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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 21, 1995

(SATURDAY SESSION)

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Taken before D'Lois Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 21st day of January, A.D., 1995, between the hours of 8:05 o'clock a.m. and 12:05 o'clock p.m. at the Texas Law Center, 1414 Colorado, Room 101 and 102, Austin, Texas 78701.

JANUARY 21, 1995

**MEMBERS PRESENT:**

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

**MEMBERS ABSENT:**

Charles Babcock
David J. Beck
Michael Gallagher
Michael Hatchell
Franklin Jones Jr.
Thomas Leatherbury
Harriett Miers
Richard Orsinger
Anthony J. Sadberry
Paula Sweeney

**EX OFFICIO MEMBERS PRESENT:**

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

**EX OFFICIO MEMBERS ABSENT:**

Hon Sam Houston Clinton
Doyle Curry
Kenneth Law
Thomas Riney

**Also present:**

Lee Parsley
Holly Duderstadt

SUPREME COURT ADVISORY COMMITTEE
JANUARY 21, 1995

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MR. SUSMAN: Rule 2, page 4, is no change from the way you have seen it before, and I don't really think it was controversial before. It probably will not be controversial now. Any comments about Rule 2? All in favor of Rule 2 raise your right hand. All opposed? Rule 2 passes.

Rule 3 we have done some work on since you have seen it. 3(1) we have not changed basically. It defines -- it first sets out the permissible forms of discovery then defines what is meant by "written discovery" for use elsewhere as we go through. The term "written discovery" does have meaning and makes it clear that these forms of discovery can be used at any time and any sequence, et cetera. Any comments about Rule 1, which I don't think is basically much a change.

MR. LOW: Part (1) of Rule 3.

MR. SUSMAN: I'm sorry. Part (1) of Rule 3. All in favor of part (1), Rule 3 raise your right hand. All opposed? That passes.

Rule, part (2), scope of discovery. Let me tell you, the general is not different,

documents and tangible things are not really different from what you have seen. (C), persons with knowledge of relevant facts. I think this is the way we did it last time and the way you instructed us to do it, and that is that insofar as persons having knowledge of relevant facts you must not only list them. You must provide a brief statement of each identified person's connection with the case. Now, we make clear in the comment that that's not what they know or what they are going to testify. It is simply with such simple designations as eyewitness, secretary, the board of directors, sales representative, economist, banker, some brief description of the person's relationship to the case.

Item (d) is -- was put in at Luke's suggestion. We thought it was a good suggestion, which is trial witnesses. "A party may obtain discovery of the identity and location of persons who are expected to be called to testify at trial." Expert witnesses and indemnity insuring settlement agreements, no change. Witness statements, my recollection is we didn't change that either.

A witness statement is discoverable where it's a statement that the witness adopts or approves.

HONORABLE DAVID PEOPLES: Steve, isn't that a change in the law?

MR. SUSMAN: What?

HONORABLE DAVID PEOPLES: Nonparty witnesses?

MR. MARKS: Yes.

MR. SUSMAN: Yes. It is a change in the law. And that is a change in the law, and we discussed that I think at the last meeting that that was a change. All of these rules have been discussed before, and people generally thought that was a good idea. Yes.

MR. LATTING: Is what we want to say is that we want to know who the other side expects to call at trial? Is that really what we want to do? We want to know who they intend to call, or who they are going to call, or who they may -- I think that's a pretty important word.

HONORABLE F. SCOTT MCCOWN: Remember this is an interrogatory. It's

not -- you might be more specific in your pretrial order closer to trial but the purpose of this --

MR. LATTING: Okay. All right.

HONORABLE F. SCOTT MCCOWN: -- is to identify for the 50 hours who the target people are.

MR. LATTING: Okay. All right.

HONORABLE F. SCOTT MCCOWN: So that's why we said "expects" as opposed to "intends" or opposed to "will."

MR. SUSMAN: Bill.

PROFESSOR DORSANEO: We talked about this before, but the provision concerning settlement agreements is very broad, broader than it was ever intended to be when we -- probably than it was ever intended to be when it was put in here to begin with because it just means any settlement agreement, and there has to be case law limits imposed on it, and I would suggest that the committee impose some sort of limit that is similar to the limit that is applicable to insurance agreements.

PROFESSOR ALBRIGHT: If I may

respond to that, Alex Albright. I have in my notes that you were supposed to provide me with something.

PROFESSOR DORSANEO: Okay.

PROFESSOR ALBRIGHT: So --

PROFESSOR DORSANEO: I will try to do that then, and I don't remember talking at this committee level -- and it may be that I'm suffering from the same memory problem that I just had a second ago, but do we really want to say a witness statement regardless of when made, one made before the transaction or occurrence giving rise to the litigation is a witness statement, too? And I guess --

PROFESSOR ALBRIGHT: Well, it doesn't matter because they are all discoverable.

PROFESSOR DORSANEO: Okay. That's what I was going to ask. Refresh my recollection on what it means.

PROFESSOR ALBRIGHT: The issue is whether witness statements made in anticipation of litigation are discoverable, and now they are work product or a party communication or a witness statement. So they

are not discoverable except that you can get a copy of your own statement. We are making it so that witness statements made in anticipation of litigation are discoverable unless they are protected by the attorney-client privilege or some other evidentiary privilege or constitutional privilege or statutory privilege but not an investigative privilege.

PROFESSOR DORSANEO: And witness statements not made in anticipation of litigation are --

PROFESSOR ALBRIGHT: Are clearly discoverable.

PROFESSOR DORSANEO: Okay. So it doesn't matter at all what it says here about regardless of when made.

PROFESSOR ALBRIGHT: We could check that out.

MR. MARKS: I have a question. Why are we doing this? I mean, why do we have to do this? I mean, a lawyer goes out, and he works on his case and prepares his case. He takes statements or investigator takes statements. I mean, something has got to be

protected, and it seems to me this is part of his protection, and if he makes available the identity of the witness, the location of the witness, the telephone number of the witness, somebody can go get his own statement. Now, why should they invade my stuff?

PROFESSOR ALBRIGHT: Well, I think the answer to that is this came from the task force's report, and we looked at it, and I think the sense of the committee at the last meeting was that witness statements are usually purely factual. They are renditions of fact, and especially when you are limiting depositions that if you can get these witness statements then that would save -- would make discovery more efficient.

MR. MARKS: But why can't people go out and get their own statements, Alex?

MR. SUSMAN: Judge Cornelius.

JUSTICE CORNELIUS: I have a concern about the requirement that a party reveal the witnesses he expects to call at trial. I believe that represents a change in the law, and I have no problem with the

requirement that they reveal the identity and location of witnesses who have knowledge of relevant facts, but to require an attorney to commit himself in advance to the use of particular witnesses at trial I think invades his strategy and is probably not a good idea.

MR. SUSMAN: Okay. Let me just do this so we can get through this a little more organized. Subdivision (a), (b), (c), all in favor of (a), (b), and (c) raise your right hand. All opposed? That passes.

Now we are going to vote on (d), trial witnesses. And let's limit the discussion of that. Then we will get to witness statement. I just want to make sure we move through it, and I made a mistake by not -- yes. We are talking about trial witnesses now.

HONORABLE SCOTT BRISTER: Yeah. I would favor putting something in with parties to discovery that certainly under 166 that I could order at pretrial conference the parties to tell me who their actual witnesses are going to be. If somebody wants to hide the ball, I assume a large number of these people when they get to section (d) will say

"see the list at section (c)" and hide the ball if that's what they really intend to do.

On the other hand, people in good faith don't expect to call 100 people who may know a little bit about it. They want to just put down 10 that they really think they are going to call, which is what I do at pretrial conference. Who are you really going to call? Most people will readily tell you, and if attorneys can tell each other that, boy, you sure can save a lot of time and money on who you have got to depose and spend time concentrating on.

HONORABLE DAVID PEOPLES: What happens to someone who lists as trial witnesses every person who's already listed as having knowledge of relevant facts? Is there sanctions for listing too many people?

MR. SUSMAN: Well, I would approach the court under those circumstances and ask the court to sanction them. That was not in good faith. I mean, I would invoke the sanction rules. I would say, "Judge, I have got 50 hours of depositions. The reason this rule was changed, as the comments will

reflect, are so I will know how to use my 50 hours wisely." By simply reiterating the long list that goes on for three pages under (c) as the persons he expects to call, we know that's impossible. It could never go to trial.

HONORABLE DAVID PEOPLES: Okay. Can you get sanctioned if you -- let's say there were 50 people with knowledge of relevant facts, and you list 20, and your position is, you know, I don't know right now for sure, but I'm not calling anybody other than these 20, but I will have to wait and see how things go. Now, can that be sanctionable?

CHAIRMAN SOULES: No.

MR. SUSMAN: I don't think so. I think that's pretty close to compliance.

HONORABLE SCOTT BRISTER: What about if you don't -- you have somebody on (c) but not on (d) and then less than 30 days before trial you decide you are going to call them?

MR. SUSMAN: That would be dealt -- that would be dealt with our sanction rule which we are coming to, the failure to disclose information in a timely fashion.

HONORABLE SCOTT BRISTER: Well, you did disclose them as a person with knowledge of relevant facts.

CHAIRMAN SOULES: A timely supplementation gets them on the list to testify.

PROFESSOR ALBRIGHT: If it's not timely, you go to our sanction rule, which is not an automatic sanction like it is now. You as the trial judge are going to have discretion to determine surprise.

HONORABLE SCOTT BRISTER: Well, what am I going to do if they were -- the first week of discovery they were designated as a person with relevant knowledge. Everybody knew about them. It's just I didn't make the decision I was going to call them at trial until two weeks before.

PROFESSOR ALBRIGHT: Right. So you as the trial judge -- the other side will come up and say, you know, "They can't do this. I'm surprised." You --

HONORABLE SCOTT BRISTER: Why are you surprised? I told you who they were a year ago.

PROFESSOR ALBRIGHT: As a trial judge you have discretion to continue the case, to say "This doesn't make any difference; you're not surprised; go on."

MR. SUSMAN: I mean, my argument if I were arguing the case would be that I only deposed people who he indicated he expected to call. That was the purpose of it, judge. He did not put them there. I did not take the deposition. Even though he listed them up here as a person with relevant knowledge, the draft of this rule he was supposed to give me that information. He did not. It has prejudiced me. I mean, you might deny the motion. You might not. I don't know.

PROFESSOR ALBRIGHT: You might say, "Go take a deposition and come back this afternoon."

MR. SUSMAN: Buddy.

MR. LOW: Is anything changed with regard to rebuttal witnesses? I mean, is that the same as now, if you show they're true rebuttal? You said "expected to testify." What are we doing with rebuttal witnesses now?

MR. SUSMAN: We haven't really changed that.

MR. LOW: Okay.

MR. SUSMAN: Luke.

CHAIRMAN SOULES: This is in response to Judge Brister. The persons with knowledge of relevant facts is in most cases going to be a broader universe of people, of course, than the trial witnesses. The persons with knowledge of relevant facts is supposed to reveal not only the persons with knowledge of relevant facts that are helpful to me but also persons with knowledge of relevant facts that are harmful to me.

The trial witnesses designation is really a means to focus the other discovery. Persons with knowledge of relevant facts is a discovery -- a universe to be used for discovery purposes to let me do whatever else I want to. Maybe by way of mere investigation among that list. Trial witnesses, as I comprehend this and the reason that I suggested this, is a tool by which you could focus the balance of the discovery, particularly the use of depositions.

For this to work a person who is not on the trial witness list but who is on the persons with knowledge list should be subject to automatic sanctions, exclusion. Otherwise, it won't work. Now, they have a new test in these rules for what a judge is to consider whenever a witness is not listed, but it is under the new test I think if it's not on the trial witness list, a person is not on the trial witness list, the persons with knowledge of relevant facts list is no cure to the problem. That's the way I envision it.

MR. SUSMAN: Yes, Judge.

JUSTICE CORNELIUS: I think with respect to focusing on the witnesses at trial it's really not going to work because the lawyer is going to list -- he's going to have to list there all persons having knowledge of relevant facts. To protect himself he's going to list all as trial witnesses everybody he lists as having knowledge of relevant facts. Don't you think?

MR. SUSMAN: Well, my view is that it is time -- the only way we are going to cut down expense of discovery and still

make trials fair is make lawyers make up their mind. Okay. Period. Lawyers have got to get to the point where they can make choices and make up their mind, and it doesn't have to be the day before trial.

MR. MARKS: 60 days after the case is filed and you have to answer the interrogatories? You have to make your mind up that fast?

MR. SUSMAN: Well, I would -- yes, sir. Because I would think you could say at that time I am clearly going to call -- I do expect to call the president of the company, the vice-president of development, our chief accountant, and so-and-so. I have not made up my mind beyond that at this time who else -- I don't know who I expect to call beyond that. That would be a fair answer, I would think.

MR. MARKS: Well, I don't -- 60 days out I don't know in a case who I'm going to call, necessarily how I'm going to defend the case. I think this is terribly unfair. Now, if you want at some point in time to require a party to identify witnesses who are

going to actually testify, I think it needs to be down the line.

JUSTICE CORNELIUS: I do, too.

MR. SUSMAN: David.

MR. PERRY: As I understand the intent of the rule -- and I'm not sure that it's drafted this way, but as I understand the intent of it when we initially answer the discovery we would be required to say who it is that at that time we expect that we would call at trial, but we would have the right as the case proceeds to supplement and add more people or to take people off as developments might occur until the time that discovery would close. Is that basically what we have contemplated here?

CHAIRMAN SOULES: Yes.

MR. SUSMAN: Yes.

MR. PERRY: So that a person theoretically could answer at the very beginning, "I don't have anybody in mind that I expect to call at trial." You might end up in the situation that we have now with regard to experts where the trial court would say, "Well, I'm going to require that you make up

your mind by a certain date" and set a deadline.

MR. SUSMAN: And if I were in Judge Brister's court I would probably be ordered to do so, and if I were in Judge Cornelius' court I probably would not be ordered to do so. I mean, there is a lot going to differ from the judge's viewpoint, but it is a opportunity to get before a court and say, look, whoever drafted these rules thought that it's time that lawyers make up their mind earlier and not hide the ball.

And I mean, this would be my pitch to the judge. Now, they might listen or might not. Make up their mind earlier, not hide the ball, tell me in good faith who they now think they are going to call as witnesses. They have got to have some idea or they are guilty of malpractice, and so I can go out and depose these people, and if they have haven't made up their mind, then maybe, judge, you ought to modify the discovery window and some of these other rules so I don't have to waste my time deposing unnecessary people. Maybe the window ought to run from the time he does make up his

mind. My time, my 50 hours, ought to run from the time that Mr. Marks does make up his mind, or whoever would be on the other side. Yes?

HONORABLE F. SCOTT MCCOWN: In many cases you won't even have to ask the judge to do that because if you look at Rule 5 on page 10 supplementation is supposed to be 30 days before trial. So you can supplement really without any problem at all, all the way up to 30 days before trial if you supplement after the discovery period is completed. So the discovery period is over. You supplement by putting new people you expect to call as witnesses. The opposing party can re-open discovery and is automatically given five hours of additional deposition time, and so I think that in most cases changing that list toward the end is going to be automatically handled, and you won't even have to see the court.

MR. SUSMAN: All right. Let me ask for then a vote on (d). If it's real close, we will come back and continue discussion. If it's not, we will move on. All in favor of (d) as written raise your

right hand. All opposed? All right. We need a count. There are opposed how many?

CHAIRMAN SOULES: Five.

MS. DUDERSTADT: Five.

MR. SUSMAN: All in favor raise your right hand.

CHAIRMAN SOULES: 12.

MS. DUDERSTADT: 13.

CHAIRMAN SOULES: 13. 13 in favor for --

MR. MARKS: Maybe if I didn't say anything the vote would be higher.

MR. LOW: Steve, don't you think that -- I mean, that's been one of the problems. Lawyers just putting it off and putting it off, and the way to save money is to focus attention early and mean it, but have some loophole for people that are acting in good faith, and if we don't have some system like that, we are not going to be changing anything.

MR. MARKS: Well, this one is going to be abused. I guarantee it. This will be abused.

MR. SUSMAN: All right. We

will move on then. I mean, I think that's a pretty good indication.

Next is experts. Experts, is there any problem with experts? That's no change basically. All in favor of (e) raise your right hand. All opposed? (E) passes.

(F), all in favor of (f) subject to Dorsaneo's providing some language to Alex, noncontroversial language, which will put similar limitations on settlement agreements that now occur for insurance agreements. All in favor of (f) raise your right hand. All opposed to (f)?

MR. LATTING: This is no change; is that right?

MR. LOW: No. On the settlement agreement.

MR. SUSMAN: No change.

MR. LOW: Yeah.

MR. SUSMAN: Now we are in (g) in witness statements. We will continue the discussion here on witness statements. Anyone else? David Perry on witness statements, and the question here is should they be -- if a witness statement has been made -- now keep in

mind, John, that by witness statement we are not talking about you going out and interviewing someone and putting notes and writing a memo to your file. We are talking about a statement which the witness adopts or signs.

MR. MARKS: But you have another provision in here, don't you, for getting that?

MR. SUSMAN: What? No, sir.

MR. MARKS: Yes, you do. I mean, you don't say he can get your notes, but he can get everything in your notes.

MR. SUSMAN: Let's not get to that right now. Okay. I want to limit this discussion to that statement because it by terms is limited.

MR. MARKS: Well, I know, but I think we need to talk about that in context with this because --

MR. KELTNER: I can talk about it with you.

MR. MARKS: Okay.

MR. SUSMAN: I mean -- David, yes.

MR. PERRY: The thinking out of the task force on this provision is that as a practical matter 90 to 95 percent of the witness statements that are taken today end up being discovered, and anybody who knows what they are doing knows before they take the witness statement that it is almost always going to be discoverable. It's just that in order to get it you have to go around and touch a lot of bases, and the thought out of the task force was that there is an undue amount of time and trouble and effort and money and transaction costs involved in touching all of those bases and that it would be much better to amend the rule to bring it in conformity with current practice, which is that as a practical matter you are going to be able to get the witness statement. So we ought to say that up front, make sure everybody knows up front they are going to be discoverable and cut out the transaction cost.

MR. SUSMAN: Other comments? Okay. Let's do a vote on this and see where we stand. All in favor of (g) as written raise your right hand. All opposed? Let's

see if we get some negatives and see if we have got to count. Okay. We have got how many negatives? One negative.

CHAIRMAN SOULES: Wait. I don't think that's a fair record vote. There has been zero discussion on this. That may be a straw vote, but I don't think there should be any record vote until the discussion has been taken, and Marks has got something to say about it over here.

MR. SUSMAN: I'm sorry. I thought they -- I'm sorry. Was there more discussion of this then? Let's continue with the discussion. I had asked for this.

MR. MARKS: Well, 20 to 1 makes it a little --

MR. LOW: I didn't vote because I haven't heard -- I want some answers to some things.

MR. MARKS: Well, I guess we need to ask the questions then, Buddy.

HONORABLE F. SCOTT MCCOWN: Let me give an example of why I am in favor of this rule. There was an entire apartment complex that burned down in Austin, and the

insurance company sent its lawyers out the day of the fire. So they retained and sent out counsel the day of the fire. Counsel conducted all of the interviews on-site that day, and the next day, the next day. No insurance investigators, strictly counsel. There was something like 200 interviews.

Well, the complex was burned to the ground. So all of those people now disperse heaven knows where, and you have got all of these interviews made at the time. Now -- and so the defense argued what John's arguing. Hey, we were out there. Here is the last known address of these people. You go interview them.

Well, there is not really any work product here. I mean, it's just the lawyers asking what happened and the people saying what happened. I mean, you really have to stretch pretty hard to find much work product in there. They are at the time. They are all there. The cost to the plaintiff of gathering that stuff up, even if it was possible, would be astronomical, and you know, I guess our thinking is the truth of the matter is there

is not a lot of work product in these witness statements regardless of what lawyers tell you, and it's just cheaper and fairer for everybody to have what the witnesses have said.

PROFESSOR ALBRIGHT: And but, Scott, what you were talking about, where lawyers' notes were interviews, right?

HONORABLE F. SCOTT MCCOWN: No.

PROFESSOR ALBRIGHT: Oh, these were statements?

HONORABLE F. SCOTT MCCOWN: These were statements.

PROFESSOR ALBRIGHT: Okay. Because it is very different. Lawyers' notes from an interview are very different from a statement. Now, we are not talking about lawyers' notes.

HONORABLE F. SCOTT MCCOWN: These are at the scene statements.

MR. SUSMAN: Yeah. Keep clear here that we are talking right now about something that the witness signs or writes, you know, or dictates or writes a letter saying that's got it. That's it. An

affidavit, a witness affidavit. Bill.

PROFESSOR DORSANEO: I just wanted to make the point that I have a different attitude about a statement that purports to be the witness' statement than I do about notes of counsel with respect to the same interview.

MR. SUSMAN: That's what we are talking about.

HONORABLE SCOTT BRISTER: Or even Q&A because the Q&A attorney, you know, "Did you see" --

PROFESSOR DORSANEO: Yes.

HONORABLE SCOTT BRISTER: -- "blue smoke?" Well, now why is the defense attorney asking that? Because he knows something about his construction that's in attorney-client that says look for blue smoke.

You know, if the witness in their recital, which as I read this is what we are talking about, mentioned blue smoke, that's their business; but if the attorney asks blue smoke then you are starting all these attorney-client things it seems to me.

MR. SUSMAN: I'm not sure if

you would cut it that -- my view is that if you had a transcript. If I went out with a court reporter and interviewed a witness, and the witness signed it under oath that would be a witness statement even though it does have my questions like a deposition does.

HONORABLE SCOTT BRISTER: Okay. I would have a problem with that.

PROFESSOR DORSANEO: I would as well.

HONORABLE SCOTT BRISTER: As you just stated because the attorney from the apartment complex, insurer, whoever, is disclosing matters -- may well be disclosing matters by the type of questions you ask. Certainly strategy, probably work product, frequently attorney-client matters, and if that's so, I would not consider a question and responses to certain matters to be a substantive verbatim recital of a statement. If so, you need to make that clear because I did not read that, this as saying that.

MR. MARKS: Well, it's in there, Judge. Because it says "any recording contemporaneously adopted."

MR. SUSMAN: Ann.

HONORABLE ANN COCHRAN: I would agree with Scott that it -- I would disagree with him in that I think that kind of statement needs to be included as a witness statement. I would agree with Scott that it needs to be clarified to say that, and I think that there is a vast difference between deciding -- announcing after the statement has been taken that, a-ha, you know, maybe you thought you were being able to protect that, but you're not.

If lawyers know and it's very clear here that lawyers are no longer going to be allowed to quote just factual gatherings under some sort of attorney work product privilege, that no matter who takes the statement and no matter how the statement is taken it's going to be discoverable then it's not -- then it's on the -- the burden is on the lawyer to be careful not to disclose any secret work product in the way the questions are phrased. So I think it's important to make it clear that that's what we are doing so that lawyers don't --

MR. MARKS: That creates work, Judge.

MR. SUSMAN: Buddy.

MR. LOW: I think that you have raised a good point. The Supreme Court held that pictures aren't -- you don't change those. You don't formulate, but your questions you do, and I just have some problem with saying that David -- and he's got the case. He can come out there, and he does all the work questioning all of these witnesses, and all I have got to do is just sit back and say, "Okay. Give it to me, and then I will try to supplement it a little bit." I have trouble with that if David does it because if that's not work product, my work, I do no more important work than that, and if that's not work product, I don't have any.

MR. SUSMAN: Alex.

PROFESSOR ALBRIGHT: Again, remember we are talking about statements. We are not going to get into every single time you are out questioning witnesses. If you are asking questions of a witness and you get the witness -- you know, you get the witness to

write down a bunch of stuff, the witness doesn't sign it, you don't have to disclose it under here.

MR. MARKS: Well, now --

PROFESSOR ALBRIGHT: Let me finish, please.

MR. MARKS: Okay.

PROFESSOR ALBRIGHT: Okay. And then, you know, so the reason you take statements from somebody is because you're afraid they are going to fudge on you when they are up on the stand, and you are going to use the statement to impeach them. That's when you take statements, and so if you don't take -- if you are worried about what you might disclose about the blue smoke, well, if this is a third party witness, you better not be talking to them because I can take their deposition, and I can say, "What did Mr. Brister ask you?" And he has to tell me.

But if -- it's different if you're taking -- if you're talking under the current law, if you're taking a statement of your employee. Okay. Under current law that is -- you know, we could say that's a party

communication. I think at one time we were talking about that that witness statement would be a party communication, and so we would continue the privilege on that. Then, you know, there is an issue about whether you want to protect witness statements, only attorney-client witness statements, or attorney-client and party communication witness statements.

So you can take the others -- the next step to say you don't have a separate witness statement privilege, but you can protect the party communications one, which would be statements that you take of your employees, representatives, agents, et cetera; but again, you have got to realize that, you know, it's only the statements that you get them to sign or contemporaneously adopt and then -- and it's just I don't think -- and with third parties you are going to be able to ask them what you asked them anyway. I just don't see that it's that big a deal.

MR. SUSMAN: I mean, I do -- I mean, I see the argument between, I mean, either not giving them at all or giving them

because -- and one is you punish the lazy lawyer or you reward the energetic lawyer is basically what we are talking about for doing a good job of getting out there and getting them.

When you try to distinguish between the types of witness statements, between a transcript and an affidavit, I personally think as much of the lawyer's mental process goes into how he crafts an affidavit for the guy to sign as if you went out there with a tape recorder and asked questions and he responded, or a court reporter. I mean, as much as you are -- I mean, so if the fear is that this is lawyer's thought process going into it just like it is at a deposition or a trial or anywhere, I mean, I think as much goes into the affidavit or statement because it's going to be written by the lawyer usually. I mean, no witness is going to have a word processer out there and write his own statement. A lawyer writes it, and says, "Will you read it, and will you sign it?"

So I almost think that that is not a good distinction, and it's a distinction that's so

easy to avoid by simply how we get witness statements. In either case you have something that you can impeach the witness with. Now, a file memo that I have written to my own file, my own memo of what the witness told me, that I haven't had the guts to ask the witness to sign because, A, maybe I don't want it discoverable, maybe I'm afraid the witness is not going to sign it, but I can't impeach the witness with that either at trial. So it seems to me what we are talking about here is -- I mean, the way it was written was supposed to cover things that you can impeach the witness with, a statement that he signed or a transcript. Now, maybe it's not clear.

MR. YELENOSKY: Then say that.

MR. SUSMAN: But what I think we ought to do on this one, on the voting at least, is divide it up. We have now identified two types of witness statements, one an affidavit and one a Q&A. Put aside totally the lawyer's memorandum or the lawyer's notes, which is not covered here. Now, let's take a straw vote and see how many -- okay. Go ahead, Steve.

MR. YELENOSKY: Well, could you phrase it in that fashion that if a witness statement is something that would be admissible for purposes of impeachment?

MR. SUSMAN: Yeah. I could. But I was going to --

MR. YELENOSKY: I mean, that wouldn't --

MR. SUSMAN: I think both of those would be.

MR. LATTING: Let's not get into that. Let's not get into that.

MR. SUSMAN: No. What I'm saying is both types that I have identified would be, I think, and there seems to be some feeling in the group that there is a distinction between the two, and maybe we ought to vote on it that way. Scott.

HONORABLE F. SCOTT MCCOWN: Well, I look at witness statements in camera, and I hear lawyers make work product arguments, but I never hear lawyers really connect up in any way what that secret work product is that they are trying to protect. I just don't see that the work product that we

are worried about here really much exists, that there really is a critical secret work product that exists.

Instead I see a privilege, work product, that we are using to shield something else, which is advantage because I have got facts, information that you don't have, and it's also not that one lawyer is lazy and one lawyer is working hard, and therefore, you know, the lazy lawyer ought to be punished. It's not the lazy lawyer. It's the well-placed lawyer. It's the lawyer defending the client who happened to be at the scene; whereas the plaintiff's lawyer wasn't at the scene because his client was in the hospital all burned up, and I sure don't want to make a distinction between Q&A and non-Q&A because Q&A is, "What happened? What happened next? What happened then?" I mean, I suppose just asking a guy, "What happened" is Q&A. I mean, that is slicing it so thin that you will just be arguing about whether it's Q&A or not Q&A.

MR. SUSMAN: Next, David Perry.

MR. PERRY: Let me just make the point that the definition of witness

statement that is set out here is the present definition out of the present rules. A witness statement as defined here is currently discoverable because the witness themself is entitled to a copy of it, and as a practical matter the other lawyer is always, on at least 90 percent of the cases, 95 percent of the cases, going to be able to get the witness to request a copy of the statement which the lawyer is then going to get. It's just that you have to go to a lot of trouble to do it, and you do have situations, as Judge Cochran mentioned, where somebody may take a statement without realizing that the other side is eventually going to get it, and our thought is it makes it a lot simpler to cut out the transaction costs, say up front that you are going to be able to get the statement.

MR. SUSMAN: David Peoples.

HONORABLE DAVID PEOPLES: Scott McCown mentioned the apartment complex, but the rules already take care of that, substantial need and so forth.

MR. MARKS: That's right.

HONORABLE F. SCOTT MCCOWN:

Substantial need, you have got to prove it. It's a court fight. It's expensive to prove it, and you know, it can be a tough burden.

HONORABLE DAVID PEOPLES: I just don't think it's really pricket to try to write this rule on the basis of an extreme example that is already provided for in the rules. Now, point two, it seems to me if we pass this then what will happen in the apartment complex case is that the adjuster or the lawyer who gets out there the next day and wants to keep it from being discoverable will just not have people sign.

MR. KELTNER: Which is what happens now.

HONORABLE DAVID PEOPLES: Which means you can't impeach with it, but they probably would protect it that way, wouldn't they?

MR. SUSMAN: David.

MR. KELTNER: I think so. I think one of the problems is we are not writing on a blank slate here, and I think there are a lot of things that are discoverable by the common law that people

don't realize. Lead Oil & Gas Vs. McCorkle, the attorney's notes that are neutral recitations of fact are discoverable, and that was just recent, and Natural Tank Vs. Brothers is sited with approval by this Supreme Court. In the Benales case, Southern County Vs. Benales, same thing in which an interview for a witness practice session in depositions could be discoverable if it attempted to in any way influence how somebody said something.

Now, I might disagree with those and, in fact, do. I think they are wrongly decided, but the truth of the matter is they are there. So a lot of these things we are even talking about protecting the courts have already said you can't protect. I worry about that, but that's where the statement law currently is.

On witness statements the truth of the matter is what innovative lawyers do is go out, look, take a witness statement, same true for investigators, don't have the person sign it or don't have a contemporaneous approval because the real truth of the matter is you are just going to ask at trial, "Did you tell Mr. Smith X? That's not what you said out at

the scene the day after the accident." So the truth of the matter now is they are being written and taken in a way that they are not going to be discoverable.

That is something you can continue to do under the rules. Very few are now taken where the witness actually signs because what happens is once it pops up in deposition -- and all of these people are going to have to be noted as persons with knowledge of relevant facts. Everybody admits that. So they are going to be discoverable anyway. So then when that is the lawyer does one of two things. Says, "Mr. Witness, wouldn't you like to see your statement?"

"Yes." Okay. Show them the statement. "Now, Mr. So-and-so, you have looked at it to refresh your recollection. Give it to me."

MR. SUSMAN: Buddy Low.

MR. LOW: Steve, let me say I'm ready to just let it all hang out, just be free. I think that's probably the way I've changed my mind, but I think it's wrong to say that you do it only for impeachment. I do it so that the witness will say, "Well, what did

I tell you? I don't remember now." Not necessarily to impeach him. "Well, did I sign that?"

"Yeah." So I think there is another reason for taking a statement, but I'm ready to just --

MR. SUSMAN: All right. Are we ready to vote? Let's see if we can vote now because, I mean -- if anyone has got something new to say, raise your hand, and you will be recognized.

HONORABLE SCOTT BRISTER: I don't know how to vote on this as it's currently written because it is not -- as I understand it, it is not contemporaneously adopted if you do a Q&A with a tape recorder, but it could be admissible to impeach somebody. In other words, we have got different impressions about what this does and what it doesn't cover and, you know, are we wanting to use everything that can be used to impeach? If you want to do it, well, then this rule doesn't do it.

MR. LATTING: Why do we need the "contemporaneously" adverb there? Does

that really help us? Can't we just take that out and cover that problem?

MR. PERRY: I think there is a lot of case law, and I think you have got to read what it says. You start out that a witness statement is a written statement signed or otherwise adopted or approved. That's point one. Then you go to stenographic, mechanical, electrical, or other type of recording.

HONORABLE F. SCOTT MCCOWN: That's point two.

MR. PERRY: That's point two. Then you go to a transcription which -- or a transcription which is a substantially verbatim recital of a statement. This would be where you take the Q&A and the court reporter then transcribes it.

MR. LATTING: Okay. All right. I'm clear.

MR. PERRY: And the guy signs it.

HONORABLE SCOTT BRISTER: No. That's an incorrect construction of this language. You would have to have another "or"

in front of "electrical" for that to be correct.

HONORABLE ANN COCHRAN: I think that's right.

HONORABLE SCOTT BRISTER: This has two things: one, written statements; two, stenographic, electrical, or transcriptions of stenographic or electrical. That's what this says, and those have to be contemporaneously adopted, and the Q&A on my tape recorder is not contemporaneously adopted and perfectly admissible as impeachment.

HONORABLE ANN COCHRAN: A lot of times it is contemporaneously adopted because in every recorded statement I have ever seen an insurance adjuster -- the last question is always, "Now, everything you have told me, you know, is the truth?" I mean, that's the --

MR. SUSMAN: Wait a second. Let me see what, Scott, the reading -- I think the notion would be a tape recording -- if I take a tape recorder and interview a witness, that is a witness statement within this definition.

HONORABLE SCOTT BRISTER: I would think it ought to be because certainly you can use it to impeach them.

MR. SUSMAN: Well, why isn't it a type of recording?

HONORABLE SCOTT BRISTER: It is, but it's not contemporaneoulsy adopted.

MR. SUSMAN: But the contemporaneously adopted only --

HONORABLE SCOTT BRISTER: Not grammatically the way this is written.

MR. SUSMAN: It's intended to modify only transcription.

HONORABLE SCOTT BRISTER: You need to change it then.

HONORABLE SARAH DUNCAN: You need to change some commas.

MR. SUSMAN: Where do we change it? How do you change it?

HONORABLE F. SCOTT MCCOWN: We need to say, "witness statements means (1)..."

MR. SUSMAN: Good.

HONORABLE F. SCOTT MCCOWN: "A written statement signed or otherwise adopted or approved by the person making it, or (2), a

stenographic, mechanical, electrical, or other type of recording, or (3), any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously adopted."

MR. SUSMAN: Well, now, as modified can we vote on (g)? Bill.

PROFESSOR DORSANEO: Well, I don't think you needed to do all of that with the language because of what it says at the beginning, but let me just tell you where this definition came from and why it's in the rules right now. I think it will be a little bit helpful. It doesn't have anything to do with what we are talking about now. This particular definition was taken from the companion federal rule that talked about a person getting his or her own statement. It was moved over into 166(b) by me because that seemed sensible to provide a definition of a witness statement when we were talking about witness statements.

If you would look in our case law, Allen Vs. Humphreys, for example, whenever we talk about the definition of a witness statement we

talk about the question of timing and anticipation of litigation, and this definition has just been kind of hanging around over here in this other context for all of this time. Now, I think it's a very important issue as to whether it's signed or adopted contemporaneously if we are going to be talking about this trial preparation privilege question, but notwithstanding the fact this has been in the rule for some time, it hasn't been in there and it wasn't crafted by anyone with this debate in mind. Okay.

MR. SUSMAN: Now, are we ready to vote? All in favor of (g) as written with the (1), (2), and (3) inserted raise your right hand. Let's see what we have with the opposition.

CHAIRMAN SOULES: You are going to have opposition.

MR. SUSMAN: Oh, you're right.

MS. DUDERSTADT: 16.

CHAIRMAN SOULES: 16 in favor.

MR. SUSMAN: All opposed?

CHAIRMAN SOULES: Two.

MR. SUSMAN: Two. Now, we turn

to rule --

HONORABLE DAVID PEOPLES: Let me -- could we put a sentence in this rule that says notes of interviews and so forth that are not adopted by the interviewee are not discoverable under this provision?

MR. SUSMAN: You mean just say negatively?

HONORABLE DAVID PEOPLES: I mean, when it's not signed, and it's not adopted. It's not a Q&A. It's just a lawyer or somebody went out and took some notes, and you know, that's not very effective for impeachment, and I think our intent is it's not covered by this. At least I think that --

MR. SUSMAN: I think that's our intent, but do you want a comment?

HONORABLE DAVID PEOPLES: No. A sentence that just makes it clear. I think a lot of judges are going to see this and think that kind of stuff is discoverable. Even though it's technically not signed and so forth, they will think that's a statement.

MR. SUSMAN: Scott.

HONORABLE F. SCOTT MCCOWN:

Well, I guess because I disagree with David Keltner if you've got a completely neutral recital that's a note that has no work product, no attorney-client privileges, I think it ought to be discoverable. I mean, I think that is the present law, and I think --

HONORABLE SCOTT BRISTER: It's too much work.

HONORABLE F. SCOTT MCCOWN: The judge can look at that in camera, and you can make that --

HONORABLE SCOTT BRISTER: And that's all the judge will do.

MR. SUSMAN: No, no, no, no, no. Please, you-all, let's not debate here that issue. Here the question is we have defined a witness statement and now David Peoples has suggested we put in --

HONORABLE DAVID PEOPLES: And I will tell you why I am doing it, Steve. Because the representation was made this does not cover notes, et cetera, that are not adopted by the witness.

MR. SUSMAN: Absolutely.

MR. LATTING: Let's state that.

I'm for stating that.

HONORABLE DAVID PEOPLES: What's wrong with saying that?

HONORABLE F. SCOTT MCCOWN: Because this doesn't cover it, but you are trying to add a sentence that would make it cover it by saying they are not discoverable.

MR. LATTING: No. It's not discoverable here.

HONORABLE DAVID PEOPLES: No. I wouldn't say it's not considered a witness statement. I mean, the fact that a witness said a bunch of stuff and the lawyer or somebody else wrote it down, and it's not signed, and therefore, it's not very effective as impeachment.

MR. SUSMAN: Buddy.

MR. LOW: When you start listing something that's not discoverable, then you are limiting that. I mean, the judge says, "Well, if that were included in that category, then it ought to be listed." So you get -- you have a problem.

MR. SUSMAN: Why can't we satisfy people by putting a comment saying

that here that lawyers' notes, a lawyer interview, a lawyer's memo to the file which is not signed by the witness or adopted by the witness is not a witness statement for these purposes. Why wouldn't that do it?

HONORABLE ANN COCHRAN: Well, I think we would need to be a lot more precise because in that second -- the last half of what you said you would have to say that if the -- you know, I mean if it is a -- if the lawyer's piece of paper is a substantially verbatim recital of a statement made by the person and contemporaneously adopted then it is discoverable even if that is in the lawyer's own handwriting. I mean so --

HONORABLE DAVID PEOPLES: How is it contemporaneously adopted?

HONORABLE ANN COCHRAN: Well, I don't know, but there are many ways it could be, but if it was, I mean, I don't want something that's written rephrasing No. 3 here that would somehow mean that certain things that otherwise fell under No. 3 we are going to say is not a statement. If it's just going to be purely an inferential rebuttal, you

know, then it needs to verbatim restate the converse and not get into something where all of the sudden we have created an exception to (3).

MR. SUSMAN: I agree. I mean, the danger -- I mean, obviously we have tried in these rules not to put inferential rebuttals in because it's just a further drafting problem, to say one thing and then to go say the negative is a problem, but if people feel strongly about it I think the place to do it is in a comment, and it should be simply a mirror reverse image of what we have already said. I agree. Bill.

PROFESSOR DORSANEO: I think the current rule says that a photograph is not a witness statement.

PROFESSOR ALBRIGHT: It says is not a party communication.

PROFESSOR DORSANEO: Well, I think there is also something in the witness statement, too, isn't there?

MR. SUSMAN: David Perry.

MR. PERRY: I would like to agree with Judge Peoples that I think it would

be desirable to make clear that this change in the rule is not carried beyond where the committee intends for it to go, and it seems to me that a sentence could be put in here that would read along the lines of saying an investigative memorandum not meeting the requirements of a, quote, "statement," close quote, is not discoverable under this rule.

HONORABLE DAVID PEOPLES: You know, it bears repeating. There are judges all across the state that don't do personal injury litigation 100 percent of the time, that do a criminal case today and then family law and then they will take a bunch of pleas and a bunch of prove-ups and so forth, and they may get a case like this once every three or four months, and we need to lay it out in black and white for them and for everybody else. We really do.

MR. SUSMAN: Bill.

PROFESSOR DORSANEO: To go back to what I said, the reason why it says in the current rule that a photograph is not a statement is to make the photograph discoverable. Now, I agree with David Peoples

if we are going to have the standard be that attorneys' notes with respect to this interview of a witness are not discoverable, that it ought to say that. It wouldn't be hard to say it, and maybe we need to confront that issue.

My own view would be that I don't care if it's a neutral recitation of the facts. I would have a bright line test to say that if it's notes, period, it's not discoverable, and that would be easier for everybody, and I wouldn't have to worry about whether Scott McCown is being influenced by what the damn thing says, okay, as to whether or not it's discoverable. Because I know when I have been in a similar position as a master or a rent-a-judge I am very influenced by what it says, and there is room to decide whether it's strictly factual or not. So...

MR. MEADOWS: Steve, I want to get something clear.

MR. SUSMAN: Go ahead, Bob.

MR. MEADOWS: If I find a witness, a non-party witness, interview him for an hour on important findings, and I take

notes, and I finish with my interview, and I go back through a few things to make sure I have got some of the witnesses' names correct, the dates correct, and I ask the witness, "Now, have I got it right?" And he says, "Yes." Is that a witness statement?

HONORABLE F. SCOTT MCCOWN: Yeah.

MR. MEADOWS: Then I would like to have --

MR. PERRY: Did you record it?

MR. MEADOWS: No. I just took notes for an hour and then I walked back through some of the high points, and I said to the witness, "Do I have that right?" And he says, "Yeah. You have got it all right." I think what Scott's saying is that is a witness statement because it's been adopted.

MR. PERRY: No.

MR. SUSMAN: Bobby, I would think in that case when the discovery request comes in to you you have got to make the decision. If I don't turn this over, okay, I can't confront this witness during his deposition or at trial and say, "Mr. Jones,

when I talked to you over the phone don't you recall, sir, that I read you this, and you said it was right, and you adopted it?" And then I would say, "Well, Bobby, how come you haven't given me that in discovery?"

I think you would probably make the election not to call it a witness statement when my request came in for it because -- and I think you couldn't play a game there. I mean, I think some judge would be very mad at you if you wouldn't turn it over to me and then later at trial or discovery tried to impeach this witness by claiming that he adopted this memo.

MR. MARKS: Steve, why couldn't we -- I'm not for this, but as long as it's here what about "adopted in writing"? In other words, you have to sign it or something.

PROFESSOR DORSANEO: Expressly adopted.

MR. MARKS: Yeah. Expressly adopted. So that it is documented on the document itself that it's been adopted.

MR. LOW: The problem with that is that you can get him to stick this note in

the billfold and say, "You know, I looked this over," and my two pieces of paper, he hasn't signed that when he signed something else.

MR. SUSMAN: Scott.

HONORABLE F. SCOTT MCCOWN: We have a drafting problem that Bobby just identified. If you look at what we are calling clause (3) it says "any transcription thereof," and I think, what's that "thereof" referred to? If the "thereof" refers to a recording then what Bobby said doesn't fall within the rule. If the "thereof" refers to the statement then what Bobby said would fall within the rule. So it's not -- I think it's not clear. I'm not sure what the answer to Bobby's question is because I'm not sure what the "thereof" refers to.

MR. PERRY: I think it refers to the recording.

PROFESSOR DORSANEO: Recording in English.

HONORABLE F. SCOTT MCCOWN: If it refers to the recording then what Bobby said would not be covered by this rule.

MR. MEADOWS: And that would be

fine with me.

MR. MARKS: Well, wait a minute. You have got three tiers here. You have got three different things.

HONORABLE SCOTT BRISTER: The argument could be made that handwritten is a stenographic, holographic recording of a witnesses statement. That is not going to mean -- I agree with the result, but that's not going to mean that they are not going to have --

HONORABLE F. SCOTT MCCOWN: Okay. Well, let's take the "thereof" out and just put whatever noun that "thereof" is referring to.

MR. MEADOWS: But, you know, it seems to me that the threshold issue is whether or not this group thinks what I have just described is a witness statement, whether you ought to be able to get it, because I think you should not.

MR. LATTING: I don't think it is a witness statement.

HONORABLE SCOTT BRISTER: I think Steve's right. It may be depending on

how you choose -- whether you choose to use it or not.

MR. SUSMAN: But I think I was probably wrong under this rule. I think under the way it's drafted I probably couldn't get it regardless of how he chooses to use it, the way that the rule is drafted.

HONORABLE SCOTT BRISTER: That's right.

MR. SUSMAN: If the "thereof" refers to recording.

HONORABLE F. SCOTT MCCOWN: Well, does it refer -- but is it a recording, stenographic?

MR. SUSMAN: If the "thereof" refers to the recording, I can't get what Bobby talked about.

HONORABLE F. SCOTT MCCOWN: His doing it is a recording.

HONORABLE SCOTT BRISTER: Yeah.

HONORABLE F. SCOTT MCCOWN: I mean, what's stenographic? What's pen and paper? Mechanical.

MR. PERRY: Now, wait a minute. You-all are taking words out of context that

the transcription --

HONORABLE F. SCOTT MCCOWN: That's because we're lawyers.

MR. PERRY: The transcription talks about a substantially verbatim recital that is contemporaneously adopted. Now, if Bobby has sat there, and he has taken it down in shorthand in a substantially verbatim recital, and he has read it back to the person, and he has had them sign it, then it's a recording. I didn't understand Bobby to say he had done that. I understand Bobby to say that he had his notes, and he asked the guy "Is this right," and the guy said, "Yes," and Bobby put it in his pocket and left.

Now, the definition of a statement has been around for a long time, and we all basically know that you take a statement so that you can tie the guy down and make sure he doesn't change his story, and you take your own personal memoranda about stuff that you hope he does change his story on, and I think we all know that your own investigative memoranda is not intended to be discoverable but that the facts contained in it may be

discoverable through some other mechanism, and I think we are making this a whole lot more difficult than it really is.

MR. SUSMAN: Luke.

CHAIRMAN SOULES: Don't we really just have two categories here? And I'm trying to pick up on the debate. "Witness statement means, (1), a written statement signed or otherwise adopted or approved by the person making it, or (2)" -- and this is the only additional one I think that modifies it in the wrong place -- a stenographic, mechanical, electrical, or other type of recording. After that we ought to pick up "which is a substantially verbatim recital of a statement made by the person and contemporaneously adopted or any transcription thereof," which is a transcription of the stenographic, mechanical, electrical or other type of recording which is a substantially verbatim recital of the statement made by a person and contemporaneously adopted. That's what we mean.

MR. LATTING: Yes. That's right.

PROFESSOR ALBRIGHT: Uh-huh.

CHAIRMAN SOULES: And then I think we should follow that with a witness statement does not mean attorneys' notes, witness interviews not signed or otherwise adopted by the person interviewed.

MR. LATTING: Can we have a motion for that? Are you making that as a motion? I would like for you to.

CHAIRMAN SOULES: Well, if it has any reception I will.

MR. LATTING: I would second that motion.

MR. SUSMAN: Let's hear it.

CHAIRMAN SOULES: Okay. Here's what I -- I move that (g) be modified to read as follows: "(g), witness statements. A witness statement regardless of when made is discoverable except as provided by Rule 4. A 'witness statement' means: (1), a written statement signed or otherwise adopted or approved by the person making it, or (2), a stenographic, mechanical, electrical, or other type of recording which is a substantially verbatim recital of a statement made by the

person and contemporaneously adopted or any transcription thereof; but does not mean attorneys' notes of witness interviews not signed or otherwise adopted by the person interviewed."

HONORABLE DAVID PEOPLES: I want to ask, why wouldn't the investigator, the insurance adjuster or David Perry's investigator, also apply? Why would it have to be an attorney? I mean, we talk about cutting down on legal fees. We ought to let the attorney's agent go out there and investigate, too.

MR. MARKS: What if I hire a stenographer?

HONORABLE DAVID PEOPLES: I mean, if we make it attorneys then attorneys are going to do their own work, and that's more expensive.

MR. PERRY: I would say "attorney or investigator."

MR. SUSMAN: Judge.

HONORABLE C. A. GUITTARD: Just a matter of wording, what is it that's adopted? Is it the recording, or is it the

transcription that's adopted? It seems like to me if it's a recording there is no point in saying it's a substantially verbatim recital. What we are saying is, I think, that the transcription is a substantially verbatim recital. So that it should read "or stenographic, mechanical, or electric or other type of recording or any transcription of such recording that is a substantial verbatim recital and contemporaneously adopted."

MR. SUSMAN: Bobby, the subcommittee is going to appoint you, Bobby, to redraft this one.

MR. MEADOWS: I will work with Alex.

MR. SUSMAN: Well, you can work with Alex but you have -- I mean, talk to Judge Guittard, get what Luke has, and let's try to see what we can come up with something. I don't want to sit here and draft, which is what we have come down to the level of.

MR. LOW: I would ask Luke, Luke, why did you just stop with "adopted" instead of "or approved" like we used before?

MR. SUSMAN: That's why I don't

want to do this right now. Okay. Because you are just drafting right now.

MR. LOW: I understand, but I want to know if there is a substantive reason.

CHAIRMAN SOULES: Well, there is not a substantive reason. It's just that the way it's drafted right now stops with "adopted" and doesn't say "or approved," but either way that's fine to include that.

MR. LOW: I was just merely asking the question if there was any substantive reason.

CHAIRMAN SOULES: And I think that the last clause should say "does not mean the notes of an attorney or representative of the attorney."

MR. LATTING: Yes. Yes.

CHAIRMAN SOULES: So that basically what we are doing is picking up the universe of people in Rule of Evidence 503.

MR. LATTING: I don't want to draft anything. I just want to ask a question.

CHAIRMAN SOULES: Does that help us? In other words, if we pick up the

503 universe of people that are involved in attorney-client as the class of people who can take the interview and write it down, the unsigned interview, then that's not discoverable. Does that meet your concern, Judge Peoples?

HONORABLE DAVID PEOPLES: I think so. Yeah. Why don't we vote on it, Steve?

MR. LATTING: Yeah. That's what I was going to say. It seems to me that except for these really technical drafting matters we have a sense of the group on this, and I think we have spent so much time on it I would like to get it voted on just before we forget about it.

HONORABLE F. SCOTT MCCOWN: Wait a second. I don't want to say "are not discoverable." But you might want to say --

MR. LATTING: Under this rule.

HONORABLE F. SCOTT MCCOWN: Yeah. It doesn't cover it within the terms of this rule, but as Judge Peoples pointed out, if you have a substantial need to protect the --

MR. SUSMAN: Okay. All in favor of authorizing the subcommittee to draft some language that makes it clear that an attorney's notes or interview or an attorney's agent's notes of an interview that has not been signed or adopted by the witness is not covered, is not a witness statement within this definition? It may be something else, but it's not a witness statement within this definition. All in favor of that? All opposed? It passes unanimously. So, Bobby, you will do that.

MR. MEADOWS: Right.

MR. SUSMAN: And you will get with people who have ideas, and there are a lot of people who have ideas, and you will come up with another draft. Let's move on to Rule 4.

MR. LATTING: Are we not going to take a vote on whether we want this rule to pass with that proviso on it?

MR. SUSMAN: You have already voted that.

MR. LATTING: Oh, we have? Okay. All right.

MR. SUSMAN: We have voted on that already.

CHAIRMAN SOULES: Does everybody agree we have got a vote on that? Okay.

MR. LATTING: Yeah. Sorry.

CHAIRMAN SOULES: Favorable vote on that?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: It was one of these backsliding things. We voted it, and then we went back and discussed it. Okay. Fine. Let's go to Rule 4.

PROFESSOR ALBRIGHT: No, we don't --

MR. SUSMAN: Now, Rule 4(a) I have been instructed is off the table. I mean, in the sense that this was supposed to be something that was going to be debated and discussed by Alex and Richard Orsinger, and that has not taken place, and so do not worry about 4(a). That will not be necessarily the final product. Right, Alex?

PROFESSOR ALBRIGHT: Right. We

will have a new version of the work product rule or party communications, whatever, at the March meeting.

CHAIRMAN SOULES: Good.

MR. SUSMAN: And so that leaves (b), (c), and (d), I think are noncontroversial and don't really represent much of a change of anything.

MR. MARKS: On Rule 4?

MR. SUSMAN: Yes.

MR. MARKS: I think that (d) is controversial.

PROFESSOR ALBRIGHT: It's very controversial.

MR. SUSMAN: What is?

CHAIRMAN SOULES: (D), dog.

MR. SUSMAN: (D). All right. Is there any controversy on (b) and (c)? All in favor of (b) and (c) raise your right hand. (B) and (c) passes. All opposed? (B) and (c) passes. (D), let's discuss (d) then.

PROFESSOR ALBRIGHT: Steve, I think (d) falls into the -- it's part of (a) really, and I think we need to bring all of those in together. This all needs a lot of

redrafting, and I don't think we should get into that now.

MR. SUSMAN: We will not discuss (d). We will not present it to you today.

Rule 5. Rule 5(1), basically nothing new from what you have seen and voted on before. Any discussion on 5(1)? And I don't think there is anything controversial there. All in favor of 5(1) raise your right hand. All opposed? 5(1) passes.

5(2), now, here is where we went back to the drawing board at your instruction. If you will recall, at one time we distinguished between the duty to amend and the duty to supplement, and now at your suggestion we have eliminated that distinction, and we treat subsequently acquired information that you do not have when you originally answered a written discovery request the same as information which you have but erroneously failed to get. They are treated the same now, and in both cases the duty is to amend or supplement reasonably promptly, and that an amendment or supplement filed less than 30

days before the trial is presumptively made without reasonable promptness. There was a lot of discussion between us, among us, on how we ought to do this, and the reason we used "promptly" was the best thing we could come up with.

CHAIRMAN SOULES: You've got one typo there.

MR. SUSMAN: Yeah. "Incomplete or incorrect." Correct.

MR. LATTING: Where is that?

CHAIRMAN SOULES: Third line.

MR. SUSMAN: Third line, the word "incomplete or incorrect when made." Do you have that, Alex?

PROFESSOR ALBRIGHT: Got it. And also on the very last sentence it's "the amendment or supplement should be in writing" instead of just "the supplement."

MR. SUSMAN: Discussion?

MR. HERRING: Questions. "The duty applies if the additional or corrective information has not otherwise been made known to the other parties in discovery or in writing." If I respond to your discovery and

then you take the deposition of a third party, and in that deposition, not my witness, I don't change my discovery responses but the information comes out, arguably I need not amend or supplement? Is that the way it works?

MR. SUSMAN: Correct.

HONORABLE SCOTT BRISTER: Worse than that. I send you two feet of medical records, and in there on one of the bills is a doctor's name that I have not disclosed, but you have been informed in writing because I sent you two feet of medical records, and on one of the bills buried in there is a doctor's name; therefore, I don't need to supplement?

MR. SUSMAN: That's the way it's written.

HONORABLE SCOTT BRISTER: Yeah. I have a problem with that. It needs to be in writing by the attorney. I don't have a problem with the deposition. You heard it. You should be reasonably awake in the deposition. I don't have a problem with a letter I sent to you. You should read your letters. I don't have a problem with

discovery products. You should read discovery products. I do have a problem with document productions because those are frequently massive, and most of the people in this room are not going to read all the way through them.

MR. SUSMAN: Good point. I think we can draft that. We will draft it in a way that captures what you said.

HONORABLE DAVID PEOPLES: It seems to me information contained in those two feet of records you supplemented but the names of potential witnesses, especially experts, that certainly should not suffice. I mean, is there a difference between names of people as opposed to complain to such-and-such or got this and that treatment? I see a difference.

HONORABLE SCOTT BRISTER: Well, but the biggest thing you need to supplement is names of people or --

HONORABLE DAVID PEOPLES: Yeah. Yeah.

HONORABLE SCOTT BRISTER: And that's the thing that messes you up so.

MR. SUSMAN: Scott, would we

solve it if we simply said that that -- the disclosure of people with knowledge of relevant facts or witnesses cannot be provided, except you have got to expressly do that?

MR. MARKS: What about if it's in a deposition as opposed to a record?

MR. SUSMAN: That wouldn't suffice either. I mean, basically I don't have to read all the depositions in a case.

MR. LATTING: Yeah. I think you're right.

MR. SUSMAN: That I didn't attend to make sure that there is some person mentioned.

MR. MARKS: I agree.

MR. SUSMAN: Okay. There is one list that I can look at, that the head lawyer can look at, as the discovery window is closing and go with my group over and say, "Now, who is this," and "what is this person," and "do we care about them," and "what are they going to say" and have them tell me; and I don't have to go through and read every deposition or scan every deposition to get all

names that were mentioned. Paul.

MR. GOLD: If I remember correctly, the intent was when we were drafting this phrase here in discovery or in writing was -- I don't think your situation, Judge, was contemplated. We were talking about if someone had either given a written answer to discovery or in a letter had sent the information. Now, I don't know how to articulate it. I'm sure Scott will come up with something in a minute. Is when we -- it was something that was affirmatively expressed by the attorney in writing as opposed to some name that appeared in mounds of documents, and I think we can draft that because that was the issue. It was if you had provided it either in a formal response or in writing.

MR. SUSMAN: David Perry.

MR. PERRY: I think that the problem with the exception is that it may end up creating a trap for the unwary and creating more litigation and more disputes than it's really worth. The purpose for the exception, as I understand, is that we wanted to avoid needless work. If something has already been

disclosed then you do not need to amend your discovery answers, and I think that that is a laudable purpose, but I'm afraid that as a practical matter what will happen is what Judge Brister has pointed out, that people will start to make their disclosures in other ways, and then when you get to trial and the issue arises, was this disclosed or was it not, it starts to become the issue of who's got the best indexing system and that there are things like the identity -- especially, basically if you have taken the trouble to ask a question about it in written discovery, aren't you entitled to look for the answer at the place where you expect to find the answer?

MR. SUSMAN: Let me point out something also that goes in accordance, and I think you need to consider this at the same time. I believe that when we wrote this first rule also we had not written our exclusionary rule. Now, our exclusionary rule is pretty flexible and forgiving and is based on the theory of surprise. So it would not disturb me too much if we required formal supplementation because obviously one of the

things I'm going to argue if you move to exclude something that I didn't formally supplement is that you couldn't have been surprised because you heard about it. Okay. There is no surprise here. You knew about that. I wrote you a letter, and then the other side is going to say, but yeah, it was hidden in a stack of 45 boxes of documents, and the trial judge is going to have to make that determination. Alex.

PROFESSOR ALBRIGHT: This came from a 1993 federal rule, is where that language came from, and I think you are exactly right. It was kind of belt and suspenders because we weren't sure how the sanction rule was going to play out, and I would not be opposed at all to taking it out under our new sanctions rules.

MR. SUSMAN: Okay. Could I say this? Does anyone object to eliminating that part of the rule? Okay. Luke.

CHAIRMAN SOULES: Well, I think that I've heard Sarah, and I really don't mean to steal her thunder. She's probably got another idea in mind, but I think there are

specific things that this should not apply to. Right now we have got to supplement the whole scope, the whole universe of discovery, even depositions. Except there is one court of appeals case that may make that a question, and I don't think there is.

MR. SUSMAN: This does not require depositions be supplemented. It's written discovery.

CHAIRMAN SOULES: But persons with knowledge of relevant facts, trial witness, experts, and documents, I think should not be subject to this exception, and everything else should be subject to this exception. I think it serves a function, should not be deleted, but it should not permit a lawyer not to give a specific supplement either in writing by letter or by something filed, whatever. Persons with knowledge of relevant facts, trial witnesses, experts, and documents to be used at trial.

MR. LATTING: Luke, let me ask a question. Here is a problem that I foresee in this in just limiting it to that. I've asked interrogatories in, say, an

architectural case, construction case, and I have asked the expert on the other side to tell me what he thought was wrong with this building, and he's given me -- he's answered that under oath. Now, later on several months later I get a letter transmitted. This happens. The lawyer sends it to me and says, "By the way, that witness whose interrogatory answers you have has sent me this letter," and it may or may not constitute a modification to his answers to his interrogatories. Do I have to take his letter and hold it up with his answers to interrogatories to know what his answer under oath is?

See, the problem I have is that I don't know where to go to know what -- what his answers are, and it seems like to me if we have interrogatories, and they are going to be changed so that at the trial if I hold up his interrogatory answers to him, and he says, "Oh, but I wrote you a letter about that or my lawyer sent you a letter about that," it seems to me that we ought to require responses to interrogatories to be changed in interrogatory responses, and the problem that you have

expressed concern about would be taken care of by Steve's observation that there is going to be forgiveness in the --

MR. SUSMAN: Luke.

CHAIRMAN SOULES: Well, I think my response directly to you is that I think if the lawyer writes you a letter and broadens the scope of what the expert is going to testify to, that's enough. It doesn't have to be done by some other means, but here is what I'm trying to get at. I mean, and really I'm talking about the identities of experts and persons with knowledge. That's what the rules say you have to do. Because if I take -- I think if we take an expert's -- you take my expert's deposition, and my expert tells you what he is going to testify to. It's beyond what the interrogatory said, but you have taken his deposition, and you have heard his testimony, that that's enough. When I said experts I don't mean everything they are going to say. I don't think I have to amend my interrogatories so that I can track what my expert gave you in his deposition or be at risk that pieces of his deposition can't be

used. I think that's make work, but --

MR. LATTING: Yeah. I would agree with that. I would agree with that.

CHAIRMAN SOULES: If my expert identifies another expert when he's giving his deposition, and I don't change my interrogatories to tell you I am going to use the one he's mentioned, the testifier mentioned in his testimony, thrn I can't use the expert that the testifier mentioned in his testimony. I have got to tell you that somehow specifically; otherwise, you can say, "Well, that person is not going to be a witness or an expert witness" unless I tell you he's on my trial witness list, he's on my expert witness list, he's on my persons with knowledge of relevant facts.

And also if a document is mentioned somewhere in a deposition and it never surfaces in a document production, I will have to worry about that document unless it's given to me in a supplementation of the documents. I think those are areas that are pretty easy to do. I think most of the Bar is oriented towards making those kinds of supplementations

timely prior to trial, but it's the quagmire of going through all of the discovery and trying to make these interrogatory answers so extensive that you can't get cut off at the pass that we are trying to get away from and the thing that Sarah has talked about several times.

MR. SUSMAN: David.

MR. PERRY: I think that we need to remember that we are modifying the rules about written discovery so that, for example, on experts you're never going to be required under the new rules to give details of their opinions in answer to written discovery so that requiring a formal modification is going to be less onerous than it was before. The old argument that you have to change the interrogatory answers to incorporate the deposition is going to go out the window anyway. I think that if we are going to require that a lawyer write a letter, it's just as easy to formally supplement the discovery as it is to write a letter, but later on down the line when people are looking for the answer the place they are going to

look is in the answer and not in their correspondence file. They are going to look in the answer to interrogatories file. So I would support requiring a formal supplementation on that.

MR. SUSMAN: Scott, and then we are going to vote.

HONORABLE F. SCOTT MCCOWN: Well, I think I agree with Luke that if it happens in a deposition that you ought not then have to do anything to your written discovery, that depositions ought to be supplementations. They are part of the discovery. The lawyers are there. If it happened in a deposition, you ought not then have to narrow it or put it into your interrogatories, but I don't think that the exception the way our subcommittee has it drafted works because I don't think that we can sit here today and think of all of the different ways that information is going to otherwise be made known to you in document production and that if we try to just except out persons with knowledge of relevant facts and a few other things we are going to miss a

lot.

I will give you an example. What about damage calculation? You send an interrogatory that says, "How do you calculate your damages?" The plaintiff writes down an answer. Six months later he sends you a box of documents. You go to trial. He has got a different damage theory and different damage calculations. You say, "It wasn't in the interrogatories." He says, "Hey, it was made known to you in that box of documents, which is underlying business records that if you had read them you would have seen my damages were calculated a whole different way." So I would like to see if we could come up with some language that would do what Luke was suggesting that if it's in a deposition you don't have to do it but wouldn't just say that any other stuff that comes to you in the way of document production can somehow make it known, too.

HONORABLE SCOTT BRISTER: Isn't document production the problem?

HONORABLE F. SCOTT MCCOWN: Yeah.

HONORABLE SCOTT BRISTER: I don't think letters are a problem. I don't think matters on the record at a deposition are problems, but document production is the problem.

MR. SUSMAN: Is that the problem?

HONORABLE F. SCOTT MCCOWN: Yeah.

MR. SUSMAN: All right. Let me suggest, can we get a vote on (2) with the notion that we will expressly except through drafting the document production?

CHAIRMAN SOULES: That doesn't satisfy me, but if that's what the committee wants to do.

MR. SUSMAN: Can we try to get a vote on this? All in favor of (2) with the idea that you can supplement and amend through discovery or in writing but not through document production?

HONORABLE SCOTT BRISTER: Discovery except document production?

MR. SUSMAN: Document production.

HONORABLE DAVID PEOPLES: Before voting I would like to know what Luke would add to it.

MR. MARKS: Yeah. I would, too.

CHAIRMAN SOULES: Well, I don't want Joe to use as an expert witness at trial the person that my testifier or that his testifier mentioned in his testimony as being another expert in the field of toxicology. I have -- I am Joe Schmaltz, and I am an expert in toxicology, and here is my testimony about this case, and besides all that Frank Jones, he's a great man, too, and he knows all about this, and he thinks the same way I do. Now then, Frank Jones has been disclosed as an expert who can testify to the same thing Joe Schmaltz does, and I don't think he ought to get that or any other person.

HONORABLE F. SCOTT MCCOWN: I don't think so, Luke. Because the interrogatory would not be, "Who are the experts?" It would be, "Who do you name as an expert?" So the fact that somebody in deposition said there is a bunch of other

experts and here is their names, that's not responsive to the interrogatory.

MR. SUSMAN: Correct.

CHAIRMAN SOULES: Well, you have heard me and my problem.

PROFESSOR ALBRIGHT: Expert witnesses are taken out. Expert witnesses are treated separately under these rules.

MR. KELTNER: Well, this doesn't say that.

MR. SUSMAN: All in favor of (2) --

CHAIRMAN SOULES: Same for fact witnesses. Same problem.

MR. SUSMAN: All in favor of (2) as we will modify it? I mean, I keep -- as we will modify it to except document production. You can't supplement or amend through simply making a document production.

MR. YELENOSKY: Except amending document production.

MR. SUSMAN: You can supplement or amend through what you say in a deposition or witness says or through a letter or through

another discovery device, but you cannot do it through simply producing a bunch of documents. All in favor of that raise your right hand. Count. Do we have a counter?

CHAIRMAN SOULES: Ten.

MR. SUSMAN: All opposed?

CHAIRMAN SOULES: 14 opposed.

MR. SUSMAN: All right. That fails.

MR. LATTING: Take care of the witness list problem and then I would change my vote.

MR. MARKS: Yeah.

CHAIRMAN SOULES: If you can't add names to persons of knowledge of relevant facts, trial witnesses, expert witnesses, or add documents just by way of mention in the other discovery then my vote changes completely.

MR. KELTNER: Steve, and I think that's what most people are feeling. I think the truth of the matter is except what we did on document production and then change the designations such as experts, fact witnesses, something that the lawyer has to

say. I understand the theory that it's not supposed to be covered, but that's not the way it's written. I think if we do that amendment, I bet you will get close to unanimous consent.

MR. SUSMAN: I guess my question is, what is the problem with simply taking it out altogether? I mean, what is the problem with ending the first sentence of (2) after "complete and" -- "is no longer complete and correct," period.

CHAIRMAN SOULES: Because, as Sarah pointed out, an extremely burdensome process that many people are going through now and high risk, complex litigation is going through is bringing into their interrogatory answers all of the other discovery because they feel if they don't the judge is going to focus on the interrogatory answers only and exclude testimony and evidence, and if we make the four exceptions that we have talked about, persons, trial witnesses, documents, and experts, then you do have to focus on those things, but they are pretty easy, and they are pretty --

MR. LATTING: They are distinct.

CHAIRMAN SOULES: -- limited, and then everything else, the universe of testimony about the facts of the case, is going to be picked up in the universe of discovery that's out there. You don't have to regurgitate that in your interrogatory answers, and I'm with Sarah. Sarah and I were together on one of those enormous things that the state, the heap of state. I don't know how many months or weeks you worked on that, and that's just make work because the information was already there in the universe of discovery.

MR. SUSMAN: Well, let's do it then. You want -- the sentence stays except that you must supplement directly the identity of witnesses with relevant knowledge of facts. Okay. People with knowledge of facts, expected trial witnesses, experts, and what else?

MR. LATTING: Documents.

MR. SUSMAN: Why do you need documents? What does that mean?

CHAIRMAN SOULES: If you are going to use a document, I want it produced, not just mentioned in a deposition.

MR. LATTING: You have to supplement your document production, not just say you knew about it because you heard about it in a deposition.

PROFESSOR ALBRIGHT: But if that document was produced, actually produced at the deposition, it's on the --

CHAIRMAN SOULES: Well, then it's done. See, then it's done.

MR. MEADOWS: I guess I don't see -- I'm happy to vote the way you want it because I think that just clarifies what I thought I was voting for. I mean, I agree with you if just some name is mentioned at a deposition that doesn't get it, but I think you ought to be able to write a letter and say, "I'm adding this expert."

CHAIRMAN SOULES: No problem.

MR. MEADOWS: So, I mean, what you want, if we can draft it, I think clarifies what I thought I was voting for.

MR. KELTNER: I think this

change probably is going to get you close to unanimous approval.

MR. GOLD: Can I ask one thing? What if in a deposition the attorney says, "By the way, I'm identifying this individual as an individual with knowledge of relevant facts or a trial witness," or "I'm identifying this document as a document that I may use"? Does that satisfy the situation, or do they have to restate it in answer to an interrogatory?

CHAIRMAN SOULES: Technically it probably would not meet what I'm suggesting, but I think it falls right into Steve's comment there can't possibly be surprise because there was something specific on the record about that.

MR. GOLD: I think I have recently seen some case or something on that.

MR. SUSMAN: Now, documents, as I understand documents, let me just for drafting purposes, if a interrogatory says -- if you ask an interrogatory that requires the other party to identify documents in the interrogatory answers, wouldn't the production of that document at a deposition, the actual

giving you the documents, suffice?

CHAIRMAN SOULES: Yes.

MR. SUSMAN: I don't have to go back and amend the interrogatory answers?

CHAIRMAN SOULES: Correct.

MR. SUSMAN: To --

CHAIRMAN SOULES: As I see it. As I see it. Correct, as I see it. So the drafting should be directed that way in my concept.

MR. SUSMAN: Okay. So, as I understand it, the vote now will be all in favor of (2) but with the understanding that insofar as witnesses with relevant knowledge, expert witnesses, and trial witnesses, you have got to do that specifically, and obviously you have got to produce the document to -- for a document request you have got to produce the document.

CHAIRMAN SOULES: Right.

MR. SUSMAN: I mean, you can't just describe the document. You have got to produce it for a document request. All in favor of that raise your right hand. Do we have any opposition to that? We have got it

unanimous. Great.

MR. HERRING: Steve, a clarification. This says "supplement prior responses to written discovery requests." Do I take it, though, that doesn't mean you have to supplement answers to depositions or written questions?

MR. SUSMAN: Yes. Yes.

MR. HERRING: All right. And it doesn't mean you have to supplement your document production in response to a subpoena or a duces tecum? That's not the kind of written discovery request you are talking about.

MR. SUSMAN: Well, you have to go -- I think that may be covered, but we need to go back and look at what is referred to as written discovery.

PROFESSOR ALBRIGHT: It's on page 5.

CHAIRMAN SOULES: Page what?

PROFESSOR ALBRIGHT: Page 5.

MR. SUSMAN: Page 5. "Request for standard disclosure or request for designation and information regarding experts,

request for production of documents," that is written, "interrogatories to a party, and request for admissions."

MR. PERRY: Chuck, there is another provision that a subpoena duces tecum to a party is treated as a request for production.

MR. HERRING: So you would have to supplement the duces tecum. You would have to supplement your deposition if you produce all of the documents responsive to that, and you have to make another supplementation to the deposition somehow or another.

MR. PERRY: I think you could make an argument because under the duces tecum rule in order to make sure that everybody has 30 days and plenty of opportunity to object we have provided that those would be handled as request for production if they are to a party.

MR. HERRING: And supplementation applies to that, too?

MR. PERRY: Well, I'm not sure if we have specifically written it that way, but I don't know that we thought about it.

MR. HERRING: Well, we ought to

answer it one way or the other because that's a supplementation duty, and that should be included somewhere.

MR. SUSMAN: That's a good point. You were talking about is a request for production attached? Alex, a request for production of documents included in a subpoena to a party or a notice to a party should be a part of written discovery.

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: I agree with that.

MR. SUSMAN: Okay. We need to make that clear.

PROFESSOR ALBRIGHT: All you would have to supplement, as I think we intend it, and we can make it more clear, is that you would supplement the document request.

MR. HERRING: Right.

PROFESSOR ALBRIGHT: If there was a deposition taken at the same time, you don't have to supplement the Q&A in the deposition.

CHAIRMAN SOULES: Right on. Right on.

MR. SUSMAN: Subdivision 5(3), please. We need to get to 5(3), and I am looking at the clock, and I am beginning to get concerned about the clock because I want to get through these.

CHAIRMAN SOULES: Page what?

MR. SUSMAN: Page 10.

MR. YELENOSKY: Steve?

MR. SUSMAN: Yes.

MR. YELENOSKY: The way I read that there is no buffer there, and in other words, you could supplement --

MR. SUSMAN: I'm going to give you right now a change, which was just a mistake on the part of the committee.

MR. YELENOSKY: Okay.

MR. SUSMAN: "If the amendment or supplement occurs," and it should be, "at such time that it is impossible to conduct discovery about the response, about the amendment or supplement within the discovery period." Something needs to be written like that that has not been -- you have hit the problem. I mean, someone who amends or supplements on the last day, I mean, you have

got to have the right to re-open. So we will make that change in the first sentence.

"If the amendment or supplement occurs at such time it is impossible to conduct discovery about the amendment or supplement within the discovery period the party may re-open discovery." Now, any problem with this as written, as it will be changed? All in favor of (3) raise your right hand. All opposed? Passes unanimously.

We go on to Rule 6. Now, 6 has been -- 6(1) was a concept discussed at length at our September meeting. I think -- I can check in a second. I think we voted on this concept, and people were happy with the concept. We have rewritten it because we were not happy the way it was written, but this is the -- a couple of things. This is the punishment for failure to disclose, timely disclose, information in discovery. Now, there are other sanction rules that may be invoked against the bad boy lawyer, and these do not mean to displace those sanction rules. I mean, someone who -- you know, you could still have a death penalty. There are all kinds of

sanction rules.

This is just we wanted to go back to the notion of a genuine surprise, and that's what it is. So "If a party fails to timely disclose information, the court may exclude the information or continue when the failure to disclose causes the opposing party to be unprepared in a way that may affect the outcome of the trial." The one thing you gave -- you approved this at the last meeting with the admonition that we should put the burden of that showing on the offending party, which we have.

HONORABLE SCOTT BRISTER: Which showing?

MR. SUSMAN: Huh?

HONORABLE SCOTT BRISTER: Which showing?

MR. SUSMAN: Now, you are going to make me state it in the negative, Scott, which is the difficult thing to do here because that's why we had to write it in this awkward way. I guess it would be I have got to show that my late disclosure of this witness or this information --

HONORABLE F. SCOTT MCCOWN: Did not --

MR. SUSMAN: -- did not cause you to be unprepared in a way that might affect the outcome of the trial. That's my burden of proof. I have got to carry that burden. I have got to show the judge that somewhere in discovery you knew about this, or it's irrelevant, or it's a minor issue, or I am going to give you a deposition tonight of the same witness, and you won't be surprised when the trial begins on Monday, or whatever it is, but I have got the burden. Buddy.

HONORABLE SCOTT BRISTER: How about burden of showing ability to prepare for the trial? It's just I think the way it's written I have got some grammatical problems because this showing unprepared, the way it's stated unprepared and the way it will affect the outcome of the trial is the burden of the opposing party.

JUSTICE CORNELIUS: "Effect" should be "affect" in the fifth line, too.

MR. SUSMAN: Oh, that's right.

HONORABLE C. A. GUITTARD: Is

there a difference between a continuance and a postponement? Technically a continuance means probably for a longer period than a postponement. I don't know if there is any real difference here, but I think what we really mean here is postponement. Is it not?

MR. LOW: What's the difference?

MR. SUSMAN: Yes.

HONORABLE C. A. GUITTARD: Well, why don't we change it then to say "postpone" or "postpone the trial"?

MR. SUSMAN: Postpone?

HONORABLE F. SCOTT MCCOWN: No, no. Trial courts don't distinguish between continuances and postponements.

HONORABLE C. A. GUITTARD: Well, some old-fashioned lawyer might.

HONORABLE F. SCOTT MCCOWN: Right. But it's not a modern concept in our rules. I mean, if you're --

HONORABLE C. A. GUITTARD: If we put it off two weeks, is that a continuance?

HONORABLE F. SCOTT MCCOWN:

That's a continuance. If I send you away today to come back tomorrow, that's a continuance.

HONORABLE C. A. GUITTARD: If that's clear, okay. I didn't think it was.

MR. SUSMAN: Bill.

PROFESSOR DORSANEO: Well, there are a lot of continuance rules that we have, and we really shouldn't use the term "continuance" because there are a lot of requirements. There are rules that say that a case is to be tried when scheduled unless it's continued on motion and notice for good cause contemplating almost a written motion, supported -- we have rules about supporting it by affidavits. We have got all kinds of razzmatazz for continuances. So none of that is meant to be applicable here, right?

MR. SUSMAN: Right.

PROFESSOR DORSANEO: We are just talking about easy, smooth, no complexity, no affidavits?

MR. SUSMAN: You would prefer "postpone"?

PROFESSOR DORSANEO: Yeah.

MR. SUSMAN: Scott, do you have any real problem with that?

HONORABLE F. SCOTT MCCOWN: Yeah.

MR. SUSMAN: Why?

HONORABLE F. SCOTT MCCOWN: Because there is no such animal in the rules.

HONORABLE C. A. GUITTARD: Well, it's a simple English word.

HONORABLE F. SCOTT MCCOWN: And there is no point in --

PROFESSOR DORSANEO: If you didn't want it to be here, it will be in the dictionary.

CHAIRMAN SOULES: How about delay, delay the trial?

PROFESSOR DORSANEO: No.

HONORABLE F. SCOTT MCCOWN: Trial judges -- I agree with what Professor Dorsaneo said that in some contexts continuances have certain requirements, but I mean, for trial judges it's just going to be if you are here today, you are here today. If you are here tomorrow, it's a continuance, and trying to get a new word is just --

HONORABLE SCOTT BRISTER: We have got statistics we have to do on continuances, et cetera, and there ain't no hole for postponements or delays. It's either continued, or it's tried.

MR. SUSMAN: David Keltner.

MR. KELTNER: Are we talking about a continuance or mistried? Are we talking about starting the trial over again three months from now and erasing what happened up to this point, or are we talking about continuing or postponing and starting up from where we were? You know, the truth of the matter is in many instances under our current practice what we have been doing is mistrial is granted. Somebody is able to withdraw their announcement of ready, and we start over. So the time period is started again. Which one are we talking about?

MR. MARKS: Why don't we just say put the trial off?

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I want to return at some point to the question that Scott Brister raised about the word "showing" and what it --

what must be shown. I mean, if I am hearing what I think I am hearing, what you are saying in effect is that if a party -- if the opposing party complains that they are unprepared, the fact that it becomes a rebuttable presumption which the offending party then shoulders the burden to displace. Is that the effect?

MR. SUSMAN: Let me -- ask your question again.

MR. JACKS: All right. My question is with respect to the showing that the offending party has the burden to make. The way this rule works, if I'm understanding it, is that if the opposing party says "I'm unprepared, and I'm unprepared in a way that may affect the outcome of this trial," then the making of that claim makes that a fact that is essentially a rebuttable presumption. Is that how it works?

HONORABLE F. SCOTT MCCOWN: Yes.

MR. SUSMAN: Yes.

MR. JACKS: All right.

HONORABLE F. SCOTT MCCOWN: And

I would suggest, to follow up on Judge Brister, that the way we change that sentence about the burden is to exactly track the language in the sentence before it so it would read something like, "The burden of showing that the opposing party is not unprepared in a way that may affect the outcome of the trial is on the offending party," because that's what we are saying. "The burden of showing that the opposing party is not unprepared in a way that may affect the outcome of the trial is on the offending party."

MR. SUSMAN: Okay. Wait a second, you-all. Now, let me get some order. Let's first begin with the question, does anyone really care -- will the trial judges show a hand? Do you care whether we use "continue" or "delay"? What do you want, Brister?

HONORABLE SCOTT BRISTER: I think we want -- the trial judges will want "continuance."

MR. SUSMAN: You want to "continue." You want "continue." Who wants "delay"? You don't count. You're not a trial

judge. The word --

PROFESSOR DORSANEO: He wants it, too. We just need to talk to him more.

MR. SUSMAN: All right. Listen, listen. This is a technical matter. You-all talk but we have got to -- because it doesn't matter to me. Let's go on to the next substantive matter, and that is placing the burden properly in a sensible way, and Scott, your language was what now?

HONORABLE F. SCOTT MCCOWN: Well, somebody else made the point yesterday, and I think it was a good one, that we need not to suddenly change the standard by paraphrasing it. So if we want to track it exactly it would be "The burden of showing that the opposing party is not unprepared in a way that may affect the outcome of the trial is on the offending party."

MR. SUSMAN: Fine.

HONORABLE SCOTT BRISTER: Another way to do it would be to say the offending party bears the burden of rebutting this presumption, this allegation, whatever you want to call it.

MR. SUSMAN: Luke.

CHAIRMAN SOULES: Well, you really have a conflict between the first sentence and the second sentence. To me, it would be -- that would be resolved if you said, let's see, "to allow the opposing party to prepare to confront or use the previously undisclosed information unless the failure to disclose does not cause the opposing party to be prejudiced in any way that may affect the outcome of the trial." The way the first sentence is written the burden is on the injured party, and that ought to be changed.

HONORABLE SCOTT BRISTER: First sentence states what the injured party has to show. The second sentence says the burden of that showing is on the offending party.

CHAIRMAN SOULES: Right. And if you just change it and say, "If a party fails to timely disclose information during discovery the court may exclude the information not timely disclosed or continue the trial to allow the opposing party to prepare to confront or use the previously undisclosed information."

MR. SUSMAN: Unless the failure to disclose causes the opposing party --

CHAIRMAN SOULES: Does not cause the opposing party to be -- I think "unprepared" ought to be "prejudiced."

MR. SUSMAN: I think it ought to be "unprepared," but we can talk about it in a second.

CHAIRMAN SOULES: In a way that may affect the outcome of the trial, and that is the two things.

MR. SUSMAN: Okay. I will buy that.

MR. PERRY: And then you could just say, "The burden of this showing is on the offending party."

PROFESSOR ALBRIGHT: Then you don't have to say anything.

MR. SUSMAN: All right. Now, it will read, "unless the failure to disclose does not cause the opposing party to be unprepared in a way that may affect the outcome of the trial." Now, Rusty.

MR. MCMAINS: I don't know if this is the way it was contemplated, but is

basically the notion here that even if there is a failure to timely disclose information and even if it unduly prejudices a party in its preparation or whatever, that the judge doesn't have to do either one of these things?

HONORABLE F. SCOTT MCCOWN: Yes. No, wait. No.

MR. MCMAINS: Well, it says "may." What it says is that if a party who intentionally refuses to disclose information and if that prejudices the other side in the presentation of the case, the court may exclude or continue.

MR. SUSMAN: Do you want to change "may" to "shall"? I don't think that was intentional.

HONORABLE ANN COCHRAN: But, I mean, let's talk about when -- because this is something that's going to really get a lot of trial judges because what you are going to have happen an awful lot of times is lawyers who have moved for continuance, continuance has been denied, they show up at trial, and one of them says, "Oh, I just found this document," and you know if you have got the

presumption that this is somehow going to hurt, and the trial judge looks at it and knows this is ridiculous. These lawyers just got together last night and figured out a way under the rule to get an automatic continuance.

The court has got to get -- I mean, if the presumption is going to be that it is going to hurt the other side unless the offending party puts on some evidence or makes some showing to overcome that presumption then if we are going to write it so that it shall, then the trial judge is just going to have to sit there and be bamboozled.

MR. MCMAINS: Well, basically what I was saying is that the "shall" part means that when the party who was getting the information was not disclosed to. The initial burden, I think, and the intent theoretically is that somebody has got to complain about the disclosure, the nondisclosure.

MR. MEADOWS: Also, Judge --

MR. MCMAINS: And so it's in conjunction with that complaint that their burden is to show it wasn't timely disclosed.

Once you have met that burden, then the burden -- then it shifts to the other side to show that that didn't cause any harm. Now, if the parties still -- and then the court has one of these two options and then basically what you're saying is the party who was complaining has a choice at that point. He can go forward if he decides he doesn't want a continuance and withdraw his complaint, or he can go ahead and except it again if that's what the judge decides to do on the additional discovery.

But, I mean, I think it's intended that this is not initiated by the judge. The judge doesn't have to monitor whether there was disclosure. Somebody has got to complain about it.

MR. SUSMAN: Alex.

PROFESSOR ALBRIGHT: The problem with putting in the word "shall" instead of "may" is then you make it an automatic sanction just like we have now. It's just that the automatic sanction is either to exclude or to continue, and I think what we were trying to do is get away from the

automatic sanction to give the trial judge the discretion, exactly like Judge Cochran said.

MR. MCMAINS: Except that, again, I have a problem with the idea that when you have someone who has failed to disclose and when you have -- and it doesn't matter what the level of their failure to disclose was, whether it was intentional or whatever, and it is going to adversely affect the presentation to decide where is and under what standard can the trial court say "no problem. We are going to trial. We are going to use the information, and that's just tough."

MR. SUSMAN: Scott. I'm sorry. Luke first. Luke first.

CHAIRMAN SOULES: I'm trying to address the concern that Judge Cochran raised. Let me see if I can put it into context like this. The defendant wants a continuance, and it's been denied. Plaintiff wants a trial. The defendant then shows up with a document. At that point the plaintiff has to decide whether to move to exclude or continue or go forward with the trial, and the plaintiff is

not going to do that, I think, because they have already tried to get their trial going, unless they really believe that they are going to be prejudiced in a way that's going to affect the outcome of their case. Now, that's what the judge has to decide. The plaintiff then for whatever reason --

HONORABLE ANN COCHRAN: The problem I really think there is, is if there is a presumption so that the trial judge really doesn't get to look at the question of is this really going to hurt anybody. That's the only thing that worries me. Under your scenario there has been really an establishment that it really is going to hurt their case to make them go forward at this point.

MR. MCMAINS: Sure.

HONORABLE ANN COCHRAN: The only thing that worries me if the rule is written on the showing in such a way that it's presumed, and the trial judge never even gets the opportunity to really look into whether or not it's going to be harmed.

HONORABLE SCOTT BRISTER: There

are 25 percent of my cases that go to trial kicking and screaming, neither one of the attorneys wants to go to trial, and every time I call them to trial they will ask for a six-week continuance. Every time. Forever. And this -- if it's "shall" they will --

HONORABLE F. SCOTT MCCOWN: Well, but --

MR. SUSMAN: And what?

HONORABLE F. SCOTT MCCOWN: Steve, isn't this problem solved by Luke's language? If we go with Luke's language, that would allow us to take out the sentence about the burden of the showing is on the offending party because Luke's language places the burden. It says unless the failure to disclose does not cause the opposing party to be unprepared in a way that may affect the outcome of the trial, but it doesn't create a presumption or say that the offending party has to carry a burden. So in the situation where you have got two lawyers, neither of whom want to go to trial, one of whom offers the document, the other agrees. The trial judge could say, "Fellows, I find as a matter

of fact that the failure to disclose here does not cause the offending party to be unprepared in a way that may affect the outcome of the trial. We are going forward."

CHAIRMAN SOULES: The opposing party.

HONORABLE F. SCOTT MCCOWN: Yeah. The opposing party, and we are going forward.

MR. SUSMAN: I'm lost now. I'm lost.

HONORABLE F. SCOTT MCCOWN: Okay. Ann's example assumes two lawyers who don't want to go to trial and a judge who does. So if we take it -- if we don't use presumption and if we don't use the sentence about a burden, but we take Luke's formulation of the test, Luke's formulation of the test sets up what the burden is, but it doesn't require anybody to go forward, and the trial judge could just say, "I've heard you both, and you're not unprepared, and we're going forward."

MR. SUSMAN: All right. So you want to use -- let me see if I can read it.

Let me read it again then. "If a party fails timely to disclose information during discovery the court may exclude the information."

CHAIRMAN SOULES: Shall.

MR. SUSMAN: Now, that's -- can we please argue -- focus on the "may" or "shall"?

HONORABLE F. SCOTT MCCOWN: Okay. Steve, let me explain how that works.

MR. SUSMAN: "May" or "shall."

HONORABLE F. SCOTT MCCOWN: It's neither. Let me explain. Let me explain how that works. The committee here has a drafting problem that Ann has pointed out to me because the way this is written is we have left out -- there is something unclear, and what's unclear is that you have three options. Option No. 1 is to say this does not leave you unprepared, the evidence is coming in, and we are going forward. That's Option 1, and that option is implied but stated.

Option No. 2 is to say this evidence is staying out, and we are going forward. Option No. 3 is to say we are going to have a

continuance. Our Option No. 1 is expressed but not implied. So the people who are hung up on "may" are thinking that the "may" saves Option 1. The "may" doesn't. That "may" doesn't express Option 1, and our rule doesn't express Option 1.

MR. SUSMAN: No, no.

CHAIRMAN SOULES: Let him finish.

HONORABLE F. SCOTT MCCOWN: Let me finish. And what Rusty's saying is if the judge says this evidence does matter, Rusty is saying then he ought to be put to a decision, either exclude it or continue it, so that this "may" ought to be "shall." There is another "may" that our rule doesn't express. That's not very clear, but did you-all get that?

CHAIRMAN SOULES: And you would delete "the burden of this showing is on the offending party."

MR. SUSMAN: Can we change the "may" to the "shall"?

HONORABLE F. SCOTT MCCOWN: We can change this "may" to "shall."

MR. SUSMAN: That's all I want

to know. Does anyone have a problem changing this "may" to "shall"? So if the showing is made --

HONORABLE SCOTT BRISTER: Read the whole sentence again.

HONORABLE ANN COCHRAN: Yeah. The whole thing has to be redrafted before you can ask us to change the "may" or "shall."

MR. SUSMAN: Well, here it is. Here it is. "If the party fails to timely disclose information during discovery, the court shall exclude the information not timely disclosed or continue the trial to allow the opposing party to prepare to confront or use the previously undisclosed information unless the failure to disclose does not cause the opposing party to be unprepared in a way that may affect," with an A, "the outcome of the trial. The court may exclude or continue it," then delete the next sentence.

CHAIRMAN SOULES: Delete "The burden of the showing is on the offending party."

MR. SUSMAN: Correct.

CHAIRMAN SOULES: I don't have

any problem with that.

HONORABLE F. SCOTT MCCOWN: Steve, let me make a suggestion, and I know you don't want to do drafting, and this isn't really drafting. This is going to, I hope, clarify the whole thing. If you say -- we need to move the "unless" clause up to the top. "If a party fails timely to disclose information during discovery, unless the failure to disclose does not cause the opposing party to be unprepared in a way that may affect the outcome of the trial, the court shall exclude the information not timely disclosed or continue the trial to allow the opposing party to prepare to confront or use the previously undisclosed information. If the failure to timely disclose does not cause the opposing party to be unprepared in a way that may affect the outcome of the trial, the court may admit the evidence and move forward." Those are the options. That's actually very clear.

CHAIRMAN SOULES: Even though it doesn't seem to be.

MR. SUSMAN: Scott, your first

sentence, your first sentence --

CHAIRMAN SOULES: Vote on that one time and see. Vote on that.

MR. SUSMAN: How about as a concept? As a concept the chairman -- what, Rusty?

MR. MCMAINS: Well, the only -- I disagree with the assertion that by removing the statement of the burden that you have actually left the burden on the offending party implicitly by merely moving it to an exception because basically what we are talking about here is there is -- if there is nothing in the record, that is, if nobody has attempted to make a record on this, then obviously when the judge says, "I find that the -- you know, just from what I know about the case, just, you know, from what I have seen here thus far that this is not going to timely affect you adversely."

He doesn't say anything specifically. He doesn't make any finding. He doesn't do anything. Now, a party who believes he is actually surprised is going to go forward. I mean, there is no lawyer in this room that

will not assume the burden of going forward to show that that exception doesn't apply and will assume that that's the way it is because that's -- essentially if what you're doing is saying that's just an independent court determination then that is another way by which the action of the court in doing nothing in this circumstance will be affirmed. That effectively shifts the burden then to the nonoffending party, and I disagree completely in saying that just by not putting it in there that it's going to -- that it stays on the offending party.

MR. SUSMAN: Joe.

MR. LATTING: I think I understand what you thought you meant to say, Scott, but this is such a hugely important issue I need to see this in writing because we are fooling with some very dangerous chemicals here, and I just want to see it in writing. I think we can agree on it, but can we get this somehow -- or put it off to be able to see the rule?

MR. SUSMAN: Buddy.

MR. LOW: Let me ask a

question, and I think I know the answer, but we are intending to change by this a body of law, on this and the other rule that says I don't list somebody as a witness but his deposition has been taken and everything and you come up and say, "Well, no, you didn't list him and therefore can't call him." We are trying to eliminate that so that if they have the information and are not advised we go forward; is that correct?

MR. SUSMAN: Yes.

MR. LOW: Because there is a body of law to that effect, and somebody may --

MR. SUSMAN: Yes, sir.

MR. LOW: -- say that, well, it doesn't really take care of that situation, and I just raise the question.

MR. SUSMAN: We are absolutely clearly intending to change existing law.

MR. LOW: Okay. Okay. All right.

MR. LATTING: Okay.

MR. SUSMAN: And when we met in September the consensus of the committee was

that's okay but just make the bad guy make the showing, put the burden on the bad guy, which I don't think anyone is quarreling with. Okay.

MR. LATTING: I'm not quarreling with it.

CHAIRMAN SOULES: Well, I think Judge Cochran is quarreling with that because if the bad guy stands there with his hands in his pockets like Brer Rabbit and just keeps on saying nothing she wants to be able to make a ruling, notwithstanding there is no resistance to the contention, a ruling that she go forward with her trial, and I am understanding that when we delete that sentence that it does become the burden of everybody in the courtroom to convince the judge that this is going to be -- or that if they think it's going to be prejudicial to say so, because if they don't the judge can find that it's not prejudicial or not causing them to be unprepared, if that's the word that's used. So I understand that what Rusty said is right. We are unburdening the offending party of the sole burden to make a showing if we delete

that sentence.

MR. SUSMAN: She needs to change paper. Let's take a 10-minute break and then we will come back.

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

MR. SUSMAN: Can we get back into session? All right. We have three more pretty substantive rules to cover and an hour and a half to cover them or an hour and 45 minutes to cover them. Let's get back. All right. We are -- Scott, let's just begin. Bill, Paul, let's get it moving.

PROFESSOR DORSANEO: Pardon me.

MR. SUSMAN: I am going to do what Luke suggested, and that is at this time take a vote on the concept of 6(1), which I think we have pretty -- we have a drafting problem. Scott may have cured it. Scott will be in charge of drafting this again to put the burden where it ought to be, but to make sure that lawyers can't collusively require the court to continue a case over something that really doesn't matter.

HONORABLE F. SCOTT MCCOWN: Can I state the concept so we can get a vote?

MR. SUSMAN: Please.

HONORABLE F. SCOTT MCCOWN: Okay. The concept would be that if there is a failure to timely disclose, that the trial judge is confronted with three options. If the failure to timely disclose does not cause the opposing party to be unprepared in a way that may affect the outcome of the trial, so that the burden or the presumption or whatever you want to call it is on the offending party, then the trial judge can let the evidence in and move forward; but if the failure to disclose does cause the opposing party to be unprepared in a way that may affect the outcome of the trial then the trial judge has to either exclude it or continue it.

MR. SUSMAN: Perfect.

HONORABLE F. SCOTT MCCOWN: It would never be an option for the trial judge to simply say, yeah, it may affect the outcome of the trial, but I am moving forward anyway.

HONORABLE ANN COCHRAN: May I ask one question?

MR. SUSMAN: Yes.

HONORABLE ANN COCHRAN: By having this, not to editorialize too much, but this arbitrary cutoff of discovery, you know, about -- and now if we are actually in trial even because of the re-opening of discovery rule about late supplementation, have we now with the other rules we have gone over gotten ourselves in a box so that very often in the real world the document that shows up the day of trial or three days into trial can be fixed in a little deposition between 5:00 and 5:15 that afternoon?

I think that this discovery cutoff business would put the trial judge in a box so that even if a little 15-minute deposition of a person who is sitting in the room, and it's going to turn out to be no big deal, but it would be unfair to put them to trial without that little 15-minute bit of testimony. The trial judge -- I mean, I just want to make sure that the trial judge still has the flexibility to say -- you know, hopefully there will be a little common sense remaining. This is sort of half in between, you know,

take the deposition between 5:00 and 5:15, do it in the jury room. Then you come tell me if it turns out to be a big deal or not, and I will hear it.

I mean, then I will decide whether or not I need to exclude it or continue because most of the time if the judge does that, the lawyer who was worried that it was going to be some dynamite thrown onto the counsel table in the courtroom is going to come in at 5:12 and say, "Thank you, judge. It turns out it's no big deal. We are going to pick our jury tomorrow morning."

HONORABLE F. SCOTT MCCOWN: The intent of this rule is to cover exactly what you said, and the way that that would come in within the language of the rule is that they wouldn't be unprepared in a way that may affect the outcome of the trial because they are unprepared, but it's curable by the judge providing that.

MR. SUSMAN: Yeah.

MR. MEADOWS: But you couldn't do that if the nine months was up, right?

MR. KELTNER: No. Our rules

are very precise in that the judge can order something contrary to the rules at any time.

CHAIRMAN SOULES: At any time.

MR. KELTNER: At any time.

MR. SUSMAN: All right. All right. We have the concept on the table. Could we have a vote on the concept because we have got to move? All in favor of this concept raise your right hand.

CHAIRMAN SOULES: 15 for.

MR. LATTING: 14 and a half.

MR. SUSMAN: All opposed?

HONORABLE PAUL HEATH TILL: I would be happy to vote with you, but I'm not sure what the concept is, and I only heard it one time very quickly, and I am not going to vote for something I don't understand.

MR. SUSMAN: Well, it's 15 to 1. That's perfectly all right. Let's move on.

CHAIRMAN SOULES: And we will look at this, Judge Till, in due time --

MR. SUSMAN: It's coming back to you.

CHAIRMAN SOULES: -- so that it

will be in writing, and you will have a clear chance to read it and decide how you feel about it.

HONORABLE PAUL HEATH TILL: Okay.

HONORABLE DAVID PEOPLES: I want to suggest that the term "may affect the outcome of the trial" is not strong enough. You know, will it probably affect the outcome of the trial? If I'm the trial judge, and I think, well, there is a little bit of wrongdoing here, but this is going to all wash out, and I go ahead and have the case, the harmless error rule is going to apply. You know, and so I think our efforts to just rigidly confine trial court discretion here are not going to work.

MR. SUSMAN: We don't want to.

HONORABLE DAVID PEOPLES: Well, I think that's exactly what it's going to do.

MR. SUSMAN: Scott, see if you can't fix that.

HONORABLE DAVID PEOPLES: But "may affect the outcome" is not strong enough. "May affect"?

HONORABLE F. SCOTT MCCOWN: Well, I think he's raising something that's not really a drafting problem. It's a philosophical problem. We might want to talk about it just a minute because it depends on what you want the trial judge to do. If you want the trial judge to be fairly insistent on disclosure and be fairly quick to exclude or continue to protect the innocent party, you are going to want to say "may" and trust the trial judge's discretion and fact finding to turn out all right. On the other hand, if you want the trial judge to be fairly lenient about letting evidence in that's late disclosed then you would want to say --

MR. SUSMAN: "Is likely to."

HONORABLE F. SCOTT MCCOWN: "Probably will."

HONORABLE DAVID PEOPLES: I think trial judges are going to try to do what they think is fair, and they are not going to get reversed on this unless it's, you know, reasonably calculated to cause and probably did cause wrong judgment.

HONORABLE F. SCOTT MCCOWN:

Well, we picked "may" because our sense from the committee was that the committee felt we were loosening up the rules quite a bit, and so they wanted -- and so to go in the other direction we picked "may" so that there would be some fairly vigorous enforcement of the disclosure rules.

CHAIRMAN SOULES: Let's do move on because this -- Rule 6 is going to go to Rule 215. So we are going to look at this not only again maybe out of this committee. We want to, but it's going to have to go into 215 because we have got all the sanctions in Rule 215. So we are going to get a revisit of this when it's put in the context of Joe's work at some future time with those. This really will not be a part of the discovery rules that go to the court unless the sanctions rules go at the same time.

Okay. What next?

MR. SUSMAN: Say again.

CHAIRMAN SOULES: This is going to be a part of the sanctions rules because we have the sanction rules all in one place.

HONORABLE F. SCOTT MCCOWN:

Well, but Luke, under our view of it this rule is pretty integral of what we have done in discovery.

MR. SUSMAN: What we have done.

CHAIRMAN SOULES: That's right.

HONORABLE F. SCOTT MCCOWN: And this isn't operating as a sanction. It's operating as a rule of exclusion on discovery.

CHAIRMAN SOULES: Well, the Chair is going to re-refer this to 215.

MR. LATTING: And, Scott, the reason that we didn't want to go forward with writing our final version of the sanctions rule was so that we could write it once we decide what we are going to do with your discovery rules so we can make it mesh sensibly so it won't be --

HONORABLE F. SCOTT MCCOWN: Well, I think coming from both committees at the same time so that they are integrated and parallel makes sense, but I don't think you can approve the discovery rules -- I couldn't vote for the discovery rules without knowing what the failure to provide discovery, Rule 6, is going to be.

MR. LATTING: Well, I think we just took a vote on the philosophy of it.

CHAIRMAN SOULES: Just so we understand, when we get to sanctions the way that goes could undo all of this because we have so tightened up on discovery, put such constraints on discovery, that the sanctions for failure to comply with discovery in good faith are going to be pretty important to whether or not this survives. So eventually it's all got to come together.

MR. KELTNER: I think I absolutely agree with that. I think it was better put on our side. We were looking at this being a replacement for 166(b)(6) as well as 215(5), and I understand that they need to be all in one place, but that's the reason it was included here because we couldn't get you a good sense of the system without it.

CHAIRMAN SOULES: And I agree that it needed to be here in our discussions. No question about it. Where it finally winds up in the text of the overall rules, though, we will see.

MR. KELTNER: It's going to

make a huge difference on how you would incorporate it.

CHAIRMAN SOULES: But this very much needed to be discussed at this time.

MR. SUSMAN: Rule 7. Rule 7 has been rewritten since we last met, but the concept is the same, and it was a concept that was warmly endorsed by this group, and that is the concept of -- that the way to preserve a privilege is by withholding the document and filing a withholding statement that says you are withholding a document and the privilege you are relying on. You need not file a withholding statement or assert a privilege in the vacuum, in advance, as a prophylactic matter. It's when you actually consciously hold the document back from discovery. That's when you have to give a withholding statement.

The party that receives the withholding statement can ask you to provide a privilege log, and within 15 days you must do so in a way that your assertion of privileges can be tested by the court. The last sentence of section (1) of Rule 7 is designed to make sure that the -- what is in trial counsel's file is

expected to be withheld. So it need not be described in a withholding statement, and it need not be identified in a privilege log unless the court expressly orders it to be identified. Any discussion of 7(1)?

MR. LATTING: Question.

MR. SUSMAN: Let's go around this way. Yes, sir.

MR. HUNT: Why do we use the word "log"? Does that have a meaning from some other source, or is there a better word we can say other than "log"?

HONORABLE SCOTT BRISTER: People's log. Let's go ahead and incorporate that.

MR. GOLD: There are federal cases that use that terminology, and so it does -- it does give you a reference.

MR. HUNT: But is it commonly understood by state practitioners as to what you --

MR. GOLD: Yes. I think at this point in time it's got more of a meaning than any other term in --

MR. SUSMAN: Going around.

Ann.

HONORABLE ANN COCHRAN: We need to clarify in the last sentence exactly what's meant by "trial counsel." Does that mean the lawyer who is lead counsel or associated counsel on the pleadings? Does it include people in the general counsel's office for the party corporation? I mean, what lawyers involved in it are included in the term "trial counsel"?

HONORABLE C. A. GUITTARD: Strike "trial."

MR. SUSMAN: Scott.

HONORABLE SCOTT BRISTER: On the same point, this is the point where somebody is going to explain to me why I really liked the task force proposal that deemed all requests for discovery not to be requesting attorney-client or work product information unless the request specifically said so, so that you don't get a stock objection on every interrogatory request, every document production request. "This is subject to attorney-client, work product. Subject to such request here is the

documents." I mean, that to me makes the most sense because most people are not requesting attorney-client, work product. We ought to do it the way most people are meaning to do it, which is deem it not to be included unless you specifically request those items.

MR. SUSMAN: Alex.

PROFESSOR ALBRIGHT: Just to respond to that, the reason that we changed that is because what we thought would happen is everybody would just ask two document requests instead of one. I want all the documents concerning X, Y, Z, and I want all the privileged documents concerning X, Y, Z, because --

HONORABLE SCOTT BRISTER: I doubt it.

PROFESSOR ALBRIGHT: -- I don't want to trust you on your assertions of privilege because that's what we felt like the problem was, is that everybody is making prophylactic objections to the request, saying, "Yes, I have information responsive to the request, and there is a bunch of it that's privileged." So that's why we have separated

out your claim of privilege to particular documents responsive to the request and your objections to the request itself. So what you do is you say, "I'm responding to it. Here is all of the documents I have. I am withholding documents on the basis of work product, attorney-client privilege, and party communications," but I don't even have to talk about the ones I created for trial because, you know, otherwise you would have to withhold for every single request. So that's why we separated out those.

MR. SUSMAN: Bill.

PROFESSOR DORSANEO: That has a surface appeal to it, but I would think that I would have to ask based upon my, you know, early experience in North Texas for someone to produce privileged information in order to find out how they are interpreting their claims of privilege because when I started practice nobody ever had anything that I was requesting, and that was because the requests were interpreted either to not reach the privileged information or people were asserting privileges on their own and ruling

in their own favor before we ever got to know what the dispute was about. So I don't think there is an easy way to deal with the issue of something that someone has and that they claim that it's privileged and the other side would like to see it, unless you get it out in the open and know what the dispute is to be about.

MR. SUSMAN: Joe.

MR. LATTING: Does this rule make it clear that we don't have to make an objection, that all we have to do is to withhold the document?

MR. SUSMAN: Absolutely.

MR. LATTING: Okay. But --

CHAIRMAN SOULES: Where?

HONORABLE SCOTT BRISTER: But this doesn't do what I think -- you're saying this will mean you don't have to do the prophylactic proposal, or you know, the task force won't work because everybody will ask for attorney-client. I'm saying this will do the same thing because everybody when they get this will say, "We are withholding lots of things." If you request then you have got to do the whole log. You are back exactly at the

same position. Everybody is going to have to request if they are distrustful of all attorneys, which means on every case I am going to have to have a huge and expensive log if you have somebody that's bigger than an individual or wealthy or something like that.

On every case you are going to have to do an expensive log describing each and every attorney work client product document you have by date, parties, why it's -- that is very expensive. That is very time-consuming, and in my experience on the motions that I have plaintiff's attorneys who usually are trying to get documents with a big company are almost never interested in it, but under this rule aren't they going to feel just as compelled to dot their I's and Q's. They are going to have to request all the time, and we are going to have to prepare these expensive logs.

PROFESSOR ALBRIGHT: Well, I think the logs is one issue. I mean, you know, the logs, we were trying to figure out a good way to focus the issues as to what, you know, what are the documents that we are really fighting about, and there may be a

better way to do that, but I think you have got to have a system where people have to declare that they are withholding documents on the basis of privilege so you can request them. Because otherwise you are going to have the problem that Bill was talking about.

And this is what we think is good about this, is that there are some times that people -- they say, "Okay. I have a stack of documents responsive to the request. None of them are privileged, but I have to make all the privilege objections to the request because six months from now I may come upon a stack of documents that I didn't know were there, and there may be some that are privileged in there, and if I don't make the privilege and the objection from the very beginning, I have waived it."

MR. LATTING: That's what we do. We do that every time.

PROFESSOR ALBRIGHT: Yeah. You have got to. So what we are saying, the way you declare privileges is you say, okay, here is my stack of documents. If none of them are privileged and I am giving them over to you, I

am not withholding anything. So I just give them, but if I am withholding two of them then I make a withholding statement on the two documents. Six months from now I have another stack, and I take out five. Then I make a withholding statement for those five.

HONORABLE SCOTT BRISTER: But the -- under what circumstances are attorney-client or work product ever going to be discoverable? If you waived it by sending it to somebody, in which case you are going to discover it from that somebody, if you find out that, you know, somebody did one of these investigations of people, which you can find out when you talk to the people, but 98 percent of the time attorney-client and work product are not going to be discoverable.

We shouldn't be doing any requests for them. We shouldn't be doing any response for them, and we sure shouldn't be doing prophylactic objections or discovery or privilege logs for them, and it ought to be presumed until the requesting attorney has some reason to suspect there is some attorney-client or work product that he or she

has some reason to have a right to before we even start going down there. The burden should not be shifted and the expense. By simple guess, maybe you've got some attorney-client, work product. If you might have some, produce it to me. That should not trigger the extreme expense of having to do all the things to protect attorney-client and work product that you have to do.

MR. SUSMAN: Scott.

HONORABLE F. SCOTT MCCOWN: Yeah. Let me respond to that by saying first that this rule does not increase in any way what you have to do from the present system.

HONORABLE SCOTT BRISTER: Sure.

HONORABLE F. SCOTT MCCOWN: All this rule does is decrease that. Now, whether we have got it drafted to make it clear is a separate question, but we don't increase it. We decrease it, and the reason I think you -- the reason I think you can't go to a system where the requester never requests attorney-client, and so if you are withholding attorney-client, you never have to put it on the table is because of my experience in in

camera inspections. In in camera inspections I am constantly finding things that were withheld under one privilege or another, and this applies to all privileges not just attorney-client, that are, in fact, not privileged, and I am ordering them produced.

MR. SUSMAN: Absolutely.

HONORABLE F. SCOTT MCCOWN: And if that happens in a system where you have got to show it to the judge, what would happen in a system where you didn't have to show it to the judge? In a system where you were never put to the test then a whole lot of things would be privileged under all the various privileges that, in fact, aren't privileged, and so what we have tried to do is split the baby by saying you don't have to make prophylactic objections. You don't have to raise the issue until you're actually holding something in your hand that you are not going to turn over, but when you are holding something in your hand that you are not going to turn over, you have to let the other side know you are holding it.

MR. SUSMAN: But it's a very

simple message you send at that point. Okay.

HONORABLE F. SCOTT MCCOWN: Right. Right. I am withholding. Unlike the present system you don't have to get all prepared for the in camera inspection. You just tell them, "I am withholding."

HONORABLE F. SCOTT MCCOWN: And then you and your opponent --

CHAIRMAN SOULES: That's step one.

HONORABLE F. SCOTT MCCOWN: That's step one. Then step two --

CHAIRMAN SOULES: It's over. Step one is complete at that point.

HONORABLE F. SCOTT MCCOWN: Right. Step two, you and your opponent talk about what you are withholding. If it's me and Tommy Jacks, I take his word for his telephone description, and I don't ask him. If it's me and somebody else here --

CHAIRMAN SOULES: Somebody else elsewhere maybe.

HONORABLE F. SCOTT MCCOWN: Somebody else elsewhere I say, "I want you to do the privilege log, and I want the judge to

look at this stuff," and so we have tried to -- we have tried to make it as narrow as possible.

MR. LATTING: Give us an example of someone you might --

MR. SUSMAN: And that, too, is a two-step process. You first say, "I want you to do the privilege log." Then you look at the privilege log, and almost invariably looking at one of those logs you can highlight a bunch of things that are really -- how in the world did they keep this out? Okay. Because you see nonlawyers listed on it, you see the subject matter of it, and you say it's those six documents, friend, that I want produced in camera because I don't -- I mean, some of them are obvious, but I think it's very much abused, and I think your system where there is some presumption -- I mean, I have got to have some reason to suspect the other guy is misusing the privilege. Reason to suspect, in every case I have ever been in, is misused.

PROFESSOR DORSANEO: The privilege logs that I -- I'm sure the state of

the art in privilege logs is different, but I am used to them being, you know, item by item. I don't see any reason why you couldn't indicate "correspondence between Steve Susman and" -- you know, "during the month or during the months of September, October, and November."

MR. SUSMAN: The fact of the matter is that, I mean, in many cases you will talk to the other lawyer about it, what detail you want to get into, because it falls equally. Clearly the other side is going to ask you to do what you ask them to do, and it can be a big job, and maybe you will decide that certain things can be described generically.

PROFESSOR DORSANEO: So, for the record, privilege log doesn't necessarily mean that you would identify each discrete item. You could perhaps proceed by category a little?

MR. SUSMAN: Possibly. Rusty.

MR. MCMAINS: With regards to this issue of how onerous and how big the log is, as I read this, and maybe I am

over-interpreting it or dealing with areas that the committee didn't think were important, but it says that the only thing that's excepted if you are withholding information is materials created by trial counsel in preparation for this litigation. Now, a goodly number of people in this room are dealing with repeat litigation scenarios all over both the state and the country, and many of those things in the mass court area, toxic area, individual areas, they have national trial counsel.

Now, am I to understand that basically if you ask -- send a request, as I interpret it, as I read this rule, if I send a request the only thing that I can't put on it, that I don't have to put on the privilege log, is my materials in this case, and I'm not saying that's not the same that we may have now in some respects in terms of burdens on what work product documents means, but is that really the committee's intent that I have got to go through -- if I represent a client, have an attorney-client relationship with a client on 300 cases, and I get a request in this case

that I have to identify for privilege log purposes everything I have got in my file in the other 299 cases? And if that's true then the only -- all he has to do is make the request in the other case in order to get it in this case.

MR. SUSMAN: Could I just make one suggestion now. Again, to simplify this so we can talk about concepts at the time? Let's not talk about the concept of the last sentence, which is Rusty's concept. Let's hold it for a second, and then come back to the problem, how do you define "trial counsel" and how broad or narrow you make that if you have it at all. Let's limit our discussion to (1), subdivision (1) without the last sentence, and then we will vote on the last sentence separately. Is that okay?

MR. LATTING: Yes. Yes.

PROFESSOR DORSANEO: Uh-huh.

MR. SUSMAN: All right. Any more comments directed at subdivision (1) without the last sentence? Ann.

MS. GARDNER: I have what is probably a simple, mechanical question just

reading this as an outsider. Is the withholding statement intended to be a separate document from, for example, the response of and the objections, if any, like under Rule 12 for interrogatories? Is it supposed to be a separate document from the response, and is it, if not -- if so, is it governed by the same 30-day time limit? In other words, could you file your response and then maybe just a few days later give your withholding statement? That's not clear.

MR. SUSMAN: I can answer that question.

MS. GARDNER: Okay.

MR. SUSMAN: Two situations. One, interrogatory answers.

MS. GARDNER: Yeah.

MR. SUSMAN: If you withhold privileged information from answer to an interrogatory, obviously the time you withhold it is the time I hand the interrogatory answer to Buddy. So it must be in the interrogatory -- it must be in your interrogatory answers, the withholding statement.

Documents, that's a different situation. You make the response to request for documents in 30 days, but I may not be producing documents for another couple of months. Documents, my withholding statement comes at the time not that I respond but the time I produce. When I actually produce and withhold the documents, that's when I have to give you a withholding statement, not at the time I file a response to the request for production of documents.

PROFESSOR ALBRIGHT: And it may be at the same time. It may be the same time.

MR. SUSMAN: It could be the same time if you are producing documents with the response but not necessarily.

MR. YELENOSKY: Can you make that clear in the drafting, though?

MR. SUSMAN: Try to make it clear.

PROFESSOR DORSANEO: It would be better if we didn't develop the idea of an entirely new instrument that differs from the instruments talked about in the mechanical rules. It would be much better if we just

talked about a discovery response, and we would know that it's a withholding statement or even to say include it because people are going to be prepared -- even I'm thinking to myself am I going to develop a form that's going to be called "withholding statement"? Is it going to be different for interrogatories than it's going to be for request to produce? Do I file the response to the request to produce and then a withholding statement as a separate thing or with it or later?

MR. SUSMAN: Paul Gold.

MR. GOLD: I think it's imperative that the withholding statement be a part of the response. I mean, otherwise, I agree totally. Otherwise, we wind up with an additional thing in our discovery files. No one is going to know where it relates or how it relates to it. You know, I think that's an easy --

PROFESSOR DORSANEO: Yeah. We could say "as part of the discovery response" or "included in the discovery response."

MR. GOLD: When you file your

response to request for production or answers to interrogatories your withholding statement should be a part of that.

MR. SUSMAN: I don't understand how you can do it on a document request. You keep switching. Interrogatories, agreed. I said it goes into your interrogatory answers; but when you have a document request very rarely, in my cases anyway, do the documents actually accompany the response to the document request. The response says, "I will produce these documents in my office on such-and-such date, or you can come to the plant in Ohio and look at them."

As I understand it, the withholding statement is due not when the response comes in because usually when I make the response I am not even looking at the documents. I don't know what I am withholding or on what privilege, and that's what we wanted to avoid, having to make some prophylactic statement in the response. It's only when I go to the plant and I look at the documents or have a legal assistant and I am not going to show them to you that I am required to produce a

piece of paper which we have called a withholding statement. You can call it whatever you want, but it is a separate piece of paper that time.

MR. GOLD: Shouldn't we call it supplemental response then?

PROFESSOR DORSANEO: Well, I need to get that before I come to the plant and you tell me, "Guess what? I'm not showing you anything. Go back to Dallas."

HONORABLE ANN COCHRAN: Yeah. That's right.

PROFESSOR DORSANEO: So I need to get that sometime earlier. Maybe the response time is too soon for documents, but I can't be made to go to Dearborn, Michigan, to screw around and then to come back to Dallas. Because then I will file a motion for sanctions because you made me come up there, wasting my time.

HONORABLE SCOTT BRISTER: If it's the same time as the response, how is it different from a prophylactic objection claiming attorney-client that we were getting away from anyway?

MR. PERRY: The difference is that you have made a determination that there is actually something that you are not getting the other side.

MR. SUSMAN: Yeah. But Scott's point is well-taken under the current -- we have not solved that problem under -- I mean, there is a problem under the current rule, and this doesn't necessarily solve it.

PROFESSOR DORSANEO: Uh-huh.

MR. SUSMAN: That is because under the current rule you can put it in your response that I will give you everything but what's privileged, and two months later I go to Acron, and there is nothing there, and you say, "Well, look at my response. I told you two months ago, dummy."

PROFESSOR DORSANEO: I don't think you really are supposed to do that under the current rule. You are supposed to make a response by item or by category, and I don't think you can just say if and when I look at things some of them might be privileged, and at that time when you appear in Michigan I am not going to show them to you.

MR. SUSMAN: Luke.

PROFESSOR DORSANEO: I hope not.

CHAIRMAN SOULES: Well, I have looked at Rule 7 and the rule on documents and then the rule on interrogatories, and my impression is that these rules do not help on prophylactic objections in any way. Maybe on documents but certainly not on interrogatories. There is nowhere that this says that objections can be made after the first response to interrogatories if you learn something new that happens to be privileged then. So you have to make your objections when you file your responses. You have to make all your objections, I guess, when you file your responses. Documents, it's a little bit clearer, although it has the problem that Bill is bringing up here, and I --

MR. SUSMAN: Please don't get to objections yet because if we haven't cleared this we need to get it clear.

CHAIRMAN SOULES: Well, it's the same thing.

MR. SUSMAN: No, it's not.

HONORABLE F. SCOTT MCCOWN: Well, no. Steve.

CHAIRMAN SOULES: To me it's the same thing.

HONORABLE F. SCOTT MCCOWN: Steve? Luke's right. Sentence No. 2 --

CHAIRMAN SOULES: Let me finish, please. I'm not done if I can hold the floor just a few more minutes.

HONORABLE F. SCOTT MCCOWN: I'm sorry.

CHAIRMAN SOULES: To me the concept is that there should be a withholding statement or whatever you want to call it. I don't think it ought to have to be some separate document that takes a life of its own, but that there has to be a disclosure that information is being withheld at the time the party expects to withhold it; and then, of course, if it's information the party didn't know about on the first round, it's in the second or third wave of document production that typically does come in a big case, then the party doesn't expect to withhold it until the party gets that second wave itself and

goes through it and decides whether or not it needs to make a claim of privilege or make a disclosure or nondisclosure statement. That's all.

HONORABLE F. SCOTT MCCOWN: Well, our Sentence No. 2, if you look at the second sentence in the rule, that sentence is carrying more information than you-all are loading out of it. So it's not clear enough. It's not express enough. What we meant there, a party shall make the withholding statement only whenever the party is actually withholding specific information of materials responsive to a request, and we don't have the word "only," and even if we did, that still wouldn't tell you enough.

What we envisioned, and we need to work on the drafting, is that you owed a withholding statement only when you actually had the materials in hand and were withholding them. So you didn't have to make prophylactic objections for later created material because you couldn't. In other words, attorney-client is constantly created even after the request. Since you wouldn't actually be withholding it

because it hadn't been created, you wouldn't have to make the objection.

CHAIRMAN SOULES: On page 26. If you're done, on page 26 you say that objections, if any, to interrogatories are to be made 30 days after service of the interrogatories.

HONORABLE F. SCOTT MCCOWN: But an objection doesn't preserve anything with regard to privilege. Privilege is raised not by objection, only by withholding statement under this system, and we say that in here.

CHAIRMAN SOULES: Where?

MR. SUSMAN: First sentence. "A party preserves a privilege only," only. Now, maybe that's not clear enough.

HONORABLE F. SCOTT MCCOWN: Yeah.

MR. SUSMAN: And maybe we want it in a comment, but a party preserves a privilege only by a withholding statement. Objections don't do any good for privilege anymore.

CHAIRMAN SOULES: Well, why do that?

MR. HERRING: Let me give you a poor example. David Perry sues General Motors. He sends a request for production that says, "Produce all passive restraint documents on the Suburban." And his case involves only air bags. So I think that's overbroad, but if he ever gets narrowed down to air bags on Suburbans for a certain period, I will answer it. I know some of those documents are privileged. I know that when I get his request. I'm going to have an overbreadth objection. When do I have to file a withholding statement? I know I have got some documents that if that request were properly narrowed down I would produce.

HONORABLE F. SCOTT MCCOWN: Okay. Once you make your objection that it's overbroad you have got no obligation to respond. So you are not withholding anything yet. The objection would have to be overruled and narrowed to Suburbans. Then you would have an obligation to respond. You would do your search. You would find your privileged documents. You would make your withholding statement. That's what we envisioned.

Whether we got that in the drafting or not is a separate question, but that's what we envisioned.

MR. HERRING: What's the time for filing it?

MR. SUSMAN: It's a time he shows up. It's a time the other side actually shows up to look for documents or you send him documents because that is the effective time you do the withholding.

MR. PERRY: In other words, Chuck, we contemplated that at some point in that process it would become your obligation to produce whatever it is you are going to produce. The documents --

MR. HERRING: I understand that. I have still got Bill's problem, though.

MR. YELENOSKY: Yeah. Now, it's Bill's problem. You show up to General Motors, and they say, "Here is the withholding statement."

MR. HERRING: We just need to have a way to get it to you so it's useful so that you don't show up in Michigan, and you

don't have it.

PROFESSOR ALBRIGHT: Another thing, Scott, if I can correct you. We do have some obligation to respond even though you have objected because we have said that you have -- unless compliance is unreasonable under the circumstances the party must respond to so much of the request as to which the party has no objection. So it may be that you say, "I will produce all of them concerning air bags," but it may be that you say, "I'm not going to do any search because I will just have to go through everything three times."

MR. HERRING: I need to know more than "maybe." I mean, I need to know do I have to or not? I think it ought to be clear.

MR. SUSMAN: Wait a second.

PROFESSOR ALBRIGHT: Well, you get to decide.

MR. SUSMAN: Listen. We can go back. Let's see if we can do this. Our notion -- on our notion on assertion of the privilege, privileges, not objections, and objections don't work for privileges anymore.

Our notion on privileges are at the very time you find a document and make a decision to withhold it on a ground for privilege that's when you notify the other side, and that notification constitutes -- that preserves the privilege. Now, if you-all don't like that system and want to go back to the current system of objections, we can do it. I mean -- yes, sir.

HONORABLE DAVID PEOPLES: Yeah. I want some more discussion on what Scott Brister brought up several minutes ago, which was -- was it Keltner's committee that proposed that you have got to specifically ask for attorney-client or work product notes, and then Scott McCown brought up, well, in camera I see all of these, you know, documents that some of them aren't even close. Now, I think we need to discuss that alternative, especially if another subcommittee of this whole committee is proposing it, and I am not sure how it works, you know, and what Judge McCown was saying. You know, it is true that sometimes people claim things are privileged which really aren't even close.

MR. KELTNER: I agree.

HONORABLE DAVID PEOPLES: But I like the idea of, you know, if you really want something that's in the attorney-client or work product area why not -- why shouldn't we say you have got to say up front, "I'm asking for that."

MR. SUSMAN: I'm not -- let me address this. I mean, we could easily make that change and add that to this rule.

HONORABLE DAVID PEOPLES: I mean, it would require more than adding because the first six words here are inconsistent with that. "You preserve privilege only by withholding." You don't even have to mention privilege unless they are asking for it.

MR. SUSMAN: I understand, but the concept would be you don't have to worry about preserving privilege unless the other side asks for it. If they ask for it then the way you preserve it is this rule. Now, if you-all want to -- the subcommittee did not think it was necessary to add the additional step of making people expressly ask for it. I

don't know what fool would not expressly ask for it. I would put that in every one of my forms.

HONORABLE DAVID PEOPLES: I think you look bad when you ask for that.

MR. SUSMAN: Huh?

HONORABLE DAVID PEOPLES: I think you look bad coming into court asking for privileged matters unless you have got some --

MR. GOLD: Which is exactly why the task force was unanimous on that. Because it creates a presumption that I am coming in, and I am having to ask for attorney-client privileged matters and work product. I start off in a bad situation in that court, and that's why that approach has problems.

MR. SUSMAN: David.

MR. PERRY: The fact is you are never going to be asking for the production of stuff that is privileged. What you are going to be asking for is to invoke the mechanism by which the claim of privilege is tested, and the system that the task force talked about and the system that the subcommittee came up

with are very close to the same, but under the system that the task force talked about almost any good lawyer is always going to say, "Tell me what it is you are withholding," because you have to do that in order to invoke the mechanism.

Under the system that the subcommittee came up with, there is a particular area carved out that is really always going to be there and is pretty much always going to be privileged, and we just said, look, we will take that little area, and you don't ever have to worry about it. The guy who's answering the discovery, the phrase I think that we talked about using, started talking about is trial counsel's file. Now, that's not the way we phrased it, and maybe the drafting could be changed, but as a practical matter in every case trial counsel has a file, and trial counsel's file is privileged, and what we are trying to do is just carve out that little area and say nobody has to do anything about that, and then in other areas create a mechanism that provides for the orderly invocation of the way to decide the claim.

MR. SUSMAN: David Keltner.

MR. KELTNER: Let me add, and I think David is exactly right in the way he explained what the subcommittee was trying to do. Here is what I think the problem is: On the task force we determined that there were an awful lot of discovery requests that came out of form books, that were simply made that by their very language requested attorney work product and attorney-client privilege, and if, for example, they said -- well, almost any request would do it, and it's because it wasn't specifically excluded, and it was difficult to do so. If you got it too specific, you didn't get everything you were after. If you got it too broad, it obviously had to ask for privileged materials.

Our thought process was let's address -- since the request is the problem let's address it through the request, and we thought that was simpler. Now, what the subcommittee did is saying, well, we want to put the emphasis on testing, at least this is my characterization, testing the privileges. I believe in about 80 percent of the time, maybe

even higher, nobody really wants to test the privilege. The real truth of the matter is we would all say, "No, I don't want that. This is -- you know, this is a 100,000-dollar case. All I want to see is what you've got that all of us would generally consider discoverable."

So it's -- I personally still like the idea of putting it into the request solely because I think that does most good in most cases. There is no doubt that what David and Paul were saying and Scott was also saying is absolutely true. There probably is no more abuse in claiming the privilege that doesn't exist in the attorney work product situation. That's where we see most of the problem areas and people trying to put stuff in there that shouldn't be there, but again, I think I would opt for the task force rule as well.

I must admit that I think we need to discuss, though, the idea of the withholding privileged information as a substitute for objections because, quite frankly, it makes some sense. I would take -- I mean, just I will put my two cents in it. I would take the objections paragraph out in the main part and

mold it into what we are talking about in sub (1), but I think it does make sense to at some point create a privilege log. If there are cases we don't have to do so, I would sure prefer we not.

MR. SUSMAN: Scott.

HONORABLE F. SCOTT MCCOWN: Well, the reason I like the subcommittee approach better than the task force approach is because under the task force approach when you ask for privileged material you are not really asking for privileged material. What you are really asking for is material that they are contending is privileged but that isn't once the judge sees it, and I think to set up a rule where we require people to ask for privileged material and to have to explain to clients that that request for privileged material is perfectly proper because they are not really asking for privileged material. They are really asking to invoke this testing mechanism. So we have to give them what we are claiming is privileged but really isn't privileged, seems to me to be kind of unattractive.

MR. SUSMAN: And particularly if a judge like David Peoples is going to look at me and say, "You are asking for privileged material? That's sanctionable. You shouldn't be doing that." I mean, why shouldn't I test the privilege?

HONORABLE F. SCOTT MCCOWN: And what we have done under this rule is what David Keltner says we ought to do, which is all you have to do is tell them you got it. Once you do that, though, they have to say to you they want it. So we still have the dialogue that the task force envisioned and the invoking, not in the 80 percent but the 20 percent.

MR. SUSMAN: All right. We have got to get some closure on this. Let's look at the rule as written without the last sentence on trial counsel. All in favor of 7, subdivision (1), with some wordsmithing? We will go back and see how we make this clearer, this concept. Raise your right hand.

CHAIRMAN SOULES: 13 for.

MR. GOLD: So long as I get to be at the meeting.

MR. SUSMAN: All opposed?

CHAIRMAN SOULES: Three against.

MR. SUSMAN: Three against. Okay. Let's go on. Trial counsel. And I really need to move now because we have got one hour left. Trial counsel. The problem is how we define trial counsel, and we have heard Ann's problem. Go ahead, Ann McNamara. What should we do with that?

MS. MCNAMARE: Why not just take the word "trial" out? Just say "counsel in preparation for the litigation."

MR. SUSMAN: All right.

MR. LATTING: And what is "the litigation"?

HONORABLE F. SCOTT MCCOWN: Yeah.

HONORABLE ANN COCHRAN: That goes to Rusty's point.

PROFESSOR ALBRIGHT: Can I respond to that?

MR. SUSMAN: Yes.

PROFESSOR ALBRIGHT: Right now -- and this is something we need to bring

up when we talk about privileges at the next meeting, is that under the party communication privilege as it's currently worded the Supreme Court has said that that material in other litigation is not privileged. So that's why we limited it to the materials created in this litigation. So we don't give people opportunities to withhold stuff that is not privileged.

MR. YELENOSKY: Alex, doesn't that raise another question here? Because it doesn't seem to include in this sentence communications from the client to the lawyer because of the "created" word. Don't you need to have attorney-client communications in there somewhere in this sentence? Because that -- I mean, a letter from the client --

PROFESSOR ALBRIGHT: That's fine with me.

MR. YELENOSKY: -- to the attorney is not created by counsel.

PROFESSOR ALBRIGHT: Yeah. And, you know, actually I think "created by counsel" is work product, which would be privileged, but we have a real problem in

text --

MR. SUSMAN: I would suggest --

PROFESSOR ALBRIGHT: -- as to what is work product, and I think it --

MR. SUSMAN: I would suggest we --

PROFESSOR ALBRIGHT: -- can be resolved when we get to the privilege if we can resolve the privilege problem.

MR. SUSMAN: Absolutely. I suggest it goes hand in hand with the privilege thing that you are working on that we have not voted on. Let's defer this sentence. You will have some sentence like this in the final rule. There is a sense that something belongs. How broad or how narrow it should be will be left to a resolution of the privilege issue.

(2), subdivision (2) of this rule. There did not seem to be a whole lot of -- there was no controversy basically about this at the last meeting, which is, "The objection shall be made only if a good faith factual and legal basis for the objection exists at the time the objection is made." Yes, sir.

MR. MARKS: There may not have been a controversy, but I recall there was some question about that second sentence, and I'm not sure that -- you know, first of all, you only make an objection, but maybe you -- there was some language, wasn't there, last time about you waive objections that you don't make? But I don't like the "any objection not specifically stated." Well, excuse me. That's not it. "Or obscured by numerous unfounded objections is waived."

PROFESSOR ALBRIGHT: You don't like either of them or just one part?

MR. MARKS: What I really don't like is "obscured by numerous unfounded objections."

MR. LATTING: Why? Do you like to do that a lot?

MR. SUSMAN: Go ahead, Paul.

MR. GOLD: That sentence, I have been the advocate of that sentence, and that's because I remember when I was starting out practice in Dallas, and in the charge conferences they would bury all of the significant objections in a sea of ink, and I

remember there is a Supreme Court case that says that a trial judge should not have to squander time with meaningless objections to try and find the correct ones.

MR. MARKS: That's to the charge. Charge.

MR. GOLD: And there is absolutely no reason why attorneys should have to bear with what a trial judge shouldn't.

MR. SUSMAN: Other comments on section (2)? Tommy Jacks.

MR. JACKS: I have a suggestion, and that is, after the phrase "If written discovery request is objectionable," in certain words, "on grounds other than privilege."

MR. SUSMAN: Perfect. It is accepted.

PROFESSOR ALBRIGHT: Well, except -- no. There is a problem. If you send me a request that says, "Send me your litigation file," the Supreme Court says that the form of that question is objectionable. That is because all it does is request work product. You know, there may be items in my

file that you can get if you request them specifically, but you cannot just send me a request that says, "Send me your litigation file."

MR. JACKS: Well, isn't the objection overbreadth?

PROFESSOR ALBRIGHT: Well, maybe it is but that --

MR. JACKS: Yeah. I understand what you are saying.

PROFESSOR ALBRIGHT: The reason it's overbroad is because of the privilege.

MR. JACKS: The reason I make the suggestion, and maybe there is another way to go about it, is because to me it's still not clear that you're accomplishing what I think you were trying to accomplish, and that is in (1) to say if you want to object on privilege grounds, do it this way.

MR. SUSMAN: We want to make that absolutely clear, and I would ask that you get together with Alex, who -- Alex will take responsibility for wordsmithing this afterwards and make sure that that is clear. That is a drafting problem, but the concept is

there. With that in mind are we ready to vote on (2)? All in favor of 7(2)?

MR. MARKS: Well, excuse me just a minute.

MR. SUSMAN: I don't mean to -- go ahead.

MR. MARKS: I don't think we have talked enough about "obscured by numerous unfounded objections." I think that should be taken out.

MR. SUSMAN: Well, I am going to give you the opportunity.

MR. MARKS: Okay.

MR. SUSMAN: Anyone who wants to -- anyone who believes it's okay to obscure an objection by numerous and unfounded objections should vote against --

MR. MARKS: That's not the point. That's not the point.

MR. LATTING: What is the point?

MR. MARKS: I think, No. 1, your objection to interrogatories in the first place is not like you are objecting to a charge. There are only so many objections

that you can make, and I have never seen objections to interrogatories that were that long.

MR. PERRY: We can talk. We can talk.

MR. GOLD: The Strasberger & Price two-page standard objection to an --

MR. MARKS: Well, I don't --

MR. GOLD: I know you're not there anymore. I know you're not there anymore, but you have seen that. It's a two-page stock objection to every interrogatory.

MR. MARKS: Well, a lot of it is privileged, though. I mean, you pull the privilege out of that, then you take the teeth out of a lot of this.

MR. SUSMAN: David.

MR. MARKS: Now, the first sentence takes care of it. It says, "only if a good faith factual and legal basis for the objection exists."

MR. SUSMAN: David.

MR. PERRY: I think that a very great deal of the unnecessary cost of

discovery revolves around numerous unfounded objections. It is very common in cases that I am involved with to receive objections that run 50 or 100 pages, and to end up by the time you are at a hearing that there are two or three out of several hundred -- up to 100 pages that somebody really wants to present to the court, but there has been a tremendous amount of lawyer time and lawyer expense on both sides of the docket spent by creating them and then weeding them out, and I don't think that the fault lies particularly with either side of the docket. I see numerous unfounded objections proposed both by plaintiffs and by defendants, but I think the rules need to put the burden on the lawyer who is filing the objection, to start with, to do a good lawyer-like job of raising the objections that need to be raised and nothing else.

MR. SUSMAN: Ann.

HONORABLE ANN COCHRAN: I would like to second very strongly what David just said. I think one of the top abuses and problems in discovery is --

MR. SUSMAN: Rusty.

MR. MARKS: Let her finish.

HONORABLE ANN COCHRAN: -- from ridiculous, incredibly numerous, ridiculous objections.

MR. SUSMAN: Rusty.

MR. MCMAINS: My comment is actually not on that sentence but the last sentence, which says, "Unless compliance is unreasonable under the circumstances a party must respond to so much of the request as to which the party has no objection." Because the earlier requirement is that you must make a timely objection or it's waived, my problem is that given the current practice there is going to be objections made by and large to most written discovery requests. Maybe we will narrow it down some. This doesn't give me very much assurance that I don't really have to go ahead and do an awful lot of work of things that I know ultimately they are going to get. There is no kind of automatic downtime until the objection was ruled on.

It doesn't -- it's just kind of "loosey-goosey," and so I'm just -- it says

there is no provision here or procedure for the determination of it, whose burden it is to show one or the other. It kind of assumes that I do have the obligation to go forward and do whatever it is I do in that if there is a kernel of something that I have to -- that I have to respond to, that I know I am going to have to respond to after all my objections are made.

MR. PERRY: You need to read the last phrase of the first sentence in conjunction with this because under the last phrase of the first sentence the person who is making the objection has to state the extent to which they are going to refuse to comply with the request. So they can say, "I object to this part, but I am answering the rest of it," or they could say, "I object, and I claim that under the circumstances it would be unreasonable to do anything," and so I am going to do nothing so that the answering party gets to decide how much they are going to comply under the terms of the rules, and they have to tell the party receiving the answer what that is.

MR. SUSMAN: Paul Gold.

MR. GOLD: Yeah. What we need to do here is we need to clarify a policy, and what we have in the practice right now is a question of when you get an overbroad request -- I think Chuck was talking about this a moment ago. He knows that in response to David's request he's got a section of documents that are responsive, but the request is overbroad. Here is where the issue is: does he object and say this is an improper request, it is overbroad, and not answer it at all, or should he object this is an unreasonably, unduly burdensome request?

It requests irrelevant materials, but I do have this responsive information that's a subset of this request, and I will produce that, and I am not producing anything else, and that's what this sentence is designed to cure so that you would at least -- it would at least finesse out the information that he himself believes is responsive.

MR. SUSMAN: Rusty.

MR. MCMAINS: But my question is, is this first part which says "and the

extent to which the party is refusing to comply," if they say it's overbroad, and therefore, I am refusing to comply, then I'm not sure that you have accomplished that.

MR. PERRY: Well, you have, and you haven't.

MR. MCMAINS: But I think the last sentence was designed to rectify that by saying, well, that's not fair because you knew there was something that you should have complied with, but I am trying to figure out how those --

MR. HERRING: What are you going to have to report, David? Because if it's all passive restraint systems, and I know there is only one of them in here that applies, if you say, "Produce all documents of General Motors," that's unreasonable, and I don't have to rewrite that. I can just refuse completely and say, "I am going to refuse to produce anything."

MR. GOLD: But it's very difficult to articulate that in the rule.

MR. HERRING: Right.

MR. PERRY: We are leaving the

decision -- we are leaving the initial decision up to the party that is going to do the answering, although they have a direction that unless it is unreasonable they are supposed to comply with the part that's not objected to. For example, in the litigation that I have with Ford, Ford will commonly object to requests for production as overbroad and produce nothing. General Motors will commonly object to the request as overbroad to the extent that it exceeds X and then they will agree to produce X, and what we are doing is incorporating a mechanism in the rule that the answering party is supposed to make it clear what they are doing. They can choose to do either one, but they are encouraged to make the production that they are not objecting to unless they claim that under the circumstances it would be.

MR. SUSMAN: Again, we are running out of time. Ann.

HONORABLE ANN COCHRAN: Well, I mean, I appreciate the time concerns, but on the other hand, if we have got real problems we have got to keep going.

MR. SUSMAN: Yeah.

HONORABLE ANN COCHRAN: The wording of the last sentence does not say what you have just said. This is not encouragement. It is unless compliance is unreasonable you must, and you know, if we are going to say that, if what we mean to say is -- and I am not arguing one way or the other, David, but if what we are trying to say is that it's purely up to the responder to decide which way to go then we sure better take that "must" out, and we had sure better clearly say that if the judge decides that the responder guessed wrong or took the wrong path that it's not sanctionable, that the other side can't complain about it, and let's be clear. Because the way this is written it is not a voluntary election on the part of the respondent.

MR. SUSMAN: Well, clearly the respondent has got to make judgment calls, I mean, but we all do. Okay. And what we are saying here is -- I mean, we give an example in the comment. Comment 1, if the request seeks specific documents from '80 to the

present, the party then objects that the documents from '80 to '90 are irrelevant and it is overly burdensome to produce them, but you may -- the party may produce the documents from '90 to the present or refuse to produce until the court resolves the objection if producing according to a modified request will require burdensome and duplicate research. Now you are saying that's not clear enough?

HONORABLE ANN COCHRAN: I'm saying the comment is not part of the rule.

MR. PERRY: I think the draft could be improved. Why don't we have a shot at the drafting and improving that because I think we can do that?

MR. SUSMAN: I mean, what we want -- does it make sense to encourage and try to get people to produce those documents?

HONORABLE ANN COCHRAN: I don't have any problem with the concept. I think it needs to be rewritten to make it clear exactly what the --

MR. SUSMAN: All right. Conceptually then. All right. Conceptually on Rule 7(2). All in favor conceptually of it

with the idea we are going to go rewrite it?

HONORABLE ANN COCHRAN: Well, I don't know at this point how you are going to end up rewriting it. Are you going to make it elective, or are you going to make it punishable if you do the wrong thing? I can't vote conceptually until that's decided.

MR. SUSMAN: All right. How do you want it? How do you want it?

HONORABLE ANN COCHRAN: I don't know. I don't think we have talked about it enough. I mean, I think that there were some real questions raised here on both sides.

HONORABLE F. SCOTT MCCOWN: Steve, I think we have got an understanding. Let's redraft it and bring it back and move on. We don't need to vote.

MR. SUSMAN: Okay.

HONORABLE F. SCOTT MCCOWN: I think we understand.

MS. MCNAMARA: Can I make one point? I know we have got very little time to go, but back to John Marks' point because I think everybody is opposed to a lot of unfounded objections. The question I have is

whether we have enough in the second sentence to -- which says you can only object if you have got a good faith basis for doing it and whether the next sentence is really gilding the lily and more properly belongs in sanctions because I think -- and I think if I heard you, John, that's what you were saying is, you know, the rule already deals with the nonsense, two-page, et cetera, et cetera, objections.

MR. MARKS: It certainly gives the court the option to deal with it.

HONORABLE ANN COCHRAN: That's right. I don't think the first sentence is a problem. I mean, the second sentence takes care of the problem because all that's saying is that, you know, the judge only sustains the ones that have a good faith factual and legal basis. The problem is what if there are 300 objections, 299 of which fail the test in sentence two. Does the judge really have to work through all 300 to find that one that was good?

MR. MARKS: Have you ever seen 300 objections?

HONORABLE ANN COCHRAN: Yes. Yes.

MR. MARKS: To one interrogatory?

HONORABLE ANN COCHRAN: Yes. The judge should be able to go through a certain number and say, "I'm assuming that all the rest of these objections -- before I spend the next two days in this oral hearing, I'm assuming that all the rest of the objections have the same high quality as the ones I have already ruled on. Get out of here." The judge has to have that ability.

MR. SUSMAN: Rusty.

MR. MARKS: The sentence says "shall be made." Okay. "An objection shall be made only if a good faith factual and legal basis for the objection exists."

MR. SUSMAN: Rusty.

MR. MCMAINS: Well, but I think also the fact -- if the purpose of this rule is to take away privileges from being preserved by objections then the idea that you waive the objection really in terms of what damage it causes is a lot more. Because if

your assertion -- well, right now our problem with the waiver of concepts and this stuff is, well, we lose privileges that you ought not to lose, and once you take that out of the fix, I mean, the privilege of what you lose is an objection that focusing -- you know, that is buried in 37 other objections that are irrelevant. Okay. So you have to go to the court. Big deal. I mean, that to me militates against the concern about this numerous unfounded stuff to know if you are going to make --

MR. SUSMAN: Let me see if we can get a show of hands on two concepts or a concept. One -- because there is a disagreement here. I mean, there is some of us that feel very strongly that that third sentence ought to be in here, and there are others that think it should not. Who thinks the third sentence or something like it ought to be in here? Raise your right hand.

CHAIRMAN SOULES: 17.

MR. SUSMAN: Who thinks it should not be in there? Two -- three.

CHAIRMAN SOULES: 17 for, 3

against.

MR. SUSMAN: Now, let me ask another question for guidance. Ann raises a good point, Ann Cochran, and the point is on the last sentence do we want that a mandatory? In other words, you have a pretty strong -- if you are responding, you have a pretty strong burden to figure out how much of the guy's request is reasonable and comply with that portion and not just stop all discovery by lodging an objection 'til he makes it right, or do we want to just kind of if you want to go ahead and do something, you can, but you don't have to? Is that -- I mean, Ann is that kind of the --

HONORABLE ANN COCHRAN: That presents the issue very squarely.

HONORABLE F. SCOTT MCCOWN: There is a third alternative. I mean, I think you ought to have a duty to put on the table whatever you think is responsive that you don't object to. When you get to the hearing on your objections if the trial court thinks that more goes on the table then he orders you to put more on the table. I don't think it

ought to be off with your head if you discharged your duty differently than the trial judge thinks you ought to have.

MR. SUSMAN: Dorsaneo.

PROFESSOR DORSANEO: The way David Perry put it I don't have any trouble with somebody saying that they will produce X and then somebody else saying, "I will produce nothing because under the circumstances it's unreasonable for me to produce anything." Now, if they are wrong about that and something might happen to them later -- but that's a separate question from the response that they can make.

MR. SUSMAN: David Perry.

MR. PERRY: The initial drafting -- and I don't remember where it came from anymore -- was to the effect that you always would have a duty to produce the information to which there was no objection. I guess that came out of the task force, and then somebody said, well, suppose this is a great, huge case, and you have requested the world, and doing the search to isolate what you object to versus what you don't object to

would be unreasonable until you have gotten a final ruling on what the scope of production ought to be. Shouldn't you have the ability to do nothing?

And the thought that we had was, well, that would be a very rare situation, but yes, we would give people an out in that regard. It seems to me that that situation is rare enough that the general duty that the party must respond to the part that they do not object to should be phrased in mandatory terms. We give them the out about the unreasonable circumstances, and as a practical matter there is no penalty attached to taking that out and being wrong. You haven't waived anything, and the chances that a trial judge is, in fact, going to sanction somebody -- we haven't written the sanction rules yet, but under all the drafts that we are looking for I can't imagine a trial judge sanctioning somebody for taking that out and then hearing a big fight over whether it was unreasonable to take that out.

MR. SUSMAN: Paul Gold, and Luke.

MR. GOLD: As a practical matter giving a response takes you out of the sanction situation. It's only when you do not respond at all to an interrogatory that you presently risk the sanctions there. I really believe that all we are doing is trying to make clear and institutionalize what should be practice. On plaintiff's side if someone asks me for 10 years of income tax returns, I shouldn't object and say, "That's overbroad." I should say, "Here is five. It would be unduly burdensome to get the other five."

All we are trying to do is encourage that type of practice, and I think there should be a duty. A party must respond to so much of the request that is not objectionable and which under the circumstances is reasonable to do, and I think if we make it discretionary, all we do is build into the rule more game playing.

MR. SUSMAN: Luke.

CHAIRMAN SOULES: I think in our earlier discussions we had talked about the discovery should go forward to the extent it's not objected to so that we get the show

on the road. The costs, the amount of discovery that is given, may turn out to be acceptable to the receiving party. For one thing, the five years may turn out to be satisfactory. Also the problem of delay by simply objecting and just shutting down discovery, the delay in most instances is also costly because that generates some kind of -- some activity during the delay period, and my understanding of this was that the purpose of this was that a party would go ahead and make discovery so as to get the case in motion, particularly since we have a discovery window under Tier 2 that's going to lapse at some point.

And my belief about this is that it should be mandatory that a party respond reasonably with making discovery even though there are objections and only put on the side the information that is really the subject of the objection so that the first three months of the nine months is not just used up in obstructions. I think that was what our philosophical approach to this was, that there was a purpose in doing it this way, in having

that in, and that it was mandatory.

MR. SUSMAN: Okay.

HONORABLE DAVID PEOPLES: Steve?

MR. SUSMAN: Yeah.

HONORABLE DAVID PEOPLES: I was one who voted for the provision that, you know, obscured by numerous unfounded objections. Do the rules deal with numerous unfounded requests anywhere? I mean, if somebody just asks for the moon, you know, everything, on the theory I'm going to ask for it, nothing happens to me, and it puts the burden on the court and the other side to whittle them down.

MR. GOLD: Loftin Vs. Martin.

HONORABLE DAVID PEOPLES: Do the new rules deal with it?

MR. MARKS: No. Nor does Loftin Vs. Martin.

MR. GOLD: Loftin doesn't deal with the number of the requests. It deals with the breadth of requests.

CHAIRMAN SOULES: Our sanctions proposal has tried to put some balance in

that, if I recall. Either a requesting party requesting too much or an objecting party objecting too much or equally offensive. Is that right, Joe?

MR. HERRING: You have got it in the rules now. You are going to have to have something to deal with that.

MR. LATTING: Now, say that again.

CHAIRMAN SOULES: I'm sorry. Judge Peoples was asking about dealing with numerous unfounded requests, and as I recall the sanctions rules, it's been a while since we looked at them, we tried to put some balance in there that both unfounded requests for discovery and unfounded objections to discovery would be sanctionable, expressly put that in there.

MR. LATTING: I can't remember.

MR. MARKS: Are you going to have unfounded objections sanctionable and also waived or --

MR. HERRING: Well, I think you deal with some of those issues at sanctions time. The question now is do you have a duty

to respond, and then we have to figure out what happens, you know, if you don't, as Ann says. Do you have waiver, and does something else happen to you?

MR. SUSMAN: Let's see. We are now, I think, voting on the concept of the last sentence, which I think there has been discussion of whether it should be mandatory. All in favor of the concept of the last sentence raise your right hand.

CHAIRMAN SOULES: As mandatory?

MR. SUSMAN: As mandatory.

MR. LATTING: What is mandatory?

MR. SUSMAN: The last sentence that you have got to comply to the extent you don't object.

CHAIRMAN SOULES: Okay. That's 17 for.

MR. SUSMAN: All opposed?

CHAIRMAN SOULES: It's unanimous.

MR. SUSMAN: Hearing, hearing and ruling, there is nothing here that is controversial, I don't think. Does anyone see

anything that's controversial on hearing or ruling?

MS. GARDNER: I have just a typographical question, and I think it's an error. The second sentence, "at or before."

MR. SUSMAN: "At or before the hearing."

MS. GARDNER: To the hearing. Well, "at or before the hearing" sort of conflicts with that part that says you have to file affidavits at least seven days before, and somewhere in there are you intending to put "or testimony can be produced at the hearing" like in the old rule or --

MR. SUSMAN: No. No testimony.

MS. GARDNER: That's two questions.

MR. SUSMAN: I'm sorry. That is one decision we did make.

MS. GARDNER: Okay.

MR. SUSMAN: That is, these hearings will only be by affidavit, no testimony, but there may be a drafting problem here.

PROFESSOR ALBRIGHT: You're

right. That first phrase needs to go out.

MR. SUSMAN: Any other comments or questions about Rule 3, subdivision (3) or (4). Yes, Rusty.

MR. MCMAINS: I'm getting some feedback, but I was just curious why when we said "any party may at any reasonable time request a hearing." That sounds like a -- there is some controversy about when it's reasonable to request a hearing. I never have -- I don't understand what that means.

MR. SUSMAN: Paul.

MR. GOLD: And we were talking with Rusty. There is a case out of Dallas, I think, that Justice Hecht wrote, National Union Fire Vs. Hoffman that talks about seeking a hearing within a reasonable time and not waiting until, for instance, the eve of trial. You have got a request, but at the beginning of the case, and you wait all the way up until the end of trial to seek a hearing on it. I think the only thing about that sentence may be syntactical, that phrase, "any reasonable time" needs to be either at the beginning or the end. It seems like it's

in an awkward place. It needs to be in there. I think it just seems awkward where it is. That's a drafting problem.

MR. SUSMAN: Luke.

CHAIRMAN SOULES: I think that it ought to be at any time, and we ought to overrule the stage of the -- I think, Judge Gonzalez made it that when trial starts it's too late. I mean, and here is the reason why. Attorney-client privileges have been asserted or withholding. Well, first of all, does the hearing include hearings on withholding and objections?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: I guess so. All right. Attorney-client objections have been made. The log has been looked at. Nobody ever asks for a hearing until they get into court, and they say, well, give us your docs. now because there never was a hearing, and you waived it because the trial started. Can you then have a hearing, and do you have to have seven days worth of affidavits to have a hearing then to keep from having to give up your attorney-client privileged documents that

up to then you never knew you had a problem with because your objections seemed to be satisfactory?

MR. GOLD: Luke, I really do think there should be some incentive to push the matter before trial, to get it so that you are not arguing discovery matters on the eve of trial because what you are going to wind up with is the situation of Service Lloyd's Vs. Harbison where on the eve of trial the person is filing a motion to compel production of experts, and they get exactly what they want within 15 days of trial. Then they claim, wait, I can't get ready for trial. I think that that needs to be pushed away from trial so that you have it done. I think it needs to be a reasonable time before trial.

CHAIRMAN SOULES: We now have prophylactic hearings. We not only make prophylactic objections, but we have prophylactic hearings before trial. I tell my young lawyers either you get an agreement, a Rule 11 agreement, that all of these objections are good, or you go to court before trial starts, and you get a ruling. Because

if you don't, you have waived. You may be in a situation of having waived your claims of privilege --

MR. GOLD: I agree with that.

CHAIRMAN SOULES: -- because of this case. Well, are we still going to do that? That means that every case before it goes to trial, if the lawyers are on their toes, every other there is going to be a fairly major hearing on objections that people are essentially comfortable with, but they are afraid if they don't have a hearing they will be caught flat-footed in a waiver situation after trial commences.

MR. PERRY: I thought that rule got changed.

MR. SUSMAN: That is not in here now, Luke.

CHAIRMAN SOULES: It is in here.

MR. SUSMAN: No, no, no. In the first place, you no longer -- the objecting party and the withholding party don't have to get a hearing. Period. Under any circumstances. Okay. It's the party who

wants to overcome the objection or overcome the withholding that has --

MR. LATTING: We covered that ground some time ago, didn't we?

MR. SUSMAN: -- to get the hearing. I mean, I think we have discussed this. So no longer do you have to worry about keeping your privileges or objections by getting a hearing. The question is, is it fair to make the party who wants the thing try to get it before trial? Now, you are right. There is a certain amount possibly of wasted effort in trying to get some material for a trial that may never take place because it will be settled or won't be needed, but isn't it usually best if you want it to come get it and resolve it before trial, not to wake up, you know, after opening statements and say, "I want you to now produce all your attorney-client stuff in camera so the judge can see it." I mean, I would think that would be --

MR. LATTING: That wouldn't be at a reasonable time, would it?

MR. SUSMAN: That's why we put

it in there.

MR. LATTING: But it might be. That might be reasonable?

MR. SUSMAN: Might be.

MR. LATTING: And when we put it in there that it's not, it seems like it hamstrings the trial judge.

MR. SUSMAN: We didn't ever put it in there as not. We just say at any reasonable time.

MR. LATTING: What about, we don't have a seven-day rule about affidavits served seven days before hearing?

MR. SUSMAN: That we do. That we do.

MR. LATTING: Then how are we going to have a hearing during the trial?

HONORABLE F. SCOTT MCCOWN: You can't.

MR. SUSMAN: You can't.

MR. LATTING: So then I am suggesting that you ought to be able to in some circumstances. Why require people to go down and schedule a hearing early so that they won't have this problem? Why don't we let

that be handled on an ad hoc basis as is reasonable during the trial?

MR. SUSMAN: Rusty.

MR. LATTING: Why make people have more hearings? I thought we were trying to get away from that.

CHAIRMAN SOULES: And the other problem is the affidavits. I mean, you can't cross-examine a corporate executive who's claiming privileges?

MR. PERRY: Well, that's confusing a trial objection versus a discovery objection.

CHAIRMAN SOULES: Yes. Exactly.

MR. PERRY: Well, they are different. You don't have to make the trial objection until you are in trial, but the discovery objection you make earlier.

CHAIRMAN SOULES: And Dow Chemical comes in, and it says, "We have never directly or indirectly sold a breast implant device," and they put that in their affidavits, and they put it in 30 courts, and they get a federal judge to grant a summary

judgment in their favor based on that affidavit, and then whenever their man finally comes to court in open courts he admits that that's a lie, and the judge then says, "You are going to get some more discovery," and the federal judge then says, "I am going to reconsider the summary judgment" because the cross-examination of that witness contradicted the affidavit that had been filed in 30 courts.

MR. PERRY: I don't understand what that has to do with this discussion.

CHAIRMAN SOULES: Well, this discussion, I mean, you can only do this -- all your discovery objections are going to be subject to --

MR. HERRING: An attorney-client product sent to a third party. You are trying to keep it attorney-client. You sent your affidavit saying it's attorney-client, and I want to show absolute waiver. How do I do that? I need to depose a third party, don't I?

HONORABLE F. SCOTT MCCOWN: I think we are confusing two things. We may

want to have live testimony at the hearing on the objection. You may not want to do that on affidavits. I myself think maybe live testimony would be a good idea, but the question is when does that hearing take place, and what we are saying is it ought to take place before the trial.

MR. HERRING: Different issues. Those are two different issues, but I don't see how we deal with that.

MR. LATTING: Scott, you want it to have to take place before the trial.

HONORABLE F. SCOTT MCCOWN: Here is why you want it before the trial.

MR. LATTING: To have to take place.

HONORABLE F. SCOTT MCCOWN: You want it before the trial because depending on the ruling that's going to affect the discovery and that's going to affect the trial. Under the current system and under our rules, though, I don't know if we expressly say it, when you make an objection you're entitled to rely upon it. You ought not be put to trial on the basis of objections you

have made that the other side has acquiesced to, and then in the midst of trial for the first time they say to the judge, "I want a ruling on the objections." That objection is overruled. Now you didn't do your discovery. You are not prepared at that point.

MR. LATTING: Okay. But you could overrule it on the ground that that wasn't reasonable time.

HONORABLE F. SCOTT MCCOWN: Well, that's what --

MR. LATTING: No. Your rule says you have to. That's my point. It seems to me that there are circumstances where you might want to say, well, we could have had this hearing earlier, but I think we need to have it, and it's not going to hurt anything to hear it now, and as I read the rule, you can't do that.

HONORABLE F. SCOTT MCCOWN: Give me an example.

MR. GOLD: When would you want to wait 'til the eve of trial to resolve discovery?

MR. LATTING: It might not be

apparent that a document was that big a deal. You might get to the trial of a case, and start trying it and say, "Well, you know, now it becomes apparent I really would like to see that letter, and I would like to have him give it to me." He says, "Well, he's waived his hearing on it." And I just say, "Well, let me ask him a couple of questions about it, and I think I can show it's not privileged." Why shouldn't the trial judge be able to bear all of those circumstances in mind and say, "What is the story on that letter," and answer a couple of questions?

HONORABLE F. SCOTT MCCOWN: Is this fixed if we say "reasonable time"? If you are going to serve affidavits they need to be served seven days in advance but you can have live testimony.

MR. LATTING: Yeah. I think you should be able to have that leeway as a trial judge.

HONORABLE F. SCOTT MCCOWN: All right. Let's fix that then.

MR. SUSMAN: Let's do it. As so fixed -- yes, sir.

MR. MCMAINS: Well, still I think the critical policy question is when should you have a determination or the parties be obligated to get a determination with regards to the privileged nature in particular. I am less concerned about objections because objections by and large if they don't include privilege are something in the discovery process, and once the discovery is over it doesn't make any difference, but from a standpoint of the withholding statement the question is, should that -- those objections be determined, or in other words, if you make the objection and there is no request for a hearing, is the objection good forever?

HONORABLE F. SCOTT MCCOWN: How about this?

MR. MCMAINS: Or is the objection -- I mean, subject to conditions changing after the close of the discovery period, or should it be not good; that is, is the burden on the party who is asserting it that they are going to have to get that determination, which is what Luke's concern

is, or else run the risk of having waived the assertion of privilege when they get down the way.

HONORABLE F. SCOTT MCCOWN: Rusty, how about this? Would it resolve the problem if we said in a comment that generally speaking hearings on objections and withholding statements should occur before trial; however, there may be circumstances in which a hearing during trial is reasonable?

MR. LATTING: That would suit me.

MR. SUSMAN: That takes care of one problem. Now, the other problem I think we just have to put a comment making clear, Rusty, which I tried to make clear that under these rules as drafted once you make an objection or a withholding statement it is good forever unless the other side does something about it. You have no burden to get a hearing. Ann.

HONORABLE ANN COCHRAN: That's really what -- and I don't think a comment will do it, and I think what pulls both of what you have said together is we need a

sentence added that says if no party ever asked for a hearing on the objection of withholding statement then blank.

MR. MCMAINS: Yeah. What I --

HONORABLE ANN COCHRAN: The real problem is not the timing of the hearing. It's those cases where there has never been a hearing.

MR. MCMAINS: What I was really proposing in essence was to say that the parties -- basically spell out that if you are a party opposing the privilege, the assertion of the privilege, it's been asserted. You don't do anything about it, and the discovery window closes, that basically you should never have to worry about the assertion of that privilege or the sustaining of that assertion of privilege relating to anything dealing with discovery. The only time that the issue of privilege should be re-opened is if there is new material that comes to light as a result of supplementation, et cetera.

At that time you should then be able to have a hearing on the objection if that raises new information; that is, if somebody decides

to supplement and gives you new information that might support a waiver or something else that you didn't have at any time before. That's the time when you -- but I think that we need to define more narrowly the nature of when this hearing is to be held and what it relates to in terms of reasonableness than just to say "at a reasonable time" because I don't think that would be consistent with the rules.

MR. SUSMAN: All right. Let me -- I don't think we are going to -- we only have 15 minutes left, and I don't think we will obviously finish this up. We will look at it again and try without a vote on this. Obviously, we can't get there on this portion, but we will try to do something to get it cleaned up. Alex, this is your rule. Take care of it.

MR. LATTING: Clean this up.

MR. SUSMAN: I am not going to force people to vote now. Let me just tell you where we -- what this leaves done.

HONORABLE F. SCOTT MCCOWN: I am a little worried the committee is going to

get the impression that Alex has done all of our work.

PROFESSOR ALBRIGHT: I certainly have not.

MR. SUSMAN: Rule 8, on protective orders was approved unanimously the last time and will not change. It has not been changed, getting unanimous approval on Rule 8 last time.

Rule 9, request for standard disclosure, is I think pretty much like it was the last time, wasn't it? I mean, we have changed some. I just don't remember what it was.

PROFESSOR ALBRIGHT: I don't think we changed it.

MR. SUSMAN: Maybe we haven't changed a thing.

PROFESSOR ALBRIGHT: We haven't discussed this one.

MR. SUSMAN: Maybe we haven't changed a thing on this. We need to indicate in section (2), Alex, that you can make this request for standard -- when you can make the request. We don't have the timing when it can be made. We do on document requests and

interrogatories. We just have to indicate that this can be made at any time before, you know, 30 days before the end of the discovery period.

Other than that we have carefully -- I mean, what the subcommittee did is we looked at the task force. We looked at the state rules committee. We looked at Alex's colleague. Who was it? Pat, Pat Hazel at the University of Texas sent us -- a lot of people have suggested rewordings, reformulations of what needs to be disclosed, and we have constantly come back to these as being a fair balance between giving information and not requiring the pretrial of a case at a time when it would be impossible for someone to put all of their contentions and evidence on the table, and so that's the specific request for standard disclosure. I mean, that's basically it, and you look at them, and if you have any comments about them, would you -- yeah.

MR. MCMAINS: The only thing I -- in whether it's in the form of the request or whatever this appears to be drafted, once again, on the idea that this is

a two-party lawsuit. It seems to me that if anybody has requested that, we need to know whether or not -- if anybody has requested standard disclosure do you serve it on all the parties, or do you have to -- or do you have to request it in order to get it? Because the rule is actually written that you only have to serve it on the party that's requesting it, which doesn't make a lot of sense. Right now you ought to be able to -- you are supposed to serve interrogatories and everything else on all the parties, but the standard disclosure ought to be the same it seems.

PROFESSOR ALBRIGHT: You just serve a copy on everybody so they know you are doing it. Is that your suggestion?

MR. MCMAINS: Well, no. I'm not -- not in terms of the request. I am talking about the response.

PROFESSOR ALBRIGHT: Just so you get a copy of it --

MR. MCMAINS: Right.

PROFESSOR ALBRIGHT: -- or so that you can use it even though you haven't asked for it?

MR. MCMAINS: No. That you get a copy of it.

CHAIRMAN SOULES: Both.

MR. MCMAINS: Yeah. Actually both.

CHAIRMAN SOULES: A copy of the request and a copy of the response to everybody.

PROFESSOR ALBRIGHT: Okay. But what about the use of it at trial?

CHAIRMAN SOULES: Same thing.

PROFESSOR ALBRIGHT: Once it's requested from somebody then everybody -- anybody in the lawsuit can use it against the party who has answered?

CHAIRMAN SOULES: Sure. One other thing I think you ought to add is you have got (e) and (f) in here for PI cases. Shouldn't there be a corollary basis for the claim of damages --

MR. KELTNER: Yes.

CHAIRMAN SOULES: -- for other cases?

MR. KELTNER: Or make it more generic.

CHAIRMAN SOULES: I mean, (e) and (f) you have got the medical records and the medical bills. In a commercial case it seems to me like it would be fairly simple for them to respond to a request for the basis of their damages.

MR. SUSMAN: Well, that's the thing we definitely did not want in. Okay. That has been a friction between this subcommittee, and clearly someone wrote a report -- I don't remember which one -- that requires that the plaintiff -- it's very one-sided -- that the plaintiff state how they calculate damages very early in the case and provide all documents that support that calculation. That to me would be an impossible thing to do. It is designed to make life miserable for the plaintiffs unnecessarily, and I did not think we ought to do it.

CHAIRMAN SOULES: Well, the plaintiff sued. Shouldn't they be able to tell you up front what the basis of their damage claim is?

MR. LATTING: They can report

the misery but not file the suit and minimize it.

MR. PERRY: I think this may be a matter of drafting and wording. Where (e) comes from is that (e) is specifically tailored to the personal injury case and is specifically intended to get some basic information without being burdensome, and it would seem to me that anybody in the commercial litigation field that wanted to propose something that similarly would be basic and not overly burdensome or anybody in the domestic relations field, you know, we could have a number of them --

MR. SUSMAN: Sure.

MR. PERRY: -- that might go to specific kinds of cases, but the principle that we would want to follow in every case is that it would be basic and not overly burdensome.

MR. SUSMAN: What would it be? Your tax returns, your P&L statements? I mean, what would you -- I mean, this is we are asking for medical records and bills, and in a commercial case what would the documents be?

MR. LATTING: Well, Steve, let me say something about this. This has to do with the change in philosophy that we are having in this committee. I stood up yesterday because it worried me that we were going to require people to amend pleadings 60 days before the end of a discovery window, and it was pointed out, well, we are changing our ways here. We want people to get prepared earlier. Now, if we really want to do that, it doesn't offend me to tell a plaintiff if you bring a lawsuit against someone you need to tell us pretty immediate or fairly immediately what it is you are suing for and how you figure we owe you that much. It's a departure from the current practice, but maybe it seems to me that's in conformity with the spirit that we are supposed to be ready early and ready to go here. So it doesn't offend me just metaphysically to have a plaintiff have to tell what it is he is suing about.

MR. SUSMAN: Tommy Jacks.

MR. JACKS: You are coming very close if you do that to doing two things; one, getting back to essentially continuing

interrogatories, and two, getting bullshit answers because if you ask me that early in my case I am going to tell you, "All right. Jack, I'm suing for $3 million," and I am going to give you a bunch of crap about why I think my case is worth that much because the truth of the matter is I'm going to know that I can't really evaluate my case until sometime shortly before trial, particularly where in personal injury cases things don't stay the same thing. They change, and if my guy is going to have surgery, they may turnout well. They may go to hell, may lose a leg, may not. Who knows. I would strongly encourage us to stick with discrete, finite, readily definable stuff as you have done rather than a broad request that's going to give you bad motive craft.

MR. LATTING: I don't disagree with that necessarily. I'm just pointing out it's not very consistent with our stated goal of having to get ready early and have our pleadings all in order and sometimes many months before.

MR. JACKS: Well, I am not

going to reiterate my views of the stated goal because it just shows why that doesn't always make sense, but all I'm saying is don't compound what's here.

MR. PERRY: I think we are confusing two different things, Joe. This is intended to be something that can be done quickly, simply, in small cases, something that will get the ball rolling quickly but without being highly burdensome. Now, we have made a change overall with regard to all written discovery that will apply to interrogatories, for example, that says that you are required to answer them up front at the time you get them and give the information you have at that time.

So that -- and that's where he we went through in the rule on objections and so forth. Part of what that does is to say that it's no longer an objection, a valid objection, that I haven't really decided that yet, or I don't know that yet because you are required to give a response that gives the information that you have. So I think we are all in agreement with the philosophy, but the

whole idea of this standard disclosure, and especially because it was a new vehicle, was to keep it basic and simple.

MR. LATTING: How does (g) work with that? What is -- if you're going to prove at a trial later on that somebody has suffered so many dollars worth of damages in a personal injury case, do you have to tell me in response to early discovery all the documents on which your damages are based?

HONORABLE F. SCOTT MCCOWN: No, no. That's the contract. Any written instrument upon which a plaintiff -- that's the kind of thing that would be attached to the pleading. That's the contract where no --

MR. LATTING: Well, that's my question. Do we need to say that?

MR. GOLD: On this I think if you look for a comment --

MR. LATTING: But isn't a W-2 statement a written instrument on which a claim is based?

MR. GOLD: No. No. If you look at (a) through (g), the common thread through all of this is these are bits of data

that are easily retrievable and can be easily exchanged. They are things that you can give. When you start getting into formulations and calculations, then that's not what this was intended to do, and that's how your request for a damage calculation and your request for a contention of how this relates to this falls outside of (a) through (g). All that was intended is exchange of bits of data and that's the --

MR. LATTING: I'm not against that, by the way. It's just a question that this is as clear --

MR. MARKS: I see a distinction between the bodily injury, personal injury, and the corporate business litigation situation. I think there is a big difference, and in that situation there ought to be something in these rules that require a plaintiff to outline what he thinks his damages are and how he got there.

HONORABLE ANN COCHRAN: That's really apples and oranges. I think really what we are saying or what I would say to be fair and to have sort of an equivalent item in

this rule for commercial or other non-personal injury cases would be something like, you know, every bill that you have incurred or paid that, you know, are included in your claim for damages, you know, in this lawsuit.

So in other words, if you had to go out and, you know, if it's the fraud in the house case, and it's going to be the $15,000 you had to pay for the new roof for the bad repair job or something, or in a commercial case if it was for the $250,000 you had to go to redesign your computer system because your first vendor didn't do it right. You can do something that is sort of generically the equivalent but saying I want the model for your damages in a commercial case is somehow the equivalent of asking only for medical business and records in a personal injury case, and that's just not the same thing, but something like all the bills you incurred or had to pay that are part of your damages in this case would be something that could be in any case, no matter what it was.

MR. SUSMAN: The problem with it is in a commercial case there is no -- I

mean, a personal injury case there is readily doctors bills, medical bills, a group you can go to. In a commercial case, my God, you know a nuclear plant doesn't work right or something, and what are you going to bill to all --

HONORABLE ANN COCHRAN: Well, but surely by the close of this discovery window plaintiff in any kind of case should be able to say that we are going to cut it off at least by, you know, close to the end of this window. You should be able to do it. That's not something you should be able to wait 'til the trial to do if trial is a year and a half away.

MR. SUSMAN: There are other vehicles to get at this. We are talking about something very quick, very automatic, and very upfront on this standard disclosure, and that's the issue. When?

CHAIRMAN SOULES: Just a simple DTPA case, can't we get the -- get the discovery through a disclosure statement of what are the basis for the plaintiff's damages? I mean, this is not necessarily a

huge commercial case. This is designed really to get some format for a simple case to go to trial without a lot of expense.

MR. PERRY: I think it would be very helpful if the defense lawyers would draft something.

CHAIRMAN SOULES: I bought a car, and it had a bad engine. The car is no good. I want a new car. The guy lied to me. I want my legal fees paid. I mean, I understand that this is focused on small cases and an example of a big case might be tortious interference, but we are going to be doing other discovery probably in a tortious interference case, but in a DTPA litigation a lot of those cases are in county court at law. They could be discovered very simply. They could be Tier 1 cases on which no discovery takes place except the mandatory disclosure request if we could design something to cause that to be a piece of mandatory disclosure similar to the medical business.

MR. SUSMAN: What you are saying, Luke, is -- if what you are saying is all you mean, it's easy to comply with. I

mean, what do you want? I want my lost profits for the next 10 years. I could say that easy to you. Is that what you want me to say? I want my lost profits on this business plus the profits I lost on three other businesses because I lost opportunities to buy them. I mean, if you can give me examples of all I have to say, that's fine. Now, if you want me to give you calculations --

CHAIRMAN SOULES: I don't want calculations. I don't want a model. I just want to know how were you damaged? How do you say you were damaged?

JUSTICE CORNELIUS: Why don't you limit it to documents?

MR. SUSMAN: Well, documents is the worst -- I mean, the documents in supporting my lost profits? I can say lost profits. That's easy enough. I can say --

JUSTICE CORNELIUS: You have got to say that in your pleadings, don't you?

MR. SUSMAN: Huh?

JUSTICE CORNELIUS: You have got to say that in your pleadings.

MR. SUSMAN: I usually do. I

mean, so I don't know what I'm giving him extra, and it's not a problem for me if that's all he's asking, but the way I have seen it worded in the task force or whoever has got the alternate is a much more onerous task than simply saying, as you have just said, lost profits. Give me a new car. Fix this. Repaint my house. Replace my toaster. It's a lot different.

HONORABLE SARAH DUNCAN: To me the difference is that in a PI case it is more routine, and it is more routinized. Once you get out of that specific area of the law, I don't care whether it's commercial, family law, trusts and estates, antitrust, civil rights, whatever it is, there is no longer any routine. That's why we have had so much difficulty creating pattern jury charges for non-PI cases. They go all over the place, and I don't think we need the equivalent of (e) in the non-PI context. It's (g), the basis, the written instruments that's the basis of the claim.

MR. SUSMAN: Yeah. And that's what we have done, and you know, that doesn't

mean you can't ask an interrogatory and then test it under the interrogatory rules whether I have answered it fairly and properly, but I mean, I think we will fight forever on this standard disclosure without making a lot of progress. That's why we tried to make it simple, unobjectionable. Yeah, Rusty.

MR. MCMAINS: Well, isn't that -- isn't the real thing is that the standard disclosure is something that you can't object to? I mean, you can't object to it. You can't claim privileges to it. I mean, it's something that you are just going to say that the Supreme Court Advisory Committee and the Supreme Court when they pass the rule says this you have got to do, and we ain't going to have no argument about it.

Now, the problem is that any time you start talking about damages in any other way when you are early in a case you are frequently talking about consulting. You may not have formulated all of them. I mean, these are things to try and investigate this stuff. You are going to then start getting into attempted prophylactic objections in

areas that the whole idea is we want to ask stuff that ain't objectionable.

Now, to solve some of the -- the one problem, it seems to me that if there is a claim for property damage, once again, I think we would have repair bills that probably does meet these types of things, if you have got a claim that has property damage in it. Or a liquidated damage claim, there may be -- you know, obviously I think the instrument is designed to deal with that, but apart from those things it seems to me that you do get into areas where you have got to preserve the objection process and the development process to other discovery.

MR. LATTING: Do you think a written instrument is a repair bill?

HONORABLE F. SCOTT MCCOWN: No.

MR. MCMAINS: No, no, no. I didn't say that. He was talking about liquidated damage claim. A note, I think a note is a written instrument.

MR. LATTING: Yeah. I do, too.

MR. MCMAINS: I think a promissory note is. I think you have got to

give it to them.

MR. SUSMAN: All right. We are beyond our quitting hour. The only other rule we have got to go over is expersts, and I assume we will do that the next time, and we will get -- my plan is to get to you now, get to everyone, a revised draft of everything but really the expert rule, which we don't have any feedback to revise on, and maybe this standard disclosure rule which we haven't got much feedback on, but we will get you a revised draft very quickly now. It may encourage some communication by mail or by phone call or something like that so we can continue working. Thank you very much.

CHAIRMAN SOULES: Okay. We are adjourned until when? Third Friday in March at the Bar center.

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on January 21, 1995, and the same was therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1,193.00 .

CHARGED TO: Luther H. Soules, III .

Given under my hand and seal of office on this the 8th day of February , 1995.

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