ORAL ARGUMENT — 11/19/98
98-0322
DRILEX SYSTEMS V. FLORES

SULLIVAN: I think it would probably be a fair statement to say that every member of this panel has at one time or another invoked the rule in the course of your separate careers. One of the issues presented today by Drilex, petitioners, is the proper invocation and application of the rule by a trial judge.

ABBOTT: You invoked the rule?

SULLIVAN: Yes, I did.

ABBOTT: And you know what it means to invoke the rule?

SULLIVAN: I do.

ABBOTT: And it's set out in the rules?

SULLIVAN: It is.

ABBOTT: And one thing that it includes is to advise your witnesses not to talk to anybody else about any of the testimony.

SULLIVAN: Those witnesses who are not covered by the provisions of the rule, yes.

ABBOTT: Well it doesn't exactly say that. It just says you are supposed to advise your witnesses not to talk to anybody else. You didn't advise your witnesses about the impact of the rule did you?

SULLIVAN: I did advise my witnesses about the impact of the rule. I advised them that parties, corporate representatives, representatives of parties and persons who are shown by a party to be essential for the presentation of this case are excluded from the requirements of the rule. And it is exactly that point that forms the heart of petitioner's appeal on this matter.

It is clear that Mr. Tom Bailey was our corporate representative. By the definition of the rule, he was excluded from the rule. In Texas, Texas has a two-tier system for the rule. You find the actual rule - exclusion of the witness from the court, and rule of evidence 614. You find the prescriptions, the admonishments that go with the rule in Rule of Civ. Proc. 267. In fact, 267 sections (a) and (b) pretty well ferret 614.

It is when it comes to section (d), where it makes the name distinction, at the

least the distinction insofar as petitioner is concerned in this appeal. That distinction says: Witnesses when placed under the rule of evidence 614 shall be admonished. That is not discretionary. That is a requirement. Petitioner understood that. But petitioner understood also that its party, Tom Bailey, was specifically excluded from the provisions of the rule. And that its expert and it reasonably assumed that its expert also fell within that category of witnesses who would also be exempt from the provisions of the rule.

SPECTOR: Why is that?

SULLIVAN: In 267(d), the section we are talking about says, witnesses when placed under rule 614 of Texas Rules of Civil Evidence shall be instructed by the court that they not converse with each other or any other person. However, under §(d), it says specifically: This rule does not authorize exclusion of. And it has several categories of parties who are not authorized to be excluded.

ABBOTT: In looking at that and reading the two together with regard to (b) it says, That those parties listed there are not to be excluded. It does not, however say, that they are exempt from the other aspect of subpart (d), which is they are not to converse with each other or with any other person about the case because of the attorneys in the case.

SULLIVAN: Except the rule in section (d) says, When placed under rule 614. And I assume that in all of our statutes and laws that the words that we use in those statutes and laws have meaning. Unless the literal interpretation of the meaning of those words would lead to an absurd result, then that meaning should be given force and effect.

ABBOTT: I don't know what you are talking about.

SULLIVAN: Well in (d), going back to 614, we have a rule that says certain classes of people may not be excluded from the courtroom. In the rule of procedure, we have a specific section that says, those witnesses who may not be excluded from the courtroom are not going to be subject to the admonishment. At least that seems to be the plain language of (d).

ABBOTT: To me it seems like the plain language of (d) is exactly what it says. And that is, that they are not to converse with each other or any other person about the case. That's different than be allowed to being present in a courtroom. It is a very common practice of course for expert witnesses to sit in a courtroom to listen to the testimony to better inform them so they can shape their opinions in accordance with the facts of the case. Listening to testimony, however, is different than conversing with the other witnesses, which is exactly what happened with some of the experts in this case.

SULLIVAN: Well the facts, the only witness that the expert conversed with was another expert, the party representative, also exempt people or exempt persons under what I would consider

to be a plain reading of the rule.

ABBOTT: So you think the reading of the rule allows an exemption, not only to be present in a courtroom, but to converse with other witnesses?

SULLIVAN: To discuss the case. If you are exempt, as I read this rule, the clause that should be struck is in 267(d). I would strike when placed under rule 614 of the Texas Rules of Civil Evidence. I would strike that section. It has no meaning whatsoever. If in fact a party is not able to converse with his witness, his expert that is freely in the conduct of this case.

SPECTOR: Well he can converse with his attorney. I do not understand your position that any of the parties named, any of the persons named in (d) are excluded from the entire rule, that's your position?

SULLIVAN: Yes, because I go all the way back to the way that the Texas statute is set up, the rule is set up. Prior to 1983 when we adopted Texas Rules of Civil Evidence, we had the rule codified in 267. And before that, I think it was in Code of Procedure in the 1925 code. But in 1983 when we adopted the rules of evidence there was a debate over whether or not to adopt the federal exclusionary rule, the federal rule for exclusion of witnesses. And they did adopt it. And this language in 267 is different from the 267 that we initially had in 1925. It's changed over time. It has moved from a completely discretionary exclusion rule, where the court has absolute discretion to exclude a witness or not to where the court has no longer any discretion once the rule has been invoked. He must exclude certain witnesses. And also within that change is specific classes of witnesses who no longer fall within the rule for exclusion: parties; corporate representatives; and persons who have shown by a party to be necessary for the presentation of his case, which normally has been applied to experts.

ABBOTT: And which of these did you show to the judge were necessary for the presentation of your case?

SULLIVAN: I showed that Mr. Acock would be necessary for the presentation of my case.

ABBOTT: Can you tell me where in the record it shows that?

SULLIVAN: Yes. Reporter §1396 to 1404.

ABBOTT: This was after he was already excluded from the courtroom?

SULLIVAN: He was never actually excluded from the courtroom.

HECHT: And there was no problem with that? The trial judge didn't fault you for that?

SULLIVAN: The trial judge did not. What happened was on the first full day of testimony in a 3-week, non-continuous trial, I had an expert in the courtroom shortly before break. At the break, an objection was raised to that witness being in the courtroom. At which time the TC instructed me to present case law to establish the exemption of my witness. I cited the court to *Triton* and to *Elvine*. The court did not rule. Approximately 3 or 4 weeks later when I called my first witness who happened to be Mr. Acock, the plaintiffs objected to him on the basis that he had violated the rule and we had a mini hearing in effect at which time at 1404 in the record, the court recited, I will let him testify. That in my opinion was a showing in accordance with the requirements of this rule of civil procedure. The court, after my having made that showing ruled that he could testify. It was at that point that another objection was raised for the first time. That objection being that Mr. Acock had discussed the case with Tom Bailey, who was the party representative at counsel table, and there was another hearing. And at that point, the court said, I will exempt him - in essence - I will exempt him from the rule for purposes of being present, but I will strike him and exclude him for purposes of testifying because he discussed the case with the witness who was under the rule.

SPECTOR: It was 3-week hiatus?

SULLIVAN: This was a non-continuous trial. The judge writes the circuit down there, we have approximately 1 week of testimony, and then 2 weeks off.

SPECTOR: In this case, there was just 1 day and then 3 weeks?

SULLIVAN: Just 1 day, and approximately the actual exclusion I believe occurred in May, and I think the case began in April. In any event, in the way I read it, this rule of procedure refers back to the rule of evidence, and the rule of evidence is the actual rule. What petitioner would show is that in this particular instance, you have in §b in both the rule of procedure and the rule of evidence, you have a group of parties or witnesses who are excluded, who are exempt from the rule. And it's not discretionary. It says, This rule does not authorize exclusion. The trap apparently is in part (3) of that. It also says a person whose prejudice is shown by a party to be essential to the presentation of the cause.

ABBOTT: What it says is it does not authorize exclusion. It doesn't say that it authorizes those people who can't be excluded to talk with other witnesses in the case.

SULLIVAN: But in the very section that talks about the admonishment, §d, it says, Witnesses when placed under rule 614. If you're not placed under rule 614 because you cannot be placed under it, because that is the clear and plain language of the rule, then what follows should not apply to you under the plain reading of the rule. And I don't believe it leads to an absurd result. I believe that there is a reason. There's a balancing that goes on of course. Parties more often than not are going to be fact witnesses. They are going to be called to testify about facts. And yet, we, in our jurisprudence allow those fact witnesses to sit in the courtroom to perceive testimony and that's the

basis of the rule. It's perceiving the testimony as it's given because it will influence your testimony. That's the heart of the rule. What we have done is we've balanced that and we have allowed people who are necessary for the presentation of their cause. And we have apparently in here also allowed an exclusion for persons such as experts.

ABBOTT: I hate to beat a dead horse here, but was Bailey put under rule 614?

SULLIVAN: He was sworn. He wasn't admonished.

ABBOTT: Was Bailey put under rule 614?

SULLIVAN: I don't believe he was.

ABBOTT: So your answer is no?

SULLIVAN: My answer is no.

ABBOTT: Was Acock put under rule 614?

SULLIVAN: No he was not.

ABBOTT: So you contend no one was put under rule 614?

SULLIVAN: I contend that fact witnesses were put under 614.

OWEN: Why was the exclusion of Mr. Acock's testimony harmful?

SULLIVAN: Mr. Acock was the only operation's expert. This is a very serious personal injury lawsuit. It involved it a _____ injury of the hand - amputation. The claim was made that a piece of dumb iron had caused the injury. The dumb iron either caused the injury because it was defectively designed, or the dumb iron caused the injury because it was mishandled. Petitioner's defense centered on mishandling of this piece of dumb iron. The respondent's claim, and the plaintiff's claim was that it was defectively designed. The only operation's expert offered by either side in this lawsuit was Mr. Acock.

ENOCH: What is a dumb iron?

SULLIVAN: There is no electronics. There is no controlling mechanism. It's just a piece of _____.

ENOCH: And it takes an expert to talk about how you handle that?

SULLIVAN: It takes an expert to explain to the jury how in the scheme of rig operations a piece of dumb iron is supposed to be handled, and who is responsible for handling it in that manner, what is the normal way of handling it and what is required within industry standards to handle it.

ENOCH: And your corporate representative couldn't talk about that?

SULLIVAN: The test is not whether or not there are other witnesses who have been able to supply that testimony, but what was the testimony actually received in the record.

ENOCH: I guess I am trying to comprehend how an expert on the handling of something that is not mechanical rises to the level of necessary the presentation of the case when you have people who handle it all the time who just have experience handling it could do that. It seems to me your argument is simply because I've got an "expert" that makes him necessary. And I'm trying to figure out what it is he's testifying about that makes him an expert necessarily instead of the fellow who just personally uses it.

SULLIVAN: His testimony was not about the actual blow-by-blow use of this particular piece of dumb iron. It was about rig operations in general: how the rigs are staffed, manned, who has the authority to do what, who's responsible for doing what, what is the pecking order on the rig. In other words, it was a way of explaining to the jury, educating the jury if you would, on how our rigs operate in the field and who - I mean saying a person is a tool pusher may mean nothing, but being able to explain and put his title in context with what his duties are, what his responsibilities are, who he reports to, why he reports to them and what authority he has all would have been helpful to the jury.

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RESPONDENT

EDWARDS: I would like to address a couple of questions very quickly. First, I do not believe that in the record there is any showing that Mr. Acock's presence in the courtroom was necessary for the development of his testimony or for the presentation of the case. That is, this was not a hyper-technical case where counsel needed an expert sitting next to him to help guide him through the technical testimony.

HECHT: Many times experts are excluded from the courtroom.

EDWARDS: Many times they are.

HECHT: But you don't think it was necessary to do so in this case?

EDWARDS: Well it was never requested in this case of Mr. Acock, and certainly it was

never shown that his presence was actually necessary in the courtroom during the testimony for the presentation of the case.

HECHT: When the TC overruled your objection to a violation of the rule based on his presence in the courtroom wasn't that tantamount to approving his being present?

EDWARDS: I don't know. He stayed out after that. Certainly the TC stuck to his decision that he was not going to exclude Mr. Acock from being present in the courtroom that first day, which leads me to the second thing that I want to make very clear. And that is the grounds for which the judge did exclude Mr. Acock and it was not just for talking to Mr. Bailey, the corporate rep. expert who was sitting in the courtroom. The record reflects that the judge was told that Mr. Acock also spoke with Jack Varnage, another designated expert for Drilex. And it was talking to both of those and each of those other witnesses that led Judge Garcia to his decision to exclude Mr. Acock as a witness.

HANKINSON: Do you agree that an expert's presence in the courtroom could also be necessary so that the expert could hear the testimony if the expert is going to opine about what facts are offered from the witness stand?

EDWARDS: That very well may be one of those situations where a trial judge would exercise his discretion and allow an expert to stay in the courtroom. In this particular instance, no request was made, there was never any attempt to show that Mr. Acock needed to be present in the courtroom. And in fact, in the bill of exceptions Mr. Acock testified that he didn't need to be in the courtroom for him to develop his opinions, he had already done so.

HECHT: Assuming that he had requested and received permission to be in the courtroom because of necessity, then is he also under rule 267(d) permitted to talk to other witnesses?

EDWARDS: I don't believe so.

HECHT: Do you think it separates exclusion and confidence?

EDWARDS: I think it's very clear that it is separate. And one of the reasons that I say that is because the rule says that the witnesses are not to converse with anybody else other than the attorneys.

HECHT: It says when placed under the rule.

EDWARDS: Sure. The rule is...

HECHT: What makes it confusing?

EDWARDS: I suppose that a strained interpretation could make it confusing. But I think experience shows that when somebody says, I'm going to invoke the rule, there is a general understanding of what that means. Certainly one of the things that that means according to this court in 1964 in *Southwestern Bell* is, that the attorneys have a responsibility to instruct their parties as to what that means.

HECHT: But this is going to be very important because it will affect a lot of cases, because as your opposing counsel noted, we've probably all invoked the rule at one point without even knowing what it meant exactly. But under 267(d), if your interpretation is correct, then even if a trial judge thinks it appropriate for an expert to stay in the courtroom and listen to the proceeding, that expert still could not talk to the party or any other witness in the case during the pendency of the proceedings, is that correct?

EDWARDS: Yes, unless and see (d) provides the unless. Unless or accept by permission of the court if you want your expert to talk to the witnesses, you need to go to talk to the judge first.

HANKINSON: If a witness has not been placed under rule 614, then why does (d) apply? Doesn't (d) on its face say witnesses when placed under rule 614. If you're not placed under 614, then (d) doesn't apply does it?

EDWARDS: No because I don't think that rule 614 is the only source of the rule.

HANKINSON: But specifically on its face 267(d) says, Witnesses when placed under the rule shall be instructed they are not to converse.

EDWARDS: Perhaps. I can get on that a little bit because while that may apply to Mr. Bailey who was present in the courtroom as the corporate representative, it does not apply to Mr. Acock and it did not apply to Mr. Varnage. Both of those gentlemen had not been excluded.

HANKINSON: Assuming as Judge Hecht said that they were excluded if 614 doesn't apply to me am I restricted in who I can talk to?

EDWARDS: If I read these rules, and I wasn't sitting here and I read the rules and I knew that the rule was invoked, I would tell me experts don't talk to any of the other witnesses until I go talk to the judge.

HANKINSON: Okay. So if you talk to the judge and the judge tells you your expert is not subject to rule 614, now what do you tell your expert - who do you tell your expert they can talk to or not?

EDWARDS: The general practice has been we don't talk about rule 614. We don't say or lawyers don't typically say, Judge, I invoke rule 614. It is, we invoke the rule. And the rule has two

meanings to it: keep out of the courtroom; and don't talk to other people. And that essence of the rule has been present in Texas Rule of Civil Procedure 267 for a long time - both aspects of that.

HANKINSON: We get so used to using the word "the rule", we don't look at the rule book but now we are being forced to in this case. So we are back to instead of just the, "I invoke the rule your honor," that occurs at the beginning of a trial, we are back to looking at 267. What are you going to tell your expert? The judge has said to you, You can have your expert here in the courtroom, your expert's not subject to 614. Who are you going to tell your expert to talk to?

EDWARDS: I am still going to tell them not to talk to anybody. I can certainly understand that interpretation, because it is there in rule 267. But I would emphasize again though that it doesn't apply here because neither Acock nor Varnage.

HECHT: Was the last guy an expert?

EDWARDS: Jack Varnage, yes. He was the designated expert for Drilex.

ENOCH: Let's assume that the "rule" is broader than what was enacted in rule 614 to elaborate on what the rule is. In that case, the argument I understand Mr. Sullivan makes to that point is it doesn't make sense. The purpose of excluding a witness from the courtroom is so that they can't be influenced by the testimony that goes on before before they testify. And as a result, a corollary to that would be, Well we don't want them in the courtroom to hear it, and therefore, we don't want them to be able to talk with any of the witnesses outside of the courtroom in essence to gain the information that's being going on in the courtroom. What logic is there to say that there is a distinction between exempting them from being excluded from the courtroom, but still applying the rule that they can't talk to anybody?

EDWARDS: Because of this. If you've got fact witnesses out in the hall or back at the hotel, wherever the fact witnesses may be who have been placed under the rule, even 614, they can't come in the courtroom. And then you've got the corporate representative/expert sitting in the courtroom because he's excluded from the rule, and if you say, Okay since he's excluded from the rule for purposes of being in the courtroom, he can also talk to the witnesses. There's nothing to prevent him from going back to the hotel or back out in the hallway after each break and telling the witnesses, talking to the witnesses and tell them what's going on the stand so that those witnesses...

OWEN: But those witnesses are under the rule. They can't talk to the expert. So you don't need the rule to protect the fact witnesses. They can't talk to the expert anyway.

EDWARDS: Maybe they can sit there and listen to the expert tell them. I don't know. I was asked is there any reason for preventing the expert who is, the person who has been excluded from the operation of the rule, is there any reason to keep him from speaking to the other witnesses.

ENOCH: From other witnesses. I'm not saying anybody else under the rule. Assuming that I am not excluded from the courtroom, that I am going to hear all this testimony, what is the continuing logic of saying that I am not free to then talk to anybody else in the courtroom. And I'm assuming that there are others who are not under the rule.

EDWARDS: Remember that this court in 1964 in *Southwestern Bell* said that when the rule has been invoked all counsel have the responsibility to inform their witnesses of that and this court in that case allowed the exclusion of a witness or from the exclusion of a witness who was not under the rule because somebody who was under the rule went and spoke to that person. So just because a person was not present in the courtroom could be sworn by the judge and be told by the judge, You are under the rule, this court historically has said that when the rule is invoked, the parties and that their counsel are responsible from the implementation of that rule and to make sure that it's carried out.

ABBOTT: Do you remember during trial when the rule was invoked?

EDWARDS: It was at the very beginning.

ABBOTT: And the judge had witnesses stand up and swore them in. Was Mr. Bailey present at that time?

EDWARDS: I don't remember. I was not present and I don't remember from my review of the record if he was there or not. My impression is that he was but without going back and looking at the record I can't answer your question.

PHILLIPS: Let me switch gears. There's all this math in the brief. And you advocate an argument that says, This statute is so obscure that there is more than one way to read it so let the trial judge exercise discretion. And as long as it's a plausible application the appellate court shouldn't disturb that. I'm talking about settlement credit. Shouldn't we try to make sense out of this statute and there's a right answer and a wrong answer?

EDWARDS: Yes. Let me ask you to imagine that if somebody had told me when this judgment was entered that I would be in front of this court on the settlement credit, I would have bet a lot of alcoholic beverage that it wouldn't be. But since reading *J.D. Adams* and since reading the amicus brief filed by the Texas Medical Liability Trust, I recognize that this court needs to do something in this regard. There are apparently people out there who are abusing what is conceived as a potential loophole.

ABBOTT: With regard to that looking at the wording of the statute, putting aside equities at this particular time, would you agree that the formula that I am about to read off to you is the correct formula to apply with regard to the wording of the statute? And that is this: you take the jury award to all claimants, add it all up, in this case it came up to $2.145 million, you subtract from that

the contributory negligence, and then you subtract from that amount the total amount of Amoco's settlement to arrive at the sum of what is the total award is before allocation. Do you agree so far that that is what the statute prescribes?

EDWARDS: No.

ABBOTT: Tell me why.

EDWARDS: Because you are lumping together all of the settlements of all of the claimants. And there is ambiguity in the statute in that regard. And where the ambiguity lies is 33.012(b)(1). A and B of that paragraph and 33.012 is the amount of recovery, uses this term "the claimant." But when it gets down to (b)(1) it says that it's going to be the sum of the dollar amounts of all settlements. But it stops there. It doesn't modify settlement. It doesn't say, Settlements of all claimants or settlements of the claimant, or settlement of the individual party. It just simply says, All settlements. It doesn't tell us whose settlements it's talking about. And that's where the ambiguity in this statute lies.

ABBOTT: Point out to me where you were talking about?

EDWARDS: 33.012(b)(1).

HECHT: So your argument now is not that the TC was simply within his discretion, but that he was correct?

EDWARDS: In light of this court's decision in *Ellender*, it would make awfully good sense to adopt the same framework of *Ellender* to apply here. And I have set that forth in our supplemental briefing after a petition was granted.

There has been one case, *J.D. Abrams* out of Houston, that adopted this alleged argument that the statute is unambiguous. If it is so unambiguous why have 3 different courts come to 3 different conclusions on it, that being El Paso, San Antonio, the dissenting in San Antonio in 2 different cases, and then Houston it must not be very unambiguous.

ABBOTT: Isn't part of that reason though because applying it as it would allegedly be applied with this wording would lead to inequitable results?

EDWARDS: I think it's worse than that. In *C&H Nationwide* this court wrote in a footnote that, Statutory provisions will not be so construed or interpreted as to lead to absurd conclusions, great public inconvenience or unjust discrimination if the provision is subject to another more reasonable construction or interpretation. I think that there is ambiguity on the face of the statute and that draws this court into the fray of what is the most reasonable interpretation. Because of that, this court must weigh, not necessarily the equities, but it must look to see if there are absurd conclusions

or unjust discrimination. And there are several situations where if this literal argument is put into place some absurd conclusions would come about. If you have two claimants, one of who is the injured person and one of who is a derivative claimant, just assume both of them have $100,000 in damages it is a combined $200,000 claim. The defendant can settle with one of them for their full amount of $100,000, go to trial against the other one, face a jury verdict of $100,000 and to buy a $100,000 verdict and end up paying zero to the second person. They have paid a $200,000 claim with $100,000. It would also apply to I think the same argument that if adopted would apply to the sliding scale.

ABBOTT: Well before we could do that, with regard to subpart (1), what is your bright line test? What is your bright line formula?

EDWARDS: It would be along the lines of *Ellender* where this court held, That we hold that to eliminate nonsettling parties dollar for dollar credit to an amount representing actual damages, the settling party must tender a valid settlement agreement allocating between actual and punitive damages. And here rather than saying actual and punitive damages it would be a valid settlement agreement allocating between plaintiffs.

ABBOTT: I'm having trouble simulating that with this. It seems like there is certain policy issues involved in that particular case which are not at play here. Why do you think *Ellender* applies here?

EDWARDS: Because first, I think that the most reasonable interpretation of the statute is that to lump all of the claimants together would create such absurd results that it is not the interpretation of the statute that this court should adopt. Taking that step that the court adopts the position that each claimant will have a dollar for dollar credit only for that individual claimant's individual settlement, there will still be circumstances where allocation will be necessary, if for instance, in the *Jim Homes* case, there was a lump sum settlement with all of the plaintiffs. There was no allocation apparently within the actual settlement agreement. So there will be times when allocation is necessary. When that time is necessary, that's when I am suggesting that this court say, We'll use the framework put in place by *Ellender* for that allocation purposes. But if, the settlement agreement allocates it, then there won't have to be the allocation.

PHILLIPS: If there were specific allocation at the time of a settlement, I guess that would encourage a lawyer not to engage in aggregate settlement.

EDWARDS: Yes it would encourage them not to do that, which would also help keep them out of trouble with the Texas Disciplinary Rules.

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REBUTTAL

HECHT: Mr. Varnage was an expert and he testified?

SULLIVAN: No, he did not.

HECHT: He was excluded also?

SULLIVAN: No he was not.

HECHT: He was not called?

SULLIVAN: He was not called. He was not sanctioned either.

HECHT: Was he under the rule?

SULLIVAN: No, he was not. At least that's what the TC said.

ABBOTT: When the rule was invoked at the very beginning, when all the witnesses stood up, was Mr. Bailey in the room?

SULLIVAN: Mr. Bailey was there.

ABBOTT: Well the rule was invoked at that time and the judge informed all the witnesses at that time what the rule was.

SULLIVAN: The actual admonishment the court gave is in the record. And the admonishment is as follows: They are parties so you may put your hands down but anybody else, and this is to Mrs. Biamonte(?), this is in regards to you also, the rule has been invoked. That means any witness that comes into this courtroom, whether it is your witness or the defendant's witness that stays here for a considerable time, I won't allow them them to testify. Okay. So keep your witnesses out of the courtroom. Vol. 5, page 47 of the record.

ABBOTT: And because the judge didn't finish the statement about not talking to other witnesses, what you're saying is that the remainder part of rule 267(d) doesn't apply? Even though you knew the rule was invoked, you thought that because the trial judge left off that part, that part didn't apply?

SULLIVAN: What's you say is true, but I believed and I think I have support for that belief, that parties and experts were exempt from the rule. And, therefore, I was not surprised that the court when faced with two parties and the corporate representative as the only witnesses in the courtroom did not admonish them. In fact, that seemed to be in line with my understanding of the rule.

Now, there's been a policy question raised and I'm sure this case or one like

it is not going to come up to this court again in a long time. But we have parties. The Flores' were at the counsel table and the rule we adopt today, whatever that rules is, is going to be applied to parties. If as we are talking about here, people are exempt from the rule for purposes of being present but not from discussing the case, then we had best make it clear that that includes parties also. And one of the questions here, and one of the issues raised by petitioner's appeal is the actual actions of the trial judge in how he enforced the rule. As you read through the record you find that the court did ultimately excuse Mr. Acock from the rule. And that the only reason and the only reason found by the CA for his exclusion was that he talked or discussed the case with Mr. Bailey, the corporate representative, a person also excluded from the rule. So the issue is, may a witness who is exempt from the prohibition or who is subject to being sequestered, be still admonished not to discuss the case.

As for the settlement credit when we talked about inequities the statute is quite clear on what a claimant is. It defines claimants. And in that definition it includes people who are seeking recovery of damages for injuries to another, which is exactly this case. That's in the definitions.

ABBOTT: Would you agree that applying your interpretation of a literal reading of Civ. Pract. & Rem. Code, that this would be an accurate formula to use and that is, you take the total jury award to all claimants, $2.145 million, you subtract out the 10% for _____, and you also subtract out the total settlement from Amoco, do you agree with that so far?

SULLIVAN: Yes. But I would phrase it differently. I would phrase it, you subtract out the total of all settlements of the claimants who sought recovery for the injury to Jorge Flores. And that would be his wife and his children.

ABBOTT: So you would subtract out the total of all settlements paid to all the claimants?

SULLIVAN: All the claimants who seek to recover for the injury of their primary claimant.

ABBOTT: What other settlements were there?

SULLIVAN: Those are all the settlements. There was no other claims. There were no other parties and no one else was injured in this action.

ABBOTT: My point is, did someone other than Amoco pay out settlement?

SULLIVAN: No, there was no one else.