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7 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
8 JANUARY 21, 1995
9 (SATURDAY SESSION)
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18 Taken before D'Lois Jones, a
19 Certified Shorthand Reporter in Travis County
20 for the State of Texas, on the 21st day of
21 January, A.D., 1995, between the hours of 8:05
22 o'clock a.m. and 12:05 o'clock p.m. at the
23 Texas Law Center, 1414 Colorado, Room 101 and
24 102, Austin, Texas 78701.
25

COPY

JANUARY 21, 1995

MEMBERS PRESENT:

Luther H. Soules III
Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Ann Tyrrell Cochran
Prof. William V. Dorsaneo III
Sarah B. Duncan
Anne L. Gardner
Honorable Clarence A. Guittard
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
David E. Keltner
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Honorable David Peeples
David L. Perry
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

Charles Babcock
David J. Beck
Michael Gallagher
Michael Hatchell
Franklin Jones Jr.
Thomas Leatherbury
Harriett Miers
Richard Orsinger
Anthony J. Sadberry
Paula Sweeney

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Hon William Cornelius
Paul N. Gold
David B. Jackson
Hon. Doris Lange
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
Doyle Curry
Kenneth Law
Thomas Riney

Also present:

Lee Parsley
Holly Duderstadt

SUPREME COURT ADVISORY COMMITTEE
JANUARY 21, 1994

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1 MR. SUSMAN: Rule 2, page 4, is
2 no change from the way you have seen it
3 before, and I don't really think it was
4 controversial before. It probably will not be
5 controversial now. Any comments about Rule 2?
6 All in favor of Rule 2 raise your right hand.
7 All opposed? Rule 2 passes.
8 Rule 3 we have done some work on since
9 you have seen it. 3(1) we have not changed
10 basically. It defines -- it first sets out
11 the permissible forms of discovery then
12 defines what is meant by "written discovery"
13 for use elsewhere as we go through. The term
14 "written discovery" does have meaning and
15 makes it clear that these forms of discovery
16 can be used at any time and any sequence, et
17 cetera. Any comments about Rule 1, which I
18 don't think is basically much a change.
19 MR. LOW: Part (1) of Rule 3.
20 MR. SUSMAN: I'm sorry. Part
21 (1) of Rule 3. All in favor of part (1), Rule
22 3 raise your right hand. All opposed? That
23 passes.
24 Rule, part (2), scope of discovery. Let
25 me tell you, the general is not different,

1 documents and tangible things are not really
2 different from what you have seen. (C),
3 persons with knowledge of relevant facts. I
4 think this is the way we did it last time and
5 the way you instructed us to do it, and that
6 is that insofar as persons having knowledge of
7 relevant facts you must not only list them.
8 You must provide a brief statement of each
9 identified person's connection with the case.
10 Now, we make clear in the comment that that's
11 not what they know or what they are going to
12 testify. It is simply with such simple
13 designations as eyewitness, secretary, the
14 board of directors, sales representative,
15 economist, banker, some brief description of
16 the person's relationship to the case.
17 Item (d) is -- was put in at Luke's
18 suggestion. We thought it was a good
19 suggestion, which is trial witnesses. "A
20 party may obtain discovery of the identity and
21 location of persons who are expected to be
22 called to testify at trial." Expert witnesses
23 and indemnity insuring settlement agreements,
24 no change. Witness statements, my
25 recollection is we didn't change that either.

1 A witness statement is discoverable where it's
2 a statement that the witness adopts or
3 approves.
4 HONORABLE DAVID PEOPLES:
5 Steve, isn't that a change in the law?
6 MR. SUSMAN: What?
7 HONORABLE DAVID PEOPLES:
8 Nonparty witnesses?
9 MR. MARKS: Yes.
10 MR. SUSMAN: Yes. It is a
11 change in the law. And that is a change in
12 the law, and we discussed that I think at the
13 last meeting that that was a change. All of
14 these rules have been discussed before, and
15 people generally thought that was a good idea.
16 Yes.
17 MR. LATTING: Is what we want
18 to say is that we want to know who the other
19 side expects to call at trial? Is that really
20 what we want to do? We want to know who they
21 intend to call, or who they are going to call,
22 or who they may -- I think that's a pretty
23 important word.
24 HONORABLE F. SCOTT MCCOWN:
25 Remember this is an interrogatory. It's

1 not -- you might be more specific in your
2 pretrial order closer to trial but the purpose
3 of this --
4 MR. LATTING: Okay. All right.
5 HONORABLE F. SCOTT MCCOWN:
6 -- is to identify for the 50 hours who the
7 target people are.
8 MR. LATTING: Okay. All right.
9 HONORABLE F. SCOTT MCCOWN: So
10 that's why we said "expects" as opposed to
11 "intends" or opposed to "will."
12 MR. SUSMAN: Bill.
13 PROFESSOR DORSANEO: We talked
14 about this before, but the provision
15 concerning settlement agreements is very
16 broad, broader than it was ever intended to be
17 when we -- probably than it was ever intended
18 to be when it was put in here to begin with
19 because it just means any settlement
20 agreement, and there has to be case law limits
21 imposed on it, and I would suggest that the
22 committee impose some sort of limit that is
23 similar to the limit that is applicable to
24 insurance agreements.
25 PROFESSOR ALBRIGHT: If I may

1 respond to that, Alex Albright. I have in my
2 notes that you were supposed to provide me
3 with something.
4 PROFESSOR DORSANEO: Okay.
5 PROFESSOR ALBRIGHT: So --
6 PROFESSOR DORSANEO: I will try
7 to do that then, and I don't remember talking
8 at this committee level -- and it may be that
9 I'm suffering from the same memory problem
10 that I just had a second ago, but do we really
11 want to say a witness statement regardless of
12 when made, one made before the transaction or
13 occurrence giving rise to the litigation is a
14 witness statement, too? And I guess --
15 PROFESSOR ALBRIGHT: Well, it
16 doesn't matter because they are all
17 discoverable.
18 PROFESSOR DORSANEO: Okay.
19 That's what I was going to ask. Refresh my
20 recollection on what it means.
21 PROFESSOR ALBRIGHT: The issue
22 is whether witness statements made in
23 anticipation of litigation are discoverable,
24 and now they are work product or a party
25 communication or a witness statement. So they

1 are not discoverable except that you can get a
2 copy of your own statement. We are making it
3 so that witness statements made in
4 anticipation of litigation are discoverable
5 unless they are protected by the
6 attorney-client privilege or some other
7 evidentiary privilege or constitutional
8 privilege or statutory privilege but not an
9 investigative privilege.
10 PROFESSOR DORSANEO: And
11 witness statements not made in anticipation of
12 litigation are --
13 PROFESSOR ALBRIGHT: Are
14 clearly discoverable.
15 PROFESSOR DORSANEO: Okay. So
16 it doesn't matter at all what it says here
17 about regardless of when made.
18 PROFESSOR ALBRIGHT: We could
19 check that out.
20 MR. MARKS: I have a question.
21 Why are we doing this? I mean, why do we have
22 to do this? I mean, a lawyer goes out, and he
23 works on his case and prepares his case. He
24 takes statements or investigator takes
25 statements. I mean, something has got to be

1 protected, and it seems to me this is part of
2 his protection, and if he makes available the
3 identity of the witness, the location of the
4 witness, the telephone number of the witness,
5 somebody can go get his own statement. Now,
6 why should they invade my stuff?
7 PROFESSOR ALBRIGHT: Well, I
8 think the answer to that is this came from the
9 task force's report, and we looked at it, and
10 I think the sense of the committee at the last
11 meeting was that witness statements are
12 usually purely factual. They are renditions
13 of fact, and especially when you are limiting
14 depositions that if you can get these witness
15 statements then that would save -- would make
16 discovery more efficient.
17 MR. MARKS: But why can't
18 people go out and get their own statements,
19 Alex?
20 MR. SUSMAN: Judge Cornelius.
21 JUSTICE CORNELIUS: I have a
22 concern about the requirement that a party
23 reveal the witnesses he expects to call at
24 trial. I believe that represents a change in
25 the law, and I have no problem with the

1 requirement that they reveal the identity and
2 location of witnesses who have knowledge of
3 relevant facts, but to require an attorney to
4 commit himself in advance to the use of
5 particular witnesses at trial I think invades
6 his strategy and is probably not a good idea.
7 MR. SUSMAN: Okay. Let me just
8 do this so we can get through this a little
9 more organized. Subdivision (a), (b), (c),
10 all in favor of (a), (b), and (c) raise your
11 right hand. All opposed? That passes.
12 Now we are going to vote on (d), trial
13 witnesses. And let's limit the discussion of
14 that. Then we will get to witness statement.
15 I just want to make sure we move through it,
16 and I made a mistake by not -- yes. We are
17 talking about trial witnesses now.
18 HONORABLE SCOTT BRISTER: Yeah.
19 I would favor putting something in with
20 parties to discovery that certainly under 166
21 that I could order at pretrial conference the
22 parties to tell me who their actual witnesses
23 are going to be. If somebody wants to hide
24 the ball, I assume a large number of these
25 people when they get to section (d) will say

1 "see the list at section (c)" and hide the
2 ball if that's what they really intend to do.
3 On the other hand, people in good faith
4 don't expect to call 100 people who may know a
5 little bit about it. They want to just put
6 down 10 that they really think they are going
7 to call, which is what I do at pretrial
8 conference. Who are you really going to call?
9 Most people will readily tell you, and if
10 attorneys can tell each other that, boy, you
11 sure can save a lot of time and money on who
12 you have got to depose and spend time
13 concentrating on.
14 HONORABLE DAVID PEOPLES: What
15 happens to someone who lists as trial
16 witnesses every person who's already listed as
17 having knowledge of relevant facts? Is there
18 sanctions for listing too many people?
19 MR. SUSMAN: Well, I would
20 approach the court under those circumstances
21 and ask the court to sanction them. That was
22 not in good faith. I mean, I would invoke the
23 sanction rules. I would say, "Judge, I have
24 got 50 hours of depositions. The reason this
25 rule was changed, as the comments will

1 reflect, are so I will know how to use my 50
2 hours wisely." By simply reiterating the long
3 list that goes on for three pages under (c) as
4 the persons he expects to call, we know that's
5 impossible. It could never go to trial.
6 HONORABLE DAVID PEOPLES: Okay.
7 Can you get sanctioned if you -- let's say
8 there were 50 people with knowledge of
9 relevant facts, and you list 20, and your
10 position is, you know, I don't know right now
11 for sure, but I'm not calling anybody other
12 than these 20, but I will have to wait and see
13 how things go. Now, can that be sanctionable?
14 CHAIRMAN SOULES: No.
15 MR. SUSMAN: I don't think so.
16 I think that's pretty close to compliance.
17 HONORABLE SCOTT BRISTER: What
18 about if you don't -- you have somebody on (c)
19 but not on (d) and then less than 30 days
20 before trial you decide you are going to call
21 them?
22 MR. SUSMAN: That would be
23 dealt -- that would be dealt with our sanction
24 rule which we are coming to, the failure to
25 disclose information in a timely fashion.

1 HONORABLE SCOTT BRISTER: Well,
2 you did disclose them as a person with
3 knowledge of relevant facts.
4 CHAIRMAN SOULES: A timely
5 supplementation gets them on the list to
6 testify.
7 PROFESSOR ALBRIGHT: If it's
8 not timely, you go to our sanction rule, which
9 is not an automatic sanction like it is now.
10 You as the trial judge are going to have
11 discretion to determine surprise.
12 HONORABLE SCOTT BRISTER: Well,
13 what am I going to do if they were -- the
14 first week of discovery they were designated
15 as a person with relevant knowledge.
16 Everybody knew about them. It's just I didn't
17 make the decision I was going to call them at
18 trial until two weeks before.
19 PROFESSOR ALBRIGHT: Right. So
20 you as the trial judge -- the other side will
21 come up and say, you know, "They can't do
22 this. I'm surprised." You --
23 HONORABLE SCOTT BRISTER: Why
24 are you surprised? I told you who they were a
25 year ago.

1 PROFESSOR ALBRIGHT: As a trial
2 judge you have discretion to continue the
3 case, to say "This doesn't make any
4 difference; you're not surprised; go on."
5 MR. SUSMAN: I mean, my
6 argument if I were arguing the case would be
7 that I only deposed people who he indicated he
8 expected to call. That was the purpose of it,
9 judge. He did not put them there. I did not
10 take the deposition. Even though he listed
11 them up here as a person with relevant
12 knowledge, the draft of this rule he was
13 supposed to give me that information. He did
14 not. It has prejudiced me. I mean, you might
15 deny the motion. You might not. I don't
16 know.
17 PROFESSOR ALBRIGHT: You might
18 say, "Go take a deposition and come back this
19 afternoon."
20 MR. SUSMAN: Buddy.
21 MR. LOW: Is anything changed
22 with regard to rebuttal witnesses? I mean, is
23 that the same as now, if you show they're true
24 rebuttal? You said "expected to testify."
25 What are we doing with rebuttal witnesses now?

1 MR. SUSMAN: We haven't really
2 changed that.
3 MR. LOW: Okay.
4 MR. SUSMAN: Luke.
5 CHAIRMAN SOULES: This is in
6 response to Judge Brister. The persons with
7 knowledge of relevant facts is in most cases
8 going to be a broader universe of people, of
9 course, than the trial witnesses. The persons
10 with knowledge of relevant facts is supposed
11 to reveal not only the persons with knowledge
12 of relevant facts that are helpful to me but
13 also persons with knowledge of relevant facts
14 that are harmful to me.
15 The trial witnesses designation is really
16 a means to focus the other discovery. Persons
17 with knowledge of relevant facts is a
18 discovery -- a universe to be used for
19 discovery purposes to let me do whatever else
20 I want to. Maybe by way of mere investigation
21 among that list. Trial witnesses, as I
22 comprehend this and the reason that I
23 suggested this, is a tool by which you could
24 focus the balance of the discovery,
25 particularly the use of depositions.

1 For this to work a person who is not on
2 the trial witness list but who is on the
3 persons with knowledge list should be subject
4 to automatic sanctions, exclusion. Otherwise,
5 it won't work. Now, they have a new test in
6 these rules for what a judge is to consider
7 whenever a witness is not listed, but it is
8 under the new test I think if it's not on the
9 trial witness list, a person is not on the
10 trial witness list, the persons with knowledge
11 of relevant facts list is no cure to the
12 problem. That's the way I envision it.
13 MR. SUSMAN: Yes, Judge.
14 JUSTICE CORNELIUS: I think
15 with respect to focusing on the witnesses at
16 trial it's really not going to work because
17 the lawyer is going to list -- he's going to
18 have to list there all persons having
19 knowledge of relevant facts. To protect
20 himself he's going to list all as trial
21 witnesses everybody he lists as having
22 knowledge of relevant facts. Don't you think?
23 MR. SUSMAN: Well, my view is
24 that it is time -- the only way we are going
25 to cut down expense of discovery and still

1 make trials fair is make lawyers make up their
2 mind. Okay. Period. Lawyers have got to get
3 to the point where they can make choices and
4 make up their mind, and it doesn't have to be
5 the day before trial.
6 MR. MARKS: 60 days after the
7 case is filed and you have to answer the
8 interrogatories? You have to make your mind
9 up that fast?
10 MR. SUSMAN: Well, I would --
11 yes, sir. Because I would think you could say
12 at that time I am clearly going to call -- I
13 do expect to call the president of the
14 company, the vice-president of development,
15 our chief accountant, and so-and-so. I have
16 not made up my mind beyond that at this time
17 who else -- I don't know who I expect to call
18 beyond that. That would be a fair answer, I
19 would think.
20 MR. MARKS: Well, I don't -- 60
21 days out I don't know in a case who I'm going
22 to call, necessarily how I'm going to defend
23 the case. I think this is terribly unfair.
24 Now, if you want at some point in time to
25 require a party to identify witnesses who are

1 going to actually testify, I think it needs to
2 be down the line.
3 JUSTICE CORNELIUS: I do, too.
4 MR. SUSMAN: David.
5 MR. PERRY: As I understand the
6 intent of the rule -- and I'm not sure that
7 it's drafted this way, but as I understand the
8 intent of it when we initially answer the
9 discovery we would be required to say who it
10 is that at that time we expect that we would
11 call at trial, but we would have the right as
12 the case proceeds to supplement and add more
13 people or to take people off as developments
14 might occur until the time that discovery
15 would close. Is that basically what we have
16 contemplated here?
17 CHAIRMAN SOULES: Yes.
18 MR. SUSMAN: Yes.
19 MR. PERRY: So that a person
20 theoretically could answer at the very
21 beginning, "I don't have anybody in mind that
22 I expect to call at trial." You might end up
23 in the situation that we have now with regard
24 to experts where the trial court would say,
25 "Well, I'm going to require that you make up

1 your mind by a certain date" and set a
2 deadline.
3 MR. SUSMAN: And if I were in
4 Judge Brister's court I would probably be
5 ordered to do so, and if I were in Judge
6 Cornelius' court I probably would not be
7 ordered to do so. I mean, there is a lot
8 going to differ from the judge's viewpoint,
9 but it is a opportunity to get before a court
10 and say, look, whoever drafted these rules
11 thought that it's time that lawyers make up
12 their mind earlier and not hide the ball.
13 And I mean, this would be my pitch to the
14 judge. Now, they might listen or might not.
15 Make up their mind earlier, not hide the ball,
16 tell me in good faith who they now think they
17 are going to call as witnesses. They have got
18 to have some idea or they are guilty of
19 malpractice, and so I can go out and depose
20 these people, and if they have haven't made up
21 their mind, then maybe, judge, you ought to
22 modify the discovery window and some of these
23 other rules so I don't have to waste my time
24 deposing unnecessary people. Maybe the window
25 ought to run from the time he does make up his

1 mind. My time, my 50 hours, ought to run from
2 the time that Mr. Marks does make up his mind,
3 or whoever would be on the other side. Yes?
4 HONORABLE F. SCOTT MCCOWN: In
5 many cases you won't even have to ask the
6 judge to do that because if you look at Rule 5
7 on page 10 supplementation is supposed to be
8 30 days before trial. So you can supplement
9 really without any problem at all, all the way
10 up to 30 days before trial if you supplement
11 after the discovery period is completed. So
12 the discovery period is over. You supplement
13 by putting new people you expect to call as
14 witnesses. The opposing party can re-open
15 discovery and is automatically given five
16 hours of additional deposition time, and so I
17 think that in most cases changing that list
18 toward the end is going to be automatically
19 handled, and you won't even have to see the
20 court.
21 MR. SUSMAN: All right. Let me
22 ask for then a vote on (d). If it's real
23 close, we will come back and continue
24 discussion. If it's not, we will move on.
25 All in favor of (d) as written raise your

1 right hand. All opposed? All right. We need
2 a count. There are opposed how many?
3 CHAIRMAN SOULES: Five.
4 MS. DUDERSTADT: Five.
5 MR. SUSMAN: All in favor raise
6 your right hand.
7 CHAIRMAN SOULES: 12.
8 MS. DUDERSTADT: 13.
9 CHAIRMAN SOULES: 13. 13 in
10 favor for --
11 MR. MARKS: Maybe if I didn't
12 say anything the vote would be higher.
13 MR. LOW: Steve, don't you
14 think that -- I mean, that's been one of the
15 problems. Lawyers just putting it off and
16 putting it off, and the way to save money is
17 to focus attention early and mean it, but have
18 some loophole for people that are acting in
19 good faith, and if we don't have some system
20 like that, we are not going to be changing
21 anything.
22 MR. MARKS: Well, this one is
23 going to be abused. I guarantee it. This
24 will be abused.
25 MR. SUSMAN: All right. We

1 will move on then. I mean, I think that's a
2 pretty good indication.
3 Next is experts. Experts, is there any
4 problem with experts? That's no change
5 basically. All in favor of (e) raise your
6 right hand. All opposed? (E) passes.
7 (F), all in favor of (f) subject to
8 Dorsaneo's providing some language to Alex,
9 noncontroversial language, which will put
10 similar limitations on settlement agreements
11 that now occur for insurance agreements. All
12 in favor of (f) raise your right hand. All
13 opposed to (f)?
14 MR. LATTING: This is no
15 change; is that right?
16 MR. LOW: No. On the
17 settlement agreement.
18 MR. SUSMAN: No change.
19 MR. LOW: Yeah.
20 MR. SUSMAN: Now we are in (g)
21 in witness statements. We will continue the
22 discussion here on witness statements. Anyone
23 else? David Perry on witness statements, and
24 the question here is should they be -- if a
25 witness statement has been made -- now keep in

1 mind, John, that by witness statement we are
2 not talking about you going out and
3 interviewing someone and putting notes and
4 writing a memo to your file. We are talking
5 about a statement which the witness adopts or
6 signs.
7 MR. MARKS: But you have
8 another provision in here, don't you, for
9 getting that?
10 MR. SUSMAN: What? No, sir.
11 MR. MARKS: Yes, you do. I
12 mean, you don't say he can get your notes, but
13 he can get everything in your notes.
14 MR. SUSMAN: Let's not get to
15 that right now. Okay. I want to limit this
16 discussion to that statement because it by
17 terms is limited.
18 MR. MARKS: Well, I know, but I
19 think we need to talk about that in context
20 with this because --
21 MR. KELTNER: I can talk about
22 it with you.
23 MR. MARKS: Okay.
24 MR. SUSMAN: I mean -- David,
25 yes.

1 MR. PERRY: The thinking out of
2 the task force on this provision is that as a
3 practical matter 90 to 95 percent of the
4 witness statements that are taken today end up
5 being discovered, and anybody who knows what
6 they are doing knows before they take the
7 witness statement that it is almost always
8 going to be discoverable. It's just that in
9 order to get it you have to go around and
10 touch a lot of bases, and the thought out of
11 the task force was that there is an undue
12 amount of time and trouble and effort and
13 money and transaction costs involved in
14 touching all of those bases and that it would
15 be much better to amend the rule to bring it
16 in conformity with current practice, which is
17 that as a practical matter you are going to be
18 able to get the witness statement. So we
19 ought to say that up front, make sure
20 everybody knows up front they are going to be
21 discoverable and cut out the transaction cost.
22 MR. SUSMAN: Other comments?
23 Okay. Let's do a vote on this and see where
24 we stand. All in favor of (g) as written
25 raise your right hand. All opposed? Let's

1 see if we get some negatives and see if we
2 have got to count. Okay. We have got how
3 many negatives? One negative.
4 CHAIRMAN SOULES: Wait. I
5 don't think that's a fair record vote. There
6 has been zero discussion on this. That may be
7 a straw vote, but I don't think there should
8 be any record vote until the discussion has
9 been taken, and Marks has got something to say
10 about it over here.
11 MR. SUSMAN: I'm sorry. I
12 thought they -- I'm sorry. Was there more
13 discussion of this then? Let's continue with
14 the discussion. I had asked for this.
15 MR. MARKS: Well, 20 to 1 makes
16 it a little --
17 MR. LOW: I didn't vote because
18 I haven't heard -- I want some answers to some
19 things.
20 MR. MARKS: Well, I guess we
21 need to ask the questions then, Buddy.
22 HONORABLE F. SCOTT MCCOWN: Let
23 me give an example of why I am in favor of
24 this rule. There was an entire apartment
25 complex that burned down in Austin, and the

1 insurance company sent its lawyers out the day
2 of the fire. So they retained and sent out
3 counsel the day of the fire. Counsel
4 conducted all of the interviews on-site that
5 day, and the next day, the next day. No
6 insurance investigators, strictly counsel.
7 There was something like 200 interviews.
8 Well, the complex was burned to the
9 ground. So all of those people now disperse
10 heaven knows where, and you have got all of
11 these interviews made at the time. Now -- and
12 so the defense argued what John's arguing.
13 Hey, we were out there. Here is the last
14 known address of these people. You go
15 interview them.
16 Well, there is not really any work
17 product here. I mean, it's just the lawyers
18 asking what happened and the people saying
19 what happened. I mean, you really have to
20 stretch pretty hard to find much work product
21 in there. They are at the time. They are all
22 there. The cost to the plaintiff of gathering
23 that stuff up, even if it was possible, would
24 be astronomical, and you know, I guess our
25 thinking is the truth of the matter is there

1 is not a lot of work product in these witness
2 statements regardless of what lawyers tell
3 you, and it's just cheaper and fairer for
4 everybody to have what the witnesses have
5 said.
6 PROFESSOR ALBRIGHT: And but,
7 Scott, what you were talking about, where
8 lawyers' notes were interviews, right?
9 HONORABLE F. SCOTT MCCOWN: No.
10 PROFESSOR ALBRIGHT: Oh, these
11 were statements?
12 HONORABLE F. SCOTT MCCOWN:
13 These were statements.
14 PROFESSOR ALBRIGHT: Okay.
15 Because it is very different. Lawyers' notes
16 from an interview are very different from a
17 statement. Now, we are not talking about
18 lawyers' notes.
19 HONORABLE F. SCOTT MCCOWN:
20 These are at the scene statements.
21 MR. SUSMAN: Yeah. Keep clear
22 here that we are talking right now about
23 something that the witness signs or writes,
24 you know, or dictates or writes a letter
25 saying that's got it. That's it. An

1 affidavit, a witness affidavit. Bill.

2 PROFESSOR DORSANEO: I just

3 wanted to make the point that I have a

4 different attitude about a statement that

5 purports to be the witness' statement than I

6 do about notes of counsel with respect to the

7 same interview.

8 MR. SUSMAN: That's what we are

9 talking about.

10 HONORABLE SCOTT BRISTER: Or

11 even Q&A because the Q&A attorney, you know,

12 "Did you see" --

13 PROFESSOR DORSANEO: Yes.

14 HONORABLE SCOTT BRISTER:

15 -- "blue smoke?" Well, now why is the defense

16 attorney asking that? Because he knows

17 something about his construction that's in

18 attorney-client that says look for blue smoke.

19 You know, if the witness in their

20 recital, which as I read this is what we are

21 talking about, mentioned blue smoke, that's

22 their business; but if the attorney asks blue

23 smoke then you are starting all these

24 attorney-client things it seems to me.

25 MR. SUSMAN: I'm not sure if

1 you would cut it that -- my view is that if
2 you had a transcript. If I went out with a
3 court reporter and interviewed a witness, and
4 the witness signed it under oath that would be
5 a witness statement even though it does have
6 my questions like a deposition does.
7 HONORABLE SCOTT BRISTER: Okay.
8 I would have a problem with that.
9 PROFESSOR DORSANEO: I would as
10 well.
11 HONORABLE SCOTT BRISTER: As
12 you just stated because the attorney from the
13 apartment complex, insurer, whoever, is
14 disclosing matters -- may well be disclosing
15 matters by the type of questions you ask.
16 Certainly strategy, probably work product,
17 frequently attorney-client matters, and if
18 that's so, I would not consider a question and
19 responses to certain matters to be a
20 substantive verbatim recital of a statement.
21 If so, you need to make that clear because I
22 did not read that, this as saying that.
23 MR. MARKS: Well, it's in
24 there, Judge. Because it says "any recording
25 contemporaneously adopted."

1 MR. SUSMAN: Ann.
2 HONORABLE ANN COCHRAN: I would
3 agree with Scott that it -- I would disagree
4 with him in that I think that kind of
5 statement needs to be included as a witness
6 statement. I would agree with Scott that it
7 needs to be clarified to say that, and I think
8 that there is a vast difference between
9 deciding -- announcing after the statement has
10 been taken that, a-ha, you know, maybe you
11 thought you were being able to protect that,
12 but you're not.
13 If lawyers know and it's very clear here
14 that lawyers are no longer going to be allowed
15 to quote just factual gatherings under some
16 sort of attorney work product privilege, that
17 no matter who takes the statement and no
18 matter how the statement is taken it's going
19 to be discoverable then it's not -- then it's
20 on the -- the burden is on the lawyer to be
21 careful not to disclose any secret work
22 product in the way the questions are phrased.
23 So I think it's important to make it clear
24 that that's what we are doing so that lawyers
25 don't --

1 MR. MARKS: That creates work,
2 Judge.
3 MR. SUSMAN: Buddy.
4 MR. LOW: I think that you have
5 raised a good point. The Supreme Court held
6 that pictures aren't -- you don't change
7 those. You don't formulate, but your
8 questions you do, and I just have some problem
9 with saying that David -- and he's got the
10 case. He can come out there, and he does all
11 the work questioning all of these witnesses,
12 and all I have got to do is just sit back and
13 say, "Okay. Give it to me, and then I will
14 try to supplement it a little bit." I have
15 trouble with that if David does it because if
16 that's not work product, my work, I do no more
17 important work than that, and if that's not
18 work product, I don't have any.
19 MR. SUSMAN: Alex.
20 PROFESSOR ALBRIGHT: Again,
21 remember we are talking about statements. We
22 are not going to get into every single time
23 you are out questioning witnesses. If you are
24 asking questions of a witness and you get the
25 witness -- you know, you get the witness to

1 write down a bunch of stuff, the witness
2 doesn't sign it, you don't have to disclose it
3 under here.
4 MR. MARKS: Well, now --
5 PROFESSOR ALBRIGHT: Let me
6 finish, please.
7 MR. MARKS: Okay.
8 PROFESSOR ALBRIGHT: Okay. And
9 then, you know, so the reason you take
10 statements from somebody is because you're
11 afraid they are going to fudge on you when
12 they are up on the stand, and you are going to
13 use the statement to impeach them. That's
14 when you take statements, and so if you don't
15 take -- if you are worried about what you
16 might disclose about the blue smoke, well, if
17 this is a third party witness, you better not
18 be talking to them because I can take their
19 deposition, and I can say, "What did
20 Mr. Brister ask you?" And he has to tell me.
21 But if -- it's different if you're
22 taking -- if you're talking under the current
23 law, if you're taking a statement of your
24 employee. Okay. Under current law that
25 is -- you know, we could say that's a party

1 communication. I think at one time we were
2 talking about that that witness statement
3 would be a party communication, and so we
4 would continue the privilege on that. Then,
5 you know, there is an issue about whether you
6 want to protect witness statements, only
7 attorney-client witness statements, or
8 attorney-client and party communication
9 witness statements.
10 So you can take the others -- the next
11 step to say you don't have a separate witness
12 statement privilege, but you can protect the
13 party communications one, which would be
14 statements that you take of your employees,
15 representatives, agents, et cetera; but again,
16 you have got to realize that, you know, it's
17 only the statements that you get them to sign
18 or contemporaneously adopt and then -- and
19 it's just I don't think -- and with third
20 parties you are going to be able to ask them
21 what you asked them anyway. I just don't see
22 that it's that big a deal.
23 MR. SUSMAN: I mean, I do -- I
24 mean, I see the argument between, I mean,
25 either not giving them at all or giving them

1 because -- and one is you punish the lazy
2 lawyer or you reward the energetic lawyer is
3 basically what we are talking about for doing
4 a good job of getting out there and getting
5 them.
6 When you try to distinguish between the
7 types of witness statements, between a
8 transcript and an affidavit, I personally
9 think as much of the lawyer's mental process
10 goes into how he crafts an affidavit for the
11 guy to sign as if you went out there with a
12 tape recorder and asked questions and he
13 responded, or a court reporter. I mean, as
14 much as you are -- I mean, so if the fear is
15 that this is lawyer's thought process going
16 into it just like it is at a deposition or a
17 trial or anywhere, I mean, I think as much
18 goes into the affidavit or statement because
19 it's going to be written by the lawyer
20 usually. I mean, no witness is going to have
21 a word processer out there and write his own
22 statement. A lawyer writes it, and says,
23 "Will you read it, and will you sign it?"
24 So I almost think that that is not a good
25 distinction, and it's a distinction that's so

1 easy to avoid by simply how we get witness
2 statements. In either case you have something
3 that you can impeach the witness with. Now, a
4 file memo that I have written to my own file,
5 my own memo of what the witness told me, that
6 I haven't had the guts to ask the witness to
7 sign because, A, maybe I don't want it
8 discoverable, maybe I'm afraid the witness is
9 not going to sign it, but I can't impeach the
10 witness with that either at trial. So it
11 seems to me what we are talking about here
12 is -- I mean, the way it was written was
13 supposed to cover things that you can impeach
14 the witness with, a statement that he signed
15 or a transcript. Now, maybe it's not clear.
16 MR. YELENOSKY: Then say that.
17 MR. SUSMAN: But what I think
18 we ought to do on this one, on the voting at
19 least, is divide it up. We have now
20 identified two types of witness statements,
21 one an affidavit and one a Q&A. Put aside
22 totally the lawyer's memorandum or the
23 lawyer's notes, which is not covered here.
24 Now, let's take a straw vote and see how
25 many -- okay. Go ahead, Steve.

1 MR. YELENOSKY: Well, could you
2 phrase it in that fashion that if a witness
3 statement is something that would be
4 admissible for purposes of impeachment?
5 MR. SUSMAN: Yeah. I could.
6 But I was going to --
7 MR. YELENOSKY: I mean, that
8 wouldn't --
9 MR. SUSMAN: I think both of
10 those would be.
11 MR. LATTING: Let's not get
12 into that. Let's not get into that.
13 MR. SUSMAN: No. What I'm
14 saying is both types that I have identified
15 would be, I think, and there seems to be some
16 feeling in the group that there is a
17 distinction between the two, and maybe we
18 ought to vote on it that way. Scott.
19 HONORABLE F. SCOTT MCCOWN:
20 Well, I look at witness statements in camera,
21 and I hear lawyers make work product
22 arguments, but I never hear lawyers really
23 connect up in any way what that secret work
24 product is that they are trying to protect. I
25 just don't see that the work product that we

1 are worried about here really much exists,
2 that there really is a critical secret work
3 product that exists.
4 Instead I see a privilege, work product,
5 that we are using to shield something else,
6 which is advantage because I have got facts,
7 information that you don't have, and it's also
8 not that one lawyer is lazy and one lawyer is
9 working hard, and therefore, you know, the
10 lazy lawyer ought to be punished. It's not
11 the lazy lawyer. It's the well-placed lawyer.
12 It's the lawyer defending the client who
13 happened to be at the scene; whereas the
14 plaintiff's lawyer wasn't at the scene because
15 his client was in the hospital all burned up,
16 and I sure don't want to make a distinction
17 between Q&A and non-Q&A because Q&A is, "What
18 happened? What happened next? What happened
19 then?" I mean, I suppose just asking a guy,
20 "What happened" is Q&A. I mean, that is
21 slicing it so thin that you will just be
22 arguing about whether it's Q&A or not Q&A.
23 MR. SUSMAN: Next, David Perry.
24 MR. PERRY: Let me just make
25 the point that the definition of witness

1 statement that is set out here is the present
2 definition out of the present rules. A
3 witness statement as defined here is currently
4 discoverable because the witness themself is
5 entitled to a copy of it, and as a practical
6 matter the other lawyer is always, on at least
7 90 percent of the cases, 95 percent of the
8 cases, going to be able to get the witness to
9 request a copy of the statement which the
10 lawyer is then going to get. It's just that
11 you have to go to a lot of trouble to do it,
12 and you do have situations, as Judge Cochran
13 mentioned, where somebody may take a statement
14 without realizing that the other side is
15 eventually going to get it, and our thought is
16 it makes it a lot simpler to cut out the
17 transaction costs, say up front that you are
18 going to be able to get the statement.
19 MR. SUSMAN: David Peoples.
20 HONORABLE DAVID PEOPLES: Scott
21 McCown mentioned the apartment complex, but
22 the rules already take care of that,
23 substantial need and so forth.
24 MR. MARKS: That's right.
25 HONORABLE F. SCOTT MCCOWN:

1 Substantial need, you have got to prove it.
2 It's a court fight. It's expensive to prove
3 it, and you know, it can be a tough burden.
4 HONORABLE DAVID PEOPLES: I
5 just don't think it's really pricket to try to
6 write this rule on the basis of an extreme
7 example that is already provided for in the
8 rules. Now, point two, it seems to me if we
9 pass this then what will happen in the
10 apartment complex case is that the adjuster or
11 the lawyer who gets out there the next day and
12 wants to keep it from being discoverable will
13 just not have people sign.
14 MR. KELTNER: Which is what
15 happens now.
16 HONORABLE DAVID PEOPLES: Which
17 means you can't impeach with it, but they
18 probably would protect it that way, wouldn't
19 they?
20 MR. SUSMAN: David.
21 MR. KELTNER: I think so. I
22 think one of the problems is we are not
23 writing on a blank slate here, and I think
24 there are a lot of things that are
25 discoverable by the common law that people

1 don't realize. Lead Oil & Gas Vs. McCorkle,
2 the attorney's notes that are neutral
3 recitations of fact are discoverable, and that
4 was just recent, and Natural Tank Vs. Brothers
5 is sited with approval by this Supreme Court.
6 In the Benales case, Southern County Vs.
7 Benales, same thing in which an interview for
8 a witness practice session in depositions
9 could be discoverable if it attempted to in
10 any way influence how somebody said something.
11 Now, I might disagree with those and, in
12 fact, do. I think they are wrongly decided,
13 but the truth of the matter is they are there.
14 So a lot of these things we are even talking
15 about protecting the courts have already said
16 you can't protect. I worry about that, but
17 that's where the statement law currently is.
18 On witness statements the truth of the
19 matter is what innovative lawyers do is go
20 out, look, take a witness statement, same true
21 for investigators, don't have the person sign
22 it or don't have a contemporaneous approval
23 because the real truth of the matter is you
24 are just going to ask at trial, "Did you tell
25 Mr. Smith X? That's not what you said out at

1 the scene the day after the accident." So the
2 truth of the matter now is they are being
3 written and taken in a way that they are not
4 going to be discoverable.
5 That is something you can continue to do
6 under the rules. Very few are now taken where
7 the witness actually signs because what
8 happens is once it pops up in deposition --
9 and all of these people are going to have to
10 be noted as persons with knowledge of relevant
11 facts. Everybody admits that. So they are
12 going to be discoverable anyway. So then when
13 that is the lawyer does one of two things.
14 Says, "Mr. Witness, wouldn't you like to see
15 your statement?"
16 "Yes." Okay. Show them the statement.
17 "Now, Mr. So-and-so, you have looked at it to
18 refresh your recollection. Give it to me."
19 MR. SUSMAN: Buddy Low.
20 MR. LOW: Steve, let me say I'm
21 ready to just let it all hang out, just be
22 free. I think that's probably the way I've
23 changed my mind, but I think it's wrong to say
24 that you do it only for impeachment. I do it
25 so that the witness will say, "Well, what did

1 I tell you? I don't remember now." Not
2 necessarily to impeach him. "Well, did I sign
3 that?"
4 "Yeah." So I think there is another
5 reason for taking a statement, but I'm ready
6 to just --
7 MR. SUSMAN: All right. Are we
8 ready to vote? Let's see if we can vote now
9 because, I mean -- if anyone has got something
10 new to say, raise your hand, and you will be
11 recognized.
12 HONORABLE SCOTT BRISTER: I
13 don't know how to vote on this as it's
14 currently written because it is not -- as I
15 understand it, it is not contemporaneously
16 adopted if you do a Q&A with a tape recorder,
17 but it could be admissible to impeach
18 somebody. In other words, we have got
19 different impressions about what this does and
20 what it doesn't cover and, you know, are we
21 wanting to use everything that can be used to
22 impeach? If you want to do it, well, then
23 this rule doesn't do it.
24 MR. LATTING: Why do we need
25 the "contemporaneously" adverb there? Does

1 that really help us? Can't we just take that
2 out and cover that problem?
3 MR. PERRY: I think there is a
4 lot of case law, and I think you have got to
5 read what it says. You start out that a
6 witness statement is a written statement
7 signed or otherwise adopted or approved.
8 That's point one. Then you go to
9 stenographic, mechanical, electrical, or other
10 type of recording.
11 HONORABLE F. SCOTT MCCOWN:
12 That's point two.
13 MR. PERRY: That's point two.
14 Then you go to a transcription which -- or a
15 transcription which is a substantially
16 verbatim recital of a statement. This would
17 be where you take the Q&A and the court
18 reporter then transcribes it.
19 MR. LATTING: Okay. All right.
20 I'm clear.
21 MR. PERRY: And the guy signs
22 it.
23 HONORABLE SCOTT BRISTER: No.
24 That's an incorrect construction of this
25 language. You would have to have another "or"

1 in front of "electrical" for that to be
2 correct.
3 HONORABLE ANN COCHRAN: I think
4 that's right.
5 HONORABLE SCOTT BRISTER: This
6 has two things: one, written statements; two,
7 stenographic, electrical, or transcriptions of
8 stenographic or electrical. That's what this
9 says, and those have to be contemporaneously
10 adopted, and the Q&A on my tape recorder is
11 not contemporaneously adopted and perfectly
12 admissible as impeachment.
13 HONORABLE ANN COCHRAN: A lot
14 of times it is contemporaneously adopted
15 because in every recorded statement I have
16 ever seen an insurance adjuster -- the last
17 question is always, "Now, everything you have
18 told me, you know, is the truth?" I mean,
19 that's the --
20 MR. SUSMAN: Wait a second.
21 Let me see what, Scott, the reading -- I think
22 the notion would be a tape recording -- if I
23 take a tape recorder and interview a witness,
24 that is a witness statement within this
25 definition.

1 HONORABLE SCOTT BRISTER: I
2 would think it ought to be because certainly
3 you can use it to impeach them.
4 MR. SUSMAN: Well, why isn't it
5 a type of recording?
6 HONORABLE SCOTT BRISTER: It
7 is, but it's not contemporaneoulsy adopted.
8 MR. SUSMAN: But the
9 contemporaneously adopted only --
10 HONORABLE SCOTT BRISTER: Not
11 grammatically the way this is written.
12 MR. SUSMAN: It's intended to
13 modify only transcription.
14 HONORABLE SCOTT BRISTER: You
15 need to change it then.
16 HONORABLE SARAH DUNCAN: You
17 need to change some commas.
18 MR. SUSMAN: Where do we change
19 it? How do you change it?
20 HONORABLE F. SCOTT MCCOWN: We
21 need to say, "witness statements means (1)..."
22 MR. SUSMAN: Good.
23 HONORABLE F. SCOTT MCCOWN: "A
24 written statement signed or otherwise adopted
25 or approved by the person making it, or (2), a

1 stenographic, mechanical, electrical, or other
2 type of recording, or (3), any transcription
3 thereof which is a substantially verbatim
4 recital of a statement made by the person and
5 contemporaneously adopted."
6 MR. SUSMAN: Well, now, as
7 modified can we vote on (g)? Bill.
8 PROFESSOR DORSANEO: Well, I
9 don't think you needed to do all of that with
10 the language because of what it says at the
11 beginning, but let me just tell you where this
12 definition came from and why it's in the rules
13 right now. I think it will be a little bit
14 helpful. It doesn't have anything to do with
15 what we are talking about now. This
16 particular definition was taken from the
17 companion federal rule that talked about a
18 person getting his or her own statement. It
19 was moved over into 166(b) by me because that
20 seemed sensible to provide a definition of a
21 witness statement when we were talking about
22 witness statements.
23 If you would look in our case law, Allen
24 Vs. Humphreys, for example, whenever we talk
25 about the definition of a witness statement we

1 talk about the question of timing and
2 anticipation of litigation, and this
3 definition has just been kind of hanging
4 around over here in this other context for all
5 of this time. Now, I think it's a very
6 important issue as to whether it's signed or
7 adopted contemporaneously if we are going to
8 be talking about this trial preparation
9 privilege question, but notwithstanding the
10 fact this has been in the rule for some time,
11 it hasn't been in there and it wasn't crafted
12 by anyone with this debate in mind. Okay.
13 MR. SUSMAN: Now, are we ready
14 to vote? All in favor of (g) as written with
15 the (1), (2), and (3) inserted raise your
16 right hand. Let's see what we have with the
17 opposition.
18 CHAIRMAN SOULES: You are going
19 to have opposition.
20 MR. SUSMAN: Oh, you're right.
21 MS. DUDERSTADT: 16.
22 CHAIRMAN SOULES: 16 in favor.
23 MR. SUSMAN: All opposed?
24 CHAIRMAN SOULES: Two.
25 MR. SUSMAN: Two. Now, we turn

1 to rule --
2 HONORABLE DAVID PEOPLES: Let
3 me -- could we put a sentence in this rule
4 that says notes of interviews and so forth
5 that are not adopted by the interviewee are
6 not discoverable under this provision?
7 MR. SUSMAN: You mean just say
8 negatively?
9 HONORABLE DAVID PEOPLES: I
10 mean, when it's not signed, and it's not
11 adopted. It's not a Q&A. It's just a lawyer
12 or somebody went out and took some notes, and
13 you know, that's not very effective for
14 impeachment, and I think our intent is it's
15 not covered by this. At least I think that --
16 MR. SUSMAN: I think that's our
17 intent, but do you want a comment?
18 HONORABLE DAVID PEOPLES: No.
19 A sentence that just makes it clear. I think
20 a lot of judges are going to see this and
21 think that kind of stuff is discoverable.
22 Even though it's technically not signed and so
23 forth, they will think that's a statement.
24 MR. SUSMAN: Scott.
25 HONORABLE F. SCOTT MCCOWN:

1 Well, I guess because I disagree with David
2 Keltner if you've got a completely neutral
3 recital that's a note that has no work
4 product, no attorney-client privileges, I
5 think it ought to be discoverable. I mean, I
6 think that is the present law, and I think --
7 HONORABLE SCOTT BRISTER: It's
8 too much work.
9 HONORABLE F. SCOTT MCCOWN: The
10 judge can look at that in camera, and you can
11 make that --
12 HONORABLE SCOTT BRISTER: And
13 that's all the judge will do.
14 MR. SUSMAN: No, no, no, no,
15 no. Please, you-all, let's not debate here
16 that issue. Here the question is we have
17 defined a witness statement and now David
18 Peoples has suggested we put in --
19 HONORABLE DAVID PEOPLES: And I
20 will tell you why I am doing it, Steve.
21 Because the representation was made this does
22 not cover notes, et cetera, that are not
23 adopted by the witness.
24 MR. SUSMAN: Absolutely.
25 MR. LATTING: Let's state that.

1 I'm for stating that.

2 HONORABLE DAVID PEOPLES:

3 What's wrong with saying that?

4 HONORABLE F. SCOTT MCCOWN:

5 Because this doesn't cover it, but you are

6 trying to add a sentence that would make it

7 cover it by saying they are not discoverable.

8 MR. LATTING: No. It's not

9 discoverable here.

10 HONORABLE DAVID PEOPLES: No.

11 I wouldn't say it's not considered a witness

12 statement. I mean, the fact that a witness

13 said a bunch of stuff and the lawyer or

14 somebody else wrote it down, and it's not

15 signed, and therefore, it's not very effective

16 as impeachment.

17 MR. SUSMAN: Buddy.

18 MR. LOW: When you start

19 listing something that's not discoverable,

20 then you are limiting that. I mean, the judge

21 says, "Well, if that were included in that

22 category, then it ought to be listed." So you

23 get -- you have a problem.

24 MR. SUSMAN: Why can't we

25 satisfy people by putting a comment saying

1 that here that lawyers' notes, a lawyer
2 interview, a lawyer's memo to the file which
3 is not signed by the witness or adopted by the
4 witness is not a witness statement for these
5 purposes. Why wouldn't that do it?
6 HONORABLE ANN COCHRAN: Well, I
7 think we would need to be a lot more precise
8 because in that second -- the last half of
9 what you said you would have to say that if
10 the -- you know, I mean if it is a -- if the
11 lawyer's piece of paper is a substantially
12 verbatim recital of a statement made by the
13 person and contemporaneously adopted then it
14 is discoverable even if that is in the
15 lawyer's own handwriting. I mean so --
16 HONORABLE DAVID PEOPLES: How
17 is it contemporaneously adopted?
18 HONORABLE ANN COCHRAN: Well, I
19 don't know, but there are many ways it could
20 be, but if it was, I mean, I don't want
21 something that's written rephrasing No. 3 here
22 that would somehow mean that certain things
23 that otherwise fell under No. 3 we are going
24 to say is not a statement. If it's just going
25 to be purely an inferential rebuttal, you

1 know, then it needs to verbatim restate the
2 converse and not get into something where all
3 of the sudden we have created an exception to
4 (3).
5 MR. SUSMAN: I agree. I mean,
6 the danger -- I mean, obviously we have tried
7 in these rules not to put inferential
8 rebuttals in because it's just a further
9 drafting problem, to say one thing and then to
10 go say the negative is a problem, but if
11 people feel strongly about it I think the
12 place to do it is in a comment, and it should
13 be simply a mirror reverse image of what we
14 have already said. I agree. Bill.
15 PROFESSOR DORSANEO: I think
16 the current rule says that a photograph is not
17 a witness statement.
18 PROFESSOR ALBRIGHT: It says is
19 not a party communication.
20 PROFESSOR DORSANEO: Well, I
21 think there is also something in the witness
22 statement, too, isn't there?
23 MR. SUSMAN: David Perry.
24 MR. PERRY: I would like to
25 agree with Judge Peoples that I think it would

1 be desirable to make clear that this change in
2 the rule is not carried beyond where the
3 committee intends for it to go, and it seems
4 to me that a sentence could be put in here
5 that would read along the lines of saying an
6 investigative memorandum not meeting the
7 requirements of a, quote, "statement," close
8 quote, is not discoverable under this rule.
9 HONORABLE DAVID PEOPLES: You
10 know, it bears repeating. There are judges
11 all across the state that don't do personal
12 injury litigation 100 percent of the time,
13 that do a criminal case today and then family
14 law and then they will take a bunch of pleas
15 and a bunch of prove-ups and so forth, and
16 they may get a case like this once every three
17 or four months, and we need to lay it out in
18 black and white for them and for everybody
19 else. We really do.
20 MR. SUSMAN: Bill.
21 PROFESSOR DORSANEO: To go back
22 to what I said, the reason why it says in the
23 current rule that a photograph is not a
24 statement is to make the photograph
25 discoverable. Now, I agree with David Peoples

1 if we are going to have the standard be that
2 attorneys' notes with respect to this
3 interview of a witness are not discoverable,
4 that it ought to say that. It wouldn't be
5 hard to say it, and maybe we need to confront
6 that issue.
7 My own view would be that I don't care if
8 it's a neutral recitation of the facts. I
9 would have a bright line test to say that if
10 it's notes, period, it's not discoverable, and
11 that would be easier for everybody, and I
12 wouldn't have to worry about whether Scott
13 McCown is being influenced by what the damn
14 thing says, okay, as to whether or not it's
15 discoverable. Because I know when I have been
16 in a similar position as a master or a
17 rent-a-judge I am very influenced by what it
18 says, and there is room to decide whether it's
19 strictly factual or not. So...
20 MR. MEADOWS: Steve, I want to
21 get something clear.
22 MR. SUSMAN: Go ahead, Bob.
23 MR. MEADOWS: If I find a
24 witness, a non-party witness, interview him
25 for an hour on important findings, and I take

1 notes, and I finish with my interview, and I
2 go back through a few things to make sure I
3 have got some of the witnesses' names correct,
4 the dates correct, and I ask the witness,
5 "Now, have I got it right?" And he says,
6 "Yes." Is that a witness statement?
7 HONORABLE F. SCOTT MCCOWN:
8 Yeah.
9 MR. MEADOWS: Then I would like
10 to have --
11 MR. PERRY: Did you record it?
12 MR. MEADOWS: No. I just took
13 notes for an hour and then I walked back
14 through some of the high points, and I said to
15 the witness, "Do I have that right?" And he
16 says, "Yeah. You have got it all right." I
17 think what Scott's saying is that is a witness
18 statement because it's been adopted.
19 MR. PERRY: No.
20 MR. SUSMAN: Bobby, I would
21 think in that case when the discovery request
22 comes in to you you have got to make the
23 decision. If I don't turn this over, okay, I
24 can't confront this witness during his
25 deposition or at trial and say, "Mr. Jones,

1 when I talked to you over the phone don't you
2 recall, sir, that I read you this, and you
3 said it was right, and you adopted it?" And
4 then I would say, "Well, Bobby, how come you
5 haven't given me that in discovery?"
6 I think you would probably make the
7 election not to call it a witness statement
8 when my request came in for it because -- and
9 I think you couldn't play a game there. I
10 mean, I think some judge would be very mad at
11 you if you wouldn't turn it over to me and
12 then later at trial or discovery tried to
13 impeach this witness by claiming that he
14 adopted this memo.
15 MR. MARKS: Steve, why couldn't
16 we -- I'm not for this, but as long as it's
17 here what about "adopted in writing"? In
18 other words, you have to sign it or something.
19 PROFESSOR DORSANEO: Expressly
20 adopted.
21 MR. MARKS: Yeah. Expressly
22 adopted. So that it is documented on the
23 document itself that it's been adopted.
24 MR. LOW: The problem with that
25 is that you can get him to stick this note in

1 the billfold and say, "You know, I looked this
2 over," and my two pieces of paper, he hasn't
3 signed that when he signed something else.
4 MR. SUSMAN: Scott.
5 HONORABLE F. SCOTT MCCOWN: We
6 have a drafting problem that Bobby just
7 identified. If you look at what we are
8 calling clause (3) it says "any transcription
9 thereof," and I think, what's that "thereof"
10 referred to? If the "thereof" refers to a
11 recording then what Bobby said doesn't fall
12 within the rule. If the "thereof" refers to
13 the statement then what Bobby said would fall
14 within the rule. So it's not -- I think it's
15 not clear. I'm not sure what the answer to
16 Bobby's question is because I'm not sure what
17 the "thereof" refers to.
18 MR. PERRY: I think it refers
19 to the recording.
20 PROFESSOR DORSANEO: Recording
21 in English.
22 HONORABLE F. SCOTT MCCOWN: If
23 it refers to the recording then what Bobby
24 said would not be covered by this rule.
25 MR. MEADOWS: And that would be

1 fine with me.
2 MR. MARKS: Well, wait a
3 minute. You have got three tiers here. You
4 have got three different things.
5 HONORABLE SCOTT BRISTER: The
6 argument could be made that handwritten is a
7 stenographic, holographic recording of a
8 witnesses statement. That is not going to
9 mean -- I agree with the result, but that's
10 not going to mean that they are not going to
11 have --
12 HONORABLE F. SCOTT MCCOWN:
13 Okay. Well, let's take the "thereof" out and
14 just put whatever noun that "thereof" is
15 referring to.
16 MR. MEADOWS: But, you know, it
17 seems to me that the threshold issue is
18 whether or not this group thinks what I have
19 just described is a witness statement, whether
20 you ought to be able to get it, because I
21 think you should not.
22 MR. LATTING: I don't think it
23 is a witness statement.
24 HONORABLE SCOTT BRISTER: I
25 think Steve's right. It may be depending on

1 how you choose -- whether you choose to use it
2 or not.
3 MR. SUSMAN: But I think I was
4 probably wrong under this rule. I think under
5 the way it's drafted I probably couldn't get
6 it regardless of how he chooses to use it, the
7 way that the rule is drafted.
8 HONORABLE SCOTT BRISTER:
9 That's right.
10 MR. SUSMAN: If the "thereof"
11 refers to recording.
12 HONORABLE F. SCOTT MCCOWN:
13 Well, does it refer -- but is it a recording,
14 stenographic?
15 MR. SUSMAN: If the "thereof"
16 refers to the recording, I can't get what
17 Bobby talked about.
18 HONORABLE F. SCOTT MCCOWN: His
19 doing it is a recording.
20 HONORABLE SCOTT BRISTER: Yeah.
21 HONORABLE F. SCOTT MCCOWN: I
22 mean, what's stenographic? What's pen and
23 paper? Mechanical.
24 MR. PERRY: Now, wait a minute.
25 You-all are taking words out of context that

1 the transcription --

2 HONORABLE F. SCOTT MCCOWN:

3 That's because we're lawyers.

4 MR. PERRY: The transcription

5 talks about a substantially verbatim recital

6 that is contemporaneously adopted. Now, if

7 Bobby has sat there, and he has taken it down

8 in shorthand in a substantially verbatim

9 recital, and he has read it back to the

10 person, and he has had them sign it, then it's

11 a recording. I didn't understand Bobby to say

12 he had done that. I understand Bobby to say

13 that he had his notes, and he asked the guy

14 "Is this right," and the guy said, "Yes," and

15 Bobby put it in his pocket and left.

16 Now, the definition of a statement has

17 been around for a long time, and we all

18 basically know that you take a statement so

19 that you can tie the guy down and make sure he

20 doesn't change his story, and you take your

21 own personal memoranda about stuff that you

22 hope he does change his story on, and I think

23 we all know that your own investigative

24 memoranda is not intended to be discoverable

25 but that the facts contained in it may be

1 discoverable through some other mechanism, and
2 I think we are making this a whole lot more
3 difficult than it really is.
4 MR. SUSMAN: Luke.
5 CHAIRMAN SOULES: Don't we
6 really just have two categories here? And I'm
7 trying to pick up on the debate. "Witness
8 statement means, (1), a written statement
9 signed or otherwise adopted or approved by the
10 person making it, or (2)" -- and this is the
11 only additional one I think that modifies it
12 in the wrong place -- a stenographic,
13 mechanical, electrical, or other type of
14 recording. After that we ought to pick up
15 "which is a substantially verbatim recital of
16 a statement made by the person and
17 contemporaneously adopted or any transcription
18 thereof," which is a transcription of the
19 stenographic, mechanical, electrical or other
20 type of recording which is a substantially
21 verbatim recital of the statement made by a
22 person and contemporaneously adopted. That's
23 what we mean.
24 MR. LATTING: Yes. That's
25 right.

1 PROFESSOR ALBRIGHT: Uh-huh.
2 CHAIRMAN SOULES: And then I
3 think we should follow that with a witness
4 statement does not mean attorneys' notes,
5 witness interviews not signed or otherwise
6 adopted by the person interviewed.
7 MR. LATTING: Can we have a
8 motion for that? Are you making that as a
9 motion? I would like for you to.
10 CHAIRMAN SOULES: Well, if it
11 has any reception I will.
12 MR. LATTING: I would second
13 that motion.
14 MR. SUSMAN: Let's hear it.
15 CHAIRMAN SOULES: Okay. Here's
16 what I -- I move that (g) be modified to read
17 as follows: "(g), witness statements. A
18 witness statement regardless of when made is
19 discoverable except as provided by Rule 4. A
20 'witness statement' means: (1), a written
21 statement signed or otherwise adopted or
22 approved by the person making it, or (2), a
23 stenographic, mechanical, electrical, or other
24 type of recording which is a substantially
25 verbatim recital of a statement made by the

1 person and contemporaneously adopted or any
2 transcription thereof; but does not mean
3 attorneys' notes of witness interviews not
4 signed or otherwise adopted by the person
5 interviewed."
6 HONORABLE DAVID PEOPLES: I
7 want to ask, why wouldn't the investigator,
8 the insurance adjuster or David Perry's
9 investigator, also apply? Why would it have
10 to be an attorney? I mean, we talk about
11 cutting down on legal fees. We ought to let
12 the attorney's agent go out there and
13 investigate, too.
14 MR. MARKS: What if I hire a
15 stenographer?
16 HONORABLE DAVID PEOPLES: I
17 mean, if we make it attorneys then attorneys
18 are going to do their own work, and that's
19 more expensive.
20 MR. PERRY: I would say
21 "attorney or investigator."
22 MR. SUSMAN: Judge.
23 HONORABLE C. A. GUITTARD: Just
24 a matter of wording, what is it that's
25 adopted? Is it the recording, or is it the

1 transcription that's adopted? It seems like
2 to me if it's a recording there is no point in
3 saying it's a substantially verbatim recital.
4 What we are saying is, I think, that the
5 transcription is a substantially verbatim
6 recital. So that it should read "or
7 stenographic, mechanical, or electric or other
8 type of recording or any transcription of such
9 recording that is a substantial verbatim
10 recital and contemporaneously adopted."
11 MR. SUSMAN: Bobby, the
12 subcommittee is going to appoint you, Bobby,
13 to redraft this one.
14 MR. MEADOWS: I will work with
15 Alex.
16 MR. SUSMAN: Well, you can work
17 with Alex but you have -- I mean, talk to
18 Judge Guittard, get what Luke has, and let's
19 try to see what we can come up with something.
20 I don't want to sit here and draft, which is
21 what we have come down to the level of.
22 MR. LOW: I would ask Luke,
23 Luke, why did you just stop with "adopted"
24 instead of "or approved" like we used before?
25 MR. SUSMAN: That's why I don't

1 want to do this right now. Okay. Because you
2 are just drafting right now.
3 MR. LOW: I understand, but I
4 want to know if there is a substantive reason.
5 CHAIRMAN SOULES: Well, there
6 is not a substantive reason. It's just that
7 the way it's drafted right now stops with
8 "adopted" and doesn't say "or approved," but
9 either way that's fine to include that.
10 MR. LOW: I was just merely
11 asking the question if there was any
12 substantive reason.
13 CHAIRMAN SOULES: And I think
14 that the last clause should say "does not mean
15 the notes of an attorney or representative of
16 the attorney."
17 MR. LATTING: Yes. Yes.
18 CHAIRMAN SOULES: So that
19 basically what we are doing is picking up the
20 universe of people in Rule of Evidence 503.
21 MR. LATTING: I don't want to
22 draft anything. I just want to ask a
23 question.
24 CHAIRMAN SOULES: Does that
25 help us? In other words, if we pick up the

1 503 universe of people that are involved in
2 attorney-client as the class of people who can
3 take the interview and write it down, the
4 unsigned interview, then that's not
5 discoverable. Does that meet your concern,
6 Judge Peoples?
7 HONORABLE DAVID PEOPLES: I
8 think so. Yeah. Why don't we vote on it,
9 Steve?
10 MR. LATTING: Yeah. That's
11 what I was going to say. It seems to me that
12 except for these really technical drafting
13 matters we have a sense of the group on this,
14 and I think we have spent so much time on it I
15 would like to get it voted on just before we
16 forget about it.
17 HONORABLE F. SCOTT MCCOWN:
18 Wait a second. I don't want to say "are not
19 discoverable." But you might want to say --
20 MR. LATTING: Under this rule.
21 HONORABLE F. SCOTT MCCOWN:
22 Yeah. It doesn't cover it within the terms of
23 this rule, but as Judge Peoples pointed out,
24 if you have a substantial need to protect
25 the --

1 MR. SUSMAN: Okay. All in
2 favor of authorizing the subcommittee to draft
3 some language that makes it clear that an
4 attorney's notes or interview or an attorney's
5 agent's notes of an interview that has not
6 been signed or adopted by the witness is not
7 covered, is not a witness statement within
8 this definition? It may be something else,
9 but it's not a witness statement within this
10 definition. All in favor of that? All
11 opposed? It passes unanimously. So, Bobby,
12 you will do that.
13 MR. MEADOWS: Right.
14 MR. SUSMAN: And you will get
15 with people who have ideas, and there are a
16 lot of people who have ideas, and you will
17 come up with another draft. Let's move on to
18 Rule 4.
19 MR. LATTING: Are we not going
20 to take a vote on whether we want this rule to
21 pass with that proviso on it?
22 MR. SUSMAN: You have already
23 voted that.
24 MR. LATTING: Oh, we have?
25 Okay. All right.

1 MR. SUSMAN: We have voted on
2 that already.
3 CHAIRMAN SOULES: Does
4 everybody agree we have got a vote on that?
5 Okay.
6 MR. LATTING: Yeah. Sorry.
7 CHAIRMAN SOULES: Favorable
8 vote on that?
9 MR. SUSMAN: Yes.
10 CHAIRMAN SOULES: Okay.
11 MR. SUSMAN: It was one of
12 these backsliding things. We voted it, and
13 then we went back and discussed it. Okay.
14 Fine. Let's go to Rule 4.
15 PROFESSOR ALBRIGHT: No, we
16 don't --
17 MR. SUSMAN: Now, Rule 4(a) I
18 have been instructed is off the table. I
19 mean, in the sense that this was supposed to
20 be something that was going to be debated and
21 discussed by Alex and Richard Orsinger, and
22 that has not taken place, and so do not worry
23 about 4(a). That will not be necessarily the
24 final product. Right, Alex?
25 PROFESSOR ALBRIGHT: Right. We

1 will have a new version of the work product
2 rule or party communications, whatever, at the
3 March meeting.
4 CHAIRMAN SOULES: Good.
5 MR. SUSMAN: And so that leaves
6 (b), (c), and (d), I think are
7 noncontroversial and don't really represent
8 much of a change of anything.
9 MR. MARKS: On Rule 4?
10 MR. SUSMAN: Yes.
11 MR. MARKS: I think that (d) is
12 controversial.
13 PROFESSOR ALBRIGHT: It's very
14 controversial.
15 MR. SUSMAN: What is?
16 CHAIRMAN SOULES: (D), dog.
17 MR. SUSMAN: (D). All right.
18 Is there any controversy on (b) and (c)? All
19 in favor of (b) and (c) raise your right hand.
20 (B) and (c) passes. All opposed? (B) and (c)
21 passes. (D), let's discuss (d) then.
22 PROFESSOR ALBRIGHT: Steve, I
23 think (d) falls into the -- it's part of (a)
24 really, and I think we need to bring all of
25 those in together. This all needs a lot of

1 redrafting, and I don't think we should get
2 into that now.
3 MR. SUSMAN: We will not
4 discuss (d). We will not present it to you
5 today.
6 Rule 5. Rule 5(1), basically nothing new
7 from what you have seen and voted on before.
8 Any discussion on 5(1)? And I don't think
9 there is anything controversial there. All in
10 favor of 5(1) raise your right hand. All
11 opposed? 5(1) passes.
12 5(2), now, here is where we went back to
13 the drawing board at your instruction. If you
14 will recall, at one time we distinguished
15 between the duty to amend and the duty to
16 supplement, and now at your suggestion we have
17 eliminated that distinction, and we treat
18 subsequently acquired information that you do
19 not have when you originally answered a
20 written discovery request the same as
21 information which you have but erroneously
22 failed to get. They are treated the same now,
23 and in both cases the duty is to amend or
24 supplement reasonably promptly, and that an
25 amendment or supplement filed less than 30

1 days before the trial is presumptively made
2 without reasonable promptness. There was a
3 lot of discussion between us, among us, on how
4 we ought to do this, and the reason we used
5 "promptly" was the best thing we could come up
6 with.
7 CHAIRMAN SOULES: You've got
8 one typo there.
9 MR. SUSMAN: Yeah. "Incomplete
10 or incorrect." Correct.
11 MR. LATTING: Where is that?
12 CHAIRMAN SOULES: Third line.
13 MR. SUSMAN: Third line, the
14 word "incomplete or incorrect when made." Do
15 you have that, Alex?
16 PROFESSOR ALBRIGHT: Got it.
17 And also on the very last sentence it's "the
18 amendment or supplement should be in writing"
19 instead of just "the supplement."
20 MR. SUSMAN: Discussion?
21 MR. HERRING: Questions. "The
22 duty applies if the additional or corrective
23 information has not otherwise been made known
24 to the other parties in discovery or in
25 writing." If I respond to your discovery and

1 then you take the deposition of a third party,
2 and in that deposition, not my witness, I
3 don't change my discovery responses but the
4 information comes out, arguably I need not
5 amend or supplement? Is that the way it
6 works?
7 MR. SUSMAN: Correct.
8 HONORABLE SCOTT BRISTER: Worse
9 than that. I send you two feet of medical
10 records, and in there on one of the bills is a
11 doctor's name that I have not disclosed, but
12 you have been informed in writing because I
13 sent you two feet of medical records, and on
14 one of the bills buried in there is a doctor's
15 name; therefore, I don't need to supplement?
16 MR. SUSMAN: That's the way
17 it's written.
18 HONORABLE SCOTT BRISTER: Yeah.
19 I have a problem with that. It needs to be in
20 writing by the attorney. I don't have a
21 problem with the deposition. You heard it.
22 You should be reasonably awake in the
23 deposition. I don't have a problem with a
24 letter I sent to you. You should read your
25 letters. I don't have a problem with

1 discovery products. You should read discovery
2 products. I do have a problem with document
3 productions because those are frequently
4 massive, and most of the people in this room
5 are not going to read all the way through
6 them.
7 MR. SUSMAN: Good point. I
8 think we can draft that. We will draft it in
9 a way that captures what you said.
10 HONORABLE DAVID PEOPLES: It
11 seems to me information contained in those two
12 feet of records you supplemented but the names
13 of potential witnesses, especially experts,
14 that certainly should not suffice. I mean, is
15 there a difference between names of people as
16 opposed to complain to such-and-such or got
17 this and that treatment? I see a difference.
18 HONORABLE SCOTT BRISTER: Well,
19 but the biggest thing you need to supplement
20 is names of people or --
21 HONORABLE DAVID PEOPLES: Yeah.
22 Yeah.
23 HONORABLE SCOTT BRISTER: And
24 that's the thing that messes you up so.
25 MR. SUSMAN: Scott, would we

1 solve it if we simply said that that -- the
2 disclosure of people with knowledge of
3 relevant facts or witnesses cannot be
4 provided, except you have got to expressly do
5 that?
6 MR. MARKS: What about if it's
7 in a deposition as opposed to a record?
8 MR. SUSMAN: That wouldn't
9 suffice either. I mean, basically I don't
10 have to read all the depositions in a case.
11 MR. LATTING: Yeah. I think
12 you're right.
13 MR. SUSMAN: That I didn't
14 attend to make sure that there is some person
15 mentioned.
16 MR. MARKS: I agree.
17 MR. SUSMAN: Okay. There is
18 one list that I can look at, that the head
19 lawyer can look at, as the discovery window is
20 closing and go with my group over and say,
21 "Now, who is this," and "what is this person,"
22 and "do we care about them," and "what are
23 they going to say" and have them tell me; and
24 I don't have to go through and read every
25 deposition or scan every deposition to get all

1 names that were mentioned. Paul.

2 MR. GOLD: If I remember

3 correctly, the intent was when we were

4 drafting this phrase here in discovery or in

5 writing was -- I don't think your situation,

6 Judge, was contemplated. We were talking

7 about if someone had either given a written

8 answer to discovery or in a letter had sent

9 the information. Now, I don't know how to

10 articulate it. I'm sure Scott will come up

11 with something in a minute. Is when we -- it

12 was something that was affirmatively expressed

13 by the attorney in writing as opposed to some

14 name that appeared in mounds of documents, and

15 I think we can draft that because that was the

16 issue. It was if you had provided it either

17 in a formal response or in writing.

18 MR. SUSMAN: David Perry.

19 MR. PERRY: I think that the

20 problem with the exception is that it may end

21 up creating a trap for the unwary and creating

22 more litigation and more disputes than it's

23 really worth. The purpose for the exception,

24 as I understand, is that we wanted to avoid

25 needless work. If something has already been

1 disclosed then you do not need to amend your
2 discovery answers, and I think that that is a
3 laudable purpose, but I'm afraid that as a
4 practical matter what will happen is what
5 Judge Brister has pointed out, that people
6 will start to make their disclosures in other
7 ways, and then when you get to trial and the
8 issue arises, was this disclosed or was it
9 not, it starts to become the issue of who's
10 got the best indexing system and that there
11 are things like the identity -- especially,
12 basically if you have taken the trouble to ask
13 a question about it in written discovery,
14 aren't you entitled to look for the answer at
15 the place where you expect to find the answer?
16 MR. SUSMAN: Let me point out
17 something also that goes in accordance, and I
18 think you need to consider this at the same
19 time. I believe that when we wrote this first
20 rule also we had not written our exclusionary
21 rule. Now, our exclusionary rule is pretty
22 flexible and forgiving and is based on the
23 theory of surprise. So it would not disturb
24 me too much if we required formal
25 supplementation because obviously one of the

1 things I'm going to argue if you move to
2 exclude something that I didn't formally
3 supplement is that you couldn't have been
4 surprised because you heard about it. Okay.
5 There is no surprise here. You knew about
6 that. I wrote you a letter, and then the
7 other side is going to say, but yeah, it was
8 hidden in a stack of 45 boxes of documents,
9 and the trial judge is going to have to make
10 that determination. Alex.
11 PROFESSOR ALBRIGHT: This came
12 from a 1993 federal rule, is where that
13 language came from, and I think you are
14 exactly right. It was kind of belt and
15 suspenders because we weren't sure how the
16 sanction rule was going to play out, and I
17 would not be opposed at all to taking it out
18 under our new sanctions rules.
19 MR. SUSMAN: Okay. Could I say
20 this? Does anyone object to eliminating that
21 part of the rule? Okay. Luke.
22 CHAIRMAN SOULES: Well, I think
23 that I've heard Sarah, and I really don't mean
24 to steal her thunder. She's probably got
25 another idea in mind, but I think there are

1 specific things that this should not apply to.
2 Right now we have got to supplement the whole
3 scope, the whole universe of discovery, even
4 depositions. Except there is one court of
5 appeals case that may make that a question,
6 and I don't think there is.
7 MR. SUSMAN: This does not
8 require depositions be supplemented. It's
9 written discovery.
10 CHAIRMAN SOULES: But persons
11 with knowledge of relevant facts, trial
12 witness, experts, and documents, I think
13 should not be subject to this exception, and
14 everything else should be subject to this
15 exception. I think it serves a function,
16 should not be deleted, but it should not
17 permit a lawyer not to give a specific
18 supplement either in writing by letter or by
19 something filed, whatever. Persons with
20 knowledge of relevant facts, trial witnesses,
21 experts, and documents to be used at trial.
22 MR. LATTING: Luke, let me ask
23 a question. Here is a problem that I foresee
24 in this in just limiting it to that. I've
25 asked interrogatories in, say, an

1 architectural case, construction case, and I
2 have asked the expert on the other side to
3 tell me what he thought was wrong with this
4 building, and he's given me -- he's answered
5 that under oath. Now, later on several months
6 later I get a letter transmitted. This
7 happens. The lawyer sends it to me and says,
8 "By the way, that witness whose interrogatory
9 answers you have has sent me this letter," and
10 it may or may not constitute a modification to
11 his answers to his interrogatories. Do I have
12 to take his letter and hold it up with his
13 answers to interrogatories to know what his
14 answer under oath is?
15 See, the problem I have is that I don't
16 know where to go to know what -- what his
17 answers are, and it seems like to me if we
18 have interrogatories, and they are going to be
19 changed so that at the trial if I hold up his
20 interrogatory answers to him, and he says,
21 "Oh, but I wrote you a letter about that or my
22 lawyer sent you a letter about that," it seems
23 to me that we ought to require responses to
24 interrogatories to be changed in interrogatory
25 responses, and the problem that you have

1 expressed concern about would be taken care of
2 by Steve's observation that there is going to
3 be forgiveness in the --
4 MR. SUSMAN: Luke.
5 CHAIRMAN SOULES: Well, I think
6 my response directly to you is that I think if
7 the lawyer writes you a letter and broadens
8 the scope of what the expert is going to
9 testify to, that's enough. It doesn't have to
10 be done by some other means, but here is what
11 I'm trying to get at. I mean, and really I'm
12 talking about the identities of experts and
13 persons with knowledge. That's what the rules
14 say you have to do. Because if I take -- I
15 think if we take an expert's -- you take my
16 expert's deposition, and my expert tells you
17 what he is going to testify to. It's beyond
18 what the interrogatory said, but you have
19 taken his deposition, and you have heard his
20 testimony, that that's enough. When I said
21 experts I don't mean everything they are going
22 to say. I don't think I have to amend my
23 interrogatories so that I can track what my
24 expert gave you in his deposition or be at
25 risk that pieces of his deposition can't be

1 used. I think that's make work, but --

2 MR. LATTING: Yeah. I would

3 agree with that. I would agree with that.

4 CHAIRMAN SOULES: If my expert

5 identifies another expert when he's giving his

6 deposition, and I don't change my

7 interrogatories to tell you I am going to use

8 the one he's mentioned, the testifier

9 mentioned in his testimony, thrn I can't use

10 the expert that the testifier mentioned in his

11 testimony. I have got to tell you that

12 somehow specifically; otherwise, you can say,

13 "Well, that person is not going to be a

14 witness or an expert witness" unless I tell

15 you he's on my trial witness list, he's on my

16 expert witness list, he's on my persons with

17 knowledge of relevant facts.

18 And also if a document is mentioned

19 somewhere in a deposition and it never

20 surfaces in a document production, I will have

21 to worry about that document unless it's given

22 to me in a supplementation of the documents.

23 I think those are areas that are pretty easy

24 to do. I think most of the Bar is oriented

25 towards making those kinds of supplementations

1 timely prior to trial, but it's the quagmire
2 of going through all of the discovery and
3 trying to make these interrogatory answers so
4 extensive that you can't get cut off at the
5 pass that we are trying to get away from and
6 the thing that Sarah has talked about several
7 times.
8 MR. SUSMAN: David.
9 MR. PERRY: I think that we
10 need to remember that we are modifying the
11 rules about written discovery so that, for
12 example, on experts you're never going to be
13 required under the new rules to give details
14 of their opinions in answer to written
15 discovery so that requiring a formal
16 modification is going to be less onerous than
17 it was before. The old argument that you have
18 to change the interrogatory answers to
19 incorporate the deposition is going to go out
20 the window anyway. I think that if we are
21 going to require that a lawyer write a letter,
22 it's just as easy to formally supplement the
23 discovery as it is to write a letter, but
24 later on down the line when people are looking
25 for the answer the place they are going to

1 look is in the answer and not in their
2 correspondence file. They are going to look
3 in the answer to interrogatories file. So I
4 would support requiring a formal
5 supplementation on that.
6 MR. SUSMAN: Scott, and then we
7 are going to vote.
8 HONORABLE F. SCOTT MCCOWN:
9 Well, I think I agree with Luke that if it
10 happens in a deposition that you ought not
11 then have to do anything to your written
12 discovery, that depositions ought to be
13 supplementations. They are part of the
14 discovery. The lawyers are there. If it
15 happened in a deposition, you ought not then
16 have to narrow it or put it into your
17 interrogatories, but I don't think that the
18 exception the way our subcommittee has it
19 drafted works because I don't think that we
20 can sit here today and think of all of the
21 different ways that information is going to
22 otherwise be made known to you in document
23 production and that if we try to just except
24 out persons with knowledge of relevant facts
25 and a few other things we are going to miss a

1 lot.

2 I will give you an example. What about

3 damage calculation? You send an interrogatory

4 that says, "How do you calculate your

5 damages?" The plaintiff writes down an

6 answer. Six months later he sends you a box

7 of documents. You go to trial. He has got a

8 different damage theory and different damage

9 calculations. You say, "It wasn't in the

10 interrogatories." He says, "Hey, it was made

11 known to you in that box of documents, which

12 is underlying business records that if you had

13 read them you would have seen my damages were

14 calculated a whole different way." So I would

15 like to see if we could come up with some

16 language that would do what Luke was

17 suggesting that if it's in a deposition you

18 don't have to do it but wouldn't just say that

19 any other stuff that comes to you in the way

20 of document production can somehow make it

21 known, too.

22 HONORABLE SCOTT BRISTER: Isn't

23 document production the problem?

24 HONORABLE F. SCOTT MCCOWN:

25 Yeah.

1 HONORABLE SCOTT BRISTER: I
2 don't think letters are a problem. I don't
3 think matters on the record at a deposition
4 are problems, but document production is the
5 problem.
6 MR. SUSMAN: Is that the
7 problem?
8 HONORABLE F. SCOTT MCCOWN:
9 Yeah.
10 MR. SUSMAN: All right. Let me
11 suggest, can we get a vote on (2) with the
12 notion that we will expressly except through
13 drafting the document production?
14 CHAIRMAN SOULES: That doesn't
15 satisfy me, but if that's what the committee
16 wants to do.
17 MR. SUSMAN: Can we try to get
18 a vote on this? All in favor of (2) with the
19 idea that you can supplement and amend through
20 discovery or in writing but not through
21 document production?
22 HONORABLE SCOTT BRISTER:
23 Discovery except document production?
24 MR. SUSMAN: Document
25 production.

1 HONORABLE DAVID PEOPLES:
2 Before voting I would like to know what Luke
3 would add to it.
4 MR. MARKS: Yeah. I would,
5 too.
6 CHAIRMAN SOULES: Well, I don't
7 want Joe to use as an expert witness at trial
8 the person that my testifier or that his
9 testifier mentioned in his testimony as being
10 another expert in the field of toxicology. I
11 have -- I am Joe Schmaltz, and I am an expert
12 in toxicology, and here is my testimony about
13 this case, and besides all that Frank Jones,
14 he's a great man, too, and he knows all about
15 this, and he thinks the same way I do. Now
16 then, Frank Jones has been disclosed as an
17 expert who can testify to the same thing Joe
18 Schmaltz does, and I don't think he ought to
19 get that or any other person.
20 HONORABLE F. SCOTT MCCOWN: I
21 don't think so, Luke. Because the
22 interrogatory would not be, "Who are the
23 experts?" It would be, "Who do you name as an
24 expert?" So the fact that somebody in
25 deposition said there is a bunch of other

1 experts and here is their names, that's not
2 responsive to the interrogatory.
3 MR. SUSMAN: Correct.
4 CHAIRMAN SOULES: Well, you
5 have heard me and my problem.
6 PROFESSOR ALBRIGHT: Expert
7 witnesses are taken out. Expert witnesses are
8 treated separately under these rules.
9 MR. KELTNER: Well, this
10 doesn't say that.
11 MR. SUSMAN: All in favor of
12 (2) --
13 CHAIRMAN SOULES: Same for fact
14 witnesses. Same problem.
15 MR. SUSMAN: All in favor of
16 (2) as we will modify it? I mean, I
17 keep -- as we will modify it to except
18 document production. You can't supplement or
19 amend through simply making a document
20 production.
21 MR. YELENOSKY: Except amending
22 document production.
23 MR. SUSMAN: You can supplement
24 or amend through what you say in a deposition
25 or witness says or through a letter or through

1 another discovery device, but you cannot do it
2 through simply producing a bunch of documents.
3 All in favor of that raise your right hand.
4 Count. Do we have a counter?
5 CHAIRMAN SOULES: Ten.
6 MR. SUSMAN: All opposed?
7 CHAIRMAN SOULES: 14 opposed.
8 MR. SUSMAN: All right. That
9 fails.
10 MR. LATTING: Take care of the
11 witness list problem and then I would change
12 my vote.
13 MR. MARKS: Yeah.
14 CHAIRMAN SOULES: If you can't
15 add names to persons of knowledge of relevant
16 facts, trial witnesses, expert witnesses, or
17 add documents just by way of mention in the
18 other discovery then my vote changes
19 completely.
20 MR. KELTNER: Steve, and I
21 think that's what most people are feeling. I
22 think the truth of the matter is except what
23 we did on document production and then change
24 the designations such as experts, fact
25 witnesses, something that the lawyer has to

1 say. I understand the theory that it's not
2 supposed to be covered, but that's not the way
3 it's written. I think if we do that
4 amendment, I bet you will get close to
5 unanimous consent.
6 MR. SUSMAN: I guess my
7 question is, what is the problem with simply
8 taking it out altogether? I mean, what is the
9 problem with ending the first sentence of (2)
10 after "complete and" -- "is no longer complete
11 and correct," period.
12 CHAIRMAN SOULES: Because, as
13 Sarah pointed out, an extremely burdensome
14 process that many people are going through now
15 and high risk, complex litigation is going
16 through is bringing into their interrogatory
17 answers all of the other discovery because
18 they feel if they don't the judge is going to
19 focus on the interrogatory answers only and
20 exclude testimony and evidence, and if we make
21 the four exceptions that we have talked about,
22 persons, trial witnesses, documents, and
23 experts, then you do have to focus on those
24 things, but they are pretty easy, and they
25 are pretty --

1 MR. LATTING: They are
2 distinct.
3 CHAIRMAN SOULES: -- limited,
4 and then everything else, the universe of
5 testimony about the facts of the case, is
6 going to be picked up in the universe of
7 discovery that's out there. You don't have to
8 regurgitate that in your interrogatory
9 answers, and I'm with Sarah. Sarah and I were
10 together on one of those enormous things that
11 the state, the heap of state. I don't know
12 how many months or weeks you worked on that,
13 and that's just make work because the
14 information was already there in the universe
15 of discovery.
16 MR. SUSMAN: Well, let's do it
17 then. You want -- the sentence stays except
18 that you must supplement directly the identity
19 of witnesses with relevant knowledge of facts.
20 Okay. People with knowledge of facts,
21 expected trial witnesses, experts, and what
22 else?
23 MR. LATTING: Documents.
24 MR. SUSMAN: Why do you need
25 documents? What does that mean?

1 CHAIRMAN SOULES: If you are
2 going to use a document, I want it produced,
3 not just mentioned in a deposition.
4 MR. LATTING: You have to
5 supplement your document production, not just
6 say you knew about it because you heard about
7 it in a deposition.
8 PROFESSOR ALBRIGHT: But if
9 that document was produced, actually produced
10 at the deposition, it's on the --
11 CHAIRMAN SOULES: Well, then
12 it's done. See, then it's done.
13 MR. MEADOWS: I guess I don't
14 see -- I'm happy to vote the way you want it
15 because I think that just clarifies what I
16 thought I was voting for. I mean, I agree
17 with you if just some name is mentioned at a
18 deposition that doesn't get it, but I think
19 you ought to be able to write a letter and
20 say, "I'm adding this expert."
21 CHAIRMAN SOULES: No problem.
22 MR. MEADOWS: So, I mean, what
23 you want, if we can draft it, I think
24 clarifies what I thought I was voting for.
25 MR. KELTNER: I think this

1 change probably is going to get you close to
2 unanimous approval.
3 MR. GOLD: Can I ask one thing?
4 What if in a deposition the attorney says, "By
5 the way, I'm identifying this individual as an
6 individual with knowledge of relevant facts or
7 a trial witness," or "I'm identifying this
8 document as a document that I may use"? Does
9 that satisfy the situation, or do they have to
10 restate it in answer to an interrogatory?
11 CHAIRMAN SOULES: Technically
12 it probably would not meet what I'm
13 suggesting, but I think it falls right into
14 Steve's comment there can't possibly be
15 surprise because there was something specific
16 on the record about that.
17 MR. GOLD: I think I have
18 recently seen some case or something on that.
19 MR. SUSMAN: Now, documents, as
20 I understand documents, let me just for
21 drafting purposes, if a interrogatory says --
22 if you ask an interrogatory that requires the
23 other party to identify documents in the
24 interrogatory answers, wouldn't the production
25 of that document at a deposition, the actual

1 giving you the documents, suffice?
2 CHAIRMAN SOULES: Yes.
3 MR. SUSMAN: I don't have to go
4 back and amend the interrogatory answers?
5 CHAIRMAN SOULES: Correct.
6 MR. SUSMAN: To --
7 CHAIRMAN SOULES: As I see it.
8 As I see it. Correct, as I see it. So the
9 drafting should be directed that way in my
10 concept.
11 MR. SUSMAN: Okay. So, as I
12 understand it, the vote now will be all in
13 favor of (2) but with the understanding that
14 insofar as witnesses with relevant knowledge,
15 expert witnesses, and trial witnesses, you
16 have got to do that specifically, and
17 obviously you have got to produce the document
18 to -- for a document request you have got to
19 produce the document.
20 CHAIRMAN SOULES: Right.
21 MR. SUSMAN: I mean, you can't
22 just describe the document. You have got to
23 produce it for a document request. All in
24 favor of that raise your right hand. Do we
25 have any opposition to that? We have got it

1 unanimous. Great.

2 MR. HERRING: Steve, a

3 clarification. This says "supplement prior

4 responses to written discovery requests." Do

5 I take it, though, that doesn't mean you have

6 to supplement answers to depositions or

7 written questions?

8 MR. SUSMAN: Yes. Yes.

9 MR. HERRING: All right. And

10 it doesn't mean you have to supplement your

11 document production in response to a subpoena

12 or a duces tecum? That's not the kind of

13 written discovery request you are talking

14 about.

15 MR. SUSMAN: Well, you have to

16 go -- I think that may be covered, but we need

17 to go back and look at what is referred to as

18 written discovery.

19 PROFESSOR ALBRIGHT: It's on

20 page 5.

21 CHAIRMAN SOULES: Page what?

22 PROFESSOR ALBRIGHT: Page 5.

23 MR. SUSMAN: Page 5. "Request

24 for standard disclosure or request for

25 designation and information regarding experts,

1 request for production of documents," that is
2 written, "interrogatories to a party, and
3 request for admissions."
4 MR. PERRY: Chuck, there is
5 another provision that a subpoena duces tecum
6 to a party is treated as a request for
7 production.
8 MR. HERRING: So you would have
9 to supplement the duces tecum. You would have
10 to supplement your deposition if you produce
11 all of the documents responsive to that, and
12 you have to make another supplementation to
13 the deposition somehow or another.
14 MR. PERRY: I think you could
15 make an argument because under the duces tecum
16 rule in order to make sure that everybody has
17 30 days and plenty of opportunity to object we
18 have provided that those would be handled as
19 request for production if they are to a party.
20 MR. HERRING: And
21 supplementation applies to that, too?
22 MR. PERRY: Well, I'm not sure
23 if we have specifically written it that way,
24 but I don't know that we thought about it.
25 MR. HERRING: Well, we ought to

1 answer it one way or the other because that's
2 a supplementation duty, and that should be
3 included somewhere.
4 MR. SUSMAN: That's a good
5 point. You were talking about is a request
6 for production attached? Alex, a request for
7 production of documents included in a subpoena
8 to a party or a notice to a party should be a
9 part of written discovery.
10 PROFESSOR ALBRIGHT: Right.
11 CHAIRMAN SOULES: I agree with
12 that.
13 MR. SUSMAN: Okay. We need to
14 make that clear.
15 PROFESSOR ALBRIGHT: All you
16 would have to supplement, as I think we intend
17 it, and we can make it more clear, is that you
18 would supplement the document request.
19 MR. HERRING: Right.
20 PROFESSOR ALBRIGHT: If there
21 was a deposition taken at the same time, you
22 don't have to supplement the Q&A in the
23 deposition.
24 CHAIRMAN SOULES: Right on.
25 Right on.

1 MR. SUSMAN: Subdivision 5(3),
2 please. We need to get to 5(3), and I am
3 looking at the clock, and I am beginning to
4 get concerned about the clock because I want
5 to get through these.
6 CHAIRMAN SOULES: Page what?
7 MR. SUSMAN: Page 10.
8 MR. YELENOSKY: Steve?
9 MR. SUSMAN: Yes.
10 MR. YELENOSKY: The way I read
11 that there is no buffer there, and in other
12 words, you could supplement --
13 MR. SUSMAN: I'm going to give
14 you right now a change, which was just a
15 mistake on the part of the committee.
16 MR. YELENOSKY: Okay.
17 MR. SUSMAN: "If the amendment
18 or supplement occurs," and it should be, "at
19 such time that it is impossible to conduct
20 discovery about the response, about the
21 amendment or supplement within the discovery
22 period." Something needs to be written like
23 that that has not been -- you have hit the
24 problem. I mean, someone who amends or
25 supplements on the last day, I mean, you have

1 got to have the right to re-open. So we will
2 make that change in the first sentence.
3 "If the amendment or supplement occurs at
4 such time it is impossible to conduct
5 discovery about the amendment or supplement
6 within the discovery period the party may
7 re-open discovery." Now, any problem with
8 this as written, as it will be changed? All
9 in favor of (3) raise your right hand. All
10 opposed? Passes unanimously.
11 We go on to Rule 6. Now, 6 has been --
12 6(1) was a concept discussed at length at our
13 September meeting. I think -- I can check in
14 a second. I think we voted on this concept,
15 and people were happy with the concept. We
16 have rewritten it because we were not happy
17 the way it was written, but this is the -- a
18 couple of things. This is the punishment for
19 failure to disclose, timely disclose,
20 information in discovery. Now, there are
21 other sanction rules that may be invoked
22 against the bad boy lawyer, and these do not
23 mean to displace those sanction rules. I
24 mean, someone who -- you know, you could still
25 have a death penalty. There are all kinds of

1 sanction rules.
2 This is just we wanted to go back to the
3 notion of a genuine surprise, and that's what
4 it is. So "If a party fails to timely
5 disclose information, the court may exclude
6 the information or continue when the failure
7 to disclose causes the opposing party to be
8 unprepared in a way that may affect the
9 outcome of the trial." The one thing you
10 gave -- you approved this at the last meeting
11 with the admonition that we should put the
12 burden of that showing on the offending party,
13 which we have.
14 HONORABLE SCOTT BRISTER: Which
15 showing?
16 MR. SUSMAN: Huh?
17 HONORABLE SCOTT BRISTER: Which
18 showing?
19 MR. SUSMAN: Now, you are going
20 to make me state it in the negative, Scott,
21 which is the difficult thing to do here
22 because that's why we had to write it in this
23 awkward way. I guess it would be I have got
24 to show that my late disclosure of this
25 witness or this information --

1 HONORABLE F. SCOTT MCCOWN: Did
2 not --
3 MR. SUSMAN: -- did not cause
4 you to be unprepared in a way that might
5 affect the outcome of the trial. That's my
6 burden of proof. I have got to carry that
7 burden. I have got to show the judge that
8 somewhere in discovery you knew about this, or
9 it's irrelevant, or it's a minor issue, or I
10 am going to give you a deposition tonight of
11 the same witness, and you won't be surprised
12 when the trial begins on Monday, or whatever
13 it is, but I have got the burden. Buddy.
14 HONORABLE SCOTT BRISTER: How
15 about burden of showing ability to prepare for
16 the trial? It's just I think the way it's
17 written I have got some grammatical problems
18 because this showing unprepared, the way it's
19 stated unprepared and the way it will affect
20 the outcome of the trial is the burden of the
21 opposing party.
22 JUSTICE CORNELIUS: "Effect"
23 should be "affect" in the fifth line, too.
24 MR. SUSMAN: Oh, that's right.
25 HONORABLE C. A. GUITTARD: Is

1 there a difference between a continuance and a
2 postponement? Technically a continuance means
3 probably for a longer period than a
4 postponement. I don't know if there is any
5 real difference here, but I think what we
6 really mean here is postponement. Is it not?
7 MR. LOW: What's the
8 difference?
9 MR. SUSMAN: Yes.
10 HONORABLE C. A. GUITTARD:
11 Well, why don't we change it then to say
12 "postpone" or "postpone the trial"?
13 MR. SUSMAN: Postpone?
14 HONORABLE F. SCOTT MCCOWN: No,
15 no. Trial courts don't distinguish between
16 continuances and postponements.
17 HONORABLE C. A. GUITTARD:
18 Well, some old-fashioned lawyer might.
19 HONORABLE F. SCOTT MCCOWN:
20 Right. But it's not a modern concept in our
21 rules. I mean, if you're --
22 HONORABLE C. A. GUITTARD: If
23 we put it off two weeks, is that a
24 continuance?
25 HONORABLE F. SCOTT MCCOWN:

1 That's a continuance. If I send you away
2 today to come back tomorrow, that's a
3 continuance.
4 HONORABLE C. A. GUITTARD: If
5 that's clear, okay. I didn't think it was.
6 MR. SUSMAN: Bill.
7 PROFESSOR DORSANEO: Well,
8 there are a lot of continuance rules that we
9 have, and we really shouldn't use the term
10 "continuance" because there are a lot of
11 requirements. There are rules that say that a
12 case is to be tried when scheduled unless it's
13 continued on motion and notice for good cause
14 contemplating almost a written motion,
15 supported -- we have rules about supporting it
16 by affidavits. We have got all kinds of
17 razzmatazz for continuances. So none of that
18 is meant to be applicable here, right?
19 MR. SUSMAN: Right.
20 PROFESSOR DORSANEO: We are
21 just talking about easy, smooth, no
22 complexity, no affidavits?
23 MR. SUSMAN: You would prefer
24 "postpone"?
25 PROFESSOR DORSANEO: Yeah.

1 MR. SUSMAN: Scott, do you have
2 any real problem with that?
3 HONORABLE F. SCOTT MCCOWN:
4 Yeah.
5 MR. SUSMAN: Why?
6 HONORABLE F. SCOTT MCCOWN:
7 Because there is no such animal in the rules.
8 HONORABLE C. A. GUITTARD:
9 Well, it's a simple English word.
10 HONORABLE F. SCOTT MCCOWN: And
11 there is no point in --
12 PROFESSOR DORSANEO: If you
13 didn't want it to be here, it will be in the
14 dictionary.
15 CHAIRMAN SOULES: How about
16 delay, delay the trial?
17 PROFESSOR DORSANEO: No.
18 HONORABLE F. SCOTT MCCOWN:
19 Trial judges -- I agree with what Professor
20 Dorsaneo said that in some contexts
21 continuances have certain requirements, but I
22 mean, for trial judges it's just going to be
23 if you are here today, you are here today. If
24 you are here tomorrow, it's a continuance, and
25 trying to get a new word is just --

1 HONORABLE SCOTT BRISTER: We
2 have got statistics we have to do on
3 continuances, et cetera, and there ain't no
4 hole for postponements or delays. It's either
5 continued, or it's tried.
6 MR. SUSMAN: David Keltner.
7 MR. KELTNER: Are we talking
8 about a continuance or mistried? Are we
9 talking about starting the trial over again
10 three months from now and erasing what
11 happened up to this point, or are we talking
12 about continuing or postponing and starting up
13 from where we were? You know, the truth of
14 the matter is in many instances under our
15 current practice what we have been doing is
16 mistrial is granted. Somebody is able to
17 withdraw their announcement of ready, and we
18 start over. So the time period is started
19 again. Which one are we talking about?
20 MR. MARKS: Why don't we just
21 say put the trial off?
22 CHAIRMAN SOULES: Tommy Jacks.
23 MR. JACKS: I want to return at
24 some point to the question that Scott Brister
25 raised about the word "showing" and what it --

1 what must be shown. I mean, if I am hearing
2 what I think I am hearing, what you are saying
3 in effect is that if a party -- if the
4 opposing party complains that they are
5 unprepared, the fact that it becomes a
6 rebuttable presumption which the offending
7 party then shoulders the burden to displace.
8 Is that the effect?
9 MR. SUSMAN: Let me -- ask your
10 question again.
11 MR. JACKS: All right. My
12 question is with respect to the showing that
13 the offending party has the burden to make.
14 The way this rule works, if I'm understanding
15 it, is that if the opposing party says "I'm
16 unprepared, and I'm unprepared in a way that
17 may affect the outcome of this trial," then
18 the making of that claim makes that a fact
19 that is essentially a rebuttable presumption.
20 Is that how it works?
21 HONORABLE F. SCOTT MCCOWN:
22 Yes.
23 MR. SUSMAN: Yes.
24 MR. JACKS: All right.
25 HONORABLE F. SCOTT MCCOWN: And

1 I would suggest, to follow up on Judge
2 Brister, that the way we change that sentence
3 about the burden is to exactly track the
4 language in the sentence before it so it would
5 read something like, "The burden of showing
6 that the opposing party is not unprepared in a
7 way that may affect the outcome of the trial
8 is on the offending party," because that's
9 what we are saying. "The burden of showing
10 that the opposing party is not unprepared in a
11 way that may affect the outcome of the trial
12 is on the offending party."
13 MR. SUSMAN: Okay. Wait a
14 second, you-all. Now, let me get some order.
15 Let's first begin with the question, does
16 anyone really care -- will the trial judges
17 show a hand? Do you care whether we use
18 "continue" or "delay"? What do you want,
19 Brister?
20 HONORABLE SCOTT BRISTER: I
21 think we want -- the trial judges will want
22 "continuance."
23 MR. SUSMAN: You want to
24 "continue." You want "continue." Who wants
25 "delay"? You don't count. You're not a trial

1 judge. The word --

2 PROFESSOR DORSANEO: He wants

3 it, too. We just need to talk to him more.

4 MR. SUSMAN: All right.

5 Listen, listen. This is a technical matter.

6 You-all talk but we have got to -- because it

7 doesn't matter to me. Let's go on to the next

8 substantive matter, and that is placing the

9 burden properly in a sensible way, and Scott,

10 your language was what now?

11 HONORABLE F. SCOTT MCCOWN:

12 Well, somebody else made the point yesterday,

13 and I think it was a good one, that we need

14 not to suddenly change the standard by

15 paraphrasing it. So if we want to track it

16 exactly it would be "The burden of showing

17 that the opposing party is not unprepared in a

18 way that may affect the outcome of the trial

19 is on the offending party."

20 MR. SUSMAN: Fine.

21 HONORABLE SCOTT BRISTER:

22 Another way to do it would be to say the

23 offending party bears the burden of rebutting

24 this presumption, this allegation, whatever

25 you want to call it.

1 MR. SUSMAN: Luke.
2 CHAIRMAN SOULES: Well, you
3 really have a conflict between the first
4 sentence and the second sentence. To me, it
5 would be -- that would be resolved if you
6 said, let's see, "to allow the opposing party
7 to prepare to confront or use the previously
8 undisclosed information unless the failure to
9 disclose does not cause the opposing party to
10 be prejudiced in any way that may affect the
11 outcome of the trial." The way the first
12 sentence is written the burden is on the
13 injured party, and that ought to be changed.
14 HONORABLE SCOTT BRISTER: First
15 sentence states what the injured party has to
16 show. The second sentence says the burden of
17 that showing is on the offending party.
18 CHAIRMAN SOULES: Right. And
19 if you just change it and say, "If a party
20 fails to timely disclose information during
21 discovery the court may exclude the
22 information not timely disclosed or continue
23 the trial to allow the opposing party to
24 prepare to confront or use the previously
25 undisclosed information."

1 MR. SUSMAN: Unless the failure
2 to disclose causes the opposing party --
3 CHAIRMAN SOULES: Does not
4 cause the opposing party to be -- I think
5 "unprepared" ought to be "prejudiced."
6 MR. SUSMAN: I think it ought
7 to be "unprepared," but we can talk about it
8 in a second.
9 CHAIRMAN SOULES: In a way that
10 may affect the outcome of the trial, and that
11 is the two things.
12 MR. SUSMAN: Okay. I will buy
13 that.
14 MR. PERRY: And then you could
15 just say, "The burden of this showing is on
16 the offending party."
17 PROFESSOR ALBRIGHT: Then you
18 don't have to say anything.
19 MR. SUSMAN: All right. Now,
20 it will read, "unless the failure to disclose
21 does not cause the opposing party to be
22 unprepared in a way that may affect the
23 outcome of the trial." Now, Rusty.
24 MR. MCMAINS: I don't know if
25 this is the way it was contemplated, but is

1 basically the notion here that even if there
2 is a failure to timely disclose information
3 and even if it unduly prejudices a party in
4 its preparation or whatever, that the judge
5 doesn't have to do either one of these things?
6 HONORABLE F. SCOTT MCCOWN:
7 Yes. No, wait. No.
8 MR. MCMAINS: Well, it says
9 "may." What it says is that if a party who
10 intentionally refuses to disclose information
11 and if that prejudices the other side in the
12 presentation of the case, the court may
13 exclude or continue.
14 MR. SUSMAN: Do you want to
15 change "may" to "shall"? I don't think that
16 was intentional.
17 HONORABLE ANN COCHRAN: But, I
18 mean, let's talk about when -- because this is
19 something that's going to really get a lot of
20 trial judges because what you are going to
21 have happen an awful lot of times is lawyers
22 who have moved for continuance, continuance
23 has been denied, they show up at trial, and
24 one of them says, "Oh, I just found this
25 document," and you know if you have got the

1 presumption that this is somehow going to
2 hurt, and the trial judge looks at it and
3 knows this is ridiculous. These lawyers just
4 got together last night and figured out a way
5 under the rule to get an automatic
6 continuance.
7 The court has got to get -- I mean, if
8 the presumption is going to be that it is
9 going to hurt the other side unless the
10 offending party puts on some evidence or makes
11 some showing to overcome that presumption then
12 if we are going to write it so that it shall,
13 then the trial judge is just going to have to
14 sit there and be bamboozled.
15 MR. MCMAINS: Well, basically
16 what I was saying is that the "shall" part
17 means that when the party who was getting the
18 information was not disclosed to. The initial
19 burden, I think, and the intent theoretically
20 is that somebody has got to complain about the
21 disclosure, the nondisclosure.
22 MR. MEADOWS: Also, Judge --
23 MR. MCMAINS: And so it's in
24 conjunction with that complaint that their
25 burden is to show it wasn't timely disclosed.

1 Once you have met that burden, then the
2 burden -- then it shifts to the other side to
3 show that that didn't cause any harm. Now, if
4 the parties still -- and then the court has
5 one of these two options and then basically
6 what you're saying is the party who was
7 complaining has a choice at that point. He
8 can go forward if he decides he doesn't want a
9 continuance and withdraw his complaint, or he
10 can go ahead and except it again if that's
11 what the judge decides to do on the additional
12 discovery.
13 But, I mean, I think it's intended that
14 this is not initiated by the judge. The judge
15 doesn't have to monitor whether there was
16 disclosure. Somebody has got to complain
17 about it.
18 MR. SUSMAN: Alex.
19 PROFESSOR ALBRIGHT: The
20 problem with putting in the word "shall"
21 instead of "may" is then you make it an
22 automatic sanction just like we have now.
23 It's just that the automatic sanction is
24 either to exclude or to continue, and I think
25 what we were trying to do is get away from the

1 automatic sanction to give the trial judge the
2 discretion, exactly like Judge Cochran said.
3 MR. MCMAINS: Except that,
4 again, I have a problem with the idea that
5 when you have someone who has failed to
6 disclose and when you have -- and it doesn't
7 matter what the level of their failure to
8 disclose was, whether it was intentional or
9 whatever, and it is going to adversely affect
10 the presentation to decide where is and under
11 what standard can the trial court say "no
12 problem. We are going to trial. We are going
13 to use the information, and that's just
14 tough."
15 MR. SUSMAN: Scott. I'm sorry.
16 Luke first. Luke first.
17 CHAIRMAN SOULES: I'm trying to
18 address the concern that Judge Cochran raised.
19 Let me see if I can put it into context like
20 this. The defendant wants a continuance, and
21 it's been denied. Plaintiff wants a trial.
22 The defendant then shows up with a document.
23 At that point the plaintiff has to decide
24 whether to move to exclude or continue or go
25 forward with the trial, and the plaintiff is

1 not going to do that, I think, because they
2 have already tried to get their trial going,
3 unless they really believe that they are going
4 to be prejudiced in a way that's going to
5 affect the outcome of their case. Now, that's
6 what the judge has to decide. The plaintiff
7 then for whatever reason --
8 HONORABLE ANN COCHRAN: The
9 problem I really think there is, is if there
10 is a presumption so that the trial judge
11 really doesn't get to look at the question of
12 is this really going to hurt anybody. That's
13 the only thing that worries me. Under your
14 scenario there has been really an
15 establishment that it really is going to hurt
16 their case to make them go forward at this
17 point.
18 MR. MCMAINS: Sure.
19 HONORABLE ANN COCHRAN: The
20 only thing that worries me if the rule is
21 written on the showing in such a way that it's
22 presumed, and the trial judge never even gets
23 the opportunity to really look into whether or
24 not it's going to be harmed.
25 HONORABLE SCOTT BRISTER: There

1 are 25 percent of my cases that go to trial
2 kicking and screaming, neither one of the
3 attorneys wants to go to trial, and every time
4 I call them to trial they will ask for a
5 six-week continuance. Every time. Forever.
6 And this -- if it's "shall" they will --
7 HONORABLE F. SCOTT MCCOWN:
8 Well, but --
9 MR. SUSMAN: And what?
10 HONORABLE F. SCOTT MCCOWN:
11 Steve, isn't this problem solved by Luke's
12 language? If we go with Luke's language, that
13 would allow us to take out the sentence about
14 the burden of the showing is on the offending
15 party because Luke's language places the
16 burden. It says unless the failure to
17 disclose does not cause the opposing party to
18 be unprepared in a way that may affect the
19 outcome of the trial, but it doesn't create a
20 presumption or say that the offending party
21 has to carry a burden. So in the situation
22 where you have got two lawyers, neither of
23 whom want to go to trial, one of whom offers
24 the document, the other agrees. The trial
25 judge could say, "Fellows, I find as a matter

1 of fact that the failure to disclose here does
2 not cause the offending party to be unprepared
3 in a way that may affect the outcome of the
4 trial. We are going forward."
5 CHAIRMAN SOULES: The opposing
6 party.
7 HONORABLE F. SCOTT MCCOWN:
8 Yeah. The opposing party, and we are going
9 forward.
10 MR. SUSMAN: I'm lost now. I'm
11 lost.
12 HONORABLE F. SCOTT MCCOWN:
13 Okay. Ann's example assumes two lawyers who
14 don't want to go to trial and a judge who
15 does. So if we take it -- if we don't use
16 presumption and if we don't use the sentence
17 about a burden, but we take Luke's formulation
18 of the test, Luke's formulation of the test
19 sets up what the burden is, but it doesn't
20 require anybody to go forward, and the trial
21 judge could just say, "I've heard you both,
22 and you're not unprepared, and we're going
23 forward."
24 MR. SUSMAN: All right. So you
25 want to use -- let me see if I can read it.

1 Let me read it again then. "If a party fails
2 timely to disclose information during
3 discovery the court may exclude the
4 information."
5 CHAIRMAN SOULES: Shall.
6 MR. SUSMAN: Now, that's -- can
7 we please argue -- focus on the "may" or
8 "shall"?
9 HONORABLE F. SCOTT MCCOWN:
10 Okay. Steve, let me explain how that works.
11 MR. SUSMAN: "May" or "shall."
12 HONORABLE F. SCOTT MCCOWN:
13 It's neither. Let me explain. Let me explain
14 how that works. The committee here has a
15 drafting problem that Ann has pointed out to
16 me because the way this is written is we have
17 left out -- there is something unclear, and
18 what's unclear is that you have three options.
19 Option No. 1 is to say this does not leave you
20 unprepared, the evidence is coming in, and we
21 are going forward. That's Option 1, and that
22 option is implied but stated.
23 Option No. 2 is to say this evidence is
24 staying out, and we are going forward. Option
25 No. 3 is to say we are going to have a

1 continuance. Our Option No. 1 is expressed
2 but not implied. So the people who are hung
3 up on "may" are thinking that the "may" saves
4 Option 1. The "may" doesn't. That "may"
5 doesn't express Option 1, and our rule doesn't
6 express Option 1.
7 MR. SUSMAN: No, no.
8 CHAIRMAN SOULES: Let him
9 finish.
10 HONORABLE F. SCOTT MCCOWN: Let
11 me finish. And what Rusty's saying is if the
12 judge says this evidence does matter, Rusty is
13 saying then he ought to be put to a decision,
14 either exclude it or continue it, so that this
15 "may" ought to be "shall." There is another
16 "may" that our rule doesn't express. That's
17 not very clear, but did you-all get that?
18 CHAIRMAN SOULES: And you would
19 delete "the burden of this showing is on the
20 offending party."
21 MR. SUSMAN: Can we change the
22 "may" to the "shall"?
23 HONORABLE F. SCOTT MCCOWN: We
24 can change this "may" to "shall."
25 MR. SUSMAN: That's all I want

1 to know. Does anyone have a problem changing
2 this "may" to "shall"? So if the showing is
3 made --
4 HONORABLE SCOTT BRISTER: Read
5 the whole sentence again.
6 HONORABLE ANN COCHRAN: Yeah.
7 The whole thing has to be redrafted before you
8 can ask us to change the "may" or "shall."
9 MR. SUSMAN: Well, here it is.
10 Here it is. "If the party fails to timely
11 disclose information during discovery, the
12 court shall exclude the information not timely
13 disclosed or continue the trial to allow the
14 opposing party to prepare to confront or use
15 the previously undisclosed information unless
16 the failure to disclose does not cause the
17 opposing party to be unprepared in a way that
18 may affect," with an A, "the outcome of the
19 trial. The court may exclude or continue it,"
20 then delete the next sentence.
21 CHAIRMAN SOULES: Delete "The
22 burden of the showing is on the offending
23 party."
24 MR. SUSMAN: Correct.
25 CHAIRMAN SOULES: I don't have

1 any problem with that.

2 HONORABLE F. SCOTT MCCOWN:

3 Steve, let me make a suggestion, and I know

4 you don't want to do drafting, and this isn't

5 really drafting. This is going to, I hope,

6 clarify the whole thing. If you say -- we

7 need to move the "unless" clause up to the

8 top. "If a party fails timely to disclose

9 information during discovery, unless the

10 failure to disclose does not cause the

11 opposing party to be unprepared in a way that

12 may affect the outcome of the trial, the court

13 shall exclude the information not timely

14 disclosed or continue the trial to allow the

15 opposing party to prepare to confront or use

16 the previously undisclosed information. If

17 the failure to timely disclose does not cause

18 the opposing party to be unprepared in a way

19 that may affect the outcome of the trial, the

20 court may admit the evidence and move

21 forward." Those are the options. That's

22 actually very clear.

23 CHAIRMAN SOULES: Even though

24 it doesn't seem to be.

25 MR. SUSMAN: Scott, your first

1 sentence, your first sentence --
2 CHAIRMAN SOULES: Vote on that
3 one time and see. Vote on that.
4 MR. SUSMAN: How about as a
5 concept? As a concept the chairman -- what,
6 Rusty?
7 MR. MCMAINS: Well, the
8 only -- I disagree with the assertion that by
9 removing the statement of the burden that you
10 have actually left the burden on the offending
11 party implicitly by merely moving it to an
12 exception because basically what we are
13 talking about here is there is -- if there is
14 nothing in the record, that is, if nobody has
15 attempted to make a record on this, then
16 obviously when the judge says, "I find that
17 the -- you know, just from what I know about
18 the case, just, you know, from what I have
19 seen here thus far that this is not going to
20 timely affect you adversely."
21 He doesn't say anything specifically. He
22 doesn't make any finding. He doesn't do
23 anything. Now, a party who believes he is
24 actually surprised is going to go forward. I
25 mean, there is no lawyer in this room that

1 will not assume the burden of going forward to
2 show that that exception doesn't apply and
3 will assume that that's the way it is because
4 that's -- essentially if what you're doing is
5 saying that's just an independent court
6 determination then that is another way by
7 which the action of the court in doing nothing
8 in this circumstance will be affirmed. That
9 effectively shifts the burden then to the
10 nonoffending party, and I disagree completely
11 in saying that just by not putting it in there
12 that it's going to -- that it stays on the
13 offending party.
14 MR. SUSMAN: Joe.
15 MR. LATTING: I think I
16 understand what you thought you meant to say,
17 Scott, but this is such a hugely important
18 issue I need to see this in writing because we
19 are fooling with some very dangerous chemicals
20 here, and I just want to see it in writing. I
21 think we can agree on it, but can we get this
22 somehow -- or put it off to be able to see the
23 rule?
24 MR. SUSMAN: Buddy.
25 MR. LOW: Let me ask a

1 question, and I think I know the answer, but
2 we are intending to change by this a body of
3 law, on this and the other rule that says I
4 don't list somebody as a witness but his
5 deposition has been taken and everything and
6 you come up and say, "Well, no, you didn't
7 list him and therefore can't call him." We
8 are trying to eliminate that so that if they
9 have the information and are not advised we go
10 forward; is that correct?
11 MR. SUSMAN: Yes.
12 MR. LOW: Because there is a
13 body of law to that effect, and somebody
14 may --
15 MR. SUSMAN: Yes, sir.
16 MR. LOW: -- say that, well, it
17 doesn't really take care of that situation,
18 and I just raise the question.
19 MR. SUSMAN: We are absolutely
20 clearly intending to change existing law.
21 MR. LOW: Okay. Okay. All
22 right.
23 MR. LATTING: Okay.
24 MR. SUSMAN: And when we met in
25 September the consensus of the committee was

1 that's okay but just make the bad guy make the
2 showing, put the burden on the bad guy, which
3 I don't think anyone is quarreling with.
4 Okay.
5 MR. LATTING: I'm not
6 quarreling with it.
7 CHAIRMAN SOULES: Well, I think
8 Judge Cochran is quarreling with that because
9 if the bad guy stands there with his hands in
10 his pockets like Brer Rabbit and just keeps on
11 saying nothing she wants to be able to make a
12 ruling, notwithstanding there is no resistance
13 to the contention, a ruling that she go
14 forward with her trial, and I am understanding
15 that when we delete that sentence that it does
16 become the burden of everybody in the
17 courtroom to convince the judge that this is
18 going to be -- or that if they think it's
19 going to be prejudicial to say so, because if
20 they don't the judge can find that it's not
21 prejudicial or not causing them to be
22 unprepared, if that's the word that's used.
23 So I understand that what Rusty said is right.
24 We are unburdening the offending party of the
25 sole burden to make a showing if we delete

1 that sentence.

2 MR. SUSMAN: She needs to

3 change paper. Let's take a 10-minute break

4 and then we will come back.

5 (At this time there was a

6 recess, after which time the proceedings

7 continued as follows:)

8 MR. SUSMAN: Can we get back

9 into session? All right. We have three more

10 pretty substantive rules to cover and an hour

11 and a half to cover them or an hour and 45

12 minutes to cover them. Let's get back. All

13 right. We are -- Scott, let's just begin.

14 Bill, Paul, let's get it moving.

15 PROFESSOR DORSANEO: Pardon me.

16 MR. SUSMAN: I am going to do

17 what Luke suggested, and that is at this time

18 take a vote on the concept of 6(1), which I

19 think we have pretty -- we have a drafting

20 problem. Scott may have cured it. Scott will

21 be in charge of drafting this again to put the

22 burden where it ought to be, but to make sure

23 that lawyers can't collusively require the

24 court to continue a case over something that

25 really doesn't matter.

1 HONORABLE F. SCOTT MCCOWN: Can
2 I state the concept so we can get a vote?
3 MR. SUSMAN: Please.
4 HONORABLE F. SCOTT MCCOWN:
5 Okay. The concept would be that if there is a
6 failure to timely disclose, that the trial
7 judge is confronted with three options. If
8 the failure to timely disclose does not cause
9 the opposing party to be unprepared in a way
10 that may affect the outcome of the trial, so
11 that the burden or the presumption or whatever
12 you want to call it is on the offending party,
13 then the trial judge can let the evidence in
14 and move forward; but if the failure to
15 disclose does cause the opposing party to be
16 unprepared in a way that may affect the
17 outcome of the trial then the trial judge has
18 to either exclude it or continue it.
19 MR. SUSMAN: Perfect.
20 HONORABLE F. SCOTT MCCOWN: It
21 would never be an option for the trial judge
22 to simply say, yeah, it may affect the outcome
23 of the trial, but I am moving forward anyway.
24 HONORABLE ANN COCHRAN: May I
25 ask one question?

1 MR. SUSMAN: Yes.
2 HONORABLE ANN COCHRAN: By
3 having this, not to editorialize too much, but
4 this arbitrary cutoff of discovery, you know,
5 about -- and now if we are actually in trial
6 even because of the re-opening of discovery
7 rule about late supplementation, have we now
8 with the other rules we have gone over gotten
9 ourselves in a box so that very often in the
10 real world the document that shows up the day
11 of trial or three days into trial can be fixed
12 in a little deposition between 5:00 and 5:15
13 that afternoon?
14 I think that this discovery cutoff
15 business would put the trial judge in a box so
16 that even if a little 15-minute deposition of
17 a person who is sitting in the room, and it's
18 going to turn out to be no big deal, but it
19 would be unfair to put them to trial without
20 that little 15-minute bit of testimony. The
21 trial judge -- I mean, I just want to make
22 sure that the trial judge still has the
23 flexibility to say -- you know, hopefully
24 there will be a little common sense remaining.
25 This is sort of half in between, you know,

1 take the deposition between 5:00 and 5:15, do
2 it in the jury room. Then you come tell me if
3 it turns out to be a big deal or not, and I
4 will hear it.
5 I mean, then I will decide whether or not
6 I need to exclude it or continue because most
7 of the time if the judge does that, the lawyer
8 who was worried that it was going to be some
9 dynamite thrown onto the counsel table in the
10 courtroom is going to come in at 5:12 and say,
11 "Thank you, judge. It turns out it's no big
12 deal. We are going to pick our jury tomorrow
13 morning."
14 HONORABLE F. SCOTT MCCOWN: The
15 intent of this rule is to cover exactly what
16 you said, and the way that that would come in
17 within the language of the rule is that they
18 wouldn't be unprepared in a way that may
19 affect the outcome of the trial because they
20 are unprepared, but it's curable by the judge
21 providing that.
22 MR. SUSMAN: Yeah.
23 MR. MEADOWS: But you couldn't
24 do that if the nine months was up, right?
25 MR. KELTNER: No. Our rules

1 are very precise in that the judge can order
2 something contrary to the rules at any time.
3 CHAIRMAN SOULES: At any time.
4 MR. KELTNER: At any time.
5 MR. SUSMAN: All right. All
6 right. We have the concept on the table.
7 Could we have a vote on the concept because we
8 have got to move? All in favor of this
9 concept raise your right hand.
10 CHAIRMAN SOULES: 15 for.
11 MR. LATTING: 14 and a half.
12 MR. SUSMAN: All opposed?
13 HONORABLE PAUL HEATH TILL: I
14 would be happy to vote with you, but I'm not
15 sure what the concept is, and I only heard it
16 one time very quickly, and I am not going to
17 vote for something I don't understand.
18 MR. SUSMAN: Well, it's 15 to
19 1. That's perfectly all right. Let's move
20 on.
21 CHAIRMAN SOULES: And we will
22 look at this, Judge Till, in due time --
23 MR. SUSMAN: It's coming back
24 to you.
25 CHAIRMAN SOULES: -- so that it

1 will be in writing, and you will have a clear
2 chance to read it and decide how you feel
3 about it.
4 HONORABLE PAUL HEATH TILL:
5 Okay.
6 HONORABLE DAVID PEOPLES: I
7 want to suggest that the term "may affect the
8 outcome of the trial" is not strong enough.
9 You know, will it probably affect the outcome
10 of the trial? If I'm the trial judge, and I
11 think, well, there is a little bit of
12 wrongdoing here, but this is going to all wash
13 out, and I go ahead and have the case, the
14 harmless error rule is going to apply. You
15 know, and so I think our efforts to just
16 rigidly confine trial court discretion here
17 are not going to work.
18 MR. SUSMAN: We don't want to.
19 HONORABLE DAVID PEOPLES: Well,
20 I think that's exactly what it's going to do.
21 MR. SUSMAN: Scott, see if you
22 can't fix that.
23 HONORABLE DAVID PEOPLES: But
24 "may affect the outcome" is not strong enough.
25 "May affect"?

1 HONORABLE F. SCOTT MCCOWN:
2 Well, I think he's raising something that's
3 not really a drafting problem. It's a
4 philosophical problem. We might want to talk
5 about it just a minute because it depends on
6 what you want the trial judge to do. If you
7 want the trial judge to be fairly insistent on
8 disclosure and be fairly quick to exclude or
9 continue to protect the innocent party, you
10 are going to want to say "may" and trust the
11 trial judge's discretion and fact finding to
12 turn out all right. On the other hand, if you
13 want the trial judge to be fairly lenient
14 about letting evidence in that's late
15 disclosed then you would want to say --
16 MR. SUSMAN: "Is likely to."
17 HONORABLE F. SCOTT MCCOWN:
18 "Probably will."
19 HONORABLE DAVID PEOPLES: I
20 think trial judges are going to try to do what
21 they think is fair, and they are not going to
22 get reversed on this unless it's, you know,
23 reasonably calculated to cause and probably
24 did cause wrong judgment.
25 HONORABLE F. SCOTT MCCOWN:

1 Well, we picked "may" because our sense from
2 the committee was that the committee felt we
3 were loosening up the rules quite a bit, and
4 so they wanted -- and so to go in the other
5 direction we picked "may" so that there would
6 be some fairly vigorous enforcement of the
7 disclosure rules.
8 CHAIRMAN SOULES: Let's do move
9 on because this -- Rule 6 is going to go to
10 Rule 215. So we are going to look at this not
11 only again maybe out of this committee. We
12 want to, but it's going to have to go into 215
13 because we have got all the sanctions in Rule
14 215. So we are going to get a revisit of this
15 when it's put in the context of Joe's work at
16 some future time with those. This really will
17 not be a part of the discovery rules that go
18 to the court unless the sanctions rules go at
19 the same time.
20 Okay. What next?
21 MR. SUSMAN: Say again.
22 CHAIRMAN SOULES: This is going
23 to be a part of the sanctions rules because we
24 have the sanction rules all in one place.
25 HONORABLE F. SCOTT MCCOWN:

1 Well, but Luke, under our view of it this rule
2 is pretty integral of what we have done in
3 discovery.
4 MR. SUSMAN: What we have done.
5 CHAIRMAN SOULES: That's right.
6 HONORABLE F. SCOTT MCCOWN: And
7 this isn't operating as a sanction. It's
8 operating as a rule of exclusion on discovery.
9 CHAIRMAN SOULES: Well, the
10 Chair is going to re-refer this to 215.
11 MR. LATTING: And, Scott, the
12 reason that we didn't want to go forward with
13 writing our final version of the sanctions
14 rule was so that we could write it once we
15 decide what we are going to do with your
16 discovery rules so we can make it mesh
17 sensibly so it won't be --
18 HONORABLE F. SCOTT MCCOWN:
19 Well, I think coming from both committees at
20 the same time so that they are integrated and
21 parallel makes sense, but I don't think you
22 can approve the discovery rules -- I couldn't
23 vote for the discovery rules without knowing
24 what the failure to provide discovery, Rule 6,
25 is going to be.

1 MR. LATTING: Well, I think we
2 just took a vote on the philosophy of it.
3 CHAIRMAN SOULES: Just so we
4 understand, when we get to sanctions the way
5 that goes could undo all of this because we
6 have so tightened up on discovery, put such
7 constraints on discovery, that the sanctions
8 for failure to comply with discovery in good
9 faith are going to be pretty important to
10 whether or not this survives. So eventually
11 it's all got to come together.
12 MR. KELTNER: I think I
13 absolutely agree with that. I think it was
14 better put on our side. We were looking at
15 this being a replacement for 166(b)(6) as well
16 as 215(5), and I understand that they need to
17 be all in one place, but that's the reason it
18 was included here because we couldn't get you
19 a good sense of the system without it.
20 CHAIRMAN SOULES: And I agree
21 that it needed to be here in our discussions.
22 No question about it. Where it finally winds
23 up in the text of the overall rules, though,
24 we will see.
25 MR. KELTNER: It's going to

1 make a huge difference on how you would
2 incorporate it.
3 CHAIRMAN SOULES: But this very
4 much needed to be discussed at this time.
5 MR. SUSMAN: Rule 7. Rule 7
6 has been rewritten since we last met, but the
7 concept is the same, and it was a concept that
8 was warmly endorsed by this group, and that is
9 the concept of -- that the way to preserve a
10 privilege is by withholding the document and
11 filing a withholding statement that says you
12 are withholding a document and the privilege
13 you are relying on. You need not file a
14 withholding statement or assert a privilege in
15 the vacuum, in advance, as a prophylactic
16 matter. It's when you actually consciously
17 hold the document back from discovery. That's
18 when you have to give a withholding statement.
19 The party that receives the withholding
20 statement can ask you to provide a privilege
21 log, and within 15 days you must do so in a
22 way that your assertion of privileges can be
23 tested by the court. The last sentence of
24 section (1) of Rule 7 is designed to make sure
25 that the -- what is in trial counsel's file is

1 expected to be withheld. So it need not be
2 described in a withholding statement, and it
3 need not be identified in a privilege log
4 unless the court expressly orders it to be
5 identified. Any discussion of 7(1)?
6 MR. LATTING: Question.
7 MR. SUSMAN: Let's go around
8 this way. Yes, sir.
9 MR. HUNT: Why do we use the
10 word "log"? Does that have a meaning from
11 some other source, or is there a better word
12 we can say other than "log"?
13 HONORABLE SCOTT BRISTER:
14 People's log. Let's go ahead and incorporate
15 that.
16 MR. GOLD: There are federal
17 cases that use that terminology, and so it
18 does -- it does give you a reference.
19 MR. HUNT: But is it commonly
20 understood by state practitioners as to what
21 you --
22 MR. GOLD: Yes. I think at
23 this point in time it's got more of a meaning
24 than any other term in --
25 MR. SUSMAN: Going around.

1 Ann.

2 HONORABLE ANN COCHRAN: We need
3 to clarify in the last sentence exactly what's
4 meant by "trial counsel." Does that mean the
5 lawyer who is lead counsel or associated
6 counsel on the pleadings? Does it include
7 people in the general counsel's office for the
8 party corporation? I mean, what lawyers
9 involved in it are included in the term "trial
10 counsel"?

11 HONORABLE C. A. GUITTARD:
12 Strike "trial."

13 MR. SUSMAN: Scott.

14 HONORABLE SCOTT BRISTER: On
15 the same point, this is the point where
16 somebody is going to explain to me why I
17 really liked the task force proposal that
18 deemed all requests for discovery not to be
19 requesting attorney-client or work product
20 information unless the request specifically
21 said so, so that you don't get a stock
22 objection on every interrogatory request,
23 every document production request. "This is
24 subject to attorney-client, work product.
25 Subject to such request here is the

1 documents." I mean, that to me makes the most
2 sense because most people are not requesting
3 attorney-client, work product. We ought to do
4 it the way most people are meaning to do it,
5 which is deem it not to be included unless you
6 specifically request those items.
7 MR. SUSMAN: Alex.
8 PROFESSOR ALBRIGHT: Just to
9 respond to that, the reason that we changed
10 that is because what we thought would happen
11 is everybody would just ask two document
12 requests instead of one. I want all the
13 documents concerning X, Y, Z, and I want all
14 the privileged documents concerning X, Y, Z,
15 because --
16 HONORABLE SCOTT BRISTER: I
17 doubt it.
18 PROFESSOR ALBRIGHT: -- I don't
19 want to trust you on your assertions of
20 privilege because that's what we felt like the
21 problem was, is that everybody is making
22 prophylactic objections to the request,
23 saying, "Yes, I have information responsive to
24 the request, and there is a bunch of it that's
25 privileged." So that's why we have separated

1 out your claim of privilege to particular
2 documents responsive to the request and your
3 objections to the request itself. So what you
4 do is you say, "I'm responding to it. Here is
5 all of the documents I have. I am withholding
6 documents on the basis of work product,
7 attorney-client privilege, and party
8 communications," but I don't even have to talk
9 about the ones I created for trial because,
10 you know, otherwise you would have to withhold
11 for every single request. So that's why we
12 separated out those.
13 MR. SUSMAN: Bill.
14 PROFESSOR DORSANEO: That has a
15 surface appeal to it, but I would think that I
16 would have to ask based upon my, you know,
17 early experience in North Texas for someone to
18 produce privileged information in order to
19 find out how they are interpreting their
20 claims of privilege because when I started
21 practice nobody ever had anything that I was
22 requesting, and that was because the requests
23 were interpreted either to not reach the
24 privileged information or people were
25 asserting privileges on their own and ruling

1 in their own favor before we ever got to know
2 what the dispute was about. So I don't think
3 there is an easy way to deal with the issue of
4 something that someone has and that they claim
5 that it's privileged and the other side would
6 like to see it, unless you get it out in the
7 open and know what the dispute is to be about.
8 MR. SUSMAN: Joe.
9 MR. LATTING: Does this rule
10 make it clear that we don't have to make an
11 objection, that all we have to do is to
12 withhold the document?
13 MR. SUSMAN: Absolutely.
14 MR. LATTING: Okay. But --
15 CHAIRMAN SOULES: Where?
16 HONORABLE SCOTT BRISTER: But
17 this doesn't do what I think -- you're saying
18 this will mean you don't have to do the
19 prophylactic proposal, or you know, the task
20 force won't work because everybody will ask
21 for attorney-client. I'm saying this will do
22 the same thing because everybody when they get
23 this will say, "We are withholding lots of
24 things." If you request then you have got to
25 do the whole log. You are back exactly at the

1 same position. Everybody is going to have to
2 request if they are distrustful of all
3 attorneys, which means on every case I am
4 going to have to have a huge and expensive log
5 if you have somebody that's bigger than an
6 individual or wealthy or something like that.
7 On every case you are going to have to do
8 an expensive log describing each and every
9 attorney work client product document you have
10 by date, parties, why it's -- that is very
11 expensive. That is very time-consuming, and
12 in my experience on the motions that I have
13 plaintiff's attorneys who usually are trying
14 to get documents with a big company are almost
15 never interested in it, but under this rule
16 aren't they going to feel just as compelled to
17 dot their I's and Q's. They are going to have
18 to request all the time, and we are going to
19 have to prepare these expensive logs.
20 PROFESSOR ALBRIGHT: Well, I
21 think the logs is one issue. I mean, you
22 know, the logs, we were trying to figure out a
23 good way to focus the issues as to what, you
24 know, what are the documents that we are
25 really fighting about, and there may be a

1 better way to do that, but I think you have
2 got to have a system where people have to
3 declare that they are withholding documents on
4 the basis of privilege so you can request
5 them. Because otherwise you are going to have
6 the problem that Bill was talking about.
7 And this is what we think is good about
8 this, is that there are some times that
9 people -- they say, "Okay. I have a stack of
10 documents responsive to the request. None of
11 them are privileged, but I have to make all
12 the privilege objections to the request
13 because six months from now I may come upon a
14 stack of documents that I didn't know were
15 there, and there may be some that are
16 privileged in there, and if I don't make the
17 privilege and the objection from the very
18 beginning, I have waived it."
19 MR. LATTING: That's what we
20 do. We do that every time.
21 PROFESSOR ALBRIGHT: Yeah. You
22 have got to. So what we are saying, the way
23 you declare privileges is you say, okay, here
24 is my stack of documents. If none of them are
25 privileged and I am giving them over to you, I

1 am not withholding anything. So I just give
2 them, but if I am withholding two of them then
3 I make a withholding statement on the two
4 documents. Six months from now I have another
5 stack, and I take out five. Then I make a
6 withholding statement for those five.
7 HONORABLE SCOTT BRISTER: But
8 the -- under what circumstances are
9 attorney-client or work product ever going to
10 be discoverable? If you waived it by sending
11 it to somebody, in which case you are going to
12 discover it from that somebody, if you find
13 out that, you know, somebody did one of these
14 investigations of people, which you can find
15 out when you talk to the people, but 98
16 percent of the time attorney-client and work
17 product are not going to be discoverable.
18 We shouldn't be doing any requests for
19 them. We shouldn't be doing any response for
20 them, and we sure shouldn't be doing
21 prophylactic objections or discovery or
22 privilege logs for them, and it ought to be
23 presumed until the requesting attorney has
24 some reason to suspect there is some
25 attorney-client or work product that he or she

1 has some reason to have a right to before we
2 even start going down there. The burden
3 should not be shifted and the expense. By
4 simple guess, maybe you've got some
5 attorney-client, work product. If you might
6 have some, produce it to me. That should not
7 trigger the extreme expense of having to do
8 all the things to protect attorney-client and
9 work product that you have to do.
10 MR. SUSMAN: Scott.
11 HONORABLE F. SCOTT MCCOWN:
12 Yeah. Let me respond to that by saying first
13 that this rule does not increase in any way
14 what you have to do from the present system.
15 HONORABLE SCOTT BRISTER: Sure.
16 HONORABLE F. SCOTT MCCOWN: All
17 this rule does is decrease that. Now, whether
18 we have got it drafted to make it clear is a
19 separate question, but we don't increase it.
20 We decrease it, and the reason I think you --
21 the reason I think you can't go to a system
22 where the requester never requests
23 attorney-client, and so if you are withholding
24 attorney-client, you never have to put it on
25 the table is because of my experience in in

1 camera inspections. In in camera inspections
2 I am constantly finding things that were
3 withheld under one privilege or another, and
4 this applies to all privileges not just
5 attorney-client, that are, in fact, not
6 privileged, and I am ordering them produced.
7 MR. SUSMAN: Absolutely.
8 HONORABLE F. SCOTT MCCOWN: And
9 if that happens in a system where you have got
10 to show it to the judge, what would happen in
11 a system where you didn't have to show it to
12 the judge? In a system where you were never
13 put to the test then a whole lot of things
14 would be privileged under all the various
15 privileges that, in fact, aren't privileged,
16 and so what we have tried to do is split the
17 baby by saying you don't have to make
18 prophylactic objections. You don't have to
19 raise the issue until you're actually holding
20 something in your hand that you are not going
21 to turn over, but when you are holding
22 something in your hand that you are not going
23 to turn over, you have to let the other side
24 know you are holding it.
25 MR. SUSMAN: But it's a very

1 simple message you send at that point. Okay.
2 HONORABLE F. SCOTT MCCOWN:
3 Right. Right. I am withholding. Unlike the
4 present system you don't have to get all
5 prepared for the in camera inspection. You
6 just tell them, "I am withholding."
7 HONORABLE F. SCOTT MCCOWN: And
8 then you and your opponent --
9 CHAIRMAN SOULES: That's step
10 one.
11 HONORABLE F. SCOTT MCCOWN:
12 That's step one. Then step two --
13 CHAIRMAN SOULES: It's over.
14 Step one is complete at that point.
15 HONORABLE F. SCOTT MCCOWN:
16 Right. Step two, you and your opponent talk
17 about what you are withholding. If it's me
18 and Tommy Jacks, I take his word for his
19 telephone description, and I don't ask him.
20 If it's me and somebody else here --
21 CHAIRMAN SOULES: Somebody else
22 elsewhere maybe.
23 HONORABLE F. SCOTT MCCOWN:
24 Somebody else elsewhere I say, "I want you to
25 do the privilege log, and I want the judge to

1 look at this stuff," and so we have tried
2 to -- we have tried to make it as narrow as
3 possible.
4 MR. LATTING: Give us an
5 example of someone you might --
6 MR. SUSMAN: And that, too, is
7 a two-step process. You first say, "I want
8 you to do the privilege log." Then you look
9 at the privilege log, and almost invariably
10 looking at one of those logs you can highlight
11 a bunch of things that are really -- how in
12 the world did they keep this out? Okay.
13 Because you see nonlawyers listed on it, you
14 see the subject matter of it, and you say it's
15 those six documents, friend, that I want
16 produced in camera because I don't -- I mean,
17 some of them are obvious, but I think it's
18 very much abused, and I think your system
19 where there is some presumption -- I mean, I
20 have got to have some reason to suspect the
21 other guy is misusing the privilege. Reason
22 to suspect, in every case I have ever been in,
23 is misused.
24 PROFESSOR DORSANEO: The
25 privilege logs that I -- I'm sure the state of

1 the art in privilege logs is different, but I
2 am used to them being, you know, item by item.
3 I don't see any reason why you couldn't
4 indicate "correspondence between Steve Susman
5 and" -- you know, "during the month or during
6 the months of September, October, and
7 November."
8 MR. SUSMAN: The fact of the
9 matter is that, I mean, in many cases you will
10 talk to the other lawyer about it, what detail
11 you want to get into, because it falls
12 equally. Clearly the other side is going to
13 ask you to do what you ask them to do, and it
14 can be a big job, and maybe you will decide
15 that certain things can be described
16 generically.
17 PROFESSOR DORSANEO: So, for
18 the record, privilege log doesn't necessarily
19 mean that you would identify each discrete
20 item. You could perhaps proceed by category a
21 little?
22 MR. SUSMAN: Possibly. Rusty.
23 MR. MCMAINS: With regards to
24 this issue of how onerous and how big the log
25 is, as I read this, and maybe I am

1 over-interpreting it or dealing with areas
2 that the committee didn't think were
3 important, but it says that the only thing
4 that's excepted if you are withholding
5 information is materials created by trial
6 counsel in preparation for this litigation.
7 Now, a goodly number of people in this room
8 are dealing with repeat litigation scenarios
9 all over both the state and the country, and
10 many of those things in the mass court area,
11 toxic area, individual areas, they have
12 national trial counsel.
13 Now, am I to understand that basically if
14 you ask -- send a request, as I interpret it,
15 as I read this rule, if I send a request the
16 only thing that I can't put on it, that I
17 don't have to put on the privilege log, is my
18 materials in this case, and I'm not saying
19 that's not the same that we may have now in
20 some respects in terms of burdens on what work
21 product documents means, but is that really
22 the committee's intent that I have got to go
23 through -- if I represent a client, have an
24 attorney-client relationship with a client on
25 300 cases, and I get a request in this case

1 that I have to identify for privilege log
2 purposes everything I have got in my file in
3 the other 299 cases? And if that's true then
4 the only -- all he has to do is make the
5 request in the other case in order to get it
6 in this case.
7 MR. SUSMAN: Could I just make
8 one suggestion now. Again, to simplify this
9 so we can talk about concepts at the time?
10 Let's not talk about the concept of the last
11 sentence, which is Rusty's concept. Let's
12 hold it for a second, and then come back to
13 the problem, how do you define "trial counsel"
14 and how broad or narrow you make that if you
15 have it at all. Let's limit our discussion to
16 (1), subdivision (1) without the last
17 sentence, and then we will vote on the last
18 sentence separately. Is that okay?
19 MR. LATTING: Yes. Yes.
20 PROFESSOR DORSANEO: Uh-huh.
21 MR. SUSMAN: All right. Any
22 more comments directed at subdivision (1)
23 without the last sentence? Ann.
24 MS. GARDNER: I have what is
25 probably a simple, mechanical question just

1 reading this as an outsider. Is the
2 withholding statement intended to be a
3 separate document from, for example, the
4 response of and the objections, if any, like
5 under Rule 12 for interrogatories? Is it
6 supposed to be a separate document from the
7 response, and is it, if not -- if so, is it
8 governed by the same 30-day time limit? In
9 other words, could you file your response and
10 then maybe just a few days later give your
11 withholding statement? That's not clear.
12 MR. SUSMAN: I can answer that
13 question.
14 MS. GARDNER: Okay.
15 MR. SUSMAN: Two situations.
16 One, interrogatory answers.
17 MS. GARDNER: Yeah.
18 MR. SUSMAN: If you withhold
19 privileged information from answer to an
20 interrogatory, obviously the time you withhold
21 it is the time I hand the interrogatory answer
22 to Buddy. So it must be in the
23 interrogatory -- it must be in your
24 interrogatory answers, the withholding
25 statement.

1 Documents, that's a different situation.
2 You make the response to request for documents
3 in 30 days, but I may not be producing
4 documents for another couple of months.
5 Documents, my withholding statement comes at
6 the time not that I respond but the time I
7 produce. When I actually produce and withhold
8 the documents, that's when I have to give you
9 a withholding statement, not at the time I
10 file a response to the request for production
11 of documents.
12 PROFESSOR ALBRIGHT: And it may
13 be at the same time. It may be the same time.
14 MR. SUSMAN: It could be the
15 same time if you are producing documents with
16 the response but not necessarily.
17 MR. YELENOSKY: Can you make
18 that clear in the drafting, though?
19 MR. SUSMAN: Try to make it
20 clear.
21 PROFESSOR DORSANEO: It would
22 be better if we didn't develop the idea of an
23 entirely new instrument that differs from the
24 instruments talked about in the mechanical
25 rules. It would be much better if we just

1 talked about a discovery response, and we
2 would know that it's a withholding statement
3 or even to say include it because people are
4 going to be prepared -- even I'm thinking to
5 myself am I going to develop a form that's
6 going to be called "withholding statement"?
7 Is it going to be different for
8 interrogatories than it's going to be for
9 request to produce? Do I file the response to
10 the request to produce and then a withholding
11 statement as a separate thing or with it or
12 later?
13 MR. SUSMAN: Paul Gold.
14 MR. GOLD: I think it's
15 imperative that the withholding statement be a
16 part of the response. I mean, otherwise, I
17 agree totally. Otherwise, we wind up with an
18 additional thing in our discovery files. No
19 one is going to know where it relates or how
20 it relates to it. You know, I think that's an
21 easy --
22 PROFESSOR DORSANEO: Yeah. We
23 could say "as part of the discovery response"
24 or "included in the discovery response."
25 MR. GOLD: When you file your

1 response to request for production or answers
2 to interrogatories your withholding statement
3 should be a part of that.
4 MR. SUSMAN: I don't understand
5 how you can do it on a document request. You
6 keep switching. Interrogatories, agreed. I
7 said it goes into your interrogatory answers;
8 but when you have a document request very
9 rarely, in my cases anyway, do the documents
10 actually accompany the response to the
11 document request. The response says, "I will
12 produce these documents in my office on
13 such-and-such date, or you can come to the
14 plant in Ohio and look at them."
15 As I understand it, the withholding
16 statement is due not when the response comes
17 in because usually when I make the response I
18 am not even looking at the documents. I don't
19 know what I am withholding or on what
20 privilege, and that's what we wanted to avoid,
21 having to make some prophylactic statement in
22 the response. It's only when I go to the
23 plant and I look at the documents or have a
24 legal assistant and I am not going to show
25 them to you that I am required to produce a

1 piece of paper which we have called a
2 withholding statement. You can call it
3 whatever you want, but it is a separate piece
4 of paper that time.
5 MR. GOLD: Shouldn't we call it
6 supplemental response then?
7 PROFESSOR DORSANEO: Well, I
8 need to get that before I come to the plant
9 and you tell me, "Guess what? I'm not showing
10 you anything. Go back to Dallas."
11 HONORABLE ANN COCHRAN: Yeah.
12 That's right.
13 PROFESSOR DORSANEO: So I need
14 to get that sometime earlier. Maybe the
15 response time is too soon for documents, but I
16 can't be made to go to Dearborn, Michigan, to
17 screw around and then to come back to Dallas.
18 Because then I will file a motion for
19 sanctions because you made me come up there,
20 wasting my time.
21 HONORABLE SCOTT BRISTER: If
22 it's the same time as the response, how is it
23 different from a prophylactic objection
24 claiming attorney-client that we were getting
25 away from anyway?

1 MR. PERRY: The difference is
2 that you have made a determination that there
3 is actually something that you are not getting
4 the other side.
5 MR. SUSMAN: Yeah. But Scott's
6 point is well-taken under the current -- we
7 have not solved that problem under -- I mean,
8 there is a problem under the current rule, and
9 this doesn't necessarily solve it.
10 PROFESSOR DORSANEO: Uh-huh.
11 MR. SUSMAN: That is because
12 under the current rule you can put it in your
13 response that I will give you everything but
14 what's privileged, and two months later I go
15 to Acron, and there is nothing there, and you
16 say, "Well, look at my response. I told you
17 two months ago, dummy."
18 PROFESSOR DORSANEO: I don't
19 think you really are supposed to do that under
20 the current rule. You are supposed to make a
21 response by item or by category, and I don't
22 think you can just say if and when I look at
23 things some of them might be privileged, and
24 at that time when you appear in Michigan I am
25 not going to show them to you.

1 MR. SUSMAN: Luke.
2 PROFESSOR DORSANEO: I hope
3 not.
4 CHAIRMAN SOULES: Well, I have
5 looked at Rule 7 and the rule on documents and
6 then the rule on interrogatories, and my
7 impression is that these rules do not help on
8 prophylactic objections in any way. Maybe on
9 documents but certainly not on
10 interrogatories. There is nowhere that this
11 says that objections can be made after the
12 first response to interrogatories if you learn
13 something new that happens to be privileged
14 then. So you have to make your objections
15 when you file your responses. You have to
16 make all your objections, I guess, when you
17 file your responses. Documents, it's a little
18 bit clearer, although it has the problem that
19 Bill is bringing up here, and I --
20 MR. SUSMAN: Please don't get
21 to objections yet because if we haven't
22 cleared this we need to get it clear.
23 CHAIRMAN SOULES: Well, it's
24 the same thing.
25 MR. SUSMAN: No, it's not.

1 HONORABLE F. SCOTT MCCOWN:
2 Well, no. Steve.
3 CHAIRMAN SOULES: To me it's
4 the same thing.
5 HONORABLE F. SCOTT MCCOWN:
6 Steve? Luke's right. Sentence No. 2 --
7 CHAIRMAN SOULES: Let me
8 finish, please. I'm not done if I can hold
9 the floor just a few more minutes.
10 HONORABLE F. SCOTT MCCOWN: I'm
11 sorry.
12 CHAIRMAN SOULES: To me the
13 concept is that there should be a withholding
14 statement or whatever you want to call it. I
15 don't think it ought to have to be some
16 separate document that takes a life of its
17 own, but that there has to be a disclosure
18 that information is being withheld at the time
19 the party expects to withhold it; and then, of
20 course, if it's information the party didn't
21 know about on the first round, it's in the
22 second or third wave of document production
23 that typically does come in a big case, then
24 the party doesn't expect to withhold it until
25 the party gets that second wave itself and

1 goes through it and decides whether or not it
2 needs to make a claim of privilege or make a
3 disclosure or nondisclosure statement. That's
4 all.
5 HONORABLE F. SCOTT MCCOWN:
6 Well, our Sentence No. 2, if you look at the
7 second sentence in the rule, that sentence is
8 carrying more information than you-all are
9 loading out of it. So it's not clear enough.
10 It's not express enough. What we meant there,
11 a party shall make the withholding statement
12 only whenever the party is actually
13 withholding specific information of materials
14 responsive to a request, and we don't have the
15 word "only," and even if we did, that still
16 wouldn't tell you enough.
17 What we envisioned, and we need to work
18 on the drafting, is that you owed a
19 withholding statement only when you actually
20 had the materials in hand and were withholding
21 them. So you didn't have to make prophylactic
22 objections for later created material because
23 you couldn't. In other words, attorney-client
24 is constantly created even after the request.
25 Since you wouldn't actually be withholding it

1 because it hadn't been created, you wouldn't
2 have to make the objection.
3 CHAIRMAN SOULES: On page 26.
4 If you're done, on page 26 you say that
5 objections, if any, to interrogatories are to
6 be made 30 days after service of the
7 interrogatories.
8 HONORABLE F. SCOTT MCCOWN: But
9 an objection doesn't preserve anything with
10 regard to privilege. Privilege is raised not
11 by objection, only by withholding statement
12 under this system, and we say that in here.
13 CHAIRMAN SOULES: Where?
14 MR. SUSMAN: First sentence.
15 "A party preserves a privilege only," only.
16 Now, maybe that's not clear enough.
17 HONORABLE F. SCOTT MCCOWN:
18 Yeah.
19 MR. SUSMAN: And maybe we want
20 it in a comment, but a party preserves a
21 privilege only by a withholding statement.
22 Objections don't do any good for privilege
23 anymore.
24 CHAIRMAN SOULES: Well, why do
25 that?

1 MR. HERRING: Let me give you a
2 poor example. David Perry sues General
3 Motors. He sends a request for production
4 that says, "Produce all passive restraint
5 documents on the Suburban." And his case
6 involves only air bags. So I think that's
7 overbroad, but if he ever gets narrowed down
8 to air bags on Suburbans for a certain period,
9 I will answer it. I know some of those
10 documents are privileged. I know that when I
11 get his request. I'm going to have an
12 overbreadth objection. When do I have to file
13 a withholding statement? I know I have got
14 some documents that if that request were
15 properly narrowed down I would produce.
16 HONORABLE F. SCOTT MCCOWN:
17 Okay. Once you make your objection that it's
18 overbroad you have got no obligation to
19 respond. So you are not withholding anything
20 yet. The objection would have to be overruled
21 and narrowed to Suburbans. Then you would
22 have an obligation to respond. You would do
23 your search. You would find your privileged
24 documents. You would make your withholding
25 statement. That's what we envisioned.

1 Whether we got that in the drafting or not is
2 a separate question, but that's what we
3 envisioned.
4 MR. HERRING: What's the time
5 for filing it?
6 MR. SUSMAN: It's a time he
7 shows up. It's a time the other side actually
8 shows up to look for documents or you send him
9 documents because that is the effective time
10 you do the withholding.
11 MR. PERRY: In other words,
12 Chuck, we contemplated that at some point in
13 that process it would become your obligation
14 to produce whatever it is you are going to
15 produce. The documents --
16 MR. HERRING: I understand
17 that. I have still got Bill's problem,
18 though.
19 MR. YELENOSKY: Yeah. Now,
20 it's Bill's problem. You show up to General
21 Motors, and they say, "Here is the withholding
22 statement."
23 MR. HERRING: We just need to
24 have a way to get it to you so it's useful so
25 that you don't show up in Michigan, and you

1 don't have it.

2 PROFESSOR ALBRIGHT: Another

3 thing, Scott, if I can correct you. We do

4 have some obligation to respond even though

5 you have objected because we have said that

6 you have -- unless compliance is unreasonable

7 under the circumstances the party must respond

8 to so much of the request as to which the

9 party has no objection. So it may be that you

10 say, "I will produce all of them concerning

11 air bags," but it may be that you say, "I'm

12 not going to do any search because I will just

13 have to go through everything three times."

14 MR. HERRING: I need to know

15 more than "maybe." I mean, I need to know do

16 I have to or not? I think it ought to be

17 clear.

18 MR. SUSMAN: Wait a second.

19 PROFESSOR ALBRIGHT: Well, you

20 get to decide.

21 MR. SUSMAN: Listen. We can go

22 back. Let's see if we can do this. Our

23 notion -- on our notion on assertion of the

24 privilege, privileges, not objections, and

25 objections don't work for privileges anymore.

1 Our notion on privileges are at the very time
2 you find a document and make a decision to
3 withhold it on a ground for privilege that's
4 when you notify the other side, and that
5 notification constitutes -- that preserves the
6 privilege. Now, if you-all don't like that
7 system and want to go back to the current
8 system of objections, we can do it. I mean --
9 yes, sir.
10 HONORABLE DAVID PEOPLES: Yeah.
11 I want some more discussion on what Scott
12 Brister brought up several minutes ago, which
13 was -- was it Keltner's committee that
14 proposed that you have got to specifically ask
15 for attorney-client or work product notes, and
16 then Scott McCown brought up, well, in camera
17 I see all of these, you know, documents that
18 some of them aren't even close. Now, I think
19 we need to discuss that alternative,
20 especially if another subcommittee of this
21 whole committee is proposing it, and I am not
22 sure how it works, you know, and what Judge
23 McCown was saying. You know, it is true that
24 sometimes people claim things are privileged
25 which really aren't even close.

1 MR. KELTNER: I agree.
2 HONORABLE DAVID PEOPLES: But I
3 like the idea of, you know, if you really want
4 something that's in the attorney-client or
5 work product area why not -- why shouldn't we
6 say you have got to say up front, "I'm asking
7 for that."
8 MR. SUSMAN: I'm not -- let me
9 address this. I mean, we could easily make
10 that change and add that to this rule.
11 HONORABLE DAVID PEOPLES: I
12 mean, it would require more than adding
13 because the first six words here are
14 inconsistent with that. "You preserve
15 privilege only by withholding." You don't
16 even have to mention privilege unless they are
17 asking for it.
18 MR. SUSMAN: I understand, but
19 the concept would be you don't have to worry
20 about preserving privilege unless the other
21 side asks for it. If they ask for it then the
22 way you preserve it is this rule. Now, if
23 you-all want to -- the subcommittee did not
24 think it was necessary to add the additional
25 step of making people expressly ask for it. I

1 don't know what fool would not expressly ask
2 for it. I would put that in every one of my
3 forms.
4 HONORABLE DAVID PEOPLES: I
5 think you look bad when you ask for that.
6 MR. SUSMAN: Huh?
7 HONORABLE DAVID PEOPLES: I
8 think you look bad coming into court asking
9 for privileged matters unless you have got
10 some --
11 MR. GOLD: Which is exactly why
12 the task force was unanimous on that. Because
13 it creates a presumption that I am coming in,
14 and I am having to ask for attorney-client
15 privileged matters and work product. I start
16 off in a bad situation in that court, and
17 that's why that approach has problems.
18 MR. SUSMAN: David.
19 MR. PERRY: The fact is you are
20 never going to be asking for the production of
21 stuff that is privileged. What you are going
22 to be asking for is to invoke the mechanism by
23 which the claim of privilege is tested, and
24 the system that the task force talked about
25 and the system that the subcommittee came up

1 with are very close to the same, but under the
2 system that the task force talked about almost
3 any good lawyer is always going to say, "Tell
4 me what it is you are withholding," because
5 you have to do that in order to invoke the
6 mechanism.
7 Under the system that the subcommittee
8 came up with, there is a particular area
9 carved out that is really always going to be
10 there and is pretty much always going to be
11 privileged, and we just said, look, we will
12 take that little area, and you don't ever have
13 to worry about it. The guy who's answering
14 the discovery, the phrase I think that we
15 talked about using, started talking about is
16 trial counsel's file. Now, that's not the way
17 we phrased it, and maybe the drafting could be
18 changed, but as a practical matter in every
19 case trial counsel has a file, and trial
20 counsel's file is privileged, and what we are
21 trying to do is just carve out that little
22 area and say nobody has to do anything about
23 that, and then in other areas create a
24 mechanism that provides for the orderly
25 invocation of the way to decide the claim.

1 MR. SUSMAN: David Keltner.
2 MR. KELTNER: Let me add, and I
3 think David is exactly right in the way he
4 explained what the subcommittee was trying to
5 do. Here is what I think the problem is: On
6 the task force we determined that there were
7 an awful lot of discovery requests that came
8 out of form books, that were simply made that
9 by their very language requested attorney work
10 product and attorney-client privilege, and if,
11 for example, they said -- well, almost any
12 request would do it, and it's because it
13 wasn't specifically excluded, and it was
14 difficult to do so. If you got it too
15 specific, you didn't get everything you were
16 after. If you got it too broad, it obviously
17 had to ask for privileged materials.
18 Our thought process was let's address --
19 since the request is the problem let's address
20 it through the request, and we thought that
21 was simpler. Now, what the subcommittee did
22 is saying, well, we want to put the emphasis
23 on testing, at least this is my
24 characterization, testing the privileges. I
25 believe in about 80 percent of the time, maybe

1 even higher, nobody really wants to test the
2 privilege. The real truth of the matter is we
3 would all say, "No, I don't want that. This
4 is -- you know, this is a 100,000-dollar case.
5 All I want to see is what you've got that all
6 of us would generally consider discoverable."
7 So it's -- I personally still like the
8 idea of putting it into the request solely
9 because I think that does most good in most
10 cases. There is no doubt that what David and
11 Paul were saying and Scott was also saying is
12 absolutely true. There probably is no more
13 abuse in claiming the privilege that doesn't
14 exist in the attorney work product situation.
15 That's where we see most of the problem areas
16 and people trying to put stuff in there that
17 shouldn't be there, but again, I think I would
18 opt for the task force rule as well.
19 I must admit that I think we need to
20 discuss, though, the idea of the withholding
21 privileged information as a substitute for
22 objections because, quite frankly, it makes
23 some sense. I would take -- I mean, just I
24 will put my two cents in it. I would take the
25 objections paragraph out in the main part and

1 mold it into what we are talking about in sub
2 (1), but I think it does make sense to at some
3 point create a privilege log. If there are
4 cases we don't have to do so, I would sure
5 prefer we not.
6 MR. SUSMAN: Scott.
7 HONORABLE F. SCOTT MCCOWN:
8 Well, the reason I like the subcommittee
9 approach better than the task force approach
10 is because under the task force approach when
11 you ask for privileged material you are not
12 really asking for privileged material. What
13 you are really asking for is material that
14 they are contending is privileged but that
15 isn't once the judge sees it, and I think to
16 set up a rule where we require people to ask
17 for privileged material and to have to explain
18 to clients that that request for privileged
19 material is perfectly proper because they are
20 not really asking for privileged material.
21 They are really asking to invoke this testing
22 mechanism. So we have to give them what we
23 are claiming is privileged but really isn't
24 privileged, seems to me to be kind of
25 unattractive.

1 MR. SUSMAN: And particularly
2 if a judge like David Peoples is going to look
3 at me and say, "You are asking for privileged
4 material? That's sanctionable. You shouldn't
5 be doing that." I mean, why shouldn't I test
6 the privilege?
7 HONORABLE F. SCOTT MCCOWN: And
8 what we have done under this rule is what
9 David Keltner says we ought to do, which is
10 all you have to do is tell them you got it.
11 Once you do that, though, they have to say to
12 you they want it. So we still have the
13 dialogue that the task force envisioned and
14 the invoking, not in the 80 percent but the 20
15 percent.
16 MR. SUSMAN: All right. We
17 have got to get some closure on this. Let's
18 look at the rule as written without the last
19 sentence on trial counsel. All in favor of 7,
20 subdivision (1), with some wordsmithing? We
21 will go back and see how we make this clearer,
22 this concept. Raise your right hand.
23 CHAIRMAN SOULES: 13 for.
24 MR. GOLD: So long as I get to
25 be at the meeting.

1 MR. SUSMAN: All opposed?
2 CHAIRMAN SOULES: Three
3 against.
4 MR. SUSMAN: Three against.
5 Okay. Let's go on. Trial counsel. And I
6 really need to move now because we have got
7 one hour left. Trial counsel. The problem is
8 how we define trial counsel, and we have heard
9 Ann's problem. Go ahead, Ann McNamara. What
10 should we do with that?
11 MS. MCNAMARE: Why not just
12 take the word "trial" out? Just say "counsel
13 in preparation for the litigation."
14 MR. SUSMAN: All right.
15 MR. LATTING: And what is "the
16 litigation"?
17 HONORABLE F. SCOTT MCCOWN:
18 Yeah.
19 HONORABLE ANN COCHRAN: That
20 goes to Rusty's point.
21 PROFESSOR ALBRIGHT: Can I
22 respond to that?
23 MR. SUSMAN: Yes.
24 PROFESSOR ALBRIGHT: Right
25 now -- and this is something we need to bring

1 up when we talk about privileges at the next
2 meeting, is that under the party communication
3 privilege as it's currently worded the Supreme
4 Court has said that that material in other
5 litigation is not privileged. So that's why
6 we limited it to the materials created in this
7 litigation. So we don't give people
8 opportunities to withhold stuff that is not
9 privileged.
10 MR. YELENOSKY: Alex, doesn't
11 that raise another question here? Because it
12 doesn't seem to include in this sentence
13 communications from the client to the lawyer
14 because of the "created" word. Don't you need
15 to have attorney-client communications in
16 there somewhere in this sentence? Because
17 that -- I mean, a letter from the client --
18 PROFESSOR ALBRIGHT: That's
19 fine with me.
20 MR. YELENOSKY: -- to the
21 attorney is not created by counsel.
22 PROFESSOR ALBRIGHT: Yeah.
23 And, you know, actually I think "created by
24 counsel" is work product, which would be
25 privileged, but we have a real problem in

1 text --

2 MR. SUSMAN: I would suggest --

3 PROFESSOR ALBRIGHT: -- as to

4 what is work product, and I think it --

5 MR. SUSMAN: I would suggest

6 we --

7 PROFESSOR ALBRIGHT: -- can be

8 resolved when we get to the privilege if we

9 can resolve the privilege problem.

10 MR. SUSMAN: Absolutely. I

11 suggest it goes hand in hand with the

12 privilege thing that you are working on that

13 we have not voted on. Let's defer this

14 sentence. You will have some sentence like

15 this in the final rule. There is a sense that

16 something belongs. How broad or how narrow it

17 should be will be left to a resolution of the

18 privilege issue.

19 (2), subdivision (2) of this rule. There

20 did not seem to be a whole lot of -- there was

21 no controversy basically about this at the

22 last meeting, which is, "The objection shall

23 be made only if a good faith factual and legal

24 basis for the objection exists at the time the

25 objection is made." Yes, sir.

1 MR. MARKS: There may not have
2 been a controversy, but I recall there was
3 some question about that second sentence, and
4 I'm not sure that -- you know, first of all,
5 you only make an objection, but maybe
6 you -- there was some language, wasn't there,
7 last time about you waive objections that you
8 don't make? But I don't like the "any
9 objection not specifically stated." Well,
10 excuse me. That's not it. "Or obscured by
11 numerous unfounded objections is waived."
12 PROFESSOR ALBRIGHT: You don't
13 like either of them or just one part?
14 MR. MARKS: What I really don't
15 like is "obscured by numerous unfounded
16 objections."
17 MR. LATTING: Why? Do you like
18 to do that a lot?
19 MR. SUSMAN: Go ahead, Paul.
20 MR. GOLD: That sentence, I
21 have been the advocate of that sentence, and
22 that's because I remember when I was starting
23 out practice in Dallas, and in the charge
24 conferences they would bury all of the
25 significant objections in a sea of ink, and I

1 remember there is a Supreme Court case that
2 says that a trial judge should not have to
3 squander time with meaningless objections to
4 try and find the correct ones.
5 MR. MARKS: That's to the
6 charge. Charge.
7 MR. GOLD: And there is
8 absolutely no reason why attorneys should have
9 to bear with what a trial judge shouldn't.
10 MR. SUSMAN: Other comments on
11 section (2)? Tommy Jacks.
12 MR. JACKS: I have a
13 suggestion, and that is, after the phrase "If
14 written discovery request is objectionable,"
15 in certain words, "on grounds other than
16 privilege."
17 MR. SUSMAN: Perfect. It is
18 accepted.
19 PROFESSOR ALBRIGHT: Well,
20 except -- no. There is a problem. If you
21 send me a request that says, "Send me your
22 litigation file," the Supreme Court says that
23 the form of that question is objectionable.
24 That is because all it does is request work
25 product. You know, there may be items in my

1 file that you can get if you request them
2 specifically, but you cannot just send me a
3 request that says, "Send me your litigation
4 file."
5 MR. JACKS: Well, isn't the
6 objection overbreadth?
7 PROFESSOR ALBRIGHT: Well,
8 maybe it is but that --
9 MR. JACKS: Yeah. I understand
10 what you are saying.
11 PROFESSOR ALBRIGHT: The reason
12 it's overbroad is because of the privilege.
13 MR. JACKS: The reason I make
14 the suggestion, and maybe there is another way
15 to go about it, is because to me it's still
16 not clear that you're accomplishing what I
17 think you were trying to accomplish, and that
18 is in (1) to say if you want to object on
19 privilege grounds, do it this way.
20 MR. SUSMAN: We want to make
21 that absolutely clear, and I would ask that
22 you get together with Alex, who -- Alex will
23 take responsibility for wordsmithing this
24 afterwards and make sure that that is clear.
25 That is a drafting problem, but the concept is

1 there. With that in mind are we ready to vote
2 on (2)? All in favor of 7(2)?
3 MR. MARKS: Well, excuse me
4 just a minute.
5 MR. SUSMAN: I don't mean
6 to -- go ahead.
7 MR. MARKS: I don't think we
8 have talked enough about "obscured by numerous
9 unfounded objections." I think that should be
10 taken out.
11 MR. SUSMAN: Well, I am going
12 to give you the opportunity.
13 MR. MARKS: Okay.
14 MR. SUSMAN: Anyone who wants
15 to -- anyone who believes it's okay to obscure
16 an objection by numerous and unfounded
17 objections should vote against --
18 MR. MARKS: That's not the
19 point. That's not the point.
20 MR. LATTING: What is the
21 point?
22 MR. MARKS: I think, No. 1,
23 your objection to interrogatories in the first
24 place is not like you are objecting to a
25 charge. There are only so many objections

1 that you can make, and I have never seen
2 objections to interrogatories that were that
3 long.
4 MR. PERRY: We can talk. We
5 can talk.
6 MR. GOLD: The Strasberger &
7 Price two-page standard objection to an --
8 MR. MARKS: Well, I don't --
9 MR. GOLD: I know you're not
10 there anymore. I know you're not there
11 anymore, but you have seen that. It's a
12 two-page stock objection to every
13 interrogatory.
14 MR. MARKS: Well, a lot of it
15 is privileged, though. I mean, you pull the
16 privilege out of that, then you take the teeth
17 out of a lot of this.
18 MR. SUSMAN: David.
19 MR. MARKS: Now, the first
20 sentence takes care of it. It says, "only if
21 a good faith factual and legal basis for the
22 objection exists."
23 MR. SUSMAN: David.
24 MR. PERRY: I think that a very
25 great deal of the unnecessary cost of

1 discovery revolves around numerous unfounded
2 objections. It is very common in cases that I
3 am involved with to receive objections that
4 run 50 or 100 pages, and to end up by the time
5 you are at a hearing that there are two or
6 three out of several hundred -- up to 100
7 pages that somebody really wants to present to
8 the court, but there has been a tremendous
9 amount of lawyer time and lawyer expense on
10 both sides of the docket spent by creating
11 them and then weeding them out, and I don't
12 think that the fault lies particularly with
13 either side of the docket. I see numerous
14 unfounded objections proposed both by
15 plaintiffs and by defendants, but I think the
16 rules need to put the burden on the lawyer who
17 is filing the objection, to start with, to do
18 a good lawyer-like job of raising the
19 objections that need to be raised and nothing
20 else.
21 MR. SUSMAN: Ann.
22 HONORABLE ANN COCHRAN: I would
23 like to second very strongly what David just
24 said. I think one of the top abuses and
25 problems in discovery is --

1 MR. SUSMAN: Rusty.
2 MR. MARKS: Let her finish.
3 HONORABLE ANN COCHRAN: -- from
4 ridiculous, incredibly numerous, ridiculous
5 objections.
6 MR. SUSMAN: Rusty.
7 MR. MCMAINS: My comment is
8 actually not on that sentence but the last
9 sentence, which says, "Unless compliance is
10 unreasonable under the circumstances a party
11 must respond to so much of the request as to
12 which the party has no objection." Because
13 the earlier requirement is that you must make
14 a timely objection or it's waived, my problem
15 is that given the current practice there is
16 going to be objections made by and large to
17 most written discovery requests. Maybe we
18 will narrow it down some. This doesn't give
19 me very much assurance that I don't really
20 have to go ahead and do an awful lot of work
21 of things that I know ultimately they are
22 going to get. There is no kind of automatic
23 downtime until the objection was ruled on.
24 It doesn't -- it's just kind of
25 "loosey-goosey," and so I'm just -- it says

1 there is no provision here or procedure for
2 the determination of it, whose burden it is to
3 show one or the other. It kind of assumes
4 that I do have the obligation to go forward
5 and do whatever it is I do in that if there is
6 a kernel of something that I have to -- that I
7 have to respond to, that I know I am going to
8 have to respond to after all my objections are
9 made.
10 MR. PERRY: You need to read
11 the last phrase of the first sentence in
12 conjunction with this because under the last
13 phrase of the first sentence the person who is
14 making the objection has to state the extent
15 to which they are going to refuse to comply
16 with the request. So they can say, "I object
17 to this part, but I am answering the rest of
18 it," or they could say, "I object, and I claim
19 that under the circumstances it would be
20 unreasonable to do anything," and so I am
21 going to do nothing so that the answering
22 party gets to decide how much they are going
23 to comply under the terms of the rules, and
24 they have to tell the party receiving the
25 answer what that is.

1 MR. SUSMAN: Paul Gold.
2 MR. GOLD: Yeah. What we need
3 to do here is we need to clarify a policy, and
4 what we have in the practice right now is a
5 question of when you get an overbroad
6 request -- I think Chuck was talking about
7 this a moment ago. He knows that in response
8 to David's request he's got a section of
9 documents that are responsive, but the request
10 is overbroad. Here is where the issue is:
11 does he object and say this is an improper
12 request, it is overbroad, and not answer it at
13 all, or should he object this is an
14 unreasonably, unduly burdensome request?
15 It requests irrelevant materials, but I
16 do have this responsive information that's a
17 subset of this request, and I will produce
18 that, and I am not producing anything else,
19 and that's what this sentence is designed to
20 cure so that you would at least -- it would at
21 least finesse out the information that he
22 himself believes is responsive.
23 MR. SUSMAN: Rusty.
24 MR. MCMAINS: But my question
25 is, is this first part which says "and the

1 extent to which the party is refusing to
2 comply," if they say it's overbroad, and
3 therefore, I am refusing to comply, then I'm
4 not sure that you have accomplished that.
5 MR. PERRY: Well, you have, and
6 you haven't.
7 MR. MCMAINS: But I think the
8 last sentence was designed to rectify that by
9 saying, well, that's not fair because you knew
10 there was something that you should have
11 complied with, but I am trying to figure out
12 how those --
13 MR. HERRING: What are you
14 going to have to report, David? Because if
15 it's all passive restraint systems, and I know
16 there is only one of them in here that
17 applies, if you say, "Produce all documents of
18 General Motors," that's unreasonable, and I
19 don't have to rewrite that. I can just refuse
20 completely and say, "I am going to refuse to
21 produce anything."
22 MR. GOLD: But it's very
23 difficult to articulate that in the rule.
24 MR. HERRING: Right.
25 MR. PERRY: We are leaving the

1 decision -- we are leaving the initial
2 decision up to the party that is going to do
3 the answering, although they have a direction
4 that unless it is unreasonable they are
5 supposed to comply with the part that's not
6 objected to. For example, in the litigation
7 that I have with Ford, Ford will commonly
8 object to requests for production as overbroad
9 and produce nothing. General Motors will
10 commonly object to the request as overbroad to
11 the extent that it exceeds X and then they
12 will agree to produce X, and what we are doing
13 is incorporating a mechanism in the rule that
14 the answering party is supposed to make it
15 clear what they are doing. They can choose to
16 do either one, but they are encouraged to make
17 the production that they are not objecting to
18 unless they claim that under the circumstances
19 it would be.
20 MR. SUSMAN: Again, we are
21 running out of time. Ann.
22 HONORABLE ANN COCHRAN: Well, I
23 mean, I appreciate the time concerns, but on
24 the other hand, if we have got real problems
25 we have got to keep going.

1 MR. SUSMAN: Yeah.
2 HONORABLE ANN COCHRAN: The
3 wording of the last sentence does not say what
4 you have just said. This is not
5 encouragement. It is unless compliance is
6 unreasonable you must, and you know, if we are
7 going to say that, if what we mean to say
8 is -- and I am not arguing one way or the
9 other, David, but if what we are trying to say
10 is that it's purely up to the responder to
11 decide which way to go then we sure better
12 take that "must" out, and we had sure better
13 clearly say that if the judge decides that the
14 responder guessed wrong or took the wrong path
15 that it's not sanctionable, that the other
16 side can't complain about it, and let's be
17 clear. Because the way this is written it is
18 not a voluntary election on the part of the
19 respondent.
20 MR. SUSMAN: Well, clearly the
21 respondent has got to make judgment calls, I
22 mean, but we all do. Okay. And what we are
23 saying here is -- I mean, we give an example
24 in the comment. Comment 1, if the request
25 seeks specific documents from '80 to the

1 present, the party then objects that the
2 documents from '80 to '90 are irrelevant and
3 it is overly burdensome to produce them, but
4 you may -- the party may produce the documents
5 from '90 to the present or refuse to produce
6 until the court resolves the objection if
7 producing according to a modified request will
8 require burdensome and duplicate research.
9 Now you are saying that's not clear enough?
10 HONORABLE ANN COCHRAN: I'm
11 saying the comment is not part of the rule.
12 MR. PERRY: I think the draft
13 could be improved. Why don't we have a shot
14 at the drafting and improving that because I
15 think we can do that?
16 MR. SUSMAN: I mean, what we
17 want -- does it make sense to encourage and
18 try to get people to produce those documents?
19 HONORABLE ANN COCHRAN: I don't
20 have any problem with the concept. I think it
21 needs to be rewritten to make it clear exactly
22 what the --
23 MR. SUSMAN: All right.
24 Conceptually then. All right. Conceptually
25 on Rule 7(2). All in favor conceptually of it

1 with the idea we are going to go rewrite it?
2 HONORABLE ANN COCHRAN: Well, I
3 don't know at this point how you are going to
4 end up rewriting it. Are you going to make it
5 elective, or are you going to make it
6 punishable if you do the wrong thing? I can't
7 vote conceptually until that's decided.
8 MR. SUSMAN: All right. How do
9 you want it? How do you want it?
10 HONORABLE ANN COCHRAN: I don't
11 know. I don't think we have talked about it
12 enough. I mean, I think that there were some
13 real questions raised here on both sides.
14 HONORABLE F. SCOTT MCCOWN:
15 Steve, I think we have got an understanding.
16 Let's redraft it and bring it back and move
17 on. We don't need to vote.
18 MR. SUSMAN: Okay.
19 HONORABLE F. SCOTT MCCOWN: I
20 think we understand.
21 MS. MCNAMARA: Can I make one
22 point? I know we have got very little time to
23 go, but back to John Marks' point because I
24 think everybody is opposed to a lot of
25 unfounded objections. The question I have is

1 whether we have enough in the second sentence
2 to -- which says you can only object if you
3 have got a good faith basis for doing it and
4 whether the next sentence is really gilding
5 the lily and more properly belongs in
6 sanctions because I think -- and I think if I
7 heard you, John, that's what you were saying
8 is, you know, the rule already deals with the
9 nonsense, two-page, et cetera, et cetera,
10 objections.
11 MR. MARKS: It certainly gives
12 the court the option to deal with it.
13 HONORABLE ANN COCHRAN: That's
14 right. I don't think the first sentence is a
15 problem. I mean, the second sentence takes
16 care of the problem because all that's saying
17 is that, you know, the judge only sustains the
18 ones that have a good faith factual and legal
19 basis. The problem is what if there are 300
20 objections, 299 of which fail the test in
21 sentence two. Does the judge really have to
22 work through all 300 to find that one that was
23 good?
24 MR. MARKS: Have you ever seen
25 300 objections?

1 HONORABLE ANN COCHRAN: Yes.
2 Yes.
3 MR. MARKS: To one
4 interrogatory?
5 HONORABLE ANN COCHRAN: Yes.
6 The judge should be able to go through a
7 certain number and say, "I'm assuming that all
8 the rest of these objections -- before I spend
9 the next two days in this oral hearing, I'm
10 assuming that all the rest of the objections
11 have the same high quality as the ones I have
12 already ruled on. Get out of here." The
13 judge has to have that ability.
14 MR. SUSMAN: Rusty.
15 MR. MARKS: The sentence says
16 "shall be made." Okay. "An objection shall
17 be made only if a good faith factual and legal
18 basis for the objection exists."
19 MR. SUSMAN: Rusty.
20 MR. MCMAINS: Well, but I think
21 also the fact -- if the purpose of this rule
22 is to take away privileges from being
23 preserved by objections then the idea that you
24 waive the objection really in terms of what
25 damage it causes is a lot more. Because if

1 your assertion -- well, right now our problem
2 with the waiver of concepts and this stuff is,
3 well, we lose privileges that you ought not to
4 lose, and once you take that out of the fix, I
5 mean, the privilege of what you lose is an
6 objection that focusing -- you know, that is
7 buried in 37 other objections that are
8 irrelevant. Okay. So you have to go to the
9 court. Big deal. I mean, that to me
10 militates against the concern about this
11 numerous unfounded stuff to know if you are
12 going to make --
13 MR. SUSMAN: Let me see if we
14 can get a show of hands on two concepts or a
15 concept. One -- because there is a
16 disagreement here. I mean, there is some of
17 us that feel very strongly that that third
18 sentence ought to be in here, and there are
19 others that think it should not. Who thinks
20 the third sentence or something like it ought
21 to be in here? Raise your right hand.
22 CHAIRMAN SOULES: 17.
23 MR. SUSMAN: Who thinks it
24 should not be in there? Two -- three.
25 CHAIRMAN SOULES: 17 for, 3

1 against.

2 MR. SUSMAN: Now, let me ask

3 another question for guidance. Ann raises a

4 good point, Ann Cochran, and the point is on

5 the last sentence do we want that a mandatory?

6 In other words, you have a pretty strong -- if

7 you are responding, you have a pretty strong

8 burden to figure out how much of the guy's

9 request is reasonable and comply with that

10 portion and not just stop all discovery by

11 lodging an objection 'til he makes it right,

12 or do we want to just kind of if you want to

13 go ahead and do something, you can, but you

14 don't have to? Is that -- I mean, Ann is that

15 kind of the --

16 HONORABLE ANN COCHRAN: That

17 presents the issue very squarely.

18 HONORABLE F. SCOTT MCCOWN:

19 There is a third alternative. I mean, I think

20 you ought to have a duty to put on the table

21 whatever you think is responsive that you

22 don't object to. When you get to the hearing

23 on your objections if the trial court thinks

24 that more goes on the table then he orders you

25 to put more on the table. I don't think it

1 ought to be off with your head if you
2 discharged your duty differently than the
3 trial judge thinks you ought to have.
4 MR. SUSMAN: Dorsaneo.
5 PROFESSOR DORSANEO: The way
6 David Perry put it I don't have any trouble
7 with somebody saying that they will produce X
8 and then somebody else saying, "I will produce
9 nothing because under the circumstances it's
10 unreasonable for me to produce anything."
11 Now, if they are wrong about that and
12 something might happen to them later -- but
13 that's a separate question from the response
14 that they can make.
15 MR. SUSMAN: David Perry.
16 MR. PERRY: The initial
17 drafting -- and I don't remember where it came
18 from anymore -- was to the effect that you
19 always would have a duty to produce the
20 information to which there was no objection.
21 I guess that came out of the task force, and
22 then somebody said, well, suppose this is a
23 great, huge case, and you have requested the
24 world, and doing the search to isolate what
25 you object to versus what you don't object to

1 would be unreasonable until you have gotten a
2 final ruling on what the scope of production
3 ought to be. Shouldn't you have the ability
4 to do nothing?
5 And the thought that we had was, well,
6 that would be a very rare situation, but yes,
7 we would give people an out in that regard.
8 It seems to me that that situation is rare
9 enough that the general duty that the party
10 must respond to the part that they do not
11 object to should be phrased in mandatory
12 terms. We give them the out about the
13 unreasonable circumstances, and as a practical
14 matter there is no penalty attached to taking
15 that out and being wrong. You haven't waived
16 anything, and the chances that a trial judge
17 is, in fact, going to sanction somebody -- we
18 haven't written the sanction rules yet, but
19 under all the drafts that we are looking for I
20 can't imagine a trial judge sanctioning
21 somebody for taking that out and then hearing
22 a big fight over whether it was unreasonable
23 to take that out.
24 MR. SUSMAN: Paul Gold, and
25 Luke.

1 MR. GOLD: As a practical
2 matter giving a response takes you out of the
3 sanction situation. It's only when you do not
4 respond at all to an interrogatory that you
5 presently risk the sanctions there. I really
6 believe that all we are doing is trying to
7 make clear and institutionalize what should be
8 practice. On plaintiff's side if someone asks
9 me for 10 years of income tax returns, I
10 shouldn't object and say, "That's overbroad."
11 I should say, "Here is five. It would be
12 unduly burdensome to get the other five."
13 All we are trying to do is encourage that
14 type of practice, and I think there should be
15 a duty. A party must respond to so much of
16 the request that is not objectionable and
17 which under the circumstances is reasonable to
18 do, and I think if we make it discretionary,
19 all we do is build into the rule more game
20 playing.
21 MR. SUSMAN: Luke.
22 CHAIRMAN SOULES: I think in
23 our earlier discussions we had talked about
24 the discovery should go forward to the extent
25 it's not objected to so that we get the show

1 on the road. The costs, the amount of
2 discovery that is given, may turn out to be
3 acceptable to the receiving party. For one
4 thing, the five years may turn out to be
5 satisfactory. Also the problem of delay by
6 simply objecting and just shutting down
7 discovery, the delay in most instances is also
8 costly because that generates some kind
9 of -- some activity during the delay period,
10 and my understanding of this was that the
11 purpose of this was that a party would go
12 ahead and make discovery so as to get the case
13 in motion, particularly since we have a
14 discovery window under Tier 2 that's going to
15 lapse at some point.
16 And my belief about this is that it
17 should be mandatory that a party respond
18 reasonably with making discovery even though
19 there are objections and only put on the side
20 the information that is really the subject of
21 the objection so that the first three months
22 of the nine months is not just used up in
23 obstructions. I think that was what our
24 philosophical approach to this was, that there
25 was a purpose in doing it this way, in having

1 that in, and that it was mandatory.

2 MR. SUSMAN: Okay.

3 HONORABLE DAVID PEOPLES:

4 Steve?

5 MR. SUSMAN: Yeah.

6 HONORABLE DAVID PEOPLES: I was

7 one who voted for the provision that, you

8 know, obscured by numerous unfounded

9 objections. Do the rules deal with numerous

10 unfounded requests anywhere? I mean, if

11 somebody just asks for the moon, you know,

12 everything, on the theory I'm going to ask for

13 it, nothing happens to me, and it puts the

14 burden on the court and the other side to

15 whittle them down.

16 MR. GOLD: Loftin Vs. Martin.

17 HONORABLE DAVID PEOPLES: Do

18 the new rules deal with it?

19 MR. MARKS: No. Nor does

20 Loftin Vs. Martin.

21 MR. GOLD: Loftin doesn't deal

22 with the number of the requests. It deals

23 with the breadth of requests.

24 CHAIRMAN SOULES: Our sanctions

25 proposal has tried to put some balance in

1 that, if I recall. Either a requesting party
2 requesting too much or an objecting party
3 objecting too much or equally offensive. Is
4 that right, Joe?
5 MR. HERRING: You have got it
6 in the rules now. You are going to have to
7 have something to deal with that.
8 MR. LATTING: Now, say that
9 again.
10 CHAIRMAN SOULES: I'm sorry.
11 Judge Peoples was asking about dealing with
12 numerous unfounded requests, and as I recall
13 the sanctions rules, it's been a while since
14 we looked at them, we tried to put some
15 balance in there that both unfounded requests
16 for discovery and unfounded objections to
17 discovery would be sanctionable, expressly put
18 that in there.
19 MR. LATTING: I can't remember.
20 MR. MARKS: Are you going to
21 have unfounded objections sanctionable and
22 also waived or --
23 MR. HERRING: Well, I think you
24 deal with some of those issues at sanctions
25 time. The question now is do you have a duty

1 to respond, and then we have to figure out
2 what happens, you know, if you don't, as Ann
3 says. Do you have waiver, and does something
4 else happen to you?
5 MR. SUSMAN: Let's see. We are
6 now, I think, voting on the concept of the
7 last sentence, which I think there has been
8 discussion of whether it should be mandatory.
9 All in favor of the concept of the last
10 sentence raise your right hand.
11 CHAIRMAN SOULES: As mandatory?
12 MR. SUSMAN: As mandatory.
13 MR. LATTING: What is
14 mandatory?
15 MR. SUSMAN: The last sentence
16 that you have got to comply to the extent you
17 don't object.
18 CHAIRMAN SOULES: Okay. That's
19 17 for.
20 MR. SUSMAN: All opposed?
21 CHAIRMAN SOULES: It's
22 unanimous.
23 MR. SUSMAN: Hearing, hearing
24 and ruling, there is nothing here that is
25 controversial, I don't think. Does anyone see

1 anything that's controversial on hearing or
2 ruling?
3 MS. GARDNER: I have just a
4 typographical question, and I think it's an
5 error. The second sentence, "at or before."
6 MR. SUSMAN: "At or before the
7 hearing."
8 MS. GARDNER: To the hearing.
9 Well, "at or before the hearing" sort of
10 conflicts with that part that says you have to
11 file affidavits at least seven days before,
12 and somewhere in there are you intending to
13 put "or testimony can be produced at the
14 hearing" like in the old rule or --
15 MR. SUSMAN: No. No testimony.
16 MS. GARDNER: That's two
17 questions.
18 MR. SUSMAN: I'm sorry. That
19 is one decision we did make.
20 MS. GARDNER: Okay.
21 MR. SUSMAN: That is, these
22 hearings will only be by affidavit, no
23 testimony, but there may be a drafting problem
24 here.
25 PROFESSOR ALBRIGHT: You're

1 right. That first phrase needs to go out.
2 MR. SUSMAN: Any other comments
3 or questions about Rule 3, subdivision (3) or
4 (4). Yes, Rusty.
5 MR. MCMAINS: I'm getting some
6 feedback, but I was just curious why when we
7 said "any party may at any reasonable time
8 request a hearing." That sounds like a --
9 there is some controversy about when it's
10 reasonable to request a hearing. I never
11 have -- I don't understand what that means.
12 MR. SUSMAN: Paul.
13 MR. GOLD: And we were talking
14 with Rusty. There is a case out of Dallas, I
15 think, that Justice Hecht wrote, National
16 Union Fire Vs. Hoffman that talks about
17 seeking a hearing within a reasonable time and
18 not waiting until, for instance, the eve of
19 trial. You have got a request, but at the
20 beginning of the case, and you wait all the
21 way up until the end of trial to seek a
22 hearing on it. I think the only thing about
23 that sentence may be syntactical, that phrase,
24 "any reasonable time" needs to be either at
25 the beginning or the end. It seems like it's

1 in an awkward place. It needs to be in there.
2 I think it just seems awkward where it is.
3 That's a drafting problem.
4 MR. SUSMAN: Luke.
5 CHAIRMAN SOULES: I think that
6 it ought to be at any time, and we ought to
7 overrule the stage of the -- I think, Judge
8 Gonzalez made it that when trial starts it's
9 too late. I mean, and here is the reason why.
10 Attorney-client privileges have been asserted
11 or withholding. Well, first of all, does the
12 hearing include hearings on withholding and
13 objections?
14 MR. SUSMAN: Yes.
15 CHAIRMAN SOULES: I guess so.
16 All right. Attorney-client objections have
17 been made. The log has been looked at.
18 Nobody ever asks for a hearing until they get
19 into court, and they say, well, give us your
20 docs. now because there never was a hearing,
21 and you waived it because the trial started.
22 Can you then have a hearing, and do you have
23 to have seven days worth of affidavits to have
24 a hearing then to keep from having to give up
25 your attorney-client privileged documents that

1 up to then you never knew you had a problem
2 with because your objections seemed to be
3 satisfactory?
4 MR. GOLD: Luke, I really do
5 think there should be some incentive to push
6 the matter before trial, to get it so that you
7 are not arguing discovery matters on the eve
8 of trial because what you are going to wind up
9 with is the situation of Service Lloyd's Vs.
10 Harbison where on the eve of trial the person
11 is filing a motion to compel production of
12 experts, and they get exactly what they want
13 within 15 days of trial. Then they claim,
14 wait, I can't get ready for trial. I think
15 that that needs to be pushed away from trial
16 so that you have it done. I think it needs to
17 be a reasonable time before trial.
18 CHAIRMAN SOULES: We now have
19 prophylactic hearings. We not only make
20 prophylactic objections, but we have
21 prophylactic hearings before trial. I tell my
22 young lawyers either you get an agreement, a
23 Rule 11 agreement, that all of these
24 objections are good, or you go to court before
25 trial starts, and you get a ruling. Because

1 if you don't, you have waived. You may be in
2 a situation of having waived your claims of
3 privilege --
4 MR. GOLD: I agree with that.
5 CHAIRMAN SOULES: -- because of
6 this case. Well, are we still going to do
7 that? That means that every case before it
8 goes to trial, if the lawyers are on their
9 toes, every other there is going to be a
10 fairly major hearing on objections that people
11 are essentially comfortable with, but they are
12 afraid if they don't have a hearing they will
13 be caught flat-footed in a waiver situation
14 after trial commences.
15 MR. PERRY: I thought that rule
16 got changed.
17 MR. SUSMAN: That is not in
18 here now, Luke.
19 CHAIRMAN SOULES: It is in
20 here.
21 MR. SUSMAN: No, no, no. In
22 the first place, you no longer -- the
23 objecting party and the withholding party
24 don't have to get a hearing. Period. Under
25 any circumstances. Okay. It's the party who

1 wants to overcome the objection or overcome
2 the withholding that has --
3 MR. LATTING: We covered that
4 ground some time ago, didn't we?
5 MR. SUSMAN: -- to get the
6 hearing. I mean, I think we have discussed
7 this. So no longer do you have to worry about
8 keeping your privileges or objections by
9 getting a hearing. The question is, is it
10 fair to make the party who wants the thing try
11 to get it before trial? Now, you are right.
12 There is a certain amount possibly of wasted
13 effort in trying to get some material for a
14 trial that may never take place because it
15 will be settled or won't be needed, but isn't
16 it usually best if you want it to come get it
17 and resolve it before trial, not to wake up,
18 you know, after opening statements and say, "I
19 want you to now produce all your
20 attorney-client stuff in camera so the judge
21 can see it." I mean, I would think that would
22 be --
23 MR. LATTING: That wouldn't be
24 at a reasonable time, would it?
25 MR. SUSMAN: That's why we put

1 it in there.
2 MR. LATTING: But it might be.
3 That might be reasonable?
4 MR. SUSMAN: Might be.
5 MR. LATTING: And when we put
6 it in there that it's not, it seems like it
7 hamstrings the trial judge.
8 MR. SUSMAN: We didn't ever put
9 it in there as not. We just say at any
10 reasonable time.
11 MR. LATTING: What about, we
12 don't have a seven-day rule about affidavits
13 served seven days before hearing?
14 MR. SUSMAN: That we do. That
15 we do.
16 MR. LATTING: Then how are we
17 going to have a hearing during the trial?
18 HONORABLE F. SCOTT MCCOWN: You
19 can't.
20 MR. SUSMAN: You can't.
21 MR. LATTING: So then I am
22 suggesting that you ought to be able to in
23 some circumstances. Why require people to go
24 down and schedule a hearing early so that they
25 won't have this problem? Why don't we let

1 that be handled on an ad hoc basis as is
2 reasonable during the trial?
3 MR. SUSMAN: Rusty.
4 MR. LATTING: Why make people
5 have more hearings? I thought we were trying
6 to get away from that.
7 CHAIRMAN SOULES: And the other
8 problem is the affidavits. I mean, you can't
9 cross-examine a corporate executive who's
10 claiming privileges?
11 MR. PERRY: Well, that's
12 confusing a trial objection versus a discovery
13 objection.
14 CHAIRMAN SOULES: Yes.
15 Exactly.
16 MR. PERRY: Well, they are
17 different. You don't have to make the trial
18 objection until you are in trial, but the
19 discovery objection you make earlier.
20 CHAIRMAN SOULES: And Dow
21 Chemical comes in, and it says, "We have never
22 directly or indirectly sold a breast implant
23 device," and they put that in their
24 affidavits, and they put it in 30 courts, and
25 they get a federal judge to grant a summary

1 judgment in their favor based on that
2 affidavit, and then whenever their man finally
3 comes to court in open courts he admits that
4 that's a lie, and the judge then says, "You
5 are going to get some more discovery," and the
6 federal judge then says, "I am going to
7 reconsider the summary judgment" because the
8 cross-examination of that witness contradicted
9 the affidavit that had been filed in 30
10 courts.
11 MR. PERRY: I don't understand
12 what that has to do with this discussion.
13 CHAIRMAN SOULES: Well, this
14 discussion, I mean, you can only do
15 this -- all your discovery objections are
16 going to be subject to --
17 MR. HERRING: An
18 attorney-client product sent to a third party.
19 You are trying to keep it attorney-client.
20 You sent your affidavit saying it's
21 attorney-client, and I want to show absolute
22 waiver. How do I do that? I need to depose a
23 third party, don't I?
24 HONORABLE F. SCOTT MCCOWN: I
25 think we are confusing two things. We may

1 want to have live testimony at the hearing on
2 the objection. You may not want to do that on
3 affidavits. I myself think maybe live
4 testimony would be a good idea, but the
5 question is when does that hearing take place,
6 and what we are saying is it ought to take
7 place before the trial.
8 MR. HERRING: Different issues.
9 Those are two different issues, but I don't
10 see how we deal with that.
11 MR. LATTING: Scott, you want
12 it to have to take place before the trial.
13 HONORABLE F. SCOTT MCCOWN:
14 Here is why you want it before the trial.
15 MR. LATTING: To have to take
16 place.
17 HONORABLE F. SCOTT MCCOWN: You
18 want it before the trial because depending on
19 the ruling that's going to affect the
20 discovery and that's going to affect the
21 trial. Under the current system and under our
22 rules, though, I don't know if we expressly
23 say it, when you make an objection you're
24 entitled to rely upon it. You ought not be
25 put to trial on the basis of objections you

1 have made that the other side has acquiesced
2 to, and then in the midst of trial for the
3 first time they say to the judge, "I want a
4 ruling on the objections." That objection is
5 overruled. Now you didn't do your discovery.
6 You are not prepared at that point.
7 MR. LATTING: Okay. But you
8 could overrule it on the ground that that
9 wasn't reasonable time.
10 HONORABLE F. SCOTT MCCOWN:
11 Well, that's what --
12 MR. LATTING: No. Your rule
13 says you have to. That's my point. It seems
14 to me that there are circumstances where you
15 might want to say, well, we could have had
16 this hearing earlier, but I think we need to
17 have it, and it's not going to hurt anything
18 to hear it now, and as I read the rule, you
19 can't do that.
20 HONORABLE F. SCOTT MCCOWN:
21 Give me an example.
22 MR. GOLD: When would you want
23 to wait 'til the eve of trial to resolve
24 discovery?
25 MR. LATTING: It might not be

1 apparent that a document was that big a deal.
2 You might get to the trial of a case, and
3 start trying it and say, "Well, you know, now
4 it becomes apparent I really would like to see
5 that letter, and I would like to have him give
6 it to me." He says, "Well, he's waived his
7 hearing on it." And I just say, "Well, let me
8 ask him a couple of questions about it, and I
9 think I can show it's not privileged." Why
10 shouldn't the trial judge be able to bear all
11 of those circumstances in mind and say, "What
12 is the story on that letter," and answer a
13 couple of questions?
14 HONORABLE F. SCOTT MCCOWN: Is
15 this fixed if we say "reasonable time"? If
16 you are going to serve affidavits they need to
17 be served seven days in advance but you can
18 have live testimony.
19 MR. LATTING: Yeah. I think
20 you should be able to have that leeway as a
21 trial judge.
22 HONORABLE F. SCOTT MCCOWN: All
23 right. Let's fix that then.
24 MR. SUSMAN: Let's do it. As
25 so fixed -- yes, sir.

1 MR. MCMAINS: Well, still I
2 think the critical policy question is when
3 should you have a determination or the parties
4 be obligated to get a determination with
5 regards to the privileged nature in
6 particular. I am less concerned about
7 objections because objections by and large if
8 they don't include privilege are something in
9 the discovery process, and once the discovery
10 is over it doesn't make any difference, but
11 from a standpoint of the withholding statement
12 the question is, should that -- those
13 objections be determined, or in other words,
14 if you make the objection and there is no
15 request for a hearing, is the objection good
16 forever?
17 HONORABLE F. SCOTT MCCOWN: How
18 about this?
19 MR. MCMAINS: Or is the
20 objection -- I mean, subject to conditions
21 changing after the close of the discovery
22 period, or should it be not good; that is, is
23 the burden on the party who is asserting it
24 that they are going to have to get that
25 determination, which is what Luke's concern

1 is, or else run the risk of having waived the
2 assertion of privilege when they get down the
3 way.
4 HONORABLE F. SCOTT MCCOWN:
5 Rusty, how about this? Would it resolve the
6 problem if we said in a comment that generally
7 speaking hearings on objections and
8 withholding statements should occur before
9 trial; however, there may be circumstances in
10 which a hearing during trial is reasonable?
11 MR. LATTING: That would suit
12 me.
13 MR. SUSMAN: That takes care of
14 one problem. Now, the other problem I think
15 we just have to put a comment making clear,
16 Rusty, which I tried to make clear that under
17 these rules as drafted once you make an
18 objection or a withholding statement it is
19 good forever unless the other side does
20 something about it. You have no burden to get
21 a hearing. Ann.
22 HONORABLE ANN COCHRAN: That's
23 really what -- and I don't think a comment
24 will do it, and I think what pulls both of
25 what you have said together is we need a

1 sentence added that says if no party ever
2 asked for a hearing on the objection of
3 withholding statement then blank.
4 MR. MCMAINS: Yeah. What I --
5 HONORABLE ANN COCHRAN: The
6 real problem is not the timing of the hearing.
7 It's those cases where there has never been a
8 hearing.
9 MR. MCMAINS: What I was really
10 proposing in essence was to say that the
11 parties -- basically spell out that if you are
12 a party opposing the privilege, the assertion
13 of the privilege, it's been asserted. You
14 don't do anything about it, and the discovery
15 window closes, that basically you should never
16 have to worry about the assertion of that
17 privilege or the sustaining of that assertion
18 of privilege relating to anything dealing with
19 discovery. The only time that the issue of
20 privilege should be re-opened is if there is
21 new material that comes to light as a result
22 of supplementation, et cetera.
23 At that time you should then be able to
24 have a hearing on the objection if that raises
25 new information; that is, if somebody decides

1 to supplement and gives you new information
2 that might support a waiver or something else
3 that you didn't have at any time before.
4 That's the time when you -- but I think that
5 we need to define more narrowly the nature of
6 when this hearing is to be held and what it
7 relates to in terms of reasonableness than
8 just to say "at a reasonable time" because I
9 don't think that would be consistent with the
10 rules.
11 MR. SUSMAN: All right. Let
12 me -- I don't think we are going to -- we only
13 have 15 minutes left, and I don't think we
14 will obviously finish this up. We will look
15 at it again and try without a vote on this.
16 Obviously, we can't get there on this portion,
17 but we will try to do something to get it
18 cleaned up. Alex, this is your rule. Take
19 care of it.
20 MR. LATTING: Clean this up.
21 MR. SUSMAN: I am not going to
22 force people to vote now. Let me just tell
23 you where we -- what this leaves done.
24 HONORABLE F. SCOTT MCCOWN: I
25 am a little worried the committee is going to

1 get the impression that Alex has done all of
2 our work.
3 PROFESSOR ALBRIGHT: I
4 certainly have not.
5 MR. SUSMAN: Rule 8, on
6 protective orders was approved unanimously the
7 last time and will not change. It has not
8 been changed, getting unanimous approval on
9 Rule 8 last time.
10 Rule 9, request for standard disclosure,
11 is I think pretty much like it was the last
12 time, wasn't it? I mean, we have changed
13 some. I just don't remember what it was.
14 PROFESSOR ALBRIGHT: I don't
15 think we changed it.
16 MR. SUSMAN: Maybe we haven't
17 changed a thing.
18 PROFESSOR ALBRIGHT: We haven't
19 discussed this one.
20 MR. SUSMAN: Maybe we haven't
21 changed a thing on this. We need to indicate
22 in section (2), Alex, that you can make this
23 request for standard -- when you can make the
24 request. We don't have the timing when it can
25 be made. We do on document requests and

1 interrogatories. We just have to indicate
2 that this can be made at any time before, you
3 know, 30 days before the end of the discovery
4 period.
5 Other than that we have carefully -- I
6 mean, what the subcommittee did is we looked
7 at the task force. We looked at the state
8 rules committee. We looked at Alex's
9 colleague. Who was it? Pat, Pat Hazel at the
10 University of Texas sent us -- a lot of people
11 have suggested rewordings, reformulations of
12 what needs to be disclosed, and we have
13 constantly come back to these as being a fair
14 balance between giving information and not
15 requiring the pretrial of a case at a time
16 when it would be impossible for someone to put
17 all of their contentions and evidence on the
18 table, and so that's the specific request for
19 standard disclosure. I mean, that's basically
20 it, and you look at them, and if you have any
21 comments about them, would you -- yeah.
22 MR. MCMAINS: The only thing
23 I -- in whether it's in the form of the
24 request or whatever this appears to be
25 drafted, once again, on the idea that this is

1 a two-party lawsuit. It seems to me that if
2 anybody has requested that, we need to know
3 whether or not -- if anybody has requested
4 standard disclosure do you serve it on all the
5 parties, or do you have to -- or do you have
6 to request it in order to get it? Because the
7 rule is actually written that you only have to
8 serve it on the party that's requesting it,
9 which doesn't make a lot of sense. Right now
10 you ought to be able to -- you are supposed to
11 serve interrogatories and everything else on
12 all the parties, but the standard disclosure
13 ought to be the same it seems.
14 PROFESSOR ALBRIGHT: You just
15 serve a copy on everybody so they know you are
16 doing it. Is that your suggestion?
17 MR. MCMAINS: Well, no. I'm
18 not -- not in terms of the request. I am
19 talking about the response.
20 PROFESSOR ALBRIGHT: Just so
21 you get a copy of it --
22 MR. MCMAINS: Right.
23 PROFESSOR ALBRIGHT: -- or so
24 that you can use it even though you haven't
25 asked for it?

1 MR. MCMAINS: No. That you get
2 a copy of it.
3 CHAIRMAN SOULES: Both.
4 MR. MCMAINS: Yeah. Actually
5 both.
6 CHAIRMAN SOULES: A copy of the
7 request and a copy of the response to
8 everybody.
9 PROFESSOR ALBRIGHT: Okay. But
10 what about the use of it at trial?
11 CHAIRMAN SOULES: Same thing.
12 PROFESSOR ALBRIGHT: Once it's
13 requested from somebody then everybody --
14 anybody in the lawsuit can use it against the
15 party who has answered?
16 CHAIRMAN SOULES: Sure. One
17 other thing I think you ought to add is you
18 have got (e) and (f) in here for PI cases.
19 Shouldn't there be a corollary basis for the
20 claim of damages --
21 MR. KELTNER: Yes.
22 CHAIRMAN SOULES: -- for other
23 cases?
24 MR. KELTNER: Or make it more
25 generic.

1 CHAIRMAN SOULES: I mean, (e)
2 and (f) you have got the medical records and
3 the medical bills. In a commercial case it
4 seems to me like it would be fairly simple for
5 them to respond to a request for the basis of
6 their damages.
7 MR. SUSMAN: Well, that's the
8 thing we definitely did not want in. Okay.
9 That has been a friction between this
10 subcommittee, and clearly someone wrote a
11 report -- I don't remember which one -- that
12 requires that the plaintiff -- it's very
13 one-sided -- that the plaintiff state how they
14 calculate damages very early in the case and
15 provide all documents that support that
16 calculation. That to me would be an
17 impossible thing to do. It is designed to
18 make life miserable for the plaintiffs
19 unnecessarily, and I did not think we ought to
20 do it.
21 CHAIRMAN SOULES: Well, the
22 plaintiff sued. Shouldn't they be able to
23 tell you up front what the basis of their
24 damage claim is?
25 MR. LATTING: They can report

1 the misery but not file the suit and minimize
2 it.
3 MR. PERRY: I think this may be
4 a matter of drafting and wording. Where (e)
5 comes from is that (e) is specifically
6 tailored to the personal injury case and is
7 specifically intended to get some basic
8 information without being burdensome, and it
9 would seem to me that anybody in the
10 commercial litigation field that wanted to
11 propose something that similarly would be
12 basic and not overly burdensome or anybody in
13 the domestic relations field, you know, we
14 could have a number of them --
15 MR. SUSMAN: Sure.
16 MR. PERRY: -- that might go to
17 specific kinds of cases, but the principle
18 that we would want to follow in every case is
19 that it would be basic and not overly
20 burdensome.
21 MR. SUSMAN: What would it be?
22 Your tax returns, your P&L statements? I
23 mean, what would you -- I mean, this is we are
24 asking for medical records and bills, and in a
25 commercial case what would the documents be?

1 MR. LATTING: Well, Steve, let
2 me say something about this. This has to do
3 with the change in philosophy that we are
4 having in this committee. I stood up
5 yesterday because it worried me that we were
6 going to require people to amend pleadings 60
7 days before the end of a discovery window, and
8 it was pointed out, well, we are changing our
9 ways here. We want people to get prepared
10 earlier. Now, if we really want to do that,
11 it doesn't offend me to tell a plaintiff if
12 you bring a lawsuit against someone you need
13 to tell us pretty immediate or fairly
14 immediately what it is you are suing for and
15 how you figure we owe you that much. It's a
16 departure from the current practice, but maybe
17 it seems to me that's in conformity with the
18 spirit that we are supposed to be ready early
19 and ready to go here. So it doesn't offend me
20 just metaphysically to have a plaintiff have
21 to tell what it is he is suing about.
22 MR. SUSMAN: Tommy Jacks.
23 MR. JACKS: You are coming very
24 close if you do that to doing two things; one,
25 getting back to essentially continuing

1 interrogatories, and two, getting bullshit
2 answers because if you ask me that early in my
3 case I am going to tell you, "All right.
4 Jack, I'm suing for $3 million," and I am
5 going to give you a bunch of crap about why I
6 think my case is worth that much because the
7 truth of the matter is I'm going to know that
8 I can't really evaluate my case until sometime
9 shortly before trial, particularly where in
10 personal injury cases things don't stay the
11 same thing. They change, and if my guy is
12 going to have surgery, they may turnout well.
13 They may go to hell, may lose a leg, may not.
14 Who knows. I would strongly encourage us to
15 stick with discrete, finite, readily definable
16 stuff as you have done rather than a broad
17 request that's going to give you bad motive
18 craft.
19 MR. LATTING: I don't disagree
20 with that necessarily. I'm just pointing out
21 it's not very consistent with our stated goal
22 of having to get ready early and have our
23 pleadings all in order and sometimes many
24 months before.
25 MR. JACKS: Well, I am not

1 going to reiterate my views of the stated goal
2 because it just shows why that doesn't always
3 make sense, but all I'm saying is don't
4 compound what's here.
5 MR. PERRY: I think we are
6 confusing two different things, Joe. This is
7 intended to be something that can be done
8 quickly, simply, in small cases, something
9 that will get the ball rolling quickly but
10 without being highly burdensome. Now, we have
11 made a change overall with regard to all
12 written discovery that will apply to
13 interrogatories, for example, that says that
14 you are required to answer them up front at
15 the time you get them and give the information
16 you have at that time.
17 So that -- and that's where he we went
18 through in the rule on objections and so
19 forth. Part of what that does is to say that
20 it's no longer an objection, a valid
21 objection, that I haven't really decided that
22 yet, or I don't know that yet because you are
23 required to give a response that gives the
24 information that you have. So I think we are
25 all in agreement with the philosophy, but the

1 whole idea of this standard disclosure, and
2 especially because it was a new vehicle, was
3 to keep it basic and simple.
4 MR. LATTING: How does (g) work
5 with that? What is -- if you're going to
6 prove at a trial later on that somebody has
7 suffered so many dollars worth of damages in a
8 personal injury case, do you have to tell me
9 in response to early discovery all the
10 documents on which your damages are based?
11 HONORABLE F. SCOTT MCCOWN: No,
12 no. That's the contract. Any written
13 instrument upon which a plaintiff -- that's
14 the kind of thing that would be attached to
15 the pleading. That's the contract where no --
16 MR. LATTING: Well, that's my
17 question. Do we need to say that?
18 MR. GOLD: On this I think if
19 you look for a comment --
20 MR. LATTING: But isn't a W-2
21 statement a written instrument on which a
22 claim is based?
23 MR. GOLD: No. No. If you
24 look at (a) through (g), the common thread
25 through all of this is these are bits of data

1 that are easily retrievable and can be easily
2 exchanged. They are things that you can give.
3 When you start getting into formulations and
4 calculations, then that's not what this was
5 intended to do, and that's how your request
6 for a damage calculation and your request for
7 a contention of how this relates to this falls
8 outside of (a) through (g). All that was
9 intended is exchange of bits of data and
10 that's the --
11 MR. LATTING: I'm not against
12 that, by the way. It's just a question that
13 this is as clear --
14 MR. MARKS: I see a distinction
15 between the bodily injury, personal injury,
16 and the corporate business litigation
17 situation. I think there is a big difference,
18 and in that situation there ought to be
19 something in these rules that require a
20 plaintiff to outline what he thinks his
21 damages are and how he got there.
22 HONORABLE ANN COCHRAN: That's
23 really apples and oranges. I think really
24 what we are saying or what I would say to be
25 fair and to have sort of an equivalent item in

1 this rule for commercial or other non-personal
2 injury cases would be something like, you
3 know, every bill that you have incurred or
4 paid that, you know, are included in your
5 claim for damages, you know, in this lawsuit.
6 So in other words, if you had to go out
7 and, you know, if it's the fraud in the house
8 case, and it's going to be the $15,000 you had
9 to pay for the new roof for the bad repair job
10 or something, or in a commercial case if it
11 was for the $250,000 you had to go to redesign
12 your computer system because your first vendor
13 didn't do it right. You can do something that
14 is sort of generically the equivalent but
15 saying I want the model for your damages in a
16 commercial case is somehow the equivalent of
17 asking only for medical business and records
18 in a personal injury case, and that's just not
19 the same thing, but something like all the
20 bills you incurred or had to pay that are part
21 of your damages in this case would be
22 something that could be in any case, no matter
23 what it was.
24 MR. SUSMAN: The problem with
25 it is in a commercial case there is no -- I

1 mean, a personal injury case there is readily
2 doctors bills, medical bills, a group you can
3 go to. In a commercial case, my God, you know
4 a nuclear plant doesn't work right or
5 something, and what are you going to bill to
6 all --
7 HONORABLE ANN COCHRAN: Well,
8 but surely by the close of this discovery
9 window plaintiff in any kind of case should be
10 able to say that we are going to cut it off at
11 least by, you know, close to the end of this
12 window. You should be able to do it. That's
13 not something you should be able to wait 'til
14 the trial to do if trial is a year and a half
15 away.
16 MR. SUSMAN: There are other
17 vehicles to get at this. We are talking about
18 something very quick, very automatic, and very
19 upfront on this standard disclosure, and
20 that's the issue. When?
21 CHAIRMAN SOULES: Just a simple
22 DTPA case, can't we get the -- get the
23 discovery through a disclosure statement of
24 what are the basis for the plaintiff's
25 damages? I mean, this is not necessarily a

1 huge commercial case. This is designed really
2 to get some format for a simple case to go to
3 trial without a lot of expense.
4 MR. PERRY: I think it would be
5 very helpful if the defense lawyers would
6 draft something.
7 CHAIRMAN SOULES: I bought a
8 car, and it had a bad engine. The car is no
9 good. I want a new car. The guy lied to me.
10 I want my legal fees paid. I mean, I
11 understand that this is focused on small cases
12 and an example of a big case might be tortious
13 interference, but we are going to be doing
14 other discovery probably in a tortious
15 interference case, but in a DTPA litigation a
16 lot of those cases are in county court at law.
17 They could be discovered very simply. They
18 could be Tier 1 cases on which no discovery
19 takes place except the mandatory disclosure
20 request if we could design something to cause
21 that to be a piece of mandatory disclosure
22 similar to the medical business.
23 MR. SUSMAN: What you are
24 saying, Luke, is -- if what you are saying is
25 all you mean, it's easy to comply with. I

1 mean, what do you want? I want my lost
2 profits for the next 10 years. I could say
3 that easy to you. Is that what you want me to
4 say? I want my lost profits on this business
5 plus the profits I lost on three other
6 businesses because I lost opportunities to buy
7 them. I mean, if you can give me examples of
8 all I have to say, that's fine. Now, if you
9 want me to give you calculations --
10 CHAIRMAN SOULES: I don't want
11 calculations. I don't want a model. I just
12 want to know how were you damaged? How do you
13 say you were damaged?
14 JUSTICE CORNELIUS: Why don't
15 you limit it to documents?
16 MR. SUSMAN: Well, documents is
17 the worst -- I mean, the documents in
18 supporting my lost profits? I can say lost
19 profits. That's easy enough. I can say --
20 JUSTICE CORNELIUS: You have
21 got to say that in your pleadings, don't you?
22 MR. SUSMAN: Huh?
23 JUSTICE CORNELIUS: You have
24 got to say that in your pleadings.
25 MR. SUSMAN: I usually do. I

1 mean, so I don't know what I'm giving him
2 extra, and it's not a problem for me if that's
3 all he's asking, but the way I have seen it
4 worded in the task force or whoever has got
5 the alternate is a much more onerous task than
6 simply saying, as you have just said, lost
7 profits. Give me a new car. Fix this.
8 Repaint my house. Replace my toaster. It's a
9 lot different.
10 HONORABLE SARAH DUNCAN: To me
11 the difference is that in a PI case it is more
12 routine, and it is more routinized. Once you
13 get out of that specific area of the law, I
14 don't care whether it's commercial, family
15 law, trusts and estates, antitrust, civil
16 rights, whatever it is, there is no longer any
17 routine. That's why we have had so much
18 difficulty creating pattern jury charges for
19 non-PI cases. They go all over the place, and
20 I don't think we need the equivalent of (e) in
21 the non-PI context. It's (g), the basis, the
22 written instruments that's the basis of the
23 claim.
24 MR. SUSMAN: Yeah. And that's
25 what we have done, and you know, that doesn't

1 mean you can't ask an interrogatory and then
2 test it under the interrogatory rules whether
3 I have answered it fairly and properly, but I
4 mean, I think we will fight forever on this
5 standard disclosure without making a lot of
6 progress. That's why we tried to make it
7 simple, unobjectionable. Yeah, Rusty.
8 MR. MCMAINS: Well, isn't
9 that -- isn't the real thing is that the
10 standard disclosure is something that you
11 can't object to? I mean, you can't object to
12 it. You can't claim privileges to it. I
13 mean, it's something that you are just going
14 to say that the Supreme Court Advisory
15 Committee and the Supreme Court when they pass
16 the rule says this you have got to do, and we
17 ain't going to have no argument about it.
18 Now, the problem is that any time you
19 start talking about damages in any other way
20 when you are early in a case you are
21 frequently talking about consulting. You may
22 not have formulated all of them. I mean,
23 these are things to try and investigate this
24 stuff. You are going to then start getting
25 into attempted prophylactic objections in

1 areas that the whole idea is we want to ask
2 stuff that ain't objectionable.
3 Now, to solve some of the -- the one
4 problem, it seems to me that if there is a
5 claim for property damage, once again, I think
6 we would have repair bills that probably does
7 meet these types of things, if you have got a
8 claim that has property damage in it. Or a
9 liquidated damage claim, there may be -- you
10 know, obviously I think the instrument is
11 designed to deal with that, but apart from
12 those things it seems to me that you do get
13 into areas where you have got to preserve the
14 objection process and the development process
15 to other discovery.
16 MR. LATTING: Do you think a
17 written instrument is a repair bill?
18 HONORABLE F. SCOTT MCCOWN: No.
19 MR. MCMAINS: No, no, no. I
20 didn't say that. He was talking about
21 liquidated damage claim. A note, I think a
22 note is a written instrument.
23 MR. LATTING: Yeah. I do, too.
24 MR. MCMAINS: I think a
25 promissory note is. I think you have got to

1 give it to them.
2 MR. SUSMAN: All right. We are
3 beyond our quitting hour. The only other rule
4 we have got to go over is expersts, and I
5 assume we will do that the next time, and we
6 will get -- my plan is to get to you now, get
7 to everyone, a revised draft of everything but
8 really the expert rule, which we don't have
9 any feedback to revise on, and maybe this
10 standard disclosure rule which we haven't got
11 much feedback on, but we will get you a
12 revised draft very quickly now. It may
13 encourage some communication by mail or by
14 phone call or something like that so we can
15 continue working. Thank you very much.
16 CHAIRMAN SOULES: Okay. We are
17 adjourned until when? Third Friday in March
18 at the Bar center.
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2 CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

3 -

4

5 I, D'LOIS L. JONES, Certified Shorthand

6 Reporter, State of Texas, hereby certify that

7 I reported the above hearing of the Supreme

8 Court Advisory Committee on January 21, 1995,

9 and the same was therafter reduced to computer

10 transcription by me.

11 I further certify that the costs for my

12 services in this matter are $1,193.00______.

13 CHARGED TO: Luther H. Soules, III__________.

14 Given under my hand and seal of office on

15 this the 8th day of February______, 1995.

16

17

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