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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

7

SEPTEMBER 16, 1994

8

(AFTERNOON SESSION)

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Taken before William F. Wolfe,

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Certified Court Reporter and Notary Public in

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Travis County for the State of Texas, on the

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16th day of September, A.D. 1994, between the

23

hours of 1:12 o'clock p.m. and 5:45 o'clock

24

p.m., at the Texas Law Center, 1414 Colorado,

25

Room 101 and 102, Austin, Texas 78701.

ORIGINAL

SEPTEMBER 16, 1994 MEETING

MEMBERS PRESENT:

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

EX OFFICIO MEMBERS:

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

OTHERS PRESENT:

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

MEMBERS ABSENT:

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

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

SUPREME COURT ADVISORY COMMITTEE
SEPTEMBER 16, 1994
AFTERNOON SESSION

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3285-3286

1 (HEARING RECONVENED 1:12 p.m.)

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

5 MR. SUSMAN: Correct.

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

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

12 CHAIRMAN SOULES: And which was
13 distributed today?

14 MR. SUSMAN: Correct.

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

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

1 suggest where we go from there that would be
2 fine.

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

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

25 And those minutes, by the way, are

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

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

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

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

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

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

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

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

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

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

1 these rules to describe certain kinds of
2 things.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. SUSMAN: Should be
13 discoverable.

14 PROFESSOR ALBRIGHT: Should not
15 be privileged.

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

21 MR. SUSMAN: Okay.

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

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

8 Okay. Response to Discovery Requests,
9 Rule 5.

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

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

18 PROFESSOR ALBRIGHT: Look on
19 Page 5.

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

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

1 MR. SUSMAN: Okay.

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

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

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

20 5(2). Duty to Supplement Discovery
21 Responses. We, again, have remained true to
22 what we understood to be approved here last
23 time, a distinction between supplementing a
24 response and amending a discovery response.

25 Supplementation is the duty that is

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

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

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

1 (2), the last sentence or the next to last
2 sentence of (2), we will try to deal with, and
3 I'm not sure we've dealt with it perfectly,
4 the notion that it's possible that in some
5 places you will get a 45-day notice of a trial
6 setting, and when you are given that kind of
7 short notice of a trial setting, what does it
8 do to your timetable. That's what that
9 "15 days after the receipt of notice of any
10 trial setting" is all about.

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

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

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

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

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

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

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

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

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

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

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

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

5 PROFESSOR ALBRIGHT: Only if
6 requested.

7 MR. SUSMAN: What's that?

8 PROFESSOR ALBRIGHT: Only if
9 they request it.

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

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

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

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

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

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

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

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

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

12 And the comment gives some examples. If
13 you are asked to produce all documents
14 relevant to your lawsuit, you need do
15 nothing. That is a ridiculous, burdensome,
16 broad request. On the other hand, if you were
17 asked to produce all profit and loss
18 information of Acme Brick Company from 1980 to
19 1994 and your position is that you shouldn't
20 have to go back beyond 1989, that's your
21 objection, you are obligated to produce '89
22 through '94 at the same time you object to
23 producing '80 through '88. We try to make
24 clear in the comment that an exception would
25 be where it would be unduly burdensome to make

1 the search twice through your files.

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

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

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

1 noticed at an inconvenient time or
2 inappropriate place. We have -- by the way,
3 I think it was kind of our feeling that
4 protective orders would encompass motions to
5 quash. It's all the same thing as a
6 protective order now. And our rule in
7 depositions is if the movant had less than
8 10 days notice of the deposition, the filing
9 of the motion itself excuses compliance with
10 the notice or subpoena until the motion is
11 overruled. So you'll see our deposition rule
12 still goes to the reasonable notice. We've
13 debated that issue. If we go to a particular
14 number of days, no, that would be reasonable
15 notice, but if it's under 10 days, the other
16 side -- all they've got to do is file a
17 motion for protective order and then they need
18 not comply with your deposition notice or your
19 subpoena. On the other hand, if they have
20 more than 10 days notice, then the filing of a
21 motion for protective order does not excuse
22 compliance, unless they have also made a good
23 faith effort to get the thing heard by the
24 court. So if you've got more than 10 days,
25 you not only have to file a motion for

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

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

12 MR. LATTING: Calendar days.

13 MR. SUSMAN: Huh?

14 MR. LATTING: Calendar days.

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

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

9 Rule 10. Expert Witnesses. This rule is
10 not automatic. It only operates upon
11 request. The notion is that you have to
12 request the other side to designate experts
13 and to disclose information concerning those
14 experts. If you have made the request that
15 they designate experts, then the plaintiff has
16 60 days before the end of the discovery period
17 to designate its experts. The defendant then
18 has 15 days after the plaintiff is supposed to
19 designate to designate the defense experts.
20 At time of designation, upon request, the
21 designating party must provide the information
22 listed in Rule 10(3). Again, it's request
23 driven but the information is standard
24 information. The identity of the experts, the
25 background. This is all new, nothing like

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

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

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

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

7 Supplementation. Page 20. Insofar as an
8 expert is concerned, we do not distinguish
9 between supplementation and amendment, because
10 both must be done when you learn additional
11 information about -- when you learn
12 additional information about the experts. You
13 can't wait on an expert to supplement 60 days
14 before the -- isn't supplementation normally
15 60 days before the end of the discovery
16 period? Yes. And that's the supplementation
17 on experts. I think that covers the expert
18 rule.

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

1 production of documents and it's due within
2 30 days, unless -- and we have a 50-day rule
3 on all of these devices, interrogatories, for
4 document requests which are served with
5 citation or accompany service, but normally
6 it's 30 days and there's a response.

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

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

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

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

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

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

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

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

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

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

3 Depositions upon Oral Examination.

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

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

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

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

14 Now, on fact witnesses save one
15 witness -- one witness you can use your whole
16 50 hours if you want, so you've got one fact
17 witness is unlimited, but all the other fact
18 witnesses are three hours. Experts are six
19 hours. And our reason for having one witness
20 unlimited is usually in most cases our feeling
21 is that there will be one witness who can
22 really basically tell the whole story and that
23 if you spend time deposing other people,
24 you're just having them regurgitate what one
25 witness has already said. So there will be a

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

6 MS. SWEENEY: Steve?

7 MR. SUSMAN: Yeah.

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

10 MR. SUSMAN: Yes, any witness.

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

14 MR. SUSMAN: Yeah.

15 MR. BABCOCK: That's your
16 franchise player.

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

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

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

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

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

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

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

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

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

3 MR. SUSMAN: Huh?

4 MS. DUNCAN: Objection,
5 leading.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Okay. I think the first big issue is the

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

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

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

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

1 trial setting. And it might be 90 days away.

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

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

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

18 MR. SUSMAN: Paula.

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

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

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

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

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

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

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

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

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

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

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

20 CHAIRMAN SOULES: Tommy Jacks.

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

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

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

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

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

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

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

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

24 CHAIRMAN SOULES: Buddy Low.

25 MR. LOW: Steve, wasn't the

1 idea that a lot of times lawyers get a notice
2 for setting and they think it's not real so
3 they don't really start discovery? And it's a
4 waste of time and money, so you need to have
5 lawyers aware that they need to begin their
6 discovery. Could you put something in there
7 that in the event the case is set within
8 100 days or something like that, then the
9 parties have a right to go to the court for a
10 modified discovery schedule or a pretrial
11 schedule or something, because it might
12 include a number of motions, but wouldn't that
13 take care of a short setting?

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

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

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

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

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

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

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

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

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

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

24 CHAIRMAN SOULES: Don Hunt.

25 MR. HUNT: Why don't we marry

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

14 CHAIRMAN SOULES: Steve.

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

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

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

10 CHAIRMAN SOULES: Well, you can
11 set the case during the discovery period and
12 try it. He's not saying that you can't set
13 the case in 120 days even though you've got a
14 180-day discovery period. He's not saying the
15 discovery period controls.

16 MR. MEADOWS: I thought he did.

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

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

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

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

3 MR. SUSMAN: Do you mean
4 whichever is earlier?

5 MR. ORSINGER: No. He said
6 later.

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

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

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

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

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

3 MR. HUNT: Yeah.

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

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

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

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

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

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

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

1 CHAIRMAN SOULES: Judge Till.

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

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

1 extent by the mere fact that there's only
2 \$5,000 in controversy between the parties
3 because that tends to act somewhat as a check,
4 but they can still have a considerable amount
5 of discovery in there.

6 And it is not going to work to tell me
7 that I'm going to have to wait and just
8 twiddle my thumbs for six months or five
9 months or four months or whatever when I can
10 just as easily try the case in probably 40 or
11 45 days, and I mean an actual trial setting.
12 It's not a make-believe setting like he's
13 talking about. I mean that's for real. When
14 we set it that date, that's when we go to
15 trial; that's when we get it settled. You
16 need to consider that in your operation or
17 you're going to destroy a great deal of what
18 that court is for.

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

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

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

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

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

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

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

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

1 second trial setting.

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

13 CHAIRMAN SOULES: Alex
14 Albright.

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

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

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

14 CHAIRMAN SOULES: Robert
15 Meadows.

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

25 MR. JACKS: It's because of the

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

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

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

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

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

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

5 CHAIRMAN SOULES: Bill
6 Dorsaneo.

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

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

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

5 CHAIRMAN SOULES: Richard
6 Orsinger.

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

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

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

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

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

1 CHAIRMAN SOULES: Steve Susman.

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

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

16 MR. SUSMAN: What?

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

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

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

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

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

22 MR. JACKS: Or the computer.

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

25 MR. MARKS: What about the case

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

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

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

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

12 CHAIRMAN SOULES: Steve
13 Yelenosky.

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

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

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

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

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

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

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

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

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

6 CHAIRMAN SOULES: Justice
7 Hecht.

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

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

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

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

25 So unless there's some kind of cutoff in

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

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

14 CHAIRMAN SOULES: Harriet
15 Miers.

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

1 unrealistic if you're handling more than one
2 case.

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

13 CHAIRMAN SOULES: Unrealistic
14 in terms of being too short?

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

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

21 MS. MIERS: Yeah.

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

25 MS. MIERS: Well --

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

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

7 MR. SUSMAN: Huh?

8 MR. MARKS: Do we have to have
9 one?

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

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

24 CHAIRMAN SOULES: Justice
25 Hecht.

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

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

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

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

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

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

12 CHAIRMAN SOULES: Buddy Low.

13 MR. LOW: We have a system like
14 that in federal court. The case is
15 automatically filed and you're under Track 1,
16 2, 3, 4 or 5, and each one has their own
17 track. First I'm going to tell you nobody
18 likes it very much, so maybe it's pretty good
19 because the lawyers don't like it very much.

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

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

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

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

1 time whether the case ought to be set.

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

5 CHAIRMAN SOULES: David Perry.

6 MR. PERRY: What if we did
7 something along this line, kind of picking up
8 where Justice Hecht was. What if we say that
9 the discovery period shall continue until
10 30 days before the first setting for trial
11 unless -- and have an opt-out provision where
12 if any party does something, and that
13 something may be a request for a scheduling
14 order or it might be something else, but if
15 the party does that, then in effect you have
16 opted out of this particular cutoff date and
17 you would go over onto, say, a scheduling
18 order track. And then with the scheduling
19 order, then you would provide that the
20 discovery cutoff would be 30 days before
21 whatever trial was set by a scheduling order.

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

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

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

10 CHAIRMAN SOULES: Justice
11 Hecht.

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

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

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

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

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

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

1 shall end when the court says it shall end.

2 JUSTICE HECHT: Or they can
3 agree.

4 MR. SUSMAN: Well, they can
5 always agree.

6 JUSTICE HECHT: Within a
7 certain amount of time.

8 MR. SUSMAN: Well, they can
9 always agree.

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

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

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

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

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

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

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

23 MR. SUSMAN: Would that be
24 agreeable?

25 CHAIRMAN SOULES: Justice Hecht

1 has the floor.

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

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

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

17 CHAIRMAN SOULES: John Marks.

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

25 JUSTICE HECHT: Yes.

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

4 JUSTICE HECHT: Yes.

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

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

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

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

22 MS. SWEENEY: That works.

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

25 MR. LOW: In keeping with what

1 Justice Hecht is saying, I think there still
2 has got be -- what we're really trying to do
3 is we've left discovery up to the lawyers.
4 That's what's happened and that's what the
5 problem is. So if we leave it unlimited, we
6 still have to cut down. So if we left the
7 lawyers to just say, "Okay. We'll go on until
8 1999," I mean lawyers -- we lawyers have
9 created the discovery costs, and so it can't
10 be left totally up to us. We have to have
11 some limit even on those bigger cases.

12 CHAIRMAN SOULES: Judge McCown.

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

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

25 What you're saying is you file the case,

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

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

24 MR. SUSMAN: Justice Hecht.

25 JUSTICE HECHT: And in

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

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

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

25 But if they're in the third category, if

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

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

1 that this is a problem case.

2 CHAIRMAN SOULES: Alex
3 Albright.

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

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

1 40 percent of our docket in the state, is
2 uncontested divorces. Then we've got suits on
3 notes and guarantees and sworn accounts and
4 defaults where the defendant never appears or
5 somebody is in bankruptcy and this whole raft
6 of cases. And then you include in that group
7 simple car wreck cases where they're not going
8 to depose but two or three people, and then
9 they're ready to get the case disposed of.

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

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

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

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

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

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

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

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

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

8 PROFESSOR ALBRIGHT: His track
9 is that you have your -- if the parties do
10 nothing, then they get whatever we as a group
11 decide is the small amount of discovery, two
12 months of discovery, 10 hours of depositions,
13 15 interrogatories. I'm dreaming these up out
14 of thin air.

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

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

1 to help us out within these parameters."
2 Well, I guess the judge decides whether it's
3 within these parameters or wherever. Then if
4 you -- even if you can agree that you want
5 more discovery than the six months and
6 50 hours, then you still have to get court
7 approval of that agreement before it can be
8 effective. Is that -- am I stating it
9 correctly?

10 MR. SUSMAN: I think --

11 CHAIRMAN SOULES: Harriet.

12 Harriet Miers.

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

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

5 PROFESSOR ALBRIGHT: A minimum
6 or a maximum?

7 MS. MIERS: A minimum that a
8 suit involving a certain amount in controversy
9 or some other measure would take.

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

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

24 CHAIRMAN SOULES: Judge
25 Guittard.

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

11 CHAIRMAN SOULES: Richard
12 Orsinger.

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

1 What I would like to see for family law
2 cases is a shorter window but not a reduced
3 quantity. In other words, we might reasonably
4 expect a divorce case or a custody case to get
5 tried in six months but use all the way up to
6 50 hours of deposition time. And I think it's
7 a mistake to say that the cases we want to
8 move through quickly also need to be moved
9 through with only three depositions per side
10 and with very little request for production.
11 I think we ought to consider severing them.
12 And if your rule becomes implemented that you
13 are stuck in the track that you're in, then
14 every single family law case is going to
15 require a hearing in front of the judge
16 because only the ones that are no-asset cases
17 can be done under a truly restrictive
18 discovery limitation like the one that Alex
19 mentioned, like 10 hours of total deposition
20 time per side or three depositions or
21 something. So I think we ought to
22 differentiate the two. We don't want a
23 divorce case a year and a half long, but we
24 don't want it limited to three depositions per
25 side either.

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

10 For the 80 percent maybe it ought to be
11 90 days after the last answer is filed. Then
12 that gets you to trial in four months if you
13 want to try your divorce case in four months.
14 And if you need more time maybe -- at what
15 point you opt out I don't know. Then the
16 opt-out is to go to some different schedule,
17 and then if you opt out and want more, you've
18 got to go to the judge and get more time.

19 Steve Susman.

20 MR. SUSMAN: Well, let me
21 just --

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

25 MR. SUSMAN: I understand

1 that.

2 CHAIRMAN SOULES: Okay.

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

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

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

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

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

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

1 MR. SUSMAN: Great.

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

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

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

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

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

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

6 CHAIRMAN SOULES: That's right.

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

11 CHAIRMAN SOULES: Well, the
12 reason is that we're trying to set a discovery
13 window for 100 percent of the cases. Some are
14 broken into some sorts of categories. Or do
15 we just say 80 percent of the cases don't
16 matter so we're not going to write a rule for
17 those? 80 percent of the cases are not a
18 problem, they don't have to have any discovery
19 rules, so Rule 1 is 80 percent of the cases
20 don't have any rules. Or do we write a rule
21 for those 80 percent of the cases? That's
22 what Category 1 is, is something for the
23 80 percent.

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

1 you can deal with them.

2 CHAIRMAN SOULES: And then the
3 20 percents opt out. They all go into the
4 longer period, whatever that is. And then if
5 some others want to go still longer, they've
6 got to get leave of the court.

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

9 MR. PERRY: Luke, I think if
10 you look at what we've got here and bring our
11 focus back, what we've got -- we all agree on
12 some concepts. We all agree that small cases
13 ought to have shorter windows. We all agree
14 that big cases out to have longer windows. We
15 all agree that the window out to end about
16 30 days before the case is supposed to go to
17 trial.

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

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

5 MR. MARKS: Where would that
6 be, Dave?

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

11 PROFESSOR DORSANEO: That's an
12 unusual place.

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

22 CHAIRMAN SOULES: Judge McCown.

23 HONORABLE F. SCOTT McCOWN: Let
24 me make an important observation about this
25 80 percent, and I think it ties in with what

1 David just said. We do not know in advance
2 what the 80 percent is. The lawyers don't
3 even know in advance if their case is an
4 80 percent case. And if you tie the discovery
5 window to the front end, you may have the
6 unintended consequence of increasing discovery
7 rather than decreasing discovery.

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

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

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

2 CHAIRMAN SOULES: John Marks.

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

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

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

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

1 really not there.

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

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

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

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

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

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

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

9 CHAIRMAN SOULES: Right.

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

13 CHAIRMAN SOULES: Case 2.

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

17 CHAIRMAN SOULES: Case 2 --

18 JUSTICE HECHT: For example,
19 your parameters.

20 PROFESSOR ALBRIGHT: Six
21 months.

22 MS. SWEENEY: Your what?

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

25 JUSTICE HECHT: Your proposal.

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

4 CHAIRMAN SOULES: 30 days
5 before a trial setting.

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

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

11 JUSTICE HECHT: But without
12 trying to --

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

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

19 MR. SUSMAN: All right.
20 30 days. Well, we've got to do -- should we
21 do the first -- let's talk about the first
22 trial setting.

23 JUSTICE HECHT: All I'm saying
24 is --

25 CHAIRMAN SOULES: Well, that's

1 what started the problem.

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

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

7 MR. SUSMAN: You mean Rule 1?

8 JUSTICE HECHT: Rule 1 and the
9 rest of it.

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

13 CHAIRMAN SOULES: Okay.

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

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

20 JUSTICE HECHT: I don't think
21 we are.

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

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

1 the maximum time.

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

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

7 CHAIRMAN SOULES: 90 days is
8 right.

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

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

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

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

18 CHAIRMAN SOULES: Just by
19 filing something that says, "I opt out of the
20 90-day rule," and you can do that anytime in
21 the 90 days, so that if your case is in
22 jeopardy, you can do it; otherwise, you can be
23 on your fast track to get your divorce case
24 tried.

25 PROFESSOR ALBRIGHT: Can I make

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

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

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

14 CHAIRMAN SOULES: What?

15 MS. MIERS: Keep going.

16 MR. ORSINGER: What's your
17 third choice?

18 MR. SUSMAN: See, the problem
19 with --

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

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

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

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

13 CHAIRMAN SOULES: Within
14 certain parameters.

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

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

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

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

1 period.

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

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

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

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

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

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

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

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

5 MR. ORSINGER: No, nine months.

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

9 MR. ORSINGER: Nine months.

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

12 90 days is the default period. Anybody
13 can opt out in the 90 days after the answers
14 are all filed. If you want to go past
15 90 days, anytime in the 90-day period you can
16 opt out and that extends your discovery period
17 to nine months, anytime during that nine
18 months.

19 MR. SUSMAN: Without agreement?

20 CHAIRMAN SOULES: Without
21 agreement.

22 MS. MIERS: Unilaterally.

23 MR. MEADOWS: I think this
24 is --

25 CHAIRMAN SOULES: After the

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

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

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

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

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

22 CHAIRMAN SOULES: Right.

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

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

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

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

13 PROFESSOR ALBRIGHT: Within
14 that six months.

15 CHAIRMAN SOULES: You can keep
16 on making agreements.

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

21 CHAIRMAN SOULES: Right.

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

1 CHAIRMAN SOULES: Unless the
2 judge tells you differently.

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

6 CHAIRMAN SOULES: The judge has
7 always got management.

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

17 CHAIRMAN SOULES: Tommy Jacks.

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

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

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

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

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

1 Commandments.

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

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

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

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

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

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

8 MR. JACKS: I understand that.

9 CHAIRMAN SOULES: And I know we
10 will get there.

11 Now, Justice Hecht, you have the floor.

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

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

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

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

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

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

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

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

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

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

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

12 CHAIRMAN SOULES: Jim Babcock.

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

1 MR. PERRY: Second.

2 CHAIRMAN SOULES: Steve
3 Susman.

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

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

20 MR. SUSMAN: What?

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

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

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

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

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

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

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

25 MR. SUSMAN: Well, that's

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

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

13 MR. MARKS: Whoa, what's that?

14 MR. PERRY: What was the
15 question?

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

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

25 CHAIRMAN SOULES: That's fine.

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

3 Those opposed.

4 That's unanimously approved.

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

8 CHAIRMAN SOULES: What?

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

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

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

18 THE COMMITTEE: No.

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

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

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

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

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

8 MR. SUSMAN: The problem --

9 CHAIRMAN SOULES: Yeah.

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

12 CHAIRMAN SOULES: That's right.

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

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

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

21 MR. ORSINGER: Yes, that's
22 right.

23 CHAIRMAN SOULES: Yes.

24 MS. BARON: All right.

25 CHAIRMAN SOULES: Okay. Hands

1 up for Chip Babcock's motion. Nine.

2 Okay. Then those against that motion.
3 12.

4 So that fails by a vote of 12 to nine.

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

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

12 Those opposed. 10.

13 So that carries by a vote of 13 to 10.

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

17 Rule 2. Can you believe it?

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

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

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

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

4 CHAIRMAN SOULES: Okay.

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

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

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

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

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

6 MS. DUNCAN: Original answers?

7 CHAIRMAN SOULES: Original
8 answers.

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

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

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

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

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

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

25 MR. SUSMAN: Can we go to

1 Rule 2?

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

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

12 When do you want the opt?

13 CHAIRMAN SOULES: Anytime in
14 the 90 days.

15 MR. SUSMAN: Oh, wait a second.

16 CHAIRMAN SOULES: That's
17 important to me, because if my case is in
18 trouble, I don't want it to close. And
19 divorce cases can get in trouble late. You
20 suddenly find out you've got a problem and
21 you've got to deal with it. Otherwise, you're
22 going to have a trial setting in another
23 30 days and you're going to have the case over
24 with.

25 MS. SWEENEY: So the parties

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

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

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

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

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

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

20 CHAIRMAN SOULES: Okay. Paula.

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

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

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

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

25 CHAIRMAN SOULES: That's what

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

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

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

15 MR. SUSMAN: I'm sorry, opens
16 with the filing of the answer and closes or it
17 runs -- it runs from the commencement to --
18 it runs from the commencement of the action to
19 90 days from the filing of the answer, unless
20 one of the lawyers opts out, in which case it
21 runs from the commencement of the action to
22 nine months from the filing of the answer,
23 unless the court determines something else.
24 The court could determine something longer or
25 shorter than the nine months. That creates no

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

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

9 PROFESSOR ALBRIGHT: We can
10 work on that.

11 MR. SUSMAN: Huh?

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

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

16 PROFESSOR ALBRIGHT: I think
17 those are details that --

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

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

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

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

11 MR. SUSMAN: It will.

12 CHAIRMAN SOULES: -- issue
13 goes away.

14 What's next, Steve?

15 MR. SUSMAN: Rule No. 2.

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

19 CHAIRMAN SOULES: On Rule 1?

20 MR. JACKS: Yes, sir.

21 CHAIRMAN SOULES: Okay.
22 Something not discussed before?

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

1 of closing the window at nine months I think
2 deserves some serious discussion when you all
3 get back in your subcommittee bearing in mind
4 the many places in this state where you cannot
5 get a case to trial within even
6 18 months or two years and the serious
7 problems we discussed before about arbitrary
8 closing dates when you end up closing the
9 window and then putting your file on the shelf
10 for a year or more.

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

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

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

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

13 MR. SUSMAN: Well, it's in
14 these rules. I mean, there's a reopener
15 provision in these rules, because whenever you
16 end discovery, whether it be 30 days before
17 the first trial setting or 60 days or
18 10 months from the filing of the case or nine
19 months from the filing of the answer, whenever
20 you have an end of discovery other than the
21 commencement of trial, you have to deal with
22 what happens between that end and the time of
23 trial.

24 CHAIRMAN SOULES: And you've
25 got something there?

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

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

5 MR. JACKS: I think we are,
6 Steve.

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

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

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

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

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

4 CHAIRMAN SOULES: Paul Gold.

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

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

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

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

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

16 CHAIRMAN SOULES: Okay. Steve.

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

1 a lot of time on it." Okay?

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

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

14 MR. SUSMAN: Okay.

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

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

1 all come up with nine months?"

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

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

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

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

13 Can we go to another rule now?

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

16 CHAIRMAN SOULES: Judge McCown.

17 HONORABLE F. SCOTT McCOWN: I
18 understand Tommy's concern, and I'm on the
19 subcommittee and I'm in agreement with him so
20 I'm going to look after his interest. I think
21 the time you pick, whether it's nine months or
22 18 months, you feel differently about
23 depending upon the words that it's couched
24 in. Because as Judge Hecht said, it's
25 intended to be a normative standard, so how

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

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

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

13 MR. SUSMAN: Rule 2.

14 CHAIRMAN SOULES: Rule 2.

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

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

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

12 JUSTICE HECHT: Right.

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

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

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

23 CHAIRMAN SOULES: Speak up,
24 Alex. Go ahead.

25 PROFESSOR ALBRIGHT: Never

1 mind. Never mind.

2 PROFESSOR DORSANEO: Steve.

3 CHAIRMAN SOULES: Bill

4 Dorsaneo.

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

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

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

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

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

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

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

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

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

16 PROFESSOR ALBRIGHT: And we
17 couldn't draft it.

18 PROFESSOR DORSANEO: I was
19 never able to.

20 PROFESSOR ALBRIGHT: Yeah. We
21 would love some suggestions.

22 CHAIRMAN SOULES: I suggest you
23 use "witness."

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

1 hearsay knowledge of facts that should be
2 discovered.

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

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

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

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

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

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

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

12 CHAIRMAN SOULES: Witnesses for
13 trial.

14 PROFESSOR DORSANEO: Okay.

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

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

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

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

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

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

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

22 CHAIRMAN SOULES: It would be a
23 major change, but we are also drastically
24 constraining what discovery can be done in the
25 15 percent of the cases that are in the

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

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

21 CHAIRMAN SOULES: I'm not.

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

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

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

16 Any opposition?

17 Okay. Let's do that.

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

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

25 MR. JACKS: Or sometime before

1 trial.

2 MR. SUSMAN: Huh?

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

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

10 CHAIRMAN SOULES: We're just
11 creating new games.

12 MR. SUSMAN: I think that's
13 fine.

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

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

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

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

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

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

20 CHAIRMAN SOULES: Tommy Jacks.

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

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

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

19 MR. SUSMAN: I understand.

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

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

3 CHAIRMAN SOULES: Okay.

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

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

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

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

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

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

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

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

25 But the main problem I have even with the

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

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

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

19 MR. SUSMAN: No.

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

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

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

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

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

18 MS. DUNCAN: -- supplement --

19 MR. SUSMAN: -- supplement.

20 MS. DUNCAN: -- your
21 disclosure statement.

22 MR. SUSMAN: True.

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

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

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

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

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

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

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

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

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

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

15 CHAIRMAN SOULES: Right.

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

25 CHAIRMAN SOULES: Well, you

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

4 HONORABLE F. SCOTT McCOWN:

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

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

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

5 HONORABLE F. SCOTT McCOWN: Oh,
6 you do.

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

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

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

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

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

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

18 Okay. There's no opposition.

19 Richard Orsinger.

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

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

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

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

9 MS. DUNCAN: We're on Rule 3.

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

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

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

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

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

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

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

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

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

15 MS. DUNCAN: I have a question.

16 CHAIRMAN SOULES: Sarah Duncan.

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

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

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

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

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

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

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

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

14 PROFESSOR DORSANEO: I thought
15 that too.

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

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

1 what it says.

2 CHAIRMAN SOULES: Steve.

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

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

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

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

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

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

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

3 CHAIRMAN SOULES: All right,
4 Steve.

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

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

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

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

1 about preexisting communications that may be
2 confidential.

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

6 MR. ORSINGER: Doctor-patient.

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

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

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

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

20 CHAIRMAN SOULES: Yeah.

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

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

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

9 MR. SUSMAN: Let me ask you
10 this --

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

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

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

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

10 MS. DUNCAN: It's right here.
11 4(a) (indicating).

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

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

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

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

25 PROFESSOR DORSANEO: That's a

1 better way.

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

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

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

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

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

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

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

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

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

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

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

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

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

21 PROFESSOR ALBRIGHT: That's
22 work product.

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

25 PROFESSOR DORSANEO: It has to

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

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

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

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

17 PROFESSOR ALBRIGHT: Don't get
18 into that.

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

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

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

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

3 CHAIRMAN SOULES: Okay.

4 Anything else on Rule 3. Richard?

5 MR. ORSINGER: Yeah. It seems
6 to me important to carry forward the concept
7 of witness statement under the current rule
8 that it has to do with the subject matter of
9 the lawsuit, because if you don't say that
10 it's a statement relevant to the subject
11 matter of the lawsuit, then you're defining in
12 witness statement something somebody wrote
13 10 years ago and we really don't need to carry
14 that baggage around because that creates
15 potential difficulties on -- and we have it
16 here in 166B. We have language that we all
17 probably understand.

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

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

25 MR. GOLD: What was that, Bill?

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

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

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

22 PROFESSOR ALBRIGHT: That's
23 right.

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

1 about.

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

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

7 MR. SUSMAN: That's right.

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

10 PROFESSOR ALBRIGHT: Because --

11 CHAIRMAN SOULES: Let's take
12 ten.

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

16 CHAIRMAN SOULES: Okay. Steve,
17 Rule 4.

18 MR. SUSMAN: Rule 4.

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

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

23 Okay. Rule 5.

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

1 CHAIRMAN SOULES: Rule 4.

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

11 MS. DUNCAN: Witness
12 statements?

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

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

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

22 And should I give my pitch?

23 MR. SUSMAN: Yes.

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

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

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

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

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

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

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

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

15 MR. GOLD: That's right.

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

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

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

7 PROFESSOR DORSANEO:

8 Mr. Chairman?

9 CHAIRMAN SOULES: Bill

10 Dorsaneo.

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

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

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

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

10 PROFESSOR DORSANEO: Usually.

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

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

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

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

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

16 PROFESSOR DORSANEO: -- of one
17 Pinto.

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

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

25 PROFESSOR ALBRIGHT: No.

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

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

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

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

23 CHAIRMAN SOULES: Or tell them
24 too bad.

25 PROFESSOR DORSANEO: Well, it's

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

10 PROFESSOR ALBRIGHT: Right.

11 And we are -- under this rule we have a
12 specific provision that says nothing in this
13 rule can be construed to render
14 nondiscoverable the underlying facts, however
15 acquired. So you can certainly get the facts
16 discovered and an investigation done.

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

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

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

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

5 CHAIRMAN SOULES: Richard
6 Orsinger.

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

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

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

4 MR. GOLD: That's wrong.

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

9 PROFESSOR ALBRIGHT: No, no.

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

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

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

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

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

25 MR. ORSINGER: I should not

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

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

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

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

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

1 a person make --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 MR. GOLD: I think there's a
12 Supreme Court decision that says you can't
13 request an attorney's litigation file. You
14 just can't request somebody's entire file,
15 make them submit the entire file in camera and
16 sort it out. You can't do that under the
17 present rule, so the only way they could do it
18 is to ask for specific items in the file.
19 That's what the present rulings are. And the
20 core work product under the federal court's
21 interpretations would remain sacrosanct. You
22 can't get it. The only things that are going
23 to be in question are the same things that are
24 questionable.

25 In fact, if you look at Leede Oil vs.

1 McCorkle, there's a case out of the first
2 circuit, the Puerto Rico fire litigation,
3 where they talk about the same type of
4 problem, the differentiation between core work
5 product and ordinary work product. And the
6 federal courts do not allow discovery of what
7 the attorney's impressions are about things
8 that he gathers or she gathers. The only
9 things that may potentially be discoverable
10 are those things that are ordinary work
11 product, those things that are gathered, those
12 things that are potentially factual in nature,
13 not what the attorney thinks about it.

14 I just -- I'm sorry, but I just don't
15 see there being any more threat to what our
16 mental impressions and trial strategies are
17 under the federal rule, the federal approach,
18 than what it is now.

19 CHAIRMAN SOULES: Judge McCown,
20 and then we'll come around the table.

21 HONORABLE F. SCOTT McCOWN: I
22 understand that you don't want the trial judge
23 looking at your work product or
24 attorney-client, but I'm confused about what
25 your notion of the present law is, because I

1 thought that the present law required when you
2 claimed a privilege that you had to prove a
3 privilege. And if the other side says to me,
4 and this happens all the time, says to me,
5 "Judge, he's claiming it's attorney-client.
6 Of course, I don't know what's in the envelope
7 and I don't trust the guy, so I want you to
8 look at it to make sure it's attorney-client,"
9 I thought I had a duty to.

10 Now, what I usually do, because I agree
11 with you, it's offensive to me that that stuff
12 can be looked at, I say, "I'm going to take
13 this guy's word for it." Or if it's work
14 product, I feel a little more requirement to
15 look at what he's saying is work product,
16 because people do fudge on that, and I do look
17 at it. I think I have to when the other side
18 says they don't trust his work product.

19 And to tell you the truth, I'm often
20 finding things claimed to be work product that
21 aren't that I'm ordering produced. I think
22 that happens all the time now. So am I wrong
23 about that? Isn't that what the law is?

24 MR. ORSINGER: I've never had a
25 judge make me turn my file over to him. The

1 thought of that just frightens me to death.

2 HONORABLE F. SCOTT McCOWN:

3 Well, I think it happens all the time.

4 MR. ORSINGER: If I had a
5 witness statement where I had interviewed
6 somebody, I can see forcing me to give that to
7 the judge and let him mark out things and then
8 turn the rest over. But if I don't have a
9 witness statement in my file, no member of the
10 judiciary should be looking at it in my
11 opinion.

12 HONORABLE F. SCOTT McCOWN:

13 Well, how do we know you don't?

14 PROFESSOR ALBRIGHT: You can
15 just clean up that in the request. You can --
16 "I request all research that you have
17 conducted in this case." Well, you're clearly
18 going to object to it because that's your work
19 product, and that's what you would do now.

20 MR. ORSINGER: And if Paul is
21 right about what federal cases say and if the
22 state district judges that have never appeared
23 in federal court in their whole life all know
24 what federal cases say, then I guess I'm
25 okay. But I don't even know what all -- I've

1 read Hickman vs. Taylor, but I don't even know
2 what all federal courts say, and we're about
3 to adopt their standard.

4 PROFESSOR ALBRIGHT: Okay. No,
5 because it says -- okay. You say, "My
6 research is my mental impressions and
7 opinions. I object to that request." Okay.
8 That request is objectionable; it cannot be
9 discovered under this rule. Okay?

10 But if you were -- if the request is "I
11 want your witness statements," or "I want your
12 notes from your interview with dead witness
13 John Doe," and you say, "I object because
14 that's my work product," then I have to prove
15 a need and hardship. I have to say, "John Doe
16 is dead and I never got a chance to talk to
17 John Doe." Then the court will look at your
18 notes that you took from John Doe's interview
19 and if there's proof of need and hardship, the
20 court will make you disclose the portions of
21 those notes that disclose only facts.

22 I think that's a difficult determination,
23 but you've still got that issue in the Texas
24 rule right now.

25 CHAIRMAN SOULES: Sarah Duncan,

1 and then we'll get to Steve and go down the
2 table.

3 MS. DUNCAN: Maybe I'm not also
4 straight on what the current law is in Texas.
5 When I went back and looked at the articles
6 discussing these rules when they first came
7 into being, the way I interpreted it was Texas
8 starts from an entirely different premise than
9 the federal work product doctrine does. We
10 start from the premise, as I understand it,
11 that all attorney work product is absolutely
12 privileged and is not subject to anybody's
13 test for anything with two exceptions. And
14 those two exceptions were witness statements
15 and party communications. The definitions of
16 "party communications" and "witness
17 statements" have changed over the years, but
18 we've still operated from a premise of
19 nondiscoverability and nontesting; whereas
20 Hickman starts from the premise that we're
21 going to divide all work product up into two
22 groups, discoverable work product and
23 nondiscoverable work product. And in order to
24 determine what's in what group, we sort of
25 have to look at it to make that determination.

1 And I, for one, am strongly opposed to
2 changing the Texas premise that all work
3 product is nondiscoverable unless it is
4 specifically excepted, because I think once we
5 change that premise, we are going to go
6 exactly where Richard is talking about; that
7 we are going to be looking at people's files.

8 You know, one of the first things that
9 came to me when I looked at this where it says
10 "mental impressions, opinions, conclusions or
11 legal theories," well, in my view, any
12 compilation of documents that I make is in and
13 of itself an impression. But I don't know
14 that this reaches that, because that's
15 something tangible, whereas these things all
16 look like intangibles, so that's just my
17 view. I'm opposed to changing the threshold
18 premise.

19 PROFESSOR ALBRIGHT: But that
20 changed in like 1988.

21 MR. GOLD: Yeah. Let me
22 respond. If you look at the Supreme Court
23 cases that have come down over the last four
24 or five years, there are references to the
25 federal cases.

1 For instance, the compilation theory is
2 from Shelton vs. AMC. That is a case in which
3 an attorney selected documents for a witness
4 to review at a deposition, and that line of
5 cases holds that that selective process is the
6 attorney's work product, core work product.

7 There's a whole other line of cases,
8 Sporck vs. Piel in the federal court, that
9 take a different view, but it's from the
10 federal cases.

11 MS. DUNCAN: That's right.

12 MR. GOLD: It's from the
13 federal cases. And slowly over the last four
14 or five years there have been continuous
15 references to this concept of core work
16 product versus ordinary work product. The
17 Leede case, Leede Oil vs. McCorkle, pretty
18 much started it, because everybody said how in
19 a world can a statement that an attorney took
20 of a witness be discoverable. And the fulcrum
21 in that case was that there were neutral
22 recitals of fact in the statement, and the
23 court said even though this may be something
24 that the attorney took down, it is factual.
25 This rule changes none of that.

1 MS. DUNCAN: It does.

2 MR. GOLD: None of it. All it
3 does is attempts to bring predictability to
4 this rule for someone who is trying to do
5 discovery in the State of Texas and brings
6 with it an entire body of law that has been
7 developed in the federal courts and attempts
8 to resolve this conundrum that we are
9 constantly faced with with party
10 communications, which is a real difficult
11 concept to deal with.

12 But for the party communications rule, I
13 think the Texas Supreme Court long ago would
14 have tacitly embraced what we're recommending
15 here. It's only when they get to the point of
16 dealing with party communications that they
17 have to stop and kind of take a detour. But
18 this concept that you enunciate about work
19 product being sacrosanct and that it diverges
20 from the federal courts, not so, not in Texas,
21 not for a long time.

22 MS. DUNCAN: Can I respond just
23 with one sentence?

24 CHAIRMAN SOULES: Okay.
25 Briefly Sarah, and then Steve.

1 MS. DUNCAN: In my view it is
2 the Supreme Court's responsibility and
3 prerogative to chip away at the rule. I will
4 not vote in favor of a rule that changes the
5 threshold premise, and that's all I'm saying.

6 CHAIRMAN SOULES: Steve Susman.

7 MR. SUSMAN: Well, it's
8 been -- the reason I was in favor of this, it
9 was only till -- I've practiced law for a
10 long time. It was only until a moment ago
11 that I learned there was a different premise.
12 I mean, I think the differences between the
13 state and federal thing are so esoteric that
14 very few lawyers understand it. Certainly
15 associates, being young people who are going
16 through files and withholding privileged
17 attorney-client, work product things, do not
18 understand it. I mean, I don't understand
19 even, frankly, sitting here today. I have
20 never in federal court felt my files are more
21 in jeopardy before a federal judge than a
22 state judge. I've never had a federal judge
23 ask for my files. A lot of it has been in
24 federal court, so I mean, I really -- this is
25 a tempest in a teapot to me.

1 We thought we were doing something to
2 simplify things just to say, "Oh, why should
3 Texas be different just for the purpose of
4 being different?" You all are conducting a
5 real Law Review type discussion of the
6 difference between the Texas and federal
7 regime, which may be -- I mean, I think we
8 ought to have papers presented by Alex and
9 you, and you all have your debating papers,
10 and maybe in the process we can learn what the
11 difference between state and federal is,
12 but I mean, that's what we did it for, because
13 no one could really very clearly explain what
14 the difference was.

15 It just seemed that we've got to write
16 something in the rule. It's easy. Why don't
17 we just pick the federal language and just --
18 because there's a body of case law. That's
19 what we did, but I don't really care and I
20 don't think anyone really cares.

21 PROFESSOR ALBRIGHT: I care. I
22 care a whole lot.

23 MR. SUSMAN: Okay. I'm sorry,
24 Alex cares.

25 CHAIRMAN SOULES: Back in 1981

1 and '82 and '83, when these rules were
2 drafted, it was very difficult to discern what
3 the hell the feds were saying about different
4 kinds of work product, so the draftsmen of
5 these rules decided we're going to break out
6 what we think are the different kinds of work
7 products that are being treated in different
8 ways under the federal system so that somebody
9 reading these rules doesn't have to go to a
10 body of federal case law and try to figure
11 out -- or Wright & Miller or somebody else and
12 try to figure out what these distinctions
13 are. Let's just say them in the rules, and we
14 did.

15 And party communications were treated
16 differently. Witness statements were treated
17 differently. Core work product was treated
18 differently. So we had work product and that
19 means core work product. And we called the
20 other things something else because they were
21 not treated like core work product. They were
22 something else in the federal law, and they've
23 been treated different ways by the Supreme
24 Court of Texas ever since.

25 But at least, Steve, somebody trying to

1 figure this out, a young, inexperienced lawyer
2 in Texas, can look and see that we have
3 different things here. And maybe they're
4 being treated in different ways rather than
5 having to go to the feds, the federal rules,
6 and say that they all look to be the same.
7 Are some of them being treated differently,
8 and if so, how?

9 How are party communications treated
10 under the federal work product? Are they
11 called party communications?

12 PROFESSOR DORSANEO: No.

13 They're called trial preparation materials.
14 But the key difference is the anticipation of
15 litigation concept. I don't actually believe
16 that there is a uniform federal interpretation
17 of that across all the circuits. But it is
18 certainly potentially much broader than our
19 party communication concept. The difference
20 boils down to this: For a party communication
21 that doesn't contain or wouldn't disclose
22 mental impressions, trial strategies,
23 conclusions or opinions, under this you would
24 have to show for a communication made in
25 anticipation of litigation in a general sense,

1 pending parallel litigation, let's say, that
2 you had substantial need and that there was
3 undue hardship. Under our practice right now
4 you do not because it's not a party
5 communication.

6 CHAIRMAN SOULES: If it's in
7 another case; is that what you're talking
8 about?

9 PROFESSOR DORSANEO: Yes. It
10 has to be in anticipation of the case in which
11 you're making the argument.

12 CHAIRMAN SOULES: Then you've
13 got another kind of interesting --

14 PROFESSOR DORSANEO: That may
15 not be what people think is strictly right
16 but -- and I don't feel that strongly about
17 it --

18 MR. SUSMAN: But Bill, you're
19 just saying something, if I'm getting you
20 right, that means it's easier to get stuff
21 under the Texas rule than it is under the
22 federal rule.

23 PROFESSOR DORSANEO: Right.

24 MR. SUSMAN: But these two
25 people are saying no, the reason they want to

1 hold on to the Texas rule is it gives more
2 protection, which is a different thing.

3 PROFESSOR DORSANEO: As Justice
4 Hecht said here, he says, "I'm the one on the
5 very left side; they're on the very right
6 side."

7 MR. ORSINGER: But Bill
8 Dorsaneo is talking about factual
9 investigations of specific problems, and I'm
10 talking about the lawyer's work that he does
11 in his or her office. And he's got a problem
12 that's different from my problem, but with
13 this --

14 PROFESSOR ALBRIGHT: But there
15 are mental impressions and opinions in the
16 stuff that Bill is talking about, so --

17 MR. ORSINGER: And I know that,
18 but --

19 CHAIRMAN SOULES: You have to
20 talk one at a time because we're trying to get
21 a record here.

22 MR. ORSINGER: I recognize that
23 they are mixed, and right now the only
24 exposure my file has is to the extent that I
25 have mixed up factual observations about my

1 case with my own notes. But under your
2 language, without regard to whether we can
3 divine what the federal rule is, which as Paul
4 already said, there's two different lines of
5 authority on what the one example he picked
6 was, everything in my file is subject to
7 judicial analysis according to the federal
8 standard whether or not it has been tainted by
9 a factual inquiry of the accident in question.

10 MR. GOLD: It's already been
11 decided that way here.

12 MR. ORSINGER: I don't agree
13 with that, Paul. I'm sorry, but I don't think
14 we are.

15 MR. GOLD: The Supreme Court
16 has said that just because you have factual
17 matters that are stuck into an attorney's file
18 does not make those factual matters exempt
19 from discovery.

20 PROFESSOR DORSANEO: That's
21 very different from saying that you can look
22 at the file.

23 MR. GOLD: You also cannot
24 request an attorney's litigation file and make
25 that attorney then segregate out those things

1 that are fact and those things that are not.
2 You have to request specific components of the
3 file.

4 And as Alex stated, if you request
5 somebody's research, for goodness sake, that
6 is by definition their mental impressions,
7 their trial strategy. If you request
8 statements, they very well may contain your
9 analysis. That's something that a court now
10 can look at.

11 The same thing with party
12 communications. You may say that "I went and
13 took photographs and those photographs reveal
14 my mental impressions." Even now that can be
15 required to be turned over to the court and a
16 determination be made whether that's the
17 case. I don't think there's anything in the
18 federal courts that make your file any more in
19 jeopardy than it is now. I don't think that
20 that's an issue. I've never seen a case that
21 said you have to turn over the file.

22 CHAIRMAN SOULES: Mike Hatchell
23 has the floor.

24 MR. HATCHELL: I appreciate the
25 good faith of the Committee in thinking that

1 it's broadening the protection, but I read the
2 rule with the same alarm that Richard Orsinger
3 does, and I think that it actually erodes the
4 attorney-client privilege in at least three
5 respects. I do not read federal core work
6 product law to be limited to documents or any
7 other material prepared in anticipation of
8 litigation. I don't want to debate that issue
9 now, but I think it's a case called In Re:
10 Seal, which talks about a whole range of
11 attorney work product that can emanate out of
12 attorney-client relations separate and apart
13 from litigation that's privileged in other
14 litigation.

15 Number two, and I think this is partly
16 what Richard is concerned about, is as I read
17 this rule, the core work really is no longer
18 absolutely privileged. It is subject to the
19 discretion of heaven knows how many district
20 judges we have. And I practice in pockets of
21 litigation that would absolutely love to get
22 into my files and will readily give them to
23 the other side.

24 And number three, I do not -- and I think
25 we're also venturing again into this business

1 of in anticipation of litigation. And just
2 today, here is what happened in Texas: A
3 national plan prepared by an outside
4 independent counsel for the trial strategy of
5 a nationwide product litigation was required
6 to be revealed by a district judge who was
7 50 miles from any Federal Reporter. And I
8 think this is a problem that we have now. Why
9 can't I not be involved in litigation as a
10 plaintiff with somebody who has prepared a
11 national strategy before his trial and
12 relative to my case. I go file another case
13 that wasn't prepared in anticipation of that
14 case, get their national trial strategy and
15 then use it in that litigation. And it's
16 happening. It's happening all that time, and
17 I think this rule just lends to that.

18 JUSTICE HECHT: Could I ask one
19 other thing?

20 CHAIRMAN SOULES: Justice
21 Hecht.

22 JUSTICE HECHT: I think an
23 effort was made to track the federal rule. Is
24 there a reason why in the fourth line of the
25 bottom of Part A it was changed from "The

1 Court shall protect the mental impressions,"
2 when the federal rule reads, "The Court shall
3 protect against disclosure of mental
4 impressions"? Is that just editing?

5 PROFESSOR ALBRIGHT: It must
6 have just accidentally happened. There was
7 no -- the intent was to track.

8 JUSTICE HECHT: I don't know if
9 that makes any difference to the argument, but
10 it sounds to me that "The Court shall protect
11 against disclosure of the mental impressions"
12 offers more assurance to -- maybe not
13 enough -- but offers more to Richard and
14 Sarah and others. Now, that is in the federal
15 rule.

16 PROFESSOR ALBRIGHT: Another
17 thing that I would not -- I think it's less
18 elegant, as Scott McCown says, but I would not
19 be opposed to saying, "The mental impressions
20 and opinions of an attorney are absolutely
21 privileged from disclosure," and having the
22 work product instead of the party
23 communications rule. I think the party
24 communications rule is the culprit.

25 CHAIRMAN SOULES: Well, the

1 party communication rule serves another
2 function too. And even though it's case
3 specific and it expires when the case goes
4 away, if executives talk to employees, lower
5 level employees, their communications are
6 privileged in the investigation of a claim,
7 either one they're going to make or one
8 they're going to defend, under party
9 communications in Texas. If the lawyer goes
10 out and talks to the lower level employees,
11 that communication is not privileged --

12 PROFESSOR ALBRIGHT: Yes, it
13 is.

14 CHAIRMAN SOULES: -- under
15 that rule. No, because you've got a
16 controlled group.

17 PROFESSOR ALBRIGHT: It's not
18 an attorney-client privilege, but it is work
19 product.

20 MR. ORSINGER: But I thought
21 the standard was the same.

22 CHAIRMAN SOULES: Well, in
23 Natco maybe they failed to assert the right
24 privilege.

25 PROFESSOR ALBRIGHT: No.

1 Because if you read Natco, what they're saying
2 is it is not an attorney-client privilege
3 because it's not with the control group so
4 we're going to go to work product. And then
5 the issue is was it made in anticipation of
6 the litigation, and that was the issue in
7 Natco.

8 But clearly a communication that a
9 lawyer -- a communication that a lawyer or
10 the president of a corporation makes with an
11 employee concerning the trial of the
12 litigation in anticipation of the litigation
13 is either a party communication or it is --
14 or it would be work product under this rule.

15 Under the current rule, if a lawyer goes
16 to talk to an employee, it is probably not
17 attorney work product if attorney work product
18 is only core work product as you have defined
19 it, so the only way to protect it would be to
20 call it a party communication.

21 CHAIRMAN SOULES: Steve.

22 MR. SUSMAN: I mean, if I'm
23 hearing the debate correctly, I understand
24 this party communication thing that Bill was
25 talking about being different between state

1 and federal depending upon whether it was in
2 anticipation of a particular litigation. And
3 no one really seems -- the people who seem to
4 be concerned about that, the plaintiffs
5 lawyers, do not seem to be making a big case
6 for that.

7 On the other hand, a case is being made,
8 a substantial case along this side of the
9 table to a fact that somehow the state work
10 product doctrine protects attorneys' mental
11 impressions and opinions more than the federal
12 work product doctrine. Is that case not --
13 you're shaking your head. That is not --

14 PROFESSOR DORSANEO: I think
15 not. You know, federal law is hard to figure
16 out a lot of times, but --

17 MR. SUSMAN: I'm sorry, Bill,
18 but is that not the case that's being made by
19 these three who have just spoken? I think it
20 is. Okay?

21 PROFESSOR ALBRIGHT: That is
22 the case that's being made, yes.

23 MR. ORSINGER: Wait a minute,
24 I'm not saying what federal law is on that
25 because I haven't studied it recently. What

1 I'm telling you is these words compared to the
2 current words jeopardize what I'm worried
3 about. Paul is the one that's telling us that
4 there's no worry because of the federal cases.

5 MR. SUSMAN: What I think we
6 ought to do is, A, have someone with someone
7 on this side, I mean, who is concerned about
8 it look at the federal cases from that aspect
9 and compare it with the state cases. Do the
10 state cases protect the attorney's mental
11 impressions and thought processes more than
12 the federal cases? And Alex, you can -- I
13 would say each side should prepare a
14 three-page memo on this subject for us for the
15 next meeting. And maybe there's --

16 PROFESSOR DORSANEO: There's a
17 good article in the Virginia Law Review called
18 "Rethinking Work Product" that does that.

19 MR. SUSMAN: It does that?

20 PROFESSOR DORSANEO: Uh-huh.

21 MR. SUSMAN: Then maybe that's
22 what we ought to look at. But I think if the
23 answer to the question is that federal law is
24 as protective as state law, well, then aren't
25 we okay with going with federal law as long as

1 we can make it clear, A, that the rule is
2 identical to the federal rule. And I agree
3 with Justice Hecht, we make it absolutely
4 clear; and make it clear in the comment that
5 we intend to adopt the federal rule and all
6 the cases that it adopts.

7 PROFESSOR ALBRIGHT: Well, I
8 think one problem with -- well, never mind.
9 This gets more complicated.

10 CHAIRMAN SOULES: David Perry,
11 go ahead.

12 MR. PERRY: Let me ask this: I
13 think we're all in agreement that we want very
14 strong inviolable protection for attorneys'
15 mental impressions and opinions and that sort
16 of thing.

17 MR. SUSMAN: Right.

18 MR. PERRY: I think that's what
19 everybody is saying. Why don't we on the
20 subcommittee have a shot at taking and
21 modifying this so that the words on the paper
22 are either at least as strong or stronger than
23 the federal rule to make sure that the words
24 on the paper as they relate to that particular
25 subject get us where we want to go and come

1 back with another draft.

2 MR. SUSMAN: Because -- I'll
3 respond to that. The economy in what we have
4 done, the environmental dollar impact
5 statement is that by adopting the federal
6 rule, with all the cases that have been
7 decided and reported, we reduce the amount of
8 litigation in controversy --

9 PROFESSOR ALBRIGHT: That's not
10 necessarily true.

11 MR. SUSMAN: Huh?

12 PROFESSOR ALBRIGHT: That's not
13 necessarily true. I think if you make it
14 clear in here that attorney core work product
15 is absolutely protected from discovery, then
16 that makes it very easy.

17 CHAIRMAN SOULES: Let me just
18 say that --

19 MR. SUSMAN: But then you've
20 adopted a separate rule from the federal rule.

21 CHAIRMAN SOULES: There's no
22 question that core work product in Texas today
23 is protected. This is not even an issue in
24 Texas today.

25 PROFESSOR ALBRIGHT: Right.

1 It's not an issue in Texas today.

2 CHAIRMAN SOULES: Now, would
3 somebody articulate for me without arguing,
4 just articulate, the reasons why we should
5 merge back into one work product rule the
6 separated categories that we deliberately
7 separated when we adopted the rules in 1984?

8 MR. GOLD: Because even when
9 the Texas Supreme Court wrote the case about
10 the party communications being limited to the
11 case at hand, you could read the struggle that
12 was going on, and the statement was, "Well,
13 this is the way the rule is written."

14 Let me flip the argument to you. Give a
15 plausible argument why the party communication
16 rule should be limited solely to the instant
17 lawsuit? I'll give you --

18 CHAIRMAN SOULES: Answer. I'll
19 give you a quick answer: Because that's the
20 way it's written and we can change it and we
21 should. But if we can change the party
22 communication rule, we don't have to change
23 any of other rules.

24 MR. GOLD: But when you change
25 the party communication rule, what you have

1 effectively done is tacitly embraced the
2 federal rule. Why not say it and adopt the
3 body of law that is there so that anybody who
4 is looking at these rules from anywhere in the
5 country can say, "Well, we don't have to deal
6 with that funky party communications exception
7 any more. Texas has come into the 20th
8 century and has adopted the work product
9 exception just like everybody else and we know
10 that our affidavits that we've drafted
11 elsewhere around the country for cases just
12 like this will work in Texas just like
13 everywhere else; as opposed to now, where when
14 we draft an affidavit, doggone, it turns into
15 party communications. And something that we
16 did in a parked-reverse case over here two
17 years ago is discoverable because it's a party
18 communication and it's not for this pending
19 litigation." I just think it's cleaner, it's
20 more efficient, and I can't think of any
21 reason not to --

22 CHAIRMAN SOULES: It seems like
23 we've got one problem and that is the party
24 communication privilege does not survive in
25 the pending litigation. Why don't we fix that

1 in the party communication and leave this as
2 is, because we've got plenty of law and
3 there's no question that work product is
4 separated in Texas. And we've got written in
5 these rules that no matter how much good cause
6 and need and all that you have, you can't get
7 that.

8 PROFESSOR ALBRIGHT: Can I
9 respond to that? Because you two, Luke and
10 Sarah, have articulated another problem with
11 the rule, because Sarah thinks attorney work
12 product is anything a lawyer does in
13 anticipation of litigation, the mental
14 impressions and opinions and the ordinary work
15 product, and she thinks it's all absolutely
16 protected from discovery. You think attorney
17 work product means core work product, only
18 your mental impressions and opinions.

19 CHAIRMAN SOULES: That's
20 because witness statements and party
21 communications and the non-core work product
22 are separated for different treatments, and
23 they are treated differently in the very words
24 of the rule.

25 PROFESSOR ALBRIGHT: I agree.

1 CHAIRMAN SOULES: Of our rule,
2 not the federal rule.

3 PROFESSOR ALBRIGHT: I agree
4 that that's the way the rule should be
5 interpreted. But Sarah and then there are
6 some courts of appeals judges in East Texas
7 who think that attorney work product means
8 anything that a lawyer does in anticipation of
9 litigation and that is absolutely protected
10 from discovery.

11 MS. DUNCAN: I don't think
12 that's what I said. But --

13 CHAIRMAN SOULES: And you're
14 not taking a witness statement?

15 PROFESSOR ALBRIGHT: No, no.
16 Okay. Other than a witness statement, when a
17 lawyer goes out and interviews a witness --
18 when a lawyer goes out and interviews a
19 witness and takes notes on it, there are a
20 couple of cases from courts of appeals where
21 the judge says that is attorney work product;
22 it is absolutely protected from discovery; you
23 cannot get it even if you have need and
24 hardship.

25 CHAIRMAN SOULES: I believe

1 that. I think that's right.

2 PROFESSOR ALBRIGHT: You think
3 that's right? Well, then there are other
4 cases that go the other way.

5 CHAIRMAN SOULES: I think
6 that's wrong.

7 They're going to close the garage on us,
8 and it's past 5:30. I appreciate your long
9 day. We'll be back here at 8:30. Your
10 materials are safe in here if you want to
11 leave them.

12 (HEARING ADJOURNED 5:45 p.m.)

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CERTIFICATION OF THE HEARING OF
THE SUPREME COURT ADVISORY COMMITTEE

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on September 16, 1994, afternoon session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are 1,222⁰⁰.
CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 27th day of September, 1994.

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