
14 process on the Federal rules, and I'm sorry, in 2010, so a
15 couple of comments. On the issue of preservation and the
16 duty to preserve, the reason why the Federal rules did not
17 address that issue is because of the Rules Enabling Act
18 where they felt that they could not impose a rule that
19 would involve issues that happened before the trial court
20 assumes jurisdiction over the case, which would trigger,
21 you know, preservation could under some views trigger
22 before the lawsuit is filed. So that's why they did not
23 touch it.

24 I don't think that issue impairs the Texas
25 Supreme Court, and therefore, the reason that the Federal

1 rules don't touch preservation should not be a reason why
2 we wouldn't do it. Now, there might be other reasons not
3 to deal with preservation but don't follow the Federal
4 rules approach on that.

5 Another issue that you talk about, which is
6 a key issue, is on the question of ESI. Why do the
7 Federal rules only deal with ESI and then for non-ESI
8 you're still left with common law? I think that's a
9 problem, and it's already starting to be a problem in
10 Federal cases where there are spoliation questions
11 involving things like videotapes. Brookshire Brothers was
12 a videotape case, and some judges are saying, well, that's
13 physical. It's on a physical thing, so ESI doesn't apply,
14 but it is ESI. It's electronically stored information
15 that happens beyond a physical media, which all ESI
16 ultimately is on physical media.

17 So there's a hole now. There's going to be
18 an inconsistency in how to apply the rule, and the reason
19 why they did not go to a full scope rule was the Silvestri
20 case, which is a case involving General Motors and an
21 expert witness for the plaintiff that they destroyed a
22 vehicle or parts of a vehicle and General Motors didn't
23 have a chance to inspect it, and there were sanctions
24 issued, and the court felt that adopting 37(e) for all
25 forms of evidence would overrule the Silvestri case, and

1 they were uncomfortable in doing that, so that's why they
2 took the middle ground and said just ESI.

3 Again, I don't think that that issue applies
4 here, but it does kind of touch back to the Wal-Mart case
5 that you referenced. That would be an analogous
6 situation, but I think the rule covers the same ground and
7 gives the same guidance and the guidance that's necessary,
8 but I suggest that going with ESI only will only cause
9 problems for judges trying to figure out what to do, and
10 then what do you do with non-ESI? Do you just go back to
11 Brookshire Brothers and then you're going to have two
12 lines of cases?

13 Another question in terms of the proposed
14 rule, it's actually a -- I think a problem with
15 another issue or problem gap in the Federal rules, which
16 is the intentional spoliage question. That's the reason
17 why the language in (e)(2) is reference to what would be
18 215.7(c) under this, that the idea that the Federal rules
19 advisory committee had was we wanted sanction for somebody
20 who tries to destroy evidence but fails. So that's where
21 you get to the fact that under (c) there's no reference to
22 prejudice. I think that also is a mistake. There should
23 be a reference to prejudice under (c). You shouldn't have
24 to deal with the issue unless there's some harm done, but
25 they wanted to have the opportunity to sanction a party

1 who tries to destroy information, but fails.

2 The idea of putting a hard drive in a
3 microwave, which actually happened and it doesn't actually
4 destroy the information; but the problem is the rule
5 doesn't kick in at all under that scenario, because there
6 is no loss of information; and so they're not solving that
7 problem; and I think that ultimately you don't want a
8 situation where a judge is trying to punish a party who
9 is -- hasn't caused harm to the other side so that there
10 should be a requirement to show under (c) that there was
11 prejudice before you deal with what are considered to be
12 the death penalty sanctions.

13 CHAIRMAN BABCOCK: Okay. Thank you. Yeah,
14 Peter.

15 MR. KELLY: What I find troubling is the
16 requirement that there be specific intent to deprive
17 another party of the information, in that what happened to
18 the gross negligence, the standard of knew but did not
19 care; and historically we've had a detachment of the state
20 of mind required for gross negligence from the state of
21 mind required for just regular negligence in the
22 assessment of punitive damages in the common law, later
23 codified in Chapter 41; but to say that -- to excuse
24 someone from spoliating evidence when they knew they had
25 to preserve it but did not care, even though they did not

1 have the specific intent to deprive the other party, I
2 think is giving far too much leeway, far too much room for
3 mischief and destruction. Especially if we're talking
4 about something that Kent Sullivan was talking about, that
5 you had to have -- you have to have written notice of a
6 claim. Something happens, everybody knows they're going
7 to get sued; and they don't care and they destroy it
8 anyway, there needs to be some penalty for that; and to
9 limit it to essentially a level of malicious intent
10 essentially renders it no remedy at all; and you'll have
11 very, very few instances of spoliation, even when you do
12 have nefarious conduct.

13 CHAIRMAN BABCOCK: Okay. I think Alex had
14 her hand up first, Richard, and then you.

15 PROFESSOR ALBRIGHT: Yeah, I just wanted to
16 respond to that. That's the Sara Shinlin view of this
17 that was the dissenting view on the Federal rules
18 amendments. You know, one thing that we decided was that
19 there was a benefit to having the same standard in Federal
20 and state court to guide action, preservation action. I
21 think there is -- for gross negligence, you don't get
22 these severe sanctions of (c), but there -- you can get
23 sanctions of -- of (a) and (b), so I mean, there is -- you
24 know, it can be called to the jury's attention as to --
25 that they lost evidence, and you know, I understand that

1 you and others don't think that's enough.

2 Another thing that our rule does is require
3 prejudice for all three. We have prejudice above --

4 MR. LEVY: Oh, I'm sorry. I missed that. I
5 apologize.

6 PROFESSOR ALBRIGHT: Yeah.

7 CHAIRMAN BABCOCK: Great. Richard.

8 MR. ORSINGER: Just briefly, I think it
9 would be helpful to have you articulate the duty to
10 preserve because it's one thing when someone is injured in
11 an event and it's self-evident that the circumstances are
12 significant. Maybe even pictures should be taken, but
13 certainly the reindeer head should be preserved, but when
14 you get over to just the routine destruction of old
15 e-mails or a security video that records over itself every
16 30 days, which is kind of an industry norm, there
17 shouldn't be -- if there's no event, you shouldn't have a
18 duty to save all of your e-mails for an unknown reason or
19 to save all of your videos for an unknown reason. So to
20 me the duty should be spelled out, and the duty should be
21 different if you're talking about an event that occurred
22 versus just the routine practice of recording all
23 communications or all videos.

24 Secondly, I'm not really happy about the
25 idea that sanctions can only be imposed for proof of mens

1 rea intent to hide evidence. I agree that that's what you
2 should show before you dismiss a case, but to allow the
3 jury to receive an instruction that they can make an
4 inference about destroyed evidence or to allow a district
5 judge to refer the -- reverse the burden of proof where
6 evidence was destroyed to me should be available even for
7 negligence and not just --

8 PROFESSOR ALBRIGHT: It's not in Brookshire
9 Brothers.

10 MR. ORSINGER: Well, I'm not on the Supreme
11 Court, so I'm not encumbered by that really. So it seems
12 to me that the subject you test going into the mind of the
13 person who deleted or destroyed the information takes us
14 to an area where we don't know what we're going to find.
15 We're almost never going to get an admission of
16 intentional destruction of evidence. It's going to be
17 speculative what their motive was. I kind of think we
18 should just stay out of the subjective analysis of the
19 thinking of some person or some three people and stay with
20 an objective test of reasonableness. That's built into
21 the negligence standard. What would an ordinary person do
22 if someone is bleeding from a reindeer head? An ordinary
23 person would save the reindeer head, and so I prefer
24 allowing the trial court to permit a jury to infer based
25 on negligence or to even reverse the burden of proof based

1 on negligence.

2 CHAIRMAN BABCOCK: Peter, last word.

3 MR. KELLY: I just think there is a value in
4 the global coherence in terms of assessment of state of
5 mind and penalty for state of mind; and if gross
6 negligence is sufficient for the assessment of punitive
7 damages, it should also be sufficient in this context for
8 sanctions for spoliation; and generally I agree with
9 Richard that negligence should be enough for some level of
10 spoliation obstruction, but the Supreme Court has decided
11 otherwise.

12 CHAIRMAN BABCOCK: All right. Let's take
13 our lunch break and be back at 1:30.

14 (Recess from 12:30 p.m. to 1:45 p.m.)

15 CHIEF JUSTICE HECHT: Back on the record.
16 Chip is dealing with a problem, so let's keep going.
17 Turning to something completely new, the evidence rules.
18 Buddy.

19 MR. LOW: Chip told me really that's why he
20 put this off until noon because he was not going to be
21 here. Okay. Let me first explain to you how we're here
22 and what we're trying to do on the evidence rules. As you
23 will recall, sometime back we redid the style, or
24 Professor Goode and his crew did, without making
25 substantive changes; and they were invited to take a look

1 when they were going through and if they saw any
2 substantive changes we would take that up later. Justice
3 Hecht appointed a committee, their committee. I call it
4 AREC, Administration of the Rules of Evidence Committee,
5 to take a look, and so I went through and I compared Texas
6 Rules of Evidence to the Federal rules and each one that
7 was different. I wasn't inviting them to adopt them,
8 reject, but look and see as a starting point do we need to
9 make any changes, and so that's where we are.

10 We are not here to suggest you follow the
11 Federals, because I know there might be some of you here
12 that don't like to follow the Federals. In fact, it used
13 to be a kiss of death. We're here to examine our rules,
14 compare them to the Federals, and see if we need to be
15 different, if we need to be the same, and my committee has
16 worked on this. We first got reports from Professor
17 Goode's committee. They made certain recommendations, and
18 we agreed or where we disagreed there were no strong
19 disagreements, so the recommendations that you will see
20 were approved or not strongly objected to by the evidence
21 committee.

22 Now, one of the first rules -- and I will
23 take it. You remember we had a proposal to change the
24 rule on foreign law from 30 days to 45 days, and the basis
25 was that Rule 1009 gave 30 days for interpretation of a

1 foreign document. Was it 30?

2 PROFESSOR HOFFMAN: 45.

3 MR. LOW: Yeah, 45, I'm sorry, and so it was
4 proposed that we go to 45. Then the committee, Steve's
5 committee, took it back, and they examined it again and
6 still recommend that. So you will find in your book the
7 rule, if there's a Federal rule like it, and then Steve's
8 committee's recommendation, you'll find that. They
9 recommended changing that and making it 45 days consistent
10 with the other, but they also have a provision "unless
11 otherwise approved by the court." Now, I got a brief from
12 a clerk on the court of criminal appeals, said, well, wait
13 a minute, criminal cases come up pretty quickly, and that
14 might not -- that might not fit in a criminal case. So I
15 talked to a judge, district judge, who tried over 500
16 criminal cases, said he never had it come up. I talked to
17 some white collar lawyers in Dallas and Houston. They had
18 never seen it. I looked in the books, and I couldn't find
19 a criminal case under that, and then my own imagination
20 told me how would it ever come up as a defense or as a
21 crime, you know, so they're convinced it's not a problem,
22 so I propose that we change that to 45 days, unless
23 otherwise ordered by the court.

24 CHIEF JUSTICE HECHT: Professor Goode, glad
25 to have you with us.

1 PROFESSOR GOODE: Thank you, glad to be
2 here.

3 CHIEF JUSTICE HECHT: Comments on that
4 proposal?

5 HONORABLE DAVID NEWELL: Well, I guess I --
6 I guess I would point out that I can think of
7 circumstances where foreign -- the applicability of
8 foreign law might come up, but I agree with you that it
9 would probably be very, very rarely; but, you know, there
10 is certain cases we've had where confessions are taken in
11 a foreign jurisdiction; and, in fact, there was another on
12 a deal with authentication of priors from a foreign
13 jurisdiction as well, so I don't know if this would be a
14 situation where they're having it mentioned, that kind of
15 a thing.

16 MR. LOW: What do you think? Do you have
17 any objection to our amending that rule, because otherwise
18 ordered by the judge, I mean, wouldn't that take care of
19 it?

20 HONORABLE DAVID NEWELL: Well, the judge
21 isn't -- it depends, if the judge has like a standing --
22 standing order for how trials are going to proceed or
23 something like that, but a lot of times they'll just call
24 the docket, and so there would not necessarily be an
25 otherwise order, and so my fear would be -- and I'm not

1 speaking on behalf of -- because you're right. I think
2 that this is something that is maybe the exception rather
3 than the rule. My fear would be a situation where they
4 get to -- they get to try -- they want to try and
5 introduce some discussion -- the state wants to try and
6 introduce some discussion of foreign law, and they say,
7 "Well, you didn't give us 45 days notice and so this
8 evidence would be excluded," but again, you're right, it's
9 kind of theoretical.

10 MR. LOW: The reason I felt it was, there
11 wasn't one single criminal case --

12 HONORABLE DAVID NEWELL: Right.

13 MR. LOW: -- out of your court that had ever
14 cited that.

15 HONORABLE DAVID NEWELL: Well, I just got
16 there, so I mean, I can take that.

17 PROFESSOR HOFFMAN: Give you time.

18 HONORABLE DAVID NEWELL: Give me some time.
19 I'm sure I can screw that up, but I would just say since I
20 feel like everyone is looking at me to say something, so
21 that's what I would offer.

22 MR. LOW: Okay.

23 PROFESSOR HOFFMAN: It might be helpful for
24 everyone, Buddy is referring to -- I guess the best place
25 to look are in the packet on evidence, so the title is in

1 bold, "Administration of Rules Committee (AREC)." That
2 big packet, and he has handwritten numbers, so starting on
3 page 22 you'll find the current version of little 203.

4 MR. LOW: See, what I did, I took the pages
5 -- the report, our report was several pages, but I took
6 those pages that pertained to this rule, so they wouldn't
7 be repetitive I just put them all on one page. All right.

8 PROFESSOR HOFFMAN: And then the proposed
9 rule appears at page 26.

10 MR. LOW: And those are the changes, the 45
11 days, and, Steve, do you have any comment about that?

12 PROFESSOR GOODE: No, I would just add that
13 this is only dealing with judicial notice of foreign
14 law --

15 MR. LOW: Right.

16 PROFESSOR GOODE: -- as opposed to Rule
17 1009, which deals with if you are trying to admit into
18 evidence some document that needs to be translated, that
19 gets covered by Rule 1009.

20 MR. LOW: That's right, and that one is 45
21 days always.

22 HONORABLE DAVID NEWELL: Okay.

23 PROFESSOR GOODE: And that's 45 days. This
24 is the judge's decision about what foreign law is, and so
25 it's really not a matter of admitting into evidence

1 something, but it's the procedure that has to be followed
2 for the judge to take judicial notice of foreign law.

3 HONORABLE DAVID NEWELL: Right. The
4 scenario I was imagining was -- I mean, it's a general
5 conflict of laws issue, but trying to figure out what the
6 law -- if a situation is a confession needs to be
7 admitted, was the confession taken properly under the laws
8 of that country. That's the example I would -- just off
9 the dome; but, I mean, the only other thing I might add,
10 which is not a reason to deviate from the recommendation
11 either, is that my sense is that practitioners know two
12 deadlines. There's 10 and 30, and so now there's a 45,
13 and they may be like, what, 45? But that's about it, but
14 I don't think that's a reason to -- that's just my own
15 anecdotal experience.

16 MR. LOW: Judge, you want any more
17 discussion on that?

18 CHIEF JUSTICE HECHT: Well, we'll see.
19 Anybody else got a comment? Yes, Judge Christopher.

20 HONORABLE TRACY CHRISTOPHER: Any thought
21 about the timing in connection with a summary judgment
22 motion?

23 MR. LOW: If there was a thought, it wasn't
24 by me.

25 MR. KELLY: Does the summary judgment motion

1 count as trial? That's exactly what I was thinking. I've
2 had this come up in summary judgment issues but never a
3 trial, but we might want to clarify that they are the
4 same.

5 CHIEF JUSTICE HECHT: Professor Goode.

6 PROFESSOR GOODE: I was just going to say
7 that the notice may be given by a pleading, and that
8 certainly includes -- there's actually a little case law
9 that says that includes summary judgment.

10 HONORABLE TRACY CHRISTOPHER: Well, but my
11 point is you do a motion for summary judgment that's based
12 on foreign law, and they only have 21 days notice -- 21
13 days to respond to that motion for summary judgment, so
14 they didn't get 45 days notice before the trial of the
15 summary judgment hearing.

16 PROFESSOR GOODE: Right.

17 MR. LOW: That's the thing, they didn't put
18 "except for good cause." They say "unless otherwise
19 ordered by the court."

20 PROFESSOR GOODE: The judge can overrule the
21 time limit.

22 CHIEF JUSTICE HECHT: What's next?

23 MR. LOW: All right. What's next? Next is
24 301 and 302 of the presumptions the Federal court had, and
25 we have no 301 or 302, and 301 and 302 has been condemned

1 by many of the writers. It's not favored. The Federal
2 courts have used it, and it's very difficult to follow how
3 they used it because what is the difference between a
4 presumption and inference, and if it's presumed then if
5 they don't rebut it then what, and you have got to
6 instruct what it is, and Texas has always followed the
7 rule that if you say a man comes in and he's wet, must be
8 raining. Well, the man said, "No, I walked under a
9 sprinkler." I mean, let the jury weigh it, put it all in,
10 and there are many statutory presumptions, too, aren't
11 there, Steve?

12 PROFESSOR GOODE: Hundreds.

13 MR. LOW: Hundreds of statutory
14 presumptions. You put that in a rule and if I'm not
15 mistaken, we've turned that down before, but I think we
16 should turn it down. If we have before we should do it
17 again.

18 CHAIRMAN BABCOCK: Okay. Sorry I was late,
19 Buddy.

20 MR. LOW: Well, I heard you left. You
21 thought I'd be through by now.

22 CHAIRMAN BABCOCK: Yeah, right. I said,
23 "Buddy's got this covered." Anyway --

24 MR. LOW: Steve, can you comment on that?
25 You have some feelings, too, on that, don't you?

1 PROFESSOR GOODE: Strong feelings in the
2 sense that I think it's inadvisable to have a rule that
3 covers all presumptions. As you mentioned, we have
4 statutory presumptions. I just had a research student
5 last year go through the statutes, and with a simple
6 Westlaw search she came up with over 300 statutory
7 presumptions, and I'm sure she didn't catch them all.
8 They go from the Agriculture Code all the way to the Water
9 Code, and then there are lots of common law presumptions,
10 and different presumptions have different effects.

11 Some presumptions shift the burden of
12 persuasion, some shift the burden of persuasion and
13 require clear and convincing evidence to rebut them. Some
14 just shift the burden of production, and it never seemed
15 feasible to us when we were first drafting the rules to
16 have a single rule that governed what effect presumptions
17 should have, and so it's been left in Texas to a
18 case-by-case adjudication ever since the Rules of Evidence
19 were adopted back in 1983, and we saw no reason to change
20 that.

21 MR. LOW: And you know of no writers that
22 really brag about it in Federal court, do you, in any
23 articles that -- I've not heard of any. All right. The
24 next thing is the expert witnesses, and back in 2000 or
25 maybe longer than that --

1 MR. GILSTRAP: What number, Buddy?

2 MR. LOW: Oh, I'm sorry. 701, 2, 3, 4, and
3 5.

4 MR. GILSTRAP: Thank you.

5 MR. LOW: I'm sorry. We had a presentation
6 from Steve's committee back then that -- that we draw a
7 702 that would be similar to what we have now, and we drew
8 one or Steve's committee drew one. My committee made a
9 couple of changes and went back, and we kind of agreed on
10 one and submitted it to the Court, and it was passed, but
11 it was not passed by the Supreme Court, because I
12 understand the rule was being applied pretty uniformly,
13 and the rule was just so long as you aid the jury. And
14 you take that to its literal extent, you go to my county
15 and anybody can aid the jury, so but that's not the way
16 the cases construe that, and even at that time we were
17 asked to draft a procedural rule because people were
18 making the Daubert attack during trial. The jury was
19 delayed and so forth, and then I talked to Judge Phillips,
20 and there was -- the judges were handling it, and it was
21 just left alone.

22 Now, the feds have passed a rule -- which
23 702, I'll go to 702 first. They've passed a rule which is
24 very similar to what Justice Brown wrote back in 2000, and
25 I'm going to let him take the lead. He can start with

1 701, 2, or whatever, however you'd like to do it.

2 HONORABLE HARVEY BROWN: All right. So if
3 you want to see the proposal it's on page 15 of the
4 packet, proposed amendments, redlined version. The memo
5 from the -- Steven Goode's committee is page nine. That
6 has a side-by-side comparison of the text. So of the five
7 rules in the 700 series the committee suggested to us
8 changes to four of them. We have agreed to all of those.
9 I'll say they're fairly minor. You might even call them
10 stylistic. I wouldn't quite call them stylistic, but I
11 would say that they would not change any substantive law
12 in civil cases in any way, in my view. I don't think they
13 would change the law in criminal cases, but there is some
14 room for discussion about that that we'll talk about as we
15 go through each rule, but the bottom line is because of
16 these issues with the Criminal Court of Appeals and their
17 initial thoughts that there may be some potential
18 conflict, that while I think these are good changes,
19 they're not changes that are necessary, and they are
20 changes that if we were to reject them I don't think they
21 would really change much in the way expert practice is
22 done and motions are made today.

23 So with that intro, let me turn you to
24 page -- I mean to Rule 701, and in 701 the Federal rules
25 have a subpart (c) that makes it clear that when somebody

1 testifies as a lay witness and gives an opinion that is
2 based on their perception, they are testifying not as an
3 expert. In other words, it's to make it clear that an
4 expert witness and a lay witness are different. Now, I
5 really misstated that a little bit, but it's the way it's
6 generally discussed. To be a little more precise, there
7 is not a lay witness and expert witness. There is lay
8 testimony and expert testimony. So this rule is making it
9 clear that when somebody gets on the stand they -- you
10 need to look at whether they're giving lay testimony or
11 whether they're giving expert testimony.

12 So, for example, if a doctor in a medical
13 malpractice case is sued and they are asked lots of
14 opinion testimony, that would fall under Rule 702, but if
15 they're asked -- I mean, the factual testimony about what
16 they said or did, that would fall under Rule 701. That's
17 what (c) is designed to do, is just to make that clear
18 that we're not talking about witnesses. We're talking
19 about testimony, and each is under a separate rubric. So
20 this happens a lot in trial. Police officers is a good
21 example. Doctors, professionals, architects, et cetera,
22 so we think this is not a change in the law. I feel very
23 strongly about that.

24 I will say that Holly Taylor for the Court
25 of Criminal Appeals was here today, was asked by the Court

1 of Criminal Appeals to look at it, and she expressed some
2 concern about that. She thought it might create some
3 confusion for witnesses like police officers that because
4 they're giving testimony that's both lay and expert in
5 some cases that this might cause some confusion. I think
6 that sometimes practitioners are confused about this, but
7 I think, frankly, the rule helps clarify the confusion
8 that we're looking at the testimony and not the label of
9 the witness, so I think those are -- she's recognizing
10 that the bar needs a little bit of education there, and I
11 think she's right about it, but I think the rule actually
12 clarifies this potential confusion in the bar. So our
13 committee recommended it. There is comment that was
14 recommended by Professor Goode's committee, and that also
15 I think helps make it clear. It expressly states this is
16 not intended to change substantive law. So that's kind of
17 our presentation on 701.

18 CHAIRMAN BABCOCK: Okay. Comments about
19 701, or does Professor Goode want to say something?

20 MR. LOW: Let me say, Steve, you found no
21 problem in the cases that would hold that you can't be
22 both an expert and a lay witness, right? Didn't you?

23 PROFESSOR GOODE: In terms of it changing
24 the law, I don't think it changes the law at all. Just to
25 be clear, the payoff on this, the reason why this is

1 important, is because of disclosure requirements. And so
2 what happens is a witness is called and the party hasn't
3 disclosed them as an expert beforehand, and so even though
4 they're testifying as an expert, they're coming in and
5 saying, "Oh, no, this is just a lay witness and they're
6 only giving lay opinion, so they were offered under 701,
7 therefore, the fact that we didn't disclose them shouldn't
8 be held against us," and the Federal rules enacted 701(c)
9 so that parties would not be able to present expert
10 opinion in lay opinion guise. So that's what this is all
11 about.

12 You have lots and lots of instances of, for
13 example, police officers testifying in Federal court under
14 this rule where the court says some of the stuff they're
15 testifying about would be -- should be considered expert
16 testimony, because, for example, the expert is not
17 testifying about the particulars of the case they
18 investigated, but they are testifying in general about how
19 crimes -- how crimes of this sort are ordinarily done by
20 other people in other instances. "This is how this kind
21 of crime is arranged." That's expert testimony, and if
22 you're going to testify as an expert, you've got to be
23 designated as an expert, but if that same expert is
24 testifying, "I was in on the investigation, and here is
25 what we uncovered" and starts to give testimony about that

1 person's role in the case, that's lay witness testimony.
2 And so the courts are just trying to make this distinction
3 between whether somebody is giving expert testimony and
4 they should have been designated for purposes of that
5 expert testimony, or are they giving lay witness
6 testimony, and to prevent parties from not living up to
7 the designation the disclosure requirement and then
8 subverting it by saying, "This is just lay witness
9 testimony."

10 CHAIRMAN BABCOCK: So, Professor Goode,
11 you've got an expert -- or you've got a fact witness, a
12 lay witness, Officer Schmoie, and you -- in a civil case
13 you would have to disclose him if somebody with
14 knowledge -- with relevant information.

15 PROFESSOR GOODE: Right.

16 CHAIRMAN BABCOCK: But you're saying that
17 you would also have to disclose him as an expert if, even
18 though a lay witness with factual testimony, you're going
19 to ask expert type questions of him.

20 PROFESSOR GOODE: If some of the testimony
21 he's going to give would be expert testimony, he's got to
22 be disclosed as an expert for purposes of that, and the
23 opinions he's going to give have to be disclosed just as
24 any other expert.

25 CHAIRMAN BABCOCK: Mister -- you don't know

1 this, but Mr. Munzinger's expert is Officer Schmoe.

2 MR. MUNZINGER: Officer Schmoe owns
3 property.

4 CHAIRMAN BABCOCK: He was a doctor this
5 morning.

6 MR. MUNZINGER: So is Dr. Schmoe. They are
7 brothers. In any event, as I understand the common law
8 and Texas law, a property owner is permitted to give
9 opinion testimony regarding property's value so long as it
10 is based upon his perception. Does such a person fall
11 within the disclosure rules, and how do these rules affect
12 that person?

13 PROFESSOR GOODE: These rules don't affect
14 the property owner rule at all. Again, this, putting (c)
15 into this rule doesn't change anything in Texas. We
16 already have the rule that if someone is going to present
17 expert testimony they've got to be disclosed as an expert.
18 This is just saying it in another place.

19 CHAIRMAN BABCOCK: Yeah.

20 PROFESSOR GOODE: So I view, personally,
21 this as inconsequential as, by the way, I think most of
22 the changes in the expert rules that we're proposing are.
23 If you read the committee's memorandum, you'll see the
24 committee is endorsing these changes rather tepidly; that
25 is, we're saying we were asked to look at the differences

1 between the Federal and the Texas rules. We don't think
2 with regard to most of the recommendations that there's
3 any difference substantively. Stylistically we think it's
4 probably a little bit better to change them, but we're not
5 changing any law in Texas, and just on balance, if given
6 the choice between conforming the rules and stylistically
7 to one another and not, we prefer conforming them
8 stylistically, but this is not designed to affect any
9 substantive change in law in Texas.

10 CHAIRMAN BABCOCK: Lamont.

11 MR. JEFFERSON: It's confusing to me. I
12 mean, if you've got a treating doctor who is obviously a
13 fact witness and expert witness, what can they not say?
14 The rule says they can testify, they're not designated as
15 an expert so they're called because they actually treated
16 the personal injury plaintiff. What is it that they're
17 prohibited from testifying about?

18 PROFESSOR GOODE: Again, this rule doesn't
19 answer that question. This is a consistent problem and a
20 problem already in Texas cases, and it's a problem still
21 in the Federal cases when you have a witness who is sort
22 of on the borderline of whether they're using expertise or
23 not. So you can read the Federal cases, and they are
24 going off and trying to split hairs and say when this
25 police officer is testifying as an expert and when they're

1 not testifying as an expert. It's the same thing we have
2 in Texas when the property owner testifies and when we
3 allow the property owner to give an opinion about the
4 value of the property and when they're not allowed to give
5 the value or when a police officer comes. We have those
6 cases in Texas already, regardless of the fact that we
7 don't have this provision (c) in there.

8 MR. JEFFERSON: But adding --

9 PROFESSOR GOODE: It's the disclosure rules
10 that create the problem as opposed to this provision (c).

11 MR. JEFFERSON: Adding (c), though, you've
12 got a doctor nobody has designated. Everybody knows
13 they're a treating doctor, or make it an accountant or
14 somebody -- you know, how does this help the litigators
15 know what the witness is restricted from saying? I mean,
16 if they're testifying to something within a profession,
17 licensed profession, pick your profession, there's
18 probably going to be something they're going to testify to
19 that's going to have, you know, both a factual component
20 and an expert component that's based on this standard, but
21 we don't know what it is they -- this says there's
22 something they cannot say because they are not designated
23 as an expert, so they're restricted from talking about --
24 testifying to things based on scientific, technical, or
25 other specialized knowledge, but how does adding -- what

1 does that -- I just don't see how that directs or guides
2 the court in what this witness is allowed to say, not --
3 or to not say, what they're restricted from saying.

4 PROFESSOR GOODE: I think you're absolutely
5 right. It doesn't. All this is is a reminder that we
6 have this distinction we draw between lay opinion and
7 expert opinion, and you're absolutely right. There are
8 gray areas. I have students writing papers on this all
9 the time. This rule doesn't help answer the question, but
10 it also doesn't create the problem. The problem is
11 created by the fact that we have rules that say if someone
12 is going to give an expert opinion, they have to be
13 designated as an expert and have to make certain
14 disclosures; and if they don't, the other party is
15 entitled to object to their testimony; and in many cases
16 that testimony is thrown out.

17 The feds put 701(c) in there just as a
18 reminder we're not going to allow someone to come in after
19 not complying with the disclosure requirement and say,
20 "Oh, we're not offering them as an expert. We've offering
21 them as a lay witness giving lay opinion," and it's just
22 saying, "No, if somebody is basing testimony on expertise
23 that's covered by Rule 702, then they have to be judged
24 according to Rule 702."

25 MR. JEFFERSON: Well, why not just say they

1 have to be designated? So anybody who has got specialized
2 knowledge who you expect to elicit opinion testimony has
3 to be designated and leave the rule alone, because, I
4 mean, if the idea is just to account for the fact that
5 people are getting away with offering expert testimony
6 when they haven't been designated, you know, make them say
7 they can't -- they must be designated to offer such
8 opinions; but I mean, as they are testifying from the
9 stand, I would be lost to try to figure out what it is I
10 could object to that they can't say on the stand, based on
11 the language that's added to the rule here.

12 CHAIRMAN BABCOCK: Okay. Richard.

13 MR. ORSINGER: I have long supported this
14 change, even though I generally don't like the way the
15 feds do anything, but I think there is confusion. These
16 are written in the context of there is a lay witness and
17 there is an expert witness, and they are two completely
18 kinds of witnesses, and that's not true. It's true that a
19 lay witness can't give expert opinion, but an expert
20 witness can give lots of factual testimony and lots of lay
21 opinions in addition to expert opinions, and when I have
22 written and talked on this before I use a typical example
23 of family law cases of a psychologist who is doing a home
24 visit.

25 The psychologist can describe what the house

1 looks like or the yard. The psychologist can describe the
2 behavior of the child that either acts -- you know, sits
3 on the lap of the parent or is afraid to sit on the lap of
4 the parent. Those are all observations of fact, or they
5 might even just say there was a loving relationship or it
6 seemed to be the child was not afraid of the father.
7 That's probably a lay opinion, but when they start saying
8 that "I believe that this indicates something" and get off
9 into psychology, then you're off into the expert witness
10 world, and it's not only an issue on disclosure. It's
11 also an issue if you have a Daubert/Robinson challenge;
12 and some or all of the expert's testimony on expert
13 opinion is excluded, that doesn't mean that they can't
14 testify to what they saw, and that doesn't mean they can't
15 testify to lay opinion; and so I think that it's confusing
16 to pretend like we have a lay witness and expert witness
17 and expert witnesses are not also lay witnesses. So I
18 would go even further by saying, let's -- let's rename
19 this, and I know we won't, but it could be called
20 "Non-expert Opinion Evidence and Expert Opinion Evidence."

21 PROFESSOR GOODE: Over the --

22 MR. ORSINGER: And, by the way, I want to
23 say "evidence" rather than "testimony" because this
24 applies to written records, like medical records. There
25 are going to be some medical records that have eyewitness

1 testimony. Some may contain -- eyewitness information.
2 Some may be lay opinions reflected in the medical records,
3 and some may be medical opinions reflected, so it's not
4 just testimony. It's evidence. So "Non-expert opinion
5 evidence is limited to," and then you come down here to
6 the traditional standards of (a) and (b), and (c) makes it
7 clear that even though they are testifying to opinions
8 they can't go off into a realm of specialized knowledge
9 because if they do that, now they're outside of lay
10 opinion and now they're into expert opinion. And then on
11 Rule 702 I would call it "Expert Opinion Evidence" and
12 make it clear, and I agree. I think it's very unclear,
13 and it would be very helpful, and I don't think it will
14 change the practice other than to maybe make a little more
15 sense.

16 CHAIRMAN BABCOCK: Judge Newell.

17 HONORABLE DAVID NEWELL: Yeah, I think that
18 is actually a very clever idea to rename it to say "lay
19 opinion testimony" because you're right, and I agree with
20 much of what has been said. The confusion is not -- is
21 the designation of someone as a type of witness and
22 failing to disclose them is what excludes their testimony;
23 and so, I mean, having been there, what my experience has
24 been, that I will put a police officer or somebody on the
25 stand; and basically any time I would start to get into

1 something the argument would come up that it is, in fact,
2 expert testimony, and then I will have to qualify this,
3 when he's only giving lay testimony. But be that as it
4 may, I appreciate the argument that this is something that
5 is already codified or this already exists. My fear might
6 be from a stylistic standpoint that if this already exists
7 and that (c) wasn't there, putting (c) there might suggest
8 a greater divide than had previously been there, when
9 it -- when there wasn't really a divide. It was about --
10 it was about the types of testimony that lay witnesses can
11 give lay opinion, but they could also give expert opinion
12 if they are qualified. So I guess that would be -- it's
13 sort of dovetailing on what Mr. Jefferson said here, is if
14 it's not helping and it's really only reflecting something
15 like what exists, the fact that we're adding it may signal
16 a divide that we don't mean to signal.

17 CHAIRMAN BABCOCK: Okay. Any other
18 comments? Okay. Justice Brown, you want to go on to --

19 HONORABLE HARVEY BROWN: All right. Going
20 on to Rule 702, newly named "Opinion evidence." The
21 additions here are to make explicit what the Texas Supreme
22 Court has already done in its opinions and is in the
23 Federal rule, and that is to have these three subparts
24 (b), (c), and (d), that are the three reliability tests
25 used by the Texas Supreme Court and used by Federal

1 courts. This language has been applied in many, many
2 cases, and this will not be a change in the law at all for
3 civil cases.

4 For criminal case it's certainly a little
5 bit different wording than what the Court of Criminal
6 Appeals has done. Subpart (c) and (d) are pretty similar
7 to language, but slightly different, used by the Court of
8 Criminal Appeals in its Kelly case which sets forth its
9 reliability test for scientific evidence and the Nenno
10 opinion that sets forth a three-part test for reliability
11 for experienced-based and nontechnical evidence. In
12 Nenno, the third part of it says "whether the expert
13 testimony properly relies upon and/or utilizes the
14 principles involved in the field." So you can see that
15 has some similarity to the language in (c) and (d). In
16 Kelly the Court said for the more technical type of
17 scientific evidence, "The technique applying the theory
18 must be valid. The scientific theory must be valid, and
19 the technique must have been properly applied on the
20 occasion in question." So that's also pretty similar to
21 (c) and (d).

22 (b) is new for the criminal cases in a sense
23 that it's not mentioned explicitly in the Court of
24 Criminal Appeals opinions on expert testimony; but it
25 seems to be the part that is usually the least

1 controversial discussion, at least in civil cases; and
2 from my reading of the criminal cases, which I am
3 certainly no expert on, it seems to not be the area of
4 most controversy. It seems like the second and third
5 parts of Kelly and the last part of Nenno, which are in
6 this rule, are the ones that are usually spent more time
7 on in criminal cases.

8 So, again, I don't think this is something
9 that's absolutely necessary. I do think it helps
10 practitioners to kind of see the threefold test. The
11 Court of Criminal Appeals uses the threefold test. Texas
12 Supreme Court uses threefold Texas. Slightly different
13 language, but I think you end up in the same place.

14 CHAIRMAN BABCOCK: Any comments on this
15 rule?

16 MR. LOW: Yeah, and this is supposed to
17 really codify what interpretation of the Court has been
18 given. It doesn't change any caselaw, but it's to put in
19 our rule the way the courts have interpreted this rule.

20 CHAIRMAN BABCOCK: Professor Goode, any --

21 PROFESSOR GOODE: I would just add one other
22 point, and that goes to the (b) requirement. That is
23 actually consistent with what is now Rule 705(c).

24 HONORABLE HARVEY BROWN: Yes, right.

25 PROFESSOR GOODE: Which talks about the need

1 to have sufficient facts or data.

2 HONORABLE HARVEY BROWN: Yeah.

3 PROFESSOR GOODE: In fact, the proposal from
4 AREC was if 702 were amended would repeal Rule 705(c) as
5 being then superfluous.

6 HONORABLE HARVEY BROWN: Yeah, that's a good
7 point.

8 CHAIRMAN BABCOCK: Any other comments?
9 Richard.

10 MR. ORSINGER: Yes, following up on
11 Professor Goode, I am wondering if 705(c) is the same as
12 702(b), and when both of these amendments came down the
13 pike I remember at the time thinking that we put part of
14 Federal Rule 702 in 705 for reasons that I don't remember,
15 and we left part of it up in 702. But is it the same
16 thing to say in 702 the "testimony is based on sufficient
17 facts and data" as it is in 705 to say that "the
18 underlying facts or data do not provide a sufficient basis
19 for the opinion"? Are they the same, or does one have to
20 do with the quality of data and the other is the
21 inferences from the data? Are they different, or are they
22 the same?

23 PROFESSOR GOODE: Let me just say the reason
24 why this is in 705 in our rules is because we beat the
25 feds to this, because our Rule 705 covered this before the

1 feds ever had Rule 702(b), (c), and (d). In addition, our
2 Rule 705 also covers the issue about the disclosure of the
3 underlying facts or data, and we did that before the feds
4 amended their Rule 703 to address that issue. So we were
5 the cutting edge on that.

6 MR. ORSINGER: Well, is there a distinction
7 between "the underlying facts or data providing sufficient
8 basis" and that "the testimony is based on sufficient
9 facts or data"? Are they the same?

10 PROFESSOR GOODE: Yes. I think they're the
11 same, and I think that is quite basic to any Daubert type
12 decision now, that there has to be sufficient facts or
13 data underlying the opinion and that those sufficient
14 facts or data are then taken by the expert, applied to the
15 reliable facts or principle in a reliable manner to come
16 to the conclusion.

17 MR. ORSINGER: Okay. An argument in favor
18 of leaving 705(c) is that we in Texas have set up Rule 705
19 to be the data-oriented rule. This is the data of the
20 expert. 702 is our Daubert/Robinson test, and if we take
21 this data component away from our data rule and stick it
22 over in the Daubert/Robinson test, then we've taken one
23 crucial part of the data rule and put it in a rule that
24 doesn't directly relate to data, and is that -- is that
25 good, or should we leave it in both places, or do you

1 disagree that it's even important?

2 PROFESSOR GOODE: Let's see. I think it's
3 unimportant.

4 MR. ORSINGER: Okay.

5 PROFESSOR GOODE: I think the reason why the
6 feds put this in there is because that has become part and
7 parcel of the Daubert analysis, and so when they were sort
8 of trying to summarize at the most general of levels the
9 principles that are the core of Daubert and the cases in
10 Federal courts that extend Daubert to nonscientific
11 evidence, these are the three basic statements of
12 principle. Again, to my mind these are at a very high
13 level of generalization and, to be honest, are not
14 terribly helpful. I think we could easily exist without
15 them. We've been doing it. I don't think if we put these
16 in our rules it will shake the foundations of Texas
17 practice.

18 Again, you'll see our recommendation was
19 sort of, well, on the whole we think it's probably better,
20 but if you read our report you'll see this is not an
21 enthusiastically we really need to do this recommendation.
22 It's an improvement, but we're not saying it's a vast
23 improvement.

24 CHAIRMAN BABCOCK: Okay.

25 HONORABLE HARVEY BROWN: And I have one

1 slight tweak, and that is I agree with all of that, but I
2 would say that for lawyers who do a lot of expert practice
3 this isn't anything new, but for lawyers who they haven't
4 done a lot of it I think setting it out in a three-part
5 test like this rather than kind of having to put together
6 some case law is helpful, because 702 as it's currently
7 written is one long sentence that doesn't talk about
8 reliability at all, so I think for the practitioner who
9 doesn't do this regularly this is somewhat helpful.

10 CHAIRMAN BABCOCK: Judge Newell.

11 HONORABLE DAVID NEWELL: The only -- I see
12 exactly what the arguments are. To say, particularly with
13 regard to 702, that this test is not really doing anything
14 new, it's really touching on the same stuff, and I do get
15 that, but my -- I guess I come back to a similar point
16 about the stylistic thing. By rewording it in different
17 ways I think that encourages people -- I think it will
18 encourage criminal practitioners to see this as a change
19 or maybe a move away from the Nenno test, which is
20 considerably broader worded and maybe unhelpful in that
21 regard. So but it covers our soft sciences. This might
22 see a shift towards attributing more of a hard science
23 approach to some of our soft sciences, which we have a lot
24 of. So that would be my concern, but I do understand, and
25 I appreciate the argument. I think that there is some

1 valid -- it's valid to say that this is really not
2 intended to be a substantive change. I fear that if you
3 get too far away from the words that are already being
4 used in criminal law it looks like a substantive change,
5 and that might cause confusion in litigation.

6 CHAIRMAN BABCOCK: Okay. All right. Any
7 other comments? Justice Boyce.

8 HONORABLE BILL BOYCE: I was focusing on the
9 last sentence of the comment, which is the disclaimer that
10 this is not intended to effect any substantive change of
11 Texas law, should not change the way courts rule on the
12 admissibility of expert opinion testimony, and one thought
13 occurs to me that the line between when you're fighting
14 about expert testimony in terms of admissibility and when
15 you're fighting about it in terms of sufficiency --

16 HONORABLE DAVID NEWELL: Sufficiency.

17 HONORABLE BILL BOYCE: -- is sometimes not a
18 bright line, and so I look at (b), (c), and (d), and maybe
19 some of those look more like admissibility criteria, maybe
20 some look like sufficiency criteria, maybe it depends on
21 the circumstances in the case. So the observation is
22 would it be helpful to reference in the disclaimer that it
23 is not intended to effect a change in the way that courts
24 rule on the admissibility or sufficiency of experts?

25 PROFESSOR GOODE: May I reply to that? The

1 rules of evidence don't deal with issues of sufficiency of
2 evidence. They deal with the admissibility of evidence.
3 The rules of evidence don't say what evidence is
4 sufficient. All they say is whether it comes in or not,
5 so I think it -- I don't think it would be appropriate to
6 say we're talking about sufficiency of the evidence. All
7 we're talking about is when expert testimony is
8 admissible.

9 CHAIRMAN BABCOCK: Right. Right. Any other
10 comments? All right. Moving to 703, Justice Brown?

11 HONORABLE HARVEY BROWN: All right. 703, if
12 you'll turn the page, you'll see there's only a suggestion
13 to remove one word, which is not in the Federal rule; and
14 that is the word "reviewed"; and the committee, Professor
15 Goode's committee, included that that word was
16 unnecessary, essentially repetitive of the phrase
17 immediately before it that "the expert has been made aware
18 of," been made aware of something that you have been -- if
19 you've reviewed it, so "been made aware of" is broad
20 enough that the "reviewed" was unnecessary, so why don't
21 we make the rule the same as the Federal rule? They added
22 another comment again to say this is not a substantive
23 change and the Court of Criminal Appeals has -- at least
24 Holly, doing research for the court, had no problem with
25 that.

1 HONORABLE DAVID NEWELL: I think we should
2 keep "reviewed" because it holds the entire rules of
3 evidence together. No, I don't have any problem with
4 that. Yeah.

5 CHAIRMAN BABCOCK: Note the levity of --

6 HONORABLE DAVID NEWELL: I haven't reviewed
7 this, though. That's not true.

8 CHAIRMAN BABCOCK: All right. Any comments?
9 Any additional comments on 703? All right. Justice
10 Brown, 704.

11 HONORABLE HARVEY BROWN: All right. And
12 704, there's no change, so going to 705, Professor Goode's
13 committee was asked to look at whether subpart (b) should
14 be changed in light of the provisions of the Michael
15 Morton Act. They recommended not making any change. They
16 noted that the Court of Criminal Appeals Rules Advisory
17 Committee had studied the issue, and they had recommended
18 no change in light of the Michael Morton Act. We agreed,
19 and so there was no controversy in either Professor
20 Goode's committee or our committee about whether that
21 needed to be changed, so we left it.

22 CHAIRMAN BABCOCK: Okay. Any comments?
23 Buddy.

24 MR. LOW: No. That's it really.

25 CHAIRMAN BABCOCK: Anybody else? All right.

1 HONORABLE HARVEY BROWN: And we've already
2 talked about 705(c), the taking 705(c) out has been
3 suggested by Professor Goode's committee and by our
4 committee is dependent on adding in 702(b), which we view
5 as the same requirement; that is, that the expert's
6 opinion must be based on sufficient facts or data. So
7 leave it in if you don't make the changes in 702, but if
8 you do make the changes in 702 we thought it was
9 unnecessary.

10 CHAIRMAN BABCOCK: Okay. Any comment on
11 that? All right. Justice Brown, do you have anything
12 more?

13 HONORABLE HARVEY BROWN: That's all the 700
14 series.

15 CHAIRMAN BABCOCK: Great. Buddy, what do we
16 do next?

17 MR. LOW: Lonny will lead us in 403, I
18 believe.

19 PROFESSOR HOFFMAN: 408. Unless you want to
20 talk about 403.

21 MR. LOW: We can talk about 403, wasting
22 time.

23 PROFESSOR HOFFMAN: Do we need to --

24 HONORABLE DAVID NEWELL: How meta. That
25 would be so meta. Let's waste time talking about wasting

1 time.

2 MR. LOW: If we're going to talk about
3 wasting time, we need to talk about it.

4 HONORABLE DAVID NEWELL: At length.

5 MR. LOW: Basically in 403 the feds have in
6 there "wasting time," and we think it's not necessary,
7 it's covered with this language, and we would be right and
8 the feds would be wrong. That's what we would propose.

9 PROFESSOR HOFFMAN: So there is no
10 recommended changes on 403.

11 MR. LOW: No.

12 CHAIRMAN BABCOCK: All right. So --

13 PROFESSOR HOFFMAN: Shall we go to 408?

14 CHAIRMAN BABCOCK: Are we talking about 403
15 or --

16 MR. LOW: 403. We looked at it. The feds
17 have added a word "wasting time." We don't have that. We
18 don't waste time putting "wasting time." We think we
19 ought to leave it like it is.

20 CHAIRMAN BABCOCK: Okay. The feds say
21 wasting time should be a ground, an additional ground for
22 excluding relevant evidence.

23 MR. LOW: We have "delay." If that's not
24 wasting time, well, then --

25 CHAIRMAN BABCOCK: All right. Anybody want

1 to argue the differences between "delay" and "wasting
2 time"? Or would that be a waste of time? Richard.

3 MR. ORSINGER: They may not waste a lot of
4 time in Federal court, but I waste a lot of time in state
5 court, so I don't think it would change the practice any,
6 because when the judges get sick of it they shut it down
7 no matter what this rule says, but I think we do waste a
8 lot of time. That's all I'm going to say. I mean, I'm
9 willing to defend the concept, but I'm not saying it will
10 change the practice.

11 CHAIRMAN BABCOCK: So are you in favor of
12 having the words in there?

13 MR. ORSINGER: I'm okay with it. I think
14 that a lot of time is wasted, but I think the judge kind
15 of knows when he or she is sick of it, and that's when it
16 stops.

17 CHAIRMAN BABCOCK: Anybody else have any
18 comments? Okay.

19 MR. LOW: Lonny has 408 and four prongs to
20 408.

21 PROFESSOR HOFFMAN: All right. So for this
22 discussion you take your big packet, you go to the back of
23 it, the quickest way to get there. Turn it back to the
24 end and go back two pages. You will see a page that
25 begins with 408 at the top, and it has Buddy's handwritten

1 number five in the right-hand corner. There are four
2 issues we are going to talk about. There are three
3 recommended changes, one recommended no change. So I know
4 it's getting late so we're going to try to make this short
5 and interesting, but it is important to begin the same --
6 just to repeat, the same thing that Buddy has said and
7 that Professor Goode has said, which is that this was
8 begun as an effort to ask should the state and the Federal
9 rules be harmonized. That was a question that Buddy asked
10 the State Bar Evidence Committee. Having been given that
11 task, they took a look. They, I think it's probably fair
12 to say, again, kind of come back with tepid endorsements
13 of making three changes here, but none for which they feel
14 strongly. So that's -- again, Professor Goode can
15 elaborate on that, but I think that's a fair
16 characterization as it was for some of the others before.

17 So the first one to look at is on the very
18 first line, the additions of the words "on behalf of any
19 party." So the idea is that everyone agrees that 408
20 excludes offers of compromise when they are being offered
21 against the party who made the settlement. The question
22 is whether there should be a similar concern when a party
23 wants to introduce evidence of the settlement not -- in
24 their favor in some matter. And the folks on the Federal
25 side decided that they should not be able to, there should

1 be a blanket rule that says you can't introduce it for any
2 reason, and so they added the words "on behalf of any
3 party."

4 Now, a little more background here. It's a
5 policy choice that they made, but it is in some ways a
6 strange policy choice because the policy that we have
7 about worrying about deterring people from entering into
8 settlements, if there's a danger that that settlement will
9 be used against you, clearly doesn't apply when you're
10 using that settlement offensively; and so there is
11 certainly an argument to be made on the policy side that
12 it ought to be allowed in and not excluded by 408.
13 Moreover, there is an analogy to subsequent remedial
14 measures in 407 where the way the case law has developed
15 is that there are certainly a number of cases that have
16 justified allowing in subsequent remedial measures when
17 someone has offered it favorably, and it's been allowed
18 in. Again, on the theory that they aren't going to be
19 deterred from doing a subsequent measure by that, but that
20 isn't how the case law has gone with 408. Okay. So right
21 now it's generally not allowed in. There are really, I
22 think, maybe no cases, or if there are they are so few
23 that you can count them quite quickly, and that
24 nevertheless the Federal rule makers decided that it was a
25 good idea to both put language in that says that, and

1 again they're making the policy choice that even though
2 there is not a similar policy concern, they err on the
3 side of excluding it entirely.

4 Now, I can say a bit about why they did that
5 from looking at the advisory note. There's essentially
6 sort of two reasons. One, there was some general concern
7 about one party being able to unilaterally waive the
8 disclosure since there were at least two prior parties to
9 the settlement, and then there was a second kind of
10 practical concern about lawyers having to testify and that
11 could lead to disqualification. And so I think, at least
12 based on the advisory committee notes, those were the
13 primary reasons prompted.

14 Okay. So fast forward to where we are in
15 Texas is the State Bar committee is recommending that we
16 go ahead and make the change and be consistent with the
17 Federal rule, and our committee I guess tepidly endorsed
18 that tepid recommendation.

19 CHAIRMAN BABCOCK: Tepidly, eh.

20 PROFESSOR HOFFMAN: Tepidly. Okay. So
21 that's one attempt at describing where we are.

22 CHAIRMAN BABCOCK: Okay. Comments?

23 They say the blood sugar level goes down in
24 the afternoon.

25 PROFESSOR HOFFMAN: Yeah.

1 CHAIRMAN BABCOCK: Richard.

2 MR. ORSINGER: No. Nothing.

3 HONORABLE TOM GRAY: I'm trying to figure
4 out what impact this has on a plea bargain that's rejected
5 and you wind up in a trial, and I'm just -- you know, as
6 the blood sugar went down I guess I'm below the level
7 where it's affecting my cognitive ability, but --

8 PROFESSOR GOODE: This rule deals with
9 offers to settle civil cases.

10 HONORABLE TOM GRAY: Only.

11 PROFESSOR GOODE: Rule 410 deals with the
12 plea bargains.

13 PROFESSOR HOFFMAN: And I'll just add one
14 other thing, is there was a proposed change. You will see
15 it in (2), (a)(2), the bracketed language that begins with
16 "except when" in (2) that is not being recommended, but
17 there is some overlap involving criminal law that is not
18 being recommended here. So, therefore, 410 would be the
19 only place that you would look.

20 HONORABLE TOM GRAY: Just because I'm real
21 dense at this time of day, can you tell me where it limits
22 it to civil cases?

23 PROFESSOR GOODE: Rule 410 is the rule
24 governing plea bargains, so you have a separate rule that
25 deals with the plea bargain process.

1 PROFESSOR HOFFMAN: Tracy, did you have --

2 HONORABLE TRACY CHRISTOPHER: I did. I had
3 a question about "on behalf of any party." I did actually
4 have a case where it was a personal injury lawsuit, and
5 the defendant was on the stand, and the plaintiff was out
6 of work, and the defendant says, "Well, we'll hire him
7 back," and so is that an offer of settlement? Would
8 that -- you know, and no one really objected, so any error
9 was waived, but it didn't really fit into a classic
10 category there, and, in fact, it was funny. I mean, they
11 like took a break to talk about hiring the guy back in the
12 middle of the trial and then they came back and told the
13 jury, "Oh, well, it didn't work out." But nobody objected
14 to it, so, you know, I didn't have to get into did it
15 actually violate this rule, but, you know, would something
16 like that have violated this rule?

17 PROFESSOR GOODE: Something qualifies as an
18 offer to settle a case only if there's a quid pro quo. If
19 someone says, "We'll hire them back" without any sort of
20 terms as to what that involves then it's not an offer to
21 settle.

22 HONORABLE TRACY CHRISTOPHER: But it would
23 limit the man's claim for future lost wages if the
24 defendant hired him back, so, you know, if it had been
25 completed his future lost wages would have ended on, you

1 know -- and they would have told the jury that, so, I
2 mean, to me it felt like a settlement, but if the
3 defendant wanted to offer that, now you're saying that
4 they couldn't under this change.

5 PROFESSOR GOODE: Well, again, I'm not sure
6 that's covered by this rule at all because I'm not sure
7 that that's a settlement offer. A unilateral statement of
8 what we are going to do is not an offer to settle a case
9 or to compromise the case and so --

10 HONORABLE TRACY CHRISTOPHER: Well, I mean,
11 we normally keep out things like "I paid their medical
12 bills." I mean, we keep that out under Rule 408,
13 regardless of whether there was any quid pro quo on that.
14 I mean, everybody just keeps that out of evidence, that
15 the defendant paid the medical bills.

16 PROFESSOR HOFFMAN: I don't think that's a
17 408 issue.

18 PROFESSOR GOODE: That's not a 408 issue.

19 HONORABLE TRACY CHRISTOPHER: Practitioners
20 think it's a 408 issue.

21 CHAIRMAN BABCOCK: Peter, did you have your
22 hand up?

23 MR. KELLY: I just had a question as to why
24 does it say "on behalf of any party"? That seems almost
25 surplusage.

1 PROFESSOR HOFFMAN: So the idea was -- the
2 idea was it would -- the Federal idea was to try to find
3 some language to make it clear that it didn't matter
4 whether it was being offered for -- against you or against
5 a party or on a party's behalf, and so the language that
6 they came up with was that language, and it sort of is --
7 the idea is it kind of covers the waterfront.

8 MR. KELLY: Doesn't "evidence of the
9 following is not admissible" cover the waterfront?

10 PROFESSOR HOFFMAN: It does, and to
11 underline, there is not a problem in Texas law right now.
12 The cases are all consistently not allowing in evidence of
13 offers to settle even when offered by the party that
14 settled it wants it in, so this is not currently a
15 problem. There is, however, a difference in the language
16 between the Federal and the state rule because of the
17 Federal rule makers choice to be more explicit and to take
18 a policy position on this.

19 PROFESSOR GOODE: If I may, here's the basis
20 of the problem. Rule 407, which deals with subsequent
21 remedial measures, and Rule 408 are both written with
22 parallel construction in the passive voice and both
23 exclude a certain kind of evidence if offered for a
24 certain purpose. Rule 407, which says, "evidence of a
25 subsequent remedial measure is not admissible" has

1 nevertheless been interpreted to allow, for example, the
2 fact that a third party made a subsequent remedial
3 measure, to be admitted to show that there was, in fact, a
4 dangerous condition. The idea being the policy that
5 underlies Rule 407, we don't want to deter parties from
6 taking safety measures, is not offended if some third
7 party's subsequent remedial measure is offered into
8 evidence against somebody else. They're not going to be
9 deterred from taking a safety measure by the threat it's
10 going to be used against, say, the manufacturer, if it's a
11 third party construction company that made the subsequent
12 change.

13 The same argument can be made with regard to
14 Rule 408; that is, so long as it's not offending the
15 policy. For example, the fact that a third party settled
16 the suit with one of the parties to this case could be
17 offered by the third party -- the party to this case as
18 evidence. The third party is the one who is liable, not
19 me, and this rule says you can't do that. That is, it's
20 excluding that sort of extra textual argument that it
21 prevailed in Federal court and in Texas court under Rule
22 407 from being made under Rule 408.

23 MR. KELLY: It's either blood sugar or a
24 tepidness issue, I'm trying to figure out. What we're
25 seeing now is insurance companies going behind the

1 plaintiff's back and purchasing, say, hospital liens that
2 they would otherwise be introducing as evidence to
3 establish their damages, and so it's not necessarily on
4 behalf of the defendant that they're doing that. They're
5 kind of doing that to -- on their own behalf, but does
6 evidence of this purchase of the lien come in? I haven't
7 quite figured out how it works with this phrase, "on
8 behalf of any party," but that's my concern, is you have
9 these almost tortious interferences with a contract to try
10 to reduce the amount of damages that the insurance company
11 would ultimately be liable for.

12 CHAIRMAN BABCOCK: Tom.

13 MR. RINEY: I think Rule 409 addresses
14 specifically paying the medical expenses, but on Rule 408,
15 maybe I'm missing something here, but a compromise
16 settlement agreement, that is, a release, may be an
17 affirmative defense to a claim. There can be disputes as
18 to whether something was released, and if we say that it
19 "can't be admitted on behalf of any party to prove or
20 disprove the validity of a disputed claim by furnishing,
21 promising, offering, or accepting a valuable
22 consideration," do we run into a problem then of proving
23 that affirmative defense of release?

24 CHAIRMAN BABCOCK: Anybody have a thought on
25 that question?

1 PROFESSOR HOFFMAN: Just that if it is a
2 problem -- I mean, I don't think that is -- I don't think
3 408 excludes it, but if it does, it's a problem under the
4 existing law. I mean, that language isn't being touched.

5 CHAIRMAN BABCOCK: Justice Brown.

6 HONORABLE HARVEY BROWN: Well, I don't think
7 it's an absolute prohibition on a release because you have
8 to read the end of the first line where it says "either to
9 prove or disprove the validity or amount of a disputed
10 claim," so this isn't a compromise being offered for a
11 release. It's being offered to show, "Oh, well, you think
12 you were hurt this bad. Well, you offered to only settle
13 for this amount. You must not be hurt that bad." That's
14 one form in which this compromise is offered to help the
15 defendant show the plaintiff is not so hurt; but the other
16 way is kind of like Justice Christopher's example, only
17 where there's a release that's part of it, where the
18 witness gets on the stand and says, "Yeah, we'll employ
19 you. We told you we would employ you if you would just
20 let us out of the lawsuit." Now, that is an offer of
21 settlement, and that is excluded under this rule, because
22 defendant is trying to offer to make himself or itself
23 look good, and it would fall under this rule as revised.

24 CHAIRMAN BABCOCK: Yeah, Lamont.

25 MR. JEFFERSON: I agree with Peter on the

1 language that it's confusing to add the "on behalf of any
2 party" because that suggests -- I mean, unintentionally
3 that it could be used against a party. I mean, that just
4 "on behalf of any party" doesn't -- isn't clear enough.
5 Now, I would just say, if you want to add anything, it's
6 not admissible by anyone or words to that effect, but that
7 "on behalf of" suggests could it be used for some other
8 purpose than on behalf of a party.

9 CHAIRMAN BABCOCK: Yeah. Professor Hoffman,
10 I -- you may have covered this, but the language you're
11 adding here "or to impeach by a prior inconsistent
12 statement or a contradiction," can you give me an example
13 of what the contradiction would be that you can't put the
14 settlement in?

15 PROFESSOR HOFFMAN: Well, again, this
16 language, Chip, comes from the Federal change.

17 CHAIRMAN BABCOCK: Right.

18 PROFESSOR HOFFMAN: I think my guess is that
19 most of the time we're talking about, you know, the prior
20 inconsistent statement. I'm not sure that -- and Steve
21 may be able to speak to this, if there's other examples
22 for something that's a contradiction but not a prior
23 inconsistent statement.

24 MR. GILSTRAP: What's its purpose? What's
25 the purpose of that phrase, "or to impeach by a prior

1 inconsistent statement or contradiction"? I understand
2 the, you know, the relation to the validity or the amount
3 of the claim, but what about impeachment? What's the
4 purpose?

5 PROFESSOR GOODE: Here is the issue that
6 this is dealing with. Suppose during the course of a
7 settlement negotiation the party makes some factual
8 statement. "I ran the red light." That's protected by
9 the rule. The rule says statements made during the course
10 of compromised negotiations can't be used in evidence.
11 The question is, okay, so this party then gets up on the
12 stand and says, "I didn't run the light." The other side
13 says, "Now I want to impeach you with the statement you
14 made during settlement negotiations because it's a prior
15 inconsistent statement"; and there's, again, very little
16 case law on this; but there was certainly a split in the
17 commentary about whether that was an appropriate thing to
18 do under Rule 408; and to resolve that question the
19 Federal rule said you can't use a statement made during
20 settlement negotiations to impeach a person who testifies
21 in a manner inconsistent with that on the stand. By the
22 same token, if the person never testifies but his side
23 takes the position that he didn't run the red light, you
24 can't use that statement to contradict that position as a
25 substantive matter.

1 So it's just saying if you say something
2 during compromised negotiations, that's going to be
3 protected, and we're not going to create an exception to
4 that protection on the grounds that you've now testified
5 in a manner inconsistent or taken a subsequent position
6 inconsistent with what you said during compromised
7 settlement negotiations.

8 CHAIRMAN BABCOCK: What about this? You've
9 got a provision of an employment contract, identical
10 provision applies to 50 employees. Five bring suit.
11 Separate courts, separate cases. In the first one, the
12 defendant takes the position this doesn't apply. It's --
13 you know, it's not applicable, your theory is crazy, but
14 they pay him a million dollars, settlement before trial.

15 Case two the defendant goes, and they go to
16 trial on that, and the defendant says, "Crazy, don't owe
17 them anything, doesn't apply. The amount they want is
18 crazy." Absent this language, could they have brought in
19 the prior settlement saying, you know, "This is
20 inconsistent" or "This is a contradiction from what you
21 did over here"?

22 PROFESSOR GOODE: Typically Rule 408 was
23 seen as designed to exclude exactly that kind of thing,
24 and so that's not where sort of the idea that this is
25 addressing came up. Again, most of what this amendment

1 that the feds put in was addressing was something that
2 rarely, if ever, came up but was certainly talked about in
3 the literature, and just to foreclose that they put this
4 language in. This is not addressing a problem, to my
5 knowledge, that has arisen in any reported case in Texas
6 at all.

7 CHAIRMAN BABCOCK: Okay.

8 PROFESSOR GOODE: It's a prophylactic rule,
9 if you will.

10 MR. GILSTRAP: Well, how often does a
11 witness participate in settlement negotiations? I mean,
12 don't the -- aren't the lawyers the one negotiating, and
13 why would you want to get your witness out there to even
14 have him talk?

15 CHAIRMAN BABCOCK: Mediation.

16 PROFESSOR GOODE: Yeah.

17 MR. GILSTRAP: Okay.

18 CHAIRMAN BABCOCK: The clients are usually
19 there.

20 MR. GILSTRAP: Well, I understand. Okay.

21 CHAIRMAN BABCOCK: And contrary to the
22 advice of their lawyers, sometimes open their mouths.

23 PROFESSOR HOFFMAN: Should we press on?

24 CHAIRMAN BABCOCK: Let's press on.

25 PROFESSOR HOFFMAN: The next one is I think

1 going to be a quick. If you'll go to (b), 408(b), you'll
2 see that what's happening here is the words, "The court
3 may admit the evidence for another purpose, such as" --
4 and the words are being deleted, "parties and" -- "or
5 interest." So it will now just read "such as proving a
6 witness' bias or prejudice." Those will become the basis.
7 So what's going on here? So this is -- will then exactly
8 mirror Federal Rule 408(b). Texas had those other words
9 in there, "party or interest," when Mary Carter agreements
10 were still okay. Although it is amazing to me that 1992
11 was as far away as it is, it has been a long time since
12 those have been allowed, and so this has no change in the
13 law. Since they're not allowed it's just eliminating it,
14 and it has the salutary effect of making us line up with
15 the Federal 408(b).

16 CHAIRMAN BABCOCK: Any other comments?

17 HONORABLE DAVID NEWELL: Could you put
18 "reviewed" in there somewhere?

19 PROFESSOR HOFFMAN: And then the final issue
20 is a non -- recommended for no change, and if you'll go
21 backwards to 808.2 -- and again, I highlighted that
22 language before in brackets, and I -- there was a
23 description of what AREC's thinking was on this that
24 begins on that next page, if you would turn the back and
25 read it on your own, but better yet I'm going to turn to

1 Steve and let him try to be more succinct. I will say my
2 colleague at U of H described the Federal change as a
3 power grab by the Department of Justice, and she was
4 delighted that we didn't follow. I don't know if that's
5 how you see it, but that's what she said.

6 PROFESSOR GOODE: What this language in the
7 Federal rule deals with was the problem that arose in
8 Federal court, which was suppose you have a settlement of
9 a civil case which is of relevance in a parallel criminal
10 piece of litigation. To take a hypothetical, suppose you
11 had a hypothetical state official who was facing criminal
12 charges on a form of securities fraud, and this
13 hypothetical state official had previously settled a civil
14 piece of litigation and had admitted engaging in some form
15 of securities fraud. This is purely hypothetical. The
16 question might come up, would that admission made in the
17 course of -- for the settlement of the civil piece of
18 litigation be admissible as proof in the criminal
19 litigation that, in fact, he's guilty of the criminal act.

20 HONORABLE DAVID NEWELL: Do I need to leave
21 the room?

22 PROFESSOR GOODE: It's purely hypothetical.

23 HONORABLE DAVID NEWELL: Okay.

24 PROFESSOR GOODE: The Federal rule courts
25 had no answer to that under their Rule 408. In fact,

1 there was a split in case law. Some courts said civil
2 settlements were not admissible in criminal cases at all.
3 That is, Rule 408 applied in criminal cases as well as in
4 civil cases. Some courts said, no, Rule 408 only deals
5 with admissibility in civil cases, and so the feds decided
6 they would try to resolve this. They came up with I think
7 a rather bizarre compromise, which is the language that we
8 did not include, where they say some stuff comes in, but
9 some stuff doesn't come in, and it depends on whether you
10 were -- your civil compromise was with a governmental
11 agency or whether it was with a private party and
12 distinguishes between the two, and it depends on whether
13 we're talking about a statement in which you admitted
14 doing something or whether you just settled it.

15 I think it's a bizarre rule, but AREC took
16 the position, first, we haven't had this problem in Texas
17 because when the Texas Criminal Rules of Evidence were
18 adopted in 1986, the Texas criminal rules had Rule 408 in
19 it. So it's always been clear in Texas since 1986 that
20 Rule 408 applied in criminal cases. When the rules were
21 consolidated in 1998, there wasn't any express intent to
22 change that. Rule 408 stayed on the books, and it's part
23 of a consolidated rule that applies both in criminal and
24 civil cases, and so our position was this issue is
25 relatively clear in Texas.

1 We don't see any particular argument for
2 changing it along the lines of the Federal rule, but AREC
3 is mostly a civil practitioners committee, and we also
4 said we're open to hearing what criminal lawyers have to
5 say, and if they want to make an argument that it should
6 be changed, we would certainly be open to hearing that
7 argument, but the case has not yet been made for
8 recommending a change.

9 CHAIRMAN BABCOCK: Okay. All right. Any
10 other comments? Okay. Do we have --

11 MR. LOW: We had 509 and 510, and two days
12 after I got this and assigned it, the Supreme Court passed
13 it, so I didn't want to waste time by talking about it.

14 CHAIRMAN BABCOCK: Okay.

15 MR. LOW: Elaine will be our next presenter,
16 and she'll talk about what 804, 803, right, Elaine?

17 PROFESSOR CARLSON: Uh-huh, and Federal Rule
18 807.

19 MR. LOW: Yeah, 807. And we don't have a
20 807.

21 PROFESSOR CARLSON: Right. So for this if
22 you look at the beginning of the packet, you'll see the
23 Texas versus the Federal rule, and if you flip back about
24 five pages to what is designated as page two in a
25 beautiful mine, you'll see the report from Professor

1 Goode's committee. These rules deal with exceptions to
2 the hearsay rule, and we concur with the State Bar
3 evidence committee's recommendation not to amend Texas
4 rules to conform to the few differences that we have with
5 the Federal counterpart. Texas Rule 804 deals with the
6 former testimony exception to hearsay, and our Texas rule
7 requires that you show unavailability of the witness, not
8 only by the witness not being able to attend the trial but
9 also that they were unable to be available for deposition;
10 and the Federal courts don't have the deposition prior,
11 but of course, our Texas practice has generally allowed
12 the use of depositions in civil cases without the
13 requirement of availability. So we thought that the
14 committee's recommendation of no change made sense for
15 that difference.

16 There is also the dying declaration
17 exception to hearsay. In Federal rule it applies only in
18 a homicide -- homicide prosecutions and in civil cases,
19 but not in non-homicide criminal cases. Texas it extends
20 to all cases, and so we recommended no change on that
21 either. There is a difference between Federal and Texas
22 practice dealing with statements against interest
23 exception to the hearsay rule. In Texas you would find
24 that in evidence Rule 803, subsection 24, not in evidence
25 Rule 804 as in the Federal practice. The distinction

1 being Rule 803 does not require unavailability of the
2 witnesses for those exceptions to be triggered for
3 admissibility.

4 The Federal rule has -- 804(b)(6) has
5 another exception to the hearsay rule called "Statement
6 offered against a party that wrongfully caused the
7 declarant's unavailability." We don't have a counterpart
8 in our rules, but the Legislature adopted a counterpart
9 for criminal cases in the Code of Criminal Procedure. So
10 that is 804. And 803, which is -- I already covered that.
11 807 is a Federal Rule of Evidence that allows for a
12 catchall residual exception to the hearsay rule, and it
13 provides that a hearsay statement is not excluded, even
14 though it doesn't fall under any other specific hearsay
15 exclusion specifically delineated in the rules, if you can
16 convince the court that the statement has -- and I'm going
17 to quote here -- "equivalent substantial guarantees of
18 trustworthiness, it's offered as evidence of a material
19 fact as probative value for which it is offered than any
20 other evidence the proponent could obtain through
21 reasonable efforts and admitting it would serve the
22 interest of justice"; and the Federal rule requires you
23 give notice to the other side, "Here's the person and
24 statement that we intend to offer because it's so reliable
25 otherwise."

1 We don't have any counterpart to that in our
2 Texas rules. The report of Steve's committee -- Professor
3 Goode's committee points out that there originally was a
4 recommendation to include the residual exception to the
5 hearsay rule and that the Supreme Court did not choose to
6 adopt that. So this has been rejected once before. There
7 are other states that have -- don't include the residual
8 exception either. According to the report from the
9 advisory committee -- and I thought this was very
10 interesting. They said there's a concern that despite the
11 purported safeguards regarding guarantees of truthfulness,
12 that this rule is stated in such a vague way it leaves
13 open for trial judges to utilize their discretion in a way
14 that could differ greatly, leaving practitioners without
15 very much predictability when you have that type of
16 evidence that is -- has equivalent circumstantial
17 guarantees of trustworthiness or is probative more than
18 any other evidence the proponent could offer.

19 And they also point out in their report that
20 the definition of hearsay in Texas is broader than the
21 Federal rules, yet they say, "It does not appear to the
22 committee" -- and we did not think so otherwise -- "that
23 there was some categories of evidence out there that was
24 hearsay and was being excluded that shouldn't be
25 excluded," and we really weren't -- couldn't find the

1 cure, why we needed a cure, and so we concurred in the
2 recommendation of Steve's committee, Professor Goode's
3 committee, that we not change our Texas rules in those few
4 instances where they differ in 804, 803, and we don't have
5 an 807.

6 CHAIRMAN BABCOCK: Okay. Any comments on
7 that?

8 MR. LOW: Elaine, wasn't there at one time a
9 prior proposal to have 803.25 in Texas entitled "Other
10 exceptions" was rejected, was it not?

11 PROFESSOR CARLSON: Yes.

12 MR. LOW: Yeah. The feds have changed it
13 around. 804 used to be -- I mean, 24 used to be other
14 exceptions. They changed it. They changed it around, and
15 our rules and theirs are different in more ways than what
16 we've been talking about.

17 CHAIRMAN BABCOCK: Yep. Justice
18 Christopher.

19 HONORABLE TRACY CHRISTOPHER: I'm not saying
20 that I like 807, the way it's written, but there does seem
21 to be a class of documents that is sort of defying
22 expectation on how to prove them up in connection with
23 internet records. Because so many governmental agencies
24 now, you know, put everything on the internet, it's
25 extremely difficult to go to the agency to get a certified

1 copy of anything to prove it up; and so if you had a
2 little exception like this where you understand that you
3 can't get certified copies of anything anymore and this is
4 the official government website that shows, you know, what
5 it's purporting to show, you know, I would like to have --
6 or for the people to consider some sort of an exception to
7 cover that.

8 MS. WOOTEN: I just want to say I support
9 that fully because I've run into that issue in at least
10 two cases where it's a document that may be on the
11 website. I get a challenge to authenticity. I say, "It's
12 from your website," not a certified copy, and that should
13 not be a problem in terms of admissibility.

14 HONORABLE TRACY CHRISTOPHER: I don't know
15 whether Peter ended up making it a case or a point of
16 error in that one case we had, but we were trying to prove
17 when was someone -- the defense was trying to prove when
18 was someone actually licensed as an architect or an
19 engineer, and the person didn't, like, have their little
20 certificate to show and was not on the witness stand, and
21 the only way to prove that was through the records of the
22 agency, and the agency wouldn't give certified records for
23 anything. I mean, it was an extremely difficult thing
24 because now governmental agencies are all like "It's all
25 on our website. It's on our website. You know, we're not

1 cooperating with you on these trying to get a certified
2 copy of something."

3 MR. LOW: Chip, could --

4 CHAIRMAN BABCOCK: Professor Goode.

5 MR. LOW: -- Professor Goode respond?

6 PROFESSOR GOODE: Yeah, I think it's a real
7 problem, but it's not a hearsay problem. It's an
8 authentication problem, and so Rule 807 would not be the
9 vehicle to deal with that, but it would be how to
10 authenticate a government record that appears on the
11 internet as being what -- as you say, what it purports to
12 be. I'm not fully sure that that should be as much of a
13 problem as you're saying because I think in some instances
14 it may be self-authenticating, but there's also some
15 proposals to the Federal rules about authenticating
16 internet -- electronic documents that might address that.
17 I haven't looked at them really carefully yet, but I
18 understand exactly the problem you're talking about, but
19 the stuff is within the hearsay exception.

20 HONORABLE TRACY CHRISTOPHER: Right.

21 PROFESSOR GOODE: It's just proving that
22 it's from that record.

23 HONORABLE TRACY CHRISTOPHER: Correct,
24 proving that it's a public record. But normally to prove
25 it's, you know, authentic you get the certified copy of

1 it. You know, you don't just print out something off of a
2 website and offer it into evidence.

3 PROFESSOR GOODE: Government reports are
4 self-authenticating.

5 CHAIRMAN BABCOCK: Justice Brown.

6 HONORABLE HARVEY BROWN: I mean, it seems to
7 me that the problem that Justice Christopher has
8 identified is both a hearsay and an authentication
9 problem. Because if they won't sign the certification,
10 you can't get the proof to meet 803(a) to prove it's a
11 public record in the first place, so it's still hearsay.
12 And sometimes this happens not just with public records,
13 but there's a corporation, you go on their website, and
14 they're not a party to the case, so it's not an admission,
15 and you want to prove up what's on the internet, and what
16 I had to do is I brought my computer. I put it on the
17 screen in front of the judge and said, "Judge, there it
18 is. Now may I print it and offer it?" It seemed kind of
19 silly, frankly, but I thought there was both a hearsay and
20 an authentication problem because I had no witness to
21 prove up the 803(6) or 803(8), and I was the one
22 essentially authenticating it, which I ended up doing by
23 just using the computer, so I think it's a problem.

24 CHAIRMAN BABCOCK: Justice Gray.

25 HONORABLE TOM GRAY: It may not be part of

1 this, but to build on the problem of the internet,
2 Facebook pages wind up getting introduced in many cases,
3 and how do you authenticate a photograph that somebody
4 printed off of a Facebook page, and, you know, there it
5 is. I mean, you don't have the person that took it.
6 Normally you have somebody that was there at the time and
7 can say, but in the context in which we see them on appeal
8 it's frequently a third party that went out to the
9 internet and found this -- you know, this photograph
10 that's pertinent either to a crime or a domestic relations
11 issue or something, and they are -- they just print it and
12 bring it in, and it's a problem in how to get it proved up
13 that what it shows, authentication first, and then hearsay
14 if there's, you know, other things attached to it.

15 CHAIRMAN BABCOCK: Okay. Anybody else on
16 this topic?

17 HONORABLE HARVEY BROWN: Well, just as a
18 final comment I would say I think this is an area that I
19 -- from my limited reading on it the Federal courts have
20 had a little bit of struggle with computer records and
21 electronic records and internet records. We've been a
22 leader before in getting out ahead of the Federal courts.
23 I think this is an area that might be helpful for people
24 with expertise like Professor Goode to get out ahead and
25 help the Texas courts. Not to volunteer you for another

1 task.

2 CHAIRMAN BABCOCK: All right. Anything
3 else? Elaine?

4 PROFESSOR CARLSON: No.

5 CHAIRMAN BABCOCK: Any other comments about
6 this? Buddy.

7 MR. LOW: I just want to thank Professor
8 Goode and the presenters, and I've shown that if you're
9 given an assignment and you can't do it, give it to people
10 that can, and that's what I did, and I want to thank them.

11 CHAIRMAN BABCOCK: That's very good of you.

12 PROFESSOR GOODE: And if I may say, it has
13 been referred to as "Professor Goode's committee" numerous
14 times. It's really not my committee. I'm not even the
15 chair of the committee.

16 PROFESSOR CARLSON: It is now.

17 CHAIRMAN BABCOCK: Now, Professor Goode,
18 thank you very much.

19 PROFESSOR GOODE: If you don't like what we
20 produced, lots of other people were involved in producing
21 it.

22 CHAIRMAN BABCOCK: Okay. So, Buddy, you're
23 done, right?

24 MR. LOW: I'm through.

25 CHAIRMAN BABCOCK: Okay. That's good.

1 Let's move on to Bill Dorsaneo's proposed appellate
2 sealing rule, 76a.

3 PROFESSOR DORSANEO: Well, that's part of
4 it, and really this stems from our assignment to do a
5 procedure, a rule that provides for a procedure to file
6 documents under seal and maybe to get them ordered sealed
7 in the appellate courts, and from our first discussion of
8 this it became clear or somewhat clear that the matter
9 would involve coordination and sequencing of the
10 procedures that are provided for in trial courts with
11 respect to trying to get -- filing documents under seal in
12 the trial courts and trying to get them ordered sealed in
13 the trial courts and then doing whatever you would need to
14 do in order to continue the sequencing of the analysis in
15 the -- in the courts of appeals, which requires you to get
16 the documents to the courts of appeals.

17 Okay. So that also was related and is
18 related to Rule 76a, which in my experience has been
19 largely ignored for many years, but that is now being
20 given more attention, and it provides for temporary
21 sealing and sealing of court records contemplating that
22 there would be an appeal of an order sealing or not
23 sealing court records. So if I can ask you to find a
24 document that I prepared, assuming I can find it, in
25 September of last year I put in that little memo

1 information about how this sequencing would be done.
2 Okay. And it's a memo dated October 24, 2016, which is
3 related to the draft of 9.2(d), the proposed sealing rule
4 in the courts of appeals as it existed in October of 2016,
5 and this is the idea, if you have it in front of you. If
6 you don't, you can just listen. That will be fine.

7 It has become increasingly clear to me that
8 the procedures followed in the trial courts probably
9 should be sequenced and coordinated with the procedures
10 followed in the appellate courts. So I have revised the
11 proposed draft of 9.2(d) to coordinate with civil
12 procedure rules, particularly civil procedure Rules 76a
13 and Rule 193.4, which is a rule that we crafted sometime
14 ago talking about how rulings would be conducted and how
15 procedures would be handled with documents involving
16 discovery disputes that are reviewed in camera by trial
17 courts.

18 Okay. So what I wanted to talk about first,
19 because I think it may be the easiest idea, is how this
20 would work in the trial court and how that would connect
21 up with sealing procedures in the courts of appeals. So
22 that takes me first to Rule 193.4, which again, has
23 existed for a considerable period of time even in the
24 predecessor appellate rules, and it deals with hearings
25 and rulings on objections and assertions of a privilege,

1 and the idea primarily is in the paragraph called "In
2 camera review" followed by "Custody of material or
3 information." So if we're going to have an in camera
4 review, the proposed rule says that the way that will be
5 done is that the requested discovery, that material or
6 information would be segregated and produced to the court
7 in a sealed envelope at a certain point in time and that
8 the material reviewed in camera would be protected by law
9 from discovery in public disclosure, pending the trial
10 court's determination of the discovery objections or
11 claims of privilege.

12 So what happens next? What happens to
13 these -- what happens to these documents? And I think we
14 have examined it in this committee at hearings early last
15 year or in the middle of the year that it's very unclear
16 what happens next from court to court and that that's bad,
17 because if we're not sure what happened, we're not sure
18 we're going to preserve any kind of confidentiality or
19 protection from public disclosure. So here's what I
20 drafted. "The material information submitted to the trial
21 court for in camera review" -- and there are several
22 alternatives to that -- "or reviewed by the court in
23 camera must be placed in the custody of the official court
24 reporter or filed with the clerk of the trial court before
25 or following the hearing." Take your pick. And here it's

1 unclear as to who -- who should be involved in keeping
2 track of this material; and at our very first discussion
3 of all of this Judge Evans talked about this, said that he
4 thought that putting it with the court reporter is good, a
5 good idea. Huh? Because that provides security and is
6 just the best way to handle it. Am I close, Judge Evans,
7 to what you said?

8 HONORABLE DAVID EVANS: I conferred with
9 Mr. Schmoe and you are.

10 PROFESSOR DORSANEO: All right. So but then
11 again some other people think the clerk would be the right
12 person, and the way this rule is drafted is it could be
13 the clerk or the reporter. Take your pick if you're the
14 trial judge. Huh? But the idea is that the documents
15 should be kept by the trial court official under seal,
16 okay, until the trial court or an appellate court having
17 jurisdiction of the appeal or original proceeding orders
18 the reporter or the court clerk to transmit the material
19 or information under seal to the appellate court, and that
20 would be the handoff. Okay. That would be the handoff.

21 A similar provision is written into proposed
22 amendments for 76a, okay; and I don't think I need to go
23 over that comparative language; but the idea is to say,
24 okay, if we have something that's subject to being
25 evaluated in an appellate court under seal then it's going

1 to stay under seal in the trial court and get to the
2 appellate court in due course under provisions in the
3 rules. And, Judge Wallace, what did you say about how you
4 handle that?

5 HONORABLE R. H. WALLACE: On getting to the
6 court of appeals?

7 PROFESSOR DORSANEO: Yeah.

8 HONORABLE R. H. WALLACE: The court reporter
9 uploads it on their -- whatever that platform is called.

10 PROFESSOR DORSANEO: Do you tell the court
11 reporter to do that, or does the court of appeals do it?

12 HONORABLE R. H. WALLACE: The court of
13 appeals does.

14 PROFESSOR DORSANEO: Okay.

15 HONORABLE R. H. WALLACE: My understanding.

16 PROFESSOR DORSANEO: Huh?

17 HONORABLE R. H. WALLACE: That's my
18 understanding, the court of appeals does. Of course, you
19 have to understand we're right there with the court of
20 appeals, so sometimes they might pick up the phone, there
21 could be an order, or whatever. My understanding is,
22 yeah, it's just handled between the clerk and the court of
23 appeals and the court reporter.

24 PROFESSOR DORSANEO: Okay. So that's the
25 basic idea of sequencing and coordinating. The provision

1 in 9.2 that's about that, proposed 9.2(d), is 9.2(d)(2).
2 If the -- which provides on page two of 9(d)(2), "If the
3 official court reporter or the trial court clerk have
4 retained custody of the document or documents filed under
5 seal or a sealed document" -- and more about that later
6 "under civil procedure Rules 76a(4) or 193.4 and the clerk
7 or the" -- "or the reporter are ordered to file the
8 documents by the trial court" -- "ordered by the trial
9 court or by the appellate court having jurisdiction of the
10 appeal, the clerk or the reporter responsible for properly
11 filing the document or documents in the appellate court."

12 So that to me sequences and kind of
13 coordinates the process in the trial court and in the
14 court of appeals at least on the front end, and again, my
15 understanding is that that happens however it happens from
16 place to place now, and it would be better if it was -- if
17 it was more uniform. I realize the trial judges don't
18 like uniform rules, but this provides a lot of opportunity
19 for doing it the way you want. Huh?

20 HONORABLE DAVID EVANS: You know, you can
21 tell he doesn't appear at benches.

22 PROFESSOR DORSANEO: Well, that is what I
23 do, but be that as it may, so that's the starting point
24 and then I wanted to go talk about 9.2, another place in
25 9.2 where I think part of this problem -- part of the

1 problem of doing all of this is addressed and may be
2 resolved.

3 CHAIRMAN BABCOCK: Okay. Any comments on
4 what Professor Dorsaneo has said? Frank.

5 MR. GILSTRAP: Could you clarify? The
6 documents come in, are they paper or electronic?

7 PROFESSOR DORSANEO: Well, we're going to
8 get to that.

9 MR. GILSTRAP: When they go to the court of
10 appeals are they paper or electronic? How do they get
11 converted? Who pays for it? Does the court reporter keep
12 a copy? Who pays for that?

13 PROFESSOR DORSANEO: Well, I can't answer
14 all of those questions, but whether they're paper or
15 electronic needs to be decided. Okay. And that's a
16 second big issue, and when we considered that in the
17 appellate rules subcommittee and I asked y'all whether it
18 should be paper or electronic, I got no -- I got no answer
19 from anybody, so I made up my own mind about how I would
20 draft it for the committee as a whole to evaluate.

21 HONORABLE TRACY CHRISTOPHER: I'm pretty
22 sure I sent you an e-mail on that.

23 PROFESSOR DORSANEO: Okay.

24 CHAIRMAN BABCOCK: Justice Christopher.

25 HONORABLE TRACY CHRISTOPHER: Okay. A

1 couple of things. You know, I think the judge should
2 retain custody of in camera documents, which is different
3 from documents that are sealed under 76a. Those are two
4 so fundamentally different documents that we're kind of
5 confusing the two the way this rule is written. Okay. So
6 in camera documents are one side's documents that only
7 they -- they only want the judge to look at. Right? It's
8 not like something that's sealed under 76a where both
9 sides have seen that document, they just don't -- and the
10 judge has seen the document and maybe the court reporter
11 has heard about the document in connection with the
12 hearing, but they don't want the public to see the
13 document in 76a, and it seems to me we're kind of
14 confusing those two different categories of documents in
15 this rule.

16 So, you know, for me, the true -- the
17 privileged documents, the judge should keep it, the judge
18 looks at it, the judge gives it back. If -- unless
19 somebody is going to appeal and then the judge keeps it
20 and the judge gets it to the court of appeals in some
21 manner; and if it came in paper they, you know, send it.
22 They might get their court reporter to do it
23 electronically, but a lot of times now the judge's
24 documents that they're reviewing in camera are on a
25 computer disk. They're electronic.

1 So to me that is sort of a fundamental
2 problem with the way it's written, and so the -- you know,
3 there's a use of the word "under seal," and it's different
4 from 76a versus a privilege document.

5 CHAIRMAN BABCOCK: Kennon.

6 MS. WOOTEN: One thing that might be worth
7 looking at is existing Appendix C to the Texas Rules of
8 Appellate Procedure because that addresses the clerk's
9 record, and as part of that appendix there's a provision
10 about what to do with sealed materials, so it's
11 addressed --

12 PROFESSOR DORSANEO: Kennon, could you
13 repeat that?

14 PROFESSOR CARLSON: Where is that?

15 MS. WOOTEN: It's Appendix C to the Texas
16 Rules of Appellate Procedure.

17 PROFESSOR DORSANEO: Yeah. It's right here.
18 Well, that has to do with what it -- how it's -- with
19 Frank's question as to whether it's -- or it's related to
20 Frank's question as to whether this is paper or it's
21 electronic, and I do think that is a separate issue, huh,
22 that we haven't -- that we haven't resolved yet.

23 MS. WOOTEN: And the other thing it
24 addresses is that the materials are, at least in my mind,
25 with the clerk. It's not -- I mean, sorry, with the court

1 reporter. And so that's one area where there's at least a
2 partial -- partial attention given to it, and then I agree
3 with the difference between the sealed documents, and for
4 example, the privileged documents, because I wouldn't want
5 privileged documents to be filed anywhere. The idea is
6 that maybe you're going to keep them out of the record
7 altogether. If they are, in fact, privileged they would
8 never actually be filed potentially, and so they would
9 just stay with the judge.

10 And in terms of timing, whenever I've had a
11 hearing, I take the documents with me to the hearing, and
12 unless it's voluminous the judge just reviews the
13 materials at the hearing and makes a ruling there.

14 PROFESSOR DORSANEO: But it's not -- not
15 regarded as a problem that the judge has them?

16 MS. WOOTEN: No. What I've done before --

17 PROFESSOR DORSANEO: At least when they were
18 in paper form they would be in a box on the floor, huh?

19 MS. WOOTEN: Well, and I've never had like a
20 situation where the volume was so extensive that it
21 couldn't just be dealt with at the hearing. So I've had a
22 disk that the judge opens up, and maybe he or she will
23 call us back, and we go over the materials, or it's an
24 envelope, hand it to the judge there. Judge goes back,
25 comes out with a ruling, and then we get the materials

1 back if they're determined to be privileged. So the
2 possession is --

3 PROFESSOR DORSANEO: Maybe it's more
4 frequent that these in camera inspections involve only a
5 few pieces of paper, but that's not uniformly true.

6 MS. WOOTEN: Yeah.

7 CHAIRMAN BABCOCK: Judge Yelenosky, then
8 Judge Evans, and then Tom.

9 HONORABLE STEPHEN YELENOSKY: I wasn't on
10 the subcommittee, but I played one on all the phone
11 conferences and participated in e-mails. I think the
12 subcommittee, as I saw it or heard it, understood that
13 distinction and wrestled with it. At one point we talked
14 about -- I suggested calling it restricted access, which
15 would be an umbrella for sealed and privileged, but -- and
16 I think this is probably just an oversight, but you'll see
17 in here conflation of the two, those two, as you just
18 discussed on page five. And I didn't see this earlier or
19 I would have pointed it out to you, Bill. Page five, 6(c)
20 says, "The documents submitted to the appellate court are
21 subject to in camera inspection by the appellate court,
22 but are not subject to inspection by other parties or the
23 public." That, if I understand the construct of the rule,
24 would apply to sealed documents as well as privileged
25 documents, right?

1 PROFESSOR DORSANEO: Right. Well, the --

2 HONORABLE STEPHEN YELENOSKY: And it can't
3 be true that, as Tracy just said, a sealed document cannot
4 be withheld from a party. That's a privileged document.
5 So I think there is a conflation there in that particular
6 one, and in -- I know it was understood that they're
7 different, but there is some difficulty working through
8 that.

9 CHAIRMAN BABCOCK: Okay. Judge Evans.

10 HONORABLE DAVID EVANS: Well, I agree with
11 Justice Christopher, except for one point, and as the
12 distinction I regard the court reporter as an agent of the
13 judge for storage of that in camera material, because she
14 has -- he or she will generally have an evidence room that
15 is secure and is used in keeping records up and filing
16 them. It doesn't just go on the judge's floor or in a
17 desk. It's not subject to courthouse personnel who are
18 cleaning and stuff like that getting to it; and so that's
19 why I think it should be the court reporter acting on
20 behalf of the judge; and my belief is is that you have to
21 retain the document until the end of the case, the
22 submission until the end of the case, because some party
23 could complain on direct appeal as opposed to taking a
24 writ up about the discovery process and then there's a
25 destruction of discovery afterwards. And so I thought the

1 reporter was easier to deal with, and you could withdraw
2 the exhibits and thus remains under the judge's real
3 control.

4 We're having some problems with the clerks
5 believing that they're under the judge's control anyway;
6 and that's a different debate; but we don't have standards
7 for sealing statewide; and we've got 400 clerks, county
8 and district, is what I was told last weekend. So we've
9 got a number of judges, but I do agree with you. It's a
10 court's job to retain them. I just don't agree that it
11 should be in the judge's drawer, and that's where I am,
12 so, I mean, that's all I would try and make a distinction
13 about.

14 CHAIRMAN BABCOCK: Tom.

15 MR. RINEY: I agree with Justice
16 Christopher. We've got some confusion between two
17 different issues, and with this we would have two
18 different rules about in camera inspections. First of
19 all, under the proposed addition to subpart (4) of 76a, it
20 says, "The information must be segregated and produced to
21 the court in a sealed envelope seven days before the
22 hearing or a reasonable time before the hearing." That's
23 different than in 193.4(b), and also I would think that it
24 would have to be after the hearing, because the court at
25 the hearing would determine in either situation whether or

1 not an in camera inspection was necessary, because it's
2 not in every case. Same Rule 193.4(b), we're saying seven
3 days before the hearing or within a reasonable time
4 following the hearing. So there would be differences for
5 the two different types of cases or situations, which I
6 think will lead to confusion, and I would think in both
7 instances it should be within a reasonable time following.

8 PROFESSOR DORSANEO: I think that's meant to
9 be an option, with the brackets in there.

10 MR. RINEY: Well, I think that would be the
11 better option.

12 PROFESSOR DORSANEO: Well, that's, you know,
13 reasonable -- a reasonable viewpoint.

14 MR. RINEY: Thank you.

15 CHAIRMAN BABCOCK: Okay. Any other
16 comments? Frank.

17 MR. GILSTRAP: Okay. Everybody is skittish
18 about the privileged documents. They're not even going to
19 be filed. When they go to the court of appeals, are they
20 not going to be filed? What about the court of appeals?
21 I thought everything was filed there.

22 PROFESSOR DORSANEO: I think everything
23 should be filed, you know, and not somebody, "Here, take
24 it home and burn it," right?

25 MR. GILSTRAP: So at some point it's going

1 to be probably reduced to electronic form and filed for
2 the court of appeals? And that's where it's going, even
3 though it's -- these are privileged documents, they're
4 just going to have to be handled differently.

5 CHAIRMAN BABCOCK: Judge Wallace, and then
6 Lisa Hobbs, and then Justice Bland.

7 HONORABLE R. H. WALLACE: I didn't raise my
8 hand.

9 CHAIRMAN BABCOCK: You didn't? Okay. Well,
10 then Lisa did.

11 MS. HOBBS: Well, I think the courts of
12 appeals do receive certain documents. They receive amicus
13 briefs, and they don't file them, even though you actually
14 do e-file them, and I don't know, do y'all receive the
15 record or do y'all file the report?

16 HONORABLE JANE BLAND: We file the record.

17 PROFESSOR HOFFMAN: You do file the record.

18 CHAIRMAN BABCOCK: Justice Bland, you had a
19 comment?

20 HONORABLE JANE BLAND: Well, I don't know if
21 this is right or wrong, but the way that courts of appeals
22 do this is if it's something filed under seal then that --
23 that's how we all think about having it filed under seal,
24 it's accessible to the parties to the case unless the
25 order sealing it directs otherwise; and if it's filed with

1 in camera, it may be -- it may be electronically filed the
2 same way, but because it's in camera it's not disclosed to
3 anybody at all except the court.

4 HONORABLE STEPHEN YELENOSKY: But that word
5 is used loosely, too, because just talking about in camera
6 review of a motion to seal, I don't call that in camera,
7 just a nonpublic review, because the parties are all
8 there.

9 HONORABLE JANE BLAND: Right.

10 HONORABLE STEPHEN YELENOSKY: So we're using
11 "in camera" loosely, and we're using "sealed" loosely, and
12 it should be "in camera" goes with privileged and "sealed"
13 goes with nonpublic --

14 HONORABLE JANE BLAND: In camera usually has
15 something like "for the court's eyes only" or something on
16 it that designates that it's different than a typical
17 sealed record.

18 PROFESSOR DORSANEO: Well, but it really
19 isn't. You just are talking about it as if it's some sort
20 of different thing.

21 HONORABLE JANE BLAND: It really is, because
22 a sealed record is accessible by counsel of record to the
23 case, although not public. An in camera record -- at
24 least in our practice, and right or wrong it's our
25 practice, in camera record is not available to anybody.

1 We only -- except for the three judges.

2 PROFESSOR DORSANEO: What a sealed record
3 ought to be accessible to should be in the order, and it
4 shouldn't just make this like you do it this way and in El
5 Paso they may not. Huh? I mean --

6 HONORABLE JANE BLAND: I agree.

7 PROFESSOR DORSANEO: It's just a mess is
8 what I think, but if you don't want to straighten it out
9 that's okay.

10 CHAIRMAN BABCOCK: Munzinger is in favor of
11 cleaning up messes in El Paso. That's for sure.

12 MR. MUNZINGER: Judge Schmoe.

13 PROFESSOR DORSANEO: Or wherever they may
14 be.

15 MR. ORSINGER: It would be helpful to me if
16 we could identify who we want to see the records at each
17 level and then decide what to call it, whether it's
18 receiving, filing, marking and offering, or whatever. So
19 along those lines, in the trial court we have the option
20 of the court clerk, the court reporter, and the judge; and
21 then at the appellate level, I think we only have the
22 clerk as the option, at least as a practitioner, because I
23 can't communicate directly with the judges and there is no
24 court reporter. So in the trial court we ought to decide
25 who is going to see and then who is going to keep the

1 sealed records and then at the appellate court level it
2 all goes to the clerk and then the clerk will have some
3 kind of internal rule to follow about, you know, court
4 employees can or cannot see this or only three justices
5 can see this or six justices can see this; and if we could
6 decide that, then maybe we could figure out what label to
7 put on it and write an easier rule, a rule that's easier
8 to understand.

9 CHAIRMAN BABCOCK: Let's let Dee Dee take a
10 little break.

11 PROFESSOR DORSANEO: This is much easier to
12 understand than what you just said.

13 CHAIRMAN BABCOCK: Let's let Dee Dee --
14 let's keep it short this time. The last long break was my
15 fault. So be back at 10 of 4:00.

16 (Recess from 3:40 p.m. to 3:56 p.m.)

17 CHAIRMAN BABCOCK: We're back on the
18 Dorsaneo item on the agenda, one of several. This one
19 being on the proposed appellate sealing rule and Rule 76a,
20 and we've had some discussion, and let's see if there
21 needs to be any more. Yeah, Justice Gray.

22 HONORABLE TOM GRAY: I agree with Justice
23 Christopher that the problems of sealing or a sealed
24 record are very different than an in camera, and I focused
25 primarily on the in camera because that's what we see the

1 most of at the intermediate appellate court, at least the
2 little country court that we have in Waco. I don't know
3 about those big city courts in Houston, how they might
4 operate. I know they want theirs electronic, and I kind
5 of like mine in paper, but we can get to that.

6 CHAIRMAN BABCOCK: All right.

7 HONORABLE TOM GRAY: But with an in camera
8 document, to me, the first thing that I think we need to
9 address as a policy decision is whether or not a document,
10 whether you use the term delivered, tendered, filed,
11 whatever -- I don't like the word "filed," and I'll get to
12 the reason why, but does that document ever become a court
13 record? Because that's real important to the individual,
14 because I -- this is my personal belief. I don't know if
15 really if it has an effect in practice, but the concept
16 that just, say, my tax returns, if they became pertinent
17 to a case and I did not want to disclose them for some
18 reason, or they were argued to be pertinent, and the trial
19 court ordered me to produce them. I would think that as
20 the plaintiff in the case I have the right to say, "Give
21 me my documents. I'm dismissing the suit. I'm going
22 home. Because they're my documents. They're not public
23 records. I submitted them for in camera inspection.
24 You've now ordered me to produce them. I don't want to do
25 that. I don't want to go forward." I just feel strongly

1 that a person should be able to do that.

2 PROFESSOR DORSANEO: That's a nice question.

3 HONORABLE TOM GRAY: If they go forward, if
4 they're ever filed, they become -- and I'm talking about
5 in the technical sense of filed -- then they become the
6 court record, and you probably lose that ability to in
7 effect get them back. The other problem once a document
8 is filed is there is a whole host -- whether you file it
9 with the trial court clerk or you file it with an
10 appellate court clerk, if it becomes the court's record,
11 it triggers a whole riff of document retention
12 requirements. On policy, statutes, you cannot destroy
13 those documents for some period of time. We had a case,
14 12 boxes of documents. They were -- I, frankly, as I sit
15 here I don't remember if they were a sealed question, but
16 I'm pretty sure they were an in camera question; and they
17 did get filed; and we had to worry about those documents,
18 because they go to offsite storage, who gets access to
19 them, just a whole host of problems that a regular public
20 document we did not have to worry with; but those we did,
21 because they were -- I believe them to have been in
22 camera; and we had to deal with them for the minimum
23 retention period, six years for criminal cases, less than
24 20 years sentence. You get 25 years retention for a
25 capital offense, you're talking about permanent storage,

1 and so you're talking about real dollars for retention
2 periods.

3 I do agree with Professor Dorsaneo. There
4 is a problem and an inconsistency, and it would be
5 helpful, but the ones that we see the most are the in
6 camera. And I've got lots of specific comments on the
7 proposal, word choice options and that kind of stuff that
8 I don't think you're wanting to get into right now, but
9 from a fundamental perspective, I do think we have to
10 separate entirely the in camera production and how it
11 comes up as being very different than a document, as Judge
12 Yelenosky points out, I mean, it comes in and both sides
13 have the document. They may be arguing about whether or
14 not it's going to be publicly released, but at least that
15 document everybody knows what it is in dealing with it.
16 When you bring up an in camera document for the protection
17 of the person that is wanting that document, I prefer to
18 get the in camera submission directly from the trial court
19 judge. That way the party that wants the document, not
20 the one that tendered it in camera, knows for sure that
21 the appellate court either by direct appeal or by a
22 mandamus has the exact same document in front of it that
23 the trial court looked at in camera, and it's organized
24 and presented in the same fashion.

25 HONORABLE STEPHEN YELENOSKY: Justice Gray,

1 there is an answer to your question about a in camera
2 document, and it's in much maligned 76a, which I think
3 obviates a lot of this. It defines "a document of any
4 nature filed in connection before any court in a civil
5 court, except documents filed with the court in camera
6 solely for the purpose of obtaining a rule on the
7 discoverability of such documents." They are not court
8 records by definition.

9 HONORABLE TOM GRAY: Excellent. Drives home
10 the point that we cannot treat them the same as sealed
11 records, and so we've got to split the two in the way that
12 we treat them going forward, and I do think that we need
13 the discussion one and then the other, and I do think
14 Professor Dorsaneo is correct in bringing the two Rules of
15 Civil Procedure first that then flow up to how we treat
16 the documents at the court of appeals.

17 CHAIRMAN BABCOCK: Could I ask a favor? If
18 you have some specific word comments, could you just put
19 that in an e-mail to Martha and myself?

20 HONORABLE TOM GRAY: Absolutely.

21 CHAIRMAN BABCOCK: That would be great.

22 PROFESSOR DORSANEO: Well, Chip, the one
23 thing, it is difficult to do 76a and 193.4 as if they can
24 work the same way, and, you know, frankly, if 76a just got
25 separated from this it wouldn't bother any of us on the

1 appellate rules subcommittee. Okay. And, you know, maybe
2 that's a way to go and to just deal with the 193.4
3 situation and just coordinate those procedures with
4 whatever sealing procedure would be involved. Now, one of
5 the things that's part of that is if the document is ruled
6 privileged, okay, does it make sense to give it back to
7 the person who wanted that order instead of keeping it
8 part of the court record to be determined, with the real
9 answer -- ultimate answer being determined in the
10 appellate court. And, I don't know, but it seems to me
11 that it doesn't make sense to just hand it over any more
12 than it makes sense to hand it over to the other party. I
13 mean, it's part of the -- it is -- it seems to me that it
14 is part of the record in the case.

15 CHAIRMAN BABCOCK: Judge Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: Well, I mean,
17 every time we say a word we're going to have to define it,
18 because you said "court record." In camera is not a court
19 record. It's defined away. It's not a court record. Is
20 it in the record? Well, it's up there for review, but --

21 PROFESSOR DORSANEO: You're talking about
22 76a's definitions now.

23 HONORABLE STEPHEN YELENOSKY: Well, yeah,
24 but --

25 PROFESSOR DORSANEO: I'm talking about it

1 really is a court record, okay, even if 76a said it's not
2 going to be treated as a court record.

3 HONORABLE STEPHEN YELENOSKY: Okay, well,
4 all right, it's a court record, but none of the 76a rules
5 apply. I do agree they should be treated separately, and
6 when it's time I don't think we need an appellate rule for
7 sealing documents other than for documents that are first
8 seen at the appellate court, as infrequently as that is.

9 CHAIRMAN BABCOCK: Okay. Frank.

10 MR. GILSTRAP: Well, I mean, I think -- I'm
11 on the committee, and I think we get the distinction, and
12 I think we're all coming around to the idea that maybe we
13 just need separate rules and a separate path. It might be
14 that that might be the simplest way, but Judge Yelenosky
15 touched on the next issue, and that's this. We started
16 out as our charge was to deal with the need to seal
17 documents filed in the appellate court, and we're not
18 talking about -- there's one kind of documents I guess
19 that have been in the trial court and have not been sealed
20 and somehow go to the appellate court and get sealed. I
21 think there's a feeling that you can't do that because
22 they're already public record, but what about the set of
23 documents that get filed in the court of appeals for the
24 first time, and what are those documents? What kind of
25 case -- what kind of documents can be filed in the court

1 of appeals for the first time? We've been able to think
2 up a couple of examples, but I'd like to hear what people
3 say. When does that happen? What kind of documents are
4 we talking about?

5 CHAIRMAN BABCOCK: Okay. Any other
6 comments? Judge Yelenosky.

7 HONORABLE STEPHEN YELENOSKY: Well, you and
8 I have talked about this a little bit, but you mentioned
9 that it may be a problem with something that wasn't sealed
10 in the trial court.

11 MR. GILSTRAP: I agree.

12 HONORABLE STEPHEN YELENOSKY: I think there
13 are multiple problems with that, and I'll just tick them
14 off. One is it's moot because it's already public. They
15 didn't seal it. Two, if they didn't move to seal it, they
16 have waived it, haven't preserved error. Three, why
17 should anybody who failed to do any of those things be
18 allowed to start seeking a sealing order at the court of
19 appeals when they had a mechanism down below? And four,
20 it's never going to happen because sealed documents
21 considered for sealing come up early in the case, at the
22 latest a dispositive motion. So you can't wait for the
23 merits appeal for the court of appeals to take a motion to
24 seal. That's going to come at the time of the summary
25 judgment, and because 76a allows it to be severed and

1 appealed it's going to get to the court of appeals that
2 way before the merits appeal ever gets there, and that
3 should be the case. Otherwise, the trial court has to
4 say, "Well, you moved to seal this on summary judgment,
5 and I don't think it should be sealed, but so I can
6 preserve the jurisdiction of the court of appeals when you
7 get up there on the merits, I'm going to seal this
8 document for the next two years while this case is
9 pending."

10 CHAIRMAN BABCOCK: Okay. Professor
11 Dorsaneo, and then Justice Bland.

12 PROFESSOR DORSANEO: I thought our directive
13 in the referral letter was to deal with filing documents
14 under seal in the court of appeals, and that included
15 documents that were not filed in the trial court at all as
16 well as documents that were filed in the trial court but
17 were not made subject to a motion to seal or a sealing
18 order, and I thought myself that this is looking a little
19 different from what I'm used to, okay, but I proceeded to
20 follow that directive.

21 Now, the hardest one to deal with is a
22 document that somebody tried to get sealed or ruled
23 privileged, which, you know, I see as the same kind of a
24 process, okay, and they failed. Then does that mean when
25 they failed that those things are not available to be made

1 subject to a motion to seal in the court of appeals?

2 Because you kind of picked your poison and you lost and --

3 HONORABLE STEPHEN YELENOSKY: No, you --

4 PROFESSOR DORSANEO: -- game's over.

5 HONORABLE STEPHEN YELENOSKY: You appeal
6 under 76a at that moment, and it goes up solely on that
7 issue.

8 PROFESSOR DORSANEO: And you file the
9 document under seal in connection with 76a.

10 HONORABLE STEPHEN YELENOSKY: Provisionally.
11 If I -- if I deny a motion to seal and they want to go
12 under 76a on an appeal of a severed judgment, I will say,
13 "I'm going to grant you a" -- "I'm going to grant an order
14 to seal long enough for you to get to the court of appeals
15 and ask them if they want to continue that order." That's
16 fine, but the idea that I would grant a motion to seal
17 just because they might want to file a motion along with
18 the merits appeal is crazy to me.

19 CHAIRMAN BABCOCK: Justice Bland, and then
20 Levi, and then Justice Christopher.

21 HONORABLE JANE BLAND: I agree with Judge
22 Yelenosky that to the extent we're making determinations
23 that require testimony or some sort of proof for
24 determining what is or is not part of the record on
25 appeal, the trial court should make those determinations

1 in the first instance, and any motion filed in the
2 appellate court seeking to seal the record on appeal ought
3 to be referred in the first instance to the trial court to
4 make that determination subject to review, but we also
5 need some sort of protection to allow that review to take
6 place. And in the case of in camera documents we need
7 something in Rule 193.4 that's similar to Rule 76a that
8 preserves the in camera nature of those documents pending
9 -- I think Rule 76a says something like "anticipated
10 appellate review." That avoids the problem of the trial
11 judge who has made a ruling on the privilege, ordered
12 disclosure, from turning to the other side and handing
13 them the documents before the --

14 HONORABLE STEPHEN YELENOSKY: Well, motion
15 to seal, remember they haven't. So it prevents --

16 HONORABLE JANE BLAND: No.

17 HONORABLE STEPHEN YELENOSKY: -- the trial
18 judge from saying -- oh, on 193.

19 HONORABLE JANE BLAND: I'm talking about
20 193, and that's where it happens. Many, many other kinds
21 of sealing orders come about by the parties' agreement.
22 Then at the appellate court if the problem is that parties
23 filed something that's not part of the record on appeal in
24 the appellate court, there needs to be, you know, the
25 ability to strike it from the record and send it to the

1 trial court for a determination of whether it's part of
2 the record on appeal.

3 Finally, there are documents filed in the
4 appellate court that are not part of the record on appeal
5 or the mandamus record but are motions, briefs, and things
6 like that, where we have specific -- right now we have
7 specific rules dealing with, you know, redaction of those
8 motions and briefs; and to the extent that those are
9 implicated, that's a completely different analysis, and
10 that's something that the appellate court can be tasked
11 with. Chris Prine, I hope you're not reading this, so but
12 the bottom line is that the effort to determine the record
13 on appeal has to happen at the trial court level with the
14 appellate court's, you know, cooperation and supervision,
15 but the appellate court is not in a position to make a
16 determination about whether the -- whether 76a has been
17 met, and we ought to just have something like we do with
18 every other sort of determination where we need findings.
19 We ought to just say, you know, if somebody files a motion
20 to seal in the appellate court, send it back, remand it to
21 the trial court for determination and ruling, which will
22 then be reviewed by the appellate court.

23 CHAIRMAN BABCOCK: Levi.

24 HONORABLE LEVI BENTON: Yeah, I thought I
25 understood Stephen to say something about records filed in

1 the court of appeals that were not sealed that had
2 previously been filed in the trial court. I don't know
3 why you can't have -- we have inadvertent production in
4 discovery. You can have inadvertent filing of documents,
5 and we ought to be able to --

6 HONORABLE STEPHEN YELENOSKY: But you do
7 that in the trial court.

8 HONORABLE LEVI BENTON: Right. Sure.

9 HONORABLE STEPHEN YELENOSKY: You
10 inadvertently filed it. You can ask the trial court and
11 then the trial court has the question as to whether or not
12 it can seal something that's already been public, but
13 that's a problem we can't resolve, but it's the trial
14 court. I don't see any reason to allow somebody to find
15 out that they have inadvertently filed something not under
16 seal and they go on a motion to the court of appeals. To
17 me that's contrary to all notions of what we require
18 people to do in the trial court before they go to the
19 court of appeals. I don't understand why there would be
20 an exception here, and in defense of Bill, the charge was
21 to write a rule for all of that, but I think whenever we
22 have a charge we write what we're asked to write, but we
23 are also entitled to say but we don't think you should do
24 this, and that's what I think we are saying.

25 CHAIRMAN BABCOCK: Okay. Who was next?

1 HONORABLE LEVI BENTON: Christopher.

2 CHAIRMAN BABCOCK: Christopher.

3 HONORABLE TRACY CHRISTOPHER: I would like
4 to speak out against requiring the trial judge to keep
5 custody of documents unless they plan to mandamus in
6 connection with the privileged documents. I just don't
7 think that the judge needs to have those unless a mandamus
8 is going. So they come in, they show me the documents,
9 and I say, "Privileged. Are you going to appeal? Are you
10 filing a mandamus?"

11 "No."

12 I give them back to the party whose
13 documents they are. They -- you know, you don't have to
14 worry about them anymore. They're gone. All right. I
15 look at the documents. I order them produced in 30 days.
16 "Are you going to mandamus?"

17 "Yes."

18 "Okay. I will hold onto them. I will stay
19 my order pending the ruling by the appellate court." And
20 somehow we have got to get those documents to the
21 appellate court. I mean, that's really as simple as it
22 needs to be.

23 HONORABLE TOM GRAY: Or as complicated.

24 PROFESSOR DORSANEO: You are doing all of
25 these things that many judges would not do. They just

1 say, "Good luck."

2 HONORABLE TRACY CHRISTOPHER: Maybe, you
3 know.

4 HONORABLE DAVID EVANS: I think that works.
5 There is a case where the ruling could be to -- could be
6 taken up on appeal, but if you set a deadline by which you
7 must take an intermediate appeal or show why you shouldn't
8 turn it back over, I don't have a problem with that idea.

9 CHAIRMAN BABCOCK: Justice Gray.

10 HONORABLE TOM GRAY: Two quick things. If
11 it's a document that is sealed under 76a or otherwise
12 sealed in the trial court, I have it on expert authority
13 that the method of getting that to the court of appeals is
14 really simple. She says all you do is when it comes in
15 the portal you check a box. It actually asks you if it is
16 sealed, and you check a box if it is. We actually had one
17 that came in from a termination case. It had been
18 inadvertently checked. We sealed it. We got a motion by
19 the parties to unseal it. The clerk -- or the court
20 reporter recognized that she had inadvertently checked the
21 wrong box. We unsealed it, and we went on. So there is a
22 procedure in place of how to get a document that is
23 sealed, not talking about in camera stuff here. I'm
24 talking about a sealed document up to the court of appeals
25 and dealt with.

1 The other wrinkle in this for the TRAP and
2 the charge that the subcommittee is going to have to deal
3 with is these are the TRAPs, and they're going to affect
4 criminal cases as well, and criminal cases have some
5 unique problems in them. There is a -- for example, in
6 the child pornography statute, there's a provision where
7 the trial court is supposed to go through the record and
8 seal certain exhibits, and they don't come to us, and they
9 don't become part of the record that is publicly
10 available. We got a record in a case, went all the way
11 through the appellate process. It got fully processed,
12 and then the inmate is working on his writ, and he asked
13 for copies of the entire record, and that was the -- we
14 realized, wait a minute, we can't send 4,000 pages of
15 child pornography back to the prison. That's probably not
16 a good idea, and so we abated it to the trial court, and
17 the trial court, you know, did what they were supposed to
18 do originally, notified the clerk, and cleaned it up that
19 way. So there are some other issues that come up on
20 appeal that we won't see coming out of either of the Rules
21 of Civil Procedure, so and the 202 question comes up as
22 well, but --

23 CHAIRMAN BABCOCK: Justice Bland.

24 HONORABLE JANE BLAND: Under Rule 193.4,
25 Justice Christopher's idea that the party that's seeking

1 the privilege keep custody of those and be responsible,
2 that could work. What would need to be done then is to
3 add something into the rule. Right now the rule says
4 something like the trial judge must order the -- well, if
5 the trial judge overrules the objection based on
6 privilege, the party is ordered to produce those documents
7 within 30 days, but what it doesn't have is the opposite,
8 which is if the trial judge orders the production
9 instant, what keeps -- what keeps -- you know, how do we
10 get that automatic stay that Judge Christopher does and
11 many judges do, but occasionally --

12 HONORABLE STEPHEN YELENOSKY: Elected
13 judges. I mean, we have to preserve error all the time.
14 I mean, preserve jurisdiction.

15 HONORABLE JANE BLAND: Right. It would be
16 good to have something in the rule that says that if a
17 party plans to appeal they may retain custody of those
18 documents.

19 PROFESSOR DORSANEO: Suppose the one who
20 wants to appeal is the one who was trying to discover the
21 document, and if it's ruled privileged and you give it
22 back to the person who doesn't want it discovered, maybe
23 that's the end of it, because isn't that why, Judge
24 Wallace, you don't let that happen?

25 HONORABLE R. H. WALLACE: I'm not sure

1 what --

2 HONORABLE DAVID EVANS: The problem with
3 what Judge Christopher -- you have to set some deadlines
4 when they -- you're assuming everybody is going to seek
5 mandamus, and I am sitting here thinking I've had one case
6 where they said -- I didn't allow the discovery, but I
7 held the records because I thought there's going to be an
8 appeal at the end of the case, and if they lose the case
9 to the jury, they're going to want to go back and review
10 this discovery ruling. So before the trial judge releases
11 it, you've got to have some sort of notice to the party
12 who didn't get the discovery, "I'm going to turn these
13 back over unless you file an objection, unless you show me
14 why I shouldn't turn them back over," and at that point
15 Richard will fly in from San Antonio, says, "We're going
16 to hold this over your head until the case is over and see
17 if we can make an appellate point out of it," and at that
18 point you've got to hold onto it. But there would have to
19 be some notice to the party denied the discovery that
20 you're going to deliver it back to the litigant, and the
21 litigant cannot be the custodian pending an appeal. That
22 just can't happen.

23 PROFESSOR DORSANEO: Yeah. That's what I'm
24 thinking.

25 HONORABLE DAVID EVANS: That just can't

1 happen.

2 PROFESSOR DORSANEO: And the way it works
3 now -- forget 76a, but the way it works now is it's just,
4 "Okay, we've made our ruling, and everybody just do what
5 you need to do." Huh? And that's not right? Huh?
6 Because you might not have somebody who, you know, likes
7 you or your case.

8 HONORABLE DAVID EVANS: If you turn over the
9 privileged material you know it's going to go up. You
10 usually build in a 30-day notice just to say, "I give you
11 30 days to seek relief, and if you don't, you've got
12 to" -- I hold it, but I could just as well tell the
13 parties, "I'm going to turn it back over to the tendering
14 party in 30 days unless you tell me why I need to retain
15 custody."

16 PROFESSOR DORSANEO: I have a question, and
17 I need to have answered to work this forward through
18 193.4. That's what I wanted to do is to take 193.4 and
19 say what happens next? Okay. It kind of stops, and
20 everybody is scrambling. You can use 52.10 of the
21 appellate rules to go get relief from the appellate court,
22 if you can get it. Huh? And you could get time to do
23 that from the trial judge, if you can get it. Okay. But
24 there's no rule requiring either of those courts to
25 exercise discretion in your favor. That is bad. Okay.

1 In some places. Huh? That's bad. So I think 193.4 needs
2 more work.

3 Now, there's a thing we were discussing up
4 here that, if I may, that needs -- that I need to know
5 about, and the way this rule was drafted -- and if we take
6 76a out of it it probably doesn't matter, but the way this
7 was drafted, documents filed under seal on our definition
8 was a document that somebody filed in an envelope, sealed
9 wrapper, and they marked sealed. Okay. And there was no
10 court order. Now, a sealed document was one where you've
11 got -- was one that was sealed by law or by a court order.
12 All right. I can accept for the sake of argument that it
13 can't be filed under seal unless it's -- there's a court
14 order, but I know y'all were telling me that in camera
15 inspection is different. If I file something for in
16 camera inspection, okay, I don't need a court order to do
17 that. Huh? All right. I don't see that as different
18 myself, but if everybody wants to go on with the idea
19 that, well, this is an in camera inspection and it's
20 different from filing a motion under a document under
21 seal, that's fine. I don't need -- if I don't have to
22 deal with 76a, I don't need to resolve that conundrum. I
23 can just take those definitions out and give a definition
24 of "in camera inspection," huh? And if that works it
25 works. Okay. We've got in camera inspection and then

1 you've get some nice questions as to how a motion to seal
2 practice would work in connection with that, and it ends
3 up working roughly the same. Okay. That can be -- that
4 can be -- you know, that can be done. But 76a, if it's
5 going to be separate, I don't want to work on it.

6 CHAIRMAN BABCOCK: Justice Bland.

7 HONORABLE JANE BLAND: Judge Evans.

8 PROFESSOR DORSANEO: I'll work on it, but I
9 don't want to.

10 HONORABLE JANE BLAND: You have convinced me
11 that we really -- you're right. We can't have the trial
12 judge rule on a universe of privileged documents and then
13 give them back to the party, because we want to make sure
14 that the record on appeal is the same record that the
15 trial judge reviewed.

16 HONORABLE DAVID EVANS: That's right.

17 HONORABLE JANE BLAND: So that's right.

18 HONORABLE DAVID EVANS: And the judge can
19 leave little notes, "Read this, please."

20 HONORABLE JANE BLAND: No. No.

21 HONORABLE DAVID EVANS: You know, I'm sorry.
22 Okay. Now you're going to get paranoid, and say, "No, no"
23 to that. Okay.

24 HONORABLE JANE BLAND: This part of the
25 mechanics of the record under 193 hasn't really presented

1 the problem that the other side of 193 has presented,
2 which is the trial judge ordering production instanter or
3 in some amount of time that does not allow the party that
4 is trying to assert the privilege to seek temporary relief
5 in the appellate court before the production of the
6 documents, and it happens frequently, and I think it
7 happens not in a few jurisdictions. So we need to --

8 HONORABLE TRACY CHRISTOPHER: We added that
9 30-day period fairly recently and most people after that I
10 mean --

11 HONORABLE JANE BLAND: Yeah. It's

12 CHAIRMAN BABCOCK: Hey, hey, one at a time.
13 Hold it, hold it, hold it. One at a time.

14 HONORABLE JANE BLAND: Well, I mean, court,
15 there are trial courts, and one routinely in a big piece
16 of litigation that engendered, you know, 50 mandamuses, I
17 mean, the trial judge routinely said, "I order you to
18 produce it."

19 PROFESSOR DORSANEO: "Get on with it."

20 HONORABLE JANE BLAND: You know, and they're
21 in Galveston County, and they've got to get to the -- it
22 was to the point where they were, you know, doing things
23 like calling the clerk at the appellate court saying, "We
24 have a hearing today in Galveston."

25 CHAIRMAN BABCOCK: All right. We're going

1 to quit a little bit early today --

2 HONORABLE LEVI BENTON: No.

3 CHAIRMAN BABCOCK: -- on motion, and it
4 looks like our next meeting is going to be a two-day
5 meeting on April 28th and 29th. Orsinger is going to
6 mention that there's an appellate seminar that day on the
7 28th, so we're going to start at 10:00 o'clock on the 28th
8 instead of our usual 9:00 o'clock so that the Chief can
9 speak to the appellate seminar on the 28th.

10 MR. ORSINGER: Oh, thank you so much.

11 CHAIRMAN BABCOCK: And we'll send -- we'll
12 send notice out on it and a new agenda, and thank you
13 everybody for all of your work and for hanging in there.
14 Not everybody has, but thank you, and we'll be adjourned.

15 PROFESSOR ALBRIGHT: Chip, that is the week
16 of the -- weekend of the Women in the Law Power Summit at
17 the Four Seasons.

18 CHAIRMAN BABCOCK: Yeah, that's the -- we've
19 got conflicts all over April, Alex. Sorry.

20 PROFESSOR ALBRIGHT: I just didn't know if
21 there would be room at the Four Seasons.

22 CHAIRMAN BABCOCK: Yeah, we're checking on
23 that, and we're going to try to reserve them, but thank
24 you, and by the way, there are photographs for those of
25 you who didn't get them last time, of ourselves. But

1 anyway, a two-day meeting next time, the 28th and 29th.

2 So thanks, everybody. Have a good weekend.

3 (Adjourned)

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MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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