* * * * * * * * * * * * * * * * *

HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 15, 1996

(MORNING SESSION)

* * * * * * * * * * * * * * * * *

Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 15th day of March, A.D. 1996, between the hours 8:45 o'clock a.m. and 12:05 o'clock p.m., at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

MARCH 15, 1996

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
Joseph Latting
Gilbert I. Low
Russell H. McMains
Anne McNamara
Richard R. Orsinger
Honorable David Peeples
Anthony J. Sadberry
Luther H. Soules III
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
David J. Beck
Ann T. Cochran
Michael Gallager
Charles F. Herring
Tommy Jacks
Franklin Jones, Jr.
David Keltner
Thomas Leatherbury
John Marks
Hon. F. Scott McCown
David L. Perry
Stephen Susman
Paula Sweeney

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
Hon William Cornelius
O.C. Hamilton
David B. Jackson
Hon. Paul Heath Till
Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

W. Kenneth Law
Paul N. Gold
Doris Lange
Michael Prince

ALSO PRESENT:

Joe Crawford, Committee on Administration of Rules of Evidence

MARCH 15, 1996
MORNING SESSION

INDEX

INDEX OF VOTES

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

CHAIRMAN SOULES: Let's come to order. We're going to begin this morning, it's 8:45, so let's begin. We're going to begin this morning with a report from Buddy Low on the Evidence Subcommittee.

I want to welcome Joe Crawford. Mike Prince could not be here, but asked Joe Crawford to come as a representative of the State Bar Rules of Evidence Committee to assist with this report and give us -- I think that they are, that the State Bar Rules of Evidence Committee is actively working on a few of these rules, and Mike has assured me that I think on May the 11th, which is the Saturday before we meet in May, that they are going to vote, whether or not they have a quorum, they're going to vote up or down on the rules that they are working on. So we're not going to be delayed probably at all by letting them finish their work, because we would typically have a rewrite of it before it goes to the Court. Even if there is some delay, it's only going to be one meeting.

I believe that we will want to accommodate the State Bar Rules of Evidence

Committee given that they are real close to making their decisions, and they've had several subcommittee meetings on this.

Joe, do you want to kind of tell us where you are with that, so that our Committee will know.

MR. CRAWFORD: Thank you, Luke. I appreciate the privilege to be here today. This is one of those things, when you practice law in Austin, you get to go to meetings like this on the spur of the moment on many occasions. Mike Prince told me that I would be here at 4:00 o'clock yesterday.

Our committee -- I was chairman of that committee last year. Mike Prince is chairman of it this year. There are five rules that as of this time have already been some time ago assigned to subcommittees of our Rules of Evidence Committee for study. Those five rules are 407(a), 412, 503(a)(2), 514, and 702. So we're not talking about all of the rules here apparently that you folks have under consideration, but those five. Those are assigned to subcommittees. Subcommittee reports are due and supposed to be voted on by

the committee as a whole, as you say, at that meeting in May.

And what we would ask you to please consider is, since these are matters already being worked on, let us give you what our report is, and then you go about your business as you see fit. Thank you.

CHAIRMAN SOULES: And we would be able to have that by the meeting? I think our meeting is on May 18th.

MR. CRAWFORD: Mike has assured me that that will take place.

CHAIRMAN SOULES: Okay.

MR. LOW: Luke, that would work well with the agenda that we have today, and I might add that the State Bar Committee has done a lot of work on this, and they have a lot of knowledgeable people on their committee, and they have given us a package of things to consider, and we did not consider that earlier because we were considering isolated rules as submitted directly to this Committee.

And there was some question as to whether or not, and I'll address that later, there

would be an effective or could be an effective merger of the Civil Rules of Evidence and the Criminal Rules of Evidence, which I think they have done some work on that in the package of things that your committee has done. We will not address that today.

I did have a meeting of my committee scheduled, but John Marks, who has voiced a different opinion than some of us, could not be there for the meeting. He was scheduled to argue before the Supreme Court, so we have not done that, but we are scheduled to consider all of the things you all have given us.

So today, as we approach one of the rules that your committee is still considering, if you will, you know, make it known, you've already told us what those are, but as they come up, then we'll know that we shouldn't try to reach any final conclusions.

So what we have today are basically things that have been submitted in isolation to this Committee where somebody writes in and says, "We ought to study this rule."

The first one is Civil Rule 606, Criminal Rule 606. There -- and it has to deal with

juror -- impeaching their verdict or testifying. The civil rule and the criminal rule as they now exist, as you will see from the report, are a little bit different. I think that the criminal rule is ambiguous; the civil rule might be a little better written.

What we did, what this committee, my committee recommended was adopting the federal rule, making some changes. As you'll note, you have the little guideline here making those changes and clarifying the rules.

Now, the only thing we propose to add to, and this is something we may not want to do, nobody has any vested interest in it, that a juror may not testify in a case in which he is sitting or has sat. In other words, it might be a remote situation in one small county where somebody was on the jury and there's a mistrial and now he's on the jury -- I mean, now he's a witness. I just don't think that you ought to be -- have ever been on the jury and then be a witness in that case. That's just our thinking, though.

We had some grammatical changes changing "he" to "juror" and things of that nature.

Now, we can go over the specifics. I've outlined what recommended changes are to be made. I've got a clean copy of the rule as written and underlined the changes.

And the first part, let's take 606 in the Rules of Criminal Evidence. They're going to be the same, civil and the criminal, but you'll see the changes.

The first change is to change "the juror," change "he" to "the juror." I don't think we should have too much controversy over that.

The next change is "in which he is sitting or has sat." No big deal. Probably it never would happen. There was just some feeling that if a person had sat on the jury that he just shouldn't be a witness. I don't know how he could come about being a witness. But does anybody have any feeling one way or the other about that? Richard.

MR. ORSINGER: Buddy, this doesn't have anything to do with proving outside influence, does it?

MR. LOW: No. That's in section (b).

MR. ORSINGER: Okay.

MR. LOW: All right. I take it there's no voice of disapproval. Does everybody approve of that? Or we can discuss it further. That was our thinking, and it would be some change from the federal rule.

Okay. Let's go down to the --

CHAIRMAN SOULES: Could I just ask why -- I mean, if the case has been mistried, and then one of the members of the jury in the case that was mistried somehow becomes a material witness, this would preclude that person from testifying at the retrial. Why is that?

MR. LOW: Well, the reason being, and that might --

CHAIRMAN SOULES: Why have such a rule, I guess?

MR. LOW: Okay. All right. The reason being, let's say I sat on a jury, all right, and I'm on the jury and I hear this case, and they declare a mistrial because of something. Okay. Then the next time I appear as a witness. I mean, if the juror -- you know, somebody knows that I'm a witness. I'm

not testifying what happened in the jury room, you understand, but they know -- but the present jury knows that I was on that jury and sat a long time and now I'm a witness. I just don't think that I should be allowed to testify. I'm assuming, and we can strike that part, but it's probably not a big deal and will never come up.

HON. PAUL HEATH TILL: Excuse me.

CHAIRMAN SOULES: Judge Till.

HON. PAUL HEATH TILL: What if the reason for the mistrial was that that particular juror didn't know that they had information or facts at the time and it came out during the trial and that was the reason? And so then when the trial was over, that would be an important witness. Why would you need a rule to prevent that?

MR. LOW: You might not. Maybe it creates more harm than good, because it might never even happen. That's a good thought. If that person were a material witness, I guess you shouldn't -- and the judge could probably handle it by not allowing

any testimony, or a motion in limine would handle the fact that he had been on the jury.

The only thing -- we just didn't think it looked good to have somebody that had been on the jury in that case, and now they're a witness that might be given more credibility, but then there's the harm, so we could strike that.

CHAIRMAN SOULES: Okay. Go ahead with your report, and then we'll have a general discussion.

MR. LOW: That's fine with my committee. Why don't we take that part out, take out the words "on which he has sat on," or end with "the juror is sitting" and take out "or has sat." Is that all right with everybody? Okay.

Okay. Let's go to impeaching the verdict. Now, this basically is a federal rule, the one we are requesting here, with one exception. We added a sentence, and we can hit this last or hit this now, "A juror may be called to testify concerning the question of whether or not the juror was qualified to serve." I mean, you can prohibit him from

testifying, but what if he didn't live in that county? You've got to prove by him that he didn't live in that county. Maybe you could prove it by some other means.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Yeah. The other -- the problem would otherwise be that if you did prove it by an affidavit that said he didn't live in the county and he's incompetent to testify that he did live in the county, you don't have any way to defend your verdict.

MR. LOW: Yeah.

MR. McMAINS: Which is problematic, I mean.

MR. LOW: I understand. But there could be -- the way it was drawn, there was some feeling that it may prevent a juror -- because we were pretty adamant about not letting a juror testify in impeaching the verdict, and it may prevent him from not impeaching the verdict, but that he's just not qualified to serve.

CHAIRMAN SOULES: Rusty is agreeing with you.

MR. LOW: No, I understand. I'm glad to have some agreement. That's the reason I'm talking to him.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I think that's a good sentence too. And frankly, it has always seemed to me that this beginning part precluding the juror from testifying relates to the deliberations and not to the entire proceeding such as voir dire examination, but that's not all that clear. When you read this thing, you kind of get confused about what it permits and what it prohibits.

MR. LOW: That was our thinking, that it's drawn to keep people -- traditionally to keep a juror from testifying about what went on in the jury room, but it's not drawn that way. It may be -- see, like the Code of Criminal Evidence provides, you know, that you can't testify but, let's see, where is the language, matters relevant to the validity of the verdict, you know, that's vague, the validity of the verdict. If they

considered the wrong thing, I mean, that's to say you can't testify, but then you can, and it's pretty ambiguous.

The Civil Rule of Evidence is not as ambiguous. Okay. The first change we faced is one in section (b), which is the effect of anything upon -- we put "his" -- we take out "his," I'm sorry, and put "that or any other juror's mind or emotion." In other words, we take out the "he" and the "his." And again, we take out "his" and add "the juror's mental processes."

Then we take out the language "as to any matter relevant to the validity of the verdict or indictment," because that's ambiguous, and say on a question, "whether extraneous or prejudicial information is improperly brought to the juror's attention," and that kind of language. Basically that's the change, other than the bottom part. Judge Guittard.

HON. C. A. GUITTARD: Of course, Rule 327 with respect to new trials has -- speaks on this same subject, and there's a proposal with respect to a revision of that rule, and my inquiry is whether they

all ought to say the same thing and whether the committee has considered that?

MR. LOW: No. We tried to address it. It came to our attention that the Rule of Criminal Evidence was ambiguous to say that you can't testify except as to matters relevant to the verdict.

HON. C. A. GUITTARD: But then I take it that it's still open, that we should look at these rules together and make sure they say the same thing?

MR. LOW: Right. I'm not aware of what has been done on Rule 327. I have no -- we did not make a study of that. I don't know. We tried to fix this rule and that only. So if you want, we can find out who is working on Rule 327. Is someone here that -- is some committee studying that? I don't know.

CHAIRMAN SOULES: That would be under Don's --

MR. LOW: All right.

CHAIRMAN SOULES: -- authority.

MR. LOW: Have you all finished that or --

MR. HUNT: Yes, we have. And in fact, in the first draft of the amendment of Rule 327 we proposed the adoption of the federal rule, and I gave a copy of that to Michael Prince. And there was no real reason for our changing 327 until the Evidence Committee had addressed this. So as far as I'm personally concerned, I would be delighted to go to the federal rule, but --

MR. LOW: That's what we've done. This copies, as you can see, and I gave you the attachment, this copies the federal rule with the exception that we added the last sentence that Rusty and Bill and I were discussing. So I'm assuming that then this would be consistent with your committee's recommendation of the federal rule, because the federal rule itself would be -- this is what we would follow.

CHAIRMAN SOULES: I think right now 606(b) and 327 are the same.

MR. HUNT: That's correct.

CHAIRMAN SOULES: We did that, or I think this Committee made that consistent back when the Rules of Evidence were adopted

or shortly thereafter.

There is a change here, though, because in both the current Rule of Evidence and the current 327, a juror is permitted to testify whether any outside influence was improperly brought to bear upon any juror.

MR. LOW: That's the civil?

CHAIRMAN SOULES: It is in the civil, yes. I don't know whether it's --

MR. LOW: Right. And what I'm telling you is I'm addressing the criminal now --

CHAIRMAN SOULES: Oh, okay.

MR. LOW: -- because they are not the same. And we decided to go with the federal rule with this change at the bottom.

Now, the civil rule says you can't testify as to outside influence, but if adopted, what this committee recommends is we would have the federal rule for both the civil and the criminal 606, with the addition of one sentence at the end.

CHAIRMAN SOULES: Okay. Any opposition to that, changing 606(b) to track the federal rule, I guess, 606?

MR. LOW: Right.

CHAIRMAN SOULES: And add a sentence. Bill Dorsaneo.

PROFESSOR DORSANEO: I'm not sure about criminal practice altogether, but in terms of going to the federal standard for impeaching verdicts in civil cases, I have some question as to whether that's a good idea, because I'm not sure what the federal standard means.

I'm not sure whether it would allow a verdict to be impeached by a juror's testimony on a new trial on the basis that there was a discussion of attorneys' fees or insurance or something like that like in the old days. I think when our current rule was adopted, we didn't embrace the federal rule because we didn't like the practice that was recommended at the CLE programs, and it was commonplace where the verdict loser would go and talk to the jurors and try to impeach the verdict as a routine matter.

Now, if you can assure me that the federal standard would not return us to the bad old days, I might be prepared to vote for

it. But I'm not sure what it means, so I'm disinclined to want to vote for it until I hear more.

MR. LOW: Okay. The rule as now written -- I mean, this is not a big change at all from Rule 606 of our Civil Rules of Evidence. The federal and the state kind of run hand in hand that you can't just impeach a verdict by "So and so said this and that." Rusty.

MR. McMAINS: Yeah. But isn't in this draft, the underlined part, that's new language, right?

MR. LOW: Right.

MR. McMAINS: Okay. And the new language that I think Bill is talking about is the part where it says on a question -- where we've added, it says, whether extraneous prejudicial information was improperly brought to the jury's attention. Now, the outside influences we know about, but the notion of extraneous --

MR. LOW: Yeah.

MR. McMAINS: -- prejudicial information, now, extraneous to what? Does

that mean evidence that was -- that the jury was told to ignore; that is, they were told to disregard certain evidence? When you talk about "extraneous," do you mean outside the record that they are supposed to consider?

MR. LOW: That was my interpretation. But it could be --

MR. McMAINS: Well, no, but I'm just saying, if that's true, then that means that you can inquire of the jurors as to whether they considered it, you know, whether they considered things they were told not to consider; that you can make those specific inquiries; that you could consider evidence that had been excluded or stricken; that you could get them to testify that they did consider that. I mean, that is extraneous information, and if they do it in violation of the court's intructions, I would have no difficulty arguing it was improperly brought to their attention, even though it was the jurors themselves who did it. That's no outside influence.

I mean, our -- to me, this is a big change from the limitation of outside

influence.

MR. LOW: Well, we can strike that portion out and make it "outside influence." I mean, for instance, I'm assuming if somebody brought a newspaper article or something into the jury room, that would be, I guess, an outside influence, or brought in a calculator or something.

MR. McMAINS: I don't think so.

PROFESSOR DORSANEO: That's unclear. The problem that I have is I don't know whether this federal language means that if a juror, a member of the jury brings in extraneous prejudicial information, and I think that happens a lot, that the verdict would be subject to being impeached.

Does the federal practice allow verdicts to be impeached on the basis of something that a juror brought to the other jurors' attention that he or she shouldn't? I don't think it does, but I'm troubled by this language which seems at least to be unclear on the question of extraneous prejudicial information and the source of that information which gets you into difficulty.

CHAIRMAN SOULES: Steve Yelenosky, and then I'll get to Richard.

MR. YELENOSKY: I don't know the answer to the question, but I'm reading for the first time the notes of the Advisory Committee that are in here for the federal rule, and it seems to address it. I'm not sure whether -- have you looked at that, what's attached in here, what happened to the case law in the federal rule that's attached in --

PROFESSOR DORSANEO: No. My impression is that the federal judge handles these problems in an authoritarian manner, and that it is not a problem for that reason.

HON. DAVID PEEPLES: I thought you couldn't even talk to a jury after a federal trial.

CHAIRMAN SOULES: It depends on the judge, I have since learned.

Richard Orsinger.

MR. ORSINGER: This "extraneous information" seems clearly to me to mean that you could impeach a verdict by asking jurors if someone on the jury introduced evidence,

like drove by the scene of the accident or talked to someone who talked to someone and reported this information, or overheard a conversation in the hallway outside the courtroom and repeated that during deliberations. Now, maybe I'm wrong. Maybe the feds have interpreted these rules or this language that that's not included. But to me, that's the principal thing that this includes, because if you look at the Texas cases all the way back, the idea of a juror being a witness during deliberations and introducing evidence that the court didn't know about was one of principal ways that you did impeach a verdict in the old days, and that led to this third-degree questioning of you box witnesses or jurors into the corner and pump them and pump them and push them until somebody signed an affidavit saying that "Juror so and so said such and such," and then you have your motion for new trial hearing and subpoena everybody and you have this zoo where everybody is forced to try to defend their vote. And I thought that was reason why we eliminated that.

And to put this language in there, I go further than Rusty and Bill. I think it clearly means that you could do that.

MR. LOW: Okay. Let me say this: It might be clear to ordinary people, but it's not clear to the lawyers that practice in federal court, but it's pretty clear in federal court. And again, it's very, very difficult to impeach a verdict in federal court. They won't even let you -- none of the judges I know of, and we've got democrats, republicans, and some that have been there so long they don't know what they are, but none of them will allow you to do anything to impeach a verdict about what went on in a jury room, so you could very well be right. This language could mean exactly that. Our thinking was that it's very, very difficult. Federal judges just don't allow it. We are not for impeaching verdicts, so we can strike that. That's no problem. If that presents a problem, we will strike that and leave it merely "outside influence." That's okay.

CHAIRMAN SOULES: Let me ask a question. Does anyone feel that we should

have in Rule 606 this language, "extraneous prejudicial information which was improperly brought to the jury's attention"? Does anyone feel that that should be included?

There's no support for that, so just delete that.

MR. LOW: Okay. So it will read "on the question of whether any outside influence," so we just strike that portion.

MR. ORSINGER: Luke, if I could, just for the record, apparently the comments by the federal committee explicitly says that it is permitted to impeach a jury verdict based on a juror relating evidence during deliberations.

MR. McMAINS: Including newspaper articles. That is extraneous prejudicial information. That is what the federal rule says does in fact constitute something that you can --

CHAIRMAN SOULES: Okay. Let's move on. We've got that resolved.

MR. LOW: Let's strike that portion then. Is that okay, just to leave it "outside influence"? Okay. Let me make a

note.

CHAIRMAN SOULES: And then the last --

MR. HUNT: Luke.

CHAIRMAN SOULES: All the other changes in 606(b) are connected to the gender neutral, except for the addition of the last sentence?

MR. LOW: Right.

CHAIRMAN SOULES: And there's no -- I'm assuming there's no objection to making the rule gender neutral. Don Hunt?

MR. HUNT: No, not that issue.

CHAIRMAN SOULES: Okay. Then on to the last sentence. Comments on the last sentence. Don Hunt.

MR. HUNT: Let me call to the Committee's attention that this Committee has already previously voted to rewrite 327, and it has been rewritten. It takes care of the gender neutral, but it also cleans up some language. It is shorter. It is a little clearer, and whatever we do on the Rule of Evidence, we ought to do the same as in the Rules of Procedure, and what we have already

adopted, except for this very last sentence about whether the juror was qualified to testify, has already been rewritten and approved once by this Committee. Maybe that would be the better language to go with, and then we could deal with this last sentence.

MR. LOW: I have no problem with that. The only thing I don't -- if you adopted the federal rule --

MR. HUNT: No, we rejected it before.

MR. LOW: Oh, okay.

MR. HUNT: There was no --

MR. LOW: Then I have no objection. Is yours limited -- I think this Committee is just wanting to limit it to outside influence. Is that the way yours is?

MR. HUNT: It's what this Committee has already done.

MR. LOW: Then I have no problem with the language, because as long as we get to where we're supposed to go, I'd like to get there, so I would go with Rule 327.

CHAIRMAN SOULES: Well, 327 is -- I've forgotten what the new one is, but

you and Don -- it's on page -- okay. Will you and Don at some break compare your respective drafts, or we may get to that later on anyway, and see it -- just pick which one you think would be the correct rule.

MR. ORSINGER: We've already adopted Don's rule, and the question is do we want the Rules of Evidence to match the already adopted Civil Rule.

CHAIRMAN SOULES: Right. And we're --

MR. HUNT: Well, the difference is --

CHAIRMAN SOULES: That's not the question. They're going to be consistent. And so our adopting of the changes to 327 is now to some extent under review because it will be consistent. We ought to pick which one we think is the best and then make them both the same.

MR. HUNT: Well, the only question, I think, other than just pure preference of language, is this last sentence.

CHAIRMAN SOULES: Yeah.

MR. HUNT: And if we could

address that, that would solve the difference, I think.

CHAIRMAN SOULES: Of course, some of this is based on the premise that we will reach a point where the Supreme Court and the Court of Criminal Appeals concur that the rules be the same, because it's really not our prerogative to change the Rules of Criminal Evidence. We are simply harmonizing those rules for purposes of the future project, if that goes forward. We're not really passing on 606 in the Rules of Criminal Evidence other than to make some suggestions maybe at some future time, so what we're really voting on today is 606 of the Rules of Civil Evidence.

And let's go to the last sentence, Buddy, and what's your position on that?

MR. LOW: Well, I just think that a juror should be able to be called as to whether or not he was qualified to serve. The rules basically were to prevent somebody from testifying about his verdict, and it's not clear now that somebody can even testify, as Rusty said, you know, that he did or didn't live in the county and was not a qualified

juror.

CHAIRMAN SOULES: Any discussion on this? Okay. Is anyone opposed to adding the last sentence? There being no opposition, that would be -- that's unanimous that it be added, so the Rule 606, Civil Rule 606 will be changed to be gender neutral and add the last sentence, and those will be the only changes, and that will get us there.

MR. LOW: And Don, at a recess would you show me your rules?

MR. HUNT: Sure.

MR. LOW: Because I learned long ago that I have no pride in language as long as I get to where I want to go.

CHAIRMAN SOULES: Okay. Next.

MR. LOW: Next would be 204, and let me focus here. Okay. All right. This is really a question of judicial notice, and it's just taking out the question of "Texas Register" and "Texas Administrative Code," which is handled by the Remedies & Practice Code.

Right now there is in the caption "Texas Register" and "Texas Administrative Code," and

someone suggested that we didn't need to do that because that's taken care of in the Civil Remedies & Practice Code, so it's just not needed, but it doesn't hurt to be in there.

CHAIRMAN SOULES: Well, if you look back at the last two pages of what's stapled together here, you'll see it's the Government Code.

MR. LOW: I'm sorry, I misspoke.

CHAIRMAN SOULES: Government Code 2002.054 says that Administrative Code state agency rules and so forth are to be judicially noticed; and 2002.022, contents of the Texas Register ought to be judicially noticed.

MR. LOW: Right.

CHAIRMAN SOULES: So the issue here, I guess, is that -- let me see, is this -- this is mandatory. 204 is mandatory, "upon his own motion or motion of any party shall take judicial notice."

So we've got a redundancy or a duplication, is the issue, right?

MR. LOW: Well, first of all,

it's in the caption, and that's why we recommended putting the footnote, you know, so we can show we're not changing anything. We need to take it out.

And I recall now that there would be a change on whether they shall or may. And I think the -- you're right, it's the Government Code. The Code of Civil Remedies doesn't affect the criminal rules anyway. And you know, on the criminal, again, we're not dealing with the criminal who drew up one, and whether or not a judge is required in a criminal case or may take. That was the question.

Now, some of the people felt like you shouldn't have in a criminal case that the judge is required to take judicial notice of some of the other things.

CHAIRMAN SOULES: What is --

MR. LOW: All right. Let's start with the criminal rule.

CHAIRMAN SOULES: Criminal rule.

MR. LOW: All right. The first thing would be to add "A court upon its own

motion or upon the motion of a party shall take judicial notice." All right. Now, there should be a question of whether the court in a criminal case on his own motion should do it.

CHAIRMAN SOULES: The criminal rule is permissive?

MR. LOW: Right.

MR. YELENOSKY: Why is that?

MR. LOW: And again, we might not want to tinker with the criminal rule, but our thought was, to be consistent, we would put it the same.

MR. YELENOSKY: Buddy, why is there a question about whether they should?

MR. LOW: Well, on his own motion should a judge in a criminal case? Nobody said anything or has done anything, and the judge just says, "Okay. Now, I'm going to take judicial notice of the city register" or whatever it is. I don't know.

CHAIRMAN SOULES: Why shouldn't the judge take judicial notice of ordinances of municipalities and counties?

MR. LOW: I mean, if the lawyers haven't even thought of it, I can't

think of a context that it would come up in, but generally in a criminal case the judge just doesn't do too much on his own.

In a civil case, I can understand -- Richard.

MR. ORSINGER: I think that it's a little bit problematic about taking judicial notice of municipal ordinances, because the city codes -- the only way for you to really find out if you have a current copy of the city code is to subscribe to it and then put it in the book properly every time a new ordinance comes out. It's not like West where they automatically go through and be sure that, you know, every statute that's been amended is no longer in effect and the new version is there.

And you can go and get a copy of an ordinance from the city clerk, but you don't know for sure that there hasn't been a subsequent ordinance that amended that or eliminated that, and so I -- just as a practical matter, I'm a little bit more uncomfortable with judicial notice of municipal ordinances simply because there's

really not anybody that's making sure that you've got the most recent copy.

Now, if that doesn't bother anybody, if the burden is on the other side to come in and prove that it's been superseded, then I guess that's a good safeguard. But the parties need to know that the court is relying on some ordinance so that they'll be able to go verify whether it's been overturned or not. And I don't know whether the implication is that the court can do this after -- without advance notice or discussion to the lawyers.

MR. LOW: Okay. The civil rule now provides that "A court upon its own motion may, or upon the motion of a party shall, take judicial notice." Are you against that?

MR. ORSINGER: I'm not proposing that we change it, but I tell you that the appellate courts won't do it on appeal for exactly that reason: It's very difficult to be sure that you have the most recent version of an ordinance.

MR. LOW: I tell you, the door is open to make these rules right, and if you've got something that can give us some

good medicine, I'm ready to hear it. We didn't recommend changing that, but if you've got something, we'll certainly consider it.

MR. ORSINGER: The only suggestion I could make is that there certainly ought to be notice to everyone, and then we can assume that anyone who has an interest would go out and check to see if the court is using the most recent version of an ordinance.

MR. LOW: Well, don't you have to give certain notice under our procedural rules when you file a motion to take judicial notice?

MR. ORSINGER: If a party does, but I'm more concerned about a court doing it sui sponte.

MR. LOW: Well, we've got smart enough judges. They can handle that. They're not going to woodshed somebody, I don't believe, by doing it, or you know, just take sides. I don't think a judge is just going to do it just blind-sighted without knowing what he's doing.

CHAIRMAN SOULES: Well, the

rule says, "A party is entitled upon timely request an opportunity to be heard as to the propriety of taking judicial notice," and the request for that may be made after the judicial notice has been taken.

MR. ORSINGER: Is it clear that the court has to advise the parties if the court is sui sponte taking judicial notice?

CHAIRMAN SOULES: That is not required, but the party is entitled to request an opportunity to be heard on the propriety of taking judicial notice, and that can be done after the judicial notice has been taken. So if a trial judge takes judicial notice of an ordinance, you could thereafter request to be heard on it and you're entitled to a hearing as to the propriety of having done.

MR. ORSINGER: But does it have to be apparent in the record? Does the court have to announce that the court is taking judicial notice?

CHAIRMAN SOULES: I don't know.

HON. SAM HOUSTON CLINTON: Let me comment on that. I should think so, if he's taking anything about evidentiary

matters, because otherwise, if he doesn't put it in the record, why, then conceivably whatever finding he might make would not be supported by evidence if it's part of what he took judicial notice of. It would seem to me that the court would be desirous, extremely desirous of having it in the record, if he's going to base a ruling on that material. I can't imagine that he would not, that he or she would not.

MR. ORSINGER: Well, perhaps we don't need to require it or perhaps we ought to have a sentence that says, "The court should advise the parties if they are sui sponte taking judicial notice."

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, what if we just procedurally put in the requirement that if the court takes judicial notice that it shall make part of the record a copy of whatever it is they're taking judicial notice of? I mean, at least it's in the record that way.

MR. LOW: There are only certain things they can take judicial notice

of under this rule that are listed there. And I'm like the learned judge down here. I just can't imagine any judge that's not going to put in the record what it is, or I don't know whether he has to attach it or show some way of finding it.

MR. McMAINS: Well, I guess the problem I have is that if the statute says that you shall take judicial notice, and some party decides to lay behind the log and take the position that the judge's decision or judgment is in fact supported by some intrinsic piece of information such as this, it doesn't appear in the record, but it says obviously the judge is -- must have taken judicial notice of this, is entitled to do it on his own without notifying anybody; and therefore, I can support the action of the court based on the statute and/or rule which says that the court on its own motion may do that on his own.

CHAIRMAN SOULES: Three courts of appeals have said that, for purposes of an appeal, an ordinance which has been the subject of judicial notice must be in the

record and in verified form.

MR. McMAINS: That doesn't appear to be in the rule, though. I don't know whether they made that up.

MR. ORSINGER: So they're saying what Justice Clinton said, that unless the trial judge can show that it's in the record, the appellate court cannot presume the trial judge took judicial notice.

CHAIRMAN SOULES: It can't tell what he took judicial notice of.

MR. ORSINGER: Well, I'm worried about what Rusty is saying. Is there an inference, since they were mandated by law to take judicial notice, is there an inference that they did, even if that's not reflected in the record.

CHAIRMAN SOULES: It says "the court upon its own motion may."

MR. McMAINS: We're talking about the administrative -- you know, the provision that's in the Administrative Code says they are required to.

CHAIRMAN SOULES: Not of ordinances.

MR. McMAINS: No, no, I understand not of ordinances, but I'm talking about even those that are -- that they are required to take judicial notice of. I mean, what's -- I have no problem that they are required to take judicial notice of it. What I have a problem with is that some of the parties may not know that he did it, and you're entitled to know that he did it, if he takes judicial notice of anything.

MR. LOW: Well, I mean --

CHAIRMAN SOULES: That's something we can't write here, and it hasn't been -- the only thing we're looking at here -- if somebody wants to do some write-up on this problem, do so and send it to Buddy. No writing has been done. The issue here is do we delete from Rule 204 the apparent redundancy of -- well, it's a somewhat different proposal, because the Government Code mandates judicial notice of the Texas Register and the Administrative Code.

MR. LOW: Right. And so in order to handle that problem, we just took it out or put a footnote to refer to it so that

you can see we weren't changing it. I don't think this Committee can amend the Government Code, and so whatever that does, I mean, that creates the problem that Rusty is talking about, taking judicial notice, but I don't think we can amend that. But we can maybe have some procedure on, you know, how it's made of record. I don't know. We need to consider that.

MR. YELENOSKY: Luke.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, why is that a problem, Rusty? Why is it a problem that the judge wouldn't have to announce that he's taking judicial notice of the Administrative Code? Why is that more of a problem than if the judge doesn't have to announce that, you know, he's looking at Article 5221 or whatever. I mean, everybody -- I mean, he doesn't -- why do you have to be told of that? I mean, it's the Administrative Code just as, you know, a statute.

MR. McMAINS: Oh, I understand,

but frankly, it's only a concern to me when it's in judge-tried cases; that is, where the judges are finding the facts. Okay? Because basically under our system the judge makes fact findings after the fact, and so they may make findings based in part on various or administrative stuff arguably, I mean, implicitly, but you have no idea to even talk about it later.

MR. YELENOSKY: Well, I guess -- okay.

CHAIRMAN SOULES: We're at a -- okay. Let me get this focused. We're at a staging situation at this point, because apparently somebody is going to want to write Buddy a rule that says that the judge has to do something when the judge on its own motion takes judicial notice of something, so that can include ordinances of municipalities and counties and also the Texas Register and the Administrative Code, if we leave the Texas Register and Administrative Code in 204.

But if we take the Texas Register and the Administrative Code out of 204, then there won't be any procedure for the judge to follow

either in the Rules of Civil Procedure or the Rules of Evidence about what he's to do, he or she is to do.

So do we take Texas Register and Administrative Code out of 204, or do we leave it in? And then we'll move on from this issue, and if some somebody wants to write a rule about what the judge is supposed to do when the judge does take judicial notice, then do that and get it to Buddy.

Right now the question is, and the committee recommends, that Texas Register and Administrative Code be taken out of 204.

MR. LOW: Luke, let me explain one reason why, because it says, "A court on its own motion may." All right. The Government Code is mandatory.

PROFESSOR DORSANEO: It's mandatory. But I think all the new provision is saying is that the Administrative Code and the Texas Register are accurate compilations and are reliable and authentic and that evidence does not need to be presented to authenticate it because of the nature of the things that we're dealing with. I don't think

these things could conceivably mean that a trial judge is required to go read the Administrative Code or to go search out the Texas Register. I don't think it means that.

MR. LOW: The trial judge is not required to go research certain other things either, but they are to follow the law. And if this is basically the law, they're to follow it, aren't they?

MR. YELENOSKY: I mean, that's my point. I don't see why the Administrative Code would be treated any differently than a statute, other than your argument that it's not authorized beyond the authority of the agency to make it. I'm more concerned about getting in there and a judge requiring me to do something with respect to the Administrative Code that he wouldn't require me to do with respect to a statute.

HON. C. A. GUITTARD: If I could, Mr. Chairman --

CHAIRMAN SOULES: Okay. In or out? Those who think that Texas Register and Administrative Code should be deleted from 204, show by hands. Four.

Those who think they should be retained. 14. 14 to four they will be retained.

And if somebody wants to suggest to the Evidence Subcommittee other changes on 204, they're open for business.

MR. LOW: And Luke, that would mean really no change in the civil rule as it exists now.

CHAIRMAN SOULES: That's correct.

MR. LOW: Right. So the next question is whether we want to put some procedural things into that rule.

CHAIRMAN SOULES: Well, that's not a question yet. It will become a question if somebody sends you some information.

MR. LOW: All right.

CHAIRMAN SOULES: Or you generate it yourself internally in your committee. Either way.

MR. LOW: I'm going to wait until I hear from somebody.

CHAIRMAN SOULES: Okay. 407(a) is next, right?

MR. LOW: Yeah. Let me make

myself a note.

Okay. 407(a). The State Bar Committee voted to do away with the last sentence of 407(a) about products liability cases.

There was Tommy Jacks -- one member of the committee, John Marks, voted to do away with it. I proposed to keep it. Tommy Jacks proposed to keep it. We had three people -- and then Mike Prince, who is head of the State Bar Committee, proposed to do away with it.

Now, Tommy Jacks, I can't give his arguments as to why we should not change it. It had to deal with products cases and having to prove a safer design now. And I think I attached -- I don't know if I attached Tommy's -- no, I didn't attach Tommy's letter, because I was expecting him to be here.

But 407(a), the federal rule does not have that provision about products, that last sentence.

CHAIRMAN SOULES: Buddy, this is one of the rules that the State Bar Rules of Evidence Committee has asked us to delay while they finish their work.

MR. LOW: Okay. Well, I

thought they had voted to do away with it.

CHAIRMAN SOULES: Has there been a vote on this up or down?

MR. CRAWFORD: Over the past 10 years it's been voted on more than once, yes. But I think there's also -- I think this is where the self-critical analysis privilege is proposed to be inserted under 407 as part of that, so that's my understanding.

CHAIRMAN SOULES: But other than the self-critical analysis, is the State Bar working on 407(a)?

MR. CRAWFORD: Not that I'm aware of, other than what Buddy has said, which is that the committee has voted before too, because that brings the rule -- the rule is taken from the federal rule with the exception of the last sentence, which Texas has and the federal rule does not have, and the committee has voted before to just make ours just like the federal rule.

CHAIRMAN SOULES: Okay. This last sentence, as I understand it, is one of the options that the feds did not take and some other states have taken. When Texas

adopted the Rules of Civil Evidence, Texas elected to take it and not omit it. Since that's not before the Rules of Evidence, the State Bar Rules of Evidence Committee, we should go ahead and make a decision on this.

MR. LOW: All right. I did attach -- I mean, it doesn't mean that it doesn't prevent the admissibility. There's been some change, I think, in the last tort reform, and some people will know more about it than I, which requires now that you prove a safer design. And Tommy had some argument why this ought to be in there in connection with that. I can't give his argument. I'm sorry he's not here to give it.

HON. SCOTT A. BRISTER: Well, you have to show a feasible alternative.

MR. LOW: Right.

HON. SCOTT A. BRISTER: That's the tort reform initiative on design cases. And so I assume that if the defendant is arguing it's not feasible, you can show that it was feasible, because they did it later.

MR. LOW: See, that's been the argument. I mean, feasibility, when they

don't stipulate feasibility, I think that even makes it admissible regardless of whether it's a product or not. That has come about mostly in the products cases, where -- like one case I have with Ronny Krist, and the question is of admitting feasibility, and I can show the design, but I can't show -- I mean, he can show the design, but he can't show he did it, but I don't think there's a big problem with it.

I've never had -- I've defended products liability cases for a long, long time, and I've never been harmed by having it the way it is. And I think it's just a psychological thing for a lot of the defendants. They just don't want it there because the federals don't have it there. That's my own belief. But I don't see the harm in it, and it hasn't been --

CHAIRMAN SOULES: So your committee is recommending no change?

MR. LOW: That's correct. Two to one. John Marks. We've got a small committee.

CHAIRMAN SOULES: Any other

discussion? Bill Dorsaneo?

HON. SCOTT A. BRISTER: What is the State Bar Rules Committee argument for dropping it?

CHAIRMAN SOULES: They don't have an argument. They're not addressing this.

HON. SCOTT A. BRISTER: What's Mr. Bishop's, or whoever is proposing it, argument for dropping it other than to be like the federal rule?

MR. LOW: That the last sentence is not needed.

CHAIRMAN SOULES: He says, "Cases and products liability law make this unnecessary," whatever that means.

Bill Dorsaneo.

PROFESSOR DORSANEO: I haven't taught products liability law for a couple of years, but the justification for removing it is not just to be parallel. It is the idea that products liability cases are different today than they were in an earlier era; that there is no particularly good reason to treat products liability, even conscious design

defect cases, differently from negligence cases under current products liability doctrine.

The idea once upon a time that conscious design defect cases are fundamentally different from negligence cases is probably an obsolete idea now. It would be less true for manufacturing defect cases where the liability still is essentially strict. And this sentence doesn't make any sense at all under the law as it has been for some time about marketing defect cases.

So this is a very complex kind of area that this sentence is caught up in. I don't like the whole rule about subsequent remedial measures to begin with, so I would vote to retain the sentence on that basis.

But frankly, if the reporters on the restated third of products liability, Professors Henderson and Twerski, were here today, they would argue against this sentence on the basis that this is old thinking about strict liability that's been superseded by more modern ideas about the field of products liability. And it's not just some sort of

"let's be parallel" or "I'm on the defense side so I'm voting against the inclusion of this sentence."

MR. LOW: Well, Bill, those people did not -- they probably aren't -- that thinking that you're attributing to them now was probably attributed to them before any chance they had of knowledge of the law now about safer design and tort reform.

And in products we quite often submit negligence theories and defect -- I mean, and other deals with negligence. I mean, there is a difference between strict liability and negligence. There is a difference, and there was a reason for this rule, and my argument is that it just hasn't caused any problems.

And I'm like you, I don't necessarily agree with the whole rule, but my argument is to leave it in.

CHAIRMAN SOULES: Anything else? Those in favor of deleting, I guess -- those in favor of retaining, that's the committee's motion, the last sentence of 407(a) show by hands. Do you get 13?

MS. DUDERSTADT: 13.

CHAIRMAN SOULES: Those opposed. One. 13 to one to retain. So no change in 407. We will be hearing from the state bar on 407 on different issues, and we may make changes responsive to the state bar's request, but that change will not be made.

Rule 413.

MR. LOW: Okay. Rule 413, a request from Doak Bishop, pertains to Moriel. And my committee felt like we did not need a rule, because it's pretty clear and it's not a difficult thing, if somebody wants a bifurcation, it's pretty easy to get. There's no magic in it, and there's no need for putting it in the rule. We drafted one in the event the Committee wants us to adopt a rule.

So the first question is whether we want a new rule or not. If we want one, then we'll talk about the one that was suggested, which we don't suggest you adopt; but if you want one, we'll adopt one.

CHAIRMAN SOULES: Okay. So this is a brand new rule, 413. Those in favor show by hands.

MR. YELENOSKY: I have

question.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Does this presume that the only instance in which you would be offering evidence of wealth or net worth would be for the purposes of exemplary damages? In other words, there is another reason to show net worth, and one comes to mind immediately for me, working for Disability Rights, under the Americans With Disabilities Act: The question of liability itself may be determined by the wealth of the business, since the reason for the readily achievable nature of the requested change is a function in part of the finances of the business.

Now, I don't know if that is relevant here, but I certainly wouldn't want to foreclose the introduction of that evidence. Obviously you couldn't under the Americans with Disabilities Act, certainly not in federal court, but if you got into state court and it stayed there and somebody said, "Well, under this rule, she can't even introduce

that; it also would come up in some other context of employment discrimination where you have an accommodation issue.

MR. LOW: That was one of the reasons for not wanting to do it.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: In the Birchfield case as well, the evidence was put on about the resources of the hospital at least to rebut the hospital's contention that it couldn't afford to buy the machinery that was needed to keep the babies from becoming blind. And that had nothing to do with exemplary damages; it had to do with the liability issue.

CHAIRMAN SOULES: Does anyone favor a new Rule 413 like this? Does anyone favor it?

JUSTICE CORNELIUS: This new rule as redrafted is limited to exemplary damages.

CHAIRMAN SOULES: Yeah. But it says "in an exemplary damage suit."

MR. LOW: And you might have an exemplary damage suit, but you've got to seek

actual damages, too, and it could be an exemplary damage suit just like the one we're talking about.

MR. YELENOSKY: Or in an employment discrimination suit --

JUSTICE CORNELIUS: But it could be limited to exemplary damages by changing the wording. That would avoid the problem that Steve and Bill have.

CHAIRMAN SOULES: One at a time, please. Judge Cornelius, go ahead and give us your view on this.

JUSTICE CORNELIUS: It could be limited to exemplary damages, and that would remove the problem that Steve and Bill have.

MR. YELENOSKY: If you could do it in a way -- for instance, in an employment discrimination case, you could have a claim for exemplary damages, but before you even got to that issue, you could have a liability question that's based on the net worth of the company, because you're asking for reasonable accommodation. And part of the question is, is it reasonable in the context of, you know, the company's finances.

So you would have to word it in a way that acknowledged that your suit may have a claim for exemplary damages but may have a reason to get into net worth even before you reach the exemplary damage claim, just on the liability claim, so I don't know if we want to go down the road of doing that, but --

CHAIRMAN SOULES: We've got 401, 402 and 403, which basically address the dynamics that we're talking about right now; and that is, does the evidence bifurcate exemplary damages? Does the evidence have any relevance to the first part of the case? If so, it's admissible, unless it should be excluded under 403.

Do we need something more than that? Does anyone feel that we do?

Okay. Then the Committee recommends we do not adopt 413. Those who agree that we not adopt this 413 show by hands. Okay.

Those opposed. Okay. There's no support for 413 as proposed, so it's unanimously rejected.

MR. LOW: Okay. On this 510(d), somebody, Peter Chamberlain, wrote a

letter about protection of psychological records of counselors or experts. His fear was that some expert might have been -- not have real clean laundry or something and you shouldn't be able to bring that out in cross-examination in these type of cases.

And the committee felt like the rule that, you know, for the prejudicial effect was so great that it would take care of that particular rule. That was kind of an isolated situation, and I don't deal in these kinds of cases, but we did draw a rule up that would conform to what he requested, if you want a rule, and that was -- basically now it says, "When the disclosure is relevant to any suit affecting the parent-child relationship." It says, "However, this exception does not include records of the identity, diagnosed for evaluation or treatment of a counselor or an expert witness involved in the case."

Our thinking was that if they have something in their background, it shouldn't be hidden, and the trial judge should treat that like anything else. Whether it's relevant would outweigh the prejudicial effect.

And I knew I was going to hear from Richard, and there he is.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I've got mixed feelings about this, because psychological counselors frequently will presume to evaluate everyone's background, psychology and everything else, and then say whether a child has been sexually abused or not or say what's in the best interest of the child, and that's a tremendous amount of power, especially if they're court appointed, which I think, not only with jurors but even with judges, gives a special weight to their testimony, because then they're not seen as just hired guns that will say whatever their employer says.

The reverse side of that, though, that gives me trouble with this issue is that it can easily be used to harass an expert who even in good faith is doing everything that they should professionally. And I've seen family lawyers who will pry into an expert witness's divorce and the reasons for the divorce and try to go into counseling

records. Maybe they were depressed; maybe they saw a marital counselor; maybe they were having a sexually dysfunctional relationship with their spouse, all not because they ever figured that this would ever get in front of a jury, but because they figured that they could harass the witness into either not participating or not being as strident or whatever.

And I think that it is subject to that abuse, and I really abhor that, because I think an expert should be able to get up and testify to their professional opinion without having to have all of their psychiatric, psychological and marital records become public information. And they do, because part of the reason -- I mean, part of the threat is that I'm going to get these records and then I'm going to share them with all my friends in town who will then try to use them to neutralize you as an expert, so I really have a problem with that.

But on the whole, but I think that we were better off when we didn't pry into the personal affairs of these counselors.

And you know, could it extend to CPAs? Let's say I bring in a CPA to testify on the value of the business, and let's say the CPA has been through a divorce. Does that mean that my CPA has to go through a two-day deposition on what happened in their divorce and whether they have any personal animosity towards wives or towards the valuation of closely held businesses or whatever. There is not a limit really, is there, if we permit this?

MR. LOW: But Richard, that's not so different than what sore-back lawyers face, because experts -- you'll get your expert, they'll subpoena all of his tax records. I mean, if you have a lawyer that's going to do that, you've got to have a judge to protect that. So all of these experts are subject to that. And what protects them is whether the relevance outweighs the prejudicial effect. But this to me has given -- this exception would really just hide anything touching on that expert witness and make them in a different category than most experts. Now, maybe that's --

MR. ORSINGER: But only as to psychological records, Buddy. And I would argue to you that there's a public policy that protects privacy on psychiatric and psychiatric counseling that goes beyond financial considerations, because when you say that your psychiatric or psychological records are subject to discovery, people who know that they may be used against them professionally are going to be afraid to get psychological or psychiatric counseling because of that.

I know of lawyers who are afraid to do it because they're afraid that it will come out, and it's possible that that leads to the breakup of marriages. It's possible that that could lead to suicides or alcoholism or anything else.

It's real serious, I think, when we allow our litigation system to make people afraid to see psychologists or psychiatrists and to tell them the truth. I think it's a real serious question, and it's much more serious than looking at my financial statement or my tax return.

CHAIRMAN SOULES: Steve

Yelenosky.

MR. YELENOSKY: I think you're absolutely right, Richard. And this has been recognized to some extent in litigation in an analogous connect. There's been a lot of litigation around the country, including here in Texas, on the question of mental health records of bar applicants. And it has been recognized aside from the disability rights aspect of it, the policy issue of not discouraging people from seeking help when they need it.

Moreover, what the courts have said in narrowing the inquiry into mental health records of bar applicants, which they did in Texas, not by court order, but prior to court decision, which they did in Florida and elsewhere, is if there is a mental health problem that is relevant, almost by definition it should exhibit itself in something that is of public record.

In other words, if a person has enough of a mental health problem that we should want to know it, then they probably would have problems, in the case of a bar applicant, in

getting through three years of law school. Or in the case of an expert, they would have other indications in their resume that would make them not qualified as an expert or something else; and that issues of mental health treatment that do not exhibit themselves or do not manifest themselves in some way that is of public record are not almost by definition worthy of inquiry. And part of that calculation may be figuring in the policy objective of not discouraging people from getting help.

Moreover, Buddy is talking about this exception of treating experts differently. Well, we're talking about an exception to an exception here, which is the way I understand the rule, and maybe I misunderstand it, but it's the Confidentiality of Mental Health Information Rule, which has an exception for disclosure in cases affecting the parent-child relationship, and all this does is make clear that that exception does not extend to the expert.

CHAIRMAN SOULES: What I hear on this -- and this is, I guess, widely

discussed in narrow circles, is that the way you put it -- is that this exception was really intended to be directed to the parents and not to be extended. It's relevant to any suit, and whether impeachment of an expert is relevant evidence, of course, is another debatable question altogether, but it wasn't ever this -- the purpose of this rule was to get to the parents or grandparents or the people that are involved in the litigation as parties or potential parties or people related to the child one way or another so that the judge could have the information about these people in trying to decide how to deal with the child; and that this movement or expansion of it to use it to berate experts or frustrate experts is sort of an invention or a creation or an extension of what was -- beyond what was initially intended, and that it should not be used for that purpose; that the rule should never have been extended to even have utility for that purpose; and that this sentence -- not this sentence, but that some clarification of that would be important.

And I'm just giving you some background

on that of what I've heard, and this is being actively discussed. Richard Orsinger.

MR. ORSINGER: I think you put your finger on an important question, which prompts me to suggest that perhaps what I ought to do is go back to the Family Law Council and come back with a revision of the language in the exception to privilege, because, I mean, I've been involved in cases where a client has been in group therapy in some institution, and the therapy records were obtained under this exception, and the names of everyone else that was in the group therapy, of course, are in there at least in first name. And then if you get ahold of the psychiatrist, you get the last name, and then you get ahold of all their psychological records, and then you have them coming in and testifying about what was said in group therapy, and then you have people questioning whether they're paranoid or delusive.

And I've always wondered why it is that everyone that is even remotely touched by a custody case suddenly has all of their psychiatric records subject to discovery. And

even they're not admitted in front of the jury, they're still in the hands of a lawyer, probably not under any kind of confidentiality order.

So you know, maybe what we need to do is not just stop the abuse with experts, but really say what are we doing here. Does every neighbor, every babysitter, every mother of every childhood friend, are all of their records now subject to discovery in order to prove whether or not they're relevant?

MR. YELENOSKY: Well, obviously you and I agree on this issue. But if what is happening now even under current law is they're not redacting that stuff off, somebody has got a lawsuit there, because they shouldn't be giving information unredacted about people that are not even involved in the lawsuit. I mean, you know, that's under current law.

CHAIRMAN SOULES: So what I'm hearing Richard suggest is that we delay action on this while the Family Law Council attempts to define a class of individuals to which the exception (d)(6) would apply, and

then everybody else would be excluded from (d)(6) anyway, right?

MR. ORSINGER: That's what I would propose. And I would do that before our next meeting, and if I'm unable to get a consensus from the council, I'll present what the different views are to the Committee.

MR. LOW: Let me come to the aid of my committee a minute.

CHAIRMAN SOULES: Yes, sir.

MR. LOW: We did not go beyond what we were requested to do. What we were requested to do is to determine -- we didn't change anything in 510. It has to do with the confidentiality of mental health information. We didn't look at any of that before for purposes of changing it. We only addressed the issue as to whether these testifying people should be excepted from the exception, and if you address that issue, they either are or they're not. If you do it, then we drew a rule. We added to it and said, however, it does not include records of identity or diagnosis and so forth. So we did draw a rule on that.

Now, we've not studied anything, because I doubt very many members of my committee know too much about these records, and so we did not study the philosophy behind the other provisions of it.

So if somebody has got -- if Richard has got some suggestion to change anything else in 510 or something like that, we'll certainly consider it. But we have not considered anything other than that one thing, and the reason we did this was not studying all of the abuses that lawyers are making and so forth, but our feeling was that the judge could handle the relevancy. We didn't consider whether or not just getting them. I mean, if somebody made the motion, I would object and ask the judge to do it in chambers. There's a procedure for things like that. But I don't practice in this field, so the shoe has never pinched my foot.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Richard, I would suggest that you consider whether you need this exception at all in light of the

exception that precedes it immediately that has been construed by the Texas Supreme Court recently. I forget the name of the case.

It almost looks to me like this exception is one of those exceptions that we developed in family law cases because of an argument that they are just needing some kind of exceptional treatment and are outside the boundaries of the normal rules that would be applicable to other cases. Do you see what I'm saying? None of this has anything to do with the family-law-cases kind of approach to the treatment of these kinds of records. It seems like that is the source of the problem.

MR. LOW: Luke, I would move that we table this until we hear from Richard and let Richard make some recommendations to me, and we can consider them or vote on them as he makes them.

CHAIRMAN SOULES: Any opposition to that? Okay. It's tabled and scheduled for discussion until the next meeting, and Richard will have something for us, if you can get that to Buddy.

MR. ORSINGER: I will. But

Luke, let me tell you that the council itself is not going to meet until the Saturday after our May meeting, in other words, the Saturday of our May meeting, so I'm probably going to have to come back with something that's less than a formal council vote on language, and then we can debate that. I'm going to have to attend the council meeting on Saturday in Corpus Christi. I can send you the preliminary stuff, but I can't get you a, quote, council position until the July meeting.

CHAIRMAN SOULES: Well, just give us some input. We may want to move it forward.

And I made a mistake. Our meeting is on the 11th and 12th, so we're going to -- 10th and 11th, so we're going to overlap with the Evidence Committee too, so that...

MR. CRAWFORD: Did he tell you when our meeting is going to be?

CHAIRMAN SOULES: He told me it was the 11th, so we're probably not going to get to that until July as well.

Okay. It's tabled and in Orsinger's

hands for review again in May, and we'll talk about it. That's 703. Okay. 902, is that next?

MR. LOW: No, 703.

CHAIRMAN SOULES: I'm sorry, that was 510. Now we're on 703.

MR. LOW: Okay. Let me take a look for second. Okay. This is one that has to deal with whether interrogatory answers should only be used against those, you know, given to answer, which is not in the Rules of Evidence but in the Rules of Procedure.

And then there's a question under the Rules of Evidence as to what an expert can consider. Can he consider those interrogatory answers of another party which would not be, you know, admissible otherwise? And I'd say that's what I considered.

My committee recommended that we make no changes; that 703 doesn't need to define every type of hearsay included in the rule.

CHAIRMAN SOULES: Any opposition to the committee position? There's no opposition; there will be no change to 703.

MR. LOW: Good thing, because

the other rules would have had to really be revisited.

CHAIRMAN SOULES: Okay 902(10), subsection (10).

MR. LOW: 902. This has to deal with Section 18.001 of the Civil Practice & Remedies Code, and it basically has a provision of 30 days', I believe, notice where you give an affidavit about attorneys' fees and things of that nature; whereas there's a 14-day notice under Rule 902(10). But the distinction -- and maybe it doesn't really matter. The distinction is that when you give -- when you're introducing documents under that rule, that's just to authenticate them. You're not giving primary evidence like you give in an affidavit saying, "I did all this work for so much attorneys' fees." This is just saying, "These are true and correct copies."

So there was the recommendation that we consider that as being inconsistent. I don't think it is inconsistent, but if we need to change the date, then we would have to change 902 to 30 days.

CHAIRMAN SOULES: You recommend no change?

MR. LOW: We recommend no change.

CHAIRMAN SOULES: Any opposition to the subcommittee's position on that? There's no opposition. There will be no change to 902(10).

MR. LOW: Okay. 514 is a new one, and this gives rise to -- David Beck requested this privilege for self-critical analysis. Our committee voted two to one. John Marks was for self-critical analysis.

CHAIRMAN SOULES: Now, this is something that the state bar is working on?

MR. CRAWFORD: We've got a subcommittee working on it.

MR. LOW: All right.

CHAIRMAN SOULES: And with your permission, we'll table this until we hear from the state bar on that, State Bar Rules of Evidence. That's what Joe wants, right?

MR. CRAWFORD: Yes, please.

CHAIRMAN SOULES: Any opposition to that?

MR. ORSINGER: Well, Luke, could I just get a one-sentence description of what the self-critical analysis would be so I can think about it?

CHAIRMAN SOULES: Joe, do you want to give us that, or Buddy?

MR. LOW: Well, self-critical analysis means that I can come in -- I'll give you my interpretation. Somebody else may have a different one. And maybe mine is slanted because I'm not for it. But with that in mind, with that caveat, let me tell you.

Now, somebody sues Company A, my company, and I say, okay, I want to go out and I want to make an analysis of what we did and so forth, and I make a self-critical analysis of all that, and it wouldn't be admissible.

Now, there's some question, is my investigation protected under that, or is it just my conclusion that I was negligent when I make up the report, the written analysis? Is that basically -- let's have the state bar's interpretation of that.

MR. CRAWFORD: Well, I mean, I can't give you the interpretation. I can tell

you the subcommittee is working on it. But I know that the discussions have also included the discussion of internal investigations that take place before any claim arises as to whether or not there should be some protection there of an investigation that was not directly connected at least with the accident.

HON. SCOTT A. BRISTER: And I think it's also -- with all the investigative privilege motion to compels I get, what they -- usually it's by the plaintiff's attorney, and what they want is not the facts that were investigated, although that's what most of the cases discuss, oh, they can't get these facts, and these are only the people that went out and looked at the fire. What they want is the lower level person's initial impression of "Gosh, I think we've got a problem here. Gosh, I think we screwed up." They want that admission by somebody in house: "Gosh, I think we screwed up."

And to me, I would like to have a rule that separated those two things, which is, an investigation about the facts that may or may not be available anymore, but it's just who,

the people that saw it and what happened, versus some lower level employee's initial impression of who was at fault, which is not, it seems to me, relevant, admissible or worth anything much at all, except for self-critical analysis. And there ought to be something protecting your first impression about whether we need to do something, we've got an emergency problem here, or not, so I think there's a way.

MR. LOW: I think the way, though, they're considering it, Judge, is not just a lower employee's statement, but a company decides they're going in and they're going to make an analysis. In other words -- and of course, that might be included in it. And so I relate it to like a hospital board, you know. There's a statute on it for the doctor or -- I don't do malpractice, but a medical --

HON. SCOTT A. BRISTER: A peer review?

MR. LOW: Yeah.

MR. YELENOSKY: No, the hospital committee.

MR. ORSINGER: Peer review.

MR. LOW: Well, that type of thing, I think, is what this maybe dovetails with or something. Go ahead.

MR. YELENOSKY: Well, there's a letter in here from Tommy Jacks that refers to the hospital committee. It follows the proposed rule, I guess, and he likens this rule to essentially extending the hospital committee privilege to all businesses, and he expresses what he thinks is the evil of the hospital committee privilege. But obviously his letter says it better than I do, and it's right in here.

MR. LOW: At any rate, I guess we'll hear from the state bar on that, because that's going to be the philosophy of having the privilege and then the question of how you limit it and what it includes, which is going to be -- you know, we do have it, and it's going to be a fine line, because as the judge said, I mean, some people don't think it includes what he said. He gives a good argument that that ought to be included, so I mean, it's going to be an interpretation

matter, but you can take that to your committee.

MR. CRAWFORD: Fine.

CHAIRMAN SOULES: And where does it stop? Is the project manager's report of yesterday's construction activities, is that a self-critical analysis? I don't know.

Anyway, the state bar has got it and we'll look at it whenever they come to us.

MR. LOW: All right. The next rule -- if you think I've been unclear on some of the others, stick around. 503. I know what it is, National Tank, the control group test. I've studied the state bar's work on that. My committee first looked at it and we decided, well, we liked Sutton's version of it, but then we couldn't understand how Sutton limited that privilege. Then we decided, well, we would go with the state bar's recommended rule on that. And since that time we've discovered that we really don't know what that means; that it's kind of vague.

Basically we don't believe, two to one, again, John Marks dissenting, that we should draw a rule that we should change the control

group test. There are a lot of other tests, Witherspoon and a lot of others you'll see, but our recommendation was not to change that, because even in National Tank they said, well, look at what great harm came because of the control group test, yes. The records were then protected under the work product.

My own feeling is that we've got too many privileges right now that the truth is not coming out, and I just don't want to add to it.

CHAIRMAN SOULES: And I've been advised by Joe that this is one of the areas that the State Bar Rules of Evidence Committee is working on, so I'm assuming we'll want to table this until we hear from them no later than our July meeting.

MR. LOW: Okay. The next one is involves a whole lot, but really little of nothing. 509(d) and 510(d). We went through and studied the -- hold on, let me see. I made -- I mean, we compared the languages and made very few recommendations.

Again, this has to deal with confidentiality of mental health information,

and maybe -- and the first -- the only thing we studied was to amend 509(d) -- 510(d) to be consistent with Section 5.09 of Article 4495(b). The only thing we recommended was to change 510(d) so that the exception applied not only to other people or other proceedings but to administrative proceedings, and that was the only recommendation we made.

We went through and tried to analyze, but again, this is something -- that was the only thing that was presented to us, was whether administrative hearings would come within and be consistent with the statute.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, I don't have the statute in front of me, but I guess I'm just wondering why, since the Texas Rules of Civil Procedure don't apply to every administrative proceeding, then 510 itself wouldn't apply to every administrative proceeding. And in the instances in which the administrative rules are that they go by the Rules of Civil Procedure, then you would read "court" to mean the "administrative hearing,"

and so I guess I don't understand why you don't put it in the rules.

MR. LOW: All right. Look, then you have your attachments --

CHAIRMAN SOULES: Speak up, Buddy, we can't hear you.

MR. LOW: Do you have the attachment, Article 4495(b)?

MR. YELENOSKY: I thought I did. Maybe I don't.

MR. McMAINS: No, it's not in mine either.

MR. LOW: Okay. I'm sorry, I thought --

MR. YELENOSKY: Do you have it there?

MR. LOW: Yeah. And it's identical. The only thing is, it does speak to -- wait, let me look at my --

MR. YELENOSKY: Well, yeah, I mean, if it says it applies to administrative hearings in the statute, then fine. I don't see any reason to put it in the rule, though, because the rules don't apply to every administrative proceeding.

MR. ORSINGER: But do they apply to any? Because if they apply to any, the exception might be relevant in those few.

MR. YELENOSKY: Well, if it applies to any, I mean, then you would read the "court proceeding" to mean the "administrative proceeding," but -- and if you don't, I don't know how you apply the rules in a lot of other places. So yeah, I mean, I guess they do apply in -- often what happens is I guess it will apply with some exceptions, but I'm trying to think where they would. Well, they must, but --

CHAIRMAN SOULES: Well, does 4495(b) make the 510(d) exceptions apply to administrative proceedings?

MR. LOW: Let me look.

MR. YELENOSKY: Here it says, "Exceptions to the privilege of confidentiality, in other than court or administrative proceedings." Is that what you're referring to?

MR. LOW: Yeah. Let me look at my original.

MR. ORSINGER: Well, Luke --

MR. YELENOSKY: (h) talks about court or administrative proceedings.

CHAIRMAN SOULES: Does Rule of Civil Evidence 510 apply to administrative proceedings through 4495(b).

MR. YELENOSKY: In looking at it quickly, I don't see it. I would be surprised if it did.

CHAIRMAN SOULES: Let's leave that question hanging for about 10 minutes while we take a break, and then I'll ask for an answer. Please be back by about -- I've got 11:23. Be back by about 11:35 -- I'm sorry, 10:35.

MR. HATCHELL: Nice try.

(At this time there was a recess.)

CHAIRMAN SOULES: Okay. Let's convene, and we'll get started.

MR. LOW: Let me get Steve.

CHAIRMAN SOULES: I understand that Steve has withdrawn his objection, is that right?

MR. YELENOSKY: Well, Richard --

THE REPORTER: Wait. Speak up.

CHAIRMAN SOULES: We'll be convened. The court reporter can't hear.

MR. YELENOSKY: At the beginning of the break, Buddy pointed out that the need for consistency is within the rule itself; that 509 refers to court and administrative proceedings and 510 refers to court proceedings, so I conceded that, yeah, we need to be consistent within the rule itself, forgetting what the statute says. Now the question is, which one do you change?

Richard said to me at the end of the break, well, let's be consistently right rather than consistently wrong, so let's change 509 rather than 510. You know, I think that's correct, that 509 refers to administrative proceedings. And of course, none of the rules apply to most administrative proceedings, so I think consistently right would be to change 509.

CHAIRMAN SOULES: Buddy.

MR. LOW: But what would you do with 4495(b) that provides the privilege in

court or administrative proceedings?

MR. YELENOSKY: I would do nothing. I would follow the statute when I was in an administrative proceedings. I don't know why you would have to reiterate that in the rules which apply to a minority of administrative proceedings.

MR. LOW: I know. But doesn't Article 4495(b) pertain to court and administrative proceedings that would apply? Why wouldn't that be the same exceptions.

MR. YELENOSKY: Well, I mean, clearly you follow the rule in the administrative proceeding. The question is, do you need to conform the Rules of Civil -- do you need to state in the Rules of Civil Procedure, which apply to all court proceedings and a minority of adminstrative proceedings, that these exceptions in the Rules of Civil Procedure also apply to the small minority of administrative proceedings that use the rule.

MR. LOW: Not the Rules of Civil Procedure, but the Rules of Civil Evidence --

MR. YELENOSKY: I'm sorry, the Rules of Civil Evidence.

MR. LOW: -- that may apply, many of them may apply to administrative proceedings.

MR. YELENOSKY: But if you're in an administrative proceeding, you have to be told by someone or some written document that the Rules of Civil Evidence are going to apply, and so when they say that, you know that everything that's in the Rules of Civil Evidence that says "court" means "administrative proceeding" in the context of the administrative proceeding that you're in, right? Doesn't that make sense?

PROFESSOR DORSANEO: What doesn't make sense to me is why the rules of privilege don't apply to administrative proceedings and why the Rules of Civil Evidence say that, if they do say that. I can see not having Rules of Civil Evidence that relate to, you know, other matters, but privilege, that just seems absurd to me, because those aren't applicable in those proceedings generally.

CHAIRMAN SOULES: Okay. Let me see if I can put the question to you. Okay. How many feel that the two rules, 509 and 510, should be consistent? Does anyone disagree with that? Okay. They're going to be consistent.

Do we delete "or administrative proceedings" from 509, or add it to 510? Those in favor of deleting it from 509 show by hands. One.

Those in favor of adding it to 510 show by hands. Seven. It will be added to 510 and kept in 509.

Okay. Next is 412, and this is tabled in deference to the Rules of Evidence Committee of the State Bar.

MR. LOW: Okay.

CHAIRMAN SOULES: So this is tabled, Buddy, unless there's some reason to discuss it before we hear from the Rules of Evidence Committee. Do you see any reason to discuss it before we hear from them?

MR. LOW: No.

CHAIRMAN SOULES: Okay.

MR. LOW: It's discussing a lot

of psychological things and sexual things and a lot of things I'm not real familiar with.

MR. ORSINGER: Or at least forgotten.

CHAIRMAN SOULES: Okay. 702 is the same, falls into the same category. It's something the State Bar Rules of Evidence Committee is working on. We're going to table it in deference to the work of that committee to a date not later than our July meeting.

Is there anything about this we need to discuss until we hear from them?

MR. LOW: No, not really. I'd just add that the motion for rehearing is still pending in duPont, and they've granted a writ, and there may be a cleaner case to write an opinion on.

MR. LATTING: Yes, sir, they sure did.

CHAIRMAN SOULES: So that takes us to 182, doesn't it?

MR. LOW: That's right. We had a recommendation regarding procedure when firearms and ammunition are in evidence in a civil case, that you couldn't have the bullet

and the gun together or something like that. And we just didn't think it's been a big problem. Most judges are going to have sense enough to know how to handle it, so we didn't think we really needed to have a rule in a civil case where you've got a pistol and a bullet.

CHAIRMAN SOULES: Okay. So you recommend no change to -- what is this, Rule of Civil Procedure 182?

MR. LOW: Yeah, it's 182. Well, there is no 182 now, I don't think. What is 182? Oh, 182 has been repealed, and I move that we keep it repealed.

CHAIRMAN SOULES: Okay.

HON. DAVID PEEPLES: On that rule, Luke.

CHAIRMAN SOULES: Yes, sir. This is from the presiding judge of the City of Cedar Park, Judge Madison.

HON. DAVID PEEPLES: Luke, I think that judge did a very responsible job of trying to draft the rule, and we ought to write him a nice letter thanking him. That's a good piece of work by him.

MR. LOW: I didn't mean to belittle that.

HON. DAVID PEEPLES: I know you didn't.

MR. LOW: Because we did not -- we couldn't -- if we were going to do it, we couldn't do it any better than he did it, and I didn't mean, and I apologize; that it did take considerable work, and I apologize that I didn't point that out in his letter. He does a good job of drafting such a rule. And in making light of it, I didn't mean to --

HON. DAVID PEEPLES: I didn't think you did make light of it. I don't know of anyone who has had this problem come up. I guess in criminal cases you do. But if I ever have this issue come up, I want to have this guy's rule here. He just has a lot of good advice in it. We might want to take another look at that.

MR. LOW: Okay.

CHAIRMAN SOULES: Okay. So your committee recommends that --

MR. LOW: No rule on that.

CHAIRMAN SOULES: -- that we

have no rule on this. Okay. Any further discussion?

Okay. Those who agree there be no rule show by hands. Eight.

Those who favor a rule on this show by hands. Okay. It's eight to none.

Okay. 504 of Criminal Evidence.

MR. LOW: Okay. This -- as the rule is drawn now, the spouse has the option of either claiming the privilege or waiving the privilege in testifying presently. We were requested to do away with the privilege not to be called as a witness against a spouse with regard to a crime threatened or committeed against a spouse. Our committee recommended no change, and we recommended keeping the option open. Now, there are arguments, you know, that it should be changed, but that was our recommendation.

CHAIRMAN SOULES: All right. Well, again, our jurisdiction is limited to the Rules of Civil Evidence, and I think if that's going to be changed, that's --

JUSTICE CORNELIUS: Hasn't this been changed by statute?

CHAIRMAN SOULES: I don't know. I was going to see if I could find the page that this comes from in our agenda.

JUSTICE CORNELIUS: They reported in the Warren Moon case that it was, and of course, the news media is always right, so we can take their word for it.

HON. SAM HOUSTON CLINTON: It has, and I don't know whether it has been available in every case, but -- I'm just fuzzy on that, but I know that the legislature did change it.

JUSTICE CORNELIUS: They did make some change.

HON. SAM HOUSTON CLINTON: They've clarified, if nothing else, the interpretation of the rule about which there is some controversy, meaning they've taken care of that to their satisfaction.

JUSTICE CORNELIUS: Well, I understand they forced Mrs. Moon to testify.

HON. SAM HOUSTON CLINTON: They what?

JUSTICE CORNELIUS: They forced Mrs. Moon to testify.

HON. SAM HOUSTON CLINTON: Well, that statute removed the spouse's option. It says the state will tell you when you have to testify.

MR. LOW: Then if that is true, then the proposed rule that we drew would have the third exception, and that's in a proceeding in which the accused is charged with a crime against his or her spouse, if the statute reads that way, then we would add that to the rule to be consistent. And that's if the Committee wanted a rule, that's what we would do, is add in the third exception.

MR. YELENOSKY: Does it --

CHAIRMAN SOULES: Does anybody have any idea what the statute is on that? We got this letter, this is from Fred Maddox, senior security officer in Bryan, Texas. This is dated July 20th, 1994, so there's been a session of legislature since.

HON. SAM HOUSTON CLINTON: And that's when it was enacted. It was enacted in '95.

CHAIRMAN SOULES: In '95?

HON. SAM HOUSTON CLINTON:

That's my recollection.

MR. YELENOSKY: Luke, why don't we just get the statute during the break or something.

CHAIRMAN SOULES: Okay. We can ask them for it. Right now, 504, do we even have a 504 in the civil?

MR. LOW: No.

MR. ORSINGER: A husband-wife privilege in civil?

CHAIRMAN SOULES: We don't have a (b), correct, in civil?

MR. ORSINGER: We have a (b), yes.

CHAIRMAN SOULES: Okay. Yeah, so there is a (b).

MR. LOW: But they are totally different, the civil and the criminal, as I understand it.

MR. ORSINGER: Luke, can you refine what the point is here?

CHAIRMAN SOULES: Right. Okay. The criminal -- the Rule of Civil Evidence -- okay. The Rules of Criminal Evidence have -- actually this is not put in

the right spot. The Rule of Criminal Evidence has a 504, section (2). It's attached to this letter to this -- to what Buddy has got, so it's the third page of what Buddy has before you. And we don't have (2) in the civil rule, and it lists (2) as "privilege not to be called as a witness against a spouse."

MR. ORSINGER: Is someone proposing that we create that exemption in civil litigation?

CHAIRMAN SOULES: No.

MR. LOW: Let me defend my committee again. We were only asked to look into this one thing about whether -- what the legislature has apparently already taken care, whether the wife still had that option. And me being a single man, that's something else that I don't know a lot about, but --

MR. LATTING: You're not Warren Moon.

MR. LOW: And the legislature has taken care of it, and this is not within our jurisdiction, and if Justice Clinton wants us to draw something consistent with the legislative act, we would have to see it and

then do that. But I don't see what we've drawn, how it could be inconsistent, if it said -- if we added that third exception, and that is, in a proceeding in which an accused is charged with a crime against his or her spouse. Do you want to add that to it?

MR. LATTING: Did I hear that this is not within our jurisdiction?

CHAIRMAN SOULES: Well, here is the issue on that, Joe: There is a proposal that the Rules of Civil Evidence and the Rules of Criminal Evidence be merged. Everybody I've talked to says that it's a piece of cake to do; that there are very few, actually very few substantive differences, and that those differences can be separated out and dealt with rule by rule, additionally in criminal cases or some party to that effect, so if we get to that project, then we would have a recommendation on this. And I think that we would want to have the Rules of Evidence be consistent with whatever the statute says.

MR. ORSINGER: Well, if I may, Luke, I don't see any logic at all in saying that a private litigant cannot call the wife

of another litigant to testify. I can see lots of reasons why the state can't do that in a criminal case. So if what we're talking about here is just changing the Criminal Rule of Evidence to match a criminal procedure, that's fine. But if we're talking about doing that in civil cases, then that's an altogether different thing.

CHAIRMAN SOULES: We're not talking about changing the practice in civil cases at all.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: And only are we open to this in criminal cases, and I think the answer is we are, and the statute compels it anyway, and if we get to the point of merging the Rules of Civil Evidence and Criminal Evidence, that this piece of the -- this number (2), 504(2) will become a part of the Rules of Evidence.

MR. ORSINGER: That apply to criminal only?

CHAIRMAN SOULES: But (2) will say it applies only to criminal cases, and we would need to add that language that picks up

the statutory requirement. Is that right?

MR. LOW: That's true. It's been recommended, though, kind of like a double-negative, that in the exception we might need to rewrite (b), the exceptions, and rewrite the whole rule, but we took the easy route out and said that it didn't apply in that case and just farm it out, because that exception doesn't apply in that case. But we may take a look, because, see, the rule as drawn is "Exceptions." However, then you get further exceptions from the exceptions.

CHAIRMAN SOULES: Okay. Well, it's really this Criminal Rule of Evidence 504(2)(b), and what I would like for you to do, Buddy, is make a note --

MR. LOW: We'll look at the statute.

CHAIRMAN SOULES: -- that if we get to the point of merging the Rules of Civil Evidence and Criminal Evidence, which apparently we will get to, that this be a part of the rewrite for what will then be Texas Rule of Evidence 504(2)(b), that it will apply only to criminal cases.

MR. LOW: And we will look at the statute. Is that in the latest legislature, do you think?

JUSTICE CORNELIUS: It must have been. I don't know. It's supposed to be very recent.

CHAIRMAN SOULES: Steve said, I think, that he's going to try to pull it. '95 is what Judge Clinton says, so we'll check on that and find that out.

Okay. Anything else on evidence?

MR. LOW: No. The only other thing, there are a couple of things that the committee has not considered that just came in recently. One of them was forwarded by you, and that was the criminal case wherein the judge did not allow the admission as primary evidence, not impeachment, but as primary evidence, the admission of a deposition in a civil case; whereas we do have a rule where you can introduce depositions in a civil case under certain exceptions.

And I think it points out that the problem in trying to merge all the rules, because all of the criminal lawyers I know and

the criminal judges I know don't favor doing anything to Section 39 in the Code of Criminal Procedure pertaining to depositions, they pretty well have written, and they don't waste a lot of time taking depositions like we do.

Section 39 of the Code of Criminal Procedure does address that, and it would be a foresight for us to say that in criminal cases, where you can't hardly take depositions unless you get approved by the judge, and they're only admitted if the person is not available and a whole bunch of stuff, and then write a rule and say, however, a deposition taken in another civil case is admissible. I mean, it points out the difficulty in merging those rules.

And I don't think -- Judge, do you think that most of the judges that you know would favor changing any of the rules pertaining to depositions?

HON. SAM HOUSTON CLINTON: Prosecutors sure wouldn't. Prosecutors wouldn't favor it.

MR. LOW: No. And I don't think the --

HON. SAM HOUSTON CLINTON: And in some jurisdictions, that answers your question about the judges.

MR. LOW: Oh, it does. Okay. We better get off of that. But at any rate, that's the end of it, Luke.

CHAIRMAN SOULES: Okay. And that really has to do with, what is it, 804(b), hearsay exceptions, former testimony? And the criminal rule has a sentence in it that says the use of depositions is controlled by the Chapter 39 of the Texas Code of Criminal Procedures, so it's another one of these places where we would have a difference in the rules.

MR. LOW: Right. And Section 39 is pretty explicit. It has 14 or 16 sections, I can't remember, and it has places in there where they say except inconsistent with other rules of evidence, the civil rules apply. And then, boy, you're talking about inconsistencies, and they're just all over the place.

CHAIRMAN SOULES: They swallow it.

MR. LOW: Yeah.

CHAIRMAN SOULES: All right. Okay. Anything else on the Rules of Evidence today?

Okay. Let's go then to the next item on the agenda, which is the report on 216 to 295, and Judge Peeples has done a handout on that, and I think everybody has got it.

HON. DAVID PEEPLES: What you need looks like that (indicating). It's got the Alamo at the bottom of it.

Just to give you the big picture, the second memo I've sent to Luke summarizes what we've done and sent to the Supreme Court and then what we did at the last meeting, and that was just basically for his information.

And then my agenda for today is on the first of those memoranda, there are three items, and I guess my goal -- we need to reject some suggestions and make a couple of changes, and then down at the very bottom, No. 3, "Still drafting," there are three things that we're talking about and working on that are not ready today. One of those is reorganizing the rules on peremptory

challenges and challenges for cause, including the Batson procedure, and that's not ready today.

In addition, we're looking at the rules and statutes that deal with randomness, ensuring randomness in jury panels.

And then finally, Arizona and some other states have been changing jury practice generally and doing things like letting jurors take notes and ask questions and setting up some procedures for those. And Chief Justice Phillips has sent Paula Sweeney some information on that, and we're just starting to do that. We're not doing those today. I just wanted to let everybody know that those were in the works and maybe we'll have something at the next meeting for you.

Now, the first item under No. 1 right there at the top, the last meeting in January we dealt with Rule 292 which dealt with the court's power to excuse jurors when they're disabled. To begin with, we passed some language that said alternate jurors, if they get moved up to the jury, have the same right to a vote and make up the majority as one of

the original 12 or 6, which was unclear, and now that's done.

What we need to do today is deal with this handout by Pam Baron, and it looks like this (indicating). It's got "Rule 292" at the top, and it's two pages. If you don't have that, you're going to need it.

CHAIRMAN SOULES: Holly will pass that out.

HON. DAVID PEEPLES: We discussed last time two issues. One of them was, can a judge excuse a juror who is unable to come to court because of a natural disaster, and there was that flood case in Houston.

And the subcommittee on it, which was Anne Cochran, Pam Baron and myself, decided that's just -- it's going to be hard to say, you know, what kind of natural disaster and so forth, but more importantly, it is just very important that we not give judges too much discretion to excuse jurors, and we just didn't want to get into authorizing the excusing of jurors because they can't get to court because there's been a flood or

something like that. And so we would prefer not to get into that and just leave that to the existing law.

Okay. Now, on the question of the disability of a juror, that's what Pam's drafting has done. And if you look at the bottom of that handout, there's a proposed sentence that we want to add to Rule 292, and with the changes this makes in the existing rule, they're required to be severe -- that the illness be severe or serious. And if a juror calls and says, "I can't come; my child is sick" or "my mother just died" or something like that, we want judges to have the discretion to excuse that juror if it's a serious illness or the death of a near relative.

And so this is the language at the bottom, and Pam you may want to -- is Pam here? Well, she stepped out.

CHAIRMAN SOULES: Okay. Discussions. The committee recommends that we add to Rule 292 a new sentence, a new last sentence, that the trial court may properly determine that a juror is disabled because of

the severe illness of the juror or the death or severe illness of a near relative of the juror.

Justice Duncan.

HON. SARAH DUNCAN: Did we vote last time that the rule would not include an exception for natural disasters?

HON. DAVID PEEPLES: No. I think we were inconclusive on that, and Judge Brister asked us to draft something that was unclear from the record what he wanted us to draft, but we decided not to draft a natural disaster provision. If somebody wants that, then go ahead and talk about it.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I think it is almost ludicrous that we would let someone stay at home because they have a sick child but we tell them they have to risk their own life and limb to get to the courthouse during a flood. That just doesn't make any sense to me.

HON. DAVID PEEPLES: We're not telling them they have to come. We're telling

judges they either have to get the agreement of the lawyers to go on with 11, or they have to wait until the flood is finished, which usually it is by the next day.

HON. SCOTT A. BRISTER: Well, that's because you live in San Antonio. In Houston our floods don't go away. Kingwood was cut off for at least two days, and the west part of Houston was cut off for close to a week, and some roads were closed for two to three weeks, so you know -- and not to mention when our hurricane came through, downtown was closed for basically a week. You were not allowed to drive in because there was glass all over everywhere. Now, you know, those are exceptional circumstances. You're not going to go forward with a trial anyway if your downtown is closed.

But my concern on that, it's kind of a natural disaster but it's kind of more, it's just, you know, what do you -- I'm concerned that this gives the option to a bad juror, a disgruntled juror, to stop the process. I've had this happen several times, and I've never had the attorneys -- I mean, to me, to say,

well, get the attorneys to agree is kind of like getting attorneys to agree on a visiting judge. They'll never agree. Somebody always doesn't want to go to trial, whichever side that may be, and they're not going to generally agree.

HON. DAVID PEEPLES: My experience has been I've always been able to get them to agree if it was a bench warmer type juror that really wasn't going to affect the deliberations. But if it's somebody that appears to be an assertive juror that probably is going to be a factor, one side or both is going to want that person there. And to excuse a juror like that I think is serious business. It can affect the trial in a major way. You're talking about adding zeros or moving the decimal point one way or the other or liability.

And I think, as I told Judge Brister this morning, we were talking about this, I need to be reminded occasionally that rules apply all across Texas to judges of all different stripes, and I frankly am reluctant to give too much discretion to judges to excuse jurors

when it might really affect that trial.

And I think we would have to trust the advocates; that if it's somebody that they don't think is really going to be a factor in the jury room, my experience has been usually they say, "Go ahead and excuse them."

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Question. I think that if we did give them the right, they would be excused for good, even if they just had to miss a day of trial, so they would be gone?

HON. SCOTT A. BRISTER: Yeah. You can't miss part of the trial and then come back. Judges can do that, but not jurors.

MR. LATTING: Well, I have to say I agree with David in that situation. That's just -- that gives a lot of -- that's just too dangerous, it seems to me.

CHAIRMAN SOULES: Okay. Any further discussion? Bill Dorsaneo.

PROFESSOR DORSANEO: Well, on the severe illness of a near relative, I guess if we're talking about children, we have to remember that mom probably isn't there anyway

because there's an exemption, and I'm --

MR. McMAINS: That's only for minor children.

PROFESSOR DORSANEO: Well --

THE REPORTER: Speak up, please.

PROFESSOR DORSANEO: Rusty said that's only for minor children. That would be the best case, it seems to me, of a severely ill minor child, and I don't think that's a problem. I have difficulty with this severe illness of a near relative kind of excuse. It's kind of like, "Well, my parents are old and they're sick because of it, and I don't want to be a juror." I mean, that's a valid sentiment, I think, but there are lots of other similar circumstances that wouldn't be as good.

Frankly, severe illness of a juror is as far as I would be willing to go with it, because I think as a practical matter, if somebody is severely ill, they're not going to show up. And if they did show up when they were severely ill, unless they may get better, I don't know what the point is.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I don't know if Bill meant to exclude death of a near relative, but I think that clearly someone should be permitted to attend the funeral of a near relative, even if they can't be there when their mother dies, which I think they ought to be able to go to the hospital for the last 24 hours of their loved one's life. I don't know how we would write that.

And if severe illness just means that they have a fever of 104, that's not that big of a deal. But if it means that they're about to die of cancer, you know, that's a once in a lifetime event, which is trivial compared to the other.

CHAIRMAN SOULES: Why can't the judge -- why won't the judge recess for that?

MR. ORSINGER: They should be forced -- that's the choice. The judge should recess. We're giving him the power to recess, right?

CHAIRMAN SOULES: No, we're giving him the power to go forward by excusing

that juror and not take a recess and go forward with the trial.

MR. ORSINGER: No. I think that you should recess it, because you can do that in 24 hours.

MR. LOW: Luke.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: I tried a case for four and a half months, and we had five funerals during that time, but -- it was a criminal case -- but we went on. We didn't excuse anybody. It only takes -- you know, maybe somebody got recessed one day because someone was critically ill; in fact, we recessed days just because we got tired, but we went on with the jurors. Why can't -- why do you have to just excuse the juror if an emergency comes up? Why can't you just wait until the next day or two days? I mean, that would be my thought on it.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: Well, first I'd like to note that it's "may." It doesn't say they have to excuse them under those circumstances. And the state of the case law

right now is that death or severe illness of a relative is not considered necessarily a disability of a juror that excuses the juror unless that event has some strenuous emotional or physical impairment on the juror him or herself, which is a very artificial distinction. We're getting back into like physical effects of emotional distress in whether or not to excuse the juror, and we just wanted to eliminate that artificial distinction that's currently in the case law.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I guess I'm wondering if we should leave it for another reason with just severe illness of the juror, because if you get into the death or severe illness of anyone else, then you get into the problem of defining the anyone else. And the way it's been defined here is "near relative." The problem with that is for some people there is going to be a death or severe illness of another person who is not legally a relative; it could be a fiancee, or it could be a relationship that's not recognized under Texas

law, so you're going to have that problem anytime you try to define another person who is sufficiently close to justify excuse from the jury.

And as Richard points out, and I think other people have pointed it out, Buddy as well, the problem with another person is generally a continuance issue as opposed to an excuse of the juror, so I guess I would argue for limiting it to severe illness of the juror.

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: Well, I agree with, you know, Buddy's case. I mean, we've got to have some flexibility here. What we're talking about is saying the judge may not ever go forward or may not excuse this person under any circumstances if you don't have some of these things in here as a provision.

If there's a four-month trial, obviously it makes sense to take a day off to let them have funerals and personal days and stuff like that. If you've got a one-day car wreck,

sore-back case, it makes no sense to do that. You've got other car wreck cases, and it's not that big a deal. You've got to take these things in context.

And remember, the more things you eliminate from this, you say that that is reversible; that the judge should not shut down the courthouse, turn off the lights. It may be easy for you all to say, "Turn off the lights," but you're not in the -- you're not on Channel 13 in the last month for not having your courtroom full of warm bodies doing something.

And what you're telling me is that because the juror -- and I've had it happen this week. A juror unaccountably shows up 45 minutes late, and I'm supposed to just -- we're stopped. The wheels of justice will stop. We'll do nothing. We call the home. No answer. You know, I mean, it could have been four hours late. Who knows where he was or what he was doing. And the answer is, I cannot do anything. We must stop. Nothing is going to happen, or just start the trial over. That happens too often in Houston with

the number of people and the number of cases we're going through to say just tough. You must just stop justice, because you cannot let that person go under any circumstances. No matter how piddling the case, the judge has no discretion, and you must stop the wheels of justice or just mistry it and start over.

I just think that's way too strong when there are circumstances that we could all agree that it doesn't make any difference, let the person go. But one of the litigants is not going to agree to that.

HON. DAVID PEEPLES: I don't think this rule has anything to do with -- it doesn't give you any power to excuse somebody just because they show up late, whether or not 45 minutes or an hour and a half has gone by and you say, well, we're going on anyway. I don't think this authorizes that in any way.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: This is a larger constitutional issue. We have a right to trial by jury guaranteed in the state constitution, and then there are limitations on that, and it does say that jurors may be

excused if they are disabled. And we are trying to provide a little guidance as to what constitutes a disability, but I think there's a limit, even a constitutional limit on how far we can take that definition.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: What is the meaning of the word "properly" in there? How does one properly or improperly determine?

HON. DAVID PEEPLES: I think what we mean and probably ought to say there is the trial court has the discretion to determine that.

HONORABLE C. A. GUITTARD: Well, maybe you can just say "may" then.

HON. DAVID PEEPLES: Just "may determine" then. "May determine," and take out "properly."

MR. LATTING: I have a question. What do you do now, Luke, if the juror fails to show?

CHAIRMAN SOULES: You wait.

MR. LATTING: What?

CHAIRMAN SOULES: Wait.

MR. LATTING: Well, what if he doesn't show?

CHAIRMAN SOULES: The judge sends a sheriff.

MR. ORSINGER: You get out an arrest warrant or a capeas.

MR. LATTING: But what if you can't find the juror, what can the court do? A mistrial? Is that it?

HON. PAUL HEATH TILL: After a reasonable time, you have to have a mistrial if the judge can't find him.

HON. SCOTT A. BRISTER: Again, to me, I'm not trying to deny anybody's right to a jury trial. I've got 11 of them and an alternate sitting out in the hall waiting. I've have an alternate. I've got 12 jurors right out there, we're ready to go, and a guy who has disappeared. And it makes no sense with 12 jurors, including an alternate that everybody had strikes on, and there's no constitutional problem here, but I can't go forward because this person hasn't shown. That makes no sense.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, I think the issue in the Supreme Court case is that you have a right to trial by 12 jurors. Now, if you've got an alternate, I think you can excuse -- or if that juror doesn't show up, I think you can get rid of that juror and put the alternate on there, and you can put the other juror in jail. You can do anything you want to with that, because the only thing the constitution guarantees is a right to trial by 12. And if you've got 13 out there already or 14 and you won't let them go, the protection that you have is that you go through the alternate system. If you have that discretion, then that's all you need.

And the only other thing is that, and what this is trying to do is trying to expand really on what is in the constitution. And I'm not sure -- you know, that's why the test is somewhat artificial, because it says you can excuse a juror for the disability of that juror.

And frankly, it's not really that hard to say to have a judge make a finding that the death of a person's mother or child or husband

or whatever is going to affect their ability to discharge their functions in this case.

First, you allegedly ask that as a leading question, but secondly, you've got a yes answer, and then the third, the judge, this is a voter in his district, is not going to have any difficulty at all making that finding. So I don't consider it to be that big of a burden.

And I have a serious problem when you've got -- usually when we talk about anything that relates to some kind of relationship, we talk about a certain degree of affinity or consanguinity, and I would object to anything that's as nebulous as "near relative," because I don't know whether that's my brother's cousin, or you know, third cousin, second cousin, fourth cousin. What does that mean?

And it may be somebody that's real close to you that isn't related to you at all, which doesn't give you any relief.

So I think the focus should be on the constitutional focus, and must be on whether or not this event, be it physical to them or emotional to them, essentially detracts or

incapacitates them from service as a juror. If they can't discharge their function because of the emotional concern or whatever, then that's what should excuse them. Otherwise, I think our remedy is by the alternate system.

HON. SCOTT A. BRISTER: David, do you agree there's a different rule if you have alternates or not?

HON. DAVID PEEPLES: Frankly, I didn't look at the alternate juror statute to see what triggers the right to replace or to --

HON. SCOTT A. BRISTER: I can't imagine it being anything different than this. Is it disability, right?

CHAIRMAN SOULES: What did we write on 292 about alternates? We've done that somewhere.

HON. DAVID PEEPLES: Well, there was a case which said your 10 has to be of the original jurors, and the Dallas Court of Appeals said that that meant that an alternate couldn't make up one of the 10, and we changed that. That's all we did at that meeting.

MR. McMAINS: No, but this rule does change it.

HON. DAVID PEEPLES: Yeah. But this is a different subject.

Luke, maybe we ought to see how closely divided the house is on this and do some more looking at this if it's close.

CHAIRMAN SOULES: We changed -- we voted on this change to recommend it. Rule 292 starts that a verdict may be rendered in any cause by concurrence, as to each and all answers made, of the same 10 members of -- and we struck "an original" -- 10 members of a juror of 12 including any alternate jurors sworn as replacements. However, where as many as three jurors die or be disabled or disqualified and there are only nine jurors remaining of a jury of 12, including any alternate jurors sworn as replacements. And then if fewer than 12, the verdict must be signed by each juror.

So that almost suggests that if you've got alternates, they're replacements as opposed to -- I don't know if they can be replacements only for disabled jurors. It

doesn't really address that question.

PROFESSOR DORSANEO: The statute does.

CHAIRMAN SOULES: The statute says what, Bill?

PROFESSOR DORSANEO: An alternate juror shall replace jurors who prior to the time that the jury retires to consider the verdict become or are found to be unable or disqualified to perform their duties.

MR. McMAINS: If you can't find them, they're unable.

PROFESSOR DORSANEO: So we need to decide what "unable" means, which is not too far different from "disabled," but it's a little bit different.

CHAIRMAN SOULES: Okay. Well, we've got that information out. Buddy Low.

MR. LOW: Well, one of the things I think that is not --

MR. McMAINS: Well, he can't perform his duties if he ain't around.

MR. LOW: I mean, I see what we're talking about. But to me, the real issue that's going to be before the bar and

the one that's going to be the most talked about is under some circumstances you can have a nine-man jury verdict. There was a big -- I mean, you know, there was a big cross in the bar when we went to 10. If they see us changing now, you can do it in these circumstances nine, you're going to have a big -- I mean, maybe there's not that much difference between nine and 10, but there is one, and so I think when you say, okay, now we can have nine, we're going to get a lot of opposition to that.

MR. McMAINS: But that's not mentioned. That's not --

MR. ORSINGER: That's the current rule, is nine.

MR. LOW: The current rule allows nine?

CHAIRMAN SOULES: Yes. Nine unanimous.

MR. LOW: Well, maybe they knew more about it than I did, but to me, I wasn't even aware of that honestly.

CHAIRMAN SOULES: Okay. Did you want to say something about --

MR. ORSINGER: I wanted to say something, David, that's a little bit different.

And if you want to vote on that, then I'll mention this after the vote.

CHAIRMAN SOULES: Well, in order to see maybe what the division of the house would be, let me first get a show of hands, no change versus some change. Okay. And then we'll decide whether we go to -- and then I guess unless there's somebody that moves to amend this, I'll get a vote on whether we stop at the juror's death or severe illness or go on to --

MR. ORSINGER: Juror's death?

CHAIRMAN SOULES: Juror's severe illness. Okay. Those who favor no change in this regard on 292 show by hands.

HON. PAUL HEATH TILL: Could I ask a question first? Are you talking about no change but with the changes that were made earlier, striking the word "original"?

CHAIRMAN SOULES: That's already been voted on.

HON. PAUL HEATH TILL: That's

what I'm trying to find out.

CHAIRMAN SOULES: I'm talking about a change such as the proposed last sentence in this memorandum that we have before us from Pam. Okay.

Those in favor of no change such as I recommended show by hands. Two.

Those in favor of some change. 16. 16 to two some change. 16 to two some change.

HON. DAVID PEEPLES: Luke, can I ask a question?

CHAIRMAN SOULES: Yes, sir.

HON. DAVID PEEPLES: I'm a little bit concerned. I want to make sure that we don't do something that doesn't mesh with the alternate juror statute which uses the words "unable" or "disqualified." This says "disabled."

I haven't thought out what rights the judge ought to have when you have waited two hours and the juror doesn't show up and it's a little bitty case. Sure you can set out and try to find them, but if you can't find them, can you bring in alternate. I would think in a little bitty case you wouldn't have

alternates.

HON. SCOTT A. BRISTER: That's true.

HON. DAVID PEEPLES: I'm just not sure that we know, you know, how it ought to work to trigger an alternate replacing a juror as opposed to just excusing one and going with a jury of 11.

CHAIRMAN SOULES: Pam is indicating that the word and constitutional standard is "disabled." Do you know where that is, Pam?

MS. BARON: Yes, I do.

CHAIRMAN SOULES: Where?

MS. BARON: Okay. Article 5, Section 13, and it's when you can have fewer than 12 jurors.

CHAIRMAN SOULES: What does it say?

MS. BARON: It says when the verdict shall be rendered by less than the whole number -- no, I'm sorry. When ending a trial in any case, one or more jurors not exceeding three may die or be disabled from sitting. The remainder of the jury shall have

the power to render the verdict.

CHAIRMAN SOULES: Well, if "disabled from sitting" is the standard, the constitutional standard, then it seems to me like the statute varies a little bit. It may have problems on its own, but we should probably stay with the constitutional.

PROFESSOR DORSANEO: But then the constitution also let's the legislature change or modify the rule authorizing less than the whole number, so the constitution defers to what the legislature wants to do.

CHAIRMAN SOULES: Okay. That suggests, then, that we can use either word. Is that what you're suggesting? Yes? Okay.

HON. DAVID PEEPLES: Luke, I think we ought to get a vote, and I'll move that we get a vote on the language as is. And I would just stress that this just gives the courts the discretion to do it, and I think the word "severe" does tighten it down a bit. "Near relative," I just think it would be too hard to soak up -- to go beyond that.

MR. LATTING: Second.

HON. SCOTT A. BRISTER: Can I

suggest that we split out a vote, the near relative vote from the other natural disaster issue, because those seem to be two different issues.

MR. LOW: Luke, it seems to me the judge ought to have more discretion when there's an alternate. I think if there's an alternate and the judge wants to do that, then there just ought to be a lot more discretion there than this other thing.

If one of the judges, you know, has that problem, he ought to be able to have alternates, and I think just if he wants to, he just -- if the guy doesn't show up or something, he ought to have a lot of discretion there, you know.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: I think we also need to look at this from the perspective of the juror. And there is a move across the country to have more rights for people sitting on juries. And if you are called to serve on a jury and are faced with a significant illness in your family, you should be excused, is my view. And we should be able to let

people know that if there's a problem that comes up, we can handle it for them.

HON. SCOTT A. BRISTER: I'll second that, because that is the main thing I see in these cases, is the -- and nobody in this room, no offense anybody, but the lawyers could care less about the jurors' lives and disruption. The jurors realize that and they get that message, and they're furious about it. And it really -- I frequently find a lawyer who for strategic reasons will throw up a roadblock because they could care less about the jurors' personal life or problems, not that they're not caring people, but it's just that this creates a strategic opportunity to do something else.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Have we decided whether the constitutional standard of "disabled" applies to the question of using alternate jurors? Obviously it applies to -- and if we haven't reached that question, then I think we need to answer that question, because if the disabled standard doesn't apply

to alternates, then we're just dealing with the statute, which says "unable or disqualified" and we can argue about whether that means something different from "disabled."

The next thing I have to say has nothing to do with that, but if we are looking from the perspective of jurors, and that's one, if not the primary, justification of this, then I get back to my original point that "near relative," is not going to satisfy every juror's perspective, because you're going to have people who are close to someone else who is not a relative, and that person will be as upset as the parent of a child or the spouse of a person who is sick or has died, so we still are going to have to deal with that problem.

CHAIRMAN SOULES: Okay. The subcommittee wants us to vote up or down on the proposed last sentence to 292, deleting only the word "properly" and leaving the rest of it, all the words intact. Those in favor show by hands. 11.

Those opposed. 11 to 6 it passes.

MR. ORSINGER: I have a different comment.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: I think the rule as written, before any of these amendments, has a problem with construction, because while in two of the sentences we're talking about juries of 12 or juries of 6, in the middle sentence we only talk about you can go down to nine jurors and still bring back a verdict, but we don't say you can go down to five jurors out of six and still bring back a verdict, and it seems logical to me that we ought to say that.

PROFESSOR CARLSON: The prior sentence does says that.

MR. ORSINGER: It's in the first and the third sentence. The point I'm making is that we say that you can return a verdict on nine out of 12, but we don't say that you can return a verdict on five out of 6, even though we all know that we should.

HON. DAVID PEEPLES: Well, doesn't the first sentence say a verdict may be rendered by five of the original 6?

MR. ORSINGER: Then why do we even need the second sentence, if the first sentence is the sentence that counts?

HON. DAVID PEEPLES: The second sentence is when you lose more than one. You can have a verdict, but it has to be unanimous too.

HON. SARAH DUNCAN: When you lose more than two. More than two. You can lose three.

MR. ORSINGER: Let's say that I'm down four out of six. Can I or can I not return a verdict?

HON. DAVID PEEPLES: I don't think so.

MR. ORSINGER: How can I tell?

HON. DAVID PEEPLES: Sentence No. 1 says you can if you go down to five in county court. Sentence 2 says in a 12-juror case you can, if you go down to 10 or nine, but it's got to be unanimous. Isn't that what it says?

CHAIRMAN SOULES: Yeah. You can't -- under this rule, it takes five in county court.

HON. DAVID PEEPLES: See, the verdict must be signed by each juror concurring therein. I guess that doesn't actually say.

MR. YELENOSKY: Well, it doesn't even explicitly say that the nine have to be unanimous, right?

CHAIRMAN SOULES: Well. That's in the 10/2 rule. Which is that?

MR. YELENOSKY: Well, it says 10 out of 12, and then it goes on to a however clause, which says that nine people can render a verdict, which may be implicit but not explicit that that has to be unanimous. There's no other rule that provides it.

CHAIRMAN SOULES: It's only the reduction below 10 that is allowed in a 12-person jury, but there's no provision for a reduction below five in a six-person jury.

MR. HAMILTON: Below six?

CHAIRMAN SOULES: No, below five.

MR. HAMILTON: There's no provision for any reduction at all. It just says how many votes you have to have.

HON. DAVID PEEPLES: I hate to have to say this, but maybe we need to take another look at it in the subcommittee.

MR. YELENOSKY: Well, it's also implicit when it says if less than the original 12 or six jurors render a verdict, so implicitly less than six or explicitly less than six can render a verdict, doesn't it?

CHAIRMAN SOULES: No. This is talking about if it's 12, it's 10-two; if you've got 11, it's 10-one.

MR. YELENOSKY: No, because it says if less than the original six --

CHAIRMAN SOULES: If six, then it's five-six.

MR. YELENOSKY: Okay. I understand.

CHAIRMAN SOULES: Or five-one.

HON. SARAH DUNCAN: I think the requirements are --

CHAIRMAN SOULES: All right. If we're going to do that, somebody suggest it and write it up. Let's get on with the business at hand today. So we've taken care of 292 to the extent of the subcommittee's

recommendation. Anything else on this? Judge Brister.

HON. SCOTT A. BRISTER: Well, don't we need to vote on whether we need to add a natural disaster or something exception?

CHAIRMAN SOULES: How many feel we should have a natural disaster provision? Three. Those opposed. 10. 10 to three against a natural disaster exception.

CHAIRMAN SOULES: Anything else on 292? Chip Babcock.

MR. BABCOCK: Luke, is the existing law that the judge does not have discretion to excuse jurors for natural disasters?

CHAIRMAN SOULES: If he can't cross the creek, he has to wait.

MR. BABCOCK: The judge has to wait?

CHAIRMAN SOULES: That's a Supreme Court decision in 1995 or '96.

MR. McMAINS: The decision is -- there was no alternate in that case. The only decision in that case was that they could not proceed with less than 12. The

holding was that 12 jurors is what they were entitled to to decide the case. There was no holding that he has no power to excuse the juror. That's not what that case is about. It says you can't reduce the number below 12. You can fix that with alternates. There's nothing in that case -- because nothing in that case suggests that you can't use the alternate system to accommodate every single problem that you're talking about.

HON. SCOTT A. BRISTER: I hope you're right.

MR. McMAINS: But the problem is the alternates -- well, the problem is that the authorization to use alternate jurors is in the statute, because that's part of the legislative change. And in the legislative provision the statute says that you can excuse a juror and use an alternate when he's unable or disqualified, becomes disqualified or unable. And what's lacking is there's no definition of "unable."

The problem is, if these things don't constitute inability, or if "unable" means the same thing as "disability" in the constitution

with regards to qualification, then what we just did is patently unconstitutional. All right? And I don't know if that's going to be -- maybe this Committee is willing to just say, "We don't care what the constitution says or what the legislation means." But unless you're willing to say that the legislature's use of the term "unable" means more than "disabled," then we have just done something that is unconstitutional in terms of the provision in 292. That's what I was objecting to.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: I sort of understand Rusty's point. I'm not sure I have it precisely. But after the alternate juror statute was passed, there was a case that said basically that alternate jurors are meaningless if it takes you below the number set in the constitution. So there's got to be a distinction, then, between when alternates can be called to sit and when they are constitutionally disabled allowing a verdict of less than 10 under that case. Is that not right?

CHAIRMAN SOULES: Okay. Well, we've voted, and that's resolved, at least the vote to recommend the rule is resolved.

What's next, Judge Peeples?

MR. ORSINGER: Before we go on, I'd like to raise one additional issue.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: I have recently had an issue come up where in a bifurcated trial the same 10 jurors that returned the first verdict were not the 10 that returned the second verdict. Now, there's one court of appeals case that said that that's okay, because the second part of the bifurcation is, quote, a separate trial; and that the requirement that it be the same 10 only applies to whatever, quote, trial you're trying, not if there's a separate trial. I'm not confident that that's right, and this is the rule that governs that, and perhaps we ought to decide whether it has to be the same 10 on punies that were in the first phase or not and then say so.

CHAIRMAN SOULES: Write it up and bring it back.

What's next on your agenda?

HON. DAVID PEEPLES: Rule 216. And you need to look in the first supplement entitled --

CHAIRMAN SOULES: I agree that that's an issue, Richard.

HON. DAVID PEEPLES: -- on Page 410, or else just get your rule book out. It's Rule 216.

Our esteemed chairman wants us to take out the words "on the nonjury docket." Do you remember asking us to do that, Luke?

CHAIRMAN SOULES: Right.

HON. DAVID PEEPLES: So it's Rule 216(a), toward the end of sub (a), the words "on the nonjury docket." If you just take a look at that, then I will tell you why. Apparently this case down there said if it's set on the jury docket and a jury fee hasn't been paid, this rule doesn't apply. It's only when the case has been on the nonjury docket and there's no fee paid that it's a problem; it gets knocked off.

CHAIRMAN SOULES: That's one problem. Problem 2 is that in some rural

courts they don't have a jury docket versus a nonjury docket. They just have a trial setting. And when you get there, if you paid a jury fee, timely paid a jury fee and made a jury demand, they'll get you a jury. And if you haven't, then you're going to try it to the bench, so there isn't a, quote, nonjury docket.

HON. SCOTT A. BRISTER: That's what I do in my court.

CHAIRMAN SOULES: Anyway, that's what I've recommended. If you haven't paid, timely paid your jury fee before a trial setting, that's what it's all about.

HON. DAVID PEEPLES: So the proposal from Luke is take out the words "on the nonjury docket." Our subcommittee said go ahead and take the words out.

CHAIRMAN SOULES: Any opposition? Okay. No opposition. Those in favor show by hands. Okay. That's unanimous. Thank you.

MS. WOLBRUECK: Excuse me, Mr. Chairman.

CHAIRMAN SOULES: Yes, Bonnie.

MS. WOLBRUECK: I just wanted to bring up an issue that was brought up before Richard Orsinger's subcommittee. We had talked about these rules just briefly because of some clerk duties involved in it. We had talked about it, and I would be willing to propose to this group if you would like to take the fee out of the statute. This is the only -- I mean, out of this rule. This is the only place that a fee is in the rules.

There is a jury fee in the statutes right now in the Government Code, and I'm wondering if that's something that this committee would like to propose. Then it would just read that the fee required by statute shall be deposited.

MR. YELENOSKY: That's a good idea.

MS. WOLBRUECK: The problem is actually, with this rule, what's the fee for a county court at law?

PROFESSOR DORSANEO: Five.

MR. ORSINGER: The rule says it's five.

CHAIRMAN SOULES: Well, that's

county court. She's saying that may be constitutional county court. Who knows?

MR. ORSINGER: Constitutional county court.

MS. WOLBRUECK: The statute in the Government Code sets out a fee for a district court, county court at law or a county court. And then that sentence says that that fee is to be paid in addition to the fee in Rule 216. I realize that the logistics of taking care of the statutory fee, possibly raising it so that it's all the same amount so that counties don't lose any revenue and the like, is maybe difficult as far as the logistics of the timing, but you know, we would be willing to go back to the legislature to clear up the Government Code statute to reflect what the rule says.

CHAIRMAN SOULES: The Government Code says what, that some fee is to be paid?

MS. WOLBRUECK: It says in district court it's a $20 fee and it's $17 if it's filed in the county court at law or county court. It mentions both courts. And

then it says that that fee is in addition to the fee in Rule 216.

MR. HAMILTON: Nobody is paying the right fee.

PROFESSOR DORSANEO: I'm just looking at this statute. It's no longer restricted to Houston. They changed it, so our procedural rule is wrong.

CHAIRMAN SOULES: Okay. Well, Bonnie, will you write somebody up for us?

MS. WOLBRUECK: Sure. And you know, it's up to the Committee, but I've talked to a few clerks about it, and I feel that there's a little cleanup that needs to be done on the statute, and we were going to possibly propose that next year with legislation anyway, and then, you know, if this Committee would like -- like I said, this is the only place that there's a fee in the rules. All fees are in the statutes.

CHAIRMAN SOULES: Well, you may not want us to change this until you get a change in the statute.

MS. WOLBRUECK: Well, that's the reason I said as far as the logistics of

all this happening, possibly if we could look at January of '98 or something, I don't know if that would be logisitically possible. If we proposed legislation, we could ask that the legislation go into effect January of '98 or something.

CHAIRMAN SOULES: If they just take out "in addition to Rule 216," take that out and set the fee, then you're going to be under "unless otherwise provided by law," and these fees in 216 won't have any operative effect. It will be what the statute says. If they say it's $20, it's $20. If it's $30, it's $30. It won't be in addition to 10 or five or whatever. It will just be controlled by the statute, because that will be otherwise provided by law. Then we can take these dollars out.

MS. WOLBRUECK: Okay. I mean, I'm just proposing it.

CHAIRMAN SOULES: And we can take them out now, but that's going to be ten and five dollars, lots of tens and lots of fives not collected.

MS. WOLBRUECK: That's the

concern that I have as far as the logistics of making all this happen so that counties don't lose revenue during an interim period or possibly gain more revenue. I don't know which way it would happen.

CHAIRMAN SOULES: Sarah.

HON. SARAH DUNCAN: It seems to me that it ought to be fairly easy to fix since we're going into a legislative session.

MS. WOLBRUECK: That's the reason I said you could --

HON. SARAH DUNCAN: We just give it to the Supreme Court with the recommendation that it take effect September 1, 1997 or whatever the date is that the amendment to the statute --

MS. WOLBRUECK: Or it could be January of '98 if it would be easier for the Supreme Court. The legislation could be written like that.

CHAIRMAN SOULES: And if you get it passed.

MS. WOLBRUECK: Yes, and if we get it passed.

CHAIRMAN SOULES: It will

probably be uncontested, but that still doesn't mean it will get passed.

Okay. Well, if you want to propose something on that, we would be happy to entertain it. Okay. Next.

HON. DAVID PEEPLES: On Rule 226(a), last meeting we voted 13 to five to include in the instructions that the judge gives to the jury panel something about, you know, "Come up and talk to me or the bailiff if you've got a felony conviction." Now, here's something, we voted to delete Rule 230, which said you can't ask jurors about theft and felony charges and convictions. And I made the -- I said maybe we can just have the judge do the asking in the standard instructions.

Now, everywhere that I'm aware of the judges follow the statutes which say you've got to be sure that jurors are qualified. And one qualification is you don't have these felonies or thefts on your record or have been charged with them.

Ann Cochran made a pretty persuasive point. She said if you're going to tell them

during the 226(a) instructions, if you're going to bring up the felony business again, why not, you know, are they all 18, are they citizens, do they reside in the county, and so forth.

And so our subcommittee basically concluded that we ought to not require the trial judge to say again a second time in the 226(a) instructions, "Anybody who is still here, even though you've got a felony, talk to the bailiff or come up and talk to me during a recess and we'll deal with it." In other words, don't change 226(a). That's our recommendation.

CHAIRMAN SOULES: Okay. Any opposition to that? So 226(a) is withdrawn and not passed.

HON. DAVID PEEPLES: All right. So for the next two you need to get the second supplement, which looks like that (indicating), and turn to Page 439.

MR. LATTING: The second supplement?

HON. DAVID PEEPLES: The second supplement, Page 439. There's a memo to Lee

Parsley from Charles Spain, and at the bottom of 439 and the top of 440, he says we need to change rule -- all we're asking for today is for some discussion on this, because quite frankly, we don't have a feel for what ought to be done. On 237(a), he says he would like for us to change that so that when a case is remanded from federal court you would have 30 days to make objections on the basis of privilege and so forth that you didn't get to make when you were in federal court and some discovery got done.

So some of you who practice in federal court, it's the bottom of Page 439 where he says, "The other issue we discussed," and so forth. It's very short. You might want to read it and give us some help on this.

MR. LATTING: What is the current status of --

HON. DAVID PEEPLES: 237(a) deals with the cases on remand, but it doesn't say anything about the status of discovery that took place federal court.

MR. BABCOCK: What objections would you not have made or not have had the

opportunity to make in federal court that you would in state court?

HON. DAVID PEEPLES: I don't know. But the last sentence in his memo says something about the specific responses that the defendant was forced to make in federal court, and that it may be because of the state of the pleadings over there. I mean, I don't know. I haven't been in federal court in 15 years.

CHAIRMAN SOULES: Lucky you.

MR. LOW: I don't know how it is anyplace else, but generally everything is halted until the judge decides whether he's going to remand or keep it or --

MR. LATTING: Not in these parts.

MR. LOW: Really? That's what happens in Beaumont.

MR. LATTING: The judge in San Antonio doesn't do anything. He just ignores the petitions for remand and we just litigate.

MR. LOW: I won't criticize my federal judges so much anymore. They aren't

so bad after all.

HON. DAVID PEEPLES: If this is not a problem for people, maybe we ought to just politely reject it and move on. I don't know. We just wanted to know if any of you all who have had experiences like this would give us some guidance.

CHAIRMAN SOULES: Well, it's something of an abyss. You're just in never-never land. If -- discovery can even commence in state court, for example, when a petition is filed. Discovery can be served. Then there are due dates, and then the case gets removed.

Our idea about that is that since that was initiated under state law, we need to respond on the deadlines provided by the state rules or we may run into problems. But there are no real answers that I see that I know of to that question.

MR. BABCOCK: Luke.

CHAIRMAN SOULES: And we had one serious problem that we fixed once before, and that was if a case was remanded you had to file an answer, and these people had been

litigating over in federal court about diversity jurisdiction or some kind of jurisdiction and everybody has made appearances and they've been fighting for a year, and then the case gets remanded back to state court. And the lawyer who has made an appearance and his client who has been litigating in federal court failed to file an answer and they defaulted him after he got back to state court, and it happened, you know, and we fixed that part of it.

Now, I don't know whether we -- this can be a pretty major undertaking to try to figure out how to deal with this tangle of issues that happens when you've got a removal and a remand and all that going on. Chip Babcock.

MR. BABCOCK: Luke, there is a problem involving removal and remand that I don't think we can fix, because it's a problem with the federal system. If you serve discovery with your complaint in state court and say you've got 50 days to answer, and then the case gets removed, I think the case law is that automatically upon removal federal procedure applies. Now, federal procedure

says you can't send any discovery until there's been a Rule 26 conference.

MR. YELENOSKY: Depending on where you are.

MR. BABCOCK: Depending on where you are. And sometimes they'll send an order out and say you don't have to have any conference. Then under the federal rules, all the federal rules say is that you get 30 days to respond once discovery is allowed to be served. So you have this 20-day hiatus between the 50 days the state rules give you and the 30 days that the federal rules give you. And if you've got requests for admissions, that's a real bad trap that you can fall into there.

But the specific problem that's being addressed here I don't think is a problem, because there is no objection under state practice that you're allowed to asserted that you could not also assert in federal court. And giving somebody just an extra 30 days to make objections after it's been remanded strikes me as a bad idea.

CHAIRMAN SOULES: I guess we

could just write a general rule that upon remand from federal court the parties have 30 days to get their house in order, whatever that is, because it's a whole panorama of things that it could be.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: My suggestion is that we do nothing, just because if we're going to do anything, we're going to have to make an extensive careful study of it, and I don't think -- I think we've got better things to do with our time, because I don't think this is that much of a pressing issue to the lawyers or the judges of this state. I mean, it's something that's legitimate, but it's just not one of our big items of business, and I don't think we better pass some little rule, because we're going to get in trouble if we do. I think we need to think about other things first.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: And depositions taken would be admissible under our rules now. Depositions taken in federal court in discovery would be admissible when it went

back, because it's the same proceeding and so forth, so it's probably not that big of a problem.

CHAIRMAN SOULES: Steve.

MR. YELENOSKY: Yeah, I was just going to say, the problem is on the other end, it's the federal rules, when you get removed. I mean, I've been removed out of the court of appeals, and the problem is not the remand, and we can't deal with the federal rules, so we should do nothing.

CHAIRMAN SOULES: Okay. Those in favor of doing nothing on this recommendation for a change to 237(a) made by Charles Spain. 14.

Those who feel we should attempt to study this new rule on it. None.

Okay. I believe our lunch is here. Why don't we take a break now until 1:00 o'clock, and we'll reconvene at 1:00 o'clock.

(At this time there was a recess.)

- -

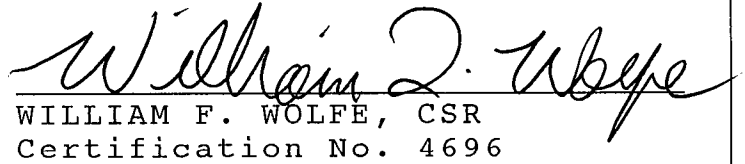
CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing excerpt of the Supreme Court Advisory Committee on March 15, 1996, Morning Session, and the same were thereafter reduced to computer transcription by me.

Given under my hand and seal of office on this the 8th day of April, 1996.

ANNA RENKEN & ASSOCIATES
925-B Capital of Texas Highway
Suite 110
Austin, Texas 78746
(512) 306-1003



WILLIAM F. WOLFE, CSR
Certification No. 4696
Certificate Expires 12/31/96

#002,692WW