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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

October 25, 2003

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 25th day of October, 2003, between the hours of 9:08 a.m. and 12:09 p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: Okay. We are on the record and rolling along.

MR. LOW: Where we ended yesterday, let me summarize, there were a lot of problems or a lot of discussion about, well, if you didn't file this counteraffidavit that -- not just an objection as it is now, but a counteraffidavit, then would you be able to question that person about "You went to the doctor more than you should or more than you shouldn't." Well, first of all, the rule as written does not say that it would be inclusive. The rule as written and the rule as remains says it will be sufficient evidence to support a finding, and the rule now is if you intend to oppose findings at trial with an affidavit we say you can't offer evidence, so it doesn't mean that it's conclusive, that you just can't offer evidence directly on that, but in no way I interpret that to say -- and nobody has so far -- that it means you can't cross-examine the plaintiff or something like that, and there's not a lot of difference in what this draft that came from the State Bar committee and my committee agreed with it.

If you intend to oppose and saying you can't offer evidence, I mean, but that doesn't include -- if it was going to be conclusive and say -- then would it have

stated so in the rule. It just says it will be evidence of, so it's not that major a change. The real change only is that you can't just object. You have to have somebody that comes in and gives an affidavit to say why, so it's a little bit more trouble to make somebody prove up something that really is -- you have to take a deposition to do it and you do the same way. It was kind of a cost-saving, trouble-saving thing, and it in my opinion doesn't change a lot, except it streamlines, and then I would favor it.

CHAIRMAN BABCOCK: Buddy, I was looking at this last night after we finished, and everything that you say I think is right except that I wonder about taking the language or striking the language in subsection (b) that says "unless a controverting affidavit is filed as provided by this section." Why is that stricken? Is this because that -- if the only change is the form of the counteraffidavit, that is, the old way an objection and now you've got to state some reasons, why is it appropriate to strike that language from (b)?

MR. GILSTRAP: Where are you, Chip?

HONORABLE TOM GRAY: (b).

MR. LOW: That is sufficient proof, doesn't matter whether a counteraffidavit is filed. See, before it says unless a controverting affidavit is filed then an affidavit would be sufficient proof, so that is going to be

sufficient proof. You can't say there is no proof.

CHAIRMAN BABCOCK: See, that's to me -- to my thinking, that works a second change in the rule because it looks to me like under the old language if you filed a controverting affidavit, you knocked it out, didn't you?

MR. LOW: Well, what happened was if you filed a controverting affidavit then it wouldn't be a sufficient proof, so then you had to take the deposition.

CHAIRMAN BABCOCK: Right. So there are really two changes that you are proposing. One is you're going to make the controverting affidavit more specific.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: And the other is that you're knocking out the possibility of being able to knock out the first affidavit.

MR. LOW: Absolutely.

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: So can you have trial by affidavit?

MR. ORSINGER: Only for the plaintiff. Not for the defendant.

MR. LOW: It allows -- and the whole idea was to -- I didn't have a lot of experience with that, but apparently people on the State Bar committee claimed they had and what was happening. It would get to the same place

without having to take the deposition.

CHAIRMAN BABCOCK: Well, the first change it seems to me is not a big deal. I mean, making the controverting affidavit more specific is fine, and as Judge Christopher pointed out yesterday, that may be required by some case law anyway, but the other change seems to me like it could be significant because now you are going to allow trial by affidavit. You're going to allow some issues to be tried just by affidavit.

MR. LOW: But then if you do that, then you might have to strike (g) because if you say "unless a controverting affidavit is filed" then that makes it that you can't do it. This is to give you a trial by affidavit if you want it, and both sides would have proof if they want it. So you would almost have to -- I don't know how (g) is consistent with leaving it the old way.

CHAIRMAN BABCOCK: Well, the old way, it seemed to me that under (g) you say "affidavits properly filed under (c) and (d)." Well, (c) and (d), you know, pick up that now stricken language in (b). Or not? I don't know.

MR. YELENOSKY: Don't we just want to decide the policy question --

CHAIRMAN BABCOCK: Yeah.

MR. YELENOSKY: -- of whether we want to try

by affidavit and then we make the language fit whatever we had?

HONORABLE TRACY CHRISTOPHER: May I ask how this is going to work? We're going to have a Rule of Evidence on the books, and we're going to have 18.001 on the books, so we're going to have competing people submitting affidavits. 18.001.

JUSTICE HECHT: Won't have two.

MR. LOW: We would have to repeal that rule.

JUSTICE HECHT: We have to --

MR. GILSTRAP: It would be officially repealed?

JUSTICE HECHT: I don't know that it will be, but --

MR. GILSTRAP: That would be the intent.

MR. LOW: The Court will still leave sensitivity to the Legislature, and if it creates an issue with the Legislature then it just doesn't go.

CHAIRMAN BABCOCK: Yeah. Carlos.

MR. LOPEZ: Unless I'm missing something, this -- I mean, it allows trial by affidavit. It doesn't mandate trial by affidavit. The thing about the concern about cross-examination, I mean, if you want to subpoena the doctor who is the affiant in this affidavit then subpoena him and cross-examine him. Now, if the custodian

signs the affidavit and not the doctor, I'm not sure what good you're going to do -- what good it's going to be to try to cross-examine him. As a practical matter this doesn't happen because that's the whole point of 18.001, is in these small cases you can't have a doctor who charges $300 an hour come down and testify for six hours on a case that's worth $700.

CHAIRMAN BABCOCK: Richard, then Frank.

MR. ORSINGER: It seems to me that the introduction to subdivision (b) forces us to admit evidence that might be incompetent and probably will be incompetent, and I notice here that the counteraffidavit can't be based on attacking the conclusion of the custodian of the records. I assume that if the doctor signs the affidavit you can challenge the basis for their expert opinion, but if the custodian of the records signs it you can't, and it seems to me that if we're going to have a trial by affidavit, which is what we have if you have this introductory clause in (b) stricken so that the affidavit comes in as evidence, then if it's signed by the custodian of the records we can't object to it as being inadmissible because they don't have the expertise to make those judgments.

It just seems like an anomaly with me that we're forcing a trial with evidence that we know is

incompetent, but we're not allowing somebody to object to it based on its incompetency, and that raises a second question, which is can you make an evidentiary question even though your counteraffidavit controverted it? For example, don't admit the affidavit because the person who signed it is not competent to state the things that they state, and if that's sustained, does that keep the affidavit out even though I have no counteraffidavit?

HONORABLE TRACY CHRISTOPHER: Well, it does under the current case law.

MR. LOPEZ: It shouldn't be sustained under 18.001.

HONORABLE TRACY CHRISTOPHER: Under current case law if your counteraffidavit is not sufficient an objection to it gets sustained and it's thrown out.

MR. ORSINGER: I'm not talking about the original affidavit.

HONORABLE TRACY CHRISTOPHER: There's no objection to the --

MR. ORSINGER: By striking (b) we're saying you can put in an affidavit by someone who is not competent to testify to something and you're not allowed to object to it and we're going to send that evidence to the jury, and I'm a little troubled by that.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: There's two issues. I mean, one, do we allow the trial by affidavit; and second, if we do, how do we tweak the procedure to make it the best procedure possible. I mean, I think most of us kind of got over the first hurdle yesterday. I initially shared Richard Munzinger's view, but when I heard from the judges that are dealing with this thing everyday, you know, I mean, the search for truth is great, but the search for truth is kind of fruitless when it costs too much. For some small level cases we need to allow affidavits to go to to the jury if nothing else and then that -- I'm not saying what should be in the affidavits, but I think I'm there on the notion of trial by affidavit in these cases.

CHAIRMAN BABCOCK: This isn't limited to small cases, you know.

MR. GILSTRAP: I understand, but in the big case you bring in the doctor.

MR. SOULES: But the judicial system is limited to -- it excludes small cases on the whole.

CHAIRMAN BABCOCK: Yeah. And so as a practical matter this applies only to big cases.

MR. SOULES: It may do that, but at least it facilitates allowing small cases to get justice, which we all ignore far too often.

CHAIRMAN BABCOCK: Judge Gaultney.

HONORABLE DAVID B. GAULTNEY: I understand that may be the practical effect of this, is to permit small cases to be tried efficiently, but I guess I always assume that what the statute was originally targeted at was identifying the cases where there's a real fact issue, and if you have a controverting affidavit that's not contested, it's really -- it's almost like a party is stipulating to the facts, so there's not the need to call witnesses.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID B. GAULTNEY: But it seems like over the years it's developed into more of an -- this is an easy way to do trial on affidavits. I think the original premise is to identify cases in which there is a legitimate fact issue, and I think by striking "unless the controverting affidavit is filed" then I think it changes perhaps the underlying approach of the statute.

CHAIRMAN BABCOCK: Okay. Carlos.

MR. LOPEZ: I just was going to make a comment, if the Supreme Court is going to adopt this as a rule and then kind of abolish 18.001, I always kind of half jokingly talk about that the Legislature tongue-in-cheek had allowed custodians who really weren't qualified to be doing it, I always said that's what happens when the Legislature starts writing rules that ought to have been done by the Supreme Court. Infra mater we might want to

think about how it looks. It's one thing for the Legislature to do one thing. Now this is going to have the Supreme Court's official seal of approval, and the language in (c)(2)(b) has always been problematic. I realize the practical consequence is that the doctor charges a thousand dollars and a custodian charges you $5 for what they're trying to accomplish, but it sure sort of runs afoul of what he's talking about, all the other competency requirements we've ever had in terms of people testifying. If the Supreme Court wants to do that, that's -- I think they ought to think about long and hard whether they want to do --

CHAIRMAN BABCOCK: Judge Bland or Judge Christopher.

HONORABLE JANE BLAND: My concern is that it's not on even footing. It's fine I think to have an affidavit admit this evidence, but what really troubles me is that the other side can't offer any evidence to controvert it unless they file a controverting affidavit, and I think they should be allowed the option of either filing a counteraffidavit if they want, and they can file -- you can have a battle of the affidavits, or they can offer other evidence to attack the evidence that's admitted by affidavit at trial.

So, you know, I don't have a problem so much

with the fact that the -- that there's a very limited attack that you can make on the original affidavit by filing the counteraffidavit, but you shouldn't require the other side to have to file a counteraffidavit in order to controvert the claim. Like the example I described yesterday, and it's not fair to say that one side can put in the evidence but the other side then is precluded from attacking unless they go and get a counteraffidavit and I just -- you know, I think they should be allowed to go and get a counteraffidavit just like the side that's getting the records admitted by the original affidavit, but they shouldn't have to in order to be able to provide other kinds of evidence at trial to counteract it.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I agree with everything that Jane said about that, but also if we're going to get rid of 18.001, my suggestion is that we get rid of the counteraffidavit completely and leave it with that the affidavit, you know, is evidence of reasonableness and necessity, but does not require such a finding. Because in the majority of your cases no one is contesting the fact that the MRI cost a thousand dollars. They are contesting that the MRI was necessary for this soft tissue injury case. All right. And as Jane said, they contest that by saying, you know, "You went to see your lawyer and

then a year later you had never gone to the doctor and suddenly you're getting this expensive MRI right before trial to beef up your medical expenses to present to the jury." That's always the issue in these cases. Nobody ever says an MRI should cost $800, not a thousand dollars. That's not the dispute.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: The only concern I have about the path that we seem to be going down is that the Legislature did have a pretty specific plan here, which was to try to reduce the cost of these cases to make small dollar cases economically feasible; and if you allow what you're suggesting, Judge, that sort of evidence without having to get a counteraffidavit, what you're doing is basically vitiating the purpose of the affidavit because then if you wanted to support your affidavit you've got to go get your doctor and you've just chased yourself around in a circle; and I would just suggest that we all keep in mind the whole purpose of this is to allow the plaintiff to use this procedure so that, one, we don't have to call doctors out of their busy practices to come hang around the courthouse in a case that doesn't justify it; and, two, the plaintiff can have some certainty that they've got their evidence in and they don't have to follow themselves up with a live doctor.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: I agree that their evidence ought to be admissible without having to prove-up with the doctor. I think affidavits work well for that, but I think just because the evidence is admissible it shouldn't be conclusive of the jury's determination. That's why I like the change to (b). I agree with Tracy. We could either get rid of counteraffidavits or present them as an option, but the idea that you can't attack the evidence that's been presented either by argument or by other kinds of evidence just because it's been admitted under this section troubles me, because I don't think that's what 18.001 originally required.

I think originally you could put the affidavit in and admit your testimony, but it doesn't preclude you from arguing through other evidence, you know, why the jury shouldn't find a thousand dollar -- shouldn't include a thousand-dollar MRI, they should only award $2,000 instead of 3,000 because the MRI was a year later or whatever reason; and it seems to me like we're going to draw a lot of objections about, you know, basic car wreck issues and, you know, and we're not going to be trying anything about damages anymore; and I don't think that that was meant to say that you couldn't let this jury evaluate the credibility of the evidence once it was admitted.

CHAIRMAN BABCOCK: Buddy, then Carlos, then Luke.

MR. LOW: It's also been to eliminate issues before you get into trial and not just leave them open. I guess you could do them by pretrial order in these little cases, "Okay, you can call this witness, that witness," but it is to eliminate so that the person who filed the first affidavit knows then, you know, are you going to be able -- are you going to call somebody for that. And these cases are not always -- not all of them are medical. We're talking about doctors, and this applies across the board. The Legislature applied it across the board. We're just talking about doctors and medical except on this one count.

HONORABLE JANE BLAND: Well, I think the certainty that it gives you is it gets you a jury issue because without this you have to have a deposition on written questions to get a medical provider to come to get a jury issue on medical expenses, and this gets you a jury issue. But I don't think it gets you a conclusive finding under the old scheme, and I'm worried that under the new scheme that it might.

MR. LOW: It doesn't, but I know that that's sufficient, but then I know basically what you're going to do to counter it, so I can weigh what I need to do then. I can't just say -- I don't just stop and say, "Okay, we've

got enough to support. I wonder what the other side's going to do," and this helps them to do that.

HONORABLE LEVI BENTON: Right. I don't quarrel with anything you-all have said except for it -- the counteraffidavit at least gives the other side notice, and if we don't require that, permitting them to controvert it in argument, for example, closing argument, we'll have an argument that Mr. Low has his affidavit from a custodian and it's not even a doctor, and that's fine. That's a permissible argument, but we at least ought to telegraph to the other side that maybe they ought to have a doctor down there available.

HONORABLE TRACY CHRISTOPHER: Levi, no one files counteraffidavits, and in every single trial that I try the jury does not award a hundred percent of the medical expenses because you know that 99 percent of those cases the medical expenses have been inflated. Period.

MR. LOW: But there are other courts besides Houston is what the State Bar tells us.

HONORABLE TRACY CHRISTOPHER: Do you do directed --

HONORABLE LEVI BENTON: No.

HONORABLE TRACY CHRISTOPHER: No, of course not.

HONORABLE LEVI BENTON: I don't quarrel with

most of what you said. It shouldn't be conclusive. All I'm saying, if they're going to controvert it, they ought to have the obligation to give some heads-up.

MS. SWEENEY: Exactly.

CHAIRMAN BABCOCK: Carlos had his hand up and then Justice Duncan and Judge Sullivan.

MR. LOPEZ: As a practical matter, I think the plaintifff had noticed that they were going to controvert the necessity of the claim that was the issue, and I totally echo what they say down there. I tried hundreds of these unfortunately, and that was every case that was the case. No one ever said the MRI should have been $800 instead of a thousand. What they said is exactly what the judge said. I'm suggesting perhaps we consider molding this rule to the reality, so why don't we make the rule applicable to the reasonableness of the charge and not have it go to the necessity of the charge, because everybody knows that's the issue that gets brought up and the cases -- every case went the same way.

You know, if they would have a doctor or even a custodian testify that a broken arm, setting a cast for a broken arm costs whatever it costs, $800, no one ever mentioned that in any single trial. It was "You kept going to the chiropractor six" -- you know, however many times, you know, "Six weeks was your maximum recovery and after

that everything else was unnecessary." The ice pack costs $45, no one ever made an issue about that. So why don't we just make this if they don't controvert on the reasonableness of the charge it becomes conclusive, which in every case that was the case anyway. And the necessity of it gets fought about on every case anyway. There wasn't a single case --

MR. SOULES: I think we all know that the Legislature sometimes moves by stakeholders and allowing these affidavits to be made by the custodian of the records of the medical provider was a way to get a certain group of stakeholders from being bothered a whole lot by a whole lot of information --

CHAIRMAN BABCOCK: You're talking about the doctors?

MR. SOULES: -- when they need to be doing something else, and I think that Judge Bland's -- I believe it was her recommendation, and it was a good one.

We know they are all going to be controverted. There is going to be some contest of the charges at trial, whether anything gets filed or not, and it seems to me like if we're going to -- and we've had some experience with this. We've had some cases that have developed, given some guidelines about maybe what affidavits ought to say or some other things, but what it

seems to me like, what it really boils down to after a few years experience is, well, just let these affidavits get in evidence, period. And then the plaintiff knows when he puts the evidence -- the affidavit in evidence that there's going to be some controverting proof or some examination or something, and that's really all that's a necessity and then the stakeholder's interest is taken care of and the trial goes on and all you get on a sworn account anyway is a bunch of numbers, and that's really what this is about, is a whole bunch of numbers with a whole list of things that somebody says got done.

And the question of necessity, that bothers me like it bothers Richard, but the reasonableness of a charge for this service and that service and a whole string of services, if we just -- if that was the four corners of the affidavit, then put it in evidence and go on.

CHAIRMAN BABCOCK: Justice Duncan and then Judge Sullivan.

HONORABLE SARAH DUNCAN: I'm having a little trouble -- I have to ask a question first. Is the last sentence in (f) in 18.001 or has that been added by the subcommittee?

MR. ORSINGER: That's new.

HONORABLE SARAH DUNCAN: That's what I thought. I can't tell if it's bold or not, but it kind of

looks like it. If Richard is correct that evidence by a custodian as to reasonable and necessary aspects of whatever charge it is is not competent evidence, an objection isn't required. It's just not evidence. If it's not evidence it can't be sufficient evidence, no matter what the Legislature says, and I think there's a real problem with encouraging anyone to file an affidavit containing incompetent evidence, however much you want to cut the costs in small cases. I guess my problem is the last sentence that's been added to (f) more than anything else.

CHAIRMAN BABCOCK: Okay. Judge Sullivan.

HONORABLE KENT SULLIVAN: I was just going to join in the earlier chorus and say I agree we ought to get rid of the counteraffidavit. I think it just creates --

HONORABLE DAVID PEEPLES: Can't hear you.

HONORABLE KENT SULLIVAN: I would get rid of the counteraffidavit. I think it makes the process unnecessarily cumbersome. I think the only real purpose of filing anything in response is to provide notice in the event that someone actually contests the validity of the affidavit, i.e., whether or not the affidavit complies with, oh, I guess it's 18.001, subsection (c); that is, you say the affidavit is defective and can't be used at all. But otherwise, I think I'd just upon the filing of the

affidavit it allows it to go to the jury.

As far as the question about whether or not the other side is given a proper heads-up, you've got all the other discovery requests that are available to you. If somebody is going to show up with an expert and is going to contest the reasonableness and the necessity, if you sent out any kind of discovery, they designated the expert. If you sent out a request for disclosure, they responded and told you the basis for their defense, one of which is going to be that the medical expenses weren't reasonable and necessary or the like.

I don't think we need to get into an arcane process that goes almost -- starts to sound like the old forms of action where if you didn't file a response on blue paper that was on eight and a half by eleven, well, I mean, that's crazy. The whole purpose of this in my view -- I agree with Luke Soules -- and that is it was to get the doctors out of this so they wouldn't have to say magic words. How many health care providers if asked are not going to say their charges were reasonable and necessary, so it's sort of a joke to require that. So we really want to create a way where you know it gets to the jury in a facilitated fashion so no one has to jump through technical hoops to do what everyone knows can be done, where there's really no merit-based issue there. There may be a

legitimate question, as Tracy and Jane said, so let the other side come forward and contest it any way they want to. They give some appropriate notice as to what the nature of the controversy is by way of response to the discovery requests, and let's get on with it.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Can we just have a vote whether anybody wants to change this at all, leave it as-is, and if we do then let the Supreme Court --

JUSTICE HECHT: I know how that vote will come out.

CHAIRMAN BABCOCK: I'm not sure I know.

MR. LOW: Or does somebody want to repeal? Do we want to tell the Court just to repeal and do away with this thing altogether? But we need some guideline, and then the Court can -- there's a draft here by a 35-man committee of judges and so forth that has been tendered to the Court, and if the Court wants to go along with their knowledge and so forth and their belief, they can do it, but I've heard so many different views till I couldn't call a vote on all of them.

CHAIRMAN BABCOCK: I think you're right, and we do need to move onto some other issues.

MR. LOW: Yeah, you know this, first of all, talking about sworn account. The rule, the Legislature

said it didn't even apply to sworn account. So I don't know. We get into -- it's like baking a cake. Martha could never have baked one if we put all the ingredients in here, and so we've got to this get this cake baked.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: We've been talking about trial by affidavit. That's not a phrase I've heard, so I thought when you put -- I always thought when you put the records in with an affidavit that was the end of that, you couldn't come in and say, "Well, all this is is an affidavit," or "Who knows who Jim Smith is" or, I mean, I thought the whole point of this was to take issues off the table so that --

MR. LOW: Right.

JUSTICE HECHT: -- ahead of time, like Bill said yesterday, you have to do in Federal court or you end up in jail; but we can't have a pretrial in state court because that takes too much time and runs up the expenses, but I was not aware of how that would work, a trial by affidavit.

CHAIRMAN BABCOCK: According to this you can submit to the trier of fact both the affidavit and the counteraffidavit under subsection (g).

JUSTICE HECHT: Right.

MR. LOW: As written.

JUSTICE HECHT: But I'm hearing then you can argue about it and say, "Well, this is obviously a sleazy affidavit because who knows who Jim Smith is," and I just didn't know that that could be done. Looks to me like when it's in it's in.

HONORABLE JANE BLAND: Under the original 18.001 we admit the records, but the affidavit doesn't go to the jury. The affidavit is just a way to get the proof -- to prove it up. So all that comes in are the bills and the records, not -- the affidavit is hearsay, so you know, I guess --

CHAIRMAN BABCOCK: Because if this subpart (g) is right, in closing argument, you know, you have your ELMO and you have your counteraffidavit and you say -- because it says you can submit it to the trier of fact, and you put your counteraffidavit up there, and say, "Now, see, the testimony from this man is that it wasn't necessary and it was incompetent, and by the way, there's no causation." You load your counteraffidavit up with all sorts of things and slap it up there on the screen and argue to the jury.

MR. LOPEZ: I had thought about that problem and realized that can be fixed. That can be fixed pretty easily if you say "Records that are authenticated by those" --

CHAIRMAN BABCOCK: Is subpart (g) in the rule

now?

HONORABLE TRACY CHRISTOPHER: No.

MR. LOW: No.

MR. LOPEZ: It's not there, and that's what created the conflict. You had a majority of judges who said the affidavits knock each other out, at least in Dallas. The minority of them said "no." When we say battle of the affidavits, we meant the records that the affidavits support, and it's sort of a battle of the records. We might want to make it -- if the Court decides to add (g) I think that's a policy decision they have to make. It should say "records that are supported by" or "made admissible by affidavits."

CHAIRMAN BABCOCK: I think we are going to take a vote in a second on whether or not we think 18.001 should be changed, but, Judge Patterson, you had a comment.

HONORABLE JAN PATTERSON: As a predicate, I don't deal with this everyday, and so let me just preface my remarks with that because I do think they have knowledge about how it works; but I worry a little bit about changing the nature of affidavit proof. And we deal with it all the time in summary judgments; and if you have controverting affidavits then they cancel one another out, but I view this rule and the purpose of this device as not a trial by affidavit, but a there's-no-harm-in-asking. So if you put

in the affidavit proof, you want to make it -- and the incentive should be that it be conservative and the true expenses and then it won't be controverted, but if it inflates then it can be controverted by whatever proof.

But in the nature of summary judgment proof, once if you have something that contests the other affidavit, they -- then it's cancelled out. You just can't go forward on that, and I worry we don't want to create a rule that changes the nature of affidavit proof, so I think we have to keep in mind how affidavits work in the rest of our practice and not just in this rule.

CHAIRMAN BABCOCK: Yeah. I'd like to take a vote, at Buddy's suggestion, on whether -- how many people think we should leave 18.001 as-is, and that would be a yes vote in favor of that, and a no vote would be that we ought to change it somehow --

MR. LOW: Right.

CHAIRMAN BABCOCK: -- without getting into how we do that, because there are lots of ideas floating around. So everybody who is in favor of leaving 18.001 as-is raise your hand.

MS. SWEENEY: Chip, what is the subcommittee's recommendation?

MR. LOW: The subcommittee's recommendation was the same as the 35-member State Bar lawyers and judges

to make this change so you can eliminate issues and reduce costs in keeping with the legislative intent. That was the subcommittee's recommendation. Even Scott agreed with it.

HONORABLE SARAH DUNCAN: Is the vote to leave 18.001 alone in the code or to leave 18.001 intact as a Rule of Evidence?

MR. LOW: Don't do anything.

CHAIRMAN BABCOCK: It's not in the Rule of Evidence now, so the vote would be to leave it in the code.

MR. LOW: In the code.

CHAIRMAN BABCOCK: Okay. So everybody who thinks we're going to -- thinks we should leave it as-is, not tinker with it, raise your hand.

Everybody that thinks we should change it in some way raise your hand. The vote is 7 think we should leave it the same and 15 that it should be changed in some way, the Chair not voting. Buddy, how do we get out of this mess today?

MR. LOW: Well --

CHAIRMAN BABCOCK: Because there's lots of ideas floating around here and lots of problems.

MR. LOW: And I don't think you could codify most of them.

HONORABLE TOM GRAY: Chip, isn't the basic next vote do you want trial by affidavit or do you want to

eliminate the counteraffidavit? That seemed to be the next major split.

CHAIRMAN BABCOCK: Everybody agree with that? You want to take a vote on that?

MR. GILSTRAP: I don't know that those are the alternatives. I mean, you can have trial by affidavit and still permit -- you know, you can still permit only one side to submit the affidavit.

HONORABLE TERRY JENNINGS: There seemed to be two points of view that kind of came out clearly. One was take the new proposed rule as it is; or two, I heard someone -- I think Kent Sullivan -- advocated stopping after (d) and eliminating the counteraffidavit part. Do you want to vote on either of those two options?

CHAIRMAN BABCOCK: Yeah. In fact, we do have a subcommittee recommendation, as Paula points out. So maybe the vote ought to be whether we feel like the subcommittee recommendation should be accepted. How about that?

HONORABLE DAVID PEEPLES: Well, we need more discussion on that. Can I say something?

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: I think it would be helpful to see if we can reach consensus on the various issues at stake here, and I've identified several, and I

think that most of us want the plaintiff to have a cheap way of getting to the jury on reasonable and necessary, okay, by this affidavit. I'm for that. I think if this were applied in a huge case and we can come up with a rule that says that an affidavit by a custodian gets it to the jury and nothing the defendant can do can destroy it, we've allowed evidence to come in and raise a fact issue that maybe we wouldn't want in these huge cases but we would want in the little cases. So that's one issue.

I think it's also clear from our discussion that causation is not established this way, and the facts may or may not get you to the jury on causation. If there's a broken leg in a car wreck, well, that's all you need, but if it's something more esoteric, you may need more. And then there's the issue of can the defendant by an affidavit or any other way cancel it, in Jan Patterson's words, destroy it or nullify it so that it's as if it never happened and the plaintiff has got to go about it the old-fashioned way.

And then there's the issue of can the defendant controvert at trial -- I guess it could work both ways, but usually it's the defendant; and, you know, it seems to me a plaintiff ought to know going to trial what he's facing; and I think Kent Sullivan said, you know, you'll know if there's an expert witness because you've

done some discovery on that. But other ways to controvert are to cross-examine. Surely you can cross-examine even though there is an affidavit, and surely if there are medical records that otherwise came in that would cast doubt on the issues and argue those.

So there are different ways to controvert at trial, which I think we would be in favor of. So I would find it more meaningful to discuss these general policies than to talk about language and versions myself, because once we decide on what we want to come out with, we can do the drafting I think.

HONORABLE TERRY JENNINGS: Under the proposed rule in regard to policy, this also gives the defendant a strategically cheap way to defend against it as well, and if the defendant wants to go the extra step after they file their counteraffidavit they could still subpoena the witness and put them before the jury or the fact-finder, couldn't they? So it gives the plaintiff a cheap way to prove it up. It gives the defendant a cheap way to challenge it, and if the defendant wants to go further after filing their counteraffidavit, they could still subpoena the witnesses and have a full-blown trial on the issue in front of the fact-finder.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: I don't think you

need the counteraffidavit because I think the reality is what's the cheap way the defendant is going to do it? He's going to cross-examine a plaintiff. That's the way it's going to be and to make snide remarks in the closing statement about what some of the medical records say or something. That's the cheap way. Okay.

And then Option 2 is it's a big enough deal that I am going to present some expert testimony. The counteraffidavit in my view is really form over substance. That's the reality of what's going to happen. So my thought is just let them do it, and if somebody wants to know what's coming, send out some discovery. I mean, you know, it's --

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, it seems that I hear a number of people of the view that the affidavit, that the first part stay as-is, that the affidavit is sufficient to support and then that's where we back off, and it might be a number of them of the view that you just stop there and say counteraffidavits are allowed and then don't just cut the rest of it off. But I point out that really is going to avoid some of the things the Legislature really intended, and I would be a little bit more hesitant to just repeal that and go to the Legislature and tell them we've done it and --

MR. YELENOSKY: Is this what the Legislature did this last session?

MR. LOW: No, no. This is --

HONORABLE DAVID PEEPLES: 1987.

MR. LOW: 1987.

MR. YELENOSKY: Okay. So they didn't do anything this past session?

MR. LOW: No, no, no.

CHAIRMAN BABCOCK: And I can't tell from our copies, but is the way it worked, Buddy, before under 18.001 if an affidavit was filed and was in compliance and did everything, but then there was a counteraffidavit --

MR. LOW: No, there wasn't a counteraffidavit. The way it was described to me by the State Bar committee was that what was happening is somebody would say "I object."

CHAIRMAN BABCOCK: Right.

MR. LOW: All right. And then you had to go take a deposition.

HONORABLE TRACY CHRISTOPHER: It required a counteraffidavit under the statute.

CHAIRMAN BABCOCK: Yeah. But the counteraffidavit --

MR. LOW: The counteraffidavit did not have to be specific.

MR. TIPPS: But it had to be an affidavit.

MR. LOW: Yeah. Well, sure, but you could say "I object that" --

HONORABLE TRACY CHRISTOPHER: And the case law struck those.

MR. ORSINGER: We have some disagreement down here.

MR. LOW: Well, let me first tell you -- I don't know if you talked to the committee or not. Let me tell you what they told me, and that they were just filing basically an objection, whether it was in the form of an affidavit or what.

CHAIRMAN BABCOCK: And that knocked it out, right?

MR. LOW: And that knocked it out.

CHAIRMAN BABCOCK: Okay.

MR. LOW: And then people were going and they were taking the deposition. I wasn't there. I don't know. That's what they tell me was happening in other courts, and so they were trying to simplify it, make it easier to eliminate issues, allow the defendant a choice if they wanted affidavits to be specific, and before they could do that they just couldn't file an affidavit, "I object to this because it's not right." They had to be more specific, and that was what they were trying to do.

Now, so maybe we should have a vote on seeing if we can talk Justice Hecht into going over and telling the Legislature we just amended all of this, but we just go with the first affidavit, sufficient proof, and then let the rest of it alone. I mean, there is -- I heard some view of that that just stopped there.

MR. SOULES: Aren't you saying that if an affidavit is filed the records are admissible, period?

MR. LOW: That's basically -- not just they're admissible, but that would be sufficient to prove it. It doesn't say it's conclusive, but once it's filed that is sufficient to support a finding that it is reasonable and necessary.

MR. YELENOSKY: Legally sufficient.

MR. LOW: Legally sufficient. Nobody can say, "Well, wait a minute. No doctor came in. There's no evidence of that." That's all you need. That issue is eliminated by them not filing a counteraffidavit that's specific, under the new proposal.

CHAIRMAN BABCOCK: Justice --

MR. SOULES: If an affidavit is filed by the plaintiff and the records are admissible and sufficient to support a jury finding within the parameters of those records.

MR. LOW: Right. And that's what I'm talking

about, Luke, that there is some view -- and I'm not arguing for or against it, but I think we need to get the view of the committee, the full committee here, that we may want to just stop there --

MR. SOULES: Right. I do.

MR. LOW: -- and then say the rest of it is repealed, and we'll just, you know, just stop there.

MR. SOULES: We can make incompetent evidence admissible. The statute -- the Legislature did it when they passed the Business Records Act and that got into the Rules of Evidence, just whatever. Evidence can be made competent that's not competent by changing the rule.

MR. LOW: Well, if the Legislature says you can offer something into evidence, I bet you most judges are going to let you offer it.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Maybe I'm the only person in the room that thinks this, but I don't think 18.001 as drafted and enacted by the Legislature is all that screwy and it all makes perfect sense to me. But you completely destroy the scheme it created by 18.001 when you knock out the introductory phrase in (b) and add the last sentence in (f).

CHAIRMAN BABCOCK: I think so, too.

HONORABLE SARAH DUNCAN: And I would like a

vote on whether a majority of this committee -- I mean, it's the same thing we do on motions for new trial. Sure, you can do it by affidavit, but if somebody objects to the affidavit as hearsay or hearsay within hearsay, you get to go to an oral evidentiary hearing, and that's all this does. And I'm not sure it is incompetent as opposed to inadmissible, but if it's incompetent and nobody objects and nobody appeals, it doesn't matter if it's incompetent, and what we're doing by knocking out the introductory phrase in (b) and adding the last sentence in (f) is saying that you can get incompetent, inadmissible evidence in and it's sufficient to support a finding and the defendant or the opposing party can't object. That makes no sense to me at all.

CHAIRMAN BABCOCK: That's kind of what I was thinking. Carlos.

MR. LOPEZ: I sort of -- it's just a suggestion, procedural I guess, but I think Judge Peeples has got it exactly right when he said we're going to be going around and around forever. We've got to identify the issues that we're trying to fix, which I think he's done a pretty good job of, and then vote on philosophically where we are on that and what are we trying to accomplish and then somebody becomes the draftsmith to make it happen.

CHAIRMAN BABCOCK: Well, Sarah's, I think,

put her finger on what -- on why this proposal from this 35-member committee is radical, because the way the Legislature did it was you have an affidavit, that would be inexpensive, that would be easy, but if somebody objects then you're out of this statute. And do we want to do that? Do we want to change that?

MS. SWEENEY: No.

MR. LOPEZ: I think the reality --

CHAIRMAN BABCOCK: Pete's had his hand up for a long time. Sorry, Pete.

MR. SCHENKKAN: I do, but also I want to propose an idea, at least how we take a vote and see where we are, and hope we can get on with this. I think that the issues are fairly well loaded, and I want to suggest what I think they are is whether the committee's way of editing 18.001 in order to achieve what we understand the intent of the Legislature to be; that is, to make it possible to get these issues tried cheaply without having to bring the doctors in the works. That's part of the intent here, and the other intent is to do that in a way which does not preclude, if the cheap steps have been taken, either side that wants to take a more expensive step and having what we would recognize as a traditional evidentiary satisfactory issue.

And so I think with a couple of tinkering

word changes to address the other concerns that I don't think were intended to be in this drafting and that don't need to be, we can take an up or down vote on the proposed new Rule 904 edited from 18.001 and see whether it has majority support or not. It will have my vote, with or without the editing changes. The editing changes I had in mind, just to flag the intent, is there is some concern that as worded this implies that you can try causation by these affidavits. I do not think that's the intent, but I can see how the wording is susceptible to that interpretation because of things like "the counteraffidavit must specifically set forth the factual basis for controverting the contested charges," which is ambiguous; whereas up in (b) we were very specific that the plaintiff's affidavit could only be about the reasonableness of the charges, whether the service was actually provided, and whether the service was necessary.

I would think you would want to edit (f) to track those same three, to word them in exactly parallel fashion. I would be happy to stick in a sentence in (d) and (f) that says, "This does not constitute evidence of causation." "This does not constitute evidence of causation or lack of causation," so we make it clear we're taking that off the table, and to stick in a sentence in (g) that says, "This doesn't prevent either side from

introducing additional evidence to these controverting affidavits."

But I think the intent of this is, in fact, to allow the plaintiff to go forward only with an affidavit that is an affidavit of the custodian of the records, and it is intended to change the Legislature's version in one way to an -- and that is to follow the Legislature's intent in making the defendant do a controverting affidavit if they want to challenge the substance of fact, but to change it in one way which removes what at least happens in the majority of cases of judges in Dallas, which is to say if there's a controverting affidavit then the whole thing is off and we have to try it in the old-fashioned, expensive way.

I don't know whether the Legislature intended that or not, if there's controverting affidavits we have to try it the expensive way, but I think it's a bad idea to say that if there's controverting affidavits the plaintiff has to bring the doctor down and have evidence, and so I think that further change, if it is a change, of the Legislature's intent is a good idea and is within the Supreme Court's power. And so with those tinkering changes, I'd like to see us take a vote on proposed new Rule 904 up or down.

There's one further concern I had about that

that I wanted to address. Judge Sullivan has suggested that, well, maybe you ought to be able to do this by sending out discovery. That is, that we don't need the controverting affidavit because you do it by discovery. I don't try these cases. I don't have the foggiest notion in reality about this, but I would have thought that the same problem that led you to want to do it by affidavit in the first place would affect the feasibility of that approach. It's just too expensive. You want the plaintiff when he files the lawsuit or as soon as the defendant answers to be able to say, "Here is the affidavit that says the charges, the services necessary, was provided and necessary, and the charges are reasonable," and I know within 30 days whether you're going to fight me about that. And then we only show up at trial and we say what caused the injury, or the controverting affidavit is produced and the plaintiff at least knows it's possible that they're going to show up with a doctor who will say the services aren't even reasonable and necessary.

HONORABLE KENT SULLIVAN: My thought was the discovery was already sent out anyway.

MR. SCHENKKAN: Well, I just don't know.

CHAIRMAN BABCOCK: Frank and then Skip and then Buddy.

MR. GILSTRAP: There is just a big difference

in my mind between the big cases and the small cases. I don't have a problem with letting them prove up by affidavit in the small case reasonableness and necessity. When we get to the big case I have a real problem for allowing either one to be proved up by affidavit. Suppose you have like a malpractice case or where the child, you know, suffers asphyxia during the birth process and receives some injury. Everybody knows that, and then starts developing some type of problems that lead to something like cerebral palsy later, years later, and you have an affidavit saying, "In my opinion all the treatment for cerebral palsy is reasonable and necessary." And in my mind that's some evidence that it's necessitated by the injury the child suffered at birth, and obviously that can't be allowed to stand as some evidence of necessity in that case. You just can't do it, but at the same time it's a completely different thing in the little case.

I mean, I'd really like -- I mean, maybe it's possible we could have some kind of cap on the amount you could prove up this way. You see what I'm saying? Maybe you can't prove up more than $10,000 worth of services through an affidavit, you know, and I don't know, but it seems to me that's the problem. That's the problem I'm hanging on.

CHAIRMAN BABCOCK: Skip, then Buddy. Then

Bob.

MR. WATSON: I understand what Sarah is saying, and I agree with her. I think I agree with what Pete is saying, except in one instance. Chip, I don't know what your experience in Federal court is, but I'm not sure that I appreciate the distinction between big, excuse me, and small cases. The object is, whether it's business records, government records, or medical records, to get the unobjected evidence in without a custodian's testimony. The object is if there is an objection to -- whether it's one line of a one-page medical record or two lines of 2,000 pages of medical records, the object should be, like it is in Federal court, to make a specific objection that this part of this evidence is inadmissible; and once that occurs, I mean, it has to be done in advance.

You know, whether it's done orally in a pretrial conference, whether it's done by written objection, or whether it's done by counteraffidavit, I frankly don't care as long as it's spelled out; but at that point the trial judge steps in and either through a magistrate or him or herself steps in and just says, "I want to be crystal clear on what's objected to and the nature of the objection"; and if it's incompetence or if it's -- you know, it wasn't necessary, the judge hears it and makes a ruling. Now, that ruling may be, "You're

right. I believe that there's going to be a material fact issue on whether this chiropractic treatment was necessary because the person had already been told you need a lifetime of chiropractic treatment before the accident or whatever." So we're going to have testimony as to these lines, you know, as to this part of this evidence. It may be most or all of the evidence, but it's coming in, but it doesn't conclusively prove the item. You're going to be able to challenge and cross-examine it because there's enough proof here to get it in before the jury, and you are going to be able to attack it. That's the way it usually plays out, and I don't see why this is different. I mean, it's just not that big a deal.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I heard the suggestions that Pete made. They sound like good suggestions to me. I think they are not -- they don't violate the intent of the Legislature as I read it and sound like to me as a whole they would be an improvement on this draft, and I would like to see a vote on that because I think he has a good idea.

CHAIRMAN BABCOCK: Okay. Bob, and then we'll get back to Pete to see if he can formulate something to vote on. So put your granola down in that.

MR. PEMBERTON: I was going to throw

something else out there since we're kind of thinking outloud at this point. If the goal of this statute in the rule we're talking about is to ensure that reasonable and necessity are -- the plaintiff is required to prove these things up the expensive way only when there's a real dispute and not just a proforma objection and not one that's made abusively, maybe the answer is something like this. No. 1, require specificity in whatever controverting affidavit, objection, however -- whatever mechanism we choose to join the issue.

Second, maybe something like a cost-shifting mechanism based on bad faith filing of the objection or controverting affidavit where the plaintiff has to go into court, bring the doctor down there, pay all that money to prove it up, and really the defendant is just jacking with them, maybe it's fair for them to assume the costs of that.

MS. SWEENEY: That would help. That would help.

MR. LOW: I totally agree with you. One of the things is it says now "Set forth the factual basis." I mean, that language could be improved.

MR. PEMBERTON: Yeah.

MR. LOW: I think that's the idea. One of the things we could get around is say, "Okay, I object. Affidavit, I object." I mean, you know, be more specific

what it is and crystalize what the issues are --

MR. PEMBERTON: Yeah. Right.

MR. LOW: -- on what they were trying to do, so I'm in accord with you on that.

CHAIRMAN BABCOCK: Okay. Pete, you got anything that you think we can vote on? Because we're going to take some sort of a vote and then we're going to move on because we've spent a disproportionate amount of time on this rule.

MR. LOW: Yeah.

HONORABLE TRACY CHRISTOPHER: This is a huge thing in 75 percent of our cases, so for you to think this is not an important rule is wrong. The people here don't deal with the kind of cases that this rule has been used for. It is a huge issue.

MR. LOPEZ: Second.

HONORABLE TRACY CHRISTOPHER: I want that to be on the record.

CHAIRMAN BABCOCK: But you want to leave it the way it is.

HONORABLE TRACY CHRISTOPHER: Well, as to any alternative I've heard so far, so that's why I voted that way.

CHAIRMAN BABCOCK: Okay. Well, let's hear what Pete has come up with. Maybe it will be attractive.

MR. SCHENKKAN: I would say that we add to (b) "The affidavit shall not address causation and shall not constitute any evidence of causation." In (f) we amend the "for controverting and contested charges reflected by the initial affidavit," and we would edit that to read "for controverting that the amount charged was reasonable, that the service was provided, or that the service was necessary to treat the condition"; and then we would have to add at the end of (f), "The counteraffidavit not address causation and shall not constitute any evidence of causation."

CHAIRMAN BABCOCK: Okay.

MR. SCHENKKAN: "Or lack of causation," whichever is the right way to say that, and then at the end of (g) add, "When the affidavit and controverting affidavit have been filed either party may then introduce other evidence if it chooses to do so."

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: I have no problem with that. That's why I suggested -- I mean, I'm not married to the language. I think it accomplishes that --

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, when you do that then in my opinion you have eliminated the benefit of this statute to the plaintiffs, okay, which was the intent to begin with, that this would be a cheap way for

the plaintiffs to get their medical bills in. If you specifically say in there -- it's a gray area right now, the whole causation thing, okay, under 18.001. If you specifically say, "These affidavits are no evidence of causation" then how is the plaintiff going to prove causation other than through a medical doctor? You cannot put that language in here that it's no evidence of causation because that will vitiate the whole rule.

MS. SWEENEY: Yeah, I agree.

CHAIRMAN BABCOCK: So this fix is not attractive to you.

HONORABLE TRACY CHRISTOPHER: No.

HONORABLE LEVI BENTON: I thought there were some cases out there that a layperson can tell us about causation.

MR. LOW: Can't the jury just find if I've got all this and I get up and testify, I say, "Yeah, you know, I was well. I got that, and these treatments helped me and so forth, and I needed them." Do you have to bring a doctor every time to prove all that?

CHAIRMAN BABCOCK: Well, let's stay on point. We've got some fixes proposed by Pete which the chair of the subcommittee thinks are okay. Any other --

MR. LOW: No.

CHAIRMAN BABCOCK: -- fixes you want?

MR. LOW: No.

CHAIRMAN BABCOCK: No other fixes that you want? Okay. So let's vote on that.

HONORABLE DAVID PEEPLES: Are we voting to approve the rule as modified by Pete or just to tack those on and then talk about it some more?

CHAIRMAN BABCOCK: That was the -- Judge Peeples, that was the motion from the chair of the subcommittee, that we approve the rule with the fixes tacked on by Pete.

HONORABLE DAVID PEEPLES: Okay. I got two of them. No. 1 is this has nothing to do with causation, and No. 2 is after all the dust settles everybody can still introduce other evidence. There was more to it, though. Pete, what was it?

MR. YELENOSKY: Three. Three was to -- in (f) to change --

MR. LOPEZ: To add --

CHAIRMAN BABCOCK: Hang on. Let's let Pete do it since he's got it in front of him.

MR. SCHENKKAN: The third one was to reword the third sentence of (f) and make it clear what I think was intended, that the counteraffidavit, like the initial affidavit, could only address the question of whether the charge -- the amount charged for the service was reasonable

at the time and place it was provided, the service was necessary. The service was provided and the service was necessary, that it would be -- that they track each other, that both of them would only address those three points.

MR. LOW: The same elements for the counteraffidavit --

MR. SCHENKKAN: Yes.

MR. LOW: -- as are listed for the affidavit.

MR. SCHENKKAN: Yes.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: Under the current scheme counteraffidavits, at least in Harris County, have largely gone by the wayside, and now you're proposing that in order to submit other evidence the defendant must get a counteraffidavit --

MR. SCHENKKAN: Yes.

HONORABLE JANE BLAND: -- and that counteraffidavit must be by a doctor.

MR. SCHENKKAN: Yes.

HONORABLE JANE BLAND: And I think it needs to be cheap. The case needs to be inexpensive to try for both sides. The plaintiff ought to be able to introduce the records, but the defendant ought to be able to introduce other evidence without being put to the burden of getting a counteraffidavit from a physician in order to

introduce other evidence.

HONORABLE TERRY JENNINGS: Who else is going to challenge it other than a physician to say these weren't reasonable and necessary?

HONORABLE JANE BLAND: No. No. What I'm saying is this rule contemplates that you can't challenge it in any other way unless you put a counteraffidavit on file, and right now most defendants don't -- we don't have these arguments, which is why Tracy is advocating leaving it alone. A lot of these arguments have gone by the wayside and defendants have stopped filing counteraffidavits because of some case law, and -- but they do attack the evidence that has been admitted by the affidavits through other means, through cross-examination, through other evidence, through arguing about the medical records and, you know, statements in medical records themselves.

But now with the amendment you're making the admissibility of other evidence to controvert the affidavit contingent on the defendant filing a counteraffidavit, and that counteraffidavit can't be like it can from the plaintiff, a custodian of records. It has to be a doctor, and so that's not cheap. That's expensive for a defendant just as it is for a plaintiff, and I think that, you know, this does not meet what was contemplated by the

Legislature. It does not meet what all of you-all want as a goal and we all want as a goal, which is an inexpensive way to get the contested issue to the jury.

CHAIRMAN BABCOCK: Nina, did you want to say something?

MS. CORTELL: I was troubled by Judge Christopher's comments, so I want to just follow up on it since I don't practice in this area. In many instances the plaintiff once they've complied with the affidavit requirement do not have to come in with medical testimony of causation?

HONORABLE TRACY CHRISTOPHER: Right. They have their affidavit that proves up $1,500 in medical bills. They've got their medical records proved up by the business records; and they come down and they say, "I was hurt and I had, you know, six weeks of physical therapy"; and the defendant says, "You only needed two"; and the jury decides; and we're, you know, two person, two witness trials. It may take us a day, day and a half to try these cases, and it's a huge number of cases on a regular civil docket.

MS. CORTELL: I guess my follow-up question -- and I'm sorry to ask this at this late in the game, if you-all want to hoot and holler when I say it, but what's the problem we're trying to fix?

HONORABLE LEVI BENTON: That's a good question.

MR. LOW: Basically, I'll say again, the problem that was brought up to us was that it was too easy for somebody to come in -- maybe the plaintiff files his affidavit, and it was too easy for somebody to come in, file an affidavit, say, "I object to that." He doesn't say that, you know, they didn't go to the doctor often enough, or it's not specific. And then what was happening was that the plaintiff then would have to go out and take the deposition of the custodian and then, you know, you go through the expense of that.

So as it was brought to us, they were trying to get around that expense and say, "Okay, plaintiff, if you're going to do that" -- I mean, "Defendant, if you're going to do that, you've got to be very specific, and if you're not then you can't offer evidence that" -- the way it originally said, that they couldn't -- if they intended to controvert it, they had to do certain things. They changed it to say they can't offer evidence. If I intend to controvert I'm going to have to controvert some way. I guess you could say argument or what.

And then they added there to say everybody that wants to, that is sufficient. You can just offer these affidavits into proof, and if either side is

satisfied with just having affidavits, fine; but if they're not it doesn't keep them from bringing whatever evidence that they want. So that was what was brought to me as the problem. That was what they were trying to address, and that was what we saw.

CHAIRMAN BABCOCK: Buddy and Bobby, will you yield down there because they have got a green flag that they're waving. It must be important.

MR. WATSON: His arm is getting tired.

CHAIRMAN BABCOCK: Okay. Whoever has got the green flag.

MR. ORSINGER: Believe it or not you can talk now.

MR. LOPEZ: A couple of things. The Beauchamp case is real clear. These affidavits do not address causation, nor can it. You've got to remember causation, we're talking about the defendant's negligence. The doctor doesn't know whether the defendant is negligent, caused this, that, or the other, never has been. This also isn't about eliminating uncontested issues. One request for admission can do that, and it's not that expensive. "Admit or deny that these charges are reasonable and necessary." I mean, it's very simple.

This was about the plaintiffs being able to put on their proof without having to call the doctor, and

the more I sat here and listened to this, I, too, like Pete's suggestions. I think they're a way to help make 18.001 better, and the more I sat here and listened to Kent and the judges up the other end, I'm not sure I've heard why just having an affidavit and saying that it does what it does and not just forgetting about the counteraffidavit, I'm not sure why that doesn't work.

CHAIRMAN BABCOCK: Okay. Bobby, you yielded. Did you want to say something?

MR. MEADOWS: Well, I just -- processing moving this along, I think that what Judge Christopher and Judge Bland have said is kind of the basic issue, and I think we ought to fashion some vote around it, and maybe what Carlos is saying is just another version of that, but it seems that we're all kind of saying the same thing and want to achieve the same objectives, but it's all about this counteraffidavit, which, you know, I also have a problem with.

CHAIRMAN BABCOCK: Well, Pete's got a proposal that's sort of been percolating around and let's -- and we were going to vote on that, so let's -- but Judge Peeples doesn't want to do that.

HONORABLE DAVID PEEPLES: Pete, does your proposal mean that unless the defendant files a counteraffidavit the defendant cannot cross-examine on

these core issues and/or cannot introduce other medical records that would contradict it? Surely you don't want that.

MR. SCHENKKAN: I think it does.

HONORABLE DAVID PEEPLES: Tell me, please, you don't want that. Well, make a good argument for that.

MR. SCHENKKAN: Well, I mean, I don't know if I do because I don't practice in this area either. I'm operating on -- you know, I'm listening to about what we're trying to do here, and what I hear we're trying to do here is keep our litigation system from pricing itself out of the market for this set of cases, and I hear it being said that the Legislature's effort to solve this problem by allowing the plaintiff to put on an affidavit of the custodian of the record from the doctor's office saying that "We provided these services to this plaintiff" and that constitutes evidence that we did provide them, that they were necessary to treat the condition as opposed to excessive, you know, six weeks worth of chiropractic instead of two, and that the prices that we charge, our standard charges, are reasonable.

That was supposed to take those issues off the table, as I understood it, unless somebody did a controverting affidavit; and then it sounds like in Dallas or Houston there were two different reasons why that didn't

work; and we're trying to solve the problem of those two different reasons why that didn't work by saying, "If you want to fight about this, Defendant, if you want to fight about it, you have to now go to the trouble of getting an affidavit, and since your guy wasn't the custodian of the records, you can't do it by doing a custodian of the records. You've got to actually find somebody who will sign his name to a piece of paper that says, 'You don't need six weeks chiropractic for this'" or that says, 'Actually, a chiropractor in this place and time doesn't charge a reasonable charge of $100 an hour. It's $30 an hour,'" and if you can't find somebody who is going to do that, you don't get to fight about that.

HONORABLE KENT SULLIVAN: But you're saying in order to cross-examine the plaintiff you've got to file an affidavit by a doctor.

MR. SCHENKKAN: In order to cross-examine the plaintiff about those issues, yeah, and that's why I'm trying to take the --

MR. MEADOWS: Well, let's vote on that.

MR. SCHENKKAN: I don't know whether it works or not, but that's the intent.

CHAIRMAN BABCOCK: Didn't the -- our court reporter's fingers are cramping now. Didn't the Legislature take a very small step with 18.001 by saying

that if the plaintiff wants to get an affidavit and puts it in there, it's going to be fine unless there's an objection; and then if there's an objection, you go back to the way you used to do it? Did the Legislature do anything more than that? I don't think so.

MR. LOW: Yes, they did.

CHAIRMAN BABCOCK: What did they do more than that, Steve?

MR. LOW: They said that the party -- wait just a minute, a party intending to controvert a claim reflected by the affidavit must do certain things. In other words, if you intend to controvert it, that's no different than if I intend to controvert, offer evidence to the contrary. What's the difference?

CHAIRMAN BABCOCK: Well, but, Buddy, but all they did was say that if you don't want to have this issue tried by an affidavit you've got to object.

MR. LOW: That's right.

CHAIRMAN BABCOCK: Okay. And so that's all the Legislature is doing.

MR. LOW: No.

MR. LOPEZ: No, that's not going --

MR. ORSINGER: It's a counteraffidavit. But it does --

MR. LOPEZ: That's how it got applied.

MR. ORSINGER: If you can get a counteraffidavit you do go back to a normal trial with real evidence and competent evidence that you can object to if it's not competent.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: So that was not a very big change. The big change is that now incompetent evidence is always admissible as long as some clerk swears to it. I think that that goes a little too far.

MR. TIPPS: I think you're right that the Legislature attempted to do only what you set out, but what I hear is that the unintended consequence of what the Legislature did is to enable plaintiffs to make their proof with regard to reasonableness and necessity, and the result is that these cases are being tried in an efficient, cheap way.

CHAIRMAN BABCOCK: In the absence of objection.

MR. TIPPS: Right.

CHAIRMAN BABCOCK: In the absence of objection, and that's fine.

MR. TIPPS: And, in fact, people aren't objecting.

MR. YELENOSKY: Right. So is there a problem? I mean, the question Nina had was my question,

and it was answered by Buddy saying, "Well, people are telling me that this is expensive because they're having to bring doctors in," and I'm hearing from the judges in Houston they're not bringing doctors in. That's an empirical question. Are doctors being called into these cases now? That would be the problem. Does it exist or not?

CHAIRMAN BABCOCK: Yeah. And Buddy says, well, that the problem that we're trying to solve is that it was too easy for a defendant to come up with a counteraffidavit saying "I object."

MR. YELENOSKY: But are they doing that?

MR. ORSINGER: No, they're not doing that.

CHAIRMAN BABCOCK: And that it ought to be something else, but the way this thing is drafted we're doing a lot more than that.

HONORABLE DAVID PEEPLES: Yeah.

CHAIRMAN BABCOCK: We're doing a whole lot more than that.

MR. YELENOSKY: But before we do anything I still don't know if there's a problem. Because, yeah, sure, theoretically, but most of us can only speak theoretically about this except for the judges from Houston and, well, all the judges. So is it a problem?

MS. SWEENEY: Yes.

CHAIRMAN BABCOCK: Well, we have four district judges from Houston and two of them voted to keep the rule the way it is and two of them voted not to, so....

MR. YELENOSKY: Paula says it is a problem.

MS. SWEENEY: It is a problem in Dallas, and it will be a problem in Dallas again if you allow any kind of a nonspecific, nonsworn objection to --

HONORABLE TRACY CHRISTOPHER: Dallas is where the case law came from that said the controverting affidavit has to be by a doctor who's looked at the records and has some basis for contending that the services were not reasonable and necessary. Since that opinion counteraffidavits have gone away because no defendant wants to spend that money.

CHAIRMAN BABCOCK: What's the date of that opinion?

MR. LOPEZ: Judge Farias said -- the problem originally was it's a visiting judge, and it was unpublished.

HONORABLE TRACY CHRISTOPHER: Well, we all followed it.

MR. LOPEZ: But then it got published. Somebody said, "You need to publish that."

CHAIRMAN BABCOCK: Yeah.

MR. LOPEZ: And since they published it, at

least in Dallas, you know, I don't know. We're sort of behind the ball here because the problem as a practical matter they're not filing those counteraffidavits. They are filing them in some cases, but it's not like they were. It was the doctor in that case that got reversed, Touchstone & Payne hired in every one of their cases, filing a counteraffidavit in every case, no exceptions, etc., and that became a real huge problem until that opinion said you can't do that.

CHAIRMAN BABCOCK: And so now has the problem gone away?

MR. LOPEZ: In my limited perspective, yes.

MR. ORSINGER: What's limited about it?

MR. LOPEZ: I don't do it anymore, and I did a lot less of these in district court than county. County I did these everyday for three years. They still do them everyday in county courts. I echo what the judges said. You've got to do something here. There is a problem. These are the kinds of cases that are getting tried.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: It sounds to me like the intent of this rule, edited version of the statute, is to get the benefit of that published opinion and say, you know, you want this problem to go away elsewhere, and what -- I also heard you say something very important, which is

that you think it still happens in some cases, and I'm guessing the some cases are the ones where there's enough at stake to make it worth the defendant's while to pay a doctor to review the records to say either you don't ever need or you -- on the facts shown in these medical records you could have probably done with a chiropractor or an MRI, you know, a year after -- as I understand it, MRIs are generally only useful if they're taken within some limited period of time after the injury. If you wait too much longer -- anyway, either you can get a doctor who will say whatever that is, a real doctor will say that.

Then what you've done by that is you've said this one is going to be fought a battle on that basis, and if you and the plaintiff are content to go forward with your affidavit and my real doctor to say that, you can take your chances. Otherwise, if you want to have a real fight about this, you better show up with your doctor, too, because we're going to have a real trial about this one.

MR. LOPEZ: Yes.

MR. SCHENKKAN: And to me that's a perfectly sensible solution. I don't see why that's a terrible thing to require. One more fact question about that, which is, again, I don't know how this works, but who are the defendants in the case? As a real matter aren't they the insurance companies paying for the defense? And they do

have access to doctors, so it is possible for them to have a doctor look at the medical records in the cases where the amount is worth fighting over.

HONORABLE TRACY CHRISTOPHER: But why should you make the defendant go to the expense of hiring a doctor in a 2,000-dollar medical bill case?

CHAIRMAN BABCOCK: Justice Hecht has a question.

JUSTICE HECHT: I'm trying to follow this, but as I understand the history from the trial judges, you used to have to file a counteraffidavit, the defendant did, but they felt like they could just get anybody to do it. So then a case came along and said, "No, you can't do that," and so they quit filing counteraffidavits at all.

HONORABLE TRACY CHRISTOPHER: Right.

JUSTICE HECHT: But then you're stuck with what they thought was the statute that made them file a counteraffidavit in the first place. So how did they think that by not filing one at all they were getting -- they weren't being heard if previously they thought they had to file one to keep something bad from happening to them? I mean, that's the part I'm missing.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: No, they were filing counteraffidavits to knock the records out because what

would happen is it would be the eve of trial, and they would say, "We filed a counteraffidavit; therefore, all of the plaintiff's records are inadmissible. Therefore, Judge, they can't get a jury issue on medical bills or on anything really because they don't have any proof of damage."

And then what happened was these counteraffidavits had to be more specific, and plaintiffs were either successful in knocking them out because they weren't by somebody competent or, you know, the plaintiffs got more sophisticated and realized if a counteraffidavit was filed then they had to go get a deposition on written questions, which is a more expensive way of proving up the records, but if you get a deposition on written questions it's not subject to attack.

And so now either the defendants no longer file counteraffidavits because they realize it's more difficult to knock the records out, or the plaintiffs go and get it proven up by deposition on written questions.

JUSTICE HECHT: Okay. But now the defendant is stuck with the records.

HONORABLE JANE BLAND: The defendant is stuck with the records, but they have a lot of other methods of challenging the credibility of that testimony, and my concern with this proposed rule is that it cuts off those

other avenues, like the cross-examination of the plaintiff. Generally if some records are proved up by affidavit but the defendant says, "Look, they omitted page 13 of this 17-page medical chart because page 13 talks about, you know, another accident," you know, under optional completeness, you know, they can get it admitted or they can at least cross-examine about it.

HONORABLE TERRY JENNINGS: But doesn't the language "but does not require such a finding" take care of that? Can't they still argue --

MR. LOPEZ: That wasn't in there originally.

HONORABLE JANE BLAND: That's not in the original 18.001, which is why I think your fix, Justice Jennings, about stopping at (d) --

HONORABLE TERRY JENNINGS: That was Judge Sullivan.

HONORABLE JANE BLAND: -- is a good change, and I think that will do it, because then it doesn't cut off other avenues for attacking the records once they were admitted. It's like business records. You should still -- the business records are admitted under the business records exception. There's still the hearsay rule, but that doesn't prevent you from calling other witnesses that may cast doubt on the credibility of those records.

HONORABLE TERRY JENNINGS: Or just logically

arguing.

HONORABLE JANE BLAND: Or just logically arguing that the records are not credible because they're internally inconsistent or they don't produce what -- they don't have enough of a relationship to the other evidence in the case or whatever.

MR. LOW: Chip, why don't we see if Judge Bland can show us, just like Pete did in detail, and let's vote on the Bland plan and the Pete plan or something.

CHAIRMAN BABCOCK: The Bland plan.

HONORABLE JANE BLAND: It was Justice Jennings's suggestion that I thought was a good one, take the changes as made but not -- take the changes as the committee recommends --

MR. LOW: Up to where?

HONORABLE TRACY CHRISTOPHER: (d).

HONORABLE JANE BLAND: Up to (d).

CHAIRMAN BABCOCK: Through (d).

MR. LOW: Through(d). Okay.

HONORABLE JANE BLAND: Through (d) and then just end at (d).

MR. LOW: All right. And don't say anything about --

HONORABLE LEVI BENTON: But keep (g).

HONORABLE TRACY CHRISTOPHER: No.

CHAIRMAN BABCOCK: Keep (g)?

HONORABLE LEVI BENTON: I'm asking.

MR. LOPEZ: Are you saying get rid of the counteraffidavits, period?

MR. LOW: You don't address counteraffidavit at all?

HONORABLE TRACY CHRISTOPHER: Get rid of it.

HONORABLE DAVID B. GAULTNEY: All you're doing is it's another way of proving up the records essentially.

MR. LOPEZ: Gets you to the jury, which is the whole point.

MR. LOW: So now they don't even have to go to the trouble of filing just a vague objection. That's another step.

CHAIRMAN BABCOCK: Okay. We're -- the Pete/Bland plan is to do something to (a) through (d) and then end at (d). So what's the something for (a) through (d)?

MR. TIPPS: No. It's the Pete plan versus the Bland plan.

CHAIRMAN BABCOCK: Oh, they're competing plans.

HONORABLE TERRY JENNINGS: No, it's the Sullivan plan.

HONORABLE TRACY CHRISTOPHER: I will take credit for it. You can call it the Christopher plan. I argued to get rid of the counteraffidavits very early on. If no one wants their name on it, I'll take it, even if it goes down in flames. I have been voted down before. I don't care.

MR. LOPEZ: Can I ask one question?

CHAIRMAN BABCOCK: Carlos wants to ask something.

MR. LOPEZ: Can I ask one question from the authors?

CHAIRMAN BABCOCK: Yeah.

MR. LOPEZ: Okay. If we go with the, quote-unquote, getting rid of the counteraffidavit, which in principle I think I like, what is the way or do we -- would there be a way or would there need to be a way for the defendant to claim that the affidavit does not in fact apply -- comply with 18.001(b) like the statute says it must?

In other words, in other words, let's say that the plaintiff does file an affidavit. Now let's say that affidavit doesn't comply with 18.001(a)(b). We've taken out -- I mean, the trial judge is going to look and say on affidavit, you know, that says this has certain effect. Okay. The defendant says, "Well, Judge, the

affidavit doesn't say that."

HONORABLE JAN PATTERSON: You object and move to strike.

HONORABLE JANE BLAND: You object and move to strike.

MR. LOPEZ: Right. And so the affidavit is no good, right?

HONORABLE JANE BLAND: Right.

HONORABLE TRACY CHRISTOPHER: Right.

MR. LOPEZ: So now you've made it even easier for the defendant, I mean --

HONORABLE TRACY CHRISTOPHER: Well, these affidavits are never incorrect. I mean, this is the simplest affidavit in the world to get from a custodian of the records. The only thing that ever happens is they don't file it 30 days before trial and we often have a continuance.

MR. LOPEZ: Right. I agree. What I'm saying now is before the defendant had to go hire George Sibling to knock out the affidavit. Now all they have to do is say, "Judge, I object." I mean, that may be the unintended consequences.

HONORABLE TRACY CHRISTOPHER: They could have knocked it out if it wasn't timely before. They could have knocked it out if it somehow wasn't sworn to before by just

objecting.

MR. LOPEZ: And they just have it ruled on and so be it?

HONORABLE TRACY CHRISTOPHER: Yes. It doesn't make a change in that.

CHAIRMAN BABCOCK: Okay. Buddy, what do we want to vote on first? Do we want to vote on the Christopher/Bland plan?

MR. LOW: It doesn't make a difference which. I guess, yeah, the competing plans. Let's -- Pete had his first. Let's vote on his.

HONORABLE TERRY JENNINGS: If we do the Sullivan plan, do we need to add in some language here to -- one small point. After the words "was unnecessary is admissible and sufficient." This is a Rule of Evidence or do we need to add --

CHAIRMAN BABCOCK: What part are you talking about, Justice Jennings?

HONORABLE TERRY JENNINGS: (b), "An affidavit that" da-da-da-da, "was necessary is admissible and sufficient evidence." "Is admissible into evidence and is sufficient to" or is that necessary or unnecessary?

CHAIRMAN BABCOCK: Well, I think that that maybe decides the issue of whether or not an objection can be brought.

MR. LOPEZ: We have to put a time frame. You can't let them object if we're going to do it as just an objection.

HONORABLE SARAH DUNCAN: The whole reason for counteraffidavit it seems to me, is one of fairness. You've got to -- if the plaintiff is thinking, "This is how I'm going to prove up my medicals," you've got to, it seems to me, in fairness give the plaintiff some notice, "No, you're not, because I'm going to controvert."

HONORABLE TRACY CHRISTOPHER: "Because I'm bringing my doctor live at trial to say something," and that's going to be in my request for disclosures.

MR. LOPEZ: Is there a deadline for that?

CHAIRMAN BABCOCK: 30 days.

HONORABLE TRACY CHRISTOPHER: It's in the request for disclosures.

CHAIRMAN BABCOCK: Okay. So Buddy wants the Pete Schenkkan plan to go to a vote first, so just briefly with no further comment reiterate what you propose to do and then we'll get onto the Christopher, Bland, Sullivan, Benton plan.

MR. SCHENKKAN: Take the proposed new Rule 904 rewrite of 18.001 --

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: -- with the addition to (d)

of a sentence that makes clear that the affidavit shall not address and shall not constitute evidence of causation; with the addition to (f) or the editing of (f) to clarify that the controverting affidavit only controverts one or more of those same three points that are in (b), that the service was in fact provided, that the service was necessary to treat the condition, and if the amount of the charge was reasonable, and adding also to it that it -- that the counteraffidavit won't address causation or constitute any evidence of causation; and then clarify by addition to (g) that, assuming these affidavits have been filed, either party may introduce other evidence of whether the services were provided, whether the service was necessary to treat the condition, and whether the amount was necessary and reasonable.

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

HONORABLE KENT SULLIVAN: Does that accept the Peeples amendment then?

CHAIRMAN BABCOCK: No. No, it does not.

HONORABLE KENT SULLIVAN: Does not.

CHAIRMAN BABCOCK: Does not. It's just what it is.

HONORABLE KENT SULLIVAN: So it does allow cross-examination.

CHAIRMAN BABCOCK: It's just what it is. Everybody who is in favor of that raise your hand.

MR. LOW: Well, we've got two, three.

CHAIRMAN BABCOCK: All right. Everybody opposed raise your hand. There are 3 in favor, 19 opposed.

Okay. Let's go onto the -- whatever we're going to call it, the Christopher, Bland, Sullivan, Benton --

MR. LOPEZ: Wait, wait, wait. Can we take a vote as to who likes his rule with the Peeples amendment? I voted against it only because I wanted the Peeples amendment on it.

MS. SWEENEY: Which is what?

HONORABLE DAVID PEEPLES: I want the defendant to be able to introduce other evidence without having to controvert it, file an affidavit, and I agree with Judge Christopher. If it's going to be a doctor it will have been disclosed by discovery, and to say you can't cross-examine someone fully on this just because it wasn't controverted in an affidavit is a step I'm not willing to take.

CHAIRMAN BABCOCK: I think Judge Christopher's and Judge Bland's proposal will raise that issue, so let's vote on theirs now. And the proposal is -- you guys want to articulate it one more time?

MR. LOW: End with (d)?

HONORABLE TRACY CHRISTOPHER: End with (d). Keep it exactly as it is changed.

HONORABLE JANE BLAND: With the changes proposed by the subcommittee.

MR. LOW: Now I understand. Take the -- okay.

MR. LOPEZ: I beg your pardon.

CHAIRMAN BABCOCK: Wait a minute. Let's just hear what it is. Hang on.

HONORABLE TRACY CHRISTOPHER: That's it. Take the subcommittee's proposals or changes in (b) and end the rule at (d), at the end of (d).

CHAIRMAN BABCOCK: Okay. Carlos, what was your question?

MR. LOPEZ: My question to the judges that are proposing that one, isn't the whole point of paragraph (d) -- why is there a 30-day requirement in (d)?

HONORABLE TRACY CHRISTOPHER: I mean, it's the same sort of time limits requirement.

MR. LOPEZ: All right. Okay. Then okay.

MR. LOW: Would you want a sentence that the defendant may at their option file? I mean, do you want to just stop and not even say --

HONORABLE TRACY CHRISTOPHER: My proposal is

just to stop.

MR. LOW: And not say that they may file?

CHAIRMAN BABCOCK: Your proposal is what it is, and we're going to vote on that.

HONORABLE LEVI BENTON: Rather than leaving the argument across the state whether or not a defendant can cross or offer other evidence why don't we just expressly say at the end of (b) that a defendant is always permitted to cross-examine or offer other evidence?

HONORABLE TRACY CHRISTOPHER: I don't think that's necessary. This is a Rule of Evidence that just proves up a piece of paper.

HONORABLE LEVI BENTON: I promise you that --

CHAIRMAN BABCOCK: She refuses to accept the amendment, so you can vote however you want to based on her refusal.

HONORABLE LEVI BENTON: On --

CHAIRMAN BABCOCK: We'll take your name off the bill.

HONORABLE LEVI BENTON: I want to vote with her if she would accept the change.

CHAIRMAN BABCOCK: Everybody in favor of the proposal to accept the subcommittee's suggestions to subparagraph (a), (b), (c), and (d), but to end the rule at

the conclusion of subparagraph (d) raise your hand.

Everybody opposed? 13 in favor, 9 against, the Chair not voting, but if he did vote he would vote strongly against. Okay. Let's take a little break.

(Recess from 10:42 a.m. to 11:04 a.m.)

CHAIRMAN BABCOCK: All right. Back on the record. Here's what we've got left for the rest of today. We're going to go to 509 now, which is going to probably engender some discussion, and I don't know if we'll finish 509 today or not. I suspect not, and then we've got 705, Rule 705 still on the evidence, which we may or may not get to, but I doubt. And for the last 15 or 20 minutes I want Richard to just give us a preview of what the 76a issue is that Court has asked us to look at, and I don't know, Bobby, if we're going to get to 202 today or not.

MR. MEADOWS: Let's not, because I didn't -- was it on the agenda that was published?

CHAIRMAN BABCOCK: It was, and there was a personal messenger that went to your office and said "Be ready on this day."

MR. MEADOWS: I thought it was a process server.

CHAIRMAN BABCOCK: So that's why you ducked him.

MS. SWEENEY: But we're not going to be

taking votes on 76a today?

CHAIRMAN BABCOCK: We will if you leave.

MS. SWEENEY: I hate you. I will sneak up behind you one day for that when you least expect it.

CHAIRMAN BABCOCK: Also, we had several efforts to clarify the record yesterday by various people, and I think Carlos wants to clarify the record on something.

MR. LOPEZ: Actually, today is my son's birthday, his second birthday, so I'm leaving to catch a plane, but I said something yesterday without thinking about it, and I wanted to clarify. I said something along the lines of "Let's be intellectually honest." This was the class action rule, and I'm not talking about the people in this room. I'm talking about the larger political debate. I was specifically talking about on the floor of the Senate where this is going on this week. That was the specific reference, but I think people who didn't know that could very easily think that I was talking about -- I was making a specific comment about people in this room, and I'm not, and everybody in here -- our salary is what it is, and everybody is down here giving their time to do the best we can, so I don't apologize for making the statement because I know what I meant by the statement, but I do apologize if it left the impression that I was talking

about the people in here rather than the larger political debate going on outside, so I thought I should clarify that.

MR. ORSINGER: Chip, there are many things that I should probably apologize for, but I can't remember them all, so I won't even start.

MR. MEADOWS: Why didn't you start with dinner last night?

CHAIRMAN BABCOCK: The list for Richard The Handsome is very long. Well, and that raises a point that the -- our debates, I think, are at an extremely high level, and it is a real honor for me to be a part of this group, and I very much look forward to our sessions. Sometimes in the heat of battle people say things that are either misinterpreted or that they don't mean, but I think we should all approach this thing at the highest level and with the greatest goodwill and particularly towards each other, and that's been the way this committee has operated since 1938, and I think it's just a wonderful thing, and it's a great thing that all of you do for this state and for our jurisprudence, and I know I'm appreciative, and I know the Court is, too.

MR. GILSTRAP: Speaking of future sessions, have you got a schedule yet?

CHAIRMAN BABCOCK: Yes, we do. We might as

well talk about that right now. The future schedule is -- the next one is January 16th and 17th, and the ones after that -- and we'll put this on the website -- is March 5th and 6th, May 14 and 15,

MS. SWEENEY: Hold on. Hold on.

CHAIRMAN BABCOCK: I'm sorry. January 16th, 17th; March 5 and 6; May 14, 15; August 13, 14; October 1 and 2; and November 19, 20. And we'll put it on the website, and we'll also send an e-mail to everybody.

MS. SWEENEY: Are we not having another meeting this year?

CHAIRMAN BABCOCK: We are not. I think we've had eight meetings this year.

MS. SWEENEY: It's been such fun.

CHAIRMAN BABCOCK: It has been. It has been fun. All right. So, Buddy, let's go to 509.

MS. SWEENEY: May I ask one more procedural question?

CHAIRMAN BABCOCK: Sure.

MS. SWEENEY: We were chatting at the break about the record of some prior votes, specifically the transcript and some questions about that. What would you suggest as a mechanism for clarifying the transcript?

CHAIRMAN BABCOCK: Well, on the issue of Rule 8a, I think that the *Texas Lawyer* independent reporter who

looked at the record concluded correctly that the vote was overwhelmingly against the rule, and that was reported that way, and that's the recollection of everybody. Jeff, you know, Jeff Boyd, who has a twisted mind, was able to get the contrary conclusion out of the record, and it is ambiguous.

MS. SWEENEY: It's very difficult to read the record and have it be clear.

CHAIRMAN BABCOCK: I think, though, it is true that there were 23 members of our committee that did not think the rule was a good idea and five that did, the Chair not voting, but I think I said, you know, how I feel. So if I had voted it would have been six.

MS. SWEENEY: All right. Thank you.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Let me correct the record on Jeff. He's the only one here that's been to my little hometown of Geneva, so don't say he has twisted mind. He knows where Geneva, Texas, is.

MR. BOYD: You bet, and you haven't invited me back since.

CHAIRMAN BABCOCK: Okay.

MR. LOW: Well, let's go to what would be proposed new Rule 514, Rule 509 on the doctor-patient privilege. A little bit of history, some of the -- the

Supreme Court has never ruled on whether or not there is a waiver, an entitlement to ex parte the plaintiff's doctor. The Federal courts of Texas have written strongly that the waiver does not include ex parte. You can get the -- all the records and everything, and you can take the depositions if waived, but the waiver doesn't include ex parte. The courts of appeal in Texas have written and said that the waiver under 509 means that you can just go and ex parte the doctor.

The problems with that have been that in most states it's unethical for the doctor to talk to you and without consent of the patient, most states. I talked to Rocky Wilcox. Texas has not taken a position on that. They think maybe it's unethical, but they will not come out and say that. I don't know what the political issues are in Texas as to why they won't say that. The closest the Supreme Court has ever come as to somebody had to give just a broad general authorization including -- and the Supreme Court said that it was too broad.

Many of the concerns have been that if you go out and you talk to the plaintiff's doctor, and I'm the defense lawyer and I go out and say, "Doctor, he's waived under 509," that the doctor says, "You know, fine, I'll talk to you" and he says -- we start talking and he gets into like a drug area or something. Well, I say, "Now,

wait, Doctor, you're not entitled to tell me that," or will my curiosity allow me to say, "Well, you know, go on." I mean, so there are a number of things.

Bill Edwards brought it up and in the meanwhile the HPPA regulations were passed and went into effect in April of this year, and all through the HPPA -- there are 174 pages, and I understand every word written in it. I'm an expert on HPPA, but when it comes to HPPA I'm going to let John speak. No, and the HPPA regulations all through there they talk about privacy and protecting privacy of records and so forth.

There are other statutes besides HPPA. There is cases on drug and alcohol treatment that have certain privacy things. There are on mental health that have -- so you really run afoul of a lot, and our committee met -- first of all, the State Bar committee met and they unanimously voted to do away with ex parte conversations unless you had specific written authorization from the patient or unless you had a court order.

My committee voted the same way, except Scott filed a minority report. I don't know, many of you might have been here. Scott expressed himself at the last meeting, and in his minority report he more or less summarized his objections, and one is that -- let me see if I can find it. Well, I'm not sure I understand.

At any rate, he says that HPPA may change. We can't just draft a rule based on HPPA, that it may change, the government may change, that ethically there's nothing wrong with it, that it's only fair that if the plaintiff's lawyer can talk to the plaintiff's doctor that the defense should be able to talk to him, that maybe then that the plaintiff's lawyer ought not to be able to talk to the plaintiff's doctor. He doesn't address what about when I get an independent medical exam whether the plaintiff's lawyer can talk to him. He more or less is for ex parte without a court order or without an authorization, and so I guess there are many things, but John was kind enough to mail me an opinion by the New Jersey court, and I got it. I didn't have a chance to really study it. I read it briefly, and I don't know. John will be more familiar. I don't know how familiar he is with it, but I asked him to please tell you basically what the New Jersey court did.

MR. MARTIN: Okay. Yeah, sure. I would be glad to talk about it, and let me disclaim any expertise on HPPA. I'm certainly not an expert on HPPA. I have talked to several lawyers who are healthcare lawyers who have studied it fairly extensively, and I have heard a couple of talks on HPPA.

Let me start by saying a couple of things that I said a year ago when this first came up, and that is

that I think we need to separate what we're looking at here when we're talking about personal injury cases that are not medical malpractice cases on the one hand and medical malpractice cases on the other hand because there is a very, very big difference in the considerations that come up there. In a medical malpractice case if you have a surgery case and you've got a surgeon who is accused of malpractice and the anesthesiologist was there, he's a fact witness, and the surgeon's lawyer ought to be able to talk to him. There's no confidential protected information about who said what during the surgery with regard to the doctor or -- the surgeon or his lawyer. They ought to be just as entitled to talk to the person as somebody who saw somebody run a red light. There's nothing there that ought to be considered protected healthcare information.

I said last year and I still believe today -- in fact, I think this opinion bears this out. I think that under HPPA a defense lawyer cannot under HPPA talk with a treating physician without a written consent from the plaintiff. I think that's clear. What this case -- I won't elaborate too much on this case, but it's an opinion, interestingly enough, a 30-page opinion by a New Jersey trial judge, which is interesting. I think he must be some sort of judge that's presiding over all of the consolidated PPA litigation up there because it speaks in terms of 30

cases or 300 cases and the plaintiffs in those cases had each seen between 4 and 10 doctors; and the defendants, the PPA manufacturers wanted permission from the court to go talk to as many of these doctors as they wanted to, which obviously is over a thousand doctors, very many doctors. And their argument was that it would be far less expensive for them to go out with a written consent and talk to these doctors than it would be to take all their depositions or take depositions on written questions.

It seems that New Jersey has had a procedure for about 20 years that's called the Stimpler procedure, and this was a case that was decided in New Jersey 20 or so years ago that allows defense lawyers to go talk to plaintiff's doctors so long as they give written notice to the plaintiff's lawyer of when they're going to go conduct this interview, that they must provide the physician with a written description of the scope of the interview, and they must inform the physician with unmistakable clarity that he doesn't have to talk to him, that it's voluntary. And the argument was made by the plaintiffs in this case that after HPPA you couldn't even use this procedure. You couldn't even go talk to him with consent, that HPPA completely preempted the case and you couldn't go talk to him at all.

And this case drew a lot of attention. There were briefs from a several defense organizations, DRI and

the New Jersey equivalent of TADC, and there was a brief filed by ATLA, so for a trial court decision this got a whole lot of attention. The judge who wrote this opinion ruled that while HPPA preempts large areas of state law, that it didn't preempt the New Jersey case law Stimpler procedure that allowed these kind of contacts with the written consent and any other safeguards, and I'm not really sure that preemption is the right analysis or whether what he really means is the New Jersey procedure doesn't violate HPPA. I'm not sure it makes a difference, but that thought occurred to me in reading the opinion, and I'm not here to say whether the opinion by one judge in New Jersey that's not even a published opinion is right or wrong, but I think the fact that this is a very thorough and exhaustive analysis illustrates the problem with trying to do this by a rule.

I just think it would be a huge mistake to try to address this problem with a procedural rule or an evidentiary rule. I think we need to let the case law decide -- if, for example, a judge were to order that with a certain authorization somebody could go talk to a plaintiff's doctor, I think it would be up to the courts to decide whether the judge has the power to do that or whether HPPA prohibits it or preempts it, and I don't think we ought to try to address that in advance through rule and

especially with this rule that I have a number of problems with.

Now, let me talk just real briefly with the medical malpractice situation. In addition to the surgery situation I talked about, if you read this rule literally, you would have huge problems in administering a hospital and trying to investigate an incident that occurs in a hospital. There are Federal requirements that in order to maintain their accreditation hospitals have to investigate what are known as sentinel events that occur in the hospital, and in order to find out if a nurse or a technician or some employee did something wrong it's imperative for the legal counsel inside the hospital or if they retain outside counsel to conduct an investigation, and the only way they can do that is to talk to the doctors that were involved in those cases, and if litigation has already been instituted, if you read that rule literally they wouldn't be able to do that, they wouldn't be able to fulfill their statutory obligation to investigate the incident.

Second, you do have the situation -- and this comes up not terribly often, but it does happen -- where a plaintiff in a malpractice case is still being treated in that hospital that they're suing at the time. It can happen in a malpractice situation or it can happen -- and

this is a real live situation I was involved in -- with a Jehovah's Witnesses situation where you've got a situation where the doctor says a child needs a blood transfusion. The parents for religious reasons are refusing to consent, so somebody goes to court to either stop it or the hospital goes to court to get the permission to do the blood transfusion. There's a lawsuit going on. If you read this rule that's been drafted literally, the hospital administration would not be able to communicate with the child's doctors to determine what ought to be done, and that's -- nobody wants to see that happen.

So I just think this needs a whole lot more study, a whole lot more thought. I looked back at the transcript of the November 8 meeting last year, which was our last meeting of the year right before we went over to Chip's office for a little holiday celebration or end of the year celebration; and, Chip, the way I read the transcript was that you sent this back to the committee to look at the rule again in light of some of these and some other issues that were brought up by me and by -- I know Harvey Brown had quite a few things, Judge Brister had quite a few things to say about this; and if something has come out of the committee since then, Buddy, I haven't seen it.

MR. LOW: No. We met and again more or less

felt that the rule as proposed by the State Bar was sufficient and should be done by rule. I don't think Scott was at our last -- no, he was, and that's when he sent me the minority, yeah, report. That's right. He sent me his minority report.

MR. MARTIN: Well, there was also in the State Bar committee --

MR. LOW: Harvey also drew a rather lengthy authorization that would purport to comply with HPPA and some forms. We studied some other things and came up with nothing better.

MR. MARTIN: Well, the medical malpractice portion of House Bill 4 contains an authorization form for release of protected healthcare information that it says complies with HPPA. It makes the statement in here -- there's something in here about obtaining information written or verbal from the healthcare provider. I have heard differing opinions from lawyers as to whether that means that this authorization allows verbal contact with the plaintiff's treating physician in the medical malpractice case or not, and I don't really have an opinion on that.

MR. LOW: Is this it?

MR. MARTIN: I don't know. I don't know. It's the one that's in the statute, that's written in the

statute.

MR. LOW: See, we have not met since the Legislature. We met, gosh, back some months ago.

MR. MARTIN: And the House Bill 4 portion that deals with med mal cases requires that the plaintiff sign an authorization in this form. And, again, I'm not prepared to say -- I don't have an opinion as to whether this authorization allows ex parte contact with a treating physician in the terms that they're talking about, which is the lawyer goes out and interviews somebody who treated this person in connection with the healthcare that's involved in the case, but I have real problems with the rule as currently drafted, and I have real problems with even trying to tackle this very difficult and complicated issue by a procedural or evidentiary rule.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: The HPPA, the problem there is a provision in HPPA that says any state law inconsistent herewith is preempted.

MR. MARTIN: If the state law is less restrictive.

MR. YELENOSKY: Is less.

MR. LOW: Yeah. Right. And as I read HPPA, more or less you've got to have a court order, or there are so many provisions it is just difficult to understand,

because it will refer, refer to this section, that section; and my best -- and I even read a summary, and the summary seemed to me that it's intended to protect healthcare information to a great degree without -- and you have to have a court order or consent basically is what the summary kind of says.

CHAIRMAN BABCOCK: Yeah, Stephen.

MR. YELENOSKY: I am less of an expert than John described himself to be, but we do have to deal with HPPA at Advocacy, Inc., because it relates to a lot of what we do in not only -- well, it relates also to our -- particularly in Federal court to access information facilities. You were mentioning investigations and that type of thing, so I do have some familiarity with it, but first I had one question. You mentioned a concern about constraining an investigation of some type. I think you called it sentinel events.

MR. MARTIN: Sentinel events. And that would deal with peer review.

MR. YELENOSKY: And how -- let me just ask you, how would a Rule of Evidence affect that?

MR. MARTIN: Well, if you read the rule that they've drafted, once there's a lawsuit it says the hospital --

MR. YELENOSKY: Oh, okay.

MR. MARTIN: If the hospital is a defendant, that defendant can't have any communication either itself or through its lawyer with another healthcare provider with regard to that patient's care, and that just leads to an impossible result in the investigation situation or in the situation where the patient comes back --

MR. YELENOSKY: Right.

MR. MARTIN: -- to the hospital, even though there is a lawsuit going on.

MR. YELENOSKY: Well, and then I do understand your point there then. I do think that even the regs say -- they have an exception that refers to judicial administrative proceedings which say that by court order, so court order always works, or in the case of subpoena, discovery requests, typical mechanisms used in a lawsuit, those can work if the entity receives one of two types of assurances; and one assurance it can receive is that the party seeking the information has made reasonable efforts to ensure that the individual, who is the subject of -- the individual's records who are the subject of the request in the case of records -- and I would imagine it would apply in ex parte communications -- has gotten notice of this request.

And the other instance is where there's a satisfactory assurance that there will be a qualified

protective order. So it is very complicated, but I wonder if we can just ignore it entirely because we can't have Rules of Evidence or for that matter rules of request for production which purport to allow things which are clearly not going to be allowed under here. The one example I can think of, and I guess I'm getting off the ex parte, but on production requests, if you issue a court order saying you don't have to notify the subject patient that -- which you can't do under the rules. You've got to make sure that order is attached to the subpoena to the doctor, because the doctor has to know that. You know, that's a simple fix there, I think, but I'm just saying that I do think it's a minefield in a way, but I'm not sure we can ignore it completely.

MR. LOW: One of the problems with HPPA, as you know, the Federal Rules of Evidence don't have privileges. There's not a privilege rule and there is --

MR. YELENOSKY: It's supposedly common law, Federal common law.

MR. LOW: Yeah. And so in the -- but they follow the law of like the Federal courts that have held you can't ex parte, like the one Judge Stieger has written, have followed Texas law and then they have their strong policy behind it. The HPPA doesn't have an exception that says if you filed a lawsuit -- there's not an exception

that I saw. Did you see one, John, that said if you file a lawsuit except a doctor -- you know, if you sue a doctor he can --

MR. MARTIN: There are some things in there about no medical malpractice cases. And, as I said before, I believe that under HPPA any lawyer who thought it was okay, which I never did, but any lawyer who thought it was okay to go out and interview a plaintiff's treating doctor, better not do it anymore. I think that's clear under HPPA in a nonmedical malpractice case, but I think in certain situations in medical malpractice cases you need to be able to do it.

MR. LOW: But I point out, though, that there's not the 509 exception, and the only exception I saw was specifically like my doctor gets sued. Or if I sue my doctor then, you know, he can -- there's an exception to him. The problem I have -- and I understand John's concern, and I have some hesitation to get heavily involved in this because we represent the hospitals in Beaumont. So I tried to disregard that. I could easily carve out and say, well, if you sue any healthcare provider then you can just talk to any doctor you want to. I have some problems with that, just saying, well, treating, just because it's a healthcare provider, different than General Motors; but I also understand that some of the healthcare providers and

hospitals have certain duties, maybe even by statute to investigate, to report, and do some things; and I would certainly be telling less than the truth if I told you I'm familiar with those; but I do know there are some there that require certain investigation; and I don't know to what extent they would have to go out to the south end and interview a doctor that treated the client, a patient, three or four years ago.

I mean, I don't know the extent of the investigation; and I'm familiar with that; and so, as I understand it, there is -- there are some people that would like to say, okay, if you give notice, just notice, tell them "I'm going to do it" and give the plaintiff's lawyer a chance to call up, I don't think that would comply with HPPA. I really don't. If I just I called up and I say, "John, you're a plaintiff here, and I'm fixing to go talk to Dr. Smith who treated. I'm telling you right now," I don't think that would comply, but there are some that -- well, there are many different schools of thought on how to deal with this, and basically if we are going to provide a rule, the rule that we came up with just more or less says you can't do it without consent.

We didn't try to -- Harvey even made one that he thought would comply with HPPA. It was real long in a form, and you had to tell the doctor that, you know, it

might be unethical for him to talk to you and all kinds of stuff. But we came up with a short rule, and if there is a rule on it, it was the best we could come up with; and, in fact, it is the same one the State Bar committee came up with here; and I'm not here to preach acceptance of the rule as it stands. That's the best I can do. Perhaps the committee can change it. The committee may not want to have a rule, but the problem with not having a rule is before HPPA came out the courts of appeal had said you could do this.

There was a doctor friend of mine that had gotten -- well, he had treated this lady, and the client wanted me to go talk to the doctor. I didn't think it was right. I felt that the Federal cases -- I lost that client. I mean, if I had had the protection of some rule it would have been different. I'm not griping about losing the client, but I just didn't think it was right, and I wouldn't do it, and so now as it stands there are courts of appeal opinions that say, yes, can you do it, Federal cases that say you can't. Some people are like John and me that even though it allows it we wouldn't go do it as defense lawyers, and without a rule or some clarification it leaves people in a state of unknown.

CHAIRMAN BABCOCK: Paula had her hand up and then Frank.

MS. SWEENEY: The purpose of the rule as it's drafted has -- is, I think, aimed at the same concerns that HPPA is aimed at, which is to protect patient privacy and to protect the fiduciary intimate personal relationship between patient and physician. The issues that John identifies about investigation or about fact witnesses to, you know, who, what, when, how, why, where in the OR are different and are in essence a very small subset of the big picture, and I think for the big picture for the overwhelming majority of cases and of instances of physician-patient relationships within the overwhelming majority of cases the rule and HPPA are hand-in-hand and espouse the same public policy, which is that the opponent of the patient who has a duty to try and advocate vigorously against the patient ought not to be the one giving the doctor advice about what is or isn't privileged under the circumstances. It's an untenable position, and for that reason among others I'm sure many defense lawyers have chosen not to follow that path.

The instances in which there is a statutory waiver such as in a malpractice case tend to be sloppily talked about as though it's an absolute waiver, you can talk to any doctor at any time about anything, and that's not even what those exceptions provide. They provide for a limited waiver to talk with physicians in the areas that

are related. So, for instance, if you have a malpractice case involving knee surgery, that doesn't entitle you to talk to the patient's physician about sexually transmitted diseases they had 10 years ago or about their HIV history or about their psychiatric history, and the Supreme Court cases on the Wilmington case, in fact, goes there and narrows the scope of waiver that is provided under the rules.

So I think the rule complies with HPPA. I think it's important to have the rule for those lawyers who without a rule argue and perhaps even believe that their duty to zealously represent their client means they have to go out and try and pry into the patient's past in meetings with physicians. If they have a rule that says they cannot do it then, as in Buddy's case, they can simply tell their client "I'm not allowed to go pry into the patient's unrelated past to try and dig up dirt. I can't go meet with the doctor without" -- either "I can't do it" or "I can't do it without notice and safeguards and limitations that are very clear"; and I think that is by far the better course for us to take if we're going to write a rule that governs cases across the board.

And that said, I think in John's examples, you know, you cannot write a rule that precludes hospitals from doing investigations; but, John, if they're not doing

their sentinel investigation until after I file a lawsuit, it's not a sentinel investigation. It's just a sneaky way around trying to --

MR. MARTIN: That's not correct. The lawsuits very often are filed while the investigation is still going on. It can take months to complete one of those investigations.

MS. SWEENEY: Do you see skepticism written large across my face?

MR. MARTIN: No. I'm just telling you what the truth is.

MS. SWEENEY: Because a lot of times I see investigations, quote-unquote, that don't start until after there has been a lawsuit on file and then suddenly everything is cloaked in an imaginary period of privilege and investigative privilege even though the triggering sentinel event is my lawsuit, and so --

MR. MEADOWS: Well, I --

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: I just want to make -- I just want to speak not so much as a lawyer on this point but as a -- I'm on the the board of trustees of a hospital in Houston, and I really want to confirm what John just said. I recently have dealt with this type of sentinel investigation while the plaintiff's lawyer was on the TV

making statements about the case, and so it does happen. You may be skeptical because it's not always that pristine, but it's clearly the case that hospitals have got this obligation, and we just need to be mindful of that.

MS. SWEENEY: And I don't disagree that it does happen. I just want to be careful that we don't draft something that says that a hospital can call it a sentinel investigation when it isn't, and that's my only concern, because I think there are times when the lawsuit gets filed early on and the investigation is still ongoing and that's fair, but there is other times when my notice letter of my lawsuit is the triggering event, and that ought not to be fair.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: And see, we did put a provision in there about -- we put joint representation. I don't know why we put that. I'm thinking joint defense maybe is what we meant, but you know, like a doctor and quite often the -- every time the hospitals -- and I don't do this work. Some of my partners do, but there are always a whole bunch of doctors that get sued, too, and I'm sure that under this they can share and get together under the -- maybe it should say "joint defense."

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Before we get into something

with these simple investigations, I mean, let's talk about the simpler case where the plaintiff is injured in a car wreck and the defense attorney wants to have an ex parte conversation with his treating physician. That's kind of where we started, and you drafted -- there's a draft of Rule 509(g). As I understand that, that doesn't require the plaintiff's consent for that conversation to occur. It gives notice to the plaintiff, and if there's a consent provision then show it to me.

MR. LOW: 509(g)?

MR. YELENOSKY: That was in the Brown --

MS. SWEENEY: That's Harvey's.

MR. YELENOSKY: That's Harvey's proposal, not --

MR. LOW: That's the reason I said some people were of the opinion, but that wasn't the committee's or the state --

MR. GILSTRAP: Is there a committee proposal?

MR. YELENOSKY: Yeah. It's on -- it's new Rule 514, right?

MR. LOW: Yeah.

MR. GILSTRAP: Okay.

MR. YELENOSKY: It's in the body of the one that at the top says "State Bar of Texas Administration of Rules of Evidence Committee, October 25th. "

MR. GILSTRAP: I'll find it then. I'm sorry. I just was confused.

MR. YELENOSKY: Chip, can I suggest something?

CHAIRMAN BABCOCK: Yeah, Steve.

MR. YELENOSKY: Because HPPA is so complicated I think before we even go any further about writing a rule, as a practical matter and for those who represent doctors -- or those who represent doctors may be able to answer this question or tell me if this is correct, but it seems to me as a practical matter that because doctors and healthcare providers face significant liability if they violate HPPA, as a practical matter whatever we would say in our rule we would determine and then write in our rule as a compliant with HPPA method of getting information from healthcare providers.

There really only are two things, given the complexity of HPPA, that a healthcare provider or a doctor would be readily comfortable with complying with, and those are the two things in the rule that Buddy proposes, either a release or a court order. Anything else is subject to interpretation up to 30 pages, like in the New Jersey case. So I'm wondering -- and I do want to ask those who represent doctors -- if, in fact, don't we end up with those two options anyway; and the Court is going to have to

express an opinion about what can be done in the case through a court order or you're going to have to have a release.

MR. LOW: Now, the court order is included by definition of court process, subpoena, and stuff like that.

MR. YELENOSKY: No. Subpoenas are not equivalent to court orders.

MR. LOW: Well, they've always been treated like if you get -- the legal process I consider to be like a court order.

MR. YELENOSKY: Yeah, but the HPPA regs specifically distinguish court orders from subpoena, discovery requests, and other lawful process, and there are different requirements.

CHAIRMAN BABCOCK: Tracy Christopher.

HONORABLE TRACY CHRISTOPHER: I've already had this come up once since HPPA, and the plaintiffs attorneys are worried that the HPPA form that now has to be provided to every doctor when you subpoena medical records because it has that phrase in it "or verbal," that that is somehow authorizing the ex parte communication by the person or by the defendant with the physician. So they have wanted to strike out the "or verbal" part of the release, which they were willing to do, but when they gave it to the healthcare provider, the healthcare provider

refused to produce the medical records because there had been a change in the form, the scratching out of the words "or verbal." So that is sort of the current issue that's around with respect to this.

MR. BOYD: Do you mean the House Bill 4 form? What form are you referring to?

HONORABLE TRACY CHRISTOPHER: The one that's in the HPPA that is the same thing as the House Bill 4. It's my understanding they track one another or are identical.

MR. MARTIN: I think that's right.

CHAIRMAN BABCOCK: By the way, I think to add another layer of complexity to this, the attorney general I think has been charged with coming up with a report to determine whether and, if so, to what extent, HPPA preempts Texas state law including rules like the proposed new Rule 514 or 509(g), whatever we might do, and Jeff I know is on that task committee to -- task force, so you might tell us a little bit about what you're doing.

MR. BOYD: I don't remember the bill, but the Legislature this past session passed a bill that charged the attorney general with the responsibility of presenting back to the Legislature next September 1 a report, a preemption analysis of Texas state law, which state law is defined under HPPA to include common law and rules and

regulatory provisions as well as statutes, basically laying out those state laws that the attorney general finds to be preempted by HPPA and then recommendations as to revisions to state law in order to ensure that there are no currently enacted preempted state laws.

So, again, preemption is a floor, not a ceiling, and state law can provide more protection, more privacy protection, than HPPA does but cannot provide for less. So the attorney general and I think even the bill recommended or permitted, expressly permitted, the attorney general to put together a task force for assisting. Edna Butts, the special assistant over healthcare issues, is the head of that task force; and it's made up of 30 or 40 attorneys from big firms, small firms, academia. I don't think there are judges on it. Several from state agencies, universities, and healthcare, Health and Human Services and Department of Health and so on.

We met for the first time, it must have been I think early September, and we're all in that process in subcommittees of looking at different areas of state law trying to identify what is and is not preempted in the first instance, and that's really where we are in that process now. I'm on the subcommittee that -- whose responsibilities include reviewing the Rules of Civil Procedure, Appellate, and Evidence; and so this is an area

that we'll be looking at. I guess if the committee wants us to -- this committee wants us to consider a proposed rule we can throw that into the mix.

CHAIRMAN BABCOCK: Let me just ask Justice Hecht or Chris or both, obviously we're not going to finish this today, and we'll have to take it up again in January, but what does the Court want and what could we do that would be most useful to the Court, a proposed new rule or an analysis of HPPA or try to meld all these different interests, some represented by John and some by the minority members of the committee and then the State Bar committee? What would be most helpful to the Court is I guess what I'm asking?

JUSTICE HECHT: Well, I'm not sure I know exactly, but I think that people would say that we would be very reluctant to do anything without knowing more about how the HPPA is going to affect this and the problems that John raises, the problems that Paula raises, but I see the difficulty here; and I think maybe if there were some prophylactic short-term solution, the Court might consider that; but I imagine that for a Rule of Evidence it would want to know that this was pretty well going to cover the area; and so I don't know if we're at that -- I don't know if this draft is at that position or not.

MR. LOW: No.

JUSTICE HECHT: I'm certainly interested in what Jeff's committee is going to turn up because there is just no telling how this -- what these issues are and how they are going to be resolved.

MR. BOYD: If I can just throw in on that, Judge, that unless the -- I mean, we will look at all the currently existing rules and statutes and make some decision or recommendation to the attorney general as to whether it's preempted, but right now there is not a rule or a statute. I guess there are certainly Federal cases or aren't there a couple of state court of appeals cases that talk about this issue? In other words, there's not really anything on the table on this issue for us to look at right now.

MR. LOW: None of the opinions that I've seen in Texas have discussed HPPA.

MR. BOYD: Okay.

MR. LOW: Have you?

MR. MARTIN: No.

MR. YELENOSKY: But there's no rule.

MR. LOW: No. Now, one of the things that possibly could be done, and this wasn't even discussed in the subcommittee, is that there is some uncertainty, and Justice Hecht mentioned they might would consider some patch-up. We could have some rule that says "A waiver of

the privilege to the extent" or something that there are certain Federal or privacy laws, state privacy laws, that it's waived only to the extent allowed by those laws and not attempt to name, you know, every one, and then that leaves everybody at their own peril. But it does point out to them that if you go do this you could have some problems.

Now, one of the things I did not understand and I have always interpreted and I would have some trouble with the rule is where it says "court order." If it doesn't mean -- I've never interpreted that to mean that I've got to go and get an order of the court before I can take a deposition. I just give deposition notice, and I would tend to do away with that. I think once it's waived then I can use the legal process, and does court order not include --

MR. YELENOSKY: Well, under -- I mean, I'm looking at the HPPA regs here, and it does distinguish court order from regular discovery, and if it's regular discovery and it has to meet one of two assurances, which may be implicit if you're talking about a deposition of an opposing party but wouldn't be implicit if you're subpoenaing records from a nonparty doctor or a doctor about a nonparty.

MR. LOW: But the patient would give notice,

and you mean --

MR. YELENOSKY: I'm just saying they are different.

CHAIRMAN BABCOCK: Okay. Well --

MR. GILSTRAP: Chip? Chip? One question.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: I mean, aren't the cases that have been decided under -- dealing with this so far, don't they come under 509(e)(4)? I mean, isn't that the provision they have been interpreting, the one that says there's an exception as to communication or record relevant to an issue of physical, mental, or emotional condition in any proceeding which the party relies upon the condition as part of the party's claim or defense"? And I think that's where those cases came from.

And also, you know, (e)(1) has to do with the suit brought against the physician there's a waiver. So it seems to me Jeff's committee might scrutinize those and tell us a great deal about the scope of HPPA and its preemption.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: We may not have -- I mean, what I'm hearing is, well, let's pass a rule, give it to Jeff's committee, and let them shoot at it; and that may not be a real productive use of our time here because it's

going to be real hard to pass a rule.

CHAIRMAN BABCOCK: Yeah, I agree. Let's -- Buddy, let's you and I and Justice Hecht put our heads together afterwards, not necessarily today, but --

MR. LOW: That will be fine.

CHAIRMAN BABCOCK: -- between now and January and see where we're going to go with this. We've got just five minutes left, and, Richard, can you give us five minutes on 76a and what's the issue and what we need to be thinking about?

MR. ORSINGER: I'm going to call on Chris Griesel to describe the work that he did, but this was prompted session before last by a proposed bill by Senator Bosse that would, among other things, make it a criminal event for a corporate officer to hide information about a product that was dangerous to the health of citizens of Texas, and that bill didn't pass, and it seems to me even less likely that it would pass with the current makeup of the Legislature, but we did undertake to try to see whether Rule 76a is being used or whether the pretrial Rule 166b is being used to secrete information that might reflect on the health of people, and examples would be reports that in the early days of Firestone tire litigation that there were settlements that sealed the threat of the blowout and that perhaps lives were lost.

Other comments that in the early days of the lawsuits against Catholic priests or sexual abuse that early settlements were hidden which might have resulted in the perpetuation of this harm, and so the concern is whether 76a is forcing this kind of information to be public so that everyone can be alerted to it. Is it over or under inclusive, but probably even more so are people using confidentiality orders to get around the 76a procedure and hiding stuff that we don't want them to hide under 76a?

And I asked Chris if he would do an investigation of the 76a appeals to the Supreme Court and get information about what was happening at the trial court levels around the state and then also kind of do a survey of what other courts in other areas of the country both Federal and state are doing about confidentiality, particularly confidentiality of settlement agreements, and so I would ask that we take these few minutes and have Chris kind of relate this broad investigation.

MR. GRIESEL: All right. I'll talk quickly. We were asked in the period between last legislative session by three different legislative offices, the Lieutenant Governor, the Governor, and Representative Bosse, to investigate certain issues; and this is along with 202 and the offer of judgment issue, within those

requests. Specifically, Representative Bosse, who was at that time chair of the Civil Practices Committee, had asked -- had proposed bills relating to specifically products liability cases and a question about imposing tort liability on people who sealed records that could potentially be harmful to the public.

That bill was left in committee, but the interim committee that he was charged with undertook an investigation of examining the practices of courts and attorneys in products liability cases that may be detrimental to public health and safety, the review should include sealing of records that might assist the public in assessing dangers of using products, agreements not to disclose information, and so on. They held hearings throughout the state, and various groups appeared before them, and there were a number of nonspecific complaints, "Please don't hide things using the courts that might hurt you"; generalized complaints that 76a worked well on paper but did not work well in real life; concerns that 76a and 166b(5) allowed documents that wouldn't be protected under 76a to be protected under 166; and there were various suggestions for codifications of that.

The representative at the end of that time suggested that the Court should consider and asked us to take a look at adopting or amending rules governing

practices and procedures regarding the sealing of records to prevent courts in this state from being used in a manner that constitutes a danger to public health and safety.

Justice Hecht assigned this to the committee in May of 2002. At that time we looked at -- and there is in addition to this concern a concern in several states and by several different advocacy organizations about secrecy agreements in general. South Carolina's Federal courts and state courts in the last several months have adopted standards on sealing of settlements and, actually, the nonsealing of settlements, which is the standard; and I have copies of the South Carolina rules for that.

There also is a -- when the South Carolina Federal courts said that "We will no longer seal settlements," there was an equalizing issue in that the South Carolina Federal courts adopted standards that would now set out uniform confidentiality agreements that the parties could agree to. So kind of the scales adjusted when there was an outcry to re-adjust the scales, and that's what South Carolina has done.

Regarding 76a, it's interesting that in 12 years of practice we have 17 bound folders of 76a filings. We get approximately two a week, about a hundred a year. In looking at the pleadings, it's real easy to tell the trade secret cases because that's, you know, esoterically

named computer company versus esoterically named computer company, but that doesn't make up I think even a majority of the cases that we see.

I think it would be fair to say that we see a number of interesting uses. For instance, we have someone who routinely seals records of probate proceedings in Fort Worth. We just see them once every three months. We know that his practice is ongoing and he's doing a good job because we get these 76a filings. We presume to mask the inventory and not make that publicly available.

There is, I would note, in 76a a requirement that you are supposed to briefly describe the specific nature of the case and the records which are sought to be sealed. That isn't necessarily contained within all of the records of 76a filings. So there is the issue of 76a, and then the second is the issue of the interrelation between 76a and 166b(5) and whether what you can't do with 76a you're doing with 166b(5).

MR. ORSINGER: And I might say that probably that the sealing of court records is not where 166b is as active as it is in the unfiled discovery. In my personal experience, which is not as broad as many, it's the unfiled discovery and not so much the terms of the settlement or the judgment that's entered that anyone's trying to seal; and as a result of that it's not on the public record for

even the newspapers to notice that a significant amount of important information has been secreted or returned to the defendant or the plaintiff or whoever because they're not trying to seal up a file. They're trying to just keep data out of the public domain, but I suspect -- and I don't know how we would ever do this systematically unless our trial judges here could tell us, but I suspect that there is lots and lots of unfiled discovery that's being protected or returned under the confidentiality orders that don't ever hit the 76a procedures.

CHAIRMAN BABCOCK: Well, I think you've hit the nail on the head. Where the problem is is that court records are defined as a number of things, some of which we would typically think are court records, pleadings, orders, of the court, and that type of thing, but also in subparagraph (2)(c) of the rule, "discovery not filed of record," if it has a proper way of respect on the public -- general public health and safety or other things, and so you have in many cases that arguably fall into those categories masses and masses of documentation that are -- much of which is legitimately protectable. Financial information of companies, trade secrets and trade secret litigation, confidential business information in commercial cases; and the issue is whether or not you've got to go through a full blown 76a hearing every time you want to

designate a document as confidential, which has the effect of sealing it, quote-unquote; and that, I think there's been sort of an uneasy alliance among parties under 76a where they will use the 166b procedures subject to a third party coming in and saying, "Huh-uh, you can't do that, and we need to have a 76a hearing."

Now, as Richard points out, that's fine except that nobody knows that that's going on, and that's the problem.

MR. ORSINGER: And one fix for that would be for us to adopt a provision that says that if you enter into a confidentiality agreement relating to unfiled discovery and agree to keep it confidential or return it then you have to file some kind of statement with the district clerk saying that's what you're doing because at least then there will be notice that it's happening. Right now I think it may be just happening under the table and we don't recognize it.

CHAIRMAN BABCOCK: It's not really happening under the table because there's always an order from the court, a protective order, which is in the public record. But it's not -- you know, those are generic protective orders often. So it's not very clear that the records that are being protected under the protective order would otherwise fall under 76a because they have a potential

adverse effect on public safety or operation of government or whatever.

MR. LOW: Quite often there will be just boxes, and the defendant wants to produce timely, so there will just be an agreement if you mark it confidential you can look at it and read it but you can't file it and do all that, and generally often they mark things that aren't confidential and then you get into an argument on that and then after that get into some motion to make them required to seal it, or -- but also you get into situations where there will be a confidentiality -- we had an electrical gear that involved safety and so forth, and they had some papers in New Jersey, and they had a confidentiality agreement, and so we can't use -- we can't even give them to our expert because they say if they do that they are going to be violating in New Jersey, and the New Jersey judge is not interested in -- he doesn't care about 76a, and so we go to our judge, and he says he doesn't care about New Jersey.

So you can find yourself in some odd situations where people are using confidentiality agreements rather than, you know, a rule comparable to 76a, even in other states.

CHAIRMAN BABCOCK: Yeah. Judge Benton.

HONORABLE LEVI BENTON: What we see in Harris

County is people submitting these agreed confidentiality orders and then buried on page 12 will be "If you file something with the court it has to be under seal," and they attempt to get that done, signed without expressly stating that you've got to comply with the temporary sealing provisions of 76a, and I think generally speaking, a person in Harris County will strike that language and talk to them about why we struck it, but sometimes they just don't see it.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: That was going to be my point. I mean, there is a problem between the confidentiality and the sealing of the records in connection with when they're replying to a summary judgment or making a summary judgment or something and they want to attach as exhibits some of these confidential documents.

CHAIRMAN BABCOCK: Right. And that raises different issues than the unfiled discovery. Justice Hecht.

JUSTICE HECHT: Well, when the Court adopted 76a some of us said, "It's impossible to comply with this rule in every case"; and others said, "That's fine. If people don't comply with it then you can come along later and say, 'Well, you didn't comply with 76a, therefore we get the materials,'" but Chip is right. I mean Chris is

right. We -- you know, we dispose of something like half a million civil -- major civil cases a year in Texas, and we get a hundred reported confidentiality orders. Now, it's a strange tenuity to think that there are only a hundred -- there's only four orders -- an order in 20 percent of the counties every year, one per those counties that makes things -- that seals records under 76a. But so I think in respect to -- in that respect Representative Bosse has a point, that this is not being complied with and maybe it can't be.

CHAIRMAN BABCOCK: Okay. Well, we'll talk about it in January. Thanks so much for a great meeting, as always.

(Meeting adjourned at 12:09 p.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 25th day of October, 2003, Morning Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,006.00.

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 11th day of November, 2003.

ANNA RENKEN & ASSOCIATES
610 West Lynn
Austin, Texas 78703
(512)323-0626

D'Lois L. Jones

D'LOIS L. JONES, CSR
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