1
2
3
4
5
6 * * * * * * * * * * * * * * * * *
7 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
8 MAY 20, 1995
9 (SATURDAY SESSION)
10 * * * * * * * * * * * * * * * * *
11
12
13
14
15
16
17
18 Taken before D'Lois L. Jones, a
19 Certified Shorthand Reporter in Travis County
20 for the State of Texas, on the 20th day of
21 May, A.D., 1995, between the hours of 8:00
22 o'clock a.m. and 12:00 noon at the Texas Law
23 Center, 1414 Colorado, Room 104, Austin, Texas
24 78701.
25

MAY 20, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
David J. Beck
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
David E. Keltner
Joseph Latting
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
Ann T. Cochran
Michael T. Gallagher
Anne L. Gardner
Hon. Clarence Guittard
Franklin Jones, Jr.
Thomas S. Leatherbury
Gilbert I. Low
John Marks, Jr.
David L. Perry
Anthony J. Sadberry
Paula Sweeney

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Paul N. Gold
Carl Hamilton
David B. Jackson
Hon. Doris Lange

EX-OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton
Hon. William J. Cornelius
W. Kenneth Law
Thomas C. Riney
Hon. Paul Heath Till

MAY 20, 1995

INDEX

Rule	Page(s)
TRCP 7 - Presentation of Privileges and Objections	1102-1295

1 CHAIRMAN SOULES: Thank you-all
2 for coming this morning on Saturday morning at
3 this early hour to get our work done. We are
4 over to, what, interrogatories?
5 PROFESSOR ALBRIGHT: Rule
6 No. 7, which is presentation of privileges and
7 objections. And as I recall -- I was just
8 trying to read the transcript and I didn't get
9 all the way through it, but my recollection is
10 on Rule 7 that the committee approved our
11 two-step concept of objecting to discovery and
12 then asserting your privileges, but the
13 comment was, is that our rule was too
14 difficult to understand. So we were sent back
15 to redraft to make the concept clearer in the
16 rule.
17 So we moved it around. We put the
18 objections first, and the objection concept is
19 that the first thing you do within the time
20 that you have to respond to a discovery
21 request is to object to the question itself.
22 If something is wrong with this question, I
23 don't have to respond to it at all, or I only
24 have to respond to a part of it because it's
25 overly broad, that type of objection to the

1 request for discovery itself.

2 After that has been resolved I guess it

3 doesn't really have to be -- yeah. I guess it

4 does have to be resolved. Then when you are

5 responding to your request you then say, "I am

6 responding to your request completely or

7 partially, and here is the information or

8 materials responsive to your request, but I am

9 withholding particular documents or

10 information or materials because they are

11 privileged," and then you state your

12 privilege. That is what we are calling a

13 withholding statement. I am withholding on

14 the -- the particular documents on the basis

15 of attorney-client and work product privilege,

16 for instance.

17 Then the next step would be that the

18 party that's requesting the discovery could

19 then ask the responding party who is

20 withholding the documents to describe the

21 information and materials in such a manner

22 that without revealing the privileged

23 information itself will enable other parties

24 to assess the applicability of the privilege.

25 So this would be some sort of privilege log.

1 It need not be a detailed document by
2 document, but I believe at the meeting in
3 January there was a discussion about you could
4 lump groups of similar documents together.
5 "Correspondence between Susman and client for
6 over these years or these months," whatever.
7 The (c) on page 14, trial preparation
8 materials, we are excluding from this entire
9 process trial preparation materials:
10 "Materials created by trial counsel in
11 preparation for the litigation in which the
12 discovery is requested need not be included in
13 a withholding statement or a description
14 except upon court order."
15 The third part of the rule is the hearing
16 where any party can request a hearing to
17 resolve the objection or the privileges
18 asserted, and the testimony is either by
19 affidavits or live testimony. Then we
20 just -- the hearing rule is really not
21 different from the current hearing rule. Then
22 on page 15, No. 4, ruling, we have the court
23 overruling the objection or granting the
24 objection.
25 If there is an overruling of the

1 objection or withholding statement, we would
2 require a response within 30 days of the
3 court's action, and then the last sentence
4 that is underlined was added in the meeting in
5 which we discussed this rule. "If the suit
6 proceeds to trial without a hearing on
7 properly asserted objections and privileges,
8 the objection or privilege is deemed sustained
9 unless during trial the judge determines that
10 the objection or privilege must be overruled
11 to prevent a miscarriage of justice."
12 I think the best thing is for you-all to
13 read over this rule pretty carefully and see
14 if you think it adequately states the concept
15 that we are trying to put into place. I think
16 we voted on the concept, as I recall, but
17 everybody -- a majority approved of the
18 two-step concept of objection and then
19 withholdings on the basis of privilege.
20 CHAIRMAN SOULES: Okay. Don
21 Hunt.
22 MR. HUNT: Let me ask you a
23 question in connection with 7(1) on page 13.
24 This has to do with the exchange of language,
25 the last sentence which was struck and the

1 sentence in the middle which was added after
2 the "unless."
3 PROFESSOR ALBRIGHT: Okay.
4 MR. HUNT: It appears as if the
5 party who has an objection can hold his own
6 hearing and say it's unreasonable and not do
7 anything, where the prior language at least
8 had an obligation to respond to that to which
9 he had no objection. Now, he can just say,
10 "Well, I object to just about everything, or
11 even that to which I have no objection I can't
12 supply very easily because of the stuff to
13 which I do have objection."
14 PROFESSOR ALBRIGHT: Well, I
15 think the intent was to continue that
16 obligation, that if you object to part of the
17 discovery request. You have requested
18 documents from 1950 to the present, and I just
19 think that's unreasonable. I will agree to
20 produce documents from 1980 to the present.
21 In some circumstances it may be reasonable for
22 me to go ahead and produce the documents from
23 1980 to the present. In other situations it
24 may not be. If the documents from 1950 to the
25 present are all mixed up and I would have to

1 do two identical searches then it makes more
2 sense to get the objection resolved before the
3 search is made.
4 MR. HUNT: Oh, I agree.
5 PROFESSOR ALBRIGHT: We were
6 just trying to protect that ability in this
7 rule.
8 MR. HUNT: What troubles me is
9 the language "unless the party has determined
10 that it's unreasonable." Perhaps if we just
11 said that unless it's unreasonable under the
12 circumstances. It's this power that the rule
13 gives the party to sort of be judge and jury
14 at that point until you go to court.
15 PROFESSOR ALBRIGHT: Scott, do
16 you recall where that language came from? I
17 think we probably put it in there so that we
18 do have a unilateral determination so that you
19 just say whether you are going to do it or
20 not, and if the other party doesn't agree,
21 they can say, "Okay. We have got to have a
22 hearing to determine that right now."
23 HONORABLE F. SCOTT MCCOWN: It
24 does in a sense do exactly what you are
25 saying, which is allow a party to make his own

1 initial decision about that, but what the rule
2 is designed to do is say that -- and I don't
3 know if the words captured this exactly, but
4 it's designed to say you've got to produce
5 everything you don't have an objection to, and
6 then like Alex said, it may be that you don't
7 have an objection to producing it, but it's
8 mixed in with a bunch of stuff that you do
9 have an objection to producing, and rather
10 than make you do two expensive searches it's
11 reasonable to wait and go to the courthouse to
12 have a hearing to decide what it is you are
13 going to have to produce so you just have to
14 do the search once.
15 And the enforcement, I guess, of that
16 would be that, you know, if they ask for tax
17 returns from '70 to '90, and you had them in
18 chronological order, and you had an objection
19 to everything but '90 and you didn't produce
20 '90, you know, it would be pretty clear you
21 would be in violation of the terms of the
22 rules. So the reasonableness of your call is
23 going to be subject to scrutiny by the judge.
24 CHAIRMAN SOULES: Well, I think
25 Don's pointing out something a little

1 different from that. You wouldn't be in
2 violation of this rule if the party -- if you
3 thought it was unreasonable, even if it was
4 not -- even if it was unreasonable for you to
5 so behave objectively you wouldn't be in
6 violation of this rule as written if you
7 subjectively thought you were being
8 reasonable.
9 MR. KELTNER: Couldn't you take
10 out the language on that last "that party has
11 determined"?
12 PROFESSOR ALBRIGHT: Right.
13 But if I can respond, I think we put that in
14 on purpose because we did not want to make
15 this decision a sanctionable decision. I
16 mean, if it's -- we wanted you to be able to
17 make that decision fairly comfortably without
18 having to worry about if I'm wrong, if the
19 judge thinks, you know, I should have just
20 made the decision a little bit differently.
21 We are not talking about gross abuses of
22 discovery. We are talking about I made the
23 decision a little bit wrong. Should that be
24 sanctionable? And I think the reason we have
25 put that in there is to set a standard that

1 was, you know, if you in good faith make this
2 decision then it's not sanctionable, it's up
3 to the other party to get a --
4 CHAIRMAN SOULES: It looks to
5 me like this is going to build in incredible
6 delays. David Keltner.
7 MR. KELTNER: Yeah. I think
8 this is an exception that flaws the rule, and
9 it's one of those things that a party can
10 unilaterally take an action that appears under
11 the rule to escape any sanction, and one, I
12 doubt if the court is going to want to adopt
13 something in discovery that escapes a
14 sanction, and then two, I think the exception
15 is a little bit too broad.
16 I think by the eliminating of that
17 language a party knows that he or she is
18 constrained to be reasonable in the
19 withholding of documents or things, and this
20 is a response, remember, to written discovery,
21 and I would eliminate the language or the
22 words "that party has determined."
23 CHAIRMAN SOULES: Okay. Is
24 that a motion?
25 MR. KELTNER: Yes.

1 HONORABLE F. SCOTT MCCOWN: Can
2 I make one more comment about that?
3 CHAIRMAN SOULES: Not 'til we
4 get a second. Is there a second?
5 MR. HUNT: I will second it.
6 CHAIRMAN SOULES: Moved and
7 seconded. Now, discussion on deleting that
8 language?
9 HONORABLE F. SCOTT MCCOWN: I
10 don't feel strongly either way. I just want
11 to point out, though, that in terms of
12 delaying discovery that we are imposing a new
13 duty that you don't have now. Now you are
14 served with the request, you respond. If you
15 make objections to a particular request, you
16 have no duty to do a search or to try to put
17 on the table what you don't have an objection
18 to or to do any unilateral offer up. So this
19 imposes for the first time a duty of
20 unilateral offer, and so our thinking was that
21 that would speed discovery. It wouldn't make
22 it worse than it is now in any case, and we
23 wanted parties to be comfortable with assuming
24 that new duty.
25 CHAIRMAN SOULES: But you

1 didn't intend it to be providing them with
2 something else new, i.e., a new delay tactic?
3 HONORABLE F. SCOTT MCCOWN:
4 It's not a new delay tactic because right now
5 you have no duty to make a unilateral offer
6 up. So it doesn't make anything worse than
7 the present system. It improves it, and it
8 only speeds. It would never delay because
9 right now you have got no duty to do this at
10 all. You can make your objections. Then you
11 have to have a hearing. They have to get an
12 order. Then your duty to respond occurs.
13 CHAIRMAN SOULES: I think we do
14 have this duty today.
15 MR. ORSINGER: I do, too.
16 CHAIRMAN SOULES: And more and
17 more -- I know the way we practice and more
18 and more almost universally I see the other
19 side practice, they make these objections.
20 Some of them are prophylactic, and some of
21 them are real, but subject to that objection
22 even if it's a real one they respond to the
23 extent they can do so without going past their
24 real objection, and it is in the practice
25 right now.

1 MR. JACKS: And they are
2 sanctioned if they don't, commonly.
3 CHAIRMAN SOULES: It can be.
4 Certainly ought to. Anyway I guess it's
5 really do we leave the language in or out?
6 Richard Orsinger.
7 MR. ORSINGER: It seems to me
8 that we could take the language out and still
9 protect the example that you gave, Alex,
10 because if someone had their documents from
11 1950 mixed up with their documents from 1970
12 forward and they didn't want to have to make
13 two passes through the warehouse, they could
14 just object that it would be unduly burdensome
15 for them to have to make two passes, and
16 therefore, they don't want to make any passes
17 until after the judge has ruled how far back
18 they have to go.
19 And they could protect themselves from
20 that unnecessary work by objecting to the more
21 recent part because of the undue burden of
22 having to do it twice, and you don't need this
23 "unless" clause to protect that because you
24 can protect yourself with an objection, but if
25 you leave the "unless" clause in there, even

1 if you don't have an objection you could just
2 arbitrarily say that I find it unreasonable,
3 and there would be no -- nothing would happen
4 until the court ruled, and then if it was in a
5 bad faith assertion or arguably bad faith,
6 there is no sanction.
7 CHAIRMAN SOULES: Okay.
8 Everybody ready to vote? Those in favor of
9 leaving the language in, leaving it as written
10 here, leaving the language in. "Unless that
11 party has determined" -- no. The language
12 that we are talking about is the word or words
13 "that party has determined."
14 PROFESSOR DORSANEO: "That."
15 CHAIRMAN SOULES: "That."
16 Those five words. Those in favor of leaving
17 those in Rule 7 show by hands. Two. Those in
18 favor of it being deleted show by hands. Ten.
19 Now, it will be deleted by a vote of ten
20 to two. Okay. What's next? Anything else on
21 Rule 7, paragraph (1)?
22 MR. KELTNER: Yes. Yes. I
23 have one other --
24 CHAIRMAN SOULES: David
25 Keltner.

1 MR. KELTNER: I am a little bit
2 concerned about the first sentence, and I
3 intentionally am not raising this in
4 subcommittee. The first sentence reads, "A
5 party shall not object to an otherwise proper
6 request on grounds it calls for the specific
7 materials or information subject to the
8 privilege pursuant to Rule 4." That will
9 change our practice because unburdensome and
10 all-encompassing, harassing, all that kind of
11 stuff is not in a privilege and probably isn't
12 going to be in a privilege under Rule 4,
13 although it probably is going to be covered in
14 the rules.
15 PROFESSOR ALBRIGHT: No. Okay.
16 What this is saying is that you do not object
17 on the grounds of privilege which are stated
18 in Rule 4.
19 MR. KELTNER: Oh, that's right.
20 PROFESSOR ALBRIGHT: Okay. So
21 what we are doing is we are starting out the
22 very first sentence saying what you don't do
23 is assert your privileges.
24 MR. KELTNER: I agree with you,
25 and I know that's what we intend to do. I

1 think it's going to be read a little bit
2 differently by practitioners.
3 CHAIRMAN SOULES: How so,
4 David? I mean, I want to follow what you're
5 saying because we want to avoid that.
6 MR. KELTNER: Well, I worry if
7 somebody is just picking this up and reading
8 it, and says, "Well, I don't have to object.
9 All I have got to do is withhold, but that's
10 only for a privilege."
11 CHAIRMAN SOULES: Since (2)
12 says "if the written discovery request is
13 otherwise objectionable"?
14 MR. KELTNER: Yeah. I think I
15 am wrong.
16 PROFESSOR ALBRIGHT: We worked
17 and worked on this.
18 MR. KELTNER: I am wrong.
19 CHAIRMAN SOULES: Are you
20 satisfied now? Because, I mean, if you are
21 confused, we are going to have a whole lot of
22 other people confused.
23 MR. KELTNER: I'm satisfied.
24 I'm sorry.
25 PROFESSOR ALBRIGHT: I would

1 really appreciate everybody reading this
2 carefully. We have worked and worked trying
3 to make this clearer and kept changing the
4 order of sentences trying to make it as clear
5 as possible, but we would gladly accept
6 suggestions.
7 CHAIRMAN SOULES: Well, I
8 appreciate your flexibility on that, and I
9 think that's very important, and that's what
10 we need to get about. Bill Dorsaneo.
11 PROFESSOR DORSANEO: Well, I am
12 concerned with two things with respect
13 primarily to the first sentence of proposed
14 Rule 7 in the objection paragraph and also the
15 first sentence in the withholding privileged
16 information and materials paragraph. My
17 concern essentially involves the idea of
18 building in waiver problems unnecessarily by
19 virtue of requiring a strict adherence to a
20 particular method of preserving complaints.
21 I think the first sentence of the entire
22 rule would work as well mechanically if its
23 tone was changed to say that a party, you
24 know, need not object to an otherwise proper
25 request and if the first sentence in the

1 second paragraph was framed affirmatively but
2 without saying "only in accordance with this
3 section," you know, by just taking out the
4 "only."
5 Maybe that doesn't make that large a
6 difference to anyone, but I wouldn't want to
7 get in a position where somebody, you know,
8 makes an objection with respect to a matter
9 that's privileged, and they don't exactly file
10 a thing that's a withholding statement, and
11 some court somewhere says, "Well, you did it
12 with the wrong club, and therefore, even
13 though I am completely aware of what you're
14 saying you've waived your complaint. Welcome
15 to Texas."
16 You know, I appreciate the importance of
17 having a procedure that is the procedure to be
18 followed, but I think we ought to provide for
19 a little bit of play in the joints from the
20 standpoint of how the language is crafted.
21 CHAIRMAN SOULES: So as I am
22 understanding what you're proposing -- and
23 let's put it in the form of a motion if you
24 wish -- that we would change the word "shall,"
25 the third word in the first sentence here, "a

1 party shall" to "a party need not."

2 PROFESSOR DORSANEO: Uh-huh.

3 CHAIRMAN SOULES: And also that

4 we delete in subsection (2) the word "only"

5 from the first line after the word -- after

6 "discovery."

7 "A party may preserve a privilege from

8 discovery in accordance with this section."

9 PROFESSOR ALBRIGHT: If we do

10 that, I would like to delete "may" and just

11 say, "A party preserves a privilege in

12 accordance with this section." Because "may

13 preserve" sounds like it's optional.

14 CHAIRMAN SOULES: Okay. Is

15 there a second, and I'm not sure exactly what

16 the language is but the concept --

17 MR. LATTING: Yes. I second

18 it.

19 PROFESSOR DORSANEO: I am more

20 concerned with the concept than the specific.

21 There may be some other only's and some other

22 shall's in here that --

23 CHAIRMAN SOULES: I am trying

24 to just get it in words so we can get it in

25 the form of a motion, but there is a motion

1 and a second to the concept. At least I think
2 we all have that. Discussion? Judge McCown.
3 HONORABLE F. SCOTT MCCOWN:
4 Well, I think Bill makes an interesting point
5 from the point of view of the responding
6 party, but we were thinking of it from the
7 point of view of the asking party, which is
8 that our task was to get rid of prophylactic
9 objections. If you allow a responding party
10 to object and preserve objections that way as
11 opposed to go through our regime of the
12 withholding statement then you haven't gotten
13 rid of prophylactic objections.
14 They will continue to be there. If they
15 are there then you have got the same problem
16 you have now, which is you have to go down,
17 you have to get a hearing. You have to get
18 them overruled to know with any certainty that
19 you are getting the things you have asked for
20 and they are not hiding behind the objections,
21 which they are entitled to rely upon until
22 it's overruled, and so we deliberately went in
23 this direction to say you can't do this by
24 objection, but you have to do it through the
25 procedure that we have outlined. So while I

1 understand what you're saying, it gives us
2 back again the problem that we were trying to
3 fix.
4 CHAIRMAN SOULES: Paul Gold.
5 Then I will get Tommy Jacks.
6 MR. GOLD: Yeah. I see where
7 Bill is coming from as well, but if you put
8 the language at the beginning that Bill is
9 recommending, "the party need not," it's
10 pretty much the same thing as what you have in
11 the deposition rule right now where you can
12 reserve objections until the time of trial and
13 everybody proceeds with making objections
14 during the deposition, which is what we are
15 trying to correct as well.
16 This is critical, I believe, and everyone
17 that I have talked with at seminars that I
18 have spoken at, everyone agrees that this
19 prophylactic objection regime is causing more
20 wasted time than anything else, and I don't
21 think that we should put into the rule
22 something that will give a responding party
23 the idea that they can preserve those
24 objections that way, because we are just
25 opening the door right back up again.

1 CHAIRMAN SOULES: Tommy Jacks.
2 MR. JACKS: I am not sure I
3 understand the full extent of Bill's proposal.
4 Under Bill's proposal could a party object,
5 withhold, but not file a withholding statement
6 and still be considered to have preserved a
7 ground of privilege?
8 CHAIRMAN SOULES: They don't
9 object. You're saying --
10 MR. JACKS: They object just as
11 they do now.
12 HONORABLE SCOTT BRISTER: They
13 do now file a prophylactic objection.
14 CHAIRMAN SOULES: Yes. This
15 proposition would allow that.
16 MR. JACKS: Then I'm against
17 it, and the reason I am against it is because
18 another of our aims here was not only to
19 hopefully prevent prophylactic objections but
20 also to let the requesting party know when
21 they see an objection on grounds of privilege
22 whether there are, in fact, documents being
23 withheld or not, and that's the function of
24 the withholding statement, so that you get
25 around this game of withholding without really

1 disclosing that you are withholding.

2 CHAIRMAN SOULES: Joe Latting.

3 MR. LATTING: I think my second

4 was intemperate, and I now wish to withdraw

5 it.

6 CHAIRMAN SOULES: Let me put

7 this concern out, and I don't know how to fix

8 that. It's kind of sort of maybe a silly idea

9 about how to fix it, but what we are going to

10 run -- we are going to change the practice

11 absolutely, and these rules are going to come

12 effective on some date, and how many lawyers

13 will by that date really understand what this

14 is all about we don't know, but certainly not

15 all of them will. Perhaps, most of them will

16 not.

17 Then a serious problem comes up because

18 somebody uses the old practice instead of the

19 new practice trying to preserve error. Is

20 there any way or does it make any sense to

21 have a grace period maybe written into this

22 rule which we would repeal next time so that

23 it says for a period of one year either way

24 goes? They can do it under the old rule or

25 the new rule. I mean, the consequence of

1 privilege waiver is pretty severe, and it
2 bothers me to change this so completely and
3 absolutely and then visit on a lot of our
4 brothers and sisters some malpractice issues.
5 I don't know whether that makes any sense or
6 not, but it's my concern. Could you-all
7 discuss that for me? Tommy Jacks.
8 MR. JACKS: I guess -- and I
9 recognize the concern, and I think it's a
10 valid concern. At the same time I would say
11 we have got lawyers practicing today that
12 haven't yet figured out our current discovery
13 law even though much of it's been on the books
14 since the 1970s. We are changing the
15 landscape, and we are changing the landscape
16 in other important ways as well. The
17 limitations we're putting on discovery, I
18 mean, the lawyer that, you know, forgets about
19 the 50-hour rule could find himself totally
20 screwed because there is important discovery
21 yet to be done and then the lawyer is out of
22 time.
23 It seems to me that the promulgation of
24 these rules is going to be accompanied by such
25 fanfare and that every CLE provider in the

1 state is going to be scrambling falling all
2 over each other trying to be the first to
3 offer definitive seminars on these new rules.
4 All of our lawyers are required to attend 15
5 hours of that stuff every year, and board
6 certified lawyers more than that, and I don't
7 think it's asking too much.
8 Frankly, I think the committee has done a
9 great job with this rule. I think when you
10 read it, and read the comments that accompany
11 it, it's very clear what they are doing. It's
12 a clearer road map in some ways than trying to
13 piece together our current discovery law when
14 one has to consult, heaven forbid, cases as
15 well as rules in order to figure out
16 everything that's going on, and so I'd say a
17 grace period is unnecessary. I think lawyers
18 can be expected to read it and learn it.
19 CHAIRMAN SOULES: Well, unless
20 somebody really disagrees with Tommy I don't
21 think we need to pursue this any further.
22 HONORABLE F. SCOTT MCCOWN: Can
23 I add one additional comment? This is
24 actually, the way this rule functions, it's
25 going to make the inadvertent waiver of a

1 privilege pretty difficult because you don't
2 have to assert the privilege until you have
3 actually got the materials in front of you,
4 you know you have got them, and you are
5 withholding them. So it's tied to specific
6 materials you have, and so because you don't
7 have to make any prophylactic objections to
8 preserve the privilege, it ought to be a more
9 gentle system than the present system.
10 HONORABLE SCOTT BRISTER: And
11 playing it out, so let's say you live in a
12 cave; you don't know the rules have been
13 changed; you file your standard prophylactic
14 objections; and then what happens? The other
15 side files a motion to compel saying, "Hey,
16 there is new rules. They haven't filed a
17 withholding statement. They are waived." You
18 wake up, file a belated withholding statement;
19 and as I read Rule 6, the sanction question is
20 going to be whether this belated withholding
21 statement would presumably before trial cause
22 the other side to be unable to prepare for
23 trial. The answer to that is almost always,
24 "No." No sanction. And now you know to do it
25 right in the future. Right?

1 CHAIRMAN SOULES: I don't see
2 how No. 6, Rule 6, address this. I thought
3 that was --
4 HONORABLE SCOTT BRISTER:
5 That's the only sanction for anything, right?
6 CHAIRMAN SOULES: Well, yes,
7 but that's -- can they use something they
8 failed to produce, not must you get something
9 they failed to protect.
10 HONORABLE SCOTT BRISTER: Yeah.
11 But the only -- so the only time limit -- if
12 there is no -- if you have got to do this to
13 preserve your privilege, you file it late.
14 HONORABLE F. SCOTT MCCOWN:
15 Wait. Can I address this?
16 CHAIRMAN SOULES: And that's
17 not the end of the sanctions consideration
18 either, Judge Brister. I mean, we are going
19 to be visiting sanctions as we go forward.
20 Judge McCown.
21 HONORABLE F. SCOTT MCCOWN: We
22 worked through this problem, and it's kind of
23 tricky. So let me kind of take you through it
24 because it took us a while to figure it out.
25 But here's how Rule 6 comes into play and what

1 the answer is. If you file a belated
2 withholding statement, okay, and it is, in
3 fact, privileged, which means that the other
4 side is not entitled to it, our reasoning was
5 that there probably ought not be any penalty
6 because you have filed a belated withholding
7 statement, but the court's determined that it,
8 in fact, was privileged which meant that the
9 other side never should have seen it.
10 The problem is you file a belated
11 withholding statement, and it, in fact, is not
12 privileged, and you should have produced it.
13 Well, then you are into Rule 6 because it's
14 stuff that the other side was entitled to that
15 you didn't timely produce.
16 CHAIRMAN SOULES: Bill
17 Dorsaneo.
18 PROFESSOR DORSANEO: How can I
19 tell the difference between a withholding
20 statement and a set of prophylactic
21 objections? I mean, what does a withholding
22 statement look like? From this paragraph it
23 just looks like it's a document that makes
24 claims of privilege.
25 HONORABLE F. SCOTT MCCOWN:

1 There is an easy way to tell the difference.
2 A withholding statement will always have
3 behind it specific documents that you are not
4 producing, and so if you file the withholding
5 statement and the other party then goes
6 through the procedure to put you to your
7 proof, there will always be something that you
8 would have to submit for in camera inspection
9 if you got down to it.
10 PROFESSOR DORSANEO: But
11 those -- when you say "it has behind it" --
12 MR. GOLD: Not literally.
13 MR. SUSMAN: It means only if
14 there are specific documents that you have in
15 mind at the time you give the other side a
16 withholding statement --
17 PROFESSOR DORSANEO: So why
18 would --
19 CHAIRMAN SOULES: Let Steve
20 finish.
21 MR. SUSMAN: Because what
22 happens is you give me a withholding statement
23 that says, "I am withholding documents on the
24 ground of the attorney-client privilege,"
25 which is what your statement says.

1 I say, "Bill, tell me" -- I write you a
2 letter, and I say tell me -- or send a
3 request. "Tell me what they are. Comply with
4 the next sentence of the rule, (b)."
5 You have got 15 days then to identify it.
6 So you better -- I mean, if you don't have
7 something at the end of 15 days I am going to,
8 you know, raise hell, go to the court, do
9 something, say this is ridiculous. So that's
10 the point. I mean, the point is you have got
11 15 days after you say, "I did it," to describe
12 what it is you did. That's clearly not going
13 to be a prophylactic deal.
14 PROFESSOR DORSANEO: People who
15 want to make prophylactic objections when they
16 don't need to make them will want to make them
17 in withholding statements just as much as they
18 want to make them now in the list of
19 objections. They don't have to make them. It
20 seems clear to me that they don't have to make
21 them despite some courts of appeals decisions
22 now.
23 People like to make them because it's
24 easier to make them so they won't overlook
25 something and they won't have to do any

1 thinking. Now, if you allow the withholding
2 statement to make claims of privilege and you
3 only get to a level of specificity when there
4 is a "Okay. What are you really talking
5 about" letter. Then why require the thing to
6 be called a withholding statement?
7 MR. GOLD: Luke?
8 CHAIRMAN SOULES: Paul Gold.
9 MR. GOLD: What happens
10 now -- and I sense that everybody's experience
11 is a little bit different, but what I
12 typically get is I will get a response that
13 will set out a number of objections. They
14 will just send out all the objections that
15 they can conceivably think of, and then you
16 have to call the person or I have to call the
17 person and say, "Okay. You have listed all of
18 these objections, which ones are real and
19 which ones are virtual?" And you have to find
20 out if they are withholding particular
21 documents with regard to each objection.
22 With regard to the holding statement, the
23 withholding statement that we are talking
24 about, they have to specifically state that
25 they are withholding documents now, right now.

1 Not in the future, not some inchoate claim.
2 They are withholding documents now because of
3 this particular privilege.
4 And the reason for that is, is when we
5 were on the task force we explored the concept
6 of having -- we would say we are not
7 requesting attorney-client privileged matters,
8 attorney work product matters, and that got to
9 be incredibly difficult. This way you can see
10 I am withholding documents because of
11 attorney-client privilege. You can say,
12 "Well, I don't care about those documents,"
13 but if the person says, "I am withholding
14 documents because of trade secrets," you go,
15 "Okay. I want to know what those are." But I
16 believe it completely obviates this
17 prophylactic objection regime that we have
18 right now.
19 PROFESSOR DORSANEO: Well, I
20 think the withholding statement paragraph
21 should say something like current Rule 274
22 says with respect to charge objections about
23 prophylactic objections are inappropriate, and
24 it ought to be clearer that you only make an
25 objection with respect to information or

1 specific information or materials that you are
2 withholding.
3 MR. GOLD: We have that.
4 That's the one that John Marks was insensed
5 about several meetings ago, the one where you
6 cannot make multiple objections. I forget
7 where that is, though.
8 MR. KELTNER: You can't
9 obscure.
10 MR. GOLD: You can't obscure
11 the real objection with other types of
12 objections.
13 MR. SUSMAN: It's in our
14 comment. I mean, look at the comments. You
15 know, you-all, I will say this, that --
16 PROFESSOR DORSANEO: That's in
17 the paragraph on objections.
18 MR. SUSMAN: I mean, we are
19 redebating at the last meeting or at our
20 meeting in January on page 5858 of the
21 transcript this whole notion of withholding
22 statements as a way of asserting privileges.
23 The whole concept was approved in a vote that
24 was 13 to 3, page 5858.
25 CHAIRMAN SOULES: All Bill is

1 talking about is a way to do this better.

2 PROFESSOR DORSANEO: I am not

3 talking about the concept.

4 CHAIRMAN SOULES: He's talking

5 about a way to do it better. We have got

6 specific language in the rule. It may need

7 other words. Some of the words here may not

8 be the right words.

9 MR. SUSMAN: Take a look at

10 the --

11 MR. MEADOWS: Page 15.

12 MR. SUSMAN: Page 15, comment

13 two. Next to the last sentence, "The

14 statement should not be made prophylactically,

15 but only when specific information and

16 materials have been withheld."

17 HONORABLE F. SCOTT MCCOWN: But

18 let me point out why I think this gets done

19 what you want, Bill. Under the present system

20 if a party is going to assert attorney-client

21 and they make an objection to a specific

22 request of attorney-client, if you call them

23 up on the phone and you ask them what they

24 have got and they tell you, if you take their

25 word for it, you are not protected. If they

1 tell you and they are telling you the truth
2 but subsequent events create new things that
3 fall into the category that you don't get an
4 update about, you are not protected, and so
5 you are forced to go down to the courthouse
6 and get a ruling on the objection.
7 Under this scheme they have to make a
8 withholding statement, and you say, "Well,
9 won't they just make a prophylactic
10 withholding statement?" Well, I think the
11 answer to that is maybe you're right that some
12 people will, but the incentive for
13 prophylactic statements is gone. If they do
14 make a withholding statement, prophylactic or
15 not, you have got a very simple way to test
16 it, which is you demand the specificity of
17 identification of what they are withholding.
18 So they have got to give you that.
19 If they can't give it to you then that
20 withholding statement preserves nothing
21 because the only thing the withholding
22 statement preserves when you make the demand
23 for specificity is what they identify
24 specifically. So once they identify it
25 specifically you have now formally fixed their

1 privilege, and if new documents fall within
2 your request, they are going to have to make a
3 new withholding statement.
4 There is no way for anything to get away
5 from you and fall through the cracks. Every
6 time they are holding something back that they
7 haven't filed a withholding statement on they
8 have got to file a withholding statement.
9 Every time they file a withholding statement
10 you can tie them down without having to go to
11 the courthouse about what specifically they
12 are withholding. If when you see it you want
13 to test it, you have got a procedure to test
14 it.
15 CHAIRMAN SOULES: David
16 Keltner.
17 MR. KELTNER: I just -- I was
18 going to say basically the same thing Scott
19 was.
20 CHAIRMAN SOULES: Okay.
21 PROFESSOR DORSANEO: I have one
22 other thing to say about it, and I am just
23 going to keep quite, is that I hope we haven't
24 gotten to a point where what you call it is
25 going to make all of the difference in the

1 world if it's content satisfies the
2 requirements of the particular paragraph that
3 you are meant to be following.
4 MR. KELTNER: That's a good
5 concern.
6 CHAIRMAN SOULES: Anything else
7 on -- well, let's just take it a paragraph at
8 a time. Rule 7, paragraph (1). Anything
9 further on that? Richard Orsinger.
10 MR. ORSINGER: I have a problem
11 with the use of the word "privilege," which I
12 think is going to dog us throughout this whole
13 process because we are dealing with both
14 privileges and exemptions, and we cross-refer
15 to Rule 4, which is entitled "Privileges and
16 Exemptions," and the exemptions are different
17 from the privileges. I don't know how many of
18 the exemptions are going to ultimately survive
19 the drafting process, but it seems to me that
20 we need some kind of shorthand rendition word,
21 or we need to agree to use the word
22 "privilege" and "exemption" both so that no
23 one comes in and says, "Hey, the privileges
24 are in Article V of the Rules of Evidence, and
25 they are not provided for under this rule."

1 PROFESSOR ALBRIGHT: I think
2 that's a good idea, and the only thing that
3 might change that is if we redefined something
4 in Rule 4, but I think that's a good rule
5 change.
6 CHAIRMAN SOULES: So what do
7 you propose? We say it's a privilege or
8 exemption?
9 PROFESSOR DORSANEO: Well, why
10 don't we just use the word "privilege" instead
11 of developing all of these separate Texas
12 style categories.
13 MR. ORSINGER: The problem is
14 the word "privilege" has a historical meaning
15 that goes back 150 years or more, and so to
16 just say that --
17 MR. GOLD: Isn't a privilege an
18 exemption?
19 CHAIRMAN SOULES: Just a
20 minute. Just a minute. Richard Orsinger has
21 the floor now. What is it?
22 MR. ORSINGER: Yes. You could
23 fold privileges into exemptions if you defined
24 exemption to mean work product, et cetera, et
25 cetera, plus all recognized privileges.

1 MR. GOLD: That's the way it's
2 defined now.
3 MR. ORSINGER: Rule 4 doesn't
4 define anything right now.
5 MR. GOLD: I mean in the
6 present rule right now.
7 MR. ORSINGER: Yeah. If we did
8 that, we could take the word "privilege" out
9 of here and just use the word "exemption"
10 instead.
11 CHAIRMAN SOULES: Alex
12 Albright.
13 PROFESSOR ALBRIGHT: I think
14 the way 166(b)(3) -- the wording of the rule
15 is it says, "The following is privileged from
16 discovery."
17 PROFESSOR DORSANEO: Right.
18 PROFESSOR ALBRIGHT: So it does
19 use the word "privilege," but I think that's
20 something we can correct in Rule 4. I think
21 that's a valid point, but we need to be clear
22 the discovery exemptions are privileged are
23 what we are talking about as well as
24 evidentiary privileges, and I think we can fix
25 that in Rule 4.

1 MR. SUSMAN: Can't we drop the
2 footnote here just to remind us that at the
3 time we -- I think we just ought to footnote
4 the word, put a footnote in that at the time
5 whoever gets around to doing Rule 4 we got to
6 make sure that the language we use here is
7 broad enough to cover both exemptions and
8 privileges.
9 CHAIRMAN SOULES: Okay. One
10 other alternative is to use "pursuant to a
11 privilege or exemption," put that in this
12 right now so we don't lose it, and it will
13 never be lost. We may take it out later if we
14 fix something someplace else.
15 HONORABLE SCOTT BRISTER: I
16 think we ought to just stick -- Bill's right,
17 just stick with "privilege." Because, I mean,
18 the current rule says first, 166(b)(3),
19 "Exemptions. The following matters are
20 protected from disclosure by privilege."
21 So --
22 PROFESSOR DORSANEO: I wish I
23 had never put the word "exemption" in there.
24 HONORABLE SCOTT BRISTER: They
25 are not different. In my mind they are not

1 different. We ought to just -- everybody
2 thinks something is privileges, let just call
3 it privileges.
4 CHAIRMAN SOULES: All right.
5 Anything else on Rule 7, paragraph (1)? Okay.
6 Those in favor of paragraph (1), Rule 7, show
7 by hands. 15. 15, right?
8 Those opposed? There is no opposition.
9 That will be declared unanimous.
10 All right. Paragraph (2) of Rule 7. Any
11 further comments about that? Is there any
12 objection to Rule 7, paragraph (2) as shown on
13 page 13? Carl Hamilton.
14 MR. HAMILTON: Fifth line down
15 there is a phrase that says "and only upon
16 compliance with the request or any part
17 thereof." I don't know that I understand what
18 that means.
19 PROFESSOR ALBRIGHT: What that
20 means is that you don't need to do it
21 prophylactically. Only when you respond to
22 the request do you have to make a withholding
23 statement. So when you comply with -- okay.
24 You have not made an objection to the request
25 under paragraph (1), and you are producing

1 your documents. You are complying with the
2 request. Then you make your withholding
3 statement. If you have objected to part of
4 the request under paragraph (1), you are only
5 responding to part of the request. Then you
6 make your withholding statement as to the
7 documents that you are withholding.
8 MR. YELENOSKY: So it's a
9 time-limiting? Because compliance sound like
10 if --
11 CHAIRMAN SOULES: Steve
12 Yelenosky, what's your question?
13 MR. YELENOSKY: Well, it sounds
14 like that -- yeah. It does sound like
15 compliance is a question of -- it sounds like
16 what you are referring to is clearly when to
17 do it.
18 PROFESSOR ALBRIGHT: Would it
19 improve it to put "response" instead of
20 "compliance"?
21 MR. YELENOSKY: Yeah. Yeah.
22 PROFESSOR ALBRIGHT:
23 "Response."
24 CHAIRMAN SOULES: Exactly where
25 is the focus of this? What word, where?

1 MR. HAMILTON: The fifth line.
2 CHAIRMAN SOULES: One, two,
3 three, four, five.
4 MR. YELENOSKY: And "at the
5 time of responding" or "when responding" and
6 only --
7 CHAIRMAN SOULES: What's being
8 proposed?
9 PROFESSOR ALBRIGHT: We haven't
10 decided what to propose. The problem is the
11 word "compliance."
12 CHAIRMAN SOULES: "Compliance,"
13 okay.
14 MR. SUSMAN: What's wrong with
15 that? I don't understand what's wrong with
16 that, Alex.
17 PROFESSOR ALBRIGHT: I think
18 they are confused about what "compliance"
19 means, and it may be that "responding" is a
20 better word than "compliance."
21 MR. SUSMAN: I don't think so
22 because responding can include objecting.
23 Okay.
24 PROFESSOR ALBRIGHT: Okay.
25 MR. SUSMAN: Compliance is not

1 objecting. I mean, I ask you to produce
2 something. If you say, "I object to doing
3 it," you aren't complying with it.
4 PROFESSOR ALBRIGHT: Uh-huh.
5 MR. SUSMAN: You are
6 responding.
7 PROFESSOR ALBRIGHT: Right.
8 MR. YELENOSKY: Well, at
9 the -- well, when do you want the withholding
10 statement? When you produce the other
11 documents?
12 MR. SUSMAN: At the time your
13 objection gets resolved, and you have to do
14 it. I mean, you object to producing documents
15 prior to 1960 because it's burdensome, it's
16 beyond the scope of the petition, et cetera.
17 Okay. That's all you have to do then.
18 That gets overruled. I take it to court
19 it gets overruled. Now you have got to go
20 look at your pre-1960 documents and produce
21 them. At that time you find a letter between
22 your client and you that is privileged. You
23 have not lost the privilege. You didn't even
24 go look at them prior to then. Now you go
25 look. You find the document. You assert the

1 privilege by that time. Now you are
2 responding because the court has ordered you
3 to do so.
4 MR. YELENOSKY: And you are
5 complying?
6 MR. SUSMAN: You are complying.
7 MR. YELENOSKY: But it's at the
8 same time you are producing other documents
9 for which you have no withholding statement.
10 Right? I mean, documents that you have no
11 problem with producing. So it's a time when
12 you produce.
13 CHAIRMAN SOULES: I think this
14 needs more clarification.
15 MR. SUSMAN: Yeah.
16 CHAIRMAN SOULES: "If a request
17 is both objectionable and calls for privileged
18 materials or information in response, the
19 responding party shall first object pursuant
20 to section (1) of this rule on grounds other
21 than privilege," right? That's what you're
22 talking about?
23 PROFESSOR ALBRIGHT: And that's
24 what Rule 1 -- section (1) is all about.
25 CHAIRMAN SOULES: Well, but

1 section (2) is asserting a privilege. Does
2 that sentence and section (2) say that if it's
3 mixed objection and privilege you have to
4 raise your privilege objection under
5 section (1)?
6 PROFESSOR ALBRIGHT: It says
7 when you are complying with any part of the
8 request you have to make a withholding
9 statement if you are withholding privileged
10 documents.
11 MR. YELENOSKY: How about
12 breaking that into two sentences? In the
13 second --
14 CHAIRMAN SOULES: Well, "If a
15 request is both objectionable and calls for
16 privileged materials or information in
17 response, the responding party shall first
18 object pursuant to section (1) of these
19 rules."
20 "On grounds other than privilege" is what
21 you are talking about there. Tommy Jacks,
22 have you got something?
23 MR. JACKS: I have got a
24 concern. I mean, I recognize in the example
25 Steve gave the party could not raise the

1 privilege because the party didn't know that
2 there was privileged material amongst the
3 documents, but there could also be a situation
4 in which I know at the time I am making the
5 objection, hey, this is burdensome, but I also
6 know that there is, in fact, privileged
7 material in there that I don't ever intend to
8 produce without getting a ruling on it. Now,
9 shouldn't I go ahead and tell people I have
10 got an objection under (1), and I am going to
11 be claiming a privilege under (2) as well?
12 CHAIRMAN SOULES: I think
13 that's a good point. Steve Susman.
14 MR. SUSMAN: I don't think -- I
15 think what we wanted to do is objections on
16 nonprivileged grounds are made first. Even if
17 you know that there is something, you have got
18 a fallback objection. Okay. I mean, that's
19 the notion. We want you to make the objection
20 on privileged grounds first and then dispose
21 of, and then once it's disposed of and
22 you -- because that should be the controlling
23 ground on which you are initially withholding
24 stuff. When that's overruled then you have
25 to -- then you fall back on your second

1 ground, which is privileged, and you provide
2 the withholding statement.
3 MR. JACKS: Well, let me give a
4 more concrete example because I'm not sure
5 this is something that we want to do. I mean,
6 let's say, for example, you have requested all
7 information of a certain kind from 1980 to
8 date. I am willing to give you some of it
9 because it's unprivileged and it's recent
10 enough that it's not a big deal. I am willing
11 to give you everything from 1990 to date. So
12 I file my stuff. I say, "Steve, here is the
13 stuff from 1990 to date as to which I am
14 claiming no privilege. It's yours. I am
15 raising a section (1) objection to the 1980 to
16 1990 stuff, and in addition to that, I am
17 withholding some things because they are
18 privileged." Now --
19 CHAIRMAN SOULES: In what time
20 period?
21 MR. JACKS: Well, in either
22 time period.
23 CHAIRMAN SOULES: Okay.
24 MR. JACKS: I mean, let's say
25 some of both because there was some

1 attorney-client information that fell within
2 your request, and I am hanging onto that.
3 MR. SUSMAN: Okay.
4 MR. JACKS: Now, are you
5 telling me that the game I play with you is I
6 first say, "Hey, Steve, I have got a section
7 (1) objection. I am giving you some stuff,
8 but I have got a section (1) objection."
9 We go down to the courthouse. We fight
10 about that. The judge signs an order. We
11 come back and then I send you some documents
12 and say, "Hey, Steve, guess what? There is
13 also some privileged stuff."
14 MR. SUSMAN: No.
15 CHAIRMAN SOULES: Let Tommy
16 finish his example.
17 MR. JACKS: And now I am
18 telling you about it. So we have got to go
19 down there again and fight about that.
20 MR. SUSMAN: No.
21 CHAIRMAN SOULES: Okay. Steve
22 Susman's response.
23 MR. SUSMAN: Let me suggest to
24 you that, No. 1, it's obvious we are not going
25 to finish these rules today. I think you have

1 hit upon a drafting problem that we can fix
2 between now and our July meeting, which
3 is -- and I think the intent in what you said
4 is that for those documents you produce from
5 1990 forward, okay, you have got to say -- if
6 there was anything privileged in there that
7 you did not produce because of the privilege
8 because otherwise it was in your time frame of
9 '90 forward, you have got to notify me you
10 withheld them. You have asserted an objection
11 at the same time to pre-1990.
12 MR. JACKS: Uh-huh.
13 MR. SUSMAN: Okay. And so far
14 as those are concerned you don't even have to
15 look at those to know -- if you happen to know
16 there is a privilege in there, fine. Who
17 cares. That's not why you held it back. You
18 held it back because of the timing. Once that
19 timing issue is resolved then I think at that
20 point in time if that objection gets
21 overruled, you then file -- notify me of the
22 withholding.
23 CHAIRMAN SOULES: Tommy Jacks.
24 MR. JACKS: And all I am
25 suggesting is that if I do know that in the

1 materials that I am making my section (1)
2 objection to there also is a portion of those
3 regarding which I am going to claim a
4 privilege, if at any time I have to produce
5 them, wouldn't it be more efficient for me to
6 raise that then? I have no problem with the
7 notion that if I really don't know about it
8 until I have seen the documents --
9 MR. SUSMAN: I will tell you
10 why not.
11 MR. JACKS: Okay.
12 MR. SUSMAN: Let me give
13 you -- the perfect example is the documents
14 prior to 1980. Okay.
15 MR. JACKS: Uh-huh.
16 MR. SUSMAN: The fact -- and I
17 think your lawsuit involves an allegation that
18 begins in '85. Okay. And I don't think I
19 ought to have to give you those documents.
20 It's totally remote to anything. If I give
21 you a withholding statement, and then I have
22 to go and follow the step in step (b), which
23 is identify within 15 days of withheld
24 documents. Okay. I have got to -- preparing
25 one of these privilege logs is no small task,

1 folks. It is a huge task.

2 If they call my card on that and make me

3 prepare a privilege log, I have defeated the

4 whole purpose of my objection. I don't have

5 to produce the documents to you before 1980 or

6 '60, but I have got to go look at them. I

7 have got to find them, and I've got to

8 identify them. That's what we are saying. So

9 that's why we don't think you should have to

10 do that.

11 CHAIRMAN SOULES: Tommy Jacks.

12 MR. JACKS: And I am not

13 quarreling with the idea that you should not

14 be compelled to do that. I agree that you

15 should not be compelled to do that. I guess

16 my point is I can envision other fact

17 situations where I want as to a given set of

18 documents, which I have looked at, to make a

19 section (1) objection, but I also know at the

20 time I make it because I have looked at them

21 that I am going to be raising privileged

22 grounds, too. Isn't it more efficient for the

23 parties and the court and less costly and time

24 consuming to dispense with all of that at the

25 same time when that fact situation exists?

1 And the rule doesn't, as I understand it,
2 accommodate that set of facts. That's all I
3 am saying.
4 CHAIRMAN SOULES: It doesn't
5 require that you --
6 MR. JACKS: Yeah.
7 CHAIRMAN SOULES: -- do both at
8 the same time?
9 MR. SUSMAN: It does not --
10 CHAIRMAN SOULES: And the cost,
11 I think, of requiring -- at least what I am
12 hearing here, the cost of requiring, Tommy,
13 that the service of a withholding statement at
14 the time you make your rule -- your section
15 (1) objection is going to be prophylactic
16 objections because some judges are going to
17 say it has to be -- if the rule has language
18 in there dealing with that, it's going to say,
19 well, that's where you have to do it. I mean,
20 that's a possibility or a possible risk.
21 Bill, you have had your hand up. Then I
22 will get down to Judge Brister.
23 PROFESSOR DORSANEO: Well, in
24 one of the many cases in this area that I have
25 lost -- I think it's a Hyundai case involving

1 a Judge O'Neill -- the exact problem that's
2 being discussed here came up. There was a
3 controversy about whether the discovery
4 request was a good request partially because
5 it was unclear what the request was, and there
6 was a debate about its scope and its contures.
7 The lawyer, the trial lawyer, at Jones, Day
8 interpreted it one way and concluded that
9 there were no documents to produce, but
10 objected to it because it was worded in an
11 obscure manner, and he wasn't exactly sure
12 what the hell it meant.
13 Ultimately it was determined that it
14 covered documents that the client had and that
15 the privileges with respect to all of those
16 documents had been waived because the
17 privileges hadn't been asserted, and there
18 hadn't been the preservation with respect to
19 the claims of privileges made at the
20 threshold. Of course, the lawyer said, "I
21 didn't even know what we were talking about
22 until after the scope of the request got
23 clarified, and our entire energies were
24 directed toward the propriety of the request
25 rather than the privilege question."

1 At least in that context it seemed absurd
2 to me that the cart had gotten way before the
3 horse, and I think in a great many cases
4 involving that kind of client it would be much
5 better to resolve the objection first and then
6 to have the objection practice with respect to
7 the specific things that you are talking about
8 work thereafter. It might be just a little
9 bit less efficient in some cases, but my
10 instincts based on my own experience suggest
11 to me that it would be more efficient if it
12 was done in the order that I suggested and I
13 think the order that the chair of the
14 subcommittee suggested initially.
15 CHAIRMAN SOULES: Judge
16 Brister.
17 HONORABLE SCOTT BRISTER: Just
18 briefly, as a trial judge I think that two
19 steps makes sense because the scope objections
20 are ubiquitous, contentious, and rarely
21 outcome determinative. On the other hand, the
22 privilege objections are few, far between,
23 usually taken care of by agreement, but may
24 well be very outcome determinative, and it
25 makes more sense to focus on those few things

1 if we ever get to that point, but save that
2 for the first step and get all the scope stuff
3 out of the way. So I agree with that.
4 CHAIRMAN SOULES: Paul Gold.
5 MR. GOLD: I have to say two
6 things. First, I think that the committee
7 should give a shot at trying to draft this
8 rule to accommodate the problem that Tommy has
9 raised, because as I understand what Tommy's
10 complaint is, if someone is responding with a
11 body of documents, they have obviously gone
12 through this body of documents and know what
13 the privileges are. It's a waste of
14 everyone's time to have to wait 'til the
15 second step to hear the privileges on those.
16 Whether or not we can efficiently draft a rule
17 to accommodate that, I don't know.
18 The second part of that is if we can't, I
19 would be willing to sacrifice the -- waive the
20 deferral of the privilege to the second step
21 to keep the integrity of the rule that we
22 presently have. And the other thing I was
23 going to say is if you want to see how this
24 plays out, there is a case out of Tyler called
25 Ford Motor Company vs. Ross, which sites I

1 think Hyundai vs. Chandler, which I think is
2 the case that you are talking about, Bill,
3 where the Tyler court of appeals goes through
4 this two-step process. It also talks about
5 Tommy's argument about preserving all the
6 privileges and objections at the time of the
7 response, but that case talks about this
8 two-step process, and I think it's a good way
9 of doing it. I would like to try and
10 accommodate Tommy's complaint, though.
11 CHAIRMAN SOULES: Let me see if
12 I understand how this all works. Taking
13 Tommy's example, somebody says, "We want to go
14 back to 1980." Tommy says, "I will give you
15 '87 forward but not '80 the through '86," and
16 I file a -- and he files a section (1)
17 objection to '80 through '86. At that point
18 he hasn't made an objection to '87 forward.
19 So he has to file a withholding statement for
20 '87 forward.
21 MR. SUSMAN: If there is
22 anything there.
23 CHAIRMAN SOULES: If he is
24 withholding anything. But '80 through '86 he
25 doesn't because until he gets a ruling from a

1 court that some of that has to be produced,
2 '85 and '86 or '80 through '86. At that point
3 then he's got to go through the '80 through
4 '86 and determine whether there is anything
5 privileged, and when he complies with the
6 court's order, at that time he objects to the
7 '80 through '86, any part of that that he's
8 had to produce. Is that the way this --
9 HONORABLE F. SCOTT MCCOWN:
10 Yeah.
11 CHAIRMAN SOULES: -- is
12 supposed to work? I'm not sure the language
13 is exact, but that's what this is supposed to
14 do, right?
15 HONORABLE F. SCOTT MCCOWN:
16 That is the way it's supposed to work.
17 CHAIRMAN SOULES: Well, what's
18 wrong with that?
19 HONORABLE F. SCOTT MCCOWN: I
20 don't think anything, and let me point out the
21 language if you want to focus on the exact
22 language. You have to put subdivision (1)
23 with subdivision (2), and in subdivision (1)
24 we say, "A party shall comply with so much of
25 the request as to which the party has no

1 objection unless it's unreasonable under the
2 circumstances."
3 So you have to comply with so
4 much -- like Luke was saying, what you don't
5 object to, you have to comply with. Then in
6 subdivision (2) when a party actually
7 withholds specific information you have got to
8 file your withholding statement. So Luke has
9 described it exactly right, that if you have
10 got no objection -- it's overbroad, but you
11 have self-narrowed it, so to speak, and you
12 got no objection to the part you have
13 self-narrowed it to, then you have got to file
14 your withholding statement. So you don't have
15 the two-step process. So I think we can meet
16 Tommy at least halfway. There is no two-step
17 process for what you self-narrow.
18 CHAIRMAN SOULES: All right.
19 As a matter of policy, are we in agreement
20 that if the rule works the way I tried to
21 describe it a moment ago and Scott has
22 confirmed, that that's the policy we want to
23 establish? Is there any disagreement with
24 that? There is no disagreement that that's
25 the policy that we want to establish.

1 MR. SUSMAN: And let me give
2 you some language that will clarify the
3 procedure. I think I can just right
4 here -- it should read, "If a request calls
5 for privileged materials or information in
6 response but is also otherwise objectionable,
7 the responding party shall first assert
8 objections -- shall first assert other
9 objections pursuant to section (1) of this
10 rule, and only upon resolution of such
11 objections and compliance with the request for
12 any part thereof withhold responsive
13 privileged materials or information pursuant
14 to this section." Something like that. I
15 think we can draft it more efficiently in
16 committee, but it will be something like that
17 to indicate more clearly what steps we are
18 talking about.
19 MR. JACKS: Another way of
20 saying it would be "if the objection is
21 overruled, then upon compliance."
22 MR. SUSMAN: Right. Right.
23 PROFESSOR DORSANEO: Your idea
24 is when the objection covers the same
25 territory as the claim of privilege?

1 MR. SUSMAN: Correct.

2 CHAIRMAN SOULES: Tommy Jacks.

3 MR. JACKS: May I also suggest

4 that you give a concrete example in the

5 comment to guide one through this maze.

6 MR. SUSMAN: Good idea. We

7 will accept that. Example in comment.

8 CHAIRMAN SOULES: Okay. As far

9 as number (2) is concerned then we have got a

10 declared policy, but we are not, I think,

11 today prepared to --

12 MR. SUSMAN: I understand.

13 CHAIRMAN SOULES: -- act on

14 language.

15 MR. SUSMAN: Right.

16 CHAIRMAN SOULES: So that needs

17 to be revisited.

18 MR. SUSMAN: We will fix it up.

19 CHAIRMAN SOULES: But that

20 doesn't mean we can't go on to the other

21 sections of the rule, does it? We can go

22 forward to section (3).

23 MR. BECK: Luke, can I ask a

24 question?

25 CHAIRMAN SOULES: David Beck.

1 Yes, sir.
2 MR. BECK: Yeah. This has to
3 do with (2). Steve, can you explain to me,
4 I'm a little bit concerned about the timing of
5 the withholding statement. What does this
6 mean where it says "either when making the
7 original response or thereafter when making an
8 amendment or supplemental response"?
9 MR. SUSMAN: Let's see. Where
10 are you?
11 MR. BECK: Eighth line.
12 CHAIRMAN SOULES: Eighth line
13 on page 13?
14 MR. BECK: Right.
15 PROFESSOR ALBRIGHT: That means
16 when you are producing additional documents
17 that you have found -- you have found more
18 documents responsive to the request;
19 therefore, you have to amend or supplement
20 according to our amendment rules. You can
21 make a withholding statement at that time.
22 You say, "I found a stack of documents
23 that are responsive. I am producing them to
24 you, but I am withholding specific documents
25 on the grounds of work product, party

1 communication." It's, again, to keep you from
2 having to make your prophylactic objections.
3 We make clear that you don't have to make a
4 prophylactic withholding statement at your
5 first response, but you make a second one when
6 you produce the second group of documents.
7 MR. LATTING: Well, it
8 shouldn't be either --
9 MR. YELENOSKY: It should be
10 clarified.
11 MR. BECK: I guess what I am
12 saying is that the way this rule reads would
13 it allow a party to file a withholding
14 statement saying, "I have got four documents,"
15 and then three months later say, "Oh, by the
16 way, here are some more documents."
17 MR. SUSMAN: You're right. We
18 have got to make it clearer, and we are trying
19 to make it clearer. The duty to provide a
20 withholding statement arises at the time you
21 subjectively know that there are documents
22 that you can look at and you are intentionally
23 withholding them. So the answer is you can't
24 parcel them out over time if you know the
25 documents exist.

1 On the other hand, suppose you find
2 another file in your vice-president of sales
3 office that was not even searched at the
4 original time. There are some documents in
5 there that certainly have got to be produced
6 as part of your duty to supplement or amend,
7 and you supplement or amend a document request
8 by producing the documents. At the same time
9 in the vice-president of sales office you find
10 some privileged documents. You have to assert
11 a withholding statement as to those documents
12 then. You didn't earlier because you didn't
13 know about them, and I guess, I mean, that's
14 what we are saying.
15 MR. BECK: But, Steve, you know
16 how this normally happens. When you are
17 looking through thousands of documents
18 somebody always pulls them and says, "Look, we
19 don't know whether these are privileged or
20 not. Put them in this stack over here."
21 And the way this reads, it would allow
22 somebody to just ignore that stack for some
23 appreciable period of time and then come in
24 later and file an amended response, and I
25 assume that's not the intent.

1 MR. SUSMAN: That's not the
2 intent.
3 MR. LATTING: I have got a
4 suggestion to the language.
5 MR. BECK: Then you need to
6 clarify that on the language.
7 CHAIRMAN SOULES: Everybody
8 agree with that? Okay. So, Joe, if you
9 could -- you have got a suggestion. This is
10 going to have to be rewritten.
11 MR. LATTING: It's real quick.
12 CHAIRMAN SOULES: All right.
13 Real quick.
14 MR. LATTING: Just take out the
15 word "either," take out the word "or," and
16 substitute "and," and take out the word "when"
17 and put "if." So it would read, "When a party
18 actually withholds specific information and
19 materials responsive to a request on the
20 ground of privilege and when" -- no. "When
21 making the original response and thereafter if
22 making an amended or supplemental response."
23 MR. SUSMAN: I got you. We
24 will do it.
25 CHAIRMAN SOULES: Okay. We

1 will consider that language. Okay. Anything
2 else on Rule 7, paragraph (2)(a)? Anyone want
3 to give the committee any further guidance on
4 how to redraft that? Okay. Then that's back
5 to the committee. Rule 7, paragraph (2)(b) on
6 page 14, any comments on that?
7 HONORABLE DAVID PEEPLES: Luke,
8 before we get to that I want to raise a more
9 philosophical problem.
10 CHAIRMAN SOULES: Judge
11 Peeples.
12 HONORABLE DAVID PEEPLES: We
13 are focusing on the conduct of the responding
14 party here, and I want to ask the committee if
15 the rules or if in your discussions there is
16 any focus on the requesting party because it's
17 been my experience that a lot of times, a lot
18 of times, requests are made that are obviously
19 excessive on the understanding that you can
20 always go to court and the court will carve it
21 down.
22 And I want to raise -- I have been
23 looking at Rule 215 sub (3), which does say
24 that if someone abuses the discovery process
25 in seeking discovery you can levy sanctions.

1 I don't think it happens very much, but I want
2 to raise the question of whether we ought to
3 focus also on the requester because, you know,
4 a lot of these problems could be obviated if
5 the requesting party instead of asking for
6 everything back to 1960 would make it more
7 reasonable.
8 CHAIRMAN SOULES: Well, Joe's
9 subcommittee has been -- it's good that this
10 continues to come up from time to time to
11 remind us, but it has come up in several of
12 our meetings that it's very important to do
13 exactly what you are suggesting, Judge
14 Peeples, and Joe's subcommittee has the
15 responsibility of drawing the sanctions rule
16 to address overreaching by the requesting
17 party or excessive requesting by the parties.
18 MR. LATTING: I sure would like
19 to hear from everybody, and particularly the
20 judges, about that because I don't know
21 exactly how to write that because of the
22 problem that you have. Sometimes when I am
23 making a good faith request for documents I
24 don't know exactly what to ask for. So I tend
25 to ask for more than I need to. I don't want

1 to get into that but --

2 CHAIRMAN SOULES: We are not

3 going to because we need to give Steve's group

4 as much guidance as we can by the end of today

5 so that we can keep making progress.

6 MR. LATTING: Well, let me hear

7 from you is all I'm saying.

8 HONORABLE DAVID PEEPLES:

9 That's a different committee, your answer is.

10 CHAIRMAN SOULES: Sanctions.

11 MR. SUSMAN: Let me respond to

12 that briefly.

13 CHAIRMAN SOULES: Don't take a

14 lot of your own time.

15 MR. SUSMAN: We began with the

16 premise that there was not a lot of abuse in

17 document request, that there was a discovery

18 device unlike depositions and unlike

19 interrogatories which really produced valuable

20 things that we needed in litigation, and

21 really the burden of looking at the stuff was

22 almost on the person who requested. If I

23 request a warehouse full of documents, the

24 burden is on me.

25 So I am going to be tending to shoot with

1 the rifle rather than a shotgun anyway because
2 it could be -- you could say, "Come see it,
3 Susman. You know, bring your hordes of
4 people." I don't want to go to Detroit to see
5 it. That's the beginning, and so we have not
6 really tried to curb through our rules by
7 limiting the scope, the number of document
8 requests.
9 Now, if one thought -- I have struggled
10 with this a lot because I know Justice Hecht
11 has talked to me about it. You know, we need
12 to do something with document requests. He's
13 talked to me about it frequently, and I have
14 struggled in my own mind.
15 How do you do that? About as close as I
16 could come conceptually, which is a totally
17 new direction for us to go in but would be a
18 way you would go, would be to say that when
19 you make a document request on the other side
20 the other side has an -- the other side can
21 produce it just like currently, or they can
22 give you back what's very similar to what we
23 have on electronic data, essentially an
24 environmental impact statement -- an economic
25 impact statement.

1 "This request is going to cost me,
2 Item 1, to search all of my sales offices
3 nationwide, and it's going to take about a
4 thousand hours of manpower, X amount of money.
5 Request No. 2 is going to cost me" -- in other
6 words, to respond by saying, "I can do it but
7 it's going to be real burdensome, and here's
8 how much it's going to cost you," and then
9 allow the requesting party to somehow pay for
10 the job of going to find the documents.
11 Now, that's about the only concept I have
12 thought of, and it's kind of close to what we
13 do on electronic data right now, where we
14 recognize that it's got to be discoverable and
15 yet you can't just say, "Give it to me
16 willy-nilly" because for the producing party
17 to produce that is a huge burden. So that's
18 kind of the procedure.
19 I don't know of any other procedure, I
20 mean, as long as lawyers are operating in good
21 faith. You know, if somebody just makes a
22 stupid request and a frivolous request, you
23 ought to sanction them, but I could ask you
24 for something. I could say, "I want any
25 correspondence you have regarding this pen,"

1 and if you have a thousand sales offices, that
2 might be a hell of a burden on you.
3 CHAIRMAN SOULES: Let me
4 interrupt. Do we want to spend today talking
5 about this philosophical issue, or how do you
6 want to use your time, Steve?
7 MR. SUSMAN: I would rather go
8 on, but I mean, if anyone has any idea of a
9 rule that ought to be in the discovery rules,
10 I mean, think about it, and let's send them to
11 the subcommittee.
12 HONORABLE DAVID PEEPLES: Luke,
13 we don't want to spend the rest of the day
14 talking about it, but I think it needs to be
15 raised, but I have some question about whether
16 the only place to deal with it is in
17 sanctions. We need to tell lawyers that it is
18 not right just to ask for every damn thing
19 that you can think of, knowing that you can
20 put the other side through a drill and the
21 burden is on them to come in and whittle it
22 down. Now, I just want to raise the question
23 of whether we want to throw all of that on
24 sanctions or whether the rules ought to let
25 people know, you know, you have to carve it

1 down some. I just wanted to raise it because
2 I didn't know when to raise it, but obviously
3 we need to move on.
4 HONORABLE F. SCOTT MCCOWN: By
5 way of moving on and drawing us back to the
6 rules at the same time, just think about this
7 thought: The real problem with overbroad
8 requests is not what's asked for. It's what's
9 compelled by the judge. What's asked for is
10 only a problem in a harsh exclusionary rule
11 regime or in a difficult privilege regime.
12 These rules that we are laying on the
13 table to a large extent solve the exclusionary
14 problems from overbroad requests, solve the
15 privilege assertion problems both from the
16 point of view of having to make prophylactic
17 responses and a simple way to test the
18 privilege. If those two problems are solved,
19 I don't know that broad requests are as much
20 of the difficulty.
21 HONORABLE DAVID PEEPLES: If.
22 That's a big "if," and I hope you're right,
23 Scott, but I am not as confident about that.
24 MR. SUSMAN: David, let me just
25 suggest that if you have the inclination to

1 draft up something, I mean, we would be glad
2 to entertain it. Anyone that has anything,
3 please send it to us. This is a very
4 difficult problem of what you do to limit the
5 cost of responding to a request for production
6 of documents without really allowing someone
7 to hide things that are relevant.
8 CHAIRMAN SOULES: Tommy Jacks.
9 MR. JACKS: I don't want to
10 belabor this, but let me say that I think the
11 practice that exists now, at least in 99
12 percent of my cases, works pretty well; and
13 that is, sure, the original requests are broad
14 because the requesting party is having to
15 shoot in the dark. You don't know the
16 circumstances of the other side by and large,
17 and you're afraid to narrow your request too
18 much because then the responding party, you
19 know, parses each word as narrowly as they can
20 and concludes they don't have to produce
21 anything because you didn't word it in the
22 right way, but what happens is that good
23 lawyers get together and they work it out, and
24 they narrow things down to practical.
25 MR. SUSMAN: Let me point out

1 also that --

2 CHAIRMAN SOULES: Time out.

3 Let me tell you something here that the chair

4 feels pretty strongly about and then we can

5 spend as long as we want to talking about

6 this. We have got to get these discovery

7 rules to the court. We have got nothing on

8 the table for sanctions right now. We have

9 got appellate and we have got the charge rules

10 out there.

11 We got maybe 25 percent of the way

12 through the discovery rules yesterday

13 afternoon and today. We either have got to

14 focus on getting these discovery rules out, or

15 we are going to be holding every other month

16 meetings in 1996 as well as 1995. We don't

17 have very many more meetings. So now,

18 everybody that wants to talk hold up your hand

19 and tell me what you want to talk about, and

20 when we get done with that we will get back to

21 Steve.

22 MR. JACKS: If I can finish

23 what I was going to say --

24 CHAIRMAN SOULES: Okay. Tommy

25 Jacks.

1 MR. JACKS: And I will make it
2 brief. All I would suggest is that if there
3 is a practical way of putting in the rule what
4 good lawyers are doing already, and that is to
5 make it permissible post-request for the
6 parties to agree upon a narrowed request, I
7 think that's a real sensible approach. You
8 know, under our rules now if people really
9 were doing it by the book and I have sent out
10 a broad request, they could object, get it
11 sustained, and then we would start the whole
12 process over, but we don't do that. We agree
13 that you can read my request a different way
14 to be narrower, and they respond to that, and
15 it's done informally, and if that process can
16 be concentrated somehow or blessed, well, it
17 might make some sense.
18 CHAIRMAN SOULES: Okay. Go
19 around the table. Anybody else have anything
20 you want to say before we go to Rule 7,
21 paragraph (2)(b)? Okay. Let's talk about
22 Rule 7, paragraph (2)(b). Any comments about
23 that?
24 MR. SUSMAN: There were no
25 real -- no. In this rule there were no real

1 changes.

2 CHAIRMAN SOULES: Okay. I'm

3 sorry. I didn't see your hand, Harriet.

4 MS. MIERS: I just wanted to

5 ask Steve a question in light of an earlier

6 remark he made and certainly in my own

7 experience. Steve, this 15 days is pretty

8 absolute, and it seems to me in some cases

9 that are huge document cases you are going to

10 have to start preparing your privilege log

11 without having received the request to do so

12 because, you know, 15 days isn't going to be

13 enough, and you have three paralegals working

14 on a privilege log. So this 15 days is sort

15 of absolute as it is currently written. So is

16 there --

17 MR. SUSMAN: I would respond to

18 that that we know it can be tight. I would

19 say this for sure. In most cases, certainly

20 in most cases I am in, I mean, you can

21 anticipate when you are going to get a

22 request. That doesn't exactly come out of the

23 blue that you are going to -- and you know you

24 have got to -- as the documents are identified

25 during the collection period is the time to

1 make your log rather than waiting until the
2 end. We think it can be complied with, and
3 because we have limited this discovery period
4 to nine months, we just think we have got to
5 compress some of these tasks so we can get it
6 done.
7 CHAIRMAN SOULES: Well, and
8 also everything can be changed by court order
9 or by agreement.
10 MR. SUSMAN: Right.
11 CHAIRMAN SOULES: The 15 days
12 is not something the judge can't move or the
13 parties can't move by agreement. I don't know
14 if that helps. Carl Hamilton.
15 MR. HAMILTON: What happens
16 when the party responding says, "I claim all
17 my privileges. Here is a room full of
18 documents. I am not going to go through them
19 all and list all the privileged documents that
20 I am claiming, but I am still claiming my
21 privilege"? Is it waived if they don't
22 provide the description of the material
23 withheld?
24 MR. SUSMAN: Well, are you
25 going to show it to me?

1 MR. HAMILTON: Yeah. I am
2 going to show it to you. I am going to let
3 you look through this room full of documents,
4 but when you come to anything that I think is
5 privileged I am going to take it back from you
6 and not give it to you.
7 CHAIRMAN SOULES: Who wants to
8 respond?
9 MR. GOLD: It's gone.
10 CHAIRMAN SOULES: Who wants to
11 respond to Carl's question?
12 MR. GOLD: It's gone. It's not
13 privileged.
14 CHAIRMAN SOULES: Hold a hand
15 up. Paul Gold.
16 MR. GOLD: The privilege is
17 gone. There is no privilege.
18 MR. HAMILTON: The rule doesn't
19 say that it's waived if they don't produce the
20 list.
21 MR. MEADOWS: But if you've
22 seen it.
23 MR. GOLD: But if you see it,
24 it's gone.
25 MR. HAMILTON: Well, I know,

1 but there are some courts that say if you
2 don't produce it intentionally --
3 HONORABLE SARAH DUNCAN: The
4 first sentence says, "A party may preserve a
5 privilege in discovery only in accordance with
6 this section."
7 MR. HAMILTON: Okay. "Only."
8 That's an "only." Well, but that's on section
9 (2). We are talking about section -- we are
10 talking about the descriptive section now.
11 HONORABLE SARAH DUNCAN: Well,
12 that's a part of the section (2).
13 CHAIRMAN SOULES: Well, it is
14 ambiguous, and we need to say "in accordance
15 with this section (2)" so that all of its
16 subparts are swept up. Would that be clearer
17 in your judgment, Carl?
18 MR. HAMILTON: If it applies to
19 all of section (2).
20 CHAIRMAN SOULES: Yes.
21 MR. HAMILTON: If it does.
22 CHAIRMAN SOULES: Okay. Well,
23 let's be sure that it's written so that it's
24 clear that we are talking about the entire
25 section (2) and all of its subparts. Bill

1 Dorsaneo on (2)(b).

2 PROFESSOR DORSANEO: Well, the

3 language here at the end, "will enable other

4 parties to assess the applicability of the

5 privilege," is comparable to language that we

6 have had in various formulations over the

7 years with respect to enabling the requesting

8 party to identify and locate the individual

9 documents, at one point in time picking up a

10 suggestion that was made at the federal level

11 that actually was never part of the federal

12 rules but I believe proposed by John Frank of

13 New Mexico.

14 Now we have language that talks about

15 enabling the party who is making the request

16 to be in essentially the same position as the

17 party who has the documents. This new

18 language, "enable other parties to assess the

19 applicability of the privilege," is a little

20 bit opaque to me. I heard what Professor

21 Albright said about what kind of information

22 needs to be provided, individual documents or

23 categories of documents. This needs to be

24 tightened up and made relatively clear with

25 respect to what the responsibility is because

1 we don't want to have a rule that doesn't
2 explain to counsel what kind of a log or
3 identification is satisfactory.
4 CHAIRMAN SOULES: Judge
5 Brister.
6 HONORABLE SCOTT BRISTER: Yeah.
7 I agree with that, that the expensive part of
8 the logs is listing each and every document,
9 but if you mean by -- we call them Peeples'
10 logs in Houston in honor of David, but we have
11 to have Bates stamp numbered, date, author,
12 label it on each one for hundreds of stacks,
13 and that's very expensive.
14 HONORABLE DAVID PEEPLES: Good
15 name of them.
16 HONORABLE SCOTT BRISTER: On
17 the other hand, if you could put "trial
18 counsel litigation file" or "correspondence
19 with attorney-client," you ought to make that
20 clear because I think that will be a lot less
21 resistent.
22 MR. SUSMAN: Well, we don't --
23 CHAIRMAN SOULES: Steve Susman.
24 MR. SUSMAN: Insofar as trial
25 counsel's preparation file, it never has to

1 be -- under paragraph (c) we exempt that. So
2 you don't have to worry about that.
3 HONORABLE SCOTT BRISTER:
4 That's one other question I had. What else is
5 going to be in (a) and (b) if nothing --
6 neither withholding statements nor
7 descriptions apply to attorney-client or work
8 product?
9 PROFESSOR ALBRIGHT: Party
10 communication.
11 CHAIRMAN SOULES: (C) is only
12 trial counsel's --
13 MR. SUSMAN: Preparation.
14 CHAIRMAN SOULES: -- trial file.
15 MR. SUSMAN: And preparation.
16 HONORABLE SCOTT BRISTER:
17 That's not what it says.
18 CHAIRMAN SOULES: Well, okay.
19 MR. ORSINGER: Let's debate
20 that in a minute.
21 CHAIRMAN SOULES: Yeah. We are
22 going to be getting to (c) unless we need to
23 do it in connection with (b).
24 HONORABLE SCOTT BRISTER: Yeah.
25 I am just trying to -- I don't -- when I read

1 (c) I don't understand what (a) and (b) are
2 talking about, what the concern is, if none of
3 this -- if all of this is just but don't worry
4 about any attorney-client or work product
5 stuff or none of that is being covered by this
6 rule.
7 CHAIRMAN SOULES: Okay. Assume
8 that (c) is talking about trial counsel's
9 trial file, and if it doesn't do that, we are
10 going to make it do that. Okay. So working
11 with that assumption as to the meaning of (c),
12 let's talk about (b).
13 PROFESSOR DORSANEO: In fact,
14 the more I look at (b) I don't know how you do
15 that. I don't know how you assess the
16 applicability of the privilege without looking
17 at the thing.
18 MR. SUSMAN: My point is that
19 what we really want is a privilege log.
20 Lawyers are doing that all the time today, and
21 we don't have any dispute about what they all
22 look like. It's not creating any problem for
23 lawyers. I don't understand what the real
24 problem is, and I can work it out with
25 opposing counsel in almost every case because

1 if I am going to make them list every
2 document, they are going to make me do it.
3 The expense is reciprocal, and we know what we
4 have got to do. "Letter from Luke Soules to
5 Joe Blow, general counsel, dated so-and-so" is
6 a privilege.
7 HONORABLE SCOTT BRISTER: Yeah.
8 They are doing it on your cases, but not on
9 car wrecks and slip and falls, which this is
10 going to apply to. Those people don't do
11 privilege logs ever.
12 CHAIRMAN SOULES: David.
13 MR. KELTNER: Yeah. I think
14 that's the point. I think we ought to make
15 this fairly broad because the kind of suit is
16 going to make a difference. In 95 -- well, I
17 won't go that far because family law is
18 documentary, but other than family law cases
19 in 95 percent this ain't going to be an issue.
20 It's going to be done on interrogatories, and
21 the truth of the matter is only in extensive
22 and cutting edge litigation are documents that
23 important anymore, and when they are, they are
24 very important.
25 But nonetheless, when you look at this

1 rule, so far almost everything we are talking
2 about has to do with documents and documentary
3 information from computers. The truth of the
4 matter is this ought to be broad and let the
5 trial judge do it. There may be a time where
6 you have to have a privilege log, but I hope
7 it's not every case because if it is, the
8 expensive litigation will have increased
9 dramatically, and I thought that's one thing
10 we didn't want to do.
11 HONORABLE F. SCOTT MCCOWN: And
12 to follow up on that, it seems to me every
13 problem in every case will seek its own level.
14 So if you have got a tiny case and what you
15 are withholding is your file, you are going to
16 write back and say, "I am withholding my
17 attorney file," and that's going to be the end
18 of it.
19 If you have got a big case where you have
20 got critical documents then the other party is
21 going to engage you in some dialogue for
22 something that looks more like an extensive
23 privilege log, but every case, every problem,
24 is going to pretty much seek its own level as
25 counsel work it out. But keep in mind that so

1 what if you can't work it out, that what you
2 submit to them they are not happy with in the
3 adequacy of the description, what happens?
4 What happens is that you gather up the
5 specific documents; you take them to the
6 judge; and you have an in camera inspection.
7 That's the test.
8 And so you really don't have any
9 practical problem if they are not happy with
10 your description. Their leverage on you is
11 you don't want to go to the expense of an in
12 camera inspection so you are going to work
13 reasonably hard to get it described and
14 satisfy them, and your leverage on them is
15 they don't want to go to that trouble either.
16 MR. SUSMAN: Would it fix it by
17 putting in "enable the other parties to
18 determine the need for a hearing" or something
19 like that? That's basically what you are
20 doing. I think Bill is right. You can't
21 assess the privilege necessarily by seeing one
22 of these descriptions, but isn't that really
23 what we are saying? Would that solve the
24 problem sufficiently, to describe it
25 sufficiently to enable the other parties to

1 assess whether they need a hearing pursuant to
2 paragraph section (3)?
3 CHAIRMAN SOULES: Well, the
4 individual that assesses the applicability of
5 the privilege is the judge.
6 MR. SUSMAN: No, no. The point
7 we are --
8 CHAIRMAN SOULES: I understand,
9 but what we are talking about here is enough
10 information to enable the requesting party to
11 challenge the privilege.
12 MR. KELTNER: Or identify the
13 withheld information.
14 PROFESSOR DORSANEO: It's the
15 understanding challenge is the claim of
16 privilege.
17 CHAIRMAN SOULES: And to do
18 that, to make the claim of privilege, are we
19 changing the law that to make the claim of
20 privilege you have to articulate the elements
21 of your privilege claim and the basis of your
22 privilege claim, or can you just now say
23 "attorney-client," and that's it?
24 And if we are still going to require that
25 the party claim a privilege or articulate the

1 basis of a privilege then that's what ought to
2 be done in the withholding statement. "I am
3 withholding this because it is a letter from
4 general counsel to management giving legal
5 advice," and then we are requiring the party
6 to articulate the basis of the claim or
7 privilege and then the judge -- first of all,
8 the requesting party can look at it and decide
9 whether or not they think it's probably right,
10 and if they decide to challenge it then the
11 withholding statement would be the predicate
12 for the judge deciding whether or not to
13 sustain the privilege.
14 MR. SUSMAN: I mean, in
15 practice, Luke, the way you'd do it -- I mean,
16 on a privilege log the way I'd do it is in
17 practice you look through this log of 20
18 pages, and you highlight what strikes you as
19 being questionable, maybe one highlighting
20 every page because it's clearly -- a document
21 from you to general counsel, I don't care what
22 you say. I am not going to challenge that.
23 That's clearly privileged, but if it's you to
24 general counsel with six copies to other
25 people or other people's lawyers, I might

1 challenge that, or if I can't recognize the
2 name of a lawyer, is really what you are
3 trying to do is provide the other lawyer
4 enough information to determine what is it
5 worth asking you to bring to court to fight
6 about and show the court in camera and make a
7 stink about.
8 CHAIRMAN SOULES: But to do
9 that --
10 MR. SUSMAN: And on those three
11 documents or six then I would want you to be
12 very specific about who it is, why you claim
13 this is privileged, what does it involve, et
14 cetera, et cetera. Some of them I am not even
15 going to have any question. On their face
16 just knowing it's Luke to a general counsel,
17 forget it, I am not going to argue about that.
18 You don't have to tell me what's in it. I
19 don't even care about the date it's written.
20 I guess that's the kind of process.
21 CHAIRMAN SOULES: Well, that
22 won't work because there has to be some
23 standard information.
24 HONORABLE F. SCOTT MCCOWN:
25 That's in part (3). This withholding

1 statement is a formal -- it formalizes the
2 process Tommy was talking about earlier. We
3 have formalized what counsel now do
4 informally, which is work out whether they
5 really want to look at this stuff. If they
6 say, "We want to test the privilege," then in
7 part (3) we set out the process that at or
8 before the hearing the party seeking to avoid
9 discovery has to produce the evidence
10 necessary to support the objection or
11 withholding statement, and he either does that
12 by affidavit served seven days before the
13 hearing, or he does it with live testimony at
14 the hearing.
15 So the establishment of the privilege for
16 the judge to test is done by this hearing
17 process. The withholding statement is a step
18 between the lawyers, and it's going to be
19 based on a level of reasonableness,
20 specificity, and trust for them to decide do
21 we want to go to the next step and test this
22 privilege, or are we satisfied that this is
23 privileged stuff that we don't need to see?
24 CHAIRMAN SOULES: But let me
25 ask -- maybe I can put it more directly. Is

1 the withholding statement the pleading on
2 which the claim of privilege will be tested?
3 MR. SUSMAN: Never.
4 CHAIRMAN SOULES: I thought it
5 was.
6 MR. SUSMAN: The withholding
7 statement is simply a notifying the other
8 person. I am withholding documents --
9 PROFESSOR DORSANEO: It's a
10 description.
11 MR. SUSMAN: -- on the ground
12 of attorney -- no, no, no. That's not.
13 PROFESSOR DORSANEO: No. I
14 mean, the description is the thing that you
15 are going to use to challenge it.
16 MR. SUSMAN: That's right.
17 (B), the next step of that, I'll tell you,
18 it's just that --
19 CHAIRMAN SOULES: Okay.
20 MR. SUSMAN: The idea that we
21 are formalizing what's an informal process.
22 The next step is I tell the other side, "Okay.
23 Now, tell me what it is" --
24 CHAIRMAN SOULES: Okay. I
25 asked the wrong question. I asked the wrong

1 question. Is the description the pleading on
2 which the claim of privilege is going to be
3 tested?
4 MR. SUSMAN: No.
5 HONORABLE F. SCOTT MCCOWN: Not
6 by itself.
7 MR. SUSMAN: It's only --
8 CHAIRMAN SOULES: The pleading?
9 MR. SUSMAN: No.
10 HONORABLE F. SCOTT MCCOWN: It
11 identifies the privilege. It identifies the
12 documents withheld under the privilege, but
13 the elements of the privilege are established
14 at the hearing that's held in subdivision (3).
15 CHAIRMAN SOULES: And you don't
16 have to assert the elements of the privilege
17 in the description?
18 HONORABLE F. SCOTT MCCOWN: No.
19 MR. SUSMAN: I guess one of the
20 questions is suppose you assert the wrong
21 privilege. I mean, suppose you have the
22 description statement that says I am
23 withholding this letter on the ground of work
24 product. Am I free then at the hearing to
25 change grounds and say, "Well, no, this is

1 attorney-client"? I mean, I don't know
2 whether we dealt with that.
3 CHAIRMAN SOULES: If it's from
4 me to general counsel do I have to say no
5 copies were sent to outsiders?
6 MR. SUSMAN: No.
7 MR. KELTNER: I hope not.
8 MR. SUSMAN: No.
9 CHAIRMAN SOULES: That I didn't
10 send out copies to outsiders.
11 MR. KELTNER: That's right, and
12 I would say that the thing I would worry about
13 here is getting to that step before we have
14 to. I think it ought to be a -- in a
15 withholding statement it ought to be a
16 statement generally of the information that's
17 being withheld.
18 CHAIRMAN SOULES: Now, I am
19 talking about the description. We are over on
20 (b).
21 MR. KELTNER: Yeah. And that
22 is what I am talking about as well.
23 CHAIRMAN SOULES: You said
24 "withholding statement." We are
25 differentiating between those two.

1 MR. KELTNER: I'm sorry. I
2 meant the description. I think it needs to be
3 broad, but I don't think -- Luke, in answer to
4 the question you asked just a second ago, I
5 don't think we anticipated that you would have
6 to demonstrate every aspect of the privilege
7 at that stage. You would just be labeling
8 what it was in the withholding statement.
9 Then you get to the description, and you're
10 saying, "Here's what's withheld," and the
11 other side gets to make a determination of
12 whether that's important to them or not. If
13 it is, then you go to the hearing and you have
14 to prove the privilege.
15 CHAIRMAN SOULES: If I don't
16 disclose that I sent no copies of my letter to
17 general counsel to outsiders, how does my
18 opponent assess the applicability of the
19 privilege?
20 MR. KELTNER: Luke, that's the
21 problem.
22 MR. GOLD: Luke, can I address
23 that?
24 CHAIRMAN SOULES: Good. That's
25 what I have been trying to do. David Beck.

1 MR. BECK: Yeah. I'm sure
2 there are very good conceptual reasons why we
3 are using different terms like "withholding
4 statements" that our lawyers have never dealt
5 with before, but I want to make sure I
6 understand. Is the withholding statement the
7 functional equivalent of the privileged
8 document log?
9 MR. SUSMAN: No.
10 MR. BECK: All right. I think
11 that's important that that's been made very,
12 very clear, and the only point I would make is
13 there is a body of law out there which tells
14 us which should be and need not be in a
15 privilege log, and is it the intent of this
16 rule, Steve, that, for example, I can send you
17 a withholding statement that says I am
18 withholding 38 documents that represent
19 correspondence between in-house counsel from
20 XYZ Company to four individuals? Is that
21 sufficient or not?
22 MR. SUSMAN: Absolutely
23 sufficient and maybe more than you need to do.
24 I think it's more than you need to do.
25 CHAIRMAN SOULES: Even though

1 he doesn't say who the individuals are or
2 whether they have any connection to XYZ?
3 MR. SUSMAN: All he needs to do
4 is tell me, "I am withholding documents on the
5 ground of attorney-client privilege." Okay.
6 That's all you need to -- that's simple. It
7 protects your privilege.
8 Now, it's up to me to ask you, "What is
9 it you are withholding, David?" If I don't
10 care, I may trust David. It may be a case not
11 worth fighting about, a small case, but if
12 it's a big case, I might say, "David, tell me
13 what it is you are withholding."
14 MR. LATTING: Would you trust
15 him then, if it's a big case?
16 MR. SUSMAN: Now, it is your
17 time to get into (b), subdivision (b),
18 descriptions. That is what we had in mind,
19 kind of like a privilege log, but Scott says,
20 you know, it should be -- what we really mean
21 is tell me enough information about what it is
22 you have withheld so I know whether it's worth
23 taking you to court on a motion to compel and
24 fighting -- what we are going to fight over.
25 MR. BECK: Is the subdivision

1 (b) requirement, the description, is that the
2 functional equivalent of the privileged
3 document log?
4 MR. SUSMAN: Yes, it is. It
5 is, but I think we got -- we want to make
6 clear that not in every case would you have to
7 do a complete privilege log. It's kind of a
8 function of giving the guy enough information
9 to know whether you need to go to court. Now,
10 if I say I want to take you to court, at that
11 time the burden is on you, and you have got to
12 then file your pleadings saying which
13 documents it is, identifying them, offering to
14 produce them in camera, et cetera, et cetera,
15 whatever it is. But that's the process. It's
16 a three-step process.
17 CHAIRMAN SOULES: The bottom
18 line is I don't have enough information to
19 really know whether to challenge your
20 privilege until I set a hearing and cause you
21 to file hearing papers. Because until that
22 time I don't know whether other people have
23 got copies of this or not, outsiders have got
24 copies of this or not.
25 MR. GOLD: You are not going to

1 know then either, because even if they file
2 their pleading there is nothing in that
3 pleading unless you have asserted waiver
4 causing that switching the burden to them to
5 have to show there hasn't been voluntary
6 waiver, there is not going to be any
7 obligation on them in the pleading to negate
8 waiver. All they have to do is establish the
9 privilege.
10 CHAIRMAN SOULES: Okay. Well,
11 I know how to do that, and I am doing it.
12 MR. GOLD: The first time you
13 are going to be able to challenge that is at
14 the hearing, or you can do it in a responsive
15 pleading.
16 CHAIRMAN SOULES: Right. So I
17 have got to go one step further. I have got
18 to also assert waiver, and now, that I have
19 asserted waiver --
20 MR. GOLD: Then it's on him.
21 CHAIRMAN SOULES: Then I'm
22 finally down through all of this to hearing
23 where I claim waiver, and I finally get the
24 information that it wasn't sent to any
25 outsider. That's the first time I could find

1 it out.

2 MR. GOLD: As I understand the
3 rule, yes, and it may not be great, but it's
4 better than what we have got right now.

5 CHAIRMAN SOULES: Judge
6 Brister.

7 HONORABLE SCOTT BRISTER: I
8 would interpret that differently. In my court
9 if you are supposed to tell them in the
10 description in a manner that will enable them
11 to assess the applicability of the privilege,
12 and you have got ten attorney-client letters,
13 nine of which was just between the attorney
14 and the client and the tenth was circulated to
15 the Houston Chronicle as well, and I find that
16 you did not tell in your description, "Oh, by
17 the way, and one of those ten was circulated
18 to the Houston Chronicle," I am going to
19 sanction you because you did not -- you
20 knowingly did not give the information to
21 enable the party to assess the applicability
22 of the information.

23 You knew that was a waiver, and you knew
24 if you disclosed it to them they would allege
25 waiver, and you intentionally did not tell

1 them in your description that it was
2 circulated and shown a carbon copy to the
3 Houston Chronicle, and that would be
4 sanctionable, and you have to include that.
5 So I would interpret it differently and say,
6 no, that's part of the thing that you have to
7 do, and I like the idea of putting it broad
8 like that and letting cases find their own
9 level.
10 MR. SUSMAN: I would agree with
11 that. I mean I think --
12 CHAIRMAN SOULES: Wait just a
13 minute. We have got hands up. Alex.
14 PROFESSOR ALBRIGHT: You-all
15 have been talking about pleadings for the
16 hearing. There is no requirement that any
17 additional pleadings be filed before the
18 hearing. I would -- you know, you are going
19 to have your privilege log or your description
20 and then somebody is going to set a hearing on
21 the objections, either the party that wants
22 the documents produced or the party that wants
23 to protect the documents.
24 CHAIRMAN SOULES: There is not
25 an objection.

1 HONORABLE F. SCOTT MCCOWN:
2 There is not an objection.
3 PROFESSOR ALBRIGHT: I mean,
4 not an objection. There is either going to be
5 a hearing to test the statement of
6 privilege -- somebody is going to set a
7 hearing to test the statement of privilege.
8 CHAIRMAN SOULES: And that
9 statement is made in some pleading on file.
10 PROFESSOR ALBRIGHT: And that
11 statement is made, one, in the withholding
12 statement, and two, in the description. So I
13 think that hearing is going to be based upon,
14 one, what you stated in your withholding
15 statement, and two, what you stated in your
16 description, and then three, at the hearing
17 you may have additional evidence and the in
18 camera inspection of the document itself, but
19 you-all were saying something about additional
20 pleadings, and there is no requirement for
21 additional pleadings where you have to set out
22 your privilege again.
23 CHAIRMAN SOULES: Well, some of
24 the draftsmen said that neither the
25 withholding statement nor the description were

1 going to be the pleading on which a hearing
2 would be based. So what is that pleading?
3 HONORABLE F. SCOTT MCCOWN: If
4 I could address that --
5 CHAIRMAN SOULES: Judge McCown.
6 HONORABLE F. SCOTT MCCOWN:
7 Okay. I think where the confusion is, that it
8 takes all three in the final analysis, that
9 you make a withholding statement. If you
10 don't make a withholding statement, you don't
11 preserve a privilege, but you make a
12 withholding statement. A withholding
13 statement merely says what privilege you are
14 asserting. You have to say what privilege you
15 are asserting, but the failure to say more is
16 not waiver at that point.
17 Then the other side wants to put you to a
18 test, and they ask you for a description. At
19 that point you have to provide a description,
20 and the inadequacy of that description as it
21 were isn't going to work a waiver. The
22 purpose of the description is merely to allow
23 the other side to make a decision about
24 whether they want to set your privilege for
25 hearing or whether they don't want to set your

1 privilege for hearing, and that's what I meant
2 by every problem in every case will seek its
3 own level.
4 The lawyer will take that description,
5 will consider the lawyer that's giving it to
6 him, will consider the case, and make a
7 decision about whether it's -- he ought to set
8 a hearing or he ought to just let it go. If
9 he decides to set a hearing then at the
10 hearing you are going to have to prove the
11 privilege. You will still have the burden of
12 proving the privilege. If you can't prove the
13 privilege then it's not there, and you will be
14 ordered to compel production.
15 If you do prove the privilege then it's
16 privileged, and so I think where we are
17 getting off track is this middle step of the
18 description and how adequate or inadequate
19 that has to be, and I think what we have done
20 is just leave it broad, let the lawyers work
21 it out because the ultimate test if you are
22 not satisfied that you are passing by things
23 you don't really need then the ultimate test
24 is to set it for a hearing and make them prove
25 the elements of the privilege, submit the

1 documents for in camera if you want the judge
2 to look at them.
3 CHAIRMAN SOULES: Okay. Well,
4 this language, "other parties to assess the
5 applicability of the privilege," is what's in
6 the Federal Rule 26. So I suppose if we use
7 that, we will be developing a parallel --
8 PROFESSOR DORSANEO:
9 Mr. Chairman?
10 CHAIRMAN SOULES: -- body of
11 law on that, but -- Bill Dorsaneo.
12 PROFESSOR DORSANEO: Well, I
13 think each case should seek its own level in
14 the process that you described, but in our
15 precedent now I perceive that there is a split
16 of authority with respect to this question
17 that we are talking about. It comes up in the
18 context of how specific you need to be in
19 making objections now.
20 I think Green vs. Lerner says you don't
21 need to identify the documents, the individual
22 documents, but I think that Hyundai case out
23 of Dallas says the opposite. So expecting the
24 courts of appeals to, you know, look to cases
25 they have decided already, we might have

1 different consequences for trial court
2 behavior on the basis of geography that would
3 not advance the ball any and would not achieve
4 your objective.
5 I think with respect to this description
6 of withheld materials that we might do well to
7 follow the federal rule in its entirety. It
8 has the "assess the applicability of the
9 privilege" language, but it also has a bit
10 more information about what you would need to
11 say in or what you will be required to say and
12 permitted to say in your description, and it
13 captures, I think, what the committee is
14 saying the right approach should be explicitly
15 while at the same time making us parallel the
16 other system, and I think there is some virtue
17 in that as well.
18 HONORABLE F. SCOTT MCCOWN: But
19 let me tell you what -- the only disadvantage
20 I see to that, Bill, is that the minute you
21 require this descriptive statement to meet any
22 standards, all right, and if the penalty for
23 failing to meet the standard is a waiver of
24 the privilege --
25 PROFESSOR DORSANEO: I don't

1 mean that.

2 HONORABLE F. SCOTT MCCOWN:

3 Okay. Well, then we will need to say that

4 that's not the penalty because we don't want

5 to create a step here where the penalty is

6 waiver so you have to be very careful about

7 it, and that means very costly.

8 CHAIRMAN SOULES: What is the

9 penalty for the sharp practitioners who use

10 this to hide information because they don't

11 have to describe it very well, and I can

12 describe it in a way that you probably won't

13 recognize that you have got a valid challenge.

14 What's the penalty for that, judge?

15 HONORABLE F. SCOTT MCCOWN: If

16 I am getting a crumby description from you or

17 a sharp description from you and I have

18 perhaps gotten it before, I set you for a

19 hearing, make you prove it.

20 CHAIRMAN SOULES: And there is

21 no waiver? Is that the intent?

22 HONORABLE F. SCOTT MCCOWN: If

23 you can prove it at the hearing then I never

24 should have gotten it to begin with. If you

25 can't prove it at the hearing, you don't have

1 a privilege.

2 CHAIRMAN SOULES: Isn't this

3 going to encourage people to hide documents?

4 MR. LATTING: But you can't

5 have it both ways. If you don't allow some of

6 that danger to exist then you go back to the

7 old cure, which is worse, which is having to

8 object to everything that comes in so that you

9 don't miss it.

10 CHAIRMAN SOULES: No. I am

11 just talking about how much information has to

12 be in the description before you are -- and if

13 it has to be just rudimentary information then

14 maybe that tends to cause some lawyers to hide

15 information that ought to be discoverable.

16 Okay. Go around the table one more time.

17 Steve Susman.

18 MR. SUSMAN: Can I read the

19 language of the federal rule? I think the

20 point was we could adopt it. When you just

21 say, "The withholding party shall make the

22 claim expressly and shall describe the nature

23 of the documents, communications, or things

24 not produced or disclosed in a manner that

25 without revealing information itself

1 privileged or protected will enable other
2 parties to assess the applicability of the
3 privilege or protection." Something like
4 that. Could we adopt that, and at least we
5 have got the same body of jurisprudence to
6 deal on in an area that seems to be working?
7 Would that satisfy you?
8 CHAIRMAN SOULES: David Beck.
9 MR. BECK: Just two comments.
10 One, I guess we have a policy question here,
11 and I have got a little bit of concern about
12 whether or not the way this rule is presently
13 framed we are going to spawn a whole new level
14 of hearings over whether or not this is
15 adequate or inadequate. You are going to have
16 people that are playing games, which means you
17 are going to have a motion to compel the
18 filing of a more adequate description.
19 So it seems to me the policy question is
20 whether or not we have got to leave it general
21 like it currently exists or you want to add
22 something to the effect that "such description
23 shall include at least" and then have certain
24 specifics in there to avoid people playing
25 games. So I think that's a policy question.

1 CHAIRMAN SOULES: What do you
2 propose on that?
3 MR. BECK: Well, I guess, you
4 know, I have lived under the privileged
5 document log for so long. I mean, we all know
6 what that means. You have got to be very
7 specific, but I guess what I am troubled by is
8 the automobile accident case and those kind of
9 cases that, you know, where you may have a
10 couple of documents. So I guess I am really
11 kind of torn, Luke, and I just want to raise
12 the policy issue by figuring out whether or
13 not we are better off going general or are we
14 better off adding some specifics?
15 MR. JACKS: I would argue -- I
16 agree with David a hundred percent, and I
17 would argue for using the words "privilege
18 log," and I think it does take care of itself
19 because in the car wreck case, I mean, you may
20 have -- you know, say you have got some
21 psychiatric records. The plaintiff wants to
22 claim a privilege. You can -- you have a very
23 short privilege log, you know, "report of
24 Dr. Smith dated such and such about
25 psychiatric condition of the plaintiff,"

1 period.

2 You're a friend of the plaintiff's
3 lawyer, and that's it, and in the document
4 intensive case, the cases that Steve deals
5 with or David deals with, they know what a
6 privilege log looks like in their case, and I
7 don't think you are creating needless cost.
8 You don't have complex privilege logs in car
9 wreck cases or the garden variety divorce
10 cases.

11 CHAIRMAN SOULES: Joe Latting.
12 I'm sorry. Were you through, Tommy? Finish
13 up, please.

14 MR. JACKS: I am through. I
15 mean, I think it's essential that this
16 description be adequate to serve the purposes
17 that you are concerned about, and that is that
18 the other side isn't burying and hiding stuff.
19 I think it has to be complete enough to let
20 the requesting party know whether there is
21 really privileged material there or whether
22 Luke's distinction.

23 CHAIRMAN SOULES: Joe Latting.

24 MR. LATTING: If we want to try
25 to save the people of Texas money we are going

1 to have to make it where we don't have to make
2 many objections. I have got that many
3 objections to make to every document request
4 that's on our word processer because I'm
5 afraid if I don't make them somebody might say
6 I have waived them, and that just costs my
7 clients money. I think if a lawyer is going
8 to try to hide documents, he is going to do so
9 anyway, and I don't think we can have this
10 both ways, and so I hear your concern, and I
11 am concerned about it, too, but I am for the
12 committee version of this because I think we
13 need to get away from making a bunch of
14 prophylactic objections if we are trying to
15 save people money and move discovery along.
16 CHAIRMAN SOULES: David
17 Keltner.
18 MR. KELTNER: I agree that
19 giving a privilege log is a lot of work,
20 David, I will admit. It's going to be the
21 legal assistant welfare act of the 1990s
22 because that's what we are going to be doing
23 in cases that don't justify that, and I think
24 that's where the real expense is, and Joe, I
25 disagree. I'm not sure that it is in making

1 objections. I think it is in terms of doing
2 those things, and I think few cases -- now, I
3 will give you an example. A 50,000-dollar
4 DTPA may be as document intensive as some
5 larger litigation, and all the judges we have
6 talked to, at least on the task force, said
7 that's where they saw the abuse and problems,
8 were those kinds of cases that didn't justify
9 spending huge sums of money. That's why some
10 of the awards of attorneys' fees ended up
11 being so high. I would suggest we leave it
12 more broad and, as Scott says, let every case
13 find its level.
14 MR. LATTING: Well, we are not
15 disagreeing, are we?
16 CHAIRMAN SOULES: Paul Gold.
17 MR. GOLD: David and I have
18 disagreed on this since the task force, and I
19 believe the privilege log is an important part
20 of all of this, and I think that the trade off
21 is we are spending an inordinate amount of
22 time right now arguing at the court level. No
23 one is engaging in the legitimate conferences
24 under Rule 166(b)(7), and this process
25 requires that. You have to identify what the

1 specific documents are that are privileged
2 rather than just taking the lazy way out and
3 saying, "This group of documents over here
4 contains privileged documents."
5 First you have to look at it. They have
6 to make the determination of what the
7 privilege is and then go through a process,
8 and I think that will weed out a lot of
9 frivolous claims of privilege, and I think the
10 recommendation to add the wording from the
11 federal rule to make it more clear what should
12 be in that log should be in there, and I think
13 this complaint about those smaller cases that
14 will froth the cost is unsupportable. I just
15 don't think there are going to be that many
16 documents in those types of cases that will
17 increase the cost. I just don't see it.
18 CHAIRMAN SOULES: Richard
19 Orsinger.
20 MR. ORSINGER: I think it would
21 be a mistake to require a privilege log
22 automatically upon the request of a party. It
23 seems to me that if you are going to require
24 people to individually itemize documents, you
25 should have to show the court that there is

1 enough of a basis to penetrate that claim, to
2 warrant that expense, and then permit the
3 court to make the decision, well, if you want
4 this information bad enough you need to pay
5 for the other side to do the privilege log you
6 want, have them to do an estimate of the cost,
7 and then if it's worth it to you, do it; but I
8 have seen privilege logs be a way for lawyers
9 to inflict expense on the other side,
10 particularly when it's a big law firm against
11 a sole practitioner, which is a situation I
12 frequently find myself in, and I don't think
13 that this is just a legal assistant's job.
14 If a legal assistant screws up on
15 privilege, it's going to be malpractice for
16 the lawyer, and I seriously think that most
17 lawyers are going to do their own privilege
18 logs. They might have a legal assistant go in
19 and yellow tag everything in the file, but the
20 lawyer is still going to have to look at every
21 document, in my view, and we have really
22 raised an automatic procedure here that's
23 going to add a lot of cost to cases when we
24 have the opportunity to get a safeguard from a
25 judge, and say, "I don't think it's worth it"

1 or "If you think it's worth it then you can
2 pay for it." We don't have that under this
3 proposal.
4 CHAIRMAN SOULES: Let me try to
5 get a consensus of those that feel that the
6 more specific language of the federal rule
7 should be in paragraph (c) and those who
8 don't. Those who feel that the more specific
9 language of the federal rule should be -- and
10 I'm sorry, in (b), should be in paragraph (b),
11 show by hands.
12 PROFESSOR ALBRIGHT: Can you
13 read that language again, please?
14 MR. SUSMAN: I will read the
15 language. Our rule would read, "The
16 withholding party shall make the claim
17 expressly and shall describe the nature of the
18 documents, communications, or other things
19 withheld in a manner that without revealing
20 information itself privileged or protected
21 will enable the other parties to assess the
22 applicability of the privilege."
23 PROFESSOR DORSANEO: That's not
24 much different.
25 CHAIRMAN SOULES: Okay. Those

1 who feel like that language should be in
2 paragraph (b) show by hands.
3 HONORABLE F. SCOTT MCCOWN:
4 Could I ask one question before we take that
5 vote? Because when we say that language, when
6 I hear that language, I don't envision a
7 privilege log automatically. I have no
8 problem with that language, but I am wondering
9 if that language brings a body of federal case
10 law that I wouldn't want.
11 CHAIRMAN SOULES: Well, it's
12 since 1993. There is some body of case law
13 out there, I imagine. Since December of '93.
14 MR. SUSMAN: Right.
15 CHAIRMAN SOULES: Okay. Those
16 who favor putting that language into paragraph
17 (b) show by hands. 15. Those opposed? Five.
18 That carries by 15 to 5 that that language
19 will be added into paragraph (b), and with
20 that language those in favor of paragraph (b)
21 show by hands. 22. Those opposed? One.
22 Carries by a vote of 22 to 1.
23 MR. MEADOWS: Luke, I had a
24 question.
25 CHAIRMAN SOULES: Robert

1 Meadows.

2 MR. MEADOWS: The question I
3 have is -- while that language suits me just
4 fine, what does it do to David's question? I
5 mean, it seems to me that the language very
6 much conveys the concept or the point that's
7 in the rule already, which Judge Brister
8 stated, which is that he reads that to say you
9 have got to give this information that David
10 wants. I am just curious as to what we have
11 done by adopting this language.

12 MR. SUSMAN: My response is
13 that we will never finish if we take votes and
14 then ask what we have done.

15 MR. MEADOWS: No. I voted
16 because I like -- I just want to know what we
17 have accomplished.

18 MR. SUSMAN: I don't think we
19 have really done more -- in my mind, you have
20 done nothing more than we already had there,
21 except you have now made it possible to use
22 all federal cases as precedence for our state
23 cases because it's now identical, but in my
24 mind you have done nothing. That was our
25 intent.

1 CHAIRMAN SOULES: There is more
2 words and more definitions, but that's
3 probably what the committee intended anyway on
4 getting. Okay.
5 MR. SUSMAN: (C). (C) is, by
6 the way, something that was voted on and
7 approved on in January with no problem. I
8 don't think we have changed this at all except
9 to just clarify the language a little.
10 Withheld information --
11 HONORABLE SCOTT BRISTER: Yeah.
12 The way it's written -- it's written is
13 either, No. 1, withheld information, or No. 2,
14 materials created by trial counsel in
15 preparation for the litigation which discovery
16 is requesting.
17 MR. SUSMAN: Oh, I'm sorry.
18 That's a mistake. We are dealing with
19 materials created by trial counsel. Okay.
20 That is the thing. So I guess we need to say
21 material -- "information or materials," comma,
22 "created by trial counsel" -- would a comma do
23 it?
24 HONORABLE SCOTT BRISTER: What
25 is "withheld information other than the

1 materials" -- what do you include in there
2 other than materials created by trial counsel?
3 MR. SUSMAN: No, no. "Created
4 by trial counsel" modifies the "withheld
5 information and withheld materials."
6 CHAIRMAN SOULES: But the
7 question, though, is what does "information"
8 add?
9 HONORABLE SCOTT BRISTER: Why
10 not drop the first three words?
11 CHAIRMAN SOULES: To
12 "materials."
13 MR. SUSMAN: Perfect. You're
14 right. "Withheld materials created by." Is
15 that okay?
16 HONORABLE SCOTT BRISTER: Just
17 "materials created by trial counsel." Just
18 start at "materials."
19 CHAIRMAN SOULES: Any objection
20 to that? Okay. We will start with
21 "materials."
22 MR. SUSMAN: Perfect.
23 CHAIRMAN SOULES: Okay. So (c)
24 now reads, "Materials created by trial counsel
25 in preparation for litigation in which the

1 discovery is requested need not be included in
2 a withholding statement or description except
3 upon court order in appropriate
4 circumstances."
5 MR. SUSMAN: Perfect.
6 HONORABLE SCOTT BRISTER: Let
7 me make sure I understand it then. I have got
8 a -- gone out, interviewed all the witnesses
9 to the fire. I don't say anything about that
10 in the objection. I don't say anything about
11 that in the withholding statement, and I don't
12 say anything about that in the description.
13 How are you going to know you need to ask the
14 court to order it to happen?
15 CHAIRMAN SOULES: I think this
16 is talking about some probably very
17 extraordinary circumstance where something
18 pops up along the way through discovery that
19 causes you to believe there has been some kind
20 of an abuse here.
21 HONORABLE SCOTT BRISTER: Well,
22 there is never any dispute about -- in my
23 court about materials created by trial counsel
24 other than the interviews of -- you know, in
25 investigation has gone and asked people who

1 saw the fire, you know.

2 CHAIRMAN SOULES: But in other

3 courts on the fifth floor they sometimes order

4 that the notes of the lawyer be produced

5 because it really only recites fact

6 information.

7 HONORABLE SCOTT BRISTER:

8 That's right.

9 CHAIRMAN SOULES: Okay. Let's

10 go around the table. Bill Dorsaneo.

11 PROFESSOR DORSANEO: Yeah. I

12 hate to be a --

13 CHAIRMAN SOULES: Oh, let's

14 take a break here. Our court reporter needs a

15 break. Let's take about ten minutes.

16 (At this time there was a

17 recess, after which the proceedings continued

18 as follows:)

19 CHAIRMAN SOULES: Okay.

20 Paragraph (c) on page 14. Discussion? Bill

21 Dorsaneo.

22 PROFESSOR DORSANEO: Well, I am

23 not sure how broad or narrow this is meant to

24 be, but if it's meant to be very broad then it

25 should say "materials created by trial counsel

1 need not be included in a withholding
2 statement," leaving out "in preparation for
3 the litigation in which discovery is
4 requested." If it's meant to be narrowed in
5 some sense, I think it ought to be narrowed
6 differently by saying, perhaps, "in
7 preparation for trial," rather than "in
8 preparation for the litigation in which
9 discovery is requested."
10 That at least suggests, to me, that we
11 are talking about a period of time before the
12 litigation is filed, leaving in doubt the
13 meaning of this paragraph after litigation has
14 been filed. Now, if you want to just keep
15 trial counsel -- and I am assuming we could
16 identify at some point who that would be
17 without a big discussion here -- protected, if
18 trial counsel is going to be protected then
19 just protect trial counsel without this
20 limiting language that is ambiguous.
21 MR. SUSMAN: Let me just
22 respond here. No. 1 is the issue here is not
23 whether we are protecting or not protecting
24 obviously. The issue here is whether it's got
25 to be identified.

1 PROFESSOR DORSANEO: Right.
2 MR. SUSMAN: Okay. I mean, we
3 have not dealt with the privilege issue.
4 That's for another day. This is a little
5 different. You would say, "materials created
6 by trial counsel in preparation for trial"?
7 PROFESSOR DORSANEO: If it's
8 going to be limited to the stuff he's doing
9 for trial, do it that way. If it's not going
10 to be limited then don't limit it because we
11 would assume that somebody wouldn't be
12 interested in, you know, if I'm trial counsel
13 what I am preparing for my kid's baseball
14 game.
15 CHAIRMAN SOULES: So, Bill,
16 you're saying if we are going to limit this,
17 what?
18 PROFESSOR DORSANEO: If you are
19 going to limit it, use the standard language
20 "in preparation for trial," and the trial
21 preparation materials are thought of as being
22 in two categories, materials prepared in
23 anticipation of litigation or in preparation
24 for trial. Now, anticipation of litigation is
25 one period of time, and preparation for trial

1 is a later period of time, although it could
2 look backwards.
3 I could start preparing something for
4 trial, although it's not likely that I would,
5 okay, for use at trial, you know, before the
6 case was filed. Okay. But if we are talking
7 about stuff that I am preparing for the trial
8 process, my exhibits, my materials of that
9 type, let's talk about that. If we are
10 talking about everything, just talk about
11 everything. Just say everything, materials
12 prepared by trial counsel.
13 MR. SUSMAN: I think we
14 were -- I mean, I'm not sure. If I get a case
15 in the office and I am representing the
16 defendant and when I get the complaint, the
17 petition, I have an associate do a legal
18 memorandum evaluating the strengths and
19 weaknesses of the plaintiff's petition and
20 suggesting kind of a discovery game plan, now,
21 is that -- I mean, that will be something that
22 certainly we don't want the lawyers to have to
23 go to the trouble of identifying.
24 PROFESSOR DORSANEO: Right.
25 MR. SUSMAN: I'm worried about

1 saying that's just in preparation. If it's
2 only the materials in preparation for trial
3 that I can avoid listing, I'd want to include
4 that. So I think use of the word "for trial"
5 is too narrow.
6 MR. ORSINGER: What about
7 mediation? Mediation is the same problem,
8 preparation for mediation. Is that excluded
9 from --
10 MR. SUSMAN: I don't know why
11 the current language doesn't cover it.
12 "Materials created by trial counsel," that's
13 me or my firm, "in preparation for the
14 litigation." That's part -- mediation is part
15 of that process.
16 PROFESSOR DORSANEO: Why not
17 use standard language that we are familiar
18 with that's in Federal Rule 26(b) and has
19 been? I'm about to check myself to make sure
20 it hasn't been adjusted in any way by the 1993
21 amendments. It's meant to be broad. Just
22 say, "in anticipation of litigation or in
23 preparation for trial," and that is the trial
24 preparation materials standard language, and
25 that way we don't leave anything out that's

1 prepared by trial counsel.

2 MR. SUSMAN: Well, because --

3 go ahead, Alex.

4 CHAIRMAN SOULES: Alex.

5 PROFESSOR ALBRIGHT: The reason

6 we drafted it the way it is because -- I think

7 David Perry is not here today, but he was

8 adamant that he did not want to say everything

9 created by trial counsel in anticipation of

10 the litigation doesn't have to be discussed

11 because he felt like that was too broad. And

12 what Trey Peacock just suggested, which may be

13 the way to do it, is just draw a line that

14 says "from the time the litigation -- the suit

15 was filed," and then that way you say, okay,

16 anything that we did before the suit was filed

17 we do have to go through this statement stuff,

18 but anything afterwards we don't.

19 I think it was intended to be somewhat

20 limited, and then also I think we need to

21 add -- when we deleted "withheld information

22 or," I think we need to say "privileged

23 materials created by trial counsel" because

24 one decision we have made is that we want

25 statements not to be privileged. So if we

1 have a statement that was taken by a lawyer
2 after a suit was filed then it wouldn't have
3 to be identified, or one, it's not privileged
4 and has to be produced. I think we need to
5 modify it by "privileged."
6 MR. SUSMAN: In other words,
7 Alex, are you saying we could use as a bright
8 line the time the suit was filed as being
9 the -- that might be a good idea.
10 MR. MEADOWS: I'm opposed to
11 that.
12 MR. JACKS: I am, too.
13 MR. MEADOWS: Yes. Absolutely
14 opposed to that.
15 MR. SUSMAN: Why is that?
16 MR. MEADOWS: There is an
17 explosion at Shell, and I get called that
18 night to go investigate the accident. I know
19 there is going to be litigation. I mean, I
20 think that what I am doing for my client
21 should be protected, and it should fall within
22 the --
23 PROFESSOR ALBRIGHT: It's
24 protected.
25 HONORABLE SCOTT BRISTER:

1 That's not privileged, just saying whether you
2 have to go into the discussion about whether
3 it's privileged or not.
4 MR. MEADOWS: I understand.
5 And I think it's just as much the character of
6 information as that which you do once the suit
7 is filed. I mean, I don't -- I mean, I don't
8 see any reason to treat that differently.
9 MR. SUSMAN: Well, but it seems
10 to me that one of the problems if you treat
11 it -- I don't know how you do it, but I guess
12 you could, I mean, have a big law firm,
13 Vinson & Elkins, that does corporate work for
14 IBM. IBM gets sued for some kind of fraud or
15 something like that, some kind of tort. You
16 could say that, well, Vinson & Elkins is their
17 trial counsel, although someone in a different
18 department. It's not the same individual, and
19 they did do this work long before any
20 particular lawsuit was filed in preparation
21 for a lawsuit. You get definitional problems,
22 it seems to me there, that maybe we avoid by
23 putting a clear line since we are not talking
24 about what's withheld. We are just talking
25 about what needs to be identified.

1 PROFESSOR ALBRIGHT: And there
2 has to be -- there is going to be fights in
3 some instances as to what is in anticipation
4 of litigation, and you need to get the
5 information on the table to have that fight.
6 MR. SUSMAN: And since we are
7 in -- and let me add another reason to draw
8 the bright line, I think. Since this
9 identification needs to be done in 15 days,
10 which is a very tight time frame, it seems to
11 be very useful to have some category of
12 documents you can tell your legal assistants,
13 "You do not have to put these on a privilege
14 log, period. If it occurred since May 1st,
15 forget about them, and they are in our files,
16 forget about them, but anything prior to May
17 1st, go ahead and list them on the privilege
18 log."
19 It's an easy, bright line, mechanical
20 test it seems to me that will reduce some
21 expense without sacrificing -- not sacrificing
22 any privileges. Wouldn't that work?
23 CHAIRMAN SOULES: Tommy Jacks.
24 MR. JACKS: I really disagree
25 with the idea of making the filing date the

1 bright line. Everything I do for a client
2 from the day they walk into the door is in
3 preparation for their lawsuit as a plaintiff's
4 attorney. I never met these people before,
5 and I have interview notes with the client. I
6 have legal memoranda that my law clerks have
7 prepared or that I have prepared outlining the
8 basis. I have drafts of the petition. I may
9 have some rough drafts of -- I have got a
10 whole file of stuff here, none of which any
11 lawyer could ever make any colorable claim is
12 discoverable, and you are telling me that I am
13 going to have to go through and do a log. I
14 may have corresponded with my client. You
15 know, there is just all kind of stuff, and
16 none of it even remotely discoverable.
17 MR. SUSMAN: I agree.
18 CHAIRMAN SOULES: Okay. Who's
19 next? Alex Albright.
20 PROFESSOR ALBRIGHT: I will
21 withdraw my suggestion then. I thought I was
22 helping you-all. I thought you-all would be
23 the ones who would be complaining about the --
24 MR. JACKS: I don't see that --
25 PROFESSOR ALBRIGHT: -- in

1 anticipation of litigation.

2 CHAIRMAN SOULES: Let Alex

3 finish. What now?

4 PROFESSOR ALBRIGHT: I was

5 trying to express what David Perry was talking

6 about in the committee since he's not here,

7 but if plaintiffs' lawyers aren't worried then

8 I think let's leave it alone.

9 CHAIRMAN SOULES: Okay. Tommy

10 Jacks, clarification.

11 MR. JACKS: I think the

12 addition of the word "privileged" helps a lot

13 because we do have case law which says there

14 is a fairly narrow range of prelitigation work

15 materials of an attorney that may under fairly

16 rare circumstances become discoverable,

17 essentially following the federal approach to

18 the discovery of prelitigation investigation

19 where there is no other way to get the

20 information.

21 And we know that stuff is not privileged,

22 and adding the word "privileged" -- and then I

23 think adding the comment saying that we put

24 the word "privileged" because we know there

25 are some things that may be in a lawyer's file

1 that aren't privileged such as witness
2 statements and such as certain prelitigation
3 investigation materials, see such-and-such
4 case, and there we have pretty well laid out
5 what we are doing, but we are not making
6 lawyers do needless work to list stuff in
7 their files which everybody knows is not
8 discoverable.
9 CHAIRMAN SOULES: Okay. The
10 language, where would you put it?
11 MR. SUSMAN: "Privileged
12 materials."
13 CHAIRMAN SOULES: Where?
14 MR. SUSMAN: Right at the
15 beginning of the sentence. "Privileged
16 materials created by trial counsel in
17 preparation for the litigation in which the
18 discovery is requested."
19 PROFESSOR DORSANEO: If you put
20 "privileged," you don't need to say "in
21 preparation for the litigation in which
22 discovery is requested" because you have
23 got -- "privileged" covers whatever it covers.
24 PROFESSOR ALBRIGHT: Right.
25 Uh-huh.

1 PROFESSOR DORSANEO: And you
2 don't need this separate, limiting or
3 different language from whatever the privilege
4 thing is.
5 HONORABLE SCOTT BRISTER: Then
6 you just wiped out everything you are doing.
7 You don't even disclose or withhold privileged
8 information. You don't mention it.
9 PROFESSOR ALBRIGHT: Only that
10 created by trial counsel.
11 CHAIRMAN SOULES: Well, the
12 suggestion is, as I am understanding it, is
13 that we say, "privileged materials created by
14 trial counsel." So you would insert
15 "privileged" and then strike "in preparation
16 for the litigation in which the discovery is
17 requested," and then pick up "need not be
18 included" and so forth.
19 MR. GOLD: Luke, can I --
20 CHAIRMAN SOULES: That's what
21 the suggestion is. Paul Gold.
22 MR. GOLD: Can I reply? Just
23 so it's out there for the debate, I think that
24 what we are really interested in protecting is
25 the attorney's core work product. The problem

1 I have got with "created" and I think creates
2 a loophole is if the attorney says, "Well, why
3 don't we go out and get witness statements" or
4 "Why don't we go out and do this?" The
5 attorney is technically causing the creation
6 of those things, and I don't want to get into
7 that esoteric argument. I think all we are
8 wanting to protect here are the attorney's
9 mental impressions, the attorney's trial
10 strategies, the attorney's memos. All of that
11 has been defined as core work product, and I
12 think if we said that in here, I think it
13 would clarify things.
14 PROFESSOR DORSANEO: Well, what
15 you are saying is we can't talk about this
16 until we talk about the privilege section
17 because that's going to say "core work
18 product" or something, but it doesn't say
19 anything now.
20 MR. GOLD: I just throw that
21 out. I think that helps clarify a lot.
22 CHAIRMAN SOULES: Carl
23 Hamilton.
24 MR. HAMILTON: We took out that
25 "withheld information." The first part of the

1 rule seems to contemplate the withholdings of
2 both materials and information, but now we are
3 only going to exempt materials from that
4 disclosure. Is that an intended, that we just
5 exempt materials from that disclosure or
6 information also?
7 MR. SUSMAN: No. I am not
8 following -- the intent here, I mean, the
9 intent of this whole provision is to create
10 some category of documents which is so
11 obviously privileged, okay, that you shouldn't
12 even have to go to the trouble of having to
13 list them unless the court orders you to do
14 so. That was our intent, and what we thought
15 about, which no one could have any question
16 about, was what the lawyers who are actually
17 trying the lawsuit do as part -- and Tommy's
18 stuff is included in that, precomplaint
19 investigation or prepetition investigation.
20 Bobby's stuff is included in that
21 obviously, but it seems to me we wanted -- and
22 this does not say what is privileged or not,
23 at all. It doesn't even speak to that
24 subject. It just says if you have got stuff
25 in the trial lawyer's files that he created,

1 you don't have to go to the trouble of
2 identifying that unless the court orders you
3 to do so.
4 CHAIRMAN SOULES: David Beck.
5 MR. SUSMAN: Let me just add
6 one thing to what I was saying.
7 I do not want to eliminate the notion
8 that it has to be trial counsel or it has to
9 be in preparation for litigation because if
10 it's just privileged materials created by
11 counsel in counsel's file, that's a big
12 mistake because there is a lot of times
13 privileged material created by counsel in
14 counsel's file, even the same law firm that
15 ends up trying the lawsuit, that clearly I
16 want to know the existence of.
17 MR. JACKS: It needs to be tied
18 to this case.
19 MR. SUSMAN: Yeah.
20 MR. JACKS: You're right.
21 MR. BECK: That really is the
22 point I am raising here. I know there are
23 good reasons why you limit this to trial
24 counsel, but I want to make sure that we know
25 exactly what we are doing. So the example you

1 gave, Steve, is if somebody else in your firm
2 has done something and they are not trying the
3 lawsuit then that has to be included, right?
4 MR. SUSMAN: Uh-huh.
5 MR. BECK: Does that include
6 also another law firm who initially handled
7 the lawsuit and was fired and then you're
8 trying the lawsuit, so the information created
9 by those lawyers who were initially retained
10 to try the lawsuit could not be -- it would
11 have to be included in the withholding
12 statement or description? Does it include,
13 for example, the work done by in-house counsel
14 who are initially going to be -- who initially
15 were going to try the lawsuit? Do you see
16 what I am saying?
17 CHAIRMAN SOULES: In other
18 words, is trial counsel just the lawyer that
19 winds up being there at the time?
20 MR. BECK: Exactly. If you
21 have two lawyers going over there trying the
22 lawsuit, is this too limited? I mean, the
23 thing I hate more than anything else is
24 getting a very broad discovery request which
25 arguably includes stuff in my file which I

1 have created, and I know there are good
2 reasons for limiting this to trial counsel,
3 but I want to make sure we know exactly what
4 we are doing because we are excluding any law
5 firm that had done work like this before trial
6 counsel were actually retained. We are
7 including the work done by in-house counsel
8 which clearly were in preparation for the
9 litigation for which discovery is requested,
10 et cetera. Is that the intent here?
11 CHAIRMAN SOULES: Can we really
12 resolve this until we get to -- is it Rule 4?
13 MR. ORSINGER: I think we can.
14 Sure.
15 MR. SUSMAN: Yes.
16 CHAIRMAN SOULES: Okay. Sarah
17 Duncan.
18 HONORABLE SARAH DUNCAN:
19 Related to what David just said, does trial
20 counsel include appellate counsel who's not
21 going to try the case, never going to show up
22 in the courtroom?
23 PROFESSOR DORSANEO: It should
24 include everybody but house counsel. That's
25 what I was interpreting it to mean. Trial

1 counsel is outside counsel.

2 MR. BECK: Bill, why is that?

3 Because you have got a lot of companies whose

4 lawyers try lawsuits, and what happens in my

5 instance or what happens to me frequently is

6 that you will have a case that is handled by

7 in-house counsel and then maybe three months

8 before trial they decide to farm it out to a

9 private law firm. Well, under this rule as

10 it's presently listed the files or materials

11 created by that lawyer in preparation for

12 litigation would have to be included in a

13 withholding statement or a description given,

14 and is that the intent of this rule?

15 MR. SUSMAN: The intent -- I

16 mean, my intent would be to exempt in-house

17 counsel who's going to prepare the lawsuit,

18 the former counsel who was at one time trial

19 cousel, anyone who is trial counsel, because

20 to me those categories of documents are

21 again -- if they are prepared by someone who

22 is going to try the lawsuit in preparation for

23 trying the lawsuit, they are so obviously

24 privileged that you shouldn't make someone go

25 to the trouble of listing them.

1 What I want to make sure that we don't
2 cover here is the large law firm that is going
3 to try the lawsuit but in the past time was
4 advising the client on a business transaction.
5 Someone in the firm drafted a contract that is
6 very pertinent. You need to know that that
7 contract is in the file. It may be
8 privileged, but it may not be as something
9 prepared by a lawyer.
10 MR. MEADOWS: But, Steve, that
11 document would not have been prepared in
12 preparation for the litigation, and I agree
13 with David's concern, but I also was reading
14 this to mean anyone who ever carried the
15 status of trial counsel. I mean, that can be
16 a mechanic thing.
17 CHAIRMAN SOULES: Alex
18 Albright.
19 PROFESSOR ALBRIGHT: Can I make
20 a motion that we amend this so that (c) reads,
21 "The privileged materials created by counsel
22 in anticipation of litigation or preparation
23 for trial in the litigation in which the
24 discovery is requested need not be included in
25 a withholding statement or description except

1 upon court order in appropriate
2 circumstances."
3 MR. SUSMAN: Second.
4 CHAIRMAN SOULES: Okay. Motion
5 seconded. Discussion?
6 PROFESSOR DORSANEO: Third.
7 MR. ORSINGER: Okay. I would
8 strongly oppose that because the thing that I
9 like about this and what I think is so
10 essential about paragraph (c) is that it does
11 not require anyone ever, unless the court
12 determines in advance, to have to inventory
13 their litigation file or to surrender it to
14 the judge for in camera.
15 The minute you start forcing someone to
16 go through their litigation file and segregate
17 out what's privileged from what's not
18 privileged, all of the sudden they are going
19 to start to have to list all of the letters
20 they received from the opposing lawyer, all of
21 the ancillary information that they received
22 while they were in the case, and here we are
23 back to having to file a description about
24 what's in our litigation file as to those
25 things that are not privileged.

1 To me it's important to say that you
2 can't be put to the automatic requirement of
3 filing a description about your litigation
4 file, that it's going to take a district judge
5 to make you do that; and under your amendment,
6 now all of the sudden we have got to go
7 through and fair out what's privileged from
8 what's not privileged in our litigation file.
9 CHAIRMAN SOULES: Alex
10 Albright.
11 PROFESSOR ALBRIGHT: But in
12 response, if we don't limit it to privileged
13 materials, if we just say "materials created
14 by trial counsel in anticipation of
15 litigation," you don't have to identify. Then
16 that means lawyers can take nonprivileged
17 materials and stick them in their file, and
18 they never have to identify them, or they can
19 claim that they are privileged because they
20 are in the litigation file, which they are not
21 privileged.
22 MR. ORSINGER: No, no. It
23 doesn't say that because it's in your file.
24 It says that it was created by you in
25 connection with the trial or preparation of

1 litigation, and to me that says you can't take
2 a document that previously exists and cloak it
3 just by putting it in your file.
4 MR. SUSMAN: Richard, you are
5 still going to have to check your file because
6 it never has said anything other than -- it's
7 always been limited to something created by a
8 lawyer. If you get something from your
9 client, it's not created by you. If you get
10 something from a third party, it's not created
11 by you. You have got to identify that.
12 So we have always limited it to something
13 created by the lawyer. So that's -- you are
14 going to have to go through your file paper by
15 paper, piece by piece, anyway and make sure
16 that if there is anything in there that you
17 didn't create, it gets up on the log. Now, if
18 we want to make it broader, that's a policy
19 issue, but I don't know how you do it without
20 cloaking the things which clearly are not
21 privileged and clearly should be identified.
22 MR. ORSINGER: Can I ask this,
23 Steve? Do you have to log all of the letters
24 you receive from your client as opposed to the
25 ones you send to your client?

1 MR. SUSMAN: Yes.

2 MR. ORSINGER: If so, why? If

3 the lawyer and client are corresponding about

4 the case, why should we have to log what we

5 receive, letters from our client?

6 CHAIRMAN SOULES: Alex

7 Albright.

8 PROFESSOR ALBRIGHT: We could

9 also broaden it to attorney-client

10 communications concerning the litigation.

11 MR. ORSINGER: That will almost

12 never be discoverable unless there is a fraud

13 exception or a waiver, and I would support

14 that a lot, and I would also support -- what

15 about a memo from a legal assistant to a

16 lawyer? It's not created by the lawyer, but

17 it's created by a representative of the lawyer

18 in connection with the lawsuit. So I would

19 think you shouldn't have to list what your

20 legal assistant did for you as opposed to what

21 your associate attorney did for you. There

22 shouldn't be a distinction in the way they are

23 treated.

24 PROFESSOR ALBRIGHT: Created by

25 counsel. Okay. So we would say, "Privileged

1 materials created by counsel in anticipation
2 of litigation or preparation for trial." So
3 that would be (1), little (1).
4 Little (2) would be attorney-client
5 communications, and then both (1) and (2)
6 would be modified by "in the litigation in
7 which the discovery is requested."
8 MR. ORSINGER: Does that mean
9 then that a legal assistant's work has to be
10 logged?
11 MR. YELENOSKY: No. That's the
12 counsel.
13 PROFESSOR ALBRIGHT: I think
14 created by counsel -- but we could have in a
15 comment that created by counsel means by
16 counsel or at the direction of counsel.
17 MR. GOLD: I think there are
18 cases that discuss the fact that legal
19 assistants, associates, are all considered to
20 be the attorney.
21 MR. ORSINGER: Well, you're
22 cases are great, except that there is not a
23 case that exists on this rule. This rule has
24 never been adopted yet.
25 MR. GOLD: I understand, but I

1 am just talking about what a definition of
2 attorney is.
3 CHAIRMAN SOULES: Well, those
4 cases really derive from the attorney-client
5 privilege rule, which talks about
6 representatives and agents, and it extends --
7 MR. GOLD: And attorney work
8 product decisions.
9 CHAIRMAN SOULES: It extends
10 beyond the lawyer. Pardon me?
11 MR. GOLD: And attorney work
12 product.
13 MR. YELENOSKY: Right. And if
14 your law clerk writes a letter to your client,
15 you consider that under the attorney-client
16 privilege. You don't have to add in there
17 attorney-law clerk privilege.
18 CHAIRMAN SOULES: Judge
19 Peeples.
20 HONORABLE DAVID PEEPLES: I
21 want to focus on the word "created." Lawyers
22 gather information that they don't create, but
23 they gather it, and it seems to me -- and I'd
24 like to hear someone make the case that that
25 kind of information -- it may be research, it

1 may be that I have talked to a lawyer that has
2 a similar case and have gotten a lot of things
3 in my file. Why should I have to log that, if
4 I'm a lawyer?
5 Can somebody make the case? In other
6 words, I am having trouble visualizing what
7 might be in a lawyer's file that he would have
8 to log under this rule here. I mean, why
9 shouldn't everything in my file I not have to
10 log? If it's independently discoverable, of
11 course, it's not sheltered by the fact that it
12 was in my file.
13 PROFESSOR DORSANEO: I don't
14 see how we can finish this until we do the
15 privilege.
16 MR. SUSMAN: Well, I will
17 respond to that. The reason we make you do
18 the log is so you don't cheat. I mean, the
19 reason to make the log is, you know, so it is
20 possible that there were only one document,
21 and it happened to be in your file, clearly
22 not privileged. Okay.
23 HONORABLE DAVID PEEPLES:
24 What's an example?
25 MR. SUSMAN: Huh?

1 HONORABLE DAVID PEEPLES:
2 What's an example of something in my file that
3 you couldn't otherwise get if you described it
4 right in your request for production?
5 MR. SUSMAN: A draft of a
6 contract that existed. There was only one
7 copy of it, and it was handed to the lawyer at
8 the beginning of the litigation and said, "Put
9 this in your file." The client gives it to
10 you and says, "This is something you might
11 find very useful because this is a draft of
12 the contract." You put it in your file. Now,
13 it's not privileged. Okay.
14 HONORABLE DAVID PEEPLES: True.
15 MR. SUSMAN: But the point is I
16 never -- as the opposing party I never even
17 find out you have got it because you have not
18 had to log your files. Everything in your
19 file, you just haven't taken any effort to go
20 through your files and log it.
21 HONORABLE DAVID PEEPLES: It
22 seems to me that in order to get at that
23 document we are giving up a lot by making it
24 impossible for Lawyer Orsinger to -- you know,
25 for making him have to log his file for that

1 thing, that's not worth it.

2 MR. ORSINGER: Steve, why can't

3 you get that document by requesting all drafts

4 of the contract and then if it's in your safe,

5 if it's in your pocket, if it's in your home,

6 you're going to have to disclose it, or if

7 it's in your file? In other words, rather

8 than saying someone might have taken a

9 discoverable document and put it in their

10 file, so let's make them inventory their

11 entire file, just if a discoverable document

12 is requested, you have got to give it to them,

13 no matter where it is, whether it's in your

14 file or not, but why do we have to inventory

15 what's in our file if it's not discoverable or

16 narrow it.

17 MR. SUSMAN: Because my

18 position, Richard, is that that draft is

19 privileged. Okay. You might think and there

20 may be cases against me, but the draft was

21 created by a lawyer at some time. I think the

22 draft is privileged. Okay. As privileged as

23 anything in my file. You actually disagree.

24 Actually, there are some cases that disagree

25 with me. Okay. But I haven't even disclosed

1 the existence of it because I have as the
2 judge made the determination that it is a
3 privileged document, as privileged as anything
4 else I have, and therefore, I am not going to
5 log it.
6 MR. ORSINGER: How can you
7 justify not logging it unless it was created
8 for the lawsuit, because this rule only
9 applies to documents that were created for
10 litigation? How do you justify not logging it
11 just because you put it in your file?
12 MR. SUSMAN: Well, now I am
13 going to have to look through my files and
14 pick out things that are created for the
15 lawsuit and things that aren't created for the
16 lawsuit, and I mean under your rule.
17 MR. ORSINGER: Under this rule.
18 Created by the trial counsel, yeah.
19 MR. SUSMAN: Well, I guess what
20 I am trying to figure out, is there a way I
21 can prevent -- I mean, we began with this
22 thinking, is there some way we can alleviate,
23 take off trial counsel the task of going
24 through their file piece by piece of paper and
25 logging things.

1 CHAIRMAN SOULES: You can't
2 take off -- you can't take the burden off of
3 trial counsel going through his file to
4 determine whether or not he has got some
5 evidence in his file that has to be disclosed.
6 That has to be.
7 MR. ORSINGER: That's right.
8 That's right.
9 CHAIRMAN SOULES: We all agree
10 with that. So you are going to have to go
11 through your file. Now, what else besides
12 evidence?
13 MR. SUSMAN: Well, basically
14 what you're saying is if there were a category
15 of documents that's clearly privileged in my
16 file, maybe I don't have to log it. I mean,
17 it's not the rule we adopted, the stuff in the
18 client's files. If it's clearly privileged,
19 they still have to log it, right?
20 CHAIRMAN SOULES: Correct.
21 MR. SUSMAN: Because they
22 aren't the judge and jury. They still have to
23 log it.
24 CHAIRMAN SOULES: Right.
25 MR. SUSMAN: But for stuff in

1 my file you are going to say I am able to make
2 the decision that's clearly privileged;
3 therefore, I don't even have to log it. Now,
4 maybe that's fair, but what are we going to
5 put in that category of clearly privileged?
6 MR. ORSINGER: Only things that
7 are created in connection with the lawsuit,
8 not things that are part of the transaction
9 originally. All we are trying to do is to
10 keep lawyers from having to constantly put at
11 issue their own litigation work,
12 litigation-related work, because that's not
13 going to be discoverable. That's being
14 created after the fact in connection with
15 representation.
16 MR. GOLD: Luke?
17 CHAIRMAN SOULES: Paul Gold.
18 MR. GOLD: There is two issues
19 here, and one is definitely dependent on how
20 we draft the privilege rule because what we
21 are talking about is what attorneys consider
22 to be work product, party communications,
23 attorney-client privilege. I think what was
24 originally contemplated when we started
25 discussing this provision was the request for

1 an attorney's file. I mean, there are cases
2 out there where people have requested the
3 attorney's file, and we wanted to say, "Wait,
4 when you request the file we shouldn't have to
5 go through the file and tell what is
6 privileged and what is not. That request
7 should just be prima facie bad."
8 PROFESSOR ALBRIGHT: But that
9 is an objection under (1).
10 MR. GOLD: Okay. Hold on.
11 Hold on. I am just saying how this all
12 developed, but the thing about it is we have
13 to hash out -- and I am asking this to kind of
14 move on here. We are going to have to hash
15 out what attorney work product is because
16 that's really what this discussion is about.
17 If you have got a contract that's been
18 given to you and you put it in your file, is
19 that attorney work product? Is that a party
20 communication? Do you have any basis for
21 protecting that? It doesn't go to the issue.
22 Should I have to inventory my file? I
23 just -- I think we are going to have to clear
24 up the issue of privilege before we can
25 meaningfully discuss this much more.

1 CHAIRMAN SOULES: Well, it
2 seems to me like we are defining privilege.
3 We are trying to define privilege in order to
4 pass on paragraph (c), and that's what a lot
5 of the discussion here has been.
6 MR. GOLD: But we have deferred
7 that.
8 CHAIRMAN SOULES: And we have
9 deferred really the definition. So we are
10 trying to do here what we have deferred, and
11 that was the reason I asked earlier whether or
12 not we felt we could really deal with this
13 subparagraph (c) before we conclude Rule 4.
14 HONORABLE SCOTT BRISTER: Let
15 me make a suggestion, Luke.
16 CHAIRMAN SOULES: Judge
17 Brister.
18 HONORABLE SCOTT BRISTER: Most
19 of the discussion we have had about is of
20 things that people would like to add to be
21 covered in this. The, for instance, trial
22 counsel. Now, you may want to add to that the
23 associate, the former counsel, the in-house,
24 but everybody agrees trial counsel, the actual
25 person that tries the case, matters prepared

1 for trial should be excluded.
2 It seems to me like we could vote on the
3 limited trial counsel with the understanding
4 that may need to be expanded to include
5 additional persons later, but if you just
6 leave it completely out, you have added
7 nothing. If you add something that everybody
8 agrees on, you may want to add to it later.
9 CHAIRMAN SOULES: Response?
10 Justice Duncan.
11 HONORABLE SARAH DUNCAN: This
12 isn't a response, but it seems to me that
13 there might be a basic disagreement not as to
14 how much -- I mean, obviously there are going
15 to be disagreements as to how much should be
16 logged, but can we get a vote first on whether
17 any of it should be logged? I mean, is that
18 already decided?
19 CHAIRMAN SOULES: Restate your
20 question again. I didn't quite follow it.
21 HONORABLE SARAH DUNCAN: From
22 what I here Richard saying and Judge Peeples
23 saying, nothing in the lawyer's file should be
24 logged. Then there is another side of the
25 debate, which is if anything is going to be

1 logged, how much should be logged? Has it
2 already been decided that something is going
3 to have to be logged? Has that already been
4 decided?
5 CHAIRMAN SOULES: I don't know.
6 I mean, we have had a lot of debate on that,
7 but I don't know whether anything has been
8 decided on it. Steve Yelenosky.
9 MR. YELENOSKY: Yeah. I just
10 ran this by Alex. I have a specific
11 suggestion here that doesn't require us to
12 define the privilege and defers that to where
13 it's defined and just says, "Materials in a
14 counsel's file which are privileged as
15 attorney work product or attorney-client
16 communication need not be included" and goes
17 on from there.
18 CHAIRMAN SOULES: As long as
19 the attorney-client communication is limited
20 to communications in this case.
21 MR. YELENOSKY: So it doesn't
22 define those terms.
23 CHAIRMAN SOULES: I think what
24 you are saying is right.
25 MR. YELENOSKY: It describes

1 the areas that we all agree need not be logged
2 and then it leaves the definition of what's
3 within those areas for the appropriate place
4 in "definition of privilege." So it's
5 materials in a counsel's file which are
6 privileged, and then you look to the other
7 rule to see which are privileged under
8 attorney work product or attorney-client
9 communication.
10 PROFESSOR ALBRIGHT: And add
11 the qualification that it has to be in
12 preparation for this litigation.
13 MR. YELENOSKY: Yeah. Uh-huh.
14 PROFESSOR DORSANEO: Why is
15 that limitation in here since that's not a
16 limitation in the law of privilege?
17 PROFESSOR ALBRIGHT: Because
18 those are privileges that someone might want
19 to fight at some other time.
20 PROFESSOR DORSANEO: Fine. All
21 right. That makes sense. It's in there
22 because it's -- not because it's part of the
23 law of privilege but it's part of the law of
24 testing privileges.
25 PROFESSOR ALBRIGHT: That's

1 part of the fight to --

2 MR. SUSMAN: What we were

3 trying to do here --

4 CHAIRMAN SOULES: Wait a

5 minute. Steve, go ahead and then I will get

6 to this side over here.

7 MR. SUSMAN: There is privilege

8 and nonprivilege, and I suspect that the line

9 between them is going to be gray. It is gray,

10 and that's what we are going to deal with when

11 we go back to Rule 4, where you draw the line

12 between privilege and nonprivilege. Now we

13 are trying to find out whether there is a part

14 on the privilege side that is so clearly away

15 from the line and so dark and so indisputably

16 privileged that we can all agree on that it's

17 not even worth the time and trouble to have to

18 describe it so the other side can evaluate is

19 it close to that line or not.

20 That's why in my view this decision could

21 be made before we draw the line because what

22 we are trying to do here is say is there

23 something -- I think it could be done before

24 we draw the line. Is there something that is

25 so far away from that line that just to

1 mention it establishes it's privileged, and
2 there should be no burden of having to
3 identify it?
4 PROFESSOR DORSANEO: I second
5 Steve Yelenosky's motion.
6 MR. ORSINGER: With Alex's
7 suggestion that it's limited to the lawsuit.
8 MR. BECK: Could I make a
9 comment here?
10 CHAIRMAN SOULES: David Beck.
11 MR. BECK: I just wonder if we
12 are coming at this the wrong way. To be
13 honest about it, I don't want to have to go
14 through my file and determine whether every
15 piece of information in there is discoverable,
16 nondiscoverable, privileged, not privileged,
17 and so on. If the concern is that somehow a
18 piece of evidence is in my file, the cases are
19 legion that say you cannot make a document
20 otherwise discoverable privileged or exempt
21 from discovery simply by giving it to the
22 lawyer.
23 Now, if that is our concern, that somehow
24 there is going to be a shielding of evidence,
25 relevant evidence, from discovery, why don't

1 we just simply say that evidence or
2 information otherwise discoverable cannot be
3 made exempt or privileged simply by putting it
4 in the lawyer's file? Otherwise, every time
5 you get one of these requests the burden it
6 puts on trial counsel is to literally go
7 through that file and see whether or not it is
8 privileged or exempt in any way, and you start
9 raising all kind of questions.
10 Supposing I discuss a case with a
11 colleague outside my law firm, sends me a
12 letter, says, "I found this case." I mean, is
13 that discoverable? I didn't create it, but
14 it's something that's certainly relevant to
15 the case I am trying, and a friend of mine
16 sends me a case and says, "This looks like it
17 may answer your question." I don't want to
18 have to make that analysis, and it seems to me
19 we may be coming at it the wrong way.
20 MR. GOLD: I would suggest --
21 CHAIRMAN SOULES: Paul Gold.
22 MR. GOLD: -- regardless of
23 whether -- I agree with what David is saying.
24 Regardless of whether we leave the rule as is,
25 (c) as is, or modify it, I think a sentence

1 should be added to it stating exactly what
2 David has just said, saying that materials
3 that are otherwise not privileged do not
4 become privileged by putting them in an
5 attorney's file, and I think that would
6 satisfy this concern that both Judge Peeples
7 and I have raised about this ambiguity about
8 the term "created." Because I think if you
9 leave "created" in there without any further
10 direction, attorneys are going to disagree
11 about what creation means, whether they
12 gathered it, whether they requested someone
13 else to generate it, or whatever. So I would
14 move to put a sentence in (c) stating what
15 David Beck has recommended.
16 MR. YELENOSKY: My language
17 didn't have "created" in it, if that makes any
18 difference.
19 MR. GOLD: Well, then I think
20 the motion for yours was on the table first.
21 So I don't know.
22 CHAIRMAN SOULES: Let me hear
23 that again, Steve, your language.
24 MR. YELENOSKY: My language?
25 Was -- you're going to have to help me, Alex,

1 where you added your part.

2 "Materials in a counsel's file which are

3 privileged as attorney work product or

4 attorney-client communication" and then

5 you -- where did you want to put your clause,

6 Alex?

7 PROFESSOR ALBRIGHT: "In

8 preparation" -- "and prepared in anticipation

9 of litigation or preparation for trial in the

10 litigation in which the discovery is

11 requested."

12 MR. YELENOSKY: I'd have to see

13 that.

14 PROFESSOR ALBRIGHT: Yeah. We

15 are going to have to look at it altogether.

16 MR. YELENOSKY: Yeah. Maybe we

17 need to write it out.

18 CHAIRMAN SOULES: Judge

19 Peeples.

20 MR. GOLD: Is there any way we

21 can put the overhead on and write it up here

22 so everybody can see it?

23 HONORABLE SCOTT BRISTER: Why

24 does -- "in the file" is not related to any

25 privilege anywhere. I mean, "created by

1 counsel" I understand. I may agree or
2 disagree with it, but created -- I mean, "in
3 the file" is no help.
4 MR. YELENOSKY: Well, that's
5 what everybody is talking about, and that's
6 what the issue is. I have got a file, and I
7 don't want to have to catalog it.
8 MR. KELTNER: I'm not sure that
9 is the issue, and I think that's part of the
10 problem.
11 CHAIRMAN SOULES: David
12 Keltner.
13 MR. KELTNER: I think it seems
14 to me that where it is makes little difference
15 if counsel has it.
16 MR. YELENOSKY: Possession.
17 MR. KELTNER: And it seems to
18 me that we are headed the right way as long as
19 we don't have "created," and I think that does
20 what Steve Susman wanted the rule to do
21 initially. So I think we are -- I worry about
22 it being "in the file," too, because I can see
23 someone reading that, and all of the sudden
24 dumping.
25 MR. YELENOSKY: What about "in

1 possession"?

2 MR. KELTNER: "In possession"

3 is fine.

4 MR. YELENOSKY: "Materials in a

5 counsel's possession which are privileged as

6 attorney work product or attorney-client

7 communication," and then your clause will --

8 PROFESSOR ALBRIGHT: "Prepared

9 in anticipation of litigation or preparation

10 for trial."

11 MR. JACKS: That's even more

12 extreme than the concern David was raising.

13 PROFESSOR ALBRIGHT: It may be

14 that this needs to go back to the subcommittee

15 for redrafting. I think we have some

16 direction but not much.

17 CHAIRMAN SOULES: We are

18 talking about -- a lot of these same materials

19 are going to be in the client's file. Do they

20 have to be inventoried?

21 MR. ORSINGER: The

22 attorney-client communications all will be

23 both places.

24 CHAIRMAN SOULES: That's right.

25 MR. KELTNER: That was my

1 point, Luke. There are going to be a whole
2 lot of things that are duplicative. So in an
3 attorney's possession may be not necessarily
4 discoverable, but if they are someplace else
5 they may be, but what David Beck's point was
6 happens not infrequently. If I go to Atla or
7 DRI and get some case analysis, I ought not to
8 have to list that or put it in any kind of
9 log. Those are the kinds of things I think we
10 are talking about, and I think we are close to
11 getting it, but I think we are also doing an
12 awful lot of drafting around the table that
13 maybe the subcommittee could do.
14 CHAIRMAN SOULES: Aren't we
15 really talking about work product, litigation
16 work product both anticipation and
17 preparation, that kind of litigation work
18 product, and we have got a safety valve down
19 here. We already say the judge can order it.
20 So that takes care of the kind of work product
21 that a judge may penetrate, witness statements
22 and that sort of thing. That's here in (3),
23 and attorney-client communications in this
24 case, in anticipation of and preparation for
25 trial of this case.

1 Now, that is going to take us to Rule 4,
2 but does that get at what we are trying to do
3 with Rule 3, work product, attorney-client
4 communications. Forget it's in the
5 trial -- what file it's in. It's work product
6 and attorney-client communications in
7 anticipation of this litigation and in
8 preparation for trial of this litigation.
9 MR. MEADOWS: So are you saying
10 the work product would have a bigger umbrella
11 than the particular litigation?
12 CHAIRMAN SOULES: No. Not in
13 terms of not listing it.
14 MR. MEADOWS: Right. Okay.
15 That's fine. Because I think we dealt with it
16 in (4), but for this particular part of the
17 rule both would be under the smaller umbrella
18 of the case in litigation?
19 CHAIRMAN SOULES: That's right.
20 Work product in this litigation and
21 attorney-client communication in this
22 litigation --
23 MR. MEADOWS: Right.
24 CHAIRMAN SOULES: -- doesn't
25 have to be listed.

1 HONORABLE DAVID PEEPLES: Can I
2 ask this?
3 CHAIRMAN SOULES: Judge
4 Peeples.
5 HONORABLE DAVID PEEPLES: The
6 idea of work product, what -- okay. We know
7 that things lawyers do, for example, witness
8 statements and photographs, we have expressly
9 said you have got to give those up,
10 communications from the client and so forth,
11 but if we grant what Paul Gold and David Beck
12 said, which is otherwise discoverable
13 information that finds its way into the
14 lawyer's file does not become shielded from
15 discovery, and there are a couple of items and
16 maybe more that are always discoverable,
17 statements and photographs, isn't everything
18 else that I do as a lawyer to help get my case
19 together, work product?
20 If I get something from DRI or Atla and I
21 know I am facing Dr. Jones and I have got five
22 depositions or five transcripts from where he
23 testified before, do I have to list that in my
24 log?
25 CHAIRMAN SOULES: Well, I think

1 that's work product.

2 HONORABLE DAVID PEEPLES: If we
3 are sure what work product means, why don't we
4 say, say so?

5 CHAIRMAN SOULES: Well, I think
6 we are going to go back to this rule where we
7 say work product when we do Rule 4, and we are
8 going to say work product, Class A work
9 product. Because Class B, which is a witness
10 statement, can be discovered, and that's going
11 to have to be disclosed as being in the
12 lawyer's file.

13 Otherwise we don't know it's there, and
14 we don't -- and we don't know whether we start
15 trying to exhaust the predicates for getting
16 that statement out of the lawyer's file. So
17 we are going to have a Class A, Class B,
18 Class C, kind of work product or some
19 definition in Rule 4 on that. So then we are
20 going to have to come back to this, and doctor
21 it some, I guess, if we choose to do so.

22 MR. BECK: Luke, may I --

23 CHAIRMAN SOULES: Okay. David
24 Beck.

25 MR. BECK: May I suggest that

1 the subcommittee consider an approach instead
2 of saying what we don't want in the trial
3 lawyer's file that we come at it the other way
4 and say what we do want out of the trial
5 lawyer's file. I just think it's an approach
6 that may make this drafting a little bit
7 easier.
8 CHAIRMAN SOULES: Well, but
9 then you get to the trial lawyer's file and by
10 saying --
11 MR. BECK: Well, I'm not -- I
12 don't mean file physically.
13 HONORABLE F. SCOTT MCCOWN:
14 Luke?
15 CHAIRMAN SOULES: Okay. Judge
16 McCown.
17 HONORABLE F. SCOTT MCCOWN: I
18 don't want to extend the problem of trying to
19 draft around the table. I think it needs to
20 go back to subcommittee, but I do have
21 something I have written. Does this solve the
22 problem?
23 "Anything protected from discovery under
24 Rule 4 and created or assembled to prosecute
25 or defend the litigation in which discovery is

1 requested need not be included in the
2 withholding statement or description except
3 upon court order in appropriate
4 circumstances."
5 MR. SUSMAN: I like it.
6 Second.
7 HONORABLE DAVID PEEPLES: Could
8 we hear it again?
9 HONORABLE F. SCOTT MCCOWN:
10 "Anything protected from discovery under
11 Rule 4," we don't know what that is, but
12 "Anything protected from discovery under
13 Rule 4 and created or assembled to prosecute
14 or defend the litigation in which discovery is
15 requested need not be included in a
16 withholding statement or description except
17 upon court order in appropriate
18 circumstances."
19 CHAIRMAN SOULES: I just think
20 that's too broad. I think that's going to eat
21 up what you have to disclose. I think that's
22 pretty broad.
23 HONORABLE F. SCOTT MCCOWN:
24 Well, what -- if you had attorney-client but
25 it wasn't done to prosecute or defend the

1 litigation, it would have to be disclosed. I
2 mean, this would catch your -- this
3 would -- No. 1, it would have to be inside
4 Rule 4, and No. 2, it would have to have been
5 specifically created or assembled to prosecute
6 or defend the litigation.
7 MR. SUSMAN: The only other
8 thing you might want to add to that is whether
9 you want to limit it to the trial lawyer's
10 file. I mean, this all began by us talking
11 about our files.
12 HONORABLE F. SCOTT MCCOWN:
13 Well, I think the problem with that, Steve, is
14 that the concept of trial lawyer files -- I
15 mean, what the house counsel has is part of
16 the trial lawyer's files, you know, in a real
17 sense. If you try to limit it to what -- if
18 you try to limit it to what's only physically
19 actually in the trial lawyer's files then all
20 of these law firms are just going to be buying
21 a lot of storage space because everybody is
22 going to get it in the trial lawyer's file.
23 MR. SUSMAN: I suggest we take
24 this back to the committee and move on since
25 we are coming back here.

1 MR. JACKS: I agree.
2 MR. SUSMAN: We have Scott's
3 language, and we can move on, or we will never
4 go anywhere. (3).
5 CHAIRMAN SOULES: Bill Dorsaneo
6 had his hand up. One last thing maybe.
7 PROFESSOR DORSANEO: After
8 listening to all of this discussion and trying
9 to sort this out, I gather for the record at
10 least that if the claim is made that the
11 information requested is not privileged but
12 that it's irrelevant from the discovery sense
13 that we don't have any withholding statement.
14 We don't have any description of the materials
15 withheld under those circumstances. All we
16 have is an objection which satisfies the
17 requirement of the objection. Is that right?
18 HONORABLE F. SCOTT MCCOWN:
19 Right. Just like now. And you have got to
20 set it for hearing, and if it's overruled, you
21 produce, and if it's not, you don't, and you
22 can rely on it until it's overruled.
23 CHAIRMAN SOULES: Okay. Three.
24 This (c) will go back to the committee, and
25 you have got an hour and a half transcript

1 here or so and no consensus that any language
2 is the right language. So you-all understand
3 that's where it stands.
4 MR. JACKS: Yeah. Back where
5 we started.
6 MR. SUSMAN: (3).
7 CHAIRMAN SOULES: Okay.
8 MR. SUSMAN: This is not new.
9 You have seen it before.
10 HONORABLE SCOTT BRISTER: How
11 does it work that you produce before the
12 hearing live testimony?
13 PROFESSOR ALBRIGHT: At or
14 before.
15 CHAIRMAN SOULES: At or before.
16 HONORABLE SCOTT BRISTER: Well,
17 but affidavits --
18 HONORABLE F. SCOTT MCCOWN: You
19 have to file your affidavit seven days before.
20 At first we thought about just doing this on
21 affidavits but then a lot of people obviously
22 are going to want the right to cross-examine
23 and call witnesses in opposition.
24 HONORABLE SCOTT BRISTER: Why
25 do you have "or before"?

1 PROFESSOR ALBRIGHT: I think
2 that should be --
3 HONORABLE SCOTT BRISTER: "At
4 the hearing the party seeking to avoid
5 discovery shall produce" --
6 MR. SUSMAN: I see. You want
7 to eliminate the first three words, beginning
8 "the party seeking to avoid."
9 CHAIRMAN SOULES: I think what
10 Judge Brister is saying is by oral testimony
11 at the hearing or by affidavits filed at least
12 seven days before the hearing you have to
13 prove the privilege.
14 HONORABLE SCOTT BRISTER: Prove
15 it up at the hearing. That's what you do at
16 the hearing.
17 PROFESSOR ALBRIGHT: If we
18 delete the first clause, begin, "The party
19 seeking to avoid discovery shall produce any
20 evidence necessary to support the objection or
21 withholding statement either by affidavit
22 served upon opposing parties at least seven
23 days before the trial or live testimony at the
24 hearing."
25 MR. SUSMAN: Perfect.

1 CHAIRMAN SOULES: That will
2 work.
3 MR. KELTNER: Are we
4 eliminating deposition admissions?
5 MR. ORSINGER: No. It should
6 just say "testimony." It shouldn't say "live
7 testimony."
8 MR. KELTNER: Because I don't
9 think we intend to do that.
10 HONORABLE F. SCOTT MCCOWN:
11 Yeah. Just "testimony," scratch "live."
12 PROFESSOR ALBRIGHT: Another
13 question is back to this leading issue here.
14 We are talking about evidence necessary to
15 support the objection or withholding
16 statement. David Beck and I were talking at
17 the break, and David Keltner, about requiring
18 a motion specifying what part of the
19 description or objection is being contested.
20 So at some point in time having to file a
21 motion to focus the dispute that's going to be
22 presented at the hearing. Okay. You have
23 given me your description, and I accept part
24 of it, but there are five documents that I
25 want to fight over. Then should I file a

1 motion to compel and specify in that motion
2 the five documents that I want to fight over?
3 HONORABLE F. SCOTT MCCOWN: No.
4 Well, I don't think so. I think you do
5 it -- right now a lot of lawyers conceptually
6 think you either have to have a protective
7 order or a motion to compel, but in fact, you
8 can merely have a notice setting objections,
9 and I think that's what this envisions, that
10 your notice would have to say what you're
11 setting for hearing, which of their objections
12 you're setting or which of their withholding
13 statements. So you only set for hearing what
14 you want heard.
15 CHAIRMAN SOULES: No. It's
16 either an objection or a description that you
17 are setting.
18 MR. KELTNER: Yeah.
19 CHAIRMAN SOULES: That's the
20 pleading.
21 MR. KELTNER: And therein lies
22 the problem, and we also in Harris County, if
23 I am not mistaken, David, and certainly in
24 Dallas County you are going to have a pleading
25 to get to the court to be heard. I think we

1 ought to engraft that here. I think that's
2 important to have, and it's not a difficult
3 step. It requires the party seeking the
4 discovery to say what I want, which is what we
5 have been leading up to to this step.
6 CHAIRMAN SOULES: Paul Gold.
7 MR. GOLD: Yeah. To pick up on
8 what's just been said, for instance, I have
9 got this very situation in Houston right now.
10 I have filed a notice of hearing on the
11 defendant's objections. I wrote the
12 defendant. I told him all the objections that
13 I wanted to challenge. They, of course,
14 ignored it. So I have put all the objections
15 into issue, and so we are going to go down to
16 court on Monday, and everything is an issue.
17 The responding party should be required,
18 the person making the objections, to file some
19 document with the court framing what the issue
20 is, saying why they are making these
21 objections or whatever. Otherwise you do all
22 of this in front of the court, and that's what
23 the waste of time is. I think there needs to
24 be some sort of motion response of you can
25 attach these documents, the withholding

1 documents, privilege log, whatever, but I
2 think there has to be some sort of document
3 that frames the issue for the court.
4 Otherwise, you waste the court's time.
5 Because right now all I do is put everything
6 in issue.
7 MR. SUSMAN: If I might address
8 this, this may be a good idea of something we
9 have not addressed at all. The word "motion
10 to compel" does not appear in our rules.
11 MR. KELTNER: Right.
12 MR. SUSMAN: And maybe -- it
13 goes beyond just privilege. It goes to other
14 objections, too. Maybe we need to specify a
15 procedure or write a rule for a procedure
16 dealing with how you handle motions to get
17 around -- you know, to compel. What needs to
18 be done? This would be just like any other
19 objection, that you would test any other
20 objection. Do you-all want us to write
21 something like that?
22 CHAIRMAN SOULES: Well, some
23 document on file with the court has to be the
24 predicate to the hearing.
25 MR. KELTNER: Right.

1 CHAIRMAN SOULES: And I have
2 been told that it's not the withholding
3 statement, and I think that has to be because
4 that's so general it probably doesn't help
5 anybody as a predicate to a hearing, and I
6 have been told it's not a description. That's
7 not it because we don't want to make that so
8 specific that it would under the current
9 practice serve as a legitimate predicate for
10 the hearing. So at this point if all of
11 that's true then we don't yet have a filing
12 with court, whatever you want to call it, that
13 predicates the hearing, and it seems to me
14 like our practice is such that some filing
15 with the court is going to have to serve as a
16 predicate for the hearing. Justice Duncan.
17 HONORABLE SARAH DUNCAN: I
18 think that's right, but I think the responding
19 party should also be required to go through
20 item by item and say either, "I admit that
21 it's privileged, and I will produce it" or "I
22 deny it's privileged and I want -- and here is
23 why I am fighting it," maybe not in great
24 detail, but it does seem like -- or at least
25 the hearings that I go to on these kinds of

1 things, most of it can be done by agreement if
2 people will just pay attention, but they don't
3 pay attention until they get in the hearing
4 and then the judge sits there while the
5 parties talk at one another, and I think the
6 judge frequently starts feeling fairly
7 superfluous.
8 HONORABLE SCOTT BRISTER:
9 Angry.
10 HONORABLE SARAH DUNCAN: Angry.
11 Angry. That's much better.
12 CHAIRMAN SOULES: Well, I guess
13 we are past this point, but you know, which is
14 going to make more work, causing the
15 description to have to be sufficient to
16 predicate a hearing or taking that a step
17 further and the challenge has to become the
18 predicate for the hearing and so -- okay.
19 Judge Brister, you had your hand up and then I
20 will get Tommy Jacks.
21 HONORABLE SCOTT BRISTER: It
22 seems like the description is pretty specific
23 and as well as fairly broad, and so it seems
24 to me it ought to be the person -- like in
25 line with McKinney the person that wants the

1 stuff requests the hearing, says which parts,
2 which items listed on the description.
3 "Attached is the description that I got
4 from the other side. I want a hearing to
5 compel on Items 1, 5, 10, and 20." That would
6 be a pretty easy motion to file.
7 CHAIRMAN SOULES: Tommy, did
8 you have a comment on this?
9 MR. JACKS: Well, I guess I
10 just wonder if we aren't getting really too
11 hung up with the elaborate pleadings practice
12 in connection with discovery. I mean, as a
13 practical matter, what harm is it if I have
14 got your objections and then, you know, your
15 description and it's adequate so that I can
16 tell pretty much what you're holding onto and
17 why. Why can't I just say, "Okay. I am going
18 to set your objections. Let's go down to
19 argue them." We get to the hearing and the
20 judge says, "All right. Which ones, Jacks,
21 are you complaining about?"
22 "Your Honor, Nos. 1, 5, 7, and 15."
23 "All right. Let's talk about those."
24 Why later again still another pleading
25 stage at which I have to file a motion saying

1 these four items and then set that?

2 CHAIRMAN SOULES: Steve.

3 MR. SUSMAN: I agree with Tommy

4 a hundred percent. I mean, I think we should

5 not build in formalities and extra steps here

6 that are unnecessary. I think the courts are

7 perfectly capable of when they get the parties

8 before them deciding what the dispute really

9 is about. It's all there, and I don't think

10 we ought to require a motion.

11 CHAIRMAN SOULES: You think

12 what now?

13 MR. SUSMAN: I do not think we

14 ought to require a motion.

15 CHAIRMAN SOULES: Richard

16 Orsinger.

17 MR. ORSINGER: My comment is on

18 a different aspect of this. We have gotten

19 real focused on the written discovery, but

20 this also applies to interrogatory answers,

21 and I don't see why the same procedures

22 shouldn't apply to privileges in depositions.

23 I looked at the deposition rule, and there

24 doesn't appear to be any hearing resolution

25 process for the invocation of a privilege

1 during the deposition, and it seems to me that
2 if you guys are going to look at this rule
3 again, you ought to consider the fact that
4 there may be a privilege as to an
5 interrogatory answer or to a deposition
6 question, and you may want to have this
7 hearing procedure apply to that because under
8 our current Rule 166(b), for example, the
9 court might order you to answer in camera to a
10 court reporter, submit the written answers to
11 the judge, or something like that.
12 PROFESSOR ALBRIGHT: Well, this
13 does apply to interrogatories.
14 MR. ORSINGER: Well, I don't
15 see -- I mean, the language appears to me to
16 talk only about the production of documents
17 when you actually get down into the hearing.
18 PROFESSOR ALBRIGHT: Well, the
19 rule applies to written discovery, which is
20 defined to include interrogatories and
21 requests for admissions.
22 MR. ORSINGER: I know, but when
23 you actually get down to the hearing language
24 I see a lot of words that relate to documents,
25 and I don't see any words that relate to

1 testimony. Now, maybe I am missing it.
2 PROFESSOR ALBRIGHT: Well, it
3 doesn't apply to depositions.
4 MR. ORSINGER: Well, let's not
5 talk about depositions just yet. Let's assume
6 that it's an interrogatory that I have
7 objected violates the attorney-client
8 privilege. I am not seeing language here in
9 paragraph (3) that gives us some parameters on
10 how we go about doing that. Like, for
11 example, in 166(b) one of the options is for
12 the court to order that testimony be given in
13 camera to be reviewed by the court or
14 something. I am just saying that this is our
15 procedure for hearings to resolve privilege
16 invocations, and let's be sure that we tell
17 them how to do it not only as to documents but
18 also as to answers to interrogatories.
19 PROFESSOR ALBRIGHT: Well, it
20 says you can have in camera inspection or some
21 of all the requested discovery. You could
22 have an in camera inspection of how you would
23 have to answer the interrogatory, if that's
24 what you are saying.
25 MR. ORSINGER: All right. If

1 you don't see the need for the language, maybe
2 it's just me. I would also say, though, that
3 whatever procedure you describe for answering
4 interrogatories that have been objected to,
5 the same procedure would work for deposition
6 questions that are objected to, and you ought
7 to either merge them here or have a duplicate
8 procedure tacked onto your deposition rule.
9 HONORABLE SCOTT BRISTER: If
10 you change "inspection" to "review" does that
11 make it clear that you are not talking about
12 just looking at documents?
13 MR. YELENOSKY: Well, it's got
14 "sealed wrapper" in there, which wouldn't
15 apply. Somehow you have got to deal with
16 "sealed wrapper."
17 HONORABLE SCOTT BRISTER: I
18 have deposition answers filed under sealed
19 wrapper.
20 MR. KELTNER: Yeah.
21 HONORABLE SCOTT BRISTER: Sure.
22 CHAIRMAN SOULES: Well, what
23 about Judge Brister's suggestion?
24 HONORABLE SCOTT BRISTER:
25 Change "inspection" to "review" so to make it

1 clear it's not just looking at documents.
2 Paragraph (3).
3 CHAIRMAN SOULES: Richard, this
4 is your concern. Does that address it?
5 HONORABLE SCOTT BRISTER:
6 Paragraph (3), one, two, three, four, five,
7 fifth line, end of the line.
8 MR. ORSINGER: Oh, Judge, let
9 me ask you this: Is it apparent to you that
10 by segregating you mean that you should go
11 ahead and answer certain interrogatories under
12 seal with the court? Does that follow without
13 saying it?
14 HONORABLE SCOTT BRISTER: It is
15 to me. Now, some judges don't like to order
16 that, but I do order that procedure, and it's
17 clear to me I can do that under this.
18 MR. ORSINGER: So that means if
19 I have invoked a privilege in answer to an
20 interrogatory then I have got to go ahead and
21 do my answers that are subject to the
22 privilege and submit them in camera in advance
23 of the hearing, right?
24 HONORABLE SCOTT BRISTER: Well,
25 on a deposition?

1 MR. ORSINGER: No. On an
2 interrogatory.
3 MR. YELENOSKY: Interrogatory.
4 MR. ORSINGER: Or is it only
5 after the hearing that I have to --
6 HONORABLE SCOTT BRISTER: After
7 the hearing. At the hearing I determine I
8 want to look at the answers to the
9 interrogatories in camera. So then I order
10 you withheld it and filed your description,
11 and we have the hearing, and I determine I
12 want to look at the answer to the
13 interrogatories that you haven't answered.
14 MR. ORSINGER: I don't have to
15 do that until you tell me to?
16 CHAIRMAN SOULES: Then you send
17 him to prepare that answer and submit it to
18 the court in camera.
19 HONORABLE SCOTT BRISTER:
20 That's the way I read this.
21 CHAIRMAN SOULES: And then you
22 would not need another hearing because you
23 could always --
24 HONORABLE SCOTT BRISTER: I
25 almost always want a second hearing because I

1 want the attorneys there to explain to me what
2 I am looking at, but that would be the option
3 of the judge.
4 MR. ORSINGER: Just for
5 informational purposes, would you use the same
6 procedure if it was a deposition question as
7 opposed to an interrogatory?
8 HONORABLE SCOTT BRISTER: Yeah.
9 MR. ORSINGER: Okay.
10 CHAIRMAN SOULES: Unless you
11 already have the answer under seal, in which
12 event you could look at it at the same time.
13 HONORABLE SCOTT BRISTER:
14 Right.
15 MR. GOLD: Luke?
16 CHAIRMAN SOULES: Paul Gold.
17 MR. GOLD: I would like to go
18 back to the motion to compel procedure for
19 just a moment. I don't know if this is a
20 problem that everyone else has, but I have
21 been -- and Bill Dorsaneo can attest to it
22 because he was the master in the case -- where
23 we would go and have hearings on these
24 discovery matters that would last all day, and
25 I mean, I see this as a waste of time. People

1 go down to these objection hearings and for
2 the first time put on testimony.
3 The other side then says, "I am
4 unprepared to challenge this testimony or
5 engage in cross-examination there in the
6 court," all because the issue has not been
7 properly framed before they get down there,
8 and if we are really interested in cost
9 savings, I think some attention should be
10 given to the waste of time that takes place in
11 having to troop down to the court and conduct
12 these hearings on these objections because
13 there isn't a framing of the issue before you
14 get down there.
15 Now, I don't want to engage in an archaic
16 pleading process, but by the same token, I may
17 be mistaken, and I guess the judges can
18 address that better than I could, but it seems
19 like every hearing I go down to, it seems like
20 a waste of my time on these issues. So I
21 imagine it is multiplied many times by their
22 experience.
23 PROFESSOR DORSANEO: Well, we
24 had a lot of prophylactic objections, and it
25 wasn't identified before the hearing which

1 objections were actually the objections in
2 question. Now, you said that earlier, that
3 you put all of them in controversy when you
4 don't get this response. That struck me as
5 interesting. Why wouldn't it be enough to say
6 it's 1, 2, 3, 4, and 15?
7 MR. GOLD: It's the evidence in
8 support of the objection. Someone says I am
9 going to bring a witness down here to prove up
10 my privilege. Well, you have no idea what the
11 evidence is going to be before you get down
12 there. So you have to cross-examine this
13 witness. The judge is ticked because you are
14 having to do that in the courtroom at that
15 time.
16 HONORABLE F. SCOTT MCCOWN:
17 But, Paul, when you are talking about
18 privileges you have got -- the way most
19 hearings go even if you have a motion to
20 compel, I mean, you shove the motion to one
21 side. Nobody looks at that. They lay down in
22 front of you what their request is, what their
23 interrogatory was, what their request for
24 production was. That's what you look at and
25 then you look at the objection, and if the

1 objection is a privilege then you ask for the
2 evidence, and it's true that the party seeking
3 the discovery has been at a disadvantage, but
4 you will always be with a privilege because a
5 lot of the evidence for privilege you will
6 never see because it's in camera, and the
7 judge goes back and thumbs through it and
8 comes back out and announces a ruling, and you
9 never know. And so what Paul is in essence
10 saying is we should have more discovery about
11 the discovery, and it just gets -- I don't
12 think it's a practical problem. It just gets
13 too expensive.
14 MR. GOLD: I don't know how you
15 ever challenge a privilege, and this is going
16 back to what Luke was saying. You know, what
17 do you do? Do you just automatically have a
18 motion that says, "I believe you have
19 voluntarily waived the privilege" just to put
20 it in issue every time, I mean, or how are you
21 going to meaningfully challenge the privilege
22 if what you are saying is all that one has to
23 do is raise the privilege. You go back and
24 look and see if they have raised it, and the
25 other guy is just sitting there playing blind

1 nillo all the time. I do resent that process.

2 CHAIRMAN SOULES: Okay. Tommy

3 Jacks.

4 MR. JACKS: Okay. It seems to

5 me that we are stuck with that problem, and

6 there are ways of dealing with it. I do

7 sometimes take discovery -- if I know there

8 are privileged documents that I think are

9 important, and I know there is a witness who

10 knows about them, I will before setting a

11 hearing go depose that witness and probe more

12 about the documents and make a record so that

13 when I come into court -- either I can or I

14 can't at that point, but I have made a record

15 upon which the judge can rule.

16 I do have a concern, though, because

17 Scott talked about the fact that the hearing

18 the judge hears the arguments, goes and takes

19 the documents, looks at them, comes back, and

20 makes a ruling, and yet, when I read this

21 section (3) it seems to say that the only way

22 the judge gets to look at the documents is

23 sometime after the hearing, and I wanted some

24 clarification from the subcommittee about that

25 because that seems to me to be appropriate in

1 some cases but inappropriate and inefficient
2 in others. Can someone explain that to me?
3 CHAIRMAN SOULES: Bill
4 Dorsaneo.
5 PROFESSOR DORSANEO: Well, this
6 language is taken from 166(b)(4) when we
7 discussed this and tried to work on it the
8 last time around, and what it's responsive to
9 is the cases that initially suggested in very
10 strong terms that the only way to establish
11 the applicability of the privilege was to show
12 everything in camera to the judge, and judges
13 reported to us that they did not want people
14 being told at CLE conferences, et cetera, that
15 they are supposed to be delivered all of this
16 material to evaluate when probably no one
17 should look at most of it.
18 So the idea was to say, well, if you have
19 a few documents, you could probably show those
20 to the judge in camera. If you have a whole
21 bunch of stuff then the judge has to decide,
22 does he want to see or does she want to see
23 some of it or all of it? And at the same time
24 counsel sometimes decides that they don't want
25 to show the judge any of it, and sometimes

1 that makes good sense because if the judge
2 would see it, the judge would say, "This is
3 contrary to the position you are taking
4 testimonially from the witness stand."
5 And that's what takes up all the time, is
6 if somebody doesn't want to show the documents
7 to the judge, any of them, and they want to
8 have somebody come in and testify about the
9 documents and then be cross-examined without
10 being required to disclose the contents of the
11 documents, and that's just stupid, but
12 probably our Supreme Court cases which don't
13 let things be done in camera hearingwise
14 contribute to that as much as anything else.
15 MR. SUSMAN: Could I just -- I
16 mean, all of this is very interesting. All of
17 these war stories are very interesting, and we
18 keep going around the table getting comments
19 from people like on our committee, Paul Gold,
20 who's very concerned about a problem, and he's
21 been at all of these meetings, and it hasn't
22 even come up.
23 MR. GOLD: Yes, it has.
24 MR. SUSMAN: Well, we haven't
25 done anything about it.

1 MR. GOLD: I know.

2 MR. SUSMAN: My point is at
3 this point in time we need to begin, I think,
4 to move forward. A, I am losing interest of
5 everyone on the subcommittee very quickly
6 because we have been working really, really
7 hard, and I am just thinking about what the
8 transcript is going to look like on this
9 discussion. I don't even have any direction
10 on where to go now on the hearing part.

11 PROFESSOR DORSANEO: It's fine.

12 MR. SUSMAN: I have got kind of
13 a problem, okay, of what to do with it when we
14 meet again. I mean, I do think and I think
15 that the court, the court and Justice Hecht --
16 when do you-all want this done? When would
17 you like to get it finished?

18 JUSTICE HECHT: I was going to
19 save this until the end, but one thing that I
20 have become convinced of after dealing with
21 the task force for a long period of time and
22 the study that went into these problems before
23 that and then the hard work that this
24 committee has done, and the subcommittee
25 particularly, is that if we had the rest of

1 our lives to devote to this project we could
2 easily spend all of that and still not have a
3 product, and at some point I do think we need
4 to bring it to closure, and I say that without
5 meaning in any way to cut off the discussion
6 that even in the meeting today and yesterday
7 has been helpful in making this a better
8 product.
9 I think everybody feels that way every
10 time they come away from these discussions,
11 but it does have to come to an end at some
12 point, and we are getting pretty close to that
13 point. I will visit with my colleagues on
14 Monday, but I imagine -- and I will
15 communicate this with the chair, but I imagine
16 they will want to have your best effort by the
17 end of the July meeting, and we have spent --
18 there has been a lot of work done on this. We
19 won't be quite at the end of it even when we
20 get the product. We will still have to be
21 hammering on some problems, but I do think we
22 need to get the committee's best judgment on
23 the whole thing, all 61 pages, which is the
24 remaining 47 pages after the 14 that we have
25 done almost so far, by the end of the July

1 meeting.

2 MR. SUSMAN: And that being the

3 case, let me suggest this as a way of

4 proceeding, if I may, Mr. Chairman.

5 CHAIRMAN SOULES: Sure.

6 MR. SUSMAN: Our discovery

7 subcommittee will have one more meeting on

8 June 17th, a full-day meeting in Houston.

9 It's a Saturday. Any of you who are

10 interested in attending can attend because I

11 will send notice to this entire committee of

12 where we will be, but I urge you to take the

13 remaining rules you have and read them

14 carefully. What?

15 PROFESSOR ALBRIGHT: I can't

16 come June 17th.

17 MR. SUSMAN: You can't come.

18 You are almost essential. What is your --

19 PROFESSOR ALBRIGHT: My eight

20 year old is going to be at camp for the first

21 time in his life, and that is the day we pick

22 him up at camp.

23 MR. SUSMAN: How about the next

24 day?

25 PROFESSOR ALBRIGHT: Sunday I

1 can do it. I mean, that's Father's Day, but
2 today is my husband's birthday, and he took
3 all three boys to a baseball game. He can do
4 it on Father's Day as well.
5 MR. JACKS: How about Friday
6 the 16th?
7 HONORABLE F. SCOTT MCCOWN:
8 Well, why not another weekend? I mean, those
9 of us who are out of town can't come to
10 Houston on Father's Day.
11 MR. SUSMAN: All right. Let me
12 find out, and I will see what we can do
13 meetingwise, but there will be a meeting. I
14 will get you a notice out next week, before
15 our July meeting, but what I ask you to do is
16 take these rules and read them, read them real
17 carefully and write us a letter, address a
18 letter to me which I will share with
19 the -- copy and send to the subcommittee as I
20 get these letters or memos from you on
21 corrections and things that need to be done to
22 these rules so that we can really move through
23 it.
24 And let me spend just a few minutes, if I
25 may, Mr. Chairman, telling them what the rest

1 of these rules do so you can see it, and make
2 your notes. Protective order, Rule 8, the
3 whole concept was approved last time. There
4 is nothing new here. We have simply moved
5 section (2) of protective order to another
6 place later on.
7 Rule 9, request for standard of
8 disclosure, there has not been much discussion
9 on this rule nor can I find any reference even
10 in the transcript to a vote on this rule, but
11 please look at Rule 9 and see whether we have
12 covered it in a way that is satisfactory.
13 Rule 10 on expert witnesses, this was
14 approved. This rule, again, how it works was
15 approved at our prior meeting, the March
16 meeting. Each subsection was approved almost
17 unanimously, if not unanimously almost
18 unanimously. But we have struggled with how
19 to do it, and basically the one problem we had
20 at our last meeting was some people said that
21 there ought to be -- you ought to be able to
22 get certain information about an expert before
23 the drop-dead date for disclosing that
24 information, which is now 75 days before the
25 end of discovery period for those experts

1 on -- experts on issues on which you have the
2 burden, which could be the plaintiff or the
3 defendant, and 45 days before the end of the
4 discovery period for those experts -- opposing
5 experts. It could be either the plaintiff or
6 the defendant.
7 You will remember a big discussion at our
8 March meeting about someone wanted to discover
9 things earlier. We have allowed you to
10 discover things earlier like the name of the
11 witness, the expert, and the subject matter of
12 his testimony through the standard disclosure
13 vehicle, if it's available, and so we have
14 struggled with that. I think we have
15 accomplished it in this Rule 10. The expert
16 information other than the deposition is
17 discovered through the standard disclosure
18 request. Some parts of that request need only
19 be complied with on the timetable that we
20 suggested. Look at the timetable there and
21 see if we have accomplished that.
22 Request for production, Rule 11 was
23 approved at our January meeting, page 5424 of
24 the transcript, except for section (5),
25 electronic or magnetic data, and we have

1 rewritten that in an effort to clarify it.
2 There was a wordsmithing problem, but I think
3 we have tried to accomplish. Rule 5 --
4 section (5) on page 25 is the area.
5 The interrogatory rule, Rule 12, has no
6 changes, and it was approved at our last
7 meeting, and I am not going to worry with
8 reading that. It should be taken off the
9 table.
10 Request for admissions, 5427, we agreed
11 to keep it the same. That's Rule 13, approved
12 at page 5427 of the transcript the notion of
13 keeping it the same as the current rule, and
14 that's what he have with done.
15 Rule 14, depositions upon oral
16 examination, nothing in here is new. It was
17 all approved. There has been a relocation on
18 page 33 of some information that appeared
19 elsewhere. Okay. The protective order
20 portion, subsection (7), was moved. The
21 deposition by telephone was moved into this.
22 Each were approved separately.
23 Rule 15, the way you conduct a
24 deposition. This entire rule was approved
25 except for subdivision (5) again. We had

1 problems with subdivision (5) on page 35,
2 terminating the deposition. That was referred
3 back to us primarily because people were
4 concerned about the language that we have now
5 eliminated to see if we could do better, and
6 we have tried mainly by eliminating that
7 language.
8 Rule 16, there is a lot in Rule 16 which
9 is new. The concept of non-stenographic
10 recording of a deposition or by any means at
11 the whim of any party was approved, leaving to
12 the other party the option of bringing a court
13 reporter if they so desired. When we got into
14 the mechanics of how it works, who swears the
15 witness, where is the tape kept, what happens
16 if you eventually have to have the tape
17 transcribed, who does it, what kind of
18 certificate must the transcriber make, what
19 opportunity should a witness who has been
20 videotaped and the videotape is then
21 transcribed have to correct the transcript of
22 the videotape.
23 These became problems for us, and we have
24 tried -- and you can see that our Rule 16 and
25 Rule 18 and Rule 19 and Rule 20 deal with

1 those problems, and they are all new. Look at
2 these rules. One of the main features of the
3 rules is that we allow you if you are going to
4 use a -- if you are going to use a
5 non-stenographically recorded deposition at
6 trial or at hearing on summary judgment you
7 have got to get the whole thing transcribed,
8 but if you are going to just use it for a
9 other type of hearing or motion, you can
10 transcribe it selectively. Look at that.
11 Now, we wanted to make it fair but
12 inexpensive, and that's basically what we have
13 done in those rules, but there was a great
14 deal of discussion, and we ran into many more
15 mechanical problems than we dreamed. It will
16 be very helpful if you read these rules
17 particularly because these are the ones which
18 we had to do in a hurry at the end, and we
19 need some -- may need some draftsmen comments
20 from you.
21 The deposition upon written questions,
22 Rule 17, not many changes here except in the
23 timetable which we found under the current
24 rule to be an impossible timetable, which we
25 have changed, and those changes appear over

1 on -- where do those changes on the timing
2 appear? The dates were wrong. They are now
3 in here.
4 On page 42 there is a notice by
5 publication we have eliminated entirely
6 because no one ever had any idea of why it was
7 there or what it was there for, and so it's
8 gone, but maybe there is a reason for putting
9 it back, and someone can write us a letter
10 about a war story. I mean, it's how you
11 depose someone who is dead by notice of
12 publication. As best I can figure it out, how
13 you take a deposition in a case where the
14 other party is dead and their lawyer is dead,
15 too. Obviously someone thought that there was
16 a need for such a discovery vehicle at some
17 time in the distant past, and we have
18 eliminated it.
19 If you look over and then you look at
20 rule -- as I said, 18 and 19 and 20 are rules
21 created -- the changes we had to make by
22 allowing non-stenographic recording of
23 depositions.
24 PROFESSOR DORSANEO: That's for
25 notice to other people, not the deponent.

1 MR. SUSMAN: Okay. Well, I'm
2 sure you will explain to us that subdivision
3 at the appropriate time. Rule 21 is a new
4 rule on page 50, and it's how you compel
5 production of a document from a non-party.
6 You don't want to take their deposition. You
7 just want to get their documents and how the
8 non-party responds.
9 Rule 22, physical and mental
10 examinations, as you can see, very few changes
11 there. Rule 23, motions for entry on
12 property, not many changes. Some changes but
13 not too many.
14 Rule 24 is a brand new rule. It's all
15 new. We thought we needed such a rule to put
16 in one place what subpoena is, who issues it,
17 how it's served, and what a non-party does to
18 seek protection from a subpoena.
19 And then we have, of course, Rule 63 that
20 is the pleading amendment rule which sets the
21 deadline of 60 days before the end of the
22 discovery period, which we all thought was
23 very important to adopt as part of this
24 package to make the escalate or telescope
25 discovery fair. The Rule 66 is -- I don't

1 know if this is new or not, but we have never
2 really discussed it, and we probably ought to
3 deal with it, too.
4 CHAIRMAN SOULES: 66?
5 MR. SUSMAN: 166. Maybe
6 it's --
7 CHAIRMAN SOULES: We discussed
8 that last time and decided to leave it alone.
9 MR. SUSMAN: Maybe it's left
10 alone.
11 CHAIRMAN SOULES: I mean left
12 alone as the current rule is, not the way this
13 is drafted.
14 MR. SUSMAN: Is that right?
15 CHAIRMAN SOULES: Yes.
16 MR. SUSMAN: Take it out. Then
17 so what I would suggest is that why don't
18 everyone shoot to get comments to me by
19 June 9th? Okay. I mean, and really help us
20 do this. We cannot come back here and get
21 through all of these rules in a day and a half
22 in July if we begin just kind of generally
23 debating this. We have got to really -- if we
24 have got a real serious drafting problem that
25 you-all don't understand, that doesn't express

1 the intention, we need to deal with it in
2 subcommittee before we come back here because
3 it's going to be too late to come back here
4 and then discover we have got a real big
5 problem with some drafting thing.
6 So help us do that. We will pick a date.
7 Everyone will get notice of it, at a
8 convenient place hopefully, and anyone who can
9 help us on it will be appreciated. When is
10 our next meeting?
11 CHAIRMAN SOULES: The next
12 meeting is Friday, July the 21st, and
13 Saturday, July the 22nd, and it will be, I
14 believe, in this room.
15 MS. DUDERSTADT: Yes.
16 CHAIRMAN SOULES: Yeah.
17 PROFESSOR DORSANEO: Steve, for
18 every hour we spend here we save thousands and
19 thousands for people out there.
20 MR. SUSMAN: I don't get
21 frustrated at all as long as I sense that we
22 get it to a point at these meetings where I
23 can go back and read the transcript and figure
24 out what to do. The problem we have is where
25 the discussion in here begins drifting, and we

1 go back and read the transcript, and we
2 scratch our heads because we have a big
3 dispute in our subcommittee then about what
4 was said in here, and we read it, and no one
5 gets any direction. So that's the only
6 problem I have got. So is that all?
7 CHAIRMAN SOULES: Well, I think
8 so. We are going to have to come back -- if
9 we are going to finish this on the 21st and
10 22nd, we are going to have to come back, come
11 to this meeting with propositions for specific
12 changes, not just philosophical issues. And I
13 am certainly cognizant of the fact that
14 whenever -- in many cases when the chair
15 starts pushing it's counterproductive because
16 people start resisting that and wanting to
17 talk, and it doesn't work, but I feel like
18 that we are going to have to -- if you have
19 got something specific, come with it, propose
20 a specific change or deletion or addition, and
21 we will try to function a little bit more
22 under Robert's Rules at that meeting.
23 Given the deadline, I think that's the
24 only way we can finish it, unless somebody has
25 got some other suggestion on how we could

1 possibly get through this in a day and a half.
2 I want to accommodate everybody, but we can't
3 debate the philosophy of these rules and get
4 done with them, in my judgment. Does anybody
5 disagree with that?
6 Okay. So we are going to conduct the
7 next meeting if you have something specific to
8 propose by a motion, we will debate it. If
9 not, amusing sort of suggestions, we are just
10 going to have to blow by that and get to
11 specifics. Does everybody agree with that?
12 MR. SUSMAN: Yes.
13 CHAIRMAN SOULES: Anybody
14 disagree with it?
15 Okay. Thank you very much.
16 MR. MEADOWS: Luke, I have a
17 question.
18 CHAIRMAN SOULES: Robert
19 Meadows.
20 MR. MEADOWS: With this new
21 focus on the discovery rules and the deadline
22 we have got for July do you still want the
23 sanctions subcommittee report by next meeting?
24 CHAIRMAN SOULES: Yes, I do.
25 MR. JACKS: Can you tell us the

1 date of the July meeting?

2 CHAIRMAN SOULES: July 21 and

3 22. 8:30 on the 21st. We will probably work

4 'til 6:30.

5 PROFESSOR ALBRIGHT: 8:00

6 o'clock on Friday?

7 CHAIRMAN SOULES: 8:30 on

8 Friday. We will probably work 'til 6:30. We

9 will start at 8:00 o'clock on Saturday, and we

10 work 'til we get through, even if it's Sunday.

11 We are not going to stop 'til the discovery

12 work is done sometime between July 21st and

13 July the 23rd. Okay.

14 (Whereupon the proceedings were

15 adjourned.)

16

17

18

19

20

21

22

23

24

25

1 -

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 May 20, 1995, and

9 the same were therafter reduced to computer

10 transcription by me.

11 I further certify that the costs for my

12 services in this matter are $__1,086.00______.

13 CHARGED TO:__Luther H. Soules, III______.

14

15 Given under my hand and seal of office on

16 this the _31st_ day of _May__________, 1995.

17

18

19

ANNA RENKEN & ASSOCIATES
20 925-B Capital of Texas
Highway, Suite 110
21 Austin, Texas 78746
(512) 306-1003
22

D'Lois L. Jones
23 D'LOIS L. JONES, CSR
Certification No. 4546
24 Cert. Expires 12/31/96

25 #002,210DJ