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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 21, 1994

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Taken before D'Lois Lea Nesbitt, Certified Shorthand Reporter in Travis County for the State of Texas, on the 21st day of May, A.D., 1994, between the hours of 8:30 o'clock a.m. and 12:30 o'clock p.m. at the Capitol Extension, Room E1.002, 1400 North Congress Avenue, Austin, Texas 78701.

MAY 21, 1994 MEETING

MEMBERS PRESENT:

Alejandro Acosta, Jr.
Prof. Alexandra W. Albright
Honorable Scott Brister
Professor Elaine Carlson
Honorable Ann Cochran
Professor William V. Dorsaneo
Anne Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
Joseph Latting
John Marks
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Luther H. Soules III
Stephen Susman
Paula Sweeney

MEMBERS ABSENT:

Charles L. Babcock
Pamela S. Baron
David J. Beck
Michael T. Gallagher
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
Stephen Yelenosky

EX OFFICIO MEMBERS:

Doyle Curry
Paul Gold
Honorable Nathan L. Hecht
David B. Jackson
Thomas Riney
Bonnie Wolbrueck

Honorable Sam Houston Clinton
Honorable William Cornelius
Doris Lange
Honorable Paul Heath Till

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Holly H. Duderstadt, Soules & Wallace
Carl Hamilton
Denise Smith for Mike Gallagher

SUPREME COURT ADVISORY COMMITTEE

MAY 21, 1994

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CHAIRMAN SOULES: Let's be in session. It's about 8:45. I passed a sign-up list. It's somewhere in circulation. Okay. Welcome back everyone. Steve, we're happy to have you here and know you've got your report from the Discovery Subcommittee. Why don't I just give you the floor this morning. We have got materials up here to my right, three different items for those of you who didn't bring yours, and Holly and I will try to give you a list of what materials to bring next time because by now we have got so much paper that it's hard to carry all of it, but we will need you to bring the materials each time to the meeting because we are getting some complaints about the cost of producing and reproducing copies. Okay. Steve, go ahead. What should we --

MR. SUSMAN: Let me give you a little overview before we turn to the draft itself.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: In an effort to give this entire committee a package that as we discussed changes, maybe even modified,

adopted, at this meeting the Discovery Committee has held three meetings in Austin since our meeting here on March 18, a number of long telephone conference calls, and I want to begin by especially thanking Alex Albright for the work she did in putting this all together. She fortunately was not teaching this semester and was able to give us a package. We would never have accomplished it in this amount of time without Alex's help. Jeff Harrison -- Jeff, I want to introduce you. Jeff, will you stand? A young lawyer with my law firm that attended all the meetings and served as our scrivener, keeping minutes so we had minutes of each of our meetings, which helped us recall what we had already covered and avoided the anticipated backslide.

And then the members of the subcommittee themselves all drafted parts of what you have before you, Paul Gold, David Keltner, Scott McCown, and David Jackson, spent a lot of time working on this. Our guiding principle in doing these changes to the discovery rules was to remain loyal to the sense of this body as

expressed in the meeting on March 18th. And Richard Orsinger did a wonderful job of maintaining detailed minutes of that meeting, particularly our discussions. So we went back to that frequently to see what you-all thought the first time around.

We carefully considered the work of the State Bar Committee on Rules, Court Rules, which we had a draft of and the Discovery Task Force, task force for which also we had some draft rules from. And then finally we were aided kind of accidentally because there was some recent publicity in the TEXAS LAWYER about the general outlines of what we were up to recently. We had a lot of letters from members of the Bar, judges, law professors, making suggestions and criticisms, and we considered them all. We rejected some, adopted others.

Our final version does reflect what we considered to be the best and brightest among the input we got. We got a lot of input from the Bar. Now, the package before you consists of both a red-lined version and an unred-lined version. Probably it's easiest to begin with

the unred-lined version because so many of the rules you have are brand new, and we do not have a counterpart. You should have a package of materials with a cover memo from Alex Albright that makes it distinct which just does a great job summarizing a phrase or two of our changes, and then she has enclosed two versions, the red-lined version to show changes from the existing rule, where we took an existing rule and modified it, and then there are some brand new rules. The package is pretty much ready and complete except for some minor changes which I spotted this week in looking at the final product, so I will give them to you as we go.

We basically left unchanged Rule 166(a) and any attempt to modify the permissible scope of discovery. We removed request for admissions as a permissible discovery device in the belief that interrogatories seeking a "yes" or "no" answer which are unlimited in number under our plan accomplish the same thing. We had to make changes in certain related rules for adding parties and amending pleadings, and we tried to simplify the

pretrial conference rule.

As an overview our premise in doing what we did was that neither the courts nor counsel can be relied on to eliminate discovery. We must, we think, have rules which operate by default and impose limits, arbitrary limits where courts are unwilling or disinclined to micromanage their dockets or where counsel, though cooperative and kissy-kissy, still cannot agree on mutual rules of engagement, and all of these rules are default rules and can all be changed by agreement of counsel or court order.

The overriding goal is to reduce the expense of discovery without too much sacrifice of justice. Although, we don't live in a perfect world and there may be some slight sacrifices as there is always that possibility when you impose limits. We recognize that in most cases our time limits will allow too much time for discovery. Not every case, indeed few cases, justify 50 hours of depositions per se, but we felt it too difficult to adopt a system which classifies cases on the front end and imposes limits

which vary depending upon the complexity of the case.

We also found it important to start somewhere. Our fear to do more should not justify our feeling to do something at this time. These limits work for most cases indeed. Most complex cases, it is our hope that future amendments can be devised which will fine tune these limits even further for cases that do not justify so much. We felt an urgency to act now. The courts of our state as you know have been under attack as being user-unfriendly, and the principal features of our proposal is a six-month discovery window, a limitation of 50 hours per side depositions, the restrictions on interrogatories that require the marshalling of evidence, and a relaxation of the exclusionary rule we believe may not deliver better justice but will certainly and demonstrably save litigants in this state millions of dollars a year.

These proposed rules are neither pro-plaintiff nor pro-defendant. Objections have been indeed voiced from both sides. The old-time defense lawyers say we are telling

them how to prepare their cases for trial, and they don't want that. Plaintiffs products liability lawyers tell us cases -- stories about when they got their confession of guilt in their 53rd hour of depositions. So from both extremes there is resistance mainly to changing the way we do business, and to that the subcommittee answers the public is demanding.

There is no question that these rules will change the way we do business. Maybe we can't handle as many cases as we are used to. Maybe we will have to more carefully plan whom to depose and what to ask when we take depositions. Maybe we will have to do a better job of preparing our clients for their depositions before we put them up in a no objection regime. That's a dawning task for trial lawyers, but again, it would be, I think, a default for us not to undertake it.

Now, let's begin with the summary. Let me walk you through these rules and tell you about the principal features. I would like to begin with the rule that appears on page 5, again, using the unred-lined version, and I

begin with this rule because of it is important that everyone realize that the whole scheme is that by agreement of the parties or order of court anything can be changed. We have used the concept of good reason as recommended at our last meeting on March 18 rather than good cause as the standard for the court changing the limits. Obviously we will have to develop a body of caselaw on what good reason means. I assume we could put some things in the comments about good reason, but if we put anything in the comment at all it should be very clearly good reason does not mean that counsel is too busy or didn't have time or that witnesses are too busy or don't have time.

We believe that if the lawyers and judges cooperate cases can be discovered in a compact period of time. We believe that the most inefficient -- one of the most inefficient and expensive parts of litigation is starting and stopping in that -- and the fact that I have tried a lot of complex cases in my short career, I do not know of any case that I could not have completely discovered in a two-month

period of time, period, no exceptions, if that's all I had to do. If witnesses were available and judges would cooperate. Those are some big if's.

The function of these rules is to make the if's come true, to make the witnesses available, and to urge the judges in view of these short discovery windows to rule promptly. The notion is we can prepare a case for trial, put it in the can, put it on the shelf, so that when the court's docket can reach the case for trial, it's ready. You will see in a rule that now appears, a new rule, at page 7, subpart 4 our provision for retouching the film before it is exhibited. This is the refreshener, the cleanup. It is essentially a re-opener of the discovery period 60 days before trial for the purpose of discovering information which has changed since you put the film in the can. A little more on that rule in a minute.

Rules 37 and 38 which appear at pages 1, 2, and 3 -- 37, 38, and 63, 1, 2, and 3 of this handout, we changed to make clear that parties can be added and pleadings amended

freely without leave of court as long as it's done during the first three months of our discovery period. Keep in mind we have always been based upon the notion that there will be a discovery period of six months. It will commence when documents are produced or the first -- in response to a request for production of documents or the first deposition taken. It will not commence if interrogatories seeking certain standard information are asked and answered, nor will it commence if certain types of voluntary disclosure are made, but it will commence -- which basically means that it opens when counsel want it to open, and it goes for six months.

In any event we had to have some way of making sure the parties were not adding pleadings willy-nilly at the end of the six-month period and then you are extended indefinitely. So we did that by providing that, you know, for three months you can do anything without leave, and after that time leave must be sought, and we provided it should be freely granted, the concept in both

Rule 37 and 63 for both the addition of parties and the amending of a pleading. It should be granted where -- it certainly should be freely granted where the addition or amendment requires no extension of the discovery period. If an extension of the discovery period is required, then leave should also be granted and the discovery period extended unless that will interfere with the trial of the case. That's an overview of what we did to Rule 37 and 38.

Rule 166 regarding pretrial conferences, a brief overview of that rule. Basically here we simply shortened the rule because we wanted to emphasize that, as the rule says, "Any matter that may aid in the disposition of the action may be considered." Having said "any matter" it seemed to us unnecessary to make the list of illustrations exhaustive. We have shortened the list of illustrations. We believe that the rule as we have written it allows the court at pretrial conference to do anything that it now can at a pretrial conference. We give a hint but not an encouragement in section 1(c) that this is the

place for a court order, a court consideration of modifying the discovery limits. The court may consider the development of a scheduling order including discovery. We do not want to encourage pretrial conferences to be used usually or customarily to modify the time limits, but this is the appropriate vehicle to get a modification if you need one.

While it was beyond the scope of our committee I personally and I speak -- and this is a personal note that someday, somehow this group will consider adding to 1(e) of Rule 166 that the court may consider limiting the time allowed for trial of cases at the pretrial conference. If we simply added some language to that effect in 1(e) most of the discovery problems would go away, I believe.

The rule appearing -- now, I would like to skip to the discovery period rule that appears at page 6. Let me ask you to make these changes in your rule to make it make sense. The rules should be added. The blanks should be 37 and 38, and the last sentence should read like this. The last sentence, something got missed on the last sentence, say

"Neither the addition of a party nor" and then circle "after the first three months of the discovery period" to say "Neither the addition of a party nor the amendment of a pleading after the first three months of the discovery period, nor the intervention of a party shall effect the duration of the discovery period unless the court so orders."

Try it again: "Neither the addition of a party nor the amendment of a pleading, after the first three months of the discovery period nor the intervention by a party shall effect the duration of the discovery period unless the court so orders." We have provided that if you add a party without leave of court during the first three months that party gets an automatic -- automatically gets six months. Now, that does not extend the time you get, but the added party gets the six-months. If you add a party after three months, how much time you get or even whether you can add a party depends on the court's order.

So the rule operates -- you don't have to go to the court if you add a party during the first three months. That party automatically

gets six months, and you can freely add. After three months you must get the court's permission, and the court giving you permission has got to say how much time that party gets. That was what we were trying to accomplish here in the discovery period.

Now we turn to the next rule that appears at page 7. And that is the rule entitled "Response, Amendment, Supplementation to Discovery Requests." This is new. Subpart 1 of this rule at page 7 makes clear that the information reasonably available both to counsel and the client is required in response to mandatory expert disclosures. Our only mandatory disclosure, by the way, are expert disclosures. We will get to that in the expert rule.

Interrogatories and document requests. It also makes clear that an objection to certain disclosures does not relieve the objecting party of the duty to provide unobjectionable information. The duty to supplement and amend does not apply to mistakes or errors made in depositions. We distinguish in this rule between two concepts,

an amendment which is a term which we apply to an answer which when given was incorrect or incomplete and which must be amended as soon as you realize the mistake, and a supplement which refers to a situation where a discovery response when given was accurate and complete but additional things have happened in the world which now make it incomplete or incorrect.

New information, change of events, that kind of supplementation must be made, but you don't make them when they occur. You save them up and you make them under rule subpart 3, the duty to supplement discovery responses. You make them 60 days before trial. So again, an amendment must be made at the time it is discovered whether during or after the discovery period. A supplement is made only at the 60-day time frame before a trial. The effect of making a supplement or an amendment is dealt with in subpart 4. Before I get to that I forgot to say that both subparts 2 and subpart 3 make it clear -- at the last sentence of both make it clear that you need not amend or supplement to provide

information which the other side has gotten anyway during the discovery process or in writing, and we define during the discovery process as to include depositions. So if you heard it by the grapevine, the grapevine happened to be in writing or part of the discovery process or a deposition, you heard it, and there is no duty to amend or supplement.

We provide that if there is an amendment or supplementation that there is, and again this refers to subpart 4, a limited right to reopen discovery on an expedited basis. Whatever additional discovery needs to be taken must be sought within 10 days of the amendment or supplement, and the response must be made in 20 days, not the usual 30, and if it involves depositions for the new matter only, you get five hours, five additional hours. Again, these are default rules designed to operate in those cases where they have not been discovered by agreement or some court order. We think that this timetable is necessary to assure that in most cases the refreshening of the film that has been in the

can for 18 months or a year can be done in a timely fashion to avoid delaying trial.

Subpart 5 of this rule on page 7 is the subcommittees's effort to provide a gentler, kinder exclusionary rule. Under subdivision (a) exclusion is tolerated only when the omission has been deliberate or wreckless. Otherwise under subsection (b) the remedy is a continuance, but only where the failure to disclose is likely to create a risk of an erroneous fact finding. So the most extreme thing is exclusion, but you must show deliberateness or wreckless indifference.

If you're worried, then the next remedy is a continuance, but you only get a continuance if proceeding with the trial with the last minute disclosure really presents a danger of an erroneous fact finding and if that occurs -- otherwise you go ahead, and you know, deal with it like a real trial lawyer au natural; but if there is a delay occasioned by an inadvertent nondisclosure, which the court punishes by a continuance, we have provided that the party causing the continuance pays the expense including any differential between

pre-judgment and post-judgment interest. We want to make sure that it is not to a party's advantage to cause continuances. Indeed it's to their great disadvantage.

Rule 9, the rule which appears at page 9, which I will point you to briefly, is our effort to deal with the subject of mandatory disclosures. We opted against mandatory disclosure because many of us on the subcommittee felt that there were many cases where who the hell needed all of that information anyway, that it just didn't justify the make work of all this disclosure. Instead we provided that certain types of disclosure which must be specifically requested are not objectionable, and those are listed in subpart 1 of the rule that appears on page 9. You will recognize many of those subparts as having a genesis either in the task force, the Discovery Task Force draft or the court committee, State Bar Court Committee draft. Some, but not all. We have provided that disclosures of this type do not count against the limit on the number of interrogatories nor commence the discovery

period.

Rule 167, page 10. The subcommittee felt that this was the most -- the document request and production was the most useful discovery device and one that should be limited -- should not be limited as long as the expense of compliance or inspection is properly allocated between the parties. We felt we had to modify parts 1 and 2 to deal with the subject of electronic data, and there are modifications in 1 and 2, and basically what we did is you can get electronic data which includes everything but the lies and bowels of your little laptop computer including the hard disk, but you have got to specifically ask for it.

Subpart 3 of this rule, 167, is self-explanatory. We have added some provisions. In most cases we believe documents today are produced -- people produce copies, not originals, and so we have a specific rule that deals with what happens when you produce copies in lieu of originals. The documents must be produced in a certain organized way as subpart 3(b) says. It's

nothing new. That comes from our existing rules.

We have subpart (b), objections and responses, is new, and basically we provide -- that together with the first sentence of subpart 3 provides for distinct deadlines, and here they are: Objections to the manner, time, or place of production must be made within 10 days of the time you receive the request. Objections as to the substance must be made within 30 days of the time you receive the request. If an objection is made as to the manner, time, or place, a response -- a response, not objection -- a response, written response, must nonetheless be made in 30 days describing what documents you have and where they are kept and how many there are. The fourth deadline is if you don't object to producing the documents, you must produce them at the time and place requested, which could be whatever date is set in the document request.

Subpart 6 on page 11 allocates costs between the producing and expecting parties. Generally you pay -- the party who is

producing pays that cost. The party who's expecting pays that cost.

Now, we turn to interrogatories, 168, page 12. And this interrogatory you ought to add to this interrogatory the following phrase at the beginning. I'm sorry. It got dropped out, and it should be "At any time prior to 30 days before the end of the discovery period." That makes it exactly equivalent to our document request any party may file.

MS. SWEENEY: Say that again.

MR. SUSMAN: Try again, "At any time prior to 30 days before the end of the discovery period, any party may file with the court and serve upon the other party," et cetera. I noticed the last sentence of paragraph 1 of subpart 1, Alex, we probably ought to eliminate, although it needs to be there. I mean, the committee agreed that interrogatories and document requests can be served with the citation of potential, but I think we cover that by saying at any time prior to 30 days before the end of discovery window that can be done. If we want to say it expressly, we can. We need to get these rules

conformed as to request and interrogatories, which we intend to treat the same, but there they are treated the same.

We also have to provide there is a little more time when you have -- when they come with the petition. The defendant has more time as the current rules do, 50 days rather than 30 days to respond. We have to look at our timetables for things served with a petition. We have retained the limitation of the current rules of limit of interrogatories may not exceed 30 in number. We have, however, made two noticeable exceptions. One is if you are asking the other side to identify or authenticate specific documents. You have an unlimited number of interrogatories to do that.

If you frame an interrogatory that seeks a "yes" or "no" answer, a contingent interrogatory, for example, unlimited in number. Our feeling there was that the burden of that question is more on the person who frames it than on the person who answers it. As any law student knows you can finish a yes/no exam in about an hour. Hundreds of

questions can be finished in a very quick period of time. The hard thing is to ask the question, and so if one wants to ask a zillion yes/no questions, fair, and we will allow that.

We have retained party verification of the answers but have required that the attorney sign the objections. Also we have eliminated from the current rule any limit to number of sets of interrogatories. Our general notion, and this goes back to the depositions, too, rather than -- we do impose limits, but we try to impose kind of gross limits so that there is some creativity among the lawyers as to whether they are going to divide their 50 hours into 8 depositions or 50 depositions, an hour each. It's your choice. You are not limited as under the federal regime to so many depositions, nor are you limited to so many sets of interrogatories. You can ask 30 sets if that's your preference, but you certainly are not limited to two as under the current regime, again allowing lawyers to maintain maximum flexibility within these outer limits.

Subpart 4 of this Rule 168 is our effort to limit contingent interrogatories that require more than a "yes" or "no" answer. We rewrote this subpart 4, contingent interrogatories, at least a dozen times because we were trying to deal -- we were trying clearly to prohibit the interrogatory that requires the marshalling of evidence, that says please state every fact you have that supports the third paragraph of the second count of your petition. At the same time we were trying to provide a device which allows one to get a little more specific pleading in this state than is currently the rule. So we have tried to say that the interrogatories can require that the party, responding party, state the factual and legal theories upon which that party bases particular allegations. Alex Albright assures us that there is such a thing as a factual theory. There was some question in the subcommittee, but there is caselaw there are factual theories, and the test is sufficient to apprise the requesting party of the positions the answering party will take to

trial, essentially a more definite statement.

Subpart 5 tracks the current rule except for the last clause of subpart 5 as written which now requires that not only if you refer -- instead of answering the interrogatory you refer the requesting party to documents it's your obligation to tell them where the documents are and that they will be produced within 10 days, and that's what the last sentence does.

Rule No. 170 on page 14, experts, is new. Subpart 1 establishes a timetable for designation. I'm sure this will be heavily debated because there are defense lawyers who would honestly, I am sure, believe that they cannot designate experts until they depose the plaintiff's experts and then it takes them a great deal of time to travel around the country and locate the hired gun who is willing to refute what the plaintiff testified to. It was the sense of the subcommittee that there is an exaggeration, that any defense lawyer worth his salt can identify experts to respond to the plaintiff's experts perhaps before the plaintiff designates but certainly

within 15 days of the time the plaintiff designates, given the kind of information we require at the time of designation.

We are trying to get the job done within the 60 days. We put the time limits as close to the end as we could. So basically the notion is a plaintiff designates 60 days before the end of discovery period, and plaintiff's experts are deposed during the following 45 days. The defendant then designates 45 days before the end of discovery period, and the defendant's experts are deposed during the last 45 days of the discovery period. The designation requires under and our -- the only kind of mandatory disclosure we have in these rules are subparts 2 and 3 of Rule 170. 2, information; 3, documents. At the time of designation you will provide the information in 2(a) to (e) whether it's asked for or not, and that includes two days on which your experts will be available for their deposition during the next 45.

It also includes a general -- a description of the general substance of the

expert's mental impressions and opinions. That is something more than he will testify about damages and something less than a long expensive report that requires the experts spend a great deal of time preparing, and that is going to be rendered superfluous by a deposition anyway. It is essentially something sufficient to allow there to be a meeting for deposition, which these rules say is a preferred way to engage in discovery of experts.

Item No. 3 though is very, very significant. Item 3 says at the time you designate an expert everything that the expert has looked at, written, considered, been provided, must be turned over to the other side. Okay. Now, if you can't figure out what kind of expert -- if defense lawyers can't figure out what kind of expert to designate when they see that little treasure trove of goodies they really need some work. These are very crucial documents there will be no arguments about in the future. They must be turned over, and not only must they be turned over at the time of designation, but if

they are prepared after designation it's a constant -- here is a continuing, like the duty to amend an erroneous answer, the duty to make mandatory disclosure of what your expert consults, reviews, prepares, continues during the discovery period, but before and after his deposition and after the discovery period up to trial. So there will be no more expert waltzing in on the eve of trial with new charts and new studies. You will get them as you go under this rule.

Subparts 5 and 6 are our efforts to discourage the proliferation of experts. More than two experts give the other side -- the designation of more than two experts gives the other side additional time to depose the additional experts, six hours per expert, and of course, we provide in subpart 6 that the failure to call an expert who has been designated and whom the other side has went to the expense of deposing could, but not necessarily will, but could result in the court charging you the expense of having designated an unnecessary expert.

The deposition rules, Rules 200 and 201.

No major changes here. We have made subpart 2(b) of Rule 200 and subpart 4 of Rule 201 conform to the federal rules. Rule 202, non-stenographic and telephone depositions. This is largely new. The principal here is that depositions -- there is no sacred, magical way about taking and preserving a deposition. The deposition taker can take the deposition by whatever means he wants, including smoke screen, sand scrit, Ouija board, whatever he wants. He pays for it.

If the other side wants something else, certified court reporter, a videographer, you bring whoever you want to take the deposition, and the court will decide at some appropriate time on who is paying for what. That's basically what these rules say. You just simply have to give notice to how you are going to do it so the other side can come in with their counter means of preserving the testimony.

Telephone depositions basically we now allow to be taken without leave of court or agreement of party, just like any other deposition. You can take a deposition over

the telephone, and we provide that the officer taking the deposition need not be located with the deponent but instead can be located with the interrogators as long as there is some way of identifying the deponent and as long as the deposition is going to be submitted to the deponent sooner or later for verification under oath.

Rule 204 may turn out to be one of our more controversial provisions. Hopefully not. Subpart 2 contains our limitation of 50 hours per side for a deposition, and you will notice after our discussion at the last meeting we have now added 10 hours for third party defendants for discovery that is unique to issues between the defendants and the third party defendants. It doesn't just extend the defendant's side to 60 hours.

Subpart 3, and basically "a side" we mean plaintiffs and defendants, and if you want, we struggled with how to define and decided best just to call them plaintiffs and call them defendants and leave it to the good sense of the court to figure out what we were trying to say. Plaintiffs get 50 hours. Defendants get

50 hours, and third party defendants get 10 hours on issues that are between them and the defendants.

Subpart 3 makes the deposition conference room as close to the courtroom as we can get it by providing that -- and the sanction, by the way, if -- the sanction for that is contained in the last sentence on page 20 of subpart 6, "All statements, objections and discussions during the oral deposition shall be on the record, count against the examining party's deposition time, and may, upon leave of court, be presented to the jury during trial." This does not -- if this does not dispense with the notion that a video camera cannot be on the examining counsel as he examines, then we ought to make an express note saying that it is intended to make the deposition room look like the courtroom and not some fake thing where the actor is on center stage in the camera, and the stage director is sitting to his left off camera passing directions, which is what happens so often.

Now, the subpart 4, 3 should provide the

protection that people may feel they lose by a no objection regime. Subpart 4 says you may instruct a witness not to answer an abusive question. "When did you stop beating your wife?" You do not have to sit there while your witness answers that question. You can instruct the witness not to answer that question. If those questions are asked with frequency, you can terminate the deposition under subpart 5.

The last sentence of subpart 4 and subpart 5, which are the same, make it clear that you do have some risk in instructing a witness not to answer or stopping a deposition, and the risk is that the re-adjourned deposition once your silly instruction or objection is overruled, the re-adjourned deposition will not count against the time limit of the deposition taker whose efforts were so rudely interrupted when you instructed the witness not to answer or terminated the deposition. That is not automatic, but the court -- we suggested that as an appropriate remedy.

We have basically -- on subpart 4

certainly there can be conferences between -- actually we saw a lot of various local rules, and one rule provided that during the entire time of the deposition from 9:00 in the morning 'til 5:00 the witness cannot confer with the lawyer. That seemed a little extreme because conferring goes on even in the courtroom at various breaks, so we provide for certainly there can be conferences during the deposition during normal recesses and adjournments, but on the record conferences should be only for the purposes of determining whether a privilege should be asserted and should be on the record. I mean, in the sense that the jury should be aware of what's going on.

Rule No. 7, our no objection rule provides that basically all objections are reserved until time of trial except for objections to leading questions, and the way you preserve an objection to a leading question is by advising everyone at the beginning of the deposition, not repeatedly during the deposition, that this is not -- you are dealing with a friendly witness, not a

hostile witness. You are not entitled to lead this witness during this deposition, and if you do ask leading questions, while I'm not going to object, when it comes time for trial I'm going to ask the court to exclude your leading questions. That's how we deal with that. Otherwise we do not provide for any objections.

Our notion was that objections are coaching. They are an attempt to subvert justice. They will make a 50-hour limit on depositions unworkable, and that's why we opted for the no objection regime, and then, of course, subpart 8 of this rule allows -- I mean, if this is the kind of case or the kind of animosity between lawyers or browbeating of witnesses that justifies objections, it justifies the court appointing a junior judge to come sit in the conference room qua courtroom and rule on the objections as they are made assessing the cost of that junior judge to the parties who have made it necessary.

Rule 208, if you will look at the marked up version of this, the blue line version,

there are very few -- there are not many changes in this rule, and so I'm not going to go over it. It pretty much is taken from the existing rule.

And that, Mr. Chairman, constitutes an overview of the subcommittee's recommendation.

THE COURT: Carl, would you like to reply? I know that your committee has done a great deal of work and has some different concepts of the State Bar of Texas Court Rules Committee, and the chair would really like to hear your response or concerns of this product so we will have the benefit of that two years of work that you-all have done.

MR. HAMILTON: Yes, sir. We have been working probably about three years on this. Our task, I guess, was to -- was put the brakes on discovery and those who abuse it, to do something to try to reduce the cost of the satellite litigation as it develops probably, with the light in mind, though, all the time though to insure fairness to both sides and that we ultimately get justice and not just a trial by who's the best lawyer, and to reduce the acrimony among the lawyers.

Now, our committee has looked at a number of different ways of doing things. We first looked at standard interrogatories. I think Paul Gold worked on some of those. He was on that committee. We looked at standard definitions, which he also worked on, and I think we finally adopted a set of standard definitions which include view and identification and those things that you-all have been furnished copies of. We looked at the concept of doing something about making parties plead more specifically the claims and the defenses with the idea that maybe we could somehow limit discovery to what's in the pleadings, but that didn't seem to be a workable solution because sometimes and in some cases it takes some discovery before you can finalize the pleadings.

We talked about limits on the number of depositions that ought to be taken and various ideas that were handed back and forth among the lawyers, and I think one of the philosophical problems that we recognized was the philosophical problem that arises from the fact that years ago we virtually had no

discovery. When I started practicing law we never took depositions. We took it to trial, and we tried the case based upon what each side could develop, and that was called trial by ambush, and at some point along the way the Supreme Court or some courts told us we are not going to have trial by ambush anymore. So this has created kind of a war between the role of the lawyer as an advocate and this no trial by ambush concept.

In the advocacy situation that we have and that has developed over a period of years the lawyer gives up as little as possible by way of discovery. You have to pry things out of him, and the lawyers go to great measures to keep information from being furnished from one side to the other, and yet the courts tell us we can't do this anymore. We can't have trial by ambush. We have to have complete disclosure. You know, so herein lies the problem. Are we going to have lawyers that are going to be advocates during the discovery stage, or are we going to de-emphasize the advocacy during the discovery stage and perhaps let lawyers be advocates at the time

of trial but during the discovery stage be more like an officer of the court who's role, and the role of lawyers on both sides, is to see to it that all the facts and all the information is discoverable by both sides so that we can have a trial based upon the facts of the case and not by the absence of the facts of the case.

We don't think that there is any art particularly in disclosing the facts. The art comes in how you avoid disclosing facts, and so our approach is a little bit different from Steve Susman's approach in that we don't think that setting limits on discovery as his committee has done does anything except continue the promotion of advocacy during the discovery period. It just gives the parties less time to fight, less things to fight about, but we don't think that that really promotes justice to try to set arbitrary limits on discovery.

We agree that the discovery process needs to be contained. It has been allowed to run wild, but we think that the better approach is to do it kind of like when you build a house.

You get a set of plans, and you get a set of specifications before you ever start, and then our approach, we think that each case has to be designed according to the particular case, according to the nature of it, according to the complexity of it. We think that there should be a pretrial-type proceeding where potential discovery problems need to be identified and dealt with before they blossom into real discovery disputes, and that in our philosophy we have got to get the judge involved at some point in this early on in the design phase of this litigation or it's not going to work because he has to make rulings, and we have to set the design of the litigation so that it can proceed in an orderly manner and reduce the cost of the litigation and the time that's involved.

So our approach was that you start out with a set of mandatory -- or we call them mandatory disclosures where it's triggered by a request. It's not like the federal rules where immediately upon filing of the suit the clock starts running and you have to disclose all this information. Our approach is that

the disclosures would be by request, and we have set out the time limits in that. One of the key elements in this disclosure is similar to what Steve has got in his, the factual basis or the legal basis for the claims or the defenses. Many times a pleading is very vague, very broad, very general, and the parties really don't know where to focus discovery until such time as a more precise, particular statement of facts is given and legal theories upon which the claim or defense is based. This is somewhat like a motion for more definite statement in Federal Court.

If the party does comply and furnishes the factual basis and legal theories upon which the claim is based, then this may eliminate special exception practice and may to some extent focus and limit the discovery in the case when the parties know precisely what facts and what legal theories would one be fighting about. Hopefully this type of a disclosure will eliminate disputes over attempts to not provide information because they are essentially nonobjectionable. You simply have to furnish the information.

Now, in designing all of these rules we have to keep in mind, too, that we are talking about what's the rule that's going to fit most cases, not what's going to fit the simple cases or the more complex cases, but what's going to fit most cases, and that's what we have tried to provide is a list of information that ought to be furnished in almost all cases, which in many cases we think will provide special information to move the case to a resolution without perhaps the necessity of any further discovery. In other cases, depending on the case, then it will suggest other discovery that needs to be had in the case. So the first step is one of disclosure of as much information as we provided for in that particular rule.

The second step in the procedure would be to have a scheduling order. This can be entered into by agreement of the parties without the intervention of the court or without taking the court's time, or it can be done through the court if that's necessary, but we feel like the scheduling order is important because that's the first stage in

the design of this litigation is to try to set an orderly plan for when things need to be done. Each case is going to be different, but it needs to deal with such things as completion of discovery rather than an arbitrary limit designed for that particular case. It needs to deal with the times that each parties will designate experts, the times that experts' depositions are to be taken, other depositions that are to be taken, pleadings and so forth, and that's all listed in the rule as to each of these things that ought to be listed in this scheduling order.

Now, shortly after the scheduling order we think that when the parties have had an opportunity to participate in the mandatory disclosures, they have had an opportunity to look at their case, talk to their witnesses, that there needs to be an early pretrial hearing, not like we have now where it's done two weeks before the trial date, but it needs to be an early pretrial hearing where the lawyers have to come prepared to really put the final touches on the design of this litigation, and it does require court

participation. It's at this time that the parties ought to be required to identify actual witnesses that they are going to call at the time of trial.

The court ought to rule on exception if there are any and require that the pleadings be put in the proper form within a reasonable time. The court should deal with discovery problems, should either limit discovery or broaden discovery or set whatever rules the court needs to make to define the discovery in this particular case, including in some instances dealing with expenses and who is going to pay expenses for what experts, where depositions are going to be taken of experts, when they are going to be taken; and at that time I think it's important although it's not in the rule that the court adjust the trial date because by that time the parties are going to know fairly well how long it's going to take the case to be prepared and when the case ought to be set for trial.

Now, the trial date is important because many, many hours are wasted in litigation when the parties both get ready for trial and get

to the courthouse and they don't get to go to trial, and then six months later we go through the same routine again, maybe six months later the same routine again. So we have got to have a system where the trial date is set. It's reasonable. It's realistic. The court can do it. The parties can do it, and it goes to trial at that time and doesn't get put off. This is all part of the design phase, and it does require that the court get involved in it, take charge of it when the lawyers can't agree, and help the lawyers fashion the plan for this particular case.

Now, how does that differ from what we are doing now? Well, first of all, it provides for nonobjectionable disclosures of very important, very basic information that's needed in almost every case. Second thing it does, it designs the suit because each suit is different and requires judge participation, and then hopefully heads off discovery disputes at that point. In the pretrial hearing the parties ought to know how many witnesses they are going to have, how many people they are going to call as experts. It

gives some guidance to the parties as to what discovery they need to do at that point.

The other thing that it hopefully will do, since there is going to be a court order entered in it, is give the lawyers some protection from malpractice claims. Take, for example, the 50 hour limitation rule. If a lawyer guesses wrong on how to use his 50 hours he is susceptive to a malpractice case. If the court designs this program for discovery and enters an order saying "Here is how many depositions you're going to be able to take in this case and no more and here is whose depositions you can take in this case," then I think the lawyer has some protection from malpractice.

These approaches are not unlike some in federal courts and then the Arizona courts. The Arizona court has much the same plan on these disclosures, and Roger McKay, who's on our committee, talked to -- or I guess he was out in Arizona and talked to some lawyers out there not long ago, and they told him they liked the system. It worked very well and cut down on discovery. He looked at one of the

mandatory disclosures that they made and said he could have gone to trial at that time with the detail of the information that was provided in the mandatory disclosure.

The Eastern District also adopts a similar plan. Theirs is more mandatory, and I might point out that in the Eastern District plan the information that's required to be disclosed is information that's both favorable and unfavorable to your clients. So you have got to put all the cards on the table, the good and the bad, so that everybody is playing with the same deck of cards instead of hiding the ball. Now, we had some lawyers tell us that over in the Eastern District people stopped filing cases in that court because of that rule, but Judge Brown who's the judge over there talked to us one day and said that wasn't true. He said it was working very well, and they really did like that approach.

Now, Steve's committee has done a good job in putting together everything that they have put together. It's just it differs a little bit from our committee's approach, and it differs in our philosophy. We, for

example, don't think that a six-month window on discovery is fair to both sides. We think that it does give plaintiffs an advantage who have had years perhaps to look into their case and prepare their case and line up their witnesses, their experts, and then the case gets filed and then in a six-month time period, which really doesn't give the defendant the same advantage that the plaintiff has.

Whereas if the court and the lawyers design that particular case, if the defendant, for example, says, "Well, yeah, Judge, six months is fine for me," the judge can put that in as a time limit; but if the defendant says, "Well, I can't do it in six months. I need 8 months or 9 months or 12 months," or whatever it is according to the case, then that's how much time the judge gives them. Also, in some cases you may have a court that may set the case for trial in three months or four months, and what happens to the six months discovery? That really ought to only be done if the court gets the consent of the lawyers to do it, and they agree they can finish the discovery in

that amount of time.

We think that these kinds of limitations on six months and 50 hours really promote trial by ambush rather than eliminating it because it really does not in some cases give the litigants the adequate opportunity to prepare their cases in an adequate amount to properly represent their clients, and if they don't have that time, then justice has really been denied even though we may have saved some time as to the 50 hours. We have discussed that. We think that that's not practical for a lot of reasons, and one of the arguments is who's on what side when there is a side, who's going to keep the time, do we keep it right, if you didn't guess right on how you might use your 50 hours, you might be exposed to malpractice claims.

Problems with experts, Steve has referred to some of them from the defense standpoint, which is where I am. I don't think 15 days is enough time for a defendant to find an expert after he knows who the plaintiff's expert is and has taken his deposition. Sometimes it takes two or three months to find an expert

that's not already booked up. It's just not that easy to find experts. Their approach seems to be to eliminate written reports from experts. We think in many cases written reports from experts are very good, that they avoid the necessity of taking an oral deposition of an expert.

Many experts, lawyers know pretty much what they are going to say, and Steve's comment was, "Well, any lawyer worth his salt can find an expert in that amount of time," and that may be so with a lot of good, really experienced lawyers. What about the lawyers who just started out practicing that haven't tried very many cases? All of the sudden they take an expert deposition, and all they have got is 15 days to find one, and they can't find one in 15 days. They don't have the experience to anticipate two months in advance the kind of expert that they may need in the case. So we just think that the time period for that is extremely short, and that these time periods and time constraints and limitations are going to create more satellite litigation than they discourage, that we are

going to get into arguments over what's good cause or what's good reason to extend the discovery time, arguments over the 50 hours, arguments over who is on what side, arguments of when an expert is not available, you can't get one in that period of time.

There are going to be motions after motions after motions filed with the courts to resolve these problems that through our approach we think could be solved in the beginning. Now, the court is going to have to spend more time in the beginning. You know, this pretrial may take two or three hours or a half a day, but we think to spend the time at that point and properly design the case start to finish is a more efficient way to spend the time than all of these disputes and fights down the road as to who did this on time, who used too much time, who's on what side, you can't take this deposition because you have already taken two, and why do you need to take another one, and all of these things.

So our approach is do the design first, get a plan that's workable for both sides, get the sanctions, enter an order on it, and

that's the architectural plan for that case which ought to be followed, and then, of course, there are going to be incidents when you have to deviate from that plan because of conflict or witnesses not available and so on, and there are going to be reasons why you do have to go back to court. I guess that's inevitable in every system, but our philosophy is just different in that respect.

Now, what we have provided to you is several different rules, and I guess you have copies of them, but essentially what our rules do is Rule 63 changes the pleading deadline from 30 days to -- seven days to 30 days or whatever is in the pretrial order, and it may be more than 30 days prior to trial. It could be 60 or 90 days. Rule 90 makes a requirement that the court hear special exceptions at least 30 days before trial or as stated in the pretrial order, which could be a much longer period of time also.

We have a rule which sets out the purpose of discovery. That's an unnumbered rule, and that kind of gets back to the philosophy I was talking about earlier, and that is whether or

not we are getting to the point where our philosophy is that lawyers should be more officers of the court in the pretrial period and only advocates at the time of trial so that as officers of the court they would have the duty to be sure that all the facts are disclosed for both sides and really not engage in this advocacy proceeding at that point as we have been doing in the past, which is the art of hiding the ball and disclosing as little as possible. That's the unnumbered rule that you have which is called "The Purpose of Pretrial and Discovery Rule."

The other rule is Rule 166, which is one of the major rules under this plan. It's a pretrial and scheduling rule, and it provides in the beginning part on page 2 for the scheduling order to be entered and suggests what can be included in that. It then discusses the pretrial hearing and what's to be considered at the pretrial and finally just the court trial, and this really doesn't have anything to do with discovery. There is a joint pretrial statement filed, which is a modified version of the federal rules and

doesn't require quite as much in it, but the pretrial scheduling offered does require the setting up of schedules. It does require that in the pretrial order the court and parties deal with discovery problems that they can anticipate, try to design their litigation so that they head off the discovery problems, identification of witnesses, and so forth.

Now, Rule 166(d), which is the so-called mandatory disclosure and disclosure by request rule, is one that the subcommittee has approved, but it has not yet been approved by the full Court Rules Committee, and one of the controversial parts of that rule is Rule 166(d)(a)(1) in disclosing information about persons with knowledge of relevant facts, and that requires that the person be identified together with the general subject matter about which that person has knowledge and a summary of the main facts about which the person may have knowledge favorable to the requested party.

HONORABLE F. SCOTT MCCOWN: May I interrupt just a second to ask the chair a question?

CHAIRMAN SOULES: Sure.

HONORABLE F. SCOTT MCCOWN: This is really a procedural question. The subcommittee took the task force report and took the court rules report, and we have really put a revolutionary proposal on the table, and I think Carl's opening comments about the philosophy of his proposal versus ours were very helpful, but if we try to compare all three systems at once before we understand the subcommittee's system I think it's going to be real difficult, and you know, we're your subcommittee. We put a lot of time on this. We have got it on the table. I would like to talk about the subcommittee report and get an understanding of it first, and if we want to go to comparisons, that would probably be useful. It's going to be hard to try to talk about each system in detail at the same time, so I'm kind of wondering if Carl might yield the floor to focus on the subcommittee's report and then if we get direction to do something different, that's fine, but this is what we have brought you.

CHAIRMAN SOULES: Okay. Carl, will you go on with your report? Just go ahead and go forward.

MR. HAMILTON: I'm just about through. I just wanted to point out that one thing that's a controversial thing as to whether one ought to have to disclose the main facts about which person has knowledge favorable to your case. The federal rules require favorable and unfavorable. We opted for a compromise to at least allow the lawyer not to disclose unfavorable facts, and make the other side go find those. Rule 166(g) is standard definitions, and I might also point out that Rule 166(d), this disclosure rule, is a combination of another rule that was previously called 166(e). 166(e) was a rule which was written at the request of Judge Phillips to implement that statute that the Legislature passed in medical claim cases where the Legislature had set up a requirement that standard interrogatories be prepared.

We prepared some in response to that request under Rule 166(e) and then a suggestion was made that that be incorporated

into our old 166(d), which would combine both medical malpractice or medical claims as well as just general litigation claims. So the rule that you have is a combination of what was 166(e) and 166(d), putting them altogether in the one rule. That's essentially the basis of our approach, and that's all I have to say at this time.

CHAIRMAN SOULES: All right. Is there -- let's see. David Keltner I don't think is here. Is there anyone here from the task force that wants to give a general overview of what the task force's work was?

Okay. No one. Okay. Then let's go ahead and go with -- Steve, let's develop an understanding then that you feel more needs to be said about your subcommittee report in order to get that before the committee as a whole.

MR. SUSMAN: I yield to Scott to do that.

HONORABLE F. SCOTT MCCOWN: Well, I think what Carl's opening comments really focused the debate real well because we concluded and thought that it was the sense of

this group that discovery cannot be effectively court-supervised and that you can't design a discovery plan on a case by case basis, and I think we hashed that around several meetings ago, but just to hit the highlights of that, there are too many cases in the state court system. Say, compare a civil docket of 2,500 in a state court to a civil docket of maybe 200 in a Federal Court. The judge has known too little about the individual cases. The judges, unlike in the Federal Court, have no support staff to help whatsoever, and then state judges being elected have certain problems imposing limits and supervising discovery.

So we rejected kind of a court-supervised model in favor of what I would think is best described not as arbitrary limits but is presumptive limits, limits that would apply to the case absent agreement or absent court order, and I think it's real important to remember because it kind of gets lost as you think about the details that everything can be changed by agreement. Everything can be changed by court order. So to the extent that

a case needs to be designed or tailored for its individualness that can be done, but presumptively the great bulk of cases would not come before the court and would operate under the standard.

The six-months window, you have to remember when you think about it you have got to remember four things. You have to look at all of the standard disclosure you get merely by asking without opening the window. So there is standard disclosure that's going to tell you a whole lot about your opponent's case without opening the window. The lawyers control opening the window. Now, it's true that really it's more accurate to say one side controls it because a side can choose to open whether the other side wants to open or not, but it's not judge-controlled. It's not tied to any arbitrary thing like the answer date. It's a lawyer-opened window.

Once the window is closed it's reopened at the end tied to the supplementation for that discovery to get it ready for trial, and of course, as I said, anything can be modified by agreement or court order, and what we

envisioned happening, the kind of change we envisioned seeing, is that once the discovery was done and the case was in the can so to speak, that you would then increase settlements at that point. It doesn't matter how far the trial date away is. If nothing else can be done, if you can't work on that file, if you can't build that file, if the discovery is concluded, that's going to increase settlement. We envisioned that parties might use 80(r) at that point in an effort to get their case resolved and then, of course, it's going to sit in the can until tied to the trial date you've got the reopener. So it's a real different thing than just thinking about a six-month window when you add all of those features.

MR. SUSMAN: Luke.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Just one more thing. I think that we really -- I think people need to really think seriously about whether the federal paradigm is something we ought to strive for. The speech that Carl just gave about the way courts ought to be

fine architects of a case and tailor-make a discovery plan and keep on top of it has been a speech that's been given for three decades to federal judges over and over and over again. The federal rules where they have a much lighter docket and have exactly that kind of regime -- and the fact of the matter is any trial lawyer knows that it costs more money to prepare a case in federal court today, not less money. It takes more time to get a case ready for trial in federal court, not less time. You don't get any better quality of justice from a federal court now than you get in state court.

So why do we even think that system will work if it hasn't worked in a regime where, a, judges are elected for life and don't have to worry about political contributions from anyone; b, have 250 or 300 cases, not 2,000 cases. It simply has not worked on the federal -- and have law clerks to help them do all of this tailoring. It hasn't worked, and I mean, there is the best example you can come up with. We have got to do something. I mean, we have to set the objective, and if the

objective is to streamline the process, make it less expensive, and produce results quicker, I just don't think the federal paradigm -- and in fact, the best federal judges, the best, judges like Sam Kent in Galveston, are developing their own little home-baked rules very much like our rules. Okay.

In fact, some of our rules came from looking at federal judges' rules dissatisfied with the federal regime. They go back to telling lawyers depositions will last from 9:00 to 5:00. There will be a lunch break at noon to 1:30, no deposition may last of an expert more than eight hours, of a fact witness more than six hours. Look at the Sam Kent rules in Galveston which are much more limiting and detailed in a default kind of basis than even the rules we have proposed because they are dissatisfied. Even the federal judges recognize they do not have the ability to design this architectural plan.

You know, the fact of the matter is if you sit down, I mean, I have been asked to take over some big case, and I sat down two

days this week and talked to the lawyers who are in it. I have no more idea after spending two full days with these lawyers about what we need in the way of additional discovery. I mean, one lawyer says 60 depositions. Someone says, "Maybe that's too much." It's impossible to design a plan. You can't do it even if you had two days on a case, and as a result if it's going to be meaningful you are going to have so many change orders in this architectural drawing that the exceptions are going to overwhelm the rules. I mean, because they are going to have to be constant revisions, and you know, I just don't think you get a very good drawing for your house when you sit down with a judge two hours and explaining what's up.

CHAIRMAN SOULES: Excuse me. Chuck Herring.

MR. HERRING: Well, I think Steve is right in terms of the change. I think philosophically federal courts traditionally did feel that a managed system was better, and I think in theory it is, but I think practice has shown that we don't have

enough judges. We can't handle the dockets that way in most cases. In big cases you have to do that. You can't fit under a default system, but if you look at the Civil Justice Reform Act, the plans that are coming up in the different districts that we now have in Texas, they are going to default systems in whole or in part as applied to certain tracks of cases or certain groups of cases, and I think really a default system is kind of, perhaps, a sadly recognized fact of life, but I think that's where we are in terms of docket management.

Nationwide that's the current trend, and I think that's what the subcommittee has come up with, and I think that's probably the way to go, recognizing that what you are dealing with are the vast majority of cases which are not the cases that a lot of us deal with in terms of size and scope and magnitude, and therefore, you need to have an escape hatch. You need to have, as you have tried to build it in, you need to have a system to get to those big cases which are a minority of dockets out of it, but I think in terms of a

general approach that makes sense, and I thought we had agreed at least as a general proposition on this committee last time that we thought that's the way we had to go. It seems to me then to move things along that's one of the first issues, do we want a default system approach as the subcommittee has come up with, or do we want to go to an individually case-managed pretrial order approach, and I've come down on the side of the former, I believe.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I like what I heard from both committees in some respects. The one question I would have for Steve's committee is why is disclosure, that concept, not something that you thought would be a good idea, disclosure on request or mandatory disclosure on request in lieu of our current paper discovery? And the management problem is a real problem, but if there was, at least in theory, a way where disclosure could work to provide a lot of basic information for typical cases in such a way

that you wouldn't have lots of battles about the form of requests, in such a way that you wouldn't have lots of claims that that's not relevant in the discovery sense, that there is no privilege argument that would come up all the time.

If you could have the mandatory disclosure work, then you would obviate the need for judicial management except when it didn't work, and the judicial management, frankly, it's going to be required at some point in the process when the system breaks down. You just can't say that the judge is not going to ever be involved in this. At some point you are going to get back to the judge who's going to have to do things in order to get the case to conclusion. So that's my question. Why the disclosure aspect?

MR. SUSMAN: The answer is page 9, Rule blank, which is entitled "Standard Request" reads, subpart 1, "The following matters are subject to disclosure by a party upon request from any other party"; and then Rule 2, subpart 2, says, "An

interrogatory asking for the standard information does not count against the limits." I mean, these are -- I guess these are the disclosure, mandatory disclosure upon request. The only difference between this and the federal rule is in the federal rule, as I understand, you have got to do it whether you are asked for it or not, and we felt that there are some cases that it's so simple to ask for it if you want it why make it automatic, and there is nothing sacred about the list. If people want to expand (a) through (f), I mean, we didn't really have a big argument over what would be there.

PROFESSOR DORSANEO: It just seems to me that disclosure is a real solution to a lot of these problems and that there isn't any completed compatibility between the views expressed here. It's a question of maybe looking at both proposals and taking the best from each.

HONORABLE F. SCOTT MCCOWN: And if I could add a couple of things to Steve's answer, the standard request rule you see on

page 9 is modeled exactly on what the task force did. In fact, we added a few things to what the task force did rather than take away, and second, we did require it to be done by interrogatory or by production request only for the purpose of the importance of having a record so that when the trial court has to superintend discovery disputes there is a record of what was asked and a record of what was answered, and it's filed with the court on the theory that it's not any harder to put a caption on it and call it an interrogatory or put a caption on it and call it a production request or response, but that's exactly what the task force did.

PROFESSOR DORSANEO: Well, the Committee on Court Rules' work on the disclosure proposals seems to me to be a lot more detailed and perhaps in that sense further along. You have been focusing on a different part of this problem really more in terms of deposition discovery and limits there, and I don't see that these are inconsistent approaches at all.

CHAIRMAN SOULES: Then we have

another handout that Pat Hazel provided for disclosure upon request. That's also in the materials, and it's somewhat detailed. Is this Pat Hazel's?

MR. HAMILTON: That's the one that our committee put together.

CHAIRMAN SOULES: Okay.

MR. HAMILTON: He just put the final touches on it and sent it out, but that's the one. 4, Rule 166(d) is our committee's request.

CHAIRMAN SOULES: State Bar of Texas Court Rules Committee, Pat just made a distribution of it for our work here?

MR. HAMILTON: Yes.

CHAIRMAN SOULES: Okay. Good. So the State Bar's is under the University of Texas Austin telecopy letter from Pat Hazel and looks like this inside. (Indicating)

Judge Guittard had his hand up and then we will go around the table.

HONORABLE C. A. GUITTARD: I wonder if either of the committees has made allowance for the different kind of judges you have. There are judges that are interested in

their cases and read their files and are prepared and are sort of activist judges and like to take the lead and get their cases disposed of. There are other judges that, perhaps, weren't very successful in the practice. They just like to hold onto their jobs. They like to go fishing or play golf later in the week, and they are not going to do anything until somebody comes to them and asks them to. Now, I don't know how to solve that problem unless you give the judges some discretion as to whether they are going to be active or passive, and perhaps the scheduling orders ought to be at the discretion of the judge. Okay.

MR. SUSMAN: The answer for our committee is that we would welcome an activist judge, and I don't know how we can make it any clearer that he has absolute discretion to call the parties in for pretrial conference under Rule 166 and to say, "In my opinion none of the work of the -- none of these new rules on limits ought to apply in this case. Here is how we are going to do it," and he can write -- he can design a tailor-made plan with

as much beauty as he pleases, absolute discretion to do that.

HONORABLE C. A. GUITTARD: So the nonactivist judge, it works with him, too, although he is not active?

MR. SUSMAN: What now?

HONORABLE C. A. GUITTARD: I say your rules will work with the other kind of judge as well.

MR. SUSMAN: Yes. For the judge who wants to go play -- the nonactivist judge. The nonactivist judge, yeah. These rules would protect the client from the lawyers bent on running up billable hours in a case where the nonactivist judge was not providing that protection, and we owe it to the public to give them that protection.

CHAIRMAN SOULES: Anyone else here? Joe Latting.

MR. LATTING: I have a question about this, and this is a little bit of a silly question, but on page 7 -- it's the subcommittee's page 7 at the bottom, "Failure to Provide Discovery." This Rule 5 is a pretty cataclysmic kind of a change from what

the body of law says. What's the thinking of the subcommittee? As I understand this if you get a lawyer on the other side who is not willful or intentional, just careless, and you find out the day or two days before trial that he's got some very important witness he didn't disclose under this rule, I'm thinking to myself explaining to my clients why we are not going to trial, and what's the thinking of the subcommittee on this?

MR. SUSMAN: Well, I think, it seems to me -- if it's not wreckless indifference, I mean, you would have to talk to your clients and say, "Okay. We have got a choice. We can either go to trial. Okay. Or we can take a continuance," and he's going to -- I think the judge will make him pay for it. Okay. Frankly, I think many, many, many lawyers, many, in the the majority of the cases will opt to go to trial because, in fact, his great big surprise is no big surprise at all, and good trial lawyers know how to handle it, but if you opt after talking to your client say, "Look this is really going to be a problem. We need some more time" and

go for the continuance route. I think it's then fair that you go to court and the courts be encouraged to make sure that this does not cost you or your client anything. Now, that may be paying for witnesses to travel to town, getting a trial office, as we talk about the differential between pre- and post-judgment interest. I don't know. I mean, there may be other things that the law will develop should be considered in the costs.

MR. LATTING: Let me ask the question a different way. We have gone through a lot of agony in the state, and maybe that's a strong word. There has been a lot of writing in the appellate opinions about excluding testimony, and this is a radical change from that. I take it the sense of the committee is that where we are today is not satisfactory.

MR. SUSMAN: Yeah. The sense is that we have rules that are trapping and unwary. They are "gotcha" rules that they really -- I mean, they make discovery an end of itself. I mean, it's a very, very important thing in and of itself so no stone

gets -- I mean, every lawyer is worried about malpractice and these great claims that something is going to happen if I don't do it right, that basically we ought to be a little more forgiving, that it's great -- we do not want trial by ambush, but at the same time a few surprises wouldn't be terrible. I mean, that's kind of the feeling.

MR. LATTING: So you really meant to do this?

MR. SUSMAN: No. This was intentional to say, you know --

HONORABLE ANN TYRRELL COCHRAN: It was not wreckless indifference.

MR. SUSMAN: Unless you are going to, I mean, one way -- I mean, if you are prepared to spend a zillion, zillion dollars in discovery you can guarantee there will be no surprises. Okay. But the public is not ready, doesn't want to do that anymore. It's better we spend a little less and have a few surprises.

MR. LATTING: Well, I agree with that. I will agree with that statement.

CHAIRMAN SOULES: It seems to

me that this paragraph 5, I mean, we have rules right now that are driving disclosure, and what else they drive I suppose we can debate, but they are driving disclosure, and they are driving disclosure of documents that will be used at trial. They are driving disclosure of witnesses and experts that are going to be used at trial, and if a party doesn't perform his driven duties properly, that party is at risk. What this rule does is transfer the risk from the failing party or guilty party. It may even be deliberate to the innocent party who is now going to have to ask the judge "drop my trial setting" because I'm at risk because the other party didn't do something they were supposed to do. And I'm on both sides of the docket. I represent as many plaintiffs as defendants. You do, too, Steve, I guess, in your firm anyway.

MR. SUSMAN: The deliberate --

CHAIRMAN SOULES: I don't think that -- and I would like to hear some discussion from the committee. I don't think that the risk should be changed. I think it ought to stay with the nondisclosing party,

the noncomplying party, as opposed to transferring it to the complying party because the loss of a trial setting is devastating in representing plaintiffs if you're faced with a six-month or a one-year delay in your trial. You don't have a choice, and as a matter of fact, if it's in federal court in some state courts you don't know when you will ever get back on the docket. So you can't even tell your client who's been injured, damaged in the business case when you are ever going to get back on that docket. So you have to go to trial against information that you have not been able to prepare to defend on.

MR. SUSMAN: Luke, I would think that most plaintiffs lawyers would opt for the trial rather than the continuance which means, usually, I think, that we think we can handle the new information. I mean, I think it means -- yeah. I mean, I wished I had learned it three months earlier.

CHAIRMAN SOULES: Well, why not just keep it out just like we do now? You can't use it if you didn't disclose it.

MR. SUSMAN: Because we think

that is too big of a punishment for -- too big of a punishment for an inadvertent nondisclosure in a system, in a regime, which says let's get things done quickly, let's get them done fast, let's put the case in the can, let's not have this case have a life of its own for three years, that that's typical punishment, and that we are going to have to soften up a little if we want this system to work. That was our response.

CHAIRMAN SOULES: And another problem here, and I will just get them all on the table for discussion is that, you know, defendants, to me this encourages gamesmanship on the part of defendants. They don't usually care whether the case goes to trial, sometimes but seldom do they care. So the plaintiffs are going to be making all of their disclosures because they are afraid if they don't defendant is going to move for a continuance and get it from the judge, and they probably will.

The defendants, on the other hand, are not going to make their disclosures because they are going to try to pop the plaintiff

with a big surprise at the end and force the plaintiff to do only one thing, ask for a continuance or go to trial against the big surprise that they are not prepared for, and it just seems to me to be imbalanced. Whenever it's keep the witnesses off, it's balanced. The side can't use it. If the plaintiff can't disclose, he can't put the proof on. If the defendant doesn't disclose, he can't put the defense on, but the case goes to trial. Neither side gets that advantage.

Anyway. David Perry.

MR. PERRY: Luke, the approach that had been taken by the Discovery Task Force on this particular point was a little bit of a mixed approach. What the Discovery Task Force, as I recall it, had recommended was that with respect to a witness that was not disclosed, that if the witness was not disclosed 30 days before trial -- now, they might have been disclosed late. Maybe somebody should have disclosed them two years ago, and they really disclosed them 35 days before. We didn't count that, but we had said that if the witness was not disclosed 30 days

before trial, they could not be used, although we then excluded from that natural parties, natural persons who are parties, anybody who had been deposed, anybody who had been disclosed by anybody else earlier on. So once the name was out there just because you didn't list it in your own list didn't work against you.

We recommended a similar exclusion for a tangible thing such as a document. There was a lot of discussion in the Discovery Task Force, however, that there is coming to be a lot of unnecessary disputes over whether certain lines of testimony had been properly disclosed in depositions, and we didn't feel like the exclusionary rule should apply to that, but the Discovery Task Force had recommended that the exclusionary rule be kept with regard to witnesses but that it be modified to eliminate some of the draconian effects of it.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: A couple of comments. No. 1, I agree with

Chuck. I mean, there is a lot of details on this I would like to address, but it seems to me the first question is which direction are you going to go, managed where I hold a pretrial conference in every one of my 1,200 cases that are filed every year or where I issue this is what the rules are and if you don't like it, come see me, put the burden.

Obviously the way I present that I'm in favor of the second, and I think in the urban counties there is just not much choice. I mean, the only -- I think Judge McCorkle basically holds -- I mean, he is the only living person I know of that tries to hold pretrial conferences, and he apparently is able to do it. I can't say it's impossible. Now, he doesn't try many cases because he spends months on pretrial conferences.

Now, on the other hand maybe he gets more settlement because he does it that way, but he is the only living person I know of that would actually probably do that, and the rest of us would -- and we have for about a year had this process where we have had roughly the idea has been the tracking system and put you on a

track and if there is some problem, I'm not sure how realistic the tracks are, but if you are on that phase and have some problem with that track, come let us know.

I, at least, have hardly heard a word, and so I think the default system will basically take a lot of this, a lot less burden on me, a lot less time coming down to the courthouse, and there are cases with thousands of plaintiffs and class actions and stuff like that that are going to have to be handled, but let the lawyers find that out and come tell me rather than the other way around.

Two other comments: No. 1, on the trial continuance as you point out, which I think is correct, especially in the urban counties, I'm seeing in some written opinions and in some of the rules the idea is that there is such a thing still as a 30-day continuance. I'm not sure. I know in my court that really doesn't exist. A combination of the process where you want to give people firm and realistic trial dates, which means you can't set 50 cases every week because it's not realistic anymore with the combination of scheduling things far

in advance because the idea is that people know when the trial date is and they can back up and do their discovery means you are setting cases 6, 8, 12 months in advance, and if you continue cases, you've got -- those months are filled.

You can stack them up, but that makes them less realistic. Plus the fact, in Harris County at least, we have got one month a year set aside for asbestos trials. All of us have scores of asbestos cases still. That's the only one you can try. You want to try them you have to do it then. The same rule, two months a year on silicon implant cases. We have all got a hundred silicon implant cases. We can try three or five at a time, and that is the only months. We have got three months a year where the attorneys can cancel previously set trial settings with vacation letters; five weeks a year that are dead weeks. I have got about 12 weeks I can set trials without somebody doing something about it, and when somebody comes in "I want a 30-day continuance." They don't understand.

I would love to give it, but

unfortunately all of these -- it is not my schedule anymore, and I want you people to understand, keep in mind, that a lot of attorneys apparently are not aware of that fact. Just say, "Well, set you off for a couple of weeks," and it won't be a problem.

Last comment was, one of the things I liked most, small matter perhaps, in the task force report was the deal about construing all discovery requests to exclude attorney/client privilege unless you specifically say, "I want the attorney/client documents," assuming it's all out so you don't get all the dot responses on all that. Is that in the -- I didn't see that in the subcommittee report.

MR. SUSMAN: That is not in, but we didn't intentionally discuss it and reject it. It's just -- I mean, I'm sure there were bells and whistles through this stuff that we just omitted, but I don't think -- we did not consider that.

HONORABLE SCOTT BRISTER: Okay.

PROFESSOR ALBRIGHT: We haven't talked about privileges or scope of discovery at all.

MR. SUSMAN: That's right.

HONORABLE SCOTT BRISTER: Okay.

CHAIRMAN SOULES: And just to add to what you say, I mean, sure those are problems in the urban counties. The rural counties have a different set of problems that produce the same result. You have got a judge who has got regular priority to criminal cases. You have got to give priority to family law cases.

HONORABLE SCOTT BRISTER: Or one civil jury week every two months.

HONORABLE ANN TYRRELL COCHRAN: Or judges who have three and four counties, and they might not even be at that courthouse.

CHAIRMAN SOULES: So whether it's urban or rural, there is an array of problems that are there. Just getting the 30-day or a short continuance is in most venues unrealistic. Tommy Jacks.

MR. JACKS: In some ways I wish we could enact both rules and then let the lawyers in every case decide, pick and choose among them about which ones they would enforce, but I know we can't do that. Did you

guys consider instead of having a six-month window that opens with either the first deposition or the first produced document in response to a request and closes six months later, did you consider instead the possibility of gearing scheduling to trial dates?

HONORABLE F. SCOTT MCCOWN: May I answer?

MR. SUSMAN: Go ahead.

HONORABLE F. SCOTT MCCOWN: We did consider it to scheduling to the trial dates, but I think, as Judge Brister points out, trial dates aren't firm and really can't be firm under almost any system, and so what we wanted to do was have every case with a window that was definite, that opened at a definite time and closed at a definite time, with the thought that after it closed the parties were going to settle that case or go to alternative dispute resolution, and if they weren't, if they were going to get it tried, that once you stop discovery the chances of resolution of the dispute went up astronomically, but if they were going to have

to get it tried that there would be a reopener tied to the real trial date.

MR. SUSMAN: And also, also it was our hope that someday with cases in the can accumulating on the shelf judges will figure out how to be a little more efficient, maybe limiting the length of trial, whatever it is, so that the trial date instead of being 18 months or two years hence from filing can be moved closer to filing, closer to the six-months, the end of the window, and that, you know, we could go to a judge and say, "Judge, how many cases in the can do you have? How many ready cases do you have in your court?" And maybe begin building some pressure to get a quicker drop.

MR. JACKS: Let me tell you what really, really bothers me about this, and that is that a very similar system was tried in Harris County in state courts, and it was an abysmal failure.

HONORABLE ANN TYRRELL COCHRAN: And we have done a lot of stupid things in Harris County.

MR. JACKS: And this was the

stupidest thing that a group of judges has ever done in the time that I have practiced law, and what they did was they set up a rule that you could not request a trial setting until you had finished your discovery, and which is -- in many cases it's going to amount to the same thing because there are many courts where you cannot get a trial setting -- you know, if you get a trial setting a year and a half from the time that your window would open under your rule, you're doing good, and that's if things are going pretty well, and the reason is because as Judge Brister points out, I mean, there are just not enough settings as there is a demand for them.

And what happens -- you know, and the idea was you have got to have your discovery in the can and then we will give you a trial setting, and so you would get your discovery in the can, and your trial would be, you know, 9 months, 12 months off, and in real life lawyers, one, will -- it doesn't work. I mean, you put it in the can, but life marches on, and you know, you've allowed for this five

extra hours of deposition discovery based upon what was supplemented in the 60 days out supplemental discovery, but I've got concerns about some of that because all that's supplemented is that which isn't known through the grapevine or because you learned about it some other way, and but I don't see where you get any refresher discovery for those things.

For experts you've got this continuing supplementation, and I'm a little confused about that. Does that mean in a malpractice case every time my guy, you know, re-evaluates and has got some article that could pertain to the case that might possibly be mentioned at some point in trial that he's got to send it to me, I've got to send it to the other side, and if I don't, what happens to me, and but the expert supplementation is a part of the 60 day supplementation, but it's already taken place. But if the expert's done more work do you get to go back and depose him again on his new work or don't you?

And while I know your effort was to avoid the court-managed plan for what I agree are some good reasons, the fact is in every case

where there is not agreement between the lawyers and where one side or the other feels that they have been put at a disadvantage with the 50-hour or the six-month rule, it could be defendants as Carl pointed out, or it could be the plaintiffs depending on the facts and the circumstances of the case. In every one of those cases you're under court management because that's the only place you can go to get relief.

If you can work it out by agreement and you've got the window closed, and it may be on your neck, then you are back to court-managed operations with the same judge who has got 2,000 cases on the docket, doesn't know anything about your case, has got 15 minutes to hear your problems before the next guys come in for their problems, and it's -- I guess all the things that concern me about the subcommittee's proposal, the potential for some of the same kind of problems we experience in Harris County. What happened in Harris County was eventually after about two years or so under this system the lawyers rose up in rebuttal and the judges recognized, some

sooner than others, that this case in the can was a bad idea.

CHAIRMAN SOULES: Let me ask you a question about that. Are you saying that the bad thing was that there was a schedule of how discovery had to be completed or it was connected --

MR. JACKS: The bad thing was --

CHAIRMAN SOULES: Excuse me, or there was a certain -- you had to certify that the discovery was complete to get a trial setting?

MR. JACKS: The bad thing, Luke, was that there was -- that you had to get your discovery in the can, to use this expression, and then there was a considerable time span between the time that happened and the time when the trial occurred, and I believe that would be true under both systems in many cases.

CHAIRMAN SOULES: Okay. That problem was recognized by this committee, and this committee had the paragraph in Rule 245, and it was statewide. It wasn't only in

Harris County. It was some other places, too, where you had to certify that you were ready to go to trial before you get a trial setting, and we recommended that the state go ahead and adopt the second paragraph of Rule 245, takes care of that. That says the trial judge cannot require any certification other than we reasonably expect to be ready for trial to get your trial setting.

MR. JACKS: I understand that, but the effect I believe is the same under either system, the time when the discovery has to be in the can. There it's because of certification. Here it's because you have got a window closing, and the time when you are really going to kick off the trial is a very long time. I guess the other concern I've got is I don't buy the premise which underlaid this, which is that once the discovery is in the can the case is going to settle.

What settles cases is trial notice. Even mediation is most effective when it is scheduled at a time when the trial is at least within sight on the horizon, if not impending, and it is -- and that's simply because those

who are paying for it would rather keep it from paying when they are not under proposal to pay.

CHAIRMAN SOULES: Let me get a consensus on the issue that Judge Brister raised, and Chuck Herring, of course, has said that one of the predicates or premises was Carl Hamilton and the State Bar's proposal, and that is whether or not we ought to have trial judges managing the cases up front, whether we ought to impose that burden because of how realistic it may really be, and I wanted to go around the table on that issue really, if anyone has got anything else they want to say about that because it's so fundamental to the State Bar's plan.

Now, that doesn't mean that there are not a lot of other good things in the State Bar's plan that can be blended into what this committee ultimately does. There are some really good things, and so everything about the State Bar's plan is not -- we don't have to have the first piece, that is, court management, in order to get a lot of other good ideas out on the table and perhaps blend

them into our work. So this isn't whether or not to reject the State Bar plan but just whether or not that's going to be an acceptable premise to managing discovery.

Anyone else want to talk about that? Harriet Miers.

MS. MIERS: Well, just listening to a lot of the comments that have been made and made extremely persuasively this morning it does seem to me that there is something we as a committee need to keep in mind, and that is that although we want to listen and be responsive to outcries from the public, it's the judges and lawyers that really know what justice is all about and the system of justice, and there are a lot of misconceptions on how the system works, and it strikes me that we could make some pretty massive changes to procedural rules that have been in place a long time reactive, and I would suggest maybe overreactive, to public sentiment without solving the problems for one thing, but also only to find that the public sentiment eight or nine years from now is totally different after they have had a few

experiences under a new set of rules that afford them what they think is less than fair, and how this -- I mean, at the national level what we are talking about a lot is simply the underfunding of justice systems throughout the United States, including the not having state judges have access to law clerks.

And so I just think we are doing a lot of good thought, but whether we are really trying to fix some systemic problems with rule changes that can never fix those problems is a big question in my mind, and one of the problems I've got with the default system which is suggested is that it depends on cooperation among lawyers, which we see is very difficult to achieve sometimes, or the judge steps in, and I might supplement Judge Guittard's comment to say that without regard to the judge who wants to play golf at the end of the week there are some judges whose either fret elections or mindsets or sheer arbitrariness is not something that I want to put the fate of a client with.

So I guess the bottom line on all of this for me increasingly is that you can't treat

all cases the same. I mean, 50 hours of depositions is a substantial amount of time in many cases, but in a lot of cases I think a lot of the lawyers around this table deal with it's not a lot, depending on the issues.

So with respect to the general question of court control one thing that hadn't gotten mentioned yet but is in some of the suggestions is the increased use of discovery masters or auxilliary means of getting the kind of pressure that was talked about just a minute ago, which is the reality of having a judge that will make a decision. So it may not be practically possible because we won't pay enough to fund a system that works, but I think a lot of this is the failure of judges to responsibly deal with their dockets, and our community is asking judges to do the impossible, which is to handle an enormous number of cases without the resources to do it and fixing the -- tinkering, even massively changing the rules doesn't solve all of those problems.

So with a general statement about what I think is essential to classify cases and

treating different type of cases differently we do need judges to act like judges, and you can't fly around judges that won't with any kind of rules.

CHAIRMAN SOULES: Carl.

MR. HAMILTON: I just want to talk about the judges just a minute and respond to Judge Guittard. We had a lot of discussion about judges that don't want to take charge and do things and recognize that that's there, but I guess we kind of think that under both systems, either under Steve's committee's system or our committee's system it's going to evolve into the lawyers putting together these pretrial orders and these scheduling orders.

In his system it's going to evolve into lawyers getting together and saying "We are going to waive all of these rules. We don't want any limitations on us" and getting together and entering an order waiving all of these rules, or they are going to go to the judge and say, "Judge, we can't do it in this time. Let's waive the rules," in which event you have got judge involvement there, so why

not have it to start with.

Our approach is that the lawyers don't even have to go to the judge for the scheduling order if they can agree to it. If not, that doesn't take much time with the judge. Secondly, at the pretrial stage initially it may involve some time for the judge, but I think as a system goes on the lawyers will get to where they can anticipate their needs in the case better than the judge can, but they are going to fill in the blanks as to when all of these things have to be done, what witnesses are going to be deposed, and really all the judge is going to do is sign the order on it and take care of the disputes as to several of the items or one or two items in the whole order.

So while it may take the lawyers two or three hours to put this together we don't envision that the judge is going to be involved that whole time but will be available to iron out disputes on certain items that have to go into the pretrial order. So we think that even though judges that don't want to participate are going to have to, and

that's why we have provided in the rule that it's mandatory that the judge do that pretrial hearing even if he only wants to spend five or ten minutes on it, he's got to spend some time on it. He's got to sign the order after the lawyers fill in the blanks.

CHAIRMAN SOULES: Okay. John Marks.

MR. MARKS: I would like to follow-up a little bit on what Harriet said and just raise this question. Are we really satisfied that we have identified the problem with the system, and if we haven't identified the problem with the system, maybe we need to spend some time doing that before we look at the fix.

CHAIRMAN SOULES: Okay. I think what I really want to try to get a consensus on is whether there should be mandatory involvement by the trial judge early on in the case.

MR. MARKS: Let me just finish. Let me say one more thing. I don't know at this point considering what's been said around this table that it's really appropriate to ask

that question right now, Luke, because if everybody is like me, I'm confused.

CHAIRMAN SOULES: Judge Cochran.

HONORABLE ANN TYRRELL COCHRAN: Well, I would like to try to answer anyway. One of the real problems that trial judges have and that trial judges give to lawyers is -- and I'm afraid what a mandatory conference or order or anything will do is that judges have tended -- and it's only been in the last ten years that any kind of trial management theory has come to Texas -- that initially the response has either been complete laissez-faire. You know, let the lawyers bring me the problems, and I will try whatever case it is the lawyers say are ready to be tried, and that's all I'm going to do, or the micromanagement that ends up taking simple, fairly inexpensive cases and, you know, judicial involvement ends up making those cases cost as much as a federal court case when the lawyers wouldn't have done it.

That's what I'm afraid happens if you get a mandatory report this needs to be -- and a

lot of this for those of us who have sort of gone through a, you know, go to some court management seminar that they had California and the experts are telling you what to do, and you come back, and I did this. I mean, years ago I came back and said, "By God we are going to get organized and make everybody fill out the same," and then I realized that all I was doing was wasting everybody's time and money on things that I didn't need to know who their witnesses were.

I want to know how many and how long they thought they would take so I could tell the jury how long they thought they would be there, but as long as the lawyers knew why should I be requiring the extra work to be federal judging and go make it and that, you know, after working through the disaster of the certification system and the individual case management, you know, finally although I'm a slow learner, it took me years of just experimenting and watching what experiments my colleagues were doing, you know, to finally realize that for this area the essence of good judging was taking the time not to have a

pretrial conference in any case, but taking the time and having the sensitivity to figure out which cases would be helped by this and which would, you know, be nothing but harassment and unnecessary expenditure of money.

That's something that I don't think any rule can write, but the rule needs to recognize that there are those two types of cases and not two types of cases from your point of view of, you know, the very complicated cases that the people here in this group handle versus the 95 percent of what trial judges have to deal with, but even with that, I mean, some of the most complicated cases with the best lawyers in the state require a judge to do nothing but declare a recess from time to time, and you know, rent them the hall, you know, and bring the jury panel over, you know, require less judicial intervention.

And some of my most complicated cases in the last 11 years have been ones that all this was going to be done by agreement. The lawyers had it all worked out, and my

requiring it to be -- so you can't categorize it by rule, but there are some times when this needs to be done and some times when it's silly. So as far as the mandatory, I have a big objection to that.

CHAIRMAN SOULES: Just keep in mind we have got, I guess, thousands, at least hundreds of tax cases.

HONORABLE ANN TYRRELL COCHRAN: I know, but not even counting tax cases. They are just on their own list. What I am talking about --

CHAIRMAN SOULES: Family law cases.

HONORABLE ANN TYRRELL COCHRAN: Yes. That's right.

CHAIRMAN SOULES: Suits on promissory notes, collection cases.

HONORABLE ANN TYRRELL COCHRAN: Consumer cases.

HONORABLE SCOTT BRISTER: Car wreck cases.

HONORABLE ANN TYRRELL COCHRAN: Slips in the grocery store.

CHAIRMAN SOULES: Hundreds and

hundreds of others of those cases.

HONORABLE ANN TYRRELL COCHRAN: And those are most of what get tried. Most.

HONORABLE SCOTT BRISTER: The majority of my jury trials in the last two years were car wrecks and slip and falls.

CHAIRMAN SOULES: Doyle Curry.

MR. CURRY: I wanted to just make a comment if you are going to ask that question that what's really going on in the Eastern District. The scheduling conferences they call them, I've been to maybe half a dozen now in the last two years. Other people at my firm have been to them, and to my knowledge, not just ours, but anywhere in the Eastern District I don't know one that's lasted two hours. I do know one that's lasted 20 minutes one time. That's the longest one. They are usually five, seven, eight minutes, and they are over.

And what it amounts to, it's usually handled by a magistrate, which is another problem. We don't have the facilities to do it, but they ask a series of questions, and the parties are required to bring the people

who make money decisions. That means the plaintiff has got to bring his client if it's an injury case or whoever makes the money decision, and the defendant has to be there and listen to the answers to those questions, and one of the questions they ask is "Starting from today forward how much do you anticipate this will cost both expense and lawyer fees through the entry of judgment?" And many times the people listening to what their expenses are going to be will wind up settling the cases.

It's not so much to schedule a case as it is it's making the two lawyers do enough preparation in the case to get together for the scheduling conference. Everybody is there, and you have to say, "All right. Have you discussed settlement?" You don't tell them what it is necessarily, but you say "Have you discussed settlement" and so on, and all of those things, bam, bam, bam. It goes within five to seven minutes you are out of there, but the important thing is it settles a lot of cases, and the scheduling deals are usually mechanical, as Carl pointed out, to

both plains borrowed heavily from the federal system.

I believe Steve pointed out they got theirs from the judges local rules, but the management conferences are really not pretrial conferences as such. Everything is pretty well set out in the plan, and they run through the schedule, and it works pretty well except in some areas, and what Carl pointed out is that what we are trying to do is make things cheaper, make things cheaper, and if we adopt -- and this is, I think, pretty well a unanimous feeling in the State Bar Rules Committee. If we adopt a substantial disclosure provision that's strict and requires a substantial disclosure, that it will give all the information that you need in most cases. You won't have to do much other discovery, and with that there won't be much need to limit discovery.

CHAIRMAN SOULES: By mandatory you mean upon request?

MR. CURRY: Well, no. The mandatory one is according to the State Bar Rules Committee. Why make a request for

something if the lawsuit is important enough to be filed?

MR. HAMILTON: Well, it's on request.

MR. CURRY: Oh, I did not know that. We had discussed that both ways, but to me, why go through the process of making a request? That's just another lawyer billable effort that you have to make. If you have got a lawsuit filed, you are going to need some basic information.

MR. HAMILTON: The reason for the request is that you may not need all the items in the list and you just specify which ones.

MR. CURRY: That's true, but when you are responding and you know that, too, and you can just write "not applicable" if it doesn't apply to your case. The other thing that I wanted to mention is that the way we operate nowadays -- and I think you all do the same thing. We operate from the date of the trial back, and I do only personal injury, and that's why it's so effective. If you do contracts or things of that nature when you

can put it in the can, and it doesn't matter. Once it's in the can you can use it later on, but in a personal injury case if you are the defendant, and you want a medical exam, and you get your medical exam, and then you depose your doctor, and six or eight or nine months later or a year later, and probably a year later you are going to trial.

Then you are up there with your defensive tool that's not worth the paper it's written on because the guy who was going to testify said "Oh, my condition has changed since then. I have got so and so and so and so.

CHAIRMAN SOULES: Or death.

MR. CURRY: And you throw that away. The same with the plaintiff. If you are talking about medical information that's a year old or testimony that's a year old, well, what's happened in the interim? That plaintiff has either gotten completely well or he's gotten completely worse or three surgeries since or anywhere in between. So none of this works in a personal injury case. So that's the problem, and it was a general feeling of the Rules Committee that if we had

really substantial disclosure provisions, request or otherwise, a substantial disclosure provision, that that would get enough information to settle a lot of cases, and you would not really need to limit anybody on their discovery, and you could then start from the trial and come back, though we have some areas we are working on on all of that. Isn't that basically what we were talking about?

MR. HAMILTON: Yes.

MR. CURRY: And get in the situation where instead of moving trial by ambush at the trial, you are moving it to trial by ambush in discovery, and that's what we were trying to get away from and make it a little bit, as Steve put it, a kinder, gentler system.

CHAIRMAN SOULES: Okay. Everyone is going to have an opportunity to discuss all the issues across this whole panorama of problems, but the chair would like to get some consensus on whether or not mandatory involvement by the trial judge is going to be a predicate to whatever we do. Now, we can revisit that. We are going to

talk about these rules for a lot of hours before this is all said and done, but just to give us some guidance of your disposition at this time is there anybody else who wants to speak to that issue that hadn't been heard on that issue?

MR. JACKS: I have a question I want to ask Carl.

CHAIRMAN SOULES: On that issue?

MR. JACKS: On that issue.

CHAIRMAN SOULES: Okay. Go ahead.

MR. JACKS: And that is, Carl, in your committee's approach would it be consistent with that to have conferences more like the ones that Doyle is describing where the judge basically is -- you know, it really is more of a scheduling than a full-blown micromanaged pretrial exchange between the judge and counsel?

MR. HAMILTON: Yes. Our rule provides for both. It provides first for the scheduling order which the judge doesn't have to be involved in, and the lawyers put that

together, and all the judge has to do is sign it, but then the second thing it provides is the management conference, which does deal with any motions, dilatory pleas, discovery schedules, trying to define the issues of the discovery, identify the witnesses, so that the witnesses are going to be identified and may cut down on the number of depositions that are going to be taken. Stipulations, identify legal issues, all of that is in that management conference.

MR. JACKS: Would it be permissible for a judge at the management conference to basically have the lawyers walk in and say, "Lawyers, do you have any problems? Is there anything you need me for? Do you know where you're heading?" And if the answer to the first two questions is "no" and the last one is "yes," "Thank you. I will see you later."

MR. HAMILTON: All he has to do is sign their order, just sign their order. Then that sets everything out.

MR. CURRY: You can do it without even appearing, just do it in advance.

MR. HAMILTON: That's right.

MR. JACKS: And it seems to me much of that can even be done by Rule 11 agreement and the judge wouldn't even have to sign the order if the system would provide for that, and it's fully as enforceable.

MR. HAMILTON: Well, the reason for the order is if there is going to be limitations on discovery the lawyers need some protection by court order that here is what the judge has ordered by way of limitation.

MR. JACKS: But if the lawyers have worked all of that out and they are in agreement, why should the judge have to sign an order about it?

MR. HAMILTON: Well, what if you get off and didn't take the right deposition, didn't schedule the right witnesses? At least you have the protection that the judge has ordered and done this way.

MR. JACKS: I guess to me it seems as enforceable. A Rule 11 agreement is as good as the pretrial order in that sense. It's easily enforceable.

MR. HAMILTON: It could, but it

may have a different connotation in the malpractice arena.

CHAIRMAN SOULES: All right. Paula Sweeney.

MS. SWEENEY: To answer your question or the question that you are asking from my standpoint, we run, I think, a huge risk when we try to make everything a square peg because we have got some square holes and we have got some round holes, and I don't think we can put the same designation and the same procedure on every case. If you try to get the judge involved -- and that's one of the things you are trying to do. By trying to force the judge's involvement in every case somewhere early the vast majority of cases don't merit it, don't need it, don't want it.

It's going to cost money. You can't get before the judge. Once you do get before the judge you are not going to get anywhere. It's not going to accomplish anything except to cost people, cost the litigants, a lot of money that they don't need to spend. In the cases where it is necessary there ought to be -- court intervention ought to be

available. It ought to be an option that the parties, any party can opt to enter, and then involve the court, but if you try to make it mandatory in every case you are going to end up, I think, increasing the cost and slowing down the system rather than the other way around.

CHAIRMAN SOULES: Anyone else on this issue? Robert Meadows.

MR. MEADOWS: Luke, a moment ago what I wanted to address, which is in the context of the question on the floor, is whether or not there is a problem, and I think it's indisputable that lawyers, judges, and the public believe that litigation costs too much and takes too much time, and the reason for that is discovery, and I think it's the mandate of this committee -- at least it's my understanding that it's the mandate of this committee to do something about that, but we have to do something about it that will work in the state courts. That's my problem with what Carl's committee is proposing.

I think what we need to do is to agree which direction we are going and devise some

plan as to how to get there rather than bogging down in sort of a random discussion of the details of the subcommittee report, but in terms of the mandatory disclosure, I don't like it for the very same reason that Paula said, that it's not right for every case, and I don't like it because lawyers don't like it.

I think that there should be some nonobjectionable matters that you have to give up, but I think you should have to give them up only if you are asked to, and that's the way I would rather go, and I would also like us to figure out which direction we're going and devise some approach to orderly proceed so that we are either going to work off the subcommittee report and talk about it because there is a lot in it to talk about. There is a lot in it I want to talk about. There are parts of it I don't like, but I think we can't discuss these two approaches in tandem. I think we need to figure out which way we want to go and devise some thought as to how to get there, but in answer to your question, I'm not for mandatory disclosure in every case.

CHAIRMAN SOULES: In response

to that what the chair is trying to do is get at least a start on the philosophical issues by trying to determine whether or not we are going to have early involvement of the trial judge, not mandatory disclosure but early involvement of the trial judge by some scheduling order either submitted by agreement of the parties that you just sign, he or she just signs, or require that in the absence of that that there be court intervention soon after the case is filed in order to get that set up and going.

That's what I would really like to talk about so that we can -- because if we are going to require that, then that's a big departure from the subcommittee's report. If it's not going to be required, that's a big departure from the State Bar's report, but it does give us a basis on which to start blending these from the predicate of early involvement of the trial judge or not, and that's what I really want to talk about until we -- and then maybe we can't get a consensus, but I would like to see if we can't get a consensus on that. David Perry.

MR. PERRY: Will you accept a motion?

CHAIRMAN SOULES: Sure.

MR. PERRY: I move that we operate on the premise that the rules should cover most of the cases including most major cases and that the need to go to court for special assistance with scheduling orders and that sort of thing be an exception rather than the rule.

CHAIRMAN SOULES: Is there a second?

MR. SUSMAN: Second.

CHAIRMAN SOULES: Steve seconds, Steve Susman. Any further discussion on that? Okay. Those in favor show by hands. 17, I think. Those opposed?

17 to 2. So that motion carries. Why don't we take a 10 minute break and try to hold it to 10 minutes, and we are going to adjourn at 12:30. So let's be back here at 11:20.

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

CHAIRMAN SOULES: Let's get back to work. Okay. The next thing I would like to go to because I think it's -- and there could be disagreement about this. If there is, so be it, but the next thing I would like to go to is the scope of information to be disclosed, call it voluntarily, whatever word we want to use. First of all, I would like to get a consensus of the committee on whether or not that information should be mandatory in every case or available upon request. So far I think everybody is in agreement that it should be done upon request, but we don't need debate on that.

How many believe that whatever is the scope of information that's disclosed, rather than discovered, if we can use the words to contrast what I am talking about, how many feel that should be only upon request? Show by hands. 17. How many feel that it should be mandatory in all cases?

So that's unanimous. Okay. Now, let's go to -- we have got Steve's report on page 9, the subcommittee report on page 9 captioned "Standard requests," and we have got Pat

Hazel's draft under his May 13th, 1994, fax transmission that starts on -- well, it's numbered page 1, but it's about the fifth page back.

MS. SWEENEY: Say again.

CHAIRMAN SOULES: Fifth page back on this one, Paula. Everybody got that?

MR. GOLD: Turn it so I can see it. Oh, I've got it.

CHAIRMAN SOULES: Okay. On about the fifth page back it says "Proposed rule on disclosure," and this proposed rule on disclosure is a rule that the, what, Discovery Subcommittee of the State Bar Committee on Rules has drafted and approved that has not been approved by the entire committee, State Bar Rules Committee, but it's got a lot of work in it, and Steve's also likewise is here on page 9, and they have done work on that, too, and I don't have the task force's. Does the task force vary much from these? Anyone know?

MR. PERRY: It's very similar

CHAIRMAN SOULES: Very similar. Okay. So we can work on these as concepts or

ideas maybe.

MR. PERRY: I think both of these are derived from the task force, and I don't think it would serve any useful purpose to go get the task force.

CHAIRMAN SOULES: Okay. Good. Appreciate that input. Alex Albright.

PROFESSOR ALBRIGHT: On the State Bar Committee you-all had put in the mandatory disclosure in health care suits, and I know Tommy Jacks has been working on that, and I'm just wondering how they fit together, and if it does make sense to put them into mandatory disclosure, or it was my understanding that the Legislature had the Supreme Court appoint a committee that had the authority to work on that, and I'm wondering if it should be separate from our rules because that makes two parallel tracks going at the same time.

MR. JACKS: I mean, ultimately that's going to be up to the Court obviously because in either event it's the Court that promulgates whatever is done either from our panel or from one of these committees. The

approaches that have been taken are different, and I don't think it affects what we do here. I guess all I would say is that it probably would make sense for this committee not to expend a lot of time on that issue because the Court is going to have it pretty well developed from both committees and then can make a determination, and Justice Hecht may feel differently, I don't know, about it.

JUSTICE HECHT: No. They do point out two things, though. Two of the philosophical issues and the approaches are how thorough should they be. Should the disclosure be more thorough or should it be more bare bones, basic kind of information, or I guess, a third alternative is staged where there is even stages of disclosure, and secondly, should it be tailored to particular kinds of cases, should there be a different set of disclosure rules or at least a different second or third stage set of disclosure rules for family cases versus medical malpractice cases, and all we have, all we are dealing with, is whether there should be standard form disclosure, basically,

interrogatories in medical malpractice cases.

PROFESSOR ALBRIGHT: If I can make a procedural motion based on those responses that we for now take this health care stuff out of here because I think that gets into a bunch of nitty gritty questions that we may not want to decide right now. Why don't we focus our attention now on mandatory disclosure that affects all cases?

CHAIRMAN SOULES: Okay. I think that's a good point, so for now let's just set aside that there will or may be special provisions for health care provider suits and talk about other suits or suits in general. When we get done it may be that the health care provider suits only need some modest amount of additional mandatory disclosure, or they may need a lot more, but we can get to that later on. Steve Susman.

MR. SUSMAN: As I see that, I mean, once you take out -- I mean, if you take out the funky health care kind of stuff, issues, and say that you are going to leave it for a different day there may be special cases, family law cases, health care cases,

that will develop their own special set, and basically what we are talking about is we are not talking about mandatory disclosure. That's a misnomer. Okay. We are talking about types of information that you cannot object to providing. That's what we are talking about. Types of information that you cannot object to providing, stuff that would be asked for.

It seems to me that the big difference between the Hazel report, which I'm just looking at now, and what we have done is the Hazel report will require a great deal more information to be provided upon request at the front end than ours will. For example, we require the disclosure of potential parties and persons with knowledge of relevant facts. Hazel requires that you also provide a summary of the main facts about which the person may have knowledge or discoverable information which are favorable to the requested party.

That to me strikes me as very much like make work that the marshalling kind of contingent interrogatories that say "Marshal, tell us everything you know, lay it out in

advance," but that's one big difference. If I look over here, factual bases, I'm sure -- at the top of page 3, item 6 of the Hazel report. "The factual basis upon which, if proven at trial, would establish each claim or defense of the requested party." Even in our contingent interrogatories we only ask factual theories, kind of general pleadings. This is marshalling facts, again, I am convinced.

"The claims or defenses of the requested party and the legal theories upon which each claim or defense is based. Such legal theories shall be set forth with sufficient specificity to give the requesting party adequate notice to prepare for trial with respect to such legal theories, and when necessary for a reasonable understanding of the theories, citations of pertinent legal or case authorities." Again, I think that probably we have dealt with this under the heading of contingent interrogatories, but I suggest that this is much more comprehensive and would require much more work I think than ours.

The damages, "Each element of damages to

be listed," and then there is a whole list of damage things there. So I believe that ours is -- we don't have that kind of information. Otherwise, those seem to be, on a quick reading, Luke, the main differences, and I mean, I guess the real question is does it make sense to require as much disclosure as Pat suggests. My sense of the matter is that that's -- his suggestion requires too much and that, in fact, what it requires will not be in lieu of depositions but in addition to.

CHAIRMAN SOULES: Okay. Richard Orsinger. I'm sorry. I cut you off.

MR. SUSMAN: I'm through. I'm through.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: I was just kind of evaluating these proposals at a broad level, and I ran some quick numbers on the deposition limitations. If the lawyers are billing an average of $200 an hour and they are limited to 50 hours per side and assuming there is two lawyers at every deposition, we have just limited deposition expenditures on

discovery to $40,000 of lawyer time and maybe another 8 to $10,000 in court reporter expense. So our deposition limits have limited the deposition part of discovery for a lawsuit to $50,000.

The time window we are talking about, six months, right now in San Antonio in a family law case I can get a jury trial setting 90 days to 120 days after I request it. I could see that the six-month discovery window is probably going to shoot that, and I will probably have to at least wait six months to get a jury trial. The nonjury trials I think are running about 10 to 12 months. Non-family law trials, non-family law jury trials are running, say, 10 to 12 months after you request a jury.

This whole subcommittee approach, I think, is dealing effectively with the big litigation that requires a lot of depositions and a lot of lawyer involvement in discovery, and it may very well address the discovery abuse that's occurring at that level of our legal system, but that the bulk of our cases are going to be beneath these limits and that

the subcommittee proposal doesn't do as much for the smaller cases to contain them or to make them cheaper and more efficient as it does the bigger cases.

And having thought that, then I said, well, what can you do to make the smaller cases cheaper, too, as well as making the bigger cases cheaper, and it seems to me that the only thing you can do is to substitute deposition time, which is probably one of the most expensive forms of discovery, substitute deposition time, get something else besides sitting around and blindly asking witnesses questions and trying to elicit information a morsel at a time with 400 hours -- $400 an hour being billed for that process.

If that's right, if everybody agrees with that, then that ought to incline us toward broader-based mandatory disclosure with more of a responsibility on the lawyer to marshal his facts and present them, maybe not from the standpoint of interviewing 30 potential fact witnesses and saying what they are going to say, but maybe just being more precise about what your contentions are, about what you

think the bases for your contentions are, more -- I don't know what, but I guess I'm not suggesting solutions here. I was just suggesting a focus.

My inclination is that the smaller cases are going to be more reachable through mandatory disclosure than they are through limitations on deposition time that don't kick in until you have already spent $50,000. So while I have some severe problems with the State Bar Committee proposal on gathering what's in the mind of your potential fact witnesses and all that and putting that all in in the mandatory fashion, I'm inclined to have more detail than what Steve's subcommittee does because Steve's subcommittee is really bare bones in terms of mandatory disclosure upon request, and that if we are going to reach the small to medium cases where a lot of money is being wasted and a lot of dissatisfaction is being generated we may only be able to reach it by putting more responsibility on the lawyers to either plead more specifically or to file answers to interrogatories that set out in a clear

picture what their contingents are and what evidence supports it.

CHAIRMAN SOULES: Okay. My impression of disclosure versus discovery is that whatever we write as being within the scope of disclosure, that's not going to be objectionable because the court is going to say "If somebody asks you for that" -- I mean, the rules are going to say if I ask Orsinger for this information that's in the disclosure list, he has to give it to me.

MR. ORSINGER: And you don't have to bill your client a ton for drafting what's in the rules already. I mean, theoretically you shouldn't bill $500 to send a letter saying "I want everything in Rule 166 subdivision 3.

CHAIRMAN SOULES: David Perry.

MR. PERRY: Let me just relate briefly the philosophy from the task force that is carried over in the subcommittee's report is basically -- there are a couple of points that I think everybody ought to have in mind. The task force came to be of the opinion that one of the real important things

to do was to try to reduce the amount of paperwork, that the paper discovery that goes back and forth was one of our major problems.

The task force also came to be of the opinion that discovery of facts is much more useful than discovery of legal theories and contentions, and that a lot of the needless time spent on paperwork has to do with trying to discover other people's contentions and other people's legal theories as opposed to facts. The use that was envisioned of the disclosure concept was that it would be primarily applicable in the smaller and routine cases.

Chuck Herring was around here earlier with a law review article that says that in 50 percent of the cases no discovery at all is filed and in about another 25 or 30 percent only three items of discovery are filed, and the concept that the task force had was that this would give people handling those kinds of cases the opportunity with one instrument or one letter request to get very basic, bare bones stuff; that in a major case, which is the place where we have all the problems that

we need to write the rules for, that this would be a reasonably good starting place.

I think we also discussed the concept of trying to develop disclosure that would force the other side to disclose what is detrimental to them and largely decided that that probably wasn't ever going to work, and therefore, why try to make that happen when it's not going to happen in reality. So the result, it was that kind of a thought process that ended up with the very simple bare bones stuff that is embodied in the subcommittee standard requests.

CHAIRMAN SOULES: Okay. Paul Gold.

MR. GOLD: I just wanted to say to the committee some insights that I have because I served on each one of these committees involved.

CHAIRMAN SOULES: Speak up a little bit, Paul. The court reporter is having trouble hearing you.

MR. GOLD: And the idea of the great request that is brought to you from the Administration of Justice Committee was my

idea, and I want to tell you what the thought behind it was because I think that the thought process that's now being advocated for it is a little bit different than the idea that I originally had. The thought behind the standard form type interrogatories when I proposed it was with a goal to eliminate as best as possible the involvement of the court and having to rule on nonsensical objections to very, very standard type of requests.

We were seeing that people were objecting, for instance, to an interrogatory that stated "Please identify all individuals with knowledge of facts relevant to the subject matter of the lawsuit," and people were going down and having to get rulings from the court on this type of interrogatory when it was obvious from the rules that that type of a request was on its face proper. So what the original intent was merely to make certain requests prima facie proper and that it would be only with a showing of good cause that you could come with an objection to certain requests and that that would allow people to get the information that they needed.

It was never my intent and I would resist any attempt to have to make someone on one side of the case do the leg work for the other side, to have to reveal to the other side what their thought process is for trial. If it's not politically correct, then I apologize, but I just believe that a certain degree of advocacy still needs to remain in this. Otherwise, I personally don't want to have to practice trial law anymore. I don't want to just be someone who marshals all the evidence that my side can get and produce it to the other side. That's not what I'm in this to do. I think there is an art to what we do, and I think that a certain amount of that should be preserved.

What I think should be discouraged and what we should be trending toward is the ways in which advocates conceal things that shouldn't be concealed, and by concealing things through nonsensical, frivolous objections to basic requests that should be responded to, and there is a correlary to this, and taking from something else that was said earlier from Carl on court intervention,

there are certain cases. I mean, David Perry, Paula, Tommy, I, Doyle practice in these types of areas where it may be appropriate in a particular case to go a little bit beyond just who are the individuals with knowledge of facts.

It may be important to have a meeting with the judge both sides to say, well, who are the individuals who could best inform us about the type of crash testing that was done? Who would be the individual who would be most knowledgeable about the type of records that this hospital keeps or doesn't keep? Those types of threshold questions that help direct you in a meaningful direction in the litigation but I believe that if you get into a situation where you are having to have each side say "This is what's helpful to me, and this is what's not helpful to me through these facts. These are what the facts show. This isn't what the facts show," I believe that all you're doing is setting up a procedure that's going to result in a need for more court involvement than less, and I wanted just to say what one of the original goals was, and it

may no longer be a goal, was to try and devise a system whereby there was an opportunity to get more information out on the table without the need for court intervention, and that was what was one of the original goals.

CHAIRMAN SOULES: Paul, is this list that was distributed by Pat Hazel, is that consistent with what you're saying here or not?

MR. GOLD: The basic framework of it with the exception of factual bases and claims, all of these were things that when I was on the committee that we originally talked about, certain basic things that you would need. Now, the degree of information that's requested under each topic is something that's been developed since I've not been on the committee, and I do have some concern about the depth of information that's requested because I think one of the things we all have to keep in mind, one of the levels of resistances that the Bar has to this, or maybe not.

Let me say one of the resistances that I have is that a litigant has to be concerned

about how this is used against them at time of trial, and people are concerned that what's going to happen is this is setting a litigant up, say, "Okay. What is your case about and what is the complete factual basis? Disclose all of this." Then when they disclose all of that two things are going to happen. Either they are going to get a motion for summary judgment in which case the other side is going to use their disclosure to say, "Well, you don't have enough facts to have a case. You are out of court." In which case they are going to be very discreet about this whole process, or two, it's going to be used to impeach them at time of trial saying, "Well, this is what you disclosed at the beginning. Now your theories are this and this. Obviously you have had a change of heart."

And it's an exclusionary thing, and that's what I think a lot of people are concerned about. If there weren't that concern about how it's going to be used to exclude evidence or better yet knock them out of court I think that people would be more forthcoming, and I think that some

consideration might be given into how that's protected, but I think that's a legitimate concern on the part is how it's ultimately going to be used. Is it case, issue, witness -- is it a case, issue, witness form of preclusion? And that's a real concern about this disclosure thing, but I don't have an answer to it. I just merely wanted to say what the original thought was in my head when I originally proposed the thing about interrogatories, and as Steve, I think, very appropriately pointed out it's not what's in a mandatory disclosure concept. It was a concept that if you ask these things someone could not, except for an extremely good reason, object to it.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: Let me just respond to a few things. The reason for the paragraph 1 or 166(a)(1) with the broad, if you will, disclosure of persons with knowledge of relevant facts is this: that we now have a rule which says all you have to do is list persons with knowledge of relevant facts, and

that's all, and so in some cases you will get, depending on the size of the case, 20 or 30 people listed. Some may have three or four hundred people listed. The whole purpose of this is to try to devise a way that you don't have to go take 400 depositions, to try to force the party to tell us enough information about these people that we will know who do we want to go depose, who are going to be the key players in this litigation.

Paul suggested perhaps going before the judge and doing that and then I have no problem with that. There just has to be some way though that we narrow the list from 400 people down to a number that's workable that people can afford to depose, and one way that we have done it is to require that you give the general subject matter about which the person has knowledge and the main facts about that witness that if you were going to call him for trial why would you be calling him, aand I think in most cases you put a witness on for a particular point or two that you want to make in your case, and that's the idea, is that you disclose the main facts about which

this witness knows if I were going to be calling him as a witness, here's why I would call him. That gives the other side enough information to know do I want to go depose this person or not.

Now, we didn't go the next step and say "Tell us also the unfavorable facts that the witness knows" as the federal rules do because like they say there would be too much opposition to that. That would never pass, and this one may not either, but that's the reason for that being in there. We do not intend by these rules to create a situation where people are afraid to do anything because it's going to come back to haunt them at the time of trial, but that just may be the nature of the beast because if you are going to make proper, correct disclosure of what the facts are and what the information is then you should be bound by that at trial, and if the facts change, then this rule provides that you have a duty to supplement, and you can supplement at any time whenever the facts change so that once you get to the time of trial theoretically if things have changed in

the disclosures then you should have filed something that would get it up to date.

Now, on the question of summary judgment, yes, that's part of the intent. If a lawsuit is filed without a reasonable investigation, without a reasonable basis, shotgun pleading, then these requests are served upon the plaintiff, and the plaintiff answers or doesn't answer or doesn't provide sufficient facts which will support him at the time of trial, then a summary judgment may be proper.

And it's my understanding that this committee has a subcommittee working on summary judgment rules that are moving toward the adoption of the federal system rather than the system that we have now, which would go hand in hand as the way that this rule is written so that this does require a plaintiff to do his homework, get his facts together so that if he does have a case, he can state what the case is in response to these requests, and he's not going to get a summary judgment against you, and that comes over on page 3, which is the factual basis, which I mentioned earlier is designed to take the place of

special exceptions and is designed to require that a party articulate the factual basis which if proven at trial would establish the claims of defense.

I think it should start with the legal theories, and you know, this is not something that's hard to -- there is big objections to people stating legal theories. That's not going to make a great deal of difference, but our committee thinks that in some cases it's important if you don't understand the nature of the claim or the nature of the defense and some weird statement is made as to why the party is not liable or what the basis of the claim is, it's helpful if the party can articulate some legal theory or basis for it or basis for the defense.

It may avoid the filing of an unnecessary motion for summary judgment, or it may avoid some other disputes when a full disclosure is made as to here is what my case is, here is what the claims are, and here is what I think the law is to support them, and defendant has to do the same thing, and so that's the reason for these; and with respect to damages, Item

No. A, this is a claim -- I mean, this is a matter that is argued about continually because the defendant claims that the plaintiff hasn't given him enough information about what the damages are, how you are going to calculate it, what the theories are, what the basis for the claim is, and all this is designed to do is to require a plaintiff to set forth in particular form what the basis for the damage is and how you calculate it, and that -- I don't know why that should be a problem.

We are not asking you to do things like damages on the amount of pain and suffering or anything like that, but it's that that's capable of being determined by some calculation ought to be disclosed and how you calculated it. I think everything else is pretty standard in those interrogatories anyway. The item that I think the motion was addressed to is Item 12 on health care provider suits, which we will leave out of this, but the other things I think are fairly nonobjectionable, but that's the reason for some of these things being here.

CHAIRMAN SOULES: Okay. Steve had his hand up first, then I will get to you.

MR. SUSMAN: I guess my general attitude is that if Carl and I were negotiating and he would agree to my 50-hour limitation, six-month limitation in exchange for my agreeing to whatever goddamn disclosure he wants, I would make the deal. Okay. But I'm afraid that he wants both. I'm afraid he wants the disclosure. Then he wants more than 50 hours, and he wants more than six months, but if I had to swap him on a negotiation, and say, "I will make whatever disclosures you want as long as it's going to be a real substitute for the more expensive depositions and other things." Fine. We will do it that way.

So, I mean, that's my -- my first question would be is this going to be a substitute or in addition to? If it's in addition to, you have not done anything to control discovery. You have not done anything to eliminate discovery dispute or anything at all. You've just -- I mean, this is just more icing on a cake which is already too big, in

fact. Insofar as the particular disclosures that he's talking about Footnote 3 on the first page demonstrates the real problem of this whole idea of disclosure. I mean, by the way of the public largely viewing that Footnote 3 we would as a profession would be made to look like fools.

You have to disclose things that are favorable to your side. But if there is any unfavorable on your side, you say, "Ya-ya ya-ya ya-ya. It's your job to come find it out." What kind of officers of -- what kind of officers of what kind of courts are we to have the hudspeth to put this in writing, that you better disclose things that are favorable, but if it hurts your client's position, you can be -- you can tell a half truth. Okay. Tell a half truth. That is the whole problem with this whole deal about trying this disclosure.

That's why there has been such resistance to it on the federal level because somehow it seems a little -- it's just not quite the adversary system, and that's why there has been such an uproar among the Bar, and that's

apparent here in the Texas regime. Solved it with Footnote 3, which I hope never sees the light of day. Insofar as, you know, things are -- I mean, again, I don't think there is a big difference on -- I mean, on factual basis of claims and defenses we can probably basically we are talking -- I don't think that's so terribly different than our contingent interrogatories. I mean, maybe it's a little more detailed.

I acknowledge we had problems writing those to begin with, but certainly -- and I think it again is a question of are you making a party pretry their -- totally just marshal their facts in having gone to that extent. But I think that, you know, the images, I mean, sooner or later that those are, I guess, appropriate questions to ask as long as it's mutual, goes both ways. The other side has got to make their claims about damages, too.

I would have no problem, by the way, with a rule, Carl, that said at the beginning of the case both sides have to identify as best they can by pain of something the witnesses they will call at trial if the trial were

tomorrow and have to update that monthly. Okay. That is quite different than a list of all people with knowledge, a 400 list where you have got to describe people you hardly know what knowledge there is, but if we had a system where at the very beginning you had a "Here's who we will call as witnesses if I go to trial tomorrow," and it was periodically updated every month, I don't have any problem with that system. I think that may be fine if there is some way of enforcing it.

MR. CURRY: Can Steve comment to the time in the federal system that they have got in the Eastern District? Both parties disclose 30 days after the answer is filed, and in this one it's proposed by the subcommittee to the Rules Committee. The Rules Committee hasn't gone through it yet. It's just a subcommittee deal. The plaintiff discloses a certain time after request which can be furnished with the answer, and then the plaintiff can't make his request until 45 days after the party has answered in court in this one. Do you have a comment to make about those changes, those differences and the

difference in yours?

MR. SUSMAN: I'm not sure there was intended to be -- all of this information, all of our information would be gotten through interrogatories, and interrogatories can be served with the petition obviously. I think when they are served with the petition the defendant has 50 days to answer.

MR. CURRY: But the problem with it is the disclosure is supposed to save the necessity of a lot of discovery, and if we are going to do that, they need to come in earlier. At least that's what the purpose of the disclosure is, and in this rule we have got a 45-day gap between when defendant does his disclosure --

MR. SUSMAN: Which rules?

CHAIRMAN SOULES: You are talking about the State Bar proposal?

MR. CURRY: No. I'm talking about the subcommittee for the -- yeah. The State Bar proposal. Page 5. That's different, and it's different from your rule, too, and I would like for you to comment on that what your feeling was.

MR. SUSMAN: Yeah. I mean, we would make ours -- ours, the timing would be different on ours, and that is the timing on ours would be whenever you can currently under the rules serve an interrogatory. You can ask for these nonobjectionable things, but plaintiff can serve an interrogatory with his petition. When he serves it with the petition my understanding is defendant has 50 days in which to respond. The defendant can serve it at any time, and the plaintiff's got 30 days in which to respond. So if --

MR. CURRY: You would just use whatever rules we have got?

MR. SUSMAN: Yeah. If plaintiff's counsel is alert and wants this kind of information they will routinely serve us with a petition. Defense counsel as soon as they get hired will fire off a set of interrogatories, one set to the plaintiff seeking the same kind of information.

CHAIRMAN SOULES: Going to, Steve, your initial point there about if you and Carl were negotiating how this might work out, that really gets to the organizational

approach that the chair is trying to take to this. I think that the degree of detail and the, what, nonobjectionable disclosure to use that phrase is going to drive some of the considerations as to if we get this level of detail and the mandatory disclosures upon request, then how many hours of depositions do we need, how many more interrogatories. In other words, how much discovery do we need once we establish the disclosures that we are going to be required to have as a predicate to discovery? Disclosures and discovery being conceptionally now two different things.

MR. SUSMAN: Well, I will give you the position of the subcommittee. We are willing to deal, and we will swap off specificity for the time limits. How about Carl? Let him talk.

CHAIRMAN SOULES: I think the committee is going to -- excuse me. I think the committee is going to -- I mean, my sense of this committee's attitude as a whole is that if we can get enough disclosure then discovery is going to be limited. That's the approach that basically the State Bar started

out with, and they haven't reached the issues of exactly how much time of depositions.

MR. CURRY: No. This is a subcommittee report; is it not? And then the State Bar Committee has not gone through this yet.

CHAIRMAN SOULES: Haven't reached that.

MR. CURRY: And there is a substantial pending in the State Bar Committee right now that the stronger and broader we make the disclosure the less need there is to limit any kind of discovery there because you get so much there that automatically will eliminate the need.

MR. SUSMAN: The less need there is to limit it?

MR. CURRY: To limit other discovery.

CHAIRMAN SOULES: I don't think that's the sense of the committee.

MR. SUSMAN: I would think the other way. See, they are using disclosure to justify no limits. That seems to me to be saying things off their head.

MR. CURRY: That's not the committee's feeling. There is a substantial group that feel that way.

MR. SUSMAN: All I'm saying is that means give me something and then if I want something else I will get it, too, and that's not right.

CHAIRMAN SOULES: Okay. Let me tell you what direction I am trying to give our committee and that is to get a basis of disclosure and then to take that to consequential limitations on discovery or correlary limitations on discovery. Now, that may not work, but that's where I think we are headed, and that's where I am trying to get to, and I don't think we can get to limitations on discovery until we have some predicate for what's not going to be discovery but what's going to be disclosure, and I agree with you that it's going to have to be a trade-off and a compromise, and so what I would like to do is try to focus on the scope of disclosure and then go to the issues of their -- if we have that, what kind of limitations on discovery can we have as a

correlary to the scope of that disclosure. That's where -- just organizationly that's the path I'm trying to take with the committee as a whole.

John Marks and then I will go around the table this way.

MR. MARKS: I will be brief. First of all, I'm also on the Rules Committee, and the Rules Committee was not in complete agreement about the way these are drafted, but in general I think that the purpose as stated by Paul is where we ought to go, and that is to require certain disclosures upon request that are already required under the rules so that you get that out of the way. And the problem I have about, for example, identifying persons with knowledge of relevant facts, it goes much further than the rules now provide and really creates all the traps and problems that Paul was talking about, but if we cut that out and go through this, in general what is being proposed by the Rules Committee is good. I think it's a good place to start, but I just wanted to make a point that the Rules Committee is not in total agreement about

this.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I vote for bare bones disclosure. I think it's -- a couple of reasons. The concept that we are going to have a long list and attorneys then, "Oh, this is on Case No. 406 I'm filing this year, responding to this year, I'm going to check off items 1, 3, and 7 that I want to request" is unrealistic. I mean, you know, I get contract cases where the interrogatories are if anybody died what's their funeral expenses and stuff like that because the interrogatories are on their word processor, and that's the cheapest way to do it. It's most cost effective to tell the secretary to send out the standard interrogatories on them.

And 98 percent of the cases the request sent out is going to be all items listed in rule whatever. Therefore, I think it should be bare bones. What is it we need? In all of my hurt neck, back, slipped at the grocery store on a grape, cases what that -- the things you need for that case are requested

ought to be all that's in here, and everybody else in the handful of cases where people really work on things like this and spend time on interrogatories, do that under the extensive interrogatory practice procedure that's in the subcommittee draft.

I have two things I want to suggest. One is I like the State Bar's -- it's just a request. I think we get this subcommittee thing to talk about either an interrogatory production, actually items (a) and (b) are interrogatories, (c) and (d) are interrogatories and request for production, and (e) and (f) are request for production. It ought to just be a request, and it includes a list that you have to generate like an interrogatory answer and documents you have to produce like a request for production rather than getting mixed up in what to call it.

And last comment is I like the State Bar's on medical records. I don't know of any defendants that are going to be satisfied with getting the medical records from the plaintiff. No. 1, they don't believe that the plaintiff gave them the right records. They

are going to request them all themselves.

No. 2, if you ask the plaintiff which ones, medical records, are reasonably related a certain number of plaintiffs will say, "Oh, no. Those low back records weren't because this is an upper back case. So I'm not telling you anything about those low back car wreck accident we had a year ago because we are not claiming a low back in this case." Juries don't always agree with that, and so I think the State Bar makes more sense, the list of the doctors you've seen, who you saw, what hospitals you went to, and the defendants are going to want to get those themselves.

CHAIRMAN SOULES: Okay. Next coming around the table. Tommy Jacks.

MR. JACKS: I'm concurring and descending. I agree with Steve that at some point I think it makes perfectly good sense to tell each other who we are going to call at trial and who we think we may call at trial, and I think that's in practice how we deal with the 300 people, the people who nod and roll at the back of the book, usually by picking up the phone and calling the other

lawyer and saying, "Look, who really knows something and which ones do you think you are going to use?"

I don't think that the list of witnesses is a substitute for people with knowledge of relevant facts because we are now under the duty to divulge even those witnesses whose information could kill our case, and we should be, and you don't get that with the "Who are you going to call" because there is no way I am going to call them. When hell freezes over I'm going to call them.

CHAIRMAN SOULES: You are suggesting now that we have a requirement for both persons with knowledge of relevant facts and witnesses?

MR. JACKS: Yes. But --

CHAIRMAN SOULES: Is there any disagreement with that on the committee?

MR. JACKS: I wouldn't do the witness list from day one. I would do it sometime when your are --

CHAIRMAN SOULES: At some point.

MR. JACKS: At a more developed

stage in the case.

MR. PERRY: I think you need to talk about the witnesses separately because people, especially with smaller cases, said that that creates a lot of problems with it.

CHAIRMAN SOULES: Okay. We will talk about that separately. Go ahead.

MR. JACKS: Secondly, I think that in the State Bar's drafts the summary of the main facts is make work and is by and large needless, and there are so many examples where it doesn't make sense. I mean, for example, along the way we are going to be deposing people. Does that mean I have got to go back and summarize every part of every deposition that was favorable to me? It doesn't work well with all of these.

Many people that you list because they do have knowledge of relevant facts, but frankly, you know, like some of the doctors that have seen your client in the past you are going to list them because they may have, but truthfully I'm not going to go out and talk to them, and I'm probably not going to know whether they have facts favorable or not. Am

I under some duty to find out and summarize it?

And then finally I agree with the "gotcha" problem, and that is you are going to have more and more lawyer friction fighting over it. Go to trial and then "Now, Judge, that wasn't in their summary and so this witness can't testify to that." And I don't think it's a good idea.

The others that I have a problem with in the State Bar set are the factual bases and the claims for defenses. That strikes me as much more trial brief type things. It's more onerous even than federal pretrial orders, which is one of the things that makes federal court litigation more expensive and certainly more of a pain in the posterior, and we are importing that into every case if we do this. I don't think we need to do that.

I have even got problems with the factual theories part of the subcommittee's approach. I think it's a slim line between factual theories and factual basis and state all the facts that underlie your pleading of such and such, and I think it's such a thin line that

we ought to just forget about it and not allow any of it. Find out about your case by talking to your witnesses and all the things lawyers do to go to trial and not by doing a lot of choreographic kind.

On the damages part of the State Bar deal I don't have any trouble with the elements and where they are calculable and saying you have to calculate them but having to say how much is for each element. How much for physical pain and suffering on the one hand versus physical impairment on the other, you don't care. You have got to plead how much we are suing you for, and that's all that matters, and again, it's a "gotcha" deal.

If the jury comes back with 3,000 in one category and 4,000 in the other and you had reversed them, you know, there is going to be the argument, "Judge, you ought to cut it back. That's what he answered in the interrogatories." You know, we don't need that kind of tricks. If the defendant knows how much they are going to get stuck for total of those elements, that's all they need to know.

And the last, 8(c), is make work, too, producing all the documents upon which your damages are based. I mean, hell, that can -- you could go down to check stubs and all kinds of things that you don't need, and it doesn't make any sense. That's what I've got to say on the subject. Thank you.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: This is not going to come as a surprise to most people. I strongly disagree with 6, 7, and 8 in the Court Rules Committee for the same reason I am against contention interrogatories. I think it's a way of shifting preparation of the case from one party to the other, and I don't think that's fair.

MS. SWEENEY: Can you speak up?

MS. DUNCAN: Oh, I'm sorry. I don't think it's fair to shift the burden of preparing a factual and legal understanding of the case from one party to another. There is an omission in my view, and I'm not sure how to get to it, that relates to factual basis and claims and defenses, and that's an exchange of proposed charges a lot earlier

than I -- I recently was in a case where I didn't get the plaintiff's charge until the day it was going to be submitted to the jury, and it didn't work very well. It was a complicated legal theory case, but I think you can have an exchange of charges as a part of unobjectionable disclosure in a way and get to what can legitimately in my view be asked as far as the factual and legal basis of the claim, and I don't know if that's something the subcommittee would consider putting in here or someplace else.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: I'm concerned about the scope of these interrogatories as to whether or not they should have a statement of what the witness is expected to testify to. My question is, is the party that answers to be limited by that statement? If so, it would seem to me that there is -- as Tommy Jacks suggested, there is going to be a lot of satellite litigation and a lot of problems with respect to admissibility of evidence and motions and so

forth as distinguished from the case where you merely disclose the witnesses. Can you answer that for me?

MR. HAMILTON: Yes, Judge. I think that that's the most troublesome area of this whole plan is the having to state what your witnesses are going to say or what people with knowledge of relevant facts are going to say, and I agree with Steve's assessment that when we leave it only to favorable information and not unfavorable, that's bad. We recognize that. The federal system provides that you have to disclose both favorable and unfavorable.

Consensus, however, seems to be that nobody wants to do that, and even on our committee we are divided on that score. So I suppose that the best way to handle that problem is just to eliminate that portion of (a)(1) and just require that the witnesses and the people with knowledge of relevant facts be listed together with the subject matter about which they have knowledge and just eliminate the rest of that, which I think would dispel a lot of controversy.

CHAIRMAN SOULES: Why don't we -- what we are trying to accomplish here seems to be, and maybe I don't have it right, is we want enough information to know whether we pick up the phone and call this person and find out what they know or go interview them or take their deposition. Should we follow up because if they were an eyewitness to the collision, okay. We have got to talk to them, or you don't have to talk to them, whatever your decision is.

MR. HAMILTON: But as a practical matter it's still not going to solve the problem.

CHAIRMAN SOULES: But when you start marshalling facts then you really get into a quagmire of problems, and the cases are pretty much juxtaposed now about whether you can get subject, which you can. How much more than that you can get is probably very little. Richard Orsinger and then I will come around the table.

MR. ORSINGER: These are kind of cumulative comments, but I agree, Luke, with your suggestion that we ought to try to

focus on the mandatory disclosure before we address the issue of limits, but in support of what Steve was saying it seems to me if we can move a lot of our work and preparation into these mandatory disclosure areas, that ought to be a reason to have more severe limitations on other forms of discovery and maybe even reduce below the 50 hours per side, not to just lift the ceiling and let everybody go. But there is a double value to that because I also think the bulk of our cases are smaller cases that are never going to hit the 50 hour limit anyway, and the mandatory disclosure is the only thing we are talking about that's going to make a difference to those cases. The 50-hour limitation won't hit the smaller cases.

CHAIRMAN SOULES: Okay. When I get around the table I'm going to -- oh, I'm sorry. Were you not through? Go ahead.

MR. ORSINGER: No, I didn't. I have to disagree with Sarah about the claims or defenses. I think that right now there is a lot of guesswork that goes on in a lawsuit where you have multiple theories and you don't

know exactly what someone's claims or defenses are, and then you take the deposition of another party and they say, "Well, I don't understand all of these legal terms," and so you are kind of frustrated about not being able to find out what the elements of the causes of actions or defenses are.

I think the lawyer ought to understand their case intellectually. They ought to be able to explain by name, or you know, name whatever statutes they are relying on or constitutions or regs, and if it's a recognized cause of action, they ought to be able to say, "This is for a breach of contract. This is for the tort of fraud" or whatever, and let's eliminate that guesswork.

I frankly don't think that ought to be in discovery. I think we ought to do that in pleadings. I think we ought to require that the pleadings set out any statute, constitutional provision, or reg, and if it's a recognized cause of action or defense they ought to name it, and that would eliminate the problem of how do you make the pleadings equate to these disclosures. And I don't

think that's unfair, and that's what a jury charge does anyway.

If you send your proposed jury charge to the other side, you are setting out crystal clear what your claims and defenses are and what your legal theories are and what the elements are. So to me it's not unfair. To me it's fair and the earlier we do that we make lawyers understand their own cases. And if they haven't got a case or if they haven't got a theory, let's get it out early on and stop wasting extra time discovering it.

And then I would like to agree with what Justice Guittard said. I'm extremely worried if you are having to detail what witnesses are going to say that the trial judge is going to preclude you from offering testimony that you didn't reveal in that answer to interrogatory, and that's especially scary to me when we are vouching for what third party witnesses say because how am I supposed to know what 30 people might say if asked a certain question in trial when it might not even occur to me to ask that question until somebody testifies to something at trial? So I'm very worried about

extreme detail and vouching for what witnesses are going to say, but I think we ought to just have a green light for lawyers to define their cases and lay them out so everybody can understand what your litigating. I'm finished.

CHAIRMAN SOULES: Paula.

MS. SWEENEY: The word that keeps coming to mind with a lot of this is that we -- what Paul is talking about is disclosing nonobjectionable material without having to go to the courthouse to have a fight over what does a relevant fact mean or is it work product or not. That has absolutely nothing to do with what some of these rules require, which is to script the trial for the other side, and the concept of scripting is the concept that is eternally frustrating, and it's going to run the cost up for everyone.

It does not advance the ball and is a "gotcha," and we have to stay away and discipline ourselves to stay away from the temptation to ask the other side for their script because we are going to have to give ours up because you can never be thorough in

your script, because we will run into what we have now with expert reports in a med-mal case. There are judges who will hold the report and if the word is not on that page, then it can't come out of their mouth on the stand. It's a script.

And to the extent that we are stumbling periodically in that direction it is, No. 1, not an adversary system anymore. No. 2, it is going to do nothing but drive up costs, increase disputes, waste time and money, and get us completely away from the original purposes which, you know, was to drain the swamp, and we are still trying to drain the swamp, not write somebody a script.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Mr. Chairman, we have nine minutes left, and I did want to speak on behalf of the subcommittee again, and this is procedural, not substantive at this point. We have spent and put a lot of work into this, and of course, we are willing to do more work. We have gotten, I don't think, any sense of direction from the meeting today. So my hyperactive subcommittee and I will have to

stand now for the next two months until we have our next meeting, but I would suggest this for the next meeting.

One, it seems unfair for this group to have a subcommittee where the -- it's not the subcommittee's proposal which is discussed but some other proposal which is discussed, and it is impossible to sit around here at a meeting and deal with three different proposals. One comes in with a fax from some law professor, okay, on the 13th, not even time to be considered by the subcommittee and becomes a principal piece for discussion at this meeting.

You are going to lose a lot of energy and attention from a lot of people who have worked on this, including yours truly, if we don't -- and that's not to say I don't mind a fair fight. Okay. And I hope we come in and go provision by provision and let's vote it in or vote it out, folks, and those who lose -- I am a fair loser. Okay.

But I do sense I am frustrated at coming to a meeting where various other groups who are not part of -- that's not to say -- I

began my speech by saying we considered their proposals such as they existed until May 13th. We didn't consider that one because it came in on May 13th, obviously, but I think it is important that we begin next time with the subcommittee's proposal, and I might add, the subcommittee's suggested order of discussion.

I believe that this discussion which the chair has directed at the disclosure is wrong directed. Of course, I'm not the chair. You are, but I think the upshot of it will be that, listen, everything we did, as I said, standard disclosures, standard requests, you are not going to save any money at all. You are just going to spend more money on the discovery process, something I don't want to be a part of. I have better things to do with my life.

If we are talking about making changes that save money to litigants in our system, I want to be part of it; therefore, I suggest we begin talking about the limitations and then after you decide them, the limitations, then if you oppose them, then you add as much disclosure as you think is necessary to make

the limitations not unfair, not begin your discussion with things that we all recognize are going to cost more money with this hope that, well, maybe if we get agreement on them we can cut down the rest because obviously we know that there are some groups that say if we get agreement on them, there will be no reason to limit the rest because we will exercise such self-restraint that you won't have to limit us. So I mean no one is -- that's why I suggest you begin discussing the limits first and then go to this issue of how much voluntary disclosure, but that's -- I've said my piece.

CHAIRMAN SOULES: All right. Well, the chair wasn't -- pardon me. I was not aware that there was sentiment here not to limit discovery and to use the disclosures as a predicate for saying, well, let's just go on and have unlimited discovery. Now, the approach I felt was important was to find out what we would require in the disclosure process and that that would justify the limitations that your committee has worked on hard and thought through very thoroughly and

get that on the table as a correlary to disclosure, and if I have done that in reverse, I apologize, but to me that was the logical approach to it. Let me get a sense of the committee. How many feel that the disclosures should be used as a predicate to limit discovery?

MR. JACKS: I don't understand. I'm sorry.

HONORABLE ANN TYRRELL COCHRAN: As opposed to what?

CHAIRMAN SOULES: As opposed to opening discovery wide open because --

HONORABLE ANN TYRRELL COCHRAN: But those are the two choices?

CHAIRMAN SOULES: Yes. Okay.

MR. JACKS: Say it one more time, please.

MR. PERRY: Mr. Chairman, I don't think that's an answerable question.

CHAIRMAN SOULES: All right. Why not?

MR. PERRY: I think everybody in the room believes that we are here largely for the purpose of cutting down on the cost

and the expense and the needless trouble of discovery, but it is not and cannot be approached in a simplistic manner. The discovery, you know, I sat on the Discovery Task Force for about two years, and we went through and identified a number of problems and worked a long time on trying to develop solutions, and what you end up finding is that everything you do and every decision you make impacts a whole lot of other areas of the rules.

It's almost impossible to decide on what is the proper starting point, and as you go through the discussions you find that there are many varying opinions that are not anticipated from people that you don't know cared about something, and I don't know that there is any way for this committee to approach the matter other than to start at someplace and start making tentative decisions and go forward with the idea that they may have to come back and change some of those tentative decisions as they go along.

CHAIRMAN SOULES: I agree with that completely, and that's what I'm trying to

do is get some step through this with tentative decisions, tentative orientations so that we kind of know where we are headed even though we may change directions at a later time.

MR. PERRY: Let me also just say very briefly as between these two proposals that we have been talking about, although there has been a lot of discussion on the differences between them, if you start going down them item by item the similarities are very much greater than the differences. Now, it may be true that the differences is where we need to focus our attention, but at some point if we start going through them item by item I think we will find that we are making a lot more progress than we think we are.

CHAIRMAN SOULES: Well, that seems to me to be the case as well, and the reason that the State Bar draft has been emphasized in the chair's approach is that it has a lot more detail in it, and you could -- we will be focusing on this issue or that item and we can reject it or discard it.

The other one is bare bones, and it doesn't have that much detail in it. So there may be things that we may overlook unless we go to something that has a whole lot of detail in it. We look at it, and we reject it or we accept it.

And I apologize to you, Steve, if I mistreated your subcommittee in any way. It certainly was not my intention.

MR. SUSMAN: No. You really didn't. You really didn't. The approaches are really totally different. Okay. We threw in at the last minute this standard request. It was not a keepheart of our thing. It wasn't even -- it was a last minute throw-in, okay, that Scott drafted. We said "Scott give them some voluntary disclosure." Okay. So we drafted it. Okay. It was a last minute thought because that to us is not the important key, crucial, anything, and certainly not money-saving.

The State Bar on the other hand has nothing about limiting the time, limiting the number, nothing like that. Okay. There is a vast philosophical difference between the two

proposals. Let's focus on that difference, not on our eyewash, which was their centerpiece. That's not going to move the ball. That's what I'm saying. To talk about this disclosure rule as a first thing is not really helpful because, you know, no one in our group felt strong about it one way or the other very much.

HONORABLE F. SCOTT MCCOWN: I mean, it's bare bones by design. The things we left out we left out because we didn't want them. We wanted a system that would operate with presumptive limits, and we focused in on making a system that would work for the small case and the small lawyer. And my concern really is sitting through this morning has been frustrating for me because I think that the world, the consumers who use our dispute resolution system, are fed up and that what we have done today is largely play inside baseball and accepted a system that they are fed up with, and I think that's why we have alternative dispute resolution growing so rapidly.

And if we can't come to grips with what

kind of changes are we going to make that get at the real cost and get at the delay and get at the intrusion, unnecessary intrusion, then the Legislature is going to do this for us, and I don't think we are getting there.

CHAIRMAN SOULES: Well, what's your suggestion on how we get there, put the limitations up front and the disclosures to the rear, reverse the order that the chair has taken? And I'm willing to do that. Just that didn't seem to be in my logic, and that's just mine and it's seldom very effective, but that seemed to be the approach to take, and I will reverse that if it makes more sense, and certainly if it makes more sense I want to reverse it.

HONORABLE F. SCOTT MCCOWN: Well, my suggestion is we need to work at a different level of abstraction, that what we need to be working at in this big group is at the big picture level like we began with, is it going to be judge managed, is it going to be limits. Then in subcommittee we can work out a lot of the detail that we focused on today, but I think we need to look at

fundamentally what kind of system we are going to design.

PROFESSOR ALBRIGHT: Can I make a suggestion?

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I think that Steve handled our subcommittee extremely well. We got so much done in a short period of time, and I think Steve has a real good focus on how to take this through so that you-all can understand our approach and why we ended up where we did. So I would suggest to kind of let Steve take everybody through and to decide what votes -- you know, at what point we need to decide, you know, between one approach or another and the philosophical decisions that need to be made because that's kind of how we did it. So he's done it once, and I think he did a very good job of it.

CHAIRMAN SOULES: Okay. Steve, go ahead.

MR. SUSMAN: I guess, too, and there is an issue, too -- I mean, I think kind of an important issue, but that's the chair's

decision, too. I mean, to what extent do we revote and revote and revote? I mean, one of the reasons our subcommittee was able to move forward is we made a decision. We recorded it in the minutes, and we did not go back and rehash it, which in this group is even worse than in the subcommittee because there are a different group of people that show every time. I mean, obviously, so in the subcommittee we had the same group at least, but this group -- so to some extent, I mean, we were discussing things today which had already been voted on on March 18th. Look at Richard's minutes. I mean, they had been voted on by this group.

Now, a lot of this stuff is a bitter pill or a hard pill or a big pill to swallow, and so maybe we need some sessions like this before we begin voting, just some sessions, but I do suggest that once we begin voting we -- that's put aside, and we go on to vote on the next thing so we aren't constantly doing the backsliding that depends on who's here to argue their position. It's just a matter of procedure. I just think we need to

work our way through and --

CHAIRMAN SOULES: Well, I agree with that, and if you recall, we spent some time on the charge, and that's been in years past a lot of time on the charge, philosophically everybody in turmoil about what to do, but we finally got that done yesterday, and these are policy issues, and these discovery issues are big policy issues, and it's important, I think, for people to think and hear and talk and then we will get to vote it, and when we get to that -- but probably we're not ready for that now. Maybe we will be ready for it by the end of the session next time, and we will, you know, subject to the committees's preference, but it would be my preference to put this on the table and get through it next time all the way.

There may be some loose ends because of the philosophical approaches that we decide to take. So there are some major changes that will go back to subcommittee, so it may be two meetings away before we get this finalized. And we didn't give you a lot of time because

only today was available to get there. So we do have representatives of 50,000 lawyers who have given us a major work product that I think the committee as a whole needs to consider as well as the subcommittee's consideration before we get to finalization, and all this I guess needs to be brought out somehow before we finalize that. That's what I'm trying to do, and I'm open to any suggestions on how I can do it better. Absolutely. David and then Carl and then we will adjourn.

MR. PERRY: I was going to suggest that we might consider approaching it on a problem and solution basis, that this problem has identified. This is the proposed solution. Try to do that, then go to the next problem and the next proposed solution, and a proposed solution might deal with a group of rules rather than just one rule.

CHAIRMAN SOULES: Carl.

MR. HAMILTON: I just want to correct one misconception. The State Bar Committee's proposal is not -- the disclosure is not a predicate for any kind of a

limitation or a broadness of discovery. It has nothing to do with it. Disclosure is a separate category from your mandatory time limits and all, which we think philosophically are wrong because each case ought to be designed according to the case, but the two are really not related.

CHAIRMAN SOULES: Okay. Anne Gardner.

MS. GARDNER: Disclosure as recommended by the Bar Committee it seems to me goes to the problem that Judge Hecht mentioned back in January when he described one of the problems with discovery being that it's a guessing game, a dragnet approach. I remembered him using those words, and to the extent that we can use disclosure upon request, disclosure of mandatory, whatever we want to call it, but disclosure in some form and even whether it's by pleadings, pretrial order, or whatever, it seems to me that that will assist in limiting discovery and define the parameters of it and then you can use the limits as proposed by their subcommittee in addition.

CHAIRMAN SOULES: Steve, when you get back from New York I should be out of trial next week. If you will give me a call, I will work with you on how you think this ought to be approached, and we can get a schedule. Thank you all very much. The next meeting will be in the State Bar building.

(Whereupon the committee was adjourned at 12:30 p.m.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS LEA NESBITT, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 21, 1994, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 974.00.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 8th day of June, 1994.

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