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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

JANUARY 20, 1995

(AFTERNOON SESSION)

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Taken before William F. Wolfe,
Certified Shorthand Reporter and Notary Public
in Travis County for the State of Texas, on
the 20th day of January, A.D. 1995, between
the hours of 1:00 o'clock p.m. and 5:35
o'clock p.m., at the Texas Law Center,
1414 Colorado, Room 101 and 102, Austin,
Texas 78701.

ORIGINAL

JANUARY 20, 1995 MEETING

MEMBERS PRESENT:

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

EX OFFICIO MEMBERS PRESENT:

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

Also present:

Lee Parsley
Holly Duderstadt

MEMBERS ABSENT:

David J. Beck
Michael Gallagher
Anne Gardner
Mike Hatchell
Tommy Jacks
Franklin Jones, Jr.
Thomas Leatherbury
Harriett Miers
Paula Sweeney

EX OFFICIO MEMBERS ABSENT:

Kenneth Law
Doyle Curry
Thomas Riney

SUPREME COURT ADVISORY COMMITTEE
JANUARY 20, 1995
(AFTERNOON SESSION)

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1 MR. SUSMAN: We're back on the
2 record. To summarize what we just did, we
3 approved Rule 11 with the exception of
4 Subdivision 5, which has been sent back for
5 redrafting. And you will see, as someone
6 pointed out, you're going to get a copy of
7 these rules again, so this will not be the
8 last time you see them.

9 Rule 12, Interrogatories to Parties.
10 Again, the "during" should be changed in the
11 rule, Subdivision 1, to "at any time prior to
12 30 days before the end of the discovery
13 period" to make it consistent with the prior
14 rule. Interrogatories can be served with
15 citation, and they can be served 30 days until
16 the end of the discovery period.

17 The notion here, which you have heard
18 before and I think we have voted on before,
19 was 30 interrogatories not to exceed --
20 including discrete subparts. No limitation on
21 sets. These are concepts that have been
22 discussed before and have been approved.

23 But officially now, is there any comment
24 on 12(1)? All in favor of 12(1), raise your
25 right hand. All opposed. 12(1) passes.

1 MR. McMAINS: Steve?

2 MR. SUSMAN: Yes, sir.

3 MR. McMAINS: The deal there
4 where you say interrogatories will be limited
5 to 30, including discrete subparts, so we
6 abandon the 30 answers? We're back to
7 questions rather than answers?

8 MR. SUSMAN: Yes.

9 MR. McMAINS: Is that the
10 deal? Okay. I just wanted to know.

11 MS. McNAMARA: Steve, one
12 question. Somewhere else doesn't the court
13 have authority to vary this?

14 MR. SUSMAN: Yes. All of these
15 rules -- to remind everyone, every rule can
16 be varied by the court or by agreement of the
17 parties.

18 Rule 12(2). Nothing new here. Any
19 discussion of Rule 12(2)? Everyone in favor
20 of Rule 12(2) raise your hand. All opposed.
21 Rule 12(2) passes.

22 HONORABLE SCOTT BRISTER: One
23 quick question. Rule 12(2)(c), "The
24 provisions of Rule 14 shall not apply." What
25 is that in reference too?

1 MR. HERRING: That's the old
2 Rule 14. The attorney signing.

3 HONORABLE SCOTT BRISTER: Okay.

4 MR. SUSMAN: It's not the new
5 rule. That's the old rule. We'll probably
6 need to make that clear in the draft, that
7 it's not this new rule.

8 Okay. Subdivision 3, Scope of
9 Interrogatories. This has received a lot of
10 drafting attention. The concept has been
11 approved and discussed and approved over and
12 over again. I think we have captured the
13 essence of what you all instructed us to
14 capture. Any problem with the wording of
15 Subdivision 3? Any discussion of that?

16 All in favor of Subdivision 3, raise your
17 right hand. All opposed. It passes.

18 Subdivision 4 is nothing new. Any
19 discussion of Subdivision 4? All in favor of
20 Subdivision 4 raise your right hand. All
21 opposed. It passes.

22 Subdivision 5. I do not believe there's
23 anything new in this from existing law. It's
24 simply the option to produce records in lieu
25 of answering.

1 Any discussion of Subdivision 5? All in
2 favor of Subdivision 5 raise your right hand.
3 Subdivision 5 passes.

4 Rule 13. We were instructed by the
5 entire Committee -- and for the record,
6 Rule 12 has passed in its entirety. Rule 13.
7 We were instructed by this Committee to leave
8 in as an available discovery vehicle requests
9 for admissions. We not only did that, but
10 when we read the current Rule 169, we did not
11 think we could significantly or materially
12 improve upon it. Therefore, we will simply
13 copy Rule 169 in as Rule 13, unless anyone has
14 any objection.

15 Any discussion of that proposal? All in
16 favor, then, of Rule 13, which will be a
17 verbatim copy of Rule 169, raise your right
18 hands. All opposed. Rule 13, as I have
19 described it, passes. Rule 14.

20 MR. LATTING: Steve?

21 MR. SUSMAN: Yeah.

22 MR. LATTING: A question about
23 the numbers of these rules. Is it proposed
24 that these will actually be the numbers of the
25 rules?

1 MR. SUSMAN: It is really -- I
2 think that's a question we'll have to take up
3 with Justice Hecht. I mean, Lee -- I mean,
4 someone will tell us what you all want to do.
5 I mean, it was easier for us to renumber
6 them. It will probably be easier for the bar,
7 but whether they want to do that for us or not
8 I don't know.

9 Depositions Upon Oral Examination. The
10 one -- every time you read these rules, you
11 learn that -- I mean, we do, when we go back
12 and read them all the time -- you learn that
13 we've missed something that -- we've left out
14 something that's important.

15 I think what we have left out in Rule 1
16 is that depositions -- this sentence, which
17 should be added at the end of Rule 1: "Leave
18 of court, granted with or without notice, must
19 be obtained if a party seeks to take a
20 deposition prior to the appearance day of any
21 defendant." That comes right out of
22 Rule 200(1). We just inadvertently left it
23 out, and it needs to be put in so no defendant
24 gets deposed or there's no effort to depose a
25 defendant prior to --

1 PROFESSOR ALBRIGHT: Nobody
2 gets deposed.

3 MR. SUSMAN: Huh?

4 PROFESSOR ALBRIGHT: Nobody
5 gets deposed. There are no depositions
6 without --

7 MR. SUSMAN: Right. Right.

8 PROFESSOR ALBRIGHT: -- court
9 order.

10 MR. SUSMAN: No one gets
11 deposed, correct. It's the existing provision
12 that we have put into Rule 1.

13 Any problems with Rule 1 as I have
14 modified it? All in favor of Rule 1 as
15 modified.

16 MR. LATTING: Rule 1?

17 MR. SUSMAN: I mean
18 Subdivision 1 of Rule 14. Forgive me.

19 All in favor. All opposed. That
20 passes.

21 Subdivision 2, Notice and Subpoena. I do
22 not believe, correct me if I'm wrong, Alex,
23 that we did anything to the existing law
24 here. Did we?

25 HONORABLE C. A. GUITTARD:

1 Steve, then it has Subdivision (b), and it
2 seems to me that the second sentence there and
3 the third are repetitive. If they're not, I
4 don't understand it. I would suggest that --

5 MR. SUSMAN: Oh, it's just --
6 it's a typo. You're absolutely right.

7 HONORABLE C. A. GUITTARD: --
8 the second one should be stricken and the
9 third probably should be kept.

10 MR. SUSMAN: I think they're
11 identical.

12 HONORABLE C. A. GUITTARD: Not
13 quite, but --

14 MR. KELTNER: The leading
15 phrase isn't.

16 MR. SUSMAN: You want to strike
17 which one?

18 HONORABLE C. A. GUITTARD: The
19 first one.

20 MR. SUSMAN: "In that event"?

21 HONORABLE C. A. GUITTARD: "In
22 that event," yes.

23 MR. SUSMAN: Strike that one
24 and leave "In response"?

25 MR. LATTING: What page is this

1 on?

2 MR. SUSMAN: Page 29. Okay.

3 Any other comments? That's a good catch. Any
4 other comments on Subdivision 2? All in favor
5 of Subdivision 2 as recommended by the
6 subcommittee and amended -- yes, Scott.

7 HONORABLE F. SCOTT MCGOWN: No,
8 I was voting.

9 MR. SUSMAN: -- by Judge
10 Guittard, all in favor raise your right hand.

11 MR. LATTING: What is being
12 stricken precisely? The second --

13 MR. SUSMAN: The second full
14 sentence of Subdivision 2(b) is being
15 stricken.

16 MR. LATTING: "In the event"?

17 MR. SUSMAN: Right.

18 Subdivision 3, as I recall, there's no change
19 from the existing law.

20 HONORABLE F. SCOTT MCGOWN: (3)
21 should be read in conjunction with (4).

22 MR. SUSMAN: Read (3) in
23 conjunction with (4). We have made it clear
24 here that if you ask for the production of
25 documents, the same 30-day requirement of

1 Rule 11 of these rules applies, so no one can
2 use a notice of a deposition to shortcut the
3 document request as to a party.

4 Any other discussions of Subdivisions 3
5 and 4? All in favor of Subdivisions 3 and 4
6 raise your right hand. All opposed.

7 Subdivision 5 --

8 HONORABLE C. A. GUITTARD: It
9 passes. It passed.

10 MR. SUSMAN: It passes. Thank
11 you, Judge.

12 Subdivision 5, Time and Place. Alex,
13 correct me, same as existing law?

14 PROFESSOR DORSANEO: Can we
15 back up to Subdivision 4 for a second?

16 MR. SUSMAN: Only if you get a
17 three quarters vote. No, go ahead.

18 PROFESSOR DORSANEO: Well, this
19 is worded like our current rule is worded, but
20 there are a number of significant problems
21 with figuring out who a person subject to the
22 control of a party is. The companion sanction
23 rule in our rules talks about this same
24 matter. It was borrowed from the federal
25 rule, which itself is not all that well

1 drafted. But the concept of managing agent
2 and the identification of an officer and a
3 director as being within the category of
4 persons that an organizational deponent, you
5 know, would have to produce, you know, would
6 clarify things tremendously. So I'm saying
7 our current rule, when it talks about a
8 deponent who is a party or a person subject to
9 the control of a party, would be improved, as
10 recodified, if it added in "officer, director
11 or managing agent," which I think is general
12 law.

13 MR. SUSMAN: No, no. How about
14 an employee? How about the lowliest employee
15 who is certainly in my control?

16 HONORABLE F. SCOTT MCGOWN:
17 What's the question? I'm having trouble
18 hearing it. What's the --

19 MR. SUSMAN: The question, I
20 think, is under (4). When the deponent is a
21 party, or a person subject to the control of a
22 party, service of the notice upon the party's
23 attorney will have the same effect as a
24 subpoena served on the deponent.

25 PROFESSOR DORSANEO: Well, the

1 issue is, who are persons subject to the
2 control of a party. And I probably stated it
3 badly. The normal statement of who those
4 persons are includes, among others, managing
5 agents, officers and directors.

6 I had a case that involved Wal-Mart. The
7 argument was made that Sam Walton, may he rest
8 in peace, was not subject to the control of
9 Wal-Mart because he was in control of
10 Wal-Mart. I thought that was a pretty silly
11 argument, but the trial judge didn't.

12 MR. SUSMAN: Anne.

13 HON. ANNE TYRRELL COCHRAN: It
14 is so -- I mean, there are so many things. I
15 mean, just while you were talking, I was
16 sitting here thinking, well, there are, you
17 know, contractual agreements that give one
18 entity control over the employees of another
19 entity. I mean, it's so factually
20 determinative that there's no way you can
21 define it.

22 PROFESSOR DORSANEO: All I'm
23 saying is in normal jurisprudence, discovery
24 jurisprudence at the federal level and in our
25 own sanction rule right now, those other three

1 types of persons subject to control are named
2 specifically, and there is a lot of litigation
3 about this.

4 HON. ANNE TYRRELL COCHRAN: But
5 that's a lot different, though, than who can
6 you make come to the deposition because
7 they'll fire them if they don't show up. I
8 mean, for sanctions it's still very
9 different. And as far as who you have the
10 ability to make show up for a deposition, it's
11 too factually specific.

12 MR. SUSMAN: Paul Gold.

13 MR. GOLD: When I drafted the
14 proposed draft of this rule, I had used the
15 federal rule. This one that has now gotten in
16 has now changed it again. And I did it for
17 the reasons that Bill has talked about.
18 Number one, it tracked the federal cases; and
19 then, number two, what another issue is, in
20 the federal cases, is if someone is a manager,
21 director or executive, they are automatically
22 considered a representative. They're already
23 someone who can bind a corporation whether the
24 defendant designates them as a representative
25 or not. And that was something that I wanted

1 to point out.

2 MR. SUSMAN: Joe Latting.

3 MR. LATTING: I don't think we
4 clarify things or make things easier by
5 specifying some particular classes. And I
6 think we would be better off to leave it just
7 like it is.

8 MR. SUSMAN: Scott.

9 HONORABLE F. SCOTT McCOWN: I'm
10 going to echo Joe's comment, and just add to
11 it that the language suggests a high degree of
12 control. So if you put the added language in,
13 it tilts the rule toward the trial judge
14 finding that they're not within control. If
15 you leave it the way it is, it's a very
16 practical test. It's not going to matter,
17 because if there's a fight about it, the trial
18 judge is going to decide it, and so I think it
19 ought to be left the way it is.

20 MR. SUSMAN: Okay. Is there
21 any motion to reconsider our approval of
22 Section 4? Okay. Hearing none, we move on to
23 Section 5.

24 Section 5, I do not believe represents a
25 change in existing law. Does it, Alex?

1 PROFESSOR ALBRIGHT: No. 5, no.

2 MR. SUSMAN: I think you would
3 have put something if it was. Section 5, time
4 and place of a deposition. Any discussion?
5 All in favor of Section 5 raise your right
6 hand. All opposed. Section 5 passes.

7 And I am pleased to announce that Rule 14
8 has now been passed in its entirety.

9 Rule 15. Rule 15(1). Subdivision 1.
10 Nothing new here to my knowledge.

11 HONORABLE C. A. GUITTARD:
12 Steve, in order to make explicit what seems to
13 be implied here in the last line of
14 Subdivision 1, it doesn't say -- it might be
15 better to say, "the officer, who shall open
16 the envelope and propound the questions to the
17 witness," to make sure that he's the person
18 who has the authority to open the envelope.

19 MR. SUSMAN: Any problem with
20 that addition?

21 MR. LATTING: Where is it?

22 MR. SUSMAN: It's the last, the
23 next to the last line of Rule 15(1), "who
24 shall transmit them to the officer who shall
25 open the envelope and propound them."

1 HONORABLE C. A. GUITTARD: The
2 questions.

3 MR. SUSMAN: Propound the
4 questions.

5 HONORABLE C. A. GUITTARD: Yes.

6 MR. SUSMAN: Any problem with
7 that? Alex, did you get that?

8 PROFESSOR ALBRIGHT: I got it.

9 MR. SUSMAN: As thus modified,
10 all in favor of Subdivision 1 of this Rule 15.

11 MR. YELENOSKY: Steve, just one
12 minor point. What about non-stenographic? I
13 mean --

14 MR. SUSMAN: All opposed. It
15 passes.

16 Now I'll take your question.

17 MR. YELENOSKY: Okay. I may be
18 missing something, but you don't have an
19 officer at a non-stenographic deposition, so
20 who is responsible for --

21 MR. LATTING: Well, you have to
22 send an envelope anyway.

23 MR. SUSMAN: Well, it doesn't
24 have to be in an envelope.

25 MR. YELENOSKY: No. I mean,

1 who is the officer that's going to propound
2 the question?

3 MR. SUSMAN: Well, there has to
4 be someone there. Doesn't there, David?

5 MR. JACKSON: Well, it's
6 whoever you hire to go take it. It's usually
7 not -- it doesn't even have to be a CSR. They
8 usually don't -- a lot of times they don't
9 even take a stenograph machine. They take a
10 typewriter or a word processor with the
11 questions in it, fill in the answer, and then
12 have it printed out and have the person sign
13 it.

14 PROFESSOR DORSANEO: Not if
15 this is an oral deposition.

16 MR. YELENOSKY: Yeah. What if
17 it's an oral deposition?

18 MR. JACKSON: Okay.

19 PROFESSOR DORSANEO: Yeah, an
20 oral deposition.

21 MR. YELENOSKY: And it's a tape
22 recorded deposition, and it's another party
23 who wants to ask questions. Who do they give
24 the questions to?

25 PROFESSOR DORSANEO: There has

1 to be a CSR there. You can't do that.

2 MR. JACKSON: I'm sorry, I
3 missed that.

4 MR. YELENOSKY: Under these
5 rules, or under the current rules?

6 PROFESSOR DORSANEO: Under
7 current rules. Under the statute. There are
8 some minor limitations on that, but not very
9 many.

10 MR. SUSMAN: Shall we go on?

11 HONORABLE F. SCOTT MCGOWN:
12 Well, wait. Hasn't he raised a problem that
13 isn't solved here?

14 PROFESSOR ALBRIGHT: I think
15 what happened is that in our redrafting last
16 weekend we didn't -- I think it was
17 originally said that this person shall be
18 placed under oath by an officer who can do so,
19 and we deleted that. And so that's where you
20 first have an officer, and then it's there
21 again, so that makes it --

22 MR. SUSMAN: I mean, the real
23 question is, where you have a non-stenographic
24 deposition do you still need an officer to
25 administer an oath?

1 PROFESSOR ALBRIGHT: Well,
2 that's not where we are. We are in an oral
3 deposition where someone has chosen to send
4 written questions to that oral deposition, so
5 what I can do is send written questions in a
6 sealed envelope. The court reporter is then
7 authorized to open the envelope. I think what
8 Justice Guittard is saying is you can't open
9 the envelope. But the court reporter can open
10 the envelope, read the questions, and then the
11 person who is being orally deposed then
12 answers those written questions. Isn't that
13 correct?

14 MR. SUSMAN: Yes. And I
15 thought Steve's question was what happens if
16 you don't have a traditional court reporter
17 because it's not being recorded
18 stenographically; in fact, it is going to be
19 recorded with a tape recorder. As I
20 understand the rules being written, an officer
21 still has to administer the oath.

22 MR. YELENOSKY: Well, they're
23 saying that's the current rule. All I know is
24 the practice very often at Legal Aid was to do
25 a non-stenographic notice and walk in there

1 with a tape recorder. And what would happen
2 is a notary would come in and swear the
3 witness and leave.

4 HON. ANNE TYRRELL COCHRAN: Now
5 you have to bring the notary back in to open
6 up the envelope.

7 MR. YELENOSKY: Okay. Okay.

8 PROFESSOR DORSANEO: I don't
9 want to be an obstructionist, though, but is
10 this the first paragraph of 201 right now?

11 PROFESSOR ALBRIGHT: I can't
12 remember.

13 PROFESSOR DORSANEO: Because if
14 it is the first paragraph of 201, the first
15 sentence of that first paragraph says that the
16 certified shorthand reporter can be the
17 deposition officer. When 201 was amended
18 effective April 1, 1984, that was the first
19 place that it said that a CSR could administer
20 oaths. I think now the government code has
21 caught up with that, or else the Civil
22 Practice and Remedies Code. But I'm not
23 completely sure that it isn't 201 that still
24 carries the freight with respect to who can
25 administer oaths for an oral deposition. It

1 used to have to be a notary public, remember?
2 And then we changed it to certified shorthand
3 reporter, and it says that in 201 right now.
4 We put it in there.

5 MR. SUSMAN: All right. You
6 have flagged a problem, and we will check it.

7 PROFESSOR DORSANEO: Okay.

8 MR. SUSMAN: David, you're
9 responsible for checking that problem and
10 reporting to the subcommittee.

11 MR. JACKSON: In 25 years of
12 court reporting, I have never done this
13 process.

14 MR. SUSMAN: Well, check
15 Rule 201 or whatever it is.

16 We've passed now Subdivision 1.
17 Subdivision --

18 HONORABLE F. SCOTT McGOWN:
19 Well, wait. Are we committing the
20 subcommittee to study and fix this problem
21 that Steve has brought up?

22 MR. SUSMAN: Yeah.

23 HONORABLE F. SCOTT McCOWN:
24 Okay.

25 MR. SUSMAN: We'll look at it.

1 HONORABLE F. SCOTT MCGOWN:

2 Okay.

3 MR. SUSMAN: Subdivision 2,
4 Time Limitations. This has been something
5 which has been controversial but, as you know,
6 discussed and approved. So I don't want to
7 revote this. These time limits were approved
8 at our last meeting.

9 MR. MARKS: They were?

10 MR. SUSMAN: Yes, sir.

11 MR. MARKS: I don't remember
12 that.

13 MR. SADBERRY: At the last
14 meeting where they were discussed.

15 MR. SUSMAN: At the meeting
16 where they were discussed. I will get that
17 for you.

18 MR. MARKS: But even if they
19 were, I think we ought to discuss it again. I
20 move that we reopen the discussion.

21 MR. SUSMAN: Is there a second
22 to the motion to reopen the discussion?

23 Hearing no second, that motion fails.

24 MR. MARKS: Thanks a lot.

25 MR. KELTNER: I'd second it,

1 except I've tried too many times on this one.

2 MR. SUSMAN: Yes, sir.

3 MR. GOLD: And just so it's
4 clear, I've talked with Alex about it, just to
5 clarify in the first sentence of (a), change
6 "their" to "the opposing party's" control,
7 because it's not clear.

8 MR. HERRING: Where?

9 MR. GOLD: It should say "shall
10 have 50 hours to examine and cross-examine
11 opposing parties and persons subject to the
12 opposing party's control," so it's clear who
13 "their" refers to.

14 MR. MEADOWS: Isn't that in
15 there, Paul?

16 MR. GOLD: "Their" is just
17 somewhat ambiguous. We can spell it out
18 better.

19 HONORABLE DAVID PEEPLES:
20 Steve?

21 MR. SUSMAN: Yes, sir.

22 HONORABLE DAVID PEEPLES:
23 What's the court supposed to do when
24 defendants who genuinely have some adversity
25 can't agree on who gets how much time? That's

1 not a hard question for me when they really
2 are aligned and they just seem like one in the
3 case. But sometimes defendants really have
4 some difficulties among themselves in addition
5 to being adverse to the plaintiffs. What am I
6 supposed to do? And they can't agree on who
7 gets how much time.

8 MR. SUSMAN: By the way, I just
9 wanted to interject so no one thinks I'm
10 taking liberty with the record, at our meeting
11 on July 15th, the vote was 15 to seven for a
12 time limit of 50 hours, and 15 to seven for
13 additional per deposition limits. That was
14 the vote.

15 Now, I think you may be right, we did not
16 discuss at that July meeting (b). I mean, I
17 think we, the committee, came back after the
18 meeting -- you wanted a per deposition limit;
19 there was some discussion. We may not have
20 all agreed on the three hours on the lay
21 witness. I don't remember without looking at
22 the actual transcript.

23 HONORABLE F. SCOTT MCGOWN:

24 Steve, in answer to the question that's been
25 posed, I think under this rule, if the

1 defendants cannot agree, you've got to keep in
2 mind that this rule can always be changed by
3 agreement. If they can't agree, then the
4 court -- they're going to have to go to court
5 and the court is going to have to hear them
6 all out and the court is going to have to set
7 the limits. This rule would be a kind of norm
8 against which the Court would look in setting
9 a limit. But you know, I think what most
10 judges would do is increase the number of
11 hours from 50 to something else and divide it
12 up between the defendants accordingly.

13 MR. SUSMAN: Any other comments
14 or questions?

15 MR. McMAINS: Steve, is this
16 rule designed to be the second tier --

17 MR. SUSMAN: Yes, sir.

18 MR. McMAINS: -- in the
19 discovery process?

20 MR. SUSMAN: Yes, sir.

21 MR. McMAINS: I'm just
22 wondering because it doesn't say that.

23 MR. SUSMAN: Oh, then I'm
24 sorry, Rusty. Forgive me. What we intend to
25 do, I think it's a drafting matter, is take 2a

1 and move it -- it is already, if you will
2 look, in Rule 1.

3 MR. McMAINS: Right.

4 MR. SUSMAN: If you look back,
5 it's in Rule 1. We just did not delete it
6 from this rule. Dave Perry wrote us a letter
7 after our meeting suggesting we should delete
8 it because it's now redundant, and he's right,
9 so I think it will be deleted here because it
10 appears, as you can see, at the top of Page 2.

11 MR. McMAINS: So it's in the
12 tier approach?

13 MR. SUSMAN: Right.

14 MR. McMAINS: That's fine.
15 That's why I was -- the problem I had was
16 that it was in the general deposition rule but
17 then it didn't relate back.

18 HONORABLE F. SCOTT McGOWN:
19 That's just a drafting problem.

20 MR. SUSMAN: Time per
21 deposition --

22 MR. LOW: Steve?

23 MR. SUSMAN: Yes, sir.

24 MR. LOW: I think if you're
25 saying third-party defendants share the

1 defendants' 50 hours regarding issues common
2 to the defendants, you mean the third-party
3 defendant has common to the defendants,
4 because as you go down and pick it up,
5 third-party defendants have an additional
6 10 hours regarding issues on which they oppose
7 the defendants. So I don't think it's just
8 issues that they're in -- that the defendants
9 have in common, but third-party defendants
10 have in common with those defendants.

11 Well, if you don't get it, that's fine.
12 Do you know what I'm talking about? Maybe
13 someone else can --

14 MR. LATTING: Buddy, say that
15 again.

16 MR. LOW: Okay. The
17 defendants -- it says third-party defendants
18 share with defendants hours with regard to
19 issues common to defendants. Common to
20 third-party defendants and defendants. In
21 other words --

22 HONORABLE F. SCOTT McCOWN: It
23 should be common to them and the defendants.

24 MR. LOW: Yeah.

25 MR. SUSMAN: Alex, did you get

1 that? Common to them and defendants.

2 MR. LOW: And then it clarifies
3 it down there later.

4 MR. LATTING: Well, but that
5 will actually be included in Page 2, because
6 what we're talking about is redundant.

7 MR. SUSMAN: The same
8 language. We're going to just fix the
9 language and put it in one place.

10 MR. LATTING: Okay.

11 MR. SUSMAN: Now, can I focus
12 your attention briefly on time per
13 depositions. The concept here is one fact
14 witness, you can burn all 50 of your hours if
15 you want to. But after the one, you are
16 limited to three hours per fact witness and
17 six hours per expert. And third-party
18 defendants may examine -- well, the
19 limitations are in here.

20 Now, you know, Alex, there's a mistake
21 here that we did not catch. I don't think we
22 intended to allow one expert deposition to be
23 unlimited in time, which is -- it could be
24 that way now the way it's written, couldn't
25 it?

1 PROFESSOR ALBRIGHT: Well,
2 don't you think -- can't you choose? Does it
3 matter?

4 MR. SUSMAN: Huh?

5 PROFESSOR ALBRIGHT: Does it
6 matter?

7 MR. SUSMAN: Well, let's
8 discuss that. I think the intent here was to
9 have a fact witness be unlimited. Like if you
10 were deposing the president of the other side,
11 the named plaintiff, it would be -- you could
12 use as much time as you want with one
13 witness. The question is whether we want that
14 one unlimited deposition to be also put on the
15 other side's expert. Any feeling? We can
16 leave it.

17 PROFESSOR ALBRIGHT: I would
18 say I wouldn't care.

19 MR. LATTING: Let's leave it,
20 because --

21 PROFESSOR ALBRIGHT: Because
22 what if you --

23 MR. LATTING: -- he might be
24 the main man in the case.

25 PROFESSOR ALBRIGHT: -- want

1 to take the treating doctor. He may be the
2 treating doctor.

3 MR. SUSMAN: Okay. Any -- as
4 thus clarified, which we will leave, that's
5 fine, any problem with -- I mean, any further
6 discussion of (b)?

7 MR. HUNT: Do (b) and (c) stay
8 with 15(2)?

9 MR. SUSMAN: (B) and (c) stay
10 with 15(2), that's correct, because it applies
11 even to the depositions that are in Tier 1.
12 Yes.

13 All in favor, then, of Rule 15(2) in its
14 entirety raise your right hand.

15 MR. GOLD: Steve?

16 MR. SUSMAN: All in favor raise
17 your right hand. All opposed. That passes.

18 Now go ahead, Paul.

19 MR. MARKS: I opposed it.

20 CHAIRMAN SOULES: By what vote?

21 MR. GOLD: All I need to
22 clarify is --

23 CHAIRMAN SOULES: We didn't get
24 the vote recorded.

25 MR. SUSMAN: The vote has not

1 been recorded on any of this. Why do you want
2 the vote recorded on this one?

3 PROFESSOR ALBRIGHT: It's the
4 only one we had a dissent.

5 CHAIRMAN SOULES: You told me a
6 while ago that you were not recording votes
7 because if there were no votes against, it was
8 considered passed. Well, there were some
9 votes against that.

10 MR. SUSMAN: All right. Let's
11 record the votes on this.

12 MR. LATTING: Who is that guy
13 that just talked? We were moving along so
14 fast.

15 MR. SUSMAN: All in favor of
16 15(2), raise your right hand. Who is going to
17 count?

18 CHAIRMAN SOULES: 15.

19 MR. SUSMAN: All opposed raise
20 your right hand.

21 CHAIRMAN SOULES: Three. Three
22 opposed.

23 MR. SUSMAN: Okay.

24 MR. GOLD: Can I get a
25 clarification now?

1 MR. SUSMAN: Yes, sir.

2 MR. GOLD: For instance, if you
3 were to take a deposition of an individual who
4 at the time was not designated as an expert
5 witness and then they were subsequently
6 designated as an expert witness, I would
7 imagine you would get your three additional
8 hours with that individual or however many
9 hours you have left. Does that make sense?

10 MR. SUSMAN: I guess.

11 MR. GOLD: Okay.

12 MR. SUSMAN: No. 3.

13 MR. HUNT: Before we go on to
14 that, let me ask about (c). I know we've
15 passed this, and it's fine, but I thought we
16 were going to have something else to help the
17 court reporter charged with the time about how
18 some of that was to be done. All that's said
19 here is that breaks don't count.

20 MR. YELENOSKY: We also have
21 the non-stenographic issue there as well. So
22 just flag that, because there's no officer, or
23 there may not be.

24 MR. SUSMAN: Well, you have an
25 officer there.

1 PROFESSOR ALBRIGHT: You have
2 to have an officer.

3 MR. HERRING: To sit there
4 through the whole depo?

5 MR. MARKS: Yeah. How are they
6 going to certify the times?

7 MR. YELENOSKY: Yeah. I was
8 only there for five seconds.

9 MR. MARKS: Could I ask for a
10 clarification? This is intended to apply to
11 Tier 2 and Tier 3 cases?

12 MR. SUSMAN: No. It applies to
13 Tier 2 cases. Tier 3 cases, make your own
14 rules.

15 MR. MARKS: Okay.

16 MR. McMAINS: But if you didn't
17 specify otherwise, it would be applicable
18 during the discovery period, right?

19 MR. SUSMAN: Yes, sir. If you
20 can't get an agreement from the other side or
21 get a judge to order otherwise, you are stuck
22 with the limitations of Rule 15(2).

23 MR. MARKS: Even if you go to
24 Tier 3? Or if you go to Tier 3, everything is
25 off?

1 MR. SUSMAN: No, sir. You
2 can't go to Tier 3 unless it's by agreement
3 between both parties or by order of the court.
4 That's how you get to Tier 3.

5 HONORABLE F. SCOTT McCOWN:
6 Steve, I think the confusion is Tier 3 is
7 custom designed. So you've got Tier 2, and
8 Tier 3 is a customization, so anything that's
9 different from Tier 2 is, by definition,
10 Tier 3.

11 PROFESSOR ALBRIGHT: But --

12 MR. GOLD: I discussed this --
13 I think that the problem is, and I discussed
14 this with Alex just before the meeting and I
15 think we need to get to it when we get to the
16 discovery plan issue, is if the discovery plan
17 does not specifically address the deposition
18 time and the time per deposition --

19 MR. SUSMAN: -- these are the
20 rules.

21 MR. GOLD: -- does it default
22 to Tier 2?

23 MR. SUSMAN: Yes. These are
24 the rules.

25 MR. GOLD: Because there's

1 nothing in the discovery plan rule that
2 specifically says the court must structure a
3 discovery -- a deposition time schedule. And
4 that's what -- I think that's what the issue
5 is.

6 MR. SUSMAN: Well, we have an
7 interesting question raised about timekeeping,
8 and I guess there's a mechanical problem
9 there. I'm not exactly sure --

10 PROFESSOR ALBRIGHT: What's the
11 problem?

12 MR. SUSMAN: -- how we make it
13 better. Do you have any ideas?

14 MR. HUNT: Well, do we want to
15 give the court reporter more help? That's
16 just a comment. I felt like if when we get
17 the final draft, is there anything more we can
18 say that will help those who must be charged
19 with the duty of saying "you used this amount
20 of time" and "you used that amount of time"
21 and avoid petty fights over timing?

22 MR. SUSMAN: Dave, is it a
23 problem, much of a problem?

24 MR. JACKSON: No. I think it's
25 just going to be a matter of the court

1 reporter writing down when he starts and when
2 he stops and putting the time limit there, and
3 then you can do your own subtracting. But I
4 think the court reporter on his certificate
5 ought to put what his tally is on there
6 according to what's in the record.

7 And there are computer programs now that
8 a lot of reporters are going to that, if you
9 want to, you can have the minute and second
10 that you said every word, so you could have
11 that, too.

12 MR. SUSMAN: Alex.

13 PROFESSOR ALBRIGHT: Is that
14 your only problem?

15 MR. HUNT: I don't have a
16 problem with the concept; I'm wondering if we
17 want to say more to help the court reporters
18 later on. And if it's solved, we may not need
19 to.

20 PROFESSOR ALBRIGHT: Okay. I
21 just misunderstood the problem.

22 MR. SUSMAN: Now can we turn to
23 Subdivision 3, Conduct during the deposition.

24 HONORABLE C. A. GUITTARD:
25 Steve?

1 MR. SUSMAN: Yes, sir.

2 HONORABLE C. A. GUITTARD: In
3 the last sentence there, it seems to imply or
4 say that these statements and objections and
5 so forth other than the testimony can be
6 presented to the jury, but it doesn't -- but
7 that seems to exclude presenting it to a judge
8 that is trying a case without a jury, and I'm
9 not sure. If that's not the intent, then I
10 would suggest that the last line be revised:
11 "Testimony to be" -- instead of "presented
12 to the jury during trial," it should be "to be
13 introduced in evidence at the trial."

14 MR. GOLD: What was the last
15 statement?

16 HONORABLE F. SCOTT MCGOWN:
17 He's saying we need to take out "to the jury"
18 because you ought to have the same rule when
19 you're trying it to the judge.

20 CHAIRMAN SOULES: The trier of
21 fact.

22 HONORABLE F. SCOTT MCGOWN:
23 Yeah. Just take out the words "to the jury."

24 MR. LATTING: Or take out
25 "presented to the jury" and include

1 "introduced in evidence."

2 HONORABLE C. A. GUITTARD: At
3 the trial.

4 MR. SUSMAN: Any problem with
5 that, Alex? The court may allow statements,
6 blah, blah, blah, to be introduced into
7 evidence at trial. Introduced into evidence
8 at trial. We will accept that.

9 MR. MARKS: Okay. I have
10 question about it.

11 MR. SUSMAN: Yes, sir.

12 MR. MARKS: Have we voted on
13 this before specifically?

14 PROFESSOR ALBRIGHT: Yes.

15 MR. MARKS: Did we vote on this
16 sentence right here, because my recollection
17 was that there was quite a bit of discussion
18 as to what do you do with, for example, the
19 rules of evidence. I mean, what does that do
20 to the rules of evidence?

21 MR. SUSMAN: Well, let me --

22 MR. MARKS: And shouldn't that
23 be a sanctionable thing that's dealt with by
24 the court rather than presenting it to the
25 jury?

1 MR. YELENOSKY: I remember some
2 of that discussion. One of the things that
3 was said, I think, was that -- I mean, at
4 least one of the things that I said was that
5 it didn't seem to me that it would be
6 admissible if it's just bad behavior. The
7 only thing would be if it did relate to the
8 veracity of the testimony; I mean, if it went
9 to the credibility. And I don't think we had
10 a drafting of it, but we did talk about it
11 being limited to the --

12 MR. SUSMAN: I'll tell you what
13 our basic discussion was, if I can refresh
14 everyone. We came in with kind of a mandatory
15 provision. No one liked that. Then it became
16 at one point in time permissive. And then we
17 said it could be used or go before the jury
18 but only if it reflects on the veracity of a
19 witness.

20 MR. LATTING: That's true.
21 That's what happened.

22 MR. YELENOSKY: That's what I
23 was saying.

24 PROFESSOR ALBRIGHT: As I
25 recall this draft, we basically redrafted it

1 in the meeting.

2 MR. MARKS: In the meeting,
3 right.

4 PROFESSOR ALBRIGHT: And we
5 voted on it, and that's when I copied it onto
6 the paper.

7 HONORABLE F. SCOTT McCOWN: And
8 let me point out, there's no evidence problem
9 with this because it's an out-of-court
10 statement of the lawyer, but it's not offered
11 for the truth of the matter of the statement.
12 It's offered to show the context of the
13 witness' answer and how the lawyer's
14 interjection may have influenced the witness'
15 answer.

16 MR. LOW: Steve, I think also
17 this is a thing against the Rambo tactic where
18 the judge can just -- and that's one of the
19 things that got to be pretty bad, and I think
20 this helps cure that pretty easily.

21 MR. SUSMAN: Well, our starting
22 point was that if you make the deposition room
23 look more like the courtroom, 90 percent of
24 your abuse will disappear. People do things
25 in depositions they wouldn't dare do in front

1 of a jury.

2 MR. LOW: Right.

3 MR. SUSMAN: Any further
4 discussion of Subdivision 3?

5 HONORABLE SCOTT BRISTER: Yes.
6 Does this mean you can't -- it says that
7 during normal recesses you can confer. Does
8 this mean somebody can complain that the other
9 side is taking more than the normal number of
10 recesses? I mean, does this permit you to say
11 that you can't -- you get to a ticklish
12 question and the attorney cannot ask for a
13 recess to discuss the problem?

14 MR. SUSMAN: That's what we
15 intend to say. Maybe we haven't done it
16 artfully enough, but I would suggest that if
17 an attorney -- that's exactly what we don't
18 want, is the attorney saying "time for a
19 recess." I think it requires some good
20 judgment here on the part of -- you know,
21 maybe the lawyer really does have to go to the
22 bathroom.

23 MR. YELENOSKY: Well, why don't
24 you just say "agreed recesses," because
25 everybody is going to want a recess at some

1 point.

2 MR. SUSMAN: No. Somebody is
3 going to say, "I've got to go to the
4 bathroom." Okay?

5 MR. YELENOSKY: Then you'll
6 agree.

7 MR. SUSMAN: Huh?

8 MR. YELENOSKY: Then you'll
9 agree.

10 MR. SUSMAN: No. Suppose the
11 other guy says --

12 MR. GOLD: Not in Dallas. Not
13 in Dallas. Nobody in Dallas goes to the
14 bathroom.

15 MR. MARKS: I do.

16 MR. GOLD: In fact, it's a sign
17 of weakness to request it.

18 CHAIRMAN SOULES: The court
19 reporter cannot make this record.

20 MR. LOW: That's one thing that
21 would be hard to do unless you provide that
22 ordinary breaks are so long or something, or
23 unless you provide that if a break is called
24 for, there shall be no consulting, you know,
25 if somebody has an emergency break or

1 something like that.

2 HONORABLE SCOTT BRISTER: I
3 think that "normal recess" isn't clear. I
4 wasn't in on that discussion; I missed that
5 meeting. But that was my impression when I
6 read this, that "normal recess" was not, when
7 you got to "Is that your signature or not,"
8 that you could take a break.

9 MR. SUSMAN: Any other
10 discussion? All in favor of Rule 15,
11 Subdivision 3, raise your right hand. All
12 opposed. Subdivision 3 passes unanimously.

13 And Mr. Court Reporter, for the record,
14 passage will be unanimous unless otherwise
15 noted.

16 Subdivision 3 passes as amended by the
17 "introduced into evidence." The last
18 sentence will read, The court may allow
19 statements, objections and discussions
20 conducted during the oral deposition that
21 reflect upon the veracity of the testimony to
22 be introduced into evidence at trial.

23 HONORABLE C. A. GUITTARD: At
24 trial.

25 MR. SUSMAN: Period.

1 MR. LATTING: Do we intend to
2 have "may allow" --

3 MR. GOLD: Yes.

4 MR. LATTING: -- as opposed to
5 "shall allow"? If the court finds that it
6 does bear on the veracity, does he get to if
7 he wants to but doesn't have to?

8 MR. SUSMAN: May. We've
9 debated this and I think people were happy
10 enough with "may."

11 MR. LATTING: Okay.

12 MR. SUSMAN: Subdivision 4. We
13 have discussed this. I do not believe that
14 this was subject to a lot of -- that there
15 were a lot of problems with this. These are
16 when you can instruct a deponent not to
17 answer.

18 And we call your attention particularly
19 to Subdivision (c), in which you may instruct
20 the deponent not to answer an abusive
21 question. What is an abusive question? One
22 that we thought was a question that if the
23 interrogator continually misstates what the
24 witness said over and over, then that could be
25 considered an abusive question.

1 You have to read this Rule 4 in context
2 with Rule 6, the objections to testimony, if
3 you recall that, where there are only three
4 objections now tolerated in an oral
5 deposition: Objection, leading; objection,
6 form; objection, nonresponsive.

7 Any discussion of Subdivision 4? Steve.

8 MR. YELENOSKY: Just the point
9 that it goes to (4) and (5). Is there a
10 provision in here for stopping things when you
11 believe the other side has exceeded their time
12 limit? Do you terminate the deposition? I
13 mean, what do you do when they keep asking
14 questions and, as far as you've got it,
15 they've exceeded their per person time limit?

16 MR. SUSMAN: I think you leave,
17 but I don't think we have to say that, do we?
18 I mean, I would just get up and leave.

19 MR. YELENOSKY: Well, shouldn't
20 it be in "Terminating the deposition" then?

21 MR. SUSMAN: That's a good
22 point.

23 PROFESSOR DORSANEO: In the
24 first sentence maybe.

25 MR. SUSMAN: I would accept

1 that amendment on behalf of the subcommittee
2 that one of the reasons for terminating a
3 deposition is the passage of time.

4 Any other discussions of either (4) or
5 (5) at this time?

6 HONORABLE C. A. GUITTARD:
7 Steve?

8 MR. SUSMAN: Yes, Judge.

9 HONORABLE C. A. GUITTARD: With
10 respect to (5), I have concern about the term
11 "in bad faith." It's so easy for any lawyer
12 to charge the opponent with bad faith and then
13 get up and leave. It seems like to me that
14 that ought to be more specific in some way, or
15 we just strike out "in bad faith." It seems
16 to me that leads to a lot of problems and --
17 well, problems for the trial court.

18 MR. LATTING: What does that
19 add to the following language, where if it's
20 not unreasonably annoying, embarrassing or
21 oppressive, what does "bad faith" add to that?

22 HONORABLE C. A. GUITTARD: I
23 don't know. Maybe if it's groundless, if they
24 make groundless objections or something, that
25 might --

1 MR. McMAINS: The thing is that
2 I think it really is a modifier of "defended."
3 The other part talks about the way it's
4 conducted. But it says if it's defended in
5 bad faith --

6 MR. LATTING: I see.

7 MR. McMAINS: -- so the point
8 is, if it's obstructive, if you've got
9 obstructionist conduct with regard to
10 answering questions, constantly telling them
11 what their answers are, you might ought to
12 have the right to terminate that examination.

13 HONORABLE C. A. GUITTARD:
14 That's right. But "bad faith" is not a good
15 way to say it, because it gives too much
16 opportunity for people to make unfounded --
17 to walk out without a real justification as
18 well.

19 MR. McMAINS: Well --

20 MR. MARKS: Does this allow
21 them to walk out or just get a hearing or
22 suspend it briefly to try to get a ruling by
23 the court?

24 HONORABLE SCOTT BRISTER: Well,
25 can't you just say when it's being conducted

1 in violation of these rules, that would cover
2 time, that would cover Part 4, questions that
3 are abusive --

4 HONORABLE F. SCOTT McGOWN:
5 That's a good idea.

6 MR. GOLD: It may. But the
7 thing I want to protect, and Rusty has pointed
8 it out, and I'm not sure if (4) deals with it
9 or (6) does either, is what happens in the
10 situation where -- and I know it's going to
11 happen now -- someone says, "That's an
12 abusive question. Don't answer that. That's
13 an abusive question. Don't answer that." Do
14 you just -- do you have to just sit there and
15 just keep asking questions that the person is
16 not going to answer, or can you terminate it
17 because someone is abusing Part 4?

18 PROFESSOR ALBRIGHT: They're
19 defending it in bad faith.

20 MR. GOLD: Then that goes back
21 to Justice Guittard's question, which is, does
22 "defended in bad faith" really tell the
23 reader of this rule that that would be bad
24 faith? And I don't know, because it's so...

25 HONORABLE SCOTT BRISTER: But

1 if it's in accordance with these rules, 4(c)
2 says you can object to abusive questions. If
3 you're doing it to every question, then you're
4 not in compliance with that rule, it's not
5 covered under any of these, and you're in
6 violation of the rules.

7 And the problem with "bad faith" is that
8 it calls for a determination of subjective
9 intent. There are people who think they are
10 doing right when they do just that; that they
11 are in good faith doing something bad. And
12 that ought to be prohibited.

13 HONORABLE F. SCOTT MCGOWN:

14 Steve?

15 MR. SUSMAN: Let me -- I think
16 I -- I mean, I think "bad faith" is the wrong
17 word. I think we have in fact selected the
18 wrong word, and I'm convinced of that.

19 HONORABLE F. SCOTT MCGOWN:

20 But --

21 MR. SUSMAN: But we have wanted
22 to provide -- I mean -- all right. The
23 history of this is that we began with wanting
24 to very much circumscribe what lawyers can do
25 in a deposition, and we have done that in

1 Subdivision 6. But the feeling was that
2 you've still got to allow a lawyer, as a last
3 resort, the opportunity to just get up. Not
4 many lawyers will use that last resort. I
5 don't think I've ever been in a deposition
6 where I've used it or someone else has used
7 it, because you play like you're going to do
8 it but ultimately you stay there and yell and
9 scream and coach the witness, but you stick
10 around because you're scared of the
11 consequences of just leaving. And you know,
12 you never know for sure what the judge is
13 going to do if you just get up and walk out,
14 so I don't think --

15 HONORABLE F. SCOTT MCGOWN:

16 That's why Judge Brister's formulation, I
17 think, is perfect, because you're forgetting
18 we've got Rule 3, too. Rule 3 says that it
19 shall be conducted in the same manner as the
20 courtroom and that counsel are to be
21 cooperative and courteous. So if you take
22 Judge Brister's formulation and say that a
23 party or the deponent may move to terminate or
24 limit the deposition when it is conducted or
25 defended -- put both in, conducted or

1 defended -- in violation of these rules, that
2 gives you free rein, then, to terminate it.
3 And you're always going to have to go down to
4 the courthouse and justify what you've done.

5 MR. SUSMAN: Okay. As chairman
6 of the subcommittee I will accept that because
7 I think it may be unclear without the change,
8 and so that's a change.

9 MR. GOLD: Steve?

10 MR. SUSMAN: Paul, do you want
11 a shot at that?

12 MR. GOLD: I'm fine with the
13 whole thing except for this (c) about "to
14 protect a witness from an abusive question,"
15 the reason being, right now, the present rule,
16 if you have a privilege, and it's kind of
17 arcane and not too many people use it, but
18 you're supposed to, under the present rule, if
19 you have a privilege, give the answer to the
20 question in camera, seal that, and give it to
21 the court. So there is testimony given and
22 you keep going with the deposition and the
23 court can rule on something.

24 I'm really afraid that (c) is going to be
25 counterproductive to our goal because what's

1 going to happen is people are going to
2 continue to send baby attorneys to the
3 deposition, and what the instruction is going
4 to be, either expressed or implied, is "If
5 you're getting killed, object to the
6 abusiveness of the question, instruct the
7 witness not to answer, and we'll pay whatever
8 sanction we have to pay. That will give me a
9 chance, the big attorney, to come back and
10 defend it on a later date or instruct you on
11 how to defend it or coach the witness." And I
12 think that would be counterproductive to our
13 goal, so I'm going to --

14 MR. SUSMAN: Mr. Gold, I'm
15 going to allow you this one privilege of
16 rearguing what you've already voted on in
17 Galveston for two days with --

18 MR. GOLD: I know. And I did
19 that with great trepidation.

20 MR. SUSMAN: But this is your
21 last chance.

22 MR. GOLD: I know. I'm
23 just -- and I'm not saying --

24 MR. SUSMAN: Because we aren't
25 going to have a subcommittee meeting here.

1 MR. GOLD: I know, and I'm just
2 saying that it's a concern.

3 MR. LATTING: It's noted.

4 MR. SUSMAN: That is noted for
5 the record.

6 MR. GOLD: I'm going to vote
7 for this. I'm just concerned about it. I'm
8 not being a traitor.

9 MR. YELENOSKY: We feel your
10 concern.

11 CHAIRMAN SOULES: We're not
12 getting a record on this, and we need a
13 record.

14 MR. SUSMAN: Rusty.

15 MR. McMains: The part on
16 "Terminating the deposition" about "A party
17 or the deponent may move to terminate or limit
18 the deposition," I'm not sure I -- I had
19 understood that what we were talking about is
20 that basically this is a privileged
21 termination in this context, although you
22 suffer the consequences if you have terminated
23 it wrongly.

24 PROFESSOR ALBRIGHT: Except
25 that --

1 MR. McMAINS: And it says "may
2 move pursuant to Rule 8," and I know we
3 haven't dealt with Rule 8, but when I went
4 back to Rule 8, it looks like, you know,
5 filing motions and stuff. So I don't -- I
6 mean, you're not going to --

7 PROFESSOR ALBRIGHT: I accept
8 your amendment.

9 MR. McMAINS: We have problems
10 with "move to" --

11 PROFESSOR ALBRIGHT: I accept
12 your amendment.

13 MR. McMAINS: Okay.

14 PROFESSOR DORSANEO: Wait a
15 minute. We --

16 PROFESSOR ALBRIGHT: Rule 8 was
17 an old rule. Throw it out.

18 MR. LATTING: So take out "move
19 to"?

20 PROFESSOR ALBRIGHT: Take out
21 "move to" and take out "pursuant to Rule 8."

22 HONORABLE F. SCOTT McGOWN: No.
23 Not "move to." You've got to read the second
24 sentence.

25 MR. McMAINS: Yeah, that's what

1 I was saying.

2 HONORABLE F. SCOTT McCOWN:

3 Just take out "pursuant to Rule 8," because,
4 see, the way --

5 MR. LATTING: Where are you,
6 Scott?

7 HONORABLE F. SCOTT McCOWN: All
8 right. The way this works -- you've got to
9 read the second sentence. The way this works,
10 you're in a deposition, the other guy is being
11 a jerk, so you say, "I am moving to terminate
12 this deposition. Mr. Witness and me are
13 leaving and we're going to get a hearing on my
14 motion." That stops the deposition. You go
15 get a hearing. If the court rules you're
16 right, it's terminated. If the court rules
17 you're wrong, the court may impose a
18 sanction.

19 MR. KELTNER: Can't we say
20 "suspend" in the first sentence, because the
21 truth of the matter is that there may be other
22 questions which will be good that you're going
23 to let him answer. So if you just change it
24 to "A party or the deponent may suspend or
25 limit the deposition when it's being

1 conducted," then that's the only thing --
2 that's the only change I think we have to
3 make.

4 Now, I know we're getting awful close to
5 drafting here.

6 MR. SUSMAN: David, let me see
7 if I understand. The notion would be you can
8 suspend a deposition or terminate it, whatever
9 you want, you suspend it without getting a
10 court order or without even filing a motion
11 because you're in a deposition room. The next
12 step is, as soon as you get back to your
13 office, it's incumbent upon you to file a
14 motion, right? And then the next step, the
15 court rules on it. And either you were right
16 or you've got to go back to prison again.

17 MR. KELTNER: Right.

18 MR. SUSMAN: Why don't we just
19 say it in that way, that you can suspend it
20 for failure to conduct it in accordance with
21 the rules. You have an obligation then to
22 promptly file a motion for protective order.

23 Scott.

24 HONORABLE F. SCOTT McCOWN:
25 Well, let me suggest that the subcommittee

1 work on this a little bit, because I agree
2 with David as to what we want. I think the
3 word "terminated" is a nice word to have,
4 though, because it suggests to the other party
5 that if your conduct has been bad, that the
6 judge may very well say, "This deposition is
7 over, it's never reconvening, and that's your
8 punishment." We don't want the party to get
9 the idea that if the conduct has been bad,
10 they go down to the courthouse, the judge
11 slaps them on the wrist and they get to go
12 right back and resume the deposition.

13 MR. KELTNER: Let's take a shot
14 at redrafting this. The only question I have
15 about that is, I may very much want that
16 witness who is not being responsive to testify
17 because I'm going to use it in trial because
18 I'm not going to have that witness there,
19 because you have conflicting -- you have
20 conflicting interests in a deposition. I may
21 be wanting, even though I'm defending the
22 deposition, to preserve the testimony. And if
23 they stop it, I'm screwed.

24 MR. SUSMAN: Okay. Let me see
25 if I can get --

1 MR. KELTNER: So we can work on
2 this some more.

3 MR. SUSMAN: Okay. Let me see
4 if I can get some order here.

5 Rule 4, Subdivision 4, have we voted on
6 that? All in favor of Subdivision 4 raise
7 your right hand. All opposed. Subdivision 4
8 passes.

9 Subdivision 5 needs to be referred back
10 to the committee. All in favor of referring
11 it back to the committee to make it clear how
12 you do this raise your right hand. All
13 opposed. That goes back to the committee.

14 And Dave Keltner, I'd like you to take
15 the first shot at getting that right. I'm
16 going to try to designate people as we go
17 through here on the committee, so if you all
18 have got any strong thoughts, you can write
19 down the names and talk to them before the two
20 days are up with your thoughts.

21 Okay. Subdivision 6.

22 HONORABLE C. A. GUITTARD:

23 Steve, I'm still concerned about the
24 unresponsive answer, which I think probably
25 ought to be admissible if relevant. I'm

1 concerned about the case where the question
2 is, Do you have an opinion of the market value
3 of the property in question, and the answer
4 is, The market value of the question -- the
5 market value of the property is so many
6 dollars. Now --

7 MR. McMAINS: That's right.
8 That's nonresponsive.

9 HONORABLE C. A. GUITTARD: Now,
10 that should be admissible, even though it's
11 not responsive, and that the only objection
12 should be that it's inadmissible because it's
13 irrelevant or some other grounds. So I'll
14 suggest that the objection to unresponsive
15 answers not be made and that the court simply
16 rule on the admissibility of the -- of it on
17 other grounds.

18 CHAIRMAN SOULES: Judge, I
19 think that this actually agrees with your
20 concept.

21 HONORABLE C. A. GUITTARD: It
22 doesn't say it. I didn't gather that from it,
23 but...

24 CHAIRMAN SOULES: What we've
25 said is an objection to a nonresponsive answer

1 has to be made at the deposition.

2 HONORABLE C. A. GUITTARD: But
3 suppose it is made at the deposition. Is that
4 a ground for excluding a nonresponsive
5 answer? I would take the position that it's
6 not if it's otherwise admissible.

7 CHAIRMAN SOULES: And you have,
8 in a written opinion. But that's not what
9 this is.

10 MR. LOW: But don't you think
11 that if they do that, the nonresponsive, the
12 lawyer is going to have sense enough to say,
13 "Okay, you do have an opinion. Now give me
14 your opinion."

15 HONORABLE C. A. GUITTARD:
16 Well, he might not.

17 MR. LOW: Well, then he --
18 shame on him. He ought not to get the answer
19 then.

20 MR. MARKS: Well, the other
21 problem you have, if you don't have that
22 objection there, is you have the guy who will
23 answer the question and go on for 20 more
24 minutes and you can't stop him. So are you
25 saying that all of his answers should be

1 admissible when it really isn't responsive at
2 all to the question that's asked? I mean,
3 maybe it's just argumentative baloney.

4 HONORABLE C. A. GUITTARD:
5 Well, that's sort of another question really.

6 MR. MARKS: Well, it seems to
7 me that the objection has to be made and
8 reserved at the time of the deposition.

9 MR. SUSMAN: Rusty.

10 MR. McMAINS: I have
11 another -- I gather that the notion is that
12 these are the words you're supposed to use in
13 the objection. The function of making the
14 obviable objections is so that the other side
15 can in fact do it. I have a problem if you're
16 saying, "Objection, form." I'm not sure what
17 that means. And I mean, if you're limited to
18 that --

19 MR. SUSMAN: No, sir. Because
20 if you sit there and object form in a
21 deposition with me, I will probably ignore
22 you. But if I thought you were smarter, real
23 smart, and I might be screwing up, I might,
24 Rusty, resort to the third sentence. And that
25 is, I might ask you what the basis of your

1 form objection is. That's my option. Okay?
2 In which case you must tell me what it is. So
3 I've got the option of either ignoring you and
4 taking the chance that I'm smarter than you
5 are or asking you to explain. But it's my
6 option.

7 MR. McMAINS: But you are
8 saying, for instance, that if I maybe just say
9 "objection, form," that that is sufficient to
10 preserve any conceivable predicate provisions
11 or anything else that I might --

12 MR. SUSMAN: Yes, sir, unless I, the
13 questioner, want you to explain it because I
14 feel nervous about it.

15 MR. GOLD: But the explanation
16 may use up some of that three hours.

17 MR. SUSMAN: Judge McCown.

18 HONORABLE F. SCOTT MCGOWN:
19 Well, back on Judge Guittard's comment on
20 nonresponsiveness, I agree with him
21 100 percent as to what the trial judge ought
22 to do. But I still think that the rule ought
23 to be written as we have it, because what we
24 envision happening is, if the witness is asked
25 a question and he gives a nonresponsive

1 answer, usually in the example you gave, you
2 won't even object because you don't care. If
3 you do care, you object. That puts the other
4 side on notice that they need to cure. Then
5 they can cure as was pointed out. If they
6 don't cure because they think your objection
7 is silly, then when you get to the trial
8 court, if it was silly, he's going to let it
9 in. And if it wasn't silly, but your
10 nonresponsiveness -- the witness'
11 nonresponsiveness is really unfair, then he
12 may keep it out. And so it allows the trial
13 judge that flexibility.

14 HONORABLE C. A. GUITTARD: I
15 have no problem with that. I simply want to
16 ask, suppose the objection is not made at the
17 deposition. Is it waived?

18 HONORABLE F. SCOTT MCGOWN:
19 Then it's waived.

20 HONORABLE C. A. GUITTARD: It's
21 waived. Okay.

22 HONORABLE F. SCOTT MCCOWN:
23 It's waived. And that's the way the present
24 rule is.

25 MR. SUSMAN: All in favor of

1 Subdivision 6 raise your right hand. All
2 opposed. It passes unanimously.

3 Rule 16. Rule 16(1). I hope you have
4 had an opportunity to read this. Basically,
5 as I understand it now, a party can take a
6 deposition without leave of court by whatever
7 means they wish, smoke signals, hypnosis,
8 whatever you want. The other side -- you've
9 got to tell them how. You've got to tell your
10 opponent how you intend to take the deposition
11 or record it. The other side can bring the
12 good old court reporter, if they want, and
13 record it in the traditional way. The
14 expense, you pay your own. You end up
15 essentially paying your own transcriber. I
16 pay the Indian if I want to do it by smoke
17 signal; you pay the court reporter if you want
18 a traditional court reporter, until the end,
19 in which the court can get it right and make
20 the adjustment. That's Rule (b), Subdivision
21 1(b). So that's basically what we've tried to
22 do here, make it very easy to take depositions
23 by nontraditional means.

24 Any discussion of Rule 1?

25 MR. LATTING: Steve, just a

1 question. Does this mean that if I want to
2 take someone's deposition in my office with a
3 personal tape recorder that I specify that and
4 take it and then I have my secretary type it
5 up and that becomes the deposition? Nobody
6 does anything else?

7 MR. SUSMAN: Yes.

8 MR. LATTING: Okay.

9 MR. MARKS: No. Your
10 secretary's transcription --

11 MR. SUSMAN: Your secretary's
12 transcription is not the deposition.

13 PROFESSOR ALBRIGHT: The
14 transcription has to comply with Rules 205 or
15 206. Your secretary has to certify to all of
16 these things.

17 MR. LATTING: And what in
18 general does that require?

19 PROFESSOR ALBRIGHT: Ask David.

20 MR. SUSMAN: David, what do 205
21 and 206 say?

22 CHAIRMAN SOULES: The existing
23 rules?

24 MR. SUSMAN: Yeah.

25 MR. JACKSON: One is the

1 submission to the witness for signature and
2 corrections, and the other is the
3 certification of the transcript, that it
4 accurately -- that it's accurate.

5 MR. SUSMAN: Rusty.

6 MR. McMANS: There's no
7 similar provision here with regards to -- of
8 the necessity of making objections. What I'm
9 wondering, therefore, is, does that mean that
10 basically that you can make objections to form
11 for the first time at trial, since there's no
12 provision one way or the other to this kind of
13 a non-stenographic proposal? Or does it mean
14 that you can't make any objections? I mean,
15 there's no objection procedure.

16 MR. SUSMAN: As I understand
17 it, and let me just make sure I can do it
18 right, I'm not sure there is an objection
19 procedure. I mean, I think you -- if you --
20 you have to bring your -- if you want to do
21 something better or different, you'd better
22 bring your own -- you'd better bring your own
23 tape recorder or your own court reporter or
24 videographer or something like that.

25 HON. SCOTT A. BRISTER: But the

1 objection, other than the amount of notice
2 you've given, which I assume you could get a
3 protective order against, is that the
4 transcript is not right.

5 MR. McMAINS: No, I'm not
6 talking about the transcript. I'm talking
7 about their playing of the recording. And
8 there is a lot of objectionable stuff in terms
9 of it's nonresponsive, it's leading,
10 et cetera. There are no provisions in here
11 with regards to it. And it may be perfectly
12 all right to take just a videotape recording
13 and not have a reporter there. It may be
14 perfectly all right. But as I read this rule,
15 I would not have to make any of those
16 objections. I would argue that I could make
17 those objections, form, leading, et cetera,
18 for the first time at trial.

19 MR. YELENOSKY: Why do you
20 think that?

21 PROFESSOR ALBRIGHT: Why?

22 MR. SUSMAN: That wasn't our
23 intention.

24 HONORABLE F. SCOTT McCOWN: I
25 think the confusion -- this does not envision

1 that the actual tape itself is going to be
2 played at trial. It would still have to
3 come -- it's still just testimony. And
4 whatever you're going to read or whatever
5 you're going to play is going to be subject to
6 objection. This is just a method for
7 recording. This is nothing but the method for
8 recording here.

9 MR. HERRING: The objection
10 procedure in the other rule would apply here.

11 HONORABLE F. SCOTT McCOWN:
12 Yeah.

13 MR. HERRING: If he wants to
14 have his leading and other objections, that's
15 what --

16 HONORABLE F. SCOTT McCOWN:
17 Sure. The tape --

18 MR. McMAINS: I mean, that's
19 what we're trying to say, right?

20 MR. SUSMAN: Yes. We're trying
21 to say that the same objections have to be
22 made in the same words, the same conduct,
23 regardless of how the deposition is
24 transcribed.

25 HONORABLE F. SCOTT McCOWN:

1 Rule 15 is how you conduct it; Rule 16 is
2 nothing but how you record it.

3 MR. MARKS: Steve?

4 MR. SUSMAN: John.

5 MR. MARKS: Okay. What exactly
6 can we talk about on this?

7 MR. SUSMAN: No, this one
8 actually is -- this one we -- I don't even
9 recall us getting to it, John, so this is wide
10 open, in fact.

11 MR. MARKS: Okay. I have a
12 real concern, and it's really more of a
13 question. How is this going to advance the
14 ball in terms of saving money? I mean, it may
15 save money at the deposition taking point.
16 But when you think about the time that the
17 lawyers spend trying to watch a videotape,
18 having it transcribed or the wording
19 transcribed in the office, it seems to me that
20 they're going to spend a lot more time fooling
21 with a non-stenographic recording or a
22 videotape than they would with a deposition
23 that's transcribed the first time by the
24 reporter they used.

25 MR. SUSMAN: Buddy. Buddy and

1 then David.

2 MR. LOW: To save money, I've
3 even asked the plaintiff, I've said, "Let me
4 just talk to him informally in my office and
5 write a report to the client. I think I can
6 get the case settled." This way I could just
7 have it recorded, send it, and the case may
8 move. I've settled several cases that way.
9 Never take a deposition, just let me interview
10 the plaintiff in my office.

11 MR. SUSMAN: Steve Yelenosky.

12 MR. YELENOSKY: Well, even if
13 what you say is true about transcribing
14 issues, if the rule --

15 THE REPORTER: Speak up,
16 please.

17 MR. YELENOSKY: If the rule
18 were clearer, and maybe it's implicit enough,
19 that you don't have to do a transcription, a
20 lot of times at Legal Aid, I mean, like Buddy
21 is saying, informally you would set up a
22 deposition, you would tape record it, and you
23 would never have it transcribed.

24 MR. MARKS: Couldn't that be
25 handled by saying if the parties agree they

1 can do that?

2 MR. GOLD: Why should it be
3 that way as opposed to --

4 MR. LATTING: John, you can
5 always have your own guy there if you want to
6 save money.

7 MR. MARKS: Well, see, that's
8 the point. I mean, at just about every major
9 deposition, if somebody doesn't get a court
10 reporter, I'm going to get that court
11 reporter. And that's a double expense there,
12 if you think in terms of the overall expense
13 and cost to the client at the end of the day
14 fooling around with that kind of a record.

15 MR. JACKSON: And it's a
16 reverse expense to the effect that if I know
17 John is going to get a court reporter every
18 time, I'll notice all of my depositions
19 non-stenographic because I'll get a free court
20 reporter paid for by John.

21 MR. SUSMAN: Mr. Gold.

22 MR. GOLD: There are a lot of
23 attorneys out there who are operating on a
24 shoestring who oftentimes don't want a
25 transcript. All they want to do is get a tape

1 of the deposition and preserve it. And you
2 can do that cheaply by either a camcorder or
3 by an audio tape. And if the other party, for
4 reporting purposes to their carrier or
5 whatever, wants to get a transcript, well,
6 that's something they can do and should do.
7 But I think the cost saving is to the person
8 who is taking the deposition, who wants the
9 deposition but may not necessarily want it
10 transcribed. And I think it's an added cost
11 on the whole system to have to get a
12 court-reported stenographic transcription
13 every time you do a deposition.

14 MR. MARKS: Maybe we ought to
15 tie it into the Tier 1.

16 MR. SUSMAN: Mr. Dorsaneo.

17 PROFESSOR DORSANEO: Well, this
18 goes back to this whole business of the court
19 reporter statute. We have in the government
20 code a provision that says all depositions
21 conducted in this state must be recorded by a
22 certified shorthand reporter, except as
23 provided in two other statutes. One of them,
24 the Civil Practice and Remedies Code,
25 Section 20.001, is limited to deposition on

1 written questions. And the other government
2 code section that's pertinent requires a
3 non-certified shorthand reporter to deliver an
4 affidavit to the parties or to their counsel
5 stating that a certified shorthand reporter is
6 not available, or an agreement of counsel. So
7 whatever we decide to do, there are statutory
8 provisions that limit --

9 MR. SUSMAN: Are you saying we
10 cannot do this?

11 PROFESSOR DORSANEO: Not right
12 now. I mean, whatever Steve is doing, he
13 can't do it, but he apparently is doing it.

14 HONORABLE SCOTT BRISTER: But
15 we can propose anything we want.

16 MR. SUSMAN: And the way things
17 are going over there, we'll get it on the
18 agenda eventually, too, and passed.

19 Steve.

20 MR. YELENOSKY: Well, my
21 concern is, in Travis County we've been
22 fortunate -- I'm no longer at Legal Aid so
23 I'm not doing this any more -- but in Travis
24 County we were fortunate enough to have a
25 pro bono court reporter system set up that

1 worked very well. That doesn't exist all over
2 the state. If there isn't a pro bono
3 requirement on court reporters, then you have
4 a real obstacle a lot of times in the Legal
5 Aid situation of doing depositions if you
6 can't do them non-stenographically. So if the
7 court -- well, you know, I -- you know, would
8 take care of that situation, then I'd be
9 happy.

10 MR. SUSMAN: I think the point
11 has been made, a good point, Bill, that the
12 committee also has to look at what statutory
13 changes need to be made, if any, to put this
14 rule into effect. And David would do that if
15 you approve the rule.

16 Are we close -- and Joe, I want you to
17 talk, because I think we're getting close to
18 voting.

19 MR. HERRING: One question.
20 Under that interpretation, would not current
21 Rule 202 be invalid? I'm not so sure.

22 HON. SCOTT A. BRISTER: I order
23 non-stenographic depositions knowing that it's
24 probably against the statute frequently.

25 MR. JACKSON: This rule had two

1 meanings.

2 MR. SUSMAN: David.

3 MR. JACKSON: The original 215
4 was set up so you could videotape a deposition
5 and have a court reporter. And we're trying
6 to change that now to where you can shift out
7 the court reporter. But the way it's written
8 and the way it's been interpreted, people were
9 just assuming that there was always going to
10 be a court reporter there. 215(c) you see
11 among a lot deposition notices, and all
12 they're meaning is that along with the court
13 reporter they're going to videotape it. And
14 now we're rewording this and reworking it
15 where it doesn't mean that any more; it means
16 something else.

17 And the point I wanted to make clear in
18 these rules is that you've got to tell them if
19 you really mean you're not going to have a
20 court reporter there, because in the past it's
21 just been assumed that there would be a court
22 reporter there.

23 MR. SUSMAN: Low and Latting
24 and then a vote.

25 MR. LOW: Steve, first of all,

1 if somebody objects to it, they can bring a
2 court reporter. So if they don't, why isn't
3 it presumed they've agreed to it? Why
4 wouldn't that come within the statute? It
5 says if it's agreed. Don't they agree to it
6 if they don't object?

7 PROFESSOR ALBRIGHT: But that's
8 not part of the agreement. The agreement is
9 that --

10 MR. SUSMAN: Joe.

11 MR. LATTING: I was only going
12 to observe that this doesn't prevent anybody
13 from having a court reporter. It just allows
14 people not to if they don't want to. It's a
15 method to save some money. And if anybody in
16 the litigation wants a court reporter, come on
17 down.

18 MR. SUSMAN: Out of the
19 largesse of my heart, John, you have the final
20 word on this.

21 MR. MARKS: Thank you. Well,
22 first of all, in response to all of this
23 business about if you want a court reporter
24 you can have one, that's great. But if we're
25 talking about saving money in litigation, that

1 is an add-on expense and it's going to
2 increase expenses overall rather than decrease
3 them. That's point one.

4 Point two. The judge made a point that
5 he often orders non-stenographic reporting.
6 Now, why can't we leave it to the option of
7 the judge. If somebody thinks that he doesn't
8 need a deposition or doesn't need it done
9 stenographically, then he goes to the court
10 and gets leave of the court to do it.

11 MR. SUSMAN: I call the
12 question. All in favor of Rule 16(1) as
13 written raise your right hand.

14 CHAIRMAN SOULES: With all its
15 problems, right?

16 MR. SUSMAN: All opposed raise
17 your hand. All right. Wait a second, I'll
18 count the nays. One, two, three, four, five.
19 Five against.

20 All in favor raise your right hand. One,
21 two, three, four, five, six, seven, eight,
22 nine, 10, 11, 12, 13, 14, 15, 16. 16 in
23 favor.

24 Subdivision 2 --

25 CHAIRMAN SOULES: Why do you

1 file a non-stenographic deposition and you
2 don't file a stenographic deposition?

3 MR. SUSMAN: This is -- I
4 think we have just passed --

5 CHAIRMAN SOULES: All right.
6 It's passed. But we're going to revisit these
7 things that go too fast sooner or later. You
8 can bet on it.

9 MR. SUSMAN: I'm sure that's
10 correct.

11 MR. SUSMAN: Rule 16(2) --

12 MR. LATTING: We don't have
13 time for that now. We're moving on.

14 CHAIRMAN SOULES: We're going
15 to file those tape recordings, but we're not
16 going to file a transcript?

17 MR. SUSMAN: -- Deposition by
18 Telephone.

19 HONORABLE C. A. GUITTARD:
20 Steve?

21 PROFESSOR ALBRIGHT: But if I
22 can respond to Luke, I think that's the
23 court -- we have said, and maybe you weren't
24 here, that these rules need lots of detailed
25 drafting; that they have not been gone over

1 close enough to catch things like that. And
2 we would love for you to give us that
3 information. We're kind of talking big
4 concepts now so then we can start doing the
5 detailed work.

6 CHAIRMAN SOULES: Okay. I
7 understand.

8 MR. SUSMAN: Now, this rule is
9 assigned on the subcommittee to David Jackson,
10 and all these subcommittee members, even if
11 they voted against it, they at least get the
12 sense of the group and will try to be
13 honest -- you know, give us a product. So if
14 you've got any problems, specific ones, give
15 them to David, and he's going to give us
16 another draft, and he's going to check the
17 statute too and see what we do with that
18 problem.

19 Okay. Now that brings us to Deposition
20 by Telephone, Subdivision --

21 HONORABLE C. A. GUITTARD: I
22 have a question on Subdivision 2.

23 MR. SUSMAN: Yes, sir.

24 HONORABLE C. A. GUITTARD: The
25 last sentence there says, "The officer taking

1 the deposition may be located with the
2 deposing parties instead of with the witness
3 if the identification of the witness is
4 substantiated and the witness does not waive
5 examination and signature of the transcribed
6 deposition."

7 I don't understand why, when the witness
8 does waive that, that the officer can't be
9 with the deposing parties rather than with the
10 witness. Do you really mean that?

11 HONORABLE F. SCOTT MCGOWN:

12 Judge, it could be that way. The reason we
13 did it this way is a belt and suspenders. Not
14 only have you substantiated that the witness,
15 who after all isn't with the officer, is who
16 he says he is; but in addition, once it's
17 transcribed, the witness has to read it and
18 swear to it in front of a notary who he is in
19 front of.

20 HONORABLE C. A. GUITTARD: So

21 that, then, the reporter has to be with the
22 witness if he does not waive the signature.
23 Is that right?

24 MR. McMAINS: No, if he waives
25 the signature.

1 HONORABLE C. A. GUITTARD:

2 Well, it says if he does not waive it, waive
3 examination and signature.

4 MR. SUSMAN: Well, what we have
5 written here is --

6 HONORABLE F. SCOTT McCOWN: No,
7 I think I can -- let me go through it.

8 MR. SUSMAN: We have a drafting
9 problem here.

10 HONORABLE F. SCOTT McCOWN: No,
11 I don't think there is.

12 CHAIRMAN SOULES: You think
13 that this says the witness reads and signs.
14 All this says is that he didn't waive the
15 right to read and sign. It doesn't say that
16 he will read and sign.

17 HONORABLE F. SCOTT McGOWN:
18 That's correct. I guess I should say it's
19 suspenders and a loose belt, because you can't
20 force -- we didn't want to go so far to say
21 that it wouldn't be any good if the witness
22 just absolutely refused to read and sign.

23 MR. SUSMAN: Pam.

24 MS. BARON: Scott, what happens
25 if, after you take the deposition, then, when

1 it's too late to fix it, then the witness
2 says, "I'm not going to read and sign it."
3 You're not going to want to use the
4 deposition.

5 HONORABLE F. SCOTT McCOWN:
6 Well, no, because under the regular rules, if
7 a witness just refuses to sign it, you can
8 still use it.

9 MS. BARON: But what if the
10 witness says, "I waive it," after the
11 deposition?

12 HONORABLE F. SCOTT McGOWN:
13 This is like the second dam. If the first dam
14 breaks, this is the second dam. And so it's
15 not that great of a dam but we've got the
16 first one. If you wanted to take it out
17 altogether, it wouldn't make any difference to
18 me. It was just an added precaution because
19 the person who is taking the deposition won't
20 be with the witness, so it was an added
21 identification oath precaution. But if you
22 don't want an added identification oath
23 precaution, we can take it out. But all of
24 the problems you've identified are there.
25 It's not perfect.

1 MR. SUSMAN: Any other
2 discussion?

3 PROFESSOR DORSANEO: I move to
4 take it out.

5 MS. BARON: I second it.

6 MR. SUSMAN: What's the motion?

7 PROFESSOR DORSANEO: I move to
8 take out the last sentence.

9 PROFESSOR ALBRIGHT: The last
10 phrase probably.

11 MR. McMAINS: By taking the
12 entire sentence out, doesn't that take out
13 your ability to take the deposition from in
14 state if you're going out of the state?

15 MS. BARON: Bill, I would like
16 to just take out the waiver part.

17 HONORABLE F. SCOTT McCOWN:
18 Well, no. Here is the problem. Excuse me,
19 let me back up, because here is the problem:
20 The law right now is that the person who
21 administers the oath has to be with the
22 witness, and so you can't hire a court
23 reporter in Dallas to be with you while you
24 take the deposition over the telephone from a
25 witness in Houston and have your court

1 reporter swear in that witness, and so that's
2 what we were trying to get around.

3 MR. SUSMAN: I take it the
4 sense of the motion we had was to take out
5 everything after "substantiate" in the last
6 sentence?

7 MS. BARON: That's what I
8 seconded, but I don't think that's what the
9 motion was.

10 MR. SUSMAN: Then we don't have
11 a motion. Is that your motion? Was that your
12 motion?

13 MS. BARON: That's my motion.

14 MR. SUSMAN: Then I second it.
15 Now we have to a motion.

16 HONORABLE F. SCOTT McGOWN:
17 Well, let me just point out that you can't
18 legally do that unless you add in there that
19 there's somebody to swear the witness in on
20 the other end. You're going to have to have
21 somebody swear the witness in who is present
22 with the witness.

23 MR. LATTING: Well, we don't
24 want to do that, do we?

25 HONORABLE F. SCOTT McCOWN:

1 That's required by law.

2 MR. KELTNER: That's what the
3 rule is now.

4 HONORABLE F. SCOTT McCOWN: I
5 mean, I don't know that we can change that.

6 MR. LATTING: Well, we just did
7 that with the court reporter rule.

8 MR. KELTNER: The truth of the
9 matter is, these are generally taken in
10 lawyers' offices in Delaware and Vermont and
11 Nevada or wherever, and the truth of the
12 matter is you have a notary there for the
13 first two minutes swearing the person in and
14 identifying who it is and writing in the
15 notary book. It's not a real problem in my
16 opinion. But it is an additional safeguard
17 against an abuse that could otherwise exist.
18 We want to make this simple to use. It
19 doesn't seem to me it's worth the expense.

20 MR. GOLD: This is the way
21 they -- there was a case out of Dallas called
22 Clone that followed what we drafted here
23 basically. And what we were trying to do is
24 codify that approach and make it simpler.

25 MR. KELTNER: Well, actually it

1 has the opposite effect.

2 MR. GOLD: Right.

3 MR. SUSMAN: Can we -- do you
4 all want to -- can we try to get a consensus?
5 Can we eliminate the last phrase, "and the
6 witness does not waive examination and
7 signature"?

8 HONORABLE F. SCOTT McCOWN:
9 What if we substitute the words "and the
10 witness is sworn by a person present with the
11 witness" or better words to that effect?

12 MR. SUSMAN: Perfect. Better.
13 Is there a second to that?

14 CHAIRMAN SOULES: The witness
15 is sworn by who?

16 HONORABLE F. SCOTT McGOWN: By
17 a person present with the witness.

18 MR. LATTING: So what do we
19 take out?

20 CHAIRMAN SOULES: Judges have
21 let people testify by telephone sworn from the
22 courtroom.

23 HONORABLE F. SCOTT McGOWN:
24 That may have happened, but there's case law
25 and indeed a statute --

1 CHAIRMAN SOULES: Well, this is
2 case law.

3 HONORABLE F. SCOTT McCOWN:
4 -- that says you can't do it.

5 CHAIRMAN SOULES: What statute
6 says that?

7 HONORABLE F. SCOTT McCOWN: The
8 statute on administering oaths. If you are
9 administering an oath, you have to verify that
10 person, you have to be with them, and there's
11 case law to that effect.

12 MR. SUSMAN: Any problems
13 with -- it would now read as follows: The
14 officer taking the deposition may be located
15 with the deposing parties instead of with the
16 witness if the identification of the witness
17 is substantiated and the witness -- and what
18 is it, Scott?

19 HONORABLE F. SCOTT McGOWN:
20 Well, we need to get some words, "is placed
21 under oath by a person present with the
22 witness" or --

23 MR. KELTNER: Why don't you let
24 Scott and I work on this.

25 MR. SUSMAN: I will delegate a

1 subcommittee of Scott and Keltner on this.

2 HONORABLE F. SCOTT MCGOWN: I
3 mean, that would be the concept. We don't
4 have the --

5 MR. SUSMAN: But our notion
6 here, the notion that the subcommittee wants
7 you to vote on, is we want to make it as easy
8 as possible, consistent with statutes or the
9 constitution or whatever it is, to take a
10 telephone deposition with your court reporter
11 and you in your city and a witness somewhere
12 else.

13 MR. JACKSON: Can I just --

14 MR. SUSMAN: Yeah.

15 MR. JACKSON: One of the
16 concepts that came up in the subcommittee that
17 hasn't come up here is that video conferencing
18 is starting to get more and more applicable to
19 discovery. We took a video conference
20 deposition yesterday. And you can actually
21 see the witness on the monitor and he's
22 looking at you and you're looking at him.
23 It's easier for the court reporter to be in
24 the room where all the people are, which is
25 where all the lawyers are, so they can look

1 around and see everybody as they write and
2 have the witness just frozen on the monitor.
3 And that's where the swearing in problem comes
4 in, if you've got to bring somebody in to the
5 room on the other side just to swear in the
6 witness.

7 HONORABLE F. SCOTT MCGOWN:

8 Well, but part of this is fundamental legal
9 magic, that when a person takes an oath and is
10 subject to penalties of perjury, that that has
11 to be done in compliance with the oath law.
12 And if somebody in Utah tells some notary in
13 Texas, "Yeah, I swear to tell the truth," I'm
14 not sure that that leagally ties them up. I
15 don't know if they could be prosecuted in Utah
16 or in Texas.

17 MR. YELENOSKY: Well, I think
18 if we have a bigger problem with the oath law
19 outside of this context, then we ought to
20 think about whether we accept that.
21 Administrative hearings are held all the time
22 by telephone where the hearing officer
23 administers an oath over the telephone to
24 somebody somewhere else. And all of those are
25 invalid, is what you're telling me, under the

1 oath law and cannot be used. And you know, I
2 mean, are we going to accept that
3 contradiction?

4 PROFESSOR DORSANEO: You're
5 taking depositions and attending hearings that
6 are all invalid.

7 MR. SUSMAN: Okay. I now call
8 for a vote on Subdivision 2. I think I
9 expressed what I'm asking you to vote on,
10 which is the sense that we want to make it as
11 easy as possible for a witness and the court
12 reporter to be in one place -- I mean, the
13 interrogator and the court reporter to be in
14 one place and the witness in a distant place.
15 And we would ask that this subcommittee of
16 Keltner and McCown work on this.

17 HONORABLE DAVID PEEPLES:
18 Steve, what does a lawyer do if he thinks that
19 this witness is too important to leave it to a
20 telephone deposition? Do you have to go to
21 court, or can you just show up where he is and
22 cross-examine there, or can you insist on a
23 regular court reporter being there? What do
24 you do if your opponent notices somebody
25 important by telephone and you don't want to

1 leave it to telephone?

2 MR. SUSMAN: Paul.

3 MR. GOLD: I would think --
4 and I think I've seen cases on this. I think
5 if someone notices by telephone and you want
6 to fly out there to Arizona and ask your
7 questions there, I would imagine you could
8 take your court reporter and go out there and
9 do it there.

10 MR. SUSMAN: See, the only
11 question is whether you have to cross-notice.
12 I mean, I would think that would be the only
13 kind of question.

14 HONORABLE DAVID PEEPLES: We
15 deal with that kind of question in
16 Subparagraph 1 and we don't, as I read it, in
17 Subparagraph 2.

18 MR. McMAINS: But actually you
19 do.

20 HONORABLE DAVID PEEPLES: Do
21 we?

22 MR. McMAINS: It says that you
23 give notice that you're going to take it
24 subject to Subsection 1(b). 1(b) says, "Any
25 party may designate another method to record,"

1 in addition to --

2 MR. SUSMAN: -- in person.

3 HONORABLE DAVID PEEPLES: All
4 right. I'm with you now.

5 MR. McMAINS: You've just got
6 to pay for it.

7 MR. SUSMAN: All right. All in
8 favor, then, of Rule 16, Subdivision 2, raise
9 your right hand. All opposed. One vote
10 au contraire.

11 Rule 17 -- I'm sorry, let me have the
12 favorable votes to this for the record,
13 please. Favorable votes for what we just
14 voted on. We had one contrary vote, and I
15 need to get a count. 20. 20 to one.

16 Rule 17 -- I got 20 to one.

17 MR. MARKS: 20 to one.

18 MR. JACKSON: And I didn't
19 vote. I was raising a question, because we've
20 got a gap between 16 and 17 of all of the
21 certification rules and the submission to the
22 witness rules and the use of transcripts in
23 court proceedings. Are those going to be just
24 incorporated, then, in between there, 205,
25 206, 207, before we get to the depositions on

1 written questions?

2 PROFESSOR ALBRIGHT: We did not
3 address those rules.

4 MR. JACKSON: But they'll be
5 just incorporated like they are in here
6 (indicating)?

7 MR. SUSMAN: Will you look at
8 that for us, David? We haven't even
9 considered it.

10 MR. JACKSON: We just have a
11 gap between these pages that don't really say
12 what we're going to do with 205, 206 and 207.

13 PROFESSOR ALBRIGHT: That's
14 because we didn't make any changes to them.

15 MR. McMAINS: But you didn't
16 incorporate them.

17 MR. SUSMAN: We need to
18 incorporate -- the truth -- no, I mean, I
19 think David is right. We didn't even consider
20 whether they needed changes, as I recall,
21 right?

22 PROFESSOR ALBRIGHT: We didn't.

23 MR. SUSMAN: So, I mean, David,
24 will you look at them and tell us?

25 MR. JACKSON: Yeah. The only

1 problem that I see as a court reporter on this
2 submission to the witness and signing, and
3 it's not a gigantic issue, is a problem that
4 Houston seems to have with interpreting
5 whether you actually give the original
6 deposition to the witness or make him come to
7 your office to read it. And that's the only
8 thing that they seem to have a problem
9 interpreting, and we may need to clear that
10 up.

11 MR. SUSMAN: I would suggest
12 that David -- again, I would like to delegate
13 to you the task of -- if there is anything
14 that needs clearing up in those rules, can
15 they be adopted as is or how should they be
16 clarified. And then they should indeed be
17 given one of our special numbers and put in
18 here, Alex, because we're doing that with the
19 other rules we aren't changing like admissions
20 or -- we're now getting to one, depositions
21 upon written questions, Rule 17.

22 There's one where we actually looked at
23 Rule 208, we said it looks fine, and we would
24 recommend adopting it in its entirety in
25 Rule 17.

1 Any problems with doing that? All in
2 favor of adopting Rule 208 as Rule 17? Anyone
3 opposed? That passes.

4 I would ask you, David, also to look at
5 208, which the subcommittee has never really
6 done, and see if it needs to be changed in any
7 minor way to comport, to be consistent, with
8 the changes we made in the other rules.

9 Dorsaneo.

10 PROFESSOR DORSANEO: 208 in its
11 current form effective April 1, 1984, has a
12 paragraph, Paragraph 4, about the deposition
13 officer. The same statutes that I mentioned
14 earlier have been amended since 1984 to talk
15 about deposition officers, and maybe this
16 rule, when it's recodified, should refer to
17 them. And that would be in Civil Practice and
18 Remedies Code -- particularly Civil Practice
19 and Remedies Code 20.001.

20 MR. SUSMAN: Do you have that,
21 Mr. Jackson?

22 MR. JACKSON: Yes.

23 MR. SUSMAN: Great. Thank you.

24 Rule 18, Physical and Mental
25 Examinations, another situation where we

1 simply adopted in toto the current Rule 167a.
2 No -- not much attention paid to it. It
3 seems to be working.

4 Any comments on this or anything like
5 Bill had on the last one? I mean, we welcome
6 any ideas, if you all have got any problems
7 with these rules.

8 Okay. All in favor of adopting, then,
9 Rule 167a in toto as Rule 18 raise your right
10 hand. All opposed. That unanimously passes.

11 Now that brings us to Rule 19, Motion for
12 Entry Upon Property. Where did this come
13 from? Did this come from the task force,
14 Alex, or the rules subcommittee? We have kind
15 of --

16 PROFESSOR ALBRIGHT: It came
17 from the task force.

18 MR. SUSMAN: Okay. Very few
19 lawyers on the subcommittee, if any, had ever
20 had any personal experience in their
21 cumulative thousands of years of practicing
22 law with this particular discovery device, so
23 we were somewhat handicapped --

24 PROFESSOR DORSANEO: It's a
25 good way to get shot.

1 MR. SUSMAN: -- but this is
2 basically --

3 MR. KELTNER: Steve?

4 MR. SUSMAN: Yes, sir.

5 MR. KELTNER: The reason we
6 broke this out was that the rules for
7 production of documents, where it is now in
8 the rules, the procedure for the production of
9 documents didn't work for entry upon land, and
10 that's why the task force broke it out. It is
11 no change from the rule now except that it
12 eliminates it from the procedure of producing
13 documents.

14 HONORABLE C. A. GUITTARD: I
15 have a problem with No. 2.

16 MR. SUSMAN: Could you let us
17 have it, Judge?

18 HONORABLE C. A. GUITTARD: All
19 right. Subdivision 2 seems to require
20 citation under Rule 106 even if the person in
21 possession is a party, and I'm not sure the
22 committee wanted to do that. If they didn't,
23 I suggest that the rule read explicitly, "If
24 the person in possession or control of the
25 property is not a party to the suit, a true

1 copy of the motion" --

2 HONORABLE F. SCOTT McGOWN:

3 That's right. We intended this to apply only
4 to parties, and we screwed up with in the
5 drafting.

6 MR. SUSMAN: Only to
7 nonparties, you mean?

8 HONORABLE F. SCOTT McCOWN:
9 Yeah, only to nonparties. We screwed up in
10 drafting it.

11 CHAIRMAN SOULES: Well, that
12 takes care of itself. The party is going to
13 get a copy of the motion served anyway.

14 HONORABLE C. A. GUITTARD:
15 Well, but do you want to go to the expense of
16 a 106 service on a party? I don't know that
17 they do.

18 MR. GOLD: I move that we make
19 that modification.

20 MR. SUSMAN: We will modify --
21 your subcommittee makes that modification.
22 This was unintentional. We wanted to make
23 sure that if the party in possession and
24 control were not a party -- I mean, if the
25 person were not a party, that there was some

1 due process involved in giving them notice
2 that you're going to show up at their house or
3 at their place of business or on their
4 property and do something. And we didn't want
5 it to be quite as rigorous as serving a
6 subpoena, because then you would have to
7 find -- hunt the person down like a dog and
8 serve them and they may be -- they may have
9 abandoned the property. So we picked
10 something like citation, which allows for
11 certain substituted service or service by
12 publication, and that's what we did.

13 MR. LATTING: Well, that was my
14 concern, because that is not Rule 106; those
15 are Rule 108 and Rule 109. And I'm concerned
16 about where parties want to go examine a piece
17 of real estate and you can't find whoever owns
18 it. And 106 won't do it, because that only
19 covers the actual personal, in personam
20 service.

21 And another thing I want to say is --

22 MR. SUSMAN: Alex.

23 PROFESSOR ALBRIGHT: Joe, I
24 think it says "or any method ordered by the
25 court" in 106.

1 MR. LATTING: Okay. That may
2 take care of that. Although I think it's a
3 little confusing, that may take care of it.

4 But I'm concerned about adding the
5 expense of having to re-serve somebody. Why
6 can't we just do it like deposition notices?
7 Why can't we send them a latter and tell them
8 we're coming out there to look at the place,
9 and if there's an objection raised, then they
10 can respond to it.

11 HONORABLE F. SCOTT McCOWN:
12 This is nonparty only, Joe.

13 MR. LATTING: I understand
14 that. I understand that.

15 HONORABLE F. SCOTT McGOWN: If
16 it's a party, you just send them the motion.

17 MR. LATTING: All right. But
18 if it's not a party, you have to do a 106
19 citation on them, right?

20 HONORABLE F. SCOTT McCOWN:
21 Right.

22 MR. LATTING: Well --

23 PROFESSOR ALBRIGHT: But only
24 if they don't agree. If they agree to let you
25 come on the property, you won't be filing a

1 motion, will you? You can call them up and
2 say, "Do you mind if I come look at your
3 property?" And they say, "No, come on."

4 It's only if they don't agree, then you
5 have to get a court order.

6 MR. SUSMAN: Bill.

7 PROFESSOR DORSANEO: Let me get
8 this straight, though. I have property, I'm
9 not a party to this case, and you're going to
10 come out to my place because you have a
11 lawsuit under the scope of discovery that
12 somehow relates to my property.

13 MR. LATTING: How about the
14 place next door. We need to come onto your
15 place because we've got a pipeline situation
16 and we need to look at it.

17 PROFESSOR DORSANEO: Hmmm...

18 MR. LATTING: It happens.

19 HONORABLE F. SCOTT McCOWN:

20 Now, the judge may say no, Bill. I mean, you
21 get served with notice, and you say, "I don't
22 want these guys on my property, I'm not a part
23 of their dispute, this is an invasion of
24 privacy, unconstitutional," whatever you
25 want. You go down and you make your

1 arguments, and the judge may side with you and
2 say they can't go on your property. This
3 gives you notice that they've made the request
4 to the court for that order and gives you an
5 opportunity to be heard.

6 PROFESSOR DORSANEO: I guess
7 that's all right, although I'm a little
8 troubled by this kind of new cause of action,
9 I guess. But what does the citation say? Is
10 there a citation? There is no citation,
11 right? It's just served in the manner of a
12 citation.

13 PROFESSOR ALBRIGHT: You get a
14 copy of the motion and the order.

15 MR. KELTNER: It's purely a
16 method of service, Bill. And I think we can
17 draft around that. The only thing is to give
18 them notice to make any objections that the
19 property owner wants to make for whatever
20 reason, just like we send, you know, requests
21 for production to nonparties. The same rule
22 applies.

23 PROFESSOR DORSANEO: I would
24 recommend to the draftsmen you say the manner
25 of service, say by personal delivery,

1 certified mail, return receipt requested,
2 instead of referencing --

3 MR. SUSMAN: Alex is our
4 draftsman on this one, so direct your comments
5 to her.

6 And Steve --

7 MR. LATTING: One further
8 question. Is there a reason for making this
9 different from a deposition notice to a
10 nonparty?

11 HONORABLE F. SCOTT MCGOWN:

12 Yes.

13 MR. LATTING: And what is that
14 difference?

15 HONORABLE F. SCOTT MCGOWN: The
16 reason is that if you want to take a
17 nonparty's deposition, you've got to
18 physically get them; but if you want to go see
19 a piece of land, it may be that the land has
20 been abandoned and you can't find the owner.

21 MR. LATTING: So it's easier to
22 do this?

23 MR. SUSMAN: Easier, yes, sir.

24 HONORABLE F. SCOTT MCGOWN:

25 It's easier.

1 MR. LATTING: Okay.

2 PROFESSOR DORSANEO: Somehow I
3 expect I'm going to be made a party to this
4 case and I don't like it. Something is
5 happening here before I'm getting ready to
6 know about it.

7 MR. SUSMAN: Steve.

8 MR. YELENOSKY: Yeah. I just
9 wanted to make a comment on this, and Alex
10 pointed it out very well to me when we were
11 talking earlier. The very same considerations
12 that are here, when the subcommittee is
13 returning to things, should be considered with
14 respect to obtaining mental health records,
15 because right now it is possible for somebody
16 to subpoena mental health records from Travis
17 County MHMR without any notice to the person
18 whose mental health records are at issue. And
19 certainly that's more of an invasion than
20 entry upon property, but there's no protection
21 for it.

22 Bill, I know you wouldn't agree, but --

23 PROFESSOR DORSANEO: I might,
24 but I might not.

25 MR. YELENOSKY: But in any

1 event, we had to intervene in a lawsuit at
2 Advocacy to prevent or at least to get a
3 chance to be heard as to whether somebody's
4 mental health records ought to be given up in
5 a case where they were not a party.

6 PROFESSOR ALBRIGHT: And I
7 think it would be very easy to add that.

8 MR. YELENOSKY: And I haven't
9 thought through all of the circumstances where
10 that may come up, but there is a letter from
11 an attorney with attachments regarding this
12 issue in there, in the --

13 MR. SUSMAN: Well, all in favor
14 of Rule 19, with some discretion or some
15 direction being given to Alex to look at the
16 service provision and make sure it applies
17 only to nonparties, and for parties it should
18 be no more difficult than taking a deposition
19 of a party. All in favor of Rule 19 raise
20 your hand. All opposed. One opposition. Oh,
21 God, raise your hand if you're in favor again,
22 please.

23 PROFESSOR DORSANEO: Yeah,
24 maybe make it worth it.

25 MR. SUSMAN: 18 yea; one nay.

1 We now --

2 CHAIRMAN SOULES: Is there a
3 reason why we took out the request for
4 documents from nonparties?

5 MR. GOLD: It's in another
6 spot.

7 CHAIRMAN SOULES: Where?

8 MR. GOLD: It's in the request
9 for production.

10 PROFESSOR ALBRIGHT: I think we
11 just put it in subpoenas, didn't we?

12 CHAIRMAN SOULES: So now we're
13 back to you have to take a deposition to get
14 documents?

15 PROFESSOR ALBRIGHT: Well, I
16 think -- I don't -- if we took it out, it's
17 because no one ever hears of anybody using a
18 motion to produce.

19 MR. KELTNER: Is this to
20 nonparties?

21 MR. SUSMAN: Yes.

22 MR. KELTNER: On the task
23 force, we have a task force rule which does
24 the same thing as the old statute that we can
25 just plug in there.

1 MR. SUSMAN: I think I can
2 answer the question. The answer to the
3 question is no, there's no reason we did it.
4 We just forgot it. Okay? The subcommittee
5 does indeed need to meet once again in
6 Galveston, this time for a three-day weekend,
7 to prepare a rule dealing with -- no, we will
8 meet, obviously. We have totally neglected
9 getting documents from third parties.

10 PROFESSOR ALBRIGHT: Well, no,
11 we haven't totally neglected them.

12 MR. SUSMAN: We haven't?

13 PROFESSOR ALBRIGHT: No,
14 because you can subpoena them with a
15 deposition, which is the way most people get
16 documents from nonparties, is by noticing the
17 deposition of a document custodian. And we
18 have addressed that in our deposition rule.

19 MR. YELENOSKY: But that
20 doesn't help my problem, because the custodian
21 of records is going to be somebody at the
22 TXMHMR, not the person whose records are at
23 issue.

24 PROFESSOR ALBRIGHT: Right. So
25 I'm saying we'll put your mental health

1 problem here, but --

2 MR. SUSMAN: Alex --

3 MR. YELENOSKY: It's not my
4 mental health problem.

5 PROFESSOR ALBRIGHT: I just
6 didn't want it to be on the record that we had
7 totally forgotten about getting documents from
8 third parties.

9 MR. SUSMAN: I agree. But I
10 think what Luke is talking about is we ought
11 to abandon the fix of having to depose a third
12 party to get documents from them. There
13 should be a simpler procedure for getting
14 documents from a third party without actually
15 having to go send a court reporter and taking
16 a deposition.

17 PROFESSOR DORSANEO: Under the
18 federal rules, you can just use a subpoena for
19 that purpose now without taking a deposition.

20 MR. GOLD: There was one other
21 consideration on that, and we may have
22 discussed it in the task force and not on our
23 subcommittee, and that is, under the request
24 for production rule, the nonparty has to
25 respond in the court in which the case is

1 pending; whereas, if you subpoena the records
2 of a nonparty in a different county, that
3 party can -- that individual can assert their
4 objection in that county and get it resolved.
5 We talked about that in the task force.

6 MR. KELTNER: And soundly
7 rejected it.

8 MR. GOLD: No. That's the
9 present rule.

10 MR. KELTNER: No, no, no.
11 Remember the Anthony vs. Teachers' Retirement
12 case?

13 MR. GOLD: Yeah. I thought
14 about it last night.

15 MR. KELTNER: Well, we have a
16 rule in the task force I think we can plug in
17 that will take charge of this issue.

18 MR. SUSMAN: All right. Dave
19 Keltner is in charge, then, on behalf of the
20 subcommittee of drafting a rule that deals
21 with getting documents from a third party in a
22 simple straightforward way.

23 We now turn to Page 40.

24 CHAIRMAN SOULES: While we're
25 on that, let me ask you, Mr. Chairman, to have

1 someone on your committee go through the
2 existing rules and identify every -- just
3 everything that the existing rules facilitate
4 that is not being carried into the new
5 rules --

6 MR. SUSMAN: Alex.

7 CHAIRMAN SOULES: -- so that
8 we do not let something fall through the
9 cracks.

10 MR. SUSMAN: I agree.

11 CHAIRMAN SOULES: Okay.

12 MR. SUSMAN: That will be
13 assigned to Alex.

14 PROFESSOR ALBRIGHT: That
15 sounds like fun.

16 MR. SUSMAN: Now, Pretrial
17 Conference, Rule 166. I don't think this will
18 be a terribly -- well, this has never been
19 controversial on our subcommittee, and I don't
20 think anyone is going to have a real problem
21 with it.

22 Item 1(c), the scheduling order,
23 including a Discovery Control Plan, you're
24 going to have to look back at Rule 1 when we
25 get there in a few minutes to see what that

1 means, what a Discovery Control Plan is.

2 MR. HERRING: Steve, let me
3 ask, and maybe you want to wait until we get
4 back to Rule 1, but parties can agree to a
5 Discovery Control Plan or a court order?

6 MR. SUSMAN: Yes, either way.

7 MR. HERRING: If the parties
8 agree, Rule 1 says -- I think you've
9 basically answered it; that they may file it.
10 And if they do file it, is it then enforceable
11 in any way other than your exclusion remedy
12 under Rule 6? In other words, if I don't have
13 a court ordered discovery control plan and we
14 just agree to it and file it, how do you
15 enforce it?

16 MR. SUSMAN: I would think it
17 would be treated as a Rule 11 agreement.

18 MR. HERRING: Okay. The only
19 enforceability, then, would be under the
20 general exclusion remedy, Rule 6?

21 MR. SUSMAN: Sure. Yes, sir.
22 The pretrial conference.

23 HONORABLE DAVID PEEPLES:
24 Steve, as I look at this as a trial judge, I
25 would think I can do just about anything I

1 want to at the pretrial.

2 MR. SUSMAN: I think that's
3 right.

4 HONORABLE DAVID PEEPLES:
5 Yeah. But I think several years ago Rule 166
6 was expanded and many more things were listed
7 explicitly so judges would know "You have this
8 power. No doubt about it, we have given you
9 this power." And I'm just wondering if by
10 boiling this down and making it more general
11 there won't be some judges who kind of think,
12 "Well, it doesn't say so in here. I probably
13 can't do it." I don't, you know --

14 HON. ANNE TYRRELL COCHRAN:
15 Anne Cochran. I just compared the rules too,
16 but -- go ahead, Scott.

17 HONORABLE SCOTT BRISTER: I
18 thought that too, and I have been reversed
19 twice by my courts of appeals who
20 unfortunately incorrectly didn't read it quite
21 as broadly as I did.

22 The problem with (d) here, "Determination
23 of uncontested and contested issues of law,"
24 the point arises, you show up at trial, both
25 sides -- it's a coverage dispute, a liability

1 insurance contract, and did we have coverage,
2 do we have a duty to defend them on this
3 case. I've seen lots of these.

4 And it immediately jumps into my mind
5 that there is an eight-corners rule and there
6 has been for 100 years. We don't have to
7 worry about all this. Just look at the
8 plaintiff's petition, look at the insurance
9 policy, is it within eight corners or not, and
10 decide.

11 Both lawyers look at me like lightning
12 has struck them. They've never heard of this
13 thing before, and they're ready to call
14 10 witnesses each to put on proof of duress
15 and what all we were going to do, the
16 discovery in the case.

17 And I say no, no, no, no, no. This is
18 eight corners. You give me a brief, you give
19 me a brief, and I'll decide whether it's
20 within eight corners or not.

21 That one I happened to be affirmed on
22 appeal two to one, because the two found that
23 I had declared a non-jury trial, which nobody
24 thought I did --

25 MR. McMAINS: Which was news to

1 you.

2 HONORABLE SCOTT BRISTER: --

3 that I declared a non-jury trial over
4 everybody's jury request to determine this.

5 Do we mean, as I think we should -- and
6 this arises in far more cases than cases you
7 all would be in, because these things would
8 strike you too, but lots of people don't think
9 of things until they come down the week before
10 trial and the judge looks at them; he can't
11 try this.

12 And I have been told in another specific
13 case, yes, I was exactly right, it is a matter
14 of law, but no, I may not skip the rules of
15 summary judgment. I may not declare what the
16 law is. I must sit through the first five
17 days of listening to witnesses as a total
18 waste of time, everybody knowing I will have
19 to direct a verdict on it. Do we mean --

20 MR. SUSMAN: Could I --

21 HONORABLE SCOTT BRISTER: Do we
22 mean determination or do we mean agreement as
23 to what's contested and uncontested?

24 MR. SUSMAN: Could I take the
25 chicken's way out, and that is, on behalf of

1 the subcommittee, remove this as a rule which
2 we present? I kind of don't know how it got
3 there. I think -- I'm kind of thinking,
4 Scott, out loud.

5 HONORABLE F. SCOTT McCOWN:

6 Well --

7 MR. SUSMAN: We have now put in
8 Rule 1 the Discovery Control Plan, which is
9 really what we were concerned about. We are a
10 discovery subcommittee. I mean, we are not
11 dealing with everything else that a court can
12 do at a pretrial conference. That is not
13 within our prerogatives, like, you know,
14 sanction people and do other kinds of things.
15 Shouldn't we just say that this is not our
16 problem? It's some other committee's
17 problem. I mean, I just -- that's a
18 possibility.

19 HONORABLE F. SCOTT McGOWN:

20 Well, the reason it's here, Steve, is because,
21 if I understand correctly, it was within the
22 numbers that were assigned our committee.

23 Now, this is basically my draft, and we
24 can make a little legislative history. There
25 is no change that was intended in any way to

1 diminish the power of the trial court. And if
2 we need to add a comment, that might be
3 helpful. But I think somebody has got to
4 review the pretrial conference rule. I think
5 this version fits with what we've done. It
6 may be that people have ideas about what a
7 pretrial conference rule needs that the
8 present rule doesn't have that they want to
9 add in here, and we can talk about that and
10 add it in.

11 MR. SUSMAN: Anne.

12 HON. ANNE TYRRELL COCHRAN: I
13 think we need to clarify the fact that, at
14 least from my perspective, there are two
15 points that have been raised about Rule 166
16 that really are different.

17 As Scott can tell you, a few minutes ago,
18 as I was reading ahead, I was reading this
19 committee proposal, and immediately had the
20 same reaction you did: You know, my God,
21 they've cut it down to a third of what it
22 was. Which powers have they deleted? And
23 then I -- so I made Scott loan me his book,
24 and I looked it up, and I learned that the
25 only ones that were deleted were the ones that

1 repeated themselves five times.

2 I mean, so in substance, you know, what
3 Scott is talking about is the question of does
4 166 go far enough to satisfy all trial judges
5 and trial lawyers and everybody else in the
6 world? But to the initial question of have we
7 somehow cut back on the pretrial powers, I
8 just went and double-checked it myself because
9 my reaction initially was the same as David's,
10 and I'm fine with it. If you go back and
11 compare them, you start checking off, oh, yes,
12 they say "uncontested questions of law and
13 fact" five times. And that's why it looked
14 sort of --

15 CHAIRMAN SOULES: Well, that's
16 not true, Judge Cochran.

17 HON. ANNE TYRRELL COCHRAN:
18 Well, Luke, what do you think is left out?

19 CHAIRMAN SOULES: The written
20 trial objections to the opposing party's
21 exhibits.

22 PROFESSOR ALBRIGHT: That's
23 trial procedure.

24 HONORABLE F. SCOTT McCOWN:
25 Well, you can make --

1 CHAIRMAN SOULES: Proposed jury
2 charge questions and instructions.

3 HON. ANNE TYRRELL COCHRAN:
4 That's in there. Proposed jury charges --

5 MR. SUSMAN: Exchange of
6 exhibits.

7 HON. ANNE TYRRELL COCHRAN:
8 -- and exhibits. Maybe just not the
9 objections to exhibits.

10 HONORABLE F. SCOTT McCOWN: It
11 says that "Trial procedure, including exchange
12 of proposed jury charges or findings of fact
13 and conclusions of law, and exchange of
14 exhibits." I mean, this is kind of a
15 philosophical drafting issue.

16 What I've done is say that you can make a
17 pretrial order about anything in the world,
18 and I have included kind of the logical big
19 examples, and don't mean by including the
20 logical big examples to leave out logical
21 little examples, but just thinking that a long
22 list didn't add anything to a short list.

23 What Judge Brister has raised is a very
24 difficult question of procedure, not one of
25 discovery, one in which trial judges and trial

1 lawyers have different perspectives. And I
2 think courts of appeals tend to side with the
3 trial lawyers on it, and I don't know that we
4 want our subcommittee to get into that because
5 it's a tough nut.

6 MR. HERRING: Well, haven't you
7 done that when you add "contested issues of
8 law"? Because you didn't have that before in
9 166.

10 HONORABLE SCOTT BRISTER: Well,
11 what you had before is --

12 HON. ANNE TYRRELL COCHRAN: It
13 was in there about four times.

14 HONORABLE SCOTT BRISTER:
15 -- where you have a simplification of the
16 issues, is one of the things where we had it;
17 and let's see, and contested issues of law in
18 Part (j), Agreed applicable propositions of
19 law and contested issues.

20 I agree with Anne, I think. The same as
21 we did on the Sanctions Task Force, it makes
22 sense to shorten these things, burn less trees
23 and say in a comment we're just intending to
24 be more concise, not less coverage.

25 CHAIRMAN SOULES: Okay. 166

1 was a virtually unused rule until after 1990.
2 And this committee got drafts of a lot of
3 pretrial orders and orders preliminary to
4 pretrial and orders from federal courts and
5 went through and tried to list everything they
6 could find in any of those pretrial orders or
7 orders preliminary to pretrial to expand
8 Rule 166 so that it spelled out for the trial
9 judges a lot of things that they could do. It
10 was a very short rule before 1990.

11 Since 1990, cases -- the appellate courts
12 have started deciding cases that involved
13 Rule 166, and I don't think there was a case
14 before 1990. There were a few. There are a
15 handful. So that did accomplish what we were
16 hoping would be accomplished, and that was
17 some activity at the trial bench of using 166
18 to do some things.

19 The problem with -- another problem the
20 appellate courts are having and the trial bar
21 is having on Judge Brister's problem of
22 getting legal rulings ahead of trial is that
23 nobody is looking at the right rule. The
24 right rule is 248. Rule 248 says the trial
25 judge is supposed to decide questions of law

1 before commencing the jury trial. If it is
2 dispositive of the case, it's over. It
3 doesn't say if it's dispositive of the case
4 it's over, but that's what 248 says. And this
5 committee also amended Rule 248 in 1990 to do
6 exactly that.

7 So really, Judge Brister, what you're
8 doing is not a summary judgment. I think it's
9 you're ready for trial, what are your law
10 points, I'm going to rule on those, and if
11 you've got anything left, we'll pick a jury.
12 If you don't have anything left, I'm going to
13 assign a judgment. That's what 248 is for.

14 To retreat on 166 just four years after
15 we're into activating it, and I think it's
16 legitimate to say that we have activated it by
17 putting in a lot of this, to me is
18 counterproductive. That's just my view.

19 MR. SUSMAN: Joe.

20 MR. LATTING: Well, it seems to
21 me what we could do, without retreating but
22 still not making it longer than necessary but
23 keep Scott's basic drafting, is just to say,
24 "The court may consider any matter that would
25 aid in the disposition including, among

1 others," or "including, without limitation,"
2 to make it clear that we don't propose to have
3 an exhaustive list here. I mean, I don't --

4 MR. SUSMAN: I guess I'm not
5 supposed to say this, but I mean, I kind
6 of -- I'm kind of with Luke on this one. We
7 have not paid much attention to this in
8 subcommittee from the first time we got a
9 draft of it. But if it's working okay --

10 CHAIRMAN SOULES: It is tough
11 to get a trial judge to pretry a case.

12 MR. SUSMAN: If it's working,
13 do we really care? Is it worth debating?

14 CHAIRMAN SOULES: It's tough.
15 What all -- even when you can't get him to
16 pretry the case --

17 HONORABLE DAVID PEEPLES: Can I
18 say something: It helps for a judge to be
19 able to look in the black-letter law and to
20 find it right there, you know. It just gives
21 you some backbone to decide "I can do this."

22 And it helps in the appellate courts too,
23 when some person who maybe, you know, does not
24 excel in the law --

25 MR. SUSMAN: Anne.

1 HON. ANNE TYRRELL COCHRAN: It
2 seems to me I made a mistake, which is what I
3 do from time to time, and maybe a few of you
4 have done it at least once in your past, you
5 know, in checking something, a list, real
6 quick and saying, "Yeah, I think it is."

7 I mean, once you start looking, and you
8 know, comparing -- I was looking for buzz
9 words and not realizing that, you know,
10 "identification" is quite a different thing
11 from "determination"; and that if you get a
12 little too general, you now have that the
13 trial judge can determine contested issues of
14 fact at the pretrial conference. I mean, I
15 think that's a little broader than anybody
16 wants to do.

17 It seems to me, though, that that doesn't
18 mean, and I don't think any of us should
19 endorse, even if we don't want to make any
20 substantive changes in the pretrial rule, to
21 not go back and try to at least organize
22 what's currently there because it's been added
23 on so many times. But if we could just very
24 carefully organize it without trying to cut
25 anything out that's there, because, just as

1 Luke said, it's hard to get a judge to want to
2 pretry a case, there sure are a bunch of
3 lawyers that sure are going to demand that
4 it's written in the rule that you can even
5 make them talk about something at the pretrial
6 conference.

7 MR. SUSMAN: Paul.

8 MR. GOLD: I move that we
9 withdraw from consideration Rule 166 --

10 MR. SUSMAN: I second it.

11 MR. GOLD: -- and send it back
12 to committee. It's enough at this time merely
13 to have the present Rule 166 in consideration
14 in order to add the Discovery Control Plan.

15 MR. SUSMAN: The motion has
16 been made and seconded that we withdraw the
17 recommendation of 166 and send it back to
18 subcommittee -- for what purpose?

19 MR. GOLD: At least for the
20 consideration of merely adding to the present
21 Rule 166 the concept of considering the
22 Discovery Control Plan.

23 MR. SUSMAN: And perhaps we're
24 deep-sixing it forever?

25 MR. GOLD: I think so.

1 HON. ANNE TYRRELL COCHRAN:

2 Deep-sixing 166 forever?

3 MR. SUSMAN: No. Just this
4 version.

5 HON. ANNE TYRRELL COCHRAN: Oh,
6 okay.

7 MR. SUSMAN: All in favor --

8 MR. GOLD: I move we just
9 withdraw 166 and submit it by --

10 MR. LATTING: Could I ask a
11 question? Scott, do you think that this draft
12 substantially limits or curtails you?

13 HONORABLE F. SCOTT McCOWN:
14 Well, I'm convinced by Judge Peeples. I'm a
15 trial judge that if it was one sentence long
16 and it said the court may consider any matter
17 that may aid in the disposition of the action,
18 that's all it would need to tell me.

19 MR. GOLD: I reverse my motion.

20 HONORABLE F. SCOTT McCOWN:
21 I've got sufficient backbone that I would do
22 whatever I wanted. But I'm convinced by Judge
23 Peeples that for the trial bench in general it
24 would be helpful to aid them in doing things
25 to have a specific list, so I'm convinced that

1 my original approach was wrong, and I agree
2 that we ought to send it back to the
3 subcommittee.

4 MR. SUSMAN: All in favor raise
5 your right hand. All opposed. 166 is
6 withdrawn.

7 We now get to the final rule, I mean,
8 before we go back to -- I mean, before
9 looking at the rules that were passed.

10 Amendments and responsive pleadings.
11 This is the rule that says where there is a
12 discovery period -- and keep in mind that the
13 only time this rule applies is in Tier 2
14 cases, because you don't have a discovery
15 period in Tier 1 cases; and in Tier 3 cases,
16 well, you might have a discovery period, but
17 it will be set by the court. So we are
18 talking about pleadings may be amended
19 typically in this situation after seven months
20 of discovery and two months before the
21 discovery period closes.

22 We thought that some of the resistance we
23 sensed from the -- well, I'm sure a lot of
24 the resistance we sensed several meetings ago
25 discussed the notion of limiting discovery,

1 restricting the time allowed for discovery;
2 was the notion expressed by many lawyers that
3 if we could only get the plaintiff to stay put
4 in one place long enough, these rules would be
5 fair. But if the plaintiff is going to act
6 like a blob of mercury and you can never get
7 stuck to the ground or to the wall his
8 contentions, that these limits would not be
9 fair.

10 This timing is scheduled so that it ends
11 at the time witnesses, experts, have to be
12 designated under our expert rule, so no expert
13 will be deposed until pleadings become final.
14 And that's the thought here.

15 MR. LOW: No experts to be
16 deposed until the pleadings become final?

17 MR. SUSMAN: The pleadings
18 become final 60 days before the end. The
19 expert's -- the first expert's deposition
20 will take place between that 60 days and the
21 next 45 days, in that time period, if you look
22 back at the expert rule.

23 CHAIRMAN SOULES: You can't
24 take an expert's deposition earlier in the
25 case?

1 MR. SUSMAN: No. Comments on
2 this rule? Yes, Sarah.

3 HONORABLE SARAH DUNCAN: Is it
4 the subcommittee's intent that leave to file
5 an amendment must be granted only if there is
6 insufficient time to complete discovery, or
7 are we completely dropping all other reasons
8 for denying leave to amend, like surprise,
9 prejudice, adding new claims and defenses?

10 MR. SUSMAN: Just what is there
11 in print. In other words, we have -- I mean,
12 that's -- the basic feeling is if you've got
13 enough time to complete discovery, you ought
14 to grant leave. Right, Scott? I mean, this
15 is --

16 HONORABLE F. SCOTT MCGOWN:
17 Yeah. I'm not sure what -- if Sarah could
18 give a specific example, I can't visualize it.

19 HONORABLE SARAH DUNCAN: Well,
20 for instance, say you've got a motion for
21 summary judgment by the defendant on grounds
22 of limitation, and all of a sudden we get
23 fraudulent concealment claims. There's a
24 motion for summary judgment set. It's been
25 worked up to the tune of a couple of volumes.

1 Can you then only deny the motion because of
2 some discovery problem? What about the
3 defendant that's relied on those pleadings
4 being the way they are and prepared a motion
5 for summary judgment based on it?

6 HONORABLE F. SCOTT MCGOWN:

7 Okay. This rule is a trial rule, and I know
8 that case law says that summary judgments are
9 trials, but we wrote this with trials in mind,
10 and I think the amendment rules for summary
11 judgments ought to be written specifically for
12 summary judgments. This is a trial rule.

13 HONORABLE SARAH DUNCAN: Well,
14 but the same thing applies with a trial. I
15 mean, if you get up to -- you've been -- you
16 know, a case has been on file for five years,
17 and all of a sudden 60 days before the end of
18 the discovery period or five days after
19 receipt of a notice of trial setting, all of a
20 sudden the plaintiff comes in and asserts
21 fraudulent concealment, and the only reason
22 we're not going to let him do that is because
23 we can't get discovery on it? I mean, that
24 just seems fundamentally unfair to me.

25 MR. SUSMAN: That couldn't

1 happen, obviously, because you have a
2 nine-month discovery window, unless it never
3 opened.

4 HONORABLE F. SCOTT McGOWN: I
5 think there's a slightly different answer,
6 Steve, because that's the way we do it now;
7 that right now, as long there is no prejudice,
8 meaning you can be ready for trial, we allow
9 leave to amend. You're suggesting that when
10 you have spent money and developed a case that
11 that ought to be the case; and if people have
12 new ideas close to the end, they ought not be
13 allowed to interject them. That's not the law
14 at present.

15 HONORABLE SARAH DUNCAN: I
16 think that's a factor the trial court can
17 consider in whether or not to deny leave.

18 HONORABLE F. SCOTT McCOWN: No,
19 no, no.

20 HONORABLE SARAH DUNCAN: No?
21 Okay. Never mind, then.

22 MR. SUSMAN: Any other
23 comments? Yes, Anne.

24 MS. McNAMARA: Making the leave
25 mandatory unless there's insufficient time to

1 complete discovery I don't think is enough
2 with this rationing of discovery time. The
3 defendant, for example, may be planning their
4 discovery assuming one cause of action. They
5 may have gone through 45 of their, whatever it
6 is, 50 hours of discovery time. There's still
7 sufficient calendar time left to complete
8 discovery, but you don't have enough hours
9 left in your bank to do it. If you then have
10 the pleadings amended to include some whole
11 new theory and you haven't taken any discovery
12 on it, you're out of luck, I think, unless I'm
13 missing something.

14 MR. SUSMAN: Well, let's -- I
15 mean, clearly it would caution a careful
16 lawyer to save some of your 50 hours until
17 after --

18 HONORABLE F. SCOTT MCGOWN: No,
19 no. She's right. We need to fix that
20 problem.

21 MR. SUSMAN: Do what? How?

22 HONORABLE F. SCOTT MCGOWN: We
23 can add a sentence to the rule that says
24 that -- this is not the drafting, this is the
25 concept -- that if there's sufficient time but

1 there's not sufficient time left on the clock,
2 the court can adjust the discovery time as
3 necessary.

4 MR. SUSMAN: Well, the court
5 has that power anyway, Scott.

6 HONORABLE F. SCOTT McCOWN:
7 Well, sure. But I think that it wouldn't hurt
8 to add that sentence there.

9 HON. ANNE TYRRELL COCHRAN: As
10 long as it's discretionary and not just a way
11 to get around the clock.

12 MR. LATTING: But that's
13 contrary to the McCown philosophy of
14 cluttering up the rules.

15 HONORABLE F. SCOTT McCOWN: No,
16 I don't think so. I think she's raised a very
17 good argument, that what the trial judge has
18 to look at is not only the calendar time
19 before trial, but now he's got a new cause of
20 action, time has been spent on the clock, the
21 trial judge needs to make an adjustment in the
22 discovery hours. I think it's going to have
23 to be done in almost every situation and we
24 ought to add a sentence there to direct them
25 in that area.

1 MR. GOLD: Steve, I think Judge
2 McCown is right, and I disagree with the
3 concept that you were advancing. I don't
4 think that you should have to save certain
5 hours in anticipation that someone at the end
6 will plead. I think that's
7 counterproductive. And I really think that
8 this is part of the tiering concept that we've
9 tried to incorporate throughout that
10 encourages people that if they're going to
11 make amendments to make them earlier knowing
12 that if you're going to make an amendment at
13 the end, it may add additional deposition
14 hours for the other side.

15 MR. SUSMAN: All right. Wait.
16 Scott, what is your proposal? Let me make
17 sure I understand what you are proposing and
18 where.

19 HONORABLE F. SCOTT McCOWN:
20 Well, right after -- excuse me, right before
21 the very last sentence, we need to insert a
22 sentence that says -- and this is the concept,
23 not the drafting -- that says if the trial
24 judge is going to -- even if there is
25 sufficient time on the calendar to complete

1 the discovery so that the trial judge is going
2 to grant leave to amend, the trial judge
3 nevertheless should think through the problem
4 of whether the discovery hours need to be
5 enlarged, not that they have to be enlarged,
6 but they need to think through that and
7 enlarge the discovery hours, if that's what's
8 fair.

9 MR. SUSMAN: I agree. No
10 problem. You mean we would modify the next to
11 the last sentence essentially in some way?

12 HONORABLE F. SCOTT McCOWN:
13 Right.

14 MR. SUSMAN: Anne.

15 HON. ANNE TYRRELL COCHRAN: Now
16 that we've taken care of that situation, could
17 we also consider amending the next to the last
18 sentence, which basically says "the court has
19 to grant leave unless," to add another
20 "unless" along the lines of unless the trial
21 court finds that, you know, the reason for the
22 late amendment to the pleadings was because
23 they were trying to get around the discovery
24 limitations? I mean, otherwise you're going
25 to have people who really are bucking about

1 these limitations who are going to look at
2 this and say, "Well, this isn't a limitation.
3 We'll just, you know, take the first fourth of
4 our discovery and then amend, you know, the
5 pleadings and then the judge will have to give
6 us, you know, 20 more hours of deposition, and
7 then we'll add our next cause of action." I
8 mean, there has to be something to prevent
9 that. The way it's written now, the court has
10 to grant leave unless...

11 MR. SUSMAN: Well, as I
12 understand it, the party who is doing the
13 amending doesn't get more time by virtue of
14 the fact that you amend. Okay? We don't want
15 the amending party to be able to buy more time
16 by amending. It's the opponent who gets more
17 time.

18 And what we are saying is, if you wait
19 until 60 days before the end of the discovery
20 period and during that time period amend, the
21 trial judge should -- you've got to get leave
22 of court, and the trial court should grant
23 leave unless there's not enough calendar time
24 or enough vehicle time left, in which case the
25 court should consider either extending the

1 calendar time or the vehicle time basically,
2 right?

3 HONORABLE F. SCOTT MCGOWN:
4 Right. But what Anne is saying is when we
5 draft this, we need to make sure that we
6 adjust the time for the one opposing the
7 amendment and not for the one urging the
8 amendment.

9 MR. SUSMAN: Yeah, opposing
10 it. Is that --

11 HONORABLE DAVID PEEPLES: I
12 want to speak to that.

13 MR. SUSMAN: Yes.

14 HONORABLE DAVID PEEPLES: You
15 know, this does happen a lot. I'm faced with
16 a last-minute amendment to the pleadings. And
17 it seems to me the judge ought to have the
18 discretion to say no, the pleadings as they
19 are will fairly frame this case. Everybody is
20 going to get their day in court, and I'm not
21 going to make these young lawyers work
22 18 hours a day, you know, getting this case
23 ready. There's always time left if the judge
24 is willing to say, "You're going to drop
25 everything else you're doing and get this case

1 ready for trial."

2 And we read articles in the Bar Journal
3 almost monthly about stress and quality of
4 life. And here we're just almost saying that
5 when somebody wants to amend at the last
6 minute, the judge has to give it to them and
7 expand the calendar and make them work their
8 tails off at the last minute.

9 Why can't we let judges say, "Look, the
10 pleadings as they are fairly frame the case.
11 You're going to try it the way it is and
12 you're going to have the rest of the time to
13 get your case ready without having to go take
14 a bunch more depositions."

15 HONORABLE SARAH DUNCAN: Yes.

16 HONORABLE DAVID PEEPLES: I
17 mean, really, it is in the legal profession's
18 interest and everyone else's to give judges
19 the discretion to say, "I think the pleadings
20 the way they are are all right. Enough is
21 enough."

22 MR. SUSMAN: Scott.

23 HONORABLE DAVID PEEPLES: And
24 if it really is something that needs to be in
25 the pleadings, okay, you can do it.

1 HONORABLE F. SCOTT MCGOWN: But
2 wait, there's a history to this, if I could
3 argue the flip side now. Most pleading
4 disputes are irrelevant. In other words, a
5 guy comes in, he wants to amend his pleadings
6 because he doesn't have them quite in order or
7 he hasn't plead something that they've done
8 all the discovery on or assumed or he forgot
9 to put in the interest. Most times when
10 pleadings are amended, it doesn't change the
11 nature of what's going to happen anyway or
12 what would have happened anyway.

13 And the history was and the reason we
14 went to the free amendment rule is because
15 people were losing cases they shouldn't have
16 lost or causes of actions or interest because
17 we had technical rules. And I actually think
18 it would wind up being more stressful and more
19 worrisome to operate under a regime that you
20 couldn't get your pleadings cleaned up than it
21 would be to operate in a regime where you
22 could freely clean up your pleadings.

23 MR. SUSMAN: Joe.

24 MR. LATTING: I'd like to speak
25 on this, and I'm going to stand up because

1 this is so important to me.

2 We're about to make a major change in the
3 way we practice law if we pass this rule and
4 the Supreme Court adopts it. Whereas we now
5 have the right to amend without leave of court
6 up to seven days unless it's an unfair
7 surprise to the other side, what we're saying
8 here, if we have a case -- and I do have one
9 or two set toward the end of this year that
10 have been on file for some time. This means
11 that our pleading changes are through 60 days
12 after the discovery period, so that means I
13 can't amend any pleadings for a case that's
14 set in November of this year. And this is a
15 huge change in the jurisprudence of the way we
16 try cases.

17 And may I add that this automatically
18 falls under the second tier of cases, and if
19 we adopt that rule, it's going to mean that
20 we're going to have to amend -- plead our
21 cases and have them all in mind and ready to
22 go to trial, and then they're going to sit
23 there for months frozen, and I don't think
24 that's going -- I think the bar is going to
25 be outraged.

1 MR. SUSMAN: Joe, wait a
2 minute. Let me see if I understand. Let me
3 see what we've got. We've got the position
4 stated in the rule, which is Scott's position,
5 that it's okay to put a deadline of 60 days
6 prior to the end of the discovery period but
7 you need to have some play in the joints.

8 We've got David's position, that at
9 60 days you ought to encourage the judge to
10 say, "You've had four months, forget about
11 it."

12 And then we have your position that says
13 I don't even want the 60-day cutoff even with
14 the flexibility of Scott's rule. Is that
15 fair, or are you arguing for Scott's -- I'm
16 not sure if -- is yours a third -- can you
17 accept this rule, or are you against the rule
18 because this is a change?

19 MR. LATTING: I'm against it
20 because it's too long before the trial. I'm
21 particularly toward or for changes in
22 pleadings that don't unfairly disadvantage the
23 other side.

24 MR. SUSMAN: All right. Let's
25 argue, if we can, let's focus the debate, if

1 we can, on the strictest rule, which is the
2 Dave Peeples rule, which is the rule that says
3 at the end of four months you've got to get
4 your pleadings in order. And if you don't,
5 the judge can say, "Tough. I'm not going to
6 make the other side go do more work even
7 though there's plenty of time to do it, okay,
8 even though he's got hours left. You should
9 have done it earlier."

10 How many people here are -- let's have a
11 show of hands, a straw vote.

12 HONORABLE DAVID PEEPLES: I
13 want the judge to have the discretion to do
14 that.

15 MR. SUSMAN: How many people
16 think the judge should have that discretion?
17 11.

18 How many think the judge should not have
19 that discretion? 12.

20 I think it's --

21 MR. LATTING: And Steve, let me
22 say, I don't think he should not have the
23 discretion. My concern is, I think he has
24 that discretion under the pretrial order as it
25 stands today. I don't think we need this

1 rule. My concern is that this is automatic,
2 and that's what the problem is. I think it
3 will -- that's my problem, is that it's an
4 automatic fail-safe.

5 HONORABLE F. SCOTT MCGOWN: But
6 that's not really -- what Judge Peeples just
7 described is not really discretion.
8 Discretion is when there's a standard and you
9 apply that standard within a range. But just
10 to say no because they've had enough time is
11 not a standard. That's just capriciousness.
12 You know, the question is, what is the trial
13 judge supposed to do?

14 Under our present system, he is supposed
15 to let people amend their pleadings unless
16 there is surprise, meaning that the amendment
17 in cooperation with the trial setting is going
18 to leave the person who is opposing the
19 amendment unprepared, unready, unable to go to
20 trial.

21 The standard in this rule would be that
22 he's supposed to allow the amendment unless
23 there isn't time on the clock or time on the
24 calendar to get ready to go to trial. So this
25 rule is really no different from the present

1 rule; it's only adapted to our discovery
2 window.

3 MR. LATTING: That's right.

4 MR. SUSMAN: Keltner.

5 MR. KELTNER: I have, I guess,
6 two observations. I don't know if we're
7 focusing on the right thing. The truth of the
8 matter now is, on cases that do get pretried,
9 and I'll agree with Luke that probably not, in
10 my opinion, enough do, we already have a
11 fairly absolute rule.

12 The other problem is that if we're going
13 to give them a rule to play by, I agree with
14 David in many instances, that you can get up
15 to the last minute and you have the hard
16 problem of you've got to do a whole lot of
17 work at the end of the case that doesn't make
18 much sense.

19 But more often what happens is like what
20 Scott said. Everything has been done, the
21 discovery has been done, the witnesses are
22 designated, and everything is worked out, and
23 just somebody through a technical problem
24 hasn't gotten exactly what they needed.

25 And I think if we can focus in terms of

1 changing the standard, to build in some
2 discretion for the trial judge and maybe
3 broaden what the discretionary playing field
4 is on the things that the court is to
5 consider, then I think maybe that would be
6 better.

7 In response to what Joe said, and I think
8 this is extraordinarily important, this system
9 of justice isn't going to get one penny
10 cheaper for the people who are in it unless we
11 prepare for trial one time and go to trial or
12 have the case resolved. That's truly what
13 costs us money. So the truth of the matter
14 is, we have to have a system -- and that's
15 one of the reasons, Steve, we had the window,
16 the discovery window, is to encourage that
17 issue.

18 And Joe, it is true that currently you
19 get ready and maybe there's a period of time.
20 But until cases are finally prepared to go to
21 trial, no system that we put in effect is
22 going to ensure that they get to trial or get
23 close to a position where they can be
24 resolved. So my thought process is there's
25 got to be a cutoff period at some point. We

1 have to give some, maybe a little bit more,
2 rein, Scott, than we have been up until now to
3 the things that the court can consider and
4 deal with in that way.

5 MR. SUSMAN: Coming around the
6 table. Luke.

7 CHAIRMAN SOULES: Under this
8 Rule 63, the only reason that a judge can deny
9 the amendment is insufficient time to complete
10 discovery. Either the period, the overall
11 period is going to end or there's no time left
12 on the clock. So we're scrapping the old 63
13 standard where the judge could deny leave to
14 file -- of course, this was within seven
15 days. We move seven days back to 60 days now,
16 so --

17 MR. LATTING: No, it's not
18 60 days.

19 CHAIRMAN SOULES: Well, to
20 whatever it is.

21 MR. LATTING: It may be a year.

22 CHAIRMAN SOULES: Well, it may
23 be a year. Anyway, it's earlier. A lot
24 earlier.

25 MR. LATTING: A hell of a lot

1 earlier.

2 CHAIRMAN SOULES: Compared to
3 seven days, it's a lot earlier.

4 MR. LATTING: A whole bunch.

5 CHAIRMAN SOULES: And the judge
6 cannot deny a leave to file if the new
7 amendment is a surprise to the adversary,
8 prejudicial to the adversary, or asserts a new
9 cause of action. It cannot do that. Even
10 though it asserts a new cause of action, it's
11 prejudicial to the opposite party and is a
12 surprise, the judge's hands are tied because
13 he can only deny a trial amendment -- or deny
14 amended pleadings on the basis of discovery.
15 It's altogether discovery driven. Is that
16 what you want?

17 MR. SUSMAN: Yeah. But all of
18 that is -- surprise, I mean, in the abstract,
19 surprise is immaterial, unless it causes you
20 some harm. If you have time to engage in
21 discovery, it's hard to see the harm.

22 Prejudice. I mean, what's the
23 prejudice? I mean, where is the prejudice if
24 you have the time to complete discovery and
25 can fairly defend the claim? So I'm not sure

1 that --

2 CHAIRMAN SOULES: So you want
3 it discovery driven? You want it altogether
4 discovery driven?

5 MR. SUSMAN: Yeah. I want it
6 discovery driven because I put the deadline
7 back. I made the deadline occur so quickly,
8 because I want to basically tell the lawyers
9 of this state, "Get your pleadings in order
10 quick. It's a new ball game."

11 But then I want to be fairly fair and
12 reasonable about what I'm going to do if they
13 don't. I mean, I don't want it to be doomsday
14 for them if they -- if there's some technical
15 problem and there's time within the discovery
16 window to fix it.

17 Bill Dorsaneo.

18 PROFESSOR DORSANEO: I think we
19 have to look at some more of the rules here.
20 You have to think about the trial amendment
21 rule too, maybe. Right now, the way our rules
22 are structured, we have this short period
23 immediately before trial, and then the trial
24 amendment rule operating under essentially the
25 same standard, surprise, prejudice -- and

1 actually, I think our case law treats trial
2 amendments and amendments that require leave
3 of court essentially the same way.

4 Now, what you're talking about here
5 earlier on is really a rule that would say
6 that leave to amend should be denied if it
7 messes up your discovery game plan. That's
8 really worded the other -- it's worded "leave
9 should be granted unless," the way you have it
10 worded, and I haven't gotten it completely
11 thought out, but it seems to me that there's
12 this category of cases where you maybe
13 wouldn't need to have any additional discovery
14 but there still would be a surprise or
15 prejudice problem that would be appropriate to
16 deny a trial amendment. It may not be a large
17 class of cases. Even a new cause of action
18 wouldn't necessarily be a surprise or
19 prejudice, and I could think of cases where a
20 new cause of action ought to be allowed to be
21 added in because it wasn't a surprise, there's
22 no real prejudice, and somebody needed to add
23 it because otherwise limitations would run on
24 that claim or will have run on the claim.

25 So I think you need to go back to the

1 drawing board and focus on the whole amendment
2 process, the trial amendment process, the
3 standard there, the time between the time of
4 trial and the end of the discovery cutoff
5 period, and what could be involved there with
6 or without discovery, and then this earlier
7 contrast.

8 MR. SUSMAN: Anne.

9 MR. LATTING: Yes. Hear, hear.

10 MR. SUSMAN: Anne.

11 HON. ANNE TYRRELL COCHRAN:

12 Steve, you know, if you look at what most
13 pleadings -- or even where leave is granted
14 after the seven-day-before-trial period, and
15 most, like you said, or all of the surprise
16 and harmful effect and everything usually
17 turns on whether or not they waited, hoping --
18 you know, hoping it would be, you know, a
19 surprise at trial and they would not have done
20 any discovery or asked the right questions in
21 discovery. 99 percent of the amendments are
22 things like "I forgot the judgment interest,"
23 "I didn't take any" -- I mean, we have some
24 pretty arcane pleading rules in some of the
25 older causes of action; you know, I didn't do

1 this or that. Or maybe it's technically a new
2 cause of action, but it's exactly the same,
3 very simple set of facts that have been
4 discovered to death during whatever discovery
5 period there is. For those, even under the
6 rest of the scheme that's being proposed here,
7 the current rule about, you know, seven days
8 before trial, two days before trial, I mean,
9 anybody is going to let those go. Nobody
10 would even dream of asking for more discovery
11 on them. You don't have to worry about how
12 close it is to trial.

13 It seems to me the only thing under your
14 current proposal where pleadings even affect
15 the discovery issue is when they really do,
16 you know, change it from a straight document
17 case to, you know, a malicious, you know, you
18 have to go discover the evil hearts of the
19 people on the other side, you know, where it
20 really does change it. And then you really
21 need to have -- but for most cases and for
22 most of the purposes of this, I don't
23 understand why -- maybe even for the whole
24 thing -- why the current amendment rule needs
25 to be changed at all to serve the purposes

1 that you're trying to get to.

2 MR. SUSMAN: Well, to speak to
3 that a little, just to speak to it, and maybe
4 it doesn't, but the history of it, Anne, was
5 the feeling that absent a discovery cutoff
6 date under the current system, yeah, pleadings
7 can be amended until seven days before trial,
8 but discovery can go on until very close to
9 trial, too.

10 Our system said not only are we going to
11 limit discovery so there's going to be an end
12 to the discovery period which could be months
13 before the trial, but we're going to limit the
14 amount of discovery vehicles. And a lot of
15 people complained, as I said before, that
16 that's a problem in Texas because people can
17 always amend their pleadings and you're
18 shooting at a moving target, and this was the
19 thought.

20 And therefore, we thought we had to
21 monkey with the amendment rules to make sure
22 that there was a point in time at which the
23 picture became fairly static and the discovery
24 vehicles could be used.

25 HONORABLE F. SCOTT MCGOWN:

1 Steve?

2 MR. SUSMAN: Scott.

3 HONORABLE F. SCOTT McGOWN: I
4 agree with everything that you said and
5 everything that Anne said and everything that
6 Bill Dorsaneo said, but the problem is --

7 MR. SUSMAN: I move. So moved.

8 HONORABLE F. SCOTT McGOWN:
9 -- but the problem is that under this
10 discovery regime we have both a clock and a
11 calendar. And what this rule is designed to
12 do is to say that if you've got any kind of
13 cause of action that is going to necessitate
14 discovery, that's going to affect the clock
15 and affect the calendar, you have got to get
16 it on the table at a certain point before the
17 calendar runs out.

18 If it doesn't affect discovery, then it
19 ought to be treated exactly like it's treated
20 under the present system, which I think is the
21 point that Anne and Bill are making. And so
22 what we need to do is redraft the rule so that
23 it's clear that if it's a calendar issue,
24 you've got this rule; if it's not a calendar
25 issue, it's the same as it's always been.

1 MR. SUSMAN: Paul Gold.

2 MR. GOLD: I agree with Scott
3 on that. I think that we should not lose this
4 rule as the discovery subcommittee has
5 submitted it. I think it's a very important
6 concept.

7 What we have now, even when we get
8 pretrial orders from the courts, is that the
9 pleading deadline is long after the discovery
10 deadline. And one of the things that that
11 perpetuates is motions for continuance,
12 surprise, gamesmanship, and because someone
13 always holds in their hand the ability to
14 change the whole complexion of the case after
15 all the discovery is completed. And the
16 concept here was to get at -- as Steve said,
17 get the case out there, what the issues are,
18 do your discovery and get done.

19 And I agree with Scott also, that if it
20 isn't an issue that revolves around additional
21 discovery, then sure, Bill is right. We
22 should keep intact the discovery under the
23 present rules that allow minor tinkering with
24 the pleadings and no one is prejudiced or
25 whatever. But I think we should go with the

1 concept that the subcommittee has put forward
2 here because I think that it's laudable.

3 MR. SUSMAN: Rusty.

4 MR. McMAINS: The problem that
5 I have with the idea that there is a different
6 standard, whether you're talking about doing
7 it early on or later on, is that -- is if the
8 standard is anywhere articulated, it's going
9 to require more discovery. Every time
10 somebody tries to amend the pleadings, they're
11 going to argue "I need more discovery," and
12 perhaps even feasibly so. I mean, you can
13 actually make arguments legitimate that would
14 say there is some discovery I would have done
15 or would have done differently that I have
16 used up, even though they're relatively minor
17 and even though all the parties have already
18 talked about everything probably to death in
19 the course of the discovery as well.

20 A judge, you know, right now under that
21 standard, if didn't surprise him as far as the
22 facts, he's going to allow the amendment.
23 He's got to, basically, even if it's a trial
24 amendment.

25 Under this rule, if it says "Leave shall

1 be granted unless" and then it says "there is
2 insufficient time to complete discovery,"
3 well, obviously, if it's made after the
4 discovery cutoff, there is insufficient time,
5 which means that all you have to do as a party
6 opposing the amendment is to allege in large
7 measure and convince somehow persuasively to
8 the court that I would have done the discovery
9 differently or that I would have done more
10 discovery or that I would have at least gotten
11 some more witnesses myself to respond to this
12 new claim or whatever, even though that may be
13 pure BS.

14 So I don't think the idea that there are
15 two standards that you can use based on
16 whether one affects discovery or not is a
17 workable notion. If we have any standard that
18 depends upon a discovery window and a
19 discovery cutoff that is earlier on, that is
20 going to be the centerpiece of the dispute.
21 And we better have a very damn fine defining
22 standard of what that means or there's going
23 to be a lot of people that get screwed up in
24 terms of not being able to amend their
25 pleadings on a technical basis, nonetheless

1 that arguably deal with some discovery. It
2 would be undisputed that one more deposition
3 could have been taken on that issue. That
4 will affect discovery.

5 And then at that point he just says --

6 MR. SUSMAN: All right. Now
7 I'm going to exercise the prerogative of the
8 Chair and call the question on Rule 63. I
9 think we've a lot of discussion. Now let's
10 vote it up or down because I'm --

11 HON. ANNE TYRRELL COCHRAN: Can
12 we have a minute to think about it?

13 MR. SUSMAN: What?

14 HON. ANNE TYRRELL COCHRAN:
15 Even if we promise not to talk, can we have a
16 minute to think about it?

17 MR. SUSMAN: I tell you what,
18 why don't we take a break now, our afternoon
19 break, for 10 minutes, and come back then and
20 vote on Rule 63. And if you don't like
21 Rule 63, think if there's something else you
22 want in its place, because we need some
23 direction, and I'm missing it in the flow.

24 (At this time there was a
25 recess.)

1 MR. SUSMAN: Can we call the
2 meeting to order, please. Where is Anne? The
3 Cochran break is over. Okay. Here is what
4 Scott McCown suggested. I think he's probably
5 right. He and Alex have come back with the
6 suggestion that the subcommittee probably can
7 do some more work on this rule insofar as the
8 standard by which leave is granted by the
9 trial court for amendments. The real question
10 is as long as we have a concept or go with a
11 concept, which we have thus far, of a clock
12 and a calendar on discovery. Discovery ends
13 at a certain point in time and also there is
14 just so much clock time you have for certain
15 vehicles.

16 Does this group agree with the concept
17 that there should be some deadline on pleading
18 during that discovery window before the
19 discovery window closes, before the discovery
20 period ends? Do not consider what the
21 standard would be. Should there be a
22 deadline, which is a departure from the
23 present system which we're using as the
24 deadline, seven days before trial, which will
25 almost by definition be outside of the

1 discovery period. All in favor of that raise
2 your right hand. All opposed.

3 All right. Let me get the count then.
4 All in favor raise your right hand. 19.

5 All opposed. Four. 19 to 4. Is that
6 right? 19 to four is the vote on that.

7 MR. MARKS: Now, let me just
8 say that I voted for this. I'm against a
9 discovery window, but if we've got to have a
10 discovery window --

11 MR. SUSMAN: I understand
12 that. I understand that.

13 MR. MARKS: Okay.

14 MR. SUSMAN: All right. The
15 assumption is that there's going to be a clock
16 and a calendar.

17 MR. MEADOWS: Steve, let me
18 just speak on this point. John, on this point
19 I think it would be -- that was my view as
20 well at this subcommittee meeting we had at
21 your house, but I think it would be helpful
22 for John and others to know the direction we
23 got on this report. I mean, that's something
24 that we didn't even pursue because Justice
25 Hecht said that in addition to discovery, a

1 limitation on discovery devices, there was
2 going to be a window.

3 MR. SUSMAN: Well, let me come
4 back to that when we go to Rule 1. But, I
5 mean -- yes, Rusty.

6 MR. McMAINS: I want to make
7 one comment about the rule that we didn't
8 address, and that is the rule deals with both
9 sides having the same time, which is kind of
10 weird, because it talks about responding as
11 well, so like, you know, the plaintiff files
12 an amended pleading. The defendant's time to
13 amend without leave is at the same time. I
14 mean, if you wait -- in other words, you can
15 file one without leave five months into the
16 time frame, 60 days before the end of the --
17 or whatever, however many it is, seven days or
18 however long, but you're two months ahead
19 then, you know. One day, you're two months
20 ahead of that, you can file your amended
21 pleading right then without any leave of
22 court. But on the next day, the defendant,
23 who is going to respond to it, has to get
24 leave of court. That looks silly to me.

25 HONORABLE F. SCOTT MCGOWN: We

1 can fix that by providing a cutoff and then
2 after the cutoff there's 10 days to file any
3 responsive pleading that was filed during the
4 cutoff.

5 MR. SUSMAN: Okay. I think we
6 have beat this one to death.

7 CHAIRMAN SOULES: Not quite.

8 HONORABLE F. SCOTT McCOWN: Not
9 quite.

10 MR. SUSMAN: Luke.

11 CHAIRMAN SOULES: When you set
12 the standard for whatever -- when you set the
13 standard for whatever is going to be the basis
14 or the criteria for amending after the free
15 amendment period expires, so we're now within
16 seven days or we're within whatever earlier
17 period now it's going to be. Please keep in
18 mind that we have trial by consent, things
19 that happen during trial that according to our
20 current practice do go to the jury, but they
21 can't go to the jury without a pleading. But
22 the judge gives you a pleading automatically
23 if it's been tried by consent so that you can
24 submit the question on discussion. So unless
25 you're going to also eliminate the whole

1 concept of trial by consent, whatever that
2 standard is has got to accommodate all kinds
3 of amendments that happened up to and
4 including the period between verdict and
5 judgment, up to judgment, okay, because
6 pleadings are amended up to judgment now.

7 MR. SUSMAN: And this is
8 delegated by the subcommittee to Scott
9 McCown.

10 All right. Now, let's go back to the
11 beginning. Rule 1. Yes, I want to get your
12 comments specifically, but let me just give a
13 little introduction here, Judge.

14 You will recall that at our last meeting,
15 the September meeting, there was a vote. This
16 was voted on, that there would be one category
17 of cases in which discovery would end 90 days
18 from the commencement of the action, unless
19 one party opted out, in which case discovery
20 would end nine months from the commencement of
21 the action, unless there was an agreement of
22 the parties or a court order. That was the
23 vote, and I forget exactly what it was, but it
24 was pretty strong in favor of that kind of
25 concept. It was that concept which we went

1 back to put into effect in Rule 1, except we
2 did not exactly do it that way for the
3 following reasons: I mean, number one, we
4 were urged by Justice Hecht in a memo -- he
5 liked the concept and told us unquestionably,
6 as Bobby said, that the Court wants this
7 approach with an end of discovery, with some
8 finite end of the discovery period. They
9 liked the three-tier approach.

10 We then began looking at this problem and
11 considering it, and at one time you will
12 recall that we even came up with the crazy
13 idea, this was very early in our work, that
14 all discovery, both the calendar and the
15 clock, the amount of time you had in full on
16 the calendar and the amount of time you had on
17 each device, you could have kind of a
18 schedule. So if the plaintiff pleads under
19 50,000, it was to be three hours; if it was 50
20 to 100, another amount of time; 100 to half a
21 million, another. It was all based upon what
22 the plaintiff asked for, with the notion that
23 if the plaintiff wishes to visit on himself or
24 herself the burden of discovery, expensive
25 discovery, that's their choice.

1 So Tier 1 actually developed out of that
2 idea, and somehow at the meeting the notion
3 came up that there are a great many cases for
4 damages only. This eliminates injunction
5 cases and eliminates family law cases. It's a
6 suit for damages where the plaintiff's
7 pleadings affirmatively seek \$50,000 or less.
8 We exclude costs, prejudgment interest and
9 attorneys' fees. We do not exclude punitive
10 damages, statutory doubling or tripling or
11 amplification damages. And we say that that's
12 the amount, if you plead for that, and you can
13 change your pleading, plaintiff, and if the
14 defendant doesn't come in with a counterclaim
15 seeking more than \$50,000.

16 Then we have by definition a small case,
17 and we have limited oral depositions to six
18 hours per party. We didn't even talk here
19 about side, because it seems like six hours is
20 so small a number that we just do it by party;
21 and 15 interrogatories per party.

22 We then considered putting a 90-day time
23 limit, a calendar limit on this type of case,
24 but decided that the Tier 1 case should have
25 clock limitations but not calendar

1 limitations, because the amount of time is so
2 small that who cares when it's done. And
3 indeed, some of the objections to the calendar
4 limitations came from lawyers, sole
5 practitioners, small firms that complained
6 about the radical change in their life that it
7 would make if they had to do things within
8 90 days; that big firms could do it, but I'm a
9 sole practitioner and so I'm going to need
10 more. As long as they file cases under
11 50,000, they don't have to do it. And so that
12 is the genesis of Tier 1.

13 Tier 2, as I've told you, is basically
14 everything else. And Tier 2 is the calendar
15 limitations that we have previously discussed
16 at nine months. Now, on this discovery window
17 on Tier 2, we decided to make it open not at
18 the commencement of the action but instead
19 when the first response to a written discovery
20 request was due, except for the request for
21 standard disclosure, which is a freebie, or
22 when the first deposition is taken, whichever
23 comes first. And it closes 90 days thereafter
24 or 30 days before trial, whichever is earlier.

25 And then Tier 3 is basically the

1 tailor-made situation that you get by motion
2 or agreement.

3 Discussion. I think the judge has asked
4 first, and then I'll get to you, Anne.

5 HONORABLE C. A. GUITTARD: I
6 have about three concerns with this Rule 1,
7 Section 1(a). One is that "suit for damages"
8 may be more restrictive than you intend. Is
9 any suit for money recovery, whether for
10 damages technically or for restitution or suit
11 on a sworn account or suit on a note? I think
12 you would have all of those within Tier 1 if
13 it's within the monetary limitation.

14 Secondly, I'm not sure you want to limit
15 it to money recovery. Say it's a suit for
16 title to an automobile or something like that
17 where it's not a big suit. Perhaps this term
18 "amount in controversy" that you have in the
19 heading here ought to be the term that you
20 stick with.

21 The third concern I have is that probably
22 you mean to say, instead of defendant by a
23 timely claim, does that include a counterclaim
24 and third-party claims, or, if so, maybe it
25 would be better to put that in.

1 So I would strike out the words "for
2 damages," and possibly say in a suit in which
3 the plaintiff affirmatively seeks monetary
4 recovery of \$50,000 or less, or say in a suit
5 in which the amount in controversy is \$50,000
6 or less. I think that gets more to what
7 you're trying to do.

8 MR. McMAINS: Say that again,
9 Judge.

10 HONORABLE C. A. GUITTARD: The
11 amount in controversy is \$50,000 or less. The
12 amount in controversy is a pretty well
13 understood concept.

14 MR. SUSMAN: Anne.

15 HON. ANNE TYRRELL COCHRAN: I
16 mean, if there's further discussion of Tier 1,
17 that's okay, because I have a question about
18 Tier 2.

19 MR. SUSMAN: Rusty

20 MR. McMAINS: The problem I
21 have about amount in controversy partly is
22 that there may be some very significant issues
23 in a number of other types of cases. And I
24 know that you're saying "affirmatively
25 allege," but also in divorce cases in which,

1 you know, the community property may be less
2 than \$50,000, I mean, do we really want to be
3 able to make that a race to the courthouse?

4 HONORABLE C. A. GUITTARD: Of
5 course, in a suit for damages of \$40,000 there
6 may be some extremely important questions
7 involved and that may be very complicated.
8 But this is the proposal that you've made, and
9 if you're going to talk about a dollar figure,
10 you ought not to limit it to a technical suit
11 for damages as opposed to some other suit for
12 money.

13 MR. SUSMAN: Scott.

14 HONORABLE F. SCOTT MCGOWN: I
15 agree with Judge Guittard that we've got the
16 wrong formulation. I'm not sure exactly what
17 the right formulation is.

18 I can tell you what we intended and what
19 we want to do. We intended to only include
20 cases for money and not for any other kind of
21 relief and cases for money that were 50,000 or
22 less and not family law divisions of the
23 estate. And our thinking was that that may
24 make Tier 1 smaller than would be desirable.
25 There may be other cases that ought to be in

1 Tier 1, but we don't want to make Tier 1
2 broader. It's better that it be smaller than
3 desirable than broader than desirable. And
4 you can always go into Tier 1 by agreement.
5 So if that's what the parties want to do, they
6 can structure a Tier 1 lawsuit by agreement or
7 by court order, if they want to argue that the
8 court ought to instruct you to a Tier 1
9 lawsuit. So we wanted to find some
10 formulation, and I think directly we don't
11 have it, but of language that would catch the
12 gist of straight suits for money.

13 MR. YELENOSKY: Well, when you
14 draft it, you need to consider if you're going
15 to draw a line between suits for money and
16 suits for injunctive or declaratory relief
17 that you can have a very important suit for
18 injunctive or declaratory relief that has a
19 nominal amount of damages claimed as well, so
20 your language needs to contemplate that.

21 HONORABLE F. SCOTT MCGOWN: If
22 there's declaratory relief, we didn't want it
23 in this tier.

24 MR. YELENOSKY: Okay. So what
25 if we say, then, that any time you add a claim

1 for declaratory or injunctive relief that it
2 takes you out of this?

3 HONORABLE C. A. GUITTARD: Or
4 you say if it's a suit for monetary recovery
5 only.

6 MR. YELENOSKY: Well, does that
7 encourage people to throw in a claim for
8 declaratory relief in order to get out of it?
9 I mean, is that a concern?

10 HONORABLE SCOTT BRISTER: That
11 they can do anytime by alleging mental anguish
12 to the extent of \$60,000.

13 MR. YELENOSKY: That's true.

14 MR. MEADOWS: I think the
15 thinking here was that the plaintiff would
16 want to exercise this Tier 1 so he could
17 control discovery and then be affirmatively
18 appearing to be inferior.

19 MR. YELENOSKY: But what about
20 the plaintiff who doesn't want to be in
21 Tier 1?

22 MR. MEADOWS: He can get out.

23 MR. SUSMAN: He can easily get
24 out. I mean, we wanted to give a way for a
25 plaintiff who wants to get in there in there.

1 And you know, someone then said, well, a
2 defendant who doesn't want to be in there can
3 always drop -- I think it was me -- can always
4 hokey-up a counterclaim to take the case out
5 of Tier 1.

6 But then people said no, there are a lot
7 of cases where you can't really even hokey-up
8 the counterclaim; I mean, some suit over a
9 note, suit over an employment -- you know,
10 that was the response I got.

11 MR. YELENOSKY: I had one other
12 point.

13 MR. SUSMAN: Yes.

14 MR. YELENOSKY: I'm just
15 confused on the drafting. In Tier 1(b), it
16 begins with "In addition to other discovery
17 limitations provided in these rules," and then
18 if you look at Tier 2(c), it says "The
19 provisions of this section shall not apply if
20 the provisions of paragraph 1 apply." So if
21 there is some commingling of (1) and (2), I
22 don't know if that's intended or not. But the
23 drafting isn't clear to me there. Are you
24 intending to import from (2) the discovery
25 window period from (1)?

1 MR. McMAINS: No.

2 MR. YELENOSKY: No. Okay.

3 Well, then your limitations language in 1(b)
4 is confusing because it says, "In addition to
5 other discovery limitations provided in these
6 rules."

7 MR. McMAINS: What he's talking
8 about there are the limitations with regards
9 to the deposition hours per person, those kind
10 of things that are provided in other rules.

11 MR. YELENOSKY: Well, then
12 maybe it needs to just be clarified.

13 MR. MARKS: Steve?

14 MR. SUSMAN: Yes, sir.

15 MR. MARKS: Somebody was
16 talking about, last time we were together,
17 about the mix of cases and what the
18 predominant number are and what most of the
19 cases filed are. And where do these cases
20 fall? The cases for money damages for \$50,000
21 or less, what percentage of those cases are on
22 the dockets in Texas? Does anybody know?

23 MR. KELTNER: The task force
24 did a study of that, and what we discovered
25 was, this was interestingly roughly depending

1 upon whether the reporting is good or bad, but
2 it's between 40 and 60 percent when you take
3 all suits.

4 The theory here was that we would
5 take -- make the \$10,000 lawsuit worthwhile
6 to file again. In other words, when somebody
7 walks in and they have a \$10,000 damages suit,
8 you say, "Yeah, I can do that. I can do that
9 and as a lawyer make it a profitable
10 situation."

11 The other thing was, in sworn accounts,
12 perhaps tax collections, perhaps certainly
13 breach of contract claims and other things
14 like that, that the system ought to spit those
15 out pretty quickly and have something that no
16 one can really unfairly beat up on you if you
17 file them, and again, to make the \$10,000
18 case, the \$5,000 case profitable for lawyers
19 again, and no one can price you out of that
20 market just by doing a bunch of discovery.

21 Justice Guittard's thoughts were right,
22 that if we had done it in a paragraph using
23 some different language, and I think we can
24 accommodate you on that.

25 There's an additional problem here that

1 you're going to think about as you go along,
2 and let me put those out and let them air out.

3 How about the case where you file this as
4 a dec action or some kind of suit and you get
5 under this. It's going to have an effect and
6 an impact on maybe the collateral and estoppel
7 in another case. Yeah, that could happen.
8 There ain't no doubt about it.

9 By the same token, having a tier that the
10 plaintiff can choose, and I think it's okay in
11 this, that the plaintiff can choose, because
12 the defendant by a counterclaim can get out of
13 it. My thought process was that it's a pretty
14 easy deal, in and out real quick, and
15 hopefully a quick trial.

16 MR. SUSMAN: Yeah. The
17 affirmative ideas that have been expressed, I
18 think, and the committee would agree on are
19 that we will state that in a suit in which the
20 plaintiff's pleading affirmatively seeks
21 \$50,000 or less, excluding, et cetera, and no
22 other relief, then you're in this clause.
23 Okay? So if you add any other relief other
24 than for your affirmative seeking of less than
25 50,000, if you seek dec action, if you seek

1 injunction, you're out.

2 HONORABLE C. A. GUITTARD: Or
3 foreclosure on an automobile?

4 MR. SUSMAN: You're out. I
5 mean, because, again, Judge, we did not -- I
6 mean, our feeling was that it would take days,
7 if not weeks, to go through and to categorize
8 all the different possible cases and types of
9 remedies. Maybe we could. Maybe this will
10 lead to this in the future, if this works.
11 But our figure was to take -- our view was to
12 take something that could be readily
13 recognized, you can see it on the face of the
14 pleading, the plaintiff's lawyer has got to
15 plead affirmatively to get in it, and if he
16 gets in it and he's not met by a counterclaim
17 that will survive a sanctions motion, he's in
18 it.

19 Buddy.

20 MR. LOW: Steve, this is not a
21 substantive thing, it's a cosmetic thing. And
22 I don't know if you want that or if you want
23 to go on and finish the subject, but it's a
24 cosmetic thing on all three tiers.

25 MR. SUSMAN: Let's hold that

1 for a second and get to substance.

2 Bill.

3 PROFESSOR DORSANEO: The
4 counterclaim language in this Paragraph (a)
5 would be restricted in the same way as well,
6 such that if the defendant by a timely filed
7 counterclaim --

8 MR. SUSMAN: Yes, it's meant to
9 be paralleled.

10 PROFESSOR DORSANEO: Does
11 any -- so the kind of case that I'm thinking
12 this would cover would be a bank would sue
13 somebody on a small note, and the counterclaim
14 back would ask for cancellation of the note,
15 the \$20,000 note, as a form of equitable
16 relief, and that would kick it into -- would
17 it stay here or would it go elsewhere?

18 HONORABLE SARAH DUNCAN: That's
19 Tier 2.

20 MR. SUSMAN: You're so smart;
21 you come up with all of these hypotheticals.

22 PROFESSOR DORSANEO: This is
23 the case that you would be worried about. It
24 would be different from a personal injury
25 plaintiff saying, "I'm willing to take \$50,000

1 or less." The cases you would be dealing with
2 would be creditors wanting to get the debtor
3 to have 10 minutes of discovery on the fraud
4 defense.

5 HONORABLE F. SCOTT McGOWN:

6 Right. Under these rules, Bill, it would come
7 out. You wouldn't be in Tier 1 any more.
8 Tier 1 is automatic and it's narrow.

9 But let me point out what our thinking
10 was. Our thinking was that if we really had
11 Tier 1 in the rules, if that was really the
12 rule, and the consumer counterclaim was for
13 cancellation of the note, that you could go
14 down to the judge and say, "Judge, we want you
15 to make this case a Tier 1 case by a Tier 3
16 order because it really is a Tier 1 case."
17 And then the judge, with Tier 1 in the rules,
18 would for the first time have a real mandate
19 to say, "Yeah, this ought to be limited to six
20 hours per party and 15 interrogatories per
21 side and that's my docket control."

22 PROFESSOR DORSANEO: Or
23 something else in between?

24 HONORABLE F. SCOTT McCOWN:

25 Right.

1 MR. SUSMAN: Sure.

2 PROFESSOR DORSANEO: That makes
3 sense.

4 MR. SUSMAN: It's a norm.

5 HONORABLE F. SCOTT McCOWN:
6 It's a norm.

7 MR. SUSMAN: All right. Any
8 other discussion of Tier 1? Yes, sir.

9 HONORABLE PAUL HEATH TILL: So
10 I understand that if a case was filed and it
11 sought any damages other than monetary damages
12 and the counterclaim was still sufficient to
13 leave it in a court such as the justice court
14 but they wanted something other than monetary
15 damages, are they going to have to have a
16 control order, a docket control order and it
17 would be a Tier 3?

18 MR. SUSMAN: No. It would just
19 go to Tier 2.

20 HONORABLE PAUL HEATH TILL: It
21 would be in Tier 2. I understand that. But
22 to be able to restrict the amount of
23 discovery, it would have to fall into Tier 3?

24 CHAIRMAN SOULES: Well, because
25 Tier 2 is restrictive, but it's nine months.

1 It's nine months plus 30 interrogatories.

2 HONORABLE PAUL HEATH TILL:

3 Nine months is totally unrealistic in that
4 little of a court. Most cases are tried in
5 60 days, not nine months.

6 MR. SUSMAN: Well, then we have
7 50-hour limits on depositions. I mean --

8 HONORABLE F. SCOTT MCGOWN: No.
9 I think the answer to the question is, Tier 3
10 is customizing, and you can customize up from
11 Tier 2 or you can customize down from Tier 2.
12 So if you've got a small case, by agreement or
13 by court order you can customize Tier 2 down
14 as well as up.

15 HONORABLE PAUL HEATH TILL:
16 That's what I wanted to know. Thank you.

17 MR. SUSMAN: Any further
18 discussion of Tier 1 cases? Rusty.

19 MR. McMAINS: Well, I had one
20 other question. The last sentence says, "No
21 amendment bringing the amount above \$50,000
22 shall be allowed at such a time as to unduly
23 prejudice the opposing party."

24 The only thing I'm wondering here is,
25 since you don't have a window, I mean, how is

1 it that you would take the position -- I
2 mean, if you've languished around with no
3 discovery for a while with this \$50,000 stuff,
4 and then all of a sudden, maybe the case is
5 set for trial in a month, and you amend your
6 pleadings to sue for over \$50,000. Is it just
7 discretionary with the judge as to whether
8 it's in Tier 2?

9 MR. KELTNER: I think that's
10 going to go back to the amendment rule, which
11 we pulled out, because I think that's an
12 excellent point.

13 HONORABLE F. SCOTT MCGOWN: But
14 I think actually, though, what Rusty is
15 saying, we could take that sentence out
16 completely, because if you get an amendment
17 that pops it out, then you either get the
18 amendment or don't get the amendment under
19 whatever your amendment rules are, and you
20 either go to trial or don't go to trial on
21 whatever your continuance rules are. So that
22 that sentence doesn't add anything.

23 MR. PERRY: I don't agree with
24 that. I think the reason that sentence was
25 put it there, David Perry, is that regardless

1 of what the amendment rules are, the court in
2 its discretion could deny an amendment under
3 this rule if the case had been in Tier 1 for a
4 long time and then at a time that would unduly
5 prejudice the other party somebody amended it
6 to try to exceed the \$50,000 claim.

7 MR. McMAINS: Well, just as a
8 classic example, to me it seems like I just
9 think that it's too -- that it has too much
10 risk for abuse in terms of lulling somebody to
11 sleep under Tier 1. All I was saying is that
12 it seems to me that there should be a window,
13 a period, whether it's done by amendment or
14 whatever, just presumptively, for instance,
15 the nine months or whatever it is under
16 Tier 2.

17 MR. SUSMAN: Well, this is
18 something we discussed, and maybe we need to
19 look at it again. I mean, we did discuss the
20 situation where a party alleges a \$49,000 case
21 until, you know, two weeks before trial. And
22 then two weeks before trial they amend it to
23 allege a \$15 million case. Okay. And now to
24 say it knocks it into Tier 2 doesn't do a damn
25 bit of good because you only have 15 days

1 left --

2 MR. McMAINS: Absolutely.

3 MR. SUSMAN: -- and discovery
4 under Tier 2 ends 30 days before trial. So
5 you're in Tier 2, but your discovery window
6 under Tier 2 is already closed. That's what
7 we were trying to deal with here, the right to
8 just hold a party's feet to the fire saying,
9 "You've been at Tier 1 too long; you cannot
10 get out of Tier 1 now."

11 MR. McMAINS: I agree with
12 that. All I'm saying is that I thought that
13 it was too loosely accomplished by simply
14 saying unduly prejudice the other party
15 without having some, again, normative
16 standard. I guess -- well, if you've been
17 there nine months, you've been in Tier 1 for
18 nine months and you've used up all your time,
19 it ought to be kind of presumptive.

20 MR. YELENOSKY: Why don't you
21 go to Tier 3 and make the court fashion
22 something in particular. If you've been in
23 Tier 1 and suddenly you allege over 49,000,
24 you can't jump to Tier 2 because, as you said,
25 some of those things may have been run.

1 You're basically throwing it to the court at
2 that point.

3 MR. KELTNER: The theory was
4 you want to keep the court out of this as
5 well.

6 MR. SUSMAN: Scott.

7 HONORABLE F. SCOTT MCGOWN: But
8 I think our present rules cover that without
9 us having to say anything. Go to your
10 example. It's been a Tier 1 case for nine
11 months. You're two weeks from trial. It's
12 been 50,000 all long, and you jump it to
13 \$500,000, so what are your opponent's
14 options? Option No. 1, motion to strike
15 because of surprise. It's been a Tier 1
16 case. I'm unprepared to defend this on Tier 1
17 discovery, surprise. Motion granted,
18 amendment struck, you go to trial.

19 Or Option No. 2, motion to strike
20 denied. Then, Judge, I move for a continuance
21 because we're two weeks away from trial. It's
22 been a Tier 1 case for nine months. I can't
23 get ready in two weeks. I need my Tier 2
24 discovery. I move for a continuance to get
25 into Tier 2. The judge says fine, we set off

1 the trial and we make it Tier 2.

2 What we wanted to do in this rule was
3 allow the guy that had a sore back to plead it
4 as a 50,000 case and get into Tier 1 and not
5 be afraid of going into Tier 1 if it turns out
6 a few months later that that sore back is a
7 slipped disk. So we wanted to allow easy
8 amending out of Tier 1, and I think we've done
9 that.

10 MR. SUSMAN: I think, Scott, I
11 mean, that's clearly what we wanted. We were
12 concerned about no one would use Tier 1
13 voluntarily if it locked them into a
14 straightjacket. I mean, why would you ever
15 affirmatively lock yourself into that
16 straightjacket in cases where you might find
17 something in discovery that's a much bigger
18 case. I mean, it would be malpractice city.

19 MR. YELENOSKY: But that isn't
20 Tier 2, because you could have already been
21 beyond the window from Tier 2. By definition
22 you may be using the same time limits as are
23 in Tier 2, but you're really in a Tier 3
24 situation.

25 PROFESSOR ALBRIGHT: That's why

1 we said that it shall be reopened.

2 MR. YELENOSKY: Reopened?

3 Meaning that it begins from that point, that
4 all the time lines begin from that point?

5 MR. SUSMAN: Right.

6 MR. MARKS: And I guess we have
7 no problem with amendments after verdict.
8 What if we've got a Tier 1 case and that goes
9 to verdict and gets a \$100,000 verdict?

10 MR. PERRY: Part of the
11 discussion in the subcommittee had to do with
12 amendments after the verdict. And we started
13 to write this sentence in a way that would
14 simply prohibit specifically amendments after
15 verdict. And then we got to thinking, well,
16 there are some times and some situations
17 before verdict, before you go to trial, when
18 also the amendments should not be allowed.
19 And so the conclusion of the subcommittee was
20 to put in a sentence that gives the judge
21 discretion to strike the amendment in his
22 discretion, if under all of the circumstances
23 it is unduly prejudicial.

24 I think you're going to see, and I missed
25 a lot of the discussion and maybe you've

1 already said it, but there are a lot of areas
2 in these rules with respect to this and with
3 respect to discovery that perhaps was
4 improperly withheld, where these proposed
5 rules go back to a lot of discretion in the
6 trial court and rely on the trial court to do
7 the right thing rather than trying to write
8 all the rules in detail.

9 I think everybody thought it was obvious
10 that no amendment of any significant amount
11 over \$50,000 would be allowed after verdict.

12 MR. MARKS: Well, shouldn't
13 that be put in here specifically, that in no
14 event should it be allowed after the return of
15 a jury verdict?

16 MR. SUSMAN: How about it,
17 Scott? That's wrong with it?

18 HONORABLE F. SCOTT MCGOWN: I
19 think what we ought to do, since you all
20 charged the subcommittee with looking at all
21 of the amendment rules and coming up with a
22 logical scheme, is to roll this problem into
23 that, because it's all related, and all the
24 amendment rules ought to be together.

25 MR. SUSMAN: Concept. Concept

1 of Tier 1 cases. Concept. Let's have a vote
2 on this: The concept of taking a group of
3 cases defined generally as we have defined
4 them and put them into a Tier 1 that has a
5 clock limitation, as we have indicated, and no
6 calendar limitation. We've got some amendment
7 problems to deal with, agreed, and we've got
8 the definitional problem of what is a \$50,000-
9 or-under case to deal with, agreed. But other
10 than that, how about the concept? Can we have
11 a vote on that?

12 All in favor of the Tier 1 concepts,
13 raise your right hand. All opposed. It
14 passes unanimously. Great.

15 And what I would suggest is, Alex, I
16 would like you to take this, you and Bobby,
17 this tier thing. Okay? And let's have you
18 all work as kind of a subcommittee
19 incorporating what you're hearing here, now
20 that we've got some ideas, including this
21 amendment issue.

22 MR. MEADOWS: Should we get
23 some sense of that? Because I agree with
24 John. I think a \$50,000 case ought to always
25 be a 50,000 case.

1 PROFESSOR ALBRIGHT: Could I
2 make a comment? Alex Albright. We discussed
3 this with the subcommittee in Galveston for a
4 long time, and I remember Scott gave us an
5 example of what made us change our mind. He
6 said, you know, what if somebody -- they
7 tried their case and it's 49,000, and then
8 everybody realizes, "My God, we miscalculated
9 the interest," and so it's really a \$51,000
10 case. If it doesn't make any difference, then
11 why not allow the amendment?

12 Where if it's something that makes it
13 significant --

14 MR. MARKS: You opened the
15 door, Alex. You just opened the door wide
16 open with that little bitty bit.

17 PROFESSOR ALBRIGHT: Well, but
18 that's what happened at the subcommittee, is
19 we had been talking about those kinds of
20 amendments. And we said, you know, let's let
21 the judge decide. So I think what I may be
22 hearing here is don't let the judge decide.
23 Maybe we should take a vote on that to get the
24 sense of the committee.

25 MR. SUSMAN: Well, as I gather,

1 I mean, I don't think -- I mean, aren't we
2 all -- isn't everyone happy with the notion
3 that if you opt to do a Tier 1 case, you ought
4 to be able to change it any time to allege
5 anything you want as long as there's plenty of
6 time prior to the trial for the whole case to
7 be converted to a Tier 2 scenario? That
8 doesn't create a problem for you, does it,
9 Bob?

10 MR. MEADOWS: No.

11 MR. SUSMAN: Okay. I mean,
12 does that create -- I mean, does anyone have
13 a problem with that notion? As long -- you
14 do?

15 MR. MARKS: Well, I hate to be
16 throwing cold water on everything. But I can
17 see a clever plaintiff's lawyer starting a
18 Tier 1 case and drawing a puff defense lawyer,
19 managing to get a lot of concessions, a lot of
20 things done, a lot of strategic errors made,
21 and then converting it into a Tier 2 or a
22 Tier 3 case. Well, maybe. Maybe he wouldn't
23 do that. I don't know.

24 HONORABLE SARAH DUNCAN: We
25 can't cure bad lawyering or bad judges.

1 MR. MARKS: Rusty is laughing.

2 HONORABLE F. SCOTT MCGOWN: If
3 you're a plaintiff and you file a Tier 1 case
4 and you draw a tough defense lawyer, then
5 you're going to want to keep it in Tier 1. I
6 mean, you already said it's a \$50,000 case.

7 MR. MARKS: I said puff, not
8 tough.

9 MR. McMAINS: Or an
10 inexperienced defense lawyer.

11 HONORABLE SCOTT BRISTER: But
12 that could happen right now with no tiers.
13 You file a \$10,000 case, get that to happen,
14 and you would have the same problem. I
15 think -- I don't mind the concept that you
16 can get out at any point. It seems like we
17 ought to have a \$50,000 firm lid, and that's
18 it, okay, at any time, up until the surprising
19 jury limit, and then it's too late. If you
20 chose to limit it to 50, you got the benefits;
21 you can't take the benefits and trash the
22 limitations.

23 MR. SUSMAN: I agree with
24 that. Does anyone think that you thought to
25 be able to get out of Tier 1 after you get a

1 verdict?

2 PROFESSOR DORSANEO: I do.

3 MR. SUSMAN: After the verdict?

4 HONORABLE SCOTT BRISTER:

5 You've gotten the benefits. You've limited
6 the costs of discovery. You can't take
7 that --

8 PROFESSOR DORSANEO: Well, what
9 harm did it -- what discovery would have
10 happened to forestall this \$60,000 accurate
11 number, is the problem I have.

12 HONORABLE SCOTT BRISTER: If I
13 was a defense attorney, I could come up with
14 something for sure.

15 PROFESSOR DORSANEO: Right.
16 Then maybe you can grant a new trial.

17 HONORABLE F. SCOTT MCGOWN: The
18 reason I'm opposed to Judge Brister's view of
19 it is because we want to encourage people to
20 go into Tier 2. And the other thing is, it
21 seems to me, and I admit I haven't gone back
22 and catalogued them, but postverdict
23 amendments have pretty strict standards. And
24 if it's just a matter that they forgot to put
25 in the prejudgment interest, they ought to be

1 able to do it.

2 The other thing, I think, is so what if
3 it's 60,000 instead of 50,000. You know, I
4 mean, we could pick a number of 100,000 to
5 write the rule. This discovery could carry a
6 \$60,000 verdict. And I think if we leave the
7 trial judge some reasonableness, the trial
8 judge ought to be able to distinguish between
9 a postjudgment amendment that truly is unfair
10 given the nature of the discovery that
11 occurred and the result that you got versus a
12 postverdict amendment that didn't have
13 anything to do with the discovery that you got
14 and is in fact the right result.

15 MS. BARON: Steve.

16 MR. SUSMAN: Yes.

17 MS. BARON: Just one
18 clarification. You've excluded prejudgment
19 interest from the 50,000, so that's not a good
20 example.

21 HONORABLE F. SCOTT McCOWN:

22 Okay. Bad example.

23 PROFESSOR ALBRIGHT: The
24 interest on the note.

25 HONORABLE F. SCOTT McCOWN: The

1 interest on the note.

2 PROFESSOR DORSANEO: No.

3 That's prejudgment interest.

4 HONORABLE F. SCOTT MCGOWN: Bad
5 example, but same concept.

6 MR. MARKS: I think that just
7 opened that old barn door wide open.

8 MR. SUSMAN: Let me see if I
9 can -- Scott, can we get a show of hands.
10 How many think that if you're in this category
11 you should -- how many think that if you're
12 in -- if you get in Tier 1, you're stuck once
13 the jury comes back with a number. All raise
14 your right hand.

15 MR. YELENOSKY: What do you
16 mean by "you're stuck"?

17 MR. SUSMAN: You can't go above
18 50,000. It's too late then.

19 How many think you ought to be able to
20 amend at that time?

21 HONORABLE F. SCOTT MCGOWN: Can
22 I rephrase that, since the way the pollster is
23 asking the question is -- how many think that
24 the trial judge is going to be able, in his
25 discretion, to sort out postverdict amendments

1 that do matter from postverdict amendments
2 that don't?

3 MR. MARKS: If they were all
4 like you, Judge, we wouldn't have any problem.

5 MR. SUSMAN: Oh, you say that
6 to everybody, John.

7 MR. SUSMAN: I mean, I think
8 the sense of the group for the subcommittee is
9 that we have -- when the jury returns a
10 verdict, it's too late. Okay?

11 Now, I think the sense of the group from
12 the earlier vote is that -- did I get the
13 sense of the group? Maybe I haven't gotten it
14 yet. But there's a sense of the group that
15 you ought to be able to amend out of Tier --
16 well, yeah, the sense of the group is that you
17 can always amend out of Tier 1 as long as
18 there's plenty of time to do Tier 2
19 discovery. Okay. So the only other thing
20 we've got is the situation where you want to
21 amend out of Tier 1 so close to the trial
22 setting that there's not enough time to give
23 you full Tier 2 discovery. That's the
24 situation we've got to deal with.

25 Steve.

1 MR. YELENOSKY: Are we saying
2 that if a lawyer and his or her client in good
3 faith claim that this is worth \$40,000,
4 including in that my claim for punitives, I
5 have a claim for punitives, it's worth
6 \$40,000, and it goes to a jury and the facts
7 have developed to where that jury is outraged
8 and wants to award punitives of \$100,000, that
9 the jury cannot do that?

10 MR. SUSMAN: Yes.

11 MR. YELENOSKY: And why is
12 that, if it has no relationship to discovery?

13 HONORABLE SCOTT BRISTER: For
14 the same reason people do high/low
15 agreements. You can agree to say, "I don't
16 care what the jury gives; I'm not going to
17 take above X," in return for whatever
18 concessions you can get for that agreement.
19 And the concession you're trading off here is
20 he ain't going to spend any -- I'm not going
21 to take 40 percent of your \$50,000 because I'm
22 only going to spend six hours on this case.

23 MR. SUSMAN: The justification,
24 Steve, is -- I mean, the thought process is
25 the defendant looking at a case that's only

1 got -- the maximum exposure is 50,000. I
2 mean, no firm is going to be able to convince
3 that defendant to spend a huge amount by the
4 hour on defending that case where the maximum
5 exposure is 50.

6 On the other hand, if you are facing a
7 case where actuals could be 50 and punitives
8 500 or more, then you might well indeed spend
9 more taking more depositions, crossing your
10 t's and dotting your i's.

11 MR. YELENOSKY: Well, then
12 you've got a real malpractice concern in
13 deciding to go into Tier 1. And I think
14 plaintiff's lawyers are -- well, I guess you
15 could explain it to your clients. I mean, I
16 don't do PI. But if you've got a plaintiff's
17 lawyer that says -- makes a decision to stay
18 in Tier 1 and they get a judgment later for
19 \$1 million and they're stuck with 50,000, I
20 mean, they're not going to take Tier 1.

21 MR. SUSMAN: Keltner first.
22 Brister second.

23 MR. KELTNER: I want to say two
24 things. I think that's a good point. In
25 general, juries do things that they're asked

1 to do or encouraged to do, so there's going to
2 be some control there.

3 A client is going to be probably
4 addressed with this issue about I'm either not
5 going to take the case unless you file it
6 under Tier 1 because I can't afford to seek
7 only 50,000 in damages and be in Tier 2, so
8 that is the trade-off. And I think that's a
9 fair trade-off that the lawyers can make with
10 clients to get additional access to the
11 system.

12 We have to remember that the one thing
13 we've found is and the one thing the Supreme
14 Court told us when we got on the task force
15 was significant numbers of citizens are denied
16 access even on damage cases because discovery
17 is so expensive. There has to be a trade-off
18 there, and malpractice may be one of them, but
19 I think that the trade-off is worthwhile.

20 MR. SUSMAN: Alex.

21 PROFESSOR ALBRIGHT: And if you
22 have a chance at punitive damages like that,
23 you're not going to file it under Tier 1;
24 you're going to file it under Tier 2. The
25 cases that are going to be under Tier 1 are

1 your little DTPA cases. They're going to be
2 the slip-and-fall cases. I see it more as
3 just a way to -- you know, just the
4 transactions that real people have where they
5 have disputes. And like David said, they have
6 no access to courts right now because it's too
7 expensive. So the issues that you're worried
8 about are not going to be --

9 MR. SUSMAN: Brister next.

10 HONORABLE SCOTT BRISTER:

11 Keltner covered it for me.

12 MR. SUSMAN: McMains.

13 MR. McMAINS: I think that we
14 can handle the malpractice stuff that's in
15 there if we have to specifically say, "You
16 ain't getting any more than this if you go
17 this route"; that if the lawyers don't cover
18 their tails with their clients with that, then
19 that's their problems. But I do think that
20 the stronger we make the rule read, the more
21 notice we give to everybody that this is the
22 trade-off and this is what's going on. And I
23 think that obviates that it's going to be a
24 serious malpractice threat.

25 MR. SUSMAN: Judge Guittard.

1 HONORABLE C. A. GUITTARD: The
2 more discussion I hear of this is that I think
3 this three-tier thing is a little too complex;
4 that perhaps two is enough; that there ought
5 to be a set of rules, not necessarily limited
6 to \$50,000, that apply to a great majority of
7 cases; that if you go beyond those cases and
8 you need more time, then you go to what we
9 have now as Tier 3. So in other words, you
10 have one and three and cut out two, except you
11 put a lot of two into one. Now, that's my
12 thought.

13 MR. MARKS: I agree. You're
14 right, Judge.

15 MR. SUSMAN: David Perry.

16 MR. PERRY: It seems to me that
17 the sense of the committee was to vote
18 overwhelmingly for Tier 1 with a stricter
19 limit on the amendments. And my suggestion
20 would be to add to the sentence that is there,
21 "but in no event, not later than 30 days
22 before trial," so that in effect what we would
23 be saying is that you could not amend out of
24 Tier 1 at a time that, in the court's
25 discretion, unduly prejudices the opponent,

1 but in no event, not later than 30 days before
2 trial.

3 MR. SUSMAN: Will that solve
4 everyone's problem?

5 CHAIRMAN SOULES: Not quite. I
6 think it ought to be 30 days before the first
7 trial setting.

8 MR. SUSMAN: We have a motion,
9 before trial. Does anyone agree with the
10 motion before trial? I'll second that.

11 All in favor of the motion raise your
12 right hand.

13 HONORABLE SCOTT BRISTER: What
14 was it again?

15 MR. SUSMAN: We are leaving
16 Section (c) like it is, and we're saying no
17 amendment bringing the last -- the last
18 sentence will read, "No amendment bringing the
19 amount above \$50,000 shall be allowed at such
20 time as to unduly prejudice the opposing party
21 and in no event later than 30 days prior to
22 trial."

23 HONORABLE PAUL HEATH TILL:
24 Trial or the first trial setting?

25 MR. SUSMAN: No, trial. And

1 the reason I think Dave is right and Luke is
2 wrong on that is that, remember, on these
3 Tier 1 cases we don't have a window at all.
4 We opted for no window. And so these are the
5 cases where no one is going to do anything
6 until right before trial.

7 MR. PERRY: Also, if you
8 remember, when we tried to tie something
9 before to the first trial setting, we got into
10 the problems that trial settings are handled
11 so much differently all around the state.
12 Sometimes we have them but they really are
13 meaningless. And it seems to me that we need
14 to have this amount of flexibility.

15 MR. SUSMAN: All right. All in
16 favor of this amendment now raise your right
17 hand. All opposed. We've got to count.

18 All in favor raise your right hand again.

19 MR. MARKS: Can you count,
20 Holly.

21 MS. DUDERSTADT: 18.

22 MR. SUSMAN: 18. Against?

23 MS. DUDERSTADT: One.

24 HONORABLE SARAH DUNCAN: Two.
25 Tony voted against.

1 MR. SUSMAN: Two against. 18
2 to two.

3 Tier 2.

4 HONORABLE F. SCOTT MCGOWN:
5 Steve, can I make a comment before we move to
6 Tier 2 on Judge Guittard's point. The reason
7 we chose three tiers is because this first
8 tier is incredibly restrictive. I mean, you
9 can look at it, six hours per party and
10 15 interrogatories. And yet David estimates
11 that it might carry as much as 40 to
12 60 percent of the docket, of a court's
13 docket. And so if we do nothing but Tier 1,
14 the public will be able to see an incredibly
15 positive benefit from our work because they
16 will be able to prosecute these small cases
17 and have it be affordable. So I think Tier 1
18 may be the best thing we have on the table.

19 And then Tier 2, which is going to cover
20 that other bulk, maybe the other half of the
21 cases, is quite a bit more expansive.

22 MR. SUSMAN: Of course, no one
23 knows, and I mean, you're guessing about this,
24 because, Scott, I would guess the opposite. I
25 would guess that Tier 1 will be rarely used,

1 and in fact it will be unused at all. It's
2 just a PR trick, a ploy, and that in fact most
3 of the cases are going to be Tier 2 cases.

4 MR. KELTNER: Steve, you've got
5 tort reform. And with tort reform, I think
6 all cases will be Tier 1 cases.

7 MR. GOLD: All mine are.

8 CHAIRMAN SOULES: Well, the
9 Chair of this Committee takes exception to any
10 statement that anything we do might be a trick
11 or a ploy, and I think the Committee is
12 opposed to accepting any rule like that.

13 MR. SUSMAN: No, I -- on the
14 record --

15 CHAIRMAN SOULES: Yeah, you
16 might want to put that on the record.

17 MR. SUSMAN: I retract my
18 statement on the record. I didn't mean to say
19 that. I mean, I just mean to say I don't
20 think it's going to be used, but we don't
21 know. We just don't know.

22 HONORABLE PAUL HEATH TILL: It
23 will be used exclusively in my court. 5,000
24 is my limit for every case that I have, and we
25 try an awful lot of cases.

1 MR. SUSMAN: Well, let me put
2 it this way: No one knows whether discovery
3 in those cases is more than we have provided
4 for usually anyway, whether there are any
5 abuses in those cases to begin with. I
6 mean, do you know?

7 HONORABLE PAUL HEATH TILL: In
8 my court, yes. I have quite a few cases that
9 are.

10 MR. SUSMAN: That are abusive?

11 HONORABLE PAUL HEATH TILL:
12 Yes. If you don't know it, I'll be glad to
13 tell you. People get their necks bowed over
14 \$4,000 just like they get their necks bowed
15 over \$400,000. They get themselves all upset
16 and fall on the ground just the same. I've
17 got one case that I measured that was
18 17 inches thick that was over only \$4,000.
19 Yeah. Yeah, I have it.

20 MR. SUSMAN: Then maybe we have
21 done some good.

22 HONORABLE PAUL HEATH TILL: I
23 think you have.

24 HONORABLE F. SCOTT MCGOWN: And
25 the other thing you're not counting, Steve, is

1 the cases that don't get filed because nobody
2 can do them because they're so expensive. I
3 think this is going to be a much bigger
4 advantage than most of us suspect.

5 MR. SUSMAN: Can we talk about
6 Tier 2 cases. Tier 2 basically -- again, I do
7 not -- I do think we should not go backwards
8 on this unless the sentiment is overwhelming.
9 The idea of having a discovery window was
10 debated at length at our meeting in September
11 and a vote was taken on a nine-month discovery
12 period that ended -- that began, as I said,
13 with the final commencement of the action,
14 ending nine months thereafter.

15 We have moved the commencement back
16 considerably by Rule -- by the first sentence
17 on Page 2. But this is the -- and we have,
18 of course, talked about the 50 hours to
19 examine. That was approved. The 50 hours was
20 approved at our -- that went back to our July
21 meeting, I believe, where the 50 hours of
22 depositions was approved, so as I said, the
23 vote was 15 to seven then.

24 Comments, then, on Tier 2 cases, or are
25 we ready to vote on Tier 2 cases?

1 HONORABLE F. SCOTT McCOWN: Can
2 I ask a question?

3 MR. SUSMAN: Scott.

4 HONORABLE F. SCOTT McCOWN:
5 This is Judge Cochran's question she raised
6 and I didn't know the answer. She had to step
7 out for a minute.

8 In Subdivision 2, we give 50 hours to
9 examine and cross-examine opposing parties and
10 persons subject to their control. So are
11 neutral fact witnesses not included in the
12 hour limitation?

13 MR. SUSMAN: Yes.

14 HONORABLE F. SCOTT McCOWN:
15 Yes, they're not?

16 MR. SUSMAN: They are not
17 included.

18 MR. MARKS: There's a different
19 provision for those?

20 MR. SUSMAN: What?

21 MR. MARKS: There's a different
22 provision for those?

23 MR. SUSMAN: No. You take as
24 much time as you need, as much as you can do
25 within nine months.

1 MR. PERRY: Well, not exactly,
2 in this sense, Steve: The neutral fact
3 witnesses are included in the per -- in the
4 time per hour witness. In other words, yeah,
5 a neutral fact witness is still limited to
6 three hours per side for the deposition
7 itself. But the total number of depositions
8 multiplied by three hours would depend on the
9 number of fact witnesses rather than total
10 amount of time in the case.

11 MR. SUSMAN: Yeah. Any other
12 comments?

13 HONORABLE SCOTT BRISTER: Is
14 the plaintiff driver's sister who was not in
15 the car and not an eyewitness, or a friend, is
16 that person in her control, or is that just
17 something that we're going to work out through
18 case law as we go along?

19 MR. SUSMAN: I think we have to
20 work that out from the case law.

21 MR. YELENOSKY: Why is it
22 important to have this distinction?

23 MR. SUSMAN: What?

24 MR. YELENOSKY: Why is this
25 distinction made between those in control and

1 those not in control?

2 MR. SUSMAN: I'll tell you why,
3 because, again, the feeling was that --
4 again, this was out of deference to the people
5 who did not want any limitations and felt that
6 50 hours was too small.

7 MR. MARKS: Like me.

8 MR. SUSMAN: Yes, you, John
9 Marks, and others. There were others. There
10 were others who thought it was too little.
11 The committee then reconsidered it, and said,
12 you know, most of the abusive discovery takes
13 place on a party or a party's employees or its
14 officers or directors. I mean, you don't beat
15 up too much on third parties because they're
16 going to go hire a lawyer and beat right back
17 up on you.

18 HONORABLE SCOTT BRISTER: They
19 will start changing their testimony and hurt
20 you.

21 MR. SUSMAN: Right. And so
22 this was the committee's -- many, many
23 meetings back, we came to this compromise,
24 which used to be a limit or 50 hours per side
25 for everything, and now it's just for

1 witnesses under your control.

2 MR. YELENOSKY: Let me just
3 make a point, because you keep referring to
4 officers, et cetera, which appropriately
5 applies to some control issues like when you
6 get to attorney-client privilege and all. But
7 for purposes of control for depositions, as
8 people have said earlier, that goes down to
9 the lowliest employee. So it sort of
10 depends. If you're suing a company and all of
11 the witnesses are the people who happened to
12 be in the factory yard at the time, your total
13 time is going to be limited to 50 hours for
14 every one of those.

15 MR. SUSMAN: Correct.

16 MR. YELENOSKY: And if you
17 happen to have a lawsuit where the witnesses
18 are standing on the street but aren't
19 employees, you're not limited.

20 MR. SUSMAN: Correct.

21 MR. YELENOSKY: And I don't see
22 the rationale of that, I guess, because for
23 purposes of the testimony, those lowly, as
24 we're saying "lowly," meaning non-management,
25 employees are not treated as management, and

1 they're not protected by the attorney-client
2 privilege; they're just fact witnesses. So I
3 guess that's what I --

4 HONORABLE SCOTT BRISTER: One
5 difference is you can't go talk to opposing
6 party's employees.

7 MR. YELENOSKY: Yes, you can.

8 HONORABLE SCOTT BRISTER: Well,
9 you may -- some judges will say you can and
10 some judges will say you've just violated the
11 rules of disciplinary procedure. You can
12 certainly go talk to anybody standing out on
13 the corner that saw the accident that's not an
14 employee of anybody and not spend a minute of
15 deposition time. You just call them at trial.

16 MR. YELENOSKY: Well, isn't it
17 the case that we can talk to an employee who
18 has relevant facts but is not --

19 HONORABLE SCOTT BRISTER: Not
20 if you know he's not represent by an attorney.

21 MR. SUSMAN: Scott.

22 HONORABLE F. SCOTT MCGOWN:
23 Well, I think as a practical matter, they're
24 going to be told not to talk to you, so it
25 really doesn't matter. And any way you cut

1 this, it's going to be arbitrary and you're
2 cutting it to fit a large group of cases.
3 You've got basically 14 days of depositions
4 for opposing parties and persons subject to
5 their control in every case. And if you've
6 got neutral witnesses, you've got as many days
7 as it takes. That's what it boils down to.

8 MR. SUSMAN: David Perry.

9 HONORABLE PAUL HEATH TILL: Can
10 I ask the Chair's indulgence? Can I have a
11 potty break?

12 MR. SUSMAN: Yes, sir. We will
13 take a seven-minute break.

14 (At this time there was a
15 recess.)

16 MR. SUSMAN: Can we reconvene.
17 We were talking about Tier 2. Is there any
18 further discussion of this that needs to be
19 discussed before we formalize this once again?

20 MR. MARKS: Tier 2?

21 MR. SUSMAN: Tier 2.

22 MR. MARKS: Maybe we ought to
23 talk about Judge Guittard's comment.

24 HONORABLE C. A. GUITTARD:
25 Somebody make a motion.

1 MR. MARKS: Well, then, I'll
2 put Judge Guittard's comment into a formal
3 motion.

4 MR. SUSMAN: Which is what?

5 MR. MARKS: To go from one to
6 three. Tier 1 and then to Tier 3.

7 HONORABLE PAUL HEATH TILL:
8 Excuse me, repeat it down at this end of the
9 room. I'm having some trouble hearing you.

10 MR. MARKS: To go from Tier 1,
11 which we talked about, and then from
12 Tier 1 -- just make Tier 3 Tier 2 and
13 eliminate the existing Tier 2.

14 HONORABLE C. A. GUITTARD: No.
15 The concept was sort of to merge Tier 1 and
16 Tier 2, make it somewhat more restrictive than
17 Tier 2 and yet less restrictive than Tier 1,
18 something in between to take care of the great
19 majority of cases. Then if it gets out of
20 that category, go to a special schedule of
21 ours.

22 MR. MARKS: So only two
23 categories, though?

24 CHAIRMAN SOULES: Tier 2 would
25 be less; Tier 1 would be nonexistent.

1 MR. GOLD: Steve?

2 MR. SUSMAN: Yes.

3 MR. GOLD: Just as a point of
4 order, I don't know how this really works, but
5 since we have put forth our proposal,
6 shouldn't our proposal be voted on either up
7 or down before a different proposal comes up?

8 MR. SUSMAN: Yeah.

9 CHAIRMAN SOULES: No. That's
10 not the way this committee works. This
11 committee does not run on Roberts' Rules of
12 Order. It runs on gathering a consensus and
13 gathering comments to be instructed to the
14 Supreme Court of Texas in considering what
15 we're doing.

16 MR. GOLD: Excuse me if that
17 was the impression. I'm just saying
18 logically --

19 MR. SUSMAN: I think we're
20 going to have close to consensus on Tier 2, so
21 could I call for a vote on Tier 2. I think
22 we're going to get all votes but one or two.

23 All in favor of Tier 2 as presently
24 worded, raise your hand. All opposed.

25 CHAIRMAN SOULES: There are two

1 votes opposed.

2 MR. SUSMAN: No, three votes
3 opposed. Let's count the fors.

4 MR. MARKS: Ha! You said one
5 or two.

6 MR. SUSMAN: Let's count those
7 in favor of Tier 2 again, please. If you're
8 in favor of Tier 2, raise your hand. 16.

9 All opposed. Three. 16 to three.

10 Tier 3. Tier 3 is the Discovery Control
11 Plan theory, which may be -- and the question
12 was asked before, is it entered by agreement
13 of the parties? We really meant it may be
14 agreed to by the parties or imposed by the
15 court. We don't -- we want to make clear
16 here -- we need to change the language here.

17 When the parties make an agreement, they
18 do not have to go get the court's order,
19 because it's make-work, because none of us
20 have ever heard of a case where the court has
21 not approved an agreement of the parties on
22 how they want to handle discovery, unless it's
23 like on the eve -- unless it would interfere
24 with the trial.

25 HONORABLE F. SCOTT McCOWN:

1 Just change the word "entered" to "made." A
2 Discovery Control Plan may be made by
3 agreement of the parties or imposed --

4 MR. SUSMAN: Perfect. All
5 right. Now, these are the things that we have
6 put in which the court should include in a
7 Discovery Control Plan.

8 JUSTICE CORNELIUS: Steve,
9 before you get to that, would the court be
10 able to do this on its own motion, or would it
11 be only on a request of a party?

12 MR. SUSMAN: I would think it
13 should be on its own motion. I guess the
14 court can always do some -- do we need to make
15 that explicit, do you think?

16 JUSTICE CORNELIUS: I don't
17 think so. I think the way it's written now it
18 would include on its own motion.

19 MR. SUSMAN: We would intend
20 that a court could do it, and many active
21 judges should be encouraged to experiment and
22 do things.

23 MR. MARKS: Should we have some
24 provision for specifically allowing the court
25 to alter the deposition taking time?

1 MR. SUSMAN: It is in there in
2 (d).

3 JUSTICE CORNELIUS: Of course,
4 if you're going to allow the court, on its own
5 motion, to impose a Discovery Control Plan,
6 then all limits are off.

7 MR. SUSMAN: Yes, sir.

8 JUSTICE CORNELIUS: Except at
9 the discretion of the judge.

10 MR. SUSMAN: The judge --
11 again, the limits apply unless the judge rules
12 otherwise, is what we're really talking
13 about. I mean, we want to make it clear that
14 these rules are default rules. If the judge
15 doesn't rule, then the limits apply.

16 JUSTICE CORNELIUS: So in any
17 case the judge can veto the limits?

18 MR. SUSMAN: Yes, in any case.
19 And that we try to make clear again in
20 Rule 2 where we say unquestionably, this is
21 from the very beginning, that "The procedures
22 and limitations set forth in these rules may
23 be modified by the court for good reason."
24 That has been in there from the very
25 beginning.

1 CHAIRMAN SOULES: I have a
2 question about that.

3 MR. SUSMAN: Yes, sir.

4 CHAIRMAN SOULES: All right.
5 It looks to me like (a) through (g) are
6 mandatory and that the parties cannot adjust
7 those by agreement and the court cannot adjust
8 them by order, because they are -- it
9 says -- they say specifically these have to
10 be a part of a control order. Later you say
11 anything can be changed, but it looks to me
12 like this cannot be changed.

13 HONORABLE F. SCOTT McGOWN:
14 Yeah. I agree with Luke. I was going to
15 suggest that we say a Discovery Control Plan
16 may include, but is not limited to, the
17 following provisions.

18 MR. SUSMAN: Okay.

19 HONORABLE F. SCOTT McCOWN:
20 That a Discovery Control Plan may include, but
21 is not limited to, the following provisions.

22 MR. PERRY: Hold on just a
23 minute. Before we make a change, I think the
24 subcommittee -- and I think you should know
25 that to a large extent this was drafted based

1 on some conversations and some memorandum from
2 some members of the Court. And I think that
3 the concept was that the Discovery Control
4 Plan does have to include items that fall
5 under (a) through (g). In other words, you
6 have to have a trial date or you have to have
7 a date that you are requesting as a trial
8 date. You have to have a discovery cutoff
9 date that is not later than 30 days prior to
10 the trial date, because even though the
11 concept is that the limits of Tier 2 no longer
12 apply, the concept also is that there has to
13 be some limits, even though they're going to
14 be different limits likely, but there have to
15 be some limits and they have to be set out in
16 the order, is the concept that I understood
17 that we were supporting.

18 MR. SUSMAN: Excuse me, hold on
19 just a minute, David. Suppose -- I mean, let
20 me -- I'm not sure we thought about it that
21 much. Why wouldn't it be -- make sense for a
22 judge to have the flexibility of saying,
23 "Look, I agree nine months is too short a
24 period of time because during this period of
25 time I know Mr. Susman is going on a

1 three-month vacation, he's got a witness in
2 the hospital, or something like that, so I
3 want to change -- I'm going to change it,
4 folks, this scheduling order. I want to enter
5 a scheduling order that makes this a 12-month
6 discovery window or 15-month discovery
7 window. But otherwise, I like everything. I
8 like your default rules. I don't think
9 depositions should be more than three hours
10 per deposition for a fact witness. I think
11 experts should be identified 60 days before
12 the end of the discovery period. All I've
13 done was move one day."

14 Now, what's wrong with that? And why
15 should the judge be forced to address
16 everything if he doesn't want to? He could.
17 He can change the length of time of
18 depositions, he can change what you can say
19 during depositions, but why does he have to?

20 MR. PERRY: There's nothing
21 that would prevent either the court or the
22 parties from doing that. But I think the
23 point is that we intend to have a requirement
24 that all of these things be addressed, was the
25 impression that I had.

1 CHAIRMAN SOULES: David, I
2 don't have too much trouble with (a), Trial
3 date; (b) Discovery cutoff date; (c) Dates for
4 disclosure of experts; (f) for joinder of
5 parties. But this may be a case where when we
6 go to the court for a Discovery Control Plan,
7 we can't identify all of the witnesses to be
8 deposed by name or category and we can't fix
9 the maximum deposition time by number. To me,
10 this is a -- when we go for this Discovery
11 Control Order, or whatever it's called, it's
12 in a case that we may not have sized and
13 probably will not have sized at that
14 juncture.

15 Also, "Stating agreements for
16 authentication of documents," maybe you want
17 to do that right then, maybe later, maybe
18 never. But that's a problem.

19 And specifying discovery disputes, I
20 mean, those are the things that are going to
21 come up, I think, after you start your
22 discovery pursuant to the Discovery Control
23 Plan.

24 So I think that some of this is okay
25 because it tends to set trial, joinder of

1 parties, discovery cutoff. But I think
2 there's too much here to say that the trial
3 judge has to do all of these things.

4 MR. SUSMAN: Do we have --
5 Alex.

6 PROFESSOR ALBRIGHT: I think
7 you were right when you first started what you
8 were talking about, and that in the
9 subcommittee we did not spend a whole lot of
10 time on all of these items under the Discovery
11 Control Order. I think we need to think about
12 them, and it may be what we can do is fold in
13 some of the work of the State Bar Committee
14 into this portion of it because they have
15 thought a whole lot about what these kind of
16 orders should contain.

17 And maybe what we should do is take this
18 back to the committee and think about what one
19 of these Discovery Control Orders should or
20 should not contain and bring it back. I
21 think, you know, it looks like now we have the
22 framework in place and we need to think some
23 more about each of these individual things.

24 So I would move to table the details of
25 Tier 3 and send it back to the subcommittee.

1 MR. SUSMAN: Paul.

2 MR. GOLD: I think before we do
3 that, Alex, I think it would be important to
4 get some sense of the committee on a direction
5 about whether the trial court should have
6 discretion to fashion just a small provision,
7 as Steve was saying, or a larger, if they
8 chose. Or the other side is that it be an
9 order that has specific things in it
10 regardless of what it is.

11 MR. SUSMAN: Well, I believe we
12 ought to do it so we get it -- it should be
13 "may" rather than "shall." We also ought to
14 make clear that if the judge doesn't cover a
15 subject, the other rules apply.

16 HONORABLE F. SCOTT McCOWN:
17 Sure.

18 CHAIRMAN SOULES: I don't agree
19 that the judge should not be required to put a
20 trial date in the Discovery Control Order. I
21 think that the trial date is probably the most
22 driving single thing that can reduce costs of
23 discovery. Everybody knows it's got to be
24 done in a certain period of time, and that's
25 classic -- in all the literature that you

1 read, that's the number one thing they say.
2 Give a case a trial setting and try to hold it
3 and you will reduce the cost of litigation,
4 and then there's a lot of things that flow
5 from that. But that's Benchmark No. 1.

6 PROFESSOR ALBRIGHT: Or any
7 time you've gone to the trouble to do a Tier 3
8 case, you ought to go to the trouble of
9 getting a trial date.

10 CHAIRMAN SOULES: A trial date,
11 I think, a discovery cutoff, and joinder of
12 parties. I mean, there are some things that
13 probably --

14 MR. SUSMAN: Scott.

15 CHAIRMAN SOULES: -- the trial
16 judge ought to have to do.

17 HONORABLE SCOTT BRISTER: But
18 this rule is not really aimed at that. I
19 mean, on Tier 1 and Tier 2 there's no
20 requirement for trial date. And it's a little
21 hard to write that into the rule because
22 cases -- there are courts with a third as many
23 cases as I have or five times as many cases as
24 I have. You can't -- I agree with you,
25 you've got to say trial date, but I'm not sure

1 that that's the focus of this rule.

2 MR. SUSMAN: Buddy.

3 MR. LOW: Steve, I think we
4 shouldn't overlook the fact that -- because
5 someone keeps saying we should also include
6 supplements there too. In other words, you
7 might say -- set a date for certain witnesses
8 you don't know but would have to by a certain
9 date, and then by supplemental order
10 supplement it at that time. But I think what
11 you want to avoid is having somebody that
12 just meant part of this and then they're in
13 no man's land on the rest of it. They're not
14 in Category 1 or Category 2. But I think we
15 need to look at the potential for
16 supplementation.

17 MR. SUSMAN: Anne.

18 MS. McNAMARA: I think what I
19 would really like, and I think it follows up
20 on that point, is that if you can't meet all
21 of these (a) through (g), the way this reads,
22 then you are not entitled to Tier 3, which
23 leaves you back at Tier 2, which in some of
24 the cases from hell we know is an unacceptable
25 alternative. You've got to be able to take

1 the really monster case into Tier 3, even
2 though if at the time you try to do it the
3 judge may not be able to force all of these
4 guidelines on the form.

5 MR. SUSMAN: Elaine.

6 PROFESSOR ELAINE CARLSON: I
7 was just trying to get a point of
8 clarification. I know when we were back on
9 Page 32 looking at Rule 15, time limits, 2(a),
10 you said that was going to be moved forward to
11 Rule 1. Are there any finite deposition
12 discovery hours that apply to a Tier 3 case?

13 MR. SUSMAN: No.

14 PROFESSOR ELAINE CARLSON:
15 Other than by order of the court or
16 agreement?

17 MR. SUSMAN: I think, again,
18 our notion was -- I think our notion has been
19 that if the judge doesn't set it in the
20 Discovery Control Plan, it is the default
21 rules in the rules. So if a judge -- all the
22 judge does in the Discovery Control Plan is,
23 as I said, says the discovery window is
24 15 months, everything else from the rules
25 governs. But he's free to change everything

1 else, including the amount of hours per
2 deposition or anything. Scott.

3 HONORABLE F. SCOTT McCOWN: I
4 think what we need to do here is make clear,
5 and we don't say it and I think we need to say
6 it expressly, is that Tier 3 is Tier 2 except
7 as changed by agreement or court order. And
8 then I think that Luke's concept of how the
9 pretrial order works is exactly right and fits
10 right here; that what we ought to do is
11 say -- and trial date may be different. You
12 may want him to have to set a trial date or
13 not. I don't have a strong opinion on that.
14 But we ought to list pretty exhaustively all
15 of the things we want a judge to have to think
16 about, and let the judge know he's got those
17 powers, like we do with the pretrial order,
18 but not require him to do any particular one,
19 so that we give him the express black-letter
20 authority, but he's got discretion then to
21 apply them to the case.

22 MR. SUSMAN: David Perry.

23 MR. PERRY: Well, I don't think
24 it's quite accurate to say that Tier 3 is
25 Tier 2 except as changed. I think that Tier 3

1 really is a different animal because, as
2 earlier people have said, you may have lots of
3 cases that are in Tier 3, which, as a
4 practical matter, you cannot come up with a
5 number of hours of depositions at the
6 beginning. You're going to have to be
7 somewhat general. I think what we had
8 contemplated was that the order should be as
9 specific as is practical under the
10 circumstances of the case. But we -- the
11 whole idea of Tier 3, as I understand it, is
12 you have to be open to a very wide flexibility
13 that will be worked out between the parties,
14 and if they cannot agree, by the court.

15 MR. SUSMAN: Elaine.

16 PROFESSOR ELAINE CARLSON: I
17 had one other question. Can you motion out of
18 Tier 2 and into Tier 3 when it doesn't look
19 like Tier 2 is going to be a reality?

20 MR. SUSMAN: Sure.

21 PROFESSOR ELAINE CARLSON: So
22 if you're eight months into discovery and it's
23 a Tier 2 case, can you say, "Judge, this is
24 really a Tier 3 case"?

25 MR. SUSMAN: Sure. Rusty.

1 MR. McMAINS: The idea that
2 Tier 2 applies unless otherwise modified I
3 don't think is accurate, because under Tier 2
4 we have an inapplicability section that says
5 the parties can agree. It basically says that
6 they can agree to waive any of those rules
7 under Tier 2 and you would still be under
8 Tier 2, which I think means the nine-month
9 limit theoretically. But if you wanted to
10 take one party's deposition for 28 hours or
11 whatever, you could agree to do that. I mean,
12 you could still be under Tier 2 and you
13 wouldn't have to file the Discovery Control
14 Plan. Isn't that right?

15 MR. SUSMAN: See, I guess the
16 philosophical question is whether if the
17 parties agree -- I mean, if you get out of
18 Tier 2 and you go to the court for a schedule,
19 a Discovery Control Plan, must the judge
20 essentially touch every subject which we have
21 touched in our rules, or are you back to an
22 unlimited do what you want?

23 For example, we have a rule that says
24 there are only three kinds of objections that
25 can be made at depositions. Does the judge

1 have to deal with that subject in a Discovery
2 Control Plan, because it was designed to
3 control discovery. Okay? And if he doesn't
4 tell you what kind of objections, you're free
5 to sit in a deposition and go back to speeches
6 again. I guess that's the question.

7 I mean, can't we have some of the work we
8 have done here apply if the judge is silent on
9 it and let the judge in his discretion, with
10 the motion of the parties, modify what they
11 want to modify?

12 MR. PERRY: I don't think that
13 was a good example, because the only things
14 that are specific to Tier 2 are what are
15 listed under 2(b)(1), (2) and (3). I mean,
16 the things about objections apply to all cases
17 anyway no matter whether they are in Tier 1, 2
18 or 3.

19 MR. SUSMAN: Well, how about
20 the amount of time per deposition?

21 MR. PERRY: That applies to all
22 cases anyway, no matter whether it's in
23 Tier 1, 2 or 3.

24 MR. SUSMAN: Then we're saying
25 the same thing, I think. I'm sorry, we're not

1 communicating. I think I agree with you then,
2 if that's what we're talking about.

3 MR. PERRY: In other words, I
4 think what we're all saying is that the three
5 specific limitations that are specific to
6 Tier 2 go out the window when you go to
7 Tier 3, but the subject matter of those
8 limitations has to be dealt with. Instead of
9 just saying "those limitations are gone and
10 there are no limitations in that area," you
11 say, "those limitations are gone, but we have
12 to decide what our parameters are going to be
13 in those areas."

14 MR. SUSMAN: Well, David, we
15 didn't draft it that way, unfortunately. I
16 mean, your limitations on Tier 2 are described
17 at the bottom of Page 1, you know, and there
18 are three limitations there. Okay? But there
19 are a lot more than three things that you deal
20 with under the Discovery Control Plan. You
21 have (a), which isn't even talked about; you
22 have (c), which is not talked about as a
23 limitation under Tier 2; (d) is not covered as
24 a limitation under Tier 2 anyway. Do you see
25 what I'm saying? I mean, you are providing

1 for things to be covered in a Discovery
2 Control Plan.

3 MR. PERRY: But these are
4 things that are going to have to be dealt
5 with. In other words, (a) and (b) both
6 replace the window. You have to have a trial
7 date and you have a discovery cutoff date.

8 MR. SUSMAN: I don't mean
9 those.

10 MR. PERRY: (C), if you don't
11 have -- if you're in Tier 2, (c) is tied to
12 the window. Once you're out of that, you have
13 to do something about it. (D) is --

14 MR. SUSMAN: No. I've done it
15 just by putting a discovery cutoff date. That
16 cures the problem.

17 MR. PERRY: It may not, because
18 in a lot of cases the 60 days for designated
19 experts is going to be too late, especially in
20 a big case. You're going to have to talk
21 about whether there are going to be earlier
22 deadlines that ought to be fixed or not.

23 HONORABLE F. SCOTT MCGOWN: I
24 think I agree with David, and I withdraw my
25 earlier comment. I've decided I was wrong

1 about that. And I think that the confusion is
2 that we're doing -- we're using one thing in
3 two different places and it means something
4 different in each place.

5 In a Tier 2 case, you might well have a
6 scheduling order or a pretrial order or a
7 docket control order, whatever you want to
8 call it, in a Tier 2 case that does a lot of
9 things but doesn't affect the Tier 2 limits
10 that we've set out.

11 In a Tier 3 case, you might have a
12 pretrial order or a scheduling order or a
13 Discovery Control Plan, whatever you want to
14 call it, that does a lot of things that don't
15 have anything to do with the discovery
16 limits. But the point is that in Tier 2,
17 you've got these certain discovery limits that
18 are set out in our rule, and in Tier 3 you've
19 got a blank slate where you've got to
20 customize your discovery limits. And you may
21 use Tier 2 as an example or as a start, but
22 you're customizing the discovery limits in
23 Tier 3 and encompassing that in a filing
24 that's either an agreement or an order.

25 MR. SUSMAN: I mean, it's so

1 theoretical now, Scott. Part of the discovery
2 limits are so many hours per depositions,
3 okay, when experts get -- when experts
4 get --

5 HONORABLE F. SCOTT MCGOWN: No.

6 MR. PERRY: But that's not
7 specific to Tier 2. So many hours per
8 deposition is not specific to Tier 2. It
9 applies in any case.

10 MR. SUSMAN: Correct. Go
11 ahead.

12 HONORABLE F. SCOTT MCCOWN: The
13 only place you --

14 MR. SUSMAN: So why does a
15 judge have to enter (d)?

16 HONORABLE F. SCOTT MCGOWN:
17 That's what I'm saying. This is wrongly
18 drafted. Tier 3 -- what we ought to have
19 under this Subdivision 3, Tier 3, is simply a
20 rule that says if you don't want to do Rule 2,
21 if you want to customize, then you've got to
22 develop your customization and put it in an
23 agreement that get's filed as a Rule 11 or get
24 a court order. But your customization on 2(b)
25 (1), (2), (3) is your Tier 3. All the other

1 rules, all the rest of the rules apply whether
2 you're in Tier 1 or Tier 2 or Tier 3.

3 MR. SUSMAN: But you can
4 customize out of it.

5 HONORABLE F. SCOTT McGOWN: But
6 you can customize them as well.

7 MR. SUSMAN: I think we're
8 having a lot of problems with a simple concept
9 that there's not much disagreement with.

10 HONORABLE F. SCOTT McCOWN:
11 Right. The drafting doesn't expose the
12 concept. We're in agreement with the concept,
13 but the drafting doesn't --

14 MR. SUSMAN: Can you address
15 what the concept is, then, Scott, and then see
16 if we can't get a motion before us that puts
17 the concepts in the drafting? Paul.

18 MR. GOLD: I think this needs
19 to go back to the committee, because I've got
20 a feeling even the people on the subcommittee
21 feel like they're going to vote on something
22 that isn't all the way cooked on this. There
23 are so many subtleties going on here that I
24 think everyone feels like they're losing the
25 stream on it. And I think it's because of the

1 drafting on this. I think we can get a sense
2 of the committee on some major concepts to
3 follow and then I think we can go back and
4 draft it and come back. But I'm concerned
5 that if we took a specific vote right now, I
6 don't know if we would capture the sense of
7 the committee on this issue that's drafted or
8 not.

9 MR. SUSMAN: All right. Then I
10 would propose that we adopt the concept of a
11 Tier 3 with a Discovery Control Plan to be
12 made by agreement of the parties or imposed by
13 court order; that what is going to be
14 contained in that Discovery Control Plan
15 should be referred back to committee for a
16 recommendation and that the committee should
17 be directed to consider how that impacts the
18 other limitations in the rules that we have
19 adopted.

20 MR. GOLD: I would second that.

21 MR. SUSMAN: Is that fair? All
22 in favor of that motion raise your hand.
23 Those opposed. That passes -- oh, one -- no,
24 that was a question, not a nay vote.

25 JUSTICE CORNELIUS: Right, a

1 question.

2 MR. SUSMAN: Great.

3 JUSTICE CORNELIUS: Before you
4 send this back to the subcommittee, I would
5 like to raise the question of whether or not
6 the judge's Discovery Control Plan -- if the
7 parties would have any remedy in case they
8 don't like the plan or feel that the trial
9 judge has abused his discretion.

10 MR. SUSMAN: Mandamus.

11 JUSTICE CORNELIUS: Well,
12 that's what they do now.

13 CHAIRMAN SOULES: I think --
14 of course, the trial judge under 166 has got
15 control of the case, period. And if the
16 parties agree to something that the judge
17 doesn't like, the judge still has Rule 166 and
18 you can run your docket under Rule 166 as you
19 see fit.

20 So if the parties agree to something, a
21 trial date two years from now, and they come
22 to court with that, and the court says, "Well,
23 you all can agree to anything you want to, but
24 the case is going to go to trial one year from
25 today," you have that absolute power. And I

1 don't think there's any review of that unless
2 something happens in the course of that year.

3 JUSTICE CORNELIUS: Well, now
4 we have trial judges entering case management
5 orders, and if the parties don't like that,
6 they file a petition for writ of mandamus and
7 it's reviewed under an abuse of discretion
8 standard. I just wondered if the court enters
9 an order under Tier 3 if the parties would
10 still have a right to have that order reviewed
11 in the appellate courts either by appeal or
12 petition for writ of mandamus.

13 CHAIRMAN SOULES: Well, they
14 don't have the right to have anything reviewed
15 by mandamus, of course. That's absolutely up
16 to your court.

17 JUSTICE CORNELIUS: Not a
18 right, but they can petition for review.

19 CHAIRMAN SOULES: They can file
20 it.

21 JUSTICE CORNELIUS: And then if
22 the appellate court finds that the trial court
23 has abused his discretion, of course, it can
24 be reversed or modified or whatever.

25 CHAIRMAN SOULES: In the

1 cases -- in the mandamus cases on
2 consolidation and separate trial, there are
3 some -- particularly some old cases that
4 don't come to mind right now -- there's some
5 language that says that mandamus just doesn't
6 ally to review of the court handling his
7 docket, handling his case. It specifically
8 has to be something beyond that. He has to
9 make an error of law.

10 JUSTICE CORNELIUS: We've had
11 about five or six petitions for mandamus about
12 a case management order involving the toxic
13 tort litigation of Lone Star Steel down there.

14 CHAIRMAN SOULES: I think it's
15 Highley vs. Hughes, I think, that says you
16 don't interfere with the judge's running of
17 his cases --

18 JUSTICE CORNELIUS: We have
19 never granted leave, and I think they've gone
20 to the Supreme Court two or three times and
21 also -- well, maybe one time the Supreme Court
22 did grant leave. Did you remember, Judge
23 Hecht?

24 JUSTICE HECHT: It seems like
25 we did.

1 MR. SUSMAN: Anne.

2 ANNE McNAMARA: I think your
3 mandamus issue is going to come up again when
4 you have a big case and you're seeking Tier 3
5 treatment to get out of Tier 2, and depending
6 on what the trial court does or doesn't do, I
7 would be really troubled to eliminate the
8 right to seek mandamus, because we're talking
9 about putting limitations on discovery, and I
10 think that's where the mandamus issue arises,
11 not on the trial judge or some of the other
12 peripheral issues, but it's the discovery
13 issue.

14 MR. LOW: But the rules don't
15 give anybody a right until you lose to seek
16 mandamus. I mean, I don't know of a rule that
17 says you can seek mandamus here or there. I
18 mean, why would this change anything?

19 MS. McNAMARA: My sense is
20 we're talking about changing it, or am I
21 misunderstanding?

22 MR. SUSMAN: No, we're not
23 changing anything. I'm sorry, I mean,
24 discovery rulings of court that you object to
25 are treated under these rules in the same way

1 they were. We have not changed that at all.
2 The same remedy.

3 MR. GOLD: Steve, I want to
4 make sure if I understand Luke. I understand
5 Luke to be saying that, for instance, to pick
6 up on the issue, a party petitions to move out
7 of Tier 2 and the judge says, "No, I don't
8 care how much evidence you bring to me that
9 you need to get out of Tier 2 to develop your
10 case, you're not getting out of Tier 2," or if
11 the parties move out of Tier 2 into Tier 3,
12 they structure a plan, and a party comes
13 forward and shows that they need some
14 additional discovery, and the court says, "No,
15 this is what I've ordered, and I'm not going
16 to allow you to do any more discovery even if
17 it impairs the development of your
18 presentation of evidence at trial," that there
19 is no mandamus relief?

20 PROFESSOR ALBRIGHT: Can I
21 answer that? Can I respond to that?

22 MR. SUSMAN: Sure.

23 PROFESSOR ALBRIGHT: I think
24 under Walker vs. Packer, which is the case
25 that limited mandamus in discovery cases, that

1 the court said, well, there are three
2 instances where you might be able to have
3 mandamuses, and one of them is if you are
4 prevented from having the discovery that you
5 need to develop your case.

6 MR. GOLD: I just heard Luke
7 say that wasn't --

8 MR. SUSMAN: Listen, this is
9 interesting, but what does it have to do with
10 the work that we've been doing?

11 HONORABLE SARAH DUNCAN: It is
12 or it isn't, and we're not going to change
13 whether it is or it isn't right here.

14 MR. SUSMAN: It's not a part of
15 what we're doing. We didn't consider it.

16 MR. GOLD: Well, I understand
17 that now. I just --

18 MR. SUSMAN: Okay. David.

19 MR. PERRY: I think that the
20 answer to the question that was asked
21 initially is that I think that the
22 subcommittee views these orders as being
23 comparable to Rule 166 orders and that you
24 would have the same rights or lack thereof as
25 you currently have under Rule 166.

1 JUSTICE CORNELIUS: Well, that
2 was my question, and I just wondered if the
3 new rule by implication would cut off that
4 right of review.

5 MR. SUSMAN: Luke.

6 CHAIRMAN SOULES: I guess I
7 have a conceptual problem, going back into
8 what I thought we did in earlier meetings,
9 between two and three. I thought Tier 2 was
10 being set up to include all of these
11 restrictions, including the time limitations
12 on any particular deposition that are over now
13 on Page 32; but that Tier 3 was obviously to
14 be governed by the same number of
15 interrogatories that we have and the way you
16 conduct a deposition and so forth, but that
17 under Tier 3 the limitations didn't apply.
18 That was a case that was -- a monster case or
19 for whatever reason a complicated case where
20 either one party says it's that and the other
21 party disagrees, and the judge decides if it
22 is a complex case that needs, in effect, a
23 Rule 166 order, or the parties agree that it
24 does and they come to an agreement; and that
25 once you opted into Tier 3, there were not

1 either total hour limitations, per deposition
2 limitations or a discovery window. All of
3 that was out that, because that was only
4 existent in Tier 2. And when you went to
5 Tier 3 you could conduct a monster case either
6 by agreement or by order of the judge just
7 like we do today without changes in the
8 substantive discovery like interrogatories and
9 that sort of thing.

10 And that's what I thought we voted on,
11 that Tier 3 was going to be a venue, if you
12 will, where John Marks and I could say we're
13 going to not have these limitations, we're not
14 going to have three hours, we're not going to
15 have 50 hours, we're not going to limit the
16 number of experts, we're going to get it done,
17 we're going to have to get it done by time of
18 trial, we're going to have to supplement
19 before trial on some schedule, either by
20 agreement or under these rules, but just like
21 it is in effect today.

22 Now, if I misunderstood that, and Tier 2
23 controls and these limitations control
24 everything in the big case, then I have a
25 different approach certainly to what we're

1 doing on Tier 3.

2 And I heard David say, well, yeah, the
3 three hour per deposition controls, six hours
4 per deposition controls, all that controls
5 even in a Tier 3. I think -- I don't
6 understand that. I think when you move into a
7 Tier 3 -- excuse me, apparently I'm out of
8 order. Go ahead.

9 MR. SUSMAN: No, you're right.
10 I mean, but isn't it semantics, Luke? I mean,
11 aren't we talking about --

12 CHAIRMAN SOULES: It's not
13 semantics the way I'm hearing it.

14 HONORABLE F. SCOTT McCOWN:
15 Steve. Steve.

16 MR. SUSMAN: If you call me and
17 we're in a case and you say, "Steve, let's get
18 an agreement to get out of Tier 2," the first
19 thing I'm going to say is, "What do you want
20 to change, Luke? What do we want to change?
21 Do you want more time for discovery? Do you
22 want more hours for depositions?" I'm not
23 going to give you a blanket agreement. Okay?
24 I'm going to say, "Luke, what do you want to
25 change by agreement?"

1 You're either going to tell me or not
2 tell me. If you don't tell me, I'll say,
3 "Well, you're going to go move to the
4 court." Then we're going to go down to court,
5 and now everything is fair game once you're
6 before the judge. And it --

7 HONORABLE F. SCOTT McCOWN:
8 Now, Steve --

9 CHAIRMAN SOULES: Now, wait a
10 minute, you are going to give me a chance to
11 respond now, aren't you?

12 MR. SUSMAN: Yeah.

13 CHAIRMAN SOULES: Okay. HL&P
14 has just sued Halliburton for \$20 billion in a
15 nuclear power plant litigation. And I just
16 say, obviously, Tier 2 is out. Can't we just
17 enter a Rule 11 agreement that we're in Tier 3
18 and we set sail and we do the best we can? I
19 mean, there were pieces of that case that were
20 \$100 million, just little pieces of that case
21 where trial teams from all sides just worked
22 on procurement, so that's all I have to do.

23 Now, in a smaller case, yeah, maybe you
24 and I can come to an agreement that we step it
25 out. You say, "I'm not going to agree to make

1 depositions longer than six hours." And I
2 either have to agree to that or go to the
3 judge and say, "Judge, I want 10-hour
4 depositions, not three-hour depositions. He
5 won't agree to but six-hour depositions."

6 But that takes a piece -- but I think
7 you can just step out of -- I mean, my
8 understanding of what we were doing and what I
9 want to see done, and obviously the committee
10 controls, is that when you step out of Tier 2
11 and I step out of Tier 2 with you, it can be
12 anything we agree on or we don't have to agree
13 on anything except to step out of Tier 2.

14 HONORABLE F. SCOTT MCGOWN:

15 Luke, you're right. That's what we voted on,
16 and that's what the rules do. The problem
17 we've got is that the drafting is not clear,
18 and I think I can explain where the
19 misconception is between you and Steve.

20 There are time limits and there are
21 vehicle limits. And what we've described
22 hereto as being on Pages 1 and 2 are time
23 limits. And when you go into Tier 3, we're
24 saying those go off. The vehicle limits are
25 in the bulk of the rules and we haven't said

1 anywhere that when you go into Tier 3 those go
2 off. But we have a rule, Rule No. 2, that
3 says anything in here can be changed by
4 agreement or court order.

5 And so I guess what I'm trying to say is
6 that this isn't clearly written. There's not
7 a -- Tier 2 is not a place like -- I mean,
8 excuse me, Tier 3 is not a place like Tier 2
9 is, and that's where the confusion is coming
10 from. We've got a clear Tier 1 that's a
11 place. We've got a clear Tier 2 that's a
12 place. You can change Tier 2 any way you
13 want, so you're right for your HL&P case. You
14 can do exactly what you want. But when you do
15 that, it's not necessarily taking you to
16 Tier 3, because Tier 3 is not really a place.

17 I'm not being very articulate, am I, but
18 do you all see what I'm saying? It's a
19 drafting problem.

20 MR. PERRY: Let me try to
21 express it a little differently.

22 CHAIRMAN SOULES: The only
23 thing I've got -- and I did understand -- and
24 David, just one short point. I did
25 understand, though, that deposition time

1 limits were going to be moved over to Tier 2;
2 that they would be taken out of the deposition
3 rule. Okay. Well, when that's over there and
4 you step out of Tier 2, then you leave those
5 limits behind too. Okay?

6 MR. PERRY: The concept is that
7 there are two different deposition time
8 limits. The time limit on the total number of
9 hours per case is drafted to go in Rule 1,
10 Tier 2. The per deposition time limit, the
11 way we conceived of it, and this can be
12 obviously changed if the committee wants it to
13 and I think we need direction from the
14 committee, but the thought process that I
15 think we were operating under is that the time
16 limit of six hours for an expert deposition or
17 three hours for a fact witness deposition was
18 a reasonable time limit to carry forth as a
19 general proposition in all cases no matter
20 what tier they were in. And the drafting that
21 we did leave would leave the per deposition
22 time limits in the deposition rule and have
23 them apply to all cases. But that is also
24 subject to the second rule, which provides
25 that all of the Discovery Rules can be

1 modified either by agreement or by court
2 order.

3 So it is true that in an HL&P case like
4 you described, you and John Marks could get
5 together and say, "Hey, we're not going to
6 have any limits on anything and we'll sign a
7 Rule 11 order to that effect and so be it."
8 But the concept of the way the drafting is
9 done is that the per deposition time limits
10 would be left in a place where they do not
11 obviously go away simply by going into Tier 3;
12 that you have to specifically do something to
13 make them go away.

14 HONORABLE SARAH DUNCAN: That's
15 the issue.

16 MR. GOLD: And just to pick up
17 on that and make a point, there was a lot of
18 criticism from plaintiff's attorneys who
19 handle large personal injury cases, medical
20 malpractice, product liability cases, when the
21 50-hour issue came out. The -- I don't
22 think -- and you know, I'm on record that
23 there's a lot of criticism of the length of my
24 depositions, so I come to this as one of those
25 people. I think the issue was to reduce the

1 amount of time spent in any given deposition
2 regardless of the nature of the case, because
3 people believe that attorneys are ginning an
4 incredible amount of wasted time and energy
5 taking people's depositions for eight and
6 10 days, and that what we wanted to do is
7 bring some reason to that and bring some
8 confinement to that; and that if people wanted
9 to opt out of that specific hour constraint,
10 they would need to talk to the court about it
11 and they would need to be specific; but to
12 avoid this blank check of "We've got this
13 monster case, all of the rules are off, and
14 regardless of what our clients know or not,
15 we're going to sit here for hours in
16 deposition," when we all know that no matter
17 how big the case is, you can probably reduce
18 the amount of time spent in any one deposition
19 considerably.

20 So I pick up with what David is saying.
21 I think the issue that everybody had was the
22 number, not so much the actual time that was
23 spent in the deposition, and I want to make
24 that point clear.

25 HONORABLE SARAH DUNCAN: It

1 sounds like people on the subcommittee aren't
2 agreed as to how this was intended to be
3 drafted. I mean, we've got Scott on the one
4 hand saying that it was intended that all of
5 the per deposition calendar limits wouldn't
6 apply to Tier 3 cases. Is that right?

7 HONORABLE F. SCOTT McCOWN:

8 No. I said that you can change them by
9 agreement or by court order.

10 MR. GOLD: We're all in
11 agreement that it's a drafting issue. That's
12 why we voted about 35 or 40 minutes ago to
13 send it back to committee.

14 MR. PERRY: But I do think we
15 need direction as to how -- I think we all
16 agree that the drafting can be improved, but I
17 think we need direction from the full
18 Committee as to substantively how the
19 Committee wants to handle some of these
20 issues.

21 MR. SUSMAN: Bill.

22 PROFESSOR DORSANEO: Well, the
23 last time we talked about this I had the same
24 attitude that I have now. In the cases that
25 Luke is talking about, I'm very sympathetic

1 towards not being able to prepare a discovery
2 plan or to anticipate what kind of disputes
3 may arise down the road or really to do very
4 much planning at that threshold. But it
5 strikes me that if someone is going to get out
6 of the requirements of the system, they ought
7 to have the responsibility to come to a
8 reasonably definite plan or game plan.
9 Otherwise, all that's going to happen in a
10 great many cases is for the lawyers to say,
11 "We won't operate under the rules; we'll
12 operate on the basis of an agreement to agree
13 in the future," and that will not work out in
14 the future.

15 So I think that the concept of having to
16 make a relatively more specific agreement at
17 the right time for doing that makes more sense
18 than just opting out of the discovery rules
19 altogether when we're talking about private
20 agreement and not court authorization.

21 MR. SUSMAN: But Bill, we kind
22 of went over -- I mean, in our subcommittee
23 meeting, we contemplated that the adversary
24 system is still what drives our litigation in
25 this country, and it's not a bad system. And

1 if two clients with lawyers, and the clients
2 are informed as they should be, agree that
3 they want to conduct unending thermonuclear
4 war against each other forever, okay, that
5 they should be able to -- that John Marks and
6 Luke Soules should be free to draft a
7 one-sentence Rule 11 letter that says,
8 "Nothing contained in Rules 1 through blank
9 will govern the way we conduct discovery. We
10 intend to conduct discovery according to the
11 rules that were repealed on June 30, 1995,"
12 the old rules or whatever rules they want, and
13 file it with the court. And that indeed
14 should be -- we should not interfere with
15 their freedom to do that.

16 HONORABLE F. SCOTT McCOWN:

17 Wait --

18 MR. SUSMAN: Now, if Luke and I
19 are in this case, okay, and he calls me and he
20 says, "Susman, I want to agree" -- "I want get
21 out of Tier 2."

22 And I say, "Well, the only way you get
23 out of Tier 2 is if you agree with me on a
24 Discovery Control Plan."

25 And he says, "Well, what do you want to

1 put in it?"

2 And I say, "I want to cover everything
3 that's in the rules. I want to give a
4 discovery window closing date, I want the
5 length of deposition; I want your agreement
6 that we will abide by this rule that's in the
7 rules, I want your agreement you can depose no
8 more than X depositions."

9 He says, "Well, I'm not going to agree to
10 that because I don't know right now."

11 I say, "Well, we don't have a Discovery
12 Control Plan then. Let's go file your motion
13 before the judge."

14 We go before the judge. Okay. He says,
15 "Judge, we can't decide right now."

16 I say, "Judge, that's nonsense. He can
17 decide." I'm now before a judge. Okay. Now
18 I'm talking to somebody who supposedly is
19 going to exercise discretion. I say, "Judge,
20 there's no reason in the world these
21 depositions should last more than three hours,
22 even though this is a zillion dollar case."

23 He will say, "Oh, yeah, there is,
24 Judge." But we are before a judge to make a
25 decision. And everything is subject to

1 argument.

2 HONORABLE F. SCOTT McCOWN: But
3 Steve --

4 MR. SUSMAN: If we won't argue
5 on some things and the judge doesn't rule on
6 things, we are still back to the default
7 rules. That was my idea. Everything is
8 subject to change at that argument. But in
9 the absence of a ruling from the court, we go
10 back to the default.

11 HONORABLE F. SCOTT McCOWN:
12 Steve.

13 PROFESSOR DORSANEO: That's
14 what I want to happen. I don't want you to be
15 able to say, "The deal is that we will not be
16 under Tier 2. We will be operating as we move
17 forward on whatever basis we decide." That is
18 not a default system; that is an agreement not
19 to have a system at all.

20 HONORABLE F. SCOTT McGOWN: Can
21 I say something important here about these two
22 views, because we wind up with the same rule
23 but we go in different directions, and here is
24 how: I do not agree with Steve that litigants
25 ought to be able to do whatever they want to

1 do and that the court has no authority or
2 responsibility to police that and make them do
3 what's in their client's best interest or the
4 system's best interest, so I have a different
5 perspective. It's in the public's interest
6 and the client's interest, and the court ought
7 to be able to interject itself. Even with
8 those two different perspectives, though, we
9 come up with the same rule, and the rule is
10 that what people agree to they agree to, and
11 we're not going to require the court to review
12 all those agreements and exercise its
13 ministerial -- or exercise its authority
14 ministerially by signing a bunch of orders
15 that it wouldn't sign because that particular
16 judge doesn't police people.

17 But if a trial judge desires to police
18 people and has the time to police, whatever
19 the judge orders is what's going to be done.
20 And I think that was Luke's point earlier. So
21 that these rules say if you make an agreement,
22 that's the way it's going to be unless the
23 judge says otherwise. And so the judge can do
24 as much as he can physically do and has the
25 inclination to do.

1 And I think that where we're getting
2 confused on Tier 2 and Tier 3, I've got a
3 better way to explain it now. Tier 2 is a set
4 of rules. Tier 3, as we've got it defined, is
5 a process, not a set of rules. That's why we
6 can't make sense out of this. Tier 2 can be
7 modified, but when you modify Tier 2, you're
8 automatically using the process that we're
9 calling Tier 3 and that's where the confusion
10 is. So you've got Tier 2. It can be
11 modified, and we need to explain clearly how
12 you can get there. But what Luke wants to do
13 in the HL&P case can be done under these
14 rules. What Steve wants to do with nuclear
15 war can be done under these rules. And if I,
16 the judge, want to control discovery and
17 police litigants, that can be done under these
18 rules.

19 PROFESSOR DORSANEO: Why can't
20 you put in the Tier 3 agreement or plan
21 requirements certain specific requirements
22 that we could agree make sense. Like Luke was
23 saying he didn't have trouble with (a) or (f)
24 or some of them. But whatever can be done, do
25 it.

1 MR. SUSMAN: Well, we're going
2 to go back to drafting that. I agree. I
3 mean, we have agreed to that.

4 MR. KELTNER: Well, that is a
5 fundamental change.

6 HONORABLE F. SCOTT McCOWN:
7 That's a big point.

8 MR. KELTNER: And I think
9 that's a very good idea, that if you've gone
10 to Tier 3, that there would be some absolutes
11 that you would have to tell the court about,
12 like a trial date and those types of things.

13 PROFESSOR DORSANEO: Yes.

14 MR. KELTNER: But then we'll
15 have a philosophical disagreement over
16 something that I don't think the committee has
17 yet voted on, and that is the question just
18 posed, that if the parties agree, can the
19 trial court overrule that? Currently I read
20 the law as there's no question about. The
21 trial court can do it.

22 HONORABLE F. SCOTT McCOWN:
23 Under these rules he can do it.

24 MR. KELTNER: Well, you can
25 certainly read these rules to indicate that is

1 not the case, and if that's what we intend to
2 do, we need to say so. And that's an issue
3 that I don't think everybody here is agreed
4 upon, so that's something we probably need to
5 seek some guidance on.

6 MR. SUSMAN: Does everyone here
7 agree that the trial judge ought to be able to
8 overrule the parties and can? Raise your
9 right hand. We have total agreement on that.

10 JUSTICE HECHT: That's
11 gratifying.

12 HON. ANNE TYRRELL COCHRAN: I
13 think what Scott just said about the different
14 proposals being -- the real differences
15 between Tier 1 and Tier 2 and what we're
16 calling Tier 3, and without in any way trying
17 to rework any of the substance of what we're
18 talking about, but to maybe make what we're
19 talking about, maybe the framework, more
20 understandable, it seems to me that the
21 problem is calling Tier 3 a tier. What it is
22 is the process to do what you're doing in
23 Rule 2. It's really Rule 2. I mean, it seems
24 to me you should have -- here you have two
25 tiers, and then if either the court wants to

1 change it, or you by a Rule 11 want to change
2 it, you go to Rule 2 and here is your
3 procedure. Wouldn't it make more sense just
4 to move all this Tier 3 business out and make
5 a comprehensive Rule 2 about if either you or
6 the trial judge want to not be in Tier 1 or
7 Tier 2, here is the process and mechanism to
8 get there.

9 MR. LOW: You have it now.

10 MR. SUSMAN: All in favor of
11 doing that as opposed to having a separate
12 Tier 3 raise your right hand.

13 MR. PERRY: Well, Steve, let me
14 make just one comment. I think there's a lot
15 of merit in that thought, but there is also
16 some down side, because part of the theory
17 about the whole approach is that if you're
18 going to do away with the limits that are in
19 Tier 2, then you need to have some requirement
20 to put something in their place.

21 And for example, if you just agree to do
22 away with the window, you need to have some
23 requirement to do a discovery cutoff date or
24 something like that. And as a practical
25 matter, once you start doing away with the

1 windows and the hourly limits, there are a
2 number of things that really are going to need
3 to be done, such as time limits on joinder of
4 parties, when are you going to name experts,
5 something to replace the hourly limits on
6 depositions, and so I do think that we may
7 need -- as I understand it, we want a system
8 that is relatively easy for the parties to get
9 out of the Tier 2 limits. But when they get
10 out relatively easily, we don't want to end up
11 that there's nothing in its place. And so we
12 want to have a requirement that if you're
13 going to get out of those limits you have to
14 get into this framework over here and touch
15 some certain bases that still lead a framework
16 in which everybody is proceeding.

17 HONORABLE F. SCOTT McGOWN: I
18 think we need to draft just what David
19 suggested.

20 PROFESSOR DORSANEO: Me too.

21 HONORABLE F. SCOTT McCOWN: But
22 there's going to be a lot of disagreement over
23 what the specifics should look like.

24 MR. KELTNER: If we can agree
25 on the basic theory that judges get to

1 overrule it, I'll wager that we can come up
2 with the basic things that you would need for
3 any case that dropped out of Tier 2, and then
4 put those as mandatory and put the others as
5 mays.

6 MR. MEADOWS: The only thing
7 you really need are those things that are lost
8 if you get out of Tier 2. All we need to
9 provide for is the things that we do.

10 HON. ANNE TYRRELL COCHRAN:
11 Maybe we need a rule that says you can't play
12 with no rules.

13 MR. GOLD: We've got docket
14 control orders that are pretty formed now that
15 fill in those things, and I think all we need
16 to do is massage those and come up with
17 dates. I think that what everybody is
18 concerned about is parties entering into
19 thermonuclear war and not have any type of
20 nuclear disarmament built into the process.

21 MR. SUSMAN: I think what I see
22 Buddy and Anne saying, I think you are right,
23 you're technically right, okay, is that Rule 2
24 does it. You don't need Tier 3. You're
25 technically right. The problem with thinking

1 about it that way is that you end up having --
2 if you want to escape the rules, you have to
3 kind of make a motion to the court to modify
4 Rule 3, modify Rule 7, modify Rule 10, modify
5 Rule 21. You know, you've got to go through
6 the rules and modify every little thing with a
7 separate motion or one motion.

8 HON. ANNE TYRRELL COCHRAN: Let
9 me back up. I think you misunderstood. I
10 didn't say I liked Rule 2 in lieu of all this
11 other stuff, I just said it might help
12 everybody understand what we're talking about
13 if you just moved Tier 3 over to a separate
14 rule and then lay out everything you want to
15 say about if you're going to craft a separate
16 rule. I didn't mean just to say some little
17 two-sentence thing there. I just meant to
18 sort of move all of this discussion to an
19 "in the event that either you agree or the
20 court wants to have a separate structure
21 crafted just for your case, then here is how
22 you do it," that includes what you have to
23 have, what the minimum requirements are,
24 everything.

25 MR. PERRY: One of the things

1 that we did not do very well is take the time
2 to integrate the Discovery Control Plan with
3 Rule 166, and maybe we ought to go back and do
4 that.

5 MR. SUSMAN: Alex.

6 PROFESSOR ALBRIGHT: As I
7 understood this whole thing when Justice Hecht
8 first brought it up at our last meeting of the
9 Advisory Committee, it was like you have
10 Tier 1 and you can agree within the limits of
11 Tier 1. Then you have Tier 2 and you can
12 agree within the limits of Tier 2 and then
13 you're still within Tier 2. But once you want
14 to go outside the limits of Tier 2, then
15 that's an indication that you've got a bigger
16 case or an unusual case. And Justice Hecht,
17 if he was the trial judge, he would want to
18 know that that case was going on. And so you
19 have something there that then flags that case
20 that this is a potential problem case. So a
21 Tier 3 case is not a Tier 2 case where you
22 have changed all the rules. A Tier 2 case is
23 a case that is within the limits of Tier 2.
24 It may be that you have agreed to 20 hours of
25 depositions, but if you've agreed to 60 hours

1 of depositions, then you're a Tier 3 case, and
2 you've got -- it's a different kind of deal.

3 HONORABLE F. SCOTT McCOWN: But
4 Alex, you can't think of it that way, because
5 then how much do you have to modify Tier 2
6 before it becomes a Tier 3?

7 PROFESSOR ALBRIGHT: Why not
8 just say if one thing goes outside of Tier 2,
9 then you have Tier 3.

10 HONORABLE F. SCOTT McCOWN: One
11 last comment, Steve. I think what Anne said
12 is exactly right, and what we have to do is
13 say here is Tier 2, here is the way you modify
14 it. If you modify it, here are the things
15 that you are required to think about. And
16 after you think about them, here are the
17 minimum kinds of things that you are required
18 to do, whatever those are.

19 MR. SUSMAN: Let's see, I think
20 we are passed our adjournment time. I think
21 we've done a great job. Thank you all. I
22 don't think there will be any discussion on
23 Rule 2 tomorrow. Basically there's not much
24 on it. We'll begin with Rule 3. We have the
25 vote on Rule 1. We know your direction. We

1 know we've got to go back to draft this Tier 3
2 concept, and we will do so. And we understand
3 the concern, but I think we're pretty much in
4 agreement on Tier 1 and Tier 2, and we've just
5 got to do something with Tier 3.

6 (HEARING ADJOURNED.)
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CERTIFICATION OF THE HEARING OF
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 January 20, 1995, 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 \$ 1,346⁰⁰.
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Given under my hand and seal of office on this the 7th day of February, 1995.

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