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

HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 16, 1997

(MORNING SESSION)

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

Taken before William F. Wolfe, Certified Court Reporter and Notary Public in Travis County for the State of Texas, on the 16th day of May, A.D. 1997, between the hours 8:45 o'clock p.m. and 5:30 o'clock p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

MAY 16, 1997

MEMBERS PRESENT:

Charles L. Babcock
Pamela Stanton Baron
David J. Beck
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Anne L. Gardner
Donald M. Hunt
Gilbert I. Low
John H. Marks Jr.
Anne McNamara
Anthony J. Sadberry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Prof. Alexandra Albright
Hon. Ann T. Cochran
Michael T. Gallagher
Hon. Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring, Jr.
Tommy Jacks
Franklin Jones, Jr.
David E. Keltner
Joseph Latting
Thomas S. Leatherbury
Hon. F. Scott McCown
Russell H. McMains
Robert E. Meadows
Richard R. Orsinger
Hon. David Peeples
David L. Perry

EX OFFICIO MEMBERS:

Honorable William Cornelius
O.C. Hamilton
Doris Lange
Mark Sales
Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

Hon. Nathan L. Hecht
Hon. Paul Womack
Paul N. Gold
David B. Jackson
W. Kenneth Law
Hon. Paul Heath Till

MAY 16, 1997
MORNING SESSION

Doc #11907

INDEX OF VOTES

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

(Meeting convened 8:45 a.m.)

CHAIRMAN SOULES: All right. Thank you all for being here. Once again we'll convene our Supreme Court Advisory Committee meeting. We'll send a sign-up sheet around.

Lee Parsley had asked me to bring something to the attention of the Committee early on for resolution here, and I think it's something that Mark Sales has been working on. I don't want to get too far ahead of Mark and Buddy. It is an evidence issue.

The Court had asked or apparently had asked for some indication from the State Bar Rules Committee and our Committee concerning having the court appoint court experts or case experts in addition to the experts selected by the parties or maybe instead of experts selected by the parties and what have you.

The State Bar Rules Committee responded to the charge of the Court to write something up that would get the job done, if necessary, but unanimously opposes having such a rule. And I think what Lee has suggested the Court may want to know first is, does anybody feel

we really need such a rule?

And Mark, I think I'm being fair to you to say that you agree we don't even need to look at the substance of this until we pass the threshold of whether it's needed, right?

MR. SALES: I think that's correct.

CHAIRMAN SOULES: You're not going to be offended if we don't noodle into your work product, and the State Bar Rules Committee won't be offended either, is that right?

MR. SALES: Well, I think the rule was -- the idea was to draft that rule taking what Judge Brister had done and first take it to them to see if there was any support for it, which there was not, but in that event, let's go forward and draft something, and here is what the rule ought to look like. And I think I put a copy up there for folks to look at. But I would not -- you know, obviously if there's no support, there's no support.

CHAIRMAN SOULES: All right. And Buddy, your committee recommends we have

no such rule?

MR. LOW: No. But let me give you a little history on it.

CHAIRMAN SOULES: Okay. Good.

MR. LOW: This Committee voted against having a rule like the Federal 706 where they testify and so forth. So it was suggested by Justice Hecht that we look at the limited situation of appointing an expert in duPont vs. Robinson type Daubert situations.

My committee met in Houston, and Judge Brister helped us to draft such a rule. We took 706 and modified it to that extent. My committee really did not address the merits of the rule, and we just drew a rule. So it is appropriate to discuss whether or not we should have a rule, and I would ask -- I think Judge Brister was in favor of such a rule, and maybe he has reasons and would like to state why he favors the reason. And I think some of the other judges have requested a rule. Judge Brister?

CHAIRMAN SOULES: Judge Brister.

HON. SCOTT A. BRISTER: The

original impetus was the discussion -- I spent a half day or a full day in the most recent judicial conference in Houston, and there seemed to be significant, if not great, majority support among the judges to at least have the option on the duPont vs. Robinson hearing for the court to get the assistance of somebody.

Now, I hope it doesn't come as a surprise to you, to anybody here, that in situations like that, judges sometimes call up doctors or neighbors and ask them about these things even now. This would allow a more formal procedure and allow you to know what the judge talked to somebody about before you just find out what the judge's decision is. The problem is, especially in the duPont situation, I'm supposed to be determining what is and is not mainstream science. And if I can't appoint an expert, then I can tell you right now what each side is going to say. The party purporting the expert is going to say it is, and the party against the expert is going to say it ain't. And that is not going to help me, because I know right now that's what

they're going to say. You could say, "Well, I could look at their CVs," and you know, sometimes that will be helpful and sometimes it won't. I could look at peer review, but you know, if you want the test to be, it has to be in a peer review journal or it ain't science, that's fine. That's easy for me to apply. But I don't think most lawyers are going to want that.

And so then I've got to have something to go on, and I've got to have something more than the credibility, that credibility assessment of the hired experts by either sides, who I know in advance what they're going to say, because you can hire experts that are good for credibility reasons, for acting like they're credible, whether they are, just like you can hire one that's good on the science.

So the idea was to draft a rule modeled on the federal rule, but limit it to allowing courts to appoint an expert only per this issue, Robinson vs. duPont, and to protect everybody -- as I understand the concern on court appointed experts, it has always been

what happens that's going to kill my case if the judge hires an expert against me. And everybody has got their horrible stories about the parts of the state where, if they go to there, the judges in that part of the state are going to hire experts against them and they're never going to be able to win because the jury is going to support the court-appointed expert. And we can take care of that simply by -- we proposed in our draft that nothing ever done, no opinion, or even the fact that the court appointed an expert for this Robinson hearing can ever come in front of any jury, period.

So my feeling is, what's the harm of making a formal procedure for me to do what a lot of judges are going to do anyway? So I would urge that we at least send the rule up to the Court to consider.

MR. LOW: Mark, do you want to address the down side that your people discussed for such a rule?

MR. SALES: There were some meeting minutes, which I didn't have time to bring copies of all, of some of the concerns.

MR. LOW: I have them.

MR. SALES: But the State Bar Committee obviously wanted to do that to give the Court at least a chance to look at a proposed rule, which I did bring. It's up there. But some of the concerns were that it could be subject to an unwillingness of judges to relegate their role. And instead of an extraordinary rule, it becomes a rule that's used in every case; that there's just automatically going to be a court-appointed expert. That was one concern that was expressed.

Another was where are you going to find these supposed independent unbiased experts. How are you going to find them? Are there any such experts out there? You know, how is the court going to pay them was a pretty hotly debated issue here. Is that something that, since it's the court's role, is that going to be taxed against the party or are you going to take it out of public funds. Those kinds of experts can be very expensive. How is it going to be paid for? I think there was a very great fear that what will happen is the

expert won't just help with the reliability issue, but will actually pass on the credibility of the various parties' opinions, and that will persuade the judge, rather than focus on the underlying methodology, which is at the heart of Robinson.

I think those are probably the primary concerns. There were a lot of other ones, but I think those are the ones I think that persuaded most people that if there was going to be a rule, it should be very extraordinary.

MR. LOW: Luke, I agree with everything Judge Brister said. But some of the criticisms I've heard in just talking to different people about it is that it tends to make more complications with regard to not really the trial of the case. It just adds another step in there, duPont vs. Robinson, and then you have a hearing. And then are you going to be able to attack whether or not this court-appointed expert is qualified to advise on that point? Does he have the qualifications? And it adds more expense and more time. Those are the criticisms I've heard people give. Steve.

MR. SUSMAN: I agree. I mean, I think that, number one, the federal system has had Daubert for some time, and experts are appointed in federal cases. I mean, there fully is authority for the court to appoint an expert. Apart from being the rule, there's no such rule in the federal regime. And I am fearful that what will happen is that the mere existence of the rule will encourage it to be overused in cases where the judge really should have no problem. I mean, most of the factors, eight or nine or 10 factors that the Robinson/Daubert kind of lines of cases identify, the judge can define readily. Has the methodology been tested? Can it be tested? Is it peer reviewed? Is it published? Is it generally accepted, which is nothing new. That's the Frye standard, which has been applied for 70 years now. In all these -- you know, can it be replicated? Was it done solely for litigation, the methodology? Was it solely for litigation, or is it used apart from litigation? All of these factors, you don't really need to be a scientist to answer the question.

The one you probably need a scientist for is is it generally accepted by the scientific community. But that's been facing courts, again, under Frye for 70 years. That's been the standard that the gatekeeper is supposed to use.

So I think the rule will become abused. Judges will appoint -- they'll have their favorite experts, their favorite doc or their favorite metallurgist or something like that, who will be foisted on the parties in every case, and we'll have one of these Robinson hearings all the time.

I'm opposed. I mean, I think this rule -- I think the rule is fine as far as it goes, although I will point out, as I read this rule, it does not require that the communications between the expert and the judge be only on the record in open court. I mean, so you could still have the expert whispering into the judge's ear, which is the same problem that Judge Brister said the rule was designed to bring out into public. So if you're going to have a rule like this, at least prohibit the expert from communicating

with the court other than in open court and on the record so everyone can hear the communications to enforce the prohibitions on what the expert is supposed to be telling the judge.

So again, my vote would be this is fine if you want to send something, but I would add some paragraph on that. But I would say we don't need it.

MR. LOW: We would have to discuss it. If we did, we would have to discuss the details, because we have not had a chance to review Mark's committee's rule. And one of the things, like on cross-examination, that would be a highly debatable point, whether you could cross-examination the court's expert. There are a lot of things that need to be worked out, I would agree. Judge Brister did an excellent job of just taking a rule and drafting it and --

HON. SCOTT A. BRISTER: Well, I just took the -- we just took the federal rule in our meeting and made it applicable just to Robinson hearings.

MR. LOW: Right.

MR. SALES: I can tell you just quickly a couple of points in our rule. I don't know how far you want to go into it.

HON. SCOTT A. BRISTER: Did you pass out a copy of our rule?

MR. LOW: Yes. And they're on the table. Everybody should have one.

MR. SALES: The rule that the State Bar Committee came up with, obviously we tried to point out that this was for use in extraordinary circumstances. This was not going to be every type of expert testimony. The idea is it should be complex, scientific testimony where you think there would be the biggest debate, not your garage mechanic type stuff.

MS. SWEENEY: Judge Brister, do we have two of these rules floating around here or just one?

HON. SCOTT A. BRISTER: You're supposed to. The state bar one says "Proposed New Rule" at the top. And then ours says "Rule 706," with "Court Appointed" struck out.

MR. SUSMAN: I haven't seen

your rule then. I've just seen yours. My comments were directed at the state bar rule.

MR. LOW: And then with reference to ours, we took it also and showed 706, the federal rule, and then showed how we modified 706, and then we have a clean version of it too. It should be in your package.

MR. SALES: The last thing I was going to say is that a couple of things that are different in ours than what Judge Brister's is is that one of the points was that the court ought to find that it really is unable to make this decision without the assistance of a court appointed expert; secondly, that the role is extremely limited to Rule 702 deciding the issue about underlying methodology. And I think that's consistent with what Judge Brister has done.

But the point that we added, a provision that allows for cross-examination, which would be paid by the party requesting it, to give the parties an opportunity to look into, you know, what the advisory expert's basis of his report is and to provide a chance to respond to that expert's report, which I think is

different than what is in Judge Brister's report.

And I think the other big thing we had that was different was the issue about compensation. That was pretty hotly debated in a fairly close vote. I think that the committee decided that it ought not to be taxed against the parties; that it is to assist the court in its decision, not the parties; and that it would come from public funds. I think that there was some support for an argument that there ought to be some discretion to allow the court to tax that, but those were kind of the key points. And then we also added a note and a comment to again underlie that this was not to be used in every case.

CHAIRMAN SOULES: John Marks.

MR. MARKS: You know, I sort of support some kind of a rule that would enable a court to get some technical assistance in working out some of the complicated issues that come up in these Daubert type motions. And my thought, and I think the way Judge Brister has worded the rule, is that it's

absolutely solely for the court's use and the court's help in making a determination on complicated issues, not intending to sway one way or the other the trial of the case. And I don't see how this -- really the only problem I would have is what Steve says: Will it be abused? And that's the question. I don't know that it really will, because it's kind of an extraordinary thing.

In run-of-the-mill cases, judges are not going to appoint experts to give them assistance. But when they came up against a really complicated thing involving some complicated product or something like that, they really probably do need the help. And it's kind of a no-harm, no-foul thing. So I'm sort of for it, because I'm for anything that will give the court the assistance in trying to arrive at the right decision on some of these evidentiary issues.

CHAIRMAN SOULES: Don Hunt.

MR. HUNT: I want to ask Judge Brister about his use of these experts now without a rule. You mentioned that you --

HON. SCOTT A. BRISTER: I

didn't say I did.

MR. HUNT: You called it to our attention.

HON. SCOTT A. BRISTER: To make that clear, I said some judges might.

MR. HUNT: Some judges within your acquaintanceship?

HON. SCOTT A. BRISTER: Sure.

MR. HUNT: Well, how do these judges that you've heard about do this?

HON. SCOTT A. BRISTER: Well, I don't think you're supposed to do it. But you know, we live in the real world. You go to lunch with a friend who is not involved in the case, and you say, I've got this interesting case, and here's the legal question. And you kick around with a friend some interesting legal question. Probably, you know, if that person gives me an idea or a judge an idea, you're probably not supposed to do that. You're probably not supposed to disclose, you know, all that kind of stuff. But that just happens all the time.

And especially on -- this is not, you know, I've got a case that's complicated and

I'm just going to hire an extra expert. What we really had the idea of in our rule was -- remember, this only comes up if one of you guys files a Robinson motion. If nobody files a Robinson motion, it's not involved in the case.

And the idea is not to make it more complicated with more depositions. If it becomes something where the expert I appoint has got to go through the deposition/ cross-examination/inquisition process, I'm not going to be able to hire him. I'm interested in the complicated case where -- you can do it like they did in Oregon where I can call in as a witness every -- the two sides on a breast implant case and we can have a several-week hearing on this deal. That's one way to do it. But it's all going to be -- the only people I can listen to are people hired by the parties. Now, some members of the public, indeed, some doctors and scientists say that ain't a great way to get science. The best way to get science is get somebody that's not involved. And if we don't have this rule, that is impossible. It's just not an option.

It is impossible for me to hear from somebody that's not on the payroll or one side or other.

And what I want to do is very simple. In Dallas, Houston, San Antonio, call up the Baylor Medical School and ask the chairman of the department to send me a letter, "Is this good science or not?" And I get a letter, and that's the end of it. Now, that will assist me. How can that hurt me in trying to decide the Robinson motion?

And I'll grant you, if you've got to depose the person and la-de-dah down the road -- but I just want a letter from the chairman of the department at Baylor Medical School with the promise that he ain't going to be deposed and not going to be dragged into this case, but what is the science on this deal? Now, how does that harm anybody?

MR. HUNT: Well, if it occurs in federal court, why can't the Texas judges do it now?

HON. SCOTT A. BRISTER: They've got a rule in federal court that the court can appoint an expert, and they've had it for

years.

MR. SUSMAN: Is this the rule?

HON. SCOTT A. BRISTER: This is a rule -- the marked up -- I've taken the federal rule and marked it up, so the unmarked one without the structure, of course, is the federal rule. And I point out, the feds have always had this power. The feds are in general much more activist and interventionist, and they almost never appoint experts. I do not think you're going to have a problem. I mean, nobody can predict the future. But with state judges, who generally have a much more "hands off, you all fight it out, this is your case" approach, I just don't think that's going to happen, especially when we can't even start it until somebody challenges somebody else's expert on a Robinson ground.

CHAIRMAN SOULES: The federal rule is in the Mark Sales package. It's about halfway through.

MR. LOW: It's in our package.

CHAIRMAN SOULES: And it's in Buddy's.

MR. LOW: I've got a clean version and then how Judge Brister and our committee modified it.

CHAIRMAN SOULES: It says at the top "Rule 706, Court Appointed Experts Appointed to Assist the Court," and the words "Court Appointed Experts" are stricken through. It looks like a red-line.

HON. SCOTT A. BRISTER: Yeah. It's a red-line.

CHAIRMAN SOULES: Right here. What's been red-lined is what Judge Brister did to modify the federal rule to limit its application to a gatekeeper function.

MR. LOW: And then we have attached also a copy of 706 to our package, so it's there everywhere you can read it.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: I have a couple of concerns to register about it. I think it's a very bad idea, and I think it's a very bad idea for a couple of reasons. First of all, I don't think most of the district judges in this state have the resources to locate an

unbiased qualified expert that the parties have not already located or identified. I think it's going to be very difficult for judges to do that. I think if you end up with a process like Judge Brister described in any given number of case where you just, quote, unquote, call up the medical school and ask for the chair of the department, you're calling up people who have, in some instances in the medical schools, by way of example, in this state have stated positions against ever even talking to plaintiffs, and that's a systemic problem in the state of Texas. And yet the knee-jerk reaction is "Well, we'll just call up the medical school." You're going to institutionalize a pro-industry bias under that concept.

But more importantly, we've always had a presumption that discovery as to experts ought to be done and that cross-examination is the best way to shine the light of truth on testimony. But cross-examination to be effective has to be, in an expert context, based on preparation, and that implies discovery. And if you bring in some expert,

you don't permit discovery, you have judges who have limited resources in their ability to find somebody who is truly qualified, because it's very easy to find an expert who will tell you he's qualified, and if you don't know any better, you think that he is. And so you've got a judge getting an expert to come in who says he's qualify who may or may not be, who may or may not be unbiased. But you're simply now, instead of being on the payroll, quote, unquote, of the parties, he's on the payroll of the court, with the presumption of a lack of bias, but no way to verify that particularly through discovery and no way for the parties to effectively protect their clients.

So in addition to the other reasons that have been stated with which I concur, I think that this is a terrible rule for those reasons. Thank you.

CHAIRMAN SOULES: David Beck.

MR. BECK: I've got a question, and I just want to make sure I understand the effect of this.

Judge Brister, if you've appointed

somebody out at Baylor College of Medicine who renders the opinion that my expert's opinion is junk science, then you're going to rely on that and my expert is not going to be able to testify. But when the case goes up on appeal, there's really no basis to reverse the trial judge, as I see it, because the only thing in the record that really speaks to the issue is the opinion you got from the outside party. So as a practical matter, what we're doing is we're giving the decision to somebody out at Baylor College of Medicine, to use your example. Am I wrong about that?

HON. SCOTT A. BRISTER: Yes. You wouldn't do away with Robinson hearings.

MR. BECK: No, I understand that you have the hearing. But if you've gone to the point of appointing an expert, what that means to me is that you are troubled by what you have heard or are hearing and you need some guidance. You then rely on the third party for this guidance. You follow the guidance. You rule that my expert can't testify. The case goes up on appeal. I challenge that. There's no way I can set that

aside, the way I read this rule.

HON. SCOTT A. BRISTER: The problem is, you know --

MR. BECK: And I'm not saying that's wrong.

HON. SCOTT A. BRISTER: And I don't want to get into -- I don't care about plaintiff's/defendant's issues, but you know, we -- without naming names, we look silly when we're saying the New England Journal has been bought off and they're just giving these opinions because somebody has paid them money. Now, we're used to saying that because we're just lawyers, and we make all kinds of defamatory statements in court because we're hired to do that. But from a grown-up educated person's perspective, that's outrageous.

And if the head of Baylor Medical School says, "This is junk. Your expert is junk, David," and you've got some other medical school people with credentials that say otherwise, that's fine. But if you don't, you know, the problem that Robinson is aimed at is courts buying and swallowing whole and juries

stuff that everybody and all the big medical schools know is junk. That's the problem.

And you're certainly not going to bring anybody from a medical school if they're not going to support you. And if the other side doesn't either for whatever reason, we are forced to swallow whole stuff. I don't care that it hurts the plaintiffs. I don't care whether it hurts defendants. It hurts justice. It hurts the system. I'll go on my soapbox again. They're leaving by droves. That's why we don't do commercial litigation anymore, because everybody puts arbitration clauses in their contracts. We're going to be left with a great system and no cases before long. They think we're nuts. What is the problem with getting somebody qualified that everybody in town knows is qualified and asking them what they think?

CHAIRMAN SOULES: An arbitrator.

HON. SCOTT A. BRISTER: I'm not giving them any -- I'm adding something to the record. I'm not taking anything, anybody's rights away. I'm adding an opinion. I'm

adding one opinion that you all won't hire, but somebody that I respect. How is that a harm? How does that hurt truth to add something?

CHAIRMAN SOULES: Anybody else? Okay. Those who feel we should have a rule similar to the suggestion, suggested Rule 706, that would be limited to the expert witness gatekeeping function of the court show by hands.

MR. SALES: You're talking about limited -- the kind of rule we're talking about, not just up or down?

CHAIRMAN SOULES: What?

MR. SALES: I didn't understand what we were voting on.

CHAIRMAN SOULES: Limited to the gatekeeping function of the trial court.

MR. SUSMAN: Just in concept.

CHAIRMAN SOULES: The concept, right. 10.

Those opposed? One. Ten to one in favor of having a rule. Okay.

Then Mark, will you and Buddy -- and who else would like to work on the rule? Paula,

would you like to be involved in looking at the rule? I know you voted against it.

MS. SWEENEY: Yes, sir.

CHAIRMAN SOULES: I think it may be important for you to be involved in the textual aspects of it. Anyone else? John Marks. And I'll assign Paul Gold. He's not here, but he'll be working with you. So it will be your committee, Buddy, and those people, all the people on your committee, and any of those people that are not on it will be specially assigned, Paula, Paul Gold and John Marks.

MR. LOW: Well, John is on mine.

CHAIRMAN SOULES: He's on yours already?

MR. LOW: Yeah.

CHAIRMAN SOULES: Okay.

MR. LOW: And Judge Brister.

CHAIRMAN SOULES: And of course, Judge Brister.

Okay. Buddy, what's next on your Evidence Subcommittee agenda? We'll get that out of the way early on.

MR. LOW: Okay. I'll give the report, I guess everybody has seen it, and I do it just to bring us up to date on the action that we took last time. They were on three rules or four rules, and I don't think there needs to be any comment on that. I just put it in the record so we have in the record the action that we did take.

The first on the agenda is what we just discussed, that's the 706. Next was -- you asked me to update on some of these things, and we've already reported on them, like Ramirez asked for a rule limiting compensation to be paid to expert witnesses. The full Committee voted unanimously against that, so that's been taken care of.

Next is Robert Martin recommending a rule following Federal Rule 706, and I don't remember if his recommendation was just for duPont vs. Robinson or what, but we've voted against a general rule, and now we've voted to have a duPont vs. Robinson rule for that.

National Tank is the next thing, 503. The Committee voted to make no change, and at the March 7, 1997 meeting it was again voted

to make no change. That was on the National Tank.

509. The physician-to-patient privilege to dentists. On November the 15th of '96 we voted to make no change to that.

702. That's the duPont vs. Robinson. We voted to take no action because it's being studied by the Family Law Council as well as the State Bar Evidence Committee. The State Bar Evidence Committee has now written a rule -- actually, it's not to change the rule, but it's to make a note.

MR. SALES: Add a comment.

MR. LOW: A note, as I understand it, isn't it, Mark?

MR. SALES: It's very similar to what you had drafted last year, I think.

MR. LOW: Right. And we're waiting on Richard, so that's what we've voted to do, wait on him. And I don't know where his committee is on this.

CHAIRMAN SOULES: Did you notify the Family Law Council that we're going to take this up or down at the next meeting?

MR. LOW: No. I expected to

hear from Richard.

CHAIRMAN SOULES: Well, he's not going to be here at all today.

MR. LOW: So if you desire, we can take this back and study with Mark the difference in our rules and prepare one. Now, when we do, then we're going to need to have, I think, some procedural rule or safeguard about -- and we'll draft it. My committee has drafted such a rule without -- I mean, everybody was approving of it. It was just drafted, and there may be some pros and cons on that. So if we do that, I think we need to work on a procedural rule. So I can put that as work, and perhaps we can do that. The people who you named today, it might be well to have them serve on that committee when my subcommittee meets to discuss that.

CHAIRMAN SOULES: Buddy, I guess I've somehow lost the issue here that Gallagher has raised. It's not the same as the gatekeeper expert issue that we talked about this morning?

MR. LOW: No. His that Gallagher raises clearly -- he complains

through the whole thing, but what he's complaining of mostly is that he gets a stack of papers every time, and duPont vs. Robinson hearings are becoming too complicated, and that's what goes to the procedure that I'm talking about.

CHAIRMAN SOULES: Oh, yeah. I see what you mean.

MR. LOW: So that's why I say that if there is a rule but it's changed so that we try to follow or draw our rule consistent with duPont vs. Robinson and another reason, there's another case before the Court right now that could add some different dimensions to such a rule. What's the one John Hill argued for the defendant, the Merrill Dow case, isn't that the -- out of Corpus? I think Hilliard argued for the plaintiff. That still has not been decided, and that's another reason, before we draw a rule, it might be well to see what the Court says, if they say anything different from duPont vs. Robinson. So I think it may be wise not just to wait on Richard but to wait on the Court and see what they say there in

that case, unless the Court wants us to proceed based on duPont vs. Robinson. I don't think the Court is going to reverse it, but they may have some language, some guidelines that may be different.

CHAIRMAN SOULES: Is the State Bar Rules Committee working on this, Mark?

MR. SALES: Luke, we have met. We've already -- in fact it should be -- I sent you on copy of it, our proposed rule, which was to address the Robinson issue, but also to address, I think, the concern of Justice Gonzalez in that surpressed memory case.

CHAIRMAN SOULES: Social science?

MR. SALES: The social science issue. Our proposed comment tried to take both of those, and it was, I think, a unanimous vote, and it's been submitted to this committee. And Buddy has a copy of that, I think.

MR. LOW: Right. And the rule doesn't change. It's just in a note.

MR. SALES: It's in a note. We

voted not to actually go in and tinker with the rule itself, but to give some assistance through a comment.

CHAIRMAN SOULES: Is that in these papers?

MR. SALES: It was sent to you on April 24. I mean, I have one extra copy here.

CHAIRMAN SOULES: Let's see what it looks like.

MR. SALES: Here it is right here. Maybe you want to take a break and circulate it.

CHAIRMAN SOULES: I'll tell you what, we'll mail this out for everybody to soak on before the next meeting. It looks like it's --

MR. SALES: It's a substantial work product. Dean Sutton did the underlying memos and brief.

CHAIRMAN SOULES: I don't think it's anything we can absorb and work on today effectively. Okay.

MR. LOW: And my committee has done only -- I think we drew something first,

and they -- Mark's committee then took that to work on. Ours was just a starting point. It wasn't something that John and I discussed, and I mean, it's something we just put together without discussing all the merits because there were other things pending. But again, my committee is ready to act if and when you feel we should, but the Havenor case is still pending.

CHAIRMAN SOULES: Let's just carry this to July and put it on the agenda for your report in July. Maybe we'll have the Havenor decision, and hopefully Richard will have given you his input.

MR. LOW: If I get that and I don't get something from Richard, I'll go ahead. But personally it's going to be pretty difficult to draft something that says for this type of expert and that type, and then you're going to wonder where you put them in, so I don't know.

MR. SALES: Our focus was to simply make it clear that not all the factors will apply in every situation, and it just depends on what the nature of the expert

testimony is. Some factors may weigh less and some more.

MR. LOW: I understand in duPont vs. Robinson whether it's capable of being tested. But I don't know that I'd be able to draft something that would meet what apparently Justice Gonzalez wanted in his concurring opinion anyway.

All right. The next thing is --

CHAIRMAN SOULES: I see you've got a Law Review article or something on junk science and family law from Justice McClure.

MR. LOW: Luke, I've got a stack of Law Review articles. I've got that much stuff. It's really more than my mental capabilities are absorbing, so I just had to simplify.

CHAIRMAN SOULES: Okay. Well, I don't know. It's a huge challenge for this Committee, if the threshold of an emerging body of law is junk science and social science behavior, to try to articulate it in a Rule of Evidence or a Rule of Procedure for the future when this is just emerging, but we can take a shot at it.

MR. LOW: We did it early on, didn't we, John? We did it right after and sent it to Mark's committee and so forth. We took a shot, and it was no more than that.

CHAIRMAN SOULES: Yeah.

MR. LOW: In a procedural step about how many days you have to object and stuff like that. In fact, I got Hadley Edgar, I got Hadley to help me with it.

CHAIRMAN SOULES: Well, let's table it and bring it up next time to work on it.

MR. LOW: Okay. Let's see, where were we? Mike Gallagher. Okay. Richard Orsinger. That's the same thing. 702. We talked about that.

1009. A rule was approved on November the 15th, and I've attached a copy of it to show what the rule was.

706. The same thing that we discussed.

705. Where we attached -- you will see the version. It allows balancing by the trial judge and more constructive than either the federal or existing civil rule. And turn to 705, if you will, and see what we did.

MR. SALES: Luke, the 705 issue I think at the last meeting was the issue about using expert witnesses as a conduit to get in otherwise inadmissible evidence. And if I remember 705, the civil rule, there's a difference between the civil and the criminal rule. The civil rule has, I think, two paragraphs that are pretty bland. The criminal rule has two additional paragraphs that deal with, I think, voir dire and with a balancing test to exclude the underlying evidence if it's not going to help explain. And our committee has already voted to basically adopt the criminal rule, and as part of the Unified Rules we would merge the two.

MR. LOW: And that's what mine --

MR. SALES: I believe there was one additional item from our committee. There was some concern by the plaintiffs bar that one paragraph seems to add some additional element of Robinson, and I think our committee suggested that we just insert in there, I believe, that what that rule is talking about is dealing with 702 and the reliability issue

of 702.

MR. LOW: See, what we put in there is it does not preclude a party conducting voir dire examination and qualification of experts and so forth and does not preclude application of 403. So see, the rule that we drew has the same concerns yours did, and we adopted the criminal rule, and that was by unanimous vote of my subcommittee. It added to the civil rule, if you want -- if you will look, I have copied the 705 criminal and I have copied the 705 civil, and you can see the first two paragraphs are no different. So criminal just has kind of this balancing test, and we saw no reason not to have the same thing. It seemed to be better to your committee.

MR. SALES: Yes, we agreed with that as well.

MR. LOW: I can give everybody a chance to see the differences, if they want. It's attached. I have both rules.

CHAIRMAN SOULES: Have we voted on this in our big Committee?

MR. LOW: No.

CHAIRMAN SOULES: Okay. Any -- what this does is it gives some protection to, for example, the reliance by an expert on inadmissible hearsay, and then using the expert as a vehicle to get the inadmissible hearsay to the jury. This gives you an opportunity to challenge that, and for the court to hear it and weigh maybe if that's what's going on, as an example. I mean, there could be a lot of other uses. And the criminal rule, the rule of criminal evidence has more safeguards in that respect than the rule of civil evidence.

MR. LOW: Right. And even than the federal. The federal rule is pretty broad. It just says the expert may in any event be required to disclose the underlying facts or data on cross-examination.

CHAIRMAN SOULES: Does your proposed 705 change the rule of criminal evidence?

MR. LOW: No. It changes the civil to the criminal.

CHAIRMAN SOULES: To the criminal. Okay. Is there any opposition to

this?

MR. SALES: It's just unifying the two.

CHAIRMAN SOULES: Unifying the two.

Is there any opposition to this? No opposition to it. Okay. It's deemed passed by unanimous consent.

MR. LOW: Then next is 106 and 107. There's really no change there because -- except 106 refers to the Texas Code of Criminal Procedure, and it should be changed to -- that should refer to that in Rule 107. It's just a housekeeping matter.

CHAIRMAN SOULES: Okay. Any opposition? That's unanimously approved.

MR. LOW: All right. 202 and 204. And that was referred by the State Bar Evidence Committee --

HON. SCOTT A. BRISTER: Buddy, we can't hear you.

MR. LOW: Oh, I'm sorry. I'm just going down. Do you have the agenda?

HON. SCOTT A. BRISTER: Yes.

MR. LOW: Okay. 202 and 204,

referred by the State Bar Evidence Committee, provide for mandatory judicial notice upon motion of the party if the other requirements are met. And that's consistent with regard to judicial notice, that we're just going that way. And you can see that was also -- that was what your committee recommended too, wasn't it, Mark?

MR. SALES: Yes.

MR. LOW: And you'll see what -- there's really no major change. Just instead of saying "may," if a party moves for it, then they're required to make judicial notice.

CHAIRMAN SOULES: And that's consistent with the Government Code?

MR. LOW: Yes.

CHAIRMAN SOULES: Any opposition to that? It's unanimously approved.

MR. LOW: Okay. The next one is 410. This is really to clarify. The rule has not changed. But the last sentence should be a separate paragraph to show that it ties in to the whole rule, as distinguished from

just that last paragraph.

Wasn't that your committee's view also, Mark?

MR. SALES: I believe that's correct. You've got it in your footnote here, what we said. That's Note 7.

MR. LOW: There's no change to it.

CHAIRMAN SOULES: We're on 410, right?

MR. LOW: Right. And on 410, you'll see there's really no --

CHAIRMAN SOULES: Let's see, we're on judicial notice?

MR. LOW: No. We're past judicial notice.

CHAIRMAN SOULES: 410 is -- okay. Explain it to me one more time. I'm sorry, I wasn't following.

MR. LOW: All right. Look at 410. You will see the rule. I've got it the way we proposed where it starts out "However," a new paragraph. All right. Look at the rule itself. It does not do that. It says -- and the reason for this, you'll see it's circled,

that last -- on the rule itself, it's right in the middle of the body. That last paragraph -- that last sentence is supposed to not modify only section (4), but it is supposed to relate to the whole rule. And so it was suggested that it be a separate paragraph, not a numbered paragraph: "However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it."

If they're talking about -- that was intended to apply -- and Lee, didn't they study the history, and at one time there was a paragraph or something. But in some way, when it got recodified, they put it in and ran it into (4), which makes it look as if it applies only to (4).

MR. PARSLEY: Mr. Chairman, can I speak to that just briefly?

CHAIRMAN SOULES: Sure.

MR. PARSLEY: Mark Sales probably doesn't remember this because he was

rained out at his committee meeting. But I attended his committee meeting. Their recommendation is actually that hanging paragraph starting with "However." It's a hanging paragraph in the civil rule. Under 410(4) it's a separate paragraph in the civil rule. In the criminal rule, under 410(3), which is the same provision, it is part of the final paragraph. And in the federal rule it is part of the final paragraph.

The Mark Sales committee recommendation is that it should be part of the final paragraph, not a separate paragraph; that their study of the history of the rule is that it should be part of the final paragraph, not a separate paragraph; that our civil rule is wrong. That's what his committee did. I'm not telling the Committee what to do, but that's you all's recommendation.

MR. SALES: That's correct. I think Buddy has it -- our committee's feeling was and our committee voted that it was just a mistake in the drafting, but the "however" statement was only supposed to apply to paragraph (4) and not refer back to the first

three.

MR. LOW: I'm sorry, I misread your subcommittee report now. I thought it made that recommendation.

MR. SALES: Well, the subcommittee's report was adopted unanimously, and I believe it was that it was not intended to apply to paragraphs (1), (2) and (3).

CHAIRMAN SOULES: What's the difference? Why should it apply only to one of them?

MR. SALES: In the packet I handed you, Luke, I think the actual subcommittee report is in that.

CHAIRMAN SOULES: A plea of guilty that's withdrawn; a plea of nolo contendere which is withdrawn.

MR. LOW: It's (c) in the subcommittee report.

MR. SALES: I'm kind of lost, because you've got -- okay. Then Buddy is correct.

MR. PARSLEY: Okay. Buddy is right. The mistake was that the criminal rule had it included in the last paragraph, and it

should not. So what we're suggesting is to change the criminal rule to conform to the civil rule and the federal rule, and that's merely a drafting error.

MR. LOW: I think we've attached it. I certainly could be mistaken, though, I'm not going to argue that point, but I'm glad to find that one time I was right.

MR. PARSLEY: That's right, I'm sorry. That's right.

MR. LOW: And I can't give you all the reasons recommended by their committee. My committee took a look at it, and it looked reasonable when I read it right now.

MR. SALES: Professor Wellborn was the one, I think, who chaired that subcommittee, and that was his recommendation.

MR. LOW: And so we drafted -- what I did is just draft one that we've attached to here where we did just that.

Sarah, go ahead.

HON. SARAH DUNCAN: I'm having a hard time seeing how that could be right. The last paragraph that begins with "however"

governs the admissibility of a statement. The only two subdivisions that deal with the admissibility of a statement are (3) and (4). (1) ask (2) are pleas. They're not statements.

MR. LOW: But I think the idea was that, being as it is, that it would be construed as applying only to (4) and not (3), because (3) also applies to a statement.

HON. SARAH DUNCAN: I understand. But the way we've got it, if we make it a separate paragraph, it would apply conceivably to all four.

MR. LOW: Why, when the other four don't deal with statements?

HON. SARAH DUNCAN: That's the concern, I think, is that someone --

MR. LOW: The plea which may be withdrawn shouldn't --

CHAIRMAN SOULES: One at a time.

HON. SARAH DUNCAN: Someone might construe a plea as -- I mean, it is a statement. "I am guilty," or "I am pleading guilty. I am pleading not guilty." But who

is it that has determined that the "however" clause or sentence doesn't just apply to (4) but that it also applies to (3)?

CHAIRMAN SOULES: Justice Duncan is pointing out to the last paragraph only deals with a statement. (1) and (2) are pleas.

HON. SARAH DUNCAN: What is the basis for saying that the "however" sentence applies to (3) as well?

MR. LOW: That was the argument that was given by the subcommittee. I didn't see a whole lot of difference.

MR. SALES: Luke, you might want to just sort of read -- there's a fairly short letter that Wellborn did on it in your packet. I doubt I have it.

MR. LOW: I've got it. Is that the one that I showed you, Mark?

MR. SALES: Yeah, I believe that's right. Is that from Wellborn?

MR. LOW: Yeah. Let me show you, Luke. It's right here.

MS. DUDERSTADT: He's got it.

MR. LOW: I mean, it wasn't

something that we spent a whole lot of time on.

CHAIRMAN SOULES: His letter says one thing: No. It doesn't give any reason. Well, let's look at what this -- if you make this last sentence apply to everything, that means that a plea of guilty later withdrawn can sometimes be admitted in a civil case.

MR. LOW: A plea of guilty in a civil case?

CHAIRMAN SOULES: No. A plea of guilty in a criminal case which is later withdrawn in the criminal case can sometimes be admitted in a civil case, if this sentence is taken out of Paragraph 4. The way it is right now, that plea of guilty in a criminal case later withdrawn in a criminal case can't be submitted at all.

Next, in the combining of the two rules, nolo contendere is treated differently in a civil than a criminal case. In a civil case, a plea of nolo can't be admitted at all, even if it's later withdrawn or whether or not it's later withdrawn. In a criminal case, a plea

of nolo contendere that's later withdrawn cannot be admitted. Now, this last sentence, if it's going to apply to (1) and (2) and somehow "statement" is broader than "statement," would make those sometimes admissible under some circumstances. And if pleas are not statements, then the last paragraph doesn't apply to (1) and (2) at all.

Let's see, and then (3) is, Any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding, in a civil case, either a plea of guilty which was later withdrawn or a plea of nolo, or in a criminal case, either a plea of guilty which was later withdrawn or a plea of nolo which was later withdrawn.

Okay. So (1) excludes pleas of guilty altogether. (2) excludes pleas of nolo in all civil litigation and pleas of nolo in criminal litigation where the pleas are withdrawn. (3) excludes any statement that was made in connection a (1) or a (2). And then (4) is statements made in the course of plea

bargaining which does not result in a plea of guilty or a plea of nolo or which results in a plea, later withdrawn, of guilty or nolo.

It looks like the civil rule is the one that's wrong, isn't it? Where is the criminal --

HON. SARAH DUNCAN: Luke.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: If I can read them, I've got the enclosures to Guy Wellborn's letter on this, the enclosure in Section 14.4 of Goode, Wellborn and Sharlot on the rules, and he specifically refers to Footnote 4 and references the "however" sentence. And a careful reading, however, indicates that interpreting it just to relate to (4) would be erroneous. The latter part of the sentence goes on to refer expressly to statements made at plea hearings as well as statements made at plea discussions. Therefore the conclusion is inescapable that the exception applies to both types of protected statements.

And then Footnote 4 reads, Both in the

Federal and Texas Civil Rules the last rule of 410 is set off from any of the subparts. The draft prepared for the Court of Criminal Appeals by the Advisory Committee also was formatted this way, and there's a cite: In the version promulgated by the Court of Criminal Appeals, however, this last sentence was appended to the last subpart, cite, as the exception refers both to statements made in the course of plea proceedings and to those made in connection with plea discussions. This is most readily explained as a typographical mistake.

I'm a little concerned about assuming it was a typographical mistake when it was sent the way the civil rule was to the Court of Criminal Appeals and they changed it. And we don't have any knowledge, as far as I know, about why they changed it. And it certainly is a narrower rule as the Court of Criminal Appeals promulgated it than is the civil rule.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Did anybody ask anybody else like Schlueter and

Wendorf? Commonly I find in these evidence books that one book says one thing and the other book says something else.

MR. SALES: From the state bar and Wellborn, and I think he has one or two other people on that committee, but he was the only professor on that committee.

MR. LOW: But he's advocating that it should apply to (3) and (4.)

MR. MARKS: What Wellborn is saying, citing back to his own book, I guess, is that the conclusion is that "however" paragraph should apply, whether it's a statement or a plea, that it should apply, and that it's just a formatting error or typographical error the way it was hanging under part (4) to begin with.

MR. LOW: And we just concur in his conclusion, whether it's true or not.

CHAIRMAN SOULES: It's just wrong. I mean, the way he interprets that last sentence is not necessarily his way. I mean, if you look at what number (4) does, it's talking about -- okay. (1) is a plea. That happens in court. (2) is a plea. That

happens in court. (3) is a statement made in the course of any proceedings under Rule 11. That happens in court. So (1), (2) and (3) are things that are going on in court.

(4) is plea bargaining negotiations, discussions with an attorney for the prosecuting authority. That's not going on in court. It does not result in a plea, or it results in a plea later withdrawn, these discussions. So when they say a statement made in the course of a plea or plea discussions, well, the course of a plea or plea discussions could be statements made with the attorney for the prosecuting authority. It's in the course. It's not at the proceedings, but it's in the course of the proceedings.

MR. LOW: And (4) talks about the statements really then tied in with the formal proceedings in (3) and then whether or not they would be related. So you might be right. It looks like it was perhaps intended to apply only to -- or would apply only to (4).

MR. MARKS: Well, it's

confusing either way.

MR. LOW: Well, it is. Obviously I started out with confusion and ended up with even more.

MR. SALES: It seems strange, though, that you're going to let in a statement that just is outside of court like that that probably has less weight and is in the middle of some negotiation as opposed to something where it's formally on the record. I guess I have a hard time understanding why that should be entitled to somehow more weight.

CHAIRMAN SOULES: Well, that's when the prosecutor pulls the trigger and says, "Don't you remember telling me this?" Now, you've got to come back with something, unless you're fortunate enough for the judge to give you an acquittal because jeopardy is attached, and the judge is probably not going to give you an acquittal, so you've got to come back swinging and you've got to be able to at that point open up to what happened and then also preserve your error that the prosecutor pulled the trigger, because you're

going to try to get a verdict, or somebody pulled the trigger. Don Hunt.

MR. HUNT: Isn't the "however" paragraph merely a statement of how the rule of operational completeness works where the prosecutor attempts to use a statement made in plea negotiations? That is, if the attempt is made, the criminal defendant can then come back with whatever occurred in those plea negotiations that are helpful to him. And that in my judgment is why it applies only to (4), because you're really not talking about what the purpose of the rule is. The purpose of the overall rule is to make absolutely clear that (1), (2) and (3) never come in under in any circumstance, and (4) never comes under in any circumstance except where somebody pulls part of it and the other side is entitled to pull the rest of it under the rule of operational completeness. That's all that's going on. And with respect to some of these other professors, it seems to me that the "however" paragraph applies only to (4) contextually and can only apply to (4).

CHAIRMAN SOULES: So would our

recommendation be that civil 410 conform to criminal 410 by merging them together into (4)?

MR. LOW: So it would all be the same?

CHAIRMAN SOULES: So it would all be the same.

HON. SARAH DUNCAN: Are we not able to simply refer this to the Court of Criminal Appeals?

CHAIRMAN SOULES: The Court of Criminal Appeals has this in (4) only.

HON. SARAH DUNCAN: I understand that. Are we not able to just refer to the Court of Criminal Appeals whether it wants the "however" sentence to apply to just (4) or (3) and (4) or (1), (2), (3) and (4)?

CHAIRMAN SOULES: Well, it applies to civil cases too.

MR. LOW: It's for civil cases.

HON. SARAH DUNCAN: Well, there's a world of difference between a civil and a criminal case.

CHAIRMAN SOULES: But in this

Rule 410 -- well, Rule 410(2) and (3) as drafted here combines the civil and criminal and makes differences and shows the differences.

HON. SARAH DUNCAN: I understand that.

CHAIRMAN SOULES: I guess the issue is, are we willing in civil cases to have the last paragraph, the last "however" paragraph, join into paragraph (4) as it is in the criminal case, in the criminal rules? Is there any opposition to that?

Those in favor show by hands. 11 for. None against.

MR. LOW: So we leave it in the body of paragraph (4), right?

CHAIRMAN SOULES: That's right. But you would still have to change (2) and (3) as you've got them changed here in order to merge the two rules.

So in 410 as proposed, (1) is right, (2) is right, (3) is right, and (4) in the last paragraph would be joined together, and that's what we passed. Okay.

MR. LOW: All right. 504 is

another thing referred by the State Bar Evidence Committee and that's something we already voted on. It's consistent with the recommendations of the State Bar Committee and we already voted on that, so there's no action to be taken there.

CHAIRMAN SOULES: Okay.

MR. LOW: 509 and 510 is referred by the State Bar Evidence Committee, and it's merely a housekeeping thing. I think that's the one Ken Lewis went back and changed from the Government Code to cite the correct authority, and certainly that should not be a problem.

CHAIRMAN SOULES: Any opposition? That's unanimously approved.

MR. LOW: 513(d) is referred by the State Bar Evidence Committee so that paragraph (d) would apply to both civil and criminal cases. And if you will refresh my memory, I think we can look and see what we're doing there.

CHAIRMAN SOULES: It's an instruction in that charge that no inference is to be drawn from a claim of privilege.

MR. LOW: Right. And it was recommended by my committee and Mark's committee that that be allowed in both civil and criminal.

CHAIRMAN SOULES: No, wait a minute, except for 504(b)(2)(b). In 504(b)(2)(b) in civil cases, you can draw an inference from a Fifth Amendment claim in a civil case. Of course, you can't even get there in a criminal case, so -- but this has that exception written into its text. Let me get there and make sure that 504(b)(2) is what I think it is.

MR. LOW: And 513(d), yes.

CHAIRMAN SOULES: 504(b).

MR. LOW: Paragraph (c).

CHAIRMAN SOULES: Paragraph (c) in, let's see, 504(b)(2). That's husband and wife privilege. 504. There's not a (b)(2)(b) in 504.

MR. PARSLEY: Here's one.

CHAIRMAN SOULES: Okay. What does it say? In criminal cases, a failure by an accused to call the accused spouse as a witness where other evidence indicates the

spouse could testify to relevant matters is a proper subject of comment by counsel. I guess that's in the criminal rules now.

Okay. 513. All right. That, in the new 504(b)(2)(b), is a sentence out of 504(2)(a) verbatim from the criminal rules. And so this applies only to criminal cases, so it's carrying that forward. But this rule that says "except as provided in Rule 504(b)(2)(b)" ignores Civil Rule 504(c).

MR. LOW: I think this is referring to the combined rules, isn't it?

MR. SALES: This is going back to the Unified Rules, 504(2)(b).

CHAIRMAN SOULES: Well, look at current Civil Rule 513 (c), paragraphs (a) and (b), which says you keep privileges out from the knowledge of the jury. Paragraphs (a) and (b) shall not apply with respect of a party's claim in the present proceeding of the privilege against self-incrimination. A party cannot get on the witness stand in a civil case and take the Fifth Amendment and then get an instruction from the judge that the jury is not to draw any inference from taking the

Fifth Amendment.

MR. LOW: That's right.

MR. SALES: And that's the point of the rule.

MR. LOW: It says that except -- you're not entitled to that except under (c), which is self-incrimination.

CHAIRMAN SOULES: Oh, okay. So it's picking up (c). Okay. That's right. Sorry.

MR. SALES: Basically what it's saying is you cannot get a jury instruction about taking the fifth in civil cases. That's what it's saying. You don't get that instruction from the court.

CHAIRMAN SOULES: Or in a narrow exception.

MR. SALES: Nor do you get that exception in the failure to bring your spouse, because that's a fair comment.

CHAIRMAN SOULES: Okay.

MR. LOW: So all it does is add, instead of in criminal cases, it says in civil.

CHAIRMAN SOULES: Okay. Now,

let's see, let me look at 513(c).

PROFESSOR DORSANEO: Well, you can't look at that. You need to look at this (indicating).

CHAIRMAN SOULES: Where is 513(c) in that? Have you got 513(c) in the Unified Rules? All I'm checking out is to see if the Unified Rule 513(c) talks about in civil cases, and yeah, present civil proceeding, so it picks that up.

PROFESSOR DORSANEO: Boy, it's hard to follow all that.

CHAIRMAN SOULES: It's there, and we've passed it. Okay. 513, I think, checks out. Has anybody got any other issues on this?

Is anybody opposed to 513 as proposed by the Committee? No opposition. It's unanimously approved. Thank you.

MR. LOW: 802 was again referred by the State Bar Evidence Committee whether to make hearsay, quote, no evidence, closed quote, as in federal court. And we recommended no change. Your committee recommended no change, and that's where we

stand, for leaving it as it is.

CHAIRMAN SOULES: All in agreement? No change.

MR. MARKS: Whoa, whoa, whoa.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I think we should go back to the federal rule, because that's the way it was before these rules were messed with several years ago in state court. And it seems to me that hearsay should not be evidence whether it's objected to or not for appellate purposes. Everybody knows what -- is this what we're talking about? Yeah. It should have the same effect in state court as it has in federal court.

CHAIRMAN SOULES: I think that's the old Joske vs. Irvine case where you didn't have to object to hearsay, you got up on appeal, and after the trial is over somebody claims it's no evidence and the only evidence is hearsay.

MR. MARKS: The problem is you get the same hearsay repeated over and over and over in the trial of the case and you miss one time objecting and you've had it, and

that's wrong.

CHAIRMAN SOULES: That's a problem. Justice Duncan.

HON. SARAH DUNCAN: To create an exception just for hearsay, TRAP 52a in my view is absolutely unjustified. If we're going to start making objections, there are things a lot more serious than hearsay that we should have to except from any preservation requirement. What this let's a party do, civil and criminal, is lay behind the log, not tell opposing the counsel, not tell the trial judge. The evidence may very well be made admissible in some other form, and then they come up on appeal, and this would be the only instance. Even the Court of Criminal Appeals has now recognized that they adopted a rule that permits hearsay testimony admitted without objection to have probative value, and I think that would be a serious mistake.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: And I'm looking at the report of John Sutton, and he disagrees with John Marks. He says a return to the view would create unnecessary disharmony between

federal and Texas evidence law. Present Texas law regarding admissible hearsay conforms to federal law and to the view prevailing throughout the country. So he does not agree that we should be returning to making it federal law. He would disagree with that and recommends that we make no change.

MR. MARKS: Well, the notation on our disposition chart says that it should be changed to conform to the federal rule, and the federal rule is that if you don't object to hearsay, you don't waive that on appeal.

MR. LOW: Well, Sutton disagrees with that. If there's an error on the disposition chart, I will take blame for that, and I would rely on Sutton more than I would rely on me.

MR. MARKS: Well, I certainly understand that.

MR. LOW: Well, I knew you would.

MR. MARKS: But that's the way it used to be in Texas. That's the way, as I understood it, it is in federal court. I know a federal judge who thinks differently, but I

think that's the rule in federal court, isn't it?

PROFESSOR DORSANEO: I don't think it is. But federal court is not -- it might be the rule in federal court in some circuit, but I don't think it's the general federal approach.

MR. MARKS: Well, it worked pretty well before they changed it for both sides. Everybody knows what hearsay is. You know when you're trying to get hearsay in. And on one side of the coin you're saying we're going to let this case be tried and let a person repeat hearsay five, six, seven and eight times, and if a lawyer does not object one time, he waives it forever. I just think that's wrong.

CHAIRMAN SOULES: Anything new on this?

MARK SALES: I was just going to add just the other thing that Sutton pointed out, I guess, in his footnote on that report was that, of course, the other side of that is the party lies behind the log and doesn't make any objection and then raises it

all on appeal.

MR. MARKS: Well, that's right. But lawyers generally are not going to do that because they're going to try to keep it out.

PROFESSOR DORSANEO: The rule doesn't say that all hearsay has probative value. It says it's not denied probative value merely because it's hearsay. And some hearsay has a high degree of probative value.

MR. LOW: Right.

MR. MARKS: Well, as provided in the rules.

CHAIRMAN SOULES: Okay. The recommendation is no change. Any further discussion? Those in favor of no change show by hands. 10.

Those in favor of a change along the lines John Marks was suggesting. Two.

10 to two, no change.

MR. LOW: Luke, the last thing refers back to 702 again and we're waiting on that, so that ends everything we've considered.

CHAIRMAN SOULES: Okay. So

what we have left on your docket is 702?

MR. LOW: And maybe Mark might have some items on -- we take recommendations from his committee and consider them, and he might have sent me some in the last couple of days or might have some to send me, so I just take those and refer them to my committee as I receive.

CHAIRMAN SOULES: Mark, where are you on your docket in the State Bar Rules of Evidence?

MR. SALES: Well, we just completed our last meeting for this year, and we'll hold our next meeting probably sometime next fall.

CHAIRMAN SOULES: Do you have anything pending?

MR. SALES: We had one item in addition that I've referred to -- I've sent it on to you and Buddy on Rule 103(a)(2). I think Lee Parsley asked us to look at it, and it's another issue about offers of proof and the difference between the civil and criminal rule, and I think we made a recommendation to conform those. That's something, I guess,

Buddy could look at and recommend at the next meeting.

CHAIRMAN SOULES: Let's go ahead and take the initiative on that. Do you think that's all that's currently on the docket at the State Bar Rules of Evidence Committee?

MR. SALES: The only outstanding items are 702 and this other report. I believe that's it.

MR. LOW: Mark, if you will go through and just drop me to a note to be sure. That's all I remember, but that doesn't mean that's all there is. Let me know, and we'll take those up.

CHAIRMAN SOULES: We want to accommodate the State Bar Rules of Evidence Committee, but we, of course, have to move on to get our report to the Supreme Court. So at this point I think it would be helpful if you would get issues on your docket, inquiries we call them here, if you could send them on to me at the time you receive them, and if they are matters of merit that we think the Supreme Court ought to change, we may do that without

hearing from you so we can get it on up there. Of course, we'll have another day and some day in the future to look at these things again.

MR. SALES: As far as I know right now, we have no outstanding inquiries other than the couple of items that I've sent on to you and Buddy, and I'll send on anything that we get in the meantime. We're putting out a final report that goes in the Bar Journal, I think, in May or June, and sometimes that brings in some additional inquiries after it goes out. And if I get any, I'll send them on.

CHAIRMAN SOULES: And Buddy, I guess when you get inquiries from me, you send them to your committee, right, so Mark automatically gets them?

MR. LOW: Yes. I copy Mark on everything I send to my committee.

MR. SALES: And what I've been doing, Luke, is copying you and Buddy and Lee on all of the meeting notes which you're getting. And if you all want to circulate it to other people on the committee, that

includes the subcommittee reports and briefs and whatever they've put together. I don't know if you want to start thinking about circulating that to everybody or not.

CHAIRMAN SOULES: That usually comes back to us in your report, right?

MR. LOW: Right. Usually I put your version -- now, I did not put your version of 706 because I only got it a couple of days ago. But what I usually do is I put what we've done and then I put what you've done and then a copy of the rule as it exists. And are you saying that 103(a)(2) is the only other item other than 702 that you remember?

MR. SALES: Right.

MR. LOW: Okay. I'll write that down.

CHAIRMAN SOULES: Okay. Let's take about a 10-minute stretch and we'll come back and get on with Paula Sweeney.

(Recess.)

CHAIRMAN SOULES: Let's get back on the record here. Lee is trying to get the Rules of Evidence, except for 702 and 706,

forwarded on to the Court of Criminal Appeals for their consideration of the merged rules. And this 103(a)(2) thing looks like it's fairly limited in what it would take for us to decide whether or not to pass it.

If you look on 103(a)(2) in the civil rule --

MR. MARKS: I'm lost.

CHAIRMAN SOULES: 103(a)(2) in the civil rule on the -- saying how to perfect error for the exclusion of evidence. And the civil rule requires that it be perfected by an offer of proof. Both the federal rule and the state criminal rule and TRAP 52a of the Rules of Appellate Procedure include -- the evidence rule, as I just said, use these verbatim, and the TRAP rule in similar language, "or was apparent from the context within which questions were asked."

In other words, error is perfected in the case ruling -- in case the ruling is won excluding the evidence, if the substance of the evidence was made known to the court by offer, and this is the additional language, "or was apparent from the context in which

the questions were asked."

Is anyone opposed to having that in the civil rule?

MR. LOW: Mark's committee voted unanimously for that. We just got it a couple of days ago. I personally favor it, but my committee has not voted on it. But I don't think it's necessary. I think it's not a complicated thing. Bill, you've read it.

PROFESSOR DORSANEO: And I enthusiastically favor it.

MR. LOW: Right.

CHAIRMAN SOULES: This is the only -- apparently in red-lining the rule, this is the only glitch left to be resolved, right?

Is there any opposition to that? No opposition. It will stand approved, so you can go ahead and make that change, Lee. And then we're down to dealing with the Court of Criminal Appeals after we have decided what to do with 702 and 706.

Okay. Bill, do you want to proceed now with your report?

PROFESSOR DORSANEO: I've got

some cleanup and fine-tuning on sections 2 and 3 that we discussed at the last meeting. The first one I want to talk about is a two-sheet Rule 6. Does everybody have one of these? It says "Time."

CHAIRMAN SOULES: Are they back here?

MS. DUDERSTADT: Yes.

PROFESSOR DORSANEO: And the next one will be Rule 10 and then Rule 27. I can hand these out if you don't have them.

CHAIRMAN SOULES: 6, 10 and 27.

PROFESSOR DORSANEO: At the last meeting, when we went past Rule 6 and proposed recodified Section 2, it was voted that this rule should conform to the appellate rules that have been ordered by the Court. The last sentence in proposed Rule 6(c) now conforms to Appellate Rule 9.2(b)(2). The appellate rule says under the subheading Proof of Mailing, "Though it may consider other proof, the appellate court will accept the following as conclusive proof of the date of mailing," colon, and then it's verbatim (1), (2) and (3) as in this draft.

CHAIRMAN SOULES: Any opposition? No opposition. It's unanimously approved.

PROFESSOR DORSANEO: 10, Service and Filing of Pleadings. I was instructed to bring back subdivision (b), which I was unhappy with at the last meeting. It is now worded as our current Rule 21a is worded, rather than being modeled on the companion federal rule. I would want to eliminate the "by" in (1)(B), (C), (D) and (E) because "by" is in the introductory paragraph. But other than that, I can represent to you that this is just like our Rule 21a, other than the little reference in the introductory paragraph to "or other papers served with citation." 21a does not now talk about the other papers that can be served with citation discovery requests.

CHAIRMAN SOULES: Let's see here, could we add the word "confirmed facsimile"? Your fax machine will tell you if it's been delivered.

MR. MARKS: Under (D)?

PROFESSOR DORSANEO: But in the

current rule, I misspoke myself, because it says "or by telephonic document transfer" rather than "facsimile."

So confirmed facsimile?

CHAIRMAN SOULES: At the time we wrote this first, I don't think the technology was there to get confirmation of delivery by fax, but it's there now.

MR. BABCOCK: That's right, and it's a good idea.

CHAIRMAN SOULES: Confirmed telephonic document transfer? I don't care how it's said.

PROFESSOR DORSANEO: Well, I've heard people say that "facsimile" is less broad that "telephonic document transfer."

CHAIRMAN SOULES: Okay.

MR. PARSLEY: We just use "fax" in the Appellate Rules.

CHAIRMAN SOULES: F-a-x?

MR. PARSLEY: Our paid consultant said just use "fax."

CHAIRMAN SOULES: Confirmed fax, f-a-x?

MR. PARSLEY: That's what we've

used.

CHAIRMAN SOULES: Well, if it's good enough for the nine, I guess it's good enough for us. By confirmed fax to the recipients, or by such other manner as the court -- okay.

Any opposition to this, if we put "confirmed fax" in the place of "facsimile" and drop by, by and by in (B), (C) and (D)? No opposition. It's unanimously recommended.

Okay. Anything else on 10?

PROFESSOR DORSANEO: No. It really in (2), (3), (4) and (5) is verbatim except for the paragraphing and the added headings.

CHAIRMAN SOULES: Okay. 27.

PROFESSOR DORSANEO: 27. This is not on the agenda, but when I read through the transcript last time and when I read about 100 pages of discussion on this, I thought it was appropriate to deal with the discussion.

In the third-party practice rule, we debated at length last time how long you should have to file a third-party complaint without leave. And the vote was first that it

be, you know, not later than 90 days after the appearance day of the third-party plaintiff. And that was pretty much a consensus vote at that point.

After that, we got into discussions about, well, what if the case changes, a new plaintiff is added by amendment or somebody intervenes. And the vote was that there be an additional window of 30 days.

Now, when I was drafting this, I was pretty pleased that I got all that figured out on the vote. When we voted on 30 days, we didn't expressly vote on 30 days after what, so I tried to do the best I could with what we had, and I came up with not later than 30 days after the appearance day of the third-party plaintiff for responding to the amended pleadings or the intervention. The idea there is not that you would be limited by what it says in the amended pleadings or the intervention. I believe Chairman Soules said that that would be unworkable. But it's pretty hard to say it. 30 days after what? And this was my best shot at it.

I don't know if any additional drafting

could be done here, but I'm not completely happy with the language, although I'm sure I captured the vote insofar as what the transcript actually said that was voted.

CHAIRMAN SOULES: Well, is there a time -- let me see, we've got a new plaintiff added, and the third-party plaintiff is then who?

PROFESSOR DORSANEO: The defendant. The third-party plaintiff is always the defendant. This is the sentence that I did not want to draft.

CHAIRMAN SOULES: Could we just make that 60 days after the new party is added?

PROFESSOR DORSANEO: Yes.

HON. SCOTT A. BRISTER: Well, is the new party added when it's filed or when they're actually served? There's a delay in the --

CHAIRMAN SOULES: Well, I can clarify that. I mean, it's 60 days after the petition is filed adding the new plaintiff.

HON. SCOTT A. BRISTER: Because when they delay service, they knock out

somebody's right.

PROFESSOR DORSANEO: That's better.

CHAIRMAN SOULES: When you get the additional notice -- when you get the pleading and you know somebody has been added, you've got to do something.

PROFESSOR DORSANEO: In 60 days after it was filed.

CHAIRMAN SOULES: You may be adding somebody before the other party is served, but so what? You know you've got to do something.

MR. HAMILTON: Doesn't the original defendant have to be served?

CHAIRMAN SOULES: Served with the amended -- plaintiff's amended petition.

MR. MARKS: How about 60 days after service?

CHAIRMAN SOULES: Well, service, filing.

MR. MARKS: Those are two different things.

CHAIRMAN SOULES: I understand they can be. They're not supposed to be. Our

rules say they're supposed to be simultaneous.

PROFESSOR DORSANEO: Well, 60 days after service would be okay.

CHAIRMAN SOULES: That's fine too, 60 days after service. If a new plaintiff is added by amendment or intervention, the third-party plaintiff need not obtain leave to make the service of a third-party complaint if it is filed not later than 60 days after the amendment or intervention is served on the third-party plaintiff.

MR. HAMILTON: Question.

CHAIRMAN SOULES: Period, as a defending party or something like that. Okay. Carl.

MR. HAMILTON: Bill may know the answer to this: If a new plaintiff suddenly appears in the pleading, does that new plaintiff have to have citation issued and served upon?

PROFESSOR DORSANEO: I think so.

MR. HAMILTON: So when you're saying "service," you're meaning that kind of

service and not just mailing a copy to the defendant?

CHAIRMAN SOULES: I don't think that's the way it works.

PROFESSOR DORSANEO: Well, people don't do that, because they figure the defendant is going to answer.

CHAIRMAN SOULES: Well, whatever the service method is supposed to be is probably not going to be done in this rule. Whatever service is, it is.

PROFESSOR DORSANEO: Maybe a better answer is I think so, but I'm completely sure.

MR. HAMILTON: Well, I think so too.

CHAIRMAN SOULES: Okay. Otherwise, the third party must obtain leave -- okay. Let's go on from there, Bill. And then what?

PROFESSOR DORSANEO: That's it. Oh, no, well, after the amended complaint or intervention is served, otherwise it's the same.

CHAIRMAN SOULES: It's the same

from the rest of it?

PROFESSOR DORSANEO: Yes. This is what all of our discussion was about.

CHAIRMAN SOULES: Okay. Any opposition to this as modified? No opposition. It's unanimously approved.

PROFESSOR DORSANEO: Now, I hate to say this, but that seemed like such a good idea in the "But if" sentence, why are we having it not later than 90 days after the appearance date of a third-party plaintiff as a defending party. Why not do it from service there too? I mean, that's not what we voted, but why is it different?

CHAIRMAN SOULES: Any opposition to making it the same? No opposition. So it will be 90 days after --

PROFESSOR CARLSON: What if there's a waiver?

MR. HAMILTON: After appearance day.

PROFESSOR DORSANEO: Well, you're always going to have "what ifs." With 90 days, you know, you'd make it longer, but it's getting pretty long. 120 days.

CHAIRMAN SOULES: Not later than 90 days after the appearance day. I think there is a reason for this.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: Do I need to articulate it?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: Okay. Done.

PROFESSOR DORSANEO: So that takes care of --

MR. HAMILTON: What did we end up with?

CHAIRMAN SOULES: Just changing to -- and we said 60 days after the amendment or intervention is served on the third-party plaintiff as a defending party, period.

PROFESSOR DORSANEO: And the last thing I have is default judgment.

CHAIRMAN SOULES: We're not going to change the first sentence -- default judgment is what rule?

PROFESSOR DORSANEO: Well, it's this Rule blank.

CHAIRMAN SOULES: Rule blank.

PROFESSOR DORSANEO: While this

is being passed out --

CHAIRMAN SOULES: Rule blank, Default Judgment. Okay.

PROFESSOR DORSANEO: The specific assignment was to deal with Judge David Evans' letter concerning current Rule 243. And to refresh your recollection, Judge Evans wanted an explicit authorization in the rule for the use of affidavits to prove up unliquidated demands. That is down in (c)(2) as drafted. "If the claim is unliquidated or not proved by a written instrument, unless the defendant is entitled to and demands a jury trial," which is substantially verbatim to 243 right now, I think it says, "demands and is entitled to a jury trial, the plaintiff must present evidence as to damages caused by the events sued upon on the record or by" -- and I use the plural here although it could be singular -- "affidavits of competent witnesses based on personal knowledge of the facts stated in the affidavits."

That is what was voted as a concept affirmatively at the last meeting, and I've

taken a stab at drafting it.

Beyond that, this Rule blank, Default Judgment, amalgamates into one rule the default judgment provisions that are contained in a number of distinct shorter rules beginning at at 237a of the current rulebook.

Whether it's appropriate to do so or not now, I believe it would be advisable for us to take that action with respect to the current rulebook and the number of shorter default judgment rules that we have making our rule modeled structurally in a manner that's similar to the federal rule. There's not much difference in wording, although not all of the provisions in Rules 237a through 244 are set forth.

For example, 237a talks generally about cases remanded from federal court, and the last sentence only appears as the last sentence of subdivision (a) of this draft. It may be that we would want to add more than the last sentence. The question is one of placement, not one of eliminating what it says otherwise in the beginning part of current Rule 237a.

Subdivision (b) is substantially like 240, but makes it clear that you can have an interlocutory default judgment as to liability. 240 at the present time only talks about an interlocutory default judgment as to one defendant in a case when there are more defendants.

Subdivision (c) is substantially verbatim with the change indicated to what it says now in Rule 241 and 243.

Subdivision (d) is the first sentence of current Rule 239a, and I will probably propose adding the rest in. I have more written after my subdivision (d) here.

(e), After Service of Publication, is verbatim current Rule 244. There might be a little bit of duplication or overlap here between what's in the party section, section 4, I believe, of the recodification, and I need to check that. Subdivision (f) is new, but it seems to me that it's a good idea.

I'm doing, I guess, more of an introduction to this than anything else. I would myself propose that this default

judgment rule in this type of form be included with the judgment section of the rulebook, which would be in recodified form section 8, and that's being processed based upon what we voted pursuant to the discussion of Don Hunt's report at this very moment. It's possible that this default judgment information could go in section 6, which is proposed to be the pretrial section of the recodification. Wherever this default judgment rule goes, I would propose putting the summary judgment rule, however it looks, and I'm assuming it will look as ordered in the drafting that I'm doing alongside of it, and I basically would ask for a vote right now, subject to what the chairman says, only on this (c)(2) issue, and we can leave the full-scale consideration of it to the consideration of section 6 or the final consideration of section 8, which I plan to bring back at the July meeting.

CHAIRMAN SOULES: Okay. Incidentally, I think that the way it looks we will probably finish our work in September, have a July meeting and a September meeting. And talking to Bill, where he is amazes me,

but he's going to be in shape, I guess, to have everything here in July and us taking a look at the comprehensive package at that point.

PROFESSOR DORSANEO: The plan will be to have a complete rulebook for you, most of which you will have already approved.

CHAIRMAN SOULES: In July. And then our September meeting will be a wrap-up meeting, a cleanup meeting, and maybe we can get done.

HON. SCOTT A. BRISTER: The July meeting is the second week, the second and not the third Friday, isn't it?

CHAIRMAN SOULES: I think it's July the 4th weekend -- no.

MS. DUDERSTADT: The 11th and 12th.

CHAIRMAN SOULES: The 11th and 12th. Okay. So what we're voting on now is the language that Bill has drafted to implement the use of affidavit testimony, affidavit proof to prove up unliquidated damages in a default judgment case.

Don Hunt, and then we'll go around the

table.

MR. HUNT: Mr. Chairman, can we make that singular instead of plural?

CHAIRMAN SOULES: Is anybody opposed? No opposition to that. Take out the "s" at the end of "affidavits" twice.

David Beck.

MR. BECK: I have two drafting comments. I'd suggest that the phrase "on the record" on the last line, Bill, be moved after the word "evidence," so that it says, "the plaintiff must present evidence on the record."

And I would put a period after "upon," because you're talking about presenting evidence and then you're talking about affidavits. Affidavits are evidence, so I would put a period after "upon," and then just start a new sentence, "Such evidence may consist of affidavits," and then the rest is all right.

PROFESSOR DORSANEO: The only small point, and I suppose it's intentional, is that you would require a hearing. You would just say, "Here, Judge. Here are my

affidavits."

MR. BECK: You've got to file the affidavits, don't you?

PROFESSOR DORSANEO: But then you'd want to hand them to the judge.

MR. HAMILTON: Or the court reporter.

PROFESSOR DORSANEO: The court reporter. Carl mentioned at the last meeting, well, does this mean that somebody could file an affidavit with their petition and that that would be, you know, proving up the unliquidated demand? And I think we answered yes.

CHAIRMAN SOULES: What Bill has got here is not just a drafting problem, David. As I see it here, they can present evidence on the record or by affidavit.

MR. BECK: Right.

CHAIRMAN SOULES: But the affidavits don't have to be on the record, so there doesn't have to be a court reporter there making a record of the affidavits being presented to the judge. You can just mark them as exhibits and have the judge maybe sign

"Received" on the front or some way to show that they were in fact considered.

MR. BECK: I think that makes sense.

CHAIRMAN SOULES: And then -- but the moving of those words could suggest that there has to be a record of the presentation of the affidavits. I think that is the matter under scrutiny here.

MR. BECK: Well, the phrase "on the record" appears in front of the word "or."

CHAIRMAN SOULES: Well, that's because you can either present evidence on the record or present affidavits.

MR. BECK: Right. And what I'm saying is moving "on the record" over after the word "evidence" doesn't change that at all.

PROFESSOR DORSANEO: That's fine, "present evidence on the record as to damages caused by the event sued upon." But then my draft isn't very good because it doesn't make it clear that the affidavits can just be filed or whether there needs to be a hearing. I suggest the issue would be or by

filing affidavits, you know. In other words, is it filing or do we want to present them to the judge or what do we want to do with these affidavits?

MR. BECK: Such evidence may consist of filed affidavits.

PROFESSOR DORSANEO: But you still have the record. And I had written in here "on the record in open court," and I thought "open court" -- to me "on the record" means that -- granted, why that wouldn't be something that's filed, but I think it's pretty clear that "on the record" would suggest to people that you're going to have a hearing. Maybe you should say "at a hearing."

CHAIRMAN SOULES: It needs to say something along this line: "The plaintiff must prove the damages caused by the events sued upon by presenting evidence on the record or by presenting affidavits." That's what we're talking about, proving the damages caused by the event sued upon by one or by the other.

PROFESSOR DORSANEO: Okay. By presenting evidence on the record, and what's

the other?

CHAIRMAN SOULES: By presenting affidavits.

PROFESSOR DORSANEO: Presenting?

CHAIRMAN SOULES: Well, we're talking about presenting evidence or presenting affidavits.

PROFESSOR DORSANEO: Where do we present the affidavits? To the clerk? To the judge?

MR. HAMILTON: It would have to be to the judge, and you would have to give the defendant notice of the hearing.

CHAIRMAN SOULES: I think you have to present them to the trier of fact or wherever any evidence would go.

PROFESSOR DORSANEO: Presenting an affidavit? We'll go back and consider this again and I'll draft it up, and we can take another look at it. It's going to come around the bend again.

CHAIRMAN SOULES: Would that solve your issue, David, if we did it that way?

MR. BECK: Yes.

CHAIRMAN SOULES: All right. We'll do it that way.

PROFESSOR DORSANEO: That's a big improvement.

CHAIRMAN SOULES: Make it in your king's English, and we probably won't need to spend much time on it.

The concept, though, everybody agrees to, right? No dissent? No dissent. Okay.

PROFESSOR DORSANEO: That's all I have.

CHAIRMAN SOULES: Okay. We can proceed. Let's see, we're going to go on with old business which is still on the first page of the agenda. And let's see, I guess you have David Peeples' to present? Okay. Let's go ahead and go with that. Great.

Justice Sarah Duncan will present Judge Peeples' where -- concerning masters.

HON. SARAH DUNCAN: It's really simple. On Page 577 of the first volume of the agenda, I'm not even sure where it comes from -- okay. John K. Chapin recommends for this Committee's consideration an amendment to the Federal Rule 72a which incorporates a

timeline for objecting to a master's report.

MS. SWEENEY: Did you say 572?

HON. SARAH DUNCAN: 577. Judge Peeples looked at it and recommends no change. There's no problem with the current rule as specified in the materials, he has not perceived a problem, and recommends that we leave the time for objections to be specified by the judge in the order appointing the master, I guess.

CHAIRMAN SOULES: 171. So this is just a recommendation that when a master's report is filed that there be a time limit for objecting to the master's report?

HON. SARAH DUNCAN: That was Judge Peeples' understanding.

CHAIRMAN SOULES: Okay. And he recommends that we not have that limitation and leave it up to the judge to decide?

HON. SARAH DUNCAN: He recommends no change. He hasn't been able to identify any problem with the current rule.

CHAIRMAN SOULES: Does anyone disagree with that? Okay. No change. It's unanimous. Is that it?

HON. SARAH DUNCAN: Judge Peeples also said he didn't know if he was supposed to address Page 578 of Volume 1. He didn't think he was, so he didn't. If anybody wants him to, just say so.

CHAIRMAN SOULES: Okay. That's it. Thank you.

And Judge Brister, you have two or three things, I think. Where would you like to begin?

HON. SCOTT A. BRISTER: I've got Joe Latting's -- Joe passed the motion in limine on to me; and then I've got 174, the bifurcation and separate trial deal.

CHAIRMAN SOULES: Which would you like to start with?

HON. SCOTT A. BRISTER: Probably 174 since we've already talked about it, and I've put some copies up there.

MS. SWEENEY: Is that the one on your letterhead?

CHAIRMAN SOULES: 174.

HON. SCOTT A. BRISTER: Yes. It's my seal with "Draft Rule 174."

CHAIRMAN SOULES: Right. And

you've got a red-line at the bottom?

HON. SCOTT A. BRISTER: Right. We discussed this last time, and I've identified three issues, one which I put there in the introduction. One was the federal rule and most of the proposals from the materials from the agendas which I put on the back of that of the memo that say add "efficiency and economy" because it's in the federal rule and is under consideration.

Two was to draw the distinction between bifurcation and separate trials. We discussed last time there's some confusion as to what a separate trial is. Some people think a separate trial is the same as like a severed trial except you don't sever, you just try them to two juries, two different times, months apart. Other people call what we would now call a bifurcation a separate trial where you have the same jury and you just get one verdict on half the case and then the other, and to straighten that out.

And then three was Justice Guittard and Bill Dorsaneo had brought up the matter of what part of the case can you retry, which is

Rule of Civil Procedure 320 and TRAP Rule 81, what part can you send back down; and that you can't send back down part of the case if it be unfairness to the parties; and that you can't send down unliquidated damages if liability is contested.

Then the fourth one was what to do with prerequisite issues. We discussed that, on having a separate trial on an introductory matter like limitations, like bill of review. And what I've done in my draft at the bottom is take the current rule with three changes.

One is to draw the distinction between separate or bifurcated trials in part (b); to add "or to promote efficiency and economy" from the federal rule. The third one is to make clear that when you talk about a separate trial, we're talking about different juries -- sorry about the typo. I don't have a secretary, so I can't blame the typos on anybody but me -- and that a bifurcated trial is before the same jury.

And then the last phrase is taken directly from current Rule of Civil Procedure 320 and TRAP 81, that you separate them out

only if they're clearly separable without unfairness to the parties, and that you don't have a separate trial on unliquidated damages.

Now, I point out that by the last sentence, by stating that you can't have a separate -- by drawing the distinction between separate and bifurcated trials, and saying on a separate trial you can't have unliquidated damages alone if liabilities are contested, implies that you can't have a bifurcated trial on those, which again is where -- was our concern. On the long case it makes sense often to try the liability phase on a complicated deal, especially if you've got hundreds of people claiming damages, try the liability, because the studies show, of course, sometimes the jury says no liability and you save the time. Very frequently, if you get a yes liability and the case settles during damages, either way you save yourself some time rather than doing the whole trial and increase the odds of settlement by getting that initial -- the same jury, same voir dire, opening statement on the whole case, no hiding

that there are damages claimed and what they are and that stuff, but bifurcating those so you get kind of an interim verdict on liability.

So that would be my proposal, and I don't think with the exception of that implication that you can now bifurcate that because we're drawing the distinction between bifurcation and separate trials, I don't think this changes the law, and it certainly doesn't broaden the rule. I mean, the rule that we have right now is about as broad as you could say it. You could argue that actually this limits the rule by putting an unfairness to the party standard in and the other stuff, so that's the issues we discussed.

CHAIRMAN SOULES: Okay. I'd like to focus this first to ignore the last sentence for the moment. Is there any opposition to any other changes that Judge Brister is suggesting? Carl Hamilton.

MR. HAMILTON: I have a problem with the wording where it says "may order separate trials before different juries." It sounds like that's the only way you can have a

separate trial, and I don't -- I think you can have a separate trial before the same jury, or you ought to be able to.

PROFESSOR DORSANEO: That's called a bifurcated trial in this case.

HON. SCOTT A. BRISTER: That's the confusion. There are actually two courts of appeals cases. This comes up on the punitive damages when you ask, "Do the same 10 people that vote for liability and gross negligence, do those same 10 have to sign on the punitive damages amount?" One case says yes, because after all, we instructed that the same 10 have got to agree on the entire verdict. But a court -- the Corpus Christi case says no, it's a separate trial. You could have done these to two entirely separate juries, so therefore you can have a different 10 on these two halves, so there is a confusion. Some courts think a separate trial is just like a severed trial. Some people think a separate trial is a bifurcated trial. Most of us think separate trial means two different months apart, two different sets of faces, two different voir dires, two different

everythings. Bifurcated is one proceeding, but you get an interim verdict.

MR. HAMILTON: Bifurcated is not just limited to bifurcated damages?

HON. SCOTT A. BRISTER: Any issue.

PROFESSOR DORSANEO: Any issue. As I'm interpreting this draft, the defining characteristic of a bifurcated trial is that it is before a single jury.

HON. SCOTT A. BRISTER: Right.

PROFESSOR DORSANEO: So all the other information you have about bifurcated trials in your head needs to be ignored.

CHAIRMAN SOULES: Bifurcated is --

PROFESSOR DORSANEO: -- single jury.

CHAIRMAN SOULES: -- stepping through a trial and different pieces to the same jury. Separate trials are different juries but on issues that eventually have to all be resolved before a final judgment can be rendered in the case.

HON. SCOTT A. BRISTER: That's

always been my understanding, but it's not everybody's.

CHAIRMAN SOULES: And severance is two causes of action, any of which can result in a final judgment.

Okay. Any opposition, then, down to the final sentence? Okay. Everything is approved down to there.

And we talked about the issues relating to the last sentence last time. I think we got to this point, so I'm just going to ask, is there any opposition to the last sentence as written by Judge Brister? No opposition.

MR. BECK: Wait, Luke, let me make sure I understand the last sentence here.

CHAIRMAN SOULES: David Beck.

MR. BECK: Judge, does this mean that the only way you're going to be able to have a separate trial on unliquidated damages alone is if either liability has been decided or agreed?

HON. SCOTT A. BRISTER: On liquidated?

MR. BECK: No, unliquidated.

HON. SCOTT A. BRISTER: The

discussion was last time let's don't have it where the appellate courts on reversing part of the case can't bust it up but the trial court could bust it up, or where the trial judge on a new trial can't bust part of it back and do it over again. So all I did was just copy the standard for a new trial for a reversal on appeal into this. And I think the effect of it means if you're going to say you can't -- if you've had -- well, assume if it's gone up, it would be you had a finding of liability, unliquidated damages, you find something wrong with the unliquidated damages. You have to reverse liability as well and send it back. As I understand it in federal court, you can leave liability finding for the plaintiff but just send back unliquidated damages, but under Texas practice you can't do that.

MR. LOW: So this wouldn't change Iley vs. Hughes?

CHAIRMAN SOULES: It would not. Any opposition to the last sentence? Okay. Then, Judge, 174 is approved as written on Judge Brister's May 14th, 1997 letter.

Next.

HON. SCOTT A. BRISTER: Then there's a motion in limine deal. Also it's one page with the seal on "Draft Rule on Motions in Limine." And I think the deal was -- I don't know if we voted to have a rule on motions in limine or if Joe was to draft one, and I wanted to make his draft more kind of normal and like the other rules.

So as I understood it, his concerns were, number one, to discourage the boilerplate motion in limine. Don't comment on calling any witness unless they should be called, don't offer any hearsay unless there's an exception, dah-de-dah-de-dah.

And two was to encourage Robinson vs. duPont matters to be included in a motion in limine. And I think the conclusion -- whoops, I've got all of them in my file. That's why you don't have one. Sorry about that. I just noticed that.

And I think we did vote on the issue of do you want to make rulings in limine appealable, or do you want to keep the current practice, which is they don't matter. Granted

or denied, it doesn't matter, you've still got to object at trial. I think we voted to keep the current practice on that.

So if you want a rule, and I've just drafted one here out of whole cloth, I've had a law clerk look for motions in limine rules, and there are about 20 states that have rules on motions in limine. They all say nothing other than they've got to be in writing, unless the judge says they don't have to be in writing, and they've got to be filed five or 10 days before the trial, unless the judge says they don't have to be filed five or 10 days before the trial. So what this rule says, the first sentence says it has to be in writing, filed at the time the court directs. I just hesitate to get into the, you know, it's four days, not five days, do we strike witnesses, does it not count, you know. The whole idea of the motion in limine is to help the trial, not hurt it, not make it more complicated.

And I've tried to address the scope section that you state with specificity the anticipated evidence that you think is going

to come in that you want out, including expert testimony, the Robinson matter. And let's see, the motion need only address matters where considerations of efficiency or prejudice justify a ruling prior to rather than during trial. Don't include standard rules of procedure or decorum. Don't include hypothetical requests unrelated to the anticipated evidence, or matters that there's no prejudice or delay, just doing them during trial. And then if the motion does a lot more than that, the judge can make you go back and do it right.

And then you can grant, deny or carry it with the case; sign an order saying don't mention it, which is just the current law.

And then last, that on review there's nothing to review; it's an interim ruling. And then I've added in brackets -- we did have the discussion, you know, we've gone through a long Robinson hearing, let's say, and the judge has made the ruling. He's still got to throw all of that into the record again at trial suggesting -- the last sentence would suggest if you do it pursuant to 166 and have

a written pretrial order by the judge making the ruling, then you don't have to tender it all again at the trial to preserve the record, but that's just a suggestion.

I'm not so sure we need this rule, but I don't remember -- you know, our task was to draft one, if we thought we needed one, and that's just my draft idea.

CHAIRMAN SOULES: Okay. Discussion. David Beck.

MR. BECK: I really question whether we need a rule on motions in limine. We don't have to specific rule now, but we have developed a pretty good practice in our courts with respect to motions in limine. For example, the fact that we're filing or granting or sustaining a motion in limine not preserving error, that's well established law and has been well established for a long time.

As far as boilerplate, you know, we can all sit there in this meeting and agree on what we think is boilerplate. But let me tell you, there are a lot of lawyers that don't know what boilerplate is, and unless they have

a court order that says don't stand up in front of the jury and comment on what the witness would have said, unless that witness is or is not within the control of -- let me tell you, they violate that. So I question whether we need this, and I certainly have some problems with this specific rule as it's worded.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: My question also is, it doesn't change Hartford vs. McArdle. I mean, that's just incorporated in it. It doesn't change that. All it does is just suggest making it. And a lot of times they come up, you know, in the middle of the trial, and I know it says you can grant it, but the system we have now seems to work all right, because most of the judges in Beaumont don't have much trouble getting people to file motions in limine, because they will do that. I don't think we need a rule.

PROFESSOR DORSANEO: Either that or Bridges vs. City of Richardson.

CHAIRMAN SOULES: Anyone else? Paula Sweeney.

MS. SWEENEY: I would concur 100 percent with David and Buddy. I think right now we have a practice that sort of operates as almost a long check-off Rule 11 agreement. You sit in there and you agree on 90 percent of it, and it's just things that aren't going to happen during trial and it solves an inordinate number of problems that otherwise we have to confront during the trial, and I don't think we need it. Far from having a current problem, I think we have currently something that works really well and we ought to leave it alone.

CHAIRMAN SOULES: Anyone else? Okay. Well, let's take a vote on the first --

HON. SCOTT A. BRISTER: Put me down as -- because Joe, I think, is the main one that wanted this, so on his behalf I know he really wants one.

CHAIRMAN SOULES: He convinced us to let him take a shot at drafting one, and he and you did, and I guess that's --

HON. SCOTT A. BRISTER: But I don't necessarily disagree with the comments that have been made. It's hard to have a

problem with something that doesn't matter, that you can't complain about on appeal.

MR. BECK: Joe didn't file a motion in limine to keep us from voting on it, did he, Luke?

CHAIRMAN SOULES: No, he didn't do that.

HON. SCOTT A. BRISTER: He left the country, though.

CHAIRMAN SOULES: Joe's issue, as I recall it, was that there was so much boilerplate in, you know, dozens and dozens of what would appear to be routine motions in limine, points in a motion in limine, that take up take time and waste time. Paula has mentioned most of those are agreed to anyway probably in advance. But I think that was Joe's main issue, unless somebody remembers it differently.

MR. BECK: Can't judges handle those kind of issues by way of docket control orders or specific orders for their individual courts?

CHAIRMAN SOULES: Sure.

HON. SCOTT A. BRISTER: It's

totally disregarded. I've got that in my pretrial instructions saying don't do any boilerplate motions, just the specific. I still get 50 items. And you ask the lawyer, and he doesn't even know what they are because he's just told somebody to print out the standard motion in limine. But that's easy. I'll just say, "You may have this back, and when you come back with something interesting, let me know."

CHAIRMAN SOULES: All right. Those who favor a rule on motion in limine show by hands.

Those who disfavor a rule on motion in limine. It looks like it's unanimous against any rule on motion in limine, so that fails.

You don't have to write that one, Bill. Okay. That takes care of motion in limine.

HON. SCOTT A. BRISTER: I think that's all I have.

CHAIRMAN SOULES: And 174.

HON. SCOTT A. BRISTER: Except one, 76a, which we may want to wait on Richard for that.

CHAIRMAN SOULES: Then this

covers, Judge Brister, 579 to 635 of the agenda and second supplement 353 to 358?

HON. SCOTT A. BRISTER: Right.

CHAIRMAN SOULES: Okay. Who is going to report on Alex Albright's venue? I understand somebody was going to take that on.

HON. SCOTT A. BRISTER: I talked to her. I don't think so. She was thinking of putting it off. I was interested in that motion for rehearing thing, but she said she thought we were just going to save it until later.

CHAIRMAN SOULES: Okay. Was anyone going to report for Orsinger?

PROFESSOR CARLSON: He may be coming tomorrow. I don't know.

HON. SCOTT A. BRISTER: I can talk about my -- I don't have anything drafted, but just the question we briefly discussed about whether 76a ought to -- "court records" ought to cover the discovery that's in your file, that's not at my place, it's at your place. And my argument on that is that it shouldn't.

The appellate rule does not cover that.

In the appellate rule, the file you seal is the stuff that we normally think of as the court file. And the problem from a trial judge's perspective of 76a is "court records" are anything that's in your file, which of course, I don't have any idea what it is, that relates to public safety, government and the other things listed which, of course, I don't know whether they do or not. And so when I get these standard motions saying, you know, the parties have agreed to a confidentiality order, my position is I have to do it by 76a because I don't know what's in their files.

How can I, without knowing what's in their files, know that it doesn't affect the public health or safety, the administration of public office, the operation of government? And how do you give the public paper some right of access to the discovery that's in the attorneys' files and yet, you know, it's not mine? I'm sealing something I don't have and don't know anything about. That's the quandary.

But the TRAP rule that we've sent up does not include anything outside of the courthouse

and court records as far as what's sealed with the same procedure. So I would recommend we drop from the definition of "court records" anything that's not at the courthouse.

CHAIRMAN SOULES: Well, just so that we recognize the history on this. This was hotly debated and heavily disputed when 76a was passed in the beginning. The fact that depositions are no longer filed and that duces tecums are no longer filed and the exhibits are no longer filed, and I guess document production was never filed, the proponents of 76a were pretty vigorous that this section (c) be in there.

And of course, the way 76a got passed anyway was that there was total opposition. There was a majority opposed to it until one of the groups, one of the minority groups, the family law was in the majority, the family law lawyers were in the majority, and so the minority then convinced the family law lawyers to vote with them and pass 76a as long as the family law -- the Family Code was exempt from 76a. So they put together a coalition overnight over at the hotel, which was the

first time that ever happened in the history of this Committee, and came back after that lobby and it got passed, of course, with a big push from one or more members of the Court at the time. So I don't know what the Court's attitude would be about this today, but that was the reason for it.

There is a court of appeals case, a pretty interesting case, I don't know the cite, that's come out recently that says that a judge should be able to -- that the 76a hearing can be bifurcated. The judge can first hold a hearing and determine whether or not the matter that is to be protected is a court record. And if the decision is it's not a court record, then they don't even go forward with the postings and all that has to be pursued in the context of a 76a proceeding. You can have this hearing on is it a court record without ever going through this 76a process. And it looks right to me, the logic that's suggested.

You've probably read that case. It's pretty good. Bill Dorsaneo.

PROFESSOR DORSANEO: I've had a

number of these 76a cases. I think I've lost them all on both sides, I believe. But the issue as to whether the thing is court records, there are at least several courts of appeals that say that the one that wants to have them made public has to establish that they're court records when they're unfiled discovery, and that's a complicated matter in and of itself that involves a number of complicated questions about, you know, what kind of injury and how probable it has to be and things of that type.

In my own experience, unless someone like the newspapers happen to develop an interest in the case, unless the judge just wants to assume some sort of responsibility to protect the public, then this does not work very well at all.

HON. SCOTT A. BRISTER: But that's not the way it's going to happen. The way it's going to happen is, if the papers, let's say -- not to pick on papers -- but the papers are the ones who are going to want this and have the burden of showing it is within this, and they're not going to be there on the

motion, the confidentiality order or agreement. They're not going to know about it unless I make you go through 76a. And so I'm going to say, "Sure. That's fine. Confidential."

And then the article is going to be "Judge Seals Files Contrary to this Rule." That has happened to me. So the way it's going to happen is, I'm going to get the -- I've got to make a decision, without knowing what any of these records are, that's going to be the one who hid the files from the public, not you all, because you all are just litigants. You're expected to hide them from the public.

CHAIRMAN SOULES: Chip Babcock, and then I'll get to Buddy.

MR. BABCOCK: The way this rule came about stemmed from a case that I handled pre-76a where the parties had gotten together and they had sealed the entire court file, not just the discovery, but the pleadings and the opinions and the orders of the court so that the only thing left in the case was a little computer notation that Smith had sued Jones.

And we went all the way to the Texas Supreme Court on that and lost on a procedural issue, the Court holding that there was no jurisdiction after the trial court had lost jurisdiction of the case to challenge this agreed-upon order to seal the entire record.

The Legislature passed a statute and said the Supreme Court has got to pass a rule dealing with this issue, and I think it said specifically court records, court files and settlement documents, which typically are not files of record either.

So this Committee, this group and then a special group that I was on got into this, and there were tremendous policy arguments back and forth on the issues that were argued out resulting in this rule. In my trial practice, I don't see this coming up as a major problem day in and day out, and I would suggest that unless there is evidence that it is a significant problem that we not change it.

I do, however, Judge, have situations, in fact I'm dealing with one right now, where the parties are attempting to agree on a protective order with respect to unfiled

discovery, and the parties agreed that this subsection (c) is not implicated because the records -- the case itself and the records do not implicate public health safety and the administration of public office and the administration of government. To me, and this is what I proposed in subcommittee, if there needs to be clarification, to me, if no one argues before you that subsection (c) is implicated, then I think it is appropriate for you to enter a protective order, if it is otherwise called for, without getting into the issue of whether 76a is implicated.

That does not, however, prevent, as you say, a newspaper or radio station or some public interest group coming in later, as the rule provides, and saying, "Hold it. The parties agree that subsection (c) wasn't implicated. We don't agree with that. We want a 76a hearing." And in that event, I think they're entitled to it and then you do have to get into whether it's a court record or not.

Now, if you're getting unnecessary flak from the Chronicle, then I can maybe help you

with that, but --

HON. SCOTT A. BRISTER: It's too late.

MR. BABCOCK: But I don't see changing the rule, unless, you know, the collective wisdom here is that we've got a huge problem that we need to solve.

CHAIRMAN SOULES: Well, (c) is here because it's in -- I mean, (c) is operative because it's in the rule. And that was where the big division came on 76a. There is not a constitutional right to see this material. It's not a court record in terms of First Amendment cases. And the certain group that wanted the discovery in products cases always available and a certain group that wanted everything open for the newspaper's scrutiny still couldn't get a majority without picking up the family lawyers by enlisting their support by excluding them from the rule. But with that, they did. But this (c) is not -- (c) makes these things court records. They are not court records for any right of access other than through 76a(c). So if we take it out, we don't have a

constitutional issue, constitutional-level problems. And Chip is shaking his head right, and they agreed with that in the beginning.

So I guess I'm trying to give a balanced history of the whole thing. I did bring this up later to see if there might be some inclination to change it and was told that no one wanted to change it that quick. There was an election that occurred not too long after this passed. But anyway, we ought to thrash this out. Buddy Low.

MR. LOW: You know, you will recall this was one of the first times we ever had most of the Court here, and the newspapers had they're lawyers. Two lawyers met with the Committee. And the concern of all of the Committee members was the fact that at that time that's when we went back to filing certain things which had been -- and the concern of the Committee members was that they didn't want some newspaper guy coming up and saying, "I have a constitutional right to look at this in your file," and go through the files. And so we tried -- it was attempted to make it, well, if they're entitled to

something, it's in the court and not in the file. And that was -- I'm not saying that's the way the thing was voted, but everybody was concerned about that. The Court was concerned about the publicity, the elections, and there were a lot of concerns.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, again, this (c) is not worth much if the burden is on the one who wants to get the documents made public to establish that the unfiled discovery is a court record unless -- you know, before you've actually won the case on the merits. I mean, if you're making a claim that a particular drug is a dangerous drug and it shouldn't have been prescribed and it shouldn't have been approved by the FDA and that all of the documents about the approval process are court records in the discovery and they need to be made public, the defendant will argue that, well, you can't show that these matters have a probable adverse effect on the general public health until you win this case, which is what this case is about.

And so you know, the way the courts of appeals have interpreted it -- and the newspapers are picking their spots. They're not coming in and arguing this section very often because they're afraid it will go away. But as far as the rest of us, it's not really worth much, I don't think.

CHAIRMAN SOULES: It's hard to administer, though. It's very hard to administer.

HON. SCOTT A. BRISTER: It implicates me in a cover-up. I mean, the government cover up -- there's little that's more damaging to a government figure than a government cover-up. And I've got to make a decision whether this is or is not bad or good without the records and frequently without anybody to argue the other side, because the parties are in agreement it ain't, but that's the classic setup for me to be in a cover-up and be the one that gets blamed for it, and boy, there's little that's more damaging.

CHAIRMAN SOULES: I don't like it now. I didn't like it then. And I hear a new spokesman, and I've got no problem with

taking a run at it.

MARK SALES: If it's a motion, I'll second it.

HON. SARAH DUNCAN: Can we take out (b) too?

CHAIRMAN SOULES: Justice Duncan wants to take out (b) also.

MR. BABCOCK: You can't take that out without violating the statute.

CHAIRMAN SOULES: Okay. Any further discussion? Chip Babcock.

MR. BABCOCK: In subcommittee, the solution for Judge Brister's problem that I proposed that I thought had general acceptance was that we may need to, and if we do need to, then we should, make explicit that with respect to this subsection the judge is under no obligation to hold a 76a hearing unless somebody, it doesn't matter who, but somebody contends that the records are court records, some or all of them are court records, under 76a(c), (2)(c).

MR. YELENOSKY: Luke.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I agree with that, because if you take (c) out, how does (7) operate if in fact somebody later comes back and says, "Hey, those are going to have a probably adverse effect on public health," and all the person holding the discovery has to say is, "Well, they don't meet the definition of a court record," so you don't even get to that issue. I mean, it's got to be in there for that instance.

So I agree with Chip. The way to fix it is not to define it out but to put something in there that satisfies Judge Brister's concern.

HON. SCOTT A. BRISTER: But you can put that the other way around. I can order to you file discovery in the case. It's just the general rule is you don't, but you know, somebody can file it or I can order you to file the discovery in the case. And that shoe ought to be on whoever's foot wants it to be done. But this is not a court record. It has never touched the courthouse. Nobody at the court knows anything about it. Now, how you can say that is a court record is just a

misuse of the English language. That's your record. Until I order you to file it, and I could do it, if somebody comes in and makes a showing, but then they need to come in, make the showing, and then we can go from there.

MR. YELENOSKY: But can you do that under continuing jurisdiction under (7)? The case is over and somebody comes in, and you're saying you can then order them to file that discovery so you can have a 76a hearing?

HON. SCOTT A. BRISTER: Well, I mean, you could declare me to have jurisdiction just in the -- I mean, 76a out of whole cloth declares me to have a jurisdiction that never existed before. You could certainly do that again if that's a problem.

MR. BABCOCK: And Judge, there are cases that, not under the Constitution, but under the common law right of access, there are cases primarily in Florida and they're primarily older, but do extend the common law right of access to the discovery process. There are cases in Florida that say that the press has got the right to attend depositions in a civil case. I don't know if

that's rightly decided or not, and I think the trend in Florida is going back the other direction. But it is not something that Texas dreamed up for the first time that the discovery process would be part of the common law right of access.

MR. MARKS: But that doesn't make it right.

CHAIRMAN SOULES: Okay. Moved and seconded. Paula, you've got the floor.

MS. SWEENEY: Well, at the risk of being one of one again, I object to changing the rule. I have not heard anyone at any time utter the complaint that Judge Brister has. I think there are other ways to address that complaint without eviscerating a rule that was the product of lengthy discussion and a great deal of compromise and a huge amount of work and that has been in effect for several years now. And I think the purpose of the rule is foiled and that the reason for this discussion is to attempt to foil, of course, not by the judge, but the reason for much of this discussion is to attempt to foil the purpose of the rule and to

hide and seal and secrete things that do adversely affect the public interest and the public welfare and that that ought not be something that this Committee embarks on.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: At the time the rule was drawn, we didn't know the effect. It was brand-new. We know a lot more about it and how it operates than we did when that rule was passed. So I think we shouldn't ignore the present knowledge that we have as to how the rule operates. It might be solved other ways. I'm not saying that.

CHAIRMAN SOULES: So what's the motion? To delete (c)?

HON. SCOTT A. BRISTER: Yeah. And then we'll need to look through the rule and probably make some stylistic changes to reflect that. And I wouldn't have any problem with putting in some kind of language about, you know, if somebody wants to open discovery, they file a motion to have the court order it and go through the 76a rigmarole.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I think what you're complaining about is the way that it's drafted, and I don't like a non-court record being called a court record so that a particular objective can be achieved, and I think it needs to be redrafted. But I would wonder about judges who -- I'm not saying this about you at all -- who would be a party to a confidentiality order without -- you know, an umbrella protective order without knowing whatever in the world it is that they're putting in the deep freeze. That doesn't make any sense to me. I don't think I would do that, if I were asked to do it, in order to facilitate a settlement between private parties. And in sentiment I agree with Paula that this stuff shouldn't be just kept secret from the world because you've gotten a judge to stamp, you know, "sealed" on it. But I don't like this rule at all, and I don't like the way that unfiled discovery is called a court record, because it kind of drives you mad when you're trying to work through the rest of it.

HON. SCOTT A. BRISTER: Well,

I'm making everybody do all 76a every time I get one of these agreed confidential because of this problem, because I don't know what they are. And attorneys from very good firms in Houston are feeling very put upon that I'm making them do this, because, of course, they're afraid when they file the 76a that then the papers are going to get in and they're going to want it.

CHAIRMAN SOULES: Judge, where is your power to cause discovery not filed of record to be filed of record?

HON. SCOTT A. BRISTER: Well, I'll have to think about that. I mean, if it's discovery in the case, you know, I can -- I've had people bring depositions in, for instance, and I order them filed because the clerk won't take them unless I write on the docket sheet they're ordered filed.

MR. YELENOSKY: You're not opposing that, though.

CHAIRMAN SOULES: Well, would it work if we just took out the word "not" out of (c)? It's still broader than the constitutional right of access.

MR. BABCOCK: No, because discovery filed of record is a court record in any event.

CHAIRMAN SOULES: Not under the Constitution.

HON. SCOTT A. BRISTER: It doesn't matter what it's about. It's a public record.

CHAIRMAN SOULES: No, not when we passed this rule. I hadn't looked at it in a long time. It had to be used as evidence before it was a court record.

MR. BABCOCK: Well, what you do is you file discovery in advance or in support of your motion for summary judgment or in opposition to a motion for summary judgment. The court rules on it, and that's a court record.

CHAIRMAN SOULES: That's a court record. But just a deposition on file in the district clerk's office in the old days was not.

MR. BABCOCK: You're right. That does make it different. But if you bring discovery to the judge's attention and say,

"Judge, make a ruling, and here is my evidence. Here is what I want to you make it on," that's a court record.

CHAIRMAN SOULES: Okay. So without complicating things, the motion is to delete (c) made by Judge Brister and seconded by John Marks. Those in favor show by hands. Nine.

Those opposed. Six. Nine to six.

PROFESSOR DORSANEO: But Mr. Chairman, I thought the judge had a separate part of his motion, though, about adding back in the responsibility to evaluate information that the parties treat as confidential if someone raises the public importance of the disclosure of the information.

CHAIRMAN SOULES: How do we do that?

MR. YELENOSKY: Well, if you've taken it out of the definition and you're talking about the operation of (7), then you're going to have to say that for that purpose, "court records" includes unfiled discovery or you're going to have to say that

the rule applies to something more than just court records. You can call it sealing court records and unfiled discovery.

PROFESSOR DORSANEO: I think somebody needs to work on this some more.

HON. SCOTT A. BRISTER: I'll be happy to take a shot at that.

PROFESSOR DORSANEO: Great.

CHAIRMAN SOULES: That's why I was thinking about taking out the word "not" and putting in some power of the court to have discovery filed. Then you could raise these issues. "This discovery has gone on. We think it affects the public interest. We think you ought to cause it to be filed, and we ought to have access to it." But that doesn't implicate your initial determination. So if it's filed of record, you get access to it.

HON. SCOTT A. BRISTER: Then at least I've got somebody else to argue the other side of the issue.

CHAIRMAN SOULES: It's not in my court. It's not filed of record.

Well, make it be filed of record, because

it's da-dah. Okay. Well, it is da-dah. File it, and we're going to have access to it.

And then you've got the press there and you can make a decision in their presence based on what they tell you, so I don't know if that's an approach to maybe one, but whatever the approach is, we'll look at it in July.

Okay. 76a is discussed with a vote of nine to six to delete (2)(c) and refer it back to committee for drafting, refer it back to you, Judge Brister, for drafting in response to that vote.

MR. BABCOCK: Luke, could I help the judge on that?

CHAIRMAN SOULES: Yes, sir. Does anyone else want to help on this? Paula, do you want to help on this?

MS. SWEENEY: Sure.

CHAIRMAN SOULES: The other thing that was going on, and there was discussion that there was a lot of unfairness going on, that in a products case they make a big confidentiality order, go through a big process, and then the product manufacturer is

in a gotcha situation, so it's all been done under seal or it's all been done confidentially, and one of the rules of the settlement is "I'm going to pay your plaintiff a whole lot of money, but you've got to give me all the stuff back." So all the stuff comes back. The next time out the plaintiff has to start all over again. Maybe that was not fair, and so I'm just not trying to judge the situation.

HON. SCOTT A. BRISTER: And it makes sense to allow the next plaintiff or the "60 Minutes" or whoever to come in on a motion and say, "Make them file what you've got from that case."

CHAIRMAN SOULES: This stuff affects the public health and you ought to cause it to be filed, and we ought to have access to it.

HON. SARAH DUNCAN: I just want to say for the record that I think there are several of us that only voted to delete subsection (c) with the understanding that it was going to be added back in, but that there were going to be parties arguing that before

the judge and there might or might not be an in-camera inspection or whatever.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: Well, it's not always the parties to a given settlement who are able to argue this should be public record. It's parties to other cases or the press.

HON. SARAH DUNCAN: Right. I understand that. And my understanding is that Judge Brister is going to draft it so that anyone can come in --

HON. SCOTT A. BRISTER: Put in a mechanism to do that.

HON. SARAH DUNCAN: -- and argue that those records should be made a court record for the benefit of the public. Am I right, Scott?

HON. SCOTT A. BRISTER: Yes.

CHAIRMAN SOULES: Okay. I think we've got that out. What time is it? Noon. It looks like there's a pretty good chance we can finish today and not work tomorrow, because we're now on new business,

right? The third agenda. And we'll try to march forward. Do you all want to just take a short lunch, 30 minutes, and get back here and go to work.

(Lunch recess.)

- -

CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Court Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 16, 1997, Morning Session, and the same was thereafter reduced to computer transcription by me.

Charges for preparation of original transcript: $820.75.

Charged to: Soules & Wallace P.C.

Given under my hand and seal of office on this the 27th day of May, 1997.

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 12/31/98

#003,344WW