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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 27, 2013

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 27th day of September, 2013, between the hours of 9:01 a.m. and 4:59 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:

Documents referenced in this session

13-05 Outline for TRE 902(10) discussion

13-06 Restyled TRE 9-12-13

13-07 Chart of Restyled FRE/Restyled TRE 9-12-13

13-08 Chart of Current TRE/Restyled TRE 9-12-13

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CHAIRMAN BABCOCK: It is straight up 9:00 o'clock on a Friday, and we will be in session today and tomorrow, and somebody pointed out it is football season, but we'll be done by 12:00 before most of the games get started, so that will be good. We have lots of developments to report on, and to do that I will turn it over to Justice -- soon to be, as you-all know, Chief Justice Hecht, and I'm annoyed about this because now I'm going to have to say an extra word every time I call on him. Now I can't just say "Justice Hecht," I have to say, "Chief Justice Hecht."

HONORABLE JAN PATTERSON: And play "Hail to the Chief."

CHAIRMAN BABCOCK: Yeah, we will have music at the next meeting.

MR. SCHENKKAN: You can still just use one word. It's just "Chief."

CHAIRMAN BABCOCK: Or we could do "Chief." That's an idea. Your Honor.

HONORABLE NATHAN HECHT: Well, if that issue gets debated like everything else, we'll be here all day. Well, it's been a while since we met, so the Court has mandated e-filing in all of the trial courts of Texas with exceptions for some kinds of cases; and that will be

rolled out over time, beginning January the 1st in the bigger counties; and so we have rules out for comment that the committee looked at and will probably be making some changes in those in response to comments that we receive, but so far that project is being implemented about -- well, more smoothly than some technology projects; and the Office of Court Administration and its executive director, David Slayton, are on top of it; and we are hopeful that that will be a smooth transition. I think the last counties, the smaller counties, are to go -- to be required to accept electronic filings in 2015. So that's happening; and it will be a big change for the trial courts; and it will, of course, affect the appellate courts because it will make it more likely that the record will be electronic in more places; and, of course, it will increase the availability of court records to the public, so a lot of different things are happening with this project.

Then the Court issued an order in August revising filing fees applicable to various documents, and this is a result of the -- some changes that were made in the session. Those fees are available on the Court's website, and the order is just two pages, so I hope it's convenient for lawyers to download and use easily.

The Legislature gave us only one assignment

this -- or two, two assignments, this session as opposed to about 11 that we got last time, not because they are displeased with the work. They seemed very pleased with all of the committee's work, and so it's very gratifying for me to report to you that the relationship between the Court and the Legislature on rule making and the Legislature's respect for this committee are as good as they've ever been in the 25 years I've been the liaison to the group. So we're very proud of that, and you should be, too, and I continue to think that it's a very efficient and good way to change and improve procedure in the Court. So that's all good, and we'll hear about one of the instructions that we've gotten from the Legislature this morning, and then the expedited foreclosure committee is working on the other one. They're working on forms that the Legislature has asked us to do, so those will be ready in the fall, and we may or may not look at them. We've looked at them before, so we'll see how many changes there are.

So that's the status of the rules at the Court, and we have had some personnel changes at the Court. Our beloved rules attorney, Marisa Secco has gone back to Vinson Elkins, and she had always had great judgment up until then, and we wish her well, and she's on vacation in Maine this week, but when she returns she

promised to come to the next meeting where we can show our appreciation more fully to her for the enormous amount of work she did this past couple of years. But we are delighted, as you know, that the Court's mandamus attorney, Martha Newton, has agreed to take the rules attorney position, and we -- the Court has learned to rely on Martha's work and to trust it, and not just because she's an honors graduate of UT undergraduate in French and the law school and certainly not because she clerked for Judge Prado, but for all of her accomplishments since then; and so we are pleased to have her now helping us with the rules.

And Shanna Dawson is our new paralegal for rules. The Legislature believed that if they were going to make us spin straw into gold we should at least have some spinners, and so Shanna is there to help us with that, and we are delighted that she's there. She's experienced and has come in and done a great job already. So we're very pleased by that.

Then on news about other subjects, the -- I understand most importantly Brandy has gotten married, so we celebrate that with her; and Tracy's daughter I think is getting married, according to Jane.

HONORABLE JANE BLAND: Tomorrow.

HONORABLE NATHAN HECHT: Tomorrow, so that's

exciting news. Kem Frost is the new Chief Justice of the Fourteenth Court of Appeals, so we congratulate Kem. Jeff Brown of that court has been appointed to the Supreme Court as of yesterday afternoon. So he'll be coming aboard next week. The Chief Justice has retired at the ripe old age of 50 and will be returning to practice, and there will be more about that in the days ahead. His last day is Tuesday, and the Governor has demoted the Senior Justice to Chief, and so he'll be taking over on Tuesday as well. So lots of changes on the Court; but I was noting to my colleagues in an e-mail last night that with people like Martha and Shanna, we really have an embarrassment of riches at the Court that its reputation draws really some extraordinary talent; and we are grateful for that, as we are for your work; and we've got some exciting things on the -- this agenda and the next agenda or two, so that's the report from the Court.

CHAIRMAN BABCOCK: Thank you, Justice Hecht. I almost said "Chief," but that would be premature. Two other family personal notes. One, my daughter Ellie had a baby on September 11th.

HONORABLE NATHAN HECHT: Grandpa.

CHAIRMAN BABCOCK: Sabrina Wells Sztykiel, so say that three times fast, and the other very important --

HONORABLE NATHAN HECHT: So we'll call you "Grandpa."

CHAIRMAN BABCOCK: Thank you so much.

HONORABLE NATHAN HECHT: Grandpop, grandpa, or --

CHAIRMAN BABCOCK: I said the baby could call me "Chip."

HONORABLE NATHAN HECHT: Gramps or --

CHAIRMAN BABCOCK: Slow down here, man. And Gene Storie is involved in something that we all need to be aware of. So, Gene.

MR. STORIE: Thank you, Chip. Some of you know I do community theater. It's the only reason I hang around anyway, but up in Round Rock we will be opening the "Red Velvet Cake War" tonight, and I told Chip a minute ago it is obviously a farce because I have not one, but two romantic interests.

CHAIRMAN BABCOCK: One would be plenty.

MR. STORIE: One is more than enough, and my wife came to the preview at rehearsal last night, so I got away with my minute and a half make out scene; but in any event, it's a very funny show, if you're not doing anything tonight or for the next four weekends, it's Sam Bass Community Theater in Round Rock, a very tiny theater, seats 50, actually used to be the old railroad depot, so

the core of the building is like 140 years old. So if you have a chance to come out, that would be great. We're serving some champagne tonight. Tickets are $20, 18 for the rest of the run. Thanks.

CHAIRMAN BABCOCK: All right. Justice Gray.

HONORABLE TOM GRAY: There was a good reason that Ana was not with us in April. She was giving birth to her own baby in April. So a new mother here with us today.

CHAIRMAN BABCOCK: Great, very good. And brought it to a seminar where I was speaking, as a matter of fact in June or in July.

Okay. Well, onto the agenda, the first matter is amendments to Texas Rule of Evidence 902, and Buddy Low is going to take us through that.

MR. LOW: Chip, I can't give you any news on marriage or birth or anything like that because I haven't got much excitement, but I did when we were first assigned the -- Legislature gave us the job of they amended 18.001 and 18.002, and they gave us the job of amending 902(10) to be consistent with that. When we got to looking at it, we found that there were many inconsistencies and many deletions. One went one way and another another way, and they didn't meet in the middle. One Dallas court -- for instance, 902 has a 14-day deadline of filing. 18.001 has

a 30-day. 18.001 started out with 14 and they amended, as you will see, in '93, so they just never kept up with each other, and one Dallas court signed -- had a case where they decided whether there was timely filing, and they cited 902, 14 days. Eight years later they cited 18.001, 30 days. So neither one recognized the other.

We found there were many other inconsistencies; for instance, 902 was never amended until 2003 -- no, 2013, and there were inconsistencies. They would sometimes call it a counter-affidavit, a controverting affidavit. 902 never mentioned that. 18.001 had a good cause provision. There were just a lot, so we first were going to just do no change and just make it applicable to medical only and then when we got to looking, 18.002 is the affidavit, and it pertains to all the records, not just medical; and so what we tried to do -- and there are a number of other inconsistencies and so forth; but what we tried to do was draw following the form the State Bar committee followed, which was a good form, followed that where there was consistency, but it didn't include everything that was in 18.001.

Then we have another form which has everything. For instance, like 902 speaks in terms of giving -- making copies available to the other side of the affidavit. 18.001 doesn't even say that. It talks about

the affidavit itself and not making available, so we drew another form you'll see in there which addresses affidavit, counter-affidavit, and the timing, and includes everything that's in 18.001 and 18.002. The one we're recommending is one that was drawn by Justice Harvey Brown with the help of the whole committee, and that's the one that we recommend.

Now, first of all, I think we should get a view of who thinks we should amend 902 to include 30 days instead of 14 days, which would be consistent with the remedies code, Civil Practice and Remedies Code. That's the first thing we did, and is there anybody that believed we shouldn't change 902 to make it 30 days and be consistent with 18.001? We did that.

CHAIRMAN BABCOCK: Lisa Hobbs.

MS. HOBBS: Well, I definitely think they should be consistent. The Court would have the authority, though, to also overrule 18.001 and make it 14 days. They just have to do so expressly and give the Legislature notice, I believe.

MR. LOW: Well, that depends on how you interpret the Government Code.

CHAIRMAN BABCOCK: Well, let's not get into a debate about that.

MS. HOBBS: But I do believe they should be

consistent.

MR. LOW: Okay. All right.

CHAIRMAN BABCOCK: Anybody think they should be inconsistent? Richard Orsinger, I knew you would have to say something.

MR. ORSINGER: I think the consistency is good, and I think that 14 days has worked well for decades, and I really don't see any reason to move it to 13. In family law litigation we --

MR. LOW: 30.

MR. ORSINGER: 30, I'm sorry.

CHAIRMAN BABCOCK: You think 14 or 30?

MR. ORSINGER: 14 is better than 30. 14 has worked for decades; and a lot of this goes on in family law because we have a lot of credit card bills, bank statements, and things like that, and adding an extra two weeks on there, I just don't see any reason for it. I would prefer to invoke the clause that Lisa is talking about and conform them to 14 days if no one thinks we would offend the Legislature, and I frankly would doubt they would care.

CHAIRMAN BABCOCK: Okay. Anybody else have an opinion on that? 14 versus 30? Everybody feels strongly about that, Buddy, so --

HONORABLE HARVEY BROWN: I'm curious, I was

going to ask Jim Perdue, since you probably file affidavits on medical expenses shortly before trial, do you have a sense of whether 14 or 30?

MR. PERDUE: Yeah, I have no idea about family law, but I know in civil cases these are filed 30 days in advance. I mean, everybody knows your medical records expense affidavits have got to get on file 30 days in advance. That's been the practice. The distinction between 14 days and 30 has to do with DWQ and whether you're using 18.001, but the practice for civil trial and plaintiffs bar on medical expenses under 18.001 has been 30 for as -- I mean, and so --

HONORABLE HARVEY BROWN: Is 30, though, problematic or burdensome?

MR. PERDUE: Absolutely not. I mean, it's well understood. I don't think it's problematic, and you've got to -- I think you do have to -- I apologize that I haven't seen the draft related to the counter-affidavit that the committee is recommending, but you have to understand that if you have 14 and then you have a procedure for a counter-affidavit --

CHAIRMAN BABCOCK: Right.

MR. PERDUE: -- now you're in a real bind.

MR. LOW: Right.

MR. PERDUE: Because you compress that, and

you have the necessity to try to depose the counter-affiant then you just can't get that done if you're using 14.

CHAIRMAN BABCOCK: What's your answer to that, Richard?

MR. ORSINGER: I think that it might be good to uncouple the specific needs of the malpractice -- the medical -- proving up medical bills.

CHAIRMAN BABCOCK: You want a special rule for family, don't you?

MR. ORSINGER: Well, no, but what I'm saying is we generally don't have any problem with counter-affidavits or depositions. All we're trying to do is to prove up bills, and so if there's special needs in the medical department because there's counter-affidavits and depositions, maybe we ought to have a longer period of time for that particular purpose and then allow the general practice for just custodian of the records documents to be done on the 14-day basis.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: What would you do -- what would you tell the Dallas court to do when somebody files it, say, 16 days? Would you tell the Dallas court to follow 14-day or what they -- 18.001 says, 30 days? What would you tell that court to do?

MR. ORSINGER: I would say in the rule we ought to clarify, if we're going to do it separately, that these medical expense affidavits have a 30-day time table and the rest of the business records have the conventional 14-day time table.

MR. LOW: Okay. It's confusing enough now. We can add some more to it.

CHAIRMAN BABCOCK: Well, is 18.001 just limited to medical? It's not, is it?

MR. LOW: No.

PROFESSOR DORSANEO: No.

MR. LOW: 18.001, the Legislature, when they amended it, it looked like when I first read it and from the history of it, it looked like they were just addressing medical only, but there is in 18.002 an affidavit that includes all records, not just medical, and then that was exemplified when they amended and had a special thing for medical, and it said, "Notwithstanding (b)(2)," which has that, so, no, there's not been -- it's been used not just medical, many things.

And a good point was raised by the counter-affidavit. For instance, the counter-affidavit by statute has to be by someone that really meets a 702 requirement. I mean, it's not the same word. It has everything in 702, but other expertise, and I construe

that and so did our committee, that make that a 702. In other words, that the defendant can't just come in and say, "I think this is not right." They have to have a person qualified, know what they're doing to upset it because the Legislature wants you to be able to prove these things that are basically uncontested; and what was happening, some of the defense lawyers just "We object to that" and then there you go.

So, also, there's a question of the statute, 18.001, has a good cause provision. Well, there's no good cause provision in 902, but the good cause provision is only for the counter-affidavit. So the question was, should there be good cause for the other? We looked at Rule 5, and Rule 5, good cause in the general rules, only pertains to those rules. The counterpart to that is Federal Rule 6, and it includes the evidence rules. There are many -- there are many little trails in this thing that need to be cleared up.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: The -- the statute addresses an affidavit that proves the cost and necessity of charges. In my view the Rule 902, self-authentication with the business record affidavit of the custodian of the records, is nothing more than meeting the business record exception to the hearsay rule. It doesn't mean that

anything in the affidavit or in the records is true or false or anything else. It just is a way of complying with the business record exception, and traditionally ever since I've been practicing law back in the Seventies, to meet that requirement you had to file it 14 days before trial. I'd like to discuss later maybe having it changed to exchange it rather than file it, but all the complications that have been discussed so far this morning have to do with the use of the affidavit to create a prima facie showing of reasonableness and necessity and not meeting the business record exception to the hearsay rule. To me they have different policies, there's reasons to have different procedures, and I don't think that we should change the simple business record affidavit and plug it into a more complicated procedure or comply with a deadline that requires more -- I mean, a procedure that requires more time. It's not necessary, and I think it would be negative in the family law arena to double this length of time requirement.

CHAIRMAN BABCOCK: Okay.

MR. PERDUE: Again, I plead ignorance on the family law situation, but the practice under 18.001 has always been a 30-day practice. So if from my perspective -- and, again, using 902 for self-authentication may have a 14-day, but if you're using 18.001 for costs, even in

family law, as I read the rule and as I understand it, if you're using 18.001 affidavit, that's a 30-day deadline. So Richard's point regarding 902 then has to work with what the Legislature has done to give us a mandate to amend -- after amending 18.001 or 2, with this affidavit change that came from 902(10).

In context, remember, there was a pretty complicated recommendation out of the State Bar's evidence committee after the Escabedo decision in how to deal with affidavits in light of paid or incurred, which eventually became this 902(10) affidavit, but we didn't enact the whole recommendation. The Court just took the affidavit and put it into 902(10), which I personally felt was an advance; but there was a conflict, an unavoidable conflict between 18.001 and 18.002; but 18.001 and 18.002 have allowed us to simplify the kind of prima facie prove up 902(10) then contemplated when it comes to medical expenses in the Rules of Evidence to allow a simplified prove up as well; and so I think -- Richard and I may be agreeing, which is a business record prove up or a self-authenticating business record affidavit, which has traditionally been a 14-day practice or DWQ has been a 14-day practice, can be done; but the medical record -- the medical record question, the amount and the prima facie proof record, has always been done under a 30-day;

and because you have this counter-affidavit situation -- and Tom can speak for the defendant bar on this. I mean, if you get compressed on a counter-affidavit situation in a 14-day I can foresee problems.

CHAIRMAN BABCOCK: Sure. Tom.

MR. RINEY: Like Jim, I don't know anything about the family law situation, but any --

CHAIRMAN BABCOCK: Can we all stipulate that most of us don't know anything about the family law other than Orsinger and some of the district judges?

PROFESSOR DORSANEO: No.

MR. ORSINGER: Bill's proud of his family law heritage.

MR. RINEY: In the nonfamily law situation, Jim is right. It's traditionally been 30 days. That's just the way that we thought. Now, this statute -- or, I mean, the procedure is to eliminate the proof of reasonableness and so forth. In other words, it's to try to narrow the issue for trial. Medical expenses can obviously be a very significant part of the damages, but it's not -- it ought to be 30 days before trial instead of 14 days before trial when you're getting a lot of other issues. The idea is to simplify the proof at trial. Let's get that part done a little bit earlier, but also the affidavits a lot of times will include bills that may

have services that really aren't pertinent to the issue in the case. For example, if there's a specific injury, a lot of times the doctor will just attach a bill, and there may be unrelated treatment, other conditions.

That is not -- a counter-affidavit is not required to contest that, because that goes to relevance and causation and so forth, but if you're going to have a big case with a significant stack of records, you ought not to have to wait until 14 days before trial to start sifting through all of that. So I think you're going to eliminate problems if you continue to keep it to 30 days and, conversely, increase problems if you get that close to trial.

CHAIRMAN BABCOCK: Justice Brown, then Professor Dorsaneo.

HONORABLE HARVEY BROWN: Well, we could decouple them and do the 902 business form affidavit separate from the 18.001 affidavit. The problem is that a lot of times those two things are combined in the real world; i.e., the lawyer orders the medical records and bills. The affidavit is an affidavit that proves up the business record, proves up the business record of the medical expenses and the medical records themselves, and then proves up the costs under 18.001. So the rule as it was presently drafted by the Supreme Court lets somebody

do all of that in one affidavit that proves up the business records and this together, so if you decouple them you might have a little confusion about whether we have one affidavit just to satisfy 18.001 versus a different affidavit to satisfy proving up the business records of the medical community; i.e., the medical records.

This makes it simpler. I don't know how much of a hardship it is to add 16 more days. My guess would be that just like the lawyers got used to having to do this in the medical records area, that the family bar would get used to it, that at first it would be burdensome initially, but I know when I was practicing law I had 14 days on my calendar before every trial, and I suspect everybody would start putting 30 days in the family bar instead. But we do have that problem of one affidavit that does two purposes right now if we decouple it.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I pretty much agree with what Harvey said, but it looks to me like the expedited actions task force work on 902(10) was misplaced. It should be over in the other -- in the Civil Practice and Remedies Code. I think decoupling -- if we're going to do decoupling, that the work that was done

on the 902(10) affidavit ought to be undone and leave that question of the amount charged for services, reasonable for time and place provided currently -- I guess, no, it's currently the paid part at the end that was added ought to be over the other place.

And, you know, I was redoing my chapter, you know, 120(c) on this, aside from the fact that, you know, the discrepancy about whether you file the records or you don't file the records, it struck me as very confusing to have both of these provisions covering essentially the same subject matter, and they either ought to be decoupled or one of them ought to go away.

MR. LOW: Right. I agree. It's -- I mean, it's real confusing. I mean, neither 902 -- it's not complete. 18.001 has many inconsistencies. Sometimes they say it has to be filed 30 days prior to when testimony begins and another time they say prior to the trial commencing, and many cases, the whole trial commences when you start picking a jury, so there are a lot of inconsistencies. Now, whether or not one was intended to be -- 902 doesn't say that that's prima facie and will support a finding. It doesn't say that. 18.001 does that, but most people reading that look at it as saying, well, what is my requirement for filing an affidavit. We're trying to make a simple procedure so we

can eliminate issues, and we don't want to complicate a simple procedure. I mean, now, the timing, I don't know. I think it would complicate it even more to say, well, for family law we've got to do this. We've got to try to bring family law into the real body of law.

PROFESSOR DORSANEO: Richard's just talking about family law because that's what he does. I mean, it's like we have one that applies across the board and then one that's more customized to deal with a separate thing.

CHAIRMAN BABCOCK: Yeah, but there's a certain mystery about family law that Richard has tried to perpetuate over the years.

MR. ORSINGER: I'm just trying to keep us out of the trouble with the Legislature. If we get too far out of line here the family law will go to the Legislature.

CHAIRMAN BABCOCK: Well, Buddy, the charge from the Legislature and the Court was to amend 902(10) to conform with the statute, right? That was what we were charged with?

MR. LOW: Well, that was the initial charge.

CHAIRMAN BABCOCK: And there is --

MR. LOW: Then I was told that since there were these to look into the full thing. The future Chief

Justice told me we should look into it. These are things that we were later told to look into. When we started amending and our first draft was just to put down exception, you know, for medicals, and we got to looking, and there were many inconsistencies. He didn't say change. He said look into it, and we've done that.

CHAIRMAN BABCOCK: Okay. Well, your -- if I'm following this correctly, your proposal to amend 902(10) is in the report in section 6b; is that right?

MR. LOW: My -- what the committee recommended is 6a.

CHAIRMAN BABCOCK: Well, 6a is --

MR. LOW: 6a is --

CHAIRMAN BABCOCK: You're now trying to blend what the -- what we're going to get to next, which is the -- what do they call it? The --

MR. LOW: Restyling.

CHAIRMAN BABCOCK: Restyling.

MR. LOW: Right. But we started out with that. The 6b is merely a form which will adopt the provisions of 18.001 and 18.002.

CHAIRMAN BABCOCK: Okay. And, as I understand it, you were looking for guidance from the full committee --

MR. LOW: Right.

CHAIRMAN BABCOCK: -- about which approach we should take, should we go to --

MR. LOW: Right, and, I mean, there are many things. For instance, in styling do you put affidavit and -- what do you call that? The unsworn declaration. You know, you call it, well, or do you put it a footnote that an unsworn declaration may be used? Do you put good cause in there? There's good cause. There are many -- there are many questions. I mean, and there's no magic answers.

CHAIRMAN BABCOCK: This committee has the answers.

MR. LOW: Well, that's what I thought.

CHAIRMAN BABCOCK: Probably 50 individual ones, but --

HONORABLE HARVEY BROWN: So Chip?

CHAIRMAN BABCOCK: Yeah, Justice Brown.

HONORABLE HARVEY BROWN: If I can just clarify, so what we did is we started with looking at the old Rule 902(10). Then we looked at the restyled rule, because that was part of our charge --

MR. LOW: Right.

HONORABLE HARVEY BROWN: -- for tomorrow and next month. So we did that, we compared those two. Then we looked at the charge from the Legislature about looking

at 18.001 and whether the medical records have to actually be filed, so we looked at whether the records should be filed or not and how to accomplish that in 902(10). That made us look at 18.001 completely and the 30 versus 14 days. So that's how that all ended up merging into this final document that has ideas from the restyling, ideas on how to fix the 18.001 inconsistency, and then to address the filing of medical records, which we then took another step and said Legislature thinks we not only should not file medical records but maybe we shouldn't file any records and what should be the procedure for filing any records, so that's how this kind of developed over time into what you're seeing.

CHAIRMAN BABCOCK: If I could just ask Harvey, what is your recommendation about whether we should look to your recommended 6a for discussion purposes or 6b or both? Because it looks --

HONORABLE HARVEY BROWN: I don't have 6a or 6b in front of me.

MR. LOW: Harvey, 6a is the one -- 6a is the one you drew where you said the qualifications, affidavit, so forth, that you mailed to me.

CHAIRMAN BABCOCK: 6a is taking the restyling draft --

MR. LOW: Right.

CHAIRMAN BABCOCK: -- and starting from there and making changes.

HONORABLE HARVEY BROWN: Now that I understand, I'm sorry, 6a is the one I think we should work on, because it takes all of that --

MR. LOW: Right, and that's the one the committee --

HONORABLE HARVEY BROWN: -- puts it together, to get the benefit of everybody's thinking here.

CHAIRMAN BABCOCK: Who over here had -- Frank.

MR. GILSTRAP: 902(10) deals with all business records.

MR. LOW: Right.

MR. GILSTRAP: 18.001 deals with a subset of those records which involve services, and it also proves up reasonableness and necessity. Why don't we have both of them? We have one for business records generally and one for services, and they have different time limits and different requirements.

PROFESSOR DORSANEO: Chip?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: Harvey, are we still going to have an 18.001, and this 902(10) is meant to match it?

HONORABLE HARVEY BROWN: Yes.

PROFESSOR DORSANEO: Well, and that can work, but it doesn't -- it won't stand the test of time. Okay. The one or the other will get changed, and it will be different, and a different committee will be discussing the same thing later. I mean, like look at legislative continuances, for example. I mean, that's just one example. We have a rule that says one thing and a statute that says something else.

HONORABLE SARAH DUNCAN: So you're suggesting that they merge.

PROFESSOR DORSANEO: Merge or just do it in one place. It's very confusing.

HONORABLE HARVEY BROWN: Well, and that's why we did not refer to 18.001 in the draft. In the earlier draft we actually referred to the statute number. We said, well, what if the statute changes, so we tried to avoid that in our drafting. We may not have succeeded, but that's what we were trying to do, is get one place everybody would look to, and it would be this rule for the drafting of the affidavit. If this works, basically people won't look at 18.001 for the drafting of that affidavit. They'll only look to it for the counter-affidavit, which 902(10) does not address.

CHAIRMAN BABCOCK: Well, the direction, at

least, at -- in its simplest form is to amend 902(10).

HONORABLE HARVEY BROWN: Yes.

CHAIRMAN BABCOCK: We may go beyond that and do other things, but that's one thing we've been asked to do. Martha, this is very easy to unsort all of this. I'm sure you're taking notes. So why don't we take the restyling rule that you suggest, 9(a), and discuss that and see if people have comments about what you've done to that. And we already know that Richard is going to throw a shoe over 30 days, but that's okay. We'll see if anybody else agrees with him or he is on the island of family law. Judge Estevez.

HONORABLE ANA ESTEVEZ: I just wanted to make sure it's on the record that I do agree with him.

CHAIRMAN BABCOCK: That will be a first in this committee, that anybody --

HONORABLE ANA ESTEVEZ: That's why I wanted to put it on the record.

CHAIRMAN BABCOCK: Yeah. It's good to have that memorialized, Richard.

MR. ORSINGER: I missed that, so I'll have to read it in the record.

CHAIRMAN BABCOCK: She said she's agreeing with you.

MR. ORSINGER: Thank you.

HONORABLE ANA ESTEVEZ: I felt like you needed a little support.

MR. ORSINGER: Solidarity on the subcommittee here.

CHAIRMAN BABCOCK: Buddy, is that okay with you?

MR. LOW: Yeah, that's fine.

CHAIRMAN BABCOCK: Well, then in your programs turn to subsection 6a which is Rule 902(10) with interlineations, but understand that this draft is not the current 902(10). This is what the restyling committee has proposed.

MR. LOW: Right. The restyling committee combined about a whole paragraph and did it in about two sentences. I mean, it took out all the "whereas" and everything, and we agreed with that on requirements, and we went from there.

CHAIRMAN BABCOCK: Okay. All right. So -- so let's talk about 902(10)(a), the first -- the introductory paragraph, and you struck the words "or unsworn declaration" and why did you do that?

MR. LOW: Well, didn't we decide, Harvey, that we were going to put a note at the bottom, an unsworn declaration may be used because we did not want to have -- we've got affidavit or unsworn declaration. We have other

places where we use "affidavit," and we can't tell where there are certain things that unsworn declaration can't be used in the Probate Code and so forth. So instead of putting that at the top, we were just going to put a note that it may be used.

HONORABLE HARVEY BROWN: The note is on the second page.

CHAIRMAN BABCOCK: Right.

HONORABLE HARVEY BROWN: Under the comment, and when we first wrote it we wrote "affidavit or unsworn declaration," about six or seven or eight times, and we said why are we saying the same thing over and over? Let's just say "affidavit" and then define it, and we did note that that might be an issue for all the rules where an affidavit may in the future need to be clarified to include unsworn declaration.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I would at least say "made under penalty of perjury," and I probably would cite the Civil Practice and Remedies Code 132.001. That's not all unsworn declarations. It's bad -- that was bad work by the Legislature to say that whenever you have an affidavit you can use an unsworn declaration, and then now as you -- as Buddy just said, you have like probate lawyers saying, "Well, we don't want that." Okay. "We

don't want to use these unsworn" -- "we don't want these unsworn declarations to be used," but it is what it is, so if we have a statute that says you can always use an unsworn declaration under penalty of perjury when you could use an affidavit, and now, unless the law provides otherwise I think you just have to get used to that. The comment is good, but make it refer to the statute.

HONORABLE HARVEY BROWN: Flow, okay.

CHAIRMAN BABCOCK: Yeah. That's a good point, and I'll tell you that there are statutes that have been passed since this declaration affidavit thing where the Legislature has used the word "affidavit" without referencing the declaration alternative, and query, do you run a risk if you attach a declaration to such a pleading when the Legislature hasn't made a distinction, subsequent to their passing the declaration thing?

MR. STORIE: Yes.

CHAIRMAN BABCOCK: Yeah, Gene.

MR. STORIE: I noticed in the statute SB 1679 they use a specific affidavit form which requires a notary, so I think under the general rules of statutory construction, it's more specific and it's later in time. In my view that would control over the general provision that you could just have a declaration.

CHAIRMAN BABCOCK: A lot of traps there.

MR. LOW: Are you suggesting that we refer to 132.001, unsworn declaration?

PROFESSOR DORSANEO: Yeah.

MR. LOW: Yeah, that's the provision of the --

PROFESSOR DORSANEO: But the important part is that it's made under penalty of perjury. That's the important part.

MR. LOW: No, I understand, but I'm looking at 132.001. That's what we were referring to, and you say we should refer to that particular statute?

PROFESSOR DORSANEO: I think.

MR. LOW: Okay, that's what I'm getting.

CHAIRMAN BABCOCK: Okay. All right. Any more comments about that? Anymore -- yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, that may be correct legally, but it's stupid.

CHAIRMAN BABCOCK: So there, Gene.

MR. STORIE: Not the first time I've done that.

CHAIRMAN BABCOCK: Act your way out of that.

HONORABLE STEPHEN YELENOSKY: Obviously the Legislature wanted to make it possible for people to swear without going to a notary. Maybe that puts notaries out

of business, I don't know, but it doesn't make sense that that would apply in some instances and not others. Either you're under the penalty of perjury or you're not, and those two things don't make a difference. So I don't know how it could be error if somebody used a declaration and not an affidavit.

CHAIRMAN BABCOCK: Yeah, and I think having confronted this issue, my thought has always been it probably isn't, but I don't want to be the first guy to be told that that's not right.

HONORABLE STEPHEN YELENOSKY: Well, I'll always tell you it's right.

CHAIRMAN BABCOCK: Okay, good.

PROFESSOR DORSANEO: Stephen, did you mean that what Gene said was stupid or what I said was stupid or both of us?

CHAIRMAN BABCOCK: He was intending to include everybody.

PROFESSOR DORSANEO: Oh, okay.

HONORABLE STEPHEN YELENOSKY: I meant to quote somebody who said, "The law is an ass."

MR. LOW: Chip, I think what happened, there was an amendment to allow prisoners who couldn't get -- and then that was followed up. They said, well, it works there, why not -- there are other people that are not in

jail that can't get a notary or something.

CHAIRMAN BABCOCK: Well, you may recall several years ago that issue was referred to this committee, and we discussed it and roundly rejected the declaration idea.

MR. LOW: I roundly did, but the Legislature didn't consult me when they --

CHAIRMAN BABCOCK: No, they didn't ask our opinion.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: So there we have it, and in Federal court, Buddy, as you know, declarations have been used, widely used, for a long time without --

MR. LOW: Absolutely.

CHAIRMAN BABCOCK: -- the republic falling to pieces.

MR. LOW: I agree.

MR. ORSINGER: I think it has fallen to pieces.

CHAIRMAN BABCOCK: Well, for other reasons.

HONORABLE SARAH DUNCAN: Read the newspaper this morning, it looks damn close.

CHAIRMAN BABCOCK: All right. 902(10)(A), the speculatory language, Richard, you got another comment on that?

MR. ORSINGER: No, I was going to get to subdivision (ii). I didn't know where you were --

CHAIRMAN BABCOCK: I'm not there yet.

MR. ORSINGER: Okay, that's fine.

CHAIRMAN BABCOCK: 902(10)(A), Gene has got a comment.

MR. STORIE: Yeah, I wondered why in sub (1) or sub (i) why is it served without the attached record?

HONORABLE HARVEY BROWN: Well, this is part -- Buddy, do you mind? Or you go ahead.

MR. LOW: You go ahead.

HONORABLE HARVEY BROWN: Please go ahead.

MR. LOW: No, well, first of all, there are a lot of records that are voluminous, I mean, and so 902 says you don't send copies. Well, or make them available, I believe, and so -- but if you -- if it's just a small amount of records you can just send them. I don't know if that answers your question, but that's -- and the Legislature did not want -- when they amended they didn't want these records filed until the trial.

MR. STORIE: Yeah, I see, but I see a difference between filing and serving a copy, so if I'm -- filing is fine, or not filing, rather.

MR. LOW: Right.

MR. STORIE: But it seems like if you're

getting one you would want to see what the underlying records are.

MR. LOW: Well, as a practical matter you're going to get the records when you -- with service, but if they're voluminous records, you don't want to have to serve them. In other words, there might be a stack, and they might not even want them, you know, who knows, and so that was the difference in serving and filing.

CHAIRMAN BABCOCK: Yeah, but, Buddy, if I'm on the other side, and I get an affidavit that says, "The attached" -- you know, "The attached documents are business records, and I comply with all the requirements," does the opponent, though, not want to know what he's going to attach?

MR. LOW: Well, see, that's what 902 does. It says "make copies available." You serve them with the affidavit, but not the records.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Well, I just think that's -- I'm just confused about what we're trying to do, what the current rule is, what we do now, and what changes we're making. It sounds like this draft is going to say we serve a copy of just the affidavit, not with anything attached, 30 days before trial; and once trial commences we have to file the original affidavit with the

attachments, because that's going into the record; and if anybody wants to see the attachments before the day it's filed at trial, you need to give the party notice and then they give you the records within three days.

HONORABLE HARVEY BROWN: That's exactly right.

MS. HOBBS: And is that current practice, too? Because I don't see the three-day thing in the current rule.

HONORABLE HARVEY BROWN: Let me back up a little bit. The impetus for this was the Legislature in attachment four telling us that they did not want medical records filed with the affidavit. Okay. So then we said, okay, we're not going to file medical records with the attachment. Then we started with that and we started with a second assumption, which is the existing rule says you don't have to attach the records. It says you make the records available. Personally I thought that was a bad rule. I thought just give the affidavit with the records attached, but somewhere a compromise was worked out on this a long time ago that you just did not have to make the records themselves available. You didn't have to actually send them. You had to just make them available so that the copy costs were -- basically it was just a copy cost issue, switching copy costs from the person who

had the affidavit to the person who wanted the records. That's what the rule does.

MS. HOBBS: Is that because you would already have the records through discovery anyway?

HONORABLE HARVEY BROWN: A lot of times you would, so you didn't want to pay for them, or if the plaintiff had thick records like this and nobody was really fighting over them, they didn't want to pay for the cost of all of that.

CHAIRMAN BABCOCK: Can't you do that by Rule 11 agreement?

HONORABLE HARVEY BROWN: I'm sorry?

CHAIRMAN BABCOCK: Can't you do that by Rule 11 agreement?

HONORABLE HARVEY BROWN: You could do it by Rule 11 agreement.

CHAIRMAN BABCOCK: If I say, "Look, I know what you're talking about. I've got this. You don't have to send it to me." He says, "Well, 902 says I do."

HONORABLE HARVEY BROWN: Right.

CHAIRMAN BABCOCK: Okay. Well, here's a Rule 11 agreement, you don't have to do that.

HONORABLE HARVEY BROWN: But our task was not to revisit whether it was a good idea to make the records be attached or to make them available for copying.

That wasn't our task. If we were asked to review that, we would have, but we were working with the basic rule now and restyling it and then incorporating these things that were necessary because of 18.001.

MS. HOBBS: So when the Legislature says we don't want to file medical records, do they mean even at trial?

HONORABLE HARVEY BROWN: They mean before trial.

MS. HOBBS: Okay, so you're still going to have -- it's not -- they're not trying to keep them out of a record somehow, like an appellate record. They're just wanting to wait until you actually need them to file them.

HONORABLE HARVEY BROWN: Right. They're saying 95 percent of the cases settle. We've got all of these records in all the courts. Why do we need those? Let's file the actual records only when the trial starts. So we had to take that and then combine that with the issue, but there has to be an affidavit so the parties know what's going on and have notice and have access to the records themselves, so that's what we were trying to merge.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: 18.001 once provided that you would attach the records to the affidavit that's

served, and that was taken out sometime this century because I think they just didn't want the stuff to be filed; but it still stayed over in 902, which has, you know, file it, make it available, do all kinds of things; but I -- so I agree with Gene that, you know, regardless of what's filed I would think that the attached record ought to be attached to what I get.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: Otherwise, what the hell is it?

HONORABLE HARVEY BROWN: I don't disagree. It's just that wasn't our task to reevaluate that portion of the rule.

CHAIRMAN BABCOCK: Well, but if we're working off this form 6a, which is the restyled rule, you have made a change.

HONORABLE HARVEY BROWN: We made a change from what the rule is that the Legislature asked us to make.

CHAIRMAN BABCOCK: No, no, no. And maybe I'm misreading this, Judge, but 10(A), little (i), you have said "serve a copy of the affidavit. You've stricken the word "or unsworn declaration" and then you've added "without the attached record on the other parties at least 30 days before trial commences." So you've changed "and

serve a copy of the affidavit and the record on the other parties." You've changed that.

HONORABLE HARVEY BROWN: Well, no, if you look at the draft from the evidence committee, all they did was they filed the affidavit in the record. They only filed the affidavit with the court. The other side didn't get the affidavit. They got a notice of filing of affidavit. And then you contact the other side and say, "I got your notice of filing. I want that record. Please make a copy. I'll pay for it."

CHAIRMAN BABCOCK: Okay, but we're talking about this rule, and that's not what this rule does.

HONORABLE HARVEY BROWN: That's not what this rule does because the Legislature said they did not want the record to be attached, so we had to change subpart (A) that said "file the affidavit and record." We had to change that.

CHAIRMAN BABCOCK: Well, but the proponent of the record must serve a copy of the affidavit. That's what you recommend, right, so now we're only talking about whether it's with the records or without the records.

HONORABLE HARVEY BROWN: Exactly. You could fix that problem if we wanted to.

CHAIRMAN BABCOCK: You could fix that problem here. And your approach is the default is you

don't attach the records, but if somebody within three days says, "I want them" then you send it to them.

HONORABLE HARVEY BROWN: Yes.

CHAIRMAN BABCOCK: Okay. Yeah, Jim.

MR. PERDUE: You're talking about, again, two separate things, business record prove up and medical bill prove up. If you take a business record prove up and say that the -- all of the records, all of the documents, must be copied and served, you're talking about thousands of pieces of paper. I mean, we do not live in a paper world anymore. If you wrote the rule the way you're describing it, you would be talking about proving up a business record of any kind of sorts that would involve making thousands of pages of copies.

Now, I get it on the medical bills, but the way it -- in practice it works is everybody has the records. All you're trying to do is jump through the hoops of getting through the hearsay exception on a business record. Everybody knows that's coming. There's not really a substantial issue on that when it comes to business records. When it comes to medical bills, the affidavit now is so precise as to the number, you know, most people don't want a 500-page printout from Memorial Hospital on a hundred thousand-dollar bill to get you down to the paid or incurred number, but if that becomes an

issue because Riney is going to say there is a bunch of diabetes care which is irrelevant to the underlying medical case.

MR. RINEY: Well, it is.

MR. PERDUE: You never know what a car wreck can do.

MR. RINEY: That's why I need 30 days.

MR. PERDUE: But again, in practice, the Rules of Evidence have always contemplated that if the other side wants the paper, you have to give it to them, and you do. But in an increasingly paperless world, especially for the courts, but really between parties, the idea that you would write a rule that mandates making a copy of that much paper so that you satisfy the rule seems a step backwards in my opinion.

CHAIRMAN BABCOCK: Well, but the rule, this rule anyway, says the other side can require that on three days notice.

MR. PERDUE: If it's an issue, yes.

CHAIRMAN BABCOCK: Yeah, if it's an issue. Just go back to -- forget about medical records for a second. Go back to business records. The affidavit is going to say what? "The attached documents are business records" and then it will say all the things you've got to say, right?

MR. PERDUE: (C) as he's written it here.

CHAIRMAN BABCOCK: Yeah. How do I know as the party opponent what records you're talking about? How do I know from the face of the affidavit if you don't attach something?

MR. PERDUE: Because it's either come up through discovery or it's been provided through a records service.

CHAIRMAN BABCOCK: No, I may have it. I may have it, but how do I know that that's what you're proposing to attach in 30 days?

HONORABLE HARVEY BROWN: Well, a lot of times they're already Bates stamped, and so everybody knows. The second paragraph of the form says you have to say "Attached are blank pages of records" so you can compare what you have with this, and if there's any doubt we fall back to you can order it. If you want it, just tell them, "You know, I'm not sure I've got the right ones. You have 400 pages. My stack here is 410. I want them. I'll pay for them."

CHAIRMAN BABCOCK: Okay. Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: I'm dense I guess, but why if you're filing this affidavit are you wanting -- are you starting with the idea you have to attach every

record, everything in the record?

MR. PERDUE: Exactly.

PROFESSOR DORSANEO: I mean, but I'm the one who's filing this affidavit. I can attach --

CHAIRMAN BABCOCK: Whatever you want.

PROFESSOR DORSANEO: -- nothing to it if I want.

CHAIRMAN BABCOCK: Right. Well, in 30 --

PROFESSOR DORSANEO: I don't understand this problem of it's too much.

CHAIRMAN BABCOCK: In 30 days if you don't settle you're going to have to file it with the records, right? That's what this rule says. Because at trial, on the day of trial you're going to have to file it with the records, and the idea is you're going to save some money because 95 percent of the cases settle. That's the idea.

PROFESSOR DORSANEO: But still at trial when the medical records are filed it's the whole thing.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: My whole file, which is getting larger as time passes.

CHAIRMAN BABCOCK: Let the record reflect that Mr. -- Professor Dorsaneo's arms are spread wide. Judge Evans, and then Kent Sullivan.

HONORABLE DAVID EVANS: Well, I'd just like

to point out that the Legislature started with the proposition of not putting medical records in the public domain, especially given electronic filings and the problems that come with 76a on sealing anything in advance, and it's a -- the wording of the change in the language is regrettable because if you're trying a contested case the medical records are going to go in the reporter's record, not in the clerk's record, and filing it with the clerk doesn't do anything for the trial of the lawsuit, and it then opens up the medical records, and so the careful practitioner complying with the rule and in order to preserve the client's privacy should probably file a 76a motion to seal it, which is a bane of a trial judges's life.

HONORABLE KENT SULLIVAN: Right.

HONORABLE DAVID EVANS: I mean, it is the worst thing that can ever happen to you is to have a bunch of sealed documents over in the clerk's file. It's also last minute filings. Except as provided in the Texas Rules of Evidence, it doesn't have to be filed with the clerk before trial commences; and I guess you imply from that that when trial commences I say, "Ready? Ready? We're going," and then everybody runs over and files. It still doesn't get to my jury. So I want to know if we can draft this to exclude putting the medical records over in

the public record or if we're just bound by this implication and the act.

And on the other comment that was made was the idea that I just tried a case where medical -- medical records were proved up by the custodian, but the poor lawyer, a transfer from another state, failed to get reasonable and necessary proved up, and so when the time came for the charge the objection was made, but that's a practitioner's problem, and I --

CHAIRMAN BABCOCK: Kent, you can't leave. You've got a comment to make.

HONORABLE DAVID EVANS: The bill actually starts in 79 as carried by Charlie Evans and Bill Mire. It's a workers' comp bill, is where it came from. That's what it was designed to take care of in that comp practice in those days. It's the foraging of 18.001, but --

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would like to echo what Judge Evans says about the difference between a court clerk and a court reporter. The court clerk is readily available, their records, to anyone that wants to look, and the court reporter's records typically are not available and can more easily be secured and can be withdrawn at the end of the hearing or the trial. So, to me, filing with the clerk is different from filing with

the court reporter.

Additionally, the electronic rules that Justice Hecht has announced that the Court has put out there, if you file anything electronically you have to redact personal information, and I forget the exact definition of personal information, but we are doing it already in appeals involving children. You have to remove their name in any way to identify --

CHAIRMAN BABCOCK: Is that a family law issue?

MR. ORSINGER: Well, I tried to say that without being too obvious, but right now -- let me tell you, right now we have to go through all of the attachments in a mandamus proceeding or the record on appeal and remove any references to children, and it's a burden, and I think that everything that's filed, including medical records that are a thousand pages long, as Jim says, if I am reading the electronic rules correctly -- and someone here that's more familiar tell me if I'm wrong -- somebody is going to have to go through all of those records and redact the personal information. Also, a concept that the committee is familiar with, this practical obscurity. If you have to go physically present yourself to the courthouse and get the record to read it, that's one thing; but when it's all electronically

available, now all of the sudden someone in India eventually is going to be able to get access to records; and so this whole idea that we have to file private records with the clerk, which doesn't even get it to the fact finder, as Judge Evans points out, is very problematic.

Now, before I yield the floor, there were so many things that were said. I probably produce more records than anybody in here except the plaintiffs and the defense lawyers. That's a large part of my practice, is producing and processing records. In this day and time photocopying a record is the same thing as scanning a record. All photocopiers are scanners, and you can either scan and then print to a piece of paper or you can scan and store an image. Everybody's photocopy machines right around the table here are scanning and storing images. So in my practice we don't deliver stacks or boxes of paper to anybody. We either e-mail the copies of the documents that we scan ourselves and stick them on an e-mail, or if it's too voluminous we put it on a travel drive and deliver the drive to the other side. So the paradigm of piles and piles and piles of paper being delivered in the photocopy world really doesn't exist anymore. It's all stored electronically, and it's pretty effortless.

Another thing I would point out is there

have been some statements here that reflected maybe that they weren't aware of it. This does not require that the proponent of the records produce records on request. They just have to make them available. So we're not going to eliminate the photocopying process. We're just shifting the burden of who has to make the photocopy. So if I promulgate some records and I file an affidavit and give notice to everybody, if there are two or three litigants on the other side, each one of them is going to have to come to my office and make arrangements to copy those records. Wouldn't it be a lot simpler to just say scan the records once and then make them available upon request? I mean, I truly think you should -- if you're going to use the records you should make them available rather than make everybody trek to your office; and in my experience is when you make discovery available at somebody's office, people generally don't go and look at it as a practical matter; but isn't it more costly to have people sending over to other people's offices to examine records and mark the ones they want to copy and send them out to a copy service, rather than just say scan them and e-mail them.

The Rule 11 agreement, Chip, that you mentioned you would think is a very normal and reasonable way to solve this problem of having to file private

records with the district clerk. I would say probably at least half the time I propose that I get no response at all, and so I have to follow it up usually with a motion with the court to ask the other side -- I mean, to get the court to permit us to waive the requirement in the Rules of Evidence that the business records be filed of record. If everybody that was practicing law in Texas was at the par of your adversaries, we probably would Rule 11 agreement all around this Rule of Evidence, but a lot of them don't, and so why -- I would just fundamentally ask, why are we filing all of this stuff with the clerk of the court?

I was telling Judge Peeples just last week, I filed a stack this thick from Nieman Marcus of handwritten charge slips for about a five-year period. Because I couldn't get them from the other side, I got them from Nieman Marcus. I didn't want to have a deposition or anything else, so I had to file them with the courthouse. I did the same thing with the Spurs purchase records. What's the purpose of the district clerk knowing about people's Nieman Marcus charges and stuff like that? What does the world care about that? Why are we filing it with the clerk at all? Maybe I don't even mark it and offer it as an exhibit at trial, so why should the State of Texas have to keep those records for

75 years or whatever when we're not even sure they're going to the fact finder anyway. So I've probably said enough. I'll come back later if I have a chance.

CHAIRMAN BABCOCK: Here's a question for you and for Justice Brown. The rule as drafted in 10(A)(ii), so 10(A)(ii) --

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: -- says, "The original affidavit and the attached record." You've got to file it. The record must -- probably should be (B), "file the original affidavit and the attached record with the court at the commencement of trial." Does that mean you file it with the clerk or with the court reporter?

HONORABLE HARVEY BROWN: We intentionally said "court." The old 902(10) said "court clerk." The restyled said "court." We thought that was a good change to say "court" because of all the things that have just been raised here.

CHAIRMAN BABCOCK: So who do you file it with?

HONORABLE HARVEY BROWN: This should fix this problem that you're talking about, about filing these things with the court clerk. You just file it with the court, i.e., you know, with the court reporter, the court itself. I don't think you need the word court --

HONORABLE SARAH DUNCAN: That seems really ambiguous.

HONORABLE DAVID EVANS: I think filing it, too --

CHAIRMAN BABCOCK: Hang on. Judge Evans.

HONORABLE DAVID EVANS: You've got to tender it into evidence or they're going to file it with the clerk.

HONORABLE HARVEY BROWN: Anyway, that was the intent. We may need some suggestions on wording.

CHAIRMAN BABCOCK: To me that's ambiguous, because most judges have a clerk right there in the courtroom, and so, you know, you file it with the court. Is the judge going to look to his right and say, "Hey, clerk, file this," or is he going to look to his left and say, "Here, court reporter, you file it."

HONORABLE ANA ESTEVEZ: We don't have clerks.

HONORABLE HARVEY BROWN: We could say "offer" and use the court reporter.

CHAIRMAN BABCOCK: Okay. Judge Wallace.

HONORABLE R. H. WALLACE: You don't file things with the court reporter, I don't think. You offer them into evidence, and that's what you would be doing at trial.

CHAIRMAN BABCOCK: Yeah.

HONORABLE R. H. WALLACE: Offering them into evidence. Whether it's filed at the clerk's office or not doesn't matter.

HONORABLE HARVEY BROWN: Right.

CHAIRMAN BABCOCK: Okay. Yeah, Richard Munzinger.

MR. MUNZINGER: I'm looking at the proposed Rule 10(A), and it says that "The original or copy of a record that meets the requirements of Rule 803," et cetera, "The proponent of the record must serve a copy of the affidavit without the attached record," but there is no obligation to describe what the attached record is with any specificity or particularity. Imagine that Richard Orsinger and I are in a case. His office is in San Antonio. He's working from his San Antonio office. I'm in El Paso. Richard is in a bad mood and doesn't want to tell me what he's going to file with the court 30 days beforehand. He gives me this blank affidavit or this affidavit which leaves up in the air what it is that's attached to it; and now I have the obligation of saying, "Richard, I want to see what's attached"; and I have to do that within three days.

What is it that he's attached? I have no idea, and so he says, "Come to San Antonio, Richard, and

I'll let you look at it." I've got to buy a an airplane ticket. I've got to fly to San Antonio. I've got to look at his documents, which are undefined for the record in any way whatsoever with specificity, at least if this rule is left in its current form, and then I've got to say, "Well, I want a copy."

"Okay, you pay for it at 20 cents a page." I don't know -- I mean, all litigation is not limited to documents an inch or two inches thick. Some cases have enormous amounts of documents, so the previous Rule 902(10) said you had to attach the record. There was no question as to what record we were talking about with Rule 902(10) in its previous form because the record had to be attached. Here we don't know what is the subject matter. You go to number (8)(ii), or I'm sorry, (iii), "make the attached record," but there is no record attached, so that's a language problem. The subject matter of the affidavit or what have you. If there's no attached record attached to the affidavit, how do I know what is being attached? I've got a real problem with -- I mean, in my lifetime some lawyers are gentlemen, ladies, honest, cooperative, et cetera. Some are not.

CHAIRMAN BABCOCK: But not Orsinger.

MR. MUNZINGER: Say again.

CHAIRMAN BABCOCK: Not Orsinger, or in your

hypothetical.

MR. MUNZINGER: God is good, I've never had a case against Richard.

MR. ORSINGER: Thank the Lord, too.

CHAIRMAN BABCOCK: Hang on, Buddy. Levi has got a comment.

MR. MUNZINGER: My point is obvious. There's a real problem here of definition as to how you're serving these things. The old rule contemplated my actually looking at the -- I mean, the old rule contemplated my receiving the record and looking at it. Here it's undefined, and lawyers can play games with this and will play games with this, because not everybody is as cooperative as Richard professes to be.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: I don't think the concern is warranted. The affidavit -- the affiant's testimony has to set out clearly what the record is the same as if the witness were in the courtroom, or it's not going to be in a proper form. You made reference to this earlier. I forget how you put the question, but this issue, with all due respect, is of no moment. The affidavit either is going to be sufficient and is going to comply and is going to set out and meet the requirements of 803.6(a) or it's not, and if the gatekeeper trial judge

is doing his or her job, you'll have no need to give Southwest Airlines any more of your money.

CHAIRMAN BABCOCK: Carl, and then Buddy.

MR. HAMILTON: Well, while we're on the attachment part, the paragraph 10(C), form of the business records, (C)(2) says, "Attached are blank pages of records." Is that not supposed to be in there or --

HONORABLE HARVEY BROWN: No, that is supposed to be there. The way it's supposed to work under this draft is you send the other side the affidavit.

MR. LOW: A copy of it.

HONORABLE HARVEY BROWN: A copy of the affidavit without the attachments, but the original affidavit you keep and you file or offer with the court reporter at the start of trial. That will have the full set of records. You should know who they -- what the records are by knowing who the custodian is and where they came from. You should have some idea from the number of pages. If you don't, though, you're allowed to say, "I'd like a copy." In an earlier draft we put you should Bates stamp them. Then we decided that, well, Bates stamps may disappear, we may no longer have Bates stamps five years from now, so we didn't want to do that. Then we said, well, maybe we should have some identifiers other than this. There was some discussion about that; and we

thought that because the party would know who the custodian is, would know where they're coming from, they would have an idea what the records were; and to try to describe in a rule what would be sufficient for identifying them was problematic, so we thought basically going back to what Levi said, everybody knows what these records are when you get these affidavits; and as Jim said earlier, usually it's just proving them up. Everybody has exchanged them before. If you have a doubt, you just ask for a copy.

CHAIRMAN BABCOCK: Okay. Yeah, Professor Albright.

PROFESSOR ALBRIGHT: It seems to me like we need to step back just a little bit. What the Legislature said is don't file all these papers with the clerk, right?

HONORABLE HARVEY BROWN: Right.

PROFESSOR ALBRIGHT: Is that right? And then what this rule does is says that here's the procedure where you have an affidavit where you can prove them up as business records, and so we need to have an affidavit. You have to give notice to somebody -- to the other side within a certain amount of time. This rule says that the proponent of the record must, in number (2), file it with the court. Well, you don't have to file it -- it doesn't seem to me like you should have to file it with anyone

unless you decide to use these records as evidence. So why isn't it that the purpose of the rule is saying, okay, I have the affidavit, I'm going to prove these records up if we go to trial if this is an issue, and I've given you notice, but there's no reason for the court to ever have them unless they are actually used as evidence. So instead of a "must file," it's an if you use them as evidence then you tender them to the court like you would any other evidence, right?

Another -- so that's one issue that I've been thinking about, and the other one is I think we're dealing with the problems that we have been for probably the last 10 years or so with living one foot in the electronic world and one foot in the paper world. It makes sense to me that if you have one of these affidavits that you just e-mail the scanned documents with the affidavit and say, "Here's what's attached" and then it's scanned and you can look at them or you can not look at them, it's no big deal, but we're also -- the way the rule is written we're also living in this paper world that seems to require that you make all these copies upon request. So why not just say you send them electronically to the other side, except that we don't really acknowledge that everybody has electronic access now, except the Supreme Court has.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I'm sort of circling back to something that was mentioned earlier about redaction and sealing records and all of that. I didn't hear anything that sounded wrong to me, but I guess I want to make a cautionary note about it because I've done training not only for attorneys but for judges on 76a, and I don't think it's well understood without some training. For example, some attorneys think that they can by Rule 11 seal documents that they file with the clerk or exhibits. Cannot do. The court has an independent obligation because the public has a right to determine whether they're to be sealed or not and they meet the requirement.

Some attorneys believe that redaction means we'll redact it in the public record but we'll show it to the judge. That doesn't work either, because, to me -- and I think the law supports this -- anything that's an exhibit in the court, first of all, the Supreme Court said in 1992 is a fortiori a court record; and so if they're showing it to me that means I've admitted it as an exhibit or in some fashion it's come to my attention and is being considered in the case; and so you can't redact something on paper and then show something unredacted to the judge, because that's just an end run around 76a. So it's just a

cautionary note that while we talk about these alternative ways of doing things that you can't do an end run around 76a. You shouldn't do an end run around 76a.

You do talk -- and I agree with you, Richard, that there are a lot of things filed with the clerk that nobody needs; and if that's true, then the rule should say you don't need to file it with the clerk; but anything you do file as an exhibit has to be a court -- and is a court record under Supreme Court ruling. So perhaps you can deal with that by saying in the rule, whatever it is, that you don't have to file it with the clerk, but you can't just say, well, nobody has an interest in things that are filed with the clerk, because just like with the Public Information Act, we don't worry why somebody wants to see something. You can't consider that in Public Information Act case, why somebody wants my records -- well, doesn't apply to the judiciary, but you can't ask that; and just because we can't imagine why somebody would want to see something filed with the clerk, doesn't make it okay, because the public decides what they think they want to see unless we say it doesn't have to be filed with the clerk.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Well, I guess I would just point out on the record that I disagree that you can't redact

things and still be in compliance with 76a, only because the court is requiring us to redact things, so I think they kind of defacto said --

HONORABLE STEPHEN YELENOSKY: Oh, that's different, though. I'm saying you can't redact things -- you can redact if you give the judge a redacted copy and you file a redacted copy, but I don't think other than in camera rules you can go around 76a by saying, well, we didn't seal it, we just blacked out the whole document and then we gave the judge an unredacted copy. That's all I'm saying. Redaction works for things the judge doesn't need to see. I don't need to see Social Security numbers.

MS. HOBBS: Well, in a suit on sworn account, though, you do. You still would redact it in the record --

CHAIRMAN BABCOCK: Lisa, you've got to speak up. Dee Dee can't hear you.

MS. HOBBS: I mean, there's sometimes you need to see the Social Security number because you are actually looking at whether something's a debt of this person, right? I mean, and that's an identifier that you need to confirm that debt.

HONORABLE STEPHEN YELENOSKY: Well, and I haven't really thought about that, but normally what happens is I'll get medical records --

MS. HOBBS: Yes.

HONORABLE STEPHEN YELENOSKY: -- in some context of a nonparty, and I don't need to know their names. I don't need to know anything about them. All of that can be redacted out, and I can look at the redacted copy.

MS. HOBBS: I agree with you 100 percent that most of the time it does not require it, but sometimes it is required that you actually see a sensitive data piece that the Supreme Court has declared to be redacted in the record, and in those instances --

HONORABLE STEPHEN YELENOSKY: If the Supreme Court has said it can be redacted in the record, that's fine.

MS. HOBBS: Yeah. It kind of trumps 76a, right, kind of qualifies it a little bit?

CHAIRMAN BABCOCK: Judge --

HONORABLE STEPHEN YELENOSKY: Well, if there's some other rule or statute that says it can be redacted in the record, that's fine, but I don't think anything else can be redacted, yet shown unredacted to the judge.

MS. HOBBS: I would just say, too, on the -- I agree that we are -- I think the idea should be that we do not file it until we need it. I think that's a change

in practice, because as an appellate lawyer I sometimes get some glimmer of hope of some evidence in a business record affidavit that someone filed, even though they didn't really use it; but so, I mean, it's going to change practice if we do that. I think that to the extent we don't want things filed, medical records filed, we also don't want business records filed. So I wouldn't really distinguish between the medical records and the business records because there's just as much proprietary information in a business record affidavit of a large corporation as there is in a medical record, so I really wouldn't make the distinction; and I would support a rule -- however it's worded, and it's hard to draft these things, but I would support a rule that says you don't file it, you tender it, let it be part of the court -- of the reporter's record if it's, in fact, introduced into evidence.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo, and then Judge Estevez.

PROFESSOR DORSANEO: Well, it's -- I think I now understand what this rule was trying to tell me, and I didn't understand it until just a few minutes ago, and I want to see if I understand it, if we all understand it, and then make a suggestion about how to fix it.

CHAIRMAN BABCOCK: Okay. What was the rule

trying to tell you? What did it speak to you?

PROFESSOR DORSANEO: Well, I didn't understand, for example, this difference between the original affidavit and a copy of the affidavit there at the beginning. I didn't get that at all. I don't think a lot of people will get that until they spend some time coping with that idea, but you get this original thing, but really nothing gets filed until the original affidavit is filed and with the attached record. Now, I gather when you say "attached record" you mean the attached record in the form prescribed below by (B), right?

MR. HAMILTON: (C).

HONORABLE HARVEY BROWN: The affidavit is 5(C), the affidavit is 5(C). The record is the medical records or the business records that are attached to it.

PROFESSOR DORSANEO: Okay. But the attached -- okay, the affidavit is -- it says "form of business record. I am the custodian," blah, blah, blah, I mean, that's the -- "form of business records," that's the attached record, right?

HONORABLE HARVEY BROWN: The form for business records is the form to prove up records as being authentic. So the records are the attachment, i.e., the medical records or the bills or the credit card reports.

PROFESSOR DORSANEO: The thing that Carl was

asking about, "Attached are blank pages of records."

HONORABLE HARVEY BROWN: Yes.

PROFESSOR DORSANEO: Okay. So that's (C). It doesn't say up here in (A)(ii) that "in the form prescribed below in (B)." All right. So I don't see the linkage between (A) and (B) unless you do that. Okay. And then we get down here to (D), "Form for costs and necessity," it says, "a party may make prima facie proof"; and I gather that's meant to say, "A party who complied with (A), (B), and (C)," okay, "can make prima facie proof." You can't just skip the beginning, huh, and make prima facie proof at trial.

HONORABLE HARVEY BROWN: Well, (C) includes everything that's in (B) and adds something else, and (C) is the same as what the current rule is the Supreme Court just recently enacted.

PROFESSOR DORSANEO: But I'm going to want to get to (D), am I not?

HONORABLE HARVEY BROWN: Excuse me, did I say (C)? I meant (D). I'm sorry, I misspoke.

PROFESSOR DORSANEO: I'm going to want to get -- I'm going to want to work my way through this rule and get to (D) so I can use this affidavit proof in lieu of calling Dr. Smith, huh?

HONORABLE HARVEY BROWN: Yes.

PROFESSOR DORSANEO: All right. So if that's an accurate understanding, all this first thing is is really a notice that, oh, by the way, when we have a trial I may introduce some stuff. Okay?

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: In some manner. And if it's just a notice, let's just call it a notice and have it describe what -- as Richard said, describe, you know, the kind of stuff that that's probably going to be and maybe even tell the people in the notice that if you want to look at this stuff, okay, or if you want it, call me. All right. I mean, have it to be an informative notice that does the small function of telling somebody what they probably already know unless they're stupid, okay, is that when we have this trial I'm going to introduce some documentary evidence, and that's 30 days in advance, that's fine. Okay, but then we get down to the attached record, that part I haven't worked my way through yet. Is the attached record, is that -- and I think that's the problem. Do we want that all to be attached at the commencement of trial before the first witness testifies, or do we not want that step? Huh?

HONORABLE HARVEY BROWN: Frankly, now that everybody has pointed out that it's better to say court reporter, the phrase, "at the commencement of trial" is

probably wrong because you don't offer exhibits at the commencement of trial in many courts. So it probably should say "offer during the trial," going back to Lisa's point, you know, if you don't need it, you don't offer it ever. We used that phrase "at the trial" because it was in the restyle, which is also similar to the language in the Legislature of "before the trial commences." But that doesn't mean we couldn't do it later than when the trial commences, so I would say probably "during the trial" would be a fix there for that issue.

CHAIRMAN BABCOCK: Judge Estevez has been very patiently waiting to say something.

PROFESSOR DORSANEO: Well, all I'm saying is the first step is making it a notice.

CHAIRMAN BABCOCK: Is your name Judge Estevez?

HONORABLE ANA ESTEVEZ: I'm going to agree with Bill and Lisa, and I think we've gone -- we've come a long way baby kind of thing because I don't know why we would ever need to file it or they would need to file it at all. I mean, frankly, when they -- usually when I see the affidavits it only comes up if they're having a problem with introducing the evidence because they already produced it under affidavit, and we never send the affidavit back to the jury. Most people detach -- they

take off the affidavit. The jury doesn't get the affidavit. They just get the records that were supported by the affidavit, so at this point where we are electronically it would not be difficult for people to serve the affidavit on the other side and serve the attaching documents, and maybe what we need to do to kind of split the baby is say that they need to serve documents under 300 pages. If it's 300 pages or less or 500 pages or less then they electronically send the papers or they keep them. That's not that big.

You know, if it's 10,000 or 20,000 pages then obviously that's when people need to come and visit your office or the office of your client, but we are in a position now that we're trying to reduce the paper, and it's not just for the clerk's office but I think for all of society we're going to be requiring everyone to electronically file and electronically serve, and it's not going to be a hardship as that continues, so I think we should look to the future. They need to have that affidavit to prove it up, and obviously if we have controverting affidavits then you'll probably have a hearing before because people are going to want to know what they're going to get in, and that's when you introduce it. You introduce it when it's at issue.

If your records are properly authenticated

under these affidavits then it's not -- I rarely have an issue with the affidavits. Let's put it that way. I don't know how the other trial judges -- how many they do have, but if they do then they'll have a hearing, and there will be an issue that they can resolve at that time, but other than that it's never really relevant to our part because everybody knows that they're in, that they're going to get in, and so it's kind of an overkill to go through all of this when it's not always an issue. And if it is, they can easily put it in the record at the time that they need to do it.

So I think we just eliminate filing altogether. It eliminates the problem of 706. We don't have to seal anything that wasn't filed. I mean, we're obviously going to have to deal with that at the trial level because if you go to trial on any type of medical issue then all your files are going to be there, and you can't redact it all because the style of the case has your name, so whose medical records are they going to be, they're going to be yours. So there's absolutely nothing you can do besides finding some way of sealing medical records in another way, unless the clerk's record is never on record. I don't know. Do those get posted as well on appeal? Will the transcript and all exhibits be available for anyone when they appeal? Online? I don't know.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: I don't know what the goal is.

MR. ORSINGER: It's a public record, too.

HONORABLE ANA ESTEVEZ: Yes?

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: Okay. Well, then we would still have that problem.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I would like to just reconsider the structure of the rule but go ahead and provide to opposing counsel a copy of the attachment. The removal of the attachment is designed to save storage space for clerks, reduce labor within the clerk's office and cost. That's the whole purpose of reducing paper from a government standpoint; but I believe that an affidavit is an exhibit; and that's why it was derived -- was obtained and is going to be an exhibit; and so we're just building in a labor step for the opposing party to say "Send it to me"; and if they are too lazy to get it, what happens, you have a jury in the box, it gets ready to be tendered, and somebody says, "This thing is full of irrelevant material that has to be redacted before we can proceed"; and since the rule doesn't require them to ask for a copy in advance, they have that right to do it at

trial.

I just think we're building in an extra step. I think you just send it to them. It's going to go electronically. You know it's going to be an exhibit, and then in the management of the case and in the motion in limine you should have that stuff come forward to you early on before you select the jury, and you're in a little bit better shape from a management standpoint, so providing a copy to the other side would be my suggestion.

CHAIRMAN BABCOCK: Justice Brown, and then Jim Perdue.

HONORABLE HARVEY BROWN: Well, I think these are all good comments. I think it might be helpful, at least to our committee, to have a sense of the committee as a whole as to whether we think that we should move forward to just require electronic copies. Because if so, (A) is much easier, much shorter, and we've heard a lot of people say that, so if people thought that --

HONORABLE DAVID EVANS: I didn't say electronic. I just said copy.

HONORABLE HARVEY BROWN: Okay.

HONORABLE DAVID EVANS: But I assume it's going to be mostly electronic.

HONORABLE HARVEY BROWN: So that would be one preliminary question; and, second, if we aren't going

to do electronic, who should bear the cost? Should we say the parties producing just should produce it, if it's the whole thing, if it's less than 300 pages, or should it be the party that wants to see them? Those are kind of two preliminary questions that affect the way you draft (A).

HONORABLE DAVID EVANS: These are exhibits and parties who tender exhibits always provide the other party with a copy of the exhibit. This is not just production. This is a trial exhibit.

HONORABLE HARVEY BROWN: Right, but this is being done 30 days before trial, and it might set on that 30 days, so --

HONORABLE DAVID EVANS: That's right. Showing them your cards.

HONORABLE HARVEY BROWN: -- we want to keep separate what gets filed at the court from what is given to the other side.

MR. LOW: Chip?

CHAIRMAN BABCOCK: Jim Perdue, and then Judge Wallace, and then Buddy.

MR. PERDUE: The last point -- because I started to disagree with Judge Evans, but the last point is important. Disclosures require that you give either the medical records, you've got to give all your billing. Discovery clearly states, I mean, you've got to disclose

your damage model when it comes to medical records and medical expenses, and you have to provide -- if you don't provide the medical record itself you've got to provide an authorization that allows them to go get them all. So you're not talking about a trick with somebody coming in 30 days before trial. You're talking about trying to establish an evidentiary predicate for something you want to use at trial. This is not something that hasn't been developed in discovery by mandate.

I mean, this is -- when it comes to medical records and medical expenses, you have to give them that under disclosures or they do not come in. So there's no real surprise issue as far as what Mr. Orsinger was putting out when you come to medical records and medical expenses. So then it just becomes -- as Justice Brown pointed, it just becomes a logistics question on you're disclosing what you're going to use at trial, which has already been provided through the discovery process, and how burdensome do you want 30 days out for the evidentiary hoop to be jumped through when the other side already has it and knows it, and that's just a discussion for the committee. I think by process you're literally talking about essentially making a second or third copy of things that have already been provided if you add another layer into this, because it's already been exchanged. The

records services will love -- if you do this, the records services are going to love it.

CHAIRMAN BABCOCK: Judge Wallace, then Buddy.

HONORABLE R. H. WALLACE: Well, when you're at this stage of preparing these affidavits you're preparing documents to be admissible at trial, and I think they should -- I agree that you ought to provide -- I don't think we ought to require it.

CHAIRMAN BABCOCK: Judge Wallace, could you speak up a little bit?

HONORABLE R. H. WALLACE: Yes. I don't think we need to require that they serve them electronically, just say you've got to provide copies, and if they want to copy them with a copier or if they want to send it on a flash drive or whatever, but I do think the other side -- you're preparing something that you intend at that point to offer at trial, and the other side shouldn't have to figure out what it is, and as far as -- to me filing -- maybe this is just me, "filing" means you go to the clerk's office and file something, and I don't know why any of this needs to be filed with the clerk ever. Because, you know, you don't file your other exhibits that you're going to offer at trial. You don't go down on the day of trial and say, "Here, clerk, file

all of these," so that's my two cents.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But to that question, it's not in the record. How -- if you don't file something and it supports a finding of something, how are you going to say that it's supported when it's not even filed?

HONORABLE R. H. WALLACE: Well, Buddy, that's what I'm saying. To me, I interpret "filing" as filing something with the clerk --

MR. LOW: Yeah.

HONORABLE R. H. WALLACE: -- as opposed to in trial saying, "Your Honor, I offer this into evidence," and if it's admitted, it's in the record.

MR. LOW: But the last page of our handout raises the same question that Justice Brown raised, whether we should electronically file with -- when we give notice. I mean, that's a question we didn't address, but that's a question we had, but it looks to me what we're trying to do is accomplish something where it's simple and you can prove up certain charges that aren't necessarily so controversial without having to go to a lot more time and expense and that you need to give fair notice to the other side, and I think they should be filed at the beginning of the trial so you notice they're going to be used. In other words, that was one of things, are they

going to lay behind the log and wait until then. So we're really trying to accomplish two simple things, fair notice and a method of proving up things without having to move the whole world.

CHAIRMAN BABCOCK: Richard Munzinger, then Gene Storie, then Judge Estevez, and then Orsinger.

MR. MUNZINGER: Jim's comments are accurate I'm sure in the medical business, but they wouldn't necessarily be so in a business context or design defect case or something else. So here I am, I'm Joe Schmoe, the plaintiff's lawyer; and General Motors lawyer says, "Here's an affidavit, and I'm going to offer these documents in accordance with this rule." He doesn't have to attach the documents. They may be -- he doesn't have to say how many pages. He doesn't have to say what division they come from, doesn't have to say where they were located, doesn't have to say the subject matter. He just says, "Attached are records that are kept in the ordinary course of business," et cetera, tracking the language of 803(6)(A), (B) and (C) or 803(7)(A) and (B) under the new rules. He doesn't have to give me any notice whatsoever; and here I am, I'm a sole practitioner plaintiff's lawyer in New Deal, Texas, and I'm looking at General Motors, a billion documents. What am I going to do? "Oh, well, come on up here to Dallas -- come up here

to Detroit. We'll show them to you." That doesn't make sense to me.

CHAIRMAN BABCOCK: This New Deal just --

MR. MUNZINGER: They're not in trial yet, but if you're going to get them -- this is an authentication rule. It's designed to remove -- two things, designed to remove the problem of authentication, and B, designed to remove the proof of the necessity and reasonableness of the services, if you get around that part of the affidavit. Right now I'm focusing on the authenticity problem. All of us have been involved in cases where there are zillions of documents. Maybe I missed something in discovery, maybe I didn't. Maybe my adversary is going to sneak something in here that his expert can come and use that I haven't seen, and I'm now getting an affidavit that doesn't tell me anything and puts the onus on me as a litigant to get there. I'm troubled by this.

CHAIRMAN BABCOCK: Gene, then Judge Estevez, and then Justice Bland, and then Orsinger, and then Levi. So you're down the list, Levi, sorry.

MR. PERDUE: But you're on it.

HONORABLE LEVI BENTON: But I'm the onus.

CHAIRMAN BABCOCK: Munzinger has already spoken, that's true. Gene.

MR. STORIE: So we don't want people to be blindsided, we don't want to complicate something that ought to be just routine, a hearsay provision. Can we say "without the attached records if such records have already been produced" or something like that?

CHAIRMAN BABCOCK: Yeah. Yeah. Judge Estevez.

HONORABLE ANA ESTEVEZ: I'm going back to where we were on whether or not they need to be filed.

CHAIRMAN BABCOCK: Right.

HONORABLE ANA ESTEVEZ: Because the comments keep changing. I think it was in '99 that the rules all changed and that's when we stopped filing discovery; and I think this -- if we took out the affidavits at this point that it would just be a clean up of the '99 change, because I don't -- there's no reason to have them filed unless there is a question about notice; and as electronic filing and other -- I think most of the parties realize that if they can't prove they've served that affidavit within that certain period of time then there's always an issue; but that would be the only reason that you would need an affidavit filed, which is just so you could prove it was filed 30 days before; but if you can prove it's served 30 days before, which I think the rules obviously allow us to do with all the other discovery; and it wasn't

a concern back in '99 when they changed the rules then, but that was the reason I think that they had them file everything, was so they wouldn't be surprised when they come to court; and if they are surprised and the judge goes, "But it's right here, and it's been here for 30 days"; but if they don't care about the rest of the discovery then I don't know why we're going to distinguish these affidavits.

They need to follow the rules. If they're not following the rules and they're outside of those for 30 days then they can object, we can strike it, we can do everything else. So I want to go back to that. I'm with Mr. Munzinger over there, I think we absolutely should have them attach the documents.

CHAIRMAN BABCOCK: Okay. Orsinger, then Justice Bland, then Levi.

MR. ORSINGER: I think it would be good to remember that we are discussing business records in one context and then this affidavit counter-affidavit business on proving up reasonable charges, but I wanted to point out that I've been sitting next to Professor Dorsaneo for something like 15 plus years.

PROFESSOR DORSANEO: More.

MR. ORSINGER: 19 years, 19 years. More than 19 years.

MS. BARON: 20, Richard.

MR. ORSINGER: And I think that it's probably rubbed off on me because I actually remember the source of this rule was Article 3737(e) of the Black statutes.

PROFESSOR DORSANEO: In a volume that is no longer available.

MR. ORSINGER: Right, except in his office. Let me also point out as an aside that Professor Dorsaneo is finally publishing his 25-year work product on the history of the rules process in the *Baylor Law Review*, coming out when?

PROFESSOR DORSANEO: Sometime.

MR. ORSINGER: Soon. So if you will bring copies and sign them we would be honored to have autographed copies, but at any rate, I just checked on my cell phone, and I found out that Article 3737(e) was adopted by the Legislature in 1951. So this procedure about filing these records with the clerk with the attachments, with the affidavits, all developed long before the robust discovery practice we have now and with the extensive rules of automatic disclosure and things of that nature; and what I'm thinking is that maybe we ought to just abandon this paradigm of using this affidavit process as a discovery mechanism and instead provide

something like if you're going to introduce records into evidence using a business record affidavit then serve a copy of it on the opposing parties 30 days before trial, if that's what you want; and let's get it out of the clerk's office and over into discovery where it's probably already covered, as Jim pointed out, and where it ought to be covered, not being filed at the district clerk's office. So I just thought that might be a little helpful perspective.

CHAIRMAN BABCOCK: Justice Bland, would it be true that you were not born in 1951?

HONORABLE JANE BLAND: That would be true.

HONORABLE LEVI BENTON: What kind of question is that to ask a lady?

CHAIRMAN BABCOCK: I didn't ask when she was born.

HONORABLE JANE BLAND: I favor the parties serving the records at the time they file the business records affidavit in some form or fashion because invariably the records that the custodian attaches and proves up differ from the records that were produced in discovery, not through shenanigans necessarily, but because the records obtained by counsel at some point were obtained through, you know, a different mechanism and they don't match up, and there's a page or two or even more

that don't match up, and so that creates problems, and you've got to get them resolved, and that's why 30 days ahead you want to know what the universe of records that the custodian's proving up are.

Also, I think you need to get going on the things that Judge Evans was talking about, redaction and all of that; and to do that, you need the universe of records, the defined universe of records that the custodian is acknowledging are authentic. Without that defined universe of records the affidavit isn't very helpful.

CHAIRMAN BABCOCK: All right, Levi, you're up.

HONORABLE LEVI BENTON: You know, I hate to repeat myself, but being pushed to the bottom afforded me the opportunity to do a little research.

CHAIRMAN BABCOCK: You were weren't pushed to the bottom. You had your hand up after the other people.

HONORABLE LEVI BENTON: I'm on Westlaw. There are 46 -- I just put in "sufficiency of affidavit." There's 4,600 cases, civil cases. I then filtered it by Justice Hecht, who has been on the Court I think since '86.

HONORABLE JAMES MOSELEY: 1886.

HONORABLE NATHAN HECHT: I heard that. What was that? What was that?

HONORABLE LEVI BENTON: I haven't looked at any of the cases, but there's 12 civil cases that pop up with that filter, and this is all intended to address Richard Munzinger. You know, if you get an affidavit that doesn't sufficiently tell you who, what, when, where, and why, there's a whole body of law that's already out there for you to get a remedy.

MR. MUNZINGER: May I respond quickly?

CHAIRMAN BABCOCK: Oh, certainly.

MR. MUNZINGER: The problem here is that you're delaying this to the time of trial.

MS. ADROGUE: Yes.

MR. MUNZINGER: And now you've got the trial judge who's sitting there, he's anxious to get the jury out. We're anxious to have efficient trials, and we are postponing an argument over the legitimacy and propriety and authenticity of records that could have been proven and should have been proven 30 days prior to trial, so Justice Bland, if she were still a trial judge, would be sitting here listening to Munzinger say, "But, Judge, he didn't give me page B763. I didn't get that."

"Yes, you did."

"No, I did not."

"Prove it." The affidavit doesn't say describe it by number, content, et cetera. You're just asking trial judges to have these fights at the time of trial. You can obviate the fights by saying have your affidavit identify with specificity what's going to be offered into trial, and do it either 30 days or 14 days. We've done it for 14 days all these years, and there's never been an argument over the documents because they have been produced to the other side. That's why there's been no argument, but I can guarantee you that if I'm that sole practitioner in New Deal and General Motors comes at me with 2,000 pieces of paper, I'm not going to have seen those 2,000, and I'm going to be fighting with Judge Bland over whether I got them and whether they ought to go to the jury because I didn't get notice.

HONORABLE JANE BLAND: Richard, I tried one three weeks ago, and no one fought about that.

HONORABLE LEVI BENTON: There is no question the documents have been produced, as Jim Perdue has already pointed out. They were produced in the disclosure process. The records were produced. At this stage before trial it's just an issue of serving and filing an affidavit; and while I have the greatest respect for every Fort Worth court, every Fort Worth state district judge, including Judge Evans, I just simply disagree that it's an

issue of management, because if -- when the trial judge manages the case you don't have this stuff come up at trial in the presence of the jury, and you certainly don't have it come up when there's Munzingers in the case. Because lawyers have already done their work. It's just not an issue, and, oh, last point, and then I'm not going to speak to this issue ever again today.

MR. ORSINGER: This morning.

CHAIRMAN BABCOCK: But there's always tomorrow.

HONORABLE LEVI BENTON: Yeah. Here's the other point. This is incredible to me that we would speak from both sides of our mouth. On the one hand we are trying to reduce the amount of expense civil litigation requires, and from the other side of our mouth we are doing the exact opposite if we adopt what my dear friends Mr. Munzinger and Judge Evans would propose.

CHAIRMAN BABCOCK: Okay. Professor Carlson. Can you bring a note of sanity to this discussion?

PROFESSOR CARLSON: Hope springs eternal. Maybe we should think about amending the discovery rules to provide expressly for the allowance of electronic copies and in subsection 10 of this evidence rule provide a party doing the affidavit must specifically describe the documents being produced but need not produce them if

they're already produced in discovery, but must produce any documents that have not yet been produced in discovery, but may do so electronically, with the other side being able to get paper copies at their cost.

CHAIRMAN BABCOCK: Okay. Yeah, Carl.

MR. HAMILTON: I favor the -- either the production of the documents electronically or at least a list, but right now we don't have a Rule 21(e) that authorizes service by e-mail. We let the electronic service provider serve other lawyers in the case by e-mail, but we still don't have a rule that allows us to serve each other by e-mail, so that needs to be looked at, I think.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: At the risk of getting a little granular, but hopefully practical, I just want to say a couple of things. One is that I think that Professor Carlson's point is right on the mark. I agree with the point just made as well. We need to have rules that explicitly recognize the importance of electronic copies and their use, the use of the internet for service purposes; and also, it seems to me that a fair number of practical considerations have been mentioned that perhaps do not deal directly with another issue that we have here; and that is you can produce documents today, I think, and

there is no requirement that you have an identifier on the documents. We normally refer to them as Bates numbers, but I think there is no provision in the rule that requires you to do that; and that begins the creation, I think, of a number problems; and I do wonder if we shouldn't have put in the rules -- I think Professor Carlson is nodding "yes" as well -- the notion of saying you need to start the process with a unique identifier on every document, whether it be electronic or paper; and then with respect to the subsequent use of rules as this document goes through the process, so to speak, and we narrow things down and they're headed towards being exhibits at the time of trial, you've got some way of identifying what's at issue and what's being discussed. Therefore, you don't need to produce the documents, either in paper or electronically. If we're going to have an affidavit, the affidavit references the unique identifier; and you, again, are eliminating some of the bulk and some of the burden, I think, in this process. But I think more than a really specific point here there's a more general point here, and that is we've just got to be thinking more about modernizing the process all the way through.

CHAIRMAN BABCOCK: Okay. Somebody said we should get a sense of the committee on some specific issues. Buddy, you disagree with that?

MR. LOW: No, no. I was just looking at something we haven't looked at at all, and it's not something my committee recommended. We recommended what we're talking about, but it sounds like to me everything we're talking about speaks in terms of the affidavit, the copies of the records, the counter-affidavit, and the qualifications of the counter-affidavit --

CHAIRMAN BABCOCK: Uh-huh.

MR. LOW: -- and the records and when they may be served, and that divides it that way. Affidavit, proponents must serve a copy of the affidavit 30 days before trial commences. Proponents must file the affidavit the day trial commences. Records, proponent must make the records available. You can do what you want, serve them electronically or however you say for copying and so forth, and the proponent must file the records the day the trial begins. Counter-affidavit, and then they have different things for the counter-affidavit, and it all fits into the affidavit, the counter-affidavit, and the records, everything we're talking about. So do we want to put them in a category like that? That's not something we recommended. I just threw it in to add to -- or try to take away from some of the confusion, but -- and lastly, I'll say that Richard is correct about 3737(e). He didn't tell you that it was intended also to include

all kind of records as well as medical. They made no distinction on that. I'm looking at the -- so he's partly correct.

MR. ORSINGER: I'll accept whatever praise I can get.

CHAIRMAN BABCOCK: All right. One thing it seems that we should have a sense of the committee is whether or not it would be 30 days or 14 days.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: And I'm speaking about the drafts of 902(10).

MR. LOW: Right, (A).

CHAIRMAN BABCOCK: (A), lower Roman (i), and so everybody that thinks it ought to be 30 days --

HONORABLE DAVID PEEPLES: Chip? Chip?

CHAIRMAN BABCOCK: -- raise their hand.

HONORABLE DAVID PEEPLES: Chip?

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: I wanted to speak an hour ago when we were talking about 14 and 30. Can I say something now?

CHAIRMAN BABCOCK: Yeah, sure.

HONORABLE DAVID PEEPLES: I've got a ton of family law experience, and the vast majority of cases are not the ones that they hire somebody of Richard Orsinger's

level. It's the level of people who don't go to Nieman's, who don't have a credit card, don't have a bank account, and they show up with records that they can prove up themselves because they have personal knowledge about them. And so I just think that it -- the run of the mill family law case, the business records affidavit and so forth are just not implicated in the 98 percent or 99. Now, you've got somebody that played for the San Antonio Spurs, yeah, a case like that, you may need it, but I think it's not correct to assume that in the vast majority of cases this ever comes up.

CHAIRMAN BABCOCK: So how do you come out?

HONORABLE DAVID PEEPLES: 14 or 30.

CHAIRMAN BABCOCK: How do you come out?

HONORABLE DAVID PEEPLES: Well, I was impressed with what Jim Perdue said. If the argument is there ought to be a special time period for family law, I respectfully disagree with that.

CHAIRMAN BABCOCK: Okay. Anybody else want to say anything on the 30 versus 14 issue?

MR. ORSINGER: I'd just like to revisit the original distinction we made. The policy arguments for simple custodian of the record affidavits and the policy arguments for the affidavit on reasonable costs and a counter-affidavit, in my opinion they do not have to be

joined at the hip. They have different policies, and so they don't necessarily have to be governed by the same --

CHAIRMAN BABCOCK: So how are you going to vote?

MR. ORSINGER: I'm going to vote that we need 30 days on the affidavit/counter-affidavit, and personally I think we probably need to file the affidavits and counter-affidavits. You can't do that in discovery, but if all you're doing is authenticating business records we don't have any counter-affidavits or anything.

CHAIRMAN BABCOCK: Okay. We're going to vote on the rule as drafted by the subcommittee.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: And it makes no distinction. Okay. So that's what we're voting on. Bill.

PROFESSOR DORSANEO: So maybe I understand, so we're just talking about sending somebody something that says, "Keep your eyes open."

CHAIRMAN BABCOCK: "Heads up."

PROFESSOR DORSANEO: Right. Okay.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: We're only talking about the number of days, not the rest of that language.

CHAIRMAN BABCOCK: That's right. We're

talking about the number of days. All right. Everybody that thinks it ought to be 30, raise your hand.

Okay, I know how this is coming out. Everybody that thinks 14?

HONORABLE ANA ESTEVEZ: This is an all or nothing, you can't have 14 and 30?

CHAIRMAN BABCOCK: That's what we're voting on right now. Well, the 30 passes unanimously. 32 votes in favor, the Chair not voting. So before we break and Dee Dee's fingers run out, Harvey, you wanted to vote on something else, but I wasn't quite sure what you wanted to vote on, so state the proposition.

HONORABLE HARVEY BROWN: Whether we should require the production electronically.

CHAIRMAN BABCOCK: Okay. Everybody who thinks we should require the production electronically?

HONORABLE HARVEY BROWN: That is, the affidavit with the records attached.

MR. JEFFERSON: Require or --

HONORABLE HARVEY BROWN: I was asking require as in put it in the rule. If you vote against that then we could have a vote on whether we should allow it. That would be a separate vote. Those are two separate things, it seems to me.

CHAIRMAN BABCOCK: Okay.

HONORABLE ANA ESTEVEZ: Can I ask a question before you put it to the vote?

CHAIRMAN BABCOCK: Yes, Judge.

HONORABLE ANA ESTEVEZ: Can we put it based on when they're required to file electronically?

HONORABLE HARVEY BROWN: I'm not sure I understand your question.

HONORABLE ANA ESTEVEZ: Well, not all counties are required to file electronically starting January. We have an extra year than other people, so when you say the require -- I like what you're requiring, but I'd like to put that in conjunction with the year they're required to file electronically, because if they can file electronically they can send the stuff.

HONORABLE HARVEY BROWN: That's a good clarification. When I said "require" I meant require production to the other side. I'm not talking about the filing issue.

HONORABLE ANA ESTEVEZ: I know, but can you -- will you amend your motion to include that they would be required as the rules require them to file electronically? So, in other words, you're not requiring someone in my county to serve it electronically until they're actually forced to file -- I mean, to serve electronically until they're required to file

electronically.

HONORABLE HARVEY BROWN: I'm fine with that. In other words, you want to give them more time to get to the electronic way of doing things.

HONORABLE ANA ESTEVEZ: Right. Yes.

HONORABLE HARVEY BROWN: Happy to accept that amendment.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Could we get a sense of whether we're going to require service at all? I mean, it seems like what we're trying to decide is whether or not we're going to serve just the affidavit or serve the affidavit and the records.

CHAIRMAN BABCOCK: Yeah, that's a great point.

HONORABLE JANE BLAND: Either electronically, by party, or however, are we going to just serve the affidavit or are we going to serve the affidavit with the universe of records that the affidavit proves up?

CHAIRMAN BABCOCK: Justice Brown, would you yield to your colleague's sensible suggestion that we have a preliminary vote on whether or not you've got to attach the records to the affidavit when you initially serve your party opponent?

HONORABLE HARVEY BROWN: Well, I would never

not yield to Justice Bland's sensible approach, but let me just offer this thought; that is, if you vote that electronic should be required then that takes care of the issue as to whether you give it, because it's easy, you give it. You give the whole thing. That answers that question, but --

HONORABLE ANA ESTEVEZ: They may not.

HONORABLE HARVEY BROWN: -- which one you vote on first doesn't matter to me strongly, but I'm willing to vote on that first.

CHAIRMAN BABCOCK: Okay. Sophia.

MS. ADROGUE: Just curious, what happened to Professor Carlson's idea about electronic but if you want you get the opportunity to ask for the hard copy and the other permutation?

CHAIRMAN BABCOCK: We're not voting on that yet.

HONORABLE HARVEY BROWN: That was going to be the next vote. If we voted down mandatory electronic then we're going to vote on --

MS. ADROGUE: But you couldn't do electronic and also the luxury to ask for copy?

HONORABLE HARVEY BROWN: Yes, but we can do what Justice Bland suggested.

MS. HOBBS: Mr. Chairman?

CHAIRMAN BABCOCK: Yes.

MS. HOBBS: There may be some of us who would vote -- their vote on whether or not they require service would depend on whether or not it was required to be electronic service.

CHAIRMAN BABCOCK: Well, but wouldn't you vote in favor of requiring service and then try to influence the next vote?

MS. HOBBS: Well, I would, but then I would want -- would that next vote fail then I would want to go back on my vote of requiring service because I only want to require service if you can e-mail me the document and not send me paper copies of it.

CHAIRMAN BABCOCK: Okay. All right. Well, notwithstanding the practical difficulties of how we vote, what we vote, and in what sequence, why don't -- why don't -- exercising the prerogative of the Chair, I'll follow Justice Bland's sensible suggestion, which we vote on whether or not we should require the documents to be attached to the affidavit when it is served on the party opponent 30 days before trial. Everybody in favor of that, raise your hand.

Everybody opposed? All right. That passes by 21 to 6, although there are mutterings in the backgrounds that the votes were cast in ignorance. Gene.

MR. STORIE: Can I ask about my previous suggestion that you don't have to serve things that have already been produced?

HONORABLE JAN PATTERSON: Well, I think --

CHAIRMAN BABCOCK: Yeah, you can ask about that. Jan.

HONORABLE JAN PATTERSON: But one of the problems in this is that even if documents have been exchanged or produced, we're now identifying what may be a more limited and specified universe of documents. So somehow there has to be either an identification or attachment, and I think that's what we've -- the strain that we've lost.

CHAIRMAN BABCOCK: Right, we've got to know what's going to be used. I mean, it may have been produced, so you may have a copy.

HONORABLE JAN PATTERSON: Well, and just to avoid the problem reference that a document may -- there may be a variation of the document or there may be a honing down of the documents. There may be a more limited universe of documents, so somehow that has to be conveyed, whether it's attached or identified. So I like Professor Carlson's.

CHAIRMAN BABCOCK: The next vote is Justice Brown's vote, which is -- let me see if I state it right

-- that the service on the party opponent 30 days before trial of the affidavit and the attached records must be electronically. Is that what you're proposing?

HONORABLE HARVEY BROWN: Well, now that -- if you went with the first one, which is we're requiring production at the same time --

CHAIRMAN BABCOCK: Yeah.

HONORABLE HARVEY BROWN: -- then it seems like it should be the producing party who decides, so I guess I would say electronic or copies.

HONORABLE ANA ESTEVEZ: Oh, okay.

CHAIRMAN BABCOCK: So the producing party can decide one way or the other whether it's electronic or paper.

HONORABLE HARVEY BROWN: Whether it's faster for them to do --

CHAIRMAN BABCOCK: Okay.

HONORABLE HARVEY BROWN: -- electronically.

CHAIRMAN BABCOCK: Everybody in favor of that, raise your hand.

Everybody opposed?

CHAIRMAN BABCOCK: That is --

MS. CORTELL: I'm not opposed. I just --

CHAIRMAN BABCOCK: You're not opposed? Let me just announce the vote first.

HONORABLE ANA ESTEVEZ: Wait, who got to decide then, the person that was producing or the person it was being produced to?

CHAIRMAN BABCOCK: Producing party. So that's unanimous, 33 to nothing, the Chair not voting. Now Nina.

MS. CORTELL: It just seems to me this sort of thing belongs in a comment that we're requiring service and then how it is accomplished, and I think a lot of the suggestions, really good suggestions made today, about not duplicating because you already have it or deals being made, we can put that in a comment, but that we also need to bring our rules up to modern practice of e-mail service, which got said earlier.

CHAIRMAN BABCOCK: Okay. All right. We're going to take our morning break. 15 minutes. We'll take our lunch break at 12:30, Scott, if that's okay. Does that help you?

MR. STOLLEY: Thank you.

CHAIRMAN BABCOCK: Okay, so 15-minute break now, 12:30 lunch break.

(Recess from 11:08 a.m. to 11:24 a.m.)

CHAIRMAN BABCOCK: All right. Again, we're focusing in on attachment 6a, which is a proposed rule, and we're going to turn now to (B) and (C) and (D). (B)

first, "affidavit concerning costs and necessity of services," and "affidavit concerning the costs and necessity of services must comply with subsection (D) or (E)." Any comment about that?

MR. HAMILTON: I have a comment about (A).

CHAIRMAN BABCOCK: Well, what about (A)?

MR. ORSINGER: It's been railroaded.

MR. HAMILTON: "The commencement of trial." We don't normally measure things by the commencement of trial. We measure them by the date it's set for trial.

MR. LOW: Not set. It might be set but not go.

MR. HAMILTON: Well, I know, but if this is like a discovery thing we want the information 30 days before the date it's set for trial. Now, the trial may be moved 30 days or 45 days later before you actually commence it, but that doesn't allow the producing party to produce it during that time period, so it ought to be the date set for trial instead of the commencement of trial.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Wouldn't the person that wants it be at risk that, you know, if it does go to trial and he doesn't have them, I mean, if you get them before the actual date of trial it doesn't matter. In other words, it's set August 1st, all right, 30 days before that, and

then it might be you continue it until December, so why put it -- go ahead and get it when they -- and if you don't have it when it's set then you're at risk.

CHAIRMAN BABCOCK: Somebody has got their hand up. Sarah.

HONORABLE SARAH DUNCAN: I think that Carl's point is maybe that you can't know when it's going to commence.

MR. LOW: Right.

HONORABLE SARAH DUNCAN: You can know when it's set.

MR. HAMILTON: You know when it's set.

HONORABLE SARAH DUNCAN: You do it 30 days before it's set. That may or may not be 30 days before it commences.

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: I think we fused the discovery component here with the filing with the clerk component. The theory, I think, on the subcommittee level was that we don't want to file records until trial actually starts because 99 cases settle and we don't need to file them at all. Buddy now is talking about the discovery disclosure component of it. If we're abandoning the requirement of filing then we're not wedded to commencement. We can use a trial setting, because we're

talking about disclosing things to each other, but if we're talking about filing all this stuff with the clerk, which I hope we're past all that now, then commencement of the trial is better than setting because a lot of cases will settle between setting and commencement.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: We have a whole month cases are set. I don't know exactly what day the case is going to go, so I can't say it's set August 3rd. It might be August 20th. I don't know when, when it's set.

CHAIRMAN BABCOCK: Why don't you know that?

MR. LOW: Because it's set any time during August. It's not set August the 1st. It might be a special setting. It's on the month of August.

CHAIRMAN BABCOCK: Gotcha.

MR. LOW: So it's not really set.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: I would share that concern if we were talking about calculating a date from a particular date, but we're actually talking about filing on the day that trial starts, so presumably you're there and you're going to go file your document, right? So it's not that we need a date certain so that we can back -- calculate back, right?

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: If the parties have exchanged the documents prior to the commencement of the trial, why would you want to have a requirement that the documents be filed at the start of the trial instead of when the documents are actually offered into evidence at the trial, if at all? What causes the problem of filing -- filing it at the beginning of the trial is I may or may not have seen the documents, but if I've seen them there's no reason to do that.

CHAIRMAN BABCOCK: Good point. Professor Dorsaneo.

PROFESSOR DORSANEO: I have a question for the committee, I guess. Based upon the votes we took before the break are we still talking about a copy of the affidavit, you know, now with the records after that vote, being done -- being served within 30 days, or are we talking about the affidavit?

MR. LOW: Well --

PROFESSOR DORSANEO: Yeah.

MR. LOW: The affidavit is going to be held by the person that has it. He just -- I mean, he's the one that's supposed to attach the record. He's going to be holding it himself, the original affidavit. He'll serve a copy, but I don't know what the -- I don't know what your question is. I just know what the answer is.

CHAIRMAN BABCOCK: You've got the answer. You don't know the question. That seemed like the answer to me.

PROFESSOR DORSANEO: But now instead of it having a blank in it it's going to have, maybe not "attached" -- "are blank pages of records." I guess in your original plan when you didn't identify the records it would say, "Attached are XXX pages of records."

MR. LOW: I'd have to refer that to Harvey. I still don't understand it.

HONORABLE HARVEY BROWN: Are you on subpart (C) now? (C) part (2)?

CHAIRMAN BABCOCK: Let's try to do this in order. Does anybody have any comments on (B)? (B) just incorporates (C) and (D). Yeah, Frank.

MR. GILSTRAP: There are three kinds of affidavits we're talking about, business records affidavit, a cost and necessity affidavit for medical records, and a cost -- or for medical services, and a cost and necessity affidavit for other kind of services. They're all permissive. You don't have to file them, but (B) says that the costs and necessity affidavits, they have to follow this form. I mean, I think that's what the purpose of it is. It says it must -- it must comply with the (D) and (E). The whole area is confusing, and if

we're going to keep (B) I would move it to the end.

CHAIRMAN BABCOCK: I'm sorry, say that again.

MR. GILSTRAP: The whole area is confusing. If we're going to keep paragraph (B), I'd move it to the end. It's kind of off putting to find it right here in the middle before we even start talking about a business records affidavit.

CHAIRMAN BABCOCK: Okay. Any other comments about (B)? Frank says move it to the end. Yeah, Gene.

MR. STORIE: I don't know if this helps, but I think it's sometimes to hard to know what the scope of the service is, I mean, as opposed to purchase of materials. We have had that in the tax world.

CHAIRMAN BABCOCK: Okay. Any other comments about (B)? Let's talk about (C) then, form for business records.

HONORABLE HARVEY BROWN: This is no change, except for the words "unsworn declaration." That's the only change we suggested from the evidence committee's proposed language.

CHAIRMAN BABCOCK: Okay. So no -- no change from the restyled draft.

MR. LOW: Right.

CHAIRMAN BABCOCK: Is that no change from

current 902(10)?

HONORABLE HARVEY BROWN: We looked at it, and we think the changes are only stylistic, so no substantive change, but the restyle does restyle things and make them a little easier to follow.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: Well, that's -- and I'm not trying to get out of order, but that's the thing that's going to start this whole process that we're going to file or, well, we're going to give somebody a copy of it. But that's the thing, you know, whether it's (C) or (D) or (E). That's what starts this whole thing going.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: And the vote that we took, I thought, said that we were going to indicate when we file this copy or when we serve this copy and file the original, whenever we do that --

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: -- that we were going to indicate what the records are.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: So instead of saying "Attached are blank pages of records," we will say something else. Huh? Right? That was the vote.

CHAIRMAN BABCOCK: Well, the vote was to

attach the records.

PROFESSOR DORSANEO: Well, okay. So we wouldn't say, "Attached are blank pages of records."

CHAIRMAN BABCOCK: No, you would say, "15 pages of records."

PROFESSOR DORSANEO: And the records would be there.

CHAIRMAN BABCOCK: Right. So you would know what they are.

PROFESSOR DORSANEO: Okay.

HONORABLE HARVEY BROWN: Right, so no need for a description because you have a copy.

CHAIRMAN BABCOCK: Right. Yeah, the debate was this way if you didn't attach them, you know, "Attached are 15 pages of records," well, what are they? We don't know. But now they're going to be attached, so we do know.

PROFESSOR DORSANEO: That just makes me wonder why you're talking about serving a copy of something that's the exact same thing that you're going to file at some time later. Why isn't this thing you file later a copy?

CHAIRMAN BABCOCK: You mean give the original to begin with and the copy later?

PROFESSOR DORSANEO: Yeah. Why would we do

it backwards?

CHAIRMAN BABCOCK: Well, because the original is being filed with the court. Or the court reporter.

HONORABLE HARVEY BROWN: You hold the original until you try the case, and you give it to the court reporter --

PROFESSOR DORSANEO: Oh, okay.

HONORABLE HARVEY BROWN: -- and the jury sees the original signature.

PROFESSOR DORSANEO: Okay. All right. We used to do request for admissions like that, so I guess we can go back to that.

CHAIRMAN BABCOCK: Okay. Anything else on (B)? All right. Orsinger.

MR. ORSINGER: I just want to note in passing that the subcommittee has modernized, if you will, the concept that the affidavit has to be signed only by the custodian of the records by saying "or an employee familiar with the manner in which these records are created and maintained by virtue of my duties and responsibilities." I think that's helpful. I think that a lot of times you have to strain to be sure that your affidavit is signed by someone who is truly a custodian, and frequently they're someone who's assigned the

responsibility of signing these affidavits, so I think this is beneficial to avoid the archaic effort to try to be sure you have the custodian of records.

CHAIRMAN BABCOCK: Yeah. Okay. Let's move on to (C), which is "Form for costs and necessity of medical services."

HONORABLE JAMES MOSELEY: (D).

MR. HAMILTON: That's (D).

HONORABLE HARVEY BROWN: It's now (D). It was (C).

CHAIRMAN BABCOCK: I'm sorry, it's now (D). (D), Frank.

HONORABLE HARVEY BROWN: I'm sorry, yes, it's now (D). It was (C). The redlines are our changes from the proposed draft by the restyle committee.

CHAIRMAN BABCOCK: Right.

HONORABLE HARVEY BROWN: As I recall, and these are just to conform with what the Supreme Court did in its most recent draft -- or not draft, rule, so this is already in the rule basically.

MR. GILSTRAP: Both forms, though, are for custodians of records. 18.002 has two forms, one for custodian of the records and one for the person who actually provided the services.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: And it seems to me that, you know, while we're concerned with big cases where there are custodians of records and one use of this is for small cases where the actual provider comes in as the plaintiff and signs an affidavit he's not the custodian. Why don't we have a form for the person who provides the services?

HONORABLE HARVEY BROWN: Well, I may just have a limited experience. My limited experience, the person that provides the services is also a custodian and signs these if they're the custodian. They come in to authenticate.

MR. GILSTRAP: Okay. Okay.

CHAIRMAN BABCOCK: That's often true. It's not always true, but --

HONORABLE HARVEY BROWN: Right. Sometimes it's the custodian. Sometimes it's an individual who says, "I'm also the custodian."

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, in defense of the restyle committee, they didn't have the benefit of the amendment the Supreme Court made --

HONORABLE HARVEY BROWN: Yes.

MR. LOW: -- to 902 at the time they did this.

CHAIRMAN BABCOCK: Right.

MR. LOW: They didn't have that benefit.

CHAIRMAN BABCOCK: Right. Mr. Munzinger.

MR. MUNZINGER: In (D) we say, (D)(1), "I am the custodian of these records or I am an employee familiar with the manner." I think that the words "an employee" are unnecessary and could prevent the owner of a business, for example, certifying to records kept by his subordinate. He is the person or she is the person who has provided the service, is certifying or swearing to its reasonable cost and necessity, but can't say, "I'm an employee." I think the words are probably unnecessary, and it should be "I am familiar with or I am familiar with." That would allow the owner of a business to file one affidavit, accomplishing the two purposes of the section.

CHAIRMAN BABCOCK: Okay. Good point. All right. Anything on (D)?

MR. ORSINGER: Did you say (B) as in boy or --

CHAIRMAN BABCOCK: (D) as in dog. (D) as in domestic dispute.

PROFESSOR DORSANEO: The only thing different between (C) and (D) is that -- is that (D) goes into in (8) and (9) an additional, you know, information about services being necessary and the costs being

reasonable, et cetera. The only difference.

HONORABLE HARVEY BROWN: Right.

PROFESSOR DORSANEO: And maybe it's not confusing to anybody else and never will be to anybody else, but if that's the only difference --

HONORABLE HARVEY BROWN: And paragraph (3).

PROFESSOR DORSANEO: -- why -- why not just point that you can add things, you know, to a business records affidavit as provided in (C) to deal with proof of the costs and necessity of services?

HONORABLE HARVEY BROWN: I -- I don't have a good answer to that. I'll just say the Supreme Court has already done it, and I assumed that maybe one of the reasons was so it would be one place somebody could look and just take it and copy it basically.

PROFESSOR DORSANEO: Okay.

HONORABLE HARVEY BROWN: We did make one change from the Supreme Court's form because we added subparagraph (E) on the cost and necessity of other services. We changed the title of this instead of saying "Form for Medical Services" to "Form for Costs and Necessity of Medical Services," because that's the title of 18.001, so we used the title of 18.001 there.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

MR. MUNZINGER: This is applicable less to

subsection (C) than to -- (D), rather, new (D), rather than to subsection (E), but it only -- the affidavit only certifies to the services rendered, as distinct from other things. Is a sale of goods, for example, a service? I don't know, but I look at subparagraph (D), and it says, "Prima facie proof of medical expenses." Expenses could include drugs. Would that be a service? I don't know, and is that a problem?

It certainly seems to me that in subparagraph (E) if I were litigating a case where it were important to prove that certain goods had been sold at a particular cost that was reasonable at the time and place, the rule contemplates services but not necessarily a sale, unless a sale is a service. I'm not sure it is. It certainly isn't for sales tax purposes.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: (C) is just an authentication affidavit, as I read it in 902; but (D), on the other hand, is a prima facie proof of the medical records -- of the medical expenses, but there's no provision for controverting that affidavit.

PROFESSOR DORSANEO: That needs to be added.

MR. HAMILTON: In (D). It's more than just authentication.

CHAIRMAN BABCOCK: Right. What about that

controverting it?

HONORABLE HARVEY BROWN: We decided not to put anything about the controverting affidavit because this rule is only to authenticate records, not to create a fact issue on whether the expenses were reasonable and necessary.

PROFESSOR DORSANEO: That's not true.

HONORABLE SARAH DUNCAN: But it does create a fact issue.

PROFESSOR DORSANEO: That's absolutely not true.

HONORABLE ANA ESTEVEZ: (8) says --

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: What's been driving me kind of insane about this whole discussion is this was about documents that self-authenticate, right? Not fact issues or anything else, but once you inject prima facie proof in there you have created a fact issue, and I think that's -- we're not talking about discovery, we're not talking about mandatory disclosure, we're not talking about anything other than self-authenticating documents; and I think the whole discussion has mushed up a lot of different concepts; and if this is just about self-authenticating documents, putting in the prima facie proof is something completely different to me. I mean, it

could easily be a subsection of a rule having to do with self-authenticating documents creating -- making prima facie proof, but it's a different thing.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: That's what I thought we were doing. I thought we were trying to incorporate the self-authenticating provisions of the Rules of Evidence with 18.001. I mean, wasn't that the intent of the subcommittee, is to combine?

CHAIRMAN BABCOCK: Well, the charge to our committee in the Senate Bill 679 said that we had to conform this rule with the statute. That's different than saying we have to recreate the statute in the rule. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, this is exactly where we started this discussion.

CHAIRMAN BABCOCK: I know. I know that.

PROFESSOR DORSANEO: So 18.001 counter-affidavit needs to be mentioned in here somehow.

MS. HOBBS: Yeah.

PROFESSOR DORSANEO: Okay, instead of just taking the Fifth Amendment on it in this provision. It needs to be mentioned, whether, you know, say, "Go read that because this -- that's where the additional information about this process is located."

CHAIRMAN BABCOCK: Yeah. Buddy.

MR. LOW: But the 902 has never mentioned counter-affidavit. That word is not in 902. It's never been, and so we didn't put a new word in it.

CHAIRMAN BABCOCK: Is there anything about the statute, you know --

MR. LOW: The statute -- the amendment did say -- talked about filing. Let's see what it said.

CHAIRMAN BABCOCK: Senate Bill 679 I'm talking about.

MR. LOW: Yeah. It said -- let's see here. And they mentioned -- that says, "Unless a controverting affidavit is served," they struck out "filed," "as provided," then such and such. So they mention controverting affidavit being served, and we didn't take that to mean we have to address serving. It says "served as provided by this section," so we didn't say "as provided by 902." So we didn't -- we just didn't add that to it. The counter-affidavit is -- and incidentally, the Legislature sometimes call it controverting affidavit, sometimes they call it counter-affidavit.

PROFESSOR DORSANEO: Question.

CHAIRMAN BABCOCK: Yes, sir.

PROFESSOR DORSANEO: Call the question.

CHAIRMAN BABCOCK: Okay. You want to state

what the question is we're calling?

PROFESSOR DORSANEO: Are you going to put a reference to 18.001 in here or keep it a secret?

CHAIRMAN BABCOCK: Well, when you put it like that.

MR. ORSINGER: We ought to tell them to buy a copy of the *Texas Litigation Guide*.

PROFESSOR DORSANEO: It will be there. That's always good advice.

CHAIRMAN BABCOCK: I feel like we're in these AT&T ads where the little kids are sitting around the table and "Which is better, fast or slow?" Judge Estevez.

HONORABLE ANA ESTEVEZ: I want to echo what Judge Duncan said, because my concern is this (D) or (C), the form for costs and necessity of medical expenses. This should not be in this rule. It is not -- the rule is called "Self-authenticating," and this is beyond that. I mean, the business rule -- the affidavit before that would create the self-authenticating part, and I think this should be either 904 and push 904 to 905 or this should be Rule 905 itself, for the same reasons that she expressed, but also because I think it's going to be confusing to litigants to find that here in the middle of it, and then if it has that separate rule put the controverting

affidavit with it as well, you know, put it all separately as a separate rule right -- right next to it.

I mean, I think it should be 904, right after it, so it's clear, the last thing before it was the business records affidavit and now here's a special rule for medical affidavits. I think that would be less confusing for litigants, and I think that then we don't have to go back and rename the whole rule, which is evidence that it's self-authenticating. I just -- I think that's the way to go.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: So because we're right. It is confusing the way it is for lawyers, for judges, and I think it's evident in our discussion this morning we've been talking about discovery mandated disclosure, authentication, admissibility into evidence, what makes something prima facie proof, what creates a fact issue, and I think a lot of that is because of the structure of this proposal.

CHAIRMAN BABCOCK: Yeah. Frank.

MR. GILSTRAP: I think there is some wisdom in what they're saying, but I think we need to understand where the confusion comes from. First of all, self-authenticating records also are an exception to the hearsay rule under 803.6. So if you self-authenticate the

records that say Joe Blow didn't pay his loan, that's proof that he didn't pay the loan, so we already have a feature in here to prove stuff up. With regard to the affidavits for goods and service -- or, excuse me, for showing reasonableness and necessity, further confusion comes in because when the Supreme Court promulgated the affidavit they tracked the business records affidavit and just added three separate sections. That's why it's all confused, but at the same time, having said that, I like the idea of putting the affidavit for necessity and reasonableness in a separate rule.

CHAIRMAN BABCOCK: Yeah, Justice Brown.

HONORABLE HARVEY BROWN: Well, I think it's pretty clear that 902(10) does more than self-authenticate. For one, it does 803.6. It gets the business records exception in here, and second Escabedo is certainly in here, but I personally think it's nice to have one place to go look to for the affidavits, because it's one rule. Do you want to see what the affidavit should be? It's all in one place, so I think that's easier for the practitioner personally.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: As to the professor's point, current practice, there is no confusion about combining 902(10) and 18.002 and 3 when it comes to

counter-affidavits. I don't know of anybody who has a problem with the way this works. It is standard practice, and everybody follows it. Levi identified, however, many cases that seemed to follow the practice just fine, and so the idea of getting the construct of the statute completely now integrated into 902(10) seems to be an effort at more confusion to me than kind of the simplicity of taking what the Court did. Justice Hecht I think expressed on the record maybe a year ago or two years ago that there ought to be a way to make this simpler.

HONORABLE NATHAN HECHT: The committee rejected that.

CHAIRMAN BABCOCK: Overwhelmingly, as I recall.

MR. PERDUE: And I think what Justice Brown has pointed out is this is a place where for these prove up affidavits, they're in the Rules of Evidence, this is straightforward. I will tell you for the practitioners that use these, both plaintiff and defense, there is nothing confusing about this. There's no confusion on this issue.

PROFESSOR DORSANEO: Were they not confused before they went to law school or after they went to law school, or does it just kind of happen when you get --

MR. PERDUE: When they were reading 3737 it

was an issue.

PROFESSOR DORSANEO: -- licensed that you know these things?

MR. PERDUE: Well, I tried to -- let me say, I mean, I don't speak for the plaintiff's bar, but I tried to survey as to whether there was an issue with this, and, you know, 902(10) has been integrated into practice. The biggest issue you've got with this is records services trying to get somebody to put a number in the affidavit. That's been the biggest change in practice in the last two years, is the burden of trying to get somebody at a doctor's office to actually give you a number in the affidavit.

So this scheme allows you to do it both ways. If they can't give you the number, then you as a plaintiff's lawyer have the burden to get to the number. If they can give you the number, then you have a prima facie proof of the number and the defendant has a very clear pathway to challenge that number with counter-affidavits under 18.003, and so that's present practice. It works everyday, and everybody deals with it. This -- all this is doing from my perspective is taking the Senate bill, getting these two affidavits to jive, and getting the structure as far as time lines to jive, and I don't think it needs to be much overengineered from what

Justice Brown and the committee did.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: The only thing I would say would be that Rule 902(10) never had a procedure whereby affidavits could be given to prove the reasonableness and necessity of service and the reasonableness and the necessity rather of having incurred the cost. You don't want to set up a competing method of proving what is allowed to be proved under 18.001 or whatever it is of the Civil Practice and Remedies Code. Why would you not have some reference saying in this rule -- referring to 18.0, whatever it is, of the Civil Practice and Remedies Code?

MR. PERDUE: Well, let me say, I don't think there is any problem with a comment referencing back to 18.001, but the current rule, the current 902(10) has this affidavit in it.

MR. MUNZINGER: Then my service is not up to date.

PROFESSOR DORSANEO: And it was a bad idea without complete information.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I don't -- I'm not opposed to two separate rules, but I think what I'm saying is not to complicate it, to simplify it. You have an (A), "These documents can be self-authenticated," here's how

you do it; a (B), "If you've self-authenticated them, here's the effect of them in an evidentiary sense"; and I think we have a caption problem if it's just called "Self-authentication" because it goes beyond self-authentication once you put the (B) part of the rule in. I just think it would be -- and, you know, if everybody understands this I don't know where those 4,600 cases, opinions came from. I think there's some disconnect somewhere or there wouldn't be case law in the annotations of this rule.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Can I -- I'd like to say two things, Chip. Number one, I'm beginning to think that we ought to move (B), that's 10(B) that talks about cost and necessity of services and put it after the current (C), so that we have (A) and (B) relate to a simple authentication of records with nobody's opinion of reasonableness of anything. So we have (A) and (B) and then we have (C), which says you can trigger this process of prima facie showing of reasonableness by following (D), and then (D) has the form of that affidavit. I don't like the fact that they're kind of intermingled. I think that adds to the confusion.

Secondly, in looking at (D), as in domestic disturbance or whatever you said, (4), "The records were

made at or near the time the service was provided." That makes really good sense when you're talking about medical services being provided, but if you look back and compare it to (B)(3), which says, "The records were made at or near the time of the occurrence of the matter set forth," that comparison may be you look back at the rules, and I realize that the rule does not restrict itself to occurrences. It includes when opinions are rendered and things which may be much later than the occurrence, so we're actually losing part of our Rules of Evidence when we carry forward in this affidavit by limiting it to occurrence, because before an opinion that was two years after the occurrence, but was still contemporaneously recorded would have been admissible but now if the opinion is two years later it's --

HONORABLE SARAH DUNCAN: It's out.

MR. ORSINGER: -- not close to the occurrence. Okay. So that's a substantive change I suggest. And then additionally I notice that the existing affidavit for custodian of the records said, "At or near the time or reasonably soon thereafter." That's the existing rule. The language "reasonably soon thereafter" has been dropped, and I don't know why, and I think that it's probably good to continue that idea that it doesn't have to be contemporaneous, it can be reasonably soon

thereafter. So I would suggest we introduce that language back into the new version of the affidavit.

HONORABLE SARAH DUNCAN: Usually will be.

MR. ORSINGER: Usually will be Sarah says. Okay. I say we reintroduce the concept of reasonably soon thereafter and we not limit ourselves just to the date of the occurrence. Did I make myself clear?

PROFESSOR DORSANEO: Uh-huh. Pretty clear.

CHAIRMAN BABCOCK: Yeah, the -- what you're saying is the current 902(10) has got that "reasonably soon after the time the service was provided" language in it.

MR. ORSINGER: Yes, but I'm more worried -- I'm not too worried about -- well, I guess that's true, right, why shouldn't somebody be able to say charges are reasonable even if it was 18 months before.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Okay. So that's one important concept, is the reasonably soon thereafter as an existing principle that we've had that we seem to be abandoning; and the other one is we now are triggering on subpart (B), triggering from the occurrence and not from when the event is in the record; so say a medical opinion comes along two years after the occurrence, as long as a medical opinion is included in the records

contemporaneously with the formation of the opinion, it ought to be okay. It doesn't matter if it's one day after the occurrence or two years after the occurrence, so to me -- I don't have the rules in front of me, but if it's the event, condition, circumstance, occurrence. There are a lot of different things that you could trigger rather than just the occurrence, and I think that may be a substantive change.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: But the occurrence would be the opinion.

MR. ORSINGER: Right. Oh, no, I don't think so. I think the occurrence could interpolate the injury or the event --

HONORABLE SARAH DUNCAN: A wreck.

MR. ORSINGER: -- where someone had a car wreck and went to the hospital.

MR. HAMILTON: But the record that was made is of the doctor's opinion, then the occurrence would be at the time of the opinion, not at the time of the --

MR. ORSINGER: Well, I hope that's what that means, but there are about five words in that rule right there that describe what starts the clock triggering, and occurrence is just one word to me that seems to relate to the underlying event. If you'll lend me your rules, I'll

tell you what the words are.

CHAIRMAN BABCOCK: Buddy and Harvey, you don't have any sense of why the restyling committee dropped those words out of the proposed affidavit, right?

MR. LOW: I don't --

HONORABLE HARVEY BROWN: The only thing I can guess is that this rule, of course, is going back to 803.6 business rules, business records rules, and it does not have "or reasonably soon thereafter," and so 902(10) did have that in its form, though, and I don't know why it was in the form to begin with or why it was dropping out, because it's not part of 803.

MR. ORSINGER: On the other point, Rule 803.6, exception to the hearsay rule, talks about an act, event, condition, opinion, or diagnosis, whereas now we're just talking about an occurrence; and that seems to me to be a narrowing, although Carl doesn't interpret "occurrence" to be as narrow as I do; but I'm concerned that "occurrence" is narrower than act, event, condition, opinion, or diagnosis.

CHAIRMAN BABCOCK: Okay. Any other comments?

HONORABLE HARVEY BROWN: I don't know that I agree that "occurrence" is narrower. We use "occurrence" in jury charges a lot to pick up all those type of things.

MR. ORSINGER: I thought the occurrence was the event that gave rise to liability in the jury charge.

HONORABLE HARVEY BROWN: It is, but it's used as kind of a global term is what I'm saying.

MR. ORSINGER: I know, but if the occurrence, which is the event that gives rise to liability in the jury charge is in 2007 and the medical opinion you're trying to get in is in 2011, is the medical opinion in 2011 at the time or right near the time of the occurrence? That's the concern I have.

HONORABLE HARVEY BROWN: Oh, okay.

MR. GILSTRAP: It says "occurrence of the matter set forth," and that's the matter described in the affidavit, the services. They're not talking about the car wreck.

MR. ORSINGER: I'm glad that's clear to you, and I hope that we don't have 4,600 cases trying to interpret that change.

MR. LOW: Oh, we would have more than that.

CHAIRMAN BABCOCK: Maybe Levi could look that up. All right. Anything else on this, on (D) as in domestic dispute? Sarah.

HONORABLE SARAH DUNCAN: Just for the record, I think "of the matter set forth" means the matter set forth in the records.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: Could I ask Jim a question?

CHAIRMAN BABCOCK: Sure.

PROFESSOR DORSANEO: Jim?

MR. PERDUE: Yes, sir.

PROFESSOR DORSANEO: If you were going to explain this process of form for costs of services and necessity of services to new people, would you mention the counter-affidavit procedure in 18.001?

MR. PERDUE: 18.003, but, yes, I would.

PROFESSOR DORSANEO: Well, okay.

HONORABLE HARVEY BROWN: Yeah, I think putting that in a comment --

PROFESSOR DORSANEO: Point made.

HONORABLE HARVEY BROWN: Putting it in a comment, I think that's a good idea, because everybody thinks about it in this room, and we thought about it in our subcommittee immediately, so putting it in the comment I think makes sense.

CHAIRMAN BABCOCK: Okay. Anything else? Yeah, Elaine. Professor Carlson.

PROFESSOR CARLSON: I think the comment should also -- the existing comment should cross-reference Chapter 132.001.

HONORABLE HARVEY BROWN: I got that.

PROFESSOR CARLSON: Okay.

CHAIRMAN BABCOCK: Okay. Anything else? All right. Let's go to (E), and, Buddy, why -- or Justice Brown, why did you leave off the last item, number (9), where you get to the money? Why leave that off?

HONORABLE HARVEY BROWN: Because subparagraph (E) is for other services.

CHAIRMAN BABCOCK: Right.

HONORABLE HARVEY BROWN: Not medical services, so Escabedo seemed to us that it did not apply to a car repair bill, but you should not have to bring the car repair person to testify. 18.001 covers the car repair person as well as it covers the medical provider, so we just didn't think it was applicable.

PROFESSOR DORSANEO: Huh. Why not?

MS. HOBBS: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah, why isn't it?

MS. HOBBS: I think the first part you would want, right? But not the second part.

CHAIRMAN BABCOCK: Sorry, Lisa.

MS. HOBBS: You would want to testify as to the total amount paid for the service, but not testify about the credit adjustment issue.

CHAIRMAN BABCOCK: Right.

HONORABLE HARVEY BROWN: Yeah, you could do that. I guess we didn't because the bills will be attached, and they'll show the amount paid, but you could do that.

MS. HOBBS: But you seem to be getting at something else, Chip.

CHAIRMAN BABCOCK: Well, yeah, I mean, why wouldn't you allow the party providing the services, even though it's not a doctor, say it's a lawyer, to say, you know, "The amount is X"? Or do you want the judge to have to paw through all the bills and get the calculator out?

HONORABLE HARVEY BROWN: I'm fine with that.

CHAIRMAN BABCOCK: Okay. Okay. Kent.

HONORABLE KENT SULLIVAN: I just wanted to reverse course briefly for a second and go back to this point in the third numbered sentence under the form for business records, because I actually think it may be somewhat more important than we're thinking. It -- it occurs to me that it probably ought to be deleted in its entirety in the sense that first it says, "The records were made at or near the time of the occurrence of the matters set forth." And I originally thought that Frank's comment was on the mark, that maybe they were just talking about the records themselves, but it doesn't really make sense if it's the matters set forth in the records because

it's then "The records were made at or near the time of the occurrence of the matters set forth in the records."

I mean, it really does seem to be pointing back to an undefined occurrence, and I guess the real question is why do we want the custodian swearing to anything like that? Really, all they're trying to do is prove up records, and the notion of whether these are timely in the context of the lawsuit, some issue in the lawsuit, whatever that issue ultimately is, the custodian is going to have no knowledge about that kind of context, I wouldn't think, and I wonder why we even want that in this form affidavit that's going to be used over and over and over.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: I think the evidence books would say on that is we just call this person "custodian," and the custodian is just somebody who knows how things are done, okay, not with having any personal knowledge of any of what it's about.

HONORABLE KENT SULLIVAN: And that is exactly my point in the sense that the custodian is not going to know anything about when these records were made or produced relative to something that I think is going to be unknown to him or her, and that is some time

perspective that's relevant only to the lawsuit and to people that are knowledgeable about the details of the lawsuit. The custodian is going to know absolutely nothing about that, and you really by creating a form and asking them to swear to something, I think it's just -- it's very problematic.

CHAIRMAN BABCOCK: Richard Orsinger, and then Carl.

MR. ORSINGER: Okay. To address what Kent just said, the hearsay exception for business records, which, as we said, was sourced in the statute, has several criteria to be met, and the affidavit is supposed to follow those exceptions to the hearsay rule criteria, and one of them is that the record in the business was made at or near the time of the event that's covered by the record.

CHAIRMAN BABCOCK: Uh-huh.

MR. ORSINGER: And the policy behind that is that when businesses are contemporaneously recording their daily experiences for accounting purposes, management purposes, and income tax reporting purposes, that there's a fundamental reliability that's imposed by the business world, the finance world, and the Internal Revenue Service; but when somebody comes in long after the fact, maybe for a motive that has to do with potential

litigation or a dispute of some kind, they might create a record that fits into the business record that's calculated to create a certain impression that would not have been a motive when you're just recording things contemporaneously. So the concept I think we're trying to capture is that if we're going to rely on the business record exception to the hearsay rule, we want routine records that are recorded by someone with personal knowledge right when the event becomes -- they become aware of the event. Because --

HONORABLE KENT SULLIVAN: And my point would be then we need to say what we mean. We need to say that. We need to say, "These records were recorded contemporaneously," or something to that effect as opposed to the language we have that's very confusing and certainly suggests that it could mean something very different.

MR. ORSINGER: Well, see, to me, that's one of the problems with using the word "occurrence" because the 803 exception to the hearsay rule doesn't even mention occurrence. It says -- it says "act, event, condition, opinions, or diagnoses." It does not use the word "occurrence." So when an event occurs, okay, maybe that's an occurrence. When a condition happens, that may be something that occurred at one time or it may be something

that extended for six weeks or six months. An opinion is something that gets expressed by someone somehow at some point in time in a diagnosis. So when you replace all of those concepts that have all of those different things in them with the word "occurrence" I think all of the sudden you're thinking of there was a tort here and somebody did something on a certain day at a certain time and everything results from that occurrence. I think that's a complete misconception of what that authentication purpose is.

CHAIRMAN BABCOCK: Okay. Anything else? Yeah, Justice Patterson.

HONORABLE JAN PATTERSON: Aren't we just trying to say that the records were made at or near the time that it's set forth therein; and really "occurrence" may be somewhat of a misleading word, but it does go to the heart of the recordkeeping exception; that is, that it is recorded at that time and the records are maintained in a manner that is systematic; and that's really the reference. It's more of a matter of time of the reflection of the substance less than to something that appears to be outside of those records, such as -- I mean, "occurrence" may not be the right word, but I think it does go to the heart of the recordkeeping exception, and so I think it's accurate, but it may just have too many

words in it.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: On (E), this concept of "other services," are they other medical services or other any kind of services or --

PROFESSOR DORSANEO: Car mechanic.

MR. HAMILTON: Anything? It's anything?

MR. GILSTRAP: It's not medical service. Anything but medical services. That's the intent.

CHAIRMAN BABCOCK: Yeah, right. Buddy.

MR. LOW: In answer to Kent's question, of course the Legislature allowed specifically with regard to medical that a custodian be able to say they're reasonable and necessary. A custodian might not know a thing about medicine. It doesn't necessarily mean that. 18.002, in the Remedies Code also has a form of affidavit, "Before me the undersigned authority appeared," and so forth. "I am the person in charge of records," and then down there, "The services provided are necessary." I mean, so we're not creating new ground. It was a cloud before.

HONORABLE KENT SULLIVAN: I agree it's not new. I guess what I'm saying is I thought it was entirely confusing, and I think it's certainly reasonable that someone who is a custodian would not realize -- this is consistent with Richard's point -- would not realize that

they were, in fact, confirming what Richard was talking about because the language doesn't say that.

MR. LOW: Well, I'm not trying to argue against that point. I'm only saying the Legislature allowed a custodian to testify not just medical, that services were reasonable and necessary and so forth.

CHAIRMAN BABCOCK: Right. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I'm not sure this makes sense, but why can't the affidavit require the custodian simply to say the date that the record was made or recorded, and then the parties can argue whether that was proximate to whatever they think is relevant.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: Well, it would be a problem to put that in the affidavit because a lot of these records have, you know, 30 time entries or 50 or a hundred time entries. I think one way to look at it might be 18.002 subpart (B) where the Legislature had some language that might be a little clearer. This is on page 426 under subparagraph -- under subpart 3 of Buddy's handout. This is the affidavit of custodian, and it's the paragraph that talks about the records. Second to last sentence says, "The records were made at or near the time or reasonably soon after the time that the service was provided." That seems a lot clearer to me than "the

occurrence."

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, it seems to me it's just pro forma then. Do we really think custodians are going through and checking that, and if they're not, why even bother, and if they are, they could quickly recite the dates they were recorded. If they don't know the dates they were recorded, how could they say that?

MR. GILSTRAP: That's not the custodian's job, though. The person who comes in -- I come in and I pay my note. I pay -- you know, Mr. Brown came in and he paid $20 on his note. Some bookkeeper writes that down. Then the custodian of the records says, "Well, I know how the bookkeeper works," and that's how he's able to testify. He doesn't have personal knowledge that Mr. Brown came in and paid $20.

HONORABLE STEPHEN YELENOSKY: No, I know he doesn't have personal knowledge, but if not the date then what the custodian is saying is that -- should be saying is that "It is our practice that these are recorded at the time made," not that I'm swearing that they were.

MR. GILSTRAP: He says it's the regular course of business to do that, I think.

HONORABLE STEPHEN YELENOSKY: On that point?

MR. GILSTRAP: Let's see.

CHAIRMAN BABCOCK: Richard Orsinger, did you have something?

MR. ORSINGER: I did, and I agree with Judge Yelenosky that this affidavit really causes the custodian to have to finesse some stuff in order to consider it all to be under oath. Many times I've actually taken the depositions of custodian of the records of people that didn't even work for the company at the time that the transaction was entered in the records. So we know it's physically impossible for them to have personal knowledge of it, but they all pretend like they do. In reality, rather than make them pretend like they have personal knowledge I am attracted to the idea to say, "It is the custom or practice of our business to make these entries at the time that the event occurred or reasonably soon thereafter." I don't want to lose that concept, and then we would be being more honest because I think a lot of times these custodians are signing this self-proving affidavit without regard to the fact that literally part of it is not true, that they truly don't really know that.

CHAIRMAN BABCOCK: Okay.

HONORABLE JAN PATTERSON: That's a different question.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, and the affidavit, as it was just pointed out to me, does not say that it is the custom or practice to record them near the time or reasonably soon after the time. It says, "The records were made at or near the time or reasonably soon thereafter the service was provided."

MR. ORSINGER: If I may say, to the extent this has been discussed in the appellate record, I think what they do to -- the fig leaf that they use for this whole thing is that a custodian or representative of the company has the knowledge of the institution and not just the knowledge of that individual person, so if you've been the head of that department for two weeks, you can still speak on the institutional memory of the company.

HONORABLE STEPHEN YELENOSKY: But you can't say that.

MR. ORSINGER: Well, I mean, literally it isn't personal knowledge. Really it's kind of the personal knowledge of the entity that is not a person, and, you know, it's been going along, nobody has been indicted for perjury. I've never heard of any records being kept out because of that, but I think we are -- it is a legal fiction that these custodians have personal knowledge of this stuff because most of the time they don't have the faintest idea. They just know that it came

out of our record keeping system and I'm familiar with it and --

HONORABLE STEPHEN YELENOSKY: Well, legal fictions are particularly bad in an affidavit.

MR. ORSINGER: That's a valid point, but --

CHAIRMAN BABCOCK: Yep. All right. Anything else on this? Gene.

MR. STORIE: Maybe. I mean, I think you can testify to the habit or routine of a person, so that maybe that works with an organization, too, even though you were not there at the time. And the thing on timeliness is, as I think Justice Patterson said, you want to be sure that it's not made outside the time frame in which a record would normally be made and not necessarily at the time of the event because it could be a summary, it could be an annual report, could be anything well after the fact, but which is nevertheless timely for the record to look at it.

HONORABLE STEPHEN YELENOSKY: Well, I mean, the most they can testify to is that they understand this is how it's done. That's the institutional knowledge, but they can't say they were made, because you could pull out a record and say, "When was this made," and they wouldn't be able to answer that question.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I think we talked about this

at length. I'm trying to remember if it was the JP rules. I remember people came and talked to us who deal with credit card debt --

CHAIRMAN BABCOCK: Right.

MS. CORTELL: -- and banking debt where there really are no witnesses at that point, and it's a creature of necessity really, and I know whether we want to say it's a legal fiction and we would really like it to be perfect, but it can't always be, and so I think the system has worked relatively well, and the cases acknowledge that.

CHAIRMAN BABCOCK: Tell that to the foreclosure guys. Okay. Buddy raises a question at the end of this. Justice Moseley.

HONORABLE JAMES MOSELEY: I didn't read "occurrence" to create the confusion that we're talking about, but I think when you look at sub (C) here, we're really saying here's how you comply with 803.6, and if we're going to do that we probably ought to go back to something closer to the bones and meat of 803.6 than what we've got.

CHAIRMAN BABCOCK: Okay. Buddy asked the question, "Should the trial court have discretion to allow a late filed affidavit upon a showing of good cause?"

MR. LOW: See, that's raised in the

counter-affidavit, good cause, and we have a Rule 5 on good cause, but it only applies to the rules themselves. Rule 6 in the Federal rules does apply to evidence as well. So should we have one for the affidavit, good cause for a late filed affidavit? I'm not suggesting we should or shouldn't, but we can't rely on Rule 5 because Rule 5 provides when these rules provide for good cause shown, "when these rules," and they're talking about these rules. The Federal is more inclusive than that, so should we have a good cause provision?

CHAIRMAN BABCOCK: Yeah, Judge.

HONORABLE ANA ESTEVEZ: I'm going to say "yes" because if we don't then what will happen is one side is going to ask for a continuance just so they can file it within the period of time, and then it's going to be an abuse of discretion issue, and then it just snowballs.

MR. LOW: Then if we do, we don't need to rewrite it. We'll say "good cause" here under defined in Rule 5.

CHAIRMAN BABCOCK: 18.001 permits the filing, if I'm reading it correctly, of a counter-affidavit with leave of the court at any time before the commencement of evidence at trial.

MR. LOW: Right. That's the only time it's

mentioned in any of this.

CHAIRMAN BABCOCK: Right.

MR. LOW: But then when you go to Texas Rules of Civil Procedure enlargement of time, "When by these rules," notice given, order of court, and so forth; and what I'm saying, if we do then we should then put "notwithstanding" or something, "Rule TRCP Rule 5 applies," or something like that. If we go that way.

CHAIRMAN BABCOCK: Does -- I should know this, but does Rule 5 apply to the appellate rules?

MR. LOW: It only says "when by these rules." Now, what are they saying? There's a question. Does that mean these rules and only -- it says TRCP 5 or are they -- I don't know. Maybe it should apply to evidence. I don't know what its intent. I did not research that.

CHAIRMAN BABCOCK: Lisa knows the answer.

MS. HOBBS: There's a TRAP 2 is suspension of rules for the Texas Rules of Appellate Procedure.

CHAIRMAN BABCOCK: TRAP 2?

MS. HOBBS: Uh-huh.

PROFESSOR DORSANEO: No evidence rule.

MS. HOBBS: But there's not one in the Rules of Evidence. But there's not a good cause or general -- I mean, it says the rules should be construed so as to

promote justice and words of that nature, but it doesn't actually give an enlargement of time power.

MR. LOW: See, the Fed rules apply their Rule 6 to everything except new trial.

CHAIRMAN BABCOCK: Okay. So do people think that this rule needs a -- needs a good cause provision to it, give the court some discretion about allowing out of time affidavits? Yeah, Carl.

MR. HAMILTON: Well, maybe the rule regarding the time when these need to be filed should be in the Rules of Civil Procedure instead of the Rules of Evidence.

CHAIRMAN BABCOCK: May be.

MR. LOW: You be in charge of that committee.

CHAIRMAN BABCOCK: Yeah, you chair that subcommittee. Anybody else have any thoughts on that? All right. Well, then let's vote on it.

HONORABLE HARVEY BROWN: Are we voting on that for this rule?

CHAIRMAN BABCOCK: Yes.

HONORABLE HARVEY BROWN: Okay.

CHAIRMAN BABCOCK: Everybody who thinks there should be a good cause provision in this rule, 902(10), restyled and refashioned and remodeled, raise

your hand.

All those opposed? It passes by a vote of 19 to 3, the Chair not voting, although I can always tell if people are enthusiastic about their vote because then their hand is way up high, and this one it was all down around their shoulders.

HONORABLE JAMES MOSELEY: We may keep low hands.

CHAIRMAN BABCOCK: All right. Let's have lunch.

(Recess from 12:22 p.m. to 1:20 p.m.)

CHAIRMAN BABCOCK: Okay, we're now going to embark on the restyled Rules of Evidence, and Justice Hecht is going to tell us how we got to where we are.

HONORABLE NATHAN HECHT: Well, let me go back a ways, just to kind of bring some of you up to date. Back in the Nineties, it probably was, several people prominent in the Federal rules process thought it would be a good idea to go through the Federal rules and write them in more easily understood English than Charles Clark used in the Thirties. So Professor Wright was one of those, Brian Garner was another, and there were others that were involved in that; and they finally convinced Chief Justice Rehnquist that that would be a good idea, but he was thoroughly skeptical almost to the end of his life; and I

think he got them to practice on the criminal rules first, as I recall, I don't remember; but the effort to go through the rules and change the format and the text in such a way that they're easier to read but not change the substance was the mission of the restyling project.

So when that worked out pretty well -- I don't remember the exact order that they took them up, but appellate was pretty high on the list because the thought was that that was pretty easy. I think the civil rules were the next to last; and I was on the Federal advisory committee when we restyled the civil rules; and so, again, this was a project. They were under strict injunction not to change the substance in any way, so all the fights on the committees were always about you're not just clarifying, you're changing; and I was telling Chip a little earlier, it's like retranslating the Bible. You don't touch the Lord's Prayer. You just leave that alone. You could write it more plainly maybe, but everybody learned it. We've been learning it for 2,000 years, and we're not going to change that.

So there was some of that, but then there was -- and there were lots of thought that some areas of the rules could really use some clarification that became really more substantive, but the -- the committees tried to stay out of that, and the civil restyling project I

think has met with a lot of success and the bar generally likes it. So Chief Justice Rehnquist was very firm in his view that the Federal Rules of Evidence not be restyled because -- I won't go back to the history of those rules, but in the history of the republic, sufficed to say, there was a lot of difference in the jurisdictions, the various American jurisdictions, on what the Rules of Evidence were, and you could go here and it would be one thing, and cross the state line or cross the county line sometimes and it would be something else; and so when the stars aligned and the Federal Rules of Evidence came together, to the extent that they did, and they didn't on privilege, but to the extent that they did, the Chief didn't want to risk losing that moment in history when we got together on the same page on these very important rules that are used everyday in the trial courts.

A lot of states -- the number floats around, but half to two-thirds of the states replicate the Federal rules, and so they automatically or soon thereafter became the Rules of Evidence in lots of American jurisdictions, and so there was lots of reason in the Chief's mind not to restyle those. There will always be some changes that subsisted, and there are lots in the Texas rules. So years ago some of you will remember when we put together the civil rules and the criminal rules, because they used

to be two different sets, we did that by saying "Civil case this, in criminal cases that." And on some of those we were able to agree that the rules should be the same in civil and criminal cases, so we were able to reduce some of the differences even in that effort.

At last -- and I think Chief Justice Rehnquist was still alive, but I've forgotten. He finally relented, I think, and said, okay, they could restyle the Rules of Evidence, and so the Feds went through the same process. Judge Fitzwater was the chair of the advisory committee when that happened, and so after -- you know, it was a year or two effort. That was concluded, and the Supreme Court was happy with it, and of course, those are now the Federal Rules of Evidence. So when they finished that our Court thought it would be a good idea to use their work and try to restyle our own rules so that we would do two things. We would benefit from the clarity that hopefully their restyling effort had made, but we would also continue to align ourselves with the Federal rules generally so that the -- kind of the overarching goal in all of this was to get to a rule that was more uniform in all American jurisdictions. There will be some differences. There have been and there still will be, but at least we could use the Federal work to try to bring our rules so that they look about the same and have the same

benefit to practitioners.

So we asked Professor Goode, who knows everything there is to know about evidence, as many of you know who had him in law school, to help us with this, and his team, who have worked very hard on this for the last more than a year, maybe close to two years; and so as we go through them, which will take us a while and we won't finish this afternoon, we -- I hope we will keep in mind that our goals -- the Court's goal is to align ourself as much as we can with the Federal language, diverging when our rule in Texas is just different; and that's what we're going to do; and while we can look in this process, unlike the Federal process, at substantive changes that we want to make and as we go through this, that -- our principal effort is to try to bring our rules to look more like the Federal rules as a result.

So substantive issues are not off the table, but we talked before lunch about whether "custodian" is the right word in the self-authentication Rule 902, and probably Texas is not going to be the other American jurisdiction that picks another word, so those kinds of changes we can think about, but most of the effort is going to be to try to use as much of the Federal work product as we can. So that's my lead-in to this.

CHAIRMAN BABCOCK: Okay. Great. A couple

of announcements, one which we missed this morning and one which has recently arrived; and the recently arrived is Justice Boyd, who we're honored to have join us again, having sat through these meetings for many years in a different role; and I neglected to mention this morning when we were handing out personal information about our families that Angie Senneff's son has just recently entered the Marines and is currently in combat training; and hopefully he won't have to see any combat; but he's serving our country; and it's an important event in her life and in our lives really. So with that, Buddy, take us away.

MR. LOW: Okay. As Justice Hecht said, it was certain charges, and I talked to Fields and the professor about that same goal, to be as consistent with the Federal without changing, and I think there's something for Angie to pass out, isn't that right, Fields, that --

MR. ALEXANDER: This hasn't been passed out yet, a note to the restyled Texas Rules of Evidence.

MR. LOW: Okay. We'll pass that out. For those that don't know, Fields Alexander, Professor Goode, and Judge Darr from Midland. And I'll say this, they have worked very long and hard on this and are to be commended. This might not have looked like such a task, but it is,

and they have -- they are to be commended for their hard work. They met. I would mainly talk to Professor Goode because you had different chairmen at different times, didn't you?

MR. ALEXANDER: We did, although I rolled onto the committee as chairman right when this work commenced.

MR. LOW: Okay. And to see what was the progress and so forth, and then once they met the evidence subcommittee here met several times, and we made some suggestions. There had been a revision, and so what you'll see -- I also talked to -- what did Judge Rosenthal? I thought she had to do something with this, Judge.

HONORABLE NATHAN HECHT: She was the chair of the big committee.

MR. LOW: Okay.

HONORABLE NATHAN HECHT: She was the chair of the civil advisory committee when we restyled those rules.

MR. LOW: Okay.

HONORABLE NATHAN HECHT: But then when these rules were restyled, she was chair of the standing committee that looks at all the sets of rules.

MR. LOW: She volunteered to help and told

me one of the things they wanted to try to change "shall" to "must" or "should," they had -- there's a big -- in fact, somebody sent me an article, maybe it was Lonny. Weren't you the one? About how the Feds use "should" and so forth. So there's been a lot of background work that this committee has done and a lot of reading they've done rather than just look, well, here's a rule, here's how we can restyle it. So I commend them for that work, and we'll get that passed out here. Where is Angie? She has -- okay. We need -- yeah, pass that out, and while that's being passed out, I'll turn it over to Fields to take the lead.

MR. ALEXANDER: Okay. Thank you, Buddy. Fields Alexander with Beck Redden, and I was the chair of the Texas State Bar Administrative Rules of Evidence Committee during this very interesting process. I think for some introductory remarks I would like Judge Darr, who has taken over as chair now -- I rolled off after this work was submitted to say a few words about the process.

HONORABLE ROBIN DARR: Thank you, Fields, and thanks for having us to your meeting. We've looked forward to this to review these restyled rules with you, and I might mention before I start, if there are any substantive issues that you want the Administrative Rules of Evidence committee to look at this year, we are open to

that, we more than welcome your suggestions. The Administrative Rules of Evidence committee started on the restyled rules over two years ago, approximately. Well, about two years ago, September of 2011; and I'm certain that you do realize, because of the nature of your work, what a big undertaking that is; and we really wouldn't have gotten through this, especially in that time frame, had we not had really great leadership from Fields Alexander, and not just leadership, but the kind of leadership that required the people on the committee to do their job and in a timely manner; and the other thing that was critical to this job, as has already been mentioned, is Professor Goode really did a yeoman's work -- yeoman's part of the work as well as, again, the leadership.

And the way this worked is, first of all, Professor Goode and Professor Jeremy Counseller from Baylor, Professor Goode from UT, Professor Jeremy Counseller from Baylor, restyled the rules to begin with, and they would go through two or three or even four drafts with extensive comments just between the two of them before then those restyled rules would be sent to the restyling subcommittee; and this is, you know, like he mentioned the Bible, this is another like church work type thing. We had subcommittees like you wouldn't believe.

So after the restyling subcommittee looked

at these rules they would go back to Professor Goode and Professor Counseller, and there would be some adjustments, some more drafts. It was only after that subcommittee was comfortable with what they had, their product, that it was sent to an article subcommittee, and Fields had the overall ARC -- that's what we called Administrative Rules of Evidence, I'm sure you know -- divided into subcommittees so we would like at one or two or three articles. There were four or five or six lawyers on each of these subcommittees. After the articles subcommittee was content -- or they would always have questions and comments or, you know, is this not substantive, and it would go back again to Professor Goode and Professor Counseller. More redrafts, more restyling. It was only after the restyling subcommittee, the articles subcommittee, Professor Goode and Professor Counseller were confident in what they had drafted as the rules that it would go to the entire Administrative Rules of Evidence Committee unbunked, if you will.

So then after the restyling -- excuse me, after the ARC had reviewed it and more drafts, it was sent to you, and as I understand it, several of you or a subcommittee of you looked at these rules and then we got them back over the summer, and Fields and Professor Goode and I again took your comments, which we greatly valued.

They were very helpful, and we looked at the issues that you had drawn to our attention and still made further changes. I can't say that we made every change that y'all brought to our attention.

HONORABLE STEPHEN YELENOSKY: And we always have more.

HONORABLE ROBIN DARR: You're excused, Judge Yelenosky, but all this to say, the restyled Rules of Evidence that are before you today have at least been reviewed and critiqued and questioned and modified by you, by the 28 members -- lawyers who are on the ARC committee, and most of the time by their law partners or their cojudges or professors as well as Professor Goode and Professor Counseller. So they have had a lot of -- a lot of review, a lot of thought has gone into this project, and that's why we are here today to visit with you, to review any rules or parts of the rules that you want to review. In particular Rule 509 and 613 because we submitted two different versions of 509 and 613 to you, but we're here to answer any further questions and to go over those rules with you, and with that I'll turn it back to Fields Alexander.

MR. ALEXANDER: Thank you, Judge Darr. This has been the most interesting project I have ever been involved with in any State Bar or local bar committee

work. It's been challenging and a lot of fun; and our charge, as Chief Justice Hecht mentioned, was explicitly to effect no substantive change either intentionally or inadvertently in connection with the restyling effort and to follow the Federal restyling effort both literally word for word where our rule mirrored their rule or certainly in tone, substance, and intent, where they differed. The two things, the note that was just circulated, which I apologize if we didn't send y'all earlier, helps to make explicit with the -- it would be our intent that when the restyled rules are published this would accompany them, and it helps to make explicit for any lawyer or judge that questions it that no substantive change was intended and also explains the thinking behind the restyling project.

And in terms of our drafting guide, in addition to the Federal restyled rules themselves, we relied heavily on the *Guidelines for Drafting and Editing Court Rules* by Brian Garner, which the Federal restyling effort relied on as well, and the last thing I'll say just by way of general comments is this work could not have been done if it wasn't for the yeoman's efforts put in by everyone on our committee and especially by Vice-chair Darr, now Chair Darr, and, of course, Steve Goode, who was instrumental in the entire process. So with all of that being said, we're happy to address the rules article by

article, rule by rule. However y'all would like to proceed, we're here to answer any and all questions.

MR. LOW: We're ready for you to proceed from Rule 1, the first, and let's just take them up in order. Is that --

MR. ALEXANDER: That's perfectly fine.

CHAIRMAN BABCOCK: Article I, Rule 101.

MR. LOW: Yeah.

MR. GILSTRAP: And we're going to go through a thousand rules?

CHAIRMAN BABCOCK: I don't know if we have to go through a thousand, but --

MR. GILSTRAP: There's a thousand rules here. Maybe not.

CHAIRMAN BABCOCK: If you start with a hundred.

PROFESSOR HOFFMAN: What is the best document? I know there's several different documents that compare. For purposes of starting, what's the best document we should have in front of us?

MR. ALEXANDER: I liked looking at -- when I was doing this work on the committee itself I liked looking first at the current Texas rule and the restyled Texas rule. That's the best way.

MS. ADROGUE: The chart.

MR. ALEXANDER: That's exactly right. For me that was the best way of determining that there was no substantive change implemented in connection with the restyled rule, and the second place I would generally look if that didn't answer my question, would be to compare the current restyled Federal rule with the proposed restyled Texas rule.

PROFESSOR HOFFMAN: Got it.

MR. LOW: Fields, we have one thing you sent me that wasn't passed out, and that was the former Federal rule and the present Federal rule.

MR. ALEXANDER: Right.

MR. LOW: I didn't feel that would be necessary, but we have it here if reference needs to be made to it.

MR. ALEXANDER: Right. And that I think is useful really to the extent you want to look and see the stylistic effort that went into the Federal rules and how they went about -- you know, for example, some of the things that we employed, like the use of bullet points were employed in the Federal restyling effort, and it was our -- it was our goal to mirror that intent in terms of clarifying and modernizing and simplifying the language and the readability of the rules whenever possible.

CHAIRMAN BABCOCK: Okay.

MR. ALEXANDER: I'm sure y'all don't want us to read each of the rules verbatim, so I guess I'll open it up for any questions anyone has. This was one of the rules where a slight modification was made after the rule was submitted to Buddy Low's evidence subcommittee here where we clarified the intent of the rules with regard to application in justice courts.

CHAIRMAN BABCOCK: Any comments on Rule 101? Stephen? No.

HONORABLE STEPHEN YELENOSKY: No. I'm 600 ahead.

CHAIRMAN BABCOCK: Well, I've got one. Under (h)(5) in these rules, "A rule prescribed by the United States or Texas Supreme Court or the Texas Court of Criminal Appeals means a rule adopted by any of those courts under statutory authority." The Court, the Supreme Court, our Supreme Court, has constitutional rule-making authority. Should that be added?

HONORABLE TOM GRAY: Chip, could you speak up? We can't hear you down here.

CHAIRMAN BABCOCK: I'm sorry. I said that our Court, the Supreme Court, has constitutional rule-making authority, section -- Article 5, Section 31, so should we add the word "statutory or constitutional authority"? That's my question. Lisa.

MS. HOBBS: I'm not certain this has happened, but there is some thought that perhaps they have inherent authority to create rules, and I'm not sure if any of our rules were ever adopted pursuant to inherent authority, but if so, I would think we would want to be bound by them as well, so you might just want to say something more vague.

CHAIRMAN BABCOCK: Okay.

MS. HOBBS: Just "by any authority."

CHAIRMAN BABCOCK: You know, it seems to me, but you're the historian, that there was a time when --

HONORABLE SARAH DUNCAN: Eichelberger.

THE REPORTER: I can't hear you.

HONORABLE SARAH DUNCAN: Eichelberger, E-i-c-h-e-l-b-e-r-g-e-r.

CHAIRMAN BABCOCK: Eichelberger, it's a trick phrase.

MR. ORSINGER: It's another one of those domestic cases.

HONORABLE SARAH DUNCAN: That's right.

CHAIRMAN BABCOCK: It's a family law case.

MR. ORSINGER: Yeah.

MS. BARON: Interesting conflict jurisdiction case.

CHAIRMAN BABCOCK: What, Pam?

MS. BARON: It was an interesting conflict jurisdiction case.

HONORABLE NATHAN HECHT: Yeah. It's an inherent authority.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: It was one of Justice Franklin Spears' series of opinions that were establishing firmly that the Court had a lot of inherent authority that wasn't explicit in the Constitution or the statute.

MR. ALEXANDER: Chip?

CHAIRMAN BABCOCK: Yes.

MR. ALEXANDER: May I make a suggestion?

CHAIRMAN BABCOCK: Sure.

MR. ALEXANDER: To satisfy your concern, what if we revised the rule to state -- and, again, we're looking at page five, "means a rule adopted by any of those courts under lawful authority" as opposed to "statutory authority."

MR. SCHENKKAN: Why do we need to make any reference to what authority it's under at all? I mean, if somebody wants to challenge the validity of the rule and say you can't use that other rule to trump this Texas Rules of Evidence because that rule was invalid, let them make that argument, but if, in fact, the other rule is different --

MR. ALEXANDER: I think this is an -- I'm sorry, I didn't mean to interrupt.

MR. SCHENKKAN: That's it.

MR. ALEXANDER: I think this is an example of where we looked to what the Federal restyling effort had done and tried to mirror that whenever appropriate; and, in fact, if you look at Federal Rule 101(b)(5), I believe it tracks this language exactly except for we put "Texas Court of Criminal Appeals" and "Texas Supreme Court." Otherwise it's identical, so that was the -- that's why it's worded the way it's worded.

MR. SCHENKKAN: But that would only be a matter of history because if we've got Texas constitutional power, just like you've already recognized we have the Texas Court of Criminal Appeals, we're already not going to use the Federal words, and I'm saying, therefore, why don't we get rid of these words that cause this problem?

MR. GILSTRAP: The Federal rules were expressly adopted under statutory authority. That's very clear.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: Why not take those three words out?

HONORABLE SARAH DUNCAN: That highlights the

problem of trying to copy -- to me, highlights the problem of trying to copy the Federal rules, is that we have a different system in Texas, we have different sources of authority.

MR. ALEXANDER: Right.

HONORABLE SARAH DUNCAN: And as a result we have different rules.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Surely it's style, but why does it say "any of those courts" when there are only two? Shouldn't it just say "either"?

CHAIRMAN BABCOCK: I'm sorry, could you speak up a little bit?

HONORABLE STEPHEN YELENOSKY: Oh, what's the answer?

MS. HOBBS: U.S. Supreme Court, Texas Supreme Court, and Court of Criminal Appeals.

HONORABLE STEPHEN YELENOSKY: Okay. You're right, I'm sorry.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: I think it's very controversial, the extent of inherent power. The Court doesn't like to talk about inherent power, it creates

trouble, and the constitutional provision says what it says, but there are lots of issues with respect to the constitutional authority of Supreme Court to make rules and have been. Take out "under statutory authority." It doesn't help.

MR. ORSINGER: I second that.

CHAIRMAN BABCOCK: Well, Fields says put "under lawful authority."

MS. ADROGUE: Yeah, he suggested "lawful."

PROFESSOR DORSANEO: Well, why would we assume that they're doing it unlawful?

MR. ORSINGER: I don't think so. I think they make the law in a lot of ways.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: Does that add anything to what you already have at 101(d), which reads "between these rules and applicable constitutional or statutory provisions or other rules"?

MR. ALEXANDER: Yeah. These are the definitions, this section. This is defining the terms.

HONORABLE JAN PATTERSON: But you want it to be consistent with any prior reference, I would think.

MR. ALEXANDER: Well, we're trying -- the intent here was to define what we meant by "a rule prescribed by the United States," et cetera, et cetera, et

cetera, so it's quoting -- it's quoting 101(d) and then defining it. That was the intent, but I -- frankly, I see no reason why we need "under statutory authority" or "under legal authority." There would be no substantive change if we just omitted those three words.

CHAIRMAN BABCOCK: Uh-huh.

MR. LOW: Fields, you're suggesting -- so that we'll know how it reads, you're suggesting as written except eliminating three words; is that correct?

MR. ALEXANDER: Yeah.

MR. LOW: All right. Does that meet the objections? Okay.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I would go further and just delete (h)(5). The definition as modified is going to say, "A rule prescribed by these courts means a rule adopted by these courts." I don't think that works for a definition.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: I think the words are adequate as originally stated.

CHAIRMAN BABCOCK: Well, the problem will come later if that term is used.

MR. ORSINGER: Why? You think that we need to explain that --

HONORABLE SARAH DUNCAN: We haven't added anything.

MR. ORSINGER: -- a rule prescribed by a court is a rule adopted by a court? You need that help?

CHAIRMAN BABCOCK: That may not meet the definition is what you're saying.

MR. ORSINGER: Yeah.

MR. ALEXANDER: We did it this way because it was defined by the Feds in their restyling effort, so we --

PROFESSOR DORSANEO: Monkey see, monkey do.

CHAIRMAN BABCOCK: I tell you, it used to be the rule on this committee that if you wanted to defeat a rule all you had to do was say, "This is what the Federal courts are doing."

MR. ALEXANDER: We had a healthy debate along those lines ourselves, frankly.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Once you take out the three words at the end, you eviscerate the purpose of it in the Federal rules, which is to say "by any statutory authority." That adds something.

CHAIRMAN BABCOCK: But, you know, I think we've had a full discussion on this. I think we've got it.

MR. ORSINGER: They're not going to change it anyway, Steve.

PROFESSOR DORSANEO: Are we done with that?

CHAIRMAN BABCOCK: I think we're done with that. Anything else on 101?

PROFESSOR DORSANEO: Yes. I don't -- I didn't read all of what's in the exceptions in (e), but -- and we have a wonderful experience in the Texas rules generally of having titles that don't inform anybody of anything, and I think this is -- this may be another example. I always have fun with my students talking about rules and say, "The title of the rule is this, and it's completely about something else," but is there a way to make "exceptions" a little more --

HONORABLE SARAH DUNCAN: Fulsome.

PROFESSOR DORSANEO: -- informative as to what it is I'm reading, or must I read it in order to find out what it's about?

MR. LOW: How else would you state it? It's just --

PROFESSOR DORSANEO: I don't know.

MR. LOW: I mean, it is an exception.

HONORABLE SARAH DUNCAN: Chip, I would say the same thing about (d) of the restyled rule. I mean, (c), "Hierarchy," that tells me where we're going. We're

going to talk about a hierarchy of some things. "Exceptions for constitutional or statutory provisions or other rules," I'm like, what do you mean, exceptions for them? What are they going to be excepted from?

MR. ALEXANDER: We went through a lot of these same discussions and debates in our subcommittee, and the fall back was for us, as we were asked by Chief Justice Hecht to follow the Federal restyling effort unless it was going to effect a substantive change to the rule, so that rather than try to rewrite the rules and parse every single word, if the Feds did it -- if the Federal rule was similar to our rule and the Feds did it one way and it looked like it was consistent with what our rule said then we deferred to that in most cases. This is another example of that. This is exactly out of the Federal restyling effort terms, this provision of the rule.

And we -- I can tell you that if our charge had been to ignore the Federal restyling effort and just rewrite the rules in a clearer fashion, it would have been a 20-year project instead of a two-year project, so I'm just warning you about the road you're going down.

PROFESSOR DORSANEO: This is going to be a 20-year project or a 50-year project. All of these projects go on forever.

HONORABLE SARAH DUNCAN: Where is the recodification draft?

CHAIRMAN BABCOCK: By the way, for people down here, excluding you, Fields, who have already drawn rave reviews from the back of the room, I just got a text from some people back there. They can't hear what we're saying here.

PROFESSOR DORSANEO: Text them back.

CHAIRMAN BABCOCK: We have a great way of communicating these days. So people down here, speak so that people down there can hear.

MS. SENNEFF: Including you.

CHAIRMAN BABCOCK: Okay. Okay. What else? Buddy.

MR. LOW: Are there any comments about the comment to this, about taking criminal, or do you need to address that, Fields? The comment to the change.

MR. ALEXANDER: I'll give everyone a chance to look at it.

MR. LOW: Yeah, I don't see any reason --

MR. ALEXANDER: Right, to us it was just a bit of arcane language that --

MR. LOW: Right. Okay.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Under the exceptions --
CHAIRMAN BABCOCK: Speak up now.
MR. GILSTRAP: What's that?
CHAIRMAN BABCOCK: Speak up.
MR. GILSTRAP: Under the exceptions, 3(a), sorry, one of the exceptions is "an application for habeas corpus and extradition, rendition, or interstate detainer proceedings." Do Texas courts hear all of those kinds of proceedings?
HONORABLE ANA ESTEVEZ: Yes. I do.
MR. GILSTRAP: Okay.
HONORABLE DAVID EVANS: I send all of mine to Ana.
HONORABLE ANA ESTEVEZ: I have quite a few extraditions.
MR. GILSTRAP: What about interstate detainer proceedings?
HONORABLE ANA ESTEVEZ: I'm not sure I've had any of those, but I think I would hear them if they came up.
HONORABLE ROBIN DARR: Yes, you would.
HONORABLE ANA ESTEVEZ: I have a lot of extraditions.
CHAIRMAN BABCOCK: Okay. Yeah, Carl.
MR. HAMILTON: On (g), exceptions, for

military justice, we've got two exceptions there, exceptions in (e) and exceptions in -- well, I guess that's not part of (e), though, is it? Never mind, I thought that was part of (e).

CHAIRMAN BABCOCK: Okay.

MR. LOW: We finished one.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: We finally finished one, it looks like.

HONORABLE JEFF BOYD: Not quite. I do have one question.

CHAIRMAN BABCOCK: Justice Boyd.

HONORABLE JEFF BOYD: When I went and looked at the comment it then made me go back and look at (d), and I'm not quite sure what (d) is actually saying, because it looks to me like it says despite these Texas rules a court must admit or exclude evidence if required to do so by the Federal rules. And if that's the case then I'm not sure what the Texas rules mean at all.

HONORABLE ANA ESTEVEZ: That --

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: That might apply more in our criminal world because even if we -- well, I don't know, I guess it applies to both, but it happens when the U.S. Supreme Court finds something wrong with our

rule. It happens a lot.

PROFESSOR GOODE: Ordinarily the Federal Rules of Evidence don't say anything about the admissibility of evidence in Texas cases, but Federal Rule 502 expressly limits the admissibility of evidence in state proceedings in certain matters, so that's there to account for that, but generally the Federal Rules of Evidence don't apply in Texas courts.

MR. ORSINGER: Chip, can I --

CHAIRMAN BABCOCK: Yeah, I'm trying to digest what professor just said. Would you mind repeating that, Professor Goode?

PROFESSOR GOODE: Federal Rule 502, which deals with attorney-client privilege and work product, and it's contained in a version of Federal Rule 511 that our committee has drafted and your committee has drafted, but the Federal Rule 502 provides that in some instances if a Federal court makes some decision with regard to nonwaiver of privilege, that is binding on state courts as well. And so even if the state court would say what you did in the Federal court under our rules constitute a waiver of the privilege, the Federal Rule 502 says, "We trump the state rule." That's one Federal Rule of Evidence that our courts have to follow.

CHAIRMAN BABCOCK: And is that -- has that

been challenged? Because I had that issue once in Arkansas.

PROFESSOR GOODE: I have not seen any challenge, at least successful, to it.

CHAIRMAN BABCOCK: Any one way or the other?

PROFESSOR GOODE: It's only been in effect for a couple of years.

CHAIRMAN BABCOCK: Right. Yeah, maybe four years maybe.

PROFESSOR GOODE: Yeah.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: Professor Goode, can I ask, do the Federal rules limit their application to Federal court proceedings except for Rule 502, or how do they handle that?

PROFESSOR GOODE: The Federal rules are generally applicable in Federal court but except for Rule 502.

MR. ORSINGER: Yeah, you said that, but I'm wondering why you're saying that. Do the rules, the Federal rules themselves, say that they're not applicable, that they're applicable only to Federal court proceedings, or is that just a general understanding or the common law or the U.S. Supreme Court said that, or how do we know?

PROFESSOR GOODE: Federal Rule 1101 deals

with that, and it lists what it's applicable to.

MR. ORSINGER: And Texas court proceedings are not on that list?

PROFESSOR GOODE: Correct.

PROFESSOR DORSANEO: 101 says, "These rules apply to proceedings in United States courts."

MR. ORSINGER: Okay. Except for Rule 502.

PROFESSOR DORSANEO: It doesn't say that.

MR. ORSINGER: Okay.

HONORABLE STEPHEN YELENOSKY: Professor, do we need to say that? It's Federal law, and the lawyer comes in and says, "It's Federal law. Look at that rule. It trumps your state rule." Why do we need a reference to it in those instances?

PROFESSOR GOODE: To be honest, I don't think we need (d) at all. It's there because our current rule has (c).

MR. ALEXANDER: Right. This was an attempt to model a new restyled rule after the current rule, which is archaically called "Hierarchical governments in criminal proceedings," so we've just restyled that.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I agree with Steve, if I heard him right. I don't think this helps me very much. I think it's like trying to tell kids, "Don't put beans in

your ears" and stuff like that, you know, it gets people thinking about things that you don't want them thinking about.

CHAIRMAN BABCOCK: You're talking about 101(d)?

PROFESSOR DORSANEO: (d), yes. I don't think it's necessary at all.

CHAIRMAN BABCOCK: It just strikes me, looking at it cold, that it could create some mischief.

HONORABLE STEPHEN YELENOSKY: We don't say in our statutes "unless they're overridden by a Federal statute." It's a supremacy clause.

PROFESSOR DORSANEO: Yeah, the Constitution says that.

CHAIRMAN BABCOCK: Yeah. Okay. Good point. What else about Rule 101? Anything else? All right. Let's go to Rule 102, purpose. Sounds like a song from Avenue Q.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yes.

PROFESSOR DORSANEO: I know we don't want to say anything other than "Exceptions" for (e), but I'm going to say on the record I'd like to say "Exceptions to applicability."

PROFESSOR CARLSON: Yeah.

PROFESSOR DORSANEO: I just can't stand "Exceptions" there nakedly by itself.

CHAIRMAN BABCOCK: Okay. All right. So you'd like it to be more descriptive.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: Okay. Fair enough. Yeah, Justice Brown.

HONORABLE HARVEY BROWN: I have a process question. I was wondering if it would be possible as we're going through these, since many of us probably have not looked at every word and compared the three things we could look at, if the committee could tell us if they made any changes from the Federal restyled and, if so, why. I don't know how difficult that would be, if you have a redlined or something that you can use, but at least to highlight to us since probably everyone here has not read every word of all three versions.

MR. ALEXANDER: Sure, we can try to do that. I can tell you that 102 I believe is identical to the Federal rule, Federal restyled rule.

CHAIRMAN BABCOCK: Any comments on 102? Yeah, Sarah.

HONORABLE SARAH DUNCAN: So this is in line, I guess, with the Federal construction of "shall" and "should"?

CHAIRMAN BABCOCK: That's a question apparently.

MR. ALEXANDER: I'm sorry, I apologize. I didn't hear the question.

HONORABLE SARAH DUNCAN: So changing -- so when the "shall" was changed to "should" in the corpus, that's consistent with the Federal constructions of what "should" versus "shall" means, but what are we doing in the Texas law about what "should" and "shall" means, statutory and common law?

MR. ALEXANDER: Well, we tried in restyling the rules any place where something was mandatory under the current Texas rules we tried to use the word "shall." Is that right?

HONORABLE SARAH DUNCAN: But you've changed this.

PROFESSOR DORSANEO: "Must," we tried to use "must" if it's mandatory.

HONORABLE SARAH DUNCAN: So it's not mandatory to construe the rules to effectuate fairness of justice in Texas. It's only -- what's the word, admonitory?

HONORABLE ANA ESTEVEZ: Suggested.

MR. GILSTRAP: Hortatory.

MR. ALEXANDER: Again, we mirrored what the

Federal rule had done.

HONORABLE SARAH DUNCAN: I think all of my comments are -- that's going to be cycling, Herb Schaker would say, "But, Judge, we've always done it this way," so it's just a -- I don't think it fits with Texas statutory or common law on "shall" and "should" in Texas; and if I were writing a dissent where the majority had construed a Rule of Evidence to denigrate fairness I would like to be able to say that a rule says "shall," not "you may" or "you should."

CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: Generally I agree with it that, you know, the (a), (b), (c) convention, which basically says you should never use the word "shall," should use some other word because "shall" is inherently ambiguous, and even though you see it in a lot of statutes even, but that's just not a good idea to use it. Going to "should," though, I'm having more trouble with that. That's a newer version for me.

HONORABLE SARAH DUNCAN: What does "should" mean? Ought?

MR. MUNZINGER: We can't hear you.

PROFESSOR DORSANEO: I don't know what it means.

HONORABLE SARAH DUNCAN: "Should" means

ought, right? You ought to do this, but if you don't, that's okay.

PROFESSOR DORSANEO: And I could see in maybe a Federal system, you know, Federal judges, basically a lot of the Federal Rules of Procedure, for example, say that a Federal judge can do what she wants, okay, but that's a whole different game than the game we're in.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, yeah, I think there's a question about the meaning, but here the distinction I would draw is when we say "must" in a rule it's something that's enforceable. This isn't enforceable. It's too vague.

PROFESSOR DORSANEO: Well, I don't know.

CHAIRMAN BABCOCK: Okay. Lisa, you wanted to say something, I can tell.

MS. HOBBS: But on Yelenosky's point that you change this to "must" and the effect of a Rule of Evidence seemed harsh, then is it an abuse of discretion to have done it, which is not the case. This is saying when you can you should try to ensure justice, but if you said "must" in this context it would mean that sometimes when that really pains you to follow the rule, you shouldn't follow the rule, and I don't think that's what

we want to tell trial judges.

HONORABLE STEPHEN YELENOSKY: You can use "will." It's better than "must."

CHAIRMAN BABCOCK: Okay. Anything else on 102?

MR. LOW: The original --

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: The original rule in Federal court said "shall." The Federal court changed that to "should." They were instructed to follow where they could the Federal rule, so they followed what the Federal said is "should," but the original -- the committee -- the rule originally in Federal court was "shall." It was changed to "should."

CHAIRMAN BABCOCK: Okay. Anything else on 102? All right. Let's go to 103, "Rulings on evidence." You want to maybe, Fields, tell us if there's changes to the Federal adaptation of 103?

MR. ALEXANDER: I'm looking right now, hold on. I'm sorry.

HONORABLE STEPHEN YELENOSKY: There is on timing.

MR. ALEXANDER: I think it is different.

HONORABLE STEPHEN YELENOSKY: It is on when you have to offer proof.

MR. ALEXANDER: (c) is different, right. That's right. I think (c) and (e) are different, and I believe the others mirror the Federal.

CHAIRMAN BABCOCK: Okay.

MS. GREER: Actually, I think there is a change in (b). This is Marcy Greer.

MR. ALEXANDER: Yes, there is. Sorry.

MS. GREER: (e) is what I hope bringing to the Federal system that once you've had, for example, a Daubert hearing outside the presence of the jury and the judge makes a definitive ruling, you don't have to renew that again at trial to preserve error, which is different from state court, and so I welcome that change, but I want to make sure that it was intended so that we can rely on it.

PROFESSOR DORSANEO: You need to send them a text and say I can't hear.

CHAIRMAN BABCOCK: Hey, Alex, what's your mobile number?

Can you speak up a little bit?

MS. GREER: Sure. In Rule 103(b) -- is this better?

HONORABLE SARAH DUNCAN: Stand up. Speak from your gut.

MS. GREER: Is this better?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Yeah.

MS. GREER: 103(b) now says that you don't have to renew an objection if the court has definitively ruled pretrial or outside the presence of the jury, so what that means in Federal court is if you have a Daubert hearing and the judge makes a definitive ruling that this evidence is or is not coming in, you don't have to keep renewing it at trial to avoid waiver, and that is a change from the way it's been in state court, and I hope that's intended. I think it's a good change, but I want to make sure that, you know, it doesn't slip in that way.

PROFESSOR GOODE: This language comes out of current Texas Rule 103(a)(1). Look at the last sentence of Texas Rule 103(a)(1). That's what's in (b).

MR. ALEXANDER: It captures the difference in part between a motion in limine pretrial and a motion to exclude evidence pretrial. The motion to exclude evidence does preserve the issue for appeal, and a motion in limine does not.

MS. GREER: I actually understood that you have to renew it again at trial even if you got a definitive ruling.

MR. ALEXANDER: On limine you do. On a motion to exclude, if you get a ruling on a motion to

exclude evidence pretrial you've preserved that issue.

MS. GREER: Okay.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah. McArdle, that was one of the problems that McArdle says in a motion in limine you have to renew it. The Federal court you don't, so that's how we differ from *McArdle vs. Hartford*, way back there, so it's not just your expert, but Texas law has been different from Federal in that regard under *McArdle vs. Hartford*.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, we don't have a rule for a motion in limine, and we ought to have some coverage of the subject if we're going to retain the distinction between preliminary rulings and definitive rulings.

MS. CORTELL: I do agree with Fields that --

PROFESSOR DORSANEO: I agree that what he said is right, but I don't agree that it's good rule writing.

CHAIRMAN BABCOCK: Yeah. Nina, you can talk, but if you talk loudly.

MS. CORTELL: Okay. Well, I was just agreeing with Fields.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: This is a restatement of the existing practice in Texas, in my view.

CHAIRMAN BABCOCK: Can you hear him?

MR. ORSINGER: This is a restatement of existing practice, and I know that there's some confusion about exclusion of evidence in a limine order; but technically a limine order merely says approach the bench and get permission before you broach the subject with the jury, and that's entirely different from ruling that evidence is suppressed, excluded, inadmissible, or whatever; and so I think practitioners should be cautious that a limine order is not an exclusive order at all; but I don't think we ought to rewrite the rules. This has been the rule since we adopted these rules, I believe; and while it's wise for practitioners to be cautious about the difference, I don't think that it -- I don't think that we need to warn them here that a motion in limine is not covered by 103(a)(2). Now, I'm not disagreeing with Bill that maybe we ought to have a rule for a motion in limine. When I was a young lawyer it always mystified me what motion all these people were filing, which I couldn't find evidence of except in his book.

PROFESSOR DORSANEO: And where is limine after all?

MR. ORSINGER: So I'm open to that

suggestion, but I don't think we ought to tinker with this at all.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: This is a question. Fields, at the beginning you said what your charge was, and I'm unclear if your charge was to keep the language of the -- or the substance of existing Texas Rules of Evidence or to -- when they differed from the Federal to consider whether to adopt a different substantive rule for us simply because the Federal rules have it. Is it either of those?

MR. ALEXANDER: Let me try to answer your question, and if I didn't, just tell me. When the Federal -- the current -- or the old Federal rule, the pre-restyled Federal rule was identical to the current Texas rule, we would adopt the Federal restyling. We obviously would look at it, but I believe in every case we adopted the Federal restyling effort. When the rules differ, for any reason, we would -- we would use the stylistic effort behind the Federal restyling effort and the rules that they employed in terms of modernizing and simplifying the language and restyle the Texas rule in that vein with a clear eye towards not effecting any substantive change.

HONORABLE STEPHEN YELENOSKY: Okay. That

does answer the question, and that will keep -- will keep me from talking about why we require the offer of proof to be done before the charge is read, for example, because that's not in the Federal rule, so the answer to that is that wasn't your charge.

MR. ALEXANDER: That's exactly right. There were two rules where we thought that it was worth presenting two versions of this to the Supreme Court Advisory Committee because to us the current Texas rule didn't necessarily mirror actual practice in state court, but other than those, which we presented in alternate versions, that was exactly our charge.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I kind of like the word "definitively" in (b) in the Federal rules that you took out, and I think part of the problem is that the phrase "rules that the evidence is admissible" can sometimes cause some mischief. A motion in limine is generally not viewed as a ruling that the evidence is admissible, but a motion to strike causes some confusion. If the judge literally just denies the motion to strike, that means the judge has not decided it's admissible. He's just decided it's not inadmissible at this point. It's not really clear that that's a definitive ruling, but under the Daubert line of cases, at least in the Daubert

context we treat a motion to strike as preserving error, but for other motions to strike you could argue that it does not preserve error because it's not a ruling that it's admissible. It's only a ruling that it's not inadmissible at this point. So I think the word "definitively" is helpful here, although it does say "ruling," and so maybe you don't really need an adjective, but I think that adjective makes it a little clearer that the court is not waffling and is going explicitly with the idea that I'm letting it in.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I agree with Harvey 100 percent. I didn't notice that the Federal rule -- I'm having to go place to place here -- I didn't notice that the Federal rule uses the term "definitively" here, but I think in 103(b) as restyled, I think it clearly is meant to mean -- the word "rules" is clearly meant to mean "makes a definitive ruling," you know, not a preliminary ruling. And we have this concept of preliminary rulings. It's very vibrant.

CHAIRMAN BABCOCK: Yeah. Yeah. Richard.

MR. ORSINGER: On subdivision 103(a) -- 103(c), where it says that you must make your offer of proof before the court reads the charge to the jury, this is an area of uncertainty in Texas law when you don't have

a jury, you have a bench trial, and there is no rule that tells you what the cutoff time is for offer of proof in a bench trial, and even though I've been searching for it for decades I've never found a case that told us when that cutoff is, and now is a perfect opportunity for us to answer that question if we're willing to. I personally think it should be before the court renders judgment. I think that's the most reasonable cutoff time for an offer of proof, but I don't want this opportunity to fix this problem slip past without mention. Probably there are more nonjury trials than there are jury trials in Texas, and we don't know when your deadline is, and we probably should decide and tell everybody.

CHAIRMAN BABCOCK: So you put on all the evidence. The judge says, "I'm going to take it under advisement." He sent you a letter, sends you a letter, says, "I'm going to find for the plaintiff, you know, in the amount of $50,000. Please prepare an order or a judgment," so then that's the time when you've got to go in and make your offer?

MR. ORSINGER: No. Under your scenario the letter was the rendition.

PROFESSOR DORSANEO: He changed his question for him.

CHAIRMAN BABCOCK: Well, that's a trick.

MR. ORSINGER: No, I mean, that's the truth. You just rendered by letter, and maybe this is too much of a discussion to have on the record for the first time with everybody listening, but you know --

CHAIRMAN BABCOCK: Not only that, we're going to post it.

MR. ORSINGER: You know, a jury verdict comes back because the foreman stands up and gives it to the clerk and all that.

HONORABLE SARAH DUNCAN: Foreperson.

MR. ORSINGER: Foreperson, yes, excuse me, but rendition of a judgment is really some kind of utterance by the judge, either oral or in writing, but it's not the same and usually isn't the signing of the final judgment, and we ought to pick a time when the offer of proof would -- should be made, but it makes sense to me that the offer of proof should go to the judge before the judge makes up his or her mind finally, but we could do it -- we could say that it will be done before the court loses plenary power. Any rule is okay. I'm just suggesting now is our chance to tell all the people that are doing the nonjury trials what their deadline is for an offer of proof.

CHAIRMAN BABCOCK: Lisa really wants to answer this question for us.

MS. HOBBS: I have done a post-judgment offer of proof where I got steamrolled by a judge, and I was very grateful to have the opportunity to do a post-judgment offer of proof and protect my record about what I would have shown had the judge followed proper procedure, and I would hate to take away that opportunity. I would support a rule that says "before the trial court's plenary power." If we're going to go here I would support that rule, but I would not support a rule that says I have to get my offer of proof in before a trial court renders judgment after a bench trial, because you can get steamrolled.

CHAIRMAN BABCOCK: Steamrolled in what way? What do you mean?

MS. HOBBS: Well, I don't want to talk about the case because --

CHAIRMAN BABCOCK: No, don't talk about the case. Just talk generically about steamrolling.

HONORABLE STEPHEN YELENOSKY: I didn't steamroll you.

MS. HOBBS: You did not.

HONORABLE DAVID EVANS: Okay, it was me, but that's all --

MS. HOBBS: I think the party came down there with some -- we didn't think it was going to be an

evidentiary hearing, and the party came down there with some evidence that we could have rebutted had he given us time, and we asked him, "Don't make this into an evidentiary hearing, that's not what we were anticipating," and he ruled right then that day without giving us the time, and so I had to come back in and show the record -- you know, what I would have shown had he given us the proper opportunity to present evidence at a hearing.

CHAIRMAN BABCOCK: Yeah, I was going to offer Richard that hypothetical.

MR. ORSINGER: I'm really indifferent about when the deadline is. As long as we have one we'll just all follow it.

HONORABLE STEPHEN YELENOSKY: Why are we discussing it after what Fields said?

MR. ORSINGER: Why am I discussing what?

HONORABLE STEPHEN YELENOSKY: This substantive change.

CHAIRMAN BABCOCK: When they calm down you can talk.

MR. ORSINGER: Because this is the first opportunity that I've had since I've been on this committee to raise this subject, which has been a thorn in my side.

MS. ADROGUE: For 19 years.

MR. ORSINGER: Really, the truth is we don't tell the lawyers who are trying most of the cases what their deadline is for their offer of proof, and I would ask the question why? Let's just make up a rule and --

HONORABLE STEPHEN YELENOSKY: I agree with you, but I thought the ground rules were and the work they've done is not to address that here now.

MR. ORSINGER: Oh, well, I understand that they did not come here to solve all the problems.

HONORABLE STEPHEN YELENOSKY: Right.

MR. ORSINGER: And so maybe I'm out of order by saying this is a problem we've had for 50 years, and we can simply solve it in a very simple way, so can we just consider it while we're pushing this project through?

HONORABLE STEPHEN YELENOSKY: There are going to be substantive requests on every rule then.

MR. ORSINGER: Not from me, not from me. I'm saving up only the really important ones.

PROFESSOR DORSANEO: I'm making no promises.

MR. ORSINGER: I've been wanting a rule like this for 20 years.

CHAIRMAN BABCOCK: Yeah, Fields wants to speak to it, then Scott, and then Richard Munzinger.

MR. ALEXANDER: I'm seeing replay now what

we saw in many of our committee meetings, and that is ad hoc desires to reframe a lot of the rules and in a lot of cases make potential improvements to the rules; but every time we started to spin out of control like that, we would revisit our charge, which was as I've explained to Judge Yelenosky. So my respectful suggestion is that we try to work through as many of these with questions y'all have as to what we did and why we did it and you note potential substantive changes for possible referral to the rules committee or for consideration whenever.

CHAIRMAN BABCOCK: Okay. Thanks, Fields. Scott.

MR. STOLLEY: I agree with the idea that there should be a deadline. I think Richard's proposed deadline could create a problem with the TRAP rule that speaks to formal bills of exception, because it says the judge can sign one of those up to 30 days after judgment, I believe, so there probably would be a conflict between his deadline and that deadline.

HONORABLE STEPHEN YELENOSKY: Well, there's a point of order here. Are you accepting his suggestion, because people are going right back to talking about substantive issues?

CHAIRMAN BABCOCK: That's because he had something to say. I think we all know the idea here is to

create a record for the Court to consult and consult more carefully the things it finds useful and disregard the things it finds are not as useful. After today in consultation with the members of the Court and the rules attorney and staff, we may recalibrate for tomorrow, but for right now, it's a free-for-all.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yes.

PROFESSOR DORSANEO: One of the things that would be a good suggestion to consider in the future in the same paragraph would be -- or perhaps in a different paragraph, but it's in the same ballpark anyway, is telling lawyers whether they need to reoffer what's elicited on the bill or whether they don't, and if it's a -- if it's an offer of proof in the form of a concise statement, do you need to somehow offer that, huh, in order to finish the job, because the cases say you do, and the rule is ambiguous on the point. I don't -- I read lots of records. I'm an appellate lawyer. I rarely see this done right, okay, when somebody is making an offer of proof. It's rarely done right. The lawyer does something, and looks at the judge and goes --

CHAIRMAN BABCOCK: Now, that's not demonstrated in the record. Richard Munzinger.

MR. MUNZINGER: I would just respond to

Richard Orsinger. I don't think we need to be putting procedural things in the Rules of Evidence.

CHAIRMAN BABCOCK: Speak up.

MR. MUNZINGER: I don't believe that we need to be putting procedural suggestions or deadlines into Rules of Evidence. It will unnecessarily complicate them and raise questions as to whether we did a procedural comment or rule or addition in rule X, why not in rule Y? We've gotten along well I think under the Rules of Evidence without saying when something has to be done as a matter of procedure. You're imparting procedure into evidence, and these are evidence rules.

CHAIRMAN BABCOCK: Okay. Yes, Justice Brown.

HONORABLE HARVEY BROWN: Oh, I just want to point out for those who haven't noticed that the Federal rule is very different in subpart (c) than it is here, and that is in the Federal rule the trial court has a lot more discretion. In other words, the trial court can say, "I'm going to do the offer of proof by statement rather than question and answer"; whereas in state court if they ask, the trial court is required to do it by question and answer. Now, that is preliminary to my comment about the second sentence in the draft of (c). I don't know why we need the second sentence when the procedure is laid out

pretty clearly that the court must allow the offer of proof and when the court must do it, because I don't know what the court would say.

Now, in our old rule we said, "The court may add any other or further statement." In other words, that the court was supplementing the record somehow. I've had a lot of trials, and I've never seen a judge supplement the record with what the offer of proof is. If the judge is just being told he can say something or she can say something, well, clearly the judge can say something anyway. We don't need a rule to say, "Judge, if you want to comment you can." So I find the second sentence a little confusing and distracting from what that section is really trying to do, which is to tell them when to make the offer of proof and whether it's in question or answer form or a statement, so maybe you could tell me why you took out the word "add" or what you think the second sentence really accomplishes.

MR. ALEXANDER: Well, first of all, I agree with your predicate that the judge can say whatever the judge wants to say. Our intent here was merely to modernize and try to restyle the current language. Obviously the current rule has language that you could argue was superfluous with regard to the court adding statements regarding the character of the evidence made in

the bill, so our effort was to modernize it, but obviously to retain that language, not to delete it, since we weren't trying to make any substantive changes to the rules.

CHAIRMAN BABCOCK: Justice Brown, you were speaking about 103(c), correct?

HONORABLE HARVEY BROWN: Yes.

CHAIRMAN BABCOCK: When you said the second sentence.

HONORABLE HARVEY BROWN: Yes.

CHAIRMAN BABCOCK: Okay, good. And, by the way, I misspoke a second ago. We are not going to continue with this tomorrow morning. We're going to do the indigency -- indigent affidavit tomorrow morning, so we will finish this hopefully in October at our meeting. Yeah, Lisa.

MS. HOBBS: On the last two sentences of subsection (c), you have modified how we typically say "at a party's request" or "upon the judge's motion" or upon -- let's see.

MR. ORSINGER: Initiative, I think we say "on the court's own initiative."

MS. HOBBS: I think it usually just says "at a party's request," comma, "or on the judge's own motion." Is that how it's usually worded in the current rules?

MR. ORSINGER: I think it says "the court's own initiative."

MR. ALEXANDER: The current rule says "the court may or at the request of a party shall."

MS. HOBBS: Oh, "shall," okay. So my point is when I read those two sentences together, "At a party's request the court must direct a question and answer or the court may do so on its own," when you put that as a separate sentence it sounds like the court would be the one doing the question and answer, and I think you mean the court is the one who can take the initiative to require the parties to do a question and answer. And it's vague as it's currently written. Even though it sounds better and is more modern I think it's a little vague here, but maybe that is your intent. Maybe you think the court is going to do the questioning.

MR. ALEXANDER: No, that was not our intent. Our intent was to modernize the language, and there are a few other instances like that, which is why we thought it was important at the beginning of these rules to have a prefacing statement that clarified that no substantive intent was changed, but our intent was merely to modernize the language with regard to when question and answer form of offer proof would be acceptable on a bill.

MS. HOBBS: I think if you said, "At a

party's request or at the court's own initiative," comma, and then strike the fourth sentence, the last sentence.

CHAIRMAN BABCOCK: Gene. Gene, you might want to move to the right just a little bit, because I couldn't see your hand.

MR. STORIE: I'll jump up and down. No, I just see a simple typo omission in (c), first sentence. It should be "as soon as practicable." It just says "as soon practicable" now.

MR. ALEXANDER: That's true.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I've got only -- this looks to me like it's an oversight, but in that same second sentence, "The court may make any statement about the character or form of the evidence, objection made, the ruling." I guess it's not obvious to me that it will be obvious to everyone that that has to be outside the presence of the jury. Huh?

MS. HOBBS: I think so, because (d) advises us to make sure that we don't talk about inadmissible evidence outside of the presence of the jury.

PROFESSOR DORSANEO: So you think it's obvious enough?

MR. LOW: Yeah, or may at that time, you

know.

PROFESSOR DORSANEO: Okay.

MS. HOBBS: I think so, because it's whatever is in the offer of proof is going to be inadmissible evidence. I mean, the judge is ruling it to be inadmissible. That's why you're --

CHAIRMAN BABCOCK: Buddy.

MR. ALEXANDER: By the way, the language, where the court may do so on its own that you were asking about, I believe that there is another version of the Federal restyled rules that uses that -- that form, but I'm trying to figure out where it is. Right now I can't recall which rule it is.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: That's a Brian Garner thing. He's written some of the Rules of Civil Procedure in the same -- you remember, weren't you there when he was rewriting -- that's a Brian thing.

MS. HOBBS: It's vague in this context.

HONORABLE SARAH DUNCAN: I mean, I agree with the comments that it implies that the court is going to do the questioning, but that's just a Brian thing. As are most of these.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: The evidence rules have always

been criticized for encompassing procedure, but --

CHAIRMAN BABCOCK: Speak louder.

MR. LOW: -- the evidence rules have to have some procedure for admitting and denying evidence, so there's procedure written in that's all over, and you can't get around it, so most of the procedural things are procedures pertaining to evidence.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: I had the same reaction to that section because in the Federal rules, subsection (c) has two parts. One is that Federal judges can comment on the evidence. They can say, "I don't believe that witness for a second," in front of the jury. In Texas it's always been the opposite, and the way that we've restructured it, we either need to make it clear that we're still going under the Texas judges can't comment on the evidence in front of the jury, because it's not clear to me, and I was going to make the same comment that you did.

PROFESSOR DORSANEO: Okay. So there.

MR. ALEXANDER: Just so it's clear, the current restyled Federal rule with regard to this has the same language about the court being allowed to make any statement about the character or form of the evidence.

MS. GREER: But that's not limited to an off-the-record communication. It's two separate parts in

the Federal rule. The court can make a statement, and they do, on the evidence in front of the jury in Federal court. Then it says if it's not -- the second part of that rule deals with just offers of proof. We had similar language in our rule, but it was in the context of an offer of proof, and so if we're going to continue to have Texas judges not comment on the evidence in front of the jury, we just need to make it clear that that's outside the presence.

MR. ALEXANDER: Right.

MR. LOW: Well, what if you put "and at that time the court may make any statements," "at the time" meaning outside the --

CHAIRMAN BABCOCK: Outside the presence.

MR. LOW: -- presence of the jury at that time may make such statement.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I think one of our problems with (c) is you've got sentences that violate one of Brian Garner's own best rules. There's about three different things that are being addressed in that first sentence, and they -- they get in partial conflict with each other, depending on which half of one of them is applicable to which half of another. We need to break out "must allow a party to make an offer of proof" from when must this be

done, from how must this be done if you have a jury trial versus if you don't; and you might get different ways, depending on which way you do it; and I just think as a drafting exercise, once this gets -- since this is going to have to be rewritten anyway, I would strongly encourage whoever does it to break these things out sentence by sentence for clarity.

MR. ALEXANDER: Yeah, we just didn't -- we certainly looked at that, and there were places obviously where we did break things out into separate sentences. In this instance, it was our conclusion that this first sentence was not -- was clear as written.

CHAIRMAN BABCOCK: Okay. Any other comments on Rule 103?

HONORABLE KENT SULLIVAN: 103?

CHAIRMAN BABCOCK: 103. Yes. Kent.

HONORABLE KENT SULLIVAN: I want to go back to (b) just a moment on something I think is a fairly serious issue. Should the language in 103(b) be construed as the court effectively granting a running objection, even if it did not explicitly do so? My question clear or not?

MR. ALEXANDER: Yes, it is clear.

HONORABLE KENT SULLIVAN: And don't you think that's something that needs some degree of

clarification?

MR. ALEXANDER: Well, I certainly think when and how you make a running objection is something that could use more clarification in Texas law. I've felt that way standing at counsel table many times.

HONORABLE KENT SULLIVAN: And that's exactly why I bring it up is because it does seem to intersect, albeit only if you raised an objection outside the presence of the jury, which makes it somewhat ironic. If you just happened to have the good fortune to do it outside the presence of the jury and you get a ruling, it seems like arguably the remainder of the language might grant you a running objection because, you know, you do not need to renew it, but I'm not entirely clear on the effect of the rule, and I was curious whether in looking at the applicable Federal history if there was an answer to that.

MR. ALEXANDER: I don't know about the applicable Federal history. I can tell you that with regard to this restyled rule it was not our express intent to alter or comment on the making of running objections, but merely to clarify existing Texas law in the current rule with regard to the ability to preserve error with regard to evidence. So obviously, as was stated earlier, current Texas practice allows you to preserve error on an

issue outside the jury's presence if you make a formal motion and get an actual ruling, and all we're doing in this is restyling that, but without trying to change it in any way.

CHAIRMAN BABCOCK: Yeah, Marcy.

MS. GREER: I think the problem could be fixed by your suggestion of putting the "definitively" back in like the Federal rule has, because if you use the word "definitively" I think that covers a running objection. Because I have the same worry, you know, when they grant you a running objection, do I have anything at that point; and if you say "definitively," which is in the Federal rule, it covers it.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I don't think that makes it clearer. I'm not sure there is an issue that's been reviewed on this for somebody -- are there cases where somebody asked for a running objection and the court said "sure" and then the court of appeals said, "You couldn't have a running objection after the judge told you you could, you had to object each time"? Is there any case that says that? And if not, if not, we -- as far as I know from other judges, we all do it, and there's not a problem.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I think there is a lot of misinformation in the CLE literature that says there are no running objections in Texas, but in *Richardson vs. Green* the Supreme Court recognized that in civil cases -- and I don't remember the case where the Court of Criminal Appeals recognized it, but I think the procedure is valid. The danger is that it has to be renewed with every different witness and it has to be renewed if the witness changes the subject matter of the testimony, and so most of the cases that I'm seeing now where waiver occurred is because the objection was made to a certain opinion or a certain line of questioning and then it got slightly changed to something else and they didn't renew it, and lo and behold, they waived it. I think that's the danger.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Why does this rule have to limit it to the objections made outside the presence of the jury? Why shouldn't the same rule apply if the evidence is offered and ruled admissible in the presence of the jury, and why should the party have to keep on objecting every time they offer it? Why shouldn't it apply to whether it's outside the presence or in the presence of the jury?

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I was just going to say I

would not put in the word "definitively." I think --

CHAIRMAN BABCOCK: Say it so they can hear.

MS. CORTELL: I would not insert the word "definitively." I think it creates an ambiguity. Once you have a ruling you should then have the comfort that you're not waiving anything by not renewing your objections thereafter, and I do think that's in keeping with current Texas law.

CHAIRMAN BABCOCK: Okay. Anything else? Yeah, Judge Evans.

HONORABLE DAVID EVANS: I'd like to go back to Lisa's comment about when you make an offer of proof, and I'm not sure that I can address directly the abusive judge problem, never having been one, but I'll try anyway. The natural point -- and it's not in the Federal rule, says "substantive." The natural point to make an offer of proof is before the close of evidence, and that's when the trial judge should be informed that the party wants to make a proffer. That's in a bench trial or in a jury trial.

It's not before the charge is read, but it's after rest and then to the close point. "I have an offer of proof I need to make," and that's when the court should be informed of it. Now, I'm sure that in Lisa -- Ms. Hobbs' case, she made that steamrolling judge well aware

of the fact that she had a proof that she wanted to bring later, and so that meets with that rule, but that's what the Rule of Evidence should be. Otherwise, it's a difficult management problem. You could get the charge all prepared, then you could hear an offer and you say, "I need to reopen and bring the jury back in," and you schedule, and we live on schedules. We try and accommodate the voter, but it also causes the other problem to the other party. They need to know who they need to go get to rebut that testimony, so that is a substantive change, I guess, but it is the natural point to cutoff offer of proofs.

CHAIRMAN BABCOCK: Okay.

MR. ALEXANDER: By the way, with regard to the issue of definitive, that language "definitive ruling" is in the old Federal rule, not the current Texas rule, so the Feds kept that language in their restyling. We obviously didn't introduce it into our restyling because it wasn't in our current rule, unlike the Federal.

CHAIRMAN BABCOCK: All right. What about Rule 104? Any comments?

MR. SCHENKKAN: Yes.

CHAIRMAN BABCOCK: Yeah, Peter.

MR. SCHENKKAN: The first, what does -- this is in 104(a). What does "preliminary question" mean?

Second, also in 104(a), why once we're recasting the wording to say whether a witness is qualified and so forth, restructuring it that way, why do we say "the privilege exists" when I assume what we mean is "applies." Privilege certainly exists. There is an attorney-client privilege. It may or may not be applicable here.

MR. ALEXANDER: With regard to the "privilege exists" language, that's the -- we mirrored what the Feds did in that regard.

MR. SCHENKKAN: I understand. Again, I'm making a point about why I think mirroring what the Feds did here is unhelpful.

MR. ALEXANDER: Right. From our standpoint, unless the Federal language looked unclear or out of step with Texas law, we would use it, and in this case we didn't think "the privilege exists" caused any mischief.

MR. SCHENKKAN: But we've got a past to not be limited to that. I get it that that's not a mistake under your charge.

MR. ALEXANDER: Right. I'm saying there was a little bit more to it than that. We didn't just parrot what the Feds did. We also looked to make sure we didn't think it caused any mischief with regard to Texas law or other current Texas rules, and in this case we didn't.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Why -- why isn't the information that's in 101(e)(1) in 104?

MR. ALEXANDER: I apologize, I didn't hear the first part of that.

PROFESSOR DORSANEO: Okay, let me try again. 101(e), my favorite heading, "Exceptions," okay?

MR. ALEXANDER: Right.

PROFESSOR DORSANEO: (e)(1) says that the Rules of Evidence don't apply to that preliminary question. Why doesn't Rule 104 say that? Wouldn't that be a nice place to provide that information to a lawyer?

MR. ALEXANDER: 104 says -- I'm trying to catch your point. You were looking at 101(e).

PROFESSOR DORSANEO: I have to look back -- I have to remember to look back to 101 and remember the exceptions --

MR. ALEXANDER: Right.

PROFESSOR DORSANEO: -- covers this subject, okay, and I might not remember to do that if I was in Rule 104.

MR. GILSTRAP: It's in the last sentence of 104(a).

MR. ORSINGER: Look at 104(a).

PROFESSOR DORSANEO: (a)?

MR. ORSINGER: Look at this last sentence

here.

PROFESSOR DORSANEO: Okay. So that proves --

MR. ORSINGER: "In so deciding, the court is not bound by evidence rules, except those on privilege."

PROFESSOR DORSANEO: Pardon me for saying what I just said.

MR. ALEXANDER: No, that's all right. And in addition, the current Texas Rule 101 refers to 104 as well, so that's why we put it in both places.

PROFESSOR DORSANEO: Okay, good. Excellent work. It proves that I don't see very well or hear very well anymore.

CHAIRMAN BABCOCK: All right. 104, any other comments about 104? Frank.

MR. GILSTRAP: In 104(e) it says, "This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence." What's the purpose of "before the jury"? I know that it's in the current rule, but it implies that it does limit a party's right to introduce evidence in a bench trial. I mean, it's confusing. What's the purpose of the limitation of the words "before the jury"?

MR. ALEXANDER: We kept it in because it's

in the current version of the rule, and rather -- you know, if we had tried to modify every place where we thought we could improve upon the current language in the rule, you would have gotten a very different draft here, so it was our express intent not to alter any -- not to make any substantive change; and frankly, if we had taken those words out, the question would have been why are those words no longer in here and what substantive change is being meant by that?

MR. GILSTRAP: Well, it's --

MR. ALEXANDER: And it's in the Federal rule as well.

MR. GILSTRAP: As written it's confusing because it applies to that -- if you're not before the jury, the rule does limit it, and I don't think that's the intent.

MR. MUNZINGER: How would the rule be interpreted in an administrative proceeding before an administrative law judge with the language "before the jury"? I appreciate why you kept it in, but I agree with Frank. I think it's surplus and probably needs to be removed.

CHAIRMAN BABCOCK: All right. Any other comments about 104? Tom, don't stretch like that. I almost called on you. Anything else on 104? Okay. Let's

go to 105, evidence that is not admissible against other parties or for other purposes. Any comments on 105?

HONORABLE HARVEY BROWN: Well, if we weren't -- I'm sorry.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: If you weren't making any substantive changes, why did we add (b)(1), which covers admitting evidence when the current rule only covers excluding evidence, unless I've misread it?

CHAIRMAN BABCOCK: Is that rhetorical, or was that addressed to Fields?

HONORABLE HARVEY BROWN: No, I was asking the question to Fields.

MR. ALEXANDER: The answer is if you look at current 105(b) it does address the admission of evidence for a limited purpose, even though it's titled offering -- I mean, so we tried -- or certainly our intent was to mirror that in (1) and (2).

PROFESSOR HOFFMAN: And is that the reason why the Texas rule is being proposed as restyled is so different than Federal restyled rule?

MR. ALEXANDER: Yeah.

PROFESSOR HOFFMAN: Because the Texas rule already began differently?

MR. ALEXANDER: Right, the current version

is different.

PROFESSOR HOFFMAN: Could I repeat the same request? I can't remember who made it earlier. When there's a difference between the Federal rule and the Texas rule, to the extent that you can remember, and you may not, before we even begin talking about it could you take a minute to explain, if you can recall, why did the committee decide that -- you may not be able to all times, but if you can, that might help guide us a little better.

MR. ALEXANDER: Sure, Lonny, you're -- yes. The answer is I'll try to do that.

HONORABLE HARVEY BROWN: One other question. We've added the word "timely" in subpart (a). We added the word "timely" in subpart (b), and neither of those were in the old rule, but -- in (b)(1), but we didn't add the word "timely" in (b)(2).

MR. ALEXANDER: I apologize, you're looking at a previous version. The most current version that we circulated to Buddy Low's subcommittee, "timely" is not included.

HONORABLE HARVEY BROWN: All right. Thank you.

CHAIRMAN BABCOCK: Anything else on Rule 105?

MS. HOBBS: I may be slow, but what is (1)

saying?

MR. ALEXANDER: (b)(1)?

MS. HOBBS: Yeah. "The party requests the court to do so" -- I just don't even understand what the "if" and the "then" or the "if" and the --

MR. ORSINGER: I'm willing to take a shot at that.

MS. HOBBS: Okay.

MR. ORSINGER: Yeah, I think that what happens in a multiparty trial where evidence is admissible against some and not others --

MS. HOBBS: Right.

MR. ORSINGER: -- is that the evidence is offered without restriction against all the opposite parties, and then someone gets up and says "hearsay," but it was their own representative, so it was an admission of a party, and then another defendant gets up and says "hearsay," and it really is hearsay. Now, if the evidence is let in, I believe the current law to be that unless the jury is instructed to consider it only against party A and not against party B, party B has waived their objection, and it's in for all purposes.

MS. HOBBS: Yes.

MR. ORSINGER: And I think this is an effort to say, "Hey, if it's inadmissible as to you, you need to

ask the court to instruct the jury to disregard it as to you or else you've waived error."

MS. HOBBS: I agree that's probably what this was meant to say. I do not think this at all says that. I've read it three times. I don't really understand what it's saying.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: Yeah, I agree, it is confusing. I think the solution is we -- the structure in the rule again. We've got (a) addressing only limiting admitted evidence and (b) preserves error both when evidence -- limited evidence has been admitted and when it's been excluded. We need (a), (b), and (c). There needs to be a (b) that says if the court excludes evidence that is admissible against a party or a purpose then that sets up the preserving claim of error that will now be in (c) that says in that scenario if you want to be able to preserve your claim of error you've got to seek an instruction that says the jury can't --

PROFESSOR GOODE: That's in Rule 103.

MR. SCHENKKAN: Huh?

PROFESSOR GOODE: That's in Rule 103.

MR. SCHENKKAN: Yeah, I understand, but I'm saying that we've got a problem with people being able to read 105 because you've got two different sets of things

going on substantively when multiparty evidence is admissible against one party and not against other and when it's admitted and when it's excluded, and then the second problem is what do you do to preserve error, and the answer is different when it's admitted from when it's excluded, and so even if part of your answer can be found in 103, if you want to make 105 read in a comprehensible fashion you ought to break them out.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I don't understand the last part of 105(b)(1) where it says "and instructing the jury accordingly," comma, "the party requests the court to do so." That last phrase, "the party requests the court to do so" throws me. I don't understand -- I just don't understand it. I believe that's what she was saying. Maybe it's a question of structure or a question of appearance. It seems to me to be an effort to say the party must ask for the limitation, but it doesn't say that. I don't mean to be disrespectful, but I don't understand it.

MR. ALEXANDER: I can understand, frankly, the confusion that y'all raise on this, and why don't we take an effort at rewriting this one, (b)(1), 105(b)(1), and see if we can come up with language that satisfies what we need and makes it clear for everyone.

CHAIRMAN BABCOCK: Richard Orsinger. Thanks, Fields. Richard Orsinger.

MR. ORSINGER: I'm not sure I understood what Peter's concern was.

CHAIRMAN BABCOCK: His concern was he doesn't understand.

MR. ORSINGER: I'm always suspicious when I think I disagree with people, but --

MR. SCHENKKAN: And I rely on that very heavily.

MR. ORSINGER: I think that (b)(1) and (b)(2) are serviceable as they stand alone. (b)(1) says if evidence comes in over your objection and it's inadmissible, you better get an instruction. (b)(2) says if you're making an offer and it's rejected, you make a general offer and it's rejected, you better make sure you go back and make a limited offer against the person against whom it truly is admissible, otherwise you've waived it. I don't see that there's a third category. Maybe I need to spend a little time talking to Peter because I acknowledge that --

CHAIRMAN BABCOCK: Get Fields involved.

MR. ALEXANDER: We aimed higher than serviceable, so let us take another look at it.

MR. ORSINGER: I don't see that there's a

third category.

MR. ALEXANDER: I'm not sure a third category is needed, but I do see the issue raised with (b)(1), that it could be clearer.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, you probably don't need any help, but one way to -- things that are hard to follow in that last line are "the party."

MR. ALEXANDER: Right

PROFESSOR DORSANEO: Who are we talking about? And "do so."

MR. ALEXANDER: Right, I get it.

PROFESSOR DORSANEO: Do what?

MR. ALEXANDER: In looking at this through y'all's eyes I can see that -- let us take another stab at that.

MR. ORSINGER: Stab, now that was an interesting metaphor.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I just want to suggest that I think it is clear, so --

CHAIRMAN BABCOCK: Speak up.

HONORABLE JAN PATTERSON: I think it is clear, although you could -- if you were speaking to timing you could say "if when the court admits the

evidence." There may be a word that could be added there, but I want to speak on behalf of it. I think it does say what you intend, and it's clear to me.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, maybe it should be clear to me, but I think it at least needs a word between "accordingly" and "the party." I think the substance is that the party has to request the court to do so.

MR. ALEXANDER: Right.

HONORABLE STEPHEN YELENOSKY: And the court nonetheless admits the evidence without restricting it, so it should either say "and instructing the jury accordingly and the party has requested the court to do so" or "after the party requests the court to do so." It needs a word.

MR. ALEXANDER: Right. That may be -- that may be the only fix that's required, but I do want to take a look at it.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: You know, we have the same kind of preservation problem when you're offering evidence against one party and it's admissible for one purpose and not the other. If you make a general offer and the objection is sustained and then you offer it for a limited purpose, you must reoffer it for a limited purpose or you

have no complaint against the exclusion. This is a complicated area. We're not -- we're discussing multiparty preservation of error here without discussing partial admissibility against a single party. I know that we're not supposed to talk about how we might add to this, but I'll just point out for the record that we are telling them how to preserve error in a multiparty case but not in a two-party case, even though the procedural steps are identical.

PROFESSOR DORSANEO: Rules of Evidence are like that. They give you some solutions to some problems but not all.

MR. ALEXANDER: I'm not sure I understand that. I thought the rule addressed the issue. Tell me again what your concern is.

MR. ORSINGER: I thought that this rule addressed multiparty cases.

MR. GILSTRAP: It says "or for a purpose."

MR. ORSINGER: "Or for a purpose," then I withdraw it. I'm like Bill. I withdraw my comment, and y'all did a great job.

MR. ALEXANDER: You know what they say about blind pigs and acorns, don't you?

CHAIRMAN BABCOCK: Moving right along, anything more on 105? Then let's go to 106, remainder of

or related writings or recorded statements. Fields, is this a change? Is there a difference between state and Federal practice here? Or Federal rules, I should say.

MR. ALEXANDER: Yes, there is, and I'm trying now to refresh myself on that. It's just -- the only difference is the last sentence in our restyled Texas rule.

PROFESSOR HOFFMAN: Which was in the old Texas rule.

MR. ALEXANDER: Correct. Correct.

HONORABLE HARVEY BROWN: There's one other difference, and it's subtle, and I think I understand why you did it, but I want to ask about it.

MR. ALEXANDER: Okay.

HONORABLE HARVEY BROWN: In the Federal rule it says the -- it has the word or phrase "may require the introduction of the evidence." In other words, when I object I may require the other side to put that into evidence; whereas in the state version you did not use the phrase "require." You just said "may introduce," so you took "may require the introduction" and changed it to "may introduce." Why?

MR. ALEXANDER: Because the current Texas rule is written that way.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Fields, I often see attorneys confusing 106 and 107. Is there -- would it be a violation of your charge to change the title of that rule or those rules so that they understand the difference?

MR. ALEXANDER: No. It would not --

HONORABLE STEPHEN YELENOSKY: That would be my request. I don't have the title, but it's "at that time" issue.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I've tried cases in both state and Federal court where the judge has told me when I've attempted to take advantage of this, "You do that on your part of the case," and I just am curious whether or not there is any agreement with me that we ought to tell trial judges "You've got to do this. That's what the rule says when it says 'at that time.'" It is not optional. I'm told all the time, "Well, you do that when you're putting your case on."

"Well, but, Judge, the rule says you get to do it --"

"Do it when you're putting your case on. Get on with it."

MR. ALEXANDER: Both the current and our proposed restyled rules say "at that time."

MR. MUNZINGER: I understand that they say "at that time," but the judges that I have been in front of -- many of them, not all of them -- don't read it that way. They just say to heck with you.

MR. ALEXANDER: We could italicize that language if you like.

MR. MUNZINGER: Maybe we put a little thing, "This applies to judges, too."

MR. ALEXANDER: "This applies to you" footnote.

CHAIRMAN BABCOCK: Kent. Speak up, Kent.

HONORABLE KENT SULLIVAN: We ought to note in the rule that there's a contemplation of a contemporaneous offer. That distinguishes 106 and 107.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: Going to Richard Munzinger's point, I do think the Federal rule is a little clearer about this where it says "may require the introduction at that time." That seems a little more forcing to the fact that it should be done right then, not later during Mr. Munzinger's redirect.

HONORABLE DAVID EVANS: It prevents the judge from hiding behind "Well, I don't think fairness requires it to be introduced at this time." That's the basis for, quote, denying the contemporaneous thing and

avoiding the interruption of the examination, so the word "require" does have a little bit more emphasis with a trial judge than "a party may."

MR. ALEXANDER: Steve's desperate to speak over here.

HONORABLE DAVID EVANS: I don't know how --

PROFESSOR GOODE: The difference between the Federal and the Texas rules, which goes back to the drafting of the Texas rules originally 30 years ago, is that the Federal rule says the judge may require the party to introduce the other evidence, if contemporaneously -- if contemporaneous introduction is what fairness demands. The Texas rule when it was drafted, the drafters said, "We don't want to require the party to introduce the other side's evidence, but we'll allow the opposing party, let's try and get this other part in, to introduce it contemporaneous if in fairness contemporaneous introduction is necessary." That's all this rule says.

So a judge can say, "You do it later," because the judge is saying, "In fairness you don't need to do it now." So the "must" only applies if in fairness contemporaneous introduction of the evidence is required. If it's not then you get to do it later.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Which is why I

disagree with my colleague, because the judge has to make a determination about whether contemporaneous introduction is necessary, and so to say the judge must make that determination is not to say really anything.

HONORABLE DAVID EVANS: No, what I say is it may -- the word "require" has a little bit more emphasis than saying "the adverse party may introduce."

HONORABLE STEPHEN YELENOSKY: "May require," but they can't require -- may require any other party --

HONORABLE DAVID EVANS: It's just a difference of the emphasis on the statement to the judge, but it always comes down to a trial judge either says, "I either think this is fair to come in right now or not."

HONORABLE STEPHEN YELENOSKY: Right, yeah.

CHAIRMAN BABCOCK: All right. Anything else on 106? Anything else anybody wants to add? Well, then we'll go to 107, the rule of optional completeness. 107.

MR. ALEXANDER: Going once, going twice, thank you for your comments.

CHAIRMAN BABCOCK: When we get desperate we do -- we have often used that tactic. Are we desperate yet? We might be. 107.

MR. ORSINGER: When you do that I like to hear a train whistle in the background.

MR. ALEXANDER: There is no Federal

counterpart, by the way, to this rule.

CHAIRMAN BABCOCK: Have you changed it much from our current 107?

MR. ALEXANDER: Not intentionally. We have modernized it. Obviously we have not intended to change the substance.

CHAIRMAN BABCOCK: It looks -- maybe it's the type, but it looks shorter.

MR. ALEXANDER: It is.

MR. ORSINGER: Can I ask a question?

MR. ALEXANDER: You can, yes.

MR. ORSINGER: This may not be relevant to your drafting, but does this include a deposition, reading from part of a deposition, or is deposition handled by a different concept?

MR. ALEXANDER: It does include -- both the current rule and the new rule, look at the last sentence, does include a deposition.

MR. ORSINGER: Oh, I see that. I jumped ahead. I'm going to go last from now on.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: 106 and 107 are very similar, and I'm wondering why we shouldn't have 107 require that the optional completeness be done at the same time.

MR. ALEXANDER: That's because the current

107 doesn't have that requirement.

MR. HAMILTON: I know it doesn't, but I'm saying it makes sense if we're going to have 106 have the offer at the same time, we ought to have 107 do the same thing.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would say in my trial practice I've always tried to do it at the same time, otherwise you don't lose the continuity. I guess I didn't realize until right now that that was discretionary with the court. I would favor saying it, because if you do optional completeness two hours later or the next day it doesn't -- the continuity is not there.

CHAIRMAN BABCOCK: Yeah, tends to lose its effect. Judge Yelenosky, then Justice Brown.

HONORABLE STEPHEN YELENOSKY: Well, once again, that would be a substantive change, and now we're allowed to do that, but --

MR. ORSINGER: Today. Today only.

HONORABLE STEPHEN YELENOSKY: But even as to that substantive change, 106 has a requirement that the judge has determined in all fairness that it needs to come in right then.

MR. ORSINGER: Right.

HONORABLE STEPHEN YELENOSKY: And so the

judge could say "no," and then under 107 they bring it -- this entitles them to bring out any other part of a document that's been read partially. They can do it later under 107.

CHAIRMAN BABCOCK: Okay. Justice Brown.

HONORABLE HARVEY BROWN: Well, Rule 107 I don't think is meant to be limited to something that occurs at the same time. Under the first sentence a part of a conversation might be introduced, and somebody might call a witness later in the case who was the second party to that conversation, and under the rule of optional completeness that witness later in the case can testify about that portion of the conversation under the rule of optional completeness, so it doesn't have to be the same time. It can be a later witness or even a different document at a later time.

PROFESSOR GOODE: Right.

CHAIRMAN BABCOCK: Okay, anything -- yeah, Lamont.

MR. JEFFERSON: I'm just not understanding what 107 is. I've just never seen it operate like that. 106 is what I've always called the rule of optional completeness where someone is reading a part of a document, and it seems like the next sentence needs to be read or introduced in order to make the meaning clear at

the time that it's introduced, so you don't want the misperception lingering out there until you get the witness on your examination. Instead you either -- either you do it yourself or you require your opponent to read it at the same time.

107, I've never seen it operate in a trial where -- I mean, obviously in cross-examination you can bring out anything you want; and someone uses a part of a document in their direct and you want to cross-examine them on the next part of the document, I don't think you need a rule that allows you to do that. You can do that. So I don't see how this -- maybe I'm just misunderstanding what optional completeness is, but I've never seen it operate like it appears to be stated here in these rules.

MR. ALEXANDER: Steve's got --

HONORABLE STEPHEN YELENOSKY: I think I agree with that, I'm just saying they're different, and maybe we don't need 107. Again, that's a substantive change, but they are different.

CHAIRMAN BABCOCK: Yeah, go ahead, Steve.

PROFESSOR GOODE: When the Federal rules adopted Rule 106 way back originally, Rule 106 which only -- you'll notice, deals with written or recorded statements, was, in fact, an extension of the traditional rule of optional completeness, saying that if you've got a

written or recorded statement and the judge determines that contemporaneous introduction of the balance is required, the judge can so order. That went beyond the traditional rule of optional completeness, which did not require contemporaneous introduction. The Federal rules did not also include the traditional statement of the rule of optional completeness, which applies not just to noncontemporaneous introduction but also to nonrecorded or written statements.

So when the Texas rules were drafted, the original version and the version that's been in effect for 30 years in Texas has a Rule 106 which corresponds to the Federal Rule 106 but also added a Rule 107 to restate the traditional rule of optional completeness, and the origin of that is actually a provision in the Texas Code of Criminal Procedure, and so you'll notice Rule 107 applies not just to written or recorded statements, it applies to oral statements.

MR. JEFFERSON: I mean, I just say as long as we're simplifying and if there's not a Federal version, I would take out 107.

CHAIRMAN BABCOCK: Pete Schenkkan.

MR. SCHENKKAN: It appears from what everybody is describing about the practice to have been a complete failure, but the intent was sound. The intent

was to say that when you are dealing with a written statement or a recorded statement it is possible that contemporaneous fairness can outweigh the interruption in the proceedings, because it's just farther down on the same page to use the easy one of the written document; whereas, if the prior statement was an oral statement, you've got to bring in the other party to the conversation, so that the reason for putting it in two different rules and putting the contemporaneous in the written statement and the prior recorded statement is a sound reason. Apparently nobody thought it so.

HONORABLE STEPHEN YELENOSKY: Well, isn't it right, though, that they are different, but you don't need 107 because you can do that under the existing rule?

MR. SCHENKKAN: Well, may --

HONORABLE STEPHEN YELENOSKY: I mean --

MR. SCHENKKAN: Maybe, but then I get terrified of we take a rule out, we're saying it's making no substantive change, but nobody will believe us.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Well, and what you lose is act, declaration, conversation. That will be out. Because that's not -- 107 encompasses acts, declarations, and conversations. 106 only covers writing and recorded statements, so you're going to lose the rule of optional

completeness for acts, declarations, and conversations if you repeal 107 and just stay with 106.

HONORABLE STEPHEN YELENOSKY: But the other rules cover it. He just offered it.

MR. JEFFERSON: You're going to do that anyway. You're going to -- I've never seen anyone say, "I'm relying on Rule 107 to introduce this part of the conversation in my cross-examination of this witness," because only a portion of the conversation was discussed in direct.

CHAIRMAN BABCOCK: Justice Boyd.

MR. JEFFERSON: I mean, nobody is going to say, "I need 107 to introduce this piece of evidence," and I never heard a judge say "That doesn't come within 107, so I'm excluding it on cross-examination," which is pretty wide open anyway.

CHAIRMAN BABCOCK: Justice Boyd, then Rusty.

HONORABLE JEFF BOYD: I'm just wondering does 107 require the admissibility of evidence that would otherwise be inadmissible, like hearsay.

HONORABLE SARAH DUNCAN: That's my point.

HONORABLE JEFF BOYD: So the other letter on the related subject is all hearsay, and so it would not be admissible, but parties can rely on 107 to say, "But, Judge, you have to let it in because it's another letter

on the same subject between the same parties."

HONORABLE SARAH DUNCAN: That's my point. Thank you.

CHAIRMAN BABCOCK: Okay. Rusty.

MR. HARDIN: I know I came to the party late because I spent all of my day in an airport, but I've had 107 -- I've had 107 and used it, I mean, for the same thing we just talked about. It's a different situation. 106, as has just been said, is totally oral or a written statement. The others are acts and other events that we might want to get into, and I've used it to go into things on cross that originally was told I couldn't go into.

MR. JEFFERSON: I'll invoke Orsinger's "never mind," if there's a practical application. I've just never seen it, and I gladly yield.

CHAIRMAN BABCOCK: Judge Wallace.

MR. ORSINGER: That was Dorsaneo's "never mind."

HONORABLE R. H. WALLACE: Rule 106 says "that a party introduces," et cetera, "the adverse party at that time," and Rule 107 doesn't have that "at that time" language in it.

HONORABLE STEPHEN YELENOSKY: But that doesn't add anything.

HONORABLE R. H. WALLACE: Well, I agree, we

don't need it. I mean, it goes --

HONORABLE STEPHEN YELENOSKY: But we do need it if it allows in hearsay and without changing the substance, if that's the purpose, we should make that explicit, because no attorney knows that's what it's there for, and I --

CHAIRMAN BABCOCK: Apparently Rusty knows.

HONORABLE STEPHEN YELENOSKY: I didn't know.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I've been sitting here reading this, and I don't know if I'm ready to talk yet, but I'm talking.

MR. ORSINGER: We're ready to listen anyway.

PROFESSOR DORSANEO: The words "the part" bother me down toward the end. I would understand it better if it said "the evidence" rather than "the part," or maybe everybody else understands it. Huh? Why did you pick the word "the part offered"?

MR. ALEXANDER: Well, we -- to us it was clear, and it was also reflective of the current Texas rule, which is talking about when part of an act, declaration, conversation, et cetera, et cetera, is given, so in part we used it because the current rule uses "part" and in part we used it because we didn't think it was unclear.

CHAIRMAN BABCOCK: So that's the part that you understand or don't understand?

MS. ADROGUE: He partly disagrees.

PROFESSOR DORSANEO: Well, but the reason I have trouble with "the part" is that this second sentence is talking about "any other writing," so --

MR. ALEXANDER: Right. It's --

PROFESSOR DORSANEO: I have trouble seeing how this "any other writing" wouldn't be different.

MR. ALEXANDER: Are you on 106 or 107? I'm sorry.

PROFESSOR DORSANEO: 107.

MR. ALEXANDER: Yeah. Okay.

PROFESSOR DORSANEO: "Part" doesn't help me. I don't know.

MR. ALEXANDER: It's part of the predicate. At least as we wrote it or we understand it, was you can use this rule of optional completeness when whatever it is you're trying to introduce helps the -- will help the trier of fact understand the part that was offered in the first place that led to the rule of optional completeness.

PROFESSOR DORSANEO: But it could be another writing. I have trouble seeing how another writing -- you say, okay, this other writing is so significant that it's part of the writing that started this whole thing.

CHAIRMAN BABCOCK: Judge Yelenosky has the answer to your problem.

HONORABLE STEPHEN YELENOSKY: Well, I don't know that I have the answer, but now that I hear this is intended to bring in what wouldn't otherwise be admissible, at least under a hearsay objection, as I said, that should some way be explicit; but isn't it intended to limit it to a part, and that -- because we're doing a hearsay exception it has to be some part of that document; and if it is a part of the document, it automatically comes in despite hearsay objection; but the second sentence, you have to establish that it's necessary to explain or allow the trier of fact; and if it's intended if you -- upon that demonstration it comes in over a hearsay objection, then that obviously would be explicitly as well.

PROFESSOR DORSANEO: He didn't -- if he gave me my answer, I missed it.

CHAIRMAN BABCOCK: Well, it's embedded in what he just said. Gene.

MR. STORIE: I would suggest maybe putting the current rules statement about when a letter is read into a comment, which would also reinforce that we're not making any change and we give people an example of the sort of thing the rule is talking about.

CHAIRMAN BABCOCK: Okay. Yeah, Professor Carlson.

PROFESSOR CARLSON: I'm a little bit confused here. Are we saying that if a party introduces inadmissible evidence, part of it, then the other party can put in other inadmissible that goes to it; or are we saying that if a party introduces a partial act, document, conversation that's admissible, the other side can come back with what otherwise would be inadmissible to explain it?

MR. ALEXANDER: You want to take that one?

PROFESSOR GOODE: The traditional rule of optional completeness -- and this is the way it's been enforced by the courts in Texas for a long time, that if a party introduces a part of an act or a writing or a recording the other side is allowed to inquire about that; and the other side, if necessary to explain and make understandable because the other side has taken the part out of context, the other side may introduce the other part of that act or recording or writing, even if it would be barred by the Rules of Evidence.

The most glaring example I can give you is there was a situation where a defendant once said, this is hard to believe, "I did not do that." And the prosecution introduced a part of that statement, "I did do that." The

defendant was allowed to introduce the remainder of that statement, the "not" part, which would otherwise be inadmissible because it's his own out of court statement, so that's a -- that's an extreme example, but it's out of a case.

CHAIRMAN BABCOCK: Rusty. Did you have your hand up, Rusty?

MR. HARDIN: No, no. I was just saying "amen."

CHAIRMAN BABCOCK: Well, do that for amen, but that means I'll call on you. Orsinger. I mean Munzinger, whatever. Richard.

MR. MUNZINGER: Your explanation that you just gave went to a single statement which had been partially used by a party, and the adverse party was then permitted to show the remainder of the same statement to explain it.

PROFESSOR DORSANEO: A part of it.

MR. MUNZINGER: But the rule says "an adverse party may also" -- second sentence, "may also introduce any other act," et cetera, and I understood Elaine's concern or curiosity to be whether or not the second sentence as interpreted or as written would allow inadmissible evidence, otherwise inadmissible evidence, to be used to further explain the first statement so that by

way of example I have a document in which I show part of document number one. The adverse party may now go to some hearsay document, not document number one, but a hearsay document or a hearsay transaction and explain document number one with evidence which is not otherwise admissible because it's hearsay. Is that the intent of the rule? Is that -- if not, is that the effect of the rule, because it seems given this discussion that it may be the effect of the rule.

PROFESSOR GOODE: Well, again, this is -- all this rule does is, again, put into a little clearer English the rule that's been in existence for 30 years in this state; and, in fact, there are instances where a court will say because one party has taken a part of something out of context, the other side gets to introduce some other related document which is necessary to understand the part -- the thing that was introduced by the proponent and has been taken out of context, and even if that evidence that is now being introduced would otherwise be inadmissible. That is the long-standing law of Texas.

CHAIRMAN BABCOCK: Judge Wallace.

PROFESSOR GOODE: This rewriting doesn't change anything. It's not intended to change anything. It's just rewriting what we already have.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, if that's the law, and it certainly may be, it seems to me that just creates a broad hearsay rule where an imaginative lawyer could say, "Well, Judge, I'm entitled to introduce it under Rule 107 because I need to explain some other act" or whatever we're talking about it. I mean, I don't -- I can't imagine this would be that.

MR. ALEXANDER: If a lawyer can meet the predicate of 107 then that's right.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But you'd have to have a predicate. You'd have to say, "Judge, he's opened the door to that," and it may be inadmissible evidence. He opens the door to inadmissible evidence, then he comes back to 107, but unless that opens the door you couldn't do it.

CHAIRMAN BABCOCK: Okay. Yes, last comment about 107.

PROFESSOR CARLSON: Well, that was my question. Does this open the door or out of context?

MR. ALEXANDER: What do you mean?

PROFESSOR CARLSON: One party has put in inadmissible evidence partially, so the other side gets to come back with inadmissible. Are we saying puts in

inadmissible but out of context and now the other party gets to meet the content, whether with inadmissible or admissible?

CHAIRMAN BABCOCK: It's opening the door a crack.

MR. ALEXANDER: It's a lateral.

CHAIRMAN BABCOCK: All right. Let's go to Rule 201.

PROFESSOR DORSANEO: One more thing.

CHAIRMAN BABCOCK: One more thing. Sure, it's always one more thing.

PROFESSOR DORSANEO: I will never like "part," but I understand now that "part" means part of the evidence.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: In other words, it doesn't mean part of the document, so why not just say "evidence"?

CHAIRMAN BABCOCK: Yeah, don't look at me.

PROFESSOR DORSANEO: Instead of saying "part."

CHAIRMAN BABCOCK: Okay.

MR. LOW: We like the word "part."

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I just want to

suggest that when we drop the word "the whole," I worry that that changes the meaning a little bit because it's different to requiring any other part on the same subject. That's "the same subject" is something slightly different than "the whole" on the same, and "the whole" adds something to that, and I think it is opening the door, and it makes something admissible that may not be admissible.

CHAIRMAN BABCOCK: Okay. Rule 201, "Judicial notice of adjudicated facts." Frank.

MR. GILSTRAP: Rule 201(e) says that you have an opportunity to be heard as to the propriety of taking judicial notice and -- in the current rule, "and the tenor of the matter to be noticed." Does anybody have any idea what "tenor of the matter to be noticed" means?

MR. ALEXANDER: That's why we restyled it.

MR. GILSTRAP: Well, now you say "nature of the fact to be noticed," and I don't know what that means. Does that mean it's animal, vegetable, or mineral? I mean, what is the "nature of the fact to be noticed"?

MS. HOBBS: I think that means whether it's --

MR. GILSTRAP: I mean, you ought to say you have the opportunity to be heard as to the decision to take judicial notice.

HONORABLE R. H. WALLACE: Well --

CHAIRMAN BABCOCK: Lisa, who is a botanist, knows the answer.

MS. HOBBS: Well, it kind of goes to my question of what I was going to point out. I think what they're saying the nature of the fact to be noticed means whether it's truly an adjudicative fact about which you can take judicial notice.

MR. GILSTRAP: But that's subsumed within the decision to take judicial notice.

MS. HOBBS: Probably, but, I mean, you've also added "not a legislative fact" to the scope, which is not in the Texas rule, but I guess is in the Federal rule; and I just -- my question for the evidence committee is why you decided to put that in other than the fact that the Feds do it.

CHAIRMAN BABCOCK: Are you talking about --

MS. HOBBS: I'm talking about --

CHAIRMAN BABCOCK: -- "nature and tenor," or are you talking about something else?

MS. HOBBS: I am talking about in 201(a).

CHAIRMAN BABCOCK: Okay.

MS. HOBBS: Texas current rule would just say, "This rule governs judicial notice of an adjudicative fact only," period.

CHAIRMAN BABCOCK: Right.

MS. HOBBS: The evidence committee has added, comma, "not a legislative fact," which is a phrase that is consistent with the Federal rules but doesn't have a lot of meaning to me in Texas practice. So I'm curious what their reasoning was for adding that.

CHAIRMAN BABCOCK: That's a good question.

MR. ALEXANDER: Well, the reason we did that is because the current Texas and the pre-restyled Federal were identical, so when we restyled the Texas in this case we mirrored what the Feds had done in their restyling effort.

MS. HOBBS: You mean the Federal rule before the restyle said "adjudicative facts only," period?

MR. ALEXANDER: It said -- right. Right. That's exactly right.

MS. HOBBS: I don't really know -- I mean, I remember this issue coming up about what you can take judicial notice of; and there's these different categories of things that you can take judicial notice of or not take judicial notice of; and I don't have that research fresh in my mind right now; but it seems to me in Texas law there are these categories of things, some of which you can take judicial notice of and some of which you can't; and they are not necessarily just adjudicative facts and legislative facts, so it just -- this might muddle Texas

law in a way that wasn't intended by following suit with the Feds.

CHAIRMAN BABCOCK: Okay. Judge Wallace, and then Richard.

HONORABLE R. H. WALLACE: I think that -- here's what I think it means, is that if the litigant stands up and says, "Judge, we want you to take judicial knowledge of this document that was filed in this case." For what -- I mean, what do you want me to take judicial knowledge of, that it was filed, the date it was filed? What they usually want is the contents to be able to come in, and that may not be right. In other words, just recently somebody said, "We want you to take judicial notice of an affidavit that was filed as a part of a motion for summary judgment in the case," and what they really wanted was for me to take judicial knowledge of it so that they could introduce it and get otherwise inadmissible hearsay into the case. So to me that would be notifying the party -- or I'm sorry, I lost it, yeah, on the judicial notice and the nature of the fact.

MR. GILSTRAP: Nature.

HONORABLE R. H. WALLACE: I could take judicial notice of something that's in the file --

MR. GILSTRAP: So it's the purpose.

HONORABLE R. H. WALLACE: -- but I'm not

going to take judicial notice of what the allegations were in the affidavit.

MR. GILSTRAP: It's the purpose for which they want you to take the judicial notice.

HONORABLE R. H. WALLACE: Yeah. Uh-huh.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Yeah, Marcy.

MS. GREER: The Feds in the advisory comments when they made this change they defined "Legislative facts are those which have relevance to the legal reasoning and law-making process, whether in the formation of a legal principle or ruling by a judge or court or the enactment of a legislative body." So that's what they're exempting out, and it might make sense to adopt their comment as well to make it clear that's what a legislative fact is.

MS. HOBBS: So they're saying you don't have to use 201 to take notice that the City of San Antonio passed this ordinance on this day?

MS. GREER: I don't know if it goes to the ordinance level. It would certainly go to a statute or regulatory rule or administrative rule, something like that, and then 4401, of course, is judicial notice of foreign law, so I think they're just trying to make it clear that we're only talking about facts that bear on the

adjudication.

CHAIRMAN BABCOCK: Okay. Richard, and then Judge Yelenosky.

MR. ORSINGER: I wish that I had understood better what Marcy was saying because I'm quite familiar with the rules of Texas evidence, but I don't know what a legislative fact is, and is that a comment to the Federal rule?

MS. GREER: It is, and they're relying on -- sorry, I can't read without these. They're relying on a law review article by Professor Kenneth Davis from Harvard where he talked about this being a problem and why there needed to be a separation between legislative type rules, which don't need to go into this provision, and adjudicative rules, which would be everything else.

MR. ORSINGER: Okay. Well, I still don't understand what a legislative act is or fact is, but I'm worried about introducing that concept into Texas jurisprudence that I'm not familiar with, and if our definition of it is a comment to the Federal rule then maybe we should consider the same comment, but if the foundation for it is one law review article from somebody at Harvard did you say?

HONORABLE STEPHEN YELENOSKY: Who listens to them?

MS. GREER: Well, but it was vetted by the Federal rules committee and, you know, approved by the U.S. Supreme Court, so it's not like it's just a law review article.

MR. ORSINGER: Okay. Well, whatever.

MS. GREER: Harvard or anywhere else.

MR. ORSINGER: Whatever. I'm a Texas lawyer, and so I'm familiar with Texas law, and I'm not familiar with legislative fact, and we're not helping anybody figure out what it is by putting it in a rule with no explanation.

CHAIRMAN BABCOCK: So you want the advisory committee note from the Federal rule?

MR. ORSINGER: I would take the "legislative act" out, because I think we all are comfortable with what an adjudicative fact is. I would be happy to listen to anybody on the committee, but I'm a little thrown by the fact that we're introducing a foreign term, and maybe it's not foreign. Maybe I've just happened to miss all of those cases on legislative facts, but I don't think they're out there.

CHAIRMAN BABCOCK: All right. Judge Yelenosky, then Judge Estevez.

HONORABLE STEPHEN YELENOSKY: Well, first, taking that reasoning on its own terms, there is no reason

to distinguish an adjudicative fact from a legislative fact unless in the past they've been the same thing, and I'm not aware that they have, and when you note -- when you have a word like "adjudicative fact," which is defined in the case law, it doesn't make any sense to say it's not this any more than it makes sense to say "an adjudicative fact, not a kangaroo." I mean, there are all kinds of nots there. Why this one?

MR. ALEXANDER: There was -- I'm sorry.

HONORABLE ANA ESTEVEZ: I just wanted to agree with Richard again. I don't want him standing all alone.

MR. ORSINGER: I'm sorry you're married.

CHAIRMAN BABCOCK: Okay. Hang on for a second.

HONORABLE ANA ESTEVEZ: I'll disagree with him a few times and then he won't -- you can talk to my husband. It's not that fun.

MR. ALEXANDER: I can tell you that our committee is not wedded to the legislative fact issue or language, but among the concerns that were raised in this and many other rules was that if we depart -- if a previous Federal rule was the same as ours and we depart from the Federal restyling effort, does it imply to practitioners after that that there must be some

difference now between what we had and what we have because it was the same, now it's not the same, why did we take that out, and what does it mean. So that was among the thing -- among the mischief we tried to avoid creating, was when our old -- when our current rule mirrored the old Texas -- Federal rule, excuse me, we generally presumptively went with mirroring the new Federal restyled rule.

CHAIRMAN BABCOCK: Buddy, hang on for one second. Skip.

MR. WATSON: I was just going to suggest that this might be an instance where trying to mirror the Federal rules, we might have stumbled upon something where they're recognizing a difference that Texas law has never recognized, and we might be inadvertently introducing a substantive change by mirroring the Federal change. That's what I'm hearing in this room.

MR. ALEXANDER: We looked at that, and I don't think that would be true there would be any substantive change here, and Steve, you'll have to weigh in on that if you'd like.

MR. WATSON: Well, I think we're respectfully suggesting that if no one in this room knows what that term means, we are introducing a substantive change.

HONORABLE SARAH DUNCAN: I don't think that's right, Skip.

MR. LOW: What if the law of Minnesota is such and I want the court to take judicial notice of this legislative law of the State of Minnesota? Can you -- isn't it a law of a foreign country or a foreign state? Wouldn't that be a judicial fact?

MR. ALEXANDER: That's a different rule.

MR. ORSINGER: There's a different rule just for that, Buddy, I think.

MR. LOW: Okay, I'm off key one.

MR. ORSINGER: There's been a lot of -- here, we keep talking about none of us know what a legislative fact is, but I bet you that Professor Goode can tell us what it is.

PROFESSOR GOODE: It's more than just what Professor Davis said. It's a well-recognized distinction in the law of judicial notice that if a court, for example, is interpreting a statute or deciding whether a statute is constitutional, it can do all the research it wants into background information. It's not bound by the fact-finding process of the law of evidence. So if the Texas Supreme Court is doing an opinion on something and it needs to know, for example, you know, how many law students were brought nationally on some particular issue,

it can go out and do that research, not because it's establishing a fact in a case, but it's using that as a way of trying to make a judicial decision about the legality of a law or how to interpret the law. An adjudicative fact is one that goes to the facts in the case that the parties are trying to establish. That's the distinction.

In terms of what some other state's law is, if you have to prove it in the case, that's what we deal with in the successive rules, 202, 203, and 204. So the distinction is just saying court -- this doesn't change anything for courts when the courts are making some policy decision in the course of interpreting or construing a law. Now, if that's confusing everybody, striking out those words won't change a thing.

HONORABLE STEPHEN YELENOSKY: And if it's so distinct, as I thought it was, why did the Federal court adopt something that they didn't need to make a distinction on because it had already been made?

PROFESSOR GOODE: I don't know.

CHAIRMAN BABCOCK: Yeah.

MR. KELLY: Peter Kelly.

CHAIRMAN BABCOCK: Peter, we can't see you.

MR. KELLY: I just want to say it's not -- the distinction is not foreign to Texas law. I actually

briefed it three or four years ago to the Supreme Court. I filed an amicus brief, and the other party, one of the other parties, moved to strike on the grounds that we went outside the record. I said, "No, we're referring to legislative facts, not adjudicative facts, and there's no reason to strike it," and I'm trying to find the brief so I can quote some Texas authority on it, but I know I did cite the Texas authority that made that distinction. So it's not foreign to Texas law.

CHAIRMAN BABCOCK: Thank you, Peter.

MR. ORSINGER: I'd have a follow-up inquiry. Peter, was that -- were you saying that the Texas Supreme Court or the court of appeals can take knowledge of that as distinguished from the trial court taking knowledge of that?

MR. KELLY: I didn't look into that distinction. I mean, it was in the Texas Supreme Court, which is a policy-making body just like the Legislature is, so it's more appropriate in the Supreme Court than in the trial court, but I wasn't aware of any -- I didn't find any distinction between the appellate courts and the trial court.

MR. ORSINGER: Well, there's long been a distinction in Texas law, going all the way back to the 1800s, that trial courts have a more limited concept of

recognizing the law of other states and it needs to be proved, either by fact witnesses or through judicial notice, but an appellate court can read the appellate decisions or the statutes of another state, and they can -- without any kind of proof at all, they can go off -- they even read magazine articles and report Federal statistics and stuff, so to me the function of legislative facts at the appellate level needs to be completely segregated from the trial court level.

CHAIRMAN BABCOCK: Peter, and then --

MR. SCHENKKAN: The distinction is well-recognized. Kenneth Davis was a -- perhaps after Felix Frankfurter the second most prominent founder of American administrative law, and that's a context in which this doctrine is important, because administrative agencies adjudicate things that are of both types. Adjudicative agencies have to decide things like is the light -- was the light green or red in a particular case, you know, adjudicative facts, but they also have to decide things like is it a good idea to do X, and so do courts sometimes. Think, everybody, back to your first year of law school and a Brandeis brief, which I assume is the kind of brief you were talking about in your amicus brief, you were putting in your amicus brief a bunch of public knowledge.

MR. KELLY: Policy arguments.

MR. SCHENKKAN: Yeah, that supported policy argument for construction of a statute one way or another or something, common law one way or the other, and that's the notion, that the United States Supreme Court in the 1930s, when it takes up the question of whether it violates due process from Minnesota to ban the use of yellow colored oleo is entitled to say on the basis of its legislative fact research that everybody knows that butter fat is good for you, and therefore, there's a rational basis for the State of Minnesota to prohibit the sale of oleo that has been colored yellow to make it look like it's butter.

I mean, this is an illustration of why we don't want legislative facts to be -- and it may also bear on your trial court issue, but this is not taking a position on whether we should strike the words "not legislative fact," but it is only to support Peter and Professor Goode both that, yes, this is a real distinction, and there are some contexts in which it actually matters, but I think they're mainly administrative law.

CHAIRMAN BABCOCK: Okay. Justice Moseley.

HONORABLE JAMES MOSELEY: This particular provision, just to contrast with 202, 202 is determining

foreign laws. 201 is simply going to whether a legislative fact can be paraded in front of a court, and legislative fact would be something like the city council has to make a determination of size of population to determine whether they qualify as a home rule city. If they bring in evidence, hold public hearings, and say, "We hereby declare we've got more than 10,000 people, we're a home rule city," for purposes of that determination that's pretty final, but whether or not you could bring in that determination into a case is what this particular rule is about, and it says you can't do it.

Similar rules would apply with respect to legislative determinations of the efficacy of a certain procedure, maybe the efficacy of blood alcohol content testing or some other type of provision. The Legislature gets to do all of that for legislative purposes but that doesn't mean their determination is automatically imported into the court. That's all.

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

HONORABLE SARAH DUNCAN: Just that if a adjudicated fact is judicially noticed, it's conclusive, right, which is significant. A legislative fact -- and adjudicative fact relates to the parties and what must be proved in the case for or against a judgment; whereas a

legislative fact is not conclusive. It's more policy driven, like when we did an amicus brief in the Bird case about the number of sexual abuse cases in the State of Texas that go unreported. We were trying to inform how the court interpreted a statute on mandatory reporting of sexual abuse determinations by examining physicians, and it's not -- it didn't relate to the actual facts of the case, but it was significant to interpreting the statute at issue that required mandatory reporting; and I think to me that's always been the difference between legislative and adjudicative facts, is one has to be proved in the case for liability against liability or guilt or innocence, whereas legislative informs and is not conclusive and doesn't relate to the parties.

CHAIRMAN BABCOCK: Okay. Justice Brown.

HONORABLE HARVEY BROWN: Perhaps our conversation has shown why the Federal rules committee added the phrase "not a legislative fact," and that is that almost no one here knew of that, probably less than five people, and therefore, no one made a distinction, and the committee thought it might be helpful for people to realize that a lot of things you think are adjudicative facts may not be. So while I initially thought that was superfluous and agree with the reasoning you don't have to say all things it's not, maybe in this context it's

helpful to point out a possible distinction that people otherwise don't realize may exist.

HONORABLE SARAH DUNCAN: And to free -- and to free legislative facts from this very strict rule. I mean, an adjudicative fact cannot reasonably be disputed. A legislative fact could be.

HONORABLE STEPHEN YELENOSKY: Well, but the rule doesn't tell you what a legislative fact is. It just makes you, "Oh, there's some distinction out there." You don't need to know the distinction if you stick to the definition of adjudicative fact, but moreover, I don't think this rule is so tight, and it's in the old rule as well as the new rule. (b)(1) is generally known within the trial court's territorial jurisdiction. People think they know a lot of things. It may generally be known but then proven wrong, so I don't think it's so tight, but I never use (b)(1). I only use (b)(2).

CHAIRMAN BABCOCK: Okay. We're going to take our break. Anything more on 201 before we take our break? Okay. 201 is closed. We're in recess.

(Recess from 3:38 p.m. to 3:54 p.m.)

CHAIRMAN BABCOCK: All right. We are on to Rule 202, "Judicial notice of other state's laws." Any comment on 202? Where is Orsinger?

MR. ORSINGER: Right here, sir. I'm sorry.

CHAIRMAN BABCOCK: I was figuring surely you have something to say about 202.

MR. ALEXANDER: Good Lord, don't prompt him.

MR. ORSINGER: I think I'll let someone else go first. Let Bill go first.

PROFESSOR DORSANEO: I'm not -- I'm done.

CHAIRMAN BABCOCK: We've cowed them into submission, have we?

HONORABLE NATHAN HECHT: You're getting the hang of it.

CHAIRMAN BABCOCK: They are getting the hang of it. Yeah, Sarah.

PROFESSOR DORSANEO: Just a stupid question, when is a statute not public?

CHAIRMAN BABCOCK: Say that a little bit louder.

HONORABLE SARAH DUNCAN: When is a statute not public?

CHAIRMAN BABCOCK: When is a statute not public?

HONORABLE SARAH DUNCAN: Do we have private statutes?

MR. ALEXANDER: Which part are you looking at?

HONORABLE STEPHEN YELENOSKY: In 1876 --

CHAIRMAN BABCOCK: She's looking at 202(a), bullet point two.

HONORABLE SARAH DUNCAN: Yes, it's uncitable because there's no number or letter beside it, but it is bullet point two. So in an opinion do I have to write "202(a), bullet point two"?

CHAIRMAN BABCOCK: I think you would just say it "202(a)."

MR. ALEXANDER: Right.

HONORABLE SARAH DUNCAN: That's not precise.

CHAIRMAN BABCOCK: So anyway, when is a statute not public? Was that rhetorical, or are you curious?

HONORABLE SARAH DUNCAN: I mean, if there is such a thing, if there are private statutes, I feel the need to go find out what they are. Because we're all presumed to know them.

MR. ALEXANDER: I think that private court in D.C. adjudicates them.

PROFESSOR DORSANEO: The ones posted on my barn.

HONORABLE STEPHEN YELENOSKY: I know what Fields is going to say, because it's in the old rule.

MR. ALEXANDER: Well, in part, but also Steve Goode tells me that Congress does enact private laws

from time to time.

PROFESSOR GOODE: There are private laws.

HONORABLE STEPHEN YELENOSKY: Private laws, but not private statutes.

CHAIRMAN BABCOCK: Okay. Moving right along, Richard.

MR. MUNZINGER: I'm just curious why bullet points are used instead of small Roman numerals or something else, the point being if you're citing a brief or if you're arguing and there's a string of bullet points, why do we have bullet points? I've not seen it before in this context, but that may be because I don't read all the rules and regulations, but --

MR. ALEXANDER: It is novel, and it is how the -- part of the drafting convention for the Federal restyled rules.

MR. MUNZINGER: So the Feds are doing it, too?

MR. ALEXANDER: They are.

CHAIRMAN BABCOCK: Huh. Richard Orsinger, I knew you would come around.

MR. ORSINGER: Yeah, this is not substantive, and I apologize, but I was always taught that when you have a series that you use commas unless the parts of the series themselves have commas and then you

use semicolons. Would we not be using either commas or nothing at all after these words rather than semicolons? And I'm not up on Brian Garner's latest work.

MR. GILSTRAP: They just use semicolons. That's it.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Yeah, Lisa.

MS. HOBBS: Should our title not say "Judicial notice" since we just talked about judicial notice is not a legislative fact?

CHAIRMAN BABCOCK: Right. And what was your question? I'm sorry.

MS. HOBBS: Should we not -- should Rule 202 have some title other than "Judicial notice," "of judicial notice," if we don't take judicial notice of legislative facts?

MR. ORSINGER: Well, Article II is about judicial notice.

MR. GILSTRAP: That was under 201. 202 you do take judicial notice of legislative facts.

MS. HOBBS: Oh.

MR. ORSINGER: The whole Article II is called --

MR. ALEXANDER: The old rule uses the phrase "judicial notice."

HONORABLE STEPHEN YELENOSKY: But it's not -- this is not judicial notice of legislative facts. This is judicial notice of legislation, statutes, and case law. It's not the same thing.

MR. ALEXANDER: Right.

PROFESSOR GOODE: Right.

MR. GILSTRAP: What's the difference? Steve, what's the difference?

HONORABLE DAVID EVANS: Wikipedia has a definition of adjudicative versus legislative facts that's over here.

HONORABLE STEPHEN YELENOSKY: Well, whatever it means I think it was clear it meant something other than -- the professor can tell us.

PROFESSOR GOODE: Okay. The difference is in certain cases you may have to prove up the law of another state in order to make out your case. It may be part of your case, in which case that is an adjudicative fact that happens to be the law of another state. Again, when we talk about legislative facts in the context of judicial notice, it goes back to this distinction that Professor Davis was the one who first articulated and it's widely recognized in the law that we're talking there about courts in interpreting or construing laws or making policy determinations may go outside the record and do

their own research, whereas these rules are specific to litigation and things that parties have to prove. So sometimes you have to prove up the law of another state.

MS. HOBBS: But Rule 203, which is about foreign law is titled "Determining Foreign Law," and so that seems to imply you're not taking judicial notice of the foreign law, you're doing something different.

HONORABLE STEPHEN YELENOSKY: Right.

PROFESSOR GOODE: That's right.

CHAIRMAN BABCOCK: Okay. Yeah, Pete. Sorry.

MR. SCHENKKAN: And the current Texas law uses "determination of law of other states" just as it does with the foreign law. I'm on the side that says this is really not the same thing as judicial notice, but maybe that's because I don't understand cases in which you have to quote-unquote prove it, but we're still providing that the court must not determine -- must determine it. It really doesn't sound -- it sounds like law, not facts to me at all and, thus, doesn't sound like judicial notice at all.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: When we do get to substantive stuff, I would bookmark this because it makes no sense in today's world. We don't have any

dispute about what the law is of other states, and everybody has it at their fingertips. I don't know why I would have to give a hearing on whether I'm going to take judicial notice of state law of New York, for example.

CHAIRMAN BABCOCK: Okay. Anything more on 202? Okay. 203, determining foreign law. Any comments on 203 regarding foreign law? And, Fields, did this -- did this change Texas from Federal?

MR. ALEXANDER: There is no analogous Federal law, Federal rule.

CHAIRMAN BABCOCK: Is there not Rule 44?

MR. ALEXANDER: Well, not in the Rules of Evidence, excuse me.

CHAIRMAN BABCOCK: Yeah.

MR. ALEXANDER: Right, there is.

CHAIRMAN BABCOCK: I thought there was a Federal Rule of Procedure.

PROFESSOR GOODE: 44.1.

MR. ALEXANDER: There's a procedural rule.

CHAIRMAN BABCOCK: 44.1, yeah. How does this -- how does this compare to 44.1? If it does at all.

MR. ALEXANDER: We -- I don't recall to the extent we looked at 44.1. We -- in this instance since there was no analogous Federal Rule of Evidence we used the styling conventions and restyled the rule, so I can't

recall off the top of my head how similar or dissimilar it is from the Federal Rule of Procedure.

CHAIRMAN BABCOCK: It's very similar. 44.1 says, "A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." So that's --

MS. HOBBS: Very similar.

MR. ALEXANDER: Very similar.

CHAIRMAN BABCOCK: -- very similar to this.

MR. SCHENKKAN: So the distinction is it falls into the category of "Texas, it's a whole 'nother country." We alone regard the laws of other states as being foreign law.

CHAIRMAN BABCOCK: The Federal rule, 44.1, says that testimony can be considered, and it is not unusual for somebody to testify about what the law of a foreign country is, but I see this Rule of Evidence does not contain such a provision, unless I missed it.

MR. ALEXANDER: Well, no, it does contain it in the -- in just stating that the court may consider any

material or source, whether or not admissible.

CHAIRMAN BABCOCK: So you think that would permit testimony?

MR. ALEXANDER: I do, yes, and that was -- right, that was the intent because the previous rule -- the current rule has a number of examples, and we tried to shorten that and just give the court discretion to consider any --

CHAIRMAN BABCOCK: Okay. Yeah, Richard Orsinger, then Lisa.

MR. ORSINGER: You know, there's always been I think a little bit of a tension between this rule and Rule 1009 of the Rules of Evidence about translating foreign language documents; and my experience with this, at least recently, is mostly with Mexican law; but since Mexico is a civil law country and each state has its own laws independent from whatever the federal laws are, what you end up with is maybe three or four or five very, very vaguely stated propositions and then you have to get expert testimony of lawyers to tell you what that means and how it's applied.

MR. ALEXANDER: Right.

MR. ORSINGER: And they don't really have a stare decisis principle to go by appellate opinions or anything; and here in this Rule 203(c), at least with

regard to Mexico and maybe also all countries, you're going to have a little bit of statutory framework and then a whole lot of expert opinions of lawyers or professors and treatises; and Rule 1009 has a process for translating foreign documents; and if there's a bona fide dispute on the translation, the rule says that it's to be resolved by the trier of fact what the correct translation is. So I've always wondered if you have articles that are written by esteemed law professors at Mexican universities and whatnot, is that governed by 1009 where you get into a dispute of how they're translating things, or is it governed by Rule 203 where the trial judge decides everything and it's not really a question of fact, it's a question of law? I throw that out. I don't know that it calls for an amendment here; but there's always, I think, been a little tension when you're not just interpreting a statute or a foreign appellate opinion.

MR. ALEXANDER: No, it's an interesting point, and one that we didn't address that specific issue, and I've never seen it -- I have employed foreign law in several cases, but I've never seen an issue come up where we had a trier of fact determine a dispute with regard to foreign law, so I've never seen it play out.

MR. ORSINGER: Well, and have you seen those cases, though, where people are fighting over the American

law equivalent of a particular phrase in a Mexican statute that has no ready correlation to a Texas law?

MR. ALEXANDER: I've seen a lot of robust fights about Mexican law and what it means in the Texas court, yes.

MR. ORSINGER: Yeah, they have a lot of legal concepts that we just don't recognize in Texas, and you can get into huge disputes about how that word is going to translate into something meaningful to us.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: I would suggest to the committee that perhaps it should be clear in subsection (b) that the translation needs to be served or used or supplied, which is an interesting word. I'm not sure what that word "supply" means, but that the translation needs to go to the other side at the same time that the foreign law is going to the other side. In other words, don't just serve me a copy of the foreign law, and I don't know what your translation of that law is going to be until the day of the hearing. I think in the current rule there's -- since there are not subsections, even though you're using the same language as the current rule, when it's all in one paragraph together it flows and implies that that would be served at the same time, but when you start breaking it out, it seems like there might be some tomfoolery.

MR. ALEXANDER: I don't see in the current rule -- I understand your point, and I don't dispute the equity of it, but I don't see in the current rule where it mandates that they be given at the same time. We certainly tried, obviously, to model the restyling after the current rule, and if we've missed something, I'd be happy to try to fix it.

MS. HOBBS: The current rule clearly requires them to raise the foreign law issue, to supply the written materials 30 days.

MR. ALEXANDER: Right. Right.

MS. HOBBS: And then the next sentence says you also have to supply a translation, and because one sentence was right after the other I read that and think my obligation is to supply the original source and my translation of the original source at the same time, 30 days before trial.

MR. ALEXANDER: And I can tell you -- I didn't mean to cut you off.

MS. HOBBS: No, no.

MR. ALEXANDER: I can tell you that the way we intended this and the way I read this is anything that you intend to use to prove your foreign law, which obviously would include any translation you have, has to be supplied more than 30 days and the other side needs to

get a copy of that, but if you think that could be made clearer.

MS. HOBBS: I think it's an easy fix. "Must at that same time supply all parties with a copy," or I think there's some easy tweak that you could clarify that, but I think it's worth just putting in the rule what you mean.

MR. ALEXANDER: Uh-huh. Okay. Well, let us take a look at that.

CHAIRMAN BABCOCK: And while you're doing that, the old rule specifically says, like you indicated, that testimony can be presented, but does a summary of the testimony have to be provided 30 days before trial? Because what if you say, "I'm going to call," you know, "Professor Hoffman, who is a well-recognized expert on Mexican law," but you don't say what he's going to say? Have you complied with the rule or not?

HONORABLE SARAH DUNCAN: Doesn't it get back to the question of do you intend to use Professor Hoffman's testimony to prove the foreign law?

PROFESSOR HOFFMAN: For the record, that would be a mistake.

MR. ALEXANDER: 702 would cover that issue.

CHAIRMAN BABCOCK: Okay. Well, we'll get to 702 sometime in this millennium. All right. Anything

else on 203?

MR. MUNZINGER: Just a question.

CHAIRMAN BABCOCK: Yes, sir.

MR. MUNZINGER: Does Rule 1009 govern proceedings under Rule 2003?

CHAIRMAN BABCOCK: Does 1009 govern proceedings under --

MR. MUNZINGER: It's translating --

CHAIRMAN BABCOCK: 203.

MR. MUNZINGER: -- foreign language documents.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: And so you've got an Afghani statute, and you're going to translate it from Afghani to English. Does the translation have to meet the requirements of Rule 1009, or can I just get my Afghani housekeeper to translate it for me?

MR. ALEXANDER: I mean, the Court's got to -- I guess the Court's got to decide that at some point. I've never interpreted it that way, and I haven't seen it that way in the cases in which I've used foreign law or translated it either.

MR. MUNZINGER: You've never viewed 1009 as governing translations under Rule 203?

MR. ALEXANDER: Well, I've always viewed --

right, when I'm supplying the court with another country's law, I viewed that separate and apart from translating, for example, a foreign language contract into evidence for my jury. I view those as separate animals.

HONORABLE STEPHEN YELENOSKY: Doesn't that have to be true the way the rules are written? Because this one is specific to foreign laws. Documents are a larger entity than laws. This is more specific; and moreover, all the instructions in here indicate -- sort of rolled together the translation and the determination of the meaning of the law. Sometimes I don't know that you can separate those two, so I don't know how you could apply 1009 to foreign laws.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: I read 1009 as when you're trying to admit evidence, and this is when you're trying to present the law to the judge, right? It's not necessarily admissible evidence. It's more to get a determination of foreign law.

MR. ALEXANDER: That's how I've always understood it.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: So I have a Sabine Pilot case, and the employee is terminated because he is violating the ecological regulations of El Salvador, and

now I have -- and so I'm coming into court now, and the law of El Salvador is at the heart of the case, and the meaning of the statute is at the heart of the case. The judge is going to have to determine the law of El Salvador, isn't he, and he's going to have to charge the jury with the law of El Salvador, isn't he? Does he do so in accordance with Rule 1009, or can my Spanish language housekeeper translate the El Salvador regulation and have that done? And so we're at a 203 hearing, and I say, "Wait a minute, Judge, the ecological regulations of El Salvador don't apply to this kind of wood. They apply to oak. They don't apply to whatever it is."

CHAIRMAN BABCOCK: Wood, where did wood come from?

MR. MUNZINGER: An actual case that I had in Federal court.

CHAIRMAN BABCOCK: Okay.

MR. MUNZINGER: Which I had to settle for a number of reasons, but it's neither here nor there. The point is you've got a fact question of what is El Salvadoran law on whether or not it's legal to do A, B, C in a Sabine Pilot case.

HONORABLE STEPHEN YELENOSKY: But that's not the translation issue.

MR. MUNZINGER: Well, but the exact nature

of the law has to be given to the jury because you have to ask the question of Sabine Pilot. The facts of the case are was he fired because a guy violated this law.

HONORABLE STEPHEN YELENOSKY: Well, right, but --

MR. MUNZINGER: Or he was trying to keep them from doing so.

HONORABLE STEPHEN YELENOSKY: But the judge has to determine what the foreign law is, and part of that may be a translation as to what the interpretation is. We have lots of bilingual judges or trilingual judges, and no one would dispute if they're looking at their native language that they can read it. I don't know why they have to present a dispute to the jury. I mean, the judge should be in control of that.

MR. MUNZINGER: I don't know that they have to submit it to the jury either, but I'm at a pretrial hearing in your court, and I say, "Judge, you can't determine El Salvadoran law based upon this person's translation because of Rule 1009 requires the translation to be so-and-so."

HONORABLE STEPHEN YELENOSKY: Well, I don't need 1009 to say I'm not going to rely on somebody you just bring in. I just say that doesn't make a lot of sense.

CHAIRMAN BABCOCK: Well, but Richard's point is if -- I think, if you're going to have your 203 hearing and part of that hearing is "Judge, here's the statute as translated by, you know, somebody," and does that translation have to comply with 1009, with 1009.

HONORABLE STEPHEN YELENOSKY: No.

CHAIRMAN BABCOCK: You say no.

HONORABLE STEPHEN YELENOSKY: No.

CHAIRMAN BABCOCK: He says maybe. Okay. Well, Orsinger.

MR. ORSINGER: It's even worse in practice because these affidavits that you get from these lawyers, my primary recent experiences in Mexico, it's impossible to segregate what their view of the law is from how the law applies to the facts of your case, because the law stated broadly is so vague that it means really nothing to us, and so you have to say we've got four statutes out of the civil code that govern real estate transactions or marriages or whatever, and they've got -- and it's incredibly broadly worded, and the expert comes in and says, "In a dispute like this these statutes would be applied in such-and-such a way," so now all of the sudden you're not just translating a statute. Now you've got an expert witness, typically a lawyer, who is saying, "This is what I believe the law says, and this is how the law

applies to these facts"; and now all of the sudden you don't have this pure instruction, "You're instructed that the law is so-and-so" and then find out what the facts are.

So in practice the distinction that Richard is drawing is even harder to discern the clear analytical decision of what the law is versus the kind of fact intensive jury-oriented decision that how the law applies to the facts, and I raised it initially because I've been troubled by it ever since we adopted 1009. I know that the jury doesn't interpret what a statute says, but I'm afraid we're going to have competing translations from law professors and lawyers about what it means and how it applies.

HONORABLE STEPHEN YELENOSKY: Well, maybe, but 1009 is an admissibility rule, isn't it? You have to do these things to even get it in before you start arguing about it, right?

CHAIRMAN BABCOCK: But doesn't 2003 say the judge can consider things whether admissible or not?

MR. ORSINGER: 203.

CHAIRMAN BABCOCK: 203. Is that what I said?

HONORABLE STEPHEN YELENOSKY: My point is I don't see why the two are mixed up because I don't see how

1009, which is an admissibility rule, can apply to a 203 determination by a judge where, in fact, the translation and the meaning may not be clearly separable.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: Y'all are going to think I'm a Federalist, and I'm not, but I'm wondering if maybe we ought to put on the table for later discussion looking at Rule 44.1 of the Federal rules, because it does work a lot more smoothly. Because I do think it's a matter of law and the rule is clear that it's a matter of law that judges decide what the law is of another jurisdiction based on everything, and it includes exactly the kinds of things you're talking about. The affidavit that says, you know, "The Mexican statute says X" is not sufficient to guide a Texas judge or any other judge into how it applies in the case, because the law works differently in the civil code country. Shoot, the law of Louisiana has the same problem; but, I mean, I think that there's more to what the judge has to consider to make a decision to understand how that law applies; and maybe we're trying to cabin it too much into, you know, law versus facts; but the last thing you want is a jury trying to figure out what Mexican law says about a property transaction.

MR. MUNZINGER: I think I wasted your time, and I think Judge Yelenosky is correct. 203(c) says

whether it's admissible or not.

MR. ORSINGER: Right.

MR. MUNZINGER: I think Judge Yelenosky is correct, and I apologize.

MR. ORSINGER: Well, it depends -- it depends on whether you apply the concept of translations to translations that the court is going to consider in determining what the law is, because I promise you in every one of these cases for every Mexican lawyer you can find that will interpret the law on your side, I can find one that will interpret the law on my side.

CHAIRMAN BABCOCK: Now, now.

MR. ORSINGER: And they usually end up being translation disputes because they're trying to define words written in a foreign language that have a different legal system that have no clear equivalent to Texas law.

MR. MUNZINGER: But the Rule says admissible or not in 1009 --

(Multiple simultaneous speakers)

THE REPORTER: Wait, wait.

MR. MUNZINGER: -- to determine what is admissible. I think the judge is correct, and I apologize.

CHAIRMAN BABCOCK: Eduardo, what do you have to say?

MR. RODRIGUEZ: I mean, that's what -- you know, those guys on that side translate, interpret our state -- one of our laws one way, and all of these guys on this side do the other. I mean, that's what we do all the time in the courthouse, and, I mean, I agree with Richard that when you're dealing with lawyers from -- and we've dealt more with lawyers from Mexico and South America, and you can get a lawyer that will interpret a statute one way, and he can get somebody to interpret it just the opposite. But, I mean, I think that's what the judge has to decide, which one of the two guys is best.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, I mean, you're going to have those disputes, I assume, when you're trying to figure out what the law is before a judge and the judge is trying to figure it out, but you're not going to have them based on 1009, because if you raise 1009, you say, "Well, that's not admissible," and then I'd say, "Did you read 203?"

MR. ORSINGER: It doesn't have to be admissible.

HONORABLE STEPHEN YELENOSKY: Right.

CHAIRMAN BABCOCK: Okay. Let's go to 204, "Judicial notice of Texas municipal and county ordinances, Texas register contents, and published agency rules." Any

comments about 204?

MR. SCHENKKAN: Yes, when we get to substance, scratch this. This is law, not fact.

CHAIRMAN BABCOCK: Do what? I'm sorry, Pete.

MR. SCHENKKAN: This is just the subject of briefing. We don't need judicial notice of these things. The Texas Register and agency rules are a good example. They're codified in Texas Administrative Code that's -- except for the fact that it consists of rules adopted by agencies instead of statutes passed by the Legislature are exactly like the Texas Alcoholic Beverage Code and Health and Human Services Code or the Human -- it's just --

CHAIRMAN BABCOCK: Okay.

MR. SCHENKKAN: This is not a matter of evidence for a trial court. This is law in briefing.

CHAIRMAN BABCOCK: Okay. Anything else about 204? Well, here's some good news. We don't have to do the 300 series of rules, but let's go to 401, "Test for relevant evidence." Fields, any -- any difference here between the state and the Federal?

MR. ALEXANDER: Let me see. I can't remember on this one.

CHAIRMAN BABCOCK: That's okay.

MR. ALEXANDER: No. No, it's the same.

CHAIRMAN BABCOCK: Okay.

MR. ALEXANDER: The restyled -- our restyled rule mirrors Federal restyled rule.

CHAIRMAN BABCOCK: Any restylists among us who would criticize this restyling?

HONORABLE SARAH DUNCAN: I would vote to go back to the old rule.

CHAIRMAN BABCOCK: You want to go back to the old rule? Okay. And the reason you don't like the restyling?

HONORABLE SARAH DUNCAN: Because it doesn't go back to the old rule. The rule before the current rule.

CHAIRMAN BABCOCK: Oh, okay.

HONORABLE SARAH DUNCAN: Where we recognized a distinction between things.

CHAIRMAN BABCOCK: Okay. All right. Any other comments on 401? All right. Hearing none, we'll go to 402, general admissibility of relevant evidence. Pete.

MR. ALEXANDER: This rule also, by the way, our restyled rule mirrors the Federal restyled rule.

CHAIRMAN BABCOCK: Pete. Pete Schenkkan.

MR. SCHENKKAN: Again, we've got the "under statutory authority" problem built into it, and that's a good reason not to do it that way, and maybe it's

substantive so we shouldn't be doing it now, but when we get to it, "Relevant evidence is admissible except as otherwise provided by law. Irrelevant evidence is not admissible," and that's all we ought to say.

CHAIRMAN BABCOCK: Okay. Yeah, we ought to start numbering our comments. We could just say, "Comment 77."

MR. SCHENKKAN: Some people tell those jokes better than others. "Comment 17."

CHAIRMAN BABCOCK: Right. Any other comments about 402? Going once. Okay. 403, excluding relevant evidence for prejudice, confusion, or other reasons. Any changes here, Fields?

MR. ALEXANDER: I think there is one minor change, and we're trying to --

CHAIRMAN BABCOCK: We'll be the judge whether it's minor.

MR. ALEXANDER: "Wasting time" is in the Federal rule and not in ours.

HONORABLE ANA ESTEVEZ: Go ahead and waste our time.

CHAIRMAN BABCOCK: But that doesn't preclude you from saying it.

MR. ALEXANDER: Nor does it preclude us from wasting time.

CHAIRMAN BABCOCK: "Your Honor, we're wasting time here." Richard.

MR. MUNZINGER: The new rule says "a danger." The old rule said "the danger." It seems to me that "a danger" is more inclusive and "the danger" implies that the court must make a ruling that there -- that there is the danger of one or more of these occurrences, not simply the possibility. I don't know if that was an intentional change or an inadvertent change, but to me it may have a substantive effect.

MR. ALEXANDER: I'm looking to see what the old Federal rule -- obviously the Federal rule, current Federal restyled rule, the old Federal changed from a -- or Federal changed from "the" to "a," and we did the same thing.

HONORABLE STEPHEN YELENOSKY: Well, whatever it says, it's not going to require the judge to make a finding on a ruling on admissibility.

MR. MUNZINGER: I couldn't hear you.

HONORABLE STEPHEN YELENOSKY: Whatever the word is, it's not going to require the judge to make a finding of anything in order to rule on admissibility, right?

MR. MUNZINGER: In his own mind he'll make the finding because of the ruling that he makes. He may

not have to make the finding on the record.

CHAIRMAN BABCOCK: Okay. 404, "Character evidence."

MR. LOW: Wait a minute, Chip, I have --

CHAIRMAN BABCOCK: Oh, Buddy, I'm sorry, I didn't see you.

MR. LOW: -- something on 403. The Feds do include "wasting time." As I understood, your committee took that out because you considered that part of undue delay, or why did you take it out? The new Feds does have "wasting time."

MR. ALEXANDER: It's not in our current Texas rule, unlike the Federal version, Federal analogy has wasting time. Our current Texas rule doesn't have wasting time, so we didn't insert it in.

MR. LOW: But it is in the current, the new Federal rule?

MR. ALEXANDER: Yes, it is.

MR. LOW: Okay.

HONORABLE ANA ESTEVEZ: It would be a substantive change.

MR. ALEXANDER: It would.

HONORABLE ANA ESTEVEZ: Yeah, right now they're allowed to waste our time.

CHAIRMAN BABCOCK: That's right. She'll

kick your butt if you make a substantive change.

MR. LOW: I won't make it again. I'll be like Richard, I'm not going to make a mistake.

CHAIRMAN BABCOCK: Anything else on that? 404, "Character evidence, crimes, or other acts." Lisa.

MS. HOBBS: In 404(a)(2) big (A), I think you omitted the word "character" between "pertinent" and "trait" in the third line.

MR. ALEXANDER: All right. Hold on.

MS. HOBBS: You say, "The defendant's pertinent trait," but I think you mean "pertinent character trait." Because the current rule is "character of the accused."

MR. ALEXANDER: I'm looking to see. I believe the Federal version -- yeah, the Federal version does it the same way. They just did "pertinent trait" as opposed to "pertinent character trait," I suppose under the assumption that it's clearly understood in the rule that we're talking about a character trait, but in any event, we mirrored what the Feds did.

MS. HOBBS: Well, in the current Texas rule it might mean when the rule is entitled "Character of the accused," but there's nothing about -- I guess "character evidence" up at the top maybe, but --

HONORABLE STEPHEN YELENOSKY: Yeah.

PROFESSOR HOFFMAN: It's also in (a)(1).
MR. ALEXANDER: 404(a) is "Character evidence" and then talks about prohibited uses.
MR. GILSTRAP: Pertinent trait could be anything. He's got two heads.
THE COURT: What does?
MR. GILSTRAP: Pertinent trait.
CHAIRMAN BABCOCK: A pertinent trait has two heads?
MR. GILSTRAP: No, it could be anything. It could be that type thing. It could be a physical trait.
HONORABLE STEPHEN YELENOSKY: Not in this rule.
PROFESSOR GOODE: The rule deals with character traits. That's the general rule, and so the exception to the general rule dealing with character traits is referring to traits, pertinent, parenthesis, character traits. Because it's an exception to the general rule. The general rule doesn't talk about noncharacter traits.
MR. GILSTRAP: Well, it didn't make it any clearer.
CHAIRMAN BABCOCK: Okay. Anything else on 404? That's a long rule.
HONORABLE HARVEY BROWN: So 404(b), the

permitted uses, the Federal rule has a little different description, such as a good cause exception and it's broader in the notice. It allows the notice of the general nature of the evidence rather than the evidence or such evidence. I take it that's just because you were trying to track our old rule more closely?

PROFESSOR GOODE: Are you referring to the restyled Federal rule?

HONORABLE HARVEY BROWN: The restyled Federal rule on page -- I may be on an older version. The restyled Federal rule (b)(2) has an (A) and (B), right?

MR. ALEXANDER: Yes.

PROFESSOR GOODE: Yes.

HONORABLE HARVEY BROWN: And those are not in your draft?

MR. ALEXANDER: Correct.

HONORABLE HARVEY BROWN: And is that because you were working off the old Texas rule and the Texas rule didn't have this good cause idea and didn't have the idea of the description of the general nature of the evidence?

PROFESSOR GOODE: Correct. This codifies the current Texas law.

HONORABLE HARVEY BROWN: Okay. Since we're allowed to consider, according to Justice Hecht, some substantive matters, do you think those two changes by the

Federal rules are good changes or bad changes?

PROFESSOR GOODE: I think any consideration of substantive changes is a bad idea right now, but --

HONORABLE HARVEY BROWN: As a law professor who teaches this, I'm just curious.

PROFESSOR GOODE: We now require on timely requests reasonable notice. That strikes me as a pretty fair rule. Is it the good cause provision that you're talking about?

HONORABLE HARVEY BROWN: I was really asking about both the reasonable notice and the good cause.

PROFESSOR GOODE: I think the reasonable notice is pretty much -- is the same as (a). I think reasonable notice would include reasonable notice of what you're doing.

HONORABLE HARVEY BROWN: Okay.

PROFESSOR GOODE: The good cause one, I don't think it would -- well, I think we have opinions, I believe, where courts have excused the failure to do so. I think there are opinions where the court has not excused the failure to do so. I guess I would be for leaving our rule the way it is now because I think the good cause excuse is too pliable I think for this area.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Subsection 404(a)(3)(5) defines

"the victim" to include an alleged victim.

MR. ALEXANDER: Right.

MS. HOBBS: I don't see that in the current rule. I support that one hundred percent, but I wonder if we can just title subsection (3) to be "Exceptions for a victim or an alleged victim." Or does that follow the Federal rule? I don't see it in the Federal rule either. It seems like it's something y'all did.

MR. ALEXANDER: The Federal uses "alleged victim" throughout, and so this version is slightly different in that it defines "victim" rather than use "alleged victim" throughout.

MS. HOBBS: You might just put "exceptions for a victim or alleged victim" in the title so that it's clear that what happens includes alleged victims.

PROFESSOR GOODE: If I may, Federal rule deals with this in 404 and 412, which 412 being what's typically known as the rape shield provision. In that rule they define "victim" as including "alleged victim." That's where this definition comes from. They're just not consistent in applying it to Rule 404, and so for drafting sake and consistency sake we used the same language in both 404 and 412. Sometimes it says "victim" and sometimes it says "alleged victim" in our current rule, and just as a matter of drafting it seemed cleaner to say

"victim" and then make clear that that -- how we define that. That's what they do in 412.

HONORABLE STEPHEN YELENOSKY: In this context it has to be an alleged victim. I mean, you don't say "victim or alleged victim" because you can't have a victim until there's a conviction.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I'm pretty sure there's case law out there that says you can't offer evidence of crimes that are more than 10 years old.

MR. ORSINGER: That's a provision in the Rules of Evidence.

MR. HAMILTON: Is that in the Rules of Evidence?

PROFESSOR GOODE: That's Rule 609.

MR. HAMILTON: That's not in here, though.

PROFESSOR GOODE: That's Rule 609, and impeachment by showing a witness has been convicted of crimes, and then Rule 609(b) says if the crimes are more than 10 years old it has to pass a special balancing test, but Rule 404 there is no 10-year limit. It's a different rule dealing with a different purpose for introducing the evidence.

MR. ORSINGER: This rule is to attack the character of a party rather than to attack the credibility

of a witness, right?

PROFESSOR GOODE: The party or the victim, but not dealing with the witness. That's right.

MR. ORSINGER: Okay.

PROFESSOR GOODE: Which is what Rule 609 is.

CHAIRMAN BABCOCK: Okay. Yeah, Frank.

MR. GILSTRAP: In 404(b), the current rule says "evidence of other crimes" and in the revision it just says "evidence of a crime," which is what the Federal rule has. Is that a substantive change?

PROFESSOR GOODE: The previous language of the -- the old Federal version talked about "evidence of other crimes, wrongs, or acts." Our current rule talks about "evidence of other crimes, wrongs, or acts," same language in the old Federal, current Texas, and so we took the restyled Federal and put it in the restyled Texas.

MR. GILSTRAP: So if the Federal law made a substantive change, we did, too.

MR. ALEXANDER: Well, no, it was not intended to be a substantive change. In the Federal -- the comments in the Federal rules is just like the comments to these rules, to make it clear that no substantive change is intended.

CHAIRMAN BABCOCK: Okay. 405, "Methods of proving character." Any comments on 405?

PROFESSOR GOODE: In responding to your request that we identify same and different, Rule 405(b) in the old Federal rule is the same as current Texas 405(b). Rule -- old Federal Rule 405(a) is pretty much the same Federal rule as our current Texas rule, except we have this special provision in Texas Rule 405(a) dealing with the qualifications of the person who can testify in a criminal case, and that's what was separated out into the restyled (a)(2).

CHAIRMAN BABCOCK: Okay. Anything else? All right. 406, "Habit, routine practice."

MR. SCHENKKAN: Back to the substance again, but this "may be admitted," and I know this is in the restyled Federal rule, and I know that we -- we say we're not making any changes, but "may be admitted," by that we here mean is admissible.

PROFESSOR GOODE: I'm sorry, I can't hear you, Pete.

MR. SCHENKKAN: By "may be admitted" we mean is admissible because if we meant may or may not be admitted as a matter of the court's discretion, that's wrong, right? What we're trying to say here is it's relevant and admissible.

PROFESSOR GOODE: Well, first, this is identical old Federal to current Texas, identical restyled

Federal, restyled Texas.

MR. SCHENKKAN: No, current Texas is "relevant to prove."

MR. ALEXANDER: Right. The old Federal was also the same, used the same language.

MR. SCHENKKAN: Right.

PROFESSOR GOODE: And, yes, it may be admissible, but of course, it may be offered in an incompetent form, in which case the judge would exclude it.

MR. SCHENKKAN: That's true of all otherwise admissible evidence.

PROFESSOR GOODE: That's right. That's why they're not saying it must be admitted because it may be incompetent or it may be the probative value might be outweighed under Rule 403 --

MR. SCHENKKAN: I see.

PROFESSOR GOODE: -- and so we're not saying it has to be admitted because there are times when evidence is excluded or limited.

CHAIRMAN BABCOCK: Okay. Justice Brown.

HONORABLE HARVEY BROWN: I'm confused by that, too. I mean, other times we say the evidence is admissible and we don't say, but it might not be under this rule or that rule, and this one seems to just make it

that -- it seems like they have kind of less of a presumption that it's admissible, and it's saying it may be admitted, and it says why. It's only admitted if it fits this rule, i.e., to prove that on a particular occasion a person or organization acted in accordance with the habit. I know it's in the Federal rule, but I don't know why we have the "may be" versus "is" here when we don't in other rules.

MR. ALEXANDER: "Is," when you say "is," is what?

HONORABLE HARVEY BROWN: "Is admissible."

MR. ALEXANDER: Well, because the old -- the current Texas rule doesn't proclaim that it is admissible. As Steve said, it could be that it doesn't meet the 403 balancing test or it could be inadmissible for some other reason, so the question is whether this effects a substantive change from the old rule, which just says it is relevant.

CHAIRMAN BABCOCK: Richard, and then Carl. Munzinger, did you have your hand up?

MR. MUNZINGER: Only I agree with Pete. I think that it weakens the case for admissibility of the evidence and casts some doubt as to whether it's admissible to say it may be admissible when elsewhere you say it's admissible. It's admissible subject to the Rules

of Evidence, which include Rule 403, statutes, and other considerations where a trial court can keep out otherwise relevant evidence. This seems to me to detract from this kind of evidence when that isn't the intent of the rule.

MR. ALEXANDER: We had this exact same discussion in connection with this very rule, and it's a valid point that where we came down on this issue was if we were to intentionally depart from the Federal rule in our restyling, although our old rules mirrored one another, what would that create with regard to future arguments or findings by courts in terms of what was meant by the difference, so we left it alone. We figured there was more potential mischief in departing from the Federal restyle than in staying with the Federal restyle.

MR. MUNZINGER: Do the comments to these rules indicate that we have copied the Feds without any intent to make a substantive change? I know we say no substantive change is intended, but do we say that specifically with reference of a situation where we now are using Federal language, where heretofore we had used God's language -- Texas' language?

MR. ALEXANDER: It doesn't quite use the God's language analogy, but we got as close as we could without ruffling feathers.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Why do we have the last sentence in there? Has there been some court decisions or something in the past that you had to have this corroborated or an eyewitness and that's why they put it in there?

MR. ALEXANDER: It's in the current Texas rule.

CHAIRMAN BABCOCK: Gene, then Buddy.

MR. STORIE: Yeah, I wonder what sort of interaction do you have now between Rule 403 and 406. If I make a 403 objection is the response going to be, "No, I'm sorry, it says right in 406 it may be admitted"; whereas, before it was just relevant, so if I had to prove prejudice or some other objection on that basis to the evidence I could get a ruling in my favor.

PROFESSOR GOODE: Sure, it's a permissive. It's not mandatory. Just -- Rule 406 is a really strange rule because if it were not in the Rules of Evidence habit evidence would still be relevant and still could be admitted. The whole point of it is to say there is something different from character, which is kept out if it's offered to prove conformity; and that's that thing we call habit; and so when the Federal rules were originally drafted they put this habit rule in, even though there's no reason to because habit is not character; but they put

it in, they said it's relevant, so we copied the Federal rule. It had that last sentence in there because common law had these restrictions on the admissibility of habit evidence, and the intent of the original Federal rule was to do away with those restrictions, so we copied the old Federal rule when we drafted our original Rule 406. They were exactly the same. Federal restyled 406, we copied the restyling.

CHAIRMAN BABCOCK: Okay. Let's go to --

MR. GILSTRAP: Including the last sentence.

PROFESSOR GOODE: Including the last sentence.

CHAIRMAN BABCOCK: Let's go to 407. Fields, was there any difference between state and Federal here?

MR. ALEXANDER: Yes, there is.

CHAIRMAN BABCOCK: Okay.

MR. ALEXANDER: It's 407(b) is the primary.

CHAIRMAN BABCOCK: But that carried forward from prior Texas law?

MR. ALEXANDER: It did, yes.

CHAIRMAN BABCOCK: All right. Any comments about 407?

MR. SCHENKKAN: We're using "is admissible" here, and it's in a situation where we're not obliged to do so by the fact that the Feds do it because the Feds

don't have a counterpart. So in these three rules 405, 406, 407, we have respectively for 405, "may be proved"; for 406, "may be admitted"; and for 407(b), "is admissible." When we get to the substance I think we should choose, and I think "is admissible" is what we mean.

CHAIRMAN BABCOCK: Anything else on 407? All right. 408, "Compromise offers and negotiations." Any change in Texas law from the Federal?

MR. ALEXANDER: Yes. These do differ.

CHAIRMAN BABCOCK: Okay.

MR. ALEXANDER: And the previous -- the current Texas rule differs from the previous Federal rule, obviously.

CHAIRMAN BABCOCK: Okay. And, of course, you changed this from the old Texas rule to this rule by restyling it, but not changing it substantively.

MR. ALEXANDER: That was definitely the intent.

CHAIRMAN BABCOCK: Anybody say differently? Anybody got a comment about 408?

MR. ORSINGER: Can I ask for a clarification? I guess I didn't understand what you just said. Are you saying that the permissible uses, paragraph (b), is not in the Federal law?

PROFESSOR GOODE: It was.
MR. ORSINGER: It is in the Federal law, but it was not in the Texas law before?
PROFESSOR GOODE: No, it was.
MR. ORSINGER: It was, so it's not a change at all then, huh?
PROFESSOR GOODE: The difference is in the prohibited uses. The Federal -- the current Federal rule is much more complicated --
MR. ORSINGER: Okay.
PROFESSOR GOODE: -- than the Texas rule, and it's just different from our rule. The basic structure of the rule, which is you start out with the prohibited uses and then you have "but it may be used for these other purposes" is the same structure.
MR. ORSINGER: Okay.
PROFESSOR GOODE: And the difference between our restyled version and the Federal restyled version simply reflects the difference in substance in which things may be used to start the prohibited part.
MR. ORSINGER: Well, do they have either more prohibited uses listed or more permissive uses listed than the Feds, the Federals?
PROFESSOR GOODE: If you take a look at the current Federal rule it's very complicated.

MR. ORSINGER: Okay.
PROFESSOR GOODE: Because --
MR. ORSINGER: Is it best to compare to the restyled Federal rule?
PROFESSOR GOODE: If you take a look -- yeah, you can see how complicated it is if you take a look at restyled Federal Rule 408(a)(2). That's where the complications come into the Federal rule that we do not have in the Texas rule.
MR. HAMILTON: You said 408(c)?
PROFESSOR GOODE: 408(a)(2).
MR. SCHENKKAN: Also in the first part of (a) before (1).
MR. ALEXANDER: Right, that's more complicated as well.
MR. SCHENKKAN: At least two different complications in Federal restyled 408 that aren't in the Texas restyled 408 because they weren't in the prior Texas.
PROFESSOR GOODE: What you're referring to at the -- in (a) before (a)(1) --
MR. SCHENKKAN: Yep.
PROFESSOR GOODE: -- is a codification of a dispute about how to interpret what's now 408(b). But the (a)(2) part was a long, drawn out contest as to the extent

to which compromised evidence would be admissible in a criminal case. So, for example, if you had a civil action by a Federal agency, the SEC, and the party enters into an agreement with the SEC, to what extent would that be admissible if there was then a criminal prosecution against the party and the SEC compromised evidence was relevant. How could that be used in a criminal case, and there was a split in case law as to whether Federal Rule 408 only covered admissibility in civil cases or criminal cases, and there was a big debate about that, and what you see in 408(a)(2) is essentially a compromise about the compromise rule. Now, some of that stuff gets in and some of that stuff doesn't get in, and we don't have any of that in our rule.

CHAIRMAN BABCOCK: Justice Brown, and then Richard Orsinger. I mean Munzinger, sorry.

HONORABLE HARVEY BROWN: You-all said earlier that you tried not to change words unless there was a good reason to. In (a)(2), the statement right at the beginning, "conduct or a statement made during compromised negotiations" is in the Federal rule, and you changed that to "conduct or statements made in compromised negotiations." Why did you change "during" to "in"?

PROFESSOR GOODE: Good question. Let me see if we can figure out the answer.

MR. ALEXANDER: The current Texas rule in place now uses "in compromised negotiations," and I need to see what the old Federal rule said. That's probably why we deviated.

HONORABLE HARVEY BROWN: Do you think there's a difference? Because if not, don't we fall back on your default rule of using the Federal language.

MR. ALEXANDER: We would, and I'm sure we discussed this earnestly, and I just can't recall those discussions quite frankly.

CHAIRMAN BABCOCK: Okay, let's -- yeah, Richard Orsinger. No, wait a minute, Munzinger had his hand up before you.

MR. MUNZINGER: I only note that here we have a comment to the rule saying that in the last part here that it's still governed by 402, 403, et cetera. We don't have such comment elsewhere when we talk about "evidence may be admitted" as distinct from "is admissible." Was that intentional? If it was intentional does it say something to the practitioners about those rules where there is no such comparable comment?

MR. ALEXANDER: In general we tried not -- there are a lot of rules where there was discussion as to whether we should have some comment appended to the rule to clarify that no substantive change was intended. We

fell back on omitting -- either you were going to put it after every dad-burned rule or you were going to have it at the beginning and then only put it in a few places where we felt it was especially necessary. This was one of those places, but it's a valid -- it's a valid issue, frankly.

PROFESSOR GOODE: These comments come directly from the Federal. It's a Federal.

CHAIRMAN BABCOCK: Okay, Orsinger.

MR. MUNZINGER: No, I understand, but they still may have a substantive effect on the practitioner. I'm sitting here trying to figure out what these rules mean. Now they're new. They've been restyled. They say they don't change this, and yet they're using this term in here and not there. I appreciate the problem that you had as drafters, and I mean no criticism.

MR. ALEXANDER: Right.

MR. MUNZINGER: I'm just pointing out an interpretation and argument that could be made.

MR. ALEXANDER: We wrestled with the same issue when we were going through these.

CHAIRMAN BABCOCK: Okay. Richard Orsinger, and then Frank.

MR. ORSINGER: Okay. In the rewrite you-all deleted the sentence from the existing rule that "This

does not require the exclusion of evidence otherwise discoverable merely because it was presented in the course of compromised negotiations," and your comment explains that you didn't delete that because you were disavowing that principle, you just feel like it's an unnecessary statement given the other language of the wording. However, it has been my experience in this rule process over the years that when you delete part of a rule an argument is made to the court that that prohibition or exception or allowance is no longer there, and you've cured that argument in this comment, but it's also been my experience in the rules process that the comments that get published with the rules by the Supreme Court for public comment do not include the kind of comments that you, the drafters, have given to us, the committee. Instead they only include the comments that the Supreme Court of Texas is giving to the practitioners and the judges, so I suspect that this comment that explains that your deletion does not indicate that you're eliminating this concept will not actually make it into the public record, and it worries me just a little bit.

MR. ALEXANDER: Well, it should make it in.

MR. ORSINGER: Well, we've had this problem before.

MR. ALEXANDER: It's intended to mirror the

Federal comment.

MR. ORSINGER: Well, there's different kinds of comments. There's comments that the task force --

CHAIRMAN BABCOCK: As we've proved today.

MR. ORSINGER: Yeah, there's different kinds of comments. There's comments the task force gives to the committee --

MR. ALEXANDER: Sure.

MR. ORSINGER: -- and to the Supreme Court to explain what they did.

MR. ALEXANDER: Right.

MR. ORSINGER: And then there's the comments that the Supreme Court gives to the lawyers and judges about what the rule means, and the comments that are going to go out to the lawyers and judges may include 10 percent of what you said, and so I just want the record to reflect, if nothing, else that your deleting that was not an effort to change anything, and your comment explains that, and I'm not sure your comment will ever get past today. So it's --

MR. ALEXANDER: The reason that I think that it hopefully will is that it mirrors the Federal comment appended to this rule for these exact same reasons, so --

MR. ORSINGER: Can I ask you a broader question then? Are you anticipating or are you

recommending that the Court carry forward into the rules of procedure adopted in Texas and all the paperbacks that all the lawyers have all of your comments?

MR. ALEXANDER: Yes, the comments -- yes, the comments that are in here and the comments that we circulated, they are intended to be published with the rules, to be part of the codified rules.

MR. ORSINGER: Okay. Thank you for that clarification.

CHAIRMAN BABCOCK: Frank, and then Professor Dorsaneo.

MR. GILSTRAP: One of the exclusions allows admission of settlement negotiations to prove the bias or prejudice of a witness. The new rule says "bias or prejudice of a witness or party." Now, I know that the Feds made that same change, but still, why isn't that a substantive change?

PROFESSOR GOODE: The current Texas rule talks about the bias or prejudice of or interest of a witness or a party, and this rule talks about a party or witness' bias, prejudice, or --

MR. GILSTRAP: I see, okay.

PROFESSOR GOODE: But back to the earlier point about whether it should be "during" or -- "during or in" in (a)(2), I think we just may have missed that in not

following the Federal version of it.

HONORABLE HARVEY BROWN: And I think "during" may be a little broader than "in." "In" sounds like to me that conversation, whereas "during" sounds like in that time frame, so you might talk to the lawyer on the phone about settlement and specifically be on the topic of settlement in conversation one that morning, and that afternoon you don't actually talk about it, but it's kind of that same time frame.

PROFESSOR GOODE: Right.

HONORABLE HARVEY BROWN: I think "during" is a better word.

PROFESSOR GOODE: The old Federal was "in." Our old -- our current is "in." The new is "during." We should have made that "during."

MR. ALEXANDER: We can make that change.

CHAIRMAN BABCOCK: Professor Dorsaneo, and then Carl.

PROFESSOR DORSANEO: I just wanted to say that what Richard said is right in the many, many rules that have much longer comments, and they don't carry forward, and publishers frequently leave out comments regarding them as not important, not official, even comments that are identified by the Supreme Court as -- as official, as official as the black letter. So you are

really playing with fire when you take out something and you say it didn't happen.

MR. ALEXANDER: It's a valid point. It's obviously intended to be a comment appended to the rule just like the comments that are appended to the request for disclosure are carried with the rule and are in both the West version and O'Connor's, and the comment is carried in the current Federal restyled rules, so it's certainly our intent that these comments would be -- would be a part of the published version of the rules, and I think that could happen because we've seen other examples where it has happened.

HONORABLE ROBIN DARR: That's why you'll need to buy Steve Goode's book.

PROFESSOR GOODE: That's the real reason for it.

HONORABLE ROBIN DARR: To make sure you have that comment in there.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: If they're going to be published as official comments, that last part of the first paragraph, the word "etc." doesn't advance the ball, so I think you need to add something to that or change the sentence. "Rules 402, 403, 801, et cetera," what does the "et cetera" mean?

MR. ORSINGER: It means that that list is not exclusive, but it doesn't tell you what's on that list.

MR. HAMILTON: It doesn't tell you what's on it.

MR. ORSINGER: You're going to have to ask Dorsaneo or Goode what's on the list.

PROFESSOR GOODE: That's straight from the Federal comment, same language.

MR. HAMILTON: The Federals are more smarter than we are, I guess.

PROFESSOR DORSANEO: No, they didn't know what to say and are pretending they did.

MR. ORSINGER: They're punting.

CHAIRMAN BABCOCK: All right. In our last dying moments here, Rule 409. Any comments about that? Tom.

MR. RINEY: Yeah. I realize this is basically the previous rule, same as Federal, but it's never made any sense to me to say "furnishing medical expenses." In other words, if it said "evidence of paying, promising to pay, or offering to pay medical, hospital, or other expenses is not admissible" that would make sense to me. I understand also that a hospital or a doctor could furnish medical treatment, but I don't see

how you can furnish expenses.

CHAIRMAN BABCOCK: Or payment.

MR. RINEY: Yeah.

CHAIRMAN BABCOCK: Okay.

MR. ALEXANDER: We just used the language that's in the current Texas rule, in the old Federal rule, in the new Federal rule.

MR. RINEY: Right. I've never been able to understand it. It's not your fault.

CHAIRMAN BABCOCK: It's a linguistic oddity. Okay. Anything else on 409? Well, we'll stop there then. Judge and Professor Goode and Fields, thank you so much. Great work, and you've now been subjected to the SCAC treatment. We hope you'll come back on October 18th for some more since this has been so much fun, and we will -- we will see you on the 18th and carry over to the morning of the 19th, ending at noon and --

HONORABLE ROBIN DARR: Okay.

CHAIRMAN BABCOCK: So we're in recess, and you guys can go out and get rodeo drunk, but the rest of us will be back tomorrow morning for affidavits of indigency, so we're in recess. Thank you.

(Adjourned)

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MEETING OF THE
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