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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 19, 1994

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Taken before William F. Wolfe,
Certified Shorthand Reporter and Notary Public
in Travis County for the State of Texas, on the
19th day of March, A.D. 1994, between the hours
of 8:30 o'clock a.m. and 12:35 o'clock p.m., at
the Texas Law Center, 1313 Colorado, Austin,
Texas 78701.

ORIGINAL

MARCH 19, 1994 MEETING

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Professor Elaine Carlson
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
David E. Keltner
Joseph Latting
Gilbert I. Low
John Marks
Honorable F. Scott McCown
Russell H. McMains
Harriet E. Miers
Richard R. Orsinger
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
David B. Jackson

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Charles L. Babcock
David J. Beck
Honorable Scott A. Brister
Honorable Ann T. Cochran
Professor William V. Dorsaneo
Michael T. Gallagher
Anne L. Gardner
Donald M. Hunt
Tommy Jacks
Franklin Jones, Jr.
Thomas S. Leatherbury
Robert E. Meadows
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Paula Sweeney

Honorable Sam Houston Clinton
Paul N. Gold
Doris Lange
Thomas C. Riney
Honorable Paul Heath Till
Bonnie Wolbrueck

SUPREME COURT ADVISORY COMMITTEE

MARCH 19, 1994

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1 to propose this morning is a comment to Rule
2 166, which is really the work of Pam taken from
3 the ABA, and it addresses the issue of what
4 kind of a hearing should be held, not what the
5 powers of the Court are so much, but what kind
6 of a hearing should be held and what the Court
7 may consider.

8 We say here that due process requires that
9 before sanctions are imposed the alleged
10 offender be afforded fair notice and an
11 opportunity to be heard. The procedure
12 employed may vary with the circumstances
13 provided that due process requirements are
14 satisfied.

15 The Court in its discretion shall
16 determine whether to hold a hearing on the
17 sanctions under consideration as well as the
18 type of evidence considered.

19 And then we say, "See the Rule on Hearings
20 Task Force on revisions of the Texas Rule of
21 Civil Procedure."

22 We have to wait to hear from them before
23 we know how to refer to that properly.

24 Then we go on to say, "A hearing is
25 ordinarily required prior to the issuance of

1 any sanction that is based on a finding of bad
2 faith on the part of the alleged offender. A
3 hearing is appropriate whenever it would assist
4 the Court in its consideration of the sanctions
5 issue or would significantly assist the alleged
6 offender in the presentation of his or her
7 defense.

8 "None of the subcommittee members is
9 entirely happy with this language, but we do
10 not feel it's a good idea to go further in
11 drafting a comment at this time for two
12 reasons:"

13 And then I won't read my letter, but what
14 we say here in essence is that we haven't heard
15 yet from Tommy Jacks, who is going to draft for
16 us the prevailing version of the sanctions
17 motion that we have debated for a long time in
18 here, and I won't go over that again, but Tommy
19 is the one who is going to -- who has
20 undertaken to draft that, and he is unable to
21 be here today and has not been able to do it so
22 far. It's really difficult to go forward any
23 more until we get that exact language.

24 Then we also say that we think that this
25 comment is such an important -- or this issue

1 is so important that it ought really be left
2 maybe to Bill Dorsaneo's group to talk about
3 what judges may consider at pretrial hearings.

4 And the issue that's out there floating
5 around there is this: A lawyer stands up and
6 says, "Judge, here is what happened." This
7 happens all the time. I'm looking at Judge
8 McCown. You know this happens. You get to
9 court, two lawyers stands up, one says, "Here
10 is what happened, Judge. A, B, C, D."

11 And the other one says, "No, that's not
12 what happened. What happened was such and
13 such."

14 Well, can the Court enter an order based
15 on that kind of representation? It's no
16 evidence at all, but my experience is that it
17 happens all the time. Should we even address
18 that in this Committee? If an unsworn
19 assertion is made by an attorney in an pretrial
20 hearing, should the other side have the right
21 to cross-examination that attorney? Those are
22 pretty important issues. I guess they are.
23 And that's right at the heart of what we're
24 doing.

25 The Sanctions Committee feels like that we

1 have the cart in front of the horse and that we
2 ought not talk about this any more at this
3 time, not because we're trying to prolong it or
4 dodge it; I think we should not duck it. I
5 think we should address this issue very
6 squarely, but until we see what discovery
7 direction we're taking and until we see what
8 Jacks is going to propose by way of actual
9 language, we really can't do anything further
10 except to suggest this rather innocuous ABA
11 language.

12 So that's what we've done. That's where
13 we are today.

14 MR. HERRING: And I think you
15 might add that we probably don't even want to
16 vote on this language today because, as we
17 talked about last time, Bill Dorsaneo is coming
18 up with a general rule to talk about hearings
19 and what courts may consider or may not
20 consider, and we would kind of like to see that
21 before we have a comment that takes that into
22 account.

23 CHAIRMAN SOULES: Okay. We had
24 a vote of 13 to 10 last time to redraft the
25 Sanctions Rule along the lines that Tommy Jacks

1 suggested. He has not participated in the
2 interim.

3 Does anyone in the 13 want to take a crack
4 at that? Because next time we're going to go
5 to a vote, a final vote on sanctions whether we
6 have input or not from the 13. So who wants to
7 take that on? Shelby?

8 MR. SHARPE: I don't want to
9 take that on, but I want to give you a report.

10 The State Bar's Committee on Court Rules
11 will take a final vote on a complete rewrite of
12 Rule 13 which is totally consistent with what
13 you did on Jacks' vote and what was the vote
14 back in November of this Committee. I think
15 you will have that, Joe. The meeting is the
16 first Saturday in April. You will have that
17 meeting before we meet next. You will see the
18 complete rewrite. It's coming from Bill Jones'
19 subcommittee on sanctions. There's also a
20 complete rewrite of Rule 215 with a new
21 number.

22 And by the way, what Bill Dorsaneo by and
23 large is using is what's coming out of Court
24 Rules because he also sits on that state bar
25 committee. So this Committee, when it meets

1 next in May, the subcommittee and the task force
2 will see from Court Rules its rewrite of Rule
3 13 which -- I can tell you right now it
4 completely passes muster on the hearings, the
5 procedures, the whole bit.

6 Also, Rule 13 will not apply at all to
7 discovery. It will apply to everything but
8 discovery. In fact, it will even have a
9 disclaimer that it does not apply to
10 discovery. And then the Rule that's coming up
11 will have basically the two-tier approach that
12 you asked for, which basically is motions to
13 compel, except in those circumstances where
14 it's just not practical, and then the
15 sanctions. And then it sets up all the
16 procedure and the process and it's very
17 concise.

18 I have seen their advance product, which
19 in fact it almost passed at this last meeting
20 but we just didn't have a chance to get the
21 wording exactly as Court Rules wanted, so your
22 Committee will have that. This Committee
23 should be able to act with some type of final
24 approval on 13 and whatever the number is going
25 to be on whatever relates to discovery.

1 MR. LATTING: Could you send
2 me --

3 CHAIRMAN SOULES: When will you
4 have that to Joe?

5 MR. SHARPE: Our meeting is, I
6 think, April the 9th, whatever that Saturday
7 is, and he should have it by the 12th or the
8 13th of April. And we don't meet until May.

9 MR. LATTING: Would you mail it
10 to me directly?

11 MR. SHARPE: Oh, it will come
12 direct to you. It will go directly to you.

13 MR. LATTING: Okay.

14 CHAIRMAN SOULES: What I would
15 like for you to do is to go ahead and send us a
16 draft.

17 MR. SHARPE: Sure.

18 CHAIRMAN SOULES: Whatever the
19 status of that is right now, send it to us.
20 Send it Joe so he can start thinking about it.
21 And tell the Court Rules Committee that this
22 Committee is going to act, probably take final
23 action on sanctions at the May meeting, and if
24 they're not on the train, it's leaving.

25 MR. SHARPE: Yeah. We knew

1 that. That's the reason why we scheduled that
2 April meeting.

3 CHAIRMAN SOULES: Okay. But we
4 do have -- the Supreme Court wants work product
5 out of this Committee in its hand and we
6 haven't done it. In three meetings we haven't
7 sent anything and we're not going to get
8 anything to it as we go through this meeting.
9 This is the third meeting, of course. The next
10 meeting we have to get something to the Supreme
11 Court.

12 MR. SHARPE: Well, these Rules
13 have been in the process through this
14 subcommittee for two years of work on 215 and
15 three years on 13 and I really think they have
16 it down in good form.

17 CHAIRMAN SOULES: Okay. That's
18 fine. Well, there has been some sensitivity in
19 the past on that State Bar Committee that this
20 Committee wasn't receiving its work product,
21 but that's never been the case. It's just that
22 this Committee has got work to do and we want
23 the input from that committee.

24 Every request that I get from anyplace
25 goes to your staff, the State Bar staff of the

1 Court Rules Committee, so you're -- they had
2 this agenda before it was ever distributed to
3 our membership as it came from time to time,
4 and we do want input on everything, but we've
5 got to, of course, keep our docket too.

6 Pardon me, go ahead, Joe.

7 MR. LATTING: Two things. I
8 think that if somebody besides Tommy is going
9 to be responsible for writing this Rule that on
10 our Committee it should be Pam. I volunteer
11 Pam to do it. She's articulate.

12 MS. BARON: Thank you so much.

13 CHAIRMAN SOULES: Okay.

14 MR. LATTING: And the other
15 thing is I want to respectfully -- this is not
16 personal at all -- I want to say that I hear
17 what you're saying and that the train is
18 leaving. I personally feel that the train
19 ought not to leave on sanctions until we decide
20 what we're going to do with discovery.

21 And for Dorsaneo, I think we're writing
22 the Rule that we ought to write last first,
23 because until we see those other Rules, we're
24 trying to make this -- we're doing the
25 pathology before we've done the anatomy.

1 CHAIRMAN SOULES: Well, the
2 Chair is doing the best I possibly can to
3 advance the ball.

4 MR. LATTING: I understand.

5 CHAIRMAN SOULES: And discovery
6 has been later than sanctions in developing and
7 we've got to keep rolling.

8 MR. LATTING: We're going to do
9 it.

10 CHAIRMAN SOULES: Okay. We're
11 going to do it.

12 MR. SHARPE: One final comment,
13 Mr. Chairman. For Joe's comfort level, Bill,
14 of course, has been a member of the State Bar
15 Committee on Court Rules for as long as he has
16 probably been on this Committee, and he is
17 familiar with where he is going on the
18 discovery aspects of it, which are also
19 consistent with what he's been working with on
20 Carl Hamilton's subcommittee on discovery
21 there, so I think you're going to find that
22 this Sanction Rule fits in with what Dorsaneo
23 and the others have been doing on discovery.
24 It is not incompatible with what's coming out
25 of Steve Susman's committee in principle, so

1 it's going to fit.

2 MR. LATTING: Okay. Well, I'm
3 glad to hear that. I just didn't know either
4 one of those things.

5 MR. SHARPE: Correct. No, it
6 will fit.

7 CHAIRMAN SOULES: Okay. We
8 spent a lot of time on 166d, very little time,
9 if any, on 13 in sessions here, and then there
10 are some other Rules that the Sanctions Task
11 Force felt needed some adjustment. And I want
12 to go through all that next time and at least
13 get 13 and 166d done. The rest of it may have
14 to wait for final action until all the other
15 Discovery Rules.

16 If anything else can be accomplished
17 without going to the rest of the Discovery
18 Rules, let's get that out of the way, too, so
19 we can get the sanctions subcommittee wrapped
20 up, except as we may need to make adjustments
21 much later in the year whenever discovery is
22 completed, and then we'll have to look to see
23 how they work one set of Rules with the other,
24 the Sanctions Rules with the Discovery Rules.

25 Anything else on sanctions today? All

1 right. Who is going to be the draftsman for
2 yours? Is it going to be Pam Baron?

3 MS. BARON: Only reluctantly.

4 CHAIRMAN SOULES: Pardon me?

5 MS. BARON: Only reluctantly.

6 CHAIRMAN SOULES: Only
7 reluctantly.

8 MR. LATTING: That's a yes.

9 CHAIRMAN SOULES: Okay. Well,
10 somebody in the 13 who wants to carry the ball
11 needs to get involved, because otherwise we're
12 not going to get the changes made.

13 MR. HERRING: Well, Pam needs to
14 talk to Tommy. That's what needs to be done.

15 MS. BARON: And I'll do that.

16 CHAIRMAN SOULES: That's right.
17 But if that doesn't work out, then we've still
18 got to wrap it up next time.

19 MR. LATTING: We'll have a draft
20 here for next time.

21 CHAIRMAN SOULES: Okay. And I
22 think that brings us to discovery. And Steve,
23 you've got a report that says "Working Draft
24 3/14." Is that the current -- is that what we
25 should be looking at?

1 MR. SUSMAN: That's it.

2 CHAIRMAN SOULES: Okay. It
3 looks like this (indicating)?

4 MR. SUSMAN: Correct.

5 CHAIRMAN SOULES: You mailed
6 this to the members, did you not, Steve?

7 MR. SUSMAN: It was mailed on
8 Monday to all the members.

9 MR. ORSINGER: I have one extra
10 copy if anybody wants it.

11 CHAIRMAN SOULES: Do you have a
12 copy, Judge?

13 MR. ORSINGER: Sorry, it's
14 gone.

15 CHAIRMAN SOULES: Somebody may
16 have to look on with somebody.

17 Now, let's see, Shelby, is this the paper
18 that you said -- request for new Rule or
19 change of existing Rules and so forth, 166d?
20 Is this it (indicating)?

21 MR. SHARPE: That's the medical
22 mal.

23 CHAIRMAN SOULES: This is the
24 medical mal?

25 MR. SHARPE: Correct. Unless

1 your secretary distributed that, that's not in
2 their packets.

3 CHAIRMAN SOULES: Okay.

4 MR. SHARPE: It went to you for
5 distribution, so you'll have to look at that in
6 the next meeting.

7 CHAIRMAN SOULES: Okay. Is this
8 for Court Rules?

9 MR. SHARPE: Yes. That was done
10 at the request of Chief Justice. We faxed him
11 a draft to see if we were on line with what he
12 had in mind, and he confirmed that he had
13 finalized that at the last meeting.

14 CHAIRMAN SOULES: Okay. Steve,
15 are you ready to go?

16 MR. SUSMAN: Ready.

17 CHAIRMAN SOULES: Okay. Please
18 take the floor.

19 MR. SUSMAN: And I've moved over
20 here because some say it's easier to hear than
21 in the middle and I've got some stuff on the
22 chart here to use to demonstrate kind of what
23 our theme is.

24 The discovery committee has now held a
25 number of meetings in Austin, the subcommittee,

1 and a number of phone conversations. And we
2 decided, as we began our work, to begin with
3 discussing the discovery vehicles and the
4 limitations on them rather than go to the more
5 general subjects of the scope of discovery and
6 whether it should be voluntary disclosure or "I
7 don't give it to you until you ask for it" or
8 the role of the Court in pretrial conferences
9 or the need to supplement discovery answers,
10 all of which are subjects that we will come to,
11 but they seem to have been subjects that have
12 been thought a lot about by the Discovery Task
13 Force; and whereas we thought this issue of
14 limitations was something we could get into
15 real quickly, come up with some very concrete
16 proposals and it would also be an area in which
17 we could make a lot of changes.

18 You basically have before you our idea of
19 interrogatories, experts, depositions and the
20 general discovery timetable. Coming to you
21 before the next meeting, we have it drafted but
22 we have not finally -- did not get it to you
23 in time, is a recommendation on the request for
24 production of documents, Rule 167.

25 The basic theme or the general philosophy

1 of the subcommittee is subject to your --
2 really what we want to know is are we going in
3 the right direction, because if this group
4 doesn't think we're going in the right
5 direction we need to make a lot of changes.

6 Our general notion was that we cannot
7 count on the micromanagement by courts through
8 the pretrial conference device or the good will
9 of counsel through a Gandhi-type cooperation to
10 solve the problem that we have in the courts
11 today, that the civil litigants have in the
12 courts today. It's just too damn expensive.
13 It takes too long and it's too expensive and no
14 one can afford to have a dispute resolved the
15 traditional old-fashioned way.

16 You've got to go to mediation because you
17 cannot afford to go to a trial, and so the
18 feeling was that it would be nice if Courts
19 could do it for us, but in a state where we
20 have an elected judiciary, it is unlikely that
21 the Courts are going to be willing on their own
22 motion to put the kind of limitations that
23 lawyers ought to have put on themselves. And
24 in every case we have been in, mostly one
25 lawyer -- it's rare that two lawyers will

1 agree on the way things ought to operate. It
2 happens periodically but not often.

3 So we began with the general idea of
4 imposing a discovery limit, a window of time
5 during which discovery can take place. And
6 that, as you can see what we have done -- and
7 by the way, as you see -- as you go through
8 these Rules, you will see that the Rule 166c
9 and all these numbers are kind of all mixed up
10 because we'll have to get them straight and
11 fixed up. But what we wanted to do and have
12 right at the front is the notion that
13 everything that we do on these Rules can be
14 modified by agreement of counsel or by order of
15 the Court on a motion made for good cause
16 shown, so it's all subject to change.

17 Everything is subject to change, but the
18 burden is upon the one who wants to change
19 these limits to come in and show some good
20 cause, or the Court can do it on its own motion
21 or the parties can certainly agree, but our
22 notion generally is that regardless of when the
23 case is filed and regardless of when the case
24 is set for trial, six months is enough time in
25 any case for the parties to complete discovery

1 if they work at it.

2 There is a tremendous -- one of the
3 biggest expenses in civil litigation today is
4 the starts and stops. You pick up a file, you
5 ask questions, you ask to take a deposition.
6 Two months later you come back for a summary
7 judgment hearing. Three months later you come
8 back for another deposition. There are too
9 many starts and stops.

10 I mean, the ideal solution, you know, in
11 the ideal world would be lawyers would work on
12 one case at a time. Well, we felt that's a
13 little too radical. Probably we can't do that
14 right now. But we didn't think there was
15 anything unreasonable about the six-month
16 window, particularly when there was some
17 ability for the lawyers among themselves to
18 agree when the window begins, when the
19 discovery period begins.

20 We said the discovery period should begin
21 at the time the first deposition is taken in
22 the case or at the time that the first document
23 is produced in response to a request for
24 production of documents, some kind of objective
25 event that says that's when the six months

1 begins. And then to some extent the lawyers
2 have control over when they want it to begin by
3 when they take the first deposition. And I'm
4 sure if we were in a case together, we might
5 discuss when are we going to kick things off
6 and how are we going to kick things off.

7 And then that discovery window runs for a
8 period of six months and then ends, and it ends
9 regardless of when the case is set for trial.
10 The case might be set three years hence. It
11 has nothing to do with the trial setting.

12 We've got to get people thinking that
13 discovery and trial are two different things.
14 That was the feeling of our subcommittee
15 because, you know, you get in these cases where
16 people say, "What's the harm of continuing
17 discovery until the trial?" Well, the harm is
18 that it costs a lot of money, and it seems to
19 me that that's something that we have to do
20 something about here. It's something that we
21 can do to save the public money and be very
22 proud of.

23 Anyway, that was the notion of the
24 discovery period being six months, and that's
25 basically what we had in Rule 166b, which

1 probably ought to be transcribed as Rule -- I
2 mean, we ought to begin with a modification
3 probably.

4 Before we go into detail, I want to just
5 kind of take you through these Rules and
6 explain them to you generally and then we'll
7 come back and discuss them in greater detail.

8 There is Rule 166(c)(3) at the bottom of
9 the first page where we have tried to determine
10 what a side is, because certain limits are
11 placed on each side in a deposition. This
12 could be a problem, we realized. For each side
13 in a trial this could be a problem, and we've
14 tried to do that in Subdivision 3 by saying
15 that should be determined by the Court pursuant
16 to the provisions of Rule 233.

17 The Interrogatory Rule, we have basically
18 set a limit on the number of interrogatories,
19 including subparts, at 30, but no limitation on
20 the number of sets. If a lawyer wishes to ask
21 six sets or 30 sets, one interrogatory per set,
22 he should be allowed to do so. Also we have
23 intentionally said that there shall be no limit
24 on the number of interrogatories which can be
25 asked to simply ask another party to identify

1 documents or authenticate documents, and that's
2 in Rule 168a.

3 In 168b, we basically take the position
4 and there was some argument as to whether the
5 answers to interrogatories should be verified
6 by the client or the lawyer. We know that
7 they're written by the lawyer frequently. We
8 opted for saying that the client should still
9 have to sign and verify the interrogatories in
10 spite of the fact that the lawyer usually
11 writes them. On objections we say you can
12 by -- and that includes answers to contention
13 interrogatories. Objections, of course, would
14 be signed by the attorney making them.

15 We thought that one of the biggest abuses
16 of interrogatories today was the use of an
17 interrogatory to require the other side to
18 marshal its evidence. "Tell me every fact,
19 please state every fact and identify every
20 document and witness that supports the
21 allegation on Page 8 of your petition." We
22 thought that's an abuse of the interrogatory
23 vehicle.

24 Yes, interrogatories need -- you need to
25 preserve the use of an interrogatory to

1 determine whether the person is contending this
2 as a tort or a contract. Yes, you ought to be
3 able to use interrogatories to determine the
4 contentions of the other party, and that's a
5 far preferable way, depending on what his
6 contentions are, than some summary motion or
7 some special exception hearing which requires a
8 lot of court time.

9 But contention interrogatories should not
10 go so far as to require a person to marshal
11 their evidence, and we tried to deal with that
12 on Page 4, little "d," in the middle of the
13 page, on contention interrogatories, where we
14 say that a party can use contention
15 interrogatories only to request another party
16 to generally state the facts and specifically
17 state the legal theories upon which that party
18 bases their particular allegations and to
19 request another party to admit or deny specific
20 facts. That wording, we hoped, together with
21 the comment on the following page will put an
22 end to the use of interrogatories as a vehicle
23 for requesting the other party to marshal
24 facts.

25 We retained the option to produce

1 documents in lieu of answering the
2 interrogatories, but make it clear that the
3 person who refers -- in a response to an
4 interrogatory -- refers the asking party to a
5 document must tell that party sufficient
6 information to allow them to locate the
7 document as easily as it would be for the party
8 responding to the interrogatory to locate the
9 document. That's the test we articulate at the
10 top of Page 5, so that they provide sufficient
11 details so that the interrogating party can
12 locate and identify the document as readily as
13 can the party served. That is a test that I
14 think is used in the Federal Rules.

15 On the subject of -- let me skip now
16 before I go to expert witnesses because I think
17 the next logical subject is depositions.

18 Our Deposition Rule appears in several
19 places, but essentially it begins on Page 8,
20 Rule 200. We adopted a Rule that in every
21 case, every case, no side should get more than
22 50 hours of depositions, 50 hours of
23 questioning of a witness. We said it does not
24 count in that 50 hours the other side's
25 cross-examination of your witness at the

1 deposition. It does not count in that 50 hours
2 your examining your own expert for the purpose
3 of using his testimony as a trial -- for use
4 at trial. But that -- and of course, breaks in
5 the depositions do not count, and we have dealt
6 with that in Rule 200.

7 And at the bottom of Page 9 we talk about
8 what counts in the 50-hour limitation. The
9 notion is that the 50 hours, again, we -- some
10 of the local rules that we looked at around the
11 country limit the number of depositions, 10 to
12 a side, eight to a side. We felt it made a lot
13 more sense to just have a number of hours and
14 let the lawyers divide them up however they
15 please. Some lawyer may want to take 50
16 depositions, very short depositions. Another
17 lawyer may want to spend three days with a
18 witness.

19 By the way, I think this is going to be so
20 refreshing to practice law under a regime like
21 this. When you get in a case, instead of
22 sending out associates to just go forth and
23 depose, you actually have a sit down and think
24 about what your theories are going to be so
25 that they do not unnecessarily use up your

1 precious 50 hours. You'll think about what
2 your theories are going to be, what you're
3 going to get from each witness and how much
4 time you're going to spend with each witness
5 asking questions.

6 To make sure that that is not abused by
7 the defending party, we have provided that no
8 objections can be made during -- while you
9 defend a deponent. The only thing you can say
10 during a deposition is to advise your client on
11 the assertion of a privilege. That's all.
12 Anything else should be go to jail. The notion
13 again, and we made it very clear in our Rule,
14 is that anything that takes place at a
15 deposition should be recorded, a record made or
16 played back, certainly, if it's on video, or
17 read it to the jury. The conference room
18 should be like courtrooms, is the notion of our
19 subcommittee, and what happens in a deposition
20 room should be no different than what happens
21 in a courtroom. And if someone wants to act up
22 or be obnoxious or obstruct the deposition, the
23 jury ought to be able to see that, so we have
24 provided that.

25 Now, objections are -- I mean, you can

1 make objections to questions at time of trial.
2 They are not lost forever by not making them,
3 but they are all reserved, and that's basically
4 our procedure. That's what we have done on the
5 subject of -- I think I've barely covered
6 basically what we've done on the deposition
7 front.

8 We were concerned on the Deposition Rule
9 about the lawyer that badgers a witness, that
10 asks an extremely misleading question that can
11 only be answered in one way, but we concluded,
12 well, that goes on at trial, too; that the
13 defending lawyer has the option of coming back
14 and cross-examining the witness, has the option
15 of objecting to the question, in other words,
16 before it is read to the jury. And there are
17 ways to deal with -- ways to protect
18 themselves, and we cannot allow this continuous
19 objection to form, objection to this, objection
20 to that, to interfere with the deposition
21 procedure. That was basically our fix on
22 depositions.

23 There was a great deal of discussion about
24 it, and we can get into that in more detail,
25 about the means of taking depositions. Are you

1 going to do -- and we dealt with the subject
2 of telephonic depositions and depositions taken
3 by other than stenographic means. And
4 basically the view of the committee was that if
5 you take a deposition and you want to take it
6 by smoke signals, great, you can take it by
7 smoke signals. Whatever method you designate
8 in your notice, you can take it.

9 Now, the other side can come up with a
10 court reporter, a stenographer, and that the
11 Court at the end will figure out who pays for
12 the smoke signal and who pays for the
13 stenographer; but that basically we ought to
14 allow people to have the freedom to experiment
15 with different ways of preserving testimony.

16 A traditional stenographic record is not
17 needed in all cases, and that -- now, this
18 does not -- by the way, we have a court
19 reporter on our subcommittee who -- and
20 certainly we want to hear from David about his
21 views, but as I read the material he passed to
22 us, David's view is not so much -- and I mean,
23 we could probably have a more heated discussion
24 on this anyway, but his view is not so much to
25 limit the method you can use as to say when you

1 transcribe it, it ought to be transcribed by a
2 certified court reporter. I mean, maybe that's
3 not it, but that's certainly what the material
4 he passed out -- the thrust of it is that.

5 Then on the subject of expert witnesses,
6 which is Rule 170 on Page 6, we thought that
7 the simple way to do this is to require that
8 the plaintiff must designate his experts
9 60 days before the close of the discovery
10 window, so after four months you need to
11 designate. It doesn't matter under our Rules
12 when you hire him or when you identify him.
13 You could have hired him before you filed your
14 lawsuit, and there's no longer this problem of
15 having to identify an expert as soon as you
16 know you've got him. And the plaintiff must
17 designate the expert, and what the plaintiff
18 must do when you disclose your expert is
19 contained at the bottom of Page 6, the
20 mandatory disclosure proviso.

21 The notion was that -- and we wrestled
22 with the question and basically we concluded
23 that you don't need an expert report and a
24 deposition, which is basically choose between
25 one of the vehicles of conducting discovery

1 using an expert. Since we concluded that most
2 people will probably want a deposition, we have
3 eliminated the -- or tried to eliminate,
4 through the language we have used in this Rule,
5 the need for an expert ever to prepare a report
6 as such. So when you disclose, you have to put
7 the name of the expert, his address, the
8 subject matter on which he is going to testify,
9 damages, and some general substance of his
10 opinions.

11 And we have in mind here something -- we
12 need to look at the wording, make sure we've
13 accomplished it, but the notion was enough kind
14 of to let the lawyer get prepared for the
15 deposition but it doesn't have to be
16 exhaustive, because all you're really doing now
17 is allowing the lawyer to get prepared for this
18 deposition and not doing something to
19 substitute for a deposition. And then you have
20 to in your designation provide two days in the
21 next 45 when these experts -- each expert will
22 be available.

23 And then the defendant has -- the
24 defendant is allowed 15 days after you learn
25 the identity of the plaintiff's expert to

1 designate their own expert, and that occurs
2 45 days before the close of the discovery
3 window. And the defendant has to provide the
4 same information and all experts are deposed 45
5 days after they were identified so it will all
6 be completed before the six months ends.

7 We dealt with what we thought was a
8 problem, we talked a lot about the problem, of
9 the proliferation of experts like nuclear
10 missiles in an arms race; that that is running
11 up the expense of litigation, and really we
12 should do something about it. There were
13 suggestions that maybe we could limit the
14 number of experts, as some local rules around
15 the country have done.

16 Our basic thought on that was that there
17 are cases, particularly kinds of cases where
18 you may need a lot of different experts but not
19 a lot of testimony from each one, but a number
20 of them, and that we would go ahead and allow
21 people to designate more than -- well, a
22 certain number of experts. But the notion is
23 that if you designate -- let me see where that
24 is in our Rules. The first two experts you
25 designate are deposed on your -- within your

1 50 hours. That's part of the 50 hours. You
2 can depose the other side's two experts during
3 those 50 hours. After two experts you --
4 there's an additional six hours added to the
5 time of the other party to depose your expert
6 or each of your experts.

7 Where is that in the Rule, Alex? I'm
8 sorry.

9 CHAIRMAN SOULES: Page 7.
10 Item 5 on Page 7.

11 PROFESSOR ALBRIGHT: Page 7,
12 Item 5.

13 MR. SUSMAN: Thank you. So that
14 two experts count within the 50-hour limit.
15 After that, the other side gets six hours of
16 testimony per expert, so there is a price you
17 pay for designating more than two experts.

18 And Subsection 6 at the bottom of Page 7
19 is designed to deal with the problem of someone
20 who decides they want to designate a bunch of
21 experts, uses their depositions as a method of
22 auditioning to see who is going to be best, and
23 then selecting from those experts who survived
24 their deposition for trial. And this Rule
25 basically says that if you don't call to trial

1 someone who you designated as an expert, then
2 the Court has the discretion to charge to you
3 the entire expense of the other side's deposing
4 of that person. Again, we were trying to build
5 in some kind of price to pay if someone
6 unnecessarily designates experts.

7 That's where we stand, Mr. Chairman, with
8 our work. I mean, that's just kind of a brief
9 summary of what we have today. Now, obviously
10 we will -- we do have and we'll get to you very
11 quickly a suggestion on document request. And
12 then we will turn our subcommittee's attention
13 to other subjects like the need to supplement,
14 the general scope of discovery and what should
15 be decided about discovery during the pretrial
16 conference.

17 CHAIRMAN SOULES: Okay. Well,
18 that's a good report and it looks like there's
19 been a lot of headway made on the concerns that
20 the Court has expressed and a lot of other
21 people have expressed and the public has
22 expressed about the costs and burdens of
23 discovery.

24 Where would you like for us to begin,
25 Steve, giving you input for your continued

1 work?

2 MR. SUSMAN: Well, I guess the
3 first general thing we need is, is it okay to
4 begin with the approach of imposing limits on
5 the amount of time allowed for discovery, the
6 amount of time each side gets for depositions,
7 and kind of the way we did on experts, you
8 know, the amount of time you give for experts
9 without giving the other side. I guess the
10 question is, if there is a big consensus of the
11 Bar represented and the judiciary represented
12 in this room that that's stupid, that lawyers
13 should -- that we should not interfere with
14 lawyers' freedom to plan their own discovery,
15 that it should be done on a case-by-case basis
16 with a lot of judicial intervention, then we've
17 obviously got to go back.

18 We're pursuing -- I mean, we can argue
19 about what the proper number of hours is and
20 the proper number of interrogatories and the
21 proper number of months and what begins the
22 window and what ends it and when it ends, but
23 the first question is, is this the right
24 approach, and that, I think, is what we ought
25 to address first because we're working -- we

1 will be doing futile work if this group is
2 going to shoot that down.

3 CHAIRMAN SOULES: Well, I think
4 the Committee has given a consensus in prior
5 meetings that some limitations on discovery
6 should be imposed.

7 Is anyone opposed to that?

8 Okay. And the approach that the
9 subcommittee is taking is to look at each form
10 of discovery, interrogatories, depositions, and
11 to try to come up with limitations on each form
12 of discovery.

13 Is anyone opposed to that approach, that
14 general approach?

15 All right. I think that gives you the
16 answer to that.

17 MR. SUSMAN: That's correct.
18 That gives me the answer to that.

19 CHAIRMAN SOULES: Okay. Rusty
20 McMains.

21 MR. McMAINS: Yes. Luke, I just
22 want to throw out my basic view. I agree with
23 a lot of what Steve is saying and what the
24 Committee's approach is in terms of trying to
25 limit the more complex problem of discovery

1 involving depositions, expert depositions and
2 that kind of stuff. But it seems to me, to the
3 extent that we limit or are trying to limit
4 that, one thing I am concerned about is
5 limiting the written discovery, you know,
6 either before or after that occurs; because
7 really, a more -- you have to -- to me, it's
8 a real problem if you're going to take away all
9 of the -- you're kind of limiting all the
10 discovery.

11 HONORABLE F. SCOTT McCOWN: What
12 do you mean by "written"? Do you mean
13 interrogatories or do you mean production?

14 MR. McMains: Well,
15 interrogatories, follow-up interrogatories.
16 Again, I think the six-month period may be fine
17 for maybe some initial limits, but there's
18 stuff that may happen after six months in my
19 judgment that needs to be of concern. And it
20 may be that we just need to go ahead and
21 provide that written discovery, and maybe in
22 the supplementation part, but that there are
23 things that will happen. The law may change.
24 There are all kinds of things that will justify
25 additional discovery and it may be that, you

1 know, it has to appear reasonable, I think, to
2 the Bar when it first comes out.

3 And one approach is to at least go ahead
4 and assume that written discovery subsequent to
5 this period is probably okay with less limits,
6 but you know, the other stuff is what you need
7 to have special provisions to conduct.

8 CHAIRMAN SOULES: Joe Latting
9 has had his hand up.

10 MR. LATTING: Steve, I was just
11 going to say I have a nitpicker, a nit or two
12 to pick, but basically I think I'd be
13 enthusiastically in favor of this approach your
14 committee has outlined. I think as a trial
15 lawyer I believe I can find out 98 percent of
16 the other side's case within those limits, and
17 I think that the longer we take with discovery
18 the more money we spend, and there's just no
19 way around that.

20 And this does limit our discovery some,
21 but as Scott McCown said once, if you take the
22 difference between what happens on a temporary
23 restraining order hearing and what happens two
24 years later at the permanent injunction
25 hearing, you just have to wonder how much you

1 really find out extra in a case. And I think
2 it's -- I think you guys are right smack on
3 the right track, and I'd like to --

4 CHAIRMAN SOULES: Buddy Low.

5 MR. LOW: Luke, I think if we do
6 what Rusty is saying, we'll be back where we
7 are. We've got to put a tight rein on all
8 discovery, because a lot of the dispute and the
9 time is over written discovery and so forth,
10 and if we don't put a tight rein on time and
11 everything, we're going to end up where we are,
12 because that's the big cost, judicial, you
13 know, intervention and all that.

14 I think if the lawyers get together on a
15 certain time limit, they know more about their
16 case, and the more you know the less confused
17 you are and the better you come into focus with
18 the problem. And I think I endorse it 100
19 percent without even any exception, written or
20 otherwise.

21 CHAIRMAN SOULES: Steve.

22 MR. SUSMAN: I did hear Rusty
23 say something that we do need to do something
24 about, and that is, it seems to me there should
25 be some provision for discovery between the

1 close of the window and trial about things that
2 have happened since the close of the window,
3 like damages in a -- where you're seeking
4 profits and you've got to look at recent
5 business or health. But it seems to me that
6 the limit is to development since the window
7 closed in some way.

8 CHAIRMAN SOULES: Yeah. We've
9 had a case on file six months where there were
10 two workers injured, and then after -- more
11 than six months after the case was filed, one
12 of those died and that changed things big
13 time. In workers' comp, the difference is --
14 you know, it's just like the whole thing turned
15 over, so that can happen.

16 But that can be done, it seems to me, like
17 on motions, so Judge McCown, why don't you
18 discuss that.

19 HONORABLE F. SCOTT McCOWN: I
20 was just going to say that I think it's just
21 like -- well, as Steve said at the outset, that
22 we're going to have to figure out about
23 supplementation. But the other thing that we
24 really can't lose sight of is that this all can
25 be altered by agreement or by the Court for

1 good cause.

2 I can't imagine a Court saying, "Well, the
3 law has changed, so I'm not going to reopen
4 discovery to address that. That's not good
5 cause. Where the worker has died, I'm not
6 going to reopen discovery to address that;
7 that's not good cause."

8 So I think if we go with a tight window
9 and then we get the supplementation problem
10 solved and rely upon agreement and good cause,
11 it will work.

12 The other thing I want to just point out
13 is that I think that this works real well with
14 mediation and other ADR forums, because when
15 the window closes and your case is in the box,
16 that's the perfect time, if you've got to wait
17 for your trial setting in these urban counties,
18 to do ADR. And that might itself resolve a lot
19 of the supplementation problems if the case
20 gets settled when the window closes.

21 I think a lot of what keeps these cases
22 going and keeps the costs going is just the
23 economics of making a living practicing law
24 waiting for your trial setting and you keep
25 churning the file. If the window is closed,

1 then you're going to go to ADR and get the
2 thing resolved, if you can.

3 CHAIRMAN SOULES: David
4 Keltner.

5 MR. KELTNER: Luke, a couple of
6 things. Let me address, I think, Rusty's
7 situation on supplementation.

8 The Supplementation Rules we've already
9 discussed would cover, Rusty, I think, the
10 majority of the problems that you have. There
11 will be, although you do not have it in front
12 of you, our Motion for Production Rule. Our
13 theory was that there would be no limitations
14 on the amount of requests for production that
15 you could make. There would still be the time
16 period limitation, but that would be a rather
17 open type of situation.

18 I worry about one thing that we discussed
19 and we argued around it but we didn't join it
20 and so in one respect the subcommittee has not
21 addressed it, and that is whether good cause
22 ought to be the standard for a Court to expand
23 or contract these -- the scope of this
24 limitation. And I'm not so sure that good
25 cause should be it, because we want to have a

1 body of law interpreting good cause. It has
2 now become a term of art and it doesn't fit
3 really perfectly here because it's been
4 primarily done in supplementation. And perhaps
5 we ought to go to something -- a slightly
6 different standard, and I've thought about it.

7 We briefly discussed at one time it being
8 more of a discretionary order of the Court, but
9 the problem is that on a case-by-case basis
10 that becomes a difficult situation. But
11 perhaps good cause isn't what we ought to do,
12 but it -- but we need to make sure that it can
13 be expanded if the circumstance is justified.

14 And I think that the Rule as -- the Rules
15 as written, I think, and as Steve has codified
16 them were pretty good at that, but we need to
17 revisit that issue. The standard could become
18 very difficult and we're going to have to
19 define "good cause," I'm afraid, because it is
20 now defined in a way that wouldn't fit. But
21 that's just an issue that I think is a fine
22 tuning issue we could work out.

23 CHAIRMAN SOULES: Chuck
24 Herring.

25 MR. HERRING: I would agree with

1 that. I think that good cause right now under
2 215(5) is laden with a lot of construction and
3 it will not translate.

4 I've got a case, a couple of toxic tort
5 cases. One has 500 plaintiffs and the other
6 has a thousand. I would think everyone would
7 say, well, that's probably a case where the six
8 months is not going to work on and that should
9 be good cause. The Court has to set a pretrial
10 order in a case like that.

11 But we've had a case down in South Texas
12 where the local judge says, "Nope. Tough. Six
13 months." We ought to be able to overturn that
14 and have some remedy. What is it? How do we
15 give that protection in the Rule or in the
16 construction of good cause or whatever the
17 standard is that you use?

18 HONORABLE F. SCOTT McCOWN: Can
19 I address that?

20 CHAIRMAN SOULES: Sure, Judge.
21 Judge McCown.

22 HONORABLE F. SCOTT McCOWN: If
23 you want to use a different word than "good
24 cause," that's fine. But it seems to me that
25 terms of art mean different things in different

1 contexts, and "good cause" fits, but I'm not
2 tied into that. Let's just use plain English.
3 Let's just say for a good reason and just say
4 "good reason."

5 I mean, it seems to me that we don't want
6 to say "for any reason." We just want to say
7 that it has to be a good reason. But to try to
8 define it further, I think is, A, going to be
9 impossible, as it so often is when you're
10 talking about discretion, particularly
11 discretion that affects so many different kinds
12 of cases and so many different issues; and
13 second, there may be a lot of resistance to
14 this Rule in the Bar as a whole, and I think
15 the way to sell it is just to say, you know,
16 we've got this good reason exception, urge that
17 on the judge, and there will be -- I actually
18 don't think this is true, because I don't think
19 it will turn out to be any problem at all in
20 reality. But if it does, there will be a
21 developing body of case law on that. But, boy,
22 I don't see how you could ever define how the
23 judge is to exercise discretion in this area.

24 CHAIRMAN SOULES: Well, I think
25 what you just said is pretty important. Why do

1 we have to -- why do we need to set any
2 standard? Just let the judge in his discretion
3 make further orders, period.

4 And then my sensitivity on this is as
5 follows: Whatever the Supreme Court does in
6 this area in the next few years is not going to
7 be something that cooks in a test tube. It's
8 going to be something that's cooking in the
9 real world, and what we really have to do here
10 is pay a lot of attention to whether what we
11 are proposing is going to work and do
12 everything we can to make it work so that the
13 constraints are not unworkable but that the
14 constraints are meaningful.

15 And if after a couple of years of this it
16 becomes apparent that the judges are not using
17 their discretion in a way that's consistent
18 with the intent of the Rules, then some sort of
19 good cause or some standard would then be
20 written into the Rules.

21 HONORABLE F. SCOTT McCOWN: But
22 Luke, let me just -- I think the reason we
23 want to say "good reason" is merely to load the
24 dice. When you say the judge's discretion and
25 you use "discretion" in that sense, then

1 theoretically the judge could do it in all
2 cases where he wanted to.

3 MR. SUSMAN: By Rule.

4 HONORABLE F. SCOTT McCOWN: Or
5 in no case. But when you say "good reason,"
6 what you're saying is presumptively the window
7 applies. That's the presumption, and the
8 burden is going to be on the person -- one
9 reason you have the standard is to indicate
10 who's got the burden.

11 If you just say "discretion," there's no
12 burden placing. The burden is going to be on
13 the person who is asking for the window to be
14 extended, so the standard places a burden. And
15 then the standard says there's got to be a
16 reason. There's got to be an articulatable, if
17 that's a word, reason to extend the standard,
18 and it's got to be good.

19 CHAIRMAN SOULES: Steve.

20 MR. SUSMAN: I agree with
21 Scott. I mean, I think what we want to do is
22 place a burden fairly substantial, not light,
23 on the party wishing an exception to get one,
24 because frankly -- I mean, otherwise, I think
25 you just -- if it's the judge's discretion,

1 the judge can just say on all of their cases
2 that this Rule doesn't apply.

3 I have no problem with putting in some
4 commentary about the kinds of things we think
5 are good reasons. I mean, if you wanted to do
6 that, you know, put the number of parties in a
7 multiparty case, the complexity of the issues;
8 or what you might consider bad reasons, which
9 might even be more important to put in.

10 One bad reason would be counsel is just
11 busy or hasn't done anything. Okay. That
12 would to me be a bad reason, that -- because,
13 I mean, the notion is -- the notion is if you
14 can't get the case ready in the next six
15 months, you better send this client to another
16 lawyer. Don't take on the lawsuit if you don't
17 have the time to do it. So the fact that
18 you're busy with other matters, that's not a
19 good reason, and maybe it's easier to talk
20 about what's not a good reason. Or your client
21 who has filed the lawsuit is unavailable for
22 his deposition or he can't find the documents.
23 Whatever it is, I mean, you could -- I just
24 think that we need to make it clear to the
25 judiciary and to the Bar that we mean

1 business. This is a serious deal and there are
2 going to be exceptions but don't count on it.

3 CHAIRMAN SOULES: Well,
4 obviously this is something we all need to
5 discuss and get a consensus on.

6 Alex Albright.

7 PROFESSOR ALBRIGHT: I think we
8 have not addressed the Pretrial Order Rule yet
9 either in the subcommittee. And in lots of
10 cases, like Chuck's cases, I think those may be
11 cases where it's more appropriate to do
12 discovery subject to a pretrial order instead
13 of a -- you know, taking every single
14 exception to the judge saying, "Well, I need 10
15 more hours for depositions, I need one more of
16 this, I need another month," but you would have
17 a pretrial order. And I think when we work on
18 that Rule, then it might be appropriate to talk
19 about cases that are more appropriate for
20 different discovery orders.

21 CHAIRMAN SOULES: And then we've
22 got the concern about whether or not this can
23 be changed by local rule, which we've got in --
24 one of the earlier Rules says you can't change
25 the general Rules by local rules, but most of

1 the big urban courts already have changed the
2 Rules of Civil Procedure by local rule. They
3 consider it binding. They've set standing
4 pretrial order local rules in effect and you've
5 got to do all these things after a case is
6 filed.

7 And 166 says that that can only be done on
8 a case-by-case basis on a motion or on the
9 Court's own motion, but it's case by case,
10 so -- I mean, the Supreme Court has never
11 addressed -- that I know of -- has never
12 addressed that. I never have seen it in the
13 Court of Appeals either, somebody attacking a
14 local rule that sets a structure for every case
15 like 166 or parts of 166, which should only be
16 permissible on a case-by-case basis. But that
17 may be something we need to look at.

18 Shelby Sharpe.

19 MR. SHARPE: The Committee on
20 Court Rules will act at its next meeting on a
21 complete comprehensive set of Rules that will
22 be coming to Steve's subcommittee. In fact,
23 some of those Rules have already reached the
24 Chair but did not reach it in time to be
25 distributed.

1 One of the things that you're going to
2 find coming from Court Rules is a complete
3 rewrite of Rule 166 that Luke was just speaking
4 of. In fact, it's a complete comprehensive
5 package of the entire Discovery Rules that have
6 come out of Carl Hamilton's subcommittee on
7 discovery.

8 What Court Rules has done and what Steve's
9 committee has done thus far are totally
10 compatible. They are headed in the same
11 direction with same principles. There's no
12 inconsistency with what's being done.

13 Let me just share with you a piece of
14 information that you need from a national
15 perspective, and I think we need to understand
16 this. Back in the early part of December, the
17 president of our state bar was invited to an
18 ABA summit meeting in Washington D.C. that was
19 supposed to be a meeting of all the presidents
20 of the state bars making up the ABA. The
21 subject was civil litigation resolution and
22 improvement. The president couldn't go, the
23 president elect couldn't go, and so I got
24 nominated and so they sent me.

25 I sat there and listened to the discussion

1 and the presentations which were made, and let
2 me tell you what's going on around the
3 country. What we're doing right now is either
4 happening in every other state or has happened
5 within the past two to three years. The very
6 kinds of limitations, the very kinds of steps
7 we're taking to get lawyers to get cases
8 prepared at a minimum of expense and at the
9 same time not compromise the preparation and
10 knowing what the two sides of the case are,
11 those things have either already happened in
12 other states with great results or they are
13 currently being done right now.

14 The mandate clear across this country is
15 litigation right now takes too long and it
16 costs too much. And every Rule that Court
17 Rules is looking at right now, the criteria we
18 use is is this going to save time, is it going
19 to save money, and at the same time not
20 compromise justice or getting the case properly
21 prepared.

22 And so where Steve's committee is headed,
23 the principles that they're using, Steve and
24 his committee are right on target with what is
25 going on or has already taken place around this

1 country, so the question is, is Texas going to
2 get into the 21st century or not? And there's
3 no question this committee and Court Rules are
4 headed that direction.

5 CHAIRMAN SOULES: Harriet
6 Miers.

7 MS. MIERS: Well, I've got a
8 couple of things or three things I wanted to
9 ask about or mention with respect to Steve's
10 work, and one is whether there was some
11 discussion of the classification effort that
12 goes on --

13 CHAIRMAN SOULES: Speak up a
14 little bit, Harriet. The court reporter is
15 having trouble hearing you. I'm sorry.

16 MS. MIERS: Let me start over.

17 One question was whether there was some
18 discussion of classification efforts, because I
19 think the people on this Committee tend to be
20 involved in significant litigation, and a lot
21 of litigation is more minor in nature, so the
22 question was, first, was there some thought
23 of -- like for what's done in the Federal
24 system, using the complex litigation
25 classification, or some method by which you

1 could categorize litigation at its beginning to
2 see whether 50 hours of deposition really
3 solves the problem because that's much more
4 than ought to happen in that particular case or
5 whether it's maybe not sufficient.

6 The other question I wanted to ask is
7 whether -- I mean, I've had depositions where
8 witnesses will pause for an inordinate amount
9 of time before they answer a question, and I
10 wonder if we're not inviting some -- if this
11 changes the nature of the tactic by using this
12 time limit kind of thing, because I suspect
13 answers are going to get longer, too, if the
14 measure is really -- if that amount of time is
15 used to measure. So these are just issues that
16 I'm sure there are solutions to, but I wonder
17 what thought had been given to them.

18 I also didn't quite understand, Steve, the
19 no limit on interrogatory sets. Could you --
20 I'm sure I missed it, but that didn't make --
21 I don't understand what you said about not
22 having a limit on interrogatory sets.

23 CHAIRMAN SOULES: Steve.

24 MR. SUSMAN: Yeah. If I can
25 respond to things, Harriet, while I remember.

1 As I recall, there was a question of whether
2 you limit the number you -- the overall number
3 of interrogatories is limited to 30. Now, the
4 question is whether we want to propose a
5 further limit and say that there can only be
6 two sets of interrogatories. Cumulatively
7 there can only be 30. Some lawyers on our
8 committee -- one of the lawyers on our
9 committee said he could see the usefulness of
10 submitting two or three interrogatories, taking
11 a deposition, and then following up with two or
12 three more and that he should not have to
13 submit them all and if he wants to divide up
14 his 30 into --

15 MS. MIERS: -- 30 sets.

16 MR. SUSMAN: -- 30 sets, into
17 one question in each set, then he ought to be
18 able to do it. So that was the notion on that.

19 As to your question about classifying
20 cases, you know, we did talk about that. We
21 talked about, well, should we talk about cases
22 by the amount in controversy, which would be
23 one way to do it. The more you ask for, the
24 more time you subject your client to discovery,
25 some kind of dollar -- you ask for an amount of

1 money, and therefore that puts you on a track
2 and gives you so much time or you depend on
3 trial judges to classify the case.

4 And basically we came to the conclusion
5 that this is a good first step, that the six
6 months is a good first step because it really
7 ought to cover virtually every case. Even the
8 most complex cases basically ought to be
9 discoverable in six months. That does not mean
10 -- we hope that that is not an invitation for
11 the cases that ought be discovered in six weeks
12 to last for six months. But the notion was
13 let's get kind of an outside limit on what's
14 tolerable and then through experience we may
15 propose sublimits over time. I mean, if this
16 works, the Bar likes it, it tends to work, then
17 you could do something else.

18 The idea of judges classifying up front we
19 thought was a bad idea because we thought that
20 it just depends on judicial intervention to
21 solve a problem. And you know, if they have
22 pretrial conferences and they bring parties in
23 and they talk about good reasons for changing
24 the schedule, they can do that. But the system
25 works without judicial intervention.

1 And your final point was the slow rolling
2 of the answers in the deposition. The basic
3 thought of the committee was that -- of the
4 subcommittee was that you had the advantage to
5 you of videotaping depositions. We have now
6 made it clear that what goes on in that
7 conference room should be exhibited to the
8 jury. And I think it would be very useful to
9 show a jury how that witness was answering if
10 the witness was intentionally slow rolling you
11 or making speeches to you.

12 Again, there are problems with it and
13 we'll have to think about how to deal with
14 them, but the notion was if you get 50 hours
15 where the other side cannot object and with
16 what goes on in that conference room can be in
17 front of the jury, that is a powerful weapon of
18 discovery in the hands of a lawyer. 50 hours
19 of unimpeded questioning that can be recorded
20 on videotape and played before the jury and the
21 other side can go to jail if he says anything,
22 powerful. That was kind of the feeling that we
23 had.

24 CHAIRMAN SOULES: David Keltner
25 and then John Marks, and I'll get around the

1 table.

2 MR. KELTNER: Harriet, let me
3 address just one thing about classification.
4 The Discovery Task Force came up with one
5 classification that would be for much smaller
6 lawsuits. We decided to table that in our
7 subcommittee meeting; to take this first step,
8 see if we were on track, and then we may have a
9 classification for smaller suits as well that
10 would be even more limited than that, that
11 would have virtually no interrogatories and
12 maybe one or two depositions per side. So
13 that's still something that we'll go back to,
14 but we wanted to see how this one floated in
15 front of the entire Committee.

16 CHAIRMAN SOULES: John Marks.

17 MR. MARKS: Basically I think
18 it's a terrific idea. I have the same question
19 that Harriet does about the evasive witness,
20 the witness that answers by nonresponsive
21 answers and that sort of thing.

22 I wondered if maybe there could be
23 something in the Rule that disciplines the
24 lawyer perhaps if his witness is not doing what
25 he's supposed to do, and that is, to get in

1 there and testify directly. You know, you can
2 take a witness and he can spend all day with
3 unresponsive answers that sound pretty good.

4 The second thing is, on the use of the
5 experts designated and then in trial, I have
6 trouble with the idea that a lawyer is going to
7 be somehow sanctioned because he doesn't use an
8 expert that he doesn't need. I mean, there
9 could be a lot of different reasons why you
10 decide not to use one. I mean, especially if
11 you're a defendant, you may decide you don't
12 need one, so I think having paid the expense of
13 that expert that you've designated might be a
14 little bit --

15 CHAIRMAN SOULES: Scott McCown.

16 HONORABLE F. SCOTT McCOWN: The
17 Rule doesn't require -- and I want to be real
18 clear about this, because I had a similar but
19 slightly different concern. The Rule does not
20 require that the judge tax the cost. It's
21 discretionary. And the reason I had that
22 concern as a judge is I didn't want people
23 putting on witnesses that they wouldn't really
24 put on just to avoid the cost.

25 And so if you can explain to the judge why

1 it is you're not calling him -- and the way to
2 make the explanation, to win it every time, is
3 to say, "Judge, I can call this guy if you're
4 going to tax it against me, but if you're not,
5 then I'm going to skip calling him."

6 And the second thing, just to make a
7 little bit of legislative history here on the
8 playing of the bad conduct, you'll notice in
9 the Rule that it's discretionary with the trial
10 judge. It's not an automatic right to get to
11 play the bad conduct at the deposition. And
12 again, that's something that I urged on the
13 Committee, because whether it's bad conduct or
14 not bad conduct is often going to be in dispute
15 and the force of that conduct. The guy who is
16 urging that it be played, he may think it's
17 actually going to show the jury a whole lot
18 that in fact it's not going to show. So the
19 judge, you know, just as with any witness, to
20 control wasting the jury's time, that is a
21 discretionary call with the judge.

22 But again, it goes back to the good reason
23 to extend the window or to extend the 50
24 hours. If you go in and show the judge this
25 witness was arguing with me or this witness was

1 taking 20-minute pauses before answering
2 questions, that can be a good reason to get
3 more time.

4 MR. SUSMAN: Mr. Chairman.

5 CHAIRMAN SOULES: Shelby Sharpe
6 had his hand up, and then I'll get to you,
7 Steve.

8 MR. SHARPE: Harriet, you'll
9 recall that Steve said that the Rules that
10 they've already presented can be modified by
11 agreement of counsel. That agreement of
12 counsel would affect any case; so therefore,
13 what you're going to deal with is if the
14 lawyers could look at it and say, "Hey, we
15 don't need all of this because our case is so
16 much smaller and doesn't have all that," the
17 parties could agree. All it's saying is that
18 there is an outside limitation.

19 The Rules that are coming over from Court
20 Rules initially put it in the hands of the
21 lawyers to craft what their case really is.
22 But if they don't do it, then there are certain
23 limitations that the Rule imposes and the Court
24 can also be involved if the parties can't get
25 together.

1 I think when you see the drafts of the
2 Rules that are going to be coming before this
3 Committee, you're going to find that initially
4 the lawyers are not losing control their
5 cases. They have the opportunity to work
6 within certain time parameters and certain
7 other parameters that are going to require the
8 lawyers to address it, to address their case
9 and get it done. Otherwise, either the Rule is
10 going to control them or they're going to have
11 to go to the Court and the Court is going to
12 resolve it. But I think each case is going to
13 fit within the scope of whether it's a small
14 case or a complex case.

15 CHAIRMAN SOULES: Steve Susman
16 and then Steve Yelenosky.

17 MR. SUSMAN: Well, Luke, I mean,
18 what I'm basically hearing around the table is
19 no one has said this is a pigheaded way to go.
20 I mean, I haven't heard any real strenuous
21 objections. I mean, if we can just get a feel
22 that we're on the right truck, I mean, we can
23 begin with some of the individual -- we can go
24 to the individual Rules today and begin
25 hammering them out, I mean, if people think

1 we're on the right track.

2 CHAIRMAN SOULES: And I think we
3 want to get to that. Steve Yelenosky.

4 MR. YELENOSKY: I just wanted to
5 make a point about what Shelby Sharpe said.
6 The premise that Steve Susman stated was that
7 neither the judges nor the attorneys are going
8 to police themselves. And what you just said
9 implies that in a smaller case they will police
10 themselves essentially by agreement. And my
11 question is, why do you presume that they won't
12 in a large case but they will in a smaller
13 case?

14 And Harriet Miers' point is a good one.
15 50 hours of deposition in most of the cases
16 that I do, and I'm sure a lot of attorneys who
17 aren't here, is an credible amount of time.
18 And if you're going to have -- if the premise
19 is that they're not going to agree, in a small
20 case the attorney who is not going to agree by
21 default gets 50 hours. So I don't think it's a
22 reasonable solution to say, well, then in the
23 smaller cases they'll just agree to a smaller
24 amount of time.

25 CHAIRMAN SOULES: Shelby

1 Sharpe.

2 MR. SHARPE: The response is
3 this: If the parties don't agree, then the
4 Rule is going to come into play. And if one of
5 them is disagreeing, he can go to the judge and
6 say, "Judge, 50 hours for this case is just
7 ridiculous. I can't reach agreement with my
8 opponent on the number of hours, but this is
9 what it is."

10 And under the Rules that are coming over
11 from Court Rules, there is a window just like
12 Steve has that if you haven't reached an
13 agreement by a certain date on your case, then
14 you're going to be before the judge and the
15 judge is going to fashion it for you.

16 So the presumption that Steve said is
17 that, yes, a lot of lawyers won't agree and
18 will have to go to the Court, and sometimes the
19 Courts won't give things. These Rules are
20 going to force either the lawyers to agree or
21 they're going to be before the Court and the
22 Court is going to fashion that thing down
23 someplace within the parameters, so it's going
24 to get done.

25 CHAIRMAN SOULES: Harriet

1 Miers.

2 MS. MIERS: Well, I would like
3 to ask that the subcommittee think about maybe
4 even getting some input from some other kinds
5 of entities like solo practice or section or
6 some entity or type of lawyers that deal with
7 really a good portion of the litigation that
8 clogs the courts right now and see if maybe a
9 first tier of limitation for smaller cases
10 makes some sense to really attack a good number
11 of cases that are on the courts' dockets.

12 CHAIRMAN SOULES: Buddy Low.

13 MR. LOW: Luke, we're talking
14 about going back to the judge, but I don't
15 think that we should go to the judge piecemeal
16 every time you have a little argument. I think
17 that if you have to go to the judge to change
18 it, you ought to go under Rule 166 and let the
19 judge cure a number of problems, set a
20 schedule. Because I've found in Federal Court,
21 when you're there and you can't get this, he
22 says, "Okay, we'll have a pretrial conference.
23 We're going to schedule when these depositions
24 are going to be taken." And you do that and
25 take care of the whole thing, rather than

1 running back piecemeal, "Now, Judge, I need a
2 little more here."

3 So I think instead of going with good
4 cause or anything like that, if you want
5 something, you ought to refer it back to
6 Rule 166.

7 The second comment is, you're talking
8 about selling this to the Bar. There's no way
9 you're going to sell a change of this nature,
10 quote, to the Bar. They've got to accept it.
11 We had that problem in the Eastern District
12 when we changed our Rules. The lawyers just
13 said, "I won't file my cases over there because
14 it's on Track 1 or Track 2." We couldn't sell
15 it; it was forced down their throat. And
16 that's the way it's going to be. This change
17 is not going to be popular with the Bar, I can
18 tell you that. They don't comprehend the
19 problem and so we've got to do it. Now, I
20 don't know if we're going to be able to sell
21 it.

22 And the third comment is that -- and
23 Steve's committee may want to consider this.
24 Lucius Bunton called me when they were doing
25 their Rules. And I told him I thought about

1 kind of a rocket docket where the parties could
2 agree. They just had no right to discovery
3 unless they agreed on it. Just try it by
4 ambush like we used to. And he said some
5 lawyers and their clients signed up on that.
6 But I don't know if that's feasible in our
7 Rules. But some people have -- they say, "We
8 don't want to spend a lot of money for
9 discovery. Let's just try this case, okay?"

10 And you give them a trial date, and if
11 they agree on some discovery -- don't come to
12 the judge if you can't agree because you've
13 waived your right to it. And so if the parties
14 really want to avoid the expense of discovery,
15 let them, you know, do it.

16 CHAIRMAN SOULES: Judge Guittard
17 has a question.

18 HONORABLE C. A. GUITTARD: I'm
19 curious about leading questions and
20 unresponsive answers. If you don't allow the
21 lawyer to make any objections, can the other
22 lawyer sit by and say, "Aha, that's a leading
23 question. I can object to that when it's over
24 and knock this all out, or I can knock all this
25 testimony out because it's unresponsive."

1 I wrote an opinion one time, I don't know
2 whether it's a law or not, that said --

3 MR. LATTING: How long ago did
4 you write that?

5 HONORABLE C. A. GUITTARD: It
6 said that an unresponsive answer at a
7 deposition, if there's no objection made at the
8 time, you can't object to that at the trial on
9 the grounds that it's unresponsive. You can
10 object that it's irrelevant or for some other
11 reason, but if it's testimony under oath, it
12 ought to be admissible; and that an objection
13 to unresponsive answers is simply a matter of
14 keeping the trial on the track, so I was
15 curious to know what your committee thought
16 about that.

17 CHAIRMAN SOULES: Steve Susman.

18 MR. SUSMAN: The committee
19 thinks that -- the committee has opted for the
20 option of you can lay behind the law and keep
21 your mouth shut, which you should, defending a
22 deposition, and if the other side is stupid
23 enough to ask leading questions and to accept
24 unresponsive -- whatever -- all objections
25 would be preserved until time of trial. That

1 was our notion.

2 Now, that puts the burden on the lawyers
3 asking the question to know he better not ask a
4 leading question. But we just felt that
5 without a judicial officer present to rule on
6 objections that were being made at the
7 deposition, given the fact that we were
8 limiting the time, the opportunity for abuse
9 was -- outweighed the danger that someone is
10 really going -- I mean, first, my experience
11 has been that when you get a deposition in any
12 event, a judge is going to -- I mean, judges
13 are going to try to let it in if they know it's
14 going to cut out some really good testimony.
15 If they're reading the deposition and they
16 don't think it's abusive -- I mean, leading,
17 that objection I don't think will get very far,
18 the leading objection.

19 But that was just -- that's the way
20 we -- Judge, that is what we opted for.
21 You've just got to sit there and keep quiet and
22 give the other side a fair share -- a fair
23 chance at the witness.

24 HONORABLE C. A. GUITTARD: Well,
25 then would it be proper to have a Rule that

1 objections to leading questions wouldn't apply
2 and that you don't make them later either or
3 unresponsive answers?

4 MR. SUSMAN: Well, let's take
5 leading questions first. I mean, I think if a
6 lawyer put up for a deposition one of his own
7 witnesses and led him through a deposition, you
8 ought to be able to object to that at trial.
9 You ought to be able to protect yourself. And
10 if the judge thinks it's just blatantly
11 leading, the judge ought to be able to kick out
12 the whole damn thing. I think the objection to
13 leading questions should be preserved for
14 trial.

15 HONORABLE C. A. GUITTARD: I'm
16 talking about the unresponsive answer. Now,
17 you've seen a lot of cases where you ask a
18 witness a question and he comes back with an
19 answer not to that question but to the next
20 question you're going to ask if he answers yes
21 to that question, and it's perfectly good
22 admissible testimony. It's just that he says,
23 "Did you see so and so?"
24 And the witness says, "I saw him do so and
25 so and so and so."

1 Now, that's unresponsive.

2 MR. SUSMAN: Okay. Now, I think
3 if I'm the lawyer asking that question, I ought
4 to be able to object to that answer coming in
5 at trial. I ought to object to the other side
6 being able to put that answer in at trial.

7 HONORABLE C. A. GUITTARD: Why?

8 MR. SUSMAN: Because it was an
9 unresponsive answer.

10 HONORABLE C. A. GUITTARD: But
11 what difference does it make if it's
12 unresponsive if it's admissible on other
13 grounds?

14 HONORABLE F. SCOTT McCOWN:
15 Could I suggest a distinction?

16 CHAIRMAN SOULES: Let Steve and
17 Judge Guittard finish their dialogue. Then
18 we'll pick it up.

19 MR. SUSMAN: Well, maybe, I
20 mean, possibly the way you would handle it --
21 I'm not sure how you would handle it, but let's
22 -- I mean, again, the notion is how can we
23 make this as close as possible to trial. When
24 you ask a witness a question at trial and he
25 gives you an unresponsive answer, you object.

1 The judge then instructs the jury -- the jury
2 has heard the answer, okay, and the judge will
3 instruct the jury to disregard that answer.

4 Now, maybe that's the way it ought to be with
5 the deposition transcript. I mean, maybe the
6 way it ought to happen is as close to trial as
7 possible. The answer comes in at the
8 deposition, the lawyer is allowed to object as
9 nonresponsive, and the judge turns to the jury
10 and says, "Disregard that as nonresponsive."

11 CHAIRMAN SOULES: Scott McCown.

12 HONORABLE F. SCOTT McCOWN: Let
13 me suggest a distinction and a possible way to
14 meet both concerns. The reason, as I
15 understand it, for the old Rule that you object
16 to form is to put the person who is taking the
17 deposition on notice because it can be cured,
18 and so you object to form. They're on notice
19 and they can make the option to cure or not to
20 cure. If they decide to cure, the problem is
21 resolved. If they don't cure, then the trial
22 judge can say, "You didn't cure; therefore, it
23 goes against you. I'm not going to let it
24 in."

25 What happens in reality, though, is that

1 for the trial judge, the witness isn't there,
2 maybe in California, and the more important the
3 witness and the more impossible to get the
4 witness to trial, then the more the trial judge
5 in their discretion is going to allow the
6 question however bad the form. And so this
7 whole distinction or the reason for the Rule of
8 making the objection at the deposition I don't
9 think has any effect really on the trial.

10 But there's a distinction between leading
11 and responsiveness, and I agree with Judge
12 Guittard. When the lawyer leads, it's the
13 lawyer doing something wrong for his advantage
14 that happens question after question after
15 question. When the witness blurts out
16 something that's nonresponsive but that is
17 admissible, there's not much point in the trial
18 in trying to boot it out because it's just kind
19 of unfairly pointless. The lawyer could have
20 asked the right question and gotten that
21 answer. It's admissible. It's relevant. Why
22 not go ahead and let it be read.

23 If you allow, though, objections at
24 depositions about responsiveness, that is the
25 key place that lawyers in depositions get into

1 it and misbehave, because they'll say,
2 "Objection, that's not a responsive answer,"
3 and it's a great opener to get into it.

4 "Leading" is not such a great opener, and
5 you might want to have a rule that you have to
6 make objections at the deposition to leading
7 questions, but that's -- other than
8 privileged, that's the only thing. Because
9 with leading all you can say is "Objection,
10 you're leading the witness," and that's it, and
11 they've got a decision to cure or not to cure
12 and it's pretty limited. I could live with
13 that.

14 But actually I think what the committee
15 decided and what I tend to think is that
16 leading is not that bad a thing anyway,
17 generally speaking, and if it happens, it
18 happens and the trial judge is going to let it
19 in anyway. A lot of lawyers can't distinguish
20 between leading and nonleading so why not just
21 forgot about it. But you can separate the
22 two. They don't have to go hand in hand.

23 CHAIRMAN SOULES: Alex

24 Albright.

25 PROFESSOR ALBRIGHT: Another

1 thing we talked about in the subcommittee about
2 this is that if you were worried about your
3 forms of questions and the forms of answers,
4 then you can take your deposition and then you
5 know what you're going to want to use that
6 deposition for at trial and you can take
7 another 10 minutes and reask questions properly
8 and get the answers that you want and that
9 gives you a 10-minute part of a deposition to
10 read into the trial that might actually be
11 better than what you had before. There are not
12 going to be any asked and answered objections.
13 They can't stop you from reasking the question,
14 so it might be able to get you to -- I
15 remember people talking about wanting discovery
16 depositions and using trial depositions and
17 they could use -- you could use some of your
18 time for doing that if it's a really important
19 witness.

20 CHAIRMAN SOULES: Well, that's
21 one thing that occurred to me. We've talked a
22 lot about how the lawyer defending the
23 deposition can't interject and how the witness
24 may respond nonresponsively or otherwise, but
25 the lawyer asking the question can also be

1 somewhat intrusive. Suppose he sits there for
2 four hours and asks the same question over and
3 over and over again. Can the lawyer defending
4 the deposition -- the way this Rule is written,
5 the lawyer defending the deposition cannot
6 object that it's been asked and answered.

7 PROFESSOR ALBRIGHT: But
8 ultimately you can get up and leave.

9 MR. LATTING: You can seek a
10 protective order procedure.

11 CHAIRMAN SOULES: But that may
12 be the next day.

13 MR. LATTING: May I address
14 that?

15 CHAIRMAN SOULES: Joe Latting.

16 MR. LATTING: There's a body of
17 Federal law on this that is very close to what
18 your committee is suggesting and it addresses
19 that very question, and it says what the right
20 of a lawyer is who feels his client is being
21 abused. But the cases that I have say that his
22 only right is to seek a protective order. I
23 guess he decides or she decides what she thinks
24 she can do before the judge and then makes that
25 decision. I was just going to say that this --

1 CHAIRMAN SOULES: I think that
2 should be a part of the Rule. I think we ought
3 to get to some -- either 166 --

4 MR. LATTING: I wasn't
5 finished.

6 CHAIRMAN SOULES: Wherever the
7 protective order piece of that Rule is, there
8 ought to be something said that a deposition
9 can be interrupted for a party to seek a
10 protective order. If you can't make
11 objections, you ought to at least be able to do
12 that, and the Rule should probably express that
13 right so that it's clear to people who were not
14 here what the intent of it is.

15 Joe, excuse me, I interrupted you.

16 MR. LATTING: I just wanted to
17 address what Judge Guittard and what Steve were
18 saying, and Scott is gone, but I don't think
19 that there's a problem myself with lawyers
20 making objections during depositions, and I
21 don't think we ought to allow lawyers to be
22 silent and then later object at trial to keep
23 testimony out when they didn't bring it to the
24 attention of the other side. I think the
25 problem is when they interfere with your right

1 to cross-examine the witness through the use of
2 objections. It's not the objection that's the
3 problem, it's not where the lawyer says, "I
4 object that that's leading" or "I object that
5 it's nonresponsive." That doesn't -- that's
6 not a big problem. It's when they go into it,
7 when they get into the middle of it and say,
8 "You need to clarify that question" or "I
9 don't understand the question" or "I don't
10 think the witness understands that question."

11 Simply to say, "Objection, leading," if we
12 make the Rule say that the objections may be
13 stated and should be stated unobtrusively and
14 without any kind of speech going along with
15 them, there's not a problem with that. I think
16 that fairly advises the lawyer that he may be
17 asking something that's not admissible.

18 And, Alex, what you said I agree with;
19 that is, you can go back and clean up your
20 deposition. But sometimes you don't know. You
21 may come back from California with several
22 depositions not intending to have used those in
23 chief, so to speak, and then things turn out
24 where you need the deposition. It strikes me
25 as just fundamentally unfair for a lawyer to be

1 able at a trial to make an objection that he
2 never did call to your attention at the time.

3 I don't think that this is a big deal, by
4 the way. I think if we make it clear that
5 lawyers cannot interfere with the interrogation
6 of the witness but still make them speak their
7 objections, we would be done with it; that that
8 will cure the problem.

9 CHAIRMAN SOULES: Well, in some
10 areas it is a significant problem.

11 MR. LATTING: I mean, just the
12 sake of saying, "I object," I don't think
13 that's the big deal. I think it's a very
14 significant problem to be interfering with the
15 other side's right to interrogate the witness.
16 But I don't think saying "Objection, leading"
17 is going to be a problem.

18 CHAIRMAN SOULES: Let's go
19 around the table one more time and I'll take
20 the hands on just general comments and then
21 we'll go through specifics. A lot of the
22 things we're talking about now go to some of
23 the specifics of the Rules as they've been
24 drafted, and if you take them up, then we'll be
25 more focused maybe.

1 Now, let's go around the table. Let's go
2 with Judge Heath to start with.

3 HONORABLE PAUL HEATH TILL: Did
4 the committee think of the idea of just saying
5 that the first 50 hours was chargeable as cost
6 and if the party on the other side wanted to do
7 more discovery than that, then they couldn't
8 recover their costs and they would be able to
9 do that?

10 MR. SUSMAN: No.

11 HONORABLE PAUL HEATH TILL: So
12 if you had a case that was -- that turned out
13 to be really complicated and was really
14 difficult and you were trying to do something
15 with it, if my client wants to finance it and
16 wants to do additional discovery and it's not
17 chargeable to the other side as far as cost is
18 concerned, would I be able to do that?

19 MR. SUSMAN: No. Our answer to
20 that was clearly no because you're imposing on
21 the other side a huge cost also. They have to
22 defend the discovery. They have to have
23 witnesses present. We didn't even think about
24 that.

25 CHAIRMAN SOULES: The cost of

1 the record is only a small piece of the overall
2 cost, I think, is probably part of the answer.

3 HONORABLE PAUL HEATH TILL: I
4 understand that.

5 CHAIRMAN SOULES: Buddy Low.

6 MR. LOW: Luke, on what Joe
7 said, there is a body of Federal law, isn't
8 there, that you can't instruct a witness not to
9 answer? Isn't that --

10 MR. LATTING: Yes. Yeah. Their
11 cases are very clear about that.

12 MR. LOW: You just cannot do
13 that, but must go -- and they have some
14 procedure and that may be considered.

15 I've found that the biggest problem is not
16 objecting, but saying, "Well, we object to
17 that. He's already told you..." and then he
18 gives him the answer and goes through that.
19 That's where it really gets unfair.

20 But if a lawyer were required to say, "I
21 object, leading" --

22 MR. LATTING: -- period.

23 MR. LOW: -- "already answered,
24 repetitious," and his objection must be stated
25 in short, concise terms or -- you know, I

1 don't know how to define it. That wouldn't
2 really be a problem. The objecting is not the
3 problem, it's the speeches. That's all. It's
4 the speeches.

5 MR. LATTING: It's the speeches,
6 that's right.

7 CHAIRMAN SOULES: Okay. Rusty,
8 you're next.

9 MR. McMains: I share the
10 judge's concern and I think it's the concern
11 that's already been expressed about the idea of
12 terminating or not allowing objections to what
13 essentially are obviable objections; in other
14 words, the ones you can get around. It's one
15 thing to say that you don't have to object to
16 something that's not obvious or something
17 that's substantively defective or your
18 objection is to something that's hearsay or
19 whatever. But something that is purely form
20 only, responsiveness, leading, that's classic
21 sandbagging, so that you're going to be able to
22 make that objection later on.

23 And with all due respect for the quality
24 of talent in this room, I've read a lot of
25 people in this room's records and there's very

1 few questioning in there that isn't leading,
2 whether it's on direct or cross-examination,
3 obviously. But the direct is of independent
4 witnesses and still tends to be leading, and
5 most of the time that's the most efficient way
6 to handle a deposition when there's not really
7 much time in discovery for just trying to find
8 out what the information is.

9 I think it's silly to suggest that you
10 ought to be able to lay behind the law and keep
11 all of the fact testimony out of an independent
12 witness, like a police officer, because you led
13 him through the accident scene. That's just
14 silly.

15 MR. LATTING: With no
16 objection.

17 MR. McMains: Yeah, with no
18 objections made or anything else. That to me
19 is just absurd.

20 Now, one way to handle it, and I just
21 throw this out for whatever it's worth, and I
22 think we're going to have a chess clock here or
23 something operating, but one way to handle the
24 notion of obstruction of testimony is to deduct
25 the amount of objection time taken by that

1 party for these types of speeches from their
2 own discovery time. I mean, I don't know if
3 that had -- it just occurred to me that maybe
4 that's a penalty which kind of -- we need it
5 to be self-implementing in a way, and that
6 would simply require that you have some way to
7 calculate that.

8 CHAIRMAN SOULES: Well, after
9 the lawyer gives the witness' answer, it might
10 take you a while to get the witness' real
11 answer, which is different from what the lawyer
12 gave, and if the witness had just been
13 permitted to answer the question to start with,
14 you wouldn't have to go through that ritual.

15 John Marks.

16 MR. MARKS: Following up with
17 what Buddy said, maybe we could not only say
18 you can make objections but state specifically
19 the objections that you can make and put that
20 in the Rules: leading, nonresponsive, period.

21 MR. LATTING: Yes. Chuck says
22 to number them. Just say "one" or "two."

23 CHAIRMAN SOULES: There seems to
24 be two ways to fix this. One is to continue to
25 admit those two objections, make them

1 mandatory; or to eliminate those and eliminate
2 them forever, they can't be made at the
3 deposition and they can't be made at trial.
4 Either way, we're going to be talking about
5 that when we get to that specific part of the
6 Rule in a minute.

7 I'm going to come around the table.

8 Anybody on this side of the table?

9 Elaine Carlson.

10 PROFESSOR CARLSON: Steve, am I
11 reading this right that the 50-hour limit is
12 not per party but per side? Was there any
13 discussion in the subcommittee about otherwise
14 utilizing shared discovery, requests or
15 responses in the written form?

16 MR. SUSMAN: Yes. We did
17 discuss like interrogatories, which is so many
18 interrogatories per party, the way it's worded
19 now, and we decided to leave that the way it
20 was because that's the way it is in the current
21 Rules. But we wondered -- we did think about
22 that. Should each of these vehicles be per
23 side, or should we make distinctions between
24 the depositions, which we felt should be per
25 side, and the interrogatories, which as our

1 Rules now word them, are per party. We did
2 think about it.

3 But as I recall in our meeting we opted to
4 leave the interrogatories the way they were
5 because there's a limit on interrogatories per
6 party now. And we decided that since we're
7 beginning to put a new limit on the hours of
8 depositions, that that should be per side.

9 PROFESSOR ALBRIGHT: And we
10 decided there was going to be a huge fight over
11 it.

12 CHAIRMAN SOULES: That carries
13 some more baggage too, of course, and that is
14 interrogatories can only be used against the
15 responding party. So how do you use them
16 against the side if -- I'm sure it can be
17 fixed, but it does have that additional
18 baggage.

19 Go ahead, Steve.

20 MR. SUSMAN: I just wanted to
21 say that I don't think the Committee -- I mean,
22 this thing on objections, that's -- I don't
23 think we're going to have a problem with
24 accomodating the view that limited objections
25 during a deposition are okay.

1 Our feeling was that the ultimate sanction
2 that we want the Bar to be aware of is that
3 what you do at the deposition gets exhibited to
4 the jury. That makes people behave
5 ultimately. Okay? If you have the fear that,
6 you know, your obnoxious objections are going
7 to go to the jury, then this constant "object,
8 leading; object, form" -- great, you just sit
9 there and do it during the deposition you're
10 defending. I don't think it eats up much time
11 either and we can put in something that that's
12 -- you can say, "Object, form; object,
13 leading; object, something else," but no
14 speeches. Nothing else.

15 CHAIRMAN SOULES: David
16 Keltner.

17 MR. KELTNER: I want to respond
18 briefly to Elaine's questions and then throw
19 something on the table that we have not
20 discussed until just now, and that is per side.

21 I think first off the subcommittee's idea
22 was that on the individual vehicle Rules other
23 than depositions, it would be per party. And
24 the reason for that is exactly as Luke said.
25 It's because of how they get to be used at

1 trial. On depositions it is per side.

2 Remember, that concept comes -- that is,
3 as used in the Rule as proposed -- comes from
4 Patterson Dental on jury -- allotment of jury
5 strikes, which interestingly, that decision is
6 made at the time of trial after discovery is
7 complete. This decision will be made up front
8 before discovery is -- just when it's
9 starting. I worry a little bit about that. In
10 fact, I worry substantially about that for two
11 reasons: It is difficult to know whether
12 somebody is truly aligned or has a conflict on
13 various answers when the case starts. That is
14 something that is fluid all the way through the
15 case in multi-party litigation, and I would
16 worry a little bit about that.

17 I think it would be the subcommittee's
18 view that if we were going to 50 hours per
19 party that we would limit the 50 hours
20 significantly, but that's something that we
21 haven't discussed. And you can read this Rule
22 without realizing it. There are only a couple
23 of words that deal with that issue.

24 I'd sure appreciate some input from the
25 entire Committee on that one, because this is a

1 difficult concept. We might cure it doing what
2 the Feds have done in the new Rules which do
3 not use the Patterson Dental determination, but
4 that is going to be a difficult situation for
5 us.

6 CHAIRMAN SOULES: Now, the other
7 place where that "side" business appears, and I
8 don't know how this is used because I've never
9 seen it used, I've just seen it in the Rules,
10 in 265g, where it says, "But one counsel on
11 each side shall examine and cross-examination
12 the same witness."

13 I mean, sometimes there are several
14 defendants and every one of their lawyers wants
15 to cross my direct testimony and they always
16 get to, but this Rule indicates that they
17 shouldn't get to do that, if "side" means the
18 same thing here that it means in getting
19 strikes, peremptory challenges.

20 MR. KELTNER: Luke, we intended
21 "side" to mean in the Deposition Rule
22 plaintiff and defendant. That's why I think
23 that's something we need to discuss maybe at
24 this point, maybe later in fine tuning, but I
25 think that is an issue that has some pragmatic

1 effects that we need to think out a little
2 bit.

3 CHAIRMAN SOULES: Okay. Is
4 there anything else in general now before we go
5 to the specific Rules.

6 All right. Why don't we start with --

7 HONORABLE C. A. GUITTARD: Let
8 me ask one thing.

9 CHAIRMAN SOULES: Okay. Judge
10 Guittard.

11 HONORABLE C. A. GUITTARD: I
12 have trouble with respect to the leading
13 question and suggestive answer thing, the
14 nonresponsive answer. Neither leading question
15 nor unresponsive answer is in itself a good
16 reason to exclude testimony. A lot of leading
17 questions are perfectly good, as has been
18 pointed out, but it should be -- I would go
19 along with Steve's idea of don't let them make
20 any objections at the deposition.

21 And the question is, what objections can
22 they make later at the trial. They ought to be
23 able to make the objection that this line of
24 questioning is unfairly suggestive to the
25 witness or something like that; that it's not

1 the lawyer testifying but -- it's not the
2 witness testifying but the lawyer who is
3 putting words in his mouth. That ought to be
4 grounds at trial for excluding evidence.

5 And so far as unresponsive answers are
6 concerned, in a case where the big question is
7 value, you put your expert on the stand and you
8 ask him, "Now, did you reach an opinion as to
9 what the value of that property is?"

10 He says, "My opinion is that it's worth so
11 many dollars."

12 Is the lawyer going to -- at the
13 deposition is the lawyer going to say, "Well,
14 what is your opinion," after he has already
15 given it? Well, not one lawyer in ten would do
16 that. So the point is just don't make at the
17 trial an objection to that answer because it
18 was unresponsive. It just ought not to be a
19 good objection and the Rule ought to say so.

20 CHAIRMAN SOULES: Justice
21 Hecht.

22 JUSTICE NATHAN HECHT: On that
23 subject, I think you have to think of the
24 dynamic of the deposition. Because what
25 ordinarily happens is that you ask the question

1 and the other side objects and it's leading.
2 And then what do you do? You either rephrase
3 it or you stand on it, and they object again
4 that it's leading, and then what do you do?
5 You either rephrase it or you stand on it. But
6 at some point, if the other side wants to
7 continue to assert the objection, you go ahead
8 and get an answer to the question. In other
9 words, you make a decision whether you think
10 you're going to get this in or not. But of
11 course, in the process, if the witness doesn't
12 know the answer by now, he's an awfully stupid
13 witness. And maybe this gets at it, but I
14 think either way it shouldn't be that big of a
15 problem.

16 On a more general note, I'm very heartened
17 and I think the Court will be very heartened to
18 hear of the spirit of these discussions and
19 this work; because there will be some
20 resistance in the Bar to these ideas, but the
21 public is dependent upon us to make some
22 changes in this area, so I think as we go
23 through these Rules it's very important to
24 recognize that they're going to pinch some.
25 They're going to pinch all of us some.

1 And we can't help but think of cases that
2 we've had or got where maybe this is going to
3 work a little bit or maybe it's not going to
4 work so well. But in all of it I think we have
5 to think in terms of really imposing meaningful
6 limits on ourselves that will not cramp justice
7 but will make it possible for litigation to
8 move along more expeditiously and more
9 cheaply. And as far as I'm concerned, this is
10 a great start and I think the Court will be
11 glad to hear about it.

12 CHAIRMAN SOULES: Okay. Steve,
13 let's start with, I guess, 166(b)(3).

14 MR. SUSMAN: Yeah. I think the
15 first Rule we ought to -- I think we ought to
16 flip these in the way that they're ordered so
17 the first thing that people read is 166c. In
18 other words, how you make exceptions ought to
19 come first, and our notion was to have a
20 general provision that deals with all
21 exceptions.

22 So 166(c)(1), does anyone have a problem
23 with that?

24 CHAIRMAN SOULES: Okay. Elaine
25 Carlson.

1 PROFESSOR CARLSON: Why not just
2 incorporate a Rule 11 provision and say parties
3 may have a written agreement signed and filed
4 with the Court modified dah da-dah da-dah.

5 MR. SUSMAN: Fine.

6 MR. ORSINGER: Would you
7 articulate that then, Steve? What are you
8 going to change? Or Elaine, what are you going
9 to change?

10 PROFESSOR CARLSON: My
11 suggestion was after the word "agreement" just
12 put "signed and filed with the Court."

13 PROFESSOR ALBRIGHT: Why not
14 "According to Rule 11"?

15 MR. KELTNER: Or how about
16 "Pursuant to Rule 11"?

17 PROFESSOR CARLSON: That would
18 be fine too.

19 MR. HERRING: So you're not
20 going to allow an agreement totally on the
21 record during the depo?

22 PROFESSOR CARLSON: No. The
23 next sentence would, I think, allow that.

24 MR. HERRING: Okay. You're just
25 going to keep that.

1 MR. ORSINGER: Read the sentence
2 as modified, if you would.

3 PROFESSOR CARLSON: The parties
4 may by written agreement, pursuant to Rule 11,
5 modify --

6 HONORABLE F. SCOTT McCOWN:
7 Could I make a plea here?

8 CHAIRMAN SOULES: Judge McCown.

9 HONORABLE F. SCOTT McCOWN: This
10 is an example of what I object to about our
11 Rules, which is the necessity that every Rule
12 incorporate and refer to every other Rule. We
13 have a Rule about how you make agreements, so
14 we have our Agreement Rule, so that in some
15 other Rule where we say this can be done by
16 agreement we don't then have to reference and
17 redo our Agreement Rule. And this is what
18 makes our Rules so hard to read and long and
19 inelegant, and I would like to just drop that
20 out.

21 CHAIRMAN SOULES: Well, of
22 course, then the question arises is the written
23 agreement in 166(c)(1) a Rule 11 agreement or
24 is it some other type of written agreement?

25 MR. HERRING: Do you have to

1 file it?

2 HONORABLE F. SCOTT McCOWN:

3 Well, in your Rule 11 you just say all
4 agreements made pursuant to these Rules must be
5 in writing, signed and filed with the Court.

6 PROFESSOR ALBRIGHT: That's what
7 it says, unless otherwise provided for in these
8 Rules.

9 HONORABLE F. SCOTT McCOWN:
10 Right.

11 MR. SUSMAN: So the parties may
12 by agreement, pursuant to Rule 11 -- that's
13 okay, isn't it?

14 PROFESSOR ALBRIGHT: But Rule 11
15 says --

16 MR. LATTING: Which says and
17 which states the following --

18 PROFESSOR ALBRIGHT: -- all
19 agreements referred to in these Rules must
20 follow Rule 11 unless otherwise provided.

21 So if you're going to say you don't have
22 to sign it and file it, then you put it in the
23 Rule. Otherwise, you would have to sign it or
24 file it.

25 MR. SUSMAN: Does Rule 11 say

1 "all agreements"?

2 PROFESSOR ALBRIGHT: Unless
3 otherwise provided in these Rules, no agreement
4 between attorneys or parties touching any suit
5 pending will be enforced unless it be in
6 writing, signed and filed with the papers as
7 part of the record or unless it be made in open
8 court and entered of record.

9 CHAIRMAN SOULES: So the
10 litigation that comes here is, does 166(c)(1)
11 otherwise provide in these Rules?

12 HONORABLE F. SCOTT McCOWN:
13 Well, but then the problem is not with this
14 Rule, it's with Rule 11. If we need to rewrite
15 Rule 11 to say that every time we use the word
16 "agreement" anywhere in the Rules of Civil
17 Procedure the agreement has to meet the
18 following form, we can do that. The problem
19 that you've identified, Luke, is not this Rule,
20 it's some lack of clarity that you see in Rule
21 11.

22 CHAIRMAN SOULES: Well, that's
23 your view. I'm not sure everybody shares
24 that. And so we will resolve that one way or
25 another, whether we will defer to Rule 11 or

1 not where its terms are to be followed.

2 Steve.

3 MR. SUSMAN: I mean, Scott, I
4 don't find it that objectionable to just say
5 that the parties may by agreement, written
6 agreement conforming with Rule 11, I don't find
7 that to be such a big deal. Most of us know
8 what Rule 11 -- most of us know that a Rule 11
9 agreement has got to be in writing, it's got to
10 be signed and it's got to be filed, right? I
11 mean, is that it?

12 CHAIRMAN SOULES: Elaine
13 Carlson.

14 PROFESSOR CARLSON: Well, I
15 guess my concern was just that I wanted to
16 clarify for the Bar that an oral agreement --
17 I think oral agreements or agreements that are
18 not signed just have this propensity for more
19 Court intervention.

20 And I also think, Judge, as you just said
21 a moment ago, good cause being one thing in the
22 context of one Rule, and I think that's what
23 happens to any kind of a rule.

24 HONORABLE F. SCOTT McCOWN:
25 Okay. I don't have any problem with what

1 you're substantively trying to do here. I'm in
2 total agreement with the content of your idea.
3 But when you lose weight, you lose it one
4 calorie at a time. And what's wrong with our
5 Rules -- for example, are we going to say an
6 agreement affecting an oral deposition which is
7 taken pursuant to rule such and so is
8 enforceable if the agreement is recorded in the
9 deposition transcript as pursuant to rule such
10 and so? I mean, I just think we ought to --
11 you can go back at the end of this process and
12 go through and do all this kind of cleanup, and
13 that's I guess what Bill Dorsaneo's committee
14 is doing, but as much as we can pay attention
15 to as we go along the less we'll have to do at
16 the end and the cleaner a product we'll have.

17 CHAIRMAN SOULES: Judge, I don't
18 know whether there is anyplace in all these
19 Rules where an agreement can be reached on
20 something, any subject, that doesn't have to be
21 signed by the parties and filed with the
22 Court. There may be someplace, so if all we do
23 is change Rule 11, now we've got an
24 inconsistency in the Rules, and that's my
25 resistance to just changing Rule 11. There may

1 be someplace in this book where there's a way
2 to reach an agreement without doing it under
3 Rule 11. If there is, we've got to find that
4 too, and we will do that probably in the
5 comprehensive rewrite.

6 Let's take about 10 minutes, take a
7 morning recess, and then we'll get back
8 together. I've got 10:30. Try to be back by
9 10:40.

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

13 CHAIRMAN SOULES: Okay. Let's
14 come to order. What we want to do in going
15 through this is not to draft from the table or
16 draft in this session, we just want to get
17 concepts to the subcommittee, to Steve and his
18 subcommittee, to guide the committee, the
19 subcommittee, in the interim between now and
20 our next meeting policywise.

21 We're really talking policy here, such as
22 in the objections thing. That's a policy issue
23 that we've got to get a consensus on so that
24 Steve's subcommittee knows how to draft the
25 Rule or what the objective of the Rule is going

1 to be that they're going to draft, so that's
2 what we're going to be doing. And if your
3 comments could be along -- responsive to that
4 objective, we could probably get done with this
5 today so that they will have guidance in the
6 interim.

7 And they have really done a lot of work.
8 It seems like I got a set of minutes about
9 every week or 10 days from that subcommittee in
10 the two-month interval between now and our last
11 meeting, and I really commend Steve. You've
12 brought this a long way, you and David.

13 Okay. Conceptually, modification by
14 agreement, does everybody concur with that;
15 that the parties can make an agreement that
16 will modify the limitations? Any objection to
17 that?

18 Okay. There's no objection to that, so
19 that will stand approved by the Committee.

20 The next is modification by court order.

21 MR. ORSINGER: Well, wait a
22 minute, we -- let's talk about the language.

23 CHAIRMAN SOULES: No.

24 MR. ORSINGER: You don't want to
25 talk about the language?

1 CHAIRMAN SOULES: No, not
2 language.

3 MR. ORSINGER: Okay.

4 CHAIRMAN SOULES: No. 2 --

5 MR. SUSMAN: We're going to
6 have --

7 CHAIRMAN SOULES: Go ahead.

8 MR. SUSMAN: We're going to
9 have -- No. 2, what I've heard on No. 2 thus
10 far is that people have suggested that maybe we
11 ought to not consider good cause because it
12 doesn't fit. Scott suggested we consider good
13 reason. Someone said we can just consider the
14 Court at its discretion. Are there any
15 others?

16 CHAIRMAN SOULES: Okay. On that
17 specific issue, what should be --

18 MR. SUSMAN: -- the standard.

19 CHAIRMAN SOULES: -- the
20 standard? Is it the Court's discretion or good
21 reason or good cause? Who -- somebody make a
22 proposition and we'll debate it.

23 Joe Latting.

24 MR. LATTING: I want to make a
25 proposition that it ought to be for good reason

1 because I think we ought to load the dice and I
2 think we ought to get away from the baggage of
3 good cause.

4 CHAIRMAN SOULES: All right.
5 The suggestion is that -- we'll make it a
6 motion, although we're only talking policy
7 here -- that we use the term "good reason" as
8 the standard for the Court to modify the
9 Limitations Rules under 166(c)(2).

10 MR. SHARPE: I'll second the
11 motion.

12 CHAIRMAN SOULES: That's
13 seconded. Any discussion?

14 Steve Yelenosky.

15 MR. YELENOSKY: Well, this may
16 cross over into the area of language, but I've
17 got to say it anyway. The way it's drafted
18 now, if you just change "good cause" to "good
19 reason," and I was pointing this out to Judge
20 McCown and I think he agrees, it leaves no
21 standard for the Court's own initiative. It
22 needs to be reworded, because it says, "Upon
23 the Court's own initiative or upon the showing
24 of good cause," so it needs to be reworded to
25 say "good reason."

1 CHAIRMAN SOULES: So whether
2 it's the Court's initiative or a party's
3 intitiative, good reason should be the
4 standard.

5 Is everybody in agreement with that? Any
6 other discussion on this?

7 MR. SHARPE: I call for a
8 consensus.

9 CHAIRMAN SOULES: Okay. Is
10 there any objection to using "good reason" as
11 the standard whether it's the Court's
12 initiative or the party's initiative?

13 Okay. The consensus of the Committee
14 unanimously is that we'll use "good reason" as
15 the standard and it will apply in either case.

16 On the meaning of "side," I don't know how
17 you know whether there are going to be jury
18 issues between the parties at the point of
19 discovery, and that's what I would like to hear
20 some discussion on.

21 HONORABLE F. SCOTT McCOWN: Say
22 that again, Luke.

23 CHAIRMAN SOULES: The standard
24 of 233 is -- which is cited here. The
25 standard is -- let's see...

1 PROFESSOR CARLSON:

2 "Antagonistic with respect to any issue" --

3 MR. ORSINGER: "Common interest
4 on the matters" --

5 CHAIRMAN SOULES: Where the
6 parties on the same side are antagonistic with
7 respect to any issue of fact that the jury will
8 decide. Now, that's the standard under
9 Rule 233.

10 MR. HERRING: No.

11 CHAIRMAN SOULES: It's uniform.
12 The Supreme Court has already up and down the
13 line -- what?

14 MR. HERRING: No.

15 CHAIRMAN SOULES: No?

16 MR. HERRING: Richard, try it.

17 MR. ORSINGER: You've got a
18 definition in the second subparagraph of that
19 Rule.

20 MR. HERRING: The language is
21 different from what is the definition of
22 "side." Now, as I understand it, they are
23 incorporating exactly this definition.

24 CHAIRMAN SOULES: Where is the
25 definition? Help me.

1 MR. ORSINGER: It's called
2 "Definition of Side." It's the second
3 subdivision.

4 MR. HERRING: See, if you have
5 more than one common interest, you're a side.

6 MR. ORSINGER: It takes two
7 common interests, not just one.

8 MR. SUSMAN: Yes. That does it,
9 doesn't it? 233, under "Definition of Side.
10 The term 'side' as used in this rule is not
11 synonymous with 'party,' 'litigant' or
12 'person.' Rather, 'side' means one or more
13 litigants who have common interests on the
14 matters with which the jury is concerned."

15 I really believe we might ought to repeat
16 that language here rather than refer to 233 so
17 they know exactly what part of 233 we're
18 talking about.

19 MS. DUNCAN: That's so you don't
20 have to go hunting.

21 MR. SUSMAN: Okay.

22 CHAIRMAN SOULES: Okay. Well,
23 anybody that's got this blue book, look at the
24 cases that are cited in there on how that Rule
25 has been interpreted, and maybe a review of

1 some of those cases may be helpful and the
2 language as well, and several of them are
3 Supreme Court cases.

4 Alex Albright.

5 PROFESSOR ALBRIGHT: Well, I
6 think anybody who has studied Rule 233 knows
7 that it's a very difficult determination to
8 decide who is on what side and how to allocate
9 jury strikes and then equalize them. I think
10 we recognize that we're getting into that mess
11 in allocating hours for depositions. I do
12 think, though, we need to think it through more
13 carefully, because I think if you think about
14 it, it will be pretty easy to determine who is
15 on the same side with respect to a particular
16 witness when the -- in a personal injury case,
17 when the plaintiff is being deposed by multiple
18 defendants, they all have the same interest
19 with regard to damages and the issues,
20 particular issues. But I don't really know how
21 we're going to be able to get into that for
22 each particular deposition.

23 But I do think we also are adamant that we
24 don't want to allow defendants to have 200
25 hours of depositions when the plaintiff only

1 has 50 hours of depositions, and I think that's
2 something that we're going to really have to
3 think about how to do this. And it may be
4 through a pretrial order process, and I think
5 we would be interested in any ideas anybody has
6 for practically how it's going to work.

7 CHAIRMAN SOULES: David Keltner.

8 MR. KELTNER: I think we can do
9 that in two ways. First off, the problem with
10 the wholesale referral to Rule 233 causes the
11 problem, because all of us immediately think of
12 Patterson Dental and the other cases and those
13 types of things. That definition there, and I
14 think Steve is right, if we repeat that in the
15 Rule and we're not talking about an antagonism
16 that has to be proved, we've got a much clearer
17 picture. The Feds have a good Rule on this in
18 the new Rules. I mean, there's going to be
19 some confusion.

20 I would suggest two things. I would
21 suggest that we not make the decision for each
22 deposition and each witness; that it has got to
23 be a decision, if it has to be made by the
24 Court, made up front for the entire discovery
25 process. Otherwise, we're going to be back in

1 front of the judge before all of these
2 depositions, and I think we can probably work
3 with this definition and come up with something
4 that will work.

5 CHAIRMAN SOULES: Go ahead,
6 Steve.

7 MR. SUSMAN: You know, it may be
8 that what we ought to do is say that the
9 plaintiffs shall get 50 hours and the
10 defendants shall get 50 hours and not even
11 refer to this side business here. Then in
12 those cases where there are antagonisms between
13 the defendants on certain claims, that would be
14 referred to in our comments on good reason for
15 adjusting the time or giving more time to allow
16 them to explore those claims, and maybe that's
17 the way we ought to do that rather than get
18 into this -- I mean, the Rule ought to be
19 simple to apply.

20 I mean, the beauty is, if I'm a defendant,
21 you're a defendant, we've got to get together
22 and split up the 50 hours, and that means we
23 need to, if we've got some -- and maybe that's
24 what we ought to do rather than refer to
25 Rule 233 which brings us into this whole

1 problem. Just say that plaintiffs get 50
2 hours, the defendants get 50 hours.

3 CHAIRMAN SOULES: John Marks.

4 MR. MARKS: I have real problems
5 with that. I think a better way to do it is
6 give each party 50 hours unless a determination
7 has been made pursuant to
8 Rule 233. I'm just not sure that that will
9 work very well, Steve, this 50 hours per side,
10 this 50 hours for the defendants and 50 hours
11 for the plaintiff. That just plain isn't going
12 to work for me in practicality. But if you say
13 per party and then have some provision that if
14 a determination is made pursuant to Rule 233,
15 then it's okay.

16 CHAIRMAN SOULES: Shelby
17 Sharpe.

18 MR. SHARPE: You are going to
19 have to address it in some fashion, because
20 quite often on the defense side you have one
21 defendant going after another defendant as much
22 as the plaintiff is going after the defendants,
23 because I have been involved in a lot of
24 litigation in the past several years where
25 primarily a plaintiff may have been coming

1 after my client but the real culprit was
2 another defendant and not my client. And in
3 the litigation, in some of the depositions that
4 were being taken, I was being very much aligned
5 with the plaintiff in that deposition, but yet
6 in other witnesses being deposed, I would be
7 aligned with a co-defendant, and then sometimes
8 I would be opposite both of them. So there's
9 got to be some consideration where a party is
10 not penalized merely because it's on one side
11 of the docket or the other.

12 As you're doing discovery, you have to
13 really look at who is being deposed and then
14 where the alignment falls. There's got to be
15 some flexibility either by determination of
16 side or by determination of the individual
17 parties.

18 Of course, you can also have an abuse on
19 the party side too. What John is suggesting
20 also runs into some potential abuse there on
21 the defendant side of the docket, where the
22 defendants could really load up on the
23 plaintiff's side and yet they have antagonistic
24 differences among themselves. It puts the
25 plaintiff at a very decided disadvantage.

1 CHAIRMAN SOULES: Put this in
2 focus. What we're debating now is what's going
3 to be the default Rule, because there's relief
4 either by agreement of the parties or by order
5 of the judge for good reason. So what is going
6 to be the standard default Rule from which
7 relief has to be sought?

8 We've already talked about relief. We're
9 going to let the judge give relief; we're going
10 to have the parties seek relief; we're going to
11 let the parties agree to relief.

12 The policy we're talking about is what is
13 going to be the standard Rule.

14 Scott McCown.

15 HONORABLE F. SCOTT McCOWN:

16 Recognizing that this is a default Rule and
17 that no Rule we write is going to cover all
18 situations, how about something like: Plaintiff
19 shall have 50 hours, defendant shall have 50
20 hours. In cases where cross-actions or third
21 parties actions have been filed, defendants
22 shall have an additional 10 hours for
23 depositions on issues between them.

24 MR. SUSMAN: Okay.

25 MR. ORSINGER: That's 10 hours

1 for each defendant, or 10 hours total for all
2 defendants?

3 MR. KELTNER: 10 hours total
4 would be --

5 HONORABLE F. SCOTT McCOWN:
6 Well, I hadn't really thought it out that far.

7 CHAIRMAN SOULES: Two types of
8 parties not covered there are third party
9 defendants and intervenors.

10 HONORABLE F. SCOTT McCOWN:
11 Well, it covers third party defendants,
12 cross-action or third party actions.

13 CHAIRMAN SOULES: Okay.

14 HONORABLE F. SCOTT McCOWN: It
15 doesn't cover intervenors.

16 MR. SUSMAN: Put them in.

17 HONORABLE F. SCOTT McCOWN: But
18 intervenors would either be plaintiff
19 intervenors or defendant intervenors, so they
20 would come under the plaintiff or defendant
21 provision.

22 CHAIRMAN SOULES: Without saying
23 that or with saying that?

24 MR. SUSMAN: I think it sounds
25 good to me.

1 HONORABLE F. SCOTT McCOWN: You
2 could say an additional 10 hours each, but that
3 seems like a lot of depositions.

4 CHAIRMAN SOULES: Okay. The
5 concept here, then, is that all the plaintiffs
6 would have a set number of hours as a group.
7 All the defendants would have a set number of
8 hours as a group. And then if there are
9 cross-actions or third party actions, they get
10 10 hours.

11 PROFESSOR ALBRIGHT: The
12 defendants as a group get 10 more hours?

13 MR. ORSINGER: You've got to
14 allocate or else it's going to be a race to
15 take the depositions and use the time.

16 MR. MARKS: I've got a
17 suggestion. Maybe if there are four or five
18 defendants, let's say, rather than one
19 defendant, and of course, the plaintiff is the
20 one who gets to pick who is going to be sued,
21 maybe a defendant should get -- the defendants
22 should get more hours than the plaintiff, but
23 not necessarily 50 hours per defendant.

24 CHAIRMAN SOULES: Well, just in
25 response to that, I mean, it would seem like

1 that the plaintiff gets to pick the defendants
2 because the plaintiff is the one who files the
3 suit and names them. But it's not all that
4 easy, because the plaintiff doesn't have all
5 the options to pick or choose. They have to
6 sue everybody and normally you do.

7 MR. MARKS: Well, I don't mean
8 that as a criticism, I'm just saying it does
9 put the defendant at a disadvantage if he has
10 things that he needs to do and doesn't have
11 enough time to do them, so maybe defendants as
12 a group should have more time just like they
13 may have more jury strikes, but not necessarily
14 six per party. So if you've got four
15 defendants, you've got so many hours. If
16 you've got three defendants, you've got so many
17 hours.

18 CHAIRMAN SOULES: Steve Susman.

19 MR. SUSMAN: Could I ask, this
20 is a tough issue; we need to go back to the
21 drawing board. Would all you-all think about
22 this and drop me a note over the next week with
23 your ideal solution. Seriously, I mean, we
24 need to think about this and I don't want to
25 get hung up on this. We recognize this as a

1 difficult problem. How do you make it fair and
2 yet make it restrictive without opening it up?
3 We know we've got a problem here, and we've
4 known that 233 was kind of a default for us.
5 We've looked at it, oh, yeah, here it is,
6 define your side. We've got a problem.

7 You all think about it. If anyone can
8 come up with some ideas, let me know so we
9 don't get hung up on this.

10 CHAIRMAN SOULES: Except I think
11 I'm picking up a consensus that there would be
12 a fixed limitation on the plaintiffs and on the
13 defendants. They might not be exactly the same
14 limitations, but the limitations would be to
15 the group. Is
16 that --

17 MR. SUSMAN: I think that's a
18 consensus.

19 CHAIRMAN SOULES: Is that the
20 consensus of the Committee? You've got to have
21 some basic -- some orientation to the problem
22 before you begin the draft.

23 HONORABLE F. SCOTT McCOWN: Here
24 is an idea, and I know -- I think Steve is
25 right, we're going to have to send this back to

1 the committee. But what about something like:
2 Plaintiff shall have 50 hours, defendant shall
3 have 50 hours, intervenors shall be aligned as
4 plaintiffs or defendants; in cases where
5 cross-actions or third party actions have been
6 filed, defendants shall have an additional five
7 hours per side per action for depositions on
8 issues between them.

9 CHAIRMAN SOULES: Okay. Did I
10 get that right, that the consensus is that the
11 group of plaintiffs and the group of defendants
12 are going to have some limitation that's an
13 aggregate limitation on all of them? Okay.

14 Does anyone disagree with that?

15 Okay. That's enacted. Now, is it going
16 to be the case -- is it also the consensus
17 that where there are cross-claims or third
18 party claims, that as to those claims there
19 would be some standard of additional discovery
20 permitted on those issues alone?

21 MR. SUSMAN: Yes.

22 CHAIRMAN SOULES: Is there any
23 disagreement with that?

24 Okay. That's also unanimous. That gives
25 you enough information to go to the drawing

1 board, doesn't it?

2 MR. SUSMAN: Correct.

3 CHAIRMAN SOULES: Okay. Rusty
4 McMains.

5 MR. McMAINS: In all fairness, I
6 think everybody has been assuming that there's
7 a lot of potential ganging up by the
8 defendants, I mean, to some extent in terms of
9 the ability of defendants to at least postulate
10 cross-claims against one another actually being
11 together and maybe taking advantage that way.
12 But there's also that possibility, of course,
13 for the plaintiffs in the sense that you may
14 have three different lawsuits against basically
15 the same defendants maybe arising out of the
16 same occurrence.

17 Obviously, chemical explosions are
18 classical examples of those. Frequently and
19 not infrequently, plaintiffs file in multiple
20 forms basically against the same defendants.
21 And in that type, and there is a lot of that,
22 whether it be toxic tort or mass disaster
23 litigation, and I realize the arguments are
24 "Well, we've got to go to the judge on each
25 one," but the first thing that people are going

1 to do in my judgment is that creative lawyers
2 will look for ways to obviate these
3 limitations.

4 And the question is whether or not we --
5 that some thought should be given to anticipate
6 at least perhaps numbers of parties and the
7 same occurrences, some -- as to whether or not
8 there's some kind of protection that will be
9 afforded under these Rules in terms of delayed
10 filing of suits by other people that are in as
11 a mechanism for expanding your number of hours
12 automatically or that sort of thing.

13 I mean, that's the problem I have with
14 this notion of per side, because you -- and
15 it's not cured by the per party. I mean,
16 that's an issue that has to be different just
17 really depending on the case.

18 CHAIRMAN SOULES: Well, doesn't
19 a piece of this -- I mean, should the Rule say
20 that the relief that can be granted from
21 whatever the default position is, should the
22 Rule express that it could be to further limit
23 discovery or to expand discovery both ways?

24 Okay. Mike Hatchell.

25 MR. HATCHELL: I'm not going to

1 be in the office next week to write you, so
2 this is just food for thought.

3 I think the default setting ought to be
4 simple, because it's probably going to apply to
5 85 percent of the cases. How about X number of
6 hours for the plaintiffs, X number of hours for
7 the defendants up to two, X number of hours for
8 each additional defendant up to a maximum
9 number of X number of hours. And then that
10 allows you to take care of the issues between
11 defendants but puts a cap on it in the Rules.

12 CHAIRMAN SOULES: Well, the
13 subcommittee should consider that as one
14 possible approach.

15 Alex Albright.

16 PROFESSOR ALBRIGHT: Just on the
17 same idea but more generally, should we as the
18 subcommittee consider a default allocation?
19 Because another thing we've been doing is
20 assuming plaintiffs and defendants are going to
21 agree on how to allocate these hours of
22 depositions when it may be that what they
23 actually do is one of them says, "Well, I'm
24 going to beat you to it and I'm going to notice
25 up depositions early on and I'm going to use up

1 all 50 hours." Should we have a default
2 allocation which is kind of like what Mike is
3 talking about where you say, you know, each
4 defendant gets so many hours of depositions,
5 and then if you all can agree to allocate them
6 some different way, maybe that's a better way
7 to do it.

8 CHAIRMAN SOULES: Maybe you
9 could say it could be allocated equally among
10 the defendants, period. That would be the
11 default. That's another idea.

12 MR. KELTNER: I'd be interested
13 to see, Luke, what people would think of that
14 idea, because I think in a default position
15 that makes some sense. And if we could get a
16 consensus on that, I think it would guide the
17 subcommittee a little bit.

18 CHAIRMAN SOULES: All right. Is
19 it the consensus of the Committee that the
20 parties on a side, and I'm using the words I
21 probably shouldn't be, but I'm trying to use
22 them for illustrative purposes, would divide
23 the hours equally unless otherwise agreed or
24 ordered by the Court? Any objection to that?

25 Okay. That's unanimous also.

1 Have we given the Committee our general
2 thoughts on policy approach to this? Anything
3 else?

4 Carl Hamilton.

5 MR. HAMILTON: I would like to
6 ask one question. Our subcommittee has kicked
7 this around and come up with the same problem.
8 That may be the reason why the Federal Courts
9 opted to have limitations on the number of
10 depositions rather than hours. Have you all
11 discussed that and why you opted for hours
12 rather than giving each party a certain number
13 of depositions and then let him decide what he
14 wants to take?

15 MR. SUSMAN: Yes. Because our
16 basic notion was to -- our basic approach was
17 to put limits on the outside. The discovery
18 period is six months. However you want to use
19 it up is the lawyer's business. Limits on the
20 number of interrogatories, but the number of
21 sets is your business. Limits on the number of
22 -- I mean, what costs money is the hours
23 spent in depositions. That's what costs money,
24 because if you limit it to 10 depositions,
25 someone can go on with one deposition for 10

1 days. I mean, that can be outrageous. Courts
2 are very reluctant to stop those depositions.

3 So our feeling was to give them 50 hours
4 and let lawyers creatively figure out how
5 they're going to divide that time. To me
6 that's the sensible thing to do. Lawyers have
7 then got to sit down, okay, I've got to
8 establish these six points, I've got these
9 witnesses, I'm not going to have any time to
10 ask background questions, I'm going to have to
11 spend an hour with this person, three hours
12 with that person, and again, planning your
13 whole discovery strategy the way you ought to
14 plan it; and that that was a better approach
15 than saying each side gets 10 depositions.

16 There were some of the personal -- I
17 mean, some of the plaintiffs lawyers, I think,
18 felt that they were more comfortable with an
19 overall outside limit of hours which gave them
20 the freedom to take some very short depositions
21 that they would need to in some cases, whereas
22 limiting them to eight depositions or 10 would
23 not be workable. That's basically -- frankly,
24 I don't frankly see how you sidestep the side
25 problem, the allocation problem, by doing it in

1 terms of numbers of depositions rather than
2 hours. You've got the same problem.

3 CHAIRMAN SOULES: Let's see if
4 we can get a show of hands, unless somebody
5 feels it's not ripe for a decision, on whether
6 we should limit it, the discovery, the
7 deposition discovery, to number of depositions
8 or hours on the record.

9 How many feel it should be by number of
10 deposition?

11 How many feel it should be by hours on the
12 record? Okay. That's unanimous on that point,
13 so that gives you guidance.

14 All right. I have some concern about
15 166(b) and (3), the discovery period.

16 MR. SUSMAN: Yes.

17 CHAIRMAN SOULES: And they
18 are -- basically they are amended pleadings to
19 add new causes of action. How is that going to
20 be handled, which may require us to fix or
21 close the pleadings at some point. I don't
22 know what the right answer is to that, but if
23 all the depositions have been taken, is that
24 just something you go to the Court for relief,
25 or how do you handle adding a new cause of

1 action and how do you handle adding additional
2 parties?

3 Suppose the discovery has taken 50 hours,
4 all the defendants have taken 50 or whatever
5 the number may be, and you all are going to
6 work that out plus any extra they're going to
7 get, and then it's all been done and a new
8 defendant has been added. Or maybe this is not
9 something we even need to deal with because it
10 all comes under going to the Court for relief.
11 But those are going to be real issues in real
12 cases, new causes of action and new parties.

13 Has any thought been given to how to
14 handle that, or do you want to just take that
15 back and think about it?

16 MR. SUSMAN: I think we need to
17 think about it. I don't think we gave this a
18 lot of thought.

19 CHAIRMAN SOULES: Okay. So that
20 bears on both the size of the discovery and
21 when the discovery period starts, because if it
22 starts from when the first deposition is taken
23 and this party is not even -- this individual
24 is not even a party at that point or at any
25 point in the next six months and now discovery

1 has been closed, so if you all could give that
2 some thought and then give us your
3 recommendation on how to approach that
4 problem.

5 Richard Orsinger.

6 MR. ORSINGER: Some states don't
7 permit unilateral amendment of pleadings. In
8 some states you have to get the permission of
9 the Court to amend your pleadings, so we could
10 give consideration to requiring Court
11 permission to amend after the discovery shutoff
12 and allow freedom to do that up until that
13 time. If you don't encourage somebody to put
14 their cards on the table before discovery is
15 over, there will be some lawyers that will hold
16 back important claims until after discovery is
17 shut off.

18 CHAIRMAN SOULES: I don't know
19 whether this is something that we can fix in
20 the Discovery Rules or something that would be
21 fixed in the Rules on joinder claims and
22 joinder parties. But somehow that can be
23 addressed if we need to address it.

24 MR. SUSMAN: I mean, you know,
25 most docket control orders that state courts

1 are routinely entering now in any event, these
2 pretrial dockets, I mean, many of them are --
3 I mean, have pleadings -- there are deadlines
4 on filing pleadings. I mean, they have these
5 deadlines when you can amend.

6 CHAIRMAN SOULES: But this is a
7 Rule that's going to apply in the absence of a
8 166 order. What you're --

9 MR. SUSMAN: I mean, my only
10 question is we might have a Rule that just that
11 says all pleadings must be amended by the third
12 month of the discovery window or something like
13 that. I mean, you could
14 say --

15 CHAIRMAN SOULES: Or after --
16 or with leave of the Court.

17 MR. SUSMAN: Three months before
18 the close of discovery, you have to get the
19 pleadings in order, period.

20 CHAIRMAN SOULES: Well, we have
21 an open field to approach the problem, and if
22 it means -- what I'm getting at is if it means
23 reaching to another section of the Rules that's
24 outside the Discovery Rules, it will be hard to
25 fix this discovery problem. If you have an

1 open field, that may be better than trying to
2 do it here. It may not be as good as trying to
3 do it here.

4 MR. SUSMAN: The other problem
5 we have with this, and someone pointed this
6 out, is that there are possibly places, I'm not
7 very familiar with them, where you can get to
8 trial in less than six months or -- and we
9 need something that adjusts this time frame for
10 those places or at least so that -- that's not
11 in here. I mean, the assumption is that it
12 always take more than six months to go to
13 trial.

14 MS. DUNCAN: But won't that be
15 good reason for shortening your discovery?

16 CHAIRMAN SOULES: Maybe that's,
17 good reason.

18 HONORABLE F. SCOTT McCOWN: But
19 do you need a Rule about that? Because then
20 the time runs until the trial setting.

21 CHAIRMAN SOULES: Let's have the
22 Committee just think about that and maybe
23 that's something we don't need to fix here.
24 You can get to trial in San Antonio in the
25 County Courts at Law in six months, and they've

1 got some pretty sizable jurisdiction.

2 Alex Albright.

3 PROFESSOR ALBRIGHT: I'd like to
4 hear some consensus of the Committee about
5 whether you all would be in favor about having
6 a pleading cutoff, because that would be a
7 major change in Texas practice. In Texas
8 practice you can freely amend whenever.

9 MR. HERRING: Even after trial.

10 PROFESSOR ALBRIGHT: Whereas in
11 Federal Court that's not true, and I think it
12 may be that we need to change that. But if
13 people feel strongly against it, I don't think
14 we should be spending a bunch of time worrying
15 about it.

16 CHAIRMAN SOULES: I'd like to
17 leave that just where I did; it's an open
18 field. Because as you all work hard in your
19 discovery subcommittee to come up with an
20 answer to this, you will either decide there's
21 a way to do it in the Discovery Rules or it's
22 really not doable there and it has to be done
23 someplace else; or we're just not going to
24 worry about it and let the Courts take care of
25 it in the form of relief. And I think we ought

1 to leave all those options open to the
2 committee, if that's okay with you, Steve and
3 David.

4 MR. SUSMAN: That's fine.

5 CHAIRMAN SOULES: John Marks.

6 MR. MARKS: A couple of things.
7 First of all, should we have, you know, a grace
8 period before the six months begins like 30 or
9 60 days after the suit is filed so that you
10 don't have a guy sending out interrogatories
11 and production requests with his petition or
12 somehow getting that time going too soon?

13 MR. SUSMAN: It begins, John,
14 only on the taking of the first deposition, so
15 obviously the Rules have the ability -- you
16 can't take a deposition right away. If you're
17 the plaintiff, you've got to wait awhile.

18 As for the production of the first
19 document pursuant a request, I had thought,
20 now, and I had given some thought to the notion
21 personally of maybe we ought to allow document
22 production and the review of documents to
23 precede the beginning of the discovery window
24 so that production of documents would not
25 trigger the opening of the window but the first

1 deposition would, but I don't know. I mean --

2 MR. MARKS: But what if a
3 plaintiff notices a deposition right after you
4 file your answer?

5 MR. SUSMAN: It's open.

6 CHAIRMAN SOULES: I think maybe
7 what John -- let me see if I can articulate
8 this. In 166b, the discovery period could stay
9 just the way it is or it could have something
10 added that says "but not sooner than 60 days
11 after the case is filed." I mean, should we
12 have some but-not-sooner-than point of time, is
13 the question I think that you're putting on the
14 table, isn't it, John?

15 MR. MARKS: Yes. Well --

16 CHAIRMAN SOULES: Okay. And
17 let's discuss that briefly here so that we can
18 let the committee know whether we want a
19 specific period, not an arbitrary period, but a
20 specific period before which the discovery
21 cannot commence.

22 MR. SUSMAN: Well, the plaintiff
23 cannot commence it until the defendant's answer
24 date. We know under the current Rules that you
25 cannot take a deposition without the leave of

1 the Court right -- if you're the plaintiff,
2 until after the answer date, so there's -- the
3 defendant can commence it by noticing the
4 plaintiff's deposition immediately, but that's
5 -- normally people say that should be the
6 case. The plaintiff should have been ready
7 when they filed their suit to get it on, and so
8 what's wrong with the defendant opening that
9 six months right away. I do not think -- I
10 personally do not think there ought to be a
11 waiting period. I think that's a big mistake
12 to have this mandatory two-month waiting period
13 unless the parties can agree on it.

14 MR. LATTING: That's the
15 opposite direction from where we want to be
16 heading, isn't it?

17 MR. SUSMAN: Yeah.

18 MR. LATTING: Don't we want to
19 get it over with faster?

20 MR. SUSMAN: Right.

21 CHAIRMAN SOULES: But let's talk
22 about this a minute. I mean, this is a
23 legitimate issue that John Marks has raised and
24 let's talk about it for a few minutes. And
25 we've got Steve's view on it.

1 Chuck Herring.

2 MR. HERRING: Just a question,
3 Steve, for your subcommittee. We don't have
4 anything yet in front of us on disclosure. Are
5 you still considering some possible mandatory
6 disclosure, because that could affect this in
7 terms of what's going to be produced when. It
8 still wouldn't trigger -- as I understand the
9 Rule -- wouldn't trigger the discovery period
10 because there wouldn't be a request, but is
11 that still open before your committee or not?

12 MR. KELTNER: Yes, I think it
13 is. We haven't specifically taken it up, but
14 it is an open question.

15 CHAIRMAN SOULES: Well, that
16 wouldn't trigger 166(b)(3), not the request,
17 but if there's an automatic production of
18 documents, since --

19 MR. HERRING: It says "upon
20 request of any party," is the way it reads
21 now.

22 CHAIRMAN SOULES: Oh, I see.

23 MR. HERRING: So this
24 automatically wouldn't trigger it.

25 CHAIRMAN SOULES: I see. Okay.

1 Is that the intent, that if there's any
2 automatic discovery, making of discovery, that
3 that would not --

4 MR. SUSMAN: It would not
5 trigger this.

6 CHAIRMAN SOULES: -- it would
7 not trigger the start of the discovery period?

8 Okay. David Keltner and then Sarah and
9 then Richard.

10 MR. KELTNER: The only reason I
11 could see for a grace period would be to give
12 the parties an opportunity to work out a time
13 period or work out what they're going to do
14 with discovery if it's going to be different
15 than the Rules. That might be something that
16 makes some sense. I worry about it being 60
17 days because that goes contrary to where we're
18 trying to go with this. I think we ought to
19 stay as close to six months as we possibly
20 can.

21 Are there any other reasons for a grace
22 period?

23 MS. DUNCAN: Yes.

24 CHAIRMAN SOULES: Sarah.

25 MS. DUNCAN: I would suggest

1 that we consider a 30-day grace period, one to
2 work out agreements, but also have mandatory
3 disclosure of documents during that 30-day
4 period. Because from the little bit of trial
5 experience I have, which isn't much, so you all
6 feel free to tell me I'm crazy, but a lot of
7 the problems that I saw was that we would have
8 all these document requests, everybody would
9 get copies of everything, and then nobody would
10 look at their documents. And they would walk
11 into the depositions and if they had just
12 bothered to look at their documents, they would
13 have half the deposition down.

14 So maybe if you have that mandated 30-day
15 period where all you can do is look at
16 documents and try to reach agreement, maybe
17 somebody will look at some documents.

18 MR. MARKS: But you've got to
19 get the documents first.

20 MS. DUNCAN: That's right.

21 MR. MARKS: And then you need to
22 have time to look at them.

23 MS. DUNCAN: That's true. But
24 if you had a mandated disclosure at some very
25 early period -- I mean, in most cases the

1 plaintiffs aren't going to have much in the way
2 of documents and the defendants ought to know
3 where their documents are, so if you had 10
4 days after an answer that you've got to produce
5 your documents unless you've got some good
6 reason to the contrary --

7 MR. MARKS: That's a little
8 soon.

9 MS. DUNCAN: Now, I'm talking
10 about most cases. I'm not talking about the
11 cases that you work on. I'm talking about most
12 DTPA cases, most promissory note cases. You
13 know, maybe you could make it 30 days. I'm not
14 really concerned about the number, but it seems
15 to me that lawyers have not been willing in
16 large measure to structure discovery to proceed
17 from Point A to Point B to Point C, and maybe
18 we can help them do that with a grace period.

19 CHAIRMAN SOULES: Let me see, as
20 a predicate to that, I think we've demonstrated
21 a consensus before that there should be some
22 mandated discovery in the Rules. Isn't that
23 right? Is there anyone in disagreement with
24 that?

25 Okay. So we're going to have some

1 mandated discovery, and I guess that needs to
2 be factored in to these Rules or at least
3 thought about as to whether or not it's a
4 factor in these Rules, Steve. We don't have
5 that on the table yet, but it will be coming.

6 Giving that some thought, then tell us
7 what the consensus or what the subcommittee
8 feels about a grace period or delay period
9 during which that mandated discovery is
10 assimilated or should be assimilated, and then
11 tell us what you think and the reasons for it.

12 Richard Orsinger, and then I'll get to
13 Shelby.

14 MR. ORSINGER: I'd like to
15 inquire what the procedure would be if the
16 plaintiff or the defendant joins a party in
17 about three months into the discovery period.
18 Is the new party going to be limited to the
19 three months left, or are they going to have
20 their own six months, or are they going to have
21 something between three and six?

22 CHAIRMAN SOULES: They're going
23 to think about that.

24 MR. ORSINGER: Okay.

25 CHAIRMAN SOULES: So that's

1 already been assigned to them. They've been
2 charged with that already.

3 Shelby.

4 MR. SHARPE: One of the things
5 that will be coming over following the April
6 Court Rules meeting is the rewrite of Rule 166
7 which has this, quote, grace period that's in
8 it. You've got 150 days following the filing
9 of a lawsuit. Also coming over is a Rule that
10 requires certain mandatory disclosure on both
11 sides so that within that 150-day period the
12 parties' attorneys may very well work out when
13 this window is going to start and these other
14 kinds of things.

15 So I think what you will have on the table
16 and Steve's committee will have would be what
17 happens following the filing of the lawsuit;
18 the mandatory disclosure that's required on
19 both sides is going to be there; plus what
20 would take place during that period of time
21 that would affect when this window opens and
22 the attorneys would have the opportunity, so I
23 think that's going to be on the table.

24 CHAIRMAN SOULES: And you're
25 going to get that to Steve in the next week or

1 so?

2 MR. SHARPE: Yes.

3 CHAIRMAN SOULES: So that he can
4 at least see where the drafting is?

5 MR. SHARPE: Yes.

6 CHAIRMAN SOULES: And whether or
7 not it becomes the consensus of Court Rules,
8 the State Bar's Court Rules Committee, it's
9 still very mature -- it's now very mature in
10 the process, isn't it? It's been in the
11 process for months?

12 MR. SHARPE: Well, some of it
13 has been in the process for about two years or
14 so.

15 CHAIRMAN SOULES: Or years.

16 MR. SHARPE: It's almost in
17 final form. But no, you'll have the draft
18 before we finally act on it.

19 CHAIRMAN SOULES: Okay.

20 MR. SHARPE: So we'll act on it
21 April 9th.

22 CHAIRMAN SOULES: Well, I just
23 wanted Steve to realize and his committee that
24 this is not something that's just rudimentary
25 in its beginning stages. This is something

1 that's already had a lot of attention, a lot
2 serious work done on it.

3 MR. SHARPE: Two to three years.

4 CHAIRMAN SOULES: Okay.

5 Anything else on the question of some delay
6 period? Is there anything else you think we
7 ought to think about? That's all we're talking
8 about here. Okay.

9 MR. MARKS: Luke, one other
10 question on this.

11 CHAIRMAN SOULES: John Marks.

12 MR. MARKS: Maybe we've decided
13 to do deal this later, but if we're going to
14 have six months of discovery, it shouldn't make
15 any difference whether we're in San Antonio or
16 we're down in McAllen or wherever. We ought to
17 be protected during that period of time from
18 trial settings. There should be some provision
19 that if we're going to have six months for
20 discovery then we ought to have it, and the
21 Court shouldn't be able to interfere with that
22 time and put us to trial before we've had our
23 discovery.

24 CHAIRMAN SOULES: All right.

25 Will the committee, then, consider that issue

1 and tell us how you come down on that.

2 HONORABLE C. A. GUITTARD: Are
3 you talking about the same case or some other
4 case?

5 MR. MARKS: Pardon me?

6 HONORABLE C. A. GUITTARD: Is
7 the trial setting in the same case or some
8 other case?

9 MR. MARKS: The same case. The
10 same case.

11 MS. DUNCAN: He wants six months
12 absolutely.

13 MR. SUSMAN: He's saying that if
14 the courts are actually faster than this we
15 ought to slow them down a little, is what he's
16 saying.

17 CHAIRMAN SOULES: In the same
18 case. In other word, you should --

19 MR. SUSMAN: As I understand it,
20 what he's saying is that if in fact there are
21 courts that are trying cases quicker than six
22 months after they're filed, we ought
23 to -- this Rule should slow that down.

24 MR. MARKS: That's what I'm
25 saying.

1 MR. SUSMAN: I understand what
2 you're saying. Maybe that's okay.

3 CHAIRMAN SOULES: It's not
4 really six months because the suit is filed and
5 then there's service and an answer and that
6 period goes on and then you've got some time
7 after that before the parties either make a
8 production or start a deposition, so it could
9 be more clearly -- it's clearly going to be
10 more than six months. It's going to be at
11 least seven months.

12 HONORABLE F. SCOTT McCOWN: But
13 I don't see any reason for that. We're not
14 suggesting that cases ought to have six months
15 of discovery. We're providing a window beyond
16 which they ought not go unless it's an
17 exception. But I dare say, in a good
18 75 percent or more of state cases the discovery
19 would be over long before six months and the
20 trial would be had. I mean, you take your
21 average family law case and they're down as
22 soon as the 60 days has passed. And some
23 notion that a party could obtain automatic
24 delay or ought to have an exception from the
25 Court and go in and ask for an exception to get

1 a trial setting inside six months seems to me
2 unnecessary.

3 CHAIRMAN SOULES: Okay.

4 MR. SUSMAN: Interrogatories.

5 CHAIRMAN SOULES: And I think
6 we -- would you like to take up next,
7 Interrogatory Rules?

8 MR. SUSMAN: 168.

9 CHAIRMAN SOULES: Okay. Let's
10 start off first with the policy issue of no
11 limit on the number of sets.

12 MR. MARKS: I just have a
13 question.

14 CHAIRMAN SOULES: Okay. John
15 Marks.

16 MR. MARKS: Where are we going
17 to leave this? I mean, are we going to just
18 drop it?

19 CHAIRMAN SOULES: No. The
20 committee is going to look into whether or not
21 they feel that a general Rule can be written
22 that would require the Court to be hands-off on
23 setting the case for trial during this
24 discovery period, whether or not that gets
25 fixed by the Relief Rules or whether or not it

1 ought to be addressed at all. And given that
2 you've got divorce cases, family law cases and
3 all that, they're going to try to consider that
4 and then bring it back. In other words, it
5 won't be dropped. They will be charged with
6 giving consideration to your suggestion, John.

7 Okay. Interrogatories to parties. I
8 guess the initial policy issue is dropping the
9 limitation on the number of sets of
10 interrogatories but retaining a fixed or
11 specific number of questions.

12 Is everybody in agreement with that?

13 Joe Latting.

14 MR. LATTING: I'm not. I think
15 as a default provision that we ought to keep
16 two sets of interrogatories as a norm. I don't
17 think there's a reason to expect that people
18 ought to be able to send four or five or six
19 sets of interrogatories. That doesn't happen
20 very often. It happens occasionally when you
21 get kind of a screwy lawyer on the other side,
22 but -- well, you ought to be able to figure
23 out what questions you want answered in two
24 sets of interrogatories usually, and if you
25 can't, you can go to the Court.

1 But it seems to me we're trying to limit
2 discovery and shorten it, and I'm just -- I
3 think that what we have works pretty well in
4 this respect.

5 CHAIRMAN SOULES: David Keltner,
6 then Sarah.

7 MR. KELTNER: I don't think it
8 will work well with a Mandatory -- even a
9 limited Mandatory Disclosure Rule, Joe. That's
10 where I have a difference of opinion with you.

11 I think you ought to be able to ask one
12 interrogatory or two interrogatories without
13 feeling the need to fill up the rest of your
14 set, and I think that's basically what's
15 happening. I may want to know one fact that I
16 couldn't clean up by a deposition, and I may
17 want to know the contention of a party by
18 saying, "Are you contending X?" Because
19 if --

20 MR. LATTING: I have no doubt
21 that being able to send --

22 CHAIRMAN SOULES: Let David
23 finish.

24 MR. KELTNER: But that's the
25 only reason I have for it.

1 CHAIRMAN SOULES: Okay. Now
2 Sarah, and then back to you, Joe.

3 MS. DUNCAN: David said pretty
4 much what I wanted to say. I think it's
5 inefficient to require that there be 15
6 including discreet subparts in each set,
7 because you may only have one that you need.

8 My real problem was on the per side versus
9 per party, and that's what we need to get to.

10 CHAIRMAN SOULES: We'll be
11 dealing with that in a minute.

12 MR. LATTING: There's no
13 question but that unlimited sets of
14 interrogatories gives you better discovery and
15 you can have more and you can learn more, just
16 like you can learn more in two years of
17 depositions than you can in six months. But if
18 we're trying to limit and hold down the cost of
19 discovery, I can tell you that answering
20 interrogatories costs clients a lot of money.
21 Every time you get a set, you go through a
22 process when you answer them. So I'm just
23 saying as a norm I think we ought to be telling
24 the Bar we want there to be quicker and less
25 discovery. Get this done and get it over

1 with. That's all.

2 And if you run out of -- if you run into
3 a problem, you can always go to your friendly
4 district judge and say, "I need to send them
5 some more interrogatories and I have a good
6 reason."

7 CHAIRMAN SOULES: David, in
8 order to get some orientation, and maybe Shelby
9 too, on this, and Carl, is the concept of
10 mandated discovery. Is that discovery going to
11 be very similar to what is normally obtained in
12 stock interrogatories?

13 MR. SHARPE: Yes.

14 MR. KELTNER: Yes. It is in the
15 Task Force's recommendation. Ours is still a
16 request process, but the request is a letter.
17 That's different than their committee. Our
18 theory was that there are some cases in which
19 even mandatory discovery isn't necessary, and
20 so what you do is you just put it in letter and
21 you get persons with knowledge of relevant
22 facts, experts who may testify, insurance
23 provisions; in suits over a document, you get
24 the document the suit is over, and that's
25 basically it.

1 Our theory basically was that those are
2 things no one really has objections to. Let's
3 not worry about it; let's get that out of the
4 way. And that's why I thought we ought to
5 limit the number of interrogatories, if not
6 just do away with interrogatories.

7 CHAIRMAN SOULES: Would you put
8 witnesses on that, too?

9 MR. KELTNER: Sir?

10 CHAIRMAN SOULES: Witnesses.
11 Instead of persons with knowledge of relevant
12 facts, would you either put them both or just
13 put witnesses?

14 MR. KELTNER: I think personally
15 that it's time to do away with that
16 distinction. I don't think that
17 interrogatories may be the way to do it up
18 front, because the whole idea of the mandatory
19 disclosure is that's something you do first and
20 then decide whether you need anything more, and
21 I think that at some point we ought to
22 designate witnesses, but maybe mandatory
23 disclosure is not the place for that. But that
24 was the Task Force's recommendation, and let me
25 let Shelby respond.

1 CHAIRMAN SOULES: Okay. So as
2 that pertains to either the number of questions
3 or the number of sets, and since we have
4 unanimous agreement that we're going to have
5 some mandated discovery, it may be triggered by
6 a letter, but if it's triggered, it's going to
7 be mandatory.

8 MR. KELTNER: Yes, sir.

9 CHAIRMAN SOULES: Then it's not
10 going to be through the interrogatory process,
11 so now we're talking about interrogatories
12 beyond mandated discovery -- or mandated
13 disclosure, pardon me.

14 MR. KELTNER: Yes. And I think
15 we need to answer -- the question is, do we
16 want interrogatories as a discovery device,
17 one; and whether the numbers are right and then
18 the sets are right. But my thought is that if
19 we're going to have them we should sure
20 substantially limit them. Yet the more we
21 limit them, my argument would be the more
22 important it is not to have them in one or two
23 sets, but that's Keltner's opinion.

24 CHAIRMAN SOULES: Okay. Shelby.

25 MR. SHARPE: The Mandatory

1 Disclosure Rule coming from Court Rules would
2 get what you would normally go after in your,
3 quote, standard set of interrogatories and
4 request for production. That's going to be
5 just bang, automatic. It's going to be
6 triggered. Well, not automatic, excuse me.
7 It's triggered by a request.

8 CHAIRMAN SOULES: Triggered by a
9 letter at some point?

10 MR. SHARPE: Yes. But it just
11 comes. Now, that's the reason why the idea of
12 Steve's committee having just the 30
13 interrogatories -- they're going to be dealing
14 with things other than what would be produced
15 by this, and so I think their committee's
16 thought that "Look, we're going to limit you to
17 this," is not unreasonable at all. And it
18 helps you to just tailor it down to some other
19 things. Like as David said, maybe you want to
20 clear up something following a deposition maybe
21 with just one or two interrogatories.

22 So I think by giving the lawyers the
23 flexibility to do what they're going to do,
24 they would use them prudently. I can't imagine
25 someone trying to say, "Well, I'm going to see

1 if I can send 31 interrogatories to the other
2 side." Economy of time just says you're not
3 going to do that.

4 CHAIRMAN SOULES: And the
5 mandatory disclosure, just so it's said on the
6 record, the mandatory disclosure is not going
7 to count against your interrogatories, either
8 the number of questions or the number sets.

9 MR. SHARPE: No, no.

10 MR. KELTNER: That's right.

11 CHAIRMAN SOULES: We're talking
12 about interrogatories as something different
13 than the mandatory disclosure.

14 MR. KELTNER: That is true under
15 both the suggestions that have been made.

16 MR. SHARPE: Correct.

17 CHAIRMAN SOULES: Okay. So
18 we've got one view that we should have limited
19 sets.

20 Rusty McMains.

21 MR. McMAINS: I just had a
22 question about the mandatory disclosure part.
23 Is it going to be subject to the
24 Supplementation Rule?

25 MR. SHARPE: Yes.

1 MR. KELTNER: It is under ours.

2 MR. SHARPE: It's under ours
3 too.

4 MR. KELTNER: Our
5 supplementation is different than the
6 supplementation suggested by the Rules
7 Committee, but yes, it would be subject to
8 supplementation.

9 CHAIRMAN SOULES: Okay. And
10 we'll be seeing that shortly and debating it
11 with input from all persons interested.

12 Okay. Are we ready to take a consensus?

13 I think that first off maybe we ought to
14 take up the number of questions first. Should
15 the default be that no more than 30 questions
16 as defined here in interrogatories, is anyone
17 opposed to that? Okay. We have unanimous
18 agreement on 30 questions.

19 All right. How many feel that
20 30 questions should be asked in a limited
21 number of sets? That's four.

22 How many feel that the sets should not be
23 limited? 10. 10 to four, so the majority has
24 indicated that the sets would not be limited,
25 but the sets in the aggregate can't contain

1 more than 30 questions as defined.

2 MR. SUSMAN: The next policy
3 issue we have --

4 CHAIRMAN SOULES: Let's see,
5 John Marks may have something else on that.

6 MR. MARKS: I just have one
7 question and it's probably answered in here,
8 Steve. But what about the six-month period, if
9 I send an interrogatory five days before it
10 expires?

11 MR. SUSMAN: We have not dealt
12 with that.

13 MR. MARKS: Okay.

14 MR. SUSMAN: That is a good
15 issue.

16 CHAIRMAN SOULES: Let's
17 articulate the issue here.

18 MR. SUSMAN: The issue is, does
19 the termination of the discovery window mean
20 all responses -- all requests must be timed so
21 that the responses are made by the end of the
22 window, or can you serve a request on the last
23 few days of the window getting the response
24 after the window closes? That's an issue that
25 happens all the time, by the way, right now

1 with these docket control orders. Someone
2 asked in our firm last week where we had
3 research on it. I saw an e-mail come around,
4 so I mean I know this happens.

5 CHAIRMAN SOULES: All right.
6 Will you all accept the charge of addressing
7 that question?

8 MR. SUSMAN: Yes.

9 CHAIRMAN SOULES: And give us
10 your recommendation either that something
11 should be in the Rule or something should not
12 be in the Rule. And if something should be in
13 the Rule, draft that demonstrating whatever the
14 policy is that you think or that your committee
15 feels that the Supreme Court should adopt and
16 then we'll talk about that when it's drafted.

17 MR. SUSMAN: The next issue,
18 Luke, is does anyone have any problem with the
19 notion of unlimited interrogatories to identify
20 or authenticate specific documents as
21 contemplated by Article 9 of the Texas Rules of
22 Evidence?

23 MR. ORSINGER: I'd like to make
24 an inquiry.

25 CHAIRMAN SOULES: Richard

1 Orsinger.

2 MR. ORSINGER: Are you
3 maintaining the use of request for admissions,
4 that we'll still have that procedure
5 available?

6 MR. SUSMAN: Yes.

7 MR. ORSINGER: Why wouldn't we
8 use that to authenticate documents rather than
9 interrogatories? Because when I authenticate
10 documents, I do it through a request for
11 admissions, if it's of the party. And if it's
12 of the non-party then you have to use -- well,
13 you can't send them interrogatories anyway.

14 MR. SUSMAN: What I had in mind
15 here more than authentication -- and we may
16 have drafted it wrong; we may have had a little
17 problem in drafting it. We have not done any
18 Admissions Rule, but we need to look at it.

19 In a document production you frequently
20 get a bunch of documents that are what we call
21 orphan documents. You don't know who wrote
22 them. You can't exactly read what they say.
23 You don't know when they were written or whose
24 file they came from. It seems to me the
25 identification -- that interrogatories are

1 very useful to identify those kind of
2 documents. You know, "Would you please
3 identify Exhibit A. Please identify" -- now,
4 that seems to me the kinds of things that
5 interrogatories should be encouraged, their use
6 should be encouraged and that we should not
7 limit those.

8 Now, that's what we really had in mind on
9 these interrogatories, I think, more than
10 authentication, but we need to look at that and
11 we need to look at the admissions issue too.

12 CHAIRMAN SOULES: But you are
13 asking a policy question. I mean, it is
14 difficult -- depositions don't work very well
15 for identifying, quote, identifying, to use
16 your word, Steve, orphan documents. You sit
17 there, and particularly whenever you're on your
18 50 hours, and somebody's trying to decide what
19 in the world this is and all that. And it may
20 be that the correct way to do that or one
21 correct way to do that is to permit
22 interrogatories and we would need to define
23 very carefully what that interrogatory can
24 encompass. In other words, let's permit
25 interrogatories for that purpose.

1 Does anyone feel that the Committee should
2 just drop that notion, or should they pursue
3 it?

4 MR. SHARPE: They should pursue
5 it.

6 CHAIRMAN SOULES: Okay. How
7 many feel that that should be pursued by the
8 Committee? Show by hands.

9 Okay. Those opposed.

10 Okay. Everyone feels, Steve, that that
11 should be pursued. And I think probably on
12 that issue you will need to be pretty precise
13 in defining what that interrogatory can
14 contain, what a request of that nature can
15 contain, so that it doesn't become a runaway
16 interrogatory.

17 MR. SUSMAN: Okay. The next
18 thing we have -- I mean, do you want me to
19 just go through the policy issues and highlight
20 them?

21 CHAIRMAN SOULES: Yes, if you
22 would, please, because you're more familiar
23 with them than I am.

24 MR. SUSMAN: I think the next
25 policy issue we have that we discussed was

1 maintaining the practice of having parties sign
2 the interrogatories regardless of whether the
3 interrogatories call for -- or contingent
4 interrogatories -- call for statements of --
5 we opted to have the parties sign them. We
6 said, "Hey, that will be a neat thing to use to
7 impeach parties at trial," even though we know
8 that lawyers may write them.

9 Now, that could be A policy decision. Do
10 you want to change who signs them, who
11 authenticates them?

12 CHAIRMAN SOULES: Does anyone
13 want to change the present practice of parties
14 signing interrogatories, or just the way it
15 is?

16 Shelby, do you want to change that?

17 MR. SHARPE: I want to require
18 that they must verify the supplements, which
19 under the Court of Appeals decision they don't
20 have to do in the way they've balanced out --
21 so I agree with Steve. I just want to be sure
22 that Steve's includes the supplements. I'm not
23 opposed to it. I just want to be sure to
24 include the supplements.

25 MR. SUSMAN: Okay. We'll keep

1 that in mind.

2 CHAIRMAN SOULES: Let me see the
3 hands of all those who feel we should continue
4 the current practice at least. Those in favor
5 show by hands.

6 Those opposed.

7 Okay. So your Rule is consistent with the
8 consensus of the Committee on the original
9 interrogatories.

10 Now, how many feel that the parties should
11 be required to sign the supplements the same
12 as -- in the same manner as the original
13 answers to interrogatories? Is there any
14 discussion about that first? Does anybody want
15 to discuss that before we take a vote?

16 Okay. Those in favor of signing -- oh,
17 I'm sorry. Pam Baron, go ahead.

18 MS. BARON: I guess the issue
19 that comes up is what if they don't, is the
20 problem. And that's why the Courts have not
21 required them to verify because they want them
22 to be -- not to exclude witnesses.

23 MR. LATTING: For example, it's
24 31 days to trial and your client is out of town
25 and you realize you have a new -- you come up

1 with a witness. And this is a major deal, if
2 we exclude witnesses because the party didn't
3 sign, or it could be.

4 CHAIRMAN SOULES: I think it's a
5 major deal in a broader sense. We think that
6 you can supplement discovery by saying that "We
7 supplement discovery," meaning all discovery.

8 And say this is going to be another expert
9 and this is what he's going to say. There may
10 be a deposition someplace where an expert --
11 where a party was asked who the experts were.
12 And rather than having to go through -- and I
13 hope this -- that there is some decision, some
14 law out there on it where you can -- instead of
15 having to go through all the depositions where
16 there may have been an answer given, that now
17 has to be supplemented. And all the discovery,
18 requests for admission, every form of
19 discovery, and be specific where it is that
20 you're supplementing, that you can simply say,
21 "We're supplementing and we're giving you this
22 information and we're going to use it at
23 trial," if that is okay, then you're
24 supplementing a lot of forms of discovery where
25 the client doesn't have to sign the responses.

1 And so what do we do with that?

2 David Keltner.

3 MR. KELTNER: Luke, remember
4 that with mandatory disclosure, which is going
5 to take care of the situation with most
6 designated witnesses, that's going to eliminate
7 this problem because we've not required, at
8 least in any of the versions I've seen,
9 verification of that.

10 MR. LATTING: Okay.

11 MR. KELTNER: So that takes, I
12 think, 90 percent of the problem out of the
13 practice. I think it's a good idea.

14 CHAIRMAN SOULES: But does the
15 lawyer sign the mandatory disclosure or doesn't
16 he?

17 MR. KELTNER: Yes, the lawyer
18 does.

19 CHAIRMAN SOULES: A lawyer does,
20 okay.

21 MR. KELTNER: Under the Task
22 Force's recommendation, and I think under yours,
23 too.

24 MR. SHARPE: Yes. It's the
25 same.

1 MR. KELTNER: But let's now
2 change -- let's get off that horse and get on
3 the other problem and that is the one that
4 you're going to use at trial as evidence. And
5 that's the one that I think all of us basically
6 agreed we want verified, and that supplement
7 probably ought to be verified. So I think that
8 since we're looking at it -- well, since we're
9 going to have a new vehicle Rule with mandatory
10 disclosure, I think we're really going to be
11 able to work that problem out fairly well from
12 a practical standpoint, and maybe you all ought
13 to let us work on that.

14 I worry about the supplementation you're
15 talking about, because supplementation on --
16 how in heaven's name do you supplement a
17 deposition? If the Court of Appeals decisions
18 are correct that you have to supplement in
19 kind, do you have to re-notice your own
20 client's deposition and then ask him or her
21 that question? Well, I hope not. But that is
22 the logical extension of some of the Court of
23 Appeals' holdings.

24 I think the issue of supplementation is
25 something we're all going to have to look at

1 and we haven't taken up yet. And your
2 supplementation idea is one that is problematic
3 as well because things can really -- you can
4 really set up a bad trap there. Again, I think
5 mandatory disclosure as a practical matter is
6 going to take 90 percent of this out of the --
7 out of being problems.

8 CHAIRMAN SOULES: Well,
9 supplementation in general, then, needs to be
10 the focus of the discovery subcommittee, and
11 since it has problems beyond who signs
12 supplemental interrogatories, I guess it should
13 be addressed in a broad sense including that
14 question and then get resolved in a package of
15 some kind.

16 Is that okay with you, Shelby?

17 MR. SHARPE: Yes, sir.

18 CHAIRMAN SOULES: Okay. Is
19 everybody in agreement with that? So agreed.

20 MR. LATTING: Can I ask a
21 question, please?

22 CHAIRMAN SOULES: I think Rusty
23 had his hand up. Go ahead, Rusty.

24 MR. McMANS: All I was going to
25 say is that to deal with the limited timing

1 problems with regards to timing before trial or
2 supplementation, we ought to be able to provide
3 -- and I don't think it would be terribly
4 objectionable -- to provide that any
5 supplementation that occurs or is required to
6 occur at the time of trial, that there's
7 sufficient compliance if the lawyer signs it
8 and before trial the party verifies it, you
9 know, from a supplementation standpoint.

10 CHAIRMAN SOULES: That's one way
11 to fix it, so that should be considered.

12 PROFESSOR ALBRIGHT: Can I --

13 CHAIRMAN SOULES: Alex Albright.

14 PROFESSOR ALBRIGHT: One thing,
15 I think a lot of those cases that Shelby was
16 talking about, what they are is they are ambush
17 cases from the other side, where they're not
18 verified but nobody objects to the lack of
19 verification until you get to trial and then
20 you say, "Gotcha. You didn't sign your -- or
21 verify your supplements."

22 Whereas if there's a requirement that you
23 have to make that objection so they can cure
24 it, then it's just an ambush problem from the
25 other side, I think.

1 CHAIRMAN SOULES: Joe Latting.

2 MR. LATTING: Question. Steve
3 and Shelby, I'll ask David, any of you. Where
4 are we headed with the mandatory disclosure and
5 the six-month window and the 30-day supplement
6 for witnesses? How is all that going to work?

7 MR. SUSMAN: The answer is we
8 haven't thought about it, okay? I mean, the
9 answer is we have not thought about the
10 mandatory disclosure issue and we have not
11 thought about the supplementation. We've got
12 to think about it.

13 MR. LATTING: Okay. I just
14 wanted to make sure we weren't covering that
15 here.

16 CHAIRMAN SOULES: No. They are
17 charged to address those problems, those
18 issues. If we haven't covered that already
19 today, we'll do that and they will address
20 that, I'm sure.

21 What's next on there on the policy
22 issues?

23 MR. SUSMAN: The next policy
24 issue is have we indeed, on Page 4, on
25 contention interrogatories, have we

1 sufficiently dealt with the problem? That
2 coupled with the comment on Page 5 with what we
3 perceive to be the -- you know, the
4 marshal-all-your-facts kind of interrogatory,
5 which we feel is abusive; tell me everything
6 you know or could possibly know that supports
7 this contention.

8 MS. DUNCAN: One thing it
9 doesn't deal with that I at least have had a
10 problem with is documents. Tell me every
11 document that supports your claim.

12 HONORABLE F. SCOTT McCOWN: Say
13 that again, please.

14 MS. DUNCAN: Tell me every
15 document that supports this claim.

16 PROFESSOR ALBRIGHT: That's not
17 allowed.

18 MR. SUSMAN: We've tried to
19 disallow that.

20 MR. LATTING: Is that the law
21 now?

22 HONORABLE F. SCOTT McCOWN: No.

23 MR. LATTING: Okay. I've got
24 one right here and I have no idea whether to
25 answer it or not.

1 MS. DUNCAN: All I'm suggesting
2 is that maybe we can say in the comment that
3 that's not allowed.

4 CHAIRMAN SOULES: David Keltner.

5 MR. KELTNER: The problem I
6 think always with contention interrogatories
7 has been they are very effective if handled
8 correctly. They also seem to make the other
9 side do your work for you, and that's the big
10 objection. And that, Sarah, is the --

11 MS. DUNCAN: That's where I have
12 problems.

13 MR. KELTNER: -- is the
14 horrible clashing. I think what we tried to
15 do, and I wish I could take credit for this but
16 I think Steve is the one who authored this, is
17 to come up with something that would allow
18 limited use of it and not require somebody else
19 to put everything together for you so you're
20 not marshaling evidence. And I think it's
21 designed to be a compromise so that there is a
22 line drawing question here, and I think
23 probably what we need to figure out is if you
24 think we drew the line in the right place or
25 not.

1 CHAIRMAN SOULES: I think that
2 is the question. In other words, did we draw
3 the line at the right place? If the responses
4 to contention interrogatories are not going to
5 limit what proof is allowed at trial, why even
6 have them?

7 MR. ORSINGER: Let me comment.
8 That's not what this comment says. It says
9 that a trial court should not exclude evidence
10 because it wasn't listed in answer to a
11 contention interrogatory if you can show that
12 they had independent knowledge of the
13 evidence. So there would still have to be some
14 discovery on it whether it's in the form of an
15 objection or if it's their own record that they
16 produced to you or whatever.

17 The way I interpret the comment is that
18 you would have preclusive power if you could
19 show that you didn't get it in any form of
20 discovery and they didn't give it to you on a
21 contingent interrogatory.

22 But that being the case, I'm a little bit
23 troubled about third party testimony, because
24 particularly in the kind of cases that I try,
25 it's very difficult for me to anticipate what

1 third party witnesses are going to say and it's
2 just not practical for me to interview all of
3 them exhaustively about what they might say.

4 And so if you ask me as a contingent,
5 "What evidence do you have to support this
6 claim," and I'm relying on -- and I generally
7 provide that a third party is familiar with
8 certain kinds of activity and then I get into a
9 trial and I elicit a response and the other
10 sides says, "Wait a minute, you didn't put that
11 in your contention interrogatory and nobody
12 took their deposition or that question wasn't
13 asked on deposition, I don't have independent
14 knowledge of it," all of a sudden I'm precluded
15 from having persons with personal knowledge
16 testifying to something because I didn't find
17 out exactly what their testimony was going to
18 be in advance. And I think you've got to be
19 careful that you don't do that.

20 PROFESSOR ALBRIGHT: But all
21 you're required to do is --

22 CHAIRMAN SOULES: Alex Albright.

23 PROFESSOR ALBRIGHT: I'm sorry.
24 I drafted the Rule and it was hard -- it was
25 very difficult to articulate this, as I think

1 we're all having problems doing. I think
2 you're only required to give the general
3 substance or -- what did we finally decide,
4 the -- to generally state the facts that that
5 witness was going to say, generally state the
6 facts which support that contention, and so you
7 would have generally stated the facts.

8 And their objection would be, "Well, your
9 general statement of the facts did not include
10 this."

11 Well, maybe that should -- and if they
12 had no other knowledge of that, maybe that
13 should be grounds for exclusion, because if you
14 were going to elicit those facts, that general
15 substantive fact as part of your case, you
16 should have known about it beforehand.

17 MR. ORSINGER: Well, if I may
18 respond to that.

19 CHAIRMAN SOULES: Okay.

20 MR. ORSINGER: I'm troubled by
21 the policy that I have to completely disclose
22 all of my trial testimony in answers to
23 interrogatories or by deposing witnesses I'm
24 going to call at trial. I'm not sure that
25 we're helping the discovery problem if we do

1 that because you're going to force lawyers, I
2 think, to over-prepare their case to be secure
3 that they will be able to present their case in
4 trial. To me that's going the wrong
5 direction.

6 MR. LATTING: Boy, I agree with
7 that.

8 PROFESSOR ALBRIGHT: But I think
9 that's what we were trying to keep from
10 happening, because right now you can ask a
11 contention interrogatory, "State all facts on
12 which you base your contention that there was
13 fraud," and people can try to get excluded
14 particular facts that were not identified in
15 the answers to the contention interrogatory but
16 they were disclosed in depositions or in
17 documents or whatever. Now all we're trying to
18 do is -- this is really a pleading rule where
19 you're in effect saying, "Give me more
20 particulars about your allegations that you
21 made in your pleading, give me more particular
22 facts about your allegations."

23 MR. MARKS: Well, isn't that
24 what contention interrogatories do?

25 PROFESSOR ALBRIGHT: Well, that

1 was the big discussion that we had. And I
2 think the feeling was that what a contention
3 interrogatory is is it's a special exception
4 done through discovery instead of by going
5 through the Court. It is a pleading tool. It
6 is a way to get more particular allegations
7 from pleadings, whether that be "give me more
8 specifically the facts that make up your
9 allegation," or more specifically, "give me the
10 legal theories that make up your allegation."
11 So it's really a pleading tool instead of a
12 fact discovery tool, and I think that's the
13 problem because it deals with pleadings instead
14 of fact discovery as we know it.

15 I think it's an important tool so that we
16 don't have to have a special exception
17 practice, to go to the judge every time and
18 say, "Require this person to give me more
19 specific allegations in the pleadings and have
20 more amendments of pleadings," so it's an
21 important tool, but it's doing something very
22 different than most of our discovery tools.

23 CHAIRMAN SOULES: That's the
24 reason it was put into the Rule, when was it,
25 in '84, I guess, was to be another way to get

1 at special exceptions. I don't know whether it
2 worked or not. It may or may not be worth the
3 candle, but the -- so that we wouldn't have to
4 do judicial intervention in order to get a
5 definition as to what the parties were really
6 claiming in a case. That's just some
7 information.

8 MR. MARKS: But there's the
9 other stuff that goes along with it that's
10 causing the problems. Because the facts and
11 all that sort of stuff, if you fully understand
12 the contentions, I mean, most of us know what
13 the facts are going to be when we get to
14 trial.

15 CHAIRMAN SOULES: Richard
16 Orsinger.

17 MR. ORSINGER: I would say that
18 this is maybe the wrong policy direction to be
19 going to have preclusive effect to these
20 contention interrogatories.

21 My personal belief is that we will have a
22 better litigation system if a party says, "Be
23 on notice that the following five witnesses
24 have knowledge about some certain aspect of
25 this case." And then if you're interested to

1 find out what they have to say, you can have an
2 investigator or you can call them yourself or
3 you can take their deposition. But on
4 discovery to say that if you don't develop in
5 the discovery record what every trial witness
6 is going to say or we can keep it out, that
7 forces lawyers to over-try their case in
8 discovery and then retry it again in trial.

9 And what we ought to be doing is we ought
10 to be saying, "In fairness, I've got the
11 following witnesses that I think I may call
12 that may talk on this subject and you're free
13 to talk to them and you're free to depose them
14 if you want, but don't make me put their entire
15 testimony in my answers to interrogatories and
16 don't make me use up my limited deposition time
17 developing their evidence for you when you can
18 just call them on the phone and do it outside
19 of the discovery process."

20 CHAIRMAN SOULES: I think we're
21 talking about two different things now here.
22 We're talking about persons with knowledge of
23 relevant facts and the general substance of
24 their testimony. At least one person feels
25 that that's as far as you can go. You can get

1 the substance of their testimony; you can't get
2 the details of it.

3 And then another -- it seems to me it's a
4 different -- that contention interrogatories
5 are something different than that.

6 MR. ORSINGER: Well, if the
7 contention is --

8 CHAIRMAN SOULES: And the
9 response to persons with knowledge of relevant
10 facts or witnesses, which I think it ought to
11 say instead of just persons with knowledge of
12 relevant facts, and then you get the substance,
13 then that puts the lawyer -- the adverse
14 lawyer, I think, then should be able to rely on
15 that in deciding whether or not to take a
16 deposition. If that's all he's going to
17 testify about, I can handle that at trial.

18 But then if you get to trial and it goes
19 beyond that, then I don't think the Court ought
20 to permit that it can go beyond the substance
21 of whatever he disclosed, because you haven't
22 given -- if you're going to do that, the only
23 thing to do then is to depose every witness
24 that's listed, because even though you say the
25 substance of the testimony of that witness is

1 X, whenever you get to trial you've got to
2 prove X, Y and Z and A, B and C as well. And I
3 wouldn't worry about it on X, but I'm very
4 worried about it on everything else, so I've
5 got to go depose the witness and find out what
6 may be their trial testimony.

7 So I think that requiring identification
8 of the persons or witnesses and the substance
9 is a shortening tool to the discovery process
10 not a widening tool.

11 Sarah.

12 MS. DUNCAN: I appreciate how
13 difficult this must be to try to draft. I
14 think this goes too far, and maybe it's because
15 I've been on the receiving end of too many
16 contention interrogatories where I had
17 60 years of documents. I had 60 years of
18 people's lives and testimony and everything
19 else and I had eight defendants phrasing each
20 of the contention interrogatories slightly
21 differently and spending eight months of my
22 life answering them.

23 And when you say, "Generally state the
24 facts," that doesn't say to what level of
25 detail you've got to go.

1 And when you say, "Specifically state the
2 legal theories," how specific? I mean, can I
3 just say, "Breach of fiduciary duty," or do I
4 have to say, "Participation in what they knew
5 or should have known was a breach of fiduciary
6 duty by a fiduciary and therefore the two-year
7 statute rather than the four-year statute"?

8 I mean, I really think these are a way
9 that most -- most often, the way I have seen
10 these contention interrogatories used is to
11 shift trial preparation and learning of the
12 documents and the facts and the witnesses to
13 create costs or impose costs on parties who
14 can't afford them.

15 PROFESSOR ALBRIGHT: I would
16 say --

17 CHAIRMAN SOULES: Given that the
18 purpose back in '84 for this was to try to
19 obtain definition of the claims other than by
20 special exceptions, would it be reasonable to
21 consider having the responses to contention
22 interrogatories governed by the same Rules that
23 govern pleadings; in other words, that amount
24 of notice?

25 Castlebury or whatever, we've got some

1 fairly good case law about what -- the extent
2 to which pleadings must go.

3 Alex Albright.

4 PROFESSOR ALBRIGHT: I've looked
5 at that. I pulled up the cases on pleadings
6 and I went through the Federal Cases on More
7 Definite Statement of Pleadings. The Federal
8 Cases on More Definite Statement of Pleadings
9 only refer to pleadings when you just cannot
10 tell at all what's going on from the
11 pleadings.

12 It's the same thing in the Texas Cases
13 Regarding Fair Notice of Pleadings. The
14 standard for pleadings now in Texas is fair
15 notice. That has gotten to be a very, very low
16 standard. It's -- you know, and the idea is
17 you get fair notice -- see, that's why we
18 thought, well, maybe we would use some word
19 like "fair notice" in the contention
20 interrogatory wording. But "fair notice" means
21 a low standard, and what the contention
22 interrogatory is for is to get you some more
23 information than fair notice.

24 It may be that what we should do, since we
25 do not have a motion for more definite

1 statement of pleadings in Texas, although I
2 think Bill is going to ask you all to do one,
3 is to say that a contention interrogatory is to
4 ask for a more definite statement of the
5 pleadings and tie it more directly to
6 pleadings. Because I would say that just based
7 on the comments that I've heard here that we
8 have failed in doing what we tried to do. I
9 think what we tried to do was exactly what you
10 were saying needs to be done.

11 MR. SUSMAN: Well, can I ask
12 this question?

13 PROFESSOR ALBRIGHT: And we
14 haven't done it.

15 MR. SUSMAN: What is wrong with
16 doing away with contention -- can I ask this
17 question: Who thinks that if we just did away
18 with contention interrogatories that we would
19 greatly handicap the discovery process?

20 CHAIRMAN SOULES: How many feel
21 that you would greatly handicap it?

22 MR. SUSMAN: Yeah. By just
23 doing away with them altogether.

24 CHAIRMAN SOULES: Well, we sort
25 of have an orientation that we have to file

1 special exceptions before trial, and we'll go
2 in and say, "Judge, it's okay, overrule them.
3 Our only purpose is we don't want the
4 presumption that this pleading covers the
5 entire universe because I didn't make special
6 exceptions, so overrule them." And then we
7 know that if it's not stated in the pleadings
8 pretty clearly, we're not going to have to try
9 that question.

10 MS. DUNCAN: What we have is a
11 pleading problem, not an interrogatory
12 problem.

13 CHAIRMAN SOULES: So we use
14 special exceptions anyway, but that may not be
15 getting at the same problem.

16 Scott McCown.

17 HONORABLE F. SCOTT McCOWN: I
18 don't know how you solve the problem, but the
19 problem is that pleadings can be very general
20 and can give you fair notice, kind of, of the
21 facts, kind of what the dispute is about, but
22 not really give you notice of what different
23 legal theories may be invoked. And it's hard
24 to get special exceptions sustained because
25 what the trial judge invariably says is you get

1 that through discovery. And all the fair
2 notice cases talk about how all you need is
3 fair notice because you get that through
4 discovery. They assume some kind of contention
5 interrogatory practice.

6 I tried a case recently that's a real good
7 example. It was a case against Amway
8 Corporation where for years they were going
9 under the DTPA. Well, then the plaintiffs'
10 lawyers real late in the game got the notion of
11 looking at the securities statute, which was a
12 far more favorable legal theory on the same
13 facts.

14 And there has to be a way to flesh out and
15 tie down and hold still what the legal theory
16 is. And whether you do it through pleadings or
17 whether you do it through contention
18 interrogatories, there's got to be a way to do
19 it.

20 CHAIRMAN SOULES: Does anyone
21 disagree with that?

22 So everybody is in agreement that we've
23 got to do that one way or another. And
24 probably the practice is that it needs to be
25 done in discovery somehow. Is that also an

1 agreement?

2 It either has to be done in pleadings or
3 in discovery?

4 MS. DUNCAN: I think it needs to
5 be done in the pleadings. I think it's a
6 pleadings problem. Fair notice is too low of a
7 standard.

8 And for instance, in that case, I have a
9 75-page pleading that told anybody that could
10 read what my case was about, and you get the
11 contention interrogatories on top of that.

12 PROFESSOR ALBRIGHT: They just
13 want to screw you around with it. That's their
14 only purpose for them.

15 MS. DUNCAN: That's right. And
16 it's my view that because we have a pleading
17 problem we've developed contention
18 interrogatories. We ought to get rid of
19 contention interrogatories and require people
20 to plead what they really mean and stick with
21 it. If you want to plead with DTPA or the
22 securities code or breach of fiduciary duty, it
23 needs to be in your pleading.

24 CHAIRMAN SOULES: Okay. I think
25 there's probably a division in the house on

1 whether this problem should be solved in
2 pleadings or discovery. We've had a pretty
3 thorough discussion on that, it seems to me.

4 Could we get a show of hands and try to
5 get a consensus so that the discovery people
6 can know so they can get some direction on
7 this.

8 How many feel that the problem should be
9 solved in pleadings?

10 MR. ORSINGER: As opposed to?

11 CHAIRMAN SOULES: As opposed to
12 contention interrogatories.

13 MR. LATTING: What if you're
14 hand goes -- can I put my hand up like that
15 (indicating)?

16 CHAIRMAN SOULES: 10 and a half.

17 How many feel that it should be in
18 discovery?

19 MR. ORSINGER: I think it ought
20 to be done in both.

21 CHAIRMAN SOULES: Three.

22 How many think it should be done in both?
23 Three.

24 MR. KELTNER: I'll vote again.

25 MR. ORSINGER: I think for

1 purposes of analysis we ought to differentiate
2 contention interrogatories from a request that
3 you state the theory of your case, which is
4 lawyer talking to lawyer, and a request that
5 you state the evidence to support your case.

6 I have a bigger problem with the latter
7 one than the first one, and it may be we ought
8 to consider them independently. We might want
9 to include one or exclude one and leave the
10 other. But right now our debate has included
11 both of them as if a contention interrogatory
12 can either require you to state your legal
13 theory or require you to state all the evidence
14 to support your legal theory, and I think we
15 ought to analyze those two separately.

16 CHAIRMAN SOULES: Well, right
17 now I don't think pleadings require you to
18 state your legal theory.

19 MR. LATTING: No. Fact.

20 MR. ORSINGER: A contention
21 interrogatory can -- I thought a contention
22 interrogatory could require you essentially
23 to --

24 CHAIRMAN SOULES: Pleadings
25 don't require you to state your legal theory

1 under the present law.

2 MR. ORSINGER: No, I agree. I
3 think we ought to make -- I think we ought to
4 be able to force a party to state their legal
5 theory both in their pleadings and in their --
6 it doesn't bother me to do it in their
7 discovery.

8 And then the abusive situation that Sarah
9 had is something that we haven't even discussed
10 yet, which is that if you have two plaintiffs
11 of three plaintiffs or four defendants, each
12 one of them could send a set of interrogatories
13 and you could have 400 interrogatories in one
14 case.

15 I know that the answers of a party can
16 only be used against that party, but if you've
17 got three plaintiffs and four defendants, each
18 one of them can send 30 questions and that's
19 120, and we're not doing anything to stop that
20 in the multi-party litigation that I've been in
21 in the past --

22 CHAIRMAN SOULES: That's another
23 issue. Let me see if we've got a division in
24 the house on this: Just abolish it, to start
25 with, abolishing contention interrogatories

1 altogether. And that may be the path of least
2 resistance and I'm not trying to suggest that
3 we should that at all. I just want to --
4 we've given it whatever soul searching we can
5 here at this moment. Do we need them at all?
6 And then we'll start there from that question.

7 How many feel that there should be some
8 access to contention interrogatories? 10.

9 How many feel there should be no
10 contention interrogatories? One, two,
11 three -- Sarah has voted both ways on this.

12 MR. SUSMAN: Can I make a
13 suggestion?

14 MS. DUNCAN: I'm holding up just
15 about a quarter of an inch.

16 MR. SUSMAN: Luke, can I make a
17 suggestion?

18 CHAIRMAN SOULES: So we will
19 have contention interrogatories, so now the
20 question is the scope of the contention
21 interrogatories.

22 MR. SUSMAN: Can I make a
23 suggestion?

24 CHAIRMAN SOULES: Yes, Steve.

25 MR. SUSMAN: Here is what I will

1 propose to do: I will get some associate in
2 our office next week to go through the Federal
3 Rules Reporter and the State to come up with
4 examples of about 15 different types of
5 contention interrogatories. I will send them
6 out in a questionnaire to this Committee and
7 ask you to vote whether you think it's a proper
8 or improper interrogatory or you don't have any
9 opinion. How about doing something like that
10 where we actually see the concrete examples
11 before us of what is a contention
12 interrogatory?

13 CHAIRMAN SOULES: That's fine.
14 So charged.

15 MR. SUSMAN: Because I think
16 we're just now -- well, what is one, and there
17 are so many different things that come to mind.

18 CHAIRMAN SOULES: Good idea.

19 PROFESSOR ALBRIGHT: How about
20 people on this Committee send you examples?

21 CHAIRMAN SOULES: Okay. Carl,
22 did you have a comment on that?

23 MR. HAMILTON: I just wanted to
24 say we first looked at amending Rule 91 on
25 special exceptions. And if an exception was

1 sustained limiting discovery, there can't be
2 any discovery on that exception unless the
3 pleading was put in proper shape with proper
4 notice given. We thought that was unworkable
5 because judges don't give you hearings on
6 special exceptions in a timely fashion and
7 there was some problem about limiting discovery
8 to the pleadings because everybody wants wide
9 open discovery.

10 So then in our mandatory disclosure we've
11 provided a sort of contention interrogatory,
12 which is a requirement that the factual basis
13 to support each claim with sufficient
14 specificity to give the defendant fair notice
15 of the factual basis for each claim of the
16 plaintiff was stated, and along with that the
17 legal theories upon which each claim was based,
18 and they should be set forth with sufficient
19 specificity to give fair notice and where
20 necessary, for reasonable understanding,
21 citations and pertinent legal authorities can
22 be -- can be had.

23 This is a sort of a contention
24 interrogatory to try to force in the absence of
25 forcing a pleading to be specific. At least

1 with the response to the mandatory disclosure
2 the party has to be specific on the complaint
3 or the defense, and that then should govern the
4 scope of discovery.

5 By the same token, on witnesses, we
6 expanded that, or people with knowledge of
7 relevant facts, to not only have to list the
8 person and the general subject matter about
9 which each person has knowledge but, to the
10 extent that it's known at the time of answer, a
11 summary of the main facts favorable to that
12 party answering the request about which such
13 person has knowledge.

14 So if you get a list of 15 people that
15 witnessed the accident and only one of them saw
16 someone take beer cans out of the car, you
17 don't just answer by saying generally, "He
18 knows about the accident, he was out there,"
19 because then you have to take 15 depositions to
20 find out who saw the beer cans.

21 So if that requirement is put in, that
22 "facts favorable to that party be disclosed,"
23 at least it cuts down on some of the
24 depositions.

25 Now, you don't have to disclose

1 unfavorable facts. You have to leave that up
2 to the other side if they want to find those,
3 but that tells the party then why you may be
4 calling that witness as to what favorable facts
5 and then you can decide whether you want to
6 depose that witness. These are just some ideas
7 that you might want to plug in.

8 CHAIRMAN SOULES: On the two
9 points that you made on contention
10 interrogatories, can you get those to Steve so
11 that he can put those in his questionnaire
12 among the others that he comes up with?

13 MR. SUSMAN: That would be
14 great.

15 CHAIRMAN SOULES: Would you do
16 that, Carl, for me?

17 MR. HAMILTON: Yes.

18 CHAIRMAN SOULES: Give those to
19 Steve early next week, if you can, so he can
20 start putting his questionnaire together or his
21 associate can start working on it.

22 Okay. Anything else on contention
23 interrogatories right now? We're going to
24 try -- we probably have some more policy
25 issues but we've only got about 15 minutes

1 before the meeting is going to adjourn.

2 David.

3 MR. KELTNER: We had some
4 guidance from the Court on this, remember, in
5 our last meeting when we discussed generally
6 these things. And then at one of the
7 subcommittee meetings it was pointed out to us
8 that -- and it's certainly true in the new
9 Federal Rules and the like that the Courts are
10 going opposite where our discussion has gone on
11 the issue of notice pleadings. And the Courts
12 -- in my opinion, I get the feeling that they
13 are going to be very reluctant to address a
14 Pleading Rule. That means to me that
15 contention interrogatories probably ought to
16 stay in.

17 The Discovery Task Force addressed it a
18 different way, just so you'll know, than the
19 Court Rules Committee did. What basically we
20 said -- there was some difference of opinion.
21 Interestingly, there was -- basically Sales
22 and Perry agreed that we ought not have
23 contention interrogatories.

24 Then we thought, well, there's some things
25 that you really ought to be able to ask that

1 even under any pleadings situation you wouldn't
2 be able to, like "Do you contend that the
3 plaintiff had notice of X?" If it's on a
4 defensive point, for example, and you're asking
5 it, no requirement would be in the pleadings.
6 No requirement would be in the pleadings. I
7 think there ought to be very limited contention
8 interrogatories.

9 CHAIRMAN SOULES: Okay. Well,
10 we're going to get to that and your committee
11 is going get to that.

12 Shelby.

13 MR. SHARPE: The quickest and
14 cheapest way to avoid contention
15 interrogatories is at the pleading stage. Now,
16 if you're not going to deal with it at the
17 pleading stage, then the next place before you
18 get to contention interrogatories is mandatory
19 disclosure which gives you the information.

20 What Court Rules concluded was that since
21 we didn't figure we were going to be able to
22 persuade the Court to change as far as pleading
23 requirements would go, we felt that the way we
24 could head off contention interrogatories was
25 under the mandatory disclosure.

1 I think Steve's question of what about
2 getting rid of contention interrogatories
3 altogether, I think that's the way to go. Get
4 rid of contention interrogatories
5 altogether --

6 CHAIRMAN SOULES: We voted that
7 down.

8 MR. SHARPE: -- but require it
9 in mandatory disclosure and that way you've got
10 it and you're saving everybody's time.

11 CHAIRMAN SOULES: Okay. But we
12 voted the other way on that, the abolition of
13 them altogether. If it gets fixed by
14 mandatory --

15 MR. SHARPE: We voted both ways
16 on it, actually.

17 MR. MARKS: We voted both ways.

18 CHAIRMAN SOULES: Okay. Are
19 there any other policy questions on these
20 Discovery Rules, Steve, that you need some
21 guidance on?

22 MR. SUSMAN: Now we go to
23 experts. Have we done -- is it okay to say
24 that experts are going to be deposed so let's
25 do away with the reports?

1 CHAIRMAN SOULES: I don't think
2 so.

3 MR. SUSMAN: I mean, not have
4 both reports and depositions. Isn't that a
5 waste? Does anyone have a strong feeling on
6 that?

7 CHAIRMAN SOULES: Mike
8 Hatchell.

9 MR. HATCHELL: I just have a
10 question, Steve. Is that concept so broad as
11 to include the situation where, if I'm to
12 depose your damage expert, is that going to
13 present me with a one-inch thick computer
14 damage model, the flaw in which is in the
15 computer program, and I can't get you to get me
16 that in advance of the deposition so I can get
17 a computer expert to tell me what the problem
18 is so that I can effectively examine him? And
19 I don't know whether it's broad enough to
20 preclude that or not.

21 MR. SUSMAN: We didn't want to
22 preclude that. I mean, our intention was not
23 to preclude that. If that was a document
24 prepared by an expert, I think you're entitled
25 to subpoena those.

1 CHAIRMAN SOULES: Doesn't your
2 Rule permit both reports and depositions on
3 Pages 6 and 7?

4 MR. SUSMAN: Well, we talk about
5 a kind of report, which is this mandatory
6 disclosure on Page 6.

7 MR. HERRING: You get the
8 substance of the mental impressions and
9 opinions.

10 MR. SUSMAN: But on Page 7 we
11 say the Court may not order the creation of an
12 expert's written report. I mean, basically we
13 need to know he's going to testify, his general
14 subject matter is going to be damages, he's
15 going to -- the general substance of his
16 mental impressions, opinion. I think maybe we
17 need to say something there to make sure you do
18 get his computer -- his work product. You
19 should get his work product that he's done
20 anyway, but he should not have to go write a
21 four-page report.

22 CHAIRMAN SOULES: Well, we
23 shortened discovery -- we used the expert
24 report requirement to shorten discovery,
25 Steve. If we're in a court where we know that

1 the judge is going to hold the expert to the
2 scope of his report, there -- I take fewer
3 experts than -- and more times than not I
4 don't depose the expert. I don't even take the
5 deposition.

6 MR. SUSMAN: Listen, my personal
7 belief, Luke, would be I would be happy with a
8 Rule that said you only get an expert's report,
9 no deposition of experts, period. I would be
10 happy with that Rule. But our feeling was that
11 most people would not, and so the notion was
12 not to -- at least to eliminate one or the
13 other.

14 CHAIRMAN SOULES: Well, why is
15 that a discovery burden to have both
16 available?

17 MR. KELTNER: Let me tell you
18 what the Discovery Task Force felt. We have
19 two problems with that.

20 First, Luke, there are two kinds of
21 experts. There's the classical hired gun that
22 you're paying for; then there's the treating
23 physician type that's a fact witness as well.
24 You can't -- there's no hammer I have over
25 that witness to make him give a detailed report

1 that is going to satisfy you in every
2 circumstance. That's issue one.

3 Issue two is that what we've been finding
4 is, and I'll tell you, although interestingly
5 it's not made it into the appellate decisions,
6 more and more we see if it ain't in the report
7 you don't get to testify about it, which I
8 don't completely disagree with. But they're
9 extremely expensive. When you're talking about
10 holding down the cost of litigation, the cost
11 of an expert report, by a factor of maybe five
12 times in my experience, is more expensive than
13 his deposition, which is sort of a fascinating
14 situation.

15 I must admit I originally felt as Steve
16 did, that when the Task Force came up with the
17 idea of doing away with the report and just
18 doing it in general terms, I had problems with
19 that. I eventually came around to their
20 viewpoint as a pragmatic thing.

21 What we didn't intend to do, and I think
22 Mike Hatchell has come up with something, when
23 it's already prepared or going to be prepared
24 for use at trial you get it, and I think that's
25 important.

1 MR. HATCHELL: What I heard,
2 Steve, was that you want to eliminate
3 duplication of effort, which I can understand
4 perfectly.

5 MR. SUSMAN: Yeah. That was the
6 only objective there.

7 MR. KELTNER: But, Luke, I've
8 got to admit, what you say makes a great deal
9 of sense. The only thing is is that it's an
10 expensive thing and it doesn't work with the
11 majority of experts that are called.

12 MR. SUSMAN: But wait a second,
13 Luke. You've got a good point. Maybe what we
14 ought to do is give the opposing party the
15 option of either asking the expert to prepare a
16 detailed written report, no deposition; or a
17 deposition. Now, that I would go for. That
18 makes a lot of sense. How does that sound to
19 you all?

20 HONORABLE F. SCOTT McCOWN: No.

21 MR. SUSMAN: What's wrong with
22 that?

23 HONORABLE F. SCOTT McCOWN:
24 Because there's two different classes of
25 experts and the kind of experts that you all

1 are thinking about at the top end where you
2 practice can prepare a detailed report. But
3 the vast majority of experts in the world,
4 while they could come to a deposition and talk
5 to you orally about what they think and why,
6 sitting down and writing it out is a very
7 difficult task for them and an expensive task,
8 like David said.

9 And the problem is where are you going to
10 go with your Exclusion of Evidence Rule. A
11 real report that will support trial testimony
12 is a lengthy expensive report, and so that
13 becomes extremely difficult for most experts to
14 do. Lawyers deal in words, but a lot of
15 experts don't, either they don't have the
16 skills or they don't have the time.

17 CHAIRMAN SOULES: My experience
18 is that that gets sorted out in the process
19 because you can't get an expert report unless
20 they either volunteer it or the other side
21 volunteers it or the Court orders it. And if
22 you -- if it's the sort of expert who is really
23 not suited for a report, you tell the judge
24 that whenever the party moves to get the
25 report.

1 MR. SUSMAN: Luke, I think maybe
2 the answer is you can work that out. Let's say
3 you're in a case opposite me and I've got an
4 economist. You call me up and you say, you
5 know, "If you will give me a six-page report of
6 your economist or a five-page report of what
7 he's going to say, I will not take his
8 deposition," I probably would say, "Great,"
9 because it's going to save me a lot of money to
10 have the guy write the report in Washington
11 D.C. and send it to me which I'll give to you
12 rather than have him come down and sit here for
13 a long period of time. Isn't that something
14 you and I can work out by agreement there? I'm
15 just thinking that maybe that's something that
16 could almost always be worked out by
17 agreement.

18 CHAIRMAN SOULES: I agree with
19 that, except I need to see the report to know
20 because I don't know what that report is going
21 to say. It may be just a bunch of malarkey and
22 now I've still got to take his deposition
23 maybe. It depends on how the trial judge is
24 towards these reports.

25 But in terms of cost, if you've got one of

1 these high-dollar experts who is going to
2 testify as an economist or an engineer or in a
3 construction case, the type of information that
4 gets reduced to a report is going to be fully
5 prepared before the deposition is ever taken so
6 all the preparation for that report except its
7 reduction to writing is done and that cost is
8 incurred anyway. At least it is in my
9 practice, and maybe it's different here than
10 elsewhere.

11 David.

12 MR. KELTNER: Luke, here is the
13 problem I have with that. I don't think that's
14 the case, and I don't think it's the case
15 because I would guess that 90 percent of the
16 experts who testify in this case are mixed fact
17 and expert witnesses. In family law cases, the
18 child psychologist; the appraiser; in personal
19 injury cases, the treating physician, and the
20 like. I don't see them doing a whole lot of
21 preparation before depositions, and I don't
22 think they want to do a report, and you can't
23 get them to be specific enough.

24 Mike mentioned in Exxon/West Texas
25 Gathering the Supreme Court basically said you

1 say it in the report; you ain't going to get to
2 testify --

3 MR. HATCHELL: No, no. They
4 said it in -- it's the other way. It was the
5 lower court that said that.

6 MR. KELTNER: Okay. But it
7 really gets to be problematic, and my situation
8 is I don't disagree with the idea if we have
9 one or the other. But for the mixed fact
10 witness who did not choose to be an expert in
11 this litigation, he or she is just going to
12 testify because they just happened to be there
13 and had to reach some conclusions. The report
14 has always been a difficulty for practitioners
15 and we've got to come to grips with that.

16 I will admit that for the hired gun expert
17 probably all I want is the report and no doubt
18 about it. But 90 percent of the experts aren't
19 the hired gun. They're somebody you didn't
20 really pick or maybe you did and you don't want
21 to admit it, but that's where I think the
22 problem comes.

23 CHAIRMAN SOULES: But you can't
24 get that report unless it's volunteered or
25 ordered by the Court, so that somehow gets

1 sorted out in that process.

2 MR. KELTNER: Yeah. That's a
3 good point. We do have to address what
4 Hatchell brought up. I think that really is
5 important. If we have the hired gun expert who
6 prepares the computer model and makes some
7 false assumptions within the computer program,
8 that's something that we have to make sure
9 comes out. But on the other, I think we just
10 need to rethink the idea, because I have a
11 whole lot of comfort in Steve Susman's idea of
12 you get one or the other. I just wonder how
13 specific you need to be. We sure are getting
14 hypertechnical in excluding things that aren't
15 in experts' reports who never intended to be
16 experts, and that's what puzzles me.

17 CHAIRMAN SOULES: I don't see
18 how we're going to improve discovery efficiency
19 and cost by changing the expert practice that
20 we have right now, and there may be so much
21 sentiment the other way that I'm just not
22 seeing it. But we try to go the cheapest
23 route. If we can get a report and it's the
24 type of thing that the report will work, that's
25 what we get and we don't spend time on the

1 deposition record, but we may not know that
2 until we get the report.

3 If you exclude -- if you foreclose a
4 deposition after you get a report, I think
5 there's going to be a lot of gamesmanship on
6 the report because they know that whenever they
7 produce this that's the end of it, and their
8 guy can't be deposed, so sometimes we have to
9 do both, but it's seldom.

10 And on the treating physician, he'll give
11 you his records, he won't give you a report, so
12 you've got to take his deposition anyway
13 because you can't even get a report and the
14 judge probably isn't going to order it.

15 Anyway, those are my thoughts for whatever
16 their worth, and yours are a lot better, I'm
17 sure. So where do we go with this?

18 MR. KELTNER: I wouldn't reach
19 that conclusion.

20 CHAIRMAN SOULES: Steve.

21 MR. SUSMAN: Before everyone
22 gets out of here, the next meeting is -- we
23 have three meetings of our subcommittee I'm
24 scheduling between now and the next meeting of
25 this Committee, which are April 2nd, April 30th

1 and May 7th in Austin at 9:00 a.m. in the
2 Dean's Conference Room, and anyone is welcome
3 to attend.

4 CHAIRMAN SOULES: The next time
5 we meet we're going to meet in the Capitol
6 Building because all the facilities here are
7 spoken for, and I will send you a diagram.
8 It's in the basement, I believe, of the Capitol
9 Building.

10 MR. PARSLEY: It's in the
11 Capitol Extension, which is that hole in the
12 ground that they built north of the Capitol,
13 and it's on the first floor of the Extension.

14 CHAIRMAN SOULES: It's on the
15 first floor of the Extension, so that's on this
16 side of the Capitol Building, I think, isn't
17 it?

18 MR. PARSLEY: There's kind of
19 some kiosks out front in the middle of what
20 used to be the Capitol grounds parking lot.
21 It's down from there.

22 CHAIRMAN SOULES: It's 12:35 and
23 we're adjourned.

24
25

1
2 CERTIFICATION OF THE HEARING OF
3 SUPREME COURT ADVISORY COMMITTEE
4

5 I, WILLIAM F. WOLFE, Certified Shorthand
6 Reporter, State of Texas, hereby certify that I
7 reported the above hearing of the Supreme Court
8 Advisory Committee on March 19, 1994, and the
9 same were thereafter reduced to computer
10 transcription by me.

11 I further certify that the costs for my
12 services in this matter are 1,086⁰⁰.
13 CHARGED TO: Luther H. Soules III.

14
15 Given under my hand and seal of office on
16 this the 4th day of April, 1994.

17
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