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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 16, 1994

(AFTERNOON SESSION)

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Taken before William F. Wolfe, Certified Court Reporter and Notary Public in Travis County for the State of Texas, on the 16th day of September, A.D. 1994, between the hours of 1:12 o'clock p.m. and 5:45 o'clock p.m., at the Texas Law Center, 1414 Colorado, Room 101 and 102, Austin, Texas 78701.

SEPTEMBER 16, 1994 MEETING

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
Tommy Jacks
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
David L. Perry
Anthony J. Sadberry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
David J. Beck
Honorable Scott A. Brister
Ann Tyrrell Cochran
Michael T. Gallagher
Anne L. Gardner
Charles F. Herring Jr.
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Honorable David Peeples

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
Paul N. Gold
David B. Jackson
Kenneth Law
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

Doyle Curry
Hon. William Cornelius
Hon. Doris Lange
Thomas C. Riney

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Denise Smith (with David Perry)
Jim Parker
Mollie Anderson (with Mike Hatchell)
Jeff Thompson (with Steve Susman)
Diana Thompson (with Steve Susman)
Jim Parker

SUPREME COURT ADVISORY COMMITTEE
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(HEARING RECONVENED 1:12 p.m.)

CHAIRMAN SOULES: Steve, are we working from a draft that's under a cover letter from you dated September the 12th?

MR. SUSMAN: Correct.

CHAIRMAN SOULES: So you've got a letter from Steve and then a bunch of material behind it.

MR. SUSMAN: And an unofficial explanation from Alex Albright under a letter dated September 15th, 1994.

CHAIRMAN SOULES: And which was distributed today?

MR. SUSMAN: Correct.

CHAIRMAN SOULES: Steve's subcommittee has met -- as has the Appellate Rules Subcommittee -- has met a lot since our last meeting. They've done a tremendous amount of work developing these rules and trying to follow the suggestions that we gave them by straw votes in the past and filling in gaps that they and we noticed.

And Steve, I would just like to turn over to you your explanation of what you've been doing, where you are, and then if you can

suggest where we go from there that would be fine.

MR. SUSMAN: Sure. I do want to thank all the members of the subcommittee who -- we really have -- they have spent a lot of time on this since our last meeting. We have met four times on Saturdays, basically full Saturdays, since our last meeting in July with the objective of presenting you today with something which is complete in scope, as it is, and which is also true to the prior votes on two separate occasions of this Committee.

I want to give special thanks to Alex Albright who has basically been -- served as our reporter and has done a hell of a lot of the drafting; and to Jeff Thompson in our office, in my office, who is an associate with my firm who volunteered -- well, he didn't exactly volunteer; I asked him to volunteer to be part of this very exciting project. And one thing that Jeff did which we found extremely helpful was to take detailed minutes of every one of our subcommittee meetings.

And those minutes, by the way, are

available to anyone, if you want to see what our positions were and how they changed. But the function of those minutes was to make sure that people did not backslide and there was no backtracking, because that seems to me to be very counterproductive. This process would never end if you didn't vote on things and then go on to the next thing. And obviously, nothing is final until it's final, but we tried to follow that rule at least. We were not going to go back and revote things of this nature from meetings like this and meetings of our subcommittee. There are different people that attend the meetings; sometimes everyone is present; the next time there's a slightly different composition. It simply would not have worked for our subcommittee if we always moved backwards.

Now, you have -- as I said, what we have elected to do is to give you rules which are complete in scope. We have renumbered these discovery rules Rules 1 through 19. There are -- that's Part One, and we renumbered them. And some of these rules, many of them are completely different from the existing

rules, so we frankly did not think that a red-lined version would be very helpful, although we certainly are not trying to keep you from having that and at some point in time we'll provide it. We just ran out of time in doing it this time.

All right. Let me also say that I think what we're doing is we're -- we were, of course, very excited by what we were doing because we feel that we are part of something that's important to the Bar and the state. I must say that the only time in the last five years that I've seen newspaper editorials favorable to our profession are those that picked up the work of this Committee on these discovery rules. There was an editorial in the Dallas Morning News, the Fort Worth paper, the Austin paper, one of the Houston papers, that basically says the Bar is finally doing something that they should have been doing a long time ago, so I mean, I think we have a real opportunity here. That's not to say we should rush through and do just anything, but it is -- it can be a very exciting and I think historic project.

Now, let me go through and tell you what we have just -- my notion is to take you through the rules quickly, all of them, and then to return and take up one rule at a time.

And basically my preference would be that we ask for people who find the concepts of our rules obnoxious, I mean, because then we have a real problem and then we ought to have a discussion. If it's just the drafting you don't like, if it's some minor drafting, we should not worry about that too much today. If it's a concept problem and if your aversion to the concept is shared by a majority of this Committee, then obviously we've got to go back and do some rethinking of everything.

On the discovery period, which is Rule 1, you will recall that at the last meeting the vote was 11 to 11 on whether there should be a six-month discovery window or period. And the Committee, after a lot of discussion, or the subcommittee, of a number of alternatives including the same six-month windows that varied with the amount in controversy and also no windows, came up with what is now in

Rule 1, which says that there is a discovery period that begins when the action is commenced or filed and it ends 30 days prior to the first trial setting. The mere fact that a trial is moved does not reopen the window unless there's an order by the court or an agreement of the parties to do so. So we have not come back to the six-month period. This will give people a much longer period, but it still has the concept that discovery is not something that lives forever. It does have a finite beginning and a finite end.

Rule 2. Modification of Discovery Procedure and Limitations. This you've seen before. It is true to the vote of this Committee. There's nothing different here. The discovery procedure and limits can be modified by either agreement of the party or order of the court for good reason.

Rule No. 3 is new, and I call your attention to the following aspects of it. We talk about the forms of discovery and there are eight forms listed, of which only the first five we call "written discovery" because we use the term "written discovery" throughout

these rules to describe certain kinds of things.

For example, usually responses to written discovery need to be amended and supplemented. But responses to oral nonwritten discovery like depositions, for example, do not need to be amended and supplemented except in the case of an expert witness, so we define written discovery.

There's nothing new in the Scope of Discovery. I think it's pretty -- and Alex, you all will correct me if I'm wrong on anything. There's nothing new on the scope of discovery. Scope of discovery is the same as it's always been.

On the "Documents and Tangible Things," we, of course, as it currently is, made sure that it's defined broad enough to include electronic data of all kinds which we deal with in our request for production rules.

We make it clear on Page 4 of the rules at the top that if a person does not have physical possession, but has a superior right to compel the production from a third party, the person has possession, custody or

control. This is sometimes an argument that occurs: "I don't have the document. My lawyer has it, my agent has it or my wife has it." That's no longer, we try to make it clear, a reason not too engage in discovery insofar as that document.

We talk about persons with knowledge of relevant facts as being discoverable. No change there, except we do now require that the party who responds describing persons with knowledge give a brief statement of the identified person's connection with the case. We do not mean a treatise, we do not mean subject-matter substance of their anticipated testimony; we mean eyewitness, employee of defendant, inventor of invention, something fairly limited. But that would prevent you from giving the other side a list, a phonebook list of people with knowledge where it's impossible in that haystack to find the needles, and so that's why we have added that. We make it clear also that you should put on this list people who do not have -- people who have -- personal knowledge is not a requisite to being listed and disclosed.

Item number (e). I'm skipping over those of which I don't think there's any change from the existing law or at least that I know of. On (e) we clearly there, and I may be -- and some of these may be existing law but I just -- I'm not that familiar with existing law. Witness statements. We try to make it clear here that witness -- we have taken the position that witness statements, all witness statements, are discoverable. Even if a lawyer procured it, obtained the statement through an interview and got the witness to either sign it or adopt it, it is discoverable, unless it happens to be a statement from the client to the lawyer, which would be protected by the attorney-client privilege. But work product or communication of a party is no longer a good reason to refuse to turn over a witness statement.

Item No. 4. Exemptions and Privileges from Discovery. We have taken a major, I think, step forward here, as Alex explains in her letter and as it's explained in the notes. We have opted to really telescope what had previously been four privileges into two,

or four into three or something like that. I mean, basically we're talking now attorney work product is a privilege. That's covered by the Rules of Evidence.

PROFESSOR ALBRIGHT: No, it's not, Steve.

MR. SUSMAN: I mean, attorney-client communication is a privilege covered by the Rules of Evidence. Work product, we have adopted the federal rule. The feeling of the members of the subcommittee is that the federal rules work pretty good. There's a lot of case law out there; Texas' particular quirk with party communications and different kinds of work product. It's better to go with the federal rule, and that's what Rule 4(a) as currently drafted intends to be, the federal rule, so that there is work product. If it's ordinary work product, it's subject to being produced upon need. If it's opinion work product it should be protected. It's the federal rule.

PROFESSOR DORSANEO: But witness statements aren't work product as they would be under the federal rule?

MR. SUSMAN: A witness statement is not work product. That's what we've decided.

PROFESSOR DORSANEO: Then that's a Texas anomaly if you adopt the federal rule.

PROFESSOR ALBRIGHT: Well, that's because, Bill -- Alex Albright. That's because we have made a decision that witness statements should not be discoverable. But as far as work product --

MR. SUSMAN: Should be discoverable.

PROFESSOR ALBRIGHT: Should not be privileged.

As far as just privileges generally, we have decided that the federal work product rule is better than the current Texas rule of dividing attorney work product with party communication.

MR. SUSMAN: Okay.

PROFESSOR DORSANEO: Then we have to be very careful about how we define "witness statement" so we don't run into ourselves.

MR. SUSMAN: Yeah. I mean, we can always -- I think the concept is that if a client comes into your office and writes a statement to you, it's privileged under the attorney-client communication; but otherwise, if you go interview someone and they adopt it or sign it, you have to turn it over.

Okay. Response to Discovery Requests, Rule 5.

HONORABLE C. A. GUITTARD: Excuse me, Steve. Does the witness statement -- does that mean a written witness statement?

MR. SUSMAN: Yeah. It means -- it does mean a written witness statement, I think, because it's got to be something that's adopted.

PROFESSOR ALBRIGHT: Look on Page 5.

MR. SUSMAN: Yeah. "Witness statement," it's on the top of Page 5, "means a written statement signed or otherwise adopted," so it would have to be written.

MR. ORSINGER: No, no. A tape recording also.

MR. SUSMAN: Okay.

MR. PERRY: That's the definition that's in the present Rule 166.

MR. ORSINGER: If you don't include tape recording, you'll throw the rule off.

MR. SUSMAN: All right. Let's go to Rule 5(1), the duty to respond. We make it -- we have incorporated someone's idea from the last meeting in Paragraph 1, the last sentence, that if you provide the other side with a compter-readable disk they have an obligation to put the question before the answer on the interrogatories or document requests. But if you don't do it, then they can give you the answers without having to retype the questions. That gives everyone an incentive to provide a computer disk to the other side.

5(2). Duty to Supplement Discovery Responses. We, again, have remained true to what we understood to be approved here last time, a distinction between supplementing a response and amending a discovery response.

Supplementation is the duty that is

required when events subsequent to the time of a prior answer mean that the answer needs to be changed because it is no longer correct or complete.

If the event or the facts took place prior to the prior answer and the answer was incomplete or incorrect when it was made, it needs to be amended, even though the person who made the answer did not know the information. If he got the information later but if the information existed at the time, it's an amendment. Like who was the eyewitness to a collision. There are three eyewitnesses. You list three. You learn later that there was in fact a fourth. Your duty is to amend, not supplement, because the fourth witness existed at the time you made the earlier answer, you just learned about it later. And that's significant because amendment must be done when you learn that your prior answer was incomplete or incorrect, and supplementation is 60 days before any trial setting.

We have tried in this series of rules to incorporate -- and you'll see at the end of

(2), the last sentence or the next to last sentence of (2), we will try to deal with, and I'm not sure we've dealt with it perfectly, the notion that it's possible that in some places you will get a 45-day notice of a trial setting, and when you are given that kind of short notice of a trial setting, what does it do to your timetable. That's what that "15 days after the receipt of notice of any trial setting" is all about.

The duty to supplement and amend is a continuing one, we try to make clear, that continues beyond the end -- the close of a discovery period; and therefore, there is an opportunity for additional discovery after supplementation or amendment.

Keep in mind there is no duty to amend or supplement answers to oral discovery as opposed to written discovery. Keep in mind, furthermore, there is no duty to supplement or amend when the information has otherwise been made known to the opposing party in discovery or in writing.

I now turn to Rule 6. I'm not trying to railroad anything but just get you through the

overview very quickly and then we'll come back. Failure to Provide Discovery. And this should -- we probably should make -- there is an exception to this, but let me give you the general rule. The general rule now is that if you fail to timely disclose something you should have disclosed and the failure leaves the opposing party unprepared for trial such that there is a significant risk of erroneous fact finding if the trial proceeds, i.e., surprise, then the court, as is fair under the circumstances, either excludes the evidence or continues the trial.

We have, this is a major change, rejected the rule of -- the current rule of automatic exclusion of certain nondisclosed information in discovery. Why did we depart from the current rule? In the first place, we think it operates unjustly in many cases. In the second place, we think it is -- it does not -- if you're going to impose limits on discovery and make people do it in less time, you need to be a little more forgiving. When they forget to do something, they don't cross all t's and dot all i's, when they forget or

do not have time to overturn every stone, you're going to need to be a little more forgiving in those circumstances. And what we are really trying to do is cut down on discovery expense and yet avoid trial by ambush. And the only way to do that is to just make the courts determine is it trial by ambush or not. So the ultimate inquiry is, is there surprise. If there's surprise, the evidence stays out or you get a continuance. If there's not surprise, it comes in and no continuance.

Now, there are people who say that the bench should not -- that it's not a good rule because we shouldn't leave that kind of thing up to courts. I think the subcommittee felt that that's the kind of stuff that courts ought to do and that's the ultimate question, was someone surprised or not.

Notice that it turns not on the state of mind of the party who made the omission, not is it intentional, inadvertent, fraudulent or something like that. You may want sanctions to deal with that type of person. But rather, it's on the effect on the rendition of a fair

trial through a surprise or ambush, to avoid surprise or ambush.

Rule No. 7, another what we consider or I would consider substantial change, and these are rules that you did not see before. We have tried to order or put them in the logical order too, so they're all kind of ordered. Presentation of Privileges and Objections. This is Page 11 of what you have here. On the subject of privilege, we have now provided that the way you assert that something is privileged is not to make a prophylactic objection at the time you file some answer or response where people object now because they may have something privileged, they don't know whether they will, but they don't want to have to turn it over if they find it is; and instead, simply say the way you assert a privilege is to simply withhold what is privileged.

And when you withhold it, you notify the other side that "I am withholding something on the ground of the attorney-client or work product privilege." You give a statement of withholding, is the term I think we use. And

when you prepare such a statement that you have a withholding statement, you have to generally describe what it is you have withheld and state the privilege relied on.

PROFESSOR ALBRIGHT: Only if requested.

MR. SUSMAN: What's that?

PROFESSOR ALBRIGHT: Only if they request it.

MR. SUSMAN: Yes. Only -- I'm sorry, no. No, no. That's not right. I think you have to give -- if a party has withheld information other than that created by its trial counsel in preparing for the litigation, the responding party shall state in writing the information that had been withheld and specifically state the privilege relied upon.

PROFESSOR ALBRIGHT: But you don't have to describe what you have withheld.

MR. SUSMAN: That's the second part. Okay? So you don't have to say anything if you're withholding trial counsel materials, your own lawyer's file. That's not to be considered. You don't have to say

anything. But if you're holding something other than trial counsel's file on a ground of privilege, you have to generally say that you're withholding something and state the privilege, state what the privilege is.

Then the other party who wants to contest that, the last -- this is the last two sentences of Rule 7(1), is allowed to ask you to, on request, to identify what it is you have withheld and you must identify it with sufficient particularity to allow the requesting party to test the basis of the asserted privilege or exception.

So this is all new. No longer -- in fact, we make it clear that objections to discovery are not the appropriate way of preserving or asserting a privilege; a withhold statement is.

Objections, we've changed that too. This is Rule 7(2). "Objections shall only be made if a good faith factual and legal basis for the objection exists at the time the objection is made." And we made it clear in the comment no more of these prophylactic, anticipatory objections. Any ground obscured by numerous

unfounded objections is waived, so if you make a bunch of stupid objections, you will have been held -- can be held to have waived your good one.

The final concept in Rule 7(2), which I think is -- I don't know whether it's new, but we think it's important, is that if you object to something, that does not excuse your compliance with the part that would be reasonable. You have got to provide discovery to the extent it would be reasonable.

And the comment gives some examples. If you are asked to produce all documents relevant to your lawsuit, you need do nothing. That is a ridiculous, burdensome, broad request. On the other hand, if you were asked to produce all profit and loss information of Acme Brick Company from 1980 to 1994 and your position is that you shouldn't have to go back beyond 1989, that's your objection, you are obligated to produce '89 through '94 at the same time you object to producing '80 through '88. We try to make clear in the comment that an exception would be where it would be unduly burdensome to make

the search twice through your files.

The hearing. We have provided for a hearing on withholding statements or objections, and that it's the burden on the party -- any party may request a hearing on an objection or withholding statement, but the party seeking to avoid discovery shall -- bears the burden of proof by producing evidence, so that covers basically that rule.

Rule 8. Protective Orders. We have made it -- we think we have now made it clear, and probably we should insert in the second sentence of 8(1) "Any party may move for such an order only when" -- Alex, I think that word "only" needs to go in because I think that was our intention. "Any party may move for an order only when an objection is not appropriate." You object when you can object, but when the only way of avoiding discovery is through a protective order, then you follow the protective order procedure. That was our intention at least, I think.

We have inserted -- one of the ways -- one of the common problems which uses the protective order are depositions which are

noticed at an inconvenient time or inappropriate place. We have -- by the way, I think it was kind of our feeling that protective orders would encompass motions to quash. It's all the same thing as a protective order now. And our rule in depositions is if the movant had less than 10 days notice of the deposition, the filing of the motion itself excuses compliance with the notice or subpoena until the motion is overruled. So you'll see our deposition rule still goes to the reasonable notice. We've debated that issue. If we go to a particular number of days, no, that would be reasonable notice, but if it's under 10 days, the other side -- all they've got to do is file a motion for protective order and then they need not comply with your deposition notice or your subpoena. On the other hand, if they have more than 10 days notice, then the filing of a motion for protective order does not excuse compliance, unless they have also made a good faith effort to get the thing heard by the court. So if you've got more than 10 days, you not only have to file a motion for

protective order -- and you don't like the time and place of the deposition, you not only need to file a motion for protective order, you need to demonstrate some effort to get a court to hear it.

Our feeling was that there's some benefit achieved by having courts be under some pressure to hear these things. "Judge, I need to get a hearing on this because I filed a motion and the deposition is set for such and such date."

MR. LATTING: Calendar days.

MR. SUSMAN: Huh?

MR. LATTING: Calendar days.

MR. SUSMAN: Yeah. Okay. Then we turn to Specific Discovery Vehicles, which begins on Page 16. We have a form of -- we don't call it mandatory disclosure, we call it request for standard disclosure, because it's not mandatory. It is invoked by a request. You don't get this information unless you ask for it. And you can ask for it in the form of Rule 9(2), the Form of Request, and you simply use that language and you can get the information provided by 9(1). And that

information pretty much comes from the task force, and I think that's where we got most of it from. Witness statements, medical records, names of the parties, persons with knowledge of relevant facts, and we refer back to Rule 3, our Rule 3, to tell you what is discoverable. Okay. That's request for standard disclosure.

Rule 10. Expert Witnesses. This rule is not automatic. It only operates upon request. The notion is that you have to request the other side to designate experts and to disclose information concerning those experts. If you have made the request that they designate experts, then the plaintiff has 60 days before the end of the discovery period to designates its experts. The defendant then has 15 days after the plaintiff is supposed to designate to designate the defense experts. At time of designation, upon request, the designating party must provide the information listed in Rule 10(3). Again, it's request driven but the information is standard information. The identity of the experts, the background. This is all new, nothing like

this, I think -- I mean, you can get it under the current practice, but it's just not automatic. It's the general substance of the expert's mental impressions and opinions and a brief summary of the basis thereof. This is stuff that you've heard before, because you agreed on that language at our last meeting. Documents and tangible things; the dates for the expert to be deposed; and item (g) on Page 19 is the identity, background, et cetera, of consulting experts whose -- we call them "reviewed consulting experts" because their opinions or mental impressions were reviewed by the testifying experts.

We make it clear that a party may obtain further discovery only by oral deposition, unless the court orders a report. The court can order a report under Subdivision 5, Page 19, but need not do so. And if the court doesn't order a report, the only way further discovery gets experts is the deposition.

Expert depositions. We have the period of time when they are taken, 45 days following designation; we have where they are taken, in the county of suit; we have the number of

hours, six hours per expert; and we have the fact that for two of the experts designated by each side the six hours count in what we will get to, the 50-hour limit, and beyond that there are six additional hours provided for each expert.

Supplementation. Page 20. Insofar as an expert is concerned, we do not distinguish between supplementation and amendment, because both must be done when you learn additional information about -- when you learn additional information about the experts. You can't wait on an expert to supplement 60 days before the -- isn't supplementation normally 60 days before the end of the discovery period? Yes. And that's the supplementation on experts. I think that covers the expert rule.

Rule 11. Request for Production and Inspection of Documents. We have again revised this from our last meeting because we had some crazy -- two or three response times under our old version of this rule. You all didn't like it because it was confusing. Now there's one written response to request for

production of documents and it's due within 30 days, unless -- and we have a 50-day rule on all of these devices, interrogatories, for document requests which are served with citation or accompany service, but normally it's 30 days and there's a response.

And the information -- if you don't like when and where the other side asks you to produce the documents, you've got to say when and where you will produce it and you've got to in fact produce at the time either requested or at the time you say when and where you will produce.

Nothing new on Subdivision 4 on Page 22. It's pretty standard. I mean, it was in our rule that you saw the last time.

Subdivision 5, electronic or magnetic data, is pretty new. It was not in the old version. We knew we had to deal with it. We have dealt with it now. And basically it works like this: Any kind of electronic information on your hard disk, fingerprints on your hard disk, anything that some genius can get off your hard disk or your backup tapes or your computer is discoverable. It's all

discoverable. Plus you can't get it -- you don't just get it every time you ask someone to produce documents. You have to ask for it specifically. You have to explain what you want a person to do to get that electronic information so that they can understand they are being asked to hire an expert to go take the hard disks off all the laptops in your office and try to get off of them something relevant to this lawsuit, so that's the first notion. Nothing is off base, but you've got to make it clear to the responding party the extent to which you expect them to work.

And if you are asking for something that is not normally done in the ordinary course of business, then the requesting party pays for that. I don't -- I may have to turn over my hard disk to you and maybe have to get an expert to go through them, but you've got to pay for it. And that in laymen's language is basically what we did, I think, on that.

Okay. Interrogatories to parties, Rule 12. You've seen this by and large. They are 30 in number, no limitation of sets. That's all from our prior meetings. We have

made it clear that we -- again, the only real debatable part of this that we have come back to over and over again is the language that appears at the top of Page 25, which is another effort yet to put in English a concept that this group seemed to agree with the last time. "Contention interrogatories may only request another party to state the legal theories and to describe in general the factual bases for the claims and defenses of the other party. Contention interrogatories may not be used to require another party to marshall all of its available proof or proof it intends to offer at trial to answer the interrogatory."

Again, I think that concept was fairly agreed to in our last meeting and we have struggled mightily with this language virtually every time we go through a draft.

Rule No. 13. Request for Admissions. We have looked at the rule and decided we cannot improve it. If you want that vehicle as a discovery vehicle, which I thought that was indicated by your vote, we give it to you. And simply because you're looking at mainly a

blank page does not mean -- it will be there exactly as the current rule.

Depositions upon Oral Examination. Rule 14. Again, the concept of reasonable notice is included in 14(2). The time and place -- I think that pretty much there are not too many changes in this, I do not think, from current law.

Rule 15 is -- some of this was discussed last time; some was not. Rule 15(2), Time Limitation. Total deposition time. The group approved a concept of a total deposition limit last time, our notes reflect. The minutes -- the stenographic record reflects it, and -- but we have kind of -- there was considerable discussion and we have kind of loosened this up a little. So now the 50-hour limit only applies to the oral examination of witnesses under the opposing party's control. It does not apply to taking depositions of your own witnesses or of your own experts, which you would only usually do for the purpose of preserving testimony for presentation at trial. It does not apply to any third parties that are under the control of neither side,

the notion there being that they will probably be represented by their counsel. Neither side will want to offend them. It probably will not be done as a harassment vehicle, so we have exempted your own witnesses and third parties from the limitation.

We have, however, in 2(b) inserted what we understood to be the consensus of this group the last time. Certainly it was a consensus that we have such a limitation, I don't know whether we've captured the amount of time correctly, but we have limited the amount of time per witness.

Now, on fact witnesses save one witness -- one witness you can use your whole 50 hours if you want, so you've got one fact witness is unlimited, but all the other fact witnesses are three hours. Experts are six hours. And our reason for having one witness unlimited is usually in most cases our feeling is that there will be one witness who can really basically tell the whole story and that if you spend time deposing other people, you're just having them regurgitate what one witness has already said. So there will be a

real premium here on lawyers identifying the important witness on the other side and making that their unlimited examination witness and then getting to the meat of it with subsequent witnesses.

MS. SWEENEY: Steve?

MR. SUSMAN: Yeah.

MS. SWEENEY: Is that any witness can be designated as the one?

MR. SUSMAN: Yes, any witness.

MR. LOW: But that still comes within the 50 hours so you'd still better be careful.

MR. SUSMAN: Yeah.

MR. BABCOCK: That's your franchise player.

MR. SUSMAN: Conduct during the deposition, Subdivision 3 on Page 31. I think we now have -- just to refresh -- this is from your vote from the last time. I mean, we discussed this and I think it was pretty well approved. Private conferences between deponents and their attorney are improper during the deposition except for the purpose of determining whether a privilege should be

asserted. You can talk to your lawyer all you want or your client all you want at breaks.

Statements, objections and discussions conducted during the oral deposition that reflect upon the veracity of the testimony may, upon motion of the aggrieved party, be presented to the jury during trial.

Again, not everything that goes on in a deposition can be played to the jury, but if it reflects on the veracity of the testimony, yes, the court may, upon motion, allow that to be exhibited or played to the jury.

In lieu of a no-objection -- well, instructions not to answer are dealt with in No. 4, Subdivision 4, and they can be for four different purposes: to preserve a privilege against disclosure; to enforce a limitation on evidence as directed by the court; to protect a witness from an abusive question; or to make a motion under Paragraph 5 for the purpose of terminating a deposition. In those four instances you can instruct the witness not to answer; otherwise, you can't.

Paragraph 5 deals with when you may move to terminate or limit a deposition. We have

provided in both cases -- you'll recall in the last drafts we had some kind of automatic rules about if you -- I mean, I think we've given them to this group, that if you instructed a witness not to answer or adjourned a deposition to get a protective order, terminated a deposition, and you were found to have been wrong in doing so, either the adjournment counted against your time or didn't -- whatever it was, we have opted here, instead of to write some special sanctions, to leave this to the Sanction Committee of what they do with a lawyer who improperly terminates a deposition or a lawyer who improperly instructs a witness not to answer a question rather than write mechanical rules that penalize them for the clock, which is what we were thinking about doing.

Objections to testimony. There are only two that can be made, and they must be made in these terms: "Objection, form"; and "Objection, nonresponsive." Those are the only two objections that can be made. Anything else should result in hard time in jail.

MR. HUNT: Objection, leading; objection, form; objection, nonresponsive.

MR. SUSMAN: Huh?

MS. DUNCAN: Objection, leading.

MR. SUSMAN: I'm sorry, there's three. Leading, form and nonresponsive. Three. Objection, leading; objection, form; and objection, nonresponsive.

Okay. All of those rules are designed to make sure that your precious 50 hours per side, three hours per deponent, six hours for expert deponent are not frivolously frittered away by an opponent who wants to waste time.

Rule 16, which we did not discuss last time, deals with the subject that you all were discussing a little earlier of non-stenographic recordings. And basically our rule is that anyone who wants to take a deposition by whatever means they want can do so. The other side has the right to have it transcribed at their expense.

We have deposition by telephone, and we have now proposed that that can be done and that it may be -- that the officer taking the

deposition may be located with the deposing party instead of with the witness, so you don't have a court reporter -- you don't have to send a court reporter to Seattle; you can keep the court reporter in Austin and have the witness in Seattle if the witness' identity is substantiated.

Depositions Upon Written Questions, Rule 17, is the same as the current rule. We could not improve on that.

Rule 18, Physical and Mental Examinations, is the same as the current rule. We did not improve on that.

Rule 19. Motion for Entry Upon Property. We basically -- we didn't pay much attention to this other than to say, well, the task force has a rule, let's adopt it. It got absolutely no discussion, because I don't -- I mean, I've been practicing law for a long time and I've never done one of those, so I think it's a little-used discovery device. It's there. We just used the task force draft.

The Pretrial Conference Rules, 166. This is one of these kind of related rules. And basically, to tell you what we did I just

confirmed with Scott McCown, too, to make sure that my recollection was correct. This rule, while it seems to have less paragraphs than the current rule, was not in any way -- well, it does. It was not in any way intended to deprive the trial court of any authority he has under current practice. But we want to encourage trial judges to get active in supervising discovery, as active as they wish in pretrying their cases. And this was simply a case of Scott thinking it could be drafted more artfully and gracefully, and that's what he did. And I don't think there was any effort here to cut down on what the court could do. You know, I'm trying to be very clear that the court can change any of the limits that we have proposed.

The final rule change on Page 39 is Amendments and Responsive Pleadings. We have still imposed -- suggested the imposition of a deadline for amending pleadings without leave of the court to 60 days before the end of trial -- end of the discovery period. The feeling here was that people will object to limits on discovery if they are constantly

having to shoot at a moving target. If the target is required to put its feet in concrete before the discovery opportunities are precluded to the other side, people will find that more palatable. So that was the purpose of having a deadline on amending pleadings and it's there for your discussion.

So that gets you through an overview of the rules, Mr. Chairman, as we have done it. And now what I would propose we do is kind of go back in the order in which we've got it through these rules for any detailed discussion.

And really, I think the way to do it best, I mean, and I think -- I mean, certainly questions on drafting things, raise them and we will note them, and we're going to go back and do some more drafting and thinking here, and we certainly want them. But I think the main thing we need guidance from you on is are the concepts -- I mean, do you find them offensive so that we need to be instructed to go back and do something entirely different? Don't just go back and play around the edges.

Okay. I think the first big issue is the

discovery period. That, as you recall, got the 11-11 vote when it was six months. Is there anyone that -- I mean, I guess the question is, does anyone object to the rule as currently drafted?

CHAIRMAN SOULES: Any objection to Rule 1 on page -- well, Rule 1 as posed? It starts on the commencement of the action and ends 30 days before the first trial setting. Paul Sweeney.

MS. SWEENEY: What consideration did you all give -- if you want me to phrase this as an objection, I will, but I'm going to start it as a question. What consideration did you all give on this and a number of other rules to the fact that the parties in most instances have little or no control about when a case is first set for trial?

It's routine that in a lot of courts you file your lawsuit and sometime thereafter, it might be 10 days later or it might be right after the answers come in, just sort of whenever some clerk gets around to pushing the button on the computer to print it, you get a

trial setting. And it might be 90 days away.

And routinely now, you know, everybody just says, "Well, okay, we're not going to make that one," and you go about doing your business. But under this rule, if that happens, which it will continue to happen, you then will have roughly 30 days for your discovery period if the clerk hauls off and gives you an early setting.

And that also applies to a lot of these other rules where you've got a five-day period of -- yeah, designation of experts to be no later than five days after -- Page 18 -- five days after receipt of notice of the first trial setting.

And then you've also got it on Page 39 for amendment --

MR. SUSMAN: Paula.

MS. SWEENEY: -- five days after the receipt of notice of the first trial setting.

MR. SUSMAN: Paula, I think we -- as Alex's letter explains, we basically believe that at least when the parties request trial settings they will consider their

discovery needs. We hope that this rule -- there's no question this rule is going to have to -- all of these rules will change how we do business. And if we do business -- the notion is that the first trial setting should be something fairly realistic. And hopefully the courts will understand that by sending out a trial setting they are putting an end on the discovery period and hopefully courts will recognize that when they set cases for trial. We will end -- I mean, the notion is we end this automatic trial setting.

Now, if we've got to write a rule that says no longer can courts automatically set cases at ridiculously short times, we should write such a rule. But that's kind of the feeling. We had to pick something. We wanted to pick a date certain and that was -- yeah. Alex.

PROFESSOR ALBRIGHT: Another thing is I think when you get that first trial setting and you know and everybody agrees that you can't get discovery done and you're not going to go to trial the first trial setting, you can talk to the other party and maybe get

an agreement that you're not going to use that trial setting as your discovery cutoff and ask the court to reset the case. And then in a letter or some other motion or however you decide to do it, you say, "Judge, we cannot finish discovery at this time. We need a different trial date. We anticipate it will take a year to conduct discovery," or whatever.

I think Steve is right. The way you think about trial settings is going to have to change, but hopefully over time, over a short time would be the best way, judges and lawyers are going to have to think about first trial settings a little bit differently than they do now.

MS. SWEENEY: Well, let me just follow up on that, because you guys have both used the word "hopefully" four or five times, and I'm also hopeful. But to the extent that my clients are going to be bound by this rule and their rights are going to be affected by this rule, I think we need to have something besides hope. We have to have some protection that if a court or a clerk hauls off and slaps

a trial setting on us that nobody has asked for and nobody wants and you say you may hopefully be able to agree with the other party, well, you may also not be able to agree with the other party.

I want to have -- I agree, a trial setting should be meaningful. It's my goal to have a meaningful trial setting. That's what we all want, but we need to have something that we build into these rules that says, you know, maybe when a party or the parties can request a trial setting or something other than just being completely at the whim of the clerk.

PROFESSOR ALBRIGHT: Well, Paula, if you're put to trial on that first trial setting, that's the way the world is right now. If you're put to trial, you have up until that trial to conduct your discovery.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I know what Paula is talking about, because although I don't do business in Dallas unless I just can't avoid it, I have filed a case up there. And what happens is you get in the setting notice in a

very short time after the case -- excuse me, after the pleadings are filed. And nobody, but nobody, pretends that this is anything other than just something that happens.

You know, the first time I got one, I called the other lawyer and said, "Well, what about this trial setting?"

And he said, "Don't worry about that. It's not a real trial setting."

We called the clerk. The clerk said, "Don't worry about that. We sent it out, but it's not a real trial setting. The judge couldn't possibly get to your case at that time." And so I ignored it.

And then after that I got another one. I called them up. "Well, is this the real trial setting or is this another one of those?"

"Oh, no. We can't try your case. What are you talking about?"

You know, but these things kept coming out like leaves off a tree. And this went on until we finally got one that really meant something.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Steve, wasn't the

idea that a lot of times lawyers get a notice for setting and they think it's not real so they don't really start discovery? And it's a waste of time and money, so you need to have lawyers aware that they need to begin their discovery. Could you put something in there that in the event the case is set within 100 days or something like that, then the parties have a right to go to the court for a modified discovery schedule or a pretrial schedule or something, because it might include a number of motions, but wouldn't that take care of a short setting?

MR. SUSMAN: Buddy, they can go to the court to modify it for anything.

MR. LOW: They can do it anyway. I understand. But they seem to be concerned about the rule where you have it and they want some, quote, protection, I guess, within the same rule that gives them the problem.

MR. SUSMAN: Well, the problem is -- see, the problem is drafting. We're willing to do whatever we can, but we have a terrible problem drafting here. I mean --

HONORABLE F. SCOTT McCOWN: Let me just make a suggestion. Assume we can fix the trial setting problem, because we don't want to design a set of rules around the ridiculous practice of sui sponte trial settings that aren't real, so we can work on drafting a trial setting rule.

What we do want is a trial setting that people think means something. It may not be, obviously, cast in concrete, but we want a goal. We think discovery will work better if there is some kind of realistic goal that this is how long it ought to take to discover and get ready for trial, and then we want to hinge the discovery period on the trial setting.

So I think you all have identified an important thing we need to do, which is draft a trial setting rule that fits with our discovery period. But assuming we can do that, which I can think we can, does the discovery period work then?

CHAIRMAN SOULES: Paula has got a real problem. This is a problem that's going to affect a high percentage of cases in the State of Texas, because there's lots of

cases filed in Dallas County. The only way probably we can work through the rule is to assume that there will be some level of cooperation of local rule in Dallas County and other counties once they've passed. And if there's not, then those people are going to be in trouble, and just exactly how we approach that I don't know.

The Supreme Court has approved Dallas -- the Supreme Court has approved Dallas County's local rules not withstanding they're in direct contravention of some of the statewide rules that say you can't have that. It's ridiculous what's happening, but it's there.

MR. MARKS: Shouldn't we try to do rules that don't assume anything with respect to what district courts are going to do? Because they can do just about anything they want to do anyhow. I mean, it looks to me like we've tried to dress this up two or three different ways and it just doesn't dress up good. This discovery period thing just doesn't fit with what we do as lawyers.

CHAIRMAN SOULES: Don Hunt.

MR. HUNT: Why don't we marry

the two concepts here and change this language to read that the discovery period shall begin upon commencement of the action and shall continue for six months or until 30 days before the first setting for trial, whichever is later. Now, that won't solve the problem that Paula brings up of the clerk who set it and the judge who must hear it at day 45 after it's filed, but that's the problem that we have now, and we get out of that problem now by going to court and getting a motion heard and granted. But I don't know whether that would work or not.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: The problem you have is apparently there are some districts, I mean, I don't practice in them, where you can get cases tried, actually tried, in less than six months. Now, the question is, do we want to tell courts that are willing to set and try cases three months or two months after they are filed "No, don't do that"?

And that's what your rule would do. I mean, your rule -- we have been working -- see, I mean, we were told during our

deliberations that there are actual places that courts can and will try cases in less than six months after they're filed and we did not want to discourage that practice because we thought it was good. And your rule would definitely -- I mean, there would be a minimum waiting period which would be of statewide applicability on cases going to trial, which we thought would be bad.

CHAIRMAN SOULES: Well, you can set the case during the discovery period and try it. He's not saying that you can't set the case in 120 days even though you've got a 180-day discovery period. He's not saying the discovery period controls.

MR. MEADOWS: I thought he did.

CHAIRMAN SOULES: Didn't you say that, Don?

MR. SUSMAN: He's saying six months or 60 days prior to trial, whichever is later.

CHAIRMAN SOULES: Whichever is later. So the trial can come right in the middle of the discovery period, and probably the trial setting is going to control what

happens at that point. It's going to get tried instead of discovered.

MR. SUSMAN: Do you mean whichever is earlier?

MR. ORSINGER: No. He said later.

MR. HUNT: The period -- we're trying to define the time period in which one is permitted to have discovery unless and until the 400-pound gorilla says "Thou shall go to trial" much earlier, in which event you will go to trial much earlier. But we're trying to write a rule here that controls discovery and discovery abuses without regard to what a trial court might or might not do with respect to the trial setting. This would give all the trial lawyers an opportunity to take a shot at it.

MR. SUSMAN: Oh, I see. What you would be saying is to leave it 60 days prior to the first trial setting --

CHAIRMAN SOULES: We haven't talked about that --

MR. SUSMAN: -- as long as that first trial setting is more than six

months after the commencement of the action, is basically what you're saying?

MR. HUNT: Yeah.

MR. SUSMAN: We could do that. That would be no problem.

CHAIRMAN SOULES: Tommy Jacks. And then I'll come around.

MR. JACKS: Well, the problem I have with Don's suggestion is the same problem we talked about, and I'm not going to belabor our prior discussions, about having a window that may close, you know, a couple of years before the real trial setting, if I understood him right, which I'm not sure I did.

But the whole problem with Paula's problem stems from gearing everything to the first trial setting and the statement and the comment that discovery can't be resumed after the first trial setting. It would seem to me that in trying to adapt what we're drafting to what happens in the real world -- I mean, we can do what Scott McCown is suggesting and that is go back and write a trial setting rule to try to harness all of the district judges in the state. That strikes me as a man who is

trying to protect himself. Or I would suggest that you simply omit the word "first" both in the rule and the comment and delete the second sentence of the comment that states that discovery doesn't resume after the first trial setting.

I don't think it's realistic to think that you're really going to be able to change the behavior of all of these trial judges all over the State of Texas to accommodate the discovery rules. I think that's -- I think that's unrealistic. And I think trying to draft a rule that tells judges how to set their cases for trial is going to get you off into a whole lot of difficulty, as the Chair and I have experienced doing some litigation down in Harris County when you start trying to have statewide micromanagement of how an individual judge sets his or her cases for trial.

And I don't see that it's critical to the working of what you're trying to do to hinge everything to the first trial setting when much of the time that's not a realistic trial setting no matter what you do.

CHAIRMAN SOULES: Judge Till.

HONORABLE PAUL TILL: Well, the time that you have set here at least for one level of court is a realistic trial setting, and the 45-day delay now gets in the way of the justice court. And they complain about the fact that we have to delay them now. One of the attractions that I guess there is of many people trying to get into the justice court is because we are able to try the cases very quickly. So if you're talking about making it now that we've got to wait at least two months or six months, then that would be totally unacceptable.

Now, $5,000, I'm sure, is not a great deal of money to a lot of you ladies and gentlemen's clients. They are to the people that are in front me, and it's quite critical that they get their cases tried as quickly as they can. So whatever you want to do here, I would ask that you consider drafting out the justice courts under this time limitation. While we do have discovery and discovery has gotten to be more and more of what appears before me, it's generally limited to some

extent by the mere fact that there's only $5,000 in controversy between the parties because that tends to act somewhat as a check, but they can still have a considerable amount of discovery in there.

And it is not going to work to tell me that I'm going to have to wait and just twiddle my thumbs for six months or five months or four months or whatever when I can just as easily try the case in probably 40 or 45 days, and I mean an actual trial setting. It's not a make-believe setting like he's talking about. I mean that's for real. When we set it that date, that's when we go to trial; that's when we get it settled. You need to consider that in your operation or you're going to destroy a great deal of what that court is for.

CHAIRMAN SOULES: Next is Judge McCown, and we'll go up the table.

HONORABLE F. SCOTT McCOWN: I don't think it would be that hard to write a trial setting rule that would work with the discovery and which would improve the present situation. It seems to me you just write a

rule that says no automatic trial settings. You have to set -- if the court is going to set it, it has to be after consultation with the attorneys and it needs to be set with the thought in mind of when it can realistically be reached and how much time is needed for discovery.

We are trying to do something if not revolutionary, at least real reform in discovery. One of the ways that this proposal makes a fundamental change is to try to contain discovery in terms of how much time, how much chronological calendar time can be dedicated to it in an effort to control the amount and the cost.

So we are going to have to harness the judges both for settings and for the discovery. We are trying to say we need something fundamentally different, and what I fear is that if we don't figure out what that fundamental difference is, we're going to wind up with just some tinkering with the present system.

CHAIRMAN SOULES: Next coming this way. Okay. David Perry.

MR. PERRY: I think we out to get back to the point of what is intended to be accomplished here, and it may be that rewording is necessary to accomplish it. But the point of what is intended to be accomplished when we were writing the rule, the idea was that ordinarily the first trial setting -- we were assuming that the first trial setting would be a meaningful trial setting, and if we could focus on the concept for a minute, the concept was that if the first trial setting is a meaningful trial setting, that both sides ought to get their discovery done ordinarily 30 days out from that trial setting; that if that trial setting is continued for a reason other than more discovery has to be done, then the discovery ought to stop and everybody can just go off and forget about it until the case comes up for trial again.

Now, there are some provisions in the rules that if the case was to be continued, you would still have to supplement certain types of discovery later and discovery would be reopened in a limited fashion before the

second trial setting.

It seems to me that it would be helpful if we on the committee got some feedback as to whether that concept is a good idea or not. We took the concept off of comments that were made during the last committee meeting. If the concept is one that a lot of people support, then we need to go back and work on drafting to make that concept fit on paper. On the other hand, if it's not a concept that folks support, then we need to figure out what else to do.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Well, I practiced in Dallas for six years also. It was a long time ago, but one of the things that I remember we wasted a whole lot of time and effort and money on was getting ready for these unrealistic trial settings. At first you can ignore them, but then there's this middle time that you're not sure whether you can ignore them or not. So one of the things that we're trying to do is save time, effort and money. So I like Scott's idea that says

that courts can't have these automatic trial setting. You have to think about the trial settings and take certain things into consideration.

And I think another thing that that does is it does some of the things that the State Bar Committee has been talking about but in a much more simple manner, where you're just -- instead of saying let's have a whole discovery schedule set out, you're saying we're going to at least figure out a realistic trial setting and then discovery is timed from that point in time.

CHAIRMAN SOULES: Robert Meadows.

MR. MEADOWS: Well, it seems to me that Scott's idea about addressing how trial settings are made might be the answer, but I didn't really see how this rule created any different imposition on the parties than the current rules that are tied to trial settings, such as designating experts 30 days before trial. I mean, you have to deal with that some way when you get a trial setting.

MR. JACKS: It's because of the

word "first" and from the accompanying requirement that discovery cannot be reopened after that first trial setting. So what happens now is you've got a trial setting that means nothing but it now means everything, because -- even though it means nothing -- because of the word "first" and the no-reopening rule.

MS. SWEENEY: And would you all quit picking on Dallas. This doesn't only happen in Dallas.

CHAIRMAN SOULES: Buddy. Buddy Low has got the floor.

MR. LOW: And because just automatically the case is continued then you have the additional time. The court can't just cut you off. But you know, I thought also about we want a window for discovery; we won't go on forever.

And on the other end of the spectrum is in Beaumont. If you don't request a trial setting, the case will not be set for two years, so if the lawyers just don't request a trial setting, then you don't have a discovery window, so that presents another problem in

setting it -- focusing it on a trial setting. So we need some kind of window, and that's all I have to say. There is another end of the spectrum.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: It's clear to me from just listening to what people have said that whatever is devised needs to take into account trial setting and a discovery period in order not to artificially extend the trial dates.

The second thing, with respect to the meaningful character of the trial date, under this proposal and current practice in Dallas and other places, the only thing really meaningful about the trial date is that it's going to cut off discovery. And Judge McCown's point about eliminating automatic trial settings needs to take into account that under many local rules, if I request a trial setting, then it is automatic that it's set unrealistically and unmeaningfully at a particular point in time. So what you're really pointing toward is a limited type of

scheduling order to make the trial date meaningful. And I think that that is the answer, as I said at the last meeting, and is the only answer.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I generally like the idea of what the committee has come up with. And I think my understanding of cases in Houston, I don't have many, is that sometimes in some courts it might take two or three years to get a jury trial in Houston. Now, how many false settings before you get there I don't know. But there's another end on this, and that is so many days before the first trial setting might be a year and a half or a two-year time period in some communities and we would be going too long rather than too short.

And I don't know -- for those of you who practice in -- well, in some rural counties, for example, I've been told that I can only get a trial setting by the summer of the following year because the guy has got criminal dockets and everything else to

handle. Then we have a discovery window that's longer than probably we anticipated.

The other thing I'd say is that I do a lot of -- mostly family law trial work and they're mostly non-jury trials. And even a complicated divorce case you can probably get together and try within six months of when it's filed. If it's not complicated, you can probably do it within three or four months of when it's filed, and I would not really want to have a minimum discovery window that a trial judge cannot set the case inside that discovery window because I think that most family law cases are going to be tried and resolved within that discovery window. So you've got to realize that, well, they may represent half of the docket, but they may only represent maybe one fourth of what's tried and maybe only one tenth of what's tried to juries.

Let's not write a rule that ignores the fact that that bulk of the litigation is probably going to happen shorter than the minimum time period that the PI lawyers and the products lawyers want.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: You can really deal with Bill Dorsaneo's idea by this kind of rule: No case will be set for trial unless the court at the same time sets a discovery cutoff date. Resetting of a case for trial does not automatically extend the discovery period unless the court so orders. I mean, that would basically be your rule. The court cannot set a case for trial unless they also set a discovery cutoff date, period. So they've got to think about it. Okay? Or someone does. And once they do that --

MR. JACKS: Don't they already do that?

MR. SUSMAN: What?

CHAIRMAN SOULES: Steve, they do that in Dallas. They send out -- it's got a little checklist on there that shows its pleadings and discovery, I can't remember what they all are, but it just spits out of the computer and away it goes to the counsel of record. It's some period of time. It's not supposed to happen. It violates the rule, but the Supreme Court has approved their local

rules, so it doesn't violate the rules in the Supreme Court's view.

MR. SUSMAN: I don't understand. Then what will happen in those jurisdictions is when they send a second trial setting out, it's also going to have a new discovery date too, and Tommy Jacks' problem is solved. Okay? His problem is solved. I mean, the computer has done it all. They've turned it all over to a computer there and he's got to live with a computer, but it's solved his problem.

CHAIRMAN SOULES: I don't know about the second trial setting. I'd have to hear from Paula about that.

MR. SUSMAN: But I mean, what's wrong with that rule, that the court cannot set a trial without setting a discovery cutoff date; but the mere resetting of a trial does not automatically move discovery unless it's so ordered by the court?

MR. JACKS: Or the computer.

MR. SUSMAN: Or the computer or local rules. Okay.

MR. MARKS: What about the case

that's set for trial in 60 days after it's filed?

MR. SUSMAN: Well, then that court is going to have to set a discovery cutoff date. Okay?

MR. MARKS: So you've 20 days for discovery?

MR. SUSMAN: Well, theoretically, I mean, I guess then the court which moves the trial would have to move the discovery too.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: You may have covered this since I came in in the middle, but the comment says, "Unless the parties otherwise agree or the court so orders." I guess I'm just wondering if the parties can extend the discovery by agreement, is it going to just become common practice that people will say, "Well, let's set it for that time, and, you know, a month before we'll determine if we're really going to trial, and if not, we'll extend it," and that just becomes the common practice and you don't really have any

real cutoff. If it can be by agreement of the parties, is that a real concern or am I missing something?

CHAIRMAN SOULES: Do you want to respond, John Marks?

MR. YELENOSKY: That's the only thing I'm saying.

MR. MARKS: That's a concern to me here, which is are we fashioning a rule that will seldom be used and we find a hundred different ways to work around it so it's not used, so therefore, it's largely impractical.

CHAIRMAN SOULES: If we have constraints on discovery, particularly depositions, then we really need the window.

MR. SUSMAN: Well, why don't we have -- I mean, it seems to me that's something we ought to vote on. I mean, that was one of the options, is no limitation. That's what Mr. Jacks, Tommy, is proposing, as I understand it. No limitations at all. You discover up to, I mean, the eve of the actual trial. Right?

MR. JACKS: I'm really not. I mean, I could go with something like Scott is

talking about, except that it is -- I do think we're underestimating the difficulty of changing the practice and behavior of the district courts throughout the state in trying by statewide rule to manage their dockets.

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: From my experience on the district court, unfortunately in Dallas, this is really a mathematical problem. You have 11 or 1200 cases on your docket. You're going to be in a trial 50 weeks out of a year if you work yourself crazy. You can divide 50 into however many cases you've got, and that comes out to so many cases a week. If you don't set that number of cases every week, you're not going to set the cases that are pending for trial in less than a year. If you want to do it in 18 months, divide that out. If you want to do it in three years, you divide that out, whatever the number comes out to.

And when I was there, I tried to set everything within a year, which meant that you had to set 22 cases a week. Well, the reason

that a trial setting is, quote, unmeaningful, as we're using the word here, is that there is no way to tell until a few days before a trial when discovery has been completed and the lawyers have started thinking about trying the case and maybe settling it, and this was before mediation, but you've gone -- nowadays you've gone to mediation, and all of that has happened, and it's impossible to tell which and how many of those 22 cases are going to go to trial.

Now, you can say after the case is filed, the lawyers can come in in all sincerity and say, "Judge, we've worked this all out. We're going to do all this discovery and we are going to be ready for trial and we think the trial is going to take two weeks and we'll be ready for it on such and such a day." But if the week before that I get into a three-week trial, there's nothing I can do about that. I mean, there's no way that case is going to be reached, even though everybody thought they could be done then and perhaps they actually were ready at that point.

So unless there's some kind of cutoff in

advance of the trial setting, you're not going to get meaningful trial settings because you're not going to know, when you look at the list of cases that are set that day or that week, which of those cases are really serious, which of the cases the week before are serious, which ones are going to go to trial and which ones aren't.

In some respects you can't get a meaningful trial setting unless you can look after all or most of the discovery has been done to see which of these cases are really going to go and which of them are not.

CHAIRMAN SOULES: Harriet Miers.

MS. MIERS: Well, I'm going to throw out something else. I understand that these are a small number of the cases, but when you have a complex business case, maybe it's to one side's advantage to have a short discovery schedule, maybe it's to the other side's, but generally speaking, the concept that you're going to do in a $100 million case all your discovery in six months depending upon the complexities of the issues is

unrealistic if you're handling more than one case.

And so another concern I have is that although it does involve a small sector of the docket, it kind of translates into Paula's comment in that when you have to depend on a default situation, you're really depending on whether the judge is impartial and fair. And sometimes that's not always the circumstances for one side of the docket or the other. And so for those kinds of cases, I am concerned that this is unrealistic.

CHAIRMAN SOULES: Unrealistic in terms of being too short?

MS. MIERS: Right. The discovery period. I mean, unless you just want to have $100 million cases decided --

MR. SUSMAN: Where would you put it? I mean, would you agree that discovery has got to end sometime?

MS. MIERS: Yeah.

MR. SUSMAN: Where? Let's get constructive, folks. Tell us where you want it to end.

MS. MIERS: Well --

MR. SUSMAN: Because we can write the rules in whatever way you want. Okay? I mean, but people say -- give me a date. Do you want a year? 18 months?

MR. MARKS: Do we have to have a date?

MR. SUSMAN: Huh?

MR. MARKS: Do we have to have one?

MR. SUSMAN: See, I mean, you've got two possibilities. One is you just say you can go right up to the time of trial, whenever that is. Okay? I think that's a question they ought to vote on. If everyone wants to go right up to the time of trial, whenever that is, we can write the rules that way. Fine. If people think that there ought to be some limit, some time shorter than that, then we need to talk about when.

So I think we can call the question "how many here are in favor of going right up to the time of the trial?" and take a vote and put that behind us.

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: I think that's right. I mean, I do think that we need to figure out if there should be one and when it should be.

But following up on what Bill said a minute ago, there really are at least three kinds of cases, maybe more than that, that we're trying to deal with here in one pile.

One kind of case, which we have the most of, which we don't have any problem with, they may get to trial in 60 days, 90 days, they may go non-jury, they may settle, they're not going to take much discovery and they're going to drop out of the system. This is not a big part of our problem. And maybe we should have -- maybe the rules should provide some fairly short cutoff period for those kinds of cases. The trigger would be if the lawyers don't say anything, this is your discovery order, this is your scheduling order. You can do this much, you've got to be done by then, and the case will be set for trial.

Then if the parties want to agree to something, they can be on sort of a second tier. Within certain limits at least you

could agree that your discovery cutoff period would be here, and the rules would provide that it had to be a certain amount in advance of trial to make the trial setting more meaningful and give you time to settle or mediate or whatever you're going to do.

And then the third category is kind of the cases where all bets are off and the lawyers are just going to have to work at it over time and the judge is going to have to be in on the discussions.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: We have a system like that in federal court. The case is automatically filed and you're under Track 1, 2, 3, 4 or 5, and each one has their own track. First I'm going to tell you nobody likes it very much, so maybe it's pretty good because the lawyers don't like it very much.

But secondly, everybody then moves to modify the track to get to be -- no matter what kind of case, and the judge can't know that, what kind of case. You know, "Well, Judge, it's just a little products case but we've got all these complicating factors," so

they'll want it in Track 5, which gives them certain unlimited -- so the problem is putting your cases into that would be -- what you're talking about would be ideal, but the problem is letting the lawyers select the track. That's all.

CHAIRMAN SOULES: One of the problems we've got in this trial setting thing is that our judges at the state court level don't use docket calls. What they really use is trial settings. They call it a trial setting, but it's really a docket call. If they wouldn't set the case for trial, if they set it for docket call for a status conference and then not get the case set for trial until there's some realistic trial date, then all of these rules would work as written by Steve.

There would be a few things maybe, maybe a few things, that would have to be maneuvered around a little bit, but these unrealistic trial settings -- the judge doesn't know whether he's going to have a trial. Why doesn't he just have an unrealistic docket call or status conference and get them in and talk to them and find out at that point in

time whether the case ought to be set.

JUSTICE HECHT: Because here is what they say: We're working on it. Leave us alone. We'll let you know.

CHAIRMAN SOULES: David Perry.

MR. PERRY: What if we did something along this line, kind of picking up where Justice Hecht was. What if we say that the discovery period shall continue until 30 days before the first setting for trial unless -- and have an opt-out provision where if any party does something, and that something may be a request for a scheduling order or it might be something else, but if the party does that, then in effect you have opted out of this particular cutoff date and you would go over onto, say, a scheduling order track. And then with the scheduling order, then you would provide that the discovery cutoff would be 30 days before whatever trial was set by a scheduling order.

Now, where I come from, when we have scheduling orders, we all talk about it. Now, maybe that's not the same way in Dallas County and maybe we would have to work on it, but --

MR. JACKS: Yeah. After about the third trial setting.

MR. PERRY: Maybe we would have to work on the language to make it fit, but something where we would have an initial provision and then if anybody wanted out of it, you can opt out; but if you opt out, you don't go into outer space, you go into some particular place.

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: We started out with a discovery period that was measured from the time the suit was filed, the defendant answered, or something at the start. That's a valid idea with respect to cases where there's not going to be much discovery, which is probably 80 percent of our cases. So you could have a provision that if a case is filed and the parties do not opt to agree or ask for a scheduling order, this is your order. The rules provide it. The good thing about that is you don't get a different one from different computers. You would have the same one statewide. This is going to be your

order. You have to join parties by a certain date, amend pleadings by a certain date; you can only conduct this much discovery, very limited, and you have to be through with it within a certain amount of time, and that's your order.

If you don't like that, if either side doesn't want that to be their schedule, then they can try to agree on a scheduling order within certain parameters, which say, well, the most you can do is this much; the most amount of time it can take is this much. You set a reasonable date for trial. You can't have discovery within X days of the trial, whatever. I mean, we can work out the parameters of that. If they want to agree to less than that, then they can do that too. If they say, "Oh, no. We can be ready in a whole lot less time than this, but we do have to take more depositions than the standard scheduling order allows us, so we want to select this agreement," it doesn't bother the trial judge. He doesn't have to get involved in it. The order just comes in and that becomes the order for the case.

If you don't -- if either you can't agree or you don't like the parameters, then you're in essence what the federal judges call Track No. 5. I mean, that's going to have to be a structured case. You're going to have to come see the judge, you're going to have to tell him what the problems are, you're going to have to work out disagreements, you're going to have to fashion some kind of order that's going to govern the trial of the case. Maybe in that case it's not realistic to go as close as 60 days to trial; maybe you need 90; maybe it's better to go with 30. But the lawyers and the judge can work that out.

Now, the good thing about that is it doesn't involve a lot of judicial time; it does involve some. It gives you a period that may vary from level to level. It at least provides some disincentive to continue discovery endlessly.

MR. SUSMAN: We could -- supposing we went back to the idea, for example, of just saying that the discovery period is six months from commencement, except if any party objects, in which case discovery

shall end when the court says it shall end.

JUSTICE HECHT: Or they can agree.

MR. SUSMAN: Well, they can always agree.

JUSTICE HECHT: Within a certain amount of time.

MR. SUSMAN: Well, they can always agree.

JUSTICE HECHT: But they can't agree to five years. I mean, they've got to agree to less than two years or less than one. I mean, the rule would have to set some parameter that you get four months, six months or whatever it should be from this unless somebody objects. If somebody objects --

MR. SUSMAN: -- they get a scheduling order.

JUSTICE HECHT: -- then they -- they can agree to a scheduling order within these parameters. If they can't agree or they don't like the parameters, they've got to go see the judge.

MR. SUSMAN: But why wouldn't you let them agree to anything they -- under

the current -- we have always presented a rule that allows you to agree to anything. Okay? If two parties want to agree that discovery will go on for a decade, under every version that we've ever come in with they can do it. Similarly, if they want to agree it will end in a month, under every version we've come in with they can do it.

The real question is, you know, and I think that's fine, but could we get support for that, for the idea, for example, that discovery will end in six months from the date of commencement unless any party objects, in which case an entry of a scheduling order setting an end of discovery becomes mandatory? Within so many days from the time of that objection, the court shall enter an order setting a deadline on the discovery, setting a date for the end of discovery, period.

JUSTICE HECHT: Now, I think of the 500,000 cases that are filed --

MR. SUSMAN: Would that be agreeable?

CHAIRMAN SOULES: Justice Hecht

has the floor.

JUSTICE HECHT: Of the 500,000 cases that are filed and pending at any time in the year, about 400,000 of them would fall in that category; that is, nobody will object and they'll have a limit and they'll know what their limit is and they'll proceed along to get it disposed of.

About 70 or 80,000 cases will fall into the second category, where people can agree, will probably agree without too much problem, and again there will be some meaningful limit on it.

And then there will be a handful of cases at the other end that have just got to be custom designed, custom treated.

CHAIRMAN SOULES: John Marks.

MR. MARKS: In your second category are you thinking that the lawyers, within certain parameters, would be able to agree on when discovery is cut off, when experts are designated, when the depositions are taken and that sort of thing, but give drop-dead dates?

JUSTICE HECHT: Yes.

MR. MARKS: So they couldn't go beyond this, but within that time period they could agree?

JUSTICE HECHT: Yes.

MR. MARKS: And then the third category would be kind of no holds barred. You go to the judge, you have him fashion everything from scratch, that sort of thing, which would also ultimately be probably by agreement plus a little arm twisting from the court?

JUSTICE HECHT: Right. Which takes care of the case where one side says, "No problem. I think we can finish with discovery in two weeks."

And the other side says, "Well, I mean, that's fine for you, but you've got all the information. It's going to take me nine months to drag it out of you."

And where they can't agree, then they can go tell the judge and get it worked out.

MS. SWEENEY: That works.

CHAIRMAN SOULES: Buddy Low, and then I'll go around the table.

MR. LOW: In keeping with what

Justice Hecht is saying, I think there still has got be -- what we're really trying to do is we've left discovery up to the lawyers. That's what's happened and that's what the problem is. So if we leave it unlimited, we still have to cut down. So if we left the lawyers to just say, "Okay. We'll go on until 1999," I mean lawyers -- we lawyers have created the discovery costs, and so it can't be left totally up to us. We have to have some limit even on those bigger cases.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT McCOWN: I think that Judge Hecht and Steve didn't quite communicate on this difference between the three categories and the two categories, and so I wanted to ask if this was what Judge Hecht was thinking and how he would respond to this problem:

You have a default rule that says that you file your case and this is the order you get unless you don't want it. If you don't want it, then you can agree or you can come see the judge. That's what Steve is saying.

What you're saying is you file the case,

this is the order you get unless you don't want it, and if you don't want it, you can agree within these parameters. And I think the reason you're putting in parameters, what I'm supposing is the reason you want the parameters, is so you've got judicial control so that the judicial interest in superintendenting and moving the cases -- which the parties don't understand; in fact, a lot of lawyers here wouldn't even believe it exists -- the judicial interest in moving the cases is vindicated.

But the problem, I think, with that is that I don't think you can write parameters that really catch that; that if you've got two lawyers and they want to agree to something and it's outside the parameters, that's not going to be the kind of case you want to superintend; and that you're not going to be able to write parameters that really catch up the negligent or incompetent lawyers, so I'm wondering if we really need the three steps or if the two steps does it.

MR. SUSMAN: Justice Hecht.

JUSTICE HECHT: And in

response, I think the basic parameters that we've been working on in the subcommittee for the total length depositions can take, the total length of each deposition, the whole limitation on how much discovery can be deducted really basically fit that second group. I mean, we're talking about in all of that discussion what defualts will basically cover most of the cases where there's going to be a significant amount of discovery conduct, which is, as I see it, that second tier.

If you don't -- I agree with you. If you don't have some parameters, if you just let the lawyers agree to anything, then there are public and judicial interests in the functioning of the justice system that are not protected by that procedure.

But certainly this would give most people, and a lot of lawyers, an incentive to agree within these parameters to prepare their case this way. I mean, for one thing, it's in the rules. I mean, it's done; it's easy to agree to, and I mean, it will cut down, it seems to me, a lot of disputes.

But if they're in the third category, if

you want to exceed this for some reasonable reason and the lawyers agree to it, while that's not a controversy that the judge needs to resolve, it's pretty easy to get that exception approved. I mean, if two lawyers come to the judge and say, "Judge, we can agree to finish in this amount of time, we can agree to join parties by this date, we agree to everything that's in the parameters in the rule; however, we've listed the depositions we want to take, and he wants to take two more than what the rules allow and I want to take four more. We've agreed that that's okay and we want you to approve it," it doesn't seem to me that that's a problem.

But for the parties who come in and say, "We want to depose the whole world and it's going to take forever," it seems to me that the judge needs to know about it. For one thing, he needs to know that that case is out there and that it's likely to need his attention over time. When you've got 1200 cases on the docket, you don't know that those cases exist until they come screaming out in a motion for sanctions and you begin to realize

that this is a problem case.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: So, Judge, what you're saying then is what we need to do in the subcommittee is then develop a different set of parameters for the small case, the two months of discovery and 10 hours of depositions or something like that that will kind of -- the 90 percent of the cases that are the small cases that have very little discovery. So what we need to do is develop a low default so that we have cases where you can -- from what we have developed, you say, "If you can agree within these parameters, you can use these parameters. And if you want to go over, then you have to have court approval." I think that makes a whole lot of sense.

JUSTICE HECHT: Well, the Rand Corporation -- people throw these numbers around, but the basic number that they use around the country is that 80 percent of the cases do not have discovery problems. They are uncontested divorces. That's about

40 percent of our docket in the state, is uncontested divorces. Then we've got suits on notes and guarantees and sworn accounts and defaults where the defendant never appears or somebody is in bankruptcy and this whole raft of cases. And then you include in that group simple car wreck cases where they're not going to depose but two or three people, and then they're ready to get the case disposed of.

And those -- it seems to me that those limits could be pretty tight. And the advantage there is by making them tight you tell the judge, too, that this case is either going to be easy to try, when you see it on your list of 22 cases or however many you've got on your weekly list, you know, or that this is either going to be a short trial or it's going to settle, and so they're pretty easy to deal with.

The second group is what most -- I mean, what we've been talking about mostly for the last several meetings and what the subcommittee has focused on. And I think the parameters that you all have worked out basically fit that second group of cases where

most of the cases that are serious as opposed to the not-so-serious cases are going to fall into.

And then you've got your mammoth cases out here that just fall outside all of the limits.

PROFESSOR ALBRIGHT: What I think makes a lot of sense about this is that we have been talking about trying to figure out a track, and I think the only way we've been trying to do it is by amount in controversy, which does not work at all, and so I think this gives us a different way to track cases.

MR. SUSMAN: I don't understand what you mean. I have no idea what you're talking about. What do you mean? Tracking what?

PROFESSOR ALBRIGHT: We had an alternative that you had thought of where we tried to have different discovery periods based upon the amount in controversy, where if the plaintiff pleads damages of X dollars, then they have this much discovery; more dollars, then another amount of discovery.

And I don't think that works. I never felt like that was a workable solution; where I think this tracks cases on a different basis than amount in controversy.

MR. SUSMAN: What is his track? Could you explain to me what his track is?

PROFESSOR ALBRIGHT: His track is that you have your -- if the parties do nothing, then they get whatever we as a group decide is the small amount of discovery, two months of discovery, 10 hours of depositions, 15 interrogatories. I'm dreaming these up out of thin air.

If a party objects to that track, then the parties can agree to an amount of discovery that is within our limits that we in the subcommittee have been talking about, which is six months of discovery, 50 hours of depositions, 30 interrogatories.

Then if you can't agree to that amount and you want more than that -- well, I guess if you can't agree within those parameters, you have to go to the judge and you say, "Judge, we can't agree. You're going to have

to help us out within these parameters." Well, I guess the judge decides whether it's within these parameters or wherever. Then if you -- even if you can agree that you want more discovery than the six months and 50 hours, then you still have to get court approval of that agreement before it can be effective. Is that -- am I stating it correctly?

MR. SUSMAN: I think --

CHAIRMAN SOULES: Harriet. Harriet Miers.

MS. MIERS: Well, actually some of that was sort of responsive to what I was thinking, because what -- I understand Steve's frustration. And running through my mind was that amount in controversy is one indication of the complexity of a case and can predict the need for more discovery, and it wasn't a perfect solution so I couldn't fully embrace it, but that is one consideration. It does seem like it's hard to imagine that most -- that even the complex cases can't be done in a year, if you just want to pick something out of the air, for -- it would make

me feel more comfortable if there was a tiering of some sort that would provide a minimum for cases that are bet-the-company cases, which we do see.

PROFESSOR ALBRIGHT: A minimum or a maximum?

MS. MIERS: A minimum that a suit involving a certan amount in controversy or some other measure would take.

CHAIRMAN SOULES: Bill Dorsaneo, and then I'll go around the table this way.

PROFESSOR DORSANEO: The only small point I wanted to make is that if you let the lawyers opt out of the system by agreeing to do whatever they like, you will not have a system. You will have everybody doing that. So that is not permissible as an option. It has to be that you're going to be in Track 1 or you get into something that's essentially a track but you could agree within that track to some adjustments or you need to go to the judge and that's it.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: Why couldn't we provide for a relatively short period of discovery for the big majority of cases, and then provide that if either party thinks they need more time than that, they will request a scheduling conference. And then from then on it's governed by what the judge provides tailor-made to this case and it's scheduled in conference rather than by the general rule.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I think that we're making a mistake by failing to differentiate the window of discovery from the quantity of discovery. Under the tracks that you guys just described, I would try to get most of my cases tried within six months, but I would opt out of the low schedule in every single case, because I can't handle a decent custody case or divorce case with five depositions or 10 hours of deposition time, but I could get the damn thing tried in six months. Some of us are talking about window and some of us are talking about quantity.

What I would like to see for family law cases is a shorter window but not a reduced quantity. In other words, we might reasonably expect a divorce case or a custody case to get tried in six months but use all the way up to 50 hours of deposition time. And I think it's a mistake to say that the cases we want to move through quickly also need to be moved through with only three depositions per side and with very little request for production. I think we ought to consider severing them. And if your rule becomes implemented that you are stuck in the track that you're in, then every single family law case is going to require a hearing in front of the judge because only the ones that are no-asset cases can be done under a truly restrictive discovery limitation like the one that Alex mentioned, like 10 hours of total deposition time per side or three depostions or something. So I think we ought to differentiate the two. We don't want a divorce case a year and a half long, but we don't want it limited to three depositions per side either.

CHAIRMAN SOULES: I'd like to set aside and just park the idea of less discovery than the minimums that Steve has got in the current draft. The small cases are going to tend to not use all their discovery anyway. They don't have the financial resources to use all those depositions maybe, so that kind of takes care of itself. Let's just talk about discovery windows, how long.

For the 80 percent maybe it ought to be 90 days after the last answer is filed. Then that gets you to trial in four months if you want to try your divorce case in four months. And if you need more time maybe -- at what point you opt out I don't know. Then the opt-out is to go to some different schedule, and then if you opt out and want more, you've got to go to the judge and get more time.

Steve Susman.

MR. SUSMAN: Well, let me just --

CHAIRMAN SOULES: And we're just talking about Rule 1. We're just talking about how long.

MR. SUSMAN: I understand

that.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: But one possibility, one thing we could do is skip over it right now. I mean, that's basically what the -- what we in the subcommittee did was we came up with these five different alternatives on discovery period and ultimately concluded, you know, that's not really the important thing.

The important thing is not how much time people absolutely have to screw around with each other and abuse the process; the important thing is the limits on the particular vehicles. That is the important thing, the number of depositions, the number of interrogatories, and that, you know -- okay. Suppose you give them a decade to have discovery but they've only got 50 hours of depositions. Now, there's going to be some inefficiency of putting down the file and picking up the file instead of working it on a concentrated basis. But it was much more important to us as a subcommittee to focus the limits on vehicles, because that's where the

real saving is, than to get in a big war on this length of discovery period.

I just -- I mean, it might make some sense to come back to that towards the end, because we can write these -- I mean, again, these rules will accomplish a lot if you have no discovery period or if you have a year one. I mean, it doesn't make -- the important things are the limitations on the vehicles. Those are the important things, not the length of the discovery period.

And I don't want to see us get all hung up on this discovery period debate, and particularly, I don't want to see us slop this debate over to the debate on how many depositions Richard needs for his cases, because that's -- we'll have that debate when we get there. Those are the important limitations, not the whole period. And one thing we could do is just go on to the second rule and come back to the discovery period.

CHAIRMAN SOULES: Well, maybe I'm sensing the Committee wrong, but it seems to me like we're getting to a point where we can maybe get some rough guidelines on Rule 1.

MR. SUSMAN: Great.

CHAIRMAN SOULES: And we know we've got to deal somehow with the trial setting problem, so -- and we're not going to do that now on Rule 1. We're going to assume that we can somehow deal with that, and we will have to deal with it.

Passing that, it seems to me, I'm hearing the general consensus that we would have a short window for the 80 percent of the cases. It has to be short enough to accommodate quick trials in family law cases, probably 90 days. I don't know what the number is, but short.

And then after that, an area by which parties by -- one party can opt out and that takes the case out and puts it under some other window.

MR. SUSMAN: Why even -- well, as Bill says, everyone will opt out. We're not dealing with -- if the small cases that Justice Hecht talks about are not creating a problem today, then you've accomplished nothing by --

MR. PERRY: We're not saying the same thing.

MR. SUSMAN: Maybe I'm missing somebody. If you set up a regime where -- if the problem is 20 percent of the cases, you can bet your booties that 20 percent will opt out.

CHAIRMAN SOULES: That's right.

MR. SUSMAN: So you've done nothing to deal with that problem. You've just dealt with the 80 percent which aren't a problem anyway. I don't understand.

CHAIRMAN SOULES: Well, the reason is that we're trying to set a discovery window for 100 percent of the cases. Some are broken into some sorts of categories. Or do we just say 80 percent of the cases don't matter so we're not going to write a rule for those? 80 percent of the cases are not a problem, they don't have to have any discovery rules, so Rule 1 is 80 percent of the cases don't have any rules. Or do we write a rule for those 80 percent of the cases? That's what Category 1 is, is something for the 80 percent.

PROFESSOR DORSANEO: So that you find out what the 20 percent are and then

you can deal with them.

CHAIRMAN SOULES: And then the 20 percents opt out. They all go into the longer period, whatever that is. And then if some others want to go still longer, they've got to get leave of the court.

Now, isn't that what we've been talking about generally? David Perry.

MR. PERRY: Luke, I think if you look at what we've got here and bring our focus back, what we've got -- we all agree on some concepts. We all agree that small cases ought to have shorter windows. We all agree that big cases out to have longer windows. We all agree that the window out to end about 30 days before the case is supposed to go to trial.

Now, if we take the language that is before you and give any party the option to opt in to a scheduling order, not to opt out, but to opt in to a scheduling order, these rules here will work for probably 90 percent of the cases. The 20 percent that are going to go to trial fairly -- the 80 percent that go to trial fairly quickly, this will work

fine for them. Those that are filed in somewhere that's not Dallas where the first trial setting is a meaningful trial setting or maybe somewhere like --

MR. MARKS: Where would that be, Dave?

MR. PERRY: -- if they're filed somewhere, like where I come from, where the first trial setting is expected to be a meaningful trial setting --

PROFESSOR DORSANEO: That's an unusual place.

MR. PERRY: -- these rules will work. If they're filed somewhere else to where the first trial setting is not meaningful, if you don't like it, go ask for a scheduling order and that automatically gets you face-to-face with the problem. It looks like to me like that sort of a program may be about as close as we can come to a rule that covers everything.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT McCOWN: Let me make an important observation about this 80 percent, and I think it ties in with what

David just said. We do not know in advance what the 80 percent is. The lawyers don't even know in advance if their case is an 80 percent case. And if you tie the discovery window to the front end, you may have the unintended consequence of increasing discovery rather than decreasing discovery.

I have a divorce that walks into my office. I file it. I represent mom. Stereotypical. I assume this isn't going to be a custody dispute. I don't know. Dad files his answer. I still don't know if it's going to be a custody dispute. But if I have to do discovery within a short period, then I am going to be forced to do discovery that over the passage of time, if I didn't have to do discovery, would fall by the wayside.

So there's no real good way right at the get-go to know if you're in the 80 percent or not. And if the rule requires short discovery, then you're going to offensively or defensively, whichever it is, take steps to do discovery that you otherwise wouldn't have done. So I think that's a real problem and that's why I like David's suggestions of an

opt-in rule rather than an opt-out rule.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I'd like to focus on the second category, the 20 percent, and I'm not sure I understand exactly where Judge Hecht is going with it. What I would like to see is, you know, not 50 hours of that and all that sort of thing, but something where the lawyers have some discretion in what they do within a general time period so that they can do their own structuring and their own architecture within that time period and not be micromanaged by some specific rule, and that's what I would like to see with the second category.

CHAIRMAN SOULES: Well, you're ready to do what Steve said; that's leave Rule 1, which is the window, and go to what's going to be done, I gather, and so --

MS. SWEENEY: Do you mean leave it as in table it or leave it as in take it?

CHAIRMAN SOULES: No, just pass it for now and come back to it, I guess. I thought we were closer to the three categories and we could go on, but apparently we're

really not there.

MR. HUNT: Well, we haven't voted on it. We may be.

CHAIRMAN SOULES: As I understand the three categories that are being described, first is the 80 percent. They would have, this is not in concrete, 90 days. They could opt out anytime in the 90 days. Okay? But if they want to stay in, they can get to trial in a divorce case in four months after the answer is filed. That's No. 1.

No. 2 is the next 15 percent, which is the cases that would have -- and again, we've got trial settings are a problem that we're going to have to deal with -- that would have some other window, whatever that is. And then that you would get by opting out. You would come under a different schedule, which would probably be in Rule 1, but both Category 1 and Category 2 would be under the general discovery rules maybe.

And then the next five percent are the cases where whatever the arbitrary time periods are for Category 1 or Category 2, the lawyers and parties think they won't work, so

they've got to go to a judge and get relief from that and get a special order or something close to that. Nothing is nailed down. Something close to that.

How many feel that that's the approach that Rule 1 should take generally?

MR. SUSMAN: I don't know what I'm voting on. Your Case 1 is 90 days. Okay?

CHAIRMAN SOULES: Right.

MR. SUSMAN: You have 90 days for discovery if you do nothing. Now, give me the Case 2.

CHAIRMAN SOULES: Case 2.

MR. SUSMAN: In specifics, now. I mean, we've got to get real specific on this.

CHAIRMAN SOULES: Case 2 --

JUSTICE HECHT: For example, your parameters.

PROFESSOR ALBRIGHT: Six months.

MS. SWEENEY: Your what?

MR. SUSMAN: No, I'm just talking about --

JUSTICE HECHT: Your proposal.

MR. ORSINGER: One side opts out of it. One side opts out of Track 1 and they fall into Track 2.

CHAIRMAN SOULES: 30 days before a trial setting.

MR. SUSMAN: 30 days before the first trial setting.

CHAIRMAN SOULES: 30 days before a trial setting of some kind, because we can't get to that in this discussion.

JUSTICE HECHT: But without trying to --

MR. SUSMAN: All right. Now, how do you get that?

CHAIRMAN SOULES: I don't know how we're going to deal with the trial setting issue. That' a big issue we're going to have to go through, but --

MR. SUSMAN: All right. 30 days. Well, we've got to do -- should we do the first -- let's talk about the first trial setting.

JUSTICE HECHT: All I'm saying is --

CHAIRMAN SOULES: Well, that's

what started the problem.

MR. SUSMAN: No. Well, give me what the -- see, I can't --

JUSTICE HECHT: The second tier is your proposal as written as it may be adjusted as people talk about it.

MR. SUSMAN: You mean Rule 1?

JUSTICE HECHT: Rule 1 and the rest of it.

MR. SUSMAN: Oh, no. No. We're only supposed to be talking about Rule 1 now. Okay?

CHAIRMAN SOULES: Okay.

JUSTICE HECHT: It's Rule 1, 2 and the rest of them too.

MR. SUSMAN: That's what I don't want us to do right now, is getting -- I mean, I think we're discussing -- see, that's the problem. You mix it up now.

JUSTICE HECHT: I don't think we are.

CHAIRMAN SOULES: No, we're not mixing it up.

MR. SUSMAN: I know you aren't. I just think we ought to talk about

the maximum time.

CHAIRMAN SOULES: That's what we're talking about right here. Let's see if we have any kind of a consensus --

MR. SUSMAN: 90 days as the default, okay, for discovery?

CHAIRMAN SOULES: 90 days is right.

MR. SUSMAN: Now, what is the second phase?

CHAIRMAN SOULES: The second one is 30 days before some trial setting or some other arbitrary date.

MR. SUSMAN: And how do you get into that one? How do you --

MR. ORSINGER: How do you opt from Track 1 to Track 2, he's asking.

CHAIRMAN SOULES: Just by filing something that says, "I opt out of the 90-day rule," and you can do that anytime in the 90 days, so that if your case is in jeopardy, you can do it; otherwise, you can be on your fast track to get your divorce case tried.

PROFESSOR ALBRIGHT: Can I make

a proposal? I think it's difficult to vote on these things with exact amounts of time in it because we really don't know what we're talking about. Can -- how about if we have a vote as to authorize the subcommittee to draft alternatives such as the one that Justice Hecht has suggested?

CHAIRMAN SOULES: That's fine. But I'm trying to get to something more specific than that for Steve's guidance in the next two months.

MS. MIERS: Why don't you just keep going.

CHAIRMAN SOULES: What?

MS. MIERS: Keep going.

MR. ORSINGER: What's your third choice?

MR. SUSMAN: See, the problem with --

CHAIRMAN SOULES: The third choice. Okay. Say -- I don't know what the next window is. Call it nine months. Okay? Or something bigger than 90 days but smaller than forever. Now, once you pass that limit, you've got to have judicial -- you've got to

have a ruling from the court that you can go past that limit. 90 days. Then Line 2. Past Line 2 you've got to have an order of the court.

Now, how you define Line 2 is something apparently you're going to have to work on. But do we have three -- do we have the concept of three?

MR. SUSMAN: I don't see the three, because I really -- are you saying that the second category is what parties can agree to?

CHAIRMAN SOULES: Within certain parameters.

HONORABLE F. SCOTT McCOWN: It's a menu.

CHAIRMAN SOULES: Well, it's a time right now for Rule 1.

MR. SUSMAN: We're talking about the time for discovery.

MR. MARKS: How about for Rule 2 a "not less than" on that rule. I mean, don't say you've got 60 days to do this or 80 days to do that, but things have to be done within not less than a certain time

period.

CHAIRMAN SOULES: That's not the concept. The concept is you've got to do it within an outer date. That's the second concept.

MR. MARKS: Well, I'm saying that, within an outer date. But you've got to make it workable.

CHAIRMAN SOULES: But not less than -- I mean, "not less than" doesn't put a cap on it. "Not more than" does, I think.

MR. MARKS: Well, maybe I mean not more than.

CHAIRMAN SOULES: All right. If you mean that, then I agree with you. I agree with you. Say it's 90 days and then some number, nine months, and you can opt from the 90-day schedule to the nine-month schedule by filing something.

MR. MARKS: Okay. And within that period you can say, "Okay. Joe, you designate your expert such and such," and that's all that does?

MR. SUSMAN: No. Oh, no, no, no.

CHAIRMAN SOULES: See, you're trying to go to something else. We're just talking about time. And then if you want to go past 90 days --

MR. ORSINGER: No, nine months.

CHAIRMAN SOULES: -- nine months, you've got to go get a judge to give you the green light to go past 90 days.

MR. ORSINGER: Nine months.

CHAIRMAN SOULES: Nine months. Sorry. Let me restate it.

90 days is the default period. Anybody can opt out in the 90 days after the answers are all filed. If you want to go past 90 days, anytime in the 90-day period you can opt out and that extends your discovery period to nine months, anytime during that nine months.

MR. SUSMAN: Without agreement?

CHAIRMAN SOULES: Without agreement.

MS. MIERS: Unilaterally.

MR. MEADOWS: I think this is --

CHAIRMAN SOULES: After the

nine months you've got to have leave of the court to go past that. You've got to have a scheduling order. I think that's in general what we're talking about.

MR. MEADOWS: I mean, all they're doing with your program is snipping at the margins. It's at the margins. It's your program, but these two things take care of the margins; you know, the fat end on the little side and the little end on the big side.

MR. SUSMAN: I'm just trying to figure out how it works now, wait a second. It's all within three months except if you say, "I don't want it." If you say, "I don't want it," then you're going to give them nine months?

CHAIRMAN SOULES: Including the first three. Six more months.

MR. SUSMAN: Six more months. And then beyond that they have to get an order of the court?

CHAIRMAN SOULES: Right.

MR. SUSMAN: I don't have any problem with that. None whatsoever. None whatsoever. Accepted. Perfect.

CHAIRMAN SOULES: But every one of these things could be done -- can be changed by agreement of the parties or order of the court, because that's what you've got in Rule 2.

MR. SUSMAN: No, no, no. I thought you said we aren't going to have any -- there's no room here for agreement of parties to operate under your regime. Okay?

CHAIRMAN SOULES: If you opt out you've got six months, but you can agree at any time and then have your trial set.

PROFESSOR ALBRIGHT: Within that six months.

CHAIRMAN SOULES: You can keep on making agreements.

MR. SUSMAN: Oh, okay. Within the suit, you mean. In other words, we could agree instead of an extra six months, we could agree on four months.

CHAIRMAN SOULES: Right.

MR. SUSMAN: But if I just opt out and I'm ornery and I don't want any agreement, I get an automatic another six months in addition to the three.

CHAIRMAN SOULES: Unless the judge tells you differently.

MR. SUSMAN: It's not automatic. The other side can go to the judge and say that it should be shorter.

CHAIRMAN SOULES: The judge has always got management.

MR. SUSMAN: So the default is I get three months if I do nothing. If neither side does anything, you get three months. If one side says uncle, you get another six months unless the court does something. And the court can either make it longer or the court can make it shorter. I don't have any problem with that at all. It's perfectly reasonable.

CHAIRMAN SOULES: Tommy Jacks.

MR. SUSMAN: The subcommittee understands that. We can draft that. No problem.

MR. JACKS: This is the first time, I think, throughout this process on the discovery rules that we're now on the verge of saying lawyers cannot really do something different by agreement. What we're now

commencing to say is that, well, lawyers can now do something different by agreement but only if it's -- but only for another six months. I think that's wrong-headed.

I think that if the lawyers who are handling the lawsuit can by agreement modify the language of Rule 2 and the procedures and limitations set forth, then we don't have any business jacking with it. I mean, I thought we were really headed in the right direction when Justice Hecht suggested the idea that if a party objects, well, then you don't impose this window on them; and then if they can't agree, then you let the court sort it out. That made sense to me. Putting constraints on lawyers' ability to agree with one another about the conduct of discovery I think is a serious mistake and one that I would really hate to see us venture into, and I think this is a first for us.

I think we're trying to make something more complicated than it really has to be. I think that -- I mean, I'm getting the feeling that if this Committee had been around at the time of Moses, it would be the 10,000

Commandments.

If in Rule 1 you simply at the end of the second sentence even word it like it is or if you want to change it to three months or whatever, and then just simply say unless a party objects, in which case the discovery period will terminate either when the parties agree or when the court orders, then it seems to me you've solved the concerns of the Dallas County folks, you've solved the concerns of the folks in areas where it takes two years to get to trial, and you solve the problems with the folks like in Travis County where automatically any party can get a trial setting just by asking for it.

I'd hate to see us throw out the baby with the bath water here by dispensing with the ability of lawyers to agree on a reasonable way to handle it.

CHAIRMAN SOULES: Justice Hecht wants to respond to that, but first I want to say this: That maybe your comment wasn't so intended that if this Committee was around then we would have written the 10,000 Commandments, but Moses had divine

inspiration; he didn't need a committee; he didn't even have to think.

MR. JACKS: And he didn't have computers either.

CHAIRMAN SOULES: But this Committee is thinking and working very, very hard to answer some very difficult questions.

MR. JACKS: I understand that.

CHAIRMAN SOULES: And I know we will get there.

Now, Justice Hecht, you have the floor.

JUSTICE HECHT: Well, this is a difficult process and I think that, for what it's worth, from what I know about what's going on in the country, this Committee is ahead in trying to really do something that will help more than any other jurisdiction that I know about. And this is after the feds have had seven or eight years to work on their rules and finally promulgated something that virtually nobody likes.

But I think in response to what you said about agreement, Tommy, again, and I invoke Scott's view of this, too, but I think on the trial bench you see a lot of people that are

able to agree and agree to reasonable things and conduct their case the way it ought to be conducted. It doesn't get far off the track, and when it does, it's pretty easy to get it back on.

But you do see a lot of cases where that's not true, and the lawyers either are not equally matched or they're not as proficient as they ought to be for the kind of case they're handling, or they have some -- they're operating for various different reasons and doing what they're doing for various different reasons. And the agreement that they are able to reach does not protect the parties. It doesn't protect the interest of the court in getting the case decided. It's not a good thing.

Now, if you and Don come in and tell me as a trial judge, "Judge, we can't agree to this parameter in the second tier, but we agree to everything else but this, and we want to do this. You don't need to worry about it. We will get our problems worked out. Just sign here." I think most judges are just going to sign it.

But if parties come in for -- I'm sorry, if lawyers come in for other reasons and suggest something that you know as a trial judge is just going to be a problem on down the line, right now a trial judge can say, "No, I'm not going to let you do that." And I don't think we're doing anything here except trying to circumscribe what that area is.

MR. JACKS: And I guess I don't mind or I have no objection to the idea that the court has the final authority to reject an agreement of counsel. I recognize that. I would prefer it, if that's the -- if we want to expressly state that in the rule that we do so in a way that preserves that prerogative of the court without trying, by writing specific numbers in the rule, to place a constraint upon the ability of lawyers to agree in that way. That is to say, you can accomplish exactly what you're talking about through general language which says, you know, unless the lawyers agree otherwise, subject to the approval of the court, without saying the lawyers have to agree on something less than, you know, pick a number, nine months, and if

they don't, they have to go to the court to get the agreement -- I'm not disputing the authority of the trial judge to regulate his or her docket.

JUSTICE HECHT: And I guess in response to that, I would simply say that one of the functions of the rules is to suggest normative behavior and normative treatment from the courts. For example, we have rules that call for trial settings within certain amounts of time. Those aren't mandatory because, you know, you can mandate that the sun come up at 5:00 o'clock every morning, but it either does or it doesn't. But they do kind of suggest what we're shooting at. And it seems to me you could at least put something in there that suggests what we're shooting at. You've got to -- everybody starts working on that basis.

MR. JACKS: And I guess I wouldn't even object to something of that sort. You know, 18 months, I think, is the time that the Supreme Court has admonished trial courts to try and get a case to trial from the time it has commenced. If it were

done as an admonition instead of being imposed as a rule, what -- it seems to me that where we get into trouble in our rule making is when we try overly by rules of universal application to make them fit the cases when the ability of the lawyers and judges who are dealing with the cases far exceeds our ability to do that. And I'm not objecting to anything in the concept you're talking about. I am concerned, though, with how specific we get in confining lawyers' ability to agree.

CHAIRMAN SOULES: Jim Babcock.

MR. BABCOCK: I'd like to make a short plea for this rule as written with one added sentence that says, "The trial court shall make a realistic trial setting given the nature and complexity of the case." If you add that sentence or something like it, it seems to me that this rule accomplishes what we're tying to do but still has that flexibility, if you read the comment, to allow the parties to agree or to go to the court if the parties don't agree and get additional time. I think we're overcomplicating this myself.

MR. PERRY: Second.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: I kind of think he's right too, because, I mean, it just seems to me, if we're talking about, I mean, what Justice Hecht -- what we were talking about, what I was talking about, what we were kind of talking about together, this three-month period of time by default, in the first place, won't everyone really opt out of that, everyone, basically? I mean, isn't your view that people will do it just in case? If they're required to do it early on, then most people -- because there will be 80 percent of the -- well, if you're right about that --

JUSTICE HECHT: Why would a plaintiff in a sworn accounts suit opt out of that?

MR. SUSMAN: What?

JUSTICE HECHT: Why would the plaintiff in a sworn accounts suit opt out of that?

MR. SUSMAN: Why wouldn't the defendant always opt out?

JUSTICE HECHT: Because he's not paying his bills. He may not even be paying attention to the lawsuit.

MR. SUSMAN: But it would be just to trap him? I mean, you know, I don't know. It --

CHAIRMAN SOULES: In divorce litigation the general rule is both parties want them to be over. Sometimes you string them out, but --

MR. SUSMAN: I mean, your view is that in a divorce litigation, when a divorce is filed, both parties would agree to that three-month deal?

MR. ORSINGER: Unless you have a complicated business-to-value or something like that, I think that's right. And furthermore, if somebody opts out unreasonably, you can always try to get a scheduling order to limit them to the 90 days or 120 days, so you do have some reaction. But we have set a standard that most of the simple cases should be finished, say, four months after they're filed.

MR. SUSMAN: Well, that's

okay. What you're doing is you're setting a simple standard, a standard for simple cases of 90 days and a standard for other cases of nine months, and I find nothing wrong with that. I think that's actually going to make a shorter discovery period in practice, in fact, than this rule as written, so I would be in favor of that. I would be in favor of what you're proposing.

CHAIRMAN SOULES: Let's see a consensus on that. How many are in agreement?

MR. MARKS: Whoa, what's that?

MR. PERRY: What was the question?

CHAIRMAN SOULES: The consensus is three tiers: 90 days, nine months, and if you go beyond nine months, you have to have a court order, either an agreed order or a non-agreed order.

MR. PERRY: Can we have as the alternative Babcock's motion about the committee report with the provision for realistic trial setting?

CHAIRMAN SOULES: That's fine.

His motion was first. Those in favor of Babcock's motion show your hands. 11.

Those opposed.

That's unanimously approved.

MR. ORSINGER: Well, no. But wait a minute. I don't have a problem with that rule, but I refer the other rule.

CHAIRMAN SOULES: What?

MR. ORSINGER: I don't have a problem with his rule, but I prefer the other one. I would like to vote on the other rule too.

MR. SUSMAN: I don't either. We voted on -- let's take one or the other.

MR. MARKS: I thought we were voting on 90 days, nine months, beyond which --

THE COMMITTEE: No.

MR. MARKS: Then I'll withdraw my yes vote.

CHAIRMAN SOULES: Okay. Let me see if I can get it to the Committee.

Babcock's -- Chip's motion is to just add a sentence to the current Rule 1 that says the judge has to make a realistic trial setting in

view of the nature of the case, something to that effect. That's his -- and leave -- and then with that additional sentence approve Rule 1 as written. Okay? Those in favor --

MR. ORSINGER: If that carries, then we're not going to consider the other alternative?

MR. SUSMAN: The problem --

CHAIRMAN SOULES: Yeah.

MR. ORSINGER: Then I've got to vote against it?

CHAIRMAN SOULES: That's right.

MR. ORSINGER: Okay. So we've got to vote against it.

CHAIRMAN SOULES: Okay. Those in favor show by hands.

MS. BARON: I need to ask a -- Luke, I'm sorry, I don't understand the vote. Is this -- if we prefer the other one, do we have to vote against this one?

MR. ORSINGER: Yes, that's right.

CHAIRMAN SOULES: Yes.

MS. BARON: All right.

CHAIRMAN SOULES: Okay. Hands

up for Chip Babcock's motion. Nine.

Okay. Then those against that motion. 12.

So that fails by a vote of 12 to nine.

MR. SUSMAN: Now let's vote on --

CHAIRMAN SOULES: Now, the three tier, those in favor of the three tier, which would be 90 days, nine months, and then after that, order of the court, whether agreed or by court order. 13 in favor.

Those opposed. 10.

So that carries by a vote of 13 to 10.

MR. SUSMAN: That's a shorter limitation than I've ever dreamed of. I love it. We are not moving back on that vote.

Rule 2. Can you believe it?

MR. GOLD: I think the record should reflect also --

MR. SUSMAN: David, I was a good committee member. I came in here unanimously supporting it. Okay? It wasn't my idea.

MR. GOLD: When Moses first came down with the 10 Commandments, he

destroyed them because he didn't think people would follow them. I don't think we should lose sight of that.

CHAIRMAN SOULES: Okay.

MR. McMAINS: Luke, I was trying to clarify your entire motion in terms of the 90 days. Are you talking about -- I assume you're talking about from the commencement?

CHAIRMAN SOULES: No. 90 days from the last time -- I mean, from the time the last answer is filed.

MR. McMAINS: The last answer. I mean, that's all I was trying to figure out. I didn't know.

MR. SUSMAN: Could I suggest that since we are now talking about a discovery period that resembles what we originally -- we make it open -- we've drafted this before. The discovery period opens with the first deposition and the production of the first document pursuant to a request. That's how we have opened the discovery period in the past. Do you want to open it in a different way?

CHAIRMAN SOULES: Open it when the answer is filed for these cases, because they want to get them tried in four months, and you can get them tried in four months in Bexar County.

MS. DUNCAN: Original answers?

CHAIRMAN SOULES: Original answers.

HONORABLE C. A. GUITTARD: Why do they need the 90-day limitation if they're getting it tried in four months?

MR. ORSINGER: It's a target to shoot at. It's a motivational tool.

MR. SUSMAN: Okay. Open it from the answer date. Fine. This is much better than I ever dreamed of.

MR. McMAINS: What's the idea if there's another party --

MR. SUSMAN: Because that was six months. My six months is like in effect five months now.

MS. DUNCAN: Tiers is all I've ever wanted from the first time we started talking about this.

MR. SUSMAN: Can we go to

Rule 2?

MR. McMAINS: There's a very simple problem, because that's part of what the standard disclosure is --

MR. SUSMAN: I've got it. The discovery window opens with the filing of the answer. Three months. If you opt out, you get an extra six months. Otherwise, you've got to go see the court. The discovery period opens with the filing of the answer. Perfect. We can write it.

When do you want the opt?

CHAIRMAN SOULES: Anytime in the 90 days.

MR. SUSMAN: Oh, wait a second.

CHAIRMAN SOULES: That's important to me, because if my case is in trouble, I don't want it to close. And divorce cases can get in trouble late. You suddenly find out you've get a problem and you've got to deal with it. Otherwise, you're going to have a trial setting in another 30 days and you're going to have the case over with.

MS. SWEENEY: So the parties

can discover right up to the deadline thinking they have a deadline, show their hands, do everything that they want, and then one party unilaterally can take advantage of the other and extend the deadline?

MR. SUSMAN: Well, that's a problem.

CHAIRMAN SOULES: But the judge can take it away from them.

MS. SWEENEY: After everybody has gotten ready for trial and spent the money to get ready for trial in good faith, one party can impose on the other party its desire to fritter away some more time?

MR. SUSMAN: That is a problem, y'all.

MS. SWEENEY: Mr. Soules, I had my hand up because I want to say one thing, which was --

CHAIRMAN SOULES: Okay. Paula.

MS. SWEENEY: -- that we have had two very close votes. This Committee is by no means of a mind that we are on a track or that we're on the right track. We're on parallel or rather on divergent tracks. And I

don't think we have a mandate here or that we're even making much sense.

I mean, there are some core concepts that are very good here, but you know, we're sitting here whipping up things like "Well, let's have 20 days." "No, let's have nine months." I mean, we're creating things out of the air that we have not seen on paper and supposedly voting on them, things that are going to influence litigants throughout the state. And that to me departs from the good sense that we have been following, which is to have something on paper that we're working from and trying to refine.

And I don't like what we've just done. I'm not sure what we've just done, but there seems to have been something that has just been done. And we're -- most of us are pretty smart, but I'll bet most of us couldn't repeat what we've just voted on. So I would like to see us maybe get some of these concepts on paper and look at them and make some meaningful votes at a time when we can see what we're doing.

CHAIRMAN SOULES: That's what

we're doing. We're referring this to the committee with the vote that was taken.

MR. SUSMAN: I clearly understand the direction the subcommittee has from the group now, which is it seems to me the majority of this group wants the default to be 90 days. There's a discovery window. It opens 90 days from the time the answer is filed, unless the lawyers at some -- one of the lawyers at some point in that -- at some point in time yet to be defined opts out.

MR. ORSINGER: You just said that it opens at 90 days and you should have said closed at 90 days.

MR. SUSMAN: I'm sorry, opens with the filing of the answer and closes or it runs -- it runs from the commencement to -- it runs from the commencement of the action to 90 days from the filing of the answer, unless one of the lawyers opts out, in which case it runs from the commencement of the action to nine months from the filing of the answer, unless the court determines something else. The court could determine something longer or shorter than the nine months. That creates no

drafting problem for us thus far to be loyal to that concept.

My problem with drafting is going to be when you know whether you have a nine-month deadline from answer date or 90 days from answer date, because some of the rules, like when you identify experts, when you have to amend pleadings by, some of --

PROFESSOR ALBRIGHT: We can work on that.

MR. SUSMAN: Huh?

PROFESSOR ALBRIGHT: I think we can work on that. I don't --

MR. SUSMAN: Do you think we can work on that?

PROFESSOR ALBRIGHT: I think those are details that --

MR. SUSMAN: Okay. All right. We'll work on that.

PROFESSOR ALBRIGHT: -- we could talk about in subcommittee for a long time. What I think we could do in the subcommittee is come up with some alternatives that would have different ways of handling this, because I think whenever we've had some

changes in the way we're thinking about things, when we work through the rules, you think of new ideas or things that work or don't work, and I think we can bring up some alternatives. I think we understand the sense of the Committee.

CHAIRMAN SOULES: And I think this is going to tend to elimintate the problem of this first trial setting. This whole trial setting --

MR. SUSMAN: It will.

CHAIRMAN SOULES: -- issue goes away.

What's next, Steve?

MR. SUSMAN: Rule No. 2.

MR. JACKS: There's something else I'd like to ask the Committee to address before we move on to Rule 2.

CHAIRMAN SOULES: On Rule 1?

MR. JACKS: Yes, sir.

CHAIRMAN SOULES: Okay. Something not discussed before?

MR. JACKS: Yeah. It's not been discussed before because we've just taken a tack that we haven't taken before. The idea

of closing the window at nine months I think deserves some serious discussion when you all get back in your subcommittee bearing in mind the many places in this state where you cannot get a case to trial within even 18 months or two years and the serious problems we discussed before about arbitrary closing dates when you end up closing the window and then putting your file on the shelf for a year or more.

I mean, I would think that if you're going to have an outside limit outside which court action is required and outside which lawyers cannot agree, it ought to be more realistic than nine months. I mean, the Supreme Court has admonished trial courts to get cases to trial in 18 months and recognizes they can't in many cases even do that.

So if we're going to have a date past which -- if we're going to say lawyers can't agree past a certain date, you need to give more grace than nine months. And I think something closer to 18 months is realistic. I mean, I'm talking about Harris County, where if you think a major percentage of the cases

go to trial in Dallas County, it's an even bigger percentage in Harris County.

CHAIRMAN SOULES: Tommy has absolutely got a real problem, and that is that whenever you close discovery and then it's a year before you get to trial, all kinds of things change. It doesn't make any difference whether it's commercial litigation or personal injury litigation. We're probably going to have to go back to some idea about reopening discovery at some point. That does have to be in place.

MR. SUSMAN: Well, it's in these rules. I mean, there's a reopener provision in these rules, because whenever you end discovery, whether it be 30 days before the first trial setting or 60 days or 10 months from the filing of the case or nine months from the filing of the answer, whenever you have an end of discovery other than the commencement of trial, you have to deal with what happens between that end and the time of trial.

CHAIRMAN SOULES: And you've got something there?

MR. SUSMAN: We have that in here. Insofar as the first part of what Tommy asked, though, it seems to me that's just a request for rehearing on what we just voted on. I mean, people voted on this. I mean, you know, you just voted on nine months from the time the answer is filed. Now, I didn't -- I still think that people -- I mean, I think this agreement of the parties, Tommy, is still possible. I mean, what -- there we're just talking about a difference without substance. I mean, you've got to get a court order to go beyond nine months, but there's nothing that precludes you and me from going into Judge McCown and saying, "We have agreed that discovery should go for 18 months in this case," and he then either has to approve our agreement or reject it. You've already said you don't find it obnoxious his being able to reject our agreement. Certainly, if you and I agree on less than nine months, I don't know whether we even have to involve him. We just agree and sign a Rule 11 agreement that we're going to do it in less than nine months. If we're going to go

beyond nine months, we agree, but we've got to go ask him, "Is it okay, Judge?" And he says yes or no. Now, isn't that -- I don't think we're arguing about anything.

MR. JACKS: I think we are, Steve.

MR. SUSMAN: What? Explain to me how we're --

MR. JACKS: We've got all the problems we had before when we had a window that closed at an arbitrarily determined time.

MR. SUSMAN: That's right. That's a vote you just lost. Okay?

MR. JACKS: No, I'm not asking to -- I mean, I'll live with that vote. What I'm saying is that I admonish you -- you know, we were talking about a window before and we talked about the problems. At least lawyers could agree around it. Now lawyers can't agree around it except with leave of court if their agreement ventures past a certain point in time. And all I'm saying is that's an unrealistic point in time in many places in this state. And I would encourage you to think about that. And just reopening

it isn't a solution as long as the reopening is as limited as it is under the rule as it's currently written.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I want to clarify something here. I swore to my family that if I was going to return from the discovery wars here with a vote then I would be a family member again, and it doesn't seem it's going to be that way. But I wanted to clarify something. Is it true that we just voted on a three-tier process that gives a definitive nine months on the second tier, or did we vote to adopt a three-tier concept and the subcommittee would attempt to work out language to bring back to this Committee? Because if it's the second, fine.

I agree with Tommy. I don't like the tier approach, but that's the vote. That's fine. But doggone, I've spent five years on various subcommittees, I've been to as many as these subcommittees as I could go to, and it just seems strange that in a 15 to 20-second epiphany everyone kind of came up with nine months and it was all voted on and that's what

passed and that's what we live with, when this subcommittee has struggled with the wording of these rules and looked at them and come up with alternatives and everything, and now we're wedded to this nine-month period because we had a revelation. I just --

PROFESSOR DORSANEO: It's the second one. It's the second one.

MR. GOLD: I just want to make sure if what we're going back to is a commitment, like Steve says, that we have this nine-month window now and that's it, or whether we're going back to bring back to the Committee various proposals to work within this three-tier approach.

CHAIRMAN SOULES: Okay. Steve.

MR. SUSMAN: At our subcommittee meeting when we got to this Rule 1, I said, "Let's not spend much time on it, folks. Everyone in this meeting is going to have very strong views." It was an 11-11 vote on six months. Okay? Now it's 13 to 10 on nine months. Who the hell cares? I mean, if you made it 12 months, you would get a different vote. And I said, "Let's not spend

a lot of time on it." Okay?

And we thought about five or six alternatives. No limits. Limits that differ with the amount of controversy. Six months again. I mean, you know, you can think of all kinds of possibilities and we ultimately said, "Well, let's present Rule 1 and maybe we'll get a consensus." But obviously -- I mean, so I don't care. And to me, again, I urge you, that's not the important -- to me Rule 1 is not the important part of our reform.

MR. GOLD: And I agree with Steve on that.

MR. SUSMAN: Okay.

MR. GOLD: And all I want to do -- and it is important. It is important to me because of the numbers of people who have talked to me who have less concern about how we deal with everything else in these rules but this window concept, and it is a very sensitive thing.

And if the Committee has voted to adopt a tier approach, fine. So be it. But I really just don't think that we want to ever go to the Bar and somebody says, "Well, how did you

all come up with nine months?"

And we say, "Well, it was just a whirlwind vote. Everyone kind of thought nine months would be fine and that's what we came down with and we structured the rule around it."

All I'm saying is that the direction to the subcommittee should be that we go back with this tier approach and come up with proposals for the Committee to consider, I think, in a deliberate way that is rational, so we don't have these problems that Paula is bringing up of what happens if somebody does this at the end of 90 days, what happens then, and everybody says that's a good question. I just want to go about it more deliberately.

CHAIRMAN SOULES: Well, the three-tier approach has been referred to the committee. Deadlines have been referred to the committee for writing. We have not done this in 15 or 20 seconds. We've been at this now for almost two and a half hours with a room full of people that have been doing a lot of hard thinking. And Steve has a close vote. He's got to go deal with it and bring

it back in writing. We've never passed anything -- we haven't even passed the charge rules because they're not in absolute final form. Yes, we've passed them, but the only thing that's left to do is just a little bit of editing, because those charge rules are not going to go to the Supreme Court the way they are until we get one more look at them. This is not going to the Supreme Court until we've probably taken more than one more look at it. So that's the way we've worked before and that's the way we're going to keep working.

Can we go to another rule now?

HONORABLE F. SCOTT McCOWN: Can I make a comment on the nine-month rule?

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT McCOWN: I understand Tommy's concern, and I'm on the subcommittee and I'm in agreement with him so I'm going to look after his interest. I think the time you pick, whether it's nine months or 18 months, you feel differently about depending upon the words that it's couched in. Because as Judge Hecht said, it's intended to be a normative standard, so how

strong you make the language tied to the time limit is important. And so I think the subcommittee can work with that in drafting it, and whatever time limit we come up with, come up with the correct nudging, so to speak, of the trial judge with the normative standard as to whether they're guidelines or mandates or whatever.

MR. JACKS: And that's all I'm asking.

CHAIRMAN SOULES: Okay. We're ready for an another rule.

MR. SUSMAN: Rule 2.

CHAIRMAN SOULES: Rule 2.

MR. SUSMAN: Now, let me suggest that we not go to Rule 2 and that we basically skip over Rule 2, which is related to Rule 1, and that's modification by agreement or by court order. I think it's related.

I mean, I basically think we ought to -- I mean, I think -- clearly I think that people would agree that we ought to be able to modify things by court order. We voted on this. We voted that the standard should be

good reason, and we voted on modification by agreement of the parties and people have been in favor of that in the past. And the only change I've heard today is that maybe the agreement of the parties should be limited by -- a court has the power to -- I mean, that's what Justice Hecht was saying, that the parties should have -- if their agreement exceeds certain parameters, they should have to get the court to bless it. Anyway, I think that's what he's saying.

JUSTICE HECHT: Right.

MR. SUSMAN: Okay. So let's go to Rule 3. Now, in Rule 3 you have your forms of discovery. I don't think that's controversial. I mean, is there anything in Rule 3 that anyone finds controversial?

PROFESSOR ALBRIGHT: Well, I would think that there's going to be a lot of people that do.

MR. SUSMAN: Hmm? Maybe we're ready to go on to Rule --

CHAIRMAN SOULES: Speak up, Alex. Go ahead.

PROFESSOR ALBRIGHT: Never

mind. Never mind.

PROFESSOR DORSANEO: Steve.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Steve, much of this is embracing what we have now, and I don't know whether it's appropriate to go into it now. Some of it ought probably be controversial as the result of the way we did things before, and maybe we've learned some things since.

Just to give one example, this d(2), a party may obtain discovery of the existence and contents of any settlement agreement. Well, when that was drafted, it evolved into this form at a meeting like this from the existence and contents of any Mary Carter agreement to any settlement agreement. And I don't think at the time we discussed it that we realized that it means any settlement agreement if taken literally without regard to anything of relevance to the case or any other change, and some of these matters maybe would be the subject of a separate, you know, report or something. There are at least three or

four cases trying to struggle with this language to provide some limits on it, some relevance limits, even though it's hard to find those limits in the way the rule is worded.

Persons with knowledge of relevant facts, most of this language in (c) was drafted -- and I remember writing comments saying, well, what about my secretary? My secretary has knowledge of relevant facts, and I wrote a comment saying, well, surely you don't have to list the name of your secretary. And they weren't ultimately published everywhere, and now I'm still worried about that.

So there are some things that are in here that aren't the product of your subcommittee's work that have been in here that maybe we could work on and improve a little bit given the fact that we have more experience at least in knowing what those flaws are.

MR. SUSMAN: I have no problem with that. But it seems to me that the way we deal with that is -- I'm sure there's a lot in here. But any member of this Committee who has ideas specifically of changes that ought

to be made should give us a letter and we can then -- you know, with the abuses and some substance to what it's about, and we can go deal with it. We can have a session that deals with all of these various problems. But I mean, I'll tell you, that's a problem we did not deal with. We had enough we did deal with, but if we have a problem with settlement agreements or --

PROFESSOR ALBRIGHT: Steve, we did deal with persons with knowledge of relevant facts. We tried to figure out a way to exclude your secretary.

MR. SUSMAN: We found out we couldn't.

PROFESSOR ALBRIGHT: And we couldn't draft it.

PROFESSOR DORSANEO: I was never able to.

PROFESSOR ALBRIGHT: Yeah. We would love some suggestions.

CHAIRMAN SOULES: I suggest you use "witness."

PROFESSOR ALBRIGHT: We tried that. But then there are people that have

hearsay knowledge of facts that should be discovered.

MR. PERRY: The way we dealt with it really is adding in the brief statement of the identified person's connection with the case, because that means that you can disregard a lot of people; but on the other hand, it points you to the ones you need to do discovery on.

MR. SUSMAN: We opted to -- I mean, we did discuss that and we opted to make the list -- keep the list broad and all inclusive, but have a little identification so you know who you've got to conduct discovery against.

PROFESSOR DORSANEO: The letter procedure is perfectly acceptable to me. I was just inquiring how to approach it.

CHAIRMAN SOULES: Could I go to what David said right here, and it has to do with the suit, and it's something that to me has been pretty fundamental in always putting constraints on discovery whether it's by time or by hours in depositions or what. I don't think that we're getting -- that those

constraints are going to be fair to litigants unless we force disclosure of witnesses.

Now, I don't think you have to make it one or the other. Don't you think you have to say witnesses and not persons with knowledge of relevant facts or persons with knowledge of relevant facts and not witnesses?

PROFESSOR DORSANEO: What do you mean by "witnesses"? Witnesses to the events or witnesses that are going to be called to trial?

CHAIRMAN SOULES: Witnesses for trial.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: That's what I'm talking about. Tell me who I need to depose. Take me to my discovery. What should I do? Don't give me -- do people want persons with knowledge of relevant of facts disclosed, because if you're forthcoming about that, if we're forthcoming about that, we could and probably will name someone who has harmful testimony. But we're not going to call them as witnesses so they're not going to be our witnesses, so in order to get

disclosure of persons whose testimony will be harmful and everybody is forthcoming about that, you've got to go with the concept of persons with knowledge of relevant facts. But I want to know who your witnesses are before I burn my 50 hours.

MR. SUSMAN: Luke, that is -- in the first place, I mean, it seems to me that that's a reasonable idea. We did not really deal with it. It was not rejected. It was not on the table. But what you're saying is something totally different. You're saying that at some point in time before the discovery period ends, the other side ought to be forced to in good faith disclose who they are going to call at trial as their witnesses, not their "may call" or bullshit call list but their real call list.

CHAIRMAN SOULES: Right. I want that before I start taking depositions.

MR. SUSMAN: Well, I don't think -- I think you -- I think at that point in time no one will give you that. I mean, even in federal court you don't get that. I mean, you know, the most you get, it seems to

me, in my experience is under the most -- the most thoroughly pretried case in a federal court is that at some point in time there will be a pretrial order where you do have to list your witnesses that some federal judges insist be a pretty realistic list, not a list of everyone in the phone book, and then you will have some limted period of time after that, usually short, to depose any people who surprise you showing up on that list and who you didn't depose before. I don't think there's any way there would be much of a consequence among the lawyers in this state to give you that list early in the stage, early in discovery, because I don't think anyone knows it.

And the real question is whether this group has any feel that you should get it at all. It would be a major change, I think, in our procedure, wouldn't it, I mean, to have to disclose real trial witnesses?

CHAIRMAN SOULES: It would be a major change, but we are also drastically constraining what discovery can be done in the 15 percent of the cases that are in the

nine-month period. And if we're going to put those kinds of constraints on discovery, we ought to be able to get some signals from the other side where that time ought to be spent, I think. And I think without that that the constraints are unfair, fundamentally unfair. That's what I think. David Perry.

MR. PERRY: Luke, let me just say as a matter of history that during the time that the task force was meeting this was discussed, but it was not discussed in the context of the per hour limits on depositions because that was never brought before the task force. I think that nobody in any of the conversations that I'm knowledgeable of either before the task force or the subcommittee or elsewhere has suggested that we restrict disclosure of people with knowledge of relevant facts. I don't think you're suggesting that.

CHAIRMAN SOULES: I'm not.

MR. PERRY: But I think that it does make a lot of sense for us to look real hard at the issue of having pretrial disclosure of witnesses that will be called in

light of the disclosures that we're going to have on deposition times. At the same time, based on the conversations that we had in the task force, I would say that there are a lot of arguments back and forth that could be presented and a lot of pros and cons on it, and I would suggest that the Committee instruct the subcommittee to look at that seriously, which we have not done, and see if we can come up with a way to deal with that as a means to be sure that the limitation on the depositions is fair and let us just have a shot at it and come back to you next go-round.

CHAIRMAN SOULES: How many feel that's a good thing to do?

Any opposition?

Okay. Let's do that.

Do you understand what we're talking about, Steve?

MR. SUSMAN: That you want to figure out whether we can write a rule that will require both sides to disclose their real trial witnesses at some time before the discovery period closes.

MR. JACKS: Or sometime before

trial.

MR. SUSMAN: Huh?

MR. JACKS: Or sometime before trial, when they're reopening, but some way that works so that you can accomplish what you want to do with discovery and accomplish what you want to do with the witnesses.

MR. SUSMAN: Okay. Yeah. We will consider that.

CHAIRMAN SOULES: We're just creating new games.

MR. SUSMAN: I think that's fine.

CHAIRMAN SOULES: We've got a bunch of games going out there, all this satellite litigation gamesmanship. Once we write a new set of rules, probably the same lawyers that are playing games with the rules we've got right now are going to figure out new ways to play games with the rules we write and that will take us on a tangent down a rabbit trail and we'll be out of time and then we're going to find out what's really going on with the lawsuit, and that's fundamentally unfair to me in my judgment.

So we have to write -- to me the way to do it is to be able to ask who are the witnesses and who are the persons with knowledge of relevant facts right at the same time up front and get it on the table. Maybe judgments or assessments change later; maybe there needs to be some supplementation or amendment later. Maybe that's the way to do it. But I would like to know as early as possible before I start burning hours who I really need to depose. That's my concept.

Other people may want to express their concepts so that you can understand what we're dealing with. Paula Sweeney.

MS. SWEENEY: Why not consider admitting who your witnesses are going to be at a time -- why not do that semi-early or before the very end of the road by designating by roll. You know, if I don't know who all your people are because either they're not written down in one place or I don't know until you tell me and then I don't know whether or not to depose them or I don't have any idea who I'm going to call as a witness but I know I'm going to want three or four of

your people, I should be able to designate, you know, Defendant's Personnel Responsible for X, name to follow later. In other words, designates my category. Do you understand what I'm saying?

In a malpractice case I'm going to get a stack of medical records. I can't even read who the nurses are. I don't have a clue. It's all initials. Nurse SN, you know. Who is that? I know eventually he or she is probably going to be a witness, but I can't tell you who they are and put them on the witness list. But I can tell you the nurses responsible for care of so and so, you know, or people responsible for design of whatever or bookkeepers or however you want to call it, so you know, you can make your witness list tell them what people you're thinking of by category.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: Well, it seems to me you'd want to try to write a rule that's flexible enough to accommodate what you can really do in the real word. I mean, in a lawsuit I can tell you some of the people who

I know I'm going to call from the day I file my lawsuit and I can tell you that early on. There's going to be some witnesses who I will end up calling at trial but I don't know that and I may not know it until 30 days out. And whenever I am able to tell you, I don't have any problem with telling you, and whenever I tell you, you ought to have a chance to depose them if you haven't deposed them already regardless of time limits or windows. And it's just coming up with something that allows people to get discovery from the people who are going to be on the stand at trial and it doesn't ask unreasonable things of lawyers in knowing what they're going to do at trial too far in advance of trial.

CHAIRMAN SOULES: But we've still got to keep the caps on.

MR. SUSMAN: I understand.

CHAIRMAN SOULES: Somehow we've got to keep the caps on. That just can't be just the threshold through which lawyers can go take all the depositions that they didn't take the first time. There has to be some reasonable basis of time.

MR. SUSMAN: I understand. I understand our mandate.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: And we will look at that as a separate rule.

CHAIRMAN SOULES: The second thing that I had on (c) is the words "connection with the case." Is that enough information for me under serious deposition constraints to know whether or not to take somebody's deposition? I think there ought to be more. I don't want to get into the wars that we've had before. I don't think that case out of El Paso is right that you can't find out anything about what somebody is going to say without taking their deposition. You're giving us more than that. But are there some words that could describe a little more information that will give some guidance to a lawyer receiving this discovery response about whether or not this person should be deposed? He's an eyewitness.

MR. SUSMAN: We did wrestle with this problem, and we -- our basic view was that this list is going to be a pretty

complete list and long, and we don't want to make a lot of unnecessary work for people. You know, it's just -- I fear that it's like getting back to, you know, the kind of marshalling your facts kind of interrogatory. I mean, it's got to be very, very detailed. It's going to be a lot of make-work for people. I'm just concerned about making it any more detailed. And basically we think that this gives you enough to take a deposition of the key person on the other side who is easy to figure out. I mean, you can figure out the key guy or the key person on the other side, take their deposition, and ask them about the people on this list who you can't quite figure out.

CHAIRMAN SOULES: That's my problem, is I don't have a whole lot of time to spend with you deposing you to find out what all these other people are going to say. That's how I find out who is key now if I don't get very much information. I scrub somebody around for a couple of days going through the corporate ladder, but we're not going to be able to do that.

Now, maybe the answer is if you give me witnesses, give me the general subject matter of their testimony, and then give me persons with knowledge of relevant facts and just give me their connection to the case, because I don't have to really worry about them unless you later say they're going to be a witness. Maybe that works. I don't know.

But I don't think this gives me enough information given the constraints on depositions to discern which persons to depose and which persons not to depose. And again, I think that's important. Sarah Duncan.

MS. DUNCAN: Well, first, it's almost like with the persons with knowledge of relevant facts or witness statements you're assuming that discovery has already been done and the answers are known. And second, we're no longer going to be supplementing this at least with respect to that which has been disclosed in discovery otherwise. So it seems to me that you're, you know, to some extent going to have to follow the depositions and see who is disclosed and go from there.

But the main problem I have even with the

requirement that you identify their connection with the case and certainly with the witness statements is that I don't think parties necessarily know these things at the time that a request for a mandated disclosure is made. And if we don't have to supplement them, then what good is it to begin with? I mean, I'm not saying we shouldn't make them.

CHAIRMAN SOULES: I think there's -- I'm not following your question about supplementation and amendment.

MS. DUNCAN: Well, it's not for written discovery. As I understand it, and correct me if I'm wrong, there is no supplementation if it was correct and complete when made but is no longer correct or complete if it has otherwise been made known to the other parties in discovery otherwise.

MR. SUSMAN: No.

MS. DUNCAN: No? Is this not considered written discovery?

MR. SUSMAN: This is written discovery. There's a duty of supplementation. When you provide the other side with a list of people with relevant

knowledge, you have a duty to supplement. It seems to me that 99 -- you have a duty basically to amend, because it seems to me like 99 percent of the people that will not be on that list will be people that were around and had their knowledge at the time you filed the answer, you just learned about them as having knowledge later, which means the amendment duty is the one that you have and you've got to do that when you get the information.

MS. DUNCAN: Not if it's otherwise been made known to the other parties in discovery.

MR. SUSMAN: That's correct. If it's been otherwise made known to the other parties in discovery, you need not --

MS. DUNCAN: -- supplement --

MR. SUSMAN: -- supplement.

MS. DUNCAN: -- your disclosure statement.

MR. SUSMAN: True.

MS. DUNCAN: So that if Joe says during his deposition, "Oh, by the by, Alex and David both know about this too," I

don't have to supplement my mandated disclosure statement. You're on notice of what was said in the deposition and you can go follow up with Alex and David.

MR. SUSMAN: Yeah. But you are now talking about a different rule than we are now currently dealing with. We aren't at your rule yet.

MS. DUNCAN: Well, but I'm just saying that --

MR. SUSMAN: And there's nothing you're going to do with this rule that's going to deal with that problem, is there?

MS. DUNCAN: No. But what Luke is talking about is getting this complete list of people, and I think his interest in this is assuming a supplementation that's not going to exist, at least as to that which is otherwise disclosed in discovery.

CHAIRMAN SOULES: Well, we'll get the information somewhere. But right now I'm talking about as complete a list as somebody can give me of persons with knowledge of relevant facts and witnesses. It's okay

with me if the persons with knowledge of relevant facts are limited to connection with the case, as long as I get the general subject matter of the witness' testimony.

Is there anyone -- maybe I'm just off base, but does somebody disagree with us about that? Should the Committee not work on this problem? Scott McCown.

HONORABLE F. SCOTT McCOWN: Well, I think the Committee can work on it and I think it's related to your suggestion about disclosing witnesses. Depending upon what the rule is on disclosing witnesses, this problem either is more important or less important.

CHAIRMAN SOULES: Right.

HONORABLE F. SCOTT McCOWN: The problem with asking for a general statement about what they know or what they're going to testify to is the exclusionary rule. And we want to get away from arguments about whether they said enough in the interrogatories, whether the interrogatory says enough or doesn't say enough either pretrial or at trial.

CHAIRMAN SOULES: Well, you

want to get away from that. Some of us don't, particularly given the constraints on depositions.

HONORABLE F. SCOTT McCOWN: Well, I think the subcommittee wants to get away from that argument. But I think maybe we can solve the problem with witness disclosure. We can work on the wording, but it's very hard here to come up with wording that says give us a little bit that's enough so we can make logical decisions but you don't have the duty to do a whole lot that becomes make-work for you and leads to fights. Again, it's like Tommy's comment a minute ago, it's easy to state what we want; it's hard to draft it in language.

CHAIRMAN SOULES: Well, if we put this in balance, you've got persons with knowledge of relevant facts and their connection with the case. Okay. I'll spot you that. If you give me the witnesses and the subject matter, the general subject matter of their testimony, you don't have to go through the whole litany of persons with knowledge of relevant facts and give me the

generally subject matter of their knowledge, because once I find out who your witnesses are and I get the general subject matter of their testimony, I don't need this over here.

HONORABLE F. SCOTT McCOWN: Oh, you do.

CHAIRMAN SOULES: But I want this witness to be sufficiently complete to lead me to discovery, to depositions if I want to use my time, and I think that's only fair. And I think the exclusionary rule should apply there, because if I'm being misled down a rabbit trail they shouldn't be able to use that witness' testimony on something they haven't told me about, because if they had told me that, I would have gone and taken that deposition.

HONORABLE F. SCOTT McCOWN: I agree 100 percent. We were aiming at another problem. We were aiming at the problem where they list 2,000 people with knowledge of relevant facts and buried in there is somebody that they're definitely never going to call as a witness who is good for your case. That's the problem this was aimed at. It's aimed at

if they list a lot of people, they have to tell you briefly the connection with the case so that you can sort out that list and narrow it down to who you're going to go investigate.

CHAIRMAN SOULES: I don't have any problem with that as long as I get your witnesses and more information about what they're going to say so that I can decide whether to burn my 50 hours on them.

HONORABLE F. SCOTT McCOWN: I think we can do that. We can write that into that rule.

CHAIRMAN SOULES: Okay. Is there a general agreement that we should have the committee write a rule such as that for our consideration? Is anybody opposed to that?

Okay. There's no opposition.

Richard Orsinger.

MR. ORSINGER: I would like to revisit briefly what I understood one of the things Sarah was saying that you don't have to supplement your list of persons with knowledge of relevant facts if their names come up in a deposition. I think that there's a public

policy to defend making somebody list the persons with knowledge of relevant facts whether or not their names have been mentioned in a deposition, because --

CHAIRMAN SOULES: Okay. We're going to get to that rule.

MR. ORSINGER: I thought that was Subdivision 2. Rule 5, Subdivision 2.

MS. DUNCAN: We're on Rule 3.

MR. ORSINGER: Oh, you had just skipped ahead. I apologize. I thought you were actually debating that clause in Rule 5. Pardon me.

CHAIRMAN SOULES: And then on Bill's question about settlement agreements, are you talking about making any settlement agreements, or settlement agreements made in the same case or a related case? What's the problem with settlement agreements?

PROFESSOR DORSANEO: I think it ought to be in the same case or in a related case rather than any settlement agreement, period.

PROFESSOR ALBRIGHT: And you're going to write us letter about that.

CHAIRMAN SOULES: That's what I think it means, but we can --

MR. SUSMAN: He's going to write us a letter on what he thinks the issue is there.

PROFESSOR DORSANEO: And a harder question about what is, you know, what -- is the amount of the settlement relevant even if it's, you know, in a related case?

MR. GOLD: There's that Palo Duro case.

CHAIRMAN SOULES: Okay. Is there anything else on Rule 3?

MS. DUNCAN: I have a question.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: Aren't all of these, (b), (c), (d) and (e), premised upon (a), that it be relevant to the claim or defense?

PROFESSOR DORSANEO: No. If you look at them, they're not. That's what I thought when I wrote them.

MS. DUNCAN: Well, then maybe we have the same problem. I mean, maybe we

have the same problem like with witness statements, because there's nothing in the witness statement as written that requires that that witness statement be relevant to the claim or defense in the lawsuit.

MR. PERRY: It all has to be relevant subject to --

MS. DUNCAN: I thought it was all premised on (a).

MR. SUSMAN: What she's saying is that we have --

MS. DUNCAN: But Bill is saying it's not.

PROFESSOR DORSANEO: I thought that too.

CHAIRMAN SOULES: Excuse me, just a second. Let Bill talk and then I'll let Sarah and Steve and then whoever has their hand up.

PROFESSOR DORSANEO: I thought that I said that. And when someone called me and asked me, then I went to justify it on the language of the current rule and I had to justify it on the basis of saying that that's what it was meant to mean, because that's not

what it says.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: I see the problem. The problem is under (b), Documents, where we require that they contain matters relevant to the subject matter; and (c), Persons With Knowledge of Relevant Facts.

But I see that under "Indemnity, Insuring and Settlement Agreements" and under "Witness statements," we don't condition it to relevance. Now, we could modify --

PROFESSOR DORSANEO: Well, indemnity is really very relevant because there's a policy that's applicable in this case to this claim.

MR. SUSMAN: I think we can solve that by simply putting in the word "relevant."

MR. GOLD: Why couldn't we change it by putting in (a) "parties may only obtain"?

MR. PERRY: Well, we talk about it in "judgment which may be rendered in the action or to indemnify or reimburse for payments made to satisfy the judgments."

CHAIRMAN SOULES: Yeah, d(1) is okay. It's d(2) and (e).

CHAIRMAN SOULES: All right, Steve.

PROFESSOR DORSANEO: Yes, d(1) is very relevant.

MR. SUSMAN: We just have to add the concept of relevance.

CHAIRMAN SOULES: Okay. Anything else on Rule 3? Richard.

MR. ORSINGER: I have an issue on (e), on the witness statement. As written, since "witness statement" is now defined, it would include a confidential husband-wife communication, for example, like a letter, which ordinarily is not subject to discovery under any circumstances unless you can prove that the privilege is waived. This purports to say that anything in the nature of a written communication, unless it was between a lawyer and the client, is subject to discovery. I think we have to be careful that we're talking only about statements given to parties to a lawsuit in the nature of a recounting of facts and that we're not talking

about preexisting communications that may be confidential.

CHAIRMAN SOULES: You've got husband-wife, you've got clergy, in some cases physician-patient.

MR. ORSINGER: Doctor-patient.

CHAIRMAN SOULES: And in some cases it's waived by the filing of the lawsuit; in some it's not.

MR. ORSINGER: But we don't purport to admit that any written statement is ever privileged in discovery unless it's between a lawyer and a client. Witness statements --

CHAIRMAN SOULES: Well, there could be other statements that are privileged.

PROFESSOR ALBRIGHT: What about if you said the privileges in the evidence rules? Does that help?

CHAIRMAN SOULES: Yeah.

MR. ORSINGER: There's a catch-all clause in here about how you can invoke -- because you have federal statutes that have to do with people that are getting alcohol treatment. You've got tons of

exemptions that we can't just throw away under this rule.

PROFESSOR ALBRIGHT: But what I'm trying to figure out is if you say, "Any matter protected from disclosure by privileges other than those in Rule 4," are you okay? Or do we need to put work product in there as well?

MR. SUSMAN: Let me ask you this --

MR. PERRY: Aren't we confusing witness statements with documents? Not every hospital record, medical record or letter is a witness statement. I think what Richard's point is that maybe we need to define a witness statement so that all of those other miscellaneous writings are not a witness statement.

MR. SUSMAN: Or alternatively, one thing we can do -- isn't what we're really trying to do here is say you can no longer withhold witness statements because of work product or claiming that they're work product? Can't we just say that in some way? I mean, just say it more directly, that a

witness statement cannot be withheld from discovery on the basis of the fact that it's work product. That's really what we're trying to do.

MR. ORSINGER: But you don't have work product under these rules, so remember, these rules are going to be in effect to describe a concept that no longer exists.

MS. DUNCAN: It's right here. 4(a) (indicating).

MR. ORSINGER: Oh, we have work product. Excuse me.

MR. SUSMAN: All right. So we have work product.

MR. ORSINGER: With your current definition of work product. Okay.

PROFESSOR ALBRIGHT: So instead of including witness statements when saying what is discoverable, you know, a witness statement is a document like any other document, then you say -- you just say for the work product rule, you say, photographs and witness statements are not work product.

PROFESSOR DORSANEO: That's a

better way.

MR. SUSMAN: Yeah. That's a better way of doing it.

PROFESSOR ALBRIGHT: Because then you can't claim the other privilege.

MR. SUSMAN: That's a better way, I think, of dealing with it.

PROFESSOR DORSANEO: But there's still the problem of making sure what you really mean by a witness statement.

PROFESSOR ALBRIGHT: Well, how would you -- tell us more about that. Don't hide the ball.

CHAIRMAN SOULES: I think you've got -- okay. "Witness statement" -- this is on Page 5 after "Evidence 503."

"Witness statement means a written statement" -- someplace put "not privileged" -- "signed or otherwise adopted." Put "not privileged" in there somewhere.

PROFESSOR ALBRIGHT: Well, I think what we would do is we would take -- delete (e) -- again, I'm talking off the top of my head without having a chance to have thought through this completely. If you

delete (e) from Rule 3, then on Rule 4(a) where you say "photographs and witnesses statements are not work product," then you could define witness statements.

HONORABLE F. SCOTT McCOWN: You don't need to define it. You just need to say it's not work product.

CHAIRMAN SOULES: Maybe that's it. Delete (e) and take care of it over under (a).

HONORABLE F. SCOTT McCOWN: I mean, the policy change we're trying to make is that witness statements aren't work product any more.

MR. SUSMAN: Well, you do need to define it in the sense that, let's say, I go out and interview a witness and I write up a memo to my file of what he said. Okay. Is that a witness statement? Not under -- that's still work product. Okay?

PROFESSOR ALBRIGHT: That's work product.

MR. SUSMAN: Because the witness never even saw my file memo.

PROFESSOR DORSANEO: It has to

be made or obtained in anticipation of litigation and adopted or approved by the person making it as that person's statement.

MR. SUSMAN: I think we see the problem here. I think we can deal with it. I mean, I understand what the problem is; that is, it's not with the definition of witness statement, it's that we need to make sure we're only removing the work product protection from that kind of witness statement.

CHAIRMAN SOULES: Are you talking here about a witness statement made in the pending litigation or in any litigation?

MR. SUSMAN: In any litigation. It doesn't make any difference.

PROFESSOR ALBRIGHT: Don't get into that.

MR. PERRY: Let's just deal with that one later.

CHAIRMAN SOULES: I didn't know whether you wanted some sort of a show of hands on what we're talking about here.

MR. SUSMAN: Let me deal with that. I think I get the sense of the group

and it's not -- it doesn't seem to be controversial. We'll take care of it.

CHAIRMAN SOULES: Okay. Anything else on Rule 3. Richard?

MR. ORSINGER: Yeah. It seems to me important to carry forward the concept of witness statement under the current rule that it has to do with the subject matter of the lawsuit, because if you don't say that it's a statement relevant to the subject matter of the lawsuit, then you're defining in witness statement something somebody wrote 10 years ago and we really don't need to carry that baggage around because that creates potential difficulties on -- and we have it here in 166B. We have language that we all probably understand.

PROFESSOR DORSANEO: It has to be not only relevant, though, the subject matter, which is a broad concept; it has to be made -- I don't know what the word exactly is. It means in anticipation of litigation.

MR. ORSINGER: It says concerning -- that's true also.

MR. GOLD: What was that, Bill?

PROFESSOR ALBRIGHT: It has to be about anticipation -- maybe it's in anticipation of the litigation. I don't know if it has to be case specific. But a husband-wife statement could be very relevant to the subject matter involved in the pending litigation but just would have to have been made --

PROFESSOR ALBRIGHT: But that would be protected under the husband-wife privilege.

MR. SUSMAN: A witness statement is any statement made by a witness, that is, a writing or something that they sign or they approve by them. That's a witness statement. Now, we aren't going to make it producible if it's privileged under one of these husband-wife or attorney-client or some other recognized clergy privilege or something like that. We're simply going to remove the work product protection from that.

PROFESSOR ALBRIGHT: That's right.

CHAIRMAN SOULES: And if you can do that, you've done the job we're talking

about.

MR. SUSMAN: I think that's all we're trying to do.

CHAIRMAN SOULES: And in the consideration about whether it's in this litigation or some other litigation --

MR. SUSMAN: That's right.

CHAIRMAN SOULES: -- I think that rule is right.

PROFESSOR ALBRIGHT: Because --

CHAIRMAN SOULES: Let's take ten.

(At this time there was a recess, after which time the hearing continued as follows:)

CHAIRMAN SOULES: Okay. Steve, Rule 4.

MR. SUSMAN: Rule 4.

PROFESSOR ALBRIGHT: Say "I assume there's no problem with Rule 4."

MR. SUSMAN: I assume there's no problem with Rule 4.

Okay. Rule 5.

MS. DUNCAN: Can we go back to Rule 4, Mr. Chairman?

CHAIRMAN SOULES: Rule 4.

MR. SUSMAN: Rule 4. I mean, actually the real question is, does anyone think there's any major problem with going to a federal regime, a federal rule regime that says that there's attorney-client, there's a special consulting experts' privilege and there's work product. And there's not all this party communication and -- what's the other one, Alex?

MS. DUNCAN: Witness statements?

PROFESSOR ALBRIGHT: It's attorney work product, whatever that be, and party communications, whatever they may be.

MR. SUSMAN: Yeah. Putting them into one. Basically we're combining those two.

PROFESSOR ALBRIGHT: Basically we're combining attorney work product and party communications.

And should I give my pitch?

MR. SUSMAN: Yes.

PROFESSOR ALBRIGHT: I have studied this for many years. I wrote an

article about discovery privileges, and the more I got into the Texas discovery privileges, the more I realized that they were a whole lot more complicated than they needed to be and they represented a trap for the unwary. Right now we have attorney work product, which is an absolute protection from discovery, absolutely protected from discovery. We also have party communications, which have a need and hardship exception, which the Supreme Court has said is like the federal work product need and hardship exception that applies to other work product; and for mental impressions and opinions, that the court should protect them when at all possible even under circumstances of need and hardship. So the court has pretty much defined party communications as much as they can to be like the federal work product rule.

The problem comes when lawyers make objections to what lawyers do in anticipation of litigation and they make an objection only on the basis of attorney work product. Because it is an absolute privilege, some courts have said attorney work product can

only be the attorneys' mental impressions and opinions. Therefore, if they want to protect ordinary work product, such as their notes concerning an interview with a witness, if they did not make the party communications privilege objection from the beginning, it will be waived and so that ordinary work product then becomes discoverable. So whenever you are objecting to attorney work product, you need to make both the attorney work product and the party communications objection to be sure you don't waive anything.

Another problem has come up with the continuing nature of the privilege. The Supreme Court held that attorney work product, at least the mental impressions and opinions of an attorney, is a continuing work product. So when Ford has lots of cases, Pinto cases, all over the country, the mental impressions and opinions of attorneys done with respect to a case in Alabama remain privileged in a connected case in Texas. But when Ford non-attorneys do work in anticipation of litigation for the Alabama case, the Supreme

Court has held that because that non-attorney work product is a party communication instead of attorney work product, the wording of the rule makes it so that that work product does not have a continuing privilege so it becomes discoverable in Texas although it is privileged everywhere else in the United States. So I think it creates a big problem for corporations such as Ford. Even Paul Gold admits that this is absurd.

MR. PERRY: How come you didn't explain it to me that way in subcommittee?

PROFESSOR ALBRIGHT: Paul and I discussed it at length one time.

MR. GOLD: That's right.

PROFESSOR ALBRIGHT: And also I think it just creates a trap for all lawyers when you're trying -- we have cases in Texas where lawyers' work product has been produced for discovery with no discussion of need and hardship, which I think is a scary precedent.

So I propose that we go -- that the Texas -- in the Texas rules we adopt the federal work product rule, and all work done by parties or their representatives, including

their attorneys, done in anticipation of litigation is discoverable -- I mean, is protected from discovery, but is then discoverable upon a showing of need and hardship with special protection for mental impressions and opinions.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I think that the main practical effect of this, and I think Alex disclosed it in what she said, would be to very much broaden the party communication exemption because the anticipation of litigation component is not self-consciously case specific the way it is in our current rule and the way that it has continued to be in our case law even after Natco a la the Rebublic case.

I think that the Supreme Court opinions are difficult to put together in that context, but nonetheless, the history behind narrowing the party communication exemption to a case-specific item is a long and a strong

one. And I, for one, would probably prefer doing to party communications what the Committee decided to do with witness statements rather than to provide them full-scale federal defense-oriented trial preparation privilege protection. So that draws the line.

MR. SUSMAN: Is that the way that cuts? In favor of defendant?

PROFESSOR DORSANEO: Usually.

MR. SUSMAN: I think our rule is stupid then. We should definitely change it.

Okay. I didn't understand. Bill, explain what the difference is. What are we doing now? I didn't exactly understand what you meant by "self-consciously case specific." I didn't quite understand what that meant.

PROFESSOR DORSANEO: For a party communication to be exempt you have to be making it in anticipation of, if not Opal Lee Humphrey's case, at least after Natco, the case that developed out of the explosion that also involved several different people. Okay?

It has to be -- when you're communicating as a party with another person who qualifies as the recipient of a party communication, it has to be after the transaction or occurrence and in anticipation of the claims made in the pending litigation. So it has to be a pretty case-specific communication. You have to be thinking about, the way I put it in the past, the litigation in which you ultimately assert the privilege.

PROFESSOR ALBRIGHT: So for Ford, you have all these Pintos that are exploding all over the country. For a party communication to be privileged, it has to be a communication made concerning the explosion --

PROFESSOR DORSANEO: -- of one Pinto.

PROFESSOR ALBRIGHT: -- of one Pinto in Austin, Texas, where the work that Ford employees did to prepare for trial of the explosion in Birmingham, Alabama, becomes discoverable in the Austin case.

PROFESSOR DORSANEO: Not the work, though; the factual information.

PROFESSOR ALBRIGHT: No.

Under -- no, because there's no protection for it. If they have mental impressions and opinions, how is it protected, Bill? Because it's not attorney work product. If an attorney is not involved, then the only other option is party communication.

MR. GOLD: Bill, wouldn't you think nationwide that defendants would want the adoption of the federal work product rather than Texas carving out this party communication --

PROFESSOR DORSANEO: Sure. I think they would want to have no discovery at all.

MR. GOLD: I'm not saying that. Of course, that's the case. But I mean, seriously, though, if the idea is that all these corporations are saying that Texas' is different than the rest of the country, wouldn't the rational approach to that be to adopt the federal rule on attorney work product?

CHAIRMAN SOULES: Or tell them too bad.

PROFESSOR DORSANEO: Well, it's

difficult to respond to Alex's point about what if a party communication reflects the mental impressions and conclusions of a person who doesn't happen to be counsel or representative of counsel. And I would concede that that's a different -- at least a very different issue than protecting all the contents of party communications even if they're much more like witness statements.

PROFESSOR ALBRIGHT: Right. And we are -- under this rule we have a specific provision that says nothing in this rule can be construed to render nondiscoverable the underlying facts, however acquired. So you can certainly get the facts discovered and an investigation done.

PROFESSOR DORSANEO: If I can figure out what the right questions are.

CHAIRMAN SOULES: Okay. Let's start around the table whenever you two are through with your opening remarks. Richard has had his hand up, and I'll go around the table.

PROFESSOR ALBRIGHT: Yeah. My concern is that when parties conduct

discovery -- I mean, conduct work preparing for litigation, it should not just be laid open to the world because of this one case that occurs in Austin, Texas.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: This work product formulation frightens me to death, and I'll explain why. And maybe I'm misinterpreting it, but as I understand the law right now, if I do legal research or if I draft my voir dire or my opening argument, no one is ever going to see that, not even the district judge that is hearing some motion to compel. And if I have some information in my file because I interviewed a witness and that witness is dead and there's no deposition, then maybe I've got to produce my notes from that interview and then some district judge will sift through it and protect out my own thoughts from the factual information I received.

Now, under this rule, everything that I have in my file, including my legal research, is now subject to disclosure depending on

whether the trial judge -- or subject to the trial judge's decision to protect my thought processes.

MR. GOLD: That's wrong.

MR. ORSINGER: Because your inquiry is not limited to going after the underlying factual information in this language.

PROFESSOR ALBRIGHT: No, no.

MR. GOLD: Because what you're doing is you're adopting the federal interpretation of work product. And the federal interpretation of work product is that your core work product can never be obtained upon a showing of undue hardship and substantial need. The only thing that is susceptible to a showing of undue hardship and substantial need are facts, factual materials that you have gathered. That's pretty much what our Supreme Court has inched toward in trying to embrace the federal concept of core work product and ordinary work product but has had difficulty in going the full measure because of our party communications rule. You're not changing anything in that regard.

MR. ORSINGER: All I have to say about that is that when I see that in writing in the Texas Rules of Procedure, then your assurance is meaningful to me. But if I have to tell --

MR. GOLD: Well, mine shouldn't be, but the federal court's interpretation --

MR. ORSINGER: No. The federal court's interpretation doesn't mean a damn thing to a state district judge who is looking at rules of procedure that don't define work product but they start out by talking about confidential documents and tangible things and then they say they can see all of them except to the extent the district judge protects them. So now everything in my file is in camera in front of some district judge that may be hostile to me.

PROFESSOR ALBRIGHT: Okay. Have you read, "When the required showing has been made, the court shall protect the mental impressions, opinions, conclusions or legal theories of the party or the party's representative concerning the litigation"?

MR. ORSINGER: I should not

even have to submit my file for in camera inspection unless and to the extent that it contains factual information. That's the problem I have, is that we have left behind the idea that we can penetrate an otherwise impenetrable shield in order to get underlying factual information and we have now put everything in my file subject to a district judge's review. That's extremely offensive to me.

PROFESSOR ALBRIGHT: Well, I don't understand why. How does that happen? I mean, how is that any different from --

MS. DUNCAN: Because you've flipped the --

MR. ORSINGER: Because right now, if I've got a folder full of research, I can say, "I've got a folder full of research here." The district judge doesn't need to see that because there's no -- I haven't even interviewed any witnesses. You can't even see anything in my file because everything has to do with my own notes to myself about my case.

MR. SUSMAN: How is he going to make a substantial showing of need? How could

a person make --

PROFESSOR ALBRIGHT: Yeah. How can he say he needs it?

MR. ORSINGER: That's not good enough. I'm sorry.

PROFESSOR ALBRIGHT: How can he even find out about it?

MR. SUSMAN: How could he make a substantial needs showing? Just look at the draft of your opening statement? I just don't quite understand how it could even get to that point.

MR. ORSINGER: Well, I don't like the fact that right now a district judge can't order me to tender my entire file in camera for inspection and you have just made it possible. Now, it may be that you're comfortable with that in the courts that you're in, and I may be comfortable about it in some of the courts that I'm in, but there are some things in my file that I don't ever want anybody to see. And by giving me this rule, then somebody is going to be able to require an in camera inspection so that somebody in a judicial posture can decide how

to protect my thoughts, and I don't like that.

MR. PERRY: Well, let me respond to that, Richard, if I can. I appreciate a lot about where you're coming from, because I started out being opposed to this just like you are. Okay? But number one, the procedure about objections and privileges and all that sort of thing as the committee is proposing is not going to be the same as it is now. You're not going to have to make an objection to somebody's request for production in order to protect your file. Under the rules that we're proposing, you can withhold anything that is prepared by trial counsel from production and you don't even have to say anything about it, because we all know that everybody has stuff that is responsive to a request for production that was prepared by trial counsel. You don't have to claim a privilege, you don't have to ask permission, you don't have to do anything.

Now, the big concern that I had when I first read these words on the paper, and I think it's your concern, is that they didn't mean anything to me. I read them and I keep

going around in circles. The argument that has been convincing to me is that there is a great deal of federal case law, federal decision law, interpreting the same language. And the argument that has been made to me is that we would be better off.

One of the things that I see -- and if there's anybody that should be able to take advantage of Ford having cases all over the country and Texas having a better rule than most other places, it's me. But what I generally see is that fights over this issue generally use up a lot more time and create a lot more friction costs than they are worth. And I think it would be a benefit to everybody to have a widespread body of law that we can all go to and take to our judges and say, you know, here is a case that is in point that interprets these same words that you can rely on.

Now, to me the key of the decision making is that I don't think that we should adopt this rule unless we have a clear legislative history on it that we are intending to adopt the federal decisional case law that is behind

it and that we are intending that our state district judges shall be guided by that.

I'll be the first to tell you that I don't have very much of an idea where the lines are drawn under that federal law because I don't do any work in federal court. But I figure that we can probably live with it as long as we have -- as long as everybody knows that we have that established body of law to go back to. And we do have certain specific things, as you pointed out, about photographs and witness statements. That's my thought.

MR. ORSINGER: Well, can I ask this: Isn't it ultimately my burden, if somebody wants my file, to tender it in camera if the review of the file is the only way for the district judge to find out what's privileged and what's not?

MR. PERRY: The way the procedure is set up, the way the procedure is proposed under these rules is that you can withhold material that is created by trial counsel without any notice, without anybody saying anything to anybody about it. Now, there is ultimately a procedure whereby you

can be required to state what you have withheld with sufficient specificity.

PROFESSOR ALBRIGHT: But that doesn't apply to your file. With your file there has to be a specific court order where says the judge says, "I want more evidence about what's in your file." And that can certainly be done under the current rule. Under the current rule, the judge can say, "Produce your file."

MR. GOLD: I think there's a Supreme Court decision that says you can't request an attorney's litigation file. You just can't request somebody's entire file, make them submit the entire file in camera and sort it out. You can't do that under the present rule, so the only way they could do it is to ask for specific items in the file. That's what the present rulings are. And the core work product under the federal court's interpretations would remain sacrosanct. You can't get it. The only things that are going to be in question are the same things that are questionable.

In fact, if you look at Leede Oil vs.

McCorkle, there's a case out of the first circuit, the Puerto Rico fire litigation, where they talk about the same type of problem, the differentiation between core work product and ordinary work product. And the federal courts do not allow discovery of what the attorney's impressions are about things that he gathers or she gathers. The only things that may potentially be discoverable are those things that are ordinary work product, those things that are gathered, those things that are potentially factual in nature, not what the attorney thinks about it.

I just -- I'm sorry, but I just don't see there being any more threat to what our mental impressions and trial strategies are under the federal rule, the federal approach, than what it is now.

CHAIRMAN SOULES: Judge McCown, and then we'll come around the table.

HONORABLE F. SCOTT McCOWN: I understand that you don't want the trial judge looking at your work product or attorney-client, but I'm confused about what your notion of the present law is, because I

thought that the present law required when you claimed a privilege that you had to prove a privilege. And if the other side says to me, and this happens all the time, says to me, "Judge, he's claiming it's attorney-client. Of course, I don't know what's in the envelope and I don't trust the guy, so I want you to look at it to make sure it's attorney-client," I thought I had a duty to.

Now, what I usually do, because I agree with you, it's offensive to me that that stuff can be looked at, I say, "I'm going to take this guy's word for it." Or if it's work product, I feel a little more requirement to look at what he's saying is work product, because people do fudge on that, and I do look at it. I think I have to when the other side says they don't trust his work product.

And to tell you the truth, I'm often finding things claimed to be work product that aren't that I'm ordering produced. I think that happens all the time now. So am I wrong about that? Isn't that what the law is?

MR. ORSINGER: I've never had a judge make me turn my file over to him. The

thought of that just frightens me to death.

HONORABLE F. SCOTT McCOWN: Well, I think it happens all the time.

MR. ORSINGER: If I had a witness statement where I had interviewed somebody, I can see forcing me to give that to the judge and let him mark out things and then turn the rest over. But if I don't have a witness statement in my file, no member of the judiciary should be looking at it in my opinion.

HONORABLE F. SCOTT McCOWN: Well, how do we know you don't?

PROFESSOR ALBRIGHT: You can just clean up that in the request. You can -- "I request all research that you have conducted in this case." Well, you're clearly going to object to it because that's your work product, and that's what you would do now.

MR. ORSINGER: And if Paul is right about what federal cases say and if the state district judges that have never appeared in federal court in their whole life all know what federal cases say, then I guess I'm okay. But I don't even know what all -- I've

read Hickman vs. Taylor, but I don't even know what all federal courts say, and we're about to adopt their standard.

PROFESSOR ALBRIGHT: Okay. No, because it says -- okay. You say, "My research is my mental impressions and opinions. I object to that request." Okay. That request is objectionable; it cannot be discovered under this rule. Okay?

But if you were -- if the request is "I want your witness statements," or "I want your notes from your interview with dead witness John Doe," and you say, "I object because that's my work product," then I have to prove a need and hardship. I have to say, "John Doe is dead and I never got a chance to talk to John Doe." Then the court will look at your notes that you took from John Doe's interview and if there's proof of need and hardship, the court will make you disclose the portions of those notes that disclose only facts.

I think that's a difficult determination, but you've still got that issue in the Texas rule right now.

CHAIRMAN SOULES: Sarah Duncan,

and then we'll get to Steve and go down the table.

MS. DUNCAN: Maybe I'm not also straight on what the current law is in Texas. When I went back and looked at the articles discussing these rules when they first came into being, the way I interpreted it was Texas starts from an entirely different premise than the federal work product doctrine does. We start from the premise, as I understand it, that all attorney work product is absolutely privileged and is not subject to anybody's test for anything with two exceptions. And those two exceptions were witness statements and party communications. The definitions of "party communications" and "witness statements" have changed over the years, but we've still operated from a premise of nondiscoverability and nontesting; whereas Hickman starts from the premise that we're going to divide all work product up into two groups, discoverable work product and nondiscoverable work product. And in order to determine what's in what group, we sort of have to look at it to make that determination.

And I, for one, am strongly opposed to changing the Texas premise that all work product is nondiscoverable unless it is specifically excepted, because I think once we change that premise, we are going to go exactly where Richard is talking about; that we are going to be looking at people's files.

You know, one of the first things that came to me when I looked at this where it says "mental impressions, opinions, conclusions or legal theories," well, in my view, any compilation of documents that I make is in and of itself an impression. But I don't know that this reaches that, because that's something tangible, whereas these things all look like intangibles, so that's just my view. I'm opposed to changing the threshold premise.

PROFESSOR ALBRIGHT: But that changed in like 1988.

MR. GOLD: Yeah. Let me respond. If you look at the Supreme Court cases that have come down over the last four or five years, there are references to the federal cases.

For instance, the compilation theory is from Shelton vs. AMC. That is a case in which an attorney selected documents for a witness to review at a deposition, and that line of cases holds that that selective process is the attorney's work product, core work product.

There's a whole other line of cases, Sporck vs. Piel in the federal court, that take a different view, but it's from the federal cases.

MS. DUNCAN: That's right.

MR. GOLD: It's from the federal cases. And slowly over the last four or five years there have been continuous references to this concept of core work product versus ordinary work product. The Leede case, Leede Oil vs. McCorkle, pretty much started it, because everybody said how in a world can a statement that an attorney took of a witness be discoverable. And the fulcrum in that case was that there were neutral recitals of fact in the statement, and the court said even though this may be something that the attorney took down, it is factual. This rule changes none of that.

MS. DUNCAN: It does.

MR. GOLD: None of it. All it does is attempts to bring predictability to this rule for someone who is trying to do discovery in the State of Texas and brings with it an entire body of law that has been developed in the federal courts and attempts to resolve this conundrum that we are constantly faced with with party communications, which is a real difficult concept to deal with.

But for the party communications rule, I think the Texas Supreme Court long ago would have tacitly embraced what we're recommending here. It's only when they get to the point of dealing with party communications that they have to stop and kind of take a detour. But this concept that you enunciate about work product being sacrosanct and that it diverges from the federal courts, not so, not in Texas, not for a long time.

MS. DUNCAN: Can I respond just with one sentence?

CHAIRMAN SOULES: Okay. Briefly Sarah, and then Steve.

MS. DUNCAN: In my view it is the Supreme Court's responsibility and prerogative to chip away at the rule. I will not vote in favor of a rule that changes the threshold premise, and that's all I'm saying.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Well, it's been -- the reason I was in favor of this, it was only till -- I've practiced law for a long time. It was only until a moment ago that I learned there was a different premise. I mean, I think the differences between the state and federal thing are so esoteric that very few lawyers understand it. Certainly associates, being young people who are going through files and withholding privileged attorney-client, work product things, do not understand it. I mean, I don't understand even, frankly, sitting here today. I have never in federal court felt my files are more in jeopardy before a federal judge than a state judge. I've never had a federal judge ask for my files. A lot of it has been in federal court, so I mean, I really -- this is a tempest in a teapot to me.

We thought we were doing something to simplify things just to say, "Oh, why should Texas be different just for the purpose of being different?" You all are conducting a real Law Review type discussion of the difference between the Texas and federal regime, which may be -- I mean, I think we ought to have papers presented by Alex and you, and you all have your debating papers, and maybe in the process we can learn what the difference between state and federal is, but I mean, that's what we did it for, because no one could really very clearly explain what the difference was.

It just seemed that we've got to write something in the rule. It's easy. Why don't we just pick the federal language and just -- because there's a body of case law. That's what we did, but I don't really care and I don't think anyone really cares.

PROFESSOR ALBRIGHT: I care. I care a whole lot.

MR. SUSMAN: Okay. I'm sorry, Alex cares.

CHAIRMAN SOULES: Back in 1981

and '82 and '83, when these rules were drafted, it was very difficult to discern what the hell the feds were saying about different kinds of work product, so the draftsmen of these rules decided we're going to break out what we think are the different kinds of work products that are being treated in different ways under the federal system so that somebody reading these rules doesn't have to go to a body of federal case law and try to figure out -- or Wright & Miller or somebody else and try to figure out what these distinctions are. Let's just say them in the rules, and we did.

And party communications were treated differently. Witness statements were treated differently. Core work product was treated differently. So we had work product and that means core work product. And we called the other things something else because they were not treated like core work product. They were something else in the federal law, and they've been treated different ways by the Supreme Court of Texas ever since.

But at least, Steve, somebody trying to

figure this out, a young, inexperienced lawyer in Texas, can look and see that we have different things here. And maybe they're being treated in different ways rather than having to go to the feds, the federal rules, and say that they all look to be the same. Are some of them being treated differently, and if so, how?

How are party communications treated under the federal work product? Are they called party communications?

PROFESSOR DORSANEO: No. They're called trial preparation materials. But the key difference is the anticipation of litigation concept. I don't actually believe that there is a uniform federal interpretation of that across all the circuits. But it is certainly potentially much broader than our party communication concept. The difference boils down to this: For a party communication that doesn't contain or wouldn't disclose mental impressions, trial strategies, conclusions or opinions, under this you would have to show for a communication made in anticipation of litigation in a general sense,

pending parallel litigation, let's say, that you had substantial need and that there was undue hardship. Under our practice right now you do not because it's not a party communication.

CHAIRMAN SOULES: If it's in another case; is that what you're talking about?

PROFESSOR DORSANEO: Yes. It has to be in anticipation of the case in which you're making the argument.

CHAIRMAN SOULES: Then you've got another kind of interesting --

PROFESSOR DORSANEO: That may not be what people think is strictly right but -- and I don't feel that strongly about it --

MR. SUSMAN: But Bill, you're just saying something, if I'm getting you right, that means it's easier to get stuff under the Texas rule than it is under the federal rule.

PROFESSOR DORSANEO: Right.

MR. SUSMAN: But these two people are saying no, the reason they want to

hold on to the Texas rule is it gives more protection, which is a different thing.

PROFESSOR DORSANEO: As Justice Hecht said here, he says, "I'm the one on the very left side; they're on the very right side."

MR. ORSINGER: But Bill Dorsaneo is talking about factual investigations of specific problems, and I'm talking about the lawyer's work that he does in his or her office. And he's got a problem that's different from my problem, but with this --

PROFESSOR ALBRIGHT: But there are mental impressions and opinions in the stuff that Bill is talking about, so --

MR. ORSINGER: And I know that, but --

CHAIRMAN SOULES: You have to talk one at a time because we're trying to get a record here.

MR. ORSINGER: I recognize that they are mixed, and right now the only exposure my file has is to the extent that I have mixed up factual observations about my

case with my own notes. But under your language, without regard to whether we can divine what the federal rule is, which as Paul already said, there's two different lines of authority on what the one example he picked was, everything in my file is subject to judicial analysis according to the federal standard whether or not it has been tainted by a factual inquiry of the accident in question.

MR. GOLD: It's already been decided that way here.

MR. ORSINGER: I don't agree with that, Paul. I'm sorry, but I don't think we are.

MR. GOLD: The Supreme Court has said that just because you have factual matters that are stuck into an attorney's file does not make those factual matters exempt from discovery.

PROFESSOR DORSANEO: That's very different from saying that you can look at the file.

MR. GOLD: You also cannot request an attorney's litigation file and make that attorney then segregate out those things

that are fact and those things that are not. You have to request specific components of the file.

And as Alex stated, if you request somebody's research, for goodness sake, that is by definition their mental impressions, their trial strategy. If you request statements, they very well may contain your analysis. That's something that a court now can look at.

The same thing with party communications. You may say that "I went and took photographs and those photographs reveal my mental impressions." Even now that can be required to be turned over to the court and a determination be made whether that's the case. I don't think there's anything in the federal courts that make your file any more in jeopardy than it is now. I don't think that that's an issue. I've never seen a case that said you have to turn over the file.

CHAIRMAN SOULES: Mike Hatchell has the floor.

MR. HATCHELL: I appreciate the good faith of the Committee in thinking that

it's broadening the protection, but I read the rule with the same alarm that Richard Orsinger does, and I think that it actually erodes the attorney-client privilege in at least three respects. I do not read federal core work product law to be limited to documents or any other material prepared in anticipation of litigation. I don't want to debate that issue now, but I think it's a case called In Re: Seal, which talks about a whole range of attorney work product that can emanate out of attorney-client relations separate and apart from litigation that's privileged in other litigation.

Number two, and I think this is partly what Richard is concerned about, is as I read this rule, the core work really is no longer absolutely privileged. It is subject to the discretion of heaven knows how many district judges we have. And I practice in pockets of litigation that would absolutely love to get into my files and will readily give them to the other side.

And number three, I do not -- and I think we're also venturing again into this business

of in anticipation of litigation. And just today, here is what happened in Texas: A national plan prepared by an outside independent counsel for the trial strategy of a nationwide product litigation was required to be revealed by a district judge who was 50 miles from any Federal Reporter. And I think this is a problem that we have now. Why can't I not be involved in litigation as a plaintiff with somebody who has prepared a national strategy before his trial and relative to my case. I go file another case that wasn't prepared in anticipation of that case, get their national trial strategy and then use it in that litigation. And it's happening. It's happening all that time, and I think this rule just lends to that.

JUSTICE HECHT: Could I ask one other thing?

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: I think an effort was made to track the federal rule. Is there a reason why in the fourth line of the bottom of Part A it was changed from "The

Court shall protect the mental impressions," when the federal rule reads, "The Court shall protect against disclosure of mental impressions"? Is that just editing?

PROFESSOR ALBRIGHT: It must have just accidently happened. There was no -- the intent was to track.

JUSTICE HECHT: I don't know if that makes any difference to the argument, but it sounds to me that "The Court shall protect against disclosure of the mental impressions" offers more assurance to -- maybe not enough -- but offers more to Richard and Sarah and others. Now, that is in the federal rule.

PROFESSOR ALBRIGHT: Another thing that I would not -- I think it's less elegant, as Scott McCown says, but I would not be opposed to saying, "The mental impressions and opinions of an attorney are absolutely privileged from disclosure," and having the work product instead of the party communications rule. I think the party communications rule is the culprit.

CHAIRMAN SOULES: Well, the

party communication rule serves another function too. And even though it's case specific and it expires when the case goes away, if executives talk to employees, lower level employees, their communications are privileged in the investigation of a claim, either one they're going to make or one they're going to defend, under party communications in Texas. If the lawyer goes out and talks to the lower level employees, that communication is not privileged --

PROFESSOR ALBRIGHT: Yes, it is.

CHAIRMAN SOULES: -- under that rule. No, because you've got a controlled group.

PROFESSOR ALBRIGHT: It's not an attorney-client privilege, but it is work product.

MR. ORSINGER: But I thought the standard was the same.

CHAIRMAN SOULES: Well, in Natco maybe they failed to assert the right privilege.

PROFESSOR ALBRIGHT: No.

Because if you read Natco, what they're saying is it is not an attorney-client privilege because it's not with the control group so we're going to go to work product. And then the issue is was it made in anticipation of the litigation, and that was the issue in Natco.

But clearly a communication that a lawyer -- a communication that a lawyer or the president of a corporation makes with an employee concerning the trial of the litigation in anticipation of the litigation is either a party communication or it is -- or it would be work product under this rule.

Under the current rule, if a lawyer goes to talk to an employee, it is probably not attorney work product if attorney work product is only core work product as you have defined it, so the only way to protect it would be to call it a party communication.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: I mean, if I'm hearing the debate correctly, I understand this party communication thing that Bill was talking about being different between state

and federal depending upon whether it was in anticipation of a particular litigation. And no one really seems -- the people who seem to be concerned about that, the plaintiffs lawyers, do not seem to be making a big case for that.

On the other hand, a case is being made, a substantial case along this side of the table to a fact that somehow the state work product doctrine protects attorneys' mental impressions and opinions more than the federal work product doctrine. Is that case not -- you're shaking your head. That is not --

PROFESSOR DORSANEO: I think not. You know, federal law is hard to figure out a lot of times, but --

MR. SUSMAN: I'm sorry, Bill, but is that not the case that's being made by these three who have just spoken? I think it is. Okay?

PROFESSOR ALBRIGHT: That is the case that's being made, yes.

MR. ORSINGER: Wait a minute, I'm not saying what federal law is on that because I haven't studied it recently. What

I'm telling you is these words compared to the current words jeopardize what I'm worried about. Paul is the one that's telling us that there's no worry because of the federal cases.

MR. SUSMAN: What I think we ought to do is, A, have someone with someone on this side, I mean, who is concerned about it look at the federal cases from that aspect and compare it with the state cases. Do the state cases protect the attorney's mental impressions and thought processes more than the federal cases? And Alex, you can -- I would say each side should prepare a three-page memo on this subject for us for the next meeting. And maybe there's --

PROFESSOR DORSANEO: There's a good article in the Virginia Law Review called "Rethinking Work Product" that does that.

MR. SUSMAN: It does that?

PROFESSOR DORSANEO: Uh-huh.

MR. SUSMAN: Then maybe that's what we ought to look at. But I think if the answer to the question is that federal law is as protective as state law, well, then aren't we okay with going with federal law as long as

we can make it clear, A, that the rule is identical to the federal rule. And I agree with Justice Hecht, we make if absolutely clear; and make it clear in the comment that we intend to adopt the federal rule and all the cases that it adopts.

PROFESSOR ALBRIGHT: Well, I think one problem with -- well, never mind. This gets more complicated.

CHAIRMAN SOULES: David Perry, go ahead.

MR. PERRY: Let me ask this: I think we're all in agreement that we want very strong inviolable protection for attorneys' mental impressions and opinions and that sort of thing.

MR. SUSMAN: Right.

MR. PERRY: I think that's what everybody is saying. Why don't we on the subcommittee have a shot at taking and modifying this so that the words on the paper are either at least as strong or stronger than the federal rule to make sure that the words on the paper as they relate to that particular subject get us where we want to go and come

back with another draft.

MR. SUSMAN: Because -- I'll respond to that. The economy in what we have done, the environmental dollar impact statement is that by adopting the federal rule, with all the cases that have been decided and reported, we reduce the amount of litigation in controversy --

PROFESSOR ALBRIGHT: That's not necessarily true.

MR. SUSMAN: Huh?

PROFESSOR ALBRIGHT: That's not necessarily true. I think if you make it clear in here that attorney core work product is absolutely protected from discovery, then that makes it very easy.

CHAIRMAN SOULES: Let me just say that --

MR. SUSMAN: But then you've adopted a separate rule from the federal rule.

CHAIRMAN SOULES: There's no question that core work product in Texas today is protected. This is not even an issue in Texas today.

PROFESSOR ALBRIGHT: Right.

It's not an issue in Texas today.

CHAIRMAN SOULES: Now, would somebody articulate for me without arguing, just articulate, the reasons why we should merge back into one work product rule the separated categories that we deliberately separated when we adopted the rules in 1984?

MR. GOLD: Because even when the Texas Supreme Court wrote the case about the party communications being limited to the case at hand, you could read the struggle that was going on, and the statement was, "Well, this is the way the rule is written."

Let me flip the argument to you. Give a plausible argument why the party communication rule should be limited solely to the instant lawsuit? I'll give you --

CHAIRMAN SOULES: Answer. I'll give you a quick answer: Because that's the way it's written and we can change it and we should. But if we can change the party communication rule, we don't have to change any of other rules.

MR. GOLD: But when you change the party communication rule, what you have

effectively done is tacitly embraced the federal rule. Why not say it and adopt the body of law that is there so that anybody who is looking at these rules from anywhere in the country can say, "Well, we don't have to deal with that funky party communications exception any more. Texas has come into the 20th century and has adopted the work product exception just like everybody else and we know that our affidavits that we've drafted elsewhere around the country for cases just like this will work in Texas just like everywhere else; as opposed to now, where when we draft an affidavit, doggone, it turns into party communications. And something that we did in a parked-reverse case over here two years ago is discoverable because it's a party communication and it's not for this pending litigation." I just think it's cleaner, it's more efficient, and I can't think of any reason not to --

CHAIRMAN SOULES: It seems like we've got one problem and that is the party communication privilege does not survive in the pending litigation. Why don't we fix that

in the party communication and leave this as is, because we've got plenty of law and there's no question that work product is separated in Texas. And we've got written in these rules that no matter how much good cause and need and all that you have, you can't get that.

PROFESSOR ALBRIGHT: Can I respond to that? Because you two, Luke and Sarah, have articulated another problem with the rule, because Sarah thinks attorney work product is anything a lawyer does in anticipation of litigation, the mental impressions and opinions and the ordinary work product, and she thinks it's all absolutely protected from discovery. You think attorney work product means core work product, only your mental impressions and opinions.

CHAIRMAN SOULES: That's because witness statements and party communications and the non-core work product are separated for different treatments, and they are treated differently in the very words of the rule.

PROFESSOR ALBRIGHT: I agree.

CHAIRMAN SOULES: Of our rule, not the federal rule.

PROFESSOR ALBRIGHT: I agree that that's the way the rule should be interpreted. But Sarah and then there are some courts of appeals judges in East Texas who think that attorney work product means anything that a lawyer does in anticipation of litigation and that is absolutely protected from discovery.

MS. DUNCAN: I don't think that's what I said. But --

CHAIRMAN SOULES: And you're not taking a witness statement?

PROFESSOR ALBRIGHT: No, no. Okay. Other than a witness statement, when a lawyer goes out and interviews a witness -- when a lawyer goes out and interviews a witness and takes notes on it, there are a couple of cases from courts of appeals where the judge says that is attorney work product; it is absolutely protected from discovery; you cannot get it even if you have need and hardship.

CHAIRMAN SOULES: I believe

that. I think that's right.

PROFESSOR ALBRIGHT: You think that's right? Well, then there are other cases that go the other way.

CHAIRMAN SOULES: I think that's wrong.

They're going to close the garage on us, and it's past 5:30. I appreciate your long day. We'll be back here at 8:30. Your materials are safe in here if you want to leave them.

(HEARING ADJOURNED 5:45 p.m.)

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CERTIFICATION OF THE HEARING OF
THE SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on September 16, 1994, afternoon session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,222^{00}$.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 27th day of September, 1994.

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