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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 21, 1995

(MORNING SESSION)

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Taken before D'Lois L. Jones, a
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 21st day of
July, A.D., 1995, between the hours of 8:30
o'clock a.m. and 11:45 o'clock a.m. at the
Texas Law Center, 1414 Colorado, Room 104,
Austin, Texas 78701.

ORIGINAL

JULY 21, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
David E. Keltner
Joseph Latting
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Honorable David Peeples
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Hon William Cornelius
O.C. Hamilton
David B. Jackson
Doris Lange
Michael Prince
Hon. Paul Heath Till
Bonnie Wolbrueck

MEMBERS ABSENT:

Alejandro Acosta Jr.
Charles L. Babcock
David J. Beck
Hon Ann Tyrell Cochran
Prof. William Dorsaneo
Tommy Jacks
Franklin Jones Jr.
Thomas S. Leatherbury
Gilbert I. Low
Harriett E. Miers
Richard R. Orsinger
David L. Perry
Anthony J. Sadberry
Paula Sweeney

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
Paul Gold

JULY 21, 1995 - MORNING SESSION

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1 CHAIRMAN SOULES: Okay. We
2 will be convened here. Thanks to all of you
3 who have been punctual this morning to be here
4 at 8:30 so we could begin. I want to first
5 welcome Michael Prince who is joining us for
6 the first time. He is the chair of the State
7 Bar Committee on Rules of Evidence; is that
8 correct, Michael?

9 MR. PRINCE: That's correct.

10 CHAIRMAN SOULES: So we want to
11 welcome him as a new participant in our
12 committee proceedings. I am passing the
13 sign-up list around, an attendance list. It
14 will come by you shortly. Please sign up to
15 indicate your attendance.

16 I had sent a letter dated June 3rd that
17 set the schedule for this meeting. As you all
18 know from the letter attached that I received
19 and sent to you, a letter dated May 20,
20 Justice Hecht for the Court told us that at
21 the conclusion of this meeting, by the
22 conclusion of this meeting, we need to have
23 the discovery rules ready to go to the Court.

24 So that's our charge. We will work as
25 long as it takes to get that done. If we have

1 any time left on our regular schedule, which
2 typically ends at noon on Saturday, we will go
3 to consideration of the sanctions rules; but
4 if we don't, we will end at noon on Saturday
5 if we are through. If not, we will keep
6 working through the weekend until we get the
7 discovery rules ready to go to the Court, as I
8 had indicated.

9 Also, I asked Steve to send to everyone
10 the subcommittee's draft of rules, which he
11 did on a timely basis, and asked that anyone
12 who had any comments -- asked first that
13 everybody read them and then anyone who had
14 comments to send them in so that we would have
15 them and Steve would have them for this
16 meeting. We did get, I think, comments from
17 two persons.

18 MR. SUSMAN: More than that
19 actually.

20 MR. TREY PEACOCK: Four or
21 five.

22 CHAIRMAN SOULES: Four or five.
23 So you should have two things as we proceed to
24 go to work on the discovery rules this
25 morning. You should have a redlined version

1 of the proposed rules that says, "Supreme
2 Court Advisory Committee, discovery
3 subcommittee proposed rules of discovery, June
4 30, 1995, draft for July 21 meeting." And it
5 says in parenthesis, "redlined from draft
6 presented at May meeting." Get that in front
7 of you, if you will.

8 The other thing you need is -- this has
9 been spiral bound I think for everyone. It
10 says "Supreme Court Advisory Committee,
11 discovery rules subcommittee draft of July 19,
12 1995," and what this is, is a collated
13 collection of the written comments that were
14 received in response to the proposed draft of
15 June 30. So I think we need to work from
16 those two items, and Steve, if you would, I
17 think, just take over, we will go rule by rule
18 or paragraph by paragraph. I will try to
19 conduct abatement, but I know you need to
20 address what changes have been made rule by
21 rule and how your committee feels we should
22 respond to the written comments.

23 MR. SUSMAN: Let me first
24 apologize that Scott Brister has done a lot of
25 work on this, both in June that was submitted

1 when we met, our subcommittee, several times
2 in June to finalize these things. He has been
3 available. He even showed up in Austin for a
4 meeting of the subcommittee, which had been
5 postponed a day.

6 HONORABLE SCOTT BRISTER: It's
7 a nice drive, though.

8 MR. SUSMAN: But we got his
9 comments. Scott did write a cover letter that
10 inadvertently got put under Tab 23 in these
11 comments. So if you want to look, and some of
12 his comments make a little more sense if you
13 read his cover letter he made, which is under
14 Tab 23. I don't know why it got there, but it
15 did.

16 Insofar as Rule 1 is concerned, let's
17 begin with Rule 1, which is in your bound
18 booklet. I think what I will do on this
19 since -- let's talk about the main comments we
20 received. We have a comment from
21 Mr. Nicholson about the family lawyer problem,
22 and I think, Alex, you should kind of report
23 on what's been done on that, and that
24 discussion you have had.

25 PROFESSOR ALBRIGHT: Scott

1 McCown and Lee Parsley and I met with several
2 family lawyers, what, last week was it, in
3 Scott's jury room, and we had a very good
4 meeting with them. We went through the rules,
5 discussed all of the limitations. We
6 emphasized to them Rule 2, which is the rule
7 that allows you to change the limitations to
8 meet your case. We talked to them about the
9 privilege rule and the way privileges would be
10 protected, and they seemed to be very
11 comfortable with these proposals at the end of
12 the meeting. So I think we had a very good
13 meeting. Scott, do you want to add anything
14 to that?

15 HONORABLE F. SCOTT MCCOWN:

16 Yes. I would just add that this was an
17 official delegation from the Family Law
18 Council that asked to meet with us because of
19 Richard Orsinger's concerns that he had shared
20 with them. Richard was unable to be at the
21 meeting, but we met with them for probably
22 almost a good two hours and went through how
23 the rules worked and talked with them about
24 their concerns, and while I don't think we can
25 say that they endorsed the rules, I think we

1 can say I think their exact words were, "Well,
2 we can live with that." They did not ask or
3 pursue the idea of any special family law opt
4 out or family law provisions. So it was a
5 very productive meeting.

6 MR. SUSMAN: And I think now on
7 Rule 1, Alex, you ought to explain -- Alex has
8 rewritten Rule 1, and it appears as Rule 1(1).

9 PROFESSOR ALBRIGHT: I have
10 just rewritten 1(1)(a) --

11 MR. SUSMAN: Why don't you tell
12 us what you have done?

13 PROFESSOR ALBRIGHT: -- about
14 pleading deadlines.

15 MR. SUSMAN: And why.

16 PROFESSOR ALBRIGHT: Scott
17 Brister raised the point that our pleading
18 deadline on 1(1)(a), which is Tier 1, which is
19 the 50,000-dollar or less cases, we have a
20 30-day pleading deadline here where we say,
21 "No amendment bringing the amount of recovery
22 above \$50,000 shall be allowed at such time as
23 to unduly prejudice the opposing party and in
24 no event later than 30 days."

25 Then in our general pleading deadline

1 rules, which we discussed very early and we
2 really have not addressed them recently, we
3 had a 60-day discovery -- I mean, pleading
4 cutoff. So Scott suggested that those rules
5 needed to be combined and made the same, have
6 the same kind of pleadings deadlines. So I
7 worked through those rules for a couple of
8 days, and what I have suggested, you will see
9 it behind your Tab 1 of the bound book, and
10 then also the rest of it should be at the end,
11 Rules 63, 66, 67, which are -- and yeah.
12 Maybe 70.

13 Anyway, these are -- yeah, 70. these are
14 the pleading amendment rules, and what I have
15 suggested is that we just have a 60-day
16 pleading deadline and have that pleading
17 deadline operate like our current seven-day
18 pleading deadline, which is you can amend as
19 of right up to 60 days before trial. After 60
20 days before trial you have to get leave of
21 court to amend your pleadings. The standard,
22 though, would be the same as it is in the
23 current rules, which is really liberal
24 amendment of pleadings unless the other party
25 can show surprise or prejudice.

1 So you have a situation where you
2 can -- you can just amend your pleadings.
3 They have to file a motion to strike if it's
4 filed before 60 days before trial. If it's
5 filed within 60 days before trial, you have to
6 file a motion for leave to amend. Then I have
7 also provided at the end of Rule 1(1)(a) that
8 "Any amendment bringing the amount of recovery
9 above \$50,000 that is offered for filing later
10 than 30 days before trial presumptively
11 prejudices the party opposing the amendment in
12 maintaining its action or defense upon the
13 merits within the meaning of Rule 63."

14 That means then that if the burden
15 shifts, that the party who is opposing the
16 amendment will have to prove it. The
17 requirement for evidence of prejudice or
18 surprise will be satisfied by this
19 presumption. So then the other side would
20 have to come forward with evidence of no
21 surprise for the court to allow the amendment.

22 CHAIRMAN SOULES: Okay. Can
23 you put that in the form of a motion as it
24 would relate to Rule 1 of the discovery book?

25 MR. SUSMAN: 1(1).

1 PROFESSOR ALBRIGHT: I move
2 that we adopt my changes to Rule 1(1)(a),
3 which appear behind Tab 1 in the bound volume.

4 HONORABLE F. SCOTT MCCOWN: Is
5 that on page 3 behind Tab 1?

6 PROFESSOR ALBRIGHT: Right.
7 Page 3, and then there is a clean version on
8 page 4.

9 CHAIRMAN SOULES: Okay. Is
10 there a second?

11 MR. SUSMAN: Second.

12 CHAIRMAN SOULES: It's been
13 moved and seconded. Anyone, any discussion?

14 Okay. Those in favor show by hands.

15 HONORABLE SCOTT BRISTER: Let
16 me just ask, Alex, so your reading of the new
17 63 is that the burden is on the party
18 objecting to leave to file?

19 PROFESSOR ALBRIGHT: As I
20 recall, it was intended to be the same as
21 under the current rules, which it is the
22 burden --

23 HONORABLE SCOTT BRISTER: Yeah.
24 I agree, under the current rules. There is a
25 presumption you should allow leave.

1 PROFESSOR ALBRIGHT: Right.

2 MR. SUSMAN: Yes.

3 CHAIRMAN SOULES: Judge

4 Brister, did that --

5 HONORABLE SCOTT BRISTER: Well,
6 I am just --

7 CHAIRMAN SOULES: Are you
8 through? I just want to be sure. It looks
9 like you were still puzzling about it a little
10 bit.

11 HONORABLE SCOTT BRISTER: Well,
12 yeah, I am, and I am not sure that it may not
13 be better to take it up when we get to
14 Rule 63. My only concern on this Rule 1 which
15 is different from the -- I agree with Alex's
16 change that you just refer to Rule 63, but I
17 had the concern if you do file this and it
18 bounces out into Tier 2 or in Tier 3, and the
19 problem is mechanically Tier 2 window may
20 already be closed. So it's just a logical
21 problem.

22 Does that mean you bounce into a track
23 where the window is also closed? And then you
24 have to bounce into -- the court has to do
25 Tier 3, but if a court won't do Tier 3, you

1 may be with a remedy that's no remedy.

2 PROFESSOR ALBRIGHT: Can I
3 respond?

4 CHAIRMAN SOULES: Yes. Alex.

5 PROFESSOR ALBRIGHT: Since you
6 have to file a motion if you are within 60
7 days before trial, the court will have to
8 address these issues because one of the things
9 the court is to consider is whether the
10 discovery that would be necessary by the new
11 pleading can be completed within the
12 applicable discovery limitations. So you
13 might be arguing, "Your Honor, you can't
14 amend, allow this amendment now, because this
15 will kick us out of Tier 1. We are too close
16 to trial. We are really -- this is a good
17 trial date that we have got in six weeks."

18 So that would be a reason for the court
19 not to allow the amendment, but I thought
20 about that, and I thought it really made more
21 sense to have the court address all of these
22 issues at one time when the pleading amendment
23 is being considered. That's why I thought it
24 made sense to require the motion 60 days
25 before trial.

1 HONORABLE SCOTT BRISTER:

2 That's fine.

3 CHAIRMAN SOULES: Joe Latting.

4 MR. LATTING: So if I
5 understand correctly now, in order to be able
6 to amend without a motion you have to file it
7 more than 60 days.

8 CHAIRMAN SOULES: No. We are
9 not voting on that.

10 MR. LATTING: Okay. Well, I am
11 just --

12 CHAIRMAN SOULES: Whether we
13 are going to let discovery drive the pleading
14 amendments is something I think that's got to
15 be discussed wide open when we get to 63.
16 Whether it's 60 days or 30 days or some other
17 number of days is not on the table. It's just
18 what's here written down, which does not say
19 "60 days."

20 PROFESSOR ALBRIGHT: Well, it
21 refers to Rule 63.

22 CHAIRMAN SOULES: Right. But
23 we haven't passed on 63 yet. So we don't know
24 how long 63 is going to be.

25 MR. LATTING: Okay. That was

1 my question.

2 CHAIRMAN SOULES: Okay. John
3 Marks.

4 MR. MARKS: I have a concern
5 about the amendment. Considering that this is
6 the first level, it seems to me that it ought
7 to be pretty set in concrete, if you don't
8 amend within not later than -- earlier than 30
9 days, you are in Tier 1; and there is no way
10 to get out of it unless you reset all of the
11 timetables because this is the one where you
12 do not much discovery; you do not much
13 interrogatories, not much of anything; and you
14 go to trial. Now, if somebody comes in within
15 30 days, and says, "Now, I want \$100,000 or
16 \$200,000," then that defeats the whole purpose
17 of the thing.

18 Even though there is some need to prove
19 that that person has not been prejudiced, in
20 fact, by the very nature of being in that tier
21 they have been prejudiced because they haven't
22 done any discovery except pursuant to this
23 first tier. So I think it ought to be pretty
24 clear that if you don't do what we need to do
25 within 30 days or before the 30-day period

1 begins, you are out. You stay in Tier 1.

2 CHAIRMAN SOULES: John, are you
3 suggesting then that --

4 MR. MARKS: We keep it the way
5 it was.

6 CHAIRMAN SOULES: -- there be
7 no amendment inside of 30 days that would
8 cause a party to be moved out of Tier 1?

9 MR. MARKS: Right.

10 CHAIRMAN SOULES: Okay.

11 PROFESSOR ALBRIGHT: Can I
12 respond?

13 CHAIRMAN SOULES: And is that
14 the way Rule 1(a) is written now?

15 HONORABLE SCOTT BRISTER: No.

16 PROFESSOR ALBRIGHT: No.

17 CHAIRMAN SOULES: So that's --
18 Alex Albright.

19 PROFESSOR ALBRIGHT: The way
20 that Rule 1(a) is written now, it just says
21 that no amendment will be allowed within the
22 30 days so as to unduly prejudice the opposing
23 party. Well, I guess, no, it does say in no
24 event later than 30 days before trial.

25 MR. MARKS: Right. I think

1 that ought to stay there.

2 PROFESSOR ALBRIGHT: And so we
3 do allow it. We do allow it possibly here.
4 One thing that I thought of --

5 MR. SUSMAN: The last sentence,
6 Alex.

7 PROFESSOR ALBRIGHT: Right. We
8 do have a presumption that it is prejudicial.
9 Now, one thing we might want to consider,
10 though, is, you know, you have 30 days before
11 trial. Is your trial date really a good trial
12 date? Are you No. 94 on the docket, or are
13 you No. 2 on the docket? So that seems to be
14 something that -- the way I wrote it is so
15 that the court could take all of these facts
16 into consideration in making the decision.

17 MR. MARKS: Well, my concern is
18 that we do Tier 1 discovery and then all of
19 the sudden we are bounced into Tier 2, or we
20 are bounced out of that, and now, we want
21 \$100,000 or \$200,000 or a million dollars, and
22 all we have done is this Tier 1 discovery, and
23 we are out.

24 CHAIRMAN SOULES: Okay. Well,
25 we have got the issue pretty well in focus,

1 whether it would be permission granted, but
2 presumptively it would be against the party
3 tendering the amendment. That's what Alex
4 proposes, or as the rule is now proposed by
5 the committee as a whole, that there be no
6 allowance of amendments within 30 days of the
7 trial setting. Okay. Do we need to separate
8 the issues then, Alex, in order to vote? Are
9 we going to change this first and then --

10 PROFESSOR ALBRIGHT: We could
11 say that that's a proposed amendment to my
12 amendment.

13 CHAIRMAN SOULES: Okay. Do you
14 offer that as -- well, of course, that's the
15 way it is right now. It doesn't really need
16 to amend. It's up or down on yours.

17 Well, let's just get a show of hands on
18 that unless there is further discussion. How
19 many feel there should be --

20 MR. SUSMAN: Let me just ask
21 this question, and I haven't really thought
22 about it very much. It seems to me, I mean,
23 what we are trying to do is encourage people
24 to plead their cases in a way that they will
25 go within Rule 1(1), and one of the reasons to

1 be a little flexible is if they discover
2 something at the last minute, and under making
3 some extraordinary showing to overcome the
4 presumption of prejudice they would be allowed
5 to amend and get out of Tier 1, particularly
6 if you are going to allow amendments under
7 some extraordinary showing in regular cases
8 within 30 days before trial.

9 I mean, it seems to me if you distinguish
10 the rights you get under Tier 1 greatly from
11 rights you get under Tier 3 insofar as
12 amendments are concerned, the Bar will just
13 say, "Listen, we can't take the chance of
14 being under Tier 1. We will just plead our
15 case in excess of \$50,000 so we have it
16 there." I mean, that's one of our concerns.
17 Maybe that's not a big concern.

18 CHAIRMAN SOULES: Of course,
19 the incentive is that a party with a small
20 case can opt into Tier 1 and stay in the
21 complaint; and that's the real incentive, is
22 minimal discovery without just getting bowled
23 over by defensive discovery in a small case.
24 Well, let's take them one at a time. The
25 first thing that Alex proposes is to delete

1 the second sentence.

2 PROFESSOR ALBRIGHT: I think
3 you kind of have to take it all at once.

4 CHAIRMAN SOULES: Well, I am
5 going to take it a piece at a time. "No
6 amendment bringing the amount of recovery
7 above \$50,000 shall be allowed at such time as
8 to unduly prejudice the opposing party and in
9 no event later than 30 days." The proposal is
10 to delete that sentence. Those in favor show
11 by hands. It's to delete this. Okay. Show
12 by hands again so we can count them. Seven.
13 Those opposed? Nine. By a vote of nine to
14 seven it stays in the way it is. Okay.

15 HONORABLE SCOTT BRISTER: Then
16 you have to do something else because that now
17 conflicts with 63. The first part where you
18 drop that sentence and put in "timely pursuant
19 to 63" makes sure that you have one cutoff
20 deadline. If you put that sentence back in,
21 you now have two different ones.

22 CHAIRMAN SOULES: Right.

23 HONORABLE SCOTT BRISTER: One
24 that goes for 63 and one that goes for Rule
25 1(1), and it's going to be a tremendous

1 confusion when you are supposed to amend your
2 pleadings, but that is a different cutoff time
3 from 63. Maybe you want to discuss all of
4 that when you discuss 63, but it's --

5 CHAIRMAN SOULES: Well, that's
6 right. Now, given that vote, Alex, what do we
7 do with the next sentence?

8 PROFESSOR ALBRIGHT: Well, I
9 would suggest that what we do is instead of
10 leaving the current sentence is amend my added
11 sentence down there and say that, "However, no
12 amendment is allowed later than 30 days."
13 Because the unduly prejudice concept is
14 included in Rule 63.

15 CHAIRMAN SOULES: Okay.

16 PROFESSOR ALBRIGHT: What we
17 are doing is making an exception to Rule 63 --

18 MR. SUSMAN: Correct.

19 PROFESSOR ALBRIGHT: -- for
20 1(1) cases. So that would be the "however"
21 clause, "however" sentence at the end of that
22 section. So I would say we say, "However, any
23 amendment bringing the amount of recovery
24 above \$50,000 that is offered for filing later
25 than 30 days before trial shall not" --

1 MR. SUSMAN: "However, no
2 amendment shall be filed," something like
3 that.

4 PROFESSOR ALBRIGHT: Right.

5 HONORABLE F. SCOTT MCCOWN: But
6 am I missing something? Doesn't the rule
7 already say that in our present version in the
8 second sentence? After "and" it says "and in
9 no event later than 30 days before trial."

10 CHAIRMAN SOULES: That's right.
11 What we are trying to do right now is
12 reconcile that concept with Rule 63, whatever
13 the Rule 63 fuse may be when we get to it. If
14 that's necessary.

15 HONORABLE F. SCOTT MCCOWN: But
16 the only point I was making is I don't think
17 we need the "however" sentence, the last
18 sentence of Alex's proposal, in the book
19 because we already have that in the rule.

20 PROFESSOR ALBRIGHT: Okay. I
21 have an idea. We could say --

22 MR. SUSMAN: Just say "No
23 amendment bringing the amount of recovery
24 above \$50,000 shall be allowed later than 30
25 days before trial."

1 PROFESSOR ALBRIGHT: Period.
2 And then we refer to Rule 63 in the next --

3 MR. SUSMAN: Correct.

4 PROFESSOR ALBRIGHT:
5 -- sentence, and what that does is then
6 trigger in the unduly prejudiced if you bring
7 in -- if you amend before 30 days before the
8 trial.

9 CHAIRMAN SOULES: One more
10 time. What are you proposing?

11 PROFESSOR ALBRIGHT: Okay. In
12 the language that is crossed out that we just
13 voted to keep in, "No amendment bringing the
14 amount of recovery above \$50,000 shall be
15 allowed." Then we are crossing out "at such
16 time as to unduly prejudice the opposing party
17 and in no event." Then we go back and
18 include, "later than 30 days before trial."

19 So it reads, "No amendment bringing the
20 amount of recovery above \$50,000 shall be
21 allowed later than 30 days before trial."

22 CHAIRMAN SOULES: Within 30
23 days prior to trial.

24 PROFESSOR ALBRIGHT: Okay.
25 "Within 30 days before trial."

1 MR. LATTING: I have a
2 question.

3 PROFESSOR ALBRIGHT: Then "if
4 by claim, amendment, or supplement filed
5 timely pursuant to Rule 63" then it says --
6 and David Keltner just made the suggestion
7 that instead of "filed" it should be "allowed
8 pursuant to Rule 63."

9 MR. LATTING: I have a
10 question.

11 CHAIRMAN SOULES: Joe Latting.

12 MR. LATTING: If a person, a
13 plaintiff, files a Tier 1 case and for some
14 good reason finds out that there needs to be
15 an amendment which will take it out of Tier 1,
16 and he finds that out 27 days before the
17 trial, it cannot be done by the trial court.

18 HONORABLE SCOTT BRISTER: No.
19 I can figure out a way.

20 MR. LATTING: Besides granting
21 a continuance.

22 HONORABLE SCOTT BRISTER:
23 That's it. You ask for a continuance and then
24 you can do it, and a continuance is always
25 done on that. This is going to be a manifest

1 injustice if we go to trial in 27 days. If it
2 looks like a manifest injustice to me, we will
3 grant a trial continuance and give you enough
4 time to replead and take it out of Tier 1 and
5 give you time to do Tier 2 discovery.

6 MR. LATTING: But it does do
7 this. It does take away from the trial court
8 the ability no matter what the circumstances
9 to stick to the trial date but to allow the
10 amendment.

11 HONORABLE SCOTT BRISTER:

12 That's right.

13 MR. LATTING: And that's

14 supposed to be saving the people of the state
15 money.

16 HONORABLE SCOTT BRISTER: Sure.

17 Because you chose to be in Tier 1 for certain
18 cost-saving reasons, and you know, if manifest
19 injustice requires that you get out of it then
20 manifest injustice ought to allow the other
21 side to do some more full discovery on it.

22 MR. MEADOWS: I agree. That's

23 the way -- you set the rules in play by
24 selecting Tier 1. If you change the tier, you
25 have changed the rules. I mean, I think you

1 should get a continuance. That's exactly the
2 way it ought to work.

3 CHAIRMAN SOULES: Okay. What I
4 propose we do is just leave Rule 1 the way it
5 is and deal with this in 63 because it's an
6 exception to 63. So whatever we do with 63 we
7 would have to recognize this exception. Any
8 objection to that?

9 Okay. There being no objection to that,
10 those in favor of Rule 1 as written show by
11 hands.

12 HONORABLE PAUL HEATH TILL: And
13 that's on page 4, right?

14 CHAIRMAN SOULES: On page --
15 well, let's see. The page numbers are a
16 little hazy here.

17 PROFESSOR ALBRIGHT: Now we are
18 going back to --

19 CHAIRMAN SOULES: It says,
20 "Rule 1, discovery limitations, revised
21 6-21-1995." If you start with the redlined
22 draft of the rules, it's the third page,
23 counting the cover page as No. 1. It's the
24 third page and part of the fourth page. Okay.
25 Any opposition?

1 MR. SUSMAN: Wait a second.
2 Why do we have this concept of unduly
3 prejudice in the rule as written? "No
4 amendment bringing the amount of recovery
5 above 50,000 shall be allowed at such time as
6 to unduly prejudice the opposing party."

7 PROFESSOR ALBRIGHT: That's why
8 I think that needs to be taken out because the
9 concept of unduly prejudice is in Rule 63.

10 MR. SUSMAN: I do, too, and
11 this would require you to get approval of the
12 court because you have to show you don't
13 unduly prejudice the other side any time you
14 go over 50,000.

15 PROFESSOR ALBRIGHT: Right.

16 MR. SUSMAN: Even if it's a day
17 after you file your original petition.

18 PROFESSOR ALBRIGHT: Right. We
19 wrote this when we were not considering
20 Rule 63.

21 MR. SUSMAN: It shouldn't be
22 there.

23 PROFESSOR ALBRIGHT: Right.

24 CHAIRMAN SOULES: Okay. So
25 you're proposing to take out in the second

1 sentence "at such time as to unduly prejudice
2 the opposing party and in no event later
3 than..."

4 MR. SUSMAN: Right.

5 CHAIRMAN SOULES: Strike that
6 and strike "before" and make the sentence
7 read, "No amendment bringing the amount of
8 recovery above \$50,000 shall be allowed within
9 30 days prior to trial."

10 MR. SUSMAN: Correct.

11 HONORABLE SCOTT BRISTER: And
12 drop the last sentence? Drop the last
13 sentence of Alex's?

14 CHAIRMAN SOULES: No. We
15 aren't working on Alex's at all. We are
16 working on the committee's draft. Okay.

17 Those in favor of that change show by
18 hands. Ten. Those opposed? Ten to one it
19 passes.

20 Okay. With that change those in favor of
21 Rule 1 show by hands.

22 HONORABLE SCOTT BRISTER: Just
23 a second. Can I ask one more thing real
24 quick?

25 CHAIRMAN SOULES: Judge

1 Brister.

2 HONORABLE SCOTT BRISTER: The
3 next sentence, are we leaving that in as 30
4 days before trial? Are we switching that to
5 "timely pursuant to 63," or did you want to
6 put whether we are going to change that
7 sentence off until we discuss 63? Because
8 this is a different time. 60 days before is
9 Rule 63 when you have to come do this, this
10 says; but if it's 50,000, you have to do it 30
11 days before trial, and it's going to create
12 confusion, and the part I definitely agreed on
13 Alex's proposal was just to drop that and make
14 it timely pursuant to 63 as just all one test.

15 CHAIRMAN SOULES: Well, I think
16 that assumes 60 days. I don't see how we can
17 live with 60 days, but some day we are going
18 to have to come to how long before trial you
19 have to amend that.

20 HONORABLE SCOTT BRISTER: Well,
21 it doesn't matter, but it sure ought not to be
22 two different dates for two different places
23 that are 62 rules apart.

24 CHAIRMAN SOULES: 63 is going
25 to have to be amended in order to recognize

1 this exception, whatever it may be.

2 MR. SUSMAN: I can tell you how
3 you might solve this. You could begin by the
4 sentence -- instead of having the second
5 sentence, the "no amendment" sentence, begin,
6 put it "if by claim, amendment, or supplement
7 any party seeks relief," et cetera.

8 PROFESSOR ALBRIGHT: And "not
9 refer."

10 MR. SUSMAN: And "not refer" --
11 don't even look at yours. Okay. Do not look
12 at yours. Look at the redlined version, and
13 would read, "If in any suit the plaintiff's
14 pleadings affirmatively seeks only monetary
15 recovery of 50,000 or less" -- to the end of
16 that, "discovery control plan."

17 Then it would skip and say, "If by a
18 claim, amendment, or supplement, any party
19 seeks relief other than monetary recovery in
20 excess of 50,000," et cetera, and then the
21 next sentence would be, "No amendment bringing
22 the amount of recovery above 50,000 shall be
23 allowed within 30 days before trial."

24 HONORABLE SCOTT BRISTER: That
25 takes care of it.

1 MR. SUSMAN: Period, and that
2 would take care of it.

3 MR. KELTNER: And, Alex, that
4 takes care of my comment as well.

5 PROFESSOR ALBRIGHT: Okay.

6 CHAIRMAN SOULES: Okay. So how
7 do you fix this "if by claim, amendment, or
8 supplement," what?

9 MR. SUSMAN: You change that
10 sentence to read "if by a claim, amendment, or
11 supplement," comma, and eliminate the balance.

12 CHAIRMAN SOULES: Down to
13 where?

14 MR. SUSMAN: Through "trial."

15 HONORABLE SCOTT BRISTER: Cut
16 the words "filed more than 30 days before
17 trial."

18 MR. SUSMAN: Yeah. Cut that
19 out. "Any party that seeks relief other than
20 monetary relief," et cetera, to the "suit,"
21 the end of that sentence.

22 CHAIRMAN SOULES: Okay.

23 MR. SUSMAN: Then you insert --

24 CHAIRMAN SOULES: And you move
25 this other sentence?

1 MR. SUSMAN: Yeah. "No
2 amendment" --

3 CHAIRMAN SOULES: Move it down
4 to follow that sentence?

5 MR. SUSMAN: Right. Right.

6 CHAIRMAN SOULES: Okay. Any
7 other changes to Rule 1?

8 HONORABLE F. SCOTT MCCOWN:
9 Yes.

10 CHAIRMAN SOULES: Judge.

11 HONORABLE F. SCOTT MCCOWN: I
12 have one suggestion because, I mean, we have
13 all been working with this a long time and
14 know what we intend, but for the lawyers and
15 judges who are reading it when you say, "No
16 amendment bringing the amount of recovery
17 above 50,000 shall be allowed within 30 days
18 prior to trial," I think you need to add the
19 phrase -- and this isn't the way you would
20 want to add it, but the concept would be if
21 the case is staying in Tier 1.

22 Because the way that sentence -- what
23 that implies to me is if you plead it in
24 Tier 1 and you're within 30 days before trial,
25 you cannot amend, period; and that's not what

1 we intend, and it's not contextually the way
2 you would read it, but I think it's an easy
3 misinterpretation to make, and it could be
4 solved just by adding some words, and you
5 would want better words than these, but maybe
6 you would want to say "No amendment leaving
7 the case under this section" or something.
8 You-all see what I am saying? I don't have
9 the words, but --

10 CHAIRMAN SOULES: I don't
11 understand.

12 HONORABLE PAUL HEATH TILL: If
13 you read it literally, it doesn't do what you
14 intend. If you just read the words on the
15 paper, it doesn't do what you are trying to
16 do.

17 CHAIRMAN SOULES: I just don't
18 understand what --

19 MR. MEADOWS: Scott's saying
20 that the objectionable amendment is an
21 amendment that takes it out of Tier 1, but
22 there may be amendments necessary within
23 Tier 1.

24 HONORABLE F. SCOTT MCCOWN: No.
25 What I am saying is that under this rule as we

1 have got it written even within 30 days prior
2 to trial the judge can still allow an
3 amendment, but if he allows it, you're out of
4 Tier 1.

5 MR. SUSMAN: No. Huh-uh.
6 That's not what the group just voted on. The
7 group voted on a circumstance that if you are
8 in Tier 1 and you wait 'til 30 days before
9 trial, you can't get into any other tier, with
10 the court's blessing or anything, unless you
11 get a continuance.

12 HONORABLE F. SCOTT MCCOWN:
13 Well, what's the last sentence mean? "When a
14 timely filed pleading renders this section no
15 longer applicable discovery shall be reopened
16 and completed within the limitations provided
17 in section 2 or 3 of this rule."

18 CHAIRMAN SOULES: Actually the
19 sentence that we are talking about moving
20 should be moved to the very end after the word
21 "redeposed."

22 MR. SUSMAN: I think that's
23 right. You're right.

24 HONORABLE F. SCOTT MCCOWN:
25 Okay. Well, then I misunderstood, but then to

1 be clear, if I am within Tier 1 and I am 27
2 days before trial, I cannot amend?

3 MR. SUSMAN: No. That's true.

4 HONORABLE F. SCOTT MCCOWN: And
5 the only thing I can do is ask the judge in
6 his or her discretion to give me a continuance
7 and then allow me to amend.

8 CHAIRMAN SOULES: That's right.

9 MR. SUSMAN: Right.

10 HONORABLE F. SCOTT MCCOWN:
11 Okay. All right. I just misunderstood.

12 CHAIRMAN SOULES: Let's see.
13 Who's that? Rusty.

14 MR. MCMAINS: When you say
15 "amend" you are talking about amend to get out
16 of Tier 1?

17 HONORABLE F. SCOTT MCCOWN: To
18 get more than \$50,000.

19 MR. MCMAINS: Yeah. I mean, we
20 are not barring amendments otherwise.

21 CHAIRMAN SOULES: That's right.

22 MR. MEADOWS: Yeah. That was
23 my point.

24 HONORABLE F. SCOTT MCCOWN: All
25 right.

1 CHAIRMAN SOULES: We are only
2 talking about the amount.

3 MR. MCMAINS: I understand. If
4 everybody is satisfied being in Tier 1 that if
5 there is some pleading defect of some kind
6 that they can fix that ain't going to hurt
7 anybody or is not a big deal, that needs to be
8 fixable.

9 CHAIRMAN SOULES: True. Okay.
10 With those changes now we are talking about
11 leaving -- starting with Rule 1(1)(a), the
12 second sentence would be changed to read, "No
13 amendment bringing the amount of recovery
14 above \$50,000 shall be allowed within 30 days
15 prior to trial." With that change it would be
16 also moved to the end of the paragraph.

17 The third sentence would read, "If by a
18 claim, amendment, or supplement, any party
19 seeks relief other than monetary recovery
20 or" --

21 PROFESSOR ALBRIGHT: That "or"
22 should be deleted.

23 CHAIRMAN SOULES: Take the "or"
24 out. In excess, "monetary recovery in excess
25 of \$50,000, excluding costs, prejudgment

1 interest, and attorneys' fees, this section
2 shall no longer apply to the suit." And the
3 last sentence as presently written would stay
4 the same.

5 PROFESSOR ALBRIGHT: Excuse me.
6 That "or" is supposed to be in there because
7 it's if you seek relief other than monetary
8 recovery or -- maybe that should be "monetary
9 recovery in excess of \$50,000." That might
10 make it clear.

11 CHAIRMAN SOULES: Oh, monetary
12 recovery. Okay.

13 MR. KELTNER: I'm sorry. Would
14 you read that one more time?

15 CHAIRMAN SOULES: Okay. Sure.
16 You want me to read the changes to what's
17 shown in the text as line three or sentence
18 three?

19 MR. KELTNER: Yes.

20 CHAIRMAN SOULES: "If by a
21 claim, amendment, or supplement, any party
22 seeks relief other than monetary recovery or
23 seeks monetary recovery in excess of \$50,000
24 excluding costs, prejudgment interest, and
25 attorneys' fees, this section shall no longer

1 apply to the suit." Okay. Those in favor of
2 Rule 1 now as modified show by hands. 13.

3 Those opposed? 13 to 1, Rule 1 is
4 approved.

5 MR. SUSMAN: This is word
6 picking, but the next to last sentence, "when
7 a timely filed pleading," can we eliminate "a
8 timely filed"? Does it add any meaning now?

9 PROFESSOR ALBRIGHT: Yes.

10 MR. SUSMAN: Huh?

11 PROFESSOR ALBRIGHT: Yes.

12 MR. SUSMAN: Can it be
13 eliminated?

14 PROFESSOR ALBRIGHT: No.

15 MR. SUSMAN: Why does it need
16 to be there?

17 PROFESSOR ALBRIGHT: Before we
18 talk about it, I'd like to do Rule 2.

19 CHAIRMAN SOULES: Okay. Well,
20 let's go on now to Rule 2. Rule 2, discovery
21 control plan suits.

22 MR. SUSMAN: Okay. Let me tell
23 you where we stand here. We have added a
24 provision on Rule 2 on conferences, 2(2). The
25 rest has been essentially wordsmithing of

1 2(1), no change in substance. Scott Brister,
2 if I fairly can characterize his suggestion,
3 would say that "except where specifically
4 prohibited" should only apply to parties and
5 not --

6 HONORABLE F. SCOTT MCCOWN:

7 Steve, we are not all together. Some people
8 are looking at part 2 of Rule 1, and some
9 people are looking at Rule 2.

10 CHAIRMAN SOULES: We have moved
11 to what appears to me to be page 64; is that
12 right?

13 MR. SUSMAN: He just approved
14 the entire Rule 1.

15 HONORABLE F. SCOTT MCCOWN: I
16 know, but different people are looking at
17 something different.

18 MR. SUSMAN: We are now looking
19 at Rule 2, which looks -- these pages are
20 terrible to read.

21 CHAIRMAN SOULES: Go back to
22 Rule 1. Okay. Rule 1 is one, two, three,
23 four pages long and then you see Rule 2.

24 MR. SUSMAN: "Modification of
25 Discovery Procedures and Limitations:

1 Conference Required." Okay. Scott Brister's
2 suggestion, which the committee has considered
3 and with all due deference not accepted, is
4 that there should be no limitations upon what
5 a court can do, and there aren't many. The
6 only ones I can think of in here limiting what
7 a court can do is that a discovery control
8 plan must contain a trial date. It must
9 contain deadlines as we have written these
10 rules. It must contain deadlines for joinder
11 parties, amending pleadings, and disclosing
12 experts.

13 They can be whatever dates the court
14 picks, and I don't know whether there are any
15 other things where we put a limitation on the
16 court, but that was one where we -- and so it
17 doesn't seem to do -- we didn't think it did
18 much harm to just leave it the way it's worded
19 so that the "except where specifically
20 prohibited" applies both to the parties, what
21 they can do by agreement, and what the court
22 can order; and as I said, I only know of the
23 two instances where the court has got any
24 prohibition.

25 CHAIRMAN SOULES: Judge

1 Brister.

2 HONORABLE SCOTT BRISTER: Well,
3 we have just made a third one now. The court
4 can't allow a excess of 50,000-dollar pleading
5 within 30 days.

6 MR. SUSMAN: Huh?

7 HONORABLE SCOTT BRISTER:
8 Within 30 days of trial.

9 MR. SUSMAN: Can't do it.
10 There is a third one.

11 HONORABLE SCOTT BRISTER: But
12 the court can't do a discovery control plan
13 without a trial date?

14 MR. SUSMAN: Yes. Or
15 deadlines.

16 HONORABLE SCOTT BRISTER: Or
17 what deadline?

18 CHAIRMAN SOULES: Discovery
19 cutoff.

20 MR. SUSMAN: Discovery cutoff,
21 experts, joinder party.

22 MR. MARKS: But the court can
23 change it?

24 MR. SUSMAN: Yes.

25 CHAIRMAN SOULES: Let me get

1 the -- let Judge Brister finish his thought
2 here.

3 HONORABLE SCOTT BRISTER: Yeah.
4 I think that's fine. I was just confused
5 reading it, and I would prefer that we say in
6 a comment what things the court can't do so
7 that you avoid confusion by some judges about,
8 well, I can't change the number of deposition
9 hours limits. I just think there is going to
10 be -- there may be some confusion because it
11 just -- I just couldn't think of the things
12 that would be limited that a court couldn't
13 do. So I would just propose that we state in
14 a -- have a footnote or comment stating
15 specifically what things the court can't
16 change.

17 CHAIRMAN SOULES: Okay. Judge
18 Guittard and then I will get to Joe Latting.

19 HONORABLE C. A. GUITTARD: All
20 of these periods seem to be keyed on trial
21 date. Now, if the case is set on a Monday,
22 and it doesn't actually get to trial 'til
23 Thursday, does that extend all of these dates
24 by three days? If so then that trial date is
25 subject to manipulation, I guess. Is that the

1 intent of the rules?

2 CHAIRMAN SOULES: I mean,
3 that's something that's just an inherent
4 problem in the whole process, even today, and
5 I don't know how to fix that. If somebody has
6 got any ideas, we can sure talk about it.

7 HONORABLE C. A. GUITTARD: The
8 only other thing would be to say the date
9 fixed for trial in the discovery control order
10 for that kind of case or some other analogous
11 provision. In other words, that so many days
12 before trial seems to be sort of a soft date
13 in view of the uncertainty of getting to trial
14 on that date.

15 CHAIRMAN SOULES: Joe Latting,
16 you had your hand up.

17 MR. LATTING: Well, what I
18 envisioned here is I am thinking of a big case
19 where competent lawyers on both sides of a big
20 case know that it's going to take maybe a long
21 time to get the case ready for trial, and they
22 don't know when it's going to be ready for
23 trial, and they want a judge to aid them in
24 moving the case along, but nobody really has
25 an idea of when the case is going to be ready

1 for trial.

2 It might be eight months. It might be a
3 year and eight months, depending, and there is
4 no way to know that, and you go into court to
5 try to get the trial judge to approve your
6 discovery plan, and you have to put a trial
7 date, although everybody knows it's
8 artificial, and it seems to me to be a
9 regression in our jurisprudence to say that a
10 court has to do that no matter what the
11 parties in their judgment think about it, and
12 I am opposed to it on that basis if none
13 other.

14 CHAIRMAN SOULES: Well, we are
15 going to get that because that's a different
16 rule. That's not this rule.

17 MR. LATTING: Well, that's what
18 it says here, though. It says, "A trial date
19 must be included in a discovery control plan,"
20 even never mind that you don't have any idea
21 when you can actually get to one.

22 HONORABLE SCOTT BRISTER: And,
23 of course, it's not really a prohibition on
24 the court. You know, you can just put down,
25 well, Christmas day of 2002 and then when I

1 want to change it I put something else
2 different. It's not what I -- the reason I
3 had originally thought put "except where
4 specifically prohibited." Just putting in a
5 trial date and putting a discovery cutoff
6 deadline is not a prohibition from the judge's
7 standpoint of view. You just enter a new
8 order and change it.

9 CHAIRMAN SOULES: Okay. We are
10 on Rule 2. I don't see anything in there
11 about trial date.

12 HONORABLE SCOTT BRISTER: No.
13 That's what Steve just said "except where
14 specifically prohibited" refers to.

15 CHAIRMAN SOULES: Okay. Well,
16 we are going to get to that.

17 HONORABLE SCOTT BRISTER:
18 That's the only thing it means, Luke. That is
19 the only thing "except where specifically
20 prohibited" with reference to clause 2 means,
21 trial date, discovery cutoff deadline, or this
22 new 30-day thing.

23 CHAIRMAN SOULES: We know it's
24 the 30-day because we have already passed on
25 Rule 1. So we know that's there. We don't

1 know whether any of the rest of it's there or
2 not.

3 MR. SUSMAN: Yeah, we do
4 because it's in the discovery control plan.

5 MR. LATTING: Yeah, we do.

6 HONORABLE F. SCOTT MCCOWN:
7 Well, could I make an observation? I think
8 that the form of Rule 2 works real well, and
9 if the Supreme Court adopts these rules,
10 undoubtedly over time they are going to be
11 amended, and you don't want to have to come
12 back and amend Rule 2 every time you amend any
13 particular rule, and the concept of Rule 2 is
14 except where specifically prohibited. Right
15 now there may only be one or two places. Two
16 years from now there may be a half a dozen
17 places, but it just says that except where
18 specifically prohibited you can modify this in
19 any suit by agreement or by court order. So I
20 think the format works, and we ought to
21 approve Rule 2 and then move forward and fight
22 about the specifically prohibited when we get
23 to each one individually.

24 MR. SUSMAN: So moved.

25 CHAIRMAN SOULES: Okay. Are we

1 ready to vote?

2 HONORABLE DAVID PEEPLES: No.

3 CHAIRMAN SOULES: I can't see
4 whose hand is up. Judge Peeples.

5 HONORABLE DAVID PEEPLES: Do we
6 mean to give the court discretion to veto
7 terms that the parties agreed on? The parties
8 come in with this vast comprehensive
9 agreement, and I don't like part of it, am I
10 stuck with it, or can I change it?

11 MR. SUSMAN: You change it.

12 HONORABLE F. SCOTT MCCOWN:
13 Change it.

14 HONORABLE DAVID PEEPLES: It
15 doesn't say that. I hope so. And if the
16 court has, you know, issued a detailed ruling,
17 can the parties change that by agreement
18 without --

19 HONORABLE F. SCOTT MCCOWN: No.
20 No. Let me point out why I think there is no
21 problem. What this says is that the
22 procedures and limitations set forth in these
23 rules may be modified by the agreement of the
24 parties. Once the court makes an order it
25 doesn't say that the order of the court can be

1 modified by the agreement of the parties. So
2 whatever the court orders the parties are not
3 going to be free by agreement to modify.

4 CHAIRMAN SOULES: Okay. The
5 only question I have is why "for good reason"?

6 MR. SUSMAN: Come again.

7 CHAIRMAN SOULES: Why the words
8 "for good reason" after "the court order"?

9 HONORABLE F. SCOTT MCCOWN: The
10 reason for that, Luke, is because this is a
11 pretty new concept to give a trial court
12 pretty vast discretion to alter the procedures
13 and limitations, and we wanted a standard to
14 say that there has to be a good reason to do
15 it so that the appellate courts if they were
16 reviewing that could say, you know, "This
17 trial judge didn't have good reason. This
18 wasn't appropriate."

19 MR. SUSMAN: Luke, this has
20 been in here. I mean, the "for good reason"
21 concept has been in for the last four meetings
22 at least.

23 CHAIRMAN SOULES: Okay.

24 MR. SUSMAN: It's been in from
25 the very beginning.

1 CHAIRMAN SOULES: Okay. Are we
2 ready to vote on Rule 2? Those in favor of
3 Rule 2 as proposed by the committee show by
4 hands. 14. Those opposed? 14 to 1 it
5 carries.

6 Okay. Now we go to the next page, which
7 is Rule 3, permissible discovery, forms and
8 scope.

9 MR. HAMILTON: Is that Rule 2
10 passed as written or as amended?

11 CHAIRMAN SOULES: It's passed
12 as shown on the page we just looked at.

13 MR. HAMILTON: And not by the
14 amendment?

15 CHAIRMAN SOULES: Pardon me?

16 MR. HAMILTON: There is an
17 amendment in this from Scott Brister.

18 HONORABLE SCOTT BRISTER: No.
19 That's not it.

20 CHAIRMAN SOULES: I'm sorry. I
21 can't hear. There are so many people talking
22 I just can't hear.

23 MR. HAMILTON: There is an
24 amendment in this book by Scott Brister, but
25 that's not --

1 HONORABLE SCOTT BRISTER: It
2 was just an idea.

3 CHAIRMAN SOULES: That's not
4 part of it.

5 MR. SUSMAN: Rule 3.

6 CHAIRMAN SOULES: Rule 3,
7 permissible discovery, forms and scope, and we
8 have comments there from Judge Brister.

9 MR. SUSMAN: Judge Brister,
10 again, comment. You have his comments. Let
11 me give you the --

12 HONORABLE SCOTT BRISTER: It's
13 mostly on the letter on item 23, the third
14 paragraph in my letter.

15 MR. SUSMAN: Yeah. Let me tell
16 you what I think would be the subcommittee's
17 response to his comments, I think, which
18 basically I think we have heard most of these
19 before. His first comment, which is covered
20 by his letter, is that the distinction between
21 written discovery and other forms of discovery
22 should be obliterated because -- and the
23 reason we have retained it is because we
24 believe that there is a requirement to
25 supplement and amend certain forms of written

1 discovery; whereas we do not believe there is
2 a requirement to supplement and amend oral
3 discovery, like deposition testimony.

4 And one of the things that this committee
5 has said on many meetings is that we don't
6 want to have lawyers having to go read
7 depositions and correct deposition testimony.
8 So we have tried to make a distinction between
9 written discovery and other forms of discovery
10 so when it comes to the duty to supplement and
11 amend we can limit it to written discovery.
12 That's the first point of the subcommittee in
13 response to, I think, Judge Brister's
14 comments.

15 CHAIRMAN SOULES: Let's get
16 Judge Brister's reaction to that.

17 HONORABLE SCOTT BRISTER: Well,
18 if the only purpose -- for instance, you have
19 two rules, 7 and 8, dealing with motions to
20 compel, et cetera, that the only difference as
21 I understand between them is one is written
22 discovery and one is everything else. If
23 everything else just means depositions, let's
24 not have two sets of rules through all of this
25 for written discovery and everything else.

1 Let's just make one rule is depositions and
2 say for everything else -- that's my first.

3 It's just a lot of wasted space in the
4 rules creating a distinction. If all we mean
5 is to separate out depositions, which I will
6 get to in just a second, just say separate out
7 depositions and have one set of rules that
8 applies to everything except depositions.

9 But No. 2, the critical -- there are
10 going to be -- there is critical or
11 noncritical items disclosed in a deposition.
12 If it's critical, for instance, plaintiff's
13 expert in a product liability case 30 days
14 before trial -- this is an actual case. This
15 isn't made up. 31 days before trial says,
16 "Component A is defective in my opinion."

17 The day before trial, new facts to report
18 from plaintiff's expert after settling with
19 Component A manufacturer, "Did I say
20 Component A? I meant Component B." Now, that
21 ought to have to be supplemented because
22 Component B manufacturer does not have an
23 expert since we took the plaintiff's depo. and
24 he said, "Nothing is wrong except
25 Component A." That critical kind of an issue

1 ought to be supplemented.

2 And I think the rule -- everything else,
3 you know, if you got the date wrong or
4 somebody's name that, you know, you talked
5 with about it or something like that, that's a
6 noncritical matter, the rules that the
7 subcommittee has drafted do not require that
8 to be supplemented anyway.

9 So I don't think there is going to
10 be -- if you abolish the distinction, if the
11 concern is you don't have to read through and
12 amend everybody's depositions on noncritical
13 matters, that's not going to be required
14 anyway. You are creating a confusing
15 distinction, duplicative set of rules for
16 something you wouldn't have to do even on
17 written discovery. So that's why it seems to
18 me it's simpler, it's shorter, everything is
19 treated the same if you just abolish the
20 distinction rather than keep people guessing.

21 CHAIRMAN SOULES: Any other
22 comments?

23 MR. LATTING: Well, what is the
24 reason for not just saying "depositions" if
25 that's what we mean?

1 MR. SUSMAN: Well, I know it
2 comes up at least in two places. Okay. It
3 comes up -- part of it is the way we wrote the
4 rule. I mean, it's just a drafting election,
5 define written discovery because then it comes
6 up I know in two places. One, it comes up on
7 the duty to supplement or amend where we felt
8 very strongly that we did not want to require
9 lawyers to go read depositions that may have
10 been -- you know, who the hell knows who
11 defended the depositions. I mean, it's a big
12 task and under penalty of some terrible claim
13 to go have to supplement.

14 MR. LATTING: Yeah. I agree
15 with that.

16 MR. SUSMAN: So we did it
17 there. Also, in the assertion of privileges,
18 when you withhold a document on the ground of
19 privilege there is a whole procedure that you
20 do with that document, identifying it, et
21 cetera, et cetera, that doesn't really, we
22 felt, apply to a refusal to answer a question
23 in a deposition. I mean, you don't typically
24 make a log, a privilege log of answers that
25 were not given in depositions.

1 I am not exactly sure how you would do
2 it, but it is withholding privileged
3 information. I mean, you know, a lawyer asks
4 you in a deposition. So it was easier to
5 write the privilege and the way you assert
6 privileges rules and objections and easier to
7 write the supplementation rule by defining
8 written discovery.

9 HONORABLE F. SCOTT MCCOWN: And
10 could I point out something, too, on that,
11 Steve? That on the merits of this issue I
12 don't feel strongly and indeed Judge Brister
13 makes a good point, but it's almost six of one
14 and half a dozen of another. The problem is
15 we picked the half a dozen, and he's arguing
16 for the six, and it's a technical drafting
17 nightmare because the whole rules that we have
18 drafted now are built on us picking half a
19 dozen. If we change to six, we are going to
20 have to redraft an incredible amount of
21 intricate detail that these are built on,
22 which we could do if it was a big point, but
23 it's going to be pretty hard to do and get
24 these up to the Supreme Court, and when it's a
25 close issue, I'd recommend we just stick with

1 what we have got.

2 CHAIRMAN SOULES: Judge
3 Brister.

4 HONORABLE SCOTT BRISTER:
5 That's why I spent 40 hours on this. They are
6 sitting right in front of you, no drafting
7 necessary. All it does is make them shorter.
8 The ones that it changes, which is Rule 7 and
9 Rule 8, and basically that's it, you drop a
10 couple of other places. You drop out
11 "written," and that's all you have to do.
12 There is no redrafting necessary, and it makes
13 it -- I mean, when somebody in here -- and it
14 ain't going to be me -- is going to have to
15 write a Law Review article explaining what
16 written discovery is and what it's not because
17 these rules don't say.

18 I mean, it defines it in the front, but
19 you have to imagine -- you know, you go
20 through the list that it has and imagine what
21 it has not and why is it has not; and if all
22 you want is a different set of rules for
23 depositions, which again in my argument is you
24 don't, but even if you do then all you have to
25 do is say at the start of the deposition rule

1 "notwithstanding any of the foregoing" or at
2 the end of the sanctions supplementations rule
3 say "except as provided in the deposition
4 rule."

5 CHAIRMAN SOULES: Let me ask
6 you, Judge, if we just said in the definition
7 of written discovery say, "Written discovery
8 as used elsewhere in these rules means all
9 discovery except oral depositions"?

10 HONORABLE SCOTT BRISTER: Sure.
11 Again, I don't -- you know, I don't see why
12 oral depositions, especially the case I -- I
13 mean, you don't have to read through a bunch
14 of depositions to know your expert just
15 changed who the target defendant was. Now,
16 that's not confusing to anybody. That doesn't
17 require any extra work, and it badly sandbags
18 Component B manufacturer who all of the sudden
19 the day before trial with no expert is the
20 target.

21 CHAIRMAN SOULES: Okay. We are
22 going to get to supplementation later since we
23 are -- and we may need to come back here if we
24 decide to supplement depositions when we get
25 to there, if that change is made; but if we

1 are worried about some almost mathematical
2 issue of trying to sort through and find out
3 what's left by reading this written discovery
4 the way it is, if we could just say, "Written
5 discovery as used elsewhere in these rules
6 means all discovery except oral depositions,"
7 then we know what's missing, what's left out
8 of the definition, and we don't have to search
9 to find out what's left out. Steve Susman.

10 MR. SUSMAN: Could I urge that
11 we not spend a lot of time making aspirages?
12 We can come back to this tomorrow sometime.
13 You need to get all the way through these
14 rules. Scott has an argument, too, that there
15 is certain other forms of discovery that are
16 written, and he wants to make them oral. I
17 mean, that's coming down the road. I mean, I
18 would agree with Scott if at the end of the
19 day we conclude that on everything we are
20 going to treat oral discovery the same as
21 written discovery then we need to come back
22 and change this, but for the time being why
23 don't we leave it as it is because we have
24 focused on it and then come back to it, rather
25 than argue now because the only way to make it

1 sensible is to get into what are the
2 consequences of those.

3 HONORABLE SCOTT BRISTER:

4 That's true.

5 CHAIRMAN SOULES: So pass this
6 problem for the moment? Is that what you are
7 suggesting?

8 MR. SUSMAN: That's what I am
9 suggesting.

10 CHAIRMAN SOULES: Do you agree,
11 Judge Brister?

12 HONORABLE SCOTT BRISTER: Yeah.

13 CHAIRMAN SOULES: Okay. We
14 will pass it for now.

15 MR. MEADOWS: What about Luke's
16 proposed change in the language to redefine
17 "written discovery"? I thought that was the
18 sentence.

19 HONORABLE SCOTT BRISTER: The
20 problem is it's entry on land and IME's --

21 HONORABLE F. SCOTT MCCOWN:
22 Right.

23 HONORABLE SCOTT BRISTER:
24 -- are also, though, I would want to change
25 them and the subcommittee wouldn't and so --

1 MR. SUSMAN: Hold it 'til the
2 end, please. Judge Brister had a comment on
3 2(c).

4 CHAIRMAN SOULES: Before we
5 leave that, we should be able, though, when we
6 get done to say "written discovery means
7 everything except" and to designate what those
8 exceptions are, right?

9 HONORABLE SCOTT BRISTER: I
10 think that would be clearer.

11 CHAIRMAN SOULES: Rather than
12 what it includes?

13 HONORABLE SCOTT BRISTER:
14 Right. Right.

15 CHAIRMAN SOULES: So we will
16 come back and do that after we know what the
17 exceptions are going to be. So when we vote
18 for this rule we know that we are doing it
19 with that reservation later.

20 MR. SUSMAN: Fine. Judge
21 Brister has -- if you look at the way we wrote
22 section 2, there is a general of what's
23 discoverable that talks about the requirement
24 of relevance, under 2(a), and then it is true
25 we repeat under (2)(c) -- well, it's in (2)(b)

1 we repeat because we talk about documents are
2 things that constitute or contain matters
3 relevant to the subject matter of the action.

4 (2)(c) says, "person with knowledge of
5 relevant facts," and so there is
6 concepts -- it is repetitive of the notion of
7 relevance, and we considered that, Judge
8 Brister, and just said the Bar is used to the
9 concept of persons with knowledge of relevant
10 facts. It maybe repeats it, but doesn't do
11 any harm.

12 CHAIRMAN SOULES: Judge
13 Brister, is your point it's redundant?

14 HONORABLE SCOTT BRISTER: Yeah.
15 I wouldn't spend a lot of time on it. I am
16 just trying to save trees.

17 CHAIRMAN SOULES: But does it
18 assist clarity?

19 HONORABLE SCOTT BRISTER: I
20 don't see how. You know relevant facts, you
21 know it, relevant facts.

22 MR. SUSMAN: He's talking about
23 (c).

24 HONORABLE SCOTT BRISTER: The
25 last sentence of (c).

1 PROFESSOR ALBRIGHT: But this
2 doesn't talk about relevance. This is about
3 that it need not be admissible and personal
4 knowledge is not required. This is the one
5 that makes it clear that you can discover --

6 MR. SUSMAN: Oh, that's right.

7 PROFESSOR ALBRIGHT: That you
8 have to identify persons with only hearsay
9 knowledge, right?

10 MR. SUSMAN: That's right.

11 HONORABLE SCOTT BRISTER: But,
12 I mean, you know, you could also list, you
13 know, maybe they got it from reading a
14 document. I mean, there is a million ways you
15 get it. The question is, is it relevant, and
16 that's defined in (2)(a), that it may be
17 admissible; it may be inadmissible.

18 I would just vote on it and move on.
19 It's not that big a deal.

20 CHAIRMAN SOULES: Okay. Those
21 in favor of deleting the last sentence of Rule
22 3(2)(c) show by hands. Eight. Those opposed?
23 Eight. Stays in.

24 HONORABLE SCOTT BRISTER:
25 That's fine.

1 MR. SUSMAN: The next item is
2 on settlement agreements that Scott again said
3 that settlement agreements should be
4 discoverable but only if they are relevant.
5 So he would replace "any settlement agreement"
6 with the words "any relevant settlement
7 agreement or part thereof." This I know we
8 discussed in our subcommittee, and there was a
9 lot of objection, particularly from Paul Gold.
10 I mean, go ahead. You tell me what --

11 PROFESSOR ALBRIGHT: Okay. The
12 issue is whether we limit it to relevant
13 settlement agreement or any settlement
14 agreement. There has been some debate in the
15 lower courts about whether settlement
16 agreements from other cases should be
17 discoverable or not. The Supreme Court just
18 came down with an opinion that's Ford V.
19 Leggett where they decided that settlement
20 agreements in other cases are not
21 discoverable.

22 So what we need to decide, I guess, is
23 whether to try to overrule Ford V. Leggett and
24 say "any settlement agreement" or to say if we
25 want to include the word "relevant" to make it

1 clear that we are accepting Ford V. Leggett,
2 or leave it the same and just leave it
3 presumably that Ford V. Leggett still exists.

4 HONORABLE SCOTT BRISTER: And I
5 move that we recognize that the Supreme Court
6 that's going to pass these rules just said
7 "relevant" would be a good idea to put in,
8 so...

9 CHAIRMAN SOULES: Okay. Judge
10 Brister is suggesting that we change paragraph
11 (g) at the bottom of the page, settlement
12 agreements, to read -- to insert in the second
13 line the word "relevant" prior to the words
14 "settlement agreement."

15 MR. HERRING: Luke, question.
16 And I have read Ford V. Leggett, but I don't
17 remember if it uses the term "relevant." I
18 would not want to change it in a way that
19 literally seems to do something different than
20 the Supreme Court had done. I just don't
21 remember the precise wording that the Court
22 used.

23 CHAIRMAN SOULES: It doesn't
24 hold that they are not discoverable. It just
25 holds that those settlement agreements were

1 not relevant to the issues in the case and
2 that they were not discoverable for that
3 reason. I don't know whether it used the word
4 "relevant," but that's the essence of it.

5 MR. HERRING: Yeah. Yeah.

6 CHAIRMAN SOULES: So this would
7 square -- adding this word would square with
8 Ford V. Leggett except Ford V. Leggett also
9 talks about the amount of the settlement,
10 which would survive this anyway.

11 HONORABLE SCOTT BRISTER: I
12 intended to cover when you say the "part
13 thereof" that for some reason you may want to
14 see the previous settlements, but it's not
15 fair just to see how much you have been
16 settling your cases for and the court not
17 allow discovery of the amounts.

18 CHAIRMAN SOULES: And is that a
19 part of this, too?

20 MR. SUSMAN: Yeah. "Any
21 relevant settlement agreement or part
22 thereof."

23 CHAIRMAN SOULES: You want to
24 just put that all in one motion?

25 HONORABLE SCOTT BRISTER: Yeah.

1 CHAIRMAN SOULES: Okay. Is
2 there a second? John. Are you seconding the
3 motion, John?

4 MR. MARKS: No.

5 CHAIRMAN SOULES: Is there a
6 second to Judge Brister's motion?

7 MR. HERRING: Second.

8 CHAIRMAN SOULES: Moved and
9 seconded. Discussion, John Marks.

10 MR. MARKS: I have a concern
11 with using the word "relevant." I think maybe
12 we ought to in some fashion word it so that
13 settlement agreements made in that case are
14 discoverable, in the case that's before the
15 court that's being tried are discoverable.

16 CHAIRMAN SOULES: Ford V.
17 Leggett is not that restrictive.

18 PROFESSOR ALBRIGHT: I have a
19 copy of it if you want to read that section.
20 I have a copy of Ford V. Leggett here. It
21 says, "We emphasize that we should not be
22 interpreted to mean that the amount of
23 settlement could never be relevant, only that
24 the Whites have offered no explanation of how
25 such information is relevant to their claims

1 in this case."

2 MR. MARKS: Okay.

3 CHAIRMAN SOULES: Okay. Any
4 other discussion on Judge Brister's motion?
5 Okay. Those in favor show by hands. 16.
6 Those opposed?

7 Okay. That's unanimous. So (g) will now
8 read, "The existence and contents of any
9 relevant settlement agreement or part
10 thereof," period, and then the last sentence
11 will stay the same. Okay. Next?

12 MR. SUSMAN: And that finishes
13 rule -- I think that finishes the rule we were
14 on, Rule 3, except for Scott did suggest that
15 he would add to Rule 3(e) a definition of
16 expert witness and consulting expert, which is
17 currently in Rule 4(2)(3)(a)(3).

18 HONORABLE SCOTT BRISTER: And
19 that was just because all the rest of these
20 are definitions. We define a witness
21 statement, define persons with knowledge of
22 relevant facts, just an organizational matter,
23 define what documents and tangible things are.
24 If we have got a definition of expert and
25 consulting witnesses, it makes more sense to

1 me to put it here rather than to put it back
2 with the rules.

3 CHAIRMAN SOULES: Do we have
4 the definition elsewhere?

5 HONORABLE SCOTT BRISTER:
6 Uh-huh.

7 CHAIRMAN SOULES: But not here?

8 HONORABLE SCOTT BRISTER: It's
9 in 10.

10 CHAIRMAN SOULES: It's in 10.

11 HONORABLE SCOTT BRISTER: And
12 consulting expert is in 4(2)(a)(3). So it's
13 actually two different places.

14 CHAIRMAN SOULES: Okay. So
15 that would be just a matter of reorganization
16 to put the definition of expert witness, I
17 guess, here at (e).

18 HONORABLE SCOTT BRISTER: It
19 would be specifically from Rule 10, part (1),
20 move the second sentence in its entirety; and
21 from Rule 4, part (2)(a)(3), the second
22 sentence in its entirety. Both are just
23 definitions.

24 CHAIRMAN SOULES: Okay. It's
25 Rule 10, and the other one is Rule 4.

1 HONORABLE SCOTT BRISTER:

2 4(2)(a)(3).

3 CHAIRMAN SOULES: And you are
4 talking about the second sentence there?

5 HONORABLE SCOTT BRISTER:

6 Right.

7 CHAIRMAN SOULES: Okay. Judge
8 Brister is proposing that we move the
9 definitions from Rule 10 where he identified
10 and Rule 4 where he identified up to this
11 Rule 3. Is there a second? Fails for lack of
12 a second.

13 Our Supreme Court member, Justice Hecht,
14 is here, and we want to welcome you, Judge. I
15 hope we are proceeding as you desire today and
16 over the weekend, and we are moving along. Do
17 you have some remarks you would like to make
18 to the committee at this time?

19 JUSTICE HECHT: Not yet. It's
20 a tribute to your concentration that I have
21 been here for about an hour and a half, and
22 you haven't noticed.

23 CHAIRMAN SOULES: I apologize.
24 Well, I'm glad that's on the record. Pardon
25 me for that error.

1 Okay. What's next?

2 MR. MCMAINS: Luke, I just have
3 one question about the expert witness section
4 of that rule on discovery. Obviously it says,
5 "A party may obtain discovery of the
6 identity," and other information, "only
7 pursuant to Rule 10." Now, I recognize that
8 Rule 10 deals with what expert witnesses are,
9 but this section also deals with persons with
10 knowledge of relevant facts. We always have
11 this problem that there are many experts
12 in-house that have knowledge of relevant
13 facts, and I recognize that we do deal with
14 that issue in 10, but to say that it's only in
15 10 along with the notion of trial witnesses,
16 for instance, we have a requirement to
17 disclose trial witnesses and identify those.

18 I mean, I am just wondering is somebody
19 going to read this little short part which
20 says, okay, we are dealing with, quote,
21 "experts." You don't even have to consider
22 the rule on scope of discovery because that's
23 not really what our current rule practice has
24 been. These other rules purveyed -- on scope
25 purveyed the issue of experts as well when you

1 are talking about nonexpert testimony. What
2 is the subcommittee's intent?

3 CHAIRMAN SOULES: Okay.
4 Response?

5 MR. SUSMAN: The subcommittee's
6 intent is that you look to the expert rule,
7 not to these other rules for an expert. That
8 was our intent, and hopefully we have
9 accomplished that.

10 MR. MCMAINS: Okay. I guess
11 one of the things I am getting at is you have
12 got experts sitting there with knowledge of
13 relevant facts. You know it. I am talking
14 about they have done testing on materials.
15 They know things about the materials, and you
16 don't make a specific request with regard to
17 experts. Then are you saying that you are
18 immune from any --

19 PROFESSOR ALBRIGHT: Rusty, can
20 I answer that question? If you look at
21 Rule 10(1), the last sentence, it says, "If
22 the expert has personal knowledge of relevant
23 facts, the party may also obtain discovery as
24 provided elsewhere in these rules."

25 MR. MCMAINS: Well, except that

1 this other rule says you can't. I mean,
2 that's kind of a circuitous thing to say,
3 well, you can't get it except through 10, and
4 10 says, well, except that if you've got
5 something else you can do it elsewhere.

6 CHAIRMAN SOULES: David
7 Keltner.

8 MR. KELTNER: I will try to
9 answer your question. That's a very good
10 point. The problem is it's even more
11 circuitous now under the rules, and as you go
12 to 166b(3) in scope -- or b(2) in scope. Then
13 you have to go to b(3) in the exception. Then
14 you have to go to the three cases that deal
15 with this issue. The way this does it is
16 really a less circuitous route, and it takes
17 care of the problem.

18 An expert can be a fact witness for a
19 whole bunch of reasons, even on expert matters
20 if they didn't get it in anticipation of
21 litigation in any event, which is really what
22 your problem is; but that's dealt with, I
23 think, well by Rule 10 and also by persons
24 with knowledge of relevant facts, which is in
25 the scope rule as well; and I think that it's

1 just going to continue the law in places it
2 is. We didn't anticipate a change in the
3 common law at all, and I don't think one is
4 done, and quite frankly, I think it's a little
5 easier done this way.

6 MR. MCMAINS: But you see what
7 I am saying?

8 MR. KELTNER: Yes. It's a good
9 point.

10 CHAIRMAN SOULES: What do we
11 mean by "elsewhere in these rules"? Are we
12 talking about as provided for persons with
13 knowledge of relevant facts?

14 MR. KELTNER: That would be one
15 example.

16 CHAIRMAN SOULES: What else?

17 MR. KELTNER: Well, it's almost
18 all that, Luke. That's just about all there
19 is.

20 CHAIRMAN SOULES: So if we say,
21 "If the expert has personal knowledge of
22 relevant facts, the party may also obtain
23 discovery as provided for persons with
24 knowledge of relevant facts." Is that what we
25 are talking about?

1 MR. KELTNER: Well, yeah. But
2 what Rusty really is talking about is the
3 situation that you have an in-house expert who
4 did not get the expert knowledge in
5 anticipation of litigation. That can be
6 discoverable, especially in a products case
7 and things like that. He has an exception to
8 the consulting expert deal. That's much
9 better dealt with in the expert rule than in
10 the scope of discovery rule, and quite
11 frankly, it always has been so, both in the
12 federal rules, most of the state rules, and
13 certainly our rules. It's just not really
14 practically a problem.

15 MR. MCMAINS: Well, except that
16 remember that what we said, what you just did
17 in the rule on the scope when you said you
18 don't need to have personal knowledge. Rule
19 10 says, "If the expert has personal
20 knowledge, a party also may obtain discovery
21 as provided elsewhere in these rules." So
22 what you have now done is you have
23 institutionalized a discrepancy between
24 experts and ordinary people with regards to
25 their position of information apart from

1 expert testimony, and there is a broader scope
2 of required disclosure under the scope of
3 discovery rule than there is makable under the
4 expert rule when it says you can use other
5 rules if they have personal knowledge.

6 MR. KELTNER: I think that's a
7 good point. That's not what we were talking
8 about before, what your first comment was. I
9 had noticed the personal -- I have problems
10 with the personal knowledge as well, but I
11 think we can cure that in Rule 10 by just
12 having knowledge of some sort, but that's how
13 it would ought to be cured.

14 I mean, it's always in all the rules that
15 I have seen, in all the ones we have looked at
16 on the task force dealing with experts, we
17 didn't deal with it in the scope rule. We
18 dealt with it in the expert rule because they
19 are more precise problems. I would say we
20 leave the scope rule the way it is and deal
21 with this issue back in the expert rule.

22 CHAIRMAN SOULES: So we are
23 going to -- Rusty, your point now is inclusion
24 of the word "personal" in Rule 10(1)?

25 MR. KELTNER: And that's a good

1 point.

2 MR. MCMAINS: Well, my first
3 observation was that it seems to me strange
4 when you say out of the scope rule a
5 particular class of testimony when those
6 people might fit there beyond the class of
7 testimony because they may have knowledge of
8 relevant facts separate and apart from
9 opinions.

10 CHAIRMAN SOULES: Okay.

11 MR. MCMAINS: And they also
12 obviously are trial witnesses. Now, I'm sure
13 that we deal with -- and we do deal with when
14 you have got to disclose the experts and so on
15 as trial witnesses, but you may also be
16 calling them for fact purposes, which to say
17 that once you wear the mantle of expert you
18 wrap yourself in Rule 10 and you don't go back
19 to this rule in any other way. You have no
20 duties with regards to disclosure, and even
21 though you know full well that the person that
22 has the most knowledge of a particular
23 accident, incident, or issue also is going to
24 be wearing the mantle of expert.

25 His response was, well, we covered that

1 because we say over here that you may also get
2 discovery as provided elsewhere if he has
3 personal knowledge of relevant facts. Well,
4 now, that's a more limited scope than what's
5 in the other rule.

6 CHAIRMAN SOULES: Okay.

7 MR. MCMAINS: So that's one
8 issue that definitely needs to be fixed, but
9 that really arose out of the response rather
10 than my initial observation.

11 CHAIRMAN SOULES: Well, we have
12 got a U-turn. When you go from Rule 3(e) to
13 Rule 10 there is a U-turn at Rule 10 that
14 takes you back to Rule 3(2)(c), and we are
15 going to fix that when we get to 10 so that
16 the U-turn gets done correctly. Okay.

17 Okay. Any other -- there is no other
18 written comments to Rule 3. Those in favor of
19 passage of Rule 3 --

20 MR. HERRING: Luke, question.

21 CHAIRMAN SOULES: -- as
22 amended. Chuck Herring.

23 MR. HERRING: 3(2)(h), witness
24 statements, near the end of that paragraph it
25 says, "A lawyer's notes taken during a

1 conversation or interview with a witness," it
2 says "is not." It ought to be "are not a
3 witness statement." Was that a vote of the
4 subcommittee to distinguish lawyer's from
5 investigator notes, or how does that work?

6 PROFESSOR ALBRIGHT: I think
7 that this came from a Supreme Court Advisory
8 Committee where there was a big discussion
9 about whether a lawyer's notes could be
10 considered a witness statement, and everybody
11 wanted to make it clear that a lawyer's notes
12 could not be.

13 I think we should delete "lawyer." I
14 think anybody's notes should not be considered
15 a witness statement. Notes are not a witness
16 statement, period. So I would move that we
17 delete "a lawyer's," and just say, "Notes
18 taken during a conversation or interview with
19 the witness are not a witness statement."

20 HONORABLE F. SCOTT MCCOWN:

21 Second.

22 MR. MEADOWS: I agree.

23 CHAIRMAN SOULES: Any further
24 discussion on that?

25 MR. MARKS: Well, I guess it's

1 time to say it. I disagree with having to
2 produce witness statements in the first
3 instance other than the way it's presently
4 written in the Rules. So I would delete that.

5 CHAIRMAN SOULES: Anyone want
6 to make a motion?

7 PROFESSOR ALBRIGHT: I made
8 one.

9 MR. MARKS: I move that we
10 delete (h).

11 MR. SUSMAN: Hers is first.

12 CHAIRMAN SOULES: Okay.
13 Restate your motion, Alex.

14 PROFESSOR ALBRIGHT: Delete the
15 word "a lawyer's." Begin the sentence, "Notes
16 taken during a conversation or interview with
17 a witness are not a witness statement."

18 CHAIRMAN SOULES: Has somebody
19 seconded that?

20 HONORABLE F. SCOTT MCCOWN:
21 Second.

22 MR. MEADOWS: Second.

23 CHAIRMAN SOULES: Robert
24 Meadows seconded. Okay. John, did you
25 propose an amendment to that motion?

1 MR. MARKS: Well, not to that
2 motion, but I have no --

3 CHAIRMAN SOULES: Those in
4 favor show by hands.

5 PROFESSOR ALBRIGHT: In favor
6 of what?

7 CHAIRMAN SOULES: In favor of
8 Alex's motion. 12. Those opposed? 12 to 2.
9 Alex's motion carries. John, do you have
10 another motion?

11 MR. MARKS: I move that we
12 delete (h) altogether as written and replace
13 it with the existing rule.

14 CHAIRMAN SOULES: Any second?

15 MS. GARDNER: I will second
16 that.

17 CHAIRMAN SOULES: Anne Gardner
18 seconds that. Discussion? Anyone have
19 discussion?

20 Okay. Those in favor of John's motion
21 show by hands. Three. Those opposed? 11.
22 That fails by a vote of 11 to 3.

23 Okay. Now, those in favor of Rule 3 with
24 the understanding that we are going to come
25 back and define what is not written discovery,

1 make that specific in paragraph 1, and with
2 the change that we just voted on in paragraph
3 3(2)(g) and (h), those in favor of Rule 3 show
4 by hands. 14 in favor, and those opposed?
5 One opposed. That carries.

6 Rule 4. Privileges and work product.

7 HONORABLE F. SCOTT MCCOWN:

8 Could I make a suggestion on Rule 4? The Rule
9 4 that you have in the redlined version was
10 originally done by Alex and I, and then it was
11 sent to all of the subcommittee, and we got
12 responses back, and then Alex and I met with
13 Lee Parsley a couple of times, and the Rule 4
14 that you have in the book under the tab is the
15 final Rule 4, and it's really the one that the
16 subcommittee would like for you to consider.
17 It's the Rule 4 under Tab 4, and I know people
18 maybe haven't had a chance to read it, Luke,
19 and I was wondering, it's 10:00 o'clock, if
20 you wanted to take just a short break,
21 restroom stop, so people could read this
22 because they just got it yesterday, but that's
23 the one that we want on the table.

24 CHAIRMAN SOULES: Okay. Let's
25 take 15 minutes and come back, and we will

1 take up Rule 4. Please try to read it at your
2 convenience.

3 HONORABLE F. SCOTT MCCOWN:

4 It's after Tab 4 in the book that we got the
5 last couple of days.

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

9 CHAIRMAN SOULES: Okay. We
10 have a motion on the floor to substitute
11 Rule 4 in the materials that were sent in
12 response to the subcommittee's report. Is
13 there a second to that?

14 PROFESSOR ALBRIGHT: Second.

15 MR. KELTNER: Second.

16 CHAIRMAN SOULES: Moved and
17 seconded. Discussion? Those in favor show by
18 hands.

19 HONORABLE DAVID PEEPLES: As
20 is?

21 CHAIRMAN SOULES: As is.

22 HONORABLE F. SCOTT MCCOWN: We
23 have one suggestion by Judge Peeples that the
24 committee is willing to accept as a friendly
25 amendment. On part 7, it would be 2(f)(7),

1 the word "attorney" should be inserted before
2 "work product" on the second line.

3 CHAIRMAN SOULES: Where are
4 you? This is 4(2).

5 HONORABLE DAVID PEEPLES: The
6 last sentence in the new rule.

7 CHAIRMAN SOULES: 4(2)(f)(7)?

8 HONORABLE F. SCOTT MCCOWN:
9 Yeah. "Attorney work product."

10 CHAIRMAN SOULES: It reads, "if
11 the circumstances"? Is that the sentence?

12 HONORABLE F. SCOTT MCCOWN:
13 Right. That's it.

14 CHAIRMAN SOULES: "Are such
15 that there is no attorney-client privilege
16 under Texas Rules of Evidence 503(d)."

17 HONORABLE F. SCOTT MCCOWN:
18 Attorney work product is discoverable, but
19 Judge Peeples suggested that, and we have
20 accepted it.

21 CHAIRMAN SOULES: Steve Susman.

22 MR. SUSMAN: I mean, it does
23 seem to me that there is some drafting
24 problems that we can deal with. I mean, I can
25 just see some. You define -- 2(a) defines

1 work product. Okay. And there is really no
2 definition, separate definition, of attorney
3 work product in Rule 2(a). 2(b) talks about
4 the protection of attorney's mental processes,
5 and that's understandable, but I mean, I just
6 gave Alex some changes that I would make in
7 the wording to make sure you don't repeat it.

8 As I understand it, the attorney's mental
9 processes, which are never discoverable, okay,
10 but if it's revealed through a compilation of
11 facts it can be discoverable while showing a
12 good -- you know, substantial need, hardship,
13 undue hardship, which makes it under like (c).
14 It becomes like other work product then.

15 So I think you can do it by saying on
16 2(b), the first sentence would be where it is.
17 I would add a second sentence instead of, "A
18 judge may not order discovery of the work
19 product" to simply say, "Work product that is
20 merely a compilation of facts of the case,
21 even if the mental impressions, opinions,
22 conclusions, and legal theories of an attorney
23 may be inferred from discoverable material,"
24 and I would eliminate the rest of that whole
25 sentence and say it's not always exempt from

1 discovery, which is basically what you are
2 saying, isn't it, Scott?

3 HONORABLE F. SCOTT MCCOWN:

4 Well, it is, but I don't think it's an
5 improvement on the way it's drafted.

6 CHAIRMAN SOULES: Well, we have
7 an opinion about a week old from the Supreme
8 Court on this subject, and the words we are
9 using here are not the words in that decision.
10 I cannot call the name of it. Can you call
11 the name of it?

12 MR. KELTNER: Occidental.

13 PROFESSOR ALBRIGHT: I have a
14 copy of it. It's the Occidental case.

15 HONORABLE F. SCOTT MCCOWN:

16 This was drafted in light of that opinion.

17 PROFESSOR ALBRIGHT: The only
18 difference is they use the words "mechanical
19 compilation." We deleted the word
20 "mechanical" because we could imagine
21 arguments in front of judges where lawyers
22 would argue that this was not a mechanical
23 compilation of facts but an artistic
24 compilation of facts using the art of
25 lawyering. So we decided to delete the word

1 "mechanical."

2 CHAIRMAN SOULES: But is the
3 first sentence really true to what they call
4 Category 1?

5 PROFESSOR ALBRIGHT: Exactly.

6 CHAIRMAN SOULES: Work product?

7 PROFESSOR ALBRIGHT: Exactly.

8 CHAIRMAN SOULES: It tracks it
9 exactly?

10 PROFESSOR ALBRIGHT: Well, I
11 can't remember if it tracks it exactly, but it
12 is clearly what they call Category 1. I have
13 the opinion right here.

14 CHAIRMAN SOULES: It seems to
15 me like sentence 1 in paragraph 2(b) is so
16 broad that it also includes Category 2, but
17 maybe not.

18 PROFESSOR ALBRIGHT: I don't
19 understand. Do you want me to read this
20 opinion from the Supreme Court?

21 CHAIRMAN SOULES: Yeah. Just
22 the part on Category 1 and Category 2.

23 PROFESSOR ALBRIGHT: "The
24 attorney work product privilege protects two
25 related but different concepts: First, the

1 privilege protects the attorney's thought
2 process, which includes strategy decisions and
3 issue formulation and notes or writings
4 evidencing those mental processes. Second,
5 the privilege protects the mechanical
6 compilation of information to the extent such
7 compilation reveals the attorney's thought
8 processes.

9 "With respect to an attorney's thought
10 processes we agree with OxyChem that the work
11 product privilege is absolute, subject only to
12 the narrow exceptions found in the Texas Rules
13 of Civil Procedure. With respect to compiled
14 information that reveals an attorney's thought
15 processes, the privilege is not absolute."

16 So that's the distinction that we are
17 trying to make. We define all work product.
18 Then we were talking about this first category
19 in the Occidental case, which is attorney
20 mental processes which are revealed directly,
21 and then we take out of that the attorney
22 mental processes that are only indirectly
23 revealed through compilations of information.
24 Then we say -- then we have protection for all
25 work product other than the direct revelation

1 of attorney mental processes, which is
2 protected, but it can be produced upon a
3 showing of need and hardship.

4 Then in (d) we have limiting disclosure
5 that whenever a judge orders discovery of work
6 product pursuant to (b) or (c) then the court
7 is to protect mental impressions and opinions
8 to the extent possible.

9 CHAIRMAN SOULES: Well,
10 paragraph (b) says you can't make discovery of
11 certain things and paragraph (c) -- at all.
12 Paragraph (c) says but you can in some
13 circumstances. They are the same thing.

14 PROFESSOR ALBRIGHT: No. It
15 says, "other work product."

16 HONORABLE F. SCOTT MCCOWN:
17 That would be like party work product.
18 Paragraph (c) is like party work product.

19 CHAIRMAN SOULES: I am talking
20 about -- okay. Forget it. I probably
21 misspoke. Paragraph (b) says two things. It
22 says you absolutely can't get work product in
23 the first sentence. The second sentence says
24 the judge may order that you do produce the
25 same work product under some circumstances.

1 PROFESSOR ALBRIGHT: No. It's
2 not the same work product.

3 HONORABLE F. SCOTT MCCOWN: No.
4 What we are trying to do, here is what --

5 CHAIRMAN SOULES: You use the
6 words, "attorney's mental impressions,
7 opinions, conclusions, and legal theories" in
8 both sentences.

9 HONORABLE F. SCOTT MCCOWN:
10 Right. And the reason is it's tricky. It's
11 the old argument that if I have to tell you
12 persons with knowledge of relevant facts, once
13 you get that list you will be able to infer
14 from that list --

15 CHAIRMAN SOULES: I understand
16 that.

17 HONORABLE F. SCOTT MCCOWN:
18 Right.

19 CHAIRMAN SOULES: I am just
20 talking about the words here. I am not
21 talking about the concepts.

22 HONORABLE F. SCOTT MCCOWN:
23 Right. And so what we have said is you cannot
24 ever ask for or get an attorney's mental
25 impressions, opinions, conclusions, and legal

1 theories; but if what you are asking for is a
2 compilation of facts and in getting that you
3 will be able to infer or you think you are
4 going to or they are arguing you are going to
5 be able to infer what their mental
6 impressions, opinions, conclusions, and legal
7 theories are, we know that; and in the
8 inference, that second category, the inference
9 kind of disclosure we are going to live with
10 that if you can show substantial need and
11 undue hardship; but we are going to protect to
12 the extent possible by only disclosing the
13 factual information.

14 So, for example, a judge might not simply
15 order that your legal pad with the witness
16 interview be turned over, but might instead
17 redact or rearrange so that you got the facts
18 but you didn't get the mental impressions,
19 opinions, conclusions, and legal theories.
20 It's a real hard trick both to draft and also
21 to do if you are conducting the in camera
22 inspection, but we think that that captures
23 the two-step process that the Court outlined.

24 CHAIRMAN SOULES: Okay. You
25 intend, though, for me to have to produce my

1 compiled chronology of the events of a case?

2 HONORABLE F. SCOTT MCCOWN:

3 Only if the party has established substantial
4 need and undue hardship, which is going to be
5 a tough burden. Then if they do that, you
6 have got to produce it, and then if the judge
7 in looking at it says, "This is only a
8 compilation of facts, and it doesn't say
9 anything about Luke's mental impressions,
10 opinions, conclusions, and legal theories," he
11 could order it turned over; but if he says,
12 "This really tells them something about Luke's
13 mental impressions, opinions, conclusions, or
14 legal theories, how can I redact it so that
15 all they are getting is the facts and not
16 being allowed to infer anything about Luke's
17 thought process."

18 CHAIRMAN SOULES: These words
19 are different in verbage and in meaning than
20 the Occidental case.

21 HONORABLE F. SCOTT MCCOWN: I
22 don't think so.

23 CHAIRMAN SOULES: Well, okay.

24 PROFESSOR ALBRIGHT: Can I --

25 CHAIRMAN SOULES: Alex

1 Albright.

2 PROFESSOR ALBRIGHT: And one
3 thing you really have to remember is the
4 substantial need and hardship. I really
5 cannot imagine a situation where another side
6 would have substantial need and hardship to
7 get your chronology of the case. I mean, the
8 only reason they would want your chronology of
9 the case is to get your mental impressions and
10 opinions. They could make their own
11 chronology of the case.

12 The situation where there is going to be
13 need and hardship is the notes of the
14 witnesses -- notes you have taken of a witness
15 interview; the witness is dead; the judge
16 decides that the other side needs to know what
17 that witness said; and under the current law,
18 under the current Supreme Court opinions, the
19 courts have allowed discovery of that with no
20 showing of need and hardship. So what we are
21 doing is requiring need and hardship and some
22 understanding that this may, in fact, reveal
23 your mental impressions and opinions, and you
24 really need to be careful of it, which is not
25 done by the courts under the current rule.

1 HONORABLE F. SCOTT MCCOWN: And
2 if these words aren't exactly the words the
3 Supreme Court used or don't quite capture,
4 they are the traditional words in the
5 jurisprudence, the national jurisprudence,
6 that defines, you know, what we are talking
7 about when we talk about work product, and
8 that's where we took them, and I think that
9 they capture what we mean when we mean the
10 attorney's mental processes.

11 CHAIRMAN SOULES: Any other --
12 Judge Peeples.

13 HONORABLE DAVID PEEPLES: Now
14 that we have granted discovery of witness
15 statements, period, how much need is there for
16 this undue hardship exception?

17 HONORABLE F. SCOTT MCCOWN:
18 Well, there may not be a lot of need, but let
19 me give you an example. Remember we have got
20 a pretty technical, straight definition of
21 what witness statements are. So imagine a
22 case where you have got an apartment complex
23 that burns to the ground. The insurance
24 company retains a lawyer immediately. He has
25 the lawyer on the scene. The lawyer conducts

1 all of the interviews. Then the people in the
2 apartment complex disperse to the four corners
3 of the world, and their whereabouts are lost.

4 He's sitting on a whole lot of fact
5 statements even though they wouldn't be
6 witness interviews under our rule. That might
7 be a case where you could show substantial
8 hardship, substantial need and undue hardship,
9 to get some kind of recitation of what he's
10 got, protecting to the extent possible any
11 legal theories or mental impressions that you
12 could infer from the way he took the notes.

13 CHAIRMAN SOULES: And one more
14 question. Do you intend to make it easier for
15 the judge to grant attorney work
16 product -- discoverable attorney work product
17 than discoverable other work product?

18 HONORABLE F. SCOTT MCCOWN: No.
19 We have tried to make it harder.

20 CHAIRMAN SOULES: Well, you say
21 here, "A judge may not order attorney work
22 product." Then you say a judge may, however,
23 order work product and then you say a
24 judge -- that's "may however order attorney
25 work product," and then you say a judge may

1 not order discovery of other work product,
2 "except." It's the second sentence of 2(b)
3 that bothers me. Why should that not also be
4 read or be worded "a judge may not unless,"
5 the same as 2(c)? It seems to me like the
6 second sentence of 2(b) is more permissive
7 than 2(c).

8 MR. SUSMAN: The problem with
9 the repetition, Scott, is that you keep -- the
10 reader of this thing wonders is there a
11 different test in 2(b) than there is in 2(c),
12 and what it turns out, I think at the end of
13 the day it's all the same thing. You either
14 don't get it because it's the attorney's
15 mental impressions, the attorney or the
16 attorney's representative, mental impressions,
17 opinions, conclusions, and legal theories
18 which you don't get under any circumstance,
19 and everything else which you can get only
20 upon a showing of undue hardship.

21 HONORABLE F. SCOTT MCCOWN: No.
22 But no, you do get it under one circumstance,
23 and we can redraft this. I think Luke makes a
24 good point, and we can redraft it to make the
25 permissive clause last instead of first, but

1 the reason it's drafted like this -- and it
2 can be redrafted, and we will do that, but it
3 is no defense or it's no shield to your work
4 product to say, "If they get these facts, they
5 will be able to infer my thoughts." That's
6 not a defense, and so what we have tried to do
7 is capture -- we have tried to express that,
8 and in expressing it where we are trying to be
9 narrow we actually sound broad. We can
10 redraft it. What I would suggest is that Alex
11 and Lee and I do that this afternoon and have
12 it for you in the morning.

13 MR. SUSMAN: Fine.

14 PROFESSOR ALBRIGHT: But I
15 think we can still talk about the rule concept
16 as presented here.

17 HONORABLE F. SCOTT MCCOWN:

18 Right. If you-all are cool on the concept, we
19 will redraft it to make it sound narrow and
20 have it for you tomorrow.

21 CHAIRMAN SOULES: Okay. Are we
22 attempting to change the Supreme Court's
23 Occidental case?

24 MR. SUSMAN: No.

25 HONORABLE F. SCOTT MCCOWN: No.

1 CHAIRMAN SOULES: Then we
2 should use the words of that case.

3 PROFESSOR ALBRIGHT: No.

4 CHAIRMAN SOULES: Why not?

5 PROFESSOR ALBRIGHT: With
6 deference to the Supreme Court this procuring
7 of opinion is not the most artfully drafted
8 opinion I have ever seen.

9 HONORABLE F. SCOTT MCCOWN:

10 Well --

11 MR. HERRING: That's deference?

12 HONORABLE SCOTT BRISTER:

13 Spoken like a true law professor.

14 PROFESSOR ALBRIGHT: With
15 apologies.

16 CHAIRMAN SOULES: Judge, the
17 per curiam is sometimes better and sometimes
18 maybe not so. I don't know, but I think they
19 do a pretty good -- they drew a pretty good
20 distinction there that I don't think this
21 quite draws. Maybe we do want to change that.

22 PROFESSOR ALBRIGHT: Well,
23 Luke, what do you think the difference is
24 between Occidental and --

25 CHAIRMAN SOULES: If you will

1 hand me the words, I will read it to you.

2 Okay. "First," this is the first category,
3 "attorney's thought processes, which includes
4 strategy decisions and issue formulation and
5 notes or writings evidencing those mental
6 processes."

7 HONORABLE F. SCOTT MCCOWN:

8 Thought processes and mental impressions,
9 opinions, conclusions, and legal theories seem
10 pretty much the same. I mean, we just kind of
11 took the traditional work product formulation
12 out of the jurisprudence.

13 CHAIRMAN SOULES: Okay. Well
14 let's wait 'til we see what you draft, and we
15 will come back to Rule 4.

16 HONORABLE F. SCOTT MCCOWN:

17 Okay.

18 MR. SUSMAN: I have a problem
19 with -- still on Rule 4 when you-all go to
20 draft, with the exception part. Now, are we
21 saying that these things are not work product,
22 or are they work product? Are we not making a
23 comment? They are discoverable?

24 HONORABLE F. SCOTT MCCOWN:

25 They are conceptually work product when you

1 apply the definition of work product, and what
2 we are saying is we are not talking about
3 that. These things are discoverable even if
4 made or prepared in anticipation of litigation
5 or for trial. The reason we list them out
6 here is because of the constant problem that
7 all of you have that you will ask contention
8 interrogatories or you will ask in admission,
9 and they will say, "Oh, that calls for legal
10 conclusion" or "that invades my work product."
11 So we just tried to very expressly set out
12 that we are serious; we mean it; these things
13 are discoverable.

14 MR. SUSMAN: Why don't you say
15 they aren't work product?

16 HONORABLE F. SCOTT MCCOWN:
17 Well, because they are conceptually work
18 product. They are work product. It's just
19 not going to be work product that's protected.
20 It's kind of like the old party admissions
21 aren't hearsay. Well, you could do it either
22 way. You could say it is hearsay and it's an
23 exception, or you could say it's not hearsay.

24 MR. SUSMAN: All right. Now
25 will you explain to me what No. (7) is then?

1 I don't quite understand.

2 HONORABLE F. SCOTT MCCOWN:

3 Okay. No. (7) --

4 MR. SUSMAN: And by the way,
5 each of these is a noun. Each of the things
6 you listed is a noun except (6) is a sentence,
7 a complete sentence.

8 HONORABLE F. SCOTT MCCOWN:

9 (6)?

10 MR. SUSMAN: I mean, everything
11 you list (1), (2), (3), (4), (5) are nouns.
12 Okay. (6) is not a noun.

13 HONORABLE F. SCOTT MCCOWN: (6)
14 is photographs. Am I not with you?

15 MR. SUSMAN: (6) reads, "Any
16 photograph is discoverable." It's a sentence.
17 It's the way it's written.

18 HONORABLE F. SCOTT MCCOWN: Oh,
19 okay.

20 MR. SUSMAN: You see?

21 HONORABLE F. SCOTT MCCOWN:
22 Yeah.

23 MR. SUSMAN: And then (7) is
24 something --

25 HONORABLE F. SCOTT MCCOWN:

1 Okay. We will fix that.

2 MR. SUSMAN: I mean, it's just
3 kind of weird.

4 HONORABLE F. SCOTT MCCOWN: No.
5 (7) is not weird. We will make (6) a noun,
6 and now I will explain (7). (7) was put in at
7 the suggestion of the big advisory committee
8 in response to their comments, and it comes
9 right out of our present rule. If you will
10 look at 166b(3)(a), and what (7) says, "If the
11 circumstances are such that there is no
12 attorney-client privilege under Texas Rule of
13 Evidence, 503(d), attorney work product is
14 discoverable."

15 So that comes out of 166b(3)(a) on page
16 53 if you have got your red book, and then if
17 you look over at the Rules of Evidence and
18 find 503(d), you see that what's referenced
19 are the ways you break attorney-client
20 privilege such as crime, fraud, exception. So
21 what we are saying is that if you break
22 attorney-client privilege under 503(d) then
23 automatically attorney work privilege is gone
24 as well. If you are engaging in a fraud with
25 your client such that you have no

1 attorney-client privilege, you also have no
2 attorney work product privilege.

3 CHAIRMAN SOULES: Do we get the
4 privilege from 503(d)?

5 MR. SUSMAN: 503(d) is -- what
6 is 503(d)?

7 HONORABLE F. SCOTT MCCOWN:
8 It's the exceptions to the privilege.

9 MR. MCMAINS: Exceptions to the
10 attorney-client privilege.

11 MR. SUSMAN: What does 503(d)
12 say?

13 HONORABLE F. SCOTT MCCOWN:
14 Yeah. There is a bunch of exceptions under
15 503(d). As I say, we put this in because the
16 big committee wanted it. It's in the present
17 rule, and I think it makes sense, but I need
18 some defenders here who wanted it and asked us
19 to put it in.

20 CHAIRMAN SOULES: Well, I think
21 it needs to say, "if the circumstances are
22 such that there is an exception to
23 attorney-client privilege."

24 HONORABLE F. SCOTT MCCOWN:
25 Okay. I like that.

1 CHAIRMAN SOULES: And then it
2 is right out of the current rule.

3 HONORABLE F. SCOTT MCCOWN:
4 503(d) is on page 225 of the book.

5 CHAIRMAN SOULES: Okay.
6 Anything else for the drafters?

7 MR. MCMAINS: Luke, Sarah
8 has --

9 CHAIRMAN SOULES: Justice
10 Duncan.

11 HONORABLE SARAH DUNCAN: I
12 guess I just have a question. I thought I
13 understood what was meant by the old rule, but
14 maybe we are changing it. The attorney-client
15 privilege applies to a communication and can
16 be broken as to a communication. Well, lots
17 of communications, but you have got to prove
18 it as to each communication, I thought; but is
19 what this rule is doing is saying once there
20 is -- once the privilege is broken as to any
21 communication, all work product is
22 discoverable regardless of whether it
23 was -- and, for instance, in furtherance of a
24 finding.

25 And does it apply -- that's my first

1 question. My second question is, I thought
2 the old rule just applied to the underlying
3 transaction. What if there is then a suit
4 based upon the underlying transaction? Is the
5 work product in that suit also discoverable?
6 For instance, if a client doesn't pay, that's
7 a breach of an obligation by the client to the
8 lawyer. As I understand the rule that is
9 being proposed, that would break the work
10 product as to all work product in the
11 underlying suit; but it doesn't, does it,
12 preclude the attorney from having work product
13 when he sues the client for payment?

14 HONORABLE F. SCOTT MCCOWN:

15 Well, I think that's true, and I remember from
16 high school debate when you put a plan on the
17 table, and people used to argue about your
18 plan. Your response would be, well, those
19 disadvantages you're pointing out are not
20 unique. The problems that you raise are
21 problems with the present rule as well as with
22 this rule. I don't think that this rule
23 creates the problems. I think the problem is
24 inherent in the present rule as well. The
25 only thing I can see that would fix it would

1 be to say "related attorney work product is
2 discoverable."

3 "If the circumstances are such that there
4 is an exception to attorney-client privilege
5 under Texas Rule of Evidence 503(d), related
6 attorney work product is discoverable," and
7 you're just going to -- you know, there is
8 going to have to be line drawing by the judge,
9 but you know, that might -- does that address
10 your problem, you think?

11 HONORABLE SARAH DUNCAN: It
12 would address my problem if there is no intent
13 to change existing law.

14 HONORABLE F. SCOTT MCCOWN: No.
15 There is no intent to change existing law, and
16 I think you point out a good problem, and if
17 we added the word "related," that might help.

18 CHAIRMAN SOULES: Okay. Any
19 opposition to that? Okay. John Marks.

20 MR. MARKS: I'm sorry. What
21 would be the consequence of just taking (7)
22 out?

23 HONORABLE F. SCOTT MCCOWN:
24 Well, the consequence of taking (7) out is
25 that Rule 4 creates a discovery privilege. It

1 creates what's called the work product
2 privilege, and you don't have any exemption.
3 If you took (7) out then you would have the
4 anomalous situation that the attorney could
5 shield -- couldn't shield attorney-client, but
6 if he could call it work product, he could
7 shield it. And so (7) is in there to make it
8 clear that if the attorney-client falls, the
9 work product falls as well.

10 CHAIRMAN SOULES: Okay. Let's
11 go to Rule 5.

12 MR. MARKS: I have one more
13 comment, Luke, on 4.

14 CHAIRMAN SOULES: All right.
15 Do we have a consensus now? Everybody has
16 said what they need to say and given their
17 input to the draftsman for redraft of Rule 4?

18 MR. MARKS: I just have one.

19 CHAIRMAN SOULES: Anyone have
20 anything else? John Marks.

21 MR. MARKS: I know this is the
22 law, but isn't it redundant in (a) to say,
23 "the relevant facts within the knowledge of
24 any party or party representative are not work
25 product"?

1 HONORABLE F. SCOTT MCCOWN:

2 Well, it may be redundant, but it's one of
3 those issues that you wind up in court on all
4 the time, and so it's just an effort to shut
5 down those disputes by emphasizing that facts
6 are never protected.

7 CHAIRMAN SOULES: It's a
8 codification of a case.

9 MR. MARKS: Well, okay, but for
10 example, I go out, and I talk to a witness. I
11 make my notes. He tells me certain things.
12 Joe said this, that, and the other. Now, I
13 have to identify that witness, and I have to
14 identify his address, and I have to identify
15 generally how he relates to the case. Now,
16 does this mean that I have to also say
17 everything that he told me? Is it just what
18 he told me, or if I identify the witness and
19 give the other side the opportunity to talk to
20 that witness, isn't that the purpose of it?
21 And does this mean that I have to now tell him
22 everything that the witness told me?

23 CHAIRMAN SOULES: If it's
24 discoverable.

25 HONORABLE F. SCOTT MCCOWN:

1 Yeah. But in response to a properly worded
2 interrogatory you might well have to disgorge
3 what you learn, and that's the present law.

4 CHAIRMAN SOULES: But we limit
5 what you can learn about persons with
6 knowledge of relevant facts elsewhere in this
7 rule.

8 MR. MARKS: Well, that's what I
9 am saying, though. Do we really need this? I
10 think it might cause more confusion in that
11 sentence than it helps because it's covered
12 everywhere else in here.

13 CHAIRMAN SOULES: Nowhere else
14 does it say, however, that that is not work
15 product, I think is the reason for including
16 the sentence. Okay. Well, let's look at it
17 after it gets redrafted and --

18 MR. SUSMAN: Rule 5.

19 CHAIRMAN SOULES: -- go to
20 Rule 5.

21 MR. SUSMAN: Okay. The only
22 comments that we got on Rule 5 were from Scott
23 Brister, and Scott's comments on Rule 5 were
24 shouldn't you have a duty to --

25 HONORABLE SCOTT BRISTER:

1 That's the written discovery issue.

2 MR. SUSMAN: Yeah. That's the
3 written discovery, which is oral discovery,
4 and again, it was our position here we were
5 dealing with not the duty to supplement or
6 amend discovery responses, and I think Scott's
7 made that point already, and our feeling was
8 that except for expert witnesses where there
9 is a special supplementation rule -- you will
10 recall in experts, we will get to that in Rule
11 10 -- where an expert's testimony does need to
12 be corrected if it's wrong or if there are
13 additional opinions, but there were a lot of
14 people that felt very strongly that we should
15 not require the supplementation or amendment
16 of deposition answers of a nonexpert witness.
17 I mean, that's an issue before the house.

18 CHAIRMAN SOULES: Well, that
19 was voted pretty one-sided before.

20 MR. SUSMAN: Before.

21 CHAIRMAN SOULES: I mean, that
22 supplementation would not be made, and the
23 committee, subcommittee, has been true to that
24 vote.

25 HONORABLE SCOTT BRISTER: Well,

1 I for one had no idea what -- how all of these
2 fit together until I looked at it. Until I
3 looked at it I didn't realize that their
4 supplementation rule doesn't require
5 supplements of noncritical matters for written
6 discovery even. So when we say, well, we
7 shouldn't be having to update the trivial
8 matters in the deposition, that's no
9 distinction from what you are saying in these
10 rules to do with trivial matters in
11 interrogatories, trivial matters in your
12 standard discovery response -- request. So
13 that's no difference.

14 I think all of us agree you shouldn't
15 have to spend a lot of time going through -- I
16 mean, doesn't everybody agree you shouldn't
17 have to spend your time reading through all
18 the written discovery to see if there is some
19 trivial matter that needs to be updated? Of
20 course. And that's no difference to me.

21 CHAIRMAN SOULES: Steve.

22 MR. SUSMAN: Well, the courts
23 did not try to distinguish between trivial and
24 nontrivial and critical and noncritical.

25 HONORABLE SCOTT BRISTER: Sure.

1 MR. SUSMAN: I think you would
2 get into a terrible problem of defining what
3 that meant. Insofar as oral discovery, it can
4 be extremely important or not important. You
5 simply do not on a fact witness have to go
6 back and read their deposition and make
7 corrections. That was a clean, bright line.
8 No one has got to go reread a factual witness'
9 deposition and correct anything, whether it's
10 enormously important or not.

11 Where it's written discovery you have to
12 correct where there was a problem, where there
13 was an incorrect answer or you learned
14 something new. The form in which you do it
15 depends upon whether it is a correction as to
16 the identity of trial witnesses, persons with
17 knowledge of relevant facts, or expert
18 witnesses. In that case it's got to be a
19 formal supplementation. If it's some other
20 kind of information that you are correcting
21 then you can get away with an informal
22 supplementation. I mean, that's the way we
23 kind of thought it through in our mind.

24 HONORABLE SCOTT BRISTER: And
25 why wouldn't that work for depositions, is

1 what I am saying? In other words, if you --
2 the plaintiff says at his deposition, "I have
3 seen Doctors A, B, C, and D." You've got the
4 medical records that show Doctors E and F
5 also. You don't have to supplement your
6 interrogatory answers. You are not going to
7 call him as an expert or anything like that
8 because of your Part (2) of Rule 5 here says
9 not required -- next to last sentence,
10 "Amendment or supplementation is not required
11 for other responses if the additional or
12 corrective information or documents have
13 otherwise been made known to other parties in
14 discovery."

15 MR. SUSMAN: Right.

16 HONORABLE SCOTT BRISTER: And
17 if that's what you're concerned about in the
18 oral deposition, he just said A, B, C, and D,
19 then he doesn't have to correct the oral
20 deposition either. He doesn't have to correct
21 it because by giving them the records they
22 know about it. They did correct it. So
23 nobody has to go back and read through the
24 deposition.

25 MR. LATTING: As a practical

1 matter when we are getting ready for trials,
2 Scott, we have got a stack of depositions this
3 tall, and I don't remember what's in all of
4 those depositions on every page. What I am
5 afraid of if we adopt your rule -- and I
6 understand the problem you are talking about,
7 but what I am concerned about is going to
8 trial, asking the witness a question, having
9 an objection, saying, "That's a change from
10 what he said on page 356 of his deposition,
11 which was taken eight months ago, and they
12 didn't correct it. So they can't put that
13 testimony on."

14 Whereas, when we are going to trial we
15 can look at our interrogatory responses, and
16 it's in one place. It's distinct and
17 separate, and you can find it. That's the
18 No. 1 problem I have. No. 2 problem I have is
19 I can't imagine how we can distinguish between
20 critical and noncritical because --

21 HONORABLE SCOTT BRISTER: It
22 already does. It's too late.

23 MR. LATTING: Well, maybe I
24 am --

25 HONORABLE SCOTT BRISTER:

1 That's what that does, and that's what
2 definitely Rule No. 6 does because to sanction
3 it and keep it out it has to be
4 unreasonably -- not reasonably prompt, won't
5 affect the outcome at trial, and they could
6 still get enough discovery done on it anyway;
7 and if it's not critical, it won't affect the
8 outcome at trial, and you can get the
9 discovery done, or you won't be prejudiced in
10 preparing for trial. If it is critical, you
11 will be. There is no way to remove that
12 distinction, I bet.

13 MR. LATTING: Well, okay. I
14 will give you that. Maybe that's right. I am
15 trying to think ahead of how this is going to
16 work in the real world, but what do we do
17 about the problem of where we have -- or maybe
18 we won't anymore under the deposition rules,
19 but what do we do when we have got a stack of
20 depositions this tall from 15 witnesses? Are
21 we going to have to go back and comb those and
22 see what's happened?

23 HONORABLE SCOTT BRISTER: Well,
24 everybody I know does. I mean, you send them
25 out for signature. As opposed to

1 interrogatories and everything else there is a
2 process built in where you do that. You send
3 it to them; they look through it; they change
4 the answers all the time. The deponent
5 changes the answers, attaches them to the
6 back.

7 MR. LATTING: Yeah. That's
8 true. That's true in 1995, but then two years
9 from now when we haven't gone to trial yet and
10 new things have come up, you don't send the
11 depositions back to them and have them say,
12 "Now, is there anything that you have learned
13 since you gave your deposition?" You just
14 don't do that, and I thought we had this
15 debate and decided we don't want to have to do
16 that.

17 HONORABLE SCOTT BRISTER: What
18 do you do with my case where they change the
19 plaintiff's expert -- I understand the
20 problem, but the plaintiff's expert said it
21 was Component A. That's the only place he
22 said it, and the day before trial -- if you
23 don't change this, the day before trial he
24 will be allowed to change to Component B.

25 MR. LATTING: That comes under

1 the expert rule.

2 HONORABLE SCOTT BRISTER: And
3 you, manufacturer of Component B -- no, no,
4 no, no. You don't only -- let me explain a
5 little more. This was outstanding lawyer,
6 former president of the Houston Trial Lawyers
7 Association; other side, good defense lawyers.
8 They didn't get reports, and the interrogatory
9 answers said, "He's going to say the product
10 was defective." Now, that may have been able
11 to get more on it, but that's a standard
12 response. People say that all the time and
13 will continue to say that all the time, and
14 they will say something in their deposition
15 specifically about what their criticism is
16 that's not in a report because reports are
17 going to be very limited under this. That's
18 not going to be in the interrogatory answer
19 other than in general terms, and it will be a
20 total surprise at trial if you don't make that
21 key expert update the critical matter of his
22 trial.

23 PROFESSOR ALBRIGHT: Scott, we
24 do require experts to supplement their
25 depositions.

1 MR. SUSMAN: The expert has got
2 to do it.

3 MR. LATTING: That's the answer
4 to that.

5 MR. MEADOWS: I think that's
6 right.

7 CHAIRMAN SOULES: Under these
8 rules expert depositions must be supplemented,
9 or at least that's the intent of it. Where is
10 that provision?

11 MR. MEADOWS: It's Rule 10.

12 MR. SUSMAN: Let me give you an
13 example of what would be a real problem in a
14 case.

15 MR. LATTING: He's asking where
16 it is. It's Rule 10, I think.

17 CHAIRMAN SOULES: Let's look at
18 Rule 10 to be sure because Judge Brister has
19 read these very carefully, and maybe that
20 doesn't --

21 MR. MEADOWS: Scott, look at
22 (3), part (3) of Rule 10 and part (6).

23 MR. SUSMAN: And (6), "A
24 party's duty to supplement and amend discovery
25 provided pursuant to this rule is governed by

1 Rule 5, except that the duty also extends to
2 the oral deposition testimony of an expert
3 that is retained or employed by or" --

4 MR. MEADOWS: But you need to
5 look at part (3) of the rule because an expert
6 is obligated to give all of his opinions under
7 part (3).

8 HONORABLE SCOTT BRISTER: No.
9 Just the general substance, which is exactly
10 what I said they are going to say, "the
11 product was defective."

12 MR. MEADOWS: Well, the opinion
13 is held. I mean, you can't say Part A is not
14 defective and Part B is and then change that
15 at trial, I don't believe.

16 MR. SUSMAN: (6) is the section
17 that expressly deals with the question that
18 says an expert's deposition must be
19 supplemented.

20 HONORABLE SCOTT BRISTER: So
21 then you are just back where you started then.
22 Joe, yes, you have to go back and read through
23 all of the experts' depositions and change all
24 of the things in there.

25 MR. LATTING: Experts are okay

1 with me. What are not okay with me are all
2 the fact witnesses that we have to do that
3 for.

4 HONORABLE SCOTT BRISTER: I
5 don't understand.

6 CHAIRMAN SOULES: Does
7 anyone -- we have voted on this before, and
8 the debate has been fully developed in earlier
9 meetings about whether we should have to
10 supplement depositions of fact witnesses.
11 These are people not expressing expert
12 opinions in their deposition testimony.

13 HONORABLE SCOTT BRISTER:
14 That's not my proposal. My proposal is
15 definitely not that you have to supplement
16 everything because that's not what this is,
17 Luke. This is not you have to supplement
18 everything in interrogatory answers. My
19 proposal is just depositions get treated the
20 same way as written discovery, which means if
21 it's matters that appear elsewhere, that's all
22 the supplementation you have to do. They knew
23 about that already because you gave them some
24 other documents that showed that. I do
25 not -- am not proposing that you have to

1 formally supplement depositions.

2 CHAIRMAN SOULES: Okay. Then
3 that's off the table, and we don't have to
4 worry about it.

5 HONORABLE SCOTT BRISTER: I am
6 just proposing that it be supplemented
7 the -- that you treat them all the same way.
8 This is going to be confusing enough to
9 attorneys without once -- I mean, you are
10 creating two sets of supplementation rules.

11 CHAIRMAN SOULES: That's right.

12 HONORABLE SCOTT BRISTER: And I
13 just think you shouldn't create extra sets of
14 new rules that we don't need.

15 CHAIRMAN SOULES: Well, let me
16 see if I can articulate what the definition is
17 in the rule; that is, oral depositions of fact
18 witnesses, that is, testimony in depositions
19 not expressing expert opinions of fact
20 witnesses is not to be supplemented at all.
21 Other discovery must be supplemented.

22 Now, we voted on that before, and those
23 who believe we should stick with our prior
24 vote show your hands. 15. Those otherwise,
25 those who feel otherwise, revisit this. To

1 one. Okay. So --

2 MR. SUSMAN: The next point in
3 Rule 5 that Scott makes and the final point he
4 makes on Rule 5 is his statement that he would
5 require under section (3) or paragraph (3) --

6 CHAIRMAN SOULES: His paragraph
7 (1) and (2) says shouldn't a party have a duty
8 to respond to any discovery? Do you mean
9 supplement?

10 HONORABLE SCOTT BRISTER: No.
11 Duty to respond is paragraph (1), but you have
12 limited that to written discovery. So there
13 is no duty to respond except to written
14 discovery. I am just pointing that out.

15 CHAIRMAN SOULES: Oh, okay.

16 HONORABLE SCOTT BRISTER:
17 That's what happens when you make two sets of
18 rules for everything.

19 CHAIRMAN SOULES: Well, we may
20 need to address that when we get to
21 depositions if a party has a duty to respond
22 to depositions. Okay.

23 MR. SUSMAN: The other point
24 Scott makes is that when there is a supplement
25 or amendment that occurs after the discovery

1 period shouldn't we, he says, require the
2 response within 48 hours or some shorter time?

3 "I do not see why a party that we presume
4 has not acted reasonably promptly should be
5 given the leisurely 20 days when it has
6 created a potentially big problem." The
7 subcommittee's response to that was to point
8 out that the amendment or supplementation of a
9 discovery response frequently after the close
10 of discovery, which is what this is mainly
11 designed to deal with, is not a consequence of
12 any fault offered to that party.

13 It will often be a consequence of the
14 fact that discovery ends at a time certain.
15 The trial is not set for many months. The
16 world changes. The conditions of plaintiff or
17 plaintiff's business changes, and responses
18 need to be brought up to date. The other side
19 ought to have a fair opportunity for
20 discovery, but it's not a fault concept that
21 we are dealing with, Scott, and that's why we
22 thought it's fair to leave it the way we have
23 it, but as you see, there has been very little
24 changes in subdivision (3) since we got going.
25 It's pretty much the same. I don't know

1 starting with the premise it's a late
2 supplementation, which is all this is about.

3 MR. SUSMAN: No, no. Remember,
4 it's not. When we began out these rules we
5 had two kinds of concepts, the duty to amend,
6 which is where you gave a wrong -- that's your
7 case, Scott, just an intentional or a mistake
8 or whatever it was, but given the wrong answer
9 in the first place and the duty to supplement
10 where facts changed, through no fault of
11 anyone but facts changed, and no one liked
12 that distinction because there were different
13 kinds of duties on the responsiveness with
14 which you had to correct a mistake under both
15 scenarios.

16 People said, "That's too complicated."
17 So now we have -- the concept of fault we have
18 taken out of this, I mean, and you have to
19 amend or supplement regardless of whether it
20 was right when it was made and changed since
21 or wrong when made and you have now discovered
22 the error. So, I mean, and we can and have
23 invited in one of our comments the sanctions
24 committee to deal with the kind of conduct
25 that you are talking about where someone who

1 has intentionally waited 'til the last minute
2 to do something.

3 There is no reason that someone couldn't
4 go to the court in a circumstance like this
5 and shorten the time because the court
6 maintains the power for good reason to change
7 these time limitations. I just think we get
8 into a major drafting problem if at this stage
9 of the game we go back here and provide
10 different time limits depending upon the fault
11 with which the responding party is charged for
12 not having --

13 HONORABLE SCOTT BRISTER: I'm
14 assuming they have a good heart, but they
15 supplemented 20 days before trial. Shouldn't
16 they have to scramble if they want to do that?
17 Shouldn't they be forced to scramble if they
18 want to do that? If they don't want to do
19 that, the question doesn't arise. This is the
20 one who wants to change the game shortly
21 before trial. They shouldn't be able to
22 demand a leisurely 20 days.

23 CHAIRMAN SOULES: All right.
24 To bring this to focus, we are really talking
25 about the 20-day period on page 2 in line 5.

1 HONORABLE SCOTT BRISTER: Sure.

2 CHAIRMAN SOULES: Shouldn't

3 that be 20 days or fewer days or more days?

4 Okay. Somebody make a motion if you want
5 to amend this to a different number of days.

6 MR. LATTING: Please make your
7 motion, Scott.

8 HONORABLE SCOTT BRISTER: My
9 motion is within 48 hours, but you know --

10 MR. LATTING: Could you stretch
11 that out a little bit?

12 HONORABLE SCOTT BRISTER: Sure.
13 You can always stretch, or you can say, "48
14 hours or at such time as agreed by the
15 parties," but it ought to be on the burden of
16 the one who's wanting to change the game after
17 discovery is closed to try to get an agreement
18 or go to court rather than the one who all of
19 the sudden, the rules have been changed, and
20 you have got to be the one that goes to court
21 to get the rules changed or to try to beg for
22 an agreement. So I would propose to amend to
23 drop "the day before trial or within 20 days
24 after the date of the service, whichever is
25 earlier" to --

1 MR. LATTING: 72 hours.

2 HONORABLE SCOTT BRISTER:

3 "Within 48 hours or such time as agreed by the
4 parties."

5 CHAIRMAN SOULES: Is there a
6 second to that motion? Fails for lack of a
7 second. Any other motion? You want to make
8 it ten days, five days, seven days?

9 MR. SUSMAN: I'd move it for
10 ten days.

11 CHAIRMAN SOULES: Steve moves
12 for ten days. Is there a second?

13 MR. LATTING: Second.

14 CHAIRMAN SOULES: Moved and
15 seconded for ten days. Any discussion?

16 HONORABLE DAVID PEEPLES: I
17 want to make a different proposal to that one.
18 Is there any sympathy for just saying after
19 the discovery period if you want to reopen you
20 have got to go to the court and get
21 permission? There is likely to have to be a
22 court hearing anyway. There is a lot to be
23 said for saying, look, once you get close to
24 trial you ought to let things settle, and the
25 burden ought to be on who wants to disturb

1 that to go to court and get permission to get
2 something different. Instead of 10 days, 20
3 days, 48 hours. Come on.

4 CHAIRMAN SOULES: Recall that
5 the discovery period starts on a start date
6 that's triggered by something that the party
7 does and goes for nine months. Then there may
8 be months before the trial date during which
9 this discovery is supplemented. So this rule
10 really covers that, too, not just eve of trial
11 supplementation but supplementation that
12 occurs other than on the eve of trial.

13 MR. LATTING: Ten days.

14 CHAIRMAN SOULES: Motion made
15 and seconded for ten days. Those in favor
16 show by hands. Ten. Those opposed? To one.
17 Carries ten to one. Now, we are changing that
18 to ten days.

19 HONORABLE C. A. GUITTARD:
20 Before we pass on Rule 5 may I inquire with
21 respect to subdivision (2) about supplements
22 and the supplement need not be verified? Now,
23 I looked up under subdivision (1) to see
24 whether the original response had to be
25 verified. I didn't find it. I don't know

1 whether the intent is that the original
2 response be verified or not. It seems that
3 they both should follow the same standard, but
4 what is the standard with respect to the
5 original response? Should it be verified or
6 not?

7 CHAIRMAN SOULES: Well, it only
8 applies to interrogatories in the first place.
9 So the verification only applies to
10 interrogatories.

11 HONORABLE C. A. GUITTARD:
12 Well, why do we have it on (2) then if we
13 don't have it in (1)? Do you have to verify
14 an original response?

15 CHAIRMAN SOULES: To
16 interrogatories, yes.

17 JUSTICE CORNELIUS: The present
18 law is, yes, but supplements, no.

19 HONORABLE C. A. GUITTARD:
20 Supplements, no.

21 MR. LATTING: Except in
22 El Paso.

23 JUSTICE CORNELIUS: Well,
24 several courts have held that supplements do
25 not have to --

1 CHAIRMAN SOULES: And I believe
2 the interrogatory rule says that the responses
3 have to be signed by the party, and they have
4 changed that, Judge. So to make this -- I am
5 trying to find the sentence, Judge, that you
6 are focusing on in Rule 5. Where is it?

7 PROFESSOR ALBRIGHT: It's in
8 the interrogatory rule.

9 HONORABLE C. A. GUITTARD: I
10 was talking about Rule 2 where it says the
11 response need not be verified, the supplement
12 need not be verified, and why is that there if
13 it's not in (1) about the original response?

14 CHAIRMAN SOULES: It's to make
15 it clear that interrogatories can be
16 supplemented without verification. That's its
17 purpose.

18 MR. LATTING: Well, is your
19 suggestion to make it clear in (1) that the
20 original one --

21 HONORABLE C. A. GUITTARD: Yes.

22 JUSTICE CORNELIUS: Yeah. He's
23 saying it's not clear that the original has to
24 be verified.

25 MR. SUSMAN: It is over in the

1 interrogatories.

2 JUSTICE CORNELIUS: It is
3 somewhere in the rules.

4 CHAIRMAN SOULES: It's in the
5 interrogatories.

6 MR. SUSMAN: 12(3).

7 CHAIRMAN SOULES: I mean, we
8 could make this "and need not be verified"
9 specific as to interrogatories only if it
10 should be done because that's the only place
11 that it applies. So I don't know if that's
12 necessary.

13 PROFESSOR ALBRIGHT: We could
14 just put in Rule 12 that any supplement need
15 not be verified, but I think that's a drafting
16 problem that Lee Parsley can consider later
17 and we don't have to address here.

18 CHAIRMAN SOULES: Well, I don't
19 think we ought to make short shrift of Judge
20 Guittard's suggestion. Should we leave this
21 in or not? Are you suggesting we take this
22 out, Judge, here, or change it?

23 HONORABLE C. A. GUITTARD: I
24 just want it clarified. I don't know what it
25 means.

1 CHAIRMAN SOULES: Okay.
2 Anybody have a motion on this? Okay. Other
3 hands were up. Carl Hamilton.

4 MR. HAMILTON: I need to go
5 back to this ten-day period just a minute. It
6 seems to me the whole purpose of this
7 discovery period, the nine months, is to get
8 everything done at once; and if there is
9 something that a plaintiff knew or should have
10 known during that period but didn't disclose,
11 why do we let him disclose it at the last
12 minute and then give the defendant only ten
13 days in which to respond --

14 MR. LATTING: We don't.

15 MR. HAMILTON: -- and ask him
16 questions.

17 MR. LATTING: We don't, do we,
18 Steve?

19 CHAIRMAN SOULES: Carl, the way
20 this reads is when the plaintiff makes the
21 disclosure then the defendant can ask for
22 their discovery any time, but the plaintiff
23 has to give ten days response. It's not
24 limiting -- it doesn't put the defendant to a
25 ten-day period. It puts the supplementing

1 party to a ten-day fuse.

2 MR. HAMILTON: What I am saying
3 is why let him make the new disclosure at all
4 after the discovery period is closed?

5 MR. LATTING: He can't. If he
6 already knew about it, he runs afoul of the
7 other rules, which prevent that; isn't that
8 correct, Steve?

9 MR. SUSMAN: That's correct. I
10 mean --

11 HONORABLE SCOTT BRISTER:
12 Huh-uh. Huh-uh. There is no limitation about
13 you didn't -- you had to have been ignorant of
14 this before it stopped.

15 MR. SUSMAN: We have the
16 failure to -- I mean, if someone knew
17 something and didn't disclose it within the
18 discovery period, it could have two
19 consequences on him because he has not failed
20 to make -- he has failed to make a timely
21 discovery disclosure, which is reasonably
22 promptly. Okay. If he holds it back, he's
23 failed. It could have a consequence on his
24 trial setting, which we deal with in Rule 6.
25 It could also have a consequence on the kind

1 of sanctions that might be imposed upon him,
2 which the sanctions committee deals with for
3 failing -- I mean, he can have -- I mean,
4 that's a different issue.

5 HONORABLE SCOTT BRISTER: Or it
6 may make no difference at all.

7 MR. LATTING: Huh?

8 HONORABLE SCOTT BRISTER: Or it
9 may make no difference at all

10 MR. LATTING: It may not.

11 MR. SUSMAN: Or it might make
12 no difference at all under Rule 6.

13 CHAIRMAN SOULES: Well, under
14 Rule 6 we have lightened up the sanctions,
15 which was a part of our debate; but as to the
16 ten-day rule in Rule 5, that's just to cause
17 the party making a late supplementation to
18 have to be ready to respond quickly to the
19 inquiry.

20 MR. HAMILTON: But what you are
21 saying is that the plaintiff can during the
22 nine-month period say it was Product A and
23 then just 19 days before trial he can say,
24 "Well, I'm sorry. Now it's Product B."

25 MR. LATTING: Well, but if he

1 does that --

2 CHAIRMAN SOULES: But he's
3 subject to the sanctions under Rule 6 if he
4 does that, which we will get to next.

5 MR. LATTING: Yeah. This is
6 not expanding his right to do that. This says
7 if he does that then he has a shorter period
8 than was suggested in order to respond to a
9 further inquiry by the other side.

10 CHAIRMAN SOULES: Anything else
11 on Rule 5? Rusty.

12 MR. MCMAINS: Do I understand
13 correctly that the way Rule 3 works that if
14 the supplementation occurs after the
15 expiration of the discovery period there is an
16 automatic right of reopening discovery by the
17 party to which the supplementation is
18 directed?

19 MR. SUSMAN: Right.

20 HONORABLE F. SCOTT MCCOWN:
21 From the way I look at it, it says the
22 reopening side is allowed five hours of
23 deposition in addition to that provided in
24 Rule 1.

25 MR. MCMAINS: Am I also correct

1 that what that means is that the party that is
2 supplementing doesn't get to ask any
3 questions? It's just the other side; is that
4 right?

5 CHAIRMAN SOULES: You're saying
6 can the late supplementing party cross-examine
7 a witness in a deposition?

8 MR. MCMAINS: Absolutely.
9 Absolutely. It appears not.

10 MR. SUSMAN: If he has time
11 left. If he has of his hours, which are 50
12 hours, yeah, I think he could.

13 CHAIRMAN SOULES: That's an
14 open question, Rusty. It's not resolved by
15 anything. It's not answered in these rules.

16 MR. MCMAINS: No. But it just
17 says that the reopening side is allowed five
18 hours of deposition time in addition to that
19 provided in Rule 1.

20 CHAIRMAN SOULES: That's right.
21 That's the only side --

22 MR. MCMAINS: And then it says,
23 "Such discovery shall be related to matters
24 related to any new information disclosed."

25 CHAIRMAN SOULES: The only side

1 that's accommodated is the reopening side.
2 The other side is not accommodated.

3 MR. PRICE: Unless the court
4 allows it.

5 CHAIRMAN SOULES: Unless the
6 court makes some ruling.

7 MR. MCMAINS: I am just trying
8 to figure out if that's the way it was
9 intended to operate.

10 MR. SUSMAN: That's the way it
11 was intended to operate.

12 MR. MCMAINS: That basically
13 you just get to -- I guess you can make an
14 objection, but other than that you can't do
15 anything if you are sitting there.

16 MR. PRICE: The ten-day
17 amendment, is the language "before trial or
18 within ten days" in there, or is it just the
19 "within ten days"?

20 CHAIRMAN SOULES: "Before
21 trial" stays in.

22 MR. PRICE: Okay. Thank you.

23 MR. MCMAINS: And let me make
24 one other observation. I disagree with your
25 interpretation that if you have got time left

1 you can do anything because previous to that
2 it says, "If the amendment, supplement, or
3 document production occurs after an applicable
4 discovery period, the opposing party may
5 reopen discovery." So it looks to me like in
6 the beginning you are saying that you don't
7 get to do anything other than just take
8 whatever the other side is going to do during
9 that period, without regard to fault, and I
10 suppose that your expectation is you have got
11 to go to the court and get some relief from
12 that if that's what happened.

13 MR. SUSMAN: Yes.

14 CHAIRMAN SOULES: Chuck
15 Herring.

16 MR. HERRING: Steve, the next
17 to the last sentence in Part (2) says,
18 "Amendment or supplementation is not required
19 for other responses," and that's other than
20 witnesses or persons with knowledge of
21 relevant facts. "If the additional or
22 corrective information or documents have
23 otherwise been made known to the other parties
24 in discovery or in writing." Normally that
25 allows you to make your supplementation then

1 in the course of a deposition, that kind of
2 information; is that right?

3 MR. SUSMAN: Yes.

4 MR. HERRING: I have got a case
5 right now with 20 parties, a bunch of
6 plaintiffs, a bunch of defendants. A bunch of
7 parties don't show up at individual particular
8 depositions because they don't apply to a lot
9 of other parties. If at one of those
10 depositions where other parties aren't present
11 someone says, "Oh, by the way, here is some
12 additional supplemental information," is that
13 adequate supplementation? Has that been made
14 known to the other parties even though they
15 may not ever see that deposition because they
16 wouldn't necessarily receive it because it
17 doesn't deal with their parties or their
18 issues?

19 CHAIRMAN SOULES: Yes.

20 MR. HERRING: Luke is nodding
21 "yes." I just wanted to be clear which way it
22 works.

23 CHAIRMAN SOULES: Yes. They
24 better read the depositions, keep up with the
25 discovery in that case.

1 MR. HERRING: Even if there are
2 other parties in the suit that have nothing to
3 do with them, you have to read every
4 deposition to see if there is any
5 supplementation?

6 MR. SUSMAN: I am not sure
7 that's right because the test is whether it's
8 been made known. Okay.

9 MR. HERRING: Yeah. Is it
10 actual knowledge, or is it kind of the
11 constructive knowledge that Luke would say you
12 are getting because there is a deposition out
13 there and it's in there somewhere?

14 MR. SUSMAN: What we really
15 want to talk about is actual knowledge. I
16 mean, I think that -- I mean, there are going
17 to be some cases here. We cannot resolve
18 everything.

19 MR. HERRING: Right. Right.
20 Well, you're saying actual knowledge, and he
21 had said "yes."

22 MR. SUSMAN: Because what the
23 drafters intended here was to focus on actual
24 knowledge, not let someone complain about not
25 having something supplemented when they

1 actually knew it. By the same token, it seems
2 to me unfair to put someone on constructive
3 notice of something in a case like you
4 described. Although, the important things,
5 which are the identity of the witnesses and
6 the -- you know, and experts and persons with
7 knowledge.

8 MR. HERRING: That's in writing
9 anyway.

10 MR. SUSMAN: Everyone is going
11 to know that in writing. So you kind of
12 wonder what's in this other category anyway.

13 MR. HERRING: Luke, you're
14 still frowning. Are you going to retract your
15 position there?

16 CHAIRMAN SOULES: No. I think
17 this says that if it's on the record in a
18 deposition, it's been supplemented, and that's
19 it.

20 MR. HERRING: Well, it says
21 "made known to the other parties."

22 CHAIRMAN SOULES: Made known.
23 It's on the record.

24 MR. HERRING: I don't get the
25 depo. It's not known to me.

1 MR. SUSMAN: We will have to
2 look at that.

3 CHAIRMAN SOULES: Well, I
4 disagree with Steve. I think that made known
5 is when it is made public, when it's stated in
6 the open for all to see, particularly if it's
7 on deposition in a case, but that's going
8 to -- that's not articulated one way or the
9 other in the text of the rule at this point.
10 Rusty McMains.

11 MR. MCMAINS: One other inquiry
12 on the reopening part or the right to do some
13 more discovery or more than you had or
14 whatever depending upon when the
15 supplementation occurs. We talk about in
16 Rule 3 "the opposing party," much like what
17 Chuck was talking about. We don't really
18 define "the opposing party."

19 First of all, you may have more than one
20 opposing party. You may have a principle
21 opposing party and a few collaterally opposing
22 parties. You may also have parties who are
23 tangentially interested, and they may even be
24 aligned with you for some purposes but against
25 you with regards to other purposes. I mean,

1 you are really talking about any party to
2 which you had an obligation to respond, aren't
3 you?

4 I mean, it could easily be asked by a
5 codefendant, for instance, without regards to
6 whether or not that defendant is actually
7 seeking relief against you, but I don't think
8 under our current practice you could define a
9 codefendant in which there is no
10 counterclaims, cross-claims or whatever as
11 opposing parties. They are on the same side.
12 That doesn't mean that they wouldn't have to
13 make an adjustment in the event that something
14 happened where one party is taking a position
15 that --

16 CHAIRMAN SOULES: Do you have a
17 motion?

18 MR. MCMAINS: -- affects his
19 liability.

20 CHAIRMAN SOULES: Do you have a
21 motion? Elaine Carlson.

22 PROFESSOR CARLSON: I agree
23 with Rusty. I mean, why talk in terms of
24 opposing party --

25 CHAIRMAN SOULES: Do you have a

1 motion? Anybody got a motion? Let's get this
2 to closure.

3 PROFESSOR CARLSON: Yeah. I
4 would move in Rule 5 and Rule 6 we delete the
5 use of the word "opposing party" and replace
6 it with "a party or parties to whom the
7 amendment or supplementation is directed."

8 CHAIRMAN SOULES: How about
9 "another party may reopen the case"?

10 Supplementation I guess is directed to
11 all other parties.

12 PROFESSOR CARLSON: Yeah. I
13 would say where it's "other party" should be
14 "from the responding party," and that's how I
15 understand the rule.

16 CHAIRMAN SOULES: Okay. Your
17 verbage is again, Elaine.

18 PROFESSOR CARLSON: Instead of
19 "opposing party" I suggest "party or parties
20 to whom the amendment or supplementation is
21 directed."

22 CHAIRMAN SOULES: "A party or
23 parties to whom the amendment, supplement, or
24 document production is directed may reopen
25 discovery." Okay. Those in favor show -- is

1 there a second to that motion?

2 MR. HERRING: Second.

3 CHAIRMAN SOULES: Moved and
4 seconded. Any other discussion? Those in
5 favor show by hands. 14. Those opposed?
6 Okay. All votes are for. That carries.

7 And then that gets us to an issue about
8 the reopening side in the next sentence.
9 Anyone have a motion about that, or do we
10 leave that the way it is?

11 MR. MCMAINS: Which sentence
12 are you talking about?

13 CHAIRMAN SOULES: The last
14 sentence -- the next to last sentence, "The
15 reopening side is allowed five hours of
16 deposition time in addition to that provided
17 in Rule 1." What if the party that -- the
18 plaintiff has supplemented and a coplaintiff
19 reopens, or a defendant supplements and a
20 codefendant reopens? Does that mean that just
21 the defendants get to do five hours, and the
22 plaintiffs don't? Anybody think that needs to
23 be fixed?

24 MR. SUSMAN: The second
25 sentence? Where are we now?

1 CHAIRMAN SOULES: Okay.

2 Starting with the first full sentence on this
3 page, second page of Rule 5. It's part of
4 Rule 5(3), we say, "If the amendment,
5 supplement, or document production occurs
6 after any applicable discovery period, a party
7 or parties to whom the amendment, supplement,
8 or document production is directed may reopen
9 discovery." We just voted to pass that.

10 "A party must respond to reopen written
11 discovery served under this rule the day
12 before trial or within ten days after the date
13 of service, whichever is earliest." Why is it
14 written? Why can't you take their deposition?
15 But anyway that's another problem.

16 Then the next sentence is what I am
17 talking about now. "The reopening side is
18 allowed five hours of deposition time in
19 addition to that provided in Rule 1." Okay.
20 It's a defendant who supplements, and a
21 codefendant reopens. Does only the defense
22 side get to have additional discovery, or do
23 the plaintiffs get some additional discovery?

24 MR. PRICE: How can that be the
25 party to whom the supplement was directed?

1 MR. KELTNER: It can't,
2 especially under the limitations we have in
3 Rule 1. I mean, our problem is we have side
4 limitations of hours. Now we are dealing with
5 reopening and giving hour or time limitations
6 per party. That's not going to work.

7 MR. MCMAINS: Right.

8 MR. KELTNER: So we have got
9 to -- our last vote I think in due respect we
10 ought to rethink a little bit because Elaine's
11 point is exceedingly well taken. It's just
12 that it goes against the grain of the
13 limitation generally, and we have got to
14 rethink that. This is a problem that was
15 bound to come up.

16 MR. MCMAINS: Again, I think
17 there is a distinction between written
18 discovery and depositions. It seems to me
19 that any party who is affected by supplemented
20 material outside the discovery period should
21 have a right to direct to the supplementing
22 party written material, whether they are on
23 their side or somebody else's side.

24 Whether or not they are entitled to open
25 depositions is a different issue because our

1 deposition rule is constructed in terms of a
2 collected side notion. So if it's a
3 plaintiff/defendant issue and it's the
4 defendant who supplements, it's the plaintiffs
5 who get to reopen, and there is only five
6 hours total. You can't make it per party
7 because five hours per party or else -- I
8 mean, five hours per party will give you more
9 than 50 hours anyway in a lot of cases.

10 So I think there are two different
11 issues, and in summary, it seems to me there
12 should be a right to reopen whether you are
13 opposing in a sense of you have a claim
14 against or are defending a claim against when
15 you have new material. You should have the
16 right to redirect discovery directed to the
17 supplementing material if you think it affects
18 you and you are in the lawsuit, and that's
19 what the first thing did, I thought, and I
20 don't have a problem with keeping them both if
21 we can. Now, whether or not there may be some
22 drafting requirements on the second part to
23 make clear that --

24 CHAIRMAN SOULES: Don't we
25 really mean, though, that -- and the opposing

1 side is allowed five hours of deposition. I
2 mean, say, I get my codefendants together, and
3 one of us supplements so that I can get five
4 more hours of deposition. We just do it that
5 way. Mainly the whole function is so that I
6 can get -- the defendants can get five more
7 hours of deposition. So we find something and
8 supplement, and that gives us five more hours
9 of deposition. The opposing party ought to be
10 the -- the opposing parties if it's a multiple
11 party case ought to control whether there is
12 any more deposition testimony, it seems to me.
13 I don't know. Yes, David Keltner.

14 MR. KELTNER: I agree with
15 that, but consider the opposite of that
16 problem. On codefendants the question is
17 which one of us really did it, and you amend
18 as my codefendant for an additional testimony
19 that it was, in fact, my product or my
20 component. Then I have a real need for that
21 discovery, the most realistic need you could
22 possibly have.

23 CHAIRMAN SOULES: Some of these
24 things are going to have to be fixed by the
25 trial judge.

1 MR. KELTNER: Right.

2 Absolutely. And I think this may be within
3 that realm, but it's a real problem we have
4 got to try to draft into, and it's going to be
5 a question of "side" versus "party." Also, if
6 we get into the responding party issue, I
7 worry about Ticor and the other cases that the
8 Supreme Court has decided on the universality
9 of discovery generally about who can rely on
10 what, and we may be rewriting that as well
11 without intending to do so, and I am trying to
12 think of a suggestion that would get around
13 this to move us along, and I am just not
14 coming up with it.

15 PROFESSOR ALBRIGHT: I have a
16 suggestion, and it goes counter to what we
17 just talked about, but we could have it where
18 the party or parties to whom the amendment or
19 supplements is directed may reopen discovery
20 and then allow both sides five hours of
21 deposition time. This gives both parties or
22 both sides some deposition hours, but it gives
23 the parties to whom the amendment or
24 supplement was directed the ability to decide
25 whether to take depositions or not. I am not

1 sure that that's -- that you-all like that,
2 but that's just an idea I thought of to try to
3 solve it.

4 MR. MCMAINS: The problem I
5 have there is it allows a party who has not
6 supplemented the opportunity to conduct more
7 discovery automatically by his mere act of
8 supplementing.

9 PROFESSOR ALBRIGHT: But also
10 as Steve noted earlier, just because you
11 supplement late does not mean you are a bad
12 person. It means the things -- the world --

13 MR. MCMAINS: No, but I know a
14 lot of people who are.

15 PROFESSOR ALBRIGHT: There are
16 a lot of them who are, but there are some that
17 aren't. I don't think we should make any
18 moral judgment about people who supplement
19 after the discovery period, and what we would
20 be saying in that situation is to say, okay,
21 only the reopening -- I mean, only the side to
22 whom it was directed -- I mean, the party to
23 whom it was directed. The other parties get
24 to decide whether they want to go into more
25 depositions or not, but if you go into

1 depositions then everybody has an opportunity
2 to examine the witness.

3 CHAIRMAN SOULES: Okay. Let me
4 see if -- this is what we are trying to write
5 into the rule, as I understand it. The judge
6 is going to have to do a lot of things in
7 multi-party cases and otherwise, but what we
8 are trying to write into the rule is that if
9 the supplementation comes late, an opposing
10 party may reopen discovery. That's the party
11 presumptively offended by the late
12 designation. I understand it can be a lot of
13 other people, but that's the party
14 presumptively offended, and that's the party
15 that we are trying to help by writing a rule
16 that they always get help. The judge can give
17 help to any party, but that's the party we are
18 trying to write the rule for, and then once an
19 opposing party reopens, that entire side has
20 five hours.

21 MR. MCMAINS: But we don't have
22 a definition of opposing party.

23 CHAIRMAN SOULES: That's what
24 we are trying to write this rule to say, and a
25 lot of other things that we hypothecate,

1 whether or not hypothecation is their real
2 world experiences, we are going to have to
3 take that to the trial judge, and I think that
4 we can fix this by just changing the word
5 "the" before "opposing" to "an."; "an opposing
6 party" and leave the rule just the way it is,
7 and it basically functions the way we expect
8 it to function.

9 MR. MCMAINS: Except that when
10 you say "an opposing party" you put a
11 qualifier in there that you have no objective
12 way of determining. We don't have a
13 definition of "opposing party."

14 CHAIRMAN SOULES: The judge can
15 decide who's an opposing party.

16 MR. MCMAINS: This is an
17 automatic right.

18 CHAIRMAN SOULES: Well, you may
19 have to go to the court.

20 MR. MCMAINS: It's drafted as
21 an automatic right.

22 CHAIRMAN SOULES: You may have
23 to go to the court if you have a disagreement
24 about whether the party is or is not an
25 opposing party. You have that reprieve, and

1 then you either get the discovery or you don't
2 after that's been repleved.

3 MR. MCMAINS: I mean, we are
4 the ones who are injecting this problem. We
5 put in a term that we refuse to define.
6 That's just silly. I mean, I don't think it
7 makes any difference whether -- I mean, the
8 notion of opposing party, I believe to the
9 extent one could fashion one from existing
10 rules, would be someone who has a claim, whom
11 there is an active pleading against or in
12 defense of if there is a pleading against
13 them.

14 Defendants suing for contribution, for
15 instance, would qualify as opposing parties,
16 but if they agree among themselves as many
17 doctors and hospitals do in malpractice
18 litigation not to seek contribution, are they
19 thereby not opposing parties, even though the
20 amendments may be one pointing the finger to
21 the other defendant, which is frequently what
22 the case is. They normally have decided,
23 well, we are not going to break a ground here,
24 and they need a target. I am going to give
25 them him.

1 CHAIRMAN SOULES: It's all
2 fact-driven. It's got to be decided by the
3 trial judge, but "an opposing party" does have
4 meaning. Anne Gardner.

5 MS. GARDNER: I was just going
6 to propose a suggested use of a term like --
7 he had used the word "affected" while ago.
8 What about substituting "adversely affected"
9 for "opposing"?

10 CHAIRMAN SOULES: The problem
11 with that is when you get to the reopening
12 side has five hours it's hard to reconcile.
13 What if that party affected is on the same
14 side as the party offending the discovery
15 process? And we can only make a rule that
16 works within a certain universe of situations,
17 and beyond that universe the trial judge is
18 going to have to be proactive.

19 HONORABLE F. SCOTT MCCOWN:
20 Judge Brister, Judge Peeples, and I will take
21 care of it. Don't worry about it.

22 HONORABLE SCOTT BRISTER: Maybe
23 not the same way in each court, but we will
24 take care of it.

25 HONORABLE F. SCOTT MCCOWN:

1 That's why you are worried, huh?

2 CHAIRMAN SOULES: Elaine, let
3 me ask you this: Would you be satisfied if we
4 backed up on that vote and just said "an
5 opposing party may reopen discovery" and then
6 go on forward with "the reopening side has
7 five hours."

8 PROFESSOR CARLSON: I guess I
9 don't know. I would like to hear from Alex or
10 Steve, what was your intent in using the word
11 "opposing party"?

12 PROFESSOR ALBRIGHT: I think we
13 were just looking for a word at the time.

14 PROFESSOR CARLSON: You were
15 tired.

16 PROFESSOR ALBRIGHT: I don't
17 think our thought processes went so far as to
18 require an actual claim being filed against
19 the other one. I think we kind of more meant
20 an adversely affected party. I agree with
21 Rusty. "The opposing party" means an actual
22 claim being filed against that, and I don't
23 think that works here.

24 CHAIRMAN SOULES: Why doesn't
25 it work? I mean, again, we can only write a

1 rule that works in a certain universe of
2 situations. Beyond that the judge has to be
3 proactive. Why doesn't that work in terms of
4 writing a rule for the largest universe of
5 cases?

6 MR. SUSMAN: I thought we -- I
7 mean, I think it works fine to insert the
8 words "to whom the amendment, supplement, or
9 document production is directed" as the one
10 who has the right to decide whether they want
11 to reopen discovery or not.

12 CHAIRMAN SOULES: Well, it's
13 directed to every party.

14 MR. SUSMAN: No. It's directed
15 only to the one who asked the question in the
16 first place. If you don't serve
17 interrogatories on me -- if you are the one
18 who serves interrogatories on me, I am going
19 to direct the supplement to you, not to these
20 other turkeys who didn't bother to serve me.

21 PROFESSOR ALBRIGHT: You have
22 to send them a copy.

23 MR. SUSMAN: I am sending them
24 a copy, but I am not directing my amendment
25 or -- I mean, the guy who asked the question

1 in the first place ought to be the guy who is
2 entitled to reopen and continue the
3 questioning. If he didn't bother to ask the
4 question in the first place -- we are dealing
5 with supplementation here -- why should you
6 have a right all of the sudden to be very
7 interested?

8 CHAIRMAN SOULES: David
9 Keltner.

10 MR. KELTNER: Steve, I really
11 disagree with that.

12 MR. PRICE: Yeah. I do, too.

13 MR. KELTNER: And the reason is
14 that if somebody else has asked it, I ought
15 not to be charging my client to ask it again.
16 That's the whole reason for Ticor and the like
17 and cutting -- the reason of the rule is to
18 cut down this expense. So I don't think
19 that's a workable solution, and I think we
20 meet ourselves in the middle on that one. I
21 would prefer it not to be that way.

22 That's why I started saying that Elaine's
23 I thought was on the right track of trying to
24 change it. I am just not sure that we got the
25 right language. I think the opposing party

1 situation probably is going to be the best we
2 can do. However, it points out the problem
3 with the side issues that we have agonized
4 before, and the one thing that I think we
5 ought to take note here was that one of the
6 things we want to do by these rules were to
7 the amount possible make decisions for trial
8 judges that they were not -- that they were
9 having to use their discretion in doing, and
10 we are now into a situation of creating more
11 and more areas that a trial judge is going to
12 have to get involved when we have really been
13 trying to get them out of the process and save
14 their time, but you know, maybe this is just
15 one of those trade-offs we have to do.

16 CHAIRMAN SOULES: Suppose we
17 assume that "opposing party" means a party
18 that is asserting a claim against the
19 offending party or is being sued by. In other
20 words, there has to be a claim asserted one
21 way or the other for them to be opposing
22 parties. Doesn't this still work?

23 MR. KELTNER: Yes.

24 CHAIRMAN SOULES: And then if
25 somebody else wants to get involved, they go

1 to the judge.

2 MR. SUSMAN: I think it will
3 work. I mean, I guess what I am thinking,
4 Luke, is in most cases, the large majority of
5 the cases that are going to be governed by
6 this rule rather than a docket control thing
7 or something having court supervision will not
8 be the cases where you have all these multiple
9 defendants. I mean, those are the cases that
10 these rules are very difficult to deal with, I
11 mean, the cases where there are all kinds of
12 cross-claims and that are kind of tough
13 conceptually to deal with on reopening and on
14 limits in the first place.

15 So we were basically picturing litigation
16 more as two-party litigation and dealing with
17 that, and there is a problem, and there are
18 going to be some practical problems, and what
19 happens when you have multiple defendants, all
20 of these counterclaims and indemnification
21 claims and contribution claims, but I would
22 think that that would be usually the case to
23 have heavy court supervision anyway and so
24 maybe --

25 MR. MCMAINS: Well, there are

1 other -- I have, I guess, some other problems
2 in the notion of the opposing -- if you use an
3 opposing party notion in the sense that you
4 may have claims by the plaintiff against one
5 defendant that he can't make or doesn't make
6 against another defendant. Perhaps he's
7 barred by limitations in making them or
8 whatever. They are then sued by one another.

9 Now, under the scenario where you define
10 "opposing party" as you must have a claim
11 against them, the plaintiff has no claim
12 against the defendant who is brought in and
13 sued as a third party defendant, which means
14 that if that party supplements then the
15 plaintiff under your definition would not be
16 an opposing party and would not be
17 automatically entitled to anything, even
18 though they might be, in fact, the facto under
19 the control or direction of the party who
20 brought him in.

21 A classic example of employers being
22 brought in under kind of quasi-bogus claims
23 for indemnity and various other type of third
24 party litigation, that's the problem I have
25 with the opposing party concept. It may

1 actually be directed to the other side, if you
2 will, but who's not perhaps an opposing party
3 in the sense of having an actual claim against
4 that person, and they still may be adversely
5 affected.

6 MR. KELTNER: I just can't come
7 up with a better solution than "opposing
8 party" is my bottom line.

9 MR. HAMILTON: How about "any
10 party on the opposing side"?

11 MR. KELTNER: Which is by
12 definition the opposing party.

13 CHAIRMAN SOULES: John Marks.

14 MR. MARKS: I want to tell
15 you-all that I am truly impressed with the
16 tremendous intellect around this table in
17 dealing with this problem, but it seems to me
18 that it's getting terribly complicated for us
19 ordinary lawyers. And aren't we trying to
20 simplify the rules so that they are more
21 understandable? Are we going to have to
22 require in the rules that every lawyer has to
23 graduate from Harvard?

24 MR. SUSMAN: The answer to that
25 is the effort here was not to simplify the

1 rules, but the effort was to curtail
2 discovery. That was our major effort, to
3 limit the amount of discovery. If we have
4 accomplished that, okay, even though it
5 requires that lawyers be a little smarter or
6 take a little more time or have a better --
7 you know, I think we have accomplished what we
8 set out to do, which was not to make life
9 easier for the lawyers but to make it cheaper
10 for the clients. That was our thought
11 process. Now, you know, in doing so,
12 obviously when you begin allotting
13 interrogatories or hours of depositions to
14 parties in a complicated multiparty lawsuit,
15 it's hard to do it.

16 CHAIRMAN SOULES: Okay.

17 MR. SUSMAN: I mean, I think we
18 ought to go back to the language we have got
19 because --

20 CHAIRMAN SOULES: Well, no, we
21 have already voted on that and -- okay. You
22 make a motion, and we will vote on it. It
23 ought to be at least "an opposing party."

24 MR. SUSMAN: I think we ought
25 to go back to the words "an opposing party."

1 CHAIRMAN SOULES: Okay. Is
2 there a second?

3 HONORABLE F. SCOTT MCCOWN:
4 Second.

5 CHAIRMAN SOULES: Okay. Those
6 in favor show by hands. Eight. Those
7 opposed? Six. Okay.

8 To go back and read, that sentence will
9 now read, "If the amendment, supplement, or
10 document production occurs after any
11 applicable discovery period an opposing party
12 may reopen discovery. The party must respond
13 to reopened discovery served under this rule
14 the day before trial or within ten days after
15 the date of service, whichever is earlier,"
16 and the rest is written. Okay.

17 MR. SUSMAN: I move the passage
18 of Rule 5 as --

19 CHAIRMAN SOULES: Since it
20 comes from the committee it doesn't require a
21 second. Those in favor show by hands. 12.
22 Those opposed? To five. Carries by a vote of
23 12 to 5.

24 MR. SUSMAN: Rule 6. Rule 6,
25 we have made it clear that we are talking

1 about here about the effect --

2 CHAIRMAN SOULES: Everybody go
3 get your lunch and bring it in here, and we
4 will take up Rule 6. We will take 15 minutes
5 and come back and go to work.

6 (At this time a recess was
7 taken, after which the proceedings continued
8 as reflected in the next volume.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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 July 21, 1995, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are \$ 943.25 .

CHARGED TO: Luther H. Soules, III .

Given under my hand and seal of office on this the 4th day of August , 1995.

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Certification No. 4546
Cert. Expires 12/31/96