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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 19, 1996

(MORNING SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 19th day of July, A.D., 1996, between the hours of 8:30 o'clock a.m. and 12:20 o'clock p.m. at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

JULY 19, 1996

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
David E. Keltner
Joseph Latting
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
David J. Beck
Ann T. Cochran
Charles F. Herring, Jr.
Tommy Jacks
Franklin Jones Jr.
Thomas S. Leatherbury
Gilbert I. Low
John H. Marks, Jr.
Hon. F. Scott McCown
Hon. David Peeples
David L. Perry
Anthony J. Sadberry

EX OFFICIO MEMBERS:

Hon Sam Houston Clinton
Hon William Cornelius
Paul N. Gold
O.C. Hamilton
David B. Jackson
Michael Prince
Mark Sales
Hon. Paul Heath Till
Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Hon. Nathan L. Hecht
W. Kenneth Law
Doris Lange

JULY 19, 1996
Morning Session

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ROBERT L. ESCHENBURG II

August 12, 1996

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Supreme Court Advisory Committee

Dear Justice Hecht:

Enclosed is your copy of the transcript of the July 19-20, Supreme Court Advisory Committee meeting.

Sincerely,

Holly H. Duderstadt
Legal Assistant

/hhd
Enclosures

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SCAC MEETING

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CHAIRMAN SOULES: I just want to say thank you for everybody for coming this morning. Brief message, we have a telephone battery here that we found on the floor, if anybody lost a telephone battery or would like to have one.

MR. YELENOSKY: If you have the telephone to it, I will take it.

CHAIRMAN SOULES: Well, I was just going to put it in my hip pocket and see if it would give me a little extra energy for the day, but anyway, here it is. If no one picks it up, we will turn it in to the State Bar lost and found later in the day.

All right. Our meeting will convene, and the agenda that we sent out will be followed in order. First this morning we will do the Rules of Civil Evidence until they are completed through the day and then after that we will get to Richard Orsinger's, the remainder of his report, then Paula Sweeney, Steve, and so forth. A sign-up list is being circulated right now, so it should be coming to you around the table counterclockwise.

We have both Mike Prince and Mark Sales

here from the State Bar rules of evidence committee; and I guess, Mike, you are going to make the presentation, and Mark may assist in some way, however you-all have that organized. Mark is the present chair of the rules of evidence committee as of June. Mike is the now retired chair; but, of course, most of the work that's been done on these rules was done under Mike's term and the previous term. So we wanted to have them both here to help us as we go forward on the rules of evidence.

So I guess we will start then. Mike, why don't you just start making your report rule by rule, and I think you indicated that the first thing you wanted to do was take up the disposition chart, what remained of that, and then move to the merger of the Rules of Civil and Criminal Evidence and then to the proposals by the State Bar; is that right?

MR. PRINCE: That's correct.

CHAIRMAN SOULES: Okay. You have the floor. Thank you.

MR. PRINCE: Thank you, Mr. Chairman. Buddy Low could not be here this week, and he asked me to do this as a

report for the committee consisting of himself, Tommy Jacks, and John Marks, with whom I have been working, of course, on some of these proposals this past year. The largest part of the report and the most time would be -- as the chairman indicated, would be the recommendation from the State Bar evidence committee which have been considered by Buddy's subcommittee and are now ready to be considered by this group as a whole.

The report is basically in three parts, and I will try to tell everybody what you should have and kind of take these in order. The first part, as we indicated, will be on the disposition chart. I think there are some extra copies of that that Buddy prepared on the table over there in case you didn't get one in the transmittal. Those are matters that have been previously considered by this group and then two new matters that have come up and been considered by Buddy's group since the last meeting.

The second part will be the recommendations from the State Bar committee, now considered and passed on to this group for

consideration by Buddy's subcommittee on the unification of the civil and criminal rules, and then the third part will be the recommendation from the State Bar committee now considered by Buddy's subcommittee in this past year for various changes or suggested changes to the Rules of Evidence or comments to various rules of evidence.

You should have with you the disposition chart for the unified rules that should have been in the transmittal the following items: a set, a draft set of the unified rules of evidence, the table of contents of the unified rules of evidence, a derivation table of the unified rules of evidence, and then a disposition -- two disposition tables, one showing the disposition of the current civil rules into the proposed unified rules and a similar disposition table showing disposition of the present criminal rules into the proposed unified rules.

And then for the third item on the agenda you should have the bound booklet listing on the cover sheet, the first couple of cover sheets there, by numbered items the proposals

considered and passed on to Buddy's committee from the State Bar committee, and the tabs in that booklet are numbered to correspond with the numbered items on those two cover sheets so that when you are looking at the short form recommendation of the State Bar committee on the front page, you can turn to the tab behind that in the booklet, and there within that tab are contained the proposal that was voted on and any work product, either pro or con, for that particular proposal that was generated by the State Bar committee. We have included in what we have submitted on to you folks everything that anybody wanted to submit by way of supporting or dissenting work product so that you could have the benefit of it.

Some of these items, of course, obviously are very contentious, particularly on the third part of the agenda, and people did a lot of work, I think a lot of very thoughtful work, both in support of and in opposition to some of these proposals, and I thought it was worthwhile, and everybody agreed that it would be worth everybody having that as part of your consideration.

If you would turn to the disposition chart then, first of all, that Buddy sent out or it was included in your package. It consists of about a page and a half. In one way or another all of those items on the first page have been voted on by the Supreme Court Advisory Committee already.

Specifically, action has already been taken and a vote reported on items dealing with Rule 606, 204, 407, 413, 703, 902, a proposed new criminal rule of 182, and 504. Action was taken to defer action on the following items, and that is Rules 514, 503, 412, and 702. And the basis for that deferral the last time around was the fact that Buddy's subcommittee was awaiting for forwarding on to you folks the finished product of last year's State Bar on evidence committee, and so when we get to that part of the agenda those four items will be addressed as part of the State Bar evidence proposals.

509, Rules 509 and 510, we were awaiting the State Bar committee action. I think it's the family law committee, and Richard Orsinger will correct me if I am wrong on the title of

that committee, but we were waiting to see if there was any input from that group on possible corrections or changes to make consistent different provisions of Rule 509 and 510; and as I understand it, Richard, as you informed me this week, there seemed to be little or no interest in that at the State Bar committee level; is that correct?

MR. ORSINGER: The Family Law Council, I raised the issue, and they created a subcommittee that I chaired on whether we should alter or eliminate the suit affecting the parent/child exception to the mental health privilege and to the doctor/patient privilege. The subcommittee members fell into a whole spectrum of those who wanted to do away with it, which was my position, to those who wanted to do nothing; and with the mid-ground of people that wanted to give the court some kind of power to weigh the discovery against the relevance or importance of the evidence under the conception that right now it's an absolute exception and, therefore, the court has no ability to weigh the availability of discovery. They may be

able to weigh admissibility at trial, but since it's an absolute exception, it's just discoverable. That was the conception.

The entire Family Law Council when it considered it and debated it decided to take the position that there should be no change, that the exception should stay in as-is. So that was what the Family Law Council's input was, and that is not my view as an individual litigator and family lawyer. So that's that.

MR. PRINCE: Based on that, Mr. Chairman, that section on the first page of the disposition chart then talking about Rules 509(d) and 510(d), we have no recommendation or Buddy's subcommittee has no recommendation to make in that regard at this time. 509 I believe applies to both judicial and administrative proceedings, and 510 I believe only applies to judicial proceedings, and it was that anticipation of that State Bar committee action with some recommendation that we were awaiting. There is none, and consequently we have no recommendation at this point. Not to say that there ought not to be one, but we just don't have one that we can

talk about on today's agenda.

CHAIRMAN SOULES: Okay. So what are we going to do with 510 and 509? Defer them to another meeting?

MR. PRINCE: I don't want to speak for Buddy. Since we have no recommendation right now to make I don't think we need to vote up or down whether it ought to be changed or ought not to be changed. If you want to table that, that probably would be appropriate, but we just don't have a recommendation at this time.

CHAIRMAN SOULES: Please bring us a recommendation to our September, I guess it would be, meeting.

MR. PRINCE: Richard, do you want to push for that?

MR. ORSINGER: Well, let me -- can I speak to this issue of the exception?

CHAIRMAN SOULES: Sure.

MR. ORSINGER: Rules 509 and 510 when they were originally adopted I believe did not contain what is now called the relevancy exception, and I could be corrected

on that, but I believe that that's true.

PROFESSOR DORSANEO: That's true.

MR. ORSINGER: So Bill confirms that that's true. There was an important need to have a suit affecting the parent/child exception to these privileges which were -- in the context we are thinking of, were absolute because we had the impediment that people were seeking custody of children or things like that, and they had some significant psychological problems, and you couldn't get that before the jury.

Subsequent to the adoption of the rule, the so-called relevancy exception was introduced to the rule and has been interpreted by the Texas Supreme Court within the last two years to say that if the psychological or medical condition of a person is important to the litigation, not ancillary but important, and someone here may have the the wordage better than I do, but it has to be -- it has to relate to an important claim. Then they are discoverable in any litigation, family law, personal injury, you name it; and

the case that the Supreme Court ruled on, which resolved differences of authority between the courts of appeals was a doctor defendant in a personal injury case where the plaintiff alleged that the negligence was a result of the doctor's dependency on either alcohol or drugs. Paula, I don't remember, but it was --

MS. SWEENEY: R.K. V. Ramirez, I think.

MR. ORSINGER: That's it.

MS. SWEENEY: It was drugs.

MR. ORSINGER: And the issue was whether the mental health and medical records of the physician were relevant to the plaintiff's claim merely because the plaintiff said, "You committed negligence because of your drug problem," and some of the courts of appeals said, no, that's not good enough; but the Supreme Court said that is good enough as long as it's not purely ancillary. As long as it goes to the central part of your claim then you have breached these privileges.

Now then, with that law it is perhaps not as necessary to have the suit affecting the

parent/child exception because it is obvious that in many instances in a custody case the relevancy exception will penetrate the privilege because the best interest of the children, the qualifications of the parents, whether they have psychological problems, whether they have drug addictions, all of that is relevant. I don't know how it could not be relevant, and so in a certain sense that relevancy exception does the duty.

Now then, the truth is, is that these mental health records, the exception as it's written here is not just limited to parties. It's anybody, and so clearly a professional that's hired, there is a case -- I think out of the Beaumont court of appeals -- that says that a professional witness that testifies on whether or not a father should have custody puts in play his or her own personal psychological and medical records.

Now, some of the people have the attitude that if a professional has a bias in favor of a mother or in favor of a father or a bias to always find child abuse whenever there is an allegation, that you can develop that bias

through their professional record, through their articles, through the fact that they have never evaluated a case where they didn't find sexual abuse, through the fact that nine out of ten times they always go with the mother. Those things can be developed out of their professional career without looking at the records that may exist about their divorce or the therapy they may have had because they were abused when they were young, but the suit affecting the parent/child exception doesn't say that, and the Beaumont court of appeals says that that's fair game. Steve.

MR. YELENOSKY: Yeah. Richard, first, when you refer to the relevancy exception, are you talking about (4)? Is that where it is?

MR. ORSINGER: Yes.

MR. YELENOSKY: Okay. And (6), the one on parent/child begins when the disclosure is relevant in any suit affecting parent/child relationship. Is the word "relevant" in (6) interpreted by the courts differently from the relevance section in (4)? Because if it is, then I have a problem with

it. If it's not, it's redundant.

MR. ORSINGER: I don't think that the courts have interpreted "relevant" in (6) for the parent/child relationship but --

MR. YELENOSKY: Because if it's interpreted the same way then (4) and (6) would -- neither one would allow you to get to the mental health records of an expert unless there is some relevance.

MR. ORSINGER: Well, I mean, it's always -- according to the Beaumont court of appeals and according to just common thinking anybody who is testifying when their credibility is in issue, then things that affect their credibility is relevant because the definition of relevant is anything that makes one of the propositions more or less likely.

MR. YELENOSKY: Well, if you take out (6) though, then would (4) not allow that in any suit? I guess I am having trouble understanding why (4) isn't also a problem if it's really just the same relevance test that you have just described in (6).

MR. ORSINGER: Well, perhaps it

is, Steve, but there is no case saying that a testifying witness breaches all of their privilege by being a witness under (4). There is under (6).

MR. YELENOSKY: Okay.

MR. ORSINGER: Now, if they start saying that about (4) then I start having the same problem with (4) that I have about (6), which is it could apply to your next door neighbor.

MR. YELENOSKY: Right.

MR. ORSINGER: It could apply to a baby-sitter. It could apply to a grandmother as well as applying to a court-appointed social worker.

CHAIRMAN SOULES: Let me interrupt this dialogue a minute. I have no idea where you are. Where is (6)? Help us get to exactly where we need to be.

MR. YELENOSKY: We were talking about 509(d), the exceptions.

CHAIRMAN SOULES: Yes.

MR. YELENOSKY: Exception No. (4) is the one that Richard has said obviates the need for No. (6), which is the

family law exception, and my questioning has been about how those two differ.

CHAIRMAN SOULES: 509(d)(4)?

MR. YELENOSKY: Right. And 509(d)(6). Since (4) has been interpreted as a relevancy exception and (6) explicitly uses the word "relevance" it's kind of hard to understand how they would be different, but Richard is saying that the case law is such that (6) is essentially interpreted to mean that in a family law case, no holds barred, you don't really even have to meet a relevance test. I guess that's what I am hearing from him.

MR. ORSINGER: No. I am saying that credibility meets the relevance test under (6) according to that case.

MR. YELENOSKY: Okay. In the family law situation.

MR. ORSINGER: Yeah.

CHAIRMAN SOULES: Now, the committee did have a recommendation on this. The committee recommended that there be no change to 510(d)(6). We discussed that. We then deferred action until we could hear back

from Richard on what the Family Law Council -- and I am not trying to shortcut the debate on this, but let's go ahead and get this resolved because we do have a recommendation from Buddy's committee to do nothing, to not change.

MR. ORSINGER: I didn't realize that. I thought that Buddy had not made a recommendation.

CHAIRMAN SOULES: No. The disposition chart from the last meeting 510(d)(6). "Peter S. Chamberlain, protection of psychological records of counselor or expert," where the source of it was, "Recommended action, none; reason, other rules give adequate protection, particularly 403."

MR. ORSINGER: That doesn't give you any protection for discovery. That only gives you protection for admissibility, and that's a misconception. We are talking now not about whether the jury sees it, but whether these records go out into the community, entirely different issue; but if it's been foreclosed by a previous vote we don't --

CHAIRMAN SOULES: No. It was not voted.

MR. ORSINGER: Oh, it's not voted?

CHAIRMAN SOULES: We deferred the vote so that we could get the input from the family law people and now we are talking --

MR. PRINCE: Mr. Chairman, one other thing, too, as the disposition chart indicates, I didn't mean to suggest earlier that there hadn't been that recommendation, but the thing we were really waiting on in Buddy's group in addition to what had been done before, if you will look at 509(d) which deals with the physician/patient privilege, Rule 509 does, and it says, "Exceptions to confidentiality privilege in court or administrative proceedings exist." 510(d), which is the confidentiality of mental health information says that exceptions to the privilege in court proceedings exist, and so the pending issue was whether or not we make them -- we put "court and administrative proceeding" in both or court only in one, and

that's what we don't have a recommendation on.

CHAIRMAN SOULES: Well, that recommendation is on the second page to the last, and the recommendation was "to amend 510(d) so the exception applies also to administrative proceedings. Reason, consistency."

MR. PRINCE: Right.

CHAIRMAN SOULES: And that got also tabled for one -- or deferred for one reason or another.

MR. PRINCE: For the same reason I think here back.

CHAIRMAN SOULES: Okay.

MR. YELENOSKY: What's on the floor now?

CHAIRMAN SOULES: I think what's on the floor now is do we amend 510(d)(6) to say that --

MR. YELENOSKY: 509(d)(6).

MR. ORSINGER: Or both.

CHAIRMAN SOULES: 510(d)(6).

MR. ORSINGER: Well, 509 and 510 have the same exceptions.

MR. YELENOSKY: Yeah.

MR. ORSINGER: So you can talk about them in the same breath if you want to.

CHAIRMAN SOULES: Okay. What is the number of the exception on 509?

MR. ORSINGER: (D)(4) and (d)(6).

CHAIRMAN SOULES: 509(d), what?

MR. ORSINGER: (4) and (6).

CHAIRMAN SOULES: (4) and (6). And 510(d)(6)?

MR. ORSINGER: (4) and (6). Well, (5) and (6). Pardon me.

CHAIRMAN SOULES: What?

MR. ORSINGER: (5) and (6). 510(d)(5) and (6).

MR. YELENOSKY: Right. It's in a different place.

CHAIRMAN SOULES: And the issue is do we propose to amend all of these so that there is a privilege of an expert not to disclose his own counseling records?

MR. ORSINGER: That may be what the letter in the agenda says, but what I am actually advocating is a rule that would apply no non-expert witnesses, particularly

non-party non-expert witnesses. So I don't know how broad you want to go, but I don't think it's any better to put the neighbor up on the witness stand and then disclose all of their mental health records than it is to put a hired expert. I think the hired expert probably professionally can expect that more than a subpoenaed witness that's brought in by one side against their will and then the other side has access to all their confidential records.

CHAIRMAN SOULES: Well, the only thing that we have in writing is the expert.

MR. ORSINGER: True.

CHAIRMAN SOULES: And if we are going to expand that, we would need to get something, to get a new agenda item.

MR. ORSINGER: I didn't realize that. I thought you could just make a motion right here in the committee.

CHAIRMAN SOULES: Well, it's something we haven't even -- have we talked about this before?

MR. ORSINGER: Well, I have

talked about it before in this committee.

MR. YELENOSKY: Well, I thought Richard was going to come back with the Family Law Council's position --

MR. ORSINGER: I did.

MR. YELENOSKY: -- which he has, and his own personal position speaking to the question of whether there ought to be a particular exception for family law cases, and my interest is from the perspective of confidentiality in general of mental health records; and if it is on the table, my position would be that the same standard of relevance ought to apply in any case, particularly because even though it is a family law case you are bringing in non-parties; and if it's been interpreted to open it up to just about anybody in a family law case, I have a problem with that.

The Family Law Council has said not to change it, but Richard personally thinks that it should go out, and so I don't feel that taking it out is going to do any harm to the family law Bar based on Richard's personal opinion.

CHAIRMAN SOULES: Taking what out?

MR. YELENOSKY: (6).

HONORABLE SCOTT BRISTER: Luke?

CHAIRMAN SOULES: Taking (6) out. Well, the committee is talking about amending by adding something to (6). That was the inquiry.

MR. ORSINGER: Adding what?

CHAIRMAN SOULES: Adding that the 510(d)(6) exception does not include the records of the identity diagnosis for evaluation or treatment of a counselor or an expert witness involved in the case.

MR. ORSINGER: Well, are we confined to the letter that the stranger sends, or can we talk about what the committee people want to do?

CHAIRMAN SOULES: Well, we have got to get our business done sooner or later, and we can't sit here and muse about things that --

MR. ORSINGER: This is not musing. This is serious to me.

CHAIRMAN SOULES: Well, I know,

but we have got to get to the items on this agenda.

MR. ORSINGER: Okay. Well, I don't mind voting on that if I'm permitted to raise my issue for vote.

CHAIRMAN SOULES: You will be permitted to raise your issue for a vote when it's submitted in writing and reviewed by a subcommittee.

MR. ORSINGER: As long as I am not foreclosed from revisiting that after I submit it in writing that's okay with me.

CHAIRMAN SOULES: Not at all.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I am wondering what effect this has because 4590(i) and 4595(b) or whatever it is makes both the hospital and the doctor liable in damages if they disclose these -- and these are statutes passed by the legislature. If they disclose these records without, one, court order or, two, consent; and that's the only way that they are not going to be liable in damages.

So I can't see what difference it's going to make if a family law attorney goes in and says, "Give me the records on my opponent," and they say, "no." They say, "Oh, well, they are not privileged. I am a family law attorney." The hospitals and doctors I know are going to say, "Tough. We don't want to get sued in damages for these. Bring us a consent or a court order, like the statute says."

I don't see why this clause is even operative practically because no hospital or doctor I know, unless they just don't know anything about the statute, are going to disclose them just because you say it's for a family lawsuit.

MR. YELENOSKY: Well, what if you do a subpoena duces tecum or something and the party is supposed to --

HONORABLE SCOTT BRISTER: The statute says court order. The statute says -- actually it's --

MR. YELENOSKY: No. I mean to the witness. "Bring your own records."

HONORABLE SCOTT BRISTER: A

subpoena is not a court order. Unless you get a trial subpoena you are getting a subpoena from a notary public, which is the court reporter, and that ain't a court order.

MR. YELENOSKY: Well, no, I mean, if you --

CHAIRMAN SOULES: Excuse me. We only have the proposal to put that language I just read in and to add "administrative proceedings" to one of the two rules, the one that doesn't have it. That's what we are talking about.

MS. SWEENEY: Mr. Chairman?

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: I think the discussion is largely at this point academic. The most recent Supreme Court on it is what Richard was talking about, which is R. K. V. Ramirez, and in construing the language which in that instance had to do with a defendant's records they went through and said, "Well, what does the exception mean that it's discoverable if it's relevant in the context of a lawsuit?"

It wasn't parent/child. It was just any lawsuit, and they said, you know, it's not just -- it can't just be something that is tangentially related to some element of a claim, and they went through and built in some protection that it has to be central and basically important, and you have got to prove it to the court before you get an order, and otherwise the statute that Judge Brister is talking about is going to apply.

So at this point I think that the recommendation makes sense because the court has built in protection that doesn't permit just a generic fishing expedition into, you know, any witness' records without that sort of protection from the court. I think we may be borrowing trouble here.

CHAIRMAN SOULES: All right. Tell me which recommendation you are talking about. Are you talking about the subcommittee's recommendation that we not change (d)(6)? That's their recommendation.

MS. SWEENEY: No. I am talking about Richard's concern that we do need to talk about it because there is this risk out

there and wanting to visit that issue, and I don't see that that's a need because I think the protection is already there. So I agree with the subcommittee.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, after listening to the discussion it seems to me that (6) and its companion -- I guess its (6) in both places -- is entirely too broad; and it either ought to be eliminated in favor of letting (4) or (5) carry the freight, or we ought to consider this proposal that limits (6), either one or the other, but let's do it. And the relevant in (6) is not limited to reliance on things that involve claims or defenses as is the case with (4), and it seems obvious to me that (6) is too broad.

MR. YELENOSKY: Thank you.

CHAIRMAN SOULES: Anyone else? All right. If there is no further discussion, we will vote on the subcommittee's recommendation that 510(d)(6) have no change.

Those in favor show your hands. Two. Those opposed? 14.

14 are for a change. We do not have language. We just refer it back to the subcommittee.

HONORABLE SARAH DUNCAN: Do you want to take a vote on what change? Are they just limited to experts or all?

MR. PRINCE: This would be 509(d)(6) and 510(d)(6).

CHAIRMAN SOULES: And 510(d)(6). And I think that probably we only have 510(d)(6) on the agenda, but it should be 509(d)(6), too. (D)(6) also because they are the same.

MR. PRINCE: The Peter Chamberlain proposal on making this just as it talks about counselors or experts, do you want a separate vote on that, or am I to take it that we have now voted to go do something different?

CHAIRMAN SOULES: Are we ready to have some sort of a showing of consensus? That's what Justice Duncan was just raising, whether that -- if it applies to everyone, it seems to me like it ought to just be taken out. If the exception applies to everybody,

why have a rule that applies to everybody and an exception that says it doesn't apply to anybody. Huh?

So I guess the vote would be -- and this is just -- all this is, is an indicator because we will debate it when we see it on the table or after the subcommittee has thought about it. One would be to eliminate (6), and the other would be to make an exception to (6) for the records of experts, stated in a shorthand way.

First, just a straw poll, those who think (6) should be eliminated entirely. Start over. All hands up and keep them up. 12.

Those who think it should be kept but an exception for records of experts.

MS. SWEENEY: How about kept as it is, option three, door number three?

CHAIRMAN SOULES: No. 3, kept as it is, no change, that's what we just voted on 14 to nothing.

MS. SWEENEY: Well, I want to vote against that. I get to vote the other side of that issue. You can't just have all the yes's and ignore us no's. I'm a "no."

CHAIRMAN SOULES: Okay.

MS. SWEENEY: Register my "no." Geez.

CHAIRMAN SOULES: Well, I think we did in the last vote. Okay. So we are probably going to get a proposal then from the committee to just delete No. (6) altogether, and then we will talk about it if we need to talk about it anymore.

MR. PRINCE: Last thing on that then is the addition of "administrative proceedings" in 510.

CHAIRMAN SOULES: Is there any opposition to that, making the two rules apply to both court and administrative?

No opposition. It's approved unanimously.

Okay. Thank you, Mike. What's next?

MR. PRINCE: The next thing is on the second page of the disposition chart, two new proposals that have come in or been considered since the last meeting. The first one was a proposal by a Mrs. Ramirez, the spouse of a doctor against whom some other doctors had testified before the State Board

of Medical Examiners, which resulted in also some judicial proceedings in state and Federal court. I have a copy of this correspondence if somebody would like to read it.

The specific issue considered by Buddy's committee was whether we should adopt a rule of evidence that would limit in some amount the amount of compensation that could be paid to expert witnesses who testified at trial, and Buddy's subcommittee felt unanimously that this was not a proper matter for the rules of evidence or procedure, and if any action were taken on that at all, it was a legislate, a matter for the legislature, and unanimously recommend that we not adopt such a rule limiting the compensation of expert witnesses.

CHAIRMAN SOULES: Any opposition to that recommendation? There is none, so the committee's recommendation will be adopted for no change in response to Mrs. Ramirez' inquiry.

MR. PRINCE: On a related but somewhat different matter, Bob Martin, a lawyer I think from Dallas, has recommended that we give consideration to the adoption in

the state courts of the equivalent of Federal Rule 706, which allows the court to appoint experts and to determine their compensation.

Buddy's subcommittee has voted unanimously to recommend that this rule not be adopted basically for two reasons. We didn't feel that the judges in Texas should be empowered to call or are empowered to call witnesses and do not believe that they should be and it would not be proper for judges to retain expert witnesses on their own and have that taxed as a cost later. So the subcommittee unanimously recommends that the analog or some analog to Federal Rule 706 not be adopted.

CHAIRMAN SOULES: Is there any opposition to the committee's recommendation? There is none. We stand approved.

HONORABLE SCOTT BRISTER: Well, let me --

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I think it would be a great idea, but if nobody is -- that may be because I am a judge. I

think it would be a great idea. I think it's a travesty that I have attorneys come in. Usually the way it works out is on an IME where the defendant comes in and wants to do the IME before a known defendant's doctor. The plaintiff's attorney objects, and I ask the plaintiff's attorney, "Well, you got your doctor. Who is your doctor, the person you sent them to?" I say, "Well, you guys tell me. Do you want two biased witnesses, or do you want one unbiased?" And in every circumstance they both say, "We want two biased witnesses."

I mean, just from a public policy standpoint that's a waste of time and money, but I don't think there is probably any consensus to change it. So just note my exception. I think judges should have that power.

CHAIRMAN SOULES: So noted.

HONORABLE PAUL HEATH TILL: Make it two exceptions. I agree with him whole-heartedly.

CHAIRMAN SOULES: So noted. Mike Hatchell.

MR. HATCHELL: I think the committee should at least consider whether or not in the wake of DuPont V. Robinson it is useful for courts to have the power to appoint experts as advisors either to them or to the masters who have to decide Robinson issues.

CHAIRMAN SOULES: If you would like to draft up something and bring it to our attention, we will certainly look at it.

Okay. What's next, Mike?

MR. PRINCE: That's it for those items on the disposition chart, Mr. Chairman. Next, the second item on the agenda is the proposed unification of the Texas Rules of Civil and Criminal Evidence, and again, did everybody -- you should have the proposed unified rules of evidence; the table of contents; the derivation table for the unified rules; the disposition table on the criminal rules, the current criminal rules, into it so that -- as it were into the proposed unified rules; and a similar disposition table on the civil rules into the proposed unified rules.

Let me start, and I do not want to take a

lot of time with this, but a lot of suggestions that both this committee and the State Bar committee has received come, of course, from letters, individual letters from lawyers and judges. This particular -- let me give you the background and the origin of this particular proposal to unify the civil and criminal rules of evidence.

Two or three years ago Justice Hecht through Lee Parsley and on his own asked the State Bar administration for the rules of evidence committee to simply examine this issue and take a look at it, and he solicited our input on it about whether the rules -- whether we ought to give consideration to unification of the rules. The State Bar committee assigned a subcommittee that at various times had two law professors; some criminal, some civil lawyers; some judges, trial judges, who reviewed the possibility; and let me assure everybody here that we spent -- our committee, because I did some of this work. We spent literally hundreds of hours analyzing this possibility and taking a look at various proposals for merging the two

rules.

The State Bar committee in 1995 voted to make the recommendation that such a proposal be adopted; that is, the rules be unified, and sent it on to this committee. Historically when both sets of rules of evidence were promulgated it was basically -- it's our understanding and there may be others in the room that have more background on this than I do personally, but it was to codify the common law.

And although Texas historically has two separate top courts, if you will, the Court of Criminal Appeals and the Supreme Court in the criminal and civil appellate hierarchy, the administration rules of evidence committee was of the view that there appeared to be no real good surviving historical reason or jurisprudential reason for the rules of evidence to be separate and that if we were looking at the question today -- today, 1995 when we did it or 1996 when you are looking at it -- whether there ought to be one set of rules or two sets of rules, our best answer and our best judgment were that there should

be one set of rules, and here are a list of some of our reasons.

First of all, most of the courts in this state outside of a few urban areas try both civil and criminal cases, and we believe that a single reference set for the trial judge in that circumstances or one set of rules would be easier to use. Secondly, the current Texas Rules of Appellate Procedure apply to both civil and criminal cases, and any differences within those rules for unique proceedings in one set or the other, such as habeas corpus, for example, those are addressed either with a separate rule or with a separate subpart that talk about that kind of proceeding.

Third, the truth is, the truth is, and this is one of those rare issues at least in my judgment where there really isn't -- unlike a lot of things that this committee considers and most of the State Bar committee considers, this is really not -- this is one of those rare issues where there really isn't -- shouldn't be, I don't think, that I know of, a big divide between the plaintiffs Bar and the defense Bar about it. I think criminal

practitioners may have a point of view about this because of the way the historical practice has developed, but there really isn't a -- there is not an issue here having to do with the plaintiffs side of the docket or the defense side of the docket.

And for 98 percent or better of the two sets of rules if you sit down and mechanically look at them and lay the text side by side and compare them, there is not a dime's worth of difference. There probably isn't a penny's worth of difference between the two rules simply in the way they are worded.

Fourth, we believe that one set of rules would result in the simplification of the rules greatly, making the reference easier for practitioners as well as for trial or appellate judges.

Fifth, we felt that the unification of the rules would in no way impinge upon or affect the jurisdiction of either the Texas Court of Criminal Appeals or the Texas Supreme Court. These rules in no way contemplate that there will be any change in the rule-making power of either one of those bodies.

Obviously any unification proposal would have to be both of those courts and approved by both of those courts, and this proposal for the rules makes no suggestion that that would in any way change in the future.

And six, you always hesitate to use the Federal court analog in any argument or any discussion with Texas lawyers, but the fact is the Federal courts have one set of rules with the differences between the civil and criminal rules, if any, clearly marked out and clearly delineated.

And there seems to be, from the people I have talked to and from the lawyers we have discussed this with, no difficulty in operating under that system; and, in fact, I can say from my own personal experience and maybe others in the room can talk about this one way or another, but I can say personally having annotated cases on evidence points from both civil and criminal trials in one reference book has for me proven to be very useful on matters that I have had to try in Federal court in the past, and I think the same would be true here.

And, seventh and finally, we felt it would save paper. All right. Buddy Low's subcommittee has looked at this, and we unanimously recommend the adoption of the unified rules in more or less the form that you have before you. You also have derivation tables and disposition tables so you can see where the old rules go and where the unified rules come from.

Now, let me give you -- before we talk about the mirrors of this I do need to let everybody know a few of the legislative history facts that I think will be of use to you in your consideration. On the draft of the unified rules that you have any footnotes remaining on those unified rules should be ignored by you. I mean in terms of what the final product would look like. We do not propose that those footnotes would remain in anything.

They are there for the drafting history, and they show the various stages in the process, what people thought, where people thought a rule had come from, what people thought it meant, and those kind of things;

and if I had kept a complete set of all of those from the three years of work that have been done on this, the length of that volume would far exceed the length of most of the briefcases in this room. So that is an incomplete set of historical footnotes at best, and I want everybody to know that.

Secondly, both the State Bar committee and Buddy's committee took the opportunity in working through this to try to make the unified rules gender neutral, and of course, neither the criminal rules currently nor the civil rules currently are gender neutral. We tried to do things like change the him's and her's in favor of words like "the party," "the witness," and similar words like that.

Third, where there was any difference between a civil rule and a criminal rule in substance the draft, the set that you have, retains that difference and points it out. For example, if you will look on page 1, Rule 101, subpart (c), that comes directly from the Texas Rule of Criminal Evidence 1101, subpart (a). You could argue that the suggestion that we have left in there in footnote 2 to rename

and reorder this section would make more sense.

I mean, if you were rewriting these rules ab initio to start with and not just unifying them, you could argue that you ought to rename and reorder that section, and it might make more sense; but this is simply lifted right out of the current criminal rule, another one of the current criminal rules, and put into place as an introduction to what would be the unified rules that makes the most sense in terms of explaining, and it's verbatim.

The next thing, if there was a wording change, it was only dictated by what we felt was logic and common sense. For example, look at page 28 of the proposal. Unified Rule 610 is the current civil rule with the current civil comment, except the addition of the underlying part in the comment showing that the analogous criminal rule, which was 615, was that there is a reference to indicate that that rule was 615.

Now, the only difference in wording between the two current rules as reflected in our unified proposal was that the current

criminal Rule 615 now starts by saying, "In criminal cases," comma, and the rest of the rule is identical to the civil rule. This is another case that kind of makes the point that I was making earlier that there really isn't a penny's worth of difference in most cases between most of these.

We dropped, therefore, as we -- what we felt was a matter of logic and common sense we dropped the wording; but there didn't seem to be any reason in this case to say here is the civil rule and the words and then a separate subpart that said "in criminal cases" and then repeat the same words. All we did was drop in the unified rule the words "in criminal cases."

Now, neither the State Bar committee nor Buddy's committee are perfect, and I want everybody to know that Lee Parsley -- who is living proof of what I have come to believe by practicing law in the Nineties that the person who owns and operates the computer disk will rule the world.

Lee Parsley has gone through. He has the master disk on all of this and has found a

couple of other places where we missed -- beyond the proposal that you have -- where we missed a couple of gender neutral items, a couple of places where we need to clean up our -- in a blue book sense, clean up our reference to some of the statutory references that we made in there to be standard to the code of criminal procedure, and missed -- picked up some semicolons that we should have turned into commas and those sorts of things.

So that would remain to be done, but it's very, very minor and could be done very quickly. And I don't think anything -- Lee, correct me if I am wrong. I have read it several times. There is nothing in there really of substance at all. It's really typographical stuff.

MR. PARSLEY: Yeah.

MR. PRINCE: So what you see in terms of the wording would be the proposal. The next item, as I pointed out, obviously the Court of Criminal Appeals would have to approve the adoption of this, as would the Supreme Court. So it would just be a recommendation from us that that be done.

Now, let me make sure everybody understands something because so many times we have proposals here where people are concerned that there is some kind of stealth agenda or secret thing or something like that. Let me assure you that in this particular case that is absolutely not the case. We tried to look at this and tried to be -- both at the State Bar level and at Buddy's subcommittee level -- tried to be scrupulous in almost just mechanically merging the rules and in leaving in place where the rules, the current rules, reflected a substantive difference between civil and criminal cases.

It took no effort at all to combine those areas where there wasn't a difference in the way things were being perceived. You can make a case -- let me give you an example. On pages 5 and 6 look at unified Rules 106 and 107. Now, note, this is very interesting. When you go through and do this process as I did you learn -- as we all did, you learn a lot of things about the rules of evidence that you didn't know.

Note that Rule 107 is a prior criminal

rule. Now, that optional completeness language, it is not a current civil rule, but it accurately states the law in civil cases and but because -- and so we have included it. Okay. Now, you can make a case, and Buddy has brought this up, but logic and common sense would probably dictate that there is a very easy, noncontroversial way to combine Rules 106 and 107. They fundamentally deal with the same concepts, but we haven't done that.

I used that as an example to point out that there wasn't any effort in here even to combine those things or to deal with those things that seem to say on their face, these logically could be argued that they ought to be together.

Now, one final comment on the unification proposal that I do need to bring to everybody's attention, Mr. Chairman. Look at pages 48 and 49 because this deals with this proposal and with one of the agenda items from the State Bar committee that we will discuss later. You will note in pages 48 and 49 there are two proposed rules on the translation of foreign documents, the rule of evidence

dealing with translation of foreign documents.

There is no current rule, either civil or criminal, addressing this topic. The State Bar committee had in some prior years, two or three or four or five years ago, submitted these two rules that you see on pages 48 and 49 for adoption in respective civil and criminal rules. They were not adopted. I don't know the extent to which they ever received any consideration. I just wasn't around at that point, and I don't know about that, but no action.

I just want everybody to know that no action has been taken on either one, but Buddy's committee opted to include that in the proposal because they were on the table, and we felt that a rule of some sort on the translation of foreign materials, the rule of evidence addressing that, was appropriate and timely and should be adopted; but this is the one area where we have made a recommendation both at the State Bar level and at Buddy's committee level, made a recommendation that is not something in a current rule. I wanted to point that out to everybody.

And the other thing I will say about it is you will see when we get to the next items in the agenda in the booklet, in the tabbed booklet, the State Bar committee this year because we knew that your group, your advisory committee, had under consideration or was considering the unified rules, we went back and undertook to come up with a unified Rule 1009 dealing with the translation of foreign documents; and that is contained in the booklet at Tab No. 4. And our State Bar committee this year worked on that, and Buddy's -- although Buddy's committee has not had time to look at that, we have -- there is no opposition in principle to the adoption of that rule, whether the rules of evidence, the civil and criminal remain separate or become unified, the combined Rule 1009 seems to make sense, certainly the concept of having a rule like that dealing with the translation of foreign materials.

Here is -- I have tried to be neutral in this report, and let me close, Mr. Chairman, with the report by saying this. I believe, as do a lot of other people who have worked with

this, that the unification of these rules makes sense. It would simplify the practice of the judges, civil and criminal practitioners, and ought not to be particularly controversial except due to the fact that currently the rules are separate.

And there is always, of course, the resistance by anyone, regardless of what side of the docket, what kind of practice you have, of not changing something you are familiar with; but I just don't think there is -- if we were doing this today from the beginning and making this decision, I think it's almost inescapable, to me at least, that you would recommend that there be a unified rule of evidence; and that is the recommendation of Buddy's committee, not necessarily that we adopt the language that is in your proposal today as the absolute final language.

I invite everybody -- you always get new insights on things with fresh sets of eyes. I invite anybody to look at this and see if they see any problems and difficulties, but we believe that this in principle ought to be adopted. We recommend it and with the view, I

think, toward coming back in the next or the next two meetings with the final cleanup that Lee Parsley generated with the final set for this committee to vote on in a final sense.

CHAIRMAN SOULES: Okay. All right. Mike, then as I am understanding what you are saying, if there are any departures from the current rules, they are unintended.

MR. PRINCE: That's exactly right. With the exception of that translation of foreign material.

CHAIRMAN SOULES: With the exception of new Rule 1009.

MR. PRINCE: Right.

CHAIRMAN SOULES: And so let's assume that that's correct in this debate, and if we find anywhere that there is a departure from current, I will say language, although I realize you have dropped a word here and there that doesn't mean anything, just so that we are talking about the literal text.

MR. PRINCE: Right.

CHAIRMAN SOULES: Any place where there is a departure from the literal text in the rules, that we are going to fix

that, and we are not going to be approving that in what we are talking about today.

MR. PRINCE: Correct.

CHAIRMAN SOULES: We are just saying assuming that the literal text of the two rules, of the two sets of rules, have been brought together, do we agree that the rules should be in one document called the Texas Rules of Evidence as opposed to two, now called Texas Rules of Civil Evidence and one on Texas Rules of Criminal Evidence. Is there any opposition to that?

MS. SWEENEY: Would a question be in order?

CHAIRMAN SOULES: Sure. Paula Sweeney.

MS. SWEENEY: I don't know the answer to this, but what attempt, if any, was made to reconcile or to determine whether there were differences in the interpretation of, say, a similarly worded rule by the civil versus the criminal chain of court analyses?

MR. PRINCE: We didn't. We have not done that in Buddy's subcommittee so much this year, but I can tell you that at the

State Bar committee we looked at that and that -- you know, that's not been looked at, that particular question -- in other words, we haven't Shepardized it, Paula; but we did try that at the State Bar committee level in '94 or '95.

If there is a current difference or something that's come up since then, I am unaware of it, but does that answer your question? It hasn't been currently Shepardized, but we did do that. We could not -- I mean, where we found out that there was a difference in interpretation between the rules we tried to incorporate that, but we didn't -- frankly, there are just not -- I mean, you won't see any.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I come from a part of the state where the civil practice and the criminal practice is completely separate, lawyers, courts at the trial court level. I don't currently read very many criminal cases. I read all of the other cases.

When I realized that this was likely to happen I started reading criminal cases for my criminal books, and I can say that there are a very large number of criminal evidence cases. A lot of criminal cases seem to be cases about evidence, and my sense is that there is a difference at a fundamental level about whether something -- when in doubt, let it in or keep it out, but I don't sense that there is a fundamental interpretive difference.

The biggest change will be that there will be a lot of additional material for someone in the book business to digest, and much of that will look pretty criminal rather than similar to what you are working on, and I don't see it as a problem really for lawyers except in that respect.

CHAIRMAN SOULES: Anyone else? Justice Duncan.

HONORABLE SARAH DUNCAN: I guess I will be the only one that's opposed to it. It's interesting to me that we are talking about merging the rules of civil and criminal evidence when my thought is let's split the rules of appellate procedure. I

think there are a lot of very different interpretations in the evidence rules, not so much by words that are used but by the values that are underlying the decisions.

The concerns in a criminal case are always colored by due process and their very different harmless error standard. You know, in the appellate rules, like right now, if the courthouse is closed on a particular day, that's not a filing day in the civil rules; and it is a filing day in the criminal rules; and we are quickly getting to the point, at least in my view, that we really do have two separate sets of appellate rules, one for criminal and one for civil. It's just that if you are interested in one or the other in the appellate rules, you have to wade through both. I think I am the only one, so I will stop there.

MR. LATTING: Well, I'm not sure you're the only one.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I have a question; and that is, is there any opposition to this? And if so, why did it take hundreds

of hours to go through all of this?

MR. PRINCE: It took hundreds of hours to go through and do the mechanical merging of the rules to make sure that we had done that correctly, to make sure that we had not inadvertently done something that would affect the substance of the meaning of the evidence rule in either criminal or civil cases.

I mean, it took a lot of time just to do that, the mechanical. You know, a lot of it had to be placed on computer disk. We had to run out copies. We had to do this. We had to do the corrections. You know, we are still -- obviously, as I pointed out, we are still in that stage, and you had to look at these things.

You had to look at the rules. I gave some examples here. Does this seem to make any difference, does it seem to make any difference in criminal cases as opposed to civil? I mean, we looked at that virtually on a rule by rule basis, and that's what consumed the time.

MR. LATTING: Well, is there

any opposition? That's my real question.

MR. PRINCE: The opposition that I heard, and I am not a criminal practitioner and I cannot speak to it, but there were some members of the -- a couple of the criminal practitioners who addressed the State Bar committee did not want to do it primarily as a -- I mean, I don't want to speak for them because I am on a different view, but let me try to articulate what I think the objection was.

It was just there was a risk that if we did it down the road someone would use this as an opportunity to take the position that the court systems ought to be unified and we ought to have one Supreme Court and not a separate Court of Criminal Appeals and a separate Supreme Court, that the court system ought to be unified, that if we tinkered -- it wasn't broke, so we shouldn't fix it, that -- some of what Justice Duncan said, you know, the context in which these rules are decided in a criminal case are different than they are in the civil case. Those were the things that I heard from a couple of criminal practitioners

that spoke to the State Bar.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: I actually just wanted to make a specific observation. In the early stage of this document you talk about that you are going to use the word "criminal proceedings" rather than "criminal cases," and then on just running through here, Rule 513 on jury instructions talks about criminal cases, for instance.

MR. PRINCE: Correct. This is one of the --

MR. McMAINS: These are the kind of things that -- and so it seems to me that --

MR. PRINCE: That Lee Parsley has caught by running the computer disk.

MR. McMAINS: There are some places where you use the terms differently, and secondly, in that rule, which is the comment upon or inference from claim of privilege, instruction.

MR. PRINCE: What page are you on?

MR. McMAINS: It's on page 24. I was curious because it says -- and its talking about the claim of privilege against self-incrimination in civil cases. Says, "Paragraphs (a) and (b) shall not apply with respect to a party's claim, in the present civil proceeding, of the privilege against self-incrimination."

Now, is -- that rule obviously doesn't exist in the criminal rules right now since it's a civil rule. Is that in our civil rules as that, in that form?

CHAIRMAN SOULES: Yes.

MR. McMAINS: What I am trying to figure out is that if a notion of civil proceeding -- because it says "in the present civil proceeding." There are a number of civil proceedings that probably have quasi-criminal overtones, and I am wondering if this is --

MR. PRINCE: The only change, to specifically answer your question, Rule of Civil Evidence 513, subpart (b), now says, "Claiming privilege without knowledge of jury. In jury cases proceedings shall be conducted,

to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury."

Subpart (c), "The claim of privilege against self-incrimination. Paragraphs (a) and (b) shall not apply with respect to a party's claim, in the present proceeding, of the privilege agains self-incrimination."

We added the word "civil" here to the unified rules because that was the current civil rule.

MR. McMAINS: Right. I understand, but what I am getting at is that, for instance, in a forfeiture proceeding and a number of other proceedings that involve perhaps penalties, perhaps -- and other proceedings that might legitimately be characterized as administrative, but will have constitutional overtones, I am not certain that the use of the word "civil" is an accurate dividing line in terms of when you can comment on the privilege against self-incrimination and when you can't.

In an ordinary action for damages, breach, injunction, that sort of thing, yes;

but I am not sure you comment on privileges against self-incrimination in forfeiture proceedings, which are civil. I mean, those are quasi-criminal, and you are entitled to numerous constitutional protections there that you don't get elsewhere and --

MR. PRINCE: I don't know the answer to your question, but all I would say is this: We didn't specifically address that issue because if that issue exists -- and you are probably right, it does -- it exists under the current civil rule, and what we have done is carry that language in the unified.

MR. McMAINS: Except that the current rule is in the civil rules, and it just says "in the present proceedings," and if there is either a criminal procedural overtone or if there is a constitutional overtone, then that's one thing; but if you pass this rule in this fashion, this appears to be a direction that if you can characterize the proceeding as civil, then you may comment on the privilege against self-incrimination.

CHAIRMAN SOULES: Well, Rusty, Rule 101(b) says in the Rules of Civil

Evidence, says, "Except as otherwise provided by statute, these rules govern civil proceedings in all courts of Texas other than small claims courts." So this problem that you are raising is in the rules right now.

MR. McMAINS: I understand.

CHAIRMAN SOULES: Okay.

MR. McMAINS: I'm not suggesting that it isn't perhaps lurking in the rules now.

CHAIRMAN SOULES: So what they are doing is they are taking 101(b), civil proceedings, which is the scope of these rules, and putting that here in 513(c).

MR. McMAINS: We don't have currently in the rules, other than in the general beginning part, any use of terms like, quote, "civil cases."

CHAIRMAN SOULES: Only in 101(b).

MR. McMAINS: Huh?

CHAIRMAN SOULES: Only in 101(b), Rule of Civil Evidence 101(b).

MR. McMAINS: But we don't have any definitions of what a civil case is.

CHAIRMAN SOULES: That's right. That's right. Civil proceedings.

MR. McMAINS: Well, again, we are not using the term "proceedings." This term here is "civil cases."

CHAIRMAN SOULES: Where?

MR. McMAINS: That's in the proposed unified rules in Rule 512(c), claim of privilege against self-incrimination in civil cases.

CHAIRMAN SOULES: That's the title of it?

PROFESSOR DORSANEO: It's 513(c).

CHAIRMAN SOULES: Now, that way --

MR. McMAINS: I understand that "civil proceedings" have to be used, but all I'm saying is it seems to me that what you are -- you are specifically saying that you may comment on the privilege against self-incrimination in a civil proceeding, period.

Now, I am not sure that actually is true, I mean, from a constitutional standpoint. I

mean, earlier on you also have put constitutional limitations on the interpretations, which obviously are implicitly there anyway, but they are explicitly there now, and --

CHAIRMAN SOULES: Well, the caption needs to say "proceedings" because that's what the rules apply to.

MR. PRINCE: Yeah. That would be fine.

CHAIRMAN SOULES: Okay. Joe Latting. Joe Latting.

MR. LATTING: Well, I would just like to note my concern that we are talking about making a change which may or may not have important implications. I don't have a feel for that, about something that really doesn't seem to be broken, and this sounds like a good idea to have one set of rules, but this is a non-problem in my world.

CHAIRMAN SOULES: Well, it's not a non-problem in our world because the Supreme Court is somewhat committed to doing this unless we can find a good reason not to.

MR. LATTING: Well, I guess I

just want to speak my mind and say that my attitude is that you ought not to change something unless there is a good reason to do it, not let's just go change something unless there is a good reason not to.

The problem is we don't foresee the unseen consequences of changes until after we have done it and they start showing up in actual people's lives. It sounds like it's going to happen, but I at least am going to have said the words, and I would be curious to know what Judge Clinton and Judge Hamilton have to say about this. Is this a problem in the jurisprudence of the state to have these two separate bodies of rules?

CHAIRMAN SOULES: Judge Clinton.

HONORABLE SAM HOUSTON CLINTON: There is no problem, no problem that I know of in having them. Let me just say something, I guess, that needs to be. I don't know when it started that we started to have a committee. It seems like it was either '82 or '72. That's how long ago it has been and how much -- the Bar committee, and it struggled

and struggled. What were they called? Liason on Committee on Federal Rules or something like that. Some of you may be on the committee, and they went around and went around dealing with it, and all of the sudden in the middle of the operations, about halfway through, somebody said, "Is this going to include criminal rules of evidence as well?"

And I wasn't on the committee, but it's my understanding it went back and forth, back and forth, and finally they decided. They took a vote and said they were going to do it and then looked around and nobody on the committee knew anything about criminal law. So then they brought in some criminal practitioners and got in there. That's when I came in, and we began to try to put something together that would accommodate the criminal law problems, and there are some evidentiary questions that don't arise in civil cases.

But anyway, to try to make a long story short, the product of that committee was then presented at a State Bar convention, I believe; and it had a hearing in advance by some members of the State Bar and all, a

public hearing for people to come and make their views known; and the criminal law practitioners came and denounced the whole thing. As a -- oh, and you must understand that the work product was a combined civil and criminal, all under one book. The "one book syndrome," we used to call it.

And because of that opposition the Supreme Court -- well, I don't want to say that because you-all may think I am making charges that I am not. In any event it worked out so that the Supreme Court went ahead and adopted the rules of evidence, but they are obviously only applicable to civil cases because criminal practitioners didn't want it in criminal law, and there wasn't anybody insisting that, therefore, it be done.

So then the criminal evidence was just a lost child. It didn't exist until then other developments came along about the rules of appellate procedure, and all that did was set the stage that once you agree that you can have a combined rule for appellate procedure to see if you can now go back and redo history and have a combined rules of evidence.

As far as I am concerned, that's all there is to it. It was a fluke in the first place that it was not done in whenever that was, '82, and the effort now is to do what was omitted then; and if there is any problems about it as it relates to criminal law, you can be assured that my colleagues will attend to that and put in there if necessary "except in criminal cases so-and-so."

You know, we did that in the rules of appellate procedure, and we can do it. Some of them are in here now. We can do it in here. I don't see, frankly, that it's a problem. I think it's finally catching up with what probably should have happened, what, 14 years ago or whatever it turns out to be; but just by politics it didn't happen; and so that's my attitude about it; and I think it's going to be generally the attitude of my brothers on the court, although I haven't discussed it with them. I have been waiting for some final product to present to them before we get at it.

CHAIRMAN SOULES: Anything else from anyone? Okay. Those in favor of the

unified rules of evidence show by hands. Hold them high and keep them up, please. 15.

Those opposed? Hold your hands high so I can see them. Four.

15 to 4 to unify the rules, and then please, those of you who can take occasion to read these rules, give Buddy Low, then he will distribute to his subcommittee, your comments on any place where you feel that there is a departure from the text that makes a difference in the way it may apply.

MR. PRINCE: Mr. Chairman, could I make a suggestion? Although I am going to continue to work with Buddy's group until this is finalized and done, and since I have it -- there is two places where there is a disk on this. One is at Lee Parsley's office, and the other one is at my office. If people would just send that to me, I can make those changes and observations and circulate that to Buddy, Tommy, and John for their consideration, and it will just save time. Rather than having to go to Beaumont and then come to Dallas, it will just come to Dallas and let me send it out.

CHAIRMAN SOULES: Okay. Send it to Buddy with a copy to Mike in all cases, please.

MR. PRINCE: That's fine.

CHAIRMAN SOULES: Additionally, if there are substantive changes that you feel should be made to the rules of evidence, send them to me, and I will assign them to the subcommittee. Bill Dorsaneo.

PROFESSOR DORSANEO: Mike, you gave the one example on Rules 106 and 107 when you have two rules dealing with the same subject that have not been combined for historical reasons. Are there many more of those, and do you have a list of them? Because these will come back to be interpretive problems along the way.

MR. PRINCE: I don't have a list I can hand out, but I can give you about four areas, if you don't mind me taking the time --

CHAIRMAN SOULES: Sure. That's fine.

MR. PRINCE: -- for people to write this down. When you are looking at what

you have for comment to Buddy's subcommittee, you might want to keep these in mind. 106 and 107. Rationalized in some way under Rules 202 and 204 between civil and criminal cases and between the two different rules of civil cases of when a judge may or when a judge must take judicial notice of things. You will see when you read that language, although we have tried to track existing rules, it's very awkward, and it may not make any sense, but we viewed that as a substantive change, but it's one that probably ought to be made. So that's Rules 202 and 204.

On Rule 410, look at the way it's currently worded and determine in your own minds whether the last sentence should apply to only subsection (4) or whether it should apply to the whole thing.

MR. LATTING: What rule?

MR. PRINCE: 410. That's in the unified rules. I think there is a footnote that sort of explains what that question is.

Look at Rule 504. This kind of goes back to some of the things we were talking about

earlier this morning with -- Steve and Richard were discussing this, but does it make sense that -- since you are doing this anyway, to suggest that the same exceptions be made to confidential communications that the code of criminal procedure makes to a spouse testifying against a spouse.

That may be a substantive criminal evidence matter that we just don't address at this point, but that's another one of the checklist items, Bill, like you were asking. So that's the specific ones, are Rules 106 and 107, 202 and 204, 410, and 504.

CHAIRMAN SOULES: If anyone sees any others, please advise us.

MR. PRINCE: Yeah.

CHAIRMAN SOULES: Okay. Then next, Mike, we will go on to the State Bar's recommendations?

MR. PRINCE: Right.

CHAIRMAN SOULES: Okay.

MR. PRINCE: Again, if you will take the booklet out, it looks like this, and it should have been in the stuff that Holly sent out to everybody. I only have one extra

because it's kind of fat, but if somebody doesn't -- if we don't have enough here, let me know.

The State Bar administration rules of evidence committee considered whether or not there should be a change to Rule 412, and that is to extend Rule 412 to cases involving prosecutions involving indecency with a child and the admission of evidence of previous sexual conduct in such cases.

After the consideration there of Professor Guy Wellborne's subcommittee, which is his work product contained at Tab No. 1, the State Bar committee voted that we take no action to revise current Rule 412. Buddy's group did not disagree with that, and so the recommendation is that we not make a change at 412 to make it apply to prosecutions for indecency with a child.

CHAIRMAN SOULES: Any opposition to that?

All right. The committee's recommendation will stand as adopted by -- the subcommittee's recommendation is the recommendation of the committee as a whole.

Next?

MR. PRINCE: The next question that the State Bar committee considered was whether the subdivision of -- subdivision (d)(5) of Rule 503 on joint clients and how that relates to other parts of Rule 503, specifically subpart (b), the general rule of privilege, was whether or not we need to make -- there was some thought that we needed to make more explicit than is currently explicit in the rule the recognition of the common interest privilege, which is fairly well-developed in the case law, sometimes referred to as the joint defense privilege, although it is not limited to just common defendants. It applies to common plaintiffs as well.

It's somewhat less -- or the feeling was it was somewhat less developed in the Texas case law, but it has been recognized. For example, there is some discussion of it in the Rio Hondo implement case. This rule we felt was intended to codify the common law, but presently there was an issue about whether the common law was broader than it stated in the

rule; and after a consideration of that, it was determined that -- or the State Bar committee recommended that no change be made in the rule, and we felt like existing case law either had or would sufficiently address that issue. So we recommended no action to modify either the rule or the comments to Rule 503.

CHAIRMAN SOULES: Any opposition to the recommendation of the subcommittee?

No opposition. It will stand as adopted by the committee.

MR. PRINCE: Item 3 in the booklet was whether or not to recommend adopting language in Rule 705, subpart (b), that would specifically allow in civil cases a voir dire inquiry into the qualifications of an expert. As you can see, the Brook V. Brook case there, the trial court's denial of a petitioner's request in a child custody case to examine an opponent's expert witness qualifications on voir dire. That was upheld on appeal, and as you may or may not know, the Rules of Criminal Evidence require that the

party against whom opinions are being offered have the opportunity to conduct a voir dire examination, but the Rules of Civil Evidence do not.

The State Bar subcommittee recommended that no action be taken to provide as a matter of right the opportunity to voir dire an expert at the time of trial. There was a slight dissent to that.

I can say from having attended that that in part no recommended change was made because of another pending item that was on the table having to do with the Robinson case, which we will get to as another agenda item here later on. But the thought was that with the changes that this group has recommended and that the Supreme Court is likely in some form to do in the Rules of Civil Procedure governing pretrial proceedings and with the Robinson case, on which I think rehearing was overruled on July the 8th, being the law, it is entirely likely, particularly in larger civil cases, that determination of experts' qualifications would be done well in advance of trial.

And so for that reason, among others, but

primarily that reason, at this time we felt that -- the State Bar subcommittee felt like there didn't need to be a specific acknowledgement of the right to conduct voir dire of an expert at trial like there is in a criminal case where, of course, the discovery considerations are much different.

So the recommendation is no action be taken at this time in light of these others.

CHAIRMAN SOULES: Any objection to the subcommittee's recommendation?

No objection. That will become the recommendation of the committee.

MR. PRINCE: Item 4, and I believe I have talked on this earlier. We can deal with this fairly quickly, but Item 4 is a -- and it's at Tab 4, is a proposal to have a now unified Rule 1009 in criminal cases rationalizing the two previous different proposals that were made for civil and criminal cases, respectively, by the State Bar committee on the translation of foreign documents.

The one that is in the booklet is the one that our State Bar subcommittee would

recommend as being appropriate if the rules are unified, which the sense of this Supreme Court Advisory Committee now is that it be; and so we would recommend, subject again, Mr. Chairman, to any -- the same kind of corrections that we are talking about on the unified proposal as a whole, typographical stuff and input from members of this committee to Buddy's committee, we would recommend that Rule 1009 be adopted as part of any unified set of rules that we sent to be used in both civil and criminal cases.

CHAIRMAN SOULES: Okay. In connection with Rule 1009 it may be that we owe some apology to the State Bar committee; however, our records do not indicate that we have ever gotten a recommendation in any way similar to this from the State Bar, and we have got suggested changes in the Rules of Civil Evidence going back to 1990, you know, in our agenda. So obviously things can get lost, and it may have gotten lost; but there was certainly no intent on our part to ignore this if we got it. Now we do have it, and --

MR. PRINCE: Any more than you

can I can't vouch for my predecessors as the chairman of anything. I can hardly vouch for myself.

CHAIRMAN SOULES: Any discussion then on proposed Rule 1009?

What's the essence of it, Mike?

MR. PRINCE: It merely provides a procedure when foreign language materials are going to be in evidence in trial or parties contemplate that it is. It is a procedure by which they can be proffered and tested as to their accuracy. That's the essence of it.

The sense of the State Bar committee was that we are seeing more and more and more of this kind of thing and it was just a good idea to do this. It's a rule I think in some jurisdictions. I don't think there is a Federal counterpart to this. Isn't that right? I don't believe there is.

Yeah. There is not a Federal rule on this, but I think there is a similar rule in some jurisdictions, and we just felt like -- I know I am seeing a lot more of it in my practice, and we just felt like we needed a

specific rule to address how do you deal with foreign language materials.

CHAIRMAN SOULES: I was thinking we had something, but now as I am trying to catch my thoughts up, what we have really is a way to get foreign law before the court in a translated form; but we do not have a way, I guess, in the rules anyway to get foreign documents before the court, foreign language documents before the court in a translated way, I guess, except through maybe some expert testimony; and that's what this is designed to do. This goes to documents and not to foreign law; is that correct?

MR. PRINCE: Correct. That's correct. Or materials. I mean, documents, materials, but really, writings.

CHAIRMAN SOULES: All right. Okay. Mark Sales.

MR. SALES: Yes. I just wanted to point out the idea on this rule because I was involved in drafting this several years ago, was to treat this sort of like the medical records, to set up a way that people could put it in issue so you didn't have to

bring a translator down to trial. If nobody is going to contest the translation, it provides a method by which you can, you know, put the issue before the court prior to trial to save a lot of time getting down there and having two different translators arguing over the translation of a document when there may not be any issue whatsoever.

And so basically the heap of the rule is that if you don't take certain steps once the thing is put into issue then you are going to be precluded, at least in civil cases, from then showing up at the trial at the last minute and saying, "That's not the right translation," kind of like the medical records.

CHAIRMAN SOULES: That sounds like a pretty good idea. Further comment? Rusty McMains.

MR. McMAINS: It appears -- and I am just trying to figure out the timing. It appears basically you get 30 days to object, and that's it. I mean, you have got to have 60 days prior to trial, is when you serve these affidavits, et cetera, and then you have

got 30 days to do something about it, to get another translation, and that's it, and then you are kind of foreclosed from attacking the translation.

MR. SALES: I want to say that I think that this was modeled kind of after the rule on truth in foreign law. I mean, I am not sure. The timetable I think may coincide with that rule. I forget which one it is. We felt like they went hand in hand, that that was a reasonable period of time.

It's difficult in civil cases to say and I think the court obviously would have the ability to reschedule, and you know, maybe that's appropriate here, something about the timing; but the thought was that this was a reasonable period, and you know, maybe there is cases where it wouldn't be; but I would think the court would have some discretion on setting scheduling matters.

CHAIRMAN SOULES: 203 on foreign law just says it has to be --

MR. McMAINS: There aren't any time limits.

CHAIRMAN SOULES: -- written

notice at least 30 days ahead of trial.

MR. SALES: 30 days?

CHAIRMAN SOULES: Prior to the date of trial.

MR. SALES: Right. So in that situation, 30 days if you can prove up foreign law, you have got to submit your notice or whatever. Here it actually backs up a little further. You have got to give them more time than that if they want to come up with a different translation.

CHAIRMAN SOULES: Other comments? No other comments? Okay. Those in favor of proposed Rule 1009 show by hands. Seven for.

Those against? None against.

Just some housekeeping, the words in a couple of paragraphs "in accordance with Rule 21a of the Texas Rules of Civil Procedure," we don't need that, and we have been trying to take that out. When the rules say "served" they mean served, and 21a defines what service is. So served is now there. And again, if anyone has any editorial input on this rule, please send it to Buddy with a copy to Mike.

Otherwise it will stand as approved.

HONORABLE PAUL HEATH TILL: May I ask a question, please, sir?

CHAIRMAN SOULES: I'm sorry. Who's asking?

HONORABLE PAUL HEATH TILL: Me.

CHAIRMAN SOULES: Judge Till.

HONORABLE PAUL HEATH TILL: Yes, sir. In this it says that in civil cases the court can appoint, but I don't -- am I overlooking the language that says in criminal cases it can? Am I overlooking that somewhere?

I see in criminal case there is no objection if timely filed. I know this might be a unique thing, but occasionally in my court the state and the defense don't necessarily agree, and we just have all kinds of just head-on collisions, and it certainly would be handy to the court system.

CHAIRMAN SOULES: What are you suggesting is omitted, Judge Till, that needs to be covered?

HONORABLE PAUL HEATH TILL: Well, I see one of the problems with

translation which has come up at my level of courts quite often, is that everybody has got their own translator like everybody has got their own expert. Sometimes they just have a little disagreement as to what the words really mean, and I am certainly not competent to settle that, and in the past I have just unilaterally gotten an expert on my own to look at it to give me some idea what's going on; but in here it says, "In civil cases the court may when necessary appoint a qualified translator." That sounds reasonable, and that's exactly what I think they should be able to do. I am just looking to find the same language in a criminal case.

CHAIRMAN SOULES: Why do we limit that last paragraph (e) to civil cases?

MR. SALES: Mr. Chairman, I can tell you that I think that we had some separate criminal lawyers look at that, and I guess there was some concern on their part that the court in a criminal case would necessarily have that power. That's something we can obviously take a further look at, but I think that that was the reason.

CHAIRMAN SOULES: Well, Judge Till has raised a question here.

Judge Till, you think that -- are you proposing to amend this to delete "in a civil case"?

HONORABLE PAUL HEATH TILL: Either that or make it state clearly that in any case or something, but I want it where the criminal cases as well the court should have the power to appoint one if they need to.

CHAIRMAN SOULES: Anyone disagree with that? No disagreement. Okay. Write it so that it covers civil and criminal cases. No disagreement on this committee to that.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Perhaps as a by-product of our last idea that it's a good idea to unify these rules we are approaching things a little differently than in the past. If I can just go back for one second, Mr. Chairman, and beg your indulgence to this

Rule 412, I don't think most of us have ever really read 412 or had a great deal of concern about what it says because it's applicable to criminal cases only, and we went by it pretty quickly, and I don't know whether the Court of Criminal Appeals cares what we vote with respect to rules like Rule 412; but now that I am sitting here I did read it, and I read the professor's letter, and I am completely unconvinced about the merits of the vote that we took.

I am not sure what the right answer should be about whether Rule 412 should extend to prosecutions for indecency with a child, but the letter suggesting why it should not was entirely unconvincing to me, and I just wanted to say for the record that if the Court of Criminal Appeals cares about this matter, that I have no view whatsoever that would cause me to validate the opinions stated in the letter.

I just don't have enough information or knowledge about it to vote one way or the other on Rule 412, and it seems to me to be a very significant matter. The letter basically

said that the evidence when relevant ought to come in to show that the child had been abused before and that's how the child knows about the details of the sexual abuse, and I have a lot of concern about that being a proper method of reasoning. I am not sure that it is, and I am not sure that it isn't, but if we are going to be voting on these criminal rules and making recommendations where we don't have any familiarity, I, for one, would recommend that we take a little more care in considering matters that we are not familiar with.

CHAIRMAN SOULES: I have a question on -- well, Judge Clinton, if you and the members of your court or your advisory committee feel that this letter that we have, Olin Wellborne, related to 412 should be given more attention, let us know, will you, please?

HONORABLE SAM HOUSTON CLINTON: Oh, "if." I'm glad you put it on a condition because we have not considered this yet.

CHAIRMAN SOULES: All right. If it does, please let us know, and then we will get to it so we can advise our court, as is our duty, and we would like to have your

input. I'm sure that's what Bill is basically suggesting.

PROFESSOR DORSANEO: Well, what I am saying is I wouldn't take the vote of this committee on Rule 412 as meaning anything other than we are unfamiliar and slightly less concerned with the criminal evidence rules than we are with the rules that relate to civil practice; and on my vote, which was probably not to vote at all, doesn't mean a thing. I don't know whether your court considers the votes of this committee on the criminal evidence rules, but I don't think they mean very much when we don't give the matter any consideration or any discussion. We just kind of go on.

CHAIRMAN SOULES: Well, Judge Clinton, if you could let us know or drop me a line, if you will, or however you want to handle it, as to whether or not we should revisit 412. Our vote was no change. 412 is now only in the Rules of Criminal Evidence. It will be, of course, in the joint rules. If we need to go revisit that question, if you will somehow let me know, we can do so. If we

don't hear from you, then we will let stand the vote that we took.

1009(b), why does an objection -- why should an objection have to be verified under oath? Mark?

MR. SALES: I'm sorry. Which one?

CHAIRMAN SOULES: This is 1009(b). "If someone objects to a translation, the objection has to be verified under oath."

MR. MARKS: I think that the thought there was there are a lot of lawyers that would just object and do nothing more just to cause the hassle, and the thought of the committee was that if somebody truly wants to argue about the translation, he ought to be willing to do something more, either -- I think they can do -- they object and/or they offer their own translations. So there should be something more required.

MR. McMAINS: No. I think they are required to do both.

CHAIRMAN SOULES: Well, if the objection has to point out the specific

inaccuracies of the original translation, I couldn't swear as a lawyer that a translation of a German document is accurate or inaccurate. I could bring a witness in that could disagree, but I am concerned about the requirement for verification of the disagreement.

MR. SALES: I believe, if I recall, the idea was just -- you know, I guess that would be sufficient, that objection, but the thought was if somebody is just going to object and do nothing more and then you are going to have to bring your translator down there, there ought to be some -- and I think that was the view of the State Bar committee at the time.

I'm not saying that they were wed to that. What they wanted to do was set up -- it's kind of like, I guess, the medical records. You know, you get a half a dozen from the doctor and then you put a few proper at a certain time ahead of -- and you have some basis then for not allowing that evidence to be contradicted at trial, and the idea was to put some barrier of some kind rather than

just a simple objection, and that's the basis. I am not agreeing or disagreeing, but that was the view of the committee.

CHAIRMAN SOULES: If nobody else is concerned about this, I guess my concern is unfounded. Does anybody have a motion?

MR. YELENOSKY: You are required to specify the inaccuracy. It isn't enough to prevent -- I mean, you can't just make an objection that this translation is bad. You have to say this translation is bad because it says that, you know, "vamos" means something it doesn't mean, and it should say it means, "We go."

CHAIRMAN SOULES: Yeah. Because the original translation doesn't even have to be verified.

MR. SALES: The committee would accept a friendly amendment.

CHAIRMAN SOULES: Okay. "Verified and under oath" taken out, any objection to that? Steve Susman.

MR. SUSMAN: Yeah, I do. I mean, I think there needs to be some obstacle

to requiring a person having to bring a translator into court, which is very expensive, and I am not sure the obstacle is good enough just to say someone has a friend who speaks Korean who says that ain't right because it means something else, but you know, I mean, you need to have some -- why can't it be you have your own translator to give you some kind of statement or verification or something?

I don't know that it needs to be under oath, but the reason you would attack the other guy's translator is that you have your own translator who's read this document and says that ain't what it means in Korean, and so you ought to have to present his statement or affidavit or something, not just some lawyer saying it's inaccurate.

I mean, I don't have any -- and it may be that the -- I mean, it seems to me if you are going to object to a translation, you have some duty to come in and establish how it properly should have been done because maybe the other side will at that time say, "That doesn't make a hill of beans, so I will take

your version or I will accept your version because it's not worth bringing a translator in from the west coast to testify about what this one paper in Korean means because what you say it means ain't so different from what I say it means."

So there should be some procedure for doing that, and I don't know whether this is the right one.

MR. SALES: The point was you could do it two ways, you know what I mean, under part (c) where it has the admissibility and failure to object it says, "If no objection is timely served in accordance with part (b) or if no conflicting translation has been timely served," then they are precluded from attacking it at trial. Now, that's sort of an either-or, but the point was that somebody out there, there needs to be some barrier to keep lawyers just from coming up with an objection to force getting the other side to spend money, because that's the teeth of the rule.

MR. SUSMAN: Why can't you just put the only way you can force the other guy

to do it is bring in a contrary translation that you sponsor? I really don't care whether they can verify it or not. I mean...

MR. SALES: I think the other point -- and this is kind of coming back to me. The other thing is that just because you give a translation doesn't give the court a lot of guidance. You need to have something more specific pointing out the differences. If I come in with a ten-page translation of a Spanish document and the other side has a ten-page translation, then where are the differences? How does somebody know that they are objecting to a particular part? I think the idea was to focus the issue.

MR. SUSMAN: Well, we are experts on this committee. You just redline it. We know how to do that.

CHAIRMAN SOULES: Okay. Bill Dorsaneo, and then I will go around the table and get on to something else.

PROFESSOR DORSANEO: I think this part needs more work. The "verified under oath," I don't know what kind of oath that is. What would this be? I talked to

somebody, and they told me that this word means that, and I verify that on information and belief, or actually I could probably verify that just plain out.

The competing affidavit thing, you know, makes better sense than "verified under oath" because some people will verify it under oath and then we will have to figure out what it means then. Because what it will mean is I talked to somebody and they told me that it doesn't mean that. It means this.

CHAIRMAN SOULES: So let me see if I can follow what you are suggesting. You are suggesting that objections shouldn't count at all, that if somebody files an affidavit or files a translation under an affidavit under (a), that the only way that can be controverted is if another party files a translation with an affidavit under (a). So you have got competing translations both filed with affidavits and then the judge has to figure out what to do with it. Is that what you are suggesting, Bill?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: No.

PROFESSOR DORSANEO: Not quite, but almost. "Verified under oath" is too broad and unclear. You know, supported by affidavit would be -- you know, of a qualified person, you know, would be better.

CHAIRMAN SOULES: So it's okay with you to have objections to set the issue, not just -- it doesn't have to be a controverting affidavit with a controverting translation. An objection will do.

PROFESSOR DORSANEO: Because you may only be talking about one sentence.

CHAIRMAN SOULES: Okay. Anybody else down this side? Joe Latting.

MR. LATTING: Just a stylistic matter, why do you have to verify it under oath? Isn't that like the widow woman?

PROFESSOR DORSANEO: Well, "verified" doesn't really mean anything.

CHAIRMAN SOULES: Okay. Anybody else down this side of the table, my left side of the table? Across the back? Coming up this way, Steve, you had your hand up.

MR. SUSMAN: Again, I believe

that the verification is not as important to me as having the competing translation because frequently -- I have just been in a case where the document is in Korean, and every time we file a translation the other side has got a translation of the same document, and in 99 percent of the cases they are objecting to ours. Theirs is different, but it doesn't make a bit of difference whether you take ours or theirs insofar as what we are trying to prove in the case.

So it's very simple for me to look at their translation and say, "Great. You object. We will use yours." But that's the kind of thing we ought to encourage, not where we encourage work for people by now having to bring the translator to court and doing anything because we need to make them really focus on what the competing translation is.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Let me suggest a cure. I don't think the verification or the oath works very well for the reasons that Bill Dorsaneo stated, and also, I would like to get

us away from those verifications as much as we could in the practice. I think what Steve says makes sense, but isn't what we are really saying is the objection has to be specific and you need to point out what it -- how it should read? And, Steve, it may be just one word.

MR. SUSMAN: That's fine.

MR. KELTNER: It may be a meaning, but we ought to redo the objection part to say it specifically state what the translation of the disputed part should be and then especially point out what the disputed portion of the translation is.

PROFESSOR DORSANEO: The last sentence says that. The last sentence of that paragraph says, "The objection shall point out the specific inaccuracies in the original translation."

CHAIRMAN SOULES: That's not saying everything David is saying. Keltner is saying that it also should provide a competing translation.

MR. KELTNER: Right. It ought to say what the translation should be. That way everybody is protected by a burden. The

truth of the matter is we make a translation easy to get in. It's got a 30-day period, which I think is a wonderful idea, and it's a good theory, and then the person objecting doesn't only have to object. They have to say, "It's wrong. This sentence is wrong. Here is why it's wrong, your friend," and then toss it up to the judge to let the judge decide.

And, Scott Brister, this may be the case where you get to hire an expert to help you figure out what it really means. So that would be my suggestion, we send it back to the committee to look at it, to redo the objection portion of the rule, which is (b).

CHAIRMAN SOULES: Okay. Anyone have an objection to that? Go around the table one more time and close up. Steve Yelenosky.

MR. YELENOSKY: Yeah. The only thing is that you may have an objection that can be resolved without you having to hire your own expert translator.

MR. KELTNER: Right.

MR. YELENOSKY: And so you need

to allow for that. You may have an objection that their -- the opposing party's translation we can see isn't correct. So you don't want to require in every instance that it be verified by a translator because then you are obligating extra expense that may not be necessary.

MR. KELTNER: And, Steve, my suggestion is it would not be verified. You wouldn't have to have a translator. All you have got to say is, "I object to the third sentence of paragraph two of the translation where it states X. The real translation ought to be Y," and you know, a good lawyer is going to say, "And by the way, here is the affidavit of so-and-so, translator attached," saying the reason for the change.

CHAIRMAN SOULES: Anyone else? Okay. Rusty McMains.

MR. McMAINS: Well, because of various encouragements of gamesmanship potential when you are dealing with foreign documents, the rule doesn't provide for what happens when both sides file within the 60-day period. In other words, you calendar it for

60 days. Both sides -- I mean, if you are working with foreign documents, the odds are you already have your translation in effect.

So as you get down to the time limit, they are basically both going to file, which means that they are both going to object, theoretically, or unless one of them may satisfy as an objection. I mean, we don't have any of these -- there is no procedure provided here, and if neither one of them objects, if both think that the filing of their own counts as an objection, theoretically they are both admissible and true, even if they happen to be different. There is no procedural resolution of that. They may cross in the mail and still be served pursuant to 21a.

CHAIRMAN SOULES: Okay. Mark.

MR. SALES: To respond, the committee looked at that issue and decided if it comes down to that there is a breach based on the language of one word or something, that's just going to be a fact issue for the jury just like when you contradict medical records or whatever. If they want to say it's

not reasonable and the doctor said it was, then you just try it to the jury, and so we did not try to put in this rule that the court has to make a decision which is the right one because it may be that the whole case rides on that fact.

MR. McMAINS: Now, wait a minute. The problem is this rule as it is framed on the use of expert testimony says "except as provided in paragraph (c)" which is the automatic admissibility, which both parties could satisfy conceivably. This rule does not prohibit the admission of an accurate translation of a foreign language record during trial by the testimony.

Now, and that's when you provided for the court to appoint somebody. There is a predicate issue of accuracy that you have written into the rule with absolutely no standard, no burden, no anything to tell anybody how to decide that, okay, I am going to admit that because that's accurate. I mean, if the judge doesn't hire somebody independently, how the hell is he going to know whether it's accurate.

MR. YELENOSKY: Well, you can have two accurate interpretations which differ slightly because there is not always a word for word translation for every language. So most would be admitted.

HONORABLE PAUL HEATH TILL: Well, we have that trouble in English. What you are talking about?

MR. McMAINS: But that's not what it says. It says as a precondition that this rule does not prohibit the admission.

CHAIRMAN SOULES: Where is that? Where are you reading, Rusty?

Time out.

MR. PRINCE: Subpart (d).

CHAIRMAN SOULES: Subpart (d), David?

MR. PRINCE: Right.

MR. YELENOSKY: But the word after it wouldn't prohibit the introduciton of two interpretations which might be thought to contradict one another, and there might need to be testimony about the history of the language and such, and they would both be, as far as experts are concerned, alternative

accurate interpretations and translations. So that language would not prohibit it.

CHAIRMAN SOULES: This is designed to facilitate the authentication of a translation before trial. It's not designed to preempt oral testimony or deposition testimony at trial. Even if you do what (a) says you can do, you still can do what (d) says you can do. It's just a way to do it.

MR. McMAINS: That's not what it reads, the rule.

CHAIRMAN SOULES: Do I have the sense of it correct, Mark?

MR. SALES: The committee looked at that issue. Our idea is the only time there is any preclusive effect is if you do nothing. Once the party tenders their translation, if you do nothing, then you can't come down to the courthouse at the last minute and say, "That's wrong," if you do nothing.

CHAIRMAN SOULES: Okay.

MR. SALES: If you take the steps, then it just goes to the jury. It's going to go to the jury as to who they believe.

MR. McMAINS: And if both parties file two competing translations in 60 days and neither party files an objection then under this rule both documents -- but neither party is entitled to object -- is entitled to complain about the other party's translation.

CHAIRMAN SOULES: No.

MR. McMAINS: Which makes no sense at all.

CHAIRMAN SOULES: (C) says, "If no conflicting translation has been timely served in accordance with paragraph (a)." If both parties have served under paragraph (a), (c) does not function, and you can have oral testimony to resolve the difference at trial.

MR. McMAINS: No.

MR. ORSINGER: Is oral testimony required, or can the competing affidavits go to the jury?

CHAIRMAN SOULES: Or they can -- well, both affidavits are going to go to the jury anyway. The competing translations are going to go to the jury anyway.

MR. ORSINGER: Okay.

MR. McMAINS: Why wouldn't an affidavit do it then?

MR. GALLAGHER: Failure to object.

CHAIRMAN SOULES: No, because that's not what it says, though. It doesn't say they both go if they are competing. It doesn't say what happens if you have competing affidavits.

MR. McMAINS: No. Absolutely not. Nothing happens, and that's the point. It's the same thing with the authentication of the medical records. I mean, the affidavit doesn't go. I mean, the thing is not automatically authenticated just by way of competing affidavits. Those are hearsay.

I mean, this is a default rule. If you don't do something, then these are treated as being true. What I am saying is it's perfectly possible that people will think that they are complying by submitting, by essentially putting the burden on the other side to object, and they are both faced with a default and then that doesn't help anybody.

CHAIRMAN SOULES: Okay. So if

you have competing affidavits, neither one of them can go to the jury.

MR. SALES: No. If you have competing affidavits and you follow the -- you comply with the rule, it should go to the jury.

CHAIRMAN SOULES: Well, it says, "If no conflicting translation has been timely served, the court shall admit," but it doesn't say if a timely -- if a conflicting translation has been timely served, then what? That's not covered if you have got two translations.

MR. SALES: We need to clarify that. I mean, I think that we didn't want to take the view that we were deciding what the court perhaps is going to decide, but we can certainly amend if there is a concern there, that we could amend that to say if a conflicting affidavit is served then the issue goes to the jury.

MR. McMAINS: Luke, is it really a jury question to decide which competing translation?

CHAIRMAN SOULES: Sure. I

think it's expert testimony.

MR. McMAINS: And what words mean. I mean, is that what we believe?

MR. LATTING: Yeah. That's what I believe.

CHAIRMAN SOULES: This isn't foreign law. This is the interpretation of a document. It's based on expert testimony.

Let me see if I can just get a sense here of the committee. Make it simple. There are two parties. It's just a two-party case. Each one of them files under (a). Do the two affidavits go to -- not affidavits. Do the translations both go to the jury or neither goes to the jury?

MR. LATTING: Neither.

MR. SALES: No. It goes to the jury. You cannot put in --

CHAIRMAN SOULES: I am going to get a sense of this --

MR. SALES: By filing the conflicting affidavit, timely doing that, you put it in issue, and now it's got to go to the jury.

MR. YELENOSKY: He's asking

just anyone.

MR. SALES: Oh, I'm sorry.

JUSTICE CORNELIUS: The second paragraph of (d) covers that. In other words, you get to do it at trial except as prohibited by (c).

HONORABLE SCOTT BRISTER: Luke, I'm not sure about that. I mean, it seems to me it's like a contract. If I construe the contract, I don't -- I tell the jury what the contract means and --

MR. YELENOSKY: Because that's a matter of law.

HONORABLE SCOTT BRISTER: Right.

MR. YELENOSKY: But what the word in some obscure language means --

CHAIRMAN SOULES: The court reporter can't -- I tell you what. This has carried on much longer than I thought it would. We need to take a break. Let's be back in 15 minutes and then we will pick up where we left off.

(At this time there was a recess, after which time the proceedings

continued as follows:)

CHAIRMAN SOULES: Okay. To open questions on 1009 seem to be, I guess, we need more of our committee here because -- I will just get the sense of those that are here. If there are competing translations filed ahead of time should they both be admitted in evidence? Justice Duncan.

HONORABLE SARAH DUNCAN: I would like to revisit the question that Rusty brought up, which is whether the jury is the right decision-maker to evaluate the credibility of a translator. I'm not sure how a jury would decide that. I am not sure that they should decide that. It seems to me that a competent translator, an unbiased translator, if there was really a new answer to a word or series of words would put that before the jury, and I guess I am getting back to Judge Brister's earlier comment, and I think the comment that was made that maybe this is an instance where trial judges should be able to hire an expert.

I am very concerned that factors that are absolutely irrelevant to which translation is

accurate will be attested by the jury in determining the credibility of the translators. So I would speak in favor I guess of neither translation going to the jury and letting -- instead having the judge hiring a translator to resolve the dispute and explain any new answers to the jury.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: The way this is now worded, if you have competing affidavits then neither would go to the jury, and you would bring in your experts to testify. There may be an intermediate step that the judge could determine whether -- when you have competing affidavits whether the differences are material to anything. Because if they are really not material then there is no need to go to the expense of bringing in the experts. So maybe the judge could at least make that determination and knowing what each of the competing translations say ought to be able to determine whether that's a material issue in the case.

CHAIRMAN SOULES: Judge

Brister.

HONORABLE SCOTT BRISTER: I think you have got all the DuPont problems. I mean, you could have junk science. You could have junk translations. Do we have to give every case with a translation to the jury just because you can find a warm body to testify "yes" means "no"? Surely DuPont means more than that. I think there is at least some cases where the judge says, "No, his translation is right. That one is wrong." I think the rule contemplates that. I am going to rule on the objection yes or no. I just understand that there is going to be sometimes when it's ambiguous and I do give it to the jury. There are some words that might have more than one meaning, but if it says "yes" or "no," I think it's the judge's job in DuPont to decide if an expert is out of line and so rule.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I worry that we are maybe blowing this a little bit out of proportion. I mean, let's think about how it

comes up. If it's an interpretation of a document, that's a question of law, not a fact, unless there is an ambiguity, and that isn't a problem. It goes to the judge. If it is, as I understand, that's just a law matter, not a matter of fact.

JUSTICE CORNELIUS: That's right.

MR. KELTNER: So if that's the case, it doesn't seem to me there is anything to go to the jury on that. The judge is going to make the determinations and instruct the jury in the correct way or be asked by the parties to instruct. So I don't think that is a problem.

If, in fact, the case turns on the translation, not of the contract interpretation, but on a document, you have a different thing. You have a completely different set of circumstances. That would be a factual matter, and that would be something that would normally be submitted to a jury. I doubt that we are going to have very many cases that are going to pit translator against translator over a particular phrase or word.

Unfortunately I have had one of those, and I will tell you what we did was settle, which really is the way to handle it. So I think we hope for a lot of these cases so we can settle more. So I don't think it's going to come up. It's going to be a law interpretation in a contract, document with legal effect.

It's going to be a fact interpretation very rarely, and I think this is also one of those things that the judge may hire and the rule provides now that a judge may hire an interpreter to deal with, but I just don't think this comes up that often, and when it does, the differences in interpretations are relatively minor. So trying to build in all of these facts and problems into the future aren't really, I don't think, very realistic; and if a case comes to be determined on the difference between translation, it's, one, going to be required; and, two, the judge under those circumstances can submit it to the jury. The only thing this rule does -- and Carl, I read it differently than you do, is a party can say here's my translation, 30 days,

and if there is any objection, get it in. So it's just in before the jury and the judge. Any party can do that.

Any party also at the time of trial could offer a translation by a live witness or I assume a deposition, and that would not be a problem, wouldn't have to rely on the filing. It looks like to me is an easy way to get it into evidence. So as long as we are talking about an evidentiary rule of getting it in, let's just deal with having it admitted. How it's handled by the judge later in instructing the jury ought not to be handled in the evidentiary rules.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Thinking about how it will come up in the way David is talking about it, the first translator will translate it with a specific --

MR. KELTNER: Slant.

PROFESSOR DORSANEO: -- approach, slant, and the second will translate it, and if you read the two together, you probably would say it doesn't

make a difference, or this one is plausible, too. The problem that I have with the rule is that it doesn't let somebody then -- it doesn't appear to let somebody bring a witness when it says "except as provided in paragraph (b)" to maybe kind of explain that. Now, I don't see why there should be a provision against bringing a witness to say something additional at the trial if you had these two kinds of varied interpretations of some otherwise admissible writing.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Let me just ask you, Bill, this question because maybe Carl is reading it right, and I am reading it wrong; but what I read this to say in (d) is that you can get it in through expert testimony of a translator at trial unless you are barred by doing that because you didn't file an objection under (c). In other words, I think you could do the (c) matter, file an objection, call your translator; or you could file it and the only thing that (d) is doing is saying you can always call an expert to

testify. That's just a more expensive way to get it in. It may be barred because you didn't object, but that's all it does.

So if that's the case, it's just a way to get it in front of the jury, and we let the judge handle the effect of it later just like we do every other contract. I mean, if you have two competing contracts, both appear to be signed, you might ask which is the real one, or if you have -- well, I won't get into that deal. That's a separate issue.

CHAIRMAN SOULES: Okay. Where are we? What issues do the members of the subcommittee see that you want to get some kind of show of hands on?

MR. PRINCE: Let me recount the bidding here if I might, Mr. Chairman. As I understand it, we are taking out the language wherever it appears by unanimous consent about service under 21a as surplusage. We don't need that. The second thing we are doing, unless I misunderstood the previous vote, is we are taking out the "verified under oath" as it appends to the objection part of this.

The third thing we would be doing is

adding as an additional clause or statements at the end of both subparts in part (b) the civil case part and the criminal case part about an additional obligation that the objecting party points out not only the inaccuracies but also what the correct translation should have been of those parts objected to; and the third or the next to the last thing we are doing without any disagreement, at least as I understand it, in the subpart (e) we delete the words "in a civil case" and allow it in either civil or criminal cases. That's the review so far, correct?

CHAIRMAN SOULES: Correct. As I understand it.

MR. PRINCE: Then I think the only issue is this thing about filing conflicting affidavits with no objection. What do we do in that event? Do we commit that to the jury, or do we direct that the judge must as a matter of law make some decision about that in advance of trial? That's the question.

CHAIRMAN SOULES: Okay. How

many feel -- let me just get a show of hands. When there are competing translations should they all go to the jury?

MR. HAMILTON: You are talking about the documents themselves going to the jury.

CHAIRMAN SOULES: The Korean document plus the Korean translation, not anything that an expert said by way of affidavit, just the translation, and I guess the original document if somebody wants to offer it.

Those in favor show by hands. One. Those opposed?

MR. ORSINGER: That's except for an ambiguity because I think if there is an ambiguity in the language, it may have to go to the jury. I think even Judge Brister acknowledged that.

CHAIRMAN SOULES: I think that's all assuming you have got a contract. Suppose it's just a letter.

MR. KELTNER: Yeah. That's exactly right.

CHAIRMAN SOULES: Saying I

pushed him off the stern, and somebody else said I tried to hold him on the stern.

JUSTICE CORNELIUS: That's a question of law if it's the interpretation of the foreign language.

MR. SALES: Mr. Chairman, I don't think you can have one black letter rule. We are in a vacuum. You don't know what document we are talking about. This is going to be a case by case basis. It might be a contract. It might be a letter. Who knows what it's going to be, and I think you are just going to have to leave that to the discretion of the court whether it's a fact issue or not a fact issue, and I don't know that we can have a single sentence that says it automatically goes if you do this or that it automatically is decided by the court if you do this.

CHAIRMAN SOULES: Of course, that becomes a drafting problem because what happens, if you have an affidavit that's a translation in support of an affidavit that's not objected to, what happens? It just, what, stays in the court's file? Judge looks at it,

jury looks at it, it becomes admissible, but it might not be admissible for some other reason.

Judge Brister.

HONORABLE SCOTT BRISTER: But only to a certain extent. If there is no objection, it's admitted. If I determine that one is accurate, it's admitted. Anything else the rule doesn't address, so I don't have a problem with this language. If I determine this is right and that's wrong, I am going to have to admit it. If I determine that there is no objection, I have to admit it, and everything else is left open. Then I don't see any problem with drafting it that way.

CHAIRMAN SOULES: So you are satisfied with the way it's drafted now?

HONORABLE SCOTT BRISTER: That allows me to determine some things as a matter of accuracy, admit it, and if I am open about it, I probably am going to have witnesses. If it's an ambiguity, I probably am going to have experts come in.

CHAIRMAN SOULES: Okay. Other than the list that Mike recounted for us a

moment ago does anyone have any other suggestions for changes to 1009? Judge Guittard.

HONORABLE C. A. GUITTARD: Mr. Chairman, there seems to be two ways to go here. One is that if a proper objection is filed pointing out the inaccuracy and providing the alternative translation, that just wipes out the first, the first affidavit, so it doesn't automatically come in as verified by the affidavit and then it becomes the question at trial of proof, so like you just automatically introduce medical records if there is an affidavit supporting them; but if that's challenged, then it has to be proved by live testimony of a translator at the trial. That's one way to go. The other is to have the judge look at these different translations and decide which one he thinks is right. Well, we ought to say one way or the other.

CHAIRMAN SOULES: All right. Does anyone have any other specific recommendations on Rule 1009? Anyone have any further motions on this rule? Okay. Do you

have your --

HONORABLE SARAH DUNCAN: Can I just ask one question?

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: Is there not case law on resolving conflicting translations in other states or in the Federal cases?

MR. SALES: I can't tell you at this point. It's been about three years. I know the committee looked at all of that. I don't think there was a very good -- there wasn't much, very little, and it's really just become more of a phenomenon of recent times, so there is not a large body there.

MR. PRINCE: And my recollection, Justice Duncan, and like Mark says, three or four years ago when this was worked on was that none of it addressed the procedural things that we are talking about now or talked about jury fact issue or legal issues. It wouldn't shed any light on that.

CHAIRMAN SOULES: Okay. Next item, Mike.

MR. PRINCE: All right. The next item is Tab No. 5 and Item 5 on the agenda. This was a recommendation by the State Bar committee that a new rule be adopted approving a privilege for self-critical analysis in the state of Texas. I am authorized to report that Buddy Low's subcommittee would vote two to one against the adoption of this proposal, and Buddy authorized me to report that, so I am; and so the subcommittee, your subcommittee's recommendation is that this proposal by the State Bar committee not be adopted.

I do want to apologize, too, to everybody here because of the way that -- you know, what happens when you put things together sometimes. What you are looking at should be up front, and in Tab 5 where you need to be on the specific proposal starts at the ninth page in Tab 5. It's not numbered nine. It's just counting. It looks like this, "Rule 514: Self-critical Analysis Privilege," and I apologize for that.

CHAIRMAN SOULES: It says, "Proposed rule" on the text?

MR. PRINCE: That's correct.

CHAIRMAN SOULES: All the way to the bottom left-hand corner it's got a date that says "3-20-96."

MR. PRINCE: Yes, sir. That is it. This is probably the most hotly debated issue that came before the State Bar committee about which there was a great difference of opinion, and we agreed as a committee to submit. Again, this is the one that generated the most work product, both pro and con, and all of that work product is included at Tab 5; and again, I apologize that I didn't put the proposal up front. I think it's generally fair to say that the supporting work product is in front of this ninth page and the anti or the work product against the adoption of this rule is behind that page.

Let me in short summarize. Although I voted in favor of this at the State Bar committee and would vote in favor of it here, let me summarize briefly if I could the background to this. This is similar to but not the same as the previous proposal that David Beck had submitted in private committee

earlier.

It is similar in concept to the statute that the state legislature adopted on medical peer review privilege, and the argument of those who are the proponents of this would be that this is to encourage the kind of behavior that is self-critical analysis, meeting the requirements of the rule, that businesses ought to be encouraged to do without the fear that they would -- that this self-critical analysis would see the light of day or be discovered.

Those opposing the rule would do so on the basis that privilege is a matter that ought to be anything that is privileged and immuned from discovery or disclosure. The presumption ought to always be that something is not privileged, and the general presumption would be that you ought not to create more privileges to hide more things from disclosure. I think the second argument that was made, these are the kind of things that businesses are doing, or ought to be doing anyway, and that is self-critical analysis without regard to whether that is privileged.

Any business that's well run and effective should be doing this kind of analysis on safety procedures and so forth, whether the material is privileged or not.

Another argument was that this is one of the few rules that the dissenters could see that almost always works in favor of defendants, and it was almost impossible for people to conceive another circumstance where either individuals or plaintiffs could take advantage of such a rule, and those I think are the major arguments in favor of it.

Let me commend you for the supporting arguments, the letters that are behind the proposal starting after page nine. I thank the very thoughtful Richard Clarkson and Kenneth Lewis. I think Rene Mouledoux well-articulated the issue in his letter in advance, but I don't think there is any mystery about it. It is a contention of industry.

Buddy's committee, again, would recommend two to one against the adoption of the self-critical analysis proposal, and so the recommendation in front of you, Mr. Chairman,

in terms of what the subcommittee recommendation is, is to not adopt the self-critical analysis provision as a new Rule 514 in the state of Texas.

CHAIRMAN SOULES: All right. So the question before the committee would be those who agree with the subcommittee not to adopt self-critical analysis. That would be the question before the committee. The subcommittee has recommended that we not adopt it. Debate? Who would like to speak first? Carl Hamilton.

MR. HAMILTON: In these materials there is some indication that the Supreme Court has no jurisdiction to create privilege. Has that been resolved?

MR. PRINCE: That was an argument. We don't believe that to be correct. We think it's within the rule-making authority of the Court to adopt privilege like they set forth in rules, but that is still an argument. I must tell you I haven't briefed the other side of it, but it's my own personal feeling that they do have jurisdiction to do it.

CHAIRMAN SOULES: Judge Brister, and I will come around clockwise.

HONORABLE SCOTT BRISTER: Did the committee consider something in between? I am troubled by the idea of making it undiscoverable. I am not as troubled by the idea of making it inadmissible. There is lots of things that are discoverable that are not admissible, like insurance, and there is lots of conclusions like the police officer's opinion of whose fault the car accident was that are perfectly discoverable, but we don't admit it because he's not an expert in deciding it.

I am concerned about some low level employee who writes a memo postaccident or post-termination or whatever to the management and says, "We may have a problem here," which is a conclusion for the jury to make, and this person is not necessarily qualified to do that; but, of course, that's what the real fight in discovery is going to be over. We want to get in some low level employee's admission that "I think we messed up," which may be based on all the evidence, may not.

Did you consider discoverability, but not necessarily admissibility?

MR. PRINCE: Yes, we did. We didn't address it in this rule, but let me address this because this topic did come up at the State Bar committee meeting and was discussed at length, and I think the conclusion was that this privilege, like any other privilege, would be treated -- without the necessity of having words in this particular rule that would be treated in the discovery process the same way.

Fights about it would be treated the same way as we currently treat fights about lawyer-client privilege, for example; and that is there would be an objection to the production of some document. There would be a privilege log that would identify what the document was, the date, the basis of the privilege, the author, the addressee; and this document then would be just like claimed attorney-client privilege documents, would be submitted to the court for in camera review for a determination of that issue. So we haven't articulated those things in the rule

or the proposed rule, but the reason was this would be treated in the discovery process just like any other claimed privilege document. It may not be addressing what you are specifically looking for, but we did talk about it and decide that that was the way to talk about it.

CHAIRMAN SOULES: Judge Brister, do you have anything else?

HONORABLE SCOTT BRISTER: I would just like to -- I mean, the alternative, it seems to me, being presented is privilege from everything or it ain't privileged in any way, and that there is a third alternative, which means it's not privileged from discovery, but that doesn't necessarily make it admissible if it's some lower level employee's conclusion based on hearsay. If it was a police officer or transportation safety board inspector with an initial conclusion, we wouldn't think about letting that in, but we wouldn't think about making it undiscoverable either.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Yeah. I have read through the materials here, and the two points that came to mind with me in thinking about this rule are argued very well in this opposition to the rule; and I don't think that the two points are answered in any of the materials supporting the rules; and those are, first of all -- and all the supporting material for, it assumes without any factual basis that this rule would provide an increased incentive over current incentives for corporations or entities to conduct self-critical analysis. I don't see any factual support for that. Moreover, I don't find it very logical, because there are a lot of other greater incentives that would encourage self-critical documents, like if the supporting documents mention key potential issues.

But, moreover, the potential liability from an accident ought to be incentive enough. I don't think that corporate officials are going to go, "Well, we may have a problem here that could cause the loss of 500 lives, but rather than look into it and see whether we

can prevent that loss of 500 lives we are just going to let it sit because if it happens we don't want a self-critical analysis to be there and available." That isn't logical to me.

Secondly, the other point is that the self-critical analysis should only be harmful to the entity or the corporation if it shows that there was an obvious problem that should have been acted upon and the corporate entities didn't act upon it, and in those instances they ought to be tagged for that. So I don't see any of the public purpose being served, as is alleged without any foundation.

CHAIRMAN SOULES: Anne Gardner, I mean, McNamara.

MS. McNAMARA: Let me just say, because it is hard to have data to show how an organization would behave depending on rule changes, but I do think a privilege such as this one would help organizations do what I think we all want them to do. I mean, the normal process after something bad happens is the lawyers sort of converge around the organization, and however much the

organization wants to do the study or get to find out what's going on, depending on who's got the loudest voice in the room, people may or may not really get into the kind of analyses I think all of us would like to see done.

You raise questions of whether or not you jeopardize the insurance relationship if during the period of defense you are creating documents which are consistent with what the insurance company wants you to do. Ideally no organization would ever let this kind of motivation change its behavior, and the good ones don't let this kind of concern change their behavior, but I think some of them do. Some of them are advised by their lawyers not to create any pieces of paper that might be harmful. So you end with kind of silly pieces of analysis. You are trying to show it one way or another. You are not writing things down. You are speaking obliquely so people can't read into what you are saying anything that's harmful.

So I think from a point of view of a business this is a very valuable social policy

tool. It will undoubtedly do all sorts of injustices as individual cases get litigated as people try to figure it out, what it means and what it doesn't mean; but, you know, from my perspective I think this is a very good thing.

CHAIRMAN SOULES: Anyone else, coming around to Steve? Steve Susman.

MR. SUSMAN: Apart from the policy arguments, I am persuaded by the term that there is a slim adoption of this new rule around the country. There does not appear to be any state rule that adopted it. There does not appear to be any state Supreme Court that has adopted it. If you look at page two of the memorandum attached to Mister --

CHAIRMAN SOULES: I can't hear you, Steve.

MR. SUSMAN: If you look at page two of the memorandum attached to Rene Mouledoux's letter of June 13th, there is a smattering of U.S. District Courts around the country, a trial court in New Jersey, no state appellate or supreme courts. I don't know what the Fifth Circuit is saying in those two

decisions that are cited, but to me this is -- and obviously no Texas cases at all. This is a very, very slim read given the notion that privileges protect parties in litigation from discovery of the truth.

This is a slim track record on which to suggest that this will put Texas in the forefront, and I just don't think the case has been made; and, I mean, it's interesting. I mean, I'm listening to Anne talking. There is no empirical evidence, but it would be helpful, she thinks. I haven't even read anything in the Wall Street Journal in the last two years, or any of the newspapers, that are certainly representing large business that this is a big problem for business. You know, businesses aren't coming to Texas or businesses aren't coming into states that don't recognize a rule like this. This is the first time I have even heard this is a problem, and so I think that's another reason. I mean, I think if it were a problem, we would be hearing more about it in newspapers, in ABA meetings, but this kind of comes out of thin air, and so I think the subcommittee was right

in not recommending it.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I agree with Steve. I think there is some other internal problems with this rule. It is a rule that only an organization, which is, I will admit, defined as a natural person or any other basically looks-like-business entity; but the rule, only an organization can claim, and I want you to think how that's going to play out in different kinds of lawsuits. If I am an organization and I have had an explosion at my plant and I have sent people out and I take remedial measures later, well, that's protected already under our rules. If I make a determination that something is wrong and, in fact, my negligence caused it, that is going to be protected. Even though the whole lawsuit will be over that one issue.

On the other hand, if it's something beforehand, is this machinery dangerous, for example, as an organization I can claim it even if the conclusion was on behalf of the company that it was a dangerous situation; but

I can interestingly claim it at one point, but if I ever got to a gross negligence situation since I own the privilege and can waive it, I can let it come into evidence to protect me to show, yeah, I thought about that, and I took some procedures.

It seems to me to be, one, I think, very little -- and I did research it a little bit, Steve, to find out what other states had done. I don't see that there is much that anyone else has done to adopt the rule. Second, it can be applied and waived in a way to work further injustice, maybe even in the same case; and, third, the general rule privilege, which is in (b) of the rule, makes it almost impossible to apply across the board on a routine basis. It's going to be applied by different judges different ways. As a result, I would argue that we ought not to adopt it.

CHAIRMAN SOULES: Mike.

MR. GALLAGHER: There is circumstances in which organizations sometimes are possessed of all of the technology on a given issue; and if you do not have access to their internal documents and cannot use their

internal documents to aid you in establishing either that the product is designed defectively or that they violated a reasonable standard of care, then in those circumstances there are no alternatives from a standpoint of developing your case.

While there are not many vestiges of the DTPA left, how do you prove the Deceptive Trade Practice Act without having gone back to substantively establish that this company did engage in false and misleading activity; and then, thirdly, I would just point out to the committee that in making a determination of whether or not punitive damages are warranted in a circumstance, the internal documents frequently demonstrate the egregious nature of the conduct of which the plaintiff is complaining; and without those internal documents you have no way of establishing their awareness, the certainty of the event of which you are complaining.

And, Mr. Chairman, there are many more reasons that I would urge this committee not to adopt this rule and the last being nobody else has done it.

CHAIRMAN SOULES: Paula.

MS. SWEENEY: Mr. Chairman, I also would speak against the rule for another reason. One of the greatest travesties that we have in the system in Texas right now as its been interpreted is the so-called peer review privilege in a medical setting. This would create the same situation in all settings, and what you have in that setting is a situation where the victim who seeks to prove, for instance, that an unfit physician is continuing to practice in a hospital or that there is a pervasive problem in a unit with abysmal care or that the same thing has happened over and over again with these providers or with this set of circumstances or with this equipment, is a response, "Oh, no, that's protected under peer review" because some committee at some point may possibly have considered or discussed it.

And it has become an all-encompassing shield that virtually, absolutely and completely shuts out the litigant from finding out what really happened, how it happened, what if anything was ever done to prevent it

from happening, and leaves the litigant, the victim, simply with the option to say, "This shouldn't have happened, and we think it probably has happened before and has been discussed, but we can't prove it, and the reason we can't prove it is because everything is shielded and privileged."

That is exactly what this rule would create except it would create it in virtually every instance in which an entity, a corporation, is a defendant and make it impossible for litigants to find the proof that they need to demonstrate foreseeability of an occurrence, which is a key component of negligence and causation, to demonstrate the state of mind and attitude required to support punitive damages or a gross negligence finding and a whole host of other claims.

And, secondly, Mr. Chairman, I question whether -- and I don't think it's been adequately briefed by the proponents. The Exxon lawyer who's in favor of it doesn't address this and the other folks in favor of it in their materials don't address it, and that is whether or not the Supreme Court, in

fact, does have this authority. When I see a rule that has an effective date in it, that to me screams this is legislation; and if a rule has an effective date and screams to me that it is legislation then I think it's something the legislature should take up, and I don't think it's something that this committee out of whole cloth with no common law precedent and with no outcry in the community and with no request from any entity, except for a few lawyers, ought to consider recommending to the Court, nor do I think the Court has a basis in law or in tradition or in any other common law basis for passing the law. So I think for those reasons and all the others that have been mentioned this is a horrible law, and I would vote against it.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I want to join in the arguments of this proposal, and I want to bring some different perspectives to it. I was involved in Texarkana Memorial V. Jones, which brought the peer review committee rule to Texas, and it's been a low point in my career. The basis for the hospital peer

review committee privilege -- though I think you need to look at it in the context in which that argument was first raised, and Paula brings out an important point; but the whole fountainhead for this privilege arises from the peer review committee privilege; and in a hospital context you have a different situation than you do in a corporation. You have a number of independent physicians who voluntarily participate in a panel to review the conduct of a peer, subjecting them potentially, if they do not have this confidentiality, to lawsuits for libel, for defamation, for fraudulent interference with whatever, and you don't find it in the cases.

But the unspoken concept in the peer review committee is to protect those doctors so that they can speak freely. You don't have this in a corporate environment, and I think that point needs to be made, because what has happened is defendants have seized upon this hospital peer review committee privilege to bootstrap it into the corporate context, and it just doesn't work. There are some real problems with this rule as it is written.

Even if you accepted the concept that there should be a self-critical analysis privilege, which there is absolutely no empirical data that says, look, there is a problem out here that warrants this, even if you accept the proposition that this rule is needed, think of the mischief that this rule creates.

First of all, the cases that have dealt with this rule have almost uniformly always said facts should never be protected by this rule. Data should not be protected by this rule. The only thing conceivably that should be affected are opinions, going back to what Judge Brister was talking about, the evaluation, the bottom line, but this rule as written goes much further. Information resulting from a self-critical analysis could conceivably protect all sorts of data, facts, and that is just antithetical to our entire process here.

The other thing that makes us all vulnerable to mischief from this rule is it is not limited to just subsequent to the incident. There is no limitation under this rule about when it applies. Conceivably,

think of it, the Pinto memo in which the manufacturers of automobiles assessed their liability versus the cost of trying those lawsuits, that wouldn't have been discoverable. The cigarette litigation, the memoranda regarding the investigation into nicotine, that wouldn't be discoverable. It's not limited to what happens after the event, and then in Texas we already have a rule which protects an investigation after the event.

This is just sheer greed. We have National Tank Company V. Brotherton which already protects the investigation; and then not to overreach here, but just because I want to bury this thing so salt in the field so the daisies never grow on its grave, on Judge Brister's comment, think about it. If you get into the admissibility issue, we are now moving toward the Upjohn test, which would protect all employees, communication with all employees, but at the same time now we are not going to allow their opinions to be potentially admissible as admissions against the company. That causes me concern about the compromise.

I see what you are saying, Judge Brister, about the opinion; but still if there are statements made by employees during this investigation, those are potentially admissions. They may be admissible as lay opinions additionally. So I just have a number of problems with this privilege.

This privilege is similarly antithetical to the concept of Rule 76a. I mean, here we have this rule where we are pioneers in the country on openness of records and then in the same state we are going to say, yes, once they worm their way into the court file you can have them, but we are never going to let you get them. Don't do this. They did this in the railroad crossing litigation. It started off with the discovery and then they went and moved it into admissibility. You can't even try a railroad crossing case because you can't get the evidence.

This is a pernicious rule. It should be killed. It should be killed by not just a majority. It should be killed unanimously.

CHAIRMAN SOULES: Okay. Anyone here, this side of the table? Anyone want to

speak? Mike Prince.

MR. PRINCE: At the risk of being shot from the other side of the room, let me say that I understand the arguments on the other side, and I think this is a close question. It's a close question in my own mind, but I have not heard articulated any objection to this rule that is not solved, while at the same time addressing what I think are important behaviors that ought to be encouraged by organizations. I have not heard any objection to this that is not solved by subpart (b) of this rule, which does require -- and the way it operates, it operates that if the discovery test of the applicability and validity of the privilege of the trial court takes place as it would with other privileges, if the four prongs that need to be met for this privilege applies, those four subparts to subpart (b) are established by proof, as you have to do with the lawyer-client privilege, to the satisfaction of the trial judge.

And in my view, Paul, let me address the specific examples that you gave. It would be

inconceivable to me that any trial judge would conclude that in the Pinto litigation or the cigarette litigation there would be a strong public interest in preserving the internal free flow of that information, which is a requirement for that rule. My view is that if the four requirements of this subpart of the rule are met, then the information ought to be privileged, and I haven't heard anything to persuade me otherwise.

CHAIRMAN SOULES: Okay. After Mike, Judge Brister, you had your hand up.

HONORABLE SCOTT BRISTER: Well, I mean, also I have a problem understanding how important this rule is going to be given our current party communications privilege rule. You know, we have lots of hearings at trial courts on the party communications privilege, and it's because we have this. You know, the key is if you can manufacture that you were afraid of getting sued, which any time anybody -- as I read National Tank V. Brotherton it's going to be pretty easy to do any time there is a -- the folks on this side of the table have a case.

All of your cases are going to be covered by the party communication privilege, and the thing that's always disturbing about those hearings is that at a lot of those hearings nobody is really after the facts because either -- I understand there is going to be some bad guys out there that might be trying to cover up the Pinto test and things like that, but the routine case is we just don't want to turn over any of our investigation because some lower level employee wrote a memo after the accident saying, "We may have a problem"; and that's the only thing the plaintiff's attorney wants because they are going to build a case on some lower level employee's initial -- I am suggesting that this rule as well as the party communications privilege, we ought not to have a blanket party communication, no discovery, no nothing, it's buried if somebody dies.

We ought to open the records up in both circumstances, but whether it's admissible because some lower level employee said we thought we have a problem is the same way as an investigator with preliminary

investigation. The police officer, we don't let the police officer's opinion in almost ever because he ain't the jury and his likely conclusions -- why do we not admit the police officer in is because his likely conclusions will probably sway the jury, and we don't let it in because his position of authority is going to give more merit to his views than what really happened, which is he talked to everybody and he decided who he thought was telling the truth, which ain't his job. That's the jury's job.

The same thing with this lower level employee. Because of his position his preliminary admission is going to carry more weight than it has; but, for goodness sakes, the flip side of that is we are covering over everything if somebody just says, "Well, we figured they were going to hire Gallagher and we were going to get sued," and I am saying we ought to put those two together and look at the question of whether we make them all discoverable but not necessarily admissible, which seems to me what the fight is about mostly.

MR. YELENOSKY: I just want to respond first to what Mike said. On part (b), (2) and (3) are both questions of public policy that require an empirical basis. They are not questions that can be answered by a judge in a particular case, at least not an answer that's worthy of any respect. Those are questions which require a look empirically, not just at this particular company, but how corporations operate in general because they call for whether preserving the internal free flow of this type of information is of public interest.

Well, I mean, the answer to that is -- I mean, you could say "yes," but the underlying implicit assumption there really goes to (3), whether it would be curtailed if discovery was allowed. In an individual case, of course, the defendant is going to say, "Well, we wouldn't have done that if we knew it was going to come out," but that isn't the question. It's a societal question, and the judge isn't going to have the empirical basis for deciding that. So I don't think it's helpful to say that (2) and (3) are in there

and, therefore, this rule is okay.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I am against this privilege, and I am not going to reiterate what has already been said. I am against it on policy grounds. I think it makes a procedural nightmare for the hearing where you are having to decide whether something was privileged or not.

I also want to make the point that the evidence professors that I have talked to at the University of Texas Law School are also against this. Guy Wellborne's views are reflected in the materials. I also talked to Steve Goode, and Steve Goode said that he was against a rule like this. I think his word was it would be stupid to have a rule like this, and neither Steve nor Guy are exactly people that you would think of being on the plaintiffs side of the Bar. They are more defense-oriented. I just wanted to make that point.

CHAIRMAN SOULES: Bill, you haven't spoken yet. Let me back up and get

you and then I will get to these other people.

PROFESSOR DORSANEO: We had until April 1, 1984, an investigative information proviso that accompanied and probably subsumed the party communication privilege, and we decided really in 1982 that was a bad part of our jurisprudence because, as Paul indicated, it's a very unusual privilege that would protect information, information collected with respect to events that occurred before the investigation began.

This is much broader than the party communication rule, you know, because of that feature. The party communication exemption also has a substantial need/undue hardship limitation on it, which would allow for some play in the joints. This does not.

And the last thing I would have to say why I would be against this is that I am not impressed that much by the limitations imposed by paragraph (b), because those will either be easily satisfied by affidavit in a particular court, or there will be a tremendous amount of friction cost that will be involved in deciding these very complex matters,

particularly (b)(3) and (b)(2), strong public interest, internal free flow, involving, you know, balancing ideas, and I just think this is a bad idea because it goes much too far.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Mike, I want to address your concern and see if you haven't heard a reason why Pinto or the other things wouldn't be changed by (b). If you will look at (b), I think I can tell you why. You get to (2), and it is, "There is a strong public interest in preserving the internal free flow of the type of information sought." I want you to think how this is going to come up.

We have the Pinto memo. I refuse to give it to the plaintiffs claiming this privilege. No one is going to see the memo at this point, and in fact, under this privilege I may not even have to produce it for an in camera review, but certainly I am not going to do it before the initial hearing.

So no one sees the memo to make a determination of whether my admission that I am going to kill a lot of people in the future

is something that ought to be done. Instead it's going to be the question the judge is going to have to determine is, is there strong public interest in preserving the internal free flow of the type of information sought, and that's rather easy for me to put on at least a prima facie case of, and now, if I am Ford looking at my products and insuring that they are safe, is the type of information that probably ought to be kept confidential. So as a result of that, I think that maybe Pinto doesn't turn out differently.

My objection here is I can sure see -- I can see some basis for the rule or similar rule. It seems like party communications, basically we already have this, and Brotherton certainly does make this a pretty strong privilege in Texas already, but going this far, I get to protect facts, and I get to protect things that I uncovered that now -- that are truth that I don't have to tell you.

Judge Brister brought up, I think, a very interesting point that's well taken, that in many instances plaintiffs end up looking for the smoking low level gun where someone made a

careless comment, and I do understand that sometimes that certainly occurs; but there are ways evidentially to take care of that. We have taken care of it with a large body of case law on accident reports and the like. We have also taken care of it on party communications, I think, in low level employees; and certainly you can say, yeah, I mean, as representing defendants I have kept some of that kind of evidence out.

I have also tried to explain it in ways that were exceedingly helpful, that of course that's what you want an employee doing. You know, when there is a big accident, you want to determine whether there were any problems, and of course, that's what this was, and that's something I think juries accept well. I think this is not just a curer of that problem. I think it is an opportunity for people to use a rule to keep facts from being known.

Anne makes a good point, I think, in saying that some companies don't do studies on advice of counsel, and I'm afraid, Anne, that really truly is right, that they don't do some

studies that they should do on advice of counsel, and I don't think we should minimize that because that is true, and I have been in situations where I was even asked by lawyers later to review things in which that was done, and there is no doubt that occurs.

I don't think this rule cures that problem. That is more of the -- in one respect, Anne, a moral issue to some respect and certainly a business decision in another, and we are not going to cure it with a privilege rule that says that what should turn up in a self-critical analysis, even if it is true, you don't have to disclose. That doesn't seem to me to be very helpful. That may mean -- and quite frankly, it may have the opposite effect. I may never look because I don't have to prove that I did, and I worry about that from a public policy standpoint.

CHAIRMAN SOULES: Mike Gallagher.

MR. GALLAGHER: I think Rusty is --

CHAIRMAN SOULES: You want to defer to Rusty?

MR. GALLAGHER: I am going to mute the question. So is Rusty.

CHAIRMAN SOULES: Does anybody else have anything else to say about this that you feel you haven't had a chance to say?

Okay. No hands are up. I am going to restate the question. I know that the committee said no rule. Those in favor of a Rule 124. Those in favor of the proposed Rule 514 show by hands. I count two hands -- three. Three.

Those opposed? There are 21. So the committee's recommendation not to adopt this is approved by the committee as a whole. The subcommittee's recommendation not to adopt such a rule is approved by the committee as a whole by a vote of 21 to 3.

Okay. Next is Robinson. Let's see. What time is it? We might be able to get this in.

HONORABLE SCOTT BRISTER: Is there any interest, or just me, in looking into both this and the party communications as to whether we make these things discoverable but not necessarily admissible? I am

unfamiliar with the cases David is talking about, but that always seemed the strange thing to me about the party communications privilege. Somebody dies; a cone of silence just ascends; nothing is discoverable because of the fear that some opinion might leak out.

MR. GALLAGHER: Do we say we are not interested?

CHAIRMAN SOULES: Did anyone have a motion to make to that effect?

HONORABLE SCOTT BRISTER: Not if nobody else is interested.

MR. GOLD: No. I don't have any. I was just going to say I think it is addressed by the rules right now.

CHAIRMAN SOULES: If anyone has a motion to make, make it. Otherwise we will move on.

MS. SWEENEY: No motion.

CHAIRMAN SOULES: Now we are to tab --

MR. PRINCE: Item 6, Mr. Chairman. Again, I apologize this happened; but this is the way it came up, and if you will look, the actual proposal of the

State Bar subcommittee begins on page 2 under the language, the part that says "proposed comments," and ends on the next page, which happens to be numbered page 2, but it's actually the third page of Tab 6. Right before that part that says "proposed scope of content," so the last paragraph, and this is a proposal that a comment be added to Rule 702, beginning with the third page of the tab and ending on the third page of the tab on proposed scope of the coment. Has everybody been able to find that, got that?

CHAIRMAN SOULES: I see. We start with a letter from Mark.

MR. PRINCE: Right.

CHAIRMAN SOULES: Then the next page says, "Proposed comment to Rule 702."

MR. PRINCE: Right.

CHAIRMAN SOULES: Is that what we are looking at?

MR. PRINCE: There is no proposal due to the DuPont/Robinson case that there be any changes made in the wording of any of the rules. The suggestion is that there be a comment added to Rule 702, which I

will now explain.

CHAIRMAN SOULES: Okay.

MR. PRINCE: Also, let me explain as a predicate, Mr. Chairman, that the language of this particular proposal has not yet been voted on or considered by Buddy's committee due to the disparate travels that people had to make; but that subcommittee, though, has during this year considered a number of different things to do or not do with regard to the Robinson case and basically has been of the opinion up until this time that we should have waited to see what was going to happen on rehearing in the Robinson case.

The rehearing has been overruled, and we have not had a meeting since then. So I discussed with Buddy what to say here, and he said we could pass this on, but just make it clear that everybody understood that his group -- himself, Tommy, and John -- had not voted on this particular language, but he wanted me to go ahead and present it anyway.

CHAIRMAN SOULES: Well, let's present it, and let's take it up for action.

We are going to take it up for action on your presentation.

MR. PRINCE: All right. But I wanted everybody to know that. Basically, given that Robinson now sets -- the DuPont V. Robinson case sets the standard for the determination of admissibility and reliability and all of those kind of things for scientific evidence.

The question that the State Bar committee considered when Robinson had first come out while the motion for rehearing was pending was whether or not if that were the standard, not whether that standard ought to change, whether that decision is right or wrong, but if that were the standard, should some guidance be put out that would benefit practitioners, of course, but maybe even more importantly than that, trial judges about the way that they ought to handle or the kind of considerations that they ought to take into account when making a Rule 702 determination under the standard, the legal standard set forth in the DuPont V. Robinson case.

And I think it would be fair to say that

the State Bar committee consisting of both plaintiff and defense lawyers, although -- and I don't think there is any mystery about this. It won't come to any surprise in the room. I think that there are some practitioners if they had their rathers would not have to live with the DuPont V. Robinson decision or what the implications of that are for the practice of law with regard to expert witnesses; and, I mean, that doesn't come as a shock to anybody to make that statement.

But given that that is the standard, is there something that we could say without changing the rule or without changing the standard that would be a benefit to practitioners and trial judges from the Robinson case about the way in which and perhaps the timing in which the determination of the admissibility of expert testimony ought to take place.

And I think if you assume that the Robinson case sets the standard, which we did, then the vast majority of the members of the State Bar committee would feel that this language here -- although many would prefer

not to say anything in hopes that you just leave it alone, but if there were going to be language, there is really not much controversy about this language in the comment being a correct reflection of really what Robinson requires.

You can see and I have attached the one suggestion that was made in the dissenting group or minority group, if I could call it that more accurately, was from Scott Osmond, his letter of March 25th, 1996, who would request that if the proposed comment were adopted -- this was not adopted by the whole State Bar committee. There was a minority group who would say that if this comment were going to be adopted, he would insert the language in the fourth paragraph of his letter of March 25th, 1996, in the last paragraph of the proposed comment; and his proposed insertion, "Absolute liability of proof to a scientific certainty is not required for admissibility of scientific evidence, et cetera."

That recommendation was not adopted by the State Bar committee, but other than that

there really wasn't -- there were three choices: Do nothing; do this, what is proposed, and that was the majority of the committee who voted to do that; and then the third option was add in the language that Scott wanted to add in.

So with that I submit this without, I guess, any vote from Buddy Low's subcommittee about what to do with this one way or the other.

CHAIRMAN SOULES: The court reporter can't hear with people --

MR. ORSINGER: I'm sorry.

CHAIRMAN SOULES: Okay. Go ahead and proceed.

MR. PRINCE: That's it.

CHAIRMAN SOULES: Okay. Comments on the proposed comment? Bill Dorsaneo.

PROFESSOR DORSANEO: This proposed comment does several things, but I gather the most important part of it is the third sentence of the first paragraph, if you are talking about giving some sort of additional guidance to trial courts.

MR. PRINCE: I think in terms of the guidance to the trial court part of it, Bill, really the -- there are really three parts. That's the first one that we thought would be of help to trial judges. The second one would be the reference to the Robinson case and the statement that the inquiry -- in the introductory sentence to the second paragraph, that the inquiry is flexible, to repeat that; and then the third reference, the third paragraph, which we felt would be of benefit to the trial court, and that is the balancing test under Rule 403.

I think those three are the three important ones insofar as trial court guidance is concerned.

PROFESSOR DORSANEO: But the one that I mentioned is, I might say, not new information but information that you would find in this comment that you wouldn't find except by implication in Robinson.

MR. PRINCE: Except by implication. That's correct. I think all other parts of this comment are either in Robinson or a pretty straight draw out of what

Robinson said.

PROFESSOR DORSANEO: Well, my immediate reaction is we don't need to put comments about cases, but this sentence that is at the end of the first paragraph might be a good candidate for a comment, and that is very neutral. That sentence to me is neutral, that this "is determined outside the presence of the jury at a preliminary hearing in advance of trial." I don't know about "whenever possible." You know, "or otherwise may be made during voir dire examination of the expert at trial."

I don't know about "whenever possible." That may be too strong, but it's a helpful, neutral sentence. Robinson, embracing Robinson altogether is helpful as long as Robinson embraces itself, I suppose.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: To me, if there is a procedure that the trial court should follow in determining the reliability of expert testimony, it ought to be in a rule and not in a comment.

PROFESSOR DORSANEO: That would be my next point, is that if it's a good sentence to be in the comment, maybe we ought to consider putting it in the rule.

HONORABLE SARAH DUNCAN: My second comment is, I mean, I guess it's going to come through just in the nature of my comments that I am very hostile to Robinson, knowing as I do that I don't know the first thing in the world about an Intoxylizer test and really don't quite know how to figure out how to determine what is reliable relating to Intoxylizer tests.

That said, Robinson says what it says. It gets argued in the cases that it needs to get argued in, from what I have seen most of the time. If we codify it, we are going to be in my view encouraging it to be argued in all the cases that it really is not really even much of a problem in.

The scope of the comment extends it to technical and other types of information as well as scientific. That brings to me my last comment. This is a really developing area of the law. I don't think it's ready to be

codified. I don't think we know how to codify it, and I think we are going to invite a lot of trouble if we do codify it.

CHAIRMAN SOULES: Anyone else on Sarah's side of the table?

Okay. Rusty, I think you are next.

MR. McMAINS: Specifically on the scope issue, I am troubled by the notion that we apply the same concerns universally that may legitimately relate to what, for want of a better term, might be called junk science, as opposed to any time anybody is offering a witness to testify as an expert.

I have on a number of occasions had an opportunity to try and get the Supreme Court to tell me what an expert was or when something was expert opinion as opposed to just ordinary testimony, and they have on several occasions held that ordinary lay testimony about certain things that happened that are within somebody's ambit of experience is expert testimony.

Now, if you start encouraging preliminary hearings or pretrial hearings or anything else in any area other than the fairly limited

scope of the concerns, I think, that are expressed in the Robinson opinion then basically all you have done is just create this entire satellite litigation about whether or not we are even going to allow these experts to -- you know, any expert to testify.

I don't really think that's what the court was trying to do in Robinson; and if they did, they didn't say it; but it's terribly, in my judgment, disruptive of the practice to encourage lawyers to look at Rule 702 and say, "Ahh, if there is anybody that's declared as an expert, I get to have a preliminary hearing on the reliability and methodology and all of this stuff." That in my judgment is not what Robinson holds. I don't think it can be defended in that basis, and I do not think that this committee should extend it's scope.

CHAIRMAN SOULES: Anyone else on Rusty's side? Richard, Richard Orsinger.

MR. ORSINGER: I don't think that this Robinson rule can be generalized. I don't do much damage litigation, but I can think of two cases, one involving an

automobile engine that blew up and one including a mobile home that burned up, and in both of those cases the experts that were used were people that had years of practical knowledge in the wearing of mobile homes or in the fixing of automobile engines, and there is no peer review for automobile mechanics or electricians that are licensed by the city.

And I'm sure those of you who do damage suits could probably think of thousands of examples where you don't have a scientific community, you don't have a publishing mechanism, you don't have a peer review process; and what you are relying on is an undegreed individual with 20 or 30 years of life experience as being more knowledgeable than the jury. That's one area where Robinson can't apply.

Another area I don't think it could apply, and some of the judges on the Supreme Court agree with this, is in dealing with human psychology. You can't run a physics experiment on the human brain, or at least you can't on the psychological parts of the human brain, and so it's going to be very difficult

for someone to come in with a diagnosis of post-traumatic stress syndrome.

And let's say it's been finally recognized by the American Psychiatric Association, and it's now in the DIAGNOSTIC AND STATISTICS MANUAL, Version IV. We are still not going to have the kind of Robinson confirmation of those kinds of human emotional things because they are so debatable. It is so difficult to set up tests, and in my opinion the de facto standard of acceptability for those kinds of things is the American Psychiatric Association DSM IV manual, which I think probably the whole damn manual wouldn't have qualified under Robinson.

And so those are just two areas that come to my mind right now where we don't have a clearly scientific question, we don't have a scientific community, we don't have scientific publications; and yet they are probably technical, they are probably specialized, and we were probably -- I mean, conceivably we might just take entire areas of our commerce and our human affairs and make them nonprovable in court by generalizing a rule

that was crafted to fit to hard science.

CHAIRMAN SOULES: Mike Prince.

MR. PRINCE: Just to respond to the point that Rusty raised, and I didn't make this clear up front, and I should have. I want everybody to understand what this proposed comment is and how it's different from the proposed scope of the comment because it's confusing, and I want to clear it up.

The proposed scope of the comment language was not adopted by the State Bar committee on evidence. It is not part of the recommendation. It was the State Bar's committee subcommittee feeling that that was the implication of Robinson. It was not -- but it was not adopted. It is not before you. Robinson was limited to scientific or technical knowledge, and the proposed comment is limited to scientific or technical knowledge.

Whether or not -- to respond to some of the things you are talking about, Richard, as well as Rusty, whether or not somebody later is going to make the argument that it applies to everything from car mechanics to

psychiatrists from people having an opinion about why the limb fell on the roof is not addressed by this comment. This comment only talks about Robinson and scientific evidence, which is all that Robinson talked about and the procedure for dealing with that.

So I think that I had not made that clear earlier, Mr. Chairman, and Rusty's comment convinced me that I had not, and I put this in here because it's part of the supporting materials, but it's not part of the proposal.

CHAIRMAN SOULES: Well, the first two sentences of the comment focus on scientific knowledge.

MR. PRINCE: Right.

PROFESSOR DORSANEO: I don't think it ever uses the word "technical" either.

CHAIRMAN SOULES: Right. It doesn't in the first two sentences.

MR. PRINCE: That's because Robinson just talked about scientific knowledge.

MR. ORSINGER: The comment does.

MS. SWEENEY: Yeah, it does.

CHAIRMAN SOULES: And even with Robinson I think there is still a question about reliability. I mean, Robinson cites with approval Daulbert, which criticizes or overrules Frye. The Frye test was reliability.

MR. HATCHELL: No, no, no, no.

CHAIRMAN SOULES: General acceptance.

MR. ORSINGER: General acceptance is the Frye test.

CHAIRMAN SOULES: Okay. Anything else on this? Mike Hatchell.

MR. HATCHELL: Well, as some of you may or may not know, Pamela Baron and I were counsel for DuPont, so we are responsible in many respects for the application of the Daulbert standard in Texas; and as succinctly as I can say it, I agree with nothing in the proposed comment beginning with where the burden of proof is, what Robinson says, and the advisability of attempting to instruct through a comment not on the meaning of a rule but how the rule is to be applied under the

interpretation of a case which I think is largely wrong in the comments, given the fact that the Supreme Court still has under consideration a number of cases in which they can spell out the procedure if they want to.

PROFESSOR DORSANEO: Uh-huh. Yeah.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I just want to amplify on that point, and that is, to the extent Robinson is clear, you don't need this comment. To the extent that Robinson is not clear, I think we are venturing into perilous grounds to clarify something that isn't clear and is evolving, and I think it's probably -- I will speak it if no one else does. I think there is an underlying hope by all of us that maybe if we don't codify it here and give it enough time to cook, it will get clear, and we will feel more comfortable with it, and we just don't want to do anything right now.

And I would resist the temptation to try and interpret this rule based upon Robinson because, as Mike points out, I just got through reading -- there is a case right now

on whether somebody who has done a lot of reading in a particular area is competent to testify in a medical malpractice case. They are very learned in a particular area, but they are not in that particular field, and I think there is going to be a lot of development on this point, and I am very unsure at this point about setting out a comment based upon Robinson.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I don't know if it matters, but practice books are pretty quickly coming out with the explanation that maybe in a proper case this should be determined in advance of trial so that everybody knows whether the witnesses they plan to use will be allowed to testify. So I don't know whether it's necessary to write it down here.

I mean, there would be other places where that could be read, and I don't think you would have that hard of a time convincing a trial judge that it could be done in advance if it's appropriate, if it's an appropriate

case.

CHAIRMAN SOULES: Robinson was in advance.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: Itself.

MR. GALLAGHER: Robinson was at a summary judgment hearing, I think.

MR. HATCHELL: No.

MR. GALLAGHER: It was at the deposition? What was it, Mike?

MR. HATCHELL: It was at a Robinson-type hearing, conducted over a period of three days, at which the court rendered basically an exclusionary ruling. Then it was followed -- that was the only evidence they had, so that was followed then by a bench trial, and that's why it looks to you in the opinion like a summary judgment hearing.

MR. GALLAGHER: Yeah.

CHAIRMAN SOULES: Okay. Anything else on this? Okay. Let me see. How do I articulate the question for a vote? The question is whether there should be some comment to Rule 702 in response to the appellate opinions coming out on expert

witnesses. Let's put it that broad.

Those in favor of having comments show by hands. Two.

Those opposed? 19. So the vote is 19 to 2 to have no comment, at least at this time.

Before we stop on evidence, Mike and Mark, there is Rule 183 on interpreters. That applies to both discovery and evidence, and the court may appoint an interpreter, fix his fee, charge it as costs. That's already in the rule, and I mentioned that only because it may have some play in what you do with Rule 1009. It's Rule 183.

MR. PRINCE: Two final items and then the report will be through.

CHAIRMAN SOULES: Good. Okay, Mike.

MR. PRINCE: Item 7 is not -- in the booklet, does not call for any action by this committee, but it is a thing that Luke had asked the State Bar committee to look at last year; and that is whether or not under the proposed rule, discovery Rule 16, that the Supreme Court Advisory Committee has adopted would that necessitate any change in

the rules of evidence, the current rules of evidence, as they deal with depositions taken in the same or different proceedings.

And Jack London, a member of our subcommittee at the State Bar, I think did an excellent job. I have included his materials, and I think I submit them for everybody's consideration because he did a lot of work on it and concluded that if your proposed Rule 16 is adopted it would not necessitate any change in Rules 801 or 804 concerning the use of depositions; and if you have a question about that, I suggest you read it.

The last thing is there is one other item that is still -- evidence item that is still pending before Buddy's subcommittee, which because of the summer vacation period people didn't get a chance to look at, and that is a proposal having to do with a change in the National Tank V. Brotherton case with regard to the control group test on the attorney-client privilege, and that will be -- it's a simple matter, up or down, and that will come back to you next time.

With that, that concludes the report of

the evidence subcommittee, Mr. Chairman.

CHAIRMAN SOULES: Well, I think it's a job well done on the part of both the State Bar rules of evidence committee and your subcommittee. I appreciate very much all of the efforts and energy that's shown here in thought, and I think we have made -- I hope you feel that we have made some good progress here to unify the rules and that we have made deliberate disposition after full debate of the other issues that have come before us. We certainly want the State Bar to feel that we have done so and the subcommittee that has done so much work to feel that we have done so.

MR. PRINCE: We appreciate it.

CHAIRMAN SOULES: And we appreciate it. Again, thank you very, very much for all of your input.

MR. PRINCE: Thank you.

CHAIRMAN SOULES: I think we will recess now for lunch. Let's try to do it in 30 minutes if we can.

(At this time there was a recess, after which time the proceedings

continued, as reflected in the next volume.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on July 19, 1996, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,032.50.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 29th day of July, 1996.

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