ORIGINAL

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

In re: House Bill 176, Code of Evidence

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Stenographic record of hearing held in Room 140, Main Capitol, Harrisburg, Pennsylvania

Wednesday, September 8, 1993, 11:00 a.m.

HON. THOMAS R. CALTAGIRONE, Chairman

MEMBERS OF THE COMMITTEE

Hon. Michael C. Gruitza
Hon. Jerry Birmelin
Hon. Robert D. Reber, Jr.
Hon. Al Masland
Hon. Kathy Manderino
Hon. Harold James
Hon. Frank Dermody

Also Present:

Hon. Marc Cohen

William H. Andring, Chief Counsel to Committee

Kenneth Suter, Counsel to the Committee

Galina Milohov, Research Analyst

Reported by:
Emily R. Clark, RPR

I N D E X

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CHAIRMAN CALTAGIRONE: This is the House Judiciary Committee. We're taking testimony on Senate Bill 176. I'm Chairman Caltagirone from Berks County. I would like the members that are here, if they would introduce themselves, and the staff that's present.

REPRESENTATIVE REBER: Representative Reber, Montgomery County, Mr. Chairman.

REPRESENTATIVE MASLAND: Al Masland, Cumberland County.

MR. ANDRING: Bill Andring, chief counsel to the Committee.

MR. SUTER: Ken Suter, Republican counsel.

REPRESENTATIVE MANDERINO: Kathryn Mandarino, Philadelphia County.

MS. MILOHOV: Galina Milohov, research analyst.

CHAIRMAN CALTAGIRONE: And as we've done before, what I would like to do, if Mike Eakin would like to come up, and Jimmy Lillis and Dave Zuckerman, and of course, Professor Ohlbaum, if we could have all of you at the table. We'll let each in their turn present whatever testimony they would like to give and then we'll open it up for questions from the members of the staff. And Mike, if you would like to start off, then, just identify yourself for the record.

MR. EAKIN: Thank you, Representative

Caltagirone. My name's Mike Eakin. I'm District Attorney of Cumberland County and immediate past president of the District Attorneys Association of Pennsylvania. And for the last six months or so, I have chaired our ad hoc committee concerning the proposed codification of the rules of evidence.

I have prepared some written remarks which I have given the staff and should be circulated. Rather than rehash what I have written there, I would simply like to make a couple of remarks of a general nature.

The back two-thirds of my prepared remarks are specific section-by-section concerns that our association has with the bill as it's presently constituted. And again, rather than go through them specifically, I would refer the committee to that.

I would apologize first for any typographicals. Given the state of our office at the present, I did the typing. And I'm not about to quit my day job to become a secretary, given what I found in the first read-through. But if I missed something, I apologize for it.

Secondly, I refer in there to an attachment being a letter to, I believe, Representative Caltagirone, if not the committee as a whole, and from Attorney Syndi Guido of the Attorney General's office, and I neglected to run copies of that and attach it to my prepared remarks. I'll

submit that, if I might, later.

With that in mind, and again, not addressing the specifics of the section-by-section analysis, I would think that I can summarize the concerns of the District Attorneys Association in this regard. The bill obviously has had a lot of work, and a lot of work before 1993. Yet, our association first had the opportunity to comment and work on it commencing about April of this year. This is an immense project, and in our estimation, probably the potential single most radical change in Pennsylvania criminal justice in the last ten years. This has that potential. And because of that, and because of the complexity of the area, six months isn't a lot of time to try and delve through something this complicated and find everything that is different in it from the present state of the law.

It is not that we suggest change is bad or the codification is a bad idea. It's probably a good idea, but to rush it through in the name of codification without taking into concern all the little nuances and all the changes in language that it entails, is not a good idea.

As presently configured, it is significantly different than what it was when we first found it, and we're not suggesting by any means that the drafters had evil intentions in the initial draft, but there were oversights, such as when we first found it. Confessions would not have

been admissible in criminal proceedings. It's a simple oversight and not something anyone was trying to pull a swifty on, but our concern is that when you're talking about something this complicated, you take your time and you go microscopically through it and see what it's doing.

It's been said in the criminal justice field there's truth and then there's the facts and then there's the evidence, and then there's the admissible evidence. And when you get about four layers down from the truth is what you give to a jury. That sometimes calls the system into question. Why is that? There are reasons for it. Reasons of fairness, reasons beyond just simply trying to get everyone's two cents in. Yet, at the same time, if we're to codify the rules of evidence, it ought to be to move us up that ladder, not to move us down the ladder. And in that regard, if we're going to change things, it ought to be with an eye toward searching for the truth or moving closer towards it.

Over the years, our association has worked with this committee and the legislature on various areas. Two that come to mind at somewhat opposite ends of the spectrum are the rape shield law, which has been in effect for some time now, but is a major, major change in juris prudence, to something as simple as was enacted within the last couple of years, changing spousal immunity and privilege such that a

spouse separated from the other up until recently was unable to testify. We had an estranged husband came in and broke in his separated-for-two-years wife's house and burglarized her. She could not testify against him. This was changed recently.

The bill as presently configured would alter both those things, both the thing of major scope, the rape shield law, and many minor things, such as the ability of a spouse to testify against his or her spouse in a criminal case.

Again, I'm not here to argue the good or the bad of it. But I am here to suggest that there are many changes in this that I believe, and our association believes, would benefit the citizenry if we made them, and that we should not in the name of rushing to codify, ignore those changes, be they big, be they small in this bill, and that time be taken to deal with them specifically. Thank you.

CHAIRMAN CALTAGIRONE: Thank you. Jim?

MR. LILLIS: Mr. Chairman, I want to thank you and your staff for inviting the Berks County Bar Association to attend and participate in these proceedings. I have no formal testimony to present on behalf of the Bar Association. I do join, and we do join specifically in the concerns that were just expressed about maybe the pace at which these rules are being adopted. We understand that a

considerable amount of work has gone into these rules and we also feel that possibly, we haven't had quite the opportunity to review the rules with as much detail as we would like, to be able to appear before you and specifically present problems, pro and con.

I'm speaking to you from the civil side more than the criminal side, as I'm here really on behalf of the Civil Rules Committee in Berks County. We noticed a couple of issues from a quick review of the rules that would seem to warrant some more research and discussion, which we really haven't had a chance to do. And I apologize for not being more prepared to present you with some research and background on these issues.

One of those issues, for example, is the rule which now would allow for post-injury remedial measures to be introduced into evidence in products liability cases. We're not so sure that that expresses the state of the law, of the common law of the rules of evidence in Pennsylvania, or not.

Another change or another inclusion in the rules that caught the attention of some of our more senior members of our committee in Berks County is what we would call the allowing any expert testimony to come in as long as it has some relevance to the case rule. In other words, opening the door for any expert testimony, whether or not that

expert testimony is truly helpful to deciding the case or not. Again, we haven't had a chance to really weigh the pros and cons, and our committee includes both plaintiff's attorneys and defense attorneys, I should point out. That's a rule that concerns us to some extent.

I do have one general concern to express to the committee, and which is a concern of not only the plaintiff's attorneys and defense attorneys on our committee, and that is, the -- and also, this is a concern of the bench, specifically present, Judge Schaeffer in Berks County. The concern is that the committee be certain that it has the full authority to adopt these rules in the first place, and that the committee is not treading on the toes of our Supreme Court. I'm sure that that has been considered and I'm sure that the Supreme Court has been involved to some extent in this process. We just wanted to inquire as to the extent that the Supreme Court is involved, and possibly, the professor, that he could join in and help allay our concerns that the Supreme Court of Pennsylvania will not have their turf violated here as these rules are put into effect. Because, after all, if the court is not satisfied with these rules and decides that their rule-making authority has been encroached upon, some of this labor, and obviously substantial labor, could go by the wayside. Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Thank you, Jim.

MR. ZUCKERMAN: Mr. Chairman, members of the committee, I would like to express my thanks for the invitation to appear today. My name is David Zuckerman. I'm from the Defenders Association of Philadelphia. We're the Public Defender Office in Philadelphia County.

Let me start off by saying that the Defender Association is in favor of the codification of the law of evidence in this Commonwealth. We do so, however, with some reservation and I come today with some advice for this committee.

Experience has shown us that the federal rules have seemed to work pretty well. Why they do so, a lot of commentators have made their livings debating this. There are a lot of articles written, areas that need revision, there's a lot of articles talk about the benefits of codification over common law. Our feeling is that if it is to work here, at least initially, that our primary focus should be on the codification of Pennsylvania law as it exists today.

There was some debate yesterday over this dichotomy between compilation versus codification. We lean towards the compilation side. That's not to say that there aren't areas of the law that need to be looked at, the law of evidence, that are ripe for revision from the current

status of the common law. Once we start down that road, however, it's going to be problematic.

There are a lot of groups that have various interests, whether it be Trial Lawyers Association, defenders groups, criminal lawyers, prosecutors, there are a lot of interests represented there. When we start getting into a debate of strictly policy and direction for the Code, we're going to get into problems. I would strongly advocate that as a starting point when we're trying to resolve the particular provisions of the Code, that we look to existing law. And if it's squarely found within our existing law of evidence, then it probably belongs in the Code.

Now, I say that, acknowledging that there are some differences in our Code as drafted, and the current status of the common law here. Most of those are fairly well thought out. And most of those changes come without a whole lot of debate. There are some exceptions, and I'll get into that in the balance of my remarks.

Let me refer briefly to a remark made by, I believe, Judge Ludgate yesterday. She rather eloquently described the Code as a living and breathing document that will adapt readily to the needs of the citizenry. I question the accuracy of that comment. One of the big problems you have with codification is that there is a tendency to freeze the law as it existed when it was

codified. I refer to that in my written remarks as the fossilization of the law of evidence. I think I'm accurate there. When we look at the federal rules of evidence, they were codified in 1975. They have changed very little. When you look at the law of evidence now, it reflects the law of evidence as it was some 18 years ago in the federal jurisdiction.

Now, they do have mechanisms for change, but change in Congress has come very slowly. And Chris Ohlbaum can correct me, but I believe only six substantive amendments have been made in the federal jurisdiction in 18 years. There have been a number of technical amendments.

If we are to really have a living and breathing document, then the enactment of a code here is not going to mean anything in and of itself. It's rather going to be a beginning. I would compare the adoption of a code to the adoption of a child. Soon the euphoria is going to wear off and you're going to realize that it's a thing that needs constant attention.

Unlike the codification of criminal statutes, for example, thou shalt not steal, or don't break into somebody's house, evidentiary rules don't necessarily lend themselves to codification. There are a lot of subtleties and as Mr. Eakin pointed out, nuances in the law of evidence. Even his esteemed authority, Professor Widmore

was wary of this type of codification, kind of an open-ended judicial discretion type codification, and was in favor, if we were to go down that codification road, was in favor of a much more detailed codification. I don't have a position on that one way or the other. I just point out that this will not be the end in and of itself.

Now, what to make of all this. I have a suggestion, which is the brunt of my remarks, the bulk of my remarks today, is that in order to keep this a living document, to quote the judge yesterday, it's going to be necessary to do more. Now, I don't know procedurally how this committee would want to accomplish that. My recommendation would be to establish like an advisory committee of experts, of judges, of lawyers, of academics, citizens, and empower them or charge them with the duty of keeping track of this. If the federal jurisdiction has that, I'm not sure, perhaps Professor Ohlbaum can enlighten us on that, but I know there are standing committees that are charged with that duty, and it becomes a repository for complaints, suggestions, where they can look at the progress of the legislation and then make recommendations as needed. I think that's essential here.

I personally, there was some reservations yesterday about keeping close to Pennsylvania law, not because Pennsylvania law is pretty good in most areas, but

because we didn't want to step on the Supreme Court's toes. I don't think the Supreme Court is going to be real upset about the legislature taking over evidence. It's pretty much of a headeache to them. A lot of appeals are generated, every case requires review of the history and look at the other case law, and when you talk about a codification, it becomes a much simpler matter for them. They can look at the plain meaning of the language, treat it as they would treat any other statute, they interpret the plain meaning of the language and that's the end of the matter unless there's some ambiguities, in which case you would go to the next step, legislative intent, for example. But I personally don't feel that the Supreme Court is going to be very upset.

The other side of that is this body has to be willing to take on the work. Common law was many years in developing and there are thousands of cases out there that contributed to the development of common law of evidence.

In any event, that concludes my general remarks. I would like briefly to touch on some specifics. What I've endeavored to do is go through the code and, again, this has been a long process, but at this point, there are still some provisions in the code which do not accurately reflect the current common law.

One example is section 6224(c) on page 11, also

404(c) involves the admissibility of specific acts, of specific acts of character, to prove character. Let me give you an example. In Pennsylvania today, the law is quite clear on this, that in a self defense case -- or in an assault case where the defense is one of self defense, if the complainant, the victim in the case, comes before the court with dirty hands, and I use that loosely, for example, say, three convictions for aggravated assault. Well, the law in Pennsylvania is that's admissible. Those specific instances of conduct is admissible to show propensity or bad character. And again, the law has been very clear on that for some time. There's a radical change envisioned by this code. They would limit evidence of bad character to a general opinion or reputation type evidence and would not admit such specific instances of conduct, even though it clearly would be relevant. I mean, it is just common sense that if you're charged with aggravated assault and you claim the other fellow is the aggressor and he's got three prior aggravated assaults, common sense would tell you, boy, that should be admissible. Under the Code it would not be.

Another example is found in the hearsay section, 6273 at page 73, subsection 6, involves admissibility of medical diagnosis. Again, the case law is clear in Pennsylvania that medical diagnosis in the form of expert opinion is not an exception to the hearsay rule. It's been

addressed a number of times in a number of cases and the law is consistent on that. The code would radically change that.

There are other minor examples. What I intend to do is summarize them and submit them to the drafters and this committee. I wanted to give a couple of examples of how we haven't quite fine-tuned the existing draft to fit existing law.

Let me conclude my remarks there and be happy to answer any questions that you may have.

CHAIRMAN CALTAGIRONE: Professor? You're anxiously awaiting some rebuttals. Did you want start off with your response to the District Attorneys Association? Do you want to walk through the concerns that they've raised on page 3 on Senate Bill 176?

PROFESSOR OHLBAUM: Page 3 of Mr. Eakin's prepared remarks?

CHAIRMAN CALTAGIRONE: Mr. Eakin's testimony. I think there are some specifics there on the items that have raised some concerns for them. I didn't know if you would want to take a look at that like we did yesterday and go through section by section so that we could get it on the record as to the concerns and how you would address those concerns in the legislation.

PROFESSOR OHLBAUM: I would be happy to do

that. Would you prefer that Mr. Eakin read each passage and tell us what he had in mind and then I can respond, if you would prefer?

CHAIRMAN CALTAGIRONE: Yes.

PROFESSOR OHLBAUM: Since I haven't seen this document before.

CHAIRMAN CALTAGIRONE: If you don't mind doing that, because I would like to get it on record and see what the response is. If there's nebulous areas that we have to take more time with, then I would like to put it on now so that members can share that and we could do any additional research into that area.

MR. EAKIN: I would be pleased to do that. With this footnote, our association has had the benefit of the meeting with Senator Lewis and Professor Ohlbaum as well as another attorney on the civil end of things. And some of these matters are things that we have discussed or exchanged correspondence on and the like.

I don't mean to say that the concerns I've listed here are comprehensive. The one problem is that having had various meetings, we're not the only persons giving input to Professor Ohlbaum or Senator Lewis or the committee, and such changes that have been made, we know what was done about the concerns we expressed, we don't know what else was done because of the concerns expressed for

others. And there are only, honestly, there are only so many times you can read through that thing and keep your sanity, and after awhile, it tends to blur into one big pile of mush and you don't know what's changed and what's not. With that footnote, I would be pleased to do that.

The first one we had is a concern of drafting where you have both a section number and a rule number for the same language. Now, I understand that was at the suggestion of the legislature or the legal research bureau at some point, but when I see that section 6201 is the same as rule 100, and you go to 6211, well, it's rule 201, there's no correlation between those two numbers. I don't know why we need two. I'm not sure we have any great reason to prefer one over the other, other than reference to the federal rules, if that's what we'll do, but we would ask to pick one.

CHAIRMAN CALTAGIRONE: Could you answer that, Professor?

PROFESSOR OHLBAUM: Yeah. I think the concern of many was that it was more cumbersome to begin citing to a statute rather than a rule number. It's much easier to do so in federal court, and many of these rules conform to the federal rules. And the consistency and the uniformity that Mr. Haines addressed yesterday, I think is served by having a rule number. For instance, 403 here is 403 there. 613

here is 613 there. Everybody getting out of law school today and people who have gotten out of law school within the past ten years, if they are familiar with rule numbers, they're familiar with the federal rule numbers. That was the reason.

MR. EAKIN: I don't care what number you put on it but as long as you've got two numbers, we're going to be talking about two different things, and one person's book has rule numbers and the other's has statute numbers. They're not going to be able to communicate with each other effectively.

PROFESSOR OHLBAUM: Mr. Chairman, originally when this was drafted, it was drafted without a statutory number. It didn't have the -- it wasn't within the 600 series per se, as noted. We simply had rule numbers, and we were told by Legislative Reference that in order for this bill to succeed, it would have to conform to, Mr. Suter's nodding his head and I guess I got that message right, so it needed to have a 600 series.

It just seemed that when the trial lawyers are going to use this code in the courtrooms, assuming they use it, I think it's going to be easier for them to cite to the numbers. Nobody is going to care much after this bill is passed, what the 600 series is, and I think Mr. Eakin's concerns along those lines are going to be allayed. There's

not going to be a confusion between 6226 and 203 because people are going to be citing to 203.

MR. EAKIN: We don't know where to look it up in the book. I don't know how far into the statute to go for 203, 226. That's --

PROFESSOR OHLBAUM: I can give you a crib sheet.

MR. EAKIN: My problem is I probably won't carry it into the courtroom when I need it.

As I say, I don't think we're in disagreement to any substantive degree. It's just I grabbed the question.

REPRESENTATIVE MANDERINO: Mr. Chairman, may I ask a question on that point?

CHAIRMAN CALTAGIRONE: Certainly.

REPRESENTATIVE MANDERINO: Professor, to the extent that we have rules in here that are not those, it's probably in front of my face, I just didn't look at it, that are not verbatim the federal rules, what have we done in terms of how we identify those?

PROFESSOR OHLBAUM: We've kept the numbers virtually the same. I say virtually because there are some differences. In effect, where one federal rule we felt was somewhat unclear or addressed two concerns, we may have chopped that rule in two and therefore, what is 801 in the federal rules may simply by example be 802 here. But I

would say that more than 75 percent of the rule numbers here conform to the parallel rule in the federal courts.

REPRESENTATIVE MANDERINO: Thank you.

MR. EAKIN: If I might follow up, one of our concerns with the whole thing is that these are not verbatim, to use Representative Manderino's words, enactments of the federal rules in many phases, changes in the federal rules. Some of them purport to be Pennsylvania law. Some of them we disagree that it's Pennsylvania law, and some of them don't purport to be either, but to reflect the trend of the law and such. So even if there's a parallel between one or the other, that doesn't mean there is a verbatim enactment of it, and that's one of the concerns we have.

Again, I hope we're not here to, I don't want to get into a debate with the professor because I'm going to lose, because my remarks are based on people smarter than I am from our association going through them and trying to find the concerns.

With that in mind, the second thing that I list is section 202(d) or rule 101(d), which defines the scope of the rules. In other words, the rules are to be applicable in everything except what is listed. And we have two concerns. There are some proceedings that ought to be listed there to which the rules do not apply. For example,

extradition hearings. Hearsay has always been admissible and should be admissible for reasons that are beyond us here. If extradition was not listed in (d)(1), then hearsay would no longer be admissible there.

We suggest there are other proceedings in the criminal system that ought to be excluded from the scope of the rules, such as some summary traffic proceedings. Or rule 1100, due diligence motions. If a due diligence motion comes up and we are bound to prove the due diligence that the officers have used finding the missing defendant for the last three years, I hope we don't have to call every postmaster that they contacted, every neighbor that they contacted, every person to whom they spoke for three years in order to establish that, in fact, they did make good efforts to do it.

Just an example that we believe there are other proceedings that ought to be -- I was hoping for -- one thing we've been thinking is coming into play in 1994 is an entire rewrite of the way our post-trial conviction and post-trial matters are handled in Pennsylvania.

And again, not having any hands-on experience in how that's going to work in 67 different counties, it may be that we don't want strict rules of hearsay to be utilized if we're talking about some of these things, or a lawyer-client privilege, if immediately before the trial court, we're

talking about what the trial counsel did and why. There may be things in that practice that ought to be excluded as well.

The other problem we have with that section is the fact that it's taken somewhat from the federal rules, the prefatory language is there, the federal rules then list areas for which there are existing federal statutes. And in our state, the listed proceedings have no enacted statutes. So the prefatory language really comes from a federal system that's different from our system, and it really is more the subject of the prefatory language of subsection (e), this chapter does not apply to these proceedings. Not that it applies in part to these proceedings. There is no statute dealing with the law of evidence in the preliminary hearings. Therefore, the chapter ought to be applicable or not applicable, and again, we think it's different from the federal system. So taking the prefatory language from the federal system doesn't make as much sense to us as taking these and saying the law should not apply in those areas.

That, in a nutshell, is our concern about that section. I pass to the professor.

PROFESSOR OHLBAUM: I think Mr. Eakin is right with respect to subsection (d)(1) through (5), and that is, where the rules are applicable in part. In fact, during the meeting with Mr. Suter and Mr. Andring and another meeting

with Senator Lewis, I think all of us agreed that the District Attorneys Association's point was well taken, and that, in fact, extradition or rendition hearings, which is subsection 1, bail hearings, which is subsection 3, and sentencing hearings, which is subsection 5, are all hearings where the law of evidence does not apply in full force and effect. Therefore, an amendment which has been prepared and will be submitted to this committee moves those three hearings to the area of subsection (e), where the chapter is inapplicable. But of course, the law of evidence does apply according to common and decisional law to preliminary hearings and to probation and parole revocation hearings. Now, it may not apply the same way that it applies at trial, and we know that there are some differences, yet, that is exactly what subsection (d) says. That, in fact, the rules of evidence do apply unless modified by Pennsylvania decisional law.

In other words, to cut to the chase, what this section will do is it will preserve the status quo. It says that the law of evidence as it now applies in preliminary hearings and probation and parole revocation hearings will continue to apply in those two hearings. Because the law of evidence does not apply with some very limited exceptions in the other three hearings, that is, extradition, bail, and sentencing, we will again maintain the status quo there.

So it seems to me that we are in agreement with the District Attorneys Association with respect to subsection (d). The difference between subsection (d) and subsection (e) is that the law of evidence does not apply in preliminary hearings, and in probation and parole revocation hearings. That's why there is a (d) that says the rules apply in part. Because there are hearings today where the law of evidence does not apply, like administrative hearings, like grand jury, et cetera, with perhaps a limited exception as noted by Pennsylvania law, we now have subsection (e), which says this chapter is inapplicable.

With respect to the other concerns that have been raised, if there is legislation in draft form now with respect to PCRA hearings, it seems to me that the draft persons and the committees that eventually are going to approve or disapprove that legislation, will have to bite the bullet for themselves and decide whether they want a code of evidence to apply to those proceedings, or not. And of course, the legislature and this committee has the power to determine what will apply or what won't apply in PCRA hearings. There's no reason to attempt to be clairvoyant now before the legislation has been enacted or at least it's before you.

MR. EAKIN: It's done. It's in effect. It came in January 1. It's done.

PROFESSOR OHLBAUM: What does it say about the law of evidence?

MR. EAKIN: I don't think it says anything. The point being I don't know what it says.

PROFESSOR OHLBAUM: The law of evidence applies today with respect to PCRA hearings. It also applies today with respect to 1100 hearings, and the example that Mr. Eakin raised with respect to whether an officer would be obligated, whether the Commonwealth would be obligated to bring everybody to whom the officer spoke, of course, is not the reality. The reality is that on a question of due diligence, the issue is not what the people out there have said. It's what the officer has heard from them. The issue is whether the officer has been duly diligent means that the officer has the opportunity to testify to whom he spoke. And whether or not 11 other people out in the community need to come in or not is rarely an issue before the Courts of Common Pleas.

But with respect to 1100 hearings and PCRA hearings and all of those other hearings today, the law of evidence applies. To the extent that a judge decides to be flexible with those rules, or to the extent that lawyers stipulate so that witnesses do not have to come in, and we can get above or around the law of evidence, is not to say that the evidentiary rules that exist today do not apply.

They do. There is no case that says that the law of evidence does not apply to these hearings. It's just that some decisions have been more flexible. This bill, this code, permits that type of flexibility. So I don't think there is any disagreement whether we come down to it. At least I don't hear any.

CHAIRMAN CALTAGIRONE: Mike?

MR. EAKIN: Again, if Pennsylvania decisional law is based on something other than this statute, now the statute becomes enacted, I question the validity of that decisional law, and I'm not sure that you can preserve it just by saying the statute, well, things that dealt with the law previously are still okay.

PROFESSOR OHLBAUM: I don't know why not.

MR. EAKIN: Well, because in the real world in the courtroom when the judge is faced with an objection and pulls this out, and it says this doesn't apply to this proceeding, or this does apply to this proceeding, that's what the judge is going to rule on.

PROFESSOR OHLBAUM: What the judge is going to rule on with respect to preliminary hearings, for instance, is that the law, that this code says that the law of evidence applies to preliminary hearings. However, it's been modified by case law. And then a member of the District Attorneys Office is going to say as, he now says,

judge, with respect to case law, we have the case of Commonwealth vs. Rick that says hearsay comes in, and a member of the Defenders Association is going to get up as she does today and say, Your Honor, this is not applicable in this case. It is not going to change the way business is done in the courts. It won't. Not with respect to these types of hearings.

MR. EAKIN: When you're asking a district justice to determine the meaning of case law, you've got a problem.

PROFESSOR OHLBAUM: But the district justice has the same problem today that he or she is going to have when this code passes. And I think that's my point. The law of evidence applies to district justices today, to the extent that the district justice chooses not to enforce or apply the law. The district justice may choose not to apply the code. We have not changed the status quo, and the reason why the language here perhaps is maybe a tad too cumbersome is because I think we've been very careful so that the law of evidence will not change with respect to any of the hearings that you have mentioned.

MR. EAKIN: Again, that's a noble intention. But we're talking about in the heat of the battle, waving around and pointing at language. And we're just not comfortable that giving the -- I don't mean to disparage the

defense bar, that's certainly not my intent -- but giving the defense attorney something else to point to that says things have changed, district justices are going to buy that.

Why change it if you're not changing anything? Of course, you have a purpose in changing law and enacting it, says the defense attorney, and we're there saying, no, no, no one meant that. Well, then, why did they do it? That's the argument that we're going to face in the courtroom and certainly before the district justices, and if you want that to be the law, then it ought to say that. That's our point. And lifting the language from the federal rules where there are specific statutes and things dealing with these things isn't the way to do it, in our judgment.

CHAIRMAN CALTAGIRONE: By the way, I want to open this up to any of the members, especially those that have legal backgrounds that practice in this area, if you want to jump in at any time please feel free to, or any of the non-legal members. And you've been a police officer. You've been an experienced officer.

REPRESENTATIVE JAMES: My concern is that I think I heard the person from the district attorneys saying what the district justice is going to say and the professor saying what he thinks the district justice is going to say, but we don't have anybody here from the district justices.

MR. EAKIN: With all respect, we have eight of them in our county. You'll get eight answers depending on how much of a Supreme Court justice they believe they are. I'm serious. Some of them I would have to write them a letter and notarize it to get them to throw a case out, and the next one I would have to go and get on bended knee to get them to bind the case over, and there's everything in between. They all have their own rules.

One of the complaints we have had over the years is about one of the better defense attorneys in the central Pennsylvania area who deals with traffic and drunk driving cases, also an instructor for the district justices statewide. And he goes in there as the teacher arguing the case. We lose a lot of those arguments. And it's simply going to happen. And I can see him sharpening his sword to argue the changes in the law that this is going to entail before the district justices, because he's the one that's going to teach them on these. Not me, they don't want to listen to me.

CHAIRMAN CALTAGIRONE: Counsel Suter?

MR. SUTER: Maybe we're not clear that the decisional law that's in effect prior to enactment of the code is still intact. Because it says decisional law, but that could be decisional law that results after enactment of the code, right?

PROFESSOR OHLBAUM: We can make that clear.

MR. SUTER: And that might help address your concern that the case law that was developing prior to the enactment of the code was still intact in terms of the code. Because it says decisional law but it doesn't say decisional law that has developed in the past prior to enactment of the code.

MR. EAKIN: I'm not sure what that would change in decisional law after the code interprets it, we're still bound by it.

MR. SUTER: I agree, but I think that there will be new -- I think it might be confusing in the sense that if the legislature promulgates this, it's still constitutional, the new decisional law may result, and the scope of the code then may change the way evidence can be admitted.

PROFESSOR OHLBAUM: Absolutely, um-hum. As it now does. I think that to use the metaphor, the heat of battle will continue. We've just changed the battleground. Instead of people waving cases left and right as Mr. Haines alluded to yesterday, we're all on the same page, and the question as to what it means is still going to be a matter for judicial interpretation.

MR. EAKIN: Can I still, if I might refer again to the question asked here about district justices, and the case of Branch and Rick? Branch and Rick are the two cases

that allow hearsay in certain circumstances at a district justice proceeding, at a preliminary hearing. I've got one district justice who says the case says if the witness is available for trial and the officer can so represent, he may hearsay in what that witness has to say. There's also case law that says that can't be the only evidence presented at a hearing. In other words, they can't take the victim of a child abuse, recite what the victim said and that's it and bind the case over.

I have one district justice who requires the officer pretty much to lay no foundation. They can hearsay in, the typical case is a drunk driver, blood test results from the state laboratory, a .20, some of my district justices require nothing but "here's the lab report." Some of them require, "I have talked to the chemist and the chemist is available for trial in the future," as if a State Police chemist somehow cannot be available to us under subpoena. They must say those magic words.

I have one district justice who will not accept an officer, the chief, calling the lab and saying, are your people going to be available for every case we have in the September term of court and the lab saying yes. They must call specifically on every case and speak to the chemist and say, are you going to be around September in this case. Are you going to be around in September in that case? Let me

talk to the other chemist, are they going to be around in September? If the officer can't say that, the case gets kicked out.

Now, to say that decisional law is going to solve this by referring to Branch and Rick, it isn't. If we're going to codify the rules of evidence, let's take Branch and Rick, the existing Pennsylvania law, and stick it in here. Hearsay is admissible at these cases. Or, the code, eliminating hearsay, does not apply. But if the codification is supposed to be the federal law as modified to accept Pennsylvania law, where is Branch and Rick in the Code? Let's put it in there if we're going to do that. Saying that Pennsylvania decisional law makes these apply in part and not in part doesn't solve that. Why wave cases around? Why argue? This is Branch and Rick, it doesn't apply over here. Put it in there. If that's what the case says, boom.

PROFESSOR OHLBAUM: I think that the members might want to consider the concerns raised by Mr. Zuckerman and others, and that is, once you make the code too specific in too many areas, then you have rigidly imposed a perspective that may not be shared by a variety of other people. I dare say that there are cases that have further modified Rick and Branch. This, to be a living document, needs to stay, to the extent that it can, generic principles

that can eventually be interpreted. Once you take one case or two cases as Mr. Eakin just did, and make Rick and Branch the law, he comes back and says, well, what about Murphy? And I come in and say, how about Dillen? And somebody else adds another case and before you know it, you do not have a code. What you have is a 25-volume treatise.

And all those members who were here yesterday will remember Judge Ludgate's very poignant testimony that what she is left with today when she has a difficult evidentiary question is to go back and consult her library. And this gets us away from that. That's what I think a further, more specific codification is going to do. That's the danger.

MR. LILLIS: I would like to point out that Judge Ludgate's library is paid for by the Berks County Bar Association, if I may.

If I may follow up on maybe a less exciting issue about the inclusive necessary problem, if there is a problem, subsection (b) of 6202 or, depending upon your preference, rule 101, says that this chapter shall imply generally civil and criminal proceedings. I have a particular emphasis in my practice on real estate assessment appeals so this particular paragraph caught my attention.

The Pennsylvania Supreme Court has determined in case law that real estate assessment appeals are not civil

cases. They're statutory appeals. And I can think of other examples of statutory appeals, one would be zoning appeals and I'm sure there are other appeals that are founded in statutory language, whereby an appellant is given express authority in a statute to appeal a decision from an administrative agency such as a zoning board or the board of assessment.

As this reads to me, anyway, it's not clear whether or not, and I'll use the assessment appeal example, whether or not a real estate assessment appeal would be considered as being governed by these rules.

I bring that out only because I just anticipate having to argue that issue one way or another, and probably depending on which side of the issue I'm on at that particular time, with a judge and spinning a lot of wheels in real estate cases, and I also do some zoning work, zoning cases. I can also see this issue arising in environmental cases, perhaps, appeals from the Environmental Hearing Board decisions to the Commonwealth Court, and I'm sure there are several others.

Are statutory appeals included in these rules? And perhaps I could direct that to the professor, or perhaps suggest that maybe there be some additional language to make that clear.

PROFESSOR OHLBAUM: The spirit of this is that

we would continue with the status quo. Certain hearings before the Commonwealth Court today respect the law of evidence and it applies today and would continue to apply, to the extent that it does not today, by virtue of statute, then I think the code preserves that as well.

What happens today with respect to real estate zoning appeals in assessments? Does the law of evidence apply? The zoning appeal is probably not a real good example because typically the record is already established by the time you get to the Court of Common Pleas and the court passes in review of legal issues. So it's not an evidentiary issue and evidence is not taken.

MR. LILLIS: But the court does have authority to take additional evidence.

REPRESENTATIVE REBER: Can I interrupt for a second? Because I think it's important. Section, I don't have it in front of me, the Municipalities Planning Code specifically states strict rules of evidence do not apply in zoning hearing cases. So you really have an ambiguity situation going up on appeal with that record, which is the only record and is the record, and is replete with hearsay, with evidence that really should not be in the record, and that's another day, another dollar. But in direct response, if you will, to the dialogue that's going on, I was reserving bringing that up till another time but now is as

good as any to look at that particular aspect.

MR. LILLIS: That's a good point. And for everyone's benefit, that section applies to evidence presented to the board.

REPRESENTATIVE REBER: That's correct.

MR. LILLIS: The zoning hearing board but that's the evidence that the court has to deal with on review.

As to real estate assessment appeals, the courts that I've practiced before follow the rules of evidence and -- not the rules of evidence, the common law evidence, as in any other civil case.

My concern is that with this rule, as it's written there, it's subsection (b), that that might become an issue from this point forward. And as to other statutory applies such as zoning hearings, it might also become an issue to some extent. I just wanted to express that concern, to try to minimize the preliminary arguments that would go on at the Court of Common Pleas as to whether or not an appraisal report can be admitted at a certain point or whether it can't be added midway, and whose rules you apply. Thank you.

CHAIRMAN CALTAGIRONE: Excellent point.

Dave, did you have any points? No?

Counsel Suter?

MR. SUTER: Mike, are your concerns the same as

the Attorney General's Office? Or are there just a lot of overlap? Or maybe Syndi, are you Syndi?

MS. GUIDO: Yes.

MR. SUTER: Are the concerns the same that have just --

MS. GUIDO: For the most part. There is a great deal of overlap between them.

MR. SUTER: But you're going to have your own separate concerns for us to look at?

MS. GUIDO: The Attorney General does, because of the fact that the Attorney General has both criminal and civil divisions. And so there's a lot of the concerns which relate to the civil division which may in some way conflict and so we have to resolve it internally over which way we want it to go.

MR. SUTER: Thanks.

MR. EAKIN: We've had the input of Syndi in the Attorney General's Office on our committee. Our concerns do overlap. I wouldn't say they're identical. There have been some changes that occurred at the request of the Attorney General, to satisfy the Attorney General and perhaps did not satisfy the District Attorneys Association, at least in full. So they're very similar but I would hesitate to say if Attorney General Preate accepts it so the DAs will accept it therefore, without taking a look at it ourselves.

CHAIRMAN CALTAGIRONE: Item 3?

MR. EAKIN: Item 3? Dealt with some commentary that existed in the draft that we have that we received, and we are just uncomfortable with commentary attached to the statutory law. I guess our question is why is it in there and perhaps better left out. If it's legislative intent, like any other law, that's fine. But to enact it as part of the statute, we didn't feel was --

CHAIRMAN CALTAGIRONE: That's an excellent question. Professor, is there a reason why that was done?

PROFESSOR OHLBAUM: It was done, I think as I mentioned yesterday, because to, it attempts to flush out some of what has arisen to as ambiguity and that which required clarification. Rather than place this rather cumbersome language in this explanatory paragraph in the code provision itself, the thinking was that it better served as commentary. There are a variety of the 38 states that have passed evidentiary codes, some of which reflect the federal rules, there is a commentary that has been published along with the code promulgated by the legislature. And this merely follows suit in an attempt to clarify it.

CHAIRMAN CALTAGIRONE: In the exchange that took place yesterday with the comments that were in the back part of the bill as was pointed out, are you suggesting then that

be made part of the free-standing part of the bill itself, as opposed to legislative intent or comments in other sections specifically? In trying to spell out what the intent was?

PROFESSOR OHLBAUM: I think, yes, I think it makes sense to keep the commentary where it is, because it follows directly that part of the Code which it's explaining or it's describing.

What we could have, but obviously would take a lot longer to do and raise a lot more issues and debate is, we could have a commentary for every particular section, as some states have done. Those states that have done that have the comments generally following each of the individual sections.

The thinking was that there were only several sections here that required commentary, at least at this point, and it seemed most parties were satisfied having the commentary immediately following the particular provision. In fact, when the Code was first drafted, there was language that said that the official commentary was not part of the Code and should not be considered as evidence of legislative intent.

My memory has been undergoing changes, but if I'm right, I believe it was an associate of Mr. Eakin who said, well, if that's the case, then why have it in here at

all? Aren't you really suggesting that this is part of the legislative intent? My response was, you're absolutely right, it really is, it clarifies it, ergo, that provision was deleted and we placed the comment right next to that particular section of the code.

We could, if the committee wanted to, the committee could choose to move this, the commentaries, the several that exist, to the back of the bill and you could put in language at the same time that it should not be construed as either legislative intent but helpful commentary and analysis. It would really be up to the committee how they want to handle that. My suggestion is we keep it as is.

CHAIRMAN CALTAGIRONE: Counsel Andring?

MR. ANDRING: Question. You referred, I think, to 38 states that have adopted a code of evidence.

PROFESSOR OHLBAUM: I think that's the number.

MR. HEUPL: Do you have a breakdown on how many of those were done through statutory enactments and how many were done through the adoption of court rules?

REPRESENTATIVE MASLAND: Judge Ludgate said only nine were done by statute.

PROFESSOR OHLBAUM: Right.

MR. ANDRING: The rest --

PROFESSOR OHLBAUM: That's my recollection.

MR. ANDRING: The rest, 29 or 30, were done by court order.

PROFESSOR OHLBAUM: Right, yeah.

REPRESENTATIVE MASLAND: And as I recall, Representative Hennessey speaking about official comments, it was his suggestion that we put that official comment in the code itself. So there's obviously a little bit of tension involved with this issue.

PROFESSOR OHLBAUM: Right. It becomes a much more cumbersome document when the commentary would be placed within the particular subsection.

REPRESENTATIVE REBER: We've done that in Pennsylvania with the Eminent Domain Code, haven't we?

PROFESSOR OHLBAUM: Where the commentary is within the section itself?

REPRESENTATIVE REBER: Following each section.

PROFESSOR OHLBAUM: I don't recall.

MR. LILLIS: I believe you're correct.

CHAIRMAN CALTAGIRONE: Can we move on to item 4?

MR. EAKIN: Item 4 is section 205(d), rule 104(d), dealing with testimony by an accused. I assume that accused means criminal defendant rather than defendant in a civil case. Be that as it may, the rule would limit the cross-examination of a criminal defendant testifying outside

the hearing of a jury on a preliminary matter as defined in subsection (a), which I believe deals with whether certain evidence is admissible at all.

Our belief is that existing decisional law gives the court some discretion to allow cross-examination of the witness beyond the issues preliminarily testified to on direct in that circumstance. And that this would therefore limit that cross-examination again, in contravention of existing Pennsylvania law. I believe there's some dispute as to whether or not that is the state of the law in Pennsylvania. But again, we believe it's appropriate for the discretion of the court not to be reigned in by statutory language in these limited circumstances.

CHAIRMAN CALTAGIRONE: Professor?

PROFESSOR OHLBAUM: My view is that the summary provided here is an extremely generous reading of the Petrakovich case, that, in fact, the law today in Pennsylvania reflects the law in the federal jurisdiction, which is that if a defendant testifies out of camera with respect to a limited issue, for instance, was the confession voluntary? Did he talk to his lawyer? Is there a doctor-patient privilege? Did he confess to his priest? That the cross-examination is limited to that area, just the area that he has chosen to testify about on this preliminary matter?

We're not talking about restricting his cross-examination at trial. We're talking about on these preliminary matters when he is obligated or chosen, depending upon what the issue is, where he's either obligated or chosen to discuss a preliminary matter, whether he should be subject to a broad cross-examination on everything else.

The committee may remember that under the rape shield law, a defendant must put consent in issue before the victim may be cross-examined with respect to prior sexual experiences. Perhaps the only way that that can be done is by the defendant testifying. Ordinarily, that hearing takes place out of camera and the cross-examination restriction applies at that point. The defendant may only be cross-examined on what he says, not on everything else in the case. And it seems to me that that is in keeping with where the law is today and it's a reflection of the federal law, and it's a good rule.

MR. EAKIN: Therein we differ.

CHAIRMAN CALTAGIRONE: That point that was made, though, is that this is completely taken out of context of the federal rules and applied in the code that we're dealing with, in the legislation. Is that the only instance? Or are there other instances? And the point that I think Mike was making is, was that selectively certain sections of the

federal code are being extracted out and put in here. Is that correct? Or is that incorrect?

PROFESSOR OHLBAUM: No, I think that is correct. I think I would cast it differently. I would say that the greater than 50, I haven't quantified it but I could for the committee's benefit, clearly greater than 50 percent of what is here before you is a verbatim enactment of the federal rules. There are changes, however, no question about it. Some which, most of which reflect those changes, the current state of Pennsylvania law, some of which reflect what we believe is a trend, or a better rule than what now exists, better because it seems to be more in keeping with what's going on in Pennsylvania. Better because we've learned from the federal example where there have been some problems, and we've done some tightening.

But most of what you see before you is the federal rules. This paragraph, for example, has been lifted and taken verbatim out of the federal rules with one slight modification that was suggested by Mr. Eakin, which we adopted. If I might direct your attention to subsection (d), and you follow along as I read, I'll let you know what the modified language was at the suggestion of Eakin, which I thought was an appropriate suggestion, it was adopted.

The accused does not, by testifying upon a preliminary matter, the phrase that follows, as defined in

subsection (a), was suggested by Mr. Eakin and he was right because it did require the clarification that was put in. And then the rest of that paragraph reads as does the federal rules.

So we clearly defined preliminary matter as it has been defined here, which again is a verbatim enactment of the federal rules.

I don't want to beat a dead horse, but let me close by saying that, again, most of what you see before you in the Pennsylvania Code of Evidence has been taken from the federal rules.

REPRESENTATIVE COHEN: Mr. Chairman?

CHAIRMAN CALTAGIRONE: Yes.

REPRESENTATIVE COHEN: Mr. Eakin states that the cumulative fact of these rules change is the selections when you use the federal law and when you use state law and when you use trend law. The cumulative effect to make it more difficult to prosecute a case in Pennsylvania. Could we have a response to that? Is that a true statement?

PROFESSOR OHLBAUM: I'm not a prosecutor. I don't want to glibly say it's a matter of opinion. I don't think that that's the case. I spent before, in my pre-incarnate days, I was a full-time criminal defense lawyer. I do lecturing and teaching today with prosecutorial agencies. I still have a limited criminal

practice.

As I've shopped this code throughout the state and have consulted with a variety of people, the consensus is among everyone but certain segments of the prosecutor's offices that it does not make prosecution any more difficult.

The United States Attorneys Office here and throughout the country would be surprised to hear that they have labored long and hard to -- their conviction rate is off the charts. Now, I'm not comparing the systems, but they haven't been any worse for wear adopting federal rules. In fact, I think that there have been some substantial changes in this code which benefit prosecutors as opposed to changes which hurt them.

It is not the code Mike Eakin would have written, it's not the code that Dave Zuckerman or Ellen Greenly would have written. So I think that, I think Cliff Haines expressed it yesterday when he said that any lawyer looking at this code, whether you're a plaintiff's lawyer, a civil defense lawyer, or a prosecutor, or a criminal defense lawyer, could take exception with each and every section.

REPRESENTATIVE COHEN: Mr. Eakin, do you agree there is provisions of this code that strengthen prosecutors?

MR. EAKIN: Yes. There are things that would

allow us to do things we don't do now. But those are things that are in large measure in the existing federal rules because of the language.

At the same time, the same rule that would allow us to do more would allow the defense to do more. As a whole, it will affect our ability to obtain convictions. It not only allows the defendant to introduce opinion evidence, specific acts that in the past a defendant did as a good citizen, it almost requires that, on pain of reversal.

One of the most troubling areas of this -- let me point out two. One is character opinion reputation evidence, the other is prior bad acts, prior crimes, things that the accused did in the past.

We have a difference of opinion as to what the state of the law and what the terminology means on that. But as to character and the like, there is existing decisional law right now that it is per se ineffective for a defense attorney to fail to call available character evidence. If it's available and they don't call it, that's a reversal and a new trial. I don't know when it's available. I can't ask of the defense, are you sure you don't have any available character evidence? Character evidence right now is not what the witness believes but what the witness has heard others say. I can't say that Syndi Guido is, in my opinion, is a reputable and honest and

nonviolent person. I have to say I've talked to others in the community and here's what they think about her.

If it's per se ineffective for me to call those people on her behalf, or for her attorney to call them, and we expand the code such that specific acts are good, I saw Syndi was nice to her dog in 1979. I saw her give candy to her children. She is a real good person. That's available in every case there is. Which means if defense counsel doesn't call it, it's per se ineffective. That's a Supreme Court case. And the attitude both appellate courts on the criminal side can't stress strongly enough the importance of character evidence. If we expand what constitutes character evidence. I've got a major problem and I'm looking at retrials on cases where there is none called. I'm going to have to, at the close of the defense case before they rest and say, I would like an in-camera hearing as to whether there's any of this existing. It's going to cause problem problems with it.

Prior bad acts, we suggested the language as written on prior crimes benefits one person, and that's the serial criminal, the person who repeats their conduct. Syndi Guido used to work in my office as an assistant before getting religion and going to the Attorney General's Office, but her last duties with my office was to prosecute a homicide that was at the time over ten years old, and a

large measure of the proof involved similarities between this individual's crimes both before and after the homicide, and the homicide, to the point where his rape victims before and after, and there were plenty, like sisters, you could put them up on a board and you would have trouble picking them apart. There were half a dozen to a dozen similarities in every crime. Not a signature crime, but very, very close, such that if this person always rapes, always goes to someone and looks for an alibi, the women have long brown hair parted in the middle, glasses, certain size, certain weight, that stuff isn't going to come in under these rules. And we wouldn't have that individual convicted of first degree murder right now if this was the code. Is this going to make us unable to prosecute? Yeah. As I say, if the rule is designed of moving up the ladder towards truth, let's have it.

REPRESENTATIVE COHEN: Mr. Zuckerman, would you like to respond to that?

MR. ZUCKERMAN: If I may, as to the one change I believe, the first change Mr. Eakin speaks of is the transition from proving character strictly by reputation, to permitting character to be proved by reputation and opinion evidence. That's a neutral provision. It's not directed for the defense or the prosecution or the plaintiff or the defense in a civil side. For example, the way it would

work, if a defendant seeks to put on evidence of his good character, now he can do so by presenting witnesses who are familiar with his reputation in the community, as being law abiding or peaceful, or whatever character trait may be in issue. He's limited now to reputation evidence. Under the rules, he would be able to prove that by reputation and opinion evidence.

Now, in rebuttal, if, in fact, the Commonwealth has evidence that this fellow is not of good character, can under the current rules cross-examine on specific acts of bad character, put on their own evidence of bad character, now they're limited to reputation evidence. Under the federal rules they'll be able to do it by reputation and opinion evidence. It's neutral. It doesn't necessarily favor one side or the other.

It's kind of a narrow area to be concerned with, anyway, because as a general rule, good character only comes in when you have an individual who has no prior record. So you're talking about an individual who is for the first time facing a criminal prosecution. In that situation, our law has favored that individual, that evidence has always been admissible here under the federal rules and virtually every other jurisdiction. If someone comes before the court accused and is of good character, he can introduce evidence of that, this doesn't change that. It only changes the way

it might be charged as neutral. It can be disproved with the same mechanism. I don't see how that provides one side or the other an advantage.

The question of proof of other crimes, like modus operandi, that issue, we discussed that at length yesterday. The standard that applies seemingly comports with the Pennsylvania decisional law. Proof of other crimes is per se prejudicial and the courts have been very circumvent about when it's admissible. There are a host of ways to get in proof of other crimes as long as you're trying to prove something, as long as you're not just using this evidence.

MR. EAKIN: The leading term is slime the defendant.

MR. ZUCKERMAN: Or slander, besmirch his character, as long as you have a reason to put it in, it comes in. And the added language makes that clear but it doesn't change Pennsylvania law.

There are omissions that we strongly urged the drafters, particularly over in the Senate, to remedy, which they declined to do, particularly at the behest of the opposition of the District Attorneys Association, and that's a question of burden of proof on other crimes. Currently, the statute as drafted, there is no burden specified as to when or how much proof you need of this other crime before

it's admissible.

For example, if a fellow is charged with robbery and he's arrested, the description is white male wearing a blue jacket and he's arrested and charged with robbery. Well, there may have been a week earlier a robbery committed by a white male with a blue jacket. Well, can that come in as proof of other crimes to show identity? How much do you have to prove? What's the burden of proof off this earlier crime before that's now admissible in your case? The code doesn't speak to that.

We urged that they adopt the standard there. And there was a lot of controversy over it and it ended up eliminating the standard. That's an example where the process has worked at least in one regard to accommodate everybody's interests. There was a compromise there in that the District Attorney Association had a lot of input into that and prevailed on that point. That's a point we're no longer pushing at this point.

I know that Mr. Eakin feels this process is going on too hastily. There was a tremendous amount of work done over in the Senate, particularly with Mr. Moyer with the committee there and was very open to all of the groups that had concerns and there was a lot of correspondence, and I know that the District Attorneys Association and all the groups that are coming before this body, were involved back

then and had their input, and a lot of the debate now, as it should be, is a renewed debate that's been hashed out.

The general tendency has been to, when there's controversy, to try to approximate Pennsylvania law, as best as possible, and I commend the drafters, everybody that's participated here in doing that, because for the most part they have. Where there are differences in the code, as opposed to the federal version, you're going to find that there's good, for the most part, uncontradicted support in the decisional law for those changes. Now, there are some exceptions. The whole entire area of expert testimony is devastating to the, from a criminal perspective, from the defense criminal perspective, it's a radical change. That was debated over in the Senate. The consensus particularly among the civil trial lawyers was it's a long time in coming. This is the new trend, most of the courts are adopting this bird's eye view towards expert testimony. As a policy stance most of the organizations that, criminal defense bar pretty much abandoned serious challenge to that. It seems to be the trend.

We acknowledge that. That's an exception, where the code as drafted does not comport with Pennsylvania law. I point this out because I want to say there's two sides to every story, and for every clause or provision that Mr. Eakin has problems with, the defense has problems with,

also. And that's why we've endeavored not to turn this into a battleground like you would see in a courtroom, but let's try to find some firm starting ground. It seems the logical thing to do is the starting ground should be what's Pennsylvania law right now, with a few exceptions.

REPRESENTATIVE COHEN: Thank you.

CHAIRMAN CALTAGIRONE: Representative Dermody?

REPRESENTATIVE DERMODY: I just have a brief question and Mr. Eakin, the state of evidence regarding character evidence, I'm just confused. Were you saying that right now in a criminal case that if a defendant can show that he had some person who was willing to come forward and say something good about him at trial, that if the defense attorney fails to call that witness, it's automatically ineffective assistance of counsel? You can get a reversal and new trial? It's been a while since I prosecuted some cases, but I never found that happening.

MR. EAKIN: Well, it's a scary world out there right now with the present state of the appellate attitude on character evidence. Not to say something good about someone but to say reputation evidence. I know --

REPRESENTATIVE DERMODY: Reputation.

MR. EAKIN: I want to make that decision, because the rule as written is not the Pennsylvania law, it's a federal rule, let's abandon Pennsylvania law in this

instance, and taking the federal rule as opposed to, let's take the federal rules and modify them to meet Pennsylvania law. This would allow anything good you can find to say about the guy to come in and be relevant, admissible in every case, and I see no reason to think the appellate courts are going to treat it differently because it's expanded than they do now, while it's restricted.

PROFESSOR OHLBAUM: May I jump in briefly on that?

MR. EAKIN: In a second, if I could just finish the thought. The present scope of Pennsylvania law limits the ability of the defense, they can't find someone just to come in and say, you were nice to your dog. They must find someone who knows you in the community, knows others who know you and has talked to them and heard what they say.

REPRESENTATIVE DERMODY: I understand most defendants in my experience can probably get somebody to come in and say those magic words, and if the defense attorneys decide not to call that person because he knows he's making something big up, I can't imagine the guy gets a new trial.

MR. EAKIN: He does, if post-conviction they can prove was available and not called. I retried a murder case simply because the judge did not give an instruction on character evidence when, in fact, by all counts, the

testimony was not even character evidence under the present state of the law. It was, he was the one to go get coffee, he was nice to his parents. The judge agreed to give the instruction and didn't. I had to retry a murder case with immigrants who didn't understand our system in the first place, and to try and convince them it's been overturned because their counsel didn't introduce or did not get an instruction on this, when it didn't even meet the present state of the law.

Yes, you're getting retrials because of it. If you make it the federal rule, I can't conceive of a defendant who couldn't find someone who saw him do something nice somewhere in his life. And if Pennsylvania appellate authority is that that means retrial if you don't call it, expanding the rule to the federal case and abandoning Pennsylvania law is not a good idea.

REPRESENTATIVE DERMODY: If that's the case, I agree.

PROFESSOR OHLBAUM: If that's the case I would agree, too. That's not the case. The hypothetical that you presented is exactly what part of the law says today. I think it's important not to mix apples and oranges, and those of us who are not as familiar with the code and have not taken the time to study it or to have considered some of its implications may be at a disadvantage, but there's a

difference between whether or not a judge is going to give an instruction in a case when character witnesses have testified, or whether or not we've adopted the federal rule, or whether or not what opinion testimony means. Those are three radically different areas.

The law is not today that you ought to get a new trial if you don't put on a character witness, because as you I think astutely recognized, there may be purposeful reasons that a defense lawyer has chosen not to call a character witness. And if a judge on review finds that there was a purposeful reason, then there is not an automatic new trial. The new trial comes when a defendant has no prior record, and a defense lawyer has absolutely nothing to say about why a character witness who was available was not produced. That's where we begin to review whether or not the defendant's lawyer was ineffective.

The second, I think misrepresented at the same time or misrepresentation was that neither under the federal rule today nor under this code, will a character witness be permitted to get up on the witness stand and talk about everything that's good about an individual. As Mr. Zuckerman mentioned before, the only change here is whether the character witness will be able to say, in my opinion, the defendant is a nonviolent person, as opposed to the current law in Pennsylvania, which is by reputation the

defendant is a nonviolent person. There is no opportunity for specific facts or detailed evidence to come in on that issue today under the code since it is an exact reflection of what the federal law is. In federal court today, character witnesses cannot get up on the witness stand and talk in specific detail about all the good acts that have been committed. So I think that at times, there's --

REPRESENTATIVE MASLAND: Can they just give their opinion without any foundation? Is that the way it works?

PROFESSOR OHLBAUM: Yes.

REPRESENTATIVE DERMODY: They say --

REPRESENTATIVE MASLAND: Just say, in my opinion he's a nice guy?

PROFESSOR OHLBAUM: That's right. The only foundation is, do you know David Zuckerman; answer, yes, I do. I may be asked how long I know him or in what capacity. That's the only foundation that I need to say in response to the question, do you have an opinion with respect to his reputation for being nonviolent? I say, yes, he's nonviolent.

Today, the way that the character rule works is is, do you know other people in the community who know David Zuckerman? I say, yes. I may be asked whether or not I've talked to these people frequently or irregularly. And then

the question is: Based on what you've heard, what's his reputation for being nonviolent? I say, he's nonviolent. The only difference is, am I now able to express a personal opinion, which most jurors hear you expressing when you say by reputation he's nonviolent, or am I limited only to reputation?

But the analysis I think is off the mark when you're informed that this will permit an open door to all of the good acts that anybody has ever done. That's not true.

The second, I think, clarification that's required is that under the code, Ms. Guido would have been as successful or unsuccessful in prosecuting that serial killer. This does not restrict in any way the prosecution of serial killers or the admissibility of other crimes evidenced to establish identification in serial criminal cases. It doesn't. It doesn't change it at all. It's a reflection of the federal rule and of present Pennsylvania case law.

The only thing that this, that particular provision does is it says, as Mr. Zuckerman represented to the committee, it says that if you're going to prove that he was a serial killer, prove he was a serial killer. Don't allow the other crimes evidence to come in simply because he had committed other crimes in the past. If you're establishing his identity, the similarity of crimes, if

you're establishing his intent, his motive, the door is still open, as it is in federal court.

So I close by saying that it's important I think to read the language carefully and not to think that because there is going to be a change, the change is going to be exaggerated as some might think it to be.

REPRESENTATIVE DERMODY: Thank you, Professor Ohlbaum.

CHAIRMAN CALTAGIRONE: Can we move on to the next item?

MR. EAKIN: I'm not sure how many paragraphs we just encompassed.

CHAIRMAN CALTAGIRONE: We've covered several of them.

MR. EAKIN: I suppose in the interest of time, I might move to the general area of the rape shield law that --

PROFESSOR OHLBAUM: May I ask? Perhaps this will save some time. The rape shield law in this particular bill is an exact codification of the statute 3104 that now exists. I think when you, in your introductory remarks, you mentioned that rape shield law had a lot of problems with it. That was perhaps an earlier version that you considered.

MR. EAKIN: I have so many versions of this that

that's entirely possible.

PROFESSOR OHLBAUM: This one is 3104. It's out of 18 Purdon's, it's the law that now exists today. In fact, it's the statute that Mr. Fasonic yesterday mentioned to the committee that he thought was unconstitutional in light of some of the new Supreme Court cases. But there was some concern that we were changing the rape shield law and notwithstanding, I think a number of efforts to suggest that it wasn't going to be changed, we merely recodified the present law.

MR. EAKIN: Again, if the present version is consistent with the present statute, then we obviously don't oppose it and don't know that it matters much which volume of Purdon's it is so long as it's there and is in effect.

REPRESENTATIVE REBER: Is that in the form of a stipulation?

MR. EAKIN: I have 6248 or 608 in my notes, which is, again, somewhat related to the area of character or conduct of a witness as opposed to character evidence of a defendant. Again, we have disagreements with Professor Ohlbaum as to the state of the law as it is. The probable guess we have here is, that again, the judge is going to be asked to rule on this during a trial and if the language isn't crystal clear, the judges, as they often do to avoid an appeal, the only way they're going to get appealed is if

there's a conviction and they've ruled against the defendant. If there's acquittal, they don't get appealed. If they rule for the defendant and there's a conviction they don't get appealed.

Therefore, there is a tendency, I'm sure Mr. Zuckerman won't see the same tendency, but a tendency in our judgment for judges to rule in favor of the defendant so as to avoid the appeal, and if there's any ambiguity, the easy way out is to rule against us and either leave the evidence the defense wants or exclude the evidence that we want.

Again, our suggestion is to utilize -- if you're going to use the federal rule, use the federal rule as written, not as modified.

If I can specifically address subsection (d) which is, the witness may be shown and examined about a document made, adopted or approved by the witness where the document itself comprises the witness's specific incidence of conducts as defined in (c).

Aside from what that is intending to do, I'm not sure in the heat of things that people are going to understand what that is intending to accomplish. And I can see the judge reading that and say that, well, it's approved by the witness, it's the police report, and therefore, it's admissible. He can be shown and examined about it regardless of -- again, I think it's more a matter that we

suggest if we're going to take the federal rules, take the federal rules and don't modify them.

CHAIRMAN CALTAGIRONE: Any comment on that?

PROFESSOR OHLBAUM: I would be happy to discuss what that provision means in the way it may be interpreted or the way it should be interpreted. I did that I think fairly extensively when I appeared before the committee, now seems like it was years ago but I know it wasn't, it was months ago.

This subsection (d) is not in the federal rule. When people have heard what it means, it is a trend in the law, most people have thought it was a wonderful idea. In fact, if memory serves me again, the meeting where we discussed this with the prosecutors, I thought that their concern was simply that it might not be clear to the judge, but that if it were clear to the judge, it would be a good provision.

I guess the question that the committee might want to ask itself is whether or not we want to continue to aim or whether we want to begin to aim at the lowest common denomination on the bench, and figure that no judge is ever going to pick this up or never have a law clerk look at it and figure out what it means, that in the heat of battle, people are going to be throwing words left and right as opposed to looking at it and saying, this is a good

provision, this makes a lot of sense, this is the way cases ought to be tried, we ought to keep it in here. And it was in that spirit that subsection (d) was drafted.

It does not appear in the federal rules. There are a number of commentators who have written about the federal rules and have suggested a subsection type (d) ought to be here. There are cases that reflect the spirit of subsection (d) and I think it makes some sense to break it down very briefly.

What you are permitted to do is cross-examine a witness about a bad act, for instance, like on a tax return. But today, you are not permitted to hand the witness the tax return and to say, did you lie here?

Today, if you ask the witness, did you lie on your tax return, and the witness says no, I did not, you are stuck with that answer. Because today, you cannot use the tax return.

All provision (d) says is that where you have a piece of paper, that itself is the bad act, like on the tax return. Or the misrepresentation on another piece of paper. You can use that piece of paper in your cross-examination of the witness and in only that limited circumstance. That's all this means. If the committee feels that that is too taxing a concept for the bench, then perhaps the committee might want to consider deleting it

because judges might not understand it. I think the judges will understand it, and they'll begin to apply it and I think it's a useful provision and ought to remain.

MR. EAKIN: It says a witness may be shown and examined about a document which was made, adopted or approved by the witness. Let's take the tax return situation. I move to show the witness the document and it's objected to because the witness, I have not proved the witness made, approved, or adopted. You're correct, Mr. Eakin, you haven't proved that, therefore, under this, you can't show it to him.

PROFESSOR OHLBAUM: Right.

MR. EAKIN: What sense does that make?

PROFESSOR OHLBAUM: I don't understand.

MR. EAKIN: Why can't I approach him and say, is this your tax return?

PROFESSOR OHLBAUM: You can.

MR. STPHAO: It doesn't say that. It says I can show it to him if it was made, adopted or approved. The defense says you haven't proved that yet, therefore, you can't show it to him.

PROFESSOR OHLBAUM: I think if a judge were considering the way in which this were to work and the way it's been written about and what the case law says, that the objection would be clearly unequivocally overruled. You

would be permitted to show the witness the return and once the witness said, this is not my return, then you would not be permitted to question further.

If the witness says, it is my return, then you would be permitted to question further. The same way it works with statements today. Once you say to witness, is this your statement, and the witness says no, it's not my statement, you can't use the statement against the witness. You may be able to call another person to say that the witness said it, but you can't use it. In other words, this does not change the way in which that procedure will --

MR. EAKIN: I disagree. That's the law. The witness says, this isn't my statement. Can I ask him serious follow-up questions on it? So if you're saying the officer wrote that down, the officer's like, this does not permit, this says I can show and examine about the document once it's made, adopted or approved. He says no. I read this to say you can't show him or examine him about it, at least at that point. And chances of me getting him back on the stand to do it are slim and none.

I understand and I'll probably win over that objection much of the time, but I'm not going to win it every time. And a lot of judges are going to read that and say, well, that's clear, you didn't make, adopt or approve it, at least I haven't proved it at that point, therefore, I

can't show him and examine him about it. Again, it's --

PROFESSOR OHLBAUM: Mr. Chairman, can I propose some language to the committee that might clarify that problem and it would then, I think, obviate this discussion?

CHAIRMAN CALTAGIRONE: Okay.

MR. EAKIN: 6249, subsection (c), again, this is a case where the first sentence is the federal rule and the second sentence is not. Our position is that the second sentence does not comprise Pennsylvania law, at least in its entirety and is, therefore, once again, a deviation from federal rule without encompassing Pennsylvania law. Again, if we're going to get the federal rule, let's get the federal rules. If we're going to get Pennsylvania law, we have a disagreement about whether that states Pennsylvania law.

MR. ZUCKERMAN: I want to note just as an aside, the federal version of this rule, there was a rule governing impeachment of juvenile or impeachment of witnesses other than a defendant on juvenile adjudications which was clearly favorable to the defense. It did not comport with state law and was deleted therefore.

I point this out because to advocate that certain rules should be adopted as written is a double-edged sword, and most of these where there are changes, again,

have been to comport with current law and it's been pretty even handed. There have been plenty of provisions in the federal rules that were favorable from a defense perspective that are not here, not in this code because it did not comport with federal law.

PROFESSOR OHLBAUM: I'm a little confused. Are we talking about 6249(c)?

MR. EAKIN: I think so.

CHAIRMAN CALTAGIRONE: Yes.

PROFESSOR OHLBAUM: That provision does not exist in the federal rules, at all, that the first sentence was changed or the second sentence. It's not part of the federal rule.

It is part of this bill because that is the law in Pennsylvania and was put in so that it would be Pennsylvania specific because it addresses some concerns that the cases now address and we felt that it was necessary to answer those questions in this particular code.

CHAIRMAN CALTAGIRONE: You have a comment?

MS. GUIDO: The comment that Mr. Eakin has actually refers to 6249(b).

CHAIRMAN CALTAGIRONE: (b)?

PROFESSOR OHLBAUM: (b), okay.

MS. GUIDO: It's a typographical error.

MR. EAKIN: I did the typing. It should be

(b).

PROFESSOR OHLBAUM: I'm sorry, B as in boy or D as in David?

CHAIRMAN CALTAGIRONE: B as in boy.

MS. GUIDO: I believe he's referring to B as in boy.

MR. EAKIN: Yes.

PROFESSOR OHLBAUM: Again, I'm confused. This is, this I guess reflects back to our discussion yesterday about Randall and the 10-year rule, and the chairman and other members of the committee may remember Representative Hennessey's discussion with respect to whether or not we should keep that 10-year rule or whether the committee might want to reinstitute a balancing test. But I'm not sure what your position is with respect to the difference with the federal rules. I don't see it.

CHAIRMAN CALTAGIRONE: If it's all right with everybody, we'll take a five-minute break.

(Recess taken from 12:50 until 1:00 p.m.)

CHAIRMAN CALTAGIRONE: Okay, if we can regroup. Some of the members will be coming back.

I know there are a number of other items, I guess up to 24. There may have been some issues that we've touched on, if you would care to just point that out, where there's any possibility that we could get the District

Attorneys Association together with us or some members of the others and have a workshop, if that's what's going to be needed to try to work out some of the issues that are raised here today.

MR. EAKIN: We're pleased to do it. Our only concern is that members of our committee come from Pittsburgh, Philadelphia, Delaware, as well as the central part of the state and it's difficult to find the time without some advance warning, but we're pleased to do it. I mean, the area's important and we would prefer to take the time and the effort to make it.

CHAIRMAN CALTAGIRONE: Just a point, I would like to do it right if we're going to do it, and make sure that we don't have to retread old ground. And if it would mean that we would have to take a little bit more time to do that, I would like to do it right, if there's anything such as right, but we certainly want to keep all parties informed and have as much total input as we possibly can so that nobody will feel that they haven't had an opportunity to participate in the process. And the end product will be we'll have as much consensus as possible. And with that in mind, if we can proceed.

MR. EAKIN: Fine. And even expanding it beyond to include whomever, is certainly welcomed by our group.

Whatever point we were on on section 6249,

apparently my typographical precludes me from figuring out what rule I was talking about. I think we're best served by, in the words of Gilda Radner, never mind. It may be that in reviewing my notes back in the office, I can find what I was intending to put in there as a section number and follow up.

If I can go to section 6250, subsection (b), again, we're talking about bias, interest, prejudice, or the lack of a witness, subsection (b) says that extrinsic evidence of that is not admissible unless on cross-examination the matter is brought to the attention of the witness and the witness has a chance to afford or deny it.

This is one that I believe cuts both ways. It would hinder cross-examination by defense and prosecution alike. What it means is if I know something that gives the witness a reason to lie in the nature of bias, interest, prejudice or the like, I have to bring it to their attention during cross-examination, or, I am precluded, it's not admissible in rebuttal. So if I know the witness took a bribe, I have to ask them about it and give them a chance to explain it, rather than ask them, did you receive a bribe for your testimony, they say no, and I shut up and then bring on the devastating testimony of the bribe and allow them to get back in the stand, if they choose to do so, and

explain it away.

The way this reads is that I must bring it to the attention of the witness and say, can you explain or deny the evidence that I have got showing that you received a bribe. Strategically that makes no sense. Alibi witnesses are a good example. We always joke about the birthday party, how do you remember now that this happened on Tuesday the 3rd of September. It was always somebody's birthday party and that's how I remember. Well, if I have extrinsic evidence that Joey's birthday really was three months before, I may want to bring that on as a matter of strategy, not while the witness is on the stand, and get them, oh, it wasn't Joey, it was Bobby. I want to lock him in and then bring it in on rebuttal. This would not allow me to do that if I did not confront the witness, and I just don't think that's wise.

The same rationale would apply for a defense. If they've got my policeman with interest or bias, they may not want to ask him while he is up there but they may want to save it, and it would be devastating as defense testimony once he's gotten down and now must retake to explain, retake the stand and explain it away, versus requiring them to ask him while he's up there and can deal with it.

I'm not sure the goal of it, nor what is to be protected by it, but I think it's something that would

affect both prosecution and defense strategy alike.

PROFESSOR OHLBAUM: I think if there were a provision that permitted the admissibility of evidence or -- let me start again. I'll try to be clear this time.

Mr. Eakin's fears are legitimate ones, but they do not address or they're not spoken to by this particular subsection. In the hypothetical that he gave you about the alibi witness, nothing in this bill precludes this setting up of the alibi witness, and the establishing later on by a different witness that the birthdate did not fall on the day that the alibi witness claimed that it did.

All this provision does is it draws a parallel to provision 6254, subsection (b)(1), which says that before you surprise a witness with an inconsistent statement, or a claim that the witness is prejudiced or corrupt in a particular way, you should confront the witness first and prove it later.

So in other words, if I have Mr. Eakin's hypothetical, if the alibi witness that I'm cross-examining has taken a bribe, I am obligated to confront the alibi witness with that bribe before I call somebody else who bribed him. But I am not required to confront the alibi witness with the fact that the birthdate that he is talking about has got absolutely nothing to do with the day that this incident took place. This is very limited to the area

of bias or prejudice or some type of corruption.

And it's the same kind of procedure that's required of lawyers when they're cross-examining witnesses with inconsistent statements. Before you can call somebody else, you must ask the witness about it first.

MR. ZUCKERMAN: I think this provision is a practical one. Again, it's neutral as to both sides, but often jury trials are three, four days, and if by day four, you're extrinsically impeaching someone, whether it be with prior inconsistent statement or bias, the witness who testified on day one is not around for most of the time, particularly police officers, they schedule them very carefully. In fact, most, at least in Philadelphia County, the day of the trial depends on the availability of the police for the most part because they don't want to take them out of squad and pay time-and-a-half or whatever.

I think it's a more of a practical consideration than anything else. Do you disagree with that?

MR. EAKIN: No. We have the same problem.

MR. ZUCKERMAN: I guess I would agree I don't like the rule. I would rather blind-side somebody and not give him the chance the explain it, if they made prior inconsistent statements or there's some bias, some reason to suspect bias. But the rule, it seems, in practice is otherwise, this codification seems to reflect.

MR. EAKIN: Again, taking my example of the alibi witness receiving a bribe. What if I don't learn of the bribe until the evening after that witness has testified? This means I can't introduce it because I didn't confront them with it, and I'm not sure what is served by making that the rule.

MR. ZUCKERMAN: I don't know. In Philadelphia County, if that occurred, the judge makes allowances and it's one of those examples, well, not every foreseen circumstance is going to fit neatly into the rule. I can't imagine that if you really learned at the last minute, that a judge would bar the introduction by strict application of the rule. At least the judges I work with.

MR. EAKIN: Well, let's suppose it was the defendant that paid the bribe and the defendant's now off the stand. You're going to scream bloody murder if I try and recall the defendant to ask him, didn't you pay a bribe to this witness?

PROFESSOR OHLBAUM: Well, I might scream because I'm expected to because I'm an advocate, but that doesn't mean the judge is.

MR. EAKIN: You're going to point to this and say, they didn't because they didn't on cross-examination and they can't call my guy on cross-examination.

REPRESENTATIVE MASLAND: Practically speaking,

most judges are going to allow that testimony to come in, I think. The only question comes as to whether or not on appeal, it's going to be upheld or overturned because there is a rule in black and white that says, you've got to do this and you didn't.

MR. EAKIN: Again, I'm not sure what the purpose or the goal of this language is. What is it we're trying to protect with that rule?

PROFESSOR OHLBAUM: The goal, the design was, again, to give the witness the same type of notice that the witness, the law now says, is entitled to with respect to prior inconsistent statements before you call a third party. It will also expedite matters, streamline matters. There may be no need to call the third party if the witness says yes, I took a bribe. Then that extra witness that you were required to call or would have been required to call is no longer necessary.

MR. EAKIN: Perry Mason gets them to stand up and confess, too, but I have no expectation of a witness to say, oh, you're right, I took a bribe.

PROFESSOR OHLBAUM: Then call the third party.

MR. EAKIN: Well, what I'm saying is, showing bias or interest or prejudice is different than a prior statement. It's bias in interest, it's something that goes to the heart of credibility of the witness, and again, both

sides are precluded from blindsiding, if you will, or at least making the most effect of the testimony, you lock this person in and then kill them on rebuttal is something that, I mean, I think of the riot trials that we had in Cumberland County where we had just a ton of inmate witnesses, tons and tons of inmate witnesses. Some would testify in multiple trials and forgot what they said in the trial before and we would have the testimony. If I want to cross-examine on prior inconsistent statements, fine, I show him the testimony, this and that. But if I've got another witness that says he's lying because of, you know, the guy getting cigarettes last night. That's something I don't want to lay before him while he's up there and can explain around it. There are many defense witnesses that are masters of an explanation for whatever you did them, and it will come.

I want to lock them in. This is what they teach you, it's the purpose of cross-examination. If you can accomplish it, lock them in on something that's disbelieved and then show the disbelief. All this is is a chance to explain away something that, in fact, shows bias, interest or prejudice. They can always get on the stand without this rule and explain it away if there is an explanation. But to say I can't bring it in unless I showed it to him on cross, serves no purpose that I can see.

CHAIRMAN CALTAGIRONE: Representative

Manderino?

REPRESENTATIVE MANDERINO: I'll wait and ask my question.

PROFESSOR OHLBAUM: I was just going to say that I wasn't aware that there was strong feeling with respect to this particular rule. I thought that most parties agreed that it would streamline the process. Can I prepare an amendment to delete that section and the committee might consider that?

CHAIRMAN CALTAGIRONE: Okay.

REPRESENTATIVE MANDERINO: I was going to ask the question based on, assuming what we discussed yesterday is still correct, that each of the general sections or rules in 176 are either a codification of current Pennsylvania practice, or a change to what is the current federal rule, where does this fall in that realm and is that where some of the misunderstanding is? Is this falling in the realm of this is how the federal rule is but Pennsylvania practice is not the same? Or, is this attempting to codify what we do in Pennsylvania practice, and maybe there's a question as to whether how it's worded will do that?

PROFESSOR OHLBAUM: That's an excellent question. This does not appear in the federal rules. And this was an attempt to put some teeth into a question that's often asked, why do I get an opportunity to cross-examine a

witness with respect to bias or prejudice? What's the rule that allows me to do this? And the answer, of course, is, there is no rule. It's the way you are permitted to cross-examine and we get that from a distillation of a variety of cases. That's what subsection (a) does. It provides a rule for what is done now in Pennsylvania, and what is done in federal courts.

What subsection (b) does is it takes it a step further, which again is not the rule in. There is no federal rule that takes it further, and there is some dispute as to whether or not in Pennsylvania you are required to do this. It certainly does. I would not represent to the committee that this is the law in Pennsylvania or that this is a trend. It is the practice in some sections. And I think that the committee could well decide to recommend that subsection (b) is deleted, and we simply maintain subsection (a).

MR. EAKIN: 6254 is another area where our committee and Professor Ohlbaum have some dispute about the present state of the federal or Pennsylvania law. This one again, as does 6250, I believe, neither tracks federal rule nor Pennsylvania law. And it is an attempt to clarify or to make it accurate, clarify and rewrite what the rule really means.

REPRESENTATIVE MASLAND: Which number are you

on?

MR. EAKIN: 6254, prior statements of the witness. Again, it's something that it's entirely new language, which means we're going to get entirely new decision of law.

I point out that section C(1), which deals with intentional fabrication, seems to say that a prior inconsistent statement of a witness is admissible to rehabilitate if the witness testified at trial and the statement is offered to rebut a charge of intentional fabrication at the time of trial. Again, I'm not sure exactly what that means if we're talking about fabrications made the day before trial, is somehow different.

REPRESENTATIVE MASLAND: In an earlier discussion, I know that there was some suggestion of removing either "intentional" and/or "at the time of trial" from that section.

PROFESSOR OHLBAUM: Right.

REPRESENTATIVE MASLAND: Is that a possible amendment?

PROFESSOR OHLBAUM: In fact, the amendment that you will get that has been drafted, removes the language "at the time of trial" because, Mr. Masland, your memory and mine comport, and that was I think the result of that discussion and this is a way to make that clearer and

tighter.

MR. EAKIN: That would go a long way for us. It's just a question of difference between a fabrication and an intentional fabrication. Is that as opposed to an unintentional fabrication? It seems to me a fabrication is intentionally false. Otherwise it's not a fabrication. Again, I'm perhaps gun shy, but if there are two words in there, I've going to have to prove them both. And if it's a fabrication, it's a fabrication. I don't want to have to prove it was, well, it was unintentional fabrication, is somehow different. He really didn't mean to, you really didn't mean to make this up. I don't know. It seems to be redundant to me, if nothing else.

Again, the federal rule seems to us sets it out fairly well. After modifications, if the modification is coming, we'll certainly be pleased to take a look at it.

PROFESSOR OHLBAUM: The federal rule uses the term intentional fabrication, so does Pennsylvania law. And Mr. Eakin might be right. It may be one of these appendages like the appendix that really serves no purpose and it might be a redundancy. The reason why the language appears here is because, again, it's consistent with Pennsylvania decisional law and the language in the federal rules, and I thought that probably would draw more attention and remove an issue if we changed the language to fabrication rather

than intentional fabrication. So we may be talking about the same thing.

MR. EAKIN: As one of my favorite redundancies, that's very true. 6264, we point this out pretty much in support of our claim that where there's a pro-prosecution section in the federal rules, it seems to have fallen by the wayside, and where there is an anti-prosecution section, it somehow finds its way in.

6264 was, as we call it, the Hinkley Amendment. It was one of those drafted in after the shooting of the president resulted in the not guilty verdict, and it is admittedly not a law in Pennsylvania as we speak. But again, if the goal is to enact federal rules, fine. If it's for Pennsylvania law, fine. There just seems to be a pattern that if it's for the prosecution in the federal rules, we strike it out in the name of Pennsylvania law, and if it's against the prosecution in the federal rule, we clean up Pennsylvania law in the name of consistency with the federal rules is the trend.

Again, I don't mean to state that our association is lobbying for the Hinkley Amendment. It certainly would benefit us, and perhaps some of the language concerning expert testimony, that may change the state of Pennsylvania law in this area as well. But again, we just point that out as something that was put in in reaction to

an acquittal that was deemed unjust in the federal system by many and for the wrong reason, and to say it's just interesting, it's not therefore, embraced in the draft. But again, I don't mean to argue the good or the bad of that language.

MR. ZUCKERMAN: If I could just respond?

CHAIRMAN CALTAGIRONE: Representative Mandarino?

REPRESENTATIVE MANDERINO: Thank you, Mr. Chairman.

I just want to make sure, also, that I'm understanding what's going on. Mr. Eakin wasn't here yesterday so I want to make sure we're all singing on the same page here. It was my understanding that 6264 was what the law of Pennsylvania and the federal law is now. I was thinking of it in, at least yesterday when we discussed it, it was mostly in the context of a civil proceeding and we talked about it in product liability law and other types of issues.

Is there a difference in terms of how it affects criminal law in current practice today?

PROFESSOR OHLBAUM: No. And perhaps the members of the committee are at somewhat of a disadvantage, because the issue about which Mr. Eakin speaks and the one he raises is actually not before you in print.

Under the federal rules, rule 704 specifically, which is 6264, there is a subsection (a) and (b). The Pennsylvania Code only has subsection (a). That is the law in Pennsylvania. It is the same as the federal rule. I don't believe there is a dispute with respect to that.

The dispute arises because under the federal rule, there is a so-called Hinkley Amendment. The Hinkley Amendment is subsection (b). The reason why the federal people call that the Hinkley Amendment is that subsection (b) was added after the acquittal of John Hinkley. And what the Hinkley Amendment says is that when it comes to the mental state of a criminal defendant, even though we allow experts to testify to ultimate issues, a variety of other issues, no expert may testify to the ultimate issue, whether he was sane or insane, in a criminal state case.

That, as Mr. Eakin acknowledges, properly so, is not the law in Pennsylvania. That is why subsection (b) does not appear here in the code.

MR. ZUCKERMAN: If I may just respond briefly to general remarks. Mr. Eakin has on more than one occasion made the point that where there are modifications, they seem to favor the defense. I find it ironic that when we look at it, we seem to think that the modifications favor the prosecution. I guess it's two sides of the same coin. But there are a number of changes that clearly favor the

prosecution.

For example, the plain error rule which permits the judge to grant a new trial even though it was raised by the defense counsel, or an objection wasn't made by defense counsel that there was plain error. That's clearly a rule favorable to the defense, can only be used by the defense. But it exists in the federal rule. It's been deleted in the current version.

Under the federal rules, you can impeach someone with juvenile, a witness with juvenile adjudications. And anyone other than the accused could be impeached through the juvenile adjudication. That clearly is only helpful to the defense. The provision as drafted in the federal code, it's deleted here.

Provisions on expert testimony that have been taken verbatim, almost verbatim, from the federal Code, changes the law radically in favor of the prosecution for the most part. Certainly criminal cases, where the bulk of the experts tend to be on the prosecutor's side, not on the defense's side.

Lastly, the rape shield, the federal version of the rape shield at least is constitutional. I think there's general consensus among the scholars that rape shield as drafted and as included in this is probably unconstitutional and caused nothing but trouble with the appellate courts so

far, and there have been a number of reversals because, really, courts are finding as written because it's a statute but it ends up being unconstitutional because they have one exception written in and there are a number of constitutionally recognized exemptions now. It's in there even though it's clearly defective. It's there at the insistence of, I believe, the District Attorneys Association, if not other groups. But those are examples where there has been an attempt to, I guess, to be even handed. It's not one-sided as Mr. Eakin seems to think.

MR. EAKIN: Plain error was taken out because, again, that's not a Pennsylvania law, and we saw many and we can no doubt all tell horror stories arising if that was the case. It just didn't matter what happened; if the court found something to be error, you got a new trial.

As I say, our familiarity with this bill began this spring and we found things like plain error in there that are new in Pennsylvania. As I said, this bill in its present form is a lot better in our judgment than it was. Simply, we have more areas that we believe need attention. While we have changed many of the things that were neither in Pennsylvania nor the federal rules that aren't in the remarks I have here, that doesn't mean they didn't exist, and what remains are possibly the vestiges of the pattern that I suggest began. I hope I didn't come here to argue

the specifics of that, and we don't certainly attribute any evil intention to the drafters.

Section 6266, I believe I have a typographical in there because I'm not sure that my remarks conflict with the subsection that I refer to. And if I might just pass that and clarify it later.

I believe that most of the major points that we have were possibly better dealt with in the letter from Attorney Guido. I don't know that I could state them any better. Two of the matters in the section 6273, though, give us concern. Subsection 8 of that would make police reports hearsay when the prosecution wants to use them, and not hearsay when the defense wishes to use them. And just again, would suggest that that's the creation of a playing field that isn't even.

Subsection 18, you allow an expert to authenticate any document or periodical themselves and quote from it pretty much as gospel. The law of expert witnesses is subject, as has been noted, to a lot of appellate authority, and I would suggest that Pennsylvania law is a little more restrictive than the federal rule. But again, Pennsylvania law is being asked to give way in the name of federal rule here, and where the expert is benefitted, and for the most part, we're talking about your psychiatric experts or the like here, that are most often called by the

other side.

The only other comment I would have, and I'll complete my run-through, is 6299, which would limit the ability of the court to comment on the evidence. The court nowadays certainly comments a lot less, and should not and does not give its opinion of the evidence nor try to create undue emphasis on any part of it. But a strict reading of 6229 precludes the judge from commenting upon the evidence, period. There are often situations during a trial where a judge ought to give cautionary instructions, or when a jury question is asked to explain something that would include a comment on the evidence. If the judge is so hamstrung that the judge cannot, in an evenhanded, non-opinionated and non-emphasized manner, comment on the evidence, I think the judges are going to be reigned in without, again, without reason.

If the judge inappropriately makes a comment on the evidence, we're going to try the case again if there's a conviction. I fear that this will take offhand comments that include reference to the evidence and be deemed inappropriate under the statute and again, cause us both to litigate more and to retry more, based on something that really is not prejudicial to either side, it's simply because it's included any mention of evidence or the witness or an exhibit or the like.

I believe that concludes certainly the important ones that are in my prepared remarks. I would assume response to those last was appropriate here. I think, though, that if nothing else, today's session shows that there remains work to be done, and I would hope we would all take the time to put the best product together, because evidence is something in law school you spend an entire year, three credits a semester, doing, and you still don't understand it. And to try and codify the law, a couple hundred years' worth of Pennsylvania juris prudence, and the federal rules, and try and get the best product, isn't something that's simply nor easily done. And time to deal with all these points is something that we need to take, and we appreciate the committee's agreement that that should be done. The product put out here must be a good product or it's going to be devastating to the criminal justice system, both sides.

CHAIRMAN CALTAGIRONE: Thank you.

Professor?

PROFESSOR OHLBAUM: Yeah. Thank you. Let me address the two issues that were last raised by Mr. Eakin.

The first is what amounts to 6273, I believe subsection 8, and Mr. Eakin mentioned that the admissibility of police reports when used by the defense is not the same playing field as it is when the government or the

Commonwealth attempts to use it, and that the playing field is not level.

That is an accurate assessment of what this does, and the reason why that's an accurate assessment of what it does is because the law as it now exists, for the most part, both here and federal court, does not permit a level playing field. The reason for that is that the police officers who have made these statements work for the Commonwealth, the same organization that employs Mr. Eakin. It is the same, in a sense, the same party that is calling the witness or that has the witness's statements. And what the law of evidence generally says in Pennsylvania and under the federal rule is that where you have a statement by a party, that statement may be used by the other side, but may not necessarily be used by your side, since it was you, your representative, your act, that produced it.

8038 is, or 62, excuse me.

MR. SUTER: 6273.

PROFESSOR OHLBAUM: Thank you. 6273, subsection (aa), in paragraph 2, is different than the federal rule. In all other respects, it's the same. The difference is that when a police report presents matters where the officer was obligated to make a report, like in an accident investigation case, or a detective summary of events, where there is a duty for that officer to make that kind of a

report, that kind of a report should be used, should be able to be used by the defendant but not by the government.

The reason for that is that in subsection (3), when a police officer makes a report based on factual findings that he or she makes as a result of an investigation that the police officer is required to undertake, those factual findings may also be used against the Commonwealth or the government because it was the government's agent that made those factual findings.

In other words, there really doesn't seem to be a distinction between paragraph 2, which talks about matters where there was a duty to report, and paragraph 3, where we're talking about factual findings as a result of an investigation that the officer was obligated to take. Many people who have written about the federal rules have suggested that that discrepancy should not exist. If anything, these commentators have said, the reports that are generated in paragraph 3, that is to say, the factual findings that an officer makes, are often less reliable than the matters which the officer actually observes with his own eyes and which he's obligated to report on.

But because, for the most part, the reports in subparagraph (3), the factual findings are admissible against the government or the Commonwealth, the matters observed by police officers ought also to be admitted

against the government or the Commonwealth.

The reason why they are admitted and should not be admitted against the defendant, in the same way that they should be admitted against the Commonwealth, is it wasn't the defendant's representative that made them. By the same token, in those instances, specifically in civil cases where a defendant's agent has generated reports, whether they're factual findings or whether the results of an investigation, those reports are admissible against the defendant. The difference, of course, in the civil model and the criminal model is, in the criminal model, we really only have one party, for the most part. And that is, in the case of generation of reports, and that is the Commonwealth. In a civil case, you have the plaintiff and you have the defendant. That's the reason why the playing field is not level.

With respect to the last comment about instructions on the evidence, it was felt by some that it would be useful to have a provision in the code that reminded judges what I think all of us acknowledge is the law today, and that is, that while a judge may charge on the law, and may offer limiting instructions, either when requested to do so or when he or she thinks it's appropriate to do so, a judge should not be commenting on the facts in any way that would be prejudicial to either side. Many

people in Pennsylvania and elsewhere feel that it is virtually impossible for a judge to comment on the facts without giving cautionary, where cautionary instructions are not given, where the comments favor one side or the other. Almost by definition, when a judge comments on the facts, aside from legal instructions, the judge is tipping her hand with respect to which side she favors, notwithstanding her instruction that it is up to the jury to determine.

So the suggestion by some was, and the suggestion followed the enactments in other states where this kind of a provision exists, and that is, to remind the judge that simply a comment on the evidence is inappropriate.

This might be further clarified or flushed out so that we don't run into the problems that Mr. Eakin suggests may arise without a more fuller explanation of what that means, and again, I would be happy to prepare additional language for the committee to consider.

MR. LILLIS: May I ask a question of the professor? Does this mean that a judge cannot in any way organize or summarize any of the evidence in a very long and complicated case for the jury? Because I found that judges, when they do their job right, can be helpful and neutral in laying out some of the issues for the jury, and to do that, to some extent the judge has to summarize some of the

witness's testimony, some of the evidence and exhibits that were presented. I realize, though, that's primarily the job of either the plaintiff's attorney or defense attorney or the prosecutor and defense attorney, but does this mean that a judge can absolutely not go over the case with the jury?

PROFESSOR OHLBAUM: It means that a judge should not go over the case with the jury other than to give the jury legal instructions or limiting instructions with respect to certain legal issues, and that the obligation and responsibility falls on the lawyers who are trying the case to comment on the facts. Since the jury is the fact finder, and not the judge, unless, of course, the judge sits without a jury and then, of course, this particular provision has no meaning. But because the fact-finding responsibility is exclusively that which belongs to the jury, it's up to the lawyers.

Now, admittedly perhaps in some courts in Pennsylvania, although I can't represent that as the case, but I can tell you that in certain federal courts, when we've had long and complicated trials, judges have, rather than commented on the evidence, have allowed the lawyers at various stages in the process to deliver mini summations or mini presentations with respect to what the evidence means, and perhaps this kind of provision would encourage that kind of a process in Pennsylvania as well. But it seems to

remind the court what I think all of us know to be the law and what judges for the most part scrupulously follow, and that is, that aside from legal instructions and limiting instructions and points of clarification, to review the evidence with a jury would be to comment upon it one way or the other.

MR. LILLIS: Thank you.

MR. EAKIN: I don't mean to beat a dead horse but I don't think the judges need reminding of what their instructions are to the jury. They're to instruct them on a lot of things, not just, "you're the sole judge of the facts" and "but you must take the law from me." It doesn't say they need to tell them that, but they do.

I just think it's, I don't want to say dangerous but it's almost dangerous when you start trying to enact reminders of parts of something that the judge must do to the exclusion of other things the judge must do at the same time. Somewhere down the road, someone will say, well, they must have meant that one extra special because they put that in the statute and that as opposed to reminding them that I'm the sole source of the law is more important than, and therefore, subject to relief in an appeal.

Again, I just don't believe that judges need reminding that they have to abide by the standards of impartiality should they mention the evidence as part of an

explanatory comment or cautionary instruction. If a witness blurts out something that can be cured, the judge necessarily must refer to it, and he should.

PROFESSOR OHLBAUM: To the extent that the committee finds that this will invite more problems than it will solve, I would be happy to, again, draft some deletion language for the committee to consider.

CHAIRMAN CALTAGIRONE: Okay. That would be helpful.

PROFESSOR OHLBAUM: Okay.

CHAIRMAN CALTAGIRONE: Are there any additional questions from members of the committee or the panel?

(No audible response.)

CHAIRMAN CALTAGIRONE: If not, we'll adjourn for the day. Thank you, one and all.

(Whereupon, the hearing was concluded at 1:43 p.m.)

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